A CRIMINAL'S JUSTICE OR A CHILD'S INJUSTICE? TRENDS IN THE WAIVER OF JUVENILE COURT JURISDICTION AND THE FLAWS IN THE ARIZONA RESPONSE

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I. INTRODUCTION

Juvenile Crime Clock

A juvenile is arrested for:

Murder every 3 hours, 30 minutes;

Rape every 2 hours;

Robbery every 12 minutes; and

Aggravated assault every 8 minutes.[1]

Headline News

In New York, two fifteen-year-old private school students stand accused of savagely slashing to death a forty-four-year-old real estate agent and dumping his body in the lake at midnight in Central Park.[2] In New Jersey, a fifteen-year-old awaits trial for the murder, sexual assault, and robbery of an eleven-year-old who had been going door to door collecting for his school's PTA fundraiser.[3] In Mississippi, a sixteen-year-old slit the throat of his own mother before going to Pearl High School to hunt down the girl who had just broken up with him—killing her, killing another girl, and wounding seven of his high school classmates.[4] In Arizona, three teenagers (out of a believed ten), ages thirteen, fourteen, and sixteen, face prosecution for the eighteen-hour abduction and gang rape of a

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1. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES—1995: UNIFORM CRIME REPORTS FOR THE UNITED STATES (1995).

2. Mona Charen, *We're Turning Children Into Thrill Killers*, FRESNO BEE, June 10, 1997, at B5.

3. John Curran, *Fund-Raiser Killed for Cash Teen Held in Slaying of Boy Selling Candy for School*, ARIZ. REPUBLIC, Oct. 2, 1997, at A12.

4. Gina Holland, *Miss. Teen Stabs Mother; Kills 2 More at School, Police Say*, BOSTON GLOBE, Oct. 2, 1997, at A3.

fourteen-year-old.[5] In California, three Satan-worshipping high school students, ages fifteen, sixteen, and seventeen, stand charged with drugging, raping, torturing, and murdering a fifteen-year-old, reportedly in hopes that a virgin sacrifice would earn them "a ticket to hell."[6]

What do all of these cases have in common? From coast to coast, juveniles were the alleged perpetrators in each of these violent crimes. Nationally, state policymakers, responding to public outrage and fears about increasing juvenile crime,[7] are advocating "get tough" policies[8] in an apparent attempt to incapacitate specific juvenile criminals and to deter violent juvenile crime. The most popular form of legislation is designed to "waive"[9] juveniles[10] charged with

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5 Richard Casey & Susie Steckner, *3 Teens Arrested in Abduction, Rape Victim, Family Move Away After Threats*, ARIZ. REPUBLIC, Feb. 22, 1997, at A1.

6. *Teenage Girl 'Ticket to Hell' for Suspects*, ARIZ. REPUBLIC/PHOENIX GAZETTE, May 3, 1996, at A4.

7. Commentators debate whether crime rates have actually increased or whether the police are simply making more arrests. *Compare* Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 636 (1994) (asserting that "by almost any measure, juvenile crime has been on the increase during the past decade"), *with* Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 508 (1995) (positing that "research does not support the notion that juveniles are committing more violent crimes today nor that they commit a larger proportion of crime [than adults]").

It may be that widely reported arrest statistics due, in some part, to the increase in the juvenile population may fuel the conception of increased youth violence. *Id.* at 508 n.3. *See* LAURA K. YAX, U.S. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, UNITED STATES POPULATION ESTIMATES BY AGE GROUP AND SEX, 1990 TO 1998 (1998) (reporting an increase in the overall juvenile population from July 1, 1990 (approx. 17,500,000) to July 1, 1998 (approx. 19,300,000)). *See also infra* note 92 (discussing the dramatic increase in the overall juvenile arrest rate). FBI arrest statistics "represent the number of juveniles arrested for violent crime—not the number of violent crimes committed by young people." Guttman, *supra*, at 508 n.3 (citing MICHAEL A. JONES & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY 8–20 (1994)).

8. For example, as a result of perceived rising juvenile crime and a distrust of the progress toward rehabilitation efforts, 47 states since 1992 have adopted laws lowering the age in which juveniles may stand trial as adults. *Should 14-Year-Olds Be Tried As Adults?*, DALLAS MORNING NEWS, Sept. 18, 1997, at 11A (referencing the National Center for Juvenile Justice). *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 478 (1987) (analyzing statutes in each of the states and the trends toward tougher laws).

9. This Note defines "waiver" as the act of relinquishing juvenile court jurisdiction over a youthful offender's case to criminal court. Depending on the jurisdiction, this procedure is also commonly referred to as "remand," "transfer," "removal," "referral," "bindover," and "certification." This Note will refer to "waiver" and "transfer" interchangeably.

10. "Juvenile" refers to "[a] young person who has not yet attained the age at which he or she should be treated as an adult for purposes of criminal law." BLACK'S LAW DICTIONARY 867 (6th ed. 1990). This age is 18 in a majority of jurisdictions, but may range from 16 to 19 years of age. Note that under the federal Juvenile Delinquency Act, a

serious crimes[11] to criminal court.[12] Generally, waiver is achieved through three methods: judicial waiver, legislative waiver, and prosecutorial waiver.

Until December 6, 1996, Arizona waived its juveniles to adult court solely by judicial waiver. In November of 1996, in its response to the perceived juvenile crime epidemic, Arizona jumped on the tails of a national movement by voting to adopt a legislative waiver statute in the form of Proposition 102, "The Juvenile Justice Initiative." Proposition 102 automatically places children aged fifteen and above in the adult criminal system if they are charged with an offense that falls within any of the four enumerated categories of felonies.[13]

In resorting to Proposition 102, Arizona, like many other states providing for legislative waiver statutes, has adopted a measure that is inherently flawed. This Note explores these flaws and recommends the need for an alternative that encompasses discretionary power and individualized assessment. Section II of this Note focuses on the history and purpose of the juvenile justice system. Section III discusses the shift of juvenile justice from being primarily one of rehabilitation to one of retribution. In addition, Section IV considers Arizona's treatment of juvenile offenders both in the past and under Proposition 102. Finally, Sections V and VI of this Note examine the inherent flaws in Proposition 102 and suggest that revisiting a state of pure judicial waiver is preferable in light of these flaws.

II. THE JUVENILE COURT MOVEMENT

The American juvenile court movement began in 1899 and swept the country in the span of only a few years. It was an institution whose time had finally come. Yet, the various elements and philosophy of the juvenile justice system sometimes collided due to tensions mounting from conflicting views on what juvenile justice actually entailed. Present day juvenile justice has resolved much of this conflict in favor of two important notions now imbedded in the juvenile court system. First, the underpinnings of the juvenile justice system are found in the state's exercise of the *parens patriae* doctrine. Second, the due process procedures that are essential to fairness ought not be discarded because of the rehabilitative aims and beneficent[14] purposes of the juvenile court.

"juvenile" is a person who has not attained his or her 18th birthday. 18 U.S.C. § 5031 (1985).

11. The question of whether or not to waive jurisdiction most often arises for juvenile offenders who have committed "serious crimes." Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93, 94 (1990). Some examples of "serious crimes" include murder, rape, and armed assault. Richard Lacayo, *When Kids Go Bad. (Juvenile-Justice System)*, TIME, Sept. 19, 1994, at 60.

12. For example, the number of juveniles who were tried as adults between 1985 and 1994 grew by 71%, with more than 12,000 juvenile cases being waived to criminal courts nationwide. *Should 14-Year-Olds Be Tried As Adults?*, *supra* note 8, at 11A (referring to figures from the National Center for Juvenile Justice). Moreover, for every 1000 formal delinquency cases nationwide, 14 are waived to criminal court. *Id.*

13. *See* ARIZ. CONST. art. IV, pt. 2, § 22(1) (effective Dec. 6, 1996). *See also infra* Section IV.C. and accompanying notes (discussing Arizona's legislative statute).

14. Despite the widespread skepticism that "nothing works" concerning the use

A. Changing Perspectives: State as a Wise Parent

It was not until the close of the nineteenth century that individualized juvenile justice was recognized.[15] At common law, before 1899, there was no separate juvenile court.[16] All juvenile criminal offenders were processed, tried, convicted, and sentenced in a similar manner as their adult counterparts.[17] "Those convicted were often jailed with adults or, beginning in the early 1800s, [even] institutionalized."[18] These early residential placements were hailed as philanthropic innovations designed to provide care for the delinquent child.[19] However, many were, "in reality, juvenile prisons, with prison bars, prison cells, prison garb, prison labor, prison punishments and prison discipline."[20] The guiding justification for incarceration was the best interest of the community, perhaps since the concept of "rehabilitation of the juvenile" had yet to emerge.[21]

Toward the turn of the twentieth century, however, institutionalized attempts at juvenile justice reform directed at "saving" and rehabilitating delinquent children did emerge.[22] In an aura of social reform striving to achieve

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and success of prevention and treatment programs for juveniles in the juvenile justice system, concrete findings indicate that "treatment programs for juveniles do work—and were working all the while." IMOGENE M. MONTGOMERY ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., WHAT WORKS: PROMISING INTERVENTIONS IN JUVENILE JUSTICE: PROGRAM REPORT (1994) (visited Mar. 20, 1999) <http://www.ncjrs.org/txtfiles/wworks.txt>. Thus, through the enactment and use of appropriate and effective programs designed at treatming juveniles, juveniles can be, and many already have been, rehabilitated. *Id.* (citing to a compendium of successful programs that should prove to be valuable tools for juvenile justice rehabilitation).

Moreover, there is evidence to suggest that while juvenile facilities are not the perfectly structured, therapeutic communities that some would like to envision, they are less violent and destructive than adult prisons. Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 361 (1991). For instance, juvenile offenders in juvenile facilities are not only more likely to be provided with opportunities for program participation, but they are also less likely to be subjected to more personal victimization and violence. *Id.*

15. *See* Sanford J. Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (providing a comprehensive history of juvenile justice in the United States); Feld, *supra* note 8, at 473–83 (discussing briefly the historical treatment of juveniles in the United States).

16. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

17. *Id.* (citing A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 LAW. Q. REV. 364 (1937)).

18. THOMAS A. JACOBS, ARIZONA JUVENILE LAW AND PRACTICE 1 (1996).

19. *Id.*

20. Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 391–92 (1991) (quoting HASTINGS HART, PREVENTIVE TREATMENT OF NEGLECTED CHILDREN 11 (1910)).

