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RIGHTS OF PASSAGE: AN ANALYSIS OF WAIVER OF JUVENILE COURT JURISDICTION

*Stacey Sabo**

INTRODUCTION

A thirteen-year-old Arizona girl is accused of killing the one-year-old boy for whom she babysat.[1] The girl claims that the child fell and struck his head on a drawer corner and then on the tiled floor.[2] The prosecution claims that she murdered him, arguing that the child's injuries are inconsistent with the girl's story.[3] An eleven-member probation team unanimously recommends that the girl be adjudicated in juvenile court, but the prosecution wants her to be tried as an adult in criminal court.[4] At a hearing, the juvenile court judge considers the testimony of psychologists and the girl's family members and friends in determining whether to transfer the girl to criminal court.[5]

The above scenario illustrates judicial waiver, the mechanism by which a juvenile court judge may transfer a juvenile offender to criminal court jurisdiction.[6] Upon the motion of the prosecutor or the juvenile, or on her own initiative, the judge conducts a waiver hearing to make this determination.[7] During the hearing, both sides present evidence regarding a juvenile's personal circumstances and prior offenses, if any.[8] The judge uses this information to weigh the juvenile's

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1. David Fritze, *Baby Sitter Accused in Death Gets Tributes*, Ariz. Republic, June 23, 1995, at B1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 281, 284 (1991); Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 St. Louis U. L.J. 629, 632 (1994).

7. *See, e.g.*, Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995) (stating that "[u]pon the motion of the court or of any party, the judge . . . shall conduct a hearing to determine whether to retain jurisdiction"); La. Child. Code Ann. art. 857(A) (West 1995) (providing that "[t]he court on its own motion or on motion of the district attorney may conduct a hearing to consider whether to transfer a child for prosecution to the appropriate court exercising criminal jurisdiction").

8. *See, e.g.*, Ala. Code § 12-15-34(d)-(e) (1995) (requiring a written report from probation services regarding the juvenile's offense, prior record, prior treatment, demeanor, maturity, and whether the juvenile's and the community's best interests require "legal restraint or discipline" for the juvenile); Ark. Code Ann. § 9-27-318(e) (Michie 1993 & Supp. 1995) (requiring the judge to consider evidence of the seriousness of the offense, the juvenile's history of response to treatment, "[t]he prior his-

potential amenability to rehabilitative treatment in juvenile court against the danger she may pose to the community.[9] If the judge finds after the hearing that the juvenile is unsuited for treatment in the juvenile justice system, she may waive juvenile court jurisdiction and transfer the case to criminal court.[10]

Waiver discretion, however, is not vested solely in judges; some states grant prosecutors that authority through prosecutorial waiver.[11] Prosecutorial waiver is a statutory mechanism that provides a prosecutor with exclusive discretion to choose the forum in which a juvenile will be tried.[12] When the prosecutor's charge subjects the juvenile, by virtue of her age and offense, to the concurrent jurisdiction of the juvenile and criminal courts, the prosecutor is then free to choose the court system in which to file the case.[13] Unlike a judge, however, the prosecutor does not hold a waiver hearing or give a written account of her decision. Moreover, while prosecutorial decisions are subject to review, the deference traditionally afforded those decisions makes reversal unlikely.[14] Thus, the prosecutor makes the "critically important"[15] waiver decision outside of the adversarial process, in the

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tory, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation").

9. *See, e.g.*, Colo. Rev. Stat. § 19-2-806(1)(a) (Supp. 1995) (mandating a finding that "it would be contrary to the best interests of the juvenile or of the public to retain [juvenile court] jurisdiction"); Or. Rev. Stat. Ann. § 419C.349(4) (1995) (mandating a finding "by a preponderance of the evidence that retaining jurisdiction will not serve the best interests of the child and of society").

10. *See supra* note 9.

11. Ark. Code Ann. § 9-27-318(b) (Michie 1993 & Supp. 1995) (providing concurrent juvenile and criminal court jurisdiction over certain juveniles); Colo. Rev. Stat. § 19-2-805(1) (Supp. 1995) (same); D.C. Code Ann. § 16-2301(3)(A) (1989 & Supp. 1995) (same); Fla. Stat. Ann. § 39.052(3)(a)(4)(a), (3)(a)(5)(a)-(b)(I) (West Supp. 1996) (same); Ga. Code Ann. § 15-11-5(b)(1) (1994) (same); La. Child. Code Ann. art. 305(B)(3) (West 1995) (same); Mich. Comp. Laws Ann. § 600.606 (West Supp. 1995) (same); Neb. Rev. Stat. § 43-247 (1993) (same); Vt. Stat. Ann. tit. 33, § 5505(c) (1991) (same); Wyo. Stat. Ann. § 14-6-203(c), (e)-(f) (1986 & Supp. 1995) (same).

12. *See* Bishop & Frazier, *supra* note 6, at 284-85; McCarthy, *supra* note 6, at 656. This procedure is also known as "direct file." Bishop & Frazier, *supra* note 6, at 284; Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harv. C.R.-C.L. L. Rev. 507, 521 (1995).

13. *See* Bishop & Frazier, *supra* note 6, at 284-85; McCarthy, *supra* note 6, at 632.

14. Frank W. Miller, Prosecution: The Decision to Charge a Suspect With a Crime 158 (1970); *see infra* note 165 and accompanying text.

15. Kent v. United States, 383 U.S. 541, 558 (1966).

privacy of her office, restricted only by the most basic principles of professional ethics[16] and the requirement of probable cause.[17]

A third mechanism called legislative waiver also can channel juvenile defendants into criminal court. Thirty-seven states and the District of Columbia provide for legislative waiver, which permits the initiation in criminal court of cases involving juveniles.[18] Legislative waiver statutorily excludes a juvenile from juvenile court jurisdiction[19]

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16. ABA Standards for Criminal Justice: Prosecution Function Standards Rule 3-1.2(b) (1993) [hereinafter ABA Standards] (stating that "the prosecutor must exercise sound discretion in the performance of his or her functions").

The ABA adopted this third edition of the ABA Standards in 1992. *Id.* at xii. The Criminal Justice Standards Committee of the ABA initiated the revision of the ABA's second edition in 1988. *Id.* at xi. Members of all areas of the criminal justice system wrote and revised the final working draft of the ABA Standards, which was approved by the ABA House of Delegates in 1992. *Id.* at xii. The ABA Standards are meant to represent the consensus of the criminal justice community "about what good, professional practice is and should be" and to serve as "extremely useful standards for consultation by lawyers and judges who want to do 'the right thing' or, as important, to avoid doing 'the wrong thing.' " *Id.* at xiv.

17. *Id.* at 3-3.9(a) (stating that "[a] prosecutor should not institute . . . criminal charges when the prosecutor knows that the charges are not supported by probable cause").

18. Ala. Code § 12-15-34.1(a)-(b) (1995); Alaska Stat. § 47.10.010(e) (1995); Conn. Gen. Stat. Ann. § 46b-127(a) (West 1995); Del. Code Ann. tit. 10, §§ 921(2)(a) (1975 & Supp. 1994), 1010(a) (Supp. 1994); D.C. Code Ann. § 16-2307(h) (1989); Fla. Stat. Ann. § 39.052(3)(a)(1), (3)(a)(3), (3)(a)(4)(d), (3)(a)(5)(b)(II), (3)(a)(5)(c)-(d) (West Supp. 1996); Ga. Code Ann. § 15-11-5(b)(2)(A) (1994); Haw. Rev. Stat. § 571-22(c)-(d) (1993); Idaho Code § 20-509(1)-(2) (Supp. 1995); Ill. Ann. Stat. ch. 705, para. 405/5-4(3.1)-(3.2), (6)(a), (7)(a), (8)(a) (Smith-Hurd 1992 & Supp. 1995); Ind. Code Ann. § 31-6-2-1.1(b), (d) (Burns Supp. 1995); Iowa Code Ann. § 232.8(1)(b) (West 1994); Kan. Stat. Ann. §§ 21-3611(a), (c) (1995), 38-1636(h) (1993); Ky. Rev. Stat. Ann. § 635.020(4) (Michie/Bobbs-Merrill Supp. 1994); La. Child. Code Ann. art. 305(A) (West 1995); Me. Rev. Stat. Ann. tit. 15, § 3101(4)(G) (West 1980); Md. Code Ann., Cts. & Jud. Proc. § 3-804(e)(1)-(4) (1995 & Supp. 1995); Minn. Stat. Ann. §§ 260.015(5)(b), 260.125(3)(a) (West Supp. 1996); Miss. Code Ann. §§ 43-21-151(1)(a)-(b), (2) (1993 & Supp. 1995), 43-21-157(9) (Supp. 1995); Mo. Ann. Stat. § 211.071(9) (Vernon Supp. 1996); Mont. Code Ann. § 41-5-206(3) (1995); Nev. Rev. Stat. Ann. §§ 62.040(1)(b)(1), 62.080(3) (Michie 1986 & Supp. 1995); N.H. Rev. Stat. Ann. § 169-B:27 (1994); N.M. Stat. Ann. § 32A-2-3(H) (Michie 1995); N.Y. Penal Law § 30.00(2) (McKinney 1987); N.C. Gen. Stat. § 7A-608 (1995); Ohio Rev. Code Ann. §§ 2151.011(B)(1), 2151.26(B) (Anderson Supp. 1995); Okla. Stat. Ann. tit. 10, §§ 7001-1.3(2), 7306-1.1(A)-(B) (West Supp. 1996); 42 Pa. Cons. Stat. Ann. §§ 6322(a) (1982 & Supp. 1995), 6355(e) (1982); R.I. Gen. Laws §§ 14-1-3(1), -7.1(c) (1994 & Supp. 1995); S.C. Code Ann. § 20-7-390 (1985 & Law. Co-op. Supp. 1995); Tenn. Code Ann. § 37-1-134(c) (Supp. 1995); Utah Code Ann. §§ 78-3a-16(1), 78-3a-25(12) (Supp. 1995); Vt. Stat. Ann. tit. 33, § 5505(b) (1991); Va. Code Ann. § 16.1-269.6(C) (Michie Supp. 1995); Wash. Rev. Code Ann. §§ 13.04.030(1)(e)(iv), 13.40.020(14) (West Supp. 1996); Wis. Stat. Ann. § 48.183 (West Supp. 1995); *see* Or. Rev. Stat. Ann. § 419C.364 (1995) (permitting the criminal court judge, in a case involving a waived juvenile aged 16 or older, to order that all further proceedings involving the juvenile will be waived to criminal court without any juvenile court proceedings).

19. Bishop & Frazier, *supra* note 6, at 284; Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 488 (1987).

by virtue of her offense or by a combination of her age and offense.[20] For instance, a fourteen-year-old girl charged with murder is automatically outside juvenile court jurisdiction in Connecticut; her case can only be filed in criminal court.[21] Because the "waiver" is automatic—the juvenile is subject to criminal court jurisdiction from the moment she is charged—no hearing takes place to determine whether the interests of the juvenile and of society will best be served by criminal prosecution. Legislative waiver systematically places these juveniles in criminal court, regardless of circumstances that might indicate that some juveniles would be amenable to the rehabilitative treatment available in the juvenile justice system.

