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WHEN PROSECUTORS ACT AS JUDGES: RACIAL DISPARITIES AND THE ABSENCE OF DUE PROCESS SAFEGUARDS IN THE JUVENILE TRANSFER DECISION

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ABSTRACT

The juvenile justice system was created and designed to be separate from the adult criminal justice system. Initially, the juvenile system was meant to be informal and to prescribe treatment for young offenders, rather than serve as an adjudicatory forum to punish them. However, with the changing demographics in the U.S. came a change in juvenile crime rates and society's perception of young people. Today, the parens patriae philosophy of the juvenile court system, where the state acts as a "parent-surrogate" and intervenes to protect children, is viewed as too weak and insufficient to handle certain juvenile offenders. A number of legislatures thus permit prosecutors to transfer juveniles to criminal courts with no standards to guide them nor judges to check their decisions. This transfer strips young people of the protections offered by juvenile courts, such as psychological treatment, rehabilitative services, and the privacy afforded by sealed records. Transfer practices are particularly problematic because a disproportionate number of these youths are minorities, and a large percentage of those transferred are charged with property offenses, not violent crimes. This Note advocates for the elimination of discretionary prosecutorial waiver statutes or, in the alternative, transparency and consistency in the review of waiver decisions.

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I. INTRODUCTION

"Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind."[1] These are the words of former Supreme Court Justice Anthony Kennedy, lamenting on the conditions of prisons and correctional facilities, and the practice of isolating prisoners for 23 hours a day.[2] Unprompted, Justice Kennedy briefly highlighted the plight of Kalief Browder, a 16-year-old who was accused of stealing a backpack and spent three years of his adolescence in the juvenile ward of Rikers Prison in New York.[3]

Browder's story is a tragic one. Browder was a young, black teenager accused of a relatively minor crime. Browder was previously charged as an adult, convicted of grand larceny, and given a youthful offender status over a previous "joyride" incident.[4] As a result of that conviction, Browder was still on probation when he was accused of stealing a man's backpack and was detained on charges of robbery, grand larceny, and assault. Browder's family could not afford to pay the $3,000 bail, and Browder, *still* 16, was sent to Rikers. Browder, detained in a section of the prison with other juveniles, was often beaten by other inmates and guards, beatings he said that other inmates "endured much worse."[5] Although Browder's family thought he had grown stronger to combat the violence he faced, Browder also struggled with depression and isolation. Browder unsuccessfully attempted to hang himself while at Rikers. After three years, the charges against Browder were dropped because the District Attorney did not have enough evidence to bring a case. Tragically, two years after returning home and attempting to restore his life, Browder committed suicide.[6] Browder's story and anguish have revitalized the

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[1] Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).
[2] *Id.* at 2208–09.
[3] *Id.* at 2210; *see also* Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sep. 24, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law/amp.
[4] Gonnerman, *supra* note 3.
[5] *Id.*
[6] Vanessa Romo, *New York City Reaches $3.3 Million Settlement with Kalief Browder's Family*, NPR (Jan. 25, 2019), https://www.npr.org/2019/01/25/688501884/new-york-city-reaches-3-3-million-settlement-with-kalief-browders-family.

movement for juvenile justice reform[7] and has brought juvenile justice issues to the forefront—unfortunately too late for Browder to benefit.[8]

The decision to charge Browder as an adult is not unique, and Browder's death should shine the spotlight on all states' juvenile justice systems and procedures—particularly, the mechanisms and statutes allowing youth offenders to be treated as adults. In Browder's case, New York legislation mandated that he be treated as an adult. But other states, with more clandestine mechanisms such as prosecutorial waiver (also called "direct file"), allow the executive branch to decide whether juveniles may be treated as adults and funnel them into the criminal justice system. In thirteen jurisdictions, state prosecutors have the absolute discretion to decide whether or not to transfer a youth offender to the criminal justice system via the direct file process.[9] Every day, black and brown boys and girls like Kalief Browder are transferred to the adult criminal justice system. In California, for example, "[i]n 2013, for every white teenager who experienced direct file, 2.4 Latino youth and 4.5 black youth faced the same situation. By 2014, 3.3 Latino youth and 11.3 black youth faced direct file for every white young person."[10]

The resulting series of events leading to Browder's tragic passing highlights one of the many problems of treating youth offenders as adults. The adult criminal justice system is insufficient to serve the wide array of needs of youths and

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[7] *See, e.g.*, Shabnam Javdani & Erin Godfrey, *A New Season for Youth Justice Reform*, HUFFINGTON POST (July 10, 2016), https://www.huffingtonpost.com/shabnam-javdani/a-new-season-for-youth-ju_b_10895542.html. *See also Sens. Lankford and Booker Introduce Bipartisan Bill to Ban Juvenile Solitary Confinement*, THE ADA NEWS (Feb. 9, 2017), https://www.theadanews.com/news/local_news/sens-lankford-and-booker-introduce-bipartisan-bill-to-ban-juvenile/article_98cf98c2-cc42-5cfd-a3e0-31919c65077e.html.

[8] *See* Romo, *supra* note 6. The death of young Mr. Browder incentivized legislators in the state of New York to pass reforms to the juvenile justice system. *Id.* One of these reforms was aimed at raising the age at which youth offenders can remain in the juvenile justice system, in contrast to previous legislation in New York, which allowed 16- and 17-year-old offenders to be treated as adults in the criminal justice system. *Raise the Age*, NEW YORK STATE, https://www.ny.gov/programs/raise-age-0 (last visited Nov. 20, 2018).

[9] *See infra* II.B(3); *see also See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (last visited Sep. 16, 2020).

[10] Sarah Barr, *Several States Look to Keep Teenagers Out of Criminal Court*, JUVENILE JUSTICE INFORMATION EXCHANGE (June 23, 2016), https://jjie.org/2016/06/23/several-states-look-to-keep-teenagers-out-of-criminal-court/.

adolescents, as evidenced by Browder's attempted suicide during his incarceration and his suicide ideation after his release. The elimination of direct file laws also would stymie many of the disparities that continue to plague our juvenile and criminal justice systems. This Note will focus on the racial and social inequalities that arise when the executive branch grants prosecutors unfettered discretion and decision-making power about how to treat our youths.[11]

II. THE HISTORY OF THE JUVENILE JUSTICE SYSTEM

The creation of the juvenile court system in the United States was the result of many reform movements.[12] Initially, there was no separate system for youth accused of criminal violations.[13] The industrialization and increased immigration of individuals into the United States in the 19th century led to "overcrowding, disruption of family life, increase in vice and crime, and all the other destructive factors characteristic of rapid urbanizations."[14] The resulting "[t]ruancy and delinquency" led to a general concern about children and the "desire to rescue [them] and restore them to a healthful, useful life."[15] These concerns manifested into goals by progressive reformers to "diagnose and treat the problems underlying deviance,"[16] with the additional goals of tackling "inadequate housing, dysfunctional and broken families, dependency and neglect, poverty, crime and delinquency, and economic exploitation."[17] These goals led to the adoption of the

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[11] *See infra* Section III.

[12] *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 19–25 (2017); ELLEN MARRUS & IRENE MERKER ROSENBERG, CHILDREN AND JUVENILE JUSTICE 3–6 (2d ed. 2012).

[13] MARRUS & ROSENBERG, *supra* note 12, at 3. This was because under the common law system, "children under 7 years [old were presumed to be] incapable of felonious intent," and thus could not "be held criminally responsible" for their actions. *Id.* Similarly, children older than 7 but under 14 years of age were not held criminally responsible "unless [it was] shown [that they could] understand the consequences of [their] actions." *Id.*

[14] *Id.* at 4. *See also* Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or A Revolution That Failed?*, 34 N. KY. L. REV. 189, 191–92 (2007).

[15] MARRUS & ROSENBERG, *supra* note 12, at 4.

[16] *Id. See also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–42 (1997).

[17] FELD, *supra* note 12, at 23.

doctrine of *parens patriae* in the burgeoning legal system, where the state acts as a "parent-surrogate" and intervenes to protect children.[18] These reforms led to the founding of many new institutions to protect children in the legal system, such as the New York City's House of Refuge in 1825, an institution created to separate children from adult offenders and provide them with "corrective treatment rather than punishment."[19] Soon after, "[s]tate reform[s] and industrial schools" for children were established.[20]

Slowly, these reforms began to take hold in court systems all over the country.[21] In 1899, Illinois became the first jurisdiction, through its Juvenile Court Act, to establish a separate court specifically for children.[22] The advocates and reformers viewed juveniles as "innocent[,] albeit misguided children…[and] they believed children were less blame-worthy than were adults for criminal behavior and more amenable to change."[23] Thus, the *parens patriae* philosophy of the juvenile justice system was viewed as negating the need for due process in juvenile proceedings.[24] "Hearings were to be informal and nonpublic, records confidential, children detained apart from adults, [and] a probation staff appointed."[25] A lawyer and other formal procedures were viewed as unnecessary because "adversary tactics"[26] would not aide in the effectuation of a treatment plan and the best interests of a child.[27]

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[18] *Id.* at 24.

