

# Serious Juvenile Offenders: The Need for a Third Sentencing Option in Wisconsin

Danielle S. Snyder  
*Marquette University Law School*

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# SERIOUS JUVENILE OFFENDERS: THE NEED FOR A THIRD SENTENCING OPTION IN WISCONSIN

*In light of the “Slenderman” trial, it has become abundantly clear that a gap exists between the sentencing options available for “Class A” juvenile offenders and “Class*

*B” juvenile offenders. This Comment proposes an expanded sentencing option for “Class B” serious juvenile offenders under the Juvenile Justice Code to allow those “Class B” serious juvenile offenders the benefit of extended supervision in the Serious Juvenile Offender Program as is available to “Class A” serious juvenile offenders currently. This expansion aims to alleviate the concern that certain “Class B” serious juvenile offenders must remain under original adult court jurisdiction in order to allow a longer period of supervision than is currently available to those “Class B” serious juvenile offenders in juvenile court.*

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## I. INTRODUCTION

In May 2014, two twelve-year-old girls inspired by the Internet character “Slenderman” were charged with attempted first-degree intentional homicide after stabbing their friend nineteen times and leaving her in the woods to die.<sup>1</sup> The “Slenderman” trial, as the case has come to be known, has drawn national attention because the girls were found competent to stand trial as adults due to the severity of their offense.<sup>2</sup> State law requires the two twelve-year-old girls be charged as adults, because Wisconsin Statutes section 938.183(1)(am) gives the adult court jurisdiction over all persons ten years or over who attempted or committed first-degree intentional homicide (“Class A” felony), first-degree reckless homicide (“Class B” felony), or second-degree intentional homicide (“Class B” felony).<sup>3</sup> In the reverse waiver hearing to consider whether the girls should be transferred to juvenile court the presiding judge refused to move the cases to juvenile court stating on record that he believed a transfer would depreciate the seriousness of the crime.<sup>4</sup> Under the juvenile system, “the girls would face only three years of incarceration and extensive supervision until age 18,” which the judge viewed as an inappropriate sentence.<sup>5</sup> This case sheds light on concerns about how to prosecute juvenile offenders that commit especially heinous crimes, namely, whether juvenile offenders are best served under the juvenile justice code or need to be prosecuted under the adult criminal code.<sup>6</sup>

In Wisconsin, the type of offense committed by a juvenile dictates classification.<sup>7</sup> A juvenile can commit a large variety of offenses that are categorized

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1. Jason Hanna & Dana Ford, *Police: Wisconsin Girl, 12, Stabbed 19 Times; Friends Arrested*, CNN (June 2, 2014), <http://www.cnn.com/2014/06/02/justice/wisconsin-girl-stabbed/index.html> [<https://perma.cc/8QUC-6DWL>].

2. Bruce Vielmetti, *Girls in Slender Man Stabbing Case to Remain in Adult Court*, MILWAUKEE JOURNAL SENTINEL, (Aug. 10, 2015), <http://archive.jsonline.com/news/crime/girls-in-slender-man-stabbing-case-to-remain-in-adult-court-b99553843z1-321293491.html> [<https://perma.cc/JJ6P-H6NW>].

3. WIS. STAT. § 938.183(1)(am) (2013–2014).

4. Vielmetti, *supra* note 2.

5. Vielmetti, *supra* note 2; WIS. STAT. § 970.032(2)(a)–(c) (2013–2014) stating that the adult court may reverse waive a child to juvenile court if the child proves by the preponderance of evidence

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system. (b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense. (c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the child is accused under the circumstances specified in s. 938.183(1)(a), (am), (ar), (b), or (c), whichever is applicable.

6. Vielmetti, *supra* note 2.

7. WIS. STAT. § 938.183(1)(a)–(c).

as different classes of felonies, which will subsequently dictate the sentencing options available to the judge; however, only “Class A” and “Class B” offenses are relevant to this Comment.<sup>8</sup> The “Class A” distinction is only given to those juveniles charged with first-degree intentional homicide, and under “Class A” a juvenile who is placed in the “Serious Juvenile Offender Program” can be held in secure custody in a juvenile correctional facility up until his or her twenty-fifth birthday.<sup>9</sup> Unlike “Class A,” the “Class B” serious juvenile offenders, including those charged with attempted first-degree intentional homicide, second-degree intentional homicide, or first-degree reckless homicide, can only be held in secure custody in a juvenile correctional facility for up to three years.<sup>10</sup> This limit on placement may deter the adult court from finding a transfer to juvenile court jurisdiction appropriate and require the adult court, instead, to retain exclusive jurisdiction if it finds a longer sentence is necessary to deter the juvenile and protect the public.<sup>11</sup>

This Comment explores the gap that exists between sentencing options for those serious juvenile offenders classified as “Class A” and those classified as “Class B.” It focuses exclusively on the need for expanded sentencing options for “Class B” serious juvenile offenders, largely, in order to avoid the concern that courts should maintain adult jurisdiction. The Serious Juvenile Offender Program only offers three years of supervision for “Class B” offenders and because there is no option for extended placement, the only available alternative is placement under adult court jurisdiction.<sup>12</sup>

First, this Comment will outline the history of Wisconsin’s Juvenile Justice

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8. WIS. STAT. § 940.01(1)(a) (2013–2014) states that “[e]xcept as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony”; WIS. STAT. § 939.32(1)(a) (2013–2014) states “[w]hoever attempts to commit a crime for which the penalty is life imprisonment is guilty of a Class B felony.”

9. WIS. STAT. § 940.01(1)(a); WIS. STAT. § 938.538(3)(a)(1m) (2013–2014) states:

If the participant has been adjudicated delinquent for committing an act that would be a Class A felony if committed by an adult, placement in a Type 1 juvenile correctional facility or a secured residential care center for children and youth until the participant reaches 25 years of age, unless the participant is released sooner, subject to a mandatory minimum period of confinement of not less than one year.

State v. Kleser, 2010 WI 88, ¶120, 328 Wis. 2d 42, 786 N.W.2d 144 (noting that the dispositional order for extended placement for serious juvenile offenders only applies to those juveniles given dispositional order before their eighteenth birthday).

10. WIS. STAT. § 939.32(1)(a) (2013–2014); WIS. STAT. § 938.538(3)(a)(1) (2013–2014) states that the following sanction can be given “[s]ubject to subd. 1m., placement in a Type 1 juvenile correctional facility or a secured residential care center for children and youth for a period of not more than 3 years.”

11. Vielmetti, *supra* note 2.

12. § 938.538(3)(a)(1).

Code and discuss the relevant legislative history of Wisconsin Statutes section 938.183(1)(am) beginning with the creation of the Juvenile Justice code in 1996.<sup>13</sup> Additionally, it will discuss the relevant Supreme Court cases and Wisconsin case law to highlight the distinction between adult and juvenile sentencing.<sup>14</sup> Second, this Comment will discuss the creation of the Serious Juvenile Offender program and highlight the sentencing options for those juveniles who are considered serious juvenile offenders.<sup>15</sup> Last, this Comment will demonstrate the need for a third option for “Class B” serious juvenile offenders.

Wisconsin’s need for extended placement options for “Class B” serious juvenile offenders has become more apparent since the waiver proceedings of the Slenderman case have begun. This Comment will demonstrate why the Wisconsin legislature should create more sentencing options for judges regarding serious juvenile offenders. Specifically, Wisconsin should consider extending the ability to hold serious juvenile offenders until the age of twenty-five to those classified as “Class B” offenders and not just limit that option to those classified as “Class A” offenders. Where both “Class A” and “Class B” offenders are considered serious juvenile offenders and are subject to original adult court jurisdiction for criminal proceedings, the options available to a judge during sentencing should be similar and not distinguished by whether the violent act was simply attempted or completed.<sup>16</sup> Instead, “Class B” offenders are often subject to adult court jurisdiction because there are increased sentencing options available to meet concerns addressed in reverse waiver hearings and may in turn be forced to serve a much harsher sentence.<sup>17</sup>

This Comment does not focus on the differences between adolescent and post-adolescent brain development in judgment or impulse control, nor does it aim to highlight whether juvenile offenders should be treated as fully culpable adults.<sup>18</sup> While this Comment recognizes the contrast between the environment, treatment, and consequences of adult and juvenile correctional systems

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13. Marygold S. Melli, *Symposium: Juvenile Justice Reform: Introduction: Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375.

