Indiana Law Journal

Volume 97 | Issue 1 Article 7

Winter 2022

Rethinking Juvenile Rehabilitation: Presumptive Waiver and Alternative Sentencing in Indiana

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Indiana's juvenile justice system, like all systems of juvenile justice, is premised on rehabilitation. And while Indiana is far from an outdated, overly punitive system, there are several tangible opportunities for improvement. Indiana enacted an alternative sentencing scheme for juvenile offenders waived into adult court in 2013, but alternative sentencing has not been implemented in an effective manner yet. Furthermore, Indiana's statutory system of waiver contains several aspects that are inconsistent with, or simply fail to account for, modern social science understandings.

This Comment seeks to expound upon relevant social science principles within the context of juvenile justice in order to bring to light many of the considerations that form the basis of a developmentally focused system. The Comment will bring to light twenty-first century literature on adolescent brain development and explain how youth behavioral tendencies can be better understood in light of this research. The Comment then takes an in-depth look at Indiana's system of "presumptive waiver" and its alternative sentencing scheme. Throughout this analysis, the Comment will highlight serious problems and inconsistencies within these statutory schemes.

The Comment will conclude with four concrete reform proposals that seek to enhance Indiana's system of waiver and alternative sentencing by making changes informed by developmental social science principles. These reform proposals are not unrealistic, system-rocking changes made for political grandstanding and internet clickbait. They are real proposals that can be effectively and immediately implemented without large-scale disruption. This Comment will demonstrate that these proposals should be taken into serious consideration by the Indiana legislature.

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INTRODUCTION

In *Miller v. Alabama*, the United States Supreme Court established the outer boundary of juvenile justice in terms of treating juveniles as adults.[1] The Court made it unconstitutional for any state to impose a mandatory sentence of life in prison without the possibility of parole (LWOP) for any individual under the age of eighteen at the time of committing the offense.[2] In 2016, the Court expanded this right by giving it retroactive effect in *Montgomery v. Louisiana*.[3] An important facet of these decisions is that they only preclude *mandatory* LWOP sentences for youth offenders.[4] *Miller* still leaves judges with *discretion* to impose an LWOP sentence, but requires that the sentencing official "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[5] This discretion, the Court explained in *Montgomery*, respects the fact that many juvenile

1. 567 U.S. 460 (2012).
2. *Id.* at 465.
3. 136 S. Ct. 718, 736 (2016).
4. *Id.* at 734.
5. *Miller*, 567 U.S. at 489.

criminal acts "reflect the transient immaturity of youth,"[6] a concept that encompasses much of the theoretical underpinnings of the juvenile justice system in America.

Again, *Miller* establishes only the outer boundary within which states must conform their punishment of youth offenders. Consistent with our federalist system of state administered criminal justice, states are free to provide juvenile offenders with greater protections than those guaranteed by *Miller*. Such a system naturally results in significant variance among states in their treatment of serious youth offenders,[7] both in the procedural posture in which they are charged (as juveniles or as adults) and the sentencing schemes to which they are subjected.[8]

The focus of this Comment is the treatment of youth criminal offenders in the State of Indiana, and specifically, the process of waiving youth offenders into adult court and the corresponding sentencing schemes. The Comment addresses some of the deficiencies in Indiana's current system and makes concrete recommendations for how it can be reformed. Before outlining the structure with which the Comment will proceed, it is important to clarify what the Comment will and will not address.

Juvenile court jurisdiction in Indiana can be summarized as encompassing three types of cases: (1) child abuse and neglect (CHINS cases); (2) delinquency cases; and (3) termination of parental rights (TPR cases).[9] The scope of this Comment is limited to the Indiana legal system's handling of adolescent criminal activity and thus only touches on delinquency cases. Any legal, social, or other principles underlying policy decisions in CHINS and TPS cases are beyond this Comment's purview. Thus, any reference herein to juvenile court or juvenile court jurisdiction refers exclusively to delinquency cases.

Indiana Code Sections 31-37-1-1 and 31-37-1-2 set forth conditions under which a juvenile court acquires jurisdiction over a delinquency case.[10] These statutes provide for jurisdiction in cases where it is alleged that a child has committed a "delinquent act"—an act that would be a crime if committed by an adult.[11] When a juvenile court acquires jurisdiction over a case, it holds a fact-finding hearing (unless the allegation is admitted) and determines whether the child has committed a delinquent act.[12] Any such finding must be based upon proof beyond reasonable doubt.[13] If the court determines the child did indeed commit the delinquent act, it will hold a "'dispositional' hearing to consider alternatives for the care, treatment, rehabilitation, or placement of the child."[14] Although the majority of youth criminal

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6. 136 S. Ct. at 734.

7. Any reference to "serious youth offenders" throughout this Comment refers to juveniles charged with the most severe crimes of violence—e.g., homicide, rape, aggravated battery, or arson, etc.

8. See discussion of Indiana statutory presumptive waiver *infra* Part II.A.

9. Frank Sullivan, Jr., *Selected Developments in Indiana Juvenile Justice Law (1993-2012)*, 48 IND. L. REV. 1541, 1542–43 (2015).

10. IND. CODE §§ 31-37-1-1 to -2 (2021).

11. Sullivan, *supra* note 9, at 1543.

12. *Id.* at 1543–44.

13. *Id.*

14. *Id.* at 1544.

activity falls within this category of cases,[15] they too are beyond the scope of this Comment.

This Comment focuses on Indiana's treatment of a much rarer and narrower group of youths—youth homicide offenders and other serious youth offenders.[16] Indiana has a comprehensive statutory "waiver" system of transferring these juveniles into the adult court system where they are tried and, if convicted, sentenced as an adult would be.[17] This system of waiver will be discussed at length in Part III of this Comment.

This Comment proceeds in four Parts. Part I outlines relevant social science principles that should inform a developmental juvenile justice system focused on rehabilitation. It addresses the ongoing brain development taking place during adolescence and how this development affects youths' ability to make decisions, process risk and reward, and their capacity to make meaningful changes in their lives as they reach adulthood. Part II analyzes Indiana's statutory scheme of waiver and alternative sentencing. It proceeds by analyzing the relevant statutes and discussing specific cases where these provisions have been applied. Part III begins by dissecting some of the deficiencies in the decisions mentioned in Part II in light of the principles outlined in Part I. It goes on to argue for specific reform measures aimed at making Indiana's system of waiver and youth sentencing more flexible and responsive to individual juvenile offenders.

I. ADOLESCENT DEVELOPMENT IN THE JUVENILE JUSTICE CONTEXT

Since the turn of the century, developments in juvenile justice have stemmed from the philosophical underlying presumption that "kids are different from adults, and therefore to be fair in responding to their undesirable behaviors, the reaction must differ from that for adults."[18] Christopher Sullivan[19] has described what he has termed the "intuitive argument" made by many scholars that appeals to this

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15. A statistical report of all offenses referred to U.S. juvenile courts in 2017 found that only 3800 cases, roughly one percent of all formally handled delinquency cases, were waived to adult court. SARAH HOCKENBERRY, OFF. JUV. JUST. & DELINQ. PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2017, 3 (2019) https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/253105.pdf [https://perma.cc/A4W8-ZEKU].

16. The same report found that 29.4% of offenses could be characterized as "person offenses." Furthermore, 63.4% of those offenses were simple assaults (and would not be considered "serious youth offenders" for the purpose of this Comment). Aggravated assaults and robberies accounted for 11% and 8.9%, respectively. Rape and homicide accounted for only 3.5% and 0.5% of all person offenses, respectively. *Id.* at 1. Interestingly, person offenses accounted for only 55% of the cases waived into adult court in 2017, with property offenses accounting for 27%, and drug and public order cases each accounting for roughly 9%. *Id.* at 3.

17. IND. CODE § 31-30-3-1.

18. CHRISTOPHER J. SULLIVAN, TAKING JUVENILE JUSTICE SERIOUSLY: DEVELOPMENTAL INSIGHTS AND SYSTEM CHALLENGES 71 (2019).

19. Associate Professor and Director of Graduate Studies in the School of Criminal Justice at the University of Cincinnati. *Dr. Christopher Sullivan*, UNIV. OF CINCINNATI (2019), https://staging10.uc.edu/about/centers/ucci/contact/faculty/christopher-sullivan.html [https://perma.cc/K679-YL4N].

reasoning.[20] To paraphrase the logic behind the arguments he is referencing, adolescents are inexperienced decision makers, and as such, it is expected that they will make mistakes. Thus, they should be afforded more latitude and leniency for the mistakes they make, and juvenile justice should focus on correcting, rather than punishing.[21] But it is necessary to develop a more fundamental understanding of what makes children different and how it affects their behavior before any productive conversation can be had about how to handle serious juvenile offenders. This Part explores modern social science understandings about youth development within the juvenile justice context in order to form a more developmental approach.

