

TRANSFER LAW AND TODAY'S YOUTH:
REHABILITATING OR CREATING LIFETIME
CRIMINALS? A COMPARATIVE ANALYSIS OF
JUVENILE TRANSFER LAW IN KENTUCKY, FLORIDA,
AND NEW YORK

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I. INTRODUCTION

All states have transfer laws that allow or require juvenile cases to be criminally prosecuted.¹ They do so even though the Supreme Court in *Roper v. Simmons* found that juveniles differ from adults in major ways.² *Roper* noted that juveniles lack maturity and a sense of responsibility, are more vulnerable to negative influence and peer pressure, and do not possess the well-formed character of an adult.³ Therefore, state juvenile courts with delinquency jurisdiction most often handle juvenile cases. In most states, that includes those who are seventeen or under that commit acts that would be considered crimes if adults had committed them.⁴

Despite the availability of juvenile courts, a significant number of youths are still treated as adults for a multitude of reasons later to be discussed.⁵ This Note presents and compares three state transfer law systems that exhibit unique transfer practices: Kentucky, Florida, and New York. Analyzing and comparing these statutory schemes offers insights into which practices are most effective—and most detrimental—in terms of criminal deterrence and juvenile protection. This Note ultimately proposes a model statutory scheme

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¹ Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEPT OF JUST. 2 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf> [<https://perma.cc/SQ7M-9FGL>].

² *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (5-4 decision) (deeming capital punishment for juvenile offenders unconstitutional).

³ *Id.*

⁴ Griffin et al., *supra* note 1.

⁵ *Youth Tried as Adults*, JUV. L. CTR. (2020), <https://jlc.org/issues/youth-tried-adults> [<https://perma.cc/8CAE-BQD8>].

for the transfer of juveniles to adult courts that best serves the interests of juvenile offenders, citizens of the community, and the justice system.

In researching this Note, I spoke with a local man from Louisville, Kentucky—now twenty years old—and his attorney about his experience as a fifteen-year-old Black youth in the adult system. For purposes of this Note, this man will be referred to as “J.” J’s attorney began by explaining to me that J “had no priors, no history of violence, no experience being incarcerated.”⁶ When I asked J if he knew what being transferred meant for him, he replied:

It threw me for a loop when they told me they charged me as an adult I thought I was going to jail for life. I was only fifteen. I didn’t really know nothing about the juvenile system. . . . It was the most dreadful feeling. Not knowing what’s going to happen, that’ll really mess with you.⁷

I then discussed his experience while awaiting sentencing and inquired whether the decision to treat him as an adult affected his mental health during these pivotal developmental years.⁸ He responded that it “most certainly did. I think I process stuff a lot differently now that I’ve been in jail It institutionalizes you.”⁹ He believes that he was in a better position than most because he had a support system and a good home, adding:

The way you turn out is really, I don’t want to say it’s really based off how you grew up or the environment you’re in, but it would be different for someone that grew up really poor and like, a parent that’s not there. If they went through something like I went through, it would tear them down.¹⁰

He continued:

They made me a felon for the rest of my life off of one mistake. I feel like everybody deserves another chance. I can see if someone got out on a bad charge, and was repeatedly doing it, yeah, you probably deserve to be a felon or something, but I was a juvenile, not knowing as much as I know now I’m not a criminal.¹¹

⁶ Interview with “J,” former youthful offender, in Louisville, Kentucky (Jan. 10, 2020).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Since his release, J has had an extremely hard time getting a job that he is proud of due to his felon status, and repeatedly stated that he is embarrassed by and internalizes his past experiences in the system.¹² His attorney explained: "He's the poster child for why there needs to be changes. He didn't need all of that."¹³ She did not think he would have been sent to adult court if not for Kentucky's mandatory waiver statute. She stated that "he still would have gone to camp and experienced all of that, but he wouldn't be in a position where he is now a felon forever."¹⁴

When people think of adult transfer, many react by associating it with repeat juvenile offenders committing heinous crimes, meriting the repercussions of an adult sentence.¹⁵ My interview with J demonstrates that is not always the case. The model statute this Note ultimately presents would shield juveniles like J, who were severely harmed by adult transfer and did not require transfer to be rehabilitated, while still protecting the community and punishing offenders for their crimes.

II. HISTORY

A. The Rise of a Separate Juvenile Court System

The idea that children differ from adults predates the American Revolution and is viewed as a concept "inscribed by the nation's founders into democratic theory."¹⁶ State governments have struggled for decades to determine how to bind children to the law when they have no right to liberty until the age of eighteen.¹⁷ Up until the late 1800s, juvenile offenders over the age of seven were processed and incarcerated in the same system and prisons as adults.¹⁸ As part of Progressive Era reforms, the first movement of

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See generally Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J. L. & POL'Y 223, 236 (1996) ("Supporters and legislators of amendments that make the juvenile justice system increasingly retributive claim that such amendments reflect public demand to 'crack down' on serious juvenile offenders.")

¹⁶ David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH. L. REV. 281, 281 (citing HOLLY BREWER, *BY BIRTH OF CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005)).

¹⁷ See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 8–9, 18–20 (2005); *id.* at 4 (explaining that children did not have the right to liberties held by adults due to custody laws).

¹⁸ Sarah E.S. Kukino, *Juvenile Transfer to Adult Criminal Court: Why Transfer is Not the Best Method in Addressing Juvenile Delinquency* 4 (2015) (senior thesis Paper 1042), https://scholarship.claremont.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2042&context=cmc_theses [<https://perma.cc/D43E-C2W9>].

change came in 1822 when the Society for the Reformation of Juvenile Delinquents (SRJD) reported that adult penitentiaries are incapable of caring for the needs of juveniles. The SRJD subsequently called for separate prisons, and a course of discipline focusing on rehabilitation rather than punishment.¹⁹ Juvenile justice reform gained further momentum in the late 1800s when advocates saw the need to create an entirely separate system for juveniles that focused more on youth rehabilitative needs rather than the crime that brought them to court.²⁰

The first juvenile court was established in Chicago, Illinois in 1899 under the Illinois Juvenile Court Act, which gave the court jurisdiction over neglected, dependent, and delinquent youth under sixteen.²¹ The objective was to rehabilitate rather than to punish.²² *Commonwealth v. Fisher* established the constitutionality of juvenile courts by rejecting the argument that juvenile courts deny youth the right to due process of law. *Fisher* held that “there is no restraint upon the national liberty of the children[,]” and that “the design [of separate juvenile courts] is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child.”²³ By 1925, every state in the nation had established a juvenile system with these ideals in mind.²⁴

Juvenile courts were different from adult courts thereafter in a multitude of ways. Juvenile proceedings were generally closed to the public, juvenile records were sealed, juvenile proceedings were run by a judge rather than a prosecutor, juveniles were not charged with crimes but rather delinquencies, and youth were sent to reformatory schools rather than to prisons.²⁵ In response to criticism concerning liberty rights of youth, the Supreme Court’s 1966 decision in *Kent v. United States* held that juvenile court judges, or juveniles themselves, can waive jurisdiction to an adult court where juveniles would be given all the rights afforded to adults, which is “critically important” in certain cases.²⁶ *Kent* explained that juveniles are entitled to the privilege against self-incrimination and the right to notice, counsel, confrontation, and cross-examination of witnesses during adjudicatory

¹⁹ Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J. L. REFORM 653, 655 (2003).

²⁰ See KUKINO, *supra* note 18, at 1.

²¹ JOAN MCCORD ET AL., *JUVENILE CRIME JUVENILE JUSTICE* 157 (2001) (ebook), <https://www.nap.edu/read/9747/chapter/7#157> [<https://perma.cc/N7NL-ZQ55>].

²² *Id.*

²³ *Commonwealth v. Fisher*, 213 Pa. 48, 56 (1905).

²⁴ KUKINO, *supra* note 18, at 10.

²⁵ MCCORD ET AL., *supra* note 21, at 154.

