

# CRIMINOLOGY

## ADOLESCENT TRANSFER, DEVELOPMENTAL MATURITY, AND ADJUDICATIVE COMPETENCE: AN ETHICAL AND JUSTICE POLICY INQUIRY

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*Based on the empirical evidence, automatic adolescent transfer to adult criminal court poses significant processing, treatment, and recidivism problems for youths, especially when issues of developmental maturity and trial fitness are brought to the fore. These concerns notwithstanding, legal tribunals increasingly rely on mandated waivers (both legislative and prosecutorial) as a basis to further judicial decision-making whose aim is punishment for serious juvenile offending and the protection of society from such future criminality. This qualitative study examines the prevailing state supreme court and appellate court opinions on this matter. By engaging in textual analysis, both the jurisprudential intent that informs these opinions and the ethical reasoning by which this intent is communicated are*

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*subjected to legal exegeses. Mindful of how existing strategies such as commonsense justice, therapeutic jurisprudence, and restorative justice represent types of psychological jurisprudence consistent with the philosophy of virtue ethics, this Article tentatively and provisionally delineates several policy recommendations for rethinking judicial decision-making on the issue of automatic adolescent transfer.*

## I. INTRODUCTION

Various theoretical approaches underscore the education, training, and research methods of the interdisciplinary law and psychology field. One key method of inquiry is the *law, psychology, and justice* perspective.<sup>1</sup> This method promotes social change and action through theory-sensitive psychological jurisprudence.<sup>2</sup> Psychological jurisprudence refers to “theories that describe, explain, and predict law by reference to human behavior.”<sup>3</sup> Thus, as a function of translating theory into public policy, psychological jurisprudence tells judges and legislators how they *should* make decisions, guided by sensible values and relevant data that draws attention not merely to what law is, but to what law ought to be.<sup>4</sup>

Within the domain of psychological jurisprudence, several dominant principles and practices have emerged that attempt to grow the law-psychology-justice agenda, especially in an effort to secure what is best for offenders, victims, and the public more generally. Chief among these principles and practices are (1) commonsense justice, (2) therapeutic

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<sup>1</sup> See Bruce A. Arrigo, *Psychology and the Law: The Critical Agenda for Citizen Justice and Radical Social Change*, 20 JUST. Q. 399 (2003); Dennis R. Fox, *Psychological Jurisprudence and Radical Social Change*, 48 AM. PSYCHOLOGIST 234 (1993). The other two main approaches are the clinical perspective, emphasizing research and practice in forensic psychology; and the law and social science orientation, stressing evidence-based legal psychology. Bruce Arrigo & Dennis Fox, *Psychology and the Law: The Crime of Policy and the Search for Justice*, in CRITICAL PSYCHOLOGY: AN INTRODUCTION 159, 161-63 (Dennis Fox et al. eds., 2d ed. 2009). Admittedly, the three identified approaches are somewhat overlapping; however, for the purpose of the ensuing investigation, the logic of the law, psychology, and justice model will guide the analysis. This is because the other two approaches do not fundamentally examine philosophical questions about the nature of justice and ethics in relation to psycho-legal controversies. Arrigo, *supra*.

<sup>2</sup> PSYCHOLOGICAL JURISPRUDENCE: CRITICAL EXPLORATIONS IN LAW, CRIME, AND SOCIETY (Bruce A. Arrigo ed., 2004).

<sup>3</sup> Mark A. Small, *Advancing Psychological Jurisprudence*, 11 BEHAV. SCI. & L. 3, 11 (1993).

<sup>4</sup> See, e.g., John Darley et al., *Psychological Jurisprudence: Taking Psychology and Law into the Twenty-First Century*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 35 (James R.P. Ogloff ed., 2002); Gary B. Melton, *The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence*, 16 LAW & HUM. BEHAV. 381 (1992).

jurisprudence, and (3) restorative justice. Each of these notions is summarily discussed below.

The notion of commonsense justice, as developed by Professor Finkel, evolves from an understanding that while the law has specified an objective path for society to follow in deciding guilt or innocence, this path does not always take into account the ordinary citizen's notion of what is just and fair.<sup>5</sup> Thus, commonsense justice attempts to include community sentiment (the judgment of the people at large) so that the law's more subjective character can be honored.<sup>6</sup> Incorporating the legal, moral, and psychological reasoning adopted by everyday people enables the displacement of the (misguided) direction that the law sets forth so that more equitable decision-making can be pursued. This decision-making endeavors to "perfect and complete the law."<sup>7</sup>

Therapeutic jurisprudence is "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."<sup>8</sup> In other words, therapeutic jurisprudence seeks to understand where and how the law can act as a healing agent.<sup>9</sup> The aim of this practice is to address both civil disputes<sup>10</sup> and criminal concerns<sup>11</sup> in mental health law, wherein salubrious outcomes are based on psychological values and insights.<sup>12</sup>

<sup>5</sup> NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* (1995).

<sup>6</sup> Norman J. Finkel, *Commonsense Justice, Psychology, and the Law: Prototypes that Are Common, Senseful, and Not*, 3 PSYCHOL. PUB. POL'Y & L. 461 (1997); Matthew T. Huss et al., *Battered Women Who Kill Their Abusers: An Examination of Commonsense Notions, Cognitions, and Judgments*, 21 J. INTERPERS. VIOLENCE 1063 (2006).

<sup>7</sup> FINKEL, *supra* note 5, at 5. Finkel specifically links jury nullification to efforts that aim to "perfect and complete the law" because it enables jurors to refuse the application of the law in instances where the law is perceived unjust according to the reasoning of everyday people.

<sup>8</sup> William Schma et al., *Therapeutic Jurisprudence: Using the Law to Improve the Public's Health*, J.L. MED. & ETHICS, Winter 2005 Supp., at 59, 60.

<sup>9</sup> See, e.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

<sup>10</sup> James McGuire, *Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework*, 4 W. CRIMINOLOGY REV. 108 (2003); Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 PSYCHOL. PUB. POL'Y & L. 80 (1995).

<sup>11</sup> Astrid Birgden, *Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis*, 14 PSYCHIATRY PSYCHOL. & L. 78 (2007); Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOLOGY REV. 143 (2003).

<sup>12</sup> BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH*

Restorative justice is a form of mediated reconciliation.<sup>13</sup> Its goal is to repair the harm and suffering that follows in the wake of interpersonal, organizational, or even global violence. This type of injury affects the victim, the offender, and the community to which all opposing parties belong.<sup>14</sup> Candid disclosures and humanistic dialogue guide the healing process in which genuine, meaningful, and, ideally, transformative resolutions are sought.<sup>15</sup>

Interestingly, although not identified as such, these collective principles and practices are consistent with virtue-based ethics. Articulated most explicitly and systematically in Aristotle's *Nicomachean Ethics*,<sup>16</sup> this version of moral philosophy seeks to promote a type of human excellence that is rooted in reason whereby one's character is not determined by what one does (for example, weighing competing interests; endorsing rights, duties, and obligations) but, instead, is an expression of living virtuously.<sup>17</sup> The highest purpose of this existence is to embody *eudaimonia* (a flourishing or excellence in being), happiness, or a fulfilled life. Aristotle's inquiry led him to explore those virtues that most profoundly facilitate such human flourishing. These are *habits* of character learned through practice; these are qualities that become a part of the person through regularly exercising their use.<sup>18</sup> Indeed, as Aristotle noted: "Anything that we have to learn to do we learn by the actual doing of it: people become builders by building and instrumentalists by playing

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LAW (1997).

<sup>13</sup> CRITICAL ISSUES IN RESTORATIVE JUSTICE (Howard Zehr & Barb Toews eds., 2004); DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE (3d ed. 2006).

<sup>14</sup> DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES (2d ed. 2005).

<sup>15</sup> See, e.g., Gordon Bazemore & Rachel Boba, "Doing Good" to "Make Good": Community Theory for Practice in a Restorative Justice Civic Engagement Reentry Model, 46 J. OFFENDER REHABILITATION (2007); Donna Coker, *Restorative Justice, Navajo Peacemaking, and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67 (2006); Murray Levine, *The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation*, 18 BEHAV. SCI. & L. 517 (2000); Mark S. Umbreit et al., *Victims of Severe Violence in Mediated Dialogue with Offender: The Impact of the First Multi-Site Study in the U.S.*, 13 INT'L REV. VICTIMOLOGY 27 (2006).

<sup>16</sup> ARISTOTLE, NICOMACHEAN ETHICS (Roger Crisp trans., Cambridge Univ. Press 2000).

<sup>17</sup> CHRISTOPHER R. WILLIAMS & BRUCE A. ARRIGO, ETHICS, CRIME, AND CRIMINAL JUSTICE 247-62 (2008).

<sup>18</sup> Aristotle identified several virtues or traits of character that predisposed a person to act morally. Additionally, he specified several vices or traits of character that inclined a person to act immorally or harmfully. For a cataloguing of these habits, along with corresponding discussion, see EMMETT BARCALOW, MORAL PHILOSOPHY: THEORIES AND ISSUES 106-19 (2d ed. 1998); WILLIAMS & ARRIGO, *supra* note 17, at 248-51, 260-62.

instruments. Similarly, we become just by performing just acts, temperate by performing temperate ones, brave by performing brave ones.”<sup>19</sup>

At the core of commonsense justice, therapeutic jurisprudence, and restorative justice is the goal of growing the character of all parties concerned, while simultaneously repairing the harm and reducing the non-therapeutic effects that negatively affect those involved in a civil or criminal dispute. Indeed, rather than emphasizing the infliction of punishment for retributive ends, these three law and psychology notions endorse, mostly unknowingly, though certainly implicitly, Aristotelian moral philosophy. In short, they help to seed and encourage the development of personal character and moral virtue among offenders, victims, and the community to which both are intimately connected. Commonsense justice accomplishes this by promoting the public’s reasoned participation in, and felt regard for, legal decision-making; therapeutic jurisprudence does this by assessing where and how the rule of law can be beneficial or harmful to citizens; and restorative justice achieves this by fostering a culture of forgiveness and compassion among warring individuals or groups. The collective effect of these three practices, then, is the cultivation of an integrity-based society. This is a society in which the moral fiber of individuals is more fully embraced and the flourishing prospects for human justice are more completely realized.

One particular law and psychology topic where the logic of psychological jurisprudence and the philosophy of virtue ethics are most germane is the competency-to-stand-trial doctrine. According to some investigators, the issue of trial fitness is “the most significant mental health inquiry pursued in the system of criminal law.”<sup>20</sup> More specifically, on the issue of *juvenile* competency to stand trial, the matter is even more complicated given the presence of developmental maturity factors. Indeed, “[d]espite the fact that attorneys and judges need guidance to recognize and address these issues in dealing with young defendants, the relationship between immaturity and competence to stand trial has been largely ignored in research and policy circles.”<sup>21</sup> The historical understanding of juvenile fitness for trial neglects to take into account the psychological limitations

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<sup>19</sup> ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 91-92 (J.A.K. Thomson trans., Penguin Books rev. ed. 1976) (1953).

<sup>20</sup> Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL’Y & L. 353, 353 (2001); see also MARK C. BARDWELL & BRUCE A. ARRIGO, *CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON* 3 (2002).

<sup>21</sup> Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question*, 18 CRIM. JUST., Fall 2003, at 20, 21.

that such youthfulness naturally entails.<sup>22</sup> Indeed, many juveniles possess similar deficits as those who experience mental illness or mental retardation. However, those deficits affecting adolescent competency are not because of mental illness or mental retardation; rather, they are because of cognitive or emotional immaturity.<sup>23</sup>

In recent years, given the increase in violent juvenile crime, a more punitive response by the criminal justice system has followed.<sup>24</sup> For example, in terms of court adjudication, automatic forms of juvenile transfer to adult court have steadily increased given the current “get tough” policy rationale used to address serious adolescent offending.<sup>25</sup> Not surprisingly, however, the decision to rely on automatic waiver strategies has led to a number of processing, confinement, and recidivism concerns. Along these lines, investigators have empirically shown how developmental immaturity negatively affects a waived juvenile’s ability to be fit for trial in the adult system.<sup>26</sup> Notwithstanding these findings, both the courts and state legislatures have mostly elected to ignore the adverse impact that current transfer policies have on juvenile offenders and on society more generally. While researchers have outlined the need to properly assess transferred youths for trial fitness purposes—with special consideration

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<sup>22</sup> See, e.g., Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463 (2003); Thomas Grisso, *Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006); Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

<sup>23</sup> THOMAS GRISSEO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 73-74 (2d ed. 2003).

<sup>24</sup> THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000); AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS (2006); YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000); Barry C. Feld, *Juvenile Transfer*, 3 CRIMINOLOGY & PUB. POL’Y 599 (2004); Barry C. Feld, *Race, Youth Violence, and the Changing Jurisprudence of Waiver*, 19 BEHAV. SCI. & L. 3 (2001) [hereinafter Feld, *Changing Jurisprudence of Waiver*].

<sup>25</sup> Feld, *Juvenile Transfer*, *supra* note 24, at 599; Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 4 CRIMINOLOGY 485, 485 (2004); Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUST. Q. 34, 35 (2006).

<sup>26</sup> Steven Bell, *Tate v. State: Highlighting the Need for a Mandatory Competency Hearing*, 28 NOVA L. REV. 575 (2004); Grisso et al., *supra* note 22; Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005); Steinberg, *supra* note 21; Jodie L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles’ Adjudicative Incompetence*, 13 PSYCHOL. PUB. POL’Y & L. 87 (2007).

given to developmental factors—the legal community regrettably has not endorsed these recommendations. Interestingly, no study has yet undertaken an exploration of the ethical reasoning that informs legal decision-making with respect to automatic juvenile transfer practices where issues of developmental maturity and adjudicative competence figure prominently into the analysis. Stated differently, the logic of psychological jurisprudence and the philosophy of ethics communicated through the relevant court cases on the law and psychology subject of adolescent automatic waiver have not been systematically examined. A thoughtful inquiry into both may very well be the basis for translating (assumed) theory into worthwhile public policy.

Accordingly, the present inquiry focuses on these prescient matters. The moral philosophy embedded within those court cases that reflect the prevailing judicial perspective on automatic juvenile transfer, developmental maturity, and trial fitness will be made explicit. After so doing, it will then be possible to assess whether, and to what extent, current retributive policies toward serious juvenile offenders promote—or fail to promote—excellence in character for all stakeholders in which the value of living virtuously guides the jurisprudential reasoning.

In Part II, the relevant literature on adolescent waiver, the social and behavioral science community's assessment of it, and the established approaches to ethics are presented. The juvenile transfer commentary explains current practices in court processing and the corresponding problems. The empirical research examines adolescent waiver, especially when complicated by developmental maturity and competency to stand trial issues. The moral philosophy exposition outlines the key principles that inform each school of ethical thought. In Part III, the qualitative methodology utilized for this study is described. This includes a discussion of how the specific court cases that constitute the data set were selected, as well as an accounting of the two levels of textual exegeses that were applied to these legal decisions. In Part IV, the results are delineated. Of particular interest are the types of ethical reasoning conveyed through the jurisprudential reasoning of each court case and across all of the decisions. In Part V, several implications that emerge from the findings are reviewed. Mindful of commonsense justice, therapeutic jurisprudence, and restorative justice, a number of policy recommendations are provisionally specified. Ultimately, this portion of the study considers whether the moral philosophy informing automatic juvenile transfer practices as supported by the court system is flawed, misguided, or inadequate, particularly given recent strategies in the law and psychology field that advance virtue-based resolutions to crime and delinquency.

## II. LITERATURE REVIEW

## A. TYPES OF JUVENILE WAIVER: AN OVERVIEW

Approximately 200,000 adolescents under the age of eighteen in the United States are tried as adults each year, and roughly 12% of these transferred juveniles are under the age of sixteen.<sup>27</sup> The legal basis for adjudicating youths to the adult system is the waiver process. Three waiver forms exist.