This Note analyzes the various waiver mechanisms and contends that judicial waiver is the only method that should be used to determine when a juvenile should be tried as an adult. Part I discusses the juvenile justice system and its philosophical underpinnings. This part demonstrates society's dedication to juveniles as manifested both by the very existence of a separate system for juvenile adjudication and by the Supreme Court's expressed concern for procedural fairness in cases involving juveniles. Part II defines judicial, prosecutorial, and legislative waiver and explains how each accomplishes the waiver of juvenile court jurisdiction in favor of criminal court jurisdiction. This part also briefly discusses reverse waiver, a method of returning a juvenile to juvenile court jurisdiction. Part III argues that, in light of the necessity of affording a juvenile a full hearing before removing her from the juvenile justice system and its attendant protections, judicial waiver is preferable over prosecutorial or legislative waiver. Finally, this Note concludes that the importance of procedural fairness for juveniles necessitates that only judicial waiver be used to waive juvenile court jurisdiction.

I. THE JUVENILE JUSTICE SYSTEM FROM 1899 TO 1996

This part chronicles the history of the juvenile justice system, beginning with the doctrine of *parens patriae*, under which the state acts in place of a juvenile offender's parents to rehabilitate her and provide her with individualized treatment aimed at her best interests. Next, this part addresses the system's ideological shift away from the procedurally informal aspects of the *parens patriae* doctrine to an emphasis on greater procedural protections for juveniles, tracing this shift through the landmark Supreme Court cases *Kent v. United States*[22] and *In re Gault*.[23] Finally, this part explores the public's criticism of

20. Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 Idaho L. Rev. 173, 181-82 (1994); Guttman, *supra* note 12, at 521.

21. Conn. Gen. Stat. Ann. § 46b-127(a) (West 1995).

22. 383 U.S. 541 (1966).

23. 387 U.S. 1 (1967).

the juvenile justice system over the past three decades for its inability to deal with increasingly violent juveniles.

A. *The Creation of the Juvenile Justice System in the United States*

The juvenile justice system in the United States has its roots in the medieval English doctrine of *parens patriae*.[24] The doctrine reasoned that "the king of England (or his agents, representatives or chancellors) was figuratively the father of the country[;] as such, he assumed almost absolute responsibility for all juvenile affairs."[25] England's common law presumed that juveniles under the age of seven were incapable of criminal intent, regardless of the seriousness of their offenses, and therefore exempted them from prosecution.[26] The law could hold juveniles between the ages of eight and fourteen responsible for criminal acts upon a showing that they understood the "nature and consequences" of those acts.[27] Juveniles over the age of fourteen were fully subject to the criminal law.[28] Under *parens patriae*, all "decisions [made by the king's chancellors] were independent of the jurisdiction of English criminal courts."[29] This jurisdictional split likely stemmed from the "minor mischievous" nature of the conduct that brought the juveniles before the chancellors; the juveniles' behavior was not necessarily criminal but rather consisted of "incorrigibility, unmanageability, running away, loitering, trespassing, [or] poaching."[30] When a juvenile committed a more serious crime, however, she could face adult trial and sentencing and could even receive the death penalty.[31]

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24. Dean J. Champion & G. Larry Mays, Transferring Juveniles to Criminal Courts: Trends and Implications for Criminal Justice 5 (1991); Royce S. Buckingham, *The Erosion of Juvenile Court Judge Discretion in the Transfer Decision Nationwide and in Oregon*, 29 Willamette L. Rev. 689, 691-92 (1993).

25. Champion & Mays, *supra* note 24, at 5.

26. *Id.* at 6; Margaret O. Hyde, Juvenile Justice and Injustice 9 (1983); Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: A National Report 70 (1995) [hereinafter Juvenile Offenders and Victims]; H. Ted Rubin, Juvenile Justice: Policy, Practice, and Law 35 (1979).

27. Hyde, *supra* note 26, at 9; Thomas A. Johnson, Introduction to the Juvenile Justice System 1 (1975); Rubin, *supra* note 26, at 35; *see* Champion & Mays, *supra* note 24, at 5-6.

28. Hyde, *supra* note 26, at 9; Johnson, *supra* note 27, at 1; Rubin, *supra* note 26, at 35.

29. Champion & Mays, *supra* note 24, at 5.

30. *See id.* at 6.

31. Hyde, *supra* note 26, at 9. In a variety of English cases occurring in the late 1600s and mid-1700s involving ten-year-old juveniles, one boy was sentenced to whipping for theft, another sentenced to death for mutilating and killing another child (although he was later pardoned by the king in return for sea service), a third hanged for burning a child in its cradle, and a fourth hanged for killing his companions. Another juvenile had her hand burned for committing theft. *Id.* at 8-11.

The first United States juvenile court was founded in Illinois in 1899,[32] and by 1945, every state had its own juvenile justice system.[33] The individual state juvenile justice systems reflected England's protective sentiment toward juvenile offenders:

> The doctrine [of *parens patriae*] was interpreted as the inherent power and responsibility of the State to provide protection for children whose natural parents were not providing appropriate care or supervision because children were not of full legal capacity. A key element was the focus on the welfare of the child. Thus, the delinquent child was also seen as in need of the court's benevolent intervention.[34]

Thus, when a juvenile court judge assessed a juvenile offender, her job was to determine the juvenile's individual situation.[35] The judge centered her analysis on the juvenile's identity and condition rather than her offense in order to determine "what had best be done in [her] interest and in the interest of the state to save [her] from a downward career."[36] The goal, then, was the rehabilitation of youthful offenders through individualized justice,[37] and the focus was on the juvenile's best interests rather than her offense.

Three fundamental beliefs, all centered around a core ideal of individualized treatment, anchored the philosophy of juvenile justice.[38] First, juvenile offenders were regarded as inherently less guilty than adult offenders and, therefore, more malleable.[39] Second, the view that these juveniles were less guilty and more "amenable to change"

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32. Champion & Mays, *supra* note 24, at 6; Johnson, *supra* note 27, at 3.

33. Champion & Mays, *supra* note 24, at 6; Hyde, *supra* note 26, at 21.

34. Juvenile Offenders and Victims, *supra* note 26, at 70; *see* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 323, 325 (1991).

35. *See* Forst & Blomquist, *supra* note 34, at 325.

36. Rubin, *supra* note 26, at 36-37 (quoting Judge Julian M. Mack of Cook County Juvenile Court, Chicago, IL, in 1909).

37. Juvenile Offenders and Victims, *supra* note 26, at 71; *see, e.g.*, Buckingham, *supra* note 24, at 691-92 (stating that the juvenile justice system had a "mission of individualized treatment"); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 709 (1991) (stating that the original purpose of the juvenile justice system emphasized "rehabilitation and the child's 'best interests' "); Forst & Blomquist, *supra* note 34, at 324-27 (stating that the juvenile justice system "has rested on a philosophy of rehabilitation and individualized justice").

38. One author has broken down the juvenile justice system's philosophy into five elements, namely: (1) the superior rights of the state; (2) the individualization of justice; (3) the status of delinquency (which protects children from the stigma of the criminal label); (4) an informal, noncriminal procedure; and (5) a rehabilitative and protective rather than punishment-oriented approach. Johnson, *supra* note 27, at 11-12 & n.27 (citing Robert G. Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, *in* Juvenile Delinquency: A Book of Readings 362-63 (Rose Giallombardo ed., 1966)).

39. *See* Bishop & Frazier, *supra* note 6, at 281. This belief in the lesser culpability of juvenile offenders likely stems from the post-sixteenth-century recognition of a fundamental difference between adults and children. *See* Juvenile Offenders and Victims, *supra* note 26, at 70.

led to a conclusion that they should be treated differently for their crimes.[40] This belief established the goal of the juvenile court as rehabilitation rather than punishment.[41] Third, the system intended "to protect children from the stigmatizing label of 'criminal' and from the contamination of incarceration with hardened adult offenders."[42]

Thus, the juvenile justice system provided alternatives to the harsher penalties meted out by criminal courts and offered a way to rehabilitate wayward youths without marking them as criminals. A child adjudicated in juvenile court "was deemed not legally capable of committing a crime [and instead regarded as] in need of counsel, education and help."[43] The state's goal was to rehabilitate the juvenile on an individual basis and send her back into the general population without the stigma of a criminal conviction,[44] a solution in the best interests of both the child and society.

In keeping with the paternalistic and nonadversarial nature of juvenile justice, juvenile court hearings were "much less formal than criminal court proceedings."[45] The juvenile court's stated mission was to help and protect children, not to punish them; thus, the procedural protections provided to criminal defendants were presumed "unnecessary"[46] because states were acting in the best interests of the child.[47] Thus, at the time of its origin, the juvenile justice system provided a relatively informal setting for the adjudication of juvenile offenders. Focusing on individualized treatment, the juvenile court judge strove to rehabilitate, not penalize, the juvenile.

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40. Bishop & Frazier, *supra* note 6, at 281.

41. *Id.* at 281 (stating that "rehabilitative treatment and protective supervision traditionally have been the preferred responses to juvenile misbehavior"); Hyde, *supra* note 26, at 21 ("[I]n Cook County, Chicago, Illinois, the child *who had offended the law ceased to be a criminal* and had the status of a child who needed care, protection, and discipline. . . . [O]ffenders became wards of the state and the emphasis was on treatment rather than on punishment.").

42. Patricia M. Wald, *Introduction to the Juvenile Justice Process: The Rights of Children and the Rites of Passage, in* Child Psychiatry and the Law 9, 9 (Diane H. Schetky & Elissa P. Benedek eds., 1980). *But see* Hyde, *supra* note 26, at 3, 22, 28-29 (suggesting that juveniles placed in training homes or otherwise incarcerated are likely to become hardened delinquents after fraternizing with the other residents).

43. Wald, *supra* note 42, at 9.

44. *See id.*

45. Juvenile Offenders and Victims, *supra* note 26, at 70.

46. *Id.*; Allison Boyce, Note, *Choosing the Forum: Prosecutorial Discretion and* Walker v. State, 46 Ark. L. Rev. 985, 987 (1994).

47. Juvenile Offenders and Victims, *supra* note 26, at 70-71. *But see In re* Gault, 387 U.S. 1 (1967) (holding that juveniles facing incarceration had the right in adjudicatory hearings to notice, to counsel, to confrontation of their accusers, and to protection against self-incrimination).

B. *"Emerging from Legal Limbo":*[48] *Procedural Protections for Juveniles*

The juvenile justice system came under scrutiny from children's rights advocates as well as from those who decried what they perceived to be its undue leniency.[49] The apparent arbitrariness of some juvenile proceedings generated concern over procedural fairness in juvenile court.[50] Two landmark Supreme Court cases, *Kent v. United States*[51] and *In re Gault*,[52] fundamentally changed the juvenile justice system, creating a more formal setting for juvenile adjudications.

