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WAIVING GOODBYE TO DUE PROCESS: THE JUVENILE WAIVER SYSTEM

RACHEL JACOBS*

INTRODUCTION

Manny was seventeen years old when he and two other gang members attacked a family, and he was subsequently charged with four counts of attempted murder.[1] The court charged him as an adult despite being only seventeen years old.[2] When determining whether a juvenile should be tried in the juvenile or adult court system, juvenile courts in California are required to consider five criteria.[3] A juvenile who does not meet all of the criteria will be tried in adult criminal court.[4] Manny failed to meet one of the criteria, and he now has two felony convictions as a result. One more conviction and Manny could be imprisoned for life as a result of California's "three strikes" law.[5]

Shawn was sixteen years old when he was charged with attempted murder after stabbing his father in the head, neck, and arms.[6] While prosecutors attempted to try him in adult court—which meant a prison sentence of fifteen years to life if found guilty—Shawn was given the option of pleading guilty in juvenile court.[7]

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[1] *Juvenile Justice: Manny*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/four/manny.html (last visited Mar. 3, 2013).

[2] *Id.*

[3] The five criteria considered by juvenile courts in California are: (1) How criminally sophisticated the juvenile is; (2) Whether time spent under juvenile court will lead to the juvenile's rehabilitation; (3) Prior delinquent behavior; (4) How successful previous attempts at rehabilitation were; and (5) How serious the crime was. *Id.*

[4] *Id.*

[5] *Id.* Under California's three strikes law, a trial judge is required to sentence any defendant who was previously convicted of a "statutorily defined 'serious'" felony to life in prison. Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. L. & POL'Y REV. 311, 321-22 (2010). Examples of "serious felonies include: rape, murder, robbery, and nonconfrontational residential burglary." *Id.*

[6] *Juvenile Justice: Shawn*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/four/shawn.html (last visited Mar. 3, 2013).

[7] *Id.* While the exact reasons as to why Shawn was given the opportunity to stay in juvenile court are unclear, many of the people involved in his case believe it was because he was white and from a wealthy neighborhood. These beliefs were held by the prosecuting attorney in his case, other youths in

Staying in juvenile court resulted in a shorter sentence for Shawn and allowed him to avoid a criminal record as an adult.[8]

Marquese was seventeen years old when he was arrested for burglary and car theft.[9] Although Marquese had a history of repeat offenses, the judge who reviewed his case found that he was fit for the juvenile system.[10] Marquese was lucky and received one last chance at rehabilitation as a juvenile.

José was fifteen years old when he participated in a brutal fight, which resulted in the death of one victim and severe injury to another.[11] He was charged with murder in adult criminal court.[12] However, José was the product of a troubled childhood—his father was a heroin addict and no longer a part of José's life, and his mother left him as well.[13] José also became addicted to drugs and alcohol.[14] Moreover, when the prosecutor reviewed the facts of José's case, he realized José's culpability in the crime was low, and allowed José to plead guilty to involuntary manslaughter.[15] Luckily for José, his sentencing judge was sympathetic to his story and only sentenced him to 208 days in juvenile hall.[16] Despite this favorable sentence, José still carried an adult criminal record when he was released.[17]

The arbitrary nature of the waiver system is apparent from the disparate results of the cases of these four juveniles. For example, both Manny and Shawn were charged with attempted murder. However, because of the "seriousness and gravity of the crime" that Manny committed, he was sent to adult court and sentenced to nine years in prison.[18] In contrast, Shawn was allowed to plead guilty in juvenile court and received a very light sentence given the nature of his crimes.[19]

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the juvenile hall where Shawn was housed, and even his defense attorney, who said "[t]here is inequity in the juvenile justice system . . . [t]here is inequity in terms of race, there is inequity in terms of socioeconomic status." *Id.*

[8] *Id.*

[9] *Juvenile Justice: Marquese*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/four/marquese.html (last visited Mar. 3, 2013).

[10] *Id.* As discussed above, under California law, juvenile courts are required to consider five criteria when deciding whether or not to waive a juvenile into adult criminal court. *Juvenile Justice: Manny*, *supra* note 1. Though the judge in Marquese's case found under two separate criteria that he was unfit for juvenile court, he was allowed to stay in the juvenile system since he was charged with a nonviolent crime, which requires waiver of the juvenile only if he was "unfit overall." *Juvenile Justice: Marquese*, *supra* note 9. After balancing all five criteria, Marquese's judge found that he "was still amenable to treatment within the juvenile system." *Id.*

[11] *Juvenile Justice: José*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/four/jose.html (last visited Mar. 3, 2013).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Juvenile Justice: José*, *supra* note 11.

[18] *Juvenile Justice: Manny*, *supra* note 1.

[19] *Juvenile Justice: Shawn*, *supra* note 6. Shawn was sentenced to remain in the Santa Clara Juvenile Hall—instead of the much more restrictive California Youth Authority—until the age of nineteen, and was allowed to attend community college classes and leave to go home and eat meals with his family. *Id.*

Both Marquese and José came from troubled homes.[20] Luckily for Marquese, since he was charged with a nonviolent felony, the judge overseeing his case could take his turbulent childhood into account and sentence him as a juvenile.[21] However, while José's background played a role in his sentencing, it did not impact the fact that he was charged in criminal court. Yet, José was a prime example of a youth who was sentenced as an adult but was an ideal candidate for rehabilitation—while in juvenile hall he graduated from high school and demonstrated his intelligence to staff.[22] Though each youth has a very different story, it appears that any one of them could benefit from treatment as a juvenile.[23]

Four children, two possible outcomes. Still, the question remains: are any of these youths less deserving of the benefits of juvenile court than the others? Sadly, youth across the country are charged as adults rather than receiving the protection and rehabilitation they would otherwise receive if they were charged as juveniles.

Juveniles are tried in adult criminal court through a process known as juvenile waiver.[24] When a juvenile waiver hearing is conducted, it is decided whether jurisdiction over a youth should pass from juvenile court to adult criminal court.[25] If a juvenile's case is adjudicated in criminal court and he is found guilty, then he can be sentenced as an adult.[26] Juveniles who are thrown into the adult criminal justice system lose a plethora of benefits that come with adjudicating the alleged crime in the juvenile justice system,[27] and they are saddled with an adult criminal record.[28] The waiver decision is typically made through one of three avenues—judicial waiver, statutory waiver, or prosecutorial waiver.[29] However, the waiver decision is often arbitrary, regardless of the type of waiver that is used.[30] Thus, a juvenile's future is placed into the hands of a potentially unpredictable decision maker.[31]

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[20] *Juvenile Justice: Marquese*, *supra* note 9; *Juvenile Justice: José*, *supra* note 11.

[21] *Juvenile Justice: Marquese*, *supra* note 9.

[22] *Juvenile Justice: José*, *supra* note 11.

[23] There are several benefits that a youth generally receives when his or her case is adjudicated in juvenile court. A few of these benefits include sealed court records; shorter sentences; and increased access to rehabilitative services. The benefits of remaining in the juvenile justice and the detriments of a youth's waiver into adult criminal court will be discussed in detail below. *See infra* Part II.A.

[24] 14 AM. JUR. TRIALS 619, § 60 (2011). In a proper case, the jurisdiction of the juvenile court can be waived so that the minor can be certified to the adult criminal court to be tried as an adult for the offense committed. *Id.*

[25] Sarah Freitas, Comment, *Extending the Privilege Against Self-Incrimination to the Juvenile Waiver Hearing*, 62 U. CHI. L. REV. 301, 301 (1995).

[26] Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *For Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 16 n.21 ("Once children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole.") (internal citations omitted).

[27] *See infra* Part II.A.

[28] *See* Kathleen Michon, *When Juveniles Are Tried in Adult Criminal Court*, NOLO: LAW FOR ALL, http://www.nolo.com/legal-encyclopedia/juveniles-youth-adult-criminal-court-32226.html (last visited Mar. 9, 2012).

[29] Each of these avenues will be explained below. *See infra* Part I.C.

[30] Tomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in*

This Note will argue that the juvenile waiver decision making process must be reformed because of its failure to take account of juveniles' capacity for rehabilitation, decreased culpability, and individual life circumstances, thereby violating the due process rights of juveniles. Compounding these problems, juveniles who are waived into the adult criminal court system lose the benefits of juvenile court and often suffer deleterious effects.[32] Additionally, and perhaps most importantly, a judge or prosecutor's decision to waive a juvenile into adult court is, more times than not, wholly arbitrary.[33] Thus, to protect the due process rights of juveniles,[34] judicial waiver must be reformed to make the waiver decision less subjective and both prosecutorial and statutory waiver must be eliminated.

Part I lays out the development of the juvenile justice system since its inception and how its focus has shifted from rehabilitating the child to seeking retribution against the accused juvenile. Specifically, Part I looks at the waiver system and its development alongside an increasingly retributory juvenile justice system. Part II addresses the general criticisms of the juvenile justice system. In particular, it outlines precisely how the process behind the waiver decision is arbitrary and the negative effects juveniles experience as a result. Part III discusses what meaningful reform of the juvenile waiver system may look like and how the due process rights of juveniles are violated without these reforms. The United States Supreme Court cases *Mathews v. Eldridge*[35] and *Parham v. J.R.*[36] will be used to analyze the different interests that juveniles and the government have in reforming the juvenile waiver system.

Discretionary Transfer Hearings, 33 WAKE FOREST L. REV. 595, 605 (1998).

[31] Daniel M. Vannella, Note, *Let the Jury Do the Waive: How* Apprendi v. New Jersey *Applies to Juvenile Transfer Proceedings*, 48 WM. & MARY L. REV. 723, 740 (2006).

