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## Waiving Goodbye to Juvenile Offenders: A Multi-State Analysis of Juvenile Transfer Laws, 54 UIC J. Marshall L. Rev. 481 (2021)

Rachel Martin

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# WAIVING GOODBYE TO JUVENILE OFFENDERS: A MULTI-STATE ANALYSIS OF JUVENILE TRANSFER LAWS

RACHEL A. MARTIN\*

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## I. INTRODUCTION

Throughout time, society has separately feared the destruction of innocence and the manifestation of evil, never quite preparing for the moments when the two coincide. In Wisconsin, and soon around the country, widespread panic grew as information about the 2014 Slender Man stabbing flooded news station and social media feeds.<sup>1</sup> Two twelve-year-old girls had just attempted to kill their friend in order to please a disturbing fictional character.<sup>2</sup> Wisconsin’s statutory exclusion mandates transfer for certain juvenile offenders once the child celebrates their tenth birthday from the juvenile system to the adult criminal system.<sup>3</sup> Rather than focusing on the best interests of the two offenders, the girls were transferred to and tried in adult court.<sup>4</sup> On the other hand, only 220 miles away and roughly fourteen months later, a twelve-year-old girl stabbed and killed her step-mother due, in part, to a

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\*Rachel A. Martin, Juris Doctor 2021, UIC John Marshall Law School. Thank you to my parents and sister who have loved, supported, and encouraged me throughout my entire life, especially these past 3 years. Additionally, thank you to my Marquette University professors for helping to inspire and further my career aspirations during my undergraduate years, and thank you to my editors, the UIC John Marshall Law Review Editorial Board, and my colleagues and professors for challenging me to achieve this goal.

1. *State v. Geyser*, 394 Wis. 2d 96, 99 (Ct. App. 2020) (upholding the circuit court’s decision to retain jurisdiction over Morgan Geyser who was “charged in adult court with attempted first-degree intentional homicide” at the age of twelve); *State v. Weier*, No. 2015AP1845-CR, 2016 WI App 67, \*1-2 (WI Ct. App. Jul. 27, 2016) (upholding the circuit court’s decision to retain jurisdiction over Anissa Weier who was charged with attempted first-degree intentional homicide at the age of twelve).

2. *Geyser*, 394 Wis. 2d at 99; *Weier*, 2016 WI App 67 at \*1-2; Cf. *The Slender Man*, FANDOM WIKIA, [creepypasta.wikia.com/wiki/The\\_Slender\\_Man](http://creepypasta.wikia.com/wiki/The_Slender_Man) [perma.cc/DZM5-Z3CE] (last visited May 3, 2021) (explaining the origin of the Slender Man). Utilizing an online forum called Something Awful, Eric Knudsen created the fictional character, The Slender Man (aka Slenderman) in 2009. *Id.* The Slender Man meme has since spread around the Internet in various forms but is mostly housed on a website titled Creepypasta – a site dedicated to paranormal stories and short pieces of horror fiction – which can be accessed by any computer that does not have personalized restriction settings. *Id.* The legend says that once Slenderman opens his arms, his victims – typically children – fall under a trance and become helpless, hypnotically drawn into his arms where he kills them or brings them to another place or dimension. *Id.* He has appeared throughout history, including references in Brazilian cave paintings and Romanian mythology, and has been associated with multiple crimes since his creation. *Id.*

3. *Weier*, 2016 WI App 67 at \*1-2.

4. *Id.*

preoccupation with the fictional character Laughing Jack.<sup>5</sup> While news stories, documentaries, and rumors of future movies about the Slender Man stabbing still permeated media outlets, this similar Indiana case went seemingly unnoticed.<sup>6</sup> Based on Indiana's juvenile transfer laws, the court considered the best interest of the child and the public in making its decision whether to transfer the juvenile offender from the juvenile court system to be treated as an adult in the criminal court system.<sup>7</sup> In turn, the young girl remained in the juvenile justice system.<sup>8</sup> Cases such as these propose the burning question: at what age is juvenile transfer necessary and effective?

This Comment will assess the various forms of juvenile transfer, or waiver, laws and evaluate their effectiveness in the juvenile population through discussion of recidivism rates and psychological constructs. Part II will evaluate the histories and goals of the juvenile and adult justice systems and discuss psychological differences between adults and juveniles. Further, it will introduce modern types of juvenile transfer through examples from various midwestern states. Part III will analyze psychological and deterrence research studies, and compare

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5. State v. J.T., 121 N.E.3d 605, 607-08 (Ind. Ct. App. 2019); cf. *Laughing Jack*, FANDOM WIKIA, villains.fandom.com/wiki/Laughing\_Jack [perma.cc/C9F8-98XT] (last visited May 3, 2021) (explaining the creation of Laughing Jack). Created by Creepypasta user SnuffBomb, Laughing Jack first appeared as a Jack-in-the-box clown who was tortured by his last owner. *Id.* Turned sinister due to this experience, Laughing Jack now looks taller and more demonic. *Id.* He acts as an imaginary friend but proceeds to kill children and terrorize families due to the trauma of being neglected by his previous owner. *Id.* He has been associated with only this one criminal case since his creation. *Id.*

6. See, e.g., BEWARE THE SLENDERMAN (HBO Films Jan. 27, 2017) (detailing the story of Morgan Geysler and Anissa Weier stabbing their friend through interviews, news coverage, and YouTube videos). See also *Law & Order: Special Victims Unit: Glasgowman's Wrath* (NBCUniversal television distribution Nov. 5, 2014) (portraying two female juvenile friends who decide to scare one of the girl's younger sisters by searching for "Glasgowman" in a nearby park). The following morning, the sister is found stabbed and eventually one of the two juvenile girls is charged with stabbing the younger girl. *Id.* See also SLENDER MAN (Screen Gems Aug. 10, 2018) (depicting a fictional story in which four friends from a small rural town who attempt to conjure the Slender Man, leading one friend to go missing). See also Janes, DeAnna, *The Complete Timeline and True Story Behind the Slender Man Stabbing*, OPRAH DAILY, www.oprahdaily.com/entertainment/tv-movies/a29591703/slender-man-stabbing-true-story [perma.cc/SX8S-94ZH] (Oct. 25, 2019) (discussing the background, events, and initial court proceedings regarding the Slender Man attack); *Slender: The Eight Pages* (Parsec Productions June 26, 2012) (providing video game players with a game format in which they seek to avoid the Slender Man in a dark forest while collecting certain "pages"); and *Slender: The Arrival* (Blue Isle Studios & Midnight City, Mar. 26, 2013) (providing video game players with a sequel to *Slender: The Eight Pages*).

7. *J.T.*, 121 N.E.3d at 607-08.

8. *Id.* at 607-08, 614-15 (upholding the decision of the juvenile court which considered the juvenile offender J.T.'s "undisputed . . . symptoms of severe mental illness, specifically [Dissociative Identity Disorder]" prior to the alleged crime, "traumatic childhood" which included being raised by her mother who "married a registered sex offender . . . [who] was physically abusive to [J.T.'s mother] in J.T.'s presence", time spent living with her father who "was verbally abusive to her," amongst other factors, when using its discretion to retain jurisdiction over J.T.).

Illinois', Wisconsin's, Indiana's, and Missouri's juvenile transfer laws. That section will evaluate how well those states' laws align with the pertinent research studies and the traditional goals of the juvenile justice system. Finally, Part IV will propose law reforms that prioritize public safety while also focusing on traditional juvenile justice goals of deterring young offenders and considering their psychological well-being when deciding the appropriateness of transfer.

## II. BACKGROUND

This section will address the history of the juvenile justice system as it has developed over time and how it compares to the adult criminal justice system, as well as introduce the various types of transfer methods. From its inception to its current form, the juvenile justice system's goals and methodologies developed and changed over time. This Comment will analyze such changes and compare the current juvenile system with the adult criminal system, highlighting recent landmark cases.

### *A. The Juvenile Justice System: From Inception to Modern Methodology*

#### *1. America: From Punisher to Parent*

Eighteenth-century America treated juveniles far differently than most states do today.<sup>9</sup> During that time, "children older than fourteen were determined to be able to understand the difference between right and wrong"<sup>10</sup> and thus "were treated as adults in the justice system."<sup>11</sup> However, the justice system acknowledged that children under seven (infants under the law) were too young to possess the criminal intent to commit crimes.<sup>12</sup> Children between the ages of seven and fourteen were evaluated "by the court on a case-by-case basis."<sup>13</sup> Thus, while a child aged six years, eleven months, and thirty days could not be prosecuted

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9. Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report*, 1, 86 (1999), [www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf](http://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf) [perma.cc/V2L2-CCGX] (explaining how the early juvenile justice system focused on punishment while the current system focuses on rehabilitation, and providing information and statistics from the U.S. Department of Justice about juvenile offenders to be used in making "informed policy decisions that will shape the juvenile justice system in the 21st century").

10. DUCHESS HARRIS & CARLA MOONEY, *THE JUVENILE JUSTICE SYSTEM* 16 (2019), [books.google.com/books?id=NtKhDwAAQBAJ&printsec=frontcover&source=gbs\\_atb#v=onepage&q&f=false](https://books.google.com/books?id=NtKhDwAAQBAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false) [perma.cc/2W4E-SM92] (discussing various aspects of the United States juvenile justice system, including its history, its relations to gender and race, and reform efforts).

11. *Id.*

12. *Id.*

13. *Id.* at 17.

and punished under the criminal laws, “[c]hildren as young as seven . . . could stand trial in criminal court for offenses committed and, if found guilty, could be sentenced to prison or even to death.”<sup>14</sup>

As the United States approached the turn of the century in 1899, it resorted first to its roots in an attempt to hold children accountable for criminal wrongdoing.<sup>15</sup> Under the British doctrine, *parens patriae*, meaning “the State as parent,”<sup>16</sup> Illinois developed the United States’ first juvenile court through the Illinois Juvenile Court Act of 1899.<sup>17</sup> Rather than punishing “children who were not of full legal capacity,”<sup>18</sup> this Chicago-based system acted as a new parent to the juveniles by granting the State “the inherent power and responsibility to provide protection for children whose natural parents were not providing appropriate care or supervision.”<sup>19</sup> The juvenile court was also developed to provide a justice system for children based on the widespread understanding that children “were not mature enough to take responsibility for their actions”<sup>20</sup> and “were still developing intellectually and emotionally.”<sup>21</sup>

During the first half of the 20th century, the juvenile justice system maintained jurisdiction over juvenile offenders aged eighteen and younger.<sup>22</sup> Contrary to earlier procedures, children under the age of twelve could no longer be held in prisons.<sup>23</sup> Based on an informal evaluation of the best interests of both the specific juvenile and the general public, the juvenile court could waive jurisdiction, thereby transferring the juvenile offender to the adult criminal court.<sup>24</sup> Thus, in

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14. Snyder & Sickmund, *supra* note 9, at 86 (explaining how children below the age of seven “were presumed to be incapable of criminal intent and were, therefore, exempt from prosecution and punishment,” but beginning at age seven, children were subject to the criminal court system and its punishments). *See also* HARRIS & MOONEY, *supra* note 10, at 17 (discussing the United States’ view of children during the 1800s). “New reforms established child labor laws, mandatory education requirements, school lunches, and more . . . Reformers believed these facilities were needed to protect child offenders from adult criminals.” *Id.*

15. HARRIS & MOONEY, *supra* note 10, at 17-18 (explaining the development of the juvenile justice system and its recognition that once offenders reached a specified age, the courts could deem the offenders suitable for criminal prosecution with certain safeguards, such as separation of some juvenile and adult offenders, in place).

16. Snyder & Sickmund, *supra* note 9, at 83-84.

17. *Id.*

18. *Id.*

19. *Id.*

20. HARRIS & MOONEY, *supra* note 10, at 17-18.

21. *Id.*

22. Snyder & Sickmund, *supra* note 9, at 86 (explaining that “[o]nly if the juvenile court waived its jurisdiction in a case could a child be transferred to criminal court and tried as an adult”).

23. HARRIS & MOONEY, *supra* note 10, at 18 (discussing the changing age requirements for prison incarceration). Harris and Mooney further recognize that at this time, juvenile court records became confidential to “minimize the stigma children experienced from being in the justice system.” *Id.* This procedure remains intact today, whereas once the juvenile is transferred to the adult system, his or her adult court records are accessible by the public. *Id.*

24. *Id.* at 18-19 (explaining that “[t]he courts tried to determine children’s best

accordance with the *parens patriae* doctrine and the understanding of juvenile's limited legal capacity, the state acted as a parental figure, making decisions for the child to best benefit the individual and protect his or her best interests.<sup>25</sup>

## 2. *The Country in Panic*

Until the 1950s, juvenile courts proceeded informally, with judges using discretion when deciding the appropriateness of transfer, as well as treatment for juvenile offenders.<sup>26</sup> If a judge believed that a child could be rehabilitated — no matter what type of offense was alleged — the judge could offer “outcomes ranging from warnings to probation supervision to training school confinement.”<sup>27</sup> During the latter half of the 20th century, young offenders remained in the juvenile justice system at the court's discretion in order to receive treatment.<sup>28</sup> The juvenile court system developed into a more formal structure pursuant to various landmark cases from the United States Supreme Court, such as *Gideon v. Wainwright*, *Kent v. United States*, and *In Re Gault*.<sup>29</sup> To stop the ongoing “violations of children's [constitutional] rights”, hearings for all waiver issues and constitutional rights — similar to those afforded to adult defendants — were granted to all alleged juvenile offenders.<sup>30</sup> As misconceptions about increasing juvenile crime rates spread across 1980s America, public panic grew.<sup>31</sup> States passed more punitive statutes, including automatic transferring juvenile “offenders charged with certain offenses” to the adult criminal justice

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interests and followed an informal approach to cases”); Snyder & Sickmund, *supra* note 9, at 86 (stating that “[t]ransfer decisions were made on a case-by-case basis using a ‘best interests of the child and public’ standard, and were thus within the realm of individualized justice”).

25. HARRIS & MOONEY, *supra* note 10, at 18 (discussing the United States' view of children during the 1800s); Snyder & Sickmund, *supra* note 9, at 83-84.

26. Snyder & Sickmund, *supra* note 9, at 87.

27. *Id.*

28. *Id.* at 87-88 (addressing the juvenile court system's treatment-based procedures and discuss' legislative changes). For instance, Congress' “Juvenile Delinquency Prevention and Control Act of 1968[] recommended that children charged with noncriminal . . . offenses be handled outside the court system.” *Id.* The Juvenile Justice and Delinquency Prevention Act of 1974 followed, requiring states who accepted federal grants to “deinstitutionalize” noncriminal and non-offenders and to separate juvenile and adult offenders. *Id.* at 88. While these recommendations and mandates aligned with the juvenile justice system's traditional goal of rehabilitating young offenders, just a few years later in the 1980s, the public perception ultimately changed towards enforcing law and order in the juvenile justice sector. *Id.*

30. *Id.* at 19.