Kent v. United States,[53] decided in 1966, accorded procedural protections to juveniles in judicial waiver hearings. Morris Kent was a sixteen-year-old male charged with several counts of rape and robbery.[54] Despite a motion for a waiver hearing by Kent's attorney, a District of Columbia juvenile court judge waived Kent to criminal court without such a hearing, without a description of the "full investigation" upon which the judge claimed to base his decision, and without discussion of the grounds for waiver.[55] Kent argued that the waiver was invalid and sought to have the criminal indictment dismissed.[56] He pursued his appeal to the Supreme Court, arguing that the judge had not made a full investigation before waiving him to criminal court.[57]

The Supreme Court agreed, finding that while the judicial waiver statute endowed a judge with "a substantial degree of discretion" in determining whether to waive jurisdiction, it did not grant "a license for arbitrary procedure" or permit the judge "to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections" of juvenile court.[58] Declaring that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective

48. *Living with* Gault, Time, Aug. 4, 1967, at 68, 68 [hereinafter *Living with* Gault].

49. *See infra* part I.C.

50. *See, e.g.*, Boyce, *supra* note 46, at 987 (stating that "advocates of the juvenile system attacked the lack of procedures in juvenile proceedings"); *Crisis in Juvenile Courts*, U.S. News & World Rep., Mar. 24, 1969, at 62, 63 [hereinafter *Crisis*] (noting that prior to the Supreme Court's holding in *In re* Gault, 387 U.S. 1 (1967), some juvenile court judges "were sending children away—for their 'own good'—to institutions for longer terms than would have been imposed on adults committing the same offense . . . often . . . on the basis of hearsay evidence" (quoting Chief Judge Florence M. Kelley of the New York State Family Court)).

51. 383 U.S. 541 (1966).

52. 387 U.S. 1 (1967).

53. 383 U.S. 541 (1966).

54. *See id.* at 543-44.

55. *Id.* at 545-46.

56. *Id.* at 548.

57. *See id.* at 552.

58. *Id.* at 553.

assistance of counsel, without a statement of reasons,"[59] the Court held that a juvenile was entitled to a hearing before being judicially waived to criminal court as well as to a statement of the court's reasons for its decision, including access to documents used by the court in reaching its determination.[60] The Court grounded its conclusion in part on "society's special concern for children,"[61] manifested by the juvenile court's very existence. In further asserting that "the admonition to function in a 'parental' relationship [under the doctrine of *parens patriae*] is not an invitation to procedural arbitrariness,"[62] the *Kent* Court set the stage for *In re Gault*.[63]

The following year, the Supreme Court decided the case of fifteen-year-old Gerald Gault. Gault and a friend made a crank phone call to Gault's neighbor,[64] who had the boys arrested but did not herself attend their adjudication hearing.[65] The juvenile court never determined whether Gault or his friend had made the "obscene" remarks,[66] but nonetheless committed Gault to a training school until he turned twenty-one.[67] Alleging several denials of his constitutional rights, Gault eventually appealed to the Supreme Court.[68] Appalled by the conclusory proceedings below, the Court declared that "the condition of being a boy does not justify a kangaroo court"[69] and held that a juvenile had a right in juvenile proceedings to notice of the pending charges,[70] to counsel,[71] to confrontation and cross-examination of witnesses,[72] and to protection against self-incrimination.[73]

The Court emphasized the need for procedural fairness in juvenile proceedings, stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[74] The Court rejected the juvenile

59. *Id.* at 554.

60. *Id.* at 561-63. In the *Kent* Appendix, the Supreme Court enumerated eight "determinative factors" for the judge's consideration in making the waiver decision. *Id.* at 565-67. These factors include: the seriousness and violence of the offense; whether it was committed against person or property; whether probable cause exists; the desirability of trying the entire case in one court (when some of the defendants are adults and thereby outside juvenile court jurisdiction); the juvenile's personal circumstances; her prior record, if any; public safety; and juvenile's likelihood of rehabilitation. *Id.* at 566-67.

61. *Id.* at 554.

62. *Id.* at 555.

63. 387 U.S. 1 (1967).

64. *Id.* at 4.

65. *Id.* at 5.

66. *Id.* at 7.

67. *Id.* at 7-8. Had an adult committed the offense, she would have been subject to a maximum sentence of only two months in jail or a $50 fine. *Id.* at 8-9.

68. *See id.* at 10-11, 13-14.

69. *Id.* at 28.

70. *Id.* at 33-34.

71. *Id.* at 36.

72. *Id.* at 56.

73. *Id.* at 55.

74. *Id.* at 13.

court's practice of acting without procedural safeguards under the *parens patriae* rationale that "a child, unlike an adult, has a right 'not to liberty but to custody,' "[75] but endorsed the *parens patriae* philosophy of individualized treatment and rehabilitation, asserting that "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[76]

After *Gault*, the Supreme Court continued to monitor the status of juvenile rights. In *In re Winship*,[77] the Court held that the state must prove its case beyond a reasonable doubt in delinquency adjudications.[78] In *Breed v. Jones*,[79] the Court determined that adjudication for the same offense in both juvenile and criminal court violated the Double Jeopardy Clause.[80]

The procedural changes mandated by the Supreme Court in *Kent*, *Gault*, *Winship*, and *Breed* provided to juveniles the best of both worlds by giving them adult procedural protections in the rehabilitative juvenile court.[81] As a result of these decisions, juvenile court lost some of its informality, yet still shielded juveniles with adult-like procedural protections while retaining its individualized, rehabilitative focus.

C. *Public Criticism Pushes the Juvenile Justice System into a New Era*

The vision of "a nonpunitive setting in which a wayward child and [her] parents could discuss their problem, be counseled by a wise patriarchical juvenile judge, and go away redeemed, not to sin again"[82] eventually came into conflict with the realities of prevailing public sentiment and juvenile conduct. In the 1950s and 1960s, the public's confidence in juvenile court's ability to rehabilitate delinquent

75. *Id.* at 17.
76. *Id.* at 21.
77. 397 U.S. 358 (1970).
78. *Id.* at 368.
79. 421 U.S. 519 (1975).
80. *Id.* at 541.
81. *See* Kent v. United States, 383 U.S. 541, 556 (1966) (observing that in juvenile court, "there may be 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"); *Living with* Gault, *supra* note 48, at 68 ("By incorporation of constitutional safeguards [in the] system, individualized justice can become a reality." (quoting Denver, CO, juvenile court Judge Ted Rubin)).
82. Wald, *supra* note 42, at 9.

juveniles began to wane.[83] Juvenile crime seemed rampant,[84] and "[d]awning everywhere [was] the realization that juvenile courts as created by the social reformers . . . [were] not living up to their blueprints."[85] Since the 1970s, further increases in juvenile crime and arrests[86] have led to even greater dissatisfaction with the juvenile court system.[87] Critics have attacked the system for its leniency in meting out punishment[88] and have lobbied for harsher treatment of juvenile offenders.[89] Many states have responded to these demands

83. Juvenile Offenders and Victims, *supra* note 26, at 71; *see also* Hercules Al Cavalier, *Juvenile Courts and Delinquents*, Catholic World, May 1955, at 110, 111 (positing that "[n]ot only is common sense and parental experience disregarded in Juvenile Court proceedings, but the constitutional rights of the youthful offenders and the safeguards of due process of law are ignored"); *Youth Crime—Some Suggested Treatments*, U.S. News & World Rep., Nov. 15, 1965, at 46, 46 (criticizing "the cloak of secrecy wrapped around . . . youthful criminals by the protection of the juvenile philosophy").

84. *See, e.g.*, *An Even Bigger Crime Explosion?*, U.S. News & World Rep., Oct. 7, 1968, at 16, 16 ("Is rampant crime . . . only the prelude to an even bigger explosion, as last year's 1 million or more U.S. delinquents move into adulthood in years ahead?"); *Crisis*, *supra* note 50, at 62 ("Across the nation, juvenile justice is moving into its biggest overhaul since the turn of the century."); *The Explosion in Teen-Age Crimes*, U.S. News & World Rep., Oct. 9, 1967, at 74, 74 ("Deep worry is developing . . . over juvenile delinquency that seems to be getting out of hand across the United States.").

85. *Crisis*, *supra* note 50, at 62.

86. Commentators debate whether crime rates have actually increased or whether the police are simply making more arrests. *Compare* McCarthy, *supra* note 6, at 636 (asserting that "by almost any measure, juvenile crime has been on the increase during the past decade [1984-1994]") *with* Guttman, *supra* note 12, at 508 (positing that "research does not support the notion that juveniles are committing more violent crimes today nor that they commit a larger proportion of crime [than do adults]"). John Wilson, acting administrator of the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, maintains that the proportion of juveniles committing violent crimes has remained constant since 1965, with juveniles committing "one out of every eight violent crimes," and that "less than half of one percent of all 10-17 year-olds in the United States were arrested for a violent offense." *Treatment of Juveniles in the Criminal Justice System: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 9-14 (1994) [hereinafter *Hearings*] (statement of John J. Wilson).

87. Bishop & Frazier, *supra* note 6, at 282; Guttman, *supra* note 12, at 515 (footnotes omitted); *Coming: Tougher Approach to Juvenile Violence*, U.S. News & World Rep., June 7, 1976, at 65, 65 (criticizing the juvenile courts for "neither punish[ing] juvenile criminals nor reform[ing] or help[ing] them") [hereinafter *Tougher Approach*]; *Upsurge in Violent Crime by Youngsters*, U.S. News & World Rep., July 17, 1978, at 55, 55 (declaring that "[v]ast reforms are urgently needed in the juvenile-justice system in order to deal with an alarming spiral of violent crimes committed by teen-agers").

88. *See, e.g.*, Bishop & Frazier, *supra* note 6, at 282 (noting that "[d]ramatic increases in juvenile crime in the 1970s" created public clamor "for the adoption of punishment-oriented policies and practices" (footnotes omitted)); Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 Notre Dame J.L. Ethics & Pub. Pol'y 397, 398 (1991) (proposing a "rehabilitated juvenile court" that would "administer[ ] real justice in its traditional retributive" sense); *Tougher Approach*, *supra* note 87, at 65 (censuring the juvenile courts for not punishing juvenile offenders).

89. Guttman, *supra* note 12, at 515 (footnotes omitted); *see, e.g.*, *Tougher Approach*, *supra* note 87, at 65 (relating that under proposed juvenile court reforms,

by proposing[90] or promulgating[91] new laws which facilitate the waiver of juvenile court jurisdiction and allow more juveniles to be tried in criminal court.

II. WAIVER OF JUVENILE COURT JURISDICTION

This part explains the three basic waiver mechanisms—judicial, prosecutorial, and legislative—and how each establishes criminal court jurisdiction over a juvenile offender. This part first examines judicial waiver, prosecutorial waiver, and legislative waiver, and the circumstances under which each mechanism operates. Next, the part briefly analyzes reverse waiver, a statutory waiver mechanism that transfers to juvenile court a juvenile whose case was originally waived to criminal court.

A. *Judicial Waiver*

Judicial waiver permits a juvenile court judge to waive juvenile court jurisdiction when, after a hearing, the judge determines that sufficient evidence supports the conclusion that the juvenile committed the charged offense and that the juvenile would not be amenable to juvenile court treatment. Forty-seven states and the District of Columbia have judicial waiver statutes.[92] Cases involving younger

"[c]ourts would deal more harshly with violent juvenile criminals"); *Crisis*, *supra* note 50, at 62 (noting that "[a]cross the nation . . . [t]here are growing signs of a sterner philosophy than has prevailed in the past when it comes to dealing with youthful troublemakers").

