

LEVERAGING THE STATE CONSTITUTION TO CHALLENGE RACIALIZED DISCRETION IN WASHINGTON’S JUVENILE TRANSFER SYSTEM

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INTRODUCTION

In jurisdictions around the country, the criminal punishment system disproportionately impacts children of color at every stage: during arrest, diversion, and incarceration, and, most importantly for this Essay, during prosecution of children in adult court¹—which is among the most severely disproportionate aspects of the system. While the dominant narrative is that adult court prosecution functions as a narrow exception to juvenile court jurisdiction for only the most serious cases, its impact is nonetheless devastating. The Civil Rights Clinic, a project of the Center for Civil Rights and Critical Justice at Seattle University School of Law, has prioritized working to end the prosecution of children in adult court because the practice is a profound racial justice problem.² The practice is also out of step with adolescent brain science and contributes to mass incarceration.³ Importantly, it is an area of criminal procedure ripe for systemic challenges under the Washington State Constitution, where in other areas the Washington state high court has made remarkable strides.

By advancing claims under different provisions of the state constitution, the Civil Rights Clinic⁴ plays a role within the community of advocates working to reduce, and

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1. NAT’L CONF. OF STATE LEGISLATURES, RACIAL AND ETHNIC DISPARITIES IN THE JUSTICE SYSTEM 9 (2022), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Racial-and-Ethnic-Disparities-in-the-Justice-System_v03.pdf [https://perma.cc/CP76-J2NC].

2. While impacted communities have always known this, Washington state courts will likely require robust empirical evidence as a precondition to a viable systemic challenge. *See infra* Part I.B.

3. *See* KATHERINE BECKETT & HEATHER EVANS, ACLU OF WASH., ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON 28–29 (2020), <https://www.courts.wa.gov/subsite/mjc/docs/2024/1.1%20About%20Time%20ACLU-WA%20Part%20I%20through%20Part%20IV.pdf> [https://perma.cc/277G-4DZX].

4. Professors Robert Chang and Lorraine Bannai began teaching the Civil Rights Clinic at Seattle University School of Law in 2012 as a project of the Fred T. Korematsu Center for Law and Equality, which was founded at Seattle University School of Law in 2009 and relocated to the University of California, Irvine School of Law in July 2024. The authors supervised clinic students and cotaught the Civil Rights Clinic with Professors Chang and Bannai for many years. The authors continue to teach the Civil Rights Clinic, which is

eventually eliminate, the prosecution of children in adult court in Washington state.⁵ Most of these novel state constitutional challenges to both automatic and discretionary prosecution of children in adult court are currently pending before the Washington state appellate courts.⁶

These advocacy efforts have evolved in parallel to increasingly sophisticated empirical analyses of the role of race in the prosecution of children in adult court—moving from descriptive statistics that describe disproportionate impact, to bivariate analyses that examine the effect of criminal history and charged offense on outcomes, and finally to multivariate regression analysis demonstrating that racial bias influences which children ultimately face prosecution in adult court. Like functional magnetic resonance imaging (fMRI)⁷ drove the sea change in juvenile sentencing law,⁷ empirical analyses of the role of race in the prosecution of children in adult court ought to fundamentally change the system at the front end, when children are accused of crimes.

Section I of this Essay lays out the necessary Washington-specific context, both legal and empirical, for the ongoing work to challenge discretionary and automatic decline (or “auto-decline”). It discusses the strategic choice to root challenges exclusively in the Washington State Constitution, insulating positive rulings from United States Supreme Court review, and allowing for articulation of race-conscious standards and antisubordination principles in the legal arguments. Section II provides a road map of the novel state constitutional claims the Civil Rights Clinic and other advocates have brought before Washington state courts to systemically challenge the prosecution of children in adult court. These state constitutional litigation strategies demonstrate how

now a project of the Center for Civil Rights and Critical Justice, which they also codirect. References to “we” or “our” in this Essay are to the authors’ advocacy, often developed with Civil Rights Clinic students.

5. The Civil Rights Clinic carefully selects cases, both direct representation and amicus curiae advocacy, where we seek to highlight underlying race disproportionality and advocate for new legal standards and remedies that account for the operation of institutional and systemic racial bias. See Jessica Levin, *A Path Toward Race-Conscious Standards for Youth: Translating Adultification Bias Theory into Doctrinal Interventions in Criminal Court*, 35 U.C. L. S.F. J. GENDER & JUST. 83, 87–90 (2024) (discussing pedagogical approach of Civil Rights Clinic). The use of empirical data related to juvenile decline to support arguments for state constitutional interventions is an example of a larger project of the Civil Rights Clinic: to establish pathways under the state constitution to recognize and remedy how race discrimination operates within systems. Cases litigated in the Civil Rights Clinic have been central to the development of state constitutional law. See, e.g., *State v. Gregory (Gregory II)*, 427 P.3d 621, 627 (Wash. 2018) (invalidating death penalty statute based on racial arbitrariness); *State v. Bassett*, 428 P.3d 343, 346 (Wash. 2018) (categorically barring juvenile life without parole sentences); *State v. Zamora*, 512 P.3d 512, 522 (Wash. 2022) (en banc) (adopting test for race-based prosecutorial misconduct).

6. We have developed collaborative relationships with the social scientists, community advocates, and impacted individuals who are partners in this fight. Civil Rights Clinic faculty have also engaged in years of relationship building with legal and community advocates in Washington state and nationally to ensure the Clinic’s advocacy approaches align with the broader community goals.

7. See generally *Miller v. Alabama*, 567 U.S. 460 (2012) (prohibiting mandatory life without parole for juveniles under the Eighth Amendment due to children’s neurological immaturity that makes them less culpable than adults); Brief for the American Medical Ass’n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647), 2012 WL 121237 (describing advances in fMRI technology that allowed scientists to understand juvenile brain development).

both state-based equal protection⁸ and due process claims⁹ can account for, and redress, evidence of systemic racial bias. In so doing, the limits of federal jurisprudence fall away. The detailed description of these claims may spark new ideas for dismantling the prosecution of children in adult court in other states.

By asking state high courts to consider difficult questions and strike down legislative schemes that operate with undeniably racist outcomes, advocates reveal the criminal punishment system for what it is and work toward realizing the full promise of state constitutions in our system of judicial federalism.

I. THE WASHINGTON CONTEXT

Reliance on state constitutions to robustly protect individual rights has become a crucial advocacy tool in light of the erosion of the federal constitutional rights regime.¹⁰ Like in many states,¹¹ the Washington Supreme Court has a long and robust history of independently interpreting its state constitution and has, in several areas, provided stronger protections for individual rights than are available under the Federal Constitution.¹² This strong tradition of engaging in critical and independent review of the constitutional rights of Washington citizens provides an ideal setting to advance the protection of important rights for youth.¹³

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See, e.g., Amy Howe, *Overturning Precedent on the Roberts Court*, SCOTUSBLOG (Oct. 29, 2025, at 09:30 ET), <https://www.scotusblog.com/2025/10/overturning-precedent-on-the-roberts-court/> [<https://perma.cc/3G42-WNCR>] (describing the Roberts Court's retreat from stare decisis in landmark constitutional cases and the ensuing erosion of federal constitutional rights); Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 131 (2020) (discussing the Roberts Court's "sustained assault on the right of poor people and minorities to vote" and the weakening economic and political power of ordinary Americans through decisions involving labor unions and forced arbitration).