31. See Harris & Mooney, *supra* note 10, at 23-24 (explaining how as juvenile crime rates began to rise, “state legislators...pass[ed] what were known as tough-on-crime policies”); Snyder & Sickmund, *supra* note 9, at 88 (explaining that “[a]lthough there was substantial misperception regarding increases in juvenile crime, many States responded by passing more punitive laws”).

system and statutory exclusions that barred certain offenders from ever stepping foot in the juvenile justice system.<sup>32</sup>

### *B. From Few Convictions to Overincarceration: A Nation Afraid of Crime*

A few decades before the nationwide panic over juvenile crime rates, the public skeptically observed the criminal justice system's failures.<sup>33</sup> In the early part of the 20th century, the United States faced an era of increasingly violent crime and scarcely populated prisons.<sup>34</sup> Due to policy makers' war on crime, the court system increased its efforts to hold offenders accountable for their crimes, but the nation's crime levels for certain offenses actually decreased dramatically.<sup>35</sup> Still, "patrolmen adopted more aggressive tactics, and prosecutors embraced new strategies for winning convictions."<sup>36</sup> The states developed the "big-house" era of prisons in which increased convictions led to quickly growing prison populations that would persist for decades to come.<sup>37</sup>

### *C. Juvenile Justice vs. Criminal Consequences: Deterrence Theories*

Traditional goals and treatments promoted by the criminal justice system differ from those of the juvenile justice system.<sup>38</sup> In the adult

32. Snyder & Sickmund, *supra* note 9, at 88.

33. Jeffrey S. Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. OF AM. HIST. 34, 36 (2015), [academic.oup.com/jah/article-pdf/102/1/34/2003472/jav173.pdf](http://academic.oup.com/jah/article-pdf/102/1/34/2003472/jav173.pdf) [perma.cc/FND6-53SA] (explaining that "[t]he nation's criminal justice system appeared paralyzed [from 1900-1925] as violent crime soared while incarceration and execution rates remained nearly flat").

34. *Id.* (explaining that "[t]he violent-crime spike at the start of the twentieth century reflected a confluence of social and cultural forces, including a surge in the proportion of young men in the population, an increase in racial conflict and ethnic tensions, and shifts in gender roles").

35. *Id.* at 34, 37, 40-41 (stating that "[n]otwithstanding this plunge in serious crime, legislators embarked on a far-reaching law-and-order crusade"). Adler explained that legislators "passed draconian laws, closed legal loopholes, initiated a massive prison-building program, limited the power of juries, and expanded federal law enforcement, all in a frantic 'war on crime.'" *Id.* at 34.

36. *Id.* at 40.

37. *Id.* at 46. See also STEPHEN D. COX, THE BIG HOUSE: IMAGE AND REALITY OF THE AMERICAN PRISON 10-11 (2009), [books.google.com/books?id=tkmfxJ514DUC&printsec=frontcover#v=onepage&q&f=false](http://books.google.com/books?id=tkmfxJ514DUC&printsec=frontcover#v=onepage&q&f=false) [perma.cc/Q5E9-HPQW] (defining the "Big House" prison system as "America's notion of what a prison is supposed to be - a huge, tough, ostentatiously oppressive pile or rock, bristling with bars and towers and rules and punishments, overwhelming in its intent to intimidate).

38. Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 56 MORBIDITY & MORTALITY WKLY. REP. 2 (2007), [www.cdc.gov/mmwr/pdf/rr/rr5609.pdf](http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf)



system, the fundamental goal is employing punishment tactics to achieve various sub-goals, such as deterrence, incapacitation, and, if possible, rehabilitation.<sup>39</sup> Whereas the juvenile justice system traditionally focuses on rehabilitation, as “juveniles are assumed to be more amenable than adults to treatment.”<sup>40</sup> While the juvenile justice system generally works to deter individuals through rehabilitative measures to make the juveniles functioning members of society post-release, the adult criminal justice system focuses on deterrence through punishment.<sup>41</sup>

The fundamental goals of the juvenile and criminal justice systems differ, but both systems seek to prevent re-offending; the juvenile system by rehabilitating juvenile offenders and the adult criminal system by punishing offenders.<sup>42</sup> General deterrence is the “imposition of sanctions on one person [in order to] demonstrate to the rest of the public the expected costs of a criminal act, and thereby discourage criminal behavior in the general population.”<sup>43</sup> Conversely, specific deterrence is the theory that criminally punishing an individual offender will deter that person from committing future criminal acts.<sup>44</sup> However, these distinct concepts often overlap in practice, and thus may be considered as a single concept of deterrence when determining the proper punishment in a criminal case.<sup>45</sup>

#### *D. Psychological Variance Between Adults and Juveniles*

In recent years, the United States Supreme Court has recognized the differences in development and psychological growth between

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[perma.cc/8MND-H36Q] (discussing the goals of the juvenile justice system); Glen A. Ishoy, *Reassessing the Purpose of Punishment: The Roles of Mercy and Victim-involvement in Criminal Proceedings*, 33 CRIM. JUST. ETHICS 1 (2014), (discussing the goals of the adult criminal justice system).

39. Ishoy, *supra* note 38, at 2.

40. Hahn et al., *supra* note 38, at 2.

41. *Id.* at 2; Ishoy, *supra* note 38, at 2.

42. Hahn et al., *supra* note 38, at 2 (explaining that “[i]n contrast to the adult criminal court, which is oriented toward punishment, the traditional juvenile court has acted ‘in the interests of the child’ and focused on rehabilitation rather than punishment because juveniles are assumed to be more amendable than adults to treatment”); Ishoy, *supra* note 38, at 2 (addressing the issue that the adult criminal justice system focuses on punishment, with underlying goals of deterrence and rehabilitation, rather than focusing mainly on rehabilitation).

43. Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. OF RES. IN CRIME AND DELINQ. 123, 123 (1993) (quoting American criminologist Daniel S. Nagin and further distinguishing deterrence theories by explaining “[w]hereas general deterrence refers to the effects of legal punishment on the general public (i.e., potential offenders), specific deterrence pertains to the effects of legal punishment on those who have suffered it (i.e., punished offenders . . .”).

44. *Id.*

45. *Id.* at 133 (explaining how “there is no systematic theory of deterrence” and thus the theoretic distinctions between general and specific deterrence have provided little insight or applicability in the real world).

juveniles and adults.<sup>46</sup> In the landmark decision, *Roper v. Simmons*, the Court evaluated a case in which seventeen-year-old Simmons was charged with capital murder and sentenced to death upon turning eighteen.<sup>47</sup> On appeal, Simmons argued that an earlier case, *Atkins v. Virginia*,<sup>48</sup> “established that the Constitution prohibits the execution of a juvenile who was under [eighteen] when he committed a crime.”<sup>49</sup> The Missouri Supreme Court granted Simmons relief, dismissing the death penalty sentence and sentencing him to life imprisonment without the possibility of parole.<sup>50</sup> In its decision, the United States Supreme Court noted three distinct differences between adults and juveniles that indicate that the latter “cannot with reliability be classified among the worst offenders.”<sup>51</sup> First, juveniles are significantly less mature and responsible than adults, causing them to commit reckless behavior at higher rates than their older counterparts.<sup>52</sup> Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”<sup>53</sup> Finally, the Court noted that juveniles have underdeveloped personality traits compared to adults.<sup>54</sup> Thus, the Court

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46. See *Graham v. Florida*, 560 U.S. 48, 48 (2010) (holding, “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole”); and *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (finding, in part, that as compared to adult offenders, juveniles tend to experience “[a] lack of maturity and an underdeveloped sense of responsibility. . . , are more venerable or susceptible to negative influences and outside pressures, including peer pressure. . . , and have a significantly less developed character than adult offenders).

47. *Roper*, 543 U.S. at 551.

48. *Atkins v. Virginia*, 536 U.S. 304, 308-09, 318-21 (2002) (explaining the case of *Atkins*, a “mildly mentally retarded” man who was charged and convicted of abduction, armed robbery, and capital murder). The United States Supreme Court found that there are two reasons that mentally disabled people should not be subject to the death penalty. *Id.* First, there is no evidence that doing so prompts general deterrence of other mentally disabled people or serves as retribution for victims of crime. *Id.* at 318-19. Second, mentally disabled offenders tend to have a reduced capacity, which can cause them to “be less able to give more meaningful assistance to their counsel and [be] typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 320-21.

49. *Roper*, 543 U.S. at 556-59. See also *Atkins*, 536 U.S. at 308-09, 318-21 (holding that capital “punishment is excessive” as applied to those with an intellectual development disability, formally referred to as mental retardation).

50. *Roper*, 543 U.S. at 560.

51. *Id.* at 569.

52. *Id.* (noting specifically that: “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”). This interesting anecdote addresses the seemingly clashing relationship between legal adulthood in everyday activities and legal adulthood when it comes to alleged criminal activity. *Id.* See also *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (asserting that “[e]ven the normal 16-year-old customarily lacks the maturity of an adult”). Interestingly, many states – including those compared in this comment – continue to use 16-years-old as the benchmark for automatic and/or presumptive transfer. *Id.*

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

54. *Id.* at 570 (explaining that “the character of a juvenile is not as well formed as that of an adult” since “[t]he personality traits of juveniles are more transitory,

concluded that juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult."<sup>55</sup>

*Graham v. Florida* furthered Roper's theories.<sup>56</sup> In 2003, at age sixteen, Graham was charged in Florida with attempted armed robbery, and through statutory discretion, the prosecutor transferred the case to the adult criminal court system.<sup>57</sup> While the armed robbery offense was "punishable by life imprisonment under Florida law[,]” Graham pleaded guilty and received probation.<sup>58</sup> Six months after his plea and approximately one month before he turned eighteen, Graham committed a home invasion robbery and a second robbery.<sup>59</sup> During the second robbery, one of Graham's accomplices was shot and killed.<sup>60</sup> Graham told the police that he had committed multiple robberies the night before.<sup>61</sup> Recognizing Graham's violation of his probation, the trial court sentenced him to life imprisonment for the 2003 armed burglary and another fifteen years for the attempted armed robbery.<sup>62</sup> On appeal all the way to the United States Supreme Court, Graham argued that the sentence violated the Eighth Amendment.<sup>63</sup> The Court ruled in his favor, noting in part that psychological and cognitive development is dramatically different between a juvenile and an adult.<sup>64</sup> Citing *Roper*, the Court also concluded that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be

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less fixed” ).

55. *Id.* at 569. *See also* *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (examining an Oklahoma case in which a fifteen-year-old was transferred to adult court, convicted of first-degree murder, and sentenced to death). The Court concluded that, for a variety of reasons, “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Id.* The Court explained that “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.” *Id.*

56. *Graham*, 560 U.S. at 48.

57. *Id.* at 54.

58. *Id.*

59. *Id.* at 54-55.

60. *Id.*

61. *Id.* at 55.

62. *Id.* at 57 (noting that the Court admonished Graham that if he admitted to any involvement in the illegal activity – considering his prior plea agreement and thus being currently on probation – he could face a life sentence based on the earlier charges that he had already pleaded to). Even so, Graham admitted to violating the conditions of his probation by fleeing the police, which the Court ultimately considered to be Graham “acknowledg[ing] violating his probation.” *Id.* Charged as an adult, Graham's potential sentence ranged from five years to life imprisonment. *Id.* This sentencing structure, though not directly relevant to juvenile transfer, exemplifies the stark contrast between a juvenile sentence and an adult sentence, and thus the lifelong impact on an individual's life. *Id.*

63. *Id.* *See* U.S. CONST. amend. VIII (stating, “Excessive bail shall not be required, nor fines imposed, nor cruel and unusual punishments inflicted”).

64. *Graham*, 560 U.S. at 68.

reformed.”<sup>65</sup>

### *E. Juvenile Transfer: Mandatory, Presumptive, or Discretionary, In Illinois, Wisconsin, Missouri, and Indiana*

For a juvenile to be tried in the adult criminal court system, generally one of three circumstances must occur.<sup>66</sup> The juvenile court may waive its jurisdiction over the alleged offender and send the case to an adult court that statutorily has jurisdiction over the case.<sup>67</sup> However, the adult court may automatically possess jurisdiction over the case based on statutory exclusions that grant the adult criminal court, rather than the juvenile court, original jurisdiction.<sup>68</sup>

#### *1. The Distinction Between Mandatory Transfer and Statutory Exclusion*

Mandatory, or automatic, transfer laws are those which mandate that offenders of a certain age who commit certain criminal acts be tried in adult court.<sup>69</sup> They begin in the juvenile justice system, but because relevant factors are met, the judge has no choice but to transfer the case to the adult court system.<sup>70</sup> However, in some states, statutory exclusions mandate that all proceedings in the case begin and end in the adult criminal justice system.<sup>71</sup> For instance, in Illinois, a juvenile “who at the time of the offense was at least [sixteen] years of age and who is charged with (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm” must be prosecuted in the adult criminal court system, not the juvenile justice system.<sup>72</sup> In

65. *Id.* at 68-69.

66. Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUSTICE Q. 34, 35 (2007).

67. *Id.*

68. *Id.* (explaining that for certain offenses, juveniles are statutorily, or legislatively, excluded from the adult court, which is a concept developed in response to concerns about the justice systems’ alleged “failure to reduce crime” and potential discrimination).

69. Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP’T OF JUSTICE 2 (2011), [www.ncjrs.gov/pdffiles1/ojdp/232434.pdf](http://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf) [perma.cc/MZ23-U9CV] (discussing various mechanisms for trying juveniles as adults, such as “statutory exclusion laws [which] grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders” and “Once an Adult, Always” statutes “requiring criminal prosecution of any juvenile who has been criminally prosecuted in the past – usually without regard to the seriousness of the current offense”).

70. *Id.*

71. Steiner et al., *supra* note 66, at 35.

72. 705 ILCS 405/5-130(1)(a) (LexisNexis 2020) (addressing the concept of “delinquent minor” under Illinois law). The relevant portion of the statute is as follows:

The definition of delinquent minor under Section 5-120 [705 ILCS 405/5-

2016, Illinois increased its age for statutory exclusion from age fifteen to sixteen.<sup>73</sup>

Similarly, in Wisconsin, rather than using automatic waiver laws, the courts employ a statutory exclusion.<sup>74</sup> After their tenth birthday, a child becomes a “juvenile delinquent” under the law if they commit certain crimes such as first degree intentional homicide, attempted first degree intentional homicide, first degree reckless homicide, or second degree intentional homicide.<sup>75</sup> The cases begin and end in the adult criminal court system, never entering the juvenile justice system.<sup>76</sup> Further, a juvenile of any age who commits an assault or battery against an employee or officer of a correctional facility, or commits battery against a probation or parole officer is subject to the statutory

120] of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 [720 ILCS 5/12-3.05] where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012 [720 ILCS 5/2-15.5 or 720 ILCS 5/1-1 et seq.]. These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State.

