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Juvenile Justice and Waiver in Indiana: A New Look at an Old Problem

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JUVENILE JUSTICE AND WAIVER IN INDIANA:
A NEW LOOK AT AN OLD PROBLEM

INTRODUCTION

Although serious juvenile crime is not a recent phenomenon, its frequency of occurrence has drawn national attention. In fact, persons under eighteen years of age committed twenty percent of all serious crime during 1978.\(^1\) Statistics also indicate that juvenile crime will have serious implications on American society in the future if the percentage of serious juvenile crime continues to increase at the rate it has over the past ten years.\(^2\) To reverse this trend, juvenile crime should be confronted with a new attitude toward treating the juvenile accused of a serious offense.

The traditional treatment of accused juveniles is to process the child through a separate judicial system known as juvenile court.\(^3\) This court views the accused juvenile as a wayward child who needs help and guidance.\(^4\) The juvenile court seeks to “help the child, and not punish him”;\(^5\) rehabilitation, not retribution is its main goal.\(^6\) Ac-

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1. Nationwide in 1979, 20.1% of all serious violent crime was committed by persons under eighteen years of age. These offenses included murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. The trend analysis shows an increase of 17% of juvenile crime from 1970 to 1979. The individual trend breakdown is as follows:

   - Murder and nonnegligent manslaughter: down 5.5%
   - Forcible Rape: up 15.2%
   - Robbery: up 32.7%
   - Aggravated Assault: up 59.7%
   - Burglary: up 21.2%
   - Larceny-theft: up 19.5%
   - Motor vehicle theft: down 20.2%
   - Arson: up 33.3%

United States Department of Justice, FBI Uniform Crime Reports 190, 196 (1980).

2. Id.

3. See Note, Waiver of Juvenile Jurisdiction and The Hard-Core Youth, 51 N.D.L. Rev. 655, 656 (1974-75) [hereinafter referred to as Hard-Core Youth]. The first juvenile court system was introduced in Illinois in 1899. Law of July 1, 1899 §§ 1-21 (1899), Ill. Laws 131-37. This note described the juvenile justice systems as “more than just another judicial body; it is another system of justice with different procedures, a different penalty structure, and a different philosophy than adult court.”

4. Comment, Rehabilitation as the Justification of Separate Juvenile Justice System, 64 Cal. L. Rev. 984 (1976) [hereinafter referred to as Rehabilitation as a Justification].

5. Note, Waiver in Indiana—A Conflict with the Goals of the Juvenile Justice System, 53 Ind. L.J. 601 (1977-78) [hereinafter referred to as Waiver in Indiana].

6. Id. at 601.
cused juveniles are seen by the court as being particularly amenable to rehabilitation because of the juvenile's age and impressionability. The juvenile court bases its actions on a theory of philosophy known as the doctrine of "parens patriae."

The individual states readily accepted a judicial process which catered to the needs of the juvenile. In fact, every state legislature has enacted, by statute, a separate juvenile justice system. These court systems have exclusive jurisdiction over the juvenile accused of a criminal offense. The lawmakers, however, also recognized that

7. Rehabilitation as a Justification, supra note 4, at 984.
8. Waiver in Indiana, supra note 5, at 601. According to Black's Law Dictionary 49 (5th ed. 1979), parens patriae is defined as "father or parent of his country; the sovereign power of guardianship over persons under disability; such as insane and incompetent persons." Juveniles are considered persons under disability and as such need the guidance and protection of the juvenile court system. In fact, early Indiana law required the juvenile court judge to be a parent and at least forty years of age. Chapter 237, Section 1, Indiana General Law 1903.
10. Id.
11. The United States Supreme Court in Kent v. United States, 383 U.S. 541, 556 (1966), stated "The Juvenile Court is vested with 'original and exclusive jurisdiction' of the child." However, the juvenile court may lose jurisdiction depending on the age of the accused juvenile or offense he is charged with. This exact age or offense charged with differs among the states. See infra notes 38-49 and accompanying text.
not every child would be rehabilitated under the juvenile justice system.\textsuperscript{12} For that reason, nearly every state has enacted provisions under which a youth can be prosecuted in adult court.\textsuperscript{13} This exception to exclusive jurisdiction over the juvenile is known as waiver.\textsuperscript{14}

Waiver enables the prosecutor to try the juvenile in adult court, a court of unlimited jurisdiction.\textsuperscript{15} In theory, the juvenile is waived to adult court in order to serve the best interests of both the juvenile and society.\textsuperscript{16} The appropriateness of waiver is decided on a case-by-case basis.\textsuperscript{17}

To be certain that the juvenile is given his constitutionally protected right of due process,\textsuperscript{18} the legislatures of each state,\textsuperscript{19} as well as the United States Supreme Court,\textsuperscript{20} have established procedural guidelines to be followed by the juvenile court judge in the waiver proceedings.\textsuperscript{21} Failure to abide by these guidelines is a violation of the due process right of the juvenile and could result in the release of a convicted felon from custody.\textsuperscript{22} Thus, it is "critically

\begin{itemize}
\item \textsuperscript{12} See \textit{Waiver in Indiana}, supra note 5, at 601.
\item \textsuperscript{13} At the present time, only New York and Nebraska do not have traditional judicial waiver provisions in their Juvenile Codes. For an explanation of judicial waiver, see infra notes 69-73 and accompanying text.
\item \textsuperscript{14} \textit{Ind. Code} § 31-6-2-4(a) (1981), defines waiver as "... an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult." Some states designate the process as "waiver," others "transfer," and still others as "certification." For purposes of uniformity and clarity this process will be labeled as "waiver" throughout this note.
\item \textsuperscript{15} The juvenile court is a court of limited jurisdiction. Once the juvenile reaches the maximum age of the state's juvenile court jurisdiction, he must be set free. For the corresponding State statutes, see supra note 9.
\item \textsuperscript{16} One author stated this theory as follows: "The criteria should adequately reflect not only the interests of the community, but also fairness to the troubled youth and consideration for his needs." Peuler, \textit{Juveniles Tried as Adults: Waiver of Juvenile Court Jurisdiction}, 3 J. Contemp. L. 349, 358 (1977).
\item \textsuperscript{17} Whether a youth is waived or not is based on the individual facts of the case. The United States Supreme Court set forth determinative factors to be used as guidelines in deciding whether or not waiver is warranted. See infra note 42.
\item \textsuperscript{18} \textit{U.S. Const. amend. V.}
\item \textsuperscript{19} For the applicable statutes, see supra note 9.
\item \textsuperscript{20} For the determinative guidelines for the waiver process, see infra note 42.
\item \textsuperscript{21} The procedural guidelines are applicable to the judicial method of waiver only. Judicial waiver is defined in infra notes 69-73 and accompanying text.
\item \textsuperscript{22} In many instances, when the judicial process finally decides that a juvenile has been improperly waived from the juvenile court, he is now beyond the jurisdiction of the juvenile court. Further, since he was a juvenile when initially charged, he cannot be subjected to the jurisdiction of the adult court until properly waived. Hence, although the juvenile was convicted, he must be set free since he was not properly waived. For example, in \textit{Kent v. United States}, 383 U.S. 541 (1966), the Supreme Court
\end{itemize}
important" that the juvenile is waived in accordance with the established guidelines.

