Comment

Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not To Revoke

*Megan M. Sulok**
*Mentored by Shobha L. Mahadev***

* J.D., Loyola University Chicago, expected May 2008. I would like to thank the editorial board of the *Loyola University Chicago Law Journal*, especially John Polhemus and Amy Kosanovich, who patiently provided feedback on the early drafts. Many thanks to Shobha Mahadev for her invaluable assistance. I would also like to thank Mary Anne Emerick, my law school study buddy, who provided helpful input and support while I was writing this Comment. Finally, none of this would be possible without my parents' continuous love and support.

** Shobha L. Mahadev is currently an Assistant Defender with the Office of the State Appellate Defender, First Judicial District. She represents indigent clients convicted of criminal offenses on appeal, handling cases involving juvenile delinquency, adult criminal matters, and post-conviction proceedings, and has argued before the Illinois Appellate Court. Prior to becoming an Assistant Defender, Professor Mahadev was a litigation associate at the law firm of Sachnoff & Weaver, representing clients in complex commercial litigation matters, disputes involving the fiduciary duties of officers and directors, criminal matters, contract disputes, and in pro bono cases, both at trial and on appeal in state and federal courts. Professor Mahadev graduated from Northwestern University School of Law, where she represented juveniles in delinquency matters in the school's Bluhm Legal Clinic, and served as the Coordinating Articles Editor for the *Journal of Criminal Law and Criminology*.

I. INTRODUCTION

Thirteen-year-old J.W. did not want to leave her great-grandmother's house to go live with her mother and her mother's boyfriend in their new apartment.[1] On her first day living with them, J.W. planned in her diary how she was going to kill her mother by stabbing her to death.[2] Then, she would call her great-grandmother to ask for help and tell her that her mom had been stabbed.[3] Five days later, J.W. carried out the plans written in her diary.[4] When her mother was leaving for a doctor's appointment, J.W. killed her mother in the car, stabbing her over two hundred times with three different knives.[5]

If this incident had occurred two years earlier, the state's attorney would have had two options for prosecuting J.W.: (1) petition the juvenile court for a discretionary transfer to try J.W. in adult court, or (2) require J.W. to remain in juvenile court, which would lose jurisdiction over J.W. upon her twenty-first birthday.[6] Instead, J.W. became the first juvenile in Cook County to be tried in an extended jurisdiction juvenile ("EJJ") prosecution.[7] The distinguishing feature of an EJJ prosecution is that a juvenile receives both a juvenile sentence and an adult sentence.[8] The adult sentence is only imposed if the juvenile violates her juvenile sentence.[9] Otherwise, the adult sentence is vacated upon successful completion of the juvenile sentence.[10] After

1. *In re* J.W., 804 N.E.2d 1094, 1096 (Ill. App. Ct. 2004).

2. *Id.* She wrote:

> go and hide in the hall stab her in the back intill [sic] she dies come back in the house and call grandma. tell her my mom said she was going out to the car to get something that was like twenty minutes ago. <<I'm going to see where she's ate [sic] because she asked me to clean my glass mirror off but I don't see the windex leave out Oh ma ma—ma Dead grandma. Help somebody knock on someones door help my mom's has got stabed. Oh let me go get my folder out of her trunk>> . . . .

Id. (<< . . . >> denotes strike outs).

3. *Id.*

4. *Id.* at 1097.

5. *Id.* at 1097–98. After the first knife became lodged in her mother's abdomen, J.W. went inside and took a bread knife from the kitchen. *Id.* She returned for another knife because the bread knife was too dull to cut well. *Id.*

6. *DNA Test Set for Girl in Mom's Death*, CHI. TRIB., Sept. 14, 2000, at 3 ("Kip Owen, chief of the delinquency division of the state's attorney's juvenile justice bureau, said his office is still weighing whether the girl should be charged as an adult."). *See infra* Section II.C (explaining the procedure to transfer a juvenile to adult court).

7. Aamer Madhani, *Dual Sentence for Girl Who Killed Mom*, CHI. TRIB., June 27, 2001, at 2 [hereinafter *Dual Sentence for Girl*]; Aamer Madhani, *Girl, 13, Convicted in Mom's Slaying*, CHI. TRIB., June 9, 2001, at 12.

8. 705 ILL. COMP. STAT. 405/5–810(4) (2006 & West Supp. 2007).

9. 705 ILL. COMP. STAT. 405/5–810(7) (2006 & West Supp. 2007).

10. *Id.* See infra Part III for a more detailed explanation of the EJJ statute.

J.W. was convicted, she received an adult sentence of thirty-five years in prison and a juvenile sentence of at least five years in a juvenile detention center.[11] She began serving her juvenile sentence with the threat of the adult sentence hanging over her head as an added incentive to follow the terms of her juvenile sentence.[12] The court will impose the thirty-five-year sentence only if J.W. violates the juvenile sentence.[13] If she does not violate the juvenile sentence, J.W. will be released by the time she turns twenty-one years old.[14]

At her sentencing hearing, J.W. promised the judge, "I plan on doing everything in my power to stay out of trouble. I am not a bad person."[15] However, because the EJJ statute was new, no one knew what J.W. had to do to stay out of trouble, or what offenses were serious enough to trigger the adult sentence.[16] Even the prosecutor was "unclear what kind of offense would be serious enough to invoke her adult murder sentence."[17]

Illinois has joined the growing number of states that use a form of blended sentencing, called EJJ prosecutions, in which a juvenile receives both a juvenile sentence and an adult sentence.[18] The juvenile has the opportunity to avoid serving the adult sentence and having a criminal record by successfully completing the juvenile sentence.[19] However, if the juvenile commits a new offense while serving her juvenile sentence, the adult sentence will be executed.[20] If the juvenile violates a condition, other than by committing a new offense (a "technical violation"), the judge has discretion in deciding whether to revoke the EJJ designation and execute the adult sentence.[21] As J.W.'s case demonstrates, however, the specific guidelines regarding when to revoke EJJ status and send a juvenile to the adult system are unclear.[22]

11. *Dual Sentence for Girl*, *supra* note 7, at 2.

12. *Id.*

13. Kevin Lynch, *Girl's Trial Opens in Killing of Mother. Prosecution Calls 'Attitude' a Motive*, CHI. TRIB., May 31, 2001, at 1 [hereinafter *Girl's Trial Opens*].

14. *Id.*

15. *Dual Sentence*, *supra* note 7, at 2.

16. *Id.*; *Girl's Trial Opens*, *supra* note 13 at 1.

17. *Girl's Trial Opens*, *supra* note 13, at 1.

18. *See infra* Part III.B (discussing the history of the EJJ statute and its provisions).

19. 705 ILL. COMP. STAT. 405/5–810(7) (2006 & West Supp. 2007).

20. 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West).

21. *Id.*

22. *See supra* notes 16–17 and accompanying text (stating the procedure was unclear).

Exposing a minor to the adult system has grave consequences, and thus it should only be a last resort.[23] This Comment discusses the current EJJ revocation procedure and suggests an alternative that will maximize a juvenile's likelihood of successful rehabilitation.[24] Part II of this Comment traces the history of the juvenile justice system, focusing on the changing jurisdiction of the juvenile court and the increasingly punitive approach towards juvenile offenders taken in the second half of the twentieth century.[25] Part III examines the Illinois Juvenile Justice Reform Act of 1998 ("1998 Act") and the new EJJ statute.[26] First, it discusses the policy shift found in the 1998 Act towards restorative justice and integrating the needs of the offender, the victim, and of society.[27] Next, it examines the mechanics of the EJJ statute and looks to the legislative history behind EJJ for further understanding.[28] Finally, it discusses two cases that argue that the EJJ revocation process is unconstitutional because it is impermissibly vague.[29] Part IV begins by arguing that to protect the public, judges should work towards keeping as many juveniles out of the adult system as possible because juveniles in the adult system tend to have higher recidivism rates than those retained in the juvenile system.[30] It then examines problems with the procedure for revoking the EJJ designation and executing the adult sentence, focusing on claims that the statute is unconstitutionally vague.[31] It concludes by arguing the EJJ statute is not *facially* unconstitutional, but may be vulnerable to an as-applied challenge to a revocation based on a technical violation.[32] Nonetheless, Part IV demonstrates that although the statute is constitutional, a judge's lack of discretion may sweep some juveniles into the adult system

23. *See infra* Part IV.A (detailing the harms juveniles face in the adult system).

24. *See infra* Part V (proposing a procedure that will give the juvenile more than one opportunity at success in the juvenile system).

25. *See infra* Part II (discussing the history behind the current juvenile justice system in Illinois).

26. *See infra* Part III (setting out the current state of the law).

27. *See infra* Part III.A (discussing the 1998 juvenile justice reforms that adopted the philosophy of balanced and restorative justice).

28. *See infra* Part III.A, III.B.1 (explaining the mechanisms of the EJJ statute and the legislative history).

29. *See infra* Part III.B.2 (discussing the two cases that have challenged the constitutionality of the statute for being vague).

30. *See infra* Part IV.A (explaining juvenile development and how it relates to the juvenile justice system).

31. *See infra* Part IV.B (analyzing the problems in the revocation process).

32. *See infra* Part IV.B.2 (describing situations in which a juvenile's EJJ designation might be revoked for a technical violation, even when the juvenile did not have notice that his conduct was prohibited).

prematurely.[33] Part V offers a solution to the uncertainties in the EJJ revocation process by suggesting a different procedure for a judge to follow in cases of technical violations and by recommending that the legislature amend the statute to make all revocations discretionary.[34]

II. BACKGROUND

Juvenile crime is not a new phenomenon.[35] Reports of juveniles on trial for robbery and murders date back to seventeenth century England, and such crimes continue today.[36] Even though juvenile crime is not new, the legal system's approach to juvenile crime has significantly changed over time.[37] This Part traces the changing response to juvenile crime in Illinois.[38] First, it examines how the early system treated juvenile offenders in the same manner as adult offenders and presents various factors contributing to the creation of the juvenile court, particularly the practice of confining children and adult offenders together.[39] Next, this Part looks at the initial Juvenile Court Act of 1899 (the "Juvenile Court Act"), which had a singular focus on rehabilitating the offender, not on punishing him.[40] It discusses the juvenile court's struggles for legitimacy and its uneasy relationship with the criminal court.[41] It also traces the emergence of a punitive focus in the juvenile court and the growing societal dissatisfaction with how the juvenile court treated juvenile offenders, leading to more circumstances

33. *See infra* Part IV.B.1 (explaining that a juvenile on probation can commit a new offense, but still complete probation successfully).

34. *See infra* Part V (proposing to give the juvenile more than one last chance).

35. *See* Christian Sullivan, *Juvenile Delinquency in the Twenty-First Century: Is Blended Sentencing the Middle-Road Solution for Violent Kids?*, 21 N. ILL. U. L. REV. 483, 485 (2001) (discussing references to juvenile delinquency found in the Hammurabic Code).

36. *Id.* at 485–86.

37. *See* Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2429–36 (1996) (detailing how the juvenile court evolved from English common law and changed over time).

38. *See infra* notes 44–48 and accompanying text (discussing how children who knew the difference between right and wrong were treated as adults); notes 63–72 and accompanying text (discussing how the 1899 Juvenile Court Act separated children and adults in the court system); notes 125–136 and accompanying text (discussing the punitive shift in juvenile justice in the 1980s and 1990s).

39. *See infra* Part II.A (discussing how the legal system did not distinguish between juvenile and adult offenders once juveniles were shown to be competent, and discussing the desire to shelter children from adult influence that led to the juvenile court).

40. David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 646–49 (2002). *See infra* Part II.B (detailing the Juvenile Court Act of 1899).

41. *See infra* notes 92–112 and accompanying text (discussing constitutional challenges to the Juvenile Court Act and the concurrent jurisdiction between criminal and juvenile courts).

in which a juvenile could be tried as an adult.[42] This Part concludes by showing that near the end of the twentieth century, the court mainly focused on the offense committed, not on the individual who committed it—a complete reversal from the original intent of the Juvenile Court Act.[43]

A. Children in the Criminal System Before the Juvenile Court Act

The status of children in the eyes of the law has changed remarkably over the past two centuries.[44] At common law, most children accused of breaking the law were treated in the same manner as adults, with a few exceptions.[45] Young children, for instance, had the benefit of the infancy defense, which provided children under the age of seven with immunity from prosecution because the law presumed they were incapable of forming criminal intent.[46] Children between the ages of seven and fourteen were also presumed to lack criminal capacity, but the prosecution could rebut this by showing that the children knew the difference between right and wrong.[47] Finally, the law considered children over the age of fourteen fully responsible for their actions and punished them as adults.[48]

---

42. *See infra* notes 125–136 and accompanying text (discussing how people thought the juvenile court was too soft on offenders and could not adequately punish juvenile offenders).

43. *See infra* notes 129–136 and accompanying text (describing how the main focus shifted from the individual who committed the offense to the offense committed).

44. *See* Mark. R. Fondacaro, Christopher Slobogin, & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 958–61 (2006) (describing the history of juvenile law).

45. Eric K. Klein, Note, *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, 375 (1998).

46. *Id.*

47. *Id.*

> Relevant factors [in rebutting the presumption of incapacity] included evidence of the youth's plan and method of execution, as well as prior similar conduct. The fact that the youth tried to hide the crime, either physically or by lying, was also pertinent to the question of legal responsibility. The inquiry might also extend into the child's environment, intelligence, education, and moral underpinnings.

James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 28–29 (2001) (citations omitted).

48. Klein, *supra* note 45, at 375. Illinois adopted the common law approach when it became a state in 1818. FRED GROSS, DETENTION AND PROSECUTION OF CHILDREN 12 (Central Howard Association 1946). It subsequently modified the infancy defense in 1827 by raising the age of criminal responsibility to ten. *Id; see* ILL. REV. STAT. CH. XXX DIV. I SEC. 4 (1845) ("An infant under the age of ten years, shall not be found guilty of any crime or misdemeanor."). At that point, children under ten were immune from prosecution, and children between the ages of ten and fourteen could only be tried for a crime if the prosecution showed the child knew the difference between good and evil. ILL. REV. STAT. CH. XXX DIV. I SEC. 3 (1845) ("A person shall be considered of sound mind . . . who hath arrived at the age of fourteen years, or before that

In Illinois, prior to the enactment of the Juvenile Court Act, children ages ten and older were subject to the same procedure as adults with regard to arrest, detention, and trial.[49] However, sentencing was slightly different for the two populations.[50] Children under the age of eighteen could only be sent to the penitentiary if convicted of robbery, burglary, arson, murder, or manslaughter.[51] For any other crime that carried a punishment of imprisonment, children between the ages of sixteen and eighteen were sent to the county jail, rather than the penitentiary.[52] Offenders under the age of sixteen were supposed to be sent to reform schools.[53] Despite these guidelines in the criminal code, in practice, many children under the age of sixteen were jailed with adults.[54]

age, if such person know the distinction between good and evil."). Children over the age of fourteen were still fully responsible for their acts. *Id.*

49. GROSS, *supra* note 48, at 12.

> The common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility . . . . The fundamental thought in criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong; punishment as a warning to other possible wrong-doers. The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then of visiting the punishment of the state upon it.

Julian W. Mack, *Appendix I* to SOPHONISBA P. BRECKINRIDGE & EDITH ABBOTT, THE DELINQUENT CHILD AND THE HOME 185–86 (1912), *available at* http://www.brocku.ca/MeadProject/Abbott/Breckinridge_Abbott_1912/Breckinridge_Abbott_1912_toc.html.

50. ILL. REV. STAT. CH. XXX DIV. XV SEC. 168 (1845).

51. *Id.*; ILL. REV. STAT. CH. 38 SEC. 449 (1898).

52. ILL. REV. STAT. CH. XXX DIV. XV SEC. 168 (1845).

53. GROSS, *supra* note 48, at 12–13. The alternatives to prison were reformatories, industrial schools (for girls), and training schools (for boys). Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, *in* A CENTURY OF JUVENILE JUSTICE 142, 147 (Margaret K. Rosenheim et al. eds., 2002). There was the Illinois State Reformatory at Pontiac for boys and a Reformatory at Geneva for girls. In addition, Industrial and Manual Training School laws, passed in 1879 and 1883, provided another option. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 102–07, 110–14 (2d ed. 1977).

54. In 1898, 575 children were confined in the county jail of Cook County (Chicago), Illinois. TIMOTHY D. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW 11–12 (AMS Press 1977). There were 1983 boys committed to the House of Correction (City Prison) of the City of Chicago, Illinois, for the twenty months ending November 1, 1898. *Id.* at 12. The boys' offenses included: petty thefts, disorderly conduct, killing birds, fighting, truancy, stealing rides on the railroad, and flipping street cars. *Id.* Twenty-five percent of the boys were charged with truancy. *Id.* Many of the boys violated a city ordinance and were fined anywhere between one and one hundred dollars. *Id.* When they did not pay the fine, they were sent to the City Prison to work off the fine at the rate of fifty cents a day. *Id.* "In Chicago, 332 boys from nine to sixteen years of age were sent to the city jail between January 1, 1899, and July 1, 1899, when the juvenile court law went into effect; all but three of these were committed to the jail because of inability to pay fines assessed against them." GROSS, *supra* note 48 at 13. John L. Whitman, the Cook County jailor in 1901, submitted statistics to the Juvenile Record, a publication devoted to juvenile court news.

The conditions children faced in jails led activist groups to try to change how the justice system treated children.[55] The most influential was the Chicago Women's Club, a group of high-society women that worked for better treatment of children.[56] The organization strove for years to segregate children from adults in penal facilities and to provide education for the incarcerated children.[57] The women believed that mixing children and adults in prison exposed malleable children to criminal influence.[58] Rather than reforming children into law-abiding citizens, this exposure taught them the ways of criminal life.[59] In 1895, the Chicago Women's Club convinced the Board of Education to establish the John Worthy School in the House of Correction ("City Prison") of Chicago.[60] The boys incarcerated in City Prison went to school during the day, but were then locked in their cells with the adults for the remainder of the time.[61] Not satisfied with this victory, the Chicago Women's Club continued working towards the complete separation of children and adults in the legal system.[62]

JUVENILE RECORD, 1901, Vol. II No. 8 at 1, *reprinted in* JUVENILE RECORD: NOVEMBER 1900–DECEMBER 1901 (David J. Rothman & Sheila M. Rothman eds., 1987). There were 1130 boys in Cook County jail in Illinois for the years 1897 and 1898. *Id.* The number of boys in Cook County jail for the year ending July 1, 1899, was 575. *Id.* Two years after the juvenile law was enacted there were twenty-four boys in the jail. *Id.*

55. Paul Gerard Anderson, *Introduction* to ORIGIN OF THE ILLINOIS JUVENILE COURT LAW, *supra* note 54, at Introduction Pt. IV; *see* HURLEY, *supra* note 54 at 17-18 ("Miss Lathrop determined to visit and see for herself [the conditions of the state and county institutions] and in the course of the work she went to every jail and poor house in the State, even in the most out-of-the-way localities. She was shocked at the conditions she found, young children shut up with the most depraved adults and being trained in crime instead of being kept away from it. She determined not to rest until some remedy for these conditions was found." (quoting a letter from Mrs. Lucy L. Flower)).

56. ELIZABETH J. CLAPP, MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA 19–21, 166 (1998).

57. Anderson, *supra* note 55, at Introduction Pt. IV.

58. CLAPP, *supra* note 56, at 28.

59. *Id; see also Home for Tramps*, CHI. DAILY TRIB., Sept. 3, 1893, at 25 ("Boys whose sole offense is perhaps mischief or some petty theft are committed to the bridewell, where they are subjected to the evil influences of men hardened in vice and skilled in crime. The result is that they come out ten times more demoralized in character than when they entered the prison.").

60. HURLEY, *supra* note 54, at 12; CLAPP, *supra* note 56, at 40; *see also School is an Elephant*, CHI. DAILY TRIB., Nov. 30, 1895, at 9 ("People were made to feel [a school] was such a crying need at the bridewell it was a reproach to the community it had not been built. . . . [A]t last, in a furor of humanitarian enthusiasm, the city erected the building and turned it over to the Board of Education with a handsome endowment.").

61. HURLEY, *supra* note 54, at 12.

62. CLAPP, *supra* note 56, at 41–43.

B. The Juvenile Court Act of 1899

In 1898, the Chicago Women's Club enlisted the Chicago Bar Association to assist in drafting legislation to establish a separate court for juveniles.[63] The two organizations sought to extend the concept of *parens patriae*, which traditionally gave the State power over orphans and incompetents, in order to encompass all neglected and delinquent children.[64] In 1899, the Illinois legislature enacted the Juvenile Court Act, titled "An Act to regulate the treatment and control of dependent, neglected and delinquent children."[65] The Juvenile Court Act defined a delinquent child as any child under the age of sixteen years who violated a state, city, or village law.[66] The Juvenile Court Act focused primarily on decriminalizing juvenile offenses and mandated individualized sentences designed to rehabilitate a child, not to punish him.[67] The bill's proponents believed punishment was inappropriate because children did not choose to become criminals of their own free will.[68] They believed that the primary cause of juvenile crime was an

63. *See* HURLEY, *supra* note 54, at 18 ("This is a legal matter. It must not go to the Legislature as a woman's measure; we must get the Bar Association to handle it." (quoting a letter from Mrs. Lucy L. Flower)).

64. *See* Douglas E. Abrams, *A Very Special Place in Life: The History of Juvenile Justice in Missouri*, *in* CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 1050 (Douglas E. Abrams & Sarah H. Ramsey eds., 2d ed. 2003) (describing the orphan trains sending orphan and abandoned children from eastern cities to new homes, mostly on midwestern farms). *See generally* Marvin Ventrell, 28 HAMLINE J. PUB. L. & POL'Y 75 (2006) (explaining the historical development of *parens patriae* and how states have broadened the initial application from orphaned children to all children).

