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JUDICIAL WAIVER AS THE ONLY EQUITABLE METHOD TO TRANSFER JUVENILE OFFENDERS TO CRIMINAL COURT

WILLIAM HANNAN*

INTRODUCTION

The notion of a juvenile offender being “tried as an adult” has become commonplace in our society due to its frequent mention in newspaper articles and on the evening news. It is generally understood that a child who has committed a serious crime can be tried as an adult in standard criminal court, as opposed to being subject to adjudication in a juvenile court. At first glance this seems like a sound policy: if a minor has committed a serious violent crime, then he should lose all the benefits of his juvenile status and be subject to harsher punishment in the criminal justice system. The rationale is that dangerous child offenders need to be kept off the streets in the interest of public safety, just like their adult counterparts. But what happens when a troubled youth is not given the benefit of the doubt by the society that has failed him and instead is locked up in jail with hardened criminals, effectively foreclosing all hope of rehabilitation? For a while, perhaps the streets are safe from this child offender, but what happens years later when inevitably he is released from a prison system that has consistently failed as a rehabilitative enterprise? An over-inclusive waiver policy fails to benefit society and juvenile offenders, who desperately need help to get on the right track. A close examination reveals that waiver of juvenile court jurisdiction over a young offender has serious legal, societal, and policy effects. Much of the debate surrounding waiver centers around important procedural considerations, namely who—and under what circumstances—determines when it is “appropriate to treat the subjects of the juvenile justice system charged with serious offenses as if they were adults and banish them to prison

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for long terms? To put the matter less charitably: When are juveniles not juveniles?"1

The juvenile justice system has gone through major changes and reforms in the past three decades, and it currently maintains a delicate balance between the original aim of rehabilitation and the more recent policies of retribution and punishment. The system transitioned from one primarily dedicated to the best interests of the child to one where the interest in public safety has become a major consideration, if not the primary consideration.2 This shift in policy parallels the increased use of legislative and prosecutorial waivers, instead of the traditional judicial discretionary waiver, as a reaction to public outcry against an upsurge in youth violence.

The increase in transfer to criminal court and the transformation of the juvenile court into a "mini criminal court" raises "grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."3

It is obvious that transfer is necessary in some cases. Some juveniles, because of the heinousness of their acts or a prior record full of violent crimes, are not amenable to any sort of treatment available via the juvenile justice system and must be transferred to criminal court so they can receive—for incapacitation and punitive purposes—the harsh punishment they deserve. These transfers should be relatively rare, however, and the current policy regarding waiver of juvenile court jurisdiction is too broad to serve any effective purpose for the juvenile or society.

This Note argues that the increased use of over-inclusive legislative and prosecutorial waivers is a mere "quick-fix" to the juvenile crime problem and serves neither the interests of society at large nor the juvenile population. The solution to this problem is a reinvigorated focus on the rehabilitative goals of the juvenile justice system and the use of judicial discretion for waiver only in the most severe cases, evaluated on an individualized case-by-case basis. Children are legally, developmentally, and psychologically distinct from adults, and these differences necessitate a focus on rehabilitation and treatment in the majority of cases. Though

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many violent and repeat juvenile offenders leave society no choice but to transfer them into the criminal system and treat them as adults, this Note argues additionally that judicial waiver—though in need of reform itself—is the only way to make this crucial determination in a way that does not run converse to the goals of the juvenile system and to the good of society.  

Section I of this Note discusses the development of the American juvenile justice system by looking at the aims of its founders and how a series of Supreme Court decisions has affected the operation and aims of the juvenile courts. Section II analyzes the three types of waiver—judicial, legislative, and prosecutorial—and concludes that the judicial discretion associated with traditional waiver is the only method that can satisfy the interests of the child and society. Section III examines developmental and psychological issues regarding juveniles, and when combined with the jurisprudence of juvenile law, shows why juveniles are considered “different” from adults and must be adjudged in a system that has their best interests in mind. Finally, Section IV offers suggestions to improve judicial waiver for the benefit of youths and society.

I. DEVELOPMENT AND EVOLUTION OF THE AMERICAN JUVENILE JUSTICE SYSTEM

A. The Origins of the Juvenile Justice System

The first juvenile court in the United States was created in 1899 by the Illinois state legislature in Cook County with the mission of “guid[ing] juvenile delinquents toward responsible and productive adulthood, not punish[ing] them.” The Illinois model spread quickly, and by 1930, every state except one had a juvenile court authorized by the state legislature in place; by the end of World War II, every state had established a separate court system for juveniles. The philosophy of the juvenile court system descended from the notion of parens patriae, an English concept whereby the sovereign’s role was that of the “ultimate protector of children.” In the English example, the king could become

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4. This Note assumes that reasonable persons would support the aims of the juvenile justice system—namely, rehabilitation and treatment of young offenders.


6. Id.


the guardian of a child and offer him whatever services the State could provide to protect him and his interests. Although juvenile court systems varied in practice from state to state, they all had similar aims. The focus of the juvenile courts was on the offender rather than the offense.

The judge played the most important official role in the juvenile court. One commentator makes the analogy of the juvenile court judge as a father to the delinquent child, with his function being to "determine the needs of the child" and then to "give sound advice to correct the child." A judge had wide discretion in dealing with a juvenile delinquent; among the options were to place the child on probation, to institutionalize him, or to place him in a foster home or orphanage. Most important to the proponents of the juvenile system was that the creation of a juvenile system infrastructure "reversed a 100-year tradition in the United States of handling juvenile offenders in criminal courts," and detaining them in adult prisons with adult criminals. The prevailing theme that existed throughout all the juvenile justice systems in the United States was that the court existed for the benefit of the child. The system and its goals were animated by several fundamental beliefs. First, juvenile offenders had less culpability than adult offenders. Second, because juvenile offenders were less guilty and more likely to be amenable to rehabilitation, they deserved to be treated differently for their crimes. Third, the system was designed to protect children from the stigmatization of having a criminal record and to protect them from the corrupting influence of being imprisoned with adults. These tenets supported the philosophy of rehabilitation rather than retribution for juvenile offenders. Clearly, the juvenile justice system was designed with the best interests of the child in mind.

9. Mary Clement, The Juvenile Justice System: Law and Process 18 (2d ed. 2002). In practice, this meant that a court of equity could use the power of the sovereign to guard the child and whatever property he may have. Id.

10. See Prescott, supra note 8, at 1004 ("There is no uniform juvenile court; individual state legislatures use their own discretion in constructing juvenile court systems to best serve the needs of their jurisdiction.").


12. Clement, supra note 9, at 18.


14. Id.

15. Clement, supra note 9, at 14.


17. See id. at 2431 (discussing the aim of the juvenile courts to help and protect the child, rather than punish him).
The juvenile justice courts were very distinct from adult criminal courts during their early history. To start with, the proceedings in juvenile court were technically civil in nature, rather than criminal. This allowed for the use of informal procedures and broad discretion by the judge during adjudication; most importantly, the proceedings took place behind closed doors and were not open to the public. This meant that no record was kept, guaranteeing privacy for the youth. These special procedures helped to encourage rehabilitation through personalized justice. Without all the formalities of a criminal trial, a judge could truly evaluate a child based on the child’s own set of circumstances—including his background, age, history of delinquency, and other relevant considerations—without focusing on the offense the juvenile had committed. Standard procedural safeguards were presumed to be unnecessary because the juvenile court’s goal was to “help and protect children, not to punish them.”