Although each state has its own unique waiver statute, each statute can be classified under one of four main categories: judicial, legislative, prosecutorial, and hybrid. The judicial method of waiver is used by the majority of the states and is the traditional method of waiver. Legislative and prosecutorial methods of waiver are relatively new and have been enacted to side-step the procedural guidelines associated with the judicial method of waiver. The fourth classification of waiver, the hybrid waiver statute, combines one or more of the pure methods of waiver. For example, a hybrid waiver statute may subject one class of accused juveniles to prosecutorial waiver while another class is subject to judicial waiver. The hybrid waiver statute seems to be the preferred statute for those states recently amending their waiver provisions.

Prior to 1981, waiver in Indiana could only be achieved through the judicial method of waiver. The waiver proceeding commenced

ultimately decided that the defendant had been improperly waived. Kent was already 21 years of age and beyond the jurisdiction of the juvenile court. Hence, the investigation was dismissed and Kent was freed. A caveat in this case, however, was that Kent was adjudged insane in his rape prosecution. As such, after the charges were dismissed, the State initiated incompetency proceedings against Kent and he was subsequently confined for psychiatric treatment. Id. at 564. See infra note 38.

23. "Critically important" is an often cited phrase in reference to juvenile waiver. The phrase was first coined in Kent. "It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." 383 U.S. at 556.

24. See generally Schornhorts, The Waiver of Juvenile Court Jurisdiction: Kent Revisited, 43 IND. L.J. 583, 596 (1967-68) [hereinafter referred to as Kent Revisited].

25. Id. at 596, 598.

26. For a discussion of the pure methods of waiver, see infra notes 69-73, 86-92, and 102-107 and accompanying text.

27. Indiana and Vermont both enacted hybrid waiver statutes in 1981. The statutes are IND. CODE § 31-6-1-4 (1981); and VT. STAT. ANN. tit. 33 635(a) (1981). These statutes are analyzed infra notes 112-117, 119-155 and accompanying text.

28. IND. CODE § 31-6-2-4 (1980) stated:

"Waiver of jurisdiction by juvenile court.

(a) Waiver of jurisdiction refers to an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult. Waiver is for the offense charged and all included offenses.

(b) Upon motion of the prosecutor and after full investigation and hearing, the juvenile court may waive jurisdiction if it finds that:

(1) The child is charged with an act:

(A) that is heinous or aggravated, with greater weight
upon a motion of the prosecutor, accompanied by a full investigation and hearing, after which the juvenile court could waive jurisdiction. With the passage of Public Law 266, juveniles charged with

given to acts against the person than to acts against property; or
(B) That is a part of a repetitive pattern of delinquent acts, even though less serious;
(2) The child was fourteen [14] years of age or older when the act charged was allegedly committed;
(3) There is probable cause to believe that the child committed the act;
(4) The child is beyond rehabilitation under the juvenile justice system; and
(5) It is in the best interests of the safety and welfare of the community that he stand trial as an adult.
(c) Upon motion of the prosecutor and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that:
(1) The child is charged with an act that would be murder if committed by an adult;
(2) There is probable cause to believe that the child has committed the act; and
(3) The child was ten [10] years of age or older when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for him to remain within the juvenile justice system.
(d) Upon motion of the prosecutor and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that:
(1) The child is charged with an act that, if committed by an adult, would be:
   (A) A class A or class B felony, except a felony defined by IC 35-48-4 [35-48-4-1 --35-48-4-14];
   (B) Involuntary manslaughter as a class C felony under IC 35-42-1-5;
(2) There is probable cause to believe that the child has committed the act; and
(3) The child was sixteen [16] years of age or older when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for him to remain within the juvenile justice system.”

29. Id.
30. Public Law 266 is now IND. CODE § 31-6-2-4 (1981).
"Waiver of jurisdiction by juvenile court."
(a) Waiver of jurisdiction refers to an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult. Waiver is for the offense charged and all included offenses.
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(1) The child is charged with an act:
   (A) That is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or
   (B) That is a part of a repetitive pattern of delinquent acts, even though less serious;
(2) The child was fourteen [14] years of age or older when the act charged was allegedly committed;
(3) There is probable cause to believe that the child committed the act;
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   (2) There is probable cause to believe that the child has committed the act; and
   (3) The child was ten [10] years of age or older when the act charged was allegedly committed; unless it would be in the best interest of the child and of the safety and welfare of the community for him to remain within the juvenile justice system.

d) Except for those cases in which the juvenile court has no jurisdiction in accordance with section 1(d) [31-6-2-1(d)] of this chapter, the court shall, upon motion of the prosecutor and after full investigation and hearing, waive jurisdiction if it finds that:
   (1) The child is charged with an act that, if committed by an adult, would be:
      (A) A class A or class B felony, except a felony defined by IC 35-48-4 [35-48-4-1—35-48-4-14];
      (B) Involuntary manslaughter as a class C felony under IC 35-42-1-4; or
      (C) Reckless homicide as a class C felony under IC 35-42-1-5;
   (2) There is probable cause to believe that the child has committed the act; and
   (3) The child was sixteen [16] years of age or older when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for him to remain within the juvenile justice system.

e) Upon motion by the prosecutor, the juvenile court shall waive jurisdiction if it finds that:
   (1) The child is charged with an act which would be a felony if committed by an adult; and
   (2) The child has previously been convicted of a felony or a non-traffic misdemeanor.

f) No motion to waive jurisdiction may be made or granted after:
   (1) The child has admitted the allegations in the petition at the initial hearing; or
serious Class A felonies\textsuperscript{31} are now automatically excluded from juvenile court jurisdiction.\textsuperscript{32} Public Law 266 is a hybrid waiver statute which combines a legislative method of waiver with the traditional judicial method of waiver.\textsuperscript{33}

This note focuses on the positive effects Public Law 266 will have on the juvenile waiver process in Indiana. Discussing the introduction of a new waiver statute necessitates an initial review of the classifications of waiver and corresponding procedural guidelines.

\textsuperscript{31}Ind. Code \textsection\textsection 31-6-2-4-(B)-(c)-(d) (1981) are known as judicial waiver provisions. Ind. Code \textsection\textsection 31-6-2-1(d) (1981), which is referred to in Ind. Code \textsection\textsection 31-6-2-4(d) (1981), is known as a legislative or exclusionary waiver provision. For definitions of judicial and legislative waiver provisions see infra notes 69-73, 86-92 and accompanying text.
Familiarity with waiver provisions in other states will facilitate an understanding of the aggressive stance Public Law 266 takes against the juvenile accused of a serious offense. Finally, subsequent sections of this note discuss the shortcomings of the statute, and propose recommendations toward correcting these defects.

**Procedural Guidelines and Types of Waiver Statutes**

The waiver proceeding could be as critical to the juvenile as a verdict of guilt or innocence. A juvenile, if waived, could be sentenced to death, whereas if he is kept under the jurisdiction of the juvenile court, the most severe sentence he could receive would be a few years in a juvenile home.\(^{34}\) Because waiver can affect the juvenile offender’s disposition significantly, certain procedural guidelines must be followed before completing the waiver process. The United States Supreme Court established guidelines which must be followed by the juvenile court judge in the judicial waiver proceeding.\(^{35}\)

*Procedural Guidelines*

In 1966, the United States Supreme Court was presented with a case in which a juvenile was waived to an adult court without being afforded his constitutional right of due process under the law.\(^{36}\) In *Kent v. United States*,\(^{37}\) the juvenile court waived the defendant to the adult court without a proper hearing.\(^{38}\) The Court stated that,

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34. Juveniles who are tried as adults often encounter drastic consequences. An example is Tilton v. Commonwealth, where the seventeen year old defendant, after being waived into adult criminal court, was convicted of murder and sentenced to death. The most severe sentence available to the juvenile court was four years in the State Boys’ School. Tilton v. Commonwealth 196 Va. 774, 85 S.E.2d 368 (1955).

