

**THE JUVENILE JUSTICE SYSTEM:  
A WOLF IN SHEEP'S CLOTHING**

  
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# THE JUVENILE JUSTICE SYSTEM: A WOLF IN SHEEP'S CLOTHING

## INTRODUCTION

Mychal Bell, Timothy Byers, Alfonso Price, Sergei Carlson, Dario Ingle, Andre Green, Nathan Brazill, Lionel Tate . . . the list of juveniles committing serious and violent crimes continues to grow at a frightening pace.<sup>1</sup> Even more frightening is the increasing number of juvenile offenders that are tried as adults. Over 1.6 million juveniles are adjudicated in the juvenile court system each year.<sup>2</sup> Of those 1.6 million, it is estimated 200,000 are transferred to the adult criminal system via prosecutorial, judicial or mandatory waiver.<sup>3</sup> Why is a system founded on the philosophy of rehabilitation transferring an alarming number of juveniles to the adult criminal system? Is it simply a matter of appeasing a society outraged at the increase in

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<sup>1</sup> Mychal Bell, 16 years old, along with five other teens (known as the “Jena Six”), was originally charged with attempted murder of another teen. *Court Rules ‘Jena 6’ Defendant to Stay Behind Bars*, CNN, Sept. 21, 2007 available at <http://www.cnn.com/2007/US/law/09/21/jena.hearing/index.html>. The charges were subsequently reduced and he was convicted of aggravated battery and conspiracy. *Id.* Both convictions were overturned on the grounds that the defendant should have been tried as a juvenile, not as an adult, on the reduced charges. *Id.* Timothy Byers, 10 years old, charged with arson and murder in the deaths of his mother and four others. Tom Beyerlein, *Boy, 10, Charged In Fatal Fire Could Get Life In Prison*, SPRINGFIELD NEW-SUN, Sept. 29, 2007, available at <http://www.springfieldnewssun.com/n/content/oh/story/news/local/2007/09/28/ddn092907darke.html>. Alfonso Price, 15 years old, charged with aggravated murder and felonious assault of his girlfriend and unborn child. *Teen Charged in Fetus Murder to be Charged as Adult*, WKRC TV CINCINNATI, Aug. 29, 2007 available at [http://www.local12.com/News/Local/story.aspx?content\\_id=ED1213FD-A927-4110-B5F3-3FA86A5F3827&gsa=true](http://www.local12.com/News/Local/story.aspx?content_id=ED1213FD-A927-4110-B5F3-3FA86A5F3827&gsa=true). Sergi Carlson, 15 years old, charged with murder and a deviate sexual act after. Dave Kolpack, *Fargo Teen Accused of Killing Sister Appears in Adult Court*, The Bismark Tribune, Sept. 27, 2007, <http://www.bismarktribune.com/articles/2007/09/27/news/state/140028.prt>. Dario Ingle, 16 years old, charged with stabbing his father. Donna J. Miller, *Teen Accused of Stabbing His Father at Firestone High School*, THE PLAIN DEALER, Oct. 5, 2007, [http://blog.cleveland.com/metro/2007/10/16yearold\\_stabs\\_his\\_father\\_at.html](http://blog.cleveland.com/metro/2007/10/16yearold_stabs_his_father_at.html). Andre Green, 13 years old, found guilty of first degree sexual assault and currently serving twenty-eight years in prison. *State v. Green*, 502 S.E.2d 819, 822-23 (N.C. 1998). Nathan Brazill, 13 years old, convicted of second degree murder and aggravated assault with a firearm. *Brazill v. State*, 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003). Lionel Tate, 12 years old, indicted for first-degree and felony murder. *Tate v. State*, 863 So.2d 44 (Fla. 4th Dist. Ct. App. 2003). Tate’s conviction would later be reversed. Andrew M. Carter, *Age Matters: The Case For A Constitutionalized Infancy Defense*, 54 U. KAN L. REV. 687, 692 (2006).

<sup>2</sup> C. Puzzancher, B. Adams, H. Synder and W. Kang, *Easy Access to FBI Arrest Statistics 1994-2004* (2006), <http://ojjdp.ncjrs.gov/ojstatbb/jcsdb> (last visited Nov. 25, 2007); *Youth at Risk: Juvenile Justice and Delinquency Prevention Act*, Legislative and Governmental Advocacy, Government Affairs Office (2007), <http://www.abanet.org/poladv/priorities/juvjustice> (last visited Nov. 25, 2007).

<sup>3</sup> *Youth at Risk: Juvenile Justice and Delinquency Prevention Act*, Legislative and Governmental Advocacy, Government Affairs Office (2007), <http://www.abanet.org/poladv/priorities/juvjustice> (last visited Nov. 25, 2007).

juveniles that commit serious and violent crimes? Is it a matter of using transfer to the adult criminal system to set an example for or deter other juveniles? What ever the reason behind the increase in transfers, the transfer of juveniles to adult criminal court needs to be addressed.

Juveniles commit crimes and should be held accountable for those crimes. However, juveniles should be held accountable in accordance with their age, stage of development (“competency”) and with an eye toward rehabilitation. As the Supreme Court stated in *Roper v. Simmons*, “From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>4</sup> The Court is not espousing a new theory. “Historically, Americans have viewed juvenile delinquents as less culpable than adult offenders.”<sup>5</sup> Even the founders of the juvenile court based the system upon that belief and, hence, focused the system on the rehabilitation of the child.

In the eyes of juvenile justice, a juvenile is any person under the legal adult age, which in most states is any person age 18 or younger. Several states, such as New York, Connecticut, and North Carolina, consider a juvenile to be age 16 or under.<sup>6</sup> Wyoming is the only state that has established the age of juveniles to be 19 or under.<sup>7</sup> However, juvenile justice no longer holds steadfast to those age requirements. In alarming rates, juveniles are being transferred or waived into adult criminal court, and convicted and sentenced as adults, regardless of age. No other area of the law treats juveniles as having the same capacity as adults. Juveniles are not capable of entering into a contract, are not eligible to vote and are not permitted to marry. Yet under

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<sup>4</sup> *Roper v. Simmons*, 105 S.Ct 1183, 1185 (2005).

<sup>5</sup> Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis Of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 373 (1998).

<sup>6</sup> Juvenile Justice Background, FindLaw for The Public, <http://criminal.findlaw.com/crimes/juvenile-justice/juvenile-justice-background.html> (last visited Nov. 25, 2007).

<sup>7</sup> *Id.*

criminal law, in most states, juveniles are presumed as fully responsible as an adult. When juveniles are transferred to the adult criminal system, they go through complex legal proceedings, make decisions regarding pleas and can be sentenced to prison for life, all without regard to their age and competency.

The juvenile court system, by transferring an inordinate number of juveniles to the adult criminal system, is abandoning the concept of adolescence to the detriment of the child and society. The purpose of this article is to expose the current state of the juvenile justice system, particularly the process of transferring juvenile offenders to the adult criminal system, and explore alternatives to the transfer process that would return the juvenile justice system closer to its original intent. Part I reviews the history of the juvenile justice system, the philosophy behind a separate juvenile court, and the Supreme Court decisions that would forever alter the juvenile court. Part II uncovers the transformation of the juvenile justice system to its current status, including an in depth review of the process of transferring juveniles to adult criminal court. This section discusses the methods by which juveniles are transferred to adult criminal court and the problems associated with each method, as well as, discusses the lack of a determination as to whether the juvenile is even competent to be transferred to adult criminal court. Part III calls for reauthorization of the Juvenile Justice and Delinquency Prevention Act and proposes a reformed transfer process that is intended to reduce the controversies and problems associated with the current juvenile justice system. The article concludes with a call for change and hope for the future of the juvenile justice system.

## **I. THE JUVENILE JUSTICE SYSTEM AS A SHEEP**

Prior to the reform movement of the 1800's, juveniles who committed criminal offenses

were often treated like adults.<sup>8</sup> The common law system delineated rules for trying juveniles as adults based upon age.<sup>9</sup> Under the common law system, juveniles over fourteen faced “adult criminal conviction and confinement in an adult prison.”<sup>10</sup> Juveniles under seven were deemed incapable of possessing criminal intent and presumed not responsible for their criminal acts.<sup>11</sup> Juveniles between seven and fourteen were also presumed not responsible for their criminal acts, but the presumption could be rebutted.<sup>12</sup> While the common law infancy defense “acknowledged physical and mental immaturity” of the juvenile, the system still adjudicated juveniles in a punitive fashion, sentencing them to “long prison sentences . . . mixed in jails with hardened criminals.”<sup>13</sup>

During the 1800’s, various groups known as the Progressives<sup>14</sup> pushed for reform of the common law system that “detained, tried, and punished children in the same manner as adults.”<sup>15</sup> The Progressives believed that juveniles were “in need of care and guidance, not punishment.”<sup>16</sup> Since juveniles “were not morally accountable for their behavior due to their limited cognitive, social and moral development,” the Progressives pushed for a rehabilitative system “focused on restoring youth to industrious members of society.”<sup>17</sup> Justice Fortas set forth the views of the Progressives when writing for the majority in *In re Gault*:<sup>18</sup>

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<sup>8</sup> *Observations Concerning State Juvenile Justice Reform*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, available at <http://ojjdp.ncjrs.org/pubs/reform/ch4.html>.

<sup>9</sup> Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings – Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629, 633 (1995).

<sup>10</sup> Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 780 (2002).

<sup>11</sup> Brummer, *supra* note 10, at 780; Susan A. Burns, Comment, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335, 337 (1996).

<sup>12</sup> Brummer, *supra* note 10, at 780.

<sup>13</sup> Klein, *supra* note 5, at 376.

<sup>14</sup> *Id.*

<sup>15</sup> Ruth E. Stone, *History and Philosophy of the Juvenile Court*, FLORIDA JUVENILE LAW AND PRACTICE, The Florida Bar 1-1, 1-6 (LexisNexis 2005).

<sup>16</sup> Klein, *supra* note 5, at 375.

<sup>17</sup> Kellie M. Johnson, *Juvenile Competency Statutes: A Model For State Legislation*, 81 IND. L.J. 1067, 1069 (2006).

<sup>18</sup> *In re Gault*, 387 U.S. 1 (1966).

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentence and mixed in jails with hardened criminals. They were convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent' but 'what he is, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child – essentially good, as they saw it – was made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial.<sup>19</sup>

The English common law doctrine of *parens patriae* formed the basis of the Progressives' beliefs.<sup>20</sup> *Parens patriae* is the notion that the state has power, as the ultimate parent, to the care, custody and control of a child when the parent is unable or unwilling to control the child and the child is unable to care for himself.<sup>21</sup> Thus, the Progressives believed the "state had an affirmative duty to intervene [and] care for 'its least fortunate citizens'."<sup>22</sup> It was the *parens patriae* doctrine that justified the creation of the first juvenile court.<sup>23</sup>

### **A. The First Juvenile Court**

As a response to the Progressives, in 1899, the Illinois legislature formed the first juvenile court in Cook County, Illinois.<sup>24</sup> The legislature's purpose behind establishing a juvenile court was aptly stated by the Cook County Bar Association:

The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under such adverse social or individual conditions as . . . crime . . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.<sup>25</sup>

Other states followed but it would take almost 50 years for every state to have a version of

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<sup>19</sup> *In re Gault*, 387 U.S. at 15.

