

STRIKING A FAIR BALANCE: EXTENDED JUVENILE JURISDICTION IN NORTH DAKOTA

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ABSTRACT

Over fifty percent of states have adopted some form of extended juvenile jurisdiction (EJJ). The purpose of EJJ is to give courts more discretion when sentencing a juvenile offender. Depending on the circumstances, a juvenile may receive a juvenile or adult sentence, or both. This Article argues the need for North Dakota to adopt some form of EJJ. Following a brief introduction, Part II outlines the history and evolution of the juvenile justice system. Three possible EJJ methods are discussed in Part III: voluntary, mandatory, and discretionary transfers. Part III also discusses the process used to transfer a juvenile case and appellate review in cases that are appealed to the North Dakota Supreme Court. Part IV illustrates the modern trend of blended sentencing defining the juvenile-inclusive, juvenile-exclusive, juvenile contiguous, criminal-inclusive, and criminal-exclusive blended sentencing model. Lastly, Part V discusses the development of this proposed bill for EJJ in North Dakota, puts forth a recommendation that North Dakota should adopt based on the state models, and restates the necessity for a change in the Juvenile Court Act to include a form of EJJ.

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I. INTRODUCTION

Juvenile courts were established to insulate juvenile offenders from the punishment aspect focused on in adult courts, to promote rehabilitation, and to eliminate the stigma associated with having a criminal conviction on

their record, by characterizing such actions as delinquent rather than criminal.¹ The distinct and separate mechanism of juvenile courts represents the nation's belief that juvenile offenders are different than adult offenders and therefore should be treated differently, namely in the areas of accountability and punishment.² At its inception, the juvenile justice system focused on rehabilitating juvenile offenders, believing that with the proper treatment, juvenile offenders could be turned into productive members of society.³

In recent years, however, the juvenile justice system has come under attack for its leniency when sentencing violent juvenile offenders. With an increase in juvenile crime, the public has demanded the juvenile justice system get tougher in its punishments.⁴ The original goals of the juvenile justice system failed to completely materialize, forcing the juvenile justice system to change its approach and take a retributivist turn.⁵ Instead of protecting juvenile offenders, the juvenile justice system now focuses on protecting society from juvenile offenders incapable of being rehabilitated.⁶

In making this change, legislators and politicians are responding by proposing various pieces of innovative legislative action to reform the juvenile justice system.⁷ The most popular of the differing propositions consists of five different models and is collectively called blended sentencing.⁸ Overall, blended sentencing focuses on balancing the harshness of adult criminal sentences and the imposition of a less restrictive juvenile placement. Blended sentencing provides a viable avenue to restructure the presently troubled juvenile justice system.

The purpose of this Article is to demonstrate the need for North Dakota to adopt some form of extended juvenile jurisdiction (EJJ). Part II outlines the history and evolution of the juvenile justice system, indicating a shift by juvenile courts away from the theory of rehabilitation to the theory of retributivism after an increase in juvenile violence. The Juvenile Court Act

1. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693-94 (1991).

2. *Id.*

3. Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System"*, 22 PEPP. L. REV. 907, 909-11 (1995).

4. See generally Jennifer M. O'Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303-04 (1996).

5. Feld, *supra* note 1, at 695-96, 701.

6. See *id.* at 723-24.

7. NAT'L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 2 (2008), available at <http://www.modelsforchange.net/publications/181>.

8. Brandi Miles Moore, *Blended Sentencing for Juveniles: The Creation of a Third Criminal Justice System?*, 22 J. JUV. L. 126, 131 (2002).

in North Dakota allows a juvenile case to be transferred to adult court through three different methods, as discussed in Part III. Part III also discusses the process used to transfer a juvenile case and the appellate review in the cases that are appealed to the North Dakota Supreme Court. Part IV illustrates the modern trend of blended sentencing defining the juvenile-inclusive, juvenile-exclusive, juvenile contiguous, criminal-inclusive, and criminal-exclusive blended sentencing model, which are the five different models used today. North Dakota currently does not have EJJ; however, a proposed bill will be presented to the North Dakota Legislature in the current session. Lastly, Part V discusses the development of this proposed bill and policy considerations, sets forth a recommendation that North Dakota should adopt, in line with twenty-six other states, some form of a blended sentencing model, and reiterates the need for a change in North Dakota's Juvenile Court Act to include a form of EJJ.

II. HISTORY AND EVOLUTION OF THE JUVENILE JUSTICE SYSTEM

Even the English common law recognized that juvenile offenders were a distinct and unique part of the population.⁹ Prior to the separation of juvenile and adult courts, juveniles were prosecuted in much the same way as adults.¹⁰ As part of the Progressive Era, separate juvenile courts were formed.¹¹ Progressives operated under the belief that adolescents could not be held morally accountable for their actions.¹² This belief supported the emerging view that juvenile criminals should be treated differently than adult criminals, because they were different.¹³

9. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 137-63 (2d ed. 1977).

10. David S. Tanenhaus & Steven A. Drizin, *Criminal Law: "Owing to the Extreme Youth of the Accused:" The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 645-46 (2002); see also Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2429-36 (1996) (discussing how the juvenile court system has evolved over time). Children under the age of seven were immune from prosecution based on the infancy defense, because the law presumed they were incapable of forming criminal intent. This presumption also applied to children between the ages of seven and fourteen; however, the presumption could be rebutted. WAYNE R. LAFAVE, *CRIMINAL LAW* 511-12 (5th ed. 2010).

11. PLATT, *supra* note 9, at 10-11. Illinois was the first state to form a juvenile court, due largely to the work of the Chicago Women's Club. ELIZABETH J. CLAPP, *MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA* 19-21, 166 (1998).