[32] For example, children who are incarcerated with adults are more likely to be sexually assaulted, to commit suicide, and to be assaulted by staff, as compared to juveniles who are housed with juveniles. Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-Term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J.L. & FAM. STUD. 281, 291 (2004). Moreover, children subjected to the adult criminal justice system have less access to an educational system and have higher recidivism rates. *Id.*

[33] *See* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 86-87 (1995) (discussing the disparities that may occur in judicial waiver because of inconsistent application of waiver statutes). *See also* Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict – the Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 36-37 (1976).

[34] *See infra* Part III.C.

[35] Mathews v. Eldridge, 424 U.S. 319 (1976). In *Mathews*, the United States Supreme Court developed a balancing test to determine "what procedures satisfy 'due process of law.'" Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 933 (2000).

[36] Parham v. J.R., 442 U.S. 584 (1979). *Parham* used the due process balancing test developed in *Mathews v. Eldridge* to determine whether a juvenile was entitled to additional proceedings before civil commitment. Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions From Law and Social Science*, 57 HASTINGS L.J. 955, 972 (2006).

I. JUVENILE JUSTICE AND ITS THEORETICAL UNDERPINNINGS

A. Theoretical Justification for the Punishment of Criminals and the Applicability—Or Lack Thereof—to Juveniles

There are traditionally four penological[37] justifications for the punishment of criminals: retribution,[38] deterrence,[39] incapacitation,[40] and rehabilitation.[41] These penological justifications are not applied exclusively to the sentencing of adults. Significantly, the United States Supreme Court in *Roper v. Simmons*,[42] *Graham v. Florida*,[43] and *Miller v. Alabama* discussed the applicability of the penological justifications to juveniles.[44]

In the 2005 landmark case *Roper v. Simmons*, the United States Supreme Court held that juveniles could not be sentenced to death, finding that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the States cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[45] By recognizing the capability of juveniles to mature, the Supreme Court implicitly acknowledged that juveniles have the potential for rehabilitation. When discussing why the death penalty should not be imposed on juveniles, the Supreme Court focused much of its attention on the immaturity of juveniles and their potential for change.[46] Because juveniles are different than adults and are generally less culpable, they deserve a greater chance to be forgiven for their crimes.[47] The Court went on to state that the

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[37] Penology—or penological—is "[t]he study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender." BLACK'S LAW DICTIONARY 1248 (9th ed. 2009).

[38] Retribution is defined as "[p]unishment imposed as repayment or revenge for the offense committed." *Id.* at 1431.

[39] Deterrence is defined as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." *Id.* at 514.

[40] Incapacitation is defined as "[t]he action of disabling or depriving of legal capacity." *Id.* at 828.

[41] Rehabilitation is defined as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." *Id.* at 1398.

[42] Roper v. Simmons, 543 U.S. 551 (2005).

[43] Graham v. Florida, 130 S. Ct. 2011 (2010).

[44] *See* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 125 (2010) ("In *Graham*, the Court evaluates all four penological principles related to youth.").

[45] *Roper*, 543 U.S. at 573-74.

[46] *See id.* at 569-70. *Roper* discusses how there are three main reasons why juvenile offenders are generally less culpable than adult offenders. First, the Court discusses that juveniles are immature and more likely to lack a sense of responsibility, meaning that a juvenile's actions are more likely to be impulsive and ill conceived. Second, the Court highlighted the susceptibility of youths to peer pressure, noting how they are more vulnerable to influence as a result. Third, the Court stresses that because the personality of juveniles is not completely formed they still have the potential to change. *Id.*

[47] *Id.* at 570 ("The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.") (internal citations omitted).

main social purpose behind the death penalty is the "retribution and deterrence of capital crimes by prospective offenders."[48] In noting this purpose, the Court found that the penological goals behind the death penalty were not met when juveniles were executed because of the diminished culpability that stems from their "youth and immaturity."[49]

The Court found several reasons to support the principle that imposing the death penalty on juveniles creates a disproportionate punishment since juveniles are less culpable than adults.[50] First, the Court noted that in regard to retribution, it "is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[51] The Court also discussed how juveniles' decreased culpability meant that deterrence was not a legitimate reason for imposing the death penalty on juveniles.[52] Thus, because the purposes behind imposing the death penalty—deterrence and retribution—are not applicable to juveniles, the Supreme Court held that children under the age of eighteen could not receive the death penalty.[53]

In 2010, the Supreme Court used reasoning similar to the language in *Roper* when it ruled that juveniles who do not commit a homicide cannot receive a sentence of life without parole ("LWOP").[54] In finding that juveniles are less culpable than adults,[55] the Court discussed the applicability of the four penological justifications of punishment to juveniles in regard to LWOP and found that none of them applied.[56] When discussing retribution, the Court found that while society can punish a juvenile for his or her crime, the sentence imposed must be related to the culpability of the offender.[57] Since juveniles have a decreased culpability, they do not have the culpability required to be sentenced to LWOP for a non-homicide crime.[58] Just as the Court found that deterrence was not a legitimate reason to

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[48] *Id.* at 571.

[49] *Id.*

[50] Roper v. Simmons, 543 U.S. 551, 575 (2005).

[51] *Id.* at 571.

[52] *Id.* at 572 ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.").

[53] *Id.* at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

[54] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.").

[55] *Id.* at 2026-27 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults.").

[56] *Id.* at 2028.

[57] *Id.*

[58] *Id.* ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. And . . . the case for retribution is not as strong with a minor.'").

impose the death penalty on juveniles, it also found that deterrence was not enough to sentence juveniles to LWOP. Because of juveniles' immaturity and propensity for spontaneous decision-making, they do not take the ramifications of their actions into account—including whether or not they will be punished.[59]

Going beyond the *Roper* opinion, the Supreme Court in *Graham* also discussed the other two penological justifications for punishment—incapacitation and rehabilitation. While the Supreme Court acknowledged that there are situations in which LWOP is a legitimate punishment, it concluded that imposing such a harsh sentence on a juvenile who did not commit homicide is inappropriate.[60] The Court came to this conclusion by recognizing the ability of juveniles to change and mature as well as the difficulties in distinguishing between a redeemable and irredeemable juvenile.[61] Lastly, the Court examined rehabilitation. While acknowledging that it is the role of the state legislatures to decide the role and extent of rehabilitation, the Court also recognized that a sentence of LWOP effectively marks a person as irredeemable.[62] Thus, since juveniles have a greater ability to change and mature, the Court decided that denying juveniles the right to rehabilitation was not a suitable punishment.[63]

In 2012, the Supreme Court held in *Miller v. Alabama* that mandatory life without parole prison sentences for juveniles are unconstitutional.[64] In reaching this conclusion, the Court relied heavily on *Roper* and *Graham*, noting the myriad ways those two cases established that children "are constitutionally different from adults for purposes of sentencing."[65] The Court reviewed the four penological justifications for punishment, finding that while the "mental traits and environmental vulnerability" of children discussed in *Graham* were made in the context of non-homicide crimes, they still applied in homicide cases.[66] Therefore, by building off its conclusions in *Roper* and *Graham*, the Court established that

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[59] *Id.* at 2028-29 ("Deterrence does not suffice to justify the sentence either. *Roper* noted that 'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles' lack of maturity and underdeveloped sense of responsibility . . . often results in impetuous and ill-considered actions and decisions,' and they are less likely to take a possible punishment into consideration when making decisions.").

[60] Graham v. Florida, 130 S. Ct.2011, 2029 (2010).

[61] *Id.* at 2029 ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society [and therefore must remain incapacitated for the rest of his life] requires the sentence to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.") (internal citations omitted).

[62] *Id.* at 2030 (noting how a sentence of LWOP "forswears" the goal of rehabilitation).

[63] *Id.* ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.").

[64] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012). *See also* Jackson v. Hobbs *and* Miller v. Alabama, EQUAL JUS. INITIATIVE, http://www.eji.org/childrenprison/deathinprison/jackson.miller (last visited Mar. 3, 2013).

[65] *Miller*, 132 S. Ct. at 2464. Specifically citing to *Roper* and *Graham*, the Court noted juveniles' immaturity, susceptibility to peer pressures, and changing character. *Id.*

[66] *Id.* at 2465.

courts must take a juvenile's youth into account when imposing such a severe sentence.[67] A sentencer failing to account for a youth's "chronological age and its [associated] hallmark features" risks imposing a "disproportionate punishment."[68] Consequently, because of a youth's ability to mature and potential for rehabilitation, juveniles cannot be sentenced to a mandatory sentence of life without parole.[69]

Taken together, *Roper v. Simmons*,[70] *Graham v. Florida*,[71] and *Miller v. Alabama*[72] establish a theoretical basis for treating youths differently from adults. Differing treatment is explained by youths' decreased culpability and increased likelihood of rehabilitation. Under this line of thought, juveniles deserve to receive the benefits of the juvenile court system. However, the juvenile justice system has developed in such a way that prevents many youths from accessing these benefits.

B. The Development of the Juvenile Justice System

The juvenile justice system in the United States is a relatively recent creation. The first juvenile justice court was established by the state of Illinois in 1899.[73] At its inception, the juvenile justice system aimed to rehabilitate children, rather than to punish them.[74] The rehabilitative juvenile justice system that developed during the twentieth century reflected society's increasing desire to protect children.[75]

In its early development, the notion of a juvenile justice system was influenced by the concept of *parens patriae*.[76] *Parens patriae* is traditionally defined as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute."[77] Specifically, in the juvenile justice context, *parens patriae* is used to allow the state to step into a parental role and assure the protection of the juvenile.[78] To protect the juvenile, the goal of this separate court

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[67] *Id.* at 2468.

[68] *Id.* at 2465, 2468, 2469. Some of the "hallmark features" of youth include "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468.

[69] *Id.* at 2469.

[70] Roper v. Simmons, 543 U.S. 551 (2005).

