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CHILDREN ARE DIFFERENT: THE NEED FOR REFORM OF VIRGINIA'S JUVENILE TRANSFER LAWS

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ABSTRACT

In Virginia, there are three ways that a juvenile can be sent to the adult criminal justice system: discretionary waiver, certification (direct file), and mandatory waiver through transfer and certification, but there are no ways to be sent back to the juvenile criminal justice system if that would be more appropriate. Once a juvenile enters the adult criminal justice system, they are subject to more significant sentences and collateral consequences. This increased punishment is counterproductive because, as the Supreme Court recognized in Roper, Graham, and Miller, juveniles are less culpable for the crimes they commit and more likely to be rehabilitated when placed in a juvenile justice facility. Therefore, Virginia should reform their juvenile transfer laws in order to effectuate the purposes outlined in Roper, Graham, and Miller. This paper suggests that Virginia can do so by abolishing direct file and mandatory waiver outright, allowing for reverse waivers in all cases, and raising the appropriate age of transfer.

INTRODUCTION

In 1966, in *Kent v. United States*, the Supreme Court of the United States held that it was constitutional for a juvenile to be transferred to adult court so long as the juvenile received a hearing prior to the transfer and the juvenile court found certain facts to justify the transfer.¹ Around 1995, due to rising youth crime rates, critics of the juvenile system determined the juvenile court sanctions were not punitive enough and called for a toughening of Virginia's juvenile justice system.² In response to these critics and their demands for greater accountability, Virginia enacted two bills that emphasized accountability for youth offenders and made it easier to try youths as adults.³ This new legislation reduced judicial discretion over transfer decisions and increased prosecutorial authority to try youths as adults without judicial review.⁴

In Virginia, there are three different ways that a juvenile can be sent to the adult criminal justice system: discretionary waiver, certification (direct

¹ *Kent v. United States*, 383 U.S. 541, 557 (1966).

² *JUVENILE LAW AND PRACTICE IN VIRGINIA* 5 (Angela A. Ciolfio & Julie E. McConnell eds., 5th ed. 2018).

³ *Id.* at 6.

⁴ *Id.*

file), and mandatory waiver through transfer and certification.⁵ When a juvenile is transferred from juvenile court to adult court, they are faced with unique consequences that can have far-reaching and long-term implications on the juvenile's life.⁶ The juvenile loses many protections when they move to adult court, such as the confidentiality of juvenile court and the discretion of the judge in sentencing.⁷ Therefore, transfer to adult court is a decision that should be considered carefully by all actors in the system.⁸ Virginia is in the minority of states that does not allow "reverse waiver" after the case has been direct filed to adult court, meaning that once the case has been moved to adult court, it cannot be moved back to juvenile court, even if the circuit court judge wanted to do so.⁹

However, this is a counterproductive practice because once a juvenile is transferred out of juvenile court and into adult court, they face much different consequences, including higher punishment and developmental costs.¹⁰ Research shows that the brain does not stop maturing until the early twenties in the parts that govern impulsivity, judgment, planning for the future, and foresight of consequences.¹¹ Juveniles are ultimately less culpable than adults and should not face the same harsh consequences that adults do.¹²

⁵ VA. CODE § 16.1-269.1 (2018).

⁶ EDWARD P. MULVEY & CAROL A. SCHUBERT, U.S. DEP'T OF JUSTICE, TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT 2 (2012), <https://www.ojjdp.gov/pubs/232932.pdf>.

⁷ Laws Regarding the Prosecution of Juveniles as Adults 4 (Feb. 24, 2012) (on file with the Va. Dep't of Educ.), http://www.doe.virginia.gov/administrators/superintendents_memos/2012/057-12a.pdf.

⁸ See MULVEY & SCHUBERT, *supra* note 6 (explaining many of the costs on the juvenile of transferring the juvenile out of juvenile court and into adult court).

⁹ *Fact Sheet: Direct File*, CAMPAIGN FOR YOUTH JUST., http://www.campaignforyouthjustice.org/images/factsheets/Direct_file_fact_sheet_Final_1_2.pdf (last visited Feb. 8, 2019); see VA. CODE § 16.1-269.6 (2018). This code provision only allows reverse waiver for transfer decisions from juvenile court to circuit court only for subsection A transfers, meaning if the case is direct filed or transferred through mandatory waiver, there is no chance for reverse waiver.

¹⁰ MULVEY & SCHUBERT, *supra* note 6 (explaining many of the costs on the juvenile of transferring the juvenile out of juvenile court and into adult court).

¹¹ See JUVENILE JUSTICE CTR., AM. BAR ASS'N, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 1-2 (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

¹² *Id.*

This analysis of Virginia's statutory scheme for the transfer of juveniles is divided into four parts. Part I will describe Virginia's statutory scheme regarding juvenile transfer. Part II will explain the consequences of juveniles being tried as adults in Virginia, including ancillary charges, the "Once an Adult, Always an Adult" statutory provision, sentencing ramifications, and the impact of adult jails and prisons on juveniles. Part III will describe why juveniles should not be treated the same as adults following *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, which acknowledged a juvenile's underdeveloped sense of responsibility, their increased vulnerability to outside negative influences, and their undeveloped character and sense of self. Part IV will describe possible remedies and alternative systems that Virginia could implement to better accommodate the concerns raised by research currently describing juvenile offenders in this country.