12. RICHARD LAWRENCE & CRAIG HEMMENS, *JUVENILE JUSTICE* 24 (2008).

13. Feld, *supra* note 1, at 693-94.

By 1925, forty-eight states had created separate court systems for juveniles designed specifically for dealing with children.¹⁴ The court in juvenile court proceedings played a different role compared to the court's role in adult proceedings.¹⁵ This role overlapped with the rise of developmental psychology, which began at the beginning of the twentieth century.¹⁶ "Developmental psychologists postulated that the 'condition' underlying delinquent juvenile behavior was poor parenting and other social ills."¹⁷

The ultimate goal of the juvenile court system was to treat and rehabilitate juvenile offenders.¹⁸ To meet this goal juvenile courts would inquire into the "crime and the criminal," and this inquiry closely resembled the research being done in developmental psychology.¹⁹ Juvenile criminals were viewed as more malleable than adult criminals and, therefore, were capable of being rehabilitated.²⁰ Rehabilitation was accomplished through individual assessment and treatment of the juvenile offender.²¹

A. THE ISSUES WITH FOCUSING SOLELY ON REHABILITATION

Although the establishment of juvenile court systems was in its infancy, the dissatisfaction grew quickly.²² The major source of this dissatisfaction was due to the wide discretion judges retained in sentencing.²³ There was not only dissatisfaction with the sentences that juveniles were being given, but also with the inability of juvenile courts to

14. HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 86 (1999). Maine and Wyoming were the only two states that did not have a separate juvenile court system. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 45 (Margaret K. Rosenheim et al. eds., 2002).

15. SNYDER & SICKMUND, *supra* note 14, at 86.

16. Emily A. Polacheck, *Juvenile Transfer: From "Get Better" to "Get Tough" and Where We Go from Here*, 35 WM. MITCHELL L. REV. 1162, 1166 (2009).

17. *Id.* at 1166. The idea of *Parens Patriae* was established by the belief that social ills could be cured. *Id.*

18. SNYDER & SICKMUND, *supra* note 14, at 86-87. In the beginning, juvenile delinquency was seen as a disease that could be cured with the proper treatment. Rossum, *supra* note 3, at 909-11.

19. Polacheck, *supra* note 16, at 1167.

20. Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 535 (1998).

21. Polacheck, *supra* note 16, at 1167.

22. SNYDER & SICKMUND, *supra* note 14, at 87-88; *see also* W. Don Reader, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Laws of Unintended Results*, 29 AKRON L. REV. 477, 480 (1996).

23. *See* Reader, *supra* note 22, at 480; *see also* Polacheck, *supra* note 16, at 1167. Judges were given wide discretion in sentencing, because the goal was to fit the punishment to the individual juvenile offender. *Id.*

effectively and properly adjudicate juvenile claims.²⁴ This was due primarily to the vast number of juvenile cases.²⁵ The goal of rehabilitation was not being met, because juveniles were either sent to large institutions that were ill prepared in giving individualized treatment or were given a sentence with little or no effect.²⁶

The decision of *Kent v. United States*²⁷ directly criticized the inadequacies of the juvenile court system.²⁸ In 1961, Morris Kent, at sixteen years of age, was arrested for housebreaking, robbery, and rape.²⁹ Although Kent was a juvenile, the juvenile court judge transferred his proceeding, without a hearing, to the U.S. District Court for the District Court of Columbia.³⁰ Kent was sentenced to thirty to ninety years in prison after a jury trial found him guilty on six counts of housebreaking and robbery.³¹ Kent appealed and alleged numerous grounds for reversal of his conviction, specifically citing the juvenile court's waiver of jurisdiction.³² The United States Supreme Court held that Kent was denied proper procedural safeguards.³³ Additionally, the Court noted that the juvenile court's latitude in deciding whether or not to waive jurisdiction is not absolute.³⁴ The Court decided that in order for a valid waiver to exist, the petitioner was entitled to a hearing and access to the juvenile court records that the judge had considered.³⁵

Kent is considered a central case to the juvenile court system, because the Court not only questioned the capabilities of the juvenile court system, but also criticized it.³⁶ In addition, the Court recognized in certain circumstances waivers of juvenile crimes into adult court were

24. SNYDER & SICKMUND, *supra* note 14, at 87-88; Erik K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 377-78 (1998).

25. SNYDER & SICKMUND, *supra* note 14, at 87-88.

26. *Id.* at 87.

27. 383 U.S. 541 (1966).

28. *See Kent*, 383 U.S. at 555-56.

29. *Id.* at 543. Kent was a prior juvenile offender. *Id.* Fingerprints at the crime scene matched those of Kent. *Id.* at 551.

30. *Id.* at 546.

31. *Id.* at 550.

32. *Id.* at 548, 551.

33. *Id.* at 563. The Court found both the court of appeals and district court erred in sustaining the validity of the waiver, and remanded for a de novo district court hearing. *Id.*

34. *Id.* at 552-53.

35. *Id.* at 557. In *Kent*, the United States Supreme Court presumed that the District Court examined not only probation reports, but also social records or other similar reports. *Id.* at 555.

36. *See id.* at 555-56 ("There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation.").

appropriate.³⁷ Secondly, the Court illustrated guidelines juvenile court judges should use when determining whether or not to waive jurisdiction of a juvenile proceeding.³⁸

B. REEVALUATING JUVENILE COURTS BY SHIFTING THE FOCUS FROM REHABILITATION TO RETRIBUTION

Following the decision in *Kent*, there was a shift in the attitudes of Americans and those involved in the juvenile justice system.³⁹ The attitudes began to focus less on the rehabilitation of juveniles and more on the retributive aspect of the criminal justice system.⁴⁰ Retributivism is a theory that supports an adult criminal sentence, by putting more focus on punishing defendants and protecting the public rather than rehabilitating them.⁴¹ During the 1960s and 1970s, baby boomers reached their “crime prone” years, which caused the unsubstantiated belief that juvenile crime was more common.⁴²

37. *Id.* at 551-54.

38. *Id.* at 566-67. The Court enumerated eight factors juvenile courts should consider when deciding if jurisdictional waiver is appropriate. The eight factors included the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id.

39. Kristin L. Caballero, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders*, 19 ST. JOHN'S J. LEGAL COMMENT 379, 388 (2005).