35. See infra note 42.


37. Id.

38. Kent was charged with housebreaking, robbery and rape. The offender was sixteen years of age when these offenses allegedly took place. Kent was held for one week before any action was taken against him. When the court finally did act, the judge entered an order stating, “that after full investigation, I do hereby waive jurisdiction and direct that the defendant be held for trial for the alleged offenses under the regular procedure for the U.S. District Court for the District of Columbia.” Neither Kent, his parents, nor his attorney were present at the “full hearing” that was supposedly conducted. The judge made no findings of fact, nor did he recite any reasons for waiver. Kent was waived into the criminal court. He was subsequently tried and convicted of six counts of housebreaking and robbery, but found not guilty by reason of insanity to the charge of rape. Kent was sentenced to serve five to fifteen years on each count as to which he was found guilty, or a total of thirty to ninety years in prison. Kent v. United States, 383 U.S. 541 (1966).
although the juvenile court has broad discretion, waiver was not to be a "license for arbitrary procedure." The Court wanted to be certain that waiver was based on consideration of the criminal charge and on the individual characteristics of the accused. Waiver was not to be based on outside influences. Therefore, the Court established determinative factors to be considered by the juvenile courts before waiving the accused. The severity and degree of violence of the alleged offense are of primary importance. Other factors to be considered are: whether the offense was against persons rather than property; the attitude of the juvenile; the juvenile's home environment; previous offenses, if any; whether the public would be adequately protected if the juvenile remained in the juvenile justice system; and certain practical aspects, such as whether there is prosecutive merit and whether the juvenile's accomplices are triable in juvenile court. Determinative factors of waiver, such as those set forth in Kent, have similarly been established in Indiana.

39. 383 U.S. at 553.
40. The Supreme Court in Kent cited the Court of Appeals as saying: "[I]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception [to the waiver proceeding] which must be governed by the particular factors of individual cases." Harling v. United States, 295 F.2d 161, 164-65 (D.C. Cir. 1961)." 383 U.S. at 560-61.
41. 383 U.S. AT 563
42. As stated in Kent v. United States, 383 U.S. at 566 (1966):
The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:
1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2) Whether the alleged offense was committed in an aggressive, violent, pre-meditated, or willful manner.
3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against person especially if personal injury resulted.
4) The prosecutive merit of the Complaint, i.e., whether there is evidence upon which Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5) The desirability of trial and disposition of the entire offense in one count when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court.
6) The sophistication and maturity of the juvenile as determined by consideration of his home, environment situation, emotional attitude and pattern of living.
The Indiana Supreme Court in *Summers v. State*\(^52\) followed the reasoning of the United States Supreme Court in *Kent*.\(^53\) Again, the importance of a full hearing for judicial waiver was stressed.\(^54\) The Indiana Supreme Court, also, set forth determinative factors to be considered by the juvenile court judge in his ultimate decision of whether to waive the accused juvenile.\(^55\) These factors included the severity and degree of violence of the offense;\(^56\) the possibility of rehabilitation within the juvenile justice system;\(^57\) and whether the

7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdiction, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See infra* note 55.
53. *See supra* note 42.
54. The Indiana Supreme Court stated: "Further we hold in accordance with *Kent* that the appellant Summers should have a right to a full hearing in the Lake Juvenile Court." 248 Ind. at 560, 230 N.E.2d at 325.
55. The determinative factors to be considered by the juvenile court judge in Indiana are as follows:

In this regard, we would say that an offense committed by a juvenile may be waived to a criminal court if the offense has specific prosecutive merit in the opinion of the prosecuting attorney; or if it is heinous or of an aggravated character, greater weight being given to offenses against person than to offenses against property; or, even though less serious, if the offense is part of a repetitive pattern of juvenile offenses which would lead to a determination that said juvenile may be beyond rehabilitation under the regular statutory juvenile procedures; or where it is found to be in the best interest of the public welfare and for the protection of the public security generally that said juvenile be required to stand trial as an adult offender.

*Summers v. State*, 248 Ind. at 561, 230 N.E.2d at 325.
56. *Id.*
57. *Id.*
public would be adequately protected if the juvenile was detained in the juvenile justice system. The factors set forth by both *Summers* and *Kent* balance the needs of the accused with those of society. However, many states have circumvented the strict procedural guidelines set forth by *Kent* and *Summers*. These states have accomplished this task by enacting statutes which allow a juvenile to be tried in adult court by circumventing the traditional method of waiver completely. An examination of the different methods of waiver is helpful to grasp a clear understanding of the process employed by these statutes to circumvent the procedural guidelines.

**Type of Waiver Statutes**

The primary distinction between judicial, legislative, prosecutorial, and hybrid waiver statutes lies in who retains the discretionary power of waiver. Further, within each of the classifications, state waiver statutes vary as to the severity of the offense required for waiver; the maximum age for juvenile court jurisdiction; and the minimum age for which waiver is appropriate. The degree of incongruousness is exemplified by failure of some states to allow waiver of a juvenile, while other states allow waiver of a mere infant. Examining each classification of waiver, with a corresponding

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58. *Id.*

59. See supra notes 42 and 55. The first determinative factor set forth in *Kent* and the fourth factor in *Summers* both relate to whether the public will be adequately protected if the juvenile is not incarcerated in an adult facility.

60. See supra note 42.

61. See supra note 54.

62. For a discussion of these waiver provisions and their constitutionality, see infra notes 180-97 and accompanying text.

63. See *Hard-Core Youth*, supra note 3, at 658.

64. Some states, such as California and Alaska, allow waiver for any criminal offense. Whereas, other states restrict waiver for felonies. These states include Colorado and Kentucky. Still others restrict waiver to serious personal offense felonies only, such as murder or rape. Examples of these states are New Mexico and Montana. For the appropriate waiver statutes, see supra note 9.

65. The maximum age varies from sixteen to nineteen. For appropriate state statutes, see supra note 9.

66. Some states do not have minimum ages. For example, Arkansas and Maine. Other states do not allow waiver for a juvenile under seventeen years of age for certain specified offenses. Examples of these states are Washington and Massachusetts. For appropriate state statutes, see supra note 9.

67. In Nebraska and New York there are no judicial methods of waiver. For the appropriate state statutes, see supra note 9.

68. Under Arizona law, it is theoretically possible to prosecute a mere infant.
example of a state statute which utilizes that method of waiver, is helpful in understanding Indiana's hybrid waiver statute.

**Judicial Waiver Statute**

Judicial waiver is the method of waiver traditionally used by most states. The judicial waiver statute vests the discretionary power of waiver in the juvenile court judge. However, before he can exercise his discretionary power, the juvenile court judge must abide by the procedural guidelines set forth in *Kent*. The discretionary power of waiver is appropriately vested in the judiciary, since judicial proceedings in general must be accompanied by the constitutional aspects of notice, a full and fair hearing, and right to counsel. These same rights are afforded to the juvenile in a judicial waiver proceeding.

California utilizes a judicial waiver statute. This statute provides the juvenile with the procedural guidelines associated with the traditional judicial waiver statute. However, this judicial waiver statute is unique in that it encourages waiver of the juvenile to adult court by creating a rebuttable presumption in favor of waiving the juvenile to adult court.

