BALANCING REHABILITATION AND PUNISHMENT: COMBINING JUVENILE COURT WAIVER MECHANISMS TO CREATE A BALANCED JUSTICE SYSTEM

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INTRODUCTION

On the night of June 15, 2013, Breanna Mitchell was driving on a rural road near Fort Worth, Texas when her vehicle stalled.1 Not long after, Ethan Couch, an intoxicated 16-year-old, lost control of his truck while speeding down the same road, killing Breanna and three bystanders who had stopped to help fix her car.2 A teenage passenger in Couch’s truck was also permanently brain damaged as a result of the crash.3 Police would later determine that Couch chose to drive despite having THC, valium, muscle relaxants and three times the adult legal limit of alcohol in his system.4 Couch reportedly showed little remorse at the scene, commenting to a friend that he would get them out of trouble.5

Only three months prior to this fatal crash, Couch had pled no contest to possessing and consuming alcohol illegally.6 The juvenile court, following its goal of pursuing rehabilitation over punishment, required Couch to complete an alcohol awareness class and to participate in twelve hours of community service.7 For causing the death of four people, Couch was charged with, and pled guilty to, four counts of intoxication manslaughter in juvenile court.8 Couch was tried in juvenile court and sentenced to only ten years’ probation, with no jail time.9 Couch’s sentence created a public uproar both locally and internationally, with

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* Brandon Weston graduated from the Georgetown University Law Center in 2015. © 2015, Brandon Weston.
3. Id.
5. See Deborah Hastings, New Details, 911 Calls Come to Light in Texas ‘Affluenza’ Case of Teen Ethan Couch, NEW YORK DAILY NEWS (Dec. 14, 2013), http://www.nydailynews.com/news/national/new-details-emerge-affluenza-teen-trial-article-1.1547671 (“I’m Ethan Couch, I’ll get you out of this,” the inebriated teen told one of his passengers at the scene, according to trial notes belonging to the attorney for Eric Boyles, who lost his wife and daughter in the terrible crash.”).
9. Id.
many in the media openly questioning whether rehabilitation should be the primary goal in these types of cases.\textsuperscript{10}

Couch’s attorney defended the sentence as consistent with the purpose of the juvenile court system: “If the point of the juvenile system is to rehabilitate these kids and make them productive members of society, then the judge did absolutely the right thing.”\textsuperscript{11} Family members of the victims, on the other hand, have expressed frustration and argued that justice was not served. Eric Boyles, a relative of two of the victims stated: ‘I’m sure the judge is doing what she thinks is probably right for Ethan’s rehabilitation . . . , But from the victims’ standpoint, she underestimated the impact. Words can’t describe how disappointed I am in terms of how the judicial system works.’\textsuperscript{12}

One year earlier, in Michigan, seventeen-year-old Takunda Mavima crashed his car, killing two of his teenage passengers and injuring two others. Mavima’s blood alcohol, at .10, was just over the legal limit for adults of .08.\textsuperscript{13} Because Mavima was seventeen years old, he was statutorily ineligible to be tried as a juvenile.\textsuperscript{14} Mavima was tried as an adult and sentenced to between thirty months to fifteen years in jail.\textsuperscript{15} Many of the victim’s family members requested that the court show Mavima leniency and spare him jail time.\textsuperscript{16} When sentencing Mavima, the judge noted that he had received many letters from educators at Mavima’s high school that described him as “a model student, someone who excelled in all he did.”\textsuperscript{17} Nevertheless, the judge chose to impose a sentence “he hoped would speak to the seriousness of drunken driving.”\textsuperscript{18}

The disparity between the sentences imposed on Mavima and Couch resulted from the divergent goals of the judicial systems in which they were tried. Couch was tried in the juvenile justice system, where the court’s goal is to rehabilitate juvenile offenders.\textsuperscript{19} Mavima, on the other hand, was tried in the criminal justice system, where “[p]unishment replaces treatment as [a juvenile’s] . . . acknowledged fate.”\textsuperscript{20}


\textbf{11.} Hallman, supra note 4.


\textbf{15.} Fenton, supra note 13.

\textbf{16.} Id.

\textbf{17.} Id.

\textbf{18.} Id.

\textbf{19.} See SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 4:1 (2015 ed.) (stating that the juvenile justice system affords the child ameliorative treatment).

In every state, there are judicial procedures that help determine when and how juvenile offenders will be waived from juvenile court into criminal court. These procedures effectively establish a line that separates the juvenile and criminal justice systems. When a juvenile’s case falls on the wrong side of the procedural line, he loses the relative protection of the juvenile court’s singular rehabilitative focus. In some states, this line is set by subjective assessments of a juvenile’s amenability to rehabilitation. In other states, objective factors such as a juvenile’s age or conduct determines when he will be tried as an adult.

This note will argue for an approach to the waiver of juveniles that balances the juvenile court’s goals of rehabilitation with the concerns of retribution, protection and deterrence in the adult criminal justice system. Specifically, it will propose a system that uses different waiver mechanisms based on discrete age range and type of offense. This system would reconcile the goals of punishment with a contemporary understanding of juvenile responsibility. Section I will explore the juvenile justice system in the United States and describe how its purpose has evolved. In particular, it will focus on how the Supreme Court has helped to define the diverging goals of the juvenile and criminal justice systems. Section II will explore how states have responded to the Supreme Court’s extension of criminal procedural protections to juveniles. In particular, it will examine the three most prevalent waiver schemes employed by states to balance the differing goals of the juvenile and criminal court systems: judicial waiver, statutory exclusion, and prosecutorial waiver. It will compare and contrast each of these procedures to illustrate how each, by itself, fails to achieve a balanced justice system. Section III advocates a solution to the problems discussed in Section II: a recognition of distinct age ranges within the overall juvenile classification, with different waiver mechanisms used for each age range to mitigate incongruities between a juvenile’s sentence and his potential for rehabilitation. Such a waiver system could better balance the rehabilitative goals of the juvenile court system with the punitive goals of the criminal courts.