11. See Robert J. Smith, Zoë Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 568–77 (2023).

12. See generally Hugh Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead—Long Live Gunwall,"* 37 RUTGERS L.J. 1169 (2006) (outlining the development of state constitutional jurisprudence in Washington state). The Washington Supreme Court established factors to help it determine when a principled basis exists for departing from federal constitutional interpretation. *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986) (en banc). These factors have at times been used as a threshold test and, at others, as guidance for the court. *State v. Evans*, 572 P.3d 1172, 1179 (Wash. 2025) ("[A] *Gunwall* analysis is not always necessary; rather, it is intended to be relied on as a focusing tool and not as a keyhole to reach an independent state law constitutional issue. . . . [W]e decline to accept the State's attempt to repurpose *Gunwall* as a restriction on the independent meaning of our state constitution."); cf. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983) (stating that the U.S. Supreme Court lacks jurisdiction to review state court decisions that are decided on adequate and independent state constitutional grounds).

13. Many other states have a similarly robust history of engagement with their own state constitutions. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16–20 (2018) (arguing that American constitutional law is most protective of individual rights when state supreme courts reject lockstepping and independently interpret their constitutions; examining the important role of state constitutional law in compelling school-funding systems to address the continuing disparities during the school desegregation era, and in development of the exclusionary rule, along with other examples). For advocates who have not yet developed state constitutional litigation strategies, this Essay encourages exploring the tradition in each jurisdiction, including areas where independent interpretation has occurred, whether courts have developed guiding principles for when independent interpretation is warranted,

A. Overview of the Washington Decline Process

The prosecution of children in adult court is not a new phenomenon. Washington state first provided for the transfer of children to adult court, known as “decline,”¹⁴ in the Juvenile Court Act of 1913.¹⁵ For the next eighty years, until 1994, the decline process remained relatively untouched; it was not limited to specific ages or crimes and was a matter left solely to the judge’s discretion after notice, hearing, and investigation.¹⁶ The only significant constitutional statement on juvenile decline took place in 1966 when, to ensure compliance with *Kent v. United States*,¹⁷ the Washington Supreme Court grounded the state’s decline hearing procedures in the state’s constitution, holding that “a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.”¹⁸

In the 1980s and ‘90s, many states began to amend their laws as part of the nationwide tough-on-crime movement, fueled in part by the then-prevailing juvenile “super-predator theory,” to streamline prosecution of children in adult court.¹⁹ Washington participated in this flawed cultural shift, establishing exclusive adult court jurisdiction for some youth in 1994.²⁰ The new auto-decline law provided that adult courts had original jurisdiction over sixteen- and seventeen-year-olds charged with serious violent offenses or those with violent offenses if they had certain criminal history.²¹ The Washington State Legislature significantly expanded the scope of the law in 1997 by adding a number of crimes to the list of those subject to auto-decline,²²

and which provisions of the applicable state constitution are ripe for extending increased protection for individual rights.

14. In Washington state, transfer or waiver of juvenile court jurisdiction is referred to as “decline.” WASH. REV. CODE ANN. § 13.40.110(1), (3)–(4) (West 2025) (defining discretionary decline); *id.* § 13.04.030(1)(e)(v) (defining automatic decline). This Essay does not address the very specific circumstances triggering a mandatory decline hearing, which occurs when the state charges the young person with escape while serving a minimum juvenile sentence to age twenty-one.

15. Juvenile Court Act of 1913, ch. 160, § 12, 1913 Wash. Sess. Laws 520, 529–30.

16. *See id.*; Juvenile Court Act of 1913, ch. 132, sec. 1, § 12, 1945 Wash. Sess. Laws 339–40; Juvenile Court Act of 1913, ch. 58, sec. 1, § 12, 1959 Wash. Sess. Laws 441–42; WASH. REV. CODE § 13.40.110 (West & Supp. 1977) (maintaining previous structure of allowing a motion for a decline hearing in any case, but adding a few specific categories of cases that require a decline hearing to occur); *see also* Dillenburg v. Maxwell, 413 P.2d 940, 947 (Wash. 1966), *modified*, 422 P.2d 783 (Wash. 1967) (noting that the 1966 version of section 13.04.120 required notice, a hearing, and investigation prior to ordering transfer to adult court).

17. 383 U.S. 541, 552–53, 556 (1966) (constraining the latitude of juvenile courts to decline jurisdiction with the express requirement that they provide “procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness,” which led to adoption of the *Kent* factors the Court had included in an appendix to its opinion).

18. *Dillenburg*, 413 P.2d at 948; *see also* Robert P. Morin, Comment, *Waiver of Juvenile Court Jurisdiction Under the Juvenile Justice Act of 1977*, 14 GONZ. L. REV. 369, 374–78 (1979) (discussing how a judicial hearing satisfies *Kent*’s due process requirement).

19. TIARA GREEN, JUV. L. CTR., SUSPENDED EMPATHY: HOW THE MYTH HEARD ROUND THE WORLD FUNNELED BLACK AND BROWN YOUTH INTO THE ADULT COURT SYSTEM 1–4 (2025), https://issuu.com/juvenile_law_center/docs/suspended_empathy?fr=xKAE9_zMzMw [<https://perma.cc/D83K-VKV6>].

20. Act of Apr. 6, 1994, ch. 7, § 519, 1994 Wash. Sess. Laws 1st Special Sess., 112–14 (codified as WASH. REV. CODE ANN. § 13.04.030 (West 2025)).

21. *Id.*

22. Act of May 13, 1997, ch. 338, § 7, 1997 Wash. Sess. Laws 32–35.

including robbery in the first degree, drive-by shooting, and any violent offense committed with a firearm.²³ The addition of these charges led to an increase in the number of youths subject to auto-decline, as well as an increase in overrepresentation of youth of color subject to decline.²⁴

After a decade and a half of courts incorporating adolescent brain science into juvenile sentencing jurisprudence,²⁵ significant and sustained advocacy by the community, and increasing public recognition that children are less culpable than their adult counterparts and more capable of reform,²⁶ the Washington State Legislature passed Senate Bill 6160 in 2018. This bill significantly retracted the decline laws by amending the auto-decline law²⁷ to remove a series of crimes, including those that had been added in 1997: robbery in the first degree, drive-by shooting, and any violent offense committed with a firearm.²⁸ The bill also limited discretionary decline to children at least fifteen years old and charged with a serious violent offense or those under fifteen years old charged with murder.²⁹

B. Challenges to the Decline System Using Federal Constitutional Claims

The few systemic challenges to Washington's decline statutes brought under the Federal Constitution have primarily targeted the auto-decline statute. None have been

23. *Id.*

24. *Id.*; see SENATE COMM. ON HUM. SERVS. & CORR., SENATE BILL REPORT SB 6160, Wash. State Leg., 2017–2018, 2018 Reg. Sess., at 4 (2018), <https://app.leg.wa.gov/committeeschedules/Home/Document/137120> [<https://perma.cc/99L2-J6YM>]; HEATHER D. EVANS & STEVEN HERBERT, UNIV. OF WASH., JUVENILES SENTENCED AS ADULTS IN WASHINGTON STATE, 2009–2019, at 24 tbl. 13 (2021) [hereinafter EVANS & HERBERT, JUVENILES SENTENCED AS ADULTS], https://www.courts.wa.gov/subsite/mjc/docs/2024/2.5%20Juvenile%20Sentenced%20as%20Adults-2021_AO_Creport.pdf [<https://perma.cc/AMZ7-L7YF>].

25. See generally *Miller v. Alabama*, 567 U.S. 460 (2012) (prohibiting mandatory life without parole for juveniles convicted of homicide under the Eighth Amendment and announcing factors that must be considered at an individualized sentencing hearing concerning the child's diminished culpability); *Graham v. Florida*, 560 U.S. 48 (2010) (categorically barring under the Eighth Amendment the imposition of life without parole on juveniles convicted of nonhomicide crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (categorically barring under the Eighth Amendment the imposition of capital punishment on juveniles).

