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Note

The Juvenile Ultimatum: Reframing Blended Sentencing Laws to Ensure Juveniles Receive a Genuine “One Last Chance at Success”

Anabel Cassady*

The State charged sixteen-year-old Derrick Smith with aggravated robbery for assaulting another adolescent on the train and stealing his cell phone.¹ Smith, who had a relatively clean juvenile delinquency history, other than a prior runaway and truancy offense, was found guilty in a Minnesota juvenile court. After finding Smith did not pose a threat to “public safety,”² and therefore declining to certify Smith as an “adult,”³ a juvenile court judge imposed a disposition under Minnesota’s Extended Jurisdiction Juvenile (EJJ) statute.⁴ Under this ruling, Smith was given both a juvenile disposition and an adult criminal sentence—but, crucially, the adult criminal sentence would be *stayed* (that is, not executed) unless Smith violated the terms of his juvenile probation.⁵ Twelve months later, Smith

* J.D. Candidate 2018, University of Minnesota Law School. I am grateful to Professors Perry Moriearty and Barry Feld for their invaluable guidance and feedback throughout the drafting process. I am also grateful for the expertise and insight shared by juvenile public defenders as I began working on this project. Thank you to the editors and staff members of *Minnesota Law Review* who diligently edited this Note. And most importantly, thank you to my family for their unwavering love and support. Copyright © 2017 by Anabel Cassady.

1. Hypothetical narrative to illustrate the workings of Minnesota’s Extended Jurisdiction Juvenile (EJJ).

2. See MINN. R. JUV. P. 19.05 (“In determining whether public safety would be served, the court shall take into account the following factors: (A) the seriousness of the alleged offense . . . (B) the culpability of the child in committing the alleged offense . . . (C) the child’s prior record of delinquency; (D) the child’s programming history . . . (E) the adequacy of the punishment or programming available in the juvenile justice system; and (F) the dispositional options available for the child . . .”).

3. See MINN. STAT. § 260B.125 (2017).

4. MINN. STAT. § 260B.130, subdiv. 4(a).

5. Under section 260B.130, subdivision 4(a) of the Minnesota Statutes, the execution of an adult criminal disposition “shall be stayed on the condition that the offender not violate the provisions of the disposition order and not

was found to have violated the terms of his probation for (1) testing positive for marijuana in one of his regular urinalysis (UA) tests, (2) being found in possession of marijuana when he was stopped for a curfew violation, and (3) failing to attend school on a regular basis. After a probation revocation hearing,⁶ Smith's original juvenile sentencing judge decided to revoke the stay of execution, thereby terminating juvenile court jurisdiction and committing Smith to the Commissioner of Corrections to serve his adult criminal sentence.⁷

Some may question whether Smith's conduct would actually result in revocation of probation and execution of his stayed adult sentence. However, the Juvenile Justice Task Force, which proposed the creation of EJJ, "recommended that the court treat probation violations of EJJ offenders in the same manner as adults who had committed a new offense or violated the terms of probation, including execution of the adult stayed sentence."⁸ In fact, an evaluation of EJJ-analyzed data collected from Hennepin County, Minnesota, between 1995 and 1997 reported that "judges revoked the probation of more than one-third (35.3%) of those youths sentenced as EJJs" and they "revoked the majority (76.23%) of EJJs youths' probation for probation violations rather than for the commission of new offenses."⁹

commit a new offense." Section 19.01(2)(A) of the Minnesota Rules of Juvenile Procedure defines "extended jurisdiction juvenile" as "a child has been given a stayed adult criminal sentence, a disposition under Minnesota Statutes, section 260B.198, and for whom jurisdiction of the juvenile court may continue until the child's twenty-first (21st) birthday."

6. See *id.* § 260B.130, subd. 5(c).

7. *Id.* § 260B.130, subd. 5(d).

8. Kathryn A. Santelmann & Kari L. Lillesand, *Extended Jurisdiction Juveniles in Minnesota: A Prosecutor's Perspective*, 25 WM. MITCHELL L. REV. 1303, 1313 (1999). Under Rule 19 of the Minnesota Rules of Juvenile Delinquency Procedure, the juvenile court judge is authorized to "execute the stayed prison sentence after revocation of extended jurisdiction juvenile status" if the court finds the following: "(a) one or more conditions of probation were violated; (b) the violation was intentional or inexcusable; and (c) the need for confinement outweighs the policies favoring probation." MINN. R. JUV. P. 19.11(3)(C)(2). See generally Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995) (explaining the genesis and rationale of EJJ prosecution).

9. Marcy R. Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, Blended Sentencing, and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1058-59 (2001). Since this finding, the Minnesota Supreme Court in *State v. B.Y.*, 659 N.W.2d 763, 768-69 (Minn. 2003), has ruled that in order to revoke probation and execute a stayed adult sentence, the court must look to the three *Austin* factors. See *State v. Austin*, 295

Known as the “pioneer of extended juvenile jurisdiction,”¹⁰ Minnesota enacted its current juvenile waiver law in 1995.¹¹ Under the program, a juvenile court judge can impose *both* a juvenile delinquency sentence and an adult criminal sentence—the execution of which is stayed pending successful completion of the delinquency disposition.¹² Minnesota’s EJJ law was intended “to give juveniles ‘*one last chance at success*’ in the juvenile justice system, with the threat of adult sanctions as an incentive not to reoffend.”¹³ Juvenile justice scholars have observed, however, that the implementation of EJJ has resulted in a “net-widening” effect on juvenile offenders and other unintended collateral consequences relating to the state’s youth.¹⁴ As the above hypothetical demonstrates, youth sentenced under the EJJ statute have been deemed not to pose a “public safety” threat, which would otherwise justify an adult prison sentence, yet, “a new offense, which itself would not warrant [adult] certification, may provide the basis to revoke probation and execute the adult criminal sentence.”¹⁵

N.W.2d 246, 251 (Minn. 1980). While the court in *State v. B.Y.* conceded that “[t]he public is not particularly well served by automatic incarceration on a technical violation,” these factors do not outright preclude revoking probation for a technical probation violation, nor do they require the commission of a new criminal offense in order to execute the stayed adult sentence. 659 N.W.2d at 768–69. The court concluded that in order “for a court to revoke probation and execute a previously stayed adult sentence for technical violations of EJJ probation, the violations must demonstrate that the offender ‘cannot be counted on to avoid antisocial activity.’” *Id.* at 772 (quoting *Austin*, 295 N.W.2d at 251). The three *Austin* factors have since been codified in Rule 19 of the Minnesota Rules of Juvenile Delinquency Procedure. For a further discussion on probation revocations and the *Austin* factors, see *infra* Part I.C.

10. Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 792 (2002).

11. Kathryn A. Santelmann & Kara Rafferty, *Juvenile Law Developments—“One Last Chance”: Applying Adult Standards to Extended Jurisdiction Juvenile Proceedings—State v. B.Y.*, 30 WM. MITCHELL L. REV. 427, 428 (2003).

12. Podkopacz & Feld, *supra* note 9, at 999.

13. Santelmann & Rafferty, *supra* note 11, at 431–32 (quoting ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, MINNESOTA SUPREME COURT, FINAL REPORT 31, 33 (1994)).

14. Podkopacz & Feld, *supra* note 9, at 1028–30. For a further discussion, see *infra* Part II.A.

15. *Id.* at 1028. Probation violations need not include criminal conduct. Failure to complete community service hours, or failure to meet with a probation officer may constitute “technical violations of probation.” As Podkopacz and Feld found in their study, “The combination of a non-certifiable prior offense and a non-criminal probation violation expose[s] these youths to the possibility of an adult criminal sentence.” *Id.* at 1059–60.

Juvenile justice is at a crossroads, with both scientific discoveries regarding adolescent brain development and reform efforts amending the ways that juvenile offenders are treated.¹⁶ As one scholar put it, “[J]uvenile crime regulation is ‘in flux,’ describing a post-moral-panic period in which different regulatory approaches have begun to take hold.”¹⁷ With more than 2.2 million individuals locked behind bars in the United States¹⁸—a 700% increase over the last forty years¹⁹—there has been a growing trend in this country towards ending the problem of mass incarceration and addressing other auxiliary issues associated with our criminal justice system. For example, John Legend’s recent #FREEAMERICA campaign—which advocates for criminal justice reform and keeping youth out of prisons²⁰—proclaims, “[t]he issues of mass incarceration and the school-to-prison pipeline, coupled with nationwide protests over the deaths of unarmed young men and women of color, provide an unprecedented opportunity for all of us to get involved in criminal justice reform efforts.”²¹ Recognizing that “adolescents are children, and prosecuting and placing them in the adult criminal justice system doesn’t work for them and doesn’t work for public safety,”²² recent Raise the Age campaigns—which aim to extend juvenile court jurisdiction over juveniles that would otherwise be prosecuted in the adult court system—have been successfully enacted into law in several states.²³ With a grow-

16. See *infra* Part I.B (discussing the Supreme Court’s recognition that juveniles are “constitutionally different from adults” and thus should be treated differently for sentencing purposes).

17. OWEN D. JONES, JEFFREY D. SCHALL, & FRANCIS X. SHEN, LAW AND NEUROSCIENCE 554 (2014) (citing Elizabeth S. Scott, “Children are Different”: Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71 (2013)).

18. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/mass-incarceration> (last visited Oct. 13, 2017).

19. FREEAMERICA, [HTTP://LETSFREEAMERICA.ORG](http://LETSFREEAMERICA.ORG) (LAST VISITED OCT. 13, 2017) (noting this staggering increase despite a decrease in crime).

20. Danielle DeCoursey, *Why John Legend Says We’re Failing Thousands of Young Americans*, ATTN: (Mar. 9, 2017), <http://www.attn.com/stories/15502/why-john-legend-says-were-failing-thousands-young-americans>.