21. JACOBS, *supra* note 18, at 1.

22. ANTHONY M. PLATT, THE CHILD SAVERS 3–4, 98–99 (1969) (discussing how the "child savers" were dedicated to rescuing those who were less fortunately placed in the social order).

more humane treatment of juveniles, reformers saw the need for a nonpunitive *parens patriae*[23] alternative to the criminal justice system,[24] whereby the courts would be authorized "to use wide discretion in resolving the problems of 'its least fortunate junior citizens.'"[25] The conception of this alternative was first brought to life in 1899 with the passage of Illinois' Juvenile Court Act, establishing the first statewide court system especially for children.[26] This triggered a movement so extensive that by the late 1920s all but two states, Maine and Wyoming, had enacted their own juvenile justice alternatives to the traditional criminal law.[27] Shortly after the end of World War II, every state and federal jurisdiction had established a juvenile court system.[28]

In philosophy, these juvenile courts were created as benevolent vehicles by which the state could strive to understand the total child and respond to him or her individually "as a wise and merciful father handles his own child whose errors are not discovered by the authorities."[29] As such, the nature of the juvenile proceedings was "benign, nonpunitive and therapeutic," and rehabilitation was its fundamental goal.[30] In the words of an early commentator, "[A] child that broke the law was to be dealt with by the state not as a criminal but as a child needing care, education, and protection."[31] To achieve its rehabilitative goals, the state utilized a clinical approach, whereby it would investigate, diagnose, and "formulate the plan by which, through the cooperation, oft-times of many agencies, the cure may be effected."[32] In formulating its plan, however, the

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23. This doctrine, literally meaning, "parent of the country," refers to the traditional role of the state as sovereign and guardian of persons under a legal disability, including individuals such as juveniles. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). In the late 1800s, it was this power that became the primary justification for the establishment of juvenile courts. JACOBS, *supra* note 18, at 1 (stating that "the doctrine of *parens patriae* set the stage for the juvenile court system of America") (emphasis added). *See generally* THEODORE J. STEIN, CHILD WELFARE AND THE LAW 26–28 (1991) (discussing historical roots of *parens patriae* doctrine).

24. JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS 54–55 (1998).

25. PLATT, *supra* note 22, at 137 (quoting Gustav L. Schramm, *The Juvenile Court Idea*, 21 FEDERAL PROBATION 13 (1949)).

26. WATKINS, *supra* note 24, at 43.

27. *Id.* at 45.

28. *Id.*

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

30. *Id.* (noting that rehabilitation means to reform not punish, to uplift not degrade, to develop not crush, and to make a worthy citizen not a criminal).

31. JACOBS, *supra* note 18, at 2 (citing HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 18 (1927)).

32. Mack, *supra* note 29, at 119. The juvenile court movement envisioned an expert judge who was assisted by social service personnel, clinicians, and probation officers in setting a particular juvenile on a productive course toward adulthood. *Id.* Which course ultimately was taken, however, depended on the discretion of the judge and the cooperation of the juvenile. *Compare* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 219 (1980) (stating that "institutionalization was a fully legitimate response, an integral part of a rehabilitative program"), *with* Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999 (1991) (contending that "[a]cts of physical and

juvenile court's focus was not on the specific offense committed.[33] Instead, the court was concerned with searching deep within the juvenile delinquent's soul and discovering what the juvenile *was*, "physically, mentally, [and] morally."[34]

To try to obtain such a level of intimacy, juvenile courts adopted deliberately informal procedures and frowned upon the jurisprudence and encumbrances of the criminal law.[35] The new order was symbolized not only by relaxed criminal proceedings that were designed to eliminate any suggestion of criminal procedure, but also by a euphemistic vocabulary and a physically separate and self-contained juvenile court building that was introduced to avoid the stigma of adult prosecution or a criminal conviction.[36] In fact, the judge often sat at a desk, rather than on a bench, with the child next to him or her, believing that physical intimacy would foster insightful and sympathetic treatment.[37] Moreover, in the absence of an adversarial framework, there was no need for juries and lawyers—the common goal of everyone involved was not to contest, object, or even seek the truth of the charges against the juvenile, but simply to determine how best to treat the juvenile and his or her family, regardless of guilt or the delicts that brought the juvenile before the court.[38] Dispositions, therefore, were indeterminate, non-proportional, and individualized.[39]

From its inception, the juvenile court was characterized as having "an extremely wide frame of relevance and an absence of controlling rules or norms...."[40] Nevertheless, the paternalistic system that was structured appeared to offer something to everyone, since it was simultaneously "benevolent and tough-minded, helpful and rigorous, protective of the child, and altogether mindful of the safety of the community."[41]

B. Park Avenue Meets Connecticut: The Due Process Revolution

In exchange for this benevolence, which came under the guise of *parens patriae*, juveniles were consistently deprived of the criminal due process protections.[42] The underpinning rationale for this deprivation was that "[s]uch

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sexual violence and exploitation by prison staff and members, contributing to an already existing sense of fear and isolation, can hardly be considered an environment in which *parens patriae* principles can be properly implemented") (citing CHARLES H. SHIREMAN & FREDERIC G. REAMER, REHABILITATING JUVENILE JUSTCE 100 (1986)).

33. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 4 (1981). *See also* SOL RUBIN, JUVENILE OFFENDERS AND THE JUVENILE JUSTICE SYSTEM 2 (1986) (stating that specific conduct is "relevant more as symptomatic of a need for the court to bring its helping powers to bear than as a prerequisite to exercise of jurisdiction").

34. Mack, *supra* note 29, at 107.

35. ROTHMAN, *supra* note 32, at 216.

36. *Id.* at 216–17.

37. Mack, *supra* note 29, at 120.

38. RUBIN, *supra* note 33, at 2.

39. Feld, *supra* note 8, at 477.

40. *Id.*

41. ROTHMAN, *supra* note 32, at 224.

42. GRISSO, *supra* note 33, at 4.

matters, more typical of adversarial systems, would only hinder the court in its benevolent relationship to the child and hinder the child in accepting the treatment to be provided," thus, rendering procedural safeguards unnecessary and counterproductive.[43] It was this tradeoff—the foregoing of due process in juvenile courts in return for benevolent treatment—that impassioned lawyers on the behalf of children—a powerless minority—took issue with, as is illustrated in the context of *Kent v. United States*[44] and *In re Gault*.[45]

1. Kent v. United States

In the late 1960s, with the instruction of the United States Supreme Court, the juvenile court evolved into a system that emphasized due process procedures as well as rehabilitation. In *Kent v. United States*,[46] the Supreme Court, in deciding its first juvenile court case, accorded procedural protection to juveniles in judicial waiver hearings.[47] The case involved Morris Kent, a sixteen-year-old boy on juvenile court probation who was apprehended by District of Columbia law enforcement on suspicion of housebreaking, robbery, and forcible rape.[48] Kent, due to his minor status, was subject to the exclusive jurisdiction of the juvenile court, which under the statute could, under "full investigation,"[49] be waived to criminal court.[50]

Kent's attorney not only made his interest in a waiver hearing apparent,[51] but he also moved for Kent to remain under the jurisdiction of the juvenile court in order to receive needed psychiatric care[52] and requested access to a social report prepared by probation authorities describing Kent's rapidly deteriorating mental condition.[53] Absent a hearing and without specific findings of fact, the juvenile court judge personally estimated that Kent was not amenable to treatment under the facilities available in juvenile court.[54] In effect, he waived jurisdiction over Kent to criminal court.[55]

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43. *Id.*
44. 383 U.S. 541 (1966).
45. 387 U.S. 1 (1967).
46. 383 U.S. 541 (1966).
47. MONRAD G. PAULSEN & CHARLES H. WHITEBREAD, JUVENILE LAW AND PROCEDURE 13 (1974).
48. *Kent*, 383 U.S. at 541.
49. The District of Columbia statute stated no precise criteria or procedures for juvenile waiver but simply called for a "full investigation." *Id.* at 547–48 (citing D.C. CODE ANN. § 11-914 (1961); now § 11-1553 (Supp. IV, 1965)).
50. *Id.*
51. *Id.* at 544.
52. *Id.* at 545. This is not to suggest that juvenile offenders always receive such needed treatment. *See generally* NATIONAL COALITION FOR THE MENTALLY ILL IN THE CRIMINAL JUSTICE SYSTEM, RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM (Joseph J. Cocozza ed., 1992) (compilation of articles examining the ability of the juvenile justice system to deal with troubled youth).
53. *Kent*, 383 U.S. at 546.
54. *Id.*
55. *Id.*

Kent was thereafter transferred for criminal trial, where he was eventually convicted of six counts of housebreaking and robbery, sentenced to thirty to ninety years in prison,[56] and acquitted by reason of insanity of several counts of rape.[57] Kent appealed all the way to the Supreme Court, arguing that the waiver proceeding was improper because the judge had not made a "full investigation" before waiving him to criminal court.[58]

The Supreme Court, after considering "disturbing" questions concerning procedures, or lack thereof,[59] agreed with Kent, vacated the conviction, and dismissed the indictment.[60] The Court found that the order waiving juvenile jurisdiction to criminal court was invalid under "basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'"[61] While the Court conceded that the judicial waiver statute gave a juvenile judge "a substantial degree of discretion" in determining whether to waive jurisdiction or not, it did not "confer upon the Juvenile Court a license for arbitrary procedure."[62] Nor did it permit the judge "to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections" of juvenile court.[63] The Court also noted that "[t]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[64]

The Supreme Court concluded by specifically finding that, although the hearing need not conform to "all of the requirements of a criminal trial or even of the usual administrative hearing," [65] the juvenile court judge erred in failing to hold a hearing with access to the relevant social report before judicially waiving the juvenile to criminal court, to make findings to support such a waiver, and to give a statement of the court's reasons for its decision.[66] Finally, the Court expressed skepticism about the underpinnings of the juvenile justice system and found that a state's exercise of the *parens patriae* doctrine was "not an invitation to procedural arbitrariness."[67] In fact, as the Court continued, "there may be grounds for concern

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56. *Id.* at 550.
57. *Id.*
58. *Id.* at 552.
59. *Id.* at 542–43.
60. *Id.* at 564.
61. *Id.* at 553.
62. *Id.*
63. *Id.* at 553.
64. *Id.* at 554.
65. *Id.* at 562.
66. *Id.* at 561–63. The Court attached as an appendix to its opinion a "policy memorandum" that delineated eight "determinative factors" the judge's waiver decision must consider. These factors include: the seriousness and violence of the offense; whether the offense was committed against persons or property; whether probable cause exists; the desirability of disposing of the offense in one court if adults were also charged; the juvenile's personal circumstances, including his or her sophistication and maturity; the juvenile's prior record and previous history; public safety; and the juvenile's likelihood of rehabilitation. *Id.* at 565–67.
67. *Id.* at 555.

that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[68]

Because the *Kent* Court did not base its decision on constitutional grounds but rather on its interpretation of the federal statute "read in the context of constitutional principles relating to due process,"[69] *Kent's* bearing on state juvenile justice systems was somewhat uncertain. Whatever the uncertainties, however, the Supreme Court quickly took steps to clarify matters the following year in 1967.

