

## A CAUTIONARY TALE: EXAMINING THE POTENTIAL IMPACT OF JUVENILE TRANSFER IN BRAZIL

*Jennifer L. Gebler*<sup>†</sup>

### INTRODUCTION

In 1993, *Proposta de Emenda à Constituição* (Proposal of Constitutional Amendment) 171 (PEC 171) was proposed in an effort to combat what was seen as a rise in violent crime committed by Brazilian youth.<sup>1</sup> If ratified in its original form, PEC 171 would reduce the age of criminal responsibility in Brazil from eighteen to sixteen years old.<sup>2</sup> While the Amendment did not gain traction when first introduced,<sup>3</sup> recent highly publicized juvenile crimes brought it to the forefront of Brazilian legislation in 2015.<sup>4</sup> The Amendment has since garnered a considerable amount of congressional support despite being fiercely condemned by the Brazilian president.<sup>5</sup>

The Brazilian government continues to debate the advisability of adopting the Amendment.<sup>6</sup> Pending a formal ratification or rejection of PEC 171, this Note addresses the potential implications of adopting such

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<sup>†</sup> J.D. 2017, Regent University School of Law; M.A. 2011, Old Dominion University. Special thanks to Professor Lynne Marie Kohm for her guidance, advice, and calming presence.

<sup>1</sup> Sam Aman, *Selective Adulthood: Brazil Moves to Lower Age of Criminal Responsibility*, COUNCIL ON HEMISPHERIC AFF. (May 29, 2015), <http://www.coha.org/selective-adulthood-brazil-moves-to-lower-age-of-criminal-responsibility/>. The original proposal by Congressman Domingos also suggests that modern juveniles are more mentally developed than the youth of previous decades and are therefore capable of understanding the consequences of their actions. *Id.*; see also Ministério Público, PEC 171/1993, <http://www.mprs.mp.br/infancia/legislacao/id2658.htm> (translation on file with J. Global Just. & Pub. Pol'y) (last visited Mar. 6, 2017).

<sup>2</sup> Aman, *supra* note 1.

<sup>3</sup> *Id.* It has been noted that PEC 171 likely did not “pass the necessary congressional hurdles” when first introduced because the political composition of congress at the time was less conservative. *Id.*

<sup>4</sup> *Id.* For instance, in 2014 fourteen-year-old Yorrally Dias Ferreira was murdered by her ex-boyfriend two days before he turned eighteen. This case made headlines due to the gruesome nature of the crime; “Ferreira’s killer filmed her bleeding body and spread the footage on the Internet, shocking the country and igniting social media networks.” *Id.*

<sup>5</sup> *Id.*; see also Associated Press, *Brazil’s Congress Reduces Age of Criminal Responsibility to 16*, GUARDIAN (July 2, 2015), <http://www.theguardian.com/world/2015/jul/02/brazil-age-of-criminal-responsibility-16> [hereinafter *Brazil’s Congress Reduces Age of Criminal Responsibility to 16*].

<sup>6</sup> See Aman, *supra* 1; see also *Brazil’s Congress Reduces Age of Criminal Responsibility to 16*, *supra* note 5.

legislation. Specifically, the similarity of the proposed Amendment to the current statutory guidelines permitting the transfer of juveniles to adult court in Virginia, allows for the application of a comparative criminal justice analysis.<sup>7</sup>

This Note contends that, based on decades of research citing the negative impact of juvenile transfer in Virginia,<sup>8</sup> Brazil should reject PEC 171 and instead strengthen its existing system of juvenile justice. Part I provides an overview of the social and legal context of juvenile justice in both Brazil and the United States. Part II addresses juvenile transfer in Virginia and its attendant consequences. Part III argues for the use of a comparative justice framework when examining the impact of transfer laws in Brazil. Finally, Part IV analyzes the potential consequences of reducing the age of criminal responsibility in Brazil and provides germane policy suggestions. Based on evidence from decades of research on the impact of transfer in Virginia, this Note concludes that the ratification of PEC 171 in Brazil will result in far-reaching, and likely unanticipated, negative consequences for both the Brazilian population at large and the Brazilian youth subjected to adult prosecution.

## I. BACKGROUND

### A. *Constitution of Brazil*

Largely due to the evolving nature of the Brazilian government, as well as several coups which resulted in brief periods of authoritarian leadership, Brazil operates under its seventh Constitution.<sup>9</sup> The Constitution is “federative” in that it grants “greater legislative (and unifying) authority to the central government with state legislation following national direction.”<sup>10</sup> The Brazilian Constitution is “the supreme law of the land . . . [and] binds all public actors, all state departments and all powers.”<sup>11</sup> As contrasted with the United States Constitution, the Brazilian Constitution is expansive and enumerates a wide array of social and political rights, including the rights of

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<sup>7</sup> See discussion *infra* Part III.

<sup>8</sup> See discussion *infra* Part II.

<sup>9</sup> Jesse Burgess, Comment, Let them Eat Cake: Constitutional Rights to Food, 18 WILLAMETTE J. INT'L L. & DISPUTE RES. 256, 268 (2010); see also *Brazil – Legal History*, FOREIGN LAW GUIDE [hereinafter *Legal History*], [http://0-referenceworks.brillonline.com.library.regent.edu/entries/foreign-law-guide/brazil-legal-history-COM\\_037301](http://0-referenceworks.brillonline.com.library.regent.edu/entries/foreign-law-guide/brazil-legal-history-COM_037301) (last updated Oct. 19, 2015).

<sup>10</sup> *Legal History*, *supra* note 9.

<sup>11</sup> Nick Oberheiden, *Law of Brazil*, OBERHEIDEN L. GROUP, <http://www.lawofbrazil.com/> (last visited Dec. 30, 2015).

children.<sup>12</sup>

Though only in force since 1988, Brazil's current Constitution already includes ninety-five amendments.<sup>13</sup> The amendment process in Brazil first requires a proposal by either "the President; at least one third of the members of the house of representatives; at least one third of the members of the Senate; or a petition of more than half of the Brazilian states [*sic*] legislature."<sup>14</sup> Following the proposal, "a two-fold reading in both houses as well as the approval of at least three-fifths of both houses" is required.<sup>15</sup>

### B. Juvenile Justice in Brazil

Recognizing the "particular condition of being a developing individual,"<sup>16</sup> Brazil's Constitution "specifies that minors under eighteen years of age may not be held criminally liable and must be subject to the rules of special legislation for minors."<sup>17</sup> The rules of "special legislation" prescribed by Article 228 are found in the *Estatuto da Criança e do Adolescente* (ECA) (also referred to as the Statute of the Child and the Adolescent).<sup>18</sup>

Enacted in 1990, the ECA replaced the earlier *Código de Menores* (Minor's Code) which was "widely recognized as repressive and as a vehicle for the wholesale internment of poor youth."<sup>19</sup> In contrast, the ECA has been "celebrated for its holistic approach to protecting and rehabilitating children."<sup>20</sup> As the name suggests, the ECA applies to both children (defined as individuals twelve and under) and adolescents

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<sup>12</sup> See generally CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], translated in *Brazil's Constitution of 1988 with Amendments through 2014*, CONSTITUTE (Keith S. Rosenn, trans.), [https://www.constituteproject.org/constitution/Brazil\\_2014.pdf](https://www.constituteproject.org/constitution/Brazil_2014.pdf) (last visited Mar. 6, 2017) [hereinafter *Brazil's Constitution of 1988*].

<sup>13</sup> See *Emendas Constitucionais* [Constitutional Amendments], PRESIDÊNCIA DA REPÚBLICA, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc/quadro\\_emc.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/quadro_emc.htm) (last visited Mar. 6, 2017).

<sup>14</sup> Oberheiden, *supra* note 11.

<sup>15</sup> *Id.*

<sup>16</sup> C.F. art 227 (Braz.), translated in *Brazil's Constitution of 1988*, *supra* note 12.

<sup>17</sup> EDUARDO SOARES, LAW LIBRARY OF CONGRESS, BRAZIL: CHILDREN'S RIGHTS: INTERNATIONAL AND NATIONAL LAWS AND PRACTICE 14 (2009), <https://www.loc.gov/law/help/child-rights/pdfs/Children's%20Rights-Brazil.pdf>; see C.F. art 228 (Braz.), translated in *Brazil's Constitution of 1988*, *supra* note 12.

<sup>18</sup> See SOARES, *supra* note 17, at 14.

<sup>19</sup> Daniel Hoffman, *The Struggle for Citizenship and Human Rights*, NACLA, <https://nacla.org/article/struggle-citizenship-and-human-rights> (last visited Feb. 6, 2017); see also Lara de Paula Eduardo & Emiko Yoshikawa Egry, *Brazilian Child and Adolescent Statute: Workers' Views about their Practice*, 44 REV. DA ESCOLA DE ENFERMAGEM DA UNIVERSIDADE DE SÃO PAULO 18, 19 (2010).