In 1976, the California juvenile code underwent drastic revision. The code was amended by a subsection aimed specifically at the

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if the prosecutor can show that the offender was aware that the act he committed was wrong.

A person less than fourteen years old at the time of the conduct charged is not criminally responsible in the absence of clear proof that at the time of committing the conduct charged the person knew it was wrong.


69. Only Nebraska and New York do not have a judicial waiver provision enacted. For appropriate state statutes, see supra note 9.

70. See Kent Revisited, supra note 24, at 597.

71. See supra note 42.

72. See Hard-Core Youth, supra note 3, at 659.

73. Id.


75. Id.

76. Id. If the juvenile fails to offer conclusive evidence of why he should be retained under the jurisdiction of the juvenile court, he will be waived to the adult court.

juvenile accused of certain "target offenses." This statute creates a presumption in favor of waiving the juvenile accused of such target offenses to adult court. Under this statute, the juvenile has the burden of proving why he should be retained under the jurisdiction of the juvenile justice system. If the juvenile fails to demonstrate that he is a fit candidate for rehabilitation, he is waived to the adult court. Although Indiana's Public Law 266 facilitates waiver by allowing waiver of a juvenile charged with a crime defined vaguely as "heinous or aggravated," it does not create a presumption favoring waiver as does the California statute.

Judicial waiver statutes which presume waiver, such as the statute in California, implicitly question the philosophy of the juvenile justice system. However, waiver statutes which are created to circumvent the procedural guidelines of judicial waiver doubt the effectiveness of a juvenile justice system entirely. Since legislative and prosecutorial waiver statutes circumvent the procedural guidelines set forth in Kent, state legislatures which enact these methods of waiver arguably doubt the justification for the juvenile court entirely. Public Law 266 adopted a legislative waiver provision.

**Legislative Waiver Statutes**

Under the legislative waiver statute, the state legislature retains the discretionary power to exclude certain juveniles from juvenile court. Exclusion can be based on either age or the offense

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78. These "target offenses" include: murder; arson of an inhabited building; robbery while armed with a dangerous or deadly weapon; rape with force or violence or threat of great bodily harm; kidnapping for ransom; kidnapping for purposes of robbery; kidnapping with bodily harm; assault with intent to murder or attempted murder; assault with a firearm or a destructive device; assault by any means of force likely to produce great bodily injury; and, discharge of a firearm into an inhabited or occupied building. CAL. WELF. & INST. CODE § 707 (West 1981).

79. Id.

80. Id.

81. Id.

82. See supra note 30. IND. CODE § 31-6-2-4(b) (1981).

83. Id.

84. See supra note 42.


86. See Kent Revisited, supra note 24, at 596.
charged. Because the legislature has this discretionary power to exclude certain juveniles, these statutes are also referred to as exclusionary waiver statutes.

Legislative waiver is not waiver in its true sense. Waiver traditionally involves a process whereby the juvenile court transfers its jurisdiction over the accused juvenile to the adult court. However, since the juvenile court never attains jurisdiction under a legislative waiver statute, it cannot waive the accused. Thus, a legislative waiver statute, although allowing prosecution of the juvenile in adult court, cannot literally be called a waiver statute. Legislative waiver does not provide for the procedural guidelines associated with judicial waiver. Recognizing the lack of necessary safeguards in legislative waiver statutes, a majority of states combine legislative waiver with either judicial or prosecutorial waiver provisions. Currently, only New York employs the legislative waiver as its sole waiver provision.

Juveniles under sixteen years of age are subject to exclusive jurisdiction of the New York juvenile justice system. However, a juvenile under sixteen years of age, when charged with certain enumerated offenses, is no longer classified as a juvenile by the court. In this situation, the juvenile cannot be tried in juvenile court. At first glance, New York appears to have a very rehabilitative juvenile justice system since it does not allow for judicial waiver, arguably on the assumption that all juveniles are rehabilitative. However, closer examination reveals that the New York juvenile code may be the most punitive. This statute excludes juve-

87. Id.
88. For simplicity, the terms legislative waiver and exclusionary waiver are to be used interchangeably throughout this note.
89. See Hard-Core Youth, supra note 3, at 659.
90. See Kent Revisited, supra note 24, at 597.
91. New York is the only state utilizing the pure legislative waiver. N.Y. CRIM. PROC. LAW § 180.75 (McKinney 1975).
92. Id.
93. The New York Family Court has exclusive jurisdiction over juveniles who are alleged to be delinquent. N.Y. JUD. LAW § 713 (McKinney 1975).
94. Id.
95. The waiver provision is the vehicle by which the juvenile court can try those individuals they believe to be beyond rehabilitation in adult court. If the juvenile court does not allow the waiver, then it can be argued that all of the juveniles under its jurisdiction must be amenable to rehabilitation.
96. See supra SMITH, note 77, at 58. This report phrased it as: "Perhaps the most unusual, most punitive and most incontroversial of all provisions are those passed by New York . . . ."
niles as young as thirteen years of age. 97 Few juvenile courts exclude or cease jurisdiction over juveniles at such an early age. 98 Although Indiana utilizes a legislative waiver provision, it does not exclude juveniles under sixteen years of age. 99

Legislative waiver provisions have been labeled incompatible with the goals of the juvenile justice system since they deny the juvenile an opportunity to show that he is amenable to rehabilitation in spite of the charge against him. 100 Concededly, the juvenile is excluded without allowing him an opportunity to be heard. However, the decision of which juveniles, based on the charge against them, are excluded from the juvenile court is determined by the state legislators. In contrast, the decision of which juveniles are to be excluded in the prosecutorial waiver statute is decided by the prosecutor alone. 101

Prosecutorial Waiver Statutes

The prosecutorial waiver procedure allows a prosecutor the discretion to determine the forum in which a juvenile, accused of a serious offense, will be tried. 102 This type of waiver provision has drawn

97. Under the New York Family Court Act, a thirteen year old can be excluded if charged with an act that would be second degree murder. To determine whether or not a child of tender age can be charged with the offense in criminal court § 30.00 of CPL must be read in conjunction with § 712 of the Family Court Act.


99. See supra note 30.

100. See Hard-Core Youth, supra note 3, at 661.

101. Id. at 660.

102. Id.
a large amount of criticism. The major criticism has been that the prosecutor cannot be expected to objectively weigh the welfare of the juvenile against the need to protect society. 103 Concededly, this may occur because of the lack of procedural safeguards. However, prosecutorial decisions, in general, have never been subject to due process protections. 104 The prosecutor has always been given unbridled discretion to charge the offender as he deems appropriate. 105 The fact that a juvenile is involved should not change this age-old function. 106 The unbridled discretion is one of the major drawbacks of prosecutorial waiver provisions and is arguably the reason Nebraska remains the only state utilizing this method of waiver. 107

The Nebraska prosecutorial waiver statute contains many procedural safeguards associated with judicial waiver provisions. The prosecutor “shall” consider factors such as the severity of the crime; the age of the offender; and the motivation for alleged commission of the offense 108 before determining whether to file the case in juvenile or adult court. The use of these guidelines contravenes the purpose of utilizing a prosecutorial waiver statute. By mandating procedural guidelines, Nebraska shows its dissatisfaction with the pure prosecutorial waiver statute. Indiana Public Law 266 does not contain a prosecutorial waiver statute because of the dissatisfaction with this method of waiver. 109

Because of the inherent defects of each pure method of waiver, many states are enacting waiver statutes which combine the best of one or more of the three waiver provisions. Statutes of this nature are referred to as hybrid waiver statutes. The passage of Public Law 266 created a hybrid waiver statute in Indiana. 110

