

**UNDISCOVERED SINS OF YOUTH: INDIANA’S  
JURISDICTIONAL GAP WHEN CHILD MOLESTING  
COMMITTED BY A JUVENILE IS NOT  
DISCOVERED UNTIL ADULTHOOD**

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TABLE OF CONTENTS

INTRODUCTION

I. INDIANA’S JUVENILE JURISDICTION

II. THE STATE STRIKES OUT: NEITHER COURT HAS JURISDICTION

*A. Juvenile Court Cannot Hear the Case*

*B. Juvenile Court Cannot Waive the Case*

*B. Adult Criminal Court Cannot Hear the Case*

III. PURPOSE AND VALUES OF THE JUVENILE JUSTICE SYSTEM

*A. The System as a Whole*

*B. Indiana Specifically*

IV. TO GRANT JURISDICTION OR NOT?

*A. The Case Against Granting Jurisdiction*

*B. The Case for Granting Jurisdiction*

V. FAILED HOUSE BILL 1198

*A. What the Bill Says*

*B. What the Bill Means: Strengths*

*1. Time Limit*

*2. Standard of Proof for Determining Sex Offender Registration*

*3. Strategic Placement*

*4. Sentence Suspension*

*5. Targeted Only to Child Molesting*

*C. What the Bill Means: A Weakness*

VI. BUILDING ON THE BILL: A PROPOSAL

*A. Keep the Strengths*

*B. Fix the Missing Protection*

*C. Add Provisions*

*1. Pre-judicial Filing Assessment*

*2. Confidentiality*

*3. Sentencing Guidance*

CONCLUSION

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## INTRODUCTION

On more than one occasion, the Indiana Supreme Court has admitted that juvenile jurisdiction is a “confused area of the law.”<sup>1</sup> Although first stated almost forty years ago, this maxim still rings true to this day. The vagaries of juvenile jurisdiction are labeled as such because of “the use of imprecise language and loose terminology” in Indiana’s juvenile statutes and appellate decisions.<sup>2</sup> And nowhere is the confusing nature of juvenile jurisdiction more prevalent than in a series of recent cases that expose how Indiana’s current framework has a unique jurisdictional gap between juvenile and adult court.

Specifically, the recent cases hold that neither juvenile court nor adult criminal court have jurisdiction when an act of felony child molesting is committed by a juvenile but is not discovered by the State until after the offender reaches the age of twenty-one.<sup>3</sup> Child molesting is committed when an individual “knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct” with a child under the age of fourteen.<sup>4</sup> In Indiana’s current juvenile versus adult court jurisdictional framework, the now-adult offender essentially receives a get-out-of-jail-free card. This dilemma may seem rare but could occur more than numbers show because only thirty-eight percent of child victims disclose the abuse.<sup>5</sup> And even if the abuse is disclosed, it may not be until after the offender is outside the reach of the juvenile justice system, leaving no recourse for the victim or community.

Lately, Indiana courts have addressed a few cases dealing with the dilemma of not discovering offense until after the juvenile offender turns twenty-one.<sup>6</sup> In these cases, the State put forth creative legal and policy arguments to hold the now-adult responsible for allegedly committing child molesting as a juvenile but ultimately struck out each time.<sup>7</sup> The overall result of the cases analyzed in this Note show that this later-discovered fact pattern can only be brought in juvenile court while the offender is still a child under Indiana law.<sup>8</sup> Distilled, either (1) the

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1. *State v. Neukam*, 174 N.E.3d 1098 (Ind. Ct. App. 2021) (citing *Twyman v. State*, 459 N.E.2d 705, 706 (Ind. 1984)), *vacated*, 189 N.E.3d 152 (Ind. 2022).

2. *Twyman v. State*, 459 N.E.2d 705, 707 (Ind. 1984).

3. *See M.C. v. State*, 127 N.E.3d 1178 (Ind. Ct. App. 2019); *D.P. v. State*, 151 N.E.3d 1210 (Ind. 2020); *State v. Neukam*, 189 N.E.3d 152 (Ind. 2022).

4. IND. CODE § 35-42-4-3(a) (2022).

5. *Child Sexual Abuse Statistics*, DARKNESS TO LIGHT 1 (2015), [http://www.d21.org/wp-content/uploads/2017/01/all\\_statistics\\_20150619.pdf](http://www.d21.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf) [<https://perma.cc/5JCH-EX4Q>].

6. *See M.C.*, 127 N.E.3d 1178; *D.P.*, 151 N.E.3d 1210; *Neukam*, 189 N.E.3d 152.

7. *See generally M.C.*, 127 N.E.3d 1178; *D.P.*, 151 N.E.3d 1210; *Neukam*, 189 N.E.3d 152.

8. *See discussion infra* Part II; *M.C.*, 127 N.E.3d at 1179-81 (holding that the juvenile courts lack jurisdiction over an adult offender because they are no longer a “child” as Indiana defines the term); *D.P.*, 151 N.E.3d at 1213-17 (holding that a juvenile court cannot waive such a case to adult criminal court because there is no juvenile jurisdiction to begin with); *Neukam*, 189 N.E.3d at 153-57 (holding that the case cannot be filed directly in adult criminal because juvenile delinquent acts are not adult crimes).

victim must first disclose the act while the victim is very young and then the State must bring the case in the juvenile system *before* the offender passes from a child to adult or (2) Indiana’s statutes need revising to grant adult criminal court jurisdiction to hear the case that is reported *after* the offender passes from child to adult.

After the series of cases that exposed this jurisdictional gap, Indiana General Assembly Rep. Wendy McNamara (R) authored House Bill 1198 (the “bill”) in the 2021 session.<sup>9</sup> The bill sought to charge now-adults in adult criminal court for any later-discovered juvenile act of child molesting, up until the alleged victim turned thirty-one.<sup>10</sup> Ultimately, the bill failed to become law before the end of the 2021 session.<sup>11</sup> As a result, this jurisdictional gap remains open. Indiana faces a choice in confronting this gap—whether or not to fill it, meaning grant jurisdiction to adult criminal court or not, and if so, whether the bill is the best answer or can be improved upon.

This Note argues that Indiana cannot not allow this gap to remain open as is. But the bill is not the right answer either. Both options are too extreme. There is a middle ground that narrows the gap by granting jurisdiction to the adult criminal court over now-adults in certain situations with juvenile justice policies weaved in. This Note’s solution allows the General Assembly to provide a unique balanced approach to justice that better handles the interests and rights of the three main players—the victim, the now-adult offender who committed the act as a juvenile, and the community.

Part I provides relevant background on Indiana’s juvenile justice system. Part II analyzes the recent cases where the State has argued, in several creative ways, that jurisdiction in either juvenile or adult criminal court exists for these later-discovered juvenile cases of child molesting, each to no avail. Part III sheds light on the history, purpose, and philosophy of the juvenile justice system throughout the United States as a whole and also Indiana specifically. This insight becomes invaluable in helping craft the solution that best aligns with the complex policies at play—namely, the juvenile justice system’s focus on leniency and rehabilitation given a juvenile’s lesser moral and cognitive brain development against a heinous act with a victim and community who deserve justice.

Part IV explores the question of whether or not to grant jurisdiction for these later-discovered juvenile acts by measuring the bedrock principles of the juvenile justice system against the emotionally disturbing act of child molesting. A grant of jurisdiction must balance many factors, and ultimately, this Note argues that such a balance is possible. Part V dissects what the bill says and what the bill means in terms of its strengths and weaknesses. Finally, Part VI proposes a solution that builds on the bill by preserving its strengths, fixing its weakness, and adding measures to provide the accused with some of the benefits of the juvenile

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9. H.R. 1198, 122nd Leg., 1st Reg. Sess. (Ind. 2021), *available at* <https://iga.in.gov/static-documents/c/8/0/7/c80763e1/HB1198.04.ENG.S.pdf> [<https://perma.cc/9GYC-B3N7>]; *see* discussion *infra* Part V.

10. Ind. H.R. 1198.

11. *Id.*

justice system. Additionally, it gives judges guidance on sentencing.

