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ILLINOIS'S CLASS X: ONE UNHAPPY TWENTY-FIRST BIRTHDAY, A RACE FOR A CONVICTION TO AVOID MANDATORY SENTENCING ENHANCEMENTS

MARIELA GUZMAN*

I. INTRODUCTION

"Nobody gets justice. People only get good luck or bad luck." – Orson Welles.[1] Suppose that you are a twice-convicted nineteen years old, like Matthew Smith.[2] You throw an "unknown liquid" at a correctional officer for denying your weekly shower.[3] Four months later, the state indicts you for a Class 2 felony of aggravated battery.[4] You have two prior convictions that have the same elements as this crime; you were convicted of an aggravated criminal assault with a weapon when you were a sixteen year old and three years later you were convicted of a Class 1 felony for bringing a weapon into the penal institution.[5] Eighteen months after committing the crime, you finally have a jury trial and are

*I dedicate this Comment to the loving memories of my grandfather, Ricardo Duarte, and my grandmother, Piedad Ortiz. I would also like to thank my mother, Hermila Duarte, for her constant support. Lastly, I deeply appreciate the guidance provided by Professor Mary Nagel.

1. BARBARA LEAMING, ORSON WELLES: A BIOGRAPHY 521 (Proscenium Publishers Inc., 1st ed. 1995).

2. People v. Smith, 76 N.E.3d 1251, 1255 (Ill. 2016).

3. *Id.* at 1254.

4. *Id.* at 1253.

5. *Id.* at 1255.

subsequently convicted.[6] You are now subject to a mandatory enhanced sentence under a state statute simply because you are twenty-one years old on the day of the conviction.[7]

As a result, you receive a minimum sentence of six years, which is double the length of the period of incarceration of a Class 2 felony, simply because time passed and you turned twenty-one before the crime.[8] This shows that there is no justice, just bad luck, in being convicted after turning twenty-one years old. In state courts, felonious offenders are sentenced within an average of 153 days after their arrest.[9] Unfortunately, the scenario you just imagined is similar to the real life of Illinois defendants.[10] Pursuant to 730 ILCS 5/5-4.5-95(b) ("Class X"), "[w]hen a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony … after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now … a Class 2 or greater Class felony … that defendant shall be sentenced as a Class X offender."[11]

The language of the statute is problematic. When applying the plain meaning of the language to the statute's terms, "defendant, over the age of twenty-one years, is convicted" could lead to an unjust result. Class X imposes a mandatory enhanced sentence that ranges from a minimum of six years to a maximum of thirty years. In addition, Class X prohibits probation.[12] Using

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6. *Id.* at 1253-54.

7. *Id.* at 1259.

8. People v. Hare, 734 N.E.2d 515, 517 (Ill. App. Ct. 2000).

9. U.S. DEP'T OF JUST., Bureau of Justice Statistics, *Felony Sentences in State Courts, 2000*, (2003), www.albany.edu/sourcebook/pdf/t550.pdf.

10. *See*, *e.g.*, People v. Brown, 86 N.E.3d 1103, 1113 (Ill. App. Ct. 2017) (holding that although defendant was 20 years old when he committed the crime and was convicted of the crime the day after he turned 21 years old he was subject to a mandatory enhanced sentence). Following the Illinois Supreme Court's order, the court vacated its previous order that vacated the Class X sentence. *Id.* at 1106. On July 3, 2013, defendant was 20 years old when a police officer arrested him after he observed defendant selling heroin. *Id.* It was not disputed that defendant had two previous qualifying convictions. *Id.* On July 29, 2013, Brown was charged with the crime and the very next day he turned 21 years old. *Id.* On November 18, 2013, Brown was found guilty of the offense. *Id.* Therefore, the court sentenced him to the mandatory minimum of six years of imprisonment. *Id.* at 1113; *see also*, People v. Douglas, 82 N.E.3d 227, 232 (Ill. App. Ct. 4th Dist. 2017) (holding that although defendant was 20 years old when he committed the crime he was subject to Class X because he was 21 years old at the time of his guilty plea).

11. 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018).

12. 730 ILL. COMP. STAT. 5/5-4.5-25(a) (2018) (imprisonment for a Class X offender is "not less than 6 years and not more than 30 years"); 730 ILL. COMP. STAT. 5/5-4.5-25(d) (2018) (bars a judge from imposing "[a] period of probation or conditional discharge" onto a Class X offender); *see* Robert P. Schuwerk, *Illinois' Experience with Determinate Sentencing: A Critical Reappraisal Part 2: Efforts to Impose Substantive Limitations on the Exercise of Judicial Sentencing Discretion*, 34 DEPAUL L. REV. 241, 249 (1985) ("abolished parole

the plain meaning of Class X, the statute is triggered by defendant's age at the date of conviction and not the date the crime was committed. Consequently, a defendant will be punished and given additional jail time simply because time passed while awaiting his day in court.

This Comment proposes changing the statutory language by substituting the term "conviction" with "committed" and raising the age from twenty-one to twenty-five. As such, the statute would be consistent with the ideals that generated the exception in the first place and would not punish juveniles simply for the passage of time. In addition, the revised statute would comport with the Constitution as it would not violate the Due Process or Equal Protection Clauses. Part I of this Comment discusses the problem of juveniles and crime. Part II of this Comment discusses the interpretation of Class X by Illinois courts, compares Illinois's Class X to other states' anti-recidivist statutes, and discusses the Due Process and Equal Protection Clauses' issues. In addition, it addresses recent developmental neuroscience studies which find the brain is not fully developed until the age of twenty-five. Part III proposes an amendment to the statute, which implements the mandatory enhanced sentence based upon the offender's age when he committed the crime.

II. BACKGROUND

In America, juvenile reform trends are motivated by how society perceives children.[13] The more society perceives juveniles as children needing protection from the injustice of the criminal system, the stronger the movement for juvenile reform.[14] This societal belief started the juvenile court system.[15] This belief is fueled by the help of developmental neuroscience, which has led to viewing juveniles as different and unique from adults, who merits

for persons convicted of murder and class X offenses").

13. Mary E. Spring, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1353 (1998); *see* James H. Difonzo, *Parental Responsibility for Juvenile Crime,* 80 OR. L. REV. 1, 9-15 (2001) (noting the conflict whether the juvenile court's hundredth anniversary "should be marked as 'a celebration or a wake'" because society now views juveniles as unsalvageable "super predators," while throughout "most of the twentieth century, juvenile delinquents were perceived as 'vulnerable and in need of protection'").

14. *See* Difonzo, *supra* note 13, at 9-19 (discussing the transformation of juvenile perception and noting the "counter-reformation" that occurred a century after the twentieth century juvenile reform, which sought to "reverse that discursive project.").

15. *See* Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 840 (2012) (discussing the history of the juvenile court system in Illinois and noting the juvenile court system resulted from a "reform movement to protect children rather than punish them.").

different treatment in the criminal system.[16] Developmental neuroscience tells us there are fundamental differences between juvenile and adult brains.[17] Section A examines the start of juvenile courts. Section B examines the transformation of juvenile courts. Section C examines modern juvenile reform. Section D examines the history of Class X.

A. The Establishment of Juvenile Courts

Since the turn of the twentieth century, there has been much debate on juveniles and the criminal system.[18] The disgust over the cruel treatment of juvenile offenders, such as being incarcerated among adult criminals, sparked a reform movement that led to the juvenile justice system.[19] In 1899, the Illinois legislature passed the Juvenile Court Act ("Act"),[20] establishing the country's first juvenile court in Cook County.[21] The Act passed

16. Terry A. Maroney, *False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 91 (2009).

17. *Id.* at 92 (noting Supreme Court Justice Stevens hinted at neuroscience studies that adolescent minds are not fully developed back in 2002). In *Roper v. Simmons* these studies played a crucial role in the Court's holding. *Id.*; Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 766 (2011) (noting the majority opinion cited to amicus briefs discussing the juvenile neuroscience studies to support the view that there are fundamental differences in juvenile brains and they should be treated differently from adult offenders).

18. Barry C. Field, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966 (1995).

19. Arthur R. Blum, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L. J. 349, 355 (1996); *see* Kara E. Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1114 (1998) (discussing that reformers viewed identical treatment of juveniles and adults as a barrier that would "preven[t] juveniles from becoming law-abiding citizens" and juveniles should not be punished for acts that they did not intend or understand); *see also* In re Gault, 387 U.S. 1, 15 (1967) (noting reformers were appalled by children being in jail among hardened adult criminals as well as the adult procedure and penalties where children had long prison sentences).

20. Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1257 (1996); Deborah L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 905 (1996) (stating "first juvenile court was established . . . in Chicago in 1899").

21. Laureen D' Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders Is Not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 280 (1997); C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 KAN. L. REV. 659, 667 n.28 (2005) (discussing the Juvenile Court Act in detail, such as the Act required counties in the state of Illinois with a population over 500,00 to have a separate courtroom to hear all juvenile cases); *see Gault*, 387 U.S. at 14 (discussing the history of juvenile courts and observing the juvenile court

with the help and support of reformers who sought to implement an alternative approach to juvenile crime.[22]

The Act was based on the *parens patrie* theory,[23] under which a young offender should not be treated as a criminal.[24] Instead, the young offender should be treated as a child in need of guidance and assistance because young offenders are more amenable to rehabilitation.[25] The intent was to have juvenile proceedings closely resemble civil proceeding, not criminal proceedings.[26] Not only were there different procedural protections as a result, but the juvenile system was based on the idea that the juvenile lacked *mens rea* to commit a crime and the focus was "reform and treatment."[27] The popularity of the Juvenile Court Act spread like wildfire across the nation.[28] By 1925, the Act was replicated in all but two states.[29]

However, the juvenile justice system did not turn out to be the saving grace the reformers had envisioned.[30] The juvenile

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movement started in Illinois when the legislature adopted the Juvenile Court Act in 1899).

22. Susan L. Brody, *Notice to Minors under the Illinois Juvenile Court Act; An Anomaly of Due Process*, 36 DEPAUL L. REV. 343, 345 n.13 (1987) (discussing juvenile justice reform movement was fueled by social workers like Jane Addams, Julia Lathrop, and Lucy Flowers). These women helped mobilize the Chicago Women's Club to support this movement. *Id.* Ms. Lathrop visited Illinois correctional institutions. *Id.* Subsequently, she approached members of the Chicago Bar Association with her reported observations to receive assistance in drafting a tentative juvenile reform act. *Id.* The CBA later drafted the initial version of the Juvenile Court Act. *Id.*

23. *See* Jeffery M. Hammer, *Denying Child Welfare Services to Delinquent Teens: A Call to Return to the Roots of Illinois' Juvenile* court, 36 LOY. U. L.J. 925, 928 (2005).

24. Frank Sullivan Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279, 281 (1997) (quoting Cook County's first juvenile judge, Richard S. Tuthill, as saying the "sole purpose" of juvenile court is "to give the children what all children need, parental care.").

25. Cintron, *supra* note 20, at 1257-59 (the philosophy of *parens patriae* was that the state, as the ultimate guardian, had a "duty to care for those who cannot take care of themselves" and noting the belief that juvenile behavior is amenable to rehabilitation.); *See* Farrah Champagne, Article, *Providing Proper Preparation: Achieving Economic Self-Sufficiency for Foster Youth*, 4 AM. U. LABOR & EMP. L.F. 1, 14 (2014) (discussing the goal of the doctrine was juvenile rehabilitation, supervision, and treatment instead of punishment). This was why hearings were confidential, no lawyers or juries were present, and judges made individualized sentencing. *Id.*

26. Cintron, *supra* note 20, at 1259; Bernabe, *supra* note 15, at 841 n.34.

27. Tonya K. Cole, Note, *Counting Juvenile Adjudication as Strikes Under California's "Three Strikes" Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 336 (1998).

28. Brody, *supra* note 22, at 343 n.3 (1987) ("the Illinois juvenile court movement would sweep over America 'like . . . prairie fires'").

29. *Id.* ("By 1909, 10 states had juvenile courts, 22 states . . . by 1912, and by 1925, all but 2 states" had juvenile courts).