*Id.*

73. *People v. Price*, 2018 IL App (1st) 161202 (holding that where a now-sixteen-year-old had committed a crime at the age of fifteen and before the amended automatic transfer age, the offender would be sentenced under the new law). *See also* CST Editorial Board, *When should a teen be tried as an adult? Let judges decide*, CHICAGO SUN-TIMES (Sept. 19, 2019), [chicago.suntimes.com/2019/9/19/20874164/juvenile-court-transfer-adult-court-lake-county-michael-nerheim-editorial](http://chicago.suntimes.com/2019/9/19/20874164/juvenile-court-transfer-adult-court-lake-county-michael-nerheim-editorial) [perma.cc/X7JE-LP6S] (discussing Illinois’ automatic transfer law and the related age change from fifteen to sixteen). This article addresses the issue through the lens of a case in which a Lake County State’s Attorney dismissed felony murder charges against five alleged juvenile offenders. *Id.* It notes that a sixteen-year-old who is “tried in juvenile court for a gun crime faces a maximum sentence of five years . . . But if tried and convicted in adult court, that same teen could be looking at 45 years in prison.” *Id.* This anecdote demonstrates an interesting dichotomy. A juvenile who commits a crime on his sixteenth birthday faces a very different criminal reality than if he had don’t so just one day earlier.

*Id.*

74. WIS. STAT. ANN. § 938.183(1)(am) (LexisNexis 2021) (addressing “juveniles under adult court jurisdiction”). The relevant portion of the statute is as follows:

(1) Juveniles under adult court jurisdiction. Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following: . . . (am) A juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile’s 10th birthday.

*Id.*

75. *Id.*

76. WIS. STAT. ANN. § 938.12(1) (LexisNexis 2021) (stating, “(1) In general. The court has exclusive jurisdiction, except as provided in ss. 938.17, 938.18, and 938.183, over any juvenile 10 years of age or older who is alleged to be delinquent”).

exclusion.<sup>77</sup> Though similar to mandatory transfer, these two processes remain distinct.<sup>78</sup> Wisconsin also allows for a reverse waiver in limited circumstances.<sup>79</sup> “[T]he [criminal] court shall retain jurisdiction” so long as three elements are met: the juvenile delinquent is subject to the statutory exclusion rule, a preliminary hearing occurs, and the court finds there is probable cause.<sup>80</sup> However, the juvenile may remain in the juvenile system if “the juvenile proves by a preponderance”<sup>81</sup> that the adult system would not provide the juvenile with adequate and necessary treatment; that “transferring the jurisdiction . . . would not depreciate the seriousness of the offense;”<sup>82</sup> and “that [the adult system]

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77. WIS. STAT. ANN. § 938.183(1)(a) (LexisNexis 2021) (addressing “juveniles under adult court jurisdiction”). The relevant portion of the statute is as follows:

(1) Juveniles under adult court jurisdiction. Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following: . . . (a) A juvenile who has been adjudicated delinquent and who is alleged to have violated s. 940.20 (1) or 946.43 while placed in a juvenile correctional facility, a juvenile detention facility, or a secured residential care center for children and youth or who has been adjudicated delinquent and who is alleged to have committed a violation of s. 940.20 (2m).

*Id.*

78. *Transfer*, NAT’L JUVENILE DEFENDER CTR., [njdc.info/transfer](http://njdc.info/transfer) [perma.cc/R3L7-WNLM] (last visited Mar. 14, 2021) (explaining how statutory exclusions, or automatic waiver, require certain juvenile cases to be charged and tried solely in the adult criminal system, whereas some mandatory transfer statutes permit cases to begin in the juvenile system and then be transferred to the criminal system). See WIS. STAT. ANN. § 970.032(2)(a-c) (LexisNexis 2021) (addressing transfer of jurisdiction). The relevant portion of the statute is as follows:

(2) If the court finds probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following: (a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system. (b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense. (c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable.

*Id.*

79. WIS. STAT. ANN. § 970.032(2)(a-c) (LexisNexis 2021) (addressing transfer of jurisdiction and the reversal of such funding where “[t]he court shall retain jurisdiction [over a juvenile transferred to the adult criminal court] unless the juvenile proves by a preponderance of the evidence three elements”).

80. WIS. STAT. ANN. § 970.032(2) (LexisNexis 2021) (addressing transfer of jurisdiction).

81. *Id.*

82. WIS. STAT. ANN. § 970.032(2)(b) (LexisNexis 2021) (addressing the elements

retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused.”<sup>83</sup> While the juvenile is statutorily required to be tried in the adult criminal court system, there remains potential for him or her to be waived from the criminal court’s jurisdiction to the juvenile court’s jurisdiction.<sup>84</sup>

Another form of statutory exclusion is the concept of “Once an Adult, Always,” where juveniles who have previously been transferred to or otherwise tried in the adult criminal court system will be “automatically transferred [to the adult system] for any future offending.”<sup>85</sup> For example, a Missouri statute states that once a child has been found guilty in the adult criminal court system, “the jurisdiction of the juvenile court over the child is forever terminated” if that child reoffends in the future.<sup>86</sup> Similarly, Indiana juvenile courts must waive jurisdiction in cases where the juvenile “is charged with an act which would be a felony if committed by an adult”<sup>87</sup> and “the child has previously been convicted of a felony or a nontraffic misdemeanor.”<sup>88</sup>

Thus, some states, such as Illinois and Wisconsin, employ automatic transfer in the form of statutory exclusion such that offenders who attain a certain age and who commit specified offenses are automatically tried in adult court.<sup>89</sup> Other states, such as Missouri and

the juvenile needs to prove to reverse a transfer, specifically “[t]hat transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense”).

83. WIS. STAT. ANN. § 970.032(2)(c) (LexisNexis 2021) (addressing the elements the juvenile needs to prove to reverse a transfer, specifically “[t]hat retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable”).

84. *Transfer*, supra note 78.

85. Hahn et al., supra note 38, at 2-3 (discussing the goals of the juvenile justice system).

86. MO. REV. STAT. § 211.071(9) (LexisNexis 2020) (addressing the circumstances when a child is barred from adult court after conviction for an earlier crime). The relevant portion of the statute is as follows:

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law and the prosecution of the child results in a conviction, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection 10 of this section, for an act that would be a violation of a state law or municipal ordinance. *Id.*

87. BURNS IND. CODE ANN. § 31-30-3-6(1) (LexisNexis 2020) (stating, “[u]pon motion by the prosecuting attorney, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act which would be a felony if committed by an adult”).

88. BURNS IND. CODE ANN. § 31-30-3-6(2) (LexisNexis 2020) (stating, “[u]pon motion by the prosecuting attorney, the juvenile court shall waive jurisdiction if it finds that: . . . (2) the child has previously been convicted of a felony or a nontraffic misdemeanor”).

89. 705 ILCS 405/5-130(1)(a) (LexisNexis 2021) (addressing the concept of “delinquent minor” under Illinois law); WIS. STAT. ANN. § 938.12(1) (LexisNexis 2021) (stating, “(1) In general. The court has exclusive jurisdiction, except as provided in ss.

Indiana, employ another form of statutory exclusion such that juveniles who have already been tried in adult court will automatically be tried there in the future if they engage in additional criminal activities.<sup>90</sup>

## 2. Presumptive Transfer

Some states also employ presumptive waiver statutes.<sup>91</sup> Based on the alleged offender's age, the type of offense, and other statutory requirements, transfer is presumed by the court to be the appropriate procedure.<sup>92</sup> While a rebuttable presumption exists in favor of the juvenile's transfer, the alleged offender has the right to present evidence that transfer is not appropriate and the judge may take that evidence into consideration.<sup>93</sup> However, if the juvenile fails to do so, the judge will have no choice but to transfer the case to the adult criminal court system.<sup>94</sup>

In Illinois, a prosecutor may file a petition for a juvenile to be transferred based on the commission of certain felonies that do not fall under the statutory exclusion.<sup>95</sup> Certain criteria must be met for the

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938.17, 938.18, and 938.183, over any juvenile 10 years of age or older who is alleged to be delinquent"); WIS. STAT. ANN. § 938.183(1)(a) (LexisNexis 2021) (addressing "Juveniles under adult court jurisdiction").

90. MO. REV. STAT. § 211.071(9) (LexisNexis 2020) (addressing the circumstances when a child is barred from adult court after conviction for an earlier crime); BURNS IND. CODE ANN. § 31-30-3-6 (LexisNexis 2020) (addressing a juvenile court's waiver of jurisdiction).

91. Griffin et al., *supra* note 69, at 4 (explaining, "presumptive waiver laws define a category of cases in which waiver from juvenile to criminal court is presumed appropriate" and such laws "leave the decision in the hands of a judge but weight in in favor of transfer").

92. *Id.*; cf. Hahn et al., *supra* note 38, at 3 (stating, "[w]ith lowered age of adult court jurisdiction, states set the age at which a person is considered responsible for criminal actions, and no longer eligible for juvenile court, to an age younger than the traditional age of 18 years"). Presumptive transfers are based upon individual states legislatively requiring certain offenders to be transferred if the defendant does not provide reasonable and sufficient rebuttal. *Id.*

93. Griffin et al., *supra* note 69, at 4.

94. *Id.*

95. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing Illinois' presumptive transfer of juvenile offenders). The relevant portion of the statute is as follows:

### (2) Presumptive transfer.

(a) If the State's Attorney files a petition, at any time prior to commencement of the minor's trial, to permit prosecution under the criminal laws and the petition alleges a minor 15 years of age or older of an act that constitutes a forcible felony under the laws of this State, and if a motion by the State's Attorney to prosecute the minor under the criminal laws of Illinois for the alleged forcible felony alleges that (i) the minor has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony under the laws of this State or any other state and (ii) the act that constitutes the offense was committed in furtherance of criminal activity by an organized gang, and, if the juvenile judge assigned to hear and determine motions to transfer a case for prosecution in the criminal



court to grant the transfer.<sup>96</sup> First, the juvenile must have a criminal record in which the juvenile was either “adjudicated delinquent or found guilty”<sup>97</sup> for a felony under Illinois criminal law.<sup>98</sup> Second, the charged crime “was committed in furtherance of criminal activity by an organized gang.”<sup>99</sup> Finally, the judge must determine that the allegations made and evidence presented in the motion for transfer demonstrate “that there is probable cause to believe that the allegations in the petition and motion are true.”<sup>100</sup> While a judge may use discretion when evaluating the evidence offered by the juvenile, a rebuttable presumption that the juvenile should be transferred persists.<sup>101</sup>

In Indiana, the court *must* transfer alleged offenders who are charged with Class A or Class B felonies so long as certain criteria are met.<sup>102</sup> First, the act would have to be a Level 1, 2, 3, or 4 felony,

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court determines that there is probable cause to believe that the allegations in the petition and motion are true, there is a rebuttable presumption that the minor is not a fit and proper subject to be dealt with under the Juvenile Justice Reform Provisions of 1998 (Public Act 90-590), and that, except as provided in paragraph (b), the case should be transferred to the criminal court.

*Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See Rachel Fugett, *Stop Presumptive Transfers: How Forcing Juveniles to Prove They Should Remain In The Juvenile Justice System Is Inconsistent With Roper v. Simmons & Graham v. Florida*, 48 J. MARSHALL L. REV. 365 (2014) (discussing modern-day presumptive transfer and proposing that Illinois eradicate this type of transfer as such would not prevent Illinois adult court from hearing cases with juvenile offenders, but rather would make transfer more discretionary and less mandatory). The comment argues that presumptive transfer – by presenting a rebuttable presumption in favor of transfer – violates a juvenile offender’s Eighth Amendment right against cruel and unusual punishment, considering the Amendment’s presumption that “a criminal offender’s punishment should be proportional to both the crime and his or her culpability.” *Id.* at 375.

102. BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (addressing Indiana’s waiver of jurisdiction for certain offenders who committed specific levels of offenses). The relevant portion of the statute is as follows:

Except for those cases in which the juvenile court has no jurisdiction in accordance with IC 31-30-1-4, the court shall, upon motion of the prosecuting attorney and after full investigation and hearing, waive jurisdiction if it finds that: (1) the child is charged with an act that, if committed by an adult, would be: (A) a Level 1 felony, Level 2 felony, Level 3 felony, or Level 4 felony, except a felony defined by IC 35-48-4; (B) involuntary manslaughter as a Level 5 felony under IC 35-42-1-4; or (C) reckless homicide as a Level 5 felony under IC 35-42-1-5; (2) there is probable cause to believe that the child has committed the act; and (3) the child was at least sixteen (16) years of age when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

involuntary manslaughter, or reckless homicide under Indiana criminal statute.<sup>103</sup> Second, “there is probable cause to believe that the child has committed the act; and . . . the child was at least [sixteen] years of age when the act charged was allegedly committed.”<sup>104</sup> Additionally, the court must transfer alleged offenders who are charged with murder if certain criteria are met.<sup>105</sup> The act would be considered murder if it had been committed by an adult, “there is probable cause to believe that the child has committed the act; and...the child was at least twelve (12) years of age when the act charged was allegedly committed.”<sup>106</sup> However, the juvenile court may override this presumptive transfer if it decides that doing so is in the child’s and the community’s best interest.<sup>107</sup>

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*Id.* See also *Criminal Law: About Felonies in Indiana*, THE LAW OFFICE OF MELISSA WINKLER-YORK, LLC., [www.winkleryorklaw.com/areas/criminal-defense/felony.html](http://www.winkleryorklaw.com/areas/criminal-defense/felony.html) [perma.cc/X86G-89QY] (last visited Mar. 24, 2021) (explaining that “crimes committed prior to July 2014” were classified by letters, with Class A and Class B felonies “carry[ing] [] penalt[ies] of 20 to 50 years” and “6 to 20 years” respectively, and crimes committed post-July 2014 are classified by numbers, with Level 1, Level 2, and Level 3 felonies “carr[y]ing [] penalt[ies] of 20 to 50 years . . . 10 to 30 years . . . [and] 3 to 20 years” respectively).

103. BURNS IND. CODE ANN. § 31-30-3-5(1)(A-C) (LexisNexis 2020) (addressing waiver of jurisdiction for juvenile offenders who are charged with Levels 1, 2, 3, or 4 felonies; involuntary manslaughter; or reckless homicide).

104. BURNS IND. CODE ANN. § 31-30-3-5(2-3) (LexisNexis 2020) (addressing two elements of the waiver statute for certain offenders for specific levels of offenses, specifically the requirement of probable cause and the minimum age of sixteen).

105. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (addressing the transfer rule when a juvenile is alleged to have committed murder). The relevant portion of the statute is as follows:

Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act that would be murder if committed by an adult; (2) there is probable cause to believe that the child has committed the act; and (3) the child was at least twelve (12) years of age when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

*Id.*

106. *Id.*

107. *Id.*; Burns Ind. Code Ann. § 31-30-3-5 (LexisNexis 2020) (addressing Indiana’s statute for waiver of jurisdiction when there is probable cause to believe a juvenile, at least sixteen years of age, has committed certain offenses, such as involuntary manslaughter or reckless homicide). See also Marilyn Odendahl, *Juvenile waiver bill stirs controversy at Statehouse*, I.N. LAWYER (Apr. 2, 2019), [www.theindianalawyer.com/articles/49861-juvenile-waiver-bill-stirs-controversy-at-statehouse](http://www.theindianalawyer.com/articles/49861-juvenile-waiver-bill-stirs-controversy-at-statehouse) [perma.cc/3S5K-HXZ6] (discussing Indiana Senate Bill 279 which would change the law, such that 12-year-old alleged offenders who *attempted* to commit murder, not only those who *did* commit murder, to be waived into adult court). The article examines the case which prompted the Bill – a school shooting in which the offender, a 14-year-old boy, was unable to be transferred to adult court based on Indiana’s laws since he only “gravely injured” two people but did not in fact kill them. *Id.* This recent potential change in the law is important because its

Thus, while Wisconsin and Missouri do not employ presumptive transfer, Illinois and Indiana presume transfer for juveniles of specified ages who commit certain offenses.<sup>108</sup> These statutes permit courts to consider additional factors, such as “the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.”<sup>109</sup>

### 3. Discretionary Transfer

Finally, discretionary transfer reflects the oldest and most traditional form of juvenile court hearings in which a court may waive a juvenile to adult court on a discretionary, case-by-case basis.<sup>110</sup> Depending on the statutory language, a court may consider various factors when deciding whether waiver is appropriate in the given case.<sup>111</sup> These factors include the “nature of the alleged crime and the individual youth’s age, maturity, history, and rehabilitative prospects.”<sup>112</sup> While many states employ discretionary transfer hearings in addition to other transfer mechanisms – such as automatic and presumptive transfer – some states, including Missouri, “rely solely on traditional hearing-based judicially controlled forms of transfer.”<sup>113</sup>

In Missouri, if any child commits one of a variety of serious offenses *or* has committed two or more prior unrelated offenses that would be felonies in the adult system, then the court *shall* order a hearing and *may*, in its discretion, transfer the case.<sup>114</sup> A 2018

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controversial consequences, though ominous, still somewhat align with traditional juvenile transfer mechanisms in which a judge may utilize discretion when deciding whether to transfer the alleged offender. *Id.*

108. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing Illinois’ presumptive transfer of juvenile offenders); BURNS IND. CODE ANN. § 31-30-3-4(1-3) (LexisNexis 2020) (addressing the presumptive of a juvenile, aged twelve years or older, who is alleged to have committed murder); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (addressing Indiana’s presumptive waiver of jurisdiction for juveniles, aged sixteen years or older, who is alleged to have committed certain levels of felonies, such as involuntary manslaughter or reckless homicide).

109. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020); Burns Ind. Code Ann. § 31-30-3-5 (LexisNexis 2020).

110. Griffin et al., *supra* note 69, at 2 (discussing waiver throughout time and in modern context). It states that “most states set a minimum threshold for waiver eligibility: generally, a minimum age and a specified type or level of offense, and sometimes a sufficiently serious record of previous delinquency” but warned that “[w]aiver thresholds are often quite low . . .” *Id.* It goes on to state, “[a]s a practical matter . . . waivers are likely to be relatively rare... the proportion of juvenile cases in which prosecutors seek waiver is not known, but waiver is granted in less than 1% of petitioned delinquency cases.” *Id.* These facts are important to note because even while waiver statutes may be concerning, in actuality, they are not as pervasive and detrimental as one may assume.

111. *Id.*

112. *Id.*

113. *Id.*

114. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (addressing Missouri’s discretionary transfer procedure). The relevant portion of the statute is as follows:

amendment to the Missouri statute changed the age at which a teenager is considered an adult under the law from seventeen to eighteen.<sup>115</sup> Illinois, Wisconsin, and Indiana employ discretionary transfer statutes in addition to other transfer mechanisms, with discretionary hearings for certain statutorily specified crimes beginning at age thirteen in Illinois, fourteen or fifteen in Wisconsin, and fourteen or sixteen in Indiana.<sup>116</sup>

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1. If a petition alleges that a child between the ages of twelve and eighteen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, second degree murder under section 565.021, first degree assault under section 565.050, forcible rape under section 566.030 as it existed prior to August 28, 2013, rape in the first degree under section 566.030, forcible sodomy under section 566.060 as it existed prior to August 28, 2013, sodomy in the first degree under section 566.060, first degree robbery under section 569.020 as it existed prior to January 1, 2017, or robbery in the first degree under section 570.023, distribution of drugs under section 195.211 as it existed prior to January 1, 2017, or the manufacturing of a controlled substance under section 579.055, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

*Id.*

115. MO. REV. STAT. § 211.031 (Amendment Notes) (LexisNexis 2020) (discussing the 2018 amendment which, in part, "substituted "eighteen years" for "seventeen years" in various sections of the statute).

116. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021) (addressing Illinois' discretionary transfer procedure). The relevant portion of the statute is as follows:

(3) Discretionary transfer. (a) If a petition alleges commission by a minor 13 years of age or over of an act that constitutes a crime under the laws of this State and, on motion of the State's Attorney to permit prosecution of the minor under the criminal laws, a Juvenile Judge assigned by the Chief Judge of the Circuit to hear and determine those motions, after hearing but before commencement of the trial, finds that there is probable cause to believe that the allegations in the motion are true and that it is not in the best interests of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

*Id.*; BURNS IND. CODE ANN. § 31-30-3-3 (LexisNexis 2020) (addressing the ability for a juvenile court to waive jurisdiction). The relevant portion of the statute is as follows:

Upon motion of the prosecuting attorney and after a full investigation and a hearing, the court may waive jurisdiction if it finds that: (1) the child is charged with an act that, if committed by an adult, would be a felony under IC 35-48-4; (2) there is probable cause to believe that the child has committed the act; (3) the child was at least sixteen (16) years of age when the act was allegedly committed; and (4) it is in the best interests of the safety and the welfare of the community for the child to stand trial as an adult.

## F. Where to Go from Here

From state to state, juvenile transfer statutes vary dramatically.<sup>117</sup> For instance, if a twelve-year-old commits a heinous felony in Indiana, her life will likely end up significantly different than if she had done so just a couple of states away in Wisconsin.<sup>118</sup> Considering a juvenile's psychological development and limited evidence that transfer is an effective deterrent, these stark differences create a concerning reality.<sup>119</sup> Thus, it is important to compare state statutes to one another and to traditional transfer mechanisms to determine how we as a society can better our justice systems and achieve the ultimate goal of juvenile rehabilitation.<sup>120</sup>

## III. ANALYSIS

This section will evaluate cognitive and psychological research and deterrence theory research as such relate to juvenile transfer. Then, it will examine Illinois, Indiana, Wisconsin, and Missouri transfer laws as they compare with both research regarding juveniles' cognitive and emotional development and deterrence theories and currently employed transfer mechanisms.

### A. Important Psychological Considerations When Evaluating Transfer

#### 1. Cognitive Development: Brain Chemistry & Criminal Conduct

Psychological development in juveniles from ages ten to eighteen varies greatly and demonstrates the importance of considering the

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*Id.*; WIS. STAT. ANN. § 938.18(LexisNexis 2021).

117. Griffin et al., *supra* note 69, at 2, 4-5 (discussing presumptive transfer, statutory exclusions, and prosecutorial discretion, and depicting various tables which include specifics about states' individual transfer laws).

118. *Geyser*, 394 Wis. 2d at 99 (discussing the "Slender Man" stabbing by two twelve-year-old offenders, including the defendant Morgan Geyser, and a Wisconsin court's decision to uphold her transfer to the adult criminal court system); *J.T.*, 121 N.E.3d at 605 (discussing a case in which a twelve-year-old stabbed her stepmother, and the Indiana court's decision to allow the juvenile court, rather than the adult criminal court, to retain jurisdiction over the case); *Weier*, 2016 WI App 67 at \*1-2 (discussing the "Slender Man" stabbing by two twelve-year-old offenders, including the defendant Anissa Weier, and a Wisconsin court's decision to uphold her transfer to the adult criminal court system).

119. *Graham*, 560 U.S. at 82 (holding that "[t]he [Eighth Amendment] prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"); *Roper*, 543 U.S. at 578 (holding "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

120. Griffin et al., *supra* note 69, at 2, 4-5.

mental experience and cognitive functioning when examining a juvenile's actions.<sup>121</sup> Studies on neurological and psychological development indicate that "youths in early- to mid-adolescence lack cognitive understanding of consequences, are hard-wired to engage in risky behavior, and are more influenced by peers than by any other environmental factor."<sup>122</sup> Researchers recognize that it is not possible to determine when a juvenile actually "attain[s] adult-like psychological capacities,"<sup>123</sup> which would establish the juvenile's ability to develop the level of culpability necessary to be charged as an adult.<sup>124</sup> Some critics may argue that these studies are indeterminate and should not be utilized in establishing laws. However, researchers Elizabeth Scott and Thomas Grisso found that "youths under age fourteen differ *significantly* from adolescents sixteen to eighteen years of age in their level of psychological development."<sup>125</sup> Youths between the ages of fourteen and sixteen share developmental characteristics with both their younger and older cohorts.<sup>126</sup> Similarly, in a 2019 study, the United Nations recommended that considering research in the field of adolescent cognitive development, "[s]tates should establish a minimum age of criminal responsibility, which shall not be below [fourteen] years of age."<sup>127</sup>

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121. Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 40 (2013) (acknowledging that some states allow transfer for even nonviolent felonies, such as certain property and drug offenses, and arguing that "[a]llowing transfer at such young ages and for such minor offenses means it is practically certain that transfer is not being authorized for the worst of the worst"). This type of transfer is seen in "Once an Adult, Always" concepts, such as those employed in Indiana and Missouri, which allow juveniles who are being charged with a felony – without distinction as to violent or nonviolent – to be automatically tried in adult courts. *Id.* See also Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 813 (2005) (noting that "[i]ntellectual capacities increase in childhood and into adolescence; although there is must variability among individuals, children and younger teens differ significantly from adults in their cognitive function"). Further, Scott & Grisso state, "[b]eyond the accumulation of knowledge and experience, intellectual development in adolescence also involves improvements in basis information processing skills, including organization, attention and short and long term memory." *Id.*

122. Hoeffel, *supra* note 121, at 40.

123. Scott & Grisso, *supra* note 121, at 811.

124. *Id.*

125. *Id.* at 811, 814 (emphasis added) (noting that "[d]uring the years between twelve and fifteen, impulse control improves, as adolescents struggle with new demands for self-direction and self-management; for some adolescents the process extends well into middle or late adolescence"). The information demonstrates that peak growth and development averages over the course of a three year span, but such is not absolute and can vary offender by offender, and thus is it important to take this factor into consideration when evaluating their psychological development. *Id.*

126. *Id.*

127. Manfred Nowak, *Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty*, UNITED NATIONS GENERAL ASSEMBLY 1, 20 (July 11, 2019), [reliefweb.int/sites/reliefweb.int/files/resources/A\\_74\\_136\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_74_136_E.pdf)

Further, psychosocial studies have addressed anti-personality disorder as it relates to juvenile behavior, psychological and social development, criminal behavior, and incorrigibility.<sup>128</sup> Research indicates that the total number and frequency of criminal offenses peaks during adolescence – most notably around age seventeen.<sup>129</sup> These rates “drop precipitously in young adulthood”<sup>130</sup> in correlation with a dramatic decrease in antisocial tendencies and increased maturity.<sup>131</sup> “Individuals with antisocial personality disorder often violate the law, becoming criminals.”<sup>132</sup> Antisocial personality disorder is “a mental

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[perma.cc/TS2V-HKWZ] (reporting the findings of the Independent Expert appointed by the Secretary-General, as instructed by the General Assembly, who analyzed global data to evaluate the circumstances of children deprived of liberty). In addition to the general findings, Nowak offered recommendations for means of depriving children of liberty, such as setting the absolute minimum age at which a child should be subject to *criminal* liability, and the best non-custodial practices that are implemented around the world. *Id.* These recent findings offer insight into the modern global society’s view of juvenile justice, and thus creates a recent and relevant basis of comparison for United States transfer laws. *Id.*

128. Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 84, n.21 (2013) (explaining that psychological research demonstrates that “even ‘older adolescents (aged 16-17) might have logical reasoning skills that approximate those of adults, but nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment”). The research further explores antisocial personality in juveniles, finding “that most youth age out of antisocial activities as they move into adulthood and that it is practically impossible to distinguish those youth who are incorrigible from those who are not. *Id.* See also *incorrigible*, MERRIAM-WEBSTER ONLINE DICTIONARY (Oct. 22, 2019), www.merriam-webster.com/dictionary/incorrigible [perma.cc/U2F5-W9JU] (defining “incorrigible” as “incapable of being corrected or amended: such as a(1) not reformable: depraved[,] (2) delinquent”).

129. Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) [hereinafter Moffitt I].

130. *Id.* (noting that “The majority of criminal offenders are teenagers; by the early 20s, the number of active offenders decreases by over 50%, and by age 28, almost 85% of former delinquents desist from offending”). Moffitt notes that, at least in the late 20th century, the “general relationship between age and crime [persists] among males and females, for most types of crimes.” *Id.*

131. Terrie E. Moffitt, *Natural Histories of Delinquency*, in CROSS-NATIONAL LONGITUDINAL RES. ON HUM. DEV. AND CRIM. BEHAV. 3, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994) [Moffitt II] (noting that “[t]emporary, situational antisocial behavior is quite common in the population, especially among adolescents,” but specifying that “[p]ersistent antisocial behavior is found among a relatively small number of males whose behavior problems are also quite extreme”). This distinction is important when addressing antisocial personality among offenders, as it indicated that antisocial behavior can change, and ultimately dissipate, over time. *Id.* See Scott & Grisso, *supra* note 121, at 811 (noting that “[l]awmakers usually defined immaturity through bright line rules that establish the legal boundaries between childhood and adulthood for various purposes on the basis of age”). Scott and Grisso further stated that “[f]rom a developmental perspective, age is a convenient but imprecise marker of the maturation process. *Id.*

132. *Antisocial personality disorder*, MAYO CLINIC (Oct. 22, 2019), www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/symptoms-causes/syc-20353928 [perma.cc/35AV-BNVD] (including

condition in which a person consistently shows no regard for right or wrong and ignores their rights and feelings of others.”<sup>133</sup> Most juvenile offenders do not develop “an entrenched pattern of criminal behavior that persists into adulthood,”<sup>134</sup> as most juvenile offenders move away from criminal behavior as they mature.<sup>135</sup> Characteristics and behaviors associated with antisocial personality disorder, a highly correlative disorder with criminal conduct, tend to decrease as juveniles mature into adulthood.<sup>136</sup> Thus, accounting for specific mental health factors is vital when determining a juvenile’s likelihood of reoffending, rehabilitative capacity, and nearness to adulthood.<sup>137</sup>

## 2. *Emotional Development: Emotional Intelligence & Criminal Conduct*

While cognitive development factors into a juvenile’s likelihood to commit a crime and to reoffend, research indicates that emotional intelligence grants insight into these behaviors as well.<sup>138</sup> Emotional intelligence is an individual’s “ability to perceive, manage, and reason about emotions and to use this information to guide thinking and behavior adaptively.”<sup>139</sup> In a study conducted in the United States,

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information about the symptoms, causes, risk factors, complications, and prevention of antisocial personality disorder).