2. In re Gault

With its landmark decision in *In re Gault*,[70] the Court marked its first major effort to relate constitutional principles to the juvenile justice system. In *Gault*, Gerald Francis Gault, fifteen years of age and on probation, was summoned before a juvenile court in Arizona for allegedly making an obscene phone call to his neighbor.[71] Neither Gault nor his mother was informed of the right to counsel, the privilege against self-incrimination, or the right to confrontation.[72] Nonetheless, Gault was adjudicated a delinquent and committed to the State Industrial School "'for the period of his minority (that is, until 21), unless sooner discharged by due process of law.'"[73]

The United States Supreme Court disagreed with the procedures entertained by the juvenile court and reversed the judgment, stating, "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"[74] Accordingly, the Court found that the observance of due process standards and the "substantive benefits of the juvenile process" are not mutually conflicting.[75] Rather, they are "commendable principles relating to the processing and treatment of juveniles separately from adults [and] are in no way...affected by the procedural" protections the Court imposed.[76] Notwithstanding, the Court found that the traditional absence of procedural protections in juvenile court had resulted in a systematic arbitrariness, "inaccurate findings of fact and unfortunate prescriptions of remedy."[77] In fact, the Court noted studies that suggest that "the appearance as

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68. *Id.* at 556.
69. *Id.* at 557.
70. 387 U.S. 1 (1967).
71. *Id.* at 4.
72. *Id.* at 4–8.
73. *Id.* at 7–8 (quoting Juvenile Judge McGhee).
74. *Id.* at 27–28 (1967). The *Gault* Court noted that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28. In so stating, the Court reaffirmed its due process position as set forth in the *Kent* case. *Id.* at 30–31.
75. *Id.* at 21.
76. *Id.* at 22.
77. *Id.* at 19–20. The *Gault* Court emphasized the need for procedural fairness in juvenile proceedings, specifically articulating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. The Court stated such while questioning the traditional appeal to *parens patriae* as a justification for the denial of procedural protection to juveniles. *Id.* at 19–20.

well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may [conversely promote the rehabilitation of the juvenile]." [78]

In accordance, the Court held that in all cases where juveniles risk the loss of their liberty due to incarceration, due process mandates that juveniles are constitutionally entitled to the following elementary procedural safeguards in their adjudication proceeding: adequate, timely, written notice of the allegations;[79] assistance of counsel;[80] an opportunity to confront and cross-examine witnesses under oath;[81] and a privilege against self-incrimination.[82]

3. Aftermath of Kent *and* Gault

After *Kent* and *Gault*, the Supreme Court continued to monitor juvenile protections. In *In re Winship*,[83] the Court concluded that because of the risks of erroneous convictions, juveniles were entitled to a standard of proof beyond a reasonable doubt rather than a lower civil standard of proof.[84] In *Breed* v. *Jones*,[85] the Court determined that an adjudication in both a delinquency proceeding and a criminal trial involving the same offense violated the ban on double jeopardy.[86] Only in *McKeiver* v. *Pennsylvania*,[87] however, did the plurality of the Court attempt to halt the extension of full procedural parity with adult criminal protections by concluding that a juvenile was not constitutionally entitled to the right of a jury trial.[88]

McKeiver excepted, *Kent*, *Gault*, *Winship*, and *Breed* take a skeptical look at *parens patriae* as a basis for not affording procedural safeguards to protect against a state's deprivation of a child's liberty. While these cases illustrate the

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78. *Id.* at 26. For example, in one study, the sociologists Wheeler and Cottrell observed that when the procedural laxness of the *parens patriae* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he or she has been manipulated, deceived, or enticed. *Id.* Accordingly, the two sociologists concluded that "'[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'" *Id.* (citing Mack, *supra* note 29, at 120).

79. *Id.* at 33.

80. *Id.* at 36–37.

81. *Id.* at 57.

82. *Id.* at 55.

83. 397 U.S. 358 (1970).

84. *Id.* at 363, 368.

85. 421 U.S. 519 (1975).

86. *Id.* at 541.

87. 403 U.S. 528 (1971).

88. *Id.* at 551. The Court's plurality opinion rests, in part, upon the concern that, if jury trials were required in juvenile adjudicatory proceedings, the proceedings would become indistinguishable from criminal trials and "there [would be] little need for [their] separate existence." *Id.* at 551. This, the Court felt, could result in an "effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545. Thus, since the juvenile justice system still holds "promise," imposing a jury trial would impede on the state's ability "to experiment further and to seek in new and different ways the elusive answers to the problems of the young...." *Id.* at 547.

dialectic found in the juvenile justice system, they demonstrate that "[t]he debate[89] is now...finished. The court of juvenile jurisdiction is a court of law upon which social and rehabilitative services have been grafted; it is [no longer] a social agency that utilizes legal authority."[90]

III. THE MOVE FROM REHABILITATION TO RETRIBUTION

While juvenile courts are still generally conceptualized in terms of the rehabilitative model, many policymakers are reevaluating the mission of juvenile justice and have begun to embrace explicitly punitive sanctions for juvenile offenders.[91] This shift in theoretical principle can be accounted for by the increasingly violent and destructive behavior associated with juvenile delinquency over the last several decades[92] and to public perception that this increase is somehow related to the failure of the juvenile court system.[93]

In response to public outrage and outcry demanding stiffer and more expedited measures,[94] many legislatures have adopted stricter laws to combat

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89. The debate consists of how and if the doctrine of *parens patriae* should coexist with the legal arena of the juvenile justice system and, specifically, affording juveniles due process rights.

90. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., REPORT OF THE TASK FORCE ON JUVENILE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 275 (1976).

91. *See generally* Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 388–90; Stacy Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2434–36 (1996).

92. After more than a decade of relative stability, the juvenile violent crime arrest rate soared between 1988 and 1997. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES—1997: UNIFORM CRIME REPORTS FOR THE UNITED STATES tbl.32 (1998) [hereinafter UNIFORM CRIME REPORTS] (documenting that the overall juvenile arrest rate increased by 35% between 1988 and 1997). If trends continue as they have over the past 10 years, the number of juvenile arrests for violent crimes will double by the year 2010. T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 167 (1997) (citing HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 111 (1995)).

Although the number of arrests for violent crimes has increased, the data also reveals that juveniles are not responsible for most violent crimes. In 1997 juveniles accounted for just 17 percent of all violent crime arrests, which has remained largely consistent since 1988. UNIFORM CRIME REPORTS, *supra*. This means that slightly less than one-fifth of all persons entering the justice system on a violent crime charge were juveniles. Moreover, less than one-half of one percent of juveniles in the United States were arrested for a violent offense in 1997. That represents less than 1 in 200 juveniles, yet these juveniles are driving national juvenile justice policy concerns.

93. Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 907–09 (1995) (stating that the American public believes that the juvenile court system has failed and that its treatment model actually contributes to serious juvenile crime).

94. Seventy-three percent of the respondents in a USA Today/CNN/Gallup

juvenile crime and to severely punish young violent offenders.[95] The most popular legislative tool comes in the form of waiver mechanisms, specifically judicial waiver, legislative waiver, and prosecutorial waiver.[96] The process of waiver involves the withdrawal of young violent offenders from the juvenile justice system in favor of adult court prosecution.[97] The net result of these mechanisms has been to increase the potential for criminal justice prosecution and decrease the population eligible for juvenile court intervention.

A. Judicial Waiver

The most prevalent practice in virtually all jurisdictions across the United States is judicial waiver.[98] In many states the matter of determining whether the juvenile court should retain jurisdiction over any youthful offender or be waived to the criminal court to be prosecuted as an adult has been placed in the discretionary hands of the juvenile court judge.[99] Judicial waiver empowers the juvenile court judge to determine the proper jurisdiction for a specific juvenile offender.[100] In making this determination, the juvenile court judge engages in a case-by-case

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survey said juveniles who commit violent crimes should be punished the same as their adult counterparts. Sarah Glazer, *Juvenile Justice: Should Violent Youths Get Tougher Punishments?*, CQ RESEARCHER, Feb. 25, 1994, at 171.

95. *Id.* at 176.

96. Every state has adopted one, two, or all three statutory strategies to transfer chronic juvenile offenders to criminal courts. Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. J. 73, 75 (1995).

Two other types of mechanisms relate to transfer decisions. "Reverse waiver" mechanisms allow the criminal court judge to transfer "statutorily excluded" or "direct filed" cases from criminal court to juvenile court under certain circumstances. PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 3, 4 (1996); Paula R. Brummel, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids*, 16 LAW & INEQ. J. 541 (1998) (discussing the "reverse waiver" or "transfer back" provision in greater detail). "Once waived/always waived" mechanisms stipulate that once juvenile court jurisdiction is waived, all subsequent cases involving that particular juvenile will be under the jurisdiction of the criminal court. TORBET ET AL., *supra*, at 3, 4.

97. Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 (1978) (recognizing the transfer mechanism as the "gateway" between juvenile and adult courts).

98. In total, forty-eight states and the District of Columbia have judicial waiver statutes. *See, e.g.*, ALA. CODE § 12-15-34 (1997); COLO. REV. STAT. § 19-2-806 (Supp. 1996); HAW. REV. STAT. § 571-22(a)–(c) (1993); KAN. STAT. ANN. § 38-1636 (1993); MICH. COMP. LAWS ANN. § 712A.21 (West Supp. 1997); N.H. REV. STAT. ANN. § 169-B:24 (Supp. 1996); 42 PA. CONS. STAT. ANN. § 6355 (West 1982 & Supp. 1995); TEX. FAM. CODE ANN. § 54.02 (West 1996 & Supp. 1998); WASH. REV. CODE ANN. § 13.40.110 (West Supp. 1998). *See also* Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1263 nn.72–73 (1996) (providing a comprehensive listing of all judicial waiver statutes by state).

99. Cintron, *supra* note 98, at 1263.

100. *Id.*

clinical assessment of not only the youth's best interest, but also the best interest of the public,[101] which reflects the individualized sentencing discretion characteristic of juvenile courts. The waiver procedures employed by judges vary from state to state and are usually those formalized in *Kent*, including such statutory criteria as the likelihood of rehabilitation and the seriousness and violence of the offense committed.[102]

Proponents of judicial waiver emphasize its retention of the juvenile courts' traditional rehabilitative sentencing philosophy and assert that individualized, discretionary assessments provide an appropriate and effective balance of flexibility and severity.[103] Critics, however, argue that juvenile court judges lack the clinical tools with which to diagnose a particular juvenile offender's amenability to treatment or to predict his or her future dangerousness,[104] and that this broad, and, often times, standardless discretion yields abusive, disparate, and unequal results.[105]

B. Legislative and Prosecutorial Waiver

In contrast to judicial waiver, some legislatures have taken the matter of determining whether the juvenile court will retain jurisdiction of juvenile offenders out of the discretionary, rehabilitative hands of the juvenile court judge altogether and placed it in the often punitive and retributive hands of the prosecutor or legislature itself.

In this regard, the legislative waiver[106] statute enables the state to directly transfer juveniles charged with certain enumerated offenses to adult criminal court for prosecution as an adult by automatically excluding them from the jurisdiction of the juvenile court.[107] In adopting this type of waiver, states have moved further

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101. DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 68 (1991).

102. See *supra* note 66, for a listing of the "determinative factors" for the judge's waiver decision that were included in the *Kent* decision.

103. *See, e.g.*, Fagan, *supra* note 11, at 114–19 (arguing that waiver can effectively address violent juvenile offenders); Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 268 (1991) (noting that "discretionary waiver...is superior to alternative methods of handing juvenile justice's hardest 'hard cases'").

104. *See, e.g.*, Feld, *supra* note 97, at 529–56.

105. *See, e.g.*, Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990) (discussing studies showing the erratic application of waiver laws); Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. J. 1, 15 (1989) (proposing that standardless discretion results in inconsistent decisions and justice by geography).

106. Also known as "statutory exclusion," "automatic waiver," and "mandatory transfer." TORBET ET AL., *supra* note 96, at 3.

107. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 707 (1991). Currently, twenty-four states and the District of Columbia provide for this form of transfer. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-127(a) (West 1995 & Supp. 1997); GA. CODE ANN. §§ 15-11-5(b)(2)(A), 15-11-39.1 (1994) (youth 13 or older charged with murder, aggravated sexual assault, or armed robbery; and youth 15 or older charged

away from relying on individualized assessment criteria, like those established in *Kent*, to make transfer decisions. Instead, the legislative waiver approach reflects the retributive values of the criminal law in that it allows no room for judicial discretion over waiver decisions as well as excludes juvenile offenders from juvenile court jurisdiction by lowering the age threshold for adult criminal court jurisdiction and/or objectively specifying serious offenses over which the juvenile court has no jurisdiction.[108] The underlying presumption is "that the juvenile court cannot sufficiently penalize some dangerous juvenile offenders."[109] Accordingly, in creating the juvenile court system, legislatures have considerable liberty to establish its corresponding jurisdiction;[110] thus, they have chosen to make an assessment of the appropriate jurisdiction for these "dangerous juvenile offenders" themselves in the form of legislative waiver statutes.

Proponents of legislative waiver endorse "just deserts" and "an eye for an eye" retributive sentencing policies. They also contend that statutory exclusion brings greater consistency, predictability, uniformity, proportionality, accountability, and equality to the transfer process, and they advocate sanctions based on predominantly objective criteria, such as the offense committed and the age of the juvenile.[111] However, critics question the legislature's ability to exclude the discretionary component from the transfer determination without imposing excessive rigidity, or substantially "multiplying several times over" the number of youths improperly transferred to the jurisdiction of the criminal court.[112]

Consistent with the legislative waiver trend toward excluding certain juvenile offenders from juvenile court jurisdiction, prosecutorial waiver[113]

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with burglary with three prior burglary adjudications); IND. CODE ANN. § 31-30-1-4 (Michie 1995) (youth 16 or older charged with murder, sexual assault, kidnapping, armed robbery, car jacking, criminal gang activity, possession of firearm, drug dealing, or any misdemeanor or felony with a prior felony or misdemeanor conviction); MD. CODE ANN., CTS. & JUD. PROC. § 3-804 (e)(1)–(4) (1995 & Supp. 1997) (youth 14 or older charged with murder, manslaughter, kidnapping, rape, aggravated assault, or mayhem; and youth 16 or older charged with armed robbery or assault with intent to murder, rape, or rob); N.M. STAT. ANN. § 32A-2-3(H) (Michie 1997) (youth 15 or older charged with first degree murder); TENN. CODE ANN. § 37-1-134(c) (Supp. 1996) (youth any age charged with first or second degree murder, rape, aggravated or especially aggravated robbery, kidnapping, or the attempt to commit any of the listed offenses). See Cintron, *supra* note 98, at 1269 nn.98–99, for a comprehensive listing of all legislative waiver statutes by state.

108. Some offenses included in legislative transfer laws are murder, rape, kidnapping, robbery, burglary, and arson. *See* CHAMPION & MAYS, *supra* note 101, at 71 (listing the statutes that legislatively waive these offenses to criminal court jurisdiction).

109. Cintron, *supra* note 98, at 1269.

110. Podkopacz & Feld, *supra* note 96, at 76.

111. *See* Feld, *supra* note 97, at 516; Feld, *supra* note 8, at 487 (describing the emergence of the "just deserts" sentencing philosophy). *Cf.* Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 521 (1998) (stating that "[e]vidence from a number of states suggests that legislative waiver can be just as arbitrary as judicial waiver...").

112. Zimring, *supra* note 103, at 273–75.

113. Also termed "direct file" and "concurrent jurisdiction." TORBET ET AL., *supra* note 96, at 3.

promotes a punitive policy of trying juveniles in adult criminal court.[114] The prosecutorial waiver method allocates to the prosecutor the discretion to select the forum in which the juvenile offender will be adjudicated.[115] The prosecutor is granted this authority on the rationale that the juvenile courts and the criminal courts share concurrent jurisdiction over most offenses.[116] This approach "facilitates the transfer of juvenile offenders to adult criminal court by allowing the prosecutor to directly file adult criminal charges against the juvenile."[117] Viewed in this light, prosecutorial waivers are seemingly a natural extension of routine "executive" charging decisions.[118]

Proponents of prosecutorial waiver assert that prosecutors are more neutral, balanced, responsive, and objective gatekeepers than either "totally child-oriented" juvenile court judges or "get tough" legislators.[119] Critics, however, object that prosecutors are properly competent to make transfer decisions and contend that their largely hidden discretionary power is just as, if not more, subjective, dangerous, and idiosyncratic as that of judges', and further lacks the redeeming virtues of any standardized guidelines, judicial record, or appellate review.[120]

Defining the boundary between juvenile and adult court jurisdiction depends, to some extent, on the "point of view" one adopts.[121] If the criminal law's emphasis on retribution predominates, then the seriousness and violence of the offense committed, the juvenile offender's age, or the juvenile offender's criminal

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114. Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284 (1991).

115. CHAMPION & MAYS, *supra* note 101, at 72. Presently, ten states and the District of Columbia have prosecutorial waiver statutes. *See, e.g.*, ARK. CODE ANN. § 9-27-318(b) (Michie 1993 & Supp. 1995); COLO. REV. STAT. § 19-2-805(1) (Supp. 1996); D.C. CODE ANN. § 16-2301(3)(A) (1989 & Supp. 1996); FLA. STAT. ANN. § 39.052(3)(a)(4)(a), (3)(a)(5)(a)–(b)(I) (West Supp. 1997); GA. CODE ANN. § 15-11-5(b)(1) (1994); LA. CODE JUV. PROC. ANN. art. 3, § 305(B)(3) (West 1995); MICH. COMP. LAWS ANN. § 600.606 (West Supp. 1996); NEB. REV. STAT. § 43-247 (1993 & Supp. 1996); N.H. REV. STAT. ANN. § 169-B:25 (Supp. 1995); VT. STAT. ANN. tit. 33, § 5505(c) (1991); WYO. STAT. ANN. §§ 14-6-203, 14-6-237 (Michie 1994 & Supp. 1996).

116. CHAMPION & MAYS, *supra* note 101, at 72. With prosecutorial waiver, both juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses, typically serious, violent, or repeat crimes. *See, e.g.*, ARK. CODE ANN. § 9-27-318(b) (Michie 1993 & Supp. 1995) (any child 14 or older charged with capital, first, or second degree murder); WYO. STAT. ANN. §§ 14-6-203, 14-6-237 (Michie 1994 & Supp. 1996) (any child 14 or older charged with a violent felony). *See generally* Bishop & Frazier, *supra* note 114 (examining prosecutorial waiver statutes); DONNA M. HAMPARIAN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 6 (1982) (discussing concurrent jurisdiction provisions).

117. Cintron, *supra* note 98, at 1270.

118. *See generally* McCarthy, *supra* note 7 (arguing for prosecutorial waiver).

119. *See, e.g.*, *id.* at 664–65.

120. Bishop & Frazier, *supra* note 114, at 299–300.

121. Podkopacz & Feld, *supra* note 96, at 77.

history dictates the waiver decision.[122] In such cases, waiver decisions lend themselves freely to substantially mechanical and objective decisional standards.[123] Conversely, if the juvenile court's therapeutic emphasis on rehabilitation and treatment predominates, then individualized assessments of the juvenile offender's "amenability to treatment," "dangerousness," and other applicable *Kent* criteria control the waiver decision, and courts demand more indeterminate and discretionary standards.[124]

IV. ARIZONA'S JUVENILE JUSTICE

A. Early History

Well in advance of statehood in 1912, the Territory of Arizona recognized children as an unique class requiring individualized attention. As early as the 1860s, laws were implemented addressing issues of child custody and support[125] as well as education.[126] The Arizona Revised Statutes of 1901 covered such areas as "guardian and ward, marriage, adoption, enlistment, descent and distribution, and legal actions by minors."[127] It was not until 1907, however, that a Juvenile Court Act was legislated specifically with respect to dependent and delinquent children.[128] The Act, in accordance with the intentions stated in the Preamble to the Act,[129] impressed upon Arizona the need to protect its children from association and contact with crime and criminals, consequently, mandating that all hearings

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122 *Id.*

123. *Id.*

124. *Id.* (citing NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 13–20 (1974); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 54–55 (1968); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 11–26 (1976); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 149–59 (1985)).

125. JACOBS, *supra* note 18, at 18 (citing The Howell Code, 1865, Ch. 31, §§ 14–15).

126. *Id.* (citing Compiled Laws of the Territory of Arizona, 1871, Ch. 23).

127. *Id.*

128. *Id.*

129. Preamble, Session Laws of the Territory of Arizona, 1907, Ch. 78, § 1:

> WHEREAS, the welfare of the Territory demands that children should be guarded from association and contact with crime and criminals, and the ordinary process of the criminal law does not provide such treatment and care and moral encouragement as are essential to all children in the formative period of life but endangers the whole future of the child; and
>
> WHEREAS, experience has shown that children lacking proper parental care or guardianship are led into courses of life which may render them liable to the pains and penalties of the criminal law of the Territory, although in fact the real interests of such child or children, require that they be not incarcerated in the penitentiaries and jails as members of the criminal class but be subjected to wise care, treatment and control, that their evil tendencies may be checked and their better instincts may be strengthened.

regarding children "'shall be held separate and apart from' the court's 'general criminal business.'"[130] In 1910, at the Constitutional Convention, these laws along with the principle of exclusive juvenile jurisdiction were adopted.[131] Thus, as was apparent from Arizona's early history, the underlying theme throughout its legislative enactments had been the best interest of the child.

This theme was carried into early Arizona case law as well. In *Burrows v. Arizona*,[132] the Arizona Supreme Court asked, "What is the purpose of the juvenile statutes of Arizona?"[133] After a careful examination of the general principles relating to juvenile offenders, the court initially stated that "the juvenile law of Arizona...affects the *treatment* and not the *capacity* of the offender."[134] Therefore, as the Arizona Supreme Court went on to hold, "the purpose of the Arizona juvenile law is...to provide a special method of treatment for minors...who have violated the criminal law...."[135] Moreover, in *Arizona v. Shaw*,[136] after stating that the need for special treatment and care begins at the instant that the juvenile is contacted by a police officer, the court opined, "A few hours of the treatment sometimes accorded mature and hardened criminals can give the impressionable mind of a youth an indelibly warped view of society and its interest in him."[137] Similarly, in an appeal of an adjudicated dependency, the Arizona Court of Appeals, in reversing the trial court, maintained the traditional position that "[t]he welfare of the child is the prime consideration of a juvenile code."[138]

By exploring Arizona's early history, we discover that the legislature and the courts at all levels "espoused essentially the same theme in varied contexts and ways."[139] Arizona Supreme Court Justice Charles C. Bernstein stated in *In re Gault*:[140]

> On the other hand, juvenile courts do not exists [sic] to punish children for their transgressions against society. The juvenile court stands in the position of a protecting parent rather than a prosecutor. It is an effort to substitute protection and guidance for punishment,

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130. JACOBS, *supra* note 18, at 19 (citing Session Laws of the Territory of Arizona, 1907, Ch. 78, § 1).