[71] Graham v. Florida, 130 S. Ct. 2011, 2011 (2010).

[72] Miller v. Alabama, 132 S. Ct. 2455 (2012).

[73] Mlyniec, *supra* note 33, at 29.

[74] Robert Anthonsen, *Furthering the Goal of Juvenile Rehabilitation*, 13 J. GENDER RACE & JUST. 729, 731 (2010) (discussing how the "primary function" of the first juvenile court was to rehabilitate and protect delinquent juveniles).

[75] Mlyniec, *supra* note 33, at 29 ("Developments such as the child labor laws and the system of public education indicate the desire to protect and isolate the nation's youth from the harshness and exploitation of an industrialized world.").

[76] *Id.*

[77] BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

[78] Anthonsen, *supra* note 74, at 731-32 (discussing how *parens patriae* puts the rehabilitation of children in the juvenile justice system into the hands of the state).

system for juveniles was rehabilitation, not retribution.[79] This rehabilitative aspect of the juvenile justice system was founded on the idea that children are less responsible than adults for their actions and thus should not be part of a "criminal class."[80] Though the goal of juvenile courts was to rehabilitate children, some children were beyond rehabilitation.[81] To address these youths, a system known as "judicial waiver" developed. Through the process of judicial waiver, the presiding juvenile court judge is given the power to decide whether the juvenile should remain in juvenile court or be transferred into the adult criminal justice system.[82]

The system that developed to "waive" children into adult criminal court was highly informal and largely arbitrary. The arbitrary nature of the waiver system was discussed in the seminal United States Supreme Court case *Kent v. United States*.[83] In 1961, Morris Kent, a sixteen-year-old boy living in the District of Columbia, was arrested for burglary and rape.[84] Because of his age, he fell under the jurisdiction of the juvenile court.[85] After Kent was detained, his counsel had him examined by psychiatrists and a psychologist, who certified that Kent was "'a victim of severe psychopathology'" and recommended "hospitalization for psychiatric observation."[86]

Kent's counsel argued that if Kent were to remain under the jurisdiction of the juvenile court and treated in a hospital, he could be rehabilitated.[87] Despite these findings, the juvenile court judge who presided over Kent's waiver hearing entered a simple order that waived Kent into adult criminal court.[88] After jurisdiction was waived, Kent was found not guilty of rape by reason of insanity

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[79] Mlyniec, *supra* note 33, at 30. For example, children could avoid developing criminal records, hearings would not be public, and children would not be held with adults. Such a setup was intended to create a more familial atmosphere.

[80] *See* Jennifer Park, Note, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies*, 76 GEO. WASH. L. REV. 786, 792 (2008) (discussing how children are not always able to foresee the consequences of their actions in the same way adults can). *See also* Mlyniec, *supra* note 33, at 30.

[81] Mlyniec, *supra* note 33, at 30. Waiver developed to deal with juveniles who had a "hardened disposition" or were too criminally "sophisticated" for juvenile court. Mlyniec, *supra* note 33, at 31.

[82] Mlyniec, *supra* note 33, at 31. Typically, the standards used by the judge to make the waiver decision are fixed by either statute or court rule, and may include "the seriousness of the alleged offense, the age of the child, the record and previous history of the child, his sophistication and maturity, the resources of the juvenile system and the amenability of the child to treatment." *Id.*

[83] Kent v. United States, 383 U.S. 541 (1966).

[84] *Id.* at 543.

[85] *Id.* at 542 ("Kent was then sixteen and subject to the 'exclusive jurisdiction' of the Juvenile Court."). D.C.CODE § 11-907 (1961), *amended by* D.C. CODE § 11-1551 (Supp. IV 1965).

[86] *Kent*, 383 U.S. at 545.

[87] *Id.*

[88] *Id.* at 545, 546. In the *Kent* majority opinion, the Supreme Court discussed the arbitrariness of the juvenile court judge's waiver decision. "The Juvenile Court judge . . . . held no hearing . . . . He entered an order reciting that after 'full investigation, I do hereby waive' jurisdiction of petitioner . . . .' He made no findings. He did not recite any reason for the waiver." *Id.* at 546.

and guilty of housebreaking and robbery; he was sentenced to thirty to ninety years in prison.[89]

On appeal, Kent argued that the juvenile court's waiver of jurisdiction was invalid.[90] The United States Supreme Court agreed and noted that "the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile."[91] In holding that Kent's waiver was invalid, the Court established several factors that aimed to create a waiver hearing that "measure[d] up to the essentials of due process and fair treatment."[92] The substantive factors are whether the community requires protection from the juvenile via waiver because of the seriousness of the alleged offense; the aggressive or violent nature of the alleged offense and whether or not it was willful or premeditated; if the alleged offense was inflicted on persons or property; the juvenile's "sophistication and maturity," based on factors such as the youth's environment and living behaviors; the juvenile's previous history and contact with juvenile court; and the likelihood the child will be rehabilitated, if he is found responsible, by the resources available to the juvenile court.[93] Following the Supreme Court's decision in *Kent v. United States*, most states adopted some version of the factors listed by the Court.[94] In fact, *Kent* is notable for being the first decision handed down by the United States Supreme Court to hold that juveniles are owed some measure of due process in the juvenile waiver decision.[95]

One year after its landmark decision in *Kent*, the Supreme Court handed down another decision that significantly enhanced juveniles' constitutional rights. As a result of *In re Gault*[96] and its progeny, children were provided with several constitutional due process safeguards, such as "representation by counsel; notice of charges; confrontation and cross-examination of witness; protection against self-incrimination; protection from double jeopardy; proof of delinquency charges

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[89] Kent v. United States, 383 U.S. 541, 550 (1966).

[90] *Id.* at 552.

[91] *Id.* at 553.

[92] *Id.* at 562. The amount of due process that juveniles are owed will be discussed in further detail below. *See infra* Part III.C.

[93] *Kent*, 383 U.S. at 566-67.

[94] Deborah L. Johnson et al., *The Violent Youth Offender and Juvenile Transfer to the Adult Criminal Court*, 2004 J. INST. JUST. INT'L. STUD. 84, 88 (2004). Since the Supreme Court set forth the waiver criteria in *Kent*, the criteria have been frequently criticized as too subjective. Lisa Ellis, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158, 173 (2005) (discussing how juvenile waiver standards remain vague after *Kent* because of their reliance on psychological factors). *See also* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 704 (1991) (noting how the subjective nature of the waiver decision creates "inequities and disparities," even within the same jurisdiction); Podkopacz & Feld, *supra* note 33, at 83 (stating that even though *Kent* helped to create a more formal review process for judicial waiver, the proceedings remain arbitrary).

[95] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1006 (1995).

[96] In *In re Gault*, Gerald Francis Gault was taken into custody by the police after allegedly making lewd phone calls to a neighbor; Gault was fifteen years old at the time the incident occurred. *In re* Gault, 387 U.S. 1, 4, 8 (1967).

beyond a reasonable doubt; and protection from judicial transfer to criminal court without hearing, effective counsel, or a statement of reasons."[97] Following these decisions, the rehabilitative nature of the juvenile court began to change.[98]

Although *Kent* and *Gault* increased the constitutional due process protections afforded to juveniles, they also resulted in a juvenile system that was more in line with the traditional criminal court system, and thus, the system became more focused on retribution than rehabilitation.[99] Ultimately, *Kent* and *Gault* had the effect of treating children the same as adults but also weakening the ideological underpinnings of the juvenile court.[100] These changes occurred because of an increased emphasis on criminal procedure in the juvenile court system and a decreased focus on youths' "real needs."[101] Thus, while these opinions are positive in the sense that they protect juveniles' constitutional rights, they largely ignore the rehabilitative intent of the juvenile court system.[102]

An emphasis on retribution means that the original goal of the juvenile justice system—rehabilitation—is no longer at the forefront. For example, in *In re Gault*, Justice Stewart pointed out the differences between the juvenile and criminal justice systems, stating "that by requiring the same due process guarantees, 'the Court's opinion . . . serves to convert a juvenile proceeding into a criminal prosecution.'"[103] However, *Kent* and *In re Gault* were only the beginning of the move toward a retribution-focused juvenile system. After these decisions, the Supreme Court's jurisprudence continued to align juvenile courts with adult criminal courts by applying the reasonable doubt standard and double jeopardy protections to juvenile court proceedings.[104] Following these trends, juvenile court systems across the country began to implement "aggressive" waiver procedures,

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[97] Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 177 (2007).

[98] Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 72 (1997).

[99] Pagnanelli, *supra* note 97, at 178. The increased focus on retribution occurred because *Kent*, *Gault*, and the cases that followed "fostered a procedural and substantive convergence with criminal courts." *Id.* at 178. As a result of these changes, "a more traditional adversarial model" displaced the rehabilitative goals of the juvenile court. Randie P. Ullman, Note, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1338 (2000).

[100] Pagnanelli, *supra* note 97, at 178.

[101] Feld, *supra* note 98, at 73.

[102] A.B.A DIV. FOR PUB. EDUC., THE HISTORY OF JUVENILE JUSTICE 7 (2011), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

[103] Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried As Adults Without the Possibility of Youth As A Mitigating Factor*, 62 RUTGERS L. REV. 241, 248-49 (2009).

[104] *Id.* at 249. Prior to the series of decisions that started with *Kent*, juveniles were not entitled to receive the protection of many of the due process standards that adults are, such as: notice of the charges against them, a right to legal counsel, the right against self-incrimination, and the right to confront and cross-examine witnesses. A.B.A DIV. FOR PUB. EDUC., *supra* note 102, at 7.

with an increased focus on retribution,[105] thus further weakening the original intent underlying the establishment of juvenile courts.