A rehabilitation program is much more likely to be successful if it is tailored to a specific person based on his individual needs. Hypothetically, the lack of a need for trial, unbendable court rules, attorneys, and other formalities normally required for criminal court adjudication would allow the judge to get to the heart of the matter in analyzing a child’s situation and the context in which he committed the offense. This grant of total access would make it easier to determine whether a child was amenable to rehabilitation and to make a personalized recommendation accordingly. Although it would seem to run counter to the unbridled idealism of the founding years of the juvenile justice system, the possibility of transfer to the adult system has existed since the advent of the youth court. This option, while always available to a judge, was used very infrequently in the early days of the juvenile court and was reserved for the most serious offenders—typically older teenagers who had long prior records.

Although designed to fit into a system where children were handled as individuals, the informality of the juvenile system and

18. Klein, supra note 2, at 376-77.
19. Clement, supra note 9, at 19. Juvenile courts even developed a different vocabulary from criminal courts that reflected its rehabilitative goals. For example, “Police did not ‘arrest’ children; they ‘took them into custody.’ Judges did not have a ‘trial’ for the youth; they held an ‘adjudicatory hearing.’ The judges did not ‘sentence’ the youth; they gave a ‘disposition.”’ Id. at 19.
20. See Sabo, supra note 11, at 2430 (setting forth the original basis for evaluating a juvenile offender).
21. Id. at 2431.
22. Klein, supra note 2, at 377.
23. Id.
its lack of procedural safeguards began to raise some startling constitutional questions regarding due process, especially as the volume of cases in the juvenile court increased and judges devoted less time to each juvenile who came before them. In time, "because of the lack of procedural protections, children accused of crimes or even status offenses were often being arbitrarily and unfairly punished." The Supreme Court confronted these issues in a string of cases beginning in the mid-1960s. These decisions had a significant impact in transforming an institution focused on individual treatment and rehabilitation into a system which more closely resembled a miniature criminal court.

B. Constitutional Changes to the Juvenile Justice System

The landmark case in the transfer of juveniles to criminal court is Kent v. United States. Morris Kent was sixteen years old and already on probation when he was arrested on suspicion of breaking into a woman's house, robbing her, and raping her. The government sought a waiver of juvenile court jurisdiction so that Kent could be tried in criminal court. The juvenile court judge failed to respond to requests by Kent's lawyer for a hearing and for access to Kent's social file. The judge entered an order waiving juvenile court jurisdiction over Kent but did not offer any reason or justification for his decision; he wrote that the decision had been made after a "full investigation," despite the fact that he had made no findings. Upon review, the United States Supreme Court held that a child who is facing "the critically important" action of transfer is "entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." The decision by the Court emphasized the significance of waiver in the life of a child—in this case it could have meant the "difference between five years' confinement and a death sentence."

24. See generally Clement, supra note 9, at 18–20 (providing an overview of the history and treatment of offenders in the early years of the juvenile justice system).
26. Id.
28. Id. at 543.
29. Id. at 546.
30. Id.
31. Id. at 546–47.
32. Id. at 556–57.
33. Id. at 557.
The decision also emphasized that the accused must have the ability to retain effective counsel before the judge makes a meaningful inquiry, taking all the relevant factors into consideration. The Kent decision afforded juveniles basic due process rights in order to avoid the arbitrariness of waiver decisions like the one that Morris Kent received and that were seemingly becoming more common as the use of judicial waiver increased throughout the country. The Court commended the goals of the juvenile justice system but observed that it was worrisome to consider the child in a state of limbo between juvenile and criminal court, with the benefits and safeguards of neither.

In re Gault, decided the year after Kent, is the decision most associated with the transformation of the juvenile court into a system that looked more like a miniature criminal court. Fifteen-year-old Gerald Gault, already on probation for a prior offense, was arrested for making a lewd phone call. He subsequently went through a series of informal hearings in the juvenile court, was denied the assistance of counsel, and was committed to a juvenile facility until his twenty-first birthday. The Supreme Court reversed the sentence and held that juveniles were entitled to basic due process rights, including advance notice of charges, the right to counsel, the rights to confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review. Taken together, this bundle of procedural safeguards and due process rights make a juvenile adjudication closely resemble a criminal trial in a substantial number of ways. The majority opinion acknowledged that the idealistic objectives of the juvenile justice system had largely failed and concluded that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." The Court in Gault sought to achieve a balance of procedural safeguards and the benefits that go along with juvenile court adjudication. Instead, finding that the juvenile justice system was falling short of expectations, the Court decided that importing basic due process rights was necessary to maintain the integrity of the courts. If the juvenile justice system was underperforming, or even broken, it was better to leave juve-

34. Id.
35. Id. at 556.
37. Klein, supra note 2, at 379.
39. See id.
40. Id. at 18.
nile offenders with some basic due process rights to protect them.

The Court tried to walk the tightrope between the juvenile courts and the criminal courts in a string of decisions post-Gault. Deciding *In re Winship*, the Court held that the "beyond a reasonable doubt" standard was the standard of proof in a juvenile court case, replacing the previous standard of "preponderance of the evidence." The majority opinion gave no credence to the argument that the adoption of the criminal court standard of proof in juvenile court would "risk destruction of beneficial aspects of the juvenile process," but instead insisted that the higher standard of proof was required as an essential tenet of due process under Gault.

The juvenile court system took one step closer to the criminal court system in *Breed v. Jones*, where the Court held that the Double Jeopardy Clause prohibited the criminal prosecution of a juvenile offender after his case had been adjudicated previously in juvenile court. Importing yet another protection from criminal to juvenile court, the Court noted that even if "the [juvenile] system has fallen short of the high expectations of its sponsors[...], in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny." The Court thus acknowledged the continuing function of the juvenile courts as a valuable and unique entity from the criminal court and explicitly stated that not all the procedures and formalities of the criminal court needed to be imported for the juvenile court to be constitutionally viable. This line of thinking is reflected in a couple of exceptions to *Kent* and its progeny, as discussed below.

The Court has, on occasion, declined to mandate that certain requirements of criminal court be applied to juvenile court as well. These decisions demonstrate that the Court, although concerned with procedural safeguards, recognizes the inherent value of having a separate apparatus to deal with youth offenders. For example, a plurality in *McKeiver v. Pennsylvania* held that jury trials were not constitutionally required in the adjudicative stage of juvenile court proceedings. The opinion written by Justice Harlan once again acknowledges the many failings of the juve-

42. *Id.* at 366.
43. *Id.* at 367.
45. *Id.* at 529.
nile justice system, but again seems to hold out hope for improvements. A large part of his reasoning seems to be based on the fact that mandating jury trials would convert the juvenile court into a true adversarial criminal court for juvenile offenders; the Court's unwillingness to take this step demonstrates its belief that the system is not fundamentally flawed, but is plagued by inadequate judges and lack of resources.  

Later, in *Schall v. Martin*, the Court held that there was no right to bail in juvenile adjudications and that a judge may authorize pretrial detention under certain circumstances.

The influential string of decisions by the Supreme Court regarding the juvenile justice system displays a willingness to provide the most essential procedural safeguards to minors in juvenile court; at the same time, the Court makes it very clear that, although the system has failed to meet expectations, it should be preserved and protected and remain distinct from the criminal court. The importation of basic procedural safeguards made the juvenile justice system look more and more like a miniature criminal court. These new procedural requirements, combined with an increase in juvenile crime and legislative changes to waiver statutes, created an environment where "juvenile justice systems around the country began shifting their emphasis from rehabilitation to punishment and incapacitation." In other words, the focus on doing what was best for the child was practically abandoned, while a new philosophy of getting tough on juvenile offenders and protecting society was adopted. The alteration in focus from rehabilitation to criminalization in the juvenile justice system coincided with state legislatures around the country using their power to enact new transfer statutes that made it easier to waive juvenile court jurisdiction; this drastically increased the number of youth offenders being transferred to criminal court and further exacerbated the problems in the juvenile court system.