<sup>20</sup> Aman, *supra* note 1.

(those between the ages of twelve and eighteen).<sup>21</sup>

The ECA is a relatively broad piece of legislation which “outlines a number of provisions for supporting minors.”<sup>22</sup> Of central importance to this Note are the ECA provisions which provide for a separate system of justice for Brazilian juveniles. In addition to “authoriz[ing] the states and the Federal District to create specialized and exclusive courts for children and youth,” the ECA provides that “conduct described as a crime or a misdemeanor is considered to be an act of infraction if carried out by a minor.”<sup>23</sup> When a juvenile is found to have committed an infraction, certain punitive measures may be undertaken; however, the available forms of punishment are limited to those enumerated in the ECA and do not intersect with the punishment options for adult offenders.<sup>24</sup> Under the ECA, the enumerated punishments include a warning, restitution or community service, and probationary measures.<sup>25</sup> The juvenile may also be released to his or her guardian and required to enroll in community programs, including psychiatric evaluation, substance abuse treatment, and/or other social service programs available to assist youth in crisis.<sup>26</sup>

In extreme cases, juveniles may be placed in a juvenile detention facility; however, this punishment is only warranted when the juvenile committed a violent act, the juvenile is a repeat offender, or the juvenile has failed to comply with previous punishments.<sup>27</sup> This type of punishment is further restricted by express temporal limitations on detention as well as an enumeration of rights retained by the minor while in detention.<sup>28</sup> Underscoring the remedial as opposed to punitive nature of juvenile confinement in detention facilities, the ECA states that “[i]nternment should be fulfilled at an entity exclusively reserved for adolescents . . . with rigorous separation on criteria of age, physical build and seriousness of the offense.”<sup>29</sup>

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<sup>21</sup> *Brazil: Laws Concerning Child Abuse and/or Neglect and Their Enforcement; Protection and Services for Children Who are Victims of Abuse and/or Neglect (2003-2005), Response to Information Requests*, IMMIGR. AND REFUGEE BOARD OF CAN. (Sept. 29, 2005), <http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=449592>.

<sup>22</sup> *Id.*

<sup>23</sup> SOARES, *supra* note 17, at 14–15, 17 (citing Estatuto da Criança e do Adolescente [E.C.A.] art. 103, 145).

<sup>24</sup> E.C.A. art. 112; SOARES, *supra* note 17, at 15–16.

<sup>25</sup> *Id.* art. 112–123.

<sup>26</sup> *Id.* art. 112.

<sup>27</sup> *Id.* art. 121–125.

<sup>28</sup> *Id.* art. 121–124. Detention may last no longer than three years. *Id.* art. 121. While detained, the juvenile retains rights such as the right to meet with counsel, the right to receive weekly visits, and the right “to be treated with respect and dignity.” *Id.* art. 124.

<sup>29</sup> *Id.* art. 123.

The ECA also extends procedural due process rights to juveniles.<sup>30</sup> For instance,

it is guaranteed that the adolescent will have the full and formal knowledge that an act of infraction is being attributed to him by means of service or the equivalent; the right to confront victims and witnesses and produce all evidence necessary for his defense; the right to be defended by an attorney; free and full judicial assistance to the needy according to the law; . . . and the right to ask for the presence of his parents or guardian during all phases of the procedure.<sup>31</sup>

Finally, the statute safeguards the identity of adolescents involved in juvenile justice proceedings.<sup>32</sup> Specifically, the ECA “prohibits the disclosure of the judicial, police, and administrative acts involving an infraction committed by a minor. Any news regarding the act cannot identify the child or adolescent by photograph or name.”<sup>33</sup>

Despite empirical evidence of the efficacy of the ECA and its attendant programs,<sup>34</sup> “[t]he obstacles to implementation of the Child Statute are considerable, including lack of basic resources and infrastructure, resistance from local and state-level politicians, and non-compliance within the judiciary.”<sup>35</sup> In addition to institutional resistance and structural inadequacies, the ECA is hampered by longstanding sociological challenges such as institutionalized racism,<sup>36</sup> poverty,<sup>37</sup> and “popular attitudes that continue to regard street children as present or future criminals that need to be repressed.”<sup>38</sup>

### C. PEC 171

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<sup>30</sup> E.C.A. art. 106–111; SOARES, *supra* note 17, at 15. The Brazilian Constitution, to a lesser extent, also extends due process protections to juveniles. *See* C.F. art. 227, § 3(iv) (Braz.).

<sup>31</sup> SOARES, *supra* note 17, at 15 (footnote omitted).

<sup>32</sup> *Id.* at 17.

<sup>33</sup> *Id.*; *see* E.C.A. art. 143.

<sup>34</sup> For instance, the recidivism rate after detention in a juvenile center is only 13 percent whereas the adult prison system battles a 70 percent recidivism rate. Aman, *supra* note 1. *See also* Carmen Maria Craidy, *Socio-educational Interventions with Non-incarcerated, Adjudicated Youth in Rio Grande do Sul: A Brazilian Experience*, 9 REVISTA PERSPECTIVAS SOCIALES 69, 93–94 (2007) (utilizing self-report questionnaires from juveniles in Community Service programs, this study found that 86.17% of the sampled juveniles considered the program a positive experience profiting from a sense of “personal relations, organized work environment, [and] inclusion and respect without discrimination.”)

<sup>35</sup> Hoffman, *supra* note 19; *see also* Eduardo & Egrý, *supra* note 19, at 22–23.

<sup>36</sup> Aman, *supra* note 1.

<sup>37</sup> *See id.*

<sup>38</sup> Hoffman, *supra* note 19.

First introduced in 1993, PEC 171 is a proposed constitutional amendment that would lower the age of criminal responsibility from eighteen to sixteen.<sup>39</sup> The Amendment was introduced by the Brazilian Congressman Benedito Domingos and was premised on the notion “that in 1940, when the age of criminal responsibility was set at 18 years, young people possessed an ‘inferior mental development’ compared to that of today’s youth.”<sup>40</sup> When first proposed the Amendment failed to gain traction and “spent the next 22 years effectively dormant in Brazil’s lower house.”<sup>41</sup>

In 2015, however, the seemingly forgotten amendment was revived.<sup>42</sup> A conservative congress coupled with a perceived increase in rates of juvenile violence laid the foundation for bringing the Amendment to the political forefront.<sup>43</sup> While Brazil has indeed witnessed an increase in violent crime,<sup>44</sup> the spike is not likely attributable to a rise in juvenile crime.<sup>45</sup> In fact, empirical data suggests that juveniles are more likely to be the victims, not the perpetrators, of violent crime in Brazil.<sup>46</sup> Unfortunately, intense media coverage of extreme, but isolated, incidences of youth violence contributed to a growing atmosphere of public fear.<sup>47</sup> The result is an increase in public support for reducing the age of criminal responsibility.<sup>48</sup>

Though certain “fundamental freedoms” granted by the Constitution cannot be amended,<sup>49</sup> a legislative “[c]ommittee concluded for the first time since PEC 171’s inception that the proposed amendment does not violate the Constitution.”<sup>50</sup> As PEC 171 continues to make its way through Brazil’s amendment process,<sup>51</sup> it appears as though legislators are more likely to approve a narrower version of the Amendment.<sup>52</sup> In its original form, PEC 171 would reduce the age of criminal responsibility for all crimes; however, a revised version that

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<sup>39</sup> Aman, *supra* note 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> Joseph Murray et al., *Crime and Violence in Brazil: Systematic Review of Time Trends, Prevalence Rates and Risk Factors*, 18 *AGGRESSION & VIOLENT BEHAV.* 471, 472 (2013).

<sup>45</sup> *See* Aman, *supra* note 1.

<sup>46</sup> Craidy, *supra* note 34, at 90–91.

<sup>47</sup> Aman, *supra* note 1.

<sup>48</sup> *Id.*

<sup>49</sup> Oberheiden, *supra* note 11.

<sup>50</sup> Aman, *supra* note 1.

<sup>51</sup> *Brazil’s Congress Reduces Age of Criminal Responsibility to 16*, *supra* note 5.