30. Spring, *supra* note 13, at 1357; *see* Champagne, *supra* note 25, at 14 (discussing the reality in which juveniles received "harsh orders of

court system was later critiqued for many reasons; among the top cited was the lack of procedural rights for juveniles.[31] The juvenile court exchanged its paternalistic protection of juveniles for constitutional guarantees of due process and fairness.[32] Juvenile courts were established on the belief that the benefits provided justified not giving procedural rights.[33] These courts attempted to dodge procedural rights for juveniles by inconvincibly stating the rights as unnecessary because juvenile courts infringed only on juvenile's custody.[34] For some time, juveniles unsuccessfully alleged violations of the Fourteenth Amendment, such as the deprivation of liberty without due process or denying the right to appeal.[35]

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confinement, which resembled strict penal sentence" instead of rehabilitation through "appropriate individualized care and treatment."); *see generally* Nelson, *supra* note 19, at 1117 (discussing how reformers gave so much power to the judge because they envisioned the judge to be a combination of attitudes: concerned father, brilliant psychologist, and dedicated social worker); *see also Gault*, 387 U.S. at 26 (discussing the role of a juvenile court judge towards defendants was to be a "fatherly judge.") The judge was to talk over the juvenile about his problems and offer "paternal advice and admonition . . . 'save him from a downward career'." *Id.* at 27-28. The Court noted the reality left juveniles feeling cheated after receiving stern discipline from juvenile courts. *Id.* at 27-28.

31. *See* Lara A. Bazelon, *The SuperPredator Myth: Why Infancy is the Preadolesent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 173 (2000) (discussing how the lack of constitutional rights gave juvenile court judges broad discretion that often led to "widespread abuses that for which the legal system provided no remedy"); *see also* Cynthia Godsoe, *The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 192 (2017) (noting there were no guidelines in juvenile courts and that prosecutors had "unreviewable authority" as juvenile proceedings and records were confidential).

32. *E.g.*, Blum, *supra* note 19, at 355 (explaining that the juvenile court system gave juveniles a chance to escape the harness of the adult criminal system, but in return juveniles "entering the juvenile justice system were forced to exchange the guarantees of 'due process and fairness'.").

33. *See* Nelson, *supra* note 19, at 1116 (discussing reformers viewed the disadvantages juveniles suffered from denial of their procedural rights did not outweigh the benefits of a separate system).

34. *See Gault*, 387 U.S. at 17 (noting under *parens patriae* that the state had the right to deny juveniles the procedural rights afforded to his elders because the juvenile was deprived of his non-constitutional right of custody). Under the doctrine, juveniles were delinquents as a result of their parent's failure to perform their custodial functions and resulted in the state intervention of custody and not the deprivation of juvenile's liberty. *Id.* The state merely provided "the 'custody' to which the child is entitled." *Id.* Juvenile proceedings were described as "civil" as a result the state did have to provide the same procedural rights because it was "not subject to the requirements which restrict[ed] the state when it [sought] to deprive a person of his liberty." *Id.*

35. State ex. Rel. Olson v. Brown, 52 N.W. 935, 936 (Minn. 1892) (holding that constitutional provisions are not applicable because a juvenile is "not 'punished,' nor is he 'imprisoned," in the ordinary meaning of those words."); State ex rel. Matacia v. Buckner, 254 S.W. 179, 181 (Mo. 1923) (holding that the "constitutional guaranties respecting defendants in criminal cases do not

B. The Transformation of Juvenile Courts: Procedural Constitutional Rights Are Necessary

Juvenile courts transformed in the late 1960's when the United States Supreme Court mandated that juvenile courts implement procedural rights for juveniles.[36] This began when the Supreme Court in *Kent v. United States* held that a juvenile may be transferred to an adult court only after a waiver hearing and that the juvenile has a right to counsel at that hearing.[37] The Court stated the *parens patriae* theory is not an invitation for a juvenile court to be procedurally arbitrary and noted "the child receives the worst of both worlds … he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulate for children."[38]

Subsequently, the United States Supreme Court in *In re Gault* held a juvenile has a right to be given written notice of charges against him, to counsel, to remain silent, and to cross-examine complaining witnesses.[39] The case involved a fifteen year-old boy, Gerald Gault, who was declared a juvenile delinquent and committed to a state industrial school until the age of majority.[40] A neighbor allegedly received a telephone call where the caller said sexual and lewd remarks to her; eventually, Gault was taken into the police station.[41] The Court noted many things went wrong in Gault's hearing.[42] For example, the petition lacked a factual basis and simply contained a legal conclusion that "minor… is in need of the protection of this Honorable Court … [and minor] is a delinquent minor."[43] Moreover, during the hearing no one was sworn in and no transcript or record was created.[44] The Court cautioned that civil labels and good intention do not erase the need for juvenile courts to implement due process,[45] especially

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apply."); *see also* Marlow v. Commonwealth, 133 S.W. 1137 (Ky. 1911) (holding the juvenile had no right to appeal under the state Juvenile Court Act); State ex rel. Matacia v. Buckner, 254 S.W. 179, 181 (Mo. 1923) (holding that the "constitutional guaranties respecting defendants in criminal cases do not apply.").

36. Jonathan Simon, *Law and the Postmodern Mind: Power without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1365 (1995); Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 409 (1999).

37. Kent v. United States, 383 U.S. 541, 553-54 (1966).

38. *Id.* at 555, 556.

39. *Gault*, 387 U.S. at 31-57.

40. *Id.* at 4, 7.

41. *Id.* at 4.

42. *Id.* at 5-7.

43. *Id.* at 5.

44. *Id.*

45. *Id.* at 36, 49-50.

when the risk of incarceration is equally serious as a felony prosecution.[46] As the Court in *Kent* and *In Re Gault* recognized the problems of juvenile courts, juveniles slowly started to gain more rights.

A few years later, the United States Supreme Court in *In re Winship* concluded that juveniles' alleged violations of criminal law must be determined under an increased standard of proof.[47] The Court explained that like adults juvenile are "constitutionally entitled to proof beyond a reasonable doubt."[48] The Court rejected the state's theory that a higher standard of proof would somehow destroy the beneficial aspect of the juvenile process.[49] The Court noted that raising the standard of proof in juvenile courts to beyond a reasonable doubt is as equally necessary as the constitutional safeguards applied in *Gault*.[50]

Then, the United States Supreme Court in *Breed v. Jones* held that a juvenile may not be constitutionally tried both as an adult and juvenile for the same charge because it violates the Fifth Amendment's Double Jeopardy Clause.[51] The Court observed that, although the juvenile "never faced the risk of more than one punishment," the Double Jeopardy Clause "is written in terms of potential risk of trial and conviction, not punishment."[52] Therefore, the purpose of the Double Jeopardy Clause is to avoid subjecting an individual to multiple trials.[53] Through these decisions, the Supreme Court mandated that juveniles do not have to leave their procedural rights at the juvenile courtroom door in exchange for the supposed rehabilitation and leniency of the juvenile court.

However, the United States Supreme Court did not make all procedures the same for juveniles and adults.[54] For example, the Supreme Court plurality opinion in *McKeiver v. Pennsylvania* concluded that juveniles do not have a right to jury trial.[55] The Court explained the Constitution does not mandate identical procedures for juveniles versus adult offenders.[56] The Court reasoned that juries disrupt the "unique nature of the juvenile

46. *Id.* at 36.
47. In re Winship, 397 U.S. 358, 365-68 (1970).
48. *Id.* at 365.
49. *Id.* at 366.
50. *Id.* at 368.
51. Breed v. Jones, 421 U.S. 519, 532-33 (1975).
52. *Id.* at 532.
53. *Id.*
54. *See Kent*, 383 U.S. at 562 (explaining that juvenile proceedings do not mandate conformance with "all of the requirements of criminal trail" but "must measure up to the essential of due process and fair treatment"); *see also Gault*, 387 U.S. at 30.
55. McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).
56. *Id.*

process."[57] This era of Supreme Court cases demonstrated there was concern over the complete freedom juvenile courts had over delinquents and thus the Court increased juveniles' procedural rights for their protection.

C. Modern Juvenile Reforms

Modern juvenile reform has been fueled by neuroscience studies concluding the brains of young adults are still developing. In the last couple of decades, there has been great discussion on juveniles and proportionate sentencing in the criminal justice system. On the federal level, this trend is demonstrated in a series of United States Supreme Court cases: *Roper v. Simmons*,[58] *Graham v. Florida*,[59] and *Miller v. Alabama*.[60] The Supreme Court in *Roper* held executions of individuals under the age of eighteen violates the Eighth Amendment cruel and unusual punishment prohibition.[61] The Court noted three fundamental differences between juveniles under eighteen and adult offenders that rendered juveniles insufficiently culpable: 1) juveniles' lack of maturity; 2) juveniles' greater vulnerability to "negative influences and outside pressures"; and 3) juveniles' still developing character.[62]

The United States Supreme Court in *Graham* held a juvenile sentence of life without parole for a non-homicide offense violates the Eighth Amendment's cruel and unusual punishment prohibition because of the characteristic of juveniles such as the lack of maturity.[63] The Court explained the application of the standard of extreme cruelty is ever-changing because it "embodies a moral judgement."[64] The applicability "must change as the basic morals of society change."[65] The Court recognized these sentencing practices were unusual, as nationwide only one hundred and twenty-three juvenile offenders were serving life sentences without parole for non-homicide offenses.[66] The Court cited to its

57. *Id.*

58. Roper v. Simmons, 543 U.S. 551 (2005).

59. Graham v. Florida, 560 U.S. 48 (2010).

60. Miller v. Alabama, 567 U.S. 460 (2012).

61. *Roper*, 543 U.S. at 568.

62. *Id.* at 569-70.

63. *Graham*, 560 U.S. at 78-79, 82 (noting the difference between adults and juveniles is common knowledge and "[a] categorical against life without parole for juvenile non-homicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.").

64. *Id.* at 59.

65. *Id.*

66. *Id.* at 64 (discussing the practice of sentencing juveniles to life without parole for non-homicide offenses is a rare punishment and noting that a study determined 123 juvenile offenders nationwide, 77 of those were imposed from the state of Florida alone). Although eleven states actually imposed those

previous decision in *Roper* to analyze the "culpability of offender … in light of their… characteristics, along with the severity of the punishment in question."[67] Juvenile offenders have a "twice diminished moral culpability" and life without parole is "the second most severe penalty."[68]

Moreover, the Court recognized that life without parole is a bleak punishment for a juvenile who will spend more years incarcerated than an adult.[69] Neuroscience research led the Court to conclude juveniles deserved different treatment; after all, juveniles have a greater possibility to be reformed.[70] Further, the Court found life without parole is not equal in application, only in name when comparing the effect on a sixteen year-old versus a seventy-five year-old.[71] The reality is a seventy-five year-old will spend a significantly shorter time in prison than a juvenile.[72] Lastly, the Court explained that imposing a life sentence on non-homicide juvenile offenders would not legitimately further any goal of penal sanctions; not retribution, deterrence, incapacitation, or rehabilitation.[73]

Under a similar rationale, the Court in *Miller* held a mandatory sentences of life with possibility of parole for juveniles in homicide cases violates the Eighth Amendment.[74] Mandatory statutes that sentence a juvenile to life without parole violate the principle of proportionality.[75] The Court explained sentencing juveniles to the harshest penalty should be uncommon because, like discussed in *Roper* and *Graham*, juveniles encompass "transient immaturity" without "irreparable corruption."[76] Those differences should guide a sentencing judge in his judgment regarding a homicide case.[77] As a result, several states revised their statutes to comply with *Miller*.[78] For example, Illinois is now consistent with *Miller* pursuant to 730 ILCS 5/5-4.5-105, which

types of sentences, twenty-six states, despite statutory authorization, did not impose juvenile sentences. *Id.* Moreover, six states had a statute that prohibited a sentence of life without parole for juvenile offenders. *Id.* at 85.

67. *Id.* at 67-68.

68. *Id.* at 69.

69. *Id.* at 70.

70. *Id.* at 68.

71. *Id.* at 70.

72. *Id.* at 71.

73. *Id.*

74. *Miller*, 567 U.S. at 479.

75. *Id.* at 489.

76. *Id.* at 479-80.

77. *Id.* at 480.

78. *See* Nicole D. Porter, *The State of Sentencing 2015 Development in Policy and Practice*, THE SENTENCING PROJECT (Feb. 10, 2016), www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/ (discussing that to comply with *Miller* some states such as Connecticut, Illinois, Nevada, Vermont enacted legislation to eliminate juvenile mandatory sentencing of life without parole).

permits judges to consider mitigating factors before sentencing an offender under the age of seventeen.[79] Thereby, the statute bars judges from automatically imposing mandatory life sentences without parole on juveniles.[80]

Additionally, many states, including Illinois, are continually re-examining their laws regarding the age for juvenile court jurisdiction.[81] The Illinois Juvenile Court Act of 1987 limited "juvenile" to an individual that was sixteen years-old or younger.[82] In 2005, the Illinois General Assembly rejected a proposed "raise the age legislation" for the juvenile court jurisdiction to eighteen.[83] Afterwards, the Illinois General Assembly passed a "raise the age" legislation that went into effect in 2010, but it only extended juvenile court jurisdiction to seventeen-year-olds charged with misdemeanor offenses.[84] In 2014, the Illinois General Assembly passed a raise the age bill that included all seventeen-year-olds.[85] Illinois has continued to re-draw its line between a juvenile and an adult. This has excluded more young offenders for automatically being treated as adults.