21. FREEAMERICA, *supra* note 19.

22. *Get the Facts*, RAISE THE AGE NY, <http://raisetheageny.com/get-the-facts> (last visited Oct. 13, 2017).

23. JUSTICE POLICY INSTITUTE, RAISE THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM 4 (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf (showing that in 2013, the Massachusetts and Illinois governors signed Raise the Age into law in their respective states; in June 2016, the Louisiana Governor signed Raise the Age into law). Mississippi and Connecticut have passed similar legislation. *Id.*

ing number of states extending juvenile court jurisdiction and adult certification coming under fire post-*Miller v. Alabama*,²⁴ the natural question in juvenile justice reform becomes: *What about the hybrid model?*

This Note argues that Minnesota's blended sentencing scheme, while flawed, can be amended to resolve these problems. Part I gives a history and overview of juvenile transfer laws. It includes a discussion of the ideological differences between juvenile and adult court jurisdictions and the evolution of blended sentencing schemes—including the passage of Minnesota's EJJ law. Part II analyzes the shortfalls of Minnesota's EJJ statute, including its disproportionate impact on racial minorities and younger, less criminally sophisticated offenders. Additionally, Part II evaluates the efficacy of juvenile probation and identifies a disconnect between the State (that is, judges, probation officers, prosecutors and other law enforcement personnel) and its youth. It argues that revoking a juvenile's stay of execution for mere probation violations not only deepens the "net-widening" effect of the EJJ statute, but also demonstrates a misunderstanding of how criminal justice involvement affects youth and impacts their future.²⁵ It also ignores critical implications of adolescent brain development.²⁶

Part III argues that revoking EJJ adjudications and imposing adult sentences for probation violations should be prohibited in the absence of a new offense—especially given the ease with which probation can be revoked and a stayed adult sentence executed. The statute should be amended to require the commission of a new criminal offense in order to execute the original stayed adult sentence, and it should include certain procedural safeguards before a juvenile judge can revoke the stay of execution. Specifically, the statute should be amended so that judges deciding whether to revoke a youth's probation and execute the stayed adult sentence would be required to hold a hearing, similar to a certification hearing, which is the proper forum for determining whether the juvenile actually

24. 132 S. Ct. 2455, 2464 (2012) (contending "children are constitutionally different from adults for purposes of sentencing" and thus certain sentences constitutionally permissible for adult offenders violate the Eighth Amendment when imposed on juveniles).

25. See generally SHELLY SCHAEFER & GINA ERICKSON, NAT'L INST. OF JUSTICE, THE IMPACT OF JUVENILE CORRECTIONAL CONFINEMENT ON THE TRANSITION TO ADULTHOOD (May 25, 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249925.pdf>. For further discussion, see *infra* Part II.B.

26. See *infra* Part II.B.

poses a threat to public safety.²⁷ The statute should also be changed to include a stay of *imposition* in addition to the stay of *execution*, which would provide another incentive for EJJ youth to successfully complete probation.²⁸ Under a stay of imposition, a juvenile's felony sentence would be reduced to a gross misdemeanor, if and when probation is successfully completed. Part III concludes that if EJJ is amended and implemented in a way that balances the interests of society with the interests of an EJJ-youth *deemed not to pose a threat to public safety*, then the legislation may serve as a model for other states in the growing trend toward extending juvenile court jurisdiction and the broader movement of criminal justice reform.²⁹

27. This proposed amendment was briefly mentioned in the piece written by Podkopacz and Feld. Podkopacz & Feld, *supra* note 9, at 1071 ("Instead of remitting EJJ youths' adult status to probation revocation proceedings, the legislature should amend the statute to require judges to consider whether a youth's earlier offense and subsequent violations pose a threat to 'public safety' warranting imprisonment using the same procedures and criteria employed to certify youths for criminal prosecution."). In a telephone conversation with Professor Feld on December 28, 2016, he suggested I propose this reform, as it is the best solution that would address the net-widening problem identified in his former piece with Podkopacz. Telephone Interview with Barry Feld, Centennial Professor of Law, Univ. of Minn. Law Sch. (Dec. 28, 2016).

28. The stay of imposition suggestion was provided by an anonymous juvenile public defender. Telephone Interview with Anonymous Juvenile Public Defender (Feb. 13, 2017).

29. It should be noted that blended sentencing, and in particular, Minnesota's EJJ statute, appears to be an area of the law that is under-researched, under-studied, and under-published, making it hard to get data and therefore evaluate the efficacy of the system. In an effort to obtain recent data on the number of, and reasons for, probation revocations in Minnesota, I reached out to Minnesota's State Court Administrator's Office, but was told they could not provide me with this "summary data" given "[t]he effort required to calculate probation violations and re-offenses that lead to EJJ withdrawals would be fairly extensive and there are no labor resources available for that effort . . ." The researcher with the Minnesota Judicial Branch stated "[they] may have to figure out a way to get [me] case numbers for cases that have EJJ withdrawn. [I] could then perform the analysis [myself], and determine on a case-by-case basis the reason for withdrawal." E-mail from Anonymous Research Analyst II, Minn. Judicial Branch to Anabel Cassady, J.D. Candidate, Univ. of Minn. Law Sch. (Feb. 28, 2017, 15:49 CST) (on file with author). Thus, this Note lays out a theoretical framework for why this particular issue is one that needs to be resolved, and the ways in which the EJJ statute could be amended to address these challenges. The embedded assumptions and arguments rely on a comprehensive study analyzing data collected from Hennepin County, Minnesota, between 1995 and 1997, phone interviews with juvenile public defenders, input from Professor Barry Feld who conducted the aforementioned study and served as a member and subcommittee chair of the 1992–1994 Minnesota Ju-

I. THE EVOLUTION OF JUVENILE TRANSFER LAWS AND BLENDED SENTENCING SCHEMES, AND THE PASSAGE OF MINNESOTA'S EXTENDED JURISDICTION JUVENILE

Juvenile transfer laws allow a youth's case to be transferred from juvenile court to adult court for prosecution. While juvenile transfer laws are not a new phenomenon,³⁰ today's juvenile transfer laws are largely the product of the "superpredator" ideology of the early 1990s, and the fear that unprecedented numbers of youth were going to create "a blood bath of violence."³¹ This Part reviews the history of juvenile transfer laws and discusses the influence of the superpredator ideology on the proliferation of automatic and prosecutor-controlled types of transfers. Part I also discusses the ideological differences between juvenile and adult court systems and the evolution of blended sentencing schemes, including the passage of Minnesota's EJJ statute.

A. A HISTORY AND OVERVIEW OF JUVENILE TRANSFER LAWS

On April 19, 1989, a young stockbroker named Trisha Meili was raped and severely beaten while jogging in Central Park.³² Five male youths, who became known as the Central Park Five, confessed to the crime and subsequently served sentences rang-

venile Justice Task Force that created the statute, and a broad swath of literature.

30. See Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, NAT'L REP. SERIES (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Washington, D.C.), Sept. 2011, at 8, <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> ("Laws allowing juvenile courts to waive jurisdiction over individual youth, sending 'hard cases' to criminal courts for adult prosecution, could be found in some of the earliest juvenile codes Most states had enacted such judicial waiver laws by the 1950s, and they had become nearly universal by the 1970s.").

31. Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> (referring to the superpredator era and explaining that while "[s]ocial scientists like James A. Fox, a criminologist, warned of 'a blood bath of violence' that could soon wash over the land," these "jeremiads" proved to be wrong. The mistaken fears "were based on a notion that there would be hordes upon hordes of depraved teenagers resorting to unspeakable brutality, not tethered by conscience.").

32. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1315-16 (2004).

ing between seven and eleven years.³³ In August 2002, Matias Reyes, a convicted rapist and murderer, finally confessed to the egregious crime, and the convictions of the five youth—all of whom had already served their sentences—were subsequently vacated.³⁴ Nevertheless, in response to the charges against the Central Park Five and the corresponding rise in juvenile violence,³⁵ “prominent and influential individuals . . . made doom and gloom predictions about the emergence of a ‘generational wolfpack’ of ‘fatherless, Godless and jobless’ youth,” and the term superpredators was coined to refer to the supposedly lawless and violent youth dominating the nation’s city streets.³⁶

Due to the public safety concerns over the rise in youth crime, and provoked by the media, “legislatures in nearly every state revised or rewrote their laws to lower thresholds and broaden eligibility for transfer, shift transfer decision-making authority from judges to prosecutors, and replace individualized discretion with automatic and categorical mechanisms.”³⁷ Although “the predicted adolescent ‘crime wave’ never materialized,”³⁸ forty-nine states and the District of Columbia enacted or expanded adult court transfer laws throughout the 1990s.³⁹ Such laws allowed or required juvenile offenders to be prosecuted in adult criminal courts.⁴⁰ These legislative reforms of the 1990s led to a “wholesale transfer of youths into the adult criminal system—more than 250,000 a year by most estimates.”⁴¹ Since the early 1990s, every state except Nebraska

33. LIZ RYAN, CAMPAIGN FOR YOUTH JUSTICE, YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2012), https://www.campaignforyouthjustice.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf.

34. Duru, *supra* note 32, at 1317.

35. JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996), <https://www.bjs.gov/content/pub/pdf/tjvfox2.pdf> (“From 1985 to 1994, the rate of murder committed by teens, ages 14–17, increased 172 percent.”).

36. RYAN, *supra* note 33.

37. Griffin et al., *supra* note 30, at 9.

38. BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 508 (3rd ed. 2009); *see also* Haberman, *supra* note 31.

39. *Juveniles in Court: All States Allow Juveniles to Be Tried as Adults in Criminal Court Under Certain Circumstances*, NAT’L REP. SERIES (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice), June 2003, at 7, <https://www.ncjrs.gov/pdffiles1/ojdp/195420.pdf>.