II. TYPES OF WAIVER

Even the most idealistic proponent of the juvenile courts must admit that not every juvenile offender is amenable to treatment and rehabilitation. Some children, based on a combination

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47. *See, e.g.*, *id.* at 544 ("Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure that the system envisaged.").
49. *Klein, supra* note 2, at 382.
50. *See Scott, supra* note 7, at 715–20 (providing an historical overview of the evolution of the juvenile justice system).
of several factors, including age, background, prior record, and the seriousness of the offense they have committed, simply do not fit within the parameters of the juvenile justice system.\textsuperscript{51} Waiver was created for such a situation. The term "waiver" refers to the juvenile court giving up its original jurisdiction over the child, and transferring the offender to the criminal system, where he will be tried and punished as an adult.

The "get tough" movement in criminal justice was spurred by a surge of youth violence in the 1980s and early 1990s.\textsuperscript{52} Most commentators agree that the extensive media coverage of youth violence in urban areas bordered on sensationalism during this time, "fuel[ing] perceptions that violence committed by juveniles ha[d] reached epidemic proportions and that no community is immune to random violent acts committed by young people—especially those involving a weapon."\textsuperscript{53} Such extensive media coverage has caused fear among the public and has led to demands for tougher punishment for violent juvenile offenders. State legislatures have responded to the public demands to get tough on juvenile crime and try more youth offenders as adults. Proponents of this punitive philosophy assume that "juveniles tried as adults will receive longer sentences in adult facilities, which, in turn, will act as a greater deterrent and will provide safety to the community."\textsuperscript{54} This focus on trying juveniles as adults has led to an increase in the ease of—and the options for—transferring kids to criminal court and has undermined the purpose of the juvenile justice system in the process.

The drastic increase in the use of transfer and the ease with which it is accomplished are a reflection of the changing goals of the juvenile justice system. Within the notion of waiver itself, the growing trend of using legislative waiver and prosecutorial waiver rather than traditional judicial waiver further signals a significant break with the past. This section, which presents and analyzes the three forms of waiver, ultimately concludes that both legislative

\textsuperscript{51} See generally Zimring, supra note 1 (arguing in favor of discretionary waiver as a method of handling the most difficult cases that threaten the mission and credibility of the juvenile court).


\textsuperscript{53} Id. at 47 (quoting Patricia Torbet et al., Nat'L Ctr. for Juvenile Justice, State Responses to Serious and Violent Juvenile Crime 1 (1996)); see also Kelly M. Angell, The Regressive Movement, 14 S. Cal. Interdisc. L.J. 125, 135 (2004–2005) (citing the extensive media coverage of the Columbine High School shooting as an example of media sensationalism generating widespread fear even though school shootings are very rare).

\textsuperscript{54} Klein, supra note 2, at 373–74.
and prosecutorial waiver strike against the essence of a coherent juvenile justice policy and should be abandoned as failed experiments, with an increased focus placed on reforming judicial waiver.

A. Judicial Waiver

Judicial waiver is the only one of the three types of waiver that naturally comports with the goal of the juvenile justice system (namely, individualized treatment with a rehabilitative aim). Judicial discretion is the most common form of waiver, and all but four states use it, either as a sole means of transfer or in conjunction with the other methods.\textsuperscript{55} As in regular juvenile court adjudications, the judge is the key decision-maker in the waiver process. The basic framework of the hearing must comply with the standards espoused in \textit{Kent}; the judge must allow the juvenile to be effectively represented by counsel;\textsuperscript{56} the judge must allow the juvenile's counsel access to his social record;\textsuperscript{57} and the judge must provide a statement of reasons for his decision if he waives his jurisdiction over the youth.\textsuperscript{58} Although judges have broad discretion in applying judicial waiver, they are constrained by certain factors that, varying from state to state, must be taken into account when evaluating the youth. Most states incorporated the list of factors suggested in \textit{Kent} into their judicial waiver statutes. These factors can roughly be broken down into two categories: danger to the public and amenability to treatment.\textsuperscript{59} The judge is then able to weigh the interests of the child against the interests of society and determine a fair outcome.\textsuperscript{60} Typically, if the child is in his late-teens, has committed a violent offense, has a serious prior record, and has not been responsive to prior treatment attempts, he will be waived to the criminal court. If, however, the offender is in his early-to-mid-teens, he has little to no record, and the crime is a relatively minor offense, the offender will be adjudicated in juvenile court and an attempt will be made to rehabilitate him. The framework of the waiver hearing allows juveniles to be protected by essential procedural safeguards but also allows the judge flexibility in using his discretion to determine the best result for the child.

\textsuperscript{55} \textit{Id.} at 385. The four states that do not use judicial waiver are Connecticut, Nebraska, New Mexico, and New York. \textit{Id.}


\textsuperscript{57} \textit{Id.} at 557.

\textsuperscript{58} \textit{Id.}


\textsuperscript{60} Sabo, supra note 11, at 2453.
The biggest advantage to judicial discretion is that it allows a juvenile offender to receive "an individualized determination as to which forum he should be subjected," and gives him "his day in court before the jurisdiction of the juvenile court can be terminated." If applied correctly, the procedural safeguards mandated by *Kent*, combined with the traditional flexibility of the judge's discretion, allows the judge to work within the premise of the juvenile justice system. The judge gets to see the youth offender, speak to him, and ask him questions; the judge then evaluates the offender based *only* on his set of circumstances, not on others with similar backgrounds or records. This is something that is lacking in the other types of waiver. Individual determinations, assuming they are done with care, ensure that only those children who cannot be helped by the juvenile justice system will be transferred to adult court. Aside from the ability to work towards the goal of rehabilitating juveniles, the system also provides checks on abuse of discretion by judges. Whereas the other methods for transfer have no meaningful checks, the judicial waiver method has several: a judge is mandated to act within a prescribed system of evaluation at the hearing; the decision of the judge is subject to appeal; and his statement of reasons produced during the hearing guarantees that a juvenile knows why he is being transferred.

Critics of judicial discretionary waiver argue that it is too lenient on violent offenders and that the decisions are arbitrary and inconsistent. Given the fact that advocates of increased transfer argue that the juvenile court is too lenient in its sentencing, it follows only naturally that they would also argue that this leniency on crime affects the judgment of juvenile court judges in regards to waiver, so that only the most extreme cases are transferred. Defenders of judicial discretion argue that judges are most adept at "selecting serious, violent, and chronic offenders for transfer." As Zimring notes, "[a] well-functioning juvenile justice system will transfer only a tiny number of very serious offenders into the criminal courts."

The other main criticism of judicial discretion is that results are arbitrary and inconsistent. Arbitrariness is somewhat minimized because of the presence of procedural safeguards in

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61. Scott, supra note 7, at 730.
62. Id. at 728.
63. See Klein, supra note 2, at 388–89 (comparing judicial waiver to other, less individualized transfer devices).
64. See Scott, supra note 7, at 731.
65. Howell, supra note 5, at 110.
66. Zimring, supra note 1, at 280.
waiver hearings, but concerns will remain as long as there are justices who are not properly trained or of the proper temperament for the juvenile court. Inconsistent results cannot be considered a disadvantage of judicial waiver because they are "a product of individualized determinations based on the best interests of each juvenile." If anything, inconsistent results can serve as anecdotal evidence that the system is working and judges are making individualized determinations as they should be required to do. Judicial waiver is not perfect, but because of its flexibility and procedural safeguards for the juvenile, it is the best option for the necessary evil of waiver.