I. HISTORY OF THE JUVENILE JUSTICE SYSTEM AND PARENS PATRiae

Generally speaking, the adult criminal justice system focuses on “the punishment of criminals,” whereas the juvenile justice system pursues “the rehabilitation of juvenile offenders.” This split within the United States justice system has its

21. Id.
22. See Davis, supra note 19, § 4:1 (explaining that these procedures determine when a juvenile “court relinquishes its jurisdiction over a child and transfers the case to a court of criminal jurisdiction for prosecution as in the case of an adult”).
23. Id.
roots in the English common law notion of parens patriae, a concept under which the state was viewed as the “ultimate protector of children.”27 Under parens patriae, the judicial system sought to help juvenile lawbreakers through rehabilitation, rather than punish them.28 Parens patriae was a “recognition that a child was an incomplete person for purposes of legal responsibility.”29 While English common law recognized a fundamental difference between children and adults, it did not go so far as to create a separate court system for children.30 Rather, common law rules acted to exempt children from the harsh penalties of the adult criminal justice system.31 Specifically, prior to the age of seven, children were not held responsible for their actions.32 From ages seven to fourteen, children were presumed to not be responsible, but this presumption could be rebutted by evidence beyond a reasonable doubt that the child understood his actions.33 However, this all-or-nothing justice system was criticized as being too rigid.34 For example, if the court decided a child over the age of seven understood his actions, he would be prosecuted and punished as an adult, even potentially facing a death sentence.35 Conversely, if a child did not fully understand his actions, he was completely exempt from the criminal justice system.36

The American juvenile system rejected the all-or-nothing approach of the English courts. From their inception in the late nineteenth century, American juvenile courts had “rehabilitation as the primary purpose, as an alternative to the punitive nature of the criminal system.”37 To achieve their rehabilitative goals, early juvenile courts were granted broad discretion to fashion individually tailored dispositions.38 Because these dispositions were not considered “criminal convictions,” the juvenile court system was initially viewed as exempt from most of the constitutional procedural protections that had developed for adults facing punitive penalties in criminal court.39 Eventually, however, concern arose over the broad powers juvenile courts exercised over children, and the potential for arbitrariness

28. Id.
30. Id.
31. Id. at 779–780.
32. Id.
33. Id. at 780.
34. Id.
35. Id.
36. Id.
38. See id. at 984–85 (“The hallmark of the juvenile justice system has always been indeterminate sentencing, focusing on the individual offender instead of the offense committed.”).
in their dispositions.40

A. The Supreme Court Extends Juveniles’ Procedural Protections

Beginning in 1966 with the landmark case Kent v. United States, the Supreme Court began to extend constitutional procedural protections to juvenile court proceedings.41 In Kent, a sixteen-year-old was charged in juvenile court with raping a woman.42 While the juvenile court had original jurisdiction over the case pursuant to a state statute, the judge waived the court’s jurisdiction and transferred the case to the United States District Court for the District of Columbia.43 In executing the waiver, the juvenile judge did not hold a hearing or provide any reasons for his decision to waive the case to criminal court.44 The Court found this waiver procedure violated Kent’s constitutional due process rights.45 Writing for the majority, Justice Fortas noted that in many juvenile courts, there was “evidence...the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”46 The Court held that the Constitution requires juvenile courts to hold hearings, allow access to records, and provide a statement of the reasons for transferring a juvenile to criminal court.47

Only one year later, in In re Gault, the Court extended additional due process rights to juvenile offenders.48 The Court held that juvenile offenders must be provided written notice of the charges against them,49 the right to counsel,50 the right to confront and cross-examine witnesses,51 and the Fifth Amendment privilege against self-incrimination.52 The Court observed that the “unbridled discretion” of the juvenile courts, even when benevolently motivated, is “frequently a poor substitute for principle and procedure.”53 Subsequently, the Court extended the reasonable doubt standard to delinquency findings,54 and found that the double jeopardy clause prevents adjudication for the same offense in both

42. See id. at 543–44.
43. Id. at 545.
44. Id. at 545–46.
45. Id. at 562.
46. Id. at 556.
47. Id. at 561–63.
49. Id. at 33.
50. Id. at 41.
51. Id. at 56–57.
52. Id. at 55.
53. Id. at 18.
criminal court and juvenile court. The extension of these criminal procedural protections led many scholars to question whether the juvenile justice system would maintain its primary focus on rehabilitation.

The Supreme Court, however, has refused to completely abandon the separation between juvenile and criminal courts. In *McKeiver v. Pennsylvania*, the Court refused to extend the right to a jury trial to juvenile offenders facing a declaration of delinquency, the juvenile court analogue to a criminal conviction. While the Court admitted that the rehabilitative goals of juvenile courts had often failed to be achieved in practice, it also recognized that a declaration of delinquency is different from, and not as “onerous” as, a finding of criminal guilt. The Court found that a jury trial would not strengthen the fact-finding of the court, and declared that it was not yet prepared to abandon the rehabilitative goals of the juvenile court system by placing the juvenile “squarely in the routine of the criminal process.”

*B. The Court Endorses Rehabilitative Goals for Juveniles*

In recent years, rather than import criminal court protections to juvenile courts, the Supreme Court has exported juvenile court goals into the criminal sentencing of children. Specifically, the Court has recognized that the Eighth Amendment limits certain punishments of juveniles in criminal court, because they lack a rehabilitative purpose.