131. *Id.*

132. 38 Ariz. 99, 297 P. 1029 (1931).

133. *Id.* at 110, 297 P. at 1033.

134. *Id.*, 297 P. at 1034 (emphasis in original).

135. *Id.* at 111, 297 P. at 1034.

136. 93 Ariz. 40, 378 P.2d 487 (1963).

137. *Id.* at 47, 378 P.2d at 491.

138. *In re* Matter of Pima County, Juvenile Action No. J-31853, 18 Ariz. App. 219, 501 P.2d 395 (1972).

139. JACOBS, *supra* note 18, at 20.

140. 99 Ariz. 181, 407 P.2d 760 (1965), *prob. juris. noted*, 384 U.S. 997 (1966), *rev'd*, 387 U.S. 1 (1967) (holding that parents, who knew the exact nature of the charge against their minor child from the day that he was taken to the detention home, who appeared at the hearing without objection, who knew that they could have retained counsel, called witnesses, and cross-examined the probation officer, and who were advised by the judge, when their son had been found delinquent on another charge, that if he came before the court again, he might be committed, were not denied due process of law in connection with the delinquency hearing pertaining to their son).

> to withdraw the child from criminal jurisdiction and use social sciences regarding the study of human behaviour which permit flexibilities within the procedures. The aim of the court is to provide individualized justice for children. Whatever the formulation, the purpose is to provide authoritative treatment for those who are no longer responding to the normal restraints the child should receive at the hands of his parents. The delinquent is the child of, rather than the enemy of society and their interests coincide.[141]

B. Juvenile Waiver in Arizona Before Proposition 102

Article VI, Section 15 of the Arizona Constitution is the bedrock of juvenile court jurisdiction and all of its consequences:

> The superior court shall have exclusive original jurisdiction in all proceedings and matters affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of eighteen years. The judges shall hold examinations in chambers for all such children concerning whom proceedings are brought, in advance of any criminal prosecution of such children, and may, in their discretion, suspend criminal prosecution of such children. The powers of the judges to control such children shall be as provided by law.[142]

The Arizona Supreme Court has ruled that the jurisdiction of the superior court to act as a juvenile court is found in this section of the constitution.[143] When a superior court exercises its jurisdiction over children[144] who are delinquent, dependent, or incorrigible, it acts as a "juvenile court."[145] In so acting, the juvenile court has exclusive original jurisdiction.[146]

The juvenile court has discretion, in the exercise of its exclusive original jurisdiction, to retain a juvenile for prosecution as a delinquent or transfer the juvenile to a criminal division of the superior court for prosecution as an adult.[147] Therefore, prior to prosecution as a adult, a person under eighteen years of age charged with an offense must first proceed through the juvenile court, as the "exercise of juvenile court jurisdiction is a 'jurisdictional' prerequisite to the criminal court jurisdiction."[148] Thereafter, the criteria as set forth in Juvenile Rules 12 to 14 must be followed.[149]

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141. *Id.* at 188, 407 P.2d at 765.

142. ARIZ. CONST. art. VI, § 15 (repealed and revised 1996).

143. *In re* Maricopa County, Juvenile Action No. J-68100 v. Haire, 107 Ariz. 309, 310, 486 P.2d 791, 792 (1971) (en banc).

144. For a definition of "child," see ARIZ. REV. STAT. § 8-201(6) (amended 1998).

145. *Id.* § 8-201(17).

146. ARIZ. CONST. art. VI, § 15 (repealed and revised 1996); ARIZ. REV. STAT. § 8-202 (1989) (Arizona's jurisdictional statute).

147. 17B ARIZ. REV. STAT. JUV. CT. R.P. 12–14 (1997).

148. Eyman v. Superior Court In and For Pinal County, 9 Ariz. App. 6, 12, 448 P.2d 878, 884 (1968); *See also* State v. Superior Court In and For Pima County, 7 Ariz. App. 170, 436 P.2d 948 (1968).

149. ARIZ. REV. STAT. § 8-202(A) (1989). The Arizona Supreme Court first implemented these court rules on April 15, 1970, and they are still in effect as amended.

Juvenile Rules 12 to 14 provide for a detailed and self-contained procedural system governing the waiver of a minor to adult court for criminal prosecution. The ultimate issue to be decided by the juvenile court judge is whether "the pending charge should be adjudicated at the juvenile court level or transferred to the criminal system applicable to adults."[150] "[A] juvenile has no right to avoid adult prosecution solely because he is less than 18 years of age. The important determinate is whether a juvenile is amenable to the special treatment opportunities of the juvenile system."[151]

Before the juvenile judge is called upon to make this determination, however, the county attorney must file a request or motion for waiver.[152] Once the motion for waiver is filed, the juvenile court will set a transfer hearing[153] to determine the issues referred to in Rule 14. At the hearing, there are two such determinations to be made: (1) whether there is probable cause to believe that the alleged offense was committed and the juvenile committed it;[154] and (2) whether the public safety or interest would be best served by the juvenile's transfer to adult court.[155] In making the latter determination, the judge is required to consider the following factors:[156]

17B ARIZ. REV. STAT. JUV. CT. R.P. 12–14.

150. JACOBS, *supra* note 18, at 76.

151. *In re* Maricopa County, Juvenile Action No. J-93117, 134 Ariz. 105, 109, 654 P.2d 39, 43 (Ariz. Ct. App. 1982). For an early statement of the philosophy of the juvenile court and waiver, see *Arizona v. Shaw*, 93 Ariz. 40, 46, 378 P.2d 487, 491 (1963). After amendments to the waiver rules went into effect in 1984, however, it was held that "community protection is now the guiding principle to be considered in transfer proceedings." Appeal in Juvenile Action No. J-96695, 146 Ariz. 238, 245, 705 P.2d 478, 485 (Ariz. Ct. App. 1985).

152. 17B ARIZ. REV. STAT. JUV. CT. R.P. 12 (a).

153. 17B ARIZ. REV. STAT. JUV. CT. R.P. 13 (a).

154. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (A), (B). Use of the phrase "probable cause" indicates that the first stage of the transfer hearing has some comparability to a preliminary hearing in an adult court, which requires that a determination be founded upon competent evidence to the same extent as in any other judicial proceeding. *In re* Anonymous, Juvenile Court No. 6358-4, 14 Ariz. App. 466, 470, 484 P.2d 235, 239 (1971); *See In re* Maricopa County, Juvenile Action No. J-72804, 18 Ariz. App. 560, 504 P.2d 501 (1972).

155. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (A), (C). A 1994 amendment to the waiver rules creates a presumption that the public safety or interest would be best served by the transfer of the child for criminal prosecution if the following is determined: (1) the child was at least 16 at the time of the offense; and either (2) the offense upon which probable cause has been found is first or second degree murder, aggravated assault involving a deadly weapon causing serious physical injury, sexual assault involving a deadly weapon or involving the intentional or knowing infliction of physical injury; or (3) the offense on which the court found probable cause constitutes a class 1 through 4 felony, and the child has been adjudicated delinquent on four prior occasions, with at least one being a § 13-604 serious offense. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (D). The presumptive transfer may be rebutted, however, upon a showing by a preponderance of the evidence that the public will be adequately protected if the child is retained under juvenile court jurisdiction and that rehabilitation is possible through services available within the juvenile justice system. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (E).

156. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (C). These factors are promulgated

(1) the seriousness of the alleged offense and whether it was committed in an aggressive, violent, premeditated or willful manner;

(2) whether the alleged offense was against person or against property;

(3) whether the child used a deadly weapon or dangerous instrument in the commission of the alleged offense;

(4) whether another person sustained serious physical injury as the result of the actions of the child;

(5) whether the child committed the alleged offense while participating in, assisting, promoting or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise;

(6) the sophistication and maturity of the child as determined by consideration of the child's age, intelligence, education, environment, emotional attitude and pattern of living;

(7) the child's physical, mental and emotional condition;

(8) the record and previous history of the child, including previous contacts with juvenile courts and law enforcement agencies in this and other jurisdictions, prior periods of probation in any court and their results, and any prior commitments to juvenile residential placements and secure institutions;

(9) whether the child has been previously committed to the Department of Youth Treatment and Rehabilitation for a felony offense and has committed another felony offense while a ward of that department;

(10) whether the child has previously been transferred for criminal prosecution in this or any other state;

(11) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of services and facilities currently available to juvenile court; and

(12) any other factors which appear to be relevant to the determination of the transfer issue.[157]

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after the *Kent* factors discussed earlier. *See supra* note 66 and accompanying text.

157. Most, if not all, of these twelve factors have been scrutinized by the Arizona courts. *See, e.g., In re* Maricopa County, Juvenile Action No. J-94518, 138 Ariz. 287, 290, 674 P.2d 841, 844 (1983) (en banc) (stating that court may consider the "social file" of the juvenile, which normally contains a history of any prior offenses, reports by the probation officer and psychologist, and any corrective action previously taken); *In re* Mario L., 948 P.2d 998, 1001 (Ariz. Ct. App. 1997) ("[T]he juvenile court must consider the particular juvenile's past record."); State *ex rel.* Romley v. Superior Court In and For Maricopa County, 172 Ariz. 109, 112, 834 P.2d 832, 835 (Ariz. Ct. App. 1992) (stating that although the juvenile court is required to consider "any other factors," future conduct is not one of the "other factors" referred to); *In re* Maricopa County, Juvenile Action No. J-96430, 142 Ariz. 515, 520, 690 P.2d 816, 821 (Ariz. Ct. App. 1984) ("[T]he seriousness of an offense may not in itself be dispositive of the case."); *In re* Maricopa County, Juvenile Action No. J-98065, 141 Ariz. 404, 406, 687 P.2d 412, 414 (Ariz. Ct. App. 1984) ("To say that offenses

At the conclusion of the transfer hearing, the juvenile court is required to make a detailed, written finding of fact to support its determination.[158] If the juvenile court grants the request for waiver and transfers the juvenile to adult court for criminal prosecution, the juvenile court proceeds as if the child were an adult.[159] Alternatively, if the request for transfer is denied, the case is reset on the juvenile court docket and proceeds accordingly.[160]

C. Arizona's Present Juvenile Waiver System

In 1996, with the passage of Proposition 102, entitled the "Juvenile Justice Initiative," Arizona voters augmented their already existing judicial waiver statute by amending the Arizona Constitution in two profound ways to provide for the mandatory prosecution of certain juvenile offenders as adults.[161]

First, Proposition 102 repealed former Article VI, Section 15 of the constitution and revised it to read: "The jurisdiction and authority of the courts of this state in all proceedings and matters affecting juveniles shall be as provided by the legislature or the people by initiative or referendum."[162] The repeal eliminated the language of former Section 15 that granted the juvenile court the discretion to transfer juveniles accused of certain felonies for criminal prosecution. Such transfer is now automatic for the enumerated offenses[163]—that is, the cases are filed directly in the superior court, and the juvenile court never acquires jurisdiction. Moreover, the transfer provision previously operated as a limited exception to the "exclusive" language of former Section 15. However, Proposition 102 left undisturbed the superior court's jurisdiction over "[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court," and over

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against persons are 'worse' than offenses against property is not to say that a minor found responsible for offenses against property does not pose a substantial threat to the safety of the community."); *In re* Maricopa County, Juvenile Action No. J-96215, 135 Ariz. 185, 187, 659 P.2d 1330, 1332 (Ariz. Ct. App. 1983) (noting that courts may also consider the length of time available for treatment through services and facilities within the juvenile justice system); *In re* Maricopa County, Juvenile Action No. J-93117, 134 Ariz. 105, 108, 654 P.2d 39, 42 (Ariz. Ct. App. 1982) ("In making this inquiry, the juvenile court can consider whether a juvenile would be best dealt with by a wider range of powers, longer term possibilities, and a greater choice of facilities available to the adult correction system.").