40. SNYDER & SICKMUND, *supra* note 14, at 88.

41. IAN MARSH, CRIMINAL JUSTICE: AN INTRODUCTION TO PHILOSOPHIES, THEORIES AND PRACTICE 12-17 (2004).

42. DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 4 (2005).

However, between 1974 and 1981, juvenile delinquency rates did rise.⁴³ This increase continued steadily through the mid 1990s.⁴⁴ Just as the level and severity of juvenile violence began to catch the attention of society and the politics, the juvenile crime rates started to decrease.⁴⁵ Regardless of this decrease in juvenile crime rates, there were a few horrific and highly publicized crimes that created the new term “super-predator.”⁴⁶ New measures focused on getting tough on juvenile crime emerged as a result of the public’s and legislature’s belief that juvenile crime was not only on the rise, but was getting more violent and horrific.⁴⁷

III. THE EVOLUTION OF JUVENILE JUSTICE IN NORTH DAKOTA

North Dakota has traditionally had a relatively low crime rate. However, North Dakota began to get tough on juvenile crime over the span of several decades, following a national trend. Much of the focus in North Dakota was on a fear of increasing violent crime and serious crime, similar to the fears expressed by other states.⁴⁸

North Dakota’s Uniform Juvenile Court Act was established in 1969 in response to the *Kent* and *Gault* decisions issued by the United State’s Supreme Court.⁴⁹ This change in North Dakota’s juvenile justice provided for certain procedural safeguards for juveniles.⁵⁰ At the time of the enactment of the Uniform Juvenile Court Act, there was no option for a child to voluntarily transfer the child’s offense to adult court, nor was there the option to automatically transfer certain offenses.⁵¹ But rather, the law provided for transfer of a delinquency offense if the court found that the child was “not amenable to treatment or rehabilitation as a juvenile.”⁵²

43. Polachek, *supra* note 16, at 1169.

44. Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 785 (2000).

45. Caballero, *supra* note 39, at 389.

46. *Id.* at 389-99. “A superpredator is thought to have no social conscience, to exhibit extremely violent behavior, and to be beyond the control of the juvenile court system.” *Id.*; see Polachek, *supra* note 16, at 1169 (discussing the increased media attention juvenile crimes received even though juvenile crime rates had gone down).

47. See *infra* Part.III-IV.

48. *Hearing on S.B. 2264 Before the H. Judiciary Comm.*, 54th Legis. Assemb. 2 (N.D. 1995) [hereinafter *Hearing on S.B. 2264*] (testimony of Governor Schaeffer stating that North Dakota is one of the safest states in the nation and S.B. 2264 will help to “maintain the security we now cherish”).

49. See *In re J.A.G.*, 552 N.W.2d 318, 324 (N.D. 1960).

50. 1969 N.D. Laws 547-48, 555-64.

51. *Id.* at 569.

52. *Id.* The option allowing a child to voluntarily transfer an offense to adult court was provided through an amendment to the Act in 1975. 1975 N.D. Laws 831-32.

In 1995, a Juvenile Justice Task Force (“Task Force”) was created in response to an increase in violent juvenile crime in North Dakota.⁵³ The Task Force completed a study, which reported that juvenile arrests and referral numbers had increased and that violent assaults and sexual crimes had become a larger portion of the juvenile crimes committed in this state.⁵⁴ In an effort to curb this increase, the Task Force recommended legislation, which eased the State’s burden in transferring serious, violent crimes and habitual offenders to adult court.⁵⁵ The legislation provided for certain serious, violent offenses to be mandatorily transferred to adult court on a finding of probable cause.⁵⁶ The legislation further provided criteria to consider in determining whether a child is amenable to treatment in juvenile court, which is relevant to a discretionary transfer.⁵⁷

Under North Dakota’s current law, there are three methods a juvenile case can be transferred to district court for prosecution as a criminal offense.⁵⁸ These three methods are as follows: voluntary transfer, mandatory transfer, or discretionary transfer.⁵⁹ The method that is used is dependent on the specific offense charged and the circumstances surrounding the child’s prior involvement with juvenile court.⁶⁰ This Article will review each type of transfer individually.

A. VOLUNTARY TRANSFER

A child charged with a delinquent offense may voluntarily transfer a case to district court for prosecution.⁶¹ The child, however, must be sixteen years of age or older to do so.⁶² This transfer applies regardless of the

53. *In re M.W.*, 2009 ND 55, ¶ 9, 764 N.W.2d 185, 188 (citing the report “Juvenile Justice in North Dakota: Building On Our Strengths”).

54. *Id.* The concern was also related to an increase in criminal street gangs. *Hearing on S.B. 2264*, *supra* note 48, at 1.

55. *In re M.W.*, ¶ 10.

56. 1995 N.D. Laws 422-24. The automatic transfer provision was again amended in 1997 to broaden the scope of offenses to be transferred upon a finding of probable cause for certain drug offenses. 1997 N.D. Laws 267. This expansion in the law was made due to a concern for increased gang activity and that some gang members use juveniles to sell drugs since juveniles generally receive lighter penalties than adults. *Hearing on S.B. 1306 Before the H. Judiciary Comm.*, 55th Legis. Assemb. 3 (N.D. 1997).

57. *Id.*

58. N.D. CENT. CODE § 27-20-34 (Supp. 2011).

59. *Id.*

60. *Id.*

61. *Id.* § 27-20-34(1)(a).

62. *Id.*

offense charged so long as it is a delinquent offense and not an unruly offense.⁶³

B. MANDATORY TRANSFER

For certain enumerated offenses, the juvenile court is mandated to transfer the case to district court for prosecution as a criminal offense if the child is fourteen years of age or older at the time the offense was committed, and there is probable cause to believe the offense was committed.⁶⁴ The offenses that qualify for the mandatory transfer are as follows:

[M]urder or attempted murder; gross sexual imposition⁶⁵ or the attempted gross sexual imposition of a victim by force or by threat of imminent death, serious bodily injury, or kidnapping; or the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of subdivision a or b of subsection 1 of section 19-03.1-23, except for the manufacture, delivery, or possession with intent to manufacture or deliver marijuana in an amount less than one pound [.45 kilogram]; or the gratuitous delivery of a controlled substance not a narcotic drug or methamphetamine which is a singular and isolated event involving an amount of controlled substance sufficient solely for a single personal use.⁶⁶

If there is probable cause to believe the child committed one of these offenses, the court must transfer the offense to district court for prosecution as a criminal offense, regardless of the child's juvenile court record, the circumstances of the offense, or the child's likelihood of rehabilitation in

63. *Id.* An "unruly child" is one who has committed a status offense, such as truancy, absencing, or any other offense applicable only to a child. *Id.* § 27-20-02(19). A delinquent act, on the other hand, is one that would be a crime under the law if committed by an adult. *Id.* § 27-20-02(6).