In *Roper v. Simmons*, the Court declared a categorical bar on the application of the death penalty to juveniles under the age of eighteen. In doing so, the Court overturned the death sentence of a seventeen-year-old convicted of committing premeditated murder. Despite mitigating factors such as his age and lack of any criminal history, a Missouri jury had sentenced Simmons to death. On appeal to the Supreme Court, the State argued that the sentence of death was constitutional under the Court’s holding in *Stanford v. Kentucky*, which upheld the application of the death penalty to juveniles above the age of fifteen when they committed a capital offense. Overruling *Stanford*, the Court held that the Eighth Amendment barred the death penalty for anyone under the age of eighteen, because “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological

56. Sullivan, supra note 39, at 489–90 (“Many scholars have used Gault as an acknowledgment that the juvenile justice system is no longer rehabilitative, but rather quasi-criminal . . .”).
58. Id. at 540.
59. Id. at 547.
61. Id. at 578–79.
62. Id. at 558.
63. Id. at 562.
justifications for the death penalty apply to them with lesser force than to adults.”

Given the diminished force of punitive justifications, the Court found that a state “cannot extinguish [a juvenile’s] life and his potential to attain a mature understanding of his own humanity.” The Court’s holding was an implicit endorsement of rehabilitation as a goal of the overall justice system when adjudicating the offenses of juveniles. Writing for the majority, Justice Kennedy identified three general differences between juveniles under eighteen and adults that demonstrated “that juvenile offenders cannot with reliability be classified among the worst offenders.”

First, Kennedy noted that common knowledge and scientific data tended to confirm that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults.” Kennedy pointed out that “adolescents are overrepresented statistically in virtually every category of reckless behavior,” and that “almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.”

Second, Kennedy noted that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure” Finally, Kennedy noted that “the character of a juvenile is not as well formed as that of an adult.”

Building on the holding in Roper, in Graham v. Florida, the Court held that states cannot impose a sentence of life without parole for a non-homicide offense. Again writing for the majority, Justice Kennedy recognized that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” For example, juveniles are “more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”

Relying on the distinction between adults and juveniles, the Court analyzed whether or not a life-without-parole sentence could be justified by the legitimate penological objectives of “retribution, deterrence, incapacitation, and rehabilitation.” The Court found that each penological objective failed to justify a life-without-parole sentence, and pointed out that the lack of a rehabilitation

64. Id. at 571.
65. Id. at 573–74.
66. Id. at 569.
67. Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
68. Id. (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REVIEW 339 (1992)).
69. Id. at 569.
70. Id. (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
71. Id. at 570.
72. Graham v. Florida, 560 U.S. 48, 74 (2010) (“This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.”).
73. Id. at 68.
74. Id. (quoting Roper, 543 U.S. at 570).
75. Id. at 71.
objective was particularly important to the analysis, because “juvenile offenders . . . are most in need of and receptive to rehabilitation” and “the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.” Still, the Court conceded that “retribution is a legitimate reason to punish” juvenile offenders, and that “[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense.”

Finally, in *Miller v. Alabama*, the Court held that the Eighth Amendment prohibits a mandatory life sentence without parole for juveniles who commit homicide, because the mandatory nature of the sentence precludes consideration of a juvenile offender’s individual circumstances. Relying on the holdings of *Roper* and *Graham*, the Court reaffirmed that children are “constitutionally different from adults for purposes of sentencing.” The Court would “not foreclose a sentencer’s ability to make that judgment in homicide cases,” but was unambiguous in its holding that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”

Justice Kagan, writing for the majority, explained how a mandatory sentence prevents an individualized consideration of a juvenile’s case:

[A mandatory sentence] prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth.

The Court also dismissed an argument by the State of Alabama that a discretionary transfer hearing, where a juvenile court judge considers the juvenile’s individual circumstances, was a sufficient individualized consideration for sentencing purposes. Rather, the Court found that “discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court,” because a juvenile court judge’s “transfer decisions often present a choice

76. *Id.* at 74.
77. *Id.* at 71.
78. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (“*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”).
79. *Id.* at 2464.
80. *Id.* at 2469.
81. *Id.* at 2475.
82. *Id.* at 2468.
83. *Id.* at 2474–75.
84. *Id.* at 2475.
between extremes: light punishment as a child or standard sentencing as an adult.”85 Thus, a decision to transfer is not the same as a sentencing, in part because “it is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole is appropriate.”86

II. STATE WAIVER PROCEDURES

Largely in response to the Supreme Court’s constitutionalizing of the juvenile justice system, states have crafted procedures to help decide when juvenile offenders should be tried in juvenile court or alternatively waived into criminal court.87 However, given the differing objectives of juvenile and criminal courts, a state’s waiver procedures essentially amount to a value judgment of how best to balance the punitive objectives of the criminal courts and the rehabilitative cornerstone of the juvenile justice system.88

Harmonizing the criminal and juvenile justice systems has proven difficult in practice. The inherent tension between a juvenile’s potential for rehabilitation and society’s need to punish certain conduct has led many states to adopt lopsided waiver procedures that effectively favor one justice system’s goals at the expense of the other. By illustration, three categories of waiver procedures have developed among a majority of the states: judicial waiver, statutory exclusion, and prosecutorial waiver.89 Each of these waiver schemes attempts to answer many of the same questions: when should a juvenile be waived into criminal court? How should they be waived? Where should this decision be made? What kind of sentence should they receive?90

