
**JUVENILE JUSTICE: SEARCHING FOR A
FLEXIBLE ALTERNATIVE TO THE
STRICT AND OVER-INCLUSIVE
TRANSFER SYSTEM FOR SERIOUS
JUVENILE OFFENDERS**

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TABLE OF CONTENTS

INTRODUCTION	344
I. THE “SLENDER MAN” STABBING CASE	346
II. THE JUVENILE JUSTICE SYSTEM.....	351
A. HISTORY OF THE JUVENILE JUSTICE SYSTEM.....	351
B. CHANGES TO THE JUVENILE JUSTICE SYSTEM IN THE LATE TWENTIETH CENTURY	352
C. USE OF THE WAIVER FOR A MORE PUNISHMENT-ORIENTED JUVENILE JUSTICE SYSTEM.....	353
1. Judicial Waiver	354
2. Legislative Waiver and Statutory Exclusion Laws	356
3. Prosecutorial Waiver or Direct Filing.....	358
D. WISCONSIN’S JUVENILE JUSTICE SYSTEM.....	359
1. Automatic Statutory Transfer	359
2. Reverse Waiver Hearing.....	360
E. COMPARING THE JUVENILE JUSTICE SYSTEM AND THE CRIMINAL JUSTICE SYSTEM.....	361
III. HOW THE JUSTICE SYSTEM FAILS TO MEET THE NEEDS OF JUVENILE OFFENDERS.....	363
A. JUVENILE TRANSFER LAWS ARE INEFFECTIVE AT ADDRESSING PUBLIC SAFETY CONCERNS AND DETERRING POTENTIAL JUVENILE OFFENDERS.....	363
B. JUVENILE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM FACE HIGHER RISKS OF PHYSICAL ABUSE, SEXUAL ABUSE, AND MENTAL	

HEALTH ISSUES.....	365
C. A SIGNIFICANT PERCENTAGE OF YOUTH IN THE JUVENILE JUSTICE SYSTEM SUFFER FROM MENTAL HEALTH ISSUES	366
IV. THE ONGOING BRAIN DEVELOPMENT OF CHILDREN AS A FACTOR WEIGHING AGAINST ADULT SENTENCING	368
V. ALTERNATIVE METHODS FOR DEALING WITH JUVENILE OFFENDERS	370
A. JUVENILE JUSTICE REFORMS THAT OPERATE WITHIN THE EXISTING JUSTICE SYSTEM	371
1. Blended Sentencing	371
2. Colorado’s Juvenile Clemency Board	373
B. “CONTINUUM OF CARE” MODEL	374
C. JUVENILE SPECIALTY COURTS.....	375
1. Juvenile Drug Courts	375
2. Juvenile Gun Courts	377
3. Mental Health Courts.....	377
D. WRAPAROUND MILWAUKEE: A PROGRAM THAT FOCUSES ON TREATING JUVENILE OFFENDERS WITH MENTAL HEALTH ISSUES	378
E. PREVENTION PROGRAMS	379
F. BLENDED SENTENCING LAWS PROVIDE THE BEST ALTERNATIVE TO CURRENT PUNITIVE TRENDS REVOLVING AROUND STATUTORY EXCLUSION LAWS	380
CONCLUSION	381

INTRODUCTION

Morgan Geysler and Anissa Weier are two adolescent girls currently in Wisconsin’s criminal justice system.¹ While Weier remains in a juvenile detention facility, Geysler spent several months in 2016 in a mental health facility receiving treatment for early-onset schizophrenia.² Unlike other

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1. See Lisa Miller, *Slender Man Is Watching*, N.Y. MAG. (Aug. 25, 2015, 8:00 AM), <http://nymag.com/daily/intelligencer/2015/08/slender-man-stabbing.html>.

2. *Wisconsin’s ‘Slender Man’ Case Subject of HBO Documentary*, MILWAUKEE J. SENTINEL (Mar. 14, 2016, 12:55 PM), <http://www.twincities.com/2016/03/14/slender-man-case>; Bruce Vielmetti, *Insanity Plea Entered in Slender Man Case*, MILWAUKEE J. SENTINEL (Aug. 19, 2016, 10:18 PM),

children their age, Geysler and Weier have both been charged with attempted first-degree intentional homicide for stabbing their friend, a girl named Payton Leutner, nineteen times with a kitchen knife and leaving her in the woods to die.³ At the time of the stabbing, all three girls were twelve years old.⁴ A fictional online character, known as Slender Man, served as the motivation behind Geysler and Weier's attempt to kill their friend, who miraculously survived after crawling out of the woods.⁵ Furthermore, unlike most children who are charged with a crime, Geysler and Weier have been charged as adults.⁶ Additionally, a trial court judge decided to keep the adolescent girls in the criminal court during a reverse waiver hearing, and consequently their names were released to the public.⁷ Videos of the police questioning both girls after their initial arrest are also readily available on media outlets.

This Note examines the experiences of children in the juvenile and criminal justice system with the purpose of finding an alternative to keeping Geysler and Weier in the criminal system. Part I provides a summary of Geysler and Weier's pending case, which has been pieced together from various news outlets. Part II looks at the development of the juvenile justice system and the transfer system, with an in-depth analysis of the three primary waiver mechanisms. Part II also examines the Wisconsin laws that Geysler and Weier are subject to, and the primary ways in which the juvenile justice system differs from the criminal justice system. Part III describes how the current justice system in America has failed to meet the needs of juvenile offenders. Part IV discusses the reasoning involved in U.S. Supreme Court decisions that have treated juvenile offenders differently than adult offenders. Part IV also presents studies that explain why the development of children's brains provides support for this differential treatment. Part V analyzes various alternatives to the prevailing regime which keeps juvenile offenders in the juvenile justice system or transfers them to the criminal justice system. Lastly, Part V also proposes that blended sentencing, while still an imperfect solution, is the best alternative to automatically subjecting juveniles who commit violent

<http://on.jsonl.in/2blqtkb>.

3. Elahe Izadi, 'Slender Man' Stabbing: 13-year-old Wisconsin Girls Will Be Tried as Adults, WASH. POST (Aug. 10, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/10/slender-man-stabbing-13-year-old-wisconsin-girls-will-be-tried-as-adults>; Abigail Jones, *The Girls Who Tried to Kill for Slender Man*, NEWSWEEK (Aug. 13, 2014, 6:49 AM), <http://www.newsweek.com/2014/08/22/girls-who-tried-kill-slender-man-264218.html>; Miller, *supra* note 1.

4. Jones, *supra* note 3.

5. *Id.*

6. *Id.*

7. See Miller, *supra* note 1.

offenses to the criminal justice system. With respect to Anissa Weier, blended sentencing would be the best alternative, because her situation could be reevaluated once she reaches the upper age limit of juvenile court jurisdiction. In the case of Morgan Geysler, under a blended sentencing regime, she could be transferred to the mental health courts and placed in a mental health facility within a designated children's ward to receive treatment for schizophrenia, as both the juvenile and criminal justice systems are ill-equipped to house juvenile offenders with serious mental illnesses.

I. THE "SLENDER MAN" STABBING CASE

On May 31, 2014, in Waukesha, Wisconsin, two twelve-year-old girls, Morgan Geysler and Anissa Weier, allegedly brought their friend, twelve-year-old Payton Leutner, into the woods during a sleepover, and stabbed her nineteen times with a kitchen knife.⁸ According to Leutner and Weier, it was Geysler who stabbed Leutner.⁹ After the alleged stabbing, Geysler and Weier left Leutner to die in the woods, and walked around Waukesha until the police found them near a highway.¹⁰ Fortunately, Leutner survived the incident after she crawled out of the woods and caught the attention of a passing bicyclist.¹¹

Geysler and Weier's case has become known as the "Slender Man stabbing" across news and social media outlets.¹² Both girls told police that their purpose in trying to kill Leutner was to satisfy Slender Man,¹³ a fictional character created and popularized online by Eric Knudsen.¹⁴ Many stories and pictures on the Internet portray Slender Man as a "tall, thin, faceless," and eerie figure who stalks children.¹⁵ In these stories, the children followed by Slender Man experience mysterious "misfortunes."¹⁶

When discussing their motive for the stabbing, Geysler and Weier

8. Jones, *supra* note 3; Miller, *supra* note 1.

9. Izadi, *supra* note 3.

10. Miller, *supra* note 1.

11. Jones, *supra* note 3.

12. Miller, *supra* note 1.

13. *Id.*

14. Keith Wagstaff, 'Slender Man' Creator Speaks on Stabbing: 'I Am Deeply Saddened', NBC NEWS (June 4, 2014, 3:50 PM), <http://www.nbcnews.com/storyline/slender-man-stabbing/slender-man-creator-speaks-stabbing-i-am-deeply-saddened-n122781>.

15. Catie L'Heureux, *Girls to Be Tried as Adults in Slender Man Stabbing*, N.Y. MAG.: THE CUT (July 28, 2016, 10:37 AM), <http://nymag.com/thecut/2016/07/slender-man-stabbing-wisconsin-girls-to-be-tried-as-adults-appeals-court.html>.

16. Miller, *supra* note 1. *See also* Jones, *supra* note 3.

provided several reasons for having to satisfy Slender Man. First, the girls wanted to become “proxies” for Slender Man,¹⁷ and claimed that they needed to sacrifice a life “to prove their loyalty” to him.¹⁸ They said that they wandered through the woods after stabbing Leutner in hopes of finding and being welcomed to live with Slender Man in his mansion.¹⁹ The girls also hoped to prove to nonbelievers that Slender Man existed, so they saw their sacrifice and subsequent invitation to live in Slender Man’s mansion as a means to do this.²⁰ Lastly, Geysler and Weier told police that they felt they needed to kill Leutner to protect themselves and their families from being hurt by Slender Man.²¹

Geysler and Weier’s behavior during the police interviews varied.²² The police interviewed the girls separately and kept them in separate quarters.²³ While in their interviews both girls claimed that the other led the plot to kill Leutner, Geysler and Weier diverged with respect to their behavior and demeanor during the police interviews.²⁴ When questioned by the detective, Weier was “detail-oriented” and cooperative.²⁵ Weier emphasized that Geysler stabbed Leutner and acknowledged that Slender Man was a fictional character.²⁶ In contrast, Geysler acted strangely during the interview and was “hostile” towards the detective interviewing her.²⁷ When discussing the stabbing, Geysler stated that she “felt no remorse” and described what she did as “[s]tabby stab stab stab.”²⁸ In the interrogation tape, Geysler can be heard saying that “[the stabbing] sort of just happened. It didn’t feel like anything. It was like air.”²⁹

Furthermore, the two girls have exhibited drastically different behavior during their time in the Washington County juvenile detention center.³⁰ In the detention center, Weier has been described as “compliant,

17. Jones, *supra* note 3.

18. Izadi, *supra* note 3.

19. *Id.* See also Miller, *supra* note 1.