Illinois is not the only state to raise the age of juvenile court jurisdiction. In fact, New York and North Carolina were the last remaining states which permitted adult criminal courts to automatically hear a sixteen years-old offender's case.[86] In 2017,

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79. *Id.*

80. *Id.*

81. *See* Michele Deitch et al., *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 AM. J. CRIM. L. 1, 17 (2012) (discussing how states have been raising the ages for juvenile court jurisdiction).

82. Erica Hughes, *Juvenile Justice in Illinois, 2014*, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, 3 (2016), www.icjia.state.il.us/assets/articles/JJ%20Statewide%20Snapshot%202014_final%20full%20version%2009132016.pdf.

83. Stephanie Kollmann, *Raising the Age of Juvenile Court Jurisdiction: The future of 17-year-olds in Illinois' justice system*, ILLINOIS JUVENILE JUSTICE COMMISSION, 13 (2013), www.ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/IJJC%20-%20Raising%20the%20Age%20Report.pdf.

84. *Id.* at 10.

85. 705 ILL. COMP. STAT. 405/5-120 (2018) (amended in 2013 by P.A. 98-61); Jeree Thomas, *Raising the Bar: State Trends in Keeping Youth Out of Adult Courts (2015-2017)*, WASHINGTON, DC: CAMPAIGN FOR YOUTH JUSTICE, 10 (2017), www.cfyj.org/research/cfyj-reports/item/raising-the-bar-state-trends-in-keeping-youth-out-of-adult-courts-2015-19.

86. Juliane T. Scarpino, *A Progressive State of Mind: New York's Opportunity to Reclaim Justice for its Juvenile*, 23 J. L. & POL'Y 845, 845-847 (2015) (discussing how New York previously automatically prosecuted a juvenile over the age of 16 in adult criminal courts); Aimee A. Durant, Comment, *Two Years in Limbo: North Carolina's Inconsistent treatment of Sixteen and Seventeen-Year-Olds*, 5 WAKE FOREST J. L. & POL'Y 531, 532-34 (2015) (discussing North Carolina's Juvenile Code section 7B- 1501 and noting juveniles over the age of sixteen are prosecuted in adult criminal court

New York raised the age of juvenile jurisdiction to protect those juveniles under the age of eighteen.[87] Left standing alone, North Carolina's legislature also passed a law to raise the age to juveniles under eighteen.[88] Despite the trend of "raise the age" bills, states such as Georgia, Michigan, Missouri, Texas, and Wisconsin still automatically prosecute seventeen year olds as adults.[89] Those states have declined to adopt those bills.[90] In 2016, Michigan's "raise the age" bill passed in its House of Representatives, but failed to make it to a vote in its Senate.[91] In 2017, Texas's "raise the age" bill suffered the same fate.[92]

The states that raised the age of juvenile jurisdiction have seen positive impacts.[93] Despite what opponents thought, raising the age of juvenile jurisdiction did not result in an increase in caseloads or the number of incarcerated juveniles.[94] For example, admissions to Illinois juvenile correction centers decreased by 45% from 1,329 in 2009 to 725 in 2015.[95] Second, there was a decrease in young offenders being automatically excluded from juvenile court; the number dropped nearly half from 170,000 in 2007 to 90,900 in 2014.[96] The dire predictions of opponents of raise the age legislation did not materialize. For example, when Connecticut raised the age of juvenile jurisdiction in 2007, the state did not experience the $100 million budget increase that was forecast.[97] Lastly, there is a lower rate of recidivism when juveniles are retained in the juvenile court system instead of the adult court

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regardless of the type of crime).

87. Thomas, *supra* note 85, at 14 (New York's juvenile court jurisdiction would include 16-year-olds in October 2018 and a year later would include 17-year-olds).

88. *Id.* at 16.

89. Stephanie Tabashneck, "*Raise the Age" Legislation: Developmentally Tailored Justice*, 32 CRIM. JUST. 13, 18-19 (2018).

90. *Id.* (discussing the legislative flops in Texas, Michigan, Georgia, Missouri, and Wisconsin). Georgia's and Missouri's raise the age bills did not make it to a vote. *Id.* at 19. Similarly, Wisconsin's raise the age bill has failed to advance even with some bipartisan support. *Id.*

91. *Id.* at 19.

92. *Id.* at 18.

93. Deitch, *supra* note 81, at 17 (discussing the improvements in states that raised their juvenile court jurisdiction age).

94. Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1460 (2008); *see* Diane Geraghty, *Bending the Curver: Reflections on a Decade of Illinois Juvenile Justice Reform*, 36 CHILD. LEGAL RTS. J. 71, 76 (2016) ("returning drug cases to juvenile court jurisdiction neither increased the number of new delinquency petitions").

95. *Raising the Age: Shifting to a Safer and More Effective Juvenile Justice System*, JUSTICE POLICY INSTITUTE, 10 (2017), www.justicepolicy.org/research/11239.

96. *Id.* at 4.

97. *Id.* at 6.

system.[98] Offenders under the age of eighteen who are retained in the juvenile court system are 34% less likely to be rearrested for another crime.[99]

In light of this, some states are attempting to further expand the age of juvenile court jurisdiction.[100] Connecticut, Illinois, Massachusetts, and Vermont have proposed "raise the age" bills to include those under twenty-one and twenty-two-year-olds.[101] Connecticut's proposed "raise the age" legislation, HB 7045, would subject young offenders under twenty-two to the jurisdiction of Connecticut's juvenile court by July 2020.[102] When Connecticut's "raise the age" bill was originally introduced, it inspired Juvenile Court reformers in Illinois, Massachusetts, and Vermont to introduce similar bills.[103] In 2016, Vermont passed "raise the age" legislation where juvenile court jurisdiction would now include individuals under twenty-two years old.[104] The law also stipulates that incarcerated juveniles between the ages of eighteen to twenty-five be housed in a separate facility that is dedicated solely to youth offenders.[105] States are continually increasing the age of juvenile jurisdiction as they begin to realize the line they drew was incorrect and should be drawn even further back.[106] This demonstrates that the modern trend is viewing juvenile offenders more like children that need leniency rather than seeing them as predators who deserve the same punishment as adults. However, states have fallen short, as none reflect recent neuroscience studies that determined a human brain is not fully develops until twenty-five.

D. Establishment of Class X and the Problems that Arose with the Act.

Forty-eight states have "anti-recidivist" criminal statutes which enhance the sentencing of habitual or repeat offenders.[107] As of October 19, 2018, only six states exclude certain juvenile

98. Deitch, *supra* note 81, at 11.

99. *Id.*

100. Tabashneck, *supra* note 89, at 13.

101. Thomas, *supra* note 85, at 19.

102. *Id.*

103. *Id.*; *see also* Tabashneck, *supra* note 89, at 13.

104. VT. STAT. ANN. TIT. 33, § 5281 (2018) (effective July 1, 2018) (restricting jurisdiction of juvenile courts to those offenders between 12 years and "not yet 22 years of age"); Thomas, *supra* note 85, at 19.

105. VT. STAT. ANN. TIT. 33, § 5281 (2018).

106. *See* Deitch, *supra* note 81, at 17, 21 (discussing how state legislatures have considered the results of neuroscience studies that the juvenile mind is not fully developed when adopting raising the age bills).

107. Erik G. Luna, *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 2 (1998) (discussing and comparing anti-recidivist laws).

offenders based on their age.[108] Anti-recidivist statutes are also referred to as habitual offender statutes, persistent offender statutes, three strikes, repeat offender statutes, etc.[109] Anti-recidivist statutes have existed since the 1700's.[110] Anti-recidivist statutes impose various punishments, anywhere from mandatory additional sentences to life imprisonment without possibility of parole.[111] The most famous anti-recidivist statute is California's three strikes statute, Cal. Pen. Code §667, which was passed in 1994.[112]

Although California's legislation was viewed as a new tool to combat crime, it was not the first.[113] Montana has had an anti-recidivist statute on its books since 1973, Texas since 1974, and Kentucky since 1975.[114] The four theories behind criminal punishment are incapacitation, deterrence, rehabilitation, and retribution.[115] Incapacitation and deterrence are the main penological justifications for anti-recidivist statutes.[116] Anti-recidivist statutes focus on removing repeat offenders from society and placing them in prison to incapacitate them from endangering others.[117] In addition, anti-recidivist statutes focus on deterring future crimes by increasing the consequences of committing

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108. *See* ARIZ. REV. STAT. ANN. § 13-706 (2018) (distinguishing offenders who are at least 18 years old); *see also* 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018) (distinguishing offenders who are 21 years old); *see also* KY. REV. STAT. ANN. § 532.080 (2018) (distinguishing offenders who are 21 years old); *see also* MINN. STAT. § 609.1095(2) (2018) (distinguishing offenders who are at least 18 years old); *see also* MONT. CODE ANN. § 46-18-502 (2017) (distinguishing offenders who are 21 years of age or older); *see also* N.D. CENT. CODE, § 12.1-32-09 (2017) (distinguishing offenders who are at least 18 years old).

109. Thomas R. Groots, Comment, *"A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will it Withstand an Eighth Amendment Challenge*, 28 AKRON L. REV. 253, 254-56 (1995) (discussing and comparing anti-recidivist laws).

110. *Id.* at 255.

111. *Id.* at 256-57.

112. Luna, *supra* note 107, at 1.

113. *Id.* at 3 (discussing the legislation was not new, but was fueled by certain events, such as the killing of Kimber Reynolds by an individual with a long rap sheet). Subsequently, her father authored the legislative bill "Three strikes and You're Out" which was then defeated. *Id.* at 3-4. Then Polly Klaas, a 12-year-old was kidnapped at knife-point and was later found dead. *Id.* at 4. Her death revived the Three Strike legislation. *Id.* at 5.

114. *Id.*; State v. Brendal, 213 P.3d 448, 453 (Mont. 2009) (noting in 1973 Montana enacted an anti-recidivist statute, 46-18-502, MCA); Bordenkircher v. Hayes, 434 U.S. 357, 358, 359 (Ky. 1978) (noting in 1975 Kentucky enacted an anti-recidivist statute).

115. David H. Norris & Thomas Peters, *Fiscal Responsibility and Criminal Sentencing in Illinois: The Time for Change Is Now*, 26 J. MARSHALL L. REV. 317, 341 (1993).

116. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 630 (2012).

117. *Id.*

crimes.[118]

Illinois used to be at the forefront of juvenile reform,[119] but this changed with the enactment of Class X. In 1977, the Illinois General Assembly passed Class X, an anti-recidivist statute that is inconsistent with the goal of juvenile reform.[120] Former Illinois Governor James Thompson introduced an eight bill package, which included this legislation, as a "get tough on crime plan" that would change criminal sentencing.[121] The bill reclassified eight felony types as "class x" offenses and proposed imposing a mandatory determinate sentence of no less than six year to offenders.[122] On December 28, 1977, the Governor signed Public Act 80-1099.[123] The act went into effect on February 1, 1978.[124] The purpose of this legislation was to shift the focus from rehabilitation to the theories of incapacitation and deterrence.[125]

The statute has gone through various re-enactments since the establishment of this legislation, but the key language has remained the same.[126] The current statute, 730 ILCS 5/5-4.5-95(b),

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118. *Id.* at 633.

119. Bernabe, *supra* note 15, at 833 (noting that historically "Illinois has been thought to be at the forefront in the creation of a 'fair and equitable juvenile justice system.'").

120. Norris & Peters, *supra* note 115, at 330 (stating on April 8, 1977 the eight-bill legislation was introduced into the Senate of the Illinois General Assembly and later was adopted). The goal of the legislation was to "minimize reliance on rehabilitation, which was seen as ineffective." *Id.* at 329-30; Cole, *supra* note 27, at 335.

121. *Id.* at 317; Schuwerk, *supra* note 12, at 249 (discussing the legislative history of new offenses labeled Class X).

122. Schuwerk, *supra* note 12, at 249.

123. Norris & Peters, *supra* note 115, at 330; *see also* People v. Shelton, 567 N.E.2d 680, 685 (Ill. App. Ct. 4th Dist. 1991).

124. People v. Williams, 599 N.E.2d 913, 915 (Ill. 1992).

125. Norris & Peters, *supra* note 115, at 326, 329-30 (discussing the legislation history of class X and discussing the goal of legislation was to "minimize reliance on rehabilitation, which was seen as ineffective, and promote theories of retribution, incapacitation, and reformation" and determining a shift in perspective towards deterrence.).

126. *See* 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018) (applying to previous conviction in any court).