I. SUMMARY OF VIRGINIA'S STATUTORY SCHEME FOR JUVENILE TRANSFER

A juvenile can only be transferred to adult court if they are at least fourteen years old.¹³ There are three methods to transfer a juvenile from juvenile court to adult circuit court: judicial discretionary waiver, certification, and mandatory waiver. Each of these methods has its own statutory requirements.

A. Judicial Discretionary Waiver

One of the ways that a juvenile can be transferred to adult court is using discretionary waiver.¹⁴ If a juvenile is fourteen years of age or older at the time of an alleged offense and is charged with an offense which would be a felony if committed by an adult, the Commonwealth's Attorney may ask to transfer the case to adult court.¹⁵ Under discretionary waiver, the juvenile court must hold a transfer hearing.¹⁶ After the transfer hearing, the court may transfer the case to circuit court if it finds that (1) notice has been given to the required parties; (2) probable cause was found to believe that the child committed the alleged offense or a lesser included felony; (3) the juvenile is competent to stand trial;¹⁷ and (4) the court finds by a preponderance

¹³ VA. CODE § 16.1-269.1(A-C) (2018).

¹⁴ *Id.* at § 16.1-269.1(A).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 16.1-269.1(A)(3) (explaining that the juvenile is presumed to be competent, and the burden is on the juvenile to rebut the presumption by a preponderance

ance of the evidence that the juvenile is not a proper person to remain in the jurisdiction of the juvenile court.¹⁸ The statute lists many factors the court can consider when determining whether the juvenile is a “proper person” to remain in the jurisdiction of the juvenile court.¹⁹

If the juvenile’s case is transferred using discretionary waiver, the juvenile may appeal the decision in circuit court and attempt to have the case transferred back to juvenile court.²⁰ If the Commonwealth’s Attorney’s petition to have the case sent to adult court is denied, the attorney can appeal the decision to the adult circuit court, if it is in the public interest to do so.²¹

B. Certification (Direct File)

Another way the juvenile can be transferred to adult court is through certification.²² In many states, this is known as direct file. In Virginia, the Commonwealth’s Attorney may choose to try the youth as an adult if the youth is charged with certain crimes.²³ The Commonwealth’s Attorney must provide written notice of their intent to try the juvenile as an adult and a hearing must be held.²⁴ The juvenile has the burden of showing that he or she is not competent.²⁵ If the juvenile court finds that the juvenile is at least fourteen years old, the prosecutor has provided written notice of wanting to try the juvenile as an adult, and there is probable cause that the juvenile committed the crime, the charge is then certified to circuit court.²⁶ If these

of the evidence).

¹⁸ *Id.* at § 16.1-269.1(A)(4).

¹⁹ *Id.* The factors for the court to consider are: the juvenile’s age; the seriousness and number of alleged offenses; whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation; the availability of services in both systems; the juvenile’s record; whether the juvenile has previously fled from any juvenile correctional facility; the juvenile’s school record and education; the juvenile’s mental and emotional maturity; and the juvenile’s physical condition and physical maturity.

²⁰ *Id.* at § 16.1-269.4.

²¹ *Id.* at § 16.1-269.3.

²² *Id.* at § 16.1-269.1(C).

²³ *Id.* The crimes that allow for direct file include murder, felonious injury by mob, abduction, malicious wounding, malicious wounding of a law-enforcement officer, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, or object sexual penetration.

²⁴ *Id.*

²⁵ *Id.* at § 16.1-269.1(A)(3).

²⁶ *Id.* at § 16.1-269.1.

requirements are met and the charge is certified to circuit court, the adult court judge has no discretion to reinstate the juvenile court's jurisdiction.²⁷

C. Mandatory Waiver

The final way a juvenile can be transferred to adult court is through mandatory waiver.²⁸ If a juvenile is charged with murder or aggravated malicious wounding and the legal requirements for certification are met in a hearing (competence, fourteen years old, written notice of wanting to try the youth as an adult, and there is probable cause), the juvenile is required to be charged as an adult.²⁹ If the requirements are met, the adult court judge, again, has no discretion to reinstate the juvenile court's jurisdiction.³⁰

II. CONSEQUENCES OF TRYING JUVENILES AS ADULTS IN VIRGINIA

When a juvenile is transferred to adult court, the juvenile may face drastically different consequences than they would if their case were adjudicated in juvenile court. For example, consider two youth who are charged with possession of marijuana, both under the exact same circumstances, at the exact same time and place. The juvenile court decides to retain jurisdiction over one of the youths, but, after a transfer hearing, the court decides to transfer the other to adult court. The juvenile who was charged and adjudicated delinquent in juvenile court may only be subject to drug testing, have to undergo substance abuse treatment, and be put on probation, never having to ever enter a jail cell.³¹ However, the youth who was tried and convicted as an adult may now have to spend thirty days confined in adult jail,³² while getting no treatment, along with an adult criminal record that follows him for the rest of his life. These two juveniles committed the exact same crime, yet one of them could spend thirty days in adult jail, with other adults, and the other will not.

