

BREAKING CALIFORNIA'S CYCLE OF JUVENILE TRANSFER

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TABLE OF CONTENTS

- INTRODUCTION 209
- I. TRACING JUVENILE TRANSFER’S CYCLICAL HISTORY FROM EUGENICS, THROUGH DUE PROCESS, TO SUPERPREDATORS . . . 213
 - A. EARLY JUVENILE JUSTICE: WHEN KIDS WERE DIFFERENT 213
 - B. A LONG ROAD TO DUE PROCESS AND INCREASED EFFICIENCY IN JUVENILE TRANSFER 216
 - C. ABANDONING THE REHABILITATIVE IDEAL IN THE “TOUGH ON CRIME” ERA 222
 - D. A GLIMMER OF HOPE: LIMITING TRANSFER IN THE LATE 2010s. 229
- II. THE CALIFORNIA SUPREME COURT WILL LIKELY UPHOLD SB 1391 AND INAUGURATE A NEW PHASE IN THE CYCLE OF JUVENILE TRANSFER 233
 - A. STANDARD OF REVIEW. 234
 - B. SB 1391 IS LIKELY A PERMISSIBLE AMENDMENT OF PROPOSITION 57. 235
- III. MOVING BEYOND THE CYCLE OF TRANSFER 238
 - A. WHAT THE LAW CAN DO: GIVING KIDS AND FAMILIES SOME BREATHING ROOM 239
 - B. WHAT ONLY COMMUNITIES CAN DO: BUILDING ALTERNATIVES TO THE JUVENILE LEGAL SYSTEM TO RENDER TRANSFER OBSOLETE 246
- CONCLUSION 253

INTRODUCTION

Frankie Guzman is a poster child for juvenile rehabilitation in California: he attended UCLA and UC Berkeley and used his personal story and law degree to advocate for young people — all after spending four years incarcerated in a juvenile facility.¹ Frankie was fifteen when he and a friend bought guns and stole \$300 from a liquor store on a Saturday afternoon in 1995.² They were caught immediately.³ Little did they know that the months separating their birthdays would send their lives in wholly different directions.⁴ Frankie was tried as a juvenile and served four years.⁵ But his friend, who had recently turned sixteen, vanished into the adult system after he was deemed unfit for treatment in the juvenile court.⁶

Between 2001 and 2016, prosecutors were able, at their discretion, to file charges directly in adult court against anyone over the age of fourteen, like Frankie and his friend. But recent changes to California law will shield many children from prosecution in adult criminal court. In 2016, Proposition 57 required that a judge (rather than a prosecutor) decide whether a young person be transferred to adult court — the process by which the juvenile court waives its jurisdiction over a delinquency proceeding and “transfers” the case to adult criminal court.⁷ Two years later, SB 1391 established sixteen (rather than fourteen) as the minimum age of transfer. Since 2019, prosecutors’ constitutional challenges to SB 1391 have divided the California Courts of Appeal.⁸ Regardless of the ultimate decision about

¹ Lisa Weinzimer, *From Juvie to Juvenile Law: Frankie Guzman’s Unlikely Journey*, THE CHRONICLE OF SOC. CHANGE (Oct. 4, 2016), <https://chronicleofsocialchange.org/news-2/from-juvie-to-juvenile-law-frankie-guzmans-unlikely-journey>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ The transfer process is variously called “waiver,” and “certification,” but common parlance in California is “transfer,” which is the term this article uses throughout. See *People v. Superior Court (Lara)*, 4 Cal. 5th 299 (2018) (declaring Prop 57 constitutional and retroactive).

⁸ See *O.G. v. Superior Court*, 40 Cal. App. 5th 626, 627–28 (2019) (collecting cases).

the new law's constitutionality, these recent changes have inaugurated a new era for juvenile transfer in California.

California's juvenile transfer history is little studied, but relevant to current and future decisions about transfer policy and juvenile punishment generally. The first juvenile court was a Progressive-Era institution intended to care for children; it originally had no formal process for transferring children to adult court. But transfer quickly became a way to punish and, in extreme cases, sterilize older boys whom the juvenile system deemed "incorrigible." Since then, the California Supreme Court has recognized that transferring a child to adult court is "the worst punishment the juvenile system is empowered to inflict."⁹ Juvenile transfer became a cornerstone of racist punishment as politicians stoked racialized fear of young, so-called superpredators. However, recent popular movements have begun to undo the legacy of the "tough on crime" era — mobilizing against racist policing and incarceration and eventually inspiring legislative change.

These swings from judicial discretion and disparate treatment to strict procedural rules and harsh punishment lead to what scholars identify as a cycle of juvenile justice. Proponents see judicial discretion as a way for a juvenile court judge who knows the individuals and their circumstances to mete out appropriate sentences, but this often leads to disparate outcomes based on race, geography, and income level and has not reliably produced lesser sentences.¹⁰ Increasing procedural justice is supposed to address some of the implicit bias inherent to discretion and cause judges to treat criminal defendants with neutrality and dignity, but often leads to inflexible rules that compound the inequalities already prevalent in criminal law.¹¹ In the cycle of juvenile justice, punishment is increased in response to a perceived "crime wave" or spectacular incident of violence and will

⁹ See *Marcus W. v. Superior Court*, 98 Cal. App. 4th 36, 41 (2002) (citing *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 810 (1985)).

¹⁰ See, e.g., Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 5 (2012) (describing problems with judicial discretion in the criminal and employment law contexts).

¹¹ See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058–62 (2017) (reviewing the legal literature that privileges procedural justice over more transformative reforms).

then decrease in response to an instance of police abuse or when some other crisis causes a public outcry against the cruelty of the system.¹²

Thomas Bernard and Megan Kurlycheck propose that the cycle is triggered when the juvenile court is forced to choose between the harshest punishments and doing nothing at all.¹³ Frank Zimring argues that transfer allows the juvenile court to provide lenient treatment and rehabilitation for “deserving” young people, while the “worst” can be transferred to a more punitive adult court.¹⁴ But the history of transfer in California shows an unworkable procedure swinging from one extreme to another with the passions of the people, not the well-designed safety valve Zimring describes. Bernard and Kurlycheck write that the cycle

cannot be broken by any particular juvenile justice policy since every conceivable policy confronts the same dilemma: after it is implemented people will continue to feel that juvenile crime is exceptionally high, that it was not a serious problem in the good old days and that it would not be a serious problem today if we only had the proper justice policies in effect . . . Caught in this cycle, we are doomed to repeat history instead of learning from it and moving toward real progress.¹⁵

¹² See, e.g., J. Lawrence Schultz, *The Cycle of Juvenile Court History* 19 CRIME AND DELINQUENCY 4 (1973) (discussing juvenile justice cycles in the first half of the twentieth century); THOMAS BERNARD & MEGAN KURLYCHECK, *THE CYCLE OF JUVENILE JUSTICE* (2010) (examining the cyclical pattern of “reform and bust” in juvenile justice on a national scale); NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON*, 204 (2014) (describing a pattern of juvenile prison officials’ abuse leading to lawsuits and increased oversight); Paul Donnelly, *The Cycle and Dynamics of Reform and Neglect in a State Juvenile Corrections Agency: The Texas Experience* (2018) (unpublished Ph.D. dissertation, on file with the University of Texas at Dallas) (“What many observers see as new or improved insight, motivations, policies or practices are more accurately described as mere turns of the wheel. Reform initiatives, then, can be framed not as improvements but reactions . . . to critical events and calls for change by influential persons or groups . . .”).

¹³ BERNARD & KURLYCHECK, *supra* note 12 at 3.

¹⁴ See Franklin Zimring, *Juvenile or Criminal Court? A Punitive Theory of Waiver*, in *AMERICAN JUVENILE JUSTICE*, 195 (2d. ed. 2019) (arguing that transfer is necessary and desirable when governed by strict procedural rules).

¹⁵ BERNARD & KURLYCHECK, *supra* note 12 at 29.

California's 120-year history with juvenile transfer may support this bleak outlook, but modern groups like #BlackLivesMatter, the Black Organizing Project, and Youth Organize California are starting to create durable alternatives to juvenile courts and redirect resources to transformative projects with the potential to change what the law alone cannot.¹⁶

Organizers and movements like these recognize that court orders and legislation alone are not enough to achieve the lofty goal of California's original Juvenile Court Law: "to substitute for the inflexible system to which criminal courts must be subject, the sympathy and strength of personal influence."¹⁷ For his part, Frankie Guzman says it was community college, not prison, that helped him.¹⁸ "Instead of hundreds of thousands of dollars, it took a few supportive people."¹⁹ New kinds of social services, inspired by decades of community organizing and made possible by current movements led by young people and people of color, have the potential to break this cycle of juvenile transfer.

Part I of this article describes California's historical transfer policies from the establishment of the juvenile court in 1903 to the present. Part II covers SB 1391, which raised the minimum age of transfer to sixteen, and recent constitutional challenges to the law. It argues that the California

¹⁶ See *Healing in Action: A Toolkit for Black Lives Matter Healing Justice & Direct Action*, BLACK LIVES MATTER (2018), https://blacklivesmatter.com/wp-content/uploads/2018/01/BLM_HealingAction_r1.pdf (describing restorative and transformative projects employed by the movement to address harm done within the community without resorting to police or prisons); *The People's Plan for Police-Free Schools OUSD Implementation Proposal*, BLACK ORGANIZING PROJECT (2019), <http://blackorganizing-project.org/wp-content/uploads/2019/11/The-Peoples-Plan-2019-Online-Reduced-Size.pdf> (proposing a plan for the divestment from the Oakland Unified School District's police department — the Oakland Unified School Board unanimously approved a similar plan on June 23, 2020); *Young People's Agenda*, YOUTH ORGANIZE CALIFORNIA (n.d.), <https://yocalifornia.org/ypa> (outlining an agenda, written by young people, for less policing, prison abolition, and transformative justice).

¹⁷ CITY AND COUNTY OF SAN FRANCISCO, CA., A REPORT ON THE JUVENILE COURT, S. 1-34, Special Sess., 4 (1906), <https://babel.hathitrust.org/cgi/pt?id=ucl.b4093710;view=lup;seq=6> (establishing courts with jurisdiction over people under the age of twenty-one accused of a crime).

¹⁸ Weinzimer, *supra* note 1.

¹⁹ Robert Salonga, *Reformed Bay Area Teen Convicts Push Pending Bill to Spare Young Offenders*, MERCURY NEWS (Sept. 26, 2018, 6:00 AM), <https://www.mercurynews.com/2018/09/26/reformed-teen-convicts-push-pending-bill-to-young-offenders>.

Supreme Court is likely to find SB 1391 constitutional. Part III revisits the notion of a cycle of juvenile punishment and discusses the possibility of keeping young people — especially young people of color — and their communities safe without resorting to juvenile transfer at all.

I. TRACING JUVENILE TRANSFER'S CYCLICAL HISTORY FROM EUGENICS, THROUGH DUE PROCESS, TO SUPERPREDATORS

This part discusses the major phases in California's historical methods for transferring young people out of juvenile court and into criminal court. Section A describes the founding of California's juvenile court and its lack of clear transfer policy. Racist and pseudoscientific understandings of childhood marred the early decades of the juvenile court with exclusionary policies and violence, and eugenics was an early driver of the first official transfer rules. Section B covers the extension of due process to the juvenile courts and their transfer decisions. In the middle of the twentieth century, the U.S. Supreme Court decided its first modern cases about juvenile defendants and extended many protections of criminal procedure at the price of the traditional lenience of the juvenile court. Section C explains how the seemingly oppositional goals of improving conditions in juvenile prisons and of increasing punishment defined California's transfer policy in the 1970s, '80s, and '90s, and Section D discusses the turn toward lenience over the past few years.

A. EARLY JUVENILE JUSTICE: WHEN KIDS WERE DIFFERENT

In the Progressive Era, states revolutionized the treatment of children who committed crimes. Illinois established the world's first juvenile court in 1899.²⁰ Other states and countries quickly followed suit, developing juvenile courts that differed widely in scope and procedure, but shared an understanding that children who violated the law should not be treated as adults.²¹ Asserting *parens patriae*, the legal doctrine that “the state must

²⁰ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

²¹ *Id.* at 107–8.

care for those who cannot take care of themselves,”²² the California Legislature passed The Juvenile Court Law in 1903.²³

Parens patriae explained the need for a juvenile court where “[s]pecialized judges, assisted by social service personnel, would act in the best interest of the child.”²⁴ The new court, said one of San Francisco’s first juvenile judges, was created “to teach the boy and girl, no matter how unfortunate, that society is trying, at least, to be his friend.”²⁵ Tension arose immediately between the tenor of the law (“that the care, custody, and discipline of a . . . delinquent person . . . shall approximate as nearly as may be that which should be given by his parents”) and its application to young people charged with especially egregious behavior.²⁶ From the outset, transfer practice reflected this tension.

Transfer practice has its roots in these first decades of the twentieth century, when total judicial discretion and a lack of oversight characterized California’s juvenile court. Not until 1920 did the California Supreme Court conclude that juvenile courts actually had the power to waive their jurisdiction and transfer juvenile cases.²⁷ In that seminal case, a superior court magistrate — who would only have had jurisdiction over an adult criminal defendant — convicted sixteen-year-old Roy Wolff of murder after the juvenile court transferred his case.²⁸ The California Supreme Court approved the juvenile court’s action, holding that on a finding of “incorrigibility,” a minor could be transferred to adult court for trial.²⁹ At the

²² *Parens Patriae Definition*, BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw. Some also argue that *parens patriae* is a meaningless phrase serving only to justify judicial overreach. See Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of Parens Patriae*, 22 S.C. L. REV. 147 (1970). The doctrine legitimized state intervention in the parent-child relationship but made no distinction between children’s criminal and noncriminal conduct. See Barry Feld, *Criminalizing the American Juvenile Court*, 17 Crime & Just. 197, 205 (1993).

²³ A REPORT ON THE JUVENILE COURT, *supra* note 17 at 4 (1906).

²⁴ Barry Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUSTICE 197, 205–6 (1993) (internal citations and punctuation omitted).

²⁵ A REPORT ON THE JUVENILE COURT, *supra* note 17 at 3.