A. Youth Developmental Brain Processes

Recent studies of adolescent brain activity provide support for the "intuitive arguments" mentioned in the preceding passage. These arguments were first postulated from behavioral observations of youths. But through the use of magnetic resonance imaging (MRI) techniques, they are now supported by hard scientific data. These studies demonstrate that biological immaturity in the adolescent brain accounts for many of the issues young people have with decision-making, regulation of emotions, and measurement of risk and reward, among other things.[22] It is helpful to address these different processes in turn.

It is common knowledge that youths have a lesser decision-making capacity than their adult counterparts, but what accounts for that difference in capacity has been misunderstood until the past two decades. Contrary to the traditional view that changes in behavior during adolescence can be explained by immature cognitive control capacities, more recent studies suggest that "what distinguishes adolescents from children and adults is an *imbalance* among developing brain systems."[23] This imbalance can be explained as involving two separately but concurrently operating systems in the brain: one involved in cognitive and behavioral control and the other dealing with socioemotional processes.[24] As a result, adolescents lack the ability to self-regulate because the brain system that influences pleasure-seeking and emotional reactivity develops at a faster pace than the system responsible for self-control.[25] This goes a long way in explaining why certain youths make poor decisions

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20. SULLIVAN, *supra* note 18, at 71. The reasoning of these intuitive arguments is reflected in the Supreme Court's decision in *Roper v. Simmons*, which prohibited imposing the death penalty on a juvenile offender under the Eighth Amendment. 543 U.S. 551, 569 (2005) (stating that "as any parent knows . . . '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'" (quoting *Johnson v. Texas*, 509 U.S. 350 (1993)).

21. *Id.* at 70–71.

22. COMM. ON ASSESSING JUV. JUST. REFORM, NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 96 (Richard J. Bonnie et al. eds., 2013), http://www.njjn.org/uploads/digital-library/Reforming_JuvJustice_NationalAcademy Sciences.pdf [https://perma.cc/67AW-ZR8B] [hereinafter REFORMING].

23. *Id.* at 97 (emphasis added).

24. *Id.*

25. *Id.*

that land them in the juvenile justice system. When faced with a choice in an emotionally charged environment, the chemical imbalance in the adolescent brain causes many youths to choose the option with the greatest potential to satisfy these pleasure-seeking brain regions.[26] Adolescents are biologically wired toward risky decision-making.[27]

This imbalance, as opposed to mere underdevelopment in decision-making regions, is also important for another reason. It helps to explain how decision-making might change for some juveniles as they grow older and their brain develops. Research shows that adolescents have a fairly sophisticated cognitive level during their mid-teenage years, meaning they are capable of understanding the level of risk involved in a particular decision in the abstract.[28] Put another way, adolescent risk-taking is not influenced to a significant degree by the introduction of additional information about the nature of the risk they are evaluating.[29] The earlier maturation of the limbic system—responsible for emotional arousal—as opposed to the "elongated development of the prefrontal region"—which provides constraint over these impulses—results in behavior favoring shorter term rewards (e.g., sex, drug or alcohol use) over benefits which will not be realized until a much later time (e.g., financial security, good health, long-term personal autonomy).[30] This explains why adolescents' threshold for risk-taking increases in emotionally charged situations when there is heightened brain activity in their limbic systems.[31] The corollary result of this imbalance is that as youths mature into young adulthood, their cognitive brain systems tend to catch up with their socioemotional counterparts, and their ability to measure risk against reward and to inhibit impulsive behavior increases accordingly.[32]

Perhaps no one is better situated to comment on the capacity of youth offenders to reform their attitude and behavior than Bryan Stevenson, the founder and director of the Equal Justice Initiative.[33] Stevenson's memoir, *Just Mercy*, provides many

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26. Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 555–56 (2017) ("Emotions influence youths' judgment to a greater extent than adults and compromise adolescents' decision-making and self-control.").

27. *Id.* at 556 ("Youths are more heavily influenced by the reward centers of the brain, which contributes to riskier decisions.").

28. SULLIVAN, *supra* note 18, at 78; *see also* Feld, *supra* note 26, at 555 ("By mid-adolescence, most youths reason similarly to adults, such as when, for example, they make informed-consent medical decisions. But the ability to make reasonable decisions with complete information under laboratory conditions differs from the ability to act responsibly under stress with incomplete information.").

29. SULLIVAN, *supra* note 18, at 76.

30. *Id.* at 77; *see also* Feld, *supra* note 26, at 557–58 ("The relationship between two brain regions–the prefrontal cortex (PFC) and the limbic system–underlie youths' propensity for risky behavior.").

31. REFORMING, *supra* note 22, at 99.

32. *See generally* Feld, *supra* note 26, at 557–59. *See also id.* at 556 ("Although sixteen-year-olds' understanding and reasoning approximates adults, their ability to exercise mature judgment and control impulses takes several more years to emerge.").

33. *About EJI*, EQUAL JUST. INITIATIVE (2021), https://eji.org/about/ [https://perma.cc/FKV8-8G8D].

anecdotes about juvenile clients he has represented.[34] After recounting the story of Evan Miller, a fourteen-year-old sentenced to life in prison without parole, Stevenson described conversations with Miller while he was incarcerated in which "he seemed deeply confused" about "his own act of violence."[35] Stevenson then remarked: "[m]ost of the juvenile lifer cases we handled involved clients who shared Evan's confusion about their adolescent behavior. Many had matured into adults who were much more thoughtful and reflective; they were now capable of making responsible and appropriate decisions."[36] He went on to explain the commonality he saw in the cases involving a violent juvenile offender—most of his clients were "nothing like the confused children who had committed a violent crime."[37] Stevenson describes this attribute as "distinct" from his clients who committed crimes as adults.[38]

It is worth noting the substantial impact that peer exposure has on these neural processes. Several studies have demonstrated the increased risk-taking tendencies of youths in the presence of peers.[39] These studies show heightened brain activity in reward centers for adolescents in comparison with adults.[40] Social situations involving adolescents often "value short-term outcomes like status maintenance and solidarity in behavior and attitudes."[41] Other factors regarding peer influence on adolescent decision-making are discussed in the next section.

B. External Influences on Adolescent Decision-Making

It is no secret that external influences play a central role in adolescent decision-making. In fact, it has been suggested that adolescent decision-making and risk-taking behavior is best understood through the interaction of the developmental brain processes discussed above and environmental factors each individual youth is subjected to.[42] Modern research has identified three conditions as critically important to fostering healthy psychological development in adolescence: (1) the presence of a parent or a parent figure who is present and invested in the success and well-being of the adolescent; (2) inclusion in a peer group that values and models prosocial behavior and academic success; and (3) activities that contribute to autonomous decision making and critical thinking.[43] Analyzing each of these factors demonstrates that they present challenges and opportunities for the juvenile system.

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34. BRYAN STEVENSON, JUST MERCY (2014).

35. *Id.* at 265–66. Evan Miller was the plaintiff in the first case discussed in this Comment, *see supra* note 1. Bryan Stevenson, through the Equal Justice Initiative, represented him and successfully argued his case before the Supreme Court in 2012. *Id.* at 295–96.

36. *Id.* at 295–96.

37. *Id.*

38. *Id.*

39. SULLIVAN, *supra* note 18, at 78–79.

40. *Id.*; Feld, *supra* note 26, at 555 ("As their orientation shifts toward peers, youths' quest for acceptance and affiliation makes them more susceptible to influences than adults. Peers increase youths' propensity to take risks because their presence stimulates the brain's reward centers.").

41. SULLIVAN, *supra* note 18, at 78–79.

42. REFORMING, *supra* note 22, at 100.

43. *Id.* at 101.

The unfortunate truth is that there is no adequate substitute in the juvenile justice system for the positive presence of parents in the home. Effective and supportive parenting through nurturing, discipline, monitoring, and supervision can help prevent negative behavior, develop prosocial behavior and values, and assist youths in developing important competencies that enable them to protect themselves.[44] A lack of involvement or interest from parents, and/or high levels of family conflict in the home, have pronounced negative effects on children that carry over into adolescence.[45] These effects include reduced emotional security, reinforcement of aggressive tendencies and personal hostility, and increased involvement with deviant peers (the effect of which will be discussed in subsequent paragraphs).[46] While there are opportunities for the juvenile justice system to intervene and be involved with parents of delinquent youths early in the process,[47] any discussion of these opportunities is beyond the scope of this Comment because serious youth offenders, generally speaking, are beyond the reach of their parents.[48] However, where familial influences have negatively impacted a youth's development, which is often the case with those that encounter the juvenile justice system, "[i]nvolvement with juvenile court offers an opportunity to engage in developmentally formative action if family is a risk factor for a youth."[49]

The juvenile justice system can exert much more control over the effect of peer relationships on youth behavior and development. While peer influences are stereotypically thought of in negative terms of "peer pressure," peer influences can be, and generally are, positive.[50] Positive peer influence takes place in many naturally occurring groups through academic, athletic, and community-oriented settings.[51] The common thread running through these organizational activities is structure and adult supervision.

