

**THE FAILURE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION IN MICHIGAN:
AN ARGUMENT FOR AN INDIVIDUALIZED AND TREATMENT BASED APPROACH**

by
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INTRODUCTION

“In political as well as natural disorders, the great error of those who commonly undertake either cure or preservation is that they rest in the second causes, without extending their search to the remote and original sources of evil.”

Samuel Johnson¹

A house built on an improperly laid or unsupported foundation will be structurally unsound and inadequate to sustain severe weather or other environmental threats. Although structural defects in an already standing home must be addressed, it is unquestionably more cost-effective in the long run to identify the infirmities and prevent their reoccurrence in the construction of new homes.

The current trend in juvenile justice is to get tough on crime. An oft quoted campaign slogan is “commit an adult crime, do adult time.” In Michigan, the legislature has coupled this catchy phrase with a juvenile justice reform package that seeks to make good on the promise by locking up early and for a long time children who display a propensity to commit crime. To achieve this goal the Michigan legislature has adopted a waiver mechanism whereby juvenile offenders can be tried and sentenced as adults. The idea seems to be that trying juveniles as adults will result in harsher sentences and a deterrent effect. Unfortunately, this quick-fix solution has not ameliorated the problem.

In reality, kids who are sent to the adult system are mostly nonviolent offenders who end

up serving little or no time.² Alongside the violent adult offenders, juveniles often seem less threatening and are treated with a gentle hand. Further, judges seem to be reluctant to send juveniles to the adult prisons for fear of what may happen to them.³ Research indicates that on the whole, juveniles who are sent to adult criminal court are treated more leniently than those in juvenile court.⁴

How, then, can the Michigan legislature justify these policy decisions? The answer is that it can not. This paper examines the historical underpinnings of the juvenile court particularly its emphasis on rehabilitation. Second, this paper discusses Michigan's approach to juvenile justice by examining recent legislation, legislative history, and interpretive case law. Finally, this paper argues that Michigan's approach is not working. The studies and statistics establish that Michigan's approach does not even come close to achieving the goal of decreasing juvenile crime. Finally, suggestions will be made to improve the system so that it will achieve its goals and help some kids along the way.

I. A SYSTEM FOCUSED ON REHABILITATION: THE EARLY JUVENILE COURT

The first juvenile court was founded in 1899 in Cook County, Illinois.⁵ The juvenile court was based on *parens patriae*,⁶ the principle that the state must care for those who cannot take care of themselves.⁷ Unlike the adult criminal court, the juvenile court formally rejected

¹ Samuel Johnson, *An Omnibus of His Wit and Wisdom* (London: Carrel Brothers, 1966), 1:49.

² John J. Wilson and James C. Howell, U.S. Dept. of Justice, A COMPREHENSIVE STRATEGY FOR SERIOUS, CHRONIC, AND JUVENILE OFFENDERS 22-23 (1993) [hereinafter COMPREHENSIVE STRATEGY].

³ See Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 376-77 (1988).

⁴ See *id.*

⁵ See Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, CHAMPION, Jun. 1998, at 10-11.

⁶ See *id.*

⁷ See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

punishment as a means of handling juveniles who committed crimes.⁸ Instead, the juvenile system was designed to offer guidance, assistance, and treatment with the goal of rehabilitation and reintegration.⁹ To achieve these goals, the juvenile court exercised wide discretion, rejecting the formal procedures of the adult court.¹⁰

The juvenile court's nonpunitive, discretionary methods, however, had a major flaw in that juveniles accused of crimes were not afforded due process protection in the courts.¹¹ As a result, these juveniles were often arbitrarily and unfairly punished.¹² The U.S. Supreme Court, in response, handed down two landmark rulings that would completely change the nature of the juvenile court by extending due process protections to juveniles.¹³

A. *Kent v. United States*¹⁴

The first Supreme Court case to dramatically change the juvenile justice system was *Kent v. United States*.¹⁵ In *Kent*, the defendant was sixteen years old when he was accused of entering the victim's apartment, taking her wallet, and raping her.¹⁶ Anticipating that he might be transferred to adult court, the defendant filed a motion for a hearing regarding the suitability of transfer. No hearing was held and the juvenile court judge, without explanation, transferred the defendant to adult court where he was sentenced to a total of thirty to ninety years in prison.¹⁷

⁸ See Klein, *supra* note 3, at 35. To protect children from the stigma of adult prosecutions the juvenile was called a respondent instead of a defendant, they were adjudicated instead of found guilty, they were committed instead of sentenced, and a petition was filed instead of the juvenile being charged. *Id.*

⁹ See *id.* at 376.

¹⁰ See Aron & Hurley, *supra* note 2, at 12.

¹¹ See Klein, *supra* note 5, at 377.

¹² See *id.*

¹³ See *id.* at 376. See also *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967).

¹⁴ 383 U.S. 541 (1966).

¹⁵ 383 U.S. 541 (1966).

¹⁶ See *Kent*, 383 U.S. at 543.

¹⁷ See *id.* at 550.

On appeal, the Supreme Court, recognizing that some juvenile courts lacked the personnel, facilities, and techniques to adequately act in a *parens patriae* capacity, stated that those in the juvenile justice system receive neither the protections given adults nor the care and treatment intended for children. As such, the Court reversed the trial court, holding that due process required a juvenile be afforded both a hearing regarding a transfer to adult court and a statement of the reasons for the judge's decision to transfer.¹⁸ In addition, the Court set forth the following factors to be considered by judges in making transfer decisions:¹⁹

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . .
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [adult court] . . .
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 . . . other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

B. *In re Gault*²⁰

One year after *Kent*, the Supreme Court handed down another landmark decision in *In re*

¹⁸ *See id.* at 557.