158. 17B ARIZ. REV. STAT. JUV. CT. R.P. 14 (G).

159. *Id.* § (H).

160. *Id.* § (J).

161. Proposition 102 was approved by voters at the November 5, 1996 general election as proclaimed by Governer Fife Symington on December 6, 1996. ARIZ. CONST. art. IV, pt. 2, § 22 (cited in the historical notes). On July 15, 1997 the Arizona Court of Appeals declared Proposition 102 to be a validly proclaimed law. Soto v. Superior Court In and For Maricopa County (State *ex rel.* Romley), 190 Ariz. 450, 949 P.2d 539 (Ariz. Ct. App. 1997) (challenging whether Proposition 102 properly became law even though the Governor was absent from the state when the voters were canvassed and did not proclaim the measure to be law until thirty-one days after the election).

162. ARIZ. CONST. art. VI, § 15 (effective as amended Dec. 6, 1996).

163. For a list of Arizona's waivable offenses, see *infra* note 166 and accompanying text.

"[c]riminal cases amounting to felony, and cases of misdemeanor not otherwise provided for by law."[164]

Second, Proposition 102 introduced a new Article IV, Part 2, Section 22, which specifically divests the juvenile court of jurisdiction over juveniles fifteen years of age or older who are accused of certain chronic and violent crimes.[165] Such juveniles are instead automatically transferred to superior court to be tried on those charges as adults. The amendment provides in relevant part:

> In order to preserve and protect the right of the people to justice and public safety, and to ensure fairness and accountability when juveniles engage in unlawful conduct, the legislature, or the people by initiative or referendum, shall have the authority to enact substantive and procedural laws regarding all proceedings and matters affecting such juveniles. The following rights, duties, and powers shall govern such proceedings and matters:
>
> (1) Juveniles 15 years of age or older accused of murder, forcible sexual assault, armed robbery or other violent felony offenses as defined by statute shall be prosecuted as adults. Juveniles 15 years of age or older who are chronic felony offenders as defined by statute shall be prosecuted as adults. Upon conviction all such juveniles shall be subject to the same laws as adults, except as specifically provided by statute and by article 22, § 16 of this constitution. All other juveniles accused of unlawful conduct shall be prosecuted as provided by law.[166]

The result of Proposition 102 is an underlying transformation of philosophies regarding selected juvenile offenders. With regard to these offenders, Arizona has strayed from its paternalistic focus on the best interest of the child and

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164. ARIZ. CONST. art. VI, § 14(1), (4) (1984); *See also In re* Cameron T., 190 Ariz. 456, 949 P.2d 545, 548 (Ariz. Ct. App. 1997) (stating that the supreme court and superior court would continue to have jurisdiction over juveniles pursuant to other existing laws unless those laws are amended by the legislature or the people at some future time).

165. ARIZ. CONST. art. IV, pt. 2, § 22 (effective as amended Dec. 6, 1996).

166. *Id.* ARIZ. REV. STAT. § 13-501(G)(5) (repealed and revised 1997) defines "other violent felony offenses" within Section 22(1) as aggravated assault, aggravated assault involving the use of a deadly weapon, drive-by shooting, and discharging a firearm at a structure.

Moreover, the Arizona Supreme Court has interpreted the meaning of the phrase "as provided by law" as follows:

> [T]he word "law" includes constitutions, statutes, the common law and the various rules which the courts from time to time necessarily must and do adopt to secure an orderly, definite and consistent administration of justice. On the other hand, the word is frequently used in a restricted sense as meaning an act of the legislature only. There can be no absolute test laid down as to when the one meaning and when the other is to be attributed to the word. It must all depend upon the context with which it is used and the presumed intent of those who use the word, judged by the usual principles of construction.

State *ex rel.* Conway v. Superior Court Within and For Greenlee County, 60 Ariz. 69, 76, 131 P.2d 983, 986 (1942).

the community, reflected in its judicial waiver jurisprudence, to an almost hostile "get tough" approach designed to incapacitate and, arguably, deter[167] juvenile offenders.

V. SYSTEM FAILURE: INHERENT FLAWS IN PROPOSITION 102

In enacting Proposition 102, Arizona voters clearly intended to speed the pace and enhance the effectiveness of the current juvenile justice system as well as to respond more stringently to juvenile crime when appropriate. Despite these seemingly honorable intentions, however, three substantial flaws result from Proposition 102. First, Proposition 102 fails to take into account the differences between adult offenders and juvenile offenders. Second, Proposition 102 is overbroad in its coverage of juvenile offenders, drawing into its governance those who may be rehabilitated. Third, Proposition 102 expands opportunities for prosecutorial abuse in overcharging the juveniles.

A. Adolescence Versus Adulthood: Obscuring the Dividing Line

To a large degree, "the cut-off age between adolescence and adulthood is arbitrary," with the dividing line, in part, a social and legal construct.[168] However, there is growing documentation from various disciplines that "adolescents are uniquely different from adults."[169] Proposition 102 fails to consider the inherent differences between adult offenders and juvenile offenders in at least two ways: (1) juveniles are not granted the same benefits and privileges as adults; and (2) juveniles are not usually considered to have the capacity to be held as accountable for their actions as their adult counterparts.

1. Less Benefits and Privileges

Proposition 102 holds juvenile offenders to the same accountability level as adults,[170] based on the view that such behavior is the product of mature and responsible will. Yet, in Arizona, or any other state, juveniles are not granted all of the same benefits and privileges as adults.[171] Arizona has adopted age-phasing laws[172] that permit juveniles to engage in certain activities only once they have

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167. There are at least two studies that suggest that legislative waiver statutes are not a deterrent for violent juvenile offenders. *See* Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521 (1988); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effects of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96 (1994).

168. Forst & Blomquist, *supra* note 14, at 366.

169. *Id.*

170. ARIZ. CONST. art. IV, pt. 2, § 22 (effective as amended Dec. 6, 1996).

171. *See* Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944) (reasoning that "[t]he state's authority over children's activities is broader than over like actions of adults...[and] [w]hat may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence").

172. Forst & Blomquist, *supra* note 14, at 365 (describing age-phasing laws as "legal regulations toward adolescents that provide for the incremental extension of

reached a minimum age, which varies according to the activity. For example, juveniles cannot drive until they reach sixteen years of age;[173] juveniles cannot vote,[174] purchase tobacco,[175] serve on a jury,[176] get married,[177] or consume pornographic material[178] until they reach eighteen years of age; and only people in Arizona who are twenty-one years of age or older can purchase alcohol.[179]

Age-phasing policies are premised on the view of the juvenile as having "a status involving semi-autonomy and partial maturity."[180] These laws "require young people to hold off from having to handle some kinds of mistakes until they have acquired the cognitive or emotional strengths to deal with them."[181] A pair of commentators stated that:

> The sequential phasing of these and related responsibilities and privileges based on age has been society's major strategy for moving youths towards adulthood and full maturity. This strategy acknowledges that responsibility and maturity are not the products of a single event or act, but rather of a process and a range of experiences. Such phasing regulations are intended to expose youths to the learning process essential to developing the ability to make well-reasoned and responsible decisions. At the same time, these regulations seek to protect young people from the full consequences of judgments that reflect their current state of immaturity and inexperience. Phasing policies allow youths to learn from some mistakes without being held fully responsible for them.[182]

Proposition 102 and other legislative statutes that have created a legal framework that assigns criminal responsibility to juveniles based solely on the offense and their age clearly conflict with the general strategy of age-phasing regulations and the theory of adolescence that underlies the extension of privileges and burdens.[183] Legislative waiver statutes expose "youths to the full liabilities of their criminal behavior by subjecting them to the processes and sanctions applicable to adults," while at the same time not extending the corresponding benefits and freedoms of adulthood.[184] Juveniles are not bestowed the same benefits and independence as adults because juveniles are different from adults.[185] Yet, Arizona, through Proposition 102, has chosen to turn the obscured line of adulthood into a black and white one and penalize juveniles as if they were adults.

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privileges and obligations based on age, life experience, and individual maturity").

173. ARIZ. REV. STAT. § 28-3153 (1997).
174. *Id.* § 16-121 (1996).
175. *Id.* § 13-3622 (1989).
176. *Id.* § 22-426 (1990).
177. *Id.* § 25-129 (1991).
178. *Id.* § 13-3506 (1989).
179. *Id.* § 4-244 (1995).
180. Forst & Blomquist, *supra* note 14, at 371.
181. *Id.* at 371–72.
182. *Id.* at 371.
183. *Id.* at 373.
184. *Id.*
185. *Id.* at 368.

2. Less Accountability

Juveniles are unique from adults in cognitive thought, moral development, and ego development.[186] In recognizing these differences, the United States Supreme Court has historically expressed the notion that juveniles should be held less accountable for their actions than adults should. In 1953, for example, Justice Frankfurter, in his concurring opinion for the Court, stated that "[c]hildren have a very special place in life which law should reflect."[187] In *Eddings v. Oklahoma*,[188] the Court recognized that this "special place" should be granted to juveniles due, in part, to their lower levels of maturity and culpability. The Court noted that:

> Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.[189]

These issues of maturity and culpability resurfaced in *Thompson v. Oklahoma*.[190] Again, the Court agreed that adolescents, as a class, "are less mature and responsible than adults,"[191] such that less culpability should attach to adolescents who commit crimes that are comparable to crimes committed by adults.[192] The Court's conclusion was "too obvious to require extended explanation."[193] However, in his opinion for the majority of the Court, Justice Stevens noted that:

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotions or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[194]

The aforementioned cases show a longstanding tradition in acknowledging that a juvenile's maturity and culpability levels are lower than those of an adult, consequently validating the idea that in our society juveniles are different from adults. Because juveniles have "diminished capacity," they also

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186. *Id.* at 366–68.
187. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).
188. 455 U.S. 104 (1982).
189. *Id.* at 116 n.11 (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).
190. 487 U.S. 815 (1988).
191. *Id.* at 834.
192. *Id.* at 835.
193. *Id.*
194. *Id.*

should have "diminished accountability."[195] This is not to say that juveniles should not be assigned some degree of responsibility for their violent actions.[196] Rather, juveniles should not be held responsible to the same extent as adults for similar acts.[197] Proposition 102 has desperately departed from legal tradition in failing to consider a juvenile's diminished capacity, and, as a result, Arizona has chosen to obscure the line of accountability by treating a fifteen-year-old child the same as a forty-year-old adult.

