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Fry 'Em Up: America's Violent Juveniles--What Should be Done with Them?

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FRY 'EM UP?

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> If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him unto the elders of his city, and unto the gate of his place; and they say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton and a drunkard." And all the men of his city shall stone him with stones, that he may die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.[1]

Everyday America is bombarded with horrendous stories of crimes committed by its youth, followed by the inevitable question: "What should America do with its violent juvenile

[1] Deuteronomy 21:18-21.

offenders?" Although the Bible's aggressive steps should not be taken, America must act decisively before the situation spins further out of control. Juveniles are becoming more and more violent[2], and as a result, America's juvenile justice system may be in danger of becoming obsolete because America, in an attempt to curb this violent behavior, is herding its youth into the adult system.[3]

This paper examines and analyzes America's sue of its adult justice system in treating its young offenders and whether its juvenile justice system any longer has a purpose. First, this paper discusses the nature and history of America's juvenile justice system, including United States Supreme Court decisions affecting youthful offenders, along with the history of Michigan's juvenile justice system. Second, it analyzes the constitutional aspects of the juvenile justice system, including the Sixth, Eighth, and Fourteenth Amendments. Third, this paper looks at the various processes employed by states in trying a juvenile in the adult system. Fourth, this paper examines the consequences, both positive and negative, of transferring juveniles to the adult system. Finally, it proposes and discusses remedies America should consider or continue to use in treating its juvenile offenders.

I. THE HISTORY OF THE JUVENILE JUSTICE SYSTEM

A. Brief History

This country developed juvenile courts as a humane way to treat children accused of criminal offenses. The courts were based on the concept that up to a certain age, juveniles were

[2] In May 2001, Nathaniel Brazill, a 14-year old Floridian boy who shot and killed his teacher, was sentenced to 25 years to life in prison after being convicted of second-degree murder. *See* Joan McCord and Cathy Spatz Widom, *A Better Way to Handle Juvenile Offenders*, NATIONAL ACADEMICS OP-ED SERVICE ARCHIVE, May 25, 2001, *at* http://www4.nationalacademies.org/onpi/oped.nsf/(Op-EdByDocID)/8E19627A85FFF7628.htm (Bazill was 13 years old when he committed the vicious attack).

[3] Two-thirds of America's youth detained before trial were held in adult jails, and one-third of those youth were housed in the general adult inmate population. *See* Paul S. Reed, *Youth Crime/Adult Time: New Report Flaws Trend: Consequences of Adult Population*, CURRENT EVENTS: LAW, *at* http://law.about.com/library/weekly/aa103000b.htm (discussing the problems in committing youths to the adult system). Therefore, opponents of America's juvenile justice system believe that these and other factors suggest that the system has outlived its usefulness, that its processes are duplicative, while its proponents suggest that it is merely in need of refinement.

incapable of forming criminal intent, and therefore, could not actually commit a crime. Instead of committing crimes, juvenile offenders committed delinquent acts, and instead of being found guilty of a crime, courts adjudicated those juveniles as delinquent. Accordingly, as a remedial measure, the court would not punish the youthful offender but place the him or her in rehabilitative treatment programs for the delinquent behavior.[4]

In 1899, the State of Illinois[5] established America's first juvenile justice system with the creation of juvenile court.[6] Prior to the creation of this court, juveniles were tried as adults in a criminal court, where, under the common law infancy defense, the age of the offender was only a mitigating factor in the sentencing of a juvenile.[7]

The doctrine of *parens patriae*, literally "parents of the country," was the traditional rationale for rendering juveniles wards of the state.[8] In addition to the custodial powers that it may exercise over property, the doctrine of *parens patriae* allows the government to become the custodian of a child and to assume the child-rearing duties normally assumed by the child's

[4] Depending on their deviant behavior, juvenile delinquents are placed into five categories: (1) non-criminal youths, (2) irresponsible youths, (3) situational offenders, (4) drug and alcohol users, and (5) chronic offenders. Non-criminal youths are either status offenders (illegal acts only if committed by juveniles) and dependant and neglected children (children who have problem in group and foster homes after being abandoned by their parents). Irresponsible youths are naïve offenders (unaware they are violating the law) and emotionally disturbed children (have severe emotion problem that interfere with everyday functioning). Situational offenders are either property or violent offenders who have a sudden and unexpected outburst (can include arson, robbery, rape and murder). Drug and alcohol offenders get into trouble because of their use and/or addition to drugs and alcohol. Finally, chronic offenders live lives that are committed to serious and repeat criminal activity. *See* CLEMENS BARTOLLAS & STUART J. MILLER, JUVENILE JUSTICE IN AMERICA 90-109 (2nd ed. 1998).

[5] Illinois' motivation for creating the juvenile court was its thought that juveniles were not getting adequate attention in the adult criminal courts. *See* Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22 JUNE CHAMPION 10, 12 (1998) (noting that, among other things, "juries were often hesitant to convict juveniles because they feared the negative effect such sentencing and incarceration would have once the juveniles returned to society.").

[6] *See* 705 ILL. COMP. STAT. 405/1-2 (1998) (amending 1899 Ill. Laws 131, §§ 1, 21).

[7] *See* Robert W. Sweet, *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 390 n.5 (1991) (noting that under the common law infancy defense, children under age seven could not be held culpable for their actions, children between the ages of seven and fourteen had a rebuttable presumption of innocence, and children above the age of fourteen were charged as adults).

[8] BLACK'S LAW DICTIONARY 1114 (7th ed. 1999) (defining *parens patriae* as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state.")

parent.[9] By acting as the juvenile's parents, the government becomes entitled to the same discretion exercised by the natural parents, specifically those activities relating to raising and disciplining the child.[10] This patriarchal view of the juvenile justice system has, in turn, supported the notion that the system is of a non-adversarial type—a system where the normal protections of the adversarial criminal system are unnecessary.[11] However, as the system tends to become more punitive that rehabilitative, this non-adversarial façade serves worries many individuals who become the subjects of the juvenile justice system.[12]

B. United State Supreme Court Decisions Affecting Juvenile Offenders

The first major United States Supreme Court decision effecting juveniles came in 1966. In *Kent v. United States*,[13] the Court concluded that the District of Columbia violated Morris Kent's due process rights when it waived him to the adult court because the court failed to articulate on the record its reasons for the decision. As the result of several break-ins, Morris Kent was introduced to the District of Columbia's juvenile system when he was fourteen.[14] Two years later, after finding his fingerprints at a crime scene, Morris was charged with robbery and rape.[15] The juvenile judge waived the court's jurisdiction without any findings and failed to recite any reason for the waiver.[16] Upon waiver, a grand jury indicted Kent, and while finding him not guilty by reason of insanity as to the rape, the jury convicted him on six counts of house breaking and robbery, and accordingly, the judge sentenced Morris to serve between 30 to 90

[9] *See* Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1008-09 (1991) (noting that the doctrine of *parens patriae* in the juvenile justice system was generally understood to grant the state the power "to assume responsibility over neglected and abandoned children").
[10] *See* Janet E. Ainsworth, Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition, 36 B.C.L. REV. 927 (1995) (noting that the early advocates of the juvenile justice system "claimed that . . . that juvenile justice system would be able to rehabilitate young lawbreakers and derail their incipient criminal careers.").
[11] *See id*.
[12] *See* Claude Noriega, *Stick a Fork in it: Is Juvenile Justice Done?*, 16 N.Y. L. SCH. J. HUM. RTS. 669, 673 (2000) (noting that the juvenile justice system may be done as known by Americans unless something is done immediately).
[13] 383 U.S. 541 (1966)
[14] *See* Kent v. United States, 383 U.S. 541, 564-65 (1966).
[15] *See Kent*, 383 U.S. at 543-44.
[16] *See id*. at 546.

years.[17] In Justice Abe Fortas' majority opinion, he made it clear that he felt the juvenile court had fallen well short of its original stated goals:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults . . . There is evidence, in fact, that 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.[18]

The Court set forth four basic safeguards required by due process during juvenile waiver proceedings: (1) if the juvenile court is considering waiving jurisdiction, the juvenile is entitled to be heard on the waiver; (2) he or she is entitled to representation by counsel at the hearing; (3) upon request, the juvenile's lawyer must be given access to his client's social records; and (4) if jurisdiction is waived, the juvenile is entitled to a statement of reasons in support of the order.[19] Initially, these basic safeguards were limited in scope because the Court based the decision on its interpretation of the District of Columbia's statutes regarding waiver rather than on constitutional grounds.[20] However, following several references to *Kent* in *In re Gault* and subsequent cases, the *Kent* safeguards have taken on constitutional dimensions and are applicable in all juvenile court waiver decisions.[21]

In 1967, the Court, in *In re Gault*,[22] revisited the issue of the propriety of juvenile court procedures.[23] After being convicted in juvenile court for making an obscene phone call to a female neighbor, the court committed fifteen-year-old Gerald Gault to a juvenile facility for an indeterminate period.[24] On appeal to the United States Supreme Court, Justice Fortas authored

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[17] *See id*. at 550.
[18] *Id*. at 555-56.
[19] *See id*. at 561-64.
[20] *See* JAMES A. INCIARDI, CRIMINAL JUSTICE 696 (5th ed. 1996).
[21] *See id*.
[22] 387 U.S. 1 (1967).
[23] *See* In re Gault, 387 U.S. 1 (1967).
[24] *See Gault*, 387 U.S. at 8.

the opinion reversing the adjudication.[25] In doing so, the Court applied the Fourteenth Amendment and made four major holdings. First, it held that the allegedly delinquent child and his or her parents have the right to notice of the charges.[26] Second, the Court also found that the child had the right to counsel, to be advised of the right, and, if indigent, to have an attorney appointed.[27] Third, it held the juvenile had the right to confront and cross-examine any adverse witness.[28] Finally, the Court found that the privilege against self-incrimination applied to juvenile proceedings and that the child had to be informed of that right.[29]

The *Gault* decision has been characterized as a dramatic, if not revolutionary, reconceptualization of the juvenile justice system.[30] Justice Fortas emphasized that regardless of the label applied to juvenile proceedings, they were essentially criminal in nature and a juvenile's rights could not be circumscribed. "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a *Kangaroo court*."[31]

After *Gault*, the Court expanded, and then restricted the rights of children. In *In re Winship*,[32] the Court applied the requirement of proof beyond a reasonable doubt standard to delinquency proceedings.[33] However, in *McKeiver v. Pennsylvania*,[34] the Court held that principles of due process and fundamental fairness did not require a right to a jury trial in delinquency proceedings.[35] The Court was reluctant to require jury trials in delinquency

[25] *See id*. at 65.
[26] *See id*. at 33.
[27] *See id*. at 34-36.
[28] *See id*. at 58.
[29] *See id*. at 49.
[30] *See* Donald Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65 (1999); Brian Michaels, *Children's Rights—Searching for a Constitutional Consensus*, 14 JUV. L. 133 (1993).
[31] *In re Gault*, 387 U.S. at 27-28 (emphasis added).
[32] 397 U.S. 358 (1970).
[33] *See* In re Winship, 397 U.S. 358, 368 (1970).
[34] 403 U.S. 528 (1971).
[35] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

proceedings for fear that they would bring to the system the delay, formality, and clamor of the adversary system and limit experimentation in the juvenile justice system.[36]

In *Breed v. Jones*,[37] the Court held that the prosecution of a youth in the adult criminal court, after he has been adjudicated delinquent in the juvenile court, was a violation of the Fifth Amendment's double jeopardy clause.[38] In *Fare v. Michael C.*,[39] the Supreme Court held that whether a child waives her right to remain silent and assistance of counsel is to be resolved by examining the totality of the circumstances surrounding the interrogation.[40]

In *Schall v. Martin*,[41] the Court decided that the pretrial detention of youths for fear they would commit further crimes did not violate due process.[42] The Court asserted that such "preventive detention" was a valid exercise of the state's *parens patriae* power, thus protecting children from their own folly.[43]

After examining and analyzing these United State Supreme Court decisions effecting the rights of juveniles, it is easy to see that the Court pendulum has swung from one side to the other, with the view of today's Court towards juvenile rights somewhere in between. The Court refuses to give juveniles all of the same constitutional rights afforded their adult counterparts, but at the same time, the Court believes juveniles should be somewhat protected from the system and makes its rulings accordingly.

