Youthfulness Matters: A Call to Modernize Juvenile Waiver Statutes

by CHELSEA ELLEN HEANEY*

Introduction

Jennifer Pruitt was sixteen years old when she was sentenced in adult court to life without the possibility of parole for a guilt-by-association, felony murder offense.[1] Jennifer's father, Denny Pruitt was a severe alcoholic who would beat Jennifer until her eyes were blackened and began sexually abusing her when she was ten years old.[2] Jennifer's mother called her a liar when she told her about the sexual abuse.[3] Jennifer ran away from home, only to be brought home by the police who told her to be grateful that she had two parents.[4]

When Jennifer was about fifteen years old, she met Donnell Miracle, a friend of Denny Pruitt's who lived close by with her infant daughter.[5] Donnell had also had a difficult childhood, and from a young age, had been molested by multiple different men.[6] Though

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* J.D. Candidate 2016, University of California, Hastings College of the Law. I would like to thank Professor Lois A. Weithorn, who provided invaluable guidance throughout the writing of this Note. I would also like to thank the editors of the *Hastings Constitutional Law Quarterly* for their efforts throughout the editing process. Lastly, I would like to thank my family and friends for their continued love and support.

1. Beth Schwartapfel, *Sentenced young: The story of life without parole for juvenile offenders*, ALJAZEERA AMERICA (Feb. 1, 2014), http://america.aljazeera.com/features/2014/1/sentenced-young-thestoryoflifewithoutparoleforjuvenileoffenders.html. The felony murder doctrine is "a rule that allows a killing that occurs in the course of a dangerous felony, even an accidental death, to be charged against the felon as first degree murder. A felon can be guilty of murder during the course of a dangerous felony even if the felon is not the killer." *Felony Murder Doctrine*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/felony_murder_doctrine (last visited Apr. 29, 2015, 3:47 PM).
2. Schwartapfel*, supra* note 1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

she was twenty-three years old, Donnell felt protective of Jennifer, and the two became friends.[7] On an August day in 1992, as Denny screamed relentless obscenities at her, Jennifer decided that could not take it anymore.[8] She went to Donnell's house, and Donnell told her that she would not have to endure the abuse any longer, and allowed Jennifer to stay with her.[9] Donnell was on welfare, with an infant daughter to provide for, and Jennifer quickly began to feel that she was a burden to Donnell.[10] After about five days of living together, struggling to make ends meet, Donnell told Jennifer that she was tired of being broke, and the girls devised a plan to rob one of their neighbors, Elmer Heichel.[11] Jennifer knew that Mr. Heichel went out drinking with his friends on Saturday nights, and the two girls developed a plan go to his home when he returned, distract him, and take whatever money he had in his wallet.[12] All seemed to be going according to plan, until, when returning from the bathroom with cash in hand, Jennifer found Donnell stabbing Mr. Heichel repeatedly in the middle of the living room floor.[13] Jennifer later learned from Donnell that Mr. Heichel had attempted to grope her, and given her childhood of abuse, this caused her to snap.[14]

The judge presiding over Jennifer's case had two options.[15] He could either sentence Jennifer as a juvenile, which would have required her release in three years when she turned twenty-one, or sentence her as an adult, which, under mandatory sentencing laws, meant life without possibility of parole.[16] Unfortunately for Jennifer, the judge chose the latter.[17] Jennifer was sixteen years old at the time of her crime and was sentenced in adult court, under the felony

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* "Mandatory minimum sentencing laws require binding prison terms of a particular length for people convicted of certain federal and state crimes . . . these inflexible, 'one-size-fits-all' sentencing laws . . . undermine justice by preventing judges from fitting the punishment to the individual and the circumstances of their offenses." *What Are Mandatory Minimums?,* FAMILIES AGAINST MANDATORY MINIMUMS, http://famm.org/mandatory-minimums/ (last visited Apr. 29, 2015, 3:23 PM).

17. *Id.*

murder doctrine, to life without possibility of parole.[18] She remains in prison to this day, hopeful, in light of recent Supreme Court decisions, that she may one day be eligible for parole.[19]

Jennifer's tragic story is representative of the stories of countless juveniles housed in adult prisons throughout the United States.[20] Due to mandatory and automatic sentencing schemes, juveniles are transferred to adult prisons without consideration of their upbringing, maturity, and potential for rehabilitation. Recent Supreme Court decisions considering the constitutionality of imposing severe sentences on juveniles have drawn attention to the ways in which juveniles end up in adult prisons throughout the United States.

This Note examines the constitutionality of state statutes that allow for and mandate juvenile adjudication in adult courts. Part I looks at the original development and purpose of the juvenile justice system in the United States—it explores the reasons behind the establishment of a juvenile justice system separate from the adult criminal justice system, and introduces some of the early cases that laid the foundation for the establishment of this system. Part II provides a multistate analysis examining which states allow for discretionary transfers from juvenile to adult courts, which states allow for direct or automatic filing in adult criminal court, and the constitutionality of such practices in light of recent Supreme Court decisions. Part III considers empirical research on juvenile and adolescent development, as well as recent Supreme Court decisions addressing the constitutionality of sentencing juveniles in adult court and subjecting juveniles to the most severe penalties available under the law. Part IV discusses the physical and psychological impacts that juveniles, sentenced in adult court, face when serving out their sentences in adult prisons. Lastly, Part V offers a recommendation for state legislators to abrogate direct and automatic placement practices in favor of discretionary transfer laws that allow for, and mandate, the consideration of the unique factors associated with youth, before transferring or filing a juvenile's case in adult criminal court.

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18. Schwartapfel*, supra* note 1.

19. *Id.*

20. Though Jennifer's case is representative of many, there are also many cases involving juveniles whose stories are not as traumatic as Jennifer's, but find themselves in similar situations where the underlying sentiments remain the same. Regardless of how traumatic or not a juvenile's upbringing and family life is, these are factors that should be considered before a juvenile is automatically transferred to, or sentenced in, adult criminal court.

I. A Look to the Past: The Development and Purpose of the Juvenile Justice System in the United States

The turn of the twentieth century brought with it the notion that there are qualities of youth that make juveniles fundamentally different from adults.[21] The juvenile justice system emerged in the United States as a means of protecting juvenile offenders, through the states' *parens patriae* power, from the harsh realities of the adult criminal justice system.[22]

Reformers and progressives in the nineteenth century called for the development of separate juvenile courts for delinquent minors.[23] These individuals specifically rejected legal institutions as appropriate rehabilitative services for children and, instead, promoted the development of a more relaxed and even nonlegal, juvenile justice system.[24] The first juvenile court was established in Cook County, Illinois in 1899.[25] This court was representative of the ideals of the reformers, with a focus on rehabilitation rather than punishment, and on the child rather than the offense.[26] The structure was less formal, less legalistic, and based around a treatment model where the focus was to diagnose and treat the delinquent minor, rather than to punish him.[27]

The seminal cases surrounding the establishment of the juvenile justice system in the United States include *Kent v. United States* in 1966, *In re Gault* in 1967, and *In re Winship* in 1970.[28] In *Kent v. United States*, the court held that, "an opportunity for a hearing which

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21. DANIELLE MOLE & DODD WHITE, TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 1 (2005), http://66.227.70.18/programs/juvenilejustice/jjtransfer.pdf. These qualities include juveniles' immaturity, impetuosity, rehabilitative potential, and failure to appreciate risks and consequences. Miller v. Alabama*,* 132 S. Ct. 2455, 2468 (2012).

22. SAMUEL M. DAVIS, ET AL., CHILDREN IN THE LEGAL SYSTEM 913 (5th ed. 2014). "*Parens patriae*, Latin for 'Parent of his or her country,' is a doctrine that grants the inherent power and authority to the state to act as a guardian for those who are legally unable to act on their own behalf." *Parens Patriae*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/parens_patriae (last visited Apr. 29, 2015, 3:29 PM).

23. DAVIS, ET AL., *supra* note 22.

24. *Id.* at 916.

25. MOLE & WHITE, *supra* note 21, at 1. Within thirty years of the establishment of this first juvenile court in 1899, virtually all of the fifty states had established a juvenile court system. *History of the Juvenile Justice System*, DEP'T OF JUV. SERVICES, http://www.djs.state.md.us/history-us.asp (last visited Apr. 29, 2015, 3:38 PM).

