

Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute

JOHN D. BURROW*

Introduction

The last several years have borne witness to examples of brutality perpetrated upon children by other children.¹ Prominent among these are the school shootings that occurred in both suburban and rural areas across America.² Even more, the media has brought into our nation's homes images of

* Ph.D., J.D., University of South Carolina J.D., 2001, University of Wisconsin, Madison; Ph.D., 1998, Michigan State University; M.A., 1991, University of Tennessee; B.A., Sociology, 1988, University of Tennessee. John Burrow is an Assistant Professor at the University of South Carolina. Some of his previous work has appeared in the *Elder Law Journal* and the *Social Justice Law Review*. The author would like to express his thanks to his family as well as Barbara Koons-Witt and John MacDonald for their helpful comments and suggestions.

¹ Jim Adams & Kim Wessel, *Citizens at Risk*, *COURIER-J.* (Louisville, Ky.) Feb. 1, 1998, at 01A; Elizabeth Brixey, *13 Year Old Faces Stiffer Charge in Shooting of Girl*, *WIS. STATE J.*, Apr. 23, 1999, at 1C; Andrew Buchanan, *Two Boys Confined to Home*, *SUN-SENTINEL* (Ft. Lauderdale, Fla.), Aug. 14, 1998, at 3A; Mary Beth Murphy, *Arkansas Shooting Aftermath*, *MILWAUKEE J. & SENTINEL*, Mar. 27, 1998, at 6; Christi Parsons, *Tougher Sentencing for Youths Awaits Edgar OK*, *CHI. TRIB.*, Feb. 4, 1998, at 10.

² Gary Fields & Paul Overberg, *Juvenile Homicide Arrest Rate on Rise in Rural USA*, *USA TODAY*, Mar. 26, 1998, at 11A; Sue Lindsay, *Boy 17, Charged in Murder in Shooting of West High Student*, *DENV. ROCKY MOUNTAIN NEWS*, Oct. 20, 1995, at 4A; James Pilcher, *Georgia Teen to be Tried as Adult in School Shooting Spree*, *BUFFALO NEWS*, Aug. 12, 1999, at 4A; Leon Stafford, *Heritage, Columbine Take Steps for Recovery*, *ATLANTA J. & CONST.*, Aug. 15, 1999, at 1C.

children who are described as packs of marauding hooligans who threaten anyone unfortunate enough to cross their paths.³ This same imagery is pervasive among some criminologists and other academics who describe juveniles as “super predators.”⁴

In spite of these grim images, official statistics paint a conflicting picture of juvenile crime. For example, a report prepared for the Bureau of Justice Statistics found crime among children has not only increased but also has grown more deadly.⁵ Further, the report indicated the rate of gun-related homicides perpetrated by juveniles has quadrupled since the 1980s.⁶ Moreover, it was found children have become increasingly desensitized and thus more willing to use violence to settle even trivial disputes.⁷ However, other reports have found that while crime among juveniles increased during the late 1980s and early 1990s, crimes perpetrated by these youths have been steadily decreasing.⁸ Howard Snyder, for example, found:

³ Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH & SOC'Y 3 (2002); Bruce Frankel, *Plea Bargain Ok'd in "Wilding" Attack*, USA TODAY, Oct. 6, 1989, at 3A; Howard Kurtz, *Brutalized Jogger Out of Hospital*, WASH. POST, Nov. 14, 1989, at A17.

⁴ Lee Bazelon, *Exploding the Super Predator Myth: Why Infancy is the Pre-adolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159 (2000); Shay Bilchik, *We Have the Tools to Help our Youth at Risk*, ARIZ. REP., Sept. 26, 1997, at B7; John Dilulio, *The Coming of the Super Predators*, WKLY STANDARD, Nov. 27, 1995, at 23; Eugene Methvin, *Mugged by Reality*, POL'Y REV: J. AM. CITIZENSHIP, July-Aug. 1997, at 32; Lori Montgomery, *Blame for Juvenile Crime: Super Predators*, HOUSTON CHRON., June 2, 1996, at 19A; Lori Montgomery, *Debating the Link Between Guns and Teen Violence*, TORONTO STAR, June 9, 1996, at F6; Bruce Shapiro, *How the War on Crime Imprisons America*, NATION, Apr. 22, 1996, vol. 262 at 14.

⁵ JAMES ALAN FOX, U.S. DEP'T JUSTICE, TRENDS IN JUVENILE VIOLENCE (1996).

⁶ See *id.* at 2.

⁷ *Id.*

⁸ HOWARD N. SYNDER, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 1998 (1999).

[A]fter peaking in 1994, arrests dropped in 1995, 1996, 1997, and again in 1998. The number of juvenile arrests in 1998 was the lowest in the 1990s for all Violent Crime Index offenses combined and the lowest since 1987 for murder, 1983 for forcible rape, 1987 for robbery, and 1991 for aggravated assault.⁹

More surprisingly, this report found the incidence of arrests for weapons violations, after reaching a plateau in 1993, significantly dropped every year thereafter.¹⁰ By some estimates, arrests for weapons-related offenses have dropped by as much as one-third since 1993.¹¹ Jeffrey Butts and Howard Snyder examined crime trends among juveniles since 1980 and found arrests of juveniles for violent crimes dropped three percent between 1994 and 1995 for all juveniles. More significantly, there was a six percent drop in arrests for violent crimes committed by juveniles who were 13 to 14 years old.¹²

These statistics belie the lack of consensus not only over the depth of the juvenile crime problem but also what should be done about it.¹³ Researchers Michelle Baird and Mina Samuels argue the changing contours of the political landscape have helped shape how the criminal justice and legal systems address the issue of juvenile crime.¹⁴ They further explain that

[F]earful of a perceived rise in youth violence, there has been a rush to condemn an already underfinanced youth justice system, thought to

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *Id.*

¹² JEFFREY BUTTS & HOWARD SNYDER, U.S. DEP'T OF JUSTICE, THE YOUNGEST DELINQUENTS: OFFENDERS UNDER AGE 15 1 (1997).

¹³ Levesque and Tomkins, for example, argue the new "punitive zeitgeist" is misplaced. Instead, energies and resources should be directed to family-based services for juveniles. *Revisioning Juvenile Justice: Implications of the New Child Protection Movement*, 48 WASH. U. J. URB. & CONTEMP. L. 87 (1995).

¹⁴ Michelle Baird & Mina Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J. L. & POL'Y. 177 (1996).

be too lenient, too ineffective at prevention and too focused on the ideal of rehabilitation. Anything less than the harshest sentence is seen as the “coddling” of a young criminal. Punishment is the new philosophy toward children in trouble with the law, and the term “juvenile delinquent” is gradually being replaced by the term “youth predator.”¹⁵

These fears add to the persistent perceptions of increased seriousness and violence among juvenile offenders.¹⁶ As such, there have been cries to get tough on juvenile offenders by not only making them more accountable for their crimes but also through increasing the sanctions associated with their crimes.¹⁷ Among others, Barry Feld has noted the primary concerns with juvenile crime center around public safety, culpability, and the adequacy of punishment.¹⁸ Furthermore, some scholars have raised the issue of completely abolishing the juvenile court.¹⁹ Given these

¹⁵ See *id.* at 181.

¹⁶ See Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 640 (1994). The author notes there has been a real increase in the level of serious juvenile crime that is reflected in the public’s concern about what is being done to combat the problem.

¹⁷ Ralph A. Rossum, *Reforming Juvenile Justice and Improving Juvenile Character: The Case for the Justice Model*, 23 PEPP. L. REV. 823, 834-38 (1996). Rossum analogizes serious and violent juveniles to “man-killing weeds” whose growth is fostered by the “moral poverty” engendered by the juvenile court’s resistance to principles of commensurability, proportionality, and equality of sanctions.

¹⁸ Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1031 (1995).

¹⁹ Feld advocates an integrated criminal court that, while responsible for juvenile offenders, is also cognizant of developmental differences between juveniles and adults. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1998); see also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Courts*, 69 N.C. L. REV. 1083 (1991); Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995). These positions can be juxtaposed with those who believe abolition of the juvenile court is not only myopic but also

concerns, waiver of juvenile court jurisdiction has increasingly become a topic of debate among both legislators and scholars.²⁰

This research article will examine the issue of juvenile waiver. Part I will compare and contrast the three models of waiver: judicial, prosecutorial, and legislative. Particular emphasis will focus on which model is best suited for dealing with serious juvenile offenders given the zeal with which some states now waive juvenile offenders.²¹ During the last

harbors an idealized view of the efficiency of the adult criminal justice system. Michael K. Burke, *This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027 (1995). This position also finds support in the work of other commentators on the juvenile justice system, such as Irene Merker Rosenberg's, *Leaving Bad Enough Alone: A Response to Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 172-73 (1993).

²⁰ See generally Kelly K. Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135 (1995); Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1999); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988).

²¹ Tara Kole, *Juvenile Offenders*, 38 HARV. J. ON LEGIS. 231, 234-35 (2001). Kole notes there has been a shift in the philosophy of juvenile justice from one of rehabilitation to one of punitiveness. This shift in orientation was due in large part to the "hysteria" created over high-profile incidents of juvenile violence. Alternatively, it has been suggested politicians were simply trying to contain the spread of juvenile crime as a result of the changing demographic makeup of juvenile offenders. See also Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on The Right Track*, 33 U.S.F. L. REV. 401 (1999). Zierdt suggests the media perpetuates the belief that a juvenile crime wave is sweeping the nation. Because the public clamors for harsher punishment for these juvenile bandits, public officials feel compelled to propose new legislation to address their concerns. She notes that

[A]s long as the media continues to sensationalize violent crime, the public will remain concerned for its safety from both adult and juvenile criminals. This concern for safety translates into a "get tough" policy against both juvenile and adult criminals. For juveniles, that policy is manifested by a trend of amending juvenile court statutes throughout the United States either to send

two decades, many states began to re-evaluate and change their juvenile justice systems.²² These changes ranged from lowering the age of jurisdiction to changing the mission of the juvenile court itself.²³ These changes, for the most part, moved the juvenile court away from an emphasis on rehabilitation to an emphasis on punishment. In spite of the transition from rehabilitation-based systems of justice, the true merits of these changes, including waiver, have never been fully explored.

Part II will examine several cases from Michigan, a state that uses a prosecutorial waiver model. Michigan switched to this model in 1988 as one way to restore accountability and responsibility in the juvenile justice system. More generally, the system of waiver in Michigan has been challenged a number of times for varying reasons, including questions of jurisdiction²⁴ and how the new waiver statute should be interpreted.²⁵ Despite the imperfections in the system of prosecutorial waiver, Michigan courts have repeatedly upheld its constitutionality. Accordingly, this section will discuss some of the challenges to the new prosecutorial waiver provisions during the period of 1988 to 1996, the time period during which this study was conducted. While this discussion of Michigan case law will by no means be exhaustive, it should provide insight into whether the courts have embraced a new system of waiver that would presumably enlarge the authority of prosecutors to make waiver decisions.

Part III will present findings from a study of Michigan's waiver system. Specifically, this study examined

more children to adult courts or, at a minimum, to require juvenile judges to punish children for their crimes.

²² PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (1998); Jeffrey Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. MAG. 50 (2000); Jeffrey Butts & Daniel Mears, *Reviving Juvenile Justice in a Get-Tough Era*, 33 YOUTH & SOC'Y 169 (2000).

²³ Craig Hemmens et al., *The Rhetoric of Juvenile Justice Reform*, 18 QUINNIPIAC L. REV. 661 (1999).

²⁴ *Michigan v. Nelson*, 425 N.W.2d 225 (Mich. Ct. App. 1988).

²⁵ *Michigan v. Brooks*, 459 N.W.2d 313 (Mich. Ct. App. 1990).

whether the sentencing practices of juvenile court judges were altered in the wake of the enactment of the new waiver law. That is, this study explored whether the new waiver criteria increased the likelihood that juvenile offenders would be sentenced as adults. Given the emphasis the new criteria placed on the offenses committed by juveniles, this study examined whether only the most serious and violent juvenile offenders were sentenced as adults. In addition, this study examined whether offenders with lengthier prior records (offense histories) were more likely to face adult sentences. Finally, this study examined the relationship between age and the likelihood that juveniles would receive adult sentences in view that the new waiver provisions lowered the age of criminal court jurisdiction for certain enumerated offenses.