20. Jones, *supra* note 3; Miller, *supra* note 1.

21. Bruce Vielmetti, *Why No Help for Schizophrenic Girl in Slender Man Stabbing?*, MILWAUKEE J. SENTINEL (July 3, 2015), <http://www.jsonline.com/news/crime/why-no-help-for-schizophrenic-girl-in-slender-man-stabbing-b99527566z1-311614861.html>.

22. See Miller, *supra* note 1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Elaine Aradillas, *Slender Man Suspect on Stabbing Friend: ‘It Felt Weird’*, PEOPLE (Feb. 27, 2015, 5:30 PM), <http://people.com/crime/slender-man-suspect-on-stabbing-friend-it-felt-weird>.

30. See Miller, *supra* note 1.

pleasant, [and] an overachiever.”³¹ Yet despite her seemingly “model” behavior, Weier has previously threatened to hurt herself and, at one point in 2014, was placed on suicide watch; she has also faced criticism from other children in the detention center.³² With respect to Geysler, during the nineteen months that she spent in the detention center untreated, her mental condition worsened.³³ She was reclusive and still believed that Slender Man existed.³⁴ An expert who observed Geysler testified that when discussing Slender Man, Geysler stated that “[i]f [Slender Man] told me to break into someone’s house and stab them, I would have to do it.”³⁵ She continued to speak to her imaginary friends and refused to take medication for fear of losing them.³⁶ However, after being committed to a mental health facility for psychiatric treatment in January 2016, Geysler’s mental condition greatly improved.³⁷ According to Geysler’s attorney, she responded well to the medication she received in the facility, the voices she used to hear began to disappear, and she began to show remorse for her actions.³⁸

After being arrested and interviewed, Geysler and Weier were automatically charged as adults for attempted intentional first-degree homicide.³⁹ Under Wisconsin law, children ten years of age and older are initially charged as adults for first-degree homicide by default, which includes attempted first-degree homicide.⁴⁰ However, juveniles charged as adults can attempt to transfer their case to the juvenile court through a “reverse waiver” proceeding.⁴¹ In this case, both girls’ attorneys tried to transfer their case to the juvenile court using a reverse waiver proceeding.⁴²

31. *Id.*

32. *Id.*

33. *Id.* See also Wisconsin’s ‘Slender Man’ Case Subject of HBO Documentary, *supra* note 2 (describing how Geysler’s mental condition finally improved after receiving treatment for early-onset schizophrenia).

34. See Jones, *supra* note 3; Miller, *supra* note 1.

35. Miller, *supra* note 1.

36. *Id.*; Vielmetti, *supra* note 21.

37. Wisconsin’s ‘Slender Man’ Case Subject of HBO Documentary, *supra* note 2.

38. *Id.*

39. Izadi, *supra* note 3; Miller, *supra* note 1.

40. WIS. STAT. ANN. § 938.183(1)(am) (West 2016) (“[C]ourts of criminal jurisdiction have exclusive general jurisdiction over . . . [a] juvenile who is alleged to have attempted or committed a violation of s. 940.01 [first-degree intentional homicide] . . . on or after the juvenile’s 10th birthday.”).

41. WIS. STAT. ANN. § 970.032(2) (West 2016). See also Wisconsin v. Martin, 530 N.W.2d 420, 422 (Wis. Ct. App. 1995).

42. Bruce Vielmetti, *Slender Man Case Attorneys Call Charging Law Unconstitutional*, MILWAUKEE J. SENTINEL (May 26, 2015), <http://archive.jsonline.com/news/crime/slender-man-case-attorneys-call-charging-law-unconstitutional-b99505478z1-304916571.html>.

The main argument for transferring the adolescent girls' case to juvenile court was that their brains were not developed enough, at the age of twelve, to possess the requisite mens rea for the crime they had been charged with.⁴³ In support of this argument, Weier's attorney cited to U.S. Supreme Court decisions that have held that sentencing juveniles to the death penalty or life in prison without parole for non-homicide offenses violated the Eighth Amendment, and was therefore unconstitutional.⁴⁴ Both girls' attorneys also raised a doubt as to their competency, and both girls subsequently had separate competency hearings.⁴⁵ During this process, Geysler was diagnosed with early-onset schizophrenia⁴⁶ and oppositional defiant disorder.⁴⁷ In her reverse waiver proceeding, Geysler's attorney argued that her mental health would continue deteriorating if she was kept in the criminal system rather than moved to the juvenile justice system.⁴⁸

Following decisions made by Waukesha County Circuit Judge Michael Bohren, both Geysler and Weier were determined competent, and will continue to be tried as adults.⁴⁹ Judge Bohren cited the "vicious" nature of the crime and the fact that the girls spent months planning their friend's death as the primary reasons for keeping their case in the criminal court system.⁵⁰ He believed the girls needed to stay in the criminal system in order to keep the public safe since the juvenile justice system has limited jurisdiction over juvenile offenders.⁵¹ Moreover, he believed that trying the case in the juvenile court would "unduly depreciate the seriousness of the

43. *Id.*

44. *Id.* See generally *Graham v. Florida*, 560 U.S. 48 (2010) (holding that it was unconstitutional to sentence a juvenile offender to life in prison without parole for a nonhomicide offense); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it was unconstitutional to sentence juvenile offenders, who were under the age of eighteen when they committed their offense, to the death penalty).

45. Christopher Kuhagen, *Emotions Run High After Judge Rules Slender Man Stabbing Suspects to Stay in Adult Court*, WAUKESHA NOW (Aug. 10, 2015), <http://www.waukeshanow.com/news/emotions-run-high-after-judge-makes-ruling-in-slender-man-stabbing-case-b99550621z1-321317491.html>.

46. Izadi, *supra* note 3.

47. Miller, *supra* note 1.

48. Izadi, *supra* note 3.

49. Miller, *supra* note 1. See also Izadi, *supra* note 3.

50. *Judge Rules Wisconsin Teens in 'Slender Man' Stabbing Case to be Tried as Adults*, FOX NEWS (Aug. 11, 2015), <http://www.foxnews.com/us/2015/08/11/judge-rules-wisconsin-teens-in-slender-man-stabbing-case-to-be-tried-as-adults.html>; Miller, *supra* note 1. See also Kuhagen, *supra* note 45 (quoting Judge Bohren as he issued the ruling calling the killings premeditated and noting that the girls misled their friend into believing help would come and told her to be quiet so that she would not "draw attention to herself").

51. See *Judge Rules Wisconsin Teens in 'Slender Man' Stabbing Case to be Tried as Adults*, *supra* note 50 (describing Judge Bohren's concerns that the girls would stop receiving mental health treatment after exiting the juvenile system at age eighteen and that people would be protected longer if the girls were in the adult system).

offense.”⁵² Wisconsin’s Court of Appeals for District II recently affirmed Judge Bohren’s decision to keep the case in the adult criminal court.⁵³ The Court of Appeals held that Judge Bohren had properly exercised his discretion because he “rationally considered the relevant testimony, applied the proper legal standard, and reached a conclusion that a reasonable judge could reach.”⁵⁴ Like Judge Bohren, the Court of Appeals also considered the violent and premeditated nature of the crime in arriving at its decision.⁵⁵ The Court of Appeals also echoed Judge Bohren’s concern over the limited jurisdiction of the juvenile court system, where, even if the girls were found guilty, they would be released within several years.⁵⁶ If the adolescent girls are found guilty in the criminal court, they could spend up to sixty-five years in prison.⁵⁷ Furthermore, the Court of Appeals noted that regardless of whether Geysler and Weier were ultimately found guilty of their crime as adults or juveniles, they would start their sentences in a Wisconsin youth prison.⁵⁸ Although the decision to try Geysler and Weier as adults may still be appealed to the Wisconsin Supreme Court, both girls have declined to pursue an appeal.⁵⁹ Instead, both adolescent girls have entered a plea of not guilty by reason of mental disease or defect.⁶⁰

While Geysler and Weier undoubtedly committed a brutally violent act against their friend, this Note argues that subjecting these adolescent girls to the criminal justice system serves none of the goals of incarceration, be it rehabilitation, deterrence, or retribution. America’s criminal justice system, known for its backed up caseloads and overcrowded prisons,⁶¹ is not equipped to handle juvenile offenders, especially those like Geysler who

52. Kuhagen, *supra* note 45.

53. Bruce Vielmetti, *Court of Appeals: Slender Man Stabbing Defendants Stay in Adult Court*, MILWAUKEE J. SENTINEL (July 27, 2016), <http://archive.jsonline.com/news/crime/court-of-appeals-slender-man-stabbing-defendants-stay-in-adult-court-b99767626z1-388368011.html>.

54. *Id.*

55. L’Heureux, *supra* note 15.

56. *See id.*; Vielmetti, *supra* note 53.

57. Jones, *supra* note 3.

58. Vielmetti, *supra* note 53.

59. Todd Richmond, *Wisconsin Girl Pleads Mental Illness in Slender Man Attack*, ASSOCIATED PRESS (Aug. 19, 2016, 5:50 PM) [hereinafter Richmond, *Wisconsin Girl*], <http://bigstory.ap.org/article/5ab9ec343915429d99ca6ddd42d6bebb/wisconsin-girl-pleads-mental-defect-slender-man-attack>; Todd Richmond, *2nd Girl in Slender Man Stabbing Enters Insanity Plea*, KSNT NEWS (Sept. 9, 2016, 10:22 AM) [hereinafter Richmond, *2nd Girl*], <http://ksnt.com/2016/09/09/2nd-girl-in-slender-man-stabbing-enters-insanity-plea/>.

60. Richmond, *2nd Girl*, *supra* note 59.

61. *See* Reid Wilson, *Prisons in These 17 States Are Over Capacity*, WASH. POST (Sept. 20, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity/> (describing the various difficulties facing states in light of prison overcrowding).

suffer from severe mental illness. In fact, the development of a juvenile justice system, separate from the adult criminal system, originated from a belief that the criminal system did not adequately serve the needs of juvenile offenders.⁶²

II. THE JUVENILE JUSTICE SYSTEM

A. HISTORY OF THE JUVENILE JUSTICE SYSTEM

Efforts to establish juvenile courts in the United States began in the late nineteenth century,⁶³ and “[t]he first juvenile court was established in Chicago[, Illinois] in 1899.”⁶⁴ Prior to this, children accused of committing a crime were tried and punished in adult criminal courts.⁶⁵ The movement to establish courts specifically for children was inspired by scientific studies indicating that the nature and needs of children differed greatly from those of adults, and thus children required different treatment under the law.⁶⁶ The movement was also rooted in the legal doctrine of *parens patriae*.⁶⁷

The doctrine of *parens patriae*, which comes from English common law, was the notion that the king, as “father of his country,” had legal authority to take care of his citizens, especially those without the capacity to care for themselves.⁶⁸ The *parens patriae* doctrine essentially gave the king unilateral authority to intervene in the lives of his citizens, and justified such intervention.⁶⁹ In England, this doctrine enabled the king to take on the role of a parent for orphans and other dependent children, such

62. See David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (discussing the origin of the juvenile court movement, which “called for the creation of specialized courts to hear the cases of all children, including adolescents, because they were understood to be qualitatively different from adults. . . . the new science of child development successfully made the case that adolescents were ‘more like infants in their nature and needs than they were like adults’ and should be treated like children at law”).