26. MOLE & WHITE, *supra* note 21, at 1.

27. DAVIS ET AL., *supra* note 22, at 916.

28. MOLE & WHITE, *supra* note 21, at 2.

may be informal, must be given the child prior to entry of a waiver order."[29] A year later, in *In re Gault*, the Court considered notice, the right to counsel, and the right to confrontation as provided by the Sixth Amendment, as well as to the right against self-incrimination guaranteed by the Fifth Amendment, in the context of juvenile adjudication.[30] The Court held that, "these four bill of rights safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years."[31] Lastly, in *In re Winship* in 1970, the Court, citing Chief Judge Fuld's dissent in the Court of Appeals, held that "'where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt.'"[32]

In the decades following the establishment of the juvenile justice system, a severe spike in violent juvenile crimes, beginning in 1985 and rising most significantly between 1988 and 1994, led many states to change their policies regarding the treatment of juvenile delinquents.[33] In fact, between 1992 and 1994, forty-nine out of the fifty states broadened or enacted legislation making it easier for

29. Kent v. United States, 383 U.S. 541, 561 (1966). Morris A. Kent, a juvenile on probation, was arrested and charged with housebreaking, robbery, and rape. After admitting his involvement, his case was transferred from juvenile to adult court without a prior waiver hearing. The Supreme Court vacated the ruling of the Court of Appeals and held that a pre-waiver hearing must occur before a juvenile's case can be transferred to adult court. *Id.* at 564.

30. In re Gault, 387 U.S. 1, 59-60 (1967) (Black, J., concurring). Gerald Francis Gault was fifteen years old when he was committed as a juvenile delinquent after having been in the company of another boy who had stolen a wallet from a woman's purse. His parents were not notified that he was committed and questioned, and he was not notified of any Fifth or Sixth Amendment rights. His case considered the extent that due process rights should extend to juvenile cases. *Id.* at 5.

31. *Id.* at 59–60.

32. In re Winship, 397 U.S. 358, 368 (1970) (rev'd*,* W. v. Family Court, 24 N.Y.2d 196, 207 (1969)). Winship was arrested and charged with stealing $172 from a gym locker, and his case looked at whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt standard when they are charged with violation of a criminal law. When a child is charged with a crime rendering him liable to substantial confinement, the court held, such a standard is required as a matter of due process. *Id.* at 365.

33. Brian Hansen, *Kids in Prison: Are the States Too Tough on Young Offenders?*, 11 THE CQ RESEARCHER 347, 348 (2001). From 1985 to 1994, the rate of murder committed by teens, ages 14 to17 increased 172%. Per 100,000 population, the homicide rate by 14 to 17 years old in 1985 was 7.0, increasing to 19.3 in 1993, and 19.1 in 1994. JAMES ALAN FOX, *Trends in Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending,* BUREAU OF JUST. STAT. U.S. DEP'T OF JUST. (1996), http://www.bjs.gov/content/pub/pdf/tjvfox.pdf.

juveniles to be tried as adults.[34] Though juvenile crime rates have consistently decreased since this peak in 1994, the legislative impact of this era of high crime remains.[35] The early protectionist *parens patriae* emphasis that provided the basis for the development of a juvenile justice system separate from the adult criminal justice system, has faded since its inception in the late 1800s. It has been replaced by the development of legislation that treats juveniles as "fully culpable and competent adults."[36]

II. Legal Responses to Juveniles in the Present: An Analysis of the Modern Mechanisms that Facilitate Juvenile Entry into the Adult Criminal Justice System

While waiver and transfer statutes are grouped and characterized in a variety of ways, this section compares "judicial waiver" statutes, in which a juvenile's case begins in juvenile court and may be transferred to adult court, with "automatic waiver" statutes, which allow a judge or prosecutor to surpass juvenile court and file a juvenile's case directly in adult court.[37] This section addresses how the former is consistent with the aforementioned Supreme Court decisions in that such statutes allow for the consideration of the unique characteristics associated with youth in determining the appropriate adjudicative steps to take.[38] The latter, on the other hand, fails to consider factors beyond a juvenile's age and offense committed and is inconsistent not only with these recent Supreme Court decisions, but also with the fundamental rationales that underlie the development and purpose of the juvenile justice system.[39] Once a juvenile is transferred or waived to the adult criminal system, regardless of the type of waiver, "they lose their legal status as minor[s] . . . and become fully culpable for their behavior."[40] This fact underscores the importance of considering a juvenile's culpability,

34. HANSEN, *supra* note 33, at 347.

35. MOLE & WHITE, *supra* note 21, at 3.

36. *Id.*

37. *See generally* PATRICK GRIFFIN ET AL., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions,* JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES (2001), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

38. Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

39. Shari R. Kim, *Parens patriae? Automatic waiver to criminal court and its toll on youth and society*, AMERICAN PSYCHOL. ASS'N (Oct. 2014), http://www.apadivisions.org/division-41/publications/newsletters/news/2014/10/innocence-research.aspx.

40. JEFFREY BUTTS & ADELE HARRELL, *Delinquents or Criminals? Policy Options for Young Offenders*, URBAN INST. 6 (1998), http://www.urban.org/UploadedPDF/307452_delinquents_or_criminals.pdf.

maturity, and rehabilitative potential *before* making the determination that he should be treated, under the law, as an adult.

A. Judicial Waiver: An Examination of Discretionary, Presumptive, and Mandatory Waiver Statutes Across the United States

Judicial waiver, comprised of three subcategories, including discretionary, presumptive, and mandatory waiver, is the most common transfer and waiver provision and is employed, in some form, by forty-six out of the fifty states.[41] Cases arising under judicial waiver laws originate in juvenile court and, at the discretion of the judge, may then be transferred to adult criminal court.[42] Bound by the Supreme Court ruling in *Kent v. United States*, all judges must hold a preliminary hearing before waiving a juvenile's case from juvenile to adult court.[43] *Kent* not only authorizes, but in fact requires judges to consider multiple factors when determining the appropriateness of a transfer.[44] However, a look at the three subcategories within judicial waiver provisions, specifically mandatory waiver statutes, reveals that such discretion may not always be properly exercised.[45]

Generally, in most of the forty-six states that employ discretionary judicial waiver, "the law specifies factors a court must weigh, findings it must make, and an overall standard it must apply in making its waiver decision."[46] More specifically, forty-four out of the forty-six states apply standards and identify factors to be considered when making a decision on waiver, based loosely on the eight factors enumerated in *Kent*.[47] Other states, including Kansas, Missouri, and Virginia, have developed their own standards based on the eight

41. MOLE & WHITE, *supra* note 21, at 6. "Discretionary waiver statutes specify threshold criteria similar to those outline in *Kent v. United States* that must be met before the court may consider waiver in a given case . . . . In a true mandatory waiver jurisdiction, the juvenile court is called upon only to determine that there is probable cause to believe a juvenile of the requisite age committed an offense falling within the mandatory waiver law . . . . Presumptive waiver statutes designate a category of cases in which waiver to criminal court is rebuttably presumed to be appropriate." *Transfer Provisions*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (Dec. 1998), http://www.ojjdp.gov/pubs/tryingjuvasadult/transfer.html.

42. MOLE & WHITE, *supra* note 21, at 6.

43. Kent v. United States, 383 U.S. 541, 561 (1966).

44. *Id.*

45. OFF. OF JUV. JUST. AND DELINQ. PREVENTION*, supra* note 41.

46. *Id.*

47. *Id.*

factors enumerated in *Kent*.[48] Kansas allows waiver upon a finding of "good cause," while Missouri and Virginia allow waiver whenever the accused is not a "proper subject" for juvenile treatment.[49] Oregon, another state that doesn't abide strictly to the *Kent* factors, bases its determination on whether the court finds that the juvenile has "the capacity 'to appreciate the nature and quality of [his or her] conduct.'"[50] While there exists variance in the execution of discretionary waiver statutes amongst states, these provisions represent an acknowledgement of the importance of considering various factors associated with a juvenile's youth, before determining whether or not he or she is suitable for juvenile, or adult, jurisdiction.

Presumptive waiver statutes are present in fifteen of the fifty states; these shift the burden of proof from the prosecution, who has the burden in discretionary waiver cases, to the minor.[51] For each state that has a presumptive waiver statute, that state designates various offenses for which waiver to adult criminal court is deemed appropriate.[52] When accused of one of the designated offenses, a juvenile is to be transferred to adult court, unless he or she can sufficiently establish that such a transfer would not be appropriate.[53] The 2005 report provided by the National Center for Juvenile Justice identified the following three basic categories in which state criteria for presumptive waiver fall: offense-based, age-based, and record-based.[54] Alaska is an example of a state where certain juveniles are deemed "unamenable to treatment" and are subject to waiver based on the crime they committed.[55] States that conform to age-based criteria focus on the age of the juvenile offender, independent of the seriousness of the crime.[56] In other words, an older juvenile who has committed a minor crime that would not otherwise be subject to

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* It is important to note that before a juvenile is required to come forward with evidence of "amenability to treatment" as a juvenile to rebut the presumption that his/her case should be transferred to adult criminal court, a prosecutor must first demonstrate probable cause to believe that the juvenile actually committed the alleged crime. *Id.*

52. *Id.*

53. MOLE & WHITE, *supra* note 21, at 7. Of the fifteen states that employ presumptive waiver statutes, four states require not only that a juvenile bear the burden of proof at the waiver hearing to rebut the presumptive waiver, but also that the juvenile must present "clear and convincing evidence" that a waiver is not justified. GRIFFIN ET AL., *supra* note 37.