<sup>52</sup> *See Brazil’s Congress Reduces Age of Criminal Responsibility to 16*, *supra* note 5.

would only require juveniles to be treated as adults if they committed certain “heinous crimes” has received considerable support.<sup>53</sup>

*D. American Juvenile Justice and the Introduction of Transfer Statutes*

Founded on the notion of *parens patriae*,<sup>54</sup> the American juvenile justice system is undergirded by the principle that “juvenile offenders are less culpable than adult offenders and more amenable to change.”<sup>55</sup> Based largely on grass-roots social reform efforts,<sup>56</sup> the juvenile justice system developed in the early twentieth-century.<sup>57</sup> At its inception, the primary aim of the juvenile justice system was “to prevent the child from being stigmatized, tried, and treated like a criminal.”<sup>58</sup> As opposed to the more rigid criminal justice system, the flexibility of the juvenile court allows judges to tailor punishments to individual offenders based on their particular needs and risks.<sup>59</sup>

Similar to the current social landscape in Brazil, the American juvenile justice system has witnessed drastic changes since its creation due to “media discourse, an increase in public fear and a ‘get tough’ government approach to crime.”<sup>60</sup> Moreover, a series of Supreme Court decisions that extended due process rights to juvenile proceedings further blurred the distinction between the juvenile and criminal justice systems.<sup>61</sup> The due process revolution in the juvenile justice system had the effect of making juvenile proceedings “eerily similar to criminal courts.”<sup>62</sup> It was against this backdrop that transfer laws came into

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<sup>53</sup> Aman, *supra* note 1. In Brazil, heinous crimes refer to offenses such as homicide, rape, and kidnapping. *Id.* See also *Brazil’s Congress Reduces Age of Criminal Responsibility to 16*, *supra* note 5.

<sup>54</sup> FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 5–6 (2005).

<sup>55</sup> Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 281 (1991); see also ZIMRING, *supra* note 54, at 6.

<sup>56</sup> See ZIMRING, *supra* note 54, at 9 (discussing the “child saving” movement).

<sup>57</sup> *Id.* at 5–6.

<sup>58</sup> Nicholas W. Bakken, *You Do the Crime, You Do the Time: A Socio-legal History of the Juvenile Court and Transfer Waivers*, INT’L FOUND. FOR PROTECTION OFFICERS 1 (2007), [http://www.ifpo.org/wp-content/uploads/2013/08/Bakken\\_Juvenile\\_Justice.pdf](http://www.ifpo.org/wp-content/uploads/2013/08/Bakken_Juvenile_Justice.pdf).

<sup>59</sup> *Id.* at 1–2.

<sup>60</sup> *Id.*; see also Bishop & Frazier, *supra* note 55, at 282–83.

<sup>61</sup> Bakken, *supra* note 58, at 1, 5–6. These cases include *Kent v. U.S.*, 385 U.S. 541, 561–62 (1966) (holding that juveniles have a right to due process in waiver proceedings); *In re Gault*, 387 U.S. 1, 55, 57 (1967) (extending, *inter alia*, the right to counsel, the right to confront witnesses, and the right against self-incrimination to youth defendants in juvenile proceedings); and *In re Winship*, 397 U.S. 358, 368 (1970) (holding that the “beyond a reasonable doubt” standard applies in juvenile proceedings, as opposed to conviction based on a preponderance of the evidence).

<sup>62</sup> Bakken, *supra* note 58, at 1.

existence.<sup>63</sup>

Currently, every state allows for juvenile transfer.<sup>64</sup> While each state's transfer provisions differ based on statute,<sup>65</sup> three main mechanisms exist to facilitate the process: judicial waiver, prosecutorial discretion, and statutory exclusion.<sup>66</sup> First, judicial waiver gives the juvenile court judge discretion in determining whether jurisdiction should be transferred from the juvenile to the criminal court.<sup>67</sup> Judicial waiver normally requires a preliminary hearing on the matter of transfer.<sup>68</sup> Conversely, statutory exclusion laws preclude judicial discretion over juvenile court transfers; instead, "[i]f a case falls within a statutory exclusion category, it must be filed originally in criminal court."<sup>69</sup> Finally, prosecutorial discretion allows the prosecutor to determine which juvenile cases should be transferred to criminal court.<sup>70</sup> This transfer mechanism is controversial as it is subject to much less judicial oversight and thus has more potential for prosecutorial abuse.<sup>71</sup> Transfer statutes that allow for prosecutorial discretion are most indicative of "a fundamental shift in delinquency policy away from the *parens patriae* philosophy that is the cornerstone of the juvenile court and toward a punitive orientation characteristic of criminal courts."<sup>72</sup>

Despite widespread acceptance, juvenile transfer has been associated with negative outcomes. Although the underlying rationale for transfer is deterrence, most empirical research suggests that transfer in fact *increases* rates of recidivism for many juvenile offenders.<sup>73</sup> Transfer is associated with negative life outcomes. For instance, transferred youth are less likely to succeed in the areas of educational

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<sup>63</sup> *See id.*

<sup>64</sup> Bishop & Frazier, *supra* note 55, at 282; Alexandra O. Cohen et al., *When Does A Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 775 (2016).

<sup>65</sup> Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 84–85 (2000); *see also* PATRICK GRIFFIN ET AL., OFF. JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>.

<sup>66</sup> GRIFFIN ET AL., *supra* note 65, at 2; Bishop & Frazier *supra* note 55, at 283–85.

<sup>67</sup> GRIFFIN ET AL., *supra* note 65, at 2; *see also* Kent v. United States, 383 U.S. 541, 561–62 (setting forth guidelines for the application of judicial discretion).

<sup>68</sup> GRIFFIN ET AL., *supra* note 65, at 2; Bishop & Frazier, *supra* note 55, at 283–84.

<sup>69</sup> GRIFFIN ET AL., *supra* note 65, at 2.

<sup>70</sup> *Id.*

<sup>71</sup> Bishop & Frazier, *supra* note 55, at 284–85.

<sup>72</sup> *Id.* at 285.

<sup>73</sup> RICHARD E. REDDING, OFF. JUV. JUST. & DELINQ. PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 6 (Aug. 2008), <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.



achievement and career attainment.<sup>74</sup> While the juvenile system was specifically tailored to prevent the stigmatization that results from a criminal conviction, transfer laws eliminate this safeguard making juveniles who are convicted in the criminal justice system more likely to suffer consequences that could impact their long-term ability to effectively function in society.<sup>75</sup> Moreover, juveniles in adult prison are more likely to be physically and/or sexually assaulted.<sup>76</sup> They are also at a heightened risk for suicide.<sup>77</sup> Despite these concerns, the transfer of juveniles is still a “prominent feature of the nation’s response to youthful offending.”<sup>78</sup>

## II. JUVENILE TRANSFER IN VIRGINIA

### A. *Transfer Statutes, Case Law, and Policy in Virginia*

Developed in the 1970s, Virginia’s juvenile justice system was created to protect the welfare of the child and, as such, “place[d] the interests of the juvenile offender above the safety of the community.”<sup>79</sup> Although certification statutes existed on the books during this time,<sup>80</sup> juvenile transfer prior to the mid-1990s was characterized by broad judicial discretion in keeping with the rehabilitative orientation of the juvenile justice system.<sup>81</sup> In the mid-1990s, however, Virginia’s juvenile justice system underwent a transformation in reaction to a predicted increase in violent juvenile crime and the apocryphal juvenile “superpredator.”<sup>82</sup> Although the anticipated spike in violent juvenile crime never materialized, “the system that was built based on these

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<sup>74</sup> See discussion *infra* at Part II(B).

<sup>75</sup> See discussion *infra* at Part II(B).

<sup>76</sup> See discussion *infra* at Part II(B).

<sup>77</sup> See discussion *infra* at Part II(B).

<sup>78</sup> GRIFFIN ET AL., *supra* note 65, at 2.

<sup>79</sup> CALIBER ASSOCIATES & VA. DEP’T JUV. JUST., DOC. NO. 194126, PROCESS EVALUATION OF RECENT JUVENILE TRANSFER STATUTES IN VIRGINIA, VOLUME 1 FINAL REPORT, 9 (2002) [hereinafter PROCESS EVALUATION].

<sup>80</sup> See, e.g., *Novak v. Commonwealth*, 457 S.E.2d 402, 406–07 (Va. Ct. App. 1995) (upholding the constitutionality of Virginia’s transfer statute).

<sup>81</sup> See ANDREW BLOCK & KATE DUVALL, JUSTCHILDREN, DON’T THROW AWAY THE KEY: REEVALUATING ADULT TIME FOR YOUTH CRIME IN VIRGINIA, 7–8 (2009). Indicative of the rehabilitative orientation prior to the 1990s is the fact that “mandatory transfer did not exist before 1996.” *Id.* at 9. See also *Novak*, 457 S.E.2d at 406–07 (stating that that dispensing with the necessity of finding the juvenile unamenable to treatment “does not result in ‘automatic certification.’”).