As a preliminary note, this jurisdictional gap could theoretically arise in other offenses, but the risk is much lower because the acts are likely discovered sooner. Child molesting is unique because the victim is so young<sup>12</sup> that they may not know how to tell someone about the abuse until they get older, let alone even if they should tell anyone at all. Thus, as child molesting is unique enough in this sense, it is the sole focus of this Note.

### I. INDIANA'S JUVENILE JURISDICTION

Under Indiana's current statutes, juvenile courts have “*exclusive* original [subject matter] jurisdiction . . . [over] [p]roceedings in which a *child* . . . is alleged to be a *delinquent child* under IC 31-37.”<sup>13</sup> For the purpose of juvenile law in Indiana, the baseline definition of *child* is a person who is under the age of eighteen.<sup>14</sup> The baseline definition then expands to include a person who is between eighteen and twenty years old if the person is either charged with a delinquent act committed before the age of eighteen or adjudicated a child in need of services before eighteen.<sup>15</sup> Simply put, the person stays a child longer in the eyes of the law in those situations. This baseline then even further expands to include a person under the age of twenty-one who has allegedly committed what would be murder when under the age of eighteen.<sup>16</sup>

A child qualifies as a *delinquent child* “if, before becoming eighteen (18) years of age, the child commits a delinquent act.”<sup>17</sup> And *delinquent act* is defined as an act committed before the age of eighteen “that would be an offense if committed by an adult.”<sup>18</sup> In other words, criminal acts are instead designated as delinquent acts when committed by an individual under eighteen. The elements of the act are the same, but the age at which the act is committed determines the term and its connotation.

The exclusive grant of jurisdiction to juvenile courts seems quite large, but as always, there are exceptions. The legislature has deemed juveniles worthy of adjudication in the adult system in some circumstances. First, the juvenile court lacks jurisdiction altogether when the individual is at least sixteen years old but less than eighteen and commits a certain felony.<sup>19</sup> These instances are referred to as “direct file” offenses and account for the majority of juvenile cases in Indiana adult court.<sup>20</sup> The felonies that trigger direct file include attempted murder,

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12. An element of child molesting under Indiana Code section 35-42-4-3 is that the victim is under fourteen, putting the onus on a child to report acts that the child may not fully understand yet.

13. IND. CODE § 31-30-1-1(1) (2022) (emphasis added).

14. *Id.* § 31-9-2-13(d)(1).

15. *Id.* § 31-9-2-13(d)(2).

16. *Id.* § 31-9-2-13(d)(3).

17. *Id.* § 31-37-1-1.

18. *Id.* § 31-37-1-2(1).

19. *Id.* § 31-30-1-4.

20. IND. CRIM. JUST. INSTIT., JUVENILES UNDER ADULT COURT JURISDICTION ANNUAL REPORT

murder, kidnapping, rape, criminal deviate conduct (before its repeal in 2014), robbery, and carrying a handgun without a license.<sup>21</sup> When one of these felonies is alleged to have been committed by someone at the age of sixteen, but the State is not aware or does not file charges until the individual is over twenty-one, there is no jurisdictional gap to worry about because juvenile court lacked jurisdiction to start.<sup>22</sup> These felonies, when committed at the age sixteen, bypass juvenile court.<sup>23</sup>

Of importance in this Note, child molesting is not one of the serious-enough direct file felonies.<sup>24</sup> For reference, child molesting occurs when an individual “knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct” with a child who is under the age of fourteen.<sup>25</sup> The list of qualifying felonies has been revised over the years but never with respect to child molesting. Most notably, in 2014, the General Assembly removed criminal gang intimidation<sup>26</sup> and criminal gang activity<sup>27</sup> from the statute.<sup>28</sup> But because the General Assembly has not yet seen fit to include child molesting in this list, the jurisdictional gap analyzed in this Note was born.

The second exception to juvenile court’s exclusive jurisdictional grant is waiver.<sup>29</sup> Waiver is defined as “an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult” and “is for the offense charged and all included offenses.”<sup>30</sup> Waiver can be either discretionary, presumptive, or mandatory, depending on the circumstances.<sup>31</sup> With this statutory structure in mind on how juveniles are usually adjudicated in juvenile court, but in certain circumstances can be tried in adult court, we move to the cases that expose this jurisdictional gap as it relates to later-discovered juvenile acts of child molesting.

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4-5 (2020), <https://www.in.gov/cji/grant-opportunities/files/Juveniles-Under-Adult-Court-Jurisdiction,-Oct.-29,-2020.pdf> [<https://perma.cc/GG6W-3SCQ>] (in Indiana’s fiscal year 2020, eighty-eight percent of juvenile cases in adult court were a direct file offense).

21. IND. CODE § 31-30-1-4(a) (robbery only qualifies “if (A) the robbery was committed while armed with a deadly weapon; or (B) the robbery results in bodily injury or serious bodily injury”).

22. *See id.*

23. *Id.*

24. *Id.* Felonies that trigger direct file include attempted murder, murder, kidnapping, rape, criminal deviate conduct (before its repeal), robbery, and carrying a handgun without a license. *Id.* § 31-30-1-4(a)(1) to (8).

25. *Id.* § 35-42-4-3(a).

26. *See id.* § 35-45-9-4.

27. *See id.* § 35-45-9-3.

28. Pub. L. No. 168-2014, §40, 2014 Ind. Acts 2084-85.

29. *See* IND. CODE § 31-30-3-2.

30. *Id.* § 31-30-3-1.

31. *Id.* §§ 31-30-3-2 to -6 (location of Indiana’s waiver statutes).

## II. THE STATE STRIKES OUT: NEITHER COURT HAS JURISDICTION

### *A. Juvenile Court Cannot Hear the Case*

Indiana appellate courts have decided a couple of cases in the last four years that deal with this jurisdictional gap, and *M.C. v. State* is the starting point.<sup>32</sup> *M.C.* concerns the State's attempt to file a delinquency petition against an individual over the age of twenty-one for actions the individual committed before the age of eighteen.<sup>33</sup> The delinquency petition the State filed against *M.C.* alleged that *M.C.* committed acts of child molesting when he was between the ages of fourteen and eighteen.<sup>34</sup> However, when the court filed the petition, *M.C.* was no longer in that age range; he was twenty-two.<sup>35</sup>

Subsequently, *M.C.* filed a motion to dismiss the delinquency petition arguing that the juvenile court did not have jurisdiction to hear the case according to Indiana's definition of *child* and the exclusive jurisdiction of juvenile courts over a child.<sup>36</sup> *M.C.* argued that when read together, these sections provide that juvenile courts lose jurisdiction over a person who is twenty-one or older.<sup>37</sup> The juvenile court disagreed with *M.C.*'s reading and denied the motion to dismiss.<sup>38</sup>

The Court of Appeals, however, agreed with *M.C.* and held that juvenile court lacked jurisdiction, reasoning that the age of the offender determines whether the juvenile court has jurisdiction.<sup>39</sup> That is, the definitional statute clearly limits juvenile courts to hearing cases that involve individuals currently under the age of twenty-one.<sup>40</sup> Although *M.C.* committed the alleged delinquent act when he was between fourteen and eighteen years old, the petition was not filed until he was twenty-two.<sup>41</sup> Thus, *M.C.* could not be considered a *child* in Indiana who was within the reach of the juvenile court.<sup>42</sup> Accordingly, the State tallied strike one in its attempt to find jurisdiction.

### *B. Juvenile Court Cannot Waive the Case*

Moving forward to 2020, the State sought to have juvenile court waive—not adjudicate—two similar cases into adult criminal court after the holding in *M.C.*<sup>43</sup> The State filed two separate juvenile delinquent petitions against two individuals,

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32. 127 N.E.3d 1178 (Ind. Ct. App. 2019).

33. *Id.* at 1179.

34. *Id.*

35. *Id.*

36. *Id.*; see IND. CODE § 31-9-2-13; see also *id.* § 31-30-1-1.

37. *M.C.*, 127 N.E.3d at 1179.

