Note

Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies

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Introduction

On January 18, 2007, Michigan released Nathaniel Abraham, one of the youngest juveniles in the nation ever charged with murder and tried as an adult.[1] When Nathaniel was first brought to court in 1998 to answer his murder charges, he was twelve years old, stood 4-foot-9, and weighed just ninety pounds.[2]

On October 29, 1997, Nathaniel fatally shot 18-year-old Ronnie Green, although Nathaniel said he was shooting at trees, not at Ronnie.[3] The State charged Nathaniel with one count of first-degree, premeditated murder, in addition to other lesser charges.[4] By statute, the prosecutor had discretion regarding whether to bring the charges in juvenile court or adult court,[5] and in Nathaniel's case she chose to try

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1 Keith Bradsher, *Need for Counseling Unmet in Boy Who Became a Killer*, N.Y. TIMES, Nov. 23, 1999, at A14; L.L. Brasier, *Judge's Signature Frees Abraham*, DETROIT FREE PRESS, Jan. 18, 2007.

2 Brian Murphy & Joe Swickard, *6th-Grader's Trial as Adult Spotlights Michigan's Tough Stand on Juveniles*, DALLAS MORNING NEWS, May 10, 1998, at 5A.

3 People v. Abraham, 662 N.W.2d 836, 840 (Mich. Ct. App. 2003) (quotation omitted).

4 *Id.*

5 *See* MICH. COMP. LAWS ANN. § 712A.2d(1) (West 2002). States typically use one of three methods to determine whether a child should be tried in adult court. The decision is either

him in adult court.[6] She made this choice even though Nathaniel had a troubled childhood and a cognitive impairment.[7] In addition, Nathaniel never had the opportunity to benefit from counseling, social services, or any prospect of rehabilitation through the juvenile justice system.[8] Nathaniel was convicted by a jury of second-degree murder.[9]

Although Nathaniel was convicted as an adult, Judge Eugene Moore had multiple sentencing options.[10] These options included a juvenile sentence, an adult sentence up to life without parole, or a combined sentence where the judge could place Nathaniel in juvenile detention until he turned twenty-one and then determine whether Nathaniel should serve an adult sentence.[11] Fortunately, for Nathaniel's sake, Judge Moore chose to sentence him to juvenile detention until his twenty-first birthday.[12]

Charles "Andy" Williams also committed murder at a young age,[13] but, unlike Nathaniel, was not given a chance to rehabilitate.[14]

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made by: (1) the legislature, where waiver is automatic based on statutorily set criteria (referred to as statutory or mandatory waiver); (2) the judge after a hearing (judicial waiver); or (3) the prosecutor prior to charging the juvenile (prosecutorial waiver or concurrent jurisdiction). *See infra* Part III.A.

6 *Abraham*, 662 N.W.2d at 840 (quotation omitted).

7 Prior to being charged with murder, Nathaniel was a suspect in twenty-two other incidents but was never charged because witnesses and victims did not cooperate. *See* Murphy & Swickard, *supra* note 2. In addition, Nathaniel was one of four children of a single mother who fought to make ends meet. Bradsher, *supra* note 1, at A14. Nathaniel had an intelligence quotient ("IQ") of seventy-eight with an estimated cognitive ability of a six- to eight-year-old child, and he was known to have an angry personality and suffer bouts of depression. Kate Randall, *On-the-Spot Report from Michigan Courtroom: Scenes from the Murder Trial of a 13-year-old*, WORLD SOCIALIST WEB SITE, Oct. 29, 1999, http://www.wsws.org/articles/1999/oct1999/abra-o28.pdf.

8 Bradsher, *supra* note 1, at A14.

9 *Abraham*, 662 N.W.2d at 839.

10 David Goodman, *Convicted Killer, 13, to Be in Juvenile Facility Until Age 21*, MACON TELEGRAPH (Ga.), Jan. 14, 2000, at 5A. According to the Michigan statute, Judge Moore could defer the decision of whether to sentence Nathaniel until he turned twenty-one. MICH. COMP. LAWS ANN. § 712A.18(n). For lesser crimes, Michigan law allows the judge to make the sentencing decision after a hearing to determine "by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to an institution or agency," *id.* § 769.1(3), based on the consideration of several statutory factors such as the seriousness of the offense, the juvenile's culpability, and the juvenile's past rehabilitation treatment, *id*. This type of policy is called "blended sentencing" and has been implemented in twenty-six states. *See infra* Part III.B.

11 Goodman, *supra* note 10, at A5.

12 *Id.* The newspaper paraphrased Judge Moore as stating that "if society is committed to preventing future criminal behavior, rehabilitation through the juvenile system is the answer." *Id.*

13 People v. Williams, No. D040917, 2004 WL 179207, at *4 (Cal. Ct. App. Jan. 30, 2004).

14 *See id.* at *1.

Instead, Andy Williams's case was automatically transferred, or "waived," to the adult court, and he was sentenced to life in prison with a chance for parole after fifty years.[15] In March 2001, fifteen-year-old Andy fatally shot two of his fellow students and injured thirteen more in a school shooting incident.[16] Like Nathaniel, Andy had a troubled life and struggled with severe depression.[17] Andy, however, showed a strong potential for rehabilitation; while awaiting trial in juvenile detention, Andy exhibited excellent behavior and had already benefited from the services provided.[18] His life sentence, however, denied him the opportunity to learn from his actions, and it confines him to prison until at least the age of sixty-five. Moreover, this long sentence is not necessarily justified by a fear that Andy poses a grave danger to society; a psychological analysis performed by a defense expert found few factors indicating Andy was likely to be violent again.[19]

Nathaniel and Andy's cases are useful for understanding the delicate balance each state must strike in its juvenile justice system between rehabilitation and punishment. Nathaniel's case illustrates the rehabilitative side, revealing the benefit of individualizing these decisions and providing juvenile dispositions where possible. At the same time, his eventual juvenile sentence calls into question the decision to waive him into adult court in the first place. Andy's case, by contrast, is an example of the punitive side of current juvenile justice policies; it shows that for many juveniles—even first-time offenders who show great potential for change—no rehabilitation options are available.

Although murder and other violent crimes are serious when committed at any age, juveniles tried automatically in the adult court are deprived of the rehabilitative opportunities offered by the juvenile court. A lengthy adult prison sentence means the juvenile has little or no access to rehabilitative programs, is more likely to recidivate, and has a higher likelihood than an adult of being victimized or killed in prison.[20] The juvenile system, in contrast, was created to provide an

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15 *Id.* at *1, *4; *see also Other Fatal School Shootings*, WASH. POST, Mar. 22, 2005, at A8. Although California has a blended sentencing policy, CAL. PENAL CODE § 1170.17 (West 2004), Andy was not eligible for a juvenile sentence because he had several aggravating factors (including multiple murder counts) that made him ineligible under the statute, *Williams*, 2004 WL 179207, at *4–6; CAL. PENAL CODE § 190.2(a)(3) (West 2004).

16 Jessica Reaves, *Charles "Andy" Williams*, TIME.COM, Mar. 9, 2001, http://www.time.com/time/printout/0,8816,101847,00.html.

17 *Sentencing Hearing for School Shooter* (CNN television broadcast Aug. 15, 2002) (transcript), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0208/15/se.10.html.

18 *See id.*

19 *Id.*

20 CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, FACT SHEET:

alternative forum based on the unique qualities of juvenile offenders, and it was designed to rehabilitate juveniles, not to punish them.[21] The juvenile court was also designed to avoid burdening a juvenile with the stigma of a criminal conviction as many proponents of the juvenile system view juvenile dispositions as civil, not criminal.[22]

After a perceived wave of violent juvenile crime in the 1980s and 1990s, however, state legislators actively increased penalties for juvenile crime and shifted the purpose of the juvenile court from rehabilitation to punishment.[23] States most actively increased penalties for juveniles by implementing policies to waive jurisdiction over juveniles to the adult court.[24] All states now have some method of waiving juveniles to the adult court, and twenty-nine states require a juvenile's case to automatically begin in the adult court if the juvenile was a certain age when he or she allegedly committed a certain offense.[25] In addition to a shift from rehabilitation to punishment, these automatic waiver policies also shifted the juvenile justice system to focus more on the offense than the unique qualities of the juvenile offender.[26]

These state practices of waiving juveniles to adult court without a full judicial investigation do not meet the original, rehabilitative goals of the juvenile court. Current public opinion also does not support the states' adoption of these more punitive policies, as an overwhelming majority of likely voters favor rehabilitation for juvenile offend-

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YOUTH UNDER 18 IN THE ADULT CRIMINAL SYSTEM 1 (2006), *available at* http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf.