C. The Waiver System—What Is It?

At the same time that the United States Supreme Court was aligning the juvenile justice system with the adult criminal justice system, juvenile crime rates were rising.[106] In response, states began to make it easier for juveniles to be waived into the criminal justice system, thereby further undermining the original rehabilitative philosophy of the juvenile courts.[107] One way states facilitated the juvenile waiver process was by amending their waiver policies to include statutory waiver and prosecutorial discretion in addition to judicial waiver.[108] In fact,

> [b]etween 1992 and 1997 . . . forty-five states made it easier to transfer juveniles to adult court, thirty-one states increased the sentencing authority of juvenile courts, and forty-seven states limited the ability of juveniles to keep their records confidential. [F]rom 1998 to 2002 there were still eighteen states that amended their waiver laws to increase the likelihood that juveniles would be transferred to adult court.[109]

These state policies demonstrate the trend that allows juveniles to enter the adult criminal justice system more easily. The development of other types of waiver, as discussed below, also fit this trend.

Statutory waiver—also known as "legislative exclusion" or "mandatory waiver"—"exclude[s] certain juveniles from the jurisdiction of the juvenile court based on set factors, such as the juvenile's age and the alleged crime."[110] If a juvenile of a certain age allegedly commits a particular crime in a mandatory waiver state, the case is "automatically transfer[red] to criminal court, bypassing both judicial and prosecutorial scrutiny."[111] Essentially, the nature of the offense

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[105] Powers, *supra* note 103, at 249.

[106] Chelsea Dunn, Commentary, *Condemning Our Youth to Lives as Criminals: Incarcerating Children as Adults*, 11 RICH. J.L. & PUB. INT. 30, 34 (2008) (discussing how, as juvenile crime rates increased, the juvenile court system began to look more and more like the criminal justice system).

[107] Pollitt, *supra* note 32, at 285-86 (discussing the shift from trying to rehabilitate children in the juvenile justice system and removing the minority who were not amenable to rehabilitation, to the automatic transfer of juvenile offenders, and how such a process flies in the face of the initial goal of the juvenile justice system).

[108] *See* Park, *supra* note 80, at 799 ("Every state uses one or several of the following waiver methods: (1) statutory waiver; (2) prosecutorial discretion; or (3) judicial waiver.").

[109] Park, *supra* note 80, at 797.

[110] *Id.* at 799; Dunn, *supra* note 106, at 38. Though statutory waiver is discussed here, it will not be mentioned in great depth below, since many of the criticisms of prosecutorial waiver and statutory waiver are the same. This is because "[i]n a statutory exclusion situation, the charging decision is the prosecutor's." Eric K. Klein, *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, 397 (1998).

[111] Dunn, *supra* note 106, at 38.

statutorily requires that a juvenile's case be brought in adult criminal court, regardless of any possible mitigating factors.[112]

Prosecutorial wavier—also known as "concurrent jurisdiction" or "direct file"—gives jurisdiction over the juvenile to adult and juvenile courts, and it allows the prosecutor to decide how to charge the juvenile.[113] Typically, in a direct file jurisdiction, the prosecutor's discretion to charge is statutorily confined by the age of the juvenile and the alleged offense.[114] Such systems tend to give prosecutors broad discretion to decide where to file the case.[115] Though direct file "is more efficient than judicial transfer, it raises concerns of arbitrariness, since it is not always subject to judicial review . . . [and] the decision frequently depends on the philosophy of the prosecutor and judge, the political climate, the publicity surrounding the offenses, and the make-up of the community."[116] In fact, neither prosecutorial waiver nor statutory waiver has an adversarial hearing, meaning that the youth's background is not taken into account at all.[117]

Judicial wavier—the type of waiver challenged in *Kent*—gives the decision of whether a juvenile should be charged in juvenile or criminal court to the juvenile judge.[118] When a judge makes the waiver decision, he or she is often guided by state statutes and by the factors articulated by the Supreme Court in *Kent*.[119] While judges who make waiver decisions can still use their personal discretion to determine which criteria should receive the most emphasis, judicial waiver is the only method of transfer that still has an aspect of "individualized rehabilitation," resulting from the ability of the judge to individually determine whether a juvenile is capable of rehabilitation.[120] When individual assessment occurs, juveniles who are amenable to treatment can remain in juvenile court and receive treatment and other benefits they could not receive in the adult criminal court system.[121] However, judicial waiver can still be problematic. Specifically, it is difficult for judges to equitably implement a discretionary waiver statute.[122] Judges are often influenced by the youth's race or "geographic locale," and judges within the same jurisdiction apply the statute inconsistently as a result of differing judicial philosophies.[123]

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112 Johnson et al., *supra* note 94, at 89.

113 Park, *supra* note 80, at 799; Dunn, *supra* note 106, at 37.

114 Dunn, *supra* note 106, at 37.

115 Johnson et al., *supra* note 94, at 89.

116 Dunn, *supra* note 106, at 37-38. Prosecutorial waiver is more efficient because there is no transfer hearing. Emily A. Polachek, Note, *Juvenile Transfer: From "Get Better" to "Get Tough" and Where We Go From Here*, 35 WM. MITCHELL L. REV. 1162, 1172 (2009).

117 Geraghty & Rhee, *supra* note 30, at 607.

118 Park, *supra* note 80, at 799.

119 Dunn, *supra* note 106, at 37.

120 *Id.*

121 *See infra* Part II.A.

122 Vannella, *supra* note 31, at 740.

123 *Id.*

Though the type of waiver system that is used varies from state to state, every state in the country uses some sort of waiver.[124] However, as discussed further below, the effectiveness of waiver is debatable.

II. CRITICISMS OF THE JUVENILE WAIVER SYSTEM

Juvenile waiver is flawed because it treats youths as adults, despite the decreased culpability of youths, and it therefore decreases the likelihood that rehabilitation of the juvenile will occur. In addition, waiver often does not recognize the individual characteristics of the juvenile that may decrease his or her culpability.

A. Waiver Harms a Juvenile's Chances of Rehabilitation

One of the biggest disadvantages experienced by juveniles who are tried as adults is the loss of privacy and the inability to leave their pasts behind.[125] Juvenile offenders are "often shielded from publicity. Records may be sealed . . . [and p]erhaps more importantly, jurisdiction terminates when the child reaches majority. Consequently, children are able to avoid the long sentences that often accompany felony convictions."[126] Being charged as a juvenile "shield[s children] from the stigma of having a permanent criminal record, which would hamper their ability to become productive, law abiding citizens."[127] Juveniles charged as adults lose this benefit.[128]

In addition, some of the harshest effects juveniles may experience if sentenced as adults are abuse at the hands of other offenders and "prisonization."[129] If a juvenile is sentenced and convicted as an adult, there is a

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[124] Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T OF JUST., OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, 2 (Sept. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[125] Jeanice J. Dawes, *Sealing a Juvenile Record: Why and How To Do It*, 47 HOUS. LAW. 22, 24 (2009) (describing how juvenile records are confidential, and only available to "certain individuals").

[126] Mlyniec, *supra* note 33, at 43.

[127] Juan Alberto Arteaga, Note, *Juvenile (In)justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1061 (2002). Moreover, "[u]nlike criminal prosecutions, juvenile proceedings are civil inquiries that result in a juvenile defendant being deemed delinquent rather than guilty of a crime. As a result, an adverse juvenile court decision produces a juvenile delinquency record, which is sealed and 'forgotten' once the juvenile attains the age of majority." *Id.* Additionally, criminal records are incredibly stigmatizing, particularly in the realm of employment—one study found that, "a criminal record reduces the likelihood of a callback or job offer by nearly fifty percent." Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men With Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

[128] For example, if a juvenile is convicted as an adult in New York State, his or her records are treated "the same as adult convictions for employment purposes." Laurie Parise, *Know Your Rights: Understanding Juvenile & Criminal Records and Their Impact on Employment in New York State*, LEGAL ACTION CTR., 48 (2009), http://lac.org/doc_library/lac/publications/kyr.pdf.

[129] "Prisonization" is defined as, "the taking on in greater or less degree of the folkways, mores, customs, and general culture of the penitentiary." Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 530

possibility that he will be placed in a facility with adult offenders.[130] Though Congress passed the Juvenile Justice and Delinquency Prevention Act ("JJDPA") Act of 1974—which mandates that juveniles be separated from adults in "[s]ight and sound" during every stage of a judicial proceeding[131]—juveniles who are waived into the adult system do not receive these protections.[132] Thus, juveniles housed in adult facilities are at a greater risk of physical, sexual, or psychological abuse.[133] In fact, "[m]ore than any other group of incarcerated persons, youths incarcerated with adults are probably at the highest risk for sexual abuse. They are also fifty percent more likely to be subjected to physical assault with a weapon by other inmates."[134] Furthermore, juveniles who are housed with adult criminals are more likely to experience prisonization.[135] As a result, juveniles incarcerated in adult facilities often experience a "deprivation of meaningful contacts with positive social influences" and become entangled in "a cycle of victimization and retribution."[136] Such negative experiences in adult correctional facilities result in groups of juveniles who are far less likely to be rehabilitated into society and are instead more likely to continue committing crimes.[137]

Moreover, when juveniles are waived into adult court, they lose the opportunity to benefit from meaningful rehabilitation. Although many juvenile offenders are not beyond the pale of treatment or rehabilitation,[138] youths incarcerated in adult prisons are excluded from access to "either educational programs or specialized therapy and treatment . . . [and] staff in adult jails and prisons do not have specialized training to work with this age population or to meet their unique needs as very young prisoners."[139] Furthermore, juveniles in adult

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(1997).

130 James Austin et al., *Juveniles in Adult Prisons and Jails: A National Assessment*, U.S. DEP'T OF JUS., BUREAU OF JUST. ASSISTANCE, 8 (Oct. 2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf (discussing how juveniles charged as adults may be housed with other adults awaiting disposition of their case).