65. 1899 Ill. Laws 131.

66. *Id.* at 132 ("The words delinquent child shall include any child under the age of sixteen years who violates any law of this State or any city or village ordinance.").

67. HURLEY, *supra* note 54, at 23–24; *see also* Jeffrey Fagan & Franklin E. Zimring, *Editors' Introduction* to THE CHANGING BORDERS OF JUVENILE JUSTICE 1, 4 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("[C]hildren who had not violated any laws could be found delinquent and treated in the same manner as children who had violated laws. Blameworthy conduct was unnecessary because punishment wasn't a part of the court's response to delinquents."); Tanenhaus & Drizin, *supra* note 40, at 646 ("[T]he basic principle of the [juvenile court] law is this: That no child under sixteen years of age shall be considered or be treated as a criminal; that a child under that age shall not be arrested, indicted, convicted, imprisoned, or punished as a criminal. . . . [I]t provides that a child under the age mentioned shall not be branded in the opening years of its life with an indelible stain of criminality, or be brought, even temporarily, into the companionship of men and women whose lives are low, vicious, and criminal." (quoting Richard S. Tuthill, *History of the Children's Court in Chicago*, *in* CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 1,1 (Samuel J. Barrows ed., 1904)).

68. *See* Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 264 (1999) (discussing how factors such as poor living environment and lack of moral and educational structure were believed to cause juvenile delinquency rather than willful behavior).

unsuitable living environment; thus, changing a child's environment would prevent crime.[69] The bill's proponents sought to remove all traces of the criminal system from the new juvenile court; to that end, the juvenile court used chancery procedures instead of criminal procedures and changed the terminology to eliminate all connection to criminal law.[70] Most significantly, if the court determined that a child committed the offense, the child was not convicted, but rather was found delinquent.[71] Thus, according to the Juvenile Court Act, no child could be convicted of a crime.[72]

In addition to the change in terminology, the Juvenile Court Act excluded lawyers from the proceedings.[73] The drafters excluded lawyers to avoid an adversarial process that would impede the goal of helping the child.[74] Furthermore, the drafters believed that lawyers

69. *Women in a Novel Role*, CHI. DAILY, Jul. 23, 1899, at 14 ("Sociologists have been trying to prove for a long time that crime is the result of environment. This sentiment has finally . . . found expression in the juvenile court law.").

70. HURLEY, *supra* note 54, at 23–24. Chancery Courts were characterized by flexibility, guardianship, and protection, focusing more on fairness than the rigid confines of the law. Albert R. Roberts, *The Emergence of the Juvenile Court and Probation Services*, *in* THE JUVENILE JUSTICE SOURCEBOOK 164, 164 (Albert R. Roberts ed., 2004). The new juvenile court set forth the charges on a petition, not in a complaint or indictment. HURLEY, *supra* note 54, at 23. Furthermore, juvenile judges issued summons for children, not warrants. *Id.* The difference between juvenile court proceedings and other legal proceedings was first made explicit in the statute in 1905:

> A disposition of any child under this act or any evidence given in such cause, shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this act.

1905 Ill. Laws 153. The complete severance from criminal law was made explicit in 1953.

> [N]o adjudication under the provisions of this Act shall operate as a disqualification of any child subsequently to hold public office or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him to the court or to any officer thereof . . . shall ever be admissible as evidence against him or his interests in any other court or proceedings.

1953 Ill. Laws 1089.

71. HURLEY, *supra* note 54, at 24.

72. CLAPP, *supra* note 56, at 180.

73. *Id; see also* Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 784–85 (2002) (listing the different terminology used in juvenile court).

74. CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 30 (1998). *But see* Anderson, *supra* note 55, at Introduction Pt. VI ("Before retiring to private practice, Hurley advocated the attendance of lawyers at Juvenile Court hearings in an adversary role."). The probation officer assumed the lawyer's duties and was the central feature of the Juvenile

were unnecessary because the central focus of the proceeding was not on whether the child committed the act, but rather on determining what services the child needed for reformation.[75]

Instead of lawyers, probation officers played a large role in the proceedings, which shifted the focus from the actual guilt or innocence of the child to the home life and general behavior of each child.[76] Based on all the information available, the judge determined what was best for the child[77] and a probation officer supervised the child's rehabilitation.[78] If a child was not committed to an institution, he was allowed to stay at home or was sent to a foster home, all under the care and guardianship of a probation officer.[79] The probation officer made "friendly visits" to supervise the child's progress and reported back to the court.[80] In time, the new juvenile court became a convenient tool

Court Act. HURLEY, *supra* note 54, at 62. The probation officer was involved at all points of the procedure, both inside and outside of the courtroom, both before and after the hearing. *Id.*

> [I]t shall be the duty of the said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require; and to take such charge of any child before and after trial as may be directed by the court.

1899 Ill. Laws 133; *see also Women in a Novel Role*, CHI. DAILY, Jul. 23, 1899 ("[The probation officers'] duties include the work of policemen, detective, guardian, and teacher. The child, though guilty, may, if the offense is but slight, be given another chance. Here the probation officer steps in and 'stands good' for the behavior of the child. When he offends again, the probation officer brings him to court."). Probation first started in Boston, Massachusetts, as early as 1841 when John Augustus began assisting offenders whose sentences were suspended with finding jobs, housing, and dealing with family problems. Marcus Purkiss et al., *Probation Officer Functions—A Statutory Analysis*, 67 FED. PROBATION 12, 12 (2003). In 1891, Massachusetts passed an act establishing probation officers throughout the state, under direction of the court. HURLEY, *supra* note 54, at 15. Massachusetts' probation system influenced the founders of the Illinois Juvenile Court. *See id.* at 13–16 (discussing early efforts around the country to aid juveniles in court).

75. PETER S. PRESCOTT, THE CHILD SAVERS 57 (1981); *see In re* Gault, 387 U.S. 1, 15 (1967) ("[The reformers] believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'").

76. Deborah L. Mills, United States v. Johnson: *Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 909 (1996).

77. HURLEY, *supra* note 54, at 24.

78. *Id.* at 62 (discussing the importance of the probation system to the newly-created juvenile court).

79. 1899 Ill. Laws 134.

80. *Id.* ("[T]he court may commit the child to the care and guardianship of the probation officer, to be placed in a suitable family home, subject to the friendly supervision of such probation officer . . . .").

for exerting jurisdiction over problem children, yet was considered insufficient by many to deal with serious juvenile offenses.[81]

C. Jurisdiction of the Juvenile Court

At the beginning of the twentieth century, the juvenile court sought to exert more control over juvenile behavior.[82] In 1901, the Illinois legislature expanded the definition of delinquent, giving the juvenile court jurisdiction over not only children who committed a crime but also over those who engaged in undesirable acts that might lead to criminal behavior.[83] In addition to being found guilty of violating a state, city, or village law, a child could be found delinquent for being "incorrigible," associating with the wrong people, or being in the wrong places.[84] The 1905 amendments further expanded the definition of a delinquent child to include those children who left home without permission, frequented the wrong places, habitually wandered around railroad yards or tracks, or used vulgar language.[85] Although such laws would be impermissible if applied to adults, the civil, as opposed to criminal, nature of the juvenile court allowed it to exert authority over children that the criminal courts could not exercise over adults.[86]

81. Daniel E. Traver, Note, *The Wrong Answer to a Serious Problem: A Story of School Shootings, Politics and Automatic Transfer*, 31 LOY. U. CHI. L. J. 281, 286–88 (2000).

82. *See generally* PLATT, *supra* note 53 (painting the reformers as elitists who use the juvenile court to exert social control over the lower classes).

83. *See* Klein, *supra* note 45, at 376–77 ("[The Court] gained jurisdiction over behaviors that were not crimes if committed by an adult . . . truancy, vagrancy, immorality . . . ."); *see also* Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1473–74 (2004) (discussing the idea that the juvenile court began as a method of social control).

84. 1901 Ill. Laws 142. The definition included a child "who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated." *Id.*

85. 1905 Ill. Laws 153. The definition included any child:

> who, without just cause and without the consent of its parents or custodian, absents itself from its home or place of abode . . . or who knowingly frequents a house of ill-repute . . . or who frequents any saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits any public pool room or bucket shop; or who wanders about the streets in the night time without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any school house.

Id.

86. *See* Tracey J. Simmons, *Mandatory Mediation: A Better Way to Address Status Offenses*, 21 OHIO ST. J. ON DISP. RESOL. 1043, 1046–47 (2006) ("Children classified as 'status offenders' fall under the jurisdiction of the juvenile courts because they have committed a non-criminal act that is considered unacceptable solely because of their age. . . . Every state maintains some form

By 1905, the juvenile court had original and exclusive jurisdiction over boys under seventeen and girls under eighteen, but it did not exercise that jurisdiction in all cases.[87] The juvenile court and the state's attorney practiced a system of concurrent jurisdiction in which the state's attorney prosecuted the children who committed serious crimes while on probation and/or who were first-time, violent offenders.[88] The 1905 amendments to the Juvenile Court Act formalized the practice by including the first discretionary transfer provision, which allowed judges to transfer a child from juvenile to criminal court.[89] The juvenile court actively transferred a small number of cases to criminal court when the judge felt the offender was not suitable for the juvenile court, usually to prevent those offenders from corrupting the younger children in the court.[90] Thus, even in its early years, the juvenile court transferred children whom the court deemed unsuitable for the juvenile system.[91]

The people involved with the juvenile court permitted concurrent jurisdiction, in part, to avoid any challenges to the constitutionality of the Juvenile Court Act.[92] However, some families resented the juvenile court for interfering in their lives.[93] In contrast, others believed that the juvenile court allowed juvenile offenders to escape punishment for their acts.[94] Therefore, those involved in the juvenile court avoided cases that would likely allow a challenge to the court's legitimacy.[95]

---

of status offense jurisdiction based on the notion that the state has a legitimate interest in protecting the welfare of children.") (citations omitted).

87. Tanenhaus & Drizin, *supra* note 40, at 646–47.

88. *Id.* at 647.

89. 1905 Ill. Laws 156 ("The court may, however, in its discretion cause such child to be proceeded against in accordance with the laws that may be in force governing the commission of crime.").

90. Tanenhaus & Drizin, *supra* note 40, at 647–48 ("Between the years 1915 to 1919, for example, the court only transferred seventy out of 11,799 cases, or 0.6%. As Judge Merritt Pinckney explained, '[A] child, a boy especially sometimes becomes so thoroughly vicious and is so repeatedly an offender that it would not be fair to the other children in a delinquent institution who have not arrived at his age of depravity and delinquency to have to associate with him. On very rare and special occasions, therefore, children are held over on a mittimus to the criminal court.' Almost all of these cases involved boys who were recidivists and at least sixteen years of age, and the few cases of first offenders were those of boys close to seventeen years of age, whose crimes 'included daring holdups, carrying guns, thefts of considerable amounts and rape.'") (citations omitted).

91. GROSS, *supra* note 48, at 17.

92. *See supra* notes 87–91 and accompanying text (explaining concurrent jurisdiction).

93. *E.g.*, the Lindsay family that challenged the juvenile court's authority and won, *infra* notes 97–1023 and accompanying text.

94. *See* Tanenhaus & Drizin, *supra* note 40, at 647 (explaining the worries the juvenile court personnel had about possible constitutional challenges).

95. *Id.*

Such a suit could not be permanently avoided, however, and in 1913 the Illinois Supreme Court heard the first case challenging the constitutionality of the Juvenile Court Act.[96] In *Lindsay v. Lindsay*, the juvenile court declared William Lindsay a dependant child for lack of proper parental care and removed him from his mother's custody.[97] William's mother appealed the decision.[98] She argued that the Juvenile Court Act violated the United States Constitution and the Illinois Constitution because it created a new court that was not authorized by the United States Constitution.[99] The Illinois Supreme Court rejected that contention.[100] It held that the statute did not create a new court, but instead gave circuit and county courts concurrent jurisdiction over certain cases.[101] The juvenile court was not a separate court; instead, it exercised the power delegated to it by the courts provided for in the United States Constitution.[102] Thus, *Lindsay* established that the juvenile court did not have jurisdiction outside the power granted to it by the existing courts because no constitutional authority supported it.[103]

The Illinois Supreme Court further emphasized the juvenile court's lack of independent jurisdiction in 1935.[104] In *People v. Lattimore*, fifteen-year-old Susie Lattimore, who had previously been declared delinquent, was found guilty of murder in the criminal courts.[105] On appeal, Susie argued that the criminal court was without jurisdiction to hear her case.[106] She argued that because she was fifteen, the case should have been heard in the juvenile court, and the juvenile court had not given consent for the criminal court to hear her case.[107] The Illinois

96. *See infra* notes 97–103 and accompanying text (discussing the *Lindsay* case).

97. Lindsay v. Lindsay, 100 N.E. 892, 893 (Ill. 1913). A dependant child included a child who was destitute, homeless, or abandoned, or did not have proper parental care. 1907 Ill. Laws 71.

98. *Lindsay*, 100 N.E. at 894.

99. *Id.*

100. *Id.* ("Our statute does not, as contended, create a new court unauthorized by the Constitution.").

101. *Id.* (discussing the concurrent jurisdiction of the circuit and county courts).

102. *Id.* ("[The statute] does not create a new court, but delegates powers to constitutional courts already existing.").

103. GROSS, *supra* note 48, at 21.

104. People v. Lattimore, 199 N.E. 275 (Ill. 1935); People *ex rel.* Malec v. Lewis, 199 N.E. 276 (Ill. 1935).

105. *Lattimore*, 199 N.E. at 275.

106. *Id.*

107. *Id.* She based her argument on Chapter 23, Section 9a of the Illinois Revised Statutes, which provides, "The [juvenile] court may in its discretion in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this State governing the commission of crimes . . . ." *Id.*

Supreme Court rejected her argument because the Illinois Constitution granted jurisdiction over criminal cases to the criminal court, not to the juvenile court.[108] This constitutional grant of jurisdiction could not be altered by the ordinary legislation found in the Juvenile Court Act.[109] Thus, while a criminal court could take jurisdiction over a juvenile without permission from the juvenile court, the juvenile court had no authority to interfere with a criminal proceeding merely because a juvenile was involved.[110] The juvenile court only had the power to refuse jurisdiction over a pending delinquency case and to transfer it to adult criminal court.[111] Thus, the juvenile court could not interfere with a case once it had begun in criminal court, and a juvenile had no constitutional right to be tried in the juvenile court.[112]

Consequently, the juvenile court and the criminal court shared jurisdiction over children who could be prosecuted in the criminal courts.[113] At the judge's discretion, the juvenile court could transfer a child to criminal court with no formal hearing.[114] This was the practice in Illinois and other states until 1966, when the United States Supreme Court decided *Kent v. United States*.[115] In *Kent*, the D.C. Juvenile Court waived jurisdiction and transferred sixteen-year-old Kent to criminal court without holding a hearing, conferring with Kent's parents or counsel, making findings, or reciting a reason for the waiver.[116] The United States Supreme Court held that the waiver was invalid and that

108. *Id.* at 276 ("The Legislature is without authority to confer upon an inferior court the power to stay a court created by the Constitution from proceeding with the trial of a cause jurisdiction of which is expressly granted to it by the Constitution.").

109. *Id*; *see* Benedict S. Alper, *Forty Years of the Juvenile Court*, 6 AM. SOC. REV. 230 (1941) (reacting to the *Lattimore* case and its assault on the juvenile court's existence, calling for the juvenile court's supporters to continue working on its behalf).

110. *Lattimore*, 199 N.E. at 276.

111. *Id.* The Illinois Supreme Court did not believe the legislature intended that children who were capable of forming criminal intent could use the juvenile court to escape punishment. *Id.* ("It was not intended by the Legislature that the juvenile court should be made a haven of refuge where a delinquent child of the age recognized by law as capable of committing a crime should be immune from punishment for violation of the criminal laws of the state, committed by such child subsequent to his or her being declared a delinquent child."); *see also* People *ex rel.* Malec, 199 N.E. 276, 277 (Ill. 1935) ("[C]onsent of the juvenile court was not required [for the criminal court's jurisdiction over a minor previously declared delinquent], and [] the Legislature is without authority to abridge the jurisdiction of the criminal court of Cook county, which was created by . . . [the Illinois] Constitution.").

112. GROSS, *supra* note 48, at 19–21.

113. *See supra* note 109-12 and accompanying text (establishing concurrent jurisdiction).

114. *See supra* note 111 and accompanying text (establishing judicial waiver).

115. Kent v. United States, 383 U.S. 541 (1966).

116. *Id.* at 543–46.

Kent was entitled to a transfer hearing.[117] Due process demanded a hearing because transfer could lead to criminal sanctions, which were more serious than juvenile sanctions.[118]

Although a judge still made the decision regarding transfer, he was first required to conduct a hearing and follow certain procedures.[119] In an appendix, the Court set forth certain criteria for a judge to consider in determining whether to transfer a juvenile to criminal court.[120] A waiver was appropriate when a juvenile committed a serious offense, or when the offense was one in a pattern of repeated offenses.[121] The underlying consideration was whether the juvenile was beyond rehabilitation or whether transfer was necessary for the protection of the public.[122]

Thus, decades after the Illinois Supreme Court denied juveniles in Illinois a *constitutional* right to be tried in juvenile court, the United States Supreme Court established a *statutory* right, which granted minors certain protections that a court must provide before taking away

117. *Id.* at 557.

118. *Id.* (pointing out the difference in sentences between the juvenile and criminal courts).

119. *Id.* at 561 ("Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order.").

120. *Id.* at 566–67. The Court set forth eight factors:

> (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.

121. *Kent*, 383 U.S. at 566-67.

122. *Id.* at 566. *See* Klein, *supra* note 45, at 387 (dividing the *Kent* factors into "two broad categories: danger to the public and amenability to treatment").

that right.[123] However, because it was only a statutory right, the legislature, not the United States Constitution, defined the boundaries of that right.[124]

D. The Shift Towards a Punitive System

Kent began the juvenile court's transformation towards an adversarial system, advanced by other United States Supreme Court decisions that granted juvenile offenders many, but not all, of the due process rights that adults possess.[125] Adding to the converging processes of the juvenile and adult courts, an influential study came out in the 1970s, which claimed that rehabilitation programs for criminals were not effective.[126] Thus came the phrase "nothing works," which undermined the rehabilitative foundation of the juvenile court.[127] The public grew increasingly dissatisfied with what it saw as a broken juvenile justice system that was too soft on juvenile offenders, and demanded action.[128]

In response to public demand to get tougher on juvenile crime, the Illinois legislature changed the contours of the juvenile court's

123. *See Kent*, 383 U.S. at 556–57 ("The Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. . . . [Kent]—then a boy of sixteen—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court.").

124. *See* Sabo, *supra* note 37, at 2427–28 ("Legislative waiver statutorily excludes a juvenile from juvenile court jurisdiction by virtue of her offense or by a combination of her age and offense."). The main difference between statutory and constitutional rights is that statutory rights can be changed by ordinary legislation, instead of the complicated process in place to amend the constitution.

125. *See* Mills, *supra* note 76, at 913–22 (discussing the Supreme Court cases regarding juvenile justice); *see also In re* Gault, 387 U.S. 1 (1967) (granting a juvenile the right to know the charges against him, the right to counsel, the right to confrontation and cross-examination of witnesses, and the right to remain silent); *In re* Winship, 397 U.S. 358 (1970) (applying the burden of proof beyond a reasonable doubt on the State in juvenile cases). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying juveniles under juvenile jurisdiction the right to a jury trial, thereby preserving some distinction between the juvenile and adult system).

126. KATHLEEN M. HEIDE, YOUNG KILLERS: THE CHALLENGE OF JUVENILE HOMICIDE 224 (1999); *see* Michael Welch, *Rehabilitation: Holding Its Ground in Corrections*, 59 FED. PROBATION 3, 4 (1995) ("In a widely cited . . . article, [Robert] Martinson concluded: 'With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation.' Martinson entitled his article 'What Works?: Questions and Answers About Prison Reform,' but it quickly became known as the 'nothing works' report. Contrary to popular opinion [the rehabilitation study] did not make the sweeping claim that 'nothing works.' In fact, they cited positive outcomes in 48 percent of the programs evaluated."). Subsequent studies contradicted the idea that "nothing works." DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 197 (2001). Effective programs include early and intermediate intervention, individualized treatment, and dispositional alternatives. *Id.*

127. MYERS, *supra* note 126, at 17–18.

128. *Id.*

jurisdiction and adopted the state's first automatic transfer law in 1982.[129] This legislation was a shift from looking at the individual circumstances of each juvenile defendant to a blanket exclusion of an entire group of juveniles from the juvenile court's jurisdiction, regardless of their personal circumstances or any mitigating factors.[130] Any juvenile fifteen years or older charged with murder, rape, deviant sexual assault, or armed robbery with a firearm automatically fell under criminal jurisdiction.[131] In the 1980s and 1990s, the legislature continued adding to the list of offenses that would exclude a juvenile from the juvenile court's jurisdiction.[132] These laws reflected a more punitive and retributive attitude towards juvenile crime, ignoring any difference between offenders and focusing on the act committed.[133] Near the end of the twentieth century, a juvenile could be tried in criminal court under three statutory provisions: concurrent jurisdiction,[134] excluded jurisdiction,[135] and transfer of jurisdiction.[136]

In some of the jurisdiction provisions, the legislature gave the court discretion over whether to prosecute a juvenile offender in juvenile or criminal court; in others, the legislature categorically removed certain

129. Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595, 611 (1998); *see* People v. J.S., 469 N.E.2d 1090 (Ill. 1984) (upholding the constitutionality of the statute under a rational basis test). Before Illinois excluded from juvenile jurisdiction offenders fifteen or older charged with murder, armed robbery, or rape, an average of forty-seven cases were transferred per year through a judicial transfer. Klein, *supra* note 465, at 390. In the two years after Illinois adopted the automatic transfer statute, the average number of transfers more than tripled to 170. *Id.* Out of those 170, 151 were from the automatic transfer statute. *Id; see also* Traver, *supra* note 81, at 289 (discussing how the *Kent* decision unwittingly led to the automatic transfer laws because legislators thought "that the rehabilitative ideal endorsed by the *Kent* Court was flawed, and that more punitive solutions for juvenile crime were necessary").