In light of these findings, the author will argue in Part IV that the new waiver provisions may not have had the impact envisioned by the state legislature. That is, the “get-tough” provisions have fallen short of fully restoring responsibility and accountability on the part of serious and violent juvenile offenders. It is quite likely some juvenile court judges are simply unwilling to completely give up on these proverbial hard cases: juveniles who commit serious crimes but are still capable of being rehabilitated. Accordingly, it seems the sentencing decisions of some judges reflect the view that the juvenile court should not abandon its mission of saving youths not only from themselves but also from overzealous reformers who would turn back the clock on juvenile justice and return to a time where juveniles were merely miniature adults.

Part I: Three Models of Juvenile Waiver

Waiver of juvenile court jurisdiction is not a new phenomenon. In fact, its origins can be traced back to the inception of the first juvenile court.²⁶ Early observers of the juvenile court were aware the common law made no distinctions between children and adults in matters of criminal

²⁶ Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

responsibility.²⁷ Over time, this belief has become the dominant philosophy in many states in view that waiver is now seen as a first response, depending on the severity of the crime, as opposed to a punishment of last resort.

Waiver, or transfer as it is referred to in some jurisdictions, is the process whereby juveniles are removed from the jurisdiction of the juvenile court to the adult court. This removal may be based on factors such as (1) amenability to treatment, (2) dangerousness or protection of community, (3) nature of offense in terms of severity or heinousness, and (4) subjective factors, such as home environment or pattern of living.²⁸ It is these factors that have given rise to the various mechanisms that are used to remove offenders from the jurisdiction of the juvenile court.

There are three mechanisms through which juvenile offenders can be waived: judicial, prosecutorial, and legislative. Judicial waiver is based on what could be termed the principle of the offender or individualized justice.²⁹ That is, the juvenile court judge retains the authority to make waiver decisions based on characteristics of the juvenile. It is this individualization of decision-making that has led some academics and legal commentators³⁰ to question whether

²⁷ See *id.* at 108. See also David Tanenhaus & Steven Drizin, "Owning to the Extreme Youth of the Accused": *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641 (2002). These authors argue that at the turn of the century, the juvenile courts were actually able to hear all cases, including homicide cases but opted not to exercise jurisdiction over such cases out of fear the juvenile court law would be declared unconstitutional. See *id.* at 647. Thus, the juvenile courts at that time participated in what could be best described as de facto or "passive" waiver. See *id.*

²⁸ *Kent v. United States*, 383 U.S. 541, 566-577 (1966).

²⁹ Kelly K. Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 138 (1995).

³⁰ Marshall Young, *Waiver from A Judge's Standpoint*, 309-20 in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY (J. Hall et al. eds. 1981); Robert B. Acton, *Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J. L. & POL'Y 277, 281 (1996); Kathleen A. Strotzman, *Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency*, 19 WHITTIER L. REV. 707 (1998).

judicial waiver is the best method for addressing the issue of serious and violent juvenile offenders.

Judicial waiver refers to the process whereby a presiding juvenile court judge makes the decision regarding the waiver or transfer. In such instances, the juvenile court judge must hold a waiver hearing, which takes into account the best interests of the child and the safety of the public.³¹ Building upon this imagery, Charles Polen suggests “judicial waiver exists when juvenile court judges are vested with discretion to determine whether to transfer juvenile offenders to criminal court for prosecution as adults.”³² Further, he notes that although discretion is limited to the criteria outlined in the case *Kent v. United States*,³³ judicial waiver decisions tend to rest most often on amenability to treatment and issues of dangerousness.³⁴ More importantly, Polen notes the

³¹ DEAN J. CHAMPION & LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURT 68 (1991).

³² Charles A. Polen, *Youth on Death Row: Waiver of Juvenile Court Jurisdiction and the Imposition of the Death Penalty on Juvenile Offenders*, 13 N. KY. L. REV. 495, 498 (1987); see also Zierdt, *supra* note 21, at 418. Zierdt, like other juvenile justice commentators, suggests the waiver hearings conducted by juvenile court judges vest them with an extraordinary amount of discretion. As such, there have been some attempts to counterbalance this discretion by not only requiring a presumption of waiver (prima facie case) but also allowing juvenile offenders the opportunity to rebut this presumption.

³³ *Kent v. United States*, 383 U.S. 541 (1996).

³⁴ See *Kent* 383 U.S. at 566-67. The *Kent* decision provides the legal basis for waiver. In this case, the U.S. Supreme Court expressed concern about the deprivation of rights of children. The Court stated that though juvenile proceedings are supposedly civil in nature, they still tend to enjoin juveniles from receiving the care and treatment that they so sorely need. As such, “... there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” Following the Supreme Court’s ruling, eight guidelines were elucidated for subsequent waiver decisions. These guidelines are as follows:

- (1) the seriousness of the alleged offense to the community and whether the community requires waiver;
- (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- (3) whether the alleged offense was against persons or against property, greater weight being given for offenses

instructions given by the Supreme Court relative to judicial waiver are pertinent only to felony offenses.³⁵

A general belief held by some researchers is that judicial waiver is a highly subjective process.³⁶ Franklin Zimring, for example, compares judicial waiver to capital punishment because of its rarity of use (low incidence).³⁷ The infrequency of judicial waiver troubles him because he believes it is impossible to develop guidelines that would purge it of the unfettered discretion given to judges.³⁸ This

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- against persons especially if personal injury resulted;
- (4) the prosecutive merit of the complaint, i.e., whether there is evidence upon which a grand jury may be expected to return an indictment (to be determined by consultation with the United State Attorney);
- (5) the desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who would be charged with a crime in the U.S. District Court for the District of Columbia;
- (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
- (7) the record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; [and]
- (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the offense) by the use of procedures, services, and facilities currently available to the Juvenile Court.

³⁵ See Polen, *supra* note 32, at 499.

³⁶ FRANKLIN ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982); see also Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teenaged Axe Murderers, Judicial Activism, and Legislative Default*, 8 *LAW & INEQ.* 1 (1989).

³⁷ See Zimring, *supra* note 35, at 194. The relevance of this analogy points to the lack of standards that juvenile court judges use in determining who deserves to be waived. Unlike capital cases where a certain class of offenses is automatically deemed appropriate for this sanction, the same may not be true of judicial waiver cases.

³⁸ See generally Podkapacz & Feld, *Judicial Waiver Policy and Practice:*

concern is also shared by Lynn Cothorn, who found even in states that authorize the execution of juveniles, there are standards in place that restrict exposure to this penalty. Those restrictions apply to only those juvenile offenders who have been convicted of first degree homicide and who have not reached a certain age.³⁹ Still, juveniles made up less than three percent of all offenders who were given the death penalty. Thus it can be argued it is indeed a rare event.⁴⁰

Moreover, Zimring appears cognizant of the broad grants of discretion given to judges. As such, the biases of the judge and any preconceived notions of justice may play as important a role in waiver as the offender. He goes on to suggest the low incidence of waiver may be reflective of widespread belief that these sanctions are incapable of accomplishing their stated goals.⁴¹

Several additional issues also concern Zimring, including the lack of standards inherent within both capital punishment and judicial waiver⁴² and the “ultimacy” of such decisions.⁴³ He notes:

[T]ransfer to criminal court is the ultimate response available within the terms of reference to juvenile court... Waiver represents a judgment that the person no longer merits the

Persistence, Seriousness, and Race, 14 LAW & INEQ. 73, 132 (1995). The authors found a “judge effect” in the waiver decisions made in the juvenile courts of Minnesota.

³⁹ LYNN COTHERN, JUVENILES AND THE DEATH PENALTY 6 (2000).

⁴⁰ *See id.* at 4.

⁴¹ *See Zimring, supra* note 35, at 194.

⁴² *See id.* at 195. Zimring suggests “the substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that share the outcome of individual cases.” *See generally* Wayne Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 714 (1998). Logan analogizes waiver to the death penalty in that it is arbitrary and varies from state to state.

⁴³ *See Zimring, supra* note 35, at 195.

consideration, regard, and special protection provided by law for juveniles.⁴⁴

Given that judicial waiver is construed as the sanction of last resort, it automatically transforms juvenile offenders into adults and thereby exposes them to the harshest of punishments, even the death penalty. As such, decisions of such magnitude should rest on stronger grounds than what a judge believes to be the best interests of the child.

Finally, Zimring addresses the issue of dissonance.⁴⁵ This choice of words connotes the paradox inherent in a system of punishment that would seemingly diminish the lives (or ability to contribute to society) of a whole category of offenders despite the presumption that great value attaches to life, especially to youth.⁴⁶ These actions confound the role of the juvenile court.

Zimring is not alone in his criticism of judicial waiver.⁴⁷ There are others who express the belief that judicial waiver decisions are arbitrary, capricious, and not guided by

⁴⁴ See *id.*

⁴⁵ See *id.* at 195-96.

⁴⁶ Zimring notes “the special terminology, stated goals, and dispositional options associated with juvenile courts cannot be made coherent without a theory that is suspended when the court for children expels its subjects.” See *id.* In other words, waiver is antithetical to the stated goals of the juvenile court; see also Feld, *supra* note 20, at 18. Feld notes the juvenile court is schizophrenic in its attempts to impose severe punishment and the “solicitous care” required by the Supreme Court. Given this inability to pursue two dissimilar objectives, the juvenile court should “uncouple” its punishment regime from social welfare and rely solely on an integrated criminal justice system.

⁴⁷ See generally Barry C. Feld, *Juvenile (in)Justice and the Criminal Court Alternative*, 39 CRIM. & DELINQ. 403 (1993); Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987); Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIM. & DELINQ. 443 (1990); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Reform*, 79 MINN. L. REV. 965 (1993).

normative legal standards.⁴⁸ Barry Feld, like Zimring, analogizes judicial waiver to capital punishment. What worries him are concepts like amenability, best interests, and protection of the community, which possess the qualities of a double-edged sword. For example, he notes:

[J]udicial waiver statutes, couched in terms of amenability to treatment or dangerousness, are effectively broad, standardless grants of sentencing discretion characteristic of the individualized, offender-oriented dispositional statutes of the juvenile court. They are the juvenile equivalent of the discretionary capital punishment statutes condemned by the Supreme Court in *Furman v. Georgia*.⁴⁹

Juvenile court judges unnecessarily mystify waiver decision-making by selectively using criteria that fit individual offenders. As such, there is no limit to the number of factors that could be considered and no parameters within which they must operate.

In addition, Feld expresses concern about the varied interpretations of waiver statutes. These vagaries of interpretation are both a reflection of the judicial philosophies of judges and the locales of their courts.⁵⁰ For example, he notes “idiosyncratic differences in judicial philosophies and the locale of a waiver hearing are far more significant for the ultimate transfer decision than is any inherent quality of the criminal act or characteristic of the offending youth.”⁵¹ Thus, judicial waiver decisions tend to reflect justice by ideology and justice by geography.⁵²

These concerns are echoed by other juvenile court analysts who express the belief that the standards found in the *Kent* criteria fail to offer significant guidance to judges and

⁴⁸ See *The Punitive Juvenile Court and the Quality of Procedural Justice Disjunctions Between Rhetoric and Reality*, supra note 46, at 15.

⁴⁹ See *id.*

⁵⁰ See *id.* at 17.

⁵¹ See *id.*

⁵² See *id.*

even attorneys.⁵³ Though these criteria were put into place to add procedural regularity to the juvenile justice system, they still allow judges to have virtually unfettered discretion.⁵⁴ Moreover, these criteria fail to distinguish between the relative importance (or weight) that should be ascribed to each in making waiver determinations.⁵⁵

These concerns led some states to adopt other ways of dealing with serious and violent juvenile offenders. One alternative that was implemented was prosecutorial waiver, or concurrent jurisdiction, which is the process whereby the prosecutor's office chooses the forum in which juveniles are to be tried for their offenses.⁵⁶ In such instances, prosecutors may, based on their own discretion, file charges in the juvenile court or bypass it altogether and file charges directly in criminal court.⁵⁷ Prosecutorial waiver is seen as a better alternative to judicial waiver in that it supposedly removes most of the discretion from the waiver process because the offense takes precedence over the individual offender.⁵⁸ In addition, this choice of waiver tends to be contingent on several other factors: (1) whether certain designated felonies have been committed by the offender, (2) age of the offender, and in some states, (3) the offense history of the juvenile.⁵⁹

⁵³ Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1988).

⁵⁴ Delbert Pruitt, *Juvenile Transfer in Capital Cases: Rehabilitation by Execution*, 7 KY. CHILD. RTS. J. 1, 3 (1999).

⁵⁵ Lisa Beresford, *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, 806 (2000).