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[36] *See McKeiver*, 403 U.S. at 547-50. *See also In re Whittaker*, 239 Mich. App. 26, 607 N.W.2d 387 (1999) (holding that because there is no constitutional right to a jury trial, any waiver of Michigan's statutory rights does not implicate constitutional concerns).
[37] 421 U.S. 519 (1975).
[38] *See* Breed v. Jones, 421 U.S. 519 (1975).
[39] 442 U.S. 707 (1979).
[40] *See* Fare v. Michael C., 442 U.S. 707 (1979). However, this rule has apparently been eroded in Michigan because it apparently offers no meaningful protection against the admission of confessions by children. *See* People v. Abraham, 234 Mich. App. 640, 599 N.W.2d 736 (1999). The court of appeals reversed the trial court's suppression of an eleven-year-old boy's confession. *See Abraham*, 234 Mich. App. at 655, 599 N.W.2d at 744. The court was not moved by the fact of the boy's age, his learning disabilities, his emotional impairments, or that he was functioning intellectually at the level of a six to eight-year-old child. *See id*. at 646-54, 599 N.W.2d at 740-44. Instead, the court emphasized the circumstances of the alleged crime, as opposed to the circumstances of the interrogation, and essentially held that the seriousness of the alleged crime justified the admission of the confession. *See id*. at 646-58, 599 N.W. 2d at 740-46.
[41] 467 U.S. 253 (1984).
[42] *See* Schall v. Martin, 467 U.S. 253 (1984).
[43] *See* 467 U.S. at 265-67.

II. CONSTITUTIONAL ISSUES SURROUING THE JUVENILE JUSTICE SYSTEM

Many of the mandatory protections in the adult criminal justice system are not offered in the juvenile justice system. The main argument centers around the history behind juvenile adjudications—there is no punishment, only rehabilitation and treatment. Historically, courts have been more protective of the criminal defendant's rights because of the potential for loss of life and liberty and less protective of rights in civil proceedings because only the loss of property is available.[44] Using similar reasoning, the juvenile court does not offer all constitutional guarantees to its defendants because, it argues, they are not being deprived of life and liberty. However, is not a juvenile deprived of his or her liberty when the court orders them to go to mandatory meetings or be incarcerated? For that reason alone it is a flawed argument.

A. The Sixth Amendment's Right to Counsel

The Sixth Amendment of the United States Constitution guarantees a right to counsel and jury trial for any criminal defendant.[45] However, both of these rights are not guaranteed in America's juvenile justice system. First, the juvenile justice system precludes trial by jury because juveniles are not "criminals," and are thus not protected by the Sixth Amendment because that right is only guaranteed "[i]n all criminal prosecutions."[46]

Second, although the right was protected in *In re Gault*,[47] the juvenile system allows a defendant to waive his or her right to counsel.[48] Thus, a juvenile exercising this right may appear before a judge without the benefit of counsel.[49] Some argue that juveniles should not be

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[44] *See* Duncan v. Louisiana, 391 U.S. 145, 151 (outlining the history of trial by jury in criminal proceedings).
[45] *See* U.S. CONST. Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.").
[46] *Id*.
[47] 387 U.S. 1 (1967).
[48] *See* In re Gault, 387 U.S. 1, 34-41 (1967) (affirming the applicability of a number of rights guaranteed to criminal defendants to juvenile court proceedings).
[49] *See* Robert E. Shepherd, Jr., *Juveniles' Waiver of the Right to Counsel*, 13 SPG. CRIM. JUST. 38, 39 (detailing the various approaches that the states have taken to juvenile waiver of counsel). It use to be argued that a juvenile did

presumed to waive the right as long as it was "knowing and voluntary" because of all of the other "rights" and "privileges" these same juveniles do not possess—such as entering into contracts, voting, driving, or drinking.[50] However, these same juveniles have the "right" to waive some of their most precious constitutional protections, protections they probably know nothing or very little about.[51]

B. The Eighth Amendment's Prohibition on Cruel and Unusual Punishment

Once sentenced to incarceration in a juvenile facility, juveniles can be subjected to several forms of "cruel and unusual punishment" within the meaning and scope of the Eighth Amendment.[52] For example, courts have held that the brutality committed by the institution's staff and by other incarcerated juveniles to be cruel and unusual punishment.[53] Courts have also found insufficient staffing to be cruel and unusual punishment where it serves to deny juveniles medical and psychiatric care.[54] However, this argument is flawed because adult prisoners are also subjected to these same forms of "cruel and unusual punishment." They experience insufficient staffing, not to mention weekly, if not daily, unwanted and non-consensual sexual encounters with other inmates. For these reasons alone this Eighth Amendment argument, as applied to juveniles, is weak.

C. The Fourteenth Amendment's Right to Due Process

The Due Process Clause of the Fourteenth Amendment is implicated at every stage of the juvenile justice proceeding including denial of the right to a jury, denial of bail were there is no

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not need assistance of counsel because the judge was his or her counsel. *See* Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22 JUNE CHAMPION 10, 63 (1998) (discussing the reasons a juvenile needs additional assistance than merely from a judge).

[50] *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 172 (1993) (noting that minors are more likely than adults to waive their rights).

[51] *See id*.

[52] *See* Morales v. Truman, 430 U.S. 322 (1977) (finding numerous violations of the prohibition against cruel and unusual punishment in several juvenile institutions).

[53] *See Morales*, 430 U.S. at 73 (illustrating some of the "various forms of physical abuse, applied by the staff or other boys with the encouragement of the staff," that institutionalized juveniles might be subjected). This is problematic where some of the institutionalized juveniles are only status offenders who have been incarcerated with violent juvenile offenders. *See id*. (stating that some of the juveniles subjected to the abuse were those being held for truancy, incorrigibility, or running away).

finding of a "serious risk" that the juvenile would commit a crime before trial,[55] waiver of right of counsel by a juvenile who would be incompetent to make that decision in other circumstances,[56] and waiver into adult court.[57] Thus, juvenile court defendants are afforded limited due process protections. This is probably the strongest argument used by the opponents of the new system because these protections are afforded to adult, and yet, not juveniles who commit the exact same crimes, and it all depends on where the juvenile stands trial (i.e. in juvenile or adult court). I do not agree that we treat juveniles as adults in some instances, and yet, not in others.[58] If America wants to punish juveniles as adults, then juveniles should be afforded the same protections no matter where they are being tried.

III. TRYING JUVENILES AS ADULTS—THE PROCESS

The initial steps for trying a juvenile, as opposed to an adult who has committed the exact same act are very different. A juvenile must first be "waived" before he or she can be tried as an adult. Waiver is the process of removing a juvenile criminal from the jurisdiction of the juvenile court and adjudicating him or her as an adult in regular criminal court,[59] and there are three types of waiver: (1) judicial, (2) legislative, and (3) prosecutorial. However, if one of these does not exist or is not chosen as an option by the proper authority, the juvenile offender is tried and sentenced as a juvenile.

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[54] *See id*. at 105.
[55] *See* Schall v. Martin, 467 U.S. 253, 278 (1984).
[56] *See supra* notes 45-51 and accompanying text (discussing a juvenile's right to counsel under the Sixth Amendment).
[57] *See* Aron and Hurley, *supra* note 49, at 63. The authors argue prosecutorial waivers amount to a violation of due process because they give the prosecutor the ability to file "concurrent jurisdiction" in both adult criminal and juvenile courts, and allow the prosecutor unfettered discretion to decide in which court to proceed. *See id*. The authors state that this vests in the juvenile's adversary the power to treat the juvenile as an adult without giving the juvenile to demonstrate otherwise. *See id*.
[58] The state cannot have its cake and eat it too.
[59] *See* Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 570 (1996).

States have been revamping their laws to allow an increasing number of juveniles to be treated as adults.[60] Patricia West, director of the Virginia Department of Justice stated, "The thinking behind the juvenile court, that everything be done in the best interest of the child, is from a bygone era".[61] Virginia, along with almost all other states, has adjusted its thinking and made issues of public safety and victims' rights as important as protecting the child's interest.

A. Judicial Waiver

A judicial waiver, also known as a "bond-over" or transfer, allows juvenile court judges to use their discretion by waiving jurisdiction and sending the young defendant to adult court.[62] This can be done through the juvenile court's own motion, a prosecutor's motion, or a motion by the juvenile defendant.[63]

Judicial waivers[64] have risen dramatically in recent years. Between 1971 and 1981, judicial waivers increased over 400% nationally from less than 1% to more than 5% of juvenile arrests.[65] In 1985, judicial waivers accounted for 7200 or 1.4% of 505,400 cases.[66] However, by

[60] The federal government has also been active in getting tougher on America's youngest offenders. The Violent Crime Control and Enforcement Act of 1994 primarily facilitated juvenile prosecutions in the adult system. *See* 18 U.S.C. § 5032 (1994). The Prisoner Reform Act of 1995 limits the rights of all prisoners, including juveniles, to effect change in their environment. *See* 18 U.S.C. § 3626 (1996). Finally, the Omnibus Crime Control Act of 1997 fails to provide hearings to investigate the specific circumstances of individual juveniles before transferring them to the adult system. *See* 18 U.S.C. § 5032 (1997).

[61] *States Revamping Laws of Juveniles as Felonies Soar, in* CRIMINAL JUSTICE 97/98 176 (John J. Sullivan & Joseph L. Victor, eds. 1998).

[62] *See* Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1997-1999: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J 17, 18 (1995).

[63] Many state have allowed the use of the judicial waiver for decades, with early waiver statutes giving complete authority and discretion to the juvenile court judge. *See id*. at 23.

[64] The driving force behind the judicial waiver was punishment, although several studies have found that the majority of judicial waiver cases have been for property and drug crimes. A 1990 study found that the majority of cases transferred to adult court through the judicial waiver were for property crimes (46%) and drug offenses (14%), with only 35% for violent crimes. A 1991 study found that more than half (55%) of transferred juveniles were charged with property offenses, 5% were alleged to have committed misdemeanor offenses, and 25% were first-time, low-level offenders. The National Center for Juvenile Justice found in 1992 that 34% of cases waived by juvenile court judges involved offenses against others, while 45% and 12% were for property and drug offenses, respectively. *See* Vincent Schiraldi & Jason Ziendenberg, *The Florida Experiment: Transferring Power from Judges to Prosecutors*, 2000 A.B.A. SEC. CRIM. JUST. 47 (2000).

[65] *See* Fritsch & Hemmens, *supra* note 62, at 23.

[66] *See* Carol J. DeFrances & Kevin J Strom, *National Survey of Prosecutors, 1994: Juveniles Prosecuted in State Criminal Courts*, Bureau Just. Stat. Selected Findings (U.S. Dep't Just., Wash, D.C.), Mar. 1997, at 4.