During the 1960s and early 1970s, the most common transfer strategy was judicial waiver.<sup>28</sup> In this approach, the juvenile court judge uses his or her discretion and determines whether transfer to a criminal court is warranted based on a hearing. At the hearing, the judge reviews the evidence regarding the youth's amenability to treatment and potential threat to society.<sup>29</sup> Typically, a decision to transfer hinges on the seriousness of the offense and the extent and type of the offender's prior record.

The second waiver strategy is known as legislative offense exclusion or statutory waiver.<sup>30</sup> This approach is the easiest way for the state legislature to emphasize the seriousness of the crime and to promote a retributive agenda. Legislatures create juvenile courts, and, as such, they are responsible for defining the appropriate jurisdictional venue in which a case can be considered. Moreover, they can support transfer based on the seriousness of the offense and the youth's age. For example, a state may exclude from juvenile court jurisdiction any youth sixteen years of age or older who is charged with a serious offense such as murder.<sup>31</sup>

The third strategy is prosecutorial waiver, or "direct file."<sup>32</sup> In this approach, concurrent jurisdiction grants the prosecutor discretion to choose whether a youth can be charged in a juvenile or criminal court, without

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<sup>27</sup> Steinberg, *supra* note 21, at 21.

<sup>28</sup> Feld, *Juvenile Transfer*, *supra* note 24, at 600.

<sup>29</sup> *Id.*; Norman Poythress et al., *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 LAW & HUM. BEHAV. 75 (2006); Martha June Rossiter, *Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society*, 27 J. JUV. L. 123 (2006).

<sup>30</sup> KUPCHIK, *supra* note 24, at 16; David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555 (2004); Feld, *Changing Jurisprudence of Waiver*, *supra* note 24, at 3; Rossiter, *supra* note 29, at 126.

<sup>31</sup> Feld, *Juvenile Transfer*, *supra* note 24, at 600 ("Legislative offense exclusion laws excise from juvenile court jurisdiction older youths whom prosecutors charge with serious offenses and 'automatically' place them in criminal court."); Feld, *Changing Jurisprudence of Waiver*, *supra* note 24, at 17.

<sup>32</sup> KUPCHIK, *supra* note 24; Brink, *supra* note 30; Feld, *Juvenile Transfer*, *supra* note 24; Poythress et al., *supra* note 29.

having to justify the decision through a judicial hearing or a formal record.<sup>33</sup> Current trends suggest that both statutory and prosecutorial waivers are the primary forms of juvenile transfer,<sup>34</sup> while judicial waiver is utilized less frequently.<sup>35</sup> Automatic waivers could, for example, alter the focus of a state's juvenile court to fit "get tough" policies demanded by the public in which a maximum age limit (for instance, fourteen) could guarantee that youths who exceed this restriction were automatically waived to the adult system.<sup>36</sup>

The various ways by which a juvenile can be transferred to criminal court enable judges, prosecutors, and legislatures to have considerable discretion in exercising their respective waiver decisions. Interestingly, judicial waiver allows for a hearing in which the juvenile's maturity level, amenability to treatment, and danger to society are all evaluated.<sup>37</sup> However, non-judicial forms of transfer, specifically statutory and prosecutorial waivers, do not adequately assess psychological maturity and amenability to rehabilitation.<sup>38</sup> A mandatory waiver only requires that the juvenile court find sufficient probable cause suggesting that the youth committed the crime according to the guidelines of the waiver statute.<sup>39</sup>

Additionally, in 2003, the Bureau of Justice Statistics reported findings from data collected in forty different jurisdictions on transferred juveniles during 1998. The data revealed that 41.6% of the adolescents were transferred by statutory exclusion, 34.7% were transferred by prosecutorial direct file, and only 23.7% were transferred by judicial waiver.<sup>40</sup> Consistent with these figures, new statutory waiver laws enacted in 1994 increased the number of juveniles automatically transferred to criminal court by 73% as

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<sup>33</sup> KUPCHIK, *supra* note 24; Brink, *supra* note 30; Feld, *Juvenile Transfer*, *supra* note 24, at 600.

<sup>34</sup> KUPCHIK, *supra* note 24, at 155; GERARD A. RAINVILLE & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, *JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS* (2003); Brink, *supra* note 30; Grisso, *supra* note 22.

<sup>35</sup> Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 24, at 231; Feld, *Juvenile Transfer*, *supra* note 24; Feld, *Changing Jurisprudence of Waiver*, *supra* note 24; Poythress et al., *supra* note 29, at 77.

<sup>36</sup> Brink, *supra* note 30; Feld, *Juvenile Transfer*, *supra* note 24; Feld, *Changing Jurisprudence of Waiver*, *supra* note 24.

<sup>37</sup> MICHAEL A. CORRIERO, *JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM* 40 (2006).

<sup>38</sup> Feld, *Juvenile Transfer*, *supra* note 24; Lois B. Oberlander et al., *Preadolescent Adjudicative Competence: Methodological Considerations and Recommendations for Practice Standards*, 19 *BEHAV. SCI. & L.* 545 (2001); Rossiter, *supra* note 29.

<sup>39</sup> Rossiter, *supra* note 29.

<sup>40</sup> RAINVILLE & SMITH, *supra* note 34.

compared with the waiver rate in 1986.<sup>41</sup> Collectively, these statistics suggest a departure from judicial waiver in favor of automatic forms of transfer whose purpose is to streamline the process of adjudicating youthful offenders. Statutory exclusion laws expose juveniles to adult criminal proceedings and sanctions without assessing for characteristics such as psychological maturity, social history, or prior record.<sup>42</sup> Moreover, these laws ensure that adjudication will be based on the offense rather than on the offender, that the severity of penalties will increase, and that judicial discretion will greatly diminish.<sup>43</sup> No formal guidelines govern prosecutorial discretion in direct-file waivers, and inadequate access to proper personal and clinical records about youthful offenders may inaccurately lead to false determinations concerning the most dangerous juveniles.<sup>44</sup> In addition, the lack of formal guidelines means that prosecutorial discretion is based more on subjective factors, such as where the youth resides and the severity of the offense, rather than more objective measures, such as assessing for maturity level, amenability to treatment, and level of risk or threat.<sup>45</sup>

A primary policy rationale for relying on the newer forms of automatic waiver is the deterrence of future juvenile crime.<sup>46</sup> Regrettably, evidence-based research has yet to support this rationale.<sup>47</sup> For example, employing a quasi-experimental, multiple-interrupted-times-series design, investigators concluded that statutory exclusion laws in twenty-two states had no statistically significant effect on general deterrence.<sup>48</sup> Another study, utilizing the same research design and published in this Journal, examined fourteen states with direct-file statutes; investigators found that direct-file laws had no lasting deterrent effect on juvenile crime.<sup>49</sup>

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<sup>41</sup> Dana Royce Baerger et al., *Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants*, 31 J. AM. ACAD. PSYCHIATRY & L. 314 (2003); David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503 (2006).

<sup>42</sup> Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 24, at 45, 48; Feld, *Juvenile Transfer*, *supra* note 24, at 601; Oberlander et al., *supra* note 38; Rossiter, *supra* note 29.

<sup>43</sup> CORRIERO, *supra* note 37, at 130; Franklin E. Zimring, *The Punitive Necessity of Waiver*, in CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 24, at 207, 214.

<sup>44</sup> Feld, *Juvenile Transfer*, *supra* note 24, at 601.

<sup>45</sup> *Id.* at 601-02.

<sup>46</sup> Bishop & Frazier, *supra* note 35, at 245-48; Feld, *Juvenile Transfer*, *supra* note 24, at 602; Rossiter, *supra* note 29.

<sup>47</sup> KUPCHIK, *supra* note 24, at 151.

<sup>48</sup> Steiner et al., *supra* note 25, at 38-40.

<sup>49</sup> 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. &

Further, New York statistics indicate that more than 60% of transferred youth recidivate within thirty-six months.<sup>50</sup> Conversely, a study of 800 adolescent offenders charged with robbery found that those adjudicated in juvenile court recidivated roughly 20% less than those waived to the adult system.<sup>51</sup> A Pennsylvania study revealed that juveniles transferred to criminal court received harsher punishments for similar crimes than young adults (eighteen to twenty-four years-old) deemed ineligible for juvenile court.<sup>52</sup> As investigators noted, transferred adolescents received eighteen months incarceration on average, while their young adult counterparts were confined for an average of only six months.<sup>53</sup> Thus, youthfulness or young age is used as an aggravating, rather than a mitigating, factor for transferring juveniles<sup>54</sup> despite the absence of empirical evidence supporting juvenile transfer based on the deterrence-of-future-crime justification. Complicating this disturbing trend are studies that report the rate of adult incarceration for transferred adolescents. To illustrate, the Bureau of Justice Statistics reported in 2003 that 64% of juveniles convicted in criminal court during 1998 were sentenced to incarceration, with 43% percent of that total serving terms in adult prisons and the remainder sentenced to confinement in jail settings.<sup>55</sup>

#### B. THE SOCIAL AND BEHAVIORAL SCIENCE RESEARCH

The extant research on juvenile waiver—including types of transfer, policy justifications for such a practice, and recidivism trends that follow—have led to several social and behavioral science questions about the appropriateness of exposing an adolescent to the criminal trial. In particular, investigators have examined six questions: (1) Are automatic waivers punitive in nature, and do the courts adequately assess developmental maturity factors when considering competence to stand trial; (2) Can the psychosocial aspects of developmental maturity be specified and, if so, what are they; (3) Is developmental immaturity a sufficient factor to declare a waived juvenile incompetent to stand trial; (4) How does one accurately measure the multiple dimensions of maturity; (5) What have researchers proposed to ensure the inclusion of developmental maturity

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<sup>50</sup> CORRIERO, *supra* note 37, at 47.

<sup>51</sup> Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in *CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 24, at 145.

<sup>52</sup> Kurlychek & Johnson, *supra* note 25.

<sup>53</sup> *Id.* at 498.

<sup>54</sup> MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 150-56 (2004), *cited in* Feld, *supra* note 22, at 602.

<sup>55</sup> RAINVILLE & SMITH, *supra* note 34, at 5-6.

factors in competency evaluations for purposes of courtroom decision-making; and (6) Why is it important to assess developmental maturity in cases where juveniles are waived to the adult system? Each concern is summarily discussed below.

Some researchers note that the principal focus of waivers based on prosecutorial discretion and automatic transfer emphasizes the crime committed to the near exclusion of the juvenile who transgresses.<sup>56</sup> As investigators warn, this orientation makes issues such as public safety, retribution, and deterrence so compelling that the courts and legislatures are less inclined to preserve the legal distinctions between adolescents and their adult counterparts.<sup>57</sup> Critics maintain that the danger with this “conventional belief” is its assumption that once a juvenile is designated for automatic transfer to criminal proceedings, the judgment regarding adult sanctions is also reached.<sup>58</sup> As a practical matter, what this means is that the youth faces imminent punishment as an adult without consideration for possible developmental immaturity or related deficits. Further, investigators argue that ignoring the importance of developmental immaturity and offender age in waiver determinations is akin to “ignor[ing] an elephant that has wandered into the courtroom.”<sup>59</sup> Indeed, as the empirical evidence indicates, deficiencies in “psychosocial maturity” among juveniles are caused by their impulsivity,<sup>60</sup> reliance on peer acceptance,<sup>61</sup> lack of autonomy,<sup>62</sup> and poor judgment in relation to future consequences.<sup>63</sup> Given these findings, researchers conclude that youthful offenders must be evaluated for trial fitness before a transfer decision can be made.<sup>64</sup>

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<sup>56</sup> See Feld, *Juvenile Transfer*, *supra* note 24, at 602; Steiner & Wright, *supra* note 49; Zimring, *supra* note 43.

<sup>57</sup> See KUPCHIK, *supra* note 24, at 18-19; Brink, *supra* note 30; Feld, *Changing Jurisprudence of Waiver*, *supra* note 24, at 12-14; Kurlychek & Johnson, *supra* note 25; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 24, at 379, 379-80; Steiner & Wright, *supra* note 49; Steiner et al., *supra* note 25.

<sup>58</sup> CORRIERO, *supra* note 37, at 170.

<sup>59</sup> Steinberg & Cauffman, *supra* note 57, at 381.

<sup>60</sup> Grisso, *supra* note 22; Grisso et al., *supra* note 22; Oberlander et al., *supra* note 38; Scott & Grisso, *supra* note 26, at 813.

<sup>61</sup> KUPCHIK, *supra* note 24, at 19; Feld, *supra* note 22; Katner, *supra* note 41; Redding & Frost, *supra* note 20; Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL*, *supra* note 24, at 291, 304; Scott & Grisso, *supra* note 26, at 815.

<sup>62</sup> Katner, *supra* note 41.

<sup>63</sup> *Id.*; see also Grisso, *supra* note 22, at 8-9; Oberlander et al., *supra* note 38; Redding & Frost, *supra* note 20; Scott & Grisso, *supra* note 26, at 815-16.

<sup>64</sup> Patricia Allard & Malcolm C. Young, *Prosecuting Juveniles in Adult Court: The*

As previously mentioned, psychosocial factors affecting a youth's reasoning process and ability to adequately function cognitively during the trial are numerous, varied, and profound.<sup>65</sup> For example, with respect to peer influence, impaired adolescents are not fully capable of understanding the long-term consequences of their actions, engage in decision-making that typically reflects an absence of independent reasoning, and are highly inclined to pursue risk-taking behaviors symptomatic of their impulsivity.<sup>66</sup> Moreover, with respect to autonomy, Corriero asserted that the diminished criminal responsibility of wayward juveniles is "explained in part by the prevailing circumstances [in which they] have less control, or less experience with control, over their own environment."<sup>67</sup> Certainly, as researchers endeavor to more clearly define and operationalize developmental maturity factors, their potential use in a legal context—especially for furthering the construct of competence to stand trial—will likely increase as well.<sup>68</sup> However, to date no official premise exists in which developmental immaturity represents a basis to declare a juvenile incompetent for adjudicative purposes.<sup>69</sup> The lack of such a premise is linked to the significance courts and state legislatures avail to the notion of maturity.

Indeed, one of the more common concerns regarding competency to stand trial among transferred youth is whether developmental immaturity is a sufficient factor when making determinations about a juvenile defendant's mental fitness for trial.<sup>70</sup> Most courts require that the defendant be diagnosed as suffering from some form of psychiatric illness or mental retardation as a prerequisite for an incompetency determination.<sup>71</sup> Research

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*Practitioner's Perspective*, 2 J. FORENSIC PSYCHOL. PRAC. 65, 75 (2002); Bell, *supra* note 26; Grisso et al., *supra* note 22; Redding & Frost, *supra* note 20; Scott & Grisso, *supra* note 26; Steinberg & Cauffman, *supra* note 57, at 397, 404.

<sup>65</sup> See Grisso et al., *supra* note 22; Scott, *supra* note 61; Scott & Grisso, *supra* note 26.

<sup>66</sup> Grisso, *supra* note 22, at 7-9; Grisso et al., *supra* note 22.

<sup>67</sup> CORRIERO, *supra* note 37, at 175 (citing Laurence D. Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.")).

<sup>68</sup> Grisso et al., *supra* note 22, at 335.

<sup>69</sup> Richard Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL, *supra* note 24, at 88.

<sup>70</sup> Grisso, *supra* note 22; Grisso et al., *supra* note 22, at 335-36; Katner, *supra* note 41; Redding & Frost, *supra* note 20; Scott & Grisso, *supra* note 26.

<sup>71</sup> Baerger et al., *supra* note 41, at 31; Mark C. Bardwell & Bruce A. Arrigo, *Competency to Stand Trial: A Law, Psychology, and Policy Assessment*, 30 J. PSYCHIATRY & L. 147, 163 (2002); Oberlander et al., *supra* note 38, at 548; Scott & Grisso, *supra* note 26; Viljoen & Grisso, *supra* note 26.

indicates that roughly one-third of juveniles between eleven and thirteen years of age, and one-fifth of juveniles between fourteen and fifteen years of age, lack the requisite competence to stand trial.<sup>72</sup> Importantly, the findings reveal that adolescent immaturity affects the juvenile defendant's behavior and ability to make decisions regarding future orientation and risk perception during the legal proceedings.<sup>73</sup> When judgment is impaired or when maturity stemming from sufficient psychosocial development is absent, then the youth's ability to competently function in adult criminal proceedings is compromised.

