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## Note

### What's My Age Again? The Immigrant Age Problem in the Criminal Justice System

Ross Pearson\*

According to government documents, on New Year's Day, 1997, Gadeise Gebywe celebrated her birthday with a special gift: she gave birth to her daughter, Derartu.<sup>1</sup> And while two New Year's birthdays would be rare enough, the coincidence did not end with mother and daughter. Gadeise's friend, Amina Adam, was also born on January 1,<sup>2</sup> as were an estimated 200,000 other immigrants living in the United States.<sup>3</sup> In reality, odds are Derartu was not born on New Year's Day, and maybe not even in 1997. But because Derartu—like Gadeise, Amina, and roughly 200,000 other refugees—does not have records of her birth, the government uses the date Derartu's mother estimated, January 1, 1997, for administrative purposes.<sup>4</sup>

These approximated birth dates allow the government to administer benefits<sup>5</sup> and track and control immigration flow,<sup>6</sup>

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\* Law Clerk to Hon. Ralph Erickson (D.N.D.); J.D. 2013, University of Minnesota Law School; B.A. 2009, University of Minnesota. The author thanks Mark Kappelhoff for his encouragement and feedback; Kim Hegvik and Ryan Younggren for their help developing the topic; Sam Light and the editors and staff of the Minnesota Law Review for their hard work and diligence; and Laura Stecker for her continuous love and support. Copyright © 2013 by Ross Pearson.

1. Annie Baxter, *Jan. 1 a Common Birth Date for Many Immigrants*, MINN. PUB. RADIO (Dec. 29, 2009), <http://minnesota.publicradio.org/display/web/2009/12/29/january-1-birthdays/>.

2. *Id.*

3. Michelle Breidenbach, *On New Year's Day, Wish a 'Happy Birthday' to 202,000 Refugees*, THE POST-STANDARD, Jan. 1, 2011, [http://www.syracuse.com/news/index.ssf/2011/01/on\\_new\\_years\\_day\\_wish\\_a\\_happy.html](http://www.syracuse.com/news/index.ssf/2011/01/on_new_years_day_wish_a_happy.html).

4. Baxter, *supra* note 1; Breidenbach, *supra* note 3.

5. *Cf.* INNOCENTI RESEARCH CTR., UNITED NATIONS CHILDREN'S FUND, BIRTH REGISTRATION AND ARMED CONFLICT 2 (2007), available at [http://www.unicef.org/protection/birth\\_registration\\_and\\_armed\\_conflict\(1\).pdf](http://www.unicef.org/protection/birth_registration_and_armed_conflict(1).pdf) [hereinafter UNICEF, BIRTH REGISTRATION] (discussing hampered access to social services for displaced children around the globe).

but they lack both certainty and accuracy. This uncertainty and inaccuracy breeds the immigrant age problem, a problem that arises when these immigrants clash with a criminal justice system that demands greater age-specificity than these immigrants can provide. Specifically, the immigrant age problem arises at three stages of the criminal process. First, a defendant's age may determine which court—juvenile or adult—has jurisdiction,<sup>7</sup> so the prosecutor must know the defendant's age to charge him in the right court. Second, a defendant's or victim's age might be an element of the crime,<sup>8</sup> requiring the State to prove age beyond a reasonable doubt. Third, a defendant's age may limit the maximum sentence a court may render.<sup>9</sup>

Age matters, but courts have not crafted standards to solve the immigrant age problem. Different states place different burdens on prosecutors to prove a defendant's age as a jurisdictional fact,<sup>10</sup> and many states have not addressed this problem.<sup>11</sup> Uncertainty surrounding the defendant's or victim's age may allow the defendant to escape prosecution.<sup>12</sup> And while the Supreme Court has held that children under age eighteen cannot get death sentences, courts have not addressed how to determine a proper sentence when they do not know the defendant's age.<sup>13</sup>

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6. See DANIEL C. MARTIN & JAMES E. YANKAY, U. S. DEPT OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2011, at 3 (2012).

7. See MELISSA SICKMUND, JUVENILES IN COURT, U.S. DEPT OF JUSTICE 5 (2003), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/195420/contents.pdf>.

8. *E.g.*, MINN. STAT. § 609.342 (2011) (criminalizing sexual conduct in the first degree based on the age difference between the victim and defendant).

9. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding unconstitutional mandatory sentences of life without parole for juveniles); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that the Eighth Amendment categorically prohibits life without parole sentences for juveniles convicted of non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (holding death sentences for juveniles categorically unconstitutional).

10. Compare *State v. Ali*, 806 N.W.2d 45, 46 (Minn. 2011) (preponderance of the evidence), with *State v. Mohamed*, 899 N.E.2d 1071, 1075 (Ohio Ct. App. 2008) (beyond a reasonable doubt).

11. See, *e.g.*, E-mail from Kim Hegvik, Assistant State's Attorney, Cass Cnty., N.D., to author (Nov. 14, 2012, 14:54 CST) (on file with author) [hereinafter Hegvik e-mail].

12. Cf. Laura Yuen, *3 Guilty in Somali Gang Sex Trafficking Case*, MINN. PUB. RADIO (May 4, 2012), <http://minnesota.publicradio.org/display/web/2012/05/04/sex-trafficking> (noting that defendants challenged victim's age due to victim's invalid birth certificate).

13. See *Roper*, 543 U.S. at 578–79.

This Note develops standards to address the refugee age problem in the criminal process. Part I examines the origins of the age problem and discusses the significance of age in each step of the criminal process: charging, trial, and sentencing. Next, Part II analyzes the problems age uncertainty creates and how courts address these issues at each step of the criminal process. Finally, Part III addresses possible solutions and proposes burdens of proof for each stage of the process. Specifically, this Note argues that (1) at charging, the refugee's age documentation should serve as rebuttable proof of age; (2) at trial, the refugee's age documentation should not be admissible for proof of age; and (3) at sentencing, the court should not consider the refugee's age at all, but rather his "age characteristics."

## I. BACKGROUND

In most cases, the court will know the defendant's age. In others, it will not. But current immigration procedures allow immigrants without known birth dates to obtain official government documents that list their "official" birth dates.<sup>14</sup> Therefore, the immigrant age problem presents a unique dilemma: the defendant has an "official" date of birth, but the court still does not know his age.

This section first traces how the immigrant age problem originates. Specifically, it examines how an immigrant can enter immigration proceedings without knowing his date of birth and exit with an official document—and therein government certification—that lists a precise birth date. Next, this section explores the three stages at which a defendant's age can substantially affect the criminal process: charging, trial, and sentencing.

### A. UNREGISTERED CHILDREN

The immigrant age problem stems from inaccurate birth documents, so it often begins abroad when children are born but not given official birth records.<sup>15</sup> While the United Nations Convention on the Rights of a Child dictates that States should register children immediately after birth,<sup>16</sup> births often go un-

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14. 8 C.F.R. § 103.2(b) (2012).

15. UNICEF, BIRTH REGISTRATION, *supra* note 5, at 3. The process of recording children's birth dates is called "registration." *Id.*

16. Convention on the Rights of the Child art. VII, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* International Covenant on Civil and Political Rights art.

registered,<sup>17</sup> usually for one of four reasons.<sup>18</sup> First, legal requirements may impose barriers on families that prevent them from registering births. For instance, some states charge high registration fees,<sup>19</sup> only register children born in wedlock,<sup>20</sup> or require parents to identify themselves before they can register their children.<sup>21</sup> Second, countries in armed conflict, such as Ethiopia and Sudan, lack the administrative systems needed to record and track childbirths.<sup>22</sup> Third, some parents refuse to register their children out of fear that the government will use registration logs to target their children for ethnic cleansing or conscription.<sup>23</sup> Finally, some cultures simply do not emphasize birth registration.<sup>24</sup>

Without proper birth registration, children face a number of problems. They might not receive social benefits.<sup>25</sup> They might be unable to reconnect with separated family members.<sup>26</sup> And they might be forcibly trafficked without detection.<sup>27</sup>

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24. Dec. 16, 1966, 999 U.N.T.S. 171 (“Every child shall be registered immediately after birth and shall have a name.”).

17. *Facts and Figures*, PLAN, <http://plan-international.org/birthregistration/the-campaign/facts-and-figures/> (last visited Oct. 31, 2013).

18. *Id.*

19. *Cf.* Mariana Muzzi, *UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000–2009); Case Studies: Bangladesh, Brazil, the Gambia and Delhi, India* 6 (United Nations Children’s Fund, Working Paper, Jan. 2010), available at [http://www.unicef.org/protection/Birth\\_Registration\\_Working\\_Paper\(2\).pdf](http://www.unicef.org/protection/Birth_Registration_Working_Paper(2).pdf) (suggesting making birth registration free of charge as a way to increase registration).

20. *Id.* at 42.