¹⁹ *See id.* at 566-67.

²⁰ 387 U.S. 1 (1967).

Gault.²¹ The defendant in *Gault* was fifteen years old when he was arrested for making lewd telephone calls to a neighbor. Upon his arrest, the defendant was detained and his parents were not notified. The juvenile court held a series of informal hearings of which no records or transcripts were kept, the complaining witness was never present, and the defendant was denied right to counsel. During these hearings, the judge questioned the defendant about the alleged calls and, subsequently, committed him to the State Industrial School until he reached the age of twenty-one.²²

The Supreme Court, on appeal, considered whether *Gault* was denied due process. The Court emphasized that the juvenile justice system's focus on discretion and individualized treatment has resulted not in enlightened procedure, but in arbitrariness and the denial of due process.²³ The trial judge's decision was reversed, and the Court held that juveniles must be afforded the same due process rights as adults, specifically: the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.²⁴

II. MICHIGAN'S APPROACH TO JUVENILE JUSTICE

Commentators have argued that the advent of procedural safeguards in the juvenile court has changed it from an individualized, treatment-oriented model of juvenile justice to a more punitive, adult-like system.²⁵ They contend that procedural protections interfere with the unique

²¹ 387 U.S. 1 (1967).

²² See *Gault*, 387 U.S. at 7.

²³ See *id.* at 18-19. The Court stated, "Juvenile Court history has again demonstrated that unbridled discretion, however, benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.

²⁴ See *id.* at 55.

²⁵ See Klein, *supra* note 5, at 377. See also Shannon F. McLatchey, *Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach*, 10 U. FLA. J.L. & PUB. POL'Y 401, 406 (1999).

nature and purpose of the juvenile court.²⁶ Alternatively, other critics assert that juveniles are not afforded enough due process protections in the juvenile court.²⁷ These critics advocate for the abolishment of the juvenile justice system in favor of placing all offenders in the adult criminal justice system where at least they will receive full due process protection.²⁸

In addition to the procedural changes that have occurred in the juvenile courts, it appears that the focus of the juvenile system has changed. Public fear and frustration have shifted the focus from protecting juvenile offenders to protecting society from the juvenile offenders.²⁹ Sadly, much of this is due to the media which sensationalizes violent juvenile crime.³⁰ Politicians have also found that a “get tough on crime” stance bolsters their ability to win elections and, as such, tougher treatment for juveniles convicted of crimes is a major focus for campaigns.³¹ Society has begun to view juvenile offenders as incapable of choosing between right and wrong.³² The cumulative result is that society is calling for more accountability from youthful offenders of all ages, and most states, especially Michigan, have heeded the call.³³

Almost all fifty states, including Michigan, have amended their juvenile codes to allow

²⁶ See *id.* at 381.

²⁷ See Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 514-15 (1995). Noting that “[a] more due process rights were guaranteed to juveniles, the juvenile court began to resemble more closely the adult criminal court in terms of formality.” *Id.* at 514.

²⁸ See *id.* at 514-15.

²⁹ See Aron & Hurley, *supra* note 2, at 10 (“Increasingly, America’s youth are labeled as ‘parasitic,’ ‘animalistic,’ ‘depraved,’ ‘super predators.’” *Id.*

³⁰ See *id.* See also Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. Fla. J.L. & Pub. Pol’y 37, 37-38 (1997). Eschholz reports that “[b]oth television and newspapers have been found to greatly overrepresent the incidence of violent crime [because] [c]rime stories are inexpensive, flashy, and politically safe.” *Id.* at 37-38.

³¹ See Eschholz, *supra* note 25, at 38. (“The candidates seldom debate substantial issues, such as the root causes of crime, but instead battle over who can be the toughest on crime, who will build more prisons, who will execute more inmates, and who will incarcerate more juveniles.”)

³² See Aron & Hurley, *supra* note 2, at 10.

³³ See Fox Butterfield, *More States Try Juveniles as Adults*, PITT. POST-GAZETTE, May 12, 1996, at A9. (Nearly all fifty states have amended their statutes to allow more juveniles to be tried as adults, and the new laws were enacted because most people assume that juveniles will face more punishment and longer sentences in adult court. See *id.*) See also, McLatchey, *supra* note 20, at 407.

more youths to be tried and sentenced as adults.³⁴ The goal of this “get tough” approach is to transfer more juveniles into the adult system, where they will presumably serve longer sentences under more punitive conditions.³⁵ The transfer statutes adopted by the different states take three forms: judicial waiver, prosecutorial waiver, or legislative waiver.³⁶

Judicial waiver, or “traditional waiver,” permits a juvenile court judge to waive jurisdiction when, after a hearing, the judge determines that sufficient evidence supports the conclusion that the juvenile committed the charged offense and would not be amenable to juvenile court treatment.³⁷ At the hearing, both the state and the juvenile, usually with the assistance of counsel, have an opportunity to present evidence to the judge regarding the juvenile’s amenability to juvenile court treatment.³⁸ The judge must consider all of the evidence as well as a list of statutorily defined factors then gives a written opinion explaining the reasoning for the decision to waive or not to waive.³⁹ The judge’s decision is then reviewable on appeal.⁴⁰

Prosecutorial, or automatic, waiver is a mechanism giving prosecutors the authority to choose the forum in which to try the juvenile offenders.⁴¹ This is possible because both the juvenile and criminal courts have original jurisdiction over the juvenile by virtue of his or her age and the nature of the alleged crime. The prosecutor is not required to file a petition with the court nor must he consider the juvenile’s best interests when making the charging decision. Instead, with no statutory guidance, the prosecutor may unilaterally and without justification

³⁴ See Butterfield, *supra* note 28 at A9.