B. Legislative Waiver

If judicial waiver is the method which most closely conforms to the traditional philosophy of the juvenile justice system, legislative waiver is the method which most directly offends that philosophy. Statutory waiver begins and ends with the power of the legislature to determine who is a juvenile for legal purposes. The framework of these types of statutes automatically excludes some juveniles from the original jurisdiction of the juvenile courts based on the satisfaction of certain criteria. For example, depending on a state's criteria, a fifteen-year-old who commits aggravated assault may automatically be transferred to the criminal court with no waiver hearing of any kind. The standard criteria included in automatic waiver statutes include the seriousness of the offense (generally murder, kidnapping, rape, or aggravated assault), age (one is more likely to be transferred automatically if over the age of fifteen), and prior record of delinquency (longer and more serious records tend to show that the juvenile is not amenable to rehabilitation). The past two decades have seen a major increase in the number of automatic waivers, largely a result of legislatures continually lowering the minimum ages for transfer while expanding the number of offenses which mandate automatic waiver for juvenile offenders.

Automatic waiver is antithetical to the presumptions upon which the juvenile justice system operates. It treats young offend-

67. See infra text accompanying notes 132–34.
68. Scott, supra note 7, at 732.
70. See Clement, supra note 9, at 142 (noting that, in Virginia, a youth must be fourteen years of age or older to be transferred to the adult criminal court, and mentioning a concern for the child's responses to past treatment efforts).
ers as "types" instead of individuals. There is no waiver hearing, so even if a juvenile is amenable to rehabilitation, or just made a single bad choice, he will never have the opportunity to contest his transfer before he is put into the adult criminal system. Automatic waiver takes away virtually all chance for rehabilitation and has purely punitive goals. One commentator has referred to automatic waiver as "justice on autopilot" for the way it arbitrarily removes the possibility for juvenile court adjudication from juvenile offenders, regardless of circumstances.\textsuperscript{72} It takes away the significant and valuable benefits of juvenile court adjudication in one fell swoop, in a legislative decision that was made years or decades before the offense was committed.

The lack of individualized determinations and the emphasis on the offense rather than the child have resulted in legislative waiver statutes that are over-inclusive, dragging people who ordinarily would belong in juvenile court into the harsh world of criminal justice.\textsuperscript{73} It is true that the kids who are intended to be transferred as a result of this mechanism will more than likely fall within the parameters of the statute. But what about the kids who have no prior record, who happened to be at the wrong place at the wrong time, or who did some things that were uncharacteristic of their normal behaviors? These are the juveniles for whom the juvenile justice system was intended; but instead of being rehabilitated, they will be labeled a criminal and will carry that stigma for the rest of their lives.\textsuperscript{74} Under an automatic waiver statute, it becomes impossible to differentiate between young career criminals and those who have made bad decisions or are going through a rebellious phase. Not only does it seem counterintuitive when dealing with youths to be overbroad and group everyone together regardless of individual circumstances, but it also offends the notion of fairness that the Supreme Court emphasized as necessary in \textit{Kent}.\textsuperscript{75}

Supporters of the "get tough" philosophy argue that legislative waiver is quicker, more predictable, and more consistent than judicial waiver.\textsuperscript{76} There is no doubt that this method is

\begin{itemize}
  \item \textsuperscript{72} Sabo, \textit{supra} note 11, at 2451.
  \item \textsuperscript{73} See Klein, \textit{supra} note 2, at 373 (discussing the "quick-fix solution of trying children as adults" and the flaws which are inherent).
  \item \textsuperscript{74} Rose, \textit{supra} note 71, at 979.
  \item \textsuperscript{75} See Ellen Marrus \& Irene Merker Rosenberg, \textit{After Roper v. Simmons: Keeping Kids Out of Adult Court}, 42 \textit{SAN DIEGO L. REV.} 1151, 1181–83 (2005) (noting both the possibility of future serious harm to the community when a child gets a lower sentence in a juvenile court and the risk of destruction to a child who might benefit society and live a productive life, and concluding that we should err on the side of treating a child as a child).
  \item \textsuperscript{76} Scott, \textit{supra} note 7, at 735.
\end{itemize}
quicker and more consistent, but certainly it is not worth the costs in terms of what is given up in exchange. It is quicker because it bypasses any individual determination of the youth's amenability to treatment, and based on a number of factors, processes him straight into the adult criminal system. How many futures are ruined because, even though a youth might be willing, he is simply unable to get the rehabilitation he wants? Legislative waiver cannot be challenged absent a constitutional violation. Courts have generally upheld legislative waiver provisions, although some commentators have questioned the judgment of the courts.

In addition to the negative policy implications and questionable constitutionality, automatic waiver has been an outright failure in terms of deterrence and recidivism rates. Studies show that waiver has no value as a deterrent, and the recidivism rates are higher for offenders who have been transferred and tried in criminal court. Retribution is the only goal served, and it is achieved at the expense of possible rehabilitation and treatment available in the juvenile justice system. Although these failures are applicable to all waivers, it is especially troubling under a method where waiver is automatic and the juvenile has no chance to seek adjudication in the juvenile court. The question then arises: why keep automatic waiver if it is antithetical to the best interests of juveniles and has failed in all of its stated goals except when viewed from a purely punitive standard? It ultimately makes society no safer and may even cause harm to society when transferred offenders are inevitably released. One commentator has a simple answer for the persistence of legislative waiver provisions: "[S]tate legislatures will remain either ignorant or unconcerned with the irrationality and ineffectiveness of such provisions as long as the popularity of such legisla-

77. That is, there is no option for meaningful appeal, as there is with judicial waiver.

78. See Marisa Slaten, Note, Juvenile Transfers to Criminal Court, 55 Rutgers L. Rev. 821, 844-46 (2003) (discussing federal and state court challenges to statutory waiver where the waiver has been upheld, including United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), and Kansas v. Sherk, 538 P.2d 1399 (Kan. 1975)).

79. See, e.g., Rose, supra note 71, at 991-95 (arguing that, absent an amenability hearing, automatic waiver statutes violate due process and equal protection because the classification based on age does not have a rational relationship with the underlying purpose of the statute).

80. See id. at 979 (comparing recidivism rates for juvenile offenders who have been transferred to criminal court with those who remained in the juvenile court system).

81. See id.
Whatever minimal benefits that are gained through consistency and expediency in automatic waiver cannot outweigh the harm done to thousands of nonviolent youth offenders who are excluded from juvenile court jurisdiction with no hearing because of the over-inclusive nature of such statutes.