54. MOLE & WHITE, *supra* note 21, at 8.

55. *Id.*

56. *Id.*

presumptive waiver may still be waived to adult court based on his age alone.[57] Lastly, states such as Colorado, that support record-based criteria, base the appropriateness of a waiver on the juvenile's prior offense record.[58]

Though presumptive waiver statutes rightfully provide a juvenile with the opportunity to demonstrate his or her suitability to juvenile court, the criteria presented above is inconsistent with both early findings in *Kent* and the recent findings by the Supreme Court in *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *People v. Gutierrez*, which will be discussed below.[59] Limiting an analysis of a juvenile's suitability to juvenile or adult court to an examination of his or her age or offense committed improperly ignores individualized levels of maturity, culpability, background, and personal circumstances. Focusing solely on age and/or offense is misguided, especially when using these factors to determine whether a juvenile will have an opportunity to reform and rehabilitate in the juvenile system. Instead, when a juvenile is faced with rebutting a presumptive waiver transfer, a court should consider not only the juvenile's age, but also the unique factors associated with that age, as well as the juvenile's ability and potential to reform within the juvenile justice system.

Of the fifty states, fifteen have enacted statutes allowing for mandatory waiver of juvenile jurisdiction in cases that meet certain age, offense, or other criteria.[60] According to a multistate analysis prepared by the Office of Juvenile Justice and Delinquency prevention, "[g]enerally, in a true mandatory waiver jurisdiction, the juvenile court is called upon only to determine that there is probable cause to believe a juvenile of the requisite age committed an offense falling within the mandatory waiver law."[61] These statutes are nevertheless classified as discretionary waiver provisions due to the fact that they mandate only that courts consider waiver, and they do not explicitly mandate that an actual waiver take place.[62] Given that these statutes do in fact mandate waiver upon a finding that an

57. *Id.*

58. *Id.*

59. Except, perhaps, for the record-based criteria, which considers a juvenile's past criminal record when determining whether or not transfer to adult criminal court would be appropriate.

60. MOLE & WHITE, *supra* note 21, at 8.

61. GRIFFIN ET AL., *supra* note 37, at 5.

62. *Id.*

offense meets certain statutory requirements, mandatory waiver statutes arguably are, as their name suggests, inherently mandatory.[63]

Mandatory waiver statutes infringe upon a juvenile's due process rights as presented in *Kent* by limiting a judge's discretionary authority and, as a result, limiting the effectiveness of the pre-waiver hearing that *Kent* requires. However, these statutes nevertheless require a level of individualized consideration that is wholly absent from the statutes discussed below in Sub-Part B. Though imperfect, judicial waiver statutes (discretionary, presumptive, and mandatory), serve as a baseline from which more appropriate statutes may develop. These statutes, particularly the elements that support judicial discretion and individualized juvenile assessments, should inform legislation aimed at addressing the problematic effects of "automatic waiver" statutes in the future.

B. "Automatic Waiver": An Examination of Direct File, Statutory Exclusion, and "Once an Adult, Always an Adult" Statutes Across the United States

"Waiver" is a bit of a misnomer in the context of direct file and statutory exclusion statutes. Rather than originating in juvenile court and later being transferred to adult court, juvenile cases subject to direct file and statutory exclusion may have original jurisdiction in adult criminal court.

Fifteen states have enacted direct file statutes that give prosecutors the authority to surpass juvenile jurisdiction altogether by directly filing a juvenile's case in adult criminal court.[64] If a prosecutor decides to directly file a juvenile's case in adult court, the adult criminal court has original jurisdiction over the case, and the juvenile court is never involved.[65] Surprisingly perhaps, the constitutionally required due process protection articulated in *Kent*, that a juvenile court hearing must be conducted before a juvenile is transferred to adult court, does not apply in direct file cases.[66]

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63. MOLE & WHITE, *supra* note 21, at 8.

64. *Id.* "Concurrent jurisdiction, or direct file, statutes afford prosecutors the unreviewable discretion to charge certain juveniles in either juvenile or criminal court . . . [f]indings reveal that direct file laws have little effect on violent juvenile crime." Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1451 (2006).

65. MOLE & WHITE, *supra* note 21, at 8.

66. *See generally* HOWARD SNYDER ET AL., *Juvenile Transfers to Criminal Court in the 1990's: Lessons Learned From Four Studies*, NATIONAL CENTER FOR JUVENILE JUSTICE (2000), http://www.ncjj.org/Publication/Juvenile-Transfers-to-Criminal-Court-in-the-1990s-Lessons-Learned-From-Four-Studies.aspx.

The seemingly misguided rationale for this exemption is the perception that prosecutors are more neutral than judges and legislators—with judges frequently considered as soft on crime and legislators seen as tough on crime.[67] However, as noted by Marsha Levick in a presentation at the Juvenile Justice Summit in 2002, prosecutors may be influenced by ulterior motives or biases of their own.[68] Specifically, Levick says, prosecutors may be operating under pressure to appear tough on crime, which may be exacerbated by a lack of experience dealing with juvenile offenders and offenses.[69] To make matters worse, the level of severity of offenses required to trigger direct file may be lower than that required for presumptive or mandatory waiver.[70] In Arkansas, for example, the offense of soliciting a minor to join a gang is sufficient to trigger direct file in adult court.[71]

The discretion and authority given to prosecutors through direct file statutes represent a great deal of faith and trust by state legislators in not only a prosecutor's neutrality and objectivity, but also in his or her ability to make such determinations in the first place. Direct file statutes operate on the assumption that prosecutors have sufficient knowledge and understanding of juvenile offenders and offenses to determine, at their sole discretion, whether or not a juvenile is fit for juvenile jurisdiction. Taking into account what a juvenile stands to lose if transferred from juvenile to adult court, this assumption is given insufficient consideration by state legislators when enacting such statutes. By enacting direct file statutes, legislators are already eliminating a juvenile's constitutionally protected due process right to a pre-waiver hearing as required by *Kent*. On top of that, allowing a single individual—who may or may not be trained or knowledgeable in the area of juvenile law—to determine the proper jurisdiction in which to file a juvenile's case, is arguably an unconstitutional infringement on a juvenile's right to due process.

Similarly, statutory exclusion statutes, which have been enacted in twenty-eight states, "define particular crimes for which juvenile

67. Marsha Levick, Presentation at CWLA 2002 Juvenile Justice Summit, New Orleans, La., Examining Transfer to Criminal Court As A Means of Reducing Delinquency and Recidivism (May 8-10, 2002).

68. *Id.*

69. *Id.*

70. GRIFFIN, ET AL., *supra* note 37, at 4.

71. MOLE & WHITE, *supra* note 21, at 9.

offenders are automatically excluded from juvenile court jurisdiction."[72] Again, these statutes, created by legislators, allow for the preclusion of any consideration of the factors identified in *Kent*.[73] Juveniles whose cases are filed in adult court under statutory exclusion provisions are treated as adults at the time they committed their offense and are sentenced accordingly.[74] Perhaps most notably, Mississippi, a state that has enacted an extensive statutory exclusion law, sends every seventeen-year-old accused of a felony into the adult criminal justice system.[75]

Thirty-one states have enacted "Once an Adult, Always an Adult" statutes, which require that once a juvenile is prosecuted in adult criminal court, any subsequent case against them will be automatically transferred to adult court.[76] Some states require an actual conviction in adult court for this statute to apply, but others, including California and Mississippi, do not.[77] California's position is that a juvenile is transferred to adult court not based on guilt or innocence, but on a finding of unfitness for juvenile court. As such, in California a conviction in adult court is not necessary to confirm unfitness for juvenile court.[78] Similarly, Mississippi does not require a

72. *Id.*

73. *Id.* The Court in *Kent* identified the following factors for a judge to consider when deciding whether to waive juvenile jurisdiction: 1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver; 2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; 3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted; 4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment; 5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia; 6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living; 7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; and 8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. *Kent, supra* note 29, at 566–67.

74. MOLE & WHITE*, supra* note 21, at 9.

75. *Id.*

76. *Id.* at 10. Though most states that have enacted this statute require criminal prosecution of all subsequent offenses, some require waiver of only a broadly defined subset of these cases, i.e., those involving juveniles of a certain age, or those who have committed a sufficiently serious offense. GRIFFIN ET AL.*, supra* note 37.