**Hybrid Waiver Statute**

Indiana 111 and Vermont 112 are two of the most recent examples

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103. *Id.*
104. Cox v. United States, 473 F.2d 334, 335 (4th Cir. 1973). This court phrased it as, “We have no such tradition with respect to prosecutorial decisions, to seek an indictment, or not to seek one, . . . to charge a greater offense or a lesser one.”
105. *Id.*
108. *Id.*
109. See *supra* note 30.
110. *Id.*
111. Indiana Senate Bill 109, soon to be Public 266, was passed on January 29, 1981.
112. Vermont House Bill 1 was passed in a specially called session on July 17, 1981.
of states utilizing hybrid waiver statutes. The hybrid waiver statute in Indiana combines judicial and legislative methods of waiver, while Vermont combines judicial and prosecutorial methods to form its hybrid waiver statute.\textsuperscript{113} Until recently Vermont did not allow waiver of a juvenile under sixteen years of age.\textsuperscript{114} The present Vermont statute allows prosecutorial waiver for juveniles aged sixteen to eighteen; judicial waiver, with a presumption of waiver to adult court, for juveniles aged fourteen to sixteen; and judicial waiver, with a presumption of retaining jurisdiction in juvenile court, for juveniles aged ten to fourteen, accused of certain enumerated offense.\textsuperscript{115} The judicial waiver proceedings in Vermont must be accompanied by procedural guidelines similar to those set forth in \textit{Kent}.\textsuperscript{116} The prosecutorial waiver proceeding, unlike the statute enacted in Nebraska, does not have procedural guidelines.\textsuperscript{117} The approach taken by Vermont towards serious juvenile crime is very similar to the approach Indiana is taking with the passage of Public Law 266.

Although no waiver statute is infallible, a hybrid waiver statute eliminates many of the shortcomings of each pure method of waiver. Similarly, Public Law 266 should eliminate many of the faults of previous Indiana waiver statutes.\textsuperscript{118} Public Law 266 appears to be the culmination of a recent trend in aggressively treating the juvenile accused of a serious offense. It also may be indicative of a change in philosophy by the Indiana legislature regarding the ability of the juvenile justice system to rehabilitate the juvenile offender.

\textbf{WAIVER IN INDIANA}

Over each of the last four years, the Indiana legislature has either added to or amended provisions of the waiver statute.\textsuperscript{119} Some of these changes have been facial alterations\textsuperscript{120} while others have broadened the classes of juveniles subject to the waiver process.\textsuperscript{121} Further changes introduced new methods of waiver not available

\begin{itemize}
\item \textsuperscript{113} VT. STAT. ANN. tit. 33 § 635(A) (1981).
\item \textsuperscript{114} Prior to passage of House Bill 1, 1981 Vt. Acts, Vermont did not allow for waiver of juveniles under 16 years of age. VT. STAT. ANN. tit. 33 § 635 (1980).
\item \textsuperscript{115} VT. STAT. ANN. tit. 33 § 635 (1981).
\item \textsuperscript{116} See supra note 42.
\item \textsuperscript{117} See supra note 107.
\item \textsuperscript{118} Compare supra note 28 with note 30.
\item \textsuperscript{120} See infra notes 123-26 and accompanying text.
\item \textsuperscript{121} See infra notes 127-35 and accompanying text.
\end{itemize}
under the Indiana juvenile code. Each of these changes indicate dissatisfaction with the prior law. The changes further indicated a gradual change of philosophy towards the treatment of the juvenile accused of a serious offense. This changing philosophy lead to the passage of Public Law 266.

The legislative trend of enlarging the class of juveniles subject to waiver began in 1978 with the passage of Public Law 136, an act which revamped the then existing juvenile law into a comprehensive juvenile code. The 1979 changes provided additional procedural safeguards to be followed by the juvenile court judge in the waiver proceeding. This act increased the guidelines set forth by Summers. As a result of the 1979 amendment, the juvenile court judge must show "probable cause to believe that the child" committed the act before he can be waived. The 1978 and 1979 amendments were aimed more at surface changes of the waiver statute, whereas the 1980 and 1981 amendments constitute substantive changes.

The 1980 amendment to the Indiana juvenile law broadened the class of offenses for which the accused juvenile, without a past conviction, could be waived. Prior to this act, the accused juvenile, without a past conviction, could be waived if he was charged with murder, a Class A felony, or a Class B felony. With the addition

122. Public Law 266 introduced the legislative method of waiver. See supra note 30.
125. See supra note 55.
126. See supra note 124.
128. Id.
129. The list of Class A felonies are defined in the following Indiana statutes: IND. CODE § 35-42-3-2 (1981) (Kidnapping); IND. CODE § 35-42-4-1 (1981) (Rape if committed by using or threatening the use of deadly force, or while armed with a deadly weapon); IND. CODE § 35-42-4-2 (1981) (Criminal deviate conduct, if committed by using or threatening the use of deadly force, or while armed with a deadly weapon); IND. CODE § 35-42-4-3 (1981) (Child Molesting if committed by using or threatening the use of deadly force, or while armed with a deadly weapon); IND. CODE § 35-42-5-1 (1981) (Robbery, if it results in bodily injury); IND. CODE § 35-43-1-1 (1981) (Arson, if bodily injury results); and IND. CODE § 35-43-2-1 (1981) (Burglary if it results in bodily injury).
of the 1980 amendment, an accused juvenile, without a past conviction, can be waived if charged with involuntary manslaughter, as a Class C felony, or reckless homicide as a Class C felony, in addition to the previously named offenses.\textsuperscript{131} The inclusion of these offenses broadened the class of juveniles subject to waiver for crimes which resulted in the death of the victim. Both the 1980 and 1981 amendments enlarged the class of juveniles susceptible to waiver. However, whereas the 1980 statute enlarged the class by lowering the age limitations, the 1981 statute did so by introducing a new classification of waiver.

The passage of Public Law 266 in 1981 introduced a provision which allows for waiver of the juvenile recidivist at any age,\textsuperscript{132} as well as enacting a legislative method of waiver.\textsuperscript{133} The recidivist provision\textsuperscript{134} allows for waiver of the juvenile recidivist without the necessity of a full investigation and hearing.\textsuperscript{135} To appreciate the impact of these changes, it is necessary to examine individual sections of Public Law 266 and to compare Public Law 266 with similar provisions in other jurisdictions.