C. Prosecutorial Waiver

The prosecutor has a substantial role in the waiver process no matter what method of transfer is used. Many jurisdictions require the prosecutor to recommend a waiver, file the motion, and make the case for the State at a waiver hearing for judicial discretion.\(^8\) For jurisdictions with automatic waiver, the prosecutor determines what charges to file, which can either place the juvenile inside or outside of the confines of the statute. For example, if a child has committed a certain crime that would automatically exclude him from the juvenile court, the prosecutor can use his discretion to charge him with a lesser violation if he feels that exclusion is unwarranted.\(^8\) In the third type of waiver, the entire decision belongs solely to the prosecutor. In jurisdictions with prosecutorial waiver (also known as "direct file"), the youth offender is subject to the concurrent jurisdiction of the adult criminal court and the juvenile court; it is up to the prosecutor to use his discretion to decide which court to file the charges in.\(^8\)

Commentators seem to be most troubled by this form of waiver because it is "'fraught with the dangers of arbitrariness."\(^8\) The prosecutor can be said to make the waiver decision "outside of the adversarial process, in the privacy of her office, restricted only by the most basic principles of professional ethics and the requirement of probable cause."\(^8\) Most states also have certain age and offense guidelines that prosecutors must abide by, which are meant to limit completely arbitrary decisions.\(^8\) Because the decision is protected by the traditional notion of

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82. Id.
83. Klein, supra note 2, at 397.
84. See generally id. (discussing the prosecutor's "substantial discretionary role" with any transfer method).
85. Scott, supra note 7, at 737.
86. Klein, supra note 2, at 395 (quoting Wallace J. Mlyniec, Juvenile Delinquent or Adult Convict—The Prosecutor's Choice, 14 Am. Crim. L. Rev. 29, 37 (1977)).
87. Sabo, supra note 11, at 2426–27.
88. See Klein, supra note 2, at 394 (discussing prosecutorial waiver as a transfer method).
prosecutorial discretion, it is not reviewable. The fact that the prosecutorial discretion insulates the prosecutor's decision by not requiring a hearing to be held, a statement of reasons to be given, or his decision to be appealable makes this method of waiver highly suspect.

The policy behind prosecutorial waiver is that it is procedurally quick and convenient, but it arguably combines the worst features of judicial and automatic waiver. The method is subject to arbitrariness and unpredictability, as is transfer by judicial discretion. In addition, it provides no due process protection and gives a juvenile no meaningful chance to protest his transfer by showing he is amenable to rehabilitation, and it is tantamount to a "blatant attempt to evade the force of the Kent decision." Like legislative waiver, a prosecutor need not consider the best interests of the child in exercising his discretion. Proponents argue that it is quicker because it bypasses a transfer hearing and all the individual determinations made by a juvenile court judge in favor of a single opinion by the prosecutor. Some also are critical of the prosecutor's ability, acting on his own, to make the determination based arguably on anything he wants to, even if there is guidance in the state juvenile statutes. This method has made gains in popularity because it satisfies the desires of the "get tough" movement—it sends more kids to jail. It does so, however, at a steep price, both for the youths and for society.

In addition to the above-mentioned problems, prosecutorial waiver is subject to several unique criticisms. First, some critics argue that the waiver decision should not be included under the power of prosecutorial discretion because that power covers only choosing which charges to file, rather than selecting the forum in which to file the charges. The second problem is that the prosecutor has a troubling conflict of interest because he represents the interests of the state, and justice cannot be served when the prosecutor is serving the best interests of the state and the best interests of the child at the same time. Unlike a neutral judge, who tries to find a balance between public safety and the best interests of the child, the prosecutor is a party to the action.

89. Prescott, supra note 8, at 1009.
91. Sabo, supra note 11, at 2441.
92. Id. at 2449-50 (arguing that there are two determinations in prosecutorial waiver—which charge to file and which court to file it in—and that only the first of these determinations is subject to the deference of prosecutorial waiver as traditionally conceived).
93. Id. at 2451.
It seems counter-intuitive that an advocate for one side can be an advocate for the other side as well, so it is logical to conclude that the prosecutor probably does not have the best interests of the child in mind. The decision becomes more muddled when considering how much a prosecutor is influenced by public pressure, especially if he is in an elected office. It is fair to say that most commentators view prosecutorial waiver as the most dangerous form of waiver because it is not designed to serve the best interests of the child and is subject to extreme arbitrariness, secrecy, and deference.\footnote{94. See generally Klein, supra note 2, at 394–97; Sabo, supra note 11, at 2439–51; Slaten, supra note 78, at 836–52. But see Scott, supra note 7, at 738 (arguing that prosecutorial waiver is superior to legislative waiver because it involves some individual discretion, as does judicial waiver).}

III. Judicial Discretion as the Superior Waiver Method: Serving Both the Public Interest and the Best Interest of the Child

Transfer for juveniles is warranted in two circumstances: first, when the juvenile cannot be helped through the rehabilitative efforts of the juvenile justice system; second, when the juvenile’s offense was so heinous that the maximum punishment that the juvenile court can impose falls far short of what is necessary. Judicial waiver is the only transfer method that is able to fully and fairly take into consideration the interests of society and the juvenile offender before taking this serious step. Transfer has serious negative effects on society and the individual and should be used only in the hardest cases. Automatic and prosecutorial transfers are “quick-fixes” designed to appease a panicked public; they send too many young people who are good candidates for rehabilitation into the criminal justice system. Thus, the use of judicial discretion must be the sole method of waiver. This section seeks to explore the negative effects of transfer on the individual juvenile and society at large, in an attempt to show why it is so crucial to only waive juvenile offenders who are truly lost causes.

A. Effects of Transfer on the Juvenile

In all cases except those involving older, repeat, violent juvenile offenders, transfer fails to serve the goals of deterrence and selective incapacitation. One of the main purposes of waiver is to allow criminal courts to punish violent youths who cannot be dealt with in juvenile courts because their crimes call for a sentence which is more serious than the juvenile court has the power to impose. Research indicates that violent juveniles are
treated more leniently in criminal court than they would have been in juvenile court.95 This is likely because judges who are used to seeing the records of hardened adult criminals will view juveniles as less harmful compared to the adults they usually see. In addition, some judges may be reluctant to send juveniles to adult prisons because they are afraid of what will probably happen to them there.96

Perhaps the most disturbing result of transfer is that juveniles may be locked up in adult prison facilities. Studies on juveniles in the adult prison population are so appalling that they shock the conscience. These studies have shown that children locked up in adult prisons are eight times more likely to commit suicide (most within the first twenty-four hours of incarceration), five times more likely to be sexually assaulted, and twice as likely to be assaulted by prison staff than youth offenders housed in juvenile facilities.97 Even if a youth has committed a terrible crime, incarceration under these circumstances amounts to nothing less than cruel and unusual punishment. What about the kids who were transferred for non-violent property or drug offenses because of overbroad automatic and prosecutorial waiver statutes with no chance at appeal? Surely it is not fair to stick them in adult prisons.

Not only do juveniles suffer victimization in adult jails after they have been transferred and convicted in adult court, but they also lose access to all of the services and treatment available in the juvenile justice system.98 In juvenile facilities, the entire focus is on rehabilitation and treatment, and this typically includes counseling, academic services, and job training, among many other programs. In adult prisons, studies have shown that staff are “consistently less helpful and more punitive,”99 as one might expect from a staff which is conditioned to respond to adult criminals in a purely punitive environment.

Another significant result of transfer is that juvenile offenders are stigmatized as criminals. Unlike juvenile court adjudica-

95. See Klein, supra note 2, at 402 (reviewing the consequences of transfer and contending that it is usually a “losing proposition”).
96. Id.
99. E.g., id. (reporting that adult prison staff provided inadequate assistance to youths in “helping them to control their violent behavior, . . . achieve personal goals, and prepare them with job skills for their return to the community,” as well as encouraging program participation, providing counseling, and securing other necessary services).
tion, where records are kept private with the goal of treating a young offender and then releasing him with a clean slate to start his life as an adult, juveniles transferred to criminal court will have the burden of carrying that stigma with them for the rest of their lives. In addition to hurting their future career and social prospects, the attachment of this stigma at a young age can affect a juvenile's psyche; if he is labeled a criminal when he is fifteen, he will believe he is one and will act accordingly. In sum, the effects of injecting young people into the criminal justice system seem to foreclose any chance that the juvenile might have of turning his life around and becoming a responsible and law-abiding adult in the future.