²⁶ See *Juvenile Court Law*, in CALIFORNIA LAWS OF INTEREST TO WOMEN AND CHILDREN, 152 § 27 (Friend Wm. Richardson, ed., 1912).

²⁷ *People v. Wolff*, 182 Cal. 728 (1920).

²⁸ *Id.* at 732.

²⁹ *Id.* at 731.

same time that *Wolff* began a new phase of the cycle by explicitly allowing transfer to adult court for the first time, the Court left many questions unanswered. For instance, it did not decide a minimum age of transfer, nor set any standards for a juvenile court's transfer decision.

As the Progressive Era drew to a close and the early creative energy of the juvenile court faded, its reality became darker and more punitive. Eugenics underlay an informal transfer policy that resulted in the sterilization of many older teens. Eugenics is the most macabre version of *parens patriae*, in which the state controls the very genes of those it decides "cannot take care of themselves." This pseudoscience justified an extrajudicial form of transfer. Louis Terman, a Stanford professor and early proponent of eugenics, tested and sorted children convicted of crimes based on their "innate intelligence."³⁰ California's first juvenile prison, the Whittier State School, relied on Terman's classification system to determine which of its young wards to transfer to psychiatric hospitals.³¹ In those psychiatric hospitals, these children were among the 20,000 people the state of California sterilized in the first half of the twentieth century.³²

The informality of the early juvenile court — exemplified by the lax *Wolff* standard for transfer — allowed Fred Nelles, the director of the Whittier State School and a close friend of Louis Terman, to experiment with lenient treatment for boys he found deserving and to mete out surgical sterilization to "incurable" kids with little judicial supervision. Nelles believed that older boys (those sixteen and up) were usually "too old

³⁰ DANIEL E. MACALLAIR, *AFTER THE DOORS WERE LOCKED: A HISTORY OF YOUTH CORRECTIONS IN CALIFORNIA AND THE ORIGINS OF TWENTY-FIRST CENTURY REFORM*, (2015), 90.

³¹ *Id.*

³² *Id.* at 91; see also Nicole L. Novak & Natalie Lira, *California Once Targeted Latinas for Forced Sterilization*, SMITHSONIAN (March 22, 2018), <https://www.smithsonianmag.com/history/california-targeted-latinas-forced-sterilization-180968567/> (reporting that of the 8,515 sterilization operations performed in the U.S. before 1928, 5,820 took place in California); E. S. GOSNEY, *STERILIZATION FOR HUMAN BETTERMENT; A SUMMARY OF THE RESULTS OF 6,000 OPERATIONS IN CALIFORNIA 1909–1929*, 174 (1930) (describing in chillingly clinical terms the logic of eugenics at the time). California's eugenics victims were overwhelmingly women, Black, disabled, or Latinx, and almost exclusively poor. MIROSLAVA CHÁVEZ-GARCIA, *STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA'S JUVENILE JUSTICE SYSTEM* 47–48 (2012).

and too difficult to reform.”³³ Nelles’ beliefs led to Whittier’s complicity in this perverse form of transfer that, like all eugenics projects, inherently privileged Whites over Black and Latinx people. Thankfully, budget constraints ended Nelles’ classification and transfer system during the Great Depression.³⁴

But Nelles’ legacy is complicated — and few administrators of the juvenile system were better. While he enabled the reform school’s horrifying eugenicist project, his research in psychology, pedagogy, and social work was cutting edge for its time, and he helped dismantle the traditional militaristic environment of youth prisons.³⁵ Nelles’ experiments with smaller housing units — cottages — are a model to this day, and escape attempts decreased dramatically during his tenure.³⁶ He instituted solitary confinement but ended corporal punishment.³⁷ Despite embracing bigotry, hatred, and bad science, Nelles seemed to have a way with the kids he deigned to work with; escape rates “shot up” when the school came under new management upon Nelles’ death.³⁸ At the end of the 1930s, the transformative rhetoric of the Juvenile Court Law in no way matched the harsh reality of cruel, mismanaged institutions and ill-defined transfer policy based on vague criteria like “incurability” and “innate intelligence.”

B. A LONG ROAD TO DUE PROCESS AND INCREASED EFFICIENCY IN JUVENILE TRANSFER

A series of tragic deaths and stories of guard misconduct in the late 1930s motivated major changes in juvenile law. On August 11, 1939, guards found thirteen-year-old Benny Moreno hanging in his cell at the Whittier State School.³⁹ Benny’s family and friends claimed that he was either murdered or pushed to suicide by staff abuse.⁴⁰ An internal investigation found

³³ CHAVEZ-GARCIA, *supra* note 32 at 55.

³⁴ See MACALLAIR, *supra* note 30 at 122.

³⁵ *Id.* at 55.

³⁶ *Id.* at 123.

³⁷ *Id.*

³⁸ CHAVEZ-GARCIA, *supra* note 32 at 47.

³⁹ Jennifer Uhlman, *Communists and the Early Movement for Mexican-American Civil Rights: the Benjamin Moreno Inquiry and its Aftermath*, 9 AM. COMMUNIST HISTORY 2, 111–12 (2010).

⁴⁰ *Id.* at 112.

“beyond a reasonable doubt” that the prison and its guards bore no responsibility for Benny’s death.⁴¹ Another boy, seventeen-year-old Edward Leiva, killed himself months later while also imprisoned at Whittier.⁴² The Whittier School’s obfuscation about the deaths of the Mexican-American teens fueled outrage in Los Angeles’ Latinx community and beyond.⁴³ Finally, an independent investigation led to public hearings documenting “widespread physical and sexual violence in all the state reform schools.”⁴⁴

These scandals prompted a quick government response that did not address any of the concerns motivating communities to protest the deaths of Benny and Edward: the creation of a new state-run youth prison system. California’s Attorney General — and later Governor — Earl Warren drafted the Youth Corrections Act to create the California Youth Authority (CYA).⁴⁵ CYA’s stated mission was to make juvenile corrections more scientific and developmentally appropriate, but it did not provide culturally specific treatment for Mexican-American youth as recommended by the committee that investigated the deaths of Benny Moreno and Edward Leiva, nor did it increase protections for young people in transfer

⁴¹ *Id.* at 114, 116–17 (arguing that the communists running the investigation “bungled” it).

⁴² See CHAVEZ-GARCIA, *supra* note 32, at 152, 158. In dark irony, Edward Leiva and Benny Moreno both passed away in solitary confinement units designed by Fred Nelles. See CHAVEZ-GARCIA, *supra* note 32, at 158. Young people in adult prisons today are often held in solitary confinement to protect them from sexual and physical violence at the hands of older inmates, but isolation is recognized as traumatic, especially for kids. See Michele Deitch and Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, in JUVENILE JUSTICE SOURCEBOOK 241, 252 (Wesley T. Church, et al. eds., 2d ed. 2018); see also *Black August and the Struggle to Abolish Solitary*, CRITICAL RESISTANCE (Aug. 21, 2015), <http://criticalresistance.org/black-august-and-the-struggle-to-abolish-solitary>.

⁴³ MACALLAIR, *supra* note 30 at 133–35; CHAVEZ-GARCIA, *supra* note 32 at 170–71.

⁴⁴ CHAVEZ-GARCIA, *supra* note 32 at 164, 168. Ultimately, two reform school administrators were criminally prosecuted for Leiva’s death. *Id.* at 168. One of the saddest stories the investigation brought to light was that of an eight-year-old boy committed to Whittier for stealing a bike. He reported sexual and physical assaults too numerous to count by staff and other wards. He told school management, including the superintendent, many times, and nothing was done — he left Whittier traumatized. See MACALLAIR, *supra* note 30 at 135.

⁴⁵ MACALLAIR, *supra* note 30 at 139–44. As governor, Warren further centralized juvenile detention and probation services under CYA.

proceedings.⁴⁶ In addition to creating CYA, the 1939 Youth Corrections Act created the Welfare and Institutions Code, which merely codified *People v. Wolff*'s holding that on a finding of "incurribility," a minor could be transferred to adult court.⁴⁷ Like *Wolff*, the Code set no minimum age for transfer, and provided little guidance about what constituted incurribility.⁴⁸ Even as the juvenile prison system formalized and began to look more like its adult counterpart, the transfer process remained opaque.

A 1939 Court of Appeal case applying the new Code illustrates the failure of these new rules to limit judicial discretion. An adult court convicted a seventeen-year-old of grand theft auto without the juvenile court first transferring his case.⁴⁹ Sam Renteria, the defendant, testified that he had merely slept in the car and had not intended to steal it.⁵⁰ Sam had just been released from the Preston State Reform School and was living out of a suitcase trying to make enough money as a professional fighter to rent an apartment.⁵¹ The probation officer, when asked whether Sam was, in fact, incurribile, turned and spoke directly to Sam, saying that his two prior probation violations — both for running away from state reform schools — "rather settle[] my mind as far as you are concerned."⁵²

The court's loose evidentiary standards meant this was enough to doom Sam. The jury was instructed to decide whether Sam was "incurribile" based solely on the probation officer's testimony — a power supposedly

⁴⁶ *Id.* at 140–42.

⁴⁷ Joel Goldfarb & Paul M. Little, *1961 Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure*, 51 CALIF. L. REV. 421, 423 (1963). Hereafter, all references to the "Code" are to the Welfare and Institutions Code, unless otherwise specified.

⁴⁸ *Id.*

⁴⁹ *People v. Renteria*, 60 Cal. App. 2d 463 (1943). *Renteria* is not mentioned specifically in the literature as a watershed ruling or a catalyst, but it exemplifies many of the concerns motivating these "process" reforms. For more information, see ELIZABETH ESCOBEDO, *FROM COVERALLS TO ZOOT SUITS: THE LIVES OF MEXICAN-AMERICAN WOMEN ON THE WORLD WAR II HOME FRONT* 22–24 (2013) (discussing Bertha Aguilar, the young woman who turned Sam Renteria in the first time he escaped from reform school).

⁵⁰ *Renteria*, 60 Cal. App. 2d at 467.

⁵¹ *Id.* at 463–64, 467.

⁵² Probation reports were a new requirement of the 1939 Code. *Id.* at 427.

reserved to the juvenile court.⁵³ He was found incorrigible, transferred to adult court, convicted, and given the maximum sentence all at once, and all without the approval of a juvenile court judge.⁵⁴ The Court of Appeal upheld his conviction. It found that the probation officer's negative assessment of Sam's capacity to change overrode procedural concerns like the prosecution's uncontested failure to carry its burden of proof that Sam was unfit for the juvenile court. Just as Nelles exploited the lack of juvenile court oversight to sterilize children, the Court of Appeal was able to ignore scant procedural rules to declare Sam Renteria incorrigible. Continuing to overlook the Code's minimal requirements throughout the 1940s and '50s, juvenile courts often automatically transferred cases to adult courts when a child defendant contested the charges rather than admitting guilt.⁵⁵

As governor, Earl Warren convened a special commission that recommended substantial changes to juvenile procedure, fulfilling one aim of the original Welfare and Institutions Code and setting clear rules for transfer.⁵⁶ The commission's main goals were to limit informality, impose clear standards, and allay concerns about disparate treatment in the juvenile court.⁵⁷ But Warren left California before these reforms came to fruition as the Arnold-Kennick Juvenile Court Act in 1961. The Act set the minimum age of transfer to adult court at sixteen.⁵⁸ In order to waive jurisdiction, a juvenile judge needed to make two findings: (1) that the charged offense would have been a felony if committed by an adult, and (2) that the young person was not "amenable to treatment in the juvenile court."⁵⁹ Prosecutors bore the burden of proving these elements by substantial evidence.⁶⁰ The cycle of juvenile transfer thus entered a new phase. Decision makers responded to complaints about unreasoned rulings by placing procedural

⁵³ *Id.*

⁵⁴ *Id.* at 467–68.

⁵⁵ Goldfarb & Little, *supra* note 47 at 442 n.134.

⁵⁶ *Id.* at 421.

⁵⁷ *Id.*

⁵⁸ California Senate, COMMITTEE ON PUBLIC SAFETY: HEARING ON SB 1391, Apr. 3, 2018.

⁵⁹ Goldfarb & Little, *supra* note 47 at 444.

⁶⁰ *Id.* The Act also provided the first evidentiary standards for juvenile court proceedings, mandated privacy in juvenile court, and required an "informal nonadversary atmosphere." *Id.* at 442; California Senate, *supra* note 58.

burdens on prosecutors seeking transfer, without reevaluating the systems that punished and controlled kids. While the Arnold-Kennick Act's streamlined transfer procedure might have protected Sam Renteria, it also constrained judges' discretion to impose lenient sanctions and expanded the availability of harsh punishment to prosecutors.

The U.S. Supreme Court — led at that time by Earl Warren — issued several rulings in the 1960s that changed juvenile transfer practice in California. First, *Kent v. United States* required that juvenile courts make specific findings on the record before transferring a case to adult criminal court.⁶¹ (California's still-lax transfer scheme under the Arnold-Kennick Act met this baseline.) While it imposed token procedural standards, *Kent* also recognized *parens patriae* and lenience as the foundations of the juvenile court.⁶² Next, *In re Gault* guaranteed Fourteenth Amendment rights of counsel, confrontation, and notice to minor defendants in juvenile court.⁶³ But due process in juvenile court also threatened the informality that was supposed to foster rehabilitation.⁶⁴ It fundamentally changed California's transfer hearings, which now had to comport with many constitutional protections. *In re Winship* held that juvenile judges must find guilt beyond a reasonable doubt,⁶⁵ but did not affect transfer hearings because jeopardy has not yet attached, and the minor defendant's guilt is supposedly irrelevant.⁶⁶

In 1967, in the wake of *Gault* and facing mounting criticism over the enormous discretion of juvenile courts, the California Legislature and courts again revamped the transfer process.⁶⁷ A new law maintained the minimum age of transfer at sixteen but gave juvenile and adult courts

⁶¹ *Kent v. United States*, 383 U.S. 541 (1966). Earl Warren played an outsized role in California's transfer policy, from beginning the process that led to the Arnold-Kennick Act, to ordering procedural standards in *Kent*.

⁶² *See id.*

⁶³ *In re Gault*, 381 U.S. 1 (1967).