³⁵ See *id.*

³⁶ See Guttman, *supra* note 22, at 520.

³⁷ Stacy Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 *FORDHAM L. REV.* 2425, 2436 (1996).

³⁸ See *id.*

³⁹ See *id.* at 2438

⁴⁰ See *id.* at 2439.

decide to charge the juvenile in juvenile or adult court and, at least in Michigan, that charging decision may carry with it a mandatory sentence from which the judge may not stray.⁴²

Finally, legislative waiver categorically excludes from juvenile court jurisdiction certain juveniles or offenses.⁴³ These cases must be tried in the criminal court. The criteria for exclusion can include age of the juvenile, type of offense, or previous convictions.⁴⁴ Legislative waiver, therefore, targets a type of offense and, except for the juvenile's age, does not consider the juvenile's individual circumstances. This type of waiver excludes juveniles on purely statutory criteria and is not discretionary. The rationale behind legislative waiver is basically to charge serious, violent, or persistent juveniles like adult criminals.⁴⁵

A. Michigan's 1996 Juvenile Justice Reform Legislation

Michigan's juvenile system was originally based on two major principles: first the juvenile court would act in loco parentis; second, the juvenile court would not maintain the degree of formality that exists in the adult court. The informality which was representative of the juvenile court was overruled by the US Supreme Court in *Kent v. United States*⁴⁶ and *In re Gault*⁴⁷ which required juveniles be afforded their due process rights in juvenile proceedings. Michigan designed its system specially to address society's recognition that juvenile offenders have special needs that were not being met in the adult system. As such, the juvenile system has traditionally emphasized rehabilitation, counseling, and specialized services.

The juvenile system, as it was created, did not provide options for long-term

⁴¹ See *id.*

⁴² See MICH. COMP. LAWS § 764.1(f)(1) and § 12A.1(1).

⁴³ See Sabo, *supra* note 32, at 2444.

⁴⁴ See *id.*

⁴⁵ See *id.* at 2445.

incarceration. Michigan, therefore, has adopted two different approaches to deal with youth who have committed particularly egregious crimes: traditional waiver and automatic (prosecutorial) waiver. Prior to the passage of the 1996 amendment to the Juvenile Justice Reform Act, the juvenile division of the probate court had exclusive jurisdiction over juveniles under the age of seventeen who committed criminal offenses.⁴⁸ Known as the “traditional waiver” rule, this Act provided that juvenile court judges, upon motion of the prosecutor, could waive jurisdiction over fifteen and sixteen-year-old offenders.⁴⁹ In making such a determination, the judge was required to conduct a hearing in which the following six statutory factors had to be considered:

- (1) The seriousness of the alleged offense;
- (2) The culpability of the juvenile;
- (3) The prior record of the juvenile
- (4) The history of the juvenile in participating in available programs;
- (5) The adequacy of both punishment and programs available in the juvenile system; and
- (6) The dispositional options available for the juvenile.⁵⁰

In 1996, the legislature adopted the “automatic waiver” process whereby prosecutors are given the unilateral and unchecked authority to “waive” juveniles who have committed a “specified offense” to the circuit court to be tried as adults.⁵¹ This is possible because the legislation gives original jurisdiction over juvenile offenders as young as age fourteen to both the

⁴⁶ 383 U.S. 541 (1966).

⁴⁷ 387 U.S. 1 (1967).

⁴⁸ See MICH. COMP. LAWS § 712A.1(1).

⁴⁹ See *id.*

⁵⁰ See MICH. COMP. LAWS § 712A.4(4)(a)-(f).

⁵¹ See MICH. COMP. LAWS § 764.1(f)(1). A “specified juvenile violation” includes the following: (1) arson of a dwelling; (2) assault with intent to commit murder; (3) assault with intent to maim; (4) assault with intent to rob and steal while armed; (5) attempted murder; (6) first-degree murder; (7) second-degree murder; (8) kidnapping; (9) first-degree criminal sexual conduct; (10) armed robbery; (11) carjacking; (12) bank, safe, or vault robbery; (13) assault with intent to do great bodily harm less than murder, if armed with a dangerous weapon; (14) home invasion if armed with a dangerous weapon; (15) escape from certain higher-security juvenile facilities; (16) manufacture, delivery, or possession with intent to deliver over 650 grams of a controlled substance; (17) possession of over 650 grams of a controlled substance; (18) an attempt to commit, conspiracy to commit, or solicitation to commit any of

family division of the circuit court and the circuit court.⁵² The prosecutor then has the discretion to choose the forum in which to bring the charges.⁵³

If the prosecutor opts to charge a juvenile as an adult, the prosecutor is required to establish that there is probable cause to support the charges before the case will be bound over to the circuit court.⁵⁴ As in traditional adult proceedings, if the district court finds there is no probable cause to charge the juvenile, the charges must be dismissed. Once a prosecutor exercises his or her discretion and the juvenile is bound over to circuit court, the circuit court judge is required to sentence a juvenile convicted of any of the following specified crimes in the same manner as an adult: (a) arson of a dwelling; (b) assault with intent to murder; (c) assault with intent to maim; (d) attempted murder; (e) conspiracy to commit murder; (f) solicitation to commit murder; (g) first-degree murder; (h) second-degree murder; (i) kidnapping; (j) first-degree criminal sexual conduct; (k) armed robbery; and (l) carjacking.⁵⁵ Unlike the judge's waiver decision, the prosecutor is not required to consider any specified factors or to conduct a formal hearing before making the decision to waive jurisdiction. Indeed, under the theory of "prosecutorial discretion,"⁵⁶ the prosecutor's decision to charge in circuit court is given deference and will be reversed only if there was an abuse of power.⁵⁷

The crimes requiring an adult sentence are included in the list of specified violations for

the above offenses; (19) any lesser-included offenses or other offenses arising out of the same transaction, if the juvenile is charged with one of the above offenses.