B. Effects of Transfer on Society

The negative effects of "quick-fix" solutions, like over-inclusive waiver statutes, eventually trickle down to harm society. Juveniles who have been transferred into the criminal system have higher rates of recidivism, are rearrested more quickly, and commit more serious crimes once they are released than do those adjudicated in the juvenile courts. The system's failure for juveniles translates to a failure for society when non-rehabilitated former juvenile offenders are eventually released from prison and re-offend. Society cannot both lock up thousands of youths with adult criminals and not expect crime rates to increase as waves of these now-adult, non-rehabilitated offenders get back on the street. Studies show that they will resume their criminal behavior, and this time the stakes will be higher because it is an adult committing the crime. One commentator has summed up the result of these reactionary waiver schemes as buying justice on credit: "Removal of the juvenile from society without rehabilitation only postpones the debt, with exorbitant interest due when the non-rehabilitated juvenile inevitably returns to society and recidivates."

It might be harder in the short run and politically unpopular, but the best way to promote public safety is to focus on rehabilitation and prevention at a young age instead of locking troubled youths up and forgetting about them until they are out on the streets again as adults with an incomplete education, no job skills, no behavioral counseling, and the stigma of being a

100. *See* Angell, *supra* note 53, at 142.
101. *Id.*
102. *Id.* at 140.
103. *See, e.g.,* *id.* at 140–41.
104. Pollitt, *supra* note 97, at 286.
criminal. The effects of transfer are so unattractive and unpromising that it seems obvious that the option must be used only for juveniles who cannot be dealt with in the juvenile justice system. Moreover, judicial waiver is the method that is least likely to result in the waiver of juvenile offenders who could be helped by the rehabilitative aims of the juvenile system. The most serious offenders to whom the strict waiver laws are meant to apply will most likely be waived by the juvenile court anyway. There is no reason for states to continue to use automatic and prosecutorial waiver when their policy aims have failed and when there exist better and fairer ways to transfer the most serious offenders without sweeping in juvenile delinquents who are amenable to rehabilitation.

IV. Legal and Developmental Differences in Children: The Need for a Separate Court System with Distinct Approaches to Treatment and Culpability

Children are capable of committing the same crimes as adults, and often do. For the “get tough” crowd, this means that children who commit the same offenses as adults should face the same punishment as adults. This position ignores one indisputable fact: children are developmentally and cognitively different than adults. Children do not have fully-developed senses of morality, decision-making skills, or resistance to a number of outside sources. These factors are reflected in the American legal system, where children are presumptively treated as less culpable than adults who commit the same crimes.

A. Developmental and Cognitive Differences in Children

Children are fundamentally distinct from adults in critical ways that make them objectively different from adults in terms of culpability. According to one commentator, the increase in waiver laws reflects the idea that lawmakers have largely ignored adolescence—the period between childhood, when there is a presumption of no culpability, and adulthood, where there is full culpability. There is no space in the continuum for young people who are almost adults but who have not developed proper decision-making abilities yet.

105. See Rose, supra note 71, at 988.
107. Id.
Law professor C. Antoinette Clarke has succinctly outlined a series of developmental factors that inherently limit how much blame can be placed on a child for his criminal actions. First, adolescents lack the reasoning, rationality, and maturity of judgment of the average adult. Second, the quest for personal identity often leads juveniles to participate in varying degrees of risky behavior, such as alcohol or drug use, sexual experimentation, or delinquent behavior, reflecting the rebellion that is normal when shifting focus from parents to peer groups. Third, children are more likely to give in to peer pressure than adults are, meaning that they are far more likely to engage in risky behavior if they associate with friends who conduct themselves in that manner. Fourth, younger people tend to be less future-orientated and weigh the short-term consequences of their conduct more than the long-term consequences. Fifth, adolescents take more health and safety risks than adults do. And sixth, teenagers tend to be more impulsive in their actions than adults, meaning that they do not think about their conduct beforehand. Because the juvenile brain has not reached its full stage of development, many of these behavioral factors will abate as the child grows older and gains more experience and maturity. Therefore, since juveniles’ brains and behavioral patterns are not fully developed, it is unfair to hold them to the same standard as fully mature adults. The problem only becomes exacerbated when children are locked up for an inordinate amount of time because of risky behavior that is likely only temporary.

Juvenile offenders are held to a higher behavioral standard than their adult criminal counterparts if they are subject to adult punishments without all of the constitutional protections and freedoms that adults have. In addition, the juvenile offender is “held to a standard of maturity and responsibility higher than that applied to her noncriminal youth counterparts” because her punishment is more severe. Juvenile offenders truly get the worst of both worlds in waiver, as they are denied the benefit of the doubt to which their age entitles them while receiving none of the “benefits and freedoms of adulthood” that adult offenders are entitled to. Because of the inherent difference in the abil-

108. Id. at 694–704.
109. Id. at 710.
110. Forst & Blomquist, supra note 98, at 374.
111. See id. at 373 (“[Y]outhful offenders are being asked to bear the liabilities of the two worlds between which they stand—childhood with its attendant dependencies and immature judgment but without its protections and nurturance—and adulthood with its attendant obligations and responsibilities, but without its freedoms and independence.”).
ity to make good decisions, as well as all the other factors discussed above, it is simply not fair to hold a juvenile to the same standard when he has less capacity to see the long-term consequences of his actions, is more likely to give in to peer pressure, and has not yet fully developed his decision-making abilities. With stricter measures and little chance for rehabilitation, the criminal youth class in America will only increase. Instead, an effort must be made to allow and help at-risk juvenile offenders mature out of their destructive habits.

Another factor that affects juvenile risky behavior is the social context of which they are a part. As Clarke notes about gang-infested neighborhoods:

[T]he assignment of status to young males based on toughness and fighting skills is an enduring theme of gang life. Social identity and respect are the most important features of the street code. Within this context, there are clear-cut rules for using violence to gain respect. The public nature of a person's image or status identity often requires open displays of "nerve," including attacks on others, getting revenge for previous situations with an opponent, and the protection of members of the group.

The social context of a juvenile's conduct is closely related to the influence that his peers exert over him. While it is obvious that grouping juveniles into one large group for purposes of cognitive development is misleading (because everyone develops morality and maturity at different paces), studies have shown that kids in less educated and poorer communities, where violence and gangs are more likely to be a problem, develop these characteristics at a slower pace. This creates a disturbing situation when coupled with the fact that transfer provisions disproportionately impact minority juveniles, especially black males. If juveniles in high-risk neighborhoods develop morality and good decision-making skills slower than the average youth due to their unfavor-

112. See Angell, supra note 53, at 139-43.
113. Clarke, supra note 106, at 704-06.
114. See Klein, supra note 2, at 407-08 (discussing Lawrence Kohlberg's theory of moral development). In his study, Kohlberg divided a person's moral development into three levels and six stages. He found that most juveniles and the majority of adults operate at his stage four, "law and order" level, where "support for the existing social order is a primary value." Id. Significantly, Kohlberg's study revealed that juveniles from low-income and low-education communities often develop moral judgment at a slower pace, sometimes operating at his stage three, "peer approval seeking" level, or even his stage two, "If I'm not getting nothing, I'm not giving nothing" mindset. Id.
able social environments, and if these youths are being denied opportunities at rehabilitation through disproportionate subject-
tion to waiver, a cycle of incarceration is created from which these neighborhoods are unable to recover. Essentially, the con-
temporary trend towards waiver and harsher punishment in the justice system sacrifices long-term goals and progress with short-
sighted “get tough” schemes designed to satisfy a frightened pub-
lic and increase approval ratings for legislators.