⁶⁴ Goldfarb & Little, *supra* note 47 at 422.

⁶⁵ *In re Winship*, 397 U.S. 358 (1970).

⁶⁶ *See generally* Ralph E. Boches, *Juvenile Justice in California: A Reevaluation*, 19 HASTINGS L.J. 47, 48–49 (1967) (describing procedure in California's juvenile courts).

⁶⁷ *Id.* at 48–49 (1967); *see generally* Howard James, *Juvenile Justice: The Worst of Both Worlds*, CHRISTIAN SCIENCE MONITOR, May 10, 1967, (discussing the crisis caused by lack of procedural safeguards in juvenile courts nationwide in the 1960s); PRESIDENT'S COMM'N ON LAW ENFT & ADMIN. OF JUSTICE: THE CHALLENGE OF CRIME IN A

concurrent jurisdiction over people between eighteen and twenty-one.⁶⁸ Judges continued to apply loose, subjective standards in transfer hearings.⁶⁹ But in 1970, the California Supreme Court stepped up where the Legislature failed to act — requiring additional findings before a young defendant could be sent to adult court.⁷⁰ In that case, Jimmy H. had been transferred to adult court based only on his age and the gravity of the charged offenses.⁷¹ The Supreme Court interpreted the new Welfare and Institutions Code Section 707, governing transfer, to require that the lower court, at the very least, consider behavior patterns, prior delinquent history, and the probation report before sending Jimmy to adult court.⁷² After *Jimmy H.*, defense attorneys could present testimony about child clients' mental state and history of trauma.⁷³

While *Jimmy H.* imposed a new set of procedural requirements to make transfer less biased and more respectful of individual circumstances, activists pushed legislators to keep children out of the court system altogether.⁷⁴ Around this time, Chicano Power student activists were leading the “Blowouts,” a series of walkouts in Los Angeles schools.⁷⁵ Students called for “affirmation of community experiences in the curriculum” and demanded an end to other forms of institutionalized racism like discriminatory criminal punishment.⁷⁶ In response to intense organizing,

FREE SOCIETY (1967) (detailing procedural defects across jurisdictions, specifically in Tables 14 and 15).

⁶⁸ Boches, *supra* note 66 at 96. Prosecutors could elect to file charges in juvenile court or adult superior court, and either court had the authority to transfer minor defendants to the other. Because of the difference in juvenile court vocabulary, these laws use language like “charged with an act which would constitute a crime if committed by an adult” but since the Welfare and Institutions Code relies on the Penal Code’s definitions of crimes, it amounts to the same thing. *Id.*

⁶⁹ *Id.*

⁷⁰ *Jimmy H. v. Superior Court*, 3 Cal. 3d 709 (1970).

⁷¹ *Id.* at 713–14.

⁷² *Id.* at 714.

⁷³ *Id.* The court even considered presuming children “fit for treatment” (as they are today) in the juvenile court, although it reserved the question. *Id.* at 709 n.1.

⁷⁴ CALIFORNIA YOUTH AUTHORITY, AB 3121 IMPACT EVALUATION 24–25 (1978).

⁷⁵ Emily Bautista, *Transformative Youth Organizing: A Decolonizing Social Movement Framework 185–86* (2018) (unpublished Ph.D. dissertation, on file with Loyola Marymount University).

⁷⁶ *See id.*

especially by young people of color, legislation prohibited sending young people to jail for status offenses like truancy or curfew violations.⁷⁷ This included all young people regardless of “offense history,” even sixteen- and seventeen-year-olds.⁷⁸

C. ABANDONING THE REHABILITATIVE IDEAL IN THE “TOUGH ON CRIME” ERA

In the 1970s and '80s, rather than committing to and experimenting with the promise of informality and rehabilitation outside of court, California embraced strict procedure and harsh punishment.⁷⁹ Youth prisons still paid lip service to the rehabilitative ideal and no longer openly promoted differential treatment based on race, gender, and ability. But at the same time, juvenile courts were recast in the retributive image of criminal courts to stem a perceived juvenile crime wave.⁸⁰ As it imprisoned more and more children in the 1970s, the California Youth Authority adopted criminal law scholar and incarceration advocate David Fogel’s “justice model,” the idea that rehabilitation is impossible and jails and prisons should focus only on incapacitating and punishing.⁸¹ However, imposing these rigid rules and stricter punishments did not reduce crime.

⁷⁷ See Stephen J. Skuris, *For Troubled Youth — Help, Not Jail*, 31 HASTINGS L.J. 539, 547 (1979).

⁷⁸ CALIFORNIA INTERIM COMMITTEE ON CRIMINAL PROCEDURE, JUVENILE COURT PROCESSES, REPORT, 1970 Interim Session 1 (1971) (report on AB 3121).

⁷⁹ *Hicks v. Superior Court*, 36 Cal. App. 4th 1649 (1995) (giving a thorough overview of the steady reduction in the minimum age of transfer and increase in punishment available for use against children).

⁸⁰ Ted Palmer, *Martinson Revisited*, 12 J. OF RESEARCH IN CRIME & DELINQUENCY 133 (1975).

⁸¹ See David Fogel, *We Are the Living Proof: The Justice Model for Corrections* (1975); see also Letter from Attorney General George Deukmejian in support of Assem. B. No. 1374 to California Governor Edmund G. Brown, Jr. (Jun. 27, 1980) (expressing similar views). Another scholar, Robert Martinson, built on Fogel’s work but focused specifically on juvenile justice in California in a report about the impossibility of rehabilitation in CYA. Palmer, *supra* note 80. While Martinson’s thorough study and dismal assessment of California’s juvenile system was interpreted to mean that mass incarceration was the only appropriate response to juvenile delinquency, his study made no such causal conclusions. See *id.* at 135. Decision makers could, and likely should, have interpreted it to mean that CYA was dysfunctional, that its methods were insufficient to help young people, and that perhaps incarceration made the “delinquency problem” worse.

In 1977 this punitive turn came to juvenile law — the Legislature amended the Code section governing transfer to include a presumption that people over sixteen and charged with certain crimes were “unfit for treatment” in the juvenile court.⁸² Young people now had to overcome this presumption to avoid transfer, rather than prosecutors’ carrying the burden of proving minors unfit.⁸³ In the next full year, juvenile courts in Los Angeles County saw a 318 percent increase in prosecutor-filed transfer petitions and a 234 percent increase in successful transfers.⁸⁴ Courts even broke from the tradition of privacy in juvenile proceedings — ordering that transfer hearings be held open to the press except in “extreme circumstances.”⁸⁵ Then–Attorney General George Deukmejian supported a Welfare and Institutions Code amendment that Governor Brown ultimately signed, which opened juvenile proceedings to the public. Deukmejian wrote,

Minors are committing more serious and violent crimes than ever before and are becoming more criminally sophisticated. The news media, victims of crime, and the public are entitled to have as much knowledge as possible about the juvenile justice system and what it is doing to better serve public safety needs.⁸⁶

Id.; see also MACALLAIR, *supra* note 30, at 195 (“it was in the Youth Authority I learned that there was no god because no god would ever put a kid through this.”).

⁸² Boches suggested the opposite approach in 1967. See Boches, *supra* note 66 at 95 (“One helpful step would be to provide for a statutory presumption that any minor of 16 or 17 is amenable to the care, treatment, and training . . . of the juvenile court.”). The California Supreme Court had considered adopting Boches’ proposed rule in *Jimmy H.* but had reserved the question. See *Jimmy H.*, 478 P.2d at 35.

⁸³ *People v. Superior Court (Steven S.)*, 119 Cal. App. 3d 162, 176 (1981).

⁸⁴ Eric Klein, *Dennis the Menace or Billy the Kidd: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIMINAL L. REV. 371, 386–87 (1997).

⁸⁵ *Tribune Newspapers W., Inc. v. Superior Court*, 172 Cal. App. 3d at 443, 450 (1985). Privacy in juvenile proceedings and records is a focal point for juvenile justice reform. See, e.g., Sue Burwell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, 333 (Nancy Dowd, ed., 2015).

⁸⁶ See Letter from Attorney General George Deukmejian, *supra* note 81. Governor Pete Wilson signed a law in 1995 that barred reporters from interviewing adult and child inmates in California correctional institutions. See Evelyn Nieves, *California Governor Plays Tough on Crime*, NEW YORK TIMES (May 23, 2000).

Deukmejian's letter encapsulates a driving force behind California politics for the next decades.

Many shared Deukmejian's perception that juvenile crime was increasing throughout the 1980s and 1990s and that transferring juvenile cases to adult court was the solution,⁸⁷ even though the same number of kids were arrested for violent crimes in 1980 and 1989.⁸⁸ During the same period, the population of the California Youth Authority — like the population of adult prisons — skyrocketed.⁸⁹ Republican Governor Pete Wilson campaigned on lowering the minimum age for transfer from sixteen to fourteen.⁹⁰ In 1994, he signed such a bill into law.⁹¹ Juvenile law scholar Frank Zimring argues that states enacted tough legislation like California's 1994 reform because "the minimum punishment felt necessary exceed[ed] the maximum punishment within the power of the juvenile court."⁹² Zimring warns that this dichotomy (society's perceived demands for harsher punishment and the juvenile court's inability to provide them) "leaves the juvenile court vulnerable to swift legislative change."⁹³

Journalist and activist Nell Bernstein explains the same era a different way, writing that researchers in the 1990s twisted juvenile crime statistics and demographic projections to stir up racialized fears of young people of color.⁹⁴ John DiIulio, for example, proposed a new "breed" of young person, "morally impoverished" and so fundamentally *other* that rehabilitation was impossible.⁹⁵ This rhetoric harks back to the early 1900s and the

⁸⁷ See Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to Juvenile System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 241–43 (2000).

⁸⁸ Martha E. Bellinger, *Waving Goodbye to Waiver for Serious Juvenile Offenders: A Proposal to Revamp California's Fitness Statute*, 11 J. JUVENILE L. 1, 4 nn.7–9 (1990).

⁸⁹ MACALLAIR, *supra* note 30 at 201.

⁹⁰ *Id.* at 214.

⁹¹ *Id.* at 214; California Senate, *supra* note 58; see also Hicks, 36 Cal. App. 4th at 1649–54 (discussing the legislative history and ultimately upholding the constitutionality of AB 560 (the 1994 bill that reduced the minimum age of transfer from sixteen to fourteen)).

⁹² See FRANK ZIMRING & JEFFREY FAGAN, *THE CHANGING BORDERS OF JUVENILE JUSTICE* 208 (2000).

⁹³ FRANK ZIMRING, *CHOOSING THE FUTURE FOR JUVENILE JUSTICE*, 199 (2014).

⁹⁴ See BERNSTEIN, *supra* note 12 at 72.

⁹⁵ William Bennet, John DiIulio, & John Walters, *Body Count: Moral Poverty — And How to Win America's War on Drugs*, 82–84 (1996).

development of transfer practice — the first juvenile prisons claimed that certain older boys were “too difficult to reform” to justify their sterilization.⁹⁶ Not coincidentally, DiIulio is also credited with coining the term “superpredator” to refer to mostly Black and Latinx teenagers.⁹⁷ Pundits, First Ladies, and other powerful Americans adopted John DiIulio’s racist terminology to justify increased punishment and more permissive juvenile transfer.⁹⁸ In spite of widespread disillusion with unchecked judicial discretion and indeterminate sentences of years past, opposition to the 1994 crime bill was fragmented.⁹⁹ Even the San Francisco–based Prisoners Union and other radical organizations supported the bill, and its opponents, like the National Center for Crime and Delinquency and the American Friends Service Committee, were not united around an alternative.¹⁰⁰

Public perception of high crime rates reflected the divisive rhetoric of DiIulio and Deukmejian rather than the reality that juvenile arrests had peaked in 1994 and declined precipitously afterward.¹⁰¹ Nonetheless, in 2000 voters passed Proposition 21, which gave prosecutors unilateral authority to file charges in adult court against kids as young as fourteen — a judge no longer had to authorize the decision and transfer hearings became

⁹⁶ See CHAVEZ-GARCIA, *supra* note 32.

⁹⁷ See Robin Templeton, *Superscapgoating*, FAIR (1998), <https://fair.org/extra/superscapgoating>.

⁹⁸ Kristen Savali, *For the Record, Superpredator is Absolutely a Racist Term*, THE ROOT (Sept. 30, 2016), <https://www.theroot.com/for-the-record-superpredators-is-absolutely-a-racist-t-1790857020>. DiIulio attempted to retract the thesis of *Body Count* when the second President Bush appointed him director of the White House Office of Faith-Based and Community Initiatives: “If I knew what I know now, I would have shouted instead for prevention of crimes.” Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators’ Bush Aide Has Regrets*, NEW YORK TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html>.

⁹⁹ Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, in SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 43, 47 (Cyrus Tata & Neil Hutton, eds. 2002).

¹⁰⁰ *Id.*

¹⁰¹ Jill Tucker and Joaquin Palomino, *Vanishing Violence*, SAN FRANCISCO CHRONICLE (Mar. 21, 2019), <https://projects.sfchronicle.com/2019/vanishing-violence>.

much less common.¹⁰² Proposition 21 *required* that prosecutors charge a minor in adult court for certain crimes, while in other cases prosecutors had discretion to choose their preferred venue.¹⁰³ In addition to removing judges' discretion to hear transfer petitions, Proposition 21 removed probation officers' discretion to release minors charged with certain offenses.¹⁰⁴ Those kids instead had to stay in juvenile prisons. Furthermore, informal probation — one of the least restrictive methods of control in the juvenile system — was no longer available for kids charged with felonies.¹⁰⁵ And if a person committed a “serious or violent offense” after turning fourteen, their juvenile record could never be sealed or destroyed.¹⁰⁶

Prop 21 also faced fervent opposition, but nascent social movements were not strong enough to fend off the initiative. For example, Critical Resistance Youth Force, an Oakland-based group, organized against Prop 21 and called for reinvestment in education and decarceration.¹⁰⁷ And in 2001,

¹⁰² See *Text of Proposition 21*, LEGISLATIVE AFFAIRS OFFICE (Mar. 21, 2000), https://lao.ca.gov/ballot/2000/21_03_2000.html; see also Diane Matthews and Kerri Ruzicka, *Proposition 21: Juvenile Crime*, CAL. INITIATIVE REV. (2000), <https://www.mcgeorge.edu/publications/california-initiative-review/initiatives-prior-to-november-2005/march-2000-initiatives/proposition-21>) (including a detailed catalog of Prop 21's other provisions and its legislative history. Such “prosecutorial transfer” is common in the U.S. and is problematic both because prosecutorial discretion is unreviewable and because it is disparately deployed against Black, Latino, queer, and rural defendants. See Josh Gupta-Kagan, *Rethinking Family Court Prosecutors*, 85 U. CHI. L. REV. 743, 775 (2018); Kristin Henning, *Correcting Racial Disparities in the Juvenile Justice System: Refining Prosecutorial Discretion*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM*, 193 (Nancy Dowd, ed., 2015).