[19] MARRUS & ROSENBERG, *supra* note 12, at 4. *See also* Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without A Fitness Hearing Is A Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 783–84 (2014).

[20] *See* MARRUS & ROSENBERG, *supra* note 12, at 4.

[21] *See* Feld, *supra* note 14, at 193–97.

[22] Hamack, *supra* note 19, at 783; MARRUS & ROSENBERG, *supra* note 12, at 5.

[23] *See* FELD, *supra* note 12, at 30.

[24] *See* Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 VT. L. REV. 441, 443–46 (2018). The "ordinary trappings of the court-room" were considered superfluous in juvenile proceedings, including the right to counsel, a jury, and the application of the rules of evidence. *Id*. at 445.

[25] MARRUS & ROSENBERG, *supra* note 12, at 5; *see also* NeMoyer, *supra* note 24, at 445–46.

[26] MARRUS & ROSENBERG, *supra* note 12, at 5. Under this system, a "fatherly and sympathetic" judge would preside over juvenile proceedings and would "investigate, diagnose, and prescribe treatment, not … adjudicate guilt or fix blame." *Id.*

[27] *See* FELD, *supra* note 14, at 196.

A. THE DEVELOPMENT OF DUE PROCESS AND PROCEDURAL SAFEGUARDS FOR JUVENILES

In the 1960s, the Supreme Court used the constitutional strategies of "incorporation, reinterpretation, and equal protection" to decide state criminal procedure cases and extend constitutional rights to criminal defendants.[28] The Court then began expanding these procedural rights and safeguards to juveniles.[29]

1. The Right to a Hearing When Faced with Judicial Transfer to Criminal Court

Notably, in *Kent v. United States*, the Court held that a juvenile, when faced with a judicial waiver of the juvenile court's jurisdiction, was entitled to a hearing, a statement of reasons for the court's decision, and access by his or her counsel to social records or other similar reports.[30] Morris A. Kent, Jr., aged 16, was accused of breaking-and-entering, burglary, and rape after his fingerprints were found to match those on the crime scene.[31] For about one week, Kent was shuffled between police headquarters for interrogation and a children's institution, with no arraignment and no determination by a judge as to whether there was probable cause to detain him.[32] Kent's counsel filed a motion to allow the Juvenile Court to grant access to Kent's social services file.[33] He aimed to show that Kent was mentally ill and if given "adequate treatment in a hospital under the aegis of the Juvenile Court," he could be rehabilitated.[34] The Juvenile Court judge entered an order waiving jurisdiction and directing that Kent be held for trial.[35] The judge did this without conducting a hearing, conferring with Kent or his parents, nor reciting any findings of fact or reasons for the waiver.[36] Kent was tried in criminal court, found guilty, and sentenced to a total of 30 to 90 years in prison.[37]

The Supreme Court reasoned that although the District of Columbia statute gave courts discretion as to the weight of factual considerations, it did not confer upon

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[28] *See* FELD, *supra* note 12, at 56–57.
[29] *Id.*
[30] Kent v. United States, 383 U.S. 541, 557, 560–62 (1966).
[31] *Id.* at 543.
[32] *Id.* at 544–45.
[33] *Id.* at 546.
[34] *Id.* at 544–45.
[35] *Id.* at 546.
[36] *Id.*
[37] *Id.* at 550.

the courts "a license for arbitrary procedure."[38] The Court emphatically stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, [and] without a statement of reasons."[39] The Court noted that although the District's statute was rooted in a "social welfare philosophy," evidence showed that the children in these proceedings received "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[40] The Court held that the hearings provided to juveniles "must measure up to the essentials of due process and fair treatment."[41] In an appendix to the opinion, the Court enumerated specific standards which a juvenile court judge should weigh during the decision to waive or transfer jurisdiction to criminal court including: the seriousness of the offense, whether the offense was committed against persons or property, the merit of the complaint and the likelihood of an indictment, the maturity of the juvenile and his or her home life situation, the juvenile's record and court history, the ability to protect the public, and the likelihood of "reasonable rehabilitation" of the juvenile.[42]

Then, in *Breed v. Jones,* the Court held that the Double Jeopardy Clause was applicable to juvenile proceedings, regardless of their "civil" nature. Jones was 17 years old when he was charged in juvenile court with armed robbery.[43] Jones was first tried in juvenile court and found "unfit for treatment as a juvenile" and then was later transferred to and prosecuted as an adult in state court for the same crime.[44] The Court reasoned that "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice,'" and given the magnitude of consequences resulting from juvenile hearings, "there is little to distinguish" it from criminal prosecution. [45] The Court held that a State must "determine whether it wants to treat a juvenile within the juvenile-court system *before*…a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather

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[38] *Id.* at 553.
[39] *Id.* at 554.
[40] *Id.* at 554–57.
[41] *Id.* at 562.
[42] *See Id.* at 564–68. The Appendix to the Opinion cited Policy Memorandum No. 7, which listed criteria previously adopted by the D.C. Juvenile Court to govern waiver requests but had been abrogated by the time of the Court's decision. *Id.* at 546 n.4.
[43] Breed v. Jones, 421 U.S. 519, 521 (1975).
[44] *Id.* at 522–26.
[45] *Id.* at 529–31.

than subject him to the expense, delay, strain, and embarrassment of two such proceedings."[46]

In sum, *Kent* and *Breed* together establish that states that choose to provide transfer hearings must provide reasonable and legitimate procedures, including a proper hearing, sufficient notice to a juvenile's family and attorney, the right to legal assistance, and a statement of reasons for the decision to transfer to the juvenile.[47]

2. A Youth's Right to Due Process During Juvenile Proceedings

The Court affirmed and further extended procedural rights for juveniles in *In Re Gault*.[48] *Gault* established the required due process rights that must be afforded to juveniles during juvenile court proceedings generally. [49] 15-year-old Gerald Gault was accused of making lewd statements via telephone to his neighbor.[50] He was arrested and detained with no notice given to his family[51], and after numerous hearings with many conflicting statements regarding Gault's involvement in the phone calls, Gault was committed to a "State Industrial School" until the age of 21.[52] The Court recognized that the "loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process."[53] The Court held that due process entitled juveniles to notice of their charges provided in time to have a "reasonable opportunity to prepare,"[54] the right to be represented by counsel,[55] the Fifth Amendment "privilege against self-incrimination" and involuntary confessions,[56] and the opportunity to cross-examine any accusers under oath.[57]

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[46] *Id.* at 537–38 (emphasis added).
[47] *See* Marisa Slaten, Note, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 829 (2003).
[48] *See In Re* Gault, 387 U.S. 1 (1967); *see also* FELD, *supra* note 12, at 56–57.
[49] *See* Gault, 387 U.S. at 30–31.
[50] *Id.* at 4–6.
[51] *Id.* at 5.
[52] *Id.* at 6–9.
[53] *Id.* at 19.
[54] *Id.* at 33.
[55] *Id.* at 41.
[56] *Id.* at 55–56.
[57] *Id.* at 56–57.

Finally, *In Re Winship*, the Court held that the standard of proof beyond a reasonable doubt was applicable to juvenile proceedings.[58] There, Samuel Winship, a 12-year old boy was convicted of stealing over $100 from a locker that he broke into.[59] He was ordered to be placed into a "training school" for six years until he turned 18.[60] The Court reversed, finding that throughout the Nation's history, a high standard for criminal cases and convictions has been expressed, and the Court, since as early as 1881, had presumed that the constitution required such a standard.[61] The Court concluded that the beyond a reasonable doubt standard was just as important as the procedural safeguards established in *Gault.*[62] Despite the progress in constitutional safeguards for juveniles, some scholars have argued that the Court's endorsement led to the "convergence" of criminal law and juvenile courts.[63]

B. AN EXAMINATION OF EXISTING JUVENILE WAIVER STATUTES

Today, every state and the District of Columbia has a separate juvenile court system. All states have statutory limits on the age of minority for juvenile court.[64] In nearly every state, 17 is the maximum age at which the juvenile court has jurisdiction over the individual,[65] while Georgia, Michigan, Missouri, Texas, and Wisconsin have a lower maximum set at age 16.[66] In addition, every jurisdiction has transfer laws, also called "waiver" or "removal" laws—that enable the removal of juveniles from the juvenile court's jurisdiction and subsequent transfer to criminal court.

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[58] *In re Winship* 397 U.S. 358, 367 (1970).
[59] *Id.* at 359–60.
[60] *Id.* at 360.
[61] *Id.* at 361–62.
[62] *Id.* at 368.
[63] *See* FELD, *supra* note 12, at 64–67 (positing that *Gault*, *Winship*, and *Breed* "criminalized delinquency trials").
[64] *See* Teigen, *supra* note 9 (last visited Sep. 16, 2020).
[65] *Id.*
[66] *Id.*; *See also* Raise the Age, NEW YORK STATE, https://www.ny.gov/programs/raise-age-0 (last visited Nov. 20, 2018); *see also* What is Raise the Age?, RAISE THE AGE NORTH CAROLINA, https://raisetheagenc.org/raise-the-age/ (last visited Nov. 20, 2018) (New York and North Carolina, states that previously set the maximum age of juvenile court jurisdiction at age 15 have both passed "Raise the Age" laws to be phased into legislation over time. By 2019, both state laws will take into effect to raise the age of juvenile court jurisdiction to 18 years old).