Statistics indicate that most adult crimes are committed for financial reasons, whereas most juvenile crimes are committed as a result of emotional damage, peer pressure, or poor decision making due to youthful impulsiveness. The divergence in motivation for criminal acts between adults and adolescents further backs up the need for corresponding different treatment. The deficiencies that motivate juvenile crime are usually things that are temporary and treatable. The intervention should be seen as a chance to rehabilitate troubled youths so that they are less likely to re-offend in the future, rather than to lock them up and subject them to the horrors of adult prisons, where their chances of a successful post-incarceration life decrease exponentially.

B. Judicial Acknowledgements of the Legal Differences Between Adults and Juveniles

Although the state legislatures seem to ignore the differences between juvenile and adult offenders in an effort to “get tough” on crime, the judicial branch has long recognized that children and adults are to be viewed separately before the law. Thompson v. Oklahoma, a 1988 United States Supreme Court case, involved a juvenile who had participated in a murder at age fifteen and had been sentenced to death in an Oklahoma trial court. Writing for the plurality, Justice Stevens asserted that “[t]he road we have traveled during the past four decades... leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community,” and vacated the capital sentence. In deciding that the death penalty for those under age sixteen at the time of the crime was a violation of the Eighth and Fourteenth Amendments, the Court looked at the prevailing opinions of professional organizations like the Ameri-

115. Id. at 407.
116. See Rose, supra note 71, at 986.
118. Id. at 832.
can Bar Association, at international law, and at the fact that juries rarely recommended the death penalty for offenders under the age of sixteen where it was legal to do so.\textsuperscript{119} The plurality reiterated that they had “already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult” and that “the basis for this conclusion is too obvious to require extended explanation.”\textsuperscript{120} It speaks volumes that the Supreme Court considered the issue too obvious to even bother addressing it in detail when deciding one of the first cases that began to scale back the scope of the death penalty after the moratorium on the death penalty was ended.\textsuperscript{121}

Although the Court had determined that capital punishment was cruel and unusual for juvenile offenders less than sixteen years of age, it upheld the death penalty for juveniles who were above the age of sixteen in \textit{Stanford v. Kentucky}.\textsuperscript{122} However, in 2002 the Court held in \textit{Atkins v. Virginia} that the imposition of the death penalty on mentally handicapped individuals was cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{123} This decision seemingly opened the door for the Court to reexamine its position in \textit{Stanford}, which it did three years later in \textit{Roper v. Simmons}.\textsuperscript{124} Writing for the majority, Justice Kennedy echoed the considerations from \textit{Thompson}: “Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”\textsuperscript{125} The majority cited three reasons for this lessened culpability of juveniles: their “lack of maturity and underdeveloped sense of responsibility,” the fact that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and the fact that “the character of a juvenile is not as well formed as that of an adult.”\textsuperscript{126} Admitting that juveniles are indeed capable of

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  \item \textsuperscript{119} \textit{Id.} at 830–32.
  \item \textsuperscript{120} \textit{Id.} at 835.
  \item \textsuperscript{121} The Supreme Court’s decision in \textit{Furman v. Georgia}, 408 U.S. 238, 239–40 (1972) (per curium), created a de facto moratorium on the use of capital punishment in the United States. In \textit{Gregg v. Georgia}, 428 U.S. 153, 206–07 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), the Court held that the death penalty is not an automatic violation of the Eighth and Fourteenth Amendments as long as certain procedural safeguards are met, effectively ending the moratorium on the imposition of the death penalty.
  \item \textsuperscript{123} \textit{Atkins v. Virginia}, 536 U.S. 304, 321 (2002).
  \item \textsuperscript{124} \textit{Roper v. Simmons}, 543 U.S. 551, 556 (2005).
  \item \textsuperscript{125} \textit{Id.} at 571.
  \item \textsuperscript{126} \textit{Id.} at 569–70.
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committing crimes that are heinous and wanton, the majority nevertheless insisted that "the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."\textsuperscript{127}

The categorical bar on capital punishment for offenders under the age of eighteen represents a big step towards changing how people view the system. The Court's ruling reinforced that, aside from societal standards, it is cruel and unusual punishment to execute children because they are not given the chance to be rehabilitated and to mature out of their reckless behavior.\textsuperscript{128} To be sure, some juveniles who commit crimes that would merit consideration of the death penalty as adults are not amenable to any sort of treatment and will be a danger to society for the rest of their lives. But the majority of risky behavior in youths is caused or exacerbated by the immaturity of children, which fades away with age.\textsuperscript{129} Even in the face of a terrible crime, it does not seem humane to force a juvenile to forfeit the rest of his life for what could possibly be a youthful mistake. The serious juvenile offenders who were spared by this decision are the ones at whom waiver should be targeted; if the circumstances dictate removal to criminal court, then a violent offender should be sentenced as an adult. But the ban on the death penalty at least gives him a chance to turn his life around. Even juvenile offenders who commit serious violent crimes that previously would have made them eligible for the death penalty deserve to be treated differently than adult offenders. Harsher sentences may be in order, but it is still vital to give them a chance to redeem themselves by giving them access to rehabilitation, counseling, and educational resources while in adult prison.

The decision in \textit{Roper} acknowledges that the proper thing to do is to err on the side of juvenile offenders, and to reject an overbroad "get tough" regimen. This rationale is equally applicable to other severe forms of punishment for juveniles, such as a life sentence without the possibility of parole. Although it does not deprive the offender of life in the literal sense, it forecloses any chance of making a positive impact on society following successful rehabilitation. As Ellen Marrus and Irene Merker Rosenberg argue, "[i]f the child's brain is still growing until either twenty or twenty-five, . . . subjecting a child to adult punishment,

\textsuperscript{127} Id. at 572–73.
\textsuperscript{128} Id. at 569–70.
\textsuperscript{129} Id. at 570.
especially life without the possibility of parole, is irrational."\textsuperscript{130} The same logic can be implied from \textit{Roper}: because children are less culpable than adults, and less able to make good decisions, it is much harder to predict what kind of person they will be in five or ten years, whereas one can predict with reasonable certainty the future of a person who has been repeatedly arrested as an adult. Without giving juvenile offenders a way out, there is no incentive for them to grow up, mature, and change their ways. 

\textit{Roper v. Simmons} was a significant step forward, but the Court must go further in restricting life without the possibility of parole for juveniles, or else it risks "the virtual destruction of young people who might benefit society and live productive lives."\textsuperscript{131} Knowing that children are inherently less culpable than adults, it is a mistake to take away any chance for them to reform while they are still young enough to have a reasonable chance of success later in life.

V. \textbf{How to Improve Judicial Waiver}

The waiver of juvenile court jurisdiction to allow some youths to be tried as adults is a necessary evil in our legal system. Clearly, the conduct of some youths calls for punishment in the criminal system. In order to function best for society and for juvenile offenders, waiver must be used only on the worst youth offenders, and the rest must be treated by an effective and efficient juvenile system. As discussed above, judicial waiver is the only one of the three popular methods of waiver which offers some semblance of what the juvenile justice system should be—a system to help youths mature and grow out of their delinquency phase through treatment, not punishment. There are several ways to improve judicial waiver to ensure that only the lost causes are sent into the adult criminal system, and only in the harshest of circumstances.

The most essential thing to allow for fair and effective discretionary waiver is to have judges who specialize in juvenile law cases. A juvenile court judge should be "extensively trained and educated on juvenile delinquency and the standards for determining when to waive juvenile court jurisdiction."\textsuperscript{132} In addition, one scholar suggests that state legislatures need to conduct research through the state juvenile justice system to determine more objective standards that juvenile court judges could use as

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\item Marrus & Rosenberg, \textit{supra} note 75, at 1180.
\item \textit{Id.} at 1182.
\item Scott, \textit{supra} note 7, at 746.
\end{enumerate}
\end{footnotesize}
guidelines in evaluating youth offenders. With objective standards to guide the expert judges and their subjective opinions, the system should run smoother and be both more consistent and predictable, satisfying "get tough" proponents. While the expertise of the judge would help him in evaluating individual youths, the objective standards suggested by the legislatures in their judicial waiver statutes will help to assure that results are not totally inconsistent or discriminatory.