<sup>20</sup> Johnson, *supra* note 17, at 1069; *see also* Burns, *supra* note 11, at 337. *Parens patriae* translated literally means "parent of the country." Stone, *supra* note 15, at 1-4.

<sup>21</sup> Brummer, *supra* note 10, at 784; *see also* Johnson, *supra* note 17, at 1069-70 and Burns, *supra* note 11, at 337-8.

<sup>22</sup> Klein, *supra* note 5, at 376.

<sup>23</sup> Stone, *supra* note 15, at 1-4.

<sup>24</sup> Brummer, *supra* note 10, at 782; *see also* Burns, *supra* note 11, at 337.

<sup>25</sup> Stone, *supra* note 15, at 1-3.

juvenile court.<sup>26</sup>

The juvenile court was designed to oversee dependent, neglected and delinquent juveniles and was, in general, nothing like the criminal justice system.<sup>27</sup> The juvenile court focused on the rehabilitation of juvenile offenders and granted judges broad authority to “administer ‘personalized justice’ to achieve that goal.”<sup>28</sup> The structure of the court was different from the criminal justice system; “more like a social agency than a court.”<sup>29</sup> Dispositions were based upon the “best interest of the child” with the juvenile “offered assistance, treatment and guidance as part of the disposition.”<sup>30</sup> Proceedings were civil, not criminal, less formal in nature, and conducted in privacy with records sealed.<sup>31</sup> Even the language used in the juvenile system was changed to reflect the rehabilitative focus. Juveniles “were not arrested but merely taken into custody.”<sup>32</sup> “Children were not found guilty, but adjudicated delinquent.”<sup>33</sup>

Despite the founding belief that “children should not be held to the same level of accountability as adults”<sup>34</sup> and other explicit differences from the adult criminal system, the juvenile court retained the option to transfer serious offenders to criminal court for prosecution.<sup>35</sup> “The law vested juvenile court judges with sole authority to determine whether juveniles should be transferred to the adult system.”<sup>36</sup> While the court followed the rehabilitative philosophy, it determined some juveniles were not amenable to rehabilitation, and thus, “beyond its reach.”<sup>37</sup>

The juvenile court was premised on good intentions; however, the juvenile court lacked

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<sup>26</sup> Randi-Lynn Smallheer, Note, *Sentence Blending And The Promise Of Rehabilitation: Bringing The Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 265 (1999).

<sup>27</sup> Klein, *supra* note 5, at 376; *see also* Burns, *supra* note 11, at 337; Brummer, *supra* note 10, at 783.

<sup>28</sup> Johnson, *supra* note 17, at 1069.

<sup>29</sup> Smallheer, *supra* note 26, at 265.

<sup>30</sup> Klein, *supra* note 5, at 377.

<sup>31</sup> *Id.*

<sup>32</sup> Brummer, *supra* note 10, at 785.

<sup>33</sup> Klein, *supra* note 5, at 377.

<sup>34</sup> *Id.* at 375.

<sup>35</sup> *Id.* at 377.

<sup>36</sup> Burns, *supra* note 11, at 339.

<sup>37</sup> *Id.*

procedural safeguards offered under the United States Constitution.<sup>38</sup> The lack of procedural safeguards was intentional as many believed the due process rights afforded in the adult criminal justice system were unnecessary since the “emphasis [in juvenile court] was on rehabilitation.”<sup>39</sup> The juvenile court would exist for almost seventy years before its operations would be reviewed by the United States Supreme Court.<sup>40</sup>

## **B. The United States Supreme Court Intervenes and Redefines Juvenile Justice**

Due to the lack of procedural safeguards, “the juvenile courts operated without adherence to strict legal processes and without any consideration of basic constitutional rights.”<sup>41</sup> Juveniles, supposedly under the watchful eye of a rehabilitative system designed to serve their best interests, were instead adjudicated “arbitrarily and unfairly punished.”<sup>42</sup> In 1966 with its decision in *Kent v. United States*, the Supreme Court would, for the first time, address growing concerns over the lack of procedural safeguards. Following *Kent*, the Supreme Court decided additional cases that dramatically affected the proceedings in juvenile court. The Supreme Court decisions provided juveniles with “procedural protections like those afforded criminal defendants.”<sup>43</sup> Some argued, however, that the Supreme Court decisions did not just provide due process but also blurred the distinction between the juvenile court and the criminal justice system, setting the juvenile court towards a punitive path and a definite shift of philosophy.<sup>44</sup>

### **1. *Kent v. United States*<sup>45</sup>**

Morris A. Kent, Jr., age fourteen, was first taken into custody for breaking into houses

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<sup>38</sup> Brummer, *supra* note 10, at 784.

<sup>39</sup> Steven Bell, *The Aftermath of the Lionel Tate Case*, 28 NOVA L. REV. 575, 578 (2004); Brummer, *supra* note 10, at 784.

<sup>40</sup> Brummer, *supra* note 10, at 785.

<sup>41</sup> *Id.*

<sup>42</sup> Klein, *supra* note 5, at 377.

<sup>43</sup> *Id.* at 381.

<sup>44</sup> *Id.* at 382.

<sup>45</sup> *Kent v. United States*, 383 U.S. 541 (1966).

and snatching purses.<sup>46</sup> Under the jurisdiction of the juvenile court he was released to the custody of his mother and placed on probation.<sup>47</sup> Two years later, at the age of sixteen and still under the jurisdiction of the juvenile court, Kent was taken into custody and questioned about a recent rape at police headquarters.<sup>48</sup> After police interrogation “it appears he admitted involvement in the offense.”<sup>49</sup> Subsequently, Kent was taken to a juvenile home where he was detained without notice to his mother.<sup>50</sup> A day later, Kent’s mother hired an attorney to represent Kent.<sup>51</sup> During detention, discussions took place regarding the possibility of Kent waiving his right to juvenile court; Kent’s attorney opposed waiver and requested examination as Kent was “a victim of severe psychopathy.”<sup>52</sup> Kent’s attorney argued that “the Juvenile Court should retain jurisdiction over the petitioner,” that under the juvenile court he would receive adequate treatment and that under “the aegis of the Juvenile Court, he would be suitable subject for rehabilitation.”<sup>53</sup> “The juvenile court judge did not rule on [the petitioner’s] motions. He held no hearing. He did not confer with petitioner or petitioner’s parents or petitioner’s counsel.”<sup>54</sup> Rather, the court entered an order waiving jurisdiction and allowed Kent to be tried as an adult.<sup>55</sup> In the order, the judge stated he made a “full investigation,” yet reported no findings or gave no reasoning for his decision.<sup>56</sup>

Kent’s attorney filed an appeal citing due process infringements, such as being “denied liberty without probable cause determination,” and being “interrogated by police without counsel

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<sup>46</sup> *Kent*, 383 U.S. at 543.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 544.

<sup>50</sup> *Id.* at 544-45.

<sup>51</sup> *Id.*

<sup>52</sup> *Kent*, 383 U.S. at 545.

<sup>53</sup> *Id.* at 545-46.

<sup>54</sup> *Id.* at 546.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

present.”<sup>57</sup> The Supreme Court took the appeal and reviewed the “proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction.”<sup>58</sup> The Supreme Court found the “order of the Juvenile Court waiving its jurisdiction and transferring petitioner for trial . . . invalid.”<sup>59</sup> Acknowledging the Juvenile Court has substantial discretion to waive and transfer jurisdiction, the Court stated, the Juvenile Court is not permitted to “determine in isolation and without participation or any representation of the child the critically important question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.”<sup>60</sup> The Court admonished the system of law for reaching a result of such tremendous consequence without affording due process rights, reminding the juvenile court that “a court of justice dealing with adults . . . would [not] proceed in this manner.”<sup>61</sup> The Court recognized the “significance of the transfer procedure” and in doing so began to recognize juveniles’ have constitutional rights.<sup>62</sup> In fact, the Court thought the transfer procedure was so significant it mandated a hearing and set forth eight factors for the juvenile court judge to consider when making the decision to transfer juveniles to the criminal justice system.<sup>63</sup> With its decision, the Court established basic due process protections for juveniles and prompted states to incorporate the enumerated factors into their transfer statutes.<sup>64</sup>

Though the Supreme Court had remained silent on the operations of the juvenile court for many decades, the Court could not resist reviewing another juvenile court decision one year

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<sup>57</sup> *Kent*, 383 U.S. at 551.

<sup>58</sup> *Id.* at 552.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 554.

<sup>61</sup> *Id.* at 554.

<sup>62</sup> Burns, *supra* note 11, at 341 (referencing *Kent*, 383 U.S. at 554).

<sup>63</sup> *Kent*, 383 U.S. at 566-67.

<sup>64</sup> Klein, *supra* note 5, at 379. Providing due process protections was mandated by the Supreme Court, but adopting each factor as it was enumerated was not. Ellen Marrus and Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out Of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1170. Most states did incorporate the factors, just not to the same degree. *Id.* Those states that were unhappy with the *Kent* decision circumvented the requirements by passing statutes that “empowered [prosecutors] to make the transfer decision without any procedural safeguards.” *Id.*; see discussion *infra*, Part II.

later. And so the transformation of the juvenile system into an adult criminal justice system continued with the Supreme Court's decision in *In re Gault*.

## 2. *In re Gault*<sup>65</sup>

Gerald Gault, fifteen, was taken into custody as a result of a verbal complaint about a lewd telephone call allegedly made by or in the presence of Gault.<sup>66</sup> Mr. and Mrs. Gault received no notice that Gerald had been taken into custody and detained at the Children's Home.<sup>67</sup> What followed the detention was a series of hearings at which "no records or transcripts were kept, the complaining witness was never present and Gault was not afforded the right to counsel."<sup>68</sup> The culmination of all the hearings resulted in Gault being adjudicated delinquent until the age of twenty-one.<sup>69</sup> Gault appealed the decision.<sup>70</sup>

The Supreme Court once again took the chance to review a decision of a juvenile court and once again admonished the operations of the juvenile court.<sup>71</sup> The Court stated the "Juvenile Court history has again demonstrated that unbridled discretion, however, benevolently motivated, is frequently a poor substitute for principle and procedure."<sup>72</sup> The Court continued by stating that "Under our Constitution, the condition of being a boy does not justify a kangaroo court."<sup>73</sup> Once the Court finished its tirade, it extended additional procedural due process rights to juveniles involved in delinquency proceedings.<sup>74</sup> The Court, in the name of safeguarding "children adjudicated in juvenile courts," afforded "the right to advance notice of charges, the right to counsel, the privilege against self incrimination and the right to confront and cross-

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<sup>65</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>66</sup> *Gault*, 387 U.S. at 4.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> Klein, *supra* note 5, at 379.

<sup>69</sup> *Gault*, 387 U.S. at 7.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> *Id.* at 10-11.

