

# An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana's System for Juvenile Waiver

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# **An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana's System for Juvenile Waiver**

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## **INTRODUCTION**

Wayne is a 15-year-old black male from southeastern Louisiana who has just been waived to adult court, convicted of armed robbery with a firearm and given the mandatory minimum sentence of 15 years of incarceration without the possibility of parole as punishment for his crime. Many may find a 15-year sentence perfectly reasonable for such a serious violent felony regardless of the offender's youth. Would opinions change, however, if it were discovered Wayne was not the hardened "superpredator"<sup>1</sup> many might assume him to be? Suppose Wayne never received any treatment for a dual diagnosis of mild mental retardation and bipolar disorder, functions at a third-grade level in both reading and math, and had no trouble with the law prior to this incident. Furthermore, his role in the crime was that of a lookout who never left the car while the two adult codefendants—who pressured Wayne into participating in the crime—carried out the robbery inside the store. None of these facts were presented to a juvenile judge prior to Wayne's transfer because the district attorney waived Wayne to adult court by indictment before he could even meet with his assigned juvenile defender. Even if Wayne had consulted with counsel prior to transfer, the juvenile defender could have done little to prevent the waiver. This is particularly true if Wayne's lawyer could not prove Wayne

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1. The term "superpredator" refers to a since-debunked stereotype created by the national media in the 1990s that still persists to this day and portrays youthful offenders as violent, unfeeling, fledgling career criminals without any prospect for rehabilitation. See Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

incompetent because he does not meet the high legal standard required for establishing mental incapacity to proceed.

Now, instead of being placed in a juvenile prison to receive special education services, vocational training, and intensive medical and mental health treatment until the age of 21, Wayne will spend the next half of his life in a punitive adult prison where, for at least the first few years, he will be a target because of his size, youth, and disability.<sup>2</sup> Wayne will most likely emerge from prison without job skills or an education but with new criminal know-how and an untreated and aggravated severe mental illness. These and a number of other considerations are relevant not only to the degree of empathy Wayne's predicament might elicit from the average person, but also to his culpability, his amenability to rehabilitation, and the likelihood his incarceration as an adult will make society safer down the road and otherwise be a wise use of public funds. Yet none of these revelations are legally relevant to the process that resulted in Wayne's transfer, conviction, and sentence, not because there was some sort of break down in the system, but quite to the contrary: because the transfer system in this case worked exactly as it was designed by the Louisiana Legislature.

Wayne's case is just one example of how Louisiana's current system for waiving juveniles to adult courts of criminal jurisdiction can, and often does, result in harsh and irreversible outcomes detrimental to both the youth involved and, in the long run, society.<sup>3</sup> In Louisiana, an increasingly rigid set of rules related to waiver and sentencing—which ignore what is known about adolescent development—intersects with a lack of procedural safeguards and judicial discretion, resulting in the unnecessary transfer of youth amenable to rehabilitation in a manner that neither promotes public safety nor is fiscally sound. Part I of this Article will examine both the history and the current structure of Louisiana's system for trying youth as adults, focusing on understanding the rationale used in bringing about the current system. Part II of this Article will provide an analysis of some particularly troubling individual components of the waiver system

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2. See CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA (2007), available at [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf).

3. Wayne's account is a theoretical example based on a conglomerate of actual cases with which the authors are familiar. For similar stories of transfer involving real cases from Louisiana, see Juvenile Justice Project of La., *The Children of Transfer*, JUV. JUST. PROJECT LA. (July 19, 2010), <http://jjpl.org/new/index.php?s=the+children+of+transfer>.

and how they interact to result in the transfer to adult court of youth who would be better served by the more rehabilitative juvenile justice system. More specifically, this Section will examine how mandatory sentencing, the law of principals, and expansive waiver provisions interact with the absence of procedural safeguards such as reverse waiver, competency protections, and standards which take into account our evolving understanding of adolescent development to result in the wasteful use of public resources on a system which harms youth who could be rehabilitated without increasing public safety or advancing other stated penological purposes. Part III provides recommendations and analyses of potential remedies for the failures in Louisiana's current transfer system and an examination of how those remedies have operated in other jurisdictions to minimize the unnecessary use of transfer. The Article concludes that the only way to provide the due process protections and individualized determinations necessary to ensure only youth unamenable to rehabilitation are waived to adult court is through the total elimination of legislative and prosecutorial waiver in favor of an exclusive reliance on judicial waiver. Recognizing the extremely unlikely prospects for such a sweeping change, however, this Article suggests a number of other less comprehensive recommendations that could be more feasibly implemented in the current political climate and still mitigate some of the most dire effects of the current system.

## I. THE HISTORY AND DEVELOPMENT OF LOUISIANA'S CURRENT WAIVER SYSTEM

### *A. Louisiana's Current Waiver System*

In Louisiana, 17 is the age of criminal jurisdiction, meaning anyone accused of committing a criminal offense at an earlier age is generally tried as a juvenile in the state's delinquency system.<sup>4</sup> However, the Louisiana Constitution grants the state legislature the authority to establish a statutory framework for waiving youth to adult court for certain enumerated offenses.<sup>5</sup> The Louisiana

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4. LA. CONST. art. V, § 19.

5. *Id.* Article V, section 19 provides, in pertinent part:

[T]he legislature may (1) by a two-thirds vote of the elected members of each house provide that special juvenile procedures shall not apply to juveniles arrested for having committed first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary, aggravated kidnapping, attempted first degree murder, attempted second degree murder, forcible rape, simple rape, second degree kidnapping, a second or subsequent aggravated battery, a second

Legislature opted to exercise this constitutional authority by creating within the Children's Code three distinct types of waiver applicable in certain cases, depending on the age of the youth and the offense charged. The types of waiver established in Louisiana fit within the three broad categories of waiver employed by other states and can be identified as: (1) legislative waiver; (2) prosecutorial waiver; and (3) judicial waiver.<sup>6</sup>

### *1. Legislative Waiver*

Legislative waiver, also known as statutory or automatic waiver, refers to the type of waiver that occurs when offenses are statutorily excluded from juvenile court jurisdiction.<sup>7</sup> In Louisiana, article 305(A) of the Children's Code provides for legislative waiver by divesting the juvenile court of jurisdiction in cases in which a child who is 15 years of age or older is accused of "first degree murder, second degree murder, aggravated rape, or aggravated kidnapping."<sup>8</sup> Divestiture of the juvenile court's jurisdiction occurs immediately once either an indictment charging one of the enumerated offenses is returned or the juvenile court makes a finding of probable cause as to one of those offenses at a continued custody hearing, also known as a detention hearing.<sup>9</sup> Notwithstanding the name, it is important to note that as a result of the unfettered charging discretion of district attorneys, it is

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or subsequent aggravated burglary, a second or subsequent offense of burglary of an inhabited dwelling, or a second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950, involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances, and (2) by two-thirds vote of the elected members of each house lower the maximum ages of persons to whom juvenile procedures shall apply, and (3) by two-thirds vote of the elected members of each house establish a procedure by which the court of original jurisdiction may waive special juvenile procedures in order that adult procedures shall apply in individual cases.

*Id.*

6. LUCY S. MCGOUGH & KERRY TRICHE, *LOUISIANA CHILDREN'S CODE HANDBOOK 2009-2010*, at 448 (2009). For a more general discussion of these and other types of waiver not employed in Louisiana, such as blended jurisdiction and "once an adult always an adult" systems, see Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 *CRIME & JUST.* 81 (2000).

7. See Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 *CRIME & JUST.* 189, 196 (1998).

8. LA. CHILD. CODE ANN. art. 305(A) (Supp. 2010).

9. *Id.*

prosecutors who still have primary control over a juvenile's exposure to legislative waiver by virtue of their election to bring a youth before the juvenile court or grand jury under an enumerated charge.<sup>10</sup> Once probable cause has been found for an enumerated offense, however, the prosecution has no further discretion as to waiver because the juvenile court's jurisdiction is automatically divested.

## 2. Prosecutorial Waiver

Prosecutorial waiver refers to the type of transfer where the district attorney has complete discretion as to whether youth of a certain age charged with certain offenses are tried as juveniles or as adults.<sup>11</sup> In Louisiana, prosecutorial waiver can be used to transfer juveniles who are 15 years of age or older and charged with offenses enumerated in article 305(B) of the Children's Code.<sup>12</sup> The district attorney can elect to transfer a child either by obtaining an indictment or by filing a bill of information in the criminal court after a finding of probable cause by the juvenile court at a continued custody hearing.<sup>13</sup> Alternatively, the prosecution can elect to try the child as a juvenile by filing a petition in juvenile court.<sup>14</sup> The prosecutorial waiver statute

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10. LA. CODE CRIM. PROC. ANN. art. 61 (2003) ("Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.").

11. See Feld, *supra* note 7, at 197.

12. LA. CHILD. CODE ANN. art. 305(B). The enumerated offenses are:

(a) Attempted first degree murder; (b) Attempted second degree murder; (c) Manslaughter; (d) Armed robbery; (e) Aggravated burglary; (f) Forcible rape; (g) Simple rape; (h) Second degree kidnapping; . . . (j) Aggravated battery committed with a firearm; (k) A second or subsequent aggravated battery; (l) A second or subsequent aggravated burglary; (m) A second or subsequent offense of burglary of an inhabited dwelling; (n) A second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.

*Id.*

13. *Id.*

14. *Id.* Neither the statute nor case law specifically addresses whether electing to file a petition in juvenile court settles the issue of jurisdiction with finality and bars the prosecution from subsequently waiving the youth to adult court via indictment or bill of information. However, the Louisiana Supreme Court in *State v. Hamilton* apparently found it to be of no moment that the prosecution had indeed filed a petition in juvenile court prior to filing a bill of information because it ultimately allowed the waiver of the juvenile without any

contains a time limitation applicable only to instances in which the juvenile is being held in detention requiring the district attorney to "make his election and file the indictment, bill of information, or petition in the appropriate court within thirty calendar days after the child's arrest, unless the child waives this right."<sup>15</sup>

### 3. Judicial Waiver

Under judicial waiver (usually referred to as transfer), a child can be transferred to adult court only after a hearing is held in which a juvenile court judge makes an individualized determination that the juvenile meets certain criteria making him proper for transfer.<sup>16</sup> In Louisiana, articles 857 through 864 of the Children's Code govern judicial transfer, which may be applied to children who are 14 years of age or older and charged with one of seven enumerated offenses.<sup>17</sup> A transfer hearing can be held at the request of the child, the prosecution, or on the court's own motion any time after a delinquency petition has been filed but before the adjudication hearing or the acceptance of a guilty plea.<sup>18</sup> After

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discussion of or reference to the previously filed petition outside of the statement of facts. 676 So. 2d 1081 (La. 1996). The question of whether the state can change its mind as to prosecutorial waiver once a petition has been filed remains open despite the court's tacit acceptance of the occurrence in *Hamilton*.