When a juvenile is transferred to adult court, they not only face the possibility of higher sentences but also many other collateral consequences.³³

²⁷ *Id.* at § 16.1-269.6(C) (allowing reverse waiver only for cases transferred only through a subsection A discretionary waiver).

²⁸ *See id.* at § 16.1-269.1(B).

²⁹ *Id.* at § 16.1-269.1(A–D) (§ 16.1-269.1(D) allows reverse waivers only for cases transferred through § 16.1-269.1(A), a discretionary waiver).

³⁰ *Id.* at § 16.1-269.1(D).

³¹ *Id.* at § 16.1-278.8:01.

³² *Id.* at § 18.2-250.1(A).

³³ MULVEY & SCHUBERT, *supra* note 6 (discussing the collateral consequences of

The four main consequences of trying juveniles as adults in Virginia are the additional transfer of ancillary charges, Virginia's "Once an Adult, Always an Adult" statutory provision, sentencing implications, and the impact of adult prisons on a juvenile.

A. Ancillary Charges

Once a juvenile has been transferred to adult court through direct file or mandatory waiver on one qualified charge, other related charges of delinquency arising out of the same act will also be transferred to adult court.³⁴ These charges are called ancillary charges.³⁵ This results in the juvenile court being divested of their jurisdiction regarding those less serious charges.³⁶ Therefore, even if those less serious charges alone would not usually place the juvenile in adult court, those charges will now also be decided in adult court,³⁷ which will result in higher penalties and other collateral consequences for the juvenile.³⁸

B. Once an Adult, Always an Adult

Virginia is one of the many states that has a statutory provision referred to as "Once an Adult, Always an Adult."³⁹ In addition to ancillary charges being brought to adult court, if the juvenile is certified or transferred to adult court and then tried and convicted in adult court, the juvenile court loses jurisdiction over that juvenile for all subsequent offenses committed by that juvenile in the future, even if the child is still under the age of eighteen when those offenses are committed.⁴⁰ From that conviction on, the juvenile will always be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal act.⁴¹ This includes charges that are pending at the time the juvenile is convicted, no matter how

transferring juvenile defendants to adult court such as psychological and developmental disruptions, possibility of harsher punishment, and victimization).

³⁴ VA. CODE § 16.1-269.1(D) (2018).

³⁵ *Id.* at § 16.1-228.

³⁶ *Id.* at § 16.1-269.1(D).

³⁷ *Id.*

³⁸ MULVEY & SCHUBERT, *supra* note 6.

³⁹ *See* VA. CODE § 16.1-271 (2018).

⁴⁰ *Id.*

⁴¹ *Id.*

serious these charges are, and the judge can sentence the juvenile using the adult sentencing guidelines.⁴²

C. Sentencing

Typically, in the juvenile court, the judge has many options for recourse when a juvenile is found to be delinquent, including: probation, requiring the juvenile and/or their parents to participate in certain programs and receive certain treatment, or pay a fine.⁴³ However, if the juvenile is being sentenced in adult court, the judge has much less discretion than the broad discretion that is available to juvenile court judges.⁴⁴ If the juvenile is convicted in adult court of a misdemeanor rather than a felony, the court may decide to sentence the juvenile in accordance with any of the options available to the juvenile court.⁴⁵

However, a juvenile convicted of a violent felony in adult court may receive the same sentence as an adult convicted of the same crime, which means that the juvenile could be sent straight to adult prison to serve a full sentence with adults.⁴⁶ The court may also sentence the juvenile to serve part of the sentence in a juvenile facility, with the remainder of the sentence to be served in an adult prison with adult inmates.⁴⁷ This is called a blended sentence. Additionally, the court may sentence the juvenile to a suspended sentence, in which the judge would sentence the juvenile to a juvenile correctional facility for one sentence as well as an adult facility for an additional sentence, but the adult sentence would be suspended, conditioned upon successful completion of the juvenile sentence.⁴⁸ Thus, if the juvenile behaves well and successfully completes the juvenile sentence, along with any other conditions,⁴⁹ the juvenile will not have to serve the adult portion of the sentence.⁵⁰

⁴² *Id.*

⁴³ *Id.* at § 16.1-278.8.

⁴⁴ *Id.* at § 16.1-272.

⁴⁵ *Id.* at § 16.1-272(A)(3).

⁴⁶ *Id.* at § 16.1-272(A)(1)(ii).

⁴⁷ *Id.* at § 16.1-272(A)(1)(i).

⁴⁸ *Id.* at § 16.1-272(A)(1)(iii).

⁴⁹ *Id.* The court may impose any of the dispositional options available in juvenile court in addition to requiring the juvenile to serve actual time in a juvenile correctional facility; therefore, the judge may also require probation, certain treatment programs, etc. as additional conditions for a blended sentence.

⁵⁰ *Id.* at § 16.1-272(A)(1).

A juvenile convicted of a non-violent felony may be sentenced as an adult, or the court also has the discretion to sentence in accordance with any of the options available to the juvenile court.⁵¹ The court may impose a suspended sentence for non-violent felonies as well.⁵² However, if the juvenile is convicted of a felony that includes a mandatory minimum sentence required by statute, the juvenile must serve at least that minimum time in an adult prison.⁵³ Because many of the juveniles who are being tried in adult court are charged under statutory provisions that do have mandatory minimums, spending time in an adult prison is a high probability for many juveniles.