<sup>72</sup> *Id.* at 18.

<sup>73</sup> *Id.* at 28.

<sup>74</sup> *See Gault*, 387 U.S. 1.

examine witnesses.”<sup>75</sup> In so affording due process rights in delinquency adjudications, the Court “found that Gault was the victim of multiple constitutional violations.”<sup>76</sup>

### 3. *In re Winship*<sup>77</sup>

Three years after *Gault*, the Supreme Court would review another juvenile court case concerning due process rights of juveniles. *Winship*, a twelve year old boy, was alleged to have entered a locker and stolen \$112.00 from a woman’s purse.<sup>78</sup> A judge for the New York Family Court found *Winship* delinquent based upon a preponderance of the evidence standard.<sup>79</sup>

*Winship* appealed, contending that the standard required in determining guilt was proof beyond a reasonable doubt.<sup>80</sup> The appellate court affirmed the family court decision, “expressly sustaining” the preponderance of the evidence standard.<sup>81</sup> The Supreme Court granted review.

As noted by the majority in *Winship*, “The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”<sup>82</sup> The Court continued stating “. . . that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”<sup>83</sup> After determining that the Due Process Clause protection includes requiring proof beyond a reasonable doubt to convict the accused in adult criminal court, the Supreme Court addressed “whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation

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<sup>75</sup> Smallheer, *supra* note 26, at 268 (referencing *Gault*, 387 U.S. at 33-56). The Supreme Court limited its decision to only the basic due process rights considered by the Supreme Court of Arizona: notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to transcript and right to appellate review. *Gault*, 387 U.S. at 10-11. The Court chose to “indicate no opinion” about other requirements of the United States Constitution, such as the right to trial by jury. *Id.*

<sup>76</sup> Bell, *supra* note 39, at 588.

<sup>77</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>78</sup> *In re Winship*, 397 U.S. at 360.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 361.

<sup>83</sup> *Id.* at 362.

of a criminal law.”<sup>84</sup> When the appellate court affirmed the family court decision to follow the preponderance of the evidence standard, it reasoned that juvenile proceedings were not criminal, and it distinguished juvenile proceedings from proceedings in adult criminal court, stating, “. . . juvenile proceedings are designed ‘not to punish but to save the child’.”<sup>85</sup> However, the Supreme Court found the lower courts’ reasoning without merit.<sup>86</sup> The Supreme Court looked to its decision in *Gault*, and then concluded that “the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* . . .”<sup>87</sup>

In an eerie foreshadowing of the future, Chief Justice Burger and Justice Stewart stated in their dissent, “The Court’s opinion today rests entirely on the assumption that all juvenile proceedings are criminal prosecutions, hence subject to constitutional limitations. This derives from earlier holdings, which, like today’s holding, were steps eroding the differences between juvenile courts and traditional criminal courts.”<sup>88</sup> They expressed concern that the juvenile court system was being “straightjacketed” into a return to the “pre-juvenile court era” by the majority’s decisions, not only the decision in *Winship* but also by earlier decisions.<sup>89</sup> Unfortunately, Chief Justice Burger and Justice Stewart predicted the progressive dismantling of the juvenile justice system.<sup>90</sup>

#### 4. *Woodard v. Wainwright*<sup>91</sup>

While not a Supreme Court case, *Woodard v. Wainwright* is included in this section because it represents the pervasive attitude of the federal court system regarding rights of

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<sup>84</sup> *Winship*, 397 U.S. at 365.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 365-67.

<sup>87</sup> *Id.* at 368.

<sup>88</sup> *Winship*, 397 U.S. at 375-76 (Burger, C.J. and Stewart, J., dissenting).

<sup>89</sup> *Id.* at 376 (Burger, C.J. and Stewart, J., dissenting).

<sup>90</sup> *Id.* at 376 (Burger, C.J. and Stewart, J., dissenting)

<sup>91</sup> *Woodard v. Wainwright*, 556 F.2d 781 (5<sup>th</sup> Cir. 1977) (certiorari denied).

juveniles in the juvenile justice system.<sup>92</sup> The Fifth Circuit Court of Appeals reviewed two cases in this decision, the case of Woodard, a 16 year old indicted by a grand jury for an offense punishable by life in prison, and the case of Bell, a 16 year old indicted by a grand jury for an offense punishable up to twenty years in prison.<sup>93</sup> Both Woodard and Bell challenged the Florida statute authorizing the state to indict and try juveniles as adults, arguing that the statute violates due process requirements as mandated in *Kent*.<sup>94</sup> In challenging the grand jury indictment, Woodard and Bell “assert[ed] that those standards include a hearing with right to counsel, confrontation and findings of fact.”<sup>95</sup>

The Fifth Circuit distinguished *Kent* and, instead, looked to the decisions of other circuits for their answer.<sup>96</sup> The Fifth Circuit determined that “treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit.”<sup>97</sup> Then, the Fifth Circuit concluded that the legislature was within its rights to divest “the juvenile court of jurisdiction over offenders indicted by a grand jury for crimes punishable by death or life imprisonment” and held that the statute “is not unconstitutional in failing to require a hearing before a juvenile can be tried as an adult.”<sup>98</sup> The Fifth Circuit’s

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<sup>92</sup> Woodard, 556 F.2d 782 (5<sup>th</sup> Cir. 1977) (cert. denied).

<sup>93</sup> *Id.* at 782-83.

<sup>94</sup> *Id.* Woodard and Bell challenged Florida Statute § 39.02(5)(c) which provides: “A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set out in § 39.06(7) unless and until an indictment on such charge is returned by the grand jury, in which event and at which time the court shall be divested of jurisdiction under this statute and the charge shall be made and the child shall be handled in every respect as if he were an adult. No adjudicatory hearing shall be held within fourteen days from the date that the child is taken into custody unless the state attorney advises the court in writing that he does not intend to present the case to the grand jury or that he has presented it to the grand jury but that that the grand jury has declined to return an indictment. Should the court receive such a notice from the state attorney, or should the grand jury fail to act within the fourteen-day period, the court may proceed as otherwise required by law.” Fla. Stat. § 39.02(5)(c) (1977). Now Fla. Stat. § 985.556 (2007).

<sup>95</sup> Woodard, 556 F.2d at 783 (citing *Kent v. United States*, 383 U.S. 541, 557).

<sup>96</sup> *Id.* at 784. The Fifth Circuit considered decisions made by the District of Columbia Court of Appeals, the Fourth Circuit Court of Appeals and the Eighth Circuit Court of Appeals, all of which “upheld the constitutionality of statutes similar to Florida’s which permit juveniles to be treated as adults without a hearing.” *Id.* at 784.

<sup>97</sup> Woodard, 556 F.2d at 785.

<sup>98</sup> *Id.* at 787. The Fifth Circuit applied rational basis scrutiny to the statute, affording the legislature great deference. *Id.* at 785. “No showing has been made that the classification is arbitrary or discriminatory. Doubtless the Florida

decision is telling of the attitude of courts and society: juvenile's who commit crimes should be held accountable for their actions in the same manner as adults. The Fifth Circuit and others seem to have set aside the founding beliefs that juveniles are different from adults, and are in need of care and treatment, not severe punishment. This belief would continue over the next several decades until the Supreme Court addressed the issue of cruel and unusual punishment of juveniles in the groundbreaking case of *Roper v. Simmons*.

#### 5. *Roper v. Simmons*<sup>99</sup>

In 2005, the Supreme Court would review the case of Christopher Simmons, a seventeen year old junior in high school who planned and committed murder.<sup>100</sup> Based on state statute, Simmons was charged in adult criminal court with burglary, kidnapping, stealing and murder in the first degree.<sup>101</sup> Upon conviction by a jury, the state sought the death penalty.<sup>102</sup> During the penalty phase, the state presented multiple aggravating factors, along with witnesses who provided "moving evidence of the devastation [the victim's] death had brought to their lives."<sup>103</sup> The defendant presented witnesses' that testified to their close relationship with Simmons, the responsibility Simmons had demonstrated, and "his capacity to show love for them."<sup>104</sup> Both the state and the defendant "addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor."<sup>105</sup> Upon hearing the evidence, the jury recommended the death penalty.<sup>106</sup> The trial judge followed the jury's recommendation and imposed the death

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legislature considered carefully the rise in the number of crimes committed by juveniles as well as the growing recidivist rates among this group." *Id.*

<sup>99</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>100</sup> *Roper*, 543 U.S. at 556-57.

<sup>101</sup> *Id.* at 557.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 557-58.

<sup>104</sup> *Id.* at 558.

<sup>105</sup> *Id.*

<sup>106</sup> *Roper*, 543 U.S. at 558.

penalty.<sup>107</sup>

On appeal, the defense highlighted the fact that “Simmons was ‘very immature,’ very impulsive,’ and ‘very susceptible to being manipulated or influenced,’” and that “Simmons’ background include[ed] a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence.”<sup>108</sup> Nonetheless, Simmons’ appeal was denied.<sup>109</sup> That is until the decision in *Atkins v. Virginia*.<sup>110</sup>

The United States Supreme Court held in *Atkins* that the Eight and Fourteenth Amendments prohibited the execution of a mentally retarded person.<sup>111</sup> After *Atkins*, Simmons filed a “new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.”<sup>112</sup> The Missouri Supreme Court agreed with Simmons and set aside his death sentence. Then, the Missouri Court resentenced Simmons to “life imprisonment without eligibility for probation, parole, or release except by act of the Governor.”<sup>113</sup> The United States Supreme Court granted review and affirmed the Missouri Supreme Court decision.<sup>114</sup> The Supreme Court also declared the death penalty for juveniles unconstitutional.<sup>115</sup>

*Roper* represents a “groundbreaking decision” for the rights of juvenile offenders, and “impliedly creates a very distinct boundary for juvenile culpability through legal precedent.”<sup>116</sup>

Groundbreaking because, in support of their decision, the majority highlighted three differences

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 559.

<sup>109</sup> *Roper*, 543 U.S. at 559. Simmons’ appeal was based upon ineffective assistance of counsel. *Id.* The trial court found no constitutional violation by reason of ineffective assistance of counsel. *Id.* The Missouri Supreme Court affirmed and the federal courts denied Simmons’ petition for writ of habeas corpus. *Id.*

<sup>110</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>111</sup> *Atkins*, 536 U.S. at 304.

<sup>112</sup> *Roper*, 543 U.S. at 559.

<sup>113</sup> *Id.* at 560.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 578-79.

<sup>116</sup> Enrico Pagnanelli, Note, *Children As Adults: The Transfer Of Juveniles To Adult Courts And The Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 188-89 (2007).

between juveniles and adults: 1) “a lack of maturity and an underdeveloped sense of responsibility . . . [that] often result in impetuous and ill-considered actions and decisions;” 2) increased vulnerability or susceptibility “to negative influences and outside pressures, including peer pressure;” and 3) “that the character of a juvenile is not as well formed as that of an adult.”<sup>117</sup> Also, the Supreme Court recognized these differences made juveniles less culpable than their adult counterparts.<sup>118</sup> Consequently, the Court’s acknowledgment of a juvenile’s “substantially diminished culpability,” and “that capital punishment of juveniles served neither of its intended purposes,” opens the door for review of other policies, such as the policies on transfer of juveniles to adult criminal court.<sup>119</sup> At the very least, the Supreme Court’s decision reverses the trend of blending the juvenile and adult criminal justice systems and signals a possible return to the rehabilitative focus of the juvenile justice system.