In contrast to previous research, a Florida study recently found that a sample of 118 direct-filed male youths between the ages of sixteen and seventeen had few differences in competence-related abilities when compared to a sample of 165 incarcerated adults between the ages of eighteen and twenty-four.<sup>74</sup> The investigators noted that while their findings supported direct-file policies for sixteen- and seventeen-year-old juveniles whose immaturity did not impair their competence-related abilities, future research would do well to assess whether the results were peculiar to the sample and jurisdiction.<sup>75</sup> Moreover, and consistent with the thrust of the ensuing inquiry, the findings did not include a discussion of the jurisprudential basis upon which juveniles were direct-filed by prosecutorial discretion. Thus, the underlying ethical considerations operating here in support of waiver were not subjected to careful scrutiny or systematic analysis.

Although researchers have found that developmental immaturity is a potentially significant factor affecting the adjudicative competence of juveniles, they have yet to determine how best to measure it. One study investigated the specific abilities that psychologists considered pertinent when assessing maturity in juvenile defendants for purposes of adjudicative competence.<sup>76</sup> The majority of psychologists focused on cognitive or social skills; only a few clinicians expressed concerns for psycho-legal abilities, that is, how a defendant's level of maturity affects his or her functioning in a legal proceeding.<sup>77</sup> Findings such as these suggest that forensic psychologists lack adequate guidelines to properly assess maturity factors, especially given the variety of testing instruments used to evaluate

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<sup>72</sup> Steinberg, *supra* note 21, at 23-24.

<sup>73</sup> *Id.* at 24; Katner, *supra* note 41; Scott & Grisso, *supra* note 26, at 815, 823.

<sup>74</sup> Poythress et al., *supra* note 29, at 88-90.

<sup>75</sup> *Id.*

<sup>76</sup> Nancy L. Ryba et al., *Assessment of Maturity in Juvenile Competency to Stand Trial Evaluations: A Survey of Practitioners*, 3 J. FORENSIC PSYCHOL. PRAC. 23 (2003).

<sup>77</sup> *Id.* at 40-41.

(juvenile) competency.<sup>78</sup> Thus, as some experts have concluded, the “judgment-related” factors associated with developmental immaturity are not consistent with adult competency evaluations; as such, it is a difficult task for psychologists, attorneys, and courts to take these factors into consideration.<sup>79</sup>

Bonnie proposed a reformulation of the concept of competency.<sup>80</sup> As a multi-faceted construct, it would include the following: (1) the ability to assist counsel, (2) the ability to reason and understand the legal proceedings and charges against the accused, and (3) the ability to make legal decisions.<sup>81</sup> In this reformulation, adjudicative competence requires “maturity of judgment.”<sup>82</sup> Psychosocial factors greatly influence an adolescent’s level of maturity and ability to make sound, autonomous judgments.<sup>83</sup> However, psychosocial immaturity is not clearly defined by the *Dusky v. United States* standard of adjudicative competency.<sup>84</sup> This case represents the legal criterion most often applied to transferred juveniles facing criminal sanctions.<sup>85</sup> Grisso and his co-authors addressed the challenges the courts might confront if developmental immaturity were identified as a sufficient basis to find adolescents incompetent to stand trial in criminal court. These investigators proposed a “two-tier standard” for adjudicative competency.<sup>86</sup> They argued that juveniles found incompetent to stand trial in adult adversarial proceedings because of developmental immaturity might still face adjudication in delinquency proceedings, which is consistent with a new “relaxed competence standard.”<sup>87</sup> However, some commentators suggest that the two-tier competency standard represents a hopeful remedy developed by researchers who fear that the courts and legislatures will not address developmental immaturity as a basis for incompetence *unless* these decision brokers can be assured that juvenile offenders will not be immune from sanctions precisely because of their

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<sup>78</sup> *Id.* at 27; see also Thomas Grisso, *Forensic Clinical Evaluations Related to Waiver of Jurisdiction*, in CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 24, at 330.

<sup>79</sup> Eileen P. Ryan & Daniel C. Murrie, *Competence to Stand Trial and Young Children: Is the Presumption of Competence Valid?*, 5 J. FORENSIC PSYCHOL. PRAC. 89, 92 (2005) (citing Redding & Frost, *supra* note 20, at 378).

<sup>80</sup> Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992).

<sup>81</sup> *Id.* at 297.

<sup>82</sup> *Id.*; see also Grisso et al., *supra* note 22, at 335.

<sup>83</sup> Grisso et al., *supra* note 22.

<sup>84</sup> 362 U.S. 402 (1960).

<sup>85</sup> See Grisso et al., *supra* note 22, at 334; Scott & Grisso, *supra* note 26, at 799-800.

<sup>86</sup> Grisso et al., *supra* note 22, at 360.

<sup>87</sup> *Id.*

“developmental incompetence.”<sup>88</sup> This concern is well founded, especially since maturity cannot be easily restored.<sup>89</sup>

The significance of the incompetency doctrine, as supported by rights protected under the Sixth and Fourteenth Amendments to the U.S. Constitution, guarantees the credibility of the criminal proceedings while upholding the “accuracy, fairness, and dignity of the process.”<sup>90</sup> The integrity of the adversarial system requires that courts not adjudicate incompetent defendants; thus, understanding how developmental maturity affects competency to stand trial for transferred juveniles is extremely important.

Grisso identified four areas pertinent to the developmental concerns regarding trial competence for juveniles.<sup>91</sup> These areas include: (1) adolescents’ understanding of the legal system, (2) their belief that legal circumstances applied to them, (3) their capacity for communicating with counsel, and (4) the processes underlying their decision-making.<sup>92</sup> Oberlander and her co-authors outlined various developmental factors that might enhance trial competency deficits.<sup>93</sup> These factors consisted of motor behavior, emotional functioning, attention span, language development and expressive communication, frame of reference and capacity for role differentiation and group relating, and passage of time.<sup>94</sup> As the investigators observed, improper development in these areas of maturity might adversely affect a juvenile’s capacity to function sufficiently and rationally under the *Dusky* standard of trial competence.<sup>95</sup> Moreover, the lack of proper developmental maturity might compel a fact-finder to conclude that a youth with such deficits was too immature to cope with the dynamics of the adversarial system.<sup>96</sup> Thus, following Grisso’s 2000

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<sup>88</sup> *Id.*; see also Scott & Grisso, *supra* note 26.

<sup>89</sup> Viljoen & Grisso, *supra* note 26, at 92-93. There is reason for concern among state legislatures if juvenile offenders are found incompetent due to immaturity alone. Maturity can only be restored through age and experience; therefore, the courts could not hold such juvenile offenders indefinitely because it is unconstitutional. See Grisso et al., *supra* note 22, at 360-61 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) (explaining that the state must release an incompetent defendant if competence cannot be restored within a reasonable amount of time)).

<sup>90</sup> Bardwell & Arrigo, *supra* note 71, at 154 (citations omitted); see also Scott & Grisso, *supra* note 26, at 799-800.

<sup>91</sup> Grisso, *supra* note 78; Grisso et al., *supra* note 22.

<sup>92</sup> *Id.*; see also Kirk Heilbrun et al., *Juvenile Competence to Stand Trial: Research Issues in Practice*, 20 LAW & HUM. BEHAV. 573 (1996).

<sup>93</sup> Oberlander et al., *supra* note 38.

<sup>94</sup> *Id.* at 557-60.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see also Grisso et al., *supra* note 22, at 357; Scott & Grisso, *supra* note 26.

findings,<sup>97</sup> “psychosocial immaturity” appears to restrict an adolescent defendant’s abilities to understand the four legal areas of trial competence because the youth might not possess the decisional competence necessary for sound “legal decision-making” in regard to the long-term consequences of his or her legal judgments (for example, plea bargaining, confessing guilt, and so on).<sup>98</sup> Given this analysis and mindful of the *Dusky* standard, some researchers have concluded that “it should make no difference whether the source of the defendant’s incompetency is mental illness or immaturity.”<sup>99</sup> Currently there appear to be no investigations that inquire about the ethical basis for which automatic juvenile transfer practices are increasingly preferred. Thus, the present analyses, within this Article, attempts to fill this void within the existing literature.

### C. APPROACHES TO ETHICS

Three basic approaches to ethics are discernible in the literature. These include consequentialism, formalism, and virtue-based reasoning. In what follows, the principles embodied by these moral philosophies are summarily reviewed. Additionally, applications in relevant criminal justice contexts are briefly discussed, particularly where useful to and appropriate for the thrust of this overall study.

Following a more strict interpretation of the doctrine, consequentialism asserts that individuals should act in their best interest to ensure optimal effects (that is, gains) as a result of those actions.<sup>100</sup> However, three forms of consequentialism exist, and each offers a somewhat modified assessment of this fundamental position. The forms of consequentialism are ethical egoism, contractualism, and utilitarianism.

Ethical egoism claims that people are intrinsically motivated by self-interest, and pursue actions and seek outcomes that will benefit themselves over others.<sup>101</sup> Consistent with this view, Thomas Hobbes, a psychological and ethical egoist, wrote in *Leviathan* that:

[E]very man is Enemy to every man . . . wherein men live without other security, than what their own strength, and their own invention shall furnish . . . there is no place for Industry . . . no Culture of the Earth . . . no Navigation . . . no Knowledge . . . no account of Time . . . no Arts . . . no Letters . . . no Society; and

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<sup>97</sup> Grisso, *supra* note 78.

<sup>98</sup> Grisso et al., *supra* note 22, at 357.

<sup>99</sup> *Id.* at 358, 361.

<sup>100</sup> MICHAEL SLOTE, COMMON-SENSE MORALITY AND CONSEQUENTIALISM 12 (1985).

<sup>101</sup> WILLIAMS & ARRIGO, *supra* note 17, at 184.

which is worst of all, continual feare, and danger of violent death; and the life of man, solitary, poore, nasty, brutish, and short.<sup>102</sup>

Hobbes's view of the state of nature, or what humankind would be like without formal government, suggests that individuals in pursuit of their own self-interest create an environment of competitiveness, fear, and insecurity. Hampton appropriated the Hobbesian perspective on self-interest and, by extension, ethical egoism, to explain possible motivations for one's opposition to the law.<sup>103</sup> Specifically, she noted that identifying moral agendas in the furtherance of personal desires helps account for how the law is egoistically displaced.<sup>104</sup>

Contractualism maintains that the establishment of government and its subsequent laws through the notion of a "social pact" allows for cooperation among individuals and freedom from fear otherwise present in the state of nature.<sup>105</sup> Jean-Jacques Rousseau, one of the principal architects of this version of consequentialism, noted that "[e]ach of us puts . . . all [our] power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."<sup>106</sup> Thus, contractualism seeks to create the civil state where moral rules and regulations govern people's actions so all may coexist, share in the security the state provides, and engage in unselfishness.

Utilitarianism is a unique form of consequentialism in that it is altruistic and fosters the "Principle of Utility." This principle maintains that when faced with a moral situation, one must choose the action that has the best overall outcome for all involved.<sup>107</sup> In other words, utilitarianism entails seeking "the greatest amount of happiness altogether" in accordance with the "greatest happiness principle."<sup>108</sup> Thus, ethical reasoning, choice, and behavior require that one deliberate over the consequences of one's actions to ensure the greatest good for the greatest number of people. However, in undertaking such an analysis, the individual must be careful to discern whether the ends secured justify the means employed. This is

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<sup>102</sup> THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) (1651); see also WILLIAMS & ARRIGO, *supra* note 17, at 191.

<sup>103</sup> Jean Hampton, *Mens Rea*, in *CRIMINAL JUSTICE ETHICS* 50, 70 (Paul Leighton & Jeffrey Reiman eds., 2001).

<sup>104</sup> *Id.* at 70-71.

<sup>105</sup> WILLIAMS & ARRIGO, *supra* note 17, at 193.

<sup>106</sup> JAMES P. STERBA, *SOCIAL AND POLITICAL PHILOSOPHY: CLASSICAL WESTERN TEXTS IN FEMINIST AND MULTICULTURAL PERSPECTIVES* 240 (3d ed. 2003) (emphasis omitted).

<sup>107</sup> JEREMY BENTHAM & JOHN STUART MILL, *THE UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1973); WILLIAMS & ARRIGO, *supra* note 17, at 197.

<sup>108</sup> JOHN STUART MILL, *UTILITARIANISM* 15-16 (Oskar Piest ed., Bobbs-Merrill Co. 1957) (1861).

because utilitarian arguments can (and sometimes do) result in the rights of the minority being violated in pursuit of the greater good (that of the majority).<sup>109</sup> Interestingly, Steinberg and Schwartz suggested that researchers should examine the utilitarian perspective with respect to juvenile transfer policies.<sup>110</sup> As they noted, one could “raise questions about fairness and justice and probe whether treating juvenile crime in a particular way strikes an acceptable balance between the rights of the offender, the interests of the offended, and the concerns of the community.”<sup>111</sup>

Formalism is another school of ethical thought. It is often termed deontology or Kantian ethics. Deontology is the practice of behaving out of moral duty because it is deemed “right” rather than because one fears potential or adverse consequences.<sup>112</sup> In support of this notion, Immanuel Kant identified what he termed the “categorical imperative.”<sup>113</sup> These imperatives constitute actions that are good, morally justified, and demand obligatory adherence regardless of personal or unique circumstances.

However, as Ross argued, an individual can confront a moral dilemma when having to choose between two categorical imperatives.<sup>114</sup> In response to this dilemma, Ross presented the concept of prima facie responsibilities.<sup>115</sup> These are “conditional duties” that may be superseded by other obligations because they possess higher moral importance.<sup>116</sup> Above all, Kant deemed human dignity to have the highest moral significance; thus, he argued that people should never be used “as a means to some end.”<sup>117</sup> Kant also argued that a maxim, or moral rule, should be viewed as a universal law.<sup>118</sup> Consequently, people should abide by such a rule at all times. However, if the maxim did not attain the status of a universal law, it should be rejected altogether.<sup>119</sup>

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<sup>109</sup> WILLIAMS & ARRIGO, *supra* note 17, at 207.

<sup>110</sup> Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL*, *supra* note 24, at 9, 28-29.

<sup>111</sup> *Id.* at 28-29.

<sup>112</sup> JAY S. ALBANESE, *PROFESSIONAL ETHICS IN CRIMINAL JUSTICE: BEING ETHICAL WHEN NO ONE IS LOOKING* 27 (2006); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Thomas E. Hill, Jr., & Arnulf Zweig eds., student ed., Oxford Univ. Press 2002) (1785).

<sup>113</sup> KANT, *supra* note 112, at 216.

<sup>114</sup> W.D. ROSS, *THE RIGHT AND THE GOOD* 18-19 (1930).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 19-21.

<sup>117</sup> WILLIAMS & ARRIGO, *supra* note 17, at 224, 239.

<sup>118</sup> *See id.* at 219.

<sup>119</sup> *Id.*; *see* KANT, *supra* note 112, at 204.