The first major change proposed by Public Law 266 is the legislative exclusionary statute.\textsuperscript{136} This statute excludes from the juvenile justice system juveniles sixteen years of age or older charged with murder, kidnapping, rape, or robbery, if committed with a deadly weapon or which resulted in bodily injury.\textsuperscript{137} These offenses are Class A felonies punishable by up to fifty years in prison.\textsuperscript{138}

Compared to the exclusionary waiver statute in New York,\textsuperscript{139} Indiana has a fairly lenient statute. New York excludes juveniles, fourteen years of age, charged with offenses such as assault, burglary, and arson, from the juvenile court.\textsuperscript{140} Although these offenses

\begin{itemize}
  \item \textsuperscript{131} See \textit{supra} notes 129 and 130.
  \item \textsuperscript{132} \textsc{ind. code} § 31-6-2-4(e) (1981) [hereinafter referred to as "recidivist provision"].
  \item \textsuperscript{133} \textsc{ind. code} § 31-6-2-1(d) (1981) [hereinafter referred to as "exclusionary provision"].
  \item \textsuperscript{134} See \textit{supra} note 132.
  \item \textsuperscript{135} \textit{id.}
  \item \textsuperscript{136} See \textit{supra} note 133.
  \item \textsuperscript{137} \textit{id.}
  \item \textsuperscript{138} For the list of Class A felonies, see \textit{supra} note 129. A person convicted of a Class A felony "shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000.00)." \textsc{ind. code} § 35-50-2-4 (1981).
  \item \textsuperscript{139} See \textit{supra} notes 91-97 and accompanying text.
  \item \textsuperscript{140} \textit{id.}
\end{itemize}
are not insignificant, the exclusion of the juvenile from the juvenile justice system should be limited to serious personal offenses. The only offenses for which the accused juvenile can be excluded in Indiana are serious personal offenses.141 Similarly, Indiana does not believe that a person under sixteen years of age should be automatically excluded from juvenile court,142 while New York allows a juvenile as young as thirteen years of age to be excluded.143 Indiana, although taking an aggressive stance against serious juvenile crime, has not gone to the extremes evidenced by the New York statute.144

Although Indiana does not allow legislative waiver of the fourteen or fifteen year old juvenile, it does permit judicial waiver of these individuals. Section 3 of Public Law 266 allows for waiver of a juvenile, who is at least fourteen years of age and charged with an act that is heinous or aggravated. This section also allows for a juvenile to be waived if charged with an act, although less serious, which is part of a repetitive pattern of delinquent acts.145 Additionally, waiver will only be effective after a full investigation and hearing146 which encompasses the procedural guidelines set forth in Kent147 and Summers.148 Indiana as well allows waiver of a ten year old if he is charged with murder.149 Unlike California's statute, Public Law 266 does not create a presumption in favor of waiving the accused juvenile.150 California only allows for waiver if the offender has reached his sixteenth year of age.151 However, under the California statute,152 this individual is subject to be waived for any violation of the criminal code. Although a fourteen year old can be waived in Indiana, the offenses for which the court may waive the accused are limited.153 In this respect, arguably, Indiana places greater faith in the discretion of its juvenile court judges than does California.

Public Law 266 also added a judicial waiver statute aimed at

141. See supra note 30. The offenses excluded are murder, kidnapping, rape or robbery.
142. See supra note 30.
143. See supra note 97.
144. See supra notes 91-97 and accompanying text.
146. Id.
147. See supra note 42.
148. See supra note 55.
149. IND. CODE § 31-6-2-4(c) (1981). See supra note 30.
150. See supra note 30.
152. Id.
153. See supra note 30.
the juvenile recidivist.154 This provision allows the juvenile court to waive the individual, regardless of age, if it finds that he is charged with an act which would be a felony if committed by an adult and if he has previously been convicted of a felony or non-traffic misdemeanor.155 This judicial waiver statute, unlike most, does not provide for a full investigation and hearing. The lack of procedural safeguards in this waiver provision seems to reflect a legislative attitude that since the juvenile has already been declared unfit for the juvenile justice system once, and subsequently was tried and convicted in adult court, he is no longer worthy of the benefits of the juvenile justice system.

Public Law 266 revised the waiver process in Indiana significantly. The recent trend of waiver provisions in Indiana expresses the aggressive attitude of the legislature against serious juvenile crime. From this legislative attitude, it can be concluded that the legislature doubts the ability of the juvenile justice system to adequately rehabilitate the serious juvenile offender. However, Public Law 266 may be more than the culmination of an aggressive trend towards serious juvenile crime. Public Law 266 may signal the beginning of a changing philosophy in the legislature toward the juvenile accused of a serious offense.

PUBLIC LAW 266 ANALYZED

Although Public Law 266 is new and its impact uncertain, facially it presents both advantages and shortcomings. However, an analysis of the statute reveals that the positive aspects of the statute outnumber the negative. The increasing percentage of serious juvenile crime156 and the considerable amount of juvenile recidivism157 underlies the aggressive stance of Public Law 266. Its popularity in the Indiana Legislature158 and constitutional validity159 further support the statute. These aspects of Public Law 266 will be analyzed individually.

Justification for Public Law 266

Public Law 266 is a calculated action taken by the Indiana

155. Id.
156. See supra note 1 and accompanying text.
157. See infra note 174 and accompanying text.
158. See infra note 161 and accompanying text.
159. See infra notes 183-96 and accompanying text.
Legislature to avoid the procedural guidelines associated with juvenile waiver.\textsuperscript{160} The passage of this statute may reflect a change in philosophy toward the juvenile accused of a serious felony. Arguably, the legislature, through Public Law 266, is questioning the theory that juveniles are more amenable to rehabilitation than adults. Furthermore, it can be concluded that this change in philosophy is felt throughout the legislature since Public Law 266 was passed without opposition.\textsuperscript{161} Implicit in this change of philosophy is a more aggressive effort to reduce serious juvenile crime.

The increase in serious juvenile crime presents an immediate as well as a future problem which warrants timely action.\textsuperscript{162} Juvenile crime is no longer limited to the traditional offenses such as vandalism or drug related offenses.\textsuperscript{163} Juveniles are contributing significantly to serious crime in America; crimes such as murder, forcible rape, burglary, and robbery.\textsuperscript{164} In fact, statistics reveal that approximately fifty percent of the burglaries are committed by persons under eighteen years of age.\textsuperscript{165} These offenders are not the same breed of juvenile offender for which the juvenile justice system was introduced.\textsuperscript{166} As such it should not be surprising that the juvenile justice system has become antiquated and inadequate. Public Law 266, however, makes necessary adjustments for the present-day serious juvenile offender by allowing him to be waived to a judicial forum more conducive to an appropriate balance between juvenile and societal needs.

If waived, the accused juvenile is subjected to a judicial process not premised solely on rehabilitation,\textsuperscript{167} but on other goals of the

\textsuperscript{160} The exact reason for passage of certain statutes can only be conjectured, because Indiana does not publish legislative history. However, each branch of the government has constructive, if not actual, knowledge of the decisions of other government branches. \textit{Summers} was decided in 1967 and clearly set forth the procedural guidelines for the judicial waiver process. Thereafter, Public Law 266 sidestepped these procedural guidelines.

\textsuperscript{161} Indiana Senate Bill 109, soon to be Public Law 266, was passed on January 29, 1981. The vote taken was forty-eight for and zero against. Two voted present.

\textsuperscript{162} See supra note 1.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} The exact figure for 1979 is 48.6\%. Id.


criminal justice system such as retribution, protection of society, individual deterrence, and general deterrence. In this forum, the accused juvenile receives rights not available to him in juvenile court. These rights include the right to be tried by a jury of his peers.

In keeping with the goals of a separate juvenile justice system, Public Law 266 does not seek to punish the juvenile offender. Rather, its purpose is to place the juvenile accused of a serious offense in a judicial forum better equipped to balance the needs of the juvenile and society. Public Law 266 may also be directed at an inherent defect of the juvenile justice system: the theory that juveniles are more amenable to rehabilitation than adults. This theory has not yet been proven.