26. See, e.g., The Editorial Board, *Crime and the Adolescent Brain*, N.Y. TIMES: OPINION (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/opinion/sunday/crime-and-the-adolescent-brain.html> (on file with the Temple Law Review).

27. WASH. REV. CODE ANN. § 13.40.030 (West 2025).

28. Act of March 26, 2018, ch. 162, § 2, 2018 Wash. Laws 4–7; WASH. REV. CODE ANN. § 13.04.030(1)(e)(v) (West 2025).

29. Act of March 26, 2018, ch. 162, § 4, 2018 Wash. Laws 17–18.

decided on independent state constitutional grounds,³⁰ and none have succeeded.³¹ In two cases, *In re Boot*³² and *State v. Watkins*,³³ the Washington Supreme Court declined to invalidate the auto-decline statute under federal due process, equal protection, and cruel and unusual punishment claims. These cases are likely representative of decisions in other jurisdictions that advocates will have to distinguish when making state constitutional claims to challenge the prosecution of children in adult court.

Boot was one of the first juvenile cases to be considered by the Washington Supreme Court after the auto-decline statute's passage.³⁴ In a consolidated case, Jerry Boot and Carlos Cornejo made several systemic challenges to the auto-decline law under the Equal Protection, Due Process, and Cruel and Unusual Punishment Clauses of the Federal Constitution.³⁵ The court held that the auto-decline statute did not violate any of these provisions.³⁶

In 2018, more than twenty years after *Boot*, the Washington Supreme Court in *Watkins*³⁷ addressed whether *Boot* had been abrogated by the evolution of juvenile sentencing jurisprudence, acknowledging that youth "are developmentally different from adults and that these differences are relevant to juvenile defendants' constitutional rights."³⁸ It determined again that the auto-decline statute did not violate federal

30. See, e.g., *State v. Watkins*, 423 P.3d 830, 833 n.2 (Wash. 2018) (en banc) ("Watkins does not invoke the due process protections of the Washington Constitution."); *In re Boot*, 925 P.2d 964, 967 n.1 (Wash. 1996) (en banc) ("Although Cornejo and Boot argue violation of various provisions of the Washington Constitution, they nowhere assert greater protections than under the Federal Constitution, and they do not address the requirements of [*State v. Gunwall*, 720 P.2d 808 (Wash. 1986)]."); *State v. Salavea*, 86 P.3d 125, 138 n.1 (Wash. 2004) (en banc) ("Salavea does not argue that Washington's due process protections should be greater than the federal protection provided. Therefore, we need not discuss a separate due process analysis under the state constitution."), *modified*, *State v. Oppelt*, 257 P.3d 653 (Wash. 2011) (en banc).

31. See, e.g., *Watkins*, 423 P.3d at 832 (upholding auto-decline statute in face of systemic challenge based on procedural and substantive due process); *In re Boot*, 925 P.2d at 975 (upholding auto-decline statute in face of systemic challenge based on procedural and substantive due process, equal protection, and cruel and unusual punishment); *In re Harbert*, 538 P.2d 1212, 1215 (Wash. 1975) (en banc) (rejecting vagueness challenge to discretionary decline statute arguing lack of standards to guide the court's decision); *State v. Quijas*, 457 P.3d 1241, 1243 (Wash. Ct. App. 2020) (holding trial court required to rule on claim that decline process tainted by racial bias at a systemic level, in violation of equal protection guarantee).

32. 925 P.2d at 975 (upholding auto-decline statute in face of systemic challenge based on procedural and substantive due process, equal protection, and cruel and unusual punishment).

33. 423 P.3d at 832 (upholding auto-decline statute in face of systemic challenge based on procedural and substantive due process).

34. Mr. Boot's crimes occurred in December 1994. *In re Boot*, 925 P.2d at 967. His case was consolidated with that of Carlos Julian Cornejo, whose crimes occurred in late July 1994. *Id.* at 967–68. The auto-decline statute became effective on June 13, 1994. Act of April 6, 1994, ch. 7, § 519, 1994 Wash. Sess. Laws 1st Special Sess., 112–14.

35. *In re Boot*, 925 P.2d at 975.

36. *Id.*

37. Mr. Watkins was subject to auto-decline because he was charged with first-degree burglary and had a prior felony conviction. *Watkins*, 423 P.3d at 832. By the time the court heard his case, the auto-decline statute had been amended, removing first-degree burglary from the offenses that would result in automatic adult court jurisdiction. *Id.* at 832 n.1. However, because the statutory changes were not retroactive, Mr. Watkins did not reap their benefits. *Id.*

38. *Id.* at 837.

procedural and substantive due process and declined to overturn its decision in *Boot*.³⁹ Citing *State v. Houston-Sconiers*,⁴⁰ the court reasoned that the existing requirement that judges consider the mitigating qualities of youth at *sentencing* in adult court obviated the need for courts to consider these factors at the initiation of cases subject to auto-decline.⁴¹ In other words, children subject to auto-decline were not entitled to a hearing regarding their transfer to adult court. The availability of a mitigated sentence in adult court eliminated the concern that judges would be faced with a “choice between extremes”—the central concern in cases where a court must choose between juvenile or adult jurisdiction.⁴²

The same year that *Watkins* was decided—making clear that federal constitutional challenges to auto-decline were a dead letter—advocates’ approach to challenging decline shifted. The Washington Supreme Court decided *State v. Gregory*, striking down the state’s capital punishment statute as administered under Article I, Section 14, the state constitution’s Eighth Amendment analog, which the court interpreted to guard against the *risk* of racially arbitrary punishment.⁴³ Previous decisional law under the Eighth Amendment had foreclosed Eighth Amendment challenges based on the risk of systemic racial arbitrariness.⁴⁴

After *Gregory*, advocates began to carefully consider what other criminal processes might be ripe for systemic challenges based on racial arbitrariness, what empirical measures of racial arbitrariness existed (or could be established) to support those challenges, and what ought to be the next targets for systemic challenges.⁴⁵ While “death is different,” necessitating specialized procedures and the most rigorous judicial review, children are different too.⁴⁶ The sophisticated empirical analyses (i.e., bivariate statistical and multivariate regression analyses) documenting the role of race in decline did not yet exist in 2018,⁴⁷ but impacted communities had long known that decline produces racial arbitrariness.

39. *Id.* at 833–37; see also *In re Boot*, 925 P.2d at 973–74 (concluding that, because under sixteen- and seventeen-year-olds could be sentenced to death under federal law, minors could be tried in adult court in noncapital cases without a prior determination of culpability). Compare *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding unconstitutional the death penalty for children under the age of sixteen), with *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding the death penalty for children aged sixteen and seventeen).

40. See generally 391 P.3d 409 (Wash. 2017) (en banc) (holding that the Eighth Amendment requires sentencing courts to conduct an individualized inquiry into the mitigating qualities of youth for every child convicted in adult court, and allows courts to depart as far as necessary below adult standard sentencing ranges and to ignore mandatory sentencing provisions to account for youthfulness).

41. *Watkins*, 423 P.3d at 837 (holding that automatic decline statute does not violate substantive due process because the sentencing court has discretion to consider the mitigating qualities of youth).

42. *Id.* at 838 (quoting *Miller v. Alabama*, 567 U.S. 460, 488 (2012)).

43. *State v. Gregory (Gregory II)*, 427 P.3d 621, 626–27 (Wash. 2018).