<sup>82</sup> BLOCK & DUVALL, *supra* note 81, at 10; see also Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), [https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?\\_r=0](https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=0) (discussing the creation and subsequent debunking of the “superpredator” theory of youth violence).

claims and fears remains intact.”<sup>83</sup>

Based on a study conducted by the Serious Juvenile Offender Task Force, the first major change to Virginia’s transfer laws was the Serious Juvenile Offender Act of 1994 which lowered the minimum transfer age from fifteen to fourteen years old.<sup>84</sup> However, the most profound change to Virginia’s juvenile justice policy came in the form of The Juvenile Justice Reform Package of 1996 (Reform Package).<sup>85</sup> This legislation expanded the class of juvenile offenders who could be certified to criminal court and substantially increased the Commonwealth’s Attorney’s role in juvenile transfer proceedings.<sup>86</sup> Specifically, the Reform Package created two new statutory mechanisms for transferring juveniles to criminal court (i.e. circuit court).<sup>87</sup> While Virginia law already provided for juvenile transfer by judicial discretion, the Reform Package added provisions to Virginia’s Code that established mandatory transfer and prosecutorial discretion (i.e. direct file) provisions.<sup>88</sup>

The first type of transfer, judicial discretion, is governed by Virginia Code section 16.1-269.1(A) and is initiated through the Commonwealth’s motion to transfer the proceedings to circuit court.<sup>89</sup> Following the motion, the judge must determine if “probable cause exists to believe that the juvenile committed” an act which would be a felony if committed by an adult.<sup>90</sup> The court must also find “by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court.”<sup>91</sup> Although the statute provides relevant guidelines to aid in determining if the juvenile is a “proper person,” it is not mandatory for juvenile court judges to consider these factors.<sup>92</sup>

Conversely, mandatory transfer (also known as automatic certification) divests the juvenile court judge of any meaningful discretion in the determination of whether a juvenile’s case should be

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<sup>83</sup> BLOCK & DUVALL, *supra* note 81, at 10. It is noteworthy that juvenile crime rates were actually falling at the time that many of Virginia’s punitive changes took effect. *Id.*

<sup>84</sup> PROCESS EVALUATION, *supra* note 79, at 10–11.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; Sanjeev Sridharan et al., *A Study of Prosecutorial Certification Practice in Virginia*, 3 CRIMINOLOGY & PUB. POL’Y 605, 607–10 (2004).

<sup>87</sup> Sridharan et al., *supra* note 86, at 607.

<sup>88</sup> *Id.* at 606–07. While “the term ‘transfer’ is primarily used in reference to the transfer hearing . . . the term ‘certify’ is used in reference to automatic and prosecutorial waiver.” *Id.*

<sup>89</sup> VA. CODE ANN. § 16.1-269.1(A) West (2012); *see also* PROCESS EVALUATION, *supra* note 79, at 1; Sridharan et al., *supra* note 86, at 607.

<sup>90</sup> § 16.1-269.1(A)(2).

<sup>91</sup> § 16.1-269.1(A)(4).

<sup>92</sup> *Id.*

transferred to circuit court.<sup>93</sup> Under this statute, the juvenile court judge *must* certify the case to circuit court if there is probable cause to believe that the juvenile committed one of the following offenses: capital murder; first or second degree murder; lynching; and/or aggravated malicious wounding.<sup>94</sup> If the juvenile court does not find probable cause, the Commonwealth's Attorney may circumvent this finding by seeking a direct indictment in circuit court.<sup>95</sup>

Additionally, upon notice from the Commonwealth's Attorney and a finding of probable cause by the juvenile court judge, the juvenile court *must* transfer the juvenile's case to circuit court if the juvenile is charged with one of the other violent felony offenses specified by statute.<sup>96</sup> Like mandatory transfer, the Commonwealth's Attorney may seek a direct indictment in circuit court if the juvenile court judge dismisses the case or finds no probable cause.<sup>97</sup> This process of direct file gives the Commonwealth's Attorney discretion in determining whether a juvenile's case should be certified to circuit court.<sup>98</sup>

Direct file differs from automatic transfer in that it must be initiated by the Commonwealth; however, in both instances the juvenile court judge must transfer the case to circuit court if probable cause is found.<sup>99</sup> Furthermore, both direct file and automatic transfer differ from judicial discretion in that "both sidestep any consideration of whether the juvenile is a 'proper person' to remain in the jurisdiction of the juvenile court."<sup>100</sup>

Further detracting from the discretion of the juvenile court judge is Virginia's "once an adult, always an adult" statute. This legislation specifies that any juvenile who has been transferred to criminal court and convicted of the charged offense "shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal acts and any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal

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<sup>93</sup> § 16.1-269.1(B); *see also* Sridharan et al., *supra* note 86, at 607.

<sup>94</sup> § 16.1-269.1(B)-(D); *see also* Sridharan et al., *supra* note 86, at 607.

<sup>95</sup> § 16.1-269.1(D). In Virginia, a direct indictment is "presented directly to the grand jury by the Commonwealth's attorney with no warrant or summons pending and usually without a preliminary hearing or probable cause hearing having been conducted in the district court." DEP'T OF JUDICIAL SERVS., CIRCUIT COURT CLERK'S MANUAL – CRIMINAL, ch. 1, 16 (2015). Additionally, "[t]he Commonwealth's attorney may also proceed with a direct indictment if a case is not certified or is nolle prossed at the preliminary hearing in a general district court." *Id.*

<sup>96</sup> § 16.1-269.1(C)-(D). The violent felonies specified in Subsection C are distinct from the mandatory transfer offense list contained in Subsection B.

<sup>97</sup> § 16.1-269.1(D).

<sup>98</sup> § 16.1-269.1(D).

<sup>99</sup> *See* Sridharan et al., *supra* note 86, at 607.

<sup>100</sup> PROCESS EVALUATION, *supra* note 79, at 13.

conviction.”<sup>101</sup>

Since the adoption of the Reform Package, Virginia’s General Assembly has approved changes to the juvenile transfer laws that mitigate some of the more punitive statutory provisions.<sup>102</sup> For instance, prior to 1997, juveniles transferred to circuit court were required to be housed in adult jails while awaiting trial.<sup>103</sup> However, “[a]fter a juvenile was brutally beaten in the Virginia Beach Jail, the law . . . was changed in 1997 to make this placement discretionary.”<sup>104</sup> The law was further limited in 2009 when legislation was passed that “created a presumption that youth who are being tried as adults are held in juvenile detention centers pretrial and will only be placed in an adult jail if they are found by a judge to be a security or safety threat.”<sup>105</sup> When, however, a juvenile is held in an adult facility, the law states that the juvenile “need no longer be entirely separate and removed from adults.”<sup>106</sup> Hence, while recognizing the potential for violence directed against juveniles in adult prison, these amendments failed to completely abolish the practice of housing juveniles with adults.

Additionally, in 2002, a blended sentence option was introduced.<sup>107</sup> When a juvenile is convicted in circuit court as an adult, a circuit court judge may allow the juvenile to serve part of their sentence in the juvenile system instead of the criminal system.<sup>108</sup> A judge may also suspend the adult sentence upon completion of the juvenile term.<sup>109</sup> However, the Virginia Supreme Court limited judicial discretion in the use of blended-sentences in *Brown v. Commonwealth*.<sup>110</sup> In *Brown*, the juvenile defendant was transferred to circuit court and convicted of use of a firearm in the commission of a felony.<sup>111</sup> Although the circuit court judge determined that the juvenile should be sentenced pursuant to Virginia’s more lenient blended sentencing statute, the Virginia Supreme Court held that “the circuit court erred when it sentenced . . .

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<sup>101</sup> § 16.1-271; see KATE DUVALL, JUSTCHILDREN, UNLOCKING THE TRUTH: REAL STORIES ABOUT THE TRIAL AND INCARCERATION OF YOUTH AS ADULTS IN VIRGINIA 4 (2010).

<sup>102</sup> KATE DUVALL, *supra* note 101.

<sup>103</sup> CAMPAIGN FOR YOUTH JUSTICE, *What is the Law in Virginia*, 3, [www.campaignforyouthjustice.org/Downloads/laws/VA\\_Law.doc](http://www.campaignforyouthjustice.org/Downloads/laws/VA_Law.doc) (last visited Feb. 27, 2017).

<sup>104</sup> *Id.*; see § 16.1-249(D) (2010).

<sup>105</sup> Jason Ziedenberg, *You’re an Adult Now: Youth in Adult Criminal Justice Systems*, NAT’L INST. CORR. 10 (2011), [https://www.openminds.com/wpcontent/uploads/indres/100\\_112nicicyouthinadulcrimsystem.pdf](https://www.openminds.com/wpcontent/uploads/indres/100_112nicicyouthinadulcrimsystem.pdf).

<sup>106</sup> § 16.1-249(D).

<sup>107</sup> § 16.1-272(A)(1).

<sup>108</sup> *Id.*; see also CAMPAIGN FOR YOUTH JUSTICE, *supra* note 103, at 2–3.

<sup>109</sup> § 16.1-272.

<sup>110</sup> See *Brown v. Commonwealth*, 688 S.E.2d 185, 192–93 (Va. 2010).

<sup>111</sup> *Id.* at 187.