15. LA. CHILD. CODE ANN. art. 305(B)(3). The statute is silent as to the appropriate remedy for the state's failure to take any action during this time period. However, in *Hamilton*, the Louisiana Supreme Court rejected arguments that the time limit imposed by article 305(B)(3) is jurisdictional in nature so as to preclude the ability to transfer a juvenile to criminal court once the 30-day time period has elapsed. 676 So. 2d 1081. Rather, the Court held that "[t]he proper remedy for an untimely filing of a bill of information or indictment under [article] 305(B)(3) should be release without bail rather than the quashing of charges against the defendant." *Id.* at 1084 (comparing LA. CHILD. CODE ANN. art. 305(B)(3) with LA. CODE CRIM. PROC. ANN. art. 701 (Supp. 2010) and LA. CHILD. CODE ANN. art. 843 (2004)). As a result, the only time constraint on prosecutorial waiver is the normal prescriptive period (the civil law equivalent of a statute of limitation) for the charged offense.

16. See Feld, *supra* note 7, at 198.

17. LA. CHILD. CODE ANN. art. 857(A) (Supp. 2010). The enumerated offenses are:

(1) First degree murder; (2) Second degree murder; (3) Aggravated kidnapping; (4) Aggravated rape; (5) Aggravated battery when committed by the discharge of a firearm; (6) Armed robbery when committed with a firearm; . . . (8) Forcible rape if the rape is committed upon a child at least two years younger than the rapist.

*Id.*

18. *Id.* art. 858 (2004). A recent amendment to article 305 of the Children's Code even allows the juvenile court to hold transfer hearings for individuals

such hearing, the juvenile court can elect to transfer a child if the state establishes probable cause for the alleged offense and proves by clear and convincing evidence that “there is no substantial opportunity for the child’s rehabilitation” in light of six statutorily established criteria.<sup>19</sup>

Additionally, the judicial transfer article contains a special sentencing rule for judicially transferred 14 year olds barring them from receiving a sentence of incarceration beyond their 31st birthday regardless of the offense.<sup>20</sup> Although in theory an article 857 transfer can be used against 14, 15, and 16 year olds, it is rarely used against anyone but 14 year olds because each of the enumerated offenses in article 857 is similarly listed under either article 305(A) or 305(B), giving prosecutors a much easier route for the transfer of youth who are older than 14. The remaining articles establish several procedural protections relevant to judicial transfer hearings such as the child’s notice rights, evidentiary rules, rights to medical and psychological examinations, discovery rights, and the right to judicial review along with the rules regarding places of detention for children both before and after the issuing of a transfer order.<sup>21</sup>

who were charged with article 857 offenses as juveniles but have reached the age of 21 years without disposition of the case due to a continued mental incapacity to proceed. *Id.* art. 305(E)(2) (Supp. 2010); *see* MCGOUGH & TRICHE, *supra* note 6, at 30.

19. LA. CHILD. CODE ANN. art. 862(A)(2) (2009). The criteria are:

- (a) The age, maturity, both mental and physical, and sophistication of the child.
- (b) The nature and seriousness of the alleged offense to the community and whether the protection of the community requires transfer.
- (c) The child’s prior acts of delinquency, if any, and their nature and seriousness.
- (d) Past efforts at rehabilitation and treatment, if any, and the child’s response.
- (e) Whether the child’s behavior might be related to physical or mental problems.
- (f) Techniques, programs, personnel, and facilities available to the juvenile court which might be competent to deal with the child’s particular problems.

*Id.*

20. *Id.* art. 857(B) (Supp. 2010).

21. *See id.* arts. 858–61, 863–64 (2004). As of 2008, article 857 of the Children’s Code also allows adults who are charged with offenses they allegedly committed as children to be tried as adults if the prescriptive period for the offense has not lapsed. Said individuals may be tried and sentenced as adults regardless of whether jurisdiction could have been waived for the offense when they were juveniles, except that if the offense were not waivable, the individual’s incarceration may not exceed the maximum amount of time he or



*B. The Evolution of Waiver in Louisiana**1. Legislative Waiver*

Legislative waiver in Louisiana is as old as the state's juvenile justice system itself, significantly predating the two other types of waiver. In 1906, the Louisiana Legislature passed a statute establishing the state's first juvenile courts and their authority over children in delinquency proceedings.<sup>22</sup> The act defined a delinquent child as any child under the age of 16 "who may be charged with the violation of any law of this State, (excepting murder, manslaughter, rape)," thereby preserving original criminal court jurisdiction for those three offenses.<sup>23</sup> Two years later, the legislature enacted a constitutional amendment that raised the age of adult criminal jurisdiction to 17 and omitted any specific reference to offenses excluded from juvenile court jurisdiction.<sup>24</sup> Nevertheless, the Louisiana Supreme Court interpreted the new constitutional provision as excluding murder from the jurisdiction of the new juvenile courts, holding that it could not "reasonably so construe the act as to result in leaving a child under 17 years of age free to commit murder under no greater penalty than being subjected to reformatory discipline during the period of his minority."<sup>25</sup>

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she could have received as a juvenile. *Id.* art. 857(C) (Supp. 2010); *see also* State v. Havis, 874 So. 2d 153 (La. 2004) (involving a defendant who was convicted at age 21 for a crime committed when he was 14 years old).

22. 1906 La. Acts 134.

23. *Id.*; *see also* *In re Parker*, 43 So. 54, 55 (La. 1907).

24. 1908 La. Acts 96, 99 (amending the Louisiana Constitution of 1898). The amendment was designed to substitute the 1906 statute in its entirety because of a technical defect in the earlier statute that made it constitutionally unenforceable in the Parish of Orleans.

25. State v. Howard, 52 So. 539 (La. 1910), *overruled in part by* State v. Dabon, 111 So. 461 (La. 1927). The court also suggested in dicta that other capital crimes would similarly be excluded from the jurisdiction of juvenile courts, stating:

If the Legislature, in enacting Act No. 83 referred to, had contemplated that children less than 17 years of age, charged with the crime of murder by indictment, should be tried before the juvenile court, the statute would certainly have provided for such trials therein; but the act fails to do so. Cases in which children are charged with the commission of a crime carrying with it the death penalty are nowhere referred to.

*Id.* at 354–55. Curiously, the court's opinion did not reference the supplanted act of 1906, which did contain an explicit statutory waiver provision for certain offenses, and so did not consider whether the exclusion of those same specific

The Louisiana Constitution of 1913 left no room for interpretation as to the framers' intent to exclude capital crimes from juvenile court jurisdiction by stating that juvenile courts "shall have jurisdiction, except for capital crimes, of the trial of all children under seventeen years of age who may be charged in said courts as neglected or delinquent children."<sup>26</sup> The Louisiana Constitution of 1924 maintained almost the exact wording of its predecessor regarding juvenile court jurisdiction, except in addition to capital crimes it added "assault with intent to commit rape" as an offense excluded from the jurisdiction of the state's juvenile courts.<sup>27</sup> Thus, legislative waiver was not just firmly established, but had been evolving for more than half a century in Louisiana before a system of either prosecutorial or judicial waiver came into existence.

Louisiana's system of legislative waiver continues to evolve in modern constitutional times. The Louisiana Constitution as adopted in 1974 maintained the automatic exclusion of capital offenses and attempted aggravated rape from the jurisdiction of the juvenile courts, but for the first time put a floor on the age of automatic waiver by limiting its application to children 15 years of age or older.<sup>28</sup> A 1979 amendment removed the rules for legislative waiver directly from the constitution, instead merging the concept into the general structure of the constitutional provision which merely authorized the statutory creation of one or more types of waiver in cases involving certain enumerated offenses.<sup>29</sup> In turn, the legislature amended Louisiana Revised

exceptions in the replacement bill drafted just two years later was purposeful given that context.

26. LA. CONST. of 1913, art. CXVIII, § 3.

27. LA. CONST. of 1921, art. VII, § 52. Capital crimes during this period included willful murder, rape, poisoning with intent to commit murder, any type of battery with a dangerous weapon while lying in wait with the intent to commit murder, and certain types of kidnapping. SOLOMON WOLFF, CONSTITUTION AND STATUTES OF LOUISIANA 388-96 (1920).

28. LA. CONST. art. V, § 19 (amended 1979) ("Except for a person fifteen years of age or older who is alleged to have committed a capital offense or attempted aggravated rape, the determination of guilt or innocence, the detention, and the custody of a person who is alleged to have committed a crime prior to his seventeenth birthday shall be exclusively pursuant to special juvenile procedures which shall be provided by law.").

29. LA. CONST. art. V, § 19 (amended 1994). Under this formulation, the legislature could only create a system of waiver for seven enumerated offenses contained in the constitutional provision: "first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary or aggravated kidnapping." *Id.*

Statutes section 13:1570(A)(5) to create a system of statutory waiver granting exclusive juvenile court jurisdiction over all children except for "a child who, after having become fifteen years of age or older is charged with having committed first degree murder, second degree murder, manslaughter, aggravated rape, or a person who, after becoming sixteen years of age or older is charged with having committed armed robbery, aggravated burglary, or aggravated kidnapping."<sup>30</sup> This was the first time a waiver provision created age-based subclasses of children subject to statutory waiver by exercising the full extent of its constitutional authority to subject all seven enumerated offenses to statutory waiver only with regard to 16 year olds, sparing 15 year olds from automatic waiver for the three less serious crimes.

After its passage, several cases unsuccessfully challenged the constitutionality of this new legislative waiver statute based on equal protection and due process concerns.<sup>31</sup> In *State v. Perique*, the most definitive of these cases, the Louisiana Supreme Court refused to apply the same due process arguments to legislative waiver, which, in both a state—*State in the Interest of Hunter*—and federal—*Kent v. United States*—Supreme Court case, successfully overturned separate judicial waiver statutes that similarly did not include individualized standards for transfer.<sup>32</sup> In reaching its decision, the court found that the general rule of non-criminal treatment of juveniles, upon which the decision in *Hunter* was based, no longer applied under the amended wording of Article V, Section 19 of the Louisiana Constitution, which now allowed "the legislature to enact a statute exempting any juvenile arrested for any of the seven enumerated offenses from 'special juvenile procedures.'"<sup>33</sup> The court then found the statute in question did not implicate the due process concerns addressed by *Kent* at all, but instead implicated only the state's police powers.<sup>34</sup> The court based this distinction on the fact that the statute in *Kent* granted the defendant the "special rights and protections"

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30. 1980 La. Acts 1113, 1114.

31. See *State v. Leach*, 425 So. 2d 1232 (La. 1983); see also *State v. Perique*, 439 So. 2d 1060 (La. 1983).

32. See *Perique*, 439 So. 2d at 1062 (distinguishing *State ex rel. Hunter*, 387 So. 2d 1086 (La. 1980), and *Kent v. United States*, 383 U.S. 541 (1966)).