38. *Id.*

39. *Id.* at 1181 (stating that Indiana courts have long held that it is the offender's age which determines juvenile jurisdiction (citing *Twyman v. State*, 459 N.E.2d 705, 708 (Ind. 1984))).

40. *Id.*

41. *Id.*

42. *Id.*

43. *D.P. v. State*, 151 N.E.3d 1210, 1211 (Ind. 2020).

D.P. and N.B., for committing, when under the age of eighteen, acts of felony child molesting if committed by an adult.<sup>44</sup> The petition against D.P. alleged that when D.P. was sixteen, he forced his eleven-year-old cousin to have sexual intercourse with him multiple times.<sup>45</sup> However, D.P. was twenty-three years old when the State filed the petition.<sup>46</sup> As for N.B., the petition alleged that when N.B. was between the ages of twelve and fifteen, he fondled his younger cousin, thus also committing child molesting if committed by an adult.<sup>47</sup> Similar to D.P., N.B. was twenty-one when the State filed the petition.<sup>48</sup>

After filing the petitions, the State's strategy was to argue for waiver from juvenile court to adult court since juvenile court under *M.C.* loses jurisdiction once the individual turns twenty-one.<sup>49</sup> Although there is not a particular statute that expressly confers this sliver of jurisdiction to conduct waiver hearings after the individual turns twenty-one, the State argued that the entirety of the juvenile justice framework evidences legislative intent to give juvenile courts this partial jurisdiction in order to waive now-adults into adult court.<sup>50</sup> In support, the State pointed out that a holding against partial jurisdiction for waiver results in bad policy because alleged offenders would "enjoy a shortened statute of limitations for child molesting."<sup>51</sup>

Both D.P. and N.B. challenged the State's strategy and argued that when the individual is over twenty-one, juvenile courts lack subject matter jurisdiction over any and all parts of a delinquency proceeding, including a waiver hearing.<sup>52</sup> As for policy, D.P. argued that accepting the State's argument that there is a sliver of jurisdiction would mean adults would be punished several years down the road for acts committed during youth, without any opportunity to receive rehabilitation that would have accompanied an earlier charge during juvenile years.<sup>53</sup> To this point, D.P. and N.B. further argued "that the legislature likely recognized this potential injustice [of committing a juvenile act but not receiving treatment in the juvenile justice system] and thus 'closed the opportunity for juvenile proceedings when the offender turns 21-years old.'"<sup>54</sup>

In the end, the Indiana Supreme Court did not address whose policy argument carried more weight because the unambiguous language of the relevant statutes provided the answer.<sup>55</sup> The court reasoned that the jurisdictional statute found in

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44. *Id.* at 1212.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1215.

51. *Id.*; see IND. CODE § 35-41-4-2(e)(1) (2022) (providing the period of limitations for child molesting is until the victim reaches the age of thirty-one).

52. *D.P.*, 151 N.E.3d at 1215-16.

53. *Id.* at 1217.

54. *Id.*

55. *Id.*

Indiana Code section 31-30-1-1(1) does not make a distinction among the various phases of a delinquency proceeding and does not disconnect waiver hearings from the larger proceeding for jurisdiction purposes.<sup>56</sup> That is, if there is no jurisdiction to hear the case in the first place—as *M.C.* makes clear—there cannot be a partial grant of jurisdiction to waive the case.<sup>57</sup> Simply put, juvenile jurisdiction is all or nothing. Consequently, the State tallied strike two in its attempt to find jurisdiction.

Lastly, although the *D.P.* Court foreclosed the State’s ability to file in juvenile court in hopes of a waiver to adult criminal court, the court did not address whether the State could file charges against D.P. in adult criminal court.<sup>58</sup> Footnote two in *D.P.* arguably invites the State to try this approach by acknowledging that both parties spent “considerable time debating whether the State could directly file charges . . . in adult criminal court.”<sup>59</sup> But because “the delinquency petitions were filed in juvenile courts and the State never attempted to file charges in criminal court,” the court found the issue to be “tangential” and not in the scope of the case before them.<sup>60</sup>

### *C. Adult Criminal Court Cannot Hear the Case*

The State accepted the invitation from footnote two in *D.P.*, and, in 2022, the Indiana Supreme Court addressed the remaining question head-on in *State v. Neukam*.<sup>61</sup> That is, whether adult criminal court has jurisdiction over juvenile acts of child molesting when the offender is over the age of twenty-one when charges are filed.<sup>62</sup> In *Neukam*, the State alleged that Neukam molested his young cousin both before and after he turned eighteen.<sup>63</sup> The State filed charges in adult criminal court for the adult acts *and* sought to add in the juvenile acts.<sup>64</sup> The State’s attempt to add the juvenile acts was denied, and an interlocutory appeal followed, bringing the question before the Court of Appeals, and ultimately, the Indiana Supreme Court.<sup>65</sup>

In an opinion written by Justice Slaughter, the majority viewed the question

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56. *Id.* at 1216.

57. *Id.* at 1214.

58. *Id.* at 1217 n.2.

59. *Id.*

60. *Id.*

61. 189 N.E.3d 152 (Ind. 2022).

62. *Id.* at 152.

63. *Id.* at 153.

64. *Id.* Note: This is an over-simplification of the case’s procedural posture. Originally, the State filed a juvenile delinquency petition in the juvenile court for the under-eighteen acts, as well as brought charges in adult criminal court for the over-eighteen acts. *Id.* But, shortly after filing the petition, the holding of *D.P.* from the Indiana Supreme Court came down, which required the State to dismiss the juvenile case given that D.P. was no longer a juvenile. *Id.* At this point, the State “moved to amend the [adult] criminal case to add” the juvenile acts. *Id.*

65. *Id.*



as one of statutory interpretation, highlighting the legislature’s precise terminology as it pertains to juvenile and adult acts.<sup>66</sup> Under the canons of statutory interpretation, a court must seek “to give every word its ‘effect and meaning’” while assuming that every word “was used intentionally.”<sup>67</sup> Doing so, the court reasoned that because the legislature chose to use two different terms for a criminal act based on the age at which it is committed—*delinquent act* for juveniles and *crime* for adults—the terms have separate meanings.<sup>68</sup> Here, the court could not read the statute in a way that allowed adult criminal court jurisdiction over delinquent acts that stayed under the radar until after juvenile years because such a reading “would treat the two terms as if they are one and the same—a view at odds with our interpretive canons.”<sup>69</sup>

The majority went on to analyze the main policy argument raised by the dissent.<sup>70</sup> It is the same policy argument raised in *D.P.*—that not allowing the case to proceed in adult criminal court means providing a safe harbor for offenders who happen to stay off the radar for years.<sup>71</sup> Although a valid and serious policy consideration, the majority again highlighted that the text of the statute provides the answer and that stepping into the world of policy would ignore the court’s “modest judicial role.”<sup>72</sup> “[I]t is legislators, not judges,” who must make the difficult policy decisions.<sup>73</sup> Consequently, the state tallied its last strike—the court held that the State cannot file criminal charges against a now-adult for acts committed while still a juvenile.<sup>74</sup>

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Each of the cases above expose the current gap where neither court has jurisdiction for a later-discovered juvenile delinquent act of child molesting. As a result, Indiana stands at the intersection of what to do about the gap and how to go about doing it. In deciding which direction to go, the complexities of the policies at play in these cases along with the history and reasons for a separate juvenile justice system provide important guideposts. Thus, we turn next to analyzing these aspects.

### III. PURPOSE AND VALUES OF THE JUVENILE JUSTICE SYSTEM

In evaluating this jurisdictional gap as it stands today and any forthcoming proposals that attempt to change it—or even leave it as is—it is vital to look at the

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66. *See id.* at 154.

67. *Id.* (quoting *Clippinger v. State*, 54 N.E.3d 986, 989 (Ind. 2016)).

68. *Id.*

69. *Id.*

70. *See id.* at 154-56.

71. *See id.* at 154-55, 158 (Massa, J., dissenting), 160 (Goff, J., dissenting); *see also D.P. v. State*, 151 N.E.3d 1210, 1215 (Ind. 2020).