77. MOLE & WHITE*, supra* note 21, at 9.

78. *Id.*

conviction from the first prosecution, provided that the subsequent offense is a felony.[79]

C. The Result of Modern Waiver Mechanisms: An Examination of the Demographics of Juveniles Incarcerated in Adult Prisons

As a result of the aforementioned waiver statutes, an estimated 250,000 juveniles are tried, sentenced, and incarcerated as adults in courts throughout the United States each year.[80] Of those 250,000, most are charged with non-violent crimes.[81] There exists a substantial racial disparity throughout both the juvenile and adult criminal justice systems, with minorities highly overrepresented in both arrests and convictions.[82]

African-American youth constitute "62% of the youths prosecuted in the adult criminal system, and are nine times more likely than white youth to receive an adult prison sentence."[83] Latino youth are 4% more likely to be petitioned, 16% more likely to be deemed delinquent, 28% more likely to be detained, and 41% more likely to receive an out-of-home placement than are white youth.[84] Of all the racial disparities existing throughout both systems, the most severe occur for Latino youth tried in the adult criminal system.[85] Latino youth are 43% more likely than white youth to be waived to the adult system, and 40% more likely to be admitted to adult prison.[86] A report published in 2000 by the Justice Department along with six leading youth foundations titled, *And Justice for Some,* does

79. *Id.*

80. Neelum Arya, *State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUSTICE 3 (2011), http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf.

81. One category of nonviolent juvenile offenses includes status offenses, which consist of conduct that would not be a crime if committed by an adult. *See id.* at 12; *see also* M. Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement* (Oct.1, 2015), http://ojjdp.ncjrs.gov/ojstatbb/ezacjrp/ 2011). It is a goal of the JJDPA to deinstitutionalize juvenile status offenders and discourage the confinement of status offenders after their adjudication hearings. *Status Offenders*, GETLEGAL, http://www.get legal.com/ (search term: "status offenders").

82. Arya, *supra* note 80.

83. Neelum Arya & Ian Augarten, *Critical Condition: African-America Youth in the Justice System,* CAMPAIGN FOR YOUTH JUSTICE 1 (Sept. 2008) http://campaignforyouthjus tice.org/documents/AfricanAmericanBrief.pdf.

84. Neelum Arya, *America's Invisible Children: Latino Youth and the Failure of Justice*, CAMPAIGN FOR YOUTH JUSTICE 2 (May 2009), http://www.campaignforyouthjust ice.org/documents/Latino_Brief.pdf.

85. *Id.*

86. *Id.* at 6.

not discuss why such severe racial disparities exist; however, Mark Soler, the president of the Youth Law Center, suggests that rather than resulting from overt racial discrimination, the cause of such disparities is more likely the result of "the stereotypes that the decision makers at each point of the system rely on."[87] Mr. Soler went on to suggest that a judge may be influenced by the clothing one chooses to wear or the lack of familial support a juvenile has.[88]

III. Empirical Research on Juvenile Development and Recent Supreme Court Decisions Illustrate the Challenges Involved in Sentencing Juveniles in the Adult Criminal Justice System

A. Goals of the Adult Criminal Justice System

According to the National Center for Victims of Crime, the criminal justice system in the United States is "the set of agencies and processes established by the government to control crime and impose penalties on those who violate laws."[89] Most criminal justice systems are divided into three main institutions: law enforcement, the court system, and corrections.[90] These institutions work together to promote the following four principle goals of the criminal justice system: retribution (punishment for crimes against society), deterrence (prevention of future crime), incapacitation (removal of criminals from society so that they can no longer harm innocent people), and rehabilitation (activities designed to convert criminals into law abiding citizens).[91]

In a recent article titled, *The Mass Incarceration Problem in America,* Grace Wyler details some of the most pressing problems related to the prison system in America today. Due in large part to overcrowding and inadequate funding, America's prisons, the largest

87. Fox Butterfield, *Racial Disparities Seen As Pervasive in the Juvenile System*, N.Y. TIMES (Apr. 26, 2000), http://www.nytimes.com/2000/04/26/us/racial-disparities-seen-as-pervasive-in-juvenile-justice.html.

88. *Id.*

89. *The Criminal Justice System*, THE NAT'L CTR. FOR VICTIMS OF CRIME, (last visited Apr. 29, 2015, 8:47 PM), https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system.

90. *How Does the Criminal Justice System Work?*, FINDLAW, http://www.findlaw.com/ (search: "how does the criminal justice system work?").

91. Misty Kifer et al., *The Goals of Corrections: Perspective from the Line*, 28 CRIM. L. REV. 47 (2003); *see also*, *Purposes of Prisons,* STOP THE CRIME, http://www.stoptheaca.org/purpose.html (last visited Apr. 29, 2015, 9:10 PM).

prison population in the world, are facing severe problems.[92] There are currently more than 2.4 million prisoners housed in federal penitentiaries, state corrections facilities, and local jails throughout the United States, a number that has more than quadrupled since the 1980s.[93] In her article, Wyler looks at these problems in relation to the four principle goals of the criminal justice system, finding that the relationship between increased prison rates and reduced crime is "tenuous and small."[94] Such findings call into question how effective our prisons really are in promoting the goals of the criminal justice system.

In *Coleman v. Brown*, a case filed in California in 1990, the District Court found that, due to prison overcrowding, prisoners with severe mental illness were receiving inadequate mental health care in violation of their Eighth Amendment right against cruel and unusual punishment.[95] A Special Master who was appointed to oversee the implementation of remedial efforts, reported twelve years later in 2002, that mental health care in prisons was deteriorating due to increased overcrowding.[96] In 2001, in a case called *Plata v. Brown*, California conceded that inadequate medical care violated prisoners' Eighth Amendment rights and stipulated to a remedial injunction.[97] Over the course of the next few years, mental health and medical services in prisons failed to improve due to continued overcrowding.[98] In 2010, the *Coleman* and *Plata* cases were consolidated and heard before a three-judge court, which, after hearing testimony and

92. Grace Wyler, *The Mass Incarceration Problem in America*, VICE NEWS (June 26, 2014, 6:05 AM), https://news.vice.com/article/the-mass-incarceration-problem-in-america.

93. *Id.* Wyler attributes this unprecedented rise to four decades of tough-on-crime policies, and a "draconian war on drugs." *Id.*

94. *Id.* Wyler cites a news report by The Sentencing Project released in July 2014, the same week she wrote her article, which found that three states—New York, New Jersey, and California—that have reduced their prison population by about twenty-five percent have seen their crime rates decline at a faster rate than the national average. *Id.* (citing Marc Mauer & Nazgol Ghandnoosh, *Fewer Prisons, Less Crime*, THE SENTENCING PROJECT (2014), http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf.)

95. Brown v. Plata, 131 S. Ct. 1910, 1917 (2011) (Note: *Coleman v. Brown* and *Plata v. Brown* were consolidated and heard before a three-judge District Court in 2010. The governor of California, Edmund G. Brown, appealed the decision in 2011.).

96. *Id.* According to the Legal Information Institute at Cornell University, a special master is an individual appointed by the court to carry out an action on the court's behalf. *Special master*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/special_master (last visited May 11, 2015, 1:06 PM).

97. *Brown*, 131 S. Ct. at 1947.

98. *Id.* at 1927.

conducting extensive fact finding, ordered that California reduce its prison population to 137.5% of design capacity within two years, either by releasing prisoners or by increasing capacity by new construction.[99]

In an era where states like California are being ordered to release prisoners to alleviate overcrowding, we must question the appropriateness of statutes that not only facilitate, but also mandate, the transfer of juveniles into an already overextended adult prison population. Juvenile facilities were developed to give juveniles, like Jennifer Pruitt, a chance to rehabilitate and become contributing members of society. Sentencing juveniles to time in adult prisons undermines this fundamental purpose of the juvenile justice system and, furthermore, contributes unnecessarily to the overcrowding that continues to exist in prisons throughout the United States.

B. Research Reveals that Juveniles, and the Goals of the Juvenile Justice System, Are Not Served When Juveniles Are Placed in Adult Criminal Facilities

With the establishment of the first juvenile court in Cook County, Illinois, in 1899, the early emphasis of the juvenile justice system was on protecting and rehabilitating juvenile offenders, rather than punishing them.[100] Due to the increase in juvenile crime between 1985 and 1994, a sense of fear about dangerous, juvenile offenders swept the nation, leading state legislators to crack down on juvenile crime and abandon the early goals of the juvenile justice system including guidance, protection, and rehabilitation.[101] As the juvenile justice system has developed and changed since its inception in the late 1800s, there has been a great deal of empirical research conducted on juvenile and adolescent development. Two leaders in the area of juvenile and adolescent research are Elizabeth Scott and Laurence Steinberg, both former members of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice.[102] Professor Scott and Professor Steinberg released

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99. *Id.* at 1923.