40. *Id.*

41. Elizabeth S. Scott & Laurence Steinberg, *Adolescence and the Regulation of Youth Crime*, in *supra* note 17 at 553. Note that only thirteen states report the total number of juvenile transfers. Griffin et al., *supra* note 30, at 1.

has amended its transfer laws to make it easier to try juveniles in adult criminal court.⁴² As two prominent scholars note, “These various legal trends have resulted in the prosecution of more and younger youths in the criminal justice system.”⁴³

Today, there are three generic versions of juvenile transfer laws: (1) judicial waiver; (2) prosecutorial direct-file; and (3) statutory offense exclusion.⁴⁴ The three approaches designate the decision of whether to prosecute a juvenile as an adult to different branches of government: the judicial, executive, or legislative branch.⁴⁵ Judicial waiver laws, the traditional method in determining whether to prosecute the youth as a juvenile or an adult,⁴⁶ give the juvenile court judge the discretion to transfer the case to the adult court system.⁴⁷ This practice of “case-by-case clinical assessment[] reflect[s] the traditional sentencing discretion characteristic of juvenile courts.”⁴⁸ Forty-five states have enacted judicial waiver laws, including Minnesota.⁴⁹

Under prosecutorial direct-file laws, juvenile and criminal courts share concurrent jurisdiction over certain offenses, and the prosecutor decides in which court to charge and try the case.⁵⁰ There is no hearing, and often there are no formal standards, for deciding between the two jurisdictions.⁵¹ The reason for this broad, unchecked exercise of discretion is that “prosecutorial transfer is considered an executive function,

42. FELD, *supra* note 38, at 518.

43. Podkopacz & Feld, *supra* note 9, at 999; *see also* Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 801 (Barry C. Feld & Donna M. Bishop, eds., 2012) (explaining that the resulting impact of the “get tough” era “was a fundamental transformation of the jurisprudence and practice of transfer, change in the legal and cultural construction of adolescence, and a dramatic increase in the numbers of youths convicted and sentenced as adults”).

44. Griffin et al., *supra* note 30, at 2; *see also* Feld & Bishop, *supra* note 43, at 802.

45. Feld & Bishop, *supra* note 43, at 802.

46. Podkopacz & Feld, *supra* note 9, at 1000.

47. Griffin et al., *supra* note 30, at 2.

48. FELD, *supra* note 38, at 511.

49. Griffin et al., *supra* note 30, at 2–3.

50. *Id.* at 2, 5 (“Laws in 15 states designate some category of cases in which both juvenile and criminal courts have jurisdiction, so prosecutors may choose to file in either one court or the other.”).

51. *Id.* at 5 (stating there is often “no opportunity for defendants to test (or even to know) the basis for a prosecutor’s decision to proceed in criminal court”).

which is not subject to judicial review,” which also mean the otherwise required due process standards do not apply.⁵² Fifteen states have enacted prosecutorial discretion laws.⁵³

Statutory offense exclusion laws define certain classes of ages and offenses in which the case must be filed in adult criminal court, and the adult criminal court is granted exclusive jurisdiction.⁵⁴ In Minnesota, for example, statutory offense exclusion laws apply only to sixteen- or seventeen-year-olds accused of murder.⁵⁵ Twenty-nine states have enacted statutory offense exclusion laws,⁵⁶ and such laws are responsible for the largest number of transfers to adult criminal court.⁵⁷

While judicial waiver laws were historically the most common type of transfer laws, throughout the 1980s and 1990s, “automatic and prosecutor-controlled forms of transfer proliferated steadily.”⁵⁸ As the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention notes, “Between 1986 and the end of the 1990s, the number of states with automatic transfer laws jumped from 20 to 38, and the number with prosecutorial discretion laws rose from 7 to 15.”⁵⁹

In addition to juvenile transfer laws, many states have one or more of the following schemes: (1) “once adult/always adult” laws; (2) reverse waiver laws; and (3) blended sentencing laws.⁶⁰ “Once adult/always adult” laws, which are a form of automatic transfer laws, require a juvenile who has been prosecuted as an adult criminal in the past to be prosecuted as an adult criminal for any offense in the future.⁶¹ Thirty-four states have enacted “once adult/always adult” laws.⁶² Reverse waiver laws allow juveniles initially charged as adults to petition to have their adult criminal cases transferred back to juvenile

52. FELD, *supra* note 38, at 519.

53. Griffin et al., *supra* note 30, at 5.

54. *Id.* at 2.

55. *Id.* at 6.

56. *Id.*

57. FELD, *supra* note 38, at 519.

58. Griffin et al., *supra* note 30, at 8.

59. *Id.* at 9; *see also* Feld & Bishop, *supra* note 43, at 815 (“Judges waive about 7,500 cases annually, prosecutors direct-file about 27,000 youths in criminal courts, and youths charged with excluded offenses account for the remainder.”).

60. Griffin et al., *supra* note 30, at 2.

61. *Id.* at 2, 7.

62. *Id.* at 7.

court.⁶³ Twenty-four states have enacted reverse waiver laws.⁶⁴ Blended sentencing schemes—the main focus of this Note—allow judges to impose either, or both, a juvenile court disposition and adult criminal court sentence on certain classes of juvenile offenders.⁶⁵ By the end of 2004, at least twenty-six states had a form of blended sentencing.⁶⁶

Juvenile justice policy experienced an ideological shift during the superpredator era, making it easier to try young offenders in adult criminal court.⁶⁷ As the following Section will discuss, however, there are significant, inherent differences between juvenile and adult offenders, and undeniable harms that result from sending adolescents to adult correctional facilities.

B. THE HISTORY AND REHABILITATIVE SPIRIT OF THE JUVENILE COURT SYSTEM, THE DANGERS OF SENDING YOUTH TO ADULT FACILITIES, AND THE INHERENT DIFFERENCES BETWEEN JUVENILE AND ADULT OFFENDERS

By the early twentieth century, states across the country began enacting “juvenile codes” with the belief that adult criminal sanctions “were inappropriate for juveniles as they were rooted in penal rather than rehabilitative interests.”⁶⁸ Advocates of the rehabilitative model “envisioned a regime in which young offenders would receive treatment that would cure them of their antisocial ways—a system in which criminal responsibility and punishment had no place.”⁶⁹ In 1899, Chicago established the nation’s first juvenile court, “thereby initiating the specialized treatment of America’s juvenile offenders” and seeking to focus on rehabilitation, rather than retribution.⁷⁰ By 1925, all but two states had created a juvenile court system.⁷¹ As the previous Section discussed, however, in response to the

63. *Id.* at 2, 7.

64. *Id.* at 7.

65. Fred Cheesman, *A Decade of NCSC Research on Blended Sentencing of Juvenile Offenders: What Have We Learned About “Who Gets a Second Chance?”*, NAT’L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 113 (2011), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Cheesman.ashx>.

66. *Id.*

67. Feld & Bishop, *supra* note 43, at 801.

68. Grace E. Shear, *The Disregarding of the Rehabilitative Spirit of Juvenile Codes: Addressing Resentencing Hearings in Blended Sentencing Schemes*, 99 KY. L.J. 211, 213–14 (2010).

69. Scott & Steinberg, *supra* note 41, at 552.

70. Shear, *supra* note 68, at 211.

71. *Id.* at 214.

rise in juvenile crime rates during the early 1990s, there was a push toward returning to a more punitive approach, and today, “the mantra ‘adult time for adult crime’ has become a reality for many young offenders.”⁷²

While at first glance it may appear that a juvenile and an adult are receiving the same sentence for committing the same crime, “adolescents are paying in a different currency.”⁷³ Juveniles serving sentences in adult criminal facilities are subject to abuse, sexual victimization, a greater risk of suicide, and a higher rate of recidivism.⁷⁴ Although adult inmates are also subject to assault and other forms of abuse, adolescents are at a greater risk of experiencing these harms.⁷⁵ Due to their age, “their relative lack of experience in these settings, their smaller size and strength, and their potential lack of interpersonal sophistication, it is just commonsensical that adolescents in adult facilities are easy potential targets for a variety of forms of victimization.”⁷⁶

Referring to findings by the Bureau of Justice Statistics, a report authored by the Campaign for Youth Justice noted “youth under the age of 18 represented 21 percent of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006—surprisingly high since only one percent of jail inmates are juveniles.”⁷⁷ In response to adolescents in adult facilities experiencing these harms, scholars have argued, “It just does not seem fair to expose juvenile offenders to an increased likelihood of being raped, infected with

72. Scott & Steinberg, *supra* note 41, at 553; *see also* Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 145 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (“Juvenile justice has come full circle in this century. With the creation of juvenile courts one hundred years ago, reformers achieved their objective of removing juveniles from the harsh, punishment-oriented criminal justice system. Now, juvenile justice is once again embracing criminal court handling of certain juvenile offenders and diminishing the role of the juvenile court.”).

73. Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE*, *supra* note 43, at 849.

74. *See Raise the Age Campaign Fact Sheet*, RAISE THE AGE NY, <http://raisetheagency.com/wp-content/uploads/2011/08/Raise-the-Age-NY-Campaign-Fact-Sheet-2017.pdf> (last visited Oct. 13, 2017).

75. Mulvey & Schubert, *supra* note 73, at 846–47.

76. *Id.* at 846.