72. *Neukam*, 189 N.E.3d at 155 (majority opinion).

73. *Id.*

74. *Id.* at 157.

history of the juvenile system and the main values at play as to why juveniles are treated differently than adults. These insights provide pillars for evaluating any proposed solution and must be considered to ensure an outcome that best aligns with the purposes, goals, and values of the adult and juvenile justice systems.

*A. The System as a Whole*

As far back as the sixteenth century in England, the educational reform movement observed that youth lacked “fully developed moral and cognitive capacities.”<sup>75</sup> But it took until the early nineteenth century for the idea to separate youth offenders from adult criminals to arise.<sup>76</sup> The establishment of the New York House of Refuge in 1825 launched a movement to provide a separate housing facility for youth deemed by authorities to be on a delinquent path.<sup>77</sup> Following this movement and the creation of different kinds of youth houses across America focusing on areas like probation and out-of-home placement, the first juvenile court sprang to life.<sup>78</sup> Established in Cook County, Illinois, in 1899,<sup>79</sup> the first juvenile court sought to provide individualized rehabilitation and supervision, not solely punishment.<sup>80</sup>

From there, juvenile court systems began to develop in each state and have seen ever-fluctuating trends around juvenile rights, procedure, and appropriate sentencing practices.<sup>81</sup> Today, the early belief that youth lacked full moral and cognitive development—and thus should be treated separately from adults—holds true. Indeed, “the premise that youth are fundamentally different from adults, both in terms of level of responsibility and potential for rehabilitation” is the major premise of today’s juvenile justice process.<sup>82</sup> The goals for the juvenile justice system include rehabilitation, addressing treatment needs, and successfully reintegrating youth into the community after committing a delinquent or criminal act.<sup>83</sup>

The United States Supreme Court has taken the lead on recognizing the major premise that juveniles and adults are different. In *Roper v. Simmons*, the Court illustrated “[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders” to justify the imposition of the death penalty.<sup>84</sup> Citing

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75. *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST. <http://www.cjcr.org/education1/juvenile-justice-history.html> [<https://perma.cc/KXX5-JZD5>] (last visited Mar. 6, 2022).

76. *Id.*

77. *Id.*

78. *Id.*

79. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965).

80. *Juvenile Justice History*, *supra* note 75.

81. *See id.*

82. *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice> [<https://perma.cc/94D2-79M4>] (last visited Mar. 6, 2022).

83. *Id.*

84. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

to recent social science, the Court explained why sentencing practices need to be viewed differently for juveniles: (1) “a lack of maturity and an underdeveloped sense of responsibility” found in youth; (2) more vulnerability or susceptibility “to negative influences and outside pressures, including peer pressure;” and (3) less fixed character and personality traits.<sup>85</sup>

Even more, the Court in 2012 in *Miller v. Alabama*, reiterated previous precedent that established “that children are constitutionally different from adults” when it comes to sentencing practices.<sup>86</sup> The Court held that a statutorily mandated sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment absent the sentencing judge taking into account “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>87</sup> Thus, while such a sentence without special considerations is constitutional for adults, it is not for juveniles “considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’”<sup>88</sup> The Court cautioned that while a life without parole sentence could still be available for a juvenile after due consideration, it would be “uncommon” and reserved for the “rare juvenile offender whose crime reflects irreparable corruption.”<sup>89</sup>

### *B. Indiana Specifically*

To be sure, Indiana follows suit in recognizing the major premises, ideals, and similar goals of the juvenile system. Specifically in Indiana, the policy and purpose of juvenile law set forth in Indiana Code section 31-10-2-1 includes, *inter alia*: “ensur[ing] that children within the system are treated as persons in need of care, protection, treatment, and rehabilitation;” providing a judicial procedure that “ensures fair hearings;” “promot[ing] public safety and individual accountability through appropriate sanctions;” and providing services.<sup>90</sup>

Arguably, the most important and often stressed policy is the first—ensuring that “children within the system are treated as persons in need of care, protection, treatment, and rehabilitation”—and Indiana has a tradition of compliance.<sup>91</sup> The

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85. *Id.* at 569-71.

86. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

87. *Id.* at 480.

88. *Id.* at 465 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010)).

89. *Id.* at 479-80. Four years later in *Montgomery v. Louisiana*, the Court clarified the holding of *Miller*, stating that *Miller* did not require a finding of fact regarding the juvenile’s incorrigibility before the rare life without parole sentence was imposed. 577 U.S. 190, 211 (2016). And later, the Court read *Miller* and *Montgomery* together in *Jones v. Mississippi*, to stand for the proposition that a separate factual finding of permanent incorrigibility was not constitutionally required in the case where a juvenile committed homicide, rather a discretionary sentencing system is all that is constitutionally required. 141 S. Ct. 1307, 1313 (2021).

90. IND. CODE § 31-10-2-1 (2022).

91. *C.T.S. v. State*, 781 N.E.2d 1193, 1202 (Ind. Ct. App. 2003) (“Indiana has a well-established policy of ensuring that ‘children within the juvenile justice system are treated as persons

State has long recognized that the roots of this policy come from the nineteenth and twentieth century movements when society rejected the idea of treating juvenile delinquents and adult criminals the same.<sup>92</sup> Even more, “Indiana was a leader in this movement.”<sup>93</sup> Indiana enacted its first juvenile court act in 1903,<sup>94</sup> just four years after Illinois passed the first juvenile court act in 1899.<sup>95</sup> The old ways of equal treatment gave way to the new and favored view that juveniles deserve “individualized diagnosis and treatment.”<sup>96</sup> This favored approach is also shown through the State’s declaration that, in terms of juvenile justice, the State’s primary interest is not punishment—but rather rehabilitation.<sup>97</sup>

To that end, the State’s juvenile code “must be liberally construed.”<sup>98</sup> It is “a comprehensive *civil* forum for *treating and protecting juveniles*, replete with *distinctions between criminal matters* and matters concerning alleged delinquents.”<sup>99</sup> It should be noted that when delinquency is alleged, the proceedings are civil in nature.<sup>100</sup> That is, the “philosophy of social welfare rather than criminal punishment” is the backbone.<sup>101</sup> To effectuate the goals of this rehabilitative model of justice, the Indiana Supreme Court has noted that “broad discretion throughout all phases” of juvenile proceedings is central.<sup>102</sup> This discretion speaks to the philosophy of individualized diagnosis and treatment. And in the sentencing phase specifically, the disposition of the juvenile “is within the sound discretion of the juvenile court, subject to the statutory consideration of the welfare of the child, the community’s safety, and the Indiana Code’s policy of favoring the least harsh disposition.”<sup>103</sup>

The legislature—since 1903—has sculpted and revised Indiana’s juvenile justice laws with these ideals in mind. Thus, failing to consider this background when contemplating proposals to this jurisdictional gap would be insincere and a discredit to those who built and contributed to the framework. But even more, this insight provides important guidance in addressing the threshold question of

in need of care, protection, treatment, and rehabilitation.”)

92. *J.C.C. v. State*, 897 N.E.2d 931, 935 (Ind. 2008).

93. *State ex rel. Camden v. Gibson* Cir. Ct., 640 N.E.2d 696, 697 (Ind. 1994); see Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279 (1997) (discussing Indiana’s history with respect to juvenile courts).

94. Indiana Juvenile Court Act, ch. 237, 1903 Ind. Acts 516 (repealed 1963); see Sullivan, *supra* note 93, at 283-97 (for a robust discussion on the enactment of the Indiana statute).

95. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965); see Sullivan, *supra* note 93, at 281-83 (for a discussion on the enactment of the Illinois statute).

96. *J.C.C.*, 897 N.E.2d at 935.

97. *N.L. v. State*, 989 N.E.2d 773, 778 (Ind. 2013) (stating that “the State’s primary interest [is] rehabilitation, rather than the punishment of juvenile delinquents”).

98. *In re K.G.*, 808 N.E.2d 631, 637 (Ind. 2004).

99. *Id.* (emphasis added).

100. *D.M. v. State*, 949 N.E.2d 327, 333 n.6 (Ind. 2011).

