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BLENDED SENTENCING: A GOOD IDEA FOR JUVENILE SEX OFFENDERS?

KRISTIN L. CABALLERO*

In 1997, two police officers sodomized a male with a broomstick after he was arrested.[1] A judge sentenced one officer to jail for thirty years[2] after he pled guilty to conspiracy to deprive a person of his civil rights, deprivation of civil rights, assault, sexual assault, and witness tampering.[3] The second officer received five years in jail after he pled guilty to perjury.[4] Six years later, a similar crime took place when a high school football team from Mepham, Long Island attended football camp in Pennsylvania.[5] Senior team members sodomized three junior

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[1] *See* United States v. Volpe, 78 F. Supp. 2d 76, 80 (E.D.N.Y. 1999), *aff'd in part,* 224 F.3d 72 (2d Cir. 2000). Abner Louima and Justin Volpe, a New York City police officer, were involved in an altercation outside a nightclub in Brooklyn. *Id.* at 79. After Louima was arrested and taken back to the precinct, he was led to a bathroom where Volpe forced a broomstick approximately six inches up Louima's rectum. *Id.* at 80.

[2] *See* United States v. Volpe, 224 F.3d 72, 79 (2d Cir. 2000) (holding that district court judge did not err in sentencing defendant to thirty years in prison).

[3] *See Volpe*, 78 F. Supp. 2d at 81 (listing six of twelve counts of indictment to which Volpe pled guilty).

[4] *See* United v. Schwarz, 283 F.3d 76, 80 (2d Cir. 2002). In earlier trials, Charles Schwarz was found guilty of conspiring to violate and violating Louima's civil rights as well as conspiracy to obstruct a grand jury proceeding. *Id.* On appeal, Schwarz's conviction to obstruct justice was overturned and his civil rights convictions were vacated and remanded. *Id.* at 81.The night before Schwarz's retrial, a judge sentenced Schwarz to five years in prison in return for his guilty plea. *See also* William Glaberson, *On the Eve of Trial, Ex-Officer Agrees to Perjury Terms in Louima Case*, N.Y. TIMES, Sept. 22, 2002, at 1.

[5] *See* Ellis Henican, *Sex Assault Case More than Hijinks*, NEWSDAY (New York), Sept. 14, 2003, at A8 (referencing Abner Louima's case when discussing alleged sexual abuse and sodomy that took place at Pennsylvania football camp); *see also* Paul Vitello, *Missing in Action: Leaders*, NEWSDAY (New York), May 4, 2004, at A08 (noting similarity between the way in which members of the 70th precinct of the New York City Police Department raped Abner Louima with a broomstick and the way several members of the Mepham High School football team tortured and humiliated their younger teammates); Grant Wahl & L. Jon Wertheim, *A Rite Gone Terribly Wrong*, SPORTS ILLUSTRATED, Dec. 22, 2003 at 68 (observing the resemblance between the Mepham case to that of Abner Louima, who was sodomized by a police officer in 1997).

team members numerous times with broomsticks, golf balls, and pine cones during a "hazing."[6] This time, the offenders' sentences were vastly different. One defendant was sentenced to a military boot camp,[7] the second defendant was sent to a residential treatment center in Pennsylvania to undergo further testing and treatment,[8] while the third defendant received probation.[9]

While the circumstances surrounding the two crimes and the injuries produced were very different, the ultimate crime was the same.[10] Abner Louima suffered serious physical injuries to his bladder and rectum that required surgery,[11] while the Mepham

[6] *See* Karla Schuster & Keiko Morris, *How the Attacks and Fear Escalated; Mepham Court Documents Detail Days of Brutality, Terror*, NEWSDAY (New York), Dec. 18, 2003, at A3 (detailing series of events and sexual assaults that occurred during Mepham High School football team's hazing of younger players). *See generally* Melissa Dixon, *Chalk Talk: Hazing in High Schools: Ending the Hidden Tradition*, 30 J.L. & EDUC. 357, 358 (2001) (listing physical activities considered hazing to include "beating, whipping, branding, electronic shock, placing harmful substances on the body, confinement in small places, and deprivation of sleep, food, or drink").

[7] *See* Brian Harmon, *Hazers Off Easy, 4 Months for L.I. Grid Predators*, DAILY NEWS, Jan. 15, 2004, at 4 (noting that seventeen year old Phil Sofia was sentenced to boot camp for four months, after which time a judge will reevaluate Sofia to see if his sentence should be extended); *see also* Patrick Healy, *Report Says Hazing Culture Led to Attacks on Three Attacks*, N.Y. TIMES, at B1 (stating that one of the defendants was sentenced to boot camp); Karla Schuster & Keiko Morris, *Players Learn Their Fate; 2 Mepham Teens Sent to Juvenile Facilities; 3rd Gets Probation*, NEWSDAY (New York), at A03 (observing that Phil Sofia, the oldest defendant, received the harshest punishment of at least four months in a wilderness boot camp).

[8] *See* Harmon, *supra* note 7, at 4 (stating that defendant, Ken Carney, will be sent to juvenile detention center); *see also* Patrick Healy, *Confinement for 2 Athletes in Sex Abuse of Teammates*, N.Y. TIMES, Jan. 15, 2004, at B6 (noting that Phil Sofia was sentenced to residential treatment center); Laura Williams, *The Longest Yard Hazing - Scarred High School Returns to Gridiron*, DAILY NEWS (New York), Aug. 31, 2004 at 3 (reporting that Ken Carney, named as ringleader in assaults, remains in Pennsylvania treatment facility).

[9] *See* Erin Calabrese, *Judge Slams Mepham Hazers*, N.Y. POST, Jan. 15, 2004, at 11 (observing that sixteen-year-old Tom Diasparra was sentenced to probation after making deal with prosecutors); *see also* Brian Harmon, *High School Football Players Sent to Juvenile Facilities for Hazing*, DAILY NEWS (New York), Jan. 15, 2004 (stating that, after making deal with prosecutor, Tom Diasparra received probation and was freed); Healy, *supra* note 8, at B6 (observing that Tom Diasparra can return to Bellmore-Merrick community, but will not be allowed to return to Mepham High School);

[10] *See* Paul Vitello, *Searching for Grown-Ups*, NEWSDAY (New York), Sept. 14, 2003, at A4 (observing that while Mepham incident may be referred to as "hazing," it is essentially "brutal anal assault with broomsticks and other objects – the kind of violence that sent Abner Louima's attackers to prison for a long time."); *see also* Patrick Healy, *Coach on L.I. Says He Knew of No Hazing*, N.Y. TIMES, Oct. 1, 2003 at B5 (quoting head coach of Mepham High School's football team, Kevin McElroy, who characterized allegations as "vicious criminal acts."); Steve Jacobson, *Mepham: Can Any Good Come of It?*, NEWSDAY (New York), Jan. 18, 2004, at B31 (noting that had victims been girls or younger boys, the crime would have correctly been identified as rape).

[11] *See* United States v. Volpe, 78 F. Supp. 2d 76, 81 (79 (E.D.N.Y. 1999), *aff'd in part, appeal dismissed*, 224 F.3d 72 (2d Cir. 2000) (stating that Louima had internal injuries

victims' physical injuries were not as severe.[12] Yet, both Louima and the younger Mepham team members were all victims of sodomy.[13] Why then, was there such a disparity in sentencing for seemingly similar crimes? The simple answer is that the perpetrators in the hazing incident were all under the age of eighteen and prosecuted as juveniles.[14] Under Pennsylvania state law, the minors could have been charged as adults, which would have resulted in much harsher sentences.[15] While the prosecutor petitioned the judge to move the juvenile's cases to adult court, the judge denied the prosecutor's request.[16]

Both the decision to keep the teenagers in juvenile court and the juvenile sentences imposed led to strong reactions from people inside and outside the community.[17] While some people did support the judge,[18] the vast majority seemed to be highly

that required doctors to repair perforations to his bladder and rectum as well as to perform colostomy and cystostomy procedures).