77. RYAN, *supra* note 33, at 5 (citation omitted).

HIV/AIDS, beaten up, or terrorized while serving their punishment for a serious offense.”⁷⁸

Whether or not to separate juveniles from adults in adult correctional facilities is not an easy question. In its report, the Campaign for Youth Justice explains that adult facility officials are placed in a Catch-22 situation when determining whether to separate juveniles from their adult inmates, or integrate the groups together.⁷⁹ If the juveniles are integrated with their adult counterparts, the juveniles risk “serious physical and emotional harm.”⁸⁰ However, if “officials do separate youth from adults, they are often placed in isolation for long periods of time. This equates to solitary confinement and can lead to depression, exacerbate already existing mental health issues, and put youth at risk of suicide.”⁸¹ Raise the Age, a New York-based public awareness campaign, contends, “Youth are 36 times more likely to commit suicide in an adult facility than in a juvenile facility.”⁸² While certain federal statutes, such as the Juvenile Justice and Delinquency Prevention Act (JJDP), were passed with the intention of providing greater protections to juvenile offenders, the “sight and sound” separation provision of the Act—requiring juveniles to be separated from adult inmates—does not apply to juveniles who were prosecuted as adults in adult criminal courts.⁸³

In addition to the physical and psychological harms associated with confining juveniles in adult correctional facilities, juveniles transferred to the adult criminal system are also more likely to reoffend. The Task Force on Community Preventive Services found that “juveniles adjudicated in the adult criminal court, were, in general, at a near 34 percent greater likelihood to be arrested for a subsequent crime than were the youths whose cases were handled in the juvenile system.”⁸⁴ This is likely due in part to the “ongoing process of ‘prisonization’—adaptation to prison through identification with the role of be-

78. Mulvey & Schubert, *supra* note 73, at 846.

79. RYAN, *supra* note 33, at 4.

80. *Id.*

81. *Id.*

82. RAISE THE AGE NY, *supra* note 74.

83. RYAN, *supra* note 33.

84. OLA LISOWSKI & MARC LEVIN, MACIVER INST. FOR PUB. POLICY, 17 YEAR OLDS IN ADULT COURT: IS THERE A BETTER ALTERNATIVE FOR WISCONSIN'S YOUTH AND TAXPAYERS? 8 (2016); *see also* RAISE THE AGE NY, *supra* note 74 (stating that recidivism rates are higher for youths held in adult facilities).

ing a criminal among criminals.”⁸⁵ The criminal identity has “an immediate and compelling purpose” behind bars “with little opportunity or benefit from exploring alternative identities.”⁸⁶ As some scholars contend, “In the longer term, transfer seems only to increase the risk to public safety.”⁸⁷ Although “‘get tough’ policies promoting long sentences for youths transferred to the adult system . . . imply that transfer to adult court produces long confinement in an adult facility,” adolescents who receive adult criminal convictions will not necessarily serve lengthy sentences so as to keep them from reentering society later on.⁸⁸ Based on some reports, over “a hundred thousand young adults, aged 18–24, will be released from federal or state prisons each year.”⁸⁹

Last, but not least, are the significant collateral consequences associated with an adult criminal conviction that can continue well beyond the juvenile’s sentence itself. Such repercussions include reduced educational and employment options, possible eviction and/or deportation, losing the right to vote and other government benefits, and much more.⁹⁰ With regard to educational opportunities, adolescents may experience severe barriers, even if the charge did not result in a conviction and/or the alleged offense took place off school grounds.⁹¹ A report on collateral consequences for juvenile offenders found that over fifty percent of adolescents in confinement have not finished the eighth grade, and two-thirds of youth returning from formal custody do not go back to school.⁹² While record expungement may be possible in cases that are retained in the juvenile justice system, it is no longer an option once the juvenile has

85. Mulvey & Schubert, *supra* note 73.

86. *Id.*

87. Feld & Bishop, *supra* note 43, at 832 (“The simple fact of being tried as an adult, regardless of the criminal sentence, appears to aggravate youths’ recidivism.”).

88. Mulvey & Schubert, *supra* note 73, at 854.

89. *Id.*

90. Angel Zang, *U.S. Age Boundaries of Delinquency 2015*, JJGPS STATESCAN (Nat’l Ctr. for Juvenile Justice, Pittsburgh, P.A.), Apr. 2016, http://www.ncjj.org/pdf/JJGPS%20StateScan/JJGPS_U.S._age_boundaries_of_delinquency_2015_8.pdf; Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION (Nat’l Ass’n of Criminal Def. Lawyers, Washington, D.C.), July/Aug. 2011, <http://sentencingproject.org/wp-content/uploads/2016/01/Addressing-the-Collateral-Consequences-of-Convictions-for-Young-Offenders.pdf>.

91. Nellis, *supra* note 90, at 22.

92. *Id.*

been transferred to adult court.⁹³ Additionally, even if the case remains in the juvenile justice system, not all juvenile cases are eligible for expungement. The report on collateral consequences revealed that “[i]n about half of the states . . . adjudication for offenses that would be felonies if committed by an adult are not eligible for record expungement.”⁹⁴

In addition to facing education and employment barriers due to involvement in the justice system, a juvenile may risk eviction, deportation, and the loss of other fundamental rights. Based on the National Affordable Housing Act of 1996—and the subsequent Supreme Court ruling in 2002 that the offense of a relative could lead to the lawful eviction of public housing residents—a youth’s conviction may result in an entire family facing eviction.⁹⁵ And regardless of a youth’s age, if the juvenile’s case is transferred to adult court and results in a criminal conviction, “an alien resident can and frequently does . . . [face] deportation.”⁹⁶ Additionally, a juvenile whose case results in an adult criminal conviction may risk “a lifetime disenfranchisement in some states—even before reaching legal voting age.”⁹⁷

Over the last decade, the U.S. Supreme Court has recognized the inherent differences between juveniles and adults and how those differences should impact sentencing. Beginning in 2005, the Court held in *Roper v. Simmons* that imposing the death penalty on offenders who were younger than eighteen years of age at the time of the offense violates the Eighth and Fourteenth Amendments.⁹⁸ In 2010, the Court held in *Graham v. Florida* that imposing a life imprisonment without parole (LWOP) sentence on a juvenile convicted of a non-homicide offense violates the Eighth Amendment.⁹⁹ Citing *Roper*, the Court stated that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”¹⁰⁰ In 2012, the Court held in *Miller v. Alabama* that imposing mandatory LWOP sentences on juvenile offenders violates the Eighth Amendment.¹⁰¹ Citing to

93. *Id.* at 21.

94. *Id.* at 23.

95. *Id.* (referencing Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002)).

96. *Id.* at 21.

97. *Id.*

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

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

100. *Id.* at 68.

101. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

Roper and *Graham*, the Court stated the two cases both “establish[ed] that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . ‘they are less deserving of the most severe punishments.’”¹⁰²

The following Section discusses blended sentencing schemes, which involve “a hybridization of juvenile and adult justice philosophies.”¹⁰³ As some scholars contend, such schemes evolved out of an effort to reconcile society’s harsh punitive response to the superpredator scare with the traditional rehabilitative spirit of the juvenile justice system.¹⁰⁴

C. THE INTERMEDIATE STATUS OF BLENDED SENTENCING DISPOSITIONS AND MINNESOTA’S PASSAGE OF EXTENDED JURISDICTION JUVENILE

Blended sentencing schemes, which vary from state to state depending on the state’s particular model, allow judges to impose either, or both, a juvenile court disposition and adult criminal court sentence on certain juvenile offenders.¹⁰⁵ There are five types of blended sentencing schemes:¹⁰⁶ (1) juvenile-exclusive blended sentencing; (2) juvenile-inclusive blended sentencing; (3) juvenile-contiguous blended sentencing; (4) criminal-exclusive blended sentencing; and (5) criminal-inclusive blended sentencing.¹⁰⁷

Under a juvenile-exclusive model, a juvenile judge may impose *either* a juvenile disposition or an adult sentence, either of which becomes effective immediately.¹⁰⁸ Under New Mexico’s juvenile-exclusive model, for example, youth are tried in “juve-

102. *Id.* at 471 (quoting *Graham*, 560 U.S. at 68).

103. Shear, *supra* note 68, at 220.

104. *Id.* *But see* Shelly S. Schaefer & Christopher Uggen, *Blended Sentencing Laws and the Punitive Turn in Juvenile Justice*, 41 LAW & SOC. INQUIRY 435, 454 (2016) (“[T]he turn toward blended sentencing for juveniles largely parallels the punitive turn in adult sentencing and corrections rather than reaffirming the historic individualized treatment emphasis of the juvenile court. While blended sentences may indeed represent a ‘last chance’ for juveniles before they are waived to adult court or an ‘alternative to expansion of other means of transfer to criminal court,’ they were likely enacted, in part, to expand harsh criminal punishments to a larger class of youthful law violators.”) (citations omitted).

105. Cheesman, *supra* note 65, at 113.

106. FELD, *supra* note 38, at 587; *see also* Cheesman, *supra* note 65, at 114 (listing sentencing schemes).

107. FELD, *supra* note 38, at 587.

108. Cheesman, *supra* note 65, at 113; *see also* FELD, *supra* note 38, at 587.

nile court with adult criminal procedural safeguards” and after a juvenile is found guilty, the judge may impose either a juvenile or adult sentence.¹⁰⁹ If the youth receives an adult sentence, juvenile court jurisdiction is terminated and the youth is transferred to the adult criminal justice system.¹¹⁰ Under a juvenile-inclusive scheme—the model under which Minnesota’s EJJ operates—a juvenile judge imposes *both* a juvenile disposition and an adult sentence, the execution of which is stayed pending successful completion of the juvenile disposition.¹¹¹

Under the juvenile-contiguous model, a juvenile judge may impose a juvenile disposition, but if the duration of the sanction exceeds the age of juvenile court jurisdiction, then the juvenile is transferred to the adult system under which the remainder of their sentence is served.¹¹² Juveniles subject to this model are at risk of receiving significant adult sentences.¹¹³ For example, Texas’s juvenile-contiguous model “greatly increases the power of juvenile courts to impose substantial sentences on youths below fifteen years of age . . . as well as on older juveniles, and gives prosecutors a powerful plea bargaining tool and alternative to adult prosecution.”¹¹⁴ In 1995, Texas’s list of six offenses for which a judge could order a determinate sentence increased to thirteen, and the maximum length of a determinate sentence increased from thirty years to forty years.¹¹⁵

Similar to the juvenile-exclusive and juvenile-inclusive schemes, under the criminal-exclusive model, a criminal court judge imposes *either* a juvenile or adult court sentence. And under the criminal-inclusive model, a criminal court judge imposes *both* a juvenile and adult sentence, but the adult sentence is stayed pending completion of probation.¹¹⁶ Blended

109. FELD, *supra* note 38, at 588.

110. Redding & Howell, *supra* note 72, at 151–52 (explaining that such a scheme is present in three states: Massachusetts, Michigan, and New Mexico).