63. *Id.*

64. MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 164 (3d ed. 2004).

65. Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 788 (2000).

66. Tanenhaus, *supra* note 62. See also CHESNEY-LIND & SHELDEN, *supra* note 64, at 121 (referring to the movement to establish a juvenile justice system as the “child-saving movement”).

67. See CHESNEY-LIND & SHELDEN, *supra* note 64, at 160; Robert Anthonson, Note, *Furthering the Goal of Juvenile Rehabilitation*, 13 J. GENDER RACE & JUST. 729, 731–32 (2010).

68. CHESNEY-LIND & SHELDEN, *supra* note 64, at 160; Beresford, *supra* note 65, at 789.

69. CHESNEY-LIND & SHELDEN, *supra* note 64, at 160; Tanenhaus, *supra* note 62, at 18.

as those whose parents were declared unfit.⁷⁰ The king then had the authority to act as the administrator for these children's property.⁷¹ In the United States, the doctrine of *parens patriae* has created a juvenile justice system where the state "assumes responsibility for the rehabilitation and protection of every juvenile who enters the . . . system."⁷² Creators of the juvenile justice system believed that juvenile offenders behaved badly because of poor parental guidance, as well as "poverty and immorality."⁷³ They felt that juvenile delinquents were more "innocent," "dependent," and malleable than their adult counterparts,⁷⁴ and thus more amenable to treatment that could transform them into productive and law-abiding members of society.⁷⁵ As a result, the early juvenile justice system had a greater emphasis on rehabilitation and treatment than the criminal system, where retribution remains one of its primary purposes.⁷⁶

B. CHANGES TO THE JUVENILE JUSTICE SYSTEM IN THE LATE TWENTIETH CENTURY

During the late twentieth century, the juvenile justice system began to shift away from its rehabilitative function towards punishment-oriented policies that aligned more with the criminal justice system.⁷⁷ According to Richard E. Redding and James C. Howell, this shift was the result of three factors. First, they believed that "extensive media coverage of violent crimes by juveniles fueled perceptions of a juvenile crime epidemic in the early 1990s."⁷⁸ An examination of newspaper headlines about female juvenile crime from the 1990s and 2000s illustrates this factor, as the headlines often suggest that there was an epidemic of young girls committing violent crimes.⁷⁹ Second, a "philosophical shift from

70. CHESNEY-LIND & SHELDEN, *supra* note 64, at 160; Beresford, *supra* note 65, at 789.

71. CHESNEY-LIND & SHELDEN, *supra* note 64, at 160.

72. Anthonen, *supra* note 67, at 731 (citing Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 137 (1995)).

73. See Elsea, *supra* note 72, at 137.

74. *Id.*

75. Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 299 (1999).

76. CHESNEY-LIND & SHELDEN, *supra* note 64, at 169; Anthonen, *supra* note 67, at 732.

77. Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 62, at 145, 145.

78. *Id.* (citation omitted).

79. See JANE B. SPROTT & ANTHONY N. DOOB, JUSTICE FOR GIRLS? STABILITY AND CHANGE IN THE YOUTH JUSTICE SYSTEMS OF THE UNITED STATES AND CANADA 5-6 (2009) (discussing headlines from American and Canadian newspapers that reveal a general concern that levels of violence are rising

rehabilitation to punishment . . . [had] filtered down” from the criminal justice system to the juvenile justice system.⁸⁰ Politicians during this time capitalized on the sensational media coverage of violent juvenile crime and the reality of rising juvenile crime rates to promote so-called tough-on-crime policies that were popular with voters.⁸¹ Third, many people believed that “juvenile rehabilitation programs [were] ineffective,” and that juvenile courts needed to deliver stricter punishments.⁸² Lisa S. Beresford adds that this shift toward harsher punishments for juvenile offenders stemmed from criticism that the juvenile system’s shorter sentences did not adequately protect society from dangerous juveniles.⁸³ High violent crime rates during the late 1980s and early 1990s fueled further criticism about the ineffectiveness of the juvenile justice system.⁸⁴ Americans in 1991 saw the highest levels of violent crime in the nation’s history.⁸⁵ Moreover, a 1991 national survey conducted by the Survey Research Center of the Institute for Social Research at the University of Michigan showed that most Americans believed juveniles charged with violent offenses should be tried as adults in criminal court.⁸⁶ This shift in the public’s and policymakers’ perception of the juvenile justice system and of juvenile offenders has led to an increasing number of juvenile cases transferred to the criminal courts.⁸⁷

C. USE OF THE WAIVER FOR A MORE PUNISHMENT-ORIENTED JUVENILE JUSTICE SYSTEM

Three tools have been used to transfer juvenile court cases to the criminal court system: (1) the judicial waiver, (2) the legislative or statutory waiver, and (3) the prosecutorial waiver.⁸⁸ Additionally, many states have “once an adult, always an adult” laws, which mandate that all cases involving juveniles who have previously faced criminal prosecution fall under criminal court jurisdiction.⁸⁹

among girls).

80. Redding & Howell, *supra* note 77, at 145.

81. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 62, at 83, 109.

82. Redding & Howell, *supra* note 77, at 145.

83. Beresford, *supra* note 65, at 792.

84. *Id.* (citing Elsea, *supra* note 72, at 139).

85. Elsea, *supra* note 72, at 139.

86. *Id.* at 136.

87. Anthonsen, *supra* note 67, at 732–33.

88. Beresford, *supra* note 65, at 793.

89. PATRICK GRIFFIN ET AL., U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, OFF. OF JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS

1. Judicial Waiver

Juvenile court judges use the discretionary judicial waiver when they decide whether to keep a juvenile case in juvenile court, or waive jurisdiction and transfer the case to criminal court.⁹⁰ The judicial waiver is exercised on a case-by-case basis, which allows judges who regularly work with juveniles to consider the unique characteristics of each case.⁹¹ Before a judge can decide to transfer the juvenile case to the criminal court, the judge must conduct a hearing to determine whether the juvenile is amenable to treatment and capable of rehabilitation in the juvenile system.⁹²

Juvenile court judges can consider many factors when making the transfer decision. These factors are drawn from the U.S. Supreme Court case *Kent v. United States*, in which the Supreme Court held that the juvenile court's waiver of jurisdiction was invalid because the juvenile court judge did not consider the requisite factors to determine waiver of jurisdiction.⁹³ These factors include:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime [in the same jurisdiction]

AND REPORTING 2 (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (“‘Once adult/always adult’ laws are a special form of exclusion requiring criminal prosecution of any juvenile who has been criminally prosecuted in the past—usually without regard to the seriousness of the offense.”).

90. DAVID L. MYERS, *BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS* 42 (Marilyn D. McShane & Frank Williams eds., 2005).

91. GRIFFIN ET AL., *supra* note 89, at 2; MYERS, *supra* note 90, at 42.

92. Beresford, *supra* note 65, at 795 (citing statutes that require a hearing in the forty states that use judicial waiver).

93. *Kent v. United States*, 383 U.S. 541, 564–65, 566–67 (1966) (finding that the juvenile court judge improperly granted the waiver request because he did not consider the factors discussed in a policy memorandum to the juvenile court regarding the disposition of waiver requests); Beresford, *supra* note 65, at 795–96.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with . . . law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.⁹⁴

Courts may also consider the juvenile's age and whether the juvenile used a "firearm or deadly weapon" in committing the offense.⁹⁵ Some courts consider the victim's opinions, and others consider "the likelihood that the minor will develop competency and life skills while in a juvenile facility in order to become a contributing member of society."⁹⁶ A study on transferred juvenile cases revealed that the factors given most weight in a transfer decision are "the seriousness of the offense, prior record, the results of previous treatment efforts, and age."⁹⁷ Studies have also shown that gender and race may be significant factors in the transfer decision.⁹⁸

The judicial waiver tool is often praised for enabling a juvenile court judge, an expert in the area of juvenile delinquency, to provide individualized review of each case.⁹⁹ Individualized review allows the judge to consider the juvenile offender's unique circumstances when deciding whether the juvenile can be rehabilitated.¹⁰⁰ In this sense, the judicial waiver is the transfer tool that best serves the rehabilitative aims of the juvenile justice system.

Critics of the judicial waiver point to its inconsistent application,¹⁰¹ and the potential discriminatory effects that result from judges exercising

94. *Kent*, 383 U.S. at 566–67 (setting forth the factors that the juvenile court should have considered in an Appendix to the Opinion of the Court).

95. Beresford, *supra* note 65, at 795–96.

96. *Id.* at 796.

97. Slobogin, *supra* note 75, at 312.

98. *Id.* at 313.

99. Beresford, *supra* note 65, at 805.

100. *Id.* ("As one commentator stated, a 'juvenile should be dealt with through individualized justice considerations based on his or her own conduct and particular needs, rather than a process solely dictated by the offense.'" (quoting Arthur L. Burnett, Sr., *What of the Future? Envisioning an Effective Juvenile Court*, 15 A.B.A. SEC. CRIM. JUST. 7, 12 (2000))).

101. *Id.*

their discretion and using subjective criteria.¹⁰² Critics are also concerned about the risk that prosecutors will abuse the judicial waiver tool to pressure juveniles into accepting guilty pleas by threatening criminal prosecution.¹⁰³ The fact that at least half of the juvenile cases waived to the criminal courts in the 1980s involved property crimes demonstrates how the judicial waiver has been an imperfect solution to the problem of juvenile offenders who commit violent crimes.¹⁰⁴ However, since the 1990s, the number of transferred cases involving person offenses has surpassed the number of transferred cases involving property offenses.¹⁰⁵

According to a 2011 national report from the Office of Juvenile Justice and Delinquency Prevention, use of the judicial waiver has decreased since 1994 because of declining juvenile violent crime rates and the rise of other transfer tools.¹⁰⁶ In 1994, juvenile courts waived jurisdiction in about 13,100 cases compared to about 8,500 cases in 2007.¹⁰⁷ Furthermore, 90% of the juvenile cases transferred to criminal court in 2007 involved a male offender, 88% involved an offender who was at least sixteen years old, and 37% involved an offender who was African American.¹⁰⁸ Unlike the number of transferred cases, the characteristics of transferred offenders in 2007 did not greatly differ from those transferred in 1994, where 95% of the juvenile cases transferred involved a male offender, 87% involved an offender who was at least sixteen years old, and 44% involved an offender who was African American.¹⁰⁹ These statistics illustrate how gender, age, and race have remained significant factors in transfer decisions.

2. Legislative Waiver and Statutory Exclusion Laws

The legislative waiver tool is created by statute and “automatically transfers” certain juvenile cases, based on legislatively defined criteria, to

102. Barry C. Feld, *Criminalizing the Juvenile Court: A Research Agenda for the 1990s*, in *JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA* 59, 68 (Ira M. Schwartz ed., 1992).