[12] *See* Bruce Lambert, *Long Island Coaches Say They Tried to Prevent Student Hazing*, N.Y. TIMES, Oct. 9, 2003, at B8 (observing that three Mepham victims required medical treatment for their injuries).

[13] *See* Vitello, *supra* note 10, at A4 (comparing Abner Louima and Mepham hazing incident).

[14] *See* Karla Schuster, *Staying in Youth Court; Pennsylvania Judge Ignores Public Pleas in Ruling in Mepham Case*, NEWSDAY (New York), Nov. 13, 2003, at A3 (affirming that Pennsylvania judge refused to move the Mepham cases to adult court and instead kept all of the defendants' cases in juvenile courts).

[15] *See, e.g.*, 42 Pa. C.S. § 6302 (2004) (listing aggravating circumstances that must be present before juvenile may be charged as an adult); 1 P.L.E. MINORS § 34 (2004) (stating that party objecting to juvenile court's jurisdiction bears burden of showing that provisions of juvenile act are inappropriate); *see also* Keiko Morris & Karla Schuster, *Kids or Adults? That is Question; DA to Say Where he Wants to Try Mepham Players*, NEWSDAY (New York), Oct. 5, 2003, at A3 (noting that while District Attorney sought to have case transferred to adult court, such transfers are rare in Pennsylvania).

[16] *See* Patrick Healy, *L. I. Athletes Are Said to Face Juvenile Trial*, N.Y. TIMES, Nov. 13, 2003, at B1 (observing Pennsylvania judge's ruling that juveniles will not be prosecuted as adults); *see also* Morris & Schuster, *supra* note 15, at A3 (stating that in 2001 fewer than 1% of all cases beginning in Pennsylvania juvenile courts were transferred to adult system); Schuster, *supra* note 14, at A3 (noting that after five-hour hearing, judge declined to transfer cases).

[17] *See* Karla Schuster & Keiko Morris, *'Appalled and Sickened'; Grand Jury Condemns Lack of Responsibility, Takes All Parties to Task for Handling of Attacks at Pa. Football Camp*, NEWSDAY (New York), Mar. 11, 2004, at A02 (commenting on grand jury report from Pennsylvania jury in Mepham case which criticized school district, Pennsylvania justice system, and judge for failing the victims); *see also* Frank Eltman, *Mepham Season Ends After Hazing; Long Island Incident Thought One of the Worst in the Nation*, TIMES UNION (Albany), Oct. 4, 2003, at C5 (observing that over 700 people from community attended meeting at high school regarding hazing incident). *See generally* Schuster, *supra* note 14, at A3 (discussing public outcry at judge's decision to try defendants in juvenile court).

[18] *See generally* Patrick Healy, *Three Athletes to be Charged in Abuse Case, Police Say*, N.Y.TIMES, Oct. 2, 2003, at BI (highlighting division among community); *see also* Schuster & Morris, *supra* note 17, at A2 (expressing grand jury's belief that judges

dissatisfied with the outcome.[19] This majority believed that the defendants were let off too easy and that harsher punishments should have been imposed.[20]

This reaction to the Mepham hazing incident illustrates that there may be flaws in the way our current juvenile court system is handling juvenile sex offenders. Specifically, there is dissatisfaction with both our current juvenile proceedings and the punishments imposed. The issue remaining is, if our current juvenile court system is ineffective in treating juvenile sex offenders, what then would be the most effective means to deal with juvenile sex offenders?[21] On one end of the spectrum, there are those who argue that the juvenile court system is completely inadequate for dealing with juvenile sex offenders and thus juvenile sex offenders should not even be in the juvenile court system to begin with.[22] A less extreme argument is that while our current juvenile court system is not effectively handling juvenile sex offenders, proper changes and reformations to our current system will then enable the system to appropriately handle juvenile sex offenders.[23]

sentencing was limited by juvenile court proceedings). *See generally* Eltman, *supra* note 17, at C5 (observing communities' interest in outcome of hazing incident).

19 *See* Healy, *supra* note 16, at B1 (quoting victim's aunt as stating "These are horrendous crimes. How can any of them be tried as juveniles? It's disgusting. They're going to be laughing all the way back to Long Island."); *see also*; Schuster & Morris, *supra* note 17, at A2 (criticizing sentences); Paul Vitello, *Omission of Their Guilt*, NEWSDAY (New York), Jan.15, 2004, at A02 (describing defendant's sentences as "gifts").

20 *See* Robert J. Conway, *Report Decries Lack of Accountability*, NEWSDAY (New York), Mar. 11, 2004, at A60 (stating that Grand Jury report expressed strong dissatisfaction with how legal system handled Mepham hazing case, specifically noting that Grand Jury was "sickened and appalled by the crimes committed" and was "incensed that these criminals were not tried as adults"); *see also*, Schuster & Morris, *supra* note 17, at A2 (discussing grand jury's belief that harsher sentences should have been imposed).

21 This note will use the terms juvenile, child, and youth interchangeably to refer to someone under the age of eighteen.

22 *See* Michael Kennedy Burke, *This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All It Needs is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027, 1028–31 (1995) (outlining arguments of those in favor of abolishing juvenile court system, including theory that juvenile court is "soft" on juvenile offenders); *see also* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C.L. REV. 1083, 1105–06 (1991) (stating that abolition of juvenile system is more in line with societies' current view, away from rehabilitating convicted criminal towards retribution). *See generally* Robert O. Dawson, *Criminal Law Symposium: Future Trends in Criminal Procedure: The Future of Juvenile Justice: Is it Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 137–40 (1990) (discussing growing support of abolishment of juvenile court system).

23 *See* Burke, *supra* note 22, at 1028–31 (arguing that by recognizing juveniles' due process rights, Court has diminished ability of juvenile courts to serve their social purpose, thus creating a system that is too similar to adult criminal system). *See generally* Ainsworth, *supra* note 22, at 1085 (stating that changing social views on

This note proposes that because juvenile sex offenders commit very harmful and injurious crimes, certain reforms must be made to our juvenile court system to adequately handle such juvenile sex offenders. First, there should be either a statutory exclusion or a mandatory judicial waiver mandating that juveniles sixteen years and older who are charged with a sexual offense must be prosecuted as adults in criminal court. Additionally, once in criminal court, the judge must impose either a blended sentence or an adult sentence. This note will examine juvenile sex offenders and will then describe how the implementation of a blended sentence statute provides the most adequate remedy.

Part I of this note will give a brief history of the establishment and evolution of the juvenile court system. Part II will focus on the unique problems and issues raised by juvenile sex offenders. Part III will then explain the current status of the juvenile court system. Specifically, this note will outline the various waiver provisions and blended sentencing statutes that allow for adult treatment of exceptional juvenile matters. Finally, this note will explain why a statutory exclusion or mandatory judicial waiver, combined with a blended sentencing statute, will provide for the most effective way to deal with juvenile sex offenders.

I. BACKGROUND

A. *History of the Juvenile Justice System*

Prior to the establishment of separate juvenile courts, states prosecuted juveniles in a manner similar to adult prosecutions.[24] In 1899, the first juvenile court was created in Cook County,

childhood and cost of maintaining juvenile system mandate abolition of juvenile court system); Susan K. Knipps, *What is a "Fair" Response to Juvenile Crime?*, 20 FORDHAM URB. L.J. 455, 460–62 (1993) (arguing that increased prosecution of juveniles in adult courts will not decrease juvenile crime).

[24] *See* David S. Tanenhaus & Steven A. Drizin, *Criminal Law: "Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 645–46 (2002) (noting that changes to juvenile prosecutions began to emerge in nineteenth century); *see also* Ainsworth, *supra* note 22, at 1097 ("Progressives fashioned a discrete juvenile justice system premised upon the belief that, like other children, adolescents are not morally accountable for their behavior"); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693-94 (1991) (arguing that nineteenth century brought new interpretation of childhood that was inconsistent with adult prosecution).