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, except for an offense listed in subsection (c) of this Section, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony, except for an offense listed in subsection (c) of this Section, and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." *Id.*; *see also Williams*, 599 N.E.2d at 915 (discussing then Class X statute). Pursuant to Ill. Rev. Stat. 1985, ch. 38, par. 1005 - 5 - 3(c)(8), "[w]hen a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted of any Class 2 or greater Class felonies in Illinois, and such charges are separately brought and tried and arise out of different

still uses the same language as the first statute: "[w]hen a defendant, over the age of 21 years, is convicted."[127] In Class X, the legislature recognized convicted defendants under twenty-one years old are more amenable to rehabilitation and less culpable because Class X does not increase defendants' sentences until after defendants have turned twenty-one.[128]

Moreover, Class X is inconsistent with the goal of rehabilitation and in line with the goal of incapacitation because the Act does not prohibit convictions obtained when the defendant was a juvenile. Pursuant to Class X, any conviction may be used to satisfy the former conviction element.[129] The Fifth District of the Illinois Appellate Court held "[a]ny conviction may be used as a former conviction under the habitual criminal statute."[130] The defendant argued that the habitual criminal statute did not apply to him because he was fifteen years-old when he committed his first conviction.[131] The court rejected defendant's theory because the court failed to see any difference between convictions obtained while the defendant is a minor versus convictions when the defendant is an adult.[132]

By contrast, thirty-two states, including Kentucky,[133] have prohibited the use of a juvenile adjudication to satisfy the prior conviction element in their anti-recidivist legislation.[134] It is hard

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series of acts, such defendant shall be sentenced as a Class X offender . . ." *Id.*

127. 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018).

128. *Brown*, 86 N.E.3d at 1107; *see* People v. Mendoza, 795 N.E.2d 316, 320 (Ill. App. Ct. 2nd Dist. 2003) (quoting People v. Storms, 626 N.E.2d 324, 327 (Ill. App. 2nd Dist. 1993)).

129. 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018); *see also* People v. Banks, 569 N.E.2d 1388, 1390 (Ill. App. Ct. 5th Dist. 1991).

130. *Banks*, 569 N.E.2d at 1390.

131. *Id.* at 1389.

132. *Id.* at 804-05.

133. KY. REV. STAT. ANN. § 532.080(2)(b) (2018) (requiring that defendant be 18 years old when committing the prior offense to qualify under its anti-recidivist statute prior conviction element).

134. Caldwell, *supra* note 116, at 619 n.240 (2012) (discussing that 10 states—Alabama, Kentucky, New Jersey, New Mexico, New York, North Dakota, Oregon, and Wisconsin—have statutory prohibited juvenile convictions from their anti-recidivist statutes). Moreover, 13 states—Alabama, Arizona, Arkansas, Delaware, Georgia, Kansas, Nebraska, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia, and West Virginia—through case law have prohibited the use of juvenile adjudications as prior convictions. *Id.* at 620 n.244; *see*, *e.g.*, State v. Smith, 13 P.3d 470, 473 (N.M. 2000) (holding New Mexico's Habitual Offender Statute does not apply because a criminal conviction does not include a juvenile adjudication according to N.M. Stat. § 32A-2-18); *see also* TENN. CODE ANN. § 40-35-120(e)(3) (2018) (excluding juvenile adjudication from being a prior conviction under Tennessee's Repeat Violent Offenders statute). The statute states:

> A finding or adjudication that a defendant committed an act as a juvenile . . . shall not be considered a prior conviction for the purposes

to justify that Illinois is not one of these states, because pursuant to 705 ILCS 405/1-8, a juvenile adjudication should "never be considered a conviction nor shall an adjudicated individual be considered a criminal."[135] In addition, anti-recidivist statutes are inconsistent with the juvenile court's "goal of rehabilitation."[136] The purpose of the Illinois juvenile court system is "[t]o provide an individualized assessment of each alleged and adjudication delinquent juvenile, in order to rehabilitate," which demonstrates Illinois's adherence to its goal of rehabilitation.[137] Allowing juvenile adjudications to satisfy the prior conviction element of Class X is not consistent with rehabilitation, but instead with incapacitation.

Class X legislation has caused various implementation mistakes in sentencing.[138] In 1995, ninety-two Class X offenders received a sentence less than the statutory minimum of six years.[139] In 2004, only twenty Class X offenders received a sentence less than the statutory minimum.[140] Moreover, the state does not need to give a defendant notice that it is seeking an enhanced sentence.[141] In Illinois, pursuant to 720 ILCS 5/111-3,"when the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant."[142] However, the Illinois Supreme Court in *People v. Easley* stated notice is "unnecessary" when the

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of this section unless the juvenile was convicted of the predicate offense in a criminal court and sentenced to confinement in the department of correction. TENN. CODE ANN. § 40-35-120(e)(3).

135. 705 ILL. COMP. STAT. 405/1-8(a) (2018).

136. Cole, *supra* note 27, at 335 (discussing how California's Three Strike Act is inconsistent with rehabilitation and citing to California statutes).

137. 705 ILL. COMP. STAT. 405/5-101(1)(c) (2018).

138. *See*, *e.g.*, *Hare*, 734 N.E.2d at 516-17 (finding defendant was subject to Class X and holding the Court's previous judgment was vacated because the plea agreement was less than the Class X sentence minimum); s*ee Mendoza*,795 N.E.2d at 318 (finding that defendant was subject to Class X and revoking his three-year probation and the court re-sentenced him to 10 years of imprisonment); *see also* People v. Whitfield, 888 N.E.2d 1166, 1169 (Ill. 2007) (finding defendant was not eligible for probation and noting regardless if the State mistakenly advised the Court of defendant's criminal history, defendant is still subject to Class X sentence).

139. Robert J. Jones et al., *2004 Statistical Presentation*, ILLINOIS DEP'T OF CORRECTIONS, 74 (Oct. 7, 2005), www2.illinois.gov/idoc/reportsandstatistics/Documents/Statistical%20Presentation%202004.pdf#search=class%20x (graphing the number of sentences that were less than statutory minimum limit for each class of felony and determining in 1995 there were 92 Class X offenders with sentences lower than the minimum).

140. *Id.* (demonstrating a decrease in number of wrongful sentences and stating in 2004 there were only 20 offenders with a sentence less than the statutory minimum).

141. People v. Easley, 7 N.E.3d 667, 672, 673 (Ill. 2014).

142. 725 ILL. COMP. STAT. 5/111-3 (2018).

enhanced sentence contains a prior conviction element.[143] This added another layer of complexity to the problem of Class X legislation. Problems have emerged since the enactment of Class X, forcing courts to interpret the text of the statute.[144] Class X has a disparate racial impact, where the number of black offenders is about double that of white offenders.[145] These facts demand that the Illinois Legislature amend Class X.

III. ANALYSIS

Section A of this analysis discusses the history of how Illinois courts have interpreted Class X. Section B compares Illinois's Class X to other states' anti-recidivist statutes. Section C discusses the Due Process and Equal Protection Clauses.

A. Class X and Illinois Courts

In 2000, the First District of the Illinois Appellate Court initially addressed Class X's language at issue, "over the age of 21, is convicted," in *People v. Baaree*.[146] The defendant, a twenty year-old, was arrested in July 1997 and charged with two separate drug possession offenses.[147] On April 20, 1998, he was found guilty of a Class 1 felony for the charged offenses, and four days later he turned twenty-one.[148] On May 22, 1998, Baaree's sentencing hearing took place and the court determined he was subject to Class X, then 730 ILCS 5/5-5-3(c)(8).[149] As a result of being subject to Class X, he was sentenced to a minimum of six years.[150] Class X enhanced Baaree's sentence by tacking on two years, as a Class 1 felony has a minimum of four years.[151] A Class X felony does not permit probation, while Class 1 felony does.[152]

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143. *Easley*, 7 N.E.3d at 672-73 (holding section 111-3(c) is applicable "only when the prior conviction is not an element of the offense" because the text "necessarily implies" such inference, "the fact of such prior conviction and the State's intention to seek an enhanced sentence are *not elements of the offense*") (emphasis in original).

144. *See*, *e.g.*, *Storms*, 626 N.E.2d at 327 (interpreting the term "over 21"); *see also Mendoza*, 795 N.E.2d at 318 (interpreting the term "over 21").

145. Hughes, *supra* note 82, at 40 (analyzing statistics on juvenile offenses across race).

146. People v. Baaree, 735 N.E.2d 720 (Ill. App. Ct. 1st Dist. 2000).

147. *Id.* at 722.

148. *Id.*

149. *Id.*

150. *Id.* at 721.

151. *Compare* 730 ILL. COMP. STAT. 5/5-4.5-25(a) (2018) (listing the imprisonment sentence for a Class X offender shall be "not less than 6 years and not more than 30 years") *with* 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2018) (listing the sentence of imprisonment for a Class 1 felony shall be a "sentence of not less than 4 years and not more than 15 years").

152. *Compare* 730 ILL. COMP. STAT. 5/5-4.5-25(d) (2018) (barring criminal

Baaree appealed his sentence, arguing he was not a Class X offender under the terms of statute.[153] The court determined the plain meaning of "conviction" or "convicted" was susceptible to more than one meaning because it was unclear if it occurred "upon defendant being found guilty or the imposition of a sentence."[154] The court ruled in favor of the defendant because "[w]here a statute creating or increasing a penalty or punishment is capable of two constructions, the construction favoring the accused is to be adopted."[155] The *Baaree* court interpreted Class X to apply either to the conviction or the defendant's sentencing hearing which was simply four days later. This was the first of many courts interpreting Class X, as more problems with the language would arise.

Soon thereafter, additional statutory complaints arose regarding Class X and the terms "over the age of 21, is convicted." In 2005, the First District Appellate Court heard another case regarding statutory interpretation of the terms "over 21" and "conviction" in *People v. Williams*.[156] However, the defendant in this case turned twenty-one, after the crime was committed and before he was found guilty.[157] The defendant appealed arguing first Class X is ambiguous.[158] Therefore, Class X did not apply to him because he was twenty years old when he committed the offense.[159] The court distinguished Williams from the defendant in *People v. Baaree*.[160] The defendant in *Baaree* turned twenty-one years old between the guilty verdict and sentencing.

The court observed that the primary objective of statutory construction "is to give effect to the intent of the legislature" by looking at the language and "giv[ing] it its plain and ordinary meaning." If the statute's terms are unambiguous, a court "must enforce it as enacted and may not depart from the language by creating exceptions, limitations or conditions not expressed by the legislature."[161] The court held the plain meaning of the term "conviction" was resolved by the court in *Baaree*; a conviction is defined as "the adjudication of guilt."[162] The court noted the *Baaree* court implicitly resolved the issue defendant raised here:

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defendants get probation or conditional discharge) *with* 730 ILL. COMP. STAT. 5/5-4.5-30(d) (2018) (permitting criminal defendants get probation but "shall not exceed 4 years").

153. *Baaree*, 735 N.E. 2d at 721.

154. *Id.* at 722-23.

155. *Id.* at 724.

156. *See* People v. Williams, 832 N.E.2d 925 (Ill. App. Ct. 1st Dist. 2005) (distinguishing the facts from *People v. Baaree*).

157. *Id.* at 927.

158. *Id.* at 926, 928.

159. *Id.*

160. *Id.* at 927.

161. *Id.* at 928.

162. *Id.*

"under a plain reading of the statute, it appears that a defendant's age at the time of conviction is the deciding factor in determining whether the statute will apply."[163] Williams also raised and lost the argument that Class X violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[164] The court noted that age was a not a suspect classification and therefore applied the rationale basis test.[165] Under its analysis the court determined Class X was "rationally related to the legitimate state goal of attempting to rehabilitate repeat offender under the age of 21 and punishing older repeat offenders more harshly."[166] In addition, Williams raised an argument that he trial was purposely delayed by the state to subject him to Class X, which the court rejected given that it is within the trial judge discretion to grant a continuance if it serves the ends of justice.[167]

This issue with Class X reappeared until there was a district split in the appellate courts.[168] In 2014, the Fourth District Appellate Court heard this issue in *People v. Douglas*.[169] Douglas appealed the dismissal of his post-conviction petition, arguing Class X did not apply to him because he was under twenty-one when he committed the offense.[170] When interpreting statutes, courts "view the statute as a whole, construing words and phrases in the light of other relevant statutory provision and not in isolation."[171] The court observed that it was not the first to discuss the issue, and not persuaded by the holding of previous courts.[172] Class X was ambiguous as to what "point in time defendant's age should be considered."[173] The statute was susceptible to more than one meaning and the court inserted the definition of defendant into the statute: "[w]hen a [person charged with an offense], over the age of 21 years, is convicted," and determined the statute was

163. *Id.* (quoting *Baree*, 735 N.E.2d at 722).

164. *Id.* at 928-30.