64. *Id.* § 27-20-34(1)(b).

65. For purposes of the offense of Gross Sexual Imposition, the threats need not be directed at the victim, but rather the threats may be directed at any human being. *In re R.A.*, 2011 ND 119, ¶ 25-27, 799 N.W.2d 332, 339. Additionally, the offense of Gross Sexual Imposition may only be transferred if there is probable cause to believe that offense was committed by force or by threat of imminent death, serious bodily injury, or kidnapping. *In re M.W.*, 2009 ND 55, ¶ 12, 764 N.W.2d 185, 189. In *In re M.W.*, the State argued that the phrase "by force or by threat of imminent death, serious bodily injury, or kidnapping" modified only attempted Gross Sexual Imposition. *Id.*

66. *Id.* The phrase "by force or by threat of imminent death, serious bodily injury, or kidnapping" not only applies to attempted gross sexual imposition, but also to the offense of gross sexual imposition. *Id.* The legislature intended to target certain serious, violent offenses for mandatory transfer to adult court upon a finding a probable cause. *Id.*

juvenile court.⁶⁷ In determining if there is probable cause to believe the child committed the alleged offense, the court may consider hearsay or other evidence not ordinarily admissible at a hearing on the merits of the offense.⁶⁸

C. DISCRETIONARY TRANSFER

Under certain circumstances, the juvenile court can transfer an offense for prosecution as a criminal offense. If there are reasonable grounds to believe the child is not amenable to treatment or rehabilitation in juvenile court.⁶⁹ For this type of transfer, the child must be fourteen years of age or more at the time of the offense.⁷⁰

In order to transfer the offense under this provision, the court must make the following findings, based on reasonable grounds: (1) the child committed the delinquent act alleged; (2) the child is not amenable to treatment or rehabilitation through juvenile court programs; (3) the child is not treatable in an institution for the mentally retarded or ill; and (4) the interests of the community require that the child be placed under legal restraint or discipline.⁷¹ “Reasonable cause” is defined as “probable cause.”⁷² In order to determine if a child is amenable to treatment through juvenile court programs, the court shall consider factors, such as the child’s age, maturity, degree of criminal sophistication, juvenile court record, prior attempts to treat and rehabilitate through juvenile court programs, and the nature and circumstances of the offense.⁷³

The burden to prove whether a child is amenable to treatment or rehabilitation is on the state, except if the offense involves certain serious, violent offenses listed in the statute.⁷⁴ For these enumerated offenses, the

67. *Id.* “Probable cause,” for purposes of the transfer statute, is met if “there is a definite probability based on substantial evidence the offense has been committed.” *In re L.A.G.*, 1999 ND 219, ¶ 11, 602 N.W.2d 516, 520. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*

68. N.D. R. EVID. 1101(d)(3). The transfer hearing in juvenile court is “equivalent to a preliminary examination in a criminal case, with relaxed standards for admission of evidence” *In re L.A.G.*, ¶ 9, 602 N.W.2d at 519.

69. N.D. CENT. CODE § 27-20-34(1)(c) (Supp. 2011).

70. *Id.* § 27-20-34(1)(c)(1). If the child is fourteen or fifteen years of age, the court must make a finding that the child committed a delinquent act involving the infliction or threat of serious bodily harm. *Id.* § 27-20-34(1)(c)(4)(e).

71. *Id.* § 27-20-34(1)(c)(4).

72. *In re A.E.*, 1997 ND 9, ¶ 5, 559 N.W.2d 215, 216-17.

73. N.D. CENT. CODE § 27-20-34(3).

74. *Id.* § 27-20-34(2). The burden to prove the child is amenable to treatment or rehabilitation is on the child if the offense alleged is:

manslaughter, aggravated assault, robbery, arson involving an inhabited structure, or escape involving the use of a firearm, destructive device, or other dangerous weapon

burden is on the child to prove that the child is amendable to treatment and rehabilitation in juvenile court.⁷⁵

D. THE PROCESS TO TRANSFER AN OFFENSE

Under the current law, the juvenile court must determine if the case should be handled in juvenile or adult court prior to an adjudication of the case on the merits.⁷⁶ Typically, for purposes of a discretionary or mandatory transfer, a transfer hearing is held to determine if there is probable cause for the offense or if the child is amenable to treatment in juvenile court. A transfer hearing is similar to a preliminary hearing in a criminal case, where the purpose is not to determine guilt or innocence.⁷⁷ The juvenile court need not ferret through conflicting evidence or make credibility determinations at the transfer hearing, unless the testimony is implausible or incredible.⁷⁸ But rather, the credibility determination is left as a question of fact for the finder of fact.⁷⁹

A juvenile transfer hearing does not provide the same protections as a criminal trial, but it is a “critically important” proceeding and must provide the juvenile with the basic protections of due process and fairness.⁸⁰ The constitutional right to confrontation of a witness does not apply at a transfer hearing, but rather, is a trial right.⁸¹ A transfer hearing is not an adjudication on the merits, but rather is considered a preliminary proceeding.⁸²

The standard for admission of evidence is relaxed at a transfer hearing.⁸³ The Rules of Evidence do not apply, except the rules regarding privileges.⁸⁴ Merely because evidence has been admitted at a transfer hearing, the child is not precluded from seeking to suppress inadmissible

or in cases in which the alleged delinquent act involves an offense which if committed by an adult would be a felony and the child has two or more previous delinquency adjudications for offenses which would be a felony if committed by an adult.

Id.

75. *Id.*

76. *Id.* § 27-20-34(1) (stating the court shall transfer the case “before hearing the petition on its merits”).

77. *In re* R.A., 2011 ND 119, ¶ 21, 799 N.W.2d 332, 338.

78. *Id.*

79. *Id.*

80. *Id.* ¶ 30, 799 N.W.2d at 340 (citing *Kent v. United States*, 383 U.S. 541, 553-62 (1966); *In re* K.G., 295 N.W.2d 323 (N.D. 1980)).

81. *Id.*

82. *State v. Woodrow*, 2011 ND 192, ¶ 13-14, 803 N.W.2d 572, 576-77.

83. *In re* L.A.G., 1999 ND 219, ¶ 9, 602 N.W.2d 516, 519.