Illinois.[25] The creation of juvenile courts was part of the Progressive Era reform.[26] The emerging view was that juvenile criminals were different from adult criminals and should thus be treated differently.[27] The juvenile court system was created to be a venue specially designed to deal with children's special needs and to provide treatment and rehabilitation to juveniles.[28] The underlying premise was the belief that children are malleable and are capable of being reformed.[29] Under the concept of "*parens*

[25] *See* Ira M. Schwartz, et al., *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 535 (1998) (noting that Illinois Juvenile Court Act of 1899 created nation's first juvenile court); *see also* JUVENILE JUSTICE FYI *available at* http://www.juvenilejusticefyi.com/history_of_juvenille_justice justice.html (last visited Sep. 12, 2004) (stating that juvenile justice system was created in late 1800's to reform U.S. policies regarding juvenile offenders). *See generally* Ainsworth, *supra* note 22, at 1097 (stating that Illinois passed Juvenile Court Act in 1899).

[26] *See* Deborah L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DE PAUL L. REV. 903, 905–07 (1996) (noting that during late nineteenth century, United States began to shift from rural, agrarian society to urban industrialized society, causing new problems to emerge as result of industrialization and modernization, including poverty, crime, urban ghettos, and lack of social services, and also leading to reform movement, known as Progressive reform, to address society's new problems, including addressing children's moral and social development); *see also* Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 264–65 (1999) (noting that the Progressive Era movement for reform of juvenile court system was premised on protecting and rehabilitating youths); Feld, *supra* note 24, at 693–94 (stating nineteenth century changing views of children prompted reformation of juvenile prosecution).

[27] *See* Adam D. Kamenstein, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2111–12 (1997) (observing that children were criminals because they lacked proper moral structure and instruction that non-criminal child had received); *see also* Feld, *supra* note 24, at 693–94 (arguing that view that childhood and adolescence were developmental stages emerged in nineteenth century); Mills, *supra* note 26, at 903, 907 (suggesting that ideological shifts in later part of nineteenth century concerned causes underlying juvenile crime).

[28] *See* Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 909–11 (1995) (discussing idea that children juvenile delinquency was like a "disease" and juvenile court would prescribe proper treatment to rehabilitate and cure delinquent of "disease"); *see also* Janet E. Ainsworth, *Symposium—Struggling for a Future: Juvenile Violence, Juvenile Justice: Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 927 (1995) (discussing juvenile courts goal to rehabilitate juvenile offenders and prevent future criminality); Korine L. Larsen, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 841 (1994) (discussing juvenile offenders being placed in system of rehabilitation).

[29] *See* Larsen, *supra* note 28, at 841 (stating that juvenile behavior is reflection of environment and being placed in rehabilitative atmosphere would reform offending behavior); Schwartz, *supra* note 25, at 535 (recognizing juvenile courts were founded on belief that children are "dependent on adults; are developing emotionally, morally, and cognitively, and therefore, are psychologically impressionable and behaviorally malleable; and have different, less competent, levels of understanding and collateral mental function that adults"); Smallheer, *supra* note 26, at 264 (arguing children are more receptive to rehabilitation).

patriae,"[30] the state was deemed to play the role of the parent.[31] As a "parent," the state assumed the power and authority to help rehabilitate the child offender.[32] The overall focus of the juvenile court system was rehabilitation.[33] By the 1940's, every state had established a juvenile court system.[34]

B. Emerging Problems with the Juvenile Court System

During the 1960's and 1970's, dissatisfaction with the juvenile court system began to grow.[35] Juvenile courts were overwhelmed

[30] Black's law dictionary defines *parens patriae* as "the state regarded as a sovereign; the state in its capacity as provider of protection for those unable to care for themselves." BLACK'S LAW DICTIONARY 712 (7th ed. 1999). *See* Barbara Margaret Farrell, *Pennsylvania's Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae*, 98 DICK. L. REV. 739, 743 (1994), discussing state's power to act as parental figure to confined children). *See also* Larsen, *supra* note 28, at 841, stating that *parens patriae* allows state to be surrogate parent.

[31] *See* United States v. Kent, 383 U.S. 541, 554–55 (1966) (noting that in juvenile proceeding, state is *parens patriae* and not prosecuting attorney and judge); *see also* Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 784–85, (2002) (formulating basis of juvenile court on idea that state acts as "surrogate parent to wayward children"); Larsen, *supra* note 28, at 841 (stating *parens patriae* allows state to play role of parent in rehabilitating juvenile offenders). *See generally* Solomon J. Greene, Note, *Vicious Streets: The Crisis of Industrial City and Invention of Juvenile Justice*, 15 Yale J.L. & Human 135, 140–43 (2003) (discussing history and development of *parens patriae* doctrine).

[32] *See* Larsen, *supra* note 28, at 841 (explaining the state, assuming the role of surrogate parent, could provide the necessary help to rehabilitate offending children); Schwartz *supra* note 25, at 535–36 (noting juvenile court plays a dual role as a disciplinarian who punishes the child and as a parent who can supervise, treat and rehabilitate the child); Simon Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 510 (1998) (explaining that as parent, juvenile courts have legal authority to coordinate various treatments, including residential placements and probation, to help reform the juvenile delinquent).

[33] *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. & CRIMINOLOGY 68, 71 (1997) (discussing rehabilitation as aim of juvenile court system); *see also* Lynda E. Frost & Adrienne E. Volenick, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 332 (2004) (noting that juvenile court originally focused on rehabilitation and best interests of the child); Larsen, *supra* note 28, at 841 (discussing treatment, and not punishment as solution to altering juvenile offending behavior).

[34] *See* Ainsworth, *supra* note 22, at 1083 (stating that all fifty states and District of Columbia have juvenile courts); *see also* Thomas F. Geraghty & Steven A. Drizin, *The Debate Over the Future of Juvenile Courts: Can We Reach Consensus?*, 88 J. CRIM. L. & CRIMINOLOGY 1, 2 n.4 (1997) (stating that Wyoming was last state to create juvenile court in 1945); Helen B. Greenwald, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1476 (1983) (stating all fifty states have enacted juvenile court acts).

[35] *See* Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 409 (1999) (noting complaints on juvenile court system's treatment of juveniles); *see also* Larsen, *supra* note 28, at 843 (discussing surge of critics of juvenile court system after World War II); Hon. W. Don Reader, *They Grow Up So Fast: When Juvenile Commit Adult Crimes: The Laws*

with staggering amounts of cases.[36] The courts were not able to adjudicate juvenile claims properly and effectively.[37] Additionally, there was dissatisfaction with the sentences.[38] Juvenile offenders were either given a slap on the wrist or they were sent to large juvenile institutions that were not equipped to effectively handle the juvenile's problems.[39] In sum, the foundational goal of rehabilitation was not being met.

The inadequacies of the juvenile system came to light in 1966 when Kent v. United States[40] was decided. Sixteen-year old Morris Kent was a prior juvenile offender who was arrested in 1961 for housebreaking, robbery, and rape.[41] The juvenile court judge, without conducting a hearing, waived jurisdiction and transferred Kent's case to the U.S. District Court for the District Court of Columbia.[42] At trial, the jury found Kent guilty on six counts of housebreaking and robbery.[43] Kent was sentenced to a

of Unintended Results, 29 AKRON L. REV. 477, 480 (1996) (discussing growing number of juvenile court system critics after 1950's increase in juvenile drug use and violence).

[36] *See* Reader, *supra* note 35, at 480 (noting increase in juvenile drug use and violent youth gangs beginning in 1950's); *see also* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 373 (1998) (noting increase in juvenile crime); Larsen, *supra* note 28, at 846 (noting increase in serious crime rate among juveniles).

[37] *See* Klein, *supra* note 36, at 377–78 (arguing that judges were treating all juvenile offenders similarly, regardless of nature of their crime, prior history, or situation); *see also* Feld, *supra* note 33, at 81 (observing questions raised regarding fairness in sentencing); Reader, *supra* note 35, at 480 (noting attacks regarding sentencing in juvenile court).