⁵² See MICH. COMP. LAWS § 712A.2(a)(1).

⁵³ See *id.*

⁵⁴ See *People v. Conat*, 238 Mich. App. 134, 150, 605 N.W.2d 49, 58 (1999).

⁵⁵ See MICH. COMP. LAWS § 769.1.1(a)-(f).

⁵⁶ See *Genessee Prosecutor v. Genessee Circuit Judge*, 386 Mich. 672, 683-684, 194 N.W.2d 693 (1972). (the prosecutor is constitutionally entrusted with authority to charge the defendant.)

⁵⁷ See *People v. Barksdale*, 219 Mich. App. 484, 488, 556 N.W.2d 521 (1996). (An abuse of power may be defined as a situation in which the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires.)

which a juvenile may be automatically waived by the prosecutor to circuit court.⁵⁸ However, not all of the specified juvenile offenses require an adult sentence. Therefore, if the juvenile is convicted of a crime which does not require an adult sentence, the judge is required to hold a hearing to determine whether to sentence the juvenile as a juvenile or as an adult.⁵⁹

Under the current system, if the juvenile offender has committed an offense which is not included in the specified list of offenses, the traditional waiver process may still be followed.⁶⁰ If the juvenile is convicted under this process, the probate judge retains discretion in handing down an adult sentence.⁶¹ Alternatively, if charged with a crime that requires an adult sentence under the automatic waiver provision, the prosecutor's charging decision determines the juvenile's sentence if convicted.⁶²

B. The Constitutionality of Automatic Waiver: *People v. Conat*

In *People v. Conat*,⁶³ the Michigan Court of Appeals upheld the constitutionality of the automatic waiver provision of Michigan's 1996 Juvenile Justice Reform Act.⁶⁴ The defendants in *Conat* argued that "automatic waiver" violates the constitutional principles of equal protection, due process, and separation of powers.⁶⁵ At trial, the circuit court ruled in favor of the defendants, holding that the automatic waiver was indeed unconstitutional.⁶⁶ On appeal by the prosecutors, the Court of Appeals reversed the circuit court's rulings on the separation of powers, equal protection and due process issues, thereby affirming the constitutionality of the

⁵⁸ See MICH. COMP. LAWS § 764.1f.

⁵⁹ See MICH. COMP. LAWS § 769.1(3).

⁶⁰ See *supra* note 71.

⁶¹ See MICH. COMP. LAWS § 769.1(3).

⁶² See MICH. COMP. LAWS § 769.1(1).

⁶³ 238 Mich. App. 134, 605 N.W.2d 49 (1999).

⁶⁴ MICH. COMP. LAWS. § 769.1 (2000).

⁶⁵ See 238 Mich. App. at 144, 605 N.W.2d at 55.

automatic waiver.⁶⁷ In April 2000, the Michigan Supreme Court refused to grant the application for leave to appeal filed by defendants.⁶⁸

Michael Conat's case was originally decided in the Oakland County Circuit Court on March 8, 1999. Conat, who was fifteen years old at the time of the alleged offenses, was charged with first-degree murder and possession of a firearm during the commission of a felony. The prosecutor elected to charge Conat as an adult pursuant to section 764.1(f)(1).⁶⁹ Because the first-degree murder charge fell within the list of enumerated offenses in section 764.1,⁷⁰ the circuit court would have been required to sentence Conat in the same manner as an adult if he had been convicted.⁷¹

The Michigan Court of Appeals reversed the circuit court's ruling that Michigan's automatic waiver provision is an unconstitutional violation of separation of powers, due process and equal protection and the case was remanded for trial.⁷² *Conat* was a consolidation of four circuit court decisions that held the juvenile waiver provision unconstitutional.⁷³ All four defendants were charged with specified crimes that would require the court to impose an adult sentence upon conviction.⁷⁴ At the circuit court level, each of the defendants successfully moved for the court to find that the juvenile waiver provision was unconstitutional.⁷⁵ Prosecutors appealed in three cases by leave granted and in one as of right.⁷⁶

⁶⁶ See *People v. Conat*, Circuit Court Case

⁶⁷ See *People v. Conat*, 238 Mich. App. 134, 605 N.W.2d 49 (1999).

⁶⁸ See *People v. Conat*, 238 Mich. App. 134, 605 N.W.2d 49 (1999) (cert. denied).

⁶⁹ See MICH. COMP. LAWS § 764.1(f)(1).

⁷⁰ See *infra* note 76.

⁷¹ See *id.*

⁷² See *Conat*, 238 Mich. App. at 141, 605 N.W.2d at 54.

⁷³ See *id.* at 144, 605 N.W.2d at 55.

⁷⁴ See *id.* Defendants Michael Conat and Stephen Raines were accused of murder, and Defendants Sarah Plumb and Derek Schroeder were accused of armed robbery.

⁷⁵ See *id.* The constitutional issues raised in the four circuit court cases included challenges based on ripeness, separation of powers, due process, and equal protection.