21 Stacy C. Moak & Lisa Hutchinson Wallace, *Legal Changes in Juvenile Justice: Then and Now*, *in* 1 YOUTH VIOLENCE & JUVENILE JUSTICE 289, 289 (2003). Traditional theories of punishment include deterrence, retribution, just deserts, rehabilitation, and incapacitation. CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 105–18 (2004).

22 Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197, 203 (1993).

23 David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1560–62 (2004); *see* Moak & Wallace, *supra* note 21, at 291.

24 *See infra* Part II.B.

25 HOWARD N. SNYDER & MELISSA SICKMUND, DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 110–11 (2006).

26 Vanessa L. Kolbe, *A Proposed Bar to Transferring Juvenile with Mental Disorders to Criminal Court: Let the Punishment Fit the Culpability*, 14 VA. J. SOC. POL'Y & L. 418, 420 (2007).

ers.[27] More importantly, these practices contradict the Supreme Court's holdings in *Kent v. United States*[28] and *Roper v. Simmons*.[29]

This Note proposes a two-part solution to alleviate the constitutional and procedural concerns associated with current waiver policies in the states and to create a better balance in the juvenile justice system between rehabilitation and punishment. First, states should eliminate all waiver of jurisdiction over juveniles to adult court and instead try all juveniles in the juvenile court. This will eliminate the constitutional and procedural problems associated with waiver. Second, states should extend the scope of juvenile court jurisdiction so that juvenile judges have the authority to sentence a juvenile as either an adult or as a juvenile, or alternatively to impose a sentence that blends a juvenile treatment program with the possibility for an adult sentence at a future date.

Part I of this Note describes the historical background of the juvenile court. Part II outlines the major Supreme Court cases, such as *Kent* and *Roper*, that influence the rights of juveniles facing waiver to adult court. This Part also describes the recent shift in focus of the juvenile justice system from rehabilitation to punishment. Part III summarizes current state waiver policies and analyzes the gaps between those policies and the requirements under *Kent* and *Roper*. Part IV explains the need for a solution to improve the procedural quality and constitutionality of the juvenile justice system. It then outlines a proposed model state statute that will accomplish that goal. This statute—which is politically viable—would improve the sentencing process in the juvenile justice system, and it would create a mechanism for judges to determine sentences for juvenile delinquents that strikes the proper balance between rehabilitation and punishment for each juvenile offender.

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27 *See* BARRY KRISBERG & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME & DELINQUENCY, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3 (2007).

28 Kent v. United States, 383 U.S. 541, 552–53 (1966) (holding that due process rights of juveniles require a full investigation prior to waiver to adult court).

29 Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that applying the death penalty to minors violates the Eighth Amendment guarantee against cruel and unusual punishment because juveniles are less culpable); *see also* Christopher Mallett, *Death Is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 CRIM. L. BULL. 3 (2007) (providing a similar analysis of the combined effect of *Kent* and *Roper* on the constitutionality of current juvenile waiver policies, but proposing a considerably more limited solution of a moratorium on the transfer of juveniles to adult court).

I. Historical Background of the Juvenile Court

Beginning in the fourteenth century, the common law used age to distinguish between those culpable or not culpable for their crimes.[30] Under common law, children younger than seven were not seen as having "felonious discretion."[31] Children between the ages of seven and fourteen years could be tried as adults, but only if the prosecution rebutted a presumption that they were incapable of having the requisite intent to commit the crime.[32] Children fourteen years of age or older were automatically tried as adults.[33]

On July 1, 1899, American juveniles were separated from the adult court system with the creation of the first specialized court for juvenile justice: the Juvenile Court of Cook County, Illinois.[34] The original mission of the juvenile court was to "cure" youths with sentences that were designed to change the juveniles from law-breaking children to good citizens.[35]

The juvenile court judge had ultimate discretion regarding sentencing with options ranging from probation to juvenile detention until the age of majority.[36] The focus was completely on rehabilitation, not punishment; the judge determined the sentence based on the individual treatment needs of the juvenile, as opposed to the nature or seriousness of the offense.[37] Dispositions were designed to treat the underlying causes of delinquency for each individual juvenile.[38] Ideally, juvenile court judges would be knowledgeable about social services available to juveniles, as well as child development, and would develop sentences that would be in the best interest of each juvenile.[39]

Along with these foundational principles, the juvenile court was also distinguishable from its adult counterpart because certain procedural protections were deemed "unnecessary and undesirable" in ju-

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30 David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

31 *Id.* at 14.

32 *Id.*

33 *Id.*

34 Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

35 Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1098–99 (1991).

36 *Id.* at 1099–100. The age of majority is a legal threshold for when a person has full legal rights, which most states set at eighteen. BLACK'S LAW DICTIONARY 66 (8th ed. 2004).

37 Ainsworth, *supra* note 35, at 1099–100.

38 *See* BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 736 (2000).

39 *See* Feld, *supra* note 22, at 203–04.

venile court, as the court was not focused on determining guilt and punishment.[40] The purpose of the juvenile justice system was to treat the juvenile,[41] and many continue to emphasize its civil, nonadversarial character.[42] The courts had fewer procedural rules to be less stigmatizing for the juvenile, and juveniles were found to be "delinquent," not "guilty."[43]

The juvenile court's original rehabilitative focus was based on the theory that juveniles are less able than adults to reason and calculate the consequences of certain actions.[44] Juveniles are also considered to be more likely than adults to be driven by emotion or act in response to peer pressure, but at the same time they can be more amenable to rehabilitation.[45] The Supreme Court acknowledged this reduced culpability in *Roper*, specifying three general differences between adults and juveniles: first, juveniles lack maturity and a full sense of responsibility, resulting in "impetuous and ill-considered actions and decisions";[46] second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures";[47] and third, a juvenile's character is not as fully formed as an adult's.[48] The juvenile court system was created in light of this reduced culpability and a juvenile's greater potential for rehabilitation.

II. Shifting from Rehabilitation to Punishment: The Supreme Court's Influence

The juvenile justice system has changed in two important ways since the first juvenile court opened its doors. First, four major Supreme Court decisions have gradually recognized and articulated juveniles' constitutional rights and increased procedural protections in the juvenile court.[49] Second, there has been a shift in the underlying

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40 Ainsworth, *supra* note 35, at 1099–101.

41 Moak & Wallace, *supra* note 21, at 289.

42 *See* Feld, *supra* note 22, at 203.

43 *See id.* at 204.

44 Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 985 (2003). Rose correctly asks state legislators to address the constitutional violations of automatic waiver statutes; this Note goes further, however, and also asks state legislators to address the constitutional and procedural concerns with prosecutorial and judicial waiver.

45 *Id.* at 985–86.

46 Roper v. Simmons, 543 U.S. 551, 569 (2005) (quotation omitted).

47 *Id.*

48 *Id*. at 570.

49 *See* Kent v. United States, 383 U.S. 541, 556–57 (1966); *In re* Gault, 387 U.S. 1, 33, 36, 55, 57 (1967) (holding that juveniles must have notice of charges, legal representation including the right to confront and cross-examine witnesses, privilege against self-incrimination, and a fair

premise of the juvenile court from rehabilitation and individual treatment to guilt and punishment.

The effect of these changes is amplified by the growth in the jurisdiction of the juvenile court because the juvenile court now has a wider reach and implicates the constitutional rights of a larger population.[50] In 2002 alone, juvenile courts handled over 1.6 million cases and had the potential to exercise jurisdiction over thirty-one million American youths.[51] In addition, every state and the District of Columbia now has a juvenile court.[52]

A. Procedural Changes

The Supreme Court's influence on the juvenile court system has primarily come in the form of increasing the procedural protections and constitutional rights of juveniles. These changes were mostly initiated by the holdings in four cases: *Kent*, *In re Gault*,[53] *In re Winship*,[54] and *Roper*.