14. *Id.*; Jaime L. Preciado, Special Issue: Comment, *The Right to a Juvenile Jury Trial in Wisconsin: Rebalancing the Balanced Approach*, 1999 WIS. L. REV. 571. See generally Katherine Hunt Federle, *Symposium: Juvenile Justice Reform: Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447.

15. See generally Kenneth M. Streit & John T. Chisholm, *Expand Sentencing Options for Young Adults*, WIS. LAW., May 2013, at 38.

16. §§ 938.183(1)(am), 938.538(3)(a)(1)–(1m).

17. Vielmetti, *supra* note 2; *State v. Kleser*, 2010 WI 88, ¶ 46, 328 Wis. 2d 42, 786 N.W.2d 144.

18. See generally Melissa S. Caulum, Comment, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729.

and in part relies on the research regarding the opportunities a juvenile correctional facility offers, the main purpose of this Comment is to demonstrate the gap that exists in sentencing serious juvenile offenders that are classified as “Class B” offenders.<sup>19</sup>

In Part I, the Comment explores the history of juvenile justice codes as a separate system for prosecuting juvenile offenders including its deviation from the traditional adult court criminal proceedings and the Juvenile Justice Code in Wisconsin. Part II discusses the use of waiver and reverse waiver proceedings for severe offenses that fall under original, exclusive adult jurisdiction. Additionally, this Part will discuss the Serious Juvenile Offender Program created by Wisconsin Statutes section 938.538 and the sentencing options available to court depending on the age of the offender and the nature of the offense, namely, whether the offense is classified as a “Class A” or “Class B” felony. This Part also demonstrates how different offenses have different sentencing options under the Juvenile Justice Code. Part III details a proposed “third option” for serious juvenile offenders that commit a “Class B” felony. Specifically, Part III suggests an extended placement option in the juvenile proceedings rather than limiting the judge’s sentencing discretion to three-year sentences under juvenile jurisdiction or potentially harsher sentences (up to sixty years)<sup>20</sup> under adult criminal court jurisdiction.

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19. *Id.*; § 938.538(3).

20. WIS. STAT. § 939.50(3) (2013–2014):

(3) Penalties for felonies are as follows:

- (a) For a Class A felony, life imprisonment.
- (b) For a Class B felony, imprisonment not to exceed 60 years.
- (c) For a Class C felony, a fine not to exceed 100,000 or imprisonment not to exceed 40 years, or both.
- (d) For a Class D felony, a fine not to exceed 100,000 or imprisonment not to exceed 25 years, or both.
- (e) For a Class E felony, a fine not to exceed 50,000 or imprisonment not to exceed 15 years, or both.
- (f) For a Class F felony, a fine not to exceed 25,000 or imprisonment not to exceed 12 years and 6 months, or both.
- (g) For a Class G felony, a fine not to exceed 25,000 or imprisonment not to exceed 10 years, or both.
- (h) For a Class H felony, a fine not to exceed 10,000 or imprisonment not to exceed 6 years, or both.
- (i) For a Class I felony, a fine not to exceed 10,000 or imprisonment not to exceed 3 years and 6 months, or both.

## II. HISTORY OF THE JUVENILE JUSTICE CODE IN WISCONSIN

### A. *Creation of Juvenile Correctional Systems in America*

In 1899, the first juvenile corrections system was established in Cook County, Illinois, as a response to the increasingly prevalent concern that juveniles were vulnerable and more likely to commit delinquent acts.<sup>21</sup> The idea was to create a juvenile court distinct from the criminal court with a focus on rehabilitation, rather than punishment.<sup>22</sup> Instead of sentencing juveniles to prison, the juveniles were committed to institutions where the primary goal was to intervene and provide correctional treatment that would help prevent juveniles from committing more delinquent or criminal acts in the future.<sup>23</sup> Thus, the juvenile court itself began to take part in the rehabilitation process as it began its early intervention efforts for children at risk, which included neglected or delinquent juveniles.<sup>24</sup>

In the juvenile court system, the judges were granted discretion to make individualized treatment decisions for each juvenile.<sup>25</sup> Under the doctrine of *parens patriae*, the juvenile court decisions replaced the decisions of natural parents who were unable or unwilling to intervene in delinquent or neglected children's lives.<sup>26</sup> These juvenile proceedings were viewed as "civil" in nature, where it removed juveniles from the adult criminal system into a system that offered more flexible treatments.<sup>27</sup> The goal was to provide individual, flexible treatment that focused on the child's needs rather than the crime.<sup>28</sup> This goal was furthered by the rejection of traditional criminal prosecution procedures; instead, juvenile courts eliminated juries, stopped applying the rules of evidence, created private proceedings, and labeled juveniles "delinquent" rather than "guilty" of a specific crime.<sup>29</sup> After a delinquency finding, the juvenile

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21. Caulum, *supra* note 18, at 747; Preciado, *supra* note 14, at 576 ("[J]uveniles, because of their age, were more vulnerable and led astray more easily than adults.").

22. Preciado, *supra* note 14, at 576 ("The punitive approach was too limited for a court that looked holistically at the situation of the youth, as opposed to a criminal law system that focused on punishment and the protection of society.").

23. *Id.* (suggesting that the juvenile justice courts were founded under a belief that "youths were amenable to change").

24. Melli, *supra* note 13, at 379 (highlighting that the juvenile court was intended for all problems with children).

25. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 147-48 (1984).

26. *Id.* at 148.

27. *Id.* at 149.

28. *Id.* at 150.

29. *Id.* at 150-51.

was committed to an institution for correction, where the juvenile was to either be released after rehabilitation or kept in custody until the juvenile reached the age of majority.<sup>30</sup>

While the objective of juvenile court was early intervention for minor criminal or delinquent conduct, there was little consideration as to how the juvenile court would address serious juvenile crime.<sup>31</sup> As a result, many states gave criminal courts jurisdiction over more serious offenses, especially those crimes considered to be felonies.<sup>32</sup> This distinction between delinquent offenses and more serious offenses meant that a prosecutor's charging decision ultimately determined whether the juvenile would be subjected to the traditional criminal court proceedings or juvenile court proceedings.<sup>33</sup> A child under juvenile court jurisdiction would not be subject to the procedures of criminal court, including those basic Constitutional rights,<sup>34</sup> because the focus on rehabilitation and flexible treatment outweighed a juvenile's access to the due process afforded to those cases seen before adult criminal court.<sup>35</sup> In the 1920s, criticisms of the juvenile court proceedings began to arise because of concerns that the juvenile courts had no procedural formalities and judges had too much discretion in treatment.<sup>36</sup> It was not until the 1960s that the U.S. Supreme Court began to recognize that juveniles under the juvenile court proceedings were not afforded due process protections or effective rehabilitation services.<sup>37</sup> This concern was expressed in the 1967 Supreme Court decision, *In re Gault*.<sup>38</sup>

*In re Gault* was the landmark case that demonstrated the lack of due process given to those juveniles subject to juvenile court proceedings.<sup>39</sup> This case took place in Arizona and involved a fifteen-year-old who allegedly made lewd and

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30. Melli, *supra* note 13, at 380 ("The treatment had no relationship to the crime involved and there was great flexibility" depending on lack of resources.).

31. *Id.* (noting several reasons why serious juvenile crime was not addressed and suggesting that the emphasis on minor criminal conduct may be due to the relatively small amount of serious criminal conduct committed by juveniles at the time the code was created or the likelihood that juvenile court was not to have jurisdiction over those committing serious crimes).

32. *Id.* at 382.

33. *Id.*

34. *Id.* at 384 ("The assumption of the founders of the juvenile court had been that the state, acting in the best interest of the child, would so fully protect the juvenile that there would be no need for traditional due process protections.").

35. See Tamar R. Birckhead, *Access to Justice: Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond: Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 65–66 (2012).