## II. THE JUVENILE JUSTICE SYSTEM AS A WOLF

The decision in *Kent* is thought of as the beginning of the end of the juvenile court as *parens patriae*.<sup>120</sup> The Court even propagated the belief when it stated that “the original purpose of the juvenile courts – care and treatment of delinquent children – was not truly being fulfilled . . . in the *parens patriae* capacity.”<sup>121</sup> “Advocates of juvenile procedural reform, however, were confident that [the decisions in *Kent* and *Gault*] would provide juveniles with necessary constitutional protections without damaging the beneficial aspects of the juvenile system.”<sup>122</sup>

Nonetheless, the consequences of the Supreme Court decisions in *Kent*, *Gault*, and their progeny

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<sup>117</sup> *Roper*, 543 U.S. at 569.

<sup>118</sup> *See Roper*, 543 U.S. at 570.

<sup>119</sup> Pagnanelli, *supra* note 116, at 186-90. The Supreme Court stated “there are two distinct social purposes served by the death penalty: ‘retribution and deterrence of capital crimes by prospective offenders.’” *Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. 304, 319 (2002)).

<sup>120</sup> *See Bell*, *supra* note 39, at 585; *see also Burns*, *supra* note 11, at 341.

<sup>121</sup> Klein, *supra* note 5, at 379 (referencing *Kent*, 383 U.S. at 566-67).

<sup>122</sup> Johnson, *supra* note 17, at 1071.

spawned “judicial, legislative, and administrative changes [that] have fostered a procedural and substantive convergence with adult criminal courts.”<sup>123</sup> The once rehabilitative foundation of the juvenile court has taken a retributivist turn, giving way to an adult-like criminal justice system.<sup>124</sup> Though, the Supreme Court did stop short of fully transforming the juvenile court into an adult criminal system with the denial of the right to trial by jury in *McKevier v. Pennsylvania*.<sup>125</sup>

While the Court intended to preserve the “historic *parens patriae* rationale and the rehabilitative model,” the *parens patriae* doctrine crumbled as state legislatures responded to the Supreme Court’s line of decisions.<sup>126</sup> After *Kent*, most states reviewed and revised their statutes to incorporate the outlined due process requirements.<sup>127</sup> Thereafter, as the Supreme Court reviewed juvenile court cases, “state legislatures passed statutes that further ‘criminalized’ juvenile courts and adapted more punitive punishments for youthful offenders.”<sup>128</sup> Legislatures lowered the maximum age for juvenile court jurisdiction, aligned juvenile sentences with their adult counterparts and, most of all, altered procedures to transfer juveniles to adult criminal court.<sup>129</sup>

In an aggressive implementation of transfer policies, states afforded prosecutors substantial discretion in transferring juveniles to adult criminal court.<sup>130</sup> Other states lowered the

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<sup>123</sup> Pagnanelli, *supra* note 116, at 178; *see also* Smallheer, *supra* note 26, at 269.

<sup>124</sup> Smallheer, *supra* note 26, at 269.

<sup>125</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The Supreme Court had an opportunity to make the juvenile justice system “truly parallel to the adult criminal courts” in *McKeiver*, but decided that a “jury trial was not fundamental to due process in juvenile delinquency cases.” Brummer, *supra* note 10, at 787. The Court, in declining to extend the right to jury trial to juvenile proceedings, reasoned that a jury is not a necessary part to every criminal process and to extend the right would convert an “informal protective proceeding” into a “full adversary process.” *McKeiver*, 403 U.S. at 546-47.

<sup>126</sup> Klein, *supra* note 5, at 381.

<sup>127</sup> Marrus, *supra* note 64, at 1170.

<sup>128</sup> Johnson, *supra* note 17, at 1071.

<sup>129</sup> Smallheer, *supra* note 26, at 272.

<sup>130</sup> C. Antoinette Clarke, *Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy*, 56 DEPAUL L. REV. 927, 938 (2007).

age in which a juvenile can be subject to adult criminal proceedings.<sup>131</sup> While some added to the “range of felonies that can result in adult prosecution” including “not only serious violent crimes but also less serious felonies such as drug crimes.”<sup>132</sup> In addition, states eliminated judicial or prosecutorial review and put in place legislative waiver statutes.<sup>133</sup> These statutes trigger criminal court jurisdiction automatically, “based solely on the child’s age and the offense, with no individualized evaluation of amenability to treatment or immaturity.”<sup>134</sup>

The states’ responses were not wholly a result of the Supreme Court’s decisions. The criminalizing of juvenile courts was also due to society’s outrage over increased serious and violent juvenile crime.<sup>135</sup> The public “was becoming increasingly infuriated with a juvenile justice system they perceived as being too lenient on society’s most dangerous juvenile offenders.”<sup>136</sup> Society called for a “crack down” on juveniles who committed crimes.<sup>137</sup> So states focused on holding juveniles accountable for their actions, “applying sanctions consistent with the seriousness of the offense, and rendering appropriate punishment to offenders.”<sup>138</sup> Transferring juveniles to adult criminal court became the mechanism through which society would be protected and states would hold the juveniles accountable for their actions. When transfer became the method to hold juveniles accountable, the juvenile justice system shifted.

The juvenile justice system “shifted from protecting and reforming children to protecting society from the young people.”<sup>139</sup> In the shift, minority juveniles have been particularly impacted. While minority juveniles comprise one-third of the juvenile population, minority

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<sup>131</sup> Clarke, *supra* note 130, at 938.

<sup>132</sup> Clarke, *supra* note 130, at 938.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Smallheer, *supra* note 26, at 269.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 273.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 262.

juveniles comprise two-thirds of juveniles in the justice system.<sup>140</sup> Specifically, minority youth are disproportionately charged in adult criminal court.<sup>141</sup> The findings on the transfer of juveniles, especially minority juveniles, to adult criminal court are disturbing and raise serious questions about the process.

### **A. Juveniles Transferred to Adult Criminal Justice System**

Originally, transferring a juvenile to adult criminal court occurred rarely, and then only in the most serious of all cases.<sup>142</sup> The intent behind the transfer policy realized that some violent and chronic juvenile offenders were not amenable to rehabilitation and, therefore, for the security of the public, the juvenile should be transferred to the adult criminal court.<sup>143</sup> However, increases in the rate of serious and violent juvenile crime, a lost faith in the rehabilitative capabilities of the juvenile court, and landmark Supreme Court decisions, led states to reform their procedures for transferring juveniles to adult criminal court. Now, all states have some form of transfer policy that permits “children who would ordinarily be within the jurisdiction of the juvenile courts [to be] waived into criminal court and tried as adults.”<sup>144</sup>

When a juvenile is taken into custody, an intake officer reviews the matter and decides

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<sup>140</sup> TIM BRICELAND-BETTS, CHILD WELFARE LEAGUE OF AMERICA, POSITIVE YOUTH DEVELOPMENT, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2007), available at <http://www.cwla.org/advocacy/2007legagenda.htm> (2007 Children’s Legislative Agenda). Minority juveniles have disproportionate contact with the juvenile justice system. While this article will not differentiate among juveniles in the juvenile justice system, the statistics are important to keep in mind when considering the policy and procedure of prosecuting juveniles in adult criminal court. Only three states have ever addressed the overrepresentation of minority youth in their juvenile justice systems. MARY SCHMID, NATIONAL JUVENILE DEFENDER CENTER, SUMMARY OF 2005 STATE JUVENILE JUSTICE LEGISLATION (2005), available at [http://www.njdc.info/pdf/njdc\\_2005\\_legislative\\_compilation.pdf](http://www.njdc.info/pdf/njdc_2005_legislative_compilation.pdf). Of the three states, only Tennessee continued to address the issue by forming a task force to study the forces behind the disproportionality. *Id.*

<sup>141</sup> Building Blocks for Youth, Fact Sheet: Transfer of Youth to the Adult Criminal Justice System, [http://www.buildingblocksforyouth.org/issues/transfer/facts\\_transfer.html](http://www.buildingblocksforyouth.org/issues/transfer/facts_transfer.html) (last visited Nov. 25, 2007).

<sup>142</sup> Deborah L. Johnson, Debra E. Banister & Michelle L. Alm, *Juvenile Transfer to the Adult Criminal Court: The Case for Reform*, 43 NO. 3 CRIM. LAW BULLETIN 4 (May-June 2007).

<sup>143</sup> Johnson et al., *supra* note 142.

<sup>144</sup> Marrus, *supra* note 64, at 1168.

whether to file formal charges, proceed informally or dismiss the case.<sup>145</sup> Informal proceedings result in the juvenile appearing before a probation officer or judge where the juvenile will receive a stern lecture and likely be required to obtain treatment or attend special classes, perform community service and make restitution.<sup>146</sup> Formal proceedings result in the juvenile being charged before a judge in juvenile court where the judge will determine whether to retain jurisdiction. Generally, the juvenile court has jurisdiction over juveniles who commit criminal acts. States use three principle approaches to transfer juveniles to adult criminal court.

### 1. Judicial Waiver

The judicial waiver approach grants juvenile court judges the ability to waive jurisdiction and to have the juvenile's case tried in adult criminal court. Even though the judge is the primary decision maker, the transfer process is initiated by the prosecutor. In addition, states that provide for judicial transfer have statutes that provide guidelines for the judge to determine when a waiver is appropriate. Generally, the guidelines use the age of the juvenile at time of offense, the nature of the offense, and the past history of the juvenile or some combination of the factors to determine whether the juvenile qualifies for waiver. These guidelines are frequently based upon the factors outlined by the Supreme Court in *Kent*. The *Kent* factors are as follows:

- (a) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
- (b) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
- (c) Whether the alleged offense was against persons or against property, greater weight being given to offenses against person, especially if personal injury resulted.

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<sup>145</sup> *When a Minor Commits a Crime*, FINDLAW FOR THE PUBLIC, Aug. 20, 2007, <http://criminal.findlaw.com/crimes/criminal-overview/when-minor-commits-crime.html> (last visited Nov. 25, 2007).

<sup>146</sup> *When a Minor Commits a Crime*, FINDLAW FOR THE PUBLIC, Aug. 30, 2007, <http://criminal.findlaw.com/crimes/criminal-overview/when-minor-commits-crime.html> (last visited Nov. 25, 2007).

(d) The prospective merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the [prosecutor]).

(e) 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 adult criminal court].

(f) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

(g) 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.