33. *Id.* at 1063. However, subsequent Louisiana Supreme Court rulings have continued to refer to a general rule of "non-criminal treatment" of juveniles. See, e.g., *In re C.B.*, 708 So. 2d 391, 396 (La. 1998). Furthermore, the relevance of this distinction is unclear since the ruling in *Hunter* was specifically predicated not upon the subsequently amended Article V of the Louisiana Constitution, but upon the due process clause, which has not been amended. See *Hunter*, 387 So. 2d at 1086.

34. *Perique*, 387 So. 2d at 1064.

associated with the original and exclusive jurisdiction of the juvenile court, making waiver of jurisdiction a “critically important” act.<sup>35</sup> The challenge of the Louisiana legislative waiver provision, however, did not actually lead to a “transfer” of jurisdiction because it made waiver automatic, preserving the original jurisdiction of the criminal court, and so did not create a statutory right subject to due process protections.<sup>36</sup> This holding in *Perique* gave the green light for further expansion of legislative waiver and the subsequent addition of prosecutorial waiver and continues to be the law of the land.

The consolidation of transfer statutes within the new Louisiana Children’s Code in 1991 preserved its predecessor’s distinction between 15 and 16 year olds, but limited statutory waiver for 16 year olds to the offenses of first degree murder, second degree murder, aggravated rape, and aggravated kidnapping and for 15 year olds to the offenses of first degree murder, second degree murder, and aggravated rape.<sup>37</sup> The legislature removed

35. *Id.*

36. *Id.* However, unlike the statute analyzed by the court in *Perique*, the current wording of Louisiana Children’s Code article 305 makes it clear that a child facing either legislative or prosecutorial waiver “is subject to the exclusive jurisdiction of the juvenile court until” the divesting event occurs. LA. CHILD. CODE ANN. art. 305(A)(1), (B)(1) (Supp. 2010).

37. 1991 La. Acts 706, 717–18. At the time, Louisiana Children’s Code article 305(A) and (B) provided:

A.(1) When a child is sixteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.  
(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first.

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications and the child shall be transferred forthwith to the appropriate adult facility for detention prior to his trial as an adult.

B.(1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, or aggravated rape, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.  
(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first.

*Id.*

manslaughter, armed robbery, and aggravated burglary altogether from the list of enumerated offenses subject to statutory waiver, and instead placed those three offenses in the state's first prosecutorial waiver provision contained later in the statute.<sup>38</sup> The original Children's Code statute was also the first to specify that the triggering event for the divestiture of the juvenile court's jurisdiction was either the return of an indictment or the finding of probable cause for an enumerated offense by the juvenile court at a continued custody hearing.<sup>39</sup> In 1994, the legislature amended article 305(A) of the Children's Code into its current form: eliminating any distinction between 15 and 16 year olds, subjecting all children 15 years of age or older to statutory waiver for the offenses of first degree murder, second degree murder, aggravated rape, and aggravated kidnapping. The most recent amendment to Article V, Section 19 of the Louisiana Constitution, passed shortly after the 1994 amendment to Children's Code article 305(A), in theory expanded the power of the legislature to subject offenses to statutory waiver by adding nine more enumerated offenses to complete the current list of transferable offenses.<sup>40</sup> However, the legislature opted to leave the statutory waiver provision untouched and limited to the four offenses which carry a penalty of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The remaining transferable offenses have instead been allocated among the provisions related to prosecutorial and judicial waiver.

A theory one might employ to explain the evolution of the state's system of legislative waiver is that Louisiana's progression employed evolving standards of decency and understanding of children based on common sense notions of adolescence. To explain, Louisiana began in 1906 with the premise that no serious crime could ever be considered juvenile. However, by the time Louisiana's Children's Code was enacted in 1992, the legislative waiver system included considerations of age as well as offense. This is at least a tacit acceptance of the idea that some children are

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38. *Id.* at 717-19.

39. *Id.* at 717.

40. LA. CONST. art. V, § 19. The added offenses are:

[A]ttempted first degree murder, attempted second degree murder, forcible rape, simple rape, second degree kidnapping, a second or subsequent aggravated battery, a second or subsequent aggravated burglary, a second or subsequent offense of burglary of an inhabited dwelling, or a second or subsequent felony-grade violation . . . involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.

*Id.*

too young for adult court—no matter the crime. The Louisiana Legislature reached this result intuitively without benefit of any of the research relating to adolescent brain development existing today. In other words, common sense notions of childhood and adolescent development led the legislature to conclude that it is one thing for a 16 year old to commit an armed robbery, but quite another for a 12 year old to commit an armed robbery. Today, while common sense is codified, new science struggles for acceptance in laws governing how Louisiana treats children in delinquency, particularly where waiver is concerned. The reduction of legislative waiver offenses from seven in 1979 to the current four can be seen more as a result of the expansion of prosecutorial waiver rather than a growing recognition or acceptance that even juveniles who commit the most serious offenses may still benefit from the rehabilitative nature of the juvenile justice system.

## *2. Judicial Waiver*

Shortly after the Louisiana Constitution of 1974 introduced the first statutory creation of various types of waiver, the legislature passed the state's first statute creating a system of judicial waiver.<sup>41</sup> The first judicial transfer statute differs substantially from the current one, most notably by allowing the transfer of youth age 15 or older for any state or local offense while at the same time requiring a prior adjudication for one of nine serious violent felonies.<sup>42</sup> The statute did contain a number of procedural

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41. 1974 La. Acts 1312, 1313–14. For the next decade and a half until the creation of the Children's Code, the laws regulating judicial transfer would be contained and modified within Title 13 of the Revised Statutes from sections 1571.1 to 1571.4. The Code of Juvenile Procedure, which went into effect on January 1, 1979, contained an article entitled "Juvenile jurisdiction over children; exceptions," but the article did not contain any substantive or procedural changes and merely referenced cases transferred pursuant to procedures in sections 1571.1 to 1571.4 as exceptions to the exclusive original jurisdiction of the juvenile courts. 1978 La. Acts 508, 518.

42. 1974 La. Acts 1312. The statute provides:

A. Effective January 1, 1975, after a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense by the statutes of the United States, of this state, or by ordinance of local political subdivisions exercising general governmental functions, the court, before hearing the petition on its merits, may transfer the alleged offender for prosecution to the appropriate court exercising criminal jurisdiction if the district attorney,

protections which remain intact to this day.<sup>43</sup> One important due process protection not included, however, was the requirement the juvenile court find probable cause the youth committed the offense in question. The only prerequisite for transfer was the rather low standard that the court find "reasonable grounds to believe that the child is not amenable to treatment or rehabilitation through facilities available to the juvenile court."<sup>44</sup> The judicial transfer statute was amended in 1975 to add a subsection D, which made armed robbery and capital crimes the sole offenses for which a child could be transferred to adult court without any prior adjudications.<sup>45</sup> During this period, several cases challenged to no avail the legality of the new judicial transfer system established in Louisiana Revised Statutes section 13:1571.1.<sup>46</sup>

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the alleged offender, or the court on its own motion, files a transfer petition and the following conditions are met:

- (1) The child has attained the age of fifteen years or more at the time of the alleged conduct;
  - (2) A hearing on whether the transfer should be made is held in conformity with R.S. 13:1571.2;
  - (3) Notice in writing of the time, place and purpose of the hearing is given to the child and his parents, tutor, or other custodian at least ten days before the hearing; and
  - (4) The court finds that there are reasonable grounds to believe that the child is not amenable to treatment or rehabilitation through facilities available to the juvenile court.
- (5) The child has previously been adjudicated a delinquent by the commission of any of the following offenses: second degree murder, manslaughter, negligent homicide, simple rape, armed robbery, aggravated battery, aggravated burglary, aggravated arson and aggravated kidnapping.

B. The transfer terminates the jurisdiction of the juvenile court over the child with respect to the delinquent acts alleged in the petition.

C. No child, either before or after attaining the age of seventeen shall be prosecuted in criminal court for an offense which was allegedly committed by the child who had not then attained the age of seventeen unless the case has been transferred to criminal court as provided herein, or except as otherwise provided by law.

*Id.* at 1313-14.

43. *Id.* In addition to the notice requirement contained in section 1571.1(A)(3), sections 1571.2 through 1571.4 contained several other important procedural protections related to transfer hearings, such as a right to have the transfer hearing recorded if requested, the right to counsel, the right to confront witnesses, the right to introduce evidence, and the right to appeal.

44. 1974 La. Acts at 1313-14.

45. 1975 La. Acts 764, 765.

46. See, e.g., *State v. Everfield*, 342 So. 2d 648 (La. 1977). In *Everfield*, a juvenile defendant challenged his judicial transfer to adult court for the offense of armed robbery, alleging that section 1571.1 was unconstitutional because it

In 1978, the legislature amended the judicial transfer statute by abrogating the sole substantive standard for transfer—i.e., a finding of reasonable grounds to believe the child is not amenable to treatment or rehabilitation—and replacing it with a finding “that probable cause exists that the child committed one of the following offenses as alleged in the original petition: first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary, or aggravated kidnapping.”<sup>47</sup> In 1980, however, the Louisiana Supreme Court in *Hunter* struck down the new provision as unconstitutionally vague, finding that the adoption of the singular criterion of a determination of probable cause as the standard for permitting judicial transfer violates the essentials of due process and fair treatment “because it leaves juvenile court judges free to cause forfeiture of important rights without any legally fixed standards and provides juvenile accused no protection against arbitrary or discriminatory action.”<sup>48</sup> As a result, the legislature amended the statute by generally limiting judicial transfer hearings to cases involving three enumerated offenses and implementing, for the first time, a dual standard requiring a finding that:

- (a) probable cause exists to believe that the child has committed armed robbery, aggravated burglary or aggravated kidnapping and is not subject to the original jurisdiction of criminal district court; and (b) after an individual consideration of the case and consideration of all relevant and material circumstances, the court concludes

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exceeded the authority of Article V, Section 19 of the Louisiana Constitution, violated the separation of powers doctrine contained in Article II, Section 2, and infringed upon his equal protection and due process rights under both the federal and state constitutions. *Everfield*, 342 So. 2d at 652.

47. 1978 La. Acts 1136, 1137.