A. Judicial Waiver

The majority of states use some form of a judicial waiver scheme.91 Judicial waiver jurisdictions give the juvenile court judge the ultimate discretion to decide

85. Id. at 2474.
86. Id. at 2475.
87. See Jennifer Park, Note, Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies, 76 GEO. WASH. L. REV. 786, 796–800 (2008) (“By requiring increased procedural and constitutional protections for juveniles in Kent, Gault, Winship, and Roper, the Supreme Court paradoxically provided an impetus for states to shift the focus of the juvenile court from rehabilitation to punishment.”).
88. Brummer, supra note 29, at 788 (“The decision to transfer involves a balance of the state’s interest in protecting its citizens and its interest in the rehabilitation of juveniles accused of committing crimes.”); see also Chamberlin, supra note 26, at 400 (“[P]rosecutorial and legislative waivers of jurisdiction to adult court, moreover, are largely a result of legislators’ tough-crime measures and illustrate the trend of imposing more punishment on juveniles in an effort to deter juveniles from committing violent crime.”).
89. See, e.g., Barry C. Feld, Juvenile and Criminal Justice Systems’ Responses to Youth Violence, 24 CRIME & JUST. 189, 190 (1998) (discussing statutory devices used to prosecute some juveniles as adults).
90. Id.
91. KRAMER, supra note 20.
whether the court will waive its original jurisdiction over the case.\textsuperscript{92} The state bears the burden to prove that the case should be tried in criminal court.\textsuperscript{93} In deciding whether to waive, judges often analyze a variety of factors specific to the case, such as the seriousness of the offense and the history of the juvenile, to determine whether the offender is amenable to rehabilitation.\textsuperscript{94} Thus, judicial waiver procedures preserve the juvenile court’s historical focus on rehabilitation, by leveraging the juvenile court’s experience with minors to perform an individualized evaluation of culpability. However, granting broad discretion to juvenile judges with a tunnel-vision focus on rehabilitation can lead to an over-emphasis on the interests of the offender, precluding an adequate consideration of society’s punitive interest.\textsuperscript{95} For example, the facts of Ethan Couch’s case suggest that society’s interest in retribution, protection, and deterrence may have outweighed his potential for rehabilitation.

Couch’s case highlights a longstanding criticism of discretionary judicial waiver schemes—they are inherently subjective. The subjective nature of judicial waiver schemes makes them especially susceptible to waiver decisions that reflect biases based on race.\textsuperscript{96} Empirical analyses provide convincing evidence that judges apply waiver statutes in an arbitrary, capricious, and discriminatory fashion.\textsuperscript{97} States’ waiver rates for similar types of offenders vary dramatically, even within a single jurisdiction, as numerous studies demonstrate that judges make inconsistent

\begin{itemize}
\item \textsuperscript{92}  Id.
\item \textsuperscript{93}  See Davis, supra note 19, at § 4:3. Davis states that:
\begin{quote}
Most states now set forth the criteria by which the waiver question is to be determined. Some, however, do not. If any attempt is made to set forth a standard at all, it is usually in the form of a statement of the last criterion suggested in Kent, i.e., that the child is not amenable to the rehabilitative processes of the juvenile court or else a statement that “it would be contrary to the best interests of the child or of the public” to handle the case as a juvenile matter.
\end{quote}
\item \textsuperscript{94}  An abuse of the judge’s discretion will warrant reversal of the court’s decision to waive or not waive jurisdiction. Id.
\item \textsuperscript{95}  See Francis Barry McCarthy, The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction, 38 St. Louis U. L.J. 629, 652 (1994) (“Any juvenile court judge who has been steeped in the child-focused philosophy of the juvenile court might be extremely reluctant to give up one last chance to try to help a child.”).
\item \textsuperscript{96}  See e.g., Eric L. Jensen, The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change, 31 Idaho L. Rev. 173, 194–96 (1994) (discussing the characteristics of juveniles transferred); see also Lisa S. Beresford, Note, Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment, 37 San Diego L. Rev. 783, 805 (2000) (“Judicial waiver is inconsistently applied; most youths who are waived have been charged with property offenses, not with violent crimes, even though the whole emphasis on waiving was to transfer violent teenagers who were a danger to society and were not amenable to rehabilitation.”).
\item \textsuperscript{97}  See, e.g., Donna M. Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 Crime & Just. 81, 100–03 (2000) (“Almost without exception, state and local studies that have explored issues of race and waiver report disproportionate minority representation in the population of youths for whom prosecutors seek judicial waiver as well as in the population of youths waived by juvenile courts . . . .”).
\end{itemize}
waiver decisions from county to county or court to court.98 In short, “the subjective nature of waiver decisions, the absence of effective guidelines to structure outcomes, and the lack of objective indicators . . . with which to classify youths allows judges to make unequal and disparate rulings . . . .”99

To mitigate the risk of inconsistent decisions and the tendency to disregard punitive objectives, in certain kinds of cases involving serious offenses, older juveniles, or both, many states have made waiver presumptive unless the juvenile offers evidence that rehabilitative efforts are likely to be successful.100 This presumption presents the benefit of giving the court more direct guidance, possibly mitigating inconsistent waiver decisions. However, the use of this burden makes less sense for younger offenders whose potential for rehabilitation may be significantly greater.