There are generally three main distinct mechanisms to transfer juveniles to criminal courts: judicial waiver, legislative exclusion, and prosecutorial waiver, also known as "direct file." Nearly every state uses a combination of these mechanisms.[67] This Note will specifically focus on waiver and transfer provisions involving prosecutorial waiver.

1. Judicial Waiver Transfer Mechanisms

The oldest method by which juveniles may be transferred to criminal court is via judicial waiver laws.[68] Judicial waiver requires an individualized assessment of each juvenile before the child or adolescent is transferred to criminal court.[69] As a result of the *Kent* decision and the standards enumerated by that Court, most judicial waiver statutes require a "psychiatric and/or psychological evaluation" of the child and a standard of "charge seriousness . . . that must be met before waiver is permitted."[70] Although judicial waiver requires individual assessment of each juvenile, some state legislatures have amended judicial waiver laws to "encourage" efficient waiver decisions.[71] In sum, more than half of states have discretionary judicial waiver laws that allow juvenile court judges to waive jurisdiction over a defendant juvenile, generally on a motion by the prosecutor and after a hearing.[72] And still, several states have presumptive or mandatory judicial waiver statutes, that presume or require the transfer of juvenile offenders charged with certain crimes.[73]

2. Legislative Exclusion Transfer Mechanisms

Legislative or statutory exclusion allows legislatures to carve out exceptions in the juvenile court's jurisdiction for the commission of certain crimes, and these

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[67] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011) [hereinafter STATE TRANSFER LAWS REPORT].
[68] *Id.* at 2.
[69] *See* Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 45 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
[70] *Id.* at 52.
[71] *Id.* at 46.
[72] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2; *see, e.g.*, IND. CODE ANN. § 31-30-3-1 (West 2018).
[73] STATE TRANSFER LAWS REPORT, *supra* note 67, at 3 (15 states each have presumptive and mandatory juvenile waiver laws).

cases must be filed in criminal court in the first instance.[74] Twenty-nine states have statutory exclusion laws.[75] Unlike judicial waiver statutes, there is little to no individualized determination regarding a juvenile's status under legislative exclusion, and these exclusions are absolute.[76] These laws generally exclude more serious offenses from the juvenile court's jurisdiction, regardless of the age of the offender.[77] Juveniles may also be excluded under this form of waiver because of their age and prior offenses.[78] Legislatures have the power to exclude certain youths from the juvenile justice system and can "freely . . . define their jurisdiction" because the juvenile court system is a legislative creation.[79]

3. Prosecutorial Discretion ("Direct File") Transfer Mechanisms[80]

The final transfer mechanism is prosecutorial discretion, also known as "direct file."[81] It is called "direct file" because a prosecutor may directly file the youth's case in criminal court, rather than juvenile court, in the first instance. In the modern juvenile justice system, some states have enacted laws granting the juvenile court and criminal court concurrent jurisdiction over youths, and the prosecutor has the discretion to decide which forum to bring the case in.[82] Only thirteen jurisdictions currently utilize prosecutorial discretion laws: Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Virginia, and Wyoming.[83] In these states, the prosecutor's decision is two-fold. First, they must decide "whether probable cause exists to believe that the youth committed a particular offense," and second, if there is concurrent

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[74] *Id.* at 2.
[75] *Id.* at 3.
[76] *See* Dawson, *supra* note 69, at 48.
[77] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.
[78] *See* Dawson, *supra* note 69, at 48.
[79] Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 85 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
[80] "Prosecutorial discretion" or "prosecutorial waiver" will be used interchangeably with "direct file."
[81] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1, 7–8 (1998).
[82] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.
[83] *Id.* at 6; *see also* Teigen, *supra* note 9 (last visited Sep. 16, 2020).

jurisdiction, the prosecutor must decide whether to charge the accused youth in juvenile court or criminal court.[84]

Similar to legislative exclusion, prosecutorial discretion laws allow little to no individualized assessment of the juvenile and prosecutors are not required to justify their decision on the record nor provide the juvenile with a hearing and a statement of the reasons.[85] In the overwhelming majority of states with prosecutorial discretion laws, there are no standards or criteria governing the prosecutor's decision over which forum to charge and try the juvenile.[86] And unlike the judicial waiver decision, where judges have access to social records and extenuating circumstances of a juvenile's home life, prosecutors do not have access to those records.[87]

4. Trends

Arguably, the most serious legal consequence for any young person is the decision made by a prosecutor to charge them as an adult. "When they get direct filed to adult [court], it's sort of this cruel wake-up call."[88] Some scholars have noted that in the 1980s to 1990s, legislators appeared to be in a frenzy—enacting new laws, nearly annually, to expand the various transfer mechanisms.[89] The new legislation included laws that "moved entire classes of young offenders" into the criminal justice system without oversight from juvenile court judges.[90] As a result, judicial oversight and authority in transfer decisions was significantly diminished, with non-judicial waiver decisions representing the mechanism by which most

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[84] Feld, *supra* note 79, at 98.

[85] STATE TRANSFER LAWS REPORT, *supra* note 67, at 5 ("Even in those few states where statutes provide some general guidance to prosecutors, or at least require them to develop their own decision-making guidelines, there is no hearing, no evidentiary record, and no opportunity for defendants to test (or even to know) the basis for a prosecutor's decision to proceed in criminal court.").

[86] Feld, *supra* note 79, at 99; STATE TRANSFER LAWS REPORT, *supra* note 67, at 5.

[87] Feld, *supra* note 79, at 99.

[88] *See* Renata Sago, *Charging Youths As Adults Can Be A 'Cruel Wake-Up Call.' Is There Another Way?*, NPR (Aug. 15, 2018), https://www.npr.org/2017/08/15/542609000/sentenced-to-adulthood-direct-file-laws-bypass-juvenile-justice-system (quoting attorney Jeff Ashton).

[89] *See* Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, *in* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, Boundary Changes in Criminal Justice Organizations 178 (2000).

[90] *Id.* at 178.

juveniles were transferred in the 1990s.[91] Today, nearly 85% of juveniles transferred to criminal court are transferred via non-judicial waiver mechanisms—legislative waiver and prosecutorial waiver.[92] These changes were fueled by the "Get Tough Era," that began in the 1970s.[93] The Get Tough Era is marked by the stereotyping of youth offenders as "super-predators" combined with predictions about soaring and spiraling youth crime rates led legislators to enact "get tough laws"—measures aimed to punish juveniles, rather than rehabilitate them.[94] These laws also permit or mandate the prosecution of certain classes of juvenile offenders in criminal court.[95]

III. PROBLEMS WITH THE "DIRECT FILE" SYSTEM

There are many problems with the direct file system. First, a youth is not entitled to a transfer hearing nor are they entitled to a weighing of individualized factors enumerated in *Kent*. This is because in direct file cases, the prosecutor exercises their discretion to directly-file the case in criminal court—the practical effect is that these cases are considered to have originated in criminal court and these youths become adults for all purposes.[96] Second, a prosecutor's decision to directly-file a youth in criminal court is made without a statement of reasons and is not reviewable by a court.[97] Third, it appears that because juvenile courts are a statutory creation, the creation or recognition of additional federal constitutional rights of youths in the juvenile justice and criminal justice system appears limited.[98]

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[91] *Id.*

[92] *See, e.g.*, JOLANTA JUSZKIEWICZ, PRETRIAL SERVICES RESOURCE CENTER, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? 7 (2000).

[93] *See* FELD, *supra* note 12, at 105.

[94] *See* FELD, *supra* note 12, at 105–06.

[95] *See generally* STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.

[96] *Id.* at 5.

[97] *See United States v. Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); Barry C. Feld, *Juvenile Transfer*, 3 CRIMINOLOGY & PUB. POL'Y 599, 601 (2004). "It has similarly been accepted that a state prosecuting attorney has wide discretion in determining whether to prosecute and, if there is to be a prosecution, in deciding which of several possible charges to bring against an accused, including a capital charge, and whether to file charges directly in criminal court against a juvenile." 4 CRIMINAL PROCEDURE § 13.2(a) (4th ed.) (Nov. 2018) (internal quotations and citations omitted).