48. *State ex rel. Hunter*, 387 So. 2d 1086, 1088 (La. 1980), *superseded by constitutional amendment*, LA. CON. art. V, § 19 (amended 1994); *see also* *State v. Perique*, 439 So. 2d 1060, 1062 (La. 1983). The singular, probable cause-based standard was analyzed by the court under the original wording of the 1974 constitution rather than the new wording of Article V, Section 19, which was amended months before the decision in *Hunter* to enumerate specific offenses for which the legislature was granted broad authority to create rules regarding transfer. However, the legislature quickly revised the statute mooted the issue before any challenges to the sole standard could be brought under the more expansive authority of the amended constitutional article. 1980 La. Acts 1113, 1114–16.



there is no substantial opportunity for rehabilitation through facilities available to the juvenile court.<sup>49</sup>

The legislature did carve out an exception to this new bifurcated standard for children who had been previously convicted of felony offenses. For this class of children, the statute still allowed transfer hearings to be held regardless of the pending offense and required only a finding of "reasonable grounds to believe that the child is not amenable to treatment or rehabilitation through facilities available to the court exercising juvenile jurisdiction."<sup>50</sup> Also, the 1980 statutory amendment for the first time gave added guidance as to what was meant by amenability to treatment or rehabilitation.<sup>51</sup> The 1980 amendment also included the addition of an important new procedural protection, a requirement that the court "inform the child, his parents, tutor or other custodian, and his counsel of the child's right to move for a medical, psychological, or psychiatric examination" and consider the results of such an examination before determining amenability to treatment or rehabilitation.<sup>52</sup>

When the Louisiana Children's Code went into effect in 1992, all of the transfer provisions contained in the Code of Juvenile Procedure and in Title XIII of the Revised Statutes were at the same time repealed and replaced with parallel provisions within the Children's Code.<sup>53</sup> Under the original version of the Children's Code, only children 15 years of age or older charged with armed robbery, aggravated burglary, or aggravated kidnapping were eligible for judicial transfer without any distinction between 15 and 16 year olds or as to whether they had any previous offenses on their record.<sup>54</sup> In order to judicially transfer a child under the statute, the state had the burden of proving: (1) probable cause the child committed one of the enumerated offenses; (2) the child was

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49. 1980 La. Acts at 1115.

50. *Id.*

51. *Id.* ("The court shall consider the chronological age of the child. The younger the child, the greater shall be the burden on the state to show unsuitability for juvenile jurisdiction or, that based on the past conduct of the child that the child is not amenable to treatment and rehabilitation. The court shall consider the maturity of the child, both mental and physical, whether the child has committed other serious felonies, and such other criteria as the court deems relevant.").

52. *Id.* at 1115-16.

53. 1991 La. Acts 706. Sections 1 to 16 of Act 235 enacted the Louisiana Children's Code. Section 17 repealed the Louisiana Code of Juvenile Procedure and provisions related to juvenile courts found in Title 13 of the Louisiana Revised Statutes.

54. 1991 La. Acts 706, 856.

15 or older at the time of the offense and not otherwise subject to original criminal court jurisdiction; and (3) by clear and convincing proof, there is no substantial opportunity for the child's rehabilitation through facilities available to the court.<sup>55</sup> The statute also contained the six criteria, unaltered from their current form, for judging whether there is a substantial opportunity for rehabilitation.<sup>56</sup>

The legislature has amended the rules regarding judicial transfer several times since the creation of the Children's Code. The statute was amended in 1993 to add the offenses of attempted first and second degree murder and aggravated battery to bring the total number of enumerated offenses subject to judicial transfer to six.<sup>57</sup> The same act amended article 862(A) to bring it to its current two-pronged standard involving a finding of probable cause for an enumerated offense and no substantial opportunity for rehabilitation by clear and convincing evidence.<sup>58</sup> The remaining former requirement in the eliminated subsection was simply moved to article 857, which then specified that judicial transfer hearings were limited to "a child who is fifteen years of age or older at the time of the commission of the alleged offense but is not otherwise subject to the original jurisdiction of a court exercising criminal jurisdiction."<sup>59</sup>

In 1994, judicial transfer was once again altered in several significant ways. First, the minimum age of those subject to judicial transfer was lowered to its current age of 14 with the limitation that a transferred 14 year old cannot be confined beyond his or her 31st birthday.<sup>60</sup> Also, the enumerated offenses for which a youth could be judicially transferred were once again amended to remove aggravated battery as well as attempted first and second degree murder while adding actual first and second degree murder, aggravated rape, and aggravated oral sexual battery to the list.<sup>61</sup> The act further specified that armed robbery was subject to judicial transfer only when committed with a firearm and aggravated

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55. *Id.* at 857–58.

56. These criteria were first enumerated by the Louisiana Supreme Court in its opinion in *State v. Everfield*, 342 So. 2d 648, 655–56 (La. 1977), and were adapted from a list contained in a policy memorandum issued by the District of Columbia Juvenile Court which was appended to the opinion of the United States Supreme Court in *Kent v. United States*, 383 U.S. 541, 566–67 (1966). See MCGOUGH & TRICHE, *supra* note 6, at 454–55.

57. 1993 La. Acts 1493, 1502–03.

58. *Id.* at 1503.

59. *Id.* at 1502–03.

60. 1994 La. Acts 710, 712–13.

61. *Id.*

battery was subject to judicial transfer only when committed by the discharge of a firearm.<sup>62</sup> In 1997, the legislature added forcible rape when committed upon a child at least two years younger than the alleged rapist as an enumerated offense subject to judicial transfer.<sup>63</sup> Finally, in 2001 the legislature repealed the offense of aggravated oral sexual battery from article 857 to create the current list of seven enumerated offenses for which a juvenile can be judicially waived.<sup>64</sup>

In the judicial waiver context, the legislature continued to apply common sense notions of adolescence to determine which classes of children ought to be vulnerable to adult court transfer. The evolution of judicial waiver, however, was shaped by two additional variables: (1) judicial precedent with *Kent* and *Everfield*; and (2) notions of the proper exercise of judicial power. Accordingly, judicial waiver in Louisiana is marked by factors and procedures meant to guide the discretion of judges. This is so because judges institutionally are meant to sit as neutral arbiters—governing the process, evaluating evidence, and coming to a fair conclusion based on the same. As a consequence, judicial waiver embraces more substantive and procedural rights for children.

### 3. Prosecutorial Waiver

Prosecutorial waiver was the last type of waiver created in Louisiana as it was not added until the advent of the Children's Code in 1992. In its original form, the statute allowed the prosecutorial waiver of 15 year olds only if they were charged with manslaughter but 16 year olds could be waived by the prosecution for manslaughter, armed robbery, or aggravated burglary.<sup>65</sup> In

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62. *Id.*

63. 1997 La. Acts 2079.

64. 2001 La. Acts 675, 677. The elimination of aggravated oral sexual battery from the list of enumerated offenses resulted from the repeal of the offense itself from the criminal code by Act No. 301 of 2001 due to its being subsumed under the crime of rape. MCGOUGH & TRICHE, *supra* note 6, at 451.

65. 1991 La. Acts 706, 718–19. Article 305(C) and (D) provided:

C.(1) When a child who is sixteen years of age or older at the time of the commission of manslaughter, armed robbery, or aggravated burglary is arrested for one of these offenses, he is subject to the exclusive jurisdiction of the juvenile court until whichever of the following occurs first:

(a) An indictment charging one of these offenses is returned.

(b) A bill of information charging one of these offenses is filed.

(2) The district attorney shall have the discretion to file a petition alleging one of these offenses in the juvenile court or alternatively, to obtain an indictment or file a bill of information. If the child is being

1994, the rules regarding prosecutorial waiver were consolidated into subsection B of article 305 to resemble closely the form they are in today. Distinctions between 15 and 16 year olds were eliminated, and a new list of 11 enumerated offenses was added, which closely follows the list of offenses added to the newly amended Article V, Section 19 of the Louisiana Constitution.<sup>66</sup> The only offenses eligible for prosecutorial waiver but excluded

held in detention, the district attorney shall make his election and file the indictment, bill of information, or petition in the appropriate court within thirty calendar days after the child's arrest, unless the child waives this right.

(3) If an indictment is returned or a bill of information is filed, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the child shall be transferred forthwith to the appropriate adult facility for continued custody prior to his trial as an adult.

D.(1) When a child who is fifteen years of age or older at the time of the commission of manslaughter is arrested, he is subject to the exclusive jurisdiction of the juvenile court until whichever of the following occurs first:

(a) A manslaughter indictment is returned.

(b) A bill of information charging manslaughter is filed.

(2) The district attorney shall have the discretion to file a petition alleging manslaughter in the juvenile court or, alternatively to obtain an indictment or file a bill of information. If the child is being held in detention, the district attorney shall make his election and file the indictment, bill of information, or petition in the appropriate court within thirty calendar days after the child's arrest, unless the child waives this right.

(3) If an indictment is returned or a bill of information is filed, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the child shall be transferred forthwith to the appropriate adult facility for detention prior to his trial as an adult.

*Id.*

66. 1994 La. Acts 710, 710–12. The offenses were:

(a) Attempted first degree murder; (b) Attempted second degree murder; (c) Manslaughter; (d) Armed robbery; (e) Forcible rape; (f) Simple rape; (g) Second degree kidnapping; (h) A second or subsequent aggravated battery; (i) A second or subsequent aggravated burglary; (j) A second or subsequent offense of burglary of an inhabited dwelling; (k) A second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.

*Id.* at 711.

from the statutory provision were the four offenses subject to legislative waiver under article 305(A).<sup>67</sup>

The brevity of Louisiana's history of prosecutorial waiver is not indicative of the power and reach the Louisiana Legislature bestowed upon district attorneys around the state. Prosecutorial waiver is based on one of the lowest legal standards existing in American jurisprudence—probable cause.<sup>68</sup> Prosecutorial waiver in Louisiana has no standards to guide discretion, none of the procedural safeguards attendant to judicial waiver and the law requires no explanation as to why the prosecutor may choose adult prosecution. Such appears to ignore present-day adolescent research and common sense notions of adolescence in favor of pure deference to the power of the elected district attorney.

#### *4. Lack of Reverse Waiver*

Special mention should be made about the absence of reverse waiver in Louisiana.<sup>69</sup> The Children's Code does not contain any statutory provision or other mechanism allowing the juvenile court to regain jurisdiction once the event triggering waiver and divestiture of the juvenile court's jurisdiction under any of the three types of waiver has occurred. In fact, with regard to the

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67. It should also be noted that Act 959 of 1995 added the offense of aggravated burglary as subsection (e) of article 305(B)(2) but redundantly left a second or subsequent aggravated burglary as subsection (j). 1995 La. Acts 2597. Also in 1995, the legislature added aggravated oral sexual battery and aggravated battery committed with a firearm to the list of enumerated offenses subject to prosecutorial waiver. 1995 La. Acts 2647, 2647–48. The current list of enumerated offenses was adopted when the legislature removed aggravated oral sexual battery from the list in 2001. 2001 La. Acts 675, 677; *see supra* note 64.

68. *See State v. Simms*, 571 So. 2d 145, 148–49 (La. 1990) (“Probable cause to arrest exists when the facts and circumstances within the officer's knowledge are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction. Probable cause, as the very name implies, deals with probabilities. The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the available evidence supports a reasonable belief that the person to be arrested has committed a crime.” (citations omitted)).