⁵⁶ Henry G. White et al., *A Socio-legal History of Florida's Juvenile Transfer Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 249, 258-59 (1999). Florida has been considered a leader in juvenile justice reforms as they affect the ability to transfer juvenile offenders to adult criminal court. It has been suggested prosecutors in Florida made significant inroads into the transfer process during the 1970s. Since that time, prosecutorial waiver has become a very important tool for prosecutors in addressing juvenile crime.

⁵⁷ Champion & Mays, *supra* note 31, at 72; *see also* McCarthy, *supra* note 16, at 656-57.

⁵⁸ *See* McCarthy, *supra* note 16, at 656-57.

⁵⁹ *See id.*

Though this method of waiver has been lauded as a tremendous improvement, prosecutorial waiver is still not without criticism.

Andrea Grundfest and others champion the utility of prosecutorial waiver.⁶⁰ These authors identify three specific areas that derive benefit from this waiver mechanism: (1) protection of the interests of the child and society, (2) addition of beneficial information to the proceedings, and (3) an advocate for society.⁶¹ Specifically, it is reasoned that participation of the prosecutor is essential within the context of the adversarial nature of these proceedings insofar as preserving the rights of the juvenile and protecting the rights of society.⁶² However, one must question the utility of this argument because it is unclear how the prosecutor can adequately balance the needs and interests of the state with those of the juvenile, especially within the context of an adversarial system.⁶³ The prosecutor's main objective is to seek retribution and punishment, concepts foreign to the juvenile justice philosophy and antithetical to the needs of the child. For the most part, the prosecutor's office refrains from focusing on the needs of the child because it must focus on building a case on objective, provable fact. The needs of the juvenile tend to be subjective and theoretical and as such, they are immaterial in a court of law.

⁶⁰ ANDREA R. GRUNDFEST ET AL., TRIAL OF JUVENILES IN ADULT COURT 321-32 (1981).

⁶¹ *See id.*

⁶² *See id.* at 328. These authors suggest that since waiver occurs in an arena beyond the social welfare of the juvenile, the role of the prosecutor is enhanced by virtue of the fact he must balance the multiple interests. That is,

[T]he interests of society as well as the juvenile accused of violating the law are best protected by the utilization of legal proceedings most appropriate to the particular individual and offense in question. To be effective, this decision must be founded on the fullest possible picture of all the circumstances involved.

⁶³ *See People v. Conant*, 605 N.W.2d 49 (Mich. Ct. App. 1999), where the Court of Appeals of Michigan found the statute that expanded the charging authority of prosecutors in making waiver decisions neither violated separation of powers nor violated equal protection guarantees of juveniles.

In addition, some suggest the prosecutor is instrumental in adding additional information to the waiver proceedings.⁶⁴ They believe this information lends credence to both the needs of the state and the juvenile offender.⁶⁵ Of concern, however, is how much information the prosecutors could gather that would demonstrate a lesser degree of culpability on the part of the juvenile. Further, there is an issue of how carefully the prosecutor would scrutinize information relative to treatment programs and services that would demonstrate the juvenile could still be treated within the juvenile system.⁶⁶ Just how willing are prosecutors to forgo waiver for a treatment option? Unfortunately, this question has not yet been addressed in the research literature.

Moreover, there is the presumption that the prosecutor assesses the offense within the context of other crimes that have been committed in the community.⁶⁷ This should provide little comfort to the juvenile in view that punishment, like the guiding philosophy of the juvenile court, is relative and varies by jurisdiction. As such, the standards of the community may prevail in waiver proceedings irrespective of the beneficial information provided by the prosecutor.⁶⁸

⁶⁴ *See id.*

⁶⁵ *See id.* These authors note:

[T]he prosecutor possesses a unique ability to add a wide range of information to this quest for the proper mode of proceeding against a juvenile. The prosecutor and his representatives are involved in all areas of the criminal justice system, from investigation through grand jury, trial, and appellate levels. Thus, the prosecutor obtains the broadest possible overview of the criminal justice system and acquires an unparalleled opportunity to assess an individual and offense in the perspective of other of other crimes committed in that jurisdiction.

⁶⁶ In an unpublished court opinion, *People v. Bentley*, the Court of Appeals of Michigan rejected a claim that the prosecutorial waiver statute failed to consider the appropriateness of treatment in the adult and juvenile systems. 2000 WL 33519653 (2000).

⁶⁷ *See id.*

⁶⁸ *See Grundfest et al., supra* note 59, at 329. Closely associated with this point is the belief the prosecutor serves as an advocate for the community. That is, the prosecutor is charged with articulating the views of the

There are three other prominent criticisms of prosecutorial waiver: (1) procedural safeguards are lacking and fail to address amenability to treatment issues, (2) juvenile justice policy has shifted, and (3) decisions are non-appealable.⁶⁹ On the first issue, it is argued prosecutorial waiver does not exist apart from the political arena.⁷⁰ Waiver decisions do not occur in a vacuum because, as an agent of the state, the prosecutor is buffeted on all sides by political pressures.⁷¹ In essence, prosecutors are captives of their office. They must quell public discontent by demonstrating they are tough on juvenile crime (thereby sidelining the interests of the juvenile), and they must appease those who form part of their

community that he or she represents. "The prosecutor is the representative of the society which is, [in theory, victimized by the] criminal behavior [of] juveniles. Thus, it is manifestly appropriate that his agency advocates society's position on the issue of how to proceed against a particular juvenile offender." Of concern here is the fact the prosecutor may be more concerned with scandal avoidance than the interests of the child. As such, the waiver decision is very responsive to public outcry. This issue is inextricably tied to politics. Accordingly, one could suggest prosecutorial waiver tends to be guided by emotion more so than what the juvenile needs.

⁶⁹ Catherine Bove, *The Child-Adult: Michigan Waiver Law*, 3 DETROIT C. L. REV. 1071 (1991); Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985 (1994); John Gasper & Daniel Katkin, *A Rationale for the Abolition of the Juvenile Court's Power to Waive Jurisdiction*, 7 PEPP. L. REV. 937 (1980); Francis B. McCarthy, *The Serious Juvenile Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 34 ST. LOUIS U. L. REV. 629 (1994).

⁷⁰ See Gasper & Katkin, *supra* note 68, at 944.

⁷¹ See *id.* An argument that has been made that prosecutors are driven by politics and many of their decisions, when it comes to juveniles, are the product of expediency. For example, Gasper and Katkin suggest:

[I]t is a political fact of life the prosecutors must be concerned with their conviction rates. Therefore, there is the possibility that they might be inclined to waive cases to criminal court when their evidence is strong, and leave them in the juvenile court when their evidence is weak. Prosecutorial waiver decisions are particularly susceptible to political pressure (district attorneys generally run for reelection more often than judges) and pressures from the police with whom prosecutors must maintain cordial working relations.

work group (i.e., the police if they are to continue to obtain the information they need for their cases). To this end, prosecutors may be less zealous when considering the prospects of rehabilitation within the juvenile justice system.⁷²

Critics of prosecutorial waiver also point to the lack of procedural safeguards for juvenile offenders.⁷³ Further, there tends not to be any delineation of the criteria to be used with the exception of offense and age.⁷⁴ Wallace Mylniec, for example, argues:

[W]hile statutes permitting adult treatment may have been meant to deal with the hardened, incorrigible juvenile offender, the traditionally wide latitude given to prosecutors regarding discretionary acts in the criminal justice system creates a serious likelihood that the process may ensnare the wrong child. In the absence of proper exercise of discretion, the statutes can have an unnecessarily harsh effect on first offenders. Without safeguards, these laws may be applied to young children who may be permanently harmed in the absence of sentencing guidelines, or correctional facilities designed to separate young offenders from older, more experienced criminals.⁷⁵

⁷² See *id.* These authors suggest that when prosecutors are confronted with the choice of trying a juvenile in criminal court and angering a particular segment of the constituency, prosecutors are more likely to take the route that can best be described as the best solution under the worst of circumstances.

⁷³ Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, CHAMPION, June 1998, at 10.

⁷⁴ Wallace J. Mylniec, *Juvenile Delinquent or Adult-Convict: The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 36 (1976); see also Aron & Hurley, *supra* note 72, at 63. These authors argue that prosecutorial waiver denies juvenile offenders the opportunity to make a case for why they should be retained in the juvenile court. That is, they are preempted from demonstrating that they are amenable to treatment.

⁷⁵ See Mylniec, *supra* note 73, at 36.

In their quest for retribution and punishment, prosecutors may not consider whether the juvenile is amenable to treatment at all.⁷⁶ Further, the inappropriateness of this waiver provision for certain offenders is a concern.⁷⁷ Moreover, there is concern that age and impulsivity may not be accorded proper consideration by prosecutors.⁷⁸

Critics of prosecutorial waiver also express concern about the shift in juvenile justice philosophy.⁷⁹ These critics focus on the fact that punishment, protection of society, and retribution are central components of prosecutorial waiver rather than whether the juvenile can be “saved” within the juvenile justice system.⁸⁰ Prosecutorial waiver sends the message that a get tough approach is being adopted by the courts.⁸¹ Donna Bishop and Charles Frazier, for example, argue:

⁷⁶ See Boyce, *supra* note 68, at 999; see also James Backstrom, *The Role of the Prosecutor in Juvenile Justice: Adversary in the Courtroom and Leadership in the Community*, 50 S.C. L. REV. 705 (1999). Backstrom argues standards have been put into place by the NDAA (National District Attorney’s Association) that guide the decision making of prosecutors relative to waiver. He notes there are nine factors that should be considered by the prosecutor when he/she contemplates charging juvenile offenders; (1) seriousness of offense, (2) role of the juvenile in the offense (whether he was the leader, an active participant, or bystander), (3) number and nature of prior offenses including their dispositions, (4) age and maturity of the offender (sophistication), (5) availability of treatment services of the juvenile court, (6) admission of guilt and involvement in the offense (remorse), (7) threat posed by the juvenile to both persons and property, (8) ability to pay restitution, (9) recommendations from referring agencies and agents of the justice system and community.

⁷⁷ See *id.*

⁷⁸ Donna M. Bishop & Charles M. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL. 281 (1991); Joanne Hirase, *State ex. rel. v. E.G.T.: Waiving Childhood Goodbye*, 18 J. CONTEMP. L. 159 (1992).

⁷⁹ Catherine Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995).

⁸⁰ See Bishop & Frazier, *supra* note 77, at 300.

⁸¹ Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985).

[B]ecause prosecutorial waiver statutes greatly expand the power of prosecutors — who historically have been more concerned with retribution than with rehabilitation — widespread use of prosecutorial waiver seems to signal a fundamental shift in delinquency policy away from the *parens patriae* philosophy that is the cornerstone of the juvenile court and toward a more punitive orientation characteristic of criminal courts.⁸²

Another criticism of prosecutorial waiver is that such decisions, for the most part, are non-appealable.⁸³ It is alleged no process is in place wherein the decisions of the prosecutor can be reviewed to ensure the case has no factual errors.⁸⁴ The lack of review may be attributable to the traditionally wide latitude given to prosecutors in their charging decisions.⁸⁵ This argument is grounded in the belief that because prosecutors possess so much latitude, there should be some mechanism for review.⁸⁶ Further, it is alleged that prosecutorial waiver expands the traditional function of prosecutors.⁸⁷ Moreover, some believe discretion in charging decisions is a necessary part of prosecutors' jobs, it must still be structured and constrained.⁸⁸ Allowing prosecutors wide latitude in deciding

⁸² See Bishop & Frazier, *supra* note 77, at 285.

⁸³ Sarah M. Cotton, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK. L. REV. 563 (1999).

⁸⁴ See Thomas & Bilchik, *supra* note 80, at 475; see also Bishop & Frazier, *supra* note 77, at 300.

⁸⁵ Alan B. Salazar, *The Expanding Scope of Prosecutorial Discretion in Charging Juveniles as Adults: A Critical Look at People v. Thorpe*, 54 U. COLO. L. REV. 617 (1983).

⁸⁶ See Boyce, *supra* note 68, at 996-98.

⁸⁷ See *id.*; see also *People v. Conant*, 605 N.W.2d 49 (Mich. Ct. App. 1999), where the Court of Appeals of Michigan ruled the waiver statute did not impermissibly enlarge the power of prosecutors insofar as they are not empowered to determine sentences, but they only have authority to bring criminal charges.