165. *Id.* at 928.

166. *Id.* at 929.

167. *Id.*

168. *Compare* People v. Stokes, 910 N.E.2d 98, 105-06 (Ill. App. Ct. 1st Dist. 2009) (holding defendant subject to Class X sentence as he was 21 years old when he was convicted or adjudicated guilty) *with* People v. Douglas, 13 N.E.3d 390, 396 (Ill. App. Ct. 4th Dist. 2014) (holding defendant not subject to Class X sentence because there is ambiguity with the term "defendant" and the "rule of lenity requires that any ambiguity be resolved in that manner which favors the accused.").

169. *Douglas*, 13 N.E.3d at 390.

170. *Id.* at 391 (discussing defendant's theory was Class X did not apply as he was not yet 21 years old.) Defendant failed to include this issue in his post-conviction petition. *Id.* However, it was not fatal as there is an exception. *Id.* at 392. In addition, defendant alleged Class X was unconstitutional as it violates ex-post facto, equal protection, and due process clauses. *Id.* at 393.

171. *Id.* at 394.

172. *Id.* at 394-95.

173. *Id.* at 396.

susceptible to more than one meaning.[174] Thus, Douglas was not subject to Class X because "when construing criminal statutes, the rule of lenity requires that any ambiguity must be resolved in the manner which favors the accused."[175]

In 2015, the Fourth District again addressed the issue of when a defendant's age should be considered in *People v. Smith*.[176] There, the court held Smith was not subject to Class X, because he was under twenty-one when charged, and remanded for a new sentence hearing.[177] This issue eventually reached the Supreme Court of Illinois.[178] The Supreme Court of Illinois granted the State's petition for leave to appeal.[179] In 2016, the Supreme Court of Illinois reversed the appellate court's decision.[180] The court held the defendant was subject to a Class X sentence because the statute is triggered by the date of conviction, not the date the crime was committed.[181] Defendant was nineteen years old at the time he committed the offense, and he was twenty years old when he was charged.[182] However, by the time of his trial, he was twenty-one years old.[183]

The court emphasized that it would "not depart from a statute's plain language by reading into it exceptions, limitations, or conditions that the legislature did not express. Where the statutory language is clear and unambiguous, it will be given effect as written, without resort to other aids of construction."[184] The court found Class X unambiguous as it does not reference a time period when defendant "committed" the crime or was "charged" with the crime, but it clearly states "[w]hen a defendant over the age of 21, is *convicted*."[185] The court noted the other sentencing provisions included time references to the date the crime was committed, such as 730 ILCS 5/5-5-3.2(b)(7): "[w]hen a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony."[186]

Afterwards, the Illinois Supreme Court directed the Fourth and First District Appellate Courts to vacate their previous orders.[187] The First District Appellate Court in *Brown* did so

174. *Id.*

175. *Id.*

176. People v. Smith, No. 4-13-0453, 2015 IL App. Unpub. LEXIS 1545, at *3 (Ill. App. Ct. 4th Dist. July 7, 2015).

177. *Id.* at *10.

178. *Smith*, 76 N.E.3d at 1251.

179. People v. Smith, 39 N.E.3d 1009 (Ill. 2015).

180. *Smith*, 76 N.E.3d at 1258.

181. *Id.*

182. *Id.* at 1255.

183. *Id.*

184. *Id.* at 1258 (citations omitted).

185. *Id.*

186. *Id.*

187. *See Brown*, 86 N.E.3d at 1106 (vacating previous order and holding Defendant is subject to a Class X sentence); *see also Douglas*, 13 N.E.3d at 229

regrettably: "[s]uch defendants are essentially punished for the passage of time, caused by factors outside their control that are unrelated to either their culpability or capacity for rehabilitation."[188] After the court vacated Brown's sentence, the court addressed his previously raised constitutional challenges: *Ex Post Facto*, Due Process, and Equal Protection.[189]

Brown alleged Class X was unconstitutional because it violated due process.[190] Brown claimed Class X violates due process first for not providing fair notice to defendants and second that it is arbitrary as there is no rational basis to subject defendants based on their age at the time of conviction.[191] In addition, Brown alleged Class X was unconstitutional because it violates the Equal Protection Clause as it subjects similarly-situated defendants to different sentences.[192] The court regrettably rejected both of Brown's constitutional arguments.[193] The court followed precedent and explained Class X is not an arbitrary exercise of the State's police power, nor does it treat similarly situated individuals differently.[194]

The court observed it does not "write on a clean state" when considering sentencing schemes that allow an increase in defendant's sentence based on a time after the date the crime was committed.[195] The court referenced two previous decisions: *In re Griffin* and *People v. Fiveash*.[196] In *Griffin* the court upheld defendant's sentence regardless of the facts he was twelve years old at the time he committed the crimes and the Juvenile Court Act expressly states it applies to those "13 years of age or older."[197]

(vacating previous order and holding Defendant is subject to a Class X sentence).

188. *Brown*, 86 N.E.3d at 1109.

189. *Id.* at 1106-13.

190. *Id.* at 1109.

191. *Id.*

192. *Id.*

193. *Id.* at 1112.

194. *Id.*

195. *Id.* at 1107-08.

196. *Id.*

197. *Griffin*, 440 N.E.2d 852, 853-54 (1982) (discussing the Juvenile Court Act allows the commitment of a delinquent minor so long as "he is 13 years of age or older.") Defendant Griffin, a 12-year-old, committed crimes on September 21, 1978, and he was found delinquent when he was 13 years old. *Id.* at 49. The sentencing hearing was to take place on January 24, 1979 but there was an extension for the hearing to take place on later dates. *Id.* A tri-agency program could not accept the defendant until he was 13 years old and the court determined the dispositional hearing should be set for March 14, four days after Griffin turned 13. *Id.* at 49-50. On March 14, the court decided the appropriate punishment was to send defendant to the Department of Corrections pursuant to section 5-2(1)(a)(5). *Id.* at 50. The People's argument was that subjecting defendant to the Act provided for the "best interest of the minor and the community" and the measures were "rehabilitative." *Id.* at 50-51. The Illinois Supreme Court held the appellate court's construction of the

The Illinois Supreme Court in *Fiveash* upheld defendant's sentence as an adult regardless of the fact that he committed the crimes when fourteen years old.[198]

The court noted Griffin did not raise constitutional challenges to the Juvenile Court Act; however, the Illinois Supreme Court's holding in *Griffin* "basing an individual's sentencing options on his age at the time of sentencing is 'no more arbitrary' than …. at time of the commission" implies the court would not view the statute as "violat[ing] principles of due process."[199] Furthermore, the court noted that the Illinois Supreme Court in *Fiveash* held "prosecuting defendant in an adult criminal court and imposing an adult sentence notwithstanding his age at the time he committed the offense did not violate due process principles."[200] Turning to Brown's argument that Class X violated the Equal Protection Clause, the court determined rationale basis applied because age is not suspect classification.[201] Suspect classifications include discrimination based on race, national origin, and alienage.[202] The court could not find defendant had "met his burden to establish an equal protection violation" considering the Illinois Supreme Court's reasoning in *Griffin* and *Fiveash*.[203]

B. Other States' Anti-Recidivist Criminal Statutes

This section will compare Illinois Class X to other states' anti-recidivist statutes that have an exception for young offenders. As of October 19, 2018, forty-eight states have anti-recidivist statutes.[204] As of October 19, 2018, only six states incorporate an

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Act was correct as the language shows the "only requirement is that the minor be 13 years at the time the order of commitment is entered." *Id.* at 51. The Court noted that the Act in other sections incorporated the "minor's age a stage other than disposition stages was to be controlling" and assumed if the legislature had intended other stages to control it would have expressed that intent. *Id.* at 52-53.

198. *Fiveash*, 39 N.E.3d at 924, 926.

199. *Brown*, 86 N.E.3d at 1108.

200. *Id.* at 1109.

201. *Id.*

202. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

203. *Brown*, 86 N.E.3d at 1109.

204. *C.f.* Alabama- ALA. CODE § 13A-5-9 (2018); Alaska- ALASKA STAT. §12.55.125(c)-(e) (2018); Arizona- ARIZ. REV. STAT. § 13-706 (2018); Arkansas- ARK. CODE ANN. § 5-4-501 (2018); California- CAL. PEN. CODE § 667 (2018); Colorado- COLO. REV. STAT. § 18-1.3-801 (2018); Connecticut- CONN. GEN. STAT. § 53a-40 (2018); Delaware- DEL. CODE ANN. tit. 11 § 4214 (2018); Florida- FLA. STAT. § 775.084 (2018; Georgia- GA. CODE ANN. § 17-10-7 (2018); Hawaii- HAW. REV. STAT. § 706-606.5 (2018); Idaho- IDAHO CODE § 19-2514 (2018); Illinois- 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018); Indiana- IND. CODE § 35-50-2-8 (2018); Iowa- IOWA CODE § 902.8 (2018); Kentucky- KY. REV. STAT. ANN. § 532.080 (2018); Louisiana- LA. STAT. ANN. § 15:529.1 (2018); Maryland- MD. CODE. ANN. CRIM. LAW § 14-101 (2018); Massachusetts- MASS.

age exception into the anti-recidivist statutes.[205] This section will

GEN. LAWS ANN. ch. 279, § 25 (2018); Michigan- MICH. COMP. LAWS § 769.11 (2018); Minnesota- MINN. STAT. § 609.1095(2) (2018); Mississippi- MISS. CODE ANN. § 99-19-81 (2018); Missouri- MO. REV. STAT. § 558.019 (2018); Montana- MONT. CODE ANN. § 46-18-502 (2017); Nebraska- NEB. REV. STAT. § 29-2221 (2018); Nevada- NEV. REV. STAT. §207.010 (2017); New Hampshire- N.H. REV. STAT. ANN. § 651:6 (2018); New Jersey- N.J. STAT. ANN. § 2C:43-7.1(b) (2018); New Mexico- N.M. STAT. ANN. § 31-18-17 (2018); New York- N.Y. PENAL LAW § 70.10 (2018); North Carolina- N.C. GEN. STAT. § 14-7.7 (2018); North Dakota- N.D. CENT. CODE, § 12.1-32-09 (2017); Ohio- OHIO REV. CODE ANN. § 2929.14(B)(1)(a)(v-vi) (2018); Oklahoma- OKLA. STAT. tit. 21, § 51.1 (2018); Oregon- OR. REV. STAT. § 161.725 (2018); Pennsylvania- 42 PA. CONS. STAT. § 9714 (2018); Rhode Island- R.I. GEN. LAWS § 12-19-21 (2018); South Carolina- S.C. CODE ANN. § 16-1-120 (2018); South Dakota- S.D. CODIFIED LAWS § 22-7-7 (2018); Tennessee- TENN. CODE ANN. § 40-35-120 (2018); Texas- TEX. PENAL CODE ANN. § 12.42 (2017); Utah- UTAH CODE ANN. § 76-3-203.5 (2018); Vermont- VT. STAT. ANN. tit. 13, § 11 (2018); Virginia- VA. CODE ANN. § 19.2-297.1 (2018); Washington- WASH. REV. CODE § 9.92.090 (2018); West Virginia- W. VA. CODE § 61-11-18 (2018); Wisconsin- WIS. STAT. § 939.62 (2018); Wyoming- WYO. STAT. ANN. § 6-10-201 (2018). *But see* Kansas- KAN. STAT. ANN. § 21-4711 (2018) (Repealed in July 1, 2011, Kansas no longer has an anti-recidivist statute); Maine- State v. Bennett, 592 A.2d 161, 162 (Me. 1991) (Maine no longer has an anti-recidivist statute as repealed in 1975).