44. See *infra* note 97 for a discussion of the limitations created by *McCleskey v. Kemp*.

45. See, e.g., *State v. Quijas*, 457 P.3d 1241, 1243 (Wash. Ct. App. 2020) (holding that issues of racial bias must be adjudicated on the record when evidence of racial bias is presented, as it was in Mr. Quijas’s discretionary decline procedure).

46. Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 1, 37–38 (2011).

47. However, basic descriptive statistics demonstrating the racial justice issues with Washington state’s decline laws had been publicly available for nearly a decade by that point. See WASH. COAL. FOR THE JUST TREATMENT OF YOUTH, A REEXAMINATION OF YOUTH INVOLVEMENT IN THE ADULT CRIMINAL JUSTICE SYSTEM

Because *Boot* and *Watkins* were decided exclusively on federal constitutional grounds⁴⁸ and reflect limitations of federal due process and equal protection jurisprudence, the Civil Rights Clinic and other advocates are now bringing state constitutional challenges to decline. As issues of first impression, these state constitutional challenges are bolstered by the critical empirical analyses demonstrating racial bias in application summarized below.

C. *Empirical Racial Disparities in Discretionary and Auto-Decline*

The *Gregory* court relied on a multivariate regression analysis that explained the statistical significance of race on the imposition of the death penalty; this analysis was central to the court's decision to invalidate the state's capital punishment scheme as administered under the Washington State Constitution's Anti-punishment Clause.⁴⁹ This decision suggested that any systemic challenge to decline must rely on rigorous empirical analysis that both exposes and explains the role of race in decline outcomes. The Civil Rights Clinic has argued that where race is a statistically significant factor in whether a child will be prosecuted in adult court—when controlling for offense type, criminal history, and statutory eligibility, among other factors—the statutes that allow for such results violate both state equal protection, due to disparate impacts on youth of color, and state procedural due process requirements, due to racial arbitrariness.

The following empirical analyses regarding racial disproportionality in decline summarized below have provided the evidentiary basis for state constitutional challenges to Washington's decline regime. The findings allow advocates to tell a compelling story of the relationship between decline and racial oppression and further suggest that advocates in other jurisdictions should collaborate with social scientists to locate the necessary data and produce similar empirical analyses to support further challenges.

1. 2009–2019

The analysis of Washington state decline data between 2009 and 2019 by Dr. Heather Evans and Dr. Steven Herbert demonstrates that youth of color, especially Black and Latinx youth, are, to an extraordinary degree, disproportionately overrepresented among youth adjudicated as adults through discretionary decline—even when accounting for the type of offense and criminal history via bivariate statistical analyses.⁵⁰ In other words, Black and Latinx youth are much more likely to face adult court adjudication and sentencing than their white counterparts with similar criminal histories for similar offenses.⁵¹ These researchers found “no evidence that criminal history [was] a primary driving factor in prosecutors' decisions to initiate a discretionary

IN WASHINGTON: IMPLICATIONS OF NEW FINDINGS ABOUT JUVENILE RECIDIVISM AND ADOLESCENT BRAIN DEVELOPMENT 9–10 (2009), <https://www.criminallegalnews.org/media/publications/a-reexamination-of-youth-involvement-in-the-adult-criminal-justice-system-in-wa-wa-coalition-for-the-just-treatment-of-youth-2009.pdf> [<https://perma.cc/9EQ3-GQKX>].

48. See *supra* notes 31–39 and accompanying text.

49. See *Gregory II*, 427 P.3d 621, 633–64 (Wash. 2018).

50. EVANS & HERBERT, JUVENILES SENTENCED AS ADULTS, *supra* note 24, at 19–20, 23, 25, 32.

51. *Id.* at 31–33.

decline hearing,”⁵² and similarly found that offense type did not significantly influence whether the State sought to prosecute a youth in adult court.⁵³

Black and Latinx youth are also starkly overrepresented among those subject to auto-decline.⁵⁴ Latinx children are adjudicated through auto-decline at a rate 4.9 times the rate of white children, and Black children at a rate that is 25.8 times (or 2,484% higher than) the rate of white children.⁵⁵ These findings, in both discretionary and auto-decline rates, led Dr. Evans and Dr. Herbert to conclude that “in the Washington juvenile justice system: race matters.”⁵⁶

2. 2009–2022

Recognizing that courts might require more than descriptive statistics or bivariate statistical analyses to provide redress, sociologists followed Dr. Evans and Dr. Herbert’s initial report with a multivariate regression analysis of an expanded set of Washington state decline data, extending from 2009 to 2022.⁵⁷ Dr. Evans and Dr. Emily Knaphus-Soran demonstrated that, despite the 2018 legislation, Senate Bill 6160, restricting the criteria for the application of both discretionary and auto-decline,⁵⁸ racial disparity for Black and Latinx youths in decline had not only persisted but worsened.⁵⁹

The researchers examined all juvenile court adjudications and superior court convictions in Washington state between July 27, 2009, and June 23, 2022, involving a respondent/defendant under the age of eighteen at the time of case filing.⁶⁰ Their report provided a descriptive summary of the data to illustrate the extent of racial disproportionality in juvenile declines in the expanded data set, as well as regression modeling to examine the independent effect of race on juvenile decline.⁶¹

Despite the overall reduction in juvenile declines, racial disparity persisted and even increased in certain populations after the 2018 legislation. Prior to 2018, Black youth represented 9% of the youth population in Washington state but represented 33% of juvenile declines, while Latinx youth made up 19% of the youth population and 37% of the juvenile declines.⁶² After the 2018 legislation, juvenile declines of Black youth rose

52. *Id.* at 23.

53. *See id.* at 24–26.

54. *Id.* at 19–20.

55. *Id.* at 20.

56. *Id.* at 33.

57. *See* HEATHER EVANS & EMILY KNAPHUS-SORAN, THE PERSISTENCE OF RACIAL DISPARITIES IN JUVENILE DECLINE IN WASHINGTON STATE, 2009–2022, at 1, 8, 20–23 (2024), https://www.courts.wa.gov/subsite/mjc/docs/2024/2.4%20The%20Persistence%20of%20Juvenile%20Declines%20in%20Washington%20State_4_9_2024.pdf [<https://perma.cc/X36C-DRPP>].

58. *Id.* at 6 (explaining that Senate Bill 6160 reduced the overall rate of juvenile decline).

59. *See id.* at 8–22.

60. *Id.* at 8.

61. *See id.* at 10–22 (accounting for relevant factors such as decline eligibility, legislative period, age at alleged offense, and nature of the focal incident).

62. *Id.* at 24.

to 37%, while Latinx youth rose to 41%.⁶³ By contrast, 60% of Washington state youth are white, yet they represented only 13% of juvenile declines within the same period.⁶⁴

These disparities exist across offense categories.⁶⁵ Notably, after the 2018 legislation, not a single case involving white youths charged with either assault in the first degree or assault in the second degree with a deadly weapon was declined to adult court, while juvenile courts declined jurisdiction in over 28% of the sixty-five cases involving the same charges against Black or Latinx youth.⁶⁶

The researchers also applied more sophisticated statistical tools to assess whether race played a role in juvenile decline, accounting for an array of factors that might have explained the observed racial disparity.⁶⁷ This is a critical analysis to any systemic challenge that invokes the *Gregory* decision, where the court relied on a regression analysis that demonstrated the risk of racial bias in the imposition of the death penalty.⁶⁸ Using a multivariate regression analysis designed to describe the association between race/ethnicity and juvenile decline, the researchers accounted for salient factors such as decline eligibility, legislative period (pre- or post-2018 legislative changes), number of prior violent offense adjudications/convictions, whether the focal charge was a serious violent offense, and youths' age during the alleged offenses.⁶⁹

Even when controlling for these variables, the analysis showed that “independent effect of race on decline demonstrate[s] that there is racial bias in the decision to decline a case to adult court.”⁷⁰ While disparities were found across every type of decline, the most pronounced disparity exists in discretionary decline, where Black youth were 2.37 times and Latinx youth were 2.52 times as likely as white youth to be declined to adult court.⁷¹ For all forms of decline, including auto-decline, controlling for other case characteristics, the researchers' analyses indicated that odds of decline were 161% higher for Latinx than white youths and 127% higher for Black than white youths.⁷²

This regression analysis shows that the racial disproportionality in decline is a result of systemic bias, not random chance. As the researchers concluded, “[w]e are confident in our conclusions that there is systematic racial bias in the transfer of youth to adult court, and that these racialized patterns persist despite a significant reduction in the overall rate of juvenile decline since 2018.”⁷³ In other words, even as decline eligibility shrinks, racial disproportionality increases.