1. Due Process and Kent v. United States

In 1966, the Supreme Court established the due process requirements for waiver decisions in *Kent v. United States*.[55] In that case, sixteen-year-old Kent was charged and indicted for housebreaking, rape, and robbery.[56] Without any explanation, the trial judge waived jurisdiction so that Kent would be tried in adult court.[57] Although claim-

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and impartial hearing); *In re* Winship, 397 U.S. 358, 368 (1970) (holding that for juveniles guilt must be shown by proof beyond a reasonable doubt); *Roper*, 543 U.S. at 578.

50 *See* ANNE STAHL ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2001–2002, at 6–8 (2005).

51 *Id.* at 6, 8.

52 Ainsworth, *supra* note 35, at 1083 & n.1. Almost every industrialized nation in the world also has a juvenile court. *Id.* at 1083–84 & n.2.

53 *In re Gault*, 387 U.S. at 33, 36, 55, 57.

54 *In re* Winship, 397 U.S. 358, 368 (1970).

55 Kent v. United States, 383 U.S. 541, 556–57 (1966). In *Kent*, the Court did not address whether Kent was entitled to all the constitutional guarantees afforded to adults charged with the same crimes, but it held that the D.C. Juvenile Court Act, "read in the context of constitutional principles relating to due process and the assistance of counsel," entitled juveniles to a form of due process. *Id.* at 543, 557. The Court later acknowledged that *Kent* had not spoken clearly as to where the general due process right originated. *See In re Gault*, 387 U.S. at 12–13. In *Gault*, however, the Court linked *Kent*'s general concept of "'due process and fairness'" to the Due Process Clause of the Fourteenth Amendment, *id.* at 12–13 (quoting *Kent*, 383 U.S. at 553), concluding that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *id.* at 13.

56 *See Kent*, 383 U.S. at 543, 548.

57 *See id.* at 546.

ing he had conducted a "'full investigation,'" the trial judge never held a hearing, conferred with Kent or his counsel, or gave any reason why Kent should be dealt with in adult rather than juvenile court.[58]

The Supreme Court held that under the District of Columbia Juvenile Court Act, which authorized the juvenile court to waive jurisdiction, there must be a full investigation before a juvenile is waived to adult court.[59] The Court stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[60]

Although the precise holding in *Kent* was based on an interpretation of the District of Columbia Juvenile Court Act, the Court's reasoning implicated the broader constitutional rights under due process, stating: "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."[61] The Court observed that juvenile court discretion regarding waiver decisions is not unlimited, and it "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness."[62] It is also unlikely that the Court intended to limit its holding to the particular type of waiver—judicial waiver—at issue in the *Kent* case; instead, the Court would likely hold waiver decisions made by the legislature via statute[63] or by prosecutors to the same standards.[64]

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58 *Id.*

59 *See id.* at 551–52, 556–57. In the appendix to its opinion, the Court reproduced a policy memorandum from the District of Columbia that lists several "determinative factors" judges should consider when deciding whether to waive jurisdiction. *Id.* at 565–67. The factors include: seriousness of the alleged offense; protection of the community; aggressive, violent, premeditated, or willful nature of the alleged offense; whether the offense was against a person; prosecutorial merit of the complaint; desirability of combining trial of a juvenile with adult codefendants; sophistication and maturity of the juvenile; and likelihood of reasonable rehabilitation. *Id.* Although these factors were not specifically required by the Court, many states subsequently incorporated them into their juvenile justice policies. *See* Brenda Gordon, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 205 (1999).

60 *Kent*, 383 U.S. at 554.

61 *Id.* at 557.

62 *Id.* at 553.

63 Statutory—or automatic—waiver by nature violates the standards disclosed in *Kent*, because the juvenile is waived to the adult court based on predetermined criteria and there is no individualized investigation. *See* Gordon, *supra* note 59, at 205–06.

64 *See* Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN. ST. L. REV. 233, 260 (2006) (arguing that the Court did not intend to limit the require-

2. In re Gault *and* In re Winship

In 1967 and 1970, the Supreme Court again increased the level of procedural protection in the juvenile court with its decisions in *In re Gault* and *In re Winship*, respectively. In *Gault*, the Court identified four basic constitutional rights that juveniles must be afforded: (1) notice of the charges against them; (2) legal representation, including the right to confront and cross-examine witnesses; (3) privilege against self-incrimination; and (4) a fair and impartial hearing.[65]

The Supreme Court found that Gault had not received due process in several respects. First, the prosecution did not provide Gault sufficient notice of the charges against him; the petition the prosecution filed (akin to a statement of charges in adult court) did not provide sufficient detail, and it was not served on Gault or his parents.[66] Second, the juvenile court did not inform the child or his parents of their right to counsel.[67] Third, as no sworn testimony (even from the complaining neighbor) was presented, Gault's conviction was based on a purported confession he made to police, but that confession was made without informing Gault of his rights and without his parents or counsel present.[68]

In *Winship*, the Court held that juvenile delinquency, like an adult defendant's guilt, must be proven beyond a reasonable doubt, not merely a preponderance of the evidence.[69] Winship challenged the New York Family Court Act, which only required the State to meet a preponderance of the evidence standard to prove juvenile delinquency, as a violation of his due process rights.[70] The Supreme Court overturned the statute, finding that although the juvenile court is seen as civil and not criminal, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."[71]

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ment of a full investigation to only judicial waiver and that the Court would also require the same level of investigation to prosecutorial waiver).

65 *In re* Gault, 387 U.S. 1, 31–58 (1967); *see also* Feld, *supra* note 22, at 207. In *Gault*, a 15-year-old boy, already under probation from a prior incident, was picked up by the police after a neighbor complained that he made a lewd phone call to her. *In re Gault*, 387 U.S. at 4. Gault was then sentenced to six years at the State Industrial School by the juvenile court in Gila County, Arizona. *Id.* at 4, 29.

66 *Id.* at 31–34.

67 *Id.* at 41–42.

68 *Id.* at 55–56.

69 *In re* Winship, 397 U.S. 358, 368 (1970). Winship was a 12-year-old child charged with theft and found delinquent by the lower court in New York. *Id.* at 360.

70 *Id.* at 360.

71 *Id.* at 365–66 (citing *In re Gault*, 387 U.S. at 27).

3. Eighth Amendment and Roper v. United States

After several decades of relative silence on juveniles' constitutional rights, the Supreme Court returned to the issue in 2005 in its decision in *Roper v. Simmons*. In *Roper*, the defendant, 17-year-old Christopher Simmons, was convicted of brutally murdering Shirley Crook.[72] Simmons was tried and convicted as an adult in Missouri, and the jury recommended the death penalty.[73]

The Supreme Court reversed Simmons's death sentence, holding both that the Eighth Amendment right against cruel and unusual punishment extends to juveniles and that subjecting a juvenile to the death penalty is unconstitutional because juveniles are not as culpable for their acts as adults.[74] In reaching its decision, the Court relied heavily on a trend across the states of eliminating the juvenile death penalty,[75] as well as the generally reduced culpability of youthful offenders.[76]

With these four cases—*Kent*, *Gault*, *Winship*, and *Roper*—the Supreme Court provided significant new procedural and constitutional protections for juveniles. These decisions extended the concept of due process to juvenile proceedings, established requirements for the waiver determination, and formally recognized that due to their reduced culpability, the Eighth Amendment's bar against cruel and unusual punishment precludes juvenile death sentences. The effect of this increased recognition of constitutional rights and procedural protections was to bring the juvenile court closer in form to the adult court. At the same time, these decisions opened the door for states to import the adult court's greater focus on punishment into the juvenile court.

B. Shift from Rehabilitation to Punishment

By requiring increased procedural and constitutional protections for juveniles in *Kent*, *Gault*, *Winship*, and *Roper*, the Supreme Court paradoxically provided an impetus for states to shift the focus of the juvenile court from rehabilitation to punishment.[77] As a response to a perceived increase in violent juvenile crime, states implemented har-

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72 Roper v. Simmons, 543 U.S. 551, 556 (2005).

73 *Id.* at 557–58.

74 *Id.* at 570, 578.

75 *Id.* at 564–67.

76 *Id.* at 568–71.