111. FELD, *supra* note 38, at 589; *see also* NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS 2014: NATIONAL REPORT 105, <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf> (explaining that ten of the fourteen states with blended sentencing laws originating in juvenile court have “inclusive blends”).

112. FELD, *supra* note 38, at 588. *See* NAT’L CTR. FOR JUVENILE JUSTICE, *supra* note 111, at 105 (explaining that Colorado, Rhode Island and Texas “have some type of contiguous blended sentencing arrangement”).

113. Redding & Howell, *supra* note 72, at 152.

114. FELD, *supra* note 38, at 589.

115. *Id.*

116. *Id.* at 587; *see also* NAT’L CTR. FOR JUVENILE JUSTICE, *supra* note 111, at 105–06 (explaining that of the eighteen states that allow blended sentenc-

sentencing models were present in sixteen states by 1995, and twenty-six states by 2004.¹¹⁷

Minnesota spearheaded the promulgation of juvenile-inclusive blended sentencing schemes when it began working on the nation's first model in 1992.¹¹⁸ Minnesota's Juvenile Justice Task Force was appointed to review and propose amendments to statutes governing the sentencing of juvenile offenders.¹¹⁹ Included in the Task Force's recommendations was the creation of "an intermediate category of young offenders who could receive extended sentences in juvenile court."¹²⁰ This intermediate category—Extended Jurisdiction Juvenile—would provide juvenile offenders with the procedural safeguards of adult criminal court, such as a right to a jury trial, given the juvenile would receive both a juvenile disposition and an adult criminal sentence.¹²¹ EJJ was intended to provide juveniles with "one last chance at success in the juvenile system" and the Task Force "discussed how to prevent 'one last chance' from becoming two or three, or four more chances."¹²² One of the motivations behind EJJ, which extended juvenile court jurisdiction to an offender's twenty-first birthday, was the belief that such an extension would reduce the number of youths certified as adults.¹²³

To be designated an EJJ youth, the adolescent must be between the age of fourteen and seventeen and be alleged to have committed a felony offense.¹²⁴ The juvenile felony offender may be designated an EJJ youth in one of three ways: "[A]utomatic, presumptive, [or] designated."¹²⁵ Under the automatic EJJ des-

ing in criminal court, eleven states have criminal-exclusive blends and seven states have criminal-inclusive blends).

117. Cheesman, *supra* note 65, at 113.

118. Shear, *supra* note 68, at 220.

119. Podkopacz & Feld, *supra* note 9, at 1005.

120. *Id.*

121. *Id.* at 1009, 1013. Minnesota's system of "[t]rying youths in juvenile courts with adult criminal procedural safeguards preserves access to juvenile correctional resources, provides longer periods of correctional supervision and control, and retains the possibility of adult incarceration if youths fail on probation or re-offend." FELD, *supra* note 38, at 589–90.

122. Feld, *supra* note 8, at 1047.

123. Podkopacz & Feld, *supra* note 9, at 1010 (explaining that prior to EJJ, juvenile court jurisdiction ended when a juvenile turned nineteen. The age cut-off "restricted juvenile courts' authority to impose appropriate sanctions on older youths and encouraged judges to certify some juveniles who did not necessarily require extended adult incarceration").

124. MINN. STAT. § 260B.130, subdiv. 1 (2017).

125. Santelmann & Rafferty, *supra* note 11, at 432.

ignation, the prosecutor may designate the proceeding as an EJJ prosecution if the juvenile was at least sixteen years of age at the time of the alleged offense and is alleged to have committed either a felony offense while using a firearm or an offense for which the Sentencing Guidelines presume a commitment to prison.¹²⁶ Under the presumptive EJJ designation, a case must be designated as EJJ if, following a certification hearing, the juvenile court denies the prosecutor's motion for adult certification in which the presumption of certification applies.¹²⁷ Lastly, a case may be designated as EJJ if the child was between fourteen and seventeen years of age at the time of the offense and either the court designates the case as EJJ following a certification hearing,¹²⁸ or the court designates the case as EJJ following a hearing on the issue at the prosecutor's request.¹²⁹

In addition to creating this intermediate category of young offenders, the Task Force also revised the state's adult certification procedure, "link[ing] the definition of serious juvenile offenders to the definition of serious offenses in the adult sentencing guidelines."¹³⁰ Rather than requiring judges to address "unanswerable questions about a youth's 'amenability to treatment' or 'dangerousness,'" as certification procedures had done in the past, "the Task Force proposed using more objective offense criteria to define 'public safety.'"¹³¹ In both adult certification proceedings and EJJ designations, the six public safety factors outlined in the certification statute are to be considered. The factors focus on the severity of the current offense and the culpability of the offender, the juvenile's prior record and programming history, as well as the punishment, programming and dispositional options available for the child.¹³²

But, unlike adult certification hearings, which ask whether public safety is better served by transferring the youth from the juvenile to the adult court system, probation revocation hearings of EJJ youth do *not* focus on public safety. Rather, the fo-

126. MINN. STAT. § 260B.130, subdiv. 1(2).

127. *Id.* § 260B.125, subdiv. 8.

128. *Id.* § 260B.130, subdiv. 1(1).

129. *Id.* § 260B.130, subdiv. 1(3).

130. FELD, *supra* note 38, at 583.

131. *Id.*; *see also* Feld, *supra* note 8, at 968 (explaining that the new statute governing certification "shift[ed] judicial focus from clinical subjectivity and an offender's 'amenability to treatment' to more objective 'public safety' offense criteria that mirror the Sentencing Guidelines' emphases on the seriousness of the present offense and prior record").

132. MINN. STAT. § 260B.125, subdiv. 4.

cus is on whether or not a youth violated probation. Under Rule 19.11 of the Minnesota Rules of Juvenile Delinquency Procedure, a court must make three written findings in order to execute the stayed criminal sentence. The court must find that “(a) one or more conditions of probation were violated; (b) the violation was intentional or inexcusable; and (c) the need for confinement outweighs the policies favoring probation.”¹³³ While some members of the Task Force advocated for the automatic execution of the stayed adult sentence in the event of either a probation violation or the commission of a new offense, the Task Force ultimately recommended that probation violations of EJJ youth should be treated in the same manner as probation violations or new offenses committed by adults.¹³⁴ Shortly after the statute was enacted, Professor Barry Feld, who served as a member and subcommittee chair of the Task Force, wrote, “Although provisions to revoke probation and execute the adult sentences are essential elements of the EJJ status, some Task Force members feared that many youths might enter adult facilities through this procedural back door.”¹³⁵ Unfortunately, as Part II discusses further, Minnesota’s blended sentencing scheme has had a significant net-widening impact and has resulted in other unintended consequences due to its structure and implementation.

II. THE SHORTFALLS OF MINNESOTA’S EXTENDED JURISDICTION JUVENILE AND EVALUATING THE EFFICACY OF JUVENILE PROBATION AS A PRACTICE

Following the creation of blended sentencing schemes in several states across the country, authors Redding and Howell posed the question: “Does blended sentencing narrow the net of juveniles channeled into the criminal justice system . . . [o]r does it widen the net of juveniles subject to adult sentences?”¹³⁶

133. MINN. R. JUV. P. 19.11, subdiv. 3(C)(2). Rule 19.11 of the Minnesota Rules of Juvenile Delinquency Procedure incorporates consideration of the three *Austin* factors enunciated in *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). *State v. B.Y.*, 659 N.W.2d 763 (Minn. 2003), made the *Austin* factors applicable to EJJ probation revocation proceedings. See Santelmann & Rafferty, *supra* note 11, at 435 (explaining that since *Austin*, “the three factors articulated in the decision have become the cornerstone of any trial court’s decision to revoke adult probation. However, until *B.Y.* the *Austin* factors had not been applied to EJJ probation revocation proceedings”).

134. Feld, *supra* note 8, at 1047–48.

135. Feld, *supra* note 8, at 1050.

136. Redding & Howell, *supra* note 72, at 160.

Unfortunately, Minnesota's blended sentencing scheme has created a significant net-widening effect on the number of youths transferred to the adult criminal system—that is, it “subject[s] more young offenders to the possibility of adult criminal sentences than occurred under the traditional judicial waiver law.”¹³⁷ Studies have shown the sentencing scheme has had a disproportionate impact on racial minorities and on younger and less criminally sophisticated offenders.¹³⁸ As the federal government has noted, “Because juvenile blended sentencing thresholds are actually lower than transfer thresholds in most states, there is a possibility that such laws, instead of providing a mitigating alternative to transfer, are instead being used for an ‘in-between’ category of cases that would not otherwise have been transferred at all.”¹³⁹ Other studies have found that “EJJs had more serious charges than transfers, raising doubts about whether transfer was being reserved for the ‘worst of the worst’ and blended-sentencing cases for the ‘least worst of the worst,’” and that “[m]inorities were more likely to be motioned by the prosecutor for transfer or EJJ than white juvenile offenders.”¹⁴⁰

In addition to highlighting the unintended impact such a statute has had on the state's youth, Part II argues that revoking a juvenile's probation and executing his stayed adult sentence for probation violations, rather than for new offenses, demonstrates a misunderstanding of how criminal justice system involvement affects youth and impacts their future.¹⁴¹ This practice also ignores critical implications of adolescent brain development.