These analyses underscore that race, rather than permissible case characteristics, influences decline outcomes; these analyses also undercut the premise that decline is

63. *Id.*

64. *Id.*

65. *Id.* at 15–16, fig. 5.

66. *Id.* at 17, 24–25.

67. *Id.* at 20–24.

68. See *infra* notes 98–102 and accompanying text for a discussion of *State v. Gregory*.

69. EVANS & KNAPHUS-SORAN, *supra* note 57, at 20.

70. *Id.* at 25.

71. *Id.* at 21, 25.

72. *Id.* at 20. Black youth are 2.1 times as likely and Latinx youth are 2.2 times as likely as white youth to be automatically declined when controlling for case characteristics. *Id.* at 21.

73. *Id.* at 25.

necessary for public safety.⁷⁴ Instead, the patterns that emerge reinscribe racial subordination.

II. TRANSLATING EMPIRICAL LITERATURE INTO STATE CONSTITUTIONAL CHALLENGES

While these empirical analyses are compelling in and of themselves, determining how best to ask courts to redress these unfair outcomes is a different task. As the decay of federal rights increases in both speed and scope, advocates are turning to state courts to protect and advance individual rights.⁷⁵

Any challenge to decline must center what we have learned from our Civil Rights Clinic clients and from other youth who have experienced prosecution in adult court: It is devastatingly harsh. One former client was declined to adult court at the age of sixteen for a burglary he committed when he was homeless, suffering from mental health crises, and failed by his family, the foster care system, and the education system.⁷⁶ Another current client, who is Latino, was discretionarily declined to adult court when he was fifteen for a crime in which his codefendants were many years his senior.

Based on the empirical literature discussed above, the Civil Rights Clinic brought state equal protection challenges to the use of the discretionary decline statute in a timely state collateral challenge before the Washington Court of Appeals.⁷⁷ After years of briefing and motions practice, the case is currently awaiting decision.⁷⁸ In a direct appeal involving another Latino youth who was prosecuted in adult court at fifteen, his counsel brought a state procedural due process challenge to the discretionary decline statute.⁷⁹ In the latter case, the Civil Rights Clinic contributed amicus briefing urging the court to consider how a multivariate regression analysis showing evidence of racial bias in decline should be part of the fundamental fairness inquiry under state procedural due process.⁸⁰

74. See WASH. REV. CODE ANN. § 13.40.110(3) (West 2025) (requiring the court to determine whether decline is in the best interest of the child or the public); *Kent v. United States*, 383 U.S. 541, 556–57 (1966) (requiring consideration of public safety in factors one and eight).

75. See *State Case Database*, STATE CT. REP., <https://statecourtreport.org/state-case-database> [<https://perma.cc/9G3B-QAW6>] (last visited Apr. 6, 2026).

76. The prosecution of that burglary in adult court constituted his first strike offense under Washington state's Three Strikes law. After he struck out at age twenty-eight, he spent nearly two decades in prison before a prosecutor finally agreed that the circumstances of his prosecution in adult court were improper. The authors negotiated resentencing, and that client is now free.

77. See generally Amended Opening Brief in Support of Personal Restraint Petition, *In re Inda*, No. 85606-5-I (Wash. Ct. App. June 5, 2024) (arguing that Washington state's discretionary juvenile decline statute is administered in a racially disparate manner and violates state equal protection and due process principles).

78. The case was filed on August 1, 2023, and argued on November 13, 2025. Docket, *In re Inda*, No. 85606-5 (Wash. Ct. App.).

79. Brief of Appellant at 1–2, *State v. Quijas*, No. 86360-6-I, 2025 WL 2439133 (Wash. Ct. App. Aug. 25, 2025) (contending that Washington's discretionary juvenile decline statute violates procedural due process because racial bias systematically influences decline decisions).

80. See generally Amicus Brief of Center for Civil Rights and Critical Justice, ACLU-Washington, King County Department of Public Defense, and TeamChild in Support of Appellant, *State v. Quijas*, No. 86360-6-I, 2025 WL 2439133 (Wash. Ct. App. Aug. 25, 2025) (arguing that multivariate regression evidence of racial bias presented in the second decline report should inform the fundamental fairness inquiry under state procedural due process). The Washington Court of Appeals did not account for the multivariate analysis presented in the amicus, which was released after Mr. Quijas's counsel filed his briefing. *Quijas*, 2025 WL 2439133, at *3–4. The court

In these cases, the Civil Rights Clinic has asked Washington state courts to part ways with federal constitutional notions of equal protection and due process that demand direct evidence of racial animus by state actors in the case.⁸¹ Instead, Washington state courts should exercise their inherent authority to independently interpret state constitutional provisions to account for the clear evidence of systemic racial bias established in the empirical literature.⁸² Our briefs propose specific legal tests that recognize that racial bias becomes clear in the aggregate—even while it may continue to evade redress in individual cases.

In arguing for heightened protection under the Washington State Constitution, the Civil Rights Clinic focuses on the structural differences⁸³ between the state constitution and the Federal Constitution, which should inform a more robust and coherent approach to state constitutional rights interpretation.⁸⁴ First, we discuss how federal judicial review is shaped by the countermajoritarian difficulty, where federal courts give stronger deference to Congress in recognition that judges are unelected and unaccountable in “what we otherwise deem to be a political democracy.”⁸⁵ Because Washington state judges are elected through direct democracy,⁸⁶ courts do not owe the same level of

inaccurately stated that the amicus brief did “not provide anything particularly dissimilar for consideration, and the Evans Report [the first decline report] is sufficiently summarized in the parties’ briefs.” *Id.* at *2. *See supra* Part I.C. (comparing and discussing the first and second reports on decline, the latter of which included multivariate regression analysis of an expanded data set). Mr. Quijas sought review of this decision by the Washington Supreme Court. Petition for Review at 1, *State v. Quijas*, No. 104720-7, 2026 WL 295723 (Wash. Feb. 4, 2026).

81. *See infra* notes 97, 107–09 and accompanying text for a discussion of the *McCleskey* court’s rejection of statistical analysis to prove racial bias in the administration of the death penalty due to reliance on a flawed analysis in *Washington v. Davis*, 426 U.S. 229 (1976).

82. *See Gregory II*, 427 P.3d 621, 627 (Wash. 2018) (en banc) (invalidating Washington state’s capital punishment statute as administered due to statistically significant risk of racial arbitrariness).

83. While the state high court has long recognized that the structural differences always weigh in favor of independent state constitutional analysis, *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986) (en banc), the articulation of those differences, and how they ought to shape the judicial role, is not yet fleshed out in the case law.