84. N.D. R. EVID. 1101; *see also In re* R.A., ¶ 10, 799 N.W.2d at 336; *In re* L.A.G., ¶ 9, 602 N.W.2d at 519.

evidence at the adjudication stage of the proceedings.⁸⁵ Once an offense has been transferred to district court and that offense has resulted in the conviction of a crime, any future offense with respect to that same child is prosecuted in adult court.⁸⁶ Once the child has been convicted of the offense in adult court, a juvenile court's jurisdiction over that child is terminated with respect to any future offense the child may commit, even if the child is still a juvenile.⁸⁷

For an offense committed by a juvenile, but not adjudicated until after the child has reached twenty years of age, the offender can be prosecuted for the criminal offense in district court without the need for a transfer hearing.⁸⁸ Under these circumstances, the district court has original and exclusive jurisdiction.⁸⁹ The prosecution after the offenders twentieth birthday, however, cannot be an intentional delay by the State in order to avoid juvenile court jurisdiction.⁹⁰ Two prior transfer hearings, which were subsequently appealed and reversed by the North Dakota Supreme Court, is not considered an intentional delay by the prosecution.⁹¹

E. APPELLATE REVIEW

An aggrieved party may appeal a transfer order to the North Dakota Supreme Court.⁹² The court reviews a transfer order under a clearly erroneous standard of review.⁹³ The appellate court will give "due regard . . . to the opportunity of the juvenile court to judge the credibility of the witnesses."⁹⁴ The court has also stated that the review of a juvenile court's order is similar to a de novo standard of review in that the court independently reviews the evidence.⁹⁵

85. *In re* L.A.G., ¶ 9.

86. N.D. CENT. CODE § 27-20-34(4) (Supp. 2011).

87. *Id.* § 27-20-34(5).

88. *Id.* § 27-20-34(8). Juvenile court jurisdiction extends only until the child reaches age twenty. *See id.* § 27-20-02(4)(b) (defining "child" as a person "under the age of twenty years with respect to a delinquent act committed while under the age of eighteen years"); *Id.* § 27-20-31 (referencing dispositional options for a delinquent child).

89. *State v. M.B.*, 2010 ND 57, ¶ 2, 780 N.W.2d 663, 664.

90. *Id.*; N.D. CENT. CODE § 27-20-34(8).

91. *State v. Woodrow*, 2011 ND 192, ¶ 16, 803 N.W.2d 572, 577. In *Woodrow*, the State did not intentionally delay the prosecution when the State initially charged the defendant in juvenile court, attempted to transfer the offenses pursuant to section 27-20-34(1)(b) and (1)(c)(4), then filed charges in district court pursuant to section 27-20-34(8) once the child turned twenty-years-old and juvenile court lost jurisdiction over the child. *Id.*

92. N.D. CENT. CODE § 27-20-56 (2006).

93. *In re* R.A., 2011 ND 119, ¶ 4, 799 N.W.2d 332, 334 (citing *In re* A.R., 2010 ND 84, ¶ 5, 781 N.W.2d 644, 647).

94. *Id.*

95. *In re* A.E., 1997 ND 9, ¶ 3, 559 N.W.2d 215, 216.

IV. BLENDED SENTENCING – THE MODERN TREND

The modern trend in states is to utilize some form of blended sentencing, which grants judges expanded sentencing authority.⁹⁶ “Blended sentencing emerged during a period of steadily increasing violent juvenile crime as a compromise between those who wanted to emphasize public safety, punishment, and accountability of juvenile offenders and those who wanted to maintain or strengthen the traditional juvenile justice system.”⁹⁷ Blended sentencing deals with a juvenile offender’s ultimate disposition and allows a juvenile court to sentence juvenile offenders to juvenile or adult criminal sanctions or both.⁹⁸

Blended sentencing statutes operate in two different respects. In juvenile blended sentencing, a juvenile court can impose both a juvenile and criminal sanction, but the juvenile’s behavior and compliance determine which sentence will be imposed.⁹⁹ If the juvenile abides by the juvenile sentence then he or she will remain in the juvenile justice system.¹⁰⁰ However, if the juvenile offender does not comply with the juvenile sentence, the criminal sentence that was previously given may take effect.¹⁰¹ Although the policies underlying blended sentencing were devised to incarcerate juvenile offenders adjudicated of committing violent crimes for a longer period of time, there may be certain situations where juveniles serve less time.¹⁰²

Criminal blended sentencing laws represent the second type of blended sentencing statutes.¹⁰³ This gives criminal courts the opportunity to sentence juvenile offenders to dispositions generally reserved to juvenile courts, even though they have been transferred to adult court.¹⁰⁴ Although the potential for a juvenile disposition is conditioned upon the offender’s

96. NAT’L CTR FOR JUVENILE JUSTICE, *supra* note 7, at 2. At the end of 1995, there were sixteen states with blended sentencing statutes in place, but by the end of 2004, at least twenty-six states had implemented some form of blended sentencing statute. FRED CHEESMAN, NAT’L CTR. FOR STATE COURTS, A DECADE OF NCSC RESEARCH ON BLENDED SENTENCING OF JUVENILE OFFENDERS: WHAT HAVE WE LEARNED ABOUT “WHO GETS A SECOND CHANCE?” 113 (2011), available at <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Special-Programs/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Cheesman.ashx>.

97. CHEESMAN, *supra* note 96, at 113.

98. *Id.*

99. See Polachek, *supra* note 16, at 1173 (discussing the operation of blended sentencing statutes).

100. *Id.* “Blended sentencing offers juvenile offenders a last chance within the juvenile system by providing an incentive to respond to treatment in order to avoid the consequences of an adult sentence.” CHEESMAN, *supra* note 96, at 113 (citations omitted).