[the juvenile] to a juvenile disposition . . . instead of imposing the mandatory minimum sentences required by” the criminal code.<sup>112</sup> Thus, when a juvenile sentencing statute is in conflict with a mandatory minimum under the criminal code, the transferred juvenile must be sentenced under the more punitive mandatory minimum.<sup>113</sup>

In addition to adding blending-sentencing options, in 2007, the General Assembly approved changes to the “once an adult, always an adult” statute to address issues of “fundamental fairness.”<sup>114</sup> Prior to the amendment, “a one-time transfer of a child to adult court was enough to trigger the ‘once an adult, always an adult’ law, regardless of the ultimate outcome of the transferred case.”<sup>115</sup> Thus, the mere act of transferring the case gave the circuit court jurisdiction over all future proceedings related to that juvenile.<sup>116</sup> The 2007 amendment to VA Code § 16.1-271 changed the wording of the statute such that a conviction in circuit court is now required prior to the juvenile “becoming an adult” for the purposes of future charges.<sup>117</sup>

While incremental statutory changes to the code suggest a potential resurgence of the rehabilitative framework, juvenile transfer in Virginia is still largely characterized by prosecutorial discretion and a “get tough on crime” approach to juvenile delinquency.<sup>118</sup> In spite of increasing evidence of the deleterious effects of transfer, cases like *Brown v. Commonwealth* demonstrate a reluctance to completely abandon the punitive paradigm of the 1990s. Moreover, statutory changes that amend, rather than repeal, laws shown to have negative consequences for juveniles, evidence a commitment to the notion that some juveniles are beyond rehabilitation.<sup>119</sup>

### *B. Impact of Transfer Laws on Public Safety and Juvenile Well-Being in Virginia*

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<sup>112</sup> *Id.* at 193.

<sup>113</sup> *See id.* at 192.

<sup>114</sup> VA. DEP’T. JUVENILE JUSTICE, 2007 GENERAL ASSEMBLY SESSION: JUVENILE JUSTICE LEGISLATIVE OVERVIEW, 29–30 (2007), [http://www.djj.virginia.gov/pdf/about-djj/Legislative\\_2007\\_Handbook.pdf](http://www.djj.virginia.gov/pdf/about-djj/Legislative_2007_Handbook.pdf) [hereinafter *Legislative Overview*]; *see also* VA. CODE ANN. § 16.1-271 (West 2007).

<sup>115</sup> *The Virginia Success Story*, CAMPAIGN FOR YOUTH JUSTICE, (Mar. 2011), [http://www.campaignforyouthjustice.org/documents/VA\\_HB\\_3007.pdf](http://www.campaignforyouthjustice.org/documents/VA_HB_3007.pdf).

<sup>116</sup> *Id.*; *see also* Cook v. Commonwealth, 597 S.E.2d 84, 85 (Va. 2004) (“[A] juvenile need not be convicted as an adult to be tried as an adult for all subsequent offenses without a transfer hearing in the juvenile court.”).

<sup>117</sup> *Legislative Overview*, *supra* note 114, at 30; 2007 Va. Acts ch. 221, (H 3007), <http://lis.virginia.gov/cgi-bin/legp604.exe?071+ful+CHAP0221+pdf>.

<sup>118</sup> *See* BLOCK & DUVALL, *supra* note 81, at 9; Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1453 (2006).

<sup>119</sup> *See* BLOCK & DUVALL, *supra* note 81, at 22.

Studies nationwide suggest that transfer generally results in an array of negative outcomes.<sup>120</sup> For instance, studies of other states have consistently found that transferred youth are more likely to recidivate,<sup>121</sup> are more susceptible to victimization during confinement,<sup>122</sup> experience heightened levels of psychological distress,<sup>123</sup> and are less likely to receive the treatment and rehabilitative services available to youth processed within the juvenile justice system.<sup>124</sup> Transferred juveniles also experience long-term ramifications stemming from their treatment as adults.<sup>125</sup> Research that specifically examines the impact of transfer in Virginia documents similar outcomes. These studies have lead researchers to conclude that “[w]hile broad transfer policies may serve the goal of retribution, they do so at a considerable price.”<sup>126</sup>

#### 1. DETERRENCE AND RECIDIVISM IN TRANSFERRED YOUTH

Though public safety is the accepted rationale for juvenile transfer, research consistently finds that juvenile transfer does not result in a general or specific deterrent effect.<sup>127</sup> Indeed some research suggests that transfer may “produce[] the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality.”<sup>128</sup> While some studies have found support for a deterrent effect,<sup>129</sup> the majority of extant empirical research suggests that juvenile transfer has no deterrent effect at best, and may in fact

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<sup>120</sup> See discussion *infra* Section B.1.

<sup>121</sup> See *id.* at 19–20.

<sup>122</sup> See *id.* at 20.

<sup>123</sup> See discussion *infra* Section B.1.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> Bishop, *supra* note 65, at 86.

<sup>127</sup> DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 3 (2001); Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996); Jeffrey Fagan, *The Comparative Advantage of Juvenile vs. Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 L. AND POL'Y 77, 98 (1996); see also Patricia Allard & Malcolm Young, *Prosecuting Juveniles in Adult Court: Perspectives for Policymakers and Practitioners*, SENTENCING PROJECT 7 (2002), [http://sentencingproject.org/doc/publications/sl\\_prosecutingjuveniles.pdf](http://sentencingproject.org/doc/publications/sl_prosecutingjuveniles.pdf); REDDING, *supra* note 73, at 8.

<sup>128</sup> REDDING, *supra* note 73, at 8 (citing Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000)).

<sup>129</sup> See, e.g., Thomas A. Loughran et al., *Differential Effects of Adult Court Transfer on Juvenile Offender Recidivism*, 34 L. & HUM. BEHAV. 476, 486 (2010) (finding that transfer may have a deterrent effect for certain classes of offenders, such as youth charged with crimes committed against persons).

promote future offending.<sup>130</sup> Studies also suggest that transferred youth are more likely than their non-transferred counterparts to “re-offend earlier, and to commit more serious subsequent offenses.”<sup>131</sup>

While longitudinal research on the effect of transfer on recidivism in Virginia is lacking, the existing research on transfer in Virginia generally finds little support for the premise that transfer is an effective deterrent.<sup>132</sup> For instance, in a study analyzing the impact of direct file statutes on recidivism in Virginia (as well as other states employing this type of transfer), the results indicate that “there is little evidence to presume” that direct file laws have a general deterrent effect.<sup>133</sup>

There is also some indication that judges and prosecutors in Virginia have little confidence in the deterrent effect of transfer. For instance, in a 2002 qualitative study of the perceptions of key decision makers in Virginia’s justice system, “[o]ne respondent remarked that deterrence is merely the public’s rationale and that the deterrent effect does not exist in reality.”<sup>134</sup> Some of the reasons that transferred juveniles are more likely to recidivate include: (1) “[t]he stigmatization and other negative effects of labeling juveniles as convicted felons”; (2) feelings of “resentment and injustice” stemming from treatment as an adult; (3) learning criminal behavior from more seasoned adult

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<sup>130</sup> Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult System*, MORBIDITY & MORTALITY WEEKLY REPORT (Nov. 30, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>; ZIEDENBERG, *supra* note 105, at 5; *see also* Kareem L. Jordan & David L. Myers, *Juvenile Transfer and Deterrence: Reexamining the Effectiveness of a “Get-Tough” Policy*, 57 CRIME & DELINQ. 247, 263–64 (2011). *See generally* REDDING, *supra* note 73 (collecting studies on deterrence and recidivism).

<sup>131</sup> Allard & Young, *supra* note 127, at 7; *see also* sources cited *supra* note 127. Griffin et al. caution that while increased levels of recidivism “could be attributable to . . . direct and indirect effects of criminal conviction on the life chances of transferred youth, the lack of access to rehabilitative resources in the adult corrections system, and the hazards of association with older criminal ‘mentors,’” a selection effect might be operating the background. GRIFFIN ET AL., *supra* note 65, at 26. Because transferred juveniles are more likely to be serious offenders, studies that find a relationship between transfer and increased rates of recidivism may in fact be an artifact of the criminogenic nature of transferred youth. However, at least two studies have found increased rates of recidivism while controlling for selection effects using a matched pairs analysis. Bishop, *supra* note 65, at 132–33. *But see* Kareem L. Jordan, *Juvenile Transfer and Recidivism: A Propensity Score Matching Approach*, 35 J. CRIME & JUST. 53, 63 (2012) (finding that “decertified youth have a higher probability of rearrest than non-decertified youth” when controlling for selection effects using propensity score matching).

<sup>132</sup> BLOCK & DUVALL, *supra* note 81, at 20.

<sup>133</sup> Steiner & Wright, *supra* note 118, at 1470.