1994, that number increased to 12,300 of 855,200, which represented an increase of nearly 60%.[67]

1. *The Hearing Requirement*

Forty states and the District of Columbia have statutes permitting judicial waivers; however, all of them require the juvenile be given a hearing to determine whether the he should be transferred or rehabilitated.[68] Some hearings, including those in Michigan, are bifurcated, meaning that at the first hearing, the judge determines whether there is probable cause to believe the defendant committed the alleged offense, while at the second hearing, the judge determines whether there is a reasonable prospect of rehabilitation.[69]

In *Kent v. United States*,[70] the United States Supreme Court established eight common factors judges should consider before transferring including: (1) the seriousness of the offense; (2) the offender's age; (3) the juvenile's previous record and court history; (4) whether the offense was against a person or property; (5) the defendant's mental and physical maturity; (6) whether the act was committed in an aggressive, violent, premeditated or willful manner; (7) prospects of adequate protection for the public and the likelihood of rehabilitation in the juvenile

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[67] *See id*.

[68] *See* ALA. CODE § 12-15-34 (Supp. 1998); ALASKA STAT. § 47.12.100 (Michie 1998); ARIZ. REV. STAT. ANN. § 8-327 (West 1999); CAL. WELF. & INST. CODE § 707 (West Supp. 2000); COLO. REV. STAT. ANN. § 19-2-518 (West 1999); DEL. CODE ANN. tit. 10 § 1010(b) (1999); D.C. CODE ANN. § 16-2307 (1997); FLA. STAT. ANN. § 985.226 (West Supp. 2000); HAW. REV. STAT. § 571-22 (Supp. 1998); IDAHO CODE § 20-508 (1997 & Supp. 1999); ILL. COMP. STAT. ANN. 405/5-805 (2) & (3) (West 1999); IND. CODE ANN. §§ 31-30-3-3, 31-30-3-5 (Michie 1997), IOWA CODE ANN. § 640.010 (Banks-Baldwin 1999); LA CHILDREN'S CODE ANN. art. 862 (West 1995); ME. REV. STAT. ANN. tit. 15 § 3101 (West 1980 & Supp. 1999); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (Supp. 1999); MICH. COMP. LAWS ANN. § 712A.4 (West Supp. 1999); MINN. STAT. ANN. § 260B.125 (West Supp. 2000); MISS. CODE ANN. § 43-21-157 (Supp. 1999); MO. ANN. STAT. § 211.071 (West 1996); MONT. CODE ANN. §§ 41-5-1603, 41-5-1606 (1999); N.H. REV. STAT. ANN. § 169-B:24 (Supp. 1999); N.M. STAT. ANN. § 32A-2-20 (Michie Supp. 1999); N.C. GEN. STAT. § 7B-2203 (1999); N.D. CENT. CODE § 27-20-34 (Supp. 1999); OKLA. STAT. ANN. tit. 10, §7303-4.3 (West 1998); OR. REV. STAT. §§ 419C.349, 419C.352 (Supp. 1998); 42 PA. CONS. STAT. ANN. § 6355 (West 1982 & Supp. 1999); R.I. GEN. LAWS § 14-1-7.1 (1994 & Supp. 1999); S.C. CODE ANN. § 20-7-7605 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 26-11-4 (Michie 1999); TENN. CODE ANN. § 371-134 (Supp. 1999); TEX. FAM. CODE ANN. § 5401 (West Supp. 2000); UTAH CODE ANN. § 37-1-3a-603 (1996 & Supp. 1999); VT. STAT. ANN. tit. 33 § 5506 (1991 & Supp. 1999); VA. CODE ANN. § 16.1-269.1 (Michie 1999); WASH. REV. CODE ANN. § 13.40.110 (West Supp. 2000); WIS. STAT. ANN. § 938.18 (West Supp. 1999); and WYO. STAT. ANN. § 14-6-237 (Michie 1999).

[69] *See* MICH. CT. M.C.R. 5.950. Arizona and Mississippi also have bifurcated hearings. *See* ARIZ. REV. STAT. R. 14; MISS. CODE ANN. 43-21-157 (Supp. 1999).

[70] 383 U.S. 541 (1966).

facilities; and (8) whether a gun or deadly weapon was used during the crime.[71] Some states have special factors, including the victim's views[72] or the likelihood the defendant will develop competency and life skills while confined in a juvenile institution that will allow him or her to become a contributing member of society.[73]

These are all very important factors that a judge should examine and analyze before waiving the juvenile to adult court. However, I feel the most important factor to be the victim's views. I think it is important that the victim and/or his or her family members be allowed to speak because they are the people most affected by the crime.[74]

2. *Transferring Age*

States have been lowering the age at which juveniles may be transferred to adult court. Several states have no age limit,[75] while others permit waiver of juveniles who are ten,[76] twelve,[77] thirteen,[78] fourteen,[79] fifteen,[80] sixteen,[81] or seventeen years of age.[82]

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[71] *See* Kent v. United States, 383 U.S. 541, 566-67 (1966). These factors are required in almost all states' judicial waiver statutes.

[72] *See* ARIZ. REV. STAT. ANN. 8-327(D)(7) (West 1999); COLO. REV. STAT. ANN. 19-2-518(4)(b)(VIII) (West 1999); 42 PA. CONS. STAT. ANN. 6355(a)(4)(iii)(A) (West Supp. 1999).

[73] *See* IDAHO CODE 20-508(8)(f) (1997 & Supp. 1999).

[74] The *Kent* factors are also very important because they determine the likelihood a juvenile will be rehabilitated; the more severe the crime, the less likely the youthful offender will have a probable chance at rehabilitation.

[75] Alaska statutory law allows waiver for an unclassified felony against a person. *See* ALASKA STAT. § 47.12.100 (Michie 1998). Arizona allows juveniles of any age to be transferred to adult court for any felony. *See* ARIZ. REV. STAT. ANN. § 8-327(A) (West 1999). Delaware law permits the waiver of a juvenile who commits first or second degree murder, first or second degree rape, first degree kidnapping, or any attempt of these. *See* DEL. CODE ANN. tit. 10 § 1010(a)(1999). Hawaii allows waiver of any juvenile who commits murder. *See* HAW. REV. STAT. § 571-22(d)(1) (Supp. 1998). Idaho law permits juveniles accused of murder, rape, robbery, forcible sexual penetration with a foreign object, infamous violent crimes against nature, or mayhem to be waived to adult court. *See* IDAHO CODE §§ 20-508, 20-509 (1997 & Supp. 1999). Under Maine law, any juvenile who allegedly commits murder of a Class A, B, or C crime may be transferred. *See* ME. REV. STAT. ANN. tit. 15 § 3101(4)(A) (West 1980 & Supp. 1999). In Missouri, a juvenile who commits murder, first degree assault, forcible rape, first degree robbery, drug distribution, or any felony if he or she has two prior juvenile adjudications may be waived to adult court. *See* MO. ANN. STAT. § 211.071 (West 1996). Under New Hampshire, Oklahoma, and Rhode Island law, any minor may be waived to adult court if he commits a crime that would be a felony if committed by an adult. *See* N.H. REV. STAT. ANN. § 169-B:24 (Supp. 1999); OKLA. STAT. ANN. tit. 10, § 7303-4.3(B) (West 1998); R.I. GEN. LAWS § 14-1-7(c) (1994 & Supp. 1999). South Carolina law permits waiver of a juvenile who commits murder or criminal sexual conduct. *See* S.C. CODE ANN. § 20-7-7605(6) (Law. Co-op. Supp. 1999).

[76] Indiana's statute only applies to juveniles who have are at least ten years old and have committed murder. *See* IND. CODE ANN. § 31-30-3-4 (Michie 1997). Texas law allows waiver of minors ten years of age who have committed a capital felony or murder. *See* TEX. FAM. CODE ANN. § 54.02(j) (West Supp. 2000). A ten-year-old who commit arson, assault and robbery with a dangerous weapon, assault and robbery causing bodily injury, aggravated assault, murder, manslaughter, kidnapping, unlawful restraint, sexual assault, aggravated sexual assault, and burglary of an occupied dwelling may be transferred to the adult system. *See* VT. STAT. ANN. tit. 33, § 5506 (1991 & Supp. 1999).

However, four states and the District of Columbia have laws that specify an upper age limit for transferring (instead of a lower age limit).[83] For example, Tennessee law states a juvenile under sixteen who commits first or second degree murder, rape, aggravated rape, aggregated robbery, kidnapping, aggravated kidnapping, or any attempts one of these crimes can

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[77] Colorado law permits juveniles at least twelve years of age to be waived to the adult system if they commit a Class 1 or 2 felony or crime of violence. *See* COLO. REV. STAT. ANN. § 19-2-518(1)(a)(I)(A) (West 1999). In Missouri, a twelve-year-old who commits any felony, except a few enumerated felonies, can be transferred. *See* MO. ANN. STAT. § 211.071(1) (West 1996). Montana law allows the stated to use extended jurisdiction juvenile prosecution if the juvenile, at least age twelve, commits a felony with a firearm (except felonies with punishment of death or life imprisonment) which permits giving the juvenile a blended sentence with adult punishment possible. *See* MONT. CODE ANN. §§ 41-5-16-2, 41-5-1604 (1999).

[78]Under Illinois and Mississippi law, a thirteen-year-old who commits any crime to be waived to the adult system. *See* ILL. COMP. STAT. ANN. § 405/5-805(3) (West 1999); MISS. CODE ANN. § 43-21-157(1) (Supp. 1999). North Carolina law permits the waiver of a juvenile of thirteen to be transferred for any felony or any related misdemeanor. *See* N.C. GEN. STAT. §§ 7B-1601(d), 7B-2200 (1999).

[79] Twenty-four states allow transfer of fourteen-year-old juveniles. *See* ALA. CODE § 12-15-34(a) (Supp. 1998); COLO. REV. STAT. ANN. § 19-2-518(1)(a)(I)(B) (West 1999); FLA. STAT. ANN. § 985.226(2) (West Supp. 2000); HAW. REV. STAT. § 571-22(b)(1) (Supp. 1998); IDAHO CODE § 20-508(1)(b) (Supp. 1999); IND. CODE ANN. § 31-20-3-2 (Michie 1997); IOWA CODE ANN. § 232.45(6) (West Supp. 1999); KAN. STAT. ANN. § 38-1636(a)(2) (Supp. 1998); KY. REV. STAT. ANN. § 635.020(2) (Banks-Baldwin 1999); LA. CHILDREN'S CODE ANN. art. 857 (West Supp. 2000); MICH. COMP. LAWS ANN. § 712(A).4 (West Supp. 1999); MINN. STAT. ANN. § 260B.125 (West Supp. 2000); MONT. CODE ANN. § 41-5-1602 (1999); NEV. REV. STAT. ANN. § 62.080 (Michie Supp. 1999); N.J STAT. ANN. § 2A:4A-26 (West Supp. 2000); N.M. STAT. ANN. § 32A-2-3 (Michie Supp. 1999); N.D. CENT. CODE § 27-20-34(1)(b)&(c) (Supp. 1999); OHIO REV. CODE ANN. § 2151.26(B) (West Supp. 1999); 42 PA. CONS. STAT. ANN. § 6355(a)(1) (West 1982 & Supp. 1999); S.C. CODE ANN. § 20-7-7605(5) & (9) (Law. Co-op. Supp. 1999); TEX. FAM. CODE ANN. § 54.02(a) & (j) (West Supp. 2000); UTAH CODE ANN. §§ 78-3a-502(3), 78-3a-603 (1996 & Supp. 1999); VA. CODE ANN. § 16.1-269(A) (Michie 1999); and WIS. STAT. ANN. § 938.18 (West Supp. 1999).