¹⁰³ See Matthews & Ruzicka, *supra* note 102.

¹⁰⁴ See *id.*; Richard Mora and Mary Christianakis, *Fit to Be T(r)ied: Ending Juvenile Transfers and Reforming the Juvenile Justice System*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM*, 234 (Nancy Dowd, ed., 2015) (“Racialized, ‘tough on crime’ policies, such as direct file laws, perpetuate racial and ethnic disparities across the system.”); see also Mike Males, *Justice by Geography: Do Politics Influence the Prosecution of Youth as Adults?* CTR. ON JUVENILE CRIME AND CRIM. JUSTICE (SPECIAL REPORT, 2016).

¹⁰⁵ See *Text of Proposition 21*, *supra* note 102.

¹⁰⁶ See *id.*

¹⁰⁷ See Louise Cooper, *Youth Confront California's Prop 21*, AGAINST THE CURRENT 81 (2000) <https://solidarity-us.org/atc/86/p942/> (cataloguing and describing the social movements organizing against Prop 21); *It's the Prisons*, Critical Resistance (2000), <http://collection-politicalgraphics.org/detail.php?module=objects&>

San Luis Obispo Chief Probation Officer John Lum was so disgusted with conditions in the California Youth Authority that he refused to transport kids who had been transferred to adult court from juvenile hall to state custody.¹⁰⁸ Lum was fired after publicly denouncing Prop 21 and CYA.¹⁰⁹ While Lum's story is perhaps heartening to reformists, it also shows the alarming degree of discretion held by probation officers,¹¹⁰ who, as agents of prosecutors and the police, tend to be *more* punitive rather than less.¹¹¹

Furthermore, voters imposed harsher punishments on “serious delinquents” just as outrage was building about conditions in California Youth Authority prisons. The Prison Law Office (PLO) filed a lawsuit against California claiming that conditions in the Youth Authority violated inmates' statutory civil rights, as well as the First and Fourteenth Amendments to the U.S. Constitution.¹¹² Governor Gray Davis fiercely resisted the litigation.¹¹³ After Davis was recalled, Governor Arnold Schwarzenegger created a commission headed by former Governor Duekmejian to study the youth corrections system and to coordinate with the PLO to attempt to reform

type=browse&id=1&term=Prisons+%26+Prisoners&kv=11511&record=21&page=1 (memorializing Critical Resistance's political art campaign against Prop 21).

¹⁰⁸ MACALLAIR, *supra* note 30 at 219.

¹⁰⁹ *Id.* at 222.

¹¹⁰ See generally Rudy Haapanen, *Understanding Ethnic Disparities in Juvenile Probation: What Affects Decisions?* DEPT. OF JUSTICE (unpublished report, 2017).

¹¹¹ Jill Viglione et al. *The Many Hats of Juvenile Probation Officers*, 43 CRIM. JUSTICE. REV. 252; Haapanen, *supra* note 110 at 84 (finding that 70 percent of first referrals to the juvenile court, regardless of their seriousness, resulted in probation rather than detention). For a discussion of the deeply negative impact probation officers can have, see MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) at 164–66; Xocheezy as told to Katrina Kabickis, *If We'd Had Housing Support, Maybe I Wouldn't Have Spent My Teen Years Locked Up*, CHRONICLE OF SOC. CHANGE (Oct. 26, 2018), <https://chronicleofsocialchange.org/youth-voice/xocheezy-foster-care-juvenile-justice-crossover>.

¹¹² Macallair, *supra* note 30 at 222–23.

¹¹³ *Id.* at 223. During the 1999 election, Davis had received nearly a million dollars in contributions from the prison guards' union, the leading opponent to reform of the juvenile justice system. Joshua Aaron Page, *The “Toughest Beat”: Incarceration and the Prison Officers Union in California*, (2007) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the immense influence of the guards' union and how it grew even as most public sector unions were in decline — as well as its entanglements with Gov. Davis). Davis was also one of few Democrats who supported Prop 21's more punitive transfer policy. *Id.*

CYA.¹¹⁴ But in February 2004, two CYA staff members were caught on tape brutally beating two of the young people in their custody.¹¹⁵ Deukmejian's Commission held hearings, and, much like the hearings in 2000¹¹⁶ and 1941, they uncovered guards' shocking mistreatment of young people.¹¹⁷ One parent's story of a child's suicide was "shockingly similar to that of Benny Moreno" in 1939.¹¹⁸ After the attack, the hearings, and public outcry, California agreed to minor reforms, replacing CYA with the Division of Juvenile Facilities as part of a settlement with the PLO.¹¹⁹

Prosecutors held the power to decide in most cases which court would hear juvenile cases for the next sixteen years; "the worst punishment the juvenile system is empowered to inflict" became the norm.¹²⁰ Between 2003 and 2015, California prosecutors charged more than 10,000 children in adult court.¹²¹ More than 70 percent of those cases were direct-filed,

¹¹⁴ *Review Panel, State Auditor Release Report on California's Correctional System*, THE CAPITOL CONNECTION (2004), 4, <http://www.courts.ca.gov/documents/Cap-Con0604.pdf>.

¹¹⁵ Jennifer Warren, *Videotape of Beating by CYA Officers Is Released*, LA TIMES (Apr. 2, 2004); <http://articles.latimes.com/2004/apr/02/local/me-cya2>. Sue Burrell and Ju Seon Song, *Ending "Solitary Confinement" of Youth in California*, 31 CHILDREN'S LEGAL RIGHTS J. 42, 49 (2019).

¹¹⁶ JOINT OVERSIGHT HEARING OF THE SENATE AND ASSEMBLY COMMITTEES ON PUBLIC SAFETY REGARDING THE CALIFORNIA DEPARTMENT OF THE YOUTH AUTHORITY (May 16, 2000), <https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2013-14/spsf.senate.ca.gov/jointinformationalhearingonthecaliforniayouth-authoritymay162000/index.html>; see also Daryl Kelly, *Arrests Prompt Call for CYA Resignations*, LA TIMES (Feb. 3, 1999), <http://articles.latimes.com/1999/feb/03/local/me-4349>. (describing male staff members' systematic abuse of young girls and female staff at the Ventura Youth Correctional Facility).

¹¹⁷ Macallair, *supra* note 30 at 224.

¹¹⁸ *Id.*

¹¹⁹ Burrell & Song, *supra* note 115 at 52.

¹²⁰ See *Marcus W. v. Superior Court*, 98 Cal. App. 4th 36, 41 (2002) (citing *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 810 (1985)); see also *Manduley v. Superior Court*, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

¹²¹ Martin F. Schwarz, *Children are Different: When the Law Catches Up with Science*, 59 ORANGE CTY. LAWYER 30, 33 (2003 was the first year data was made available, and 2015 was the last full year of prosecutorial waiver). In the same period prosecutors petitioned juvenile courts to transfer 3,095 additional children to adult court. Laura Ridolfi, *Youth Prosecuted as Adults in California: Addressing Racial, Ethnic, and Geographic Disparities after the Repeal of Direct File 1*, BURNS INSTITUTE (2017), <http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=9081&Inline=True>.

meaning a prosecutor alone determined whether a young person would be tried in adult court.¹²² Between 2006 and 2016, 50 percent of Latinx kids and 60 percent of Black kids who faced transfer hearings were transferred to adult court, compared to only 10 percent of White kids.¹²³ Unsurprisingly, young people of color also received longer sentences in adult court than White young people.¹²⁴ The US Supreme Court in this period again issued landmark juvenile law decisions: ruling in 2005 that minors could not be executed and in 2010 that they could not be sentenced to life without the possibility of parole for a crime other than homicide.¹²⁵ Some states took these rulings as impetus to entirely revamp their juvenile systems, but not California.¹²⁶

D. A GLIMMER OF HOPE: LIMITING TRANSFER IN THE LATE 2010s

Finally, California began to relax juvenile punishments in response to organizing against mass incarceration and harsh prosecution, although the first steps were small and only tangentially related to transfer.¹²⁷ Perhaps anticipating the coming changes to the law, Governor Brown signed amendments to the criteria a judge must consider in a transfer hearing.¹²⁸ Welfare and Institutions Code Section 707 lists five factors that judges use to decide whether to transfer a case to adult court. The factors had not changed since 1975, but

¹²² Schwarz, *supra* note 121.

¹²³ Sara Tiano, *Bill Would Prohibit Californians from Sending Youth Under 16 to Adult Courts*, CHRONICLE OF SOC. CHANGE (Aug. 14, 2018), <https://chronicleofsocialchange.org/news-2/new-bill-would-prohibit-ca-from-sending-youth-under-16-to-adult-courts/31931>.

¹²⁴ See Kareem L. Jordan & Tina L. Frieberger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in Adult Court*, 21 CRIM. JUSTICE POL. REV. 185, 186–89 (2010).

¹²⁵ *Roper v. Simmons*, 532 U.S. 551 (2004); *Graham v. Florida* 560 U.S. 48 (2010).

¹²⁶ See, e.g., Burrell & Song, *supra* note 106 at 49; Barry Krisberg, *A New Era in California Juvenile Justice: Downsizing the State Youth Correctional Facilities*, BERKELEY CTR. FOR CRIM. JUSTICE (2010); CARA DRINAN, *THE WAR ON KIDS*, 150 (2017).

¹²⁷ For example, AB 703 allowed the Judicial Council to set minimum standards for court appointed counsel in juvenile cases. See Schwarz, *supra* note 121 at 34. The Council's new rule required that court-appointed attorneys receive eight hours of youth-specific training to better address common problems with mental health issues, sexual identity, undiagnosed learning disabilities, adolescent behavior among other factors. See CAL R. COURT 5.664.

¹²⁸ See CAL. WELF. & INST. CODE § 707; see also Schwarz, *supra* note 121 at 34.

new legislation explained them in greater detail and permitted defense attorneys to present mitigation evidence. Of course, in 2015 prosecutors charged most minors directly in adult court, and the new law only applied to those few transfer hearings actually argued before a judge.¹²⁹

However, in 2016, Proposition 57 restored full judicial discretion to transfer hearings — requiring prosecutors to petition the court for transfer and prove that a kid was “not a suitable candidate for treatment in the juvenile court system.”¹³⁰ Only 158 young people were transferred to adult court in 2017, the first full year after Prop 57, compared to 566 in 2015.¹³¹ Judicial discretion still suffers from implicit bias, especially where it applies multi-factor tests about “criminal sophistication” and family support systems, but a judge’s transfer decision, unlike a prosecutor’s, is at least reviewable by extraordinary writ.¹³² Prop 57 did away with California’s “once an adult, always an adult” provision, which had required that defendants who were transferred automatically be treated as adults in subsequent prosecutions.¹³³ Juvenile defendants also previously had to rebut a “presumption of unfitness,” but now prosecutors bear the burden of proving young people unfit by a preponderance of the evidence.¹³⁴

¹²⁹ See Ridolfi, *supra* note 122 and accompanying text.

¹³⁰ See CAL. R. CT. 5.770(a); CAL. EVID. CODE § 606. At the time, fourteen and fifteen-year-olds could be transferred at the discretion of the court if charged with one of thirty “serious felonies” enumerated in Code Section 707. SB 1391 removed this provision from Section 707 on January 1, 2019.

¹³¹ Division of Juvenile Justice Statistics, CALIFORNIA ATTORNEY GENERAL (2017); Division of Juvenile Justice Statistics, CALIFORNIA ATTORNEY GENERAL (2015).

¹³² CAL. R. CT. 5.770. A juvenile court’s decision to transfer a case can only be reviewed by extraordinary writ within twenty days of the jurisdictional order. Defendants have no opportunity to contest the transfer decision once convicted in criminal court. See *People v. Chi Ko Wong*, 18 Cal. 3d 698 (1976). The Court of Appeal reviews the juvenile court’s decisions of law *de novo*, and its conclusions of fact for substantial evidence. See *Haraguchi v. Superior Court*, 43 Cal. 4th 706 (2008) (allowing reversal of a lower court only if its holding was “arbitrary and capricious”).

¹³³ Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEPT. OF JUSTICE (2011), <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf>.

¹³⁴ See *Rodrigo O.*, 22 Cal. App. 4th at 1297; *J.N. v. Superior Court*, 23 Cal. App. 5th 706, 711 (2018); cf. *Jimmy H. v. Superior Court*, 478 P.2d 32, 35 (1970) (declining to presume minors “fit for treatment”).

The Legislature capitalized on the anti-carceral energy Proposition 57 represented. SB 1391, signed by Governor Brown on September 30, 2018, abolished transfer entirely for kids younger than sixteen.¹³⁵ Furthermore, young people can now stay in juvenile prisons or jails until age twenty-five.¹³⁶ But this legislation did not merely restore the pre-1994 status quo¹³⁷ — now, juvenile judges must make findings on the record to the five statutory factors in Section 707.¹³⁸ In 1994, each of the factors had to weigh in favor of the juvenile defendant, whereas judges now apply a totality of the circumstances analysis.¹³⁹

A 2018 Court of Appeal decision exemplifies the state of the law at this historically anti-transfer moment.¹⁴⁰ The defendant, J.N., and two friends were hanging out in a public park when an adult gang member approached them with a knife. S.C., J.N.'s friend, took out a gun. The adult wrestled with S.C. for the gun, shots were fired, and J.N. and the other boy “stood frozen, nearby.” The man died. But J.N. and his friends claimed they had

¹³⁵ SB 1391 Letter from Edmund G. Brown Jr., Office of the Cal. Governor, to the Members of the Cal. State Senate (Sept. 30, 2018). This was a symbolically important bill, but even without it no one under sixteen was transferred in 2017, the first full year of judicial waiver without SB 1391's age restrictions. Division of Juvenile Justice Statistics, CALIFORNIA ATTORNEY GENERAL (2017).