101. Polachek, *supra* note 16, at 1173.

102. Moore, *supra* note 8, 131.

103. CHEESMAN, *supra* note 96, at 113.

104. Polachek, *supra* note 16, at 1173.

cooperative behavior, there is a belief that criminal blended sentencing is more lenient.¹⁰⁵

A. MODELS OF BLENDED SENTENCING

Blended sentencing authority can be exclusive, inclusive, or contiguous.¹⁰⁶ In an exclusive blended sentencing model a judge has the discretion to impose either a juvenile or an adult sentence.¹⁰⁷ That sentence is made effective immediately.¹⁰⁸ The inclusive blended sentencing model allows a judge to “impose both a juvenile and an adult sanction.”¹⁰⁹ Generally, the adult sentence would remain suspended, unless the juvenile committed a subsequent violation.¹¹⁰ The last type is called the contiguous blended sentencing model.¹¹¹ This model allows a juvenile court judge to impose a sentence that begins in the juvenile system, but extends beyond the maximum age of the extended juvenile court jurisdiction.¹¹² When the maximum age is reached the offender would be transferred to an adult correctional system to finish out the imposed sentence.¹¹³

There are five different models of blended sentencing that have emerged from recent legislation.¹¹⁴ These different models are juvenile-exclusive blend, juvenile-inclusive blend, juvenile contiguous blend, criminal-exclusive blend, and criminal-inclusive blend.¹¹⁵ In the first three varieties, the juvenile court “retains responsibility for adjudicating the

105. *Id.* at 1174. This belief is due to the fact that even though a youth has been transferred to adult court they may receive a juvenile disposition, which is arguably more rehabilitative than punitive in nature. *Id.*

106. CHEESMAN, *supra* note 96, 113.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. PATRICIA TORBET ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 11-14 (1996). There is also a New York Model, but it will not be discussed in detail. The New York Model is used primarily for adolescents in criminal court. It allows the criminal sentence to be suspended while the juvenile participates in an alternative to an incarceration program. Successful juveniles avoid a criminal sentence, upon successful completion of the alternative. Megan M. Sulok, *Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not to Revoke*, 39 LOY. U. CHI. L.J. 215, 243 (2007).

115. Moore, *supra* note 8, at 131; *see also* CHEESMAN, *supra* note 96, at 114 (identifying the five different varieties of blended sentencing used across the United States).

case.”¹¹⁶ The second two varieties leave responsibility with the criminal court.¹¹⁷

1. *Juvenile-Exclusive Blend Sentencing*

The juvenile-exclusive blend allows a juvenile court to impose either a juvenile or adult sentence.¹¹⁸ At the outset, the juvenile court retains original jurisdiction, but upon adjudication or a finding of guilt, the juvenile court judge may impose either a juvenile or adult sentence.¹¹⁹ When an adult sentence is imposed, the juvenile can be sentenced to the adult mandatory for the convicted offense.¹²⁰ However, when the offender is given a juvenile sentence, the offender may be sentenced to two years or until the age of 18, whichever is longer.¹²¹ New Mexico,¹²² Massachusetts,¹²³ and Michigan¹²⁴ utilize this type of blended sentencing.¹²⁵

2. *Juvenile-Inclusive Blend Sentencing*

The juvenile-inclusive blend¹²⁶ allows the juvenile court judge to impose both a juvenile and adult sentence.¹²⁷ Generally, the adult sentence is suspended.¹²⁸ This blended sentencing option “provide[s] a viable dispositional option for juvenile court judges facing juveniles who have committed serious or repeat offenses and to give juveniles one last chance at success in the juvenile system, with the threat of adult sanctions as a

116. Moore, *supra* note 8, at 131. At the end of 1997, nine of the twenty states with blended sentencing authority left the responsibility of sentencing with the juvenile judge. CHEESMAN, *supra* note 96, at 114.

117. Moore, *supra* note 8, 131. There were nine states that placed authority in criminal court judges when exercising blended sentencing following a juvenile’s conviction. CHEESMAN, *supra* note 96, at 114. Blended-sentencing options were given to both juvenile and criminal court judges in Colorado and Michigan. *Id.*

118. CHEESMAN, *supra* note 96, at 114.

119. Moore, *supra* note 8, at 132.

120. *Id.*

121. *Id.*

122. N.M. STAT. ANN. §§ 32A-2-20, -23 (2011).

123. MASS. GEN. LAWS ch. 119, §§ 58, 74 (2008).

124. MICH. COMP. LAWS ANN. § 712A.18(1)(m) (West 2012).

125. RICHARD E. REDDING & JAMES C. HOWELL, BLENDED SENTENCING IN AMERICAN JUVENILE COURTS, in CHANGING BORDERS OF JUVENILE JUSTICE 145, 146, 149, tbl.4.3 (Jeffery Fagan & Franklin Zimring eds., 2000).

126. Normally, the juvenile court will retain jurisdiction over the juvenile offender until they reach the age of 21. Moore, *supra* note 8, at 133.

127. CHEESMAN, *supra* note 96, at 114.

128. *Id.* The adult sentence is suspended, unless the juvenile offender violates the dispositional order or commits a new offense. Moore, *supra* note 8, at 133.

disincentive.¹²⁹ Illinois,¹³⁰ Kansas,¹³¹ South Dakota,¹³² Minnesota,¹³³ Alaska,¹³⁴ Arkansas,¹³⁵ Connecticut,¹³⁶ Michigan,¹³⁷ Montana,¹³⁸ Vermont,¹³⁹ and Ohio¹⁴⁰ have adopted the juvenile inclusive blend sentencing.¹⁴¹

3. *Juvenile Contiguous Blend Sentencing*

The states following the juvenile contiguous blended sentencing model impose a juvenile sentence; however, this juvenile sentence extends beyond the age of the states EJJ.¹⁴² When the age of extended jurisdiction is reached, the juvenile court decides whether or not the juvenile offender should serve the remainder of the sentence in an adult correctional institute.¹⁴³ Texas,¹⁴⁴ Massachusetts,¹⁴⁵ Rhode Island,¹⁴⁶ Colorado,¹⁴⁷ and South Carolina¹⁴⁸ have enacted statutes following the juvenile contiguous blended sentencing.¹⁴⁹

4. *Criminal-Exclusive Blend Sentencing*

In criminal-exclusive blended sentencing a criminal court can choose to impose either an adult or juvenile sentence.¹⁵⁰ Generally, if an adult court determines a juvenile sentence is appropriate then the juvenile offender is adjudicated delinquent and committed to a juvenile facility.¹⁵¹

129. *Id.* at 132-33 (quoting PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT CRIME (1996)).

130. 705 ILL. COMP. STAT. ANN. 405/5-810 (West Supp. 2012).