⁷⁶ See *id.*

The issues presented on appeal included challenges based on ripeness, separation of powers, equal protection, and due process. The court of appeals held that the statute did not violate the constitutional separation of powers because the trial courts retained their sentencing power, and the courts should not interfere with the prosecution's broad charging discretion.⁷⁷ Likewise, the court found no violation of equal protection based on the fact that for the same offense some juveniles would be charged and sentenced differently than other juveniles.⁷⁸ Finally, the court held that there was no violation of due process because there is no requirement that there be a hearing before an automatic waiver is filed by the prosecution.⁷⁹

In its due process analysis, the court asserted that juveniles have no constitutional right to be treated as juveniles. Indeed, the court noted that at common law, juveniles at least fourteen years of age were presumed to be capable of criminal intent and were, therefore, subject to the same criminal penalties as adults. The court concluded that the 'juvenile court's jurisdiction is, by implication, something that is purely the creation of the legislature.'⁸⁰

Further, the *Conat* court held that due process did not require a hearing prior to a trial on an automatic waiver case and that the requirements of *Kent v. United States* did not apply because *Kent* was not decided under the automatic waiver system. The court's holding, however, disregarded the Michigan Supreme Court's holding in *People v. Fields*⁸¹ where it noted that, "[i]t is important to understand the precise issue in this case. It is not whether constitutional requirements of due process stated in *Kent v. United States* . . . were met. Rather, it is whether the lack of standards in the statute preclude a waiver proceeding." The *Fields* court went on to

⁷⁷ See *id.* at 61.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ 388 Mich. 66, 199 N.W.2d 217 (Mich. 1972).

hold that if the legislature decide to treat some children under the age of seventeen differently from the entire class of such people, excluding them from the beneficent processes and purposes of the juvenile courts, the legislature must establish suitable and ascertainable standards to determine which persons are to be deemed adults and treated as such.⁸² Based on this holding, the *Conat* court should have found the statute unconstitutional because it lacks any standards.

The modern trend in Michigan juvenile justice is to inflict on youth the punishment previously reserved for adults without any of the due process reserved for either adults or the protections reserved for children in *Kent*, *Gault* and their progeny.

C. The Legislative Intent

It is particularly interesting to examine the legislature's reasons for abandoning the traditional waiver system in which the judge had to consider numerous individual factors before transferring a juvenile to adult court. Absent any official statement by the legislature, the intent of the lawmakers can be inferred from examining the House Bill Analysis of the Juvenile Justice Reform Package⁸³ and the cases interpreting the law. The automatic waiver provision was originally introduced in a package of bills addressing Michigan's treatment of juvenile offenders. The primary motivation behind the legislation was to "combat the growing menace of juvenile crime in our society."⁸⁴

According to the House Bill Analysis, the traditional waiver system was "designed to deal with youthful offenders who committed far less heinous crimes than the current generation

⁸² See *Fields*, 388 Mich. at 66, 199 N.W.2d at 221-22.

⁸³ HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, SB. 281, 283, 682, 689, 699, 700, 867, 870; HB. 4307, 4371, 4445, 4486, 4487, 4490 (Mich. 1996).

⁸⁴ Prosecuting Attorneys Association of Michigan Brief Amicus Curiae in Support of Plaintiff's Application for Leave to Appeal. *People v. Conat*; See House Legislative Analysis Juvenile Justice Reform Package (Senate Bills

of youthful criminals.”⁸⁵ It was believed that, because of this leniency, society was being confronted with an increase in the number of serious juvenile offenders.⁸⁶ The legislature believed that the best way to deal with these serious juvenile offenders was to “have them tried and sentenced as adults.”⁸⁷ In order to achieve this goal, the legislature felt that it had to make the waiver system much more strict. It was seen as a weakness in the original system that “a juvenile tried in circuit court would not necessarily be subjected to an adult sentence.”⁸⁸ It was believed that requiring mandatory adult sentences would “induce juveniles to take more seriously the consequences of their actions.”⁸⁹

The legislature believed that automatic waiver would offer a reasonable solution to the problem of “how effectively to deal with violent and hardened juvenile criminals without sacrificing the opportunity to rehabilitate salvageable delinquents within the juvenile system.”⁹⁰ The drafters of the bill intended that the automatic waiver would “provide the system with maximum flexibility to protect the public from violent juvenile criminals while preserving the rehabilitative aspects of juvenile court for offenders who can benefit from them.”⁹¹ The legislature attempted to ensure the availability of rehabilitation for “those offenders who can benefit from [rehabilitation]” by creating a system in which the prosecutor, alone, decides whether juveniles convicted of specific violent crimes would be required to receive adult

281, 283, 682, 689, 698, 699, 700, 867, and 870; House Bills 4037, 4044, 4371, 4445, 4486, 4487, and 4490) (5-14-96).

⁸⁵ HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, at 2.

⁸⁶ *See id.* at 2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 11.

⁹¹ HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, SB. 281, 283, 682, 689, 699, 700, 867, 870; HB. 4307, 4371, 4445, 4486, 4487, 4490, at 11 (Mich. 1996).

sentences.⁹² The justification for the imposition of mandatory adult sentences is that:

Since some violent youthful offenders are not amenable to rehabilitation, requiring the incarceration of the most violent juvenile offenders will serve to protect the public and will save juvenile rehabilitation resources for less serious offenders who will more likely benefit from rehabilitative efforts . . . Requiring the courts to review and consider the unique circumstances of each case (except those where an adult sentence is required) allows for the sentencing of the juvenile to be specific to the needs of the particular juvenile.⁹³

The legislature believed that it was appropriate to tie the charging decision to a mandatory adult sentence because the prosecuting attorney has access to all of the information necessary to make such a decision, and “as an elected county official, his or her decisions reflect the community’s priorities.”⁹⁴

D. Michigan Cases Interpreting Michigan’s Juvenile Justice Laws

Case law addressing Michigan’s Juvenile Waiver statute is sparse. In fact, *People v. Conat*⁹⁵ is the first case in Michigan to specifically address the current automatic waiver provision. The Michigan cases prior to *Conat* that have dealt with the juvenile justice system have focused on the system in general, traditional waiver, due process, and equal protection issues.