21. For example, in certain areas of Peru, parents must present their own identification to register a child to discourage the parents from associating with rebel groups. UNICEF, *BIRTH REGISTRATION*, *supra* note 5, at 8. Therefore, parents that do not have documents themselves cannot register their children either. *Id.*

22. *Id.* at 7.

23. *Id.* at 10.

24. *See, e.g.*, *United States v. Dire*, 680 F.3d 446, 476 (4th Cir. 2012) (“[M]ost Somalis do not know their exact birth date . . . .” (quoting *United States v. Hasan*, 747 F. Supp. 2d 642, 676–77 (E.D. Va. 2010))).

25. UNICEF, *BIRTH REGISTRATION*, *supra* note 5, at 11.

26. *Id.* at 13–14.

27. *Id.* at 9. For example, in Southeast Europe, non-governmental organizations estimate that 70 percent of trafficked women and girls do not have valid birth documents. UNITED NATIONS CHILDREN’S FUND ET AL., *TRAFFICKING IN HUMAN BEINGS IN SOUTHEASTERN EUROPE* 141 (2002), available at <http://www.osce.org/odhr/18540>. *But cf.* ASIAN DEV. BANK, *LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 2007: LEGAL IDENTITY FOR INCLUSIVE DEVELOPMENT* 5 (Caroline Vandenabeele & Christine V. Lao eds., 2007)

Proper documentation alone can help alleviate some of these problems—regardless of whether the document accurately lists the child's birthday.<sup>28</sup> Therefore, in order to prevent these problems, many international organizations partner with foreign governments to increase registration rates.<sup>29</sup> The goal is simple: give each child a birth document. But to achieve this goal, the child's actual birth date is immaterial. After all, any form of registration will allow a child to collect social benefits, reunite with separated family, and better avoid trafficking.<sup>30</sup> Therefore, these organizations allow parents to estimate the child's date of birth, sometimes up to ten years after his actual birth.<sup>31</sup> As a result, the child ends up with an official birth document with an inaccurate birth date.<sup>32</sup>

#### B. IMMIGRATION TO THE UNITED STATES

When children emigrate to – or take refuge in – the United States, immigration procedures require that the government give them official documents listing biographical information, including date of birth.<sup>33</sup> In fact, even when the child does not know his exact date of birth, the government must still give him an official document that lists a date of birth, albeit an estimated date.<sup>34</sup> As a result, by law the child will end up holding an official government identification with an official birth date, even though that date is based merely on the child's (or his parents') best guess.<sup>35</sup> Specifically, this paradox occurs in two instances. First, the estimated date of birth listed on a child's birth registration<sup>36</sup> will become his "official" U.S. birth date. Second, when the child has no registration, he may estimate a birth date, which will then become his "official" birth date.<sup>37</sup>

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(noting that in developing countries birth registration might not fix these problems).

28. See *supra* notes 25–27 and accompanying text.

29. See Muzzi, *supra* note 19, at 5.

30. *Id.* at 35.

31. See CLAIRE CODY, PLAN, COUNT EVERY CHILD: THE RIGHT TO BIRTH REGISTRATION 63 (2009) [hereinafter PLAN, COUNT EVERY CHILD], available at <http://plan-international.org/birthregistration/files/count-every-child-2009>.

32. See *id.*

33. See E-mail from Steve Blando, Pub. Affairs Officer, U.S. Citizenship & Immigration Servs., to author (Oct. 23, 2012, 08:32 CST) [hereinafter Blando e-mail] (on file with author).

34. See *id.*

35. *Id.*

36. See *supra* Part I.A.

37. 8 C.F.R. § 103.2(b) (2012).

United States Citizenship and Immigration Services (USCIS) requires immigrants and asylees to present a birth certificate when they apply to immigrate to the U.S.<sup>38</sup> But the USCIS Handbook neither defines “birth certificate” nor limits acceptable birth certificates to countries with high registration rates.<sup>39</sup> Therefore, USCIS will accept birth certificates from nongovernmental organizations or countries with poor registration rates—both of which may contain estimated birth dates.<sup>40</sup> This process makes the first path from estimated to official birth date simple. The child is born. Years later, a nongovernmental organization registers his birth using a date his parents estimate.<sup>41</sup> The child presents this certificate to USCIS.<sup>42</sup> And this date becomes his “official birth date” for all other government documents.<sup>43</sup>

Second, when applicants do not have any birth documents, USCIS allows them to estimate their birth dates.<sup>44</sup> Before estimating their birth dates, these applicants must first prove that their birth documents are unavailable.<sup>45</sup> But proving these documents are unavailable is not always difficult. For instance, the applicant may submit a letter from his home nation that his birth document does not exist,<sup>46</sup> or he can show that he made good faith (but fruitless) attempts to get his birth document.<sup>47</sup> USCIS will then waive the birth document require-

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38. See *id.* § 103.2(b)(1) (“Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.”); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., OMB NO. 1615-0037, FORM I-730 REFUGEE/ASYLEE RELATIVE PETITION INSTRUCTIONS 3–4 (2013) [hereinafter FORM I-730] (requiring a birth certificate for applications from relatives).

39. See 8 C.F.R. § 103.2 (not defining birth certificate).

40. Cf. *id.* (stating only that a birth certificate is a required document).

41. See *supra* Part I.A.

42. See 8 C.F.R. § 103.2(b)(1).

43. See Blando e-mail, *supra* note 33.

44. See FORM I-730, *supra* note 38, at 4.

45. 8 C.F.R. § 103.2(b)(2)(ii).

46. *Id.* In fact, if the State Department’s Visa Reciprocity Tables state that the applicant’s home country normally does not keep birth documents, USCIS may accept other proof of birth without a letter from the home country. Blando e-mail, *supra* note 33. For example, a Somali refugee would not need to show his birth document is unavailable because the State Department’s Visa Reciprocity Table for Somalia notes, “There are no police records, birth certificates, school records etc., available from Somalia.” *County Reciprocity Schedule, Somalia*, U.S. DEPT OF STATE, [http://travel.state.gov/visa/fees/fees\\_5455.html?cid=9738](http://travel.state.gov/visa/fees/fees_5455.html?cid=9738) (last visited Oct. 31, 2013).

47. 8 C.F.R. § 103.2(b)(2)(ii).

ment.<sup>48</sup> With this requirement waived, USCIS permits the applicant to submit “secondary evidence”<sup>49</sup>—such as school records—and his own testimony,<sup>50</sup> which USCIS will use to estimate the applicant’s age.

In both cases, the estimated birth date becomes part of the applicant’s immigration file,<sup>51</sup> as well as his official birth date on government records.<sup>52</sup> In effect, USCIS certifies that the date of birth is accurate.

How prevalent is this problem? It is unclear—USCIS does not specifically track how often it assigns official-yet-inaccurate birth dates.<sup>53</sup> But government immigration statistics suggest that the problem occurs with some level of frequency. For instance, according to the State Department, in war-torn Iraq birth registration documents are frequently “withheld in individual cases for political or other reasons.”<sup>54</sup> Therefore, when Iraqi children take refuge in the United States, USCIS will assign them birth dates.<sup>55</sup> And these Iraqi children are not alone—USCIS will also assign birth dates to Bhutanese,<sup>56</sup> Somalian,<sup>57</sup> and Iranian<sup>58</sup> children, none of whom come from countries that keep birth records. Over the three-year span from 2009 to 2011, over 105,000 people took refuge in the U.S.

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48. *See id.* § 103.2(b)(2)(i).

49. *Id.*

50. *Id.* § 103.2(b)(7).

51. Blando e-mail, *supra* note 33.

52. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB NO. 1615-0023, INSTRUCTIONS FOR I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 3 (2013) (using this process for registering for permanent residence). In fact, this estimated birth date procedure does not just apply to immigrants. A U.S. citizen may obtain a passport upon a sworn affidavit of birth and evidence that no record of his birth exists. U.S. DEP’T OF STATE, OMB APPROVAL NO. 1405-0132, BIRTH AFFIDAVIT (2011) (“A birth affidavit should be submitted (with an application for a U.S. passport) when an acceptable birth certificate cannot be obtained for a person born in the United States. The affidavit must be accompanied by a notice from the appropriate authorities indicating that no birth record exists and a photocopy of the front and back side of the affiant’s identification.”).

53. Blando e-mail, *supra* note 33.

54. *Country Reciprocity Schedule, Iraq*, U.S. DEP’T OF STATE, [http://travel.state.gov/visa/fees/fees\\_5455.html?cid=9218](http://travel.state.gov/visa/fees/fees_5455.html?cid=9218) (last visited Oct. 31, 2013).

55. *See supra* notes 44–50 and accompanying text.

56. *See Country Reciprocity Schedule, Bhutan*, U.S. DEP’T OF STATE, [http://travel.state.gov/visa/fees/fees\\_5455.html?cid=9005](http://travel.state.gov/visa/fees/fees_5455.html?cid=9005) (last visited Oct. 31, 2013).