103. Beresford, *supra* note 65, at 806.

104. See NAT'L CTR. FOR JUV. JUST., *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT* 173 (Melissa Sickmund & Charles Puzzanchera eds., 2014), <http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

105. *Id.*

106. GRIFFIN ET AL., *supra* note 89, at 10.

107. *Id.*

108. *Id.*

109. *Id.*

the criminal courts.¹¹⁰ In other words, the criminal court has original jurisdiction over these juveniles' cases. Statutory exclusion laws enable legislators to determine the policies and goals of the juvenile justice system by deciding which cases are serious enough to originate in the criminal system.¹¹¹ In effect, the legislative waiver eliminates the "initial discretionary power of juvenile court" judges and prosecutors.¹¹² A juvenile's case may be automatically transferred to the criminal court because of the offender's age, the nature of the offense charged, or the offender's juvenile record.¹¹³ Statutory exclusion laws that automatically transfer juvenile cases based on the offense charged illustrate the shift towards a more punishment-oriented system that fails to account for the unique circumstances of each juvenile's case.¹¹⁴ However, most states have utilized the automatic legislative waiver only for juvenile offenders who are at least fifteen or sixteen years old.¹¹⁵ As illustrated by Geyser and Weier's case, Wisconsin is not one of those states.¹¹⁶

The legislative waiver has been lauded as an efficient and easy-to-administer tool for holding juvenile offenders accountable for their criminal actions.¹¹⁷ Advocates say that, in contrast to the discretionary judicial waiver, the use of "objective criteria" in the legislative waiver makes its application more predictable and consistent.¹¹⁸ Proponents also argue that the use of objective criteria reduces the risk of arbitrary or discriminatory decisionmaking associated with the judicial and prosecutorial waivers.

However, opponents of the legislative waiver criticize it for being over-inclusive and harsh on juveniles.¹¹⁹ Critics have also asserted that the legislative waiver is actually inefficient because juveniles whose cases start in the criminal court system often have the opportunity to request that their case be transferred back to the juvenile court through a reverse waiver

110. Beresford, *supra* note 65, at 806; Robert E. Shepherd Jr., *Juvenile Justice: The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 40 (1995).

111. SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, *BALANCING JUVENILE JUSTICE* 111 (2d ed. 2004).

112. MYERS, *supra* note 90, at 44.

113. *See* Shepherd, *supra* note 110, at 40.

114. Feld, *supra* note 102, at 66–67.

115. Beresford, *supra* note 65, at 810 (explaining that seven states allow automatic transfers for juvenile cases where the juvenile is at least fifteen years old).

116. *Id.* at 809 (citing WIS. STAT. ANN. § 938.183(1)(am) (West 1999); WIS. STAT. ANN. § 940.02 (West 1996); WIS. STAT. ANN. §§ 940.01, 940.05 (West 1996)) (Wisconsin's criminal court has original jurisdiction over all cases involving a minor who is at least ten years old and who commits, or attempts to commit, first-degree intentional homicide).

117. *See id.* at 806–07.

118. MYERS, *supra* note 90, at 44.

119. *Id.*; Beresford, *supra* note 65, at 811.

hearing.¹²⁰ Moreover, the same problems that arise when juvenile court judges make discretionary decisions in judicial waiver hearings come up when criminal court judges make discretionary decisions in reverse waiver hearings.¹²¹ Prosecutors also wield power in a legislative waiver setting because they can decide whether or not to charge the juvenile with an offense that automatically transfers the juvenile to criminal court.¹²²

Unfortunately, it is difficult to determine whether the proponents or critics of the legislative waiver have a stronger argument because little statistical analysis has been done on the use of the legislative waiver.¹²³ Since statutory exclusion laws cause juvenile cases to be directly filed in the criminal system, compiling statistics about these cases proves to be extremely difficult.¹²⁴ These juvenile cases are also difficult to identify statistically because they represent a very small portion of the caseload of the criminal justice system.¹²⁵

3. Prosecutorial Waiver or Direct Filing

The prosecutorial waiver was developed to reduce the use of judicial discretion in transfer decisions and establish a “more predictable” tool for dealing with serious juvenile offenders.¹²⁶ The prosecutorial waiver is used in states where both the criminal court system and the juvenile court system can have jurisdiction over a juvenile offender’s case based on the juvenile’s age and the nature of the juvenile’s offense.¹²⁷ These states are known as having “concurrent jurisdiction.”¹²⁸ The prosecutorial waiver gives the prosecutor the choice of filing the juvenile’s case in either the juvenile court or the criminal court.¹²⁹ The filing decision rests solely within the prosecutor’s discretion.¹³⁰

While the goal in developing the prosecutorial waiver was to

120. See Beresford, *supra* note 65, at 812–13 (discussing difficulties confronted by courts in automatic waiver jurisdictions).

121. MYERS, *supra* note 90, at 44–45.

122. Beresford, *supra* note 65, at 812.

123. GRIFFIN ET AL., *supra* note 89, at 12.

124. *Id.*

125. *Id.*

126. GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 109.

127. Beresford, *supra* note 65, at 813.

128. *Id.*

129. GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 109.

130. GRIFFIN ET AL., *supra* note 89, at 2. See also Beresford, *supra* note 65, at 813 (explaining that the prosecutor’s decision is usually not subject to judicial review and not required to be based on strict criteria).

“shift . . . discretion from juvenile court judges to prosecutors,” there is no evidence that prosecutors are more capable of making a good waiver decision.¹³¹ The prosecutorial waiver gives prosecutors the ability to unilaterally decide whether or not a juvenile offender is tried as an adult.¹³² Critics note that the lack of review of prosecutorial waiver decisions can lead to a lot of potential abuse by prosecutors.¹³³ Some worry that publicly elected prosecutors will succumb to pressures to be tough on juvenile crime and file their cases in the criminal system.¹³⁴ The fact that most transferred cases involve nonviolent offenses provides some evidence for this concern.¹³⁵ Although the prosecutorial waiver has been praised for being an efficient transfer tool,¹³⁶ it has also been highly criticized for yielding too much power to prosecutors without providing adequate protection for juveniles.¹³⁷

While prosecutorial waiver statutes have survived many constitutional challenges in state supreme courts,¹³⁸ as of 2011, only fourteen states and the District of Columbia used the prosecutorial waiver.¹³⁹ In contrast, forty-four states and the District of Columbia used the discretionary judicial waiver, and twenty-nine states had statutory exclusion laws.¹⁴⁰

D. WISCONSIN’S JUVENILE JUSTICE SYSTEM

1. Automatic Statutory Transfer

Geyser and Weier were automatically charged as adults for attempted first-degree homicide in accordance with the legislative waiver law in Wisconsin.¹⁴¹ Wisconsin’s legislative waiver law states that the criminal court has original jurisdiction over a case involving a juvenile age ten and above who committed or attempted to commit first-degree intentional homicide.¹⁴²

131. MYERS, *supra* note 90, at 44.

132. Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 62, at 181, 192.

133. Beresford, *supra* note 65, at 816–17.

134. MYERS, *supra* note 90, at 44.

135. GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 110.

136. Beresford, *supra* note 65, at 816.

137. *Id.* at 816–17; GRIFFIN ET AL., *supra* note 89, at 5.

138. Clausel & Bonnie, *supra* note 132, at 194 (citing cases in which courts have upheld prosecutorial waivers).

139. GRIFFIN ET AL., *supra* note 89, at 3.

140. *Id.*

141. Izadi, *supra* note 3; Miller, *supra* note 1.

142. WIS. STAT. ANN. § 938.183(1)(am) (West 2016).

2. Reverse Waiver Hearing

While Geysler and Weier were automatically charged as adults under Wisconsin law, they had a chance to transfer their case to the juvenile court through a reverse waiver hearing.¹⁴³ A reverse waiver hearing gives transferred juvenile offenders the opportunity to have their cases individually reviewed by a criminal court judge,¹⁴⁴ who may or may not have experience working with juvenile offenders. To keep a juvenile in its custody, a criminal court must first find that “probable cause” exists to suggest “the juvenile has committed the offense charged.”¹⁴⁵ If probable cause exists, the criminal court can waive jurisdiction over the case only if the juvenile proves three factors by a “preponderance of the evidence.”¹⁴⁶ First, the juvenile has to show that the criminal justice system would not provide the juvenile with “adequate treatment.”¹⁴⁷ Second, the juvenile has to prove that adjudicating the juvenile’s case in juvenile court “would not depreciate the seriousness of the offense.”¹⁴⁸ Lastly, the juvenile has to prove that the juvenile’s case does not need to be adjudicated in criminal court in order “to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused.”¹⁴⁹ Similar to the discretion that juvenile court judges have in making judicial waiver decisions, criminal court judges can exercise discretion in making reverse waiver decisions.¹⁵⁰ As illustrated by the Court of Appeals’ affirmation of Judge Bohren’s decision to try Geysler and Weier as adults, the Wisconsin Court of Appeals will uphold a trial judge’s reverse waiver decision “if the trial judge demonstrate[d] a ‘rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and rational decision.’”¹⁵¹

143. Vielmetti, *supra* note 53.

144. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 62, at 45, 50.

145. 9 CHRISTINE M. WISEMAN & MICHAEL TOBIN, *WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE* § 10:1 (2d ed.), Westlaw (database updated June 2016).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* (citing *Wisconsin v. Dominic E.W.*, 579 N.W.2d 282, 284 (Wis. Ct. App. 1998)).

E. COMPARING THE JUVENILE JUSTICE SYSTEM AND THE CRIMINAL JUSTICE SYSTEM

States must determine whether the three waiver tools that currently exist adequately protect the interests of juvenile offenders because significant differences exist between the juvenile justice system and the criminal justice system. As stated earlier, the focus of the juvenile justice system has traditionally been rehabilitation and treatment, while the focus of the criminal justice system has consistently been retribution and punishment. As a result of the juvenile system's focus on rehabilitation and treatment, juvenile offenders in the juvenile justice system tend to have greater "access to mental health, educational, recreational, and other rehabilitative services" than juveniles in the criminal justice system.¹⁵²

Another noted difference between the two justice systems is the fact that juvenile court proceedings are civil.¹⁵³ Juveniles in the juvenile court therefore enjoy less "constitutional protections" than defendants in criminal court.¹⁵⁴ For example, unlike criminal defendants, juvenile offenders in juvenile courts do not have the right to a jury trial.¹⁵⁵

Juvenile proceedings and records are also afforded much more confidentiality than criminal court proceedings and records.¹⁵⁶ The general public cannot attend juvenile court proceedings, and the records of these proceedings are sealed.¹⁵⁷ In contrast, criminal court proceedings are "often well-publicized," and their records are public.¹⁵⁸ The privacy and confidentiality afforded to juvenile court proceedings enable juvenile offenders who are eventually released to avoid "being labeled as criminals."¹⁵⁹ This shielding of juvenile offenders from the "embarrassment, shame, stigma, and lasting consequences" associated with being in criminal court further the rehabilitative goals of the juvenile justice system.¹⁶⁰

The most significant distinction between the juvenile justice system and criminal justice system is the fact that juvenile courts have much more

152. Andrea Knox, Note, *Blakely and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals"*, 70 OHIO ST. L.J. 1261, 1270-71 (2009).

153. Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186, 189 (1997).

154. *Id.*

155. Knox, *supra* note 152, at 1269.

156. *Id.* at 1270.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

limited sentencing options than criminal courts.¹⁶¹ With respect to incarceration, a juvenile offender in the juvenile justice system can only be sentenced to confinement in a juvenile detention facility up until the “maximum control age,” which ranges between twenty-one and twenty-five.¹⁶² Therefore, juvenile sentencing is limited by age. When juvenile offenders reach their state’s maximum control age, they are simply “released from the juvenile justice system,” regardless of whether they are under community supervision or confined in a correctional facility.¹⁶³ In contrast, juveniles in the criminal courts face the same potential sanctions as adult offenders.¹⁶⁴ While juveniles can no longer be sentenced to the death penalty or life sentences without parole for nonhomicide offenses, the U.S. Supreme Court has yet to explicitly rule that it is unconstitutional to sentence juvenile offenders to life in prison for a homicide offense.¹⁶⁵ Unlike juvenile offenders in the juvenile justice system, juvenile offenders in the criminal system may have their conviction listed in public records, may have to report their conviction when seeking employment, may lose their right to vote, and may no longer be able to serve in the military.¹⁶⁶

While juvenile offenders who remain in the juvenile system are not entitled to all the constitutional protections that criminal defendants receive, they do enjoy some of the same due process rights. The U.S. Supreme Court’s decision *In re Gault* firmly established that, like criminal defendants, juvenile offenders in the juvenile justice system have the right to notice of the charges against them,¹⁶⁷ the right to be represented by an attorney,¹⁶⁸ the privilege against self-incrimination,¹⁶⁹ and the right to confront and cross-examine witnesses.¹⁷⁰

The differences that exist between the juvenile court system and the

161. *Id.* at 1271.

162. Dawson, *supra* note 144, at 51.

163. *Id.*

164. See Knox, *supra* note 152, at 1271.

165. See generally *Graham v. Florida*, 560 U.S. 48 (2010) (holding that it was unconstitutional to sentence a juvenile offender to life in prison without parole for a nonhomicide offense); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it was unconstitutional to sentence juvenile offenders, who were under the age of eighteen when they committed their offense, to the death penalty).

166. MALCOLM C. YOUNG & JENNI GAINSBOROUGH, *THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES* 7 (2000), <http://www.prisonspolicy.org/scans/sp/juvenile.pdf>.

167. *In re Gault*, 387 U.S. 1, 33–34 (1967).

168. *Id.* at 41–42.

169. *Id.* at 55.

170. *Id.* at 57.

criminal court system with respect to privacy, procedural protections, and sentencing limits for juvenile offenders suggest that even the most serious juvenile offenses should not be adjudicated solely through the criminal justice system.

III. HOW THE JUSTICE SYSTEM FAILS TO MEET THE NEEDS OF JUVENILE OFFENDERS

While the juvenile justice system is admittedly flawed, the movement toward a more punishment-oriented regime for dealing with juvenile offenders has not proven to be any more effective. Harsher treatment of juvenile offenders has actually been counterproductive to the goals of rehabilitation and deterrence because studies have shown that juvenile offenders in the criminal system are more likely to have mental health issues¹⁷¹ and to reoffend¹⁷² than juvenile offenders who remain in the juvenile system.

A. JUVENILE TRANSFER LAWS ARE INEFFECTIVE AT ADDRESSING PUBLIC SAFETY CONCERNS AND DETERRING POTENTIAL JUVENILE OFFENDERS

Transfer laws have shifted focus away from the rehabilitative purpose of the juvenile justice system, and on increasing accountability amongst serious juvenile offenders through harsher punishments and enhancing public safety through deterrence.¹⁷³ However, Lisa S. Beresford, who has done the same analysis of the transfer system that this Note does above, argues that the transfer system does not effectively further the goals of deterrence and retribution.¹⁷⁴ First, studies have shown that juvenile offenders tend to face more immediate, and thus more effective, sanctions in the juvenile system than in the criminal system.¹⁷⁵ Next, while most studies have shown that juvenile cases transferred to the criminal courts lead to higher rates and longer periods of incarceration than cases that remain in the juvenile courts, some studies show “no such differences in

171. See CHESNEY-LIND & SHELDEN, *supra* note 64, at 220 (“The suicide rate for youths in jail is 4.6 times higher than the suicide rate for youths in the general population; remarkably, it is 7.7 times the rate for youths in juvenile detention centers.”).

172. YOUNG & GAINSBOROUGH, *supra* note 166, at 9 (discussing a study comparing recidivism rates of juvenile offenders that found that “juveniles coming out of the adult system were more likely to reoffend, to reoffend earlier, to commit more subsequent offenses, and to commit more serious subsequent offenses than juveniles retained in the juvenile system”).

173. MYERS, *supra* note 90, at 40–41.

174. Beresford, *supra* note 65, at 817–22 (citing GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 18).

175. Shepherd, *supra* note 110, at 42.

sentencing severity.”¹⁷⁶ Studies showing no sentencing differences between cases in the juvenile system and cases in the criminal system cast doubt on whether juvenile transfer laws actually increase accountability and enhance public safety. Moreover, the increasing number of transferred juvenile cases places a strain on the already limited resources of the criminal justice system.¹⁷⁷

The most significant finding from studies about the transfer system has been that juveniles transferred to the criminal system had a higher rate of recidivism than juveniles who remained in the juvenile justice system.¹⁷⁸ In a study controlling for both prior record and offense severity, Jeffrey Fagan “examined the eight-year recidivism rate of eight hundred fifteen- and sixteen-year-old juvenile offenders charged with robbery or burglary, comparing those charged in juvenile court in New Jersey with matched offenders charged in criminal court under New York’s automatic transfer law.”¹⁷⁹ He found that “[r]obbery offenders tried in [New York’s] criminal court reoffended faster and at a higher rate than those tried in [New Jersey’s] juvenile court.”¹⁸⁰ However, Fagan’s study also found no difference between the recidivism rates of burglary offenders tried in criminal court and those tried in juvenile court.¹⁸¹ In arguing that adjudicating juvenile offenders in criminal court actually undermines public safety, Malcolm C. Young and Jenni Gainsborough cited to a Florida study which found that transferred juvenile offenders were “more likely to reoffend, to reoffend earlier, to commit more subsequent offenses, and to commit more serious subsequent offenses than juveniles” who remained in the juvenile justice system.¹⁸²

Overall, studies have shown that juvenile transfer laws do not effectively deter juvenile offenders because the problems that critics claim plague the juvenile justice system also affect the criminal justice system.¹⁸³

176. GRIFFIN ET AL., *supra* note 89, at 24.

177. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 62, at 227, 240.

178. RICHARD E. REDDING, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 6 (2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

179. Redding & Howell, *supra* note 77, at 150.

180. *Id.* at 150–51.

181. *Id.* at 151.

182. YOUNG & GAINSBOROUGH, *supra* note 166, at 9.

183. GRIFFIN ET AL., *supra* note 89, at 26; Stephen J. Schulhofer, *Youth Crime—And What Not to Do About It*, 31 VAL. U. L. REV. 435, 442 (1997). See generally *supra* Part II.E (discussing criticisms of the juvenile justice system).

B. JUVENILE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM FACE
HIGHER RISKS OF PHYSICAL ABUSE, SEXUAL ABUSE, AND MENTAL
HEALTH ISSUES

Juveniles convicted in the criminal court system “usually serve their sentences in adult prisons and jails.”¹⁸⁴ In 2001, 7,613 juveniles were housed in adult jails.¹⁸⁵ According to a 2000 study on juveniles in adult jails, 3% of the 5,400 juveniles in adult jails in 1997 were girls.¹⁸⁶

Juvenile offenders housed in adult jails are over seven times “more likely to commit suicide,” five times “more likely to be sexually assaulted,” “[t]wice as likely to be beaten by [a] staff [member],” and about “50% more likely to be attacked with a weapon” than those housed in juvenile detention facilities.¹⁸⁷ Additionally, juvenile offenders in adult jails are usually treated like adults, and do not receive “health, educational[, or] recreational services” that are tailored toward their particular needs.¹⁸⁸

Girls in adult jails, especially those in “sexually integrated facilities,” often face more restrictive and isolated living conditions than their male counterparts.¹⁸⁹ In many cases, girls in adult jails are housed in conditions that essentially “amount[] to solitary confinement.”¹⁹⁰ As discussed above, juvenile offenders in adult jails are already extremely vulnerable to physical abuse by other inmates and even by prison staff. For girls, this vulnerability is further elevated by the fact that they are female.¹⁹¹ Thus, the main purpose for their restrictive living conditions is to protect them from other inmates.¹⁹² An unfortunate product of these isolated living conditions is the high risk of depression, self-destructive behavior, and suicide amongst girls in adult jails.¹⁹³ The lack of supervision over juveniles in adult jails further contributes to this increased risk.¹⁹⁴

Sentiments from juvenile offenders within the two systems also vary. Youth within the juvenile justice system often felt that juvenile court judges genuinely wanted “to help them” and were invested in them and

184. YOUNG & GAINSBOROUGH, *supra* note 166, at 6.

185. CHESNEY-LIND & SHELDEN, *supra* note 64, at 218.

186. *Id.*

187. *Id.* (citing YOUNG & GAINSBOROUGH, *supra* note 166, at 6).

188. YOUNG & GAINSBOROUGH, *supra* note 166, at 6–7.

189. CHESNEY-LIND & SHELDEN, *supra* note 64, at 219.

190. *Id.* at 219, 221.

191. *Id.* at 219.

192. *Id.* at 219, 221.

193. *Id.* at 220.

194. *Id.*

their cases.¹⁹⁵ In contrast, juveniles within the criminal justice system described criminal court judges as apathetic, and court proceedings as “hurried” and confusing.¹⁹⁶ Furthermore, few juvenile offenders who remained in the juvenile justice system felt that their “outcomes [were] unfair,” while most transferred juvenile offenders were disappointed by their outcomes.¹⁹⁷ Juvenile offenders in the juvenile system have also noted that most of the staff in juvenile facilities cared about their well-being, provided guidance with their problems, and were overall very encouraging.¹⁹⁸ Juveniles in adult facilities usually described staff, particularly correctional officers, as being “hostile and derisive.”¹⁹⁹

Overall, the statistics make it clear that adult jails are not equipped to meet the needs of juvenile offenders housed within their walls. These jails were built with the purpose of housing men,²⁰⁰ and most are still operated as though this is their only purpose.