D. The Effect of Adult Prisons on Juveniles

If a juvenile is convicted after being transferred to adult court, a judge may sentence the child to time in adult prison,⁵⁴ even though the effect of incarcerating a juvenile in an adult prison may be detrimental to the child.⁵⁵ When a juvenile is incarcerated with adults, “they are exposed to an older, stronger, more seasoned and more violent group of offenders over an extended period.”⁵⁶ This reality, though, does not prevent thousands of youth from being confined with adults in adult facilities rather than in juvenile facilities.⁵⁷

“Transferring juveniles and incarcerating them with adults increases the likelihood of recidivism.”⁵⁸ When juveniles are incarcerated in adult facilities, they are taught advanced criminal techniques by adult offenders and make more adult criminal contacts.⁵⁹ “The juvenile re-arrest rate after being released from adult prisons is higher than the re-arrest rate for juveniles in-

⁵¹ *Id.* at § 16.1-272(A)(2).

⁵² *See id.*

⁵³ *See Commonwealth v. Brown*, 688 S.E.2d 185, 193 (Va. 2010) (holding the mandatory minimum sentencing provisions of the statute control over the juvenile sentencing options of § 16.1-272).

⁵⁴ VA. CODE § 16.1-272(A)(1) (2018).

⁵⁵ MULVEY & SCHUBERT, *supra* note 6, at 2–3.

⁵⁶ Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 139 (2000).

⁵⁷ Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1447 (2012).

⁵⁸ Amanda M. Kellar, *They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U.L. REV. 155, 156 (2006).

⁵⁹ *Id.* at 172.

carcerated in youth-only facilities.”⁶⁰ Thus, incarcerating juveniles with adults does not satisfy the goal of deterrence.⁶¹

Additionally, juveniles in adult prisons are much more likely to be victims of violent crimes, “7.7 times more likely to commit suicide...five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than their counterparts in juvenile justice facilities.”⁶² Furthermore, these adult facilities do not have employees trained to work with young offenders.⁶³ Juveniles will also have fewer educational opportunities in an adult prison compared to those in juvenile facilities and will face an increased lack of employment opportunities upon release.⁶⁴

Research shows that children involved in the system have higher rates of suicidality, trauma, and other mental disorders.⁶⁵ As the “tough on crime” movement continued, public mental health services for children decreased, and this led to more juveniles entering the criminal justice system as opposed to receiving treatment.⁶⁶ Juveniles in adult facilities also “have higher rates of paranoid ideation, depression, [and] psychoticism.”⁶⁷ Additionally, many juvenile offenders have anxiety disorders, such as post-traumatic stress disorder.⁶⁸ Research shows “that long-term confinement in the justice system...is detrimental to mental health.”⁶⁹ However, a juvenile’s chance of receiving any mental health treatment in an adult prison are extremely unlikely.⁷⁰

⁶⁰ *Id.*

⁶¹ *Id.* at 177.

⁶² *Id.* at 171.

⁶³ *Id.* at 172.

⁶⁴ *Id.* at 171–72.

⁶⁵ Divya Kiran Chhabra, *Mental Health and the Juvenile Justice System: Where Has History Taken Us?*, AM. J. PSYCHIATRY RESIDENTS’ J. 2, 2 (2017).

⁶⁶ *Id.*

⁶⁷ Wendy N. Hess, *Kids Can Change: Reforming South Dakota’s Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 327 (2014) (citing MACARTHUR FOUND. RES. NETWORK, ADOLESCENT DEV. & JUVENILE JUSTICE, THE CHANGING BORDERS OF JUVENILE JUSTICE 3 (Issue Brief 5), available at http://www.adjj.org/downloads/3582issue_brief_5.pdf).

⁶⁸ Thuc Vy H. Nguyen, *Juvenile Justice: Searching for a Flexible Alternative to the Strict and Over-Inclusive Transfer System for Serious Juvenile Offenders*, 90 S. CAL. L. REV. 343, 366 (2017).

⁶⁹ Chhabra, *supra* note 65.

⁷⁰ Michael L. Perlin & Alison J. Lynch, *She’s Nobody’s Child/The Law Can’t Touch Her At All’’: Seeking to Bring Dignity to Legal Proceedings Involving Juve-*

When a juvenile is incarcerated, prison can be stressful, intimidating, and isolating, and juveniles do not necessarily know how to react to the conditions of prison.⁷¹ “The stress of the environment, levels of intimidation or abuse, authoritative nature, and potentially problematic relationships with the prison staff” may affect the juvenile in ways that it does not affect other populations,⁷² demonstrating the need to reconsider the practice of sending juveniles to adult prisons with adult offenders in the first place.