57. *See Country Reciprocity Schedule, Somalia*, *supra* note 46.

58. *See Country Reciprocity Schedule, Iran*, U.S. DEP’T OF STATE, [http://travel.state.gov/visa/fees/fees\\_5455.html?cid=9217](http://travel.state.gov/visa/fees/fees_5455.html?cid=9217) (last visited Oct. 31, 2013).

from one of these four countries,<sup>59</sup> a stream of people with estimated birth dates certified as official. Therefore, while the frequency of the immigrant age problem is unknown,<sup>60</sup> immigration statistics suggest that the age problem is potentially vast.

### C. AGE AND THE CRIMINAL PROCESS

In many contexts, a child's exact birth date is both immaterial and malleable—as any summer-born third grader forced to celebrate with his classmates in January would know. But the criminal justice system specifically distinguishes based on age in three contexts: determining jurisdiction, proving age-specific elements, and imposing maximum sentences.<sup>61</sup> The immigrant age problem, therefore, arises when children with uncertain-yet-official birth dates collide with the criminal justice system in one of these contexts.

#### 1. Juvenile Court Jurisdiction

In the criminal justice process, the defendant's age first matters when the state must decide whether to charge the defendant in juvenile or adult court.<sup>62</sup> At charging, age is relevant for two reasons. First, the defendant's age determines which court has original jurisdiction.<sup>63</sup> Most juvenile courts have jurisdiction over children up to age eighteen,<sup>64</sup> while other states use lower limits, such as sixteen<sup>65</sup> or seventeen.<sup>66</sup> Second, some states set maximum age limits for juvenile courts to *rehabilitate* defendants, so once the defendant reaches the maximum age, he “ages out” and the juvenile court loses jurisdiction.<sup>67</sup>

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59. See MARTIN & YANKAY, *supra* note 6, at 3.

60. See Blando e-mail, *supra* note 33.

61. See, e.g., H.D. Warren & C.P. Jhong, Annotation, *Age of Child at Time of Alleged Offense or Delinquency, or at Time of Legal Proceedings, as Criterion of Jurisdiction of Juvenile Court*, 89 A.L.R.2d 506 § 2 (1963).

62. *Id.* § 3(d).

63. CHARLES DOYLE, CONG. RESEARCH SERV., RL 30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 7–26 (2004).

64. *Id.*; see, e.g., MINN. STAT. § 260B.007 subd. 3 (2012).

65. N.C. GEN. STAT. § 7B-1501(7) (2012).

66. See, e.g., TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2009).

67. See, e.g., N.D. CENT. CODE § 27-20-36(6) (2012) (“[W]hen the child attains the age of twenty years, all orders affecting the child then in force terminate and the child is discharged from further obligation or control.”).



Therefore, the defendant's age affects whether the juvenile court has jurisdiction, and for how long.<sup>68</sup>

In fact, age is most relevant in the criminal process in juvenile court due to the lower penalties for juveniles than adults. For example, imagine that two Fargo teens rob a 7-Eleven, and each fires a shot, a class A felony in North Dakota.<sup>69</sup> The first robber is seventeen, so the juvenile court will have jurisdiction,<sup>70</sup> and he will age out of juvenile court at age twenty.<sup>71</sup> The second robber, however, is eighteen, so the district court will have jurisdiction,<sup>72</sup> and he will face a maximum penalty of twenty years in jail.<sup>73</sup> Therefore, even though the two defendants committed the same crimes, they face substantially different punishments if convicted. The first robber will be free when he is twenty.<sup>74</sup> The second robber may not be free until he's nearly forty.<sup>75</sup>

Therefore, whether the juvenile or adult court has jurisdiction significantly affects the sentence the defendant will receive. And because the defendant's age determines which court has jurisdiction,<sup>76</sup> the defendant's age significantly affects the sentence he could serve. So the immigrant with an assigned birth date has a substantial interest in his age when the state charges him with a crime.<sup>77</sup>

However, two exceptions to a juvenile court's exclusive age jurisdiction over children make the age problem less relevant. First, some states give juvenile and district courts concurrent jurisdiction, so the State may choose to prosecute the child in

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68. For instance, if a district court found that the defendant was a child, but his birth certificate showed he was an adult, the juvenile court would end up having jurisdiction due to the district court order. However, the juvenile court would again risk losing jurisdiction, because it could only rehabilitate the child up until a certain age. This critical age, in turn, would have to be determined based on his or her faulty birth certificate. *See, e.g.,* Hegvik e-mail, *supra* note 11.

69. *See* N.D. CENT. CODE § 12.1-22-01 (2012) (classifying robbery as an A felony when the perpetrator fires a firearm). In North Dakota, a Class A felony is a felony that carries a maximum penalty of twenty years imprisonment and a twenty thousand dollar fine. *Id.* § 12.1-32-01(2).

70. *Id.* § 27-20-03.

71. *See id.* § 27-20-36(6).

72. *See id.* §§ 27-20-02(4)(a), 27-20-03 (giving juvenile courts jurisdiction for a child under the age of eighteen).

73. *See id.* § 12.1-32-01(2).

74. *See id.* § 27-20-36(6).

75. *See id.* § 12.1-32-01(2).

76. *See supra* notes 63–68 and accompanying text.

77. *See, e.g.,* Hegvik e-mail, *supra* note 11.

either juvenile or adult court.<sup>78</sup> Therefore, even when it is unclear whether an immigrant is, say, seventeen or eighteen, the State may choose to prosecute him in a district court.<sup>79</sup> Second, juvenile courts may waive or transfer jurisdiction to district courts based on the nature of the crime<sup>80</sup> or the offender's age combined with various aggravating factors.<sup>81</sup> In these states, the uncertainty surrounding an immigrant's age may not serve as a bar to prosecution in adult court because the juvenile court may waive jurisdiction and allow the state to prosecute in district court regardless of the offender's age.<sup>82</sup>

Nonetheless, in states where the juvenile court has exclusive jurisdiction, or the juvenile court chooses not to waive jurisdiction, the immigrant's age can significantly impact his sentence.<sup>83</sup>

## 2. Age as an Element of the Crime

The age problem also arises when age is an element of the crime,<sup>84</sup> so the state must prove the victim's or defendant's age beyond a reasonable doubt.<sup>85</sup> Minnesota's criminal code, for example, criminalizes statutory rape based on the victim's age: sex with a victim less than thirteen years old is criminal sexual conduct, even if the victim consents.<sup>86</sup> But Minnesota *classifies* the degree of criminal sexual conduct based on the defendant's age. If the defendant was three years older than the victim, he committed first degree sexual conduct,<sup>87</sup> and he must serve at least twelve years in jail.<sup>88</sup> If the defendant was less than three years older than the victim, he only committed third degree

78. See, e.g., ARIZ. REV. STAT. ANN. § 13-501(B) (LexisNexis 2012).

79. See *id.*

80. See, e.g., CONN. GEN. STAT. ANN. § 46b-127(b) (2012) (permitting juvenile court to waive jurisdiction for C or D felonies).

81. See, e.g., ALA. CODE § 12-15-203(a), (d) (2012) (permitting a court to waive jurisdiction for any child over fourteen years old based on six factors).

82. See *id.* Yet even in states where juvenile courts may waive jurisdiction, the court must still know the defendant's age to determine if he is old enough to transfer into an adult court. See, e.g., IOWA CODE § 232.45(6) (2012) (permitting the juvenile court to waive jurisdiction for any crime if the defendant is at least fourteen years old).

83. See *supra* notes 69–75 and accompanying text.

84. See, e.g., Yuen, *supra* note 12.

85. See *In re Winship*, 397 U.S. 358, 364 (1970).

86. See, e.g., MINN. STAT. § 609.342 subd. 1 (2012) (criminalizing sexual conduct based on the age difference between the defendant and victim).

87. *Id.*

88. *Id.* § 609.342 subd. 2(b).

sexual conduct,<sup>89</sup> which carries no minimum sentence.<sup>90</sup> Therefore, to ensure a minimum jail sentence for the defendant, the state must prove two age-specific elements: (1) the victim was thirteen or younger; and (2) the defendant was at least three years older than the victim.<sup>91</sup>

However, if either the victim or the defendant has an official-yet-inaccurate birth dates, the 12-year difference in minimum jail time<sup>92</sup> may depend on the age USCIS assigned the victim or defendant based on an estimate.<sup>93</sup>

### 3. Age as a Sentencing Factor

Finally, the immigrant age problem arises in sentencing when a court must determine whether it can sentence the defendant to death or life without parole for a non-homicide offense, both of which the Supreme Court has categorically prohibited for defendants under eighteen.<sup>94</sup> First, in *Roper v. Simmons*, the Court held that the Eighth and Fourteenth Amendments prohibit states from executing children that committed capital crimes before they turned eighteen.<sup>95</sup> In *Roper*, the Court drew a bright line based on age: the state may not execute a seventeen year old, but it may execute an eighteen year old.<sup>96</sup> More recently, in *Graham v. Florida*, the Court held that the Eighth Amendment prohibits states from sentencing juveniles to life without parole for non-homicide offenses.<sup>97</sup> As in *Roper*, the *Graham* Court structured its prohibition of life without parole sentences for non-homicide offenses solely based of the defendant's age, so the state may sentence an eighteen

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89. *Id.* § 609.344 subd. 1(a).