A. EJJ'S NET-WIDENING EFFECT AND OTHER UNINTENDED COLLATERAL CONSEQUENCES

Minnesota's blended sentencing statute was formulated “to open a door to the future for juveniles who have committed serious offenses but for whom rehabilitation in a juvenile setting meets the interests of public safety.”¹⁴² Although the scheme was created to give youthful offenders another chance at re-

137. Podkopacz & Feld, *supra* note 9, at 1028.

138. *Id.* at 1031–33.

139. Griffin et al., *supra* note 30, at 7.

140. Cheesman, *supra* note 65, at 114.

141. See SCHAEFER & ERICKSON, *supra* note 25 (discussing the effects of confinement on youths' psychosocial development).

142. Santelmann & Lillesand, *supra* note 8, at 1336.

maining within the jurisdiction of the juvenile courts, Minnesota's blended sentencing model has "had a substantial net-widening impact."¹⁴³ Most EJJ youth are charged with serious offenses, however prior to the passage of Minnesota's EJJ statute, many of these youth would have been treated as ordinary juvenile delinquents.¹⁴⁴ Minnesota's "intermediate sanction appears to sentence more severely offenders who otherwise would have been dealt with as ordinary delinquents rather than those who previously were bound for prison."¹⁴⁵

An analysis of data collected from Hennepin County, Minnesota between 1995 and 1997 reported that the majority of probation revocations of EJJ youth were for technical probation violations rather than for committing new crimes.¹⁴⁶ The study found "the combination of an initial EJJ status and a subsequent probation revocation consigned a substantial number of juveniles to prison who likely would not have been waived or imprisoned under the previous waiver law or in the context of a 'public safety' certification hearing."¹⁴⁷

Minnesota's statute has had a particularly harsh impact on younger offenders. Prior to the creation of EJJ, most transfer motions (sixty percent) were filed against seventeen-year-olds, whereas only three percent were filed against fourteen-year-olds and seven percent against fifteen-year-olds.¹⁴⁸ After the passage of Minnesota's EJJ, "[m]ore than two-out-of-five (41.5%) youths against whom prosecutors filed EJJ motions were only fourteen- or fifteen-years of age at the time of their offenses."¹⁴⁹ The statute has also had a disproportionate impact on minorities: "Over 79% of the youth against whom prosecutors filed waiver and EJJ motions were members of racial minorities."¹⁵⁰

A report by the head prosecutor of the Ramsey County, Minnesota, Juvenile Prosecution Section found that lower courts were "exercising significant discretion when deciding

143. Podkopacz & Feld, *supra* note 9, at 1030; *see also* Feld & Bishop, *supra* note 43, at 823 ("[J]uvenile court judges do not use [blended sentences] in lieu of transfer, but instead impose them on less serious offenders, which results in 'net widening.'").

144. FELD, *supra* note 38, at 598.

145. *Id.*

146. Podkopacz & Feld, *supra* note 9, at 1059.

147. *Id.* at 1063.

148. *Id.* at 1031-32.

149. *Id.* at 1032.

150. *Id.* at 1033.

whether to execute the stayed adult sentence,” which “appear[ed] consistent with the Task Force’s recommendation to treat EJJ probation violations in the same manner as adult violation proceedings.”¹⁵¹ Might such an exercise of discretion potentially do more harm than good? Several scholars and practitioners have expressed their concerns with this discretion, especially given EJJ was intended to be reserved for a particular category of youthful offenders. As scholars have noted, *most* juvenile offenders do *not* need to be incarcerated, and waiver laws should be reserved for a special class of youths; “Except in rare instances, these will be older adolescents who have demonstrated by the *severity* and *chronicity* of their offending that they deserve to be incarcerated for lengthy periods and that the public needs to be protected from them.”¹⁵²

Unfortunately, given the great leverage EJJ provides to prosecutors, many EJJ youth are designated as a result of a plea agreement,¹⁵³ and as practitioners have noted, many are young, first-time offenders. While “it is often preferable to bring a motion for [adult] certification” from the perspective of the prosecutor,¹⁵⁴ EJJ “increase[s] prosecutors’ plea bargaining leverage by enabling them to coerce pleas to [an] extended sentence[] in lieu of outright transfer [to adult court].”¹⁵⁵ Criticizing blended sentencing as a prosecutorial power grab, one author wrote, “If the enhancement of prosecutorial power was sought and plea-bargaining was encouraged, then blended sentencing is just what the district attorney ordered.”¹⁵⁶

151. Santelmann & Lillesand, *supra* note 8, at 1323.

152. Feld & Bishop, *supra* note 43, at 833 (emphasis added); *see also* Redding & Howell, *supra* note 72, at 166 (stating that blended sentencing schemes should “target only serious and violent juvenile offenders who have an extensive prior offending history.”).

153. Feld & Bishop, *supra* note 43, at 823.

154. Santelmann & Lillesand, *supra* note 8, at 1315.

155. Feld & Bishop, *supra* note 43, at 823; *see also* Redding & Howell, *supra* note 72, at 157 (explaining that blended sentencing “sets up a classic plea bargaining situation: prosecutors use the threat of criminal court transfer as leverage against juveniles to waive their right to a jury trial, plead guilty, and/or agree to a certain sentence”).

156. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 14 (2010).

B. EVALUATING THE EFFICACY OF JUVENILE PROBATION IN
LIGHT OF THE IMPLICATIONS OF ADOLESCENT BRAIN
DEVELOPMENT

A corollary to a blended sentence is a longer period of monitoring. While an EJJ disposition gives a juvenile the opportunity to stay out of the adult criminal system, the adolescent is on probation with the court until their twenty-first birthday, rather than until age nineteen as an ordinary delinquent.¹⁵⁷ For any person, the possibility of staying out of prison—or, even better, going home—may sound like a good deal. However adolescents who generally “show less ability to make judgments and decisions that require future orientation,”¹⁵⁸ may be unable to fully understand the impact probation will have on their daily lives going forward. As the American Psychological Association (APA) pointed out in its amicus brief in *Roper*, sixteen- and seventeen-year-olds, “as a group, are not yet mature in ways that affect their decision-making” due to the underdevelopment of an adolescent’s frontal lobes of the brain.¹⁵⁹ As the APA explained, “The frontal lobes, especially the prefrontal cortex, play a critical role in the executive or ‘CEO’ functions of the brain,” and an under-developed frontal lobe “has been associated with greater impulsivity, difficulties in concentration, attention, and self-monitoring, and impairments in decision-making.”¹⁶⁰ “At first blush, community-based probation seems to allow justice-involved youth to avoid the detrimental effects of confinement,” however, partly due to these biological impairments, “about half of juveniles on probation fail to comply with their requirements at some time while under court supervision.”¹⁶¹

While the executive functions of adolescent brains continue to develop into adulthood, adolescents actually exhibit heightened activity in the nucleus accumbens, which is an area of the

157. MINN. R. JUV. P. 19.01(2)(A) (“[J]urisdiction of the juvenile court may continue until the child’s twenty-first (21st) birthday.”).

158. See Nat’l Research Council, *Reforming Juvenile Justice: A Developmental Approach*, in LAW AND NEUROSCIENCE, *supra* note 17, at 545.

159. Brief for the Am. Psychological Ass’n, & the Mo. Psychological Ass’n as Amici Curiae Supporting Respondent at 5, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) 2004 WL 1636447 at *2.

160. *Id.* at 9–10, 2004 WL 1636447 at *2.

161. Naomi E.S. Goldstein et al., “You’re on the Right Track!” Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation, 88 TEMP. L. REV. 803, 804 (2016).

brain rich in dopamine and responsible for seeking pleasure and reward.¹⁶² The limbic system, responsible for these socio-emotional processes and including parts of the brain such as the nucleus accumbens, the hippocampus, and the amygdala, generally matures more rapidly than the system responsible for executive controls, which results in an imbalance between the two systems.¹⁶³ As a result of this imbalance “it has been suggested that the emotionally driven reactions of an adolescent’s more developed limbic system often prevail over the rational reasoning of his or her underdeveloped prefrontal cortex during socially or emotionally charged situations.”¹⁶⁴ Thus, while a juvenile may be able to demonstrate cognitive functioning skills necessary to comply with the terms of their probation, such as abstaining from alcohol use or engaging in destructive activity, *while in the presence of their probation officer*, many juveniles would struggle to exhibit these capabilities “when faced with distracting social or emotional situations” out in their communities.¹⁶⁵

Data collected by the Department of Justice revealed that over “16% of all youth in juvenile correctional centers were committed or detained for technical probation violations” that are “typically not criminal in nature; instead, they involve acts that defy court-mandated conditions, like failing to attend school, missing curfew, or failing to meet with a probation officer as scheduled.”¹⁶⁶ While this may be the traditional response to disobedient probationers, studies indicate that disproportionate sanctions are not more effective than proportionate ones.¹⁶⁷ Rather, overly punitive responses “tend[] to lose [their] effectiveness over time, as youths become accustomed to the negative experiences” and “believe the negative consequences are unavoidable,” developing what is known as “learned helplessness.”¹⁶⁸

Once juveniles are taken out of their communities and placed in residential facilities, they are subject to developing mood disorders, such as depression, “increasing the chances

162. *See id.* at 813.

163. *See id.*; *see also* Nat’l Research Council, *supra* note 158, at 549.

164. Goldstein et al., *supra* note 161, at 813.

165. *Id.* at 812.

166. Amanda NeMoyer et al., *Predictors of Juveniles’ Noncompliance with Probation Requirements*, 38 LAW & HUM. BEHAV. 580, 581 (2014).