101. *Id.*

102. *In re K.G.*, 808 N.E.2d at 637.

103. *D.S. v. State*, 829 N.E.2d 1081, 1084 (Ind. Ct. App. 2005).

whether the General Assembly should grant jurisdiction at all.

#### IV. TO GRANT JURISDICTION OR NOT?

Should the General Assembly amend the current statutes to hold the now-adult responsible for youthful offenses of child molesting? Importantly, the differences between juveniles and adults and their respective justice systems must be considered when answering this question. But the answer to this question—like most in law—is it depends. Specifically, it depends on the foundation and principles of the juvenile justice system and whether these considerations can align with where the line is drawn in the statute.

##### *A. The Case Against Granting Jurisdiction*

On one hand, juveniles, as shown through the history and emergence of juvenile courts and juvenile law, are regarded as more impulsive, more easily misled, less fixed in their personalities, and less capable of reflecting before they act.<sup>104</sup> That is, childhood is understood to be a fundamentally different time in one's life than adulthood in terms of moral and cognitive development.<sup>105</sup> Scientific research shows the brain is not fully developed and that individuals are not fully mature until the mid-twenties—a fact which lends to the system's strong focus on rehabilitation.<sup>106</sup>

So, allowing prosecution for juvenile acts when the offender is well into adult years reflects the adult criminal system's principle of punishment, *not* the juvenile justice system's principle of individualized treatment and rehabilitation. Sure, the individual is *now* an adult, but the culpability level of the offender *at the time of the act* was that of a juvenile—not an adult. The passage of time does not change the level of culpability at the time of the act. Had the State found out about the act during juvenile years, the individual would have had a chance to benefit from the juvenile justice system's protections and principles, subject only to waiver.

Additionally, allowing prosecution for later-discovered child molestation has the potential to ruin the life of someone who has achieved rehabilitation from their delinquent past by growing up and gaining full cognitive and moral development. This risk is especially present for the one-time offender who realized the severity and disturbed nature of the acts and then self-rehabilitated. After all, this could be the reason that the rare direct file offenses listed in Indiana Code section 31-30-1-4 draw the line right before child molesting.<sup>107</sup>

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104. See discussion *supra* Part III.

105. *Id.*

106. *Adolescent Brain Development*, CAMPAIGN FOR YOUTH JUST. 1 (2018), [http://www.campaignforyouthjustice.org/images/factsheets/Adolescent\\_Brain\\_Development\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/factsheets/Adolescent_Brain_Development_FINAL.pdf) [<https://perma.cc/2GYU-9A4A>].

107. See discussion *supra* Part I. Recall that Indiana Code section 31-30-1-4 lists, in relevant part, that attempted murder, murder, kidnapping, rape, criminal deviate conduct, robbery (if committed either while armed with a deadly weapon or resulting in bodily injury), carrying a handgun without a license, and a few other acts are direct file offenses.

Differentiating juveniles from adults means a line must be drawn somewhere to uphold the demarcation. After all, a stark demarcation between adults and juveniles is present in *Roper v. Simmons*.<sup>108</sup> A juvenile cannot receive the death penalty, but an adult can.<sup>109</sup>

The moral dilemma is clear when considering the worst-case scenario. This line places the juvenile who commits murder a day shy of her eighteenth birthday on the opposite side of the individual who, moments after turning eighteen, commits the same murder. The same crime was committed, but one is eligible for the death penalty while the other is constitutionally ineligible. These few minutes likely do not magically convert the individual into having full moral and developmental capability. Yet, this is where the line was drawn.

In a similar vein, a second line demarcating which juvenile offenses are considered serious enough to allow holding the now-adult responsible must be drawn somewhere. This line is drawn by the direct file and waiver statutes. And notably, for sex offenses considered worthy of direct file in Indiana, the General Assembly drew the line to only include rape.<sup>110</sup>

Lastly, although denying jurisdiction hurts the victims, it would be amiss to not acknowledge that this lack of justice after the passage of time is not a new idea in the law. As seen in statutes of limitations and statutes of repose, most claims are limited by time, even rape.<sup>111</sup>

Overall, the considerations of (1) the system's foundational principle of the differences between juveniles and adults, coupled with (2) the more punitive nature of punishing a juvenile act years down the road, (3) the need to draw a line somewhere, and (4) the everyday notion that claims are not actionable forever, make the case for not granting jurisdiction to the adult criminal court.

### *B. The Case for Granting Jurisdiction*

On the other hand, child molesting is a heinous act. Recall that child molesting is committed when an individual “knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct” with a child under the age of fourteen.<sup>112</sup> This is not a rare or new offense. Between 1982 and 1992, juvenile sex offender treatment programs saw a forty-fold increase.<sup>113</sup> At least in 2009, the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention reported that juveniles committed roughly one-third of sex offenses against juveniles, leaving adults committing the remaining two-thirds.<sup>114</sup> In

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108. *Roper v. Simmons*, 543 U.S. 551 (2005); see discussion *supra* Section III.A.

109. See *Simmons*, 543 U.S. at 578.

110. See IND. CODE § 31-30-1-4 (2022).

111. See *id.* § 35-41-4-2(n).

112. *Id.* § 35-42-4-3(a).

113. David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, JUV. JUST. BULL. (U.S. Dep't Justice, Off. of Juv. Just. & Delinq. Prevention, D.C.), Dec. 2009, at 2, <https://www.ojp.gov/pdffiles1/ojdp/227763.pdf> [<https://perma.cc/PU3E-7FWM>].

114. *Id.* at 3.

addition to prevalence, research shows that child sexual abuse has a very serious and detrimental impact on the mental and physical health of the abused child and can result in post-traumatic stress disorder, depression, and anxiety.<sup>115</sup> The prevalence and impact alone weigh heavily toward granting jurisdiction.

Further, the General Assembly's decision not to include child molesting as a direct file offense is curiously drawn given that child molesting has the same felony level as rape—Level 3—and is similarly capable of being enhanced to a Level 1 felony under certain aggravating circumstances.<sup>116</sup> The General Assembly views child molesting as worthy of the same punishment as rape, so it seems incongruent that the General Assembly left child molesting off the direct file list but included rape.

Moreover, granting jurisdiction and holding individuals responsible for their juvenile conduct even into adult years can likely still align with the purpose and policy of Indiana's juvenile law, despite the argument that doing so would too heavily reflect the adult criminal justice system's punitive nature. Indiana already makes several exceptions where juveniles are seen as adults and their juvenile delinquent acts are seen as crimes—in the direct file and waiver statutes.<sup>117</sup> This is not a new idea. Is it that much of a difference or disruption to the philosophy of the juvenile justice system to hold adults accountable for acts of child molesting committed during their juvenile years when other exceptions like rape, murder, and armed robbery have already been made and seem to be viewed by society as worthy of the same punishment? Perhaps not, especially because child molesting fits the same theme as the acts listed above—heinous.

However, the specific wording and placement of the jurisdictional grant must be carefully scrutinized so that the existing balance of rehabilitation and punishment is not tipped too far in either direction. Any change that tips the balance too far is difficult to justify. But if a similarly situated balance is struck,

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115. *Sexual Abuse Effects*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/sexual-abuse/effects> [<https://perma.cc/T4B4-6QJS>] (last visited Mar. 6, 2022).

116. Compare IND. CODE § 35-42-4-3 (child molesting is a Level 3 felony at baseline, but becomes a Level 1 felony if: (1) "it is committed by a person at least twenty-one (21) years of age;" (2) "it is committed by using or threatening the use of deadly force or while armed with a deadly weapon;" (3) "it results in serious bodily injury;" (4) "the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug . . . or a controlled substance . . . or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge;" or (5) "it results in the transmission of a serious sexually transmitted disease and the person knew that the person was infected with the disease"), with § 35-42-4-1 (rape defines rape as a Level 3 felony at baseline, but can become a Level 1 felony if: (1) "it is committed by using or threatening the use of deadly force;" (2) "it is committed while armed with a deadly weapon;" (3) "it results in serious bodily injury to a person other than a defendant;" or (4) "the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug . . . or a controlled substance . . . or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge").