90. *Id.* § 609.344 subd. 2.

91. *Id.* § 609.342 subd. 1(a).

92. *See supra* notes 88, 90 and accompanying text.

93. *See supra* Part I.A.

94. *See Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (prohibiting imposition of life without parole for a non-homicide offense on a juvenile); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (forbidding death penalty under the age of 18). Courts may also consider a defendant's age and age characteristics to mitigate the defendant's sentence. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2012).

95. *Roper*, 543 U.S. at 578–79.

96. *See id.*

97. *Graham*, 130 S. Ct. at 2034.

year old to life without parole for a non-homicide offense, but not a seventeen year old.<sup>98</sup>

Although the Supreme Court prohibited these sentences based on the defendant's age, it reached its decisions on the grounds that children are less mature than adults psychologically, so they should not be punished equally.<sup>99</sup> For instance, in *Roper*, the Court reasoned that three relevant characteristics distinguish children and adults.<sup>100</sup> First, children are psychologically less mature than adults, causing them to make poor and reckless decisions.<sup>101</sup> Second, peer pressure affects juveniles more than adults, giving them less control in some situations.<sup>102</sup> Third, a juvenile's character has yet to fully develop, so the criminal justice system can more easily rehabilitate the juvenile.<sup>103</sup> In fact, the Court expounded on *Roper* in *Miller v. Alabama*, when it invalidated mandatory life without parole sentences for juveniles on the grounds that such rigid and severe sentences fail to properly account for the defendant's "age-related characteristics."<sup>104</sup>

These age-related characteristics do not necessarily disappear when children turn eighteen.<sup>105</sup> Nonetheless, the court has drawn a bright line and categorically prohibited death sentences and life without parole sentences for non-homicide offenses for children that committed the crime before their eighteenth birthday.<sup>106</sup>

This distinction complicates the immigrant age problem. An immigrant with an estimated birth date could fall on either side of the constitutionally critical age (eighteen), so the severity of his sentence could potentially depend on an unreliable estimate of his age.<sup>107</sup>

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98. See *id.* at 2030 ("[T]hose who were below [the age of eighteen] when the offense was committed may not be sentenced to life without parole for a non-homicide crime.").

99. See *Roper*, 543 U.S. at 570.

100. *Id.* at 569–70.

101. *Id.* at 569; see also L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 421 (2000).

102. *Roper*, 543 U.S. at 569.

103. *Id.* at 570.

104. *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2475 (2012).

105. See Spear, *supra* note 101, at 419 (noting that characteristics of adolescence may occur in people anywhere from ages twelve to twenty-five).

106. *Roper*, 543 U.S. at 578–89.

107. See Blando e-mail, *supra* note 33.

## II. ANALYSIS

Because age is relevant at three phases of the criminal justice process, courts must know the defendant's exact age. Yet the immigrant age problem hides the defendant's actual age when he has an inaccurate birth document. This section explores how these inaccurate birth documents create problems for the criminal justice system at the three stages where age is relevant: at charging, while establishing an element of the crime, and during sentencing.

## A. STANDARD OF PROOF FOR AGE JURISDICTION

The immigrant age problem first arises when juvenile courts must determine whether they have age jurisdiction over a defendant with an official-yet-inaccurate date of birth. Specifically, courts must determine whether the burden of proof for age jurisdiction lies with the state when the defendant's age is unclear.

Yet these courts cannot look to the Constitution for guidance.<sup>108</sup> The Due Process Clause of the Constitution requires the state to prove each element of a crime beyond a reasonable doubt,<sup>109</sup> and prohibits states from shifting the burden of proof to the defendant, except for affirmative defenses.<sup>110</sup> But age jurisdiction is neither an element of the crime nor an affirmative defense.<sup>111</sup> Therefore, the Due Process Clause dictates neither the burden of proof for age jurisdiction,<sup>112</sup> nor which party bears the burden.<sup>113</sup>

Without constitutional guidance, different jurisdictions have adopted a number of different burdens for proving age jurisdiction. These standards range from placing the burden on the state to prove the defendant's age beyond a reasonable doubt<sup>114</sup> to placing the burden on the defendant to *disprove* age jurisdiction so long as a "reasonable basis" exists to believe the defendant is an adult.<sup>115</sup> Within this spectrum of different bur-

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108. See *United States v. Alvarez-Porras*, 643 F.2d 54, 67 (2d Cir. 1981).

109. See *In re Winship*, 397 U.S. 358, 364 (1970).

110. See *Patterson v. New York*, 432 U.S. 197, 205 (1977).

111. *Alvarez-Porras*, 643 F.2d at 67.

112. Cf. *State v. Ali*, 806 N.W.2d 45, 53–54 (Minn. 2011) (rejecting the argument that Due Process requires the state to prove jurisdiction beyond a reasonable doubt).

113. *Alvarez-Porras*, 643 F.2d at 67.

114. See *State v. Mohamed*, 899 N.E.2d 1071, 1073 (Ohio Ct. App. 2008).

115. See *State v. Sandomingo*, 695 P.2d 592, 594 (Wash. Ct. App. 1985); see

dens of proof, two distinct approaches to age jurisdiction exist: (1) jurisdictions that require the state to prove age jurisdiction beyond a reasonable doubt; and (2) jurisdictions that require lower burdens of proof of age jurisdiction.

First, some jurisdictions treat age jurisdiction as the equivalent of an element of a crime because the court cannot enter a valid conviction unless it has jurisdiction.<sup>116</sup> Because age jurisdiction is functionally an element of the crime, these jurisdictions require the state to prove the defendant's age just as it must prove each element of a crime:<sup>117</sup> beyond a reasonable doubt.<sup>118</sup>

In practice, it is difficult for the state to prove a defendant's age beyond a reasonable doubt because the defendant needs only rebut the state's claims, not prove his own age.<sup>119</sup> For instance, in *State v. Mohamed*, the State brought forth a catalogue of evidence that defendant was eighteen: her birth certificate, her booking card, her marriage license, her statement to the police, her co-conspirator's statement, her child's birth certificate, school records, immigration forms, and her application for state welfare benefits.<sup>120</sup> In response, the defendant elicited testimony from an expert witness that many Somali refugees did not know their birth dates.<sup>121</sup> On the balance of this evidence, the trial court remanded the case to juvenile court because the State had not proven beyond a reasonable doubt that the defendant was over eighteen.<sup>122</sup> Short of prohibitively expensive and invasive bone marrow testing, it is

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also *Carsons v. Commonwealth*, 47 S.W.2d 997, 1001-02 (Ky. 1931) (presuming that the court has jurisdiction and thereby placing the burden on the defendant to disprove jurisdiction). A number of jurisdictions have adopted standards of proof between these extremes. See *Ali*, 806 N.W.2d at 54 (preponderance of the evidence); *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999) (shifting burden to defendant once government makes a prima facie showing of age jurisdiction); *State v. Duckett*, 107 So. 696, 697 (La. 1926) (clear and convincing evidence).

116. See *State v. Neguse*, 594 N.E.2d 1116, 1120 (Ohio Ct. App. 1991).

117. See *In re Winship*, 397 U.S. 358, 364 (1970).

118. See *Mohamed*, 899 N.E.2d at 1073; cf. *Duckett*, 107 So. at 697 (interpreting the statute to require the state to prove a child's age by clear and convincing evidence).

119. See, e.g., *Mohamed*, 899 N.E.2d at 1073.

120. *Id.* at 1072.

121. *Id.* (estimating that over ninety percent of ages assigned to Somali Bantu refugees were incorrect).