The justification for having a juvenile judicial system separate from the adult system is based on the premise that juveniles are more amenable to rehabilitation than adults. However, no evidence presently exists to support this proposition. Therefore, rather than simply waive the accused juvenile to the jurisdiction of the adult court, Public Law 266 essentially removes the juvenile from a

168. Id.
169. Juveniles are not provided all of the procedural safeguards in the juvenile court that adults receive in criminal court. The rights a juvenile is entitled to are outlines in IND. CODE § 31-6-3-1 (1981):
(a) Except when the child may be excluded from a hearing under IC 31-6-7-10, the child is entitled:
   (1) to cross-examine witnesses;
   (2) to obtain witnesses or tangible evidence by compulsory process; and
   (3) to introduce evidence on his own behalf.
(b) A child charged with a delinquent act is also entitled to:
   (1) be represented by counsel under IC 31-6-7-2;
   (2) Refrain from testifying against himself; and
   (3) Confront witnesses.
170. These rights are not granted to the juvenile. Compare with the criteria listed in Id.
171. There is no empirical evidence showing that juveniles are more amenable to rehabilitation than adults. "Keeping some offenders out of the system, however, does not solve the problem of an unfulfilled promise of rehabilitation for those who continue to go through the system. It is not possible to prove conclusively that rehabilitation is ineffective. But if, 77 years after enactment of the first juvenile court act, we still lack evidence that the juvenile justice system rehabilitates, perhaps it is time to consider abandoning reliance on rehabilitation as a basis for the system." Rehabilitation as a Justification, supra note 4, at 1016.
172. See supra notes 2-5 and accompanying text.
173. See supra note 171.
system which has not been proven effective, to a system whose methods have been shown to be effectual. This adds further support to the proposition that Public Law 266 is more than an addition to the waiver statute. It is indicative of a change in the philosophy of the legislature towards the treatment of the juvenile accused of a serious offense.

A further change in legislative philosophy is reflected in the approach Public Law 266 takes towards juvenile recidivism. The legislature must have recognized the serious problem of juvenile recidivism because it passed a provision aimed directly at this offender. Statistics indicate that fifty-four percent of all juvenile offenders commit at least two offenses. The recidivist commits his first at an early age and, in most instances, continues to commit crimes until he is apprehended. Under prior law, even if the juvenile recidivist was apprehended, the state would probably place him in a correctional system not conducive to his needs. This system was the juvenile justice system. In general, the juvenile justice system tends to punish the older recidivist at the end of his criminal career rather than the young and criminally active one. With the addition of Public Law 266, the young and criminally active recidivist can not be waived into adult court jurisdiction.

The constitutionality of exclusionary waiver statutes, similar to section 1(d) of Public Law 266, has been decided in other courts. These decisions indicate that another positive aspect of Public Law 266 is that it should survive constitutional scrutiny. The sections

174. Studies have shown that between 40% and 54% of all juveniles who commit one offense, go on to commit at least one more offense. The class of offenses for which 30% of the recidivists were charged with was either murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft or arson. See generally M. WOLFGANG, R. FIGLIO, T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972).
176. See supra note 174.
178. Id. at 96-97.
179. Id.
180. See supra note 30.
181. Cases which discuss the constitutionality of exclusionary statutes include: Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977), cert denied, 434 U.S. 1088 (1978); Cox v. United States, 473 F.2d 334 (4th Cir. 1973); United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972); Johnson v. State, 314 So. 2d 573 (Fla. 1975); State v. Sheppard, 371 So. 2d 1135 (La. 1979). In each case the court has upheld the constitutionality of the exclusionary statute.
most vulnerable to constitutional challenge are sections 1(d), the exclusionary provision, and 4(e), the recidivist provision.182

The principle constitutional challenge to Public Law 266 would be the failure of the exclusionary waiver provision to provide for the due process rights of the juvenile.183 This attack has focused on the power vested in the prosecutor to determine whether a juvenile will be tried as an adult since the prosecutor decides what charge to bring against the accused juvenile.184 At least one court addressing the constitutionality of such a provision has held that the tradition of due process has never been extended to decisions of prosecutorial discretion.185 Public Law 266 should survive this challenge because the exclusion of similar offenses in other jurisdictions has been upheld.186 As well as being challenged on due process grounds, these statutes have been challenged as violative of equal protection under the law.

The equal protection challenge questions the power of the legislature to distinguish between minors accused of serious offenses and those accused of lesser crimes.187 This is precisely what the exclusionary waiver statute and the recidivist statute attempt to do. The courts have quickly disposed of this constitutional challenge.188 One court held that to distinguish between juveniles charged with capital offenses and those charged with felonies is "neither arbitrary nor unreasonable."189 Additionally, distinguishing juveniles on the basis of a serious felony or recidivism does not violate their rights of equal protection under the law since this distinction is neither arbitrary nor unreasonable. Differentiating juveniles on the basis of race,190 religion,191 or sex192 would be an arbitrary classification. There is a substantial state interest in distinguishing juveniles accused of a serious felony and juvenile recidivist. That substantial state interest is the protection of society.193

182. See supra note 30.
183. U.S. Const. amend. V.
184. See infra note 185.
185. Cox v. United States, 473 F.2d at 335.
186. See supra notes 180-81.
188. See supra notes 180-81.
191. Id.
193. The protection of society is a determinative factor in the waiver procedure set forth by Kent and Summers. See supra notes 42 and 55.
The right to be tried in a juvenile court is not an inherent one.¹⁹⁴ The individual states have the power to restrict or qualify the correctional treatment the juvenile receives.¹⁹⁵ Public Law 266 restricts the serious juvenile offender from treatment under the juvenile justice system. Further, since the distinction is "neither arbitrary nor unreasonable,"¹⁹⁶ Public Law 266 does not violate the constitutional rights of the juvenile. As such, Public Law 266 should survive constitutional scrutiny. However, constitutional validity is not the sole benefit of Public Law 266. It is also beneficial because it eliminates unbridled judicial discretion.¹⁹⁷

Under the prior waiver statute, two individuals charged with the same offense, committed under similar circumstances, could be tried in different court systems.¹⁹⁸ This judicial discretion could lead to a great disparity in sentences. Public Law 266 eliminates this discretion by automatically excluding all juveniles charged with a serious felony.¹⁹⁹ An offender who is convinced that he was treated more harshly than others who have committed similar offenses is likely to be much more difficult to control in a corrective setting.²⁰⁰ The exclusionary waiver provision of Public Law 266 eliminates some of the judicial discretion that could lead to a disparity of forums for juveniles accused of similar offenses. The serious juvenile offender is now automatically held accountable for his actions in adult court.

It appears that the reasons for waiving the juvenile accused of a serious offense are justified. The rising juvenile crime rate,²⁰¹ the amount of juvenile recidivism,²⁰² and the seriousness of the offenses are factors which support Public Law 266. There are, nonetheless, shortcomings in the statute's method. The statutory scheme, however, is not beyond repair.

¹⁹⁴. The Court in Woodward v. Wainwright, 556 F.2d at 785, held "that treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore, the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved."
¹⁹⁵. Id.
¹⁹⁶. See supra notes 189-93 and accompanying text.
¹⁹⁷. IND. CODE § 31-6-2-1(d) (1981) eliminated part of the judicial discretion by enacting an exclusionary waiver provision. See supra note 30.
²⁰⁰. See supra note 198.
²⁰¹. See supra note 1, 162-64 and accompanying text.
²⁰². See supra note 174 and accompanying text.
PROPOSED CHANGES OF PUBLIC LAW 266

Public Law 266 confronts many of the serious issues associated with juvenile waiver. However, its statutory language is flawed. The problems are not irreparable and more importantly can be rectified with an amendment to the statute.