90. *See, e.g.*, J.W. Brown, *Juvenile Justice Overhaul; Prosecutor to Say If Adult Trial Needed*, Ariz. Republic, Nov. 15, 1995, at A1 (detailing the Romley/Foreman juvenile justice proposal, including a provision for prosecutorial waiver allowing prosecutors "to decide whether young defendants will be tried as adults"); Laurence Hammack, *Poll at Odds with Allen Panel's Stance on 'Young Thugs'*, Roanoke Times, Oct. 14, 1995, at C1 (stating that Virginia's Governor Allen planned a juvenile court reform which would allow prosecutors "to seek adult trials for juveniles younger than fourteen"); Doris Sue Wong, *Many Agree Serious Juvenile Cases Require Court Changes*, Boston Globe, Sept. 12, 1995, at 18 (explaining plans by Massachusetts Attorney General Scott Harshbarger and Governor Weld to eliminate transfer hearings altogether).

91. Since 1978, Alabama, Arkansas, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin have passed laws enlarging the pool of juveniles who may be sent to criminal court. United States General Accounting Office, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 19 & n.16 (1995) [hereinafter GAO Report].

92. Ala. Code § 12-15-34 (1995); Alaska Stat. § 47.10.060 (1995); Ariz. R. Juv. P. 12, 14 (Supp. 1995); Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995); Cal. Welf. & Inst. Code § 707 (West 1984 & Supp. 1996); Colo. Rev. Stat. § 19-2-806 (Supp. 1995); Conn. Gen. Stat. Ann. § 46b-127(b) (West 1995); Del. Code Ann. tit. 10, § 1010(b)-(c) (1975 & Supp. 1994); D.C. Code Ann. § 16-2307(a) (1989 & Supp. 1995); Fla. Stat. Ann. § 39.052(2) (West Supp. 1996); Ga. Code Ann. § 15-11-39 (1994); Haw. Rev. Stat. § 571-22(a)-(c) (1993); Idaho Code § 20-508 (Supp. 1995); Ill. Ann. Stat. ch. 705, para. 405/5-4 (Smith-Hurd 1992 & Supp. 1995); Ind. Code Ann.

juveniles who have committed less violent offenses usually originate in juvenile court;[93] the juvenile court may then waive its jurisdiction in favor of criminal court prosecution. Some jurisdictions permit the prosecutor, the juvenile, or the judge herself to request a judicial waiver hearing once a case is filed in juvenile court.[94] At the waiver hearing both the state and the juvenile, usually with the assistance of counsel,[95] have an opportunity to present information to the judge regarding the juvenile's amenability to juvenile court treatment.[96] The judge considers this evidence in light of various statutory criteria[97] and only then decides whether to waive juvenile court jurisdiction.

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§ 31-6-2-4 (Burns 1987 & Supp. 1995); Iowa Code Ann. § 232.45 (West 1994 & Supp. 1995); Kan. Stat. Ann. § 38-1636 (1993); Ky. Rev. Stat. Ann. §§ 635.020, 640.010 (Michie/Bobbs-Merrill 1990 & Supp. 1994); La. Child. Code Ann. art. 857 (West 1995); Me. Rev. Stat. Ann. tit. 15, § 3101(4) (West 1980 & Supp. 1995); Md. Code Ann., Cts. & Jud. Proc. § 3-817 (1995); Mass. Ann. Laws ch. 119, § 61 (Law. Co-op. 1994); Mich. Comp. Laws Ann. § 712A.4 (West 1993); Minn. Stat. Ann. § 260.125 (West 1992 & Supp. 1996); Miss. Code Ann. § 43-21-157 (1993 & Supp. 1995); Mo. Ann. Stat. § 211.071 (Vernon 1983 & Supp. 1996); Mont. Code Ann. § 41-5-206 (1995); Nev. Rev. Stat. Ann. § 62.080 (Michie 1986 & Supp. 1995); N.H. Rev. Stat. Ann. § 169-B:24 (1994 & Supp. 1995); N.J. Stat. Ann. § 2A:4A-26 (West 1987 & Supp. 1995); N.C. Gen. Stat. § 7A-608 (1995); N.D. Cent. Code § 27-20-34 (1991 & Supp. 1995); Ohio Rev. Code Ann. § 2151.26 (Anderson 1994 & Supp. 1995); Okla. Stat. Ann. tit. 10, § 7303-4.3(B) (West Supp. 1996); Or. Rev. Stat. Ann. §§ 419C.349, 419C.352 (1995); 42 Pa. Cons. Stat. Ann. § 6355 (1982); R.I. Gen. Laws §§ 14-1-7 (1994), 14-1-7.1 (1994 & Supp. 1995); S.C. Code Ann. §§ 20-7-430(3)-(6) (Law. Co-op. 1985 & Supp. 1995), 20-7-430(9) (Law. Co-op. Supp. 1995); S.D. Codified Laws Ann. § 26-11-4 (1992 & Supp. 1995); Tenn. Code Ann. § 37-1-134 (1991 & Supp. 1995); Tex. Fam. Code Ann. § 54.02 (West 1986 & Supp. 1996); Utah Code Ann. § 78-3a-25 (1992 & Supp. 1995); Vt. Stat. Ann. tit. 33, § 5506 (1991); Va. Code Ann. § 16.1-269.1 (Michie Supp. 1995); Wash. Rev. Code Ann. § 13.40.110 (West 1993); W. Va. Code § 49-5-10 (1995 & Supp. 1995); Wis. Stat. Ann. § 48.18 (West Supp. 1995); Wyo. Stat. Ann. § 14-6-237 (1986 & Supp. 1995).

93. *See, e.g.*, Ark. Code Ann. § 9-27-318(a) (Michie Supp. 1995) (vesting the juvenile court with exclusive jurisdiction when the case involves a juvenile who was: (1) younger than 14 when the alleged delinquent act occurred; (2) younger than 16 when she allegedly engaged in a nonviolent felony or who is not a habitual juvenile offender; (3) younger than 18 when she allegedly engaged in conduct constituting an adult misdemeanor); Wyo. Stat. Ann. § 14-6-203(d) (1986 & Supp. 1995) (vesting the juvenile court with exclusive original jurisdiction over all cases involving juveniles under age 13 who allegedly committed felonies or misdemeanors punishable by more than six months of imprisonment).

94. *See, e.g.*, Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995) (providing that the judge or "any party" may move for a waiver hearing); Idaho Code § 20-508(2) (Supp. 1995) (stating that the prosecutor, judge, or juvenile may institute a waiver hearing).

95. Kent v. United States, 383 U.S. 541, 554 (1966) (declaring that "there is no place in our system of law" for making the waiver determination "without effective assistance of counsel"). *But see* Juvenile Offenders and Victims, *supra* note 26, at 71 (noting that in some jurisdictions, "attorneys for the State and the youth are not considered essential to the operation of the system, especially in less serious cases").

96. *See Kent*, 383 U.S. at 561 (holding that "an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order").

97. *See infra* text accompanying notes 98-101.

Almost all judicial waiver statutes require a juvenile court judge to consider certain delineated factors before making the waiver decision.[98] While the most basic requirement for judicial waiver is that the evidence support the allegations, an overwhelming majority of judicial waiver jurisdictions provide a list of discrete factors regarding a juvenile's personal circumstances and other potentially mitigating factors that judges must consider.[99] For instance, the Florida judicial waiver statute calls for a consideration of the offense's nature and seriousness, the community welfare, whether the offense was against person or property, whether probable cause exists, the juvenile's sophistication, maturity, previous history and record, the effect of treatment in juvenile court upon the public's safety, and the likelihood of the juvenile's rehabilitation if she is adjudicated in juvenile court.[100] Similarly, Michigan judges must consider the juvenile's prior record, character, maturity, and pattern of living, the seriousness of the offense, and whether the offense is one of a repetitive pattern casting doubt on the likelihood that the treatment available in the juvenile system will be successful.[101] Even in cases where the judge is not bound to consider enumerated criteria, she must still hold a full hearing and determine that the evidence reasonably supports the charge prior to making the

98. *See infra* text accompanying notes 99-103.

99. Thirty-eight jurisdictions provide such considerations in their judicial waiver statutes. Ala. Code § 12-15-34(d) (1995); Ariz. R. Juv. P. 14(c), (d)(1), (e) (Supp. 1995); Ark. Code Ann. § 9-27-318(e) (Michie 1993 & Supp. 1995); Cal. Welf. & Inst. Code § 707 (West 1984 & Supp. 1996); Colo. Rev. Stat. § 19-2-806(3)(b) (Supp. 1995); Del. Code Ann. tit. 10, § 1010(c) (Supp. 1994); D.C. Code Ann. § 16-2307(e) (1989 & Supp. 1995); Fla. Stat. Ann. § 39.052(2)(c) (West Supp. 1996); Haw. Rev. Stat. § 571-22(b) (1993); Idaho Code § 20-508(8) (Supp. 1995); Ill. Ann. Stat. ch. 705, para. 405/5-4(3)(b) (Smith-Hurd 1992 & Supp. 1995); Ind. Code Ann. § 31-6-2-4(b)-(f) (Burns 1987 & Supp. 1995); Iowa Code Ann. § 232.45(7) (West 1994); Kan. Stat. Ann. § 38-1636(e) (1993); Ky. Rev. Stat. Ann. § 640.010(2)(b) (Michie/Bobbs-Merrill 1990 & Supp. 1994); La. Child. Code Ann. art. 862(A)(2) (West 1995); Me. Rev. Stat. Ann. tit. 15, § 3101(4)(D) (West Supp. 1995); Md. Code Ann., Cts. & Jud. Proc. § 3-817(d) (1995); Mass. Ann. Laws ch. 119, § 61 (Law. Co-op. 1994); Mich. Comp. Laws Ann. § 712A.4(4) (West 1993); Miss. Code Ann. § 43-21-157(5) (1993 & Supp. 1995); Mo. Ann. Stat. § 211.071(6) (Vernon Supp. 1996); Mont. Code Ann. § 41-5-206(1)-(2) (1995); N.H. Rev. Stat. Ann. § 169-B:24(I) (Supp. 1995); N.J. Stat. Ann. § 2A:4A-26(a)(1)-(2) (West 1987 & Supp. 1995); N.D. Cent. Code § 27-20-34(1)-(3) (Supp. 1995); Ohio Rev. Code Ann. § 2151.26(C)(1)-(2) (Anderson Supp. 1995); Okla. Stat. Ann. tit. 10, § 7303-4.3(B) (West Supp. 1996); Or. Rev. Stat. Ann. § 419C.349(4) (1995); 42 Pa. Cons. Stat. Ann. § 6355(a) (1982); R.I. Gen. Laws §§ 14-1-7.1 (1994 & Supp. 1995), 14-1-7.2 (1994); S.D. Codified Laws Ann. § 26-11-4 (1992 & Supp. 1995); Tenn. Code Ann. § 37-1-134(b) (1991 & Supp. 1995); Tex. Fam. Code Ann. § 54.02(f) (West 1986 & Supp. 1996); Utah Code Ann. § 78-3a-25(4) (Supp. 1995); W. Va. Code § 49-5-10(g) (Supp. 1995); Wis. Stat. Ann. § 48.18(5) (West 1987 & Supp. 1995); Wyo. Stat. Ann. § 14-6-237(b) (1986 & Supp. 1995). Many of the criteria for consideration in these judicial waiver statutes are similar to the eight "determinative factors" enumerated by the Supreme Court in its Appendix to *Kent v. United States*. *See* 383 U.S. 541, 566-67 (1966); *supra* note 60.