84. *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“[F]ederal law . . . must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”). For an example of how the authors have presented this information, see generally Brief of Amici Curiae Center for Civil Rights and Critical Justice, ACLU of Washington, and King County Department of Public Defense, *State v. Wasuge*, No. 103530-6, 2026 WL 111813 (Wash. Jan. 15, 2026) (en banc).

85. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–59 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–36 (1998) (summarizing scholarship regarding characterization of federal court judicial review as in tension with American democracy).

86. WASH. CONST. art. IV, § 3 (“The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature.”); *id.* § 5 (“There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election . . .”). The election of judges by direct democracy reflects that democracy is a “structural, orienting value.” Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1358 [hereinafter Bulman-Pozen & Seifter, *The Democracy Principle*].

deference to the state legislature.⁸⁷ Relatedly, unlike their federal counterparts, Washington state court judges are subject to a variety of accountability mechanisms.⁸⁸ In addition to electoral politics, judges may be removed by the legislature,⁸⁹ a commission on judicial conduct,⁹⁰ or impeachment.⁹¹ Washington citizens can also respond to state court decisions “by countermanding them through constitutional amendment.”⁹² Finally, we emphasize that state courts are common-law courts that play an accepted policymaking role,⁹³ which should not “invoke their relative lack of democratic legitimacy” or “decline to engage in judgments that may sound like policymaking” because their institutional position is different from that of federal courts.⁹⁴ These structural differences obligate the state judiciary to more meaningfully review legislative enactments, rather than lockstepping with federal tiers of scrutiny, and to express judgments about competing interests, as state judges are part of the democratic process and not mere bystanders.⁹⁵ This is exactly the work required of state high courts when considering systemic challenges to the decline statutes.

A. State Equal Protection Claims To Redress Racialized Subordination

State courts are not bound to replicate the limitations of federal equal protection doctrine, which have long failed to address the harms of facially neutral laws that produce racially disparate outcomes.⁹⁶ Under federal jurisprudence, even deeply unequal systems escape scrutiny unless the challenger can prove intentional discrimination by the state.⁹⁷

87. See Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1888 (2023) [hereinafter Bulman-Pozen & Seifter, *Democratic Proportionality*] (critiquing state courts for echoing the federal judicial role, as state courts are majoritarian actors whose judges are elected and whose decisions can be readily countermanded); WASH. CONST. art. XXIII (providing the process for amending the constitution, which requires two-thirds of the vote by each house of the legislature and a simple majority of the state electorate).

88. See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 87, at 1889–90, 1904.

89. WASH. CONST. art. IV, § 9 (“Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature . . .”).

90. *Id.* art. IV, § 31 (creating commission on judicial conduct and setting forth procedure for addressing complaints against judges or justices).

91. *Id.* art. V, § 2 (excepting only courts not of record from impeachment proceedings); *State v. Smith*, 33 P. 974, 974 (Wash. 1893). Unlike in many other state constitutions, Washington state courts are not subject to recall. WASH. CONST. art. I, § 33 (excepting courts of record from recall).

92. Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 87, at 1890; WASH. CONST. art. XXIII.

93. Bulman-Pozen & Seifter, *The Democracy Principle*, *supra* note 86, at 1359.

94. Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 87, at 1888.

95. *Id.* at 1891–908.

96. See *infra* notes 97, 107–09 and accompanying text.

97. In the death penalty context, *McCleskey v. Kemp* rejected statistical analysis as insufficient to prove racial bias in the administration of the death penalty. 481 U.S. 279, 297 (1987). The *McCleskey* decision substantially limited subsequent challenges to the death penalty in both state courts and the U.S. Supreme Court. In rejecting Mr. Kemp’s Fourteenth Amendment equal protection claim, the Court relied, in part, on the deeply flawed analysis from *Washington v. Davis*, 426 U.S. 229 (1976), that equal protection claims required both disparate racial impact and discriminatory intent. *McCleskey*, 481 U.S. at 292 (“Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’” (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967))); *id.* at 293–94 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); see also Mario L. Barnes & Erwin

In *Gregory*, the Washington Supreme Court relied on a multivariate regression analysis demonstrating racial arbitrariness in capital punishment, with no showing of racial animus, to strike down the state's scheme as administered.⁹⁸ After this decision, and the court's stated commitment to addressing systemic racial bias in the court system,⁹⁹ advocates have continued to look for compelling cases in which to ask the court to consider whether state equal protection¹⁰⁰ provides a remedy for empirically established racial arbitrariness in other aspects of the criminal process.

In post-conviction proceedings for our Latino client who was discretionarily declined at age fifteen, the Civil Rights Clinic leveraged the descriptive and regression analyses discussed in Part I.C.2 into a state equal protection theory that could require courts to provide redress where an underlying empirical analysis demonstrates that race improperly influences outcomes. This theory posits that, rather than reflexively applying rational basis because there is no evidence of racial animus by actors in that particular case, Washington state courts should apply heightened scrutiny where a challenger can demonstrate that race has a "meaningful impact" on the imposition of the challenged statute¹⁰¹—drawing directly from the principles in *Gregory*.¹⁰² Application of heightened scrutiny would be consistent with the *Gregory* decision and necessary to fulfill the court's obligation to examine the real impact of a statute on suspect classes.¹⁰³

Auto-decline cases involving Black or Latinx youth present the same opportunity to request heightened scrutiny due to racial arbitrariness.¹⁰⁴ The statistical analyses described in Part I.C demonstrate the severe racial disproportionality in auto-decline

Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1293 (2018) ("[T]he [McCleskey] Court rejected the Baldus study's findings of statistically significant correlations between the races of the perpetrators and victims and the imposition of the death penalty within Georgia criminal courts as insufficient proof of discriminatory intent, overlooking unconscious and structural racism.").

98. *Gregory II*, 427 P.3d 621, 633–35 (Wash. 2018) (en banc) (invalidating capital punishment under the cruel punishment clause of the Washington State Constitution, WASH. CONST. art. I, § 14).

99. Letter from Wash. Sup. Ct., to Members of the Judiciary and Legal Cmty. 1–2 (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> [<https://perma.cc/6UQ4-GQ5X>].

100. WASH. CONST. art. I, § 12.

101. Amended Opening Brief in Support of Personal Restraint Petition, *supra* note 77, at 1–6.

102. *See Gregory II*, 427 P.3d at 634 ("The most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty. We make this determination by way of legal analysis, not pure science."). The *Gregory* court noted that whether the impact is "meaningful" is demonstrated through statistical analysis and judicial notice of systemic racial bias. *Id.* at 633–36.

103. *See Bulman-Pozen & Seifter, Democratic Proportionality*, *supra* note 87, at 1884–88 (discussing limitations of federal tiers of scrutiny in the context of state constitutional rights, as they short-circuit meaningful judicial engagement with important and complex issues).

104. The authors briefed that issue for defense counsel, who presented that claim to King County Superior Court. Defendant's Objection to Adult Jurisdiction and Motion to Transfer to Juvenile Court for Decline Hearing at 33, *State v. Sulcer*, No. 20-1-02946-3 (Wash. Super. Ct. Mar. 24, 2024). The authors also relied on *State v. Quijas* to argue that the superior court was required to thoroughly investigate, on the record, a youth's claim that the auto-decline process was tainted by racial bias—including holding an evidentiary hearing if necessary. 457 P.3d 1241, 1247–48 (Wash. Ct. App. 2020) (observing that once a claim of racial bias is raised, supported by some evidence in the record, an investigation must be conducted "on the record and with the oversight of the court" (quoting *State v. Berhe*, 444 P.3d 1172, 1180 (Wash. 2019) (en banc))).

cases¹⁰⁵ and multivariate regression analysis shows that systemic racial bias explains auto-decline outcomes.¹⁰⁶ As with the argument in the discretionary decline context, empirical evidence of the role of race should be sufficient to trigger heightened scrutiny of auto-decline procedures.

