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Death is not different: The transfer of juvenile offenders to adult criminal courts

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Introduction

The U.S. Supreme Court first reviewed a state’s statutory procedure for juvenile transfer to adult criminal courts in Kent v. U.S.1 Morris Kent was a fourteen-year-old first convicted for purse snatching and house-breaking, placed on probation, and later charged at the age of sixteen with robbery and rape.2 Kent was arrested, presumably admitted to involvement in these crimes after seven hours of interrogation, and placed in a receiving home for one week.3

Under then applicable District of Columbia (DC) Juvenile Code Act,4 the juvenile court judge could waive jurisdiction of a sixteen-year-old or older youth who was charged with a felony after the judge conducts a “full investigation”.5 The judge neglected to hold a hearing or rule on defense counsel’s motions for a hearing and entered an order that did not state specific findings. Juvenile court jurisdiction was waived allowing for adult criminal court trial on the alleged offenses.6 Kent eventually appealed the waiver order but was subsequently indicted by a grand jury. He was sentenced at trial to thirty to ninety years in prison, affirmed by the D.C. Circuit Court, and appealed to the U.S. Supreme Court.7

The Supreme Court reversed and remanded the District Court’s decision,8 holding that juvenile offenders are provided due process protections and cited a list of determinative factors for review in making a transfer decision.9 These due process requirements include a hearing, notice of the hearing, effective assistance of counsel, and a statement of reasons for the courts’ decision if a transfer to criminal

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2 Kent, 383 U.S. at 543.
3 Id. at 544-545.
4 This section of the D.C. Juvenile Code Act was rescinded in 1968.
5 Id. at 547-548. See Sally T. Green, infra note 113 (“Although Kent involved a case of judicial waiver, the Court’s interpretation of the jurisdictional statute and its reasoning articulates principles of fundamental fairness owed juveniles and the proper function/role of the state in juvenile justice proceedings”).
6 Id. at 546-549.
7 Id. Shannon F. McLatchey, Note, Juvenile Crime and Punishment: An Analysis of the “Get Tough” Approach, 10 U Fla. J. L. & Publ. Pol’y 401, 417 (1999) (discussing the District Court’s consideration of counsel’s motion to dismiss the grand jury indictment on invalid waiver grounds, but finding that the “full investigation” language of the D.C. Code did not require a judicial hearing).
8 Id. at 562.
9 Id. at 556-557.
court was made.\textsuperscript{10} The required determinative review factors include the following: the seriousness of the alleged offense and threat to community safety; whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; whether the alleged offense was against persons or against property, with the weight leaning more toward waiver if against persons; the prosecutorial merit of the complaint;\textsuperscript{11} the sophistication and maturity of the juvenile as determined by consideration of his home, environment, emotional attitude, and pattern of living; the record and previous history of the juvenile; and whether co-defendants in the offense are being tried in criminal court.\textsuperscript{12}

The Court held that the waiver decision is of critical importance.\textsuperscript{13} While latitude is presumed for the determinative judicial court, it is not complete and must include a full investigation of these factors\textsuperscript{14} with meaningful review.\textsuperscript{15} The Court stated that “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults . . . would proceed in this manner. It would be extraordinary if society’s special concern for children, as reflected in the District of Columbia’s Juvenile Court Act, permitted this procedure”.\textsuperscript{16} In response to Kent, most states incorporated these delineated factors in their waiver determinative state laws and many included individual offenders’ amenability to treatment and threatened level of community danger.\textsuperscript{17}

The Kent decision has not been modified or overturned by the Court in the ensuing four decades, but a state law driven “tough on crime” policy beginning in the 1970’s and a search for less adversarial

\textsuperscript{10} Id. One year later in re Gault, 387, U.S. 1 (1967), the Court extended specific constitutional protections to juveniles including notice of charges, legal representation, the privilege against self-incrimination, and confrontation and cross-examination of witnesses.

\textsuperscript{11} Id. Whether there is evidence upon which a grand jury may be expected to return an indictment.

\textsuperscript{12} Id.

\textsuperscript{13} Id. at 556.