III. CONSIDERING JUVENILE TRANSFER AFTER *ROPER*, *GRAHAM*, AND *MILLER*

Christopher Simmons was seventeen years old when he committed murder, and he was eighteen-years-old when he was sentenced to death.⁷³ Before committing the murder, Simmons spoke to his friends about his plan, stated he wanted to murder someone, and proposed the idea of committing a burglary and murder by breaking and entering, tying up the victim, and throwing the victim off a bridge.⁷⁴ He even stated to his friends that that they “could ‘get away with it’ because they were minors.”⁷⁵ After Simmons committed the murder in the manner in which he previously described, he bragged about the killing to his friends.⁷⁶ Simmons was subsequently charged with burglary, kidnapping, stealing, and murder in the first degree and was tried as an adult.⁷⁷ Missouri sought the death penalty, stating that the murder was “committed for the purpose of avoiding, interfering with or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.”⁷⁸ The jury recommended the death penalty, and the judge accepted that recommendation.⁷⁹

Despite the depravity and nature of the crime as well as the fact that the state judge accepted the death penalty, the Supreme Court of the United

niles, 56 FAM. CT. REV. 79, 84 (2018).

⁷¹ Karen M. Kolivoski & Jeffrey J. Shook, *Examining the Relationship Between Age and Prison Behavior in Transferred Juveniles*, 43 CRIM. JUST. & BEHAV. 1242, 1247 (2016).

⁷² *Id.*

⁷³ *Roper v. Simmons*, 543 U.S. 551, 556 (2005).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 557.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 558.

States held that the death penalty was unconstitutional for a juvenile under the age of eighteen at the time of the crime according to the Eighth Amendment.⁸⁰ The Court based this holding on three primary differences between juveniles and adults:

1. “A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”⁸¹
2. “Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁸²
3. “The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”⁸³

Five years later, in *Graham v. Florida*, the Supreme Court of the United States held that life without the possibility of parole was unconstitutional for a juvenile under the age of eighteen who committed non-homicide offenses, again reiterating its reasoning from *Roper* that juveniles are different than adults.⁸⁴ Just two years after *Graham*, in *Miller v. Alabama*, the Supreme Court further held that mandatory life without the possibility of parole for juveniles under the age of eighteen at the time of their crimes was unconstitutional, relying again on its reasoning in *Roper* and *Graham*.⁸⁵ In all three of these decisions, the Court emphasized that juveniles do not have the same developmental and cognitive abilities as adults, finding that juveniles are ultimately less culpable than adults and should not face the same harsh consequences that adults do.⁸⁶

A. Underdeveloped Sense of Responsibility

The *Roper* Court acknowledged that juveniles have an underdeveloped sense of responsibility, shown by adolescents’ overrepresentation statisti-

⁸⁰ The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII; *Id.* at 568.

⁸¹ *Roper*, 543 U.S. at 569.

⁸² *Id.*

⁸³ *Id.* at 570.

⁸⁴ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

⁸⁵ *Miller v. Alabama*, 567 U.S. 460, 465, 470 (2012).

⁸⁶ *Id.* at 471; *Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 570.

cally in every category of reckless behavior.⁸⁷ “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”⁸⁸ In studies in which the participants were asked about their perceptions of the short-term and longer-term pros and cons of various sorts of risk-taking or asked to give advice to others about risky decisions, adolescents were more likely to discount the future and to weigh short-term consequences more heavily.⁸⁹ There is good reason to believe that an adolescent’s immaturity and underdeveloped sense of responsibility is linked to brain development that is biological in origin.⁹⁰ An adolescent’s psychosocial immaturity compromises adolescents’ decision-making in ways that mitigate blameworthiness because they are unable to truly evaluate the consequences of their conduct, while at the same time, they are motivated heavily by emotion and peer pressure.⁹¹ Adolescents do not have the same capacity as adults “to exercise mature judgment or control impulses.”⁹² This imbalance between impulse-control and reward-seeking behavior contributes to juveniles’ poor judgment, impulsive behavior, and criminal involvement.⁹³

B. More Susceptible to Outside Negative Influences

Adolescents are more susceptible to outside negative influences. There is much research that shows that if one adolescent in a group engaged in problem behavior, there is a high probability that other members of that group will do the same.⁹⁴ Juveniles who spend time with other deviant peers significantly increase the likelihood of their own delinquency.⁹⁵ Deviant peers play a critical role in both the initiation and exacerbation of delinquent be-

⁸⁷ *Roper*, 543 U.S. at 569.

⁸⁸ *Id.*

⁸⁹ Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

⁹⁰ *Id.* at 1013.

⁹¹ *Id.*

⁹² Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 557 (2017).

⁹³ *Id.* at 560.

⁹⁴ Mary Gifford-Smith et al., *Peer Influence in Children and Adolescents: Crossing the Bridge from Developmental to Intervention Science*, 33 J. ABNORMAL CHILD PSYCHOL. 255, 255 (2005).

⁹⁵ *Id.* at 263.

havior.⁹⁶ The role of peer influence is a factor contributing to adolescents' heightened tendency to make risky decisions.⁹⁷ Research shows that an adolescent's need for acceptance within their peer group is a powerful tool for the use of group pressure towards group norms.⁹⁸ Therefore, if an adolescent's peer group is partaking in illegal activity, that juvenile is also more likely to participate in illegal activity in order to feel accepted.