77 *See* Feld, *supra* note 22, at 197–98; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1098 (1995).

sher penalties to "get tough" on juveniles,[78] and the newly increased procedural protections in the juvenile court had the apparently unintended effect of paving the way for this change.[79] Indeed, "even before the ink was dry on the standards and case law according children criminal due process rights in juvenile delinquency proceedings, some policymakers were viewing the enfranchisement of children as a long-awaited window of opportunity to hold them *accountable* for their law violations."[80]

In this context, states implemented new policies that greatly shifted the focus of the juvenile court from rehabilitation to punishment. For example, several states changed the statement of legislative purpose in their juvenile codes from an emphasis on rehabilitation to a focus on public safety, punishment, and accountability.[81] Between 1992 and 1997, state legislatures enacted numerous other statutory changes to increase the punitive aspect of the juvenile court. During that period, forty-five states made it easier to transfer juveniles to adult court, thirty-one states increased the sentencing authority of juvenile courts, and forty-seven states limited the ability of juveniles to keep their records confidential.[82] Only one state, Nebraska, did not change its transfer statutes after 1992 to make it easier for the state to try juveniles in adult court.[83]

Although these changes began to slow after 1997, from 1998 to 2002 there were still eighteen states that amended their waiver laws to increase the likelihood that juveniles would be transferred to adult court.[84] These changes included adding "once an adult, always an adult" provisions, broadening the categories of offenders eligible for

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78 *See* Brink, *supra* note 23, at 1560–62. Brink argues that this rise in juvenile crime was not as clear as the public perceived it to be, noting that empirical studies on the rates of serious juvenile crimes are inconsistent: one study showed an increase in juvenile offense rates but a decrease in violent juvenile crime after the 1980s, whereas another study showed steady overall juvenile crimes rates, with property crime arrest rates decreasing but juvenile murder rates sharply increasing in the late 1980s and early 1990s. *See id.* at 1561–62.

79 *See* Hunter Hurst III, *Crime Scene: Treating Juveniles as Adults,* TRIAL, July 1997, at 34, 34.

80 *Id.*

81 *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 83 n.29 (1997) (citing a more detailed analysis conducted by Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 239–42 (1996)).

82 Moak & Wallace, *supra* note 21, at 291.

83 SNYDER & SICKMUND, *supra* note 25, at 113.

84 PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, TRYING AND SENTENCING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER AND BLENDED SENTENCING LAWS 12 (2003).

adult court, and creating new mechanisms for filing charges against juveniles directly in adult court.[85]

Not only have states added more avenues to transfer juveniles to adult court, but they have also adopted a greater punitive focus. Waiver decisions are now driven more by the offense allegedly committed than by the individual's need for treatment or rehabilitation.[86] States have also implemented waiver policies that increase punishment even for juveniles who are not charged with violent crimes, such as drug or property offenses. For example, according to a 2004 survey of state policy by the National Center for Juvenile Justice ("NCJJ"), twenty states allow or require waiver for drug offenses[87] and twenty-one states and the District of Columbia allow or require courts to try juveniles as adults for property offenses.[88] Although the Supreme Court added protections for juveniles in *Kent*, *Gault*, *Winship*, and *Roper*, the overall effect has harmed juveniles because these increased protections spurred state waiver policies that increase the likelihood of punitive outcomes for juvenile offenders.[89]

III. Current State Policies for Juvenile Waiver

States are currently using unconstitutional mechanisms to punish juveniles by transferring jurisdiction over juvenile cases to the adult court. As of 2006, every state had a policy in place to waive jurisdiction over a juvenile to adult court.[90] As described above, nearly all states and the District of Columbia implemented waiver policies that shifted the juvenile court to a focus on punishment rather than rehabilitation and a focus on the offense and not the juvenile's individual culpability or amenability to treatment.[91]

These policies, however, fall short of the constitutional standards the Supreme Court has articulated. Indeed, as the Court observed in *Kent* "[t]here is evidence . . . that the [juvenile] receives the worst of both worlds: that he gets neither the protections accorded to adults

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85 *See id.*

86 *See, e.g.*, FELD, *supra* note 38, at 774–75.

87 PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, STATE JUVENILE JUSTICE PROFILES: NATIONAL OVERVIEWS: WHICH STATES ALLOW OR REQUIRE ADULT CRIMINAL PROSECUTION OF NONVIOLENT OFFENDERS? (2007), http://www.ncjj.org/stateprofiles/overviews/transfer8t.asp. The findings of the NCJJ survey identifying the practices of each state are summarized in a table in the Appendix, *infra*.

88 *Id.*

89 *See* Feld, *supra* note 81, at 73–79; Hunt, *supra* note 86, at 624–25.

90 SNYDER & SICKMUND, *supra* note 25, at 111.

91 *See supra* Part II.B.

nor the solicitous care and regenerative treatment postulated for children."[92] Waiver of jurisdiction over juveniles to the adult court is an example of precisely this problem, as current waiver policies neither match the due process requirements of *Kent* nor the Eighth Amendment requirements expressed in *Roper*.

A. State Waiver Policies

Every state uses one or several of the following waiver methods: (1) statutory waiver; (2) prosecutorial discretion; or (3) judicial waiver.[93] Statutory waiver of jurisdiction, also called legislative exclusion, excludes certain juveniles from the jurisdiction of the juvenile court based on set factors such as the juvenile's age and the alleged crime.[94] Prosecutorial waiver, also called concurrent jurisdiction, empowers both the juvenile and adult courts to have jurisdiction over the juvenile, leaving it to the prosecutor to decide whether to charge a juvenile as an adult.[95] Judicial waiver allows a juvenile judge to decide whether to waive juvenile jurisdiction and thus try the juvenile in criminal court.[96] Judicial waiver has several variations, including full judicial discretion, presumptions that the juvenile should be transferred, or mandatory waiver where the judge is required to waive the juvenile when the juvenile is a certain age or accused of a certain offense.[97]

Many states use a combination of these three waiver policies.[98] Although the permutations employed vary widely, a recent Department of Justice study indicates that states' approaches have much in common:

- All but six states now allow judicial discretion for at least some waiver decisions.[99]
- Fifteen states include in their judicial waiver policies a rebuttable presumption that a juvenile should be waived to the adult court.[100]

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92 Kent v. United States, 383 U.S. 541, 556 (1966).

93 SNYDER & SICKMUND, *supra* note 25, at 110–11. The states using mandatory judicial, prosecutorial, or statutory waiver provisions typically target those policies at older juveniles or those charged with more serious crimes. *Id.* at 111.

94 *Id.* at 110.

95 *Id.*

96 *Id.*

97 *Id.* at 111–12.

98 *Id.* at 111.

99 *Id.* The Appendix, *infra*, lists the policies followed by each state as identified by the Department of Justice study.

100 *Id.*

- Fifteen states have mandatory judicial waiver where the judge must transfer certain cases to adult court if he or she finds that certain circumstances exist.[101]
- Twenty-nine states initiate a juvenile's case in the adult court when the juvenile is a certain age and committed a certain offense.[102]
- Fourteen states and the District of Columbia have concurrent jurisdiction between the juvenile and adult courts, which allows prosecutors the discretion to bring a charge against a juvenile in either criminal or juvenile court.[103]
- Thirty-three states and the District of Columbia have "once an adult, always an adult" provisions where once a juvenile is treated as an adult offender he or she will always be treated as an adult offender, regardless of his or her age or alleged crime.[104]
- Twenty-two states and the District of Columbia have no minimum age for when a juvenile can be transferred to adult court.[105]

Notably, only four states rely solely on fully discretionary judicial waiver, eliminating presumptive or mandatory judicial waiver, prosecutorial waiver, and statutory waiver: Hawaii, Missouri, Tennessee, and Texas.[106] Although discretionary judicial waiver is more in line with the *Kent* holding, all four of these states also have the "once an adult, always an adult" provision, as well as the procedural problems that accompany even discretionary judicial waiver.[107] While there is certainly variation across the states in juvenile waiver policies, no state has resolved all of the problems inherent in juvenile waiver and most have policies that are contrary to the approach of the Supreme Court in *Kent* and *Roper*.

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101 *Id.* Mandatory judicial waiver is only different from statutory waiver because the case originates in the juvenile court. *See id.* at 112.

102 *Id.* at 111. An example of this type of waiver is a policy in California under which any juvenile who is fourteen years old or above who commits murder is automatically tried as an adult. CAL. WELF. & INST. CODE § 602(b)(1) (West 2004).

103 SNYDER & SICKMUND, *supra* note 25, at 111.

104 *Id.*

105 *Id.*

106 *Id.*

107 *See infra* notes 120–23 and accompanying text.