There are, of course, many variables associated with peer association that negatively influence youth behavior. When peer interaction takes place in unstructured settings without adult supervision, incidences of offending increase dramatically.[52] The most obvious but also most salient form of negative peer influence occurs through gang activity.[53] As discussed in the previous section, the presence of peers triggers heightened socioemotional activity in the brain, making it

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44. COMM. ON SCI. ADOLESCENCE BD. ON CHILD., YOUTH, & FAMS., INST. MED. & NAT'L RSCH. COUNCIL, THE SCIENCE OF ADOLESCENT RISK-TAKING 61 (2011) [hereinafter Committee].

45. *Id.*

46. *Id.*

47. *See id.* at 61–64.

48. I feel compelled to include a footnote emphasizing that once a serious youth offender is incarcerated, continued parental contact through visitation, letters, telephone calls, etc., would likely provide a great boost to a delinquent's morale and motivation to rejoin society. But again, any such continued action on the part of parents is largely beyond the control of the juvenile justice system.

49. SULLIVAN, *supra* note 18, at 166.

50. REFORMING, *supra* note 22, at 105.

51. *Id.* at 105–08.

52. *Id.* at 105.

53. *Id.*

more difficult for youths to measure risk and control impulsive behavior. These factors present the juvenile justice system with some of its principal opportunities—providing adolescents with structure and supervision and mitigating the prevalence of gang activity.[54]

Opponents of the notion that juvenile correction can positively reform youth behavioral development will cite evidence that "aggregation of deviant adolescents with other deviant adolescents" can negatively impact individuals in some situations.[55] Congregation of deviant youth can cause a phenomenon referred to as "deviancy training," a process by which delinquents in detention facilities learn new inappropriate behavior and increase their chances of reoffending.[56] Deviancy training is most likely to occur when adolescents are grouped under the following circumstances: (1) participants are of early adolescent age; (2) participants have begun a trajectory toward deviance but are not extremely deviant; (3) participants are exposed to slightly older, slightly more deviant peers; and (4) the setting is unstructured and allows for free interaction without well-trained adult supervision.[57] These factors make it apparent why the presence of the most depraved, serious adolescent offenders in youth correctional facilities could have a substantial negative impact on other, less serious offenders.

With this being said, all of the factors that make a situation conducive to deviancy training demonstrate that any youth incarcerated in an adult correctional facility will inevitably be influenced to a heightened degree by adult inmates. A juvenile—regardless of age—is at an "early age" when compared to the other inmates at the facility. The fact that the adolescent was waived into adult court and placed in an adult correctional facility is dispositive in itself of his or her trajectory toward extreme deviancy. The adolescent will be one of a small number of minors incarcerated at the facility, meaning he or she will be exposed to inmates of all ages and who have been convicted of crimes of any conceivable nature. Finally, regardless of the level of security at the facility, the youth will be interacting daily with older inmates of varying criminal propensity without any meaningful adult supervision. In summary, the conditions in a juvenile facility that have been shown to promote negative peer influence and increase prospects of reoffending are amplified to a disturbing degree in an adult correctional facility. Thus, the effect of incarcerating an adolescent in an adult facility is to give up on any chance of meaningful rehabilitation through the justice system.

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54. I use the term mitigate as opposed to eliminate in recognition of the fact that gang activity can occur in juvenile correctional facilities. *See, e.g.*, Atasi Satpathy, Note, *Urgent Reform "In the Name of Our Children": Revamping the Role of Disproportionate Minority Contact in Federal Juvenile Justice Legislation*, 16 MICH. J. RACE & L. 411, 413 (2011) (recounting the story of a young, black inmate at D.C. and Maryland correctional facilities whose gang affiliation started while incarcerated and likely prevented him from obtaining a sentence reduction).

55. REFORMING, *supra* note 22, at 106.

56. Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons For A New Era*, 16 GEO. J. POVERTY L. & POL'Y 483, 523 (2009).

57. REFORMING, *supra* note 22, at 106.

C. Juvenile Justice, Waiver, and the Effect on Future Youth Behavior

There are several ways a juvenile offender can end up in adult court, and ultimately, an adult correctional facility.[58] The major theoretical underpinning of the juvenile justice system in America is rehabilitation of the offender.[59] The decision to waive a juvenile to the adult court system presupposes that rehabilitation through the juvenile system is no longer an option.[60] The following sections address this presumption by analyzing the effects of the practice of waiving youths into adult court on the development and future behavior of the youth offenders.

1. Problems Adolescents Face in Adult Criminal Court

Adolescents tried, convicted, and sentenced in adult criminal court go on to face enumerable challenges at every stage of the process. Adolescent defendants have been shown to think, behave, and understand legal proceedings differently than adults during a criminal prosecution.[61] They may be expected to:

> (1) misinterpret the role of counsel and think that they must be truthful with their attorney so the latter will decide whether to advocate for the defendant's interests; (2) distrust defense counsel and not be forthcoming with that person due to a belief that adult defense attorneys would not work for a juvenile the way they would for adults; (3) overestimate the probability of desired events that may result in a greater likelihood of rejecting plea bargains; and (4) have difficulty comprehending the significance of the length of sentences, which can interfere with an ability to appreciate the consequences of various dispositions and to make informed legally-relevant decisions.[62]

As a result, developmental psychologists claim that adolescents lack the requisite maturity of judgment to be competent to participate in a criminal trial.[63] Unfortunately, the relative difficulty an adolescent faces in competently standing trial in a criminal court is only the tip of the iceberg.

Research has shown that adolescents housed in adult correctional facilities are far more likely to experience the worst outcomes of incarceration than those housed in a juvenile center. While incarcerated youths are generally much more likely than non-incarcerated youths to commit suicide,[64] the statistics are even more alarming

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58. *See infra* Part II.

59. *Youth in the Justice System: An Overview*, JUV. L. CTR. (2020), https://jlc.org/youth-justice-system-overview [https://perma.cc/YWN4-6SNS] ("Today's juvenile justice system still maintains rehabilitation as its primary goal and distinguishes itself from the criminal justice system in important ways.").

60. HOCKENBERRY, *supra* note 15, at 3.

61. Joseph B. Sanborn, Jr., *Criminology: Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 152 (2009).

62. *Id.* at 152.

63. *Id.* at 150.

64. Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* 10 (Nov. 2007),

for those incarcerated in adult facilities. The CDC has estimated that youths in adult jails are thirty-six times more likely to commit suicide than those in a juvenile detention facility.[65] Additionally, youths are substantially more likely to be raped or sexually assaulted in adult prison. One survey reported five times as many youths held in adult prisons having been subjected to an attempted sexual attack in comparison to those held in a juvenile facility.[66] Finally, non-sexual physical abuse is much more pervasive at adult correctional facilities as well. Adolescents in adult facilities are twice as likely to report being beaten at the hands of staff than those at a juvenile facility and are fifty percent more likely to report being attacked with a weapon.[67]

2. Merit to Notions of Deterrent Criminal Justice

The vast majority of research into recidivism rates of youths incarcerated at adult correctional facilities has revealed that this practice has little to no deterrent effect. A 2007 CDC report analyzed six separate studies of the deterrent effect of statutes transferring youth to the adult criminal system.[68] Of the six, only one indicated that transfer of juveniles to the adult system had a deterrent effect on future violent or general criminal activity, and another found no effect at all.[69] The remaining four studies all found that this subset of juveniles actually committed more subsequent violent or general crime than youth retained in the juvenile system.[70] Based on "the *Community Guide*'s rules of evidence," these studies provided a sufficient basis for the CDC researchers to conclude that "transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence."[71]

Another report compiled by the Washington Coalition for the Just Treatment of Youth analyzed the findings of the CDC report in the context of modern understandings about youth brain development.[72] This report elaborated on the

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http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf [https://perma.cc/R6KP-FGYQ] (citing DOJ Bureau of Justice study finding the suicide rate for jail inmates under 18 was 101 per 100,000 from the year 2000 to 2002, compared with a rate of 5.32 per 100,000 amongst fourteen- to seventeen-year-olds over the same time period).

65. *Id.*

66. Vincent Schiraldi & Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults*, CTR. ON JUV. & CRIM. JUST. (July 1997), http://www.cjcj.org/uploads/cjcj/documents/the_risks.pdf [https://perma.cc/TEQ2-SNN6].

67. *Id.*

68. Robert Hahn, et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Vol. 56/RR-9 6–7, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2007), https://www.cdc.gov/MMWR/PDF/rr/rr5609.pdf. [https://perma.cc/GL9S-S8E3]

69. *Id.*

70. *Id.*

71. *Id.* At 7–8.