122. *Id.* at 1075.

unclear how the State could have ever proved beyond a reasonable doubt that defendant was over eighteen.<sup>123</sup>

Second, other jurisdictions place a lower burden on the state to prove age jurisdiction in order to encourage the defendant to put forth information about his age that only he can access.<sup>124</sup> These jurisdictions reason that jurisdiction is separate from the elements of the crime because it does not relate to the defendant's guilt.<sup>125</sup> And although the defendant's maximum penalty may hinge on which court (juvenile or adult) has jurisdiction,<sup>126</sup> the defendant's age will not *directly* increase his maximum penalty.<sup>127</sup> Therefore, the state need not prove his age beyond a reasonable doubt.<sup>128</sup>

Practically, these jurisdictions recognize that requiring the State to prove age jurisdiction beyond a reasonable doubt is impractical, because unlike other jurisdictional factors—such as where the crime took place<sup>129</sup>—the defendant has unique access to the information necessary to prove his age.<sup>130</sup> Indeed, some courts question whether the state could “ever meet a standard higher than preponderance of the evidence” where the defendant has an inaccurate or unknown date of birth.<sup>131</sup>

In practice, the lower evidentiary burden forces the defendant to establish his own age, rather than merely rebutting the state's evidence.<sup>132</sup> For instance, in *United States v. Salga-*

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123. *See id.* at 1073–74.

124. *See, e.g.,* *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 102 (9th Cir. 1980) (“The age of the accused, unlike many elements of crimes, is a fact which at times may be peculiarly within the knowledge of the accused and sometimes, perhaps often, not susceptible to independent proof. Especially is this so where the accused is an alien.”).

125. *See, e.g.,* *State v. Ali*, 806 N.W.2d 45, 52–53 (Minn. 2011).

126. *See* discussion *supra* Part I.C.1.

127. *See Ali*, 806 N.W.2d at 53 (“[E]stablishing the defendant's age determines whether jurisdiction lies in the district or juvenile court. Once jurisdiction is established, the defendant will be sentenced only if the State can prove the elements of the crime beyond a reasonable doubt.”).

128. *See id.* *But see* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt.”).

129. *See, e.g.,* *United States v. Johnson*, 323 U.S. 273, 275 (1944) (finding federal jurisdiction in the district in which the defendant used the mails illegally).

130. *See Ali*, 806 N.W.2d at 54.

131. *Id.*; *cf.* *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999) (“At the outset, the court notes the impossibility of definitively determining defendant's date of birth.”).

132. *See supra* notes 119–23 and accompanying text.

*do-Ocampo*, the government first produced evidence that the defendant told various government authorities that he was eighteen years old.<sup>133</sup> Because this evidence met the government's prima facie burden to prove the defendant's age, the burden shifted to the defendant to prove his own age,<sup>134</sup> which the defendant did with evidence uniquely in his possession: his mother's testimony, a record of his baptism, and his elementary school records, all of which defendant obtained in Mexico.<sup>135</sup> In this case, then, the lower burden allowed the court to accumulate all evidence available to both parties before it decided whether it had jurisdiction.<sup>136</sup>

As *Salgado-Ocampo* illustrates, the benefit of a lower burden of proof for age jurisdiction is deliberation. Rather than merely rebutting the state's evidence, the defendant must bring forth his own evidence of his age. Therefore, to determine whether it has jurisdiction, the court will have all available evidence, not just evidence the state can obtain.

#### B. EVIDENTIARY RULES FOR USE OF BIRTH DOCUMENTS AT TRIAL

When age is an element of the crime—rather than an element of jurisdiction—the state cannot circumvent the age problem by lowering the state's burden of proof. After all, the Due Process Clause requires the state to prove each element of the crime beyond a reasonable doubt.<sup>137</sup> The issue, then, is not *whether* the state must prove age beyond a reasonable doubt, but *how* the state can prove age beyond a reasonable doubt. Specifically, what evidence may the state use to prove the defendant's or victim's age?<sup>138</sup>

Certainly the state may rely on an array of circumstantial evidence to prove the defendant's age, including testimony by the victim's or defendant's parents,<sup>139</sup> testimony by the victim

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133. 50 F. Supp. 2d at 910.

134. *Id.*

135. *Id.* at 911.

136. *See id.* at 912–13.

137. *See In re Winship*, 397 U.S. 358, 364 (1970).

138. This issue does not arise in an age jurisdiction hearing, because evidentiary rules do not apply to preliminary hearings. *See* FED. R. EVID. 1101(d)(3); *see also* *United States v. Salgado-Ocampo*, 50 F. Supp. 2d at 913 (noting that evidence admitted at preliminary hearing on age jurisdiction “may not be admissible in the context of a trial”).

139. *See* *People v. Scott*, 141 P. 945, 946 (Cal. Ct. App. 1914).



himself,<sup>140</sup> and even physical appearance.<sup>141</sup> But in many cases, the state must rely on this circumstantial evidence because it does not have direct evidence of the victim's or defendant's age in the form of a birth certificate.<sup>142</sup> Yet in the immigrant age problem, the state has the victim's or defendant's birth certificate, but cannot prove its accuracy.<sup>143</sup> Nonetheless, evidentiary rules still permit the state to introduce this foreign birth certificate to prove age—even if the birth certificate is inaccurate<sup>144</sup>—because foreign birth certificates are self-authenticating<sup>145</sup> and excepted from the hearsay rules.<sup>146</sup>

Inaccurate foreign birth certificates are self-authenticating. A foreign document is self-authenticating so long as a foreign official certifies that the document is an official government document.<sup>147</sup> But the official only certifies that the document is a government record, not that the record is *accurate*.<sup>148</sup> Therefore, the state (or defendant) may introduce an inaccurate foreign birth certificate so long as a foreign official attests that the certificate represents an official government record.

Even self-authenticating birth certificates must satisfy other evidentiary rules,<sup>149</sup> and the hearsay rules could potentially prohibit a court from admitting a foreign birth certificate.<sup>150</sup> When the state admits a birth certificate to prove the defendant's or victim's age, it relies on a statement made by an

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140. See *State v. Scroggs*, 96 N.W. 723, 724 (Iowa 1903).

141. See *Barnett v. State*, 488 So. 2d 24, 24–25 (Ala. Crim. App. 1986) (stating that although the defendant's physical appearance may be considered in determining age, some additional circumstantial evidence must be presented as well).

142. *Cf., e.g., id.* at 24 (“The record supports the appellant's assertion that the state did not offer any direct evidence of the defendant's age during its case in chief. There is, however, no requirement that the proof of age be established by direct evidence.”).

143. See *supra* notes 29–32 and accompanying discussion.

144. See *supra* notes 29–32 and accompanying discussion.

145. See FED. R. EVID. 902(3).

146. See *id.* 803(9).

147. *Id.* 902(3).

148. See *United States v. Doyle*, 130 F.3d 523, 545 (2d Cir. 1997) (“The requirement that the document be ‘certified as correct’ means only that the authenticating official certify that the copy delivered to the court is an accurate copy of the government record.”).

149. See, *e.g., Raphaely Int'l, Inc. v. Waterman S.S.*, 972 F.2d 498, 502 (2d Cir. 1992) (noting that the hearsay rules still apply to authenticated foreign documents).

150. See FED. R. EVID. 801.

out-of-court declarant (the certificate's stated date of birth) to prove the truth of the matter asserted (the defendant's or victim's actual age).<sup>151</sup>

However, a foreign birth certificate would fall under the hearsay exception for records of birth, so the state could still rely on the certificate to prove the defendant's or victim's age. The hearsay rules except records of birth "if reported to a public office in accordance with a legal duty," even if the birth records are inaccurate.<sup>152</sup> This exception could permit a court to admit a foreign birth certificate, despite its estimated age, as long as the foreign certificate was made pursuant to a legal duty.

For example, in 1969, the India Parliament passed a law requiring government designees to register all births,<sup>153</sup> but even thirty years later India still failed to register even half of births in some states.<sup>154</sup> In response to such low registration, India launched the National Campaign on Birth Certificates in 2003.<sup>155</sup> Because the National Campaign on Birth Certificates sought to register all children under ten,<sup>156</sup> a nine-year old Indian child could get a valid government birth certificate, even though the child's parents might estimate the child's age.<sup>157</sup> But despite the estimated date, the hearsay exception for birth records would still permit a court to admit this birth certificate—the certificate is a record of birth reported to India's public office pursuant to a legal duty (the Registration of Births and Deaths Act).<sup>158</sup> Because the birth records exception does not specify *when* the birth record must be reported, it is legally irrelevant that the Indian child's parents estimated his age approximately nine years after birth.

Therefore, this hearsay exception coupled with the self-authentication of certified foreign documents permits the state to introduce a certified foreign birth certificate as evidence of

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151. *See id.*

152. FED. R. EVID. 803(9).

153. *See* The Registration of Births and Deaths Act, No. 18 of 1969, INDIA CODE (1993), vol. 5, § 8(1).

154. *See* PLAN, COUNT EVERY CHILD: ENSURING UNIVERSAL BIRTH REGISTRATION IN INDIA 8 (2009), available at <http://plan-international.org/birthregistration/count-every-child-in-india>.

155. *National Campaign to Issue Birth Certificates*, TIMES OF INDIA, Oct. 16, 2003, [http://articles.timesofindia.indiatimes.com/2003-10-16/bangalore/27209625\\_1\\_certificates-first-phase-national-campaign](http://articles.timesofindia.indiatimes.com/2003-10-16/bangalore/27209625_1_certificates-first-phase-national-campaign).