In *Roper*, the Court stated that "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."⁹⁹ Furthermore, the relationship between adolescent criminal behavior and family structure has been recognized for decades.¹⁰⁰ "Children growing up in single-parent households are at a greater risk for experiencing a variety of behavioral...problems...including...criminal acts."¹⁰¹ High-conflict families and lack of family attachment correlate with higher delinquency rates.¹⁰² Children do not choose their family, yet the environment that they are born into can directly affect their future.

C. Juveniles Have Not Yet Formed Their Character

The *Roper* Court also stated that "the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably deprived character."¹⁰³ The Court further went on to state that "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."¹⁰⁴ Only a small group of juvenile offenders will participate in a "life of crime."¹⁰⁵ Adolescents are not yet the person they will ultimately become, and crimes committed in youth represent "experimentation in risky behavior that is a part of the identity development but desists naturally" as adolescents get

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ May Omogho Esiri, *The Influence of Peer Pressure on Criminal Behavior*, 21 *IOSR J. HUMAN. & SOC. SCI.* 8, 10 (2016).

⁹⁹ *Roper*, 543 U.S. at 570.

¹⁰⁰ Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 *J.L. FAM. STUD.* 83, 89 (2007).

¹⁰¹ *Id.* at 99.

¹⁰² *Id.* at 93.

¹⁰³ *Roper*, 543 U.S. at 570.

¹⁰⁴ *Id.*

¹⁰⁵ See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 *TEX. L. REV.* 799, 821 (2003).

older.¹⁰⁶ Usually, the criminal acts of juvenile offenders are not due to their “bad character,” but rather the product of immature judgment and developmental factors consistent with adolescent development.¹⁰⁷ Therefore, by transferring a juvenile to adult court and possibly into adult prison, the court would be weakening the juvenile’s high chance of rehabilitation that occurs just by nature of psychological development.

IV. REMEDIES AND ALTERNATIVE SYSTEMS THAT VIRGINIA COULD IMPLEMENT

Virginia is one of twelve states (and the District of Columbia) that allow their prosecutors to direct file youth into adult court and only one of six states that gives no opportunity to seek a reverse waiver back to juvenile court once the youth has been direct filed into adult court.¹⁰⁸ “Across the country, lawmakers, juvenile justice advocates and community groups are shifting away from direct file.”¹⁰⁹ Associate Judge Ray Cavanaugh of the Ninth Judicial Circuit Court in Illinois stated,

As a juvenile court judge, there are many more services we can provide in juvenile court. When people are younger, it’s easier to modify their behavior. You might be able to change their home environment, might be able to change school environment. There’s a much higher likelihood of doing that in the juvenile court than in the adult system.¹¹⁰

Direct file and mandatory waiver face many criticisms¹¹¹ as research shows “that taking kids out of the juvenile system and putting them in the adult system makes them worse off.”¹¹² Numerous studies have concluded that “transferred adolescents are more likely to ‘recidivate, recidivate at a higher rate, and be rearrested for more serious offenses’” than those in the juvenile system.¹¹³ In response to these concerns, many states have begun to

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Fact Sheet: Direct File, supra* note 9.

¹⁰⁹ Renata Sago, *Charging Youths as Adults Can Be a ‘Cruel Wake-Up Call.’ Is There Another Way?*, NAT’L PUB. RADIO (Aug. 15, 2017), <https://www.npr.org/2017/08/15/542609000/sentenced-to-adulthood-direct-file-laws-bypass-juvenile-justice-system>.

¹¹⁰ Antwon R. Martin, *Judges Granted Greater Discretion in Juvenile Court*, REG.-MAIL (Aug. 8, 2015), <https://www.galesburg.com/article/20150809/news/150809829>.

¹¹¹ *See* Sago, *supra* note 109.

¹¹² *Id.*

¹¹³ Thomas A. Loughran et al., *Differential Effects of Adult Court Transfer on Ju-*

reform their transfer laws,¹¹⁴ and Virginia should become one of those states. This final section will discuss three possible alternative systems that Virginia could implement in order to reform its juvenile transfer laws: abolish direct file and mandatory waiver completely, allow for reverse waiver in all cases, and raise the appropriate age of transfer.

A. Abolish Direct File and Mandatory Waiver Completely

Allowing a prosecutor to direct file is problematic because many prosecutors do not always account for the unique considerations of youth in the same way that a judge would.¹¹⁵ Abolishing direct file and mandatory waiver would not mean that a youth cannot be transferred to an adult court; however, it would allow a judge to consider several factors before allowing transfer either by the request of the prosecutor or mandatory transfer.¹¹⁶

In 2016, California enacted Proposition 57, which amended California law to require that the juvenile court consider a motion by the prosecutor to transfer a juvenile to adult court before a juvenile can be prosecuted in adult criminal court.¹¹⁷ This repealed the parts of the California law that allowed certain felonies to be automatically prosecuted in adult criminal court (mandatory waiver) as well as the law which authorized the prosecutor to transfer juveniles through direct file (certification/direct file).¹¹⁸ Therefore, prosecutors could only seek transfer through a transfer hearing in which a juvenile judge determines whether a youth should remain in the juvenile justice system or be placed in adult criminal court.¹¹⁹ “Transfer hearings require prosecutors to successfully demonstrate that a youth should be tried in adult court in spite of their life circumstances, treatment needs and other mitigating factors.”¹²⁰ As a result, prosecutors in California sought prosecu-

venile Offender Recidivism, 34 L. HUM. BEHAV. 476, 477 (2010).