¹³⁶ WELF. & INST. CODE § 1769 (as amended June 2018).

¹³⁷ *Contra* People v. Lara, 4 Cal. 5th at 305, (“Proposition 57 . . . largely returned California to the historical rule.”)

¹³⁸ CAL. R. CT. 5.770. Jeopardy has not yet attached at a transfer hearing, and guilt or innocence is supposedly irrelevant to a judge's decision to impose the most severe penalty available in juvenile court. CAL. WELF. & INST. CODE § 707(a)(1). Although this is true in every jurisdiction with judicial waiver, it is a legal fallacy for the judge to consider “the gravity” of a charged offense that may never have happened, and “whether the minor can be rehabilitated” before determining if they have even done wrong. This odd state of affairs has persisted since before 1961, when juveniles risked immediate transfer to adult court if they contested the charges. See CAL. WELF. & INST. CODE § 707; People v. Superior Court (Rodrigo O.), 22 Cal. App. 4th 1297, 1304 (1994) (“the criteria the court must use to determine fitness are based upon the premise that the minor did in fact commit the offense”); see also Goldfarb & Little, *supra* note 47.

¹³⁹ Compare People v. Superior Court (Zaharias M.), 21 Cal. App. 4th 302, 308 (1993) (“the trial court must find that the minor is amenable to treatment under each and every one (not any one) of the five criteria set forth in § 707” (internal citations and emphasis omitted)) with Ridolfi, *supra* note 122 at 1 (describing current totality of the circumstances test).

¹⁴⁰ J.N., 23 Cal. App. 5th at 720.

no intention to kill anyone; they only wanted “to spray graffiti and go home.”¹⁴¹ Nevertheless, a prosecutor direct-filed murder charges against J.N. in adult court.¹⁴²

The Court of Appeal reversed the lower court and held that J.N.’s evidence of childhood trauma and limited culpability rendered him suitable for treatment in the juvenile court. Three pages of the short opinion are devoted to J.N.’s biography: his mother had relationships with several men who were physically and emotionally abusive to J.N., his mother, and his siblings.¹⁴³ The family moved to a one-bedroom apartment in a new neighborhood, where there were frequent shootings and stabbings, and J.N. himself was shot three times in the leg.¹⁴⁴ Even though J.N. had previously been arrested for “strong arm robbery” — he allegedly took \$25 from another boy at school — because he had served his juvenile sentence, returned with a “changed attitude,” graduated from high school, successfully completed probation, and got a job, the court still found him suitable for juvenile court.¹⁴⁵ Even though at the time of the *J.N.* decision juvenile courts could only maintain jurisdiction until the twenty-third birthday, and J.N. was almost twenty-one by the time his case was decided, he was not transferred. The Court held that the prosecution had failed to carry its newly heavy burden of proving him unfit for treatment in the juvenile court.¹⁴⁶

Also recognizing the anti-punitive turn in public opinion, the California Supreme Court later declared that Prop 57’s requirement that judges, not prosecutors, make the transfer decision applied retroactively, calling transfer “too severe” a punishment clearly disfavored by voters.¹⁴⁷ Voter

¹⁴¹ *Id.* at 711.

¹⁴² Seventeen months passed between the events at issue and the filing of charges. *Id.* at 711, n.1. After Prop 57 passed, the case was remanded to juvenile court for a fitness hearing. The judge quickly found J.N. unfit for treatment by the juvenile court. *Id.* at 706–8.

¹⁴³ *Id.* at 712–13. No transfer decision issued between 2000 and 2015 discussed facts about a minor defendant’s background or upbringing.

¹⁴⁴ *Id.* at 720.

¹⁴⁵ *Id.* at 715, 720.

¹⁴⁶ *Id.* at 711.

¹⁴⁷ See *People v. Superior Court (Lara)*, 4 Cal. 5th 299 (2018) (disapproving all Courts of Appeal but one in declaring Prop 57 retroactive); see also Prop 57 itself — as “urgency” legislation it took effect immediately.

intent to impose a lighter penalty on criminal defendants can overcome the general presumption that laws do not apply retroactively.¹⁴⁸ When voters or legislators choose to reduce punishment, California courts interpret the new law to apply to as many cases as possible given the “obvious” inference that the old punishment was too harsh.¹⁴⁹ The Supreme Court found that Proposition 57 represented a reduction in punishment, comporting with the idea that transfer is the juvenile court’s worst punishment. In explicitly deferring to voters’ apparent desire for lenience, the California Supreme Court “protect[ed] the juvenile courts from political risk,” by keeping them in step with public opinion — just as it had when it upheld Proposition 21’s imposition of harsher transfer policy in 2002.¹⁵⁰ Having lost their challenges to Prop 57, district attorneys across the state are now challenging the constitutionality of SB 1391.

II. THE SUPREME COURT WILL LIKELY UPHOLD SB 1391 AND INAUGURATE A NEW PHASE IN THE CYCLE OF JUVENILE TRANSFER

This part discusses the pending constitutional challenge to SB 1391. District attorneys have challenged the constitutionality of this law and appealed transfer decisions to the California Supreme Court. The question is whether SB 1391 is a permissible modification of Proposition 57, with which voters authorized judges, rather than prosecutors, to decide whether people between fourteen and eighteen could be transferred.¹⁵¹ Most Courts of Appeal have upheld SB 1391, with which the Legislature banned transfer of fourteen- and fifteen-year-olds, but the Second District (following dissenting justices in the Fifth and Sixth Districts) found SB 1391 unconstitutional

¹⁴⁸ *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1224 (1988); *Lara*, 4 Cal. 5th at 312 (explaining that the court does not distinguish between electoral and legislative intent).

¹⁴⁹ *Lara*, 4 Cal. 5th at 308 (citing *People v. Superior Court (Estrada)*, 63 Cal. 2d 740, 748).

¹⁵⁰ Zimring, *CHOOSING THE FUTURE*, *supra* note 95 at 212; *see also* *Manduley v. Superior Court*, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

¹⁵¹ *See* Sara Tiano, *Landmark Juvenile Justice Reform Challenged by California DAs*, *THE CHRONICLE OF SOC. CHANGE* (20 Jan. 2019) (listing the cases filed up to that point that challenged the constitutionality of SB 1391).

because “the Legislature cannot overrule the electorate” by setting a higher minimum age of transfer than voters implicitly approved with Prop 57.¹⁵² The great weight of authority favors upholding SB 1391,¹⁵³ and it is unlikely — though not unimaginable¹⁵⁴ — that the Supreme Court will strike it down. However the case comes out, the Supreme Court’s decision will set up the next phase of California’s cycle of juvenile transfer.

A. STANDARD OF REVIEW

Legislation cannot alter the scope or effect of an initiative like Prop 57 “whether by addition, omission, or substitution of provisions,” without express language in the initiative authorizing such an amendment.¹⁵⁵ In invalidating SB 1391, the Second District found that SB 1391 unconstitutionally amended Prop 57 because it “prohibit[ed] what the initiative authorize[d].”¹⁵⁶ Even the Courts of Appeal that have upheld SB 1391 acknowledge that it is an amendment of Prop 57 — it prohibits transfer of fourteen- and fifteen-year-olds to adult court, which Prop 57 at least implicitly authorizes.¹⁵⁷

The California Constitution still allows the Legislature to amend an initiative where the proposition expressly permits amendment, which

¹⁵² See *O.G. v. Superior Court*, 40 Cal. App. 5th 626, 627–28 (2019).

¹⁵³ At least eight Courts of Appeal have upheld SB 1391. See *People v. Superior Court (Alexander C.)*, 34 Cal. App. 5th 994 (2019); *People v. Superior Court (K.L.)*, 36 Cal. App. 5th 529 (2019); *People v. Superior Court (T.D.)*, 38 Cal. App. 5th 360, 375 (2019); *People v. Superior Court (I.R.)*, 38 Cal. App. 5th 383 (2019); *People v. Superior Court (S.L.)*, 40 Cal. App. 5th 114 (2019); *B.M. v. Superior Court*, 40 Cal. App. 5th 742 (2019); *Narith S. v. Superior Court*, 42 Cal. App. 5th 1131 (2019); *People v. Superior Court (Rodriguez)*, __ Cal. App. 5th __, 2020 WL 2765766 (2020).

¹⁵⁴ For example, the Supreme Court disagreed with all but one Court of Appeal in declaring Prop 57 retroactive. See *Lara*, 4 Cal. 5th at 308.

¹⁵⁵ See *Brown v. Superior Court*, 63 Cal. 4th 335, 354 (2016); see also Michael Cohen, *Can Fourteen- and Fifteen-Year-Olds be Transferred to Adult Court in California?: A Conceptual Roadmap to the Senate Bill 1391 Litigation*, 67 UCLA L. REV. DISCOURSE 200 (2019), <https://www.uclalawreview.org/can-fourteen-and-fifteen-year-olds-be-transferred-to-adult-court-in-california-a-conceptual-roadmap-to-the-senate-bill-1391-litigation/> (giving a detailed primer on the split in the District Courts and the constitutional question at issue in *O.G.*).

¹⁵⁶ *People v. Superior Court (Pearson)*, 48 Cal. 4th 564, 571 (2010).

¹⁵⁷ See, e.g., *Alexander C.*, 34 Cal. App. 5th 994; *K.L.*, 36 Cal. App. 5th 529.

Prop 57 does.¹⁵⁸ Prop 57's Section 5 requires it be "broadly construed to accomplish its purposes," and allows all legislative amendments that are "consistent with and further the intent of this act."¹⁵⁹ A court reviewing amendatory legislation starts "with the presumption that the Legislature acted within its authority . . . if, by any reasonable construction, it can be said that the statute furthers the purposes of the initiative."¹⁶⁰ The court must resolve all doubt in favor of upholding the statute.¹⁶¹ And courts may rightly consider other "indicia of voter intent" like the Voter Information Guide or a "general description of the initiative's purpose offered by its proponents."¹⁶² The most relevant question for the Supreme Court is whether SB 1391 furthers the intent of Prop 57 — the Second District held that it does not.

B. SB 1391 IS LIKELY A PERMISSIBLE AMENDMENT OF PROPOSITION 57

Prosecutors' challenges to SB 1391 usually center on the claim that SB 1391 is an unconstitutional modification of Prop 57. *O.G. v. Superior Court*, the case before the Supreme Court, begins by framing the principal purpose of Proposition 57 as restoring judicial discretion to grant or deny transfer petitions.¹⁶³ It follows that SB 1391 is then a *restriction* on judges' newly reinstated power because it disallows juvenile courts to transfer fourteen- and fifteen-year-olds. This limitation would thus unconstitutionally nullify Prop 57's supposed intent to expand judicial discretion.¹⁶⁴ However, the Supreme Court has already found the intent of Prop 57 to be "ameliorating the possible punishment for a class of persons, namely juveniles."¹⁶⁵

¹⁵⁸ CAL CONST. art. IV § 1, art. II § 10(c).

¹⁵⁹ Cal. Proposition 57 § 5.

¹⁶⁰ *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1119 (2004); *People v. DeLeon*, 3 Cal. 5th 640, 651 (2017).

¹⁶¹ *Foundation for Taxpayer & Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1354, 1365 (2005).

¹⁶² *Robert L. v. Superior Court*, 30 Cal. 4th 894, 900–1 (2003); *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal. App 4th 1473, 1490–91 (1998).

¹⁶³ See, e.g., *O.G.*, 40 Cal. App. 5th 626.

¹⁶⁴ See *id.* at 628.

¹⁶⁵ *Lara*, 4 Cal. 5th at 308.

Furthermore, Prop 57 lists five purposes in its text — the Second District focused only on one.

First, Prop 57 intends to “[p]rotect and enhance public safety.”¹⁶⁶ As the United States Supreme Court has discussed at length, subjecting young people to the full force of adult criminal punishment undermines rather than enhances public safety by increasing recidivism.¹⁶⁷ The arguments in favor of Prop 57 in the voter pamphlet also discussed the broad consensus that the more lenient and evidence-based treatment of the juvenile system reduces recidivism.¹⁶⁸ So voters — theoretically — agreed that treatment in the juvenile system enhances public safety, which accords with the mission of SB 1391. Furthermore, Governor Brown considered a common argument against SB 1391 in his signing statement, writing that if a young person is considered a “threat,” a prosecutor can petition for them to remain in custody beyond their original sentence.¹⁶⁹

Second, Prop 57 was intended to “[s]ave money by reducing wasteful spending on prisons,” a purpose SB 1391 indisputably serves.¹⁷⁰ It keeps kids out of adult court where they can be subject to longer sentences at much greater cost. Third, Prop 57 aimed to “[p]revent federal courts from indiscriminately releasing prisoners.”¹⁷¹ Reducing the number of prisoners in state custody and the lengths of their sentences does not undermine this purpose, and prosecutors have never argued the contrary. Fourth, Prop 57 aimed to “[s]top the revolving door of crime by emphasizing rehabilitation”¹⁷² The juvenile system’s mission is ostensibly rehabilitative, while the adult system’s

¹⁶⁶ Cal. Proposition 57 § 2 (1) (“Purpose and Intent”).

¹⁶⁷ See *Miller v. Alabama*, 567 U.S. 460, 467 n.5 (2012); see also Kristin Johnson et al., *Disregarding Graduated Treatment: Transfer Aggravates Recidivism*, 57 CRIME & DELINQUENCY 757 (2011).

¹⁶⁸ See Cal. Atty. Gen., *Argument in Favor of Proposition 57*, PROP. 57 CRIMINAL SENTENCES. PAROLE. JUVENILE CRIMINAL PROCEEDINGS AND SENTENCING. INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE. CALIFORNIA PROPOSITION (2016), <https://www.courts.ca.gov/documents/BTB24-5H-1.pdf>.