117. See discussion *supra* Part I.

jurisdiction may be justified. Distilled, the strength of the argument that jurisdiction can align with the already-existing dichotomy of treating juveniles as adults in certain circumstances rises and falls with where the line is drawn.

For example, if the line is drawn by adding child molesting to the direct file statute, the impact is not just a grant of adult criminal court jurisdiction over now-adults but also a grant of jurisdiction for *every juvenile* who commits, and is charged with, child molesting between sixteen and eighteen. Recall that the juvenile court lacks jurisdiction over the offenses in the direct file list.<sup>118</sup> Thus, adding child molesting as a direct file offense would take away the option of juveniles who are charged with child molesting between the ages of sixteen and eighteen from receiving treatment in the juvenile justice system. This option tips the scales of rehabilitation and punishment too far into the punitive realm because it negatively effects current juveniles, not just the now-adults targeted in these cases. As a result, granting jurisdiction in the form of adding child molesting to the direct file list appears misaligned and unjustified.

But a specific statute with a very narrow jurisdictional grant tailored to this exact fact pattern may still be aligned and justified. Simply, such a statute would say that in the case where a now-adult allegedly committed child molesting as a juvenile, adult criminal court has exclusive and original jurisdiction. This option only targets the now-adults in these later-discovered cases, still allowing juveniles to be treated within the juvenile system—with all the rehabilitative and individualized principles—subject only to adult criminal court via waiver. Simply, the option of adding to the direct file offenses would cast a bigger jurisdictional net than intended and disrupt the already-existing tension between systems found in the direct file and waiver statutes. The result of jurisdiction via a specific and narrow statutory grant, however, increases the attractiveness of the argument for jurisdiction because it better balances the treatment of juveniles with the need for justice.

Overall, the considerations of (1) the prevalence and severe impact of child molesting, plus (2) the incongruency of leaving child molesting off the direct file, and (3) the ability to strike a balance of principles through a specific grant of jurisdiction, equal a strong case for granting jurisdiction.

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Accordingly, even in light of the strong foundational principles of the juvenile justice system, Indiana should allow the ability to prosecute the now-adult through a specific and narrow grant of jurisdiction, especially when certain circumstances—like repeated acts over a period of time, multiple victims, or belief that a requisite intent was formed—are present to make it justifiable. Any proposed grant of jurisdiction must be carefully scrutinized to ensure only the cases that should be brought, are brought, and that there are still some juvenile system protections in place so the already-existing tension in values is kept in balance. With this in mind, we turn next to the bill put forth in the 2021 session

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118. See discussion *supra* Part I (background on how direct file works).



that sought to fix this gap and analyze its approach.

#### V. FAILED HOUSE BILL 1198

In *D.P.* and *Neukam*, the Indiana Supreme Court noted that the proper body to fix this gap is the General Assembly.<sup>119</sup> Some Indiana lawmakers listened and proposed House Bill 1198.<sup>120</sup> Ultimately, the bill failed despite gaining bipartisan support.<sup>121</sup> Although unsuccessful, the bill is still helpful—it provides a unique opportunity for analysis, which can help in the proposal of a new and better solution.

##### A. What the Bill Says

Authored by Representative Wendy McNamara (R) and co-authored by Representatives Gregory Steuerwald (R) and Sharon Negele (R), the bill allowed for an adult criminal court to have jurisdiction over the now-adult who committed felony child molesting while between the ages of fourteen and eighteen, provided that the now-adult was over twenty-one at the time of filing.<sup>122</sup> If the now-adult was found guilty, the bill then mandated registration as a sex offender if the court found by clear and convincing evidence that the now-adult was likely to repeat an act enumerated in Indiana Code section 11-8-8-4.5(a).<sup>123</sup>

If ordered to register as a sex offender, the bill allowed the now-adult to petition the court for reconsideration of the registration order at any time after the successful completion of court-ordered sex offender treatment.<sup>124</sup> In reconsideration, the bill provided that “[t]he court shall consider expert testimony concerning whether a child or person is likely to repeat” a sex offender offense under Indiana Code section 11-8-8-4.5(a).<sup>125</sup> Thus, the idea is that the court would be aided in making this reconsideration determination.

Additionally, the bill required prosecution of later-discovered crimes to have been commenced within certain timeframes.<sup>126</sup> Currently, a child molesting charge is barred unless commenced before the date that the victim reaches the age

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119. *D.P. v. State*, 151 N.E.3d 1210, 1217 (Ind. 2020) (“If today’s result was not the intent of the legislature, then it—not we—must make the necessary statutory changes.”); *State v. Neukam*, 189 N.E.3d 152, 155 (Ind. 2022) (“Policymakers often must make difficult judgment calls about when an alleged offender’s needs should outweigh an alleged victim’s. But it is legislators, not judges, who bear that responsibility.”).

120. H.R. 1198, 122nd Leg., 1st Reg. Sess. (Ind. 2021), available at <https://iga.in.gov/static-documents/c/8/0/7/c80763e1/HB1198.04.ENG.S.pdf> [<https://perma.cc/9GYC-B3N7>].

121. See *House Bill 1198*, IND. GEN. ASSEMBLY, <https://iga.in.gov/legislative/2021/bills/house/1198#digest-heading> [<https://perma.cc/9CEF-UAFD>] (last visited Jan. 7, 2023).

122. Ind. H.R. 1198.

123. *Id.* at § 1; see IND. CODE § 11-8-8-4.5(a) (2022) (listing the convictions that qualify an individual as a “sex offender”).

124. Ind. H.R. 1198, § 1.

125. *Id.*

126. *Id.* at § 5.

of thirty-one.<sup>127</sup> Although this limitations period was essentially rendered superfluous in the cases analyzed above,<sup>128</sup> the bill threw it back into play.<sup>129</sup> The timeframes proposed by the bill provided that an adult criminal prosecution for child molesting committed by a person under eighteen must be commenced before the earlier of:

- (e) . . . the date that the alleged victim of the offense turns thirty-one (31) years of age [or]
- (q) . . .
  - (1) One (1) year after the earliest date on which:
    - (A) the state first discovered evidence sufficient to charge the offender with the offense through DNA (deoxyribonucleic acid) analysis;
    - (B) the state first became aware of the existence of a statement or recording . . . that provides evidence sufficient to charge the offender with the offense;
    - (C) the person confesses to the offense; or
    - (D) the victim discloses the nature of the offense involving the person;
 if the discovery, awareness, confession, or disclosure . . . occurred before the person reached twenty-one (21) years of age. . . .<sup>130</sup>

Lastly, the bill provided that a court may suspend any part of a sentence for child molesting brought under the new grant of jurisdiction.<sup>131</sup>

### *B. What the Bill Means: Strengths*

In light of what the bill *says*, we turn next to dissecting what the bill *means* in terms of its strengths. The bill arguably takes a forward step in balancing the complexities of the issue by having a handful of good strengths. Each is discussed in turn.

*1. Time Limit.*—The biggest protection found in the bill is the time limit on when the State is able to bring this type of charge. If the State sought to prosecute a now-adult for child molesting committed before the individual turned eighteen, the bill provided that the State must commence the case either (1) before the victim turns thirty-one or (2) within a year of discovering DNA evidence, discovering a statement or recording that provides sufficient evidence, the individual confesses, or the victim reports the abuse before the individual turns twenty-one, whichever is earlier.<sup>132</sup> These limits allow finality, protect against

127. IND. CODE § 35-41-4-2(e)(1).

128. See discussion *supra* Part II.

129. See Ind. H.R. 1198, § 5.

130. *Id.*; see discussion *infra* Section V.B.1. (for a simplified breakdown of this language).

131. Ind. H.R. 1198, § 6.

132. *Id.* at § 5.

digging up old acts, and protect juveniles from the prosecutor who is made aware of possible charges when the individual is a juvenile but delays bringing charges until the age of majority is reached in order to subject them to the adult criminal system.