⁸⁸ See *id.*

the forum for prosecution unnecessarily expands this discretion without the benefit of checks and balances.⁸⁹

Lastly, prosecutorial waiver has come under scrutiny because of the fear of inconsistency, both real and imagined, in the application of the law.⁹⁰ Critics allege nothing prevents a prosecutor from refusing to charge a juvenile offender in criminal court even though he/she may have committed crimes similar to those that resulted in the waiver of others.⁹¹ As such, the application of prosecutorial waiver is arbitrary and irrational.⁹² Although some have argued prosecutorial waiver is better suited to deal with juvenile offenders who commit serious felony offenses, waiver is still susceptible to the charge that too much discretion is vested in a single individual. Consequently many say prosecutorial waiver fails to meaningfully deal with the issue of serious and violent juvenile offenders. As an alternative measure, some jurisdictions have turned to a third method of dealing with these juvenile offenders: legislative waiver.

Legislative waiver is a procedure through which certain offenses are excluded from the jurisdiction of the juvenile court. Also called statutory exclusion, legislative waiver limits the breadth of cases the juvenile court can hear.⁹³

⁸⁹ See *id.* But compare *id.* at 58, where the Court of Appeals of Michigan identifies several areas that act as checks and balances on the powers of the prosecutor.

⁹⁰ See *id.*

⁹¹ See *id.*; see also Salazar, *supra* note 84, at 629, where it is pointed out that in Colorado, a statutory scheme is in place that allows a prosecutor to charge one minor in district court as an adult and another minor as a juvenile delinquent even if the misbehavior or criminal conduct is the same. The prosecutor's decision to charge the child as an adult is therefore not based upon rationally distinct offenses.

⁹² See *Conant*, 605 N.W.2d at 60 where the Court of Appeals of Michigan found that unless plaintiffs can demonstrate a prosecutor's arbitrary classification singled them out for disfavored treatment while not charging others who are similarly situated, then there is no violation of equal protection. Moreover, such plaintiffs cannot challenge the discretionary charging decisions of prosecutors where there is no showing the decisions were based on impermissible factors, such as race. See *id.* at 61.

⁹³ See *Champion & Mays*, *supra* note 31, at 70; see also *Griffin et al.*, *supra* note 20.

In addition, legislative waiver affixes age requirements (automatic adulthood) to coincide with jurisdiction and forum. It is reasoned this procedure is really not a waiver mechanism at all but is more akin to legislative exclusion. That is certain offenses are considered to be beyond the purview of the juvenile court.⁹⁴

There are two primary strengths associated with legislative waiver: (1) elimination of discretion and (2) improvement of accountability. First, legislative waiver has been heralded as the best way to remove discretion from waiver decisions in view that the reliance on totally objective and legally relevant criteria prevents biased or arbitrary decisions from being made.⁹⁵ More specifically, the intersection of three legally relevant factors — age, offense seriousness, and offense history — form what some juvenile court commentators have called a legislative matrix that makes waiver decisions mechanical and devoid of discretion or emotion.⁹⁶

More recently, some court decisions have suggested the implementation and application of legislative waiver criteria is entirely within the domain of state legislatures.⁹⁷

⁹⁴ See Griffin et al., *supra* note 20, at 8. In using this waiver mechanism, criminal courts automatically possess the jurisdiction necessary to proceed against juvenile offenders just as they would have jurisdiction if the offense was committed by an adult.

⁹⁵ Gasper & Katkin, *supra* note 68; *The Juvenile Court Meets The Principle of The Offense: Changes in Juvenile Waiver Statutes*, *supra* note 46; Hirase, *supra* note 77; Simon Singer, *The Automatic Waiver of Juveniles and Substantive Justice*, 39 CRIM. & DELINQ. 253 (1993).

⁹⁶ *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, *supra* note 46, at 588. Feld, for example, has commented that the waiver decision-making process should be built upon a legislative matrix that determines the extent of the jurisdiction of the juvenile court. He writes:

[T]he matrix eliminates all discretion with respect to the decision to refer for adult prosecution. Once the decision to proceed against the offender has been made and the appropriate charge determined, the decision whether to proceed in the juvenile court or the district court is made mechanically by reference to the matrix.

⁹⁷ *State v. Angel C.*, 715 A.2d 652 (1998).

That is, once a state legislature has determined how far to extend juvenile court jurisdiction, or how far to restrict it, then the courts are powerless to alter this jurisdictional framework.⁹⁸ Though the courts have seemingly taken a hands-off approach to legislative waiver, several concerns remain that have not been fully addressed. First, the legislative selection of an appropriate age is itself an arbitrary decision because it assumes juveniles have reached a level of maturity that is reflective of adulthood.⁹⁹ Moreover, there is the presumption that a pattern of re-offending is more indicative of non-amenability to treatment.¹⁰⁰ One could make the argument that continued offending may be more representative of inadequate or improper treatment. The inherent flaw within legislative waiver schemes is they are in fact too mechanical.¹⁰¹ Rather than allow for the possibility that many juvenile offenders do not mentally function at adult levels, these statutes equate crime with maturity.¹⁰² As such, the criminal justice system proceeds against them without taking into account their mental development or propensity for criminality.¹⁰³ More should be expected from a system of laws where juvenile offenders could spend the rest of their lives in prison, or worse yet, lose their lives.

Second, legislative waiver is believed to increase accountability on the part of the juvenile and adult criminal justice systems.¹⁰⁴ Feld, for example, has commented:

⁹⁸ *See id.* at 663-64.

⁹⁹ *See supra* note 53, at 2-3.

¹⁰⁰ *See id.* at 3. While Pruitt does suggest the number of contacts with the justice system is a good predictor of whether a juvenile is amenable to treatment, he also indicates experts are best suited to make the determination of whether the juvenile system can still be beneficial in changing the juvenile's "undesirable condition," which is likely due only to an anti-social personality rather than hardcore criminality.

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions supra* note 46, at 65. Some observers of the juvenile courts believe the focus on "the best interests of the child" skews the true purpose of the juvenile court. Rather

[T]he rehabilitative ideal has minimized the significance of the offenses as a dispositional criterion. The emphasis on the “best interests of the child” has weakened the connection between what a person does and the consequences of that act on the theory that the act is at best only symptomatic of real needs.... The results of efforts to treat offenders in the absence of an effective change in technology, in the face of inadequate resources and a lack of social commitment to provide them, and through a process that grants discretion without rational, objective basis for its exercise suggests that juveniles still receive the worst of both worlds.¹⁰⁵

This observation rests on a couple of assumptions. It assumes juveniles would receive better treatment and rehabilitation in the adult system; however, there are as many resource shortages in prisons and jails as there are in the juvenile justice system.¹⁰⁶ Similarly, it assumes there is more willingness to treat offenders in the adult system than in the juvenile system.¹⁰⁷ Irene Merker Rosenberg admits the juvenile justice system is flawed and not without its own problems. However, she points out it is still better to deal with juveniles within existing juvenile courts rather than through adult criminal courts. She notes:

[T]he juvenile courts do provide benefits that are not present in the adult criminal courts, such as the institutionalized intake diversionary system, anonymity, diminished stigma, generally shorter sentences, and recognition

than instill in juveniles a sense of accountability and responsibility, the juvenile justice instead treats them as blameless victims who are unable to cope with the rigors of the communities in which they live.

¹⁰⁵ See *id.*

¹⁰⁶ Irene Merker Rosenberg, *Teen Violence and the Juvenile Courts: A Plea for Reflection and Restraint*, 37 HOUS. L. REV. 75, 94-95 (2000).

¹⁰⁷ See *id.*

that rehabilitation is a goal still worth pursuing.¹⁰⁸

There are two other criticisms of legislative waiver. First, some say legislative waiver signals a repudiation of the juvenile justice philosophy.¹⁰⁹ Feld is among a number of juvenile court commentators who have suggested legislative waiver is a rejection of the traditional juvenile court model, which focused on rehabilitation and the best interests of the child. He suggests “exclusion on the basis of offenses represents a legislative repudiation of the courts’ philosophical premise that it can aid those appearing before it by denying the courts the opportunity to try, without even an inquiry into the characteristics of the offending youth.”¹¹⁰

Second, legislative waiver denies juveniles the opportunity for rehabilitation within the juvenile justice arena.¹¹¹ Legislative waiver is believed to be an expression of the lack of confidence in juvenile court judges in general and a more specific disenchantment with the juvenile justice philosophy.¹¹² A problem with this assertion is legislatures do not present clear alternatives to judges in the waiver decision-making process.¹¹³ Rather, juvenile court judges tend to have a better awareness of the problems and needs of the juvenile. They are closer to the community in terms of advancing and defending its interests and values. Legislative waiver tends to take a “one size fits all” mentality by suggesting juveniles who fit a certain profile, as determined by offense and age, are

¹⁰⁸ See *id.*

¹⁰⁹ Katherine L. Evans, *Trying Juveniles as Adults: Is the Short term Gain of Retribution Outweighed by The Long term Effects on Society?*, 62 *MISS. L.J.* 95 (1991); Polen, *supra* note 32.

¹¹⁰ See *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, *supra* note 46, at 520.

¹¹¹ See McCarthy, *supra* note 16, at 654.

¹¹² See *id.*

¹¹³ See *id.* at 655. McCarthy approaches the issue of legislative waiver from the perspective of its net-widening effect. That is, it sweeps up juveniles into the system who would be better served by the juvenile court. In this manner, any alternative strategy that could be used to address the problem of these youths who are still salvageable is completely divested from judges.

beyond the help of the juvenile system.¹¹⁴ Such a blanket policy unnecessarily penalizes juveniles and denies many of them the fundamental right to treatment.

Added to this criticism is the belief that legislative waiver ignores the rehabilitative potential of the juvenile justice arena.¹¹⁵ As early as 1981, some juvenile court commentators recognized this waiver provision considers only the offense and the criminal history of the juvenile rather than the circumstances surrounding the offense or the circumstances of the juvenile.¹¹⁶ Thus, this waiver mechanism was considered ill-conceived.¹¹⁷ Similarly, Joanne Hirase takes note that legislative waiver applies sterile standards to the steadily changing conduct typical of most adolescents.¹¹⁸ This observation is somewhat suggestive that guided discretion is good within an acceptable range relative to waiver decisions. However, legislative waiver rules out any possibility that mitigating factors could be considered irrespective of whether the juvenile belongs in the adult criminal system.

Despite its shortcomings, judicial waiver seems to be the best method for disposing of juveniles who commit especially serious crimes as well as those who are believed to be unredeemable within the juvenile court. Unlike prosecutorial and legislative waiver, judicial waiver ensures the procedural and constitutional rights of juveniles are protected and assures consideration of appropriate mitigating and aggravating factors.¹¹⁹ Moreover, with some refinement of “dangerousness” and “amenability to treatment,” judicial

¹¹⁴ See *id.*

¹¹⁵ See Beresford, *supra* note 54, at 811.

¹¹⁶ See Young, *supra* note 30, at 316.

¹¹⁷ See McCarthy, *supra* note 16, at 656.

¹¹⁸ See Hirase, *supra* note 77, at 166. Hirase’s observation is premised on the belief that some states blindly adopt and apply legislative waiver statutes. Such blind application ignores the offender’s amenability to treatment and rehabilitation in the juvenile system. The legislative waiver system provides no discretion in deciding whether to waive, and does not consider anything about the child, except the crime committed, his or her age, and past criminal history.

¹¹⁹ See Guttman, *supra* note 78, at 523, 526.

waiver could eliminate some of the discretion possessed by juvenile court judges.¹²⁰ Judicial waiver seems to be the best method to ensure juvenile offenders are not arbitrarily removed from the protection of the juvenile justice system.¹²¹ Further, the use of judicial waiver refrains from making arbitrary determinations of adulthood without consideration of mitigating factors, such as sophistication, “environment,” and “pattern of living.”¹²²

Though the aim of this research article is not to determine which mechanism is best, it will suggest prosecutorial waiver may not be the panacea that was envisioned by many legislators. This research will suggest that while the expanded authority of prosecutors in Michigan may have resulted in more juveniles getting charged as adults, many still do not receive especially severe punishment for their offenses. Notwithstanding the fact Michigan adopted what could be termed the “Principle of Offense,” juveniles who committed so-called “adult crimes” were still, for the most part, sentenced as “children.” Several reasons could be put forward for why this disconnect occurred. One answer may lie in how judges interpreted the law. Though the argument cannot be made that judges purposefully subverted the intent of the law, it is quite reasonable to believe many of them believed the juvenile court was the best hope for these serious offenders. Such views would be diametrically opposed to those of the legislators’, who championed personal responsibility and accountability under the law.