72. WASH. COAL. FOR THE JUST TREATMENT OF YOUTH, *A Reexamination of Youth Involvement in the Adult Criminal Justice System in Washington: Implication of New Findings about Juvenile Recidivism and Adolescent Brain Development* (2009), https://www.njjn.org/

adolescent brain research discussed in Section A above and concluded that "adolescents are more amenable to rehabilitation than adults because one's character continues to form as the brain matures."[73] This logic explains why exposing adolescents to "adult criminal culture rife with violence and antisocial behavior" naturally results in many youth emerging from incarceration with a greater likelihood of reoffending.[74] In summary, during a period of brain development when the juvenile justice system *could be* positively influencing and shaping an adolescent's future behavioral tendencies, many youths are thrust into an institution that will likely set them on a path toward lifelong criminality.

II. TREATMENT OF JUVENILES AS ADULTS IN THE INDIANA JUSTICE SYSTEM

The remainder of this Comment addresses the effects and underlying policy considerations behind the practice of trying juveniles as adults and, if convicted, incarcerating them in adult correctional facilities in Indiana. Juveniles can end up in adult court through several different mechanisms. The simplest way an adolescent will end up in adult court is by way of jurisdictional age limits on juvenile courts. Juvenile courts in all states have a jurisdictional upper age limitation of either fifteen, sixteen, or seventeen.[75] Any individual older than the upper limit who is charged with an offense will be prosecuted in adult criminal court. A 2011 report from the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice (OJJDP) estimated that in the thirteen states that hold youths criminally responsible before turning eighteen, roughly 175,000 cases involving sixteen- or seventeen-year-olds were tried in adult criminal court in 2007.[76] Indiana is one of the majority of states whose juvenile court jurisdiction has an upper age limit of seventeen.[77] However, there are still a number of ways that youths in Indiana end up in adult court.[78]

Indiana's juvenile justice system employs a statutory scheme with some progressive elements and a certain degree of flexibility for handling individual juvenile defendants. While Indiana has generally tried to make its juvenile justice

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uploads/digital-library/resource_970.pdf [https://perma.cc/57DE-7RSP].

73. *Id.* at 5.

74. *Id.* at 1.

75. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2011 1 (2014), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248410.pdf [https://perma.cc/475Z-JAAY].

76. PATRICK GRIFFIN ET AL., U.S. DEP'T JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 21 (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf [https://perma.cc/29MM-2LUV].

77. *Id.*

78. For a thorough explanation of the three general types of statutory provisions that enable youths to be tried in adult court irrespective of age, see generally Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 7–8 (2017). Soohoo has labeled these three types of statutes as "prosecutorial discretion," "statutory exclusion," and "judicial waiver" laws. *Id.* There are examples of both statutory exclusion and judicial waiver laws in Indiana's statutory code. *See* IND. CODE ANN. §§ 31-30-3-2 to -3 (LexisNexis 2020) (judicial discretion); *id.* §§ 31-30-3-4 to -6 (presumptive waiver); *id.* § 31-30-1-4 (statutory exclusion).

system more responsive to the special needs and characteristics of youth offenders,[79] there are still several deficiencies in the system in its current form. Several attempts at reform have been made over the last decade or so. But the focus (or aim) of these reform measures has been inconsistent and, in some respects, in opposition to one another.

The following two examples are illustrative of this dichotomy. Indiana has what has been referred to as a "special 'presumptive waiver' situation for murder" that automatically waives a child into adult court if they are charged with a crime that would be murder if committed by an adult.[80] Until 2015, this statute applied to any child ten years or older.[81] A 2015 amendment modified the statute slightly by raising the minimum age requirement to "twelve (12) years of age,"[82] displaying a measure of compassion and understanding for the undeveloped and malleable phase of childhood. However, in response to a 2018 school shooting in Noblesville, Indiana, conducted by a thirteen-year-old boy,[83] the Indiana legislature proposed a law that would lower the age at which a child could be charged as an adult for attempted murder from fourteen to twelve.[84] This statutory proposal evinces either a lack of understanding for the same attendant characteristics of adolescence or a disregard for the role those characteristics should play in administering juvenile justice.

These two contrasting reform measures are indicative of larger problems with Indiana's treatment of serious youth offenders in the criminal justice system. This Part engages with those problems by analyzing the statutory provisions this Comment seeks to reform. This Part proceeds by explaining the way that these statutes operate and providing examples of their application, highlighting problems and inconsistencies along the way.

A. Presumptive Waiver Statute for Offenders Accused of Committing Murder

Indiana's presumptive waiver statute for youths accused of committing murder appears in Indiana Code Section 31-30-3-4.[85] This statute combines prosecutorial

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79. *See generally* Sullivan, *supra* note 9, at 1571 (explaining that "a 'full investigation and hearing' is required before a judge makes a waiver decision, whether presumptive or discretionary," and emphasizing that a judge retains the final decision of whether or not to waive a youth offender into adult court in each case).

80. *Id.*

81. *Id.*

82. IND. CODE § 31-30-3-4(3), *amended by* Pub. L. No. 187-2015, § 26 (effective July 1, 2015).

83. Emma Kate Fittes, *In Court, The Noblesville Shooter Was Quiet. In His Video, He Calmly Pressed a Gun to His Cheek*, INDYSTAR (Nov. 12, 2018, 8:19 AM), https://www.indystar.com/story/news/local/hamilton-county/education/2018/11/12/noblesville-west-middle-school-shooting-video-suspect-chilling-court-quiet/1928846002/ [https://perma.cc/5DK6-3Y8D].

84. Chris Sikich, *Noblesville School Shooting Inspires Legislation That Would Allow 12-Year-Old Suspects in Adult Court*, INDYSTAR (Jan. 15, 2019), https://www.indystar.com/story/news/politics/2019/01/15/noblesville-shooting-measure-would-allow-12-year-old-suspects-to-be-tried-in-adult-court/2575505002/ [https://perma.cc/T2F9-256F].

85. IND. CODE § 31-30-3-4 provides:

and judicial discretion. The statute can only be invoked on motion of the prosecuting attorney. Once the prosecution makes the motion and after a full investigation and hearing, the juvenile court "shall waive jurisdiction" if certain, relatively barebone, criteria are met.[86] The court must find that "the child is charged with an act that would be murder if committed by an adult," that "there is probable cause to believe the child has committed the act," and that "the child was at least twelve (12) years of age when the act was allegedly committed."[87] The final provision of the statute leaves a small amount of discretion with the judge, stating that the juvenile court may retain jurisdiction if "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system."[88]

The three enumerated criteria that the juvenile court must find to waive jurisdiction under this statute do not call for much factfinding. The first condition, that the child is charged with an act that would be murder if committed by an adult, is easily satisfied by the prosecutor's charging decision. The second condition, the existence of probable cause to believe the child committed the act, is the same precondition that must be met to hold a defendant on criminal charges for any crime in adult court in Indiana.[89] Probable cause is not regarded as a particularly high standard to meet.[90] The final condition, the age of the defendant, is also easily proven and is unlikely ever to be in dispute. Thus, it is safe to assume that a prosecutor will almost always be able to satisfy the requisite conditions to waive a youth accused of

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

86. *Id.*

87. *Id.*

88. *Id.*

89. *Overview of Indiana Criminal Procedure for the Non-Lawyer Information/Indictment*, THE CLARK CNTY. PROSECUTING ATT'Y: VICTIM/WITNESS SERVS., http:www.clarkprosecutor.org/html/victim/VICTIM2.HTM [https://perma.cc/M9S2-LFES] (explaining that, to initiate a prosecution in Indiana, a prosecutor files an Information with the court along with a Probable Cause Affidavit, from which the "Judge must find that there is 'probable cause' to believe that the defendant committed the crimes charged").

90. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 996 (2003) (debating the correct percentage of certainty to meet the probable cause standard and concluding "probable cause is thus a percentage nestled somewhere between .01% and 51%"); Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 347 (2004) (explaining that in the absence of an established standard for competence of a juvenile to stand trial as an adult, "it is probably appropriate to think in terms of a fairly low standard, like probable cause").

murder into adult court, leaving the decision in most cases to the discretion of the judge.

The final provision of the statute offers judges discretion to keep a case in juvenile court. Under the statute, the juvenile court "shall waive jurisdiction if it finds that" the necessary conditions are met "unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system."[91] This Comment takes the position that the discussion in Part II of this Comment[92] provides dispositive evidence that it is *always* in the best interests of the child to remain in the juvenile justice system.[93] However, research on Indiana case law did not uncover any cases where a court seriously debated whether waiver was in the best interests of the child. Discussion of this provision of the statute has always considered both the interests of the child and the interests of society in tandem, as though those two interests are inseparable for the purpose of making these decisions. As a result, Indiana juvenile courts have denied a motion by a prosecutor under section 31-30-3-4 and retained jurisdiction over a very small and narrow subset of cases.