²⁶ *Kent v. United States*, 383 U.S. 541, 560–61 (1966).

hearings.²⁷ While this decision sought to further protect the rights of youth, it led to increased prosecutorial involvement in juvenile courts where little to no juvenile representation was provided.²⁸ Between 1781 and 1981, although reformers continued to call for more preventative measures and the deinstitutionalization of youth, lawmakers in almost half of states began enacting tougher legislation governing the handling of serious and repeat juvenile offenders.²⁹

B. "Super Predators" on the Loose and a Move Toward Increased Juvenile Transfer

The 1980s and 1990s came with a significant increase in juvenile arrest and overall violent crime rates, which led to unease and overall concern by the general public.³⁰ According to a statistical report by the National Center for Juvenile Justice, juvenile arrests for violent crimes increased by thirty-eight percent between 1988 and 1991.³¹ Criminologist John DiIulio additionally sparked panic in 1995 when he predicted an explosion of "juvenile super predators," who he claimed would invoke widespread violence.³² While the prediction was unfounded, the "super predator" mindset has continued as a part of American culture to this day and has perpetuated a belief that the current system has been too lenient on juveniles.³³ This mindset fueled a call for harsher policing, as well as a call for juveniles to be punished rather than rehabilitated.³⁴

Along with increased juvenile arrests came a "get tough on crime" mentality, which led to legislation that expanded the offenses and circumstances under which a juvenile could be transferred to adult court.³⁵ Between 1992 and 1997, forty-seven states and the District of Columbia passed laws making it easier to transfer juveniles to adult court that changed

²⁷ ZIMRING, *supra* note 17 (explaining that juveniles can waive themselves to adult court to obtain rights that would not be afforded through the juvenile court system).

²⁸ *Id.*; see also Barry C. Feld, *Procedural Rights in Juvenile Courts: Competence and Consequences*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 674 (Donna M. Bishop & Barry C. Feld eds. 2012).

²⁹ MCCORD ET AL., *supra* note 21, at 161.

³⁰ See HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE 6 (1995), <https://www.ncjrs.gov/pdffiles1/Photocopy/153570NCJRS.pdf> [<https://perma.cc/LR3D-V2VQ>].

³¹ *Id.*

³² Alex S. Vitale, *The New 'Superpredator' Myth*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/opinion/superpredator-myth.html> [<https://perma.cc/9A5X-NBR9>].

³³ *Id.*

³⁴ *Id.*

³⁵ KUKINO, *supra* note 18, at 27.

sentencing structures, and/or modified or removed juvenile confidentiality provisions.³⁶ Examples of this type of legislation included statutes lowering the age at which a juvenile could be transferred to adult court and expanding the number of offenses for which one could be transferred.³⁷ Thus, it became much easier for judges to waive juvenile court jurisdiction, and prosecutors had multiple vehicles for relocating youthful offenders to adult court systems.³⁸

Consequently, the number of judicially waived persons increased 198% between 1985 and 1994.³⁹ In addition, males were much more likely to be judicially waived than females.⁴⁰ Once arriving in adult court, juveniles were given harsher penalties for their criminal behavior that more closely mirrored the sentences that adults would have received.⁴¹

C. Recent Trends

In 1978, New York Governor Hugh Carey and the public were outraged when a fifteen-year-old from Harlem, Willie Bosket, who had been convicted of killing two men and shooting a third, was sentenced to five years at a juvenile facility.⁴² Days after sentencing, Carey passed the Juvenile Offender Act of 1978, which legislatively waived entire categories of children to adult courts.⁴³ Other states soon followed suit.⁴⁴ By 1997, all fifty states had passed legislation allowing or requiring certain juveniles to be tried as adults.⁴⁵ The number of incarcerated juveniles more than doubled over the next nineteen years.⁴⁶

Despite the notable shift from the progressive movement of separating juvenile proceedings from adult proceedings, the U.S. Supreme Court has been at the forefront of juvenile justice reform through its regulation of juvenile procedures in recent years. Significant Court decisions include *In re Winship*, which established that the “beyond a reasonable doubt standard”

³⁶ MCCORD ET AL., *supra* note 21, at 204–05.

³⁷ *Id.*

³⁸ *See id.*

³⁹ Charles Puzanzchera & Sean Addle, *Delinquency Cases Waived to Criminal Court*, U.S. DEPT. OF JUST. 2 (Feb. 2014), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/243042.pdf> [<https://perma.cc/QA7S-JW3R>].

⁴⁰ *Id.* at 3.

⁴¹ KUKINO, *supra* note 18, at 11.

⁴² Eli Hager, *The Willie Bosket Case*, THE MARSHALL PROJECT (Dec. 29, 2014, 7:15 AM), <https://www.themarshallproject.org/2014/12/29/the-willie-bosket-case> [<https://perma.cc/5T7K-94NT>].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Hager, *supra* note 42.

applies in juvenile cases;⁴⁷ *Roper v. Simmons*, which prohibited sentencing juveniles to death;⁴⁸ *Graham v. Florida*, which prohibited a sentence of life without the possibility of parole for crimes excluding murder;⁴⁹ and *Miller v. Alabama*, which eliminated mandatory life sentences without the possibility of parole for juvenile offenders.⁵⁰

While advocates of juvenile justice reform criticize the process of juvenile transfer, all states currently have statutory provisions in place for transferring youth seventeen and under to criminal court.⁵¹ A description of transfer practices and specific mechanisms of transfer utilized in Kentucky, Florida, and New York is discussed below.

III. METHODS OF TRANSFER

Transfer law varies from state to state, which affects youth in many aspects depending on where they live.⁵² At least 75,900 youth under eighteen were transferred to adult court in the U.S. in 2015.⁵³ A juvenile can be transferred through different statutory methods, including judicial waiver, direct file, statutory exclusion, or “once an adult, always an adult” laws.⁵⁴

In many states, judicial waiver, the process of leaving the decision of transfer to the discretion of the juvenile court judge, is the traditional method used to try juveniles criminally.⁵⁵ Judicial waiver encompasses discretionary waiver, presumptive waiver, and mandatory waiver.⁵⁶ Forty-six states and the District of Columbia allow juvenile court judges to exercise judicial discretion over transfer of youth to adult court if youth are a certain age and have been charged with certain offenses.⁵⁷ Twelve states use presumptive waiver provisions, which presume that a judge will transfer the youth to adult court unless the youth’s counsel can meet a certain burden of proof to keep

⁴⁷ *In re Winship*, 397 U.S. 358, 368 (1970).

⁴⁸ *Roper*, *supra* note 2, at 568.

⁴⁹ *Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

⁵⁰ *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

⁵¹ Griffin et al., *supra* note 1.

⁵² *See generally id.*

⁵³ JEREE M. THOMAS & MEL WILSON, NAT’L ASS’N OF SOC. WORKERS, THE COLOR OF JUVENILE TRANSFER: POLICY & PRACTICE RECOMMENDATIONS 4 (2017), <https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0> [<https://perma.cc/BBV8-26KP>].

⁵⁴ *Id.*

⁵⁵ MCCORD ET AL., *supra* note 21, at 207.

⁵⁶ SNYDER & SICKMUND, *supra* note 30, at 3.