1. *People v. Hana*⁹⁶

In 1993, the Michigan Supreme Court decided *People v. Hana* in which it addressed the issue of whether due process and equal protection apply to the dispositional as well as the

⁹² HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, at 11.

⁹³ *Id.* at 11.

⁹⁴ *Id.* at 11

⁹⁵ 238 Mich. App. 134, 605 N.W.2d 49 (1999).

⁹⁶ 443 Mich. 202, 504 N.W.2d 166 (1993).

adjudicatory phases of a juvenile waiver hearing.⁹⁷ In holding that these constitutional rights do not apply to the dispositional phase, the court examined the treatment of this issue by the United States Supreme Court in *Kent v. United States*⁹⁸ and *Gault v. United States*.⁹⁹

The *Kent* holding requires that juvenile waiver hearings include a degree of procedural regularity that comports with the basic requirements of due process.¹⁰⁰ *Gault* assured that juveniles have the right to counsel in a juvenile waiver proceeding.¹⁰¹ The *Hana* court, however, held that neither of these holdings required such constitutional protections in the dispositional phase of the waiver hearing “*that focuses on balancing the interests of both the juvenile and the public.*”¹⁰² It is on this basis that the *Hana* court distinguished Michigan’s waiver law from the holdings in *Kent* and *Gault*. Accordingly, the majority in *Hana* held that “[t]he legislative purpose and the underpinnings of the Probate Code mandate the conclusion that a probate court’s discretion at the dispositional phase of a waiver hearing remains unfettered by certain evidentiary requirements recognized in criminal proceedings and already extended to the adjudicative phase of a hearing.”¹⁰³

Chief Justice Michael Cavanagh wrote the dissenting opinion in *Hana* arguing that, contrary to the majority’s holding, the decision to waive jurisdiction over a juvenile is not consistent with the “rehabilitative ideal” on which the juvenile system is based.¹⁰⁴ Chief Justice Cavanagh pointed out that if the court were to follow the rehabilitative purpose of the legislature then “as a matter of logic, waiver could only be appropriate when a better means of rehabilitation

⁹⁷ See *Hana*, 443 Mich. at 209, 504 N.W.2d at 169.

⁹⁸ 383 U.S. 541 (1966).

⁹⁹ 387 U.S. 1 (1967).

¹⁰⁰ *Kent*, 383 U.S. at 553.

¹⁰¹ *Gault* 387 U.S. at 7.

¹⁰² *Hana*, 443 Mich. 202, 219, 504 N.W.2d 166, 174. (emphasis added.)

¹⁰³ *Id.* at 204, 504 N.W.2d at 167.

¹⁰⁴ See *People v. Hana*, 443 Mich. 202, 227, 504 N.W.2d 166, 178 (1993) (Cavanagh, C.J., dissenting).

– that is, a better process of removing the juvenile’s desire to misbehave – exists in juvenile court.”¹⁰⁵ According to Chief Justice Cavanagh, the criminal courts “as a practical matter” will “never provide a better rehabilitative process than the juvenile court.”¹⁰⁶ Therefore, “the decision to waive [juvenile offenders to adult court] cannot be characterized as being consistent with the philosophy underlying the juvenile court system.”¹⁰⁷

2. *People v. Veling*¹⁰⁸

The Michigan Supreme Court examined the 1988 automatic waiver statute again in the 1993 case, *People v. Veling*.¹⁰⁹ In *Veling*, the defendants challenged Michigan’s automatic waiver statute¹¹⁰ on the grounds that the circuit court lacks jurisdiction to sentence juveniles who are charged with enumerated offenses but convicted of nonenumerated lesser included offenses.¹¹¹ Under the 1988 Act, the prosecutor had the discretion to file charges directly in adult court for enumerated offenses.¹¹² If the prosecutor originally filed a charge for a nonenumerated offense, it could only have been filed in the juvenile court. As such, the defendants in *Veling* argued that conviction of the nonenumerated lesser included offense divested the circuit court of jurisdiction.¹¹³

Once a juvenile has been convicted of an enumerated offense for a charge that was waived to adult court under the 1988 Act, the circuit court judge had authority to conduct a hearing to determine whether the defendant should be sentenced as an adult or a juvenile.¹¹⁴ It is

¹⁰⁵ *Hana*, 443 Mich. at 228, 504 N.W.2d at 178.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 443 Mich. 23, 504 N.W.2d 456 (1993).

¹⁰⁹ *Veling*, 443 Mich. at 23, 504 N.W.2d at 456 (1993).

¹¹⁰ MICH. COMP. LAWS § 600.606

¹¹¹ *Veling*, 443 Mich. at 27, 504 N.W.2d at 458.

¹¹² MICH. COMP. LAWS § 764.1f.

¹¹³ *Veling*, 443 Mich. at 28, 504 N.W.2d at 458.

¹¹⁴ *See id.* *See also* MICH. COMP. LAWS § 769.1(3).

because of this authority vested in the circuit judge to decide each case on an individualized basis that the Michigan Supreme Court ruled against the defendant.¹¹⁵ Especially interesting is the court's finding that the automatic waiver statute which gives the circuit court judge discretion in sentencing is preferable to the traditional waiver statute in which a juvenile tried as an adult must be sentenced as an adult.¹¹⁶ Indeed, the court held that "giving a circuit judge sentencing discretion for both types of offenses [more serious charges as well as less serious charges] under the automatic waiver statute provides the greatest flexibility in dealing with juvenile offenders."¹¹⁷

3. *People v. Black*¹¹⁸

In *People v. Black*, the Michigan Court of Appeals upheld the constitutionality of the 1988 automatic waiver provision of the juvenile code against a separation of powers challenge.¹¹⁹ As stated, under the 1988 Act, the prosecutor could charge a juvenile as an adult but before the court imposed an adult sentence, a hearing had to be held by the court in order to determine how best to serve the interests of the juvenile and the public.¹²⁰ As with any judicial action, the courts' determinations were subject to review by the appellate court.

