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THE TREATMENT OF HARD CASES IN AMERICAN JUVENILE JUSTICE: IN DEFENSE OF DISCRETIONARY WAIVER

FRANKLIN E. ZIMRING*

Every state in the federal union provides special treatment in juvenile or family courts to young persons accused of crimes. At the same time, every state makes some provisions for the trial of offenders under eighteen in criminal courts in special cases. The responsibility for deciding when juvenile court jurisdiction will be waived and young offenders transferred to a criminal court is variously distributed among prosecutors, judges, and state legislatures. But the substantive question does not vary: When is it appropriate to treat the subjects of the juvenile justice system charged with serious offenses as if they were adults and banish them to prison for long terms? To put the matter less charitably: When are juveniles not juveniles?

In most states, the law provides that individuals under the jurisdictional maximum age of the juvenile court can be “waived” from that court to the full rigors of criminal court jurisdiction and adult punishment at the discretion of a juvenile court judge. The prosecutor usually files a petition or makes a motion in juvenile court to be decided by a juvenile court judge. If the juvenile court declines jurisdiction, the defendant is subject to prosecution in criminal court. This practice, widely criticized, has been under sustained attack for fifteen years.

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years in the United States from both liberals and conservatives.4

This paper argues that discretionary waiver, with all its faults, is superior to alternative methods of handling juvenile justice’s hardest “hard cases” and suggests some basic reforms in the standards for waiver. First, this paper examines the reasons why waiver might be the least harmful response to exceptionally severe youth crimes. It reviews three alternatives to the waiver system which propose to deal with “hard cases.” The second part discusses some substantive and procedural changes necessary to elicit a set of principles to be applied when considering waiver, a critical legal decision now unguided by coherent substantive rules. The juvenile justice system’s treatment of these hard cases presents its most significant test, and, as this paper concludes, a well-developed and administered waiver program provides a solution.

I. WAIVER AND ITS ALTERNATIVES

The argument for waiver rests on two important assumptions. First, the modern juvenile court is preferable to the criminal justice system for the vast majority of young offenders under seventeen or eighteen years old. Second, it is inevitable, where the juvenile court retains jurisdiction to ages seventeen or eighteen, that cases will arise where the minimum punitive response believed necessary by the court and the community exceeds that available to the juvenile court.

In any era, to say nothing of our age of declining confidence in the rehabilitative ideal,5 strong measures must be taken in cases where police officers are killed, elderly widows raped, and eight-year-old girls molested and strangled by offenders under the normal age of the adult courts’ jurisdiction. These are not typical cases; they occur infrequently. But one cannot evade the responsibility for dealing with such cases simply by documenting their rarity. They happen. They place


extraordinary strains on the assumptions, processes, and credibility of juvenile justice.

The existence of these cases requires that any balanced discussion of waiver include an analysis of its alternatives. Discretionary waiver by the juvenile court is only one of many possible systemic adjustments to the “hard cases” that threaten the mission and the credibility of the juvenile court. A review of existing juvenile justice policies and current proposals for their reform suggests three distinct strategies that could supplant waiver: (1) increasing the punishment and incapacitation power of the juvenile court; (2) lowering the maximum age for juvenile court delinquency jurisdiction in general; or (3) passing legislation that makes criminal court jurisdiction necessary for stipulated categories of offenses and offenders.

All three strategies have been tried, alone or in combination, in various American jurisdictions. The substantial social costs involved in each of these alternatives to waiver provide the principal justification for arguing that refining and reforming discretionary waiver is the least bad response.