[38] *See* Feld, *supra* note 33, at 81 (opining that sentences issued by juvenile courts may not be fair); *see also* Klein, *supra* note 36, at 374 (discussing court leniency with serious offenders and harsh sentences for minor offenders); Reader, *supra* note 35, at 480 (discussing critical attacks made on juvenile court sentences).

[39] *See* Jennifer M. O'Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303–04 (1996) (explaining that juvenile delinquents in 1960s were sent to large institutions that lacked necessary resources to provide individualized treatment); Smallheer, *supra* note 26, at 266 (observing that juvenile offenders were often given "slap on the wrist"); *see also* Klein, *supra* note 36, at 378 (remarking that juvenile status offenders were being locked up in same institutions as juvenile violent offenders, thus defeating purpose of individualized treatment).

[40] 383 U.S. 541 (1966).

[41] *See id.* at 543. "On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her . . . [The fingerprints] matched the fingerprints of Morris Kent . . . Kent was taken into custody by police." *Id.*

[42] *See id.* at 546 (stating that Juvenile Court judge did not rule on petitioner's motions and held no hearings, but rather entered an order waiving jurisdiction and directing that Kent be held for trial under procedure of U.S. District Court for District of Columbia).

[43] *Id.* at 550. "On the six counts of housebreaking and robbery, the jury found that petitioner was guilty." *Id.*

total of 30 to 90 years in prison.[44] Kent appealed from the juvenile court's waiver of jurisdiction[45] and urged numerous grounds for reversal of his conviction.[46] The Supreme Court held that Kent was denied proper procedural safeguards[47] and remanded the case back to the District Court for a hearing *de novo* on waiver.[48] The Court noted that while the juvenile court has considerable latitude in determining whether or not to waive jurisdiction, the latitude is not absolute.[49] The Court held that as a condition to a valid waiver, the petitioner was entitled to a hearing and access to certain juvenile records the judge had considered.[50]

While *Kent* was ultimately decided on procedural grounds, it is considered to be a pivotal case because the Court openly questioned and criticized the juvenile court system. The Court stated that "There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation."[51]

Additionally, *Kent* is a landmark case for two other reasons. First, the Court recognized that waivers into adult criminal court were appropriate in certain circumstances.[52] Second, the Court

[44] *Id.* "Kent was sentenced to serve five to fifteen years on each count as to which he was found guilty, or a total of 30 to 90 years in prison." *Id.*

[45] *Id.* at 548 (stating that petitioner appealed from Juvenile Court judge's order waiving jurisdiction).

[46] *See* Kent v. United States, 383 U.S. 541, 551 (1966). "Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal." *Id.*

[47] *See id.* at 563. "[W]e conclude that the Court of Appeals and the District Court erred in sustaining the validity of waiver by the Juvenile Court." *Id.*

[48] *See id.* at 565. "[W]e vacate the order of the Court of Appeals and the judgment of the District Court for a hearing *de novo* on waiver, consistent with this opinion." *Id.*

[49] *See id.* at 552–53. "We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or . . . should waive jurisdiction. But this latitude is not complete." *Id.*

[50] *See id.* at 557. "[W]e conclude that as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court . . ." *Id.*

[51] *Id.* at 556–57.

[52] *See* Kent v. United States, 383 U.S. 541, 551–54 (1966) (noting that though Court never questioned validity of Juvenile Court Act, which governed waivers in this case, Court instead focused on statutory language that expressly provided for jurisdictional waivers after full investigation).

gave guidelines for a juvenile court judge to use when deciding whether or not to waive jurisdiction.[53]

C. *Modern Juvenile Court System – Shift in Focus from Rehabilitation to Retribution*

After *Kent*, both the focus of the juvenile justice system and American attitudes began to shift away from rehabilitation and towards retribution.[54] Retribution focuses on punishing the criminal rather than trying to rehabilitate him,[55] and is

[53] *Id.* at 566–67. The Court gave a list of eight factors a judge should consider when deciding if a jurisdictional waiver is appropriate. The eight *Kent* factors are:

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, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a 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 court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
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 jurisdictions, prior records 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."

Id. at 566–67.

[54] *See* Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WISC. L. REV. 375, 390 (1996) (acknowledging movement towards focusing on retribution and accountability, which are both objectives of criminal justice system); *see also* Feld, *supra* note 33, at 73 (arguing that Supreme Court decisions during 1960's unintentionally transformed juvenile court system into "wholly-owned subsidiary of criminal justice system"); Eric J. Fritsch & Craig Hemmens, *Juvenile Justice and the Criminal Law: An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 563–65 (1996) (explaining change in public attitude toward juvenile punishment).

[55] *See* Richard S. Murphy, Comment, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1306–09 (1988) (summarizing basic premises behind retributive theory of punishment). *See generally* Aimee D. Borromeo, Comment, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175, 186–88 (2002) (discussing mental state required for retributive punishment); Christopher Adams Thorn, Note, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199,

characteristic of an adult criminal sentence.[56] There are various reasons why the focus has shifted to retribution.

First, there has been a perceived increase in juvenile crime rates.[57] While juvenile violent crime arrest rates rose between 1980 and 1994, after 1994, juvenile arrest rates have been steadily declining.[58] Second, there is the "superpredator theory."[59] This is a term coined during the 1980's and 1990's to describe a "new breed" of juvenile offender.[60] A superpredator is

201 (1983) (noting that under retribution theory, we seek to punish simply because offender deserves punishment).

56 *See generally* Katherine L. Evans, Comment, *Trying Juveniles as Adults: Is the Short Term Gain of Retribution Outweighed by the Long Term Effects on Society*, 62 MISS. L.J. 95, 107-09 (1992) (analyzing how the juvenile justice system is beginning to encompass adult retributive punishment); Barry C. Feld, *Criminal Law: The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM L. & CRIMINOLOGY 471, 511 (1987) (observing fundamental changes in states that have rejected rehabilitative juvenile sentencing in favor of "offense-oriented adult sentencing policies of retribution, deterrence, and selective incapacitation"); Marisa Slaten, Note, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 823–24 (2003) (discussing characteristics of adult retributive punishment and how it differs from traditional juvenile punishment).

57 *See* Judith L. Hunter, Symposium, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: A Dilemma For the Juvenile System*, 29 AKRON L. REV. 473, 473-74 (1996) (noting rise in violent crime committed by youth); *see also* Hon. John B. Leete, Symposium, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: A Dilemma for the Juvenile System*, 29 AKRON L. REV. 491, 497-98 (1996) (discussing 94% increase in homicides committed by Pennsylvania juveniles from 1987-1994); Reader, *supra* note 35, at 488-89 (noting FBI report stating that 11% of all violent crimes are committed by people under 18).

58 *See* Howard N. Snyder & Melissa Sickmund, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 Report, available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/chapter5.pdf (graphing juvenile violent crime arrest rates from 1980 until 1997 which shows that juvenile violent crime arrest rates peaked in 1994, but has since been steadily declining). *See generally* Christine T. Greenwood, Note, *Holding Parents Criminally Responsible for the Delinquent Acts of Their Children: Reasoned Response or "Knee-Jerk Reaction"?*, 23 J. CONTEMP. L. 401, 408 (1997) (noting that juvenile crime increased at rate of 11 times from 1991-1995); Brandi Miles Moore, Comment, *Blending Sentencing for Juveniles: The Creating of a Third Criminal Justice System?*, 22 J. JUV. L. 126, 128 (2001) (noting that while juvenile violent crime rates increased between 1980 and 1993, partially due to availability of guns, juveniles only accounted for 19% for all violent crime arrests in 1994).