100. U.S. Dept. of Justice, *Juvenile Justice: A Century of Change* (December 1999), https://www.ncjrs.gov/html/ojjdp/9912_2/juv1.html.

101. Id.

102. "The MacArthur Foundation is a think tank that has provided influential research for the formation of juvenile justice policy for the past decade." Lucy McGough, *Reviewing Rethinking Juvenile Justice, by Elizabeth S. Scott and Laurence Steinberg*, Louisiana State University Law School. "Elizabeth Scott, formerly of the University of Virginia Law School and now the Harold R. Medina Professor at Columbia Law School, is a highly regarded expert on issues of family and children's law. Laurence Steinberg,

an article in 2010 titled, *Blaming Youth*, addressing the question of "how lawmakers should think about immaturity in assigning criminal punishment to young offenders."[103]

Scott and Steinberg characterize the juvenile justice reforms that have occurred since the 1980s as "worrisome" and "highly politicized," arguing that these reforms have been carried out in a highly politicized climate, "driven by exaggerated public fears that seem to be reinforced by illegitimate racial attitudes."[104] Scott and Steinberg go on to say that recent policy reform is not simply a coherent response to changing experiences, but rather that it fits the pattern of what sociologists describe as "moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat."[105] Scott and Steinberg view adolescents as a unique group of individuals deserving a separate set of policies, procedures, and sanctions than younger juvenile delinquents and fully developed adult criminal offenders.[106] Consequently, they ask, "whether, and in what ways the immaturity of adolescent offenders is relevant to their blame-worthiness and to appropriate punishment for their criminal acts."[107] Relying on careful and extensive analysis of the developmental capacities relevant to adolescent criminal choices, in combination with the sources of mitigation present in criminal law, Scott and Steinberg reject both the early excuse-based model of juvenile justice and the emerging full-responsibility approach.[108] Instead, Scott and Steinberg arrive at a compromise, a model in which "immaturity mitigates responsibility—but does not excuse the criminal acts of youth who are beyond childhood."[109]

In their research, Scott and Steinberg identify two major elements of adolescence, which they argue, distinguish adolescents consequentially from adults in terms of their capacity for criminal culpability.[110] First, Scott and Steinberg rely on scientific evidence

whose specialty is adolescence, is a Distinguished Professor of Psychology at Temple University." *Id.*

103. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

104. *Id*. at 800.

105. *Id.* at 807.

106. McGough, *supra* note 102, at 79.

107. Scott & Steinberg, *supra* note 103, at 800.

108. *Id.*

109. *Id.*

110. *Id.* at 801.

that indicates that teens are simply less competent decision makers than adults, "largely because typical features of adolescent psychosocial development contribute to immature judgment."[111] Second, Scott and Steinberg argue that youthful involvement in crime is a natural part of the youthful process of exploration and experimentation, rather than an indication of future adult criminal tendencies.[112] As such, such involvement "reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity."[113] As a result, because youthful indiscretions are often motivated by factors unique to adolescence, Scott and Steinberg argue that youthful indiscretions are not reliable indicators of a juvenile's eventual development into an adult criminal.[114]

As evidenced by Scott and Steinberg's research, due to the influence of these developmental factors, youthful offenders are less morally culpable and blameworthy than their fully developed adult counterparts. Scott and Steinberg cite various studies, including one by Jeffrey Fagan, indicating that juveniles are simply not amenable to time spent in the adult criminal justice system, and in fact, face a higher recidivism rate once released from adult prisons, versus juveniles released from juvenile facilities.[115] Far removed from the nineteenth century progressive social reformers who classified juvenile offenders as "blameless children," Scott and Steinberg argue that contemporary lawmakers have "forcefully rejected this [nineteenth century] paternalism, reclassifying young offenders as adults," without considering the misfit that results from treating underdeveloped children as adults.[116] Recent Supreme Court decisions have begun to recognize the empirical research on juvenile and adolescent development, as conducted by scholars such as Elizabeth Scott and Laurence Steinberg, in ways that have begun to shed light on how to appropriately place and sentence juvenile offenders in courtrooms throughout the United States.

C. How Empirical Research on Juvenile and Adolescent Development

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111. *Id.*; Scott and Steinberg proceed to say that this immature judgment is the result of reduced adolescent capacities for autonomous choice, self-management, risk perception and calculation of future consequences, compared to that of adults. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See* Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77, 82 (1996).

116. Scott & Steinberg, *supra* note 103, at 802.

Has Influenced Recent Supreme Court Decisions

Beginning in 2005, with a Supreme Court case, *Roper v. Simmons*, there has been a renewed interest in examining juveniles' culpability and rehabilitative potential and how these factors can, and should, influence juvenile adjudication and sentencing.[117] Together, the following cases stand for the proposition that courts should look beyond a juvenile's age and the offense committed when determining the appropriate sentence to impose upon a minor convicted of a serious offense. Generally, these cases establish that, "[c]hildren are constitutionally different from adults for purposes of sentencing . . . [and] are less deserving of the most severe punishments."[118] This Note proposes that factors, such as a juvenile's diminished culpability and potential for reform, should be considered not only at the sentencing phase but also when determining whether to transfer jurisdiction to adult court. To consider the unique factors associated with youth only at the sentencing phase ignores the potentially detrimental impacts caused by adjudicating youth in adult courts, in the first place.

In 2005, the Supreme Court held in *Roper v. Simmons* that the imposition of the death penalty upon a juvenile offender is prohibited by the Eighth Amendment's prohibition against cruel and unusual punishment.[119] At seventeen years old, Christopher Simmons committed a vicious and violent homicide.[120] Simmons was sentenced, under a mandatory sentencing scheme, to death.[121] The Court in *Roper* rejected the death penalty sentence as unconstitutional given its disproportionate nature in light of the defendant's age and imposed a sentence of life without possibility of parole instead.[122] It

117. Roper v. Simmons, 543 U.S. 551, 555–56 (2004).

118. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

119. *Roper*, 543 U.S. at 568.

120. *Id.* at 555; Simmons discussed his plans to commit murder with friends beforehand, and bragged about it afterward. At around 2 AM Simmons, along with one other, broke into the home of Shirley Cook, a woman who Simmons had had a previous car accident with, used duct tape to cover her eyes and mouth and bind her hands, and drove her to a state park. The boys reinforced the bindings, covered her head with a towel, and walked her over to a railroad trestle spanning the Meramec River. They tied her hands and feet together with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge, drowning her. *Id.* at 559.

121. *Id.* at 556.

122. *Id.* at 560; "The Roper ruling affected 72 juveniles in 12 states . . . most of the 72 individuals who were on death row prior to the Roper decision had their sentences converted to life without possibility of parole." Death Penalty Information Center, *U.S.*

left for future courts to decide whether reducing a sentence from the death penalty to life without possibility of parole is an adequate remedy.

One case to address this question was *Graham v. Florida*, five years later, in 2010.[123] *Graham* looked at the imposition of life sentences without the possibility of parole in the context of juvenile nonhomicide offenses.[124] *Graham* banned the imposition of mandatory sentences of life without possibility of parole upon juvenile nonhomicide offenders.[125] The Court held that these mandatory penalty schemes "prevent the sentencer . . . from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."[126] *Graham* held that a sentence of life without possibility of parole is a disproportionate punishment for a nonhomicide juvenile offense, and is thus unconstitutional.[127]

After *Graham*, the Court was left to decide whether a sentence of life without possibility of parole is an appropriate sentence to impose upon a minor convicted of a homicide offense. The Court addressed this issue two years later in 2012.[128] In *Miller v. Alabama*, the Supreme Court held that *mandatory* life imprisonment without parole for individuals under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment.[129]

The holding in *Miller* asserts that imposing a mandatory sentence of life without possibility of parole upon a juvenile defendant violates

Supreme Court: Roper v. Simmons*, No. 03-633*, (Apr. 29, 2015, 4:32 PM), http://deathpenaltyinfo.org/u-s-supreme-court-roper-v-simmons-no-03-633; "Between 1976 and the *Roper* decision, 22 defendants were executed for crimes committed as juveniles." Death Penalty Information Center, *Facts About the Death Penalty*, (Apr. 29, 2015, 4:35 PM), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

123. Graham v. Florida, 560 U.S. 48, 52 (2010).

124. *Id.* at 48.

125. Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012).

126. *Id.* at 2466.

127. *Id.* at 2461.