(h) 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.<sup>147</sup>

Statutes incorporating the *Kent* factors, therefore, do not permit unfettered discretion of the juvenile court judge; the judge must base his decision upon a comparison of the facts of the case to the factors. In some states, the judicial waiver process even requires psychological or psychiatric evaluation of the juvenile.<sup>148</sup> The availability of evaluations provides another check on the discretion of the juvenile court judge. In addition, judicial waivers may be reviewed by the appellate courts.<sup>149</sup>

Variations of the judicial waiver are used throughout the states to determine whether juveniles will be transferred to adult criminal court.<sup>150</sup> A presumptive waiver model is used by twelve states and the District of Columbia.<sup>151</sup> Presumptive waiver shifts the burden of proof

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<sup>147</sup> *Kent*, 383 U.S. at 566-68.

<sup>148</sup> Marrus, *supra* note 64, at 1177; see Ark. Code Ann. § 9-27-318(g) (2002 & Supp. 2005), Colo. Rev. Stat. § 19-2-518(4)(b) (West 2005), and Haw. Rev. Stat. § 571-22(b) (1992 & Supp. 2004).

<sup>149</sup> Klein, *supra* note 5, at 389.

<sup>150</sup> Christopher Mallet, *Death is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 No. 4 CRIM. LAW BULLETIN 3 (July-August 2007).

<sup>151</sup> Klein, *supra* note 5, at 387.

concerning a transfer decision from the state to the juvenile.<sup>152</sup> Use of presumptive waiver basically eliminates the judge and an individualized analysis of the juvenile, resulting in an exponential increase in juveniles transferred to the adult criminal court.<sup>153</sup> Another variation is mandatory waiver. Mandatory waiver automates transfer of the juvenile to the adult criminal court upon a finding of probable cause by the juvenile court judge.<sup>154</sup> However, the most widely used model is the discretionary waiver described above.<sup>155</sup>

While most states have a judicial waiver procedure,<sup>156</sup> it is the least used method of transferring juveniles to adult criminal court: only 15% of determinations to prosecute juveniles as adults were made by judges, whereas 85% of cases are transferred by prosecutors or statutory exclusion.<sup>157</sup> The high rate of prosecutorial and statutory waivers is a direct result of society's call to get tough on juvenile crime.<sup>158</sup> In an effort to implement society's call for a retributive focus of the juvenile justice system, legislatures created the two additional transfer processes. These two processes bypass the constraints of the judicial waiver and permit juveniles to be transferred at a faster and higher rate to the adult criminal system.

## 2. Prosecutorial Waiver or "Direct File"

The prosecutorial waiver approach allows the prosecutor to direct file the juvenile's case in either the juvenile system or the adult criminal court. The prosecutor is empowered to use his discretion to determine in which court to file. However, the legislature limits the circumstances

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* Klein cites a study performed in California where one jurisdiction experienced a 318% increase in waiver hearings and a 234% increase in transfers after adopting the presumptive waiver model. *Id.*

<sup>154</sup> Mallet, *supra* note 150.

<sup>155</sup> Mallet, *supra* note 150. Thirty-one states use this model. *Id.*

<sup>156</sup> Klein, *supra* note 5, at 385. Only Connecticut, New York, Nebraska and New Mexico do not have judicial waiver. *Id.* They provide for other manners of waiver. *Id.* at n.109.

<sup>157</sup> Mallet, *supra* note 149.

<sup>158</sup> *Id.*; *see also* Pagnanelli, *supra* note 119, at 178.

in which the prosecutor may exercise his discretion, usually by age or nature of the offense.<sup>159</sup> Even with limitations, however, the prosecutor has expansive authority as the limitations “are usually much broader than [statutory] waivers, typically engaging a wider range of offenses and offenders.”<sup>160</sup> In addition, the prosecutor is not required to hold a hearing and the decision is not subject to appellate review.<sup>161</sup> The direct file approach is the least common method among the states<sup>162</sup>, however, it accounts for the highest percentage of transfers.<sup>163</sup>

### 3. Legislative Waiver or “Statutory Exclusion”

As stated in *Woodard v. Wainwright*, there is no constitutional right to be treated as a juvenile exists; juvenile rights are created by statutes.<sup>164</sup> Thus, many states have adopted an approach that automatically requires a juvenile’s case, usually based on the age of the youth or the nature of the crime or both, to be tried in the adult criminal court. No discretion by either a judge or prosecutor is involved in statutory exclusion; the juvenile is presumed dangerous and not amenable to rehabilitation.<sup>165</sup> Statutory exclusion also does not provide for a hearing prior to transferring the juvenile to adult criminal court. Without discretion, the prosecutor or judge cannot abuse his authority. However, without a hearing, statutory exclusion does not provide the juvenile an opportunity to rebut the presumption prior to being transferred to adult criminal court. Despite the drawbacks to statutory exclusion, this method of waiver is used in over thirty-

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<sup>159</sup> Klein, *supra* note 5, at 374.

<sup>160</sup> Joshua T. Rose, *Innocence Lost: The Detrimental Effect Of Automatic Waiver Statutes On Juvenile Justice*, 41 BRANDEIS L.J. 977, 982 (2003) (“In Florida, for example, prosecutors may transfer any juvenile sixteen years of age charged with any felony; sixteen year olds charged with any misdemeanor if they have two prior convictions, one of which involved a felony; and fourteen or fifteen year olds charged with any of several enumerated offenses.”).

<sup>161</sup> Klein, *supra* note 5, at 394; Shannon F. McLatchey, Note, *Juvenile Crime and Punishment: An Analysis of the “Get Tough” Approach*, 10 J. LAW. & PUB. POL’Y 401, 410 (1999).

<sup>162</sup> Klein, *supra* note 5, at 394. Only District of Columbia, Arkansas, Colorado, Florida, Georgia, Louisiana, Michigan, Nebraska, New Hampshire, Vermont and Wyoming included prosecutorial waiver as a transfer option. *Id.* at n.155.

<sup>163</sup> Mallet, *supra* note 149.

<sup>164</sup> *See Woodard*, 556 F.2d 781.

<sup>165</sup> McLatchey, *supra* note 161, at 412.

five states, largely as a response to the apparent increase in juvenile crime.<sup>166</sup>

#### 4. Implications of Transfer Policies

The implementation of transfer policies has resulted in significantly more juveniles being tried as adults in the criminal court. Unfortunately, transfer to the adult criminal system brings only severe consequences. The juveniles tried in adult criminal court face the same penalties as adults, receive little or no education, mental health treatment or rehabilitative programming, and obtain an adult record which may significantly limit their future education and employment opportunities. Also, they are jailed in adult prisons with adult inmates and are at greater risk of rape, assault and death. In fact, “the suicide rate for juveniles incarcerated in adult prisons and jails is eight times higher than for children in juvenile facilities.”<sup>167</sup>

Many juveniles transferred to the adult criminal system are “non-violent and highly amenable to rehabilitative serves and supports.”<sup>168</sup> Many juveniles transferred are also incompetent to proceed in adult criminal court.<sup>169</sup> The transfer policies are at fault. Often, the transfer policies do not provide adequate guidance or factors for analysis by judges and prosecutors. In particular, few waiver provisions include a competency factor or require a

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<sup>166</sup> Klein, *supra* note 5, at 390.

<sup>167</sup> Klein, *supra* note 5, at 405.

<sup>168</sup> C. Puzzancher, B. Adams, H. Synder & W. Kang, *Easy Access to FBI Arrest Statistics 1994-2004*, NATIONAL CENTER FOR JUVENILE JUSTICE (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/jcsdb> (last visited Nov. 25, 2007); *Youth at Risk: Juvenile Justice and Delinquency Prevention Act*, LEGISLATIVE AND GOVERNMENTAL ADVOCACY, GOVERNMENT AFFAIRS OFFICE, available at <http://www.abanet.org/poladv/priorities/juvjustice> (last visited Nov. 25, 2007).

<sup>169</sup> Andrew M. Carter, *Age Matters: The Case For A Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 687-688 (2006) (citing *State v. Massey*, 803 P.2d 340 (Wash. Ct. App. 1990)). Edward “Barry” Massey was 13 years old when the State of Washington charged and tried him as an adult for being an accomplice to an armed robbery during which the store owner was murdered. *Id.* Massey was never given the opportunity to be adjudicated within the juvenile justice system; Washington’s statutory transfer policy considers youths twelve and over “full-fledged adults” and requires the juveniles to be transferred for prosecution in adult criminal courts. *Id.* The adult criminal court sentenced Massey to life in prison without possibility of parole, the statutorily mandated sentence. *Id.* Similarly, Andre Green, also thirteen years old, was denied the protections of the juvenile justice system and tried as an adult. *Id.* at 690 (citing *State v. Green*, 477 S.E.2d 182 (N.C. Ct. App. 1996)). North Carolina law permitted the adult criminal court to exercise jurisdiction over juveniles thirteen years and older. *Id.* North Carolina law mandated that Green serve a life sentence without parole. *Id.* at 691.

competency to stand trial analysis of the juvenile prior to transfer to the adult criminal system, even though competency differences between adults and juveniles are well documented in research.<sup>170</sup> Even if the waiver provision does supply adequate guidance, the waiver provision empowers the judge or prosecutor to make the decision to transfer the juvenile frequently without a hearing or without analyzing the factors on an individual basis.<sup>171</sup> In addition, the waiver policies do not express what weight each factor should be given. Therefore, age relative to majority and nature of the crime are often heavily weighted.<sup>172</sup>

Statutory waivers suffer from similar inadequacies as judicial and prosecutorial waivers. They alone can be held accountable for the large increase in juveniles transferred to adult criminal courts. Statutory waivers automatically transfer the juvenile based on general criteria, without a hearing and individualized determination. They are often drafted broadly to “sweep into criminal court not only the principals in serious offenses but also those accomplices with lesser culpability for the crime . . . [and] to transfer many nonviolent property and drug offenders who may be more amenable to treatment than the serious, violent offenders.”<sup>173</sup> Society and supporters of the “adult crime, adult time” stance on juvenile crime favor the statutory waivers over judicial waivers, “complain[ing] that juvenile court judges are too easy on children who are brought before them and are unwilling to waive jurisdiction except in the most extreme cases.”<sup>174</sup> Both statutory and prosecutorial waiver methods, supporters argue, are efficient and effective in

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<sup>170</sup> Mallet, *supra* note 150. No state has enacted criteria to review youth’s transitory personality or less formed character. *Id.* The maturity of offending youth is reviewed by only 26 of 51 states. *Id.*; *see* discussion Part II.B on competency differences between adults and juveniles.

<sup>171</sup> Klein, *supra* note 5, at 387-88.

<sup>172</sup> *Id.* at 388.

<sup>173</sup> *Id.* at 391.

<sup>174</sup> *Id.* at 387 (citing Tolbert’s discussion on public sentiment).

facilitating the goals of retribution and protection.<sup>175</sup> While automatic transfer may meet society's call for serious and violent juvenile offenders to be held accountable, the policy is contrary to the original purpose and goals of the juvenile justice system.