1. Increasing Juvenile Court Sanctions

One obvious reason why cases arise in which the minimum appropriate punishment exceeds the dispositional authority of juvenile courts is their limited power to punish. Every juvenile justice system can subject convicted delinquents to secure confinement, but the maximum duration of confinement permitted is much shorter than that provided for serious offenses in adult courts. For example, prior to 1976, a juvenile offender convicted in the New York Family Court could spend no more than eighteen months in secure confinement as a direct result of a delinquency finding and commitment order. In 1976, the leg-

6. See New York Family Court Act § 756b (McKinney 1975). Other statutes typically confer authority on juvenile courts to make commitments that theoretically could extend to the age of majority. Surveys of the actual lengths of commitments report mean stays of six to eight months. The effect of short and administratively determined sentence frames on plea negotiation and sanctioning patterns appears to be profound. Whereas many sentence negotiations in criminal courts focus on the amount of time that is to be served, that issue is less important in juvenile court than the question of whether or not a delinquency finding will result in postadjudicatory confinement. This speculation is consistent with (1) the lower postadjudication commitment rates found in juvenile courts, (2) the higher use of probation in juvenile court systems after conviction, and (3) the relatively high ratio of pretrial detention to posttrial commitment observed in many juvenile justice systems. Unfortunately, this pattern also indicates that pretrial detention is frequently used in cases where postadjudicatory
islature amended the Family Court Act to provide for extended periods of custodial confinement for juveniles found to be "designated felons." The purpose of this legislation was to make available, within a family court system that has a maximum jurisdictional age of fifteen, sentencing options that were openly directed at retribution, incapacitation, and deterrence for extremely serious crimes.7

This legislation is an excellent illustration of the substantial costs of expanding the punitive power of juvenile courts in response to a very small number of exceptional cases, an egregious example of letting the tail wag the dog. Only a minuscule number of delinquents under sixteen require such large doses of social control.8 Retaining them in the juvenile justice system creates the sort of dissonance suggested by the contrast between the terms "designated felon" and "family court." The problem is not solely linguistic. The sending of a fifteen-year-old away for five years is almost never in the offender's best interests, and thus requires operating at cross-purposes with the court's purported role. Moreover, although the same might be said of any extended period of secure confinement, the difference between eighteen months and five years in an adolescent's life is not just quantitative: a five-year sentence very nearly destroys a teen-aged offender's life chances, an impact qualitatively different from the limited destruction wrought by the ordinary maximum terms awarded by juvenile courts.9

Increasing the punishment power of juvenile courts also puts substantial pressure on their usual procedures for fact-finding. The informality, nonentitlement to trial by jury, and discretionary character of the juvenile justice system have been defended from constitutional attack on the grounds that the primary mission of the juvenile court is not to punish but to

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serve the young people who appear before it.\textsuperscript{10} This defense of the system troubles many who regard the disposition of the juvenile cases as being motivated, at least in part, by the traditional purposes of punishment. The lack of traditional legal safeguards in juvenile courts becomes far more questionable when the court “designates” its clients as “felons” and then locks them away for periods of time that can only be ascribed to retributive, incapacitative, and deterrent agendas. The processes of contemporary juvenile justice are too frail to be associated with drastic sanctions; a substantial argument can be made that the couplings of severe sanctions with procedural informality is unconstitutional.

Thus, if extraordinary procedural protections are to be required for hard cases, either the entire juvenile justice system must be refashioned to accommodate the demands of a few cases, or special institutional arrangements will have to establish a form of criminal court within the juvenile court.\textsuperscript{11}

Even if such adjustments are made, expanding the punishment power of juvenile courts may not defuse the pressures building for waiver of juvenile jurisdiction. In 1978, two years after the passage of New York’s “designated felon” provisions, that state’s governor proposed and its legislature passed legislation lowering the age of criminal responsibility to fourteen (and in one instance to thirteen) for twelve felonies.\textsuperscript{12} This legislation mandates the transfer of all such cases to the criminal courts. Among other things, the 1978 legislation was a reaction to a celebrated homicide for which the offender could

\begin{thebibliography}{9}
\item \textsuperscript{10} See, e.g., McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion).
\item \textsuperscript{11} The establishment of a “two-track” system within the juvenile court would require that prosecutors or judges within the juvenile court make the same kind of sorting decision between the high-stakes formal adjudication and the lower-stakes informal adjudication; there is thus a disturbing resemblance to waiver. If expanded punishment power in the juvenile court is viewed as a total displacement of waiver, this expanded and specialized jurisdiction would merely transplant functions now performed by the criminal court into the juvenile court’s criminal court analogue. If, as is the case in New York, “designated felon” procedures within the juvenile court and waiver referrals to the criminal courts coexist, a three-track system is created. The hierarchical relationship in punishment between the three tracks is not obvious: in practice, designated felons within the Family Court could receive higher levels of punishment than imposed for the same offense committed by an offender who is waivered to the criminal courts.
\item \textsuperscript{12} See Juvenile Justice Reform Amendment of 1978, 1978 N.Y. Laws, ch. 478.
\end{thebibliography}
receive only the maximum five years provided in the 1976 legislation.¹³