128. *Id.* at 2455; Many sentencing law advocates were surprised by the Supreme Court's decision to review the constitutionality of life-without-parole sentences imposed upon juveniles, fourteen years or younger, convicted of homicide crimes, so shortly after *Graham*. This decision served to illustrate the Court's shifting Eighth Amendment jurisprudence and the larger debate regarding the constitutionality of imposing harsh sentences on juveniles. Scott Hechinger, *Another Bite at the Graham Cracker: The Supreme Court's Surprise Revisiting of Juvenile Life Without Parole in Miller v. Alabama and Jackson v. Hobbs,* GEO. L. REV. ONLINE (2012), http://georgetownlawjournal.org/glj-online/another-bite-at-the-graham-cracker-the-supreme-court%E2%80%99s-surprise-revisiting-of-juvenile-life-without-parole-in-miller-v-alabama-and-jackson-v-hobbs/.

129. *Miller*, 132 S. Ct. at 2460.

the Eighth Amendment in that it "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[130] Additionally, these mandatory sentencing schemes fail to consider the juvenile's family and living situation, regardless of how dysfunctional they may be.[131] Furthermore, a mandatory scheme fails to consider the nature of a defendant's crime and the extent to which he participated.[132] Similarly, this scheme neglects to consider any potential familial or peer pressure that may have influenced the juvenile's actions.[133] The Court stated that, "'[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability."[134] The Court made clear that its holding is meant to set forth a certain process for judges to follow when determining whether it is appropriate to impose such a severe sentence on a juvenile.[135] Specifically, this holding requires that judges "consider the 'mitigating qualities of youth.'"[136]

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130. *Id.* at 2468.

131. *Id.*

132. *Id.*

133. *Id.* According to Elizabeth Scott and Laurence Steinberg in their article, *Blaming Youth*, "Adolescent decisionmaking capacity is diminished as compared to adults due to psycho-social immaturity. At the same time, the scientific evidence suggests that most young lawbreakers are "ordinary" persons (and quite different from typical adult criminals) in that normal developmental forces drive their criminal conduct. This is important in two ways. First, ordinary adolescents are more vulnerable than are adults to exogenous pressures that can lead to criminal conduct. Further, an important source of mitigation in criminal law—evidence that the criminal act did not derive from bad moral character—is as applicable to youths as to upstanding adults who act aberrantly." Scott & Steinberg, *supra* note 103, at 802.

134. *Miller*, 132 S. Ct. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

135. *Id.* at 2459.

136. *Id.* at 2467 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); Scholars have argued since *Miller* was decided, that this decision does not go far enough, and that rather than precluding only mandatory sentences of life without possibility of parole, the Court in *Miller* should have placed a categorical ban on juvenile life without parole sentencing. *See*, Anna K. Christensen, *Rehabilitating Juvenile Life Without Parole: An Analysis of Miller v. Alabama*, CA. L. REV. CIR. 132, 133 (2013) ("Because juveniles are more apt to engage in risky behavior than are adults, and because of their ability to respond positively to rehabilitative services, juvenile delinquency is a poor predictor of adult criminality, and juvenile life without parole sentences fail to achieve the penological goals they seek to advance.").

The Court considered several such factors in *Miller*. Evan Miller's mother was an alcoholic and drug addict and his stepfather abused him.[137] He spent his youth in and out of foster care and developed a dependency on drugs and alcohol.[138] He attempted suicide four times with the first attempt at just six years old.[139] Evan Miller was fourteen years old when he and his friend, Colby Smith, beat and murdered his neighbor, Cole Cannon.[140] Miller and Smith followed Cannon back to his trailer after he had completed a drug deal with Miller's mom.[141] After a night of drinking, Miller attempted to steal money from Cannon's wallet after he had fallen asleep.[142] Cannon awoke and grabbed Miller by the throat, at which point Smith jumped in and struck Cannon with a baseball bat.[143] Miller grabbed the bat and struck Cannon repeatedly before he placed a sheet over Cannon's face and walked out the door.[144] Soon after, the two decided to return to Cannon's trailer to cover up their crime.[145] Miller and Smith lit two fires which, combined with Cannon's injuries, ultimately led to his death.[146]

Miller's case was quickly removed from juvenile to adult court where he was charged as an adult with murder in the course of arson.[147] A jury found Miller guilty, and, in light of Alabama's mandatory minimum sentence of life without possibility of parole for crimes including murder by arson, Miller was sentenced to life without possibility of parole at fourteen years old.[148] The Alabama Court of Criminal Appeals affirmed the sentence, holding "life without possibility of parole was 'not overly harsh when compared to the crime,' and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment."[149]

137. *Miller*, 132 S. Ct., at 2469.
138. *Id.* at 2462.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id*.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2462–63.
148. *Id.*
149. *Id.* at 2463 (citation omitted).

The Supreme Court reversed, relying in large part on its reasoning presented in *Graham v. Florida* and *Roper v. Simmons*.[150] Specifically, "*Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without possibility of parole for a child who has committed a nonhomicide offense."[151]

According to the Court, the confluence of these two lines of precedent, categorical bans on disproportionate sentences, and requisite individualized sentencing in capital cases, "leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[152] The Court concluded that these mandatory penalty schemes are problematic in that they:

> preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other-the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.[153]

These mandatory penalty schemes, by precluding a judge from considering potential mitigating factors associated with youth, "contravene *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[154] Therefore, the Court reversed. It held that, "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of

150. *Id.* at 2464.

151. *Id.* at 2463.

152. *Id.* at 2464.

153. *Id.* at 2467–68.

154. *Id.* at 2466. Elizabeth Scott and Laurence Steinberg reject the binary classifications of child versus adult, and focus on the unique category of "adolescence" as a wholly separate category from both children, and adults. Scott and Steinberg urge that, "the use of binary categories has not worked well as a framework for juvenile justice policy, whether young offenders are treated as children, as they were in the traditional juvenile justice system, or as adults, as they increasingly are today. Binary classification has reinforced simplistic understandings of young offenders' criminal responsibility." Scott & Steinberg, *supra* note 103, at 804. Furthermore, Scott and Steinberg argue that because of the focus on forcing adolescents into the category of a blameless child, or a fully culpable adult, "questions about the mitigating effects of immaturity in assessing criminal culpability are seldom addressed." *Id.*

parole for juvenile offenders . . . we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[155] The Court did not deny, nor attempt to detract from, the clearly vicious nature of Miller's crime.[156] However, in light of the reasoning presented in *Graham* and *Roper*, it recognized that the sentencing judge was precluded from considering applicable mitigating factors associated with Miller's age as a result of the mandatory sentencing scheme.[157] The Court, in support of its determination that certain mitigating factors should have been considered, reiterated the grave reality of Miller's upbringing, including his alcoholic and drug addicted mother, abusive stepfather, and history of multiple suicide attempts, beginning at just six-years-old.[158]

Miller held that a mandatory sentence of life without possibility of parole upon a juvenile offender violates the Eighth Amendment by "preclude[ing] a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[159] Therefore, the Court prescribed that sentencers, when considering whether to sentence juvenile offenders to life without possibility of parole, "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[160] Specifically, *Miller* identified the following hallmark features of youth that should be considered before sentencing juveniles to life without possibility of parole: immaturity, impetuosity, failure to appreciate risks and consequences, brutal or dysfunctional family and home environments, impacts of peer pressure, and the circumstances of the crime itself, including the extent of the juvenile's involvement.[161]

After *Miller* held that imposing a *mandatory* sentence of life without the possibility of parole upon a minor violates the Eighth Amendment, the Supreme Court examined the constitutionality of imposing a *discretionary* sentence of life without possibility of parole in *People v. Gutierrez,* in 2012.[162] Luis Angel Gutierrez, who was seventeen years old when he raped and murdered his aunt, was

155. *Miller*, 132 S. Ct. at 2469.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 2467.
160. *Id.* at 2469.
161. *Id.* at 2468.
162. People v. Gutierrez, 58 Cal. 4th 1354, 249, 252 (2012).

convicted of first-degree special circumstance murder and sentenced to life without possibility of parole under Penal Code 190.5, subdivision (b).[163] California Penal Code §190.5(b), an example of a statutory exclusion provision, states that the penalty for sixteen or seventeen-year-old juveniles who commit first-degree special circumstance murder "shall be confinement in the state prison for life without the possibility of parole or, at the discretion court, 25 years to life."[164] Finding that the trial court and the California Court of Appeal had failed to exercise discretion and consider the unique factors associated with youth prescribed by section 190.5 and *Miller*, the California Supreme Court remanded *Gutierrez* for resentencing in light of the principles set forth in *Miller*.[165]

Collectively, these cases recognize what social science research demonstrates, which is that juveniles are fundamentally different from adults and have certain unique characteristics associated with their youth that render them inappropriate recipients of the law's most severe punishments.[166] These findings emphasize the importance of exercising judicial discretion when sentencing minors and of abrogating the practices that sentence juveniles as adults without consideration of their immaturity, impetuosity, and potential for rehabilitation.[167] The emphasis on supporting judicial discretion should inform the development of judicial transfer and waiver laws in the future. As was discussed in Part II, discretionary transfer statutes are consistent with these Supreme Court holdings as they allow for the opportunity to consider relevant factors before making a determination to transfer jurisdiction from juvenile to adult court. A juvenile's case should not be directly filed in adult court or automatically transferred to adult court because such practices fail to consider the unique factors associated with youth as identified by social and psychological research on juvenile development, and as recognized by the Supreme Court, over the past decade.