B. Statutory Exclusion/Mandatory Waiver

In large part to address concerns that the judicial waiver system is too subjective and lenient, many states have created statutory exclusion procedures that align the waiver decision with the juvenile’s conduct.101 Statutory exclusion schemes withdraw the juvenile court’s original jurisdiction over cases in which a minor engages in conduct that the legislature has determined should be tried in criminal court.102 Thus, instead of transferring a case from juvenile to criminal court, these cases originate in criminal court where the minor’s rehabilitation is not the primary goal.103 Statutory exclusion cases are often limited to specific offenses, such as serious felonies or crimes that involve violence, and juveniles above certain age.104 Statutory exclusion states have adopted a judgment that certain conduct invokes

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98. See Feld, supra note 89, at 200 (“Even within a single jurisdiction, judges do not administer, interpret, or apply waiver statutes consistently from county to county or court to court.”).
99. Id.
100. See, e.g., MINN. STAT. ANN. § 260B.125(3) (West 2015) (creating a presumptive waiver based on factors including age and nature of offense with the burden on the juvenile to show amenability to rehabilitation to keep the case in juvenile court).
101. See, e.g., Beresford, supra note 96, at 806–07 (“[R]easons [for statutory exclusions] include the strong public sentiment that juveniles should be held responsible for their actions, a perception that certain juveniles deserve a greater punishment than that given in juvenile court, and a belief that juvenile court cannot or will not transfer these cases.”).
102. Id. at 807.
103. See Brice Hamack, Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing is a Denial of Their Basic Due Process Rights, 14 WYO. L. REV. 775, 788–89 (2014) (“Because the case against the juvenile is filed directly in adult court by operation of law, he is subjected to the adult criminal justice system without a single opportunity to be heard by anyone as to his individual circumstances.”).
104. See, e.g., ALA. CODE § 12-15-102(6) (2015) (applying to offenders sixteen or older committing offenses including capitol offenses, class A felonies, or other serious infractions); ALASKA STAT. ANN. § 47.12.030(a) (West 2015) (applying to offenders sixteen or older committing offenses including class A felonies, first-degree arson, or other serious infractions); ARIZ. REV. STAT. ANN. § 13-501(A) (2015) (applying to offenders fifteen or older committing offenses including murder, forcible sexual assault, or other serious infractions).
penological objectives to such a degree that the goal of rehabilitation is de facto outweighed.105

Proponents of statutory exclusion point to the perceived leniency of juvenile courts, and the efficiency gains of bypassing the constitutionally required Kent hearing and the judicial appeals process.106 By relying on objective legislative criteria, statutory exclusion also minimizes the opportunity for juveniles to be waived based on race, gender, or socio-economic status.107 Other reasons cited in favor of statutory waiver include “the strong public sentiment that juveniles should be held responsible for their actions, a perception that certain juveniles deserve a greater punishment than that given in juvenile court, and a belief that juvenile court cannot or will not transfer these cases.”108 Statutory exclusion rests on the idea that “the ‘right’ of a juvenile to be in juvenile court is entirely a statutory right” and therefore the legislature can take the right away.109 As the architect of the overall justice system, the legislature is best positioned to distinguish conduct that invokes punitive objectives of the criminal court.

Statutory exclusion can be problematic, however, because it “is often a simple answer to a complex problem.”110 Legislatures are incapable of performing individualized assessments of juvenile culpability, so in practice exclusionary statutes may “cast the net too widely and bring into the criminal court children who do not belong there.”111 Thus, statutory exclusion procedures could undercut the culpability assessment necessary for a balanced waiver procedure.

The indiscriminate nature of these exclusions often criminalizes overly broad conduct, encompassing relatively common adolescent behavior.112 For example, a statutory exclusion that includes second degree robbery and second degree assault could mandate criminal court for a junior high bully who takes another student’s skateboard or gets into a schoolyard fight.113 These types of adolescent mistakes are fairly common and may simply be the result of immaturity, making a rehabilitative sentence more appropriate.114

105. See McCarthy, supra note 95, at 654 (1994) (“[Reasons for legislative waivers include] some juveniles should be held responsible for their conduct, or that they are deserving of significantly greater punishment than that offered in juvenile court.”).

106. See Beresford, supra note 96, at 806–07 (“Some commentators find the reason behind the switch to automatic transfer to be ‘the time-consuming and burdensome nature of the transfer hearing process’ which can take from several months to a year to complete.”).

107. See McCarthy, supra note 95, at 656 (“[H]aving a clear rule certainly eliminates some claims of unfairness by treating like cases alike . . . .”).

108. Beresford, supra note 96, at 807.

109. McCarthy, supra note 95, at 654.

110. Id. at 655.

111. Id.

112. Beresford, supra note 96, at 811 (discussing an Oregon waiver statute that was criticized as overly broad in its criminalization of behavior).

113. Id.

114. Id.
A related issue involves exclusionary statutes that apply to juveniles of a broad age range, including younger juveniles, where culpability is more likely to be diminished enough that punitive objectives may not be the proper goal of the justice system.\textsuperscript{115} For example, in some jurisdictions a thirteen-year-old and a seventeen-year-old are not distinguished for purposes of waiver when charged with certain conduct.\textsuperscript{116} When treating a broad age range of juveniles alike for waiver purposes, states risk ignoring the Supreme Court’s rationale for finding that “children are constitutionally different from adults” in the sentencing context—the diminishing culpability of youth.\textsuperscript{117}

In response to concerns that exclusionary statutes result in more children being “swept into the criminal court than either justice or common sense requires,”\textsuperscript{118} many states now employ reverse waiver procedures.\textsuperscript{119} These procedures allow a juvenile charged as an adult pursuant to an exclusionary statute to petition the criminal court to transfer the case into juvenile court, usually based on a showing that they are amenable to rehabilitation.\textsuperscript{120} The burden of proof usually lies with the juvenile to demonstrate amenability to rehabilitation.\textsuperscript{121} While reverse waiver hearings can provide an individualized culpability assessment, criminal judges may be too inexperienced in evaluating juvenile culpability to make this procedure viable for the youngest offenders whose amenability to rehabilitation may be higher.\textsuperscript{122} This practical limitation notwithstanding, the individual culpability assessment of reverse waiver procedures may still be helpful to older juveniles, who may have a higher amenability to rehabilitation than their age suggests. For example, the individual circumstances of Takunda Mavima’s case suggest a potential for rehabilitation that may have outweighed the state’s interest in

\textsuperscript{115} See, e.g., ALA. CODE § 12-15-203(a) (2015) (covering all juveniles over fourteen that commit certain crimes); CONN. GEN. STAT. ANN. § 46b-127(a) (West 2015) (covering all juveniles over fourteen that commit certain crimes).