These state equal protection arguments advocate for state constitutional jurisprudence that relies on the antistatutory principle, rather than the antidiscrimination principle.¹⁰⁷ The antidiscrimination principle, dominant in federal jurisprudence, views equality as a formal commitment to prohibiting state action that explicitly classifies based on race or some other forbidden category.¹⁰⁸ By contrast, the antistatutory principle views equality as a substantive guarantee against state action that entrenches or exacerbates social hierarchies, particularly those rooted in race, class, and status.¹⁰⁹

Development of state constitutional law provides a promising avenue in which to advance the antistatutory principle, especially via application of the state's equal protection guarantee, as well as a corresponding opportunity to address entrenched systemic racism in the criminal punishment system. Washington Supreme Court Justice González clearly explained the distinct political project of state constitutions and state courts:

In a review of a federal court action by the government, the question is, what gives them the authority to do something? And if there isn't explicit authority to do it, it can't be done.

In states, it's the opposite. States can do anything unless they're prohibited from doing so. The job of the state supreme court is to question whether

105. EVANS & HERBERT, JUVENILES SENTENCED AS ADULTS, *supra* note 24, at 20, 21 fig. 4, tbl. 10. Among juveniles sentenced as adults through the auto decline process, Latinx children are adjudicated as adults at rate 4.9 times the rate of [w]hite children; that is, the rate of Latinx children being sentenced as adults is 386% higher than the rate for [w]hite children. Black children are adjudicated as adults through auto decline hearings at a rate that is 25.8 times or 2,484% higher than the rate of [w]hite children, Asian children at a rate 1.4 times that of [w]hite children, and American Indian children at a rate 5.2 times the rate of [w]hite children.

Id. at 20 (emphasis omitted).

106. EVANS & KNAPHUS-SORAN, *supra* note 57, at 21 fig. 9, 25.

107. See generally Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 U. MINN. L. REV. 1049, 1050 (1978) (analyzing mid-twentieth century Supreme Court precedent to demonstrate that while the law has outlawed racial discrimination, "it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law").

108. See *id.*

[The antidiscrimination principle] is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim

Id. at 1053–54.

109. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIA. L. REV. 9, 9 (2003) ("Antistatutory theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.").

authority has been exercised under law. That is, if the government has done something, were they allowed to do it and did they do it right?¹¹⁰

Justice González's articulation of more expansive judicial review reflects efforts to translate and give effect to the antistatutory principle. This practice acknowledges that racial disparities in legal outcomes, like juvenile decline, are not aberrations but reflections of structural forces that are not always obvious in individual cases. Only when viewed in the aggregate do these violations come into relief. By rejecting the antidiscrimination principle in favor of substantive equality, state equal protection jurisprudence can begin to transform, rather than preserve, social hierarchy.

B. State Due Process Claims Should Account for Risk of Systemic Racial Arbitrariness

State courts are also not bound to replicate the limitations of federal due process doctrine that have long failed to address whether procedures themselves invite operation of racial bias and therefore involve an inherent risk of racial arbitrariness. Pending litigation in Washington state courts advances the argument that the discretionary decline process violates state procedural due process guarantees,¹¹¹ relying on the empirical studies discussed in Part I.C to ask courts to account for the risk of racial arbitrariness. Additionally, the auto-decline statute violates state substantive due process as all youth should be entitled to individualized consideration of their youth when determining the propriety of adult court prosecution.

1. Procedural Due Process

Procedural protections in discretionary decline hearings fall far short of what state due process should require—that is, a procedure that accounts for the racial biases of the decision-makers. Under the federal framework in *Mathews v. Eldridge*, due process requires weighing (1) the private interest at stake, (2) the risk of erroneous deprivation under current procedures, and (3) the government's interest in using those procedures.¹¹² Under a reimagined state procedural due process framework, the *Mathews* balancing test must account for evidence of systemic racial arbitrariness when considering the risk of erroneous deprivation—again, requiring courts to engage with how these decline statutes actually operate in the aggregate, rather than solely at the individual level.

Washington state courts already recognize that youth have “a reasonable interest in remaining in juvenile court because juvenile court carries with it the potential for lighter punishment.”¹¹³ In contrast, transfer to adult court exposes youth to vastly harsher sentencing regimes, including lengthy incarceration and mandatory enhancements.¹¹⁴ For example, a child adjudicated of first-degree assault in juvenile court faces a

110. Alicia Bannon, *A Conversation with Washington Supreme Court Chief Justice Steven C. González*, STATE CT. REP. (Jan. 23, 2023), <https://statecourtreport.org/our-work/analysis-opinion/conversation-washington-supreme-court-chief-justice-steven-c-gonzalez> [<https://perma.cc/H6VM-S7Q9>].

111. WASH. CONST. art. I, § 3.

112. 424 U.S. 319, 334–35 (1976).

113. *State v. Watkins*, 423 P.3d 830, 836 (Wash. 2018) (en banc).

114. *See id.*

maximum of just under 2.5 years, plus firearm enhancements of no more than one year, while the same conviction in adult court can carry from just under eight to 26.5 years, plus firearm enhancements of five years.¹¹⁵

The second *Mathews* factor, which examines the risk of erroneous deprivation to the *individual*, must shift to evaluate the evidence that the current decline procedures produce a *systemic* risk of erroneous deprivation.¹¹⁶ In discretionary decline hearings, judges rely on subjective assessments of a youth's maturity, amenability to rehabilitation, and potential danger to the community¹¹⁷—categories deeply susceptible to implicit racial bias.¹¹⁸ As Dr. Evans and Dr. Knaphus-Soran's study discussed in Part I.C.2 makes clear, these discretionary judgments are not reliably tied to objective case characteristics and instead track racial lines. The absence of standardized safeguards, such as racial impact analyses, exacerbates this risk.¹¹⁹ Without this systemic lens, courts will simply demand that a particular youth determine with certitude that they were deprived of their interests.

Mathews also asks whether additional safeguards protect against erroneous deprivation.¹²⁰ Consideration of this factor under the state's procedural due process analysis should again consider the best available statistical evidence—like the regression analysis discussed above in Part I.C.2—regarding the effect of race on the decline process. If rigorous empirical analyses demonstrate that race influences outcomes in decline hearings, advocates should feel emboldened to argue for a presumption of juvenile court jurisdiction in discretionary decline hearings, or some other structural change to the procedure that would reverse the flow of children to adult court.

The third *Mathews* factor, which looks at the state's interests,¹²¹ recognizes as valid the state's interest in deterring violent crime.¹²² However, in the juvenile sentencing context, courts have recognized that harsh punishment does not deter youth from committing crime because “their immaturity, recklessness, and impetuosity . . . make

115. Compare WASH. REV. CODE ANN. § 9.94A.510 (West 2025) (classifying first-degree assault, under WASH. REV. CODE ANN. § 9A.36.011, as a Class A felony with a seriousness level of XII, WASH. REV. CODE ANN. § 9.94A.515, which, depending on offender score, can result in standard range punishment from ninety-three to 318 months, plus a mandatory enhancement of sixty months for a firearm enhancement, WASH. REV. CODE ANN. § 9.94A.533(3)(a)), with *id.* § 13.40.0357 (classifying first-degree assault as “A” under the juvenile grid, which results in punishment of 103 to 129 weeks, which is just under 2.5 years, plus a firearm enhancement of from six to twelve months for any Class A felony, depending on the age of the respondent, WASH. REV. CODE ANN. § 13.40.193(3)).