205. *C.f.* Arizona- ARIZ. REV. STAT. ANN. § 13-706 (2018) (distinguishing those offenders at least 18 years old); Illinois- 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018) (distinguishing those who are 21 years old); Kentucky- KY. REV. STAT. ANN. § 532.080 (2018) (distinguishing those who are more than 21 years old); Minnesota- MINN. STAT. § 609.1095(2) (2018) (distinguishing those at least 18 years old); Montana- MONT. CODE ANN. § 46-18-502 (2017) (distinguishing those offender 21 years of age or older); and North Dakota- N.D. CENT. CODE, § 12.1-32-09(1)(c) (2017) (distinguishing offenders that are over 18 years old). *Contra* Alabama- ALA. CODE § 13A-5-9 (2018); Alaska- ALASKA STAT. §12.55.125(c)-(e) (2018); Arkansas- ARK. CODE ANN. § 5-4-501 (2018); California- CAL. PEN. CODE § 667 (2018); Colorado- COLO. REV. STAT. § 18-1.3-801 (2018); Connecticut- CONN. GEN. STAT. § 53a-40 (2018); Delaware- DEL. CODE ANN. tit. 11 § 4214 (2018); Florida- FLA. STAT. § 775.084 (2018; Georgia- GA. CODE ANN. § 17-10-7 (2018); Hawaii- HAW. REV. STAT. § 706-606.5 (2018); Idaho- IDAHO CODE § 19-2514 (2018); Indiana- IND. CODE § 35-50-2-8 (2018); Iowa- IOWA CODE § 902.8 (2018); Louisiana- LA. STAT. ANN. § 15:529.1 (2018); Maryland- MD. CODE. ANN. CRIM. LAW § 14-101 (2018); Massachusetts- MASS. GEN. LAWS ANN. ch. 279, § 25 (2018); Michigan- MICH. COMP. LAWS § 769.11 (2018); Mississippi- MISS. CODE ANN. § 99-19-81 (2018); Missouri- MO. REV. STAT. § 558.019 (2018); Nebraska- NEB. REV. STAT. § 29-2221 (2018); Nevada- NEV. REV. STAT. §207.010 (2017); New Hampshire- N.H. REV. STAT. ANN. § 651:6 (2018); New Jersey- N.J. STAT. ANN. § 2C:43-7.1(b) (2018); New Mexico- N.M. STAT. ANN. § 31-18-17 (2018); New York- N.Y. PENAL LAW § 70.10 (2018); North Carolina- N.C. GEN. STAT. § 14-7.7 (2018); Ohio- OHIO REV. CODE ANN. § 2929.14(B)(1)(a)(v-vi) (2018); Oklahoma- OKLA. STAT. tit. 21, § 51.1 (2018); Oregon- OR. REV. STAT. § 161.725 (2018); Pennsylvania- 42 PA. CONS. STAT. § 9714 (2018); Rhode Island- R.I. GEN. LAWS § 12-19-21 (2018); South Carolina- S.C. CODE ANN. § 16-1-120 (2018); South Dakota- S.D. CODIFIED LAWS § 22-7-7 (2018); Tennessee- TENN. CODE ANN. § 40-35-120 (2018); Texas- TEX. PENAL CODE ANN. § 12.42 (2017); Utah- UTAH CODE ANN. § 76-3-203.5 (2018); Vermont- VT. STAT. ANN. tit. 13, § 11 (2018); Virginia- VA. CODE ANN. § 19.2-297.1 (2018); Washington- WASH. REV. CODE § 9.92.090 (2018); West Virginia- W. VA. CODE § 61-11-18 (2018);

focus on the anti-recidivist statutes Kentucky, Minnesota, and Montana.

Kentucky's anti-recidivist statute, persistent felony offender sentencing ("PFO"), Ky. Rev. Stat. Ann. § 532.080, is the most similar to Class X.[206] The Kentucky legislature adopted this statute in 1974 and it became effective on January 1, 1975.[207] The statute, PFO, applies to those offenders who are over twenty-one years of age.[208] The statute states: "[a] persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies … and now stands convicted of any one (1) or more felonies."[209] The Supreme Court of Kentucky in *Hayes v. Commonwealth* held the plain meaning of PFO requires the offender be at least twenty-one years old when he stands convicted of another felony and not at the time of commission.[210] The dissent observed that subjecting defendant to this statute is "unrelated to [his] criminal liability" but simply punishment for turning twenty-one.[211] The Supreme Court of Kentucky re-affirmed the interpretation of PFO in *Harris v. Commonwealth*.[212] The court cited to *Hayes*, explaining the plain text of the statute means that the defendant is subject to PFO if he is "at-least twenty-one years old at the time of his conviction, even though he may have been less than twenty-one at the time of the underlying crimes."[213]

Wisconsin- WIS. STAT. § 939.62 (2018); Wyoming- WYO. STAT. ANN. § 6-10-201 (2018).

206. KY. REV. STAT. ANN. § 532.080(2) (2018). The statute states:

> A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony . . . a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided: (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and That the offender was over the age of eighteen (18) years at the time the offense was committed; and (c) That the offender: 1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted. KY. REV. STAT. ANN. § 532.080 (2012).

207. Hardin v. Commonwealth, 573 S.W.2d 657, 661 (Ky. 1978); KY. REV. STAT. ANN. § 532.080 (2018).

208. KY. REV. STAT. ANN. § 532.080 (2018).

209. KY. REV. STAT. ANN. § 532.080(3) (2018).

210. Hayes v. Commonwealth, 660 S.W.2d 5, 6 (Ky. 1983).

211. *Hayes*, 660 S.W.2d at 6.

212. Harris v. Commonwealth, 338 S.W.3d 222, 227 (Ky. 2011).

213. *See Harris*, 338 S.W.3d at 227-28 (discussing the plain language of that statute requires the age to be examined at the time of conviction). The court noted that the legislatures could have changed PFO as it was amended on more than one occasion. *Id.* at 228. It has been twenty-seven years since

In stark contrast, Minnesota's anti-recidivist statute increased sentences for certain dangerous and repeat felony offenders ("RFO"), Minn. Stat. § 609.1095, has a different date of application than Class X.[214] The Minnesota legislature enacted this statute in 1998.[215] The statute, RFO, applies to those offenders at least 18 years old.[216] RFO applies to individuals convicted of a "violent crime that is a felony … the judge may impose an aggravated durational departure from the presumptive imprisonment sentence … if the offender was at least 18 years old at the time the felony was committed, and… the offender has two or more prior convictions for violent crimes."[217] By examining the text of the statute, it is clear that a defendant who is eighteen years-old and commits a third violent crime is subject to RFO.

Finally, Montana enacted its anti-recidivist statute, sentencing of persistent felony offender statute ("MTPFO"), Mont. Code Ann. § 46-18-502 in 1973.[218] Originally, the statute did not

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the court decided *Hayes*. *Id.* Although the statute was amended, the legislature left this controversial language untouched. *Id.* The court presumed the "legislature agrees with, or at least has adopted, our interpretation." *Id.*

214. MINN. STAT. § 609.1095(2) (2018). The statute is known as the increased sentences for dangerous offender who commits third violent crime. MINN. STAT. § 609.1095(2) (2018). The statute states:

> Whenever a person is convicted of a violent crime that is a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence if the offender was at least 18 years old at the time the felony was committed, and: (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and (2) the fact finder determines that the offender is a danger to public safety. The fact finder may base its determination that the offender is a danger to public safety on the following factors: (i) the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications; or (ii) the fact that the present offense of conviction involved an aggravating factor that would justify a durational departure under the Sentencing Guidelines. MINN. STAT. § 609.1095 (2) (2018).

215. State v. Franklin, 847 N.W.2d 63, 68 (Minn. Ct. App. 2014).

216. MINN. STAT. § 609.1095(2) (2018).

217. *Id.*

218. MONT. CODE ANN. § 46-18-502 (2017). The statute is known as sentencing of persistent felony offender. MONT. CODE ANN. § 46-18-502 (2017). The statute states:

> (1) Except as provided in 46-18-219 and subsection (2) of this section, a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present offense. (2) Except as provided in 46-18-219, an offender shall be imprisoned in a

provide any exception for mandatory enhanced sentences.[219] MTPFO applies to those offenders twenty-one years old or older.[220] MTPFO states "a persistent felony offender shall be imprisoned … for a term not less than 5 years or more than 100 years … if the offender was 21 years of age or older at the time of the commission of the present offense."[221] By looking at the text of the statute, it is clear that if defendant is twenty-one or older at the commission of the crime, he is subject to MTPFO.

C. Developmental Neurological Science Suggests the Brain is Not Fully Formed Until the Age of Twenty-Five

Although developmental neuroscience studies have been around for some time state courts, federal courts, and the United States Supreme Court have not taken notice until recently. Developmental neuroscience derives from functional magnetic resonance imaging ("MRI"), and before a MRI was invented, it was believed that the brain was fully developed at the age of twelve.[222] MRIs allow scientists to perform brain developmental studies by using ionizing radiation to provided clear brain images.[223]

Since 2002, Supreme Court justices have cited to developmental neuroscience studies that demonstrated there are fundamental differences between juvenile and adult brains.[224]

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state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if: (a) the offender was a persistent felony offender, as defined in 46-1-202, at the time of the offender's previous felony conviction; (b) less than 5 years have elapsed between the commission of the present offense and: (i) the previous felony conviction; or (ii) the offender's release on parole, from prison, or from other commitment imposed as a result of the previous felony conviction; and (c) the offender was 21 years of age or older at the time of the commission of the present offense. (3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) of this section or the first 10 years of a sentence imposed under subsection (2) of this section may not be deferred or suspended. (4) Any sentence imposed under subsection (2) must run consecutively to any other sentence imposed. MONT. CODE ANN. § 46-18-502 (2017).

219. *Brendal*, 213 P.3d at 453.

220. MONT. CODE ANN. § 46-18-502 (2017).

221. *Id.*

222. Andrea Maciver, *The Clash Between Science and the Law: Can Science Save Nineteen-year-old Dzhokhar Tsarnaev's Life?*, 35 N. ILL. U. L. REV. 1, 15 (2014).

223. Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC HEALTH L.J. 1, 10 (2005).

224. *See* Maroney, *supra* note 16, at 92 (noting as far back as 2002, Supreme Court Justice Stevens hinted at neuroscience studies indicating that

This difference has become widely accepted and is reflected in the Supreme Court's recent decisions.[225] Developmental neuroscientists have long documented juveniles as volatile, impulsive, and poor risk evaluators.[226] Since then, new studies have demonstrated the brain continues to develop well past the age of eighteen.[227] These studies recognize the brain is not fully developed until the age of twenty-five.[228] For example, the frontal lobe of the brain is not fully developed until the age of twenty-five.[229] The frontal lobe is responsible for the "executive functions" of the brain, such as impulse control, planning, risk assessment, and decision-making.[230] Behind infancy, the greatest development stage of the brain is the development that occurs between the ages of ten and twenty-four.[231]

The Supreme Court is not the only institution paying

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adolescent minds are not fully developed.); *see also* Maroney, *supra* note 17, at 766 (noting Supreme Court opinions cited to the amicus briefs discussing the juvenile neuroscience studies to support the view that there are fundamental differences in juvenile brains and they should be treated differently from adult offender); *Miller*, 567 U.S. at 472 n.5 (discussing how post-Roper and Graham the research of developmental psychology and neuroscience has continued to increase and strengthen the belief that juvenile brains are different).

225. *See, e.g.*, *Graham*, 560 U.S. at 68 (noting that brain science continues to show "fundamental differences between juvenile and adult minds.").

226. Scarpino, *supra* note 86, at 867 (discussing juvenile brain development compared to that of an adult and noting how juveniles are more impulsive).

227. Deitch, *supra* note 81, at 7.

228. Andrew Michaels, *A Decent Proposal Exempting Eighteen to Twenty Year-Old From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 139, 146 n.36 (citing Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 Science 1358, 1358-59 fig.1 (2010), which found that the brain's maturity plateaus around twenty five.); Maroney, *supra* note 17, at 152 (discussing neuroscientists have suggested that brain is developed until the mid-twenties and not at the age of eighteen); Vivian E. Hamilton, *Immature Citizen and the State*, 2010 B.Y.U. L. REV. 1055, 1114-1(citing Laurence Steinber, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Review 78, 79 (2008)). The study found that individuals over 25-year-olds had increased emotional regulation, better impulse control, not affected by peer pressure, and have better executive function. *Id.*; Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 20 (2015) (citing Clea McNeely & Jayne Blanchard, *The Teen Years Explained: A Guide to Healthy Adolescent Development* 2 JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 2009, "[b]rain may not be completed until age 25."); Waterman v. State, 342 P.3d 1261, 1268 (Alaska Ct. App. 2015) (acknowledging the brain is not fully developed until an individual is 25 years old).

229. Rightmer, *supra* note 223, at 332 (citing Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 217 (2009)).

230. *Id.*; United States v. C.R., 792 F. Supp. 2d 343, 499-500 (E.D.N.Y 2011).

231. Rightmer, *supra* note 223, at 332.

attention to this neuroscience. State legislatures are recognizing the importance of this research as well and have considered or enacted juvenile justice bills informed by this research.[232] For example, the Connecticut legislature considered neurological studies before adopting its "raise the age" bill in 2007.[233] The Connecticut General Assembly appointed a committee to make a report which found juvenile brains are "not yet fully developed, take longer than adults to judge something to be a bad idea and are slower to respond appropriately."[234]

D. The Due Process and The Equal Protection Clauses

Constitutional challenges have been raised against Class X, including violations of the Due Process Clause and the Equal Protection Clause.[235] This section will analyze Class X under both clauses. There is virtually no difference whether a court uses a due process or equal protection analysis to protect a fundamental right.[236] The Due Process Clause appears both in the Fourteenth Amendment and Fifth Amendment.[237] The Fourteenth Amendment states, "nor shall any state deprive any person of life, liberty, or property, without due process of law."[238] Due process has two categories: procedural due process and substantive due process.[239]

The Due Process Clause protects individual's fundamental rights from being deprived by arbitrary government action.[240] A

232. *See* Francis Shen, *Legislating Neuroscience: The Case of Juvenile Justice*, 46 LOY. L.A. L. REV. 985, 997, 1000 (2013) (noting the state legislatures heard testimony on the findings of neuroscience studies when considering a certain juvenile justice bill).