Virtue ethics, or Nichomachean philosophy, is Aristotle's teleological perspective regarding human purpose and existence.<sup>120</sup> Virtue ethics suggests that human beings can flourish and excel. In order to do so, they must actualize their potential moral reasoning by expressing moral character through the decisions they make and the actions they undertake.<sup>121</sup> According to Aristotle, the highest good that all people seek is a flourishing in being.<sup>122</sup> This state of existence is consistent with happiness (*eudaimonia*), and is achieved through developing one's moral virtues.<sup>123</sup> Aristotle noted that people have the ability to engage in higher reasoning.<sup>124</sup> He also recognized that we are social beings and that, as such, we can only thrive as moral agents if we cooperate with others and develop lasting relationships that will foster a sense of connectedness.<sup>125</sup> Excellence in character, along with virtue, must be learned through experience.<sup>126</sup> When we live virtuously as a function of our humanity—and not because of duties or because of consequences—we have the greatest likelihood of obtaining genuine happiness. Building on this notion, Aristotle observed that virtue “is a mean between two vices, one of excess, the other of deficiency.”<sup>127</sup> For example, courage is the “golden mean” or virtue between the excess vice of foolishness and the deficient vice of cowardice.<sup>128</sup> Practical wisdom, then, must be utilized when making the appropriate ethical decision in relation to the moral situation at hand.<sup>129</sup>

Corriero applied Aristotle's moral philosophy to the impulsiveness of adolescents.<sup>130</sup> He specified how such impetuosity affects the criminal responsibility of juvenile offenders, especially when considering the issue of waiver. In addition, Corriero explained how Aristotle's ethical precepts and the Aristotelian method of persuasion can be employed by judges. Specifically, he indicated how judges can assist transferred juveniles gain perspective on their behavior by engaging the youthful offender “in a process of remembrance, of empathetic association.”<sup>131</sup> In light of these ethical frameworks, this Article examines the prevailing ethical reasoning

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<sup>120</sup> ARISTOTLE, *supra* note 16.

<sup>121</sup> WILLIAMS & ARRIGO, *supra* note 17, at 255-56.

<sup>122</sup> ARISTOTLE, *supra* note 16.

<sup>123</sup> ALBANESE, *supra* note 112, at 14-15; WILLIAMS & ARRIGO, *supra* note 17, at 260.

<sup>124</sup> ARISTOTLE, *supra* note 16, at 22.

<sup>125</sup> WILLIAMS & ARRIGO, *supra* note 17, at 257.

<sup>126</sup> ALBANESE, *supra* note 112, at 16.

<sup>127</sup> ARISTOTLE, *supra* note 16, at 31.

<sup>128</sup> *Id.* at 32.

<sup>129</sup> WILLIAMS & ARRIGO, *supra* note 17, at 260.

<sup>130</sup> CORRIERO, *supra* note 37, at 25-27.

<sup>131</sup> *Id.* at 87.

that informs the judicial intent for court decisions regarding issues of adolescent transfer, developmental maturity, and competency to stand trial.

### III. METHOD

This research investigates the underlying ethical reasoning communicated in various state supreme court and state appellate court decisions that address adolescent waiver, developmental immaturity, and competency to stand trial where automatic transfer is employed.<sup>132</sup> In this instance, “ethical reasoning” refers to those moral philosophical concepts or principles that guide, impact, or otherwise underscore the courts’ interpretations and judgments of the legal issues at hand.<sup>133</sup> In order to systematically examine this matter, a targeted assessment of the jurisprudential intent found within each case will be featured. Jurisprudential intent refers to an assessment of the “judicial construction of the opinion,” based on a careful analysis of its wording or language, in which the court’s essential or plain meaning is more fully revealed.<sup>134</sup> Ascertaining the link between the courts’ underlying ethical reasoning and their jurisprudential intent represents something of a qualitative and interpretive endeavor. However, as other researchers have noted, legal inquiries of this sort allow investigators to reflect upon various aspects of juridical decision-making in which the contexts that socially organize the law are made more explicit.<sup>135</sup> Moreover, consistent with this logic, other commentators have noted that this qualitative approach helps to more expressly unpack “how and for whom justice is served.”<sup>136</sup>

Before any interpretive analysis was undertaken, specific criteria were established to determine which court cases would be considered for examination. First, an initial search on LexisNexis was conducted for key terms. Those words and phrases included “juvenile transfer,” “competency to stand trial,” and “maturity.” “Juvenile transfer” was chosen over

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<sup>132</sup> Initially, the search for relevant cases to evaluate focused on decisions rendered by the United States Supreme Court. However, the specific parameters informing the identification of such cases—juvenile (automatic) transfer, developmental maturity, and trial fitness—did not yield any results. Consequently, attention was subsequently directed toward state supreme court and appellate court cases that met the criteria.

<sup>133</sup> RICHARD PAUL & LINDA ELDER, UNDERSTANDING THE FOUNDATIONS OF ETHICAL REASONING (2006), available at <http://www.criticalthinking.org/store-page.cfm?P=products&ItemID=169&catalogID=224&cateID=132>; VINCENT RYAN RUGGIERO, BEYOND FEELINGS: A GUIDE TO CRITICAL THINKING (7th ed. 2004).

<sup>134</sup> Bruce A. Arrigo, *Justice and the Deconstruction of Psychological Jurisprudence: The Case of Competency to Stand Trial*, 7 THEORETICAL CRIMINOLOGY 55, 59 (2003).

<sup>135</sup> Reza Banakar & Max Travers, *Studying Legal Texts*, in THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 133, 134 (Reza Banakar & Max Travers eds., 2005).

<sup>136</sup> Arrigo, *supra* note 134, at 55.

“juvenile waiver” because a preliminary search with the latter term yielded cases primarily involving waiver of rights; the former term, however, yielded cases specifically regarding juvenile transfer practices. Additionally, “competency to stand trial” was selected over the relatively new usage “adjudicative competency” because the latter phrase produced no results; the former expression, however, led to the retrieval of several court decisions. “Maturity” was chosen over “immaturity” because the former usage is the root of the developmental question courts consider, thereby making it more likely to reveal cases that examine aspects of youth development. With these criteria in mind, the LexisNexis search yielded seven court cases. These judicial decisions included the following: *Tate v. State*,<sup>137</sup> *M.D. v. State*,<sup>138</sup> *Stanford v. Kentucky*,<sup>139</sup> *State v. Gonzales*,<sup>140</sup> *Otis v. State*,<sup>141</sup> *People v. Hana*,<sup>142</sup> and *State v. McCracken*.<sup>143</sup>

An eighth case, *In re Causey*,<sup>144</sup> was also identified. However, it was not included in the analysis for clear and compelling reasons. While *Causey* appears to be the only court decision that recognizes that a juvenile may be incompetent to stand trial due to developmental immaturity alone, the case’s outcome originated in juvenile court. Since *Causey* assesses competency to stand trial and immaturity *only* in delinquency proceedings, it must be excluded because the present inquiry investigates cases dealing with juvenile waiver—particularly direct-file or statutory exclusion—where issues of developmental maturity and competency to stand trial are featured.

The next step in the selection of cases was to determine which of them dealt with direct-file or statutory exclusion (automatic transfer) instead of traditional judicial waiver. Both *M.D. v. State*<sup>145</sup> and *People v. Hana*<sup>146</sup> are judicial waiver cases; consequently, they were excluded from consideration. *State v. Gonzales*<sup>147</sup> is a New Mexico case. This case is unique in that New Mexico does not have a typical transfer system, instead relying on a blended sentencing provision.<sup>148</sup> With this provision, juvenile defendants are classified into three different categories: delinquent offenders, youthful

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<sup>137</sup> 864 So. 2d 44 (Fla. Dist. Ct. App. 2003).

<sup>138</sup> 701 So. 2d 58 (Ala. Crim. App. 1997).

<sup>139</sup> 492 U.S. 361 (1989).

<sup>140</sup> 24 P.3d 776 (N.M. Ct. App. 2001).

<sup>141</sup> 142 S.W.3d 615 (Ark. 2004).

<sup>142</sup> 524 N.W.2d 682 (Mich. 1994).

<sup>143</sup> 615 N.W.2d 902 (Neb. 2000).

<sup>144</sup> 363 So. 2d 472 (La. 1978).

<sup>145</sup> 701 So. 2d 58 (Ala. Crim. App. 1997).

<sup>146</sup> 524 N.W.2d at 682.

<sup>147</sup> 24 P.3d 776 (N.M. Ct. App. 2001).

<sup>148</sup> See N.M. STAT. § 32A (2008).

offenders, and serious youthful offenders. Delinquent offenders are charged in children's court, while serious youthful offenders may be direct-filed to adult court when over age fifteen and following the commission of first-degree murder.<sup>149</sup> Further, youthful offenders who are fourteen years of age or older and who commit one of twelve violent felonies are subject to a judicial hearing to assess amenability to treatment, serious nature of the crime, maturity, prior record, etc. This protocol is similar to a judicial waiver hearing.<sup>150</sup> Gonzales was classified as a youthful offender. Since the New Mexico form of judicial hearing applied in this instance,<sup>151</sup> the case was excluded from review.

*Stanford v. Kentucky*<sup>152</sup> was excluded because the decision was overturned by the subsequent case of *Roper v. Simmons*.<sup>153</sup> While *Roper* did in fact discuss juvenile transfer and maturity, it did not adequately address the issue of competency to stand trial, but instead focused on capital punishment of juveniles in light of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>154</sup> Thus, this court decision was excluded from consideration.

*Otis v. State*<sup>155</sup> and *State v. McCracken*<sup>156</sup> were identified as direct-file cases and, as such, were retained for the analysis. *Tate v. State*<sup>157</sup> is slightly different than the two cases previously mentioned. As a Florida decision, *Tate* is different because Florida requires that juvenile offenders under age fourteen be indicted before they are direct-filed for adult criminal trial purposes.<sup>158</sup> However, since the grand jury hearing to indict Tate was not

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<sup>149</sup> *Id.* § 32A-2-3(H).

<sup>150</sup> *Id.* § 32A-2-20(C).

<sup>151</sup> *Gonzales*, 24 P.3d at 782.

<sup>152</sup> 492 U.S. 361 (1989).

<sup>153</sup> 543 U.S. 551 (2005).

<sup>154</sup> U.S. CONST. amend VIII. The criteria for case selection specifically required that the decision: (1) involve automatic or direct file juvenile transfer, (2) discuss developmental immaturity, and (3) review the competency-to-stand-trial doctrine. *Roper* is an automatic transfer case in which the defendant, Simmons, is described as "very immature," "very impulsive," "and very susceptible to being manipulated or influenced." 543 U.S. at 559. However, the trial fitness of Simmons is not raised by the Court, despite these deficits. Instead, the defendant's age is mentioned as a factor that limits the immature youth from reaching the threshold requirements to be *sentenced to death*. As such, *Roper* fundamentally represents a death penalty case, in which the Court's concern for age and developmental immaturity are used to explain why such juveniles cannot be deemed as the most deserving for execution. Given the absence of a discussion on the important issue of defendant Roper's competency, the case was excluded.

<sup>155</sup> 142 S.W.3d 615 (Ark. 2004).

<sup>156</sup> 615 N.W.2d 902 (Neb. 2000).

<sup>157</sup> 864 So. 2d 44, 47 (Fla. Dist. Ct. App. 2003).

<sup>158</sup> FLA. STAT. ANN. § 985.56 (2008).

representative of a traditional judicial waiver hearing and only examined whether sufficient clear and convincing evidence existed to proceed to criminal trial,<sup>159</sup> this case was included in the analysis.

Having determined which cases addressed adolescent transfer, developmental maturity, and competency to stand trial in the context of mandated waiver, these decisions were then Shepardized. In other words, at issue were those subsequent court decisions that cited *Otis*, *McCracken*, and *Tate*, relying on these respective rulings for jurisprudential guidance. Moreover, each list of cases generated from these three Shepardized summaries was then scrutinized. The point of this examination was to ascertain whether each opinion discussed juvenile transfer, competency to stand trial, and developmental maturity within the context of automatic waiver. Given these specific selection parameters, several cases were immediately excluded from consideration. However, the case of *Williams v. State*<sup>160</sup> was deemed acceptable, especially since it was a direct-file decision exploring the issue of a juvenile's competency to stand trial as an adult in lieu of evidence suggesting developmental immaturity and low I.Q. Accordingly, the *Williams* decision was included in the analysis.

Finally, for purposes of thoroughness, the specific legal cases cited within *Otis*, *McCracken*, and *Tate* were reviewed to see if they met the criteria for inclusion in the analysis. Following this investigation, two additional court decisions were identified. *State v. Nevels*<sup>161</sup> was cited in *McCracken*.<sup>162</sup> It was chosen for inclusion because the court weighed several arguments made by various mental health professionals regarding the psychosocial factors affecting one's maturity that impacted whether defendant Nevels was competent to stand trial in an adult criminal setting.<sup>163</sup> *Brazill v. State*<sup>164</sup> was cited in *Tate*. It was selected for inclusion because the court explored the rationale underlying Florida's indictment and direct-file process of juvenile offenders as well as the extent to which this protocol failed to adequately assess a youth's competency and suitability to stand trial in adult court.<sup>165</sup> Overall, this study analyzed six cases: *Otis v. State*, *State v. McCracken*, *Tate v. State*, *Williams v. State*, *State v. Nevels*, and *Brazill v. State*.

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<sup>159</sup> *Tate*, 864 So. 2d at 47.

<sup>160</sup> 239 S.W.3d 44 (Ark. Ct. App. 2006).

<sup>161</sup> 453 N.W.2d 579 (Neb. 1990).

<sup>162</sup> 615 N.W.2d 902, 916 (Neb. 2000).

<sup>163</sup> *Nevels*, 453 N.W.2d at 584-88.

<sup>164</sup> 845 So. 2d 282 (Fla. Dist. Ct. App. 2006).

<sup>165</sup> *Id.* at 288.

Having identified the six state supreme court and appellate court cases that fit the specific criteria for review, two levels of qualitative analysis were applied to each of them.<sup>166</sup> First, a targeted assessment of the plain meaning was emphasized in which the jurisprudential intent was discerned. Past applications of the “plain meaning rule” have sought to extrapolate the “textual context” as well as the “ordinary usage” of particular terms within statutes in order to unearth legislative intent.<sup>167</sup> However, other commentators believe that this strategy is deceptive, especially since determinations regarding meaning reside in the complex perspectives of the statute’s creator(s).<sup>168</sup> Thus, interpretive analyses of legal texts are better served by seeking jurisprudential plain meaning from judicial decisions themselves. Indeed, this approach is preferred over any attempt to peer into the minds of legislators in which the “broader systems of meaning” that inform and underscore a court’s rulings are determined.<sup>169</sup> As such, this variation in application of the plain meaning rule was employed in order to undertake an interpretive analysis of the legal language expressed in the six judicial opinions that constitute this data set.

In order to facilitate the process of eliciting information on plain meaning in which underlying jurisprudential intent was specified, a series of questions were posed to each case. These queries are consistent with the recommendations for undertaking qualitative inquiry as described by Ritchie and Spencer.<sup>170</sup> The questions consisted of the following:

- (1) What are the dimensions of attitudes or perceptions that are held?
- (2) What factors underlie particular attitudes or perceptions?
- (3) Why are decisions or actions taken, or not taken?
- (4) Why do particular needs arise?
- (5) Why are services or programs not being used?

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<sup>166</sup> The six cases that were examined did not have dissenting opinions. Accordingly, only the majority opinions were analyzed to retrieve data for the two levels of analysis.

<sup>167</sup> See, e.g., Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401 (1994); Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 LAW & SOC’Y REV. 567 (2000); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71 (1994).

<sup>168</sup> See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994).

<sup>169</sup> Phillips & Grattet, *supra* note 167, at 569; see also Easterbrook, *supra* note 168.

<sup>170</sup> Jane Ritchie & Liz Spencer, *Qualitative Data Analysis for Applied Policy Research*, in THE QUALITATIVE RESEARCHER’S COMPANION 305, 307 (A. Michael Huberman & Matthew B. Miles eds., 2002).

(6) What are the goals, purposes, and concerns of the decisions or actions taken, or not taken?