156. *Id.*

157. *See* PLAN, COUNT EVERY CHILD, *supra* note 31, at 53.

158. *See* FED. R. EVID. 803(9).

the immigrant's age, even when the court cannot determine the reliability of the birth certificate.<sup>159</sup>

But this hearsay exception only applies to birth records, not all government documents that list dates of birth.<sup>160</sup> Therefore, this exception only affects immigrants with foreign birth certificates, not immigrants without any birth certificates.<sup>161</sup> In cases where the immigrant does not have a foreign birth certificate—only a birth date that USCIS estimated<sup>162</sup>—the state may not rely on his government-issued documents to prove age. In these cases, the immigrant will have neither a foreign record nor a birth document, so the foreign government records will be neither self-authenticating nor excepted from hearsay rules.<sup>163</sup> Therefore, the state must prove the immigrant's age as if he had no documentation listing his date of birth.<sup>164</sup>

### C. AGE CHARACTERISTICS AND SENTENCING

It may appear that the sentencing court will know the defendant's age by the time it must sentence him. After all, prior to trial the court must determine in a preliminary hearing whether it has age jurisdiction, a decision that requires the court to find that the defendant is too old for juvenile court.<sup>165</sup>

However, because the age of transfer to district court does not align with the age of constitutionally permissible execution, a court may still encounter the age problem at sentencing without guidance from an earlier finding of age. States impose the death penalty almost exclusively on convicted murderers,<sup>166</sup> and in order to sentence the convicted murder to death the state must first find that he was over eighteen when he committed the crime.<sup>167</sup> It may seem that prior to sentencing the court al-

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159. See, e.g., *New York Life Ins. v. Aronson*, 38 F. Supp. 687, 688 (W.D. Pa. 1941) ("The objection [to the admissibility of the birth certificates] is without merit, as it undertakes to prescribe requirements for the introduction of foreign records not specified in [the applicable Rules].").

160. See FED. R. EVID. 803(9).

161. See *supra* notes 44–50 and accompanying discussion.

162. See *supra* Part I.B.

163. See FED. R. EVID. 803(9).

164. Cf., e.g., *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 910, 913 (D. Minn. 1999) (noting that government documents, including defendant's driver's license, "may not be admissible in the context of a trial").

165. See *supra* Part II.A.

166. See VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* 69 (3d ed. 2008). Some states additionally categorize treason and espionage as capital crimes, but "prosecution and conviction for these crimes are extremely rare." *Id.* at 71.

167. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (stating that the

ready made this finding. The mere fact that a district court had jurisdiction to try the defendant means that the court previously found that the defendant was eighteen or older.<sup>168</sup>

But juvenile transfer laws negate this assumption. In murder cases, thirty five states try children in district court at ages younger than eighteen by either (a) mandating the juvenile court to transfer the defendant to district court, or (b) stripping the juvenile court of jurisdiction to try murder cases.<sup>169</sup> In these cases, then, the court will only make one age-related preliminary finding: that the defendant is over the age of transfer.<sup>170</sup> Significantly, the court will *not* find that the defendant is over the constitutionally-relevant age of eighteen.<sup>171</sup>

For instance, imagine that an Alabama immigrant with an estimated age of seventeen-and-a-half commits a capital crime. Due to Alabama's statutory exclusion of capital crimes, the juvenile court will not have jurisdiction so long as it finds the defendant is sixteen or older.<sup>172</sup> The defendant has two choices. First, the defendant can concede that he is sixteen or older and proceed with his case in district court; the juvenile court then would not have to make a finding of age. Second, the defendant can claim that the juvenile court has jurisdiction because he is, in reality, younger than sixteen. If the juvenile court disagrees, it will find itself without jurisdiction based on its finding that

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Eighth and Fourteenth Amendments forbid "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

168. See, e.g., MINN. STAT. § 260B.007 subd. 3 (2012) (granting the juvenile court jurisdiction over defendants under eighteen years old). Granted, this logic would only apply to jurisdictions where the juvenile court has jurisdiction over defendants up to age eighteen. Cf., e.g., N.C. GEN. STAT. § 7B-1501(7) (2012) (granting the juvenile court jurisdiction over defendants under sixteen years old).

169. See PATRICK GRIFFIN ET AL., U.S. DEPT OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 4 (2011), available at <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf> ("Functionally, a mandatory waiver law resembles a statutory exclusion, removing a designated category of cases from juvenile court jurisdiction."). Through one of these two mechanisms, 35 states force juvenile defendants charged with murder or "capital crimes" into district court before they reach age eighteen. *Id.* at 5-6 (noting that the minimum age of transfer in these states ranges from no minimum age to 17 years old).

170. See, e.g., CONN. GEN. STAT. § 46b-127(a) (2012) (requiring the juvenile court to transfer to district court any child over age fourteen charged with a capital offense).

171. See *supra* Part I.C.3.

172. ALA. CODE § 12-15-204(a)(1) (2009).

the defendant is *sixteen* or older.<sup>173</sup> In either event, the sentencing court will not be able to rely on a previous finding that the defendant is over eighteen.

Instead, a court could potentially rely on inaccurate birth documents when it decides whether a defendant is old enough for the court to sentence him to death or life without parole for a non-homicide offense. It is unclear how a court would handle this life or death decision—courts have not encountered this situation. Yet this issue is likely to arise—currently, at least 1161 people are serving life sentences for crimes they committed between their seventeenth and eighteenth birthdays.<sup>174</sup> Because the court draws a bright line at eighteen, it is possible that an immigrant with an age range that straddles this line will commit a capital crime,<sup>175</sup> and a court will have to decide whether it can constitutionally sentence him as an adult.

In addition, because evidentiary standards at sentencing are less stringent than evidentiary standards at trial,<sup>176</sup> a court might simply use the date of birth USCIS estimated to determine the defendant's exact age, even if the assigned date of birth is inaccurate.<sup>177</sup> In fact, because evidentiary rules do not apply to sentencing proceedings,<sup>178</sup> only due process standards directly<sup>179</sup> limit the evidence the court may consider: the evi-

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173. *See id.* While the juvenile court could enter a specific finding of age that the sentencing court could use later, courts often resolve matters of age jurisdiction by merely finding that the defendant is older or younger than the statutory threshold, perhaps because determining the defendant's exact age is nearly impossible. *See* *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999) (“At the outset, the court notes the impossibility of definitively determining defendant’s date of birth.”); *State v. Sandomingo*, 695 P.2d 592, 594 (Wash. Ct. App. 1985) (noting that the trial court thought the defendant appeared older than seventeen, “but had no definitive means of determining his age”).

174. *See* AMNESTY INT’L HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 25–26 (2005), available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf> (noting that at least 2225 children were serving life sentences, and 52.2% of these children committed the crime between their seventeenth and eighteenth birthdays).

175. *Cf., e.g.*, Hegvik e-mail, *supra* note 11 (noting that defendant claimed to be seventeen at the time he committed the crime although his birth certificate indicated that he was eighteen).

176. *See* FED. R. EVID. 1101(d)(3).

177. *See supra* Part II.B.

178. *See* FED. R. EVID. 1101(d)(3); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) cmt. (2011) (“In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial.”).

179. The appellate abuse of discretion standard does, however, indirectly

dence must have “sufficient indicia of reliability.”<sup>180</sup> And even “uncorroborated hearsay” meets the due process reliability standard if the defendant has a chance to rebut or explain the hearsay.<sup>181</sup> Therefore, to make this life-or-death decision—whether a defendant is old enough to execute—the court can consider a wide range of minimally reliable evidence.<sup>182</sup> This lower evidentiary standard amplifies the risk that a court will mistakenly sentence a juvenile to death or life without parole for a non-homicide offense simply because his estimated birth date was older than his actual birth date.

### III. SOLUTION

Because immigrants with inaccurate-yet-official birth dates must still face the age-specific boundaries in the criminal justice system, courts must develop standards to deal with the age uncertainty of the immigrant age problem. This section proposes a separate solution for each phase of the criminal justice process where age is relevant: (1) courts should rebuttably presume that the defendant’s birth document is accurate for purposes of determining age jurisdiction; (2) courts should not admit inaccurate birth dates at trial to prove age as an element of the crime; and (3) courts should consider a defendant’s age characteristics—rather than trying to determine his actual birth date—when deciding whether they can sentence the defendant to death or life without parole for a non-homicide offense.