[80] The District of Columbia allows a fifteen-year-old juvenile to be transferred to the adult system if the crime he or she committed would be a felony if committed by an adult. *See* D.C. CODE ANN. § 16-2307 (1997). Texas law permits the waiver of a fifteen-year-old juvenile who commits a second or third degree felony, or state jail felony. *See* TEX. FAM. CODE ANN. § 54.02(a) & (j) (West Supp 2000). Several other states allow waiver of juveniles at least fifteen years of age. *See* 705 ILL. COMP. STAT. ANN § 405/5-805 (West 1999); IOWA CODE ANN. § 232.45(7) (West Supp. 1999); MD. CODE ANN., CTS. & JUD. PROC. § 3-817(a) (Supp. 1999); N.H. REV. STAT. ANN. § 169-B:24 (Supp. 1999); OR. REV. STAT. § 419C.349 (Supp. 1998).

[81] Delaware law says that if a sixteen-year-old juvenile has been previously adjudicated as a delinquent and has committed a first degree conspiracy, third degree rape, first degree assault, or first degree burglary, then he or she may be waived to the adult system. *See* DEL. CODE ANN. tit. 10, § 1010 (1999). Indiana law allows a judge to his discretion to transfer a sixteen-year-old to the adult system if he or she has committed a Class A or B felony, involuntary manslaughter, or reckless homicide. *See* IND. CODE ANN. §§ 31-30-3-3, 31-30-3-5 (Michie 1997). South Carolina law allows transfer of a juvenile sixteen years old if he or she commits a misdemeanor or Class E or F, felony, or a felony that permits for a maximum of ten years imprisonment. *See* S.C. CODE ANN. § 20-7-7605(4) (Law. Co-op. Supp. 1999). Several other states allow sixteen-year-olds to be waived to the adult system. *See* CAL.WELF. & INST. CODE § 707 (West Supp. 2000); HAW. REV. STAT. § 571-22 (Supp. 1998); KY. REV. STAT. ANN. § 635.020(3) (Banks-Baldwin 1999); S.D. CODIFIED LAWS § 26-11-3.1 (Michie 1999); TENN. CODE ANN. § 37-1-134 (Supp. 1999); UTAH CODE ANN. § 78-3a-602 (1996).

[82] *See* WASH. REV. CODE ANN. 13.40.110 (West 2000).

[83] *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-804(3) (1998) and § 3-817 (Supp. 1999); OR. REV. STAT. § 419C.352 (Supp. 1998); TENN. CODE ANN. § 37-1-134(a)(1) (Supp. 1999); W. VA. CODE § 49-5-10 (1999); D.C. CODE ANN. § 16-2307(4) (1997).

be waived to adult court.[84] Judicial waiver is usually used for transferring younger juveniles who have committed more serious crimes or transfer older juveniles who have committed a less serious offense. Under these state laws, a juvenile court judge is given considerable discretion in dealing with very young offenders who have committed violent crimes.

3. *Pros and Cons*

One benefit of judicial waiver is that a juvenile court judge, who has years of experience in dealing with children's issues, can determine whether rehabilitation is a realistic possibility. Another benefit is that a juvenile who commits a seriously violent crime may get what he or she deserves and be transferred to adult court. "[A] juvenile should be dealt with through individualized justice considerations based on his or her own conduct and particular needs, rather than a process solely dictated by the offense."[85]

However, opponents of judicial waivers point to its supposedly "negative aspects." They point to the fact that many juvenile delinquents are transferred after committing property offenses, when the purpose behind judicial waiver laws is to punish the most violent juvenile offenders. However, major property offenses, such as arson, are usually only the first step on the road towards a life of crime for these offenders. Another concern is that the state can use the potential for transfer as a bargaining chip.[86] A minor may choose to plead to a lesser offense and avoid the chance of being transferred to adult court and receiving an adult sentence.[87] Plea bargaining is just one of the consequences of our criminal justice system. If the juvenile truly believes that he is innocent, then it should not matter whether he is tried in an juvenile or adult court because either a judge or jury must find him guilty beyond a reasonable doubt. Another

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[84] *See* TENN. CODE ANN. § 37-1-134(a)(1). *See also* W. VA. CODE § 49-5-10 (Under West Virginia law, a juvenile younger than fourteen can be waived for committing treason, murder, robbery with a deadly weapon, kidnapping, first-degree arson, or first-degree sexual assault.).

[85] Arthur L. Burnett, Sr., *What of the Future? Envisioning an Effective Juvenile Court*, 2000 A.B.A. SEC. CRIM. JUST. 7, 12 (2000).

[86] *See* Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Court*, 90 NW. U.L. REV. 1254, 1267 (1995-1996) (discussing the use of judicial waiver as a bargaining chip).

[87] *See id*.

argument against judicial waivers is its potential for abuse and discrimination since transfer is highly discretionary.[88] This excuse—abuse and discrimination—is frequently raised, when in all actuality, it has neither "standing"[89] nor purpose. A final argument against judicial waivers is the fact that some states have no lower age limits barring the youngest offenders from being tried as adults.[90] However, why should these young but very violent juveniles be spared severe punishment when their victims have scars that will remain with them of the rest of their lives, that is, if they were not victims of homicide.

B. Legislative Waiver

Legislative or "automatic" waiver focuses on the offense, whereas judicial waiver focuses on the offender.[91] This type of waiver rests on the idea that "the 'right' of a juvenile to be in juvenile court is entirely a statutory right," which the legislature has the power to take away at any time.[92] Depending on their age, this type of waiver automatically transfers some juveniles who have committed certain crimes,[93] and does not give the juvenile an opportunity to persuade the juvenile court that he or she is amendable to treatment.[94]

There are many reasons why state legislatures have instituted the automatic waiver. First, America's philosophy in treating its young offenders has changed—shifting from rehabilitation to retribution and punishment.[95] Second, some say that the transfer hearing process can be burdensome and time-consuming and can take several months to a year to complete.[96] Third,

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[88] *See* Barry C. Feld, *Criminalizing the Juvenile Court, A Research Agenda for the 1990s*, *in* JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 59, 68 (Ira. M. Schwartz ed., 1992) (A juvenile's race and geographic location can influence transfer decisions).

[89] Just an excuse to get a guilty defendant off and make the police and/or prosecutor look bad or at least question their motives.

[90] *See* Feld *supra* note 88, at 66.

[91] *See id.*

[92] Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 654 (1994).

[93] These crimes are usually the most serious offenses such as murder, kidnapping, and rape. Also, repeat offenders are often automatically waived.

[94] *See* Feld, *supra* note 88, at 66.

[95] *See* Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 29 (1995).

[96] *See* Scott Harshbarger & Carolyn Keshian, *The Attorney General of Massachusetts' Bill Relative to the Trial and Sentencing of Serious Juvenile Offenders*, 5 B.U. PUB. INT. L.J. 135, 139 (1995).

America is scared of its delinquent juveniles because the media has given significant attention to story after story of violent juvenile acts.[97] Finally, other reasons for automatic waiver include America's strong public sentiment that juveniles should be held responsible for their actions, a perception that violent juveniles deserve a harsher punishment than the juvenile court can hand down, and a belief that juvenile court cannot or will not transfer these cases.[98]

1. *Transferring Age*

The statutes governing the age at which the state will automatically transfer its most violent juveniles differs dramatically. Florida,[99] Nevada,[100] New York,[101] and Pennsylvania[102] automatically transfer any minor who commits certain crimes, while several other states have minimum ages at which a violent juvenile can be automatically transferred to the adult system.[103] Four states will only transfer a juvenile who is at least thirteen and has committed one of a list of offenses,[104] while a few states allow fourteen-year-old offenders to be transferred.[105] However, a

[97] *See id*. at 139-40.
[98] *See* McCarthy, *supra* note 92, at 654.
[99] Under Florida law, regardless of the juvenile's age, if the young offender has been found delinquent three or more times with residential commitments commits a felony, he or she will be automatically transferred to the adult system. *See* FLA. STAT. ANN. § 985.227(2)(b) (West Supp. 2000).
[100] Nevada's legislative waiver statute states that if a juvenile commits murder, attempted murder, or any offense if the minor has been previously convicted of a criminal offense, or felony on school property which results in death or substantial bodily injury, he or she will be automatically transferred. *See* NEV. REV. STAT. ANN. § 62.040(2) (Michie Supp. 1999).
[101] In New York, if there is reasonable cause to believe a juvenile under the age of sixteen committed a crime, he or she is automatically transferred to superior court, where the superior court can hold a hearing to transfer the young offender back to juvenile court. *See* N.Y. CRIM. PROC. LAW § 180.75(3)(a) (McKinney 1993).
[102] Under Pennsylvania law, a minor will only be automatically transferred if he or she commits murder. *See* 42 PA. CONS. STAT. ANN. § 6355 (West Supp. 1999).
[103] For example, Wisconsin transfers a ten-year-old who has committed first or second degree reckless homicide, s*ee* WIS. STAT. ANN. § 940.02 (West 1996); s*ee also* WIS. STAT. ANN. §§ 940.01, 940.05 (West 1996), and in Indiana, the state transfers a ten-year-old offender if probable cause exists that he committed murder. *See* IND. CODE ANN. 31-30-3-4 (Michie 1997).
[104] Under Georgia law, a thirteen-year-old will be automatically transferred for committing murder, voluntary manslaughter, rape, aggravated child molestation, aggravated sexual battery, or armed robbery with a firearm. *See* GA. CODE ANN. § 15-11-5(b)(2)(A) & (C) (Harrison 1998). However, after the indictment and an investigation, the district attorney, for an extraordinary cause, can transfer the case back to juvenile court. *See id*. Mississippi automatic waiver law will transfer a thirteen-year-old if he or she commits or attempts a crime that is punishable by death or life imprisonment, or commits or attempts to commit a crime with a deadly weapon or carries a concealed weapon. *See* MISS. CODE ANN. § 43-21-151 (Supp. 1999). In North Carolina, a case will be automatically transferred if there is probable cause that a thirteen-year-old juvenile commits a Class A felony. *See* N.C. GEN. STAT. § 7B-2200 (1999). Under Oklahoma law, if a thirteen-year-old commits first degree murder he will be automatically transferred. *See* OKLA. STAT. ANN. tit. 10, § 7306-1.1(B) (West 1998).
[105] Unless otherwise stated, all of these statutes apply the juveniles who are fourteen or older. California law allows a juvenile to be transferred if he or she committed murder, certain sex crimes, rape, spousal rape, or forcible sex

majority of states automatically transfer a juvenile only if he or she is at least fifteen[106] or sixteen.[107]

2. *Pros and Cons*

One benefit of the legislative waiver is that its forces the court to transfer the juvenile to the adult system if he commits a violent crime. Otherwise, a liberal judge may determine that the crime was not violent enough to entitle the transfer of the juvenile to the adult system with the possibility of adult punishment. This is one way legislatures can effectively get tough on America's violent juveniles.