167. Goldstein et al., *supra* note 161, at 829.

168. *Id.* at 820–21.

that they will engage in self-harming behavior.”¹⁶⁹ Once released, “formerly incarcerated juveniles often exhibit poor academic performance, face reduced earnings, and obtain fewer job opportunities.”¹⁷⁰ Studies indicate that “70–80% of incarcerated juveniles still recidivate within 2–3 years of release.”¹⁷¹ On top of all this, it is worth noting that studies have found that approximately two-thirds of incarcerated juveniles suffer with a mental health condition, and in a pertinent survey it was found that “approximately 70% of the group with a mental health problem also had a substance use disorder.”¹⁷²

Confinement during adolescence has a severe impact on an individual. As noted previously, there are significant collateral consequences associated with a criminal conviction—and in some circumstances, even a delinquent adjudication. Additionally, there are serious implications on an adolescent’s emotional and psychological development. A recent study emphasized how confinement—and *any* involvement in the juvenile system—impacts a youth’s future.¹⁷³

EJJ youth serving time in group homes and other juvenile institutions are being confined during a critical time of “psychological development and maturation.”¹⁷⁴ As the authors of the study on confined youth explained:

Because juvenile correctional facilities operate under strict surveillance and are gender-segregated, the social context for development changes; confined youth are not able to practice skills associated with developing perspective . . . responsibility . . . and temperance . . . that in turn promote the successful transition to adulthood.¹⁷⁵

Further, the authors contend, it is mistaken to believe that formerly confined youth re-offend as a result of “poor choic-

169. NeMoyer et al., *supra* note 166.

170. *Id.*

171. *Id.*

172. Mulvey & Schubert, *supra* note 73, at 855; *see generally* THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS (Franklin E. Zimring ed., 2004) (discussing the prevalence of mental health conditions among adolescent offenders).

173. *See* SCHAEFER & ERICKSON, *supra* note 25, at 15 (“[A]s youth exit correctional facilities and struggle to transition to the community, they are lagging further behind other youth in their self-clarity, self-esteem, decision-making, and future orientation. . . . Despite hopes that a period of confinement can be the turning point leading youth out of future offending behavior, the barriers produced by the context of confinement have real consequences for the development of psychosocial maturity and attainment in adulthood.”).

174. *Id.* at 5.

175. *Id.* at 5–6.

es.”¹⁷⁶ As the authors point out, typically, a person’s adolescence is associated with “trial and error”; however, highly confined youth are given “few opportunities for developmental failure.”¹⁷⁷ The authors suggest that programming available to juveniles should provide “room for autonomy *and failure*,” and should “teach youth to build on failure as a natural part of development.”¹⁷⁸ Critically, the authors’ quantitative analysis revealed that “not only confined youth, but also arrestees . . . have poorer outcomes in the transition to adulthood.”¹⁷⁹ The authors emphasized that it is not merely confinement, but any “formal juvenile justice intervention” that can inadvertently harm a youth going forward.¹⁸⁰

Currently, the “structure of most juvenile probation systems fails to recognize the unique characteristics of adolescent development, and thus, many youths likely fail to comply with probation, facing harsh consequences.”¹⁸¹ As a result of this detrimental impact on youth engaged in the juvenile justice system, a recent study suggested revising the current approach of juvenile probation so that it incorporates sensitivities to the important biological differences of adolescents compared to adults. The current structure of juvenile probation closely reflects that of adult probation, in that the system focuses more on what the juvenile does wrong, rather than rewarding compliant behaviors.¹⁸² Such a system “fails to recognize the power of positive reinforcement in shaping behavior over time.”¹⁸³ The study suggests reframing juvenile probation in a way that helps juveniles better understand and appreciate the terms of their probation, provides short-term positive reinforcement for

176. *Id.* at 15 (citing a study which “uncovered the complexity between incarceration and psychosocial maturity that ultimately made it difficult for young offenders to meet the demands and expectations of adulthood upon release”).

177. *Id.* at 17.

178. *Id.* (emphasis added).

179. *Id.* at 16.

180. *Id.* (noting that this result is “surprising given this is the very system intervening on the ‘best interests of the child’”). See generally Mulvey & Schubert, *supra* note 73 (discussing the impact of adult prisons on youth both during and after confinement and the challenges they face as they reenter their communities).

181. Goldstein et al., *supra* note 161, at 819.

182. *Id.* at 808–09.

183. *Id.* at 809; see also Nat’l Research Council, *supra* note 158, at 546–47 (concluding that recent studies “suggest that immediate incentives can alter both desirable and undesirable behavior in adolescents and may be used to positively alter behavior”).

good behavior, imposes sanctions for disobedience “in ways that enable youths to learn from their mistakes and modify their behaviors in the future,” and encourages juveniles to associate themselves with prosocial activities and positive peers.¹⁸⁴ This “graduated response system” of juvenile probation would highlight “effort and improvement over perfect compliance with probation requirements,” and would impose “predictable, proportionate, and fair sanctions for noncompliant behaviors.”¹⁸⁵ Such a framework would provide juveniles with an opportunity to learn from their mistakes, “rather than removing youths from the community and, thus, also removing them from opportunities to revisit past choices and make better decisions in similar scenarios in the near future.”¹⁸⁶

Fortunately, the graduated response system is being implemented in a growing number of jurisdictions around the country, including in both Hennepin County and Ramsey County, Minnesota.¹⁸⁷ With a reframed approach to probation and a blended sentencing framework that incorporates the proposed changes outlined in Part III, this Note argues that Minnesota could be a leader in the broader movement of criminal justice reform and the way we treat our youth who offend.

III. AMENDING MINNESOTA’S EJJ TO ENSURE JUVENILES RECEIVE A GENUINE “ONE LAST CHANCE AT SUCCESS”

Given the detrimental impact of blended sentencing schemes on younger and less criminally sophisticated youth, many scholars and practitioners question the intention of these laws as providing a genuine “one last chance at success” to juvenile offenders. While Minnesota’s juvenile-inclusive scheme appears to be the preferable model, its statute is far from perfect, and studies have shown that its implementation has resulted in a significant net-widening effect and other unintended collateral consequences on the state’s youth.¹⁸⁸

Despite these challenges, Minnesota’s EJJ statute can be successfully amended to resolve its flaws. Although Minnesota’s blended sentencing scheme was intended to treat juvenile probationers similarly to their adult counterparts, adolescents

184. See Goldstein et al., *supra* note 161, at 819, 830.

185. *Id.* at 828–29.

186. *Id.* at 829–30.

187. See *id.* at 825 n.120.

188. See *supra* Part II.A.

are “constitutionally different”¹⁸⁹ and “[p]olicies that equate juveniles with adults in the name of retribution—‘old enough to do the crime, old enough to do the time’—ignore fundamental differences between adolescents and adults.”¹⁹⁰ This Part argues that the ease with which probation can be revoked, and a stayed criminal sentence executed, requires the legislature to amend Minnesota’s EJJ statute. The statute should require (1) the commission of a new crime; and (2) certain procedural safeguards before a juvenile judge can revoke juvenile probation and execute the stayed adult sentence.¹⁹¹ Additionally, the statute should be amended to include a stay of *imposition* in addition to the stay of *execution*.¹⁹² Under a stay of imposition, a juvenile’s felony sentence would be reduced to a gross misdemeanor, if and when probation is successfully completed. Part III concludes by arguing that if Minnesota’s EJJ statute is amended and implemented appropriately, then it may serve as a model for other states’ blended sentencing schemes.

A. PROPOSED AMENDMENTS TO MINNESOTA’S EJJ STATUTE

EJJ was created to give juveniles “one last chance at success in the juvenile system,”¹⁹³ and it was intended that the courts would treat probation violations of EJJ youth similarly to adult probationers who violate probation or commit a new offense.¹⁹⁴ Adolescents, however, are “constitutionally different from adults for purposes of sentencing.”¹⁹⁵ Recognizing these critical differences, the U.S. Supreme Court enunciated in *Roper* 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 reformed. . . . “[T]he signature qualities of youth are *transient*; as individuals mature, the impetu-

189. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

190. Feld & Bishop, *supra* note 43, at 831.

191. See Telephone Interview with Feld, *supra* note 27 (discussing certification hearings as a procedural safeguard against imposing long adult sentences on EJJ youth for minor violations).

192. See Telephone Interview with Anonymous Juvenile Public Defender, *supra* note 28 (explaining that a stay of imposition—which reduces a felony to a gross misdemeanor—is often made available to adult offenders, which becomes inherently unfair when an adult and a juvenile commit a felony crime together).

193. Podkopacz & Feld, *supra* note 9, at 1015 (internal quotation marks omitted) (quoting Feld, *supra* note 8, at 1047–49).

194. Feld, *supra* note 8, at 1047–48.

195. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

ousness and recklessness that may dominate in younger years can subside.”¹⁹⁶

A report, written from the perspective of a prosecutor, stated that “the success of the Extended Jurisdiction Juvenile designation depends” in part on “juveniles appreciating that this is a door that has been opened for them to let in a better future.”¹⁹⁷ While this statement certainly holds merit, the door to a juvenile’s future should not be shut for merely violating the terms of their probation. Although smoking marijuana, for example, may constitute a new offense, it arguably does not change the juvenile’s status from someone who does *not* pose a threat to public safety to one who does. Rather than focusing merely on what a juvenile has done wrong (failing to meet with a probation officer, for example, or testing positive for drug use), there should be a turn toward what the juvenile is doing right.¹⁹⁸ The inability, or reluctance, to do so suggests an important disconnect between the State and its youth. Specifically, it demonstrates the State’s under-appreciation of the impact involvement in the criminal justice system has on a youth, and overlooks critical implications of adolescent brain development.¹⁹⁹

Revocations are improper in the absence of a new offense and undermine the spirit of the EJJ statute. Juveniles should rarely be waived to the adult court system, and only “when their serious offenses, persistent offending, heightened culpability, active criminal participation, and clinical evaluations indicate a need for minimum sentences that exceed the maximum sanctions available in juvenile court.”²⁰⁰ Thus, the statutory language, “[w]hen it appears that a person convicted as an extended jurisdiction juvenile has violated the conditions of the stayed sentence,” should be stricken from the statute so the subdivision of Minnesota Statute 260B.130 focusing on execu-

196. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (emphasis added) (citation omitted); *see also* Feld, *supra* note 8, at 1011 (“Chronic offenders typically begin their criminal careers in their early to mid-teens, achieve their peak rates of criminal activity in their late teens to early-twenties, and then gradually reduce their criminal involvement.”).