59 *See* Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 176–77 (2000) (observing that commentators, sociologists, and criminologists used this term to reflect changing perceptions of juvenile offenders); *see also* Lizabeth N. de Vries, Comment, *Guilt by Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F.L. REV. 191, 196-97 (2002) (discussing qualities of "Superpredator"); Howard N. Snyder, Perspective, *Gray Rage: A Researcher's Dilemma*, 3 J. CENTER CHILDREN & CTS. 99, 99 (2001) (defining "Superpredator").

60 *See* Snyder, *supra* note 59, at 99 (defining "Superpredator"); *see also* Tanenhaus & Drizin, *supra* note 24, at 642 (noting that various academics invented term to describe"remorseless and morally impoverished youth" whom they predicted would arrive like "tidal wave"); de Vries, *supra* note 59, at 196–97 (discussing qualities of "Superpredator").

thought to have no social conscience, to exhibit extremely violent behavior, and to be beyond the control of the juvenile court system.[61] Lastly, in the wake of Columbine and other highly publicized school shootings, extremely violent and serious crimes by juveniles grabbed the public's attention.[62] All of these reasons have led the public and legislature to take new measures in order to "get tough" on juvenile crime.

II. JUVENILE SEX OFFENDERS

Although this proposal can be applicable to a variety of juvenile offenders, this Note focuses on juvenile sex offenders. In order to understand why this proposal will be the most adequate and effective means to deal with juvenile sex offenders, we first must understand the unique problems and issues that juvenile sex offenders pose.

A. Characteristics and Motivations of Juvenile Sex Offenders

The terms "sex offender," "sex crimes," and "sex offenses" are broad terms. As used in this note, they refer to all offenders and crimes that are sexual in nature, including, but not limited to rape, incest, and molestation.

Traditionally, juvenile sex offenders have been identified with crimes of rape, incest, and molestation.[63] In recent years, there

[61] *See* Kenneth B. Nunn, *The End of Adolescence: The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L REV. 679, 711–14 (2002) (listing common attributes of "Superpredator" juveniles and discussing stereotype cast onto child named "Superpredator"); *see also* Snyder, *supra* note 59, at 99 (describing superpredators as juveniles who would "kill for a new pair of sneakers" and who had abused drugs and alcohol so much that their DNA was altered); de Vries, *supra* note 59, at 196–97 (discussing qualities of "Superpredator").

[62] *See* Tara Kole, *Recent Development: Juvenile Offenders*, 38 HARV. J. ON LEGIS. 231, 231–32 (2001) (stating that day after shootings, representative Bill McCollum introduced Congress House Bill 1501, Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act, which expanded crimes a juvenile could be tried in adult federal court, lowered age that a juvenile offender could be tried as an adult in federal court, and allowed for prosecutorial waivers, but bill was never enacted despite fact that House and Senate overwhelmingly passed bill); *see also* Jennifer A. Chin, Note, *Baby-Face Killers: A Cry For Uniform Treatment For Youth Who Murder, From Trial to Sentencing*, 8 J. L. & POL'Y 287, 335–36 (1999) (explaining public outcry for harsher juvenile sentences in wake of Columbine); Darci G. Osther, Note, *Juvenile Informants – A Necessary Evil?*, 39 WASHBURN L.J. 106, 113–14 (1999) (noting public interest in changing juvenile punishment system).

[63] *See* Victor I. Vieth, *When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLINE L. REV. 47, 51–52 (2001) (discussing types of sex crimes juveniles commit most often); *see also* Timothy E.

has been a development of a new breed of juvenile sex offenders: those who have committed sexual offenses during hazing incidents.[64] The types of crimes committed, and those juvenile offenders who commit them, greatly differ. This note will compare the characteristics and motives of both the traditional juvenile sex offender and the hazer. Additionally, this note will show that while the traditional juvenile sex offender and the hazer do not share many of the same characteristics and motives, this proposal is an effective solution to deal with all types of juvenile sex offenders.

1. The Traditional Sex Offender

Although there is no one profile that all sex offenders fit in, there are certain common characteristics that researchers and experts believe many juvenile sex offenders share.[65] While we will never be able to conclusively know why juvenile sex offenders commit these crimes, the common characteristics are closely related and help us formulate meaningful juvenile policies.

First, the overwhelming majority of juvenile sex offenders are male.[66] Additionally, juvenile sex offenders tend to be socially

Wind, *The Quandary of Megan's Law: When the Child Sex Offender is a Child*, 37 J. MARSHALL L. REV. 73, 76–77 (2003) (explicating extent to which juveniles commit certain crimes); Pamela S. Richardson, Note, *Mandatory Juvenile Sex Offender Registration and Community Notification: The Only Viable Option to Protect All the Nation's Children*, 52 CATH. U.L. REV. 237, 246 n.56 (2002) (listing percent distribution of sex crimes among juveniles).

64 *See generally* Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996) (discussing facts of specific sexual hazing incident); *see also* Scott R. Rosner & R. Brian Crow, Article, *Institutional Liability for Hazing in Interscholastic Sports*, 39 HOUS. L. REV. 275, 279–82 (2002) (explaining how far problem of "hazing" reaches into High School interscholastic sports); Meredith Goldstein, *Hazing Stress Blamed for Teen's Arrest*, BOSTON GLOBE, Oct, 10, 2002, at 16 (observing that football team's hazing involved sexual assault of younger players).

65 *See* Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 295–302 (1998) (noting that juvenile sex offenders have similar family relationships); William Winslade, T. Howard Stone, Michele Smith-Bell & Denise M. Webb, *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment of Old Punishment?*, 51 SMU L. Rev. 349, 360–64 (1998) (providing list of common characteristics of juvenile sex offenders); Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplications of Sex-Offender Registration and Community Notification Law to Juveniles*, 91 CALIF. L. REV. 163, 190-94 (2003) (discussing common characteristics of juvenile sex offenders).

66 *See* Wind, *supra* note 63, at 107 (stating that 90% of juvenile sex offenders are male with median age of fourteen); Jessica E. Mindlin, Comment, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model For Reform*, 65 WASH. L. REV. 189, 193 (1990) (stating that most juvenile sex offenders are male); Sander N. Rothchild, Note, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance*,

isolated from their peers.[67] They are often described as "loners" who are shy, timid, withdrawn and who "lack the social skills necessary to develop close and meaningful relationships."[68] These loners are more likely to commit crimes against children, such as molestation.[69] As a result of isolation, a juvenile sex offender may turn to younger children who they perceive as socially safer and easier to control.[70]

One of the most common characteristics shared by juvenile sex offenders is that they themselves have been victims of prior sexual or physical abuse. Statistics show that anywhere from 40% to 80% of juvenile sex offenders have suffered prior sexual abuse.[71] As a victim of sexual abuse, the offender then victimizes another person to perpetuate the "cycle of abuse."[72]

Juvenile sex offenders frequently come from a dysfunctional home and family life.[73] Parents of juvenile sex offenders have

4 J.L. & POL'Y 719, 724-25 (observing that juvenile females consist of less than 1% of rapists).

67 *See* Martin & Pruett, *supra* note 65, at 295 (stating that researchers have concluded that social isolation is hallmark descriptor of juvenile sex offender); *see also* Janan Hanna, *Teen Rape Suspect Could Face Adult Trial*, CHI. TRIB., Jan. 14, 1998, Metro Du Page, at 3 (describing some young rapists as socially isolated, unable to get a date, or mentally challenged); Serena S. Thakur, Note, *Juvenile Sex Offenders: Proposition 21 - The Hope for a Better Solution*, 21 J. JUV. L. 97, 98 (2000) (reporting that one study showed that "65% of juvenile sexual offenders showed evidence of significant social isolation").

68 Martin & Pruett, *supra* note 65, at 296.

69 *See id.* at 296 (noting that juvenile molesters are more likely as a group to have less intimate relationships and fewer friends, particularly, fewer female friends); *see also* Sean Flynn, *Actions Often Reflect Abuser's Experiences*, BOSTON HERALD, Apr. 17, 1994, at 19 (describing typical teen-age sex offenders who molest younger children as socially inept and uncomfortable with peers of their own age). *See generally* Thakur, *supra* note 67, at 98–100 (observing that many juvenile sex offenders have few or no friends).