[98] *See, e.g.*, Hamack, *supra* note 19, at 808. Hamack argues that "under the Due Process Clause juveniles have a liberty interest in adjudication within the juvenile court system…[and] to adequately protect this liberty interest, the Due Process Clause demands

Black and brown adolescents are facing a crisis in the criminal justice system. One study found that "nearly two-thirds of the juveniles detained pretrial were held in adult jails pending disposition of their cases," and a third of those detained in these adult jails were held among the "adult inmate population."[99] The study also showed that the high pretrial release rates, non-conviction, and probation rates of arrested and detained youths show that cases "filed in adult court in many instances may not be sufficiently serious or strong."[100] It would appear that states with direct file laws are "unnecessarily and inappropriately [sweeping youths] up into the adult criminal justice system."[101] The absence of statutory guidelines for prosecutors utilizing direct file leads to arbitrary decision-making and prosecutorial discretion in the transfer system results in disproportionately greater numbers of racial minorities being direct-filed into criminal court. Furthermore, the direct file system is not an effective punitive measure, does not actually deter crime rates, and results in worse outcomes for youths in adult jails and prisons.

A. ARBITRARY DECISION-MAKING

Prosecutorial waiver statutes generally vary by state. However, they provide little to no guidelines for prosecutors in their decision to transfer a juvenile to criminal court.[102] In Georgia, the prosecuting attorney may transfer a juvenile to criminal court if the youth is "alleged to have committed a delinquent act which would be considered a crime if tried in a superior court and for which an adult may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution."[103] In Arizona, the statute provides that "[i]f during the pendency of a criminal charge in any court of this state the court

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a full fitness hearing before a juvenile is transferred to the adult criminal system--a hearing similar to those utilized in traditional judicial waiver schemes." *Id.* at 806. *See also United States v. Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972), *cert. denied* 412 U.S. 909, where the Supreme Court refused to take up the issue of juvenile transfer hearings within the direct file prosecutorial waiver system.

[99] *See* JUSZKIEWICZ, *supra* note 92 at 62.

[100] *Id.*

[101] *Id.*

[102] For a nationwide summary of transfer laws, including judicial waiver, statutory exclusion, and prosecutorial discretion laws (direct file), *see* ACLU.org (2014), https://www.aclu.org/sites/default/files/assets/2014_03_19_hrw_amicus_appendix_state_transfer_laws.pdf.

[103] *See* GA. CODE ANN. § 15-11-560 (West 2019).

determines that the defendant is a juvenile who is subject to prosecution as an adult. . . on motion of the prosecutor the court shall transfer the case to the juvenile court."[104] And in Arkansas, the statute states that a prosecutor "may charge a juvenile in either the juvenile or criminal division of circuit court when a case involves a juvenile: (1) At least sixteen (16) years old when he or she engages in conduct that, if committed by an adult, would be any felony" or (2) any fourteen or fifteen year old accused of engaging in certain crimes.[105] In addition to the absence of guiding principles, a prosecutor's decision to transfer a juvenile to criminal court is not reviewable by a court.[106]

The absence of any guiding principles for prosecutorial waiver decisions increases the "dangers of arbitrary, capricious, and discriminatory dispositions inherent in unstructured decision-making."[107] Further, the separation of powers doctrine has long held courts at bay from interfering with the "free exercise of the discretionary powers" of prosecutors.[108] In the absence of a showing that a prosecutor deliberately considered unconstitutional factors, such as race, sex, or religion, differential treatment of the accused by the prosecutor does not necessarily warrant judicial review.[109]

> Arbitrary, unsystematic decision-making…sometimes results in disparate treatment of similarly situated victims and defendants. That prosecutors do not intend to cause racial disparities does not excuse them from responsibility for the harmful effects of their decisions.[110]

Additionally, the Department of Justice's Office of Justice Programs ("OJP") notes that although juvenile courts provide data about delinquency proceedings to the National Center for Juvenile Justice, there is no national information database on decisions waived or originating in criminal court as a result of legislative waiver

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[104] *See* ARIZ. REV. STAT. § 8-302(B).
[105] *See* ARK. CODE ANN. § 9-27-318(c) (2018) (part (c) still current and valid).
[106] *See, e.g.*, Feld, *supra* note 97, at 601.
[107] *Cf.* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284 (1991) (noting that the standard enumerated in *Kent* to guide judges during transfer decisions ensured "some degree of equitability to the transfer process.")
[108] *See, e.g.*, *Bland*, 472 F.2d at 1335 (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).
[109] *See id.* at 1336 (citing *Oyler v. Boles*, 368 U.S. 448 (1962)).
[110] *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 210 (2007).

or prosecutorial discretion.[111] As a result, some data on the transfer or waiver practice of prosecutors in juvenile justice cases is largely missing.[112] For example, data collected from the 75 largest counties in the United States, showed that less than 25% of juvenile cases were transferred to criminal court via judicial waiver.[113] This means that nearly 80% of juveniles are transferred from juvenile court to criminal court in those counties without the individualized determination and judicial hearing that *Kent* envisioned.[114]

The absence of comprehensive available data and the increasing frequency of transfer via direct file is problematic given the many serious consequences that follow when a juvenile is transferred to adult court.[115] For example, a teenager convicted of robbery with a firearm would face a minimum sentence of three years in California's juvenile detention facility, while the same act would carry a minimum sentence of twelve years for an adult.[116] The transfer decision causes the charged juvenile to lose the "shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults, and a guarantee that confinement will not extend beyond the age of majority."[117] In more than half the states, a youth that has been previously prosecuted and convicted as an adult is rendered "an adult forever."[118] The media may also have a coercive effect on a prosecutor's decision to transfer a juvenile to criminal court—a prosecutor, whose supervisor is politically elected, may feel pressure to waive a juvenile in order to appease the public and ease political pressure.[119]

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[111] STATE TRANSFER LAWS REPORT, *supra* note 67, at 12. OJP found that of the states with prosecutorial discretion laws, only one state publicly reported the number of cases filed in criminal court, while four other states merely reported an "undifferentiated total of all criminally prosecuted cases." *Id.* at 15.

[112] *Id.* at 10–12. The dearth of data makes it difficult to "assess the workings, effectiveness, and overall impact of these laws." *Id.* at 15.

[113] *Id.* at 12.

[114] *See id.* at 12.

[115] *See* Bishop & Frazier, *supra* note 107, at 283.

[116] Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 991 (2002).

[117] *See* Bishop & Frazier, *supra* note 107, at 283.

[118] STATE TRANSFER LAWS REPORT, *supra* note 67, at 7.

[119] *See* Taylor, *supra* note 116, at 994.

1. Lessons to be Learned from Florida and Its Prosecutorial Waiver Laws

There are important lessons to be learned on the pitfalls of the "opaque and unlimited discretion"[120] of prosecutorial waiver decisions from one of the largest states utilizing prosecutorial discretion: Florida. Florida enacted its prosecutorial waiver statute in 1979 and amended it in 1981 to give prosecutors unlimited discretion to transfer 16 and 17-year old juvenile offenders.[121] In Florida, prosecutors were able to transfer a juvenile without a hearing, statement of reasons explaining the transfer decision, counsel for the juvenile, or a showing of amenability or resistance to treatment.[122] Transfer data from the years 1986 and 1987 showed 50,289 and 57,298 delinquency filings in total.[123] The percentage of those filings transferred to criminal court were 6.41 and 7.35, respectively.[124] However, of the percentage transferred from juvenile court to criminal court, 88% were transferred via prosecutorial discretion in both years.[125] Scholars noted that this overwhelming increase in the amount of juvenile cases transferred via direct file were followed by declines in indictment and judicial waiver—citing a 12% decline in judicial waiver in the year 1987.[126]

Interviews conducted in Florida with prosecutors after the enactment of the waiver legislation helped explain the following immense rise in prosecutorial waiver decisions. Nearly all Florida prosecutors that responded to an interview request were pleased with the law because they viewed the increase in their discretionary power as a positive one.[127] Half of the prosecutors surveyed "wished the change [in the law] had been even more far reaching,"[128] while some expressed reservations about the "considerable potential for abuse" or worried that "less ethical" prosecutors would unnecessarily transfer cases.[129]

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[120] *See generally* HUMAN RIGHTS WATCH, BRANDED FOR LIFE 40–78 (2014).
[121] Bishop & Frazier, *supra* note 107, at 287 (citing FLA. STAT. ANN. § 39.02(5)(c) (West 1988); FLA. STAT. ANN. § 39.04(2)(e)(4) (West 1988)). Florida's current prosecutorial waiver and direct file laws are codified in FLA. STAT. ANN. § 985.557 (West 2019).
[122] Bishop & Frazier, *supra* note 107, at 287–288.
[123] *Id.* at 288 (referring to Table 1).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 289.
[128] *Id.*
[129] *Id.* at 290.