197. Santelmann & Lillesand, *supra* note 8, at 1336.

198. *See* Goldstein et al., *supra* note 161, at 809 (explaining that the current approach of most juvenile probation systems “emphasize[s] probationers’ failures to comply with requirements rather than attending to compliant behaviors” which “fails to recognize the power of positive reinforcement in shaping behavior over time”).

199. *See supra* Part II.B.

200. Feld & Bishop, *supra* note 43, at 834.

tion of the adult sentence would read, “[w]hen it appears that a person convicted as an extended jurisdiction juvenile is alleged to have committed a new offense, the court may, without notice, revoke the stay and probation and direct that the offender be taken into immediate custody.”²⁰¹ Such a change would help to ensure EJJ youth are not being sent to the adult criminal system for a mere probation violation.

Additionally, the EJJ statute should be amended so that judges deciding whether to revoke a youth’s probation and execute the stayed adult sentence must hold a hearing similar to a certification hearing, where the judge is to determine whether the juvenile actually poses a threat to public safety.²⁰² As one scholar put it, shortly after the enactment of EJJ, a juvenile’s “‘adult’ status may now be decided in the context of [a] summary probation revocation hearing[] rather than [a] certification hearing[].”²⁰³ The 1995–97 study referenced above revealed that Minnesota’s EJJ has developed into a juvenile’s “‘first and last chance’ for treatment,” has “widened the net of criminal social control, and moved larger numbers of younger and less serious or chronic youths into the adult correctional system indirectly through the ‘back door’ of probation revocation proceedings rather than through certification hearings.”²⁰⁴

Unlike adult certification determinations, EJJ revocations do not require a juvenile court judge to decide whether or not the juvenile is a public safety concern.²⁰⁵ A juvenile court judge has already determined that an EJJ youth does *not* belong in adult criminal court, and a technical probation violation should not alter that determination. If the State believes a juvenile belongs in criminal court, it should conduct something similar to a certification hearing, which is the appropriate forum for determining whether a juvenile’s behavior warrants imprisonment. Although probation revocation procedures provide a probationer with the right to counsel and a contested hearing, it is a summary proceeding that addresses whether the terms of

201. See MINN. STAT. § 260B.130(5)(a) (2016).

202. See Telephone Interview with Feld, *supra* note 27 (discussing that probation violation hearings focus primarily on whether the juvenile violated probation rather than on issues of public safety).

203. Feld, *supra* note 8, at 1050.

204. Podkopacz & Feld, *supra* note 9, at 1070.

205. See MINN. R. JUV. P. 19.11(3)(C)(2) (outlining three written findings that the court must make in order to execute a stayed prison sentence after revoking EJJ status). For further discussion on probation revocations, see *supra* Part I.C.

probation were violated, not whether the juvenile poses a public safety risk.²⁰⁶

The statute should also be amended to include a stay of *imposition*, in addition to the stay of *execution*, which would provide another incentive for EJJ youth to successfully complete probation.²⁰⁷ Minnesota Statute 260B.130, subdivision four should be changed to read:

(a) If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile dispositions under section 260B.198; and (2) impose an adult criminal sentence, the execution *and imposition* of which shall be stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense.²⁰⁸

Under this changed regime, a juvenile's felony sentence would be reduced to a gross misdemeanor, if and when probation is successfully completed. This change would not only make a juvenile's sentence fairer in comparison to an adult's,²⁰⁹ but it would remove the harsh collateral consequences associated with a felony conviction,²¹⁰ and, most importantly, incentivize EJJ youth to successfully complete probation to stay out of the adult criminal system. As studies have shown, "incentives have been recognized as an important component of systems promoting young people's compliance with court requirements."²¹¹

Others have also suggested that the statute should be amended so that the length of probation is reduced,²¹² or that

206. See MINN. R. JUV. P. 19.11(3)(C)(2).

207. See Telephone Interview with Anonymous Juvenile Public Defender, *supra* note 28.

208. See MINN. STAT. § 260B.130(4)(a) (2017).

209. An anonymous juvenile public defender explained that the difference in offering stayed impositions becomes "particularly stark" when you have, for example, a seventeen-year-old and an eighteen-year-old who engage in a crime together. The public defender explained that following the arrest, the seventeen-year-old gets taken to detention and is likely not entitled to bail; he gets an EJJ disposition and is sent off to a residential facility with a felony sentence hanging over their head. On the other hand, the eighteen-year-old is entitled to bail, gets convicted with a stay of imposition, and after, say, five years of probation, the felony gets reduced to a gross misdemeanor. Telephone Interview with Anonymous Juvenile Public Defender, *supra* note 28.

210. See *supra* Part I.B for further discussion on collateral consequences.

211. Goldstein et al., *supra* note 161, at 820.

212. Reducing probation to an offender's nineteenth birthday may, however, have the inadvertent effect of certifying more youths as adults. As Podkopacz and Feld explain, the prior age cut-off of nineteen "restricted juvenile courts' authority to impose appropriate sanctions on older youths and encouraged judges to certify some older juveniles who did not necessarily require extended adult incarceration." Podkopacz & Feld, *supra* note 9, at 1010. The

juvenile probationers should receive an annual mandatory review hearing to determine whether probation supervision until age twenty-one is warranted.²¹³ Again, taking into account the impact of incentives on adolescents, giving EJJ youth the opportunity to get off probation may ultimately translate into fewer juveniles being transferred to the adult criminal system.

B. SERVING AS A MODEL FOR OTHER STATES' BLENDED SENTENCING SCHEMES

If Minnesota's EJJ statute is amended and implemented appropriately, then it may serve as a model for other states' blended sentencing schemes. As aforementioned, while far from perfect, the juvenile-inclusive model under which Minnesota's EJJ operates appears to be the preferred model out of the five.²¹⁴ First, EJJ dispositions originate in juvenile, rather than adult court.²¹⁵ Second, the juvenile court maintains jurisdiction over the case, with an adult criminal sentence stayed pending successful completion of the juvenile disposition. This set up provides a juvenile with a "last chance" at rehabilitation within the juvenile system,²¹⁶ and "allows flexibility in crafting sentencing dispositions responsive to the juvenile's progress in rehabilitation while maintaining the possible consequences of an adult sentence."²¹⁷ Third, under Minnesota's scheme, the juvenile court judge is given the authority to decide whether or not to transfer the juvenile to the adult criminal system. While there are certain guidelines the juvenile court judge must follow, this scheme provides the judge with significant discretion, unlike automatic transfer laws, which automatically transfer the youth to the adult system upon reaching the jurisdictional

point of EJJ is to *extend* juvenile court jurisdiction. If probation were to be shortened, then arguably the purpose of EJJ is defeated.

213. These suggestions were made by two different anonymous juvenile public defenders in separate phone interviews on January 31 and February 13, 2017.

214. See Redding & Howell, *supra* note 72, at 169–70.

215. *Id.* at 169 ("[I]t is preferable to have blended sentencing in juvenile court rather than the criminal court," given criminal court judges are likely "less sensitive to the immaturity and mental health problems of many juvenile offenders, who may be negatively influenced by the criminal culture of adult courts.").

216. *Id.* at 170 (quoting Elizabeth E. Clarke, *A Case for Reinventing Juvenile Transfer: The Record of Transfer of Juvenile Offenders to Criminal Court in Cook County, Illinois*, 47 JUV. & FAM. CT. J. 3, 4 (1996)).

217. *Id.*

age limit of the juvenile system.²¹⁸ As some scholars contend, “Automatic transfer (with substantial adult sentences) provides no incentive or possibility for juveniles to reform.”²¹⁹ The provisions of such schemes “often are overinclusive”²²⁰ and “do not effectively target those juveniles who should be subject to adult sanctions.”²²¹

If Minnesota’s blended sentencing scheme were (1) reserved for a special class of youthful offenders,²²² rather than used as an effective plea bargaining tool;²²³ (2) implemented in a way that balances the interests of society with the interests of an EJJ youth *deemed not to pose a threat to public safety*; and (3) if it took into account the critical biological differences between adolescents and adults, then Minnesota’s EJJ would provide adolescent offenders with a genuine “one last chance at success in the juvenile system.”²²⁴

CONCLUSION

While Minnesota’s blended sentencing model is far from perfect, this Note argues that it can be successfully amended to resolve its flaws. First, the EJJ statute should be amended to require the commission of a new criminal offense in order to execute the original stayed adult sentence. Second, the statute should be amended so that judges deciding whether to revoke a youth’s probation and execute the stayed adult sentence would be required to hold a hearing similar to a certification hearing, which is the proper forum for determining whether the juvenile actually poses a threat to public safety. And third, the statute should be amended to include a stay of *imposition* in addition to the stay of *execution*.

If amended and implemented in a way that balances the interests of society with the interests of an EJJ youth *deemed not to pose a threat to public safety*, and takes into account the critical biological differences between adolescents and adults,

218. *Id.*

219. *Id.*

220. *Id.* (quoting James C. Howell, *Juvenile Transfers to the Criminal Justice System: State of the Art*, 18 LAW & POL’Y 17 (1996)).

221. *Id.*

222. *See id.* (“[I]f blended sentencing systems are to serve as an alternative to transfer, then they should be structured to have maximum impact on life-course-persistent offenders, who are responsible for as much as 75 percent of the violent crimes committed by adolescents.”).

223. *See supra* Part II.A.

224. Feld, *supra* note 8, at 1047.

then Minnesota's EJJ statute may serve as a model for other states in the growing trend toward extending juvenile court jurisdiction and the broader movement of criminal justice reform.