100. Fla. Stat. Ann. § 39.052(2)(c) (West Supp. 1996).

101. Mich. Comp. Laws Ann. § 712A.4(4) (West 1993).

waiver decision.[102] The judge often must accompany the waiver order with written findings explaining her reasoning.[103] This order may be reviewed on appeal, should either party wish to challenge the ruling.[104] Thus, judicial waiver statutes restrain a judge's discretion while providing for a full consideration of a juvenile's best interests.

B. *Prosecutorial Waiver*

Ten states empower prosecutors to choose the forum in which to try juvenile offenders[105] when both the juvenile and criminal courts have jurisdiction over a juvenile suspect by virtue of her age and the nature of her alleged crime.[106] The prosecutor may, at her broad discretion, file the case directly in either court.[107] The process involves two determinations. First, the prosecutor determines the charge.[108] Second, if that charge places the juvenile within the concurrent jurisdiction of the two court systems, the prosecutor next decides whether to file the case in juvenile court or to "direct file" it in criminal court.[109]

Prosecutorial waiver statutes will often specify the combination of age and offense warranting the exercise of the prosecutor's filing discretion. Colorado's prosecutorial waiver statute, for example, has several age and offense combinations providing for waiver to criminal

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102. *See, e.g.*, N.C. Gen. Stat. § 7A-608 (1995) (leaving the waiver decision solely to the judge's discretion after a hearing and a finding of probable cause, except in the case of an offense punishable by death or life imprisonment); Va. Code Ann. § 16.1-269.1(A)(4) (Michie Supp. 1995) (requiring a hearing before any transfer from juvenile court but not requiring a consideration of mitigating circumstances in all hearings); Vt. Stat. Ann. tit. 33, § 5506(d) (1991) (stating that after the hearing, "the court *may* consider, among other matters" seven mitigating factors (emphasis added)).

103. *See, e.g.*, Ala. Code § 12-15-34(f) (1995) (requiring that the court set forth in writing its reasons for a transfer); D.C. Code Ann. § 16-2307(d) (1989 & Supp. 1995) (requiring that a statement of the judge's reasons for the waiver accompany the order); Iowa Code Ann. § 232.45(8) (West 1994) (requiring that the court "make and file written findings" of "its reasons for waiving its jurisdiction").

104. *See, e.g.*, Ark. Code Ann. § 9-27-318(h) (Michie 1993 & Supp. 1995) (stating that "[a]ny party may appeal from [the judge's] order granting or denying the transfer of a case"); Fla. Stat. Ann. § 39.052(2)(e) (West Supp. 1996) (stating that the judge's waiver order shall be reviewable upon appeal).

105. Ark. Code Ann. § 9-27-318(b) (Michie 1993 & Supp. 1995); Colo. Rev. Stat. § 19-2-805(1) (Supp. 1995); D.C. Code Ann. § 16-2301(3)(A) (1989 & Supp. 1995); Fla. Stat. Ann. § 39.052(3)(a)(4)(a), (3)(a)(5)(a)-(b)(I) (West Supp. 1996); Ga. Code Ann. § 15-11-5(b)(1) (1994); La. Child. Code Ann. art. 305(B)(3) (West 1995); Mich. Comp. Laws Ann. § 600.606 (West Supp. 1995); Neb. Rev. Stat. § 43-247 (1993); Vt. Stat. Ann. tit. 33, § 5505(c) (1991); Wyo. Stat. Ann. § 14-6-203(c), (e)-(f) (1986 & Supp. 1995).

106. *See infra* notes 110-18 and accompanying text.

107. Bishop & Frazier, *supra* note 6, at 284-85; McCarthy, *supra* note 6, at 632. Concurrent jurisdiction exists when both the juvenile and criminal courts are competent to try the alleged offender. Some commentators term this mechanism "direct file." GAO Report, *supra* note 91, at 5; Bishop & Frazier, *supra* note 6, at 284.

108. *See* ABA Standards, *supra* note 16, 3-3.4, -3.9.

109. *See* GAO Report, *supra* note 91, at 5; Bishop & Frazier, *supra* note 6, at 284-85; McCarthy, *supra* note 6, at 632.

court of only the most dangerous or recidivist juveniles.[110] Similarly, in Arkansas, both the juvenile and criminal courts have concurrent jurisdiction over a fourteen- or fifteen-year-old juvenile only when she is charged with one of several enumerated, particularly violent acts constituting adult felonies such as capital murder, kidnapping, or rape.[111] When the juvenile reaches sixteen, however, the juvenile and criminal courts share jurisdiction when the juvenile is charged with any act constituting an adult felony.[112] Thus, if a fourteen-year-old juvenile kills her classmate, both courts have jurisdiction over her, and the prosecutor decides where to file the case.[113] If, however, the juvenile commits a nonenumerated felony, the courts have concurrent jurisdiction only if she is sixteen or older.[114] District of Columbia prosecutors can directly file a juvenile case in criminal court only when the juvenile is sixteen or older and charged with a serious, violent felony;[115] in Louisiana and Michigan, the juvenile need only be fifteen.[116] While Georgia prosecutors can directly file a juvenile case in criminal court when the juvenile has committed a serious, violent felony for which a criminal court could sentence her to life imprisonment or death regardless of the juvenile's age,[117] Vermont's legislature has made the opposite choice. Vermont prosecutors can directly file only the less serious cases in criminal court, and the juvenile must be sixteen or seventeen.[118]

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110. Colo. Rev. Stat. § 19-2-805 (Supp. 1995).

111. Ark. Code Ann. § 9-27-318(b)(2) (Michie Supp. 1995). Arkansas courts also have concurrent jurisdiction over 14- and 15-year-old juveniles who have allegedly committed the adult felonies of murder in the first or second degree, aggravated robbery, battery in the first or second degree, possession of a handgun on school property, aggravated assault, terroristic act, unlawful discharge of a firearm from a vehicle, any felony committed with a firearm, soliciting a minor to join a criminal street gang, criminal use of prohibited weapons, or a felony attempt, solicitation, or conspiracy to commit capital murder, murder in the first or second degree, kidnapping, aggravated robbery, rape, or battery in the first degree. *Id.* The courts also have concurrent jurisdiction in two other situations where the juvenile is 14 and has committed a felony involving a handgun or a felony after having been adjudicated as a juvenile delinquent three times in the preceding two years for acts that would have been felonies if committed by an adult. *Id.* § 9-27-318(b)(3)-(4).

112. *Id.* § 9-27-318(b)(1).

113. *Id.* § 9-27-318(b)(2).

114. *Id.* § 9-27-318(b)(1). Florida's prosecutorial waiver statute is similar to Arkansas's in terms of its age and offense categories. *See* Fla. Stat. Ann. § 39.052(3)(a)(4)(a), (3)(a)(5)(a)-(b)(I) (West Supp. 1996).

115. D.C. Code Ann. § 16-2301(3)(A) (1989 & Supp. 1995).

116. La. Child. Code Ann. art. 305(B) (West 1995); Mich. Comp. Laws Ann. § 600.606 (West Supp. 1995).

117. Ga. Code Ann. § 15-11-5(b)(1) (1994). The criminal court, however, has exclusive jurisdiction over 13- to 17-year-old juveniles charged with murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, or armed robbery if committed with a firearm. *Id.* § 15-11-5(b)(2)(A).

118. *See* Vt. Stat. Ann. tit. 33, § 5505(c) (1991). Offenses that cannot be directly filed in criminal court include arson causing death, assault and robbery with a dangerous weapon or causing bodily injury, aggravated assault, murder, manslaughter, kid-

Prosecutorial waiver does not require the prosecutor to petition the court for a waiver hearing, nor does it require her to consider the juvenile's best interests. The prosecutor herself determines the court in which to file the case.[119] Although the choice of forum is "critically important,"[120] the prosecutor often has little statutory guidance regarding what criteria she should consider in making a waiver decision. Of the ten jurisdictions with prosecutorial waiver statutes,[121] only Nebraska and Wyoming provide prosecutors with waiver considerations.[122] Furthermore, while Wyoming prosecutors must consult these

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napping, maiming, sexual assault, aggravated sexual assault, or nighttime burglary of sleeping apartments. *Id.*

119. *See supra* notes 107-09 and accompanying text.

120. Kent v. United States, 383 U.S. 541, 558 (1966).

121. *See supra* note 105.

122. Neb. Rev. Stat. § 43-276 (1993); Wyo. Stat. Ann. §§ 14-6-203(f)(iii), 14-6-237(b) (1986 & Supp. 1995).

In Nebraska, in cases of concurrent jurisdiction or when the juvenile is under age 16, the prosecutor shall consider:

(1) The type of treatment such juvenile would most likely be amenable to;
(2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner;
(3) the motivation for the commission of the offense;
(4) the age of the juvenile and the ages and circumstances of any others involved in the offense;
(5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence;
(6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof;
(7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile;
(8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and
(9) such other matters as the county attorney deems relevant to his or her decision.

Neb. Rev. Stat. § 43-276 (1993). Though Nebraska requires the prosecutor to consider mitigating circumstances, the statutory language skews the consideration towards the best interests of the community, not the child.

Wyoming's prosecutorial waiver statute requires a prosecutor to consider similar "determinative factors" only when the case falls within the juvenile and criminal courts' concurrent jurisdiction and the juvenile is 17. Wyo. Stat. Ann. § 14-6-203(f)(iii) (1986 & Supp. 1995). Again, however, the balancing of interests favors "the protection of the community." *Id.* § 14-6-237(b)(i). These considerations are:

(i) The seriousness of the alleged offense to the community and whether the protection of the community required waiver;

(ii) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

considerations in only one of five situations in which the juvenile and criminal courts have concurrent jurisdiction,[123] Wyoming judges must evaluate them in every judicial waiver proceeding.[124] Thus, prosecutorial waiver endows prosecutors with wide latitude in making the waiver decision.

In the absence of express considerations within the prosecutorial waiver statute itself, a prosecutor usually relies on other criteria in determining where to file a case. Because some state appellate courts view the filing decision as within a prosecutor's charging discretion,[125] a prosecutor might employ typical criminal charging considerations in determining where to file a juvenile case. The prosecutor's first task in deciding where to file the case[126] is to determine if sufficient evi-

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(iii) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;

(iv) The desirability of trial and disposition of the entire offense in one (1) court when the juvenile's associates in the alleged offense are adults who will be charged with a crime;

(v) The sophistication and maturity of the juvenile as determined by consideration of [her] home, environmental situation, emotional attitude and pattern of living;

(vi) The record and previous history of the juvenile, including previous contacts with the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this court, or prior commitments to juvenile institutions;

(vii) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if [she] is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

Id. § 14-6-237(b)(i)-(vii).