\textsuperscript{14} Id. at 553.

\textsuperscript{15} Id. at 562. The juvenile court must give careful consideration and “set forth the basis for the order with sufficient specificity to permit meaningful review” of these determinative factors.

\textsuperscript{16} Id. at 554.

\textsuperscript{17} Barry C. Feld, The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes, 78 J. Crim. L. and Criminology 471, 477 (1987); Ellen Marrus & Merker Rosenberg, After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court, 42 San Diego L. Rev. 1151 (2005) (Kent did not mandate the use of these determinative factors, although most states incorporated them into their laws).
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transfer options prevailed. Today, a majority of states use explicitly punitive juvenile sentencing transfer strategies with an emphasis on public safety, sentencing, and offender accountability. Since 1992 all but one state passed legislation easing the requirements to permit the transfer of juvenile offenders to criminal court. The ease of transferring juvenile offenders has been accomplished by expanding automatic transfer criteria, lowering age limits on excluded offenses, expanding prosecutorial waiver provisions, and adding crimes eligible to judicial waiver.

In March 2005, the Supreme Court decidedly weighed in on this issue of felonious juvenile offenders again, albeit not directly. In Roper v. Simmons the Court based part of its death penalty decision on noted developmental differences between juveniles and adults. In extending Eighth Amendment protections to 16- and 17-year-old juvenile offenders by declaring the death penalty unconstitutional the Court held that juveniles’ underdeveloped sense of responsibility and lack of maturity, vulnerability to peer pressure, and less-fixed transitory personalities make them less culpable than adult offenders. The Court recognized this diminished culpability for juveniles and found youth itself to be a mitigating factor.

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20 See Patrick Giffin, National Center for Juvenile Justice, “National Overviews,” State Juvenile Justice Profiles (2003), tbl. “How have state laws governing criminal prosecution of juveniles changed in recent years?” (“From 1992 through 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults (Nebraska represented the only exception). In general, recent state legislative activity in this area has tended to 1) expand the categories of offenses for which transfer is possible; 2) lower minimum age limits for transfer; 3) limit juvenile court judges’ discretion to retain jurisdiction over certain cases; 4) shift transfer decision-making from judges to prosecutors; and 5) redraw jurisdictional lines between the juvenile and criminal courts, so that cases involving serious, violent, or repeat offenders fall automatically to the latter rather than the former.”)
21 Id at 14-15.
23 Id.
24 Id. at 1188. (“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders . . . these qualities often result in impetuous and ill-considered actions and decisions . . . (i)n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”)
This paper advocates that the *Roper* decision further expands recognition of juvenile offenders’ decreased culpability in decisions to transfer juveniles to adult criminal courts. This requires incorporation of the Court’s *Roper* holdings on juvenile offenders’ culpability in amendment of current punitive state laws. Part I discusses the three legal options, and corresponding number of juveniles, that judicial courts, prosecutors, and states pursue in transferring juvenile offenders to adult criminal courts. Part II provides current research efficacy and outcomes of punitive sentencing strategies and finds this policy is counterproductive to intended goals and harmful to juvenile offenders. Transferred juvenile offenders receive little rehabilitation, have higher and faster recidivism rates, and lose ties with family and the community to which they return. Part III presents an analysis of all current 50 state law (and District of Columbia) criteria for judicially transferring a juvenile to adult criminal court. This comparison shows adherence to the Supreme Court’s holding in *Kent*, subsequent state statutory amendments, and identifies minimal congruence to the recent *Roper* holding on juvenile culpability. The findings are discouraging for anyone who believes, as the Supreme Court does in *Roper*, that juvenile offenders deserve a second (or even a third) chance and that they are truly different, and less culpable, than adult offenders. The call is made for a moratorium on transferring youth to adult criminal courts.