The Defendant in *Black* was a juvenile who was tried as an adult pursuant to section 764.1(f).¹²¹ She was found guilty of premeditated murder and armed robbery and, after a hearing, the trial court found that the best interests of the public and the juvenile would be served by imposing an adult sentence.¹²² As such, the Defendant was sentenced to life in prison without

¹¹⁵ See *Velting*, 443 Mich. at 39, 504 N.W.2d at 463.

¹¹⁶ See *id.* at 40, 504 N.W.2d at 464.

¹¹⁷ *Id.*

¹¹⁸ 203 Mich. App. 428, 513 N.W.2d 152 (1994).

¹¹⁹ See *Black*, 203 Mich. App. at 431, 513 N.W.2d at 154.

¹²⁰ See *supra* note 126.

¹²¹ See MICH. COMP. LAWS § 764.1(f).

¹²² See *Black*, 203 Mich. App. at 430, 513 N.W.2d at 153.

the possibility of parole.¹²³

Defendant appealed as of right to the Michigan Court of Appeals on the ground that the automatic waiver law violates the separation of powers doctrine.¹²⁴ Defendant argued that the automatic waiver provision gives prosecutors authority that should be exercised by the judiciary.¹²⁵ The court, in ruling against Defendant, held that the automatic waiver provision simply vests with the circuit court the power to hear certain cases and that, although prosecutors are given the discretion to decide in which court to proceed, all judicial power continues to be exercised by the judiciary.¹²⁶ The appellate court, therefore, relying on the fact that the trial judge held the required hearing before imposing an adult sentence, affirmed the trial court's decision.¹²⁷

4. *People v. Haynes*¹²⁸

In the consolidated case of *People v. Haynes*,¹²⁹ three juvenile defendants pleaded guilty to first-degree murder and other felonies. In each case, the prosecution appealed, alleging that the defendants should have been sentenced as adult offenders to mandatory term of life imprisonment without the possibility of parole.¹³⁰ The Michigan Court of Appeals reversed and remanded in each case.¹³¹ The Michigan Supreme Court denied the defendants' applications for leave to appeal.¹³² Chief Justice Cavanagh and Justice Levin wrote separately to state that they would grant leave to appeal and to express their disagreement with the lack of sentencing

¹²³ *See id.*

¹²⁴ *See id.* at 429, 513 N.W.2d at 152. *See also* MICH. CONST. OF 1963, art. III, § 2.

¹²⁵ *See Black* 203 Mich. App. at 430, 513 N.W.2d at 153.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ 221 Mich. App. 551, 562 N.W.2d 241 (1997).

¹²⁹ *See Haynes*, 221 Mich. App. at 551, 562 N.W.2d at 241.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See People v. Haynes* 445 Mich. 855, 519 N.W.2d 842 (1994) (Cavanagh, C.J. and Levin, J., dissenting).

discretion afforded to the court under section 769.1 of the juvenile waiver statute.¹³³

Chief Justice Cavanagh wrote:

I write separately to urge the legislature to amend M.C.L. § 769.1; M.S.A. § 28.1072 to provide a broader range of sentencing discretion in cases involving automatic waiver of juveniles. The interests of public safety can be served without forcing the trial court into the all-or-nothing choice of placing a person sixteen or seventeen years old in the juvenile system until the age of twenty-one, or placing that same person in the adult system for a nonparolable term of natural life.¹³⁴

III. WHY THE SYSTEM IS NOT WORKING

As gleaned from Michigan case law and the Michigan House Bill Analysis,¹³⁵ the drafters of the bill intended that the automatic waiver would “provide the system with maximum flexibility to protect the public from violent juvenile criminals while preserving the rehabilitative aspects of juvenile court for juvenile offenders who can benefit from them.”¹³⁶ The legislature proceeded to take measures to ensure the availability of rehabilitation for “those offenders who can benefit from [rehabilitation]”¹³⁷ by creating a system in which the prosecutor alone decides which offenders will be tried and sentenced in juvenile court and which in adult court.

The difficulty in understanding how this goal can be accomplished lies in the glaring fact that the legislature provides absolutely no guidance for prosecutors in making their charging decisions. Such a delegation is especially troublesome considering the fact that the prosecutor’s charging decision is unreviewable on appeal. Further troubling is the fact that the prosecutor, unlike the judge, is not a neutral arbiter in a criminal proceeding but rather is a party to the

¹³³ See *Haynes*, 445 Mich. at 855, 519 N.W.2d at 842.

¹³⁴ *Id.*

¹³⁵ HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, SB. 281, 283, 682, 689, 699, 700, 867, 870; HB. 4307, 4371, 4445, 4486, 4487, 4490 (Mich. 1996).

¹³⁶ HOUSE LEGISLATIVE ANALYSIS SECTION, JUVENILE JUSTICE REFORM PACKAGE, at 2.

litigation.

The legislature tried to justify its decision to delegate such broad authority to the prosecutor by pointing out that the prosecutor has access to the juvenile's records and would be able to make an educated decision reflecting the public sentiment.¹³⁸ Curiously missing from this analysis is the fact that the prosecutor is an elected official whose job often depends on the satisfaction of the public and that it is a given that the public may not always be interested in the best interests of the juvenile defendant. This fact alone ensures that the prosecutor's judgment will not always be in the best interest of the juvenile defendant.