What is perhaps most disconcerting is that the personal philosophies of prosecutors regarding juvenile justice did not align with their transfer decisions.[130] Half the survey respondents believed that juveniles should be transferred to criminal court only as a last resort, yet "many of them transferred as high a proportion of cases as those prosecutors reporting a more punitive stance. Virtually every prosecutor, *regardless of [their] orientation toward juvenile justice*, reported having increased the transfer of juveniles to criminal court following the 1981 change in the law."[131] One reason cited by prosecutors for waiver decisions, even when they believed prosecutorial waiver should only be a method of last resort, is that they viewed Florida's juvenile treatment and rehabilitative programs as insufficient, and believed juveniles would not and could not be rehabilitated in such a system.[132] As a result, Florida prosecutors felt that the juvenile justice system could serve no rehabilitative purpose and they felt forced to transfer juveniles to the criminal justice system much sooner.[133]

Further, in Florida, the prosecutorial waiver decisions appeared "largely attributable to differences in bureaucratic practices, rather than [] differences in the seriousness or perceived prosecutorial merit of cases."[134] A study of two midsized counties revealed that charged juveniles were at different levels of risk for being direct filed merely because of the "idiosyncrasies" of the prosecutors' offices.[135] In the smaller county, many cases failed to proceed to criminal court merely because the prosecutors in the criminal division of the county office failed to act timely, and their cases were unable to be prosecuted "for violation of speedy trial rules."[136] While in the larger county, this problem was not present because the chief of the juvenile division "personally filed bills of information" in criminal court, and transfers were only halted if an attorney from the criminal division intervened.[137]

Although the public and policymakers may believe that prosecutors act with care to select dangerous groups of offenders to transfer to criminal court, this was

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[130] *See id.* (characterizing philosophies of juvenile justice under "a "pure" just deserts model, a "modified" just deserts model (i.e., one that ties together just deserts with some utilitarian goal such as deterrence), and a traditional rehabilitative model of juvenile justice.") (internal quotations omitted).
[131] *Id.* at 292 (emphasis added).
[132] *See id.* at 292–293.
[133] *See id.*
[134] *Id.* at 294.
[135] *Id.* at 295.
[136] *Id.* at 294–295.
[137] *Id.* at 295.

not the reality in Florida. Only 29% of direct file transfers were considered "dangerous."[138] About half, 55%, instead were charged with property offenses, including unarmed burglary, while 11% involved felony drug charges, and 5% involved misdemeanors.[139] Further, 23% of the juveniles transferred by prosecutors were first-time offenders, 58% had only received probation or a court-ordered sanction, and only 35% of the transferred juveniles had previously been committed to a juvenile program.[140] Decades later, another study confirmed that the apparent arbitrariness of waiver decisions still persists. Data from 2008-2013 shows that Florida youths "are prosecuted in adult court approximately as often for property crimes as they are for violent felonies."[141] Additionally, the study showed that nearly half of direct-filed youths were actually categorized as "low or moderate risk to re-offend," and less than a third of direct-filed youths were categorized as "high risk."[142] In sum, the findings from the Florida study showed that juveniles transferred via direct file "were not unequivocally dangerous."[143]

2. Similar Lessons to be Learned from California

These problems are not unique to Florida, and the same issues of arbitrariness are applicable to other states utilizing prosecutorial waiver. Researchers analyzed information collected by the California Department of Justice regarding the use of direct file.[144] The study found that despite a 55% drop in the rate of serious juvenile felony arrests – arrests that are eligible for direct file – district attorneys in California are increasing their use of direct file.[145] California saw a 23% increase in direct filings per capita in 2014 than in 2003.[146] Even more alarming, from 2012 to 2014, over 80% of juvenile cases were transferred to the criminal justice system

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[138] *Id.*
[139] *Id.*
[140] *Id.* at 296.
[141] *See* HUMAN RIGHTS WATCH, *supra* note 120, at 27.
[142] *See id.*, at 28.
[143] *See* Bishop & Frazier, *supra* note 107, at 296.
[144] *See* LAURA RIDOLFI, WASHBURN & GUZMAN, THE PROSECUTION OF YOUTH AS ADULTS: A COUNTY-LEVEL ANALYSIS OF PROSECUTORIAL DIRECT FILE IN CALIFORNIA AND ITS DISPARATE IMPACT ON YOUTH OF COLOR 3 (2015), http://www.burnsinstitute.org/wp-content/uploads/2016/06/Ending-Adult-Prosecution_FINAL.pdf.
[145] *Id.* at 4.
[146] *Id.*

via direct file.[147] Only about 20% of cases during this time period were transferred by a judge.[148]

California also saw county-level variations in the use of prosecutorial discretion, which led to a system of "justice-by-geography" for juveniles.[149] In 2014, 14 of California's 58 counties "relied on direct file *at the complete exclusion* of judicial transfer hearings."[150] Twenty-five counties reported no prosecutorial waiver cases nor judicial transfer hearings in the same year.[151] Further, the study showed that counties with the highest rates of direct file were more inclined to transfer 14- and 15-year-old juveniles to the criminal justice system than counties with lower rates of direct file.[152] Counties with fewer instances of direct file per youth population had prosecutorial waiver cases involving 14- and 15-year-olds 2% and 8% of the time, respectively; while counties with greater instances of prosecutorial waiver had cases involving 14- and 15-year-olds 4% and 13% of the time, respectively.[153] Yet, counties with the greatest rates of direct file "did not have discernably higher rates of serious youth arrest."[154] For example, juveniles living in and arrested in Yuba County were 34 times more likely to be transferred to criminal court via prosecutorial waiver than juveniles in San Diego County – even though Yuba and San Diego County had identical rates of youth arrests per population (256 serious felony arrests per 100,000 of the youth population).[155] These differences appear to be a result of the "system of justice-by-geography" mentioned earlier.[156] Factors such as the "age, race, and location of a young person" impacted and increased the likelihood that a prosecutor would waive or directly file their case in criminal court.[157] The ease of prosecutorial discretion, combined with

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[147] *Id.* (see Figure 2).
[148] *Id.* (see Figure 2).
[149] *Id.* at 5.
[150] *Id.* (emphasis added).
[151] *Id.* at 6. (see "Note" near the bottom of the page explaining that "Alpine, Amador, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Imperial, Inyo, Lake, Lassen, Mariposa, Modoc, Mono, Plumas, San Benito, San Francisco, San Mateo, Sierra, Siskiyou, Tehama, Trinity, Tuolumne, and Yolo counties reported no direct file or transfer hearing in 2014").
[152] *Id.* at 9.
[153] *Id.* (see Figure 7).
[154] *Id.* at 10.
[155] *Id.* (see Figure 8).
[156] *Id.* at 15. (see Figure 8).
[157] *Id.*

California prosecutors increasing reliance on this mechanism, impacted young minority youth in the state more than their white counterparts.[158]

B. DISPROPORTIONATE IMPACT ON MINORITIES

Unchecked prosecutorial discretion in the waiver system further exacerbates the existing racial problems in our juvenile and criminal justice system. These racial disparities in the transfer decision and the overrepresentation of youth in the justice system are not merely the result of youths of color committing more crimes.[159] The overrepresentation of minority youth could be due to a variety of factors that begin even prior to the decision to transfer them to criminal court. Minority youth are more often and more likely to be charged with murder, and murder charges significantly affect whether a juvenile will be transferred from juvenile jurisdiction to criminal court.[160] Even still, there are indirect racial effects in a youth's offense history tied to different jurisdictions' decisions to police and monitor certain neighborhoods, many of which are minority-majority populations.[161]

Youth of color are significantly overrepresented in the youth who are direct filed to criminal court. A survey of 75 largest counties in the United States revealed that 96% of the defendants transferred to criminal courts were male; and of all transfers, over 62% were black or African American, 16.2% were Hispanic or

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[158] *Id.*

[159] *Id.*; NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 1 (2007). "It is not clear whether this overrepresentation is the result of differential police policies and practices (targeting patrols in certain low-income neighborhoods, policies requiring immediate release to biological parents, group arrest procedures); location of offenses (African American youth using or selling drugs on street corners, White youth using or selling drugs in homes); different behavior by youth of color (whether they commit more crimes than White youth); different reactions of victims to offenses committed by White and youth of color (whether White victims of crimes disproportionately perceive the offenders to be youth of color); or racial bias within the justice system. In a meta-analysis of studies on race and the juvenile justice system, researchers found that about two thirds of the studies of disproportionate minority confinement showed negative 'race effects' at one stage or another of the juvenile justice process." *Id.*

[160] *See* Jeffrey Fagan, Martin Frost & T. Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987).