Another goal of society is the protection of the communities. However, while the number of juveniles transferred to the adult criminal system has increased, research shows communities are not safer.<sup>176</sup> According to two main studies of the effect of transfers on recidivism, transferred youth, even if incarcerated for longer periods of time, display significantly higher rate of recidivism in a shorter time following incarceration than similarly situated youth who were not transferred.<sup>177</sup> “Moreover, transferred offenders [were] more likely to commit subsequent felony offenses,” while non-transfers “were shown to have substantially improved their behavior over time.”<sup>178</sup> Research even suggests that juveniles within the adult criminal system “may become more violent in response to their violent surroundings” and when released into society continue to reflect that violent influence.<sup>179</sup>

Thus, the increase in transferring juveniles to adult criminal court is a knee-jerk response that has failed as a policy to achieve its intended goals. Transferring juveniles to adult criminal court “is neither reducing juvenile crime nor enhancing public safety.”<sup>180</sup> Rather, it has created a “punitive, just desserts system” that is far removed original intent of the Progressives.<sup>181</sup>

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<sup>175</sup> *Id.* at 395. While testifying in favor of direct file, Alabama Attorney General Jefferson Sessions stated that “one of the greatest difficulties in trying a juvenile as an adult is ‘the transfer hearing and the red tape associated with these hearings’.” *Id.*

<sup>176</sup> TIM BRICELAND-BETTS, CHILD WELFARE LEAGUE OF AMERICA, POSITIVE YOUTH DEVELOPMENT, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2007), available at <http://www.cwla.org/advocacy/2007legagenda.htm> (2007 Children's Legislative Agenda).

<sup>177</sup> Klein, *supra* note 5, at 403 (citing the Bishop and Fraizer study of transfers in Florida and the Fagan study of New York-New Jersey transfer versus non-transfer cases).

<sup>178</sup> Klein, *supra* note 5, at 403.

<sup>179</sup> McLatchey, *supra* note 161, at 416.

<sup>180</sup> Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 J.L. & PUB. POL'Y 129, 155 (1998).

<sup>181</sup> See generally Klein, *supra* note 5, at 375.

## **B. Juveniles and Competency<sup>182</sup>**

Both the juvenile justice system and the adult criminal court have largely ignored the issue of juvenile competency. However, with the increase in transfers of juveniles to the adult criminal system and the shift from a rehabilitative focus to a punitive focus within the juvenile justice system, the time has come for both systems to reevaluate juvenile competency and the role it should play in each system. Current social science research shows that “adolescents in general are not cognitively and morally developed to the same extent as adults, and that delinquent adolescents are less cognitively and morally developed than their nondelinquent peers.”<sup>183</sup> Therefore, though juvenile offenders should be held accountable for their actions, it is likely they should not be held accountable by the same standard as adults.

### **1. Competency within the Adult Criminal Justice System**

Long before the Supreme Court adopted a standard for competency to stand trial, common law ruled that the “state cannot indict, try, sentence or execute any individual if he was known to be insane.”<sup>184</sup> The rationale behind the common law was that “an offender who was not mentally competent to appreciate the nature of the proceedings could not appreciate the significance of conviction and therefore, could not respond by repentance, or presumably, be reformed by punishment.”<sup>185</sup> In 1899, the same year the juvenile court was created, a federal court found that “the right to be competent while on trial” originates from the Due Process Clause of the Constitution.<sup>186</sup>

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<sup>182</sup> Competency refers to being competent to stand trial which is distinct from the lack of competency offered by the defendant as a defense (“insanity”). Competency is determined at a special proceeding typically prior to beginning trial. Insanity is raised as a defense to the committed crime and based upon the defendant’s competency at the time the crime was committed. This article addresses competency to stand trial and not the issue of insanity or incompetence as a defense.

<sup>183</sup> Klein, *supra* note 5, at 406.

<sup>184</sup> Cowden & McKee, *supra* note 9, at 629.

<sup>185</sup> *Id.*

<sup>186</sup> Johnson, *supra* note 17, at 1072.

Basic fairness in administering justice would lead the Supreme Court to adopt a standard for competency in *Dusky v. United States*.<sup>187</sup> The test for competence is “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.”<sup>188</sup> The Supreme Court expanded the test to include the ability of the defendant to “assist in preparing his defense” in *Drope v. Missouri*.<sup>189</sup> The test focuses on the defendant’s “present abilities to understand the proceedings and assist his attorney,” particularly the defendant’s cognitive ability and rational understanding.<sup>190</sup> “Accordingly, the adult competency right is now a well-recognized constitutional protection, and many modern state statutes adopt the *Drope* and *Dusky* competency standards verbatim.”<sup>191</sup> Nevertheless, the well-established competency rights and standards are not always carried over to juvenile proceedings.

## 2. Competency in Juvenile Court

Historically, common law treated juveniles as incompetent. The common law presumed juveniles were incapable of forming the requisite intent due to their lack of mental maturity.<sup>192</sup> The law held juvenile’s immaturity impeded their ability to comprehend the seriousness of the offense and the nature of the proceedings. The presumption operated to keep juveniles from the adult criminal system and formed the basis for the first juvenile courts.

Because the focus of juvenile courts was on non-adversarial proceedings and

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<sup>187</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>188</sup> *Dusky*, 362 U.S. at 489.

<sup>189</sup> *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

<sup>190</sup> Johnson, *supra* note 17, at 1072-73 (alteration in original).

<sup>191</sup> *Id.* at 1073. Although the right is well established, the adopted standard is highly debated. Some scholars argue the standard is too broad and therefore, unpredictable in its results. Terry A. Maroney, *Emotional Competence, "Rational Understanding," And The Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1379 (2006). Scholars point to a lack of standardized testing and application of theoretical framework as contributors to the unpredictability. *Id.* Also, scholars argue the standard is too “forgiving” and that many defendants who are truly incompetent are found competent to stand trial. Even courts have found that “the mere fact that a defendant has psychotic symptoms or a particular IQ does not mean that the defendant is incompetent to stand trial.” Johnson, *supra* note 17, at 1073 (citing *Ryan v. Clarke*, 218 F. Supp. 2d 1008, 1044 (D. Neb. 2003)).

<sup>192</sup> Brummer, *supra* note 10, at 779-80.

rehabilitation of the offenders, early juvenile courts diminished the role of competency in juvenile proceedings.<sup>193</sup> In *Gault*, the Supreme Court did not enumerate the right of the juvenile to be found competent. Even today, the Supreme Court has yet to directly address a juvenile's right to be found competent before a juvenile court proceeding is held. Nevertheless, over time, state courts extended competency rights to juveniles in the juvenile justice system. A majority of states, excluding Oklahoma, have ruled that competence to stand trial applies to juvenile proceedings, and have established the requirement through case law or legislation.<sup>194</sup> However, no particular legal standard for juvenile competency has been established. Each state follows a different approach; some apply the adult standard, while many juvenile courts have a relaxed or lesser standard of competence.<sup>195</sup> Few states recognize there are "fundamental developmental differences" between adult and juvenile defendants that should be considered in every juvenile

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<sup>193</sup> *Id.* at 811; see also Jodi L. Viljoen & Thomas Grisso, *Prospects For Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCHOL. PUB. POL'Y & L. 87, 89 (2007).

<sup>194</sup> Viljoen & Grisso, *supra* note 193, at 89; Johnson, *supra* note 17, at 1074-75. As of 2002, fourteen states had yet to address the juvenile competency issue. *Id.* In *G.J.I. v. State*, the Oklahoma Court of Criminal Appeals determined adjudicative competence is not constitutionally required, reasoning that juvenile proceedings are not criminal proceedings but rather proceedings as directed towards the rehabilitation of juveniles and therefore, juveniles are to be treated "regardless of mental state." *Id.*; Elizabeth S. Scott and Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, n.27 (2005).

<sup>195</sup> Viljoen & Grisso, *supra* note 193, at 89. Michigan allows for a lower level of competence in juvenile court. *Id.* (referencing *In re Carey*, 615 N.W.2d 742 (Mich. Ct. App. 2000)); see also Scott & Grisso, *supra* note 194, at 803. Ohio follows a more relaxed standard of competence. *Id.* (referencing *State v. Settles*, No. 13-97-50, 1998 Ohio App. LEXIS 4973, at \*9 (Ohio Ct. App. Sept. 30, 1998)). Although, states are taking positive steps to further implement competency standards in juvenile courts. In 2005, Colorado and Maryland passed legislation permitting multiple parties to raise the issue of competency. Mary Schmid, Summary of 2005 State Juvenile Justice Legislation, National Juvenile Defender Center (2005) available at [http://www.njdc.info/pdf/njdc\\_2005\\_legislative\\_compilation.pdf](http://www.njdc.info/pdf/njdc_2005_legislative_compilation.pdf). The bills included the steps to be followed when making the determination of whether the juvenile is competent to stand trial. *Id.* (referencing Colorado House Bill 1034 and Maryland House Bill 802). That same year, the Michigan legislature proposed a bill that would apply current rules used to determine competency in adult criminal court apply in juvenile court. *Id.* (referencing Michigan HB 4214 and HB 4213). While Louisiana did not pass legislation to include competency standards, the legislature did "extend the existence of its Juvenile Competency Task Force" with the expectation the Task Force will recommend competency standards. *Id.* (referencing Louisiana HB 179). However, not all states are on board. Legislation outlining competency standards and procedures to be applied in juvenile court was introduced in Connecticut but failed to pass. *Id.* (referencing Connecticut SB 1078). The lack of a comprehensive competency standard in the juvenile justice system has repercussions for all juveniles in the system, but particularly those juveniles transferred to the adult criminal system.

proceeding through a competency evaluation.<sup>196</sup> Similarly, few adult criminal courts consider immaturity or other fundamental developmental differences between adults and juveniles when evaluating a juvenile defendant's competency to stand trial.<sup>197</sup>

### 3. Implications

Until recently, the lack of consideration of juvenile competency was likely irrelevant as only a small number of juveniles were transferred to adult criminal court.<sup>198</sup> Now, an overwhelming number of juveniles are transferred to adult criminal court where they are presumed competent under the *Dusky* standard. However, current research shows that “juvenile offenders present additional, unique competency considerations” not addressed by the *Dusky* standards.<sup>199</sup> *Dusky* requires the defendant to have the capacity to understand the charges against him, the possible penalties stemming from those charges and the various roles of court personnel, in addition to assist his counsel with the defense against the charges. Specifically, the defendant “must appreciate the significance of each of these matters [to] *his own* situation.”<sup>200</sup> Yet, many juvenile offenders are not likely to meet the *Dusky* standard as “[a]dolescent development is marked by immaturity and less responsible decision making,” as well as the “ongoing process of personality growth and identity formation.”<sup>201</sup> *Dusky* does not account for these developmental immaturity issues when determining competency to stand trial; *Dusky* is based upon adult measures. Therefore, juveniles, particularly young juveniles, may have significant impairments when transferred to adult criminal court as “the doctrine prohibiting the adjudication of incompetent defendants has not been adapted to exclude immature youths from criminal

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<sup>196</sup> Johnson, *supra* note 17, at 1074-75; see Mallett, *supra* note 150.

<sup>197</sup> Scott & Grisso, *supra* note 194, at 797.