¹²⁰ Brenda Gordon, *A Criminal’s Justice or a Child’s Injustice: Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 *Ariz. L. Rev.* 193, 207.

¹²¹ Eric 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 (1998).

¹²² Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 *FORDHAM L. REV.* 2425, 2449 (1996); see also Strottman, *supra* note 30.

Part II: Prosecutorial Waiver in Michigan

In 1987, the Michigan House of Representatives began debate on a package of bills that would amend the juvenile code and expand prosecutors' power to make waiver decisions.¹²³ The proposed statutory changes would also amend and revise the criteria for making waiver decisions.¹²⁴ The impetus for this change grew out of a concern that the number of hardened, serious juvenile offenders was increasing at both the state level and nationally.¹²⁵

Many of the legislators who supported changes in the law believed that by providing stiffer punishments and longer sentences, juvenile offenders would be forced to take responsibility for their actions.¹²⁶ As such, juveniles would be confronted with the possibility that their actions could have serious consequences relative to the punishments they receive.¹²⁷ Further, proponents of the statute believed the current judicial waiver system was too cumbersome because crowded court dockets prevented some juveniles from getting the immediate treatment they needed.¹²⁸ As such, greater flexibility was sought by empowering prosecutors to make

¹²³ See House Legislative Analysis Section, H.B. 4731 et al., (Mich. 1988).

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ Richard P. Duranczyk et al., *New Juvenile Waiver Legislation*, 12 CRIM. DEFENSE NEWSL. 1 (1988); See also *People v. Valentine*, 577 N.W.2d 73, 74-76 (Mich. 1998), where the Supreme Court of Michigan ruled that the passage of the new waiver statutes expressed a clear legislative intent to treat juvenile offenders as adults for certain enumerated crimes. The defendant, who was 16 years old at the time he committed the crime and who was originally charged in 1989, appealed the decision of the trial court where his probation was revoked and a sentence of life was imposed. Reasoning that while the unmistakable intent of the legislature was to severely punish offenders convicted of violating the controlled substance law, the Supreme Court of Michigan found the legislature also intended for alternative sentences to be imposed on juveniles where it has been determined that treatment was appropriate. Providing such alternatives was one of three goals outlined in the statute MICH. COMP. LAWS. §769.1(3) (1988).

¹²⁷ See *id.*; see also P.A. 1988, No. 78, § 2; House Legislative Analysis Section, H.B. 4731 et al., (Mich.1988).

¹²⁸ See Duranczyk et al, *supra* note 125.

waiver decisions. It is also important to point out that House Bill No. 5203 sought to amend and improve upon the waiver language outlined in M.S.A. 27.3178(598.4). By way of comparison, the new bill retained the criteria outlined in items a, b, and e. Concurrently, H. B. 5203 added the following criteria:

(c) [W]hether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations: (i) the child is not amenable to treatment [, and] (ii) that despite the child's potential for treatment, the nature of the child's delinquent behavior is likely to disrupt the rehabilitation of other children in the treatment program [,] whether despite the child's potential for treatment, the nature of the child's delinquent behavior is likely to render the child dangerous to the public is released at the age of 19 or 21 [, and] (e) whether the child is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile program and services.¹²⁹

Though many changes were proposed, a few troublesome issues remained unaddressed. The legislature did not clarify the meaning behind "amenability to treatment." Those that argue for greater clarity say amenability is a clinical term that relies on the prediction of future outcomes. This capacity is beyond the expertise of legislators. They cannot predict the efficacy of treatment programs with any degree of certainty because of the multitude of factors that may affect the juvenile's likelihood of success.¹³⁰ Further, it

¹²⁹ See *House Legislative Analysis Section H.B. 5203*, *supra* note 126.

¹³⁰ See Jeffrey Fagan, *Juvenile Justice or Injustice? The Debate Over Reform*, 14 ST. JOHN'S J. LEGAL COMMENT. 359 (2000). Some researchers argue we do not currently have either the technology or the knowledge that is necessary to make predictions about whether juvenile offenders will respond to treatment or whether they will pose a danger to society if they are retained in the juvenile justice system. As such, a great disservice is done to juveniles in that we simply do not know with any degree of certainty what may truly be their outcomes.

seems the legislators held the opinion that rehabilitation programs in the adult system may be better than those in the juvenile one. However, there were no legislative findings of greater treatment success for such programs. The record suggests the legislators measured the likelihood of success as contingent upon the amount of time a juvenile has remaining in the juvenile justice system.¹³¹

Several counter-arguments to this waiver provision were also advanced. Some legislators called the new waiver provision a simplistic solution to a national problem.¹³² This argument suggested the new waiver provision would effectively allow the state to write off salvageable young juveniles. Other arguments suggested the best way to deal with serious, violent, and chronic offenders is to automatically try them as adults but allow the criminal courts to place them in the juvenile system following trial.¹³³

In the wake of these changes, Catherine Bove proffered a detailed critique of the new waiver proposal.¹³⁴ She suggested many state legislators fully believed juveniles were cognizant of the limitations on the juvenile system and used them to their advantage.¹³⁵ This dual system would then remove the incentive to abuse the juvenile justice system.

Bove also observed that some of the legislators had concerns and misgivings regarding the new law.¹³⁶ For example, some critics of the new legislation suggested prosecutors were being given too much discretion in that the law would simply allow them to screen cases to determine whether "... to recommend a warrant, or to seek a permissive waiver from juvenile court, or simply file charges in juvenile court."¹³⁷ Under such conditions, the youth and his/her defense counsel may be subject to different policies and procedures in every county because inevitably there would be

¹³¹ Bove, *supra* note 68, at 1092.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *Id.* at 1086.

¹³⁵ *See id.*

¹³⁶ *See id.* at 1087.

¹³⁷ *See* at 1986.

inconsistency in the manner in which prosecutors pursued charges. Some of these concerns were echoed in court decisions that followed the passage of the new law.

One of the first cases to challenge the new Michigan waiver law was *Michigan v. Nelson*.¹³⁸ The issue presented in this case was whether the probate court improperly waived its jurisdiction over the defendant.¹³⁹ Eddie Nelson, who was 16 years old at the time and accompanied by another juvenile who was 14, forced his way into a Taco Plaza Restaurant while armed with a sawed-off shotgun and demanded to see the safe.¹⁴⁰ While forcing the employees to open the safe, the gun discharged, wounding both employees.¹⁴¹ Nelson and his accomplice then fled the restaurant, but not before taking the purse of one of the employees.¹⁴² Some time later, they both turned themselves in to the authorities.¹⁴³

Nelson was charged with two counts of assault with intent to murder, one count of armed robbery, one count of assault with intent to rob while armed, and one count of possession of a firearm during the commission of a felony. He was subsequently waived to criminal court.¹⁴⁴ On February 10, 1986, the defendant filed an appeal challenging the probate court's waiver of jurisdiction, but during the pendency of this appeal, he was convicted on all counts.¹⁴⁵

On review by the Court of Appeals of Michigan, the court reviewed the criteria for waiver of jurisdiction.¹⁴⁶ After

¹³⁸ *Michigan v. Nelson*, 425 N.W.2d 225 (Mich. App. 1988).

¹³⁹ *See id.* at 226.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* The Court of Appeals examined the waiver criteria outlined in MICH. COMP. LAWS § 712A.4(1) (1988) and MICH. STAT. ANN § 27.3178 (598.4) (1) (Michie 1988). These criteria include: (1) seriousness of the offense, (2) prior record, character, and maturity of the offender, (3) whether the offender is amenable to rehabilitation based on his past contacts with the justice system, (4) the suitability of programs and facilities available in both the juvenile and adult criminal justice systems,

examining these criteria in light of *People v. Schumacher*,¹⁴⁷ the Court of Appeals found the circuit court erred in finding Nelson had a repetitive pattern of offending given that he lacked a prior record.¹⁴⁸ However, the court did not believe this was reversible error because the record, when examined in its entirety, showed the defendant had limited prospects for rehabilitation in the juvenile system.¹⁴⁹

The court went on to say the circuit court committed three errors. First, the circuit court erred in relying on *A Juvenile v. Commonwealth*.¹⁵⁰ Properly read, the case stood for the proposition that the lack of a prior criminal record is indicative of the good prospects of rehabilitation.¹⁵¹ Second, the circuit court erred in determining that the probate court's findings relative to the suitability of programs and facilities available to the juvenile were inadequate.¹⁵² All that is required by law is there must be evidence on the record, sufficiently specific for meaningful appellate review, to which the court can refer in making its determination about the suitability of programs and facilities.¹⁵³ The record clearly showed the probate judge referred to the evidence on the record in making the determination to waive the defendant.¹⁵⁴ Third, the circuit court erred in finding the best interests of the

and (5) whether it is in the best interests of the public to try the juvenile as an adult.

¹⁴⁷ *People v. Schumacher*, 256 N.W.2d 39, 42 (Mich. Ct. App. 1977).

¹⁴⁸ *See Michigan v. Nelson*, 425 N.W.2d 225, 227 (Mich. App. 1988).

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*; *see also A Juvenile v. Commonwealth et al.*, 405 N.E.2d 143 (Mass. 1980) for an extended discussion of this case.

¹⁵¹ *See id.* at 227; *see also People v. Brown*, 517 N.W.2d 806 (Mich. Ct. App. 1994) where the Court of Appeals of Michigan ruled that a judge's decision to sentence an offender as a juvenile rather than an adult was not erroneous where there was a finding that the juvenile's prospects for treatment and rehabilitation in the juvenile system were good despite the relative seriousness of the crime.

¹⁵² *See id.* at 228.

¹⁵³ *See id.* *But compare with State in Interest of Clatterbuck*, 700 P.2d 1076 (Utah 1985), where an appellate court determined that even though the trial judge's findings were insufficient relative to transfer to criminal court, the juvenile could still be waived in light of the fact all of the statutory criteria were considered before making the final decision.

¹⁵⁴ *See id.*

public did not require the defendant to stand trial as an adult.¹⁵⁵ The probate court properly found the defendant was prone to sociopathic behavior, from which society clearly deserved protection.¹⁵⁶

The new waiver law was also challenged in *Michigan v. Brooks*.¹⁵⁷ Miguel Brooks, who was 16 years old at the time, was charged with murder.¹⁵⁸ After the defendant was arrested, he gave a statement to the police regarding his participation in the offense.¹⁵⁹ The trial court later dismissed the case citing the fact the juvenile had not been taken to the juvenile division of the probate court immediately after arrest as required by § 27.¹⁶⁰ The trial court also rejected the arguments of the prosecutor that the automatic waiver provisions did not require adherence to § 27¹⁶¹ and it was these rulings that were the subject of the appeal.¹⁶²

On review by the Court of Appeals of Michigan, the history and purpose of the new waiver legislation was examined.¹⁶³ The Court found the language of MCL 764.1f

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 229. Court decisions in other states have similarly found the best interests of the public are served by transferring some juvenile offenders to criminal court. These decisions, for the most part, are premised on the juveniles age, public safety, and the crime that was committed. *C.f. Hutcherson v. Commonwealth.*, 375 S.E.2d 403 (Va. Ct. App. 1989); *State v. Flying Horse*, 455 N.W.2d 605 (S.D. 1990); *People v. Cheeks*, 549 N.W.2d 584 (Mich. Ct. App. 1996).

¹⁵⁷ *Michigan v. Brooks*, 459 N.W.2d 313 (Mich. App. 1990); The authority of prosecutors to make these waiver decisions was also addressed in *People v. Veling*, 504 N.W.2d 456, 458 (Mich. 1993), where the court interpreted the new waiver law as having the effect of “divesting” the juvenile court of jurisdiction when certain enumerated offenses are committed.