69. Reverse waiver functions as an opportunity for criminal court judges to return jurisdiction to the juvenile court after a hearing. Reverse waiver is usually reserved for cases in which the juvenile court lost jurisdiction under legislative, prosecutorial, or some other form of waiver in which there was no prior opportunity for a judicial determination of the youth's suitability for removal to the adult system. *See Bishop, supra* note 6, at 94.

statutory and prosecutorial waiver rules established in article 305, the code specifically notes:

The court exercising criminal jurisdiction shall retain jurisdiction over the child's case, even though he pleads guilty to or is convicted of a lesser included offense. A plea to or conviction of a lesser included offense shall not revest jurisdiction in the court exercising juvenile jurisdiction over such a child.<sup>70</sup>

Similar language appears in the statutes related to judicial transfer.<sup>71</sup> Both provisions can be traced back to their respective parallel provisions in Title XIII of the Revised Statutes, which in turn were also both originally added by the same 1975 act.<sup>72</sup>

The addition of this language statutorily superseded a line of cases that culminated with the Louisiana Supreme Court holding that district courts did not have jurisdiction over juveniles to accept guilty pleas and impose sentences for lesser-included offenses that were not specifically included in the constitutional provision related to legislative waiver.<sup>73</sup> The result of the holding was that juveniles convicted in adult court of a non-enumerated, lesser-included offense would have to be retried in juvenile court.<sup>74</sup> The addition of the explicit statutory wording added in 1975 under the broad authority of the newly amended constitutional provision put an end to this narrow form of jurisprudentially developed reverse waiver.

70. LA. CHILD. CODE ANN. art. 305(D) (Supp. 2010).

71. *Id.* art. 863(A) (2004). The article provides:

An order of transfer terminates the jurisdiction of the court exercising juvenile jurisdiction over the child with respect to the delinquent acts alleged in the petition. The appropriate court exercising criminal jurisdiction shall retain jurisdiction over the case, even though the child pleads guilty to, or is convicted of, a lesser included offense. The plea to, or conviction of, a lesser included offense shall not revest juvenile jurisdiction over such child.

*Id.*

72. 1975 La. Acts 764, 764–65.

73. *State ex rel. Moore v. Warden of La. State Penitentiary*, 308 So. 2d 749, 752 (La. 1975), *superseded by statute*, 1975 La. Acts at 765 (“Although it can be argued that the constitutional deposit of jurisdiction in the district courts of the trial of juveniles in capital [c]ases is the grant of jurisdiction embracing every part of the case, from arraignment to sentence, we decline to make such a departure from established jurisprudence . . .”).

74. *Id.* at 751–52 (reasoning that “the question of double jeopardy is avoided because a person is not in jeopardy in a trial in which the court lacks jurisdiction”).

## II. EXAMINING THE PROBLEM WITH LOUISIANA'S WAIVER SYSTEM

The previous Section of this Article describes how Louisiana arrived at a system of waiver in which a large number of juveniles either must or may be tried as adults based solely on their age and charged offense without regard for their individual circumstances or amenability to rehabilitation. The next Section analyzes some particularly troubling aspects of those waiver rules and how they can interact with other Louisiana laws to exacerbate the flaws generally associated with legislative and prosecutorial waiver and to leave gaps in protection resulting in the waiver of youth amenable to rehabilitation with little due process.

### *A. Failing to Account for Adolescent Brain Development*

A common thread running through each problematic aspect of the waiver system discussed below is its failure to take into account what the sciences teach and the law now recognizes about adolescent brain development and the resulting differences between juveniles and adults. In *Roper v. Simmons*, the United States Supreme Court held that the application of the death penalty to juveniles below the age of 18 was a violation of the Eighth Amendment.<sup>75</sup> This finding was based in large part on research illustrating that juveniles are not as culpable as adults and therefore that “the penalogical justifications of the death penalty apply to them with lesser force than to adults.”<sup>76</sup> Various scientific and sociological studies were cited by the *Roper* Court as a principal justification for finding the application of the death penalty to all juveniles below the age of 18 was cruel and unusual punishment in violation of the Eighth Amendment.<sup>77</sup> These justifications apply with at least equal force to Louisiana’s system of waiver. Due to natural biologically rooted developmental factors, children in most cases lack the maturity, sense of responsibility, independence, and general character required to expose them to adult sanctions in adult court. These fundamental differences between juveniles and adults are rooted in very real biological differences between juvenile and adult brains.<sup>78</sup> The scientific studies detailed in the

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75. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

76. *Id.* at 571.

77. *Id.* at 578–79.

78. Brief of American Medical Ass’n et al. as Amici Curiae in Support of Respondent at 9, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549 [hereinafter AMA Brief]; Brief for American Psychological Ass’n & Missouri

amici briefs submitted in *Roper* (and relied on by the Court) explain that the differences in juvenile and adult culpability result from the anatomically underdeveloped nature of the juvenile brain. These studies revealed that “regions of the adolescent brain do not reach a fully mature state until after the age of 18,” and “psychosocial maturity is incomplete until age 19.”<sup>79</sup> Children’s brains are biologically less developed, resulting in less culpability for their actions when compared to adults.

Specifically, the *Roper* Court identified three significant differences between adults and juveniles under age 18 that impact juveniles’ culpability.<sup>80</sup> First, “[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. These qualities often result in impetuous and ill-considered actions and decisions.”<sup>81</sup> Second, juveniles are more susceptible to outside influence and peer pressure.<sup>82</sup> Third, the character of juveniles is not well-formed, and, therefore, juvenile personality traits are more transitory than those of adults.<sup>83</sup> Based on this scientific research, the *Roper* Court concluded that the differences between juveniles and adults “render suspect any conclusion that a juvenile falls among the worst offenders.”<sup>84</sup> The Court explained:

The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s

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Psychological Ass’n as Amici Curiae Supporting Respondent at 7–10, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447.

79. AMA Brief, *supra* note 78, at 2, 7.

80. *Roper*, 543 U.S. at 569–70.

81. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).

82. *Id.*

83. *Id.* at 570.

84. *Id.*



character deficiencies will be reformed . . . . [O]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.<sup>85</sup>

These conclusions were recently reaffirmed in the United States Supreme Court's ruling in *Graham v. Florida*, which extended the Eighth Amendment protection against cruel and unusual punishment to prohibit the imposition of the penalty of life without the possibility of parole for non-homicide cases involving juveniles.<sup>86</sup> This Article does not suggest that the courts are ready to apply the Eighth Amendment to legislative, prosecutorial, or any other type of waiver.

Policymakers should, however, be aware of the implications of adolescent development issues when they make rules abandoning the juvenile justice system by facilitating the funneling of juveniles into criminal court where they are subjected to rigid punitive rules and conditions designed for adults. Louisiana's juvenile justice system is by no means a panacea, but thanks to ongoing reform efforts, it is a vastly improved rehabilitative system specially designed and equipped to handle issues of adolescent development.<sup>87</sup> For that reason, the capacity of the juvenile justice system to rehabilitate juveniles, even those accused of serious offenses, should not be underestimated. As the examples below illustrate, failure to take into account the lessons of adolescent development elaborated in *Roper* and *Graham* when developing policies directly or indirectly affecting waiver results in ineffective, wasteful, and oftentimes counterproductive outcomes for the youth involved and in the long-term also undermine public safety.

### *B. Mandatory Minimum Sentencing*

Most offenses subject to waiver also carry with them mandatory minimum sentences of incarceration. Each of the four

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85. *Id.* at 570–71 (citations omitted).

86. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (“No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).

87. For a summary of the progress and challenges of Louisiana’s juvenile justice system, see JASON ZIEDENBERG, JUSTICE POLICY INST., MODELS FOR CHANGE: BUILDING MOMENTUM FOR JUVENILE JUSTICE REFORM (2006), available at [http://www.justicepolicy.org/images/upload/06-12\\_REP\\_ModelsForChange\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-12_REP_ModelsForChange_JJ.pdf).

offenses statutorily excluded from juvenile court jurisdiction under Louisiana's system of legislative waiver, commonly known as "305(A)" offenses, carry a mandatory minimum sentence of "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."<sup>88</sup> Offenses falling under the state's system of prosecutorial waiver, commonly referred to as "305(B)" offenses, offer a wider range of possible punishments.<sup>89</sup> Still, with

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88. LA. REV. STAT. ANN. § 14:30 (Supp. 2010) (first degree murder); *id.* § 14:30.1 (second degree murder); *id.* § 14:42 (2007) (aggravated rape); *id.* § 14:44 (aggravated kidnapping). However, the recent ruling in *Graham* now precludes the sentencing of juveniles to life imprisonment without the possibility of parole for non-homicide offenses as a violation of the Eighth Amendment's ban on cruel and unusual punishment. As a result, juveniles transferred for aggravated rape and aggravated kidnapping in Louisiana will have to be afforded a "realistic opportunity to obtain release" such that they are not guaranteed to die in prison. *Graham*, 130 S. Ct. at 2034.

89. Attempted first and second degree murder are punishable by imprisonment at hard labor for not less than ten nor more than 50 years without benefit of parole, probation, or suspension of sentence. LA. REV. STAT. ANN. § 14:27(D)(1)(a) (2007). Manslaughter has a 40-year maximum but does not have a minimum sentence unless the victim is under the age of ten, in which case a mandatory minimum of ten years at hard labor without benefit of probation or suspension of sentence does apply. *Id.* § 14:31(B) (Supp. 2010). Armed robbery carries a sentence of 10 to 99 years of incarceration without benefit of parole, probation, or suspension of sentence, except that the minimum sentence increases to 15 years if the dangerous weapon used is a firearm. *Id.* §§ 14:64, :64.3 (2007). Aggravated burglary is punishable by imprisonment at hard labor for not less than one nor more than 30 years. *Id.* § 14:60. Forcible rape carries a sentence of between 5 and 40 years of incarceration with a requirement that at least two of the years be without benefit of probation, parole, or suspension of sentence. *Id.* § 14:42.1. Simple rape carries a maximum sentence of 25 years with or without hard labor and no minimum, but any time given must be served without benefit of probation, parole, or suspension of sentence. *Id.* § 14:43. Second degree kidnapping requires that the offender be imprisoned at hard labor for not less than five nor more than 40 years, with the requirement that at least two years of the sentence be without benefit of parole, probation, or suspension of sentence. *Id.* § 14:44.1(C). The sentence for aggravated battery is a fine of not more than \$5,000, imprisonment with or without hard labor for not more than ten years, or both. *Id.* § 14:34. The sentence for simple burglary of an inhabited dwelling is imprisonment at hard labor for not less than one year, without benefit of parole, probation, or suspension of sentence, but not more than 12 years. *Id.* § 14:62.2. The sentences for transferable second or subsequent felony-grade drug offenses involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances range from a sentence of imprisonment at hard labor for not less than five nor more than 30 years for marijuana, *id.* § 40:966(B) (Supp. 2010), to imprisonment at hard labor for not less than ten nor more than 30 years, at least ten years of which shall be served without benefit of parole, probation, or suspension of sentence for offenses

the exception of aggravated battery, simple rape, and under certain circumstances manslaughter, all of the 305(B) offenses require minimum terms of incarceration ranging from 1 to 15 years in length. A youth who is transferred via judicial waiver under article 857 faces the same mandatory minimum sentences as one transferred under legislative or prosecutorial waiver except a youth who is 14 years old at the time of the offense may not be incarcerated beyond his or her 31st birthday.<sup>90</sup> As a result, most transferred juveniles are subject to the same mandatory minimum sentencing laws as adults.