¹⁶⁹ SB 1391 Letter, *supra* note 135.

¹⁷⁰ See Cal. Proposition 57 § 2 (1) (“Purpose and Intent”).

¹⁷¹ See *id.* Other sections of the initiative were meant to help the state comply with a federal court order to reduce the population of California prisons to 137.5 percent of their design capacity, which is not necessarily relevant to the constitutionality of SB 1391. See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 962 (E.D. Cal. 2009).

¹⁷² Cal. Proposition 57 § 2 (1) (“Purpose and Intent”).

is not. One Court of Appeal has considered a prosecutor's argument that an older kid would not be subject to juvenile court jurisdiction long enough to benefit from these rehabilitative services.¹⁷³ The Court ruled that this situation was not enough to justify invalidating SB 1391, which promotes juvenile rehabilitation in general. And again, the prosecutor can always petition the court to keep kids in custody beyond their original sentences.¹⁷⁴

Finally, Prop 57 sought to “[r]equire a judge, and not a prosecutor, to decide whether juveniles should be tried in adult court.”¹⁷⁵ Challengers read judicial discretion as the thrust of Prop 57's purpose and claim that SB 1391 undermines it by banning transfer of everyone under sixteen. Proposition 57, however, does not set any minimum age for transfer. It applies, by its own terms, to “[c]ertain categories of minors,” and SB 1391 simply narrows the category of minors to which it applies.¹⁷⁶ Under SB 1391 a judge — and not a prosecutor — still makes every transfer decision.¹⁷⁷ To be sure, the ballot materials for Prop 57 made clear that fourteen- and fifteen-year-olds could be tried in adult court,¹⁷⁸ but the Supreme Court explained that Prop 57 sought to “ameliorate[] the possible punishment for a *class of persons*, namely juveniles.”¹⁷⁹ The Supreme Court declared Prop 57 retroactive because voters had expressed such clear intent to reduce punishment,¹⁸⁰ and the same preference for the lenient treatment of the juvenile court underlies SB 1391.

The Second District Court of Appeal and other dissenting justices make various, less compelling arguments to strike down SB 1391. For one, an early draft of Proposition 57 set sixteen as the minimum age of transfer, but the initiative was revised during the public comment period.¹⁸¹ The updated measure provided that “[t]ransfers were generally limited to minors

¹⁷³ *People v. Superior Court* (T.D.), 38 Cal. App. 5th 360, 373–74 (2019).

¹⁷⁴ SB 1391 Letter, *supra* note 135.

¹⁷⁵ Cal. Proposition 57 § 2 (1) (“Purpose and Intent”).

¹⁷⁶ *Lara*, 4 Cal. 5th at 305; *Rodriguez*, __ Cal. App. 5th __, 2020 WL 2765766 at *5.

¹⁷⁷ *Rodriguez*, __ Cal. App. 5th __, 2020 WL 2765766 at *5; T.D., 38 Cal. App. 5th at 373.

¹⁷⁸ SB 1391 Letter, *supra* note 135; *see* Cal. Atty. Gen., *supra* note 168; *see also* Cohen, *supra* note 155 (discussing the district attorney's arguments in O.G.).

¹⁷⁹ *Lara*, 4 Cal. 5th at 308 (emphasis added).

¹⁸⁰ *See id.*

¹⁸¹ *Brown v. Superior Court*, 63 Cal.4th 335, 340 (2016).

aged sixteen or older, but were permitted for fourteen- or fifteen-year-olds accused of certain serious crimes.”¹⁸² Thus, prosecutors claim, SB 1391 imputes to Proposition 57 a provision intentionally rejected by the voters.¹⁸³ For this argument to hold water, prosecutors would have to prove that voters knew that a provision had been omitted from the final version of Prop 57 and relied on that omission more than the general ameliorative tenor of the initiative.

In *O.G.*, the Second District lamented other courts’ failure to consider important precedent. However, the Second District misapplied its own chosen precedent.¹⁸⁴ In *Pearson*, the case the Second District cited to strike down SB 1391, the Supreme Court found that the legislative enactment at issue did not modify the relevant initiative.¹⁸⁵ Therefore, it had no reason to reach the question of whether the initiative, by its own terms, permitted such a legislative change.¹⁸⁶ But in the case of SB 1391, no Court of Appeal disputes that the Legislature modified Prop 57 — the only question that remains is whether that modification accords with the constitutional standard. Because SB 1391 matches so closely the purposes of Prop 57, the Supreme Court will likely uphold it.

III. MOVING BEYOND THE CYCLE OF TRANSFER

Even in the unlikely event that the Supreme Court agrees with the Second District and declares SB 1391 unconstitutional, California has entered a new phase in its cycle of juvenile transfer. Recent steps toward abolishing

¹⁸² *Id.*

¹⁸³ See, e.g., SB 1391 Letter from Santa Clara Cty. Dist. Atty.’s Office, to Susan S. Miller, Clerk of the Court of the Sixth District Court of Appeal 11 (Oct. 10, 2018), <https://yoloda.org/wp-content/uploads/2018/10/SB-1391-CHALLENGE-LETTER-MODIFIED-10-10-18-FINAL-FINAL-2.pdf>, (“If the voters passed an initiative that increased taxes on all persons except those making under \$10,000 dollars a year, and the legislature then passed a statute eliminating the exemption for those making under \$10,000 dollars, would this Court have any hesitation in finding the statute inconsistent with the initiative notwithstanding the general thrust of the initiative was to reduce taxes? Of course not!”).

¹⁸⁴ See Cohen, *supra* note 155 for a thorough discussion of this argument.

¹⁸⁵ *Pearson*, 48 Cal. 4th at 570–71.

¹⁸⁶ *Id.*

transfer could be more than a new phase — they may represent an effort to allow something new to grow in the place of the juvenile system. The dire predictions of Bernard and Kurlycheck's cycle presume a largely unchanged juvenile legal system, with law making tweaks at the margins, for example, by imposing stricter conditions on a judge's decision to transfer decision or implementing racial bias training.¹⁸⁷ But tinkering is not the only option — the social movements of the spring and summer of 2020 and sustainable reforms they have already inspired around California may provide the impetus to break this grim cycle. This part discusses the promise and limits of law changes to ending the cycle of juvenile transfer and the necessity of extralegal organizing.

A. WHAT THE LAW CAN DO: GIVING KIDS AND FAMILIES SOME BREATHING ROOM

Scholars across disciplines and the political spectrum have recognized that criminal procedure and the prison system function to subordinate poor people, queer people, and people of color.¹⁸⁸ Some estimate that one in every three young Black men will spend part of his life in jail or prison.¹⁸⁹ Police, too, target Black people and people of color and use excessive force in response to the myriad social issues they are asked to address.¹⁹⁰ The

¹⁸⁷ See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEORGETOWN L.J. 1479, 1513–17 (2016) (arguing that police training encourages, rather than discourages, violence); see also ALEX S. VITALE, *THE END OF POLICING* 8–11 (2017) (arguing that police training is ineffective and should not be considered a reform).

¹⁸⁸ See, e.g., ALEXANDER, *supra* note 111; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 3 (2010); Andrea J. Ritchie & Delores Jones-Brown, *Policing Race, Gender, and Sex: A Review of Law Enforcement Policies*, 27 WOMEN & CRIMINAL JUSTICE 21 (2017); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 2018.

¹⁸⁹ See BECKY PETTIT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* 58 (2012) (interpreting statistics from the early 2000s).

¹⁹⁰ FRANKLIN E. ZIMRING, *WHEN POLICE KILL* (2017) (discussing the explosion of research and critique into police treatment of people of color since the Ferguson rebellion); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157 (2016) (discussing the virtually unchecked nature of police discretion to arrest and kill); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 209 (2015) (arguing that policing is a form of social control); Jeffrey Fagan & Garth

juvenile system suffers the same structural defects as adult courts and prisons.¹⁹¹ Despite decades of “reform,” a 2019 study found that California’s juvenile prisons are still “hotbeds of violence and trauma” where officers often use physical force against youth and where “young people experience or witness fights, riots, or beatings on a regular basis.”¹⁹² One young person reports: “if you weren’t bleeding or dying, you wouldn’t get medical attention.”¹⁹³ If years of progressive reforms and steadily increasing spending¹⁹⁴ have not improved the detention facilities or lives of incarcerated youth who leave state custody “unprepared for life after release,”¹⁹⁵ perhaps it is time to consider shrinking jurisdiction and directing money elsewhere.

Scholars of crime and punishment, including a growing group of legal scholars, propose an alternative to procedural fairness or unconscious bias training: the transformation of systems of punishment — what some call an abolitionist horizon for reform.¹⁹⁶ Abolitionists recognize that the

Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000) (dissecting the racialized nature of policing); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2006) (cataloguing ways that police target the poor); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (giving an overview of the role of police in maintaining racial subordination of Black people).

¹⁹¹ See, e.g., BERNSTEIN, *supra* note 12 at x–xv, 110–13 (comparing adult and juvenile prison systems, and abolition movements).

¹⁹² See Maureen Washburn, *State Spending Soars to Historic Levels Amid Reorganization of California’s Youth Correctional System*, CTR. ON JUVENILE AND CRIMINAL JUSTICE 1 (Feb. 2020), http://www.cjcj.org/uploads/cjcj/documents/state_spending_soars_to_historic_levels_amid_reorganization_of_californias_youth_correctional_system.pdf.

¹⁹³ *Id.* at 52.

¹⁹⁴ Mike Males, *Who Knows Why California Crime by Youth is Plummeting?* Juvenile Justice Info. Exchange (Oct. 23, 2019), <https://jjie.org/2019/10/23/who-knows-why-california-crime-by-youth-plummet>.

¹⁹⁵ See Washburn, *supra* note 192 at 1.

¹⁹⁶ See *Introduction*, in DEVELOPMENTS IN THE LAW — PRISON ABOLITION, 132 HARV. L. REV. 1568, 1568 (2019); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1168 (2015); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW* (2d ed. 2015); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U. CAL. DAVIS L. REV. 197 (2018);

occasional instance of excess in policing, jail, or prison is not the fundamental problem with the criminal system, nor is the lone bad actor, nor a lack of resources and training.¹⁹⁷ When much of the violence of police and prison guards seems to be constitutional and sanctioned by the law,¹⁹⁸ the problem is the system of punishment itself.¹⁹⁹ The systemic issues manifest

Amna A. Akbar, *An Abolitionist Horizon for Police Reform*, 108 CALIF. L. REV. ___ (2020) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670952; Priscilla A. Ocen, *Beyond Ferguson: Integrating the Social Psychology of Criminal Procedure and Critical Race Theory to Understand the Persistence of Police Violence*, in A THEORY OF CRIMINAL JUSTICE: LAW AND SOCIOLOGY IN CONVERSATION (Sharon Dolovich & Alexandra Natapoff eds., 2017); see also *What Is Abolition?*, CRITICAL RESISTANCE (2012), <http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf> (“We take the name ‘abolitionist’ purposefully from those who called for the abolition of slavery in the 1800s.”).

¹⁹⁷ See Akbar, *An Abolitionist Horizon*, *supra* note 196 (deconstructing the idea that “giving more to the police” — in the form of technology, anti-bias training, and funding — actually improves outcomes, and instead arguing for divestment from the police).

¹⁹⁸ For example, after the Baltimore and Ferguson rebellions in 2016 and incidences of police brutality and terror, the United States Department of Justice declared that police behavior comported with the law. U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016); U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017); see also McLeod, *Police Violence*, *supra* note 190 at 158–59 (arguing that law authorizes rather than limits police violence); *Jamison v. McClendon*, ___ F. Supp. 3d ___; 2020 WL 4497723 (Aug. 4, 2020) (lamenting the inability of the law to redress an instance of police brutality).

¹⁹⁹ This is the core claim of the penal abolition movement. See *Abolishing Carceral Society*, COMMON NOTIONS 4 (2018), <https://www.commonnotions.org/abolishing-carceral-society> (“Today we seek to abolish a number of seemingly immortal institutions, drawing inspiration from those who have sought the abolition of all systems of domination, exploitation, and oppression.”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, in *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575, 1578 (2019) (“abolition is not merely a practice of negation — a collective attempt to eliminate institutionalized dominance over targeted peoples and populations — but also a radically imaginative, generative, and socially productive communal (and community-building) practice”); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007) (describing California’s massive prison-building project and arguing that abolishing the prison institution is the only way to achieve the fundamental social reordering required to address the problem of mass incarceration); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND PRISONS, TORTURE, EMPIRE* 73 (2005) (“prison abolition requires us to recognize the extent that our present social order — in which are embedded a complex array of social problems — will have

throughout the criminal process: from the police officer who is five times more likely to arrest a Black kid than a White kid,²⁰⁰ to the judge who, considering “whether the minor can be rehabilitated” or is “criminally sophisticated,” transfers the same Black kid to adult court,²⁰¹ to the prison guard

to be radically transformed), Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460–61 (2018) (proposing that legal scholarship focus on imagining solutions beyond dominant paradigms, beyond reforms to existing systems); CHARLENE A. CARRUTHERS, *UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS* (2018) (recounting the history of Black radical movements in the U.S., centering the stories of unrecognized figures like movement organizers). The statements of the organizers themselves are arguably more important than the statements of the scholars who bring their words to the academy — though of course there is no clear line between movement organizers and movement scholars. See, e.g., *About — What is the PIC? What is Abolition*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/>; CALIFORNIA IMMIGRANT YOUTH JUSTICE ALLIANCE, <https://ciyja.org/> (“CIYJA works tirelessly across the state to fight back against policy that attempts to criminalize undocumented youth and families”); *What is Abolition?*, NO NEW SF JAIL COALITION, <https://nonewsffail.org/what-is-abolition/> (“As a vision, abolition for No New SF Jails is about: Imprisonment, policing, surveillance & punishment of any kind cause harm, exacerbate oppression, and should not be used”); *Who We Are*, LA NO MORE JAILS, <https://lanomorejails.org/about/> (“Because imprisonment is fundamentally violent, we are working to reduce the number of people locked up in Los Angeles”); BLACK & PINK, <https://www.blackandpink.org/> (“Black and Pink . . . and is a national prison abolitionist organization dedicated to dismantling the criminal punishment system and the harms caused to LGBTQ+ people and people living with HIV/AIDS”); INCITE! WOMEN OF COLOR AGAINST VIOLENCE, <https://incite-national.org/> (INCITE! is a network of radical feminists of color organizing to end state violence and violence in our homes and communities”); ASSATA’S DAUGHTERS, <http://www.assatasdaughters.org/> (“our freedom looks like quality public schools; our freedom looks like universal healthcare; our freedom looks like living without fear of physical or sexual violence; our freedom looks like economic stability; our freedom looks like self-determination; our freedom looks like communities that practice restorative justice and that make police and cages obsolete; our freedom looks like the eradication of anti-Blackness and all forms of oppression.”).