2. Decreases in Jurisdictional Age

Most of the extremely serious crimes that come under the jurisdiction of juvenile courts are clustered in the later years of court jurisdiction: every year more sixteen- and seventeen-year-olds are arrested for crimes of violence than persons under sixteen.¹⁴ For this reason, one obvious method of reducing the number of hard cases confronted by juvenile courts is to reduce the maximum age of their jurisdiction. Unfortunately, this too is only a partial solution: extreme violence, while rather uncommon, still occurs often enough among thirteen- and fifteen-year-olds to constitute a formidable political problem. Nationally, in 1975, the FBI reported over 400 arrests for criminal homicide by persons between the ages of thirteen and fifteen.¹⁵ One would thus have to cut the jurisdictional age of the juvenile court back to twelve to deal comprehensively with hard cases. Such a drastic reduction in the general jurisdictional age to accommodate the problems raised by rare acts of serious violence would be overbroad in the extreme, a response with profound negative consequences. In a large juvenile justice system, reducing the jurisdictional age by even one year will sweep thousands of adolescents into criminal courts.¹⁶ Nine out of ten will be accused of property crimes; ninety-nine out of every 100 accused teen-aged felons will be transferred to criminal courts for offenses that would otherwise not result in waiver.¹⁷ This represents a retreat, on a very broad front, from the principles of the juvenile court.

13. See Boy, 15, Who Killed Two and Tried to Kill a Third, is Given Five Years, N.Y. Times, June 29, 1978, at 1, col. 5. See also Carey, in Shift, Backs Trial in Adult Court for Some Juveniles, N.Y. Times, June 30, 1978 at 1, col. 3. It may also be worthy of note that Governor Carey of New York was then involved in a closely contested re-election campaign.


16. Id.

17. Id. Arrest statistics that form the basis of this assertion are reported here. The waiver assumptions reflect the data reported in Joel P. Eigen, The Borderlands of Juvenile Justice: The Waiver Process in Philadelphia (unpublished doctoral dissertation, University of Pennsylvania).
Of course, if juvenile court is the wrong place to process most young offenders, wholesale reduction in the court's delinquency jurisdiction can be justified. But reduction in jurisdictional age is too blunt an instrument to serve as an alternative to waiver. Indeed, sweeping large numbers of juveniles into criminal court would prompt the establishment within criminal courts of institutions and patterns of decision-making that resemble the contemporary juvenile court; in those circumstances, prosecutors and judges will make discretionary decisions about "exceptional cases" that might bear a disturbing resemblance to waiver.

3. Legislative Definition of Transfer Standards

In recent discussions of juvenile justice reform, much energy has been devoted to reducing the inherent discretion that currently characterizes transfer between juvenile and criminal court. The Juvenile Justice Standards attempt to restrict the court's discretion by confining waiver to particularly serious "Class 1" juvenile offenses and requiring, in addition, that the accused juvenile have a "prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury." Even when both findings are made, the judge retains the discretion not to transfer the juvenile under the Standards.

Professor Barry Feld produced an even more ambitious proposal for Minnesota: his proposed legislative scheme would make certain combinations of current charges and prior record a sufficient condition for transfer to a criminal court, with only one provision for "transfer back" to juvenile court.

One cannot help but applaud efforts to create a rule of law for such a critical decision. At the same time, it may be impossible to define in advance all those elements that should be weighed in the decision to waive; and it is certainly unrealistic to expect a legislature to approve (or long maintain) criteria as restrictive as those recommended by the Standards or those proposed by Professor Feld.