36. *Id.*

37. *Id.* at 66–67.

38. *Id.* at 66; *In re Gault*, 387 U.S. 1 (1967).

39. Birckhead, *supra* note 35, at 67.

offensive phone calls.<sup>40</sup> As a result of the phone calls, the juvenile was sentenced to six years and committed to an institution until he reached the age of majority.<sup>41</sup> Unlike the juvenile in *Gault*, an adult convicted of the same conduct could be sentenced to no more than sixty days in jail under the corresponding criminal code.<sup>42</sup>

In considering the due process rights afforded to those tried in criminal proceedings, the Supreme Court found the Juvenile Code of Arizona was invalid because it did not provide “adequate notice of the charge and the hearing” and gave no advice to the juvenile regarding his constitutional rights, such as the right to counsel or right to confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review.<sup>43</sup> This landmark case opened the door to reconsidering the flexible and informal nature of juvenile court proceedings.<sup>44</sup> It led to many states implementing more formal procedures and guidelines similar to those used in criminal court in the late 1970s and early 1980s.<sup>45</sup>

Following the *Gault* decision, the Supreme Court continued to define the due process rights outlined in the juvenile court.<sup>46</sup> In *In re Winship*, a case heard in 1970, the Supreme Court ruled that the reasonable doubt standard applied in juvenile adjudications.<sup>47</sup> However, in 1971, the Supreme Court also refined juvenile due process rights in *McKeiver v. Pennsylvania* where the Court held there was no constitutional right to a juvenile jury trial.<sup>48</sup> The Court reasoned a constitutional right to a jury would cause juvenile court to be too adversarial because fairness did not require fact-finding through a jury.<sup>49</sup> This decision departed from *Gault* and limited the amount of due process rights afforded to juveniles in an attempt to remain focused on the original intent of

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40. Melli, *supra* note 13, at 385; *In re Gault*, 387 U.S. at 4.

41. Melli, *supra* note 13, at 385. Note that the age of majority was twenty-one at the time and the juvenile’s family was also required to file a writ of habeas corpus in order to challenge the commitment because the juvenile court at this time did not allow appeals. *Id.*

42. *Id.*

43. *In re Gault*, 387 U.S. at 10.

44. Melli, *supra* note 13, at 386.

45. *Id.* (“*Gault* was followed by the incorporation of other criminal law protections into the procedures of the juvenile court—the requirement of proof beyond a reasonable doubt and the prohibition against double jeopardy.”) (citations omitted).

46. *In re Winship*, 397 U.S. 358, 367 (1970).

47. *Id.* at 368.

48. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550–51 (1971).

49. Preciado, *supra* note 14, at 580 (“The Court reasoned that to recognize a constitutional right would change the nature of the juvenile court by making it too adversarial and formal, effectively going against the original design of the early juvenile court’s intentions.”).

juvenile court to be less formal and more rehabilitation focused.<sup>50</sup>

The due process reforms transformed the juvenile court system from a rehabilitation model to a more adversarial model.<sup>51</sup> Not only did juvenile courts begin to focus on criminal conduct and due process rights following landmark decisions like *Gault*, but widespread concern that juveniles were being committed until the age of majority without successful rehabilitation demonstrated the need to initiate proportionate sentencing.<sup>52</sup> Therefore, many states began setting definite terms of commitment, with possible court-ordered extensions to ensure both equitable sentencing among juveniles and that juvenile sentences are comparable to adult sentencing for similar criminal conduct.<sup>53</sup> Under the more adversarial, equitable form of juvenile justice, punishment began to reflect the seriousness of the offense while considering the criminal code's sentencing limitations for the same crime if committed by an adult.<sup>54</sup> This in turn caused courts and legislatures to consider how to handle more serious juvenile offenders, or rather, those offenders whose conduct was deemed too heinous for the punishments available under the juvenile justice code.<sup>55</sup>

While more formal procedures and more proportionate sentencing have been introduced in juvenile court proceedings to create a more criminalized juvenile court system, the juvenile system by nature is only meant to retain control over delinquent juveniles until they reach the age of majority.<sup>56</sup> Therefore, many states have created legislation that removes serious offenders from the juvenile court jurisdiction and waives those offenders into the adult system to ensure more appropriate sentencing.<sup>57</sup>

#### *B. Wisconsin's Juvenile Justice Code and Classification of Serious Juvenile Offenders*

Prior to 1996, the Wisconsin's Children's Code aimed to protect the best

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50. See *McKeiver*, 403 U.S. at 545.

51. Melli, *supra* note 13, at 387 (mentioning three significant juvenile court reforms, "the limitation of delinquency to criminal conduct, the introduction of prosecuting attorneys, and determinate and proportionate sentencing").

52. *Id.* at 389 ("Looking at the juvenile court system from the perspective of the criminal justice system, reformers were concerned about the fairness of juvenile court open-ended disposition.").

53. *Id.* (for example, in *Gault*, the minor was sentenced to six years although the maximum adult sentence was a sixty-day jail sentence).

54. *Id.* at 390.

55. *Id.* at 390–91.

56. *Id.* at 392 (noting that "criminalization" of the juvenile court was a response to public concern that the creation of a rehabilitation-focused juvenile court had failed, which resulted in an increased use of criminal court jurisdiction for serious juvenile offenders and harsher penalties).

57. *Id.*

interest of the child and help those children in need of protection.<sup>58</sup> Following legislative reform in July of 1996, the Juvenile Justice Code, which is codified in Chapter 938 of the Wisconsin Statutes, began to shift focus by moving away from rehabilitation and more towards punishment and juvenile accountability, where delinquent offenders were considered separate from status offenders.<sup>59</sup>

The Code underwent remarkable changes, such as adopting the age of ten to be the threshold for delinquency in order to establish accountability at an earlier age and allowing seventeen-year-old juveniles to be prosecuted under adult criminal court.<sup>60</sup> Furthermore, the Code expanded original criminal jurisdiction to juveniles ten and older who “commit[] or attempt[] to commit first-degree intentional homicide, or who have committed first-degree reckless homicide, or second degree intentional homicide.”<sup>61</sup> Additionally, Wisconsin abolished the juvenile’s right to a jury trial.<sup>62</sup> The Wisconsin Juvenile Justice Code exemplifies the transition from the original purpose of the juvenile court to rehabilitate the youth and prevent continued criminal conduct to a more adversarial process that focuses on accountability.<sup>63</sup> The transition has left gaps in how to approach juvenile justice and the gap of greatest concern is how a court is to treat serious juvenile offenders and whether original adult court jurisdiction is the answer.<sup>64</sup>

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58. Preciado, *supra* note 14, at 584–85.

Prior to July 1, 1996, the juvenile code was listed under Chapter 48 of the Wisconsin Statutes, which maintained the same legislative intent for all youths, whether labeled “child victim” or “juvenile offender.” As of July 1, 1996, the Code was renamed the Juvenile Justice Code and now resides as Chapter 938, a largely symbolic move that has pushed juveniles next to the Criminal Code, serving as a warning to juveniles that “they’re almost there.”

*Id.* at 585.

59. *Id.* at 585–86. (“The JJC makes an effort to deal only with juvenile delinquency and not commingle delinquent juveniles, or those who violate the law, with those juveniles who are in need of protection. Juveniles in need of protection are not carried over into Chapter 938, but are left behind in Chapter 48 of the Children’s Code.”). Note that status offender refers to an offense that is punishable because the offender is a juvenile where the same offense would not be subject to a criminal charge if the offender was an adult. *See* WIS. STAT. § 938.999 (2013–2014).

60. Preciado, *supra* note 14, at 586 (“[S]eventeen, as opposed to eighteen, ‘would benefit early intervention programs and impose greater accountability for the most mature juveniles who violate criminal laws.’”).

61. *Id.* (noting that the decrease in age from twelve to ten has “[t]he effect [] that a ten-year-old can now be held delinquent, whereas previously he or she would have been considered in need of protection”).

62. *Id.* at 587 (stating that jury trials are expensive and are often used for negotiation of pleas, “which interferes with the rehabilitation and personal accountability goals of the juvenile justice system”).