C. A SIGNIFICANT PERCENTAGE OF YOUTH IN THE JUVENILE JUSTICE SYSTEM SUFFER FROM MENTAL HEALTH ISSUES

Mental health issues affect children in the juvenile justice system at higher rates than children in the general U.S. population.²⁰¹ According to the National Mental Health Association, potentially 60% to 75% of all youth in the juvenile justice system are afflicted with a “mental health disorder,” and about 20% suffer from “severe” mental health disorders.²⁰² Among juvenile offenders, anxiety disorders such as post-traumatic stress disorder are common, whereas psychotic disorders such as schizophrenia are rare.²⁰³ Mood disorders, usually clinical depression, have been found to affect about 10% to 25% of juvenile offenders.²⁰⁴ Studies have revealed a strong correlation between substance use disorders and delinquent

195. Bishop & Frazier, *supra* note 177, at 250.

196. *Id.*

197. *Id.* at 250–51.

198. *Id.* at 255.

199. *Id.* at 256.

200. CHESNEY-LIND & SHELDEN, *supra* note 64, at 221.

201. Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN 143, 150 (2008).

202. Jon R. Farrar, *Law and the Treatment of Mentally Ill Youth*, in 2 YOUTH VIOLENCE AND DELINQUENCY: MONSTERS AND MYTHS 119, 119 (Marilyn D. McShane & Frank P. Williams III eds., 2007).

203. SARAH HAMMOND, NAT’L CONFERENCE OF STATE LEGISLATURES, MENTAL HEALTH NEEDS OF JUVENILE OFFENDERS 4 (2007), http://www.ncsl.org/print/health/Mental_health_needsojuvenileoffendres.pdf.

204. Grisso, *supra* note 201, at 145.

behavior.²⁰⁵ Research has also shown that when an adolescent suffers from a substance use disorder and either depression or anxiety, this increased the likelihood that the adolescent would commit a serious and violent offense.²⁰⁶ In general, youth afflicted with a mental disorder are much more likely to offend than youth who do not have a mental disorder.²⁰⁷ However, Professor Thomas Grisso emphasizes that most youth afflicted with a mental disorder have never committed a juvenile or criminal offense.²⁰⁸

Mental health issues amongst juvenile offenders have largely been ignored amidst the recent shift toward a more punishment-oriented juvenile justice system.²⁰⁹ Under Texas law, which was revised in 1996 to establish a more punitive juvenile justice regime, a juvenile offender afflicted with a mental disorder is treated the same as a juvenile offender without a disorder.²¹⁰ Furthermore, mentally ill juvenile offenders are no longer sent to a state mental health facility for treatment.²¹¹ In a rare case that actually addressed the issue of mental illness in the juvenile system, *United States v. S.A.*, the court held that a juvenile offender who was recently released from a juvenile detention facility could be committed indefinitely because he had a mental disorder, and thus “posed a substantial risk of bodily injury to another person or serious damage to property of another.”²¹² Instead of ignoring the population of juvenile offenders with mental health issues, or simply hospitalizing them, the current justice system needs to develop an alternative to incarceration that adequately accommodates and provides treatment for juvenile offenders afflicted with mental disorders.

While it would be unwise, and likely impossible, for the juvenile justice system to become the primary provider of mental health care services in communities, the juvenile system can serve an important role in combating mental health issues amongst juvenile offenders. First, youth in the juvenile justice system should be screened and examined for mental health issues when they are first processed.²¹³ Screening at the beginning of the juvenile court process, rather than after adjudication, ensures that juvenile offenders with mental health needs are identified early on so that

205. *Id.* at 146.

206. *Id.* at 147.

207. *Id.* at 149.

208. *Id.*

209. Farrar, *supra* note 202, at 127.

210. *Id.*

211. *Id.*

212. *Id.* at 128 (citing *United States v. S.A.*, 129 F.3d 995 (8th Cir. 1997)).

213. See HAMMOND, *supra* note 203, at 6.

they can receive treatment,²¹⁴ and so that judges can take into account their unique circumstances when deciding their sentence. The juvenile system should also use the mental health screening process to identify juvenile offenders who can be diverted from the juvenile justice system to community-based treatment programs,²¹⁵ which have proven to be successful at treating mentally ill juvenile offenders.²¹⁶ Once the mental health needs of juvenile offenders are identified, juvenile justice systems should collaborate with community mental health agencies to ensure that the juvenile is treated effectively and efficiently.²¹⁷ Collaboration would lessen the financial burden on each respective entity.²¹⁸ To better identify and treat juvenile offenders with mental health disorders, juvenile justice programs should also focus on educating juvenile facility staff about mental health issues that afflict youth.²¹⁹

The prevalence of mental illness amongst the juvenile offender population has likely created a population of repeat offenders who will ultimately end up incarcerated and neglected in overcrowded adult prisons. To combat this problem, state detention facilities need to focus on diagnosing and treating juvenile offenders with mental illness early on.

IV. THE ONGOING BRAIN DEVELOPMENT OF CHILDREN AS A FACTOR WEIGHING AGAINST ADULT SENTENCING

In response to the increasingly harsh state policies toward juvenile offenders, the U.S. Supreme Court has issued several decisions limiting lower courts' ability to punish youth. These decisions justify the restrictions by emphasizing the differences between children and adults that necessitated the creation of the juvenile justice system in the first place. Specifically, several decisions have acknowledged that children lack the cognitive capacity to make sound decisions, and thus are not as "morally culpable" for their criminal actions as their adult counterparts.²²⁰

In *Thompson v. Oklahoma*, the Supreme Court held that the Eighth Amendment prohibited the practice of sentencing a juvenile, who was younger than sixteen years old at the time of his or her offense, to the death

214. *Id.*

215. Grisso, *supra* note 201, at 155–56.

216. *Id.* at 153 (summarizing the results of studies examining the effects of community-based treatment programs on later arrests of juvenile offenders).

217. *Id.* at 155.

218. *Id.*

219. *Id.* at 159.

220. *Roper v. Simmons*, 543 U.S. 551, 615 (2005) (Scalia, J., dissenting).

penalty.²²¹ The Court stated that the inexperience, lack of education, and lower levels of intelligence that prevent juveniles from being entrusted with the “privileges and responsibilities of an adult,” such as the right to vote, also supported the notion that juveniles are less morally culpable for their criminal actions than adults.²²²

In *Roper v. Simmons*, the Supreme Court widened the scope of their ruling in *Thompson* and held that sentencing juvenile offenders who were under the age of eighteen at the time of the offense to the death penalty violated the Eighth and Fourteenth Amendments, and was therefore unconstitutional.²²³ The Court found that juveniles under the age of eighteen differed from adults in three ways that justified treating them differently in the criminal context: (1) children exhibited a “lack of maturity and an underdeveloped sense of responsibility . . . [that] often result[ed] in impetuous and ill-considered actions and decisions”;²²⁴ (2) “juveniles [were] more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”;²²⁵ and (3) “the character of a juvenile is not as well formed as that of an adult [so] [t]he personality traits of juveniles are more transitory, less fixed.”²²⁶ The majority opinion emphasized that the vulnerability of juvenile offenders to “negative influences” and their tendency to act irresponsibly made them less morally culpable for their offenses than adults.²²⁷ Furthermore, the Court found that because juveniles were less morally culpable for their actions, the retributive force of the death penalty was excessive when applied to a minor.²²⁸ The Court also stated that because juveniles tended to make “impetuous and ill-considered” decisions, the death penalty had less of a deterrent effect on them, since it was unlikely that they would engage in a “cost-benefit analysis” of their actions.²²⁹

221. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

222. *Id.* at 824, 835 (“Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”).

223. *Roper*, 543 U.S. at 578.

224. *Id.* at 569 (first citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993); then citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

225. *Id.* (citing *Eddings*, 455 U.S. at 115).

226. *Id.* at 570.

227. *Id.*

228. *Id.* at 571.

229. *Id.* at 569, 571–72.

The reasoning behind these Supreme Court rulings is bolstered by scientific findings that children's brains are still developing when they reach early adulthood.²³⁰ According to Robert Anthonen, children who commit crimes are less culpable than adults who commit crimes because they "have physiologically less developed means of controlling themselves."²³¹ Furthermore, Anthonen argues that this "delayed brain development" makes juveniles in adult prisons more vulnerable to mental health issues because they "often lack the physical and mental coping mechanisms that older adult prisoners use to maintain their mental health."²³² In considering these arguments, the fact that children's brains are less developed therefore seems to require that juvenile offenders remain in the juvenile justice system in order for the retributive and rehabilitative goals of the justice system to be met.

V. ALTERNATIVE METHODS FOR DEALING WITH JUVENILE OFFENDERS

In response to the current justice system's shortcomings, states and local communities have developed several alternatives to combat the problem of serious or violent juvenile offenders. Some alternatives, such as blended sentencing laws and the Colorado Juvenile Clemency Board, create more flexible and individualized sentencing options for the existing juvenile and criminal justice systems.²³³ Other developments are based in local communities and have been established to address specific types of juvenile offenses or juvenile offenders with mental health needs.²³⁴ Lastly, successful prevention programs, such as Head Start, attempt to eliminate juvenile crime before it begins.²³⁵

230. Anthonen, *supra* note 67, at 744.

231. *Id.* at 744–45 (quoting HUMAN RIGHTS WATCH, THROWN AWAY 26 (2005), <https://www.hrw.org/sites/default/files/reports/us0205.pdf> (discussing scientific studies that have found that the parts of the brain responsible for "impulse control" develop in a person's twenties)).

232. *Id.* at 745 (quoting AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 52 (2005), <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>).

233. *See infra* Part V.A.

234. *See infra* Part V.B–D.

235. *See infra* Part V.E.

A. JUVENILE JUSTICE REFORMS THAT OPERATE WITHIN THE EXISTING JUSTICE SYSTEM

1. Blended Sentencing

Blended sentencing laws enable courts to give juvenile offenders both a juvenile and a criminal sentence.²³⁶ Blended sentencing schemes utilize both the existing juvenile justice and criminal justice structures to create more sentencing options for serious juvenile offenders.²³⁷ These laws reflect the shift toward a more punishment-oriented juvenile justice system because they allow the juvenile courts to impose harsher sentences on juveniles.²³⁸ Significantly, blended sentencing laws, which allow juvenile court judges to impose adult sentences, have appeared to eliminate the maximum control age that limited juvenile sentences.²³⁹ Five blended sentencing models exist: three models give juvenile court judges the sentencing decision, while two models give criminal court judges the sentencing decision.²⁴⁰

The juvenile court has three blended sentencing models.²⁴¹ In a “juvenile-exclusive model,” the juvenile court can “impose *either* a juvenile or an adult sentence on certain repeat and/or serious [juvenile] offenders.”²⁴² If the juvenile receives a juvenile sentence, the juvenile remains in the juvenile system until he or she reaches the maximum control age.²⁴³ If the juvenile receives an adult sentence, the juvenile court loses jurisdiction over the juvenile and he or she is transferred to the criminal system.²⁴⁴ In a “juvenile-inclusive model,” the juvenile court can “impose *both* a juvenile and adult sentence, with the adult sentence conditionally suspended unless the juvenile violates the terms of the juvenile sentence or commits a new offense.”²⁴⁵ If there is an alleged violation, the juvenile can

236. Knox, *supra* note 152, at 1263.

237. Brandi Miles Moore, *Blended Sentencing for Juveniles: The Creation of a Third Criminal Justice System?*, 22 J. JUV. L. 126, 130–31 (2001).