B. Constitutional Shortcomings of Current Policies

Although every state now allows juvenile waiver, the practice does not pass constitutional muster and entails procedural shortcomings. Statutory or prosecutorial waiver of juveniles to adult court without a full judicial investigation does not meet the original, rehabilitative goals of the juvenile court and, more importantly, contradicts the Supreme Court's holdings and intentions in *Kent* and *Roper*. Moreover, statutory, prosecutorial, and mandatory judicial waiver all violate the due process and Eighth Amendment rights of juveniles, as a sentence is imposed with neither a full investigation as required by *Kent*, nor an analysis of mental culpability as required by *Roper*.[108]

Waiver decisions are unconstitutional under *Kent* if they do not include a full investigation consistent with the general right of due process recognized in *Kent*.[109] Neither statutory nor mandatory judicial waiver provides an opportunity for such an investigation because juveniles are automatically waived to adult court without a hearing.[110] The only variables are the juvenile's age and the nature of the alleged offense.[111] With prosecutorial waiver, the same criteria apply, but the decision is even less fair to the juvenile because it is made by a nonobjective party—the prosecutor.[112]

Waiver is unconstitutional under *Roper* because it is a sentence without a consideration of individual culpability. Although *Roper* only involved the juvenile death penalty, the reasoning in *Roper* can be extended to apply to statutory or prosecutorial waiver decisions. Of course, as the Court stated in *Roper*, the Eighth Amendment applies to the death penalty with "special force,"[113] but it also applies to other sentences as well.[114] The Eighth Amendment is driven by a review of proportionality, where courts must consider the seriousness of the crime alleged and the defendant's culpability to protect defendants from an excessive sentence.[115] Waiver decisions are sentencing

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108 *See supra* Part II.A.

109 Kent v. United States, 383 U.S. 541, 552–54, 556–57 (1966).

110 *See* Brink, *supra* note 78, at 1564 ("Perhaps the most significant and disturbing aspect of the transfer trend is the legislative adoption in many states of *mandatory transfer* statutes that require certain cases that would otherwise go to juvenile court to go to adult criminal court, bypassing both judicial and prosecutorial scrutiny over the appropriate forum for the accused.").

111 SNYDER & SICKMUND, *supra* note 25, at 110.

112 *See* Green, *supra* note 64, at 245–49.

113 Roper v. Simmons, 543 U.S. 551, 568 (2005).

114 Lisa McNaughton, *Extending* Roper*'s Reasoning to Minnesota's Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1063, 1067 (2006) (citation omitted).

115 *See* Atkins v. Virginia, 536 U.S. 304, 311 (2002).

decisions because the court must decide whether to subject the juvenile to the punitive outcomes of the adult court or to the rehabilitative (or at least less punitive) outcomes of the juvenile court.[116] Therefore, under *Roper* and the Eighth Amendment, waiver decisions violate the constitutional rights of juveniles unless they are made after the court considers the juvenile's individual culpability, which in turn requires the State to prove, beyond a reasonable doubt, that the juvenile is "at least as culpable as the average adult."[117]

Judicial waiver is also inadequate. Although judicial waiver is better than statutory or prosecutorial waiver because only judicial waiver includes an actual hearing that gives the juvenile court judge an opportunity to consider the juvenile's mental culpability and amenability to treatment, judicial waiver also can have the same constitutional concerns as statutory or prosecutorial waiver. In several states, if either the juvenile was a certain age at the time of the offense or is accused of a particular offense, then judicial waiver hearings are bound by either a presumption that the juvenile should be tried in adult court or a mandate that the judge waive jurisdiction to the adult court.[118]

These automatic waiver provisions deprive the juvenile of the full investigation required in *Kent* and the determination of individual culpability required in *Roper*.[119] In fact, after the holdings in *Kent* and *Roper*, no version of waiving juvenile jurisdiction to the adult court is constitutional because they either: (1) do not have the "full investigation" required by *Kent*; (2) implicate the juvenile's right against cruel and unusual punishment as outlined for juveniles in *Roper*; or (3) provide an individualized hearing, but still have serious procedural problems such as relaxed evidentiary standards and automatic assumptions of guilt.

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116 Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 472 (1987). For a full legal analysis of why juvenile waiver decisions are forms of punishment, see Robert E. Searfoss III, *Waiver of Juvenile Jurisdiction and the Execution of Juvenile Offenders: Why the Eighth Amendment Should Require Proof of Sufficient Mental Capacity Before the State Can Exact Either Punishment*, 35 U. TOL. L. REV. 663, 679–81 (2004) (analyzing factors identified in Supreme Court precedents for determining whether a statute is punitive, and concluding that juvenile waiver is punitive because it furthers retribution and deterrence, relies on underlying conduct that is a crime, and has an alternative purpose—protection of the public—that can be addressed without waiver).

117 Searfoss, *supra* note 116, at 687; *see also* McNaughton, *supra* note 114, at 1067–68.

118 *See* SNYDER & SICKMUND, *supra* note 25, at 112.

119 *See supra* Parts II.A.1, II.A.3.

Only four states—Hawaii, Missouri, Tennessee, and Texas—always permit judges to make the determinations contemplated in *Kent* and *Roper*, which they accomplish by making waiver discretionary, never mandatory, and by removing all presumptions.[120] Even these states, however, face procedural concerns that accompany judicial waiver hearings. For example, some states' judicial waiver hearings employ more relaxed evidentiary rules, such as allowing or even requiring a judge to consider delinquency history and social services reports that would be inadmissible in adult court.[121] In addition, some states allow statements by juveniles made at preliminary waiver hearings—where the juvenile has an incentive to confess or show remorse so that the judge will deem them amenable to rehabilitation—to be used against the juvenile at a later adjudicatory hearing, arguably violating juveniles' Fifth Amendment privilege against self-incrimination.[122] Also, to avoid double jeopardy problems, judges deciding whether to waive juvenile jurisdiction must assume that the juvenile is guilty of the offense charged.[123]

This policy shift at the state level—making it more common to waive juveniles to adult court and making the juvenile court more punitive in nature—ignores the unique needs of juveniles and the positive impact rehabilitation can have on a juvenile delinquent. Juveniles are generally less culpable than adults and at the same time more amenable to rehabilitation.[124] By focusing on punishment rather than rehabilitation, the juvenile court misses an opportunity to turn a life around and remove a child from the criminal system. The decision between rehabilitation and punishment for each juvenile should be in

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120 SNYDER & SICKMUND, *supra* note 25, at 111.

121 *E.g.*, Henry George White et al., *A Socio-Legal History of Florida's Juvenile Transfer Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 249, 256–57 (1999) (describing changes in Florida's waiver procedure requiring courts to consider, inter alia, prior delinquency and social agency reports); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 337 (1967). This type of evidence likely would be inadmissible in adult court because it would be hearsay, *cf.* FED. R. EVID. 801, 802, evidence of a prior juvenile adjudication, *cf.* FED. R. EVID. 609(d), or both.

122 *See* Sarah Freitas, *Extending the Privilege Against Self-Incrimination to the Juvenile Waiver Hearing*, 62 U. CHI. L. REV. 301, 301–02 (1995); *see, e.g.*, *In re* Hegney, 158 P.3d 1193, 1203 (Wash. Ct. App. 2007) (holding that the Fifth Amendment right against self-incrimination and the Sixth Amendment right to confrontation do not apply at transfer hearings because the transfer "procedure itself cannot lead to a loss of liberty").

123 United States v. Nelson, 68 F.3d 583, 589 (2d Cir. 1995) (holding that in federal court, a judge should assume that the juvenile is guilty as part of the decision of whether to waive jurisdiction); Chauncy E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 790 (2002).

124 Roper v. Simmons, 543 U.S. 551, 570 (2005).

the hands of a judge, after guilt has been established, because only a judge—and only one considering the question at that time—can fairly make the waiver decision based on the individual needs of each juvenile. Waiving juveniles to adult court does not protect the due process or Eighth Amendment rights of juveniles, and waiver policies do not adequately protect the potential of each juvenile to be rehabilitated by the juvenile court.