(7) What needs of society are represented by the decisions or actions taken, or not taken?<sup>171</sup>

The first two questions evaluate how the court perceives the legal issues and controversies it confronts, while endeavoring to pinpoint those factors affecting these attitudes. For example, does the court rule in favor of automatic forms of adolescent waiver because juvenile crime is perceived as a severe threat, overshadowing any competence-related concerns of the defendant? Questions 3 through 5 denote the judicial motivations and rationales that underscore particular judgments as the court assesses certain forms of punishment over others. To illustrate, does the court view the violent juvenile offender as mature enough to receive adult sanctions over rehabilitative programming because a get-tough-on-youth-crime logic informs judicial decision-making? The final two questions examine phrases used within the legal decisions that potentially reveal what the court values in regard to adolescent waiver, developmental maturity, and competency to stand trial. For example, does “greater societal protection” take precedence over individual rights?

Collectively, then, when applied to the six court cases under consideration, these seven questions enabled a more careful reading of the legal language employed by jurists. Emphasis on this discourse or wording functioned as a basis to review the plain meaning in which underlying jurisprudential intent could then be extracted. As such, the process followed here examined the substance of juridical language and the extent to which this substance provided “clues” to the court’s essential meaning, especially when filtered through the seven queries previously delineated.

To be clear, information gathered on jurisprudential intent is not the same as specifying the fundamental ethical reasoning conveyed by or through this intent. To address this matter, a second layer of qualitative analysis was applied to the six court decisions. This second level of inquiry was textual in orientation.<sup>172</sup> In this instance, the legal language that constituted jurisprudential intent was subjected to close scrutiny in order to better ascertain what it meant ethically.

Previous inquiries have used this strategy of undertaking textual legal analysis.<sup>173</sup> However, none have investigated the content of jurisprudential

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<sup>171</sup> *Id.* at 307.

<sup>172</sup> Claire Macken, *Preventive Detention and the Right to Personal Liberty and Security Under Article 5 ECHR*, 10 INT’L J. HUM. RTS. 195 (2006).

<sup>173</sup> See, e.g., BRUCE A. ARRIGO, *MADNESS, LANGUAGE AND THE LAW* (1993); Arrigo, *supra* note 134; Bruce A. Arrigo, *Martial Metaphors and Medical Justice: Implications for*

intent and translated it into ethical reasoning. Thus, the second layer of qualitative analysis is somewhat novel. As a basis to understand the essential ethical reasoning communicated through the court's perspective on adolescent (automatic) transfer, developmental maturity, and trial fitness, this component of the method was deemed absolutely essential. Accordingly, for purposes of the present inquiry, this second level of qualitative inquiry consisted of the following steps.

First, mindful of the data retrieved that specified underlying jurisprudential intent (that is, the information elicited on plain meaning given the seven questions posed to each of the six court decisions), the particular textual context in which these findings appeared in the case was considered. Second, having identified this actual textual context, the words or phrases themselves were examined. In each instance, the terms or expressions were evaluated in relation to the three schools of ethics consequentialism, including ethical egoism, contractualism, and utilitarianism; formalism; and virtue-based philosophy. This step in the analysis determined the "manifest content," that is, what actually was said.<sup>174</sup> Moreover, it facilitated an understanding of the deeper ethical meaning embedded in the courts' language. For example, terms or expressions located in a case that addressed underlying jurisprudential intent by reference to competing interests such as "greater societal protection" or "individual rights" represented manifest content. However, they were categorized as a utilitarian argument, given the philosophical principles this school of thought embraces. Conversely, actual words or phrases found in a case that reflected underlying jurisprudential intent by employing "moral duty" or "responsibility" also represented manifest content. However, these notions are consistent with the logic of Kantian ethics or formalism and, as such, were classified as consistent with this school of ethical thought. In those instances where the jurisprudential intent did not translate into or otherwise convey ethical reasoning, this legal language was not subjected to additional textual analyses.

Third, individual words or expressions situated in a case emanating from underlying jurisprudential intent are insufficient for purposes of deciphering the more complete ethical reasoning conveyed through such intent. Thus, the presence of these terms or phrases as found across the six cases included a thematic analysis. This is a reference to the extent to which each case, as well as the *collective* cases, employed one type of ethical reasoning over others. Thematic analysis as specified here was

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*Law, Crime, and Deviance*, 27 J. POL. & MIL. SOC. 307 (1999); Macken, *supra* note 172.

<sup>174</sup> OLE R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES 12 (1969) (emphasis omitted).

facilitated by a review of the manifest content in each court decision and the meanings of these contents in relation to the three schools of ethical thought. In this respect, the meanings per case constituted a data set in which an assessment of the moral philosophy that conveyed the underlying jurisprudential intent was enumerated (1) from court decision to court decision and (2) across the six cases. Stated differently, the thematic analysis led to an identification of the primary ethical rationale that underscored the court's regard for mandated adolescent transfer, developmental maturity, and competency to stand trial in each court decision and across these respective judicial decisions.

To summarize, the method employed in this study engaged in two levels of qualitative analysis. The first layer elicited information on underlying jurisprudential intent by focusing on plain meaning as found in the six court cases under consideration. Several specific questions guided this inquiry. A second layer of analysis reviewed this intent by re-situating it within the actual words or phrases the court employed in rendering its decisions. This activity drew attention to the manifest content whose fundamental meaning—essential ethical reasoning—remained concealed. To discern such reasoning, each instance of manifest content was interpreted, mindful of the principles and logic that inform the three schools of ethical thought considered. Finally, in order to gauge the court's overall moral philosophy regarding adolescent automatic transfer, developmental maturity, and competency to stand trial, a thematic analysis was employed. Specifically, the collective ethical meanings located in each case and across all of them were evaluated.

#### IV. DISCUSSION

Appendix A lists key concepts and exact quotes as derived from the court cases that summarily represent the responses to the seven questions posed to these legal decisions. Collectively, the data reflect the various attitudes, perceptions, goals, purposes, and concerns that form the basis for specifying the courts' underlying jurisprudential intent on the matter of adolescent transfer, adjudicative competence, and developmental immaturity. Appendix B identifies the particular phrases situated within the individual cases themselves that convey moral philosophical themes or related rationales. Thus, the data in Appendix B disclose what the jurisprudential intent of each case means ethically.

## A. LEVEL 1 ANALYSIS

The data collected from *Tate v. State*<sup>175</sup> yielded several clues regarding the court's underlying jurisprudential intent. Specifically, statements made in this opinion conveyed the perception that "there is no absolute right requiring children to be treated in a special system for juvenile offenders"<sup>176</sup> and that "the common law presumption of incapacity of a minor between the ages of seven and fourteen years to commit a crime no longer applies."<sup>177</sup> Thus, the *Tate* court upheld the attitude that the state's "statutory scheme,"<sup>178</sup> which "supplanted the common law defense of 'infancy,'"<sup>179</sup> is sufficient to make the assertion that "competency hearings are not, per se, mandated simply because a child is tried as an adult."<sup>180</sup> The court buttressed its perspective with the observation that "it is not unreasonable for the legislature to treat children who commit serious crimes as adults in order to protect societal goals."<sup>181</sup> Moreover, mindful of its articulated perspective, the *Tate* court stated that it had the "obligation"<sup>182</sup> to make certain that young juveniles with apparent deficits be competent to stand trial.

Questions 3 through 5 elicited the court's rationale regarding its decision to ensure that Tate, the juvenile, was competent to stand trial. The court's opinion that "Tate was entitled to a complete evaluation and hearing,"<sup>183</sup> was motivated by "the argument that the proper inquiry was whether the defendant *may* be incompetent, not whether he *is* incompetent,"<sup>184</sup> especially since he was only twelve and this was his first offense. Initially the trial court overlooked this argument; thus, the *Tate* court determined that in light of Tate's age, any doubt in fitness to stand trial should be eliminated by a complete competency evaluation.<sup>185</sup> In other words, due to his age, there was a possibility that Tate was incompetent to stand trial.

However, other statements in the decision expressed no objection to current transfer practices and the adult sanctions that youthful offenders therefore face. For example, the *Tate* court communicated its approval of

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<sup>175</sup> 864 So. 2d 44 (Fla. Dist. Ct. App. 2003).

<sup>176</sup> *Id.* at 52.

<sup>177</sup> *Id.* at 53.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 50.

<sup>181</sup> *Id.* at 54.

<sup>182</sup> *Id.* at 51.

<sup>183</sup> *Id.* at 50.

<sup>184</sup> *Id.* at 51.

<sup>185</sup> *Id.* at 46-47.

transfer trends and subsequent sanctions with the following observation: “[W]e reject the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child”<sup>186</sup> because “[s]entences imposed on juveniles [as adults] of life imprisonment are not uncommon in Florida Courts.”<sup>187</sup> Indeed, consistent with the logic of favoring juvenile transfer trends, the *Tate* court opined that “it is not unreasonable for the legislature to treat children who commit serious crime as adults in order to protect societal goals.”<sup>188</sup> Thus, previous arguments made by the *Tate* court in which it maintained that “there is no absolute right requiring children to be treated in a special system for juvenile offenders”<sup>189</sup> and “competency hearings are not, per se, mandated simply because a child is tried as an adult,”<sup>190</sup> suggest that competing interests are jurisprudentially weighed. These are interests in which “societal goals” take precedence over individual rights. Although the *Tate* court recognized the responsibility to determine a juvenile offender’s trial fitness in criminal proceedings when the offender was “less than the age of fourteen,”<sup>191</sup> it nonetheless perceived such offenders as a severe threat to society. Thus, the issue of public safety compelled the court to conclude that it was reasonable for serious youthful offenders to be treated as adults.

In *Otis v. State*,<sup>192</sup> the court’s jurisprudential intent was similar to the reasoning adopted in *Tate*. This perspective was clearly conveyed in the following statement: “[I]t can be inferred from the serious and violent nature of the offense that the protection of society demands that Otis be tried as an adult.”<sup>193</sup> In addition, the *Otis* court held the perception that “while Otis’s lack of sophistication and maturity may be mitigating factors, they are not of such a nature to warrant a transfer to juvenile court.”<sup>194</sup> When the factors underlying these perceptions are examined more closely, several declarations made by the *Otis* court indicate how the court weighed the various criteria that must be assessed to determine if a direct-filed youth should be transferred back to juvenile jurisdiction. For example, as the majority opined, “the trial court [was] not required to give equal weight to each of the statutory factors,”<sup>195</sup> “the State was not required to put on proof

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<sup>186</sup> *Id.* at 54.

<sup>187</sup> *Id.* (quoting *Blackshear v. State*, 771 So. 2d 1199 (Fla. Dist. Ct. App. 2000)).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 52.

<sup>190</sup> *Id.* at 50.

<sup>191</sup> *Id.* at 51.

<sup>192</sup> 142 S.W.3d 615 (Ark. 2004).

<sup>193</sup> *Id.* at 607.

<sup>194</sup> *Id.* at 625.

<sup>195</sup> *Id.* at 609.

of each statutory factor,”<sup>196</sup> and “each factor need not be supported by clear and convincing evidence.”<sup>197</sup> Furthermore, in *Otis*, the court reasoned that “the second factor does not require proof of premeditation; rather, the second factor pertains to whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.”<sup>198</sup> Thus, when considering the rights of the individual versus the goals of society, the *Otis* court endorsed the view that the defendant’s “lack of sophistication and maturity”<sup>199</sup> gave sway to the “protection of society,”<sup>200</sup> particularly because of the violent nature of the crime.

Hence, the intent of the *Otis* decision seems both plain and clear. In short, the discretion of the trial court warrants endorsement so that it can gauge the importance of statutory factors when reviewing those interests that are most important when reaching a decision about whether a youth predisposed to a “lack of sophistication and maturity” should be tried as an adult.<sup>201</sup> Moreover, the emphasis placed on “the serious and violent nature of the offense,” as well as the court’s contention that it “[did] not require proof of premeditation,” but only “whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner,” suggested that “the protection of society” was paramount.<sup>202</sup>

In *State v. McCracken*,<sup>203</sup> the concept of interest-balancing was made obvious when the court delineated the criteria and process used to determine if criminal trial proceedings should be supplanted by decision-making in juvenile court. The *McCracken* court explained that “[i]t is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile,” wherein “[t]here are no weighted factors and no prescribed method[s] by which more or less weight is assigned to each specific factor.”<sup>204</sup> Despite the evidence detailing that “McCracken’s age of 13 [years] favored transferring jurisdiction; [that] McCracken had no prior criminal history . . . ; [and that] McCracken’s sophistication and maturity was unclear,” the court supported the district court’s reasoning that “‘without question’ the best interests of the juvenile and the security of the public

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<sup>196</sup> *Id.* at 626.

<sup>197</sup> *Id.* at 610.

<sup>198</sup> *Id.* at 608.

<sup>199</sup> *Id.* at 609.

<sup>200</sup> *Id.* at 607.

<sup>201</sup> *Id.* at 609.

<sup>202</sup> *Id.* at 608, 613.

<sup>203</sup> 615 N.W.2d 902 (Neb. 2000), *overruled on other grounds by* State v. Thomas, 637 N.W.2d 632 (Neb. 2002).

<sup>204</sup> *Id.* (quoting State v. Mantich, 543 N.W.2d 181 (Neb. 1996)).

require[d] that the district court retain jurisdiction, especially since the crime was so violent and McCracken's psychiatric prognosis was so poor."<sup>205</sup>

Given that the defendant's "crime involved extreme violence,"<sup>206</sup> other noteworthy factors—age and maturity level—were overshadowed in the court's "balancing test" assessment. Indeed, the majority's perception and attitude toward the brutal nature of the offense revealed the court's punitive resolve designed to ensure "public protection and societal security."<sup>207</sup> To illustrate, the *McCracken* court upheld the district court's ruling that "it is not appropriate that [the accused] be treated as a juvenile, because of the extreme risk of danger that he presents to himself and society."<sup>208</sup> Moreover, the court expressed its concern for the seriousness of the crime in several instances throughout the opinion. For example, the majority in *McCracken* agreed with the district court's description of the offense as being "of a particularly violent and aggressive nature,"<sup>209</sup> and as representative of an "extremely violent nature."<sup>210</sup> Finally, the court's more punitive intention was reinforced when it opined that "the record therefore reveals that the district court's decision to retain jurisdiction rested, to a great extent, upon the nature of the offense with which McCracken was charged."<sup>211</sup>

The unequivocal language the court employed when commenting on the violent nature of the crime made evident its rationale for concluding that public protection was more important than the defendant's age and level of maturity. This perspective was summarily disclosed in the following passage:

In spite of McCracken's youthful age at the time of the crime, the extreme violence perpetrated upon the victim and the protection of the public in light of McCracken's poor psychiatric prognosis lead us to conclude that the district court did not abuse its discretion when it denied McCracken's motion to transfer to the juvenile court.<sup>212</sup>

Thus, the *McCracken* court concurred with the district court's opinion that the defendant should "be held accountable through proceedings in the

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<sup>205</sup> *Id.* at 916. Darren McCracken had retrieved a handgun from the bedroom of his mother, Vicky Bray. He then loaded the handgun and used it to shoot Bray twice in her head as she slept on the sofa in the downstairs family room.

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

<sup>207</sup> *Id.* at 915.