Opponents of the waiver also point to its "downsides." One potential downside is the claim that the waiver is too broad and too strict on certain juveniles because some crimes

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crimes. *See* CAL. WELF. & INST. CODE § 602(b) (West 2000). Connecticut law allows automatic transfer of a juvenile who commits a capital felony or a Class A or B felony. *See* CONN. GEN. STAT. ANN. § 46b-127(a) (West Supp. 1999). Kentucky law transfers a minor if probable cause exists that he or she committed a felony with a firearm. *See* KY. REV. STAT. ANN. § 635.020(4) (Banks-Baldwin 1999). Maryland law transfers a juvenile who commits a crime punishable by death or life imprisonment. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-804(e) (1998). Massachusetts law transfers a juvenile between fourteen and sixteen if he or she commits first or second degree murder. *See* MASS. GEN. LAWS ANN. ch. 119, § 74 (West Supp. 2000). North Dakota transfers a juvenile who commits murder, kidnapping, and gross sexual imposition. *See* N.D. CENT. CODE § 27-20-34(1)(b) (Supp. 1999). Ohio law transfers a minor who has already been transferred and convicted of or pleaded guilty to a felony. *See* OHIO REV. CODE ANN. § 2151.26(B)(1) (West Supp. 1999). South Carolina transfers a juvenile if he or she has two prior delinquency adjudications or convictions and is now accused of committing a crime that is punishable by ten years or more in prison. *See* S.C. CODE ANN. § 20-7-7605(10) (Law. Co-op. Supp. 1999). Vermont transfers a juvenile for committing arson which causes death, assault and robbery with a dangerous weapon, assault and robbery which causes bodily injury, aggravated assault, murder, manslaughter, kidnapping, unlawful restraint, maiming, aggravated sexual assault, or burglary of an unoccupied dwelling. *See* VT. STAT. ANN. tit 22, § 5505 (1991 & Supp. 1999); W.VA. CODE § 49-5-10(d) (1999). However, the court may transfer the minor back to juvenile court if he or she is amendable to treatment or public safety is secured. *See id*. West Virginia transfers juveniles if there is probable cause that he or she committed various crimes including first degree arson, treason, murder, kidnapping, first degree sexual assault, or robbery with a deadly weapon or if he or she committed any act of violence to a person and has been previously adjudged delinquent for a violent act on a person or if the juvenile committed any felony and has two prior felony adjudications in juvenile court for offenses that would be felonies if committed by an adult. *See* W. VA. CODE § 49-5-10(d)(1999).

[106] *See* ARIZ. REV. STAT. ANN. § 13-501(A) (West Supp. 1999); GA. CODE ANN. § 15-11-39.1 (Harrison Supp. 1999); 705 ILL. COMP. STAT. ANN. 405/5-805 & 405/5-130 (West 1999); LA. CHILDREN'S CODE ANN. art. 305 (West Supp. 2000); OKLA. STAT. ANN. tit. 10, § 7306.2.6(A) (West Supp. 2000); OR. REV. STAT. § 137.707 (Supp. 1998); 42 PA. CONS. STAT. ANN. § 6302 (West Supp. 1999).

[107] *See* ALA. CODE § 12-15-34.1 (Supp. 1998); ALASKA STAT. § 47.12.030 (Michie 1998); DEL. CODE ANN. tit. 11, § 630A (1995); FLA. STAT. ANN. § 985.2272(2) (West Supp. 2000); IND. CODE ANN. § 31-30-1-4 (Michie 1997); MD. CODE ANN., CTS.& JUD. PROC. § 3-804(e) (1998); MINN. STAT. ANN. § 260B.103(1) (West Supp. 2000); NEV. REV. STAT. ANN. § 62.040(2) (Michie Supp. 1999); OKLA. STAT. ANN. § 7306-1.1 (West 1998) & § 7306-2.6 (West Supp. 2000); OHIO REV. CODE ANN. § 2151.26(B)(3) (West Supp. 1999); R.I. GEN. LAWS § 14-1-7.2(c) (1994); UTAH CODE ANN. § 78-3a-601(Supp. 1999), 78-3a-602 (1996); WASH. REV. CODE ANN. § 13.40.030 (West Supp. 2000).

included in these statutes can trap "undeserving" juveniles in the adult system.[108] Another commonly cited downside of legislative waivers, similar to that of judicial waivers, is that fact some states' legislative waivers depend upon the crime and not the juvenile's age. I agree with this aspect of legislative waivers because it does not matter whether a fifteen-year-old or ten-year-old committed the murder—the fact still remains that the victim is still dead.

C. Prosecutorial Waiver

1. *Introduction*

The prosecutorial waiver is the last type of waiver utilized by states to transfer juveniles to the adult system and only occurs when the state has concurrent jurisdiction statutes.[109] Under this type of waiver, the prosecutor has discretion to file charges against a juvenile in either juvenile or adult court, with his discretion not usually subjected to judicial review nor is it required to be based on certain criteria.[110] State appellate courts have ruled that "prosecutorial discretion is equivalent to routine charging decision made in criminal cases," meaning that prosecutors decide what crime should be tried, as well as which court in which the young defendant should be tried. One commentator stated:

> Only those most knowledgeable about the juvenile justice system fully appreciate the breadth of discretion prosecutors exercise every day in deciding how juvenile delinquency cases should be handled. . . [P]rosecutors decide not only whether a case is legally sufficient but also make the "social" decision about whether legally adequate cases should be transferred to the adult court, diverted, or formally petitioned. Add to this discretion the authority to make plea agreements about charges or dispositional recommendation.[111]

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[108] For example, Oregon's Measure 11 includes second-degree robbery and second-degree assault. *See* OR. REV. STAT. § 137.707 (Supp. 1998). Two high school students who bully and threaten students for money could be convicted of second degree robbery, or a student who gets in a fight at school that results in a black eye (the injury) could be convicted of second-degree assault. *See* Shari Del Carlo, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out*!, 75 OR. L. REV. 1223, 1236 (1996).

[109] *See* Carol J. DeFrancis & Kevin J. Strom, *National Survey of Prosecutors, 1994: Juveniles Prosecuted in State Criminal Courts*, Bureau Just. Stat. Selected Findings (U.S. Dep't Just. Wash., D.C.) Mar. 1997, at 1.

[110] *See* Robert E. Shepard Jr., *Juvenile Justice: The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 41 (1995).

[111] JAMES SHINE & DWIGHT PRICE, *Prosecutors and Juvenile Justice: New Roles and Perspectives, in* JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 101 (Ira M. Schwartz ed. 1992).

Prosecutorial waiver statutes hand prosecutors magnificent amounts of power because the prosecutor can not only decide what crimes with which to charge the juvenile, but also in which court to try the case and any types of pleas that may be offered.

Several states have prosecutorial waiver statutes, [112] and some allow concurrent jurisdiction over any offense committed by a juvenile. However, other states only allow concurrent jurisdiction for certain offenses. For example, a prosecutor in Arizona "may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least fourteen years of age" and accused of certain crimes.[113] In Arkansas, the juvenile court and state circuit court have concurrent jurisdiction over a criminal at least sixteen years of age who commits any felony, and over a fourteen-year-old charged with numerous crimes including murder, kidnapping, aggravated sodomy, rape, battery, and any felony firearm charge.[114] Georgia's prosecutorial waiver laws apply to any juvenile who is alleged to have committed a crime that would be punishable by death or life imprisonment without the possibility of parole.[115] Nebraska gives its court concurrent jurisdiction over any juvenile who commits a felony,[116] while Wyoming only gives its courts concurrent jurisdiction if the juvenile is thirteen years of age or older.[117] As evidenced by the above-cited state statutes, the minimum age limits and crimes under which a prosecutorial waiver may be asserted differ drastically. However, all give the prosecutor almost unfettered discretion.

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[112] *See* ARIZ. REV. STAT. ANN. § 13-501(B) (West Supp. 1999); ARK. CODE ANN. § 9-27-318(b) (Michie Supp. 1999); CAL. WELF. & INST. CODE § 707(d) (West 2000); COLO. REV. STAT. ANN. § 19-2-517 (West Supp. 1999); CONN. GEN. STAT. ANN. § 46b-127 (West Supp. 1999); FLA. STAT. ANN. § 985.227(1) (West Supp. 2000); GA. CODE ANN. § 15-11-5(b)(1) (Harrison 1998); LA. CHILDREN'S CODE ANN. art. 305(B)(3) (West Supp. 2000); MICH. COMP. LAWS ANN. § 712A.2 (West Supp. 1999); MONT. CODE ANN. § 41-5-206 (1997); NEB. REV. STAT. § 43-276 (1993); VT. STAT. ANN. tit. 33, § 5505 (1991 & Supp. 1999); VA. CODE ANN. § 16.1-269.1 (Michie 1999); WYO. STAT. ANN. § 14-6-203 (Michie 1999).

[113] ARIZ. REV. STAT. ANN. § 13-501(B). The felonies include the following: Class 1 or 2 felonies, Class 3,4 or 5 felonies involving the intentional or knowing infliction of serious physical injury, or the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument, and any felony offense committed by a chronic felony offender. *See id*.

[114] *See* ARK. CODE ANN. § 9-27-318(b).

[115] *See* GA. CODE ANN. § 15-11-5(b)(1).

[116] *See* NEB. REV. STAT. § 43-276.

[117] *See* WYO. STAT. ANN. § 14-6-203.

2. *Pros and Cons*

A benefit of the prosecutorial waiver is that it makes the system more efficient and convenient.[118] Proponents of this view point to the lengthy and time-consuming process involved in obtaining a judicial waiver because the process includes certain procedural requirements, such as a hearing and appellate review.[119]

Opponents point to the downsides of the prosecutorial waiver. Some say it places too much unfettered discretion in the prosecutor whose "primary duty is to secure convictions and who is traditionally more concerned with retribution than with rehabilitation."[120] However, prosecutors are to do the right thing, which usually means punishing the alleged wrongdoer to the fullest extent of the law, thereby protecting society from further harm. Another downside to the prosecutorial waiver is that a prosecutor's decision to try the juvenile in the adult system is not appealable and not reviewed.[121] However, the prosecutor is only using the power given to him by the legislature—the legislature approved by the people. If that state's citizens feel they cannot trust their prosecutor with this power, then they have the option to change their legislature. However, until that occurs, the prosecutor should be able to use the power afforded to him by the legislature.

D. Summary

These are the three types of waiver that state legislatures have designed to make it easier to try America's most violent juveniles as adults, and many states have at least one or more of these waiver statutes in place. I believe that all of the waivers are very beneficial in punishing our youngest offenders, even if that means treating an eight-year old triple-murderer as an adult.

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[118] *See* Eric K. Klien, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 395 (1998).
[119] *See id*. While testifying before Congress in favor of direct file for U.S. Attorneys, Jefferson Sessions, Alabama's Attorney General, stated that the two most difficult parts in trying a juvenile as an adult include the transfer hearing (all of its red tape) and the appeals for a waiver decision (delay the entire case). *See id*.
[120] Fritsch & Hemmens, *supra* note 95, at 18.
[121] *See* Klien, *supra* note 118, at 397. It can only be reviewed and corrected through the political process.

Although some of these statutes seem harsh and may not be the best way to get tough, they are a good start.

IV. MICHIGAN'S TREAMENT OF JUVENILE OFFENDERS

Michigan's law pertaining to waiver has existed since 1923.[122] However, before the most recent changes in Michigan law pertaining to waiver, most juveniles were only incarcerated until their twenty-first birthday. In 1985, the Michigan Supreme Court decided the case of *People v. Dunbar*,[123] in which the State charged a sixteen-year-old boy with first-degree felony murder and armed robbery.[124] After being waived to adult court, Dunbar was tried and convicted of the felony murder charge and received a mandatory life sentence without chance for parole.[125] However, the Michigan Supreme Court reversed the conviction and discharged Dunbar after finding the waiver to be improper.[126] The court held that the juvenile court could not grant a waiver based solely on the seriousness of the crime and the belief that Dunbar would receive better vocational training in the adult system.[127] The court wrote:

> Here the probate judge believed that rehabilitation was possible and placed the defendant in a setting that would provide the best vocational program. This attempt was pointless, however, since the judicial system gave vocational training with one hand while taking away the other hand any possibility that the vocational training would ever be used. This defendant has been sentenced to live in prison until he dies. Of what use is his vocational training?[128]

Since *Dunbar*, both Michigan courts and its legislature have been moving steadily towards providing adult punishment for juveniles and limiting the availability of rehabilitation in the juvenile system. Both of these branches of government feel that it is time to get tougher on Michigan's young violent offenders.