[161] *Id.*

Latino, and only 19.9% were white.[162] In sum, studies of transfer decisions consistently show that certain racial groups are more impacted than others, that offense seriousness may not be a determinative factor in prosecutorial waiver as legislators had previously envisioned, and that geography and prosecutorial practices lead to different outcomes for even similarly situated youth within the same state. Additionally, the DOJ found that in the 75 largest counties in the United States, roughly 75% of youths appeared in criminal court via nonjudicial mechanisms, and in those counties, black youth represented 62.2% of transferred juveniles, and Hispanic youth represented 16.2% of transferred juveniles—despite their relative population size generally.[163]

Florida, again, is evidence of the problems with prosecutorial discretion in the juvenile justice system as it relates to racial disparities. One study showed that although black males represented 27.2% of youths arrested and processed by the Florida Department of Justice, they accounted for 51.4% of transfers to the criminal justice system.[164] In contrast, white males represented 28% of youths arrested and processed, yet they account for 24.4% of transfers to adult criminal court.[165] Transfer rates for black and white youths for murder and property crimes appeared similar.[166] However, transfer rates for black and white youths for violent offenses, excluding murder, diverged.[167] The study found that 13.3% of black youths were transferred to criminal court while only 7.4% of white youths were transferred after an arrest for similar violent offenses.[168] In every single judicial circuit in Florida, black youths were transferred to criminal court after an arrest for a violent felony at higher rates than their white youth counterparts.[169] Similar disparities existed for black and white youth transfer rates for drug felony offenses—in one circuit, 8.8% of white youth arrested were transferred to criminal court, while 30.1% of black youth were transferred for a similar offense.[170]

Likewise, data collected from 2003 to 2014 showed that in California, youth of color are 70% of the state's 14- to17-year-old population, yet they represent 90%

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[162] STATE TRANSFER LAWS REPORT, *supra* note 67, at 12.
[163] *Id.*
[164] *See* HUMAN RIGHTS WATCH, *supra* note 120, at 29.
[165] *Id.*
[166] *Id.* at 29–30.
[167] *Id.* at 30.
[168] *Id.*
[169] *Id.* (see Figure 4).
[170] *Id.* at 31 (see Figure 5).

of the youth transferred to criminal court via prosecutorial waiver.[171] Latino and black juveniles in the state were 3.3 times and 11.3 times more likely than white juveniles to be direct filed.[172] In nine counties, including Los Angeles and Santa Barbara, black juveniles were direct filed to criminal court, but in these same counties, there were no white juveniles reported as direct filed.[173] In twelve counties, including Los Angeles, Santa Barbara, and Santa Cruz, a number of Latino juveniles were direct filed, but there were no white juveniles direct filed.[174] Data continues to show that black juveniles are transferred to the criminal justice system in numbers in excess of the proportion they represent in the general population and are further overrepresented in the number of cases in the juvenile justice system.[175] More specifically, being "[b]lack and older or charged with a felony increased the likelihood of transfer to adult court when compared to all other youth."[176]

These findings were further confirmed in a study of juvenile cases in major cities and counties around the country. Although black youths accounted for 57% of all the charges filed, they were overrepresented in drug and public order charges.[177] Black youths also accounted for 85% of drug charges and 74% of public order charges.[178] For black youth, nearly 90% of those charged with violent offenses or drug offenses had their juvenile status determined by the prosecutor or by statutory exclusion, not by the judicial waiver and hearing mechanism.[179]

C. WORSE OUTCOMES FOR JUVENILES AND LITTLE DETERRENT ON CRIME

Several assumptions are made in the juvenile transfer decision. One such assumption is that juvenile courts are incapable or insufficient to handle the seriousness of the crime committed or the juvenile in question, and the juvenile

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[171] RIDOLFI, WASHBURN & GUZMAN, *supra* note 144, at 11.
[172] *Id.*
[173] *Id.* at 13 (see Figure 12).
[174] *Id.* at 14 (see Figure 14).
[175] *See* Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331, 357 (2013).
[176] *Id.* at 358.
[177] *See* JUSZKIEWICZ, *supra* note 92, at 19.
[178] *Id.*
[179] *Id.* at 31–32.

would be more appropriately punished by the criminal court system.[180] By using direct file, prosecutors aim to deter future crime by transferring a juvenile to criminal court, which metes out harsher sentences in comparison to the juvenile court system.[181] Prosecutors also use direct file to send a signal to other potential juvenile offenders about the severity of punishments awaiting them.[182]

However, many studies show that transfers may lead to *increased* rates of recidivism and may not deter crime.[183] One study specifically focused on how transfer to criminal court affected the recidivism rates of juveniles in the long term, including the probability of rearrests, the time of the first rearrest, and the frequency of subsequent arrests.[184] The study showed that transferred juveniles and non-transferred juveniles were equally as likely to be rearrested in the long run.[185] The decision to transfer youths to criminal court only seemed to deter or reduce recidivism for juveniles transferred as a result of property offenses.[186] In contrast to their non-transferred peers, "more transferred property felons avoided rearrest on release."[187] Yet, the average number of rearrests were higher for those juveniles transferred into criminal court than their non-transferred counterparts, and, on average, transferred juveniles were rearrested in a shorter period than their non-transferred peers.[188] This was true even when the researchers controlled for the type

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[180] *See, e.g.*, Lonn Lanza-Kaduce, Charles E. Frazier & Donna M. Bishop, *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 277, 277–78 (1999) ("From the beginning, transfer to criminal court was regarded as necessary to remove serious and violent offenders who were thought to be too dangerous or too intractable for the juvenile justice system.").

[181] *See* Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1455 (2006).

[182] *Id.*

[183] *See, e.g.*, *id.* at 1455; Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548, 555–56 (1997).

[184] *See* Winner et al., *supra* note 183, at 549–50.

[185] *Id.* at 557.

[186] *Id.* at 557–58. Researchers were unable to theoretically explain this finding this given the "loose" and vague label of "property felon." *Id.* at 560.

[187] *Id.* at 558.

[188] *Id.* at 556.

and seriousness of the offense.[189] Both in the short-term and long-term, "[t]ransfer was more likely to aggravate recidivism than to stem it."[190]

Another empirical study examined the effects of prosecutorial waiver on juvenile arrest rates in comparison with carefully selected control states without direct file laws and with a similar size, location, and percentage of youth population.[191] Although arrest data is an imperfect predictor, arrest data is useful because it provides age-specific data on crimes.[192] Nonetheless, the findings of this study showed that after the enactment of prosecutorial waiver laws, the majority of states did not see a decrease in juvenile crime rates.[193] Nine states remained unaffected after the laws went into effect, while two states, Arkansas and Montana, actually experienced an increase in their arrest rates for violent juvenile crimes.[194] Further, "no state experienced a lower juvenile homicide/manslaughter rate after their direct file waiver law went into effect."[195] The findings show that prosecutorial discretion statutes have had little to no deterrent effect on violent juvenile crimes—indeed, in some states, the opposite has happened— and there has been an increase in arrest rates.[196]

Although youths should face the consequences of their actions, the criminal court system appears insufficient to truly rehabilitate juveniles or deter them from criminal activity. Research consistently shows that there are "negative consequences of criminal sanctions for children," and decisions to transfer juveniles to criminal court are "counterproductive."[197] Youths transferred to the criminal justice system are imprisoned longer than non-transferred youth, and as a result, "the conditions often associated with extended detention—separation from

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[189] *Id.* at 556.
[190] *Id.* at 558–59.
[191] *See* Steiner & Wright, *supra* note 181, at 1460–62. The study excluded several states from its analyses due to the inability to find a sufficient control state or because the state enacted its prosecutorial discretion laws in a time period that would have introduced a "history effect" to the statistical analysis. *Id.* at 1461.
[192] *Id.* at 1462–63.
[193] *Id.* at 1464.
[194] *Id.*
[195] *Id.* at 1467–68.
[196] *Id.* at 1467. That juvenile crime rates have continued to decrease *nationally* is not as a result of prosecutorial waiver or the threat of increased punitive measures for juveniles. *See id.* at 1467. Instead, the findings suggest that other extraneous factors play a role. *Id.* at 1468.
[197] *See* Winner et al., *supra* note 183, at 559, 561.

loved ones, crowding, and solitary confinement—may increase the risk of suicidal behavior among transferred youth."[198]

There may be one major reason why waiver decisions have no impact on juvenile crime rates. Many psychologists, scholars, and even the Supreme Court,[199] acknowledge that due to the neurological and developmental stage of juveniles, they hold extraordinarily different perceptions of risk than adults do.[200] Juvenile decisions are "influenced more heavily by the potential rewards of their choices rather than by the potential risks involved, as well as the short-term, rather than long-term, consequences of their actions."[201] Meaning that a developing teenager is unlikely to be deterred by the possibility of more punitive measures because they may be incapable of adequately weighing the risks of their actions in comparison to the relative reward they perceive from their potential actions.[202] In sum, the possibility of transfer to criminal court or increased punitive measures are unlikely to sway juveniles from committing "the most serious of illegal acts."[203]

In addition to increased rates of recidivism for transferred juveniles, social science research also continues to show that transfer decisions have a detrimental effect on juvenile offenders. These detrimental effects include a lack of access to social and mental welfare services available in juvenile court and violence juvenile offenders face while incarcerated with adults. Often, juveniles transferred to criminal court are detained in adult jails.[204] Many juveniles transferred to and

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[198] *See* WASHBURN ET AL., DEP'T OF JUSTICE, DETAINED YOUTH PROCESSED IN JUVENILE AND ADULT COURT: PSYCHIATRIC DISORDERS AND MENTAL HEALTH NEEDS 3 (Sep. 2015).

[199] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005). The Court agreed that "as any parent knows and as the scientific and sociological studies…confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Id.* (internal quotations omitted).

[200] *See* Steiner & Wright, *supra* note 181, at 1469; *see generally* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156–72 (1997).

[201] *See* Steiner & Wright, *supra* note 181, at 1469.