131 *Id.* at 9.

132 *Id.*

133 Dunn, *supra* note 106, at 34.

134 Michele Deitch, *Juveniles in the Adult Criminal Justice System in Texas*, UNIV. TEX. AUSTIN, LBJ SCH. PUB AFFAIRS, 7 (Mar. 2011), http://www.utexas.edu/lbj/sites/default/files/file/news/juveniles texas--final.pdf ("Although there are federal laws that generally require the separation of youth from adults in correctional settings, those laws do not apply to juveniles who have been transferred to adult system.").

135 Dunn, *supra* note 106, at 45.

136 *Id.*

137 Campaign for Youth Justice, *Youth in Adult Prisons Fact Sheet*, ACT 4 JUVENILE JUS., 2 (Mar. 3, 2013), act4jj.org/media/factsheets/factsheet_26.pdf. In fact, a study conducted in Florida that "matched [juveniles] based on age, race, gender, [and] previous offenses" found that youths who remained in juvenile court were less likely to re-offend—only thirty-seven percent of juveniles who remained in juvenile court re-offended, compared to the forty-nine percent re-offend rate for juvenile who received an adult sanction. *Id.*

138 Pollitt, *supra* note 32, at 292-93 ("[E]arly intervention and rehabilitation works for both non-violent and violent offenders . . . Rehabilitation is still a viable option for all juvenile offenders. By incorporating rehabilitation techniques, even violent offenders respond to treatment.").

139 Deitch, *supra* note 134, at 7.

facilities may not have the opportunity to participate in job readiness programs, making it less likely that they will stay out of trouble in the future.[140] The loss of access to these services also hampers a juvenile's chances of achieving meaningful rehabilitation after his or her release.[141] In particular, many juveniles caught up in the system are learning disabled, so incarceration as an adult means that those problems are not addressed.[142] The negative effects resulting from a lack of access to rehabilitation is heightened by the fact that juveniles are also separated from their families and communities.[143] As a result, when juveniles are charged and then sentenced as adults, their chances of rehabilitation diminish.[144]

In fact, an increased recidivism[145] rate for juveniles charged as adults is a very real problem.[146] Juveniles who are transferred into adult criminal court recidivate much faster than children who remain in juvenile court and are more likely to later commit felony offenses.[147] The Centers for Disease Control ("CDC") recognized the occurrence of increased recidivism rates when it determined that juveniles who were charged as adults "reoffended more quickly and at rates equal to or higher than comparable youths retained in the juvenile system."[148] To address this issue, the CDC proposed the repeal of juvenile transfer laws and policies.[149] This finding is reinforced by the fact that there is almost no evidence to support the proposition that state waiver laws have actually decreased juvenile crime rates.[150] Problems with increased recidivism rates are magnified by

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[140] *Id.* For example, the Arizona State Department of Juvenile Corrections created a vocational training program for youths in juvenile detention to help prepare the kids "to be successful in the real world." Dustin Gardiner, *Juvenile Offenders Given Job Training*, ARIZ. REPUBLIC (Dec. 14, 2009 12:00 AM), http://www.azcentral.com/news/articles/2009/12/14/20091214juveniles1214.html. The program provides the youths with job and life training classes. *Id.*

[141] *See* Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, U.S. DEP'T JUS., OFF. JUVENILE JUS. & DELINQUENCY PREVENTION, 4 (Aug. 2005), https://www.ncjrs.gov/pdffiles1/ojjdp/209326.pdf (discussing how an "effective strategy for treating and rehabilitating juvenile offenders and preventing recidivism" is providing comprehensive services).

[142] Klein, *supra* note 110, at 403. For example, while eighty-four percent of children in short-term juvenile facilities and forty-eight percent of youths in long-term juvenile facilities receive the appropriate educational services, only twenty-nine percent of juveniles in adult facilities have access to educational programming that fits their needs. Mary M. Quinn et al., *Students with Disabilities in Correctional Facilities*, COUNCIL FOR EXCEPTIONAL CHILDREN, http://www.cec.sped.org/ (last visited Mar. 3, 2013).

[143] Christopher Mallett, *Death is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 CRIM. L. BULL. 3, 3 (2007) ("Transfers also loosen ties with family members because adult prisons, compared to juvenile facilities, are much further in distance from the youths' community.").

[144] *See* Klein, *supra* note 110, at 403.

[145] Recidivism is defined as, "[a] tendency to relapse into a habit of criminal activity or behavior." BLACK'S LAW DICTIONARY 1384 (9th ed. 2009).

[146] Klein, *supra* note 110, at 403. Moreover, juveniles who are not transferred tend to show improved behavior over time, as compared to transferred juveniles. Klein, *supra* note 140, at 403.

[147] Klein, *supra* note 110, at 403.

[148] Deitch, *supra* note 134, at 7.

[149] *Id.*

[150] Mallett, *supra* note 143, at 3 ("A study of twenty-two states that enacted or substantially

the fact that juveniles charged as adults are stigmatized as criminals.[151] As a result, youths waived into the adult criminal justice system will have a harder time finding jobs and housing and applying for welfare benefits after their release.[152]

As a whole, juveniles who are waived out of juvenile court are negatively affected by their involvement in the waiver system—they fail to receive essential services, experience prisonization, and are unable to leave their pasts behind. Consequently, a youth tried and sentenced in adult criminal court is more likely to return to prison later in his or her life.

B. Waiver Fails to Account for the Juvenile's Individual Circumstances

Several critical issues arise if children are treated as adults in the criminal justice system. The first is that waiver decisions often fail to take the individual juvenile and his or her particular situation into account. For example, "no consideration is allowed for individual circumstances such as maturity, social needs, and culpability,"[153] particularly with statutory and prosecutorial waiver, which tend to statutorily define when waiver will occur.[154] Significantly, the original goals of the juvenile court were based on the individual needs of the child and failure to make an individualized waiver decision runs contrary to these objectives.[155] Compounding the problem is the fact that, unless there is a limit on prosecutors' discretion to charge juveniles, first-time offenders may experience particularly harsh effects.[156] These harsh effects occur because juveniles can be automatically transferred—even as first-time offenders—into criminal court, where they will lose the opportunity "for individual reformation" as a juvenile.[157]

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amended [waiver] statutes after 1979 found that only two of the states experienced declines in arrest rates for violent juvenile crime after the laws became effective.").

[151] Hilary Hodgdon, *Border Disputes Between Juvenile and Adult Criminal Justice Systems: Exclusion and Transfer Laws*, THE FUTURE OF CHILD. (Mar. 9, 2012), http://futureofchildren.org/futureofchildren/publications/highlights/18_02_Highlights_09.pdf. A delinquency in juvenile court is less stigmatizing than an adult criminal court. *See also* Michon, *supra* note 28.

[152] James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177 (2008).

[153] Johnson et al., *supra* note 94, at 89.

[154] *See* Johnson et al., *supra* note 94, at 89; Dunn, *supra* note 106, at 37. However, when the waiver decision is left to the judiciary, the juvenile's background is considered. For example, when Marquese's case was reviewed by the judge assigned to his case, she seriously considered his background, and concluded that he was fit for the juvenile system party because of his horrendous childhood. *Juvenile Justice: Marquese*, *supra* note 9. Marquese's case is an example of the benefits of looking at the factors that affected each individual juvenile's life.

[155] Park, *supra* note 80, at 791 (discussing how judges would sentence the juvenile based on their "individual treatment needs").

[156] Mlyniec, *supra* note 33, at 36 ("[I]n the absence of a proper exercise of discretion, the statutes can have an unnecessarily harsh effect on first offenders."). Moreover, "these laws may be applied to children who may be permanently harmed in the absence of sentencing schemes, or correctional facilities designed to separate young offenders from older, more experienced criminals. The speed with which these decisions are often made . . . [are] fraught with the dangers of arbitrariness." Mlyniec, *supra* note 33, at 36-37.

[157] Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1273 (1996).

Furthermore, a prosecutor's decision to charge the juvenile may be fraught with political undertones. A majority of the prosecutors in the country are elected,[158] and consequently, they are judged by their conviction rates and pursuit of criminal activity.[159] Although politics tend to be a concern in charging juveniles and adults, "it is [particularly] unfair to the child to have the fate of their young life hang in the balance of a political struggle."[160] Prosecutors may face political pressures for a number of reasons.[161] Many prosecutors' decisions are influenced by their own political ambitions.[162] They may think, "[h]ow will my track record on the environment be perceived in light of my prosecution of Dirty Water, Inc.? Or given my political philosophy, what entities are likely to support my candidacy financially so that I can't afford to alienate them?"[163] As a result, the prosecutor may try to transfer the juvenile to adult court to increase his or her chances of re-election, instead of "consider[ing] the welfare of the accused."[164]

Moreover, these pressures can be amplified by the press, which draws increased public attention to the juvenile's case, thereby creating even more political pressure.[165] Lastly, when making the charging decision, prosecutors face an "inherent conflict of interest."[166] Prosecutors must:

> Perform the dual responsibility of 1) protecting society by vigorously prosecuting criminals and 2) shielding those juveniles who may still be rehabilitated from the harsh realities of the penal system. When asked to weigh one interest against the other, though, prosecutors will generally assume their role as advocates of the state and tend to err on the side of protecting society.[167]

Since prosecutors tend to put their duty to protect society first, they are more likely to treat juveniles harshly and try to waive them into adult criminal court.

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[158] Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 77 (2011) ("More than ninety-five percent of lead state and local prosecutors in the United States are elected.").

[159] Brenda Gordon, Note, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona* Response, 41 ARIZ. L. REV. 193, 222 (1999).