⁵⁷ JEREE M. THOMAS, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015-2017) 30 (Campaign for Youth Justice 2017), http://cfyj.org/images/A-StateTrends_Report-Web.pdf [<https://perma.cc/FGL4-RUS7>].

the youth in juvenile court.⁵⁸ Fourteen states utilize mandatory waiver, meaning that if the youth meets certain requirements such as age, offense, and probable cause, he or she must be transferred.⁵⁹

Statutory exclusion, another method commonly used in states, is the process of excluding youth from juvenile court by lowering the age of jurisdiction, or mandating youth charged with certain offenses be charged criminally.⁶⁰ In 2015 in the U.S., around 66,700 youth were automatically treated as adult defendants due to the statutory exclusion of juveniles over sixteen or seventeen years old.⁶¹ Furthermore, “once an adult, always an adult” laws impact youths in that if they have ever previously been tried in adult court, they will be tried in adult court for any subsequent charges or proceedings.⁶² Thirty-four states utilize this type of law.⁶³

IV. KENTUCKY

Kentucky is unique in that it only utilizes judicial waiver to transfer youth to adult court. Under Kentucky law, a discretionary waiver of transfer upon motion of the county attorney can be initiated if the youth meets the statutory requirements under Ky. Rev. Stat. Ann. § 635.020.⁶⁴ In regard to capital offenses and Class A or B felonies, the child must have attained the age of fourteen in order for the prosecutor to make the motion for transfer.⁶⁵ If the child is charged with a Class C or D felony, has one prior felony offense, and is of the age of sixteen, then the motion may be made.⁶⁶

In Kentucky, if a child has reached the age of fourteen and was charged with a felony in which a firearm, whether functional or not, was used in the commission of the offense, he or she will be transferred to circuit court if the prerequisites are met at the preliminary hearing.⁶⁷ Lastly, youths eighteen or older who allegedly committed a felony before their eighteenth birthday can be treated as adults.⁶⁸ In order to be judicially transferred, one only has to be fourteen years of age for most felony charges.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ THOMAS & WILSON, *supra* note 53.

⁶¹ *Id.*

⁶² *Id.*

⁶³ SNYDER & SICKMUND, *supra* note 30, at 2.

⁶⁴ Ky. Rev. Stat. Ann. § 640.010(2)(c) (West 2021).

⁶⁵ Ky. Rev. Stat. Ann. § 635.020(2) (West 2021).

⁶⁶ Ky. Rev. Stat. Ann. § 635.020(3) (West 2021).

⁶⁷ Ky. Rev. Stat. Ann. § 635.020(4) (West 2021).

⁶⁸ Ky. Rev. Stat. Ann. § 635.020(7) (West 2021).

After the motion for waiver is filed, the district court must conduct a preliminary hearing to determine whether a child should be transferred to adult court for trial as a “youthful offender.”⁶⁹ A youthful offender in Kentucky is treated in most respects the same as an adult.⁷⁰ The factors used to determine whether a child should be treated as a youthful offender are as follows:

- (a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020.
- (b) If the District Court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the Circuit Court:
 1. The seriousness of the alleged offense;
 2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;
 3. The maturity of the child as determined by his environment;
 4. The child's prior record;
 5. The best interest of the child and community;
 6. The prospects of adequate protection of the public;
 7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and
 8. Evidence of a child's participation in a gang.⁷¹

If the court determines that sufficient probable cause exists, the statutory criteria are met under Ky. Rev. Ann. Stat. § 635.020, and at least two of the eight determinative factors are present, the court may then use its discretion to issue an order transferring the child.⁷² All offenses arising from the same course of conduct must be tried with the felony.⁷³

Kentucky also utilizes a mandatory waiver statutory provision. The statute provides:

- (4) Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm,

⁶⁹ See Ky. Rev. Stat. Ann. § 600.020(72) (West 2021).

⁷⁰ See generally *id.*

⁷¹ Ky. Rev. Stat. Ann. § 640.010(b) (West 2021).

⁷² Ky. Rev. Stat. Ann. § 640.010(c) (West 2021).

⁷³ Ky. Rev. Stat. Ann. § 635.020(8) (West 2021).

whether functional or not, was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony.⁷⁴

This statute, in simpler terms, describes that a child may be automatically transferred if a firearm was used in the commission of a crime where probable cause was found.⁷⁵

Lastly, Kentucky utilizes reverse waiver. This gives the court the opportunity to return a child to district court as a juvenile if, after being tried in Circuit Court, a grand jury fails to return an indictment for an offense qualifying the child for treatment as a youthful offender, but instead returns an indictment for some other offense.⁷⁶

V. FLORIDA

Florida is unique because, in addition to discretionary waiver, its statute provides avenues for transfer through direct file, statutory exclusion, and “once an adult, always an adult” laws. First, the State’s Attorney can request transfer in cases involving children over the age of fourteen.⁷⁷ In such cases, the juvenile court must hold a discretionary hearing and apply a number of factors in making the transfer determination.⁷⁸ The court must support its decision with written findings of fact with respect to each factor.⁷⁹ Second, in the instance of a child who is at least fourteen and who has been adjudicated for at least three previous felonies, one of which involves possession of a firearm or violence against a person, the prosecutor will either follow direct file procedure, file a motion requesting mandatory transfer, or provide the court reason for failing to do so.⁸⁰

Florida also has the highest publicly reported number of cases in which charges against youths are directly filed in adult court.⁸¹ Under Florida’s direct file law, any child that meets the age and offense criteria can be directly

⁷⁴ Ky. Rev. Stat. Ann. § 635.020(4) (West 2021).

⁷⁵ Ky. Rev. Stat. Ann. § 635.020(4) (West 2021).

⁷⁶ See Ky. Rev. Stat. Ann. § 640.010(3) (West 2021).

⁷⁷ Fla. Stat. § 985.556(2) (2021).

⁷⁸ Fla. Stat. § 985.556(2) (2021).

⁷⁹ Fla. Stat. § 985.556(3)(b) (2021).

⁸⁰ Fla. Stat. § 985.556(3)(a) (2021).

⁸¹ THOMAS & WILSON, *supra* note 53, at 10.

sent to criminal court based on the State Attorney's "judgment and discretion" that public interest requires it.⁸² Once a child has been transferred and found to have committed the offense or a lesser included offense, the child is thereafter handled in every respect as an adult under the law.⁸³ In addition, if a child is accused of a capital offense, the State's Attorney may present the case to a grand jury and seek an indictment which, if returned, will provide that the child will be tried as an adult not only for the capital offense but also for any included offenses.⁸⁴ Finally, Florida law holds that:

(a) Once a child has been transferred for criminal prosecution pursuant to an involuntary waiver hearing and has been found to have committed the presenting offense or a lesser included offense, the child shall thereafter be handled in every respect as an adult for any subsequent violation of state law, unless the court imposes juvenile sanctions. . . .⁸⁵

This provision encompasses Florida's "once an adult, always an adult" procedure, meaning that once a juvenile is tried as an adult they will then be treated as an adult in the justice system for the remainder of their youth, no matter the crime committed.

VI. NEW YORK

Unlike Kentucky or Florida, New York does not allow judicial waiver by the court, the most common method of transfer in other states. New York law also does not allow direct file or "once an adult, always an adult" provisions. New York transfers youth primarily through its statutory exclusion law, which provides that a child who meets the statutory age and offense criteria under New York law will be excluded from juvenile court and held criminally responsible as a "juvenile offender."⁸⁶ An example of youths prosecuted and sentenced to adult time under the statutory exclusion law are the Central Park Five, who were fourteen and fifteen-year-old boys wrongfully convicted of assaulting and raping a female jogger in 1989.⁸⁷

Once a youth is determined to have met the age and offense exclusion requirements, which can be as low as thirteen for certain crimes, the juvenile offender is arraigned in criminal court, which will then conduct a hearing to

⁸² Fla. Stat. § 985.557(1)(a)-(b) (2021).

⁸³ Fla. Stat. § 985.557(2)(a) (2021).

⁸⁴ Fla. Stat. § 985.556(1) (2021).

⁸⁵ Fla. Stat. § 985.557(3)(a) (2021).

⁸⁶ N.Y. PENAL LAW § 30.00 (LexisNexis 2021).