#### A. REBUTTABLE PRESUMPTION OF AGE JURISDICTION

In order to deal with the difficulty of determining whether a district court has age jurisdiction, courts should adopt a rebuttable presumption that the defendant’s date of birth on his government documents is his actual date of birth. If the defendant rebuts the presumption, the state must then prove age jurisdiction by its jurisdictional burden of proof using other means of evidence.<sup>183</sup>

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limit the court’s sentencing decision. *See, e.g.*, *Commonwealth v. McFarlin*, 587 A.2d 732, 735 (Pa. Super. Ct. 1991) (“Abuse of discretion consists of overlooking pertinent facts, disregarding the force of the evidence, committing an error of law, or imposing a sentence which exceeds the statutory maximum.”).

180. *United States v. Ortiz*, 636 F.3d 389, 393 (8th Cir. 2011).

181. *United States v. Pratt*, 553 F.3d 1165, 1170 (8th Cir. 2009).

182. *See id.*

183. *See supra* Part II.B.

Courts should presume that the defendant's listed date of birth is accurate for two reasons. First, this presumption solves the information imbalance that states face when only the defendant "has direct knowledge and control over the information necessary to resolve the dispute" about his age.<sup>184</sup> Functionally, this presumption requires the defendant to supply the court with information of which he has direct knowledge and control—such as self-testimony,<sup>185</sup> baptismal records,<sup>186</sup> or school registration<sup>187</sup>—in order to rebut his government-listed age. Therefore, this presumption will allow the court to resolve the age problem by considering all documentation available, not just the limited information available to the state. And this presumption will also benefit defendants: when their government-listed age is under the juvenile age, the juvenile court will be presumed to have jurisdiction.

Second, this presumption will not offend constitutional requirements for presumptions.<sup>188</sup> A presumption is constitutional when a rational connection exists "between the fact proved and the ultimate fact presumed."<sup>189</sup> This presumption would apply to all cases of age jurisdiction, including cases where de-

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184. *State v. Ali*, 806 N.W.2d 45, 54 (Minn. 2011).

185. *See, e.g., United States v. Dire*, 680 F.3d 446, 476 (4th Cir. 2012). Currently, the Fifth Amendment shields the defendant from self-testimony in states that consider age jurisdiction an element of the offense. *Cf. United States v. Frasquillo-Zomosa*, 626 F.2d 99, 102 (9th Cir. 1980) ("Construction of the age of the accused as a substantive element of the offense would permit the accused to invoke his Fifth Amendment privilege as to this essential fact, thereby delaying, if not prohibiting, a determination of the appropriate manner of proceeding.").

186. *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 911 (D. Minn. 1999).

187. *Id.* This approach is also similar to the approach other nations take. For example, in the Philippines courts first consider the child's birth certificate; then the child's early birth records, such as baptismal certificates or school documents; and finally, testimony. *See* RULE ON JUVENILES IN CONFLICT WITH THE LAW, A.M. No. 02-1-18-SC (S.C., Feb. 28, 2002) (Phil.), available at [http://www.lawphil.net/courts/supreme/am/am\\_02\\_1\\_18\\_sc\\_2002.html](http://www.lawphil.net/courts/supreme/am/am_02_1_18_sc_2002.html).

188. As discussed, some courts hold that age jurisdiction is an element of the crime that the state must prove beyond a reasonable doubt. *See* discussion *supra* notes 116–23 and accompanying text. In courts that hold that Due Process does not mandate any standard of proof for age jurisdiction, the constitutional rules for presumptions in criminal cases will not apply. *See supra* notes 108–13 and accompanying text; *cf.* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 *YALE L.J.* 165, 165 (1969) ("[I]t has likewise been clear that presumptive language may not be used to circumvent substantive constitutional rights.").

189. *Tot v. United States*, 319 U.S. 463, 467 (1943).

fendants have accurate birth dates on their documents.<sup>190</sup> Therefore, in most cases, a rational connection exists between the fact proved (the birth date on the government document) and the ultimate fact presumed (defendant's age). Indeed, in most cases the presumption is flawless. Because this presumption is true for most defendants—though not defendants with inaccurate birth dates—it is constitutional.

However, this presumption may fail in states that consider age jurisdiction as an element of a crime.<sup>191</sup> In these states, this presumption will violate the constitutional requirement that the state must prove all elements of a crime beyond a reasonable doubt,<sup>192</sup> because the presumption functionally shifts the burden of disproving age jurisdiction to the defendant: the state can simply point to the defendant's listed birth date, then the defendant must prove the date is inaccurate. Therefore, this solution will work only in states that consider age a separate jurisdictional element, not an element of a crime.<sup>193</sup>

#### B. EXCLUSION OF BIRTH DOCUMENTS AT TRIAL

Rules of evidence permit courts to admit foreign certified birth certificates at trial because these documents are self-authenticating and excepted from hearsay limitations.<sup>194</sup> Nonetheless, courts should exclude these documents when age is an element of the crime because these foreign birth certificates undermine the rationale of the hearsay exception for birth records.

The hearsay rules except birth certificates from the hearsay rule for two reasons: necessity and trustworthiness.<sup>195</sup> First, birth documents are necessary to prove age because they often do not reach the court until years after birth, so forcing a party to prove age by other means would be impractical.<sup>196</sup> Second,

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190. This presumption would apply, for instance, to a child born in the United States whose birth date is not in question.

191. *See, e.g.*, *State v. Neguse*, 594 N.E.2d 1116, 1120 (Ohio Ct. App. 1991) (holding that age was an element of subject matter jurisdiction, which needed to be proved beyond a reasonable doubt).

192. *See In re Winship*, 397 U.S. 358, 364 (1970).

193. *See, e.g.*, *State v. Ali*, 806 N.W.2d 45, 53–54 (Minn. 2011) (“[W]hen the age of the defendant determines the jurisdiction of the court, the State has the burden of proving . . . the defendant's age on the date of the alleged offense.”).

194. *See supra* Part II.B.

195. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:93 (3d ed. 2007).

196. *Id.*



birth documents are trustworthy because public officials usually create these documents in the ordinary course of work, and there is little dispute over the age.<sup>197</sup> Certainly, the first rationale applies to foreign birth certificates—a defendant's birth date is nearly impossible to prove without a birth certificate.<sup>198</sup>

But the second rationale does not apply to foreign birth documents, which do not have the "circumstantial probability of trustworthiness" that justifies the hearsay exception.<sup>199</sup> To the contrary, these foreign birth certificates may often be inaccurate because they can come from the parent's estimate of when the child was born, sometimes years after birth.<sup>200</sup> Therefore, the hearsay exception should not apply to these inaccurate birth certificates, and courts should not admit them.<sup>201</sup>

In opposition, states might argue that even if the birth records exception fails in certain cases, the court should nonetheless admit allegedly inaccurate birth certificates. A defendant can challenge the weight and credibility of his birth certificate on a case-by-case basis, and the state's high burden of proof beyond a reasonable doubt eliminates the risk of an erroneous decision based on an inaccurate birth certificate alone.<sup>202</sup> Therefore, the court does not need to make an exception to the hearsay exception—an inaccurate birth certificate is no different than any other disputed evidence.

But the immigrant age warrants special treatment because it presents a systematic problem that, as a class, undermines the rationale for the birth records exception.<sup>203</sup> Granted, a court might properly place a burden on the defendant to challenge

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197. *Id.*; cf. JOHN HENRY WIGMORE, EVIDENCE § 1370 (3d ed. 1942) (noting that a degree of trustworthiness in a class of evidence justifies each hearsay exception).

198. See *United States v. Salgado-Ocampo*, 50 F. Supp. 2d 908, 909 (D. Minn. 1999) ("[T]he court notes the impossibility of definitively determining defendant's date of birth.").

199. See WIGMORE, *supra* note 197, at § 1370.

200. See discussion *supra* notes 29–32 and accompanying text.

201. Alternatively, courts could refuse to authenticate the foreign birth certificate if the certificate appears to be "suspicious in [its] tenor or on [its] face." See MUELLER & KIRKPATRICK, *supra* note 195, at § 9:32.

202. See 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND STATE COURTS ¶ 803, at 314 (1996) ("If the opponent of the record does not believe the statements contained in the record, he is free to call the parents for cross-examination or to introduce other evidence controverting the facts stated.").

203. See *supra* text accompanying notes 195–99.

the weight and credibility of a birth certificate when a single mistake renders the certificate unreliable.<sup>204</sup> In these isolated instances, the defendant bears only a minimal burden to disprove the accuracy of the certificate, so the court need not create an entire exception to the birth records rule.<sup>205</sup> However, because the immigrant age problem is not isolated, but potentially widespread, inaccurate birth certificates as a class warrant an exception to the birth records exception. Otherwise, each case would risk an erroneous decision based on the inaccurate document.