123. Those five situations are: (1) violations of municipal ordinances; (2) misdemeanors for which the maximum penalty is less than six months of imprisonment; (3) cases in which the juvenile has reached age 17; (4) cases in which the juvenile has reached age 14 and is charged with a violent felony; (5) cases in which the juvenile has reached age 14, is charged with a felony, and has previously been twice adjudicated delinquent for committing adult crimes. Wyo. Stat. Ann. § 14-6-203(f)(i)-(v) (1986 & Supp. 1995). Only in the third circumstance must a prosecutor consider mitigating factors before she decides where to file the case. *Id.* § 14-6-203(f)(iii).

124. *Id.* § 14-6-237(b) (Supp. 1995).

125. *See, e.g.*, Hansen v. State, 904 P.2d 811, 818-19 (Wyo. 1995) (stating that Wyoming prosecutors have discretion to determine what charges to file and to choose the court in which to file those charges); Myers v. District Court, 518 P.2d 836, 838 (Colo. 1974) (en banc) (holding that because "a prosecutor has constitutional power to exercise [her] discretion in deciding which of several possible charges to press in a prosecution," she may properly choose the court in which to file those charges); Juvenile Offenders and Victims, *supra* note 26, at 87 (stating that "[s]tate appellate courts have taken the view that prosecutorial discretion is equivalent to the routine charging decisions made in criminal cases").

126. *See generally* Miller, *supra* note 14, at 151-345 ("Part IV: Discretion and the Charging Decision"). The ABA Standards set out similar considerations for choosing *not* to institute criminal proceedings:

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstand-

dence supports the complaint's allegations.[127] This determination is the most basic element of any charge.[128] After ascertaining that such evidence exists, the prosecutor may then properly consider such factors as the dangerousness of the offense,[129] the juvenile's prior record,[130] her age,[131] and her amenability to juvenile court treatment.[132]

C. *Legislative Waiver*

Legislative waiver, also known as statutory exclusion,[133] categorically excludes from juvenile court jurisdiction certain juveniles or offenses.[134] These cases must be tried in criminal court. Thirty-seven states and the District of Columbia have legislative waiver statutes.[135]

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ing that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

ABA Standards, *supra* note 16, at 3-3.9(b)(i)-(vii).

127. The Model Rules of Professional Conduct require that a prosecutor "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Model Rules of Professional Conduct 3.8(a) (1994). Similarly, the ABA Standards require probable cause to institute criminal proceedings. ABA Standards, *supra* note 16, at 3-3.9(a). In the same vein, the Model Code of Professional Responsibility advises prosecutors to "use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute." Model Code of Professional Responsibility EC 7-13 (1981).

128. *See* ABA Standards, *supra* note 16, at 3-3.9(a).

129. Bishop & Frazier, *supra* note 6, at 295; *see* ABA Standards, *supra* note 16, at 3-3.9(b)(ii).

130. Bishop & Frazier, *supra* note 6, at 299.

131. *Id.*

132. *Id.* at 301.

133. *See* GAO Report, *supra* note 91, at 5; Guttman, *supra* note 12, at 521.

134. Bishop & Frazier, *supra* note 6, at 284; Feld, *supra* note 19, at 488; *see* GAO Report, *supra* note 91, at 5.

135. Ala. Code § 12-15-34.1(a)-(b) (1995); Alaska Stat. § 47.10.010(e) (1995); Conn. Gen. Stat. Ann. § 46b-127(a) (West 1995); Del. Code Ann. tit. 10, §§ 921(2)(a) (1975 & Supp. 1994), 1010(a) (Supp. 1994); D.C. Code Ann. § 16-2307(h) (1989); Fla. Stat. Ann. § 39.052(3)(a)(1), (3)(a)(3), (3)(a)(4)(d), (3)(a)(5)(b)(II), (3)(a)(5)(c)-(d) (West Supp. 1996); Ga. Code Ann. § 15-11-5(b)(2)(A) (1994); Haw. Rev. Stat. § 571-22(c)-(d) (1993); Idaho Code § 20-509(1)-(2) (Supp. 1995); Ill. Ann. Stat. ch. 705, para. 405/5-4(3.1)-(3.2), (6)(a), (7)(a), (8)(a) (Smith-Hurd 1992 & Supp. 1995); Ind. Code Ann. § 31-6-2-1.1(b), (d) (Burns Supp. 1995); Iowa Code Ann. § 232.8(1)(b) (West 1994); Kan. Stat. Ann. §§ 21-3611(a), (c) (1995), 38-1636(h) (1993); Ky. Rev. Stat. Ann. § 635.020(4) (Michie/Bobbs-Merrill Supp. 1994); La. Child. Code Ann. art. 305(A) (West 1995); Me. Rev. Stat. Ann. tit. 15, § 3101(4)(G) (West 1980); Md. Code Ann., Cts. & Jud. Proc. § 3-804(e)(1)-(4) (1995 & Supp. 1995); Minn. Stat. Ann. §§ 260.015(5)(b), 260.125(3)(a) (West Supp. 1996); Miss. Code Ann. §§ 43-21-

These statutes typically focus on juveniles who have committed capital or violent offenses.[136] In some states, for instance, if a juvenile is sixteen or older and is charged with murder, she must automatically be tried in criminal court.[137] In other states, the minimum age is lower, and the offenses compelling criminal court adjudication may range from murder to arson.[138] In still other states, if the juvenile has already been convicted of a crime or has been previously adjudicated delinquent a certain number of times and is presently charged with an excludable offense, she must automatically be tried in criminal court.[139]

Legislative waiver thus targets the offense and, except for the juvenile's age,[140] does not consider the juvenile's individual circumstances.[141] This type of waiver excludes juveniles on purely statutory

151(1)(a)-(b), (2) (1993 & Supp. 1995), 43-21-157(9) (Supp. 1995); Mo. Ann. Stat. § 211.071(9) (Vernon Supp. 1996); Mont. Code Ann. § 41-5-206(3) (1995); Nev. Rev. Stat. Ann. §§ 62.040(1)(b)(1), 62.080(3) (Michie 1986 & Supp. 1995); N.H. Rev. Stat. Ann. § 169-B:27 (1994); N.M. Stat. Ann. § 32A-2-3(H) (Michie 1995); N.Y. Penal Law § 30.00(2) (McKinney 1987); N.C. Gen. Stat. § 7A-608 (1995); Ohio Rev. Code Ann. §§ 2151.011(B)(1), 2151.26(B) (Anderson Supp. 1995); Okla. Stat. Ann. tit. 10, §§ 7001-1.3(2), 7306-1.1(A)-(B) (West Supp. 1996); 42 Pa. Cons. Stat. Ann. §§ 6322(a) (1982 & Supp. 1995), 6355(e) (1982); R.I. Gen. Laws §§ 14-1-3(1), -7.1(c) (1994 & Supp. 1995); S.C. Code Ann. § 20-7-390 (1985 & Law. Co-op. Supp. 1995); Tenn. Code Ann. § 37-1-134(c) (Supp. 1995); Utah Code Ann. §§ 78-3a-16(1), 78-3a-25(12) (Supp. 1995); Vt. Stat. Ann. tit. 33, § 5505(b) (1991); Va. Code Ann. § 16.1-269.6(C) (Michie Supp. 1995); Wash. Rev. Code Ann. §§ 13.04.030(1)(e)(iv), 13.40.020(14) (West Supp. 1996); Wis. Stat. Ann. § 48.183 (West Supp. 1995); *see* Or. Rev. Stat. Ann. § 419C.364 (1995) (permitting the criminal court judge, in a case involving a waived juvenile aged 16 or older, to order that all further proceedings involving the juvenile will be waived to criminal court without any juvenile court proceedings).

136. Bishop & Frazier, *supra* note 6, at 284.

137. *See, e.g.*, Ala. Code § 12-15-34.1(a) (1995) (stating that "any person who has attained the age of 16 years at the time of the conduct charged and who is charged with the commission of any act or conduct, which if committed by an adult would constitute [a capital offense], shall not be subject to the jurisdiction of juvenile court but shall be charged, arrested, and tried as an adult"); Okla. Stat. Ann. tit. 10, §§ 7001-1.3(1), 7306-1.1(A) (West Supp. 1995) (stating that "[a]ny person sixteen (16) . . . years of age who is charged with murder . . . shall be considered as an adult" and thus automatically subject to criminal court jurisdiction).

138. *See, e.g.*, Conn. Gen. Stat. Ann. § 46b-127(a) (West 1995) (excluding juveniles 14 and older charged with capital or serious felonies); Ga. Code Ann. § 15-11-5(b)(2)(A) (1994) (excluding juveniles 13 and older charged with murder or other violent felonies).

139. *See, e.g.*, Me. Rev. Stat. Ann. tit. 15, § 3101(4)(G) (West 1980) (stating that "[i]n all prosecutions for subsequent crimes, any person bound over and convicted as an adult shall be proceeded against as if [she] were an adult"); N.H. Rev. Stat. Ann. § 169-B:27 (1994) (requiring that "[a]ny minor who has been tried and convicted as an adult shall henceforth be treated as an adult"); Wash. Rev. Code Ann. §§ 13.04.030 (1)(e)(iv), 13.40.020 (West Supp. 1996) (stating that the adult criminal courts have "exclusive original jurisdiction" when the juvenile is 16 or 17, has committed a violent offense, and has a criminal history of "[o]ne or more prior serious violent offenses," "two or more prior violent offenses," or "three or more of any combination of" certain felonies, vehicular assault, and manslaughter in the second degree).

140. *See supra* notes 136-38 and accompanying text.

141. *See* Feld, *supra* note 37, at 701, 708; Guttman, *supra* note 12, at 522.

criteria and is not discretionary.[142] The rationale behind legislative waiver is simple: charge serious, violent, or persistent juvenile offenders like adult criminals.

D. *Reverse Waiver*

Reverse waiver simply permits the transfer of juveniles from criminal court to juvenile court jurisdiction, just as judicial waiver permits the transfer of juveniles from juvenile court to criminal court jurisdiction. If a prosecutor originally files a juvenile's case in criminal court, that court may conduct a hearing regarding whether the juvenile should be transferred to juvenile court.[143] Similarly, reverse waiver can also take place when a juvenile's case has been originally filed in criminal court through legislative waiver.[144] Alternatively, if she has already been waived to criminal court jurisdiction under a judicial waiver statute, reverse waiver permits the juvenile to appeal the decision in the hopes of returning to juvenile court jurisdiction.[145] Reverse waiver exists in four of the ten prosecutorial waiver jurisdictions,[146] eleven of the thirty-eight legislative waiver jurisdictions,[147] and seven of the forty-eight judicial waiver jurisdictions.[148]

III. JUDICIAL WAIVER SERVES JUSTICE

The very existence of the juvenile justice system illustrates society's commitment to helping its troubled youth. The Supreme Court, in *Kent v. United States*[149] and *In re Gault*,[150] substantiated that interest

142. Guttman, *supra* note 12, at 521; *see* Feld, *supra* note 37, at 701. Of course, prosecutors still determine how to charge the juvenile. Jensen, *supra* note 20, at 181.

143. *See, e.g.*, Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995) (stating that either party or the court may ask for a reverse waiver hearing); Del. Code Ann. tit. 10, § 1011(a)-(b) (Supp. 1994) (permitting the Attorney General to reverse waive a juvenile case or the juvenile to petition the court for reverse waiver).