130. Geraghty & Rhee, *supra* note 129, at 602–03.

131. Traver, *supra* note 81, at 290. *See* People v. Reed, 465 N.E.2d 1040 (Ill. App. Ct. 1984) (upholding the constitutionality of the excluded jurisdiction statute).

132. *See* Traver, *supra* note 81, at 290–93 (discussing the legislation passed during this time period). In 1985, the legislature added to the automatic transfer juveniles charged with drug or weapons offenses around a school. *Id.* at 291. Then, in 1989, the legislature added gang-related offenses. *Id.* at 290–91. In 1991, it added drug offenses in public housing to the automatic transfer list. *Id.* at 292. Finally, in 1995, the legislature created a new type of transfer, the presumptive transfer, for aggravated battery with a firearm. *Id.*

133. *See In re* R.L.L., 435 N.E.2d 904, 908 (Ill. App. Ct. 1982) (Webber, J., dissenting) (disagreeing with the majority affirming the trial court's denial of a transfer motion (before enactment of the automatic transfer laws) for a sixteen and one-half-year-old who allegedly murdered his foster mother because "the trial court's emphasis on rehabilitation [is] out of line with current public policy . . . [and] some cases . . . simply demand punishment").

134. 705 ILL. COMP. STAT. 405/5–125 (2006).

135. 705 ILL. COMP. STAT. 405/5–130 (2006 & West Supp. 2007).

136. 705 ILL. COMP. STAT. 405/5–805(1)–(3) (2006 & West Supp. 2007).

juvenile offenders from the juvenile court's jurisdiction.[137] Concurrent jurisdiction, for example, vests complete discretion in the state's attorney.[138] If a juvenile allegedly violates a traffic, boating, or fish and game law, both the juvenile court and the criminal court have jurisdiction over the offense, allowing the state's attorney to file charges in either court.[139]

Excluded jurisdiction is similar to concurrent jurisdiction in that the charges bypass the juvenile court, but differs because the state's attorney has no discretion over in which court to file the charges.[140] The legislature has excluded certain groups of juvenile offenders from the jurisdiction of the juvenile court.[141] First, if a juvenile has previously been convicted in criminal court, all future charges will be filed in criminal court; the juvenile may no longer fall under the juvenile court's jurisdiction.[142] In addition, excluded jurisdiction automatically removes some juveniles from the jurisdiction of the juvenile court based only on age and offense.[143] The legislature determined that juveniles over a certain age who have allegedly committed certain crimes should be treated as adults, regardless of the circumstances surrounding the crime.[144]

137. Traver, *supra* note 81, at 295, 304–05 (discussing aggravated battery and the transfers under the Juvenile Justice Reform Act).

138. 705 ILL. COMP. STAT. 405/5–125.

139. *See* People v. Bradley M., 815 N.E.2d 1209, 1210–11 (Ill. App. Ct. 2004) (discussing concurrent jurisdiction and noting that the State may file charges against a juvenile in criminal court for allegedly violating a traffic, boating, or fish and game law, but not a curfew violation). Section 5–125 also authorizes a juvenile who has allegedly violated a municipal or county ordinance to be tried in municipal courts. 705 ILL. COMP. STAT. 405/5–125; *see* City of Urbana v. Andrew N.B., 813 N.E.2d 132, 138 (Ill. 2004) ("Thus, under section 5–125, the Cities could pursue their own cases against the minors as an alternative to requesting the State commence delinquency proceedings against them.").

140. Alma Tolliver, Comment, *Juvenile Justice on the Brink of Another Failed Reform. Where Do We Go From Here?*, 24 S. ILL. U. L.J. 569, 582 (2000).

141. *Id.*

142. 705 ILL. COMP. STAT. 405/5–130(6) (2006 & West Supp. 2007).

143. 705 ILL. COMP. STAT. 405/5–130.

144. For juveniles fifteen or over at the time of the offense, the excluded felonies include first degree murder, aggravated criminal assault, aggravated battery with a firearm committed in or around a school or school related activity, armed robbery with a firearm, or aggravated vehicular hijacking with a firearm, 705 ILL. COMP. STAT. 405/5–130(1)(a), and unlawful use of a weapon in or around a school, 705 ILL. COMP. STAT. 405/5–130(3)(a). Excluded jurisdiction also extends to any minor who was at least thirteen at the time of the offense and is charged as a principal in first degree murder committed during the course of criminal sexual assault or aggravated kidnapping. 705 ILL. COMP. STAT. 405/5–130(4)(a); *see* People v. Clark, 518 N.E.2d 138, 143 (Ill. 1987) ("We note with interest that the legislature itself balanced the competing interests of minor offenders and society where it is alleged that a minor has committed 'murder, [or] aggravated criminal sexual assault' and 'was at least 15 years of age' at the time of the alleged offence. Under these circumstances, the legislature struck the balance in favor of societal security

Finally, some charges that are initially filed in juvenile court may be transferred to the criminal court.[145] Mandatory transfers are another type of categorical exclusion, but they are slightly more individualized than excluded jurisdiction because a judge must consider the juvenile's prior history.[146] Instead of transferring *all* juveniles over fifteen years of age based on the offense, a mandatory transfer applies to juveniles with a prior felony record who allegedly committed a felony in furtherance of gang activity,[147] and juveniles with a prior forcible felony record who allegedly committed a Class X felony or aggravated discharge of a firearm.[148] A mandatory transfer also applies to any juvenile who allegedly committed aggravated discharge of a firearm in or around a school, regardless of the minor's prior delinquency history.[149]

Discretion enters the system with the presumptive and discretionary transfer.[150] When a juvenile fifteen years or older allegedly commits an offense that subjects him to a presumptive transfer, a rebuttable presumption exists that the minor will not benefit from being in the juvenile system and should be transferred to the criminal court.[151] The minor can rebut that presumption by showing with clear and convincing evidence that he would be amenable to the services available in the juvenile system.[152] In a discretionary transfer, available for any crime allegedly committed by a juvenile thirteen years or older, no such presumption exists.[153] Instead, the judge must find that it is not in the best interests of the public to maintain juvenile jurisdiction.[154]

by vesting exclusive jurisdiction over these alleged offenders within the criminal court.") (citations omitted) (alteration in original).

145. *See* Traver, *supra* note 81, at 290–93 (describing the history of the automatic transfer laws).

146. *Id.*

147. 705 ILL. COMP. STAT. 405/5–805(1)(a)–(b) (2006 & West Supp. 2007). If the current alleged offense is a felony, the prior offense must have been a forcible felony. 705 ILL. COMP. STAT. 405/5–805(1)(b). If the current alleged offense is a forcible felony, the prior offense need only have been a felony. 705 ILL. COMP. STAT. 405/5–805(1)(a).

148. 705 ILL. COMP. STAT. 405/5–805(1)(c). Without a prior record, such an offense would subject the minor to a presumptive, not mandatory, transfer. 705 ILL. COMP. STAT. 405/5–805(2)(a)–(b).

149. 705 ILL. COMP. STAT. 405/5–805(1)(d).

150. *See* 705 ILL. COMP. STAT. 405/5–805(2) to –(3) (listing discretionary factors for a judge to consider).

151. 705 ILL. COMP. STAT. 405/5–805(2)(a).

152. 705 ILL. COMP. STAT. 405/5–805(2)(b).

153. 705 ILL. COMP. STAT. 405/5–5/805(3)(a).

154. *Id.*

When a judge exercises discretion, either during a presumptive transfer or a discretionary transfer, the statute lists factors for the judge to consider[155] based on the factors listed in *Kent*.[156] The factors focus on the seriousness of the offense, the minor's involvement in the offense, the minor's background, whether the juvenile system has services that may help the minor, and whether the juvenile system can adequately punish the minor.[157] In determining whether to transfer the juvenile to adult court, the juvenile court places greater weight on the seriousness of the alleged offense and the minor's prior record than on other factors.[158]

Illinois appellate cases suggest that transfer decisions are motivated by how long the juvenile court will have jurisdiction over the juvenile and whether that time is sufficient to rehabilitate the offender and

155. 705 ILL. COMP. STAT. 405/5–5/805(2)(b), (3)(b).

156. People v. Taylor, 391 N.E.2d 366, 370 (Ill. 1979) ("[T]he present [transfer] statute closely parallels the District of Columbia transfer statute as interpreted by the Supreme Court in *Kent*. Indeed the council commentary to the new provision indicates that the statute was amended in response to the *Kent* decision.").

157. 705 ILL. COMP. STAT. 405/5–5/805(2)(b), (3)(b). The factors are:

(i) the age of the minor;

(ii) the history of the minor, including:

(a) any previous delinquent or criminal history of the minor,

(b) any previous abuse or neglect history of the minor, and

(c) any mental health, physical, or educational history of the minor or combination of these factors;

(iii) the circumstances of the offense, including:

(a) the seriousness of the offense,

(b) whether the minor is charged through accountability,

(c) whether there is evidence the offense was committed in an aggressive and premeditated manner,

(d) whether there is evidence the offense caused serious bodily harm,

(e) whether there is evidence the minor possessed a deadly weapon;

(iv) the advantages of treatment within the juvenile justice system including whether there are facilities or programs or both, particularly available in the juvenile system;

(v) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections:

(a) the minor's history of services, including the minor's willingness to participate meaningfully in available services;

(b) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court's jurisdiction;

(c) the adequacy of the punishment or services.

Id. Interestingly, these factors were amended in 2005. 2005 Ill. Laws 574. The previous factors were similar, but less detailed. *See* 705 ILL. COMP. STAT. 405/5–805(2)(b), 3(b) (West 2004) (amended 2005) (listing the previous factors).

158. 705 ILL. COMP. STAT. 405/5–805(2)(b), 3(b).

adequately punish him for the offense.[159] For example, in *In re L.J.*,[160] the trial court denied the State's transfer motion, but the appellate court reversed, focusing on a rationale of protecting the public.[161] Because previous juvenile interventions had not been effective for L.J., the appellate court held that the risk was too great to keep L.J. in the juvenile system where he would be released upon reaching age twenty-one.[162] In contrast, in *People v. Booth*,[163] although the judge noted that juvenile facilities might benefit the defendant, the need to protect the public tipped the scales in favor of the transfer.[164] The judge granted the transfer because he had no reason to believe that the offender's behavior would change before the juvenile court's jurisdiction ended.[165]

The evolution of the transfer statute mirrors society's conceptions of juvenile crime.[166] From the juvenile court's inception, the public did not trust it to deal adequately with serious juvenile offenders.[167] Opponents of the juvenile court felt that some crimes were so serious that the juvenile court could not adequately punish offenders within the limited time frame that it exercised jurisdiction over them.[168] Further, the public did not believe that the juvenile court could rehabilitate the offenders or that the offenders necessarily deserved another chance.[169] Thus, the solution was increasingly to transfer such juveniles to criminal court.[170]

159. *See* Geraghty & Rhee, *supra* note 129, at 600–01 (identifying the normative question at transfer hearing to be "given the seriousness of the offense and the background of the child, should there be an effort to rehabilitate the child?").

160. *In re* L.J., 654 N.E.2d 671 (Ill. App. Ct. 1995).

161. *Id.* at 674.

162. *Id.*

163. People v. Booth, 637 N.E.2d 580 (Ill. App. Ct. 1994).

164. *Id.* at 583.

165. *Id*; *see also* People v. Morgan, 758 N.E.2d 813, 825 (Ill. App. Ct. 2001) ("[T]he [trial] court observed that if [the defendant] should be convicted in juvenile court, he would be released at age twenty-one whether or not he was rehabilitated.").

166. Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PRAC. L. INST./CRIM. 395, 397–98 (1999).

167. Kathleen A. Strottman, Note, *Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency*, 19 WHITTIER L. REV. 707, 726 (1998).

168. *Id.* at 723.

169. Fagan, *supra* note 166, at 414–15 (detailing the belief that serious crimes deserve punishment that a juvenile court may not be in the position to impose).

170. David O'Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) To Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1555 (2004).

III. DISCUSSION

In the decades leading to the 1998 reforms, the Illinois legislature responded to juvenile crime by making the juvenile system more punitive and by facilitating transfers to adult court.[171] Juvenile crime appeared to be on the rise, and the public demanded more "get tough" measures.[172] Many states reformed their juvenile justice systems in the 1990s, due in large part to media coverage depicting a juvenile crime epidemic.[173] Media coverage surrounding some high profile cases drew national attention to the juvenile justice system.[174] The media depicted juveniles as "superpredators"—criminals without remorse.[175] The increased attention suggested an epidemic, but in reality, juveniles only committed a small fraction of the total number of violent crimes.[176] Rather, the juvenile population was larger, so more juveniles entered the system, giving the impression of a more serious crime epidemic than existed in reality.[177] Even though the threats of superpredators were exaggerated, many states in the 1990s enacted legislation directed towards them, making it easier to try juveniles as adults.[178]

Illinois, however, did not follow that trend.[179] The 1998 reforms represented a shift away from the increasingly punitive trend of juvenile justice.[180] The reforms embraced the philosophy of balanced and restorative judgment, which attempts to balance the needs of the offender with the harm done to the victim and the safety of the community.[181] Unlike other states, Illinois did not change its transfer

171. *See supra* Part II.D. (discussing the new transfer laws).

172. DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 95–97 (2005).

173. Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Programs, U.S. Dept. of Justice), Nov. 1998, at 1. Between 1988 and 1994 the national juvenile violent crime arrest rate increased 64% after remaining constant since the early 1970s. *Id*. at 2. Between the mid-1980s and 1993, the number of juveniles arrested for murder more than doubled. *Id.*

174. *Id.* at 1.

175. *Id.* at 1–2.

176. *Id.* at 2. In 1986 juveniles were responsible for 9% of all violent crimes and 5% of all murders. *Id*. In 1996, juveniles committed 13% of all violent crimes and 8% of all murders. *Id.*

177. *Id.*

178. *Id.* at 1–2.

179. *See* Traver, *supra* note 81, at 294 (describing how the Juvenile Justice Reform Act shifted away from imposing automatic transfer provisions).

180. *See* Joseph E. Birkett, *Juvenile Justice Reforms—County & State*, DUPAGE COUNTY B. ASS'N BRIEF ONLINE, Oct. 1999, *available at* http://www.dcba.org/brief/octissue/1999/art31099.htm (including an explanation of the 1998 reforms by one of the drafters, noting that the reforms are not simply a "get tough" approach).

181. Daniel Dighton, *Balanced and Restorative Justice in Illinois*, ILL. CRIM. JUST. AUTHORITY PUBLICATIONS, *available at* http://www.securitymanagement.com/library/icjia.txt.

laws, but created a new statute providing for EJJ prosecutions, a purported alternative to transfer.[182]

This Part examines the effects of the 1998 reforms on the Illinois juvenile justice system.[183] It demonstrates the compromise sought by balanced and restorative justice between the putative singular goal of rehabilitating the offender and the actual practice of a more punitive aim.[184] It then describes the new EJJ provision, intended as an alternative to transfer, and explains the statute's aim of giving the offender one last chance to succeed in the juvenile system.[185] After examining the legislative intent behind enacting the EJJ provision, this Part discusses some uncertainties surrounding the EJJ revocation procedure, including the process by which the juvenile loses the chance to remain in the juvenile system and the adult sentence is executed.[186] It further explains two recent constitutional challenges to the EJJ revocation process alleging that the process is unconstitutionally vague; however, neither case was decided on the merits.[187] In those cases, juveniles claimed that the statute does not provide a juvenile with notice of how to conform his conduct to avoid the imposition of the adult sentence, and that it does not provide the judge with any standard to use in determining when to impose the adult sentence.[188] This Part concludes with the open question of whether the EJJ revocation process is void for vagueness.[189]

A. The Juvenile Justice Reform Act of 1998

Before 1998, the part of the Juvenile Court Act governing delinquent minors did not have its own purpose statement; instead, the overarching purpose and policy of the Juvenile Court Act applied, which governed

182. Traver, *supra* note 81, at 294–95.

183. *See* Birkett, *supra* note 180 (explaining that the 1998 reforms were not simply a "get tough" approach).

184. *See infra* notes 192–203 and accompanying text (discussing balanced and restorative justice, a philosophy that works to protect society, compensate the victim, and build the offender's competency).

185. *See infra* notes 206–245 and accompanying text (detailing the EJJ process).

186. *See infra* notes 246–275 and accompanying text (finding that the legislative intent was to provide serious juvenile offenders with one last chance in the juvenile system without laying out the process in which a juvenile would lose that chance).

187. *See infra* notes 276–307 and accompanying text (discussing the two cases that have challenged the constitutionality of the EJJ revocation process).

188. *In re* Christopher K., 841 N.E.2d 945, 951 (Ill. 2005); *In re* J.W., 804 N.E.2d 1094, 1103 (Ill. App. Ct. 2004).

189. *In re* Christopher K., 841 N.E.2d at 952 (showing that the Illinois Supreme Court refused to determine the vagueness challenge because the case was moot).

delinquent, dependent, and neglected or abused minors.[190] Thus, the purpose of the Juvenile Court Act was focused almost exclusively on the best interests of the child.[191]

The 1998 Act changed the focus for delinquent minors by incorporating the philosophy of balanced and restorative justice ("BARJ") in the article governing delinquent minors.[192] BARJ is a philosophy that seeks to balance the rehabilitative model of juvenile justice with the punitive model.[193] In doing so, the BARJ model strives to repair the harm to the victim, protect the community, and build the competency of the offender.[194] To reflect these goals, the drafters added a separate purpose statement governing the delinquency section of the Juvenile Court Act, which serves to guide judges in interpreting the 1998 Act.[195] The four main purposes of the 1998 Act are: (1) to protect citizens; (2) to hold the juvenile accountable; (3) to build the juvenile's competency; and (4) to provide the juvenile with procedural due process.[196] The new policy statement no longer focuses solely on rehabilitation, but also emphasizes public safety and personal accountability.[197] The previous Juvenile Court Act did not have a separate purpose statement governing delinquent minors, so this

190. 705 ILL. COMP. STAT. 405/5–1 to –34 (West 1996) (amended 1998).

191. 705 ILL. COMP. STAT. 405/1–2 (West 1996) (amended 1998) ("The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community.").

192. Phillip Stevenson, *The Juvenile Justice Reform Act*, ILL. CRIM. JUST. AUTH.: TRENDS & ISSUES UPDATE (Ill. Criminal Justice Information Authority), June 1999, at 1.

193. *Id.* at 1. The three main concepts behind BARJ are to "(1) hold each offender accountable for his or her conduct, (2) have a mechanism in place that allows juvenile justice professionals to intervene early in an offender's 'career,' and (3) increase the participation of the community in the juvenile justice process, including the offender's victims." *Id; see also* Geraghty & Rhee, *supra* note 129, at 595, 599–600 (discussing the unavoidable conflict between punishment and rehabilitation when deciding whether to transfer a case to criminal court).

194. Stevenson, *supra* note 192, at 1; *see* Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1587–89 (2002) (discussing BARJ as an alternative to both the more criminalized juvenile justice system and the classic rehabilitative model).

195. 705 ILL. COMP. STAT. 405/5–101 (2006); *see* 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 16, 49 (Ill. Jan. 27, 1998) (statement of Rep. Cross) (setting forth the new balanced and restorative justice purpose of the bill).

196. 705 ILL. COMP. STAT. 405/5–101(1)(a)–(d). Rehabilitation is achieved by developing competency through "educational, vocational, social, emotional and basic life skills which enable a minor to mature into a productive member of society." 705 ILL. COMP. STAT. 405/5–101(1)(c).

197. People v. Taylor, 850 N.E.2d 134, 139 (Ill. 2006).

addition gives particular guidance to judges and attorneys who work in the juvenile justice system.[198]

In addition to the new purpose statement, the 1998 reforms changed the terminology used in juvenile court to parallel the terminology used in criminal proceedings,[199] undoing some of the work done by the Chicago Women's Club a century ago.[200] These changes, however, were not made to criminalize the juvenile system, but to make the process easier for lay people to understand.[201] Despite these changes, rehabilitation, not punishment, continues to underlie the juvenile system.[202] A juvenile adjudication is still distinct from a criminal conviction.[203]

B. EJJ Provisions of the Juvenile Justice Reform Act of 1998

The 1998 Act went further than merely distinguishing between delinquent minors and abused or neglected minors.[204] It also separated serious, violent juvenile offenders from other juvenile offenders.[205] The 1998 Act created a distinct part, Part 8, within the delinquent minor section, to govern the small number of juvenile offenders who commit serious crimes.[206] Part 8, applicable only to serious and violent offenders, contained its own purpose statement that emphasized protection of the public as the main goal.[207] Part 8 incorporated earlier

198. Daniel Dighton, *Balanced and Restorative Justice in Illinois*, THE COMPILER, Winter 1999, at 4. One of the principal architects of the legislation said, "[The new purpose and policy clause is] going to provide a lot more specific guidance to the judges, as well as others who work in the system." *Id*; *see also* Geraghty & Rhee, *supra* note 129, at 614 ("Since legislatures know that judges frequently examine the purpose of a statute to guide their interpretation, perhaps there are no more explicit instructions to judges from the legislature than such statutory statements of purpose and legislative findings.").

199. Now juveniles are "arrested" instead of "taken into custody" and have "trials," not "adjudicatory hearings," and have "sentencing hearings" rather than "dispositional hearings." Michelle M. Jochner, *An Overview of the Juvenile Justice Reform Provisions of 1998*, 87 ILL. B.J. 152, 152 (1999).