For example, under both the tentative Standards and the proposed Minnesota legislation, two sixteen-year-olds currently charged with robbery and murder may be treated differ-
ently if one has a prior adjudication for an offense against a person and the other does not. Only the juvenile with the prior adjudication can be waived under the Standards, and he or she must be waived (if appropriately charged by the prosecutor) under the Minnesota proposal. Will such schemes secure legislative approval? This is doubtful. When proposals of this kind are introduced in legislative bodies, the list of "special crimes" leading to waiver tend to expand substantially. Once such legislation is passed, the most typical form of amendment is the addition of new crimes to the list of those permitting or mandating waiver. Such expansion did occur when Minnesota adopted waiver guidelines.21

It is also doubtful that we can remove discretion from waiver decisions without multiplying several times over the number of juvenile offenders transferred to criminal court. Both the Standards and the proposed Minnesota statute hold a prior record to be absolutely necessary for transfer to criminal court to be considered. In Professor Feld's case, "a prior record of violence or crime is the best indicator of such behavior in the future."22 The rationale for the approach in the Juvenile Justice Standards is more opaque. But the typical legislative approach to creating necessary conditions for transfer into criminal court is deliberately overbroad because such standards must be drafted to provide for the worst cases within any particular category. With respect to the prior record requirement, the lawmaker must ask herself whether mass murder without prior formal adjudication is a proper subject for a juvenile court delinquency proceeding. If not, the need for a prior record will be deleted, either for all cases of homicide or by a separate provision for discretionary waiver in "exceptional cases."

A review of state legislation over the period 1970-1987 provides examples of both expanding the list of eligible felonies and of deleting requirements of waiver statutes. No state has a waiver statute as restrictive as those proposed by either Feld or the Standards.23 If legislative criteria for waiver are overbroad because they are drafted with the worst cases in mind, then attempts totally to rid the system of discretion will inevitably lead to the transfer to criminal courts of large numbers of juvenile offenders who fall into the categories provided by the legislation, even though their offenses and prior records would not compel waiver in a discretionary system. A mechani-

21. See Feld, supra note 4, at 506 (Table 1).
22. Id. at 497.
23. See id. at 505-07 (Table 1).
cal approach that requires transfer to criminal court whenever possible would result in the transfer of many more cases than in a system that retains discretion. Systems that attempt to cope with this problem by providing judicial or prosecutorial discretion to transfer back to juvenile court (a common "safety valve to the safety valve") are no less discretionary because the reference back occurs after a waiver decision. They simply reallocate discretion, generally from a juvenile court judge to prosecutors or criminal court judges. Discretion can be removed only at the price of a rigidity that increases the punitive bite of legal policy toward youth crime.

The fact that legislation cannot specify a comprehensive list of sufficient conditions for transfer to criminal court does not excuse the absence of meaningful legislative guidance in those circumstances in which transfer should be considered. Legislation could and should list a very few crimes for which transfer should be considered regardless of prior juvenile record: willful homicide, attempted murder, and aggravated rape are my own short list for this category. Legislation can specify a longer list of violent crimes for which a serious prior record generates eligibility for waiver. All this is necessary but not sufficient. The ultimate decision must be made on a case-by-case basis.

The foregoing discussion does not celebrate the unguided discretion of juvenile court judges in making the waiver decision. Instead, it is suggested that some form of waiver policy centered in the juvenile court may be preferable to those alternative schemes that are achievable in real-world settings. If this is the case, the best recourse is to reform existing waiver practices radically so that they meet minimum standards of legality in a liberal democratic state.

II. SOME STANDARDS FOR REFORM

A rule of law for exceptional cases is difficult to formulate, impose, and regulate. But that does not excuse the currently primitive doctrinal and procedural structure of discretionary waiver. We have not failed to construct a legal structure for waiver; failure implies unsuccessful effort, and most American political subdivisions have devoted little serious effort to this widely acknowledged problem.

This section argues, first, that a basic principle for making the waiver decision can be derived from the justification for the practice presented earlier in the article, and, second, that the
problems identified above provide guidance toward appropriate reforms of waiver decisions and their consequences.

Essential elements of a coherent, defensible waiver policy are:

1. A basic criterion for making the waiver judgment that is consistent with the rationale for the juvenile court’s delinquency youth-serving mission;
2. A workable procedure for reviewing the discretionary waiver decision; and
3. A punishment policy in criminal court which explicitly recognizes that youth must be taken into account in determining appropriate punishment.