¹¹⁴ Sago, *supra* note 109.

¹¹⁵ Brittany Harwell, *The Detriments of Direct File*, CAMPAIGN FOR YOUTH JUST. (Feb. 10, 2016), <http://www.campaignforyouthjustice.org/research-policy/item/the-detriments-of-direct-file>.

¹¹⁶ *Id.*

¹¹⁷ JUDICIAL COUNCIL OF CAL., INVITATION TO COMMENT ON JUVENILE LAW: IMPLEMENTATION OF PROPOSITION 57, at 2–4 (2017), <http://www.courts.ca.gov/documents/W17-02.pdf>.

¹¹⁸ *Id.*

¹¹⁹ Maureen Washburn, *California’s Latest Adult Transfer Law Models Pathways for Reform for Rest of U.S.*, JUV. JUST. INFO. EXCHANGE (Oct. 3, 2018), <https://jjie.org/2018/10/03/californias-latest-adult-transfer-law-models-pathways-for-reform-for-rest-of-u-s/>.

¹²⁰ *Id.*

tion in adult court approximately half as often in 2017 as in 2016,¹²¹ resulting in fewer juveniles facing the possible traumatic consequences of adult criminal court.

Many other states, such as Illinois,¹²² Utah,¹²³ and Indiana,¹²⁴ have limited the types of charges that are automatically transferred to adult court. In Illinois, the court may only mandatorily transfer based on the juvenile's previous delinquent history or possible gang affiliation.¹²⁵ In Utah, juvenile courts may now only consider juveniles as "serious youth offenders" for nine specific crimes and crimes involving dangerous weapons, and the state made it harder to transfer juveniles into adult court by changing the standard of review by which juvenile transfer hearings are evaluated.¹²⁶ In Indiana, there are nine specific offenses that statutorily exclude youth from the juvenile court.¹²⁷

Laws governing statutory exclusion are often overly broad, and limitation or elimination of these types of offenses could result in less juveniles being prosecuted in adult criminal court.¹²⁸ The Virginia legislature could allow the juvenile court judges more discretion when deciding whether transferring a youth into the adult system is appropriate, rather than only considering the seriousness of the offense.¹²⁹ Policymakers should review

¹²¹ *Id.*

¹²² See 705 ILL. COMP. STAT. 405/5-130 (2019).

¹²³ See UTAH CODE § 62A-7-201 (2019).

¹²⁴ See IND. CODE § 31-30-1-4 (2019).

¹²⁵ 705 ILL. COMP. STAT. 705/5-805 (2019).

¹²⁶ UTAH CODE § 62A-7-201 (2019); S.B. 167, 2015 Gen. Sess. (Utah 2015). The nine specific crimes include aggravated arson, aggravated assault resulting in serious bodily injury to another, aggravated kidnapping, aggravated burglary, aggravated robbery, aggravated sexual assault, felony discharge of a firearm, attempted aggravated murder, and attempted murder.

¹²⁷ IND. CODE § 31-30, § 4(a) (2018). The nine specific crimes in Indiana are attempted murder, murder, kidnapping, rape, criminal deviate conduct, robbery (if with a deadly weapon or results in bodily injury or serious bodily injury), carjacking, carrying a handgun without a license, and children and firearms.

¹²⁸ See JEREE THOMAS, CAMPAIGN FOR YOUTH JUSTICE, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015-2017) 41 (2017), http://cfyj.org/images/A-StateTrends_Report-Web.pdf.

¹²⁹ *Id.* at 40. Other characteristics the court could consider include: the juvenile's age; the seriousness and number of alleged offenses; whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation; the availability of services in both systems; the juvenile's record; whether the juvenile has previously fled from any juvenile correctional facility; the juvenile's school record and education; the juvenile's mental and emotional maturi-

the transfer criteria and determine ways to make them more individualized and balanced, in addition to requiring consideration and documentation of specific statutory factors.¹³⁰

B. Allow Reverse Waiver in All Cases

Reverse waiver laws allow the adult criminal court to transfer cases back to juvenile court for adjudication or disposition rather than prosecuting the juvenile in adult criminal court.¹³¹ Virginia is one of six states that does not allow reverse waiver for cases that have been transferred through direct file or mandatory waiver.¹³² “Reverse waiver provisions increase judicial oversight, thereby providing a safeguard for the youth.”¹³³ This is particularly important for cases in which the juvenile is automatically transferred to adult court without first ever seeing a juvenile court judge.¹³⁴ “Judges deciding reverse waiver motions usually consult the same kinds of standards and weigh the same factors as their juvenile court counterparts in discretionary waiver proceedings.”¹³⁵ Therefore, if Virginia is not ready to completely abolish direct file and mandatory waiver, the legislature could allow for the possibility of reverse waiver in all cases to allow for a more individualized approach to each case.

C. Raise the Age of Transfer

In Virginia, the law allows juveniles to be transferred at the age of fourteen.¹³⁶ One of the ways that states are currently limiting the number of juveniles that can be transferred to adult court is by raising the age of trans-

ty; and the juvenile’s physical condition and physical maturity.