C. Blended Sentencing Policies

Despite these constitutional defects, no state has completely eliminated waiver. Twenty-six states, however, currently allow for "blended sentencing," which gives judges the flexibility to choose either a juvenile or adult sentence, or a combination of the two.[125] Where jurisdiction over a juvenile's case originates in the juvenile court, states follow one of three approaches.[126] States use: (1) an "exclusive blend" approach, in which a juvenile court can impose either an adult or a juvenile sanction, but not both; (2) an "inclusive blend," where the juvenile court judge can impose a sentence involving *both* the juvenile and the adult court; or (3) the "contiguous" jurisdiction model, where the juvenile court retains jurisdiction over the case and can impose a juvenile sanction that remains in effect even beyond the time the juvenile reaches majority.[127]

Although the states using blended sentences have taken an important step towards giving some juveniles the possibility of rehabilitation, blended sentencing is an incomplete solution for several reasons. First, all states with blended sentencing policies also still have policies that waive jurisdiction over juveniles to the adult court.[128] Thus, blended sentencing fails to address the constitutional and procedural problems inherent in waiver, as the juvenile can still be waived to adult court without a full investigation or an analysis of individual culpability.[129]

Second, many of the states that allow blended sentencing limit the circumstances in which courts may impose a blended sentence. For example, only six states allow blended sentencing regardless of

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125 Hurst, *supra* note 79, at 36–37. Blended sentencing policies expand the jurisdiction of the juvenile court to allow the juvenile court judge the discretion to impose criminal penalties. SNYDER & SICKMUND, *supra* note 25, at 115.

126 Hurst, *supra* note 79, at 36.

127 *Id.*

128 SNYDER & SICKMUND, *supra* note 25, at 111.

129 *Id.*

whether the case originates in the adult court or the juvenile court, ten states allow blended sentencing only when a case originates in the juvenile court, and seventeen states only allow adult court judges to use blended sentences.[130]

A third problem with blended sentencing schemes is that they provide a "back door" to prison for juvenile offenders who otherwise probably would not go to adult prison.[131] In a study of blended sentencing in Minnesota, researchers found that only youths who were unlikely to be transferred to adult court in the first place were actually eligible for blended sentences.[132] The juveniles received a blended sentence with juvenile punishment at first, but they faced the continued threat of an adult sentence for any probation violation.[133] Then, upon committing even a technical probation violation, as is common, he or she could be sent to adult prison.[134]

In short, although blended sentencing provides an increase in rehabilitative possibilities for some juveniles, it does not eliminate the constitutional and procedural shortcomings inherent in juvenile waiver. Indeed, for some juveniles, it has the potential to actually increase the likelihood of adult punishment when those juveniles otherwise would be eligible for only a juvenile sentence.

D. Previous Challenges to State Waiver Statutes

Although some state courts have applied *Kent* and required judges to conduct a full investigation prior to juvenile waiver,[135] and others have attempted to address the problems with waiver through blended sentencing regimes, a number of other state courts have expressly held that their juvenile justice provisions and automatic and

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130 *Id.*

131 *E.g.*, March Rasmussen Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1063 (2001) (describing how Minnesota's Extended Jurisdiction Juvenile Prosecution program "created a 'back door' to prison for youths who likely would never have been certified").

132 *See id.* at 1065.

133 *See id.* at 1066.

134 *See id.* at 1058–59. The study noted that although judges usually only transferred about thirty-three youths each year, eighty-four youths entered prison through this "back door." *See id.* at 1063.

135 *See, e.g.*, State v. Pittman, 647 S.E.2d 144, 160–61 (S.C. 2007); *In re* Welfare of J.C.P., Jr., 716 N.W.2d 664, 668 (Minn. 2006) (citing *Kent* for the proposition that "fundamental fairness under the Due Process Clause does require that a juvenile court grant a hearing before waiving its jurisdiction and certifying a juvenile for prosecution as an adult").

prosecutorial waiver provisions are not unconstitutional under *Kent*.[136] These holdings, however, are based largely on distinguishing the state's statute from the District of Columbia statute analyzed in *Kent*; either the state had a review process for the juvenile to be transferred back to juvenile court, the state waiver statute did not require a hearing prior to transfer, or—unlike *Kent*, where the juvenile court had original jurisdiction—only the adult court ever had jurisdiction over the juvenile.[137]

The decisions resting on this distinction are problematic in at least two respects. First, they ignore the broad language in *Kent* suggesting that the Supreme Court intended to extend its impact beyond cases that originate in the juvenile court and intended to require a general right to due process for juveniles.[138] Second, the decisions ignore *Kent*'s reasoning, under which state statutes that do not require a hearing are unconstitutional.[139] Accordingly, this difference should not be the basis states use to distinguish the *Kent* holding and its requirements.

Moreover, these cases limit the *Kent* holding to address only the arbitrary decisions made by *juvenile* judges, ignoring the fact that adult courts can make these same arbitrary decisions. This is especially troublesome because the same procedural problems discussed above exist in the adult court during hearings to determine whether a juvenile who has been automatically waived to the adult court should be waived back.[140]

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136 *See, e.g.*, State v. Eggers, 160 P.3d 1230, 1237–38 (Ariz. 2007); People v. Thorpe, 641 P.2d 935, 939 (Colo. 1982); People v. P.H., 582 N.E.2d 700, 712 (Ill. 1991); State v. Perique, 439 So. 2d 1060, 1064 (La. 1983); *In re* Wood, 768 P.2d 1370, 1372–73 (Mont. 1989); Vega v. Bell, 393 N.E.2d 450, 454–55 (N.Y. 1979); State v. Berard, 401 A.2d 448, 451 (R.I. 1979).

137 *See, e.g.*, *Vega*, 393 N.E.2d at 454–55 (holding that a New York statute automatically transferring juveniles of a certain age and accused of a certain offense is not unconstitutional because it confers jurisdiction only to the adult court and the adult court has the power to remove the juvenile to juvenile court).

138 *See* Kent v. United States, 383 U.S. 541, 553, 557 (1966) (finding that juveniles have a general right to due process).

139 *See id.* at 561–62. Although most of the language in the *Kent* case specifically refers to or cites the D.C. Juvenile Court Act, there is still language that indicates the Court intended a broader holding. For example, without referring at all to the D.C. Juvenile Court Act the court stated: "[c]orrespondingly, we conclude that an opportunity for a hearing . . . must be given the child prior to entry of a waiver order. [W]e . . . hold that the hearing must measure up to the essentials of due process and fair treatment." *Id.* The Court also used broad language to recognize the importance of the juvenile waiver decision, holding "that it is, indeed, a 'critically important' proceeding." *Id.* at 560.

140 *See, e.g.*, People v. Parish, 549 N.W.2d 32 (Mich. Ct. App. 1996) (finding that the "'waiver-back' procedure is the equivalent of a second phase hearing under traditional waiver procedures . . . and uses the same flexible evidentiary standards); *supra* Part III.C.

In addition to distinguishing and limiting *Kent*, courts have also been unwilling to overrule state waiver policies on substantive due process or equal protection grounds. Courts that have analyzed the constitutionality of waiver have concluded that such waiver policies are subject only to rational basis review, either because juveniles do not have a fundamental constitutional right to juvenile prosecution, or because age is not a suspect class.[141] Moreover, courts have failed to apply even this deferential standard correctly: although many state courts have upheld automatic waiver provisions under rational basis scrutiny, they have "fail[ed] to make any analysis on whether the statute is rationally related to a legitimate purpose."[142]

If the courts had examined the issue, they would have found that automatic waiver fails even rational basis review. To be sure, the government has a legitimate interest in increasing public safety by incarcerating dangerous juveniles.[143] The current waiver provisions states employ, however, are not rationally related to that justification.[144] In fact, studies show that automatic waiver actually undermines this interest: juveniles processed in the adult system are more likely to commit future offenses, whereas juveniles processed in the juvenile court are more likely to be rehabilitated.[145] When waiver provisions automatically transfer juveniles to the adult court without an investigation into individual amenability to rehabilitation, they "have lost any rational relationship to the state's objective (punishment of 'untreatable' juveniles)," but rather are "arbitrary and capricious."[146]

In sum, the state cases finding that automatic waiver of juveniles to the adult court is constitutional are incorrect because they have either oversimplified the holding in *Kent* or failed to recognize the arbitrary nature of the waiver provisions. These cases also do not fully incorporate *Roper*'s application of the Eighth Amendment to juveniles, which requires an individualized review of mental culpability that automatic waiver does not provide.[147] These policies should

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141 Rose, *supra* note 44, at 991–92; *see, e.g.*, *Thorpe*, 641 P.2d at 940 (holding that use of prosecutorial waiver to try the defendant as an adult while others were tried as juveniles did not violate equal protection); State v. Doe, 576 P.2d 1137 (N.M. 1978) (holding that age is not a suspect class and therefore a juvenile's equal protection claim must be analyzed under rational basis scrutiny). Rational basis review requires the classification to have a rational relationship with the justification for the statute. Rose, *supra* note 44, at 992.