2. *Standard of Proof for Determining Sex Offender Registration.*—The second strength is the standard of proof—clear and convincing evidence—for the determination of whether the offender would likely repeat another sex offense and thus be initially ordered to register as a sex offender.<sup>133</sup> This is the most appropriate and balanced standard of proof here. Proof beyond a reasonable doubt is likely not feasible because this is a predictive determination, leaving clear and convincing the highest standard of proof left. And although sentencing usually carries a preponderance standard, the heightened sensitivity of charging an adult for a juvenile act coupled with the weight and impact of registration as a sex offender disfavors a lower standard. The clear and convincing standard serves to protect the individual that has fully reformed and will likely only be met in the cases that should be brought where the individual needs help to reform or deserves punishment for forming the requisite intent.

3. *Strategic Statutory Placement.*—Third, the bill’s strategic placement in the Indiana Code is a strength. Recall the discussion in Section IV.B. where the strength of the arguments in favor of jurisdiction rely on where the line is drawn.<sup>134</sup> Instead of the very specific grant of jurisdiction addressing just this later-discovered issue, the bill could have proposed adding child molesting to the direct file offenses in Indiana Code section 31-30-1-4.<sup>135</sup> The authors made the right decision to not add child molesting to the direct file offenses given that it would have a greater impact on juveniles than intended or needed to fix this gap.<sup>136</sup> A specific grant of jurisdiction—just as the bill proposes—targets only the subset of individuals who reach the age of majority before the State discovers the offense and does not force juveniles into adult criminal court every time the State discovers the offense before the age of majority.

4. *Sentence Suspension.*—Fourth, the bill protects the now-adult by allowing a court to suspend any part of a sentence without any required findings.<sup>137</sup> This protection aligns with the juvenile justice goal of individualized diagnosis and treatment.<sup>138</sup> An individual could be fully reformed by the time the charge is brought, and this provision would allow the court to cater the sentence to reflect that. In another instance, this option would allow for a favorable sentencing practice that could impose accountability but not overly punish the individual. Take for example, the individual ordered to complete a sex offender treatment

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133. *Id.* at § 1.

134. *See* discussion *supra* Section IV.B.

135. *See id.* (providing analysis on how adding child molesting to the direct file offenses casts a bigger jurisdictional net than intended).

136. *Id.*

137. *See* Ind. H.R. 1198, § 6.

138. *See* discussion *supra* Part III (discussing the purpose and values of the juvenile justice system).

program and ordered to register as a sex offender. This sentence-suspension provision would allow the judge to suspend the order to register until successful completion of the treatment program. Overall, this provision is a strength because it allows the judge to consider a range of circumstances unique to the individual and suspend a sentence when warranted.

5. *Targeted Only to Child Molesting.*—The last strength of the bill is found in its exclusion of other sex crimes. The bill does not attempt to tie in other sex crimes and cast a wider net than intended. The bill is appropriately limited in this sense. There is no need to expand the bill to include offenses like incest<sup>139</sup> or sexual misconduct with a minor.<sup>140</sup> This is true simply because these offenses can *only* be committed by a person who is at least eighteen years of age.<sup>141</sup> That is, an element of both offenses is that the individual committing it is over the age of eighteen—a juvenile cannot evade charges for these crimes because they cannot be charged in the first place. So based on the age element, the adult criminal court would already have jurisdiction over these crimes, and the court already has jurisdiction over rape through the direct file statute. Thus, the only possible bar to prosecution with these crimes then is the applicable statute of limitations—not jurisdiction.

### C. *What the Bill Means: A Weakness*

There is, however, a weakness in the bill; it misses a protection for the now-adult offender. Although a very small detail, the bill does not amend Indiana Code section 11-8-8-4.5(c), which reads: “[i]n making a determination under [the clear and convincing evidence element], the court shall consider expert testimony concerning whether a *child* is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.”<sup>142</sup> This section only speaks in terms of a *child*—a child gets expert testimony before the determination of whether a repeat act is likely to be committed.

But in the proposed Indiana Code section 11-8-8-4.5(d), which is operative only when the now-adult petitions the court for reconsideration of offender status after the completion of treatment, the words “or person” follow the word “child.”<sup>143</sup> When the court reconsiders the order to register as a sex offender, “[t]he court shall consider expert testimony concerning whether a child *or person* is likely to repeat an offense described in subsection (a) or an act that would be offense described in subsection (a) if committed by an adult.”<sup>144</sup>

So, given the Indiana Supreme Court’s strict reading of unambiguous statutes, there is too big of a risk that the now-adult who is prosecuted for a later-discovered act will not have this same protection in the initial determination of

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139. IND. CODE § 35-46-1-3 (2022).

140. *Id.* § 35-42-4-9.

141. *See id.*; § 35-46-1-3.

142. *See* Ind. H.R. 1198, § 1; IND. CODE § 11-8-8-4.5(c) (emphasis added).

143. Ind. H.R. 1198, § 1 (emphasis added).

144. *Id.* (emphasis added).

whether the sex offender registration requirement is met because the words “or person” do not follow “child” in the provision stating that expert testimony must be considered. If the person is not a child, which they would not be in this jurisdictional gap issue, then the court would *not* have to consider any expert testimony in deciding whether there is clear and convincing evidence that the person is likely to be a repeat sex offender. But if charges were brought during juvenile years, the offender would get this benefit of putting an expert witness on to aid the court in the registration determination of whether they have to file as a sex offender in the first place.

Distilled, juveniles tried as juveniles get expert testimony *before and after* the court determines sex offender registration, whereas later-discovered adults only get the expert testimony *after* the determination. Consequently, there is an unintentional discrepancy where the passage of time impacts how the determination is made. This is unfair to the adult who would have been treated differently if the charges were discovered earlier.

#### VI. BUILDING ON THE BILL: A PROPOSAL

Overall, the bill is a step in the right direction because Indiana’s legislature should narrow this unique jurisdictional gap for the act of child molesting. On the one end of the spectrum, not granting jurisdiction—which entails leaving the statutory framework as is—is too small of a step because it disproportionately holds the now-adult’s interest in being treated in the juvenile system above that of the victim and community in seeking justice. The current framework grants now-adults a get-out-of-jail-free card if the victim does not report the abuse before the offender reaches adulthood. But children under fourteen may not know how to or even if they should report such an act committed against them. Leaving the framework as is places too big of a burden on the victims to disclose the act when they may not understand what happened or be too traumatized to communicate it in time.

But on the opposite end, the bill takes too big of a step and weighs the victim’s interest too heavily over the principles and policies of the juvenile system. And while there is only one weakness directly in the text of the bill—the missing protection<sup>145</sup>—the bill fails to consider several important aspects in attempting to strike the right balance between a juvenile offense prosecuted in adult court against a now-adult years after the fact. These aspects include policy choices that derive from the juvenile justice system—policies like confidentiality and a pre-judicial assessment before charges can move forward.<sup>146</sup> Further, the bill leaves much to be desired about how judges should sentence an individual in these cases. Thus, the bill takes too big a step in that it skips over aspects that should be included for the most aligned approach. In sum, there is a middle ground that builds on the bill to better balance the philosophy of the juvenile justice system with the severity and heinous nature of child molesting.

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145. See discussion *supra* Section V.C.

146. See discussion *infra* Section VI.C.

Therefore, in acknowledging the above, this Note's proposed solution is to: (1) keep the strengths of the bill discussed in Section V.B.; (2) fix the missing protection discussed in Section V.C.; and (3) add provisions, including a confidentiality requirement, a requirement that a judge approve the filing to ensure it is in the best interest of society and not purely punitive, and give judges some guidance on sentencing.<sup>147</sup>

#### *A. Keep the Strengths*

The strengths of the bill, discussed *supra* in Part V.B., are well formulated and serve to strike a good balance between the competing sides. Listed again, the bill's strengths are: the time limit on when prosecution must commence; the standard of proof for determining when an individual must register as a sex offender in these cases; the strategic statutory placement; the ability of a judge to suspend a sentence without any required findings; and the exclusion of other sex crimes. The bill grants the victim the opportunity to seek justice where it was previously not available and where there are strong competing policies. These strengths seek to balance that grant by acknowledging those policies.