¹⁵⁸ *See Michigan*, 459 N.W.2d at 314.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*; *see also* MICH. COMP. LAWS. ANN. § 764.27 (West 1988) which requires police officers to transport juveniles, if under the age of 17, to the juvenile division of the probate court in the county in which the offense took place and immediately file a petition.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See Michigan v. Brooks*, 459 N.W.2d 313 (Mich. Ct. App. 1990) at 314-15.

empowered the prosecuting attorney to file a complaint and warrant charging the juvenile with an offense that can be tried in criminal court.¹⁶⁴ The Court went on to say that in enacting the new waiver provisions, the legislature did not intend for exceptions premised on § 27 to apply to juveniles who were charged as adult offenders.¹⁶⁵ In matters where juveniles are charged as adults under the automatic waiver provisions, the juvenile court is divested of jurisdiction thereby nullifying the force behind § 27.¹⁶⁶

The Court of Appeals of Michigan again addressed the issue of prosecutorial waiver in *Michigan v. Parrish*.¹⁶⁷ The issue presented in this case was whether a trial court retains jurisdiction over a juvenile who pleads nolo contendere to an offense not enumerated under the waiver provisions.¹⁶⁸ Allen Parrish, who was 16 years old at the time of the offense, was charged with first degree criminal sexual conduct, breaking and entering an occupied dwelling with intent to commit criminal sexual conduct, and misdemeanor malicious destruction of personal property.¹⁶⁹ As part of a plea agreement, Parrish agreed to plead nolo contendere to the charge of third degree criminal sexual conduct in exchange for

¹⁶⁴ See *id.*; § 764.1f empowers prosecutors to file criminal complaints with a magistrate if two conditions are met: (1) the juvenile is between the ages of 14 and 17 and (2) a designated offense has been committed.

¹⁶⁵ See *id.* In the wake of changes to the statute since 1988, there have been a number of cases decided by Michigan courts that have reiterated the apparent irrelevance of Section 27 as it applies to juveniles who commit certain enumerated felonies. Among these cases are *People v. Tremble*, 2000 WL33534678, (Mich App. 2000); *People v. Spearman*, 491 N.W.2d 606 (Mich. Ct. App. 1992); *People v. Williams*, 1997 WL33354401, (Mich. App. 1997).

¹⁶⁶ See *id.* § 764.1f; See also *People v. Thengkam*, 610 N.W.2d 571 (Mich. Ct. App. 2000) where the Court of Appeals of Michigan ruled only prosecutors have the discretion to decide whether to charge and try juveniles as adults under the newly revised waiver statute. Though this case followed *Brooks* by 10 years, it still reiterates the point that juvenile courts are divested of jurisdiction if juveniles commit certain enumerated offenses.

¹⁶⁷ *People v. Parrish*, 549 N.W.2d 32 (Mich. Ct. App. 1996).

¹⁶⁸ See *id.*; see also MICH. COMP. LAW. ANN. § 600.606 (West 1996).

¹⁶⁹ See *Parrish*, 549 N.W.2d at 32-34.

the prosecutor dropping all other charges.¹⁷⁰ Parrish also reserved the right to challenge the constitutionality of the automatic waiver provision.¹⁷¹ Parrish appealed after the trial court sentenced him for seven to 15 years.¹⁷²

On review, the Court of Appeals of Michigan examined the provisions of the automatic statute.¹⁷³ The court reasoned the waiver statute authorizes the prosecutor to file a complaint and warrant in accordance with MCL 764.1f if he has reason to believe the juvenile is 15 years or older but less than 17 years of age and if he committed one of nine enumerated offenses.¹⁷⁴ Consequently, once the criminal court acquires jurisdiction, it does not lose it simply because the defendant pleads to a non-enumerated offense.¹⁷⁵

Several themes emerge from these cases. First, there is the suggestion that the severity of offense outweighs all other relevant waiver criteria.¹⁷⁶ Though this is not an absolute maxim, there is clearly a pattern among the cases where offense severity emerges as the predominate factor in waiver decisions. Second, the weight accorded to offense severity is tied to prospects for rehabilitation. While on the one hand, the juvenile court cannot impermissibly speculate as to the rehabilitative prospects of a juvenile, the juvenile court can properly weigh the amenability of juveniles to treatment.¹⁷⁷ The juvenile courts seem to have adopted a position that focuses on an inverse relationship between offense severity and treatment prospects. In other words, the greater the severity of the offense, the less amenable juveniles are to treatment.

¹⁷⁰ See *id.* at 34.

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ In many cases, judges seem to place greater emphasis on the type of crime that was committed by the juvenile. Additional examples of this emphasis can be seen in the following cases *In re G. B. K.*, 376 N.W.2d 385 (Wis. Ct. App. 1985); *In re J. A. L.*, 471 N.W.2d 493 (Wis. 1991); *In re Elmer J. K.*, 591 N.W.2d 176 (Wis. Ct. App. 1999).

¹⁷⁷ See *Michigan v. Nelson*, 425 N.W.2d 225 (Mich. Ct. App. 1988).

A third theme that emerges from the cases concerns age. Juvenile offenders in these cases were all between the ages of 15 and 17. However, there was no clear relationship between age at the time of the offense and waiver.¹⁷⁸ Typically, juvenile offenders who are in the middle or upper end of the age distribution are more likely to be waived. However, the pattern in these cases is contrary to those findings. In one example, the juvenile court waived a 15-year-old because of his prior history and “perceived” dangerousness.¹⁷⁹ In yet another case, the juvenile court waived a 15-year-old who had a “sociopathic personality” that would likely render him dangerous to the community.¹⁸⁰ In a third case, the juvenile court refused to waive a 17-year-old because it believed the juvenile court could more adequately punish and supervise the teen as opposed to the adult court.¹⁸¹ This pattern, whether construed as anomalous or accurate, does seem to fit Barry Feld’s observation that judicial discretion often leads to unequal results.¹⁸²

One last theme that can be discerned from these cases is that waiver does not seem to be a punishment of last resort.¹⁸³ Instead, it appears waiver has become an instrument of first response. This presumption is quite clear from a

¹⁷⁸This is contrary to the body of literature that has found that there is a clear relationship between age and waiver. Works that exemplify this point include SIMON SINGER, *RECRIMINALIZING DELINQUENCY: VIOLENT CRIME AND JUVENILE JUSTICE REFORM* (1996); Mary J. Clement, *A Five Year Study of Juvenile Waiver and Adult Sentences: Implications for Policy*, 8 CRIM. JUST. POL’Y. REV. 201 (1997); Kathleen M. Heide & Benjamin W. Pardue, *Juvenile Justice in Florida: A Legal and Empirical Analysis*, 8 LAW & POL’Y 437 (1986); G. Larry Mays & Marilyn Houghtalin, *Trying Juveniles as Adults: A Note on New Mexico’s Experience*, 15 JUST. SYS. J. 814 (1992); Tammy Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 CRIME & DELINQ. 3 (1994).

¹⁷⁹See *In re J. A. L.*, 471 N.W.2d 493 (Wis. 1991).

¹⁸⁰See *In re Elmer J. K.*, 591 N.W.2d 176 (Wis. Ct. App. 1999).

¹⁸¹See *Michigan v. Nelson*, 425 N.W.2d 225 (Mich. Ct. App. 1988).

¹⁸²See Feld, *supra* note 18, at 1007. Feld notes the discretion given to juvenile court judges in order that they may weigh amenability and dangerousness is subject to abuse and inequality.

¹⁸³See Zimring, *supra* note 35.

reading of *People v. Nelson* where the court said that lack of a prior offense history is not a bar to waiver.¹⁸⁴ The caveat is that the single offense for which juveniles are charged must be sufficiently serious or heinous that the lack of a prior offense history can be overlooked.

Part III: Empirical Analysis of Michigan's Waiver Law

Despite the changes made to Michigan's waiver statute, little empirical evidence was offered that would have supported the contention that juvenile court judges possessed too much discretion. Even more, there has been very little empirical research nationally on the merits of prosecutorial waiver.¹⁸⁵ As such, there is a large void in our knowledge about the effectiveness of prosecutorial waiver and whether it sufficiently constrains the discretion of juvenile court judges. This study was conducted to address some of the gaps in our knowledge about prosecutorial waiver and its impact on juvenile offenders. Though this research was primarily undertaken to determine the characteristics of youths who are waived, such as age and offense severity, there are other pertinent issues that will be addressed. First, this research explores the expanded authority of prosecutors to make waiver decisions. Given that one of the professed aims of prosecutorial waiver was to make juveniles more accountable, this research will address whether prosecutors strictly adhere to the legal criteria that is contained in the new waiver statute. In other words, the "Principle of the Offense" should control the decisions of prosecutors.¹⁸⁶ Second, this research examines

¹⁸⁴ See *Nelson*, 425 N.W.2d at 227.

¹⁸⁵ In the last 15 years, very few research studies have focused exclusively on prosecutorial waiver. The studies that have been completed have focused almost exclusively on Florida since it is one of the few states that actively uses prosecutorial waiver as a response to juvenile crime. See Bishop et al., *Prosecutorial Waiver: Case study of a Questionable Reform*, 35 CRIME & DELINQ. 179 (1989); Bishop & Frazier, *supra* note 77; Thomas & Bilchik, *supra* note 80.

¹⁸⁶ The Principle of Offense actually has its origins in the research of David Matza whose research on the juvenile court suggested that principles of proportionality and commensurability should be used as guides so that

whether there are any differences between juvenile offenders who are sentenced as adults versus those who are retained in the juvenile court. Third, this research examines whether waived juvenile offenders receive longer, more severe sanctions than those who commit similar offenses but are retained in the juvenile court.

Hypotheses

In this study, the following hypotheses were examined in order to assess the relationships between waiver and the severity of offenses: prior offense history and length of sentence. The “Principle of Offense” is premised on the belief that legal criteria are the most important determinants of whether a juvenile offender will be waived to adult court. More importantly, the “Principle of Offense” identifies the severity of the offense as the most important predictor of whether a juvenile will be sentenced as an adult.

Hypothesis 1: Only the most serious and violent juvenile offenders are sentenced as adults in criminal court.

Hypothesis 2: Juvenile offenders who commit a Class I felony are more likely to be punished more severely than offenders who are waived for any other offense.

Hypothesis 3: The prior record (offense history) of juvenile offenders strongly influences their final disposition or case outcome.

Hypothesis 4: Juvenile offenders who are 16 years old or older are more likely to be sentenced as adults.

fairness could be restored to punishment. DAVID MATZA, *DELINQUENCY AND DRIFT* (1964); *see also The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it makes*, *supra* note 20.

Data and Methodology

The data used in this research study was obtained from the Wayne-Metro Region Intake and Court Services Unit and pre-sentence social reports of juvenile offenders who were waived by the Wayne County Prosecutor's Office between 1988 and 1996. In addition, records maintained by the Wayne County Prosecutor's Office for offenders who committed waivable offenses between 1988 and 1996 were used. These records include legally relevant information, such as the instant or current offense, date of petition, result of waiver motion, presiding judge, final charge, and sentence. The years 1988 to 1996 were chosen primarily because the new prosecutorial (discretionary) waiver law went into effect in 1988.

Using the information obtained from these data sources, approximately 1,967 cases were identified as offenders who had committed offenses that resulted in a waiver petition being filed by the Wayne County Prosecutor's Office. Of these 1,967 cases, only 827 cases actually resulted in waiver while the remainder (1,140) were kept in the juvenile court. Upon further investigation, it was discovered the actual number of waived cases was much smaller given that some of the cases were still pending before the court or had been dismissed, declared a mistrial, or resulted in not-guilty verdicts. Once these cases were removed, a total of 577 cases remained.¹⁸⁷

A narrow focus distinguishes this research from the existing body of similar inquiries exploring the issue of prosecutorial waiver to the extent that a matched sample will not be used given that it is the sentencing outcome that is the variable of interest. However, the literature is filled with

¹⁸⁷ **Cases not included among those waived to adult court**

Pending cases	n = 137
Dismissed cases	n = 74
Not Guilty	n = 33
Mistrial	n = 3
Returned to Juvenile Court	n = 2
Transferred to other jurisdiction	n = 1
Total cases	n = 250

examples of studies that utilized a matched sample framework with great success.¹⁸⁸

Offense and Offender-specific Variables

Data was collected on specific offender characteristics including age of offender (date of birth), race, sex, marital status of parents, instant offense (or charge), incident date, offense history (number and type of prior offenses), disposition, and date of sentence. The selection and use of these variables was predicated on research conducted by several researchers including Marjorie Gutske¹⁸⁹ and Donna Bishop et al.¹⁹⁰ Further, data was also collected regarding the number of victims, injury to victims, use/type of weapon, and treatment options and availability.¹⁹¹ In addition, data was collected for both original charge and final charge brought against the juvenile.¹⁹²

¹⁸⁸ Lonn-Lanza Kaduce et al., *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 277 (1999).

¹⁸⁹ MARJORIE GUTSKE, OFFICE OF CHILDREN'S & YOUTH SERVICES, AN UPDATED STUDY OF DISCRETIONARY WAIVER. (1989).