238. See Redding & Howell, *supra* note 77, at 151 (observing that while blended sentencing may lead to harsher sentences for juvenile offenders, it is not altogether inconsistent with a rehabilitative model).

239. See Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 62, at 45, 51 (discussing states that have extended their maximum control age, or the age at which an offender is released from the juvenile system).

240. See Redding & Howell, *supra* note 77, at 151–53.

241. *Id.* at 151–52.

242. *Id.* at 151 (emphasis in original).

243. *Id.* at 151–52.

244. *Id.* at 152.

245. *Id.* (emphasis in original).

“challenge the alleged violation” and the imposition of the adult sentence.²⁴⁶ In a “juvenile-contiguous model,” the juvenile court “may impose a juvenile sentence *extending* until age eighteen to twenty-one.”²⁴⁷ When the juvenile reaches the end of this extended sentence, the juvenile will have a transfer or sentencing hearing to decide if the juvenile should serve a criminal sentence.²⁴⁸

The criminal court has two blended sentencing models.²⁴⁹ In a “criminal-exclusive model,” the criminal court can “impose *either* an adult or a juvenile sentence.”²⁵⁰ Regardless of the sentence imposed under the “criminal-exclusive model,” the criminal court would retain jurisdiction over the juvenile’s case.²⁵¹ In a “criminal-inclusive model,” the criminal court can “impose *both* a juvenile and adult sentence, with the adult sentence conditionally suspended unless the juvenile violates the terms of the juvenile sentence or commits a new offense.”²⁵²

Supporters of blended sentencing laws assert that a blended sentence serves both public safety goals and rehabilitative goals for juveniles.²⁵³ Blended sentencing enhances public safety by giving courts more flexible sentencing options to deal with serious and violent juvenile offenders while still prioritizing rehabilitation as “the first option.”²⁵⁴ Proponents emphasize that the potential for longer and harsher sentences provides juvenile offenders with the “incentive[] . . . to be rehabilitated in the juvenile system.”²⁵⁵ Furthermore, blended sentencing laws promote the juvenile justice system’s rehabilitative goals by giving juvenile offenders one “‘last chance’ at rehabilitation within the juvenile system” to avoid a criminal sentence.²⁵⁶

Critics of blended sentencing laws primarily highlight their punitive nature. Despite providing juveniles with a “‘last chance’ at rehabilitation,”²⁵⁷ blended sentencing laws have been viewed as too harsh

246. *Id.*

247. *Id.* (emphasis in original).

248. *Id.*

249. *Id.* at 153.

250. *Id.* (emphasis in original).

251. *Id.*

252. *Id.* (emphasis in original).

253. Knox, *supra* note 152, at 1265.

254. Moore, *supra* note 237, at 131.

255. Knox, *supra* note 152, at 1265.

256. Redding & Howell, *supra* note 77, at 147.

257. *Id.*

on juvenile offenders.²⁵⁸ In some jurisdictions, blended sentencing statutes mandate the imposition of the adult criminal sentence “for any violation of juvenile sentences, including . . . technical violations (*e.g.* curfew, truancy).”²⁵⁹ If a juvenile offender’s adult sentence can be imposed simply for curfew violations, then the chance at rehabilitation that blended sentencing provides appears to be a false promise.²⁶⁰ This reality might discourage juvenile offenders from seeking rehabilitative services since their efforts could easily be overshadowed by a minor violation.²⁶¹ Critics also assert that blended sentencing exposes more juvenile offenders to the potential of receiving a criminal sentence.²⁶² A major concern about blended sentencing is that a very young, but serious, juvenile offender could receive an adult criminal sentence.

2. Colorado’s Juvenile Clemency Board

Although the governor is the only person who can grant clemency within the state of Colorado, the Colorado Juvenile Clemency Board can make recommendations to the governor regarding the commutation of sentences for juvenile offenders tried as adults.²⁶³ When making recommendations to the governor, the Juvenile Clemency Board can recognize “exemplary rehabilitation and institutional behavior, address sentencing disparities, and correct inequities within the Colorado juvenile justice system.”²⁶⁴ By allowing the Board to recognize these factors in recommending commutation of sentences, Colorado provides an incentive and motivation for juvenile offenders to rehabilitate.²⁶⁵ These factors also illustrate how the Board acts as an extrajudicial check on juvenile court decisions to ensure fairness.²⁶⁶ Critics of the Juvenile Clemency Board denounce the discretionary nature of the Board’s decisions, the fact that its recommendation decisions cannot be reviewed, and the risk that these

258. See Knox, *supra* note 152, at 1266 (quoting a woman discouraged by the “ease with which adult sentences are invoked for youths in detention centers . . . ‘it’s like that’s it for them . . . they don’t get another chance’”).

259. David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 696–97 (2002) (emphasis in original).

260. *Id.*

261. *Id.* at 696.

262. Redding & Howell, *supra* note 77, at 151.

263. Anthonsen, *supra* note 67, at 748–49.

264. *Id.* at 749.

265. *Id.*

266. *Id.* at 749–50 (citing *Ex Parte Grossman*, 267 U.S. 87, 120–21 (1925) (stating that the “administration of justice by the courts is not . . . considerate of circumstances which may properly mitigate guilt”)).

“standardless” decisions can be subject to political abuse.²⁶⁷

B. “CONTINUUM OF CARE” MODEL

In 2000, the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) laid out a “continuum of care model” as part of “its Comprehensive Strategy for preventing and controlling juvenile delinquency.”²⁶⁸ The model advocated for “immediate sanctions in the community for first-time, nonviolent offenders; community-based programs for serious and repeat offenders; secure programs for the most serious, violent, and chronic offenders; and aftercare programs that provide high levels of social control and treatment.”²⁶⁹

The Missouri Division of Youth Services (“DYS”) provides an example of how the OJJDP’s continuum of care model can be successfully implemented.²⁷⁰ Missouri has established juvenile offender programs that fall within different ranges of the correctional continuum.²⁷¹ The most serious juvenile offenders, who constitute less than ten percent of Missouri’s “committed [juvenile offender] population,” are housed in secure residential treatment facilities.²⁷² About three-quarters of the committed population actually reside within the community, such as in “residential neighborhoods, state parks, and . . . college campuses.”²⁷³ Juveniles living within the community may be housed in “moderately secure” residential facilities where they are still closely supervised by staff when participating in “field trips, community service projects, and job placements” or non-secure group homes where they can participate in community activities without supervision.²⁷⁴ Below these residential facilities on the continuum is the “Intensive Case Management” program.²⁷⁵ Juveniles in this program do not live in a residential facility, but are closely “monitor[ed] and mentor[ed]” by a “tracker.”²⁷⁶ Last on the continuum are juveniles with “aftercare” status.²⁷⁷ These juveniles live within the community and are supervised by a case manager who has

267. *Id.*

268. GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 160–61.

269. *Id.* at 161.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 161–62.

275. *Id.* at 162.

276. *Id.*

277. *Id.*

“overseen their case since they were first committed.”²⁷⁸

Missouri’s DYS has achieved national recognition for its “correctional continuum” of programs tailored to different groups of juvenile offenders.²⁷⁹ The goals of rehabilitation and treatment are reflected throughout all of their programs.²⁸⁰ Even in the most secure facilities, the focus remains on counseling, positivity, and skill-building.²⁸¹ Missouri also places strict limits on the size of its residential facilities,²⁸² thereby enabling greater supervision and more individualized treatment. According to the American Youth Policy Forum, “Missouri’s recidivism rate is one-half to two-thirds below that of most other states, while their costs [for administering juvenile justice programs were] substantially lower than neighboring states.”²⁸³

C. JUVENILE SPECIALTY COURTS

Local communities throughout the United States have developed “juvenile specialty courts” for certain types of juvenile offenses.²⁸⁴ These courts embody the rehabilitative purpose that characterized the early juvenile justice system by having “small case loads, frequent hearings, immediate sanctions, family [and community] involvement, and treatment services.”²⁸⁵ However, all of these juvenile specialty courts are subject to “net-widening” concerns because they may subject certain youth populations to the justice system who otherwise would not be exposed to it.²⁸⁶

1. Juvenile Drug Courts

Juvenile drug courts were established in the mid-1990s and were modeled after adult drug courts to specifically handle drug- and alcohol-related offenses committed by juvenile offenders.²⁸⁷ Juvenile drug courts serve several goals, which include providing intervention, treatment, and “[s]kills [t]raining” for juvenile drug offenders, as well as “[p]romot[ing]

278. *Id.*

279. *Id.* at 161–62.

280. *Id.*

281. *Id.* at 161.

282. *Id.* (describing how most of Missouri DYS’s residential facilities house less than thirty-three youths).

283. *Id.* at 162–63.

284. Victoria Simpson Beck et al., *Juvenile Specialty Courts*, in 2 YOUTH VIOLENCE AND DELINQUENCY: MONSTERS AND MYTHS, *supra* note 202, at 49, 51.

285. *Id.*

286. *Id.* at 54, 56, 62.

287. *Id.* at 52.

[a]ccountability” amongst these offenders.²⁸⁸ These courts also focus on “[s]trengthen[ing] families” of juvenile drug offenders and incorporating them into the juvenile’s treatment program.²⁸⁹

In Birmingham, Alabama, juvenile drug offenders enter the juvenile drug court system by referral.²⁹⁰ The drug court then decides whether to keep a juvenile offender’s case, evaluating whether the juvenile is “suited” to the drug court program.²⁹¹ If the drug court decides to keep the juvenile, then the juvenile will take part in regular court hearings and drug tests.²⁹² Juveniles will also be assigned a drug court team consisting of “the judge, prosecutor, defense attorney, probation officer, treatment personnel, police, and any other family or community members.”²⁹³ Members of these drug court teams work together to help “reduce [the juvenile offender’s] drug and alcohol abuse” by maintaining supervision over the juvenile, constantly monitoring the juvenile’s progress, and providing individualized treatment to the juvenile.²⁹⁴

While juvenile drug courts have become prevalent and well-regarded throughout the United States,²⁹⁵ many still debate the effectiveness of these programs.²⁹⁶ Studies on recidivism rates of juveniles in drug court programs “report mixed results,” but other studies indicate that these programs have effectively provided treatment for, and supervision over, juvenile drug offenders.²⁹⁷ Regardless of recidivism rates, these drug courts have at least alleviated the criminal court’s juvenile caseload.²⁹⁸

288. *Id.* at 52–53.

289. *Id.* at 53.

290. *Id.* at 52.

291. *Id.* at 52–54.

292. *Id.*

293. *Id.* at 53.

294. *Id.* at 52–54.

295. *Id.* at 52 (noting that in 2006, 406 juvenile, 166 family, and 14 combined drug courts existed in the United States).

296. *Id.* at 54.

297. *See id.* (“Drug courts seem to be effective in selecting and serving offenders with drug problems, retaining these offenders in treatment, and reducing the general caseload of the criminal courts. Drug court programs appear to provide better supervision than traditional probation and to reduce the number of offenders who are sent to jail or prison. Recidivism studies report mixed results, with most evaluations showing that drug court graduates commit fewer new crimes in the short term, at least.”).