In terms of training, judges must have knowledge regarding the "operative psycho-social, contextual, and biological influences on a 'person-in-progress'"; only with this sort of expertise will judges have the "necessary tools to properly evaluate a juvenile's past or future choices." If the system is to function for the benefit of children, the judges must be involved in and have experience with juvenile law cases. Without automatic waivers, each child will get an individual determination that will hopefully result in the receipt of treatment or rehabilitation that is likely to help him mature and become a productive member of society. If the juvenile justice system is going to be effective in transferring only the most hopelessly lost youth offenders to the adult system while finding suitable rehabilitation options for the rest, it is essential to have well-trained judges who will look beyond the youth's offense to determine how to get him back on track.

One way to satisfy "get tough" advocates in the absence of automatic waiver statutes is through the use of presumptive waiver. For certain types of offenders who commit certain crimes, presumptive waiver statutes shift the burden of proof onto the child to prove he is amenable to treatment. This method creates a hybrid of legislative and judicial waiver. It is a way of fast-tracking the cases that are likely appropriate for waiver while still allowing juvenile offenders to receive individual determinations from qualified juvenile judges. Critics have raised the concern that presumptive waiver has many of the faults of automatic waiver; for example, after California passed a presumptive waiver statute, Los Angeles saw increases of 318% in waiver hearings and a 234% increase in actual waivers. One way to correct this overuse of presumptive waiver is to restrict its application to a very limited class of juvenile offenders, perhaps only those with a certain number of convictions and who have committed a serious violent crime that is objectively likely to warrant transfer. Addi-

133. Id.
134. Clarke, supra note 106, at 715.
135. Klein, supra note 2, at 387.
136. Rose, supra note 71, at 983.
137. Klein, supra note 2, at 387.
tionally, the burden of proof that shifts to the juvenile to show that he is amenable to treatment could be relatively low. As always, the ultimate decision must be made by the judge. Although there would be a presumption towards waiver in prescribed cases, the final decision would have to be based on the judge's evaluation of the child and the likelihood that he is amenable to some sort of treatment.

Another alternative is the imposition of blended sentences by juvenile court judges. A blended sentence allows a judge to "impose sentences consisting of detention at a state youth facility until the juvenile reaches age twenty-one, combined with a suspended adult prison sentence to be served if the juvenile re-offsends, has not been rehabilitated, or does not comply with the conditions of the juvenile sentence."138 Blended sentences provide a type of insurance policy for the juvenile offender and society—he is given access to the juvenile system, but if he fails to cooperate, he is then sent to adult prison. Blended sentences should only be handed out in severe cases, where the crime is especially heinous or the youth has a long record, but where there is also a chance of amenability. The danger of imposing blended sentences in less serious cases is that a juvenile who would not ordinarily be sent to adult prison may wind up there on a technicality or because of a small mistake. Blended sentences are an effective way to give a juvenile an incentive to stay out of trouble and to rehabilitate himself, while still providing an insurance option to the state if he proves he is not amenable to treatment in the long run.

One final option for the improvement of judicial waiver is to allow for juvenile courts to statutorily retain their juvenile jurisdiction past the age of eighteen. This allows the juvenile system to continue to provide its benefit, even when the former juvenile is technically no longer a juvenile within its jurisdiction. By providing "a rehabilitative sentence for a retributive amount of time,"139 this method allows juvenile courts to use rehabilitative treatments even into the early adult years, when such treatment will be useful for the offender while maintaining retributive aims. This alternative to traditional waiver is meant for older, non-violent juvenile offenders and is meant to provide them time to mature before subjecting them to the harsh world of adult prison.140 Like a blended sentence, it offers the juvenile an incentive to straighten up and fly right or else risk incarceration

138. Clarke, supra note 106, at 681-82.
139. Prescott, supra note 8, at 1015.
140. Id. at 1011.
in an adult prison. As discussed above, juveniles' behaviors and cognitive functions develop at different paces, and this method allows extra time for slow learners to mature. Critics of the retention of juvenile jurisdiction argue that it offers a contradictory signal to participants, as it sends both rehabilitative and retributive messages. Some argue that if the former juvenile is allowed to continue rehabilitation meant for minors, he will not learn his lesson and will fail to appreciate the seriousness of the conduct that landed him in the program.

All the methods described above are ways in which states can tweak judicial waiver to meet the perceived needs—and often demands—of their citizens. This Note argues that judicial waiver is the only method of transfer that can serve the original purposes of the juvenile justice system. That being said, there is not just one type of judicial waiver. The precise method that each state uses must be tailored to its own needs and enshrined in a comprehensive statute outlining its goals and aims. It is possible to have both lenient and harsh judicial waiver statutes. It is essential, though, for every system to provide individualized evaluations of juvenile offenders by experienced juvenile judges and the chance for meaningful appeal of transfer through reverse waiver. Likewise, each system should be designed to attempt to rehabilitate youth, not to give up on them at the first sign of juvenile delinquency and ship them off to the adult criminal system where their chances of rehabilitation decrease exponentially.

CONCLUSION

Juvenile crime is a problem in this country, as it is in most places. The worst possible reaction to juvenile crime is to think of the juvenile offender in the same way as an adult criminal. Youths are developmentally different from adults in a number of critical ways which in turn affects how accountable they should be held for their actions. Sending record numbers of juvenile offenders to adult prisons may seem like a way to make society safer, but that strategy is short-sighted and ends up making society less safe when the juvenile is released from prison as a hardened criminal and is more likely to become a repeat offender. The focus of the juvenile justice system must be refocused on the values its proponents preached during its early days. The system

141. See generally Clarke, supra note 106, at 721 (commenting on the developmental immaturity of juveniles and the dangers of subjecting a juvenile offender to trial in a juvenile court under extended juvenile jurisdiction).
142. Id. at 720–21.
143. See, e.g., id.
must be set up to help children, not punish them, and to help turn troubled teenagers into productive adults. In accordance with this philosophy, waiver of juvenile court jurisdiction must be reserved for cases where there is no chance for rehabilitation—only the most serious cases. And even in these cases, a juvenile still deserves an individual determination by a qualified juvenile court judge after the judge has looked at his unique situation.

Automatic and prosecutorial waivers only make the problem worse by being so over-inclusive as to sweep into the criminal system juveniles who are perfectly amenable to rehabilitation but never get the chance to mature out of their troubled youth years. Judicial discretionary waiver is the only method of waiver that can serve both short-term and long-term goals for individual juveniles and society. For a juvenile offender, individual determinations give him a chance to show that he is amenable to treatment and that he wants to improve his behavior. For society, rehabilitating youths—despite the cost, resources, and time involved in the treatment process—can create a generation of mature adults who have learned from their mistakes rather than a class of convicted criminals who enter adult prisons as children and leave with little chance to rebound from their troubled childhoods. Judicial waiver, although in need of improvement, is the only way of dealing with the small portion of the juvenile offender population that is not amendable to treatment while simultaneously embracing the philosophy of the original juvenile system for troubled youths who just need a little help getting through the teenage years to reach responsible adulthood. Embracing the child-first philosophy through the elimination of automatic waiver and the adoption of an improved version of judicial waiver is the best and only way to create a system that works in the best interests of both juveniles and society.