200. *See supra* notes 70–71 and accompanying text (explaining the change in terminology at the adoption of the 1899 Juvenile Court Act).

201. *Q&A on Juvenile Justice Reform*, THE COMPILER (Chicago, Ill.) Winter 1999, at 10–11 [hereinafter *Q&A on Juvenile Justice Reform*].

202. *Taylor*, 850 N.E.2d at 141; *see* Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 237 (1997) ("The ethic of the juvenile court is to support children through adolescence as they mature out of patterns of impulsive behavior. Sending children to adult court destroys this ethic of hope and patience.").

203. *Taylor*, 850 N.E.2d at 140.

204. *See* 705 ILL. COMP. STAT. 405/5–801 (2006) (creating different categories of delinquent minors).

205. *Id.*

206. *Id.*

207. The purpose statement reads:

provisions regarding violent and habitual juvenile offenders and the transfer laws.[208] It also included a new type of jurisdiction for juveniles called EJJ prosecution.[209]

Before the 1998 reforms, the Juvenile Court Act provided two options for prosecuting juvenile offenders: (1) keeping the juvenile in juvenile court, or (2) transferring the juvenile to criminal court where he would remain for any future offenses.[210] Therefore, when a judge was faced with a juvenile alleged to have committed a serious crime, he had a choice between transferring the minor to the adult system, where the minor essentially lost any chance for rehabilitation,[211] or keeping the case in juvenile court.[212] If the minor remained in the juvenile system, the judge took the risk that the juvenile would not be amenable to rehabilitation services, yet in a few years would be out on the streets after the juvenile court's jurisdiction expired.[213] EJJ prosecutions offer a third alternative, often described as "one last chance" for juvenile offenders.[214]

> The General Assembly finds that a substantial and disproportionate amount of serious crime is committed by a relatively small number of juvenile offenders . . . and in all proceedings under Sections 5–805, 5–810, and 5–815, the community's right to be protected shall be the most important purpose of the proceedings.

Id. Section 5–805 governs how and when a minor may be transferred to adult criminal court. 705 ILL. COMP. STAT. 405/5–805 (2006 & West Supp. 2007). Section 5–815 governs habitual juvenile offenders: those who have been adjudicated delinquent twice before for what would be a felony if they had been prosecuted as adults. 705 ILL. COMP. STAT. 405/5–815 (2006 & West Supp. 2007).

208. 705 ILL. COMP. STAT. 405/5–805, –815, –820 (2006 & West Supp. 2007).

209. 705 ILL. COMP. STAT. 405/5–801 to –820.

210. *See* Smallheer, *supra* note 68, at 276 ("The present choice available to juvenile court judges adjudicating offenders presents an all-or-nothing decision: either keeping the individual in the juvenile system, or placing him in the adult criminal system.").

211. *See* Klein, *supra* note 45, at 403 (discussing the loss of rehabilitative opportunities to transferred juveniles, including access to educational and therapeutic services, psychological and educational counseling, and job training).

212. People v. Clark, 518 N.E.2d 138, 144 (Ill. 1987) ("[T]he choice is between two extremes, incarceration to age twenty-one under the [Juvenile] Act or incarceration for life without possibility of parole under the Criminal Code . . . .").

213. *See* Brummer, *supra* note 73, at 788 ("Of great concern to courts has been the juvenile who engages in reprehensible crimes or who is not amenable to rehabilitation within the time prescribed for juvenile court jurisdiction."); Geraghty, *supra* note 202, at 227 ("The perceived, and sometimes real, need to provide long-term incarceration for the small minority of children who must be institutionalized could be satisfied by the 'blended sentencing' schemes.").

214. Kathryn A. Santelmann & Kara Rafferty, *Juvenile Law Developments—"One Last Chance": Applying Adult Standards to Extended Jurisdiction Juvenile Proceedings*—State v. B.Y., 30 WM. MITCHELL L. REV. 427, 431–32 (2003) (describing the reasons behind Minnesota's EJJ provision as "one last chance . . . to give deserving juveniles an opportunity to change through treatment in the juvenile system"); *see* Mary E. Spring, Comment, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J.

EJJ prosecutions are a type of "blended sentences," a trend in juvenile justice, adopted by over one-third of states, which allow juvenile courts more sentencing options.[215] Six different models have emerged.[216] In the *juvenile-exclusive model*, the juvenile court may impose *either* an adult sentence *or* a juvenile sentence on certain repeat and/or serious offenders.[217] In the *juvenile-inclusive model*, the juvenile court imposes *both* a juvenile *and* an adult sentence; the adult sentence is stayed and vacated if the juvenile sentence is successfully completed.[218] A juvenile under the *juvenile-contiguous model* may receive a juvenile sentence that extends beyond his eighteenth birthday, after which the court holds a hearing to determine whether to transfer the juvenile to the adult system or release him.[219] Other states have blended sentencing options in the criminal court instead of the juvenile court.[220] The *criminal-exclusive model* permits a criminal court to impose an adult sentence *or* a juvenile sentence, while the *criminal-inclusive model* permits both an adult sentence *and* a juvenile sentence.[221] Finally, New York has a model for adolescents in criminal court in which the criminal sentence is suspended while the juvenile participates in an alternative to an incarceration program.[222] Successful juveniles avoid a criminal sentence.[223] The overall purpose of blended sentencing is to allow juveniles who have committed serious crimes, but may still be amenable to services, to have a chance to remain in juvenile

MARSHALL L. REV. 1351, 1374–75 (1998) (discussing the negative consequences of sentencing a juvenile who is amenable to treatment to adult court).

215. Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 67, at 146, 149.

216. *See id.*, at 151 (describing five basic models of blended sentencing); MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN 54–55 (2006) (discussing how New York's Youthful Offender paradigm is similar to blended sentencing).

217. Redding & Howell, *supra* note 215, at 151. Massachusetts, Michigan, and New Mexico follow the *juvenile-exclusive model*. *Id.*

218. *Id.* at 152; 705 ILL. COMP. STAT. 405/5–810(7) (2006 & West Supp. 2007). Connecticut, Kansas, Minnesota, Montana, and Illinois follow the *juvenile-inclusive model*. Redding & Howell, *supra* note 215, at 152; 705 ILL. COMP. STAT. 405/5–810(7).

219. Redding & Howell, *supra* note 215, at 152. Colorado, Massachusetts, Rhode Island, and Texas have the *juvenile-contiguous model*. *Id.*

220. *Id.* at 153.

221. *Id.* The *criminal-exclusive model* is found in California, Colorado, Florida, Idaho, Michigan, Oklahoma, Virginia, and West Virginia. *Id.* Colorado and Michigan have both the *criminal-* and *juvenile-exclusive model*. *Id.* The *criminal-inclusive model* exists in Arkansas, Iowa, Missouri, and Virginia. *Id.* Vermont has a hybrid of extended juvenile jurisdiction beyond eighteen and suspended adult sentences. *Id.* The adult court imposes both an adult sentence and a juvenile sentence, then transfers jurisdiction to the family court. *Id.*

222. CORRIERO, *supra* note 216, at 157.

223. *Id.* at 144.

court, receive needed services that would be unavailable to them in adult court, and avoid the stigma of an adult conviction.[224]

In Illinois, EJJ prosecutions are an option if a minor over thirteen years old is alleged to have committed an offense that would be a felony if committed by an adult.[225] The state's attorney may file a petition to designate the proceeding as an EJJ prosecution at any time before the trial begins.[226] If the juvenile court judge finds probable cause that the allegations are true, there is a rebuttable presumption that the proceeding shall be designated as an EJJ proceeding.[227] The presumption can be overcome by a finding based on clear and convincing evidence[228] that an adult sentence would not be appropriate for the minor.[229] When making that determination, the judge must consider factors similar to those used in transfer hearings, which focus on the minor's background, the seriousness of the offense, and the minor's involvement in the offense.[230] Analogous to the transfer statutes, the most important factors are the seriousness of the alleged offense and the minor's prior record of delinquency.[231] The EJJ statute is further similar to the transfer statute in that the same offenders who are eligible for an EJJ designation are also eligible for a presumptive transfer.[232] Therefore, an EJJ designation means that the judge determined that the minor is amenable to the services in the juvenile

224. Redding & Howell, *supra* note 215, at 172.

225. 705 ILL. COMP. STAT. 405/5–810(1) (2006), *amended by* Act of Aug. 21, 2007, Ill. Legis. Serv. 95–301 (West), 705 ILL. COMP. STAT. 405/5–810(1)(a).

226. *Id.*

227. *Id.*

228. Clear and convincing evidence is a standard of proof between preponderance of the evidence, used in civil trials, and beyond a reasonable doubt, used in criminal trials. BLACK'S LAW DICTIONARY 577 (8th ed. 2004). The evidence must indicate that "the thing to be proved is highly probable or reasonably certain." *Id.*

229. 705 ILL. COMP. STAT. 405/5–810(1)(b) (West 2004), *amended by* 705 ILL. COMP. STAT. 405/5–810(1)(b) (West Supp. 2005).

230. *Id.* These factors were recently amended in 2005 to copy the transfer statute. See *supra* note 157 for the statutory factors a judge must consider.

231. *Id*; *cf. supra* note 157 (listing the factors for a discretionary transfer).

232. Both EJJ and discretionary transfers apply to minors who were thirteen or older at the time of the alleged offense. 705 ILL. COMP. STAT. 405/5–805(3) (2006 & West Supp. 2007); 705 ILL. COMP. STAT. 405/5–810(1) (2006), *amended by* Act of Aug. 21, 2007, Ill. Legis. Serv. 95–301 (West), 705 ILL. COMP. STAT. 405/5–810(1)(a). Discretionary transfers are available for "any crime," while EJJ designations are limited to felonies. 705 ILL. COMP. STAT. 405/5–805(3); 705 ILL. COMP. STAT. 405/5–810(1) (2006), *amended by* Act of Aug. 21, 2007, Ill. Legis. Serv. 95–301 (West), 705 ILL. COMP. STAT. 405/5–810(1)(a).

system or that the adult system is otherwise inappropriate for the offender.[233]

An EJJ juvenile has the right to a jury trial because the potential for an adult sentence exists.[234] If the minor pleads guilty or is found guilty after trial, the judge imposes two sentences: a juvenile sentence in accordance with section 5–710 of the Juvenile Court Act and an adult criminal sentence in accordance with the provisions of Chapter V of the Unified Code of Corrections.[235] The adult sentence is stayed and the minor serves the juvenile sentence.[236] If the minor successfully completes the juvenile sentence, the adult sentence is vacated.[237] If, however, the minor violates the conditions of the sentence or commits a new offense, the adult sentence may be imposed.[238]

The drafters of the EJJ statute looked to the juvenile probation revocation hearings as a model for EJJ revocation.[239] After the State learns of an alleged violation, it must file a petition to revoke the stay of the adult sentence based on the alleged violation.[240] The court then conducts a hearing, and if it finds by a preponderance of the evidence[241] that the minor committed a new offense, it must impose the adult sentence.[242] If the court finds by a preponderance of the evidence that the minor violated a condition of his sentence, other than by committing a new offense, it has several options.[243] The court may continue the existing juvenile sentence with or without modifying the conditions, or

233. Marcy R. Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1011 (2001).

234. 705 ILL. COMP. STAT. 405/5–810(3). Juveniles in Illinois under the jurisdiction of the juvenile court do not have the right to a jury trial. 705 ILL. COMP. STAT. 405/5–605(1) (2006). Only certain proceedings, those in which the juvenile has the possibility of receiving an adult sentence, allow the juvenile the right to a jury trial. *Id; see also* McKeiver v. Pennsylvania, 403 U.S. 528 (1976) (holding that juveniles have no constitutional right to a jury trial).

235. 705 ILL. COMP. STAT. 405/5–810(4) (2006), *amended by* Act of Aug. 21, 2007, Ill. Legis. Serv. 95–301 (West), 705 ILL. COMP. STAT. 405/5–810(4).

236. 705 ILL. COMP. STAT. 405/5–810(4)(ii).

237. 705 ILL. COMP. STAT. 405/5–810(7) (2006 & West Supp. 2007).

238. 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331(West).

239. Timothy Lavery, *Extended Jurisdiction Juvenile Prosecutions in Illinois*, ON GOOD AUTHORITY, Dec. 2002, at 4.

240. 705 ILL. COMP. STAT. 405/5–810(6).

241. Preponderance of the evidence is the standard used in most civil trials. BLACK'S LAW DICTIONARY 1201 (8th ed. 2004). The winning party must have the stronger evidence, "however slight the edge may be." *Id.*

242. 705 ILL. COMP. STAT. 405/5–810(6).

243. *Id.*

it may order execution of the previously-imposed adult sentence.[244] If the court orders the adult sentence, it transfers jurisdiction over the minor to the adult criminal court and the juvenile court jurisdiction over the minor is terminated for that offense as well as for any future offenses.[245]

1. Legislative Intent in Enacting EJJ

The EJJ provision is a significant change to the juvenile court's jurisdiction, but the 1998 reforms of the juvenile justice system originally did not include the EJJ provision.[246] After the bill passed the Illinois Senate, the Illinois House added an amendment that included the EJJ provision.[247] The original EJJ provision provided that upon finding that a minor committed a new offense or violated a condition of his sentence, the court *must* impose the adult sentence, leaving the court no discretion.[248]

During the legislative debates, the bill sponsor explained that the EJJ provision was directed towards juveniles who were subject to the presumptive transfer laws and was designed to give a juvenile an additional chance to take advantage of the rehabilitative services of the juvenile system.[249] The potential adult sentence acted as a threat hanging over the juvenile's head to assure that the juvenile would take advantage of the juvenile services and avoid committing other offenses.[250] One representative supported the idea of EJJ because it

244. *Id.*

245. *Id.*

246. S.B. 0363, 90th Gen. Assemb., Reg. Sess. (Ill. 1997).

247. JOURNAL OF THE HOUSE OF REPRESENTATIVES, Jan. 27, 1998, at 191–92. The House Sponsor, Representative Cross, in describing EJJ to the representatives, said, "We are creating a creature known as 'blended sentencing' . . . where we will sentence a juvenile to a traditional juvenile sentence, but at the same time, give that juvenile an adult sentence. If the juvenile does not complete the juvenile sentence as he or she is ordered, then the adult sentence will be put into place." 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 15–16 (Ill. Jan. 27, 1998) (statement of Rep. Cross).

248. The relevant part read:

> When it appears that a minor convicted in an extended jurisdiction juvenile prosecution under subsection (1) has violated the conditions of his or her sentence, or is alleged to have committed a new offense upon the filing of a petition to revoke the stay, the court may, without notice, issue a warrant for the arrest of the minor. After a hearing, if the court finds by a preponderance of the evidence that the allegations in the petition to revoke the stay of execution of the adult sentence have been proven, the court shall order execution of the previously imposed adult criminal sentence.

JOURNAL OF THE HOUSE OF REPRESENTATIVES, Jan. 27, 1998, at 192.

249. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 33 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson).

250. *Id.* at 35 (statement of Sen. Hawkinson).

gave the young offender an opportunity to turn around and become a model citizen.[251]

Some members of the legislature, however, raised concerns about the EJJ provision.[252] One representative argued that EJJ would keep juveniles in the system longer, despite the fact that juvenile systems state-wide lacked the resources or programs to effectively care for the physical and mental health needs of the juveniles.[253] A member of the Illinois Senate feared that, without adequate services in place, EJJ would send more children to the adult system through the back door.[254] Another representative expressed doubts regarding whether the suspended adult sentence would actually affect future criminal behavior because children do not think about future consequences in the same manner as adults.[255] Further, another senator objected to judges' lack of discretion in imposing the adult sentence.[256] He did not believe that all violations of the sentence conditions should trigger the adult sentence.[257] He argued that there was a huge difference between committing another felony while on probation and, for example, missing an appointment with a probation officer.[258]

251. 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 26 (Ill. Jan. 27, 1998) (statement of Rep. Lang) ("The ideas in here regarding blended sentences . . . are fabulous ideas in terms of going directly to these young offenders and saying, 'This is your opportunity to turn around. We've created a system for you, so that you can turn around and we will help you turn around to be the kind of citizens you would like to be, the kind of citizens that would make your parents proud, the kind of citizens that will be model citizens for our state.'").

252. *See infra* notes 253–258 and accompanying text (listing objections).

253. 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 18 (Ill. Jan. 27, 1998) (statement of Rep. M. Davis).

254. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 12–13 (Ill. Jan. 29, 1998) (statement of Sen. Obama) ("If, in fact, we are creating a system where we're going to give young people an adult sentence and a juvenile sentence at the same time, then we are obliged to make sure, as much as possible, that they're going to be successful in carrying out that juvenile sentence. If we don't do that, if we don't provide the services to allow them to complete a juvenile sentence successfully, then this bill, essentially, will result in more incarcerations of young people. . . . [I]f we don't have the funding in place, then this, essentially, is a bill that will permit, or facilitate through the backdoor, additional incarcerations of young people, and . . . I don't think is the intent of the bill.").

255. 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 19 (Ill. Jan. 27, 1998) (statement of Rep. M. Davis) ("Do you know that kids don't know the ramifications of their behavior from now until tomorrow, but you want them to think that they'd better do this as a child because that'll happen to them when they become adults? Psychologists, psychiatrists, teachers, parents will tell you, children don't think that way.").

256. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 34–35 (Ill. Jan. 29, 1998) (statement of Sen. Molaro).

257. *Id.*

258. *Id.* ("Now, you're right when you say normally, or most of the times, they go out and commit another offense. That's great. Go out and commit an offense while you're on probation, maybe . . . the stay should be lifted. But what if it's not that you did another sentence [sic]? What

In response to the concern over violations that trigger the adult sentence, the bill's sponsor focused on the layers of discretion built into the statute.[259] Although any violation could trigger the adult sentence, a probation officer must first feel that the violation was serious enough to warrant the adult sentence.[260] Next, the state's attorney has to agree with the probation officer and file the petition.[261] Finally, the juvenile court judge has to find that there was a violation, prior to imposing the adult sentence.[262] In the discussion, some of the contemplated violations included: not completing a drug or alcohol program, not completing community service, not staying in school, not staying at home during home confinement, missing an appointment with a counselor, or failing to meet a probation officer.[263] The debate stressed that the purpose of EJJ was not to send a juvenile to the Department of Corrections following a minor violation.[264]

Governor Jim Edgar did not sign the bill.[265] Instead, he submitted an amendatory veto that revised the contentious portion of the EJJ statute.[266] The amendment still provided that the judge must impose the

if it's that you missed seeing your counselor? You didn't report to your probation officer? Because it's clear in the Statute . . . that it talks about any violation of the sentence, and then it talks about that it's brought and the judge hears whether or not it's a violation. So missing seeing your counselor is a violation. Not seeing your probation officer is a violation. And it says, then, the . . . judge must lift the stay order and sentence them. The judge has no discretion to say 'Wait a second. He missed his probation officer. I'm not going to lift it.' A violation is a violation. So I just want to make sure that if we're going to put it in the hands of judges out there, we're going to put it in the hands of State's Attorneys, that there's some intent that committing another felony while you're on felony probation is one thing, but not seeing your probation officer or missing the date is another.").

259. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 35 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson) ("[T]here's a lot of discretion built into this.").

260. *Id.*

261. *Id.*

262. *Id.*

263. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 35 (Ill. Jan. 29, 1998) (statement of Sen. Molaro).

264. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 36 (Ill. Jan. 29, 1998) (statement of Sen. Molaro); *see also*, 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 35 (Jan. 29, 1998, Ill.) (statement of Sen. Hawkinson) (discussing the amount of discretion numerous state officers have in deciding whether a violation warrants lifting the suspended sentence). This purpose conflicts with the statutory language that *any* violation would result in the adult sentence.

265. JOURNAL OF THE SENATE (Ill.), Apr. 28, 1998, at 1366.

266. *Id.* He described the EJJ provision as follows:

> SB 363 creates a new blended sentencing option for minors otherwise eligible to be considered for discretionary transfer to adult court. The blended sentence allows the court to impose a juvenile sentence and a suspended adult sentence on a minor found delinquent. If the minor violates any provision of the juvenile sentence, the adult sentence will be imposed resulting in an adult criminal conviction record.

adult sentence if the minor commits a new offense.[267] However, if the minor violated the sentence by committing a technical or minor violation, the judge would have discretion to impose the adult sentence or continue the juvenile sentence.[268] The Illinois Senate interpreted the amendment to mean that a judge is not required to impose the adult sentence for non-willful or technical violations.[269] However, the amendment did not contain any criteria to guide the judge in deciding when to impose the adult sentence.[270] The legislature enacted the governor's amendment, which became the current EJJ statute, requiring the mandatory imposition of the adult sentence after a new offense, but allowing discretion for other violations.[271]

According to the legislative history, the legislature defined "offense" as a violation of the criminal law and mandated that the adult sentence must be imposed if the offense is proven by a preponderance of the evidence.[272] However, the judge would have complete discretion for other violations.[273] Although mere technical, non-willful, or minor violations were not supposed to trigger the adult sentence, legislators suggested leaving one's home during home confinement and failing to attend school as possible violations that could trigger the adult sentence.[274] Still, the overall purpose of the EJJ proceeding was to ensure that the juvenile would take the juvenile sentence seriously, participate in services, and not commit other crimes.[275]

Id. at 1367 (quoting letter from the governor).

267. *Id.*

268. *Id.* The new part would read:

> After a hearing, if the court finds by a preponderance of the evidence that the minor committed a violation of his or her sentence other than by a new offense, the court may order execution of the previously imposed adult sentence or may continue him or her on the existing juvenile sentence with or without modifying or enlarging the conditions.

Id. at 1369 (quoting from the governor's letter).

269. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 11 (Ill. May 5, 1998) (statement of Sen. Hawkinson). With the governor's changes, the bill passed the senate unanimously, 57–0–0. *Id.* at 15 (statement of Sen. Donahue).

270. *See* JOURNAL OF THE SENATE (Ill.), Apr. 28, 1998, at 1364–67 (no factors listed in the amendment).

271. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 11 (Ill. May 5, 1998) (statement of Sen. Hawkinson); *Id.* at 15 (statement of Sen. Donahue).

272. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 9–10 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson).

273. *See supra* note 268 and accompanying text (explaining the judge's discretion in deciding to revoke a juvenile sentence or continue it with or without modifying the terms of the sentence).

274. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 9–10 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson).

275. *Id.*

2. Challenges to the EJJ Statute's Constitutionality

Since its enactment, two Illinois cases have challenged the constitutionality of the revocation process in the EJJ statute.[276] The first, *In re J.W.*, the case discussed at the beginning of this Comment,[277] involved a thirteen-year-old girl charged with first-degree murder for allegedly killing her mother and found guilty in the subsequent EJJ proceeding.[278] On appeal, she claimed that the EJJ statute was unconstitutionally vague for two reasons.[279] First, she argued that it did not provide notice as to what acts constituted violations that would trigger the adult sentence.[280] Second, she argued that the judge had no guidance in deciding whether to impose the adult sentence or to continue the juvenile sentence.[281] The appellate court, however, did not reach the merits of the claim because it determined that J.W. lacked standing.[282] J.W. did not have standing because she had not yet suffered a direct injury from the statute, nor was she in immediate danger of injury because the adult sentence had not yet been imposed.[283] In fact, the adult sentence would never be imposed if J.W. successfully completed her juvenile sentence.[284] Thus, while *In re J.W.* first raised concerns regarding the constitutionality of the statute, the court did not resolve the case on the merits.[285]

In a subsequent case, fourteen-year-old Christopher K. was tried and found guilty of first degree murder in an EJJ proceeding.[286] On appeal,

276. *In re* J.W., 804 N.E.2d 1094 (Ill. App. Ct. 2004); *In re* Christopher K., 810 N.E.2d 145 (Ill. App. Ct. 2004), *aff'd in part*, 841 N.E.2d 945 (Ill. 2005) [hereinafter *In re Christopher K. I*]; *In re* Christopher K. 841 N.E.2d 945 (Ill. 2005) [hereinafter *In re Christopher K. II*].

277. *See supra* Part I (detailing the murder and J.W.'s subsequent trial).

278. *In re J.W.*, 804 N.E.2d at 1096.

279. *Id.* at 1103.

280. *Id.*

281. *Id.* J.W. also argued that the EJJ designation violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge did not make a finding determining an EJJ proceeding beyond a reasonable doubt, and that the judge abused his discretion in designating her case as an EJJ proceeding because she was only thirteen and it was her first offense. *In re J.W.*, 804 N.E.2d at 1101. The appellate court held that the EJJ designation did not violate *Apprendi* because that designation did not purport to establish any element of the crime of first-degree murder. *Id.* at 1102. In addition, the judge did not abuse his discretion in designating the proceeding as an EJJ prosecution instead of a normal juvenile proceeding because, although it was J.W.'s first offense, she stabbed her mother over 200 times with three different knives. *Id.* at 1105–07. The seriousness of the offense and her culpability overrode her age and lack of prior offenses. *Id.* at 1107.

282. *In re J.W.*, 804 N.E.2d at 1105.

283. *Id.*

284. *Id.* at 1103.

285. *Id.* at 1105.

286. *In re Christopher K. I*, 810 N.E.2d 145, 150 (Ill. App. Ct. 2004).

he questioned the constitutionality of the EJJ proceedings, based on a similar argument to that in *In re J.W.*[287] Christopher K. argued that juveniles do not have adequate notice of prohibited conduct and that courts have no standards to use in deciding whether to impose the adult sentence.[288] He argued that the EJJ provision did not define what "new offense" would trigger the adult sentence and did not clearly state the standard to which he must conform to avoid the imposition of the adult sentence.[289] The statute also did not give the court any standards to determine when to execute the adult sentence after a violation has been proven.[290] Thus, he claimed the statute was unconstitutional on its face.[291]

Christopher K. further argued that the statute was vague as applied to him.[292] In Illinois, a person cannot be held responsible for violating a statute unless he reasonably could be expected to know, in light of the particular facts of his case, that his conduct was proscribed.[293] At Christopher K.'s sentencing hearing, the judge sentenced him to the Department of Corrections, Juvenile Division ("JDOC"), then asked the attorneys their opinions on "'what the provisions of the juvenile sentence would be for a commitment to the Department of Corrections, speculating that perhaps there was a requirement 'that he stay there and not leave.'"[294] Neither the State nor the defense articulated any acts that could trigger the adult sentence during a commitment to the JDOC.[295] Further, the trial court did not attempt to clarify the uncertainty by specifying any conditions that would trigger the adult sentence;[296] the judge also agreed that the statute provided no guidance.[297] Thus, Christopher K. began his juvenile sentence without knowing what he had to do to avoid triggering the adult sentence.[298]

287. *See supra* notes 274–281 and accompanying text (discussing J.W.'s case).

288. *In re Christopher K. I*, 810 N.E.2d at 158. The other issues were whether the prosecutor could file a petition for an EJJ prosecution after her petition for a discretionary transfer to adult court was denied, whether Christopher's statements were voluntary, whether he asked for a lawyer, and ineffectiveness of counsel. *Id.* at 153–57, 160–67.

289. *Id.* at 158.

290. *Id.*

291. *Id.*

292. *Id.*

293. People v. Garrison, 412 N.E.2d 483, 488–89 (Ill. 1980).

294. Brief and Argument of Respondent-Appellee/Cross-Appellant at 15, *In re* Christopher K., 841 N.E.2d 945 (Ill. 2005) (No. 99JD730) (quoting the judge presiding over the appellant's sentencing hearing) [hereinafter Christopher K.'s Brief].

295. *Id.* at 16.

296. *In re Christopher K. I*, 810 N.E.2d 145, 158 (Ill. App. Ct. 2004).

297. Christopher K.'s Brief, *supra* note 294, at 16.

298. *Id.* at 17.

Christopher K. argued that the vagueness surrounding the elements of the EJJ statute undermined its two main goals: rehabilitating youth and protecting the community.[299] The appellate court disagreed.[300] It held that the statute was not unconstitutionally vague, concluding that offense means "something that would, if done without any previous history, subject a minor to a juvenile sentence," but limited "offense" to a criminal offense defined in the criminal code.[301]

The Illinois Supreme Court granted leave to appeal.[302] On appeal, Christopher K. again raised the constitutionality of the EJJ statute on vagueness grounds.[303] However, the Illinois Supreme Court held that the mootness doctrine precluded it from addressing the vagueness claim.[304] Christopher K. had reached the age of twenty-one by the time of the appeal to the Illinois Supreme Court.[305] Because he had successfully completed his juvenile sentence, the adult sentence was vacated.[306] Therefore, the constitutionality of the provisions governing the imposition of the adult sentence remains uncertain.[307]

IV. ANALYSIS

Although the Illinois Supreme Court has yet to determine whether the EJJ revocation procedure is void for vagueness, subsequent cases are likely to raise the issue if an EJJ juvenile's adult sentence is executed.[308] Both *In re Christopher K.* and *In re J.W.* suggest that the Illinois Supreme Court will probably not entertain a facial challenge to the EJJ revocation procedure.[309] The statute, however, may be

299. Brief of Juvenile Law Center et al. as Amici Curiae In Support of the Respondent-Appellee at 26–30, *In re* Christopher K., 841 N.E.2d 945 (Ill. 2005) (No. 99JD739) [hereinafter Amici Brief].

300. *In re Christopher K. I*, 810 N.E.2d at 160–61.

301. *Id.*

302. The main issue on appeal was whether the State could seek an EJJ designation after a discretionary transfer was denied. *In re Christopher K. II*, 841 N.E.2d 945, 949 (Ill. 2005).

303. *Id.* at 950.

304. *Id.* at 952.

305. *Id.*

306. *Id.*

307. *See id.* (refusing to rule on the validity of the EJJ statute because the issue was moot).

308. *See, e.g.* TIMOTHY LAVERY ET AL., AN IMPLEMENTATION EVALUATION OF THE JUVENILE JUSTICE REFORM PROVISIONS OF 1998: PART TWO: CASE STUDIES OF NEW OR CHANGED JUVENILE JUSTICE SYSTEM PROCESSES 77 (Ill. Juvenile Justice Comm'n 2002) [hereinafter IMPLEMENTATION EVALUATION: PART TWO] (showing an example of an EJJ juvenile who challenged the constitutionality of the EJJ statute after his adult sentence was executed, but decided to drop the appeal).

309. *See* John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 281 (2002) (noting that courts generally do

susceptible to an as-applied challenge.[310] Yet, regardless of whether it is constitutional, the EJJ statute is not designed to provide juveniles with the best chance to succeed in the juvenile system.[311]

As written, the EJJ statute has two main flaws: the statute does not specify how to carry out the purpose of protecting the public and the revocation procedure is unclear.[312] This Part argues that, although the stated purpose behind Part 8 is to protect the public, the legislature has failed to clarify how the courts should carry out that objective.[313] This Part then discusses why the revocation procedure, as written, is not designed to maximize the number of juveniles who can avoid their adult sentence.[314]

A. The Legislature's Purpose of Protecting the Public Is Not Well-Defined

Studies support the legislature's conclusion, embodied in the purpose statement of Part 8, that most of the serious juvenile crimes are committed by a relatively small number of juvenile offenders.[315] Therefore, focusing on these offenders should aid in protecting the public.[316] Unfortunately, previous trends in the juvenile justice system suggest that many people assume that to best protect the public the dangerous juveniles must be punished more severely to deter them from

not hear facial vagueness challenges to statutes that do not involve First Amendment issues). A facial challenge claims the statute is incapable of any constitutional application. *Id.* at 275.

310. *Cf.* Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 846–52 (1999) (discussing ways to challenge the constitutionality of probation conditions, focusing on as-applied challenges).

311. *See infra* Part IV.B.2.a (discussing what juveniles would need from a developmental perspective to successfully complete their juvenile sentences).

312. *See infra* Part IV.A–IV.B. (explaining why the purpose and revocation procedure are unclear).

313. *See* 705 ILL. COMP. STAT. 405/5–801(1) (2006 & West Supp. 2007) (including no explanation on how to carry out the purpose statement).

314. *See infra* Part IV.B (discussing how the EJJ statute could be more effective).

315. 705 ILL. COMP. STAT. 405/5–801; s*ee, e.g.*, ROBERT D. HOGE, THE JUVENILE OFFENDER 21 (2001) (listing studies that confirm that "much of the serious crime in a community is committed by a small group of high-risk offenders").

316. Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-Term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J. L. & FAM. STUD. 281, 293 (2004). A California study concluded that only a small percentage of juveniles recidivate, and even a small reduction in recidivism rates for those juveniles could have a huge impact. *Id.* Focusing on these particular juveniles early on can reduce future crime. *Id.*

committing other crimes and to set an example for other juveniles.[317] By extension, they believe juveniles must be treated as adults because the juvenile system cannot adequately punish them in the limited years during which it has jurisdiction, thereby lessening the seriousness of the offense and not teaching the offender an adequate lesson.[318] However, that assumption is predominantly based on the public's demand to "get tough" on juveniles rather than on empirical research.[319]

In most cases, keeping juveniles in the juvenile system better protects society than transferring them to adult court.[320] For instance, juveniles transferred to the adult system are more likely to become repeat offenders sooner and reoffend more often than juveniles who remain in the juvenile system.[321] Also, transferred juveniles are more likely to commit felony offenses in the future.[322] Furthermore, research shows that juvenile court treatment programs are more effective in rehabilitating the offender than either incarceration in adult prison or juvenile training schools.[323] This is, in part, because the juvenile system focuses on rehabilitation, but also because the juvenile forms

317. David P. Farrington & Rolf Loeber, *Serious and Violent Juvenile Offenders*, *in* A CENTURY OF JUVENILE JUSTICE 206, 226–27 (Margaret K. Rosenheim et al. eds., 2002). Between 1987 and 1994, tougher penalties, including prosecution in adult court, an increase in number of delinquency cases judicially waived to the adult court, felony convictions of juveniles transferred to adult courts, and "blended sentencing" models, increased substantially in many states. *Id.*

318. *See* MYERS, *supra* note 126, at 3 ("In general, it is believed that these youthful offenders [transferred to adult court] will receive harsher treatment in adult court, which in turn will have a beneficial impact on juvenile crime, through both greater deterrence and longer incapacitation.").

319. *See* Fagan & Zimring, *supra* note 67, at 2 ("When very serious crimes by youth are a focus of public concern, laws about transfer to criminal court jurisdiction are the most likely legislative response to that concern. . . . Without exception, [forty states passed] new laws . . . designed to expand the number and kind of cases where transfer occurs . . . ."); Traver, *supra* note 81, at 308–09 (describing how the Illinois General Assembly passed another automatic transfer law in 1999 in response to a highly publicized school shooting, despite opposition based on the ineffectiveness of transfer provisions).

320. Pollitt, *supra* note 316, at 284 ("Unquestionably, society possesses a vested interest in protecting its members from juvenile offenders. Society also possesses an undeniable interest in holding juvenile offenders accountable for their actions. Treating juvenile offenders as adults and transferring them to criminal court, however, fails to best serve either of these interests.").

321. Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 227, 261 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (discussing three major findings from studies comparing rates of recidivism among youths transferred to criminal court and youths retained in the juvenile system as: (1) transferred youths are likely to reoffend more often and more quickly, (2) that these different effects are not dependent on sentence types or length, and (3) the risk of reoffense is aggravated when incarceration is imposed).

322. Klein, *supra* note 45, at 403.

323. Geraghty, *supra* note 202, at 204 n.25.

more positive relationships with staff in the juvenile system.[324] A further problem with incarceration is that it inhibits a juvenile's chance to reintegrate into society because the juvenile loses contact with family members and his community while serving his sentence.[325] Juveniles also tend to become more involved with gangs while in adult prison than in juvenile institutions because they fear older, bigger inmates and seek protection.[326] Finally, juvenile institutions offer superior educational opportunities compared to adult institutions.[327] Although the goal of public safety is served in the short term by imposing an adult sentence on a juvenile and keeping him off the streets longer, the long-term effects actually decrease public safety.[328] When the juvenile is released, he will have less education and fewer ties to family and the community, but more knowledge about gangs and prison life.[329] Ultimately, most juvenile offenders will leave prison and return to society with more knowledge of criminal behavior than before they entered.[330]

The only advantage of the adult system over the juvenile system is that the adult system can retain control over the juvenile longer, maintaining jurisdiction over the offender beyond the age of twenty-one.[331] Yet, when compared to the adult system, the juvenile system has better educational and vocational programs, better access to therapy, smaller detention facilities, and staff who are better trained to work with

324. Bishop & Frazier, *supra* note 321, at 261–62 (saying one of the reasons juveniles in the juvenile system have a lower probability of reoffending may be because the juvenile system communicates a message of caring); *see also* Geraghty, *supra* note 202, at 203 ("[A]n individual or a program that forges a relationship with a child has a good chance of succeeding.").

325. Geraghty, *supra* note 202, at 207.

326. *Id.*

327. *Id.* at 207–08.

328. *Id.* at 207 n.35 (discussing James C. Howell, *Juvenile Transfers to the Criminal Justice System: State-of-the Art*, 18 J.L. & Pol'y 58–60 (1996)).

329. *Id.* at 207.

330. *See* Pollitt, *supra* note 316, at 291 ("The average juvenile offender receiving a prison sentence returns to the streets before age thirty."); Geraghty, *supra* note 202, at 209 n.42 ("Unless society intends to lock up every child who enters the justice system for the rest of his or her life, it must [be] acknowledged that these children will ultimately re-enter society." (quoting Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 509 (1995))).

331. Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK. L. REV. 563, 564 (1999) (discussing the problem in the juvenile justice system of not retaining jurisdiction long enough to adequately punish the offender); *see* Brianna M. Sinon, *Failing Girls: A Cure Worse than the Disease—Charging, Trying and Sentencing Female Juvenile Offenders as Adults*, 7 HOW. SCROLL SOC. JUST. L. REV. 32, 40 (2004) ("[J]uvenile offenders . . . should not enter the adult criminal justice system at any point.").

juveniles.[332] Juveniles in adult prison, on the other hand, are more likely to commit suicide and are at greater risk of being beaten by staff or being sexually assaulted by other inmates.[333] However, the juvenile court loses jurisdiction over the offender at age twenty-one and must release the offender, regardless of the threat that he may still pose to society.[334] In a few cases, therefore, long-term incapacitation may truly be necessary to protect society.[335] In the other cases, delinquent behavior is a youthful phenomenon and will pass with age, but may intensify if the youth is transferred to the adult system.[336] Therefore, judges should not assume that protecting the public requires that an adult sentence be imposed in all cases—it should be applied only in the most egregious ones.[337]

Although the clear purpose of Part 8 is to protect the public, the statute fails to specify what that means when applied to EJJ proceedings.[338] This failure could lead juvenile court judges to conclude erroneously that the best way to protect the public is to revoke the EJJ designation and impose the adult sentence at the first sign of trouble.[339] While that may incapacitate the offender for a period of time, when he is eventually released, he will probably be more of a threat to society than if he had stayed in the juvenile system.[340] Furthermore, juveniles will not change until they are ready.[341] Thus, a

332. Bishop & Frazier, *supra* note 321, at 252–54 (discussing the characteristics of juvenile and adult correctional institutions).

333. *Id.* at 254–61.

334. *See supra* note 212 (juxtaposing the two possibilities).

335. HEIDE, *supra* note 126, at 237 (discussing young killers who are so "badly damaged that rehabilitation appears . . . unlikely" and they are "likely to kill again").

336. *See* MYERS, note 126, at 192 (comparing systems designed to retain youths in juvenile court and those that transfer youths to adult systems and concluding that systems which retain youths appear best); *see also* Farrington & Loeber, *supra* note 317, at 227–29 (discussing the three studies that suggest transfer to adult court increases recidivism rates).

337. *See* Spring, *supra* note 214, at 1382–83 (arguing that the juvenile court should have discretion in determining whether to revoke EJJ status).

338. Interview with Cathryn Crawford, Clinical Professor, Nw. Sch. of Law, in Chi., Ill. (Dec. 21, 2006) [hereinafter Professor Crawford Interview].

339. *See* MYERS, *supra* note 172, at 105–11 (explaining why harsher punishments are not effective deterrents and advocating a matching design fitting crime and punishment).

340. *See* Farrington & Loeber, *supra* note 317, at 227–29 (discussing the three studies that suggest transfer to adult court increases recidivism rates).

341. JOAN SERRA HOFFMAN, YOUTH VIOLENCE, RESILIENCE, AND REHABILITATION 108 (2004) ("All the young people who participated in [the] study remarked that the . . . desire to change has to come from within."). Hoffman describes change as a process containing various phases. *Id.* at 112. The process begins with thinking about changing, proceeds to wanting to change, followed by being ready for change, then beginning to change, and finally maintaining that change. *Id.* After a young person is ready to change, he nonetheless needs external support to continue the process. *Id.* at 114.

juvenile's behavior at the beginning of his sentence is not indicative of how he may act over time.[342] The failure to clarify when a judge must revoke EJJ status to protect the public may lead judges to revoke EJJ status hastily, unnecessarily interrupting the long process of change.[343]

B. Problems in the EJJ Revocation Procedure

The EJJ statute contains a procedure for revoking a juvenile's EJJ status and executing the adult sentence, but the revocation process is unjust in some cases and uncertain in others.[344] Either a new offense or a technical violation could trigger revocation.[345] For both situations, the revocation procedure should be changed.[346] Currently, if the juvenile commits a new offense, the imposition of the adult sentence is mandatory, which could result in injustice and interrupt an otherwise successful rehabilitation process.[347] Besides commission of a new offense, the EJJ statute is so unclear about what other violations could trigger the adult sentence that it fails to provide any meaningful incentive for the juvenile to modify his behavior or any guidance to the judge in executing the adult sentence.[348] This Part first discusses how mandatory revocation for a new offense is counterproductive in some cases.[349] Then this Part examines the uncertainties surrounding revocation based on a technical violation and how those uncertainties may lead to a constitutional challenge.[350]

342. *See* HEIDE, *supra* note 126, at 87–219 (presenting case studies of juvenile killers comparing pre-conviction interviews with interviews four to six years later, concluding that some of the youth had matured and others had not).

343. *Cf.* Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973) ("[T]he whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.") (citation omitted).

344. 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West).

345. *Id.*

346. *See infra* Part IV.B.1–B.2 (explaining why the procedures are insufficient).

347. *See* HOFFMAN, *supra* note 341 (describing the process of change).

348. *See infra* Part IV.B.2 (explaining the problem with the technical violations).

349. *See infra* Part IV.B.1 (explaining that mandatory revocation for a new offense is bad policy because not all offenses indicate that the juvenile is a danger to society).

350. *See infra* Part IV.B.2 (discussing the many conditions that come with a juvenile sentence and the confusion those conditions could cause).

1. Problems with "New Offense"

There are several problems with the EJJ's statutory language of "new offense."[351] First, the meaning of "new offense" is vague, leaving its application far too broad.[352] Second, the statute wrongfully removes the judge's discretion in considering revocation of EJJ status.[353] The negative effects of this are illustrated through case studies.[354] Furthermore, eliminating discretion for new offenses forces the system to exercise discretion in other, earlier parts of the process, which may allow the juvenile to escape accountability entirely.[355]

a. The Meaning of "New Offense" Is Unclear

Although the statute does not explicitly define "offense," parties have consistently spoken of "offense" as involving a violation of the criminal code, not merely a status offense.[356] This is consistent with the legislative history in which speakers used "crime" and "offense" interchangeably.[357] However, the statute does not specify what "offense" means, so a judge may feel obligated to execute the adult sentence after a curfew ordinance violation or after a juvenile runs away from home.[358]

Additionally, the statute does not distinguish among classes of offenses; *all* new offenses must trigger the adult sentence, regardless of severity.[359] As a result, an EJJ juvenile could have his adult sentence

351. *See infra* Parts IV.B.1.a–b (discussing problems with EJJ revocation upon a new offense).