²⁰⁰ *Compare Juvenile Justice in California*, CALIFORNIA ATTORNEY GENERAL 56 (2018) <https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Juvenile%20Justice%20In%20CA%202018%2020190701.pdf> (showing, in Table 3, slightly more arrests of Black youth than White youth) *with* Current Population Survey, CENSUS.GOV <https://www.census.gov/cps/data/cpstablecreator.html> (narrow by “Age:0–17” and “Race”) (showing California is home to more than five times the number of White minors than Black minors).

²⁰¹ These are some of the findings that CAL. WELF. & INST. CODE § 707 requires before deciding to transfer a juvenile case to adult court. Criminal sophistication is an inherently

who puts him in solitary confinement to prevent an “accidental injury” after his jaw is broken in a fight.²⁰²

SB 1391 could be one step toward finding less retributive, less costly, and more effective methods of addressing harm. At first glance it may seem like this law change merely tinkers with the edges of juvenile law by constricting adult court jurisdiction over a small class of children.²⁰³ But by reducing sentences and keeping hundreds of people out of prison,²⁰⁴ it may free up money and energy for communities and movements to work toward effective alternatives to prison and policing. Of course, SB 1391 still allows children to be prosecuted in juvenile court, and without other legislative action, limiting transfer might mean little. However, there are other important signs that the wind is shifting in California.

Another bill passed in 2018 established the minimum age of jurisdiction for the juvenile court at twelve years old.²⁰⁵ In 2017, “almost all children arrested under the age of 12 were kids of color.”²⁰⁶ The importance of this legislation cannot be overstressed: it means that *no criminal court or penal institution* has jurisdiction over any Californian under the age of twelve. This new rule sets “counsel and release” as the official policy for police encountering kids eleven and younger and represents a major change to the law from 2015, when 687 kids under twelve, including one five-year-old, were prosecuted in juvenile court.²⁰⁷ Santa Clara County has

racialized term, like “serious delinquent” and “super predator.” See GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* 258 (2012).

²⁰² See Maureen Washburn & Renee Menart, *Unmet Promises: Continued Violence & Neglect in California's Division of Juvenile Justice*, *CTR. ON JUVENILE AND CRIMINAL JUSTICE* 54 (Feb. 2019), http://www.cjcj.org/uploads/cjcj/documents/unmet_promises_continued_violence_and_neglect_in_california_division_of_juvenile_justice.pdf.

²⁰³ See Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4–5 (2017) (unpublished manuscript), <https://perma.cc/6A24-H87Y>.

²⁰⁴ See CAL. WELF. & INST. CODE §§ 601, 602, 1731.7; Penal Code § 1769 (establishing the minimum age of juvenile court jurisdiction at twelve and the maximum at twenty-five).

²⁰⁵ SB 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²⁰⁶ Taylor Walker, *LA County Supes Seek to Establish A Minimum Age for Juvenile Prosecution*, *WITNESS LA* (Nov. 1, 2018) <https://witnessla.com/la-county-supes-seek-to-establish-a-minimum-age-for-juvenile-prosecution>.

²⁰⁷ *Id.*

already set the minimum age for juvenile court jurisdiction a year higher, at thirteen, and Los Angeles County is considering a similar move — Senator Holly Mitchell has made it clear that she “wholeheartedly embrace[s] expanding the minimum age” for the entire state.²⁰⁸

Young people can now stay in the custody of the juvenile court — and therefore in rehabilitation-focused, less crowded, less violent juvenile prisons — until they turn twenty-five.²⁰⁹ This accords with neurological research often cited by courts showing that people do not reach emotional and neurological maturity until their mid-twenties.²¹⁰ Keeping people in juvenile court will fix neither the juvenile nor the adult system. But any public defender will report that juvenile court rehabilitation, however flawed, is preferable to more dangerous and more punitive adult court punishment.²¹¹ These reforms, taken with SB 1391, mean that older kids and young adults will serve shorter, more “rehabilitative” sentences in juvenile facilities, and many more children will not be subject to court jurisdiction at all — what could be the first steps towards a fundamental transformation.

Two other recent events speak to the possibility for structural change in California juvenile law: the abolition of fees in delinquency cases and increasingly successful calls to defund the police. UC Berkeley’s Policy Advocacy Clinic, working with local partners around the state, advanced legislation that “repealed county authority to assess all fees [charges aimed at recouping court costs, not at compensating victims or punishing youth] in the juvenile legal system.”²¹² This project is a good example of abolitionist organizing because it deprives the legal system of funds and leaves money in the pockets of the marginalized people who are most likely to be

²⁰⁸ *Id.*

²⁰⁹ Washburn & Menart, *supra* note 202 (discussing AB 1812).

²¹⁰ See Brief for Mental Health Experts as Amicus Curiae, 16, 36–37, *Miller v. Alabama*, 567 U.S. 460 (2012).

²¹¹ See David P. Farrington, Rolf Loeber, *James C. Howell, Increasing the Minimum Age for Adult Court: Is it Desirable, and What Are the Effects?* 16 *CRIMINOLOGY & PUB. POL’Y.* 83 (2017) (reviewing the medical and psychological literature to find juvenile court treatment is preferable from a medical and psychological perspective as well as being more likely to reduce recidivism).

²¹² Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 *N.C. L. REV.* 401, 410 (2020).

policed, punished, and thus charged fees.²¹³ More importantly, it involved a sustained campaign that incorporated local groups and impacted populations, especially youth of color and their families, with an eye toward the future.²¹⁴ In explicitly recognizing that “governments and courts may find other ways to tax the same communities,” and naming their fee project as one step toward “replac[ing] the juvenile and criminal systems,” organizers set their sights on an abolitionist horizon.²¹⁵

The spring and summer of 2020 have marked a renaissance of civil unrest in California in the wake of police killings of Breonna Taylor, George Floyd, Ahmaud Arbery, and many others.²¹⁶ In California, the protests have resulted in local governments taking action to reduce policing — the Oakland Unified School Board voted on June 24, 2020 to disband the Oakland Unified School District Police Department.²¹⁷ The Black Organizing Project (BOP) made an impassioned case to the Board, noting that Black students make up less than 26 percent of the school district’s population

²¹³ See Jessica Feerman et al., *Debtors Prison For Kids? The High Cost of Fines and Fees in the Juvenile System*, JUVENILE L. CENTER 8–9 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> (discussing racial disparities in fine and fee assessment).

²¹⁴ See Selbin, *supra* note 212 at 414 (“Race-conscious advocacy grounded in impacted communities is less likely to compromise on reforms that bake in such bias”).

²¹⁵ *Id.* at 418.

²¹⁶ See generally Matthias Gafni, John King, & Mallory Moench, *Around the Bay Area, day 5 of protests demanding justice*, SAN FRANCISCO CHRONICLE (Jun. 2, 2020), <https://www.sfchronicle.com/bayarea/article/In-Bay-Area-a-fifth-straight-day-of-protests-15312298.php> (covering the early days of protests in the Bay Area); Aida Chavez, *After Killing of 18-Year-Old Andres Guardado, LA Protesters Struggle Against the Limits of Police Reform*, THE INTERCEPT (Jun. 25, 2020, 3:03 PM), <https://theintercept.com/2020/06/25/andres-guardado-los-angeles-police/> (discussing the radical potential of current anti-police mobilization in LA); Supriya Yelimeli, *Teenage Black Lives Matter protesters demand that Berkeley Hills residents ‘wake up’ and take action*, BERKELEYSIDE (Jun. 24, 2020, 4:46 PM), <https://www.berkeleyside.com/2020/06/24/teenage-black-lives-matter-protesters-demand-that-berkeley-hills-residents-wake-up-and-take-action> (describing a recent action in Berkeley).

²¹⁷ Brett Simpson, *District police eliminated from Oakland schools: Board votes to abolish agency*, SAN FRANCISCO CHRONICLE (Jun. 25, 2020), <https://www.sfchronicle.com/bayarea/article/District-police-eliminated-from-Oakland-schools-15364811.php>. This success came after years of calls from the Black Organizing Project to defund the OUSDPD. *Id.*

and account for 73 percent of arrests in Oakland schools.²¹⁸ Similarly, in response to sustained public pressure, the San Francisco Unified School District ended its contract with local police.²¹⁹ The San Francisco School Board imposed restrictions on any on-campus interactions between police and students and promised to reallocate the money it will save to “school health and wellness programs.”²²⁰ Jessica Black, BOP’s director, said: “Letting go of law enforcement that has oppressed our communities is historic.”²²¹

It is only organizing like this that will enable us to break the cycle of juvenile transfer. To avoid going back to the punitive transfer policy of the 1990s and 2000s, institutions need to make sure parents have the money to support their kids and provide communities the resources and the knowledge to help families without resorting to the juvenile system. However, these changes have taken place as the juvenile crime rate has been declining for decades²²² — a spike might lead to backlash and a more punitive turn, launching California back into a retributive iteration of the cycle. Real reform can happen only if there is a combination of limited transfer and sustained investment in developing alternatives that can keep kids out of courts altogether.

B. WHAT ONLY COMMUNITIES CAN DO: BUILDING ALTERNATIVES TO THE JUVENILE LEGAL SYSTEM TO RENDER TRANSFER OBSOLETE

Jurisdictional reforms alone will not bring the transformative change needed to break the cycle of juvenile transfer — that work will be done

²¹⁸ *Oakland school board abolishes its police force with unanimous vote*, SFGATE (Jun. 24, 2020, 9:56 PM) <https://www.sfgate.com/news/bayarea/article/School-Board-Abolishes-Its-Police-Force-With-15364930.php>.

²¹⁹ Jill Tucker, *San Francisco schools sever ties with city police*, SAN FRANCISCO CHRONICLE (Jun. 24, 2020), <https://www.sfchronicle.com/education/article/San-Francisco-schools-sever-ties-with-city-police-15363295.php>.

²²⁰ Annika Hom, *San Francisco School Board votes to cut ties and funds from police*, MISSION LOCAL (Jun. 23, 2020), <https://missionlocal.org/2020/06/san-francisco-unified-school-district-votes-to-cut-ties-and-funds-from-police>.

²²¹ See Simpson, *supra* note 217.

²²² See Males, *supra* note 194; see also Washburn, *supra* note 192 (showing that despite decreasing crime rates, California’s spending on the Department of Juvenile Justice has skyrocketed).

outside of the courtroom. Black-letter law, codes, and professional rules can only go so far toward what Michelle Alexander calls “critical political consciousness,” a greater cultural shift that forces policy change. More effective and fair interventions in schools and communities could limit the use of juvenile proceedings — including transfer — because schools tend to punish the same young people that courts criminalize.²²³ School should be a safe haven for young people, but it is often a site of violence.²²⁴ Summarizing the experiences of female gang members, Meda Chesney-Lind and Randall Shelden write, “School is a road that leads to nowhere, and emancipation and independence are out of reach, given their limited family and community networks . . . avenues of opportunity for urban underclass girls are blocked.”²²⁵ Kids are the subject of a carceral state over which they have no control: queer kids, kids of color, and kids with disabilities more than others.²²⁶ If the goal is breaking the cycle of juvenile justice, the process begins with restorative and transformative justice in schools and communities.

Restorative justice (RJ) can contribute to transformation by creating spaces for communities, outside the juvenile or criminal legal systems, to respond to harm caused by kids. RJ focuses on the harm, but also on the needs of the people harmed, their families, and the people who did harm

²²³ See, e.g., Michael Krezmien et al., *Marginalized Students, School Exclusion, and the School-to-Prison-Pipeline*, in JUVENILE JUSTICE SOURCEBOOK 267, 269 (Wesley T. Church et al., eds., 2d ed. 2018) (showing that Black students, Hispanic students, and students with disabilities are suspended from school at disproportionate rates).

²²⁴ See ERICA MEINERS, *FOR THE CHILDREN?* 109–10 (2016).

²²⁵ MEDA CHESNEY-LIND & RANDALL SHELDEN, *GIRLS, DELINQUENCY AND JUVENILE JUSTICE* 64 (4th ed. 2014).

²²⁶ Shannon D. Snapp & Stephen T. Russell, *Discipline Disparities for LGBTQ Youth: Challenges that Perpetuate Disparities and Strategies to Overcome Them*, in *Inequality in School Discipline* 207–23 (Russell J. Skiba, Kavitha Mediratta, & M. Karenga Rausch, eds., 2016); Jennifer F. Chmielewski et al., *Intersectional Inquiries with LGBTQ and Gender Nonconforming Youth of Color: Participatory Research on Discipline Disparities at the Race/Sexuality/Gender Nexus*, in *Inequality in School Discipline* 171–88 (Russell J. Skiba, Kavitha Mediratta, M. & Karenga Rausch, eds., 2016); Jemimah L. Young, jamaal R. Young, & Bettie Ray Butler, *A Student Saved is NOT a Dollar Earned: A Meta-Analysis of School Disparities in Discipline Practice Toward Black Children*, 17 J. OF CULTURE AND EDUCATION 95 (2018); see also ALEXANDER, *supra* note 111 at 199 (“Because black youth are viewed as criminals, they . . . are . . . ‘pushed out’ of schools through racially biased school discipline policies.”).

themselves.²²⁷ It seeks to fulfill the obligations of young people to their communities, and the obligations of communities to their young people, using inclusive, collaborative processes that also correct individual wrongs.²²⁸ Contrary to the proposal that we “trust in government and experts,”²²⁹ restorative justice urges communities to trust themselves. Even twenty years ago, the National Institute of Justice reported to Congress that restorative justice was the best tool to address the needs of young people and their communities, and RJ has only developed since.²³⁰ One undisputed benefit is that RJ is cheap.²³¹ More numerous and more effective restorative justice programs affiliated with the juvenile court — or better yet independent of the court system entirely — can both help communities and convince judges that transferring cases to adult court is unnecessary.