The two primary goals of mandatory minimum sentencing are crime deterrence and the incapacitation of serious offenders.<sup>91</sup> However, harsh sentencing laws are not an effective deterrent for juvenile crime because juveniles tend to act impulsively and not think about the long-term consequences of their actions when engaging in delinquent behavior.<sup>92</sup> In fact, research indicates transferred youth in general are more likely to recidivate more quickly, more often, and for more serious crimes than non-transferred youth, even when controlling for factors such as age, waiver offense, and prior record.<sup>93</sup> With regard to incapacitation, in many individual cases mandatory minimum sentencing does indeed result in some extended period of incapacitation for waived youth convicted of one of these offenses.<sup>94</sup> However, the immediate benefit of whatever incapacitation results is probably outweighed by the increased likelihood of recidivism of youth

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involving the production or manufacturing of cocaine-based substances, *id.* § 40:967(B)(4).

90. LA. CHILD. CODE ANN. art. 857(B) (Supp. 2010). Since a youth who is arrested at 14 can spend up to the next 17 years in prison until his 31st birthday, all of the mandatory minimum sentences are applicable to judicially waived 14 year olds except for the life without parole sentence called for by first and second degree murder, aggravated rape, and aggravated kidnapping.

91. See Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 65 (1993).

92. See Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 655-56 (1999).

93. See *id.* at 656.

94. Whether there is a net gain in incapacitation from our system of waiver and sentencing is less clear since many waiver offenses are also subject to mandatory minimums in juvenile court under Louisiana Children's Code article 897.1. Also, the tendency of some judges to treat transferred juveniles more leniently than their adult counterparts and the added pressure on juveniles to plea down to a probation-eligible offense makes it difficult to predict the effects of these policies on incapacitation in general. See Hunt, *supra* note 92, at 658.

exiting the punitive adult system.<sup>95</sup> What is clear under current mandatory minimum sentencing policies is that the sentencing judge does not have discretion to deviate from the statutory minimum and give probation or a shorter jail sentence even when the youth's record, level of involvement in the offense, or receptiveness to community-based services indicates such a course of action would maintain public safety and be more cost effective.

### C. *The Law of Principals*

The Louisiana Criminal Code recognizes only principals and accessories after the fact as classifications for parties to a crime.<sup>96</sup> In other words, Louisiana does not have a separate classification or theory of criminal liability for accessories who participate at some diminished level in the planning or execution of a crime.<sup>97</sup> Rather, the term "principal" is broadly defined to encompass "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime."<sup>98</sup> As a result, accomplices to crimes in Louisiana are equally subject to the full range of charges and penalties as the main actor in the crime no matter how minor a role they play in the commission of the offense. For specific intent crimes, the state still bears the burden of proving beyond a reasonable doubt that the principal to a crime acted with the required level of intent or *mens rea*.<sup>99</sup> However, the Louisiana Supreme Court held "under general principles of accessorial liability, 'all parties [to a crime] are guilty for deviations from the

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95. See Bishop, *supra* note 6, at 154–55.

96. LA. REV. STAT. ANN. § 14:23 (2007).

97. Traditionally, common law states divided parties to a felony into the following four categories in order to allow for different degrees of punishment: (1) principals in the first degree; (2) principals in the second degree (aiders and abettors present at the scene of the crime); (3) accessories before the fact; and (4) accessories after the fact. However, the federal government and most states statutorily eliminated these distinctions over the years, resulting in systems of full accessorial liability similar to Louisiana's in most jurisdictions. See Baruch Weiss, *What Were They Thinking? The Mental States of Aider and Abettor and Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1357 (2002); see also Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 96–98 (1985).

98. LA. REV. STAT. ANN. § 14:24 (2007).

99. State v. Tate, 851 So. 2d 921, 930 (La. 2003) ("[S]o long as the State sufficiently proves that the defendant is a principal and that he possessed the requisite specific intent, a conviction for first degree murder will be upheld.").

common plan which are the foreseeable consequences of carrying out the plan.”<sup>100</sup> As a result, the felony murder provision contained within Louisiana’s definition of second degree murder, which carries a mandatory sentence of life without the possibility of parole, applies to codefendants even when the action that resulted in death was another’s deviation from the common plan.<sup>101</sup>

Although Louisiana-specific data is unavailable, the disproportionate effects of the law of principals on transferred juveniles, particularly in the case of mandatory waiver, is clear because of the pronounced tendency of juveniles to offend in groups rather than as lone individuals at a much higher rate than adults.<sup>102</sup> As one expert on the topic explains, “[t]he group context of most juvenile offending is not simply one characteristic of youth crime, it is an essential feature of the juvenile offender, and a major distinction between juvenile and adult offending.”<sup>103</sup> This tendency toward juvenile group offending is consistent with *Roper’s* description of adolescents as being categorically more impulsive, short-sighted, and susceptible to peer pressure than adults. Accordingly, the law of principals exposes a comparatively larger percentage of youth with very little involvement in a crime to harsh and often mandatory consequences of the law such as waiver and minimum periods of incarceration. In this context, it is difficult to justify an equal distribution of liability and punishment between certain juveniles who are the least culpable party to a crime by nature of their limited involvement and understanding and adult codefendants with primarily roles in the planning and carrying out the offense.

Such a result does not comport with even the most punitive concepts of justice, such as those based on retribution. Retributive justice focuses on the moral imperative to hold offenders accountable for their actions rather than on more pragmatic justifications for punishment.<sup>104</sup> As such, it is frequently used to counter the policy arguments of juvenile justice reformers

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100. *State v. Smith*, 748 So. 2d 1139, 1143 (La. 1999) (alteration in original) (citation omitted) (quoting 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 7.5, at 211–12 (1986)).

101. *See id.*

102. *See* FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 90 (2005).

103. *Id.*

104. Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 351 (1997).

advocating for restrictions on the use of waiver.<sup>105</sup> However, a central tenet of retributive justice is the punishment must “fit the crime: ‘Its degree must be proportionate to the seriousness or moral gravity of the offense.’”<sup>106</sup> Although individuals may disagree with what constitutes a proper fit in any given case, the basic principles of retributive justice require at a minimum persons be punished “in proportion to their personal guilt and in proportion to their personal involvement in the crime.”<sup>107</sup> Yet, Louisiana’s rules of liability and waiver expose a reluctant juvenile lookout of limited intelligence with no prior record to the same consequences as a seasoned adult criminal who plans, recruits, and ruthlessly carries out the crime. When the law of principals, mandatory waiver, and mandatory sentencing interact to result in the punishing of such vastly unequal acts in an equally harsh manner, the interests of retributive justice are not served.<sup>108</sup> Though this criticism can apply to both juvenile and adult principals with minor roles in serious offenses, the tendency of juveniles to offend in groups combined with their diminished culpability, and heightened vulnerability to peer pressure makes a retributive justification for the law of principals all the more difficult in cases of juvenile waiver.

On a more practical level, the law of principals simply adds another level of rigidity to the waiver system, which needlessly wastes resources by exposing youth to the negative effects of the punitive and inflexible adult system without regard for their degree of culpability or the likelihood of their rehabilitation within the juvenile justice system. As noted previously, the general deterrent effects of laws establishing harsh consequences for criminal behavior is lost on juveniles because of their impulsivity and inability to take into account long-term consequences.<sup>109</sup> Certainly, the law of principals facilitates the incapacitation of youth in so far

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105. See Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 668 (1994).

106. See Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1559 (2002) (quoting Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 728 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000)).

107. See Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 53 (1979).

108. See Dressler, *supra* note 97, at 115–21 (systematically refuting each of the traditional nonutilitarian moral justifications for coequal accomplice liability).

109. See Bishop, *supra* note 6, at 129.

as it expands the potential for longer periods of incarceration. The benefits of such specific deterrence, however, are likely outweighed by the increase in recidivism rates that result when low-level group offenders that could have been rehabilitated in the juvenile justice system or simply would have aged out of crime are released from the punitive adult system as lone offenders or, even worse, as new ringleaders now capable of recruiting other youth to offend.<sup>110</sup>

#### *D. Competency Protections*

Juvenile defendants in Louisiana, whether in juvenile or criminal court, enjoy the same due process protection as adult defendants requiring they be mentally competent to stand trial.<sup>111</sup> In order to safeguard this right for juveniles, Louisiana law recognizes the need to take the science of adolescent development into account when dealing with the issue of competency in minors.<sup>112</sup> It does so through the establishment in the Children's Code of enhanced requirements and procedures for determining and restoring the mental capacity to proceed of juveniles and for disposing of cases in which a juvenile is deemed irrestorably incompetent.<sup>113</sup> Additionally, the Children's Code contains a special competency protection specifically relating to waiver. Once a competency examination has been ordered, article 305(E) of the

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110. See Joan McCord & Kevin P. Conway, *Patterns of Juvenile Delinquency and Co-Offending*, in CRIME AND SOCIAL ORGANIZATION (Elin Waring & David Weisburd eds., 2002).

111. See *Dusky v. United States*, 362 U.S. 402 (1960). The United States Supreme Court has never explicitly extended competency protections to juveniles. However, Louisiana statutorily grants juveniles "[a]ll rights guaranteed to criminal defendants" under the state or federal constitution except for the right to trial by jury. LA. CHILD. CODE ANN. art. 808 (2004). Furthermore, the existence of a competency requirement for juveniles can be confidently derived from the court's general extension of other due process protections to juveniles in delinquency proceedings. See *In re Gault*, 387 U.S. 1 (1967) (extending the right to notice, counsel, confrontation, and cross-examination as well as the privilege against self-incrimination to defendants in delinquency proceedings); see also *In re Winship*, 397 U.S. 358 (1970) (requiring a guilt beyond a reasonable doubt standard in delinquency proceedings); MCGOUGH & TRICHE, *supra* note 6, at 416 (arguing the rights extended in *Gault* are "meaningless if the accused lacks the competence to understand the nature of the charge, the range of penalties, and the possibilities of a defense").

112. See Thomas Grisso et al., *Juveniles and Adults' Competence as Trial Defendants*, 27 LAW & HUM. BEHAV. 33 (2002); see also MCGOUGH & TRICHE, *supra* note 6, at 413-15.