<sup>134</sup> PROCESS EVALUATION, *supra* note 79, at 67.

offenders;<sup>135</sup> and (4) “the loss of a number of civil rights and privileges, further reducing the opportunities for employment and community reintegration.”<sup>136</sup>

## 2. ACCESS TO TREATMENT AND REHABILITATIVE SERVICES

Another negative consequence of transfer is the diversion of juveniles away from programs and services that focus on re-entry and rehabilitation. While the juvenile system is tailored to meet the “specific education, treatment, and health needs” that youth require, adult institutions are often ill-equipped to provide these services.<sup>137</sup>

In Virginia, while the circuit court may refer juveniles to the treatment options available in the juvenile justice system, “circuit court judges are less likely than juvenile court judges to be familiar with all of the available juvenile justice programs and services available in a locality.”<sup>138</sup> This is particularly problematic due to the fact that transferred youth in Virginia are more likely to have substance abuse disorders.<sup>139</sup> Because transferring juveniles to the adult system “is an ineffective and expensive substitute for use of prevention strategies” designed to address issues like substance abuse, transferring youth offenders with mental and emotional health needs ultimately disservices the public interest.<sup>140</sup>

## 3. SAFETY AND PSYCHOLOGICAL WELL-BEING

Studies suggest that youth transferred to the criminal justice

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<sup>135</sup> REDDING, *supra* note 73, at 7. Based on a review of extant research, one report noted that “[j]uveniles in adult prison reported that much of their time was spent learning criminal behavior from the inmates and proving how tough they were. . . . Because juveniles in adult prisons are exposed to a criminal culture in which inmates commit crimes against each other, these institutions may socialize delinquent juveniles into true career criminals.” *Id.*

<sup>136</sup> *Id.* (citation omitted).

<sup>137</sup> ZIEDENBERG, *supra* note 105, at 12; *see also* Allard & Young, *supra* note 127, at 8.

<sup>138</sup> PROCESS EVALUATION, *supra* note 79, at 34; *see also* VA. STATE CRIME COMM’N, HRJ 113 (2008) FINAL REPORT: STUDY OF VIRGINIA’S JUVENILE JUSTICE SYSTEM, H. DOC. NO. 12, at 17 (2009) [hereinafter FINAL REPORT: STUDY OF VIRGINIA’S JUVENILE JUSTICE SYSTEM].

<sup>139</sup> PROCESS EVALUATION, *supra* note 79, at 53 (finding that 61% of the sampled transferred youth had a history of substance abuse compared to only 49% of youth who remained in the juvenile justice system); Sridharan et al., *supra* note 86, at 618–19 (finding that 57% of the sampled transferred youth had a history of substance abuse compared to only 48% of youth who remained in the juvenile justice system, representing a statistically significant difference among the two groups).

<sup>140</sup> Allard & Young, *supra* note 127, at 8.



system are more likely to be victims of inmate violence.<sup>141</sup> Additionally, studies find that youth in the criminal justice system are more likely to experience adverse psychological consequences when compared to juveniles managed within the juvenile justice system.<sup>142</sup> Indicative of the psychological toll of adult confinement, “[t]he suicide rate for juveniles in jails is estimated greatly to exceed the rate for the general youth population and to be several times higher than the rate of suicide among youths in juvenile detention centers.”<sup>143</sup>

Victimization and adverse psychological consequences have been noted as a concern in studies addressing the impact of transfer on juveniles in Virginia.<sup>144</sup> Notably, Sheriff Gabriel Morgan of Newport News, Virginia stated that

[t]he average 14-year-old is a “guppy in the ocean” of an adult facility. The law does not protect the juveniles; it says they are adults and treats them as such. Often, they are placed in isolation for their protection, usually 23 ½ hours alone. Around age 17, we put him in the young head population, a special unit where all the youth are put together, and the 13 and 14 year olds normally fall prey there as well.<sup>145</sup>

Interviews with juveniles housed in adult facilities in Virginia highlight the deleterious physical and psychological consequences of transfer.<sup>146</sup> The accounts of some youth include experiencing “physical, sexual, and emotional assault when housed in the general population of adult correctional facilities.”<sup>147</sup> Finally, similar to studies in other localities, youth held in adult institutions in Virginia also have an increased risk

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<sup>141</sup> See Bishop, *supra* note 65, at 145–46 (collecting studies finding that juveniles are more likely to be victims of physical and sexual violence when confined in adult institutions).

<sup>142</sup> *Id.* at 138, 147 (collecting studies on the psychological impact adult confinement has on juveniles); see also Ziedenberg, *supra* note 105, at 11. Additionally, Bishop notes that fear of victimization itself has been linked to increased reports of anxiety and depression. Bishop, *supra* note 65, at 146 (collecting studies on juvenile fear of victimization in adult jails).

<sup>143</sup> Bishop, *supra* note 65, at 138; see also Ziedenberg, *supra* note 105, at 11.

<sup>144</sup> VA. STATE CRIME COMM’N, USE OF JAILS FOR JUVENILES IN VIRGINIA: AN ASSESSMENT AND RECOMMENDATIONS 3–4 (1983), <https://www.ncjrs.gov/pdffiles1/Digitization/91184NCJRS.pdf> [hereinafter USE OF JAILS FOR JUVENILES]; see also BLOCK & DUVALL, *supra* note 81, at 6, 19.

<sup>145</sup> Ziedenberg, *supra* note 105, at 9 (quoting Sheriff Gabe Morgan, National Institute of Corrections Convening, June 18, 2010).

<sup>146</sup> See DUVALL, *supra* note 101, at 6 (summarizing the responses from interviews with youth and adults affected by the juvenile justice system).

<sup>147</sup> *Id.*

for suicide.<sup>148</sup>

#### 4. COLLATERAL CONSEQUENCES THROUGHOUT THE LIFE COURSE

In addition to the immediate consequences of lack of access to rehabilitative services, victimization, and psychological distress, transfer to the adult criminal justice system carries a wide range of “long-term legal, political and socioeconomic” implications.<sup>149</sup> Juveniles housed in adult correctional facilities are less likely to receive educational services that meet their needs;<sup>150</sup> they also face obstacles “following release . . . in their attempts to find employment, complete their educations, and enter into conventional social networks.”<sup>151</sup> Moreover, a felony conviction in criminal court creates a publicly accessible criminal record that can impact a juvenile’s eligibility for federally funded housing and public assistance programs.<sup>152</sup> These barriers to successful reintegration make it less likely that juveniles will be able to “leave their criminal offending behind them.”<sup>153</sup>

Research shows that juveniles in Virginia face similar obstacles.<sup>154</sup> Anecdotal evidence from juveniles and adults familiar with the system provide compelling accounts of the struggles that youth face upon re-entry.<sup>155</sup> For example, a former volunteer at an alternative school in Virginia stated that she “[g]ot the sense from many of the kids that they felt they really had nowhere to go. One of the students would get excited about things but then stop and say no wait I don’t think I can do this, I have a felony.”<sup>156</sup> The personal stories of these juveniles suggest that they experience a sense of fatalism which may also result in negative

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<sup>148</sup> USE OF JAILS FOR JUVENILES, *supra* note 144; BLOCK & DUVALL, *supra* note 81, at 19.

<sup>149</sup> Allard & Young, *supra* note 127, at 7.

<sup>150</sup> Bishop, *supra* note 65, at 124, 140, 146 (collecting studies on the educational services juveniles receive in adult court verse the juvenile justice system).

<sup>151</sup> *Id.* at 156; see Ziedenberg, *supra* note 105, at 24.

<sup>152</sup> See Allard & Young, *supra* note 127, at 7; Ziedenberg, *supra* note 105, at 24.

<sup>153</sup> Ziedenberg, *supra* note 105, at 24 (citing THE LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 1–2 (2009), [http://lac.org/roadblocks-to-reentry/upload/lacreport t/Roadblocks-to-Reentry--2009.pdf](http://lac.org/roadblocks-to-reentry/upload/lacreport%20Roadblocks-to-Reentry--2009.pdf)); see DUVALL, *supra* note 102, at 6.

<sup>154</sup> VA. CODE ANN. § 16.1-305 (West 2012) (making most of a transferred juveniles court file public record); § 16.1-249(D) (prohibiting employers from hiring individuals convicted of certain crimes); FINAL REPORT: STUDY OF VIRGINIA’S JUVENILE JUSTICE SYSTEM, *supra* note 138, at 20 (“Study results indicate that the availability of juvenile records may impact a juvenile’s ability to get a job, join the military, and go to college.”); § 24.2-427 (potential loss of voting rights); see also DUVALL, *supra* note 102, at 6.

<sup>155</sup> DUVALL, *supra* note 101, at 9–12; see also BLOCK & DUVALL, *supra* note 81, at 20–21.