131. KAN. STAT. ANN. § 38-2347 (Supp. 2011).

132. S.D. CODIFIED LAWS § 26-11-4 (West Supp. 2012).

133. MINN. STAT. § 260B.130 (2012). Blended sentencing in Minnesota is referred to as Extended Juvenile Jurisdiction or EJJ. Moore, *supra* note 8, at 132-33.

134. ALASKA STAT. ANN. § 47.12.065 (West 2007).

135. ARK. CODE ANN. § 9-27-306 (Supp. 2009), -506 (2008).

136. CONN. GEN. STAT. § 46B-133c (West Supp. 2009).

137. MICH. COMP. LAWS ANN. § 712A.18 (West 2012).

138. MONT. CODE ANN. § 41-5-1602 (2012).

139. VT. STAT. ANN. tit. 33, §§ 5201- 5293 (West Supp. 2011).

140. OHIO REV. CODE ANN. §§ 2152.121, 2152.13, 2152.14 (West 2012).

141. Moore, *supra* note 8, at 132-33.

142. CHEESMAN, *supra* note 96, at 114.

143. *Id.*

144. TEX. FAM. CODE ANN. § 54.04 (Supp. 2012).

145. MASS. GEN. LAWS ch. 119, §§ 58, 74 (2008).

146. R.I. GEN LAWS § 14-1-7.3 (Supp. 2011).

147. COLO. REV. STAT. §§ 19-2-601, 19-2-907 to -908, 19-2-910 to -911 (2012).

148. S.C. CODE ANN. § 63-19-1210 (2010).

149. CHEESMAN, *supra* note 96, at 114.

150. *Id.*

151. Moore, *supra* note 8, at 134.

On the other hand, if the adult court imposes an adult sentence then the offender is sentenced as an adult and transferred to a correctional facility.¹⁵² Virginia,¹⁵³ West Virginia,¹⁵⁴ Colorado,¹⁵⁵ Florida,¹⁵⁶ California,¹⁵⁷ Idaho,¹⁵⁸ Michigan,¹⁵⁹ and Oklahoma¹⁶⁰ utilize the criminal-exclusive blended sentencing model.¹⁶¹

5. *Criminal-Inclusive Blend Sentencing*

The last type of blended sentencing allows a criminal court to sentence a juvenile offender to both an adult and a juvenile sentence.¹⁶² However, the adult sentence is typically suspended.¹⁶³ Criminal-inclusive blended sentencing is similar to juvenile-inclusive blended sentencing.¹⁶⁴ The only difference is that in criminal-inclusive blended sentencing adult courts retain jurisdiction over the offender, rather than the juvenile court.¹⁶⁵ Virginia,¹⁶⁶ Florida,¹⁶⁷ Arkansas,¹⁶⁸ Michigan,¹⁶⁹ and Iowa¹⁷⁰ are the five states that utilize the criminal-inclusive blended sentencing model.¹⁷¹

V. RECOMMENDATION

A fundamental principal of juvenile law is the ability to tailor the disposition for the particular child based on the circumstances of the offense and the child's situation.¹⁷² Juvenile courts are often asked to strike a balance between providing for the care and rehabilitation of the child and

152. *Id.*

153. VA. CODE ANN. § 16.1-272 (2010).

154. W. VA. CODE § 25-4-6 (2002).

155. COLO. REV. STAT. § 19-2-907 (2012).

156. FLA. STAT. ANN. §§ 985.56, .565 (2012).

157. CAL. WELF. & INST. CODE § 707.01 (Deering Supp. 2012).

158. IDAHO CODE ANN. § 20-509 (2004).

159. MICH. COMP. LAWS ANN. §§ 712A.18(1)(m)-712A.18g (West 2012).

160. OKLA. STAT. tit. 10, § 2-2-401 to 2-2-403 (2009).

161. CHEESMAN, *supra* note 96, at 114.

162. *Id.*

163. *Id.*

164. Moore, *supra* note 8, at 135.

165. *Id.*

166. VA. CODE ANN. § 16.1-272 (2010).

167. FLA. STAT. ANN. § 985.565 (2012).

168. ARK CODE ANN. § 9-27-306 (Supp. 2012).

169. MICH. COMP. LAWS ANN. § 712A.18(1)(m) (West 2012).

170. IOWA CODE § 907.3A (2012).

171. CHEESMAN, *supra* note 96, at 114.

172. State *ex rel.* D.R., 51 So. 3d 121, 124 (La. App. 4 Cir. 2010); *see also* N.D. CENT. CODE § 27-20-31 (2006) (“[T]he court may make any of the following orders of disposition best suited to the child’s treatment, rehabilitation, and welfare . . .”).

the protection of the public.¹⁷³ These hallmarks of juvenile justice are difficult to accomplish under a framework that gives little or no consideration to the specific circumstances of a case or child.

A. AN IMPERFECT SYSTEM

Under North Dakota's current transfer statute, little discretion is left to the court or the parties in determining what type of disposition is the most appropriate or effective in a particular case.¹⁷⁴ For those offenses qualifying for automatic transfer, the prosecutor has discretion to determine the offense that is charged, which in turn determines if the case is prosecuted in juvenile or adult court.¹⁷⁵ In this situation, prosecutors are expected to see into the future to determine if an adult or juvenile disposition is most appropriate. Oftentimes, if a child has committed a serious, violent offense, but his juvenile court record is minimal or nonexistent, the determination of whether the case should be transferred to adult court is difficult.

Additionally, the discretionary transfer is difficult to obtain in cases where the child has no prior involvement with juvenile court. The discretionary transfer requires a finding that the child is not amenable to treatment or rehabilitation in juvenile court.¹⁷⁶ This element is often shown through the child's prior juvenile court programs and his level of success in those programs.¹⁷⁷ For example, if a child is charged with involuntary manslaughter, but has no prior record in juvenile court, that case may not meet the criteria for transfer to adult court.

B. AN UNFAIR RESOLUTION

Whether a child is prosecuted as an adult or juvenile poses significant differences for both the child and the safety of the public. For example, if a child fourteen years or older is charged with gross sexual imposition by

173. See *In re Hamill*, 271 A.2d 762, 765 (Md. App. 1970) (“[T]he juvenile court is to make disposition so as to provide for the care, protection, and wholesome mental and physical development of the child; by a program of treatment, training and rehabilitation ‘consistent with the protection of the public interest.’”).