133. *Id.*

134. Brief for American Psychiatric Association et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (discussing the argument that juveniles should not and cannot be equated with adults who commit similar offenses due to a variety of factors, including maturity and psychological development). It also notes that, according to *Roper*, “the same characteristics that render a juvenile less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Id.* See also Moffitt I, *supra* note 129, at 685-86 (discussing the differences between those juveniles whose antisocial personality traits pervaded their entire lives compared to those who developed these traits during adolescence). It states a previous longitudinal study indicated that of the juvenile boys studied, “12% . . . were classified as new delinquents at age 13; they had no prior history of antisocial behavior from age 5 to age 11.” *Id.* Their levels of delinquency increased above the study’s self-reported average between the ages of eleven and thirteen. *Id.* “By age 15, another 20% of this sample of boys” were qualified as new delinquents who had no history of antisocial personality traits throughout their lives. *Id.* Finally, “[b]y their mid-20s, at least three fourths of these new offenders were expected to cease all offending.” *Id.* These findings indicate the effects of antisocial personality trait development on juveniles, and importantly, the likelihood that the traits will dissipate by young adulthood. *Id.*

135. Moffitt I, *supra* note 129, at 675 (analyzing antisocial behavior in juveniles as it relates to criminal activity throughout adolescence).

136. *Id.* See also Moffitt II, *supra* note 131, at 29 (analyzing the development of and changes in antisocial behavior as one ages and specifically during adolescence).

137. Moffitt I, *supra* note 129, at 675-76 (explaining the development of antisocial personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years).

138. Sonja Milojevic et al., *Bad Past, Gloomy Future: The Trait Emotional Intelligence Profile of Juvenile Offenders*, 94 PERSONALITY & INDIVIDUAL DIFFERENCES 295 (2016).

139. Rachel E. Kahn, Elsa Ermer, Peter Salovey, & Kent A. Kiehl, *Emotional*



researchers examined a sample of incarcerated youth to determine whether callous-unemotional traits, the affective characteristics associated with psychopathy, are related to reduced emotional intelligence.<sup>140</sup> Researchers noted that youths with lower emotional intelligence tend to experience psychological maladjustment, “including externalizing and internalizing symptoms of aggression.”<sup>141</sup> The study concluded that while the juvenile offenders scored similarly to the general population on emotional intelligence measures, a significant relationship exists between high levels of callous-unemotional characteristics and emotional processing abnormalities.<sup>142</sup> The researchers further found that youth with “high levels of [callous-unemotional] traits may demonstrate impairment in ability [emotional intelligence], especially with regard to later developing [emotional intelligence] skills.”<sup>143</sup> These results indicate the importance of evaluating a juvenile’s emotional intelligence or callous-unemotional traits, as low levels can explain the youth offender’s reason for offending and likelihood to reoffend, as well as help identify proper interventions.<sup>144</sup>

Other studies have specifically evaluated emotional intelligence in delinquent youths compared to those in control groups.<sup>145</sup> In Serbia, researchers compared results on the Trait Emotional Intelligence Questionnaire of male juvenile offenders with male adolescents (the control group).<sup>146</sup> Researchers evaluated the males’ scores on four factors (i.e., Well-being, Self-control, Emotionality, and Sociability) and fifteen facets (e.g., Adaptability; Emotion expression, management, perception, and regulation; Social Awareness; Stress management).<sup>147</sup>

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*Intelligence and Callous-Unemotional Traits in Incarcerated Adolescents*, 47 CHILD PSYCHIATRY HUM. DEV. 903, 903 (2016).

140. *Id.* at 904, 906 (defining callous-unemotional traits as “the affective features of psychopathy and providing examples of callous-unemotional traits in youth, such as “lack of empathy/remorse, shallow affect, and callousness”). The study further notes that juveniles with callous-unemotional traits tend to experience difficulties in responding to and recognizing facial expressions, such as fear and sadness, and signals of distress or pain, and they often “endorse social goals consistent with deviancy and dominance . . . [viewing] aggression as an acceptable way to obtain goals.” *Id.*

141. *Id.*

142. *Id.* at 914.

143. *Id.*

144. *Id.*

145. Milojevic et al., *supra* note 138, at 295-96 (noting previous research studies addressing juvenile offenders and emotional intelligence). For instance, a 2013 study out of Ireland and a 2002 study out of China found that juvenile detainees scored significantly lower on emotional intelligence measures compared to control groups, indicating that these results tend to be pervasive across the world, not just in the United States. *Id.*

146. *Id.*

147. *Id.* at 296 (discussing the study’s method and procedure, such that the researchers compared a group of convicted juvenile offenders with a control group, all of whom were of normal intellectual capacity; further, the juvenile group contained twenty-five nonviolent offenders and twenty violent offenders which

Results indicated significant differences between the delinquent youths – those who had committed nonviolent or violent crimes – and the control group.<sup>148</sup> The scores suggested that juvenile offenders often “exhibit lower self-efficacy when it comes to dealing with emotions (differentiating and expressing their own, or recognizing and empathizing with the feelings of others); . . . hold a less positive/optimistic representation of themselves, their past, present, and future; and . . . have more difficulties regulating affect, controlling their impulses, and managing stress.”<sup>149</sup> While some may argue that this study is not persuasive as it examined only male juveniles in another country, it nevertheless adds to the research previously discussed which took place in the United States.<sup>150</sup> While it does not examine female offenders, it still accounts for the majority of juvenile offenders, as males tend to outnumber females when it comes to arrests for the most serious offenses.<sup>151</sup> This study further indicates that juvenile offenders experience lower levels of emotional intelligence than the general population, specifically with handling emotions, having less optimistic views of themselves and their lives, and regulating mental mechanisms, such as affect, impulse, and stress.<sup>152</sup>

### *B. Deterrence: Will a Juvenile Actually Re-offend?*

Studies over the years have addressed whether juveniles who are transferred to the adult criminal justice system experience deterrence at higher rates than those who remain in the juvenile justice system.<sup>153</sup> Research regarding general deterrence has produced somewhat inconsistent results with limited and not necessarily strong conclusions.<sup>154</sup> Most of the studies’ results indicate “that transfer laws, at least as currently implemented and publicized, have little or no general deterrent effect in preventing serious juvenile crime.”<sup>155</sup>

Similarly, specific deterrence has also been examined and studied throughout the literature.<sup>156</sup> The studies generally conclude that “youth

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allowed intragroup analysis, as well).

148. *Id.* at 297.

149. *Id.*

150. *Id.*

151. Melissa Sickmund & Charles Puzzanchera, *Juvenile Offenders and Victims: 2014 National Report*, NAT. CTR. FOR JUV. JUST. 115, 118 (2014), [www.ojjdp.gov/ojstatbb/nr2014/downloads/chapter5.pdf](http://www.ojjdp.gov/ojstatbb/nr2014/downloads/chapter5.pdf) [perma.cc/Q4TN-J2Q4] (providing a table that includes information on larceny-theft, simple adult, drug abuse violations, and disorderly conduct offenses by gender, age, and race, and indicates that of the 1,642,500 total juvenile arrests, only twenty-nine percent of those were female).

152. Milojevic et al., *supra* note 138, at 297.

153. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. DEP’T OF JUST. 1, 3 (2008), [www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf) [perma.cc/6CBH-K8F6].

154. *Id.* at 3.

155. *Id.*

156. *Id.* at 4 (noting that “[c]riminal sanctions will only have deterrent effects if

tried in adult criminal court generally have greater recidivism rates after release than those tried in juvenile court.<sup>157</sup> According to a meta-analysis conducted in 2016, three studies indicated that transfer had no effect on recidivism, one study indicated that transfer reduced recidivism, and five studies indicated that transfer increased recidivism.<sup>158</sup> Additionally, three other studies indicated that transfer increased felony recidivism, with two of those three studies showing increases in violent felony recidivism.<sup>159</sup> Therefore, while transfer might decrease recidivism, it may also increase it, and “there is no reliable basis on which to argue that scientific evidence exists for or against transfer as a policy of specific deterrence.”<sup>160</sup>

While transferring juveniles to the adult system for certain offenses in order to punish, rather than rehabilitate, is statutorily mandated and/or permissible in many states, the goal of deterring other offenders through punishment has not been significantly effective.<sup>161</sup> Some may argue that the results of the general deterrent studies should not be persuasive in changing state laws because they are notably inconsistent, and the specific deterrent studies tend to focus on violent rather than nonviolent and drug offenders.<sup>162</sup> However, these factors together indicate that deterrence is not an adequate basis for transfer where general deterrence is not consistently achieved and transferred juveniles experience higher rates of re-offense than their counterparts who remain in the juvenile justice system.<sup>163</sup>

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potential offenders: (1) believed there is a likelihood of getting caught (2) believed there is a significant likelihood of receiving a substantial sentence, and (3) consider the risk of the penalty when deciding whether to offend”). It specifically notes that while all of these factors are vital for deterrence to be effective, they mean nothing if juveniles who they are targeted towards do not know they exist. *Id.*

157. *Id.* (discussing specific deterrence generally, as well as a specific 1996 study in which the researcher concluded that “[j]uveniles with the highest recidivism rates were those incarcerated after being tried in the criminal court . . . [o]verall, youth adjudicated in juvenile court had a 29-percent lower risk of rearrest than those tried in criminal court”). Drug offenses were the one exception to this overall finding, where being tried in “criminal court substantially reduced the risk of rearrest in [drug] cases.” *Id.*

158. Stephen N. Zane, Brandon C. Welsh, & Daniel P. Mears, *Juvenile Transfer and the Specific Deterrence Hypothesis*, 15 CRIM. & PUB. POL. 901, 908-10 (2016).

159. *Id.*

160. *Id.*

161. *Id.* See also Hahn et al., *supra* note 38, at 2 (discussing the differences between the juvenile and adult court systems, and specifically noting “the traditional juvenile court has acted ‘in the interests of the child’ and focused on rehabilitation rather than punishment because juveniles are assumed to be more amendable than adults to treatment”).

162. Zane, Welsh, & Mears, *supra* note 158, at 901.

163. Redding, *supra* note 153, at 3-4.

### *C. State by State: Are We Doing This Right?*

#### *1. Illinois Juvenile Transfer Laws*

##### *a. Automatic (mandatory) transfer*

Illinois law includes a statutory exclusion, such that “any minor who at the time of an offense was at least [sixteen] years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm”<sup>164</sup> must be prosecuted in the state’s adult criminal court.<sup>165</sup> Where the transfer age is relatively close to the age of legal adulthood, Illinois’ statutory exclusion age corresponds with psychological research findings that a juvenile who is nearing adulthood has more likely achieved sufficient maturity and psychological development than his younger counterparts.<sup>166</sup> The minimum transfer age of sixteen also exceeds the United Nations’ recommended transfer age of fourteen.<sup>167</sup>

##### *b. Presumptive transfer*

In Illinois, a juvenile may be presumptively transferred to the adult criminal court if a prosecutor files a petition for the juvenile to be transferred based on the commission of certain felonies that do not fall under the statutory exclusion.<sup>168</sup> Certain criteria must be met.<sup>169</sup> First, “the minor has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony under the laws of this State or any other state.”<sup>170</sup> Second, “the act that constitutes the offense was committed in furtherance of criminal activity by an

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164. 705 ILCS 405/5-130(1)(a) (LexisNexis 2021) (addressing the concept of “delinquent minor” under Illinois law).

165. *Id.*

166. Scott & Grisso, *supra* note 121, at 811.

167. Nowak, *supra* note 127, at 20.

168. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing presumptive transfer of juvenile offenders under Illinois law, specifically the process of a prosecutor filing a petition to waive the juvenile court’s jurisdiction over an offender aged fifteen years or older who is alleged to have committed a forcible felony). *See also* Griffin et. al., *supra* note 69, at 5 (noting that when prosecutorial discretion regarding transfer is statutorily granted, there typically is “no hearing, no evidentiary record, and no opportunity for defendants to test (or even to know) the basis for the prosecutor’s decision to proceed in criminal court”). Thus, prosecutorial discretion can sometimes be viewed and employed as if it is a statutory exclusion, rather than a discretionary or semi-discretionary transfer mechanism. *Id.*

169. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing presumptive transfer of juvenile offenders aged fifteen years or older who committed a forcible felony under Illinois law).

170. 705 ILCS 405/5-805(2)(a)(i) (LexisNexis 2021) (addressing the first prong required for a presumptive transfer of juvenile offenders under Illinois law, such that “the minor has previously been adjudicated delinquent or found guilty for commission of an act that constitutes a forcible felony under the laws of this State or any other state”).

organized gang.”<sup>171</sup> Third, “if the juvenile judge assigned to hear and determine motions to transfer a case for prosecution in the criminal court determines that there is probable cause to believe that the allegations in the petition and motion are true.”<sup>172</sup> A judge may use his or her discretion when transferring the juvenile, but there is a rebuttable presumption that he should be transferred.<sup>173</sup> Finally, this statute does not set a problematically low minimum age at which a juvenile may be presumptively transferred, as it includes a minimum transfer age of fifteen years or older.<sup>174</sup> Thus, if a juvenile meets the criteria, he can be transferred to the adult court system beginning at age fifteen, which aligns with research suggesting the juvenile has reached sufficient psychological development that allows him to understand his actions as they relate to the law and prevent him from reoffending.<sup>175</sup> However, while the court may use its discretion when transferring the juvenile, it does not need to consider any specific factors or otherwise the child’s best interest, and as such, does not align with traditional transfer mechanisms that focus on individual characteristics, such as the likelihood of rehabilitation.<sup>176</sup>

c. Discretionary transfer

Under Illinois statute, if the prosecution moves for the juvenile to be prosecuted in the criminal justice system, a juvenile court may use its

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171. 705 ILCS 405/5-805(2)(a)(ii) (LexisNexis 2021) (addressing the first prong required for a presumptive transfer of juvenile offenders under Illinois law, such that “the act that constitutes the offense was committed in furtherance of criminal activity by an organized gang”).

172. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing presumptive transfer of juvenile offenders under Illinois law, specifically the process of a prosecutor filing a petition to waive the juvenile court’s jurisdiction over an offender aged fifteen years or older who is alleged to have committed a forcible felony). *See also* People v. Chapai, 2017 IL App (3d) 140037-U, at 2, 5, 9-10 (discussing a case in which thirteen-year-old Chapai, already an adjudicated delinquent after committing a retail theft at the age of eleven, committed an armed robbery). Based on Illinois state law, the prosecution used this opportunity to file a juvenile delinquency petition and a motion to transfer the juvenile to adult criminal court, which the court granted and thus Chapai was transferred to and tried in the criminal court system. *Id.* At a bench trial the judge found Chapai guilty and at thirteen years old, he received an adult sentence of twenty-one years with a mandated thirteen-year firearm enhancement. *Id.* The Appellate Court of Illinois affirmed the judgment on appeal. *Id.* This case demonstrates presumptive transfer in Illinois, such that the prosecution may petition for transfer, and in such is granted, the juvenile will be subject to the adult sentencing structure that may keep him in prison beyond the maximum time he could receive if he remained in the juvenile justice system. *Id.*

173. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021).

174. *Id.*

175. Hoeffel, *supra* note 121, at 40; Scott & Grisso, *supra* note 121, at 811.

176. Hahn et al., *supra* note 38, at 2 (noting that “an emphasis of the judicial response to [juveniles’] deviant behavior should be on reform rather than, or in addition to, punishment – in contrast to the punitive focus of the adult criminal justice system”).

discretion when determining whether to transfer the juvenile.<sup>177</sup> The court may consider the best interests of the public when deciding whether to transfer a thirteen-year-old juvenile offender whose alleged actions would “[constitute] a crime under the laws of [Illinois].”<sup>178</sup> This statute correlates well with the traditional mechanisms of the juvenile justice system, in which judges could take into account extrinsic factors when deciding whether the juvenile’s alleged offense is better suited for criminal court than for juvenile court.<sup>179</sup> However, it does not specifically state that the juvenile’s best interests should be taken into account.<sup>180</sup> An Illinois juvenile court does not necessarily have to consider factors such as the juvenile’s age, maturity level, and potential for rehabilitation.<sup>181</sup> For instance, a juvenile may express symptoms of antisocial personality disorder but psychological evaluations do or would indicate that the juvenile will likely outgrow such traits by the age of adulthood. However, the judge does not necessarily have to consider those findings when determining whether transfer is proper.<sup>182</sup> Additionally, this statute allows discretionary transfer for juveniles thirteen and older.<sup>183</sup> Thus, it does not align with studies showing that juveniles who have not neared the age of majority (eighteen) have not achieved the psychological capacity to indicate criminal culpability.<sup>184</sup> Similarly, according to the United Nations, the Illinois transfer law breaches the recommended a minimum transfer age of fourteen by allowing thirteen-year-olds, even discretionarily, to be transferred.<sup>185</sup>

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177. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021) (addressing discretionary transfer of juvenile offenders aged thirteen years or older when transfer is in the best interests of the public, under Illinois law).

178. *Id.*

179. Griffin et al., *supra* note 69, at 2.

180. *Id.*; 705 ILCS 405/5-805(3)(a) (LexisNexis 2021) (addressing discretionary transfer of juvenile offenders under Illinois law, which specifically acknowledges the “best interests of the public” but not those of the juvenile themselves).

181. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021); Griffin et al., *supra* note 69, at 2. *See also Roper*, 543 U.S. at 560 (discussing Eighth Amendment violations with juvenile offenders and transfer mechanisms). *Roper* specifically holds, in part, “[t]he prohibition against ‘cruel and unusual punishments,’ like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.” *Id.* This interesting take on juvenile transfer and the Constitution reflects the discretionary transfer mechanism, such that both argue for the analysis of extrinsic evidence – with cruel and unusual punishments, the history, precedent, and so on, and with discretionary hearings, age, nature of the offense, mental illness and/or development, and so on. *Id.*

182. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021). *See also* Moffitt I, *supra* note 129, at 675, 86 (describing developments in the understanding of antisocial behavior in juveniles and explaining that “self-reports of deviant behavior . . . merely reflect the top of the deviance iceberg”).

183. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021).

184. Scott & Grisso, *supra* note 121, at 811.

185. Nowak, *supra* note 127, at 20.

## 2. Indiana Juvenile Transfer Laws

### a. Automatic (mandatory) transfer

Under Indiana law, if a juvenile “has previously been convicted of a felony or a nontraffic misdemeanor”<sup>186</sup> and he is currently being charged with what “would be a felony if committed by an adult,”<sup>187</sup> then the juvenile court must waive jurisdiction and the juvenile thus must be charged in the adult court system. Unlike Illinois’ transfer statutes, Indiana’s automatic transfer statute includes no mandatory minimum age at which a juvenile must or may be transferred.<sup>188</sup> Thus, the statute does not align with traditional mechanisms of the juvenile justice system as it does not allow the juvenile court to take any factors into account and simply mandates that the juvenile be charged in the criminal court system.<sup>189</sup> Similarly, it allows juveniles who may be cognitively unaware of the consequences of their actions due to limited psychological development based on their ages to be automatically tried in the adult court regardless of any rehabilitative consideration.<sup>190</sup>

### b. Presumptive transfer

Indiana has two statutes that constitute presumptive transfer.<sup>191</sup> If a juvenile who is at least sixteen years of age at the time of the alleged act is charged with a Class A or Class B felony that would be considered a Level 1, 2, 3, or 4 felony, involuntary manslaughter, or reckless

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186. BURNS IND. CODE ANN. § 31-30-3-6 (LexisNexis 2020) (stating, “Upon motion by the prosecuting attorney, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act which would be a felony if committed by an adult; and (2) the child has previously been convicted of a felony or a nontraffic misdemeanor”).

187. *Id.*

188. *Id.*; 705 ILCS 405/5-130(1)(a) (LexisNexis 2021) (addressing the concept of “delinquent minor” under Illinois law); 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing presumptive transfer of juvenile offenders under Illinois law, specifically the process of a prosecutor filing a petition to waive the juvenile court’s jurisdiction over an offender aged fifteen years or older who is alleged to have committed a forcible felony); 705 ILCS 405/5-805(3)(a) (LexisNexis 2021) (addressing discretionary transfer of juvenile offenders under Illinois law, which specifically acknowledges the “best interests of the public” but not those of the juvenile themselves).

189. Griffin et al., *supra* note 69, at 2.

190. BURNS IND. CODE ANN. § 31-30-3-6 (LexisNexis 2020) (addressing the automatic transfer of a juvenile who committed a felony and has a prior conviction for “a felony or a nontraffic misdemeanor” pursuant to a prosecutor’s motion); Scott & Grisso, *supra* note 121, at 811.

191. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (addressing the transfer rule when there is probable cause to believe a juvenile, who is at least twelve years old, committed what would be considered murder by an adult offender); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (addressing Indiana’s presumptive waiver of jurisdiction to adult court for juveniles, aged sixteen years or older, where there is probable cause that such juvenile committed a certain level of felony, such as involuntary manslaughter or reckless homicide).

homicide under Indiana criminal statute, and evidence indicates probable cause that he committed the crime, he must be transferred to the criminal justice system.<sup>192</sup> This statute aligns with psychological research regarding cognitive and emotional development in adolescents.<sup>193</sup> It presumes transfer for juveniles who have allegedly committed certain offenses only after the juveniles have attained an age close to the age of legal adulthood, and thus likely have significantly greater psychological development than their younger counterparts, especially those who are younger than fourteen.<sup>194</sup>

Additionally, if a juvenile who is at least twelve years of age at the time of the alleged act is charged with what would constitute murder if he committed the same act as a legal adult, and evidence indicates probable cause that he committed the crime, he must be transferred to the criminal justice system.<sup>195</sup> Unlike Indiana's other presumptive transfer statute, this law presumes transfer for youth offenders who, due to their young age, are unlikely to have achieved cognitive and emotional development.<sup>196</sup> Older age can increase the likelihood that the juvenile would fully understand the consequences of his actions, steer away from pervasive peer pressure, and potentially outgrow antisocial personality traits.<sup>197</sup>

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192. BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020).

193. Scott & Grisso, *supra* note 121, at 811.

194. *Id.*

195. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (addressing Indiana's transfer statute, such that where probable cause exists to believe a juvenile, aged twelve years old or older, committed what would be considered murder by an adult offender). *See also J.T.*, 121 N.E.3d at 607, 610-11 (discussing a 2015 case in which a twelve-year-old girl – in part, due to a preoccupation with fictional character Laughing Jack – stabbed and killed her stepmother). Based on Indiana's juvenile presumptive transfer laws in Indiana, even though she was twelve years old and had committed murder, the judge had discretion in transferring her, such that the court could choose to transfer or not to transfer based on the best interest of the juvenile and the public. *Id.* In turn, the judge chose to keep the juvenile in the juvenile justice system rather than to send her to the adult criminal justice system. *Id.* The prosecutor's motion for transfer was heard by the court but denied. *Id.* The Court of Appeals of Indiana affirmed the trial court's ruling regarding transfer. *Id.* This case demonstrates Indiana's presumptive transfer statute and the impact that the court's discretion can have on a juvenile's case. *Id.*; compare with *Geyser*, 394 Wis. 2d at 99 and *Weier*, 2016 WI App 67 at \*1-2 (discussing a 2014 Wisconsin case with similar facts but a dissimilar result based on Wisconsin's statutory exclusion statute). *See also HARRIS & MOONEY*, *supra* note 10, at 7 (noting that with the reformation of the juvenile court system through the Illinois Court Act of 1899, “[c]ourt records for juvenile proceedings were confidential to minimize the stigma children experienced from being in the justice system,” which can be seen in the previously noted case, *State v. J.T.*, where the name of the offender was never released).

196. Hoeffel, *supra* note 121, at 40; Moffitt I, *supra* note 129, at 675, 686 (explaining how “[b]efore modernization, biological maturity came at a later age, social adult status arrived at an earlier age, and rites of passage more clearly delineated the point at which youths assumed new roles and responsibilities”).

197. Hoeffel, *supra* note 121, at 40; Moffitt I, *supra* note 129, at 675, 686 (explaining that “[c]ritical features of the [adolescent] development period are variability in biological age, the increasing importance of peer relationships, and the



Further, it must be noted that both statutes are subject to the court's discretion.<sup>198</sup> The juvenile court may override this presumptive transfer if it concludes that maintaining jurisdiction over the alleged offender is in the child's and the community's best interest.<sup>199</sup> This provision in each statute aligns with traditional goals of the juvenile justice system, in which the juvenile's best interest is taken into account when deciding whether transfer is appropriate.<sup>200</sup> The court has the opportunity to evaluate whether the juvenile meets certain psychological criteria that impact his ability to be rehabilitated or otherwise to outgrow tendencies that cause his alleged actions.<sup>201</sup> While both statutes presume transfer for certain offenders who are below the age at which antisocial personality traits tend to peak (age seventeen), they allow the court to consider the child's best interest.<sup>202</sup> Thus the court can evaluate the alleged offender's likelihood of reoffending based on not only age and previous history, but also antisocial and other psychological traits.<sup>203</sup>

### c. Discretionary transfer

Finally, Indiana employs discretionary transfer for juveniles fourteen years and older who commit heinous or aggravated acts or have participated in "repetitive pattern[s] of delinquent acts,"<sup>204</sup> as well

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budding of teenagers' self-conscious values, attitudes, and aspirations" – all of which may contribute to delinquency during youth).

198. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (including a provision such that the court may consider the best interests of the child and the public); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (including a provision, just as that included in §31-30-3-4, such that the court may consider the best interests of the child and the public).

199. *Id.*

200. Griffin et al., *supra* note 69, at 2.

201. *Id.*; Moffitt I, *supra* note 129, at 675, 686 (analyzing antisocial behavior in juveniles and the characteristics of adolescent years that may lead to juvenile delinquency).

202. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (including a provision such that the court may consider the best interests of the child and the public); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (including a provision, just as that included in §31-30-3-4, such that the court may consider the best interests of the child and the public).

203. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (including a provision such that the court may consider the best interests of the child and the public); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (including a provision, just as that included in §31-30-3-4, such that the court may consider the best interests of the child and the public); Moffitt I, *supra* note 129, at 675, 686 (analyzing antisocial behavior in juveniles as it relates to criminal activity throughout adolescence); Moffitt II, *supra* note 131, at 29 (analyzing the development of and changes in antisocial behavior as one ages and specifically during adolescence).

204. BURNS IND. CODE ANN. § 31-30-3-2 (LexisNexis 2020) (addressing Indiana's transfer process of a juvenile offender from an Indiana juvenile court). The relevant portion of the statute is as follows:

Upon motion of the prosecuting attorney and after full investigation and

as for juveniles who are at least sixteen years of age.<sup>205</sup> Not only does the discretionary transfer mechanism align with the traditional juvenile justice system's transfer system, but also these age minimums correlate with psychological research.<sup>206</sup> As previously noted, studies have indicated that by the age of fourteen, and even more likely by the age of sixteen, psychological development begins to align with that of an adult counterpart.<sup>207</sup> Further, both of Indiana's discretionary statutes align with the United Nations' recommendation that the minimum age that a juvenile should be tried in adult court is fourteen.<sup>208</sup> Thus, Indiana's discretionary statutes closely align with traditional juvenile justice goals, psychological research findings, and modern recommendations for juvenile transfer.<sup>209</sup>

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hearing, the juvenile court may waive jurisdiction if it finds that: (1) the child is charged with an act that is a felony: (A) that is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or (B) that is a part of a repetitive pattern of delinquent acts, even though less serious; (2) the child was at least fourteen (14) years of age when the act charged was allegedly committed; (3) there is probable cause to believe that the child committed the act; (4) the child is beyond rehabilitation under the juvenile justice system; and (5) it is in the best interests of the safety and welfare of the community that the child stand trial as an adult.

*Id.*

205. BURNS IND. CODE ANN. § 31-30-3-3 (LexisNexis 2020) (addressing the ability for a juvenile court to waive jurisdiction, where there is probable cause to believe that a child aged sixteen years or older committed what would be a felony if considered by an adult).

206. See Griffin et al., *supra* note 69, at 2 (discussing the history of juvenile justice in the United States); HARRIS & MOONEY, *supra* note 10, at 18 (discussing the history of the juvenile justice system and specifically noting that with the creation of the Illinois Juvenile Court Act of 1899, "the court required youth offenders to be separated from adults in prison and banned children younger than 12 from being detained in prisons"); Hoeffel, *supra* note 121, at 40 (discussing the lack of cognitive risk factors that place juveniles in a disadvantage as compared to adults); Moffitt I, *supra* note 129, at 675 (explaining the development of anti-social personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years); Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions). See generally, Hahn et al., *supra* note 38, at 2 (discussing the goals of the juvenile justice system).