163. *Id.* at 1366–67.

164. CAL. PENAL CODE § 190.5(b) (West 2014).

165. *Gutierrez*, 58 Cal. 4th at 249–50.

166. *See Miller,* 132 S. Ct. at 2468.

167. Roper v. Simmons, 543 U.S. 551, 571 (2004).

IV. A Look at the Physical and Psychological Impacts of Sentencing Juveniles in Adult Criminal Court

In light of recent Supreme Court precedent assessing the constitutionality of imposing harsh sentences on juvenile offenders, legislation has been passed to provide parole opportunities to the countless youth serving life sentences in adult prisons throughout the United States.[168] States including Iowa, Florida, Missouri, and Alabama, however, provide opportunities for release only after a juvenile serves at least fifty years in prison.[169] Though the development of parole opportunities is a step in the right direction, a look into the physical and psychological risks faced by juveniles incarcerated in adult prisons reveals a grim situation that cannot be sufficiently remedied by eventual release. Providing parole opportunities fifty years down the road ignores the devastating reality faced by juveniles in adult prisons on a daily basis. Such a remedy, it seems, is too little, too late.

A. There Are No Adequate Means of Protecting Juveniles in Adult Prisons

The Juvenile Justice and Delinquency Prevention Act requires that youth in the juvenile justice system be removed from adult jails or sight and sound separated from other adult inmates.[170] However, this protection does not apply to juveniles sentenced to adult jails or prisons through the adult criminal justice system.[171] This raises the

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168. Kelly Orians, *One Year Later: State Level Response and Implementation of Miller v. Alabama*, NAT'L CTR. FOR YOUTH LAW (Oct. 1, 2013), http://youthlaw.org/publication/one-year-later-state-level-response-and-implementation-of-miller-v-alabama/. Specifically, states have made efforts to (1) bring their sentencing statutes into compliance with the ban on *mandatory* sentencing, (2) determine whether the ruling is retroactive, (3) provide youth with a meaningful and realistic opportunity for release, and (4) reform their juvenile-to-adult court transfer processes in general. *Id.*

169. *Id.*

170. A Campaign for Youth Justice Report, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUSTICE, (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf. Sight and sound separation is required by the Juvenile Justice and Delinquency Prevention Act, and is a provision which "seeks to prevent children threats, intimidation, or other forms of psychological abuse and physical assault. Under "sight and sound," children cannot be housed next to adult cells, share dining halls, recreation areas, or any other common spaces with adults, or be placed in any circumstance that could expose them to threats of abuse from adult offenders. *Sight and Sound Separation*, COALITION FOR JUVENILE JUSTICE (Apr. 29, 2015, 5:44 PM), http://www.juvjustice.org/juvenile-justice-and-delinquency-prevention-act/sight-and-sound-separation.

171. *Jailing Juveniles, supra* note 171.

question, how then do we protect juveniles incarcerated in adult prisons? The answer is, unfortunately, we really have not developed adequate means of protecting juveniles in adult prisons, and the effects have been devastating.[172]

What is increasingly becoming known as the "no-win" situation, prison guards are faced with the options of either (a) leaving juveniles in the general adult prison population, or (b) isolating them from the general population where they may be in complete isolation for up to twenty-three hours a day. The integration involved in option (a) leaves juveniles at a significantly increased risk of physical and sexual assaults while the isolation involved in option (b) puts them at risk of exacerbating existing mental conditions, developing depression and, most severely, at an increased risk of committing suicide.[173]

B. Juveniles Housed in Adult Prisons Face an Increased Risk of Suicide and Sexual Victimization

The rates of suicide and sexual victimization of juveniles in adult prisons throughout the United States illustrate the insufficiency of providing eventual parole opportunities as an adequate remedy. By the time many juveniles are ultimately released, the damage has been done. Juveniles in adult prisons are subject to extreme and traumatic sexual assaults and often develop irreparable anxiety and depression. Worst of all, some juveniles forgo the opportunity for release altogether as taking their own life becomes more bearable than the reality they are forced to endure on a daily basis.

Youth are nineteen times more likely to commit suicide in jail than youth in the general population and thirty-six times more likely to commit suicide in adult jail than are youth housed in juvenile detention facilities.[174] One effect of adjudicating juveniles in adult courts is that they are housed in adult jails even if in connection to crimes that may never lead to a conviction.[175] This practice demonstrates the lack of consideration our justice system puts toward the potentially adverse impact that even short stays in adult jails or prisons can have on incarcerated youth. Not only does incarceration subject juveniles to an increased risk of physical and sexual violence,

172. *Id.*

173. *Id.*

174. *Id.*

175. The Editorial Board, *Throwing Away Young People: Prison Suicide,* N.Y. TIMES (Nov. 21, 2007, 12:33 PM), http://theboard.blogs.nytimes.com/2007/11/21/throwing-away-young-people-prison-suicide/?_r=0.

but it also puts this vulnerable population at risk of influence by hardened criminals and ignores the potential they have for rehabilitation in the juvenile justice system.[176]

According to *Jailing Juveniles*, a 2007 report by a Washington-based advocacy group, Campaign for Youth Justice, statistics show that suicides in jails were "heavily concentrated in the first week spent in custody (48%) with almost a quarter of suicides taking place on the day of admission to jail (14%) or on the following day (9%)."[177] Direct file and automatic transfer statutes give judges and prosecutors complete discretion to place children in adult criminal jurisdiction, sentence them to a number of weeks, months, or even years in adult prisons, and then turn a blind eye to what we know very likely will happen to them once they get there. There must be a greater awareness of the impacts of adjudicating juveniles in adult criminal courts and the very real effects these can have on a juvenile's life.

When looking at the numbers of juvenile offenders who are physically and sexually abused in adult jails and prisons, it is important to remember that many such crimes go unreported, so the true numbers are unfortunately higher than reported.[178] According to the Bureau of Justice Statistics, youth under the age of eighteen represented 21% of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13% in 2006.[179] This number is disproportionately high given that only 1% of inmates are juveniles.[180] A former juvenile inmate who was raped and abused while in prison notes that, once released, juveniles are "coming back into society indelibly marked by what they've experienced—either traumatized by sexual assault or hyper-violent from having learned to fend off the threat."[181]

These statistics on the physical and sexual abuse endured by juveniles in adult prisons, how vulnerable juveniles are to the

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176. *Id.*

177. *Jailing Juveniles, supra* note 171, at 10 (citing C.J. Mumola, *Suicide and Homicide in State Prisons and Local Jails*, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STANDARDS).

178. Aviva Shen, *Teenagers in Adult Prisons More Likely to be Sexually Abused by Staff, DOJ Finds*, (May 16, 2013, 4:30 PM), http://thinkprogress.org/justice/2013/05/16/2023511/teenagers-in-adult-prisons-more-likely-to-be-sexually-abused-by-staff-doj-finds/.

179. Liz Ryan, *Op-Ed: There's No Excuse for Keeping Children in Adult Prisons,* (Mar. 5, 2015, 11:47 PM), http://www.takepart.com/article/2013/03/12/op-ed-theres-no-excuse-keeping-children-adult-prisons.

180. *Id.*

181. Shen, *supra* note 178.

influence of hardened criminals, and the increased rate of recidivism by juveniles released from adult facilities as opposed to those leaving juvenile facilities, clearly illustrate the mistake our justice system is making in sentencing juveniles in the adult criminal court. Despite research indicating that juveniles are not well served in adult prisons, that the goals of the juvenile justice system are completely ignored, and that juveniles will likely face traumatic abuse, state legislators continue to enact policies and practices that grant judges and prosecutors the authority to file juveniles' cases in adult court based solely on the juvenile's age in combination with the crime committed. Section V presents a proposal for states to modify their juvenile waiver legislation to ensure that juveniles receive their constitutionally protected due process rights before a waiver order may be issued.

V. Proposal: Discretionary Transfer Statutes and Recent Supreme Court Precedent Should Influence State Legislators in Seeking the Ultimate Abrogation of Automatic Waiver Statutes

In *Kent v. United States*, the Court held that before a juvenile could face transfer to adult criminal court, that juvenile had a right to a hearing, representation by counsel, access to social service records, and a written statement detailing the reasons in support of the waiver.[182] Even though juvenile crime rates have since decreased, the post-*Kent* increases in juvenile crime rates in the mid-1980s and mid-1990s had a lasting effect on states' policies about how to best deal with juvenile offenders.[183] As a result, the *parens patriae*-focused emphasis, once put toward protecting and rehabilitating juvenile offenders, was replaced with legislation and statutes that treat juveniles as fully culpable adults. These statutes, which facilitate the funneling of juveniles into adult prisons throughout the United States, continue to exist despite being in clear conflict with empirical evidence indicating that such placements are ineffective for both juveniles, and society as a whole.