63. Melli, *supra* note 13, at 392.

64. *See generally* Breann Boggs et al., *Treatment of Juveniles in the Wisconsin Criminal Court*

### III. JUVENILE COURT JURISDICTION VERSUS ORIGINAL ADULT JURISDICTION IN WISCONSIN

#### A. Waiver and Reverse Waiver Proceedings

Waiver and reverse waiver proceedings are a vital part of due process.<sup>65</sup> The transfer of juveniles to criminal court to be prosecuted under the adult criminal code has continuously been justified by finding that the juvenile court is not capable of handling those juvenile offenders who commit serious crimes and determining that handling those juveniles under an adult criminal court is best because the criminal court can impose harsher punishments.<sup>66</sup> This transfer policy was enacted in a large majority of states, including Wisconsin.<sup>67</sup> Further, states, like Wisconsin, made the transfer procedures easier by establishing “offense-based, categorical, and absolute alternatives to individualized, offender-oriented waiver proceedings in the juvenile court” or by lowering the age at which a juvenile is transferred automatically to adult criminal court jurisdiction.<sup>68</sup>

In Wisconsin, section 938.183(1) governs whether the adult court has exclusive original jurisdiction over juveniles.<sup>69</sup> As mentioned previously, a juvenile that has reached the age of seventeen at the time of the crime is prosecuted as an adult for any violations of the law.<sup>70</sup> However, juveniles younger than seventeen may be prosecuted as adults in criminal court as required by Wisconsin Statutes section 938.183.<sup>71</sup>

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*System: An Analysis of Potential Alternatives*, Robert M. La Follette School of Public Affairs (2008), <https://www.lafollette.wisc.edu/images/publications/workshops/2008-juvenile.pdf> [https://perma.cc/76XJ-CXSB]. See also Streit, *supra* note 15, at 43; Preciado, *supra* note 14, at 586–87.

65. See generally *Kent v. United States*, 383 U.S. 541 (1966).

66. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 81–82 (2000).

67. *Id.*; Melli *supra* note 13, at 392 (“A recently enacted provision of the juvenile delinquency statutes in Wisconsin is a good example of the trend to a criminalized approach to juveniles.”).

68. Bishop, *supra* note 66, at 84.

69. WIS. STAT. § 938.183(1).

70. 9 CHRISTINE WISEMAN & MICHAEL TOBIN, WISCONSIN PRACTICE SERIES, CRIMINAL PRACTICE AND PROCEDURE § 10:1 (2d ed. 2015).

71. *Id.*; WIS. STAT. § 938.183(1):

(1) JUVENILES UNDER ADULT COURT JURISDICTION. Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following:

(a) A juvenile who has been adjudicated delinquent and who is alleged to have violated s. 940.20 (1) or 946.43 while placed in a juvenile correctional facility, a juvenile detention facility, or a secured residential care center for children and youth or who has been adjudicated delinquent and who is alleged

Pursuant to Wisconsin Statutes section 938.183, any juvenile accused of battery or assault while in custody or any juvenile over the age of ten who is charged with attempted first-degree homicide, first-degree reckless homicide, or second-degree intentional homicide will be subject to the original jurisdiction of the criminal court.<sup>72</sup> Additionally, if a juvenile commits a crime after waiving juvenile court jurisdiction, during waiver proceedings, or after the adult criminal court had already exercised original jurisdiction over the juvenile the criminal court will retain jurisdiction.<sup>73</sup>

Unlike delinquency proceedings within juvenile court, a juvenile prosecuted in adult criminal court is subject to those penalties and punishments outlined by the criminal code.<sup>74</sup> Often, the sentencing associated with the criminal code is significantly harsher than the sentencing options available in juvenile court.<sup>75</sup> This difference in sentencing has led courts to adopt a waiver procedure where the juvenile court is able to assess the facts of the crime, the relevant waiver factors, and determine if the offender will be best served under the criminal code.<sup>76</sup>

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to have committed a violation of s. 940.20 (2m).

(am) A juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juveniles 10th birthday.

(ar) A juvenile specified in par. (a) or (am) who is alleged to have attempted or committed a violation of any state criminal law in addition to the violation alleged under par. (a) or (am) if the violation alleged under this paragraph and the violation alleged under par. (a) or (am) may be joined under s. 971.12 (1).

(b) A juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation following waiver of jurisdiction under s. 48.18, 1993 stats., or s. 938.18 by the court assigned to exercise jurisdiction under this chapter and ch. 48 or if the court assigned to exercise jurisdiction under this chapter and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending.

(c) A juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation over which the court of criminal jurisdiction had original jurisdiction under this section or if proceedings on a previous violation over which the court of criminal jurisdiction has original jurisdiction under this section are still pending.

72. WISEMAN, *supra* note 70.

73. *Id.*

74. *Id.*

75. Vielmetti, *supra* note 2 (discussing how sentencing options differ depending on whether the girls being prosecuted in the Slenderman trial are under juvenile court jurisdiction or adult court jurisdiction, where the juvenile system allows a maximum of three years of punishment rather than a larger sentence under adult criminal code jurisdiction).

76. WISEMAN, *supra* note 70, § 10:6.

A “waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile” because the juvenile court has original jurisdiction along with special rights and immunities over juveniles that are unavailable in the criminal code.<sup>77</sup>

A landmark case demonstrating the impact of the waiver hearing is *Kent v. United States*.<sup>78</sup> In *Kent*, the Supreme Court held that a hearing must be given to the juvenile prior to allowing the waiver order where an offender is entitled to a “meaningful review” of the facts that motivate the waiver and a detailed explanation of the conclusion of the court.<sup>79</sup> Moreover, the Supreme Court held that under prior precedent,<sup>80</sup> the offender is entitled to legal counsel as well as a hearing to meet the minimum due process rights afforded to juveniles.<sup>81</sup> Following the *Kent* decision in 1966, the judicial waiver process in courts across the country has become increasingly formalized where each juvenile is given a formal hearing during which the waiver request is evaluated according to the state’s explicit criteria.<sup>82</sup> For instance, in Wisconsin, a juvenile that is subject to a waiver hearing is afforded the same rights as a criminal defendant with the exception of a jury and the rules of evidence.<sup>83</sup>

Pursuant to Wisconsin Statutes sections 938.18(4) and 938.18(1) and (5), the waiver hearing involves a two-part inquiry within the juvenile court.<sup>84</sup> Upon receiving a petition requesting waiver of jurisdiction, the juvenile court determines if the proceedings have prosecutorial merit.<sup>85</sup> If there is sufficient evidence to demonstrate the juvenile “probably committed” the crime, the state will meet the burden of proving prosecutorial merit.<sup>86</sup> Then, the court considers if the jurisdictional factors under Wisconsin Statutes section 938.18(1) are present.<sup>87</sup>

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77. *Kent v. United States*, 383 U.S. 541, 556 (1966). For instance, the court in *Kent* discusses how juveniles under juvenile court jurisdiction are protected from publicity, are not jailed with adults, and can only be detained until the age of twenty-one. *Id.*

78. *Id.*

79. *Id.* at 561.

80. *Black v. United States*, 355 F.2d 104, 106–07 (D.C. Cir. 1963); *Watkins v. United States*, 343 F.2d 278 (D.C. Cir. 1964). Note that the due process rights available to juvenile offenders are equivalent to the due process rights available for adult offenders under the criminal code. *See id.*

81. *Kent*, 383 U.S. at 561–62 (citing *Pee v. United States*, 274 F.2d 556, 559 (D.C. Cir. 1959)).

82. Bishop, *supra* note 66, at 88–89.

83. WISEMAN, *supra* note 70, § 10:2.

84. *Id.* § 10:5.

85. *Id.*; *State v. Toliver*, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251.

86. WISEMAN, *supra* note 70, § 10:5. (“Thus, the juvenile court first determines whether the matter has prosecutive merit under Wis. St. § 938.18(4), and then determines whether to waive its jurisdiction under Wis. St. § 938.18(5), if indeed it found prosecutive merit to the charges.”).