174. *E.g.*, N.D. CENT. CODE § 27-20-34 (Supp. 2011). This is particularly true for an automatic transfer as the statute provides that “the court before hearing the petition on its merits *shall* transfer the offense . . . [if] there is probable cause to believe the child committed the alleged delinquent act.” *Id.* § 27-20-34(1) (emphasis added). However, even under a discretionary transfer, the court must also make certain findings, such as if the child is amenable to treatment or rehabilitation through juvenile programs. *Id.* § 27-20-34(1)(c). This requirement is often difficult to prove if the child has no prior involvement with juvenile court programs.

175. See *id.* § 27-20-34(1).

176. *Id.* § 27-20-34(1)(c)(4)(b).

177. *Id.* § 27-20-34(3).

force or by threat of imminent death, serious bodily injury, or kidnapping, the offense would transfer to adult court upon a finding of probable cause.¹⁷⁸ This offense imposes a minimum mandatory sentence of twenty years' imprisonment with probation supervision to follow the incarceration.¹⁷⁹ In addition to the sentence, the child would also be required to comply with lifetime registration as a sex offender.¹⁸⁰

Conversely, if the child was charged with a lesser offense in an effort to avoid the mandatory transfer provision, he or she would likely face a much less significant disposition than that imposed in adult court. In juvenile court, the maximum sentence imposed on any delinquency offense is twelve months.¹⁸¹ This order can be extended in increments of twelve months upon a finding that the extension is necessary for the treatment or rehabilitation of the child.¹⁸² However, a juvenile court's jurisdiction over a child terminates on the child's twentieth birthday.¹⁸³

This example exhibits the drastic differences between each disposition that could be imposed. Neither disposition may be appropriate for the offender or the public. The adult sentence creates the risk that the child may be over-punished for the offense charged. However, the juvenile disposition may not provide for sufficient time to adequately treat and rehabilitate the child and protect the public from a serious, violent offender.

C. STRIKING A FAIR BALANCE

Presently, the North Dakota Legislature is contemplating a method of blended sentencing for juvenile offenders.¹⁸⁴ Blended sentencing would provide a middle ground between the grave sanctions of adult court and the limited jurisdiction of juvenile court.¹⁸⁵ The proposed legislation provides a juvenile with "one last chance" in juvenile court and an opportunity to

178. *Id.* § 27-20-34(1)(b). The offense of Gross Sexual Imposition by force or by threat of imminent death, serious bodily injury, or kidnapping is classified as a class AA felony. N.D. CENT. CODE § 12.1-20-03(3)(a) (2012).

179. *Id.* § 12.1-20-03(3)(a). The court may deviate from this sentence if it finds that there is manifest injustice in the sentence and the defendant has accepted responsibility for the offense. *Id.*

180. *Id.* § 12.1-32-15(2)(a), (8)(c).

181. N.D. CENT. CODE § 27-20-36(2) (Supp. 2011).

182. *Id.* § 27-20-36(2)(a).

183. *Id.* § 27-20-36(6).

184. S.B. 2035, 63d Legis. Assemb. (N.D. 2013).

185. CHEESMAN, *supra* note 96, at 113 (explaining that blended sentencing serves "as a compromise between those who wanted to emphasize public safety, punishment, and accountability of juvenile offenders and those who wanted to maintain or strengthen the traditional juvenile justice system").

comply with a juvenile sentence before an adult sentence could be imposed.¹⁸⁶

The proposed legislation is a juvenile-inclusive model.¹⁸⁷ This would allow the juvenile court judge to impose a juvenile sentence and an adult sentence, with the latter being stayed or suspended.¹⁸⁸ So long as the child complies with the conditions of the juvenile sentence, the adult sentence is never imposed. Conversely, if the child fails to comply with the juvenile conditions, that sentence can be revoked and the adult sentence imposed, at the discretion of the juvenile court judge. Even though the child is initially sentenced as a juvenile, the child would receive all of the adult criminal procedural safeguards, such as the right to a jury trial.

Research shows adolescent brains do not fully develop until about the age of twenty-five.¹⁸⁹ As a result, trends in juvenile justice legislation shows that transfer statutes are being modified to give more discretion to juvenile court judges to determine the most appropriate disposition.¹⁹⁰ On the other hand, greater discretion presents the risk of potential bias in decision making.¹⁹¹

Transferring a child to adult court should be used as a last resort. Research suggests that prosecuting youth in the adult system results in a higher recidivism rate and an increase cost to the government. The proposed legislation removes all of the mandatory transfers to adult court, except for murder and attempted murder, and places those offenses under extended juvenile jurisdiction.

The transfer of a case to adult court or blended sentencing should be used on an infrequent basis. However, the infrequency of its usage does not diminish the importance of this sentencing alternative. The use of blended sentencing in those few cases would make a substantial difference for both the child and the safety of society.

VI. CONCLUSION

North Dakota's juvenile justice system has adopted the mission of "balanced and restorative justice."¹⁹² The intent of this approach is to

186. *See id.* (reporting that blended sentencing gives a child an incentive to comply with treatment in juvenile court in order to avoid the imposition of the adult sentence).

187. S.B. 2035, 63d Legis. Assemb. (N.D. 2013).

188. *Id.*

189. SARAH ALICE BROWN, NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2001-2011, at 3 (2012).

190. *Id.* at 5.

191. Cheesman *supra* note 96, at 116 (suggesting objective risk-and-needs assessments be used to assist in identifying the most appropriate candidates for blended sentencing).

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balance the offenders' need for treatment and rehabilitation with the safety of the community.¹⁹³ To appropriately strike this balance, the juvenile justice system must be flexible and must carefully consider each particular situation.

The adoption of a blended sentencing system would provide for rehabilitation and accountability for the child, and protect the public from serious, violent offenders that have failed in the juvenile justice system. If passed, S.B. 2035 would give juvenile offenders one last chance to participate in appropriate juvenile programs before facing the more serious consequences of an adult court sentence. Unlike our current law, blended sentencing would allow the juvenile justice professionals to wait and see which disposition is most effective and appropriate for the child. The implementation of such approach would provide a more fair result by balancing the interests of the child and society.

193. *Id.*