Shortcomings of Public Law 266

The statutory language of the exclusionary waiver provision could lead to consequences not considered by the legislature when drafting Public Law 266. The exclusionary provision states: "...the court having adult criminal jurisdiction shall retain jurisdiction over the case, even if the individual pleads guilty to or is convicted of a lesser included offense." Under this statutory scheme, the plea bargaining phase becomes crucial. The prosecutor retains the discretionary power to charge the accused juvenile with the offense he deems appropriate. If the juvenile is immediately charged with an excluded offense, he will remain in the adult system even though he is convicted of or pleads guilty to a lesser offense. However, the prosecutor can exercise his discretion to force a plea bargain in nearly any situation.

By not charging the juvenile with an excluded offense, the prosecutor leaves open the possibility of a plea of guilty to a lesser offense and incarceration in a juvenile facility. The juvenile who does not want to risk confinement in an adult facility will plead guilty to the lesser offense. For example, if a juvenile sixteen years of age is charged with sexual assault, he will not automatically be waived to adult court. The juvenile could plead guilty to the charge and be placed in a juvenile correctional facility. Now another possibility could be that the juvenile is charged with rape. The juvenile is automatically waived to adult court jurisdiction. In this court he may be found guilty not of rape but of the lesser included offense of sexual assault and be placed in an adult correctional facility on the basis of the initial charge.

An effective solution to this problem would be to amend the statute so that it read:

... the court having adult criminal jurisdiction shall retain jurisdiction over the case only if the individual is convicted

204. Cox v. United States, 473 F.2d at 335.
of one of the crimes listed in clauses (1) through (4) of this section. If convicted of, or pleads guilty to, a lesser offense, the individual shall be sentenced to a juvenile correctional facility until such time as he reaches the age of majority. If at that time the individual still has not completed his sentence, he shall be transferred to the adult correctional facility until such time as the sentence is complete.

This amendment would help avoid the problems associated with sentencing juveniles with adults.\(^{205}\) Other states have enacted similar statutes to solve this problem.\(^{206}\) An amendment of this nature would not restrain the aggressive stance Public Law 266 takes against the juvenile accused of a serious offense. This amendment would effectively safeguard the juvenile from the overzealous prosecutor and protect the youthful offender from confinement with hardened adult offenders.

An issue Public Law 266 fails to confront is the decrease in criminal activity of the juvenile offender as he grows older.\(^{207}\) It has been shown that for some juvenile offenders, age alone is the cure for criminality.\(^{208}\) Confinement would be detrimental to these individuals since with or without correctional treatment, these offenders would not commit another offense.\(^{209}\)

Although this is a significant finding, the Indiana legislature has not acted upon it by incorporating it in the waiver proceeding. Arguably, the legislature's failure to address this finding is premised on the difficulty of identifying those juveniles for whom age along is the settling force. A response and solution would be not to incarcerate any juvenile until after his twenty-first birthday. However, this would be absurd since over one-half of juveniles offenders are recidivists.\(^{210}\)

The appropriate solution is not presently known. Public Law 266 does not provide for this finding in its aggressive stance towards

\(^{205}\) For a discussion of the problems that occur when juveniles are imprisoned with adults, see generally W. Morrison, Juvenile Offenders (1973).

\(^{206}\) Vermont has recently enacted a provision whereby juveniles convicted of a lesser offense than originally charged, are referred back to the juvenile court for sentencing in the juvenile correctional system. VT. Stat. Ann. tit. 33 § 635(a)(h) (1981).

\(^{207}\) Although the percentages and ages differ for each study, they generally "show that while individual crime rate decreases with age, the severity of official sanctions rise." See Fighting Crime, supra note 177.

\(^{208}\) Id. at 94.

\(^{209}\) Id.

\(^{210}\) See supra note 174.
the juvenile accused of a serious offense. Until a feasible solution is proposed, the aggressive stance and the ramifications of Public Law 266 are justified.

Ramplications of Public Law 266

Regardless of the scope of the waiver statute, waiver rarely occurs except for those individuals who are in the last two years of jurisdiction in the juvenile court and are charged with a serious felony. It is these individuals Public Law 266 excludes from the jurisdiction of the juvenile court. These individuals could have been waived under the prior statute. The 1980 statute allowed a juvenile, aged sixteen to eighteen, accused of a serious offense to be judicially waived to the adult court. In essence, if the juvenile court was waiving the juvenile accused of a serious offense, Public Law 266 should only affect the method by which the juvenile would have been waived. However, if the juvenile court was utilizing its discretionary power properly, Public Law 266 would not have been passed. Therefore, arguably the legislature perceived the need to check excessive judicial discretion.

As indicated, Public Law 266 should not have a drastic effect on juvenile waiver. Nevertheless, it is important that the legislature is looking at the juvenile accused of a serious offense as a significant threat to society. Thus, the juvenile should be tried in a court whose aim includes protecting society. The direction of future amendments to the juvenile waiver process is necessarily speculative. However, if Public Law 266 is any indication of the direction of the legislature, it will most likely be an amendment affecting the disposition of the juvenile offender.

CONCLUSION

The issue of serious juvenile crime seems to emphasize the age of the offender and not the severity of the crime. A murderer,

211. INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO TRANSFER BETWEEN COURTS 18 (1980).
212. See supra note 30.
213. The 1980 statute allowed waiver for these individuals under a judicial waiver process. IND. CODE § 31-6-2-4(d) (1980).
214. Id.
215. See supra note 168 and accompanying text.
216. In 1978, 243 juveniles were waived from juvenile to adult court in Indiana. The ratio of juveniles waived to those not waived is 2.506 / 10,000. Of the juveniles
rapist, robber, or kidnapper should be treated as a serious offender, regardless of his age. Public Law 266 provides for this by prosecuting the juvenile accused of a serious offense in adult court.

Many books, journals, articles and notes on this subject conspicuously disregard the fact that a serious crime has been committed. The Indiana legislature, along with the legislatures of other states which have passed similar waiver provisions, are indicating its displeasure with the traditional approach of treating the problem of serious juvenile crime. The traditional philosophy of the juvenile court is not effectively solving the problems and an alternative must be attempted.

Waiver is not a determination of guilt. The state must still prove guilt beyond a reasonable doubt and twelve of the accused’s peers must ascertain such guilt. Public Law 266 does not mandate an inevitable conviction. Its purpose is to hold the juvenile accused of a serious offense responsible for his actions.

_Perry Carter Rocco_

waived, 46.6% were for personal injury offenses, 48.6% were for property offenses, and 4.7% were for public order offenses (alcohol abuse and drug addiction). Of the 243 cases, 86% were found guilty in adult court, 13% were dismissed, and 1% were found not guilty. The convictions of juveniles in adult court included:

11 Murders and manslaughters
5 Rapes
48 Burglaries
1 Aggravated assault
2 Assault and batteries
24 Miscellaneous property offenses, such as larceny
16 Miscellaneous personal injury offenses, such as sexual assaults and weapon offenses
7 Public Orders

The sentences of those convicted ranged from:

19% less than 1 year
14% minimum 1 year - maximum 3 years
36% minimum 3 years - maximum 5 years
28% minimum 5 years - maximum 10 years
0% over 10 years

_HAMPERIAN, ET AL., ACADeMY FOR CONTEMPORARY PROBLEMS, YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS (as of yet unpublished). Considering the severity of these offenses and the leniency of the sentences, the most likely addition to the juvenile code would be a mandatory sentencing policy similar to one enacted in Delaware. DEL. CODE ANN. tit. 10, § 937(c) (Supp. 1980)._