87. WIS. STAT. § 938.18(1) (2013–2014) factors include the following:

Once the court establishes there is prosecutorial merit and a jurisdictional factor is met, the second part of the waiver inquiry is conducted.<sup>88</sup> During the second inquiry, the court determines whether to waive jurisdiction considering the criteria outlined in Wisconsin Statutes section 938.18(5).<sup>89</sup>

Upon consideration of the criteria, if the court determines there is clear and convincing evidence to demonstrate that it would be “contrary to the best interests of the juvenile or of the public to hear the case,” the judge can waive jurisdiction.<sup>90</sup> Only upon completion of the waiver hearing will the adult criminal

(a) The juvenile is alleged to have violated s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31, 943.10 (2), 943.32 (2), 943.87 or 961.41 (1) on or after the juvenile’s 14th birthday.

(b) The juvenile is alleged to have committed a violation on or after the juvenile’s 14th birthday at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9), that would constitute a felony under chs. 939 to 948 or 961 if committed by an adult.

(c) The juvenile is alleged to have violated any state criminal law on or after the juvenile’s 15th birthday.

88. WISEMAN, *supra* note 70, § 10:5. (“The second stage of the waiver hearing involves the juvenile court’s consideration of the criteria for waiver enumerated in Wis. St. § 938.18(5), and its determination to waive jurisdiction.”).

89. *Id.*; WIS. STAT. § 938.18(5) (2013–2014):

(5) CRITERIA FOR WAIVER. If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria:

(a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile’s physical and mental maturity, and the juvenile’s pattern of living, prior treatment history, and apparent potential for responding to future treatment.

(am) The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court’s jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile’s motives and attitudes, and the juveniles prior offenses.

(b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.

(c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.

(d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction.

90. § 938.18(6) (2013–2014).

court be given exclusive jurisdiction over the juvenile's proceedings.<sup>91</sup> However, if the petition for a waiver is uncontested the court will consider the capacity of the juvenile to knowingly, intelligently, and voluntarily decide not to contest waiver prior to evaluating the criteria outlined in Wisconsin Statutes section 938.18(5).<sup>92</sup>

To retain flexibility over the juvenile's criminal proceedings, the adult criminal court may conduct a "reverse waiver" proceeding to determine whether or not to transfer the case from criminal court to juvenile court despite the criminal court's original jurisdiction.<sup>93</sup> In *State v. Kleser*, the Wisconsin Supreme Court held that a juvenile has the right to a reverse waiver hearing following the criminal court's finding of probable cause to hold exclusive jurisdiction over the juvenile regarding the crime the juvenile was accused of.<sup>94</sup> The criminal court must retain jurisdiction unless the juvenile, during the course of the reverse waiver hearings, proves by a preponderance of evidence that each of the following factors is present:

- (a) [T]hat, if convicted, the child could not receive adequate treatment in the criminal justice system;
- (b) [T]hat transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense;
- (c) [T]hat retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused [under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable].<sup>95</sup>

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91. WISEMAN, *supra* note 70, § 10:6.

92. *Id.* § 10:5.

Whether the state is required to present testimony beyond the delinquency and waiver petitions to support the waiver determination during the second stage of the inquiry depends, according to the newly-enacted provisions of Wis. St. § 938.18(4)(b) and (4)(c), on whether the juvenile contests the waiver. If the waiver petition is uncontested by the juvenile, the court need only inquire into the juvenile's capacity to effect a knowing, intelligent and voluntary waiver of juvenile court jurisdiction. If the court is satisfied that the juvenile's decision not to contest the waiver meets the traditional criteria, no additional testimony need be taken. The court may make its determination to waive juvenile court jurisdiction on the record before it, although its determination must reflect the criteria enumerated in Wis. St. § 938.18(5).

93. *Id.* § 10:1.

94. *State v. Kleser*, 2010 WI 88, ¶ 128, 328 Wis. 2d 42, 786 N.W.2d 144.

95. WISEMAN, *supra* note 70 (quoting WIS. STAT. § 970.032(2)).

The *Kleser* court held that a juvenile must be able to offer evidence to satisfy his or her burden on all three elements, including evidence about the offense to put the act in context, but evidence cannot be offered to contradict the charged offense.<sup>96</sup> This reverse waiver hearing procedure was recently demonstrated in the *Slenderman* case, where the judge determined that the adult criminal court must retain exclusive and original jurisdiction over the two twelve-year-old girls because transferring jurisdiction to juvenile court would depreciate the seriousness of the pre-meditated offense.<sup>97</sup> Following the decision, the Wisconsin Court of Appeals affirmed the lower court's decision leaving the girls subject to the criminal court's jurisdiction because of the seriousness of the offense.<sup>98</sup>

The judicial waiver statutes often gave judges broad discretion in considering a multitude of eligibility factors, and while their discretion was limited by the *Kent* decision, the factors are subjectively applied to each juvenile and the decision as to what court holds original and exclusive jurisdiction affects the sentencing options available if the juvenile is found guilty.<sup>99</sup> The sentencing options available differ so greatly between those juveniles placed under the original and exclusive jurisdiction of the adult criminal court than those juveniles who remain in the Juvenile Justice Code that numerous law reviews have discussed both the benefit and harm that may come from prosecuting children who commit "serious" crimes under the adult system.<sup>100</sup>

*B. Sentencing in Wisconsin: The Difference Between Juvenile Court Sentencing and Adult Criminal Court Sentencing*

A juvenile can be placed under adult court jurisdiction by judicial waiver, automatic transfer, prosecutorial discretion, or because the adult court has original jurisdiction,<sup>101</sup> as is in the *Slenderman* case.<sup>102</sup> While states vary on how to define the jurisdiction and purpose of juvenile courts, all states have enacted

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96. *Id.* (stating that evidence to contradict the offense may not be presented at the reverse waiver hearing but is permitted at the preliminary examination).

97. Vielmetti, *supra* note 2.

98. Associated Press, *Wisconsin Girls Should Be Tried as Adults in Slender Man Attack, Appeals Court Rules*, FOX NEWS U.S. (July 27, 2016), <http://www.foxnews.com/us/2016/07/27/wisconsin-girls-lose-appeal-in-slender-man-attack.html> [<https://perma.cc/59TH-XBUJ>].

99. Bishop, *supra* note 66, at 88–89.

100. *Id.* at 84–85; Melli, *supra* note 13, at 392; Streit, *supra* note 15, at 39.

101. Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U. L. REV. 141, 141 (2004).

102. Vielmetti, *supra* note 2.

some waiver laws that allow juveniles to fall under adult criminal court jurisdiction based on age or seriousness of their offense.<sup>103</sup> As a result, juveniles prosecuted under a state's juvenile code will experience a number of procedural differences than a juvenile prosecuted under the adult criminal code.<sup>104</sup>

First, a juvenile in adult criminal court will experience longer, more drawn out proceedings where their anonymity and confidentiality will not be protected.<sup>105</sup> A juvenile in juvenile court will remain anonymous and information will be confidential and his or her civil rights, such as the right to vote, will not be affected.<sup>106</sup> Second, juveniles under both systems are given due process rights, including the right to counsel, but only juveniles prosecuted in the adult system will have a right to a jury.<sup>107</sup> Third, the juvenile system includes flexibility to terminate or extend supervision as a result of a juvenile offender's response to his or her initial confinement.<sup>108</sup> Last, and potentially most significant, the sentencing and punishments available to judges are determined by the code under which the juvenile is being prosecuted.<sup>109</sup>

The juvenile code, despite its increased focus on punishment, takes a more rehabilitative and deterrent approach, which limits a judge's power to impose lengthy incarceration sentences.<sup>110</sup> On the other hand, the adult criminal code exposes a juvenile to longer, harsher sentences often mandated by statute, which results in the juvenile spending time incarcerated with adults in state

103. Langemo, *supra* note 101, at 141 ("To accomplish this goal [of punishing and deterring juvenile crime], states have made it easier to waive juvenile defendants into adult court by utilizing one of three methods: judicial waiver, automatic transfer, or prosecutorial discretion.").