⁸⁷ Hager, *supra* note 42.

determine whether reasonable cause exists to believe the child committed the excludable offense.⁸⁸ If the court finds that reasonable cause exists, the case is sent to a grand jury.⁸⁹ If the court finds that reasonable cause does not exist, the case is sent back to juvenile court.⁹⁰ In any case in which the court orders removal to juvenile court, it must state its reasons for doing so on the record, “in detail and not in conclusory terms.”⁹¹

While New York statutorily excludes a great amount of youth from juvenile court, it also provides juvenile offenders with an avenue for returning to juvenile court through reverse waiver procedure.⁹² The court, after motion by the juvenile offender or on its own motion, may order the removal of a statutorily excluded case back to juvenile court if, after the consideration of the following factors, it finds that removing the child would be “in the interests of justice.”⁹³ The factors the court considers are:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (f) the impact of a removal of the case to the family court on the safety or welfare of the community;
- (g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system;
- (h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
- (i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.⁹⁴

In cases of second-degree murder, first-degree rape, criminal sexual act in the first degree, or armed felonies, the court must give consent to removal and state its reasons in detail.⁹⁵ In addition, the court must find mitigating circumstances directly bearing on the way the crime was committed,

⁸⁸ N.Y. C.P.L.R. § 180.60 (CONSOL. 2021).

⁸⁹ N.Y. C.P.L.R. § 180.75 (CONSOL. 2021).

⁹⁰ *See id.*

⁹¹ N.Y. C.P.L.R. § 722.20 (CONSOL. 2021).

⁹² N.Y. PENAL LAW § 722.22 (LexisNexis 2021).

⁹³ N.Y. PENAL LAW § 722.22(1)(a) (LexisNexis 2021).

⁹⁴ N.Y. PENAL LAW § 722.22(2) (LexisNexis 2021).

⁹⁵ N.Y. PENAL LAW § 722.22(1)(b) (LexisNexis 2021).

relatively minor participation in the crime on the child's part, or possible deficiencies in proof of the crime.⁹⁶

Prior to 2017, all New York citizens sixteen and over were automatically handled criminally in adult court as juvenile offenders under New York's statutory exclusion law.⁹⁷ On April 10, 2017, New York passed its Raise the Age Bill, which provided that all minors sixteen or seventeen years old at the time they commit a crime qualify as "adolescent offenders" who should be handled in the "youth" part of the adult court where they are treated more like children than adults and are given more lenient sentencing treatment than an adult would receive.⁹⁸ In setting up the youth part of the adult court, the legislation provides that:

Judges shall receive training in specialized areas, including, but not limited to, juvenile justice, adolescent development, custody and care of youths and effective treatment methods for reducing unlawful conduct by youths and effective treatment methods for reducing unlawful conduct by youths, and shall be authorized to make appropriate determinations within the power of such superior court with respect to the cases of youth assigned to such part.⁹⁹

Additionally, under the bill, misdemeanors for adolescent offenders are always prosecuted in juvenile court.¹⁰⁰

This legislation has had a dramatic effect in the state of New York because it diverted more than 17,000 sixteen and seventeen-year-old youth accused of misdemeanors to juvenile court each year.¹⁰¹ Non-violent felony charges against adolescent offenders are now generally automatically sent to juvenile court unless the prosecution is able to show "extraordinary circumstances."¹⁰² Additionally, under the law, violent and other enumerated felonies are only subject to transfer if the prosecution can prove by a preponderance of the evidence that the defendant caused "significant physical injury," had a firearm, or engaged in sex crimes.¹⁰³ Also, the bill prohibits the placement of youth in adult jails and prisons and provides that

⁹⁶ *Id.*

⁹⁷ *Raise the Age*, OFF. FOR JUST. INITIATIVES, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/ip/oji/raisetheage.shtml> [<https://perma.cc/2HSQ-5RX5>] (last visited Mar. 20, 2021).

⁹⁸ *Id.*

⁹⁹ N.Y. PENAL LAW § 722.10(1) (LexisNexis 2021).

¹⁰⁰ *Id.*

¹⁰¹ Eli Hager, *The Fine Print in New York's Raise the Age Law*, THE MARSHALL PROJECT (Apr. 14, 2017, 2:24 PM), <https://www.themarshallproject.org/2017/04/14/the-fine-print-in-new-york-s-raise-the-age-law> [<https://perma.cc/9KAA-5XF2>].

¹⁰² N.Y. PENAL LAW § 722.23 (LexisNexis 2021).

¹⁰³ *Id.*

juvenile records should be sealed for youths with no more than two convictions, in which neither are for violent felonies, sex offenses, or Class A felonies.¹⁰⁴

New York was one of the last states to increase the age for automatically trying juveniles as adults from sixteen to eighteen.¹⁰⁵ Critics argue that the law still creates challenges for young offenders who can face adult consequences such as lengthy prison sentences and lifetime records.¹⁰⁶ Nevertheless, Governor Andrew Cuomo of New York hoped that “[b]y raising the age of criminal responsibility, the legislation will reduce crime, recidivism and costs to the state, and help us deliver on the New York promise to advance social justice and affirm our core progressive values.”¹⁰⁷

VII. ANALYSIS

This section analyzes the need for and impact of transfer law in greater depth and, more specifically, looks at the impact of methods of transfer used in Kentucky, Florida, and New York. Further, this section compares the practices utilized in each state, analyzing their specific effects on juveniles, including brain development, recidivism, and deterrence rates. Ultimately, the analysis leads to a proposal for a model statute regarding the implementation of the transfer of juveniles to adult court at the state level.

A. The Needs of the Adolescent Brain and Opportunities for Rehabilitation

As previously stated, the U.S. Supreme Court has prohibited sentences of death and mandatory life without parole for juveniles.¹⁰⁸ The reasons for this are straightforward. Beginning in the 1980s, scientists began studying teen risk-taking behavior, self-awareness, the concept of peer pressure, and personal decision-making to assess just how differently teens function in terms of human development when compared to adults.¹⁰⁹ It is generally accepted among the scientific community that teens have a propensity for risk-taking behavior, as well as higher levels of peer orientation, and that a

¹⁰⁴ THOMAS, *supra* note 57, at 26.

¹⁰⁵ Hager, *supra* note 101.

¹⁰⁶ *Id.*

¹⁰⁷ GOVERNOR'S PRESS OFF., *Governor Cuomo Signs Legislation Raising the Age of Criminal Responsibility to 18-Years-Old in New York*, N.Y. STATE (Apr. 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-raising-age-criminal-responsibility-18-years-old-new-york> [<https://perma.cc/9SVR-P7TQ>].

¹⁰⁸ *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

¹⁰⁹ Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 96 (2009).

vast majority of teens eventually outgrow delinquent behavior that may have been normal in their youth.¹¹⁰ Most often, juveniles commit crimes in groups, and studies show that the presence of peers doubles risk-taking among adolescents, increases it by fifty percent in young adults, and is an effect not seen in older adults.¹¹¹

Regarding brain development among young adults, studies show that teens are not truly able to control their impulses and their ability to assess risk until the age of twenty-five.¹¹² Professor David Pimentel poined out:

If modern parents, with support from recent neuroscience research, believe that their college-age kids are not fully self-sufficient and still need support because they cannot be trusted to manage their own lives at that stage, the same must be true of the far less privileged inner-city kids who are being prosecuted for their own lapses in judgment at these and at much younger ages. Ironically, one might expect the child from the more privileged background to be advantaged in this regard and more capable of exercising judgment thanks to the advantages of the education, safety, and security that he has had better access to over the course of his young life. But the law, at least as it now functions, is far more likely to push the underprivileged juvenile from the urban core into the regular, adult criminal justice system.¹¹³

The issue then becomes when and how courts should treat youth like kids, and when they should hold them criminally accountable as adults for their actions.

In *Roper v. Simmons*, the Supreme Court decision distinguishing children as different from adults in major ways, Justice Stevens wrote, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."¹¹⁴ Stevens drew the line at eighteen for prohibiting the imposition of the death penalty since "[it] is the point where society draws the line for many purposes between childhood and adulthood."¹¹⁵

¹¹⁰ *Id.* at 91–103.

¹¹¹ Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 91 (2008).

¹¹² David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, TEX. TECH L. REV. 71, 84 (2013).

¹¹³ *Id.* at 99.

¹¹⁴ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

¹¹⁵ *Id.* at 574.