233. Deitch, *supra* note 81, at 17.

234. *Id.* at 17 n.81.

235. *See Brown*, 86 N.E.3d at 1113, 1106-07 (discussing defendant's constitutional challenges: Ex Post Facto, Due Process, and Equal Protection and noting the court rejected the constitutional challenges and upheld Class X as constitutional).

236. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 950 (Rachel E. Barkow et al. eds., 5th ed. 2017).

237. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1726 (2012) (discussing the nation adopted the Fourteenth Amendment to "unambiguously" apply to the state after the Civil War ended); *see*, *e.g.*, Hurtado v. People of State of Cal., 110 U.S. 516, 535 (1884) (noting the Due Process Clause when "employed in the Fourteenth Amendment [is] to restrain the action of the states.").

238. U.S. Const. amend. XIV.

239. United States v. Salerno, 481 U.S. 739, 746 (1987) (two doctrines are substantive due process and procedural due process); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 417-18 (2010) (stating a major obstacle in analyzing Fourteenth Amendment Due Process Clause is distinguishing from substantive due process and procedural due process).

240. Chapman & McConnell, *supra* note 237, at 1729; Williams, *supra* note

court applies the highest level of scrutiny, strict scrutiny, when it considers government actions constitute a deprivation of an individual's fundamental right.[241] Usually the application of the strict scrutiny test is fatal to the challenged law.[242] The Supreme Court has used many theories to decide what is a fundamental right.[243] Under strict scrutiny, the government has the burden to show there is a compelling state interest.[244] The government has to persuade the Court that a "truly vital interest is served by the law."[245] In addition, the government must show the law is necessary to achieve its objective and it could not attain the goal through any other less restrictive means available.[246] On the other hand, the rational basis test is highly deferential to the government with the burden on the challenger.[247] A court will implement a rational basis test if it determines there is no fundamental right.[248]

A defendant can claim that Class X affects his or her right to liberty because during sentencing, Class X arbitrarily extends imprisonment solely for the passage of time.[249] Class X, which in some cases subjects an individual to increased sentencing merely because the individual did not get in front of a trier of fact in time, cannot be reconciled with "common and fundamental ideas of fairness." The counter argument that there is no violation of due process.[250] Moreover, the defendant could argue under the Due Process Clause that Class X is unconstitutionally void for vagueness.[251] The defendant could point to *Johnson v. United*

239, at 476; *see also* Consol. Waste Sys., LLC v. Metro Gov't of Nashville, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005).

241. Chemerinsky, *supra* note 236, at 951; *see also* Williams, *supra* note 239, at 427.

242. *Id.* at 727; Regents of Univ. of Cal. V. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., dissenting).

243. Chemerinsky, *supra* note 236, at 953.

244. *Id.* at 954.

245. *Id.*

246. *Id.*

247. *See* Williams, *supra* note 239, at 427.

248. Chemerinsky, *supra* note 236, at 952; Williams, *supra* note 239, at 427; *see generally* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (The Court classified the right as not fundamental and applied rational basis standard of review).

249. *See* United States v. Dyck, 287 F. Supp. 2d 1016, 1021 (D.N.D. 2003) (holding there is a fundament liberty interest, the "due process right arises at sentencing because sentencing involves the most extreme deprivation of personal liberty" and noting individualized sentencing is deeply rooted in America's legal tradition).

250. *See* United States v. Goodface, 835 F.2d 1233, 1236 (8th Cir. 1987) (rejecting defendant's argument that the anti-recidivist statue violates due process and noting there is no violation of due process "merely because a statute divests the trial judge of discretion to sentence as he might wish.").

251. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015)

States, where the Supreme Court held the federal Armed Career Criminal Act ("ACCA") residual clause as unconstitutionally vague.[252] The relevant part of the ACCA's residual clause stated a violent felony could also include "conduct that present a serious potential risk of physical injury to another."[253] The Court noted that ACCA "invites arbitrary enforcement by judges."[254] The Court determined the ACCA residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[255]

Similarly, a defendant can argue that Class X is vague because the language regarding conviction "leaves uncertainty" about whether defendant's crime will eventually qualify defendant as a Class X offender.[256] Class X's use of the term "conviction" makes it difficult for a defendant to know ahead of time whether his crime will subject him to a mandatory enhanced sentence.[257] Whether one is subject to Class X depends on the arbitrary result of the passage of time, which itself depends on factors outside the defendant's control, such as the court docket.[258] This leads to arbitrary results. The counter argument is that Class X is not vague regardless of the fact a defendant may not know with "mathematical certainty" what his sentence range will be or if he will be subject to Class X.[259] A person of ordinary intelligence would know if one commits a crime a month before turning twenty-one years old, a conviction is very likely to occur after his birthday.[260]

This counter argument fails for two reasons. First, it is an illusion that defendant has notice. As mentioned before although 720 ILCS 5/111-3 requires notice be given to the defendant when

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(determining the Act violated the 5th amendment due process clause for vagueness).

252. *Id.* at 2557 (noting that the residual clause denies fair notice to defendants and invites arbitrary enforcement by judges and holding the defendant's sentence increments deny due process).

253. *Id.* at 2555-56.

254. *Id.* at 2557.

255. *Id.* at 2558.

256. *See* Rose v. Locke, 423 U.S. 48, 50 (1974) (discussing "the fair-warning requirement" embodied in the Due Process Clause bars a state from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed.").

257. *See Brown*, 86 N.E.3d at 1109 (holding that Class X is not void for vagueness). A defendant is subject to Class X despite not knowing his sentence range with "mathematical certainty." *Id.* A reasonable person would have known that committing a Class 1 or Class 2 felony with two prior convictions of crimes with the same elements one month before turning twenty-one would have subjected him to a mandatory enhanced sentence. *Id.*

258. *See id.* at 1110 (noting Brown's argument that the date of conviction depends on factors outside his control such as how crowded the court's docket is or even delays due to DNA testing).

259. *See id.* at 1109 (holding defendant had the "fair warning" of the criminal penalties).

260. *See id.*

the State seeks an enhanced sentence due to a prior conviction unfortunately that is not the case.[261] The Illinois Supreme Court in *People v. Easley* held that notice is "unnecessary" when the enhanced sentence contains a prior conviction element.[262] Therefore, a defendant is not aware he is subject to a Class X sentence with a minimum of six years until his sentencing hearing. Second, the uncertainty will vary for each defendant. Even assuming an individual of ordinary intelligence would have known he would be subject to Class X if he committed a crime one month before his twenty-first birthday, the same cannot be said if the individual committed a crime sixteen months before his twenty-first birthday.[263] Moreover, Illinois law requires an incarcerated individual receive a trial within 120 days.[264] It would be harsh to impute that knowledge to an individual of ordinary intelligence who committed the crime more than four months before his twenty-first birthday. Therefore, Class X should be void for vagueness.[265]

The Equal Protection Clause prohibits the government imposing different treatments on individuals who are similarly situated.[266] The Fourteenth Amendment states "No state shall … deny to any person within its jurisdiction the equal protection of the laws."[267] There are three standards of review: strict scrutiny, intermediate scrutiny, and rational basis.[268] A court implements that highest standard, the strict scrutiny test, if the court finds a "suspect classification."[269] The analysis to determine if there is a suspect classification is if the social group: "1) constitutes a discrete and insular minority; 2) has suffered a history of discrimination; 3) is politically powerless; 4) is defined by an immutable trait; and 5) is defined by a trait that is generally

261. 725 ILL. COMP. STAT. 5/111-3 (2018).

262. *Easley*, 7 N.E.3d at 672-73 (holding section 111-3(c) is applicable "only when the prior conviction is not an element of the offense" because the text "necessarily implies" such inference, "the fact of such prior conviction and the State's intention to seek an enhanced sentence are *not elements of the offense*") (emphasis in original).

263. *See generally* Smith, 76 N.E.3d at 1253 (noting that Mathew Smith committed the crime on September 2, 2011). The state indicted him with the crime on January 20, 2012. *Id.* His trial was held on April 19, 2013. *Id.* at 1253-54.

264. 725 ILL. COMP. STAT. 5/103-5 (2018).

265. *See* United States v. Batchelder, 422 U.S. 114, 123 (1979) (noting that a criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden").

266. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (The Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respect alike.").

267. U.S. Const. amend. XIV.

268. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. Pa. J. Const. L. 739, 742-43 (2014).

269. *Id.* at 744.

irrelevant to one's ability to function in society."[270]

The United State Supreme Court has held that suspect classifications include discrimination based on race, national origin, and alienage.[271] Under strict scrutiny, the government bears the burden of establishing that a compelling interest justifies the law and that distinction drawn by the law is necessary to further that purpose.[272] Strict Scrutiny requires the classification to be "narrowly tailored" to accomplish a compelling state interest.[273] The purpose of using strict scrutiny is to look closely to make sure government is not following a stereotype but looking to an individual's merit.[274] Usually the application of the strict scrutiny test is fatal to the challenged law.[275] On the other hand, under rational basis the burden is on the plaintiff to show that there is an "absence of any legitimate basis for the law."[276] In addition, the plaintiff must show government classification cannot be "rationally related to a legitimate government purpose."[277] A court is not bound by what the legislature actually considered, but is free cite any rational justification for the law.[278] The rational basis standard of review has been criticized as "bordering on meaningless."[279]

A defendant could argue that a suspect class exist because Class X creates a racially discriminatory impact.[280] There are more black juvenile offenders than white juvenile offenders in juvenile correction centers.[281] For example, black juvenile offenders made up 69% of juvenile offenders convicted of Class 1 felony while white juvenile offender composed 21%.[282] In addition, black juvenile offenders composed 65% of the juvenile offenders convicted of a Class 2 felony while white juvenile offenders made up 25% of the population.[283] Proponents of Class X legislation

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270. *Id.* at 742 (citing *City of Cleburne,* 473 U.S. at 442-47).

271. *See* Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 159 (Conn. 2008); *see City of Cleburne*, 473 U.S. at 440; *see also* Chemerinsky, *supr*a note 236, at 727 (discussing the standards of review that may apply given the type of alleged governmental discrimination).

272. Chemerinsky, *supra* note 236, at 727.

273. Pollvogt, *supra* note 268, at 744.

274. *See* Plyer v. Doe, 457 U.S. 202, 222 (1982).

275. *Id.* at 727; Regents of Univ. of Cal. V. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., dissenting).

276. Pollvogt, *supra* note 268, at 744.

277. Chemerinsky, *supra* note 236, at 732.

278. *Id.* (citing McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

279. Pollvogt, *supra* note 268, at 745.

280. *See* Hughes, *supra* note 82, at 40 (graphing the number of juvenile offenders based on race for each felony class).

281. *Id.*

282. *Id.* (listing 70 white offenders and 228 black offenders out of 331 juvenile offenders).

283. *Id.* (listing 143 white offenders and 363 black offenders out of 561 juvenile offenders).

would argue there is no suspect class because Class X only makes a distinction based on age.[284] The state would argue although age makes distinctions it is not a suspect class; therefore, Class X is subject to rational basis.[285] There is second way to get the strict scrutiny test, a defendant could state that Class X affects a fundamental right.[286] A defendant could state Class X affects the right to liberty by infringing on an individual right to not be arbitrarily confined for an extended period simply for the passage of time.[287]

IV. PROPOSAL

Illinois used to be at the forefront of juvenile reform,[288] but has since receded in the advancement of modern juvenile reform. Ever since the Illinois legislature passed the 1977 Class X legislation as a "get tough on crime" plan,[289] Illinois has been on equal footing with Kentucky, one of nation's toughest states on crime.[290] Although only six of the forty-eight states with anti-recidivist statutes carved an exception for juvenile offenders, Class X has carved out an exception for juvenile offenders in an arbitrary manner.

However, a few select changes to the terms of Class X can ensure the plain meaning of the statute is consistent with the goals of juvenile reform. Section A below proposes a model for the Illinois legislature to incorporate. Section B argues that Class X needs to be amended to comply with both the Due Process and Equal Protection Clauses.

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284. *See* 730 ILL. COMP. STAT. 5/5-4.5-95 (2018).

285. *Brown*, No. 86 N.E.3d at 1109.