<sup>156</sup> DUVALL, *supra* note 101, at 10.

emotional states and recidivism.<sup>157</sup>

### III. EFFICACY OF A COMPARATIVE CRIMINAL JUSTICE APPROACH

Comparative criminal justice involves the comparison of approaches to criminal justice across localities.<sup>158</sup> It can be an invaluable tool when one nation is “borrowing from, or at least trying to learn from, what is done in other places.”<sup>159</sup>

In attempting to justify their position that the amendment will reduce rates of juvenile crime, supporters of PEC 171 have specifically pointed to the longstanding practice of juvenile transfer in the United States.<sup>160</sup> Interestingly, no formal analysis comparing the practice of transfer in the United States to the potential outcome in Brazil exists.<sup>161</sup> Those who oppose PEC 171, however, have noted that “[t]he available evidence on this practice in the United States” does not support the theory that lowering the age of criminal responsibility in Brazil will achieve its intended result.<sup>162</sup> This Note, therefore, is designed to address a gap in the literature by providing a direct and systematic analysis of the potential consequences of PEC 171 based on the extant research on transfer in the United States with special attention to outcomes in Virginia.<sup>163</sup>

In order to make a valid prediction of the potential consequences of Brazil’s Amendment based on known outcomes in Virginia, it is important to first assess the extent to which juvenile crime is the result of similar etiological factors in both nations.<sup>164</sup> If the root causes of crime are similar, it is feasible to expect that the implementation of more punitive approaches will have similar results.<sup>165</sup>

#### A. *Comparison of Juvenile Crime Correlates in Brazil and the*

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<sup>157</sup> This phenomenon has been referred to as a “mood of fatalism.” DAVID MATZA, *DELINQUENCY AND DRIFT* 189 (5TH ed. 2009). Matza posits that “[t]he mood of fatalism is the negation of the sense of active mastery over one’s environment. It is likely to culminate in a sense of desperation among persons who place profound stress on the capacity to control the surroundings.” *Id.*

<sup>158</sup> David Nelken, *Comparative Criminal Justice: Beyond Ethnocentrism and Relativism*, 6 *EUR. J. CRIMINOLOGY* 291, 291 (2009).

<sup>159</sup> *Id.*

<sup>160</sup> Maria Laura Canineu, *Brazil: Reject Move to Try Children as Adults: Letter to Congressional Leaders*, HUMAN RIGHTS WATCH (June 9, 2015), <https://www.hrw.org/news/2015/06/09/brazil-reject-move-try-children-adults>.

<sup>161</sup> *See id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See infra* Part IV.

<sup>164</sup> *See* Murray et al., *supra* note 44, at 472 (“Given its economic, cultural, and social context, it is possible that risk factors for crime identified in other contexts have different effects in Brazil, and this needs empirical testing.”).

<sup>165</sup> *See* Canineu, *supra* note 160.

### *United States*

Despite a paucity of criminological research on the correlates and risk factors of criminal behavior in Latin America, the available studies suggest that “[i]ndividual and family-level risk factors for crime identified in Brazil are similar to those [found] in high-income countries.”<sup>166</sup>

Based on a systematic analysis of prior research, Murray et al. identify several statistically significant risk factors for crime and delinquency.<sup>167</sup> The factors most consistently reported include “male sex, cigarette use, alcohol use, drug use, mental health problems, lacking religious belief/practice, low family income, large family (many siblings), and family or friends involved in crime.”<sup>168</sup> Macro-level correlates to juvenile delinquency in Brazil include ineffective external social controls, gang violence, and “economic instability.”<sup>169</sup> Though an extensive review of the factors found to be significant predictors of juvenile delinquency in the United States is beyond the scope of this review, research on risk factors in the United States parallels the results of Brazilian studies.<sup>170</sup>

#### *B. Similarities Between Transfer in Virginia and PEC 171*

In its current form, PEC 171 contemplates treating all juveniles sixteen years and older as adults.<sup>171</sup> The amendment, as such, would be

<sup>166</sup> Murray et al., *supra* note 44, at 479.

<sup>167</sup> *Id.* at 480. It is important to note that while these factors are all significantly associated with delinquency, the inherent limitations in statistical analysis constrain the extent to which one may infer a causal connection between risk factors and delinquency. Because it is impossible to control for all variables that may impact offending behavior, there is the unavoidable risk that some associations are merely spurious, meaning that the association would disappear after the insertion of the missing confounding variable (though Murray et al. note that many of the studies in Brazil do control for confounding variables). *Id.* See generally Murray et al., *Drawing Conclusions about Causes from Systematic Reviews of Risk Factors: The Cambridge Quality Checklists*, 5 J. EXPERIMENTAL CRIMINOLOGY 23 (2009), for a discussion on the difference between a ‘correlate’, ‘risk factor’, and ‘causal risk factor.’

<sup>168</sup> Murray et al., *supra* note 44, at 480. Based on one of the reviewed studies, Murray et al. note that “[b]eing in the lowest family income group carried about 10 times the risk of violent conviction compared with being in the highest income group.” *Id.* at 479, 481 (citing Beatriz Caicedo et al., *Violent Delinquency in a Brazilian Birth Cohort: The Roles of Breast Feeding, Early Poverty and Demographic Factors*, 24 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 12 (2010)).

<sup>169</sup> Murray et al., *supra* note 44, at 480.

<sup>170</sup> *Id.* at 479. For a review of risk factors related to delinquency in the United States and other high-income countries, see generally Jeremy Staff et al., *Early Life Risks, Antisocial Tendencies, and Preteen Delinquency*, 53 CRIMINOLOGY 677 (2015); Joseph Murray & David P. Farrington, *Risk Factors for Conduct Disorder and Delinquency: Key Findings from Longitudinal Studies*, 55 CANADIAN J. PSYCHIATRY 633 (2010).

<sup>171</sup> Canineu, *supra* note 160.

unquestionably broader than the statutorily permissible circumstances under which juveniles in Virginia may be treated as adults.<sup>172</sup> Thus, while the impact of transfer laws in Virginia could certainly inform a discussion about the potential ramifications of PEC 171, the analysis would be speculative at best.

Committee hearings in Brazil suggest, however, that PEC 171 is more likely to be adopted in a revised form.<sup>173</sup> Specifically, Brazilian legislators appear more amenable to passing an amendment that would require treating juveniles who are sixteen years or older as adults only when they are charged with the commission of “heinous crimes” such as murder, rape, or kidnapping.<sup>174</sup> While some dissimilarities exist,<sup>175</sup> the revised Brazilian Amendment would address a class of offenders similar to those targeted by Virginia legislation, thus making a comparative criminal justice analysis feasible and informative.<sup>176</sup>

#### IV. CONSIDERATION FOR BRAZIL

##### A. *Application of Virginia’s Outcomes to Brazil*

Because the “heinous crime” adaptation of PEC 171 is more likely to be adopted, and because of its similarity to current Virginia legislation, the remainder of this Note discusses the potential implications of adopting the revised version of PEC 171. Based on the results of studies done in Virginia that examine the effect of transfer laws on deterrence, recidivism, and juvenile well-being,<sup>177</sup> this Note argues that the adoption of PEC 171 will be unsuccessful in its stated goal of decreasing juvenile crime.<sup>178</sup> Indeed, it is likely that the Amendment will have unintended, harmful effects similar to those documented in Virginia.

Like the problems encountered by transferred juveniles in Virginia, the lack of available resources in adult prisons in Brazil is likely to have a profoundly negative effect on juvenile well-being.<sup>179</sup> This could ultimately translate into an increased incidence of recidivism among the youth population transferred to adult court.

Studies on juvenile delinquents in Brazil consistently find a high

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<sup>172</sup> See VA. CODE ANN. § 16.1-269.1 (West 2012).

<sup>173</sup> Aman, *supra* note 1.

<sup>174</sup> *Id.*

<sup>175</sup> For instance, Virginia law allows for three types of transfer and also allows for transfer of youths as young as fourteen. See § 16.1-269.1.

<sup>176</sup> See Nelken, *supra* note 158, at 291 (noting the potential value of a comparative criminal justice analysis).

<sup>177</sup> See *supra* Part III.

<sup>178</sup> See Canineu, *supra* note 160.

<sup>179</sup> See INT’L BAR ASS’N, ONE IN FIVE: THE CRISIS IN BRAZIL’S PRISONS AND CRIMINAL JUSTICE SYSTEM 17 (2010).

prevalence of psychiatric disorders.<sup>180</sup> For instance, one study reported that in addition to poverty and substance abuse, “the lives of these youngsters seem to have been permeated by violent and perturbed social, interpersonal, and family relationships that are sources of emotional and often physical pain.”<sup>181</sup> Faced with substantial overcrowding,<sup>182</sup> the underfunded Brazilian prison system is unlikely to be able to provide the type of individualized and consistent therapy these children require.<sup>183</sup> The prevalence of mental health issues among juvenile offenders also raises concerns about suicide. Because Virginian youth who are transferred to criminal court have significantly higher rates of suicide, Brazilian youth with mental health issues may exhibit similar rates of suicide, especially in the absence of treatment.