A. Looking Ahead: The Reasons to Modernize Juvenile Waiver Statutes

As a result of research on juvenile development in the eighteenth and nineteenth centuries, came the idea that there was a disconnect

182. Kent v. United States, 383 U.S. 541, 554 (1966).

183. Hansen, *supra* note 33.

between rehabilitating juveniles, and imprisoning them.[184] Research proved that juveniles were not amenable to the adult criminal justice system's focus on punishment, and, in response, reform groups advocated the development of a separate system.[185] Reformers advocated the development of a system that rehabilitated juvenile offenders rather than punishing them, in hopes that their time in a juvenile facility would render them able to learn from their mistakes, reenter society, and not make those same mistakes again.[186]

Despite research that children were not amenable to the goals of criminal justice system, that they were not as culpable as adults, and that they were not served by incarceration in adult prisons, the eventual increase in juvenile crime rates in the mid-1990s changed the treatment of juvenile offenders, and this change is evidenced by the 250,000 juveniles currently housed in adult prisons throughout the United States.[187] Empirical, psychological, and sociological research on juvenile and adolescent development tells us not only that imprisoning juveniles with adult criminals does not serve the juvenile, but it also tells us that such practices fail to serve society because juveniles in adults prisons are statistically more likely to become recidivists than those sentenced to juvenile facilities.[188] Statistics shows that juveniles sentenced to adult prisons are significantly more likely to face physical and sexual assaults than adults housed in those same prisons.[189] Furthermore, prison overcrowding is a documented and serious problem in prisons throughout the United States.[190] Prisons have been unable to function effectively due to overcrowding and, in recent years, have even been ordered to release prisoners to reduce overpopulation.[191] Despite severe overpopulation, states continue to employ waiver statutes that funnel juvenile offenders, many of whom are convicted of non-violent crimes, into these already overextended prisons.[192] Decades of research prove that sentencing juveniles to time in adult prison does not serve the juvenile or society.[193] In light of this research, automatic waiver statutes that

184. Mole & White, *supra* note 21, at 1.
185. *Id.*
186. *Id.*
187. Hansen, *supra* note 33; Arya, *supra* note 80.
188. Fagan, *supra* note 115.
189. Shen, *supra* note 178.
190. Wyler, *supra* note 92.
191. *Id.*
192. Arya, *supra* note 80.
193. Scott & Steinberg, *supra* note 103.

mandate juvenile adjudication in adult court, and sentencing in adult prison, are inappropriate in today's society.

B. Automatic Waiver Statutes Should Be Abrogated in Favor of Discretionary Statutes That Mandate a Pre-Waiver Hearing and Original Jurisdiction in Juvenile Court

As discussed above, waiver statutes, employed in one form or another by each of the fifty states, generally fall into one of two categories, judicial waiver or automatic waiver.[194] Judicial waiver statutes, comprised of discretionary, presumptive, and mandatory statutes, are utilized in cases arising in juvenile court jurisdiction.[195] Cases subject to judicial waiver statutes originate in juvenile court and may or may not, subject to judicial discretion, be waived to adult court.[196] Automatic waiver statutes on the other hand, consisting of direct file and statutory exclusion statutes, allow for a judge or prosecutor to automatically file a juvenile's case in adult criminal court, without going through the juvenile court system.[197]

The constitutionally required due process protection articulated in *Kent v. United States*, that a juvenile court hearing be conducted before a juvenile is transferred to adult court, simply does not apply to cases subject to direct file or statutory exclusion statutes.[198] As a result, judges and prosecutors, looking generally at the juvenile's age and the offense committed, are sentencing juvenile offenders to overcrowded, and in all likelihood dangerous, adult prisons without so much as an informal hearing to assess their level of culpability or amenability to rehabilitation in a juvenile facility. If juveniles are to be waived from juvenile to adult court, an action with the potential to impose grave consequences on the duration of their life, they should, at the very least, be granted their constitutionally protected right to a hearing in juvenile court before any such waiver determination can be made.

Of the fifty states, five states, including Connecticut, Kentucky, North Carolina, West Virginia, and New Jersey, do not employ any automatic waiver statutes (direct file, statutory exclusion, or "once an

194. PATRICK GRIFFIN ET AL., *supra* note 37.

195. *Id.*

196. *Id.*

197. *Id.*

198. Snyder, et al., *supra* note 66.

adult, always an adult").[199] New Jersey provides a model of what states' juvenile waiver legislation would look like if automatic waiver statutes were to be abrogated. Of the three subcategories of judicial waiver, mandatory, discretionary, and presumptive, New Jersey employs only discretionary and presumptive statutes.[200] Because these are judicial, rather than automatic waiver statutes, the juvenile court has original jurisdiction, meaning that each case subject to waiver must begin in juvenile court.[201] Each of New Jersey's waiver statutes set the minimum age at which a juvenile may be eligible for waiver at fourteen years old.[202]

New Jersey's discretionary waiver statute allows, on motion by the prosecutor, the juvenile court to waive jurisdiction of a juvenile who is at least fourteen years old and meets the statutory offense/record criteria if it finds "(1) that there is probable cause to believe the child committed the alleged offense and (2) that the State has proven 'that the nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public require waiver.'"[203] Regardless of whether the court grants or denies the motion, all of its reasons must be stated in writing.[204]

The presumptive waiver statute in New Jersey differs from the discretionary waiver statute in that it does not require that the State make a showing that the public interest requires a waiver.[205] In order to waive jurisdiction in a case meeting the age/offense criteria subject to presumptive waiver, the court needs only to find probable cause to believe that the child committed the alleged offense.[206] However, if the juvenile "can show that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court

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199. These five states employ the following judicial waiver statutes: Connecticut: mandatory; Kentucky: discretionary and mandatory; North Carolina: discretionary and mandatory; West Virginia: discretionary and mandatory; New Jersey: discretionary and presumptive. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Appendix: Summary of Transfer Laws*, (May 11, 2015, 5:53 PM), http://www.ojjdp.gov /pubs/tryingjuvasadult/appendix.html.

200. *Id.*

201. Mole & White, *supra* note 21, at 8.

202. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Appendix: Summary of Transfer Laws*, (May 11, 2015, 5:53 PM), http://www.ojjdp.gov/pubs/trying juvasadult/appendix.html.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

prior to. . .reaching the age of nineteen substantially outweighs the reasons for waiver, waiver shall not be granted."[207]

New Jersey's discretionary and presumptive waiver statutes each mandate original jurisdiction in juvenile court and a mandatory pre-waiver hearing and, as such, are consistent with the constitutionally protected due process right articulated in *Kent*. By conducting these hearings in juvenile court before a waiver order may be issued, the juvenile is given the chance to demonstrate his or her amenability to juvenile court, and the judge is required to consider the facts and circumstances specific to that particular juvenile, and his or her particular offense.

If more states were to model their juvenile waiver legislation after New Jersey's, all juveniles would be granted their constitutionally protected due process right to a pre-waiver hearing as mandated in *Kent*. Such a model would not limit a state's ability to waive jurisdiction in cases where it is warranted; it would simply require that a juvenile's constitutional rights be protected before any such action is taken. Ultimately, the decision whether to waive is made by the judge, and discretionary and presumptive waiver statutes preserve the judge's authority while, at the same time, ensuring that the juvenile's right to due process is protected. Consistent with the findings in *Kent*, and supported by *Roper*, *Graham*, *Miller*, and *Gutierrez*, state legislators should abrogate currently enacted direct file and statutory exclusion laws in favor of discretionary waiver laws that mandate an individualized assessment at a pre-waiver hearing before a juvenile's case can be filed in, or transferred to, adult criminal court.

Conclusion

Abrogating automatic waiver statutes and supporting the use of discretionary and presumptive waiver statutes preserves society's right to protection from those juvenile offenders who truly are not amenable to rehabilitation in the juvenile justice system while also protecting juvenile offenders' constitutional rights. Furthermore, presumptive and discretionary waiver statutes ensure that due consideration is given to each juvenile's case before a waiver determination is made. Such consideration is particularly important in light of the potentially devastating impacts of sentencing a juvenile to time in an adult prison. The majority of automatic waiver

207. *Id.*

legislation in place today was enacted in response to the increase in juvenile crime from a period that ended over two decades ago.[208] It is time to allow what we know about juvenile development and the impacts of juvenile incarceration, rather than the past, to inform the development of modern juvenile adjudicatory laws and policies across the United States.

208. Hansen, *supra* note 33.