70 *See* Martin & Pruett, *supra* note 65, at 296 (noting that juvenile child molesters may look to younger children who appear to be emotionally safer); *see also* Barbara Laker, *An All American Boy- But Jeff's Good Looks Hide A Dark Side*, SEATTLE POST-INTELLIGENCER, Jan. 9, 1992, at A6 (reporting story of 16 year old child molester who described his victims as "less knowledgeable, easier to victimize"); Wind, *supra* note 63, at 108 (observing that loners may perceive young children as easier to manage).

71 *See* Wind, *supra* note 63, at 107 (noting that sex offenders are more likely to be prior victims of abuse); *see also* Flynn, *supra* note 69, at 19 (noting that juvenile abusers "tend to pick victims close in age to their own when they were abused"); Stacey Hiller, Note, *The Problem With Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 281 (1998) (commenting that past sexual victimization may be contributing cause to juvenile sex offender's inappropriate behavior).

72 *See* Robin Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 35 SAN DIEGO L. REV. 1195, 1240 (1996) (observing that juvenile sex offenders are often themselves victims of prior sexual abuse and are thus repeating the cycle of abuse); Thakur, *supra* note 67, at 99 (observing the cyclical nature of sexual abuse).

73 *See* Martin & Pruett, *supra* note 65, at 296–97 (observing that family dysfunction is common characteristic shared by all juvenile delinquents, not just juvenile sex

been found to have high rates of psychiatric disorders, alcoholism, family violence, and divorce.[74] Additionally, juvenile sex offenders themselves often suffer from various psychiatric disorders, specifically disorders that affect the juvenile's impulse control and cause aggressive behavior.[75] A juvenile sex offender may act out his aggression or psychotic tendency in the form of a sexual assault.[76]

2. Hazing: A New Breed of Juvenile Sexual Offender

Traditionally, juvenile sex offenders were often identified with sex crimes such as rape, molestation, incest, etc.[77] In recent years, a new type of sex crime is emerging. Sexual offenses

offenders); *see also* Tom Leversee & Christy Pearson, *Responding to Juvenile Delinquency: Eliminating the Pendulum Effect: A Balanced Approach to the Assessment, Treatment, and Management of Sexually Abusive Youth,* 3 J. CENTER CHILDREN & CTS. 45, 47 (2001) (noting that sexually abusive youths often have experienced history of abuse, both sexual and physical as well as neglect, loss of parent, disruptions of care, or domestic violence); Howard Pankratz, *Court: Limits on Sex-Offender Foster Homes Unfair Restrictions Block Care, Justices Rule,* DENV. POST, Jan. 14, 2003, at B-02 (noting that many juvenile sex offenders living in city's foster homes came from dysfunctional families).

74 *See* Center for Sex Offender Management, *Understanding Juvenile Sexual Offender Behavior: Emerging Research, Treatment Approaches and Management Practices,* at 2 (Dec. 1999) [hereinafter *Juvenile CSOM*], *available at* http://www.csom.org/pubs/juvbrf10.pdf (linking exposure to family violence to juvenile sex offender's motivation); *see also* Martin & Pruett, *supra* note 65, at 296–97 (reporting studies which showed that juvenile sex offenders tend to have high rates of separation from their parents, parents with psychiatric disturbances, alcohol abuse, and domestic violence); Thakur, *supra* note 67, at 99 (finding that juvenile sex offenders tend to grow up in similar households).

75 *See Juvenile CSOM, supra* note 74, at 3 (noting that studies have shown that up to 80% of juvenile sex offenders have a diagnosable psychiatric disorder, that between 30 % and 60% of juvenile sex offenders exhibit some form of academic or learning disability, and that one researcher has identified four categories of juvenile sex offenders including adolescents with a psychiatric condition that compromises his or her ability to regulate and inhibit aggressive and sexual impulses); *see also* Hiller, *supra* note 71, at 281–82 (stating that various sociological factors can act as causes of juvenile sexual misconduct, as well as that biological abnormalities can also contribute to sexually aggressive behavior); Leversee & Pearson, *supra,* note 73, at 46 (noting that biological abnormalities such as chemical imbalances in brain also contribute to juvenile's overwhelming need for sensation and encourage sexually aggressive behavior).

76 *See* Wind, *supra* note 63, at 107–08 (theorizing that juvenile's psychiatric disorder may lead him to have problems controlling his impulses and aggressive behavior); *see also* Hiller, *supra* note 71, at 282 (noting that some juveniles, especially those in face of encouragement, channel need for thrill-seeking into sexually aggressive behavior); Richardson, *supra* note 63, at 246–48 (describing category of juvenile sex offenders who abuse peers or adults as more likely to commit their offenses with aggression and violence).

77 *See* Leversee & Pearson, *supra,* note 73, at 46 (noting that juveniles commit as many as 13 % to 16 % of rapes and 18 % of other sexual assaults); *see also* Martin & Pruett, *supra* note 65, at 286–87 (stating that approximately 20% of all rapes and between 30% and 50% of all child molestations are perpetrated by adolescent males); Vieth, *supra* note 63, at 51 (noting that brother-sister sexual contact may be five times as common as father-daughter incest).

committed during "hazings" have gained increasing notoriety and have created a new breed of sexual offenders.[78]

Hazing can be defined as "any action taken or situation created, intentionally, whether on or off a school campus, to produce a mental or physical discomfort, embarrassment, harassment, or ridicule."[79] Hazing is not a new phenomenon and has in fact been around for many years.[80] Hazing is generally done in fraternities, sororities, athletic teams, clubs, organizations, etc.[81] Hazing often includes mental and or physical aspects that a younger or new member must endure to become part of the organization or team.[82] While hazing often includes harmless initiation rites, it has escalated to very serious

[78] *See* Karen Kucher, *Hazing Not 'Just Fun' Anymore; Schools Enact Strict Policies on Pranks*, SAN DIEGO UNION-TRIBUNE, Oct. 2, 2000, at B1 (noting that three baseball players at Rancho Bernardo High School sodomized a freshman teammate with broomstick); Bob Migra, *Hazing Haunts Memory of Ex-Wrestler*, PLAIN DEALER (Cleveland), May 19, 2003, at C10 (recounting late 1990's hazing incident that occurred when fellow wrestlers hazed fifteen year old member of team by verbally, physically, and sexually assaulting him); *see also* Fred A. Mohr, *Schools Work to Curb Abuse; Parents Must Monitor More What Children Are Exposed to, Expert Says*, POST-STANDARD (Syracuse), Nov. 30, 2003 at B3 (suggesting that "[t]he Fulton locker room case, as well as two sports-related hazings at Tompkins County schools and a Long Island football camp incident, represent the dark side of the changing sexual mores of the past few decades").

[79] Christine Torres, *Making Waves; Hazing Hits at Dignity of Human*, LEDGER (Lakeland, Fl.), Oct. 30, 2001, at H1.

[80] *See* Dara Aquila Govan, *"Hazing Out" the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability*, 53 RUTGERS L. REV. 679, 686 (2001) (recalling that hazing can be traced back to World War II where "boot camp mentality" of veterans eventually wound up in Greek life); *see also* Michael John James Kuzmich, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths*, 31 MCGEORGE L. REV. 1087, 1093 (2000) (discussing hazing's existence in some form in probably every school "since time immemorial"); Rosner & Crow, *supra* note 64, at 276 (observing that hazing has been around for over one hundred years in United States).

[81] *See* Dixon, *supra* note 6, at 357 (stating that "hazing is normally associated with college-level organizations such as fraternities, sororities, and sports teams. . . ."); *see also* Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 N.E. J. ON CRIM. & CIV. CON. 377, 377–78 (2002) (listing places where hazing is prevalent, including athletic teams, fraternities, and military); Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls*, 14 AM. U. INT'L L. REV. 519, 527-29 (1998) (detailing typical case of ritual hazing in military).