\textsuperscript{116} GA. CODE ANN. § 15-11-560(b) (West 2015) (juveniles charged with murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, or armed robbery with a firearm, are automatically waived into criminal court if thirteen or older).

\textsuperscript{117} Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012).

\textsuperscript{118} McCarthy, supra note 95, at 656.

\textsuperscript{119} See, e.g., DEL. CODE ANN. tit. 10, § 1011(a)–(b) (West 2015); KY. REV. STAT. ANN. § 640.010(3) (West 2015); MISS. CODE ANN. § 43-21-157(8) (West 2015).

\textsuperscript{120} See, e.g., WIS. STAT. ANN. §§ 938.183(1), 938.183(1m), 970.032 (West 2015) (requiring criminal court to retain jurisdiction in cases of (1) assault or battery while incarcerated in a juvenile or correctional facility or battery against a probation or parole officer or other aftercare officer, (2) first-degree murder or an attempt thereof, first-degree reckless homicide, and second-degree murder when committed by child ten or older, and (3) any offense committed by child who has been convicted previously of an offense following waiver of jurisdiction or over which the criminal court has original jurisdiction (or who has any such charge pending), but criminal court may transfer appropriate cases to juvenile court).


\textsuperscript{122} See Bishop, supra note 97, at 125 (“To the extent that offender needs, amenability to treatment, and familiarity with juvenile treatment resources matter, such decisions would presumably best be made by the juvenile courts.”).
retribution, protection, and deterrence. Michigan, however, excludes all seventeen-year-olds who meet one of several broad statutory qualifications from juvenile court and does not provide reverse waiver procedures.\footnote{123}{Mich. Comp. Laws Ann. § 712A.2 (West 2015).}

**C. Prosecutorial Waiver/Concurrent Jurisdiction**

Some states use prosecutorial waiver, where concurrent jurisdiction is granted to juvenile and criminal courts over certain statutorily defined cases, usually based on the age of the offender and the conduct charged.\footnote{124}{See, e.g., Ariz. Rev. Stat. Ann. § 13-501 (allowing a prosecutor to file charges directly in criminal court if a juvenile is at least fifteen-years-old and the alleged conduct falls within the statute’s list of offenses).} When a case is subject to concurrent jurisdiction, the prosecutor has broad discretion on whether to originate the case in juvenile court or criminal court.\footnote{125}{See, e.g., Wyo. Stat. Ann. § 14-6-203(f) (West 2015) (“The district attorney shall serve as the single point of entry for all minors alleged to have committed a crime....The following cases, excluding status offenses, may be originally commenced either in the juvenile court or in the district court or inferior court having jurisdiction ...”).} Concurrent jurisdiction waiver schemes often do not require the prosecutor to follow any substantive criteria when deciding in which court to originate the case.\footnote{126}{Beresford, supra note 96, at 813 (“The prosecutor’s decision is generally not subject to judicial review and is not generally required to be based on detailed criteria.”).} When a juvenile’s case originates in criminal court, courts have usually held that the *Kent* requirement of a formal hearing is not constitutionally required.\footnote{127}{Russell v. Parratt, 543 F.2d 1214, 1216–17 (8th Cir. 1976) (rejecting a similar claim made against the Nebraska statutory procedures); see Woodard v. Wainwright, 556 F.2d 781, 786–87 (5th Cir. 1977) (rejecting defendant’s appeal based on claim that prosecutorial discretion violated *Kent* hearing requirement).} Nevertheless, some states require a hearing in connection with a juvenile tried in criminal court by way of a prosecutorial waiver.\footnote{128}{State v. McKee, 127 P.3d 445, 254 (Mont. 2006) (upholding a prosecutorial waiver statute as constitutional , because it requires a hearing be provided to a juvenile within 30 days of criminal charges being filed).}

Proponents of prosecutorial waiver argue that it provides the efficiency gains of bypassing the *Kent* requirement, but “does not represent the blunt weapon that legislative waiver does” because prosecutors can theoretically “tailor their decisions closely to the individual case.”\footnote{129}{McCarthy, supra note 95, at 665.} In practice, however, prosecutorial waiver fails to fulfill either prong of a balanced waiver procedure and instead exemplifies the problems inherent in both statutory exclusion and judicial waiver schemes.\footnote{130}{Bishop, supra note 97, at 125 (analyzing empirical evidence that prosecutorial waiver schemes are overly broad in criminalizing conduct and invite inconsistent decision making).} The lack of judicial fact finding available at the time an offense is charged prevents any meaningful assessment of an offender’s culpability, and a conflict of interest arising from the prosecutor’s role in the criminal justice system taints any estimation of society’s interest in punishing alleged conduct.\footnote{131}{Beresford, supra note 96, at 813, 816.}
Prosecutors are ill-suited for completing an individualized culpability assessment because they lack fact-finding resources and experience of a juvenile court.132 The focus on strengthening fact-finding procedures in *Kent* strongly indicates the Court’s view that a thorough investigation of a juvenile’s circumstances helps limit arbitrary waiver decisions. In concurrent jurisdiction states, however, prosecutors effectively make the waiver decision after they have gathered enough evidence for probable cause that a juvenile committed prohibited conduct.133 Similarly, because a prosecutor’s decision to try a juvenile as an adult is often “not appealable and not reviewed, except through the political process if it is highly publicized,” there exists an even greater danger of arbitrariness than discretionary judicial waiver schemes.134