D. Legislative Overbreadth: Punishing Juveniles Amenable To Treatment

Proposition 102, like other similarly drafted legislative waiver statutes, does not distinguish between serious offenders who are likely "to recidivate and those who are likely to desist from [committing] future delinquencies" through rehabilitation.[198] Rather than focusing on or even considering the individual characteristics of the juvenile offender and the circumstances surrounding the crime, the initiative's sole interest in on the offense committed.[199]

For example, on December 2, 1996, two mentally retarded fifteen-year-old boys were arrested and accused of raping a mentally retarded sixteen-year-old girl at a Chandler, Arizona group home where all three were staying.[200] Both boys admitted their roles in pinning down the girl and taking turns raping her,[201] but one had an IQ of only forty-nine and was described as the highest functioning among the three.[202] The boys appeared to understand right from wrong in police interviews, but when asked why they raped the girl said that they could not stop themselves from acting on impulse.[203] These two boys became the first juveniles automatically transferred to adult criminal court under Proposition 102.[204] Despite diversified backgrounds,[205] Proposition 102 mandates that all offenders be treated identically. For instance, if convicted in the aforementioned rape case, both boys will probably serve the same amount of time even assuming that one of the boys was a chronic and serious offender and the other had no prior criminal history. Because juvenile offenders differ greatly in their future dangerousness, family histories, peer relationships, degrees of culpability, and treatment needs, such

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195. Forst & Blomquist, *supra* note 14, at 368.

196. *Id.*

197. *Id.*

198. Feld, *supra* note 97, at 565.

199. Feld, *supra* note 8, at 515.

200. Eric Miller, *Stiff Law on Youth is Upheld 2 Teens Facing Trial as Adults in Rape,"* ARIZ. REPUBLIC, July 16, 1997, at A12.

201. *Id.*; Soto v. Superior Court In and For Maricopa County (State *ex rel.* Romley), 949 P.2d 539, 541 (Ariz. Ct. App. 1997).

202. Miller, *supra* note 200, at A12.

203. *Id.*

204. *Id.*

205. "Evidence is overwhelming that, as a class, juvenile delinquents have lower IQs and educational attainment than their nondelinquent peers. They also have a higher incidence of learning disabilities and mental illness, may have lower levels of moral development, often lack social problem-solving skills, and may not fully understand their legal rights." Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 725–26 (1997).

uniformity is grossly problematic and undoubtedly reaches those offenders who are amenable to treatment.[206]

As the preceding discussion suggests, Proposition 102 presumes that children who commit certain offenses are incapable of being rehabilitated through the juvenile process.[207] According to studies and commentators, however, "serious offenders are best identified by their persistence rather than by the nature of their initial offense."[208] First offenses, even those that are considered serious and violent, do not accurately predict the probability or gravity of future offenses—that is, one serious violent act is not necessarily indicative of the juvenile offender's persistent threat to society.[209] For example, the chances of a first time serious offender committing a second serious offense is so low that it is comparable to the chances of a nonserious first time offender committing a second serious offense.[210] In fact, evidence suggests that many juvenile offenders actually refrain from engaging in any criminal activity after their first serious offense.[211] Therefore, legislative statutes that are tailored to concentrate only on specific offenses may punish a juvenile delinquent who is neither a serious offender nor a threat to society.[212]

Because Proposition 102 bases the waiver and punishment decision completely on the specific offense committed rather than on the amenability and needs of a particular juvenile offender, it is overly broad. Under Proposition 102, non-threatening juveniles who are promising candidates for successful rehabilitation will be denied the opportunity to become better people and citizens.[213] Instead, these juveniles will be left to a system that may, at the very

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206. Martin L. Forst et al., *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Survey of Approaches to Commitment and Release Decision-Making*, 36 JUV. & FAM. CT. J. 1, 2 (1985).

207. Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 37 (1976).

208. Feld, *supra* note 8, at 497.

209. Feld, *supra* note 97, at 569.

210. *Id.*

211. Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979–1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 32 (1995).

212. Feld, *supra* note 97, at 571.

213. For a short discussion on the anti-therapeutic atmosphere of adult prisons, see *supra* note 14. Also, Justice Skelly Wright, in his dissenting opinion in *United States v. Bland*, stated: "I am confident that a child is unlikely to succeed in the long, difficult process of rehabilitation when his teachers during his confinement are adult criminals." 472 F.2d 1329, 1349–50 (D.C. Cir. 1972) (Wright, J., dissenting).

Once transferred to the criminal justice system with its emphasis on punishment, the juvenile, as with his or her adult counterparts, will probably "become a less productive member of society." COMMUNITY RESEARCH FORUM OF THE UNIVERSITY OF ILLINOIS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., A COMPARATIVE ANALYSIS OF JUVENILE CODES 9 (1980). For example, as an adult ex-offender, the juvenile "will no doubt feel the hostility and fear and lack of trust of the public—the stigma of criminal prosecution—reflected primarily in limited opportunities for employment." *Id.* Waiver therefore "increases the chances that the juvenile offender will continue in the criminal justice system indefinitely having very little choice or opportunity to do

least, stigmatize and harden them "without any benefit to society other than the satisfaction of a desire for revenge."[214]

E. Prosecutor As Gatekeeper: Expanding The Potential For Abuse

Historically, prosecutors, in performing the functions of their profession, have enjoyed great discretionary power.[215] However, it is *solely* in the case of juveniles that prosecutors may utilize their discretion in favor of one of two possible adjudicatory forums, which is clearly an expansion of the prosecutor's traditional function.[216] Thus, Proposition 102, like other legislative waiver statutes, gives prosecutors the omnipotent position of "gatekeeper."[217] Prosecutors, in using their discretionary authority to select a forum, can decide (1) not to charge the juvenile for any offense; (2) to charge the juvenile for a lesser offense that is not covered under Proposition 102; (3) to charge the juvenile for only one or more offenses enumerated in Proposition 102; or (4) to plea bargain with the juvenile to a lesser offense.[218] Generally, a prosecutor's decision of what, if any, charge to bring against a criminal suspect, "rests entirely in his discretion." [219]

In the 1972 case of *United States v. Bland*,[220] the court addressed the issue of prosecutorial discretion with respects to a District of Columbia legislative

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otherwise." *Id.*

214. Fritsch & Hemmens, *supra* note 211, at 32–33. Placing juveniles in violent adult prisons could result in an increased number of violent offenders upon release. Forst & Blomquist, *supra* note 14, at 353. Research suggests that juveniles who are placed in adult correctional institutions may develop "institutionalized" personalities and become more violent "as part of their adjustment to the violence that surrounds them in prison." *Id.* at 353 (citing Eisikovits & Baizerman, *"Doin' Time": Violent Youth in a Juvenile Facility and in an Adult Prison*, 6 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 5 (1983)). Scholars have learned that "[v]ictimization by violence has well-established etiological consequences in subsequent violence and crime." Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 10 (1989). Therefore, the social costs of adult prosecution and imprisoning juveniles in adult prisons "may be paid in later crime and violence upon their release." *Id.* at 11.

215. McCleskey v. Kemp, 481 U.S. 279, 311–12 (1987) (stating that the capacity of prosecutorial discretion is "firmly entrenched in American Law") (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.2(a) (1984)); United States v. LaBonte, 117 S. Ct. 1673, 1679 (1997) (noting that prosecutorial discretion is an "integral feature of the criminal justice system").

216. Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and* Walker v. State, 46 ARK. L. REV. 985, 996 (1994).

217. Phil Manzano, *The Hard Line on Crime*, OREGONIAN (Portland), Apr. 15, 1995, at A1.

218. Murray R. Garnick, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467, 468 (1983).

219. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); State v. Murphy, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976) (en banc) ("[C]ourts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers.").

220. 472 F.2d 1329 (D.C. Cir. 1972). For a further discussion of differences between prosecutorial discretion in charging decisions and forum decisions, see Alan B.

waiver statute.[221] The case involved Jerome T. Bland, a sixteen-year-old boy who was charged as an adult for armed robbery of a post office.[222] Bland challenged the constitutionality of the legislative waiver statute, claiming that it, in addition to judicial waiver statutes, is governed by procedural due process as pronounced in *Kent*.[223] The majority of the court, however, held against Bland and refused to apply the *Kent* safeguards to legislative waiver statutes.[224] The court, while focusing on the doctrine that prosecutorial discretion is not subject to judicial review "[i]n the absence of such 'suspect' factors as 'race, religion, or other arbitrary classification,'" concluded that due process does not require "an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom."[225] Because courts strongly protect prosecutorial discretion by making it "largely unencumbered by any external standards predicated on due process,"[226] Proposition 102 expands the opportunities for prosecutorial abuse.

The most troublesome opportunity for prosecutorial abuse is through the state's ability to overcharge juvenile offenders. Since a prosecutor is first and foremost a zealous advocate on behalf of the state, his or her ultimate responsibility is to adequately serve the state's interest; therefore, there is a "constant threat" that a prosecutor may choose to overcharge a juvenile in order that the criminal courts obtain jurisdiction.[227] For example, instead of charging a juvenile with third degree assault,[228] the prosecutor may wish to transfer the juvenile to adult jurisdiction and charge the juvenile with forcible sexual assault.[229]

Salazar, *The Expanding Scope of Prosecutorial Discretion in Charging Juveniles as Adults: A Critical Look at* People v. Thorpe, 54 U. COLO. L. REV. 617 (1983).

221. *Bland*, 472. F.2d at 1335–37.

222. *Id.* at 1331.

223. *Id.*

224. *Id.* at 1337.

225. *Id.* In *Cox v. United States*, 473 F.2d 334, 335–36 (4th Cir. 1973), the court made these observations:

> When the question is one of waiver of jurisdiction of a juvenile court and it is to be decided by a judge of the juvenile court, it is clear that the juvenile is entitled to a hearing on the question of waiver and the assistance of counsel in that hearing.... We have no such tradition with respect to prosecutorial decisions to seek an indictment, or not to seek one, to make or not make a charge, or to charge a greater offense or a lesser one. Such decisions have a substantial impact on the outcome of subsequent proceedings. Indeed, they may foreclose such proceedings, but they are left for determination by the prosecutor without a hearing and without extension of any of the other due process protections to the person whose exposure and degree of exposure to prosecution the prosecutor determines.

226. Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 41 (1995).

227. Boyce, *supra* note 216, at 998.

228. ARIZ. REV. STAT. § 13-1203 (1989) (not defined by statute to be a legislatively waivable offense).

229. *Id.* § 13-1406 (1989) (defined by statute to be a legislatively waivable offense).

By overcharging the juvenile, "the prosecutor effectively ensures harsher punishment, thereby [arguably] protecting society's interests."[230] As a result, however, the juvenile bears the consequences of the prosecutor's discretionary charging decision to the possible detriment of the juvenile receiving justice. For example, the majority rule, as was discussed at length in *Walker v. State*,[231] was articulated as follows: "[O]nce a general jurisdiction court acquires jurisdiction of a juvenile, it may convict and sentence the juvenile for a lesser included offense that could not have been tried by that court in the first instance."[232]

Another example where a prosecutor may overcharge a juvenile includes circumstances where there is escalating pressure placed on a prosecutor to waive and convict juveniles, so as to gain public approval and improve electoral standing.[233] Due to their status as elected officials, prosecutors are not neutral decision-makers, but rather they actively seek convictions against those who pose a threat to society.[234] Ordinarily, a prosecutor's measure of success is largely determined by his or her conviction rate; therefore, the prosecutor who wishes to be reelected (or to maintain his or her appointment) will seek to satisfy the public on these matters.[235] One of the leading commentators on juvenile justice, noted that

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The charging decision can also go the other way. For instance, if the prosecutor decides, for whatever reason, that a particular juvenile should not be subject to criminal court jurisdiction, he or she simply has to reduce the charges. Kimberly S. May, Note, *Shifting Away from Rehabilitation:* State v. Ladd's *Equal Protection Challenge to Alaska's Automatic Waiver Law*, 15 ALASKA L. REV. 367, 391 (1998). "This is unfair to juveniles who are not the objects of favoritism or mitigating circumstances that may resonate with a particular prosecutor." *Id.* at 392.