207. Hahn et al., *supra* note 38, at 2; Scott & Grisso, *supra* note 121, at 811.

208. Nowak, *supra* note 127, at 20.

209. See Griffin et al., *supra* note 69, at 2 (discussing the history of juvenile justice in the United States); HARRIS & MOONEY, *supra* note 10, at 18 (discussing the history of the juvenile justice system and specifically noting that with the creation of the Illinois Juvenile Court Act of 1899, "the court required youth offenders to be separated from adults in prison and banned children younger than 12 from being detained in prisons"); Hoeffel, *supra* note 121, at 40 (discussing the lack of cognitive risk factors that place juveniles in a disadvantage as compared to adults); Moffitt I, *supra* note 129, at 675 (explaining the development of anti-social personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years); Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a

### 3. Wisconsin Juvenile Transfer Laws

#### a. Automatic (mandatory) transfer

In Wisconsin, courts utilize a statutory exclusion.<sup>210</sup> A child who has attained the age of ten is considered a “juvenile delinquent”<sup>211</sup> under the law if he commits first degree intentional homicide, attempted first degree intentional homicide, first degree reckless homicide, second degree intentional homicide.<sup>212</sup> Additionally, a juvenile of any age who commits an assault or battery against an employee or officer while in a correctional facility, or commits battery against a probation or parole officer, is subject to the statutory exclusion and thus must be tried in adult court.<sup>213</sup> In these situations, a juvenile delinquent may motion for reverse waiver so long as the juvenile proves certain factors, such as that the adult system’s lack of adequate and necessary treatment for the juvenile and that the juvenile does not need to remain in the adult system to be deterred.<sup>214</sup> This automatic transfer law violates traditional norms of the juvenile justice system by requiring the juvenile to prove that he should be sent to the juvenile court, rather than allowing the court to consider extrinsic factors for why the juvenile should not be

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minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile’s ability to comprehend the consequences of his or her actions). *See generally*, Hahn et al., *supra* note 38, at 2 (discussing the goals of the juvenile justice system).

210. WIS. STAT. ANN. § 938.183(1)(am) (LexisNexis 2021) (addressing “[j]uveniles under adult court jurisdiction”).

211. *Id.*

212. *Id.* *See also* *Geysler*, 394 Wis. 2d at 99; *Weier*, 2016 WI App 67 at \*2 (discussing a 2014 case in which two 12-year-old girls – in an attempt to “become proxies for” the fictional mythical character Slenderman (also known as Slender Man) – planned to stab and kill their friend). After luring her into a wooded area with them in Waukesha, Wisconsin, they repeatedly stabbed her, and, believing she was dead, they left her at the edge of the forest where she was eventually discovered by a passerby. *Id.* The victim survived, and the two juvenile offenders were charged as adults with attempted first degree intentional homicide in Wisconsin’s criminal court system because they met the requirements for Wisconsin’s statutory exclusion, which mandates that offenders who have attained the age of 10 and have committed certain felonious conduct, including attempted first degree intentional homicide, be charged in the adult criminal court system rather than the juvenile court system. *Id.* As is permitted in Wisconsin, the juveniles petitioned for reverse waiver, but such was denied and thus they remained in the adult system. *Id.* These two cases – which share a case cite but can be found under either offender’s last name – plainly demonstrate Wisconsin’s statutory exclusion and the opportunity for reverse waiver. *Id.*; *compare with J.T.*, 121 N.E.3d at 610-11 (discussing a 2015 Indiana case with similar facts but a dissimilar result based on Indiana’s presumptive transfer statute).

213. WIS. STAT. ANN. § 938.183(1)(a) (LexisNexis 2021) (addressing “[j]uveniles under adult court jurisdiction”).

214. WIS. STAT. ANN. § 970.032(2)(a-c) (LexisNexis 2021) (addressing transfer of Wisconsin juvenile court’s jurisdiction).

transferred to the adult system.<sup>215</sup> Further, by mandating that certain offenders who are only ten years old be tried in adult court, this statute does not align with psychological findings which indicate that juveniles below the age of majority, and specifically under the age of fourteen, have not achieved significant psychological development, limiting their understanding of the consequences of their criminal or otherwise risky behaviors and allows them to fall victim to peer pressure.<sup>216</sup>

Additionally, while not all juveniles who commit crimes display antisocial personality traits, many do exhibit these tendencies which tend to dissipate in young adulthood.<sup>217</sup> Once these traits dissipate as maturity increases, the individual's likelihood of reoffending is significantly reduced.<sup>218</sup> However, this statute requires that a juvenile — who has not reached an age of maturity and whose criminal behavior may stem from antisocial personality traits that he will likely outgrow by the time he achieves young adulthood — prove that he requires treatment in the juvenile justice system rather than punishment from the adult system.<sup>219</sup> Finally, Wisconsin's statutory automatic transfer age is significantly lower than the United Nations' recommended minimum age.<sup>220</sup> While the reverse waiver provision importantly provides the juvenile the opportunity to have his case transferred to the juvenile justice system, the statutory exclusion itself violates traditional juvenile justice mechanisms and contradicts relevant psychological research findings.<sup>221</sup>

#### b. Discretionary transfer

Unlike Illinois and Indiana, Wisconsin does not employ presumptive transfer but does permit discretionary transfer under certain circumstances.<sup>222</sup> Wisconsin law allows discretionary transfer

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215. Griffin et al., *supra* note 69, at 2.

216. Hoeffel, *supra* note 121, at 40 (acknowledging that research demonstrates “developmental differences in adolescents that greatly impact their culpability, their susceptibility for deterrence, and their capacity for competent participation in criminal proceedings”); Scott & Grisso, *supra* note 121, at 811 (explaining the developmental difference, including psychological immaturity, amongst pre-teens and adolescents).

217. Moffitt I, *supra* note 129, at 685-86 (explaining how peer pressure during adolescence influences delinquent behavior, particularly with those juveniles who experience antisocial characteristics during those formative years).

218. *Id.*

219. *Id.*; WIS. STAT. ANN. § 970.032(2)(a-c) (LexisNexis 2021) (addressing transfer of Wisconsin juvenile court's jurisdiction).

220. Nowak, *supra* note 127, at 20.

221. Griffin et al., *supra* note 69, at 2; Moffitt I, *supra* note 129, at 685-86 (examining juvenile delinquency and the frequency of police contacts during adolescence – the years when antisocial behavior often peaks before a decrease as one ages); Nowak, *supra* note 127, at 20; WIS. STAT. ANN. § 938.183(1)(am) (LexisNexis 2021) (addressing “[j]uveniles under adult court jurisdiction”).

222. WIS. STAT. ANN. § 938.18(1)(a-c) (LexisNexis 2021) (addressing the conditions for “[w]aiver of juvenile court jurisdiction”). The relevant portion of the statute is as follows:

for a fourteen or fifteen year old offender, depending on the offense, if the district attorney or the juvenile himself petitioners the court to waive jurisdiction based on certain characteristics the juvenile displays.<sup>223</sup> To permit the transfer, the court must conduct a hearing and decide that transfer is appropriate under the circumstances.<sup>224</sup> This

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(1) Waiver of juvenile court jurisdiction; conditions for. Subject to s. 938.183, a petition requesting the court to waive its jurisdiction under this chapter may be filed if the juvenile meets any of the following conditions: (a) The juvenile is alleged to have violated s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31, 943.10 (2), 943.32 (2), 943.87 or 961.41 (1) on or after the juvenile's 14th birthday. (b) The juvenile is alleged to have committed a violation on or after the juvenile's 14th birthday at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9), that would constitute a felony under chs. 939 to 948 or 961 if committed by an adult. (c) The juvenile is alleged to have violated any state criminal law on or after the juvenile's 15th birthday. *Id.*

223. *Id.*; WIS. STAT. ANN. § 938.18(2) (LexisNexis 2021) (addressing the petition to waive juvenile court jurisdiction). The relevant portion of the statute is as follows:

(2) Petition. The petition for waiver of jurisdiction may be filed by the district attorney or the juvenile or may be initiated by the court and shall contain a brief statement of the facts supporting the request for waiver. The petition for waiver of jurisdiction shall be accompanied by or filed after the filing of a petition alleging delinquency and shall be filed prior to the plea hearing, except that if the juvenile denies the facts of the petition and becomes 17 years of age before an adjudication, the petition for waiver of jurisdiction may be filed at any time prior to the adjudication. If the court initiates the petition for waiver of jurisdiction, the judge shall disqualify himself or herself from any future proceedings on the case.

*Id.*

224. WIS. STAT. ANN. § 938.18(5) (LexisNexis 2021) (addressing the criteria to waive juvenile court jurisdiction). The relevant portion of the statute is as follows:

(5) Criteria for waiver. If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria: (a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment. (am) The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, and the juvenile's prior offenses. (b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner. (c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048. (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a

statute appropriately sets the minimum at fourteen or fifteen – aligning with psychological research findings and the United Nations’ recommended minimum age for a juvenile to be tried in the adult criminal court system.<sup>225</sup> Further, this statute allows for a hearing that promotes traditional juvenile transfer mechanisms, such as evaluation of the juvenile’s characteristics and a hearing to evaluate the circumstances surrounding potential transfer.<sup>226</sup>

#### 4. Missouri Juvenile Transfer Laws

##### a. Automatic (mandatory) transfer

Similar to Indiana’s statutory exclusion, Missouri law mandates that for a child, no matter his or her age, who has previously been prosecuted and found guilty in the state’s criminal court system, “the jurisdiction of the juvenile court over that child is forever terminated”<sup>227</sup> and thus any future offenses will automatically be charged in the adult court.<sup>228</sup> Similar to Indiana’s statute, Missouri’s statute gives the court no discretion regarding whether the child should or should not be tried in the adult court system.<sup>229</sup> Thus, the statute does not sufficiently align with traditional juvenile justice goals and psychological research regarding determinative characteristics for transfer, such as age, maturity, and mental illness.<sup>230</sup>

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crime in the court of criminal jurisdiction.

*Id.*

225. Moffitt I, *supra* note 129, at 675 (explaining the development of anti-social personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years); Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile’s ability to comprehend the consequences of his or her actions).

226. Griffin et al., *supra* note 69, at 2.

227. MO. REV. STAT. § 211.071(9) (LexisNexis 2020) (addressing the juvenile court’s retention of jurisdiction over a juvenile offender after a petition for transfer has been denied).

228. *Id.*

229. Griffin et al., *supra* note 69, at 2; Hoeffel, *supra* note 121, at 40.

230. See Griffin et al., *supra* note 69, at 2 (discussing the history of juvenile justice in the United States); HARRIS & MOONEY, *supra* note 10, at 18 (discussing the history of the juvenile justice system and specifically noting that with the creation of the Illinois Juvenile Court Act of 1899, “[t]he court required youth offenders to be separated from adults in prison and banned children younger than 12 from being detained in prisons”); Hoeffel, *supra* note 121, at 40 (discussing the lack of cognitive risk factors that place juveniles in a disadvantage as compared to adults); Moffitt I, *supra* note 129, at 675 (explaining the development of anti-social personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years); Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile’s ability to

b. Discretionary transfer

Similar to Wisconsin, Missouri does not employ presumptive transfer but does permit discretionary transfer.<sup>231</sup> Missouri's primary form of transfer is discretionary transfer, paralleling in many ways the traditional juvenile justice system's transfer goals and mechanisms.<sup>232</sup> If a juvenile commits a certain serious offense or commits at least two unrelated offenses that would be felonies in the criminal court system, then the juvenile court must hold a hearing and, through its discretion, may transfer the case to the adult court system.<sup>233</sup> The statute does not specify an age at which transfer is allowed, and thus a child younger than the United Nations' recommended age of fourteen, or a child otherwise not sufficiently psychological developed to be rightfully transferred to the adult system, may be transferred to Missouri's criminal court through the discretionary transfer process.<sup>234</sup> However,

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comprehend the consequences of his or her actions).

231. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (addressing the process of discretionary transfer in Missouri, including the requirement that a court order a hearing and use its discretion in transferring certain juvenile offenders).

232. *Id.*; Hahn et al., *supra* note 38, at 2; Griffin, et al., *supra* note 69, at 2, 4-5 (providing a table that breaks down the states that allow juvenile transfer and the various offenses that each state does or does not employ when utilizing discretionary waiver, and further specifying that Missouri remains one of the few states that relies solely on discretionary transfer, in addition to the Once An Adult, Always statutory exclusion).

233. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (discussing the discretionary transfer process in Missouri for juvenile offenders alleged to have committed a crime "which would be considered a felony if committed by an adult"). See also Erin Heffernan, *Teen charged with murder of retired St. Louis police sergeant to be tried as an adult*, ST. LOUIS POST-DISPATCH (June 11, 2019), [www.stltoday.com/news/local/crime-and-courts/teen-charged-with-murder-of-retired-st-louis-police-sergeant/article\\_26f22109-7c05-5b1f-b67e-07d4ca205f04.html](http://www.stltoday.com/news/local/crime-and-courts/teen-charged-with-murder-of-retired-st-louis-police-sergeant/article_26f22109-7c05-5b1f-b67e-07d4ca205f04.html) [perma.cc/N37N-WZU3] (discussing a recent Missouri case in which Justin Mathews was charged in the juvenile court system with second-degree murder, among other charges, after allegedly shooting a retired police sergeant). At the transfer hearing, juvenile officer Marianna Macke Swier "testified that the juvenile corrections system does not have a facility with the level of security needed to hold someone accused of such a violent crime and, at 16, Mathews could be released from juvenile detention in as soon as two years." *Id.* Further, the juvenile officer noted that before his arrest, Mathew "showed signs of 'sophistication' and 'independence.'" *Id.* Based on Missouri's discretionary transfer statute, the judge may take into account various factors, including those testified to by the juvenile officer, and thus the judge chose to transfer Mathews. *Id.* Thus, this case demonstrates Missouri's discretionary transfer mechanisms, such that even at age sixteen, Mathews' transfer remained subject to the court's discretion and at his hearing, evidence was presented not only to prove the effect of transfer on the public (e.g., the violent nature of the crime, the level of security available at various prisons) but also to demonstrate Mathew's characteristics and traits beyond those exemplified by the alleged crime (e.g., his sophistication and independence). *Id.*

234. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (addressing discretionary juvenile transfer, but not including a minimum age of such transfer); Griffin et al., *supra* note 69, at 2 (explaining that juvenile transfer ages have changed throughout

this transfer mechanism is ideal as it follows the traditional goals of the juvenile justice system by using discretion in every case of potential transfer to determine the best course for the juvenile and likely the public as well.<sup>235</sup> To better align with the traditional goals and modern psychological research findings, including a minimum transferability age would more closely align this statute with both traditional 20th-century transfer mechanisms in which children under the age of twelve could not be held in prisons, as well as psychological research findings and the United Nations' research recommendations.<sup>236</sup>

#### IV. PROPOSAL

##### A. Age Matters

This Comment proposes solutions to the issue of juvenile transfer mechanisms in comparison with traditional transfer procedures and modern research findings. Courts should reemploy traditional transfer mechanisms that focus solely on discretionary, not automatic or presumptive, transfer processes. If states decide to continue using those modern transfer mechanisms, each transfer statute should include a minimum transfer age of fourteen, at the very youngest. Finally, for every discretionary and presumptive transfer hearing a juvenile should be psychologically evaluated by a licensed professional and the judge should consider the professional's findings when deciding whether transfer is proper.