[202] *Id.*

[203] *Id.*

[204] *See* Leiber & Peck, *supra* note 175, at 360; *see also* Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 21–22 (2010) ("Many black youth waived to adult court were held in adult jails. About half of black youth prosecuted in adult court were released pretrial. Of those who were not released, almost two-thirds (65.4%) were held in adult jails. The rest were held in juvenile facilities.").

incarcerated in adult prisons attempt suicide, and the suicide rate is eight times higher for juveniles in these facilities than for juveniles in juvenile detention facilities.[205] A number of factors contribute to the suicide rate for juveniles incarcerated in adult prisons, including a lack of access to rehabilitative services, sexual abuse by inmates and even prison officials, and physical attacks and abuse, due to their smaller size and youth, by other inmates.[206]

Moreover, a juvenile's experience while incarcerated may be a significant factor that leads to increased recidivism.[207] Juveniles incarcerated with adults often turn to violence as a way to survive their time—further exacerbating the troubling transfer decision when a juvenile may be raised "with some of the most hardened criminals"[208] as opposed to being given the opportunity to experience some rehabilitative treatment in the juvenile court system.

Scholars continue to point to studies that show that juvenile crime has not significantly increased and is not on the rise.[209] Nearly sixty percent of the juveniles referred to juvenile court are single offenders who do not have persistent or frequent contact with the juvenile court system.[210] And, even for juvenile offenders who are serious or frequent offenders of the law, the prevalence of "serious violence" decreases significantly after they reach adulthood.[211] For the aforementioned reasons, state legislators should look to alternate means, not direct file, if they wish to effectively punish and rehabilitate juvenile offenders.

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[205] *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis in the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 405 (1998) (citing H.R. Rep. No. 105-86, at 74).
[206] *Id.* at 404–05.
[207] *See* BARRY HOLMAN & JASON ZEIDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4 (2006).
[208] *See* Klein, *supra* note 205, at 405 (citing Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60).
[209] *See* Robert E. Jr. Shepherd, *Juvenile Justice*, 10 CRIM. JUST. 39, 39 (1995).
[210] *Id.*
[211] *Id.*

IV. POTENTIAL SOLUTIONS

Prosecutorial waiver decisions implicate the due process rights of juveniles and subvert the intent and aim of the Court's decision in *Kent*[212]—a youth's first appearance is in criminal court because that is where the prosecutor chose to bring the case, not because a neutral arbiter determined that the youth was better suited in criminal court or could not be rehabilitated. Yet, challenges to direct file laws have nearly always failed.[213] The judiciary's immense deference to a prosecutor's discretion, in charging and in bring forth a case, is difficult to square within the juvenile justice area because states with prosecutorial waiver laws appear to have enacted them exactly *because of* such judicial deference.

The District of Columbia, for example, enacted its prosecutorial discretion statute "[b]ecause of the great increase in the number of serious felonies committed by juveniles *and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law*."[214] Given the political nature of prosecutors, the deference granted would appear unwarranted. And further, because a prosecutor's decision to transfer youths into the criminal justice system is unreviewable by the judicial branch, juveniles are subject to another injustice. State legislatures—when confronted with the evidence posed above—should move towards eliminating or restraining direct file or prosecutorial waiver in juvenile waiver decisions.

A. ELIMINATION OF DIRECT FILE STATUTES

The current direct file system is one riddled with abuse, as a result of the absence of judicial review, and the influence of external factors, such as implicit biases and political pressure.

The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable.

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[212] *See, e.g.*, Hamack, *supra* note 18; Rachel Jacobs, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989 (2013).

[213] *See, e.g.*, United States v. Bland, 472 F.2d 1329, 1336–38 (D.C. Cir. 1972) (reasoning prosecutors are officers of the executive branch and exercise discretion as to whether to prosecute, therefore as a result of separations of powers and absent "suspect factors" like race or religion, courts are not to "interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").

[214] *Id.* at 1341 (emphasis in original) (quoting H. REP. 91-907, 91st Cong., 2d Sess., at 50 (1970)).

Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected.[215]

Combined with a system of "justice-by-geography," youths that are direct filed are denied the individualized determination and the opportunity for rehabilitation envisioned by the creators of the juvenile justice system. The seriousness of the offense committed should play a role in the decision to use prosecutorial discretion, instead, data shows that the "age, race, and location of a young person" impacts whether or not they will be treated as a juvenile or waived into criminal court.[216]

The juvenile justice system and public safety—unless and until appropriate standards are developed for prosecutorial waiver decisions—would be better served by the elimination of direct file laws. Several states have recently repealed their direct file laws—including California and Vermont. These decisions can serve as legislative acknowledgments that the harms of direct file greatly outweigh any added value. Further, as stated above, the youths transferred into the criminal justice system are not serious or high-level offenders. Direct file statutes are superfluous and repealing these statutes would not create unsafe communities, because most serious offenders are already captured by legislative exclusion statutes and judicial waiver mechanisms.

1. Legislative History from California and Vermont Support the Choice to Repeal Direct File Statutes

In California, citizens voted to enact Proposition 57, which requires, in relevant part, "a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."[217] Although the main focus of Proposition 57 was California's overcrowded prison system, the State acknowledged that youth crime was decreasing, yet the state's prosecutors continue to increase the number of youths charged as adults.[218]

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[215] *See* United States v. Bland, 472 F.2d 1329, 1329 (D.C. Cir. 1972)., *cert. denied* 412 U.S. 909 (Douglas, J., dissenting) (internal quotations omitted).

[216] *See* RIDOLFI, WASHBURN & GUZMAN, *supra* note 144, at 15.

[217] CAL. SEC'Y OF STATE, *Text of Proposed Law, Proposition 57,* available athttp://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf.

[218] Navnit Bhandal & Tessa Nevarez, *Proposition 57: Criminal Sentence. Parole. Juvenile Criminal Proceedings and Sentencing. "The Public Safety and Rehabilitation Act of 2016"*. 15 (May 2016), http://www.mcgeorge.edu/Documents/Publications/prop57_CIR2016.pdf (citing Frankie Guzman, Laura Ridolfi, & Maureen Washburn, *The Prosecution of Youth as Adults: A County-Level*

The Center on Juvenile and Criminal Justice strongly advocated for the passage of Proposition 57, arguing that transfer decisions should only be made by judges "after careful consideration." Other proponents of the law also argued that juvenile judges were better qualified to assess youths in the system and were more likely to be neutral parties, unlike prosecutors.[219] Despite arguments presented in opposition of Proposition 57's scope as it applied to adult offenders,[220] most agreed with the law as it related to juvenile justice reform. In 2016, Proposition 57 successfully passed by a vote of 64% to 35%, effectively repealing California's direct file laws.[221]

Similarly, in 2016, the Vermont legislature enacted statutes to override and greatly limit their previous prosecutorial discretion laws.[222] Now, in Vermont, nearly all juvenile cases must begin in juvenile court.[223] Prosecutors must file a motion, and there must be a hearing and judicial approval before waiving or transferring certain juveniles into criminal court.[224] However, the statute still mandates the waiver of juveniles accused of one of twelve serious felony offenses enumerated.[225] Still, Vermont is an example of successful juvenile justice reform in the prosecutorial discretion area. The state, while mulling over its direct file laws, even considered treating as juveniles all offenders under the age of 21, excluding

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Analysis of Prosecutorial Direct File in California and its Disparate Impact on Youth of Color, YOUTHLAW.ORG (June 2016), *available at* http://youthlaw.org/wp-content/uploads/2016/06/The-Prosecution-of-Youth-as-Adults.pdf).

[219] *Id.* at 16 (citing Frankie Guzman, Laura Ridolfi, & Maureen Washburn, *The Prosecution of Youth as Adults: A County-Level Analysis of Prosecutorial Direct File in California and its Disparate Impact on Youth of Color*, YOUTHLAW.ORG (June 2016), *available at* http://youthlaw.org/wp content/uploads/2016/06/The-Prosecution-of-Youth-as-Adults.pdf).

[220] *Id.* at 16–18.

[221] *See* The New York Times, *California Proposition 57*, N.Y. TIMES (Aug. 1, 2017), *available at* https://www.nytimes.com/elections/2016/results/california-ballot-measure-57-sentencing-parole-reform.

[222] *See* VERMONT ACT NO. 153, H.95, (2016) *summary available at* https://legislature.vermont.gov/Documents/2016/Docs/ACTS/ACT153/ACT153%20Act%20Summary.pdf.

[223] *See* VT. STAT. ANN. tit. 33, § 5201(d) (West 2020).

[224] *Id.* § 5204(a).

[225] *Id.* § 5204(a)(1)–(12).

those offenders charged with major felonies, as a result of data collected across several social service agencies.[226]

The key takeaway from the legislation enacted by California and Vermont is that rational legislatures are beginning to recognize that although some juveniles should be subject to adult penalties within the criminal justice system, prosecutorial waiver decisions are not the best way to accomplish this goal. Justice is better served by a fair and individualized process that allows a better-placed and neutral party, a judge, to determine the amenability to treatment and the jurisdiction of the charged youth.