I. The Transfer of Juvenile Offenders to Adult Criminal Courts

25 Id. ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.")

26 Id. ("The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.")
There are three options within state laws for juveniles to be transferred to adult criminal courts.\textsuperscript{27} One, a judicial waiver allows a juvenile court judge to waive jurisdiction based on state law criteria.\textsuperscript{28} Within the judicial waiver are three subtypes: discretionary waiver (same definition as the judicial waiver); mandatory waiver,\textsuperscript{29} making it mandatory that a juvenile court judge waive jurisdiction if probable cause exists that the juvenile committed the alleged offense (allowed in fifteen states - Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, and West Virginia); and presumptive waiver,\textsuperscript{30} where the burden of proof concerning a transfer decision is shifted from the state to the juvenile (allowed in fourteen states and the District of Columbia - Alaska, California, Colorado, Illinois, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, and Utah). Judicial review waivers account for approximately 15 percent (8,500) of all juveniles transferred to adult criminal courts annually.\textsuperscript{31}

Two, direct file provisions (prosecutorial discretion) give the prosecutor discretion to file charges in either the juvenile or criminal court.\textsuperscript{32} Prosecutorial waivers account for approximately 45 percent (90,000) of all juveniles transferred to adult criminal courts annually.\textsuperscript{33}


\textsuperscript{28} See Torbet, supra note 27 at 3; Sickmund, supra note 27 at 1.

\textsuperscript{29} Id. This list is current as of the 2004 state legislative sessions. \url{http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp} (visited January 10, 2006)

\textsuperscript{30} Id. The presumptive waiver requires that certain juveniles be waived to criminal court unless they can prove they are suited to juvenile rehabilitation. This list is current as of the 2004 state legislative sessions. \url{http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp} (visited January 10, 2006)


\textsuperscript{32} See Torbet, supra note 27. Thus, original jurisdiction is shared by both criminal and juvenile courts.

\textsuperscript{33} See supra note 31.
Three, statutory exclusion provisions (statutory, automatic, or mandatory transfer) automatically exclude certain juvenile offenders from the juvenile courts’ original jurisdiction, with specified offense and age criteria.\(^{34}\) Statutory exclusion waivers account for approximately 45 percent (90,000) of all juveniles transferred to adult criminal courts annually.\(^ {35}\)

Following the *Kent* decision, judicial waiver had been the most common state procedural approach to transferring juveniles to criminal court.\(^{36}\) The *Kent* decision enumerated criteria to guide judges in this decision and many states adopted some of these guidelines.\(^{37}\) Subsequent “tough on crime” state policies have made judicial (discretionary) transfer decisions less frequent and statutory (mandatory) and prosecutorial (direct) transfer decisions much more frequent.\(^{38}\) Most states today use a combination of judicial, prosecutorial, and statutory waivers, as well as blended sentencing.\(^{39}\)

Judicial waivers are still the most common transfer state provision, authorizing but not requiring juvenile courts to designate appropriate cases for adult prosecution\(^{40}\) (allowed in forty-six states and the District of Columbia - Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Okalahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South

\(^{34}\) See Torbet, supra note 27.

\(^{35}\) See supra note 31. It must be noted that prosecutorial and statutory waivers are more difficult to track than judicial waivers. The estimates for these two are based on cited sources. For further review, see David S. Tanenhaus & Steven A. Drizin, Criminal Law, Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide, 92 Crim. L. & Criminology 641 (2002). Also, there are additional transfer classifications found in a majority of state statutes. “Reverse waivers” allow juvenile court judges to transfer “excluded” or “prosecutorial” filed cases from criminal court to juvenile court. “Once an adult/always an adult” provisions state that once a juvenile is convicted in criminal court all subsequent cases for that juvenile will be under criminal court jurisdiction.

\(^{36}\) Kent, 383 U.S. 541 at 542.

\(^{37}\) See Feld, supra note 17. Attached Appendix delineates current state law (as of 2004 to 2006 legislative sessions) and Kent criteria utilized in juvenile transfer judicial decisions.

\(^{38}\) See Griffin, supra note 20.