State v. J.T. is a 2019 case in which the Indiana Court of Appeals upheld a decision by a juvenile court to deny a prosecutor's motion to waive jurisdiction under section 31-30-3-4.[94] The court gave some credence to the prosecutor's argument by noting that the twelve-year-old juvenile had committed a "brutal act with some degree of premeditation."[95] However, the court then proceeded to discuss the girl's "symptoms of severe mental illness:" a dissociative identity disorder that manifested itself through multiple personalities named Star and Anna, as well as experiencing hallucinations, blackouts, and voices in her head.[96] The court also discussed the conditions the youth was brought up under, including a broken and unstable home life; pervasive verbal, physical, and potential sexual abuse; constant exposure to controlled substances and alcohol; and continuous bullying at school.[97] The court's exposé of evidence of J.T.'s mental illness and her disturbing upbringing spanned thirty-five paragraphs of the opinion.[98] After acknowledging that "[n]either the juvenile court nor this Court can predict the future," and that J.T's treatment under the supervision of the juvenile court "may not adequately address [her] mental illness," the court concluded that the juvenile court did not abuse its discretion in denying the prosecution's motion to waive jurisdiction.[99]

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91. IND. CODE ANN. § 31-30-3-4 (LexisNexis 2020).
92. *See supra* notes 58–61 and accompanying text.
93. *See* discussion *supra* Section II.C.
94. 121 N.E.3d 605, 621 (Ind. Ct. App. 2019).
95. *Id.* at 614.
96. *Id.* at 614–16.
97. *Id.*; *id.* at 614 ("J.T. was repeatedly physically and verbally abused by her half-brother, who punched and choked her.").
98. *Id.* at 614–20; *see id.* at 618 ("J.T's answers to one diagnostic questionnaire indicated that she had experienced severe physical abuse, emotional neglect, emotional abuse, severe sexual abuse, and physical neglect (meaning that her basic physical needs had not be met in the past).").
99. *Id.* at 620–21.

J.T. v. State is illustrative of the extremely high bar that must be shown in order to overcome the "presumption in favor of waiver" that exists when the conditions of section 31-30-3-4 are met.[100] This is the only case citing this statute on Lexis or Westlaw in which a prosecutor's motion to waive jurisdiction was denied by a juvenile court. It may be true that juvenile courts in Indiana decline motions by prosecutors to waive jurisdiction under section 31-30-3-4 more often than is reflected in retrievable appellate decisions. But the paucity of relevant case law leaves juvenile courts without any meaningful guidance to determine when the presumption is overcome, beyond the vague language contained in the statute.

Villalon v. State further illustrates how rare and difficult it is to overcome the presumption of waiver where a juvenile is alleged to have committed murder.[101] In this case, fifteen-year-old Martin Villalon allegedly chased down and shot another boy of similar age because Villalon believed him to be a member of the Vice Lord gang.[102] Upon the state's motion and after a hearing, the juvenile court waived jurisdiction into adult criminal court.[103] Villalon was convicted of murder and sentenced to sixty years imprisonment.[104] On appeal, Villalon focused his argument on what was in the best interests of himself and the safety and welfare of the community, emphasizing his lack of criminal history and his minor juvenile record.[105] The court rejected these arguments, instead finding that it was not in Villalon's best interests to remain in the juvenile system because he did not have the "identified psychological or mental health issues that would benefit from treatment in the juvenile system."[106] And further, it was not in the interests of the safety and welfare of the community because, despite his "very limited juvenile history," Villalon reported involvement with gang activity where he was pressured to sell marijuana, and that he had tried alcohol and marijuana at an early age.[107] Finally, the court relied on a forensic evaluation conducted by a doctor that recommended that Villalon be "waived to adult court 'due to the heinous nature of the offense.'"[108]

There are several troubling aspects of this decision. First, the court seems to find the fact that Villalon lacked any serious psychological issues or mental illness to be dispositive evidence that he would not benefit from treatment in the juvenile system. This runs contrary to the extensive body of evidence that shows that the decision-making capacity of adolescents continues to progress into their midtwenties.[109] Furthermore, the court finds that Villalon's gang affiliation and his willingness to sell drugs at the encouragement of his fellow gang members are factors that would make him a continuing threat to society and his community if he is retained in the juvenile system. However, social science research suggests that his gang affiliation

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100. *Id.* at 613 (citing *Moore v. State*, 723 N.E.2d 442, 446 (Ind. Ct. App. 2000) ("Proof of these elements creates a rebuttable presumption in favor of waiver.")).

101. 956 N.E.2d 697, 706 (Ind. Ct. App. 2011).

102. *Id.* at 702.

103. *Id.*

104. *Id.*

105. *Id.* at 705. Villalon's juvenile record was limited to truancy and property damage. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See generally supra* discussion in Section II.A.

is a factor that substantially exacerbates his inability to control his impulses and make future-oriented decisions.[110] Villalon's gang affiliation should properly be viewed as an explanatory factor for why he committed this act in the first place, rather than evidence that he will be a continuing threat to society in the future or that he is incapable of rehabilitation.

As for the court's recitation of the fact that Villalon drank alcohol and tried marijuana at a young age, it is unclear why his substance use factors into the court's analysis of his threat level to society. The court's discussion of these facts reflects an antiquated, general disdain toward the use of alcohol and marijuana by minors. To be clear, this Comment does not suggest that it is acceptable for adolescents to use marijuana or drink alcohol, but it is well established that experimenting with these substances during adolescence is incredibly common.[111] Therefore, a court should not rely on self-reported drug or alcohol use by a juvenile as evidence that they are a continuing threat to society.[112]

Finally, the court's description of this crime as "heinous" is a mischaracterization and illustrates why there should not be a presumption in favor of waiver. Yes, Villalon did shoot and kill another person in what can only be construed as an act of gang violence, but he did not torture or humiliate him.[113] The act was not preceded or motivated by an act of sexual violence, nor were there any other specific facts the court cited to justify its characterization of the killing as "heinous."[114] So why did the juvenile court call this a "heinous" crime, and why does that justify the court's decision to waive jurisdiction? One answer to this question is that taking the life of

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110. *See supra* discussion in Section II.B.

111. *See Teen Substance Use & Risks*, CDC (February 10, 2020), https://www.cdc.gov/ncbddd/fasd/features/teen-substance-use.html [https://perma.cc/FG45-FAQ2] (stating that by 12th grade, about two-thirds of students have tried alcohol, and half of 9th through 12th grade students reported ever having used marijuana); *see also* Robert Woods Johnson Foundation, *Model Policies for Juvenile Justice and Substance Abuse Treatment: A Report by Reclaiming Futures*, RECLAIMING FUTURES (July 2008) https://www.njjn.org/uploads/digital-library/resource_860.pdf [https://perma.cc/XE2X-9R6X] (stating that "as many as four in five teens in trouble with the law are abusing drugs and alcohol" and citing a membership survey by the National Council of Juvenile and Family Court Judges that determined sixty to ninety percent of teens in juvenile court have a substance abuse problem).

112. It could also be argued that preventing juvenile offenders from using alcohol and drugs is one of the most attainable benefits of juvenile incarceration. For that reason, if drug or alcohol abuse played a significant role for a juvenile in committing or prompting the decision to commit a crime, this should factor in favor of keeping that individual in the juvenile system.

113. *Compare Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014) (finding that, "although senseless and reprehensible, the murders in this case were not particularly heinous" because "there is no evidence that the victims were tortured, beaten, or lingered in pain"), *and Taylor v. State*, 840 N.E.2d 324, 341–42 (Ind. 2006) (concluding that a trial court erred in characterizing a murder a "heinous" where the defendant killed the victim with a single gunshot wound to the heart over an unpaid debt), *with Penick v. State*, 659 N.E.2d 484, 488 (Ind. 1995) (finding it heinous that the defendant caused a drawn-out, painful, and torturous death for the victim).

114. *See Villalon v. State*, 956 N.E.2d 697, 705 (Ind. Ct. App. 2011).

another human being is, by and large, the worst thing that an individual can do to another person. For that reason, every murder can be described as a "heinous" crime.[115] And if a child committing a heinous crime is enough by itself to find that it is not in the best interests of the safety and welfare of the community to retain that child in juvenile court, then there is never a situation in which a child accused of murder should not be waived into adult court.[116] But this statute retains a provision providing for judicial discretion to deny waiver into adult court in certain situations, which means that the Indiana legislature intended for there to be instances where a child takes the life of another person and remains in the juvenile system. If the legislature intended for this discretionary provision to only apply in situations where extreme mental illness predated the criminal act, it would make sense that they would have made that intention explicit, as opposed to the open-ended provision the statute employs in its current form. But this is essentially the reading that has been given to the statute by Indiana appellate courts, which is the natural result of instituting a *presumption* in favor of waiver.