104. *Id.* at 145.

105. *Id.* at 151–52.

106. *Id.* at 152.

107. *Id.* at 151–52.

108. Streit, *supra* note 15, at 40.

109. Langemo, *supra* note 101, at 154 ("While some states consider youthfulness as a mitigating factor, it is only one factor of many considered when imposing a sentence and is within the judge's discretion. Under federal sentencing guidelines, youthfulness, as a mitigating factor, is explicitly rejected.").

110. *Id.* at 153.

The majority of states permit the imposition of life without parole or even mandate it upon conviction of juveniles in adult court. For example, in Washington, eight-year-olds can be subject to life without parole, and ten-year-olds in Vermont can also be sentenced to life without parole if convicted in adult court. In Florida, Lionel Tate, at twelve years old, killed a playmate and was tried in adult court and convicted of first-degree murder. The conviction carries a mandatory life without parole sentence.

Note, however, that the U.S. Supreme Court has invalidated statutes that mandate life without parole for juveniles.

prisons.<sup>111</sup> While state statutes vary on the sentencing options available to a judge regarding juveniles prosecuted for serious crimes either in criminal court or in juvenile court, this Comment will only discuss the sentencing options available to judges within Wisconsin regarding those juveniles who are eligible for adult criminal court proceedings based on age and seriousness of the offense.<sup>112</sup>

### C. *Sentencing in Light of the Serious Juvenile Offender Program*

The Wisconsin Juvenile Justice Code assumes juvenile offenders will quickly improve their behaviors through rehabilitation-focused programs, and as a result the usual disposition length is one year with the possibility of annual reviews.<sup>113</sup> For juveniles who commit more serious offenses but remain under the juvenile court's jurisdiction, Wisconsin has a Serious Juvenile Offender Program that allows a juvenile to stay in custody for up to three years.<sup>114</sup> Alternatively, a juvenile who is retained under the adult criminal court's jurisdiction faces long periods of incarceration with less focus on rehabilitation.<sup>115</sup> To understand how dramatically the sentencing may differ under the two court systems, the Slenderman case, as discussed earlier, can serve as an example.<sup>116</sup>

Two twelve-year-old girls were charged with attempted first-degree intentional homicide in Wisconsin, a serious "Class B" offense that automatically places the girls under adult criminal court jurisdiction pursuant to Wisconsin Statutes section 938.183(1)(am).<sup>117</sup> In a reverse waiver hearing that aimed to place the girls back under juvenile court jurisdiction, the trial court judge ruled that a three-year incarceration with supervision until age eighteen in the juvenile justice system was not sufficient punishment.<sup>118</sup> Specifically, the judge expressed concern over the inability to supervise the girls after they reach the age of majority and how a lighter sentence under the Juvenile Justice Code may

111. *Id.* at 152–53.

112. Bishop, *supra* note 66, at 115.

113. Streit, *supra* note 15, at 39.

The juvenile system assumes that offenders will make fairly rapid developmental improvements with the assistance of appropriate rehabilitation programs. The normal disposition length in juvenile court is one year, with the possibility of annual reviews if the targeted changes have not yet occurred. For the most serious offenses, initial dispositions can be to a multiphase Serious Juvenile Offender Program . . . .

114. *Id.* at 39–40; WIS. STAT. § 938.538.

115. Streit, *supra* note 15, at 39.

116. Vielmetti, *supra* note 2.

117. *Id.*; WIS. STAT. § 938.183(1)(am).

118. Vielmetti, *supra* note 2.

depreciate the seriousness of the offense and may not deter or protect the public from future crimes.<sup>119</sup>

Under the Juvenile Justice Code in Wisconsin, the type of offense committed by the juvenile determines the classification of the offense, which dictates the sentencing options available to the presiding judge.<sup>120</sup> A juvenile charged with first-degree intentional homicide falls under a “Class A” distinction, whereas a juvenile charged with attempted first-degree intentional homicide, second-degree intentional homicide, or first-degree reckless homicide is viewed as a “Class B” distinction.<sup>121</sup> While the Serious Juvenile Offender Program in Wisconsin covers both “Class A” and “Class B” offenses, the available sentencing options differ.<sup>122</sup> The two twelve-year-old girls, as “Class B” offenders, could receive a maximum sentence of three years in secure custody with supervision until age eighteen under Wisconsin’s Serious Juvenile Offender Program.<sup>123</sup> However, if either girl was classified as a “Class A” juvenile offender she could be held in secure custody in a juvenile correctional facility up until her twenty-fifth birthday.<sup>124</sup> This limit on supervision often leads to an adult court retaining exclusive jurisdiction because it finds a longer sentence is necessary to not only deter the juvenile but to protect the public.<sup>125</sup>

For a juvenile under adult criminal court jurisdiction, the sentencing available for first-degree intentional homicide would not necessarily be limited to secure custody until the age of twenty-five but would more likely result in a longer sentence.<sup>126</sup> In Wisconsin, first-degree intentional homicide is a “Class A” felony that carries a mandatory life sentence.<sup>127</sup> A twelve-year-old juvenile charged with intentional first-degree homicide is automatically subject to adult criminal court jurisdiction and assuming the juvenile is not reverse waived to juvenile court, the juvenile will be subject to that mandatory life sentence.<sup>128</sup>

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119. *Id.* (noting this fear was also expressed as a factor in the court of appeals decision to affirm the trial court judge’s ruling).

120. § 940.01(1)(a); § 939.32(1)(a).

121. § 938.538(3)(a)(1); § 938.538(3)(a)(1m); § 939.32(1)(a); § 940.01(1)(a).

122. § 939.32(1)(a); § 940.01(1)(a).

123. § 939.32(1)(a); § 938.538(3)(a)(1).

124. § 938.538(3)(a)(1m); § 940.01(1)(a); Streit, *supra* note 15, at 40 (stating that the maximum sentences for adults are increasing in length so the disparity in confinement between juvenile court and adult court has grown making it easier to move more juveniles to adult court jurisdiction).

125. Vielmetti, *supra* note 2.

126. § 938.538(3)(a)(1m); § 940.01(1)(a); Streit, *supra* note 15, at 40.

127. § 939.50(3)(a); § 940.01(1)(a). *See* State v. Deal, 2010AP1804-CR, 2011 Wis. App. LEXIS 753 at \*9–10 (September 20, 2011).

128. § 939.50(3)(a).

While the Supreme Court's decision in *Roper v. Simmons* prevented the imposition of the death penalty upon juvenile offenders under the age of eighteen, Wisconsin courts have held that neither *Roper* nor the Eighth Amendment preclude a court from sentencing a juvenile who committed first-degree intentional homicide to life imprisonment.<sup>129</sup> Thus, in Wisconsin, juveniles convicted of first-degree intentional homicide would be held in secure custody at a juvenile correctional facility until their eighteenth birthday, at which time they would be transferred to a state prison to serve the remainder of their sentence.<sup>130</sup>

Similarly, in the Slenderman case, the two twelve-year-old girls charged with attempted first-degree intentional homicide under the adult criminal code could be sentenced to a maximum term of up to sixty years of imprisonment if they are convicted of the charged crime of attempted first-degree intentional homicide.<sup>131</sup>

The maximum sentences available in adult criminal court proceedings result in significantly larger potential sentences than those maximum sentencing options available in the juvenile court proceedings.<sup>132</sup> The two twelve-year-old girls, if convicted of attempted first-degree intentional homicide in the juvenile justice system, could face up to three years of secure custody in a juvenile correctional facility with continued supervision until their eighteenth birthday.<sup>133</sup> However, if the two twelve-year-old girls are convicted of attempted first-degree intentional homicide under the adult criminal code they could face up to sixty years in prison.<sup>134</sup> Three years of custody may seem to be a disproportionately light penalty for a twelve-year-old stabbing a friend nineteen times, but on the other hand sentencing a juvenile to a large remainder of their life in prison may seem disproportionately harsh.<sup>135</sup> While there is no mandatory minimum for attempted first-degree intentional homicide and a judge may not necessarily impose the maximum term of imprisonment, there is no guarantee that the troubled juveniles will not be subjected to a significant amount of time in adult prison upon reaching the age of majority.<sup>136</sup>

In Wisconsin, the options presented above—a maximum sentence of three years under the Juvenile Justice Code or a maximum sentence of up to sixty

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129. See generally *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *State v. Ninham*, 2011 WI 33, ¶ 77, 333 Wis. 2d 335, 797 N.W.2d 451.