#### *B. Fix the Missing Protection*

Although the missing protection is a very small detail, and likely an oversight, a new bill should provide adults with the same pre-determination expert testimony requirement in establishing whether there is clear and convincing evidence to show that the person is likely to be a repeat sex offender. To do otherwise would risk having less protection for the now-adult just by the passage of time. Further, this protection would prevent cases being brought against individuals who are now fully functioning adults and have since been on the right track after realizing their misguided youthful acts. The victim and the community may not have received justice for the act committed years prior, but in these cases, the burden on the criminal system and the taxpayer's dollar to provide a sex offender program for someone who is not at risk of repeating a heinous act may outweigh the lack of justice. If someone is already rehabilitated by the mere fact of more brain development, better moral propensity, and is now a productive member of society when the charge is filed such that providing any services would not lessen the non-existent risk of repeating, then some of the purposes and policies of the juvenile system are not met. Thus, fixing this weakness is a must.

#### *C. Add Provisions*

*1. Pre-judicial Filing Assessment.*—Seeing as the grant of jurisdiction stems from a juvenile delinquent act, the grant should incorporate a system similar to that of the pre-judicial filing assessment present in juvenile delinquency cases.<sup>148</sup>

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147. See discussion *supra* Section V.B.

148. See IND. CODE § 31-37-10-2 (2022).

Indiana Code section 31-37-10-2 directs that, before a juvenile delinquency case can proceed, a juvenile court judge must “[c]onsider the preliminary inquiry and the evidence of probable cause” and “[a]pprove the filing of a petition if there is probable cause to believe that: (A) the child is a delinquent child; and (B) it is in the best interests of the child or the public that the petition be filed.”<sup>149</sup> This is a good screening system and should be mirrored in the prosecution of now-adults for juvenile offenses of child molesting to ensure—again—that the cases that should be brought are brought, and the cases that seek to merely punish an already reformed and productive member of society do not proceed. In these later-discovered cases, the State should have the burden of convincing the court that it is in the best interest of the community to push the foundational principles of the juvenile justice system to the back and pull the punitive nature of the criminal system to the front. A juvenile court judge should make the initial determination before the case proceeds in adult criminal court.

In making this determination, a juvenile court judge sits in the best position given their knowledge of the juvenile justice system and the chances that waiver would have been granted if the case were brought while the offender was still a juvenile. This determination should be a matter of discretion, and the factors that the judge should consider include: the chance of waiver had the case been brought during juvenile years, the number of acts, the length of the time period if repeated acts occurred, the number of victims, and the belief that a requisite intent was formed by the individual. These are not exclusive, and it is plausible that one egregious factor may be dispositive in a given case.

However, because this prosecution will ultimately be in adult criminal court, this pre-judicial determination should move from being non-adversarial when concerning juveniles<sup>150</sup> to being adversarial. Thus, defense counsel should be present and have the opportunity to aid the court in making the determination of whether it is in the best interest of society for the State to move forward. Given the higher stakes of the proceeding since the adjudication will shift into adult criminal court—namely, loss of liberty and public condemnation—the accused should be able to put forth evidence of his reformation, good standing in society, and any expert witness testimony that aids the court. Indeed, a main theme of this grant of jurisdiction is to strike the proper balance between competing policies, weeding out the cases that should not move forward because they are purely punitive and ensuring the right cases are brought.

2. *Confidentiality.*—Further, confidentiality aspects should be included to protect the accused from the public disapproval that comes with criminal accusations. To be sure, all juvenile court records are confidential and only available to persons who are entitled to access.<sup>151</sup> Indiana’s juvenile code devotes a whole chapter, Indiana Code section 31-39-2, to defining who qualifies as

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149. *Id.*

150. *See id.* § 31-37-10-7 (providing that the parties to a juvenile delinquency petition proceeding include the child, the child’s parent or guardian, and the prosecuting attorney).

151. *Id.* § 31-39-1-2.

having access to juvenile court records.<sup>152</sup> Thus, because the later-discovered act was committed during juvenile years, the individual should still get some benefit of confidentiality. The grant of jurisdiction here, however, is to the adult criminal court, making confidentiality somewhat unpractical because of the general public's ability to observe proceedings and see records. Although complete confidentiality may be unpractical, there are still steps that should be taken to keep these accusations confidential.

To start, the initial pre-judicial determination that occurs in juvenile court<sup>153</sup> should follow the confidentiality procedures outlined in the juvenile code. If the judge decides the case should not move forward, then the individual will not suffer from the same level of public embarrassment that would accompany an adult crime. If not kept confidential, even a dismissed charge could have a severe negative impact on the individual's job, relationships, and reputation within the community.

But if the judge determines the case should move forward, the offender's initials—not the full name—should be used in the adult criminal court case. Like a dismissed charge, an acquittal could still result in potentially unjustified and severe consequences. The offender's name should not be used until after both a conviction and failure to complete any treatment program that the court may order. Up until the point that the court orders the offender to register as a sex offender for failure to complete the sentenced program, the general public should not be privy to this type of later-discovered child molesting accusation. This balance draws the juvenile justice aspect of confidentiality into the grant of jurisdiction, helping strike the right balance.

3. *Sentencing Guidance.*—Sentencing the adult for the juvenile delinquent act is a big question left unanswered in the bill. A provision should be added to guide judges down the sentencing road and ensure some consistency across cases. On one hand, putting adults back into the juvenile justice system and its programs would likely be harmful to the juveniles in the system. After all, a main aim in the formation of the juvenile justice system at the turn of the nineteenth century was to separate youth offenders from adults in light of juveniles' lesser brain development and capacity for rehabilitation.<sup>154</sup> But on the other hand, the adults do not necessarily fit easily into adult sentencing practices either. The individual still committed the act as a juvenile, implicating the overtones of lesser culpability and delayed moral development.

In attempting to balance these complexities, a new provision should detail a sentencing scheme for judges that focuses on diversion and rehabilitation before punishment. First, upon a conviction, the judge should order the individual to complete an appropriately tailored sex offender treatment program. Some programs may be more intense, with parole officers, more required judicial check-ins to ensure compliance, and a longer length of time. If the individual is determined to be a very high-risk for repeating related sex-offense acts, then an

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152. *Id.* § 31-39-2.

153. *See* discussion *supra* Section VI.C.1.

154. *See* discussion *supra* Part III.



incarcerated program is likely an appropriate response. Community service or other diversion options should also be considered in crafting an appropriate sentence. The sentencing judge should receive guidance from a pre-sentence investigation report alongside the recommendations of defense counsel and the prosecuting attorney.

The second step depends on whether the individual successfully completes the program(s). Upon successful completion of requirements and proof of good standing in society, the individual should not have to file as a sex offender. However, if the individual does not successfully complete the program(s), then an order to register as a sex offender should be almost immediate. Ordering the individual to register before the completion of any program is more punitive than what the accused likely would have received had adjudication occurred during juvenile years. As such, it is inappropriate here to mandate registration without a rehabilitative option first. Once the individual is ordered to register as a sex offender, the requirements set forth in Indiana Code section 11-8-8, the Sex Offender Registration chapter, should be followed.<sup>155</sup> In sum, this two-step sentencing process serves two functions: (1) guides judges in this new and unique grant of jurisdiction and (2) better balances the focus of rehabilitation from the juvenile justice system with the punitive focus of the adult criminal system.

#### CONCLUSION

A unique gap arose when the State sought to prosecute adults for an alleged juvenile delinquent act of child molesting. Through a series of cases, the end result is that neither adult criminal court, nor juvenile court, have jurisdiction over such cases. Indiana cannot not allow this gap to remain as is. The State should be able to prosecute now-adults in some circumstances. Indiana's best solution to this jurisdictional gap lies in combining the strengths of the previous bill that sought to fix it, fixing its weakness, and adding additional juvenile justice system protections and sentencing guidance. This solution best maintains the balance of policies throughout the Indiana Code pertaining to the treatment of juveniles and adults in the criminal justice system.

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155. *See* IND. CODE § 11-8-8.