\(^{39}\) See Griffin, supra note 20 at 1. Robert Dawson, Judicial Wavier in Theory and Practice (45-81) in The Changing Border of Juvenile Justice: Transfer of Adolescents to the Criminal Court 4 (Jeffrey Fagan & Franklin E. Zimring eds., 2000). See Torbet, supra note 27 (blended sentencing statutes are significantly different in allowing for juvenile and/or adult correctional sanctions on serious and violent juvenile offenders who have been adjudicated in juvenile court or convicted in criminal court. Five basic models state models currently exist; each applied to a subset of juvenile offenders specified by statute and usually defined by age and offense).

\(^{40}\) See Griffin, supra note 20. This list is current as of the 2004 state legislative sessions. http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp (visited January 10, 2006).
Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming), but prosecutorial waivers (allowed in fourteen states and the District of Columbia - Arizona, Arkansas, California, Colorado, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming) and statutory waivers (allowed in twenty-nine states - Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New York, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin) account for a vast majority of transferred juveniles. Prosecutorial waivers generally provide no review guidelines and are subject to only grand jury review, unlike judicial waivers that allow for appellate court review.

II. Punitive Policies are counter-productive and harmful to Juvenile Offenders

Research knowledge to date finds this current punitive approach in juvenile offender transfers to criminal courts is counter-productive to stated policy intentions of increased public safety and increased youth accountability. There is little evidence these state laws have reduced arrest or crime rates (Steiner

41 Id. This list is current as of the 2004 state legislative sessions. http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp (visited January 10, 2006).
42 Id. This list is current as of the 2004 state legislative sessions. http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp (visited January 10, 2006).
43 Id. Much less frequently utilized are the juvenile blended sentences (available in 15 states – Alaska, Arkansas, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Ohio, Rhode Island, Texas, and Vermont) and criminal blended sentences (available in 17 states – Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, Oklahoma, Virginia, Wisconsin, and Wyoming). These lists are current as of the 2004 state legislative sessions. http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp (visited January 10, 2006).
44 See Feld supra note 17, at 119-124; Tanenhaus, supra note 35.
45 See Co-offending and Patterns of Juvenile Crime, Office of Juvenile Justice and Delinquency Prevention, Department of Justice, (Dec., 2005, NCJ 210360); Juvenile Accountability Incentive Block Grants: Assessing Initial Implementation, U.S. Department of Justice (2005) (“JAIBG required that States and localities have or consider adopting policies to prosecute as adults juveniles over the age of 15 who commit serious, violent, crimes. Of the 56 jurisdictions receiving funds, 42 reported that their policies confirmed to this objective. As the trend in States had been toward toughening juvenile transfer laws, 39 States had such policies when the program began, by 2001, three additional states had enacted laws or adopted policies that strengthened transfer policies. States allocated an average of 11 percent of JAIBG funds in FY 1998-2000 to strengthening prosecution of serious, violent juvenile offenders”); J. Houston & Sam Barton, Juvenile Justice: Theory, Systems, and Organizations (2005); J. Ferro, Library in a Book: Juvenile Crime, (2003) (The passage of the Violent Crime Control and Law Enforcement Act, which authorized the imposition of harsher sentences for certain crimes committed by gang members, authorized adult prosecution of minors 13 years of age or older, charged with certain crimes); Howard Snyder, Melissa Sickmund, & E. Poe-Yamagata, Juvenile Transfers to Criminal Court in the 1990’s: Lessons Learned from Four States, Office of Juvenile
et al., studied twenty-two states that enacted or substantially amended statutes post-1979 and found that only two of the states had declines in their arrest rates for violent juvenile crime after the laws became effective,\textsuperscript{46} reduced recidivism (Howell reviewed fifty studies of juvenile transfers to the criminal justice system and found recidivism rates were higher among juveniles transferred to criminal courts than among those retained in the juvenile justice system),\textsuperscript{47} or subsequently improved community safety (Singer found