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[122] The 1972 act set up concrete criteria for "waiver," thus curing constitutional defects in the earlier statutes. *See* People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972). Between 1915 and 1923, the law allowed "automatic waiver" of juveniles older than fourteen years old. *See* Hon. Eugene Moore, *Waiver Proceedings in Michigan Juvenile Courts*, 65 B.J. 36 (1986).
[123] 423 Mich. 380, 377 N.W.2d 262 (Mich. 1985).
[124] *See* People v. Dunbar, 423 Mich. 380, 384-85, 377 N.W.2d 262, 263 (1985).
[125] *See Dunbar*, 423 Mich. at 385, 377 N.W. 2d at 263.
[126] *See id*. at 398, 377 N.W.2d at 269.

A. 1988 Amendments to the Juvenile Code and Code of Criminal Procedure

In 1988, Michigan's legislature decided to take the first step in stiffening its penalties for juvenile offenders. The state amended both its Juvenile Code and its Code of Criminal Procedure to provide that juveniles, between the ages of fifteen and seventeen charged with certain felonies,[129] could be tried as adults if the prosecutor chose to charge them by warrant.[130] If tried in adult court, then under the "reverse waiver" procedures, the adult court would decide the juvenile's sentence—either an adult sentence or commitment or probation to a state juvenile institution,[131] with emphasis placed on the seriousness of the offense, amenability and potential for treatment, potential dangerousness at age twenty-one, and the best interests of public welfare and protection of public security.[132] These criteria significantly moved away from analyzing the nature of the youth as an individual, and instead, placed the sentencing responsibility upon the adult trial judge.[133]

Many proponents of this new system argued that the adult system would provide a greater level of procedural fairness and leniency based on the juvenile's age and immaturity.[134] However, the Michigan Court of Appeals stopped this practice by reversing a series of juvenile sentences handed down by the adult system.[135] In *People v. Miller*,[136] after pleading guilty to

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[127] *See id*. at 397, 377 N.W.2d at 269.
[128] *Id*.
[129] *See e.g*. MICH. COMP. LAWS ANN. § 750.83 (West 2000), assault with intent to commit murder; *id*. at § 750.316, first-degree murder; *id*. at § 750.317, second-degree murder; *id*. at § 750.520b, first-degree criminal sexual conduct; *id*. at § 750.529, armed robbery.
[130] *See* MICH. COMP. LAWS ANN. § 600.606 (West 2000);, MICH. COMP. LAWS ANN. § 712A.2 (West 2000); MICH. COMP. LAWS ANN. § 764.1 (West 2000), MICH. COMP. LAWS ANN. § 769.1 (West 2000), MICH. COMP. LAWS ANN. § 769.1b (West 2000).
[131] *See* MICH. COMP. LAWS ANN. § 769.1(3) (West 2000).
[132] *See* MICH. COMP. LAWS ANN. § 769.1(3)(a)-(f) (West 2000). The legislation's intent was to "treat juvenile offenders who engage in serious criminal activity more harshly by providing adult penalties for certain crimes." People v. Veling, 443 Mich. 23,27 , 504 N.W.2d 456, 458 (1993). These adult penalties were already available under the old discretionary waiver system. *See* MICH. COMP. LAWS ANN. § 712A.4 (West 2000).
[133] Usually the guy with little experience in handling juvenile criminals (as compared to the juvenile judge).
[134] *See e.g*., Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).
[135] *See e.g*., People v. Haynes, 199 Mich. App. 593, 502 N.W.2d 758 (1993) (very similar to Miller, and appeals court forced his plea-based sentence to mandatory life in prison without parole); People v. Dilling, 222, Mich. App. 44, 564 N.W.2d 56 (1997) (where the court found no violation of due process where a youth was initially charged as a juvenile, the prosecution successfully moved to dismiss the juvenile charges, and the youth was subsequently charged, tried, and sentenced as an adult); People v. Perry, 218 Mich. App. 520, 554 N.W.2d 362 (1996); People v.

first-degree murder, assault with intent to rob while armed, and possession of a firearm during the commission of a felony, the adult court sentenced Miller to probation and confinement until his twenty-first birthday.[137] The appeals court reversed Miller's sentence and vacated the felony firearm conviction after stating:

> In this case, although we will concede that none of the statutorily required witnesses *recommended* adult disposition, we cannot conclude that the prosecution failed to present any affirmative evidence in support of sentencing defendant as an adult. In our opinion [,] the prosecution did produce evidence that, when considered in light of the statutory criteria, established that the best interests of the defendant and the public would be served by sentencing him as though he was an adult.[138]

However, Miller was then trapped with his earlier efforts to plead guilty and threw himself at the mercy of the trial court. On remand, the trial court sentenced Miller to mandatory life in prison without possibility of parole, but then the trial court granted a motion allowing Miller to withdraw the guilty plea because he was not made fully aware of the consequences of those pleas.[139] The prosecution appealed and the court of appeals reversed, leaving Miller with his plea-based sentence to mandatory life in prison without possibility of parole.[140]

B. 1996 Amendment to the "Automatic Waiver" Statute

In 1996, the Michigan legislature amended the state's "automatic waiver" statute, thus requiring any juvenile convicted of certain offenses to be sentenced as an adult and lowered the age of automatic waiver to fourteen.[141] Therefore, the prosecutor can make the decision on whether to try a youth between fourteen and seventeen as a juvenile or as an adult.[142]

Cheeks, 216 Mich. App. 470, 549 N.W.2d 584 (1996); People v. Black, 203 Mich. App. 428, 513 N.W.2d 152 (1994); People v. Lanusberry, 217 Mich. App. 358, 551 N.W.2d 460 (1996) (finding that a mandatory life sentence without parole was not cruel and unusual punishment).

[136] 199 Mich. App. 609, 503 N.W.2d 89 (1993).

[137] *See* People v. Miller, 199 Mich. App. 609, 610, 503 N.W.2d 89, 90 (1993).

[138] *Miller*, 199 Mich. App. at 613, 503 N.W.2d at 91.

[139] *See id*. at 612-13, 503 N.W.2d at 90-91.

[140] *See id.* at 614-16, 503 N.W.2d at 91-93.

[141] *See* MICH. COMP. LAWS ANN. § 769.1 (West 2000). The offenses include arson of a dwelling, assault with intent to commit murder, assault with intent to maim, attempted murder, conspiracy to commit murder, solicitation to commit murder, first-degree murder, second-degree murder, kidnapping, first-degree criminal sexual conduct, armed robbery, and carjacking.

[142] *See* People v. Conat, 238 Mich. App. 134, 164-65, 605 N.W.2d 49, 64-65 (1999).

In 1999, the Michigan Court of Appeals upheld this statutory change in the case of *People v. Conat*.[143] Prosecutors appealed the trial court's decision after the juvenile defendants successfully challenged the statute.[144] The court of appeals upheld the statute, while making three findings. First, it held that the statute does not violate the constitutional separation of powers because trial courts retain their sentencing power, and the courts should not interfere with the prosecution's broad discretion as to what changes to bring.[145] Second, there is no equal protection violation merely because some juveniles would be charged and sentenced differently than others.[146] Finally, it held there is no due process violation because a hearing is not required before the prosecution files its "automatic waiver."[147] The court also noted that at common law juveniles at least fourteen years old were presumed to be capable of criminal intent, and therefore, were subject to adult punishment.[148] The court concluded that the "juvenile court's jurisdiction is, by implication, something that is purely the creation of the legislature."[149]

C. 1996 Amendment to the Juvenile Code

More statutory changes occurred in 1996 when the state legislature amended the state's juvenile code, thus allowing a child of any age to be tried and sentenced in the juvenile court as an adult.[150] This procedure may occur either at the discretion of the prosecutor, for "certain specified violations," or, by court order for any violation.[151] Under current Michigan law the court has three options if a juvenile has been convicted in a designated case: (1) the court can enter any disposition under the juvenile code; (2) the court can delay imposition of a sentence of imprisonment and place the child on a delayed sentence (or probation) under a juvenile disposition; or (3) "if the court determines that the interests of the public would be served,

[143] 238 Mich. App. 165, 605 N.W.2d 49 (1999).
[144] *See Conat*, 238 Mich. App. at 164-65, 605 N.W.2d at 65.
[145] *See id.* at 144-53, 605 N.W.2d at 56-59.
[146] *See id*. at 153-57, 605 N.W.2d at 59-61.
[147] *See id*. at 157-161, 605 N.W.2d at 61-63. It also found that the requirements of *Kent v. United States* were inapplicable because that case did not involve an automatic waiver statute.
[148] *See id*. at 158, 605 N.W.2d at 62.
[149] *Id*. at 158, 605 N.W.2d at 61.
[150] *See* MICH. COMP. LAWS ANN § 712A.2d (West 2000).

impose any sentence upon the juvenile that could be imposed upon an adult convicted of the offense for which the juvenile was convicted."[152] Under this statute, Michigan has moved to criminalize all delinquent behavior.[153]

Case-in-point is Nathaniel Abraham.[154] In 1997, Nathaniel, eleven years old at the time of the crime, was charged as an adult with first-degree premeditated murder, assault with intent to murder, and two counts of felony firearm. The jury convicted Nathaniel of second-degree murder, and the judge sentenced him to a juvenile institution until twenty-one.[155] The case gained nationwide fame for two reasons. First, Nathaniel faced severe charges, along with potential punishment.[156] Second, the appellate courts and the state's political establishments handled the case much differently than did the trial court.[157] A major element of the prosecution's case Nathaniel's confession to police after his arrest. The trial judge suppressed the confession after finding that Nathaniel failed to understand his Miranda rights, and he neither knowingly nor intelligently waived those rights.[158] On appeal, the Michigan Court of Appeals reversed, holding that the trial court improperly relied on the fact that Nathaniel did not know the consequences of his statements.[159] The court stated that the trial court placed too great an

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[151] However the court order may only come following the prosecutor's request and a hearing. *See id*.
[152] MICH. COMP. LAWS ANN. § 712A.18(n) (West 2000).
[153] However, Michigan is not the only state that has taken this bold and dramatic move. See, e.g., KAN. STAT. ANN. § 38-1663(6)-(7) (Supp. 1997); MASS. GEN. LAW ANN. ch. 119, § 58 (West Supp. 1998); MINN. STAT. ANN. § 260.126(4) (West 1998); MO. ANN. STAT. § 211.073 (West Supp. 1999); N.M. STAT. ANN. § 32 A-2-20 (Michie Supp 1998).
[154] *See* People v. Abraham, 234 Mich. App. 640, 599 N.W.2d 736 (1999). "This case, I believe, is the first example of the emerging trend of charging very young children as adults." People v. Abraham, 461 Mich. 851, 597 N.W.2d 836 (Cavanagh J. dissenting from denial of leave to appeal).
[155] *See* Keith Bradsher, *Fear of Crime Trumps the Fear of Lost Youth*, N.Y. TIMES, Nov. 21, 1999, A1. The judge criticized Michigan's three-year-old juvenile designation law by stating, "The legislature has responded to juvenile criminal activity not by helping to prevent and rehabilitate, but rather by treating juveniles more like adults. The real solution is to prevent an adult criminal population ever coming into existence." *Id*.
[156] The defendant faced a sentence of mandatory life in prison without parole if he was convicted of the first-degree murder charge. *See* MICH. COMP. LAWS ANN. § 712A.2d and MICH. COMP. LAWS ANN. § 712.18(n).
[157] Michigan's Republican Governor John Engler stated that eleven-year-olds were mature enough to understand the seriousness of firing a gun. *See* Bradsher, *supra* note 155, at A1.
[158] *See Abraham*, 234 Mich. App. at 641, 599 N.W.2d at 738.
[159] *See id*. at 643, 597 N.W.2d at 739.

emphasis on Nathaniel's learning disabilities, age, and emotional impairment, and did not place enough emphasis on the facts of the crime.[160]

A question still plagues every Michigander—what should Michigan do with its juvenile offenders? It appears Michigan is moving towards becoming much more punitive and less forgiving and understanding. The state's juvenile offenders are becoming more violent. Everyday we hear of cases where kids shoot and kill a fellow student or stranger for no reason. We must get tough but how?