<sup>198</sup> Scott & Grisso, *supra* note 194, at 805. The occasional sixteen or seventeen year old criminal defendant may not have raised concerns about trial competence because they were mature enough to participate adequately in the proceedings. *Id.*

<sup>199</sup> Cowden & McKee, *supra* note 9, at 630.

<sup>200</sup> Johnson, *supra* note 17, at 1078.

<sup>201</sup> Mallett, *supra* note 150.

prosecution.”<sup>202</sup>

A recent study performed by the MacArthur Foundation supports the idea that juveniles are incompetent under the *Dusky* standards. The study found “a high risk of trial incompetence among younger teens and even mid-adolescents using the measures applied to adults.”<sup>203</sup> Juveniles failed to understand the judicial process and were less likely than adults to understand their constitutional rights. Additionally, the ability of juveniles to assist in their defense was seriously questioned.<sup>204</sup> Juveniles were found to have an “underdeveloped sense of responsibility” and were more likely to act impulsively and engage in reckless behavior.<sup>205</sup> The study confirmed that many juveniles were “not able to draw logical conclusions from facts and [were] less able to realize what the future consequences of their actions might be.”<sup>206</sup> Basically, juveniles have an increased likelihood to consider only short-term consequences, often ignoring significant long-term consequences of their decision.<sup>207</sup> This developmental immaturity of juveniles translates to an inability to rationally understand the proceedings against him and an inability to think through the consequences of various pleas, and thus, renders the juvenile incompetent under *Dusky*.<sup>208</sup>

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<sup>202</sup> Scott & Grisso, *supra* note 194, at 797.

<sup>203</sup> Scott & Grisso, *supra* note 194, at 797. In the MacArthur study, which included 1393 subjects from ages eleven to twenty-four, almost one-third of youths aged eleven to thirteen years and nineteen percent of fourteen and fifteen year olds performed as poorly on adjudicative competence measures as adults who are found to be incompetent to stand trial, where as sixteen and seventeen year olds performed much like adults. *Id.* at n.11.

<sup>204</sup> David R. Katner, *The Mental Health Paradigm And The MacArthur Study: Emergin Issues Challenging The Competence OF Juveniles In Delinquency Systems*, 32 AM. J. L. AND MED. 503 (2006).

<sup>205</sup> Marus, *supra* note 64, at 1163 (“They engage in unprotected sex which often results in out of wedlock pregnancies and disease; drive recklessly causing their own death and that of others; they do drugs; drink enough to die from alcohol poisoning and are at serious risk for suicide.”).

<sup>206</sup> Johnson, et a., *supra* note 142.

<sup>207</sup> *Id.*

<sup>208</sup> Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective On Serious Juvenile Crime: When Should Juveniles Be Treated As Adults?*, 63-DEC FED. PROBATION 52 (1999) (“Numerous cognitive and social-cognitive competencies change during the adolescent years . . . among them the ability to engage in hypothetical and logical decision making (in order to weigh the costs and benefits of different pleas), demonstrate reliable episodic memory ( in order to provide accurate information about the offense in question), extend thinking into the future (in order to envision the consequences of different please), engage in advanced social perspective-taking (in order to

Furthermore, juveniles may be incompetent under the adult standards of *Dusky* due to incomplete brain development. In the MacArthur study, a significant number of juveniles were found to have decision-making capacities similar to adult offenders found incompetent to stand trial.<sup>209</sup> This similarity is due to the fact that the brain of the juvenile is not completely developed yet the justice system requires the same level of accountability from the juvenile as it does for an adult.<sup>210</sup> A juvenile's brain "goes through a great amount of cognitive development" [during adolescence] . . . . This includes areas of the brain that have been shown to be involved with emotional control and integrating information, as well as the development of the frontal lobe which is responsible for hypothetical thinking, logical reasoning, long-range planning and complex decision making.<sup>211</sup> As a result of incomplete brain development, juveniles lack psychosocial maturity that leads to poor decision making as compared to adults . . . .<sup>212</sup> Also due to lack of brain development, juveniles are unequipped to "rationalize and understand their environments."<sup>213</sup> In light of this evidence, a juvenile lacks the skills to "fully articulate his thoughts and adequately understand complex situations" and accordingly, lacks the competence to meet the *Dusky* test.<sup>214</sup>

If, as the MacArthur study seems to demonstrate, juveniles being transferred into the adult criminal system are truly not competent, a substantial injustice is being served upon juveniles. These juveniles are being inappropriately removed from the protective and

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understand the roles and motives of different participants in the adversarial process), and understand and articulate one's own motives and psychological state (in order to assist counsel in mounting a defense).").

<sup>209</sup> Katner, *supra* note 204, at 507.

<sup>210</sup> *Id.*

<sup>211</sup> Johnson et al., *supra* note 142. Various studies have determined that the brain does not physically stop maturing until early to mid-twenties. Marrus, *supra* note 64, at 102-03.

<sup>212</sup> Johnson et al., *supra* note 142.

<sup>213</sup> Johnson, *supra* note 17, at 1080-81. Brain scans of young adults (23-30) and teens (12-16) show a difference of myelin, the cylindrical covering on axons of neurons. *Id.* More myelin equates to more connections to gray matter and a significantly more "developed" brain. *Id.*

<sup>214</sup> See Johnson, *supra* note 17, at 1081.

rehabilitative environment of the juvenile justice system and inappropriately adjudicated and punished in the adult criminal system. With the increase in transfer of juveniles to the adult criminal court system, the competency of juveniles to stand trial in adult court needs to be addressed. The juvenile justice system operates under the presumption that juveniles are immature, their development is incomplete, and their character is still maturing, but the adult criminal court presumes defendants are mature, competent, responsible and unlikely to change.<sup>215</sup> Specifically, the developmental immaturity of juveniles and the affect immaturity has upon juveniles' competency to stand trial in adult criminal court needs to be addressed. "A child is not just a shorter, more compact version of an adult."<sup>216</sup> Therefore, a juvenile should not be subject to the same competency standards as adults in the criminal justice system.

### **III.A CALL TO THE SHEPARD TO TEND THE FLOCK**

Society was afraid; afraid that juveniles were committing increasingly violent crimes without a showing of remorse and afraid that juveniles were not being held accountable for their actions. In response to that fear, society called for a "get tough on crime" approach, an approach that focused on accountability and punishment, and the state legislatures responded introducing a punitive approach to the juvenile justice system. However, as discussed above, the punitive approach that included increased transferring of juveniles to the adult criminal system turned out to be counter productive to society's goals. Arrest rates for juveniles have not decreased, recidivism rates have not declined and community safety has not improved.<sup>217</sup> Given the results of the punitive approach, it is time to regroup and reevaluate the juvenile justice system.

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<sup>215</sup> Steinberg & Cauffman, *supra* note 208, at 52.

<sup>216</sup> Steven Bell, Tate v. State: *Highlighting The Need For A Mandatory Competency Hearing*, 28 NOVA L. REV. 575, 603 (2004).

<sup>217</sup> See *infra* Part III; Mallet, *supra* note 150, at n.52.

## **A. Merger of the Juvenile Justice System and the Adult Criminal System**

Some scholars and some in the justice system are calling for “complete abolition” of the juvenile justice system.<sup>218</sup> A judge from Pennsylvania, in recommending to the state legislature that they should “rethink” the juvenile justice system, stated “in light of all of the adult rights and privileges which have been afforded juveniles, the juvenile court system should be abolished as it no longer serves its original purpose of determining “the proper therapeutic course on which to launch the young offender.”<sup>219</sup> Abolitionists propose a “unified” system that provides the best of both the adult criminal system and the juvenile justice system.<sup>220</sup> A system that combines the procedural safeguards offered in the adult criminal system with the rehabilitative services offered in the juvenile justice system. Abolitionists argue creating a unified system would be “more responsive to the characteristics of all those it touches, regardless of age.”<sup>221</sup>

However, merger of the juvenile and adult systems into a unified justice system is not the answer to society’s fears and concerns over the failing juvenile justice system. Abolition of the juvenile justice system is a radical approach that likely would not solve society’s concerns any more than the “get tough” approach implemented in the juvenile justice system. Rather, the answer lies in the reformation of the juvenile justice system. A reformation that keeps the adult criminal system separate and distinct and returns the juvenile justice system to the founding *parens patriae* notion of “preserving and promoting the welfare of the child.”<sup>222</sup>

## **B. Juvenile Justice and Delinquency Prevention Act**

Congress can lead the revitalization of the juvenile justice system through the

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<sup>218</sup> Klien, *supra* note 5, at 382; *see also* Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997).

<sup>219</sup> Klein, *supra* note 5, at 382 (quoting Cirillo, J., 639 A.2d 798, 806 (Pa. Super. Ct. 1994).

<sup>220</sup> McLatchey, *supra* note 161, at 416-17.

<sup>221</sup> *Id.* at 417.

<sup>222</sup> Klein, *supra* note 5, at 380.

reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDP). The JJDP was implemented in 1974.<sup>223</sup> The intent behind the JJDP was to create a “unique federal-state partnership to address the problems presented by juvenile delinquency.”<sup>224</sup> Since its inception, JJDP has been regularly reauthorized.<sup>225</sup> When last reauthorized in 2002, the act committed to supporting “state and local programs that prevent juvenile involvement in delinquent behavior,” assisting “state and local governments in promoting public safety by encouraging accountability for acts of juvenile delinquency” and assisting “state and local governments in addressing juvenile crime through the provision of technical assistance, research, training, evaluation, and the dissemination of information on effective programs for combating juvenile delinquency.” These commitments were exercised through the federal agency named Office of Juvenile Justice and Delinquency Prevention (OJJDP) and a planning and advisory system established in all 50 states.<sup>226</sup> The JJDP also provided federal funding for state and local programs aimed at improving juvenile justice systems.<sup>227</sup>

The JJDP has been a critical piece of the juvenile justice system as it promotes “federal standards for care and custody” of juveniles, “while also upholding the interest of community safety . . .”<sup>228</sup> JJDP encourages states to offer “preventative programs that address precursor issues like truancy and status offenses” that are designed to keep juveniles out of the juvenile justice and adult criminal systems.<sup>229</sup> Second, JJDP provides “crucial support for treatment programs” that addresses both the juveniles’ needs and the needs of their families, particularly

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<sup>223</sup> Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5792 (2002).

<sup>224</sup> Robert E. Shepard, Jr., *Federal Juvenile Justice Act Due for Reauthorization*, 22-SUM CRIM. JUST. 45 (2007).

<sup>225</sup> Shepard, *supra* note 224, at 45.