144. Del. Code Ann. tit. 10, § 1011(a)-(b) (Supp. 1994); Ga. Code Ann. § 15-11-5(b)(2)(B) (1994); Ky. Rev. Stat. Ann. § 640.010(3) (Michie/Bobbs-Merrill 1990 & Supp. 1994); Miss. Code Ann. § 43-21-157(8) (Supp. 1995); Nev. Rev. Stat. Ann. § 62.080(3) (Michie Supp. 1995); N.H. Rev. Stat. Ann. § 169-B:25 (1994 & Supp. 1995); N.Y. Crim. Proc. Law §§ 190.71, 210.43 (McKinney 1993); Okla. Stat. Ann. tit. 10, § 7306-1.1(E) (West Supp. 1996); 42 Pa. Cons. Stat. Ann. tit. 33, § 6322(a) (1982 & Supp. 1995); Vt. Stat. Ann. tit. 33, § 5505(a)-(b) (1991); Wis. Stat. Ann. § 970.032 (West Supp. 1995).

145. Del. Code Ann. tit. 10, § 1011(a)-(b) (Supp. 1994); Ky. Rev. Stat. Ann. § 640.010(3) (Michie/Bobbs-Merrill 1990 & Supp. 1994); Miss. Code Ann. § 43-21-157(8) (Supp. 1995); Tenn. Code Ann. § 37-1-159(d) (Supp. 1995); Tex. Fam. Code Ann. § 51.08 (West 1986 & Supp. 1996); Va. Code Ann. § 16.1-269.4 (Michie Supp. 1995); W. Va. Code § 49-5-10(j) (Supp. 1995).

146. Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995); Neb. Rev. Stat. § 43-261 (1993); Vt. Stat. Ann. tit. 33, § 5505(c) (1991); Wyo. Stat. Ann. § 14-6-237(g) (1986 & Supp. 1995).

147. *See supra* note 144.

148. *See supra* note 145.

149. 383 U.S. 541 (1966).

150. 387 U.S. 1 (1967).

by providing juveniles with procedural protections, including the right to a hearing in judicial waiver cases before being transferred from juvenile court jurisdiction.[151] In deciding these cases, the Supreme Court manifested a firm belief in both the rehabilitative philosophy of the juvenile justice system and in the idea that juvenile status does not justify unceremonious and informal proceedings.[152] The Court thus expressed a twofold concern: that juveniles receive broad procedural protections and that those protections include full consideration of the juveniles' best interests.

This part asserts that prosecutorial and legislative waiver operate in contravention both of the purposes of the juvenile justice system and of the Supreme Court's twofold concern. The part argues that judicial waiver best ensures that juveniles receive procedural safeguards and have their best interests protected because it alone provides juveniles with a full hearing before subjecting them to the criminal justice system.

A. *Three Reasons Why Prosecutorial Waiver Does Not Serve Justice*

The scope of a prosecutor's virtually unfettered discretion makes her an inappropriate party to make the waiver decision. Prosecutorial waiver ignores the best interests of the juvenile, permits the prosecutor to choose both the charge and the forum, and may place the prosecutor in the double bind of trying to ascertain the juvenile's best interests while simultaneously attempting to represent the community's best interests. Furthermore, prosecutorial waiver is not procedurally fair because it does not provide for a hearing or written findings from which a juvenile can meaningfully appeal.

1. Ignoring Juveniles' Best Interests

A juvenile's best interests are not served by a system in which a prosecutor does not have to consider those interests. Justice Douglas, backed by Justices Brennan and Marshall in a vigorous dissent from the Supreme Court's denial of certiorari in a prosecutorial waiver case, eloquently stated the problem:

> A juvenile or "child" is placed in a more protected position than an adult .... In that category [she] is theoretically subject to rehabilitative treatment. Can [she], on the whim or caprice of a prosecutor, be put in the class of the run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against [her], without a chance of

151. *See supra* text accompanying notes 59-60.

152. *See supra* notes 58-63, 69, 74-76 and accompanying text.

> showing that [she] is being given an invidiously different treatment from others in [her] group?[153]

The answer is no. No situation exists in the criminal system analogous to the unfettered discretion many prosecutors enjoy in choosing the forum in which to try a juvenile. Although two states with prosecutorial waiver statutes attempt to restrain this discretion by providing prosecutors with enumerated waiver considerations,[154] neither statute focuses on the best interests of the juvenile. While the factors provided in these two statutes are similar to those a judge must weigh,[155] the juvenile's concern is that prosecutors in the majority of prosecutorial waiver jurisdictions are not obliged to consider either these factors[156] or the juvenile's best interests. Additionally, prosecutorial waiver allows the party with an interest in conviction the discretion to pick the court which provides harsher penalties.[157] This omission is antithetical to the Supreme Court's expressed concern for juvenile rights and for individualized, rehabilitative treatment;[158] it ignores the very foundations of the juvenile justice system.[159] Moreover, the prosecutor does not have to make written findings, so a sparse record is available on which to argue an appeal.[160]

Proponents of prosecutorial waiver might argue that the opportunity to be heard through appeal or through a reverse waiver process affords juveniles adequate procedural protection. This position, however, ignores that these procedures are not universally available in prosecutorial waiver jurisdictions.[161] Only four of the ten states with prosecutorial waiver also have reverse waiver.[162] Of the other six states, Colorado does not permit criminal court judges to send directly filed cases to juvenile court,[163] and no other prosecutorial waiver statute explicitly guarantees the right to appeal.[164] Any appeal of

153. United States v. Bland, 412 U.S. 909, 911 (1973) (Douglas, J., dissenting).

154. Neb. Rev. Stat. § 43-276 (1993); Wyo. Stat. Ann. §§ 14-6-203(f)(iii), -237(b) (1986 & Supp. 1995).

155. *See supra* text accompanying notes 98-101.

156. *See supra* text accompanying notes 121-24.

157. *See* State v. Mohi, 901 P.2d 991, 1003 (Utah 1995) (stating that Utah's prosecutorial waiver statute "does not indicate what characteristics of the offender mandate [the] choice" of forum; thus, the prosecutor has discretion to choose the court). Of course, prosecutors are bound to serve justice. *See* Model Code of Professional Responsibility, *supra* note 127, EC 7-13.

158. *See supra* part I.B.

159. *See supra* part I.A.

160. Prosecutorial waiver is difficult to review meaningfully due to the lack of written reasons for the waiver and the protected nature of prosecutorial discretion. *See* Champion & Mays, *supra* note 24, at 72; *infra* note 165 and accompanying text.

161. *See infra* notes 162-65 and accompanying text.

162. Ark. Code Ann. § 9-27-318(d) (Michie 1993 & Supp. 1995); Neb. Rev. Stat. § 43-261 (1993); Vt. Stat. Ann. tit. 33, § 5505 (1991); Wyo. Stat. Ann. § 14-6-237(g) (1986 & Supp. 1995).

163. GAO Report, *supra* note 91, at 66.

164. The only prosecutorial waiver jurisdictions that statutorily guarantee the right to appeal are Arkansas, Nebraska, Vermont, and Wyoming. *See supra* note 162.

prosecutorial authority is difficult; on that subject, the Supreme Court has written:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.[165]

Prosecutorial waiver jurisdictions perceive the mechanism as a discretionary function and thus require no written findings regarding the prosecutor's reasons for her decision.[166]

Once in criminal court, the juvenile usually bears the burden of proving that she should not be tried as an adult.[167] Conversely, in juvenile court, the prosecutor bears the burden of proving that the juvenile should not be subject to juvenile court jurisdiction.[168] Moreover, even if a juvenile can appeal or petition the court for reverse waiver, and if the court indeed transfers the juvenile to juvenile court, the solution comes too late: the juvenile will have already suffered the psychic trauma of being treated, albeit temporarily, as an adult criminal defendant. When Morris Kent's case was improperly transferred to criminal court (through judicial waiver, but without a hearing), he faced incarceration with adults and a possible death sentence, as opposed to a maximum of five years of treatment as a juvenile.[169] The mere prospect of such a fate is undoubtedly detrimental to the juvenile who can be rehabilitated through juvenile court treatment. Even

165. Wayte v. United States, 470 U.S. 598, 607 (1985); *see also* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise [of prosecutorial] discretion . . . .").

166. *See infra* part III.A.2.

167. *See, e.g.*, Walker v. State, 803 S.W.2d 502, 505-06 (Ark. 1991) (stating that the party seeking to transfer the defendant has the burden of proof); State v. Buelow, 587 A.2d 948, 950 (Vt. 1990) (stating that the party petitioning the court for reverse waiver to juvenile court when she has been statutorily excluded therefrom has the burden of proof; because legislative and prosecutorial waiver are similar, prosecutorial waiver likely places the burden of proof on the juvenile as well); Wyo. Stat. Ann. § 14-6-237(g) (1986 & Supp. 1995) (stating that, after a reverse waiver hearing initiated by either party or the judge, the criminal court judge may transfer the matter if she finds it "more properly suited to disposition" in juvenile court; presumably, the juvenile would have to persuade the judge to make this finding). *But see* Neb. Rev. Stat. § 43-261 (1993) (stating that a juvenile's petition for reverse waiver will be granted after the presentation of evidence by both parties at a hearing "unless a sound basis exists for retaining jurisdiction").

168. This presumes, of course, that the prosecutor or the judge institutes the waiver proceeding. If the juvenile herself petitions the court for waiver, she bears the burden of proof. *See supra* note 167. *But see* S.D. Codified Laws Ann. § 26-11-10 (Supp. 1995) (stating that when the juvenile is 16 or older and charged with a violent or serious felony, she must rebut the presumption that juvenile court jurisdiction should be waived in order to avoid judicial waiver).

169. Kent v. United States, 383 U.S. 541, 553-54 (1966).

if the juvenile is psychologically unharmed by her criminal court experience, her record may bear the blemish of the time she spent in criminal court prior to transfer to juvenile court.[170]

Most significantly, prosecutorial waiver denies a juvenile the opportunity for the "critically important"[171] hearing before she enters the criminal justice system. A post-waiver hearing by a criminal court judge is not equivalent to the waiver hearing held by a juvenile court judge preceding her every waiver of juvenile court jurisdiction. Holding a waiver hearing is a common part of a juvenile court judge's regular duties, but is a more rare occurrence for most criminal court judges.[172] In the absence of statutory guidelines, the criminal court judge who conducts a reverse waiver hearing will appraise a juvenile in the light of the criminal court's punitive and retributive philosophy.[173] No persuasive reason exists to believe that the concerns raised by the Supreme Court in *Kent v. United States*[174] regarding judicial waiver should not apply to the exercise of prosecutorial waiver. Like a judge, a prosecutor has "a substantial degree of discretion" in making the waiver decision, and thus should similarly not be permitted "to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections" of juvenile court.[175]

2. Choosing the Forum Is a Decision Distinct from Charging

Courts have upheld prosecutorial waiver as analogous to the charging decision.[176] Proponents of this view believe that the prosecutor's charging discretion therefore justifies discretion in the waiver context. This analysis, however, erroneously collapses two decisions into one. Waiver is a distinct and unique function. Charging a juvenile suspect with a crime involves examining the juvenile's age and the type of offense she has allegedly committed.[177] Waiving juvenile court jurisdiction entails an additional determination, *after the charge*, of the forum in which to try the case.[178] Thus, under a system of concurrent

170. *See, e.g., In re* R.D., 574 A.2d 160, 163 (Vt. 1990) (stating that juvenile proceedings for transfer from criminal to juvenile court are not confidential).