[82] *See* Govan, *supra* note 80, at 687 (tracing transition in hazing from one that originally consisted of "rough-and-tumble antics such as swats with paddles" to one evolving into "public stunts, humiliating games, punishing physical exercises and other forms of psychological discomfort" (quoting Katy Marquardt, *A Compact History of the Greek Empire at U. Texas*, DAILY TEXAN VIA U-WIRE, Aug. 27, 1999)); *see also* Pelletier, *supra* note 81, at 378–79 (summarizing what hazing is by providing various definitions created by number of organizations and associations); Toney & Anwar, *supra* note 81, at 528–29 (detailing physical and emotional toll that typical hazing event took on less-tenured military recruits).

and dangerous activities in the past few years.[83] Most notably, there have been recent hazing events that have involved juvenile high school students committing sexual offenses.[84] These hazing events involve serious sexual crimes that require the proper punishment of the offenders.

Although there is little research on teenager hazers, it appears that juveniles who commit sex offenses during "hazings" or initiation rites often do not share the same common characteristics that traditional sex offenders usually have. The most obvious difference is that hazers are generally not loners.[85] In fact, they are the opposite. They are often very popular and social teenagers who are on athletic teams, cheerleading squads, and clubs.[86] In addition, there is typically no evidence that hazers were prior victims of abuse.[87] However, there is evidence

[83] *See* David S. Doty, *No More Hazing: Eradication Through Law and Education*, 10 UTAH BAR J. 18, 18 (1997) (recounting Maryland fraternity hazing incident where victim was beat with hammer, whip, and chair leg); *see also* Govan, *supra* note 80, at 679 (discussing fraternity hazing incident where two pledges suffered kidney failures after fraternity members painted fraternity symbol on pledges' backs with toxic substance); Rosner & Crow, *supra* note 64, at 276 (recognizing that harmless hazing can include having team rookies carry bags or sing songs).

[84] *See* Jackie MacMullan, *Aftershocks the Pentucket Hazing Case Still Torments a Victim and a Community*, BOSTON GLOBE, Mar. 3, 2002, at C1 (reporting on an incident where high school football player was pinned down by three teammates who attempted to violate him with peeled banana); *see also* Greg Sandoval, *Athletes Face Assault Charges*, WASH. POST, Sept. 6, 2002, at D10 (detailing high school hazing incident where teenage boy was forced to participate in simulated sex acts during preseason football camp by other teammates); Schuster & Morris, *supra* note 6, at A03 (describing incidents of sodomy where senior members of Mepham's high school football team hazed younger players with golf balls, broomsticks, and pine cones).

[85] *See generally* Doty, *supra* note 83, at 18 (describing high school hazing incident involving football team captains and student body officer); Govan, *supra* note 80, at 689 (reviewing incident where pledge at University of Nevada's social drinking club consumed excessive amounts of alcohol at club's initiation ceremony where many club members were present); Joe LaPointe, *Hockey; Trying to Skate Past a Hazing Scandal*, N.Y. TIMES, Sept. 15, 2000, at Sports Desk (reporting on hazing incident where University of Vermont's new hockey team members were coerced into various activities to appease veteran players on team).

[86] *See generally* Doty, *supra* note 83, at 18 (detailing hazing incident committed by individuals including football team captains and an officer of student body); John Gonzalez, *Federal Court Gets Party Case; Cheerleaders' Ouster Raises Legal Questions*, HOUS. CHRONICLE, Mar. 28, 2002, at A25 (noting that 15 out of 16 Alamo Heights High School cheerleaders were dismissed from squad due to party involving drinking and hazing); Rosner & Crow, *supra* note 64, at 279–91 (summarizing recent hazing events which included members of Connecticut high school wrestling team and members of Arizona basketball and track team).

[87] *See generally* Doty, *supra* note 83, at 18 (describing hazing incident with no mention of any previous sexual abuse suffered by any of hazers); Brian Harmon, *Ringleader of Hazing Pack; Troubled Teen Blamed for Leading Vicious Attacks*, DAILY NEWS (New York), Dec. 21, 2003, at 94 (describing three teens involved in Mepham hazing incident and not mentioning any prior sexual abuse when discussing their

that some hazers may come from dysfunctional families and troubled home lives.[88] Further, sex offenses committed during hazings are committed for different motivations.[89] Hazing is usually done for a variety of reasons such as to foster teamwork, form a bond between old and new members, carry on "tradition," prove loyalty, and serve as a rite of passage.[90]

The advent of recent hazings involving sexual crimes requires us to impose legislative reforms to deal with such sexual offenders. While the characteristics and motives of traditional juvenile sex offenders and hazers are different, they are both still committing harmful sexual offenses that cause serious harm. The ideal legislative reform would be one that will effectively deal with both the traditional juvenile sex offender and the hazer. This proposal is applicable to all juvenile sex offenders because it is based on the sexual nature of the offense and the age the juvenile commits the crimes. Additionally, blended sentencing is an effective means to deal with all sexual offenders.

B. Recidivism and Rehabilitation

One of the problems we face when dealing with sex offenders or juvenile offenders is whether or not they are capable of being

disciplinary records and personal lives outside of school); LaPointe, *supra* note 85, at Sports Desk (leaving out any hint of hazers having suffered prior sexual abuse).

[88] *See* Harmon, *supra* note 87, at 94 (observing that one of defendants in Mepham incident had father with history of drug abuse, legal problems, and martial problems); *see also* Reena Shah, *Increase Seen in Sex Crimes Among Youth*, ST. PETERSBURG TIMES (FLORIDA), Dec. 18, 1989, at 1B (referring to therapist sentiments that parents rarely detect abuse of juvenile sex offenders and actually often contribute to abuse through creation of some type of residual anger within child which originates from home); *cf.* Dixon, *supra* note 6, at 362 (conveying that parents should take active role in "teaching their children the values of civility and kindness in connection with their behavior towards others . . .").

[89] *See generally* Govan, *supra* note 80, at 686 (discussing how hazing was used to imbue notions of Greek tradition and life. Sexual abuse is far from notions of such tradition); Harmon, *supra* note 87, at 94 (noting that one of defendants involved with Mepham incident had threatened one of victims prior to commencement of crime due to hostile shoving match that had taken place between two parties indicating that his motivations were not for sake of tradition); Kuzmich, *supra* note 80, at 1093 (detailing how hazing signified formal introduction where beginner had been given some new knowledge).

[90] *See* Dixon, *supra* note 6, at 361–62 (noting that Alfred University survey found that students felt hazing was "traditional rite of passage" necessary for membership into an organization); Govan, *supra* note 80, at 686 (discussing history of hazing and how traditions and rites associated with Greek ideals were used to rationalize hazing); Michael Dobie, *What is Hazing?*, NEWSDAY (New York), Dec. 12, 1999, at C7 (finding that hazing is supposed to strengthen bonds between team members).

rehabilitated.[91] This is an even more pertinent concern when we are dealing with juvenile sex offenders.[92] There is a common public belief that sex offenders, both juvenile and adult, are not capable of being reformed.[93] Society fears are further fueled by the belief that juvenile sex offenders will continue to commit crimes and will grow up to become more serious adult sex offenders.[94] Indeed, studies often show that they have higher rates of recidivism.[95] If juvenile sex offenders are not capable of being rehabilitated, then why should we send them to a juvenile

[91] *See* Kathey Alexander, *'Plenty of Blame to Go Around' Legislators Cite Juvenile Justice System's Woes, Seek Remedies*, ATLANTA JOURNAL AND CONSTITUTION, Sept. 29, 1994, at 1 (stating that problems with juvenile justice system at issue had to deal with decreasing confidentiality afforded to juveniles and costs of system itself); Gregory Kane, *Slaps on Wrist Hurt Juveniles, Their Victims*, BALT. SUN, Aug. 21, 2004, at 1B (characterizing Baltimore's rehabilitation-based juvenile justice system as ineffective slap on wrist of juvenile criminals); Roger Roy, *They Need Help and Don't Get it; Even Insiders Admit Florida's Juvenile-Justice System is Failing*, ORLANDO SENTINEL (FLORIDA), May 27, 1990, at A1 (discussing how Florida's juvenile justice system, which is based on philosophy of correcting and helping problematic juveniles, is failing as number of youth-crimes increases rapidly and nature of crimes involved becomes more severe).