<sup>208</sup> *Id.* at 916.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 916-17.

adult criminal justice system for effective deterrence of future antisocial misconduct.”<sup>213</sup>

In *Williams v. State*,<sup>214</sup> the circuit court also made several statements that conveyed concern for the violent nature of those crimes committed by the juvenile defendant and the danger such wrongful acts posed toward the public’s safety. To illustrate, the court asserted that “Williams’s offenses were serious; . . . they were committed in an aggressive, violent, and premeditated manner and . . . the protection of society required prosecution in the criminal division of circuit court.”<sup>215</sup> Interestingly, Williams was diagnosed with a “borderline” I.Q.; that is, he “function[ed] at a lower-than-average range.”<sup>216</sup> However, based on the psychiatric testimony—the court noted Dr. Paul Deyoub’s expert conclusions—“Williams had no mental disease or defect, was competent to proceed to trial, had no problems understanding the criminality of his actions, and had the ability to conform his conduct to the law.”<sup>217</sup> As such, the court perceived the “evidence showing that Williams had great culpability in a serious crime” to be sufficient to prosecute him in an adult court.<sup>218</sup> Consistent with *McCracken*, the *Williams* decision hinged on the violent nature of the crimes committed.<sup>219</sup> Absent diagnosed psychiatric illness or disability, the defendant was competent to stand trial in a criminal court, especially since the offenses “were committed in an aggressive, violent, and premeditated manner.”<sup>220</sup> Here, too, the underlying rationale for this determination was in the furtherance of societal goals and needs—specifically, the “protection of society.”<sup>221</sup>

In *State v. Nevels*,<sup>222</sup> the court communicated its perspective regarding the rehabilitation of juvenile offenders and the maintenance of the public’s general welfare. In particular, the court opined that while “rehabilitation has traditionally played a key role in the treatment of young offenders . . . . [T]he concept of deterrence and the need to balance

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<sup>213</sup> *Id.* at 916.

<sup>214</sup> 239 S.W.3d 44 (Ark. Ct. App. 2006).

<sup>215</sup> *Id.* at 46.

<sup>216</sup> *Id.* at 48.

<sup>217</sup> *Id.* at 46.

<sup>218</sup> *Id.* at 48.

<sup>219</sup> Robert Lee Williams, Jr., and an accomplice, Kevin Barton, entered the home of Alena Tate, a seventy-four-year-old woman with Alzheimer’s disease, with the intent to steal her car. During the robbery, Tate was struck in the head and then fatally shot in the neck area. In addition, Williams also admitted to a second robbery-related homicide prior to the attack on Tate.

<sup>220</sup> *Id.* at 46.

<sup>221</sup> *Id.*

<sup>222</sup> 453 N.W.2d 579 (Neb. 1990).

individual justice with the needs of society . . . also have a place in the juvenile justice system.”<sup>223</sup> This language makes clear that the court intended to adopt a “balancing test” standard in which competing rights and needs were subjected to jurisprudential scrutiny.<sup>224</sup> Moreover, the *Nevels* court stipulated that “[t]here is no arithmetical computation or formula required in a court’s consideration of the statutory criteria of factors” and “the court need not resolve every factor against the juvenile.”<sup>225</sup> Thus, the attitude endorsed in *Nevels* was one in which an assessment of those factors that outweigh others rightfully falls within the court’s discretion.

Numerous accounts from mental health experts raised concerns for defendant Nevels’s ability to stand trial in an adult criminal setting.<sup>226</sup> For example, commenting on his personality difficulties, one forensic specialist indicated that the defendant’s problems stemmed from a “lack of identity in that Nevels engage[d] in negative behavior which [made] him feel more secure about his black, male identity and which secure[d] acceptance in his peer group[s].”<sup>227</sup> Additional testimony as reported in the case intimated that the accused “suffer[ed] from several disorders and disabilities, including a mixed developmental disorder involving several speech-and language-base[d] learning disabilities . . . .”<sup>228</sup> Moreover, restating the psychiatric evidence proffered, the *Nevels* court indicated that this particular deficit was only compounded by a:

“[C]onduct disorder socialized aggressive,” which means Nevels is aggressive during periods of anxiety and has difficulty in conforming his behavior to the norms of society; a major depressive disorder . . . and an adolescent identity disorder which means Nevels is “still . . . in the process of forming his own identity, [and] [is] very immature . . . .”<sup>229</sup>

These diagnoses led one psychiatrist to conclude that the defendant was “treatable because he [did] not yet have a fixed personality . . . .”<sup>230</sup> A second forensic expert similarly deduced that “Nevels’[s] disorders [were] treatable as evidenced by his favorable response to treatment” and that “mainstreaming Nevels into an adult prison population ‘would probably be [devastating].’”<sup>231</sup>

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<sup>223</sup> *Id.* at 587 (quoting *State in Interest of C.A.H.*, 446 A.2d 93, 98 (N.J. 1982)).

<sup>224</sup> *Id.* at 588.

<sup>225</sup> *Id.* at 587 (quoting *State v. Alexander*, 339 N.W.2d 297 (Neb. 1983)).

<sup>226</sup> *Id.* at 583-85.

<sup>227</sup> *Id.* at 585.

<sup>228</sup> *Id.* at 583.

<sup>229</sup> *Id.* at 583-84.

<sup>230</sup> *Id.* at 585.

<sup>231</sup> *Id.* at 584.

Despite the varied testimony of medical specialists documenting the bases for the defendant's misconduct, the court rejected it. Indeed, notwithstanding the significant psychosocial factors raised by mental health professionals, the underlying rationale informing the court's perspective was located elsewhere. In short, the *Nevels* majority ruled that "[a]s the trier of fact, the district court was not required to take the opinions of experts as binding upon it."<sup>232</sup> To reinforce this jurisprudential attitude, the court offered a number of arguments.

For example, the court speculated that "if Nevels'[s] case were to have been transferred to the juvenile court, he might have viewed the transfer as his manipulation of the system and [he might] not [have taken] responsibility for the crime."<sup>233</sup> The court adopted this view, especially since it found "the facilities available to the juvenile court would not provide enough protection to the public."<sup>234</sup> More consideration was therefore given to the general welfare than to Nevels's developmental immaturity. In support of this logic, the court stipulated that the accused had "repeatedly violated the law and performed other antisocial acts, culminating in [a] very violent and cruel beating . . ."<sup>235</sup> Elsewhere, the court acknowledged Dr. Joseph Palombi's opinion that "an individual's future dangerousness" could not be predicted by mental health professionals.<sup>236</sup> Consequently, the *Nevels* court opined that "in addition to considering the defendant's age, [it was] 'obliged to consider protection of the public and deterrence,'"<sup>237</sup> because "dealing with Nevels in the juvenile court system might diminish the seriousness of the offense."<sup>238</sup> Once again, and consistent with prior cases on the matter, an assessment of the plain legal language yielded underlying jurisprudential intent. Nevels needed to be prosecuted in criminal court to protect society and in order to deter future violent juvenile offenses.<sup>239</sup>

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<sup>232</sup> *Id.* at 587.

<sup>233</sup> *Id.* at 588.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 582. Eugene Nnakwe made sexual overtures toward the defendant, Nevels. A struggle ensued between the two. Nnakwe was taken to the ground, where Nevels proceeded to stomp, kick, and strike him. Nnakwe was then dragged by Nevels, with the help of Jason Daniels, forty feet away, where Nevels began to strike Nnakwe in the chest and head with a metal tire iron. Later, Nevels pulled a pine branch from a tree and began striking Nnakwe with it, and then stole his car keys and left the area. *Id.* at 582-83.

<sup>236</sup> *Id.* at 584.

<sup>237</sup> *Id.* at 588.

<sup>238</sup> *Id.* at 586.

<sup>239</sup> *Id.* at 588.

A review of the data in *Brazill v. State*<sup>240</sup> indicates that this ruling mirrors the opinions of the cases previously analyzed. Specifically, the *Brazill* court stated that “the legislature was entitled to conclude that the *parens patriae* function of the juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by that system.”<sup>241</sup> Moreover, the decision in *Brazill* reaffirmed prior court holdings when it opined that “there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders.”<sup>242</sup> The court in *Brazill* conveyed its motivation here when noting that “[i]t is not unreasonable for the legislature to treat children who commit serious crimes as adults in order to protect societal goals.”<sup>243</sup> In addition, the *Brazill* court embraced the perspective that “[t]he legislature could reasonably have determined that for some crimes the rehabilitative aspect of juvenile court must give way to punishment.”<sup>244</sup> The court’s rationale for adopting such perceptions is embedded in several comments. To illustrate, the *Brazill* majority observed that “[t]he legislature has the power to determine who, if anyone, is entitled to treatment as a juvenile.”<sup>245</sup> Elsewhere, the court reasoned that “the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice.”<sup>246</sup> With these two statements, the *Brazill* court summarily approved statutory exclusion and direct-file laws.

*Brazill* raised numerous concerns about how the transfer practices in Florida did not adequately assess whether a juvenile should stand trial in criminal court. Drawing attention to the relevant state statute, the court argued that “Section 985.56 does not require a court to hold a hearing to decide whether adult sanctions are appropriate.”<sup>247</sup> *Brazill* proffered an additional objection by specifying that Section 985.56 permitted “the state to bypass a hearing on the suitability of adult sanctions by [first] securing an indictment.”<sup>248</sup> Therefore, the automatic waiver practices of Florida provided a statutory loophole in which prosecutors could direct-file juveniles like *Brazill* (aged thirteen) into criminal proceedings without initially having to undertake a thorough assessment of the child’s

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<sup>240</sup> 845 So. 2d 282 (Fla. Dist. Ct. App. 2006).

<sup>241</sup> *Id.* at 288 (quoting *Woodard v. Wainwright*, 566 F.2d 781, 785 (5th Cir. 1977)).

<sup>242</sup> *Id.* at 287.

<sup>243</sup> *Id.* at 288.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 287.

<sup>246</sup> *Id.* at 289 (quoting *State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980)).

<sup>247</sup> *Id.* at 288.

<sup>248</sup> *Id.*

competency to stand trial as an adult. This legislative rationale in support of automatic transfer is made most evident wherein Section 985.56 stipulates that it “applies to ‘[a] child of *any age* who is charged with a violation of state law punishable by death or life imprisonment’ . . . . It does not differentiate between age groups.”<sup>249</sup>

The decision in *Brazill* was motivated by a concern for societal interests over and against the protection of individual rights. The court emphasized an “interest in crime deterrence and public safety,” and acknowledged that “society demanded greater protection from . . . offenders.”<sup>250</sup> Thus, the court’s jurisprudential intent in *Brazill* was consistent with prior court rulings on mandated adolescent waiver, developmental maturity, and competency to stand trial. The societal goals of safety and security were balanced against the rights and interests of the youthful offender.

#### B. LEVEL 2 ANALYSIS

The second level of our textual analysis re-situated each instance of jurisprudential intent within the specific case under scrutiny. The aim of this endeavor was to interpret what this legal language (manifest content) communicated ethically (that is, the deeper meaning embedded in the words and phrases themselves). Stated differently, the goal of this particular inquiry was to determine what moral philosophy was conveyed through jurisprudential intent, mindful of the three ethical schools of thought under consideration as well as of their corresponding principles.

Upon a close re-reading of the *Tate*<sup>251</sup> opinion, specific words and phrases were found signifying a reliance on the consequentialist perspective of utilitarianism. For example, expressions such as “treat children who commit serious crimes as adults in order to protect societal goals”<sup>252</sup> and “no absolute right requiring children to be treated in a special system”<sup>253</sup> indicate that two conflicting interests were weighed by the court. In other words, the manifest content of the opinion indicated that the welfare of the general public was balanced against the rights of the individual. However, upon closer investigation, this concept of interest-balancing is most closely related to the utilitarian principle of ascertaining the greatest good for the greatest number of people.

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<sup>249</sup> *Id.* at 289.

<sup>250</sup> *Id.* at 288.

<sup>251</sup> *Tate v. State*, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003).

<sup>252</sup> *Id.* at 54.

<sup>253</sup> *Id.* at 52.

Conversely, other phrases found in the *Tate* ruling were consistent with ethical formalism, or Kantian moral philosophy. To illustrate, the discussion of an “obligation to ensure that the juvenile defendant . . . was competent”<sup>254</sup> suggests that the court believed it had a duty or responsibility to determine the defendant’s competency to stand trial. The word “obligation” clearly implies *duty*, which formalism recognizes as a moral maxim or categorical imperative. Thus, the deeper ethical meaning located in the jurisprudential intent of the *Tate* decision communicated both the logic of utilitarianism as well as formalism.

Similarly to the *Tate* ruling, *Otis v. State*<sup>255</sup> appropriated legal language that, when re-evaluated for its ethical significance, endorsed utilitarian objectives. For example, phrases such as “not required to give equal weight to each of the statutory factors”<sup>256</sup> and “society demands greater protection from serious offenders”<sup>257</sup> once again signaled an interest-balancing argument. Indeed, the court in *Otis* considered competing factors (for instance, age, maturity, severity of the offense) where determining which of them was more substantive than others was left to the discretion of the court of first instance. Declarations of this sort constituted manifest content. Moreover, the court’s opinion that “greater protection” for society outweighed the defendant’s “lack of sophistication and maturity”<sup>258</sup> similarly conveyed jurisprudential intent and functioned as manifest content warranting textual exegeses. Thus, when interpreted ethically, this statement represented an appeal to the greatest happiness principle articulated within the philosophy of utilitarianism.

In *State v. McCracken*,<sup>259</sup> the court’s decision embodied utilitarian reasoning, as can be seen from an assessment of those key phrases that reflected its underlying jurisprudential intent. For example, the *McCracken* court referred to the case as “a balancing test by which public protection and societal security [were] weighed against . . . rehabilitation.”<sup>260</sup> As manifest content, this statement amounts to an interest-balancing argument. Moreover, the court agreed with the lower court’s finding that the “best interests of the juvenile and security of the public . . . without question [weighed] in favor of the court” retaining jurisdiction.<sup>261</sup> When interpreted ethically, the deeper meaning lodged within this legal language is that

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<sup>254</sup> *Id.* at 51.

<sup>255</sup> 142 S.W.3d 615 (Ark. 2004).

<sup>256</sup> *Id.* at 624.

<sup>257</sup> *Id.* at 628.

<sup>258</sup> *Id.* at 609, 613.

<sup>259</sup> 615 N.W.2d 902 (Neb. 2000).

<sup>260</sup> *Id.* at 915.

<sup>261</sup> *Id.* at 916.

ensuring protection for the collective good was preferred over the rights and interests of the individual.

In addition to the utilitarian underpinnings located within *McCracken*'s jurisprudential intent, there is language in support of formalist principles. Specifically, the court upheld the lower court's decision that "McCracken should be held accountable through proceedings in the adult criminal justice system for effective deterrence of future antisocial misconduct."<sup>262</sup> The manifest content, "should be held accountable," refers to the deeper, ethical signification of responsibility. By logical extension, then, it could be inferred that the court felt a (moral) duty to hold McCracken "accountable," given the serious crime that he had committed. Additionally, and consistent with this reasoning, the statement could be interpreted to mean that the court viewed McCracken as violating a categorical imperative. As such, he was duty-bound to take responsibility for his failure to adhere to an unqualified maxim, in the form of adult accountability for his serious criminal actions committed as a juvenile.

The *Williams v. State*<sup>263</sup> opinion similarly employed legal language whose underlying jurisprudential intent communicated an ethical commitment to the philosophy of utilitarianism. To illustrate, the court's declaration that "protection of society required prosecution in the criminal division of circuit court"<sup>264</sup> represented manifest content. However, when interpreting this phrase within the context of ethical thought, the court's meaning is consistent with the view that the greatest good for the greatest number of people was most paramount in the *Williams* decision. Indeed, issues such as "age, I.Q., immaturity, and lack of sophistication" were all eclipsed by a desire to ensure the "protection of society."<sup>265</sup> Here, too, it is noted how legal language can be subjected to additional textual exegeses when filtered through the prism of moral philosophy.

In *State v. Nevels*,<sup>266</sup> the court also conveyed its reliance on utilitarian principles when endorsing a "balancing test" approach.<sup>267</sup> In particular, the *Nevels* court stated that "the concept of deterrence and the need to balance individual justice with the needs of society . . . also have a place in the juvenile justice system."<sup>268</sup> Declarations such as these constituted manifest content. However, when subjected to further textual analysis, the ethical

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<sup>262</sup> *Id.*

<sup>263</sup> 239 S.W.3d 44 (Ark. Ct. App. 2006).

<sup>264</sup> *Id.* at 46.

<sup>265</sup> *Id.* at 48.

<sup>266</sup> 453 N.W.2d 579 (Neb. 1990).

<sup>267</sup> *Id.* at 587.