Many states have since used the *Roper* logic and other recent juvenile case law to re-examine the appropriate age for persons to exercise various adult rights, such as raising the age for purchasing tobacco and drinking alcohol.¹¹⁶ Distinctions between ending the juvenile death penalty, mandatory life without parole sentences, and re-examination of other various adult rights all stem from the fact that juveniles are psychologically at a different stage of life than adults.¹¹⁷ They are capable of rehabilitation and thus are undeserving of sentences and felon statuses that write them off as irreparable.¹¹⁸

Those representing juveniles have frequently used adolescent brain science research to challenge transfers to adult court.¹¹⁹ For example, in *People v. Jones*,

An Illinois youth similarly argued that the transfer should be disallowed as the “same science . . . that led the Supreme Court to conclude that the incomplete brain development and resulting character attributes . . . renders the death penalty an inappropriate punishment for juveniles necessitates the conclusion that other harsh adult penalties are also inappropriate for juveniles.”¹²⁰

This argument, and most others made by juveniles in court, fails because of judicial deference to the legislative intent regarding the statutory construction of transfer laws.¹²¹

B. Environments of Restraint and Punishment

One of the four main rationales behind the American incarceration system is to rehabilitate criminal offenders.¹²² Another is punishing those offenders and keeping them off the streets in order to protect the

¹¹⁶ See generally National Minimum Drinking Age Act, 23 U.S.C.A. § 158 (West 1984); see also Madeleine Carlisle, *Federal Legal Age to Buy Tobacco Products Officially Raised to 21*, TIME (last updated Dec. 23, 2019, 4:59 PM), <https://time.com/5754266/trump-tobacco-age-21/> [<https://perma.cc/5QE9-DH9U>] (“Raising the age one can purchase the products is intended to combat what many are calling a health epidemic amongst America’s youth.”).

¹¹⁷ See generally Maroney, *supra* note 109.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 130.

¹²⁰ Maroney, *supra* note 109, at 130 (quoting Motion to Declare Defendant’s Transfer to Adult Court Unconstitutional at 7–8, 10, *People v. Jones*, (Ill. Cir. Ct., Cook County, Apr. 7, 2006)).

¹²¹ *State v. Pittman*, 647 S.E.2d 144, 161 (S.C. 2007).

¹²² DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2001), <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf> [<https://perma.cc/9477-BU6J>] (explaining that “[f]our major goals are usually attributed to the sentencing process: retribution, rehabilitation, deterrence, and incapacitation”).

community.¹²³ Legislators and advocates of transfer law point out that some juvenile offenders should not get a “get out of jail free pass” simply because of their age—a valid argument that must be addressed.¹²⁴

Juvenile courts were implemented due to “the belief that[,] because of their developing maturation, young people are by their nature uniquely amenable to rehabilitation while also being unfit subjects for punishment because their immaturity renders them neither culpable nor deterrable.”¹²⁵ Despite this view, juvenile state courts are becoming more like adult courts, with a focus on retribution.¹²⁶ By allowing youth to stay in juvenile court and be incarcerated in youth facilities, offenders are still facing significant punishment for their crimes while receiving rehabilitation and treatment through state services aimed at making them productive citizens.¹²⁷ These state services would not be received in criminal court.¹²⁸

In contrast of the United States juvenile system, England has a system that holds young offenders accountable through the use of youth incarceration and treatment, but focuses more on the goal of rehabilitation instead of punishment.¹²⁹ When comparing the United States to England, statistics “clearly indicate[] that stiffer sentences result in increased crime, while commitment to rehabilitation lead[] to a decrease in brutal crimes by juveniles.”¹³⁰ By saving transfer as a last resort for violent and unpredictable juveniles incapable of rehabilitation, the United States, like England, would better balance the policy rationales of punishment and rehabilitation.¹³¹

¹²³ See *id.* (“Deterrence emphasizes the onerousness of punishment; offenders are deterred from committing crimes because of a rational calculation that the cost of punishment is too great. . . . Incapacitation deprives people of the capacity to commit crimes because they are physically detained in prison.”).

¹²⁴ Giardino, *supra* note 15.

¹²⁵ Martin Gardner, *Youthful Offenders and the Eight Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 471–72 (2016) (footnotes omitted).

¹²⁶ Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 837 (1988) (“[D]espite persisting rehabilitative rhetoric, the dispositional practices of the contemporary juvenile court increasingly are based on the Principle of Offense and reflect the punitive character of the criminal law.”).

¹²⁷ Gardner, *supra* note 125, at 504–05 (“Although juvenile systems have become increasingly punitive, none has abandoned rehabilitation as an important goal. . . . While the juvenile system has not been widely successful in dispensing effective rehabilitation, some commentators are optimistic that meaningful treatment can occur within the system.”).

¹²⁸ *Id.* at 506–07.

¹²⁹ Amy M. Campbell, *Trying Minors as Adults in the United States and England: Balancing the Goal of Rehabilitation With the Need to Protect Society*, 19 SUFFOLK TRANSNAT'L L. REV. 345, 358 (1995).

¹³⁰ *Id.*

¹³¹ See *id.*

C. Does Transfer Truly Promote Deterrence?

As noted by Richard E. Redding, “The nationwide policy shift toward transferring juvenile offenders to the criminal court is based largely on the assumption that more punitive, adult criminal sanctions will act as a deterrent to juvenile crime.”¹³² The determination of whether the utilization of transfer truly acts as a deterrent is not a question of fact that can be definitively answered without more information than is available.¹³³ Through scientific study of the brain and following the trends of general teen behavior, many scholars show that the idea of being tried criminally does not have the same deterrent effect on youth as it does adults.¹³⁴ Overall, most studies have not found that transfer laws result in a reduction in juvenile crime, and indeed there are suggestions that these laws may be counter-productive.¹³⁵ Some point out that just like the mentally ill, juveniles are less able to make conscious decisions and are unaffected by the potential for punishment.¹³⁶ Thus, they should be sent to separate justice systems that focus on prevention rather than punishment.¹³⁷

Advocates of statutory exclusion and direct file laws argue that increased availability to judicial transfer is necessary to protect public safety.¹³⁸ By issuing adult sanctions, recidivism rates are reduced, and juveniles are deterred from committing crimes in the first place.¹³⁹ Critics argue some juveniles find juvenile court sanctions to be “relatively light” and, thus, there is a need for less of a distinction between juvenile and adult court.¹⁴⁰ To

¹³² Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency*, U.S. DEPT. OF JUST. 2 (June 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> [<https://perma.cc/NRT8-FN2Q>].

¹³³ Griffin et al., *supra* note 1, at 16.

¹³⁴ *Id.* at 26.

¹³⁵ *Id.*

¹³⁶ Corey J. Sacca, Note, *A Second Chance: Michigan's Progressive Shift in Social Policy to Rehabilitate its Mentally Ill and Juvenile Defendants*, 86 U. DET. MERCY L. REV. 559, 578 (2009).

¹³⁷ *Id.*

¹³⁸ See Hector Linares & Derwyn Bunton, *An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana's System for Juvenile Waiver*, 71 LA. L. REV. 191, 214 (2010) (“Policymakers should, however, be aware of the implications of adolescent development issues when they make rules abandoning the juvenile justice system by facilitating the funneling of juveniles into criminal court where they are subjected to rigid punitive rules and conditions designed for adults.”).

¹³⁹ *Id.* (arguing that the ineffective use or overuse of waivers can “result[] in ineffective, wasteful, and oftentimes counterproductive outcomes for the youth involved and[,] in the long-term[,] also undermine public safety”).

¹⁴⁰ Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521, 522 (1988) (“There is also some evidence that young people themselves perceive the juvenile court's sanctions to be relatively light . . . Based on such results, critics of the juvenile court argue that crime rates could be decreased if the distinction between the adult and juvenile justice systems were reduced.”); see also *id.* at 522–23 (arguing that judicial waiver and legislative exclusion are two ways to make juvenile court more like adult court).

determine which statutory schemes work most effectively and which produce the most harmful results, this Note will analyze recent effects on juvenile deterrence, recidivism, and overall policy benefits and disadvantages related to transfer laws in Kentucky, Florida, and New York.