Likewise, a prosecutor’s adversarial relationship with a juvenile offender creates a conflict of interest that taints any estimation of society’s interest in punishing specific conduct.135 The prosecutor’s primary role in the criminal justice system—to represent the state and obtain convictions—creates an incentive to ignore the rehabilitation interest of a juvenile offender.136 For instance, a prosecutor may face political pressures to be viewed as tough on crime.137 Further, there is potential for abuse, as the option to charge an offender in criminal court could be leveraged to secure plea bargains from juveniles.138

III. COMBINING PROCEDURES TO ACHIEVE A GRADUAL TRANSITION

The goals of juvenile and criminal court systems can co-exist in a justice system that “protects society from serious and violent juvenile offenders and effectively rehabilitates those who can be saved; however, it must allow for processes that discriminate between the two.”139 The Supreme Court has acknowledged that legal culpability generally increases with age.140 But “age is only a proxy,” because the rate at which individual culpability increases varies dramatically among juveniles

132. Cf. *id.* at 816 (noting that prosecutor’s primary duty it to secure convictions).
133. Bishop, *supra* note 97, at 133 (examining data from Florida, which uses prosecutorial waiver: “prosecutors rarely have access to offenders’ personal and family background information when they make transfer decisions . . . . [I]n Florida prosecutorial waiver decisions are most often made quickly, based on readily available information regarding the offense, the defendant’s age, and prior record . . . .”).
135. Sabo, *supra* note 40, at 2451 (“A prosecutor cannot serve justice when she must serve both the state and the best interests of the juvenile at the same time.”).
136. *Id.*
138. *Id.* at 806.
and is greatly dependent on individual circumstances.\textsuperscript{141} Varying rates of maturity notwithstanding, a fourteen-year-old is generally less culpable than a seventeen-year-old.\textsuperscript{142}

In practice, however, determining a juvenile’s amenability to rehabilitation with certainty is virtually impossible, because it requires a complete understanding of a juvenile’s individual circumstances.\textsuperscript{143} To minimize this uncertainty, judges typically look to objective factors that generally indicate higher or lower culpability, such as whether or not the crime involved violence or property damage, and whether or not the juvenile has a history of breaking the law.\textsuperscript{144}

Furthermore, the existence of waiver procedures is an acknowledgment that society’s interest in retribution, punishment, and protection can outweigh a juvenile’s interest in rehabilitation.\textsuperscript{145} Yet, discerning society’s punishment interest in specific conduct is an exercise best left to the representatives of the people—the legislature. If, in the legislature’s determination, the need to punish certain conduct outweighs a focus on individualized rehabilitation, the case should be tried in criminal court.

When a state centers its waiver decision only on whether a juvenile is amenable to rehabilitation, it risks diminishing the legitimate penological purposes of deterrence, incapacitation, and retribution.\textsuperscript{146} On the other hand, if a state chooses to waive juveniles based only upon discrete objective criteria, such as the type of conduct committed, it risks ignoring that “juveniles are generally less culpable than adults.”\textsuperscript{147} A balanced justice system, therefore, should use a waiver scheme that largely achieves both: (1) an individualized evaluation of a juvenile’s rehabilitation interest; and (2) an appraisal of society’s interest in punishing the conduct committed. A waiver scheme that gradually transitions from judicial


\textsuperscript{142} \textit{See id.} at 686 (“While it is safe to say that, generally speaking, fifteen-year-olds are less culpable than sixteen-year-olds, such a bright line rule removes the issue of the actual individual defendant’s culpability from the trier of fact.”).

\textsuperscript{143} \textit{See Feld, supra note 89, at 246 (“Attempting to individualize adolescent culpability assessments carries all of the risks of discretionary subjectivity inherent in amenability determinations with no greater likelihood of success.”}).

\textsuperscript{144} \textit{Id.; see also Davis, supra note 19, at § 4:3 (“A comprehensive survey of some 207 juvenile courts in the country showed that two factors were cited by the courts as weighing most heavily in the decision to waive jurisdiction: the seriousness of the offense and the past history of the juvenile.”}).

\textsuperscript{145} \textit{See Chamberlin, supra note 26, at 399–401; see also In re Seven Minors, 664 P.2d 947, 951 (Nev. 1983) (“The public interest and safety require that some youths be held accountable as adults for their criminal misconduct and be subjected to controls, punishment, deterrence and retribution found only in the adult criminal justice system. This is the reason for transfer.”)}.

\textsuperscript{146} \textit{Cf. McCarthy, supra note 95, at 652 (1994) (discussing the effects of a waiver system that focuses on the child’s amenability to treatment as a juvenile and dangerousness).}

\textsuperscript{147} \textit{Park, supra note 87, at 803.}
waiver procedures to a statutory exclusion model by recognizing discrete juvenile age ranges could achieve this balance.

For example, states could distinguish two discrete age ranges for juveniles between the overall range of fourteen to eighteen. These age ranges would be subject to different waiver mechanisms, with the likelihood of a juvenile’s case being tried in criminal court increasing when offenders are older. This waiver scheme could dramatically alleviate the tension between the disparate penological goals of the juvenile and criminal court systems, by gradually shifting the focus of the overall justice system away from rehabilitation as the overall juvenile population matures.