<sup>226</sup> American Bar Association, *Youth at Risk: Juvenile Justice and Delinquency Prevention Act Legislative and Governmental Advocacy*, Governmental Affairs Office (2007) available at <http://www.abanet.org/poladv/priorities/juvjustice>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

minority juveniles and juveniles in poorer communities.<sup>230</sup> Last but certainly not least, JJDPDA “seeks to ensure responses that are appropriate to a young person’s age and stage of development: it seeks to ensure that children and youth in the justice system are treated in an age-appropriate manner and provided with developmentally appropriate, evidence-based services and supports.”<sup>231</sup>

The JJDPDA is scheduled for reauthorization this year.<sup>232</sup> As stated by the ABA, “The continuing success of effective juvenile crime prevention and deterrence depends on Congress strengthening . . . the provisions of the Act, as well as the funding resources needed to fulfill such provisions to the greatest extent possible.”<sup>233</sup> Congress needs to reauthorize the JJDPDA as the JJDPDA serves as a model and a message for the states. By not reauthorizing the JJDPDA, the progress made in reforming the juvenile justice system will be put in serious jeopardy. All efforts surrounding prevention, protection and rehabilitation of juveniles are likely to erode without federal law and funding. Without the JJDPDA, it is likely state legislatures will continue to propose and enact statutes increasing the number of juveniles eligible for transfer to the adult criminal system, imposing longer sentences and harsher penalties and reducing safeguards available to juveniles. The success of reforming the juvenile justice system hinges on the reauthorization of the JJDPDA. Only with the force of the federal government will states undertake significant reforms of their juvenile justice system.

### **C. A Reformed Juvenile Justice System**

The juvenile system should remain a separate entity from the adult criminal court.

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Shepard, *supra* note 24.

<sup>233</sup> American Bar Association, *Youth at Risk: Juvenile Justice and Delinquency Prevention Act* Legislative and Governmental Advocacy, Governmental Affairs Office (2007) available at <http://www.abanet.org/poladv/priorities/juvjustice>.

Juveniles should be adjudicated in the juvenile justice system. Juveniles are not adults; they tend to “differ from adults on several psychological factors and decision making.”<sup>234</sup> Because of the difference in developmental functioning, juveniles warrant different treatment. Even the Supreme Court in *Roper* acknowledged that juveniles lack maturity and have an “underdeveloped sense of responsibility” that gives juveniles a “greater claim than adult to be forgiven . . . .”<sup>235</sup> A unified system would alter the legal process by which the juvenile is tried. The adult criminal court is based on the adversarial model; the juvenile justice system is based on a rehabilitative model. The legal standards in each system are different, and the possible outcomes after adjudication are worlds apart. Additionally, juveniles in the adult system face harsh penalties and incarceration in adult prison, all without the benefit of treatment or rehabilitative services.

As a distinct entity, the juvenile justice system can retain its rehabilitative intent and maintain its broad discretion in determining the disposition of juvenile offenders. Also, the juvenile justice system can continue to focus on the juvenile more than the juvenile’s offense, making individualized assessments to determine treatment. Research indicates that “prevention and treatment are more effective methods of dealing with juvenile crime.”<sup>236</sup> Society should not give up on the juvenile justice system and condemn the juveniles who come into the system. Rather, society should invest in the juvenile justice system and give the juveniles within the system a chance to be rehabilitated.

Nevertheless, as was true upon the foundation of the juvenile justice system, not “every serious juvenile offender is going to become a model citizen . . . .”<sup>237</sup> There will be juveniles

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<sup>234</sup> Johnson et al., *supra* note 142.

<sup>235</sup> *Roper*, 543 U.S. at 560-70.

<sup>236</sup> Klein, *supra* note 5, at 410.

<sup>237</sup> *Id.*

who are not amenable to rehabilitation and should not fall under the juvenile justice system protection. Therefore, even the most zealous advocate for the juvenile justice system must realize there is a need to transfer certain juveniles to the adult criminal system. However, the answer is not the “wholesale transfer” of juveniles to the adult criminal court. Rather, the answer is a revised transfer policy such that transfer removes only those juveniles who are truly deserving of prosecution and are competent to stand trial in the adult criminal system.

The revised transfer policy should eliminate prosecutorial waiver and statutory exclusion, and rely solely on judicial waiver.<sup>238</sup> Of the three waiver processes, judicial waiver is the only process that “retains the humanistic goal of individualized determinations of which children can actually be aided by the juvenile system.”<sup>239</sup> Judicial waiver mandates a prewaiver hearing so that the judge can carefully weigh the interests of the juvenile against the interests of the state and society – amenability to rehabilitation against his dangerousness to the community. As part of the mandatory hearing, the judge follows guidelines based upon the *Kent* factors.<sup>240</sup> The judge must consider the factors, including the sophistication and the maturity of the juvenile, and make an individualized assessment of the juvenile’s amenability to rehabilitation. “[B]ecause of such an individualized determination, only those children who truly cannot be helped or whose crimes are beyond the purview of the juvenile system will be transferred.”<sup>241</sup> By transferring only those juveniles who are beyond rehabilitation, juveniles amenable to rehabilitation and treatment can be retained in the juvenile justice system. Thus, individual determinations of

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<sup>238</sup> See discussion *supra* Part II.A.

<sup>239</sup> Klein, *supra* note 5, at 389.

<sup>240</sup> *Kent*, 383 U.S. at 566-67. The factors set forth in *Kent* have been criticized by some because the factors are not “objective indicators” but rather subjective guidelines. Klein, *supra* note 5, at 387. However, objective standards are not likely to determine the individual needs of each juvenile and a process using objective factors would resemble the existing and unacceptable statutory exclusion. Therefore, any factors used must be of a subjective nature to ensure proper analysis of the juvenile’s amenability to rehabilitation and competency to stand trial in adult criminal court.

<sup>241</sup> Klein, *supra* note 5, at 389.

amenability are critically important to ensure appropriate transfers. Prosecutorial waivers and statutory exclusions do not engage in case-by-case, individual determinations of amenability or competency, nor do they balance the interests of the juvenile and society. Only the judicial waiver process includes the necessary individual assessments, and only the judicial waiver process reflects the Progressives' vision and the original intent of the juvenile justice system.<sup>242</sup>

Critics of the judicial waiver process will point out that it places “absolute discretion as to the ultimate waiver decision in the hands of one person.”<sup>243</sup> However, judges are neutral decision makers, similar to an umpire. Judges are not subject to party politics or societal demands, as are prosecutors and legislators. In fact, prosecutors are subject to the dual responsibilities of protecting society and pursuing justice; prosecutors do not have the best interest of the child as a primary responsibility. As stated by Enrico Pagnanelli, “A prosecutor is a champion of retribution and has no incentive to consider a juvenile’s lack of culpability or the failure of the adult criminal court system to tame violent juveniles.”<sup>244</sup> In addition, judicial waiver decisions are subject to appeal, unlike prosecutorial waivers and statutory exclusions. By being subject to appeal, the decision is additionally protected against abuse of discretion by the juvenile court judge. Based on the foregoing, judges are unlikely to use unchecked discretion in making the decision to retain or transfer a juvenile offender.

Critics also claim that the judicial waiver process takes “too long” and is inefficient because of the hearings and the following appeals.<sup>245</sup> Discretionary decisions do likely take longer than administering bright lines rules. However, while the judicial waiver process may

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<sup>242</sup> Klein, *supra* note 5, at 386-87.

<sup>243</sup> Klein, *supra* note 5, at 389.

<sup>244</sup> Pagnanelli, *supra* note 116, at 191.

<sup>245</sup> Klein, *supra* note 5, at 395. The critics may complain about the “swiftness” of the judicial waiver process, however, studies show that the juvenile system processes offenders at a far faster pace than the adult criminal system. *Id.* On average the adult criminal system processed juveniles in 246 days; the juvenile system processed juveniles in only 98 days. *Id.*

take longer than a direct file or statutory waiver, the intent of the juvenile justice system should not fall prey to efficiency and convenience, the consequences of transferring juveniles to the adult criminal system are just too severe.

Even if judicial waiver is not made the sole method to transfer juveniles to the adult criminal court, every waiver method should include a provision to evaluate the competency of the juvenile as part of the determination of whether the juvenile is to be transferred to adult criminal court.<sup>246</sup> The competency evaluation should include not only criteria for mental illness and mental retardation, but also criteria to determine developmental maturity.<sup>247</sup> The criteria for developmental maturity should focus on the juvenile's level of decision-making capabilities, logical reasoning skills, ability to foresee short and long term consequences of conduct, and social and emotional functioning. The criteria should not exclusively include age; "[a]ge is a convenient but imprecise marker" of competency.<sup>248</sup> Age does not accurately reflect the cognitive capacity to rationally understand criminal proceedings and to participate in the defense. Only criteria that analyze cognitive capacity can lead to an accurate determination of the juvenile's competency to stand trial in adult criminal proceedings.

Evaluating a juvenile's competency prior to transfer to the adult criminal system would

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<sup>246</sup> Some state statute provisions include evaluation of a juvenile's maturity in their waiver provisions, including Arkansas and Florida. See Ark. Code Ann. § 9-27-503 and Fla. Stat. § 985.556. The Arkansas statute on competency requires the examiner to report on multiple areas, such as the ability to understand and realistically appraise the likely outcomes, the ability to extend thinking into the future, the ability to consider the impact of his actions on others and the logical decision-making abilities. Ark. Code Ann. § 9-27-503. Arkansas also permits a juvenile to seek extended juvenile jurisdiction over transfer to adult criminal court. Ark. Code Ann. § 9-27-503. As part of the designation hearing, the culpability of the juvenile and the sophistication and maturity of the juvenile are considered in the determination to extend juvenile jurisdiction. Ark. Code Ann. § 9-27-503(c). The Florida statute permits consideration of the child's sophistication and maturity. Fla. Stat. § 985.556(4)(c). However, the Florida statute is not as detailed as Arkansas and fails to provide further direction on the manner in which the juvenile's sophistication and maturity should be considered. *Id.*

<sup>247</sup> This article addresses only the need for evaluating juveniles for developmental immaturity. Discussion of the standard a juvenile must meet to be held competent to stand trial is beyond the scope of this article. The *Dusky* standard, as discussed in Part II.B, is likely inappropriate. However, some scholars argue a dual competency standard, including *Dusky* and a relaxed standard for juveniles incompetent under *Dusky*, is appropriate. See Scott & Grisso, *supra* note 194, at 827.

<sup>248</sup> Scott & Grisso, *supra* note 194, at 811.

ensure that only those juveniles competent to comprehend the adult criminal court proceedings are transferred to the adult criminal system for adjudication; incompetents would remain in the juvenile justice system. Also, addressing the issue of competency protects the juvenile's due process rights, particularly the right to be competent to stand trial. Transferring only competent juveniles to adult criminal court is imperative as the consequences stemming from adult adjudication are severe.<sup>249</sup>

## CONCLUSION

Juveniles should be held accountable for their criminal acts. However, juveniles are not adults and should not be tried as adults. Statistics show that the current punitive focus of the juvenile justice system and the transfer of juveniles to the adult criminal system are not achieving the desired results. Therefore, change is a must. States must stop "blurring the longstanding distinctions between the adult and juvenile systems."<sup>250</sup> Reform of states' transfer policies is necessary. Only through reform can the juvenile justice system return to its founding philosophy of rehabilitation and give juveniles an opportunity to be rehabilitated, thereby saving the juvenile from the severe consequences of an adult criminal adjudication.

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<sup>249</sup> See discussion *supra* Part II.A.3.

<sup>250</sup> Brummer, *supra* note 10, at 822.