116. See 424 U.S. at 321.

117. *Kent v. United States*, 383 U.S. 541, 566–67 (1966) (listing the factors to be considered when declining jurisdiction).

118. See EVANS & HERBERT, JUVENILES SENTENCED AS ADULTS, *supra* note 24, at 33 (discussing specific factors that contribute to racial disparities, including adultification bias).

119. See *id.*; *cf. Gregory II*, 427 P.3d 621, 635 (Wash. 2018) (en banc) (recognizing risk of racial bias in capital punishment as a basis to invalidate death penalty statute).

120. *Mathews*, 424 U.S. at 334–35.

121. *Id.*

122. *State v. Watkins*, 423 P.3d 830, 836–37 (Wash. 2018) (en banc).

them less likely to consider potential punishment.”¹²³ Nor does decline promote community safety.¹²⁴

The *Mathews* balancing test as adapted above—to account for risk of racial arbitrariness—demonstrates the need for fundamental changes to the discretionary decline statute. It requires affirmative safeguards designed to detect and mitigate the disparate burdens borne by youth of color in the decline process. State procedural due process doctrine should recognize the structural risk of racialized harm and demand procedural reforms capable of disrupting it.

2. Substantive Due Process

Substantive due process arguments are notoriously difficult as courts are reluctant to recognize new fundamental rights that trigger heightened scrutiny.¹²⁵ Even so, and despite this argument’s failure under federal law in *Boot* and *Watkins*,¹²⁶ there is promise for a substantive due process argument under Article I, Section 3 of the Washington State Constitution.

The state constitutional substantive due process argument we have developed does not draw on the empirical analysis of the role of race in decline. However, in jurisdictions where courts are not as receptive to acting on evidence of systemic racial bias or where courts have embraced the need to adjust legal processes to account for the role of adolescent brain development, this claim may hold greater potential to succeed.¹²⁷

This substantive due process claim asserts that the auto-decline statute violates due process because of the judicial recognition that “children are different,” which encompasses a corresponding right to individualized consideration of youth before subjecting a child to procedures and consequences that presume them to have adult-equivalent culpability.¹²⁸ Because the state substantive due process claim is not foreclosed by existing precedent in Washington state,¹²⁹ we have urged Washington

123. *State v. Bassett*, 428 P.3d 343, 353 (Wash. 2018) (quoting *Miller v. Alabama*, 567 U.S. 460, 472 (2012)). *Bassett* implicitly overruled *Watkin*’s conclusion that the threat of harsher punishment in the adult system furthers the State’s interest in deterrence. *See id.*; *Watkins*, 423 P.3d at 836–37.

124. *E.g.*, Sarah Cusworth Walker & Asia Sarah Bishop, *Length of Stay, Therapeutic Change, and Recidivism for Incarcerated Juvenile Offenders*, 55 J. OFFENDER REHAB. 355, 371, 373 (2016), <https://www.tandfonline.com/doi/epdf/10.1080/10509674.2016.1194946?needAccess=true> (on file with the Temple Law Review). Studies of incarceration at Washington state juvenile rehabilitation prisons to determine the impact of “length of stay (dosage) and recidivism,” *id.* at 373, “failed to find a relationship between length of stay and felony recidivism occurring within one year of release,” *id.* at 371.

125. *See, e.g.*, *Watkins*, 423 P.3d at 841 (Yu, J., dissenting) (articulating that youth should have a fundamental right to individualized consideration of their youth at the decline phase).

126. *See supra* Part I.B.

127. In her dissent in *Watkins*, Justice Yu set out an articulable basis for a substantive due process challenge to auto-decline, which would overrule the court’s decisions in *Boot* and *Watkins*. This dissent served as a beginning framework that the authors developed for the argument in litigation. *See* Tiffani N. Darden, *Constitutionally Different: A Child’s Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 215 (2018).

128. *See* Defendant’s Objection to Adult Jurisdiction and Motion to Transfer to Juvenile Court for Decline Hearing at 18, *State v. Sulcer*, No. 20-1-02946-3 (Wash. Super. Ct. Mar. 24, 2024).

129. *Watkins*, 423 P.3d at 833 n.2 (“*Watkins* does not invoke the due process protections of the Washington Constitution.”). *Watkins* raised a claim under the Eighth Amendment too, but the court quickly disposed of it, reasoning that auto-decline does not implicate the Eighth Amendment because sentencing courts have discretion to depart from adult range sentences. *Id.* at 834.

courts to independently interpret the state's due process provision to recognize the fundamental right to individualized consideration of youth at the front end of the criminal legal process.¹³⁰

The court's conclusion in *Watkins*—that consideration of youth at the sentencing stage cures any violation that may exist as a result of a failure to consider youth at the decline stage—is flawed.¹³¹ In Washington state, the child has the burden of proving, through mitigation evidence, that they deserve a lesser punishment and that the court should exercise its discretion to impose an exceptional sentence downward.¹³² This imperfect procedure for ensuring proportionate sentences for children is not enough to protect youths' substantive due process rights at the front end of the criminal process.¹³³ When jurisdiction over a child is transferred to adult criminal court,¹³⁴ “[i]t creates an unacceptable risk that juveniles will be subjected to convictions, stigma, conditions, and punishments that are disproportionate to their crimes.”¹³⁵

CONCLUSION

To leave children vulnerable to adult prosecution is to accept a system that punishes youth for their race as much as for their alleged conduct. Washington state courts have demonstrated a willingness to advance protections under the state constitution that reckon with and begin to remedy criminal laws that have profoundly racialized outcomes. By challenging the prosecution of children in adult court exclusively under state constitutional law, advocates can encourage state courts to articulate race-conscious principles that federal jurisprudence has failed to deliver. Pressing state courts to confront the racialized nature of decline can result in the dismantling of a regime that has long inflicted harm on communities of color. These challenges also signal to other jurisdictions that state constitutions remain powerful, underutilized tools in the struggle for racial justice. Practicing in this way can also encourage arguments in other contexts that realize the promise that Justice Brennan articulated in 1977, when he saw the Court's golden era of civil rights protections begin to fade: that state constitutions can be sites of deeper liberty and equality.¹³⁶

130. We argued that the right to individualized consideration of youthfulness is a fundamental right subject to strict scrutiny, and that under the strict scrutiny test, the state's infringement of this right is not “narrowly tailored to serve a compelling state interest.” *Yim v. City of Seattle*, 451 P.3d 694, 689, 697–98 (Wash. 2019) (en banc) (quoting *Amunrud v. Bd. of Appeals*, 143 P.3d 571, 576 (Wash. 2006) (en banc)).

131. *Watkins*, 423 P.3d at 833–34 (upholding *Boot*'s due process holdings despite recent Eighth Amendment decisions “because adult courts have discretion to depart from standard sentence ranges to avoid excessive punishment of juveniles” (citing *State v. Houston-Sconiers*, 391 P.3d 409, 419–20 (Wash. 2017) (en banc))).

132. See *State v. Gregg*, 474 P.3d 539, 542–44 (Wash. 2020) (en banc); *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) (en banc); WASH. REV. CODE ANN. § 9.94A.535 (West 2025).

133. Cf. *Gregg*, 474 P.3d at 546–47 (González, J., dissenting) (noting data demonstrating that children do not routinely receive exceptional sentences downward in adult court).

134. Cf. *Miller v. Alabama*, 567 U.S. 460, 488–89 (2012) (recognizing that discretion to consider individualized circumstances at the transfer stage cannot take the place of consideration of youthfulness at sentencing).

135. *Watkins*, 423 P.3d at 841 (Yu, J., dissenting).

136. Brennan Jr., *supra* note 84, at 490–98.