B. Alternative Sentencing Scheme

Indiana has a statutory alternative sentencing scheme available for juvenile offenders after conviction in an adult court.[117] This scheme provides judges with discretion to keep certain offenders within the juvenile system for a period of time before serving the remainder of their criminal sentence at an adult corrections facility. It also grants judges the option to modify an offender's criminal sentence based on progress and rehabilitation demonstrated by the offender while under the supervision of the juvenile system. The mechanics and potential benefits of the alternative sentencing scheme are discussed in more detail in Section (a) below. The issues with the implementation of Indiana's alternative sentencing scheme are covered in Section (b).

1. Overview of Alternative Sentencing

An offender is eligible for sentencing under this scheme if he or she: is less than eighteen; is either (1) waived into an adult court under Indiana Code section 31-30-3 or (2) is charged with a felony over which a juvenile court lacks jurisdiction under section 31-30-1-4; and is convicted of committing the felony or enters a plea of guilty.[118] If an individual qualifies for alternative sentencing and "there is space

115. It is important to note that this oversimplified explanation ignores the fact that the Indiana Supreme Court has previously defined when a crime can accurately be characterized as heinous. *See Villalon v. State*, 956 N.E.2d 697, 705 (Ind. Ct. App. 2011); *see also Holmes v. State*, 642 N.E.2d 970, 972–73 (Ind. 1994); *Reaves v. State*, 586 N.E.2d 847, 852 (Ind. 1992).

116. The only exception would be with the profoundly disturbing circumstances present in a case like *J.T. v. State* that would balance the analysis back in favor of retaining the child in the juvenile system because of severe and pervasive mental health issues that the court deems treatable in a residential facility. *See supra* notes 96–100 and accompanying text.

117. *See* IND. CODE ANN. §§ 31-30-4-1 to -7 (LexisNexis 2020).

118. IND. CODE ANN. § 31-30-4-2(a) (LexisNexis 2020).

available for the offender in a juvenile facility of the division of youth services of the department," the sentencing court may: (1) impose an appropriate criminal sentence; (2) suspend the criminal sentence; (3) order the offender to be placed in a juvenile facility of the division of youth services; and (4) "provide that the successful completion of the placement of the offender in the juvenile facility is a condition of the suspended criminal sentence."[119]

In summary, this statute allows for a juvenile waived into adult court and convicted of a felony to be placed in a juvenile facility for a period of time before being incarcerated in an adult correctional facility. This has several benefits. First, the adolescent has a much lower probability of committing suicide or being physically or sexually assaulted in a juvenile facility.[120] Additionally, because the youth has the opportunity to spend a significant number of his or her remaining formative years of development outside of the adult correctional system, the youth has a greater chance at rehabilitation and may be less susceptible to the trend of recidivism associated with youths waived out of the juvenile system.[121] These can be characterized as the "front-end" benefits of Indiana's alternative sentencing scheme.

Indiana's alternative sentencing statutes also provide "back-end" flexibility by allowing courts to modify a sentence in response to significant rehabilitation demonstrated by an individual offender. Under Indiana Code section 31-30-4-5,[122] upon request of the sentencing court, the department of correction must provide a progress report concerning an offender sentenced and placed in a juvenile facility under the alternative sentencing program.[123] Additionally, the department of corrections is required to notify the sentencing court when one of these offenders turns eighteen, and the sentencing court must hold a review hearing concerning the offender's progress before he or she turns nineteen.[124] After said hearing, the sentencing court has the discretion to:

> (1) continue the offender's placement in a juvenile facility until the objectives of the sentence imposed on the offender have been met, if the sentencing court finds that the objectives of the sentence imposed on the offender have not been met;
> (2) discharge the offender if the sentencing court finds that the objectives of the sentence imposed on the offender have been met;
> (3) order execution of all or part of the offender's suspended criminal sentence in an adult facility of the department of correction; or
> (4) place the offender:
> (A) in home detention under IC 35-38-2.5;

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119. *Id.* § 31-30-4-2(b)(1)–(4).

120. *See supra* discussion Section I.C.1.

121. *See supra* discussion Section II.C.2; *see also* Olivia Covington, *Juvenile Incarceration, Crime Falling Nationwide*, THE IND. LAW. (July 9, 2019), https://www.theindianalawyer.com/articles/50780-juvenile-incarceration-crime-falling-nationwide [https://perma.cc/P6HL-9ZQS] ("Most literature now accepts the proposition that human brains are not fully developed until the mid-20s, so detaining minors can have a negative impact on their minds, especially for young people who have mental illnesses.").

122. IND. CODE ANN. § 31-30-4-5 (LexisNexis 2020).

123. *Id.* § 31-30-4-5(a).

124. *Id.* § 31-30-4-5(a)(1)–(2).

(B) in a community corrections program under IC 35-38-2.6;
(C) on probation under IC 35-50-7; or
(D) in any other appropriate alternative sentencing program.[125]

The only limitation on the court's discretion under this statute is that upon motion of the prosecuting attorney, it may not modify the sentence of an offender over whom a juvenile court lacks jurisdiction under Indiana Code section 31-30-1-4.[126]

It is important to summarize what this "Progress Report" provision entails. First, it requires the detention facility to closely monitor the progress and rehabilitation of an individual offender sentenced under section 31-30-4-2 and to provide the sentencing court with a written update on the offender at any time the court requests one. In addition, it requires the sentencing court to hold a review hearing between the youth's eighteenth and nineteenth birthday, during which the court will review the youth's progress. Depending on the court's evaluation of the youth, it has the power to modify the original criminal sentence, discharge the offender from the system entirely, or order execution of the original sentence in full. The court can also order the juvenile to be transferred to a number of other alternative sentencing programs outside of a juvenile detention facility. The statute's most important feature is the wide-ranging flexibility it affords judges to take into account the progress, or lack thereof, of individual offenders and to make decisions accordingly. This flexibility and individualized decision making is entirely consistent with what social science researchers have advocated for in crafting responses to delinquent juvenile behavior.[127]

Indiana's alternative sentencing scheme clearly has the *potential* to benefit many juvenile offenders, but these benefits cannot be realized without proper implementation and application of the statute. The next Section addresses some of the underlying problems with the statute in its current form.

2. Problems with Current Application

Indiana's alternative sentencing scheme is a good starting point for progressive juvenile justice, but there are substantial problems with the statute as written and with the manner in which it has been interpreted and applied that hinder its effectiveness. The statute lacks any explicit factors to guide courts in determining when it should be applied, and the approach courts in Indiana have adopted essentially renders the statute null and void in most circumstances. Additionally,

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125. *Id.* § 31-30-4-5(b).

126. This statute takes jurisdiction away from the juvenile court for any offender at least sixteen years of age charged with committing (1) attempted murder, (2) murder, (3) kidnapping, (4) rape, (5) criminal deviate conduct (before its repeal), (6) robbery (if committed with a deadly weapon, or if robbery results in bodily injury), (7) carjacking (before its repeal), (8) carrying a handgun without a license (if charged as a felony), or (10) any offense that may be joined under IC § 35-34-1-9(a)(2) with any crime listed in this subsection. IND. CODE ANN. § 31-30-1-4(a) (LexisNexis 2020).

127. SULLIVAN, *supra* note 18, at 167 ("Maintaining some individual decision-making discretion—within boundaries—is important in ensuring that discretion that takes account of developmental factors can enter the assessment process and subsequent decision making.").

there are components of the "Progress Report" provision that could be modified so that judicial decisions made under this provision occur at the optimal point in a juvenile offender's development without compromising the safety of other inmates and staff members in juvenile detention facilities. Finally, the last provision of the statute contains a measure of inflexibility that takes discretion away from judges in a manner counterintuitive to the flexible and discretionary nature of the preceding provisions of the statute. Each of these issues will be explored in the following Sections.

a. The Alternative Sentencing Statute Lacks Explicit Factors to Guide Courts

The alternative sentencing statute is highly discretionary, providing that a "court *may* . . . impose a sentence upon the conviction of the offender under this chapter" if certain conditions are met.[128] However, the statute is silent as to why a court would or would not impose an alternative sentence. It does not list any factors to consider or elements to be met. The statute—passed in 2013—is still relatively new, and as a result, there are few cases interpreting it.[129] However, the cases that have interpreted and applied the statute are consistent in how they determine whether alternative sentencing is appropriate.