V. CONSEQUENCES OF WAIVER

Americans, through their elected officials, have decided to "get tough" on violent juvenile offenders, however, is this "stiff upper lip" attitude working. A 1991 study apparently indicates that the answer is "no." The study found that juveniles between the ages of sixteen and seventeen-years-of-age who were "adjudicated in the juvenile court were rearrested less often, at a lower rate, and after more time had elapsed."[161] However, this could be true not because the juvenile justice system works better, but because the most violent juveniles, those who are more likely to be career criminals, were waived to adult court. Therefore, the new waiver system may be working very well and handling our most violent juveniles in an effective and less forgiving manner.

Some opponents of the waiver system say that the adult-type sentences handed down to juveniles are not stiffer than those given in juvenile court.[162] They point to a study from 1980 to 1988 that examined sentences of juveniles and found on average that 55% of all juvenile waivers to the adult system resulted in probation, in 26% of the cases charges were dismissed or the

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[160] *See id*.
[161] *See* SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 18 (1996) (citing a study conducted at Columbia University about New York and New Jersey juvenile arrests).
[162] *See* Dean J. Champion, *Teenage Felons and Waiver Hearings: Some Recent Trends, 1980-1988*, 35 CRIM. & DELINQ. 577, 579 (1989). Some evidence suggests juveniles who are transferred get more lenient dispositions.

defendant acquitted, while only 11% of the cases resulted in incarceration.[163] Additionally, these same opponents raise a 1989-1993 Utah study that found of fifty-three juvenile cases transferred to the adult system, forty-nine of those cases proceeded with forty ending in plea bargains.[164] Out of the forty-nine juveniles, the court sentenced twenty-eight of the defendants to an average prison term of approximately two years.[165] However, these studies can be misleading because, for example, in the1988 study, the juvenile court may have chose to incarcerate less than the 11% incarcerated by the adult system. Additionally, the 1993 study found that eight defendants sentenced to an average two-year prison term may have received no prison time if left in the juvenile system. Therefore, these studies can be misleading because they fail to shed sufficient light as to the ineffectiveness of the new waiver system.[166]

Another consequence of waiver may be how the child is harmed and/or influenced because of his young age. A grave consequence of sentencing juveniles as adults is that sometimes the juveniles are housed with adult criminals—a tragic mix. Juveniles in adult institutions are five times more likely to be sexually assaulted, twice as likely to be physically abused by staff, and fifty percent more likely to be attacked with a weapon than minors in juvenile facilities.[167] Some opponents of sending juveniles to adult institutions argue that the benefits of juvenile facilities, no matter how small, far outweigh the harmful effects that occur in adult prisons, and also claim that juvenile facilities are far more likely to provide life and problem-solving skills to juvenile offenders.[168] They contend that once a juvenile is housed with adults, the youthful offender learns the trade of their adult counterparts, and therefore, they are

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[163] *See id*. at 583.
[164] *See* Robert E. Shepherd Jr., *Juvenile Justice: The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 42 (1995).
[165] *See id*.
[166] Remember, statistics can be used to prove any point.
[167] *See* Martin L. Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989). *See also* Jason Ziedenberg & Vincent Schiraldi, *The Risks Juveniles Face When They are Incarcerated with Adults*, Justice Policy Institute, July 1997, *at* http://www.cjcj.org.jpi/risks.html.
[168] *See* Martin L Frost & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 361 (1991).

oftentimes far too dangerous to be allowed back on the street. Additionally, they point out that even if a juvenile refuses to learn how to commit rampant crime, he may be permanently scarred by the adult inmates' mistreatment of him, and therefore, have to undergo counseling for years after being released.[169]

VI. PROPOSED REMEDIES

America's epidemic—its violent juvenile offenders—cannot be solved overnight. Should America treat juveniles similar to how they were treated at the turn of the twentieth century—through rehabilitation— or treat them as their adult counterparts and throw away the key? America's remedy should be a combination of both—attempting to rehabilitate the less violent juvenile offenders, while sentencing those who commit adult crimes with adult time.

A. Prevention Programs

First, America needs to take preventative measures against juvenile crime. Prevention is the first step to remedying juvenile crime in the United States because it entails interceding before the juvenile is referred to the courts.[170] Juvenile crime has been on the rise, with many blaming it on the sex and violence-filled television shows, movies and songs that infiltrate our homes.[171] Although Americans have the freedom to see and hear almost whatever they desire, one cannot deny that some of this has negatively impacted America's youth and turned some to commit very violent acts.

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[169] After being exposed to the before-mentioned sexual assault, physical abuse, and assaults with weapons. *See supra* note 167.

[170] *See* J. David Hawkins, *Controlling Crime Before it Happens: Risk-Focused Prevention in* CRIMINAL JUSTICE 97/98 167 (John J. Sullivan and Joseph L. Victor, eds. 1998). Once juveniles have experienced the reinforcing properties of drugs and are convinced of crime's profitability, they are hard to turn around. *See id*. Once in the crime culture, they reject the virtues of school and family because to them school is place of alienation and failure, while family is a source of unremitting conflict. *See id*.

1. Introduction

Prevention programs are the initial step to solving America's juvenile crime problem. Figuring it is too late to help, many people have given up on prevention programs and just get tough on juveniles by building new prisons to house juveniles. However, prevention programs can work if administered properly because they are designed to identify those kids who are "at-risk."[172] However, these prevention programs not only look for "at-risk" factors, but also for protective factors[173] because it is common knowledge that not every youngster who is surrounded and inundated with the above-mentioned risk factors succumbs to those factors and spends the remainder of his life in and out of the criminal justice system. Instead, these juveniles respond positively to overcome the obstacles and barriers placed before them.

2. Examples of Effective Prevention Programs

a. Family therapy

Family therapy may be one of the best preventive programs because the family is the foundation of a child's future, and a dysfunctional family is likely to produce a delinquent juvenile. These programs should be modeled after the Sacramento 601 Diversion Project,[174] designed to improve communication between family members and divert status-offending juveniles[175] from the juvenile justice system with the assistance of short-term family crisis counseling.[176] However, to be effective, family therapy must focus on teaching parents communication, problem-solving, and disciplining skills. Therefore, this type of prevention

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[171] Research over the last 30 years shows that there is a clear correlation between television violence and the development of aggressive behavior because media violence teaches violent problem-solving strategies while altering a child's attitude and sensitivity towards violence. *See id.* at 168. However, this finding is not unanimous.
[172] These programs look at risk factors including interaction and influence by the child's neighborhood, family, school, and peers. *See id*. at 167-70.
[173] These protective factors include a resilient temperament, positive social orientation, gender, and intelligence. *See id*.
[174] The programs has four goals: (1) to reduce the number of cases going through the juvenile court process; (2) to reduce the number of repeat offenders; (3) to decrease overnight detentions; (4) to accomplish all of these goals without increasing the cost required for regular case processing. *See* CLEMENS BARTOLLAS & STUART J. MILLER, JUVENILE JUSTICE IN AMERICA, 366 (2nd ed. 1998).
[175] *See supra* note 4 (discussing the five categories of juvenile offenders).
[176] *See* BARTOLLAS & MILLER, *supra* note 174, at 366.

program is most likely to help status offenders,[177] rather than violent juvenile offenders, because status offenders may not already be in the system and there is still a chance the lines of communication and parental discipline can be resurrected before it is too late.

b. Skill development programs

Currently, skill development programs are very popular among juvenile prevention programs because they teach communication, decision-making, daily living, educational advancement, and vocational and career skills.[178] These types of programs are attractive because they can be very challenging and provide more juvenile involvement. One very effective program is Outward Bound, a wilderness program teaching juveniles skills such as rock climbing, rappelling, high-altitude camping, and survival.[179] The program's purpose is to develop inner control and decision-making, expand interpersonal effectiveness, enhance environmental awareness, create individual confidence, as well as teach teamwork.[180]

Associated Marine Institute (AMI) is another popular skill-development program that teaches skills such as ship handling, diving, lifesaving, first aid, photography and marine maintenance.[181] The object of this program is to develop attitudes of responsibilities and self-confidence, as well as give some employable skills.[182]

Another seemingly effective program Tallahassee's Project Fresh Start.[183] A fifth grader from a single-mother home who entered the program after repeatedly getting into trouble has been one early beneficiary.[184] After six weeks of summer classes and daily after-school class

[177] *See supra* note 4. (discussing the five categories of juvenile offenders).
[178] *See id*. at 367.
[179] *See id*.
[180] *See id*.
[181] *See id*.
[182] *See id*.
[183] *See Crime Time Bomb*, U.S. NEWS AND WORLD REPORT, March 25, 1996, 28.
[184] *See id*.

sessions, the student went from "class problem to development leader" and was named student of the month.[185]

Scared Straight allows youth to visit a prison or local jail to let them experience first-hand where they will be living if they fail to correct their deviant behavior. The smell of the cell may be enough to turn wayward juveniles back on the straight and narrow, while for others it may take the beating on cell doors by out-of-control inmates or testimonials by former violent juveniles, now permanent inmates. Some juveniles think they are tough and no one can touch them—that is, until they visit a real prison or jail and find out what life is really like on the inside and that those inmates do not see the juvenile gang-banger as big and bad but as yet another weakling upon which to prey.

These are just a few of the preventative programs that should be implemented and/or continued throughout America if we hope to effectively combat juvenile violence. These programs strike at the risk factors, while at the same time trying to promote protective factors.[186] If America fails to take these preventative measures, then only juvenile punishment is left; however, the by the time punishment is administered, the crime has already been committed.

B. Punishment

If prevention programs prove to be ineffective, then the alternative is punishment. However, before administering a punishment it is important to look at the crime, as well as the juvenile's likelihood of rehabilitation. Juvenile punishment involves two categories—probation and/or confinement—with probation being used for those juveniles who are not totally lost and are not dangerous if returned into society, while confinement should be reserved for the most violent juvenile offenders, as well as those delinquents who need a "wake up call."

[185] *Id*.
[186] *See supra* notes 172 & 173 (discussing risk and protective factors).