113. See LA. CHILD. CODE ANN. arts. 832-38 (2004 & Supp. 2010).

Children's Code prohibits any "further steps to prosecute the child" in adult court (except for the filing of a delinquency petition) until counsel has been appointed and the court finds the child has the mental capacity to proceed with the case.<sup>114</sup>

The Louisiana Legislature unanimously adopted this protection in 2008 upon the recommendation of the Louisiana State Law Institute for the expressed purpose of ensuring a halt to all action related to waiver once a competency commission is ordered in juvenile court and until the issue of competency is resolved.<sup>115</sup> However, article 305(E) does not prevent the waiver of incompetent youth in all instances since the district attorney may waive a child by obtaining an indictment before the child is arrested, appointed an attorney, given a meaningful opportunity to consult with the attorney, or otherwise has an opportunity to raise competency in the juvenile court.<sup>116</sup> As a result, article 305(E)'s protection against the transfer of incompetent youth is incomplete.

Louisiana's failure to prevent the waiver of incompetent juveniles in some cases but not others is difficult to justify because in all cases the benefits of waiving incompetent youth to adult court are non-existent while the resulting harm to the youth can be grave. Granting all potentially incompetent youth an opportunity to have that determination made in juvenile court prior to waiver would not create a loophole for avoiding waiver, result in the release of violent youth, or lead to any greater delay of trial than if the competency determination were made in adult court. First, the venue for the competency proceedings should not affect the ultimate outcome of the determination because the substantive

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114. *Id.* art. 305(E)(1) (Supp. 2010) ("If a competency or sanity examination is ordered, except for the filing of a delinquency petition, no further steps to prosecute the child in a court exercising criminal jurisdiction shall occur until (a) Counsel is appointed for the child and notified in accordance with Article 809; and (b) The court determines mental capacity to proceed in accordance with Chapter 7 of Title VIII.").

115. LA. SENATE, 2008 LEGISLATIVE SESSION HIGHLIGHTS 100 (2008), available at <http://senate.legis.state.la.us/sessioninfo/2008/highlights/2008Highlights.pdf>; see MCGOUGH & TRICHE, *supra* note 6, at 28.

116. See LA. CHILD. CODE ANN. art. 305(A)-(B). Furthermore, the district attorney in at least one jurisdiction has interpreted article 305(E) as allowing the return of an indictment while competency proceedings in juvenile court are pending. Although the appellate court upheld the plain reading of the statute as barring the state from seeking the indictment and dismissed the state's arguments related to prescription, the opinion has only persuasive value outside of the Louisiana First Circuit Court of Appeal and does not prevent prosecutors in other appellate jurisdictions from engaging in the same practice. See *State ex rel. T.C.*, 35 So. 3d 1088 (La. Ct. App. 1st 2010).



legal standard for competency is the same for both juveniles and adults regardless of the court.<sup>117</sup> Likewise, the same special juvenile procedures for determining competency contained in the Children's Code must be used whether the youth remains in juvenile court or is waived to criminal court.<sup>118</sup> As a result, juveniles gain no strategic legal advantage from having competency proceedings conducted in juvenile court.

Second, any fears that violent or dangerous youth are more likely to be released into the community if competency is determined in juvenile court are unfounded. Juvenile court judges have the same authority to detain dangerous defendants pending the completion of competency proceedings and trial as criminal court judges.<sup>119</sup> As elected officials, juvenile court judges face the same pressures and motivations to detain dangerous codefendants as their adult counterparts.<sup>120</sup> Additionally, the fact that juvenile delinquency proceedings involving crimes of violence are open to the public in Louisiana makes release of a juvenile in a high profile transfer case unlikely.<sup>121</sup> In the absence of evidence to the contrary, there is no reason to believe requiring competency proceedings to be held in juvenile court prior to waiver increases the risk of dangerous individuals being released into the community.

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117. Defendants in criminal court are deemed incompetent "when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." LA. CODE CRIM. PROC. ANN. art. 641 (2003). The same legal standard applies to juveniles in delinquency proceedings since the Children's Code does not contain a different standard and requires adherence to the Code of Criminal Procedure when special procedures are not established in the Children's Code. LA. CHILD. CODE ANN. art. 803 (2004). However, the detailed requirements contained in the Children's Code for the content of competency commission reports provides further guidance for judges of special factors to consider in determining if a juvenile meets the Code of Criminal Procedure's standard for mental incapacity to proceed. *See id.* art. 837 (Supp. 2010).

118. LA. CODE CRIM. PROC. ANN. art. 644.1 (Supp. 2010).

119. LA. CHILD. CODE ANN. arts. 819–30 (2004 & Supp. 2010); *cf.* LA. CODE CRIM. PROC. ANN. arts. 311–47 (2003 & Supp. 2010).

120. In fact, only the four largest parishes in Louisiana (Caddo, Orleans, Jefferson, and East Baton Rouge) have specialized juvenile courts and therefore separate juvenile court judges. In all other judicial districts, the same judges from district, parish, or city courts exercise juvenile court jurisdiction. KATE MITCHELL, THE LOUISIANA JUVENILE DEFENDER TRIAL PRACTICE MANUAL 30 (2007).

121. LA. CODE CRIM. PROC. ANN. art. 407 (2003) ("[T]he court shall allow the proceedings to be open to the public when the alleged delinquent act committed by the child would be considered a crime of violence as defined in R.S. 14:2(B), or when the alleged delinquent act would be a second or subsequent felony-grade adjudication.").

Finally, competency proceedings in juvenile court do not take longer than the same proceedings in criminal court, and so raising competency in juvenile court cannot be used as a dilatory tactic by the defense for delaying trial. To begin with, the juvenile court is only required to order a competency commission triggering a halt to proceedings if it “has reasonable grounds to doubt the mental capacity of the child to proceed.”<sup>122</sup> This threshold is itself a check on the frivolous raising of competency. If the competency commission is ordered, however, the special competency procedures that apply to minors in both juvenile and criminal court contain strict timelines requiring the competency hearing to be held within 45 days of the appointment of the competency commission when the youth is detained and allow only one 15-day extension of this timeline.<sup>123</sup> Once a youth is found competent by the juvenile court, he or she can be transferred normally under any of the types of waiver which apply to the case.<sup>124</sup> Under current law, even a youth who is found to be incompetent and is not restored by the time of his or her 21st birthday can be transferred to adult court at that time.<sup>125</sup> As a result, the only practical effect of preventing waiver until a youth is determined competent is a delay in the timing of the indictment or the bill of information and therefore waiver, not a delay in trial or overall case processing time. Operating under the same timelines applicable to waived youth in criminal court, juvenile defendants cannot cause greater delay by having their competency determined in juvenile court.

On the other hand, there are a number of philosophical and practical objections to the current system in which youth with genuine issues of competency may be irreversibly waived to adult court without an opportunity for a competency determination in juvenile court. Most notably, it makes little sense to have criminal court judges without particular expertise in juvenile issues and possessing much less familiarity with the Children’s Code procedures making decisions on an issue as complex as adolescent competency in lieu of specialized juvenile court judges.<sup>126</sup> If the

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122. LA. CHILD. CODE ANN. art. 833(A) (Supp. 2010).

123. *Id.* art. 836(A). The timeline for non-detained youth is 60 days with one 15-day extension allowed.

124. *Id.* art. 305(E).

125. *Id.* arts. 305(E)(2), 857(C).

126. See Feld, *supra* note 7, at 125–26 (discussing the general lack of expertise of criminal court judges vis-à-vis juvenile court judges in handling juvenile cases). Although only four parishes have specialized juvenile courts, see *supra* note 120, they are the largest four parishes with the state’s most populous urban centers, making it likely that the issue of differing levels of

purpose of competency proceedings is to determine accurately a juvenile's level of competence and order the most effective treatment and services for restoring incompetent youth, then juvenile courts are logically better equipped to achieve that goal.

Another drawback of the current system with potential for irreversible harm is the place of detention for incompetent youth who are waived to criminal court. Once an incompetent juvenile's case is transferred to adult court, the juvenile is also physically transferred to an adult jail.<sup>127</sup> As referenced in this Article's introduction, incarcerating children with adults can have serious negative psychological and physical consequences for the youth.<sup>128</sup> In addition to the general concerns associated with incarcerating juveniles in adult jails, however, Louisiana's system for assessing and restoring the competency of adults presents particular cause for worry.

Although Children's Code procedures are used in the initial determination of competency for waived youth, normal adult procedures are used once a waived juvenile is found incompetent for the provision of restoration services and disposition of the case if the youth is not restorable.<sup>129</sup> The problem is the Code of Criminal Procedure allows only one option for individuals who are found incompetent, considered likely to commit crimes of violence, and are not restorable in a short period: commitment to the Feliciana Forensic Facility.<sup>130</sup> For an incompetent juvenile, this can mean languishing in the adult jail without any access to mental health or competency restoration services for extended periods of time.<sup>131</sup> On the other hand, an incompetent youth who remains

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expertise and familiarity with juvenile issues and procedures will apply to a significant percentage of juvenile waiver cases where competency is an issue.

127. LA. CHILD. CODE ANN. arts. 306, 864(B) (2004).

128. See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 2.

129. LA. CODE CRIM. PROC. ANN. art. 644.1(B) (Supp. 2010).

130. *Id.* art. 648(A)(2)(a) ("If the person is charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence, and if the court determines that his mental capacity is likely to be restored within ninety days as a result of treatment, the court may order immediate jail-based treatment by the Department of Health and Hospitals not to exceed ninety days; otherwise, if his capacity cannot be restored within ninety days and inpatient treatment is recommended, the court shall commit the defendant to the Feliciana Forensic Facility.").

131. A lawsuit filed by a disability rights organization alleges the average wait time for an incompetent inmate to be transferred to the facility is over six months, with one inmate waiting more than two years for a slot to open. See Laura Maggi, *Defendants Wait Too Long for Pretrial Care, Lawsuit Says*,

under juvenile court jurisdiction has access to a number of treatment and dispositional options under the Children's Code.<sup>132</sup> In other words, criminal courts do not have nearly the same resources or legal options available to juvenile courts for restoring competency and dealing with irrestorable youth. As a result, allowing the waiver of incompetent youth may result in a greater delay until trial because adult courts are not as effective at restoring youth to competency. For these reasons, the current system in which incompetent juveniles can be irreversibly waived without a competency hearing in juvenile court can lead to inefficient and inaccurate results that may actually delay trial and burdens an already strained adult system in addition to harming the youth.

### III. RECOMMENDATIONS FOR POTENTIAL SOLUTIONS

The following Section contains a non-exhaustive list of recommendations for potential modifications to the Louisiana waiver system that could ameliorate, to varying degrees, the

TIMES-PICAYUNE (New Orleans, La.), Apr. 13, 2010, *available at* [http://www.nola.com/crime/index.ssf/2010/04/defendants\\_wait\\_too\\_long\\_for\\_p.html](http://www.nola.com/crime/index.ssf/2010/04/defendants_wait_too_long_for_p.html).