298. *Id.*

2. Juvenile Gun Courts

As part of the shift toward a more punitive juvenile justice system, juvenile gun courts were first established in the mid-1990s to address increasing violent juvenile crime rates.²⁹⁹ These courts handle juvenile cases involving “[weapons] offenses that have not resulted in serious physical injury.”³⁰⁰ Juvenile gun courts are characterized by “[e]arly intervention,” an “[i]ntensive educational focus,” and collaboration amongst court personnel, law enforcement officials, and community members to monitor and supervise juvenile offenders.³⁰¹ Like the juvenile drug courts, juvenile cases must be referred to and accepted by the juvenile gun courts.³⁰² Also similar to the drug courts, juveniles in gun court programs are assigned to a “[g]un court team” consisting of “community and juvenile justice members.”³⁰³

Few statistics exist to determine the effectiveness of juvenile gun courts.³⁰⁴ A promising study on the Jefferson County Juvenile Gun Court revealed lower recidivism rates for juveniles “processed through the Gun Court” compared to juvenile offenders in the traditional justice system.³⁰⁵

3. Mental Health Courts

One significant way in which some jurisdictions are choosing to address prevalent mental health issues in the juvenile offender population is by establishing mental health courts to specifically serve juvenile offenders with mental health disorders.³⁰⁶ Similar to the drug and gun courts, adult mental health courts were established during the 1990s and led to the development of juvenile mental health courts.³⁰⁷ These courts conduct thorough mental health evaluations of juvenile offenders and develop more individualized treatment plans for them.³⁰⁸ Mental health courts also employ “teams of mental health and criminal justice professionals” who are supervised by the courts.³⁰⁹

The Court for the Individualized Treatment of Adolescents (“CITA”)

299. *Id.* at 54–55.

300. *Id.* at 54.

301. *Id.* at 55–56.

302. *Id.* at 55.

303. *Id.* at 55–56.

304. *Id.* at 56.

305. *Id.*

306. HAMMOND, *supra* note 203, at 6.

307. Beck, *supra* note 284, at 60–61.

308. *See* HAMMOND, *supra* note 203, at 6.

309. Beck, *supra* note 284, at 61.

is an example of a specialized juvenile mental health court in Santa Clara, California.³¹⁰ This court hears only cases involving juvenile offenders “who have been diagnosed with a serious mental illness that is related to their criminal involvement or involvement with the juvenile court.”³¹¹ Like the juvenile drug and gun courts, CITA screens referred juvenile cases and determines which cases to take on.³¹² Juveniles who want to remain in CITA must show a commitment to taking their medication, attending counseling sessions, and maintaining “a positive attitude.”³¹³ While certain juvenile offenders with serious mental illness stay in CITA’s residential facilities, CITA’s goal is to provide treatment to juveniles while allowing them to live in their own homes.³¹⁴ To do so, CITA utilizes electronic monitoring in most of its cases.³¹⁵

Similar to the gun courts, there are relatively few studies evaluating the “effectiveness” of mental health courts.³¹⁶ The establishment of mental health courts in some jurisdictions does at least illustrate a positive effort to move away from the tradition of ignoring mental illness in both the criminal and juvenile justice systems.

D. WRAPAROUND MILWAUKEE: A PROGRAM THAT FOCUSES ON TREATING JUVENILE OFFENDERS WITH MENTAL HEALTH ISSUES

Wraparound Milwaukee is a program designed to treat juvenile offenders with mental health issues.³¹⁷ The program “is comprised of four key program elements: (1) Care Coordinators . . . [who] provide assessment, develop a treatment plan, identify service providers, and monitor service delivery [to youths]; (2) Child and Family Teams” consisting of family and community members in the youth’s life “who meet monthly to review the youth’s progress; (3) [A] Service Provider Network . . . [of] community agencies” that provide services including “tutoring, substance abuse treatment, [and] transportation”; and (4) “[A] Mobile Crisis Team [which] provides twenty-four-hour crisis intervention services when the Care Coordinator is not available[,] . . . reviews requests for inpatient psychiatric services[,] and operates two group homes that

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 61–62.

317. GUARINO-GHEZZI & LOUGHRAN, *supra* note 111, at 168–69.

provide short-term stabilization.”³¹⁸ Moreover, the program places a lot of emphasis on communicating with youths’ families about their treatment and tailoring treatment plans to meet the needs of both the youth and the family.³¹⁹ Program youths also generally live in their own homes with their families.³²⁰

Studies have shown Wraparound Milwaukee to be effective at treating juvenile offenders with mental health issues.³²¹ “Psychological tests administered to youths pre- and post-treatment show an average decline from ‘high impairment’ of mental health to ‘moderate impairment’ after one year of participation.”³²² Arrest rates for the program’s youth also declined after a year of participation in the program.³²³ Lastly, costs of maintaining this program are much lower than the costs of maintaining residential treatment facilities.³²⁴

E. PREVENTION PROGRAMS

Prevention programs, which exist in many forms in many states, aim to reduce the rates of juvenile delinquency by “target[ing] high-risk youth *before* they commit crimes.”³²⁵ Factors that make an individual a high-risk youth include: “(1) early troublesome, dishonest, aggressive, or antisocial behavior; (2) poor parental guidance and stability; (3) criminal parents and siblings; (4) broken homes and early separations; (5) social deprivation stemming from a low economic level; and (6) school failure resulting from low intelligence or achievement, and absenteeism.”³²⁶ Prevention programs with the greatest potential for success usually involve the family or community.³²⁷ These programs can include counseling, recreational sports teams, educational programs, and job placement programs.³²⁸

Head Start is an example of a successful prevention program aimed to address the problem of youth crime.³²⁹ Head Start is a pre-school academic program that targets young children from low-income families and prepares

318. *Id.* at 169–70.

319. *Id.* at 169.

320. *Id.* at 169–170.

321. *Id.* at 170.

322. *Id.*

323. *Id.*

324. *Id.*

325. Schulhofer, *supra* note 183, at 445 (emphasis in original).

326. Beresford, *supra* note 65, at 822–23 (citing Elsea, *supra* note 72, at 141).

327. *Id.*

328. Elsea, *supra* note 72, at 141.

329. Beresford, *supra* note 65, at 823.

them for school.³³⁰ While critics of pre-school prevention programs like Head Start cite to findings that the academic advantages gained through these programs are lost by “the third or fourth grade,” advocates cite to studies showing long-term “positive effects.”³³¹ In fact, communities that Head Start targets have seen improvements in the “educational outcomes” of the population and lower crime rates.³³²

F. BLENDED SENTENCING LAWS PROVIDE THE BEST ALTERNATIVE TO
CURRENT PUNITIVE TRENDS REVOLVING AROUND STATUTORY
EXCLUSION LAWS

Despite some shortcomings addressed earlier, blended sentencing laws provide the best alternative to statutory exclusion laws that automatically subject juvenile offenders to the criminal court system. Blended sentencing laws create flexibility for sentencing decisions to address both public safety goals and the juvenile justice system’s rehabilitative goals.³³³ By enabling courts to acknowledge the reality that every juvenile offender has unique circumstances and that there is no “bright-line test to distinguish adults from juveniles,” blended sentencing helps ensure that juveniles are not disproportionately punished for their offenses.³³⁴ As discussed earlier in Part V, the conditional adult sentence in a blended sentence still protects the public from the most serious juvenile offenders who cannot be rehabilitated and are “most likely to re-offend.”³³⁵ However, the conditional adult sentence also protects the juvenile offender’s interest in rehabilitation as it can be invoked only if the juvenile commits a violation or new offense.³³⁶ To safeguard against the risk that any minor technical violation could invoke an adult sentence, blended sentencing statutes should avoid mandating that an adult sentence be applied when a juvenile commits any sort of violation. The adult sentences should generally be invoked only when a juvenile commits a serious new violation or offense. A juvenile offender should also have the ability to appeal a decision to invoke the adult sentence based on a technical violation or minor transgression.

330. *Id.*

331. Schulhofer, *supra* note 183, at 445–46.

332. *Id.* at 445.

333. Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 670–71 (1999).

334. *Id.* at 670–73.

335. *Id.* at 674.

336. *Id.* at 672–73.

An ideal blended sentencing scheme would be based on the “juvenile-inclusive model,” where a juvenile court judge can “impose *both* a juvenile and [a criminal] sentence.”³³⁷ This model provides the best alternative to current waiver schemes because all juvenile cases will remain under the juvenile court’s jurisdiction until an adult sentence is invoked. Juvenile court judges, with their training and expertise in working with juvenile offenders, are best equipped to make sentencing decisions that serve both the public and the juvenile’s interests. The juvenile-inclusive model also gives juvenile court judges the sentencing flexibility necessary to address the complex needs of serious juvenile offenders. Lastly, since juvenile offenders subject to blended sentencing laws can potentially receive a criminal sentence, they should be entitled to the same procedural safeguards as adult offenders, such as the right to a jury trial.³³⁸

For Anissa Weier, a blended sentence where the juvenile court retains jurisdiction over her case with an adult sentence conditionally suspended would be most appropriate. Since she is still very young, it would be best to first give her the opportunity to receive treatment and be rehabilitated within the juvenile justice system. However, because she has been charged with a serious and violent offense, her case should be reevaluated once she reaches the upper age limit of Wisconsin’s juvenile system.

In the case of Morgan Geysler, neither the juvenile justice system nor the criminal system has the resources to meet her mental health needs, as her condition clearly worsened while she was left untreated in a juvenile detention facility. Since she appeared to respond positively to the medication and treatment she received in a state mental facility, the best alternative would be to first refer her to a mental health court, like Santa Clara’s CITA. The mental health court would then be tasked with designing a treatment plan for her in a mental health facility with a separate ward for children with serious mental illnesses.

CONCLUSION

The trend of increasing transfers of juvenile cases to the criminal courts depicts a juvenile justice system that has moved away from its foundation in rehabilitation. While the stabbing that Morgan Geysler and Anissa Weier committed is undeniably violent, the criminal treatment of their case is also disproportionately harsh. Like Geysler and Weier, many serious juvenile offenders nationwide have been excessively punished as a

337. Redding & Howell, *supra* note 77, at 152 (emphasis in original).

338. Hunt, *supra* note 333, at 674, 677–78.

result of punitive waiver tools. Ultimately, studies on the effects of transfers suggest that waiver laws excessively punish juvenile offenders without providing any greater protection for society. Blended sentencing schemes provide the best alternative to the transfer system because they are flexible enough to address both public safety concerns and the interests of juvenile offenders. Blended sentencing schemes also make use of the existing juvenile justice and criminal justice structures. While the risk of exposing more juvenile offenders to an adult sentence does exist, this risk could be alleviated by providing juveniles with the same procedural safeguards criminal defendants receive. Blended sentencing gives juvenile offenders an opportunity to be rehabilitated, while ensuring that the public is protected from the most serious juvenile offenders who are incapable of rehabilitation.