An example of a scheme that accomplishes this goal might be one in which juveniles are only subject to discretionary judicial waiver until the age of sixteen. Between the ages of sixteen and eighteen, the judicial waiver procedures would be subject to a presumptive waiver into criminal court for all felonies, except felonies that involve violence or a loss of life that would originate in criminal court by way of statutory exclusion. Cases that are subject to statutory exclusion would be subject to reverse waiver procedures.

A. Under the Age of Sixteen—Lowest Culpability

Discretionary judicial waiver tends to focus on an offender’s rehabilitative potential, making it the waiver scheme most appropriate for younger juveniles who are likely to be amenable to such rehabilitation. In contrast, the reasons for discretionary judicial waiver procedures diminish as a juvenile becomes more likely to be responsible for his or her actions. Generally speaking, most states treat juveniles that have reached the age of sixteen as possessing a greater degree of responsibility.148

By extension, prior to the age of sixteen, statutory exclusion waiver procedures should not apply, even to crimes of a serious nature, such as homicide. This procedure would have the benefit of emphasizing rehabilitation for the group of juveniles most likely to be amenable to it. Given the low culpability of this age range, exclusionary statutes are not an appropriate mechanism. The indiscriminate nature of exclusion statutes creates too great a risk juveniles will be waived even when their potential for rehabilitation exceeds society’s interest in punishing the conduct alleged.149


149. Beresford, supra note 96, at 811.
B. Sixteen to Eighteen—Increased Culpability (Three Tiers of Conduct)

Between the ages of sixteen and eighteen, juvenile cases would originate in juvenile court, subject to a presumption that they be waived into criminal court. The burden would be on the juvenile to demonstrate that he or she is amenable to rehabilitation. Statutory exclusion statutes would be reserved for serious crimes that involve violence or the loss of life. If waived into criminal court pursuant to an exclusionary statute, however, the juvenile should have access to a reverse waiver procedure, where the juvenile again bears the burden of proving he or she is amenable to rehabilitation in juvenile court.

This phased-in presumptive judicial waiver scheme would preserve the juvenile court’s focus on rehabilitation, while recognizing that offenders are increasingly culpable for their conduct as they grow older. Given the generally higher culpability of this age group, shifting the burden of proving amenability to rehabilitation onto the juvenile makes logical sense. A presumption also has the benefit of limiting a juvenile judge’s discretion, mitigating the risk of arbitrary waiver decisions.

With the increased culpability in this age group, statutory exclusion waivers are appropriate for certain serious conduct, such as crimes that involve violence or loss of life. Society’s interest in punishing this behavior is more likely to outweigh the diminished rehabilitative interests of an older juvenile. Further, the severity of criminal penalties makes statutory exclusion’s mitigation of biased waiver decisions particularly important. Limiting statutory exclusion to only the most serious offenses would help mitigate the risk of over-criminalizing relatively common adolescent behavior. Reverse waiver procedures would help further minimize the overly broad nature of exclusionary statutes by identifying juveniles whose rehabilitation interests outweigh society’s interest in punishing the alleged conduct.

This waiver scheme would have likely resulted in both Ethan Couch and Takunda Mavima initially being tried in criminal court by way of statutory exclusion. Yet, with reverse waiver procedures, both juveniles would have been given the chance to transfer their cases to juvenile court. With the burden of proof shifted against them, juveniles such as Ethan Couch who show little remorse and commit particularly heinous acts may have a tougher time convincing a criminal judge that they belong in juvenile court. On the other hand, juveniles who demonstrate a greater amenability to rehabilitation, such as Takunda Mavima, would at least have the opportunity to present evidence of why they should be tried in juvenile court.

C. All Ages

Overly harsh waiver procedures such as prosecutorial waiver should be abandoned. Prosecutorial waiver simply presents too much opportunity for inconsis-
tency, abuse, and discrimination. Even if limited to serious conduct committed in the higher culpability age range, prosecutorial waivers’ worst-of-both-worlds effects make it an inappropriate mechanism for balancing rehabilitation and punishment.

A waiver system that divides juveniles into discrete age ranges has the advantage of presenting a smoother transition from rehabilitative to punitive objectives. Such a system harmonizes the historical focus of the juvenile court system on the rehabilitative interest of the offender, with the force of society’s legitimate punishment interests. This waiver system would be consistent with the historical understanding of juveniles as possessing less legal culpability, a principle consistently recognized by the Supreme Court and empirical research.

CONCLUSION

The decision to try a juvenile in criminal court represents a value judgment of the proper balance between the rehabilitative goals of the traditional juvenile justice system and the punishment objectives of the adult court system. Overly simplistic procedures often create an adulthood cliff, where a single objective bright line increases the risk that a juvenile will end up in a court that is inappropriate given his or her actual culpability. On the other hand, waiver procedures that do not include objective controls increase the risk of inconsistent decisions where rehabilitation goals are promoted at the expense of society’s legitimate punishment objectives. A balanced waiver scheme, therefore, must recognize that a single bright line, based on either age or conduct, is too rigid. To create a balanced waiver scheme, states should adopt procedures that effectively satisfy a two-prong waiver analysis: (1) an assessment of a juvenile’s rehabilitation potential and (2) an evaluation of society’s interest in punishing the alleged conduct.

Such a system could be created by applying multiple waiver mechanisms to discrete age ranges within the overall juvenile classification. This scheme would recognize the diminished culpability of youth and create a rational transition between the rehabilitative goal of the juvenile courts and the punitive focus of criminal courts.

150. Supra Section II Part C.
151. Id.
152. Supra Section II.