D. Kentucky

Kentucky is different from Florida and New York because it does not utilize statutory exclusion or direct file laws, which may be a reason that it has not been identified as a problem state regarding juvenile transfer.¹⁴¹ However, Kentucky does allow children age fourteen and up to be automatically transferred if certain requirements are met,¹⁴² which some juvenile justice advocates may consider to be too young. A major problem is that Kentucky does not report transfers at all, so the data is lacking regarding deterrence and recidivism rates in the state.¹⁴³ Therefore, inferences must be made regarding its effects.¹⁴⁴

While the data may reflect inaccuracies due to non-reporting, a 2016-2018 youthful offender report showed that in Jefferson County, Kentucky, the overwhelming majority of cases transferred to adult court were first-degree robbery charges.¹⁴⁵ This is a result of Kentucky's automatic transfer law that transfers all cases involving a firearm.¹⁴⁶ Interestingly, out of 598 offenses transferred in 2016-2018, juveniles in 246 of those cases ended up pleading guilty as a way to avoid adult sentencing.¹⁴⁷ Of the two juveniles brave enough to bring their cases to trial and risk facing adult sentences, both were acquitted of all charges.¹⁴⁸

In Kentucky, a judge is always involved in the transfer process, and there is always an opportunity for a reverse waiver back to juvenile court.¹⁴⁹ Inferences can be made that the utilization of judicial discretion in Kentucky has aided the court in addressing juvenile needs on a more case-by-case basis. The Louisville (a city in Jefferson County) man I interviewed was transferred

¹⁴¹ *State Laws*, FRONTLINE: JUVENILE JUSTICE, PBS (2014), <https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/states.html> [<https://perma.cc/E9TW-V5NL>].

¹⁴² *Id.*

¹⁴³ Griffin et al., *supra* note 1, at 15.

¹⁴⁴ *Id.*

¹⁴⁵ Maria Gurren, Jefferson County Youthful Offender Analysis: 2016-2018 (2019) (unpublished presentation, Juvenile Justice Advisory Committee) (analyzing the patterns of youthful offenders in Jefferson County) (on file with the UNIVERSITY OF LOUISVILLE LAW REVIEW).

¹⁴⁶ Ky. Rev. Stat. Ann. § 635.020(4) (West 2021).

¹⁴⁷ Gurren, *supra* note 145.

¹⁴⁸ *Id.*

¹⁴⁹ See Ky. Rev. Stat. Ann. §§ 635.020, 640.010(3) (West 2021).

to adult court as a result of the automatic transfer statute. Explaining whether the transfer helped him rehabilitate, he stated, “Most of the help I got was when I was in juvenile [court],” not in the adult system.¹⁵⁰ This statement leads me to believe that, while this young man has been in no trouble since his release, adult court had no effect on his personal deterrence and recidivism rate, although lawmakers hoped it would.

E. Florida

Mishi Faruqee, an expert on juvenile justice at the American Civil Liberties Union, recently stated that Florida “continues to be the worst state for young people accused of crimes.”¹⁵¹ Between 2003 and 2008, Florida had an average annual transfer rate of 164.7 youths, with the next highest being Oregon at a shockingly lower rate of 95.6 youths.¹⁵² What is especially unique about Florida is that while ninety-eight percent of cases transferred were felonies, only forty-four percent of reported 2008 transfers were offenses against individuals, while thirty-one percent were property offenses and eleven percent were drug offenses.¹⁵³ These non-violent offense rates are abnormally high compared to most other states.¹⁵⁴ While Arizona and California have discretion laws similar to Florida’s, the federal Office of Juvenile Justice and Delinquency Prevention attributes Florida’s high transfer rates to an “aggressive use of prosecutorial discretion.”¹⁵⁵

Prosecutors play a powerful role in the Florida system because the direct file law takes judges out of the equation by precluding them from reviewing prosecutorial transfer decisions.¹⁵⁶ In 2014, Human Rights Watch (HRW) reported that ninety-eight percent of all juveniles were transferred as a result of the direct file law.¹⁵⁷ Because Florida prosecutors are vested with a higher degree of discretion, similar crimes committed by juveniles with similar histories can be treated differently depending on the prosecutor in the area

¹⁵⁰ See Interview with “J,” *supra* note 6.

¹⁵¹ Eli Hager, *The Worst State for Kids Up Against the Law*, THE MARSHALL PROJECT (Mar. 24, 2015, 2:21 PM), <https://www.themarshallproject.org/2015/03/24/the-worst-state-for-kids-up-against-the-law> [<https://perma.cc/MUR9-UA8G>].

¹⁵² Griffin et al., *supra* note 1, at 18.

¹⁵³ *Id.* at 19.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 18.

¹⁵⁶ Denise Rock, *Florida Legislature Must Stop Letting Prosecutors Charge Children as Adults*, JUV. JUST. INFO. EXCH. (Aug. 7, 2019), <https://jjie.org/2019/08/07/florida-must-stop-letting-prosecutors-charge-children-as-adults/> [<https://perma.cc/8BQR-LT32>].

¹⁵⁷ ALBA MORALES, HUMAN RIGHTS WATCH, *BRANDED FOR LIFE: FLORIDA’S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS “DIRECT FILE” STATUTE 1* (2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf [<https://perma.cc/Z5TX-J5RQ>].

where the crime occurred.¹⁵⁸ Indeed, the evidence suggests that racial bias can affect the exercise of discretion regarding certain charges as well.¹⁵⁹ While African American males make up twenty-seven percent of those who enter the juvenile justice system, they constitute more than half of the youth sent to adult courts in Florida.¹⁶⁰

The HRW report also suggested that prosecutors may threaten juveniles with being transferred to adult court in order to encourage guilty pleas in juvenile court.¹⁶¹ In mid-2009, the National Prisoner Statistics Program collected a one-day snapshot of state prison inmates being held in adult facilities who were under the age of eighteen.¹⁶² Out of 2,778 juveniles being held in adult facilities, a shocking 393 of those juveniles were located in Florida.¹⁶³ The next highest state was Arizona, holding 157 juveniles.¹⁶⁴ Unsurprisingly, judges are removed entirely from the transfer decision, seeing as it is a result of Florida's direct file statute. Alba Morales, a researcher and author of the HRW report, stated that "[t]hese decisions should be handled by Florida's juvenile judges, who can ensure fair treatment, not by prosecutors who have a vested interest in getting defendants to plead guilty or in punitive outcomes."¹⁶⁵ While there are five bills currently pending in the Florida legislature that would eliminate or limit prosecutorial power, no changes have yet been enacted.¹⁶⁶

A 1987 study compared the recidivism rates of 2,738 juvenile offenders who were transferred to adult courts in Florida to that of a matched sample of juveniles with similar backgrounds who remained in the juvenile system.¹⁶⁷ It revealed that "transfer actually aggravated short-term recidivism."¹⁶⁸ Considering rearrest information through 1994, all seven classes of offense groups in the adult transfer category recidivated at higher rates than the non-transfer groups.¹⁶⁹ "Overall, the results suggest that Florida

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.* at 5.

¹⁶² Griffin et al., *supra* note 1, at 25.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Meredith Clark, *Report: Florida Leads the Nation on Charging Kids as Adults*, MSNBC (Apr. 11, 2014, 4:31 PM), <http://www.msnbc.com/msnbc/florida-charging-kids-adults> [<https://perma.cc/9WLL-QNQU>].

¹⁶⁶ Hager, *supra* note 151.