However, some criticize programs that “rehabilitate” rather than shake the foundations of prisons and the carceral system. Some restorative justice programs fit that bill.²³² Juvenile courts around the country

²²⁷ Restorative programming also generally produces lower recidivism rates than juvenile court. See Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 YOUTH VIOLENCE AND YOUTH JUSTICE 465, 495 (analyzing by race and controlling for prior criminal convictions). A 2006 study of an RJ program called direct victim-offender mediation (VOM) found that kids who participated in VOM were 34 percent less likely to recidivate than those formally charged in juvenile court. See William Bradshaw et al. *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A meta-analysis*, 24 CONFLICT RESOLUTION 1 (2006); see also Bouffard, *supra*, at 467–68.

²²⁸ HOWARD ZEHR, *CHANGING LENSES* 270 (3d ed. 2005); see also Mark Umbreit, *Multicultural Implications of Restorative Justice* 63 FED. PROBATION 44 (1999); MEINERS, *supra* note 224 at 108 (explaining the origins of RJ in Native American cultures).

²²⁹ See ZIMRING, *CHOOSING THE FUTURE*, *supra* note 95 at 231.

²³⁰ See Thomas Simon et al. *Changing Course: Preventing Gang Membership*. NATIONAL INSTITUTE OF JUSTICE (2013).

²³¹ J. C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice into Chicago’s Juvenile System*, 104 J. CRIM. L. & CRIMINOLOGY 635, 643 (2014).

²³² See Dean Spade (FACEBOOK.COM, Apr. 7 2012) <https://www.facebook.com/notes/dean-spade/seattle-youth-jail-rehabilitation-project-thoughts-on-thursdays-public-forum/405286129483770>; see also Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson’s Masculinity as Prison*, THE CIRCUIT 4 (2012) (critiquing a program that provided funding and training to jail guards who interact with LGBTQ inmates); Critical Resistance, *What is the PIC? What is Abolition?* CRITICALRESISTANCE.ORG, <http://criticalresistance.org/about/>

have adopted the so-called Missouri Model of intensive therapeutic and allegedly restorative interventions in juvenile prisons. The Missouri Model has inspired glowing reviews from staff, politicians, and even former juvenile inmates.²³³ But Erica Meiners, an organizer with the abolitionist group Critical Resistance and a former California educator, argues that RJ, especially when conducted in juvenile prisons as in Missouri, can incorporate to an unacceptable degree the structures of the prisons it should dismantle.²³⁴ “While the goal of RJ, for some, is to disentangle young people from relationships with prisons and policing, the location of RJ programs in schools already inherently wedded to the carceral state poses significant challenges.”²³⁵ These are challenges that ongoing efforts to build out RJ will have to contend with, but it still has “the potential to negotiate some forms of conflict in schools and communities, and to reduce the roles that the police and courts play in the lives of young people.”²³⁶

not-so-common-language/ (“Abolition isn’t just about getting rid of buildings full of cages. It’s also about undoing the society we live in because the [prison industrial complex] both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people”); see also Kathy Evans, *Restorative Justice in Education — Possibilities, but also Concerns*, ZEHR INSTITUTE FOR RESTORATIVE JUSTICE (Jun. 26, 2014), <https://zehr-institute.org/resources/restorative-justice-in-education-possibilities-but-also-concerns.html> (warning against restorative programs that are actually punitive or have otherwise “been completely co-opted”).

²³³ See BERNSTEIN, *supra* note 12 at 284–89.

²³⁴ MEINERS, *supra* note 224 at 113–14.

²³⁵ *Id.* at 114; see also Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. OF EDUCATIONAL AND PSYCHOLOGICAL CONSULTATION 313, 322–24 (outlining the extensive training teachers and school staff will need to support effective RJ in schools); Paul J. Hirschfield, *The Role of Schools in Sustaining Juvenile Justice System Inequality*, 28 THE FUTURE OF CHILDREN 11, 13–15 (2018) (describing disproportionately negative outcomes for Black students in school RJ programs); Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. OF EDUCATIONAL AND PSYCHOLOGICAL CONSULTATION 325, 350–52 (covering many of the same challenges to productive use of RJ in schools but outlining how to use the practice of RJ to transform relationships and systems that support the school to prison pipeline).

²³⁶ MEINERS, *supra* note 224; see also Jeanie Austin, *Restorative Justice as a Tool to Address the Role of Policing and Incarceration in the Lives of Youth in the United States*,

Meiners instead advocates for what she calls transformative justice (TJ). Some organizations conceive of TJ as distinct from RJ because rather than restoring some former status quo, it attempts instead to change the conditions that allow harm to occur.²³⁷ For example, California teacher and transformative justice practitioner Mimi Kim suggests using general terms like “person who caused harm” (rather than perpetrator, offender, batterer, or thief), or first names to “allow the possibility of change, without assuming it is inevitable.”²³⁸ Kim founded and led an organization called Creative Interventions (CI), which exemplifies the promise and difficulty of transformative justice, important tenets of which are anti-institutionalism and impermanence.²³⁹ CI produced a toolkit based on Kim and others’ years practicing TJ and then closed up shop.²⁴⁰ Similarly, Meiners notes that many TJ initiatives are suspicious of being catalogued or transposed into new places and recognize the difficulty of reproducing the personal, local spaces required for success.²⁴¹ That makes it hard to develop a clear roadmap for TJ (although CI’s Toolkit is an excellent start).

However, organizations — especially youth- and people-of-color-led abolitionist organizations²⁴² — are increasingly organizing for transformative justice, whether they so name it or not.²⁴³ Youth Organize (YO!)

1 J. LIBRARIANSHIP AND INFO. SCI. 15 (2018) (discussing the implementation of restorative justice in a completely different context: San Francisco public libraries).

²³⁷ See MEINERS, *supra* note 224 at 121; Esteban Lance Kelly, *Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community*, 37 SOCIAL JUSTICE 44 (2012) (discussing transformative justice as practiced by a Philadelphia abolitionist organization).

²³⁸ Mimi Kim, *Moving beyond critique: Creative Interventions and reconstructions of community accountability*, 37 SOCIAL JUSTICE 14 (2012).

²³⁹ Creative Interventions, <http://www.creative-interventions.org>.

²⁴⁰ See *Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS 3 (2012), <https://www.creative-interventions.org/tools/toolkit>.

²⁴¹ MEINERS, *supra* note 224 at 123–24.

²⁴² See Eric Braxton, *Youth leadership for social justice: Past and present*, in CONTEMPORARY YOUTH ACTIVISM: ADVANCING SOCIAL JUSTICE IN THE UNITED STATES 25 (2016) (arguing that youth social justice organizing tends to center young people of color).

²⁴³ See *About Us*, YOUTHBUILD, <https://www.youthbuildcharter.org/about-us/> (describing the youth-led projects YouthBuild supports, including explicitly abolitionist campaigns around Los Angeles County jails — YouthBuild works with kids who

California calls for justice with “no prisons, criminalization, deportation, mass incarceration, state-sanctioned violence, or racial profiling in communities of color. Instead, young people and community members are embraced by a true community of healing and transformation.”²⁴⁴ YO! has been involved in recent successful campaigns to overhaul school discipline and defund police departments.²⁴⁵ With the political energy of the moment,²⁴⁶ expertise developed over years of restorative and transformative justice practice,²⁴⁷ and money that cities and counties have pledged to redirect from police contracts,²⁴⁸ TJ can become a cornerstone of a larger transformative project.

Bernard and Kurlycheck argue that restorative justice programs will not break the cycle of juvenile justice because they cannot change systemic causes of violence and wrongdoing.²⁴⁹ But more transformative programs, like those outlined in Mimi Kim’s Creative Interventions toolkit, seem tailor-made to respond to such a criticism.²⁵⁰ Rather than inserting restorative programs into institutions like schools and jails, restorative practice can be a part of larger social and political

have been expelled or otherwise removed from public schools and explicitly recognizes the negative impact of neoliberal charter school programs on public education in Los Angeles).

²⁴⁴ *Young People’s Agenda*, *supra* note 16.

²⁴⁵ See *Welcoming & Safe Schools for All*, ADVANCEMENT PROJECT, <https://www.advancementprojectca.org/what-we-do/educational-equity/k-12-education-policy/welcoming-safe-schools-for-all> (describing the successful 2017 YO! California campaign for abolitionist school safety programs); see also *Fresno Announces Commission on Police Reform*, KMJNow (Jun. 19, 2020), <https://www.kmjnow.com/2020/06/19/video-fresno-announces-commission-on-police-reform/> (listing Yo! members as participants in a commission that will make recommendations about the future of Fresno’s police department).

²⁴⁶ See, e.g., *Angela Davis on Abolition, Calls to Defund Police, Toppled Racist Statues & Voting in 2020 Election*, DEMOCRACY NOW! (Jun. 12, 2020) https://www.democracynow.org/2020/6/12/angela_davis_on_abolition_calls_to (reflecting on the unique energy of the moment and the challenge of turning that energy into sustained momentum for change).

²⁴⁷ See, e.g., *Creative Interventions Toolkit*, *supra* note 240.

²⁴⁸ See Simpson, *supra* note 217 (discussing the redirection of \$2.5 million from Oakland’s school police department to student services).

²⁴⁹ BERNARD & KURLYCHECK, *supra* note 12, at 200.

²⁵⁰ See *Creative Interventions Toolkit*, *supra* note 240.

transformation. RJ — perhaps TJ, too — has already decreased referrals to juvenile court.²⁵¹ Many teachers, schools, communities, and organizers, especially those run by and for Black people and people of color, have been working on this transformation for years.²⁵² And now California’s families, schools, and communities seem to be ready.²⁵³ School districts are pledging to stop calling the police to campus, cities are

²⁵¹ See, e.g., Fania Davis, *Discipline with Dignity: Oakland Classrooms Try Healing Instead of Punishment*, 23 RECLAIMING CHILDREN AND YOUTH 38 (2014); David Washburn & Daniel J. Willis, *The Rise of Restorative Justice Programs in Schools Brings Promise, Controversy*, EDSOURCE (May 13, 2018), <https://edsources.org/2018/the-rise-of-restorative-justice-in-california-schools-brings-promise-controversy/597393>.

²⁵² See, e.g., kihana miraya ross, *Black girls speak: struggling, reimagining, and becoming in schools*, 45–47, 83–83 (2016) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the risk, power, and opportunity of a pilot program of all-Black-women high school classrooms in the Bay Area); Chrissy Anderson-Zavala et al., *Fierce Urgency of Now: Building Movements to End the Prison Industrial Complex in Our Schools*, 19 MULTICULTURAL PERSPECTIVES 151 (2017) (drawing on a forum in Oakland: “Without Walls: Abolition & Rethinking Education” to discuss strategies to dismantle the “school-prison nexus”); Roam Romagnoli, *Decarcerating California: A Critical Trans-politics Approach to Expanding Incarcerated Students’ Access to Upper-Division Coursework* (2018) (unpublished Ph.D. dissertation, on file with San Francisco State University) (asking a series of questions to judge the value of partnerships between schools and prisons: “is this tactic/reform/approach recuperating systems and institutions we want to dismantle? . . . Does it leave out an especially marginalized part of the affected group (e.g., people with records, people without immigration status)? Does it legitimate or expand a system we are trying to dismantle?”).

²⁵³ For example, the Black Organizing Project had called for dismantling the Oakland Unified School District Police Department for ten years before the school board suddenly, unanimously, agreed in June 2020. Sarah Ruiz-Grossman, *Oakland School Board Votes to Eliminate its Police Department*, HUFFINGTON POST (Jun. 24, 2020, 11:02 PM), https://www.huffpost.com/entry/oakland-schools-vote-eliminate-police_n_5ef3e6c0c5b643f5b22ee844?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAABY2FHRP1K3IsPL8e3ChMZgBRf5OzjgWfWq-1SCaUi49hBYXAHK2UJ53w0SJFwRQNEugxWTH9AOTtC0jbwgwZa_4jQMqJV-Pd3RORMum9FsZrIpF7mcFAANrNUbMWBG7mTYv6TS_ZyJU12XUPwFHq53tpHXNO8F7IcRPtBjFpm. The superintendent of Oakland Unified School District said, “As an educator, I know that students and staff must be safe physically and emotionally. In reflecting over the past few weeks, it has become clear to me that we must answer this call and this moment in a way that fundamentally transforms how we operate.” Chris Walker, *Oakland School Board Unanimously Votes to Disband its Own Police Force*, TRUTHOUT (Jun. 25, 2020), <https://truthout.org/articles/oakland-school-board-unanimously-votes-to-disband-its-own-police-force>.

defunding police departments, and Californians seem to be looking for alternative ways of living without resorting to policing, prisons — or juvenile transfer.

CONCLUSION

Juvenile transfer presents interesting legal questions about jurisdictional lines, but dark realities about prosecution and incarceration of young people. Despite the reforms of the last twenty years, Frankie Guzman and his friend might have the same experience if they were charged today. The few-month difference in their birthdays would make Guzman ineligible for transfer to adult court under SB 1391, while prosecutors could still ask the court to transfer his friend. And prosecutors are attempting to reinvigorate the juvenile court's worst punishment — their constitutional challenges to SB 1391 are the backlash to lenient treatment and show the formidable opposition facing anti-police and anti-carceral movements in California.

State and national history inform transfer rules, but the people set them and decide whether we need transfer at all. Perhaps community-based programming can engender a “fundamental shift in public consciousness” and end the transfer of kids to adult court.²⁵⁴ Perhaps, even as we restrict the jurisdiction of adult courts over the oldest children, we can also limit juvenile court jurisdiction over our youngest children, until more and more young people are treated, held responsible, and made whole outside of any legal system. To avoid a more punitive turn in the cycle of juvenile transfer, and perhaps to end the cycle altogether, California should continue to explore the horizons of transformative change.

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²⁵⁴ ALEXANDER, *supra* note 111 at 222.