130. Vielmetti, *supra* note 2.

131. §§ 939.32(1)(a), 939.50(3)(b).

132. § 938.538(3)(a)(1); § 939.50(3)(b); Vielmetti, *supra* note 2.

133. § 938.538(3)(a)(1).

134. §§ 939.32(1)(a), 939.50(3)(b).

135. Vielmetti, *supra* note 2.

136. § 939.50(3)(b).

years under the adult criminal code—are the only options available to those juveniles who commit “Class B” felony offenses.<sup>137</sup> While Wisconsin is aware of this gap in sentencing options, it has only remedied the gap for juveniles that commit “Class A” offenses.<sup>138</sup> The Serious Juvenile Offender program recognizes the need for expanded supervision and allows juveniles found guilty of “Class A” offenses to remain in a juvenile correctional facility under secure custody until their twenty-fifth birthday.<sup>139</sup> This option is currently not available for those juveniles guilty of “Class B” offenses.<sup>140</sup> Therefore, a juvenile who is convicted of attempted first-degree intentional homicide in adult criminal court may be subjected to sixty years imprisonment to be carried out in state prison after his or her eighteenth birthday but a juvenile that is convicted of first-degree intentional homicide in juvenile court may be permitted to carry out their sentence in a juvenile correctional facility until they turn twenty-five.<sup>141</sup> This gap is what leaves the court attempting to decide whether to subject a “Class B” offender to a relatively short time in secure custody or to carry out a harsh and lengthy sentence.<sup>142</sup> This gap is what must be remedied to allow juvenile court judges more discretion in sentencing “Class B” offenders.<sup>143</sup>

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137. § 938.538(3)(a)(1); § 939.50(3)(b); Vielmetti, *supra* note 2.

138. § 938.538(3)(a)(1m); *see* Streit, *supra* note 15, at 40.

139. § 938.538(3)(a)(1m); *see* Streit, *supra* note 15, at 40.

140. § 938.538 (3)(a)(1).

141. § 938.538(3)(a)(1)–(1m); *see* Streit, *supra* note 15, at 40.

142. Vielmetti, *supra* note 2.

143. It important to note that other states have attempted to address the same gap within their legislation. For instance, in Montana, the legislature created blended sentencing for juvenile offenders under the Extended Jurisdiction Prosecution Act (EJPA). Robert E. Henderson, Comment, *Blended Sentencing in Montana: A New Way to Look At An Old Problem*, 61 MONT. L. REV. 337, 339 (2000). In 1995, the original EJPA was created to allow youth court judges to retain jurisdiction over juveniles that committed “felony” offenses by imposing juvenile and disposition and adult sentences, where the adult sentence was stayed unless the juvenile committed another offense. *Id.* In 1999, the EJPA was amended to avoid subjecting juveniles to potentially longer sentences as the original EJPA did by combining juvenile disposition with adult sentences. *Id.* The legislature believed the EJPA’s focus on meaningful and serious consequences through extended juvenile jurisdiction would be an effective forum for rehabilitation and treatment. *Id.* at 353. While the revised EJPA aimed to extend juvenile jurisdiction for some offenses, it also removed some serious offenses, such as offenses “punishable by death, life imprisonment, or a sentence of 100 years,” from the program recognizing that some juvenile offenses should remain under adult criminal jurisdiction. *Id.* at 354. Despite its attempts, EJPA failed to address the gap between those individuals that are able to benefit from the extended juvenile jurisdiction where the EJPA tends to extend jurisdiction to only those juveniles that commit property offenses. *Id.*

IV. PROPOSAL: EXPAND SENTENCING OPTIONS FOR “CLASS B” SERIOUS JUVENILE OFFENDERS UNDER THE JUVENILE JUSTICE CODE

The Wisconsin Juvenile Justice Code needs to be altered to allow presiding judges to sentence “Class B” juvenile offenders to expanded supervision in juvenile correctional facilities under the Serious Juvenile Offender Program, similar to the sentencing options available for “Class A” juvenile offenders. Specifically, Wisconsin should extend the length of time in a juvenile correctional facility available to “Class B” serious juvenile offenders until the age of twenty-five, as it is for “Class A” serious juvenile offenders.<sup>144</sup> “Class A” and “Class B” juvenile offenders are considered serious offenders and are subject to original adult jurisdiction for criminal proceedings under Wisconsin Statutes section 938.183.<sup>145</sup>

Wisconsin, through its reconstruction of the former Children’s Code into the Juvenile Justice Code, has increasingly aimed to issue punishment, provide protection for society, and afford juveniles due process rights.<sup>146</sup> Despite this change, the Serious Juvenile Offender Program is limited to juveniles ages fourteen or over who have committed or conspired to commit a variety of serious crimes,<sup>147</sup> and juveniles over the age of ten adjudicated for attempting to commit or committing a violation of section 940.01 or committing section 940.02 or section 940.05 offenses.<sup>148</sup>

Wisconsin Statutes section 938.538 outlines the guidelines of the Serious Juvenile Offender Program, including the sanctions allowed for “Class A” offenders.<sup>149</sup> The statute explicitly allows the court to hold a juvenile who committed an offense, considered a “Class A” felony if committed by an adult, in a Type 1<sup>150</sup> juvenile correctional facility until the juvenile reaches twenty-five

144. § 938.538(3)(a)(1m).

145. § 938.183(1)(am).

146. Preciado, *supra* note 14, at 575.

147. WIS. STAT. § 938.34(4h)(a) outlines what conditions must apply in order to place a juvenile in the Serious Juvenile Offender Program:

(a) The juvenile is 14 years of age or over and has been adjudicated delinquent for committing or conspiring to commit a violation of s. 939.32(1)(a), 940.03, 940.06, 940.21, 940.225(1), 940.305, 940.31, 941.327(2)(b)4., 943.02, 943.10(2), 943.23(1g), 943.32(2), 948.02(1), 948.025(1), or 948.30(2) or attempting a violation of s. 943.32(2) or the juvenile is 10 years of age or over and has been adjudicated delinquent for attempting or committing a violation of s. 940.01 or for committing a violation of s. 940.02 or 940.05.

148. *Id.*

149. *Id.*; § 938.538(3)(a)(1m).

150. Pursuant to WIS. STAT. § 938.02, a Type 1 juvenile correctional facility is a correctional facility excluding those under sections 938.533(3)(b), 938.538(4)(b), or 938.539(5) whereas a Type 2 juvenile correctional facility is a correctional facility that meets the criteria solely because of s.

years old.<sup>151</sup> However, this extension is only available to “Class A” juvenile offenders whereas all other juveniles placed in a juvenile correctional facility cannot be held for more than three years.<sup>152</sup>

Presumably, the reason for this distinction is that “Class A” felonies are considered the most serious offenses.<sup>153</sup> However, it does not seem appropriate to allow “Class A” offenders guilty of first-degree intentional homicide to be prosecuted under the Juvenile Justice Code, where they are placed under the serious offender program giving judges the discretion to extend their supervision until the age of twenty-five, but to not allow judges the same option for those “Class B” offenders guilty of attempted first-degree intentional homicide.<sup>154</sup> As a result, “Class B” offenders guilty of a heinous and serious crime with a less serious outcome are limited to three years under the Juvenile Justice Code.<sup>155</sup> To prevent these offenders from being rewarded with seemingly light sentences, “Class B” offenders may be more likely kept under adult criminal court original jurisdiction to ensure the judge has increased sentencing options available to meet the factual circumstances of the juvenile offender’s case.<sup>156</sup>

This Comment aims to not only expose this gap in sentencing, but proposes a slight change in legislation that would prevent the presiding judge from being forced to accept a lower sentence than believed necessary under the Juvenile Justice Code or subject the juvenile offender to the potentially harsh sentences available under the adult criminal code. Other scholars have noted the potential for harsh dispositions for young-adult offenders between the ages of seventeen and twenty-four under Wisconsin’s current truth-in-sentencing regime and have proposed concurrent non-truth-in-sentencing options to allow juveniles to earn early release through good behavior.<sup>157</sup> While proposals such as the one suggested above aim to give judges more discretion in their sentencing by remedying the amount of time to be served it does not expand the sentencing options

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938.533(3)(b), 938.538(4)(b), or 938.539(5). Further, the Type 2 facilities are defined under WIS. STAT. section 938.357(4) where a juvenile placed in a Type 2 juvenile correctional facility or secured residential care center for children is under the supervision of the department of corrections and is considered to be in custody, being subject to the rules and discipline of the department of corrections.