[92] *See* Alexander, *supra* note 91, at 1 (introducing article by noting that 11-year old rapist was let out onto streets to confront his victim after only 19 days of rehabilitation); *see also* Shah, *supra* note 88, at 1B (stating that parents of juvenile sex offenders often take their child's crimes lightly and do not act sufficiently to prevent further occurrences and that merely telling offenders to "stop" is ineffective. The article further discusses jail as an insufficient rehabilitative technique for juvenile sex offenders because they are typically already alone in their lives and do not need to be further isolated from society); Vieth, *supra* note 63, at 71–72 (noting that juvenile sex offenders are likely to commit sexual or non-sexual offense again in future).

[93] *See* Robert R. Hindman, *Megan's Law and it's Progeny: Whom Will The Courts Protect?*, 39 B.C. L. Rev. 201, 204 (1997) (stating that majority of sex offenders are not successfully rehabilitated); *see also* Thakur, *supra* note 67, at 101 (discussing that sex offenders had higher rate of recidivism than other juvenile offenders); Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 KY. L.J. 477, 488 (1997) (stating that sex offenders are most difficult class of criminals to rehabilitate).

[94] *See* Hindman, *supra* note 93, at 203 (noting that sex offenders' propensity to commit offenses does not decrease with time); *see also* Martin & Pruett, *supra* note 65, at 287–88 (stating that research revealed that many young sexual offenders grow into older, more dangerous predators); Thakur, *supra* note 67, at 101 (noting that society's views are shaped by common fear that juvenile sex offenders will continue to commit even more serious sexual offenses as they become adults).

[95] *But see* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 896 (stating that sex offenders are no more likely to be recidivists than other criminals); *see also* Leonore M.J. Simon, *The Treatment of Sex Offenders: The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 N.E. J. ON CRIM. & CIV. CON. 387, 392 (1997) (arguing that there is no empirical data to support conclusion that sex offenders have recidivism rates higher than non-sex offenders); Alan Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 335 (1998) (stating that sex offenders are no more likely to relapse into criminal behavior than other types of offenders).

facility in the first place? Instead, adult prison may be the proper place for them.

The answer to these concerns is that first, there is no conclusive proof the sex offenders, both juvenile and adult, cannot be rehabilitated.[96] Second, despite the lack of research on juvenile sex offenders, many commentators believe that the recidivism rates of juvenile sex offenders are not higher than recidivism rates of non-sexual juvenile offenders.[97] Most of the research on juvenile sex offenders has been done on those juveniles who have received some form of treatment.[98] Several studies in the mid 1990's showed that juvenile sex offenders who have participated in treatment programs had recidivism rates of between 7% and 13% over a five-year period.[99] Other studies done during the same time have shown recidivism rates of non-sexual offenders to be between 15% and 50%.[100] Studies on adult sex offenders have produced analogous results.[101]

[96] *See* Michael H. Marcus, 1 OHIO ST. J. CRIM. L. 671, 673–74 (2004) (stating that treatment aimed at risk factors is significantly effective at lowering sex offender recidivism); *see also* Martin & Pruett, *supra* note 65, at 310 (concluding that recent improvements in modern treatments suggest that they have significant impact on recidivism rates (quoting Judith v. Becker, *Offenders: Characteristics and Treatment*, 4 SEXUAL ABUSE OF CHILDREN 181, 186 (1994)); Robin Fretwell Wilson, *Justice, Ethics, and Interdisciplinary Teaching and Practice: Mental Health and the Law*, 14 WASH. U. J.L. & POL'Y 315, 321-22 (indicating that treatment may mitigate risk of recidivism in sex offenders).

[97] *See* Richardson, *supra* note 63, at 249 (noting that research on juvenile sex offender recidivism is scarce); *see also* Wind, *supra* note 63, at 105 (indicating that juvenile offenders were more likely to repeat non-sexual related acts than to commit another sexual offense); Center for Sex Offender Management, *Recidivism of Sex Offenders* (May 2001), at 16, *available at* http://www.csom.org/pubs/recidsexof.html [hereinafter *Recidivism CSOM*] (commenting on lack of research on juvenile sex offender recidivism rates).

[98] *See* Wind, *supra* note 63, at 105 (stating that most studies on juvenile sex offenders examine effectiveness of treatment protocols). *But see* Martin & Pruett, *supra* note 65, at 313 (indicating that research is slow in coming because most youths will not choose treatment, and therefore research, unless mandated). *See generally Recidivism CSOM*, *supra* note 97, at 13–14 (graphing statistics from studies done on comparisons of recidivism rates of treated and untreated child molesters and re-arrest rates of treated and untreated sex offenders).

[99] *See* Wind, *supra* note 63, at 105 (noting statistics from early 1990's on juvenile sex offenders who have been treated in treatment programs). *See generally* Martin & Pruett, *supra* note 65, at 309 (stating prevention of recidivism as main goal of treatment programs); *Recidivism CSOM*, *supra* note 97, at 7 (reporting recidivism rates based on type of sexual offense committed, i.e. incest, rape, child molesters and exhibitionists).

[100] *See* Wind, *supra* note 63, at 105 (providing recidivism rates for non-sexual offenders). *See generally* Martin & Pruett, *supra* note 65, at 310 (discussing elements which impact recidivism rates); *Recidivism CSOM*, *supra* note 97 (noting that studies have been done involving both sexual and non-sexual juvenile offenders).

[101] *See* Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U.L. REV. 1203, 1208 (1998) (indicating that sex offenders do not have higher recidivism rates than other

While the studies seem to support the idea that juvenile sex offenders would be responsive to rehabilitative treatments, there are some problems with these studies. The biggest problem is that these studies are generally done on offenders who have received treatment.[102] They do not compare their results to the many sex offenders who go untreated.[103] Thus, it is not clear that the treatments are primarily responsibly for a lower recidivism rate. There is much dispute as to whether or not these treatments work.[104] Additionally, there are commentators who believe that the recidivism rates of sex offenders, both juvenile and adult, are actually higher because many sexual assaults go unreported due to fear of embarrassment, shame, or other similar reasons.[105] Finally, despite the above statistics, many

criminals); Kenneth Crimaldi, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 RUTGERS L. J. 169, 174 (1995) (stating that only through selective reading of available research can one conclude that sex offenders have higher recidivism rate than other criminals); Center for Sex Offender Management, *Myths and Facts About Sex Offenders*, at 3–4 (Aug. 2000), *available at* http://www.csom.org/pubs/mythsfacts.html [hereinafter *Myths CSOM*] (attempting to dispel myth that adult sex offenders are likely to commit repeat offenses by noting that recidivism rates for sex offenders are actually lower than recidivism rates of general criminal population, particularly noting that a study performed in 1995 showed that 63% of non-sexual offenders released from prison were rearrested within three years of their release).

[102] *See* Kris W. Druhm, *A Welcome Return to Draconia: California Penal Law 645, The Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 299 (1997) (noting that, until recently, there were few serious, controlled, group studies on effectiveness of treatment for sex offenders and recent studies have incorporated control groups); *see also* Gerald G. Gaes, Timothy J. Flanagan, Laurence L. Motiuk & Lynn Stewart, *Adult Correctional Treatment*, 26 CRIME & JUST. 361, 410–11 (1999) (suggesting that full effects of research must be viewed cautiously due to muddy research methodology); Wind, *supra* note 63, at 105 (indicating that methodological flaws may have impacted outcome of post-treatment sex-offender recidivism research).

[103] *See generally