¹⁹⁰ Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make A Difference*, 42 CRIME & DELINQ. 171 (1996); Other researchers have examined the importance of these variables and they have found these variables exert a very strong influence on the decision to waive juvenile offenders to criminal court or whether to retain them in the juvenile court. These researchers include Bishop & Frazier, *supra* note 185; Jeffrey Fagan & Elizabeth P. Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990); Martin Forst & Martha Elin-Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991); Mays & Houghtalin, *supra* note 177.

¹⁹¹ See *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, *supra* note 20; Feld, *supra* note 35; Poulos & Orchowsky, *supra* note 177.

¹⁹² Various researchers have found that both the original and final charges that are brought against juvenile offenders are significant predictors of whether they will be sentenced as adults. For example, in a study conducted on mandatory transfer in Illinois, researchers found that the factor that was largely responsible for the increase in the number of criminal prosecutions was the seriousness of the charge (offense). THOMAS REGULUS ET AL., CHICAGO LAW ENFORCEMENT STUDY GROUP, STATE

The variables used in this study can be grouped into two categories: legally-relevant and extra-legal variables (Table 1). Lastly, a final category of variables was examined. These variables, statutory criteria, were included because, at a minimum, prosecutors must evaluate whether the juvenile justice system is an appropriate forum for the offender.¹⁹³ Jeffrey Fagan and Elizabeth Deschenes's research, for example, focuses on the importance of understanding whether the use of statutory criteria can sufficiently identify juvenile offenders whose crimes and background are more conducive to an adult criminal court forum.¹⁹⁴ Presumably, the inclusion of these criteria in any analysis is necessary to explain potential differences in waiver decisions.¹⁹⁵

Findings

Descriptive statistics are presented for the variables in Table 1. What stands out is the fact males are overrepresented among those offenders who are waived to adult court (97 percent). This overwhelming difference is consistent with other studies that have found males make up the majority of offenders who are waived to adult court.¹⁹⁶ In addition, African-American juvenile offenders were disproportionately waived to adult court (84 percent). In regards to other non-legal variables, 52 percent of the offenders had substance use/abuse problems, while only about seven percent were diagnosed with psychological problems. Also prominent among the non-legal variables is the presiding judge because approximately 31 percent of waiver cases were heard by the same judge (Judge #3).

SCHOOL TO STATEVILLE: A REPORT ON MANDATORY TRANSFER AND CRIMINAL PROSECUTION OF JUVENILES IN COOK COUNTY, ILLINOIS, JANUARY 1980 TO JUNE 1985 (1988); see also Leona Lee, *Predictors of Juvenile Court Dispositions*, 29 J. CRIME & JUST. 149 (1996).

¹⁹³ Fagan & Deschenes, *supra* note 190.

¹⁹⁴ See *id.* at 328.

¹⁹⁵ See *id.* at 328-29.

¹⁹⁶ CAROL DEFRANCES, BUREAU OF JUSTICE STATISTICS, JUVENILES PROSECUTED IN STATE CRIMINAL COURTS (1994); KEVIN STROM, BUREAU OF JUSTICE STATISTICS, PROFILE OF STATE PRISONERS UNDER EIGHTEEN (2000).

Table 1.**Descriptive Statistics for Legally-relevant and Extra-legal Variables**

Variable	Frequencies	Percentages
Current Offense-Total #		
Felony- Person(violent)	1000	98%
Felony- Property	12	1%
Other	4	
Age at Instant Offense		
15 yrs	207	36%
16 yrs	349	60%
17 yrs	16	3%
Crime results in death		
Yes	175	30%
No	149	26%
Prior Felony Referrals		
Yes	315	55%
No	175	30%
Race		
African-American	487	84%
Other	67	12%
Sex		
Male	557	97%
Female	20	3%
Substance Use/Abuse		
Yes	301	52%
No	185	32%
Psych. Problems		
Yes	43	7%
No	356	62%
Presiding Judge		
Judge #1	178	31%
Judge #2	200	35%
Judge #3	182	31%
Amenable to Treatment		
Yes	328	57%
No	48	8%
Recommendation of Intake/Court Services		
Retain	397	69%
Waive	93	16%

The descriptive statistics for the legally-relevant and statutory criteria show an overwhelming majority of juvenile

offenders who were waived committed felony offenses (98 percent). Of these offenses, approximately 30 percent resulted in the death of the victim. In addition, approximately 60 percent of offenders who were waived were 16 years old. Also, more than half of the offenders who were waived had prior felony court referrals (55 percent). A large percentage of these offenders, 69 percent, also received positive recommendations from the Intake Unit that opposed sentencing them as adults in the criminal court.

Table 2 presents the bivariate correlations of each predictor variable. All of the legally-relevant predictors, with the exception of current offense (the offense with which the juvenile was originally charged), are positively associated with the decision to sentence juvenile offenders as adults. Instead, this variable is negatively associated with the sentencing decision. In addition, all of the statutory considerations with the exception of amenability to treatment and time remaining in the juvenile system are positively associated with the sentencing decision.

Both of these predictors are negatively associated with the decision to sentence juveniles as adults. Only two extra-legal predictors are associated with the sentencing decision: number of prior placements was positively associated while the judge was negatively associated with the sentencing decision.

In view that the variable of interest, sentenced as an adult, is a dichotomous variable, logistic regression models were estimated to assess the relationships among the predictors.¹⁹⁷ Logistic regression is advantageous because the coefficients that are derived can be used to "... estimate the probability of *y* [dependent variable] at different values of *x* [independent variable], and from that, determine the exact change in the predicted probability between any two values."¹⁹⁸ That is, it allows researchers to estimate the

¹⁹⁷Raymond Wright, *Logistic Regression, in* READING AND UNDERSTANDING MULTIVARIATE STATISTICS (Laurence G. Grimm & Paul R. Yarnold eds., 1995).

¹⁹⁸RONET BACHMAN & RAYMOND PATERNOSTER, STATISTICAL METHODS

probability that a certain event will occur. Three models were estimated to test the hypotheses.

Table 2.
Bivariate Correlations with the Predictor Variables

Sentenced as Adult	I. V.
Age	0.15*
Recommendation	0.57*
Current Offense	-0.33*
Number of charges	0.19*
Victim Injured	0.26*
Death of victim	0.30*
Number of prior felonies	0.21*
Used gun	0.07
Gender (Male=1)	0.02
Race (African-American=1)	0.02
Judge (Judge #3=1)	-0.23*
First-time Offender	-0.08
Probation Status	0.08
Threat	0.50*
Amenable to Treatment	-0.38*
Time remaining in juv. system	-0.11*
Risk	0.20*
Number of Placements	0.24*
Living Arrangement	0.03
Substance Use/Abuse	0.00
Psychological History	0.03

*Marked Correlations are significant at $p < .05$; one-tailed

Model I contains only the legally-relevant predictors. Model II, the full model, contains all of the legal, statutory, and extra-legal predictors. Lastly, Model III, the reduced model, contains the legally-relevant predictors and the significant statutory and extra-legal predictors. (See Table 3).

A series of logistic regression models were specified. Results from Model I indicate there were three significant predictors of the sentencing decision. The analysis indicates

juveniles who committed offenses that resulted in the death of a victim were more likely to be sentenced as adults ($\beta=1.01$, $S.E.=0.275$). Given the fact homicide is the most serious of all

Table 3.**Logistic Regression Results for Predictors Affecting the Sentencing Decision**

	Model I		Model II		Model III	
	β	Odds Ratio	β	Odds Ratio	β	Odds Ratio
Legal Predictors						
Age 16	.820	2.27*	.966	2.62*	.850	2.34*
Number of Charges	.437	1.60*	.634	1.88*	.484	1.62*
Felony Category	.045	1.04	-1.48	.862	.033	1.03
Used Gun	-.155	.855	-1.47	.862	-.202	.816
Number of Accomplices	-.067	.934	-3.61	.693	-.138	.871
Victim Died	1.01	2.76*	.759	2.13*	.863	2.37*
Number of Prior Felonies	-.045	.955	-.216	.804	-.028	.972
Other Statutory Considerations						
Recommendation			1.09	2.99*	2.93	18.67*
Threat to Community			1.85	6.39*		
Amenable to Treatment			.384	1.46		
Time line			-.182	.833		
Risk			.425	1.53		
Extra-legal Predictors						
Gender (Male=1)			.627	1.87		
Race (African-American=1)			.205	1.22		
Presiding Judge (Judge #3=1)			1.02	2.79*	1.22	3.40*
First Time Offender			-.043	.957		
Probation Status			.158	1.17		
Number of Placements (non-detention)			.162	1.17		
Living Arrangements			-.058	.943		
Substance Use/Abuse History			-.514	.597		
Psychological History			.012	1.01		
Constant	-3.10		-5.71		-5.09	
-2*log (Likelihood)	367.34		191.91		352.74	
Model Chi-square	160.77		108.43*		175.37*	

* $p < .05$; one-tailed tests. Note: R^2 is not reported because there is no comparable statistic in logistic regression.¹⁹⁹

¹⁹⁹ According to Gary King, there is no need for a R^2 statistic because the goodness of fit to the data will always be comparable if not better than any

felonies, it is not surprising that juveniles who commit these offenses face the greater possibility of being given adult sentences.

In addition, the findings indicate the number of pending charges was a significant predictor of whether a juvenile would be sentenced as an adult.

As the number of charges against the juvenile increased, so did the likelihood that he/she would be sentenced as an adult ($\beta = .473$, $S.E. = 0.164$). This increased likelihood of being sentenced as an adult may suggest prosecutors are targeting juveniles who are chronic offenders. Lastly, age was a statistically significant predictor controlling the effects of all other predictors in the model. The findings indicate older juveniles (16 or 17) had a higher likelihood of being sentenced as adults than juveniles who were younger than 16 years old ($\beta = 0.820$, $S.E. = 0.291$). This finding supports the hypothesis that older juveniles are sentenced more harshly than those who are younger (Hypothesis 4). This finding also provides some evidence that age may serve as a proxy for the amount of time that juvenile offenders have remaining in the juvenile justice system. Given that older juveniles would have less time during which they would be able to receive treatment or even be held accountable for their offenses, this finding suggests they are more likely to be sentenced as an adult to assure they are suitably punished.

Results from Model II, the full model, indicate there were six significant predictors of whether a juvenile would be sentenced as an adult (See Table 3). Three legal predictors continued to be significant: number of pending charges ($\beta = 0.634$, $S.E. = 0.237$), death of the victim ($\beta = 0.759$, $S.E. = 0.413$), and age ($\beta = 0.966$, $S.E. = 0.455$). In addition, three other predictors significantly influenced the decision to sentence juveniles as adults. The findings show that juvenile offenders who appeared before certain judges, an extra-legal

least squares estimation. *How Not to Lie with Statistics: Avoiding Common Mistakes in Quantitative Political Science*, 30 AM. J. POL. SCI. 666 (1986).

predictor, were more likely to be sentenced as adults ($\beta=1.02$, $S.E.=0.498$). More specifically, juveniles who appeared before Judges *A* or *B*, judges with the least amount of judicial experience on the bench, as opposed to Judge *C*, the judge who had the greatest amount of experience in handling waiver cases, were more likely to be sentenced as adults.

The sentencing recommendation, one of the statutory considerations, was also a significant predictor of the decision to sentence a juvenile as an adult. Juvenile offenders were much more likely to be sentenced as an adult when there was a negative recommendation by the Intake Unit ($\beta=1.09$, $S.E.=0.828$). This finding was not unexpected given the fact the sentencing recommendation can be viewed as a composite of all the statutory criteria required under the law.

An additional predictor that was significant in this model was threat to community. Juvenile offenders who were perceived to pose a threat to the community had a higher likelihood of being sentenced as an adult compared to those who were not perceived to pose a threat ($\beta=1.85$, $S.E.=0.834$). Of the remaining predictors, none significantly influenced the decision to sentence juveniles as adults.

Model III, the reduced model, contains the legal predictors and only the significant statutory and extra-legal predictors. The results from Model III indicate all of the previous legal predictors remained significant as well as one extra-legal and one statutory predictor. The results show that death of victim remained significant ($\beta=0.863$, $S.E.=0.285$). Again, this finding was not surprising considering homicide represents the most egregious offense for which juveniles can be prosecuted and sentenced. In addition, age ($\beta=0.850$, $S.E.=0.297$) and number of pending charges ($\beta=0.484$, $S.E.=0.165$) were significant.