\begin{footnotesize}
\textsuperscript{46} See Benjamin Steiner, Craig Hemmens, & Valerie Bell, Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws enacted Post-1979, Justice Quarterly, 23(1), 34-59 (2006); D. Myers, Excluding Violent Youths from Juvenile Court: The Effectiveness of Legislative Waiver, unpublished dissertation, University of Maryland (1999); L. Winner, L. Lanza-Kaduce, D., Bishop, & C. Frazier, The Transfer of Juveniles to Criminal Court: Reexaming Recidivism over the Long Term, Crime and Delinquency, 43(4), 548-563 (1997) (Matched pairs of juveniles found that transferred youths re-offended more quickly than did their non-transferred counterparts); Jeffrey Fagan, Separating the Men from the Boys: The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in J. Howell, B. Krisberg, J.D. Hawkins, & J. Wilson, eds., A Sourcebook: Serious, Violent, and Chronic Juvenile Offenders, Sage Publications (1995); R. Redding, Examining Legal Issues: Juvenile Offenders in Criminal Court and Adult Prison, Corrections Today (1999) (Criminalization of adolescent crimes failed to provide more effective punishment and lower recidivism rates. Results indicated that recidivism rates were higher for adolescents in criminal court, their re-arrests occurred more quickly, and their return to jail more likely. Sentence lengths were comparable. Expected outcomes of greater youth accountability and lengthier sentences were not gained from criminal court punishment, nor was community protection increased); Lisa Stolzenberg & Stewart J. D’Alessio, Three Strikes and You’re Out: The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates, 43 Crime & Delin. 457, 465 (1997); Coalition for Juvenile Justice, Childhood on Trial: The Failure of trying and sentencing Youth in Adult Criminal Court (2005), at \url{http://www.juvjustice.org/publications/2005ar.html} (this research-based report identifies the public safety and rehabilitative failures of our nation’s “adult time for adult crime” policies and reaffirms the effectiveness of retaining the vast majority of juvenile offenders in the juvenile justice system).

\textsuperscript{47} See James C. Howell, Juvenile Transfers to the Criminal Justice System: State-of-the-Art, Law and Policy, 18, 17-60 (1996); Donna Bishop, C. Frazier, L. Lanza-Kaduce, & H. White, The Transfer of Juveniles to Criminal Court: Does it make a Difference? Crime and Delinquency, 41, 171-191 (1996) (recidivism of youths who were transferred to criminal court in Florida in 1987 was compared with that of those retained in the juvenile system. Results indicated that transferred youths quickly re-offended at a higher rate than matched non-transferred youth. The seriousness of re-offending was also greater for the transfer group than non-transfer group, with transfers more likely to commit a subsequent felony offense.); Fagan, supra note 46; C. Mason & S. Chang, Re-arrest rates among youth sentenced in Adult Court: An Evaluation of the Juvenile Sentencing Advocacy Project, Juvenile Sentencing Advocacy Project, Miami-Dade County Public Defender’s Office (2001), \url{http://www.pdmiami.com/JSAP_2001_Impact_Evaluation.pdf} (youth tried as adults who were given adult sentences were twice as likely to re-offend as youth who are sentenced to juvenile justice programs. Over a one-year time period, almost 90% of the youth sentenced to adult probation or boot camp re-offended; in contrast, 40% of youth who received juvenile justice sanctions re-offended); Winner, supra note 46; Donna Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 Crime and Justice: A Review of Research, 81, 85 (2000) (juveniles prosecuted as adults had higher rates of re-arrest for serious felony crimes, were rearrested more quickly, and were more often returned to incarceration); Marcy Rasmussen Podkopacs & Barry C. Feld, The End of the Line: An Empirical Study of Judicial Waiver, 86 J. Crim. Law & Criminology 449, 451-452 (1996); S. W. Henggeler, Multisystemic Treatment of Antisocial Behavior in Children and Adolescents, New York: Guilford (1998); C. Spohn & D. Holleran, The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders, Criminology, 40, 329-357 (2002); R.E. Redding, Recidivism rates in Juvenile versus Criminal Court.
\end{footnotesize}
in New York state that juvenile transfers to criminal courts had no deterrent effect). Many juvenile offenders transferred to criminal court do not receive a prison sentence. If they do there is little consistency in sentencing rationale or length.