230. Boyce, *supra* note 216, at 998.

231. 827 S.W.2d 637 (1992).

232. *Id.* at 639.

233. In *Wainright v. Witt*, Justice Brennan stated:

> Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. When prosecutors...are elected, or when they harbor political ambitions, such pressures are particularly dangerous.

469 U.S. 412, 459 (1985).

234. Boyce, *supra* note 216, at 998.

235. The evidence suggests that prosecutors do focus on winning a high percentage of their cases. *See* Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 414–15 (1976) (noting the "competitive emphasis on winning" and the "lack of any other good indicators of measure of the effectiveness of the prosecutor"); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 119 (1975).

In the 1996 election for county attorney, difficult issues, such as juvenile crime, drove the race. Barbara LaWall, who was ultimately elected Pima County attorney, was the candidate who echoed the public's sentiment with regards to Proposition 102. For example, in referring to Proposition 102, LaWall stated that "I think the people of the state have passed the first meaningful reform of the juvenile justice system in two decades." Kristen Cook, *Juvenile Crime Proposition Wins Handily*, ARIZ. DAILY STAR, Nov. 6, 1996, at 8A. Barbara LaWall, also known as "one of the measure's big backers," further commented, "We have to put [juveniles] on notice that this kind of behavior will not be tolerated.... If

a prosecutor, responding to political pressure, is "more likely to seek transfer of jurisdiction in response to society's demand for retribution...[and] less likely...to consider the welfare of the accused."[236]

In response to public sentiment and electoral pressures, prosecutors may also abuse their discretion by overcharging juveniles as a distinct tool in negotiating plea bargains. Because the prosecutor is "the central and controlling figure in the plea bargaining process,"[237] he or she has the ability to coerce a juvenile offender, innocent or otherwise, into pleading guilty to circumvent Proposition 102 sanctions.[238] A juvenile offender faced with the possibility of being convicted at criminal trial and sentenced to a much longer prison term is generally sufficiently risk adverse and so desperate to avoid the severe penalties imposed by Proposition 102 that he or she will consent to any plea, irrespective of whether it is a very good bargain.[239] The "give and take" elements characteristic of typical plea bargaining "transactions" thus completely disappear. Although plea bargaining provides the juvenile offender with the opportunity to sidestep the consequences of Proposition 102, as well as to "dispose of [the charges] with the lowest possible sentence,"[240] it is an opportunity that comes at the sole mercy of the prosecutor in exercising his or her control over the fate of the juvenile offender.

Admittedly, prosecutors are often sharply criticized for their broad decision-making authority. However, it is a criticism that must not be ignored, especially with respect to legislative waiver statutes. In finalizing whether the juvenile offender receives juvenile or criminal court treatment, prosecutors clearly need more of a constraint on their discretion than the mere statutory definition of the offense.

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there is any hope for any deterrence in the system, we have to tell young offenders what's expected of them and then follow through with swift action." Shaun McKinnon, *Judge, Prosecutor Plead for Funds to Enforce Prop. 102*, ARIZ. DAILY STAR, Jan. 18, 1997, at 1B.

236. Feld, *supra* note 97, at 564 n.155.

237. Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion?: A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 994 (1995) (describing characterizations of the prosecutor as an "'unregulated monopoly,' capable of changing at will the 'going rate' for a particular category of crime").

238. *Id.* at 993–94 (citing Eric Felton, *Crime and Punishment: Disorder in the Court*, INSIGHT, Feb. 15, 1993; *available in* WESTLAW, 1993 WL 7511408, at *2; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992)). "It is no surprise that innocent defendants may buckle under the emotional strains of the criminal justice system. The criminal justice process has been known to destroy marriages and cause alienation or emotional disturbances among a defendant's children." *Id.* at 993 n.62.

239. Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1187 (1996). *See also* Acevedo, *supra* note 237, at 994. One Portland defense attorney who was given the opportunity to slip out from under a legislative waiver statute's mandates commented: "[W]hat we had to do was plead guilty to whatever [the prosecutor] said. I likened it...to signing a blank check and [the prosecutor] could fill it out as he wanted." Phil Manzano & Erin Hoover, *Law Poses Problems for Oregon Justice System*, OREGONIAN (Portland), Aug. 22, 1995, at A1.

240. Richman, *supra* note 239, at 1187.

Overall, Proposition 102 is a deeply flawed piece of legislation. First, Proposition 102 fails to take into account the differences between adults and juveniles. Second, Proposition 102 is a broadly sweeping mechanism that reaches juveniles who are amenable to treatment. Finally, Proposition 102 expands the opportunities for abuse of prosecutorial discretion.

VI. GOING FORWARD BY GOING BACK: JUDICIAL WAIVER

In discussing the inherent flaws in Proposition 102, a common theme is brought to the forefront—that is, each of the three criticisms encompasses the notion of a remedy in discretionary waiver and individualized assessment. Arizona's return to a pure judicial waiver state would provide this remedy by enabling juvenile court judges to make the necessary discretionary, individualized assessments of juvenile offenders.[241]

In *Kent v. United States*,[242] the Supreme Court accentuated the importance of evaluating the "whole person" when considering whether to prosecute a juvenile as an adult.[243] In doing so, the Justices enumerated factors that juvenile court judges must evaluate in the process.[244] In supporting this rationale, Arizona adopted the *Kent* criteria and tailored each to meet the demands of Arizona's juvenile justice. Judicial waiver statutes that provide for this type of clear guidelines for assessing each particular juvenile's situation before waiver can protect the goals of the juvenile system and the community at large by preventing unnecessary and inappropriate transfers, which legislative waivers risk.[245]

For instance, pursuant to the legislative waiver statute, a prosecutor, who may be motivated by racial, political, or other reasons, has the "unbridled discretion" to overcharge a juvenile in order to ensure that he or she is brought within the clutches of Proposition 102.[246] This is not to suggest that judicial waiver is a flawless alternative to discretionary abuses. Undeniably, a juvenile court judge can be as biased as a prosecutor can. However, objective criteria exist to guide the judge's waiver decision, and such waiver decision-making authority is nonetheless reviewable.[247] In contrast, a prosecutor's discretionary charging decision is not complimented by statutory guidelines or "a mechanism to challenge [his or her] charging decision or transfer the case to the appropriate forum."[248]

Under a judicial waiver mechanism, instead of being in the unilateral charging authority of the prosecutor, the fate of a child is in the hands of a juvenile court judge who strives for "individualized" justice within a rehabilitative framework. Because Arizona's judicial waiver statute provides for individualized

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241. Bishop & Frazier, *supra* note 114, at 301.
242. 383 U.S. 541 (1966).
243. *See generally id.*
244. *Id.* at 565–67.
245. Laureen Q. D'Ambra, *A Legal Response to Juvenile Crime: Waiver and Certification Statute in Rhode Island*, 45-FEB. R.I. B.J. 5, 29 (1997).
246. May, *supra* note 229, at 390–91.
247. Cintron, *supra* note 98, at 1265–67.
248. May, *supra* note 229, at 390 (quoting Hughs v. State, 653 A.2d 241 (Del. 1994)).

determinations, only those juvenile offenders who truly cannot be saved or whose offenses are beyond the purview of the juvenile justice system will be transferred to adult court.[249] Accordingly, discretionary waiver by judges based on such factors as the offender's maturity, dangerous propensity, and likelihood of rehabilitation allows the juvenile court judge to look beyond the shadow of the specific offense committed to discover the *child* who committed the specific offense.

Thus, Arizona did, and should once again, put an emphasis on the desirability of discretionary, individualized assessment by empowering judges to consider the diversity of life experiences and motivations affecting each juvenile.[250] Waiver mechanisms that fail to incorporate an individualized juvenile assessment,[251] conversely, are inferior, for such approaches are myopic in focus and overlook relevant information that may be determinative of a juvenile's amenability to treatment and rehabilitation.[252]

VII. CONCLUSION

Due to highly publicized accounts of juvenile violence and society's fiercely critical view of the juvenile justice system, Arizona began following the national trend towards imposing increasingly punitive and retributive treatment of juvenile offenders through the enactment of Proposition 102. One can hope that the Arizona legislature will take cognizance of the inherent flaws in Proposition 102 and make the necessary modifications.

An ideal juvenile justice system adequately protects society from serious and violent juvenile offenders and effectively rehabilitates those who can be saved; however, it must allow for processes that discriminate between the two. To achieve such ends, approaches to the juvenile justice "crisis" must not only move beyond the simplistic and overly dismissive "out of sight, out of mind" philosophy of incarcerating the juvenile already before the court, but they also must resist masking juvenile offenders as "criminals who happen to be young, not children who happen to be criminals."[253] Instead, approaches must embrace "discretionary and individualized" assessments that recognize that it takes a "village" to raise a child, such that the juvenile offender is but one product of a society that fails to meet the needs of its children. Proposition 102, or any other legislative waiver

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249. Cintron, *supra* note 98, at 1256 (stating that adult criminal treatment is a last resort for most juveniles).

250. See *supra* Section IV.B., for the criteria used in Arizona's judicial waiver statute.

251. *See generally supra* Section III and accompanying notes.

252. *See In re* Pima County, Juvenile Action No. J-70101-2, 149 Ariz. 35, 37, 716 P.2d 404, 406 (1986) (en banc) (stating that decisions to transfer juveniles to adult jurisdiction may be made only after individualized inquiry that focuses on the juvenile him or herself and the nature of the offense committed).

253. Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs An Overhaul*, 34 POL'Y REV. 65 (1985). *See also* Laura Stepp, *The Crackdown on Juvenile Crime: Do Stricter Laws Deter Youth?*, WASH. POST, Oct. 15, 1994, at A1 (quoting a Maryland legislator to have said, "If they want to do adult-type crimes, we're going to treat them like adults").

statute, that attempts to solve the problem of juvenile crime by merely lowering the age of adulthood is in effect disregarding the underlying problem as a failure on the part of society. If treatment and care through the traditional judicial waiver model have been less than effective thus far, the incentive should be to refine existing or design better approaches, not to avoid the problem altogether through legislative waiver.

As Arizona and the nation continue to combat serious juvenile crime, they must carefully heed the warning given by Justice Skelly Wright in *United States v. Bland*:[254]

> [T]here is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration. We will inevitably hear from the Blands and Kents again, and the kind of society we have in the years to come will in no small measure depend upon our treatment of them now.[255]

254. 472 F.2d 1329 (D.C. Cir. 1972).
255. *Id.* at 1349.