286. Pollvogt, *supra* note 268, at 744.

287. *Dyck*, 287 F. Supp. 2d at 1021 ("due process right arises at sentencing because sentencing involves the most extreme deprivation of personal liberty").

288. Bernabe, *supra* note 15, at 833 (noting that historically "Illinois has been thought to be at the forefront in the creation of a 'fair and equitable juvenile justice system'.").

289. Norris & Peters, *supra* note 115, at 330 (introducing Class X legislation into the Senate of the Illinois General Assembly on April 8, 1977).

290. Peter Wagner & Wendy Sawyer, S*tate of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), www.prisonpolicy.org/global/2018.html (comparing United States' incarceration rates). The state of Kentucky places ninth place in states with the highest incarceration rates. *Id.*; *See generally* Robert G. Lawson, Article, *Difficult Times in Kentucky Corrections-Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 311, 325, 336 (2005) (discussing how since the adoption of Kentucky's new criminal code there has been a 600% spike in inmate population and noting in 1980 the inmate population was 3,723, while in 2003 it rose to 17,330). Meanwhile, Kentucky's population increased only 25%. *Id.* at 325.

A. Proposed Model for Illinois Legislature to amend Class X, 730 ILCS 5/5-4.5-95(b).

Class X, as written, leads to unjust results. A defendant will be imprisoned longer because Class X increases the minimum sentence of imprisonment from one-third of the time if it is a Class 1 felony or up to double the time if a Class 2 felony simply because the defendant turned twenty-one while awaiting the outcome of the charge.[291] Suppose twin brothers, Albert and Bobby, live in different counties in Illinois. Both possess a stolen firearm, which is a Class 2 felony. They have previously been convicted of that charge twice. Albert is discovered with this stolen firearm and charged in a county with a faster court docket. Albert is convicted of his third offense a day before his twenty-first birthday. Thus, Albert is subject to a minimum sentence of three years.[292] Bobby is discovered with his stolen firearm and charged in a county with a slower docket. Bobby is convicted of his third offense a day after his twenty-first birthday. Thus, Bobby is subject to a minimum sentence of six years and cannot receive probation.[293] It would be unfair and harsh to subject Bobby to a mandatory enhanced sentence of three years simply because he had the bad luck of having to wait longer for his conviction.

Moreover, this proposed model solves the arbitrary manner Class X distinguishes which young offenders to subject a minimum of six years. No longer will defendants be "punished for the passage of time, caused by factors outside their control that are unrelated to either their culpability or capacity for rehabilitation."[294] The passage of time from when the defendant committed the offense in entirely unrelated to defendant's potential for rehabilitation.[295] Moreover, the passage of time is not based on defendant's culpability.[296] The new model will set forth logical penalties and consequences based on defendant's state of

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291. *See* 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2018) (listing the sentence of imprisonment for a Class 1 felony shall be a sentence of "not less than 4 years and not more than 15 years"); *see* 730 Ill. Comp. Stat. 5/5-4.5-35 (2018) (noting the sentence of imprisonment for a Class 2 felony shall be a sentence of "not less than 3 years"); *see also* 730 ILL. COMP. STAT. 5/5-4.5-25(a) (2018) (imprisonment for a Class X offender is "not less than 6 years and not more than 30 years").

292. *See* 730 Ill. Comp. Stat. 5/5-4.5-35 (2018) (listing the sentence is "not less than 3 years").

293. *See also* 730 ILL. COMP. STAT. 5/5-4.5-25 (2018) (listing the sentence for Class X offender is "not less than 6 years" and excluding probation).

294. *Brown*, 86 N.E.3d at 1113 (discussing that Class X's application is of "questionable legislative efficiency" given that defendants convicted before 21 will be excluded, yet those offenders who have the bad luck of being convicted after turning 21 are punished based solely on the passage of time).

295. *Id.* at 1110.

296. *Id.*

mind and his action at the time he committed the crime. Most importantly, this new model would ensure a sentence is based on justice, and not bad luck.

In addition, Class X is not in line with neuroscientific studies mentioned above that the brain is not fully developed until the age of twenty-five. This Comment proposes a model statute change to 730 ILCS 5/5-4.5-95(b). The statute should raise the age to twenty-five and clarify that the statute is triggered on the day the crime was committed, not when the offender is convicted.[297] Traditional notions of when adulthood commences is not supported by neurological studies.[298] Drawing the line at twenty-fine will be supported by the neurological studies. In addition, the new model would be consistent with Illinois's attempts to extend juvenile jurisdiction to twenty-five-year-olds.[299] It is time for Illinois juvenile justice law to reflect the neurological studies that indicate a brain is not fully developed until age twenty-five.

The proposed revision is as follows: "When a defendant is 25 years or older at the time of commission of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as the offense now classified in Illinois as a Class 2 or greater Class felony … that defendant shall be sentenced as a Class X offender."[300]

B. Analyzing Class X against the Due Process Clause and the Equal Protection Clause

As noted above, defendants have raised constitutional challenges Class X, such as violations of the Due Process Clause and the Equal Protection Clause.[301] Similar constitutional challenges were raised against PFO.[302] The Kentucky Supreme

297. *But see* 730 ILL. COMP. STAT. 5/5-4.5-95(b) (2018) ("[w]hen a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as the offense now . . . that defendant shall be sentenced as a Class X offender.").

298. Jessica Lee, Note, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845, 872 (2016).

299. *See* Tabashneck, *supra* note 89, at 13.

300. *See* 730 ILL. COMP. STAT. 5/5-4.5-95 (2018) (incorporating the changes of the actual statute from the proposed model in bold. The author of the comment proposes two separate changes. One change is raising the applicable age to 25, and the other is to change the terms to focus on the age the crime was committed. This proposal is virtually identical to that of Montana's anti-recidivist statute.); *See* MONT. CODE ANN. § 46-18-502 (2017).

301. *Brown*, 86 N.E.3d at 1106-07 (discussing defendant's constitutional challenges: Ex Post Facto, Due Process, and Equal Protection and noting the court rejected the constitutional challenges and upheld Class X as constitutional).

302. *Harris*, 338 S.W.3d at 228.

Court rejected defendant's argument and upheld PFO.[303] The Illinois Supreme Court has not directly address the constitutionality of Class X.[304] However, the First District Appellate Court in *Brown* noted the Illinois Supreme Court upheld a "similar sentencing scheme against claims of arbitrariness and due process violations."[305]

However, respectfully, the First District Appellate Court was wrong. Under the court's Due Process analysis, there was no discussion as to why the rational basis standard of review applied.[306] Those cases are distinguishable because the statutory scheme as applied to defendants Griffin and Fiveash, would even satisfy the strict scrutiny test. There would be no other less restrictive means to achieves the states goal. In stark contrast, Class X would not be able to satisfy the strict scrutiny test.[307] Class X infringes on a defendant's fundament right to liberty because the Act arbitrarily extends sentencing by focusing on the age when the defendant receives a conviction.[308] Moreover, Class X violates the Due Process Clause because the Act is vague. Unlike Kentucky,[309] Illinois does not require that prior notice be given to the defendant.[310] As mentioned above, Class X does not involve "mathematical certainty" but guessing whether the defendant should have known he would be subject to the statute. It is unsuitable to impute knowledge on an individual who committed a crime sixteen months before his twenty-first birthday.[311]

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303. *Id.* at 228-29 (rejecting Harris's claims that KRS 532.080(2) violates the Due Process Clause). The Kentucky Supreme Court held the statute to be constitutional. *Id.* The court cited to Rust v. Sullivan, 500 U.S 173, 183 (1991) that a "facial challenge to a legislative Act . . . is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstance exists under which the Act must be valid." *Id.* Because under the circumstances, where there a defendant is "over twenty-one at the time he commits the underlying crime" the statute is constitutional and defendant cannot support a facial constitutional claim. *Id.*

304. *See Smith*, 76 N.E.3d at 1251 (analyzing only the statutory interpretation of Class X).

305. *Brown*, 86 N.E.3d at 1106.

306. *Id.* at 1110, 1112.

307. *See* Chemerinsky, *supra* note 236, at 727 (noting that typically when a court applies strict scrutiny to an allegedly unconstitutional law it is fatal to the law).

308. *See* People v. Olivas, 551 P.2d 375, 376-77 (Cal. 1976) (holding that a fundamental right to liberty exists and trigger the strict scrutiny test). The court found a right to liberty involving a juvenile being committed longer than adults could be incarcerated for commission of the same offense. *Id.* The court analyzed the statute under the equal protection clause. *Id.*

309. Price v. Commonwealth, 666 S.W.2d 749, 750 (Ky. 1984) (interpreting the PFO statute as requiring the state to provide defendant with "notice of [enhancement] before the trial of the underlying substantive offense" and holding a separate indictment satisfies this requirement).

310. *Easley*, 7 N.E.3d at 672-73 (holding notice is "unnecessary" when the enhanced sentence contains a prior conviction element).

311. *See generally* Smith, 76 N.E.3d at 1253 (noting that Mathew Smith

Therefore, Class X is invalid because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[312]

However, the argument that Class X violates The Equal Protection Clause would fail. There is not suspect classification even though Class X has a racially discriminatory impact. The Supreme Court has held that discriminatory impact is insufficient to prove racial classification unless there is evidence of a discriminatory purpose behind the law.[313] There is no evidence that Class X was enacted to target racial minorities. Class X was enacted as a "tough on crime plan" thus is was in spite of race.[314]

As strict scrutiny applies, Illinois bears the burden of establishing that a compelling government interest both justifies the distinction drawn and is necessary because its purpose cannot be achieved through a less discriminatory alternative.[315] The state will fail to show Class X can pass strict scrutiny because although there might be a compelling state interest, other less discriminatory alternative exists. The state has to look no further than to Minnesota's and Montana's anti-recidivist statutes, which focus on defendant's age when the crime was committed, in order to find other least restrictive alternative.[316] These statutes have the perfect fit as they are narrowly tailored to not arbitrarily imprison those offenders under the age they have deemed as less culpable. Therefore, Class X violates the Due Process Clause.

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committed the crime on September 2, 2011). The state indicted him with the crime on January 20, 2012. *Id.* His trial was held on April 19, 2013. *Id.* at 1253-54.

312. *See Batchelder*, 422 U.S. at 123 (noting criminal statute is invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.").

313. Chemerinsky, *supra* note 236, at 781; *see* Washington v. Davis, 426 U.S. 229, 232 (1976) (upholding D.C. qualifying metro police exam through rational basis standard) The court noted that although there was a disproportionate impact and African Americans were failing more than four times as whites and only 1% of D.C. officers were African Americans, discriminatory purpose is needed to trigger strict scrutiny. *Id.* at 239; *Contra* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (noting that although the San Francisco statute was facially neutral there was such a big racial disparity in approved applications that the only justification was a discriminatory purpose). Around 240 Of the 320 laundries in the city were owned by Chinese individuals. *Id.* The petitioner as well as 200 individuals petitioned the board for a variance to force the board to comply with the statute and operate a laundry in a wood building. *Id.* However, all petitions of Chinese individuals except one were denied. *Id.*

314. Norris & Peters, *supra* note 115, at 330.

315. *See* Chemerinsky, *supra* note 236, at 727 (explaining that the government has the burden to show there is a compelling state interest and is narrowly tailored).

316. MINN. STAT. § 609.1095(2) (2018); MONT. CODE ANN. § 46-18-502 (2017).

V. CONCLUSION

In American society, there has been a long problem with juvenile delinquency. The way society grapples with a solution in responding to the problem depends on the societal views of these offenders. Do we perceive them as children or predators? Juvenile courts have transformed over the years, but the scales have tilted back to viewing young offenders closer to adult than children. The recent change is reflected in states continuing to raise the age of juvenile jurisdiction. States are increasingly recognizing the injustice of punishing young offenders the same as adults. This is reflective in the recent trend of legislation that raises the age of juvenile jurisdiction. Some states, including Illinois, are attempting to raise the juvenile jurisdiction age to twenty-five years-old.

This, combined with developmental neurological studies which have found the brain is not fully developed until twenty-five, suggests Illinois should raise the age of Class X statute to twenty-five. It is logical to raise the age of Class X given that it is an extremely harsh punishment to increase the time of imprisonment by two-thirds or double simply due to the passage of time between the crime and the conviction. In addition, other states' anti-recidivist statutes, such as Minnesota and Montana, have narrowly drawn their youth offender exception to be effective without arbitrarily distinguishing between offenders. The Illinois legislature should amend Class X to this Comment's proposed model statute. Not only will Class X comply with the Due Process Clause, but it would incorporate society's perception of fairness and justice that Class X currently lacks. The model statute provided above in this Comment ensures that offenders get justice, not simply the bad luck of losing the race towards a conviction.