The very structure of the court system is designed such that two adversarial parties can have their dispute decided by a neutral party, the judge. The goal of the prosecutor in a criminal proceeding necessarily will not comport with the goals of a defendant in a criminal proceeding. The nature of the criminal justice system characterizes the prosecutor and the defendant as adversaries. The goal of the prosecutor is to get a conviction and, naturally, to achieve public acceptance. The purpose of providing a separation between the prosecution and the defendant in the form of the judge is to ensure that the defendant is afforded justice.

It is undeniably clear that the public will not always want justice for a criminal defendant. Lacking a great deal of information, the public is much more likely to judge a criminal defendant based on personal biases and fear. It is impossible to decide if a juvenile is amenable to treatment without taking into consideration the juvenile offender's background. While it is true that the prosecutor has access to such information, far more powerful is the prosecutor's understandable sense of responsibility to the public and desire for a conviction.

This is just the beginning of why Michigan's juvenile justice laws fail dismally to meet

¹³⁷ *Id.* at 11.

the goal of reducing juvenile crime. As discussed at the beginning of this paper, juveniles who are transferred to adult court actually receive more lenient sentences than those who remain in the juvenile system.¹³⁹ The few that are actually sentenced in the adult system are more likely to be sexually and physically assaulted in an adult facility,¹⁴⁰ and do not receive the education and therapy programs provided in the juvenile system. As a result, after these kids serve their time in adult prison they are returned to us with no new skills to help them become productive members of society. Indeed, after release from adult prison, juvenile offenders are usually tougher, more educated on crime, and more dangerous to the community.¹⁴¹

Although it would seem logical to adopt public policy based on what is known to work, the Michigan legislature chooses to ignore all of the studies and statistics reporting that waiver of juvenile offenders is an ineffective way to decrease juvenile crime. The two main studies which have shown the effect of transfer on rates of recidivism both conclusively show that, contrary to the intentions of legislators, transferred youth, even those who are incarcerated for long periods of time, display a significantly higher rate of recidivism in a shorter time following incarceration than those similarly situated youth who were not transferred.¹⁴² This is true for all types of offenses.¹⁴³ Further, transferred youth are more likely to commit subsequent felony offenses. In addition, more juvenile offenders who were not transferred have substantially improved their behavior over time.¹⁴⁴

Unfortunately, the current state of juvenile justice in Michigan is borne out of fear and

¹³⁸ *See id.* at 11.

¹³⁹ *See supra* note 2.

¹⁴⁰ Martin Forst et al., Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, 40 JUV. & FAM. CT. J. 1, 7-8 (1989).

¹⁴¹ *See id.*

¹⁴² Donna M. Bishop et al., The Transfer to Criminal Court; Does It Make a Difference?, 42 CRIME & DELINQ. 171, 183 (1996).

¹⁴³ *See id.*

ignorance. Even more tragic is the fact that alternative exist, the Michigan legislature just chooses to ignore them.

IV. RECOMMENDATIONS FOR EFFECTIVE JUVENILE JUSTICE AND DELINQUENCY PREVENTION IN MICHIGAN

A child who is not taught basic coping and socialization skills early in life is going to have problems with coping and socialization skills later in life unless there is some intervention. Likewise a child exposed to or victimized by violence at a young age will have a higher propensity to commit violence.¹⁴⁵ These very basic facts scream for prevention. Currently, it is possible to identify certain risk factors in neighborhoods, families, and individuals. It is possible to link risk factors to certain outcomes. By looking at these statistics it possible to deal with at-risk kids before they enter into the juvenile justice system. Alas, the Michigan legislature has chosen to promulgate a juvenile justice bill shown by study after study to fail at decreasing juvenile crime. Until prevention can be fit into a catchy campaign slogan it appears that the “justice” in juvenile justice is going to rule policy in Michigan.

The current trend of waiving juvenile offenders is reactionary and ill-conceived policy. Although the causes of juvenile crime are hotly debated, many agree that most causes are reversible. It is as simple as asking any adult to take a look at the kind of person they were when they were fifteen years old compared to now. Most adults can remember decisions they regret and can remember behaviors that they have changed. Add into that equation just one stumbling block such as poverty, neglect, physical abuse, sexual abuse, mental abuse, a learning disorder, a

¹⁴⁴ See *id.*

¹⁴⁵ See Frank E. Vandervort, *The Worst of All Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. DET. MERCY L. REV. 203, 255 (2001).

mental illness, loss of a loved one, violence, drugs, gangs, etc. Even without the cards stacked against them, however, adolescents in general are not cognitively and morally developed. Thus, policy that generically classifies adolescents holding all of them to the same standard ignores basic human nature.

Because adolescents are cognitively and morally immature, the proper approach to deal with an adolescent's delinquent behavior must focus on development and rehabilitation. Adolescents are, by nature, egocentric. As such, rehabilitation and training in a social setting is most conducive to effectively dealing with chronic delinquents. In a social setting, juveniles can be given systematic training in social perspective taking skills where the juvenile is put into controlled situations that force them to adapt to the perspectives of another. Such a setting can take place in a secure facility such as a group home or residential facility. However, the key to success is focusing on the individual's treatment, education and rehabilitation.

CONCLUSION

Obviously, it is important to figure out how to stem the tide of juvenile crime. Equally important, however, is how to get rid of social policies that are punitive, born out of fear, not based in reality or statistics and simply do not work. The current trend of prosecutorial waiver and mandatory sentencing for juveniles removes the individualized determinations of a child's amenability to treatment. Indeed, a child in the system today faces fewer rights and more sanctions than he has in decades. In order to reduce juvenile crime and rehabilitate troubled youth, it is clear that public policy must begin to address the unmet needs of our young people on an individual basis.