352. *See infra* Part IV.B.1.a (discussing possible meanings of "new offense").

353. *See infra* Part IV.B.1.b–c (demonstrating problems with the judge's lack of discretion).

354. *See infra* Part IV.B.1.c (examining case studies).

355. *See infra* Part IV.B.1.d (illustrating discretion in other parts of the system).

356. *E.g.*, IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 106–07 (listing how various juvenile court professionals defined offense). A status offense is a "minor's violation of the juvenile code by doing some act that would not be considered illegal if an adult did it, but that indicates that the minor is beyond parental control. Examples include running away from home, truancy, and incorrigibility." BLACK'S LAW DICTIONARY 1112 (8th ed.).

357. *See* 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATES 11 (Ill. May 5, 1998) (saying courts would still have discretion under the statute for technical violations, but courts would not have such discretion where the juvenile has been convicted of a later *crime*) (emphasis added).

358. *See* 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West) ("When it appears that a minor convicted in an extended jurisdiction juvenile prosecution . . . has violated conditions of his or her sentence or is alleged to have commited a new offense upon the filing of a petition . . . the court may . . . issue a warrant for the arrest of the minor . . . [and] order execution of the previously imposed adult criminal sentence.").

359. *Id.* ("[I]f the court finds by a preponderance of evidence that the minor committed a *new offense*, the court shall order execution of the previously imposed adult criminal sentence.") (emphasis added). In addition, Professor Crawford has argued that because of the serious

triggered by a misdemeanor or other minor offense.[360] Such an offense does not necessarily show that the minor is a danger to the public.[361] However, upon proof by a preponderance of the evidence of such a violation, the judge has no choice but to impose the adult sentence.[362]

b. EJJ Revocation Versus Probation Revocation

The revocation procedure is based on juvenile probation procedures,[363] but the judge's lack of discretion goes against the theory underlying probation revocation hearings.[364] At least in the adult context, probation in Illinois is a privilege, used when a court determines that a defendant would not pose a threat to society and that probation would enhance the defendant's rehabilitation.[365] A violation of probation suggests that the defendant is a threat to society and that the reasons for keeping him out of jail are no longer valid.[366] In *Gagnon v. Scarpelli*,[367] the United States Supreme Court held that revocation of adult probation should only be used as a last resort when treatment has failed or is about to fail.[368] The Illinois Supreme Court

consequences, the prosecution should have to prove the new offense beyond a reasonable doubt, not just by a preponderance of the evidence. Professor Crawford Interview, *supra* note 338. One response to this argument is that the juvenile is not being sentenced for the new offense, but for the original one, which could have originally resulted in the adult sentence. Interview with Dr. David Olson, Criminal Justice Professor, Loyola Univ. Chi., in Chi., Ill. (Nov. 20, 2006).

360. For example, theft of less than $300 is a Class A misdemeanor. 720 ILL. COMP. STAT. 5/16–1(b)(1) (2006). Criminal damage to property resulting in damage under $300 is also a Class A misdemeanor. 720 ILL. COMP. STAT. 5/21–1(2) (2006). Criminal trespass to property is a Class B misdemeanor. 720 ILL. COMP. STAT. 5/21–3(a) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West). While these are all crimes, they are common youthful transgressions. But for an EJJ juvenile, they will result in the execution of the adult sentence.

361. *See Q&A on Juvenile Justice Reform*, *supra* note 201, at 14 (discussing how juveniles automatically transferred to adult court based on "victimless zone transfers" (drug and weapon offenses around schools or public housing) are generally not viewed as a threat to public safety and the resulting adult convictions are more harmful than helpful to society).

362. 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West).

363. *See* 705 ILL. COMP. STAT. 405/5–715 (2006 & West Supp. 2007) (detailing the process for probation).

364. *See infra* notes 365–372 and accompanying text (explaining why the EJJ revocation procedure goes against the theory behind probation).

365. People v. Allegri, 487 N.E.2d 606, 607 (Ill. 1985); *see also* People v. Cozad, 511 N.E.2d 211, 216 (Ill. App. Ct. 1987) ("The two primary purposes of probation are (1) to rehabilitate the defendant without sending him or her to prison, and (2) to protect the public from the type of conduct that led to the placement of the defendant on probation.").

366. *Allegri*, 487 N.E.2d at 607.

367. Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973).

368. *Id.* at 785.

adopted *Gagnon* in *People v. Beard*.[369] Thus, a judge need not impose a prison sentence on every proven violation of probation if he believes that the probationer still has strong rehabilitative potential.[370] The Illinois Supreme Court has not explicitly made such principles applicable to juveniles, but juvenile probationers' interest in their conditional liberty is similar to that of adult probationers, allowing them many of the same procedural protections at revocation hearings.[371] Furthermore, these adult cases should apply to EJJ revocation hearings because such hearings may result in an adult sentence.[372]

Although probation and EJJ status are two distinct designations, they are significantly similar. As such, EJJ revocation should follow a procedure similar to one applied when probation is revoked.[373] A court gives a probation sentence if it determines that the individual is not a threat to society.[374] For that reason, before revoking probation, the court must state the reasons why the individual now poses a threat to society.[375] Similarly, an EJJ designation implicitly means that a transfer to adult court is not appropriate and the juvenile could benefit from the services of the juvenile court.[376] Therefore, an EJJ designation

369. People v. Beard, 319 N.E.2d 745, 748 (Ill. 1974) (accepting the idea from *Gagnon* that a probationer's liberty is not taken away unjustifiably and the State is not "unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community").

370. *Id.*

371. People v. Peterson, 384 N.E.2d 348, 353 (Ill. 1978) (holding that coerced confessions cannot be used in probation revocation procedures for both adult and juvenile probationers).

372. *See* State v. B.Y., 659 N.W.2d 763, 767 (Minn. 2003) (requiring Minnesota courts to use adult probation revocation procedures instead of juvenile procedures when revoking an EJJ designation because it contemplates the imposition of an adult sentence).

373. *See infra* notes 374–377 and accompanying text (comparing EJJ proceedings with probation proceedings).

374. *Peterson*, 384 N.E.2d at 352.

375. *Beard*, 319 N.E.2d at 747.

376. *See* Podkopacz & Feld, *supra* note 233, at 1017 ("An EJJ youth [in Minnesota] is one whom a judge or a prosecutor already has determined can remain in juvenile court consistently with 'public safety.'"). After *In re Christopher K.*, 841 N.E.2d 945 (Ill. 2005), prosecutors started filing the EJJ petitions at the same time as the transfer petitions. Jeff Coen, *Juvenile Sentencing Law Could Seal a Fate*, CHI. TRIB., Mar. 27, 2005, *available at* www.kidsincourt.net (discussing the impact of legislation allowing youths to receive both juvenile detention and an adult prison sentence). Professor Crawford believes that is how the statute is supposed to work—putting both options before the judge and letting him decide. Professor Crawford Interview, *supra* note 338. *Compare* 705 ILL. COMP. STAT. 405/5–805(3) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West) *with* 705 ILL. COMP. STAT. 405/5–810(1) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West) (the same juveniles who are eligible for transfer to adult court are eligible for EJJ designation).

should only be revoked if the juvenile could no longer benefit from services in the juvenile system.[377]

In addition, the mandatory provision directly opposes the juvenile justice system's focus on individual deterrence.[378] Juvenile court judges interact with youth every day and are familiar with developmental issues particular to adolescence.[379] Those judges are in the best position to decide whether a new offense is merely a minor deviance in the path to becoming a law-abiding citizen or whether the new offense demonstrates that the juvenile has truly wasted his "last chance" in the juvenile system.[380] Most importantly, a juvenile may commit a new offense while serving probation, yet still successfully complete probation.[381] In a study on juvenile probation, roughly thirty-five percent of the juvenile probationers studied had one or more arrests for new offenses, only one-quarter of which were violent offenses.[382] A relatively large proportion of those rearrested were discharged with a status of "satisfactory termination," and only one-quarter had their probation revoked.[383] Therefore, juvenile court judges do not view every new offense as indicative that the services are not helping, especially in light of the fact that many of the new offenses may have been due to poverty or substance abuse.[384] Thus, the EJJ statute unnecessarily removes some juveniles from the juvenile court jurisdiction and interrupts what may be an otherwise successful treatment program.[385]

c. Case Studies About EJJ Sentences

A 2002 report, sponsored by the Illinois Criminal Justice Information Authority, contained a detailed case study about an EJJ prosecution that

377. *See* Podkopacz & Feld, *supra* note 233, at 1071 (recommending that the Minnesota legislature change its EJJ revocation procedure from the adult probation procedures to one which "require[s] judges to consider whether a youth's earlier offense and subsequent violations pose a threat to 'public safety' warranting imprisonment using the same procedures and criteria employed to certify youths for criminal prosecution").

378. *See Q&A on Juvenile Justice Reform*, *supra* note 201, at 12 ("The goal of juvenile court remains one of individual deterrence . . . .").

379. Tanenhaus & Drizin, *supra* note 40, at 694.

380. *See* Spring, *supra* note 214, at 1382 (arguing that juvenile judges should be given discretion to deal with EJJ juveniles who reoffend).

381. SHARYN B. ADAMS, DAVID E. OLSON & RICH ADKINS, *Executive Summary*, *in* RESULTS FROM THE 2000 ILLINOIS JUVENILE PROBATION OUTCOME STUDY (2002).

382. *Id.* at 25.

383. *Id.* at 27.

384. *Id.*

385. *See supra* note 341 (discussing the process of change).

demonstrates the problems in the EJJ revocation process.[386] The minor in the case study pled guilty in an EJJ proceeding to robbing a convenience store with a pellet gun while four friends waited outside.[387] This offense was the minor's first involvement with the juvenile justice system.[388] The attorneys, the judge, the probation officer, and the juvenile's mother all believed that the root of the juvenile's recent change was the death of his father a few months earlier.[389] After the death of his father, the minor began to engage in impulsive, self-destructive behavior, including cocaine use.[390] The juvenile was given a two-year juvenile probation sentence with a five-year suspended adult sentence.[391]

The juvenile began his probation sentence on intensive probation and was gradually placed on less restrictive probation because of his compliance and good behavior.[392] However, the first day he was permitted to go out with a friend unsupervised, he and the friend were arrested for retail theft of a few CDs, a Class A misdemeanor.[393] Because intense supervision had been effective, if the juvenile had been on juvenile probation the judge likely would have modified the probation to return to more intensive supervision.[394] The judge stated that for most minors, stealing a CD would not result in a probation revocation.[395] However, because the juvenile had an EJJ sentence, the judge had no choice but to execute the adult sentence once the

386. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 74–139.

387. *Id.* at 75–76. He also pled guilty to conspiracy to rob a convenience store. *Id.*

388. *Id.* at 83.

389. *Id.*

390. *Id.*

391. *Id.* at 94. Interestingly, both the prosecution and the defense admitted that the case would not have been transferred to adult court because the offense was not that serious and it was the juvenile's first offense. *Id.* at 88. Without EJJ, the juvenile would never have been exposed to an adult sentence, but the defense attorney did not feel that he could successfully rebut the presumption that it should be an EJJ prosecution because of the juvenile's age (sixteen years old) and the offense. *Id.* So, the juvenile pled guilty, accepting the EJJ designation and the agreed-upon sentence to avoid the chance of being sentenced to detention. *Id*. at 91.

392. *Id.* at 97–100. The intensive probation involved electronic monitoring and random on-site and telephone checks. *Id.* at 97. The juvenile could only leave his house to go to school, counseling, and work. *Id*. The restrictions were gradually eased as the minor complied with the terms of the intensive probation. *Id.* at 99. Under the less-intensive probation, the minor was allowed to participate in structured activities without a parent if he received permission at least twenty-four hours in advance. *Id.* at 99–100.

393. *Id.* at 76. Retail theft, less than $150 is a Class A misdemeanor with a maximum prison sentence of one year. 720 ILL. COMP. STAT. 5/16A–10(1) (2006).

394. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 137.

395. *Id.* at 128.

prosecution proved the offense by a preponderance of the evidence.[396] The minor began his adult sentence at a maximum security adult prison, while the friend who was with him received relatively minor sanctions.[397]

Although the judge told the juvenile at sentencing that *any* new offense would result in the imposition of the adult sentence, the juvenile admitted that he did not quite understand the ramifications of his behavior.[398] In his case, the adult sentence was not a deterrent to future risky behavior because the juvenile simply did not consider the possibility that his behavior would trigger the adult sentence.[399] The judge stated that EJJ would only work for minors with a certain "mindset," that is, those with the ability to avoid acting impulsively and to think about potential consequences before acting.[400]

The public defender, the probation officer, and the judge on the case agreed that the possibility of an adult sentence would not effectively deter minors from reoffending.[401] The public defender noted that often minors reoffend because it takes time to resolve the issues that led to their criminal behavior in the first place, not because they are destined to be criminals.[402] The juvenile court judge originally believed that the EJJ statute was an effective idea, but later changed his mind when he realized that the threat of an adult sentence would not serve as a deterrent to minors.[403] In his experience, minors often violate probation because they are not mature enough to think through the consequences of their behavior.[404] In this case, the threat of an adult sentence hanging over the minor's head did not prevent him from taking risks, but he was generally complying with the terms of his probation.[405]

396. *Id.* at 137–38.

397. *Id.* at 122, 131.

398. *Id.* at 107. The minor denied that he committed retail theft because the store security apprehended him before he passed the checkout lanes and the security officers could not have reasonably inferred that he intended to steal the CDs. *Id.* at 76.

399. *Id.* at 107.

400. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 129, 136. The researcher surmised that the minor did not consider the EJJ sentence an absolute bar to risky behavior. *Id.* at 130. Instead, the minor may have acted by thinking "what violations he could potentially commit and still avoid having the adult sanctions imposed." *Id.*

401. *Id.* at 125, 129.

402. *Id.* at 126. In this case, the minor's delinquent behavior probably stemmed from drug use and his father's death. *Id* at 83. These problems cannot be remedied in a short time.

403. *Id.* at 127.

404. *Id.* at 127–28.

405. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 136.

In the case study, the judge's lack of discretion in imposing the adult sentence ultimately hurt the minor, and arguably society as well.[406] The initial juvenile probation sentence included paying restitution, attending high school or a GED program, obtaining a full- or part-time job, getting a driver's license, and attending various counseling and treatment programs.[407] The programs included grief counseling, anger management training, drug and alcohol treatment, and other life skills training.[408] The minor accomplished a great deal in the initial two months of probation before he was rearrested.[409] He completed a drug education program, started working towards his GED, and attended Alcoholics Anonymous.[410] In contrast, once in prison, he did not receive any services.[411]

The minor was later transferred to a medium security prison to finish his sentence.[412] He chose not to take part in the prison GED program because the inmates often got into fights during the class, and he did not want to risk getting into a fight and having his parole date extended.[413] As a result, he lost any progress he had made while on probation.[414] His former probation officer visited him while in prison and noted that the minor had changed.[415] The minor had gone from a "kid" to a "hardened adult inmate."[416] The EJJ statute in this case failed both the minor and the public.[417] The minor did not receive the services that may have helped him deal with the death of his father and his drug use, which everyone acknowledged was at the root of his delinquent behavior.[418] Instead, he will be released back into society as a "hardened adult inmate" with a criminal record, making it harder for him to get a job, but equipped with new knowledge of how to survive in prison.[419]

406. *See id.* at 98–99, 123–24 (stating that the minor did not receive the services that could have helped him and, upon release, he will not have any job skills).

407. *Id.* at 97–98.

408. *Id.* at 98. The minor thought the large number of conditions placed too much responsibility on him and, in essence, set him up for failure. *Id.*

409. *Id.* at 99.

410. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 99.

411. *Id.* at 123–24.

412. *Id.* at 123.

413. *Id.* at 124.

414. *Id.*

415. *Id.*

416. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 124.

417. *See id.* at 83 (describing how services could have helped the minor with the issues he was encountering).

418. *Id.* at 83.

419. *Id.* at 124.

In contrast, in New York, where imposition of an adult sentence is not mandatory upon a new offense, a fourteen-year-old girl received a conditional adult sentence after slashing another girl's face in a fight over a boy.[420] She served a year in detention, received a year of counseling, and was on probation for five years.[421] Although she missed a number of appointments and was caught smoking marijuana several times, she successfully completed her probation without committing any more violent crimes.[422] Not only was she able to avoid having a felony record, she was not a threat to the public and was able to stay with the child to whom she had given birth while on probation.[423] If the judge had been forced to impose an adult sentence after the marijuana violations, she would have had a felony record, which would have excluded her from federal housing programs, rendered her ineligible to vote, and prevented her from obtaining certain city jobs.[424] Above all, her child would have started life without her mother.[425] The judge in New York expected progress, not perfection, and had the discretion to allow the juvenile to continue striving for perfection.[426]

d. Discretion in Other Parts of the System that May Compensate for the Lack of Judicial Discretion

Because an Illinois judge has no discretion in deciding whether to impose the adult sentence after a new offense, probation officers or prosecutors may be reluctant to bring new offenses to the court's attention because of the harsh consequences that would result.[427] Discretion, then, would be exercised at a different level in the system, but at a level in which the juvenile would not be held accountable for his actions.[428] Furthermore, if the judge does not know about the new offense, he will not be able to modify the juvenile's sentence to better

420. CORRIERO, *supra* note 216, at 69–70.

421. *Id.* at 70–71.

422. *Id.* at 71.

423. *Id.*

424. *Id.* at 49.

425. *Id.* at 71.

426. *Id.* at 98.

427. Professor Crawford Interview, *supra* note 338; IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 112.

428. *See Q&A on Juvenile Justice Reform*, *supra* note 201, at 14–15 (encouraging putting limits on the number of station adjustments juveniles can get before being referred to the court system because allowing too many sends youth the message that "there are no consequences for their anti-social conduct").

address the changed circumstances.[429] The result would be the opposite of what the legislature intended: juveniles will not see the direct consequences of their actions, will not learn accountability, and will not have access to services that may prevent them from reoffending in the future.[430]

A mandatory adult sentence only serves to show a juvenile that he truly has "one last chance."[431] Yet juveniles, in general, do not evaluate risk in the same manner as adults.[432] In fact, juveniles are treated differently than adults in the legal system partly because they do not yet have the experience, perspective, and judgment to think through all the possible choices and to avoid the harmful ones.[433] Adolescence is a probationary period of life in which adolescents learn to make responsible choices in order to assume adult roles.[434] Studies show that part of the process of adolescence is learning how to make good choices through trial and error, including making some bad choices along the way.[435] The mandatory nature of the execution of the adult sentence

429. Not all the circumstances surrounding a juvenile are known at the time of sentencing; some may arise later. *See* ADAMS, OLSON & ADKINS, *supra* note 381, at Executive Summary ("For a relatively large proportion of probationers the extent and nature of the offender's substance abuse problem was unknown to the probation officer. Further, even among those identified as substance abusers at the point of probation intake, not all were ordered or referred to treatment. Analysis of the data clearly reveals the potential impact treatment can have on reoffending: those with substance abuse problems who did not complete treatment were much more likely to get rearrested while on probation as those who completed treatment.").

430. One of the most important aspects of discipline is that juveniles have clear, firm, and consistent discipline. HEIDE, *supra* note 126, at 234–35. Consistency is perhaps the most important. *Id.* at 235. Research suggests that punishments that are *certain but moderate* are a better specific deterrent than more severe punishments, such as incarceration. MYERS, *supra* note 126, at 55. This suggests that if an EJJ juvenile commits a subsequent offense, and the prosecutor files a petition to revoke, the punishment will be certain, but too severe for effective deterrence. If the prosecutor does not file a petition to revoke, then the juvenile will not receive any punishment for the new offense, holding him unaccountable for criminal actions.

431. *See* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 720–21 (2005) ("While blended sentencing may recognize the role that immaturity plays in serious criminal behavior, it fails to differentiate ultimate punishment . . . . [B]y postponing punishment until perhaps years after the original wrongful act, the 'accountability' lesson is lost . . . . When the adult sentence is imposed because of the juvenile's less serious misconduct or when rehabilitation efforts have failed, the ability of the juvenile to associate his original acts with his punishments is particularly doubtful.").

432. *See infra* notes 433–41 and accompanying text (describing the differences between adolescents and adults).

433. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

434. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 175, 181 (1997).

435. *See* F. PHILIP RICE, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE 161 (9th ed. 1999) ("The breadth of experience plays an important role in the quality of decisions that are made.").

after a new offense, regardless of the type or severity of the new offense, may even undermine a juvenile's potential to change because he may perceive the sanction as unfair, especially if the new offense was minor.[436] As a result, he may feel cheated, not helped, by the system.[437]

In addition, the mandatory imposition of the adult sentence undermines the protection of the public.[438] In most cases the public is better protected by keeping the juvenile out of the adult system and continuing to provide services in the juvenile system because juveniles exposed to the adult system are more likely to reoffend.[439] In the long-term, most juveniles have a better chance of being productive citizens if they stay in the juvenile system instead of the adult system.[440] Therefore, because the judge has no discretion in determining whether to impose the adult sentence if the juvenile commits a new crime, the EJJ statute creates a system that ultimately leads to higher juvenile reoffending rates, which endangers the public.[441]

2. Technical Violations Are Undefined

The EJJ statute is not completely devoid of discretion.[442] If an EJJ juvenile violates the terms of his juvenile sentence other than by committing a new offense, the judge has discretion to continue the juvenile on the same sentence, modify the terms of the juvenile sentence, or impose the adult sentence.[443] However, the statute does

436. The minor in the case study, discussed *supra* notes 386–419 and accompanying text, committed retail theft, a Class A misdemeanor which alone could result in no more than one year of incarceration, but ended up beginning a five-year adult sentence. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 76, 137. Throughout the study, the minor continued saying how unfair it was to sentence him to prison after committing retail theft. *Id.* at 129–30. The study, however, did not emphasize that the five-year sentence was for the original armed robbery, not the retail theft, and instead focused on how unfair the minor, his mother, and others involved felt the sanction was for such a minor offense. *Id.* at 125.