142 Rose, *supra* note 44, at 994–95.

143 *Id.* at 993.

144 *See id.*

145 *Id.* at 979, 993.

146 *Id.* at 995.

147 *See supra* Part II.A.3.

be changed to require an analysis of each juvenile's individual culpability and amenability to rehabilitation.

IV. Model State Legislation

A. Why Change Is Needed

As noted above, the juvenile court was originally focused entirely on rehabilitation and individualized treatment.[148] Driven by the combined effect of increased procedural protections established by the Supreme Court and a perception that violent juvenile crime had increased since 1980, state legislators sought more punishment from the juvenile court.[149] Now the juvenile justice system strives to serve two goals: the desire to punish juvenile offenders, as well as the rehabilitative needs of juveniles accused of a crime.

States must change this current trend and reformulate the juvenile court into a system that focuses instead on the needs of each juvenile, including an analysis of the juvenile's individual culpability.[150] The juvenile justice system should give juvenile court judges the power to determine for each juvenile offender whether that offender needs punishment or rehabilitation. Such a change would offer the potential for punishment without removing the possibility for rehabilitation of a juvenile who made a mistake at a very young age.[151]

To accomplish this change, states should eliminate waiver altogether while broadening juvenile judges' sentencing options. Under the current juvenile justice system, the prosecutor files a petition alleging a juvenile offense, and then the state—either automatically by statute or through the judge or the prosecutor exercising his or her discretion—determines whether the juvenile should be tried in juvenile or adult court. Next, the juvenile faces adjudication on the merits, and, finally, sentencing. In place of this system, states should adopt legislation that allows judges to determine, in each juvenile court case, whether rehabilitation or punishment is the correct solution for a particular juvenile. To do this, states should give the juvenile court sole

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148 *See supra* notes 34–48 and accompanying text.

149 *See supra* Part II.B.

150 This review will, by nature, also provide an analysis of the danger posed to society by the juvenile.

151 Also, it is important to note that not every juvenile accused of a crime poses a danger to society. The majority of juvenile crime is nonviolent; only 291 out of 100,000 juveniles (ages 10–17) who were arrested were charged with violent crimes such as homicide, assault, or weapons charges. SNYDER & SICKMUND, *supra* note 25, at 113. Thus the focus on punishment in the juvenile courts to address the problems of a minority of violent offenders has harmed the more numerous nonviolent offenders. *See supra* Part II.B.

jurisdiction over the adjudication of guilt for juveniles. The juvenile court judge should then have the discretion to impose an adult sentence, a juvenile sentence, or a sentence combining aspects of each.

Eliminating waiver altogether and giving the juvenile judge broader sentencing options will help strike a better balance between rehabilitation and punishment. Under the proposed approach, the juvenile judge has discretion to punish or rehabilitate each juvenile based on a full investigation that considers the juvenile's individual culpability, the likelihood that the juvenile will benefit from rehabilitation, and the potential danger the juvenile poses to his or her community.

Keeping the option of rehabilitation open for juvenile offenders is important because juveniles in the adult criminal system can face serious, negative consequences.[152] As Judge Skelly Wright explained, "a child is unlikely to succeed in the long, difficult process of rehabilitation when his teachers during his confinement are adult criminals."[153] Moreover, youths tried in the juvenile court are less likely than those tried as adults to commit new offenses.[154] Studies evaluating the system in Florida—the first state to give prosecutors the discretion to charge juveniles as adults—found that forty-nine percent of juveniles transferred to adult court were later arrested for a felony, compared to only thirty-seven percent of juveniles with similar backgrounds tried in juvenile court.[155] Research also shows that waiving jurisdiction over juveniles directly to adult court does not reduce violent juvenile crime rates.[156]

Beyond concerns for public safety, keeping juveniles in the juvenile court also makes better fiscal sense. Juveniles in juvenile court are less likely to become repeat offenders, decreasing the burden they impose on society. For example, it costs taxpayers between $1.7 and

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152 Juveniles in the adult criminal system face harsher sentences, little or no rehabilitation programming, a criminal record, a greater chance of death or victimization in adult jails and prisons, and a greater chance of becoming a repeat offender. *See* HARTNEY, *supra* note 20, at 1.

153 United States v. Bland, 472 F.2d 1329, 1349–50 (D.C. Cir. 1972) (Skelly Wright, J., dissenting).

154 *A Matter of Choice: Forks in the Road for Juvenile Justice*, ADVOC., Spring 2003, at 4, 8.

155 *Id.*

156 *See* Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1464 (2006). Of the fourteen states in the study, only Michigan exhibited a significant deterrent effect after its direct file law went into effect. *See id.*

$2.3 million annually for one child to leave school for a life of crime and drug abuse.[157]

Public opinion also supports rehabilitation through the juvenile justice system. A 2007 national survey of likely voters found that eighty-nine percent favor rehabilitation for juvenile offenders,[158] ninety-two percent think judicial waiver decisions should be based on a case-by-case analysis and not a blanket policy,[159] sixty-seven percent disapprove of imprisoning youths in adult facilities,[160] and seventy-two percent think the decision to try a person under age eighteen in the adult court should be made by a juvenile court judge as part of a formal hearing.[161] Those surveyed also expressed doubt that the current juvenile justice system is effective at reducing violent crimes.[162]

B. Proposed State Legislation

Public support for a juvenile system focused more on rehabilitation, together with the problems inherent in imposing adult punishment on vulnerable juveniles, requires a new approach to juvenile justice policy. This Note proposes that states adopt the following legislation to achieve that approach. The proposed legislation has two key parts. First, all forms of waiver would be eliminated, and the merits hearing would always take place under the jurisdiction of the juvenile court.[163] Then, only after the juvenile has been found delinquent, the judge would have the discretion to apply a juvenile or an adult sentence, or a combined sentence. This new model serves the rehabil-

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157 42 U.S.C. § 5601(a)(2) (Supp. IV 2000) (congressional findings while implementing the Juvenile Justice and Delinquency Prevention Act).

158 Krisberg & Marchionna, *supra* note 27, at 3.

159 *Id.* at 4.

160 *Id.* at 5.

161 *Id.* at 4.

162 Sixty-one percent of likely voters disagreed with the statement: "The juvenile justice system is effective in getting youth to stop committing violent crimes." *Id.* at 3.

163 A waiver hearing after adjudication of the merits was suggested in Note, *supra* note 121, at 318. That article proposed the solution only in the limited sense of solving the problem of the use of hearsay in preliminary juvenile hearings and was written prior to the holdings in *In re Winship*, 397 U.S. 358 (1970), and *Roper v. Simmons*, 543 U.S. 551 (2005). *See* Note, *supra* note 121, at 281. This suggestion was also made prior to the Supreme Court's case of *Breed v. Jones*, 421 U.S. 519 (1975), in which the Court held that double jeopardy applies to juvenile court proceedings, *see id.* at 531. Some authors have suggested that the holding in *Breed* means that the waiver decision must be made prior to an adjudication on the merits of the case. *See, e.g.*, Feld, *supra* note 116, at 480. Double jeopardy concerns are not implicated by the solution proposed in this Note, however, because the present model legislation proposes to eliminate waiver decisions altogether, and the adult versus juvenile decisions are only made in terms of sentencing.

itation needs of juvenile offenders because the judge still can recommend a juvenile sentence that includes treatment and rehabilitation. This model law also serves the needs of public safety because there is still a possibility for adult punishment and confinement where appropriate.

Model Juvenile Sentencing Act

To accomplish these goals, states should adopt the following model legislation, which has two key parts. First, states should repeal all waiver provisions and limit jurisdiction over all alleged offenders who are under the age of eighteen to only the juvenile court:

> Sec. 1: All petitions alleging delinquency of a child under the age of eighteen shall have their merits adjudicated in a juvenile court in front of a juvenile court judge. No juvenile delinquency petition will be transferred to the adult court for any reason.