At trial, then, the court must first determine whether the birth certificate is, in fact, inaccurate, considering, among other factors, the defendant's place of birth,<sup>206</sup> and the listed birth date.<sup>207</sup> If the court finds the birth certificate is inaccurate, it should exclude the document and instead, the state will have to prove age as if the immigrant had no listed birthday by relying on other evidence, such as testimony,<sup>208</sup> physical appearance,<sup>209</sup> or forensic testing.<sup>210</sup> In addition, to prove the victim's age the state (or defendant) could also rely on testimony from the victim himself.<sup>211</sup>

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204. See, e.g., *United States v. Austrew*, 202 F. Supp. 816, 822 (D. Md. 1962) (admitting victim's birth certificate even though the certificate reversed her middle and last names, which "weaken[ed] the document's evidentiary value").

205. Additionally, when the court encounters isolated incidents of unreliable birth documents, instead of invalidating the birth records exception the court may exclude the evidence as substantially prejudicial in relation to its probative value. See FED. R. EVID. 403. But because the immigrant age problem is too widespread, a court will better protect the defendant from an erroneous finding by categorically excluding inaccurate birth certificates rather than finding substantial prejudice in each case.

206. For example, a birth certificate from Central and Eastern Europe (92% registration rate) would more likely be accurate than a birth certificate from Sub-Saharan Africa (37% registration rate). See PLAN, COUNT EVERY CHILD, *supra* note 31, at 10.

207. For instance, a January 1 date of birth would be more suspect than a less frequently assigned birth date. See *Baxter*, *supra* note 1.

208. See, e.g., *United States v. Hasan*, 747 F. Supp. 2d 642, 673–74 (E.D. Va. 2010).

209. See, e.g., *Barnett v. State*, 488 So. 2d 24, 24–25 (Ala. Crim. App. 1986).

210. See, e.g., Andreas Schmelting et al., *Forensic Age Estimation in Unaccompanied Minors and Young Living Adults*, in FORENSIC MEDICINE: FROM OLD PROBLEMS TO NEW CHALLENGES 77, 83–94 (Duarte Nuno Vieira ed., 2011) (describing methods of forensically testing carpus, dental, and clavicle for age assessments).

211. See, e.g., *United States v. Austrew*, 202 F. Supp. 816, 822 (D. Md. 1962) ("[U]nder an exception to the hearsay rule of great antiquity, one's own testimony as to his age is sufficient."). The Fifth Amendment, however, would

Of course, relying on this evidence without using the specific date on a birth certificate will make age more difficult for the state to prove—particularly beyond a reasonable doubt.<sup>212</sup> But not only does omitting suspect foreign birth certificates comport with the rationale for the hearsay exception for birth records, it also treats all estimated birth dates equally. Without this rule, estimated birth dates on foreign birth certificates would be admissible; estimated birth dates on other official documents would not.<sup>213</sup> With this rule, though, all estimated birth dates would be inadmissible in a criminal trial. Therefore, while this rule places a higher burden on the state, it comports with the rationale of the hearsay exception for birth certificates, and it treats all estimated birth dates equally by making each inadmissible.

### C. AGE CHARACTERISTICS AND SENTENCING

Because a court cannot accurately determine the defendant's age due to the immigrant age problem, it cannot determine whether the defendant is constitutionally old enough for the court to sentence him to death or life without parole for a non-homicide offense.<sup>214</sup> Instead, in cases where the defendant falls close to the crucial age (eighteen), the court should consider whether the defendant's age characteristics—immaturity, susceptibility to peer pressure, and character underdevelopment<sup>215</sup>—show that the defendant is culpable enough for the

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bar the state from forcing the defendant himself to testify as to his age. *See* U.S. CONST. amend. V.

212. *See* *State v. Ali*, 806 N.W.2d 45, 54 (Minn. 2011) (“[I]t is questionable in situations in which the defendant's country of origin does not maintain birth records whether, in a case in which a defendant's age is open to question, the State could ever meet a standard higher than preponderance of the evidence.”).

213. *See supra* notes 160–64 and accompanying text.

214. *See* *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

215. *Roper*, 543 U.S. at 569–70. In *Miller v. Alabama*, the Court called these three characteristics the “hallmark features” of juveniles. 132 S. Ct. 2455, 2468 (2012). But the *Miller* court also outlined more factors of youthfulness a sentencing court could consider: (1) the defendant's family environment; (2) the extent of the defendant's participation in the crime; and (3) the defendant's inability to navigate the criminal justice system due to his youth, such as his inability to deal with police or prosecutors, or his “incapacity to assist his own attorneys.” *Id.* Under this proposed solution, a court could certainly consider these factors as further circumstantial evidence of the juvenile's culpability. But at minimum, the court should analyze the three “hallmark features” of juveniles that led the Supreme Court to categorically prohibit death and life

court to sentence him to death or life without parole for a non-homicide offense. Specifically, because young adults increase in maturity the most between sixteen and nineteen,<sup>216</sup> a psychological analysis of a defendant with an unknown birth date might reveal whether he is psychologically mature enough for society to hold him culpable, and to what degree.<sup>217</sup>

This solution has two benefits. First, it is consistent with the Supreme Court's rationale for prohibiting death and life without parole sentences for juveniles that commit non-homicide offenses: children are different psychologically.<sup>218</sup> This solution considers the psychological difference between adults and children by examining whether the child's psychological immaturity motivated the (potentially) capital crime.

Second, this solution is practical. Courts currently use presentence investigation reports to assess sentencing factors, including the nature of the crime and the defendant's psychological profile.<sup>219</sup> Where the court cannot determine the defendant's age with accuracy, the presentence investigation report for a crime with a potential sentence of death or life without parole for a non-homicide offense could also consider the three age-relevant characteristics: the defendant's maturity, the role peer pressure played in the crime, and the defendant's potential to further develop and rehabilitate his character.<sup>220</sup> If these factors suggest the defendant's youth played a large role in the crime, the court should not sentence the defendant to death or life without parole; if these factors were absent, the court could grant these sentences.

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without parole sentences for non-homicide offenses. *See Graham*, 130 S. Ct. at 2030; *Roper*, 543 U.S. at 578–79.

216. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 756 (2000).

217. *Cf. id.* at 757 (“[I]t is important to consider individual differences, rather than simply age, when assessing decision-making ability or maturity of judgment among adolescents.”).

218. *See supra* Part II.C. In fact, other scholars have recommended giving defendants a sentencing discount based on youthful characteristics, not just age. *See, e.g.*, Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 487 (1998) (“Even when sufficient cognitive capacity and emotional control is present to pass the threshold of criminal capacity, a significant deficit in the capacity to appreciate or control behavior would mean the forbidden conduct is not *as much* the offender's fault, and the quantum of appropriate punishment is less.”).

219. *See* FED. R. CRIM. P. 32(c); ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT 7–17 (1984).

220. *See Roper*, 543 U.S. at 569–70.

However, this solution still places a life or death decision in the hands of the court based on inaccurate factors. While a psychological profile might more accurately predict whether the defendant is culpable, it still does not accurately predict the defendant's age. In addition, courts could already use a psychological profile in their current decision—whether the defendant is eighteen—so long as the profile is sufficiently reliable.<sup>221</sup>

Nonetheless, this solution allows courts to assess the culpability by relying on a professional psychological analysis, rather than assessing a defendant's age based on an estimated birth date. Therefore, in cases where a court cannot follow the letter of the law because the defendant's age is unknown, it may nonetheless follow the spirit of the law by prohibiting death sentences for psychologically immature defendants.

### CONCLUSION

The immigrant age problem originates when children are born in countries that do not keep birth records or otherwise limit children from getting birth certificates. Sometime after birth, these children receive birth certificates, and their parents estimate the date of birth. When these children emigrate to the United States, this estimated date of birth becomes their official date of birth on government documents: immigrant files, green cards, and driver's licenses. The government accepts the uncertainty because it does not need an exact age for monitoring immigration or allocating government resources. But this uncertainty is unacceptable in the criminal justice system. At three stages of the criminal process—charging, trial, and sentencing—the criminal justice system distinguishes on the basis of specific ages. Because of this, immigrants with approximated birthdates on their official government documents pose a problem at each of these stages.

Yet courts have yet to craft standards to fix the problems. They have not addressed what burden of proof to use for charging the defendant in district court rather than juvenile court, whether these documents are admissible at trial, or how the uncertainty affects constitutional limitations on sentencing. To alleviate this problem, this Note proposes a different solution for each step of the criminal process. For charging, courts should adopt a rebuttable presumption that the listed birth date is accurate in order to put the burden on the defendant,

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221. See *United States v. Ortiz*, 636 F.3d 389, 393 (8th Cir. 2011).

who will have more knowledge about his own date of birth, to prove his own age. At trial, the hearsay rule should bar courts from admitting the birth documents. Finally, at sentencing, courts should not attempt to determine the defendant's actual age. Instead, courts should consider only the defendant's age characteristics—immaturity, susceptibility to peer pressure, and character underdevelopment—to determine whether the defendant's youthfulness prohibits the court from sentencing him to death or life without parole for a non-homicide offense.