2. Constitutional Challenges

One state constitution challenge has prevailed, and others may prevail in the future. The Supreme Court of Utah in *State v. Mohi* declared that the state's direct file laws were unconstitutional.[227] Under one of Utah's constitutional provisions, similar to the Equal Protection Clause, "[f]or a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the *operation* of the law be uniform. A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly.'"[228] First, the Utah court concluded that the direct file statute created a class of juveniles that remained in juvenile court jurisdiction while also creating a class of "like-accused juveniles" that are "singled out by prosecutors to be tried as adults."[229] Second, the court concluded that youths were indeed treated "nonuniformly" under the Utah statute, noting that "[j]uveniles against whom indictments or informations are filed are statutorily indistinguishable from those who remain in juvenile jurisdiction" except for the decision to charge one set of juveniles as adults.[230] The court found that this amounted to unequal

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[226] *See generally* VERMONT AGENCY OF HUMAN SERVICES, YOUTHFUL OFFENDERS REPORT (2016).

[227] State v. Mohi, 901 P.2d 991, 1004 (Utah 1995) (referring to UTAH CODE ANN. § 78–3a–25).

[228] *Id*. at 997 (emphasis original) (quoting Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993) (quoting Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984))).

[229] *Id.* at 997–98.

[230] *Id.* at 998 ("[T]he statute permits two identically situated juveniles, even co-conspirators or co-participants in the same crime, to face radically different penalties and consequences without any statutory guidelines for distinguishing between them."). The non-uniformity at issue was the result of the prosecutor's decision to direct file certain youths in criminal court but allow similarly situated youths to remain in juvenile court. In this case, the decision to direct file the named-plaintiff may have been the result of the

treatment under Utah law.[231] Finally, the Utah court invalidated the statute because it found that although the legislature had a legitimate purpose in promoting "public safety and individual accountability"[232] and achieving justice in order to serve the best interests of children, the statute was not "reasonable in relation" to the legislature's purpose.[233] Because the statute did not "require the prosecutor to have any reason, legitimate or otherwise, to support his or her decision of who stays in juvenile jurisdiction and who does not," it could not withstand scrutiny.[234]

In relevant part, the Court also acknowledged that "[s]uch unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making."[235] The absence of a check in such a system means that there is no barrier "to prevent such acts as a prosecutor's singling out members of certain unpopular groups for harsher treatment in the adult system while protecting equally culpable juveniles to whom a particular prosecutor may feel some cultural loyalty or for whom there may be broader public sympathy"[236] This summary is exactly the system we are faced with today. The Utah Supreme Court held that "[l]egitimacy of a goal cannot justify an arbitrary means," and "[l]egitimacy in the purpose of the statute cannot make up for a deficiency" in the design of direct file statutes.[237] Other cases based on state constitutional provisions may prevail.[238]

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charges against him, recklessly causing a death with a firearm, but may have also been influenced by local community outrage and allegations of gang activity, *see* Amy Donaldson, *Mohi Blames Triad Center Killing on 'Stupidity,'* DESERET NEWS (Sep. 3, 1996), https://www.deseretnews.com/article/511184/mohi-blames-triad-center-killing-on-stupidity.html.

[231] *Id.*

[232] Utah Code Ann. § 78–3a–25, (7).

[233] State v. Mohi, 901 P.2d 991, 998–99 (Utah 1995).

[234] *Id.* at 999.

[235] *Id.* at 1002.

[236] *Id.*

[237] *Id.* at 999.

[238] *See, e.g.*, Rostyslav Shiller, *Fundamental Unfairness of the Discretionary Direct File Process in Florida: The Need for a Return to Juvenile Court Waiver Hearings*, 6 WHITTIER J. CHILD & FAM. ADVOC. 13, 33–46 (2006) (arguing that Florida's discretionary direct file statute violates the state's non-delegation and due process doctrines).

B. DATA COLLECTION

The decision to eliminate prosecutorial waiver statutes is likely to be a politically unpopular one. Recognizing the difficulties of repealing legislation, there are additional or alternative ways that prosecutors can counter the disparities in the waiver system.

An alternate solution to the arbitrariness of direct file would be to maintain data and records to create a fairer system. This process could ameliorate many of the problems prevalent in discretionary waiver decisions, but it would not resolve all the issues. Although incomplete data exists on the number of juveniles transferred via prosecutorial waiver in the relevant jurisdictions using such a method, the data collected shows that the rates of prosecutorial discretion vary significantly across states and across prosecutors' offices.[239] A juvenile may be more likely to be waived into criminal court by prosecutors in one county in Arkansas, for example, than in another county within the same state. This is likely due to an individual prosecutor's proclivities and the mission of each district attorney's office.[240] By collecting data and keeping records, state prosecutors can collaborate to form a more effective and fair justice system. Tracking waiver decisions may allow prosecutors' offices to recognize racial disparities and inconsistent decision-making in their charging decisions, especially in the states that currently maintain no such database for direct file decisions.[241] This would maintain the discretion that prosecutors already have but would constrain them to meet a series of guidelines based on historical data and the standard practice of other counties in the region. Following historical practice and creating internal office guidelines for filing juvenile cases in criminal court could reduce the "justice-by-geography" system present in many states utilizing direct file. A simple, yet effective, best practice within the existing framework of prosecutorial discretion laws would be to have

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[239] *Compare, e.g.*, HUMAN RIGHTS WATCH, *supra* note 120, at 41 (Prosecutors in Florida's 8th Circuit State Attorney's Office decide whether to direct file by considering "the age of the child, the nature of the crime, and the child's record" and the "the juvenile division chief state attorney consults with the chief assistant state attorney, who has the final say in direct file decisions") with *Id.* at 41 (Prosecutors in Florida's 17th Circuit State Attorney's Office file a "'notice of intent to review for direct file' in cases where the charge is a violent crime against a person or the defendant has an 'extremely long record' or is about to turn 18").
See generally STATE TRANSFER LAWS REPORT, *supra* note 67, at 10–19.

[240] *See* Bishop & Frazier, *supra* note 107, at 299.

[241] *See* STATE TRANSFER LAWS REPORT, *supra* note 67, at 15.

prosecutors state their reasons, in writing, for their decisions to transfer a youth into the criminal justice system. Although prosecutorial waiver decisions cannot be reviewed by a court, this may help with the appeals process when a final decision is rendered and internally could allow prosecutors to track their decisions and develop criteria.

One scholar proposes that in order to move toward a path of "structured decision making," communities should form local committees within their jurisdictions made up of "prosecutors, probation officers, experts in developmental psychology, school officials, and other community stakeholders."[242] In order for these standards to benefit juveniles effectively, "prosecutors should routinely evaluate and revise prosecution standards to correct for evidence of racially disparate outcomes."[243] Prosecutors who recognize disparities within the referral system, for example, that "youth of color are routinely referred from one or more schools for drug use, disorderly conduct, or other low- to midlevel offenses," can decline to charge these youths as adults or prosecute these youths at all and instead encourage "community leaders to identify responses to adolescent offending that do not impose the stigma and collateral consequences" of the court system.[244] This recognition could also lead prosecutors to the conclusion not to charge juveniles as adults except for only the most serious offenses, despite having the authority to do otherwise, thus "set[ting] the standard for juvenile court intake" that "over time may significantly influence patterns of arrest and referral."[245] State prosecutors, however, are political figures and must answer to community members. To prevent accusations from community members that they are "ignor[ing] or underenforc[ing] criminal laws in communities of color, prosecutors must communicate the rationale for their charging decisions and actively engage the community, legislators, and school leaders in developing alternatives to prosecution."[246]

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[242] *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 436-37 (2013).
[243] *Id.* at 443.
[244] *Id.* at 430.
[245] *Id.*
[246] *Id.*at 430–31.

CONCLUSION

When the juvenile justice system was created, its original aim was to diagnose and treat deviant youths. Eventually, as the racial makeup of the country changed, many began to fear the "other," and youth of color were no longer considered young in the eyes of the public. State legislators have transformed the juvenile justice system to an entirely punitive model, with no opportunity for rehabilitation. In a number of jurisdictions, prosecutors are given unfettered discretion to treat certain youth offenders as adults, with no guidance about how to make such a determination. The result of such discretion is a system where young, racial minorities who engage in criminal activity are disproportionately treated as adults under the law and are "direct filed" to criminal court, instead of having their cases brought in juvenile court. The decision regarding jurisdiction of these youths is not subject to judicial review and results in the over-penalization of black and brown adolescents.

The direct file system is clandestine, inconsistent, and ineffective. Justice is better served with the elimination of the direct file system. Legislative exclusion laws already capture violent and repeat offenders. Unless state legislatures enumerate specific standards that state prosecutors can follow before transferring youths to the criminal justice system, data will continue to show that transfer decisions disparately affect minority youths and do not effectively deter crime. In the alternative, unless prosecutors recognize the troubling statistics within their respective jurisdictions, these issues will continue. With the recognition of the disparate impact of direct file decisions, prosecutors' offices should aim to enact inter- and intra-office measures to maintain consistency and transparency in their decisions about which youths to direct file and in order combat the implicit biases always present in unrestrained decision-making.