Legg v. State is instructive on this point.[130] Sixteen-year-old Donta Legg was convicted of murder and sentenced to fifty-five years in prison.[131] Legg argued on appeal that the trial court erred in declining to sentence him under the alternative sentencing scheme.[132] Before analyzing Legg's argument, the Indiana Court of Appeals acknowledged that "[t]he statute itself offers no guidance regarding when the alternative sentencing scheme should be implemented."[133] The court then cited the factors listed in Indiana Code section 31-30-3-2[134] and found them "to be instructive," and further, that they are "good examples of the kinds of criteria a trial court may consider in reaching its decision on this issue."[135] This might not seem

128. IND. CODE ANN. § 31-30-4-2(a) (LexisNexis 2020) (emphasis added).

129. Act of Apr. 29, 2013, Pub. L. No. 104-2013, § 1 (codified as amended at Ind. Code § 31-30-4 (2014)). A February 21, 2021, search performed on both LexisNexis and WestLaw for cases citing this statute yielded only four results on both databases, with no variation between the two.

130. 22 N.E.3d 763 (Ind. Ct. App. 2014).

131. *Id.* at 764.

132. *Id.*

133. *Id.* at 766.

134. Under this statute, the court must consider whether the act charged is a felony that is either heinous or a part of a repetitive pattern of delinquent acts, the child was at least fourteen at the time of offense, there is probable cause to believe the child committed the act, the child is beyond rehabilitation under the juvenile justice system, and it is in the best interests of the safety and welfare of the community for the child to stand trial as an adult. IND. CODE ANN. § 31-30-3-2(1)–(5) (LexisNexis 2020).

135. *Legg*, N.E.3d at 767; *see also* Honorable v. State, 2019 WL 1561977 *4 (Ind. Ct. App. Apr. 11, 2019) ("[W]hile there are no mandatory considerations for a trial court making this determination, the criteria listed in Indiana Code section 31-30-3-2 regarding waiver into adult court 'are good examples of the kinds of criteria a trial court may consider in reaching its decision on this issue.'" (citing *Legg*, N.E.3d at 767)).

problematic at first blush. In fact, it would seem quite helpful to have well-established, previously interpreted statutory factors to use in making the determination whether or not to impose alternative sentencing.[136] But this ignores what section 31-30-3-2 is—a discretionary waiver statute allowing a juvenile court to waive jurisdiction over an offender when the enumerated factors are met.

The result of the court's decision to use these factors to determine if alternative sentencing is appropriate is a circular analysis that inevitably does not work in favor of the individuals meant to benefit from this sentencing scheme. Consider the process: a juvenile court has a case involving a serious youth offender; the court looks to the factors set out in section 31-30-3-2 to determine if waiver into adult court is proper and decides in the affirmative; the youth is tried and convicted in adult court; the adult court, in considering whether to impose alternative sentencing, *again* looks to the factors set out in section 31-30-3-2. At this point in the process, the only thing that has changed from the initial waiver determination is that what was *alleged* to have happened in the juvenile court was *proved* beyond a reasonable doubt to have happened in adult court—making it virtually impossible for a judge to find that these factors weigh in favor of granting the offender an alternative sentence. Is it plausible to believe that the Indiana Legislature intended for this result? Would they have implemented an alternative sentencing scheme for juvenile offenders with the goal in mind that no juvenile waived into adult court would ever successfully be able to invoke it? This interpretation essentially renders the statute ineffective and superfluous.

b. The Mandatory Hearing and Evaluation of Youth's Progress Takes Place at an Unnecessarily Early Point in Time

The "Progress Report" statute can be amended such that the mandatory hearing and evaluation takes place at a later point in time without causing undue safety risk to others. In the statute's current form, the hearing and evaluation must occur between the juvenile's eighteenth and nineteenth birthday.[137] However, the youth is eligible to remain in a juvenile facility until he or she is twenty-one.[138] Additionally, there are statutory safeguards that allow for continued monitoring of the juvenile by the sentencing court and provide for the offender's removal if he or she becomes a danger to other inmates or staff.[139] Thus, there is minimal safety risk in delaying the point at which the sentencing court examines the youth's progress and reevaluates the efficacy of the original sentence.

Furthermore, because it is well established that adolescents continue to mature and develop their decision-making processes well into their midtwenties,[140] it makes

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136. Indiana Code Section 31-30-3-2 has been cited twenty-one times on Lexis and forty-nine times on WestLaw.

137. IND. CODE ANN. § 31-30-4-5(a) (LexisNexis 2020).

138. *See* IND. CODE ANN. § 31-30-4-6(a) (LexisNexis 2020) ("At any time before an offender placed in a juvenile facility under section 2(b) of this chapter becomes twenty-one (21) years of age, the department of correction may transfer that offender to an adult facility if the department of correction believes the offender is a safety or security risk.").

139. *See* IND. CODE ANN. § 31-30-4-3–6 (LexisNexis 2020).

140. *See* Covington, *supra* note 121 ("Most literature now accepts the proposition that

sense to give offenders as much time as possible to demonstrate their rehabilitation. It is true that this two-year delay could make no difference for an individual offender, but it is also possible that an offender progresses by leaps and bounds toward rehabilitation during this time—so much so that it makes a meaningful difference when the court reevaluates his or her sentence. Additionally, there are controls in place for the removal of an offender who demonstrates that he or she is incapable of rehabilitation, too dangerous to retain in a juvenile facility,[141] or violates a condition of his or her suspended sentence in some other way.[142] Therefore, any potential harm in delaying the progress hearing is outweighed by the possibility for rehabilitation. And because the legislature has already contemplated circumstances that necessitate removal of an offender from a juvenile facility, in the absence of these circumstances, the sentencing court's evaluation of the juvenile's progress should take place at the latest possible point in time.

c. The Sentencing Court Should Retain Discretion at all Times in Making Final Decisions under this Statute

The Indiana Legislature established an alternative sentencing scheme that provides judges with a vast amount of discretion at almost every step of the process, except for one category of offenders. The final provision of the "Progress Report" statute provides that, for any "offender over whom a juvenile court lacks jurisdiction under IC 31-30-1-4 . . . [t]he court may not modify the original sentence of an offender to whom this subsection applies if the prosecuting attorney objects in writing to the modification."[143] Recall that Indiana Code section 31-30-1-4 takes jurisdiction away from juvenile courts for offenders charged with certain felonies.[144] It is unclear why judicial discretion is taken away for only this narrow subset of offenders based on the unilateral decision of a prosecutor. There is no reason why the statute cannot specify that a motion of a prosecuting attorney creates a *presumption against* modifying a sentence for these offenders—or something of that nature—while leaving the ultimate decision to the judge. Because this abdication of judicial discretion is inconsistent with the rest of the alternative sentencing scheme established by the Indiana Legislature, it should be abolished or amended.

III. INDIANA SHOULD ADOPT A SYSTEM OF WAIVER WITH A PRESUMPTION IN FAVOR OF ALTERNATIVE SENTENCING

The preceding Sections have established that the Indiana statutory system of waiver and alternative sentencing, while containing some positive progressive

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human brains are not fully developed until the mid-20s, so detaining minors can have a negative impact on their minds, especially for young people who have mental illnesses.").

141. *See* Legg v. State, 22 N.E.3d 763 (Ind. Ct. App. 2014).

142. IND. CODE ANN. § 31-30-4-3 (LexisNexis 2020) (providing that the sentencing court may order execution of the previously suspended criminal sentence, with or without modification, if it finds by a preponderance of evidence that the offender has violated a condition of the suspended sentence or committed a new offense).

143. IND. CODE ANN. § 31-30-4-5(c) (LexisNexis 2020).

144. *See supra* discussion Section I.C.1.

elements, has some significant deficiencies that detract from the overall juvenile justice goal of rehabilitation. This Section makes concrete proposals to amend the applicable statutes in order to rectify some of these problems. I acknowledge that these proposals will not altogether eliminate the problems identified in this Comment and could potentially lead to other ancillary issues. However, my position is that these proposals will move Indiana's juvenile justice system toward the proper balance between flexibility and individualized decision-making that accounts for modern social science principles and provides serious youth offenders with an opportunity for rehabilitation.

A. Abolish Presumptive Waiver

Indiana should abolish or amend all statutory provisions that impose presumptive waiver. The discussion in Section III.A focused exclusively on Indiana Code section 31-30-3-4, dealing with youths accused of murder, but sections 31-30-3-5[145] and 31-30-3-6[146] also carry a presumption in favor of waiver. The analysis of Indiana cases dealing with challenges to presumptive waiver provisions demonstrate that absent excruciating underlying mental health issues, Indiana courts will not find that it is in the best interests of a child or the safety and welfare of the community for a youth offender to remain in the juvenile system.[147] Courts appear to have taken the position that a serious youth offender without a severe mental disorder is categorically incapable of rehabilitation through the juvenile system. This logic contradicts social science findings about adolescent brain development that have shown significant behavioral adjustments taking place as late as an individual's midtwenties.[148]

Furthermore, Indiana courts fail to take relevant social science principles into account when they weigh the facts of a particular offense that counsel for or against waiver. Factors such as gang affiliation and susceptibility to peer pressure are looked at as probative evidence that an offender will be a continuing threat to society. But social science understandings explain that the negative peer pressure, particularly in a gang setting, exacerbates the already deficient short-term decision-making capabilities of adolescents.[149] Often of paramount concern in a gang setting, pressure to impress peers increases brain activity in pleasure-seeking regions of the adolescent brain, which then overpower the less active regulatory brain regions.[150] As

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145. Indiana Code section 31-30-3-5 applies to offenders at least sixteen years of age charged with a Level 1, Level 2, Level 3, or Level 4 felony, and involuntary manslaughter or reckless homicide as a Level 5 felony.