171. *See* Kent, 383 U.S. at 553.

172. *Cf. Hearings*, *supra* note 86, at 10 (stating that juveniles commit only one out of eight violent crimes).

173. Boyce, *supra* note 46, at 995-96.

174. 383 U.S. 541 (1966).

175. *Id.* at 553.

176. *See* Russell v. Parratt, 543 F.2d 1214, 1216-17 (8th Cir. 1976); Myers v. District Court, 518 P.2d 836, 838 (Colo. 1974) (en banc).

177. *See supra* notes 106-08 and accompanying text.

178. *See* State v. Mohi, 901 P.2d 991, 1003 (Utah 1995) (stating that selecting a charge and selecting the trial forum are two different functions); *supra* text accompanying note 109.

jurisdiction, deciding how to charge the juvenile allows the prosecutor to further choose the forum in which to try her.[179]

In *State v. Mohi*,[180] the Supreme Court of Utah overturned Utah's prosecutorial waiver statute,[181] examining the prosecutor's traditional discretionary charging power and distinguishing it from the power to choose the forum in which to file a juvenile case.[182] The court acknowledged that selecting a charge based on the likelihood that certain elements of the offense would be proved at trial was "a necessary step in the chain of any prosecution."[183] The court reasoned that prosecutorial discretion in this arena benefitted the public by promoting judicial economy, allowing plea bargaining, and avoiding costly and time-consuming criminal prosecutions.[184] The court noted, however, that these benefits did not extend to the prosecutor's choice of forum in a juvenile case, stating "The elements of the offense are determined by the *charging* decision, and *it is only the charging decision that is protected by traditional notions of prosecutor discretion.*"[185] Charging, then, involves a determination of whether a crime has been committed, while the decision to file a case in criminal court—to waive juvenile court jurisdiction—is a subsequent step which implicates a juvenile's interest in procedural fairness.

Choice of charge is simply one part of the prosecution of a juvenile and, when the juvenile and criminal courts both have jurisdiction, it precedes the choice of forum. Prosecutorial waiver thus allows the prosecutor to determine without a hearing (and thus potentially without regard to a juvenile's best interests) that a juvenile is not amenable to juvenile court rehabilitation. While prosecutors traditionally enjoy wide discretion in charging a suspect,[186] this discretion arguably does not extend to determining where to file the case; the two functions are separate. The choice of forum in cases involving prosecutorial waiver thus should not be considered part of the traditionally protected use of prosecutorial discretion.[187]

179. 901 P.2d at 1003.
180. 901 P.2d 991 (Utah 1995).
181. *Id.* at 1002-04. *But cf.* Chapman v. State, 385 S.E.2d 661, 663 (Ga. 1989) (holding that prosecutors may both charge a juvenile and choose the forum in which to file her case because "the initial option to select a forum when concurrent jurisdiction exists belongs to the litigant").
182. 901 P.2d at 1002-03.
183. *Id.* at 1003.
184. *Id.*
185. *Id.* (second emphasis added).
186. *Id.*; *see supra* note 165 and accompanying text.
187. *Mohi*, 901 P.2d at 1003.

3. Requiring Prosecutors to Serve Two Masters: The Public and the Juvenile

A prosecutor cannot serve justice when she must serve both the state and the best interests of the juvenile at the same time.[188] Moreover, her dual role compromises the premises of the juvenile justice system. As both a party to the suit and the representative of the state, a prosecutor acting alone, in the absence of statutory criteria, is in a poor position to represent the best interests of the child. Even in a jurisdiction that provides statutory considerations (and thus requires consideration of the juvenile's personal circumstances and of other potentially mitigating factors), the most principled prosecutor will have difficulty because she must also evaluate the state's interests, which may include prosecution of the juvenile to the fullest extent of the criminal law.[189]

Commentators have rejected arguments by some government attorneys that, in an analogous situation, they can represent both sides in a matter, such as when two agencies represented by the Attorney General are embroiled in a dispute.[190] In the prosecutorial waiver situation, a prosecutor is asked not only to represent both the state and the juvenile, but also to be the judge. This task is not only overwhelmingly difficult and sensitive but also contrary to the legal ethics of our adversarial system, which insist upon the "independent presentation of . . . differing interests [to] enable those who judge in our society to make better decisions."[191] Prosecutorial waiver does not serve this decision-making process.

B. *Legislative Waiver: Justice on Autopilot*

Legislative waiver is more fair to juveniles than prosecutorial waiver, but also more damaging; rather than involving even an arbitrary exercise of discretion, the exclusion from juvenile court is automatic and offense-based.[192] The mechanism thus does not provide any opportunity before criminal court jurisdiction attaches for a hearing or consideration of whether the juvenile is amenable to rehabilitation in juvenile court.[193] In addition to this glaring problem, legislative waiver duplicates the faults of prosecutorial waiver, including shifting

188. *See* Model Code of Professional Responsibility, *supra* note 127, EC 7-13.

189. *See* T. Kenneth Moran & John L. Cooper, Discretion and the Criminal Justice Process 53 (1983).

190. *See* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 How. L.J. 539, 540-41 (1986).

191. *Id.* at 567.

192. Barry C. Feld, *supra* note 37, at 701-02; Guttman, *supra* note 12, at 521-22; Martin J. O'Hara, Note, *Is It a Crime to Live in Public Housing? A Proposal to the Illinois General Assembly to Amend the Automatic Transfer Statute*, 27 J. Marshall L. Rev 855, 864 (1994).

193. *See supra* text accompanying notes 98-101.

the burden of proof to the juvenile, limiting the opportunity for meaningful appeal, and stigmatizing and traumatizing the juvenile through prosecution in criminal court—even if only on a temporary basis.[194]

Legislative waiver also contravenes the individualistic and rehabilitative philosophy of the juvenile justice system because it does not take place on a case-by-case basis with an examination of the juvenile's life and the circumstances of her offense. By failing to provide a hearing before determining the adjudicatory forum, legislative waiver prevents a determination of the juvenile's best interests until after those interests may have already been harmed through the juvenile's time in criminal court.[195] If the legislature has decided that the crime with which the juvenile is charged should be tried in criminal court, this waiver mechanism operates automatically to exclude her from juvenile court jurisdiction, blind to her best interests and in disregard of any mitigating factors. The Supreme Court decried this sort of treatment in *Kent v. United States*[196] when it forbade judicial waiver conducted "without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[197] Juveniles must receive an opportunity to be heard before they are deemed unsuited to juvenile court jurisdiction.

C. *Serving the Purposes of the Juvenile Justice System and Juveniles' Interests in Being Heard*

Judicial waiver is the only waiver mechanism that provides a hearing before a juvenile is sent to criminal court jurisdiction, thereby serving the best interests of the juvenile and society. During the waiver hearing, a juvenile court judge serves as a nonpartisan arbiter of the dispute[198] and protector of the juvenile's rights.[199] She performs this task by independently and impartially[200] considering both the evidence presented during the adversarial hearing and the personal circumstances of the juvenile.[201] Because she is impartial and not a party to the case, a judge's primary interest in the outcome is that justice is done.[202]

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194. *See supra* text accompanying notes 161-70.

195. *See id.*

196. 383 U.S. 541 (1966).

197. *Id.* at 554.

198. *See* Moran & Cooper, *supra* note 189, at 84.

199. *See id.* at 85 (stating that a judge's authority in the courtroom is given to her "in the name of protecting the rights of the accused").

200. *See* ABA Model Code of Judicial Conduct, Canons 1 & 3 (1990).

201. *See supra* text accompanying notes 98-102; *see also* Kent v. United States, 383 U.S. 541, 565-67 (1966) (advocating consideration of eight potentially mitigating factors in judicial waiver hearings).

202. *See, e.g.*, Model Code of Judicial Conduct, *supra* note 200, Canon 1(A) (stating that "[a]n independent and honorable judiciary is indispensable to justice in our society").

In pursuit of a just result, the judge looks beyond the mere probable cause requirement that binds prosecutors.[203] She seeks not only evidence that the juvenile committed the alleged offense, but also evidence that the juvenile is not amenable to juvenile court treatment.[204] Because the judge is statutorily bound to consider potentially mitigating factors such as amenability to treatment, personal circumstances, and lack of a prior record,[205] her waiver decision accords the juvenile the individualized treatment promised by the juvenile justice system.[206] As an added protection, the judge's decisions are subject to meaningful review based on her written findings.[207]

Judicial waiver thus provides an adversarial process in which the interests of the juvenile and society may be weighed against each other in a neutral setting to achieve a fair outcome.[208] Procedure is not provided at the expense of an opportunity for rehabilitation, and the option remains available in particular cases to prosecute in criminal court juveniles charged with especially egregious crimes or determined not to be susceptible to rehabilitation in juvenile court.

While prosecutorial and legislative waiver may save courts the time and expense of waiver hearings by making no provision for their occurrence, these mechanisms do not serve the purposes of the juvenile justice system. Prosecutorial waiver allows a prosecutor to file juvenile cases in criminal court without full consideration of the juvenile's individual circumstances or of other potentially mitigating factors; in other words, without consideration of a juvenile's best interests.[209] It may also require a prosecutor to attempt simultaneously to represent a juvenile's best interests and to serve the state, which may seek to prosecute the juvenile.[210] Legislative waiver similarly denies a juvenile the right to a hearing before she is subject to criminal court jurisdiction, also in abrogation of her best interests.[211] By contrast, and in keeping with the Supreme Court's concerns regarding procedural fairness for juveniles, judicial waiver provides for a full and impartial hearing in juvenile court, including a balanced consideration of the juvenile's best interests on a case-by-case basis,[212] before criminal court jurisdiction can attach.

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203. *See supra* text accompanying notes 99, 127-28.

204. *See supra* text accompanying notes 98-102.

205. *Id.*

206. *See supra* part I.A.

207. *See supra* text accompanying notes 103-04; Bishop & Frazier, *supra* note 6, at 301.

208. *See* Rubin, *supra* note 26, at 186-87 (advocating the initiation of all juvenile cases in juvenile court with a judicial waiver proviso); Boyce, *supra* note 46, at 1008-09 (same).

209. *See supra* parts III.A.1, III.A.2.

210. *See supra* part III.A.3.

211. *See supra* part III.B.

212. *See supra* parts I.A, I.B., III.C.

CONCLUSION

The decision to waive juvenile court jurisdiction and its rehabilitative benefits in favor of punitive criminal court treatment is a decision that can forever change a juvenile's life. In view of its monumental importance, the decision should be made only after a full and impartial consideration of the juvenile's individual circumstances and best interests. Whereas prosecutorial and legislative waiver do not provide a forum for this examination, judicial waiver does. Only judicial waiver allows a juvenile to present her case to an impartial arbiter and to receive the fairest treatment under the law. Society's investment in and concern for its children mandates that it provide them every opportunity for rehabilitation before deeming them incorrigible—it demands a judicial waiver hearing before every waiver of juvenile court jurisdiction.