1. A Basic Waiver Criterion

The list of goals we pursue in dealing with young offenders in juvenile court is bewilderingly long. We wish to punish, but also to mitigate the harshness of the punishment because of the offender’s immaturity. We undertake to supervise and to rehabilitate. We uphold privacy, seeking to protect the offender from the stigma normally associated with criminal conviction. Yet while the purposes of juvenile justice are many, the justification for waiver is singular: transfer to criminal court is necessary when the maximum punishment available in juvenile court is clearly inadequate for a particular offender.

If this statement of the justification for waiver is correct, it follows that the standard for making a waiver decision should be a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with. Principal offenders accused of criminal homicide, and a few repetitively violent offenders accused of life-threatening crimes, will constitute the bulk of hard cases to be measured against such a standard.\(^\text{24}\) Accessories to extremely serious crimes will represent the most troublesome and novel problems for the implementation of such a standard because of the special meaning and enormous statistical significance of group crime in early and middle adolescence.\(^\text{25}\)

Judgments about an offender’s amenability to rehabilitation will play a relatively minor role in individual decisions under this standard.\(^\text{26}\) For one thing, both juvenile and crimi-

\(^{24}\) For an elaboration of this scheme, see Zimring, *supra* note 6, at 100-02.

\(^{25}\) See generally Zimring, *supra* note 15, at 75-76.

\(^{26}\) The "hard data" correlates of suitability for rehabilitation, prior
nal justice systems seek rehabilitation as one result of their interventions. Moreover, such a nebulous standard usually plays a minor role in decisions made about persons charged with extremely serious offenses.

2. Procedures for Review

The proposed standard of individualized waiver decisions leaves enormous leeway for discretion, with all its attendant abuses. How can these be controlled? In the main, by appellate review of all waiver decisions.

This prescription is based on the assumption that predetermined standards for waiver that attempt precisely to delineate both necessary and sufficient conditions for transfer will sweep too broadly. Judicial review, most properly by an appellate court with jurisdiction over criminal cases, should scrutinize the written opinions of the juvenile court judge and use both principles and precedent in deciding whether waiver is necessary. Admittedly, this is a costly, cumbersome, time-consuming process; however, appellate review of individual waiver decisions is necessary for the evolution of a common law of waiver, i.e. a set of principles and precedents elaborated by appellate courts to guide individual juvenile court judges in future cases. For this reason, every decision to transfer a juvenile to a criminal court should generate an automatic right of appeal.27 Given the long delays associated with careful appellate review and the overwhelming probability of pretrial custody in this class of cases, waived defendants should be provided with the option either to appeal the waiver decision before trial, or to raise the issue of the propriety of waiver after conviction in criminal court.28 Collaterally, a guilty plea in adjudication, prior institutionalization, and age are related to the waiver patterns noted for homicide and robbery. See generally Eigen, supra note 17. It appears much more fruitful to build any such criteria directly into a scheme of decisionmaking rather than have them feed into the vaporous world of amenability to treatment.

27. The single exception to the presupposition is transfer to criminal court initiated by the motion of a juvenile represented by counsel. In many jurisdictions, transfer mechanisms can be used by juvenile court defendants, such as girls charged with prostitution, who are likely to receive more lenient treatment in the criminal court system. That form of waiver, and the transfers that occur solely because a juvenile offender is close to an age boundary that has substantial administrative significance, are beyond the scope of this discussion.

28. An alternative to this approach is found in the conjunction of Juvenile Justice Standards, supra note 18, at §§ 2.4 and 2.4-B, which make the proceeding interlocutory and mandate that it be speedy.
criminal court should not void a juvenile's right to appeal his transfer under this system.

There are a number of difficult issues surrounding the standard for appellate review of waiver decisions and the appropriate remedy when an appellate court finds that the behavior alleged is insufficient to justify a transfer to the criminal courts that was made months or years before the appellate court's opinion. While the standards for review and the consequences of reversal are, in theory, independent issues, they are interrelated in practice because the consequences of reversal will influence an appellate court's willingness to intrude. Hence, the standard for review must be somewhat stricter than the current practice of requiring the defendant to demonstrate that the trial court abused its "sound discretion." Particularly in the early years of appellate involvement, appellate courts should exercise supervisory power over the principles to be applied in waiver decisions while giving more deference to findings of fact.