Transferring juveniles to adult criminal court systems eliminates rehabilitative or treatment options for those juveniles who could benefit because adult prison systems offer few treatment modalities to inmates; loosens ties with family members with which they are ultimately reunified because adult prisons, compared to juvenile facilities, are much further in distance from the youths’ community; harms youth during adult prison incarceration with increased physical trauma experienced and an inability to separate youths from adults in the facilities; and decreases chances of future employment after adult

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49 California Senate Report 1993-1994 Session (AB 560) at 7 (“One criminologist has observed that only about 10-12% of juveniles now transferred to criminal court serve any time in California.”); see Fagan, supra note 33 at 802.

50 Id. See Kevin Strom, Steve Smith, & Howard N. Snyder, United States Department of Justice, Bureau of Justice Statistics, Juvenile Felony Defendants in Criminal Courts, at Highlights (Sept., 1998; NCJ 165815) (“About a third of juveniles in criminal courts sentenced to State prison received a sentence of 4 years or less. The average prison sentence for juveniles convicted in criminal courts was about 9 years; for those convicted of a violent offense, the average prison sentence was nearly 11 years.”).


52 See Redding, supra note 47; R. Seltzer, Juveniles with Mental Disabilities: When Incarceration makes Youth Worse, Juvenile Justice Update, 7(2), 9-10 (2001).

criminal justice processing because record expungement is much more difficult.\textsuperscript{54} A majority of juvenile felony offenders in secure custody facilities have a mental health disorder (40 to 90%), substance abuse addiction (37 to 73%), and/or a special education disability (33 to 41%).\textsuperscript{55} Adult court systems are not equipped to deal with inmates’ significant disability needs.\textsuperscript{56}


Why the disconnect between intended policy goals and research findings for these youth? The Supreme Court seems to have articulated the answer in their \textit{Roper} decision through abolishment of the death penalty for sixteen-and seventeen-year-old offenders based on “evolving standards of decency” in finding the punishment grossly disproportionate because of juveniles’ underdeveloped sense of responsibility, lack of maturity, vulnerability to peer pressure, and less-fixed transitory personalities.\textsuperscript{57}


\textsuperscript{57} See Roper, supra notes 24, 25, & 26. The Court cites Steinberg & Scott, Less Guilty by Reason of Adolescence, Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (“as legal minors, juveniles lack the freedom that adults have to extricate themselves from a criminogenic setting”); Eric Erikson, Identity: Youth and Crisis (1968) (seminal research on adolescent
These youth developmental differences relied on by the Court in the *Roper* holding are well documented in research literature. Adolescents are group focused in their development, greatly influenced by other peers, and more likely to commit violent crimes in groups. Adolescence is an ongoing process of youth personality growth and identity formation.

**Current State Law**


A review of current state (and District of Columbia) judicial (and limited prosecutorial) statutes waiver criteria finds significantly limited reflection of the Roper juvenile offender culpability factors, identifies many states that do not comport with numerous Kent review factors, and reflects significant punitive state policies.

1. No current state law waiver criteria reviews youths’ transitory personality or less formed character. However, 27.5% of states (and District of Columbia) review the youths’ mental and/or emotional condition. Most of these state laws do not report how to “review” these criteria, two state laws require records or report reviewing, and one state law requires a juvenile court-ordered examination and report.

2. The maturity of the offending youth is reviewed by only 26 of 51 (50.9%) of the states.

Twenty-three of these states utilize the Kent definition, while three states review for “maturity.”

3. Vulnerability to peer pressure and negative influences is reviewed by only two states (Arkansas,

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64 See Appendix for full listing of state (and District of Columbia) law criteria. This state law list is current as of the 2004 to 2006 state legislatures.

65 Roper, 125 S. Ct. at 1188.

66 Arizona, Arkansas, California, District of Columbia, Maryland, Massachusetts, Mississippi, New York, North Dakota, Ohio, Pennsylvania, Virginia, Wisconsin, and Wyoming.

67 Arkansans and California.

68 Ohio.

69 Roper, 125 S. Ct. at 1188; Kent, 383 U.S. at 556-557.

70 Alabama, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Oregon, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

71 New Hampshire, North Dakota, and Pennsylvania.
determining whether the youth offense was committed “alone or in a group”; and Utah, determining whether “two or more youth” committed the offense). Three additional states review whether the youths’ offense was “committed while involved in gang or syndicate enterprises”, but the focus is punitive not culpability.