1. Probation and Probationary-Type Programs

Probation[187] is the nonpunitive legal disposition of delinquent juveniles who are in need of supervision, and it emphasizes maintenance in the community and treatment without incarceration.[188] Massachusetts enacted the first juvenile probation services, which were quickly copied by Missouri, Illinois, Rhode Island, and New Jersey.[189] Juvenile probation is based on the idea that the offender is not dangerous to the community and has a much better chance of being rehabilitated in the community rather than through incarceration.[190]

Probation is a great alternative for less dangerous juveniles who need guidance, while not needing to experience the ill effects of confinement.[191] It is also a valuable alternative to incarceration because it is less expensive. Incarceration costs America billions of dollars annually, and if and when the inmate is released, he or she can be even more dangerous.[192]

An effective probationary-type program is house arrest and/or electronic monitoring. This allows for similar types of punishment encountered in incarceration without all of the ill side effects (i.e. harmful influence from other inmates and/or physical or mental abuse). It also reduces institutional overcrowdedness and allows juveniles to remain at home and participate in useful counseling, educational, or vocational programs.[193] This type of probation also gives the

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[187] John Augustus is the father of American probation, and he believed that many criminals only needed another person to show interest and concern to be able to straighten out their own lives. *See* BARTOLLAS & MILLER, *supra* note 174, at 366. It is desirable for the following reasons: (1) it maximizes the individual's liberty, while at the same time vindicating the law's authority and protecting the public from further violations; (2) it promotes rehabilitation by allowing and maintaining normal community contacts; (3) it avoids the negative effects of confinement which usually push the juvenile into recidivism; and (4) it is much less costly than confinement. *See* LARRY SIEGAL & JOSEPH SENNA, JUVENILE DELINQUENCY THEORY, PRACTICE AND LAW 583 (6th ed. 1997).

[188] *See id*. at 582.

[189] *See* BARTOLLAS & MILLER, *supra* note 174, at 228.

[190] However, because probation is a legal disposition, it can only be ordered by the judge.

[191] Juveniles who are incarcerated with adults are much more likely to become repeat offenders because they make strong friendships with career criminals who teach them the "tricks of the trade." It is only normal to believe an individual who is surrounded by an environment, whether it be positive or negative, will soon come to accept those who are in that environment and become one of them.

[192] However, in probation, the juvenile reports to his or her probation officer on a weekly basis for a meeting. Additionally, in recent years there has been a proliferation of civilian volunteers to assist probation officers, with those volunteers providing tutoring, group counseling, and job training. *See id*. at 591.

[193] *See id*. at 592.

court a clearer picture of how the individual may respond to being put on "normal" probation when he would experience more freedom.

Shock probation, widely used in Kentucky, North Carolina, Texas, Indiana, Idaho, and Maine, is another type of probation that could be effective in treating first-time juvenile offenders.[194] In this sentencing option, the judge sentences the juvenile to jail (usually 90 days) and then places him on probation. This would be an effective form of treatment for some juveniles because it allows them to live in the jail/prison lifestyle for a short time as an effort to "shock" them into leading a more fruitful life.

Another potentially effective type of probation is boot camp, which emphasizes military discipline and physical training. Critics believe that these boot camps are a fad that will pass with time, however, these programs are proving to be very effective.[195] They are usually designed for juvenile offenders who have failed probation and are looking at jail and/or prison as the only alternative.[196] Some programs will accept any juvenile offender, while others exclude sex offenders, armed robbers, and violent offenders.[197] One significant problem with boot camps is their high failure rate because graduates do not continue to attend aftercare programs.[198] However, boot camps are successful for those who are intent on making it work, and for the most part, those who fail boot camp would fail other types of probationary-type programs and would once again become part of the system.

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[194] *See* BARTOLLAS & MILLER, *supra* note 174, at 239.
[195] *See id*. at 240. A 1996 evaluation of Cleveland, Denver, and Mobile boot camps made the following findings: (1) First-year boot camp completion rates were anywhere between 80% to 94%; (2) the attitudes, educational performance, and physical fitness of the graduates improved significantly; and (3) youths who graduated from the three-month boot camp and remained in after-care for at least five months reported positive changes in attitudes and behavior. *See id*. However, there were also some negative findings from these programs: (1) they were disrupted by high staff turnover and had unclear disciplinary measures and termination policies; (2) staff found it difficult to balance military discipline and remedial education and counseling; and (3) aftercare was hampered by high rates of absenteeism and failure. *See id*.
[196] *See id*. at 239-40.
[197] *See id*. at 240.
[198] *See id*. Nearly half of the juveniles who entered aftercare dropped out, were re-arrested, or terminated for non-compliance.

These are just a few of the good aspects of probation and probationary-type programs and why they should be used more often to treat non-violent juvenile offenders and/or those who can be rehabilitated. Youth are the future of this country, and therefore, America must take every step possible to keep them from being incarcerated, especially in the adult system.

2. Confinement/Institutionalization

Confinement, often referred to as "institutionalization" is America's last choice in dealing with its violent juveniles.[199] There are two types of institutionalization—short and long term—where short-term being used to treat non-violent juveniles as a last resort of rehabilitation and long-term institutionalization being used to house America's most violent juveniles with whom all hope of rehabilitation has disappeared.

a. Short-term facilities

Short-term facilities, typically jails,[200] detention centers,[201] and shelter care facilities,[202] should be used for property and drug offenders.[203] Detention centers should be used as the primary way to house nonviolent juveniles for the short-term because (1) they provide trained

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[199] Until the early 1800s, juveniles were locked up with their adult counterparts under horribly punitive and inhumane physical conditions. *See* SIEGAL & SENNA, *supra* note 187, at 616. In 1825, the State of New York established the New York House of Refuge, designed to protect children from the evil influences of adult facilities. *See* BARTOLLAS & MILLER, *supra* note 174, at 310. In most of the institutions, the youth stayed anywhere between six weeks to twenty-four months, during which time they often learned trades or prepared themselves for apprenticeships. *See* SIEGAL & SENNA, *supra* note 187, at 616. Reformatories or training/industrial schools were established in the mid-nineteenth century and were very similar to houses of refuge except that they stressed longer periods of learning (usually one-half day) and became more exploitative in regards to contracting out the inmates' labor. *See* BARTOLLAS & MILLER, *supra* note 174, at 310.

Today, there are approximately 1,100 public and 2,200 private juvenile facilities in the United States, holding approximately 98,000 juveniles. *See id*. at 312. America's most violent juveniles are treated as adults and housed in prisons, often for the remainder of their natural life. However, many other youths are sentenced to jail but are able to graduate from state-accredited high school programs, and even some are permitted to go home on furloughs and/or perform community work during the day. *See id*. at 313.

[200] As of 1998, the average daily population of juveniles in jails was 7,888, with 1, 870 being held as adults. See BARTOLLAS & MILLER, *supra* note 174, at 316.

[201] They can be an effective alternative and are intended to be temporary holding centers. In 1991, there were 335 public and 28 private detention centers throughout the United States, with the normal inmate being a 16-year-old male charged with a serious property offense. *See id.*.

[202] Shelter care facilities took hold in the early 1970s and have grown to approximately 309 private and 439 public shelters in this country. They were initially developed to house status offenders, with the current stay in these non-secure facilities varying from overnight to a week. *See id*. at 318.

[203] Contrary to popular belief, the majority of residents in short-term facilities are not committed for violent crimes but for property and drug offenses. *See* SIEGEL & SENNA, *supra* note 187, at 624. For a short discussion on these types of offenders, *see supra* note 4.

staff, (2) they are secure, and (3) they only allow for positive adult interaction. First, detention centers house juveniles with qualified and highly trained staff who know how to work with juveniles, [204] whereas jail guards are trained, not to handle the individual problems of inmates, but to guard and handle out-of-control inmates. Second, detention centers are secure facilities, with locked doors and windows and staff that treat while, at the same time, act as guards. Shelter care facilities are too open, often non-secure, thus creating problems with runaways and making it difficult to control resident drug use.[205] These facilities also have disciplinary problems because the residents often have problems controlling their attitudes and actions—a problem that easily rubs off on other residents. Third, detention centers house the juveniles with other juveniles, and the only adult interaction is with trained staff. Jailed juveniles, if not housed with adults, still have occasional interactions with those inmates, thus only leading to trouble because oftentimes, these older inmates are looked upon as "heroes" and "idols" by the younger juvenile population. These are three reasons why detention centers should be preferred over jails and shelter centers as way to house non-violent juveniles for the short-time.

b. Long-term facilities

These facilities, such as prisons, should only be used for America's most heinous juvenile criminals, when hopes of rehabilitation have long since faded and releasing them back into society in a short period of time by using jails, detention centers, or shelter care facilities is not an viable option. These young individuals are dangerous and must be treated accordingly. Ten years ago, homicide defendants ranged in age of 20 to 25, however, today, that range has dropped to between 15 and 20.[206] America's streets are becoming a much more violent place, especially with juveniles raging out of control.

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[204] Juveniles housed in these centers need to be given another chance and must be treated by these qualified individuals,

[205] *See id*.

[206] *See* Randal Edwards, *The Search for a Proper Punishment, in* CRIMINAL JUSTICE 97/98 179 (John J. Sullivan & Joseph L. Victor, eds. 1998).

However, certain criteria should be met before a child is treated as an adult. First, the crime must be of a serious nature, and not merely a shoplifting charge, even if it is the third or forth time. For example, serious crimes would include rape,[207] arson, robbery, home invasion, burglary, certain drug offenses, attempted murder, and homicide. The crimes must be of a serious nature because once a child is treated as an adult, chances are very high that the child will be in and out of the criminal justice system for the remainder of his life. Second, there should be no age limit on when a child can be treated as an adult. Several states have specific ages that children must reach before they can be charged as an adult. However, it is also important to remember that the victim had no choice on whether to be robbed or raped by a juvenile or an adult—the physical and/or emotional impact on the victim it still the same. Third, the judge and/or jury must take the crime, the child's age and chances of rehabilitation into account when sentencing the child as an adult. If a juvenile is very young and committed a robbery, then the rehabilitation is likely and the child should be treated accordingly. However, if the child narrowly qualifies as a juvenile and has committed a heinous crime, such as murder and shows no remorse, then he should receive a stiff punishment because it is almost inevitable the child has no chance of rehabilitation.[208] These are the three criteria that should be examined and analyzed before a juvenile is treated as an adult because once that giant step is taken all hope of rehabilitation quickly vanishes. Long-term confinement is a very plausible alternative in treating this country's most violent juveniles.

VII. CONCLUSION

America's juveniles are becoming more and more violent and now this country must act accordingly. Should it release all juvenile criminals on their twenty-first birthday, or treat them as adults, even if that means imprisoning them for the remainder of their natural life? Almost all

[207] Not statutory rape
[208] A good example would have been the Columbine shooters had they lived.

state legislators throughout this nation have answered this question by instituting stiffer penalties upon violent juvenile offenders.[209]

However, our leaders must take all possible measures to stop juveniles from even entering the system. First, this means instituting prevention programs aimed at diluting risk the factors that surround many of America's youth. Second, probation and probationary-type programs should be used on non-violent juvenile offenders as a last resort to confinement. These programs give juveniles the freedom but also instill the requisite fear that confinement is only one quick step away. The final option should be confinement for violent juveniles or those who failed probation. Short-term confinement, in the form of detention centers, would be the most effective means for remedying the attitudes and behavior of less-violent juveniles. However, when all hope has disappeared for America's most violent and heinous juveniles, long-term confinement is a viable alternative. This is the order in which the four options should be used, and hopefully, a juvenile's unacceptable behavior can be remedied before option four—confinement.

America must wake up before another tragedy like Columbine occurs. This country's youth can become very violent and must be treated accordingly. If a juvenile is going to do the crime, then he must be prepared to do the time, including time in a maximum-security state prison.

[209] This is evident by the fact that some states have no age limit on when a juvenile can be waived to the adult system. *See supra* note 75 and accompanying text.