151. § 938.538(3)(a)(1m).

152. *Id.*

153. Melli, *supra* note 13, at 390; Hon. Dennis Barry, *Juvenile Justice: A Wisconsin Blueprint For Change*, WIS. LAW., Mar. 1995, at 31.

154. § 938.538(3)(a)(1)–(1m).

155. *Id.*

156. Vielmetti, *supra* note 2.

157. Streit, *supra* note 15, at 41 (“For indeterminate sentences, judges issue a single total sentence and release is determined by the Parole Commission. The remaining unserved portion is parole time; for serious violations, authorities may revoke the offender’s parole and order the offender returned to prison.”).

for those offenders not considered “Class A.”<sup>158</sup> Failure to expand the sentencing options beyond three years under the Juvenile Justice Code still leaves the potential for harsh dispositions, which are generally objected to by the public.<sup>159</sup>

“Class B” offenders commit serious crimes, like “Class A” offenders, but are effectively punished for failing to complete a homicide under sentencing guidelines.<sup>160</sup> While “Class A” juvenile offenders, like “Class B” juvenile offenders, are often subjected to original jurisdiction in the adult criminal code, the sentencing available to judges regarding “Class A” offenders may make it more likely the juvenile’s reverse waiver will be granted in order to allow the juvenile access to rehabilitation and re-entry programs more prevalent in juvenile correctional departments.<sup>161</sup> This line of reasoning was expressed in the Slenderman reverse waiver decision by both the trial court judge and the court of appeals.<sup>162</sup> A “Class B” serious juvenile offender must be released after three years in the juvenile correctional facility, but the same offender can be held for a longer period of time to ensure proportionate punishment and protection of the public under the adult criminal code.<sup>163</sup> Thus, the reverse waiver considerations will not likely be deemed met as to justify transferring the juvenile back under juvenile court jurisdiction.<sup>164</sup> This problem would be eliminated if a judge could instead find that “Class B” offenders be subjected to supervision up until their twenty-fifth birthday in the Serious Juvenile Offender Program.<sup>165</sup>

In an era of rising violence and public concern regarding violent juvenile offenders, the inclusion of “Class B” serious juvenile offenders under Wisconsin Statutes section 938.538 (3)(a)(1m) and allowance of judges to sentence

158. *Id.*

159. *Id.* at 40–41; § 938.538(3)(a)(1).

160. § 938.538(3)(a)(1)–(1m).

161. Lahny R. Silva, *The Best Interest Is The Child: A Historical Philosophy For Modern Issues*, 28 BYU J. PUB. L. 415, 436 (2014).

162. Vielmetti, *supra* note 2.

163. § 938.538(3)(a)(1); § 939.50(3).

164. Vielmetti, *supra* note 2.; WISEMAN, *supra* note 70; WIS. STAT. § 970.032, which requires the criminal court to retain jurisdiction unless each of the following factors is present:

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable..

WIS. STAT. § 970.032(2)(a)–(c).

165. § 938.538; § 970.032.

“Class B” offenders to supervision beyond the three-year maximum imposed on non-serious juvenile offenders will avoid the need to maintain adult jurisdiction in order to protect the public.<sup>166</sup> Additionally, this modification to legislation will likely result in an increased number of juvenile offenders being reverse-waived to juvenile court jurisdiction, where the juvenile system has programs in place to help those juvenile offenders manage the years of adolescence that will be spent in custody.<sup>167</sup> This proposal does not recommend that judges change their considerations regarding waiver and reverse waiver procedures for serious juvenile offenders subjected to original adult criminal court jurisdiction but rather it suggests the need for legislative change that would generate greater flexibility in the sentencing of “Class B” juvenile offenders. While not all “Class B” juvenile offenders should be reverse-waived to juvenile court, those “Class B” offenders who would benefit from extended time with the programs provided under the juvenile justice system could remain under supervision instead of subjected to the harsh realities presented by placement in an adult correctional facility.<sup>168</sup>

This Comment does not suggest that the juvenile court should retain jurisdiction over offenders that are near the age of majority simply because they serve to benefit from the treatment available nor does it suggest that all “Class B” juvenile offenders should be placed under the Serious Juvenile Offender Program until their twenty-fifth birthday.<sup>169</sup> Rather, this proposal suggests creation of a third sentencing option for “Class B” juvenile offenders to parallel the sentencing options available for “Class A” juvenile offenders under the Serious Juvenile Offender Program. If the Wisconsin legislature were to adopt this proposal, the Serious Juvenile Offender Program would allow judges to sentence certain “Class B” offenders to extended placement beyond the age of majority to protect the public and determine appropriate length in sentencing while ensuring that those juvenile offenders can still benefit from the juvenile correctional facility programs.<sup>170</sup>

## V. CONCLUSION

Due to the nature of juveniles and the purpose of the Juvenile Justice Code, Wisconsin should amend the Serious Juvenile Offender Program outlined in

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166. § 938.538; § 970.032.

167. § 970.032; Vielmetti, *supra* note 2.

168. Streit, *supra* note 15, at 43.

169. § 938.538.

170. Streit, *supra* note 15, at 43.

Wisconsin Statutes section 938.538.<sup>171</sup> Specifically, Wisconsin should expand section 938.538 (3)(a)(1m), allowing “Class A” juvenile offenders to remain in a juvenile correctional facility or secured residential care center until the age of twenty-five to “Class B” juvenile offenders.<sup>172</sup> This amendment will not mandate that “Class B” juvenile offenders remain under juvenile jurisdiction until their twenty-fifth birthday nor will it extend original, exclusive juvenile jurisdiction to twenty-five.<sup>173</sup> This amendment will fill the gap that exists in sentencing options available to judges regarding the supervision of juveniles below the age of majority that commit serious crimes that would be considered a “Class B” felony under the adult criminal code.<sup>174</sup> By extending the ability to hold both “Class A” and “Class B” serious juvenile offenders to the age of twenty-five in juvenile correctional facilities, the offenses subject to original adult court jurisdiction for criminal proceedings will have similar sentencing options rather than being differentiated based on whether the violent offense was attempted or completed.<sup>175</sup>

Beginning with the history of Wisconsin’s Juvenile Justice Code, this Comment explored the purpose of the Juvenile Justice Code in Part I. This Comment differentiated between original, exclusive adult criminal jurisdiction in Part II discussed the use of waiver and reverse waiver proceedings for juveniles who commit serious offenses that potentially subject them to adult criminal court jurisdiction. Part II also outlined the Serious Juvenile Offender Program and highlighted the gap in sentencing options available to courts regarding “Class B” juvenile offenders. Finally, Part III detailed a proposed “third option” in sentencing “Class B” juvenile offenders that emulates the available options for sentencing “Class A” juvenile offenders.

By exposing the gap in sentencing and suggesting an amendment to Wisconsin Statutes section 938.538 to fill the gap, this Comment hopes to avoid the dilemma faced in the reverse waiver hearing in the Slenderman case due to current Wisconsin legislation.<sup>176</sup> Expanding supervision of “Class B” juvenile

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171. § 938.538(3)(a)(1m).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Vielmetti, *supra* note 2.

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offenders will remove the need to subject juveniles to adult criminal court jurisdiction and harsh sentences unless that reality is deemed necessary to protect the public.

DANIELLE S. SNYDER\*