4. Four states do not allow any other transfer criteria outside the statute to be reviewed. One of these states requires that two of the delineated seven factors must be reviewed in the transfer decision.

5. While many state statutes follow some of the Kent criteria, many do not: only 78.4% review safety and/or protection of the community; only 66.7% review the youths’ prior juvenile court record, with 19.6% specifically reviewing previous felony offenses, and two states requiring this review in all transfer decisions; only 65.5% review the seriousness (nature) of the offense, with three states requiring this factor to be reviewed; only 54.9% review youth treatment that is available, with two states requiring a review of how close the youth is to age eighteen; only 50.9% review youth maturity.

72 Roper, 125 S. Ct. at 1188.
73 See Appendix.
74 Kentucky, Ohio, and Tennessee.
75 Idaho, Kentucky, Oklahoma, and Wyoming.
76 Seriousness of the offense; and safety of the community.
77 Kentucky.
78 Kent, supra note 12.
79 See Appendix for full state criteria listings.
82 Arizona, Colorado, Delaware, Florida, Indiana, Missouri, Nebraska, Ohio, Virginia, and Wisconsin.
83 Michigan and Minnesota.
85 Kentucky, Michigan, and Minnesota.
87 Ohio and Virginia.
only 46.2% review the likelihood of the youths’ rehabilitation; only 41.5% review whether the offense was violent, aggressive, premeditated, or willful, with only one state that did not adopt the *Kent* definition; only 37.3% review youths’ past treatment efforts and responses; and only 37.0% review whether the offense was against person or property.

6. A limited number of current state statute criteria are in line with the Court’s *Roper* holdings on youth culpability: 27.5% review youths’ mental and emotional condition; 15.7% review materials related to youths’ mental, physical, educational, and social history, with two states making this a court-ordered requirement; 13.7% review whether the youth is subject to mental institutionalization; 5.8% review youths’ motivation to commit the offense; and 2.0% review youths’ demeanor.

7. Some current state statute review criteria reflect the post-*Kent* punitive policy shifts: 13.7% review whether any codefendants are being tried as adult offenders; 9.8% review previous juvenile residential or secure facility placements; 7.8% review any other anti-social or physical violence history, and 5.9% review the number of other alleged, unadjudicated offenses.

8. Youth waiver to adult criminal court based on probable cause evidentiary requirements are

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89 Arizona, California, Colorado, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming.


91 Missouri.

92 Alabama, California, Delaware, District of Columbia, Florida, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, and Wisconsin.


94 See supra note 66.

95 California, Kansas, Massachusetts, Maine, North Dakota, South Dakota, Texas, and Wisconsin.

96 California and Wisconsin.


98 Nebraska, Virginia, and Wisconsin.

99 Alabama.

100 Delaware, Florida, New Hampshire, South Dakota, Utah, Wisconsin, and Wyoming.

101 Arizona, Colorado, Florida, Ohio, and Virginia.

102 Arizona, Kansas, Michigan, and Nebraska.

103 Kansas, Ohio, and Wisconsin.
necessary in only 25.5% of the states. Over 37.0% of the states (and District of Columbia) require less than probable cause evidence (reasonable suspicion or reasonable cause – 13.7%, clear and convincing evidence – 11.8%, and preponderance of the evidence – 11.8%). Over 33% of state statutes do not specify the level of evidence required.

9. In over 60.0% of the states (including District of Columbia), once a youth is transferred to adult criminal court the youth will always be considered an adult for any future offense. Seven state statutes (13.7%) do not specify this transfer rule.

10. Six states (11.8%) have no statute directing juvenile transfers to adult criminal courts.

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**Death is Not Different**

The Supreme Court has found juvenile offenders less culpable than adult offenders because of youth developmental issues. The Court in *Roper* held specifically the death-sentencing of 16- and 17-year-olds unconstitutional in finding less support “to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character”.

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104 Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland, Massachusetts, and North Carolina.