¹⁶⁷ Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996), <https://www.prearesourcecenter.org/sites/default/files/library/transferofjuvenilestocriminalcourt.pdf> [<https://perma.cc/SWU4-NNZE>].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

transfers have had little deterrent value. Nor has it produced any incapacitative benefits that enhance public safety."¹⁷⁰

F. New York

New York has reformed its juvenile transfer statutory law throughout the years; therefore, there are multiple studies and conclusions that come from the state that are helpful to this analysis. One analysis that compares juvenile arrest rates between 1974 and 1984 found that a 1978 New York juvenile offender law that automatically sent violent juvenile offenders to adult courts had no deterrent effect on violent juvenile crime.¹⁷¹ The authors of the study suggested that the most likely explanation for the lack of reduction in crime rates is that "juveniles were not responsive to its provisions" and "may have not been deterred by the increased certainty and severity of punishment promised by the law."¹⁷²

In 1996, a cross-jurisdictional study conducted by Jeffery Fagan examined deterrent effects and recidivism rates for juveniles charged with either felony robbery or burglary in juvenile courts in New Jersey versus juveniles with similar demographics and social and cultural characteristics, whose cases went to adult court as a result of statutory exclusion laws.¹⁷³ Fagan found, "For robbery offenders, rearrest rates were higher for cases adjudicated in criminal court. However, rearrest rates did not differ for burglary offenders by court jurisdiction. The pattern was similar for reincarceration."¹⁷⁴

Based on the study, Fagan concluded that criminalizing juveniles and sentencing them to longer incarceration periods than would be given in juvenile courts does not increase accountability, provide for more effective punishment, or lower recidivism rates.¹⁷⁵ Actually, Fagan asserted that "there may be a negative return on criminalizing adolescent crime. The effects on case outcomes may be quite the opposite from what was intended. . . ."¹⁷⁶ Fagan emphasized that "rather than affording greater community protection, the higher recidivism rates for the criminal court cohort suggest that public safety was in fact compromised by adjudication in those courts."¹⁷⁷

¹⁷⁰ *Id.*

¹⁷¹ Singer & McDowall, *supra* note 140, at 531.

¹⁷² *Id.* at 533.

¹⁷³ Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77, 86 (1996).

¹⁷⁴ *Id.* at 92.

¹⁷⁵ *Id.* at 98.

¹⁷⁶ *Id.* at 100.

¹⁷⁷ *Id.*

As previously mentioned, in 2017 New York passed a Raise the Age Bill in efforts to narrow the avenue for statutory juvenile transfer.¹⁷⁸ The New York Raise the Age Task Force determined that, after implementing the Raise the Age Bill and reviewing available data, youths overall are receiving intervention and services to address their needs in juvenile court and, therefore, rates of recidivism have been reduced.¹⁷⁹ The task force explained that sixteen-year-olds charged with misdemeanors now remain in juvenile court, which creates more opportunity for “adjustment, diversion, and other interventions to support their rehabilitation.”¹⁸⁰ Most sixteen-year-olds charged with felonies are no longer receiving a permanent criminal record, “which would create future barriers to employment, education, and housing.”¹⁸¹ The remaining offenders that are being sent to the youth division of criminal court are now provided with specialized resources that were not available before.¹⁸² Overall, New York has seen great success with implementing the new law that keeps juveniles out of adult court.

VIII. RECOMMENDATION

Kentucky, Florida, and New York all currently utilize distinct statutory regulations for juvenile transfer. This section offers model statutory provisions for all states to consider to improve their current systems for juvenile prosecution. The proposed statutory provisions include proscribed methods of transfer, along with a description of other legal provisions that should be implemented in each state’s criminal code. These proposed laws and other statutory considerations are written with the goal of best serving juvenile offenders, members of the community, and the court and its resources.

A. Definition of Terms

1. Model Statutory Provision

(1) “Child” means any person who has not reached his or her eighteenth birthday.¹⁸³

¹⁷⁸ See OFF. FOR JUST. INITIATIVES, *supra* note 97.

¹⁷⁹ First Annual Report, Raising the Age of Criminal Responsibility, N.Y. STATE RAISE THE AGE IMPLEMENTATION TASK FORCE 6 (Aug. 2019), https://www.ny.gov/sites/ny.gov/files/atoms/files/NYS_RTA_Task_Force_First_Report.pdf [<https://perma.cc/G9GN-K9W7>].

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Ky. Rev. Stat. Ann. § 600.020(9) (West 2021).

- (2) “Eligible youth” means a youth who is eligible to be found a youthful offender.¹⁸⁴
- (3) “Firearm” means any weapon which will expel a projectile by the action of an explosive.¹⁸⁵
- (4) “Youthful offender” means any person, regardless of age, transferred to adult court and subsequently convicted in adult court.¹⁸⁶

2. Reasoning for Statutory Language

These four definitions provide background and context for the statutory interpretation of the following provisions. Much like most current state statutory definitions, a “child” is anyone who has not reached his or her eighteenth birthday.¹⁸⁷ This is an important distinction, as some states automatically treat children younger than eighteen as adults for prosecutorial purposes.¹⁸⁸ A “youthful offender” is any “eligible youth” who is transferred to adult court and subsequently convicted.¹⁸⁹

B. Discretionary Waiver as the Sole Method of Transfer

1. Model Statutory Provision

- (1) If, prior to an adjudicatory hearing, there is a reasonable cause to believe that a child before the court has committed a felony, a misdemeanor, or a violation that corresponds with the following provisions of this chapter, the court shall hold a preliminary hearing to determine if the eligible youth should be transferred to adult court as a youthful offender.¹⁹⁰
- (2) If a child charged with a capital offense, Class A felony, or Class B felony had attained age sixteen (16) at the time of the alleged commission of the offense, the county attorney filed a motion made prior to adjudication, and the county attorney has consulted with the Commonwealth’s attorney.¹⁹¹
- (3) If a child charged with a Class C or Class D felony has on one (1) prior

¹⁸⁴ N.Y. PENAL LAW § 720.10(2) (West 2021).

¹⁸⁵ See Ky. Rev. Stat. Ann. § 237.060(2) (West 2021).

¹⁸⁶ See Ky. Rev. Stat. Ann. § 600.020(7) (West 2021).

¹⁸⁷ See *id.* at § 600.020(9).

¹⁸⁸ *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. OF STATE LEG., <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> [https://perma.cc/3S9R-4KHR] (last visited Jan. 12, 2020).

¹⁸⁹ N.Y. PENAL LAW § 720.10(2) (West 2021); Ky. Rev. Stat. Ann. § 600.020(72) (West 2021).

¹⁹⁰ See Ky. Rev. Stat. Ann. § 635.020(1).

¹⁹¹ See *id.* at § 635.020(2).

separate occasion been adjudicated as a youthful offender for a felony offense, and had attained the age of sixteen (16) at the time of the alleged commission of the offense, the county attorney filed a motion made prior to adjudication, and the county attorney has consulted with the Commonwealth's attorney.¹⁹²

(4) If a child who is charged under subsection (2) of this section is also charged with a Class C or D felony, a misdemeanor, or a violation arising from the same course of conduct, then the child may have all charges included in the same proceeding; the county attorney must file a motion prior to adjudication, and the county attorney must consult with the Commonwealth's attorney.¹⁹³

(5) If a person who is eighteen (18) or older and before the court is charged with a felony that occurred prior to his eighteenth birthday, the county attorney filed a motion made prior to adjudication, and the county attorney has consulted with the Commonwealth's attorney.¹⁹⁴

(6) First-time offenders, otherwise eligible for discretionary transfer, involved in conspiracy cases with co-defendants, are ineligible for transfer if not one of the most culpable offenders. Determining the most likely culpable offenders is at the judge's discretion.

...
(a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, that the child is of sufficient age, and that the child fits provisional requirements contained in (2)–(6) of the model statute.¹⁹⁵

(b) If the court determines that probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to adult court:

1. The seriousness of the alleged offense;
2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;
3. The evidence of guilt, whether admissible or inadmissible at trial;
4. The child's prior record;
5. The best interest of the child and community; and
6. The likelihood of reasonable rehabilitation of the child by the use of

¹⁹² See *id.* at § 635.020(3).

¹⁹³ See *id.* at § 635.020(6).

¹⁹⁴ See *id.* at § 635.020(7).

