

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, 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 incident.⁴ As a result of that conviction, Browder was still on probation when he and was detained on charges of robbery, grand larceny, and assault.

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, beatings⁵

thought he had grown stronger to combat the violence he faced, Browder also struggled with depression and isolation. Browder unsuccessfully T/F1 12n Gtod-32(yT/F1 12n GtQq

movement for juvenile justice reform⁷ 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 should shine the spotlight on all _____s and procedures particularly, the mechanisms and statutes allowing youth offenders to be treated as

³⁸ The Court emphatically stated that stem of law for reaching a result of such tremendous consequences without ceremony without hearing, without effective assistance of counsel, [and] without a statemen ³⁹ The Court noted that although the

adults nor the solicitous care and regene 40
The Court held that the hearings provided to

⁴¹ In an appendix to the opinion, the

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

turned 18.⁶⁰ The Court reversed, finding 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

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 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 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

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

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

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>

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

⁹³ The Get Tough Era is marked by the
-predators

Black and brown adolescents are facing a crisis in the criminal justice system.
-thirds of the juveniles detained pretrial were held

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

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 a juvenile detention facility, while the same act would carry a minimum sentence of twelve years for an adult.¹¹⁶ The transfer decision causes the

trial detention and post-c

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

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

¹²⁸ while some expressed
ethic prosecutors would unnecessarily transfer cases.¹²⁹

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. § 985.557 (West 2019) (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

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

¹³¹ One reason cited by prosecutors for waiver decisions, even when they believed prosecutorial waiver should only be a method of last resort, is

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

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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

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 specific felony increased the likelihood of transfer to adult court when compared to all other

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

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

and seriousness of the offense.¹⁸⁹ Both in the short-term and long-
was mor¹⁹⁰

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

after
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
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¹⁹⁷ Youths transferred to the criminal justice system are imprisoned longer than non-transferred youth, and as a conditions often associated with extended detention separation from

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
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 transfer¹⁹⁸

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

rather than by the potential risks involved, as well as the short-term, rather than long-term, consequences²⁰¹

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 percei

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IV. POTENTIAL SOLUTIONS

Prosecutorial waiver decisions implicate the due process rights of juveniles and

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 s -by- 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,

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 eniles should be tried in adult

²¹⁷ Although the main focu prison system, the State acknowledged that youth crime was decreasing, yet the ²¹⁸

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 at <http://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*.

Act of 2 . 15 (May 2016),

http://www.mcgeorge.edu/Documents/Publications/prop57_CIR2016.pdf (citing Frankie

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The Center on Juvenile and Criminal Justice strongly advocated for the passage of

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 of²²⁰ most agreed with the law as it related to juvenile justice reform. In 2016, Proposition 57 successfully passed²²¹

Similarly, in 2016, the Vermont legislature enacted statutes to override and

treatment under Utah law.

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 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 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 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 coul

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, 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 l