146. Indiana Code section 31-30-3-6 applies to minors who are charged with a felony offense and who have previously been convicted of a felony or nontraffic misdemeanor.

147. *See generally supra* Section III.A.

148. *See* Feld, *supra* note 26, at 557 ("Neuroscience research reports that the human brain continues to mature until the early to mid-twenties.").

149. *Id.* at 560–61 ("As their orientation shifts toward peers, youths' quest for acceptance and affiliation makes them more susceptible to influences than adults. Peers increase youths' propensity to take risks because their presence stimulates the brain's reward centers.").

150. Michael N. Tennison & Amanda C. Pustilnik, *"And if Your Friends Jumped off a Bridge, Would You Do it too?": How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533, 583 (2015) ("Gangs are peer

adolescents grow into adults, this imbalance equalizes, and their susceptibility to impulsive decision-making due to the presence of peers diminishes accordingly. For these reasons, the prospect of separating a youth from his or her affiliated gang—or other negative peer group—should be seen as a positive opportunity for the juvenile system as opposed to evidence that the youth is a continuing danger to society.

Presumptive waiver should be abolished. If the goal of a juvenile justice system is to rehabilitate, then the presumption should be to keep juveniles within that system as often as possible. Indiana's presumptive waiver system fails to adequately take into account individual characteristics of defendants and their offenses, and it should be repealed accordingly.

B. Amend Indiana Code Section 31-30-4-2(a) to Impose a Presumption in Favor of Alternative Sentencing

Indiana should amend Indiana Code section 31-30-4-2(a) such that there is a presumption in favor of alternative sentencing for every youth offender that falls within the statute. Juvenile offenders are more amenable to rehabilitation than Indiana courts account for in assessing requests for alternative sentencing. Furthermore, the Indiana Legislature's failure to provide explicit factors to guide courts in determining when to impose alternative sentencing has led to a backwards system in which it is virtually impossible for youths to benefit from this alternative scheme. Courts now look to the same factors that a juvenile court weighs in making the initial waiver determination. These factors will not paint a youth offender in a better or more sympathetic light after he or she has been adjudged or pled guilty, and thus, courts will continue to decline to impose alternative sentences.

Ultimately, it is within the purview of the Indiana Legislature to settle on explicit factors that should guide this analysis, but the social science principles discussed in this Comment provide several good starting points. The level of premeditation as opposed to impulsive conduct should be instructive. Adolescents lack sufficient emotional regulation and tend to favor short-term rewards even if negative consequences are imminent. Youth offenders who act on impulse should be treated more leniently than those who commit a pre-planned crime with the benefit of time to consider their actions. Additionally, the presence of peers, particularly an older peer, should be seen as a factor weighing in favor of alternative sentencing. Youth offenders often act irrationally to impress others, and this tendency diminishes as they get older. Finally, lack of a criminal history should be given heightened importance when determining whether alternative sentencing is appropriate. An isolated, serious offense can understandably result in a youth offender being tried in adult court, but if the offender has a minimal criminal history, they should be given the opportunity to show rehabilitation through alternative sentencing.

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pressure mechanisms. They play into all of the age-typical adolescent neurological vulnerabilities: Temporal discounting or the 'short future'; impulsivity; poor risk/reward calculations that overvalue positive . . . payoffs; discounting negative outcomes . . . ; the need for peer approval; and the use of the social group for identity formation.").

These are merely starting points and should be expanded upon by the Indiana Legislature through a statutory amendment that also includes an explicit presumption in favor of alternative sentencing. For the juvenile system to accomplish its goal of rehabilitation, youths must be given every opportunity to show they are rehabilitated.

C. Amend Indiana Code Section 31-30-4-5 to Mandate that the Sentencing Court Conduct its Review Hearing between the Offender's Twentieth and Twenty-First Birthday

Indiana should amend Indiana Code section 31-30-4-5 so that the review hearing performed by the sentencing court takes place between the twentieth and twenty-first birthday, as opposed to between the eighteenth and nineteenth. This Comment has emphasized ad nauseam the fact that youth development continues into the midtwenties. It also has been established that Indiana's alternative sentencing scheme has extensive safeguards in place to ensure that offenders who pose a danger to other inmates or staff are promptly removed from juvenile facilities.[151] Any youths that do not pose a risk of danger should be given every opportunity to demonstrate their rehabilitation. Other states, such as Michigan[152] and Ohio,[153] have already imposed a system of reevaluating serious youth offenders at or near the age of twenty-one. Indiana should follow suit.

D. Abolish the Restriction in Subsection 31-30-4-5(c) Prohibiting the Court from Modifying the Sentence of an Offender Convicted under that Subsection on the Motion of a Prosecutor

One of the most encouraging aspects of Indiana's alternative sentencing scheme is the flexibility afforded to judges in making decisions throughout the process. The sentencing court is uniquely situated to communicate with the juvenile offender's supervisors and monitor the progress of the offender. Contrarily, the prosecuting attorney has no responsibility or capability to conduct ongoing monitoring of the youth's progress. Relinquishing judicial discretion over this category of offenders causes the statute to lose one of its primary benefits. It places total control in the hands of an adversary party who is ill-equipped to make an informed decision regarding the progress and rehabilitation of the youth offender. This provision should be abolished or amended so that the prosecutor's motion is not determinative of a final decision to modify an offender's sentence if they fall within subsection (c).

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151. *See supra* notes 133–36 and accompanying text.

152. *See* Sullivan, *supra* note 9, at 1572–73 (discussing "blended" sentencing in Michigan).

153. *See* Andrea Knox, Note, Blakely *and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals,"* 75 Ohio St. L.J. 1261, 1292 (2009) (describing Ohio's serious youthful offender provision as a complex blended sentencing scheme); *see, e.g.*, *In re J.B.*, No. CA2004-09-226. 2005 Ohio App. LEXIS 6348, *52–3 (Ohio Ct. App. Dec. 30, 2005) (finding no error in trial court's decision to impose concurrent adult and juvenile sentences under the serious youthful offender provision, with the juvenile sentence to be carried out until age twenty-one).

CONCLUSION

Crafting a perfect system of administering juvenile justice is an impossible task, but constantly working on improving and modernizing a system to get as close as possible is something every state should strive for. Indiana's juvenile justice system has made many important strides over the last couple of decades, with one of its principal accomplishments being the enactment of its alternative sentencing scheme. Unfortunately, alternative sentencing has not been implemented on a wide scale, and this is likely due to a lack of sufficient legislative guidance for when and how to effectively utilize this sentencing mechanism. Indiana also took a step in the right direction by amending its presumptive waiver statute for youths accused of murder to raise the minimum applicable age from ten- to twelve-years-old. But regardless of age or offense classifications, presumptive waiver statutes present a serious roadblock against the kind of flexible decision-making necessary for effective juvenile justice administration. More can and should be done to bring the Indiana's juvenile system in line with modern social science research and understandings.

In order to bring further positive reform to Indiana's juvenile system, this Comment makes four concrete proposals: (1) abolish "presumptive waiver" in Indiana Code sections 31-30-3-4 to -6; (2) amend Indiana Code section 31-30-4-2(a) to impose a presumption in favor of alternative sentencing for all juvenile offenders waived into adult court; (3) amend Indiana Code section 31-30-4-5 to mandate that the sentencing court conduct its review hearing between the offender's twentieth and twenty-first birthday; and (4) abolish the restriction in subsection 31-30-4-5(c) prohibiting the court from modifying the sentence of an offender convicted under that subsection on the motion of a prosecutor.

Each of these four proposals are small individual steps in their own right, but together they present a significant opportunity for Indiana to be a leader in the area of developmental juvenile justice. Effective utilization of Indiana's alternative sentencing scheme will likely require a greater allocation of resources to the state's juvenile justice system than what is currently provided for. The economic constraints limiting the effectiveness of these reform proposals is beyond the scope of this Comment, but it is an area that should garner more research, attention, and action. For now, it is important to continue to make progress toward a more flexible, responsive, and rehabilitative system, and implementing some or all of the proposals offered in this Comment can do just that.