¹⁹⁵ See *id.* at § 640.010.

procedures, services, and facilities currently available to the juvenile justice system.¹⁹⁶

(c) The court must find that three of the six factors exist in support of transfer to adult court.

2. Reasoning for Statutory Language

The language of this statute is derived from Kentucky's discretionary waiver provisions and New York's reverse waiver provision.¹⁹⁷ Since the sole method of transfer would be discretionary, states would no longer utilize statutory exclusion and direct file laws that have been shown to send mass amounts of juveniles to adult prisons each year for non-violent offenses. The idea behind this alternative is that it leaves transfer decisions in the sole discretion of the judge—eliminating prosecutors from the equation—which is a major issue in states such as Florida.¹⁹⁸ This statute ultimately reserves transfer as a last resort for juveniles sixteen and older who are least likely to benefit from juvenile system services, and from whom the community has a need to be shielded.¹⁹⁹

This model statute additionally removes transfer factors that reflect racial and economic bias. Unlike the current Kentucky provision, the model statute provides that courts should refuse to consider a juvenile's "maturity" and "participation in a gang."²⁰⁰ The reason for these exclusions is that children are not the same as adults in many respects, and inflicting harsher treatment and penalties upon mainly Black, inner-city children does not aid in deterrence, recidivism, or rehabilitation, but actually has the opposite effect.²⁰¹ This alternative would additionally exclude first-time offenders in violent crime conspiracy cases, in instances where juveniles are not the most culpable offenders, from eligibility for transfer. This exclusion addresses the issue of peer-pressure among teens and young adults when committing offenses. These specific youth are more than capable of rehabilitation, and treatment otherwise is an abuse of government authority:

¹⁹⁶ See *id.* at § 640.010 (a)–(b); N.Y. PENAL LAW § 722.22(2) (West 2021).

¹⁹⁷ See Ky. Rev. Stat. Ann. § 635.020 (West 2021); see also *id.* at § 640.010(a)–(b); N.Y. PENAL LAW § 722.22(2) (West 2021).

¹⁹⁸ Griffin et al., *supra* note 1, at 18.

¹⁹⁹ KUKINO, *supra* note 18, at 53.

²⁰⁰ See Ky. Rev. Stat. Ann. § 640.010(b)(3), (8) (West 2021).

²⁰¹ See generally Griffin et al., *supra* note 1; see also THOMAS & WILSON, *supra* note 53.

C. Opportunity for Reverse Waiver Back to Juvenile Court

1. Model Statutory Provision

(1) If the child is transferred to adult court and the grand jury does not find that there is probable cause to indict the child as a youthful offender, but does find that there is probable cause to indict the child for another criminal offense, the child shall not be tried as a youthful offender in adult court and shall be returned to juvenile court.²⁰²

(2) The court, after motion by the juvenile offender, or its own motion, may order removal of a discretionarily transferred case back to juvenile court if, after the reconsideration of the discretionary factors, it finds that removing the child back to juvenile court would be “in the interests of justice.”²⁰³

2. Reasoning for Statutory Language

Again, borrowing from Kentucky and New York’s reverse waiver provisions, this model statute gives courts an avenue that appropriately sends juveniles back to juvenile court when probable cause does not exist, or the judge who approved the transfer was wrong in their discretion.²⁰⁴ Ultimately, adopting reverse waiver provisions gives states more flexibility in addressing the specific, case-by-case needs of juveniles regarding rehabilitation and community protection and saves adult court resources when they are not truly needed.

D. Procedure for Incarceration

1. Model Statutory Provision

(1) If convicted in the adult court, the youthful offender shall be subject to the same penalties as an adult offender, except that until he reaches the age of eighteen (18) years, the youthful offender shall be confined in a facility or program for juveniles or youthful offenders. If an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court. At that time, the sentencing court shall make one (1) of the following determinations:

²⁰² See Ky. Rev. Stat. Ann. § 640.010(3) (West 2021).

²⁰³ See N.Y. PENAL LAW § 722.22(1)(a) (West 2021).

²⁰⁴ See Ky. Rev. Stat. Ann. § 640.010(3); see also N.Y. PENAL LAW § 722.22 (West 2021).

(a) Whether the youthful offender shall be placed on probation or conditional discharge;

(b) Whether the youthful offender shall be returned to the Department of Juvenile Justice to complete a treatment program, in which the treatment program shall not exceed the youthful offender's attainment of the age of eighteen (18) years and five (5) months. At the conclusion of the treatment program, the individual shall be returned to the sentencing court for a determination under paragraph (a) or (c) of this subsection; or

(c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections.²⁰⁵

2. Reasoning for Statutory Language

Many states, such as Florida, currently allow juveniles to be incarcerated in adult prisons before reaching the age of eighteen.²⁰⁶ While adult prisons can serve purposes related to rehabilitation and incarceration, this model statute better protects the physical safety and mental health of juvenile offenders by requiring that juvenile offenders prosecuted as adults must be housed in juvenile facilities until at least their eighteenth birthdays, when conditions of their sentences can be re-evaluated.²⁰⁷ This process shall be followed for all youthful offenders.

E. Other Statutory Considerations

In addition to the above model statutory language, state legislators should also consider implementing the following statutory provisions. First, as with New York, states should handle transferred cases in a "youth part" of adult court where judges, prosecutors, and defense attorneys have been specially trained in the specific needs of youthful offenders.²⁰⁸ This provision gives judges, who are specially trained in dealing with young offenders, greater discretion in imposing appropriate alternative sentencing and allows juveniles to be surrounded by a system of individuals who best understand them and their needs.²⁰⁹

Second, social workers involved in cases in family and juvenile court should remain engaged in cases when an assigned youth has been charged in

²⁰⁵ See Ky. Rev. Stat. Ann. § 635.020(4); see also Ky. Rev. Stat. Ann. § 640.030(2).

²⁰⁶ MORALES, *supra* note 157, at 4.

²⁰⁷ *Id.* at 97.

²⁰⁸ See N.Y. PENAL LAW § 722.10(1).

²⁰⁹ *Id.*

adult court.²¹⁰ Pre-existing or active abuse, neglect, abandonment, or custody challenges can affect the behavior and development of youth who are prosecuted, and the presence of social workers and their advocacy for appropriate treatment recommendation is necessary for judges to most accurately make a case-by-case transfer and sentencing determination.²¹¹

Lastly, to combat increased recidivism rates in juveniles transferred to adult court, legislators should allow for the expungement of criminal records upon completing sentences for crimes committed by those seventeen and under.²¹² Currently, juveniles sentenced as adults are labeled felons for life, rendering them unable to vote, obtain employment, or register for certain beneficial programs.²¹³ This practice directly defies the point of a juvenile system and the idea that youth are capable of rehabilitation. Allowing for expungement will ultimately incentivize juveniles to participate in completing alternative sentencing programs to gain a clean record and a chance for a new start.²¹⁴

IX. CONCLUSION

Juvenile transfer was created to produce a more “punitive approach” that would encourage deterrence and lower recidivism rates among juveniles and protect the community from dangerous offenders.²¹⁵ Instead of accomplishing its intended result, transferring large numbers of juvenile offenders to adult court each year has wasted judicial resources, damaged juveniles physically and mentally, and decreased public safety for decades.²¹⁶ While progress toward narrowing the system of juvenile transfer and abolishing the “super predator” mindset has slowly gained ground over the years, much remains to be done. Legislators should consider adopting a transfer system that raises the age of transfer eligibility, places the authority for transfer solely within the discretion of the courts, and makes juvenile transfer a last resort to best serve the needs of all members of society.

²¹⁰ THOMAS & WILSON, *supra* note 53, at 15.

²¹¹ *Id.*

²¹² MORALES, *supra* note 157, at 7.

²¹³ *See generally* Interview with “J,” *supra* note 6.

²¹⁴ *Id.*

²¹⁵ KUKINO, *supra* note 18, at 64.

²¹⁶ *Id.*