Second, the states should allow judges to determine, based on factors listed in the appendix in *Kent*, whether the juvenile should be charged as a juvenile, as an adult, or as a juvenile with a suspended adult sentence:

> Sec. 2: (a) After adjudication of the merits and a finding that a child under the age of eighteen is delinquent, a juvenile court judge shall conduct a sentencing hearing. The juvenile court judge shall have jurisdiction to sentence the juvenile to any one of the following three sentences:
>
> (1) juvenile detention or probation up to the time the juvenile reaches the age of majority;
>
> (2) adult detention up to life without parole;
>
> (3) juvenile detention until the age of majority, with a suspended sentence to the adult detention center, which can be implemented at the juvenile court judge's discretion during a subsequent hearing held when the juvenile reaches the age of majority.
>
> (b) The juvenile court judge must issue a written analysis of all factors considered when determining how to sentence a delinquent juvenile. The judge will consider the following factors, although additional factors may be considered:
>
> (1) the seriousness of the offense;
>
> (2) protection of the community;
>
> (3) aggressive, violent, premeditated, or willful nature of the offense;
>
> (4) whether the offense was against a person;

> (5) sophistication and maturity of the juvenile, including mental culpability for the current offense; and,
> (6) amenability to rehabilitation and the likelihood that needed services are available to the individual juvenile.

The current waiver provisions in the states will still be useful for creating sentencing guidelines under this new legislation. When a juvenile court judge decides how to sentence a juvenile based on the seriousness of the offense, he or she should be limited based on the state's current waiver practice.[164] For example, if a crime under current state law can only be tried in juvenile court and only receive a juvenile punishment, the juvenile court judge should only have juvenile sentencing options available. In addition, if the state identifies certain crimes that require statutory, prosecutorial, or mandatory judicial waiver, the judge will have the option to enforce an adult sentence or a combined juvenile and adult sentence.[165] The actual length of the adult sentence imposed will be based on state-determined sentencing guidelines that could also be modeled after the current penalties in place for juveniles transferred to adult court.[166]

In addition to the legislation proposed above, states may consider other options for improving the balance between punishment and rehabilitation in the juvenile justice system. States may consider adopting a sentencing presumption in favor of juvenile rehabilitation that can only be overcome if the state shows that the juvenile is beyond rehabilitation or is a danger to the community. States may also consider conducting special training for juvenile court judges to implement both the concerns of public safety and juvenile rehabilitation.[167]

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164 This Note does not outline model legislation for this part of the solution because it would vary greatly from state to state based on how each state currently deals with different offenses.

165 The juvenile court still does not have the same procedural protection that exists in the adult court, but solving the procedural shortcomings of the juvenile court itself is beyond the scope of this Note. States may want to consider adding procedural protections to the juvenile court when implementing the legislation proposed in this Note, and may possibly even offer the full panoply of procedural protections offered in the adult court when a juvenile is accused of a crime that carries a potential adult sentence. Alternatively, juveniles may be allowed to choose to be tried in the adult court to benefit from the additional procedural protections or may otherwise be willing to waive certain protections to benefit from the rehabilitative possibility of the juvenile court.

166 States may choose to allow the judge to consider age as a mitigating factor against the adult sentencing guidelines.

167 One commentator suggests four policies that would improve the ability of juvenile court judges to implement blended sentences: having only juvenile-specializing judges on the bench, providing specific training for juvenile court judges, requiring judges to have both prosecution

The possibility of reduced crime, a reduced strain on taxpayer dollars, and public opinion in support of rehabilitation makes state legislation to keep juveniles under the jurisdiction of the juvenile court politically viable. This solution is also feasible in the current political environment because it retains the possibility for punitive and adult penalties for juveniles who are repeat offenders, a danger to the community, or not amenable to rehabilitation.

Conclusion

States should eliminate all forms of waiver of juvenile jurisdiction and enhance the sentencing options available to juvenile judges by enacting the model legislation proposed in this Note. The proposed approach would analyze on a case-by-case basis whether a juvenile needs rehabilitation or punishment. This solution would eliminate the current constitutional and procedural problems present in juvenile courts and would help the juvenile justice system take a step away from its recent shift in focus to punishment.

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and defense experience, and ensuring that judges are only appointed—as opposed to elected—to the juvenile court so they are free from public influence. *See* Hunt, *supra* note 86, at 674–77.

APPENDIX

Table 1: State Mechanisms for Juvenile Waiver and Types of Offenses that Qualify

State	States that Allow or Require Waiver for[168]:		States using[169]:				
	Drug Offenses	Property Offenses	Judicial Waiver	Judicial Waiver with a Presumption that Juveniles Should be Waived	Mandatory Judicial Waiver	Automatic Waiver	Prosecutorial Waiver
Alabama	X		X			X	
Alaska		X	X	X		X	
Arizona			X			X	X
Arkansas			X				X
California	X	X	X	X		X	X
Colorado		X	X	X			X
Connecticut					X		
Delaware	X	X	X		X	X	
District of Columbia		X	X	X			X
Florida	X	X	X			X	X
Georgia		X	X		X	X	X
Hawaii			X				
Idaho	X	X	X			X	
Illinois	X		X	X	X	X	
Indiana	X		X			X	
Iowa	X		X		X	X	
Kansas	X		X	X			
Kentucky			X		X		
Louisiana	X	X	X		X	X	X
Maine			X	X			
Maryland			X			X	
Massachusetts						X	
Michigan	X	X	X				X
Minnesota			X	X		X	

168 *See* GRIFFIN, *supra* note 84, at 5–8.

169 *See* SNYDER & SICKMUND, *supra* note 25, at 111.

Mississippi			X			X	
Missouri			X				
Montana	X	X				X	X
Nebraska							X
Nevada			X	X		X	
New Hampshire	X		X	X			
New Jersey	X	X	X	X	X		
New Mexico						X	
New York		X				X	
North Carolina			X		X		
North Dakota	X		X	X	X		
Ohio		X	X		X		
Oklahoma	X	X	X			X	X
Oregon		X	X			X	
Pennsylvania			X	X		X	
Rhode Island			X	X	X		
South Carolina	X		X		X	X	
South Dakota			X			X	
Tennessee			X				
Texas	X		X				
Utah		X	X	X		X	
Vermont		X	X			X	X
Virginia			X		X		X
Washington		X	X			X	
West Virginia	X	X	X		X		
Wisconsin	X	X	X			X	
Wyoming		X	X				X
Total:	*20*	*22*	*45*	*15*	*15*	*29*	*15*

Table 2: State Variations of Juvenile Waiver Policy

State	States with "Once an Adult, Always an Adult" Provisions[170]	States with no Minimum Age for Waivers[171]	States with Blended Sentencing Policies[172]:			
			When a Case Originates in the Juvenile Court	When a Case Originates in the Criminal Court	Using an Exclusive Model	Using an Inclusive Model
Alabama	X					
Alaska		X	X	X		
Arizona	X	X				
Arkansas			X	X		X
California	X				X	
Colorado			X	X	X	
Connecticut			X	X		
Delaware	X	X				
District of Columbia	X	X				
Florida	X	X				X
Georgia		X				
Hawaii	X	X				
Idaho	X	X				X
Illinois	X		X	X	X	
Indiana	X	X				
Iowa	X					X
Kansas	X		X	X		
Kentucky					X	
Louisiana						
Maine	X	X				
Maryland	X	X				
Massachusetts			X	X	X	
Michigan	X		X	X		X
Minnesota	X		X	X		
Mississippi	X					

170 *See id.*

171 *See id.* at 112–13.

172 *See id.* at 111, 116.

Missouri	X					X
Montana			X	X		
Nebraska		X			X	
Nevada	X	X				
New Hampshire	X					
New Jersey						
New Mexico			X	X	X	
New York						
North Carolina	X					
North Dakota	X					
Ohio	X		X	X		
Oklahoma	X	X			X	
Oregon	X	X				
Pennsylvania	X	X				
Rhode Island	X	X	X	X		
South Carolina		X				
South Dakota	X	X				
Tennessee	X	X				
Texas	X		X	X		
Utah	X					
Vermont			X	X		
Virginia	X					X
Washington	X	X				
West Virginia		X			X	
Wisconsin	X	X			X	
Wyoming						
Total:	*34*	*23*	*15*	*15*	*10*	*7*