Appellate activism will produce a large number of cases in which the proper remedy after reversal is not to return the youth to juvenile court. It is likely, particularly with reconsideration of the waiver decision after criminal court conviction, that appellate courts may decide that a waiver decision was inappropriate, but that the individual so affected is now far beyond the age and setting suited to juvenile court processes and has already served a number of years in adult penal facilities. Under these circumstances, the appropriate remedy is not remand to juvenile court but a reduction in sentence. While such a procedure does not restore the defendant to the status of a juvenile, it is consistent with the basic criterion proposed for the administration of waiver and recognizes a continuity between juvenile and adult corrections that appears realistic.

The procedures outlined above are inelegant but necessary. There is some degree of inconsistency in substantive review of waiver decisions in a system that does not provide for substantive appellate review of other sentencing decisions. Preferably a broader right of appellate review of criminal sentences should exist to resolve the inconsistency. It is also untidy to provide for the postponement of a transfer appeal until after resources have been invested in a determination of guilt by the criminal court. However, less comprehensive appellate review procedures would retard the evolution of principles and precedents necessary to rationalize waiver.

Whether this approach should be supplemented with administratively or judicially derived "guidelines" for waiver is a tough question. Certainly, far more extensive studies of waiver procedures and decisions should be undertaken. Whether this information should be the nucleus of future policy guidelines is the test question for the desirability of administrative guidelines. If it is desirable to base future policy on past practices, administrative guidelines can be justified. If not, the task of fashioning principles is more properly viewed as judicial.

3. Youth Crime Policy in Criminal Court

We come now to what may be the heart of the matter, the step necessary to prevent waiver from becoming the capital punishment of juvenile justice. The death penalty is inherently inconsistent with the assumptions that underlie other interventions of criminal justice. But transfer to criminal court need not contradict completely the assumptions that animate juvenile justice if the criminal courts give due regard to youth as a factor in determining appropriate punishment.

A fifteen-year-old offender who is expelled from the juvenile court because of the seriousness of the allegations against him remains fifteen years old. It would be ludicrous to argue that the policy toward youth which so heavily influences the proper outcome in other cases should be considered totally irrelevant in those exceptional cases in which jurisdictional transfer occurs.

Coherent waiver policy, thus, must extend beyond the boundaries of juvenile justice. The appropriate sentence for fifteen-year-olds and thirty-year-olds in criminal court is not necessarily the same. At present, however, most states have no explicit policy stipulating youth as a mitigating factor, and those jurisdictions which have addressed the question in "young offender legislation" use the rehabilitative models and indeterminate sentences now out of fashion.\(^3\) The trend toward determinate sentences set by legislative or administrative bodies makes it even more necessary that in the formal jurisprudence of criminal sentences, immaturity be given due consideration.

There is more than a little irony in the fact that effective reform of the waiver decision in juvenile court ultimately depends on reform in the criminal court. The two systems are

\(^3\) A primary example is the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1988). See generally Zimring, supra note 6, at 57-64.
profoundly interdependent; the simultaneous reform of both of them, however difficult, is essential if either system is to achieve its purposes.

III. Conclusion

Waiver appears to be a necessary evil in the interface between juvenile justice and criminal justice in the United States. A well-functioning juvenile justice system will transfer only a tiny number of very serious offenders into the criminal courts. Yet the legal policy toward this minority of young offenders becomes a key test of the principles and practices of the juvenile court.

If the selection processes within juvenile court for waiver are not both fair and coherently explained, it is the whole of the juvenile court’s jurisprudence that is called into question. Inadequate processes and principles in the criminal court may distort even the best of decisions to waive in juvenile court. Thus, legal policy toward the serious young offender requires that significant attention be paid to what happens after a young offender is waived. One of the most significant tests of the juvenile justice system is the legal treatment of the system’s worst failures.