[160] Johnson et al., *supra* note 94, at 89 (citation omitted). Others writings on this point argue "that prosecutors are unsuited to make this decision, having the wrong incentives and being much less attuned to the rehabilitative goals of juvenile justice." Pagnanelli, *supra* note 97, at 182.

[161] Milo C. Mason & Paul B. Smyth, *Reviewing Nonreviewable Prosecutorial Discretion: What and Who Is Behind the Big, Powerful Curtain*, 23 NAT. RESOURCES & ENV'T 23, 31 (2009).

[162] *Id.*

[163] *Id.*

[164] Gordon, *supra* note 159, at 223.

[165] Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 994 (2002). Since most prosecutors are elected, scholars have stated that voters are the ones who control prosecutors' decisions. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1353 (2008).

[166] Arteaga, *supra* note 127, at 1063.

[167] *Id.*

C. The Justifications for Juvenile Waiver Are Not Realized

Just as the reasons for imposing the death penalty and LWOP for non-homicide crimes on juveniles failed to carry their weight,[168] so do the justifications for waiving juveniles into adult criminal court. As discussed earlier, juvenile courts were originally established to rehabilitate the juvenile.[169] However, as juvenile crime rates rose, the public questioned the rehabilitative goals of the juvenile justice system.[170] In response, legislatures hoping to deter juvenile crime and increase juvenile accountability began to move away from rehabilitation and toward retribution.[171]

Despite the move toward retribution, the legislative ideal of punishing juveniles to enhance public safety never came to fruition.[172] Juveniles who are waived into criminal court and sentenced as adults are more likely to commit serious crimes than juveniles who are found delinquent as juveniles,[173] and there is little evidence to date that youths are now more accountable as a result of harsher transfer laws. In fact, research has found that the current retributive approach has had little effect on achieving the stated goals of these policies:

> Research to date finds that the current, punitive approach in juvenile offender transfers to criminal courts is counter-productive to stated policy intentions of increased public safety and increased youth accountability. There is little evidence these state laws have reduced arrest or crime rates[, n]or has the 'get tough' approach reduced recidivism. . . . Lastly, the current approach has not improved community safety.[174]

Waiver is not making society less dangerous.[175] Therefore, the justifications for waiving juveniles into adult criminal court break down for the same reasons that the death penalty and LWOP cannot be legitimately imposed on juveniles.[176] Parallel to the conclusions drawn by the Supreme Court in *Roper*,[177] *Graham*,[178] and *Miller*[179]—that the imposition of either the death penalty on juveniles, or

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168 *See supra* Part I.A.

169 Anthonsen, *supra* note 74, at 731.

170 Mlyniec, *supra* note 33, at 31 ("The rise of juvenile crime in both the nation's cities and suburbs has called into question the very premises upon which the juvenile justice system is founded.").

171 Pollitt, *supra* note 32, at 289 (discussing how legislatures no longer focused on the initial goals of the juvenile justice system, and instead began to make it easier for juveniles to be transferred into the criminal justice system, with the hopes that harsher sentences would prevent juvenile crime).

172 Mallett, *supra* note 143, at 2 (stating that today most states that transfer juveniles say transfers are needed for public safety and accountability purposes).

173 Pollitt, *supra* note 32, at 292 ("Of those who committed new crimes, the youth who had previously been tried as adults committed serious crimes at double the rate of those sent to juvenile court.").

174 Mallett, *supra* note 143, at 3.

175 Griffin et al., *supra* note 124, at 26.

176 Arya, *supra* note 44, at 106.

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

178 Graham v. Florida, 130 S. Ct. 2011 (2010).

179 Miller v. Alabama, 132 S. Ct. 2455 (2012).

LWOP on juvenile non-homicide and homicide offenders is inimical to the penological justifications for those sentences—waiver as a system is inherently flawed, since the justifications for waiving juveniles into adult criminal court are not being realized.

III. REFORMATION OF JUVENILE WAIVER AND THE BARRIERS TO GETTING THERE

A. No Right to Be Treated As A Juvenile is No More

In light of the fact "that treatment as a juvenile is not an inherent right but one granted by the state legislature, [and] therefore the legislature may restrict or qualify that right as it sees fit," how can meaningful change occur?[180] Though a series of courts have found that children do not have a right to juvenile treatment, many of these decisions pre-date *Roper v. Simmons*[181] and *Graham v. Florida.*[182] Moreover, it is also important to note that from the outset, the law has long recognized juveniles as a different and protected class of sorts:[183]

> The protections provided to juveniles in our society . . . are legion. Juveniles are protected from sexual contact from non-juveniles, they are provided compulsory and extensive schooling experiences, their welfare, by law, is assumed by their guardians, and those who provide services to children are deemed mandated reporters of neglect or abuse to further protect children's health and safety.[184]

Graham and *Roper* enhanced these long-standing protections afforded to juveniles, and thus, children do have some right to be treated as juveniles, because they are different from adults.[185]

As discussed above, *Roper* held that juveniles cannot be sentenced to death.[186] In the *Roper* opinion, the Court brought up several differences between children and adults.[187] Since the Court in *Roper* recognized that juveniles are different from adults, the law must adapt to recognize that juveniles deserve to be treated differently.[188] Yet, many courts in the post-*Roper* era hesitated to apply the

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180 Woodard v. Wainwright, 556 F.2d 781, 785 (1977).

181 *Roper*, 543 U.S. 551.

182 *Graham*, 130 S. Ct. 2011. Note that it is still too early to tell the effect *Miller v. Alabama* will have in strengthening the argument that children have a right to be treated as juveniles.

183 Matthew William Bell, *Prosecutorial Waiver in Michigan and Nationwide*, MICH. ST. L. REV. 1071, 1084 (2004) ("Juveniles are arguably the most protected class of individuals within our society.").

184 *Id.* at 1085.

185 Arya, *supra* note 44, at 99.

186 *Roper*, 543 U.S. at 573-74.

187 Emily Ray, *Waiver, Certification, and Transfer of Juveniles To Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317, 340 (2010) ("[T]he Court's reasoning speaks to the wisdom of certifying juveniles to stand trial as adults. The Supreme Court's justifications for its ruling, namely, the three differences between adults and juveniles, counsel against treating children and adults identically, as is the case when a minor is transferred to adult court."). *See also Roper*, 543 U.S. at 570.

188 *See* Ray, *supra* note 187, at 340-41.

"death is different" reasoning to a non-capital framework.[189] Studies show that post-*Roper*, no state reviews the transitory nature of youths' personalities or underdeveloped character.[190] As such, by failing to recognize the right of juveniles to be treated differently from adults, the chasm that lies between juvenile and adult culpability disappears.[191]

However, the concept that juveniles have a right to be treated as juveniles was strengthened when the Supreme Court decided *Graham*.[192] In *Graham*, the Court found that the "case implicated a particular type of sentence as it applies to an entire class of offenders,"[193] thus suggesting that juveniles are different than adults and have the right to be treated as juveniles. Consequently, *Graham* solidified the fact that juveniles are different from adults.[194] Therefore, since "the Court found that a juvenile's social, physiological, and psychological underdevelopment merit a legally recognizable diminished culpability warranting a bright-line rule against capital punishment"[195] and LWOP,[196] "it follows that this same diminished culpability"[197] warrants a recognition that children deserve to be treated as juveniles—and not as adults—in the justice system.

B. Meaningful Reform of the Waiver System

It is clear that the waiver of juveniles into adult criminal court is problematic because it fails to achieve its stated goals of deterrence and public safety, it increases the juvenile recidivism rate, and it exposes juveniles incarcerated in the adult criminal system to abuse. In light of these problems, it is apparent that the waiver system warrants revision to provide juveniles with extra protection. Some believe the best way to cure the juvenile waiver system is to completely eliminate the system.[198] In an ideal world, disposing of juvenile waiver may be the only way to completely keep juveniles out of the adult criminal system. Yet, realistically, the

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[189] Arya, *supra* note 44, at 120 ("[C]ourts have been unwilling to make the leap from youth are generally less culpable to every youth is less culpable.").

[190] Mallett, *supra* note 143, at 4 ("No state has enacted criteria to review youths' transitory personality or less formed character.").

[191] Ray, *supra* note 187, at 340 ("The *Roper* analysis, which relied heavily on scientific brain research, counsels for a continuation of the use of separate systems for juvenile and adult offenders. When a juvenile is certified to stand trial as an adult, the important distinctions between the culpability of adults and children are lost.").

[192] *See* Arya, *supra* note 44, at 102 ("*Graham* is not merely an extension or incremental continuation of *Roper*, but provides significant fodder for a reexamination of our juvenile justice policies more broadly.").

[193] Arya, *supra* note 44, at 112.

[194] *Id.* at 120 ("For youth charged with nonhomicide crimes, the 'juveniles are different' argument now has legal relevance.").

[195] Pagnanelli, *supra* note 97, at 187-88.

[196] Graham v. Florida, 130 S. Ct. 2011 (2010).

[197] Pagnanelli, *supra* note 97, at 187-88.

[198] Park, *supra* note 80, at 791 ("[S]tates should eliminate all waiver of jurisdiction over juveniles to adult court and instead try all juveniles in the juvenile court. This will eliminate the constitutional and procedural problems associated with waiver.").

elimination of juvenile waiver is unlikely to occur in all fifty states unless the Supreme Court makes the improbable announcement that juveniles cannot be tried in adult criminal court.[199] A more pragmatic solution is to establish a more accurate waiver system that accounts for juveniles' capacity for rehabilitation, decreased culpability, and individual life circumstances.