¹³⁰ *See id.* at 41.

¹³¹ RICHARD E. REDDING, U.S. DEP’T OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 2 (2010), <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

¹³² VA. CODE § 16.1-269.6 (2018) (stating that the statute only allows reverse waiver for cases that have been transferred through discretionary waiver under subsection A); PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), <http://www.leg.state.nv.us/App/InterimCommittee/REL/Document/5367>.

¹³³ *Reverse Waiver*, CAMPAIGN FOR YOUTH JUST. (Dec. 10, 2018), http://www.campaignforyouthjustice.org/images/factsheets/Reverse_Waiver_FINALE.pdf.

¹³⁴ *Id.*

¹³⁵ GRIFFIN ET AL., *supra* note 132, at 7.

¹³⁶ VA. CODE § 16.1-269.1 (2018).

fer.¹³⁷ States have raised the age for many reasons, one of which is due to research showing that adolescents are more likely to move past delinquency and successfully transition into adulthood if they are served by the juvenile justice system rather than the adult criminal justice system.¹³⁸ “During this past decade when seven states raised the age [of transfer], the number of young people excluded from the juvenile justice system solely because of their age was cut in half.”¹³⁹

Connecticut and New Jersey both raised the lowest age at which a youth could be mandatorily transferred to adult court to fifteen, and Illinois has raised that age to sixteen.¹⁴⁰ Some states, including Connecticut, Illinois, Massachusetts, and Vermont, have also introduced legislation that would raise the age to allow young adults to remain in the juvenile system beyond eighteen.¹⁴¹ Each of these four states proposed bills to treat most youth under the age of twenty-one or twenty-two in the juvenile justice system rather than adult criminal court.¹⁴² In Vermont, in 2016, a bill was signed into law to raise the age of youthful offender status from seventeen to twenty-one for youth who have not committed one of the “big 12 offenses.”¹⁴³ This allows young adults to be eligible for protections that are usually only awarded to juveniles.¹⁴⁴

¹³⁷ THOMAS, *supra* note 128, at 31.

¹³⁸ JUSTICE POLICY INST., RAISE THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM 3 (2017), http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf.

¹³⁹ *Id.* at 4.

¹⁴⁰ John Kelly, *19 States Have Narrowed Juvenile Involvement in Adult System Since 2015*, CHRON. SOC. CHANGE (Oct. 10, 2017), <https://chronicleofsocialchange.org/justice/juvenile-justice-2/19-states-narrowed-juvenile-involvement-adult-system-since-2015/28413>.

¹⁴¹ H.B. 2628, 100th Gen. Assemb. (Ill. 2017–2018); H.B. 3037, 119th Gen. Ct. (Mass. 2017–2018); H.B. 7045, 2017 Gen. Assemb., Jan. Sess. (Conn. 2017); H. 95, 2015–2016 Gen. Assemb. (Vt. 2016).

¹⁴² H.B. 2628, 100th Gen. Assemb. (Ill. 2017–2018); H.B. 3037, 119th Gen. Ct. (Mass. 2017–2018); H.B. 7045, 2017 Gen. Assemb., Jan. Sess. (Conn. 2017); H. 95, 2015–2016 Gen. Assemb. (Vt. 2016).

¹⁴³ H.B. 95, 2015–2016 Gen. Assemb. (Vt. 2016). The big 12 offenses are defined as: arson causing death, assault and robbery with a dangerous weapon, assault and robbery causing bodily injury, aggravated assault, murder, manslaughter, kidnapping, unlawful restraint, maiming, sexual assault, aggravated sexual assault, and burglary.

¹⁴⁴ *See id.*

If Virginia wanted to lower the number of young adults in the adult criminal justice system, the legislature could raise the minimum age of transfer and raise the minimum age for which young adults are automatically tried as adults, which would permit the juvenile justice system to handle more cases involving young adults with brains that are not yet completely developed. Doing so would allow the system to treat these young adults and juveniles justly, rather than criminally.¹⁴⁵

CONCLUSION

For the past fourteen years, since its decision in *Roper v. Simmons*, the Supreme Court has continuously acknowledged what most people already know – children are different than adults. Society places a high value on children. Yet, Virginia’s juvenile transfer laws reflect something quite different. Virginia’s laws allow for prosecutorial direct filing as well as mandatory transfer and do not give any discretion to judges to send the case back to juvenile court. The Supreme Court acknowledged that children are less culpable than adults because of their immaturity, their vulnerability to negative influences, and their undeveloped character; yet, Virginia does not allow the courts to consider any of these factors when determining whether they should be transferred to adult court through direct file and mandatory waiver. Despite all the negative consequences of treating juveniles as adults, thousands of juveniles are still transferred to adult criminal court every year, left to deal with the consequences that await them, despite their inherent inability to completely understand the consequences of their actions. Because of these detrimental and traumatic experiences and research that shows that juveniles are different than adults, it is imperative that Virginia reconsider and reform its juvenile transfer laws to match the trends already taking hold throughout the United States.

¹⁴⁵ Brian Evans, *Passing ‘Raise the Age’ Measure for Juvenile Offenders Puts Missouri on Right Path*, KAN. CITY STAR (May 28, 2018), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article212034069.html>.