<sup>268</sup> *Id.* (quoting *State in Interest of C.A.H.*, 446 A.2d 93, 98 (N.J. 1982)).

rationale operating here is consistent with the greatest happiness principle. Moreover, the court's decision to disregard the developmental immaturity factors raised by defense counsel in favor of pursuing alternative goals that protected society further communicated the notion that utilitarian objectives informed *Nevels*'s underlying jurisprudential intent.

On the other hand, the *Nevels* court also appropriated language that when interpreted ethically conveyed fidelity to the philosophy of formalism. For example, the statement, "we 'are obliged to consider protection for the public and deterrence'"<sup>269</sup> represented underlying jurisprudential intent. Indeed, as manifest content, it indicated a concern for the collective good in which future harm was to be abated. However, the deeper level of signification embedded in this phrase ethically implied that the *Nevels* court also felt a *duty* to seek an outcome in support of the citizenry's general welfare in which future crime prevention was reasonably assured. Additionally, the expression, "responsibility for the crime," communicated formalist sensibilities in that the court believed the defendant violated a moral maxim and, as such, ought to be held accountable for it. Moreover, consistent with this logic, the expression's fundamental meaning suggests that the court understood its moral duty to hold *Nevels* responsible for violating a categorical imperative by committing several antisocial acts that culminated in a very violent and cruel beating.

Finally, upon review of the jurisprudential intent of the decision in *Brazill v. State*,<sup>270</sup> the ethical meaning endorsed by the court was compatible with utilitarian principles. For instance, phrases such as "society demanded greater protection from these offenders than that provided by that system" and "interest in crime deterrence and public safety" once again drew attention to an instance in which the court engaged in an interest-balancing test.<sup>271</sup> As manifest content, the court gave societal protection considerable emphasis, notwithstanding those concerns raised by *Brazill* regarding competency and age-related deficits.<sup>272</sup> Moreover, when interpreting this legal language for its ethical significance, the court's focus on "greater protection"<sup>273</sup> for society constituted *the* linchpin factor in its decision to not transfer the case to juvenile court. Hence, textual exegeses of the sort undertaken here affirmed that utilitarian objectives were conveyed through the court's juridical discourse.

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<sup>269</sup> *Id.* at 588 (quoting *State v. Alexander*, 339 N.W.2d 297, 302 (Neb. 1983)).

<sup>270</sup> 845 So. 2d 282 (Fla. Dist. Ct. App. 2006).

<sup>271</sup> *Id.* at 288.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

When considering the ethical reasoning communicated through the jurisprudential intent for all six court cases, it is overwhelmingly evident that the philosophy of consequentialism and the principles of utilitarianism were prominently featured. The themes of “interest balancing” and “the greatest good for the greatest number” were located throughout each case and, to a lesser extent, were made patently obvious in some of them. Indeed, not only did the utilitarian perspective appear most often in the courts’ language usage, but the prestige and reverence afforded this perspective was far greater than what was found in those passages endorsing Kantian formalism. While *Tate*, *McCracken*, and *Nevels* clearly appropriated expressions or phrases consistent with this latter moral philosophy, the full ethical meaning lodged within these respective instances of manifest content was not easily ascertainable. Consequently, the first and second levels of analyses indicate that with regard to the issue of adolescent (automatic) transfer, developmental maturity, and competency to stand trial, the primary ethical rationale embedded within the court’s jurisprudential intent is consistent with the logic of utilitarianism. This finding prevails in each court decision and, correspondingly, across all of them.

#### V. IMPLICATIONS AND CONCLUSIONS

This Article undertook a qualitative examination of state supreme court and appellate court reasoning on the practice of automatic transfer for juveniles, where issues of developmental maturity and trial fitness were notably featured. The first level of analysis focused on plain meaning as guided by a series of questions that elicited information (in the form of key words or expressions) specifying the court’s underlying jurisprudential intent. The second level of analysis resituated these terms or phrases within their respective legal contexts and evaluated them against prevailing moral philosophical thought as a basis to ascertain the ethical logic communicated by the court.

Intriguingly, although not surprisingly, the results indicated that juridical decision-making principally entails a utilitarian balance of competing interests in which concerns for the public majority’s greater good is esteemed and sought. In other words, it is unremarkable that courts weigh and value the interests of the state over and against the needs of youths. This finding is consistent with one main premise of this study. Simply put, legal tribunals fail to take seriously the empirical findings from the social and behavioral science community on the manifold confinement, treatment, and recidivism problems that developmentally immature adolescents face when automatically waived and deemed fit to stand adult criminal trial. The traditional hearing conducted by the judicial transfer

process has been supplanted with direct-file legislative and prosecutorial waiver. These efforts circumvent any thorough examination of the juvenile's competence to stand trial. Unlike judicial transfer where, among other things, development immaturity is assessed, mandated forms of waiver mostly bypass this critical evaluative practice.

While this investigation produced significant findings regarding the court's ethical reasoning on the issue of automatic juvenile transfer, competency to stand trial, and developmental maturity, it also suffered from several limitations. First, this study addressed a very specific law and psychology problem that yielded only six court cases warranting textual scrutiny. The small data set raises questions about the generalizability of the overall findings. In addition, no statutory analysis on this issue was undertaken. Undoubtedly, this legislative inquiry would have resulted in a more complete portrait of the state's underlying intent and the ethical regard conveyed through that intent. Third, the research method employed was somewhat novel and clearly interpretive; thus, concerns over whether various types of quantitative analyses of the law would yield similar findings warrant future attention. For example, a survey instrument could be developed in which judges were queried about the moral philosophy they believed informed their decision-making. Specifically, it would be noteworthy to evaluate how jurists talk about the ethical reasoning that informs their decision-making on adolescent waiver as contrasted with what their court judgments actually say (that is, jurisprudential intent via plain meaning, as well as moral philosophical logic communicated through that intent).

These shortcomings notwithstanding, the results delineated draw attention to a number of unambiguous concerns. At their most manifest level, the results demonstrated how inadequately or insufficiently legal tribunals rely on the empirical research for judicial guidance when endorsing automatic juvenile transfer. First, courts excessively focus on the serious nature of the offense, an analysis in which public safety, deterrence, and retribution mostly override an evaluation of a juvenile's competency-related abilities.<sup>274</sup> Second, courts routinely neglect to consider how psychosocial immaturity factors are, to a certain extent, the cause of violent juvenile crime<sup>275</sup> and, correspondingly, how such causes affect the juvenile's legal decision-making abilities.<sup>276</sup> Third, courts generally fail to

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<sup>274</sup> See KUPCHIK, *supra* note 24, at 19; Brink, *supra* note 30; Feld, *Juvenile Transfer*, *supra* note 24, at 601; Feld, *Changing Jurisprudence of Waiver*, *supra* note 24, at 13-14; Kurlychek & Johnson, *supra* note 25; Steinberg & Cauffman, *supra* note 57, at 380; Steiner & Wright, *supra* note 49; Steiner et al., *supra* note 25.

<sup>275</sup> CORRIERO, *supra* note 37; Feld, *Juvenile Transfer*, *supra* note 24, at 603.

<sup>276</sup> See Grisso et al., *supra* note 22, at 335-36; Katner, *supra* note 41; Scott & Grisso,

recognize the significant impact developmental immaturity has on the defendant's adjudicative competence,<sup>277</sup> as well as the psychosocial factors that greatly impair an adolescent's decisional competence when transferred to an adult criminal proceeding.<sup>278</sup> Fourth, courts typically emphasize a get-tough-on-juvenile-crime perspective, thereby readying the youth to become a hardened career criminal,<sup>279</sup> eroding prospects for rehabilitative treatment<sup>280</sup> and undermining the possibility of successful community reentry.<sup>281</sup>

Collectively, then, the approach adopted by the courts, as repeatedly borne out in this qualitative endeavor, satisfies the needs of an organized society. However, it does little to address the replicated empirical problems raised when waiving adolescents to the adult system. These problems arise from "the belief that serious crimes committed by young offenders may reflect developmental deficiencies in autonomy and social judgment, [that if treated could lead to] . . . a reduction in their culpability."<sup>282</sup> Accordingly, if society is to create meaningful change in the character of persistent youthful offending, then it must reconsider what is for "the greater good." This deeper level of investigation entails a re-assessment of the moral philosophy through which the court's logic could be communicated, mindful of the more current trends in the law-psychology-justice sub-field, and as developed in psychological jurisprudence.

#### A. ADOLESCENT TRANSFER: A PRELIMINARY LAW-PSYCHOLOGY- JUSTICE PERSPECTIVE

The current legal theory informing automatic juvenile transfer cases is dominated by the philosophy of consequentialism and, to a lesser extent, deontology. These forms of legal ethics perceive the function of law as a guarantor of personal safety and property, as well as a securer against the invasion of or harm to the moral rights of others.<sup>283</sup> However, consequentialist and formalist approaches do not recognize that the "proper

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*supra* note 26; Steinberg, *supra* note 21.

<sup>277</sup> See Oberlander et al., *supra* note 38, at 548; Scott & Grisso, *supra* note 26; Viljoen & Grisso, *supra* note 26.

<sup>278</sup> See Bonnie, *supra* note 80; Grisso et al., *supra* note 22; Katner, *supra* note 41; Scott & Grisso, *supra* note 26; Steinberg, *supra* note 21.

<sup>279</sup> Bishop & Frazier, *supra* note 35, at 257; Rossiter, *supra* note 29, at 130.

<sup>280</sup> KUPCHIK, *supra* note 24, at 152; Rossiter, *supra* note 29.

<sup>281</sup> CORRIERO, *supra* note 37, at 49; Bishop & Frazier, *supra* note 35, at 260.

<sup>282</sup> KUPCHIK, *supra* note 24, at 82.

<sup>283</sup> Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE 2* (Colin Farrelly & Lawrence B. Solum eds., 2008).

end of law is the promotion of human flourishing.”<sup>284</sup> This philosophy constitutes the foundation of Aristotelian virtue ethics.<sup>285</sup> As such, if judicial decision-making is to resemble this brand of moral philosophy, then outcomes must be sought that enable *all* people to excel.<sup>286</sup> If the prevailing science repeatedly indicates that transferred juveniles who receive adult sanctions undergo grave harm throughout the course of their incarceration and recidivate more violently upon release, then the judicial actions taken against youthful offenders does nothing to encourage them to live morally. Moreover, and consistent with virtue jurisprudence, a judge who acts as a “fully virtuous agent . . . is not disposed [or required] to act in accord with social norms that would undermine human flourishing.”<sup>287</sup> Regrettably, the punitive path endorsed by the courts does little to nurture or grow such potential excellence. As such, an alternative jurisprudence is sorely needed; one that is consistent with a virtue-based philosophy and one that moves past the harm and ineffectiveness perpetuated by consequentialist and formalist thinking.

Ethical inquiry is an undertaking that is prescriptive more so than descriptive.<sup>288</sup> Explained differently, the study of ethics does not merely cease when the moral beliefs, principles, and goals of the subject (for example, adolescent waiver, developmental maturity, and trial fitness) are evaluated; instead, it endeavors to establish what ought to be in light of what is.<sup>289</sup> Consistent with psychological jurisprudence, then, what is fundamentally at issue is whether something more, or something better, can (and should) be done for all parties in dispute, such that assumed theory is translated into worthwhile public policy. Therapeutic jurisprudence,

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<sup>284</sup> *Id.*

<sup>285</sup> Aristotle recognized the immature rationality of youths and regarded it as natural. He referred to adolescents as “prone to desires and inclined to do whatever they desire . . . unable to resist their impulses.” ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 149 (George A. Kennedy trans., Oxford Univ. Press 2007). He noted that youths resort to impulses because they have not yet experienced much failure. Aristotle suggested that adolescents were “inexperienced with constraints” because they had only been “educated by conventions,” lacking an understanding in the complexities of life. *Id.* at 150. He argued that youths act out of an excess of emotion because they are convinced that they know everything worth knowing and are passionate in their stubbornness. *Id.* For this reason, Aristotle maintained that adolescents commit wrongs out of insolence rather than malice. *Id.* Thus, he argued that youths who committed crimes warranted pity for their emotional immaturity; they still possessed innocence, yet were often placed in the realm of adult matters. *Id.* at 150-51.

<sup>286</sup> VIRTUE JURISPRUDENCE, *supra* note 283.

<sup>287</sup> Lawrence B. Solum, *Natural Justice: An Aretaic Account of the Virtue of Lawfulness*, in VIRTUE JURISPRUDENCE, *supra* note 283, at 167.

<sup>288</sup> WILLIAMS & ARRIGO, *supra* note 17, at 5.

<sup>289</sup> *Id.*

restorative justice, and commonsense justice are three distinct practices that endeavor to grow the law-psychology-justice agenda, consistent with the aims of psychological jurisprudence and the moral philosophy of virtue ethics. In what follows, the application of their respective key principles to the problem of juvenile transfer is speculatively enumerated. The goal here is to provisionally outline the ethical direction in which court decision-making could move for the benefit of offending youths, their victims, and the communities to which both are intimately connected, in order to grow human excellence for all.

Winick and Wexler maintain that if lawyers and judges are to practice therapeutic jurisprudence in which less harmful outcomes for crime are sought, then they must employ an ethic of care.<sup>290</sup> Care ethics utilizes virtues such as compassion, tolerance, relationship, and benevolence when assessing the contextual and situational factors of conflict.<sup>291</sup> This approach promotes effective resolution rather than scrutinizing essential legal facts.<sup>292</sup> Thus, the role of the legal professional entails “sensitive counseling.”<sup>293</sup> This is a jurisprudence in which the client’s psychological well-being is valued by the judge-as-counselor,<sup>294</sup> a decision-maker whose honed interpersonal skills follow from a revamped approach to clinical legal education.

In the instance of juvenile transfer where the adolescent possesses psycho-legal deficits due to developmental immaturity, such a practice could be quite beneficial, especially if the courtroom workgroup was sensitive to the adolescent’s limited trial fitness. However, to retool the way practicing lawyers and judges approach juvenile transgressors will require a “reconceptualization” of skills training for these professionals.<sup>295</sup> In other words, and especially in the case of youthful offenders, additional consideration would need to be given to the defendant’s cognitive deficits and emotional well-being instead of merely attending to their legal rights.<sup>296</sup> Thus, education is pivotal to the application of therapeutic jurisprudence and to the anti-therapeutic response the criminal justice system engenders

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<sup>290</sup> Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-06 (2006).

<sup>291</sup> See Elizabeth Bernstein & Carol Gilligan, *Unfairness and Not Listening: Converging Themes in Emma Willard Girls’ Development*, in MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 147, 155 (Carol Gilligan et al. eds., 1989).

<sup>292</sup> WILLIAMS & ARRIGO, *supra* note 17, at 263-65.

<sup>293</sup> Winick & Wexler, *supra* note 290, at 605.

<sup>294</sup> See generally LAW IN A THERAPEUTIC KEY, *supra* note 9.

<sup>295</sup> Winick & Wexler, *supra* note 290, at 606.

<sup>296</sup> See *id.* at 606-07.

towards waived adolescents. Indeed, re-educating legal professionals—including judges—in the principles of therapeutic jurisprudence helps make the case that decision brokers can identify alternatives to harsh punishments, including transfer, for juvenile offenders, particularly since the punitive response often leads to recidivism in most cases.<sup>297</sup> Consequently, the lawyer and judge would need to learn the importance of resolutions that endeavor to heal the character flaws of wayward youth. This strategy would attempt “to keep the client out of trouble, to reduce conflict, and to increase the client’s life opportunities,”<sup>298</sup> built on an ethic of care. If successfully undertaken, such an approach could foster a reduction in recidivism benefiting both potential victims and society more generally.