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the development of the juvenile justice system); Hoeffel, *supra* note 121, at 40 (discussing the developmental differences in juveniles over adolescent years as it impacts criminal, or deviant, behavior); Nowak, *supra* note 127, at 20 (noting that the United Nations' study recommends a minimum transfer age of fourteen); Scott & Grisso, *supra* note 121, at 811 (explaining the developmental difference, including psychological immaturity, amongst pre-teens and adolescents).

235. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (addressing discretionary juvenile transfer, including language permitting the court to use its discretion in moving forward or dismissing the petition); Griffin et al., *supra* note 69, at 2; Hoeffel, *supra* note 121, at 40; Nowak, *supra* note 127, at 20; Scott & Grisso, *supra* note 121, at 811.

236. See Griffin et al., *supra* note 69, at 2 (discussing the history of juvenile justice in the United States); HARRIS & MOONEY, *supra* note 10, at 18 (discussing the history of the juvenile justice system and specifically noting that with the creation of the Illinois Juvenile Court Act of 1899, "the court required youth offenders to be separated from adults in prison and banned children younger than 12 from being detained in prisons"); Hoeffel, *supra* note 121, at 40 (discussing the lack of cognitive risk factors that place juveniles in a disadvantage as compared to adults); Moffitt I, *supra* note 129, at 675 (explaining the development of anti-social personality characteristics in youths and the increased frequency of criminal offenses and deviance during juvenile years); Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).



### B. *Resorting Back to Tradition*

When Chicago first developed the juvenile court system, it employed some drastic and necessary changes to the treatment of juveniles in the justice system.<sup>237</sup> Recognizing that children possess neither the same legal capacity nor the maturity or intellectual and emotional development of their adult counterparts, the Illinois Juvenile Court Act of 1899 aimed to protect children.<sup>238</sup> The juvenile justice system maintained jurisdiction over all juveniles under eighteen, and in each instance when the possibility of waiving the juvenile to the adult criminal court existed, the court considered both the interests of the public and the juvenile before granting transfer.<sup>239</sup> This procedure is ideal for a variety of reasons.

First, the traditional transfer process grants the court discretion in every case.<sup>240</sup> Automatic transfers and statutory exclusions require a court to transfer the juvenile to adult court without consideration of any extrinsic factors.<sup>241</sup> Presumptive transfers require a court to presume that transferring the juvenile is the correct process and the court *may* take into account other interests.<sup>242</sup> Whereas the traditional transfer mechanism mandates that a judge considers the juvenile's best interest by considering relevant factors to a case.<sup>243</sup> Such factors may include the juvenile's age, maturity, history in and out of the system, the likelihood of rehabilitation, and the public's wellbeing if the juvenile is tried in the juvenile rather than the adult system.<sup>244</sup> These factors can greatly impact a juvenile's behavior and thus may cause him/her to commit crimes without fully understanding the consequences of his actions.<sup>245</sup> Therefore, the court should always consider these factors when determining whether the juvenile should be transferred or is better suited for the juvenile system. Further, by granting the court discretion, the court retains autonomy when employing juvenile transfer.

Still, traditional transfer procedures do not completely align with best practices. The traditional transfer mechanism allows a court to transfer *any* juvenile it deems fit.<sup>246</sup> While this method is important as it allows courts to retain autonomy over juvenile transfer, it does not include a minimum age at which the court can actually consider the possibility of transferring the juvenile into the adult system.

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237. Snyder & Sickmund, *supra* note 9, at 83-84.

238. *Id.*

239. *Id.* at 86.

240. *Id.* at 85.

241. Griffin et al., *supra* note 69, at 2.

242. *Id.*

243. Snyder & Sickmund, *supra* note 9, at 83-84.

244. *Id.*

245. Hoeffel, *supra* note 121, at 40.

246. Snyder & Sickmund, *supra* note 9, at 83-84.

Psychological research indicates that juveniles mature and psychologically develop and thus are more likely to acquire the cognitive capacity for culpability as they grow closer to the age of majority.<sup>247</sup> Further, the United Nations recommends a minimum transfer age of fourteen.<sup>248</sup> This Comment proposes that in addition to implementing the traditional transfer mechanisms that allow for discretion in every juvenile transfer case, courts should establish the minimum age for transfer and thus for this discretionary case-by-case evaluation, at a minimum age of fourteen.<sup>249</sup>

### *C. If Not Tradition, Consider Likelihood of Developmental Maturity*

Considering the drastic changes made to juvenile transfer laws in the 20th-century through the implementation of various types of transfer, it may be difficult to resort back to the traditional transfer process. Thus, to accommodate pre-existing laws, this Comment proposes that regardless of the transfer styles employed by a state, the minimum age that a juvenile may be automatically, presumptively, or discretionarily transferred should be at or above age fourteen. This minimum age reflects the suggested age of psychological maturity, culpability, and overall development, as well as the United Nations' recommended minimum age of transfer.<sup>250</sup> Preexisting laws that already include this age minimum or include a minimum age above fourteen should not be amended.

#### *1. Amending Illinois' Juvenile Transfer Laws*

While some Illinois law aligns with the suggested minimum age requirements, others do not. Illinois' statutory exclusion, which sets the transfer age at sixteen, should not be altered.<sup>251</sup> Similarly, Illinois' presumptive transfer law designates fifteen as the minimum age for presumptive transfer.<sup>252</sup> Thus, such statute need not be amended unless

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247. Scott & Grisso, *supra* note 121, at 811.

248. Nowak, *supra* note 127, at 20.

249. *Id.*; Scott & Grisso, *supra* note 121, at 811.

250. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

251. 705 ILCS 405/5-130(1)(a) (LexisNexis 2021) (addressing the concept of "delinquent minor" under Illinois law).

252. 705 ILCS 405/5-805(2)(a) (LexisNexis 2021) (addressing presumptive transfer of juvenile offenders under Illinois law, specifically the process of a

to increase the minimum age.<sup>253</sup> On the other hand, Illinois' discretionary transfer law allows juvenile courts to waive jurisdiction over certain juvenile offenders once they reach the age of thirteen.<sup>254</sup> Illinois should amend its discretionary transfer statute to reflect a minimum transfer age of fourteen.<sup>255</sup>

## 2. Amending Indiana's Juvenile Transfer Laws

Some of Indiana's juvenile transfer laws align with the proposed minimum age of transfer, whereas other laws should be amended. Indiana's first presumptive transfer law sets a minimum transfer age of sixteen, and the discretionary transfer law includes a minimum transfer age of fourteen.<sup>256</sup> Those two statutes do not require amendment where they reflect the proposed minimum age of transfer. However, Indiana's statutory exclusion law includes no minimum age at which the juvenile can be statutorily excluded from the juvenile court system.<sup>257</sup> Similarly, one of Indiana's presumptive transfer statutes presumes that a juvenile who is at least twelve years old and charged with murder may be transferred.<sup>258</sup> Thus, Indiana should amend its statutory exclusion law

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prosecutor filing a petition to waive the juvenile court's jurisdiction over an offender aged fifteen years or older who is alleged to have committed a forcible felony).

253. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

254. 705 ILCS 405/5-805(3)(a) (LexisNexis 2021) (addressing discretionary transfer of juvenile offenders aged thirteen or older under Illinois law).

255. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

256. BURNS IND. CODE ANN. § 31-30-3-2 (LexisNexis 2020) (addressing Indiana's discretionary transfer process for a juvenile offender aged fourteen or older who is alleged to have committed certain heinous acts); BURNS IND. CODE ANN. § 31-30-3-5 (LexisNexis 2020) (addressing Indiana's presumptive waiver of jurisdiction to adult court for juveniles, aged sixteen years or older).

257. BURNS IND. CODE ANN. § 31-30-3-6 (LexisNexis 2020) (addressing the automatic transfer of a juvenile who committed a felony and has a prior conviction for "a felony or a nontraffic misdemeanor" pursuant to a prosecutor's motion, but including no minimum age for such transfer).

258. BURNS IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020) (addressing Indiana's transfer statute, such that where probable cause exists to believe a juvenile, aged twelve years old or older, committed what would be considered Murder by an adult

and the second presumptive transfer law to reflect minimum transfer ages of fourteen.<sup>259</sup>

### 3. Amending Wisconsin's Juvenile Transfer Laws

While Wisconsin's discretionary transfer statute aligns well with the proposed minimum transfer age, Wisconsin's automatic transfer sets a shockingly low minimum age of transfer at a mere ten years old.<sup>260</sup> Thus, Wisconsin should amend its automatic transfer statute to include a minimum age of fourteen.<sup>261</sup> Wisconsin does not employ presumptive transfer, and thus no current Wisconsin statute can be amended. However, if Wisconsin chooses to employ a presumptive transfer statute in the future, it should include a minimum transfer age of at least fourteen years of age.<sup>262</sup>

### 4. Amending Missouri's Juvenile Transfer Laws

Missouri's juvenile transfer process greatly aligns with traditional goals of the juvenile justice system, but some of Missouri's laws should be amended where they include no minimum ages at which juveniles

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offender).

259. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

260. WIS. STAT. ANN. § 938.18(1)(a-c) (LexisNexis 2021) (addressing the conditions for "[w]aiver of juvenile court jurisdiction" should a petition for such transfer be filed); WIS. STAT. ANN. § 938.183(1)(am) (LexisNexis 2021) (addressing "[j]uveniles under adult court jurisdiction" for those offenders who committed offenses "on or after the juvenile's tenth birthday").

261. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

262. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

may be transferred. Neither Missouri's statutory exclusion law nor its discretionary transfer law includes a minimum transfer age<sup>263</sup> and thus they should be amended to include minimum transfer ages of fourteen.<sup>264</sup> Missouri does not employ presumptive transfer and thus no current Missouri statute can be amended. However, if Missouri chooses to employ a presumptive transfer statute in the future, it should include a minimum transfer age of at least fourteen years of age.<sup>265</sup>

#### *D. Psychological Evaluation and Consideration at Juvenile Transfer Hearings*

In addition to employing traditional transfer mechanisms or otherwise amending statutes to reflect a minimum transfer age of fourteen, courts should always consider cognitive and emotional development when evaluating whether the juvenile is best suited for the juvenile or the adult criminal court system.<sup>266</sup> Considering a juvenile's

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263. MO. REV. STAT. § 211.071(1) (LexisNexis 2020) (addressing discretionary juvenile transfer, but not including a minimum age of such transfer); MO. REV. STAT. § 211.071(9) (LexisNexis 2020) (addressing the circumstances when a child is barred from adult court after conviction for an earlier crime, but including no minimum age of such transfer).

264. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

265. See Kahn et al., *supra* note 139, at 903 (discussing emotional intelligence amongst youth offenders compared to those in the general population and how limited emotional intelligence can impact the juvenile's ability to connect others, understand facial expressions, and so on). See also Nowak, *supra* note 127, at 20 (noting that the United Nations recommends a minimum transfer age of 14); Scott & Grisso, *supra* note 121, at 811 (discussing cognitive development amongst youth offenders compared to those of the general population, as well as extrinsic factors that may impact a juvenile's ability to comprehend the consequences of his or her actions).

266. Richard E. Redding, *One Size Does Not Fit All: The Deterrent Effect of Transferring Juveniles to Criminal Court*, 15 AM. SOC'Y OF CRIM. & PUB. POL. 1, 6 (2016) (noting that, "Juvenile justice practitioners and policy makers should recognize, as the Zane et al. (2016) meta-analysis suggests, that one size of legal processing and sanction does not fit all offenders and offenses"). Further, Redding argues, "Whether done at the discretion of the prosecutor or judge or done automatically under state law, transfer should be predicated on the juvenile's treatment needs, offense history, and community protection needs rather than on the violent nature of the charged offense." *Id.* See also Zane, Welshe & Mears, *supra* note 158, at 908-10 (discussing various studies that address recidivism rates in juvenile offenders). See generally Carol A. Schubert, et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 L. & HUM. BEHAV. 460, 471 (2010) (acknowledging that "once the decision to transfer a youth to adult court has been made, a rather formulaic approach, rooted in charge, determines what happens with these youth, with little consideration given to

developmental growth over the course of adolescence, every juvenile should be evaluated to determine his or her maturity, cognitive processing, and emotional development, as psychological research indicates that juveniles learn over time the consequences of their actions, how to avoid peer pressure, how to self-regulate mental mechanisms, such as impulse and stress, and so on.<sup>267</sup> Without considering the juvenile's development in these areas, a court cannot fully understand why the juvenile might have acted in the way that he/she did, whether the juvenile is psychologically mature enough to have the culpability to commit the crime, and how the juvenile may or may not be able to be rehabilitated in the juvenile versus the adult criminal justice system. Thus, when the court has the option to employ discretionary transfer, or when a juvenile is rebutting presumptive transfer, a psychological evaluation of the juvenile, particularly regarding cognitive and emotional development, should be completed and considered by the court when determining the juvenile's fate in the juvenile rather than the adult criminal justice system.

## V. CONCLUSION

Just as juvenile transfer has an ever-changing history in our country, juvenile minds and their understanding of the world grow each and every day as they develop psychologically throughout their youth.<sup>268</sup> Still, state-by-state, legislatures have established transfer laws that often stray far from traditional transfer mechanisms in which the court should or must take into account the juvenile as a *person*, not simply as an alleged offender.<sup>269</sup> When two twelve-year-old girls in Wisconsin attempted to kill their friend, they were not given a chance in the juvenile court.<sup>270</sup> Instead, Wisconsin law required that regardless of the fact that they had not even reached their teenage years and thus had limited psychological growth due to their ages, they had to be tried in adult court.<sup>271</sup> Had they committed their crime across state lines in Illinois or Indiana, that result may have been quite different.<sup>272</sup> The juvenile justice system was founded on the doctrine of *parens patriae*,

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individual factors”).

267. *Id.*; Milojevic et al., *supra* note 138, at 297.

268. Hoeffel, *supra* note 121, at 40 (noting that juveniles from those in young adolescence to those nearing young adulthood show varying levels of psychological development); Snyder & Sickmund, *supra* note 9, at 83-84 (discussing the history of the United States juvenile justice system).

269. Steiner et al., *supra* note 66, at 35.

270. *See e.g., Geysler*, 394 Wis. 2d at 99, and *Weier*, 2016 WI App 67 at \*1-2 (discussing the case of Geysler and Weier, two 12-year-old girls, who attempted to kill their friend as a means of pleasing the fictional character Slender Man).

271. *Id.*

272. *See e.g., J.T.*, 121 N.E.3d at 605 (discussing a case in which a twelve-year-old offender stabbed and killed her stepmother, in part, as an attempt to please fiction character Laughing Jack, similar case to Slender Man Stabbing case, *Geysler*, 394 Wis. 2d at 99, and *Weier*, 2016 WI App 67 at \*1-2).

“the State as parent,”<sup>273</sup> and just as good parents put their children’s needs and well-being before their own, state juvenile transfer laws should do the same.

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273. Snyder & Sickmund, *supra* note 9, at 83-84.