437. *See* MYERS, *supra* note 126, at 56 (explaining that one factor affecting how juveniles respond to punishment is "whether or not the sanctioning is perceived as being fair").

438. *See* Bishop & Frazier, *supra* note 321 and accompanying text (discussing three major findings from studies that suggest transfer to adult court increases recidivism rates).

439. *Id.* at 261.

440. *See* Scott & Grisso, *supra* note 434, at 179 (explaining how a criminal sentence may negatively affect "the future educational, employment and social productivity of those youths whose crimes are adolescent-limited behavior").

441. *See supra* Part IV.A. (discussing how protecting the public is best served by keeping as many juveniles out of the adult system as possible).

442. *See infra* note 443 and accompanying text (giving examples of conditions a judge may attach to a sentence).

443. 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West). Juvenile sentences can come with many conditions attached, such as mandatory school,

not specify which technical violations could result in the execution of the adult sentence, nor does it specify what factors a judge should consider when making that determination.[444] The judge only has the purpose statement of Part 8 to guide him, namely, protection of the public.[445] A judge may have conflicting views on how best to protect the public: either impose the adult sentence at the first sign of deviance or retain the juvenile in the juvenile system for as long as possible to give the juvenile more time to reform.[446] This Part first explains that an EJJ juvenile will be most successful in avoiding the adult sentence if there are clear rules and standards for him to follow.[447] Next, this Part argues that, although juvenile court judges are well-equipped to exercise discretion in this context, judges may be unsure what conditions can be the basis of an EJJ revocation.[448] Finally, this Part suggests how the statute may succumb to an as-applied constitutional challenge for vagueness because of these uncertainties.[449]

a. Juveniles Need Clear Notice of Prohibited Conduct

The Illinois statute does not optimize an EJJ juvenile's likelihood of avoiding the adult sentence.[450] Juveniles evaluate risk differently than adults[451] and set different priorities because they focus more on short-

drug treatment programs, or curfews. 705 ILL. COMP. STAT. 405/5–715 (2006 & West Supp. 2007). A violation of one such condition is a "technical violation," or "technical."

444. *See In re Christopher K. I*, 810 N.E.2d 145, 158–61 (Ill. App. Ct. 2004) (presenting Christopher K.'s argument that the statute is vague because it does not give the juvenile clear notice of prohibited conduct or guidelines to the judge in determining when to execute the adult sentence).

445. 705 ILL. COMP. STAT. 405/5–801 (2006).

446. *See* People v. Morgan, 758 N.E.2d 813, 825 (Ill. 2001) (identifying the conflict between rehabilitation and punishment in the juvenile system).

447. Amici Brief, *supra* note 299, at 15.

448. *See id.* at 19 ("Under the vague terms of the Illinois EJJ statute, a judge . . . has no standards by which to determine whether or not the triggering misconduct must be a violation of the dispositional order.").

449. *See* State v. B.Y., 659 N.W.2d 763, 771–72 (Minn. 2003) (reversing an EJJ revocation for technical violations because the minor did not have sufficient notice that his conduct could result in the execution of the adult sentence).

450. *Cf. Q&A on Juvenile Justice Reform*, *supra* note 201, at 13 (describing Minnesota's EJJ program as providing a specialized probation program for the EJJ juveniles with more intense supervision).

451. Scott & Grisso, *supra* note 434, at 160–61; *see* DiFonzo, *supra* note 47, at 30 ("Divergences between the adult's and the child's life experience and temporal outlook affect the number and level of hazards undertaken. Unrealistic optimism in balancing the likelihood of success versus the prospects for failure characterizes adolescence because juveniles generally have difficulty meshing a speculative future outcome into their strong presentist outlook. . . . Risk-taking helps to shape teenage identity . . . .").

term than long-term benefits.[452] Juveniles are also more susceptible to peer pressure; in fact, peer pressure is the real motivation for most teenage crime.[453] Adolescents are still developing the skills necessary to resist temptation when surrounded by peers who wish to misbehave.[454] Thus, due to a juvenile's different developmental stage, he may be overwhelmed by the number of conditions, both formal and informal, that come with a juvenile sentence and may be unable to comply in the same manner as an adult, especially when around his peers.[455]

Additionally, juveniles tend to be less psychologically mature than adults as measured by self-restraint, consideration of future consequences, and self-reliance.[456] The United States Supreme Court acknowledged such differences in *Roper v. Simmons* and noted that juveniles tend to be more reckless than adults, resulting in "impetuous and ill-considered actions and decisions."[457] For example, adolescents who are still developing problem-solving skills may be capable of considering a number of variables at the same time, but are not yet able to prioritize them appropriately.[458] As a result, if a juvenile is given a

452. See CORRIERO, *supra* note 216, at 27–28, for a story about a fourteen-year-old delivery boy who hit a sixty-five-year-old widow with a frying pan as she was getting his tip and stole her purse. She called the police, and the juvenile was quickly apprehended because his employer had his address on file. *Id.* at 28. The juvenile did not think beyond the money he saw in her wallet to what would happen after he robbed the woman. *Id.*

453. Scott & Grisso, *supra* note 434, at 160–61 (commenting on specific decision-making factors of adolescents); DiFonzo, *supra* note 47, at 31; *see also* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 30 (1998) ("The immediate motive for [juvenile] criminal involvement is group standing. The participant is showing off, living up to group expectations, pressing to avoid being ridiculed.").

454. CORRIERO, *supra* note 216, at 21 ("The idea that one's perception of self-worth as a teenager often does not come from within but from without, is an important observation on the nature of adolescence . . . . Key to resisting peer pressure is the capacity to believe in one's self, one's destiny.").

455. *See infra* Parts IV.B.2.a.i–ii (discussing probation and incarceration).

456. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 67, at 397.

457. Roper v. Simmons, 543 U.S. 551, 569 (2005) (internal quotations omitted); *see* Amici Brief, *supra* note 299, at 16–17 ("Evidence suggests that adolescents use information differently from adults . . . they are less likely to behave consistently across different problem solving situations *especially when subject to stress or ambiguity*, and they differ from adults in how they value perceived consequences in the decision-making process.") (quoting Jill Ward, *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, 7 U.C. DAVIS J. JUV. L. & POL'Y 253, 270–71 (2003)).

458. RICE, *supra* note 435, at 140. Studies show that adolescents make risky decisions because they "assign different desirability weights to the various possible outcomes of their actions," not because of a lack of information about the risk. Laurence Steinberg & Elizabeth

long list of conditions, he may view them differently than the judge or probation officer and emphasize the wrong ones.[459]

Juveniles are also at a stage of development in which their characters are still in formation.[460] Therefore, a juvenile's behavior at the beginning of probation may change as he matures.[461] Because change is a process, the judge should not expect a juvenile to incorporate all the changes immediately.[462] Instead, the judge must give the juvenile clear and careful instructions about the conditions of his probation and take the time to ensure that the juvenile understands.[463] Then, if the juvenile violates one of the conditions, the judge should reemphasize what could occur if the juvenile does not comply with the sentence.[464] In this manner, a juvenile will begin to internalize appropriate standards of behaviors and consequences for not following them.[465] If a judge merely gives a juvenile a laundry list of probation conditions to accomplish, he is setting the juvenile up for failure.[466]

Cauffman, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1772 (1995). For example, one study demonstrated that half of adolescents who drink and drive are aware of the risks of drunk driving. *Id.* Another study showed that, although adolescents are generally aware that condoms can prevent the spread of HIV infections, two-thirds of sexually active adolescents between sixteen and nineteen years old had sex without a condom. *Id.*

459. *See* RICE, *supra* note 435, at 140 ("[Y]oung adolescents [have] the capacity to consider alternatives, but this new-found capacity is not completely under control . . . because they are . . . not yet experienced."); CORRIERO, *supra* note 216, at 123 ("[Juvenile] Judge Corriero gives defendants clear, firm, and reasonable statements about what is expected of them: going to school every day, program participation, curfew, and so on. The importance of this is backed up by the therapeutic jurisprudence model's application of research on the psychology of compliance. This research suggests that judges must carefully and clearly instruct the defendant about the conditions of release . . . .").

460. *Roper*, 543 U.S. at 569–70.

461. *See* HEIDE, *supra* note 126, at Part 2 (conducting case studies of five youth in prison for murder, and noting the difference a few years made for some of them, but not others); Bishop & Frazier, *supra* note 321 at 264 ("[M]ost youths who engage in delinquency will desist by early adulthood . . . .").

462. *See* HOFFMAN *supra* note 341, at 112 (explaining the process of change in adolescents).

463. CORRIERO, *supra* note 216, at 123–24.

464. *Id.* at 124.

465. *Id.*

466. The minor at the center of the case study, *supra* notes 386–419 and accompanying text, felt that the number of conditions attached to his probation set him up for failure. IMPLEMENTATION EVALUATION: PART TWO, *supra* note 308, at 98; *see also* Roper v. Simmons, 543 U.S. 551, 571–72 (2005) (internal quotations omitted) ("[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.") (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)); 90TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 19 (Ill. Jan. 27, 1998) (statement of Rep. M. Davis) ("Do you know that kids don't know the ramifications of their behavior from now until tomorrow, but you want them to think that they'd better do this as a child because that'll happen to them when they become adults?").

In order to assist a juvenile in successfully completing his juvenile sentence, the statute or the court should prioritize the conditions that the minor must follow.[467] This Part first examines the conditions associated with probation sentences, and then with those associated with incarceration.[468] This Part also examines possible ways a judge might find a violation in both a probation and a prison sentence.[469]

i. Possible Ways To Violate a Probation Sentence

One of the key architects of the EJJ provision designed it with an initial sentence of juvenile probation in mind.[470] A judge may impose a number of conditions on a juvenile as part of probation, such as mandatory school, drug treatment, anger management, or community service.[471] Without proper guidance, the juvenile may have a different idea than the judge or probation officer about which of these conditions is the most important.[472]

In addition to the conditions the judge attaches to probation, the probation officer has the authority to modify the conditions of probation, yet case law is unclear about how the modified conditions factor into revocation.[473] The EJJ statute does not state whether a violation of these later-imposed conditions could trigger the adult sentence.[474] The juvenile probation procedures do not clarify the issue, and case law is conflicting and does not address conditions added by

467. *See* U.S. COMPTROLLER GENERAL, FEDERAL PAROLE PRACTICES: BETTER MANAGEMENT AND LEGISLATIVE CHANGES ARE NEEDED 177 (July 16, 1982) [hereinafter FEDERAL PAROLE PRACTICES] ("Parole supervision is most effective when probation officers and parolees have a clear understanding of what is required of them . . . .").

468. *See infra* Parts IV.B.2.a.i & ii (discussing probation sentences, then prison sentences, respectively).

469. *See id.* (discussing ways juveniles might violate their sentences).

470. *Q&A on Juvenile Justice Reform*, *supra* note 201, at 13. In fact, probation is the most common juvenile sentence for those found delinquent. ADAMS, OLSON, & ADKINS, *supra* note 381, at 1. At the end of 2000, there were ten times more juveniles on probation than in prison (18,800 juveniles on probation compared to 1886 juveniles in prison). *Id.* However, no data is available on the most common EJJ sentence.

471. 705 ILL. COMP. STAT. 405/5–715 (2006 & West Supp. 2007).

472. *See* FEDERAL PAROLE PRACTICES, *supra* note 467, at 143 ("Two ingredients are necessary for properly administering special conditions of parole: (1) clear definitions of requirements and (2) specific criteria for determining what constitutes a violation of such conditions.").

473. 705 ILL. COMP. STAT. 405/5–715(6).

474. *See id.* (discussing violations of sentence conditions without specifying where those conditions are found). In *State v. B.Y.*, B.Y.'s EJJ designation was initially revoked based on a curfew his probation officer imposed, not the court. State v. B.Y., 659 N.W.2d 763, 771 (Minn. 2003).

probation officers.[475] In *In re Serna*,[476] the appellate court overturned a juvenile's probation revocation for not attending school because attending school was never a condition of probation. The judge told him only to listen to his mother and stay out of trouble.[477] These conditions were so vague that they violated the juvenile's due process right to know the expected standards of behavior.[478] However, this holding does not extend so far as to require written notice of the probation conditions.[479] In a subsequent case, *In re R.E.M., Jr.*, the appellate court upheld the revocation of probation for violating an oral condition, even though R.E.M., Jr. never received a written list of probation conditions.[480] The court deemed the oral notice sufficient.[481] Thus, mere notice of a condition may suffice as a basis to revoke probation upon a violation of that condition, and it may not matter whether the probation officer or the judge imposed it.[482]

In contrast to the juvenile revocation procedure, the adult probation revocation procedure provides better guidance through case law.[483] By statute, some conditions of adult probation are mandatory and others are discretionary.[484] The mandatory conditions do not need to be in writing to form the basis of a probation revocation, provided that the defendant had knowledge of the conditions.[485] But the discretionary conditions must be written on the certificate; it is not sufficient for the court to advise the defendant orally of a discretionary condition.[486] If this applies to juveniles, all probation conditions must be in writing because all of the probation conditions are discretionary, according to the juvenile probation statute.[487]

475. *See infra* notes 476–491 and accompanying text (discussing the uncertainties in the juvenile probation law).

476. *In re* Serna, 385 N.E.2d 87, 88–89 (Ill. App. Ct. 1978).

477. *Id.*

478. *Id.* at 89.

479. *See In re* R.E.M., Jr., 514 N.E.2d 593, 594 (Ill. App. Ct. 1987) (upholding the revocation of juvenile probation for violating a condition that was not in writing when the juvenile was aware of the condition).

480. *Id.*

481. *Id.*

482. *Id.*

483. *See infra* notes 484–486 and accompanying text (discussing caselaw about adult probation).

484. 730 ILL. COMP. STAT. 5/5–6–3 (2006 & West Supp. 2007). In juvenile probation, all the conditions are discretionary. 705 ILL. COMP. STAT. 405/5–715 (2006 & West Supp. 2007).

485. People v. Glover, 489 N.E.2d 491, 494 (Ill. App. Ct. 1986). In this case, the defendant committed another offense during his probation. *Id.* at 492.

486. People v. Brown, 484 N.E.2d 945, 946–47 (Ill. App. Ct. 1985).

487. 705 ILL. COMP. STAT. 405/5–715.

The EJJ statute and case law, on the other hand, are silent as to whether violations of conditions later added by the probation officer can trigger the adult sentence.[488] Based on juvenile probation procedures, nothing prevents those later conditions from forming the basis of a revocation, resulting in the execution of an adult sentence.[489] However, according to the adult procedure, they could not.[490] At any rate, the juvenile might place less importance on conditions added by his probation officer and not realize that violating them may trigger the adult sentence.[491]

ii. Possible Ways a Juvenile May Violate a Prison Sentence

If a juvenile is sentenced to a term of imprisonment in the JDOC, other problems arise regarding which violations can trigger the adult sentence.[492] A juvenile prison sentence does not come with the same conditions that probation does; in fact, the statute does not mention any conditions of incarceration.[493] Instead, the juvenile is expected to follow the rules and regulations of the institution, which means possible infractions include not returning a library book on time or possessing a cassette tape without permission.[494] Thus, a juvenile's success in an institution often depends upon whether he has a good relationship with the staff.[495] Furthermore, it is not unusual for a juvenile to accumulate many rule violations in the beginning of his confinement because other inmates or staff may be testing him.[496] Prison fights are common and

488. *See* 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West) (saying nothing about subsequent conditions imposed outside the court).

489. *See supra* Part IV.B (noting that it does not take much to revoke a juvenile's probation).

490. *See Brown*, 484 N.E.2d at 946–47 (requiring that any discretionary violation be written on the probation certificate before it can be the basis of a revocation).

491. *See* State v. B.Y., 659 N.W.2d 763, 770 (Minn. 2003) ("[I]t is probable that [B.Y.] did not fully comprehend the harsh sanction he would face for violating curfew.").

492. *See infra* notes 493–502 and accompanying text (discussing other problems that may arise in the prison context). Illinois recently created the Department of Juvenile Justice, a separate department in corrections to handle juvenile prisoners. 730 ILL. COMP. STAT. 5/3–2.5–5 (2006). Formerly, juveniles fell under the Department of Corrections, Juvenile Division, which shared administration with the adult system. Illinois Department of Juvenile Justice, *Gov. Blagojevich names acting director of new Illinois Department of Juvenile Justice*, http://www.idjj.state.il.us/subsections/news/default.shtml#2006May26.

493. *Compare* 705 ILL. COMP. STAT. 405/5–710(1)(b) (2006 & West Supp. 2007) (commitment to JDOC) *with* 705 ILL. COMP. STAT. 405/5–715 (2006 & West Supp. 2007) (possible probation conditions) (showing commitment to JDOC does not include any affirmative conditions like the probation statute does).

494. Amici Brief, *supra* note 299, at 10; Christopher K.'s Brief, *supra* note 294, at 41.

495. Professor Crawford Interview, *supra* note 338.

496. People v. Martin, 674 N.E.2d 90, 95 (Ill. App. Ct. 1996). The unpublished testimony regarding services in juvenile facilities was eliminated from opinion pursuant to Illinois Supreme

sometimes unavoidable.[497] Therefore, the institutional setting is not the best place to evaluate whether a juvenile will be a threat to society.[498]

Professor Cathryn Crawford, the lead attorney on Christopher K.'s appeal, believes that nothing short of an escape could trigger the adult sentence.[499] If that is true, then the entire point of the EJJ statute is thwarted because an incarcerated EJJ juvenile could serve his sentence and be released at age twenty-one without taking advantage of any of the services in the juvenile system.[500] Christopher K.'s situation demonstrates the effect this uncertainty can have on a juvenile.[501] When he was twenty years old, less than a year from successfully completing his juvenile sentence, he was so paranoid about getting in trouble in prison that he refused to even play basketball.[502]

b. Insufficient Judicial Guidelines for Technical Violations

The judge has little to guide him in deciding whether to impose the adult sentence if any of these technical violations occur.[503] Different judges might have different understandings of what constitutes a violation that could trigger the adult sentence, or different probation officers might report violations inconsistently based on personal opinions of what is a serious violation.[504] Because of this uncertainty,

Court Rule 23. The full "hybrid" opinion is filed with the clerk, People v. Martin, No. 1–94–3937 (Ill. App. Ct. Nov. 27, 1996).

497. *See* MARK SALZMAN, TRUE NOTEBOOKS 72–73 (2003) (describing racially motivated fights in a juvenile hall in Los Angeles). A fight could even be considered a battery, a new offense, resulting in a mandatory imposition of the adult sentence. 720 ILL. COMP. STAT. 5/12–3 (2006).

498. *Martin*, 674 N.E.2d at 95.

499. Professor Crawford Interview, *supra* note 338.

500. The point behind the EJJ statute is to use the threat of the adult sentence as an incentive for the juvenile to take advantage of the services, in part to help the juvenile build competencies for the future. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 35 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson).

501. *See infra* note 502, and accompanying text (explaining how the uncertainty affected Christopher K.)

502. Jessica M. Bloustein, *Two Sentences, One Future: Treatment of Serious Juvenile Offenders Under Constitutional Challenge*, MEDILL NEWS SERVICE, Feb. 23, 2005.

503. He only has the purpose statement in Part 8, that the most important purpose of an EJJ proceeding is the community's right to be protected, and philosophy of BARJ, balancing the needs of the victim, the community, and the offender. 705 ILL. COMP. STAT. 405/5–101 (2006); 705 ILL. COMP. STAT. 405/5–805(1) (2006 & West Supp. 2007).

504. *See* FEDERAL PAROLE PRACTICES, *supra* note 467, at 147–48, 153 (finding that a lack of guidance as to what constituted a violation of a special condition of parole led to federal probation officers reporting violations inconsistently and addressing the "need for a specific definition of when technical violations constitute sufficient infractions of the conditions of release to justify a warrant request"); *see also* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 366 (2005) ("Reducing individual discretion is useful

judges need standards to guide them in deciding when to impose the adult sentence.[505] Discretion is important in an individualized, rehabilitative setting,[506] but a lack of standards leaves judges uncertain about what they are allowed to do, defense lawyers uncertain about how best to prepare for the hearing, and appellate courts uncertain about what to examine on review.[507] Thus, the judge must speculate about the policy behind the EJJ revocation provision[508] and guess how to balance the conflicting punitive and rehabilitative goals of the juvenile system.[509] In every other part of the 1998 Act where the judge exercises discretion over whether a minor should be transferred to the adult system, the legislature provided guidelines for the judge to consider.[510] On review, appellate courts look to whether the judge used those standards in her decision-making.[511] The silence here leaves

because with discretion inevitably comes disparity based upon the inherent differences among decision makers. . . . Room for the exercise of discretion also can give opportunity to malevolent influences such as racism, sexism, and the like.").

505. *See* Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1027–28 (1986) (stating that substantive standards reduce the threat of arbitrariness and discrimination in adjudication, while "a lack of standards makes decisions 'responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society'") (quoting Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 90 (1960)); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A3(a) Guidelines versus Policy Stmts. (2006) (choosing to issue advisory policy statements instead of guidelines for revocation of probation because it provided greater flexibility to the courts). *But see* Klein, *supra* note 45, at 388 (claiming that a long list of factors in discretionary decisions "reinforce judges' exercise of virtually unreviewable discretion by allowing them to emphasize one set of factors or another to justify whatever disposition they may prefer") (citing Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 491 (1987)).

506. Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 494–95 (1999).

507. *Id.* at 501 (discussing the confusion resulting when, in the absence of "any other law," courts have no "official standards to apply").

508. *See id.* at 496 (discussing how procedural rules "cannot resolve the continuing policy debate over the proper goals of criminal sentencing").

509. *See* 705 ILL. COMP. STAT. 405/5–101(1) (2006) (stating that the purpose of the Article on Delinquent Minors is to protect the citizens, hold juveniles accountable, rehabilitate the offender, and provide due process); Geraghty & Rhee, *supra* note 129, at 631 ("Because most transfer statutes fail to give any guidance on how to resolve a conflict between punitive and rehabilitative factors, even though such conflicts occur frequently, the judge often must exercise unfettered discretion.").

510. *See supra* Part II.C (explaining discretionary transfers).

511. *E.g.*, People v. Clark, 518 N.E.2d 138, 146 (Ill. 1987), *cert. denied*, 97 U.S. 1026 (1990) ("[Prior cases] require that the juvenile judge receive sufficient evidence on all statutory factors. . . . Where the record fails to support the juvenile judge's recitation that all statutory factors were considered, there is an abuse of discretion."); People v. M.D., 461 N.E.2d 367, 372–73 (Ill. App. Ct. 1984) ("[W]hile no formal statement of reasons or conventional findings of fact are necessary

judges to decide whether the guiding policy is to truly give juveniles "one last chance" and tolerate very little deviance from the probation conditions, or to examine whether the violations show that a juvenile is no longer amenable to the services in the juvenile system.[512] This, however, leaves policy decisions in the hands of judges.[513]

c. Possible Legal Challenges After Revocation for a Technical Violation

These uncertainties could result in a constitutional challenge if a juvenile's adult sentence is executed because of a technical violation.[514] A challenge may be successful if the juvenile did not have notice that his behavior could trigger the adult sentence or the judge acted arbitrarily.[515] It is an element of due process that a criminal statute be clearly defined.[516] A person cannot be held responsible for violating a statute unless he reasonably could be expected to know, in light of the particular facts of his case, that his conduct was proscribed.[517] Due process also requires that a statute provide law enforcement personnel and triers of fact with sufficient guidelines to avoid arbitrary enforcement and to prevent them from basing enforcement on their own personal convictions.[518] The uncertainties surrounding when a technical violation could trigger the adult sentence could lead to a constitutional violation.[519]

[in a transfer hearing], the juvenile judge must take care to preserve a record sufficiently explicit so that his exercise of discretion may be reviewed meaningfully.") (quoting People v. Taylor, 391 N.E.2d 366 (Ill. 1979)).

512. *See Girl's Trial Opens*, *supra* note 13, at 1 ("[B]ecause the [EJJ] measure has never been used in Cook County . . . it is unclear what kind of offense would be serious enough to invoke [the juvenile's] adult murder sentence.").

513. Leaving policy decisions in the hands of judges could be a problem because judges are part of the judicial branch, not the policy-making legislative branch. *See* Decker, *supra* note 309, at 246 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.").

514. *Cf.* O'Hara Kelly, *supra* note 310, at 847 ("Probation conditions may be voided if they are impossible to follow, excessive, vague, or illegal.").

515. An "as-applied" constitutional challenge looks to the particular facts of the case to see whether a reasonable person would understand that his conduct was prohibited. Decker, *supra* note 309, at 281; *see In re* Serna, 385 N.E.2d 87, 89 (Ill. App. Ct. 1978) (overturning a juvenile's probation revocation for unconstitutional vagueness because the judge never set any specific conditions of probation).

516. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

517. People v. Garrison, 412 N.E.2d 483, 488–89 (Ill. 1980).

518. *Id.* at 488.

519. *E.g.*, State v. B.Y., 659 N.W.2d 763 (Minn. 2003), discussed *infra* notes 521–529 and accompanying text (showing how the EJJ revocation process can be overturned).

A challenge to the EJJ revocation process was successful in Minnesota, whose EJJ statute was the model for the Illinois statute.[520] In *State v. B.Y.*, the Minnesota Supreme Court overturned the revocation of B.Y.'s EJJ status based on a curfew violation.[521] The probation officer, not the court, imposed the curfew because B.Y. had failed to comply with the probation conditions.[522] The Minnesota statute requires a judge to consider any mitigating factors before imposing the adult sentence.[523] The Minnesota Supreme Court found that the trial court overlooked potential mitigating factors, including that B.Y. probably did not fully understand the harsh consequence that could result from violating the curfew.[524] In addition, a curfew violation did not show that B.Y. was no longer amenable to treatment; thus, revoking EJJ status may have been premature.[525]

Furthermore, the Minnesota Supreme Court held that in an EJJ revocation proceeding, a court must follow adult probation procedures, specifically the three factors established in an earlier Minnesota case, *State v. Austin*.[526] Before a court in Minnesota may revoke an EJJ designation, it must (1) specify which condition or conditions were violated; (2) find that the violation was intentional or inexcusable; and (3) find that the violations demonstrate that probation is no longer appropriate and incarceration is necessary instead.[527] The court stressed that the revocation of an EJJ designation should be done only if the

520. *See Q&A on Juvenile Justice Reform*, *supra* note 201, at 13 (showing that Minnesota was the original EJJ state).

521. *B.Y.*, 659 N.W.2d at 766. The Minnesota statute provides that, for a certain class of EJJ juveniles, if the court finds that the defendant violated a condition of his sentence, either by committing a new offense or violating a condition of his disposition, the court *must* order the execution of the adult sentence *unless* the court makes written findings of mitigating factors. MINN. STAT. ANN. § 260B.130 Subd. 5 (West 2007).

522. *B.Y.*, 659 N.W.2d at 770.

523. *Id.* at 772. The Minnesota EJJ statute differs from the Illinois statute in that revocation is never mandatory. MINN. JUV. DELINQ. PROC. R. 19.11, subd. 3(C). In most cases, the court has discretion after finding a violation. *Id.* at 19.11, subd. 3(C)(1). However, if the juvenile was originally convicted of an offense with a presumptive prison sentence, the court must execute the adult sentence unless it finds mitigating factors. *Id.* at 19.11, subd. 3(C)(3). Thus, a court always has an option to continue the juvenile sentence if the circumstances do not warrant the adult sentence. Santelmann & Rafferty, *supra* note 214, at 444.

524. *B.Y.*, 659 N.W.2d at 770.

525. *Id.*

526. *Id.* at 768–69. The *Austin* factors were from an earlier Minnesota case, *State v. Austin*, 295 N.W.2d 246 (Minn. 1980). The *Austin* factors are not applicable to juveniles in general. *In re* A.W.S., No. A05–1215, 2006 WL 1529352, at *3 (Minn. Ct. App. June 6, 2006). The Minnesota Supreme Court applied them to the EJJ revocation procedure because of the serious consequences that may result from revocation. *B.Y.*, 659 N.W.2d at 769.

527. *B.Y.*, 659 N.W.2d at 768.

violation demonstrated that the juvenile would probably continue antisocial behavior.[528] A judge should not revoke an EJJ designation merely on the basis of an accumulation of technical violations.[529]

The Minnesota Supreme Court remedied the potential problems in Minnesota's EJJ statute by defining when the court should revoke EJJ designation because of technical violations and execute the adult sentence.[530] The Illinois statute, similar to the Minnesota statute, could face a similar challenge because it also fails to set forth any criteria for the judge to use when deciding whether to impose the adult sentence.[531] In Minnesota, the statute directs the judge to consider mitigating factors; thus, the court in *B.Y.* remedied the problem through statutory interpretation.[532] However, Illinois does not require a judge to consider mitigating factors, nor does it have the equivalent of Minnesota's *Austin* factors to guide juvenile court judges in the revocation procedure.[533] In the adult context, Illinois does require that revocation of probation be a last resort, to be used only when treatment is about to fail.[534] However, in Illinois, a probation violation need not be intentional if the violation shows that the probationer is a danger to society; nothing prevents a judge from revoking based on an accidental violation.[535] The Minnesota example demonstrates an instance in which the Illinois statute could be vulnerable to an as-applied constitutional challenge if the juvenile did not have notice that his behavior could trigger the adult sentence.[536]

528. *Id.* at 772.

529. *Id.*

530. *Id.*

531. *See* 705 ILL. COMP. STAT. 405/5–810(6) (2006), *amended by* 2007 Ill. Legis. Serv. 95–331 (West) (detailing the current EJJ revocation hearing procedures).

532. *See* MINN. JUV. DELINQ. PROC. R. 19.11, subd. 3(A) ("If the court finds . . . that any provisions of the disposition order were violated . . . the court *may* revoke the probationer's extended jurisdiction juvenile status . . . .") (emphasis added); MINN. JUV. DELINQ. PROC. R. 19.11, subd. 3(C) ("If the extended juvenile jurisdiction conviction was for an offense with a presumptive prison sentence . . . the court shall order execution of the sentence *unless* the court makes written findings indicating the mitigating factors that justify continuing the stay.") (emphasis added).

533. The closest case that exists is *People v. Beard*, 319 N.E.2d 745 (Ill. 1974), *cert. denied*, 421 U.S. 992 (1975), in which the Illinois Supreme Court adopted the policies set forth in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and required a showing that probation was no longer appropriate for the probationer before revoking his probation.

534. *Beard*, 319 N.E.2d at 748.

535. People v. Alegri, 487 N.E.2d 606, 608 (Ill. 1985).

536. *See supra* notes 520–529 and accompanying text (discussing the possible constitutional challenge).

V. PROPOSAL

Although the intent behind the EJJ statute was to use the threat of the adult sentence as a deterrent to the EJJ juvenile to avoid reoffending, studies demonstrate that, in reality, the threat will not be a consistent deterrent.[537] The EJJ statute does, however, allow a juvenile court judge to take a chance on some juveniles whom he would otherwise transfer to criminal court and allow them more time in the juvenile system.[538] The adult sentence should be a last resort, not a first resort, reserved for cases in which a juvenile sentence is not effective.[539] Some juveniles will change their behavior, but only with time.[540] Although there may be a few juvenile offenders who are such a threat to society that they should never be released, those juveniles cannot be identified through early assessment.[541] Trying to identify them early will result in false positives, incarcerating too many juveniles unnecessarily.[542] The EJJ statute will be most effective if it keeps as many juveniles in the juvenile system as possible.[543] Sending a juvenile to the adult system will likely increase the chances that he will reoffend.[544] Therefore, the revocation process should be designed to give the juvenile many opportunities to comply with the juvenile sentence.[545]

This Part proposes a process, working within the current statute, that a judge should follow for technical violations in which the judge imposes increasingly harsh juvenile sanctions on the offender before resorting to the adult sentence.[546] This Part then suggests that the legislature should amend the EJJ statute to make revocation after a new

537. *See supra* Part IV.A (discussing how juveniles do not think about future consequences the same way adults do).

538. 90TH GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 33 (Ill. Jan. 29, 1998) (statement of Sen. Hawkinson).

539. *Id.*

540. *See supra* note 341 (discussing the process of change).

541. HEIDE, *supra* note 126, at 237.

542. *Id.*

543. *See supra* Part IV.A (demonstrating that the adult system harms juveniles and increases the chance they will reoffend).

544. *See supra* note 3241 (discussing studies that suggest transfer to adult court increases recidivism rates).

545. *Cf.* Arkansas' EJJ provision, ARK. CODE ANN. § 9–27–507(e)(1) (West 2007) (requiring a court to review the juvenile's status before juvenile jurisdiction ends). If the juvenile is approaching his twenty-first birthday (or eighteenth in some cases), and has not yet had a hearing about his status, the court will conduct a hearing to determine whether to release the juvenile or execute the adult sentence based on how the juvenile has responded to treatment.

546. *See infra* Part V.A (laying out a process for revoking based on technical violations that will ensure that the juvenile has notice and the judge acts consistently).

offense discretionary.[547] In the alternative, the legislature should amend the statute so that only violent offenses trigger mandatory revocation; the judge should have discretion for non-violent offenses.[548] The adult sentence should be a last resort for those juveniles who consistently put the public at risk, not a first resort for minor infractions.[549]

A. Suggested Process for Revocation Based on the Current EJJ Statute

After an EJJ juvenile receives a probation sentence, the court should leave it to the probation officer to set particular goals for the juvenile.[550] If a juvenile consistently disobeys a probation order, such as violating curfew, then the juvenile should be brought back before the judge.[551] The judge should specifically include that particular condition in the probation order, but not execute the adult sentence at that time.[552] If the juvenile continues to violate that specific condition, the judge should exercise other options at his disposal, such as more intensive probation, a stay in the temporary detention center, or even commitment to JDOC.[553] When the juvenile completes that sanction, the judge should give the juvenile another chance to comply with the condition before executing the adult sentence.[554] If the juvenile obeys that particular condition after seeing the judge, but begins to violate another condition,

547. *See infra* notes 568–569 and accompanying text (suggesting that the legislature should made all revocations discretionary).

548. *See infra* notes 569–573 and accompanying text (suggesting at least the legislature should make revocation for non-violent offenses discretionary).

549. *See* Clarke, *supra* note 431, at 683 ("The 'blended sentencing' option was seen as a way to keep the focus on the rehabilitation of youthful offenders while still providing some measure of accountability and public safety: the law retained the threat of the adult sentence should rehabilitation efforts fail.").

550. The probation officer will have the most contact with the juvenile, and thus is in the best position to adapt the goals if necessary. *See* 705 ILL. COMP. STAT. 405/5–715(6) (2006 & West Supp. 2007) (allowing the probation officer to adjust the conditions of probation according to a system established by the chief judge of the circuit).

551. *See* CORRIERO, *supra* note 216, at 124 ("[W]hen a defendant is not meeting Judge Corriero's expectations, he reemphasizes the consequences of not doing so. An important part of the defendants' socialization involves their internalizing what is at stake if they don't follow the judge's rules.").

552. By including the particular condition in the probation order, everyone can set the same priorities regarding the conditions. *See supra* notes 450–466 and accompanying text (discussing how young people view choices differently because their problem-solving skills are not as developed as adults).

553. *See* 705 ILL. COMP. STAT. 405/5–710 (2006 & West Supp. 2007) (listing juvenile sentencing options).

554. Perhaps the juvenile has learned his lesson at this point, but unless he is twenty years and 364 days, there is still time. *See supra* note 341 (discussing how change is a process).

the judge should repeat the process for the new condition.[555] Therefore, the juvenile will see the consequences of his actions, but will still have time to take advantage of the juvenile system.[556] Moreover, this procedure will ensure that the juvenile has notice that his conduct could trigger the adult sentence.[557]

If an EJJ juvenile is sentenced to prison, the judge should follow the same procedure laid out above for any rule violations.[558] If the juvenile, however, is written up for fighting, and that is treated as a new offense, the juvenile should have the ability to argue self-defense to avoid the automatic execution of the adult sentence.[559] Furthermore, the judge should impose affirmative conditions on the juvenile if he is incarcerated, such as mandatory school or skills training.[560] This will ensure that the juvenile will be more prepared upon release to lead a productive life.[561]

When a judge does decide to revoke an EJJ designation and execute the adult sentence, he should follow the adult probation revocation procedure, which requires revocation to be a last resort.[562] The judge should make written findings about what has changed that makes the adult sentence appropriate when it was not at the time of the EJJ designation.[563] Finally, the judge should consider factors similar to those found in Arkansas' EJJ statute, which focus on how the juvenile

555. *See* Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L. Q. 381, 382 (2003) ("[The Juvenile Court founders] envisioned the Juvenile Court functioning in the best interest of children and youth, acting in any circumstance, they said, exactly as a kind and just parent would act.").

556. Such a process has been successful in New York's Youthful Offender paradigm. CORRIERO, *supra* note 216, at 11–13, 53–55.

557. *See supra* notes 520–529 and accompanying text (discussing the Minnesota Supreme Court's reluctance to revoke EJJ status if the juvenile might not have had notice that a certain violation could trigger the adult sentence).

558. *See supra* notes 550–556 and accompanying text (suggesting a procedure for technical violations which provides the juvenile with plenty of notice).

559. *See generally* James E. Robertson, *"Fight or F . . ." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339 (1995) (discussing the dangers inmates face in prison from other inmates).

560. *See* Illinois Department of Juvenile Justice, *supra* note 492 ("By creating a separate Department of Juvenile Justice, young offenders will receive individualized services including educational, vocational, social, emotional services that will help enable them to become productive adults.").

561. *See id.* ("It's expected that the new department [of Juvenile Justice] will help reduce the number of juvenile offenders that return to the juvenile system.").

562. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).

563. *See* Daniel F. Pair, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 173 (2003) (recommending that for every probation revocation, "the court shall issue a written statement, or shall cause a stenographic transcript to be made, of the reasons for revoking probation and the evidence relied upon for the revocation").

responded to services, the seriousness of the original offense, and the recommendations of those who worked with the juvenile.[564]

B. Suggested Legislative Changes to the EJJ Statute

Under the current EJJ revocation procedure, a judge cannot ignore the statutory language and refuse to execute the adult sentence after the juvenile commits a new offense.[565] Therefore, the probation officers and the state's attorneys will have to exercise discretion to prevent injustice in specific cases.[566] For example, a state's attorney need not file a petition to revoke for minor offenses, like vandalism or possession of marijuana, for which an adult sentence would be unjust.[567]

Ideally, the legislature should amend the EJJ revocation procedure to make all revocations discretionary.[568] In that case, the judge should use the same reasoning set forth above for deciding whether to revoke based on a technical violation: revocation should be a last resort and the judge

564. The factors are:

> (A) The experience and character of the juvenile before and after the juvenile disposition, including compliance with the court's orders;
>
> (B) The nature of the offense or offenses and the manner in which the offense or offenses were committed;
>
> (C) The recommendations of the professionals who have worked with the juvenile;
>
> (D) The protection of public safety;
>
> (E) Opportunities provided to the juvenile for rehabilitation and the juvenile's efforts toward rehabilitation; and
>
> (F) Victim impact evidence…

ARK. CODE ANN. § 9–27–507(e)(2) (West 2007). New York has developed similar factors through case law to identify which juvenile should take part in the Youthful Offender Program. CORRIERO, *supra* note 216, at 85. A court must consider:

> [T]he gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in pre-sentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude towards society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life.

Id.

565. *See* Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 394 (1988) (discussing how prior and precise written rules can be harmful when they leave decisionmakers unable to adapt to individual circumstances).

566. *See id.* at 459 ("[T]he virtues of the legality principle apply to all stages in the process of distributing criminal sanctions. At the same time, normative judgments, which necessarily depend on vague standards, must be made part of the process.").

567. *Cf.* Podkopacz & Feld, *supra* note 233, at 1017 (describing that one concern with the Minnesota EJJ procedure is that "even if an initial offense clearly would not warrant certification and a subsequent offense or probation violation would not in itself justify imprisonment, for an EJJ youth, the two in combination may result in a more severe outcome than either a juvenile or criminal court judge would impose if asked directly whether imprisonment is appropriate").

568. Professor Crawford Interview, *supra* note 338.

should use the Arkansas factors to determine whether revocation is appropriate.[569]

If, however, the legislature chooses not to give the juvenile court judges that much discretion, the statute should at least differentiate between violent and non-violent offenses.[570] Only a violent offense should be the basis for the mandatory execution of the adult sentence, and juvenile court judges should have discretion in deciding whether to execute the adult sentence for a non-violent offense.[571] Otherwise, the EJJ statute could widen the net and send more juveniles to the adult system unnecessarily.[572] A judge should execute the adult sentence based on a non-violent offense only after considering the Arkansas factors, focusing particularly on how the juvenile has responded to services.[573]

VI. CONCLUSION

For too long, juvenile justice policy has been driven by a perceived demand to "get tough" on juvenile offenders instead of by research on adolescent development. That approach, however, has proven to be ineffective and even counterproductive in preventing future offenses. EJJ prosecutions have the potential to provide a viable alternative to dealing with violent juvenile offenders, but only if juvenile justice professionals use adolescent development theories when working with EJJ juveniles. Not only must juvenile justice professionals use such knowledge, but the legislature must also amend the statute to clarify what conditions may trigger the adult sentence and to give judges necessary discretion to adapt to a juvenile's changing circumstances. EJJ will only be effective if the EJJ juveniles have the opportunities

569. *See supra* notes 550–556 and accompanying text (suggesting a procedure for technical violations which ensure the juvenile has notice); *supra* note 564 and accompanying text (listing factors Arkansas considers which focus on how the juvenile responded to services, the seriousness of the original offense, and the recommendations of those who worked with the juvenile).

570. *See supra* notes 378–385 and accompanying text (discussing the results of a probation study which showed that many juveniles who committed a new offense while on probation still completed probation successfully).

571. For a discussion about characteristics of juvenile crime, see MICHAEL RUTTER, HENRI GILLER, & ANN HAGEL, ANTISOCIAL BEHAVIOR BY YOUNG PEOPLE 30–63 (1998). Theft is the most common juvenile crime. *Id.* at 63. Violent crimes are a small proportion of juvenile crime. *Id*. Offending tends to peak in the late teens then taper off with age. *Id.*

572. *See supra* notes 395–397 and accompanying text (giving an example of an EJJ juvenile whose adult sentence was executed after he shoplifted some CDs, even though he would not have been transferred to adult court for the original offense); *supra* note 567 (discussing the net-widening effect in Minnesota).

573. *See supra* note 564 (listing the Arkansas factors).

they need to successfully complete their juvenile sentences. If Illinois does not make these changes, the EJJ statute will become merely another step on the path to the adult system.