Rather than focusing on punishing the offender, restorative justice emphasizes repairing the relationship between the victim and transgressor while seeking to “maintain[] order and social and moral balance in the community.”<sup>299</sup> This is because the “nature of crime” is not perceived “as an offense against the . . . state [or] . . . as deviant behavior that needs to be suppressed, punished, or treated” through the formal court system.<sup>300</sup> Rather, and especially in the instance of youth justice reform, decision-making is best addressed vis-à-vis a “community conference model.”<sup>301</sup>

Restorative justice recognizes that when a harm or injury occurs, the manner by which the criminal justice system responds can potentially cause the community, the victim, and the offender to feel “alienated, more damaged, disrespected, disempowered, . . . less safe and less cooperative with society.”<sup>302</sup> In the context of youthful transgressors, this outcome can and does lead to recidivism.<sup>303</sup> The restorative justice approach seeks to prevent this potential danger through discussion, dialogue, and negotiation

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<sup>297</sup> James McGuire, *Can the Criminal Law Ever Be Therapeutic?*, 18 BEHAV. SCI. & L. 413 (2000).

<sup>298</sup> Winick & Wexler, *supra* note 290, at 609.

<sup>299</sup> MICHAEL BRASWELL ET AL., CORRECTIONS, PEACEMAKING, AND RESTORATIVE JUSTICE: TRANSFORMING INDIVIDUALS AND INSTITUTIONS 141 (2001); *see also* NESS & STRONG, *supra* note 13; SULLIVAN & TIFFT, *supra* note 14.

<sup>300</sup> Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 CONTEMP. JUST. REV. 13, 14 (2004).

<sup>301</sup> Jim Dignan & Peter Marsh, *Restorative Justice and Family Group Conferences in England: Current State and Future Prospects*, in RESTORATIVE JUSTICE FOR JUVENILES 85 (Allison Morris & Gabrielle Maxwell eds., 2001).

<sup>302</sup> BRASWELL ET AL., *supra* note 299, at 142; *see also* Christopher R. Williams, *Toward a Transvaluation of Criminal ‘Justice’: On Vengeance, Peacemaking, and Punishment*, 26 HUMAN. & SOC’Y 100 (2002).

<sup>303</sup> Laura S. Abrams et al., *Young Offenders Speak About Meeting Their Victims: Implications for Future Programs*, 9 CONTEMP. JUST. REV. 243, 244 (2006).

among those involved in and affected by a crime.<sup>304</sup> The ensuing conversation among offender, victim, mediator, and the broader community strives to construct an effective and pro-social course of reparative action for the juvenile.<sup>305</sup> Additionally, the objective is to heal the harm done to the victim and to society.<sup>306</sup> Along these lines, the community might undertake action to correct the underlying causes of the criminality.<sup>307</sup> These reparative efforts could be social, economic, or environmental in nature.<sup>308</sup>

Interestingly, a courtroom workgroup, educated in the principles of therapeutic jurisprudence, might perceive the benefits of a restorative justice program and seek it out as a venue better suited to address the needs of youthful offenders, as well as those injured and the community in which such transgressors and victims reside.<sup>309</sup> As an integrative expression of psychological jurisprudence, such an approach would endeavor to specify where and how community justice might be embodied for all parties in dispute.<sup>310</sup> This proposed conceptual synthesis would strategically promote “improving the quality of community life and the capacity of local communities to prevent [adolescent] crime and to effectively respond to criminal incidents when they occur . . . .”<sup>311</sup> As a tangible expression of virtue ethics, the integration of therapeutic jurisprudence and restorative justice would acknowledge that juvenile transgression “is caused by young people growing up in . . . dysfunctional areas with high neighborhood disorder, poor public services, high fear of crime, and poor quality of life.”<sup>312</sup> Moreover, as a practical basis to advance policy and to honor and affirm the dignity and needs of offenders, victims, and the neighborhood in which both live, an ethic of care would underscore the jurisprudential decision-making analysis.<sup>313</sup>

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<sup>304</sup> David R. Karp et al., *Reluctant Participants in Restorative Justice? Youthful Offenders and Their Parents*, 7 CONTEMP. JUST. REV. 199, 199-200 (2004); see also Christopher R. Williams, *Compassion, Suffering and the Self: A Moral Psychology of Social Justice*, 56 CURRENT SOC. 5 (2008).

<sup>305</sup> Dignan & Marsh, *supra* note 301.

<sup>306</sup> Karp et al., *supra* note 304, at 199-200.

<sup>307</sup> See, e.g., VAN NESS & STRONG, *supra* note 13.

<sup>308</sup> SULLIVAN & TIFFT, *supra* note 14.

<sup>309</sup> John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244 (2002).

<sup>310</sup> McCold, *supra* note 300.

<sup>311</sup> David R. Karp & Todd Clear, *The Community Justice Frontier: An Introduction to WHAT IS COMMUNITY JUSTICE?* ix (David R. Karp & Todd R. Clear eds., 2002).

<sup>312</sup> McCold, *supra* note 300, at 16.

<sup>313</sup> Williams, *supra* note 302.

Finkel's approach to commonsense justice is not limited to promoting a more informed opinion of practical judgment from the jury box alone; rather, re-engaging the conscience of the community in justice matters also is pursued.<sup>314</sup> An important aspect of restorative justice is to bring the neighborhood back into the conflict resolution process.<sup>315</sup> Thus, restorative justice is a practice that engages the public so that citizens can take a more active role in a process that seeks a remedial response to juvenile offending while also being cognizant of those concerns emanating from the community at large. Indeed, the mediation process is the setting in which all citizens in disagreement—for example, victim, offender, family members, and civic leaders—work to establish a fair and just resolution guided by the logic of determining the best course of action with minimal harm. Here, too, commonsense justice is consistent with virtue ethics in that ordinary people are encouraged to articulate their felt regard for such notions as fairness, equity, and honor—in short, *morality*.<sup>316</sup>

In this respect, then, a very important dimension of restoring justice is to engage the adolescent offender and the victim in a form of “empathetic association.”<sup>317</sup> While forms of restorative justice mediation assume several approaches (for example, victim-offender reconciliation programs, family group conferencing, victim-offender panels),<sup>318</sup> they all place the transgressor and the injured party as well as other concerned citizens in a setting where varying points of view regarding pain and harm, remorse and repentance, and healing and forgiveness are voiced.<sup>319</sup> Following the logic of psychological jurisprudence in which the moral philosophy of virtue ethics underscores the judicial analysis, legal tribunals would do well to assess whether and to what extent reliance on such restorative programming as a dimension of their courtroom decision-making would yield reparative outcomes beneficial to all parties in dispute.

When judicial decision-making on the issue of youthful offending is guided by an ethic of care and sensitive counseling (therapeutic jurisprudence), relationship building in which injury is owned and healing

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<sup>314</sup> FINKEL, *supra* note 5.

<sup>315</sup> SULLIVAN & TIFFT, *supra* note 14.

<sup>316</sup> Norman J. Finkel et al., *Commonsense Morality Across Cultures: Notions of Fairness, Justice, Honor, and Equity*, 3 DISCOURSE STUD. 5 (2001).

<sup>317</sup> CORRIERO, *supra* note 37, at 87-88.

<sup>318</sup> VAN NESS & STRONG, *supra* note 13; SULLIVAN & TIFFT, *supra* note 14.

<sup>319</sup> See, e.g., Abrams et al., *supra* note 303; Bruce A. Arrigo & Robert C. Schehr, *Restoring Justice for Juveniles: A Critical Analysis of Victim-Offender Mediation*, 15 JUST. Q. 629 (1998); Edmund F. McGarrell & Natalie K. Hipple, *Family Group Conferencing and Re-Offending Among First-Time Juvenile Offenders: The Indianapolis Experiment*, 24 JUST. Q. 221, 222-23 (2007); Williams, *supra* note 304.

promoted (restorative justice), and community conscience in which everyday citizens discuss fairness and morality (commonsense justice), then the resolutions sought entail integrity-based dialogical exchange. Most specifically, these are exchanges in which the wayward youth and the aggrieved party convene in a non-adversarial setting whereby a mediator facilitates the conversation so that “resolving” the pain caused by the conflict can commence.<sup>320</sup> Moreover, when judges face decision-making in which juvenile crime is at issue, empathic insight underscoring the jurisprudential reasoning necessitates that considerations of character also inform the mediated discussion. These are discussions among those in dispute where the adolescent is encouraged to assess how his or her criminal actions were morally flawed and why adopting pro-social behavior would benefit the individual and society. Along these lines, Braithwaite explained the powerful impact that “shaming” rather than punishment can have on an offender’s character. As he observed:

Shaming is more pregnant with symbolic content than punishment. Punishment is a denial of confidence in the morality of the offender by reducing norm compliance to a crude cost-benefit calculation; shaming can be a reaffirmation of the morality of the offender by expressing personal disappointment that the offender should do something so out of character, and, if shaming is reintegrative, by expressing personal satisfaction in seeing the character of the offender restored. Punishment erects barriers between the offender and punisher through transforming the relationship into one of power assertion and injury; shaming produces a greater interconnectedness between the parties, albeit a painful one, and interconnectedness which can produce the repulsion of stigmatization or the establishment of a potentially more positive relationship following reintegration. Punishment is often shameful and shaming usually punishes. But whereas punishment gets its symbolic content only from its denunciatory association with shaming, shaming is pure symbolic content.<sup>321</sup>

The theory and practice of reintegrative shaming fosters “earned redemption” for the offender and it has demonstrated success in empirical research.<sup>322</sup> When fitted to the mediation process, the dialogical exchange becomes more therapeutic in design in that it enhances a sense of community, promotes participation, and aims to empower all parties involved in healing the injury caused by (adolescent) crime.<sup>323</sup> Additionally, psychosocial factors such as peer pressure, risk taking, and blunted autonomy—so prominent among developmentally immature youths—can be explored while seeking a reparative solution. Thus, when recognized as a dimension of virtue ethics, as well as an expression of how psychological jurisprudence translates evolving theory into worthwhile

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<sup>320</sup> Arrigo & Schehr, *supra* note 319.

<sup>321</sup> JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 72-73 (1989).

<sup>322</sup> McGarrell & Hipple, *supra* note 319, at 241.

<sup>323</sup> Levine, *supra* note 15.

public policy, the judge's decision-making in support of mediation becomes as fully informed as it does potentially enlightened. Arguably, the benefits of such an approach inure to the adolescent offender, the aggrieved victim, and the community that inexorably binds both together.

As a matter of establishing cogent law and policy, the reality of automatic adolescent transfer in which cognitive and emotional deficits are featured raises significant questions about the youth's trial fitness, as well as the adolescent's amenability to processing, treatment, and successful community reentry. These empirical concerns notwithstanding, the prevailing case law on the subject as articulated in state supreme court and appellate court decisions repeatedly overlooks or ignores this scientific evidence when rendering judicial opinions.

As this interpretive study documents, the jurisprudential intent that forms the basis for the court's decision-making ethically conveys its meaning in the form of utilitarian reasoning wherein the "greater good" amounts to protecting the public against persistent wayward adolescents. However, as tentatively reviewed in this Part, more can be and, thus, should be done to address the interests of society (including the victim) and, correspondingly, the needs of delinquent or troubled youth. A law-psychology-justice approach, steeped in the logic of psychological jurisprudence, suggests that this direction already exists in practice in several very noteworthy respects. Therapeutic jurisprudence, commonsense justice, and restorative justice are three distinct, though related, strategies whose conceptual underpinnings advance the moral philosophy of virtue ethics. This moral philosophy endeavors to grow, deepen, and transform the character of all people. Accordingly, legal tribunals are encouraged to appropriate the principles of each when rendering their judicial opinions. This undertaking may very well represent a necessary basis by which the flourishing of developmentally immature juveniles, injured victims, and the community to which both are intimately connected is more fully and responsively achieved. Indeed, this recommended direction helps to make healing, reintegration, and prospects for justice that much more realizable.

## APPENDIX A

*Level I Analysis: Underlying Jurisprudential Intent*

<i>Tate v. State</i>	<i>Otis v. State</i>	<i>State v. McCracken</i>	<i>Williams v. State</i>	<i>State v. Nevels</i>	<i>Brazill v. State</i>
1 court obligation to ensure competency; no special treatment for serious juvenile offenders	The violent nature of the offense negates mitigating factors and demands societal protection.	balancing test to weigh public protection against the juvenile's rights; consideration of extreme risk to society	Williams's offenses were aggressively violent and required criminal prosecution to protect society.	"obliged to consider protection for the public and deterrence"  "balance individual justice with needs of society"	not unreasonable to treat serious juvenile offenders as adults to protect society
2 "Nothing in the law or constitution requiring children be afforded a special system for juveniles."	The court is not required to give equal weight or proof for each statutory factor.	no method to weigh factors; offense was extremely violent.	evidence revealing great culpability in a serious crime	No formula required in the court's consideration of statutory factors.	Legislature and the prosecutor have discretion in deciding who can be treated as a juvenile
3 not uncommon for Florida courts to impose life imprisonment on juveniles; substantial evidence of intent	The weight given to each statutory factor is at the discretion of the court.	Jurisdiction was retained in adult court due to violent nature of offense.	Expert testimony stated that Williams had no mental defect and understood his actions.	Nevels repeatedly violated the law and engaged in violent antisocial acts.	Florida legislature has considered the rise in crimes committed by juveniles.
4 Tate was entitled to a pre-trial competency hearing in order to ensure his ability to stand trial as an adult.	no data ascertained	McCracken was 13, had no prior record, and his maturity level was unclear.	Williams was immature and his I.Q. was borderline. Refusal to transfer to juvenile court was contested.	Testimony on defendant's mental health suggests immaturity and several disorders.	State is allowed to bypass hearing to decide if adult sanctions are appropriate.

5	Life without parole is not considered cruel and unusual for a twelve-year-old in Florida.	Programs and facilities available are not likely to rehabilitate him.	in the best interest of juvenile and society to retain jurisdiction	Court failed to consider rehabilitative programs for juvenile offenders.	Expert opinions are not binding on the court; future dangerousness is a concern.	no data ascertained
6	treat serious juvenile offenders as adults to protect societal goals	The need for greater protection from serious offenders is not arbitrary.	McCracken should be held accountable to deter future misconduct.	"protection of Society"	balancing individual justice with the needs of society, public protection, and deterrence	"interest in crime deterrence and public safety"
7	treat serious juvenile offenders as adults to protect societal goals	Society demands greater protection from a serious offender.	security of the public; deterrence of future antisocial behavior	"protection of Society"	protection for the public; effective deterrence of future antisocial behavior	"protect societal goals" "society demands greater protection"

## APPENDIX B

*Level II Analysis: Underlying Ethical Reasoning Conveying Jurisprudential Intent*

	<b>Consequentialism (Utilitarianism)</b>	<b>Formalism</b>	<b>Virtue Ethics</b>
<i>Tate v. State</i>	<p>“treat children who commit serious crimes as adults in order to protect society goals”</p> <p>“no absolute right requiring children to be treated in a special system”</p>	<p>“obligation to ensure that the juvenile defendant . . . was competent”</p>	
<i>Otis v. State</i>	<p>“not required to give equal weight to each of the statutory factors”</p> <p>“[s]ociety demands greater protection from serious offenders”</p>		
<i>State v. McCracken</i>	<p>“balancing test by which public protection and societal security are weighed against . . . rehabilitation”</p> <p>“best interests of the juvenile and security of the public . . . without question [weigh] in favor of” the court retaining jurisdiction</p>	<p>McCracken should “be held accountable through proceedings in the adult criminals justice system for effective deterrence of future antisocial misconduct.”</p>	
<i>Williams v. State</i>	<p>“protection of society required prosecution in the criminal division of circuit court”</p>		
<i>State v. Nevels</i>	<p>“the concept of deterrence and the need to balance individual justice with the needs of society . . . also have a place in the juvenile justice system”</p> <p>“balancing test”</p>	<p>“obliged to consider protection for the public and deterrence”</p> <p>consideration of “responsibility for the crime”</p>	
<i>Brazill v. State</i>	<p>“society demanded greater protection from these offenders than that provided by [the juvenile] system”</p> <p>“interest in crime deterrence and public safety”</p>		