105 District of Columbia, Georgia, New Jersey, New York, North Dakota, Ohio, South Dakota, and Tennessee.

106 Arkansas, Minnesota, Mississippi, Oklahoma, West Virginia, and Wisconsin.

107 Maine, Oregon, Pennsylvania, Rhode Island, Utah, and Virginia.


110 Alaska, Colorado, Montana, New Jersey, New Mexico, North Carolina, and West Virginia.

111 Montana, Nevada, New Mexico, North Carolina, South Carolina, and Washington.

112 *Roper*, 125 S. Ct. at 1188.

113 Id. The Court referenced three research studies: Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992) (“adolescents are over-represented statistically in virtually every category of reckless behavior”); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 48 Am. Psychologist 1009, 1014 (2003) (“as legal minors, juveniles lack the freedom that adults have to extricate themselves from a criminogenic setting”); and Eric Erikson, Identity: Youth and Crisis (1968) (seminal research on childhood and adolescent developmental stages); supra notes 58, 59, 60, & 61 (research cited supports and expands upon the Court’s citations, reinforcing these findings across broad sociological studies).
Most current state law does not follow the Court’s original Kent discussed criteria on youth maturity and rehabilitation factors and only a few states incorporate the recent Roper criteria finding youth less culpable because of underdeveloped maturity, transitory personalities, and peer influences.\footnote{See Appendix.} The states that follow some of the Roper holdings have done so serendipitously, with legislative changes enacted prior to the Court’s decision in March 2005.

Florida and North Carolina are not states that follow the Kent or Roper holdings. For many months, national reporting portrayed the tragic prosecution in Florida of Lionel Tate (12 at the time of the crime) and Nathan Brazill (16 at the time of the crime) for first and second degree murder, respectively, as the state legislature utilized the prosecutorial waiver to bypass the juvenile courts and required adult criminal court adjudication and subsequent conviction (Tate received an original life sentence, now serving 30 years for a probation violation; Brazill is currently serving a 28-year sentence).\footnote{See Green, supra note 46 at 234.} Similarly, thirteen-year-old Andre Green was transferred to criminal court, convicted of sexual assault, and sentenced to his current life imprisonment without parole – eight years after the North Carolina legislature required this outcome for youth as young as thirteen.\footnote{See Andrew M. Clark, Age Matters: The Case for a Constitutional Infancy Defense, 2006, 54 Kan. L. Rev. 687 (for detailed case description and an extended discussion of why Constitutional due process rights support an infancy defense not allowing criminal prosecution of anyone under the age of fourteen).} “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed”.\footnote{Roper, 125 S. Ct. at 1188.} A majority of juvenile transfers to criminal courts do not allow for reformation of the youth.\footnote{See supra notes 31 & 35.}

A moratorium on juvenile offender transfers to adult criminal courts must be declared.\footnote{See Campaign 4 Youth Justice (new national initiative to raise awareness about the impact of prosecuting youth in the adult criminal justice system) at \url{http://www.campaign4youthjustice.org/}; the American Psychiatric Association Board of Trustees position statement is for the federal and state governments to “review and develop a strategy to reform current transfer/waiver options”, at \url{http://www.psych.org/}; the National Education Association stated position is in opposition to prosecuting, detaining and imprisoning youth in the adult criminal justice system, at \url{http://www.nea.org/index.html}; Christopher Hartney (National Council on Crime and Delinquency), Youth Under} Approximately 200,000 youth are transferred to criminal courts each year, with a significant percentage
permanently transferred to prosecution within the adult criminal justice system. The Supreme Court in *Roper* has drawn a clear bright line on youth culpability based upon developmental issues and rehabilitation. It is now up to the states to reflect this holding and change the current harmful, outmoded concept of juvenile culpability.

The Court struck down the juvenile death sentence reasoning that juvenile offenders are truly different than adult offenders. Transferring juveniles to adult criminal courts as states currently do disregards the Court’s current holding. The outcome of death sentencing juveniles or transferring them to adult criminal courts is the same – no youth receives a second chance. Death is not different.

See supra notes 31, 33, & 35.