132. LA. CHILD. CODE ANN. art. 837(B) (Supp. 2010). The juvenile court may:

- (1) Dismiss the petition in accordance with Article 876.
- (2) Adjudicate the family of the child to be in need of services and proceed to a disposition in accordance with Chapters 10 and 12 of Title VII.
- (3) Commit the child to the Department of Health and Hospitals, a private mental institution, or an institution for the mentally ill in accordance with Department of Health and Hospitals policy. The court may also order restoration services for the child and appoint a restoration service provider. However, a child shall not be committed unless the court finds, after a contradictory hearing with ten days notice to the district attorney and counsel for the child, that the child, as a result of mental illness, is dangerous to himself or others or is gravely disabled. If the court further finds that the child will not have the mental capacity to proceed in the foreseeable future, the court shall order civil commitment as provided in Title XIV. However, no child shall be discharged or conditionally discharged except upon court order after a motion and contradictory hearing.
- (4) Place the child in the custody of his parents or other suitable person or private or public institution or agency under such terms and conditions as deemed in the best interests of the child and the public, which conditions may include the provision of outpatient services by any suitable public or private agency. The court may also order restoration services for the child and appoint a restoration service provider.

*Id.*

deficiencies resulting from the failure to take into account the categorical differences between adolescents and adults related to brain development and their impact on individual cases.

*A. Eliminate Legislative and Prosecutorial Waiver*

The most obvious way to incorporate the lessons of adolescent brain development into waiver policy is by requiring individualized judicial determinations of suitability for transfer based on standards related to assessing diminished culpability and amenability to rehabilitation. Only such individualized determinations would allow a judge with expertise in adolescent development to determine whether a juvenile can still benefit from the juvenile justice system or if the juvenile is competent, culpable and mature enough to face the consequences of waiver.

This, of course, would require the elimination of legislative and prosecutorial waiver altogether. Given the policy trend of expanding waiver which has dominated the last two decades, the chances of removing these firmly entrenched types of waiver through one fell legislative swoop are limited, to say the least. The possibility of challenging automatic and prosecutorial waiver on the basis of constitutional due process and equal protection concerns are similarly slim. The Louisiana Supreme Court shut the door on these types of arguments in *Leach* and *Perique*, and the United States Supreme Court has until now declined to address the constitutionality of these types of waiver.<sup>133</sup> Nevertheless, in light

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133. *Bland v. United States*, 412 U.S. 909, 909-13 (1973) (Douglas, J., dissenting from denial of certiorari). The dissenting Justices observed:

*First.* A juvenile or "child" is placed in a more protected position than an adult, not by the Constitution but by an Act of Congress. In that category he is theoretically subject to rehabilitative treatment. Can he on the whim or caprice of a prosecutor be put in the class of the run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? *Kent* and *Gault* suggest that those are very substantial constitutional questions. *Second.* The barricade behind which the prosecutor operates is that this, like other prosecutions, is committed to his informed discretion, which is beyond the reach of judicial intrusion. . . . "*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.* Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected." These two questions are large questions and substantial ones. I would grant the petition for certiorari in order to resolve them.

of the new scientific evidence and attitudes regarding the diminished culpability and increased malleability of adolescents as well as the potential negative impacts of transfer, one can still hope a majority on one of these courts may one day be willing to recognize the proposition put forth by the dissent in *Bland* that the issues raised by prosecutorial waiver present “very substantial constitutional questions.”<sup>134</sup> Until then, the more measured approaches described below present more realistic alternatives for at least mitigating some of the worst harms of our current rigid waiver system.

### *B. Add Reverse Waiver*

In the absence of an individualized determination of suitability for transfer on the front end, the possibility of reverse waiver by the criminal court on the back end is likely the next best thing. Supporters of reverse waiver find it can

act as a check against overcharging by prosecutors by allowing for an examination of the minor’s role in the alleged offense, potential for rehabilitation, and other factors beyond the minor’s age and the seriousness of the charged offense. Reverse transfer statutes also mitigate the consequences of overly broad transfer statutes that sweep into criminal court accomplices, non-violent, and first-time offenders.<sup>135</sup>

Even supporters of prosecutorial waiver acknowledge “[t]he only device that seems capable of effectively supervising a prosecutor’s exercise of discretion is some form of judicial review.”<sup>136</sup> In this manner, reverse waiver can help correct some of the most blatant ills of the current inflexible system, such as when incompetent youth are waived without opportunity for a determination in juvenile court or when the law of principals leads to charging decisions that result in the automatic waiver of youth of particularly limited culpability who could clearly still benefit from the juvenile justice system.

*Id.* at 911–13 (citation omitted) (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 211–12 (1969)).

134. *Id.* at 911.

135. David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 693 (2002).

136. McCarthy, *supra* note 105, at 668.

Though data is limited, studies in two jurisdictions with reverse waiver statutes revealed between 10 and 31% of waived youth were returned to juvenile court, with the most likely to be returned being “[f]emales, younger offenders, those without prior arrests, and those charged with lesser felonies.”<sup>137</sup> Reverse waiver, however, is less preferable than an exclusive reliance on judicial waiver because of the burden it places on the resources of the criminal courts and because the criminal judges making the decisions and the probation officers, social workers, and mental health professionals that they rely upon for input often do not have the “knowledge and training of their juvenile court counterparts.”<sup>138</sup>

### *C. Eliminate Mandatory Minimum Sentencing for Waived Youth*

As explained in the previous Section, mandatory minimum sentencing adds another layer of rigidity to already harsh waiver laws in a manner that serves little penalogical purpose and can exacerbate negative outcomes for youth and, in the long run, society. As a result, many juvenile advocates have been calling for a “youth exception to such one size fits all sentences.”<sup>139</sup> A simple way of eliminating this harmful aspect of our waiver system without having to rewrite the Criminal Code is by adding a single provision to the Children’s Code stating that, notwithstanding any other law to the contrary, transferred or waived juveniles are not subject to the mandatory minimum sentences applicable to actual adults.

### *D. Increase Competency Protections*

Competency protections for youth facing waiver in Louisiana need to be strengthened, not weakened.<sup>140</sup> There is no reason juvenile court jurisdiction should be divested for any youth with pending competency proceedings, particularly as a finding of competency would not preclude a subsequent waiver in any way.

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137. Bishop, *supra* note 6, at 112.

138. Tanenhaus & Drizin, *supra* note 135, at 694; *see also* Bishop, *supra* note 6, at 112.

139. Tanenhaus & Drizin, *supra* note 135, at 698.

140. During the 2010 legislative session, an attempt to eliminate this protection altogether almost succeeded but was thwarted when House Bill 1106 died in a Senate committee after having been unanimously approved in the House of Representatives. *2010 Regular Session—Instrument Information*, LA. LEGISLATURE, <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=10RS&billid=HB1106&doctype=ALL> (last visited Oct. 12, 2010).

Given what is now known about the differences between juveniles and adults, determinations regarding an area inextricably linked to adolescent brain development like competency should be made in the juvenile court, where the judge and professionals working with the child have specialized knowledge and the available alternatives for those found incompetent are tailored for juveniles.<sup>141</sup> Resolving competency issues in juvenile court for all cases will have the added benefit of relieving a resource drain on an overburdened adult mental health system that will then be better able to treat the adults they were designed to serve.

#### *E. Improve Data Collection*

The creation of laws expanding waiver in Louisiana and across the nation “did not flow from or build on careful research. Recent research demonstrates convincingly that if changes in transfer policy had been contingent on scientific evidence of their efficacy, they would have been rejected.”<sup>142</sup> There is currently no publicly available or centrally maintained data in Louisiana tracking numbers, method of waiver, demographic information, offense information, and outcomes for waived youth either in individual jurisdictions or statewide. If Louisiana is to form an intelligent policy surrounding waiver based on empirically proven methods of increasing public safety, then better data will be needed to understand who the children being waived are, what offenses they are committing, and what is happening to them as a result of the waiver process.

### CONCLUSION

The evolution of Louisiana’s system for waiving and transferring youth to adult court has not been linear in its trajectory. It would be misleading to characterize the history of waiver in Louisiana as an uninterrupted movement away from a system focused on individualized determinations of opportunity for rehabilitation toward one that focuses almost exclusively on the age of the accused and the charging of an enumerated offense contained in an ever-expanding list of crimes. The truth is judicial transfer existed for only 17 years prior to the creation of the first prosecutorial waiver statute and both of these types of waiver are

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141. See Brian G. Sellers & Bruce A. Arrigo, *Adolescent Transfer, Developmental Maturity, and Adjudicative Competence: An Ethical and Justice Policy Inquiry*, 99 J. CRIM. L. & CRIMINOLOGY 435, 439–40 (2009).

142. Bishop, *supra* note 6, at 154–55.



relatively recent additions to Louisiana's juvenile laws, although legislative waiver dates to the creation of the state's juvenile justice system itself. All three types of waiver experienced additions and subtractions to the offenses that fall under their purview, revisions to their respective standards, and criteria that made it both easier and more difficult at various times to waive a youth to adult court.

Nevertheless, the 1990s undoubtedly marked a turning point in which the number of juveniles exposed to waiver expanded greatly due to the lowering of the age of youth eligible for waiver under set circumstances, a substantial net increase in the number of offenses subject to waiver, and the introduction of prosecutorial waiver. It is also clear Louisiana's waiver laws do not operate in a vacuum. Rather, they are inextricably linked to the laws and rules of a broader criminal justice system, such as the law of principals and mandatory minimum sentences, which are often promulgated without any consideration for the peculiar circumstances of youth. Science related to adolescent brain development has revealed that youth are categorically less culpable than adults because they are less mature, more susceptible to peer pressure, and more malleable than adults. The United States Supreme Court recognized this fact in finding both the death penalty in all cases and now life without parole in non-homicide cases to be cruel and unusual punishment when applied to juveniles. Yet Louisiana's waiver laws, developed before this research was widely available and accepted, continue to operate in a context in which neither the categorical nor the individual differences related to a juvenile defendant's adolescent stage of development are legally relevant except in a narrow subsection of waiver cases involving judicial transfer.

The result is a system of waiver in which society spends a significant amount of limited resources incarcerating transferred youth who could be amenable to rehabilitation for extended periods of time in punitive adult prisons with little services and high recidivism rates. Both the youth in question and society as a whole would be better served by a flexible and efficient system for identifying those children who are amenable to rehabilitation and ensuring they receive the benefits of the juvenile justice system or are at least spared from the most harmful effects of the punitive adult system. The recommendations in this Article are a non-exhaustive list of partial remedies that can bring Louisiana closer to a system that recognizes those differences and uses them to make decisions which benefit youth, increase public safety, and are cost effective.