An additional predictor that was significant in this model was the recommendation of the Intake Unit. The findings show that where there was a recommendation to treat the juvenile as an adult, juveniles were more likely to be sentenced as adults ($\beta=2.93$, $S.E.=0.369$). Lastly, the presiding

judge continued to be a significant predictor ($\beta=1.22$, S.E.=0.342).

Part IV- Implications and Conclusions

The series of logistic models indicate that legal, statutory, and extra-legal predictors influence the decision to sentence a juvenile as an adult. In both Model I and Model III, there were three significant legal predictors: age, number of charges, death of victim, and recommendation. The findings show that death of victim was a significant predictor of whether a juvenile would be sentenced as an adult. That is, juvenile offenders who committed crimes in which the victim died were more likely to be sentenced as adults compared to all other offenders.²⁰⁰ Also, it is important to point out that age is treated as a legal predictor because this factor coupled with the offense triggers the waiver decision.

Additionally, the findings show only one statutory predictor, recommendation, remained significant across all three models. Only in Model II did the findings show additional statutory predictors may influence the decision to sentence juveniles as adults. The findings show that in cases where juveniles were considered a threat to the community, 79 percent were sentenced as adults, whereas in cases where they were not considered a threat, only 20 percent were sentenced as adults.²⁰¹

²⁰⁰This result seems to be consistent with research that has found juveniles tend to be waived at a higher rate when they commit homicides. Fagan and Deschenes, for example, found juveniles who commit "heinous" offenses, such as murder, are waived at higher rates than other juveniles. However, these researchers temper their findings with the observation that the rate at which juveniles are waived for murder varies from city to city. See Fagan & Deschenes, *supra* note 190, at 337.

²⁰¹Randy Salekin et al., *Juvenile Waiver to Adult Criminal Courts: Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment*, 7 PSYCHOL. PUB. POL'Y & L. 381 (2001). Salekin and his colleagues found dangerousness, the factor that tends to be determinative of whether a juvenile is considered a threat to the community, is highly salient to the waiver decision. In other words, those juveniles who score

Only one extra-legal predictor, presiding judge, significantly influenced the decision to sentence juveniles as adults. This finding was unexpected given the fact the new waiver legislation supposedly removed subjectivity from waiver and sentencing decisions. Prosecutorial waiver was designed so only objective factors would be considered in the decision-making process. While the motives of the judges are beyond the scope of this study, one could suggest their philosophies of justice may well play a part in this decision-making process.²⁰²

The first hypothesis suggested the most serious and violent juvenile offenders are sentenced as adults. Table 4 shows the number of waived offenders who were sentenced as

Table 4.

Summary Table of Offenses Committed by Waived and Retained Juvenile Offenders

Offense most serious	Waived Sentence as Adult	Retained Sentence as Juvenile
Homicide	93	85
Attempted Murder	0	1
Armed Robbery	24	135
Unarmed Robbery	0	3
Assault	37	76
CSC	18	40
Carjacking	2	28
Firearms Violation	0	4
Drugs	1	1
Total (N)	175 (31%)	383 (69%)

low on dangerousness tend not to be good candidates for waiver.

²⁰²A similar judge effect was noted in Feld's research where it was found the rate of transfer among the judges varied considerably. This difference, it is believed, may lie in the differing philosophies that judges bring with them to the bench. Marcy Podkopacz & Barry Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996).

adults as well as waived offenders who were retained in the juvenile justice system. The results show that 53 percent of juveniles who committed homicide-related offenses were sentenced as adults. This finding is in keeping with the logistic regression models that suggested offenders faced a higher likelihood of being sentenced as adults if the victim died.²⁰³ In addition, the results show 15 percent of juveniles who committed armed robbery and 31 percent of juveniles who committed Criminal Sexual Conduct (CSC) offenses were sentenced as adults. Overall, 31 percent of the offenders were sentenced as adults. Thus, it can be said that while serious and violent juvenile offenders, such as those who commit homicides, are being properly targeted by the waiver law, the majority are still sentenced as juveniles.²⁰⁴

The second hypothesis suggested juvenile offenders who committed Class I felonies face a higher probability of being sentenced more severely than all other offenders. Support for this hypothesis is reflected in Table 5, which shows that overall, 51 percent of juveniles who commit homicides are sentenced to prison terms in excess of 10 years. Furthermore there is additional evidence that 14 percent of offenders who commit robberies and 21 percent of offenders who commit CSC offenses are sentenced to a minimum of six months of confinement (See Table 5).

The issue of age and the likelihood of being waived was addressed in the fourth hypothesis. Specifically, this hypothesis suggested juvenile offenders who were 17 years old at the time of the instant offense are more likely to be sentenced as adults than offenders who were 15 years old (Table 6). Only 21 percent of 15-year-olds were sentenced as adults whereas 58 percent of 16-year-olds and 37 percent of 17-year-olds were sentenced as adults.²⁰⁵ This relationship

²⁰³ Joel P. Eigen, *Punishing Youth Homicide Offenders in Philadelphia*, 72 J. CRIM. L. & CRIMINOLOGY 1072 (1981).

²⁰⁴ Elizabeth Clarke, *A Case for Reinventing Juvenile Transfer*, 47 JUV. & FAM. CT. J. 17 (1996).

²⁰⁵ Jeffrey Fagan et al., *Racial Determinants of the Juvenile Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME &

was also confirmed in the logistic regression models, which showed age was a significant predictor of the decision to sentence a juvenile as an adult. All three logistic regression models showed that older juvenile offenders, those 16 and older, were significantly more likely to be sentenced as adults than younger offenders (15-year-olds).²⁰⁶

Table 5.**Summary Table of Offenses and Dispositions**

General Offense Category							
Disposition	Homicide	Assault	CSC	Robbery	Carjacking	Firearms	Drugs
DSS/FIA	84	87	41	137	28	4	1
Probation	1	3	5	0	0	0	0
Time served	0	1	0	0	0	0	0
Boot camp	0	1	0	1	0	0	0
6 mo to 10 yrs	1	9	0	13	0	0	0
11 yrs to 19 yrs	14	7	2	6	0	0	0
20 yrs to 29 yrs	18	10	2	2	2	0	0
30 yrs to 50 yrs	22	5	7	1	0	0	0
More than 50 yrs	8	2	1	0	0	0	0
Life	27	0	0	1	0	0	1
Totals	175	125	58	161	30	4	2

Taken as a whole, new prosecutorial waiver provisions do not seem to have had the impact that was envisioned by the Michigan legislators. First, only about one-third of juveniles

DELINQ. 259 (1987); Leona Lee, *Factors Determining Waiver in Juvenile Court*, 22 J. CRIM. JUST. 329 (1994); Kristine Kinder et al., *A Comparison of Juvenile Offenders Certified as Adults with Juvenile Offenders not Certified*, 46 JUV. & FAM. CT. J. 37 (1995); Marcy Podkapacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996).

²⁰⁶A number of states have enacted or rewritten their juvenile laws to reflect the new reality that younger juveniles are capable of committing serious crimes. Among these states is Pennsylvania who enacted a dangerous juvenile provision, which designates as “dangerous” any juvenile who is at least 15 years old and commits an enumerated violent crime. Margaret Farrell, *Pennsylvania’s Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae*, 98 DICK. L. REV. 739 (1994).

who are waived are actually sentenced as adults. Second, though more than half of offenders who commit homicide-related offenses are sentenced as adults, other offenders who commit felonies — such as robbery, CSC, and carjacking — fare much better. That is, waived juvenile offenders who commit these offenses are sentenced as adults at much lower rates (15 percent for robbery and 21 percent for CSC offenses). While these findings may not suggest the vigorous prosecution of juveniles would reduce the crime problem, they do point to a need to re-evaluate the purpose behind prosecutorial waiver given the number of offenders who are actually waived and sentenced as adults is so small.²⁰⁷

The juvenile court has undergone some major changes since the 1980s. Since that time, a number of states have changed their punishment philosophies toward juveniles. While some states have enacted legislative waiver provisions,²⁰⁸ others have granted prosecutors greater authority to make waiver decisions.²⁰⁹ Despite such profound change, major gaps still exist relative to whether these changes have had any measurable impact on serious and violent juvenile crime.

This research article attempted to explore some of the questions that have been raised about prosecutorial waiver. More specifically, this article sought to address whether prosecutorial waiver provides a better method for dealing with the “crisis” that many communities face relative to the

²⁰⁷ CHARLES FRAZIER, FLORIDA COMMISSION ON JUVENILE JUSTICE, DEEP-END JUSTICE: PLACEMENTS OF TRANSFERS TO ADULT COURT BY DIRECT FILE? (1991).

²⁰⁸ PATRICIA TORBERT ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES FACING CRIMINAL SANCTIONS: THREE STATES THAT CHANGED THE RULES (2000); Butts & Mears, *supra* note 22; Eric Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas*, 23 AM. J. CRIM. L. 563 (1996); Eric Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173 (1994).

²⁰⁹ See Bishop & Frazier, *supra* note 77; Jennifer Taylor, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983 (2002).

Table 6.**Summary of Age and Race by Sentence**

Age	Race	Sentenced as Adult Yes	Sentenced as Adult No	Totals
15	Other	5 (2%)	17(5.5%)	22 (4%)
15	African-American	37(15%)	140 (46%)	177 (32%)
16	Other	15(6%)	29 (9.5%)	44 (8%)
16	African-American	182(74%)	109 (36%)	291(53%)
17	Other	1(<1%)	0 (0%)	1 (<1%)
17	African-American	5 (2%)	9 (3%)	14 (2.7%)
Total		245	304	549

* missing values omitted (n=28)

crimes committed by juveniles. While this study provides some evidence that prosecutorial waiver may work insofar as juveniles who commit homicides receive more severe punishments, the picture is murkier relative to offenders who commit “less serious” Class I felonies. Outcomes for these offenders are remarkably less grave when compared to those offenders who commit similar offenses yet nonetheless are retained in the juvenile justice system.

The present analysis indicates prosecutors base their waiver decisions largely on the legal and statutory criteria that prescribe the conditions that must be met before a juvenile can be waived to criminal court. Despite the adoption of these guidelines, there still seems to be other mechanisms at work that limit the number of juveniles who are actually confronted with the full force of the criminal justice system. In other words, while the power of prosecutors to make waiver decisions has expanded, obstacles of other kinds prevent them from fully executing the intent of the legislature. Future research on this subject needs to be undertaken to explore why this occurs, or more importantly, whether there are actors within the criminal justice system itself who are responsible for the uneven application of the law.

One area that may raise some tough questions centers on the issue of race. The results of this study show minority youth are disproportionately represented among offenders who are sentenced as adults. This over-representation is especially pronounced among juveniles who are 16 years old. Other researchers have observed similar patterns.²¹⁰ Answers that have been proffered have ranged from “minority youth commit more waivable offenses”²¹¹ to “the charging and sentencing practices of criminal justice actors are motivated by racial bias.”²¹² While this research did not find any evidence of bias, one cannot escape the reality that minority youth bear the brunt of the new waiver provisions.

In the end, this research should provide the impetus for further discussion of the proper response to the juvenile crime problem. Although states continue to view waiver as the most appropriate method for addressing serious and violent juvenile offenders, serious doubts remain about whether waiver is the best solution. As this research suggests, juveniles who commit homicides are waived and sentenced as adults more often than any other group of offenders. However, those offenders whose crimes include robbery and assault are more likely to escape the full force of the law. It is unlikely that imposing stricter waiver criteria would offer much hope because prosecutors already tend to follow the statutory criteria pretty closely when it comes to making these decisions. Thus, it seems judges, through their sentencing decisions, act as gatekeepers to the

²¹⁰For example, in their study of Minnesota’s waiver and extended jurisdiction laws, Feld and Podkapacz found minority youth were over-represented among offenders who had waiver proceedings initiated against them by prosecutors. They partly attributed this finding to the fact these youth commit violent and other serious crimes at higher rates than other youth. This finding held even after they controlled for the seriousness of the crime and additional legal factors that could affect the waiver decision. *The Backdoor to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1034 (2001).

²¹¹*See id.*

²¹²John Kerbs, *(Un)Equal Justice: Juvenile Court Abolition and African Americans*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 109 (1999); Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002).

adult criminal justice system. It could be that judges are simply reluctant to throw these proverbial babies out with the bathwater. However, other explanations do not seem capable of shedding much light on what factors may be at work, which sets sentencing decisions of judges at odds with the charging decisions of prosecutors. Until a plausible explanation is found, the debate will continue, relative to whether prosecutorial waiver can truly hold juvenile offenders accountable for their actions.