Research on the causes of juvenile delinquency in Brazil also reveals that frustration with perceived injustice and victimization underlie youth offending.<sup>184</sup> Because studies in Virginia have found that juveniles treated as adults are more prone to feelings of resentment and frustration which in turn lead to an increased likelihood of recidivism,<sup>185</sup> there is reason to suspect that Brazilian youth will respond to the psychological stressors resulting from transfer in a similar fashion.

Additionally, Brazilian prisons, like Virginian prisons, lack services designed to successfully reintegrate youthful offenders.<sup>186</sup> For instance, educational opportunities in adult prisons are sparse.<sup>187</sup> While Brazilian law requires that inmates in adult facilities receive access to education, “[t]he more overcrowded, noisy and dangerous the prison . . . the less conducive it is to education . . . . [S]ome notoriously bad prisons . . . offer inmates no educational opportunities.”<sup>188</sup> In addition, despite evidence

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<sup>180</sup> See, e.g., R.C. Andrade et al., *Preliminary Data on the Prevalence of Psychiatric Disorders in Brazilian Male and Female Juvenile Delinquents*, 37 BRAZILIAN J. MED. & BIOLOGICAL RES. 1155, 1159 (2004); Claudio Hutz & Débora Frizzo M. Silva, *Developmental Issues and Delinquent Behavior of Brazilian Adolescents*, 42 INT’L SOC’Y FOR STUDY BEHAV. DEV. 6, 7–8 (2002).

<sup>181</sup> Hutz & Silva, *supra* note 180, at 7; see also Fernanda Fonesca Rosenblatt, *A Youth Justice Approach to the Street Children Phenomenon in Brazil: A Critical Review*, 12 YOUTH JUST. 229, 231–32, 234 (2012).

<sup>182</sup> JOANNE MARINER, HUMAN RIGHTS WATCH, BEHIND BARS IN BRAZIL 32 (1998).

<sup>183</sup> See Carolina Gomma de Azevedo, *Brazil: Reforming Prison Management*, U.N. OFF. ON DRUGS & CRIME (2015), <https://www.unodc.org/newsletter/en/perspectives/no02/page002.html>; Andrade et al., *supra* note 180, at 1159.

<sup>184</sup> Hutz & Silva, *supra* note 180, at 7–8.

<sup>185</sup> See FINAL REPORT: STUDY OF VIRGINIA’S JUVENILE JUSTICE SYSTEM, *supra* note 138, at 4.

<sup>186</sup> See, e.g., MARINER, *supra* note 182, at 97 (“[T]he demand for such [social] services in many prisons outstrips the supply.”).

<sup>187</sup> *Id.* at 4.

<sup>188</sup> *Id.* at 184; see also Canineu, *supra* note 160.

that Brazilian youth who come into contact with the justice system often suffer from substance abuse disorders,<sup>189</sup> evidence suggests Brazilian prisons are less likely than youth centers to offer treatment programs.<sup>190</sup>

Long-term consequences similar to those cited in Virginia are also likely to result from PEC 171. Extant research on juveniles sentenced to Brazil's youth detention centers has already noted that "formal court proceedings and detention often 'label' children and reinforce their criminal 'status'" and "lessen[] the choices available to them."<sup>191</sup> Transferring youth into the adult system will only exacerbate the problems which already exist in connection with juvenile detention.<sup>192</sup>

To the extent that adult criminal convictions foreclose conventional forms of societal participation,<sup>193</sup> juveniles have more incentive to participate in criminal behavior in order to meet key life needs.<sup>194</sup> Research shows that an alarming rate of Brazilian youth are "pushed to the streets in order to earn money."<sup>195</sup> Though many of these youth engage in legitimate employment,<sup>196</sup> lowering the age of criminal responsibility may introduce juveniles to criminal networks and illegal activities that are ultimately more lucrative.<sup>197</sup>

Youth safety is also a critical concern. Like youth incarcerated with adults in Virginia, transferring Brazilian youth to the adult system will almost inevitably result in violent victimization.<sup>198</sup> The United Nations has reported that

[v]iolent recidivists and persons held for first-time petty offenses often share the same cell in Brazil, a situation which, combined with prisons' harsh conditions, lack of effective supervision, abundance of weapons, and lack of activities,

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<sup>189</sup> See Hutz & Silva, *supra* note 180, at 7.

<sup>190</sup> Canineu, *supra* note 160.

<sup>191</sup> Rosenblatt, *supra* note 181, at 241.

<sup>192</sup> See Canineu, *supra* note 160.

<sup>193</sup> *United Nations in Brazil Opposes Lowering the Legal Age of Majority*, U.N. OFFICE ON DRUGS & CRIME, <https://www.unodc.org/lpo-brazil/en/frontpage/2015/05/13-Nacoes-Unidas-no-Brasil-se-posicionam-contra-a-reducao-da-maioridade-penal.html> (last visited Mar. 17, 2017). The UN notes that incarceration in general stifles the "development of life skills." *Id.*

<sup>194</sup> See, e.g., Rosenblatt, *supra* note 181, 231–32, 241 (finding that juvenile detention already results in similar effects).

<sup>195</sup> *Id.* at 231–32.

<sup>196</sup> *Id.* at 233.

<sup>197</sup> For instance, juveniles convicted as adults "will have much more contact with gang members and convicted criminals . . . result[ing] in higher levels of recidivism." Bruce Douglas, *Brazil's Prison System Faces 'Profound Deterioration' if Youth Crime Law Passes*, GUARDIAN (June 29, 2015), <http://www.theguardian.com/world/2015/jun/29/brazil-prisons-criminal-responsibility-law-overcrowded>; see also Aman, *supra* note 1.

<sup>198</sup> See Canineu, *supra* note 160.

results in prisoner-on-prisoner abuses. In the most dangerous prisons, powerful inmates kill others with impunity, while even in relatively secure prisons extortion and lesser forms of mistreatment are common.<sup>199</sup>

The threat of victimization in prisons may also drive juveniles to join prison gangs for protection.<sup>200</sup> Youth are unlikely to sever their gang ties upon release leading to the potential for an increase in Brazilian gang violence.<sup>201</sup>

### B. Policy Implications

Based on the preceding analysis, Brazil's ratification of PEC 171 is susceptible to resulting in the same unintended consequences as seen in Virginia. As such, strengthening the existing juvenile system is a more productive and humane alternative to PEC 171.<sup>202</sup>

When implemented as intended, the ECA is substantially more effective at reducing recidivism compared to incarceration.<sup>203</sup> It is imperative, therefore, that Brazilian legislators address the issues of non-compliance and political resistance that detract from successful implementation of the ECA.<sup>204</sup> For instance, it has been noted that while the ECA is theoretically a rehabilitative measure, "[i]n practice . . . [youth] are often locked-up for long periods of time for alleged offences that would not result in imprisonment if they were committed by adults."<sup>205</sup> This practice has been associated with increased recidivism which underscores the futility of a retributive justice framework in conjunction with juvenile offenders.<sup>206</sup> Non-compliance with the ECA may account for a significant portion of youth re-offending and as such should be further explored.

### CONCLUSION

In both Virginia and Brazil, the implementation of juvenile transfer laws stems from a misguided fear of violent juvenile offenders; however, research has shown that juveniles are more likely to be the victims, rather than the perpetrators, of violent crime. While the stated goal of

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<sup>199</sup> MARINER, *supra* note 182, at 98.

<sup>200</sup> Canineu, *supra* note 160.

<sup>201</sup> *Id.*

<sup>202</sup> *Rapporteur on the Rights of the Child Wraps Up Visit to Brazil and Speaks out Against the Lowering of the Age of Criminal Responsibility*, ORG. AM. STATES (July 17, 2015), [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/078.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/078.asp).

<sup>203</sup> *See Aman, supra* note 1.

<sup>204</sup> *See Hoffman, supra* note 19; *see also* Eduardo & Egry, *supra* note 19, at 22–23.

<sup>205</sup> Rosenblatt, *supra* note 181, at 237.

<sup>206</sup> *Id.*



juvenile transfer is to reduce rates of recidivism, decades of research in the United States and Virginia, suggest that juvenile transfer is ineffective at reducing recidivism at best and counter-productive at worst.

Because delinquent youth in Brazil face many of the same challenges as youth who are transferred to criminal courts in Virginia, it is likely that PEC 171 will result in similar outcomes, including increased levels of recidivism as well as physical and psychological harm. As such, Brazilian legislators should be urged to reject PEC 171 and focus on reforming and strengthening the ECA. Though juvenile transfer might provide a short-term sense of relief, lessons learned from juvenile transfer in Virginia show that the long-term consequences may be dire for both Brazilian citizens and the youth who come into contact with the justice system.