Critics of the juvenile justice system generally agree that prosecutors cannot make an unbiased charging decision.[200] Thus, one way of limiting a prosecutor's discretion is by eliminating prosecutorial and statutory waiver and allowing only judicial waiver.[201]

However, judicial review is troublesome as well.[202] There is no evidence that courts can accurately predict a juvenile's risk to society or necessarily identify a youth's treatment potential any better than a prosecutor can.[203] Moreover, even if courts follow the factors laid out by the Supreme Court in *Kent v. United States*,[204] the waiver decision will, more often than not, still be arbitrary.[205] Judges often lack guidelines to help them make decisions on how best to classify the juvenile; as a result, waiver statutes are applied inconsistently between counties in the same state and even between two courts in the same jurisdiction.[206]

Yet, there are ways to overcome the disadvantages that come with judicial waiver.[207] For example, the legislature—which would be responsible for laying down the guidelines in which judges make their waiver decisions—would have to develop standards that judges can more objectively evaluate.[208] Another key component of enhancing the judicial waiver system would be training the juvenile

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[199] *See* Park, *supra* note 80, at 807.

[200] *See* Arteaga, *supra* note 127, at 1067 ("[P]rosecutors, in the context of juvenile justice, are unable to serve adequately in the role of disinterested decisionmaker. In order to maintain an unbiased approach, a check on their decisionmaking process is necessary."). *See also* Bell, *supra* note 183, at 1093 ("It is unreasonable, given the political nature of the prosecutor's position, to have an expectation that prosecutors can make an unbiased waiver decision without guidelines to channel their discretion."); Melissa A. Scott, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 744 (2004) ("Prosecutorial and legislative waivers do not provide juveniles with the protections that should be essential in determining these critically important decisions.").

[201] Scott, *supra* note 200, at 744 ("Since waiver of juvenile court jurisdiction is a critically important decision, it should only be made after a full hearing of the facts of the offense and the circumstances of the juvenile. Judicial waiver is the only waiver mechanism that provides these opportunities to the juvenile."). *See also* Bell, *supra* note 183, at 1096 ("The ideal modification to the automatic waiver procedure would be to eliminate it entirely . . . when significant rights are at stake efficiency and speed should not take precedence over due process and fairness.").

[202] Podkopacz & Feld, *supra* note 33, at 85.

[203] *Id.* at 84-85.

[204] Kent v. United States, 383 U.S. 541 (1966).

[205] Podkopacz & Feld, *supra* note 33, at 85-86.

[206] *Id.* ("Because of the subjective nature of waiver criteria, the absence of guidelines to structure the decision, and the lack of concrete indicators . . . to classify youths, a variety of inequalities and disparities may occur . . . National analyses of states' waiver practices document the arbitrary, capricious, and discriminatory consequences of discretionary transfer decisions.").

[207] Scott, *supra* note 200, at 746.

[208] *Id.*

court judges on juvenile delinquency issues and helping them to better understand the waiver standards.[209] Additionally, since the weaknesses of judicial waiver are already known, these problems can be strategically addressed to create a waiver process that adequately and fairly evaluates the juvenile alongside his or her particular circumstances.[210] Therefore, despite the problems with judicial waiver, its reformation is the most realistic way to improve the juvenile waiver system, since judicial waiver is already in place in courtrooms around the country and thus requires fewer resources to implement. Lastly, as discussed below, reformation is necessary to protect the due process rights of juveniles who are facing waiver into adult criminal court.[211]

C. Are Juveniles Due Due Process in the Waiver Context?

Juveniles are guaranteed due process in the juvenile waiver system, as revealed by the *Mathews v. Eldridge* due process balancing test.[212] When an individual is deprived of a liberty interest[213]—which occurs when a juvenile is tried and sentenced as an adult—a court must determine what procedures are required to protect the individual's due process rights.[214] To adequately protect the due process rights of juveniles, judicial waiver must be reformed and both prosecutorial and statutory waiver must be eliminated. The *Mathews* test balances three prongs. The first is the importance of the private, or individual, liberty interest at risk.[215] The second prong explores how the suggested procedure can

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[209] *Id.*

[210] While the problems with prosecutorial and statutory waiver are also known, it is more difficult to address the issues with those waiver systems because of the inability of many prosecutors to be unbiased. *See supra* Part II.B.

[211] *See infra* Part III.C.

[212] Mathews v. Eldridge, 424 U.S. 319 (1976). Juvenile courts are civil and not criminal courts. 43 C.J.S. INFANTS § 11 (2011) ("Except to the extent that juvenile courts have statutory jurisdiction of prosecutions under the laws for the protection of infants, a juvenile court is not a criminal court, it is, rather, a civil court devoted to the furtherance of the welfare of children."). Thus, the waiver decision, which is made while the youth is still in the juvenile system, is a civil one, and the *Mathews* balancing test applies instead of the test announced by the United States Supreme Court in *Medina v. California.* Medina v. California, 505 U.S. 437, 443 (1991) ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process.").

[213] A juvenile's liberty interest in being charged as a juvenile is statutorily created, and there are several "rights and immunities" that come with this interest. Deborah Katz Levi, State v. Mohi-*State Sanctioned Abuse?*, 10 J.L. & FAM. STUD. 173, 194 (2007). As a result, juveniles have "a substantial liberty interest in the continuation of that juvenile status and the juvenile cannot and should not be deprived of that status without proper procedural protections." *Id.* The issue that the right to be charged as a juvenile arises from the state's "statutory authority, rather than from any inherent or constitutional right," State v. Skakel, 888 A.2d 985, 1007 (Conn. 2006), is addressed above. *See supra* Part III.A.

[214] RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 110 (3d. 1999) ("All courts must now employ the *Mathews v. Eldridge* balancing test to determine the type of procedures that are required by due process when a governmental action would deprive an individual of a constitutionally protected liberty or property interest.").

[215] *Id.*; *See also Mathews*, 424 U.S. at 335.

decrease the chances of an incorrect "deprivation" of the individual's interest,[216] and evaluates the merits of supplementary or different procedural safeguards.[217] The third and final prong reviews whether the requested procedure will place any additional "fiscal or administrative burdens" on the government and the interest the government has in deflecting these burdens.[218] The first two factors determine the individual's interest at stake,[219] and the third factor evaluates the government's interest.[220] Considering the conclusions in *Roper*, *Graham*, and *Miller* that juveniles are different from adults, the application of the *Mathews* balancing test in the context of juvenile waiver comes down on the side of the juvenile.

The United States Supreme Court's holding in *Parham v. J.R.*[221]—which considered the procedures used by the state of Georgia to voluntarily commit children to mental hospitals—is a useful example illustrating how to apply the *Mathews* balancing test, particularly in the context of juveniles.[222] There, the Court relied upon the *Mathews* balancing test to determine what level of constitutional due process a minor child, whose parents or guardians seek "state administered institutional mental health care for the child," is owed at the time of commitment or shortly thereafter.[223] In looking at the child's interest in not being committed, the *Parham* Court found that juveniles have two important "protectable interests."[224] The first is their liberty interest—remaining free from unnecessary physical restraints—and the second is not being wrongly characterized as mentally ill because of a hospital's faulty decision-making.[225]

Similarly, the erroneous mislabeling of a youth as an adult criminal rather than as a juvenile delinquent has significant consequences,[226] and it impacts the juvenile's liberty interest, since the "treatment and social consequences" of incarceration in an adult prison are different from those in a juvenile detention facility.[227] The effects of erroneous mislabeling are heightened by the fact that when juveniles enter into the adult criminal justice system, they lose many of the

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216 ROTUNDA & NOWAK, *supra* note 214, at 110. *See also Mathews*, 424 U.S. at 335.

217 *Mathews*, 424 U.S. at 335.

218 ROTUNDA & NOWAK, *supra* note 214, at 110. *See also Mathews*, 424 U.S. at 335.

219 ROTUNDA & NOWAK, *supra* note 214, at 110.

220 *Id. See also Mathews*, 424 U.S. at 335.

221 Parham v. J.R., 442 U.S. 584 (1979).

222 *Id. Parham* is a useful proxy because of its discussion of "issues at the heart of due process doctrine: truth seeking and fairness." Fondacaro et al., *supra* note 36, at 973. This is because the Court in *Parham* not only thoroughly explores all of the *Mathews v. Eldridge* prongs, and thus likely made the correct decision, but also does so in the context of reviewing a juvenile's liberty interest. *Id.*

223 *Parham*, 442 U.S. at 587.

224 *Id.* Children have an interest in being correctly characterized because of the social stigmas that often arise after it becomes public knowledge that the child was committed. *Id.*

225 *Id.*

226 Mlyniec, *supra* note 33, at 43 ("[D]eprivation of juvenile status is a substantial loss.").

227 *See* Patricia Puritz & Mary Ann Scali, *The Administrative Procedure Act in Juvenile Corrections*, A.B.A. JUVENILE JUS. CTR., http://www.ojjdp.gov/pubs/walls/sect-05.html (last visited Mar. 3, 2013).

benefits of being charged as a juvenile, such as being shielded from publicity, having their records sealed, and being eligible for termination of jurisdiction when the juvenile reaches majority.[228] Moreover, the Supreme Court found in *Kent v. United States*[229] that the decision of whether or not a child should be waived into criminal court is a decision "of such tremendous consequences [so it should not be made] without a hearing, without effectiveness of counsel, [and] without a statement of reasons."[230] If the decision of whether or not to waive a child is of such critical importance when a judge is making the decision, it follows that the juvenile's interest in the effects of the decision is of equally high importance when a prosecutor is the one making the decision. Thus, because of the risk of erroneous mislabeling and the tremendous consequences of such a decision, a juvenile's individual liberty interest is very high, regardless of the type of waiver used.

To further assess the individual's interest, the second prong of the *Mathews v. Eldridge* balancing test calls for an analysis of the extent to which the requested procedure may reduce the possibility of erroneous decision-making. Again, in *Parham*, the Court concluded that, "[t]he risk of error inherent in the . . . decision to have a child institutionalized . . . is sufficiently great that some kind of inquiry should be made by a '*neutral factfinder*' to determine whether the statutory requirements for admission are satisfied."[231] Similarly, when deciding whether a juvenile should be waived into adult criminal court, the risk of error—that a juvenile will be tried as an adult even though he or she can still benefit from treatment in the juvenile system—"is sufficiently great," such that the waiver decision should be made by a neutral factfinder.[232]

It is difficult, even for psychologists, to accurately determine whether children are immature but redeemable, or permanently corrupted.[233] This determination is particularly hard because juveniles, more so than adults, have a greater capacity to change.[234] The potential of incorrectly charging a juvenile is heightened by the fact that once charged and sentenced as adults, juveniles are in danger of being harmed physically and emotionally.[235] Thus, because of the difficulties of accurately deciding whether a child is immature or forever corrupted,

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228 Mlyniec, *supra* note 33, at 43.

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

230 Mlyniec, *supra* note 33, at 43.

231 Parham v. J.R., 442 U.S. 584, 606-07 (emphasis added).

232 Who should fill the role of the "neutral factfinder" was discussed above. *See supra* Part III.B.

233 Roper v. Simmons, 543 U.S. 551, 573, 574-75 (2005). ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing a juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation–that a juvenile offender merits the death penalty.").

234 Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("Juveniles are more capable of change than are adults.").

235 Dunn, *supra* note 106, at 44. Children who are waived into adult criminal court are more likely to be physically and sexually abused, and less likely to access therapy and treatments, than their counterparts who remain in juvenile court. *See supra* Part II.A.

and the capability that children have to grow emotionally, the risk of erroneously charging a juvenile as an adult is extremely high. Additionally, the current waiver regime—particularly prosecutorial and statutory waiver—heightens the chances that incorrect waiver decisions will occur since neither process requires an adversarial hearing to take the individual youth's background into account.[236] Furthermore, prosecutors' decision-making may be politically influenced.[237] As a result, the waiver decision must be made by a *neutral* factfinder who can "carefully probe the child's background" and make a waiver decision that is as accurate as possible.[238]

Parham also helps to illustrate application of the last *Mathews v. Eldridge* factor—the government's interest in avoiding the increased administrative and fiscal burdens that result from increased procedural requirements. In *Parham*, the Court concluded that the state had several significant interests that included limiting the use of its mental health facilities to individuals who actually need help, not dissuading mentally ill persons or their families from attaining psychiatric help, and beginning the diagnosis and treatment of patients shortly after they are admitted.[239] Moreover, the *Parham* Court found that the procedures the state of Georgia had in place at the time the suit was brought were "reasonable and consistent with constitutional guarantees"[240] because the procedures provided an independent, non-arbitrary review of the decision to hold the child.[241] As a result, after balancing the strong state interests against the other factors, the Supreme Court held that Georgia's procedures did not violate any constitutional due process guarantees, and as such, the additional protections would detract from the overall objectives of Georgia's health care program.[242]

In the juvenile waiver framework, the government has a strong interest in protecting society from criminals.[243] Additionally, the creation of a meaningful waiver process will increase the government's burden since time and money are required to develop and implement such a system. However, the government's interest in protecting its citizens is weakened by the fact that prosecutors also have a responsibility to protect children who are still amenable to treatment from the adult criminal system.[244] This diverges from *Parham*, where the government's

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236 Geraghty & Rhee, *supra* note 30, at 607.

237 *See* Mason & Smyth, *supra* note 161, at 31.

238 Parham v. J.R., 442 U.S. 584, 606-607 (1979).

239 *Id.* at 604-06.

240 *Id.* at 621.

241 *Id.* at 613. The Court was "satisfied that an independent medical decisionmaking process . . . will protect children who should not be admitted." *Id.* The Court went on to state that "Georgia's procedures are not 'arbitrary' in the sense that a single physician has the 'unbridled discretion' the District Court saw to commit a child to a regional hospital." *Id.* at 615.

242 *Id.* at 621.

243 Arteaga, *supra* note 127, at 1063.

244 *Id.*

interest was not weakened.[245] Furthermore, there is no neutral decision-maker in the juvenile waiver system—unlike in *Parham*—that can make a meaningful and independent waiver decision: the determination is wholly in the hands of a prosecutor in a legislative waiver or direct file jurisdiction,[246] or in the hands of a judge in a judicial waiver jurisdiction.[247] Finally, the additional burdens placed on the government in the juvenile context will not detract from the government's objectives, as they did in *Parham*. By ensuring that the waiver process thoroughly explores each child and his or her background, the government will fulfill its duty to juveniles to ensure no child is erroneously waived into adult criminal court and achieve its goal of protecting the public from crime, since juveniles who remain in the juvenile system are less likely to re-offend.[248]

Balancing all three of the *Mathews v. Eldridge* factors in the juvenile waiver context, it appears that the interests of the juvenile outweigh those of the government. First, a youth's individual liberty interest is strong in the waiver context because of the risk of erroneous mislabeling and the attendant consequences.[249] Second, the chances of mislabeling a youth as an adult criminal are high, since it is difficult to classify juveniles and they have the capacity to change.[250] Therefore, the best way to secure the juvenile's interests is to ensure that the waiver decision is made by a fully informed, neutral factfinder, which will lessen the likelihood of an erroneous classification.[251] Lastly, the government's interest in the waiver context—protecting its citizens from criminals—is weakened because of its responsibility to also protect youths who are amenable to treatment from being waived out of juvenile court.[252] This is divergent from the Court's analysis in *Parham*, in which the governmental interest remained robust.[253] As a result, all three factors in the *Mathews v. Eldridge* due process balancing test come out in favor of the juvenile. Accordingly, meaningful reform of the juvenile waiver system is required.

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245 Parham v. J.R., 442 U.S. 584, 604-06 (1979).

246 Mlyniec, *supra* note 33, at 33 ("[T]he prosecutor controls the waiver decision either by directly picking the forum (prosecutor's choice) or indirectly through his decision to charge (legislative waiver)."). As discussed earlier, prosecutors must balance multiple interests when deciding whether or not to waive the youth out of juvenile court, so their decision may not be entirely disinterested. *See supra* Part II.B.

247 The difficulties judges have in equitably implementing waiver statues are discussed above. *See supra* Part I.C.

248 Campaign for Youth Justice, *supra* note 137.

249 Mlyniec, *supra* note 33, at 43.

250 *See* Roper v. Simmons, 543 U.S. 551, 573, 574-75 (2005).

251 *See* Scott, *supra* note 200, at 731-32 (discussing how an individualized determination creates an outcome that is in the youth's best interests).

252 Arteaga, *supra* note 127, at 1063.

253 Parham v. J.R., 442 U.S. 584, 604-06 (1979).

CONCLUSION

The procedure by which juveniles are waived into the adult criminal justice system is fraught with problems. The decision over whether or not a juvenile should be waived into criminal court is so arbitrary that it may come down to luck of the draw. Moreover, the people who make the charging decision—a prosecutor or a judge—do not always have the child's best interest at heart. This may be because of political aspirations or an inadequate understanding of how to accurately evaluate the juvenile. Either way, the consequences of a juvenile's waiver into adult criminal court are disastrous. If tried and convicted as adults, children are sentenced as adults, are often housed in facilities with adult prisoners, and lose the many protections that come with being charged as a juvenile.[254]

However, there is the potential for reform in the juvenile justice system. In light of the United States Supreme Court's decisions in *Roper v. Simmons*,[255] *Graham v. Florida*,[256] and *Miller v. Alabama*,[257] it is clear that juveniles are different from adults—they cannot be sentenced to death, nor can they receive a punishment of life in prison without parole. If the trend of viewing juveniles as different continues, it is possible a door may open that grants children a *right* to be charged as juveniles, thus allowing for real and meaningful reform of the juvenile waiver system.

For reform to have a real impact, it must increase the accuracy of the waiver system and ensure that juveniles who are not beyond the pale of rehabilitation remain in the juvenile justice system and receive treatment. Conducting a more individualized inquiry into the youth—by taking account of his or her capacity for rehabilitation, decreased culpability, and individual life circumstances—will enhance the accuracy of the waiver decision. A more meaningful inquiry can occur with the reformation of judicial waiver and the elimination of prosecutorial and statutory wavier. Additionally, per *Mathews v. Eldridge*, reform is constitutionally required to protect the due process rights of juveniles facing waiver into adult criminal court.[258]

Reform is not only constitutionally required, but it is also consistent with a trend that indicates society is open to the idea of moving away from retribution and toward rehabilitation of juveniles. Though it is challenging to break the stereotype that children are "super predators" and "packs of marauding hooligans who threaten anyone unfortunate enough to cross their paths,"[259] the rate of juvenile

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254 *See supra* Part II.A.

255 *Roper*, 543 U.S. 551.

256 Graham v. Florida, 130 S. Ct. 2011 (2010).

257 Miller v. Alabama, 132 S. Ct. 2455 (2012).

258 Mathews v. Eldridge, 424 U.S. 319 (1976).

259 John H. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2005).

arrests has declined by thirty-six percent as of 2009, after peaking in 1996.[260] Additionally, it appears that the trend of inflicting retributory measures on juveniles instead of promoting rehabilitation may be beginning to wane, especially in light of *Roper*,[261] *Graham*,[262] and *Miller*.[263] Therefore, it seems reform of the juvenile justice system may be on the horizon.

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[260] Puritz & Scali, *supra* note 227.

[261] Roper v. Simmons, 543 U.S. 551 (2005).

[262] Graham v. Florida, 130 S. Ct. 2011 (2010).

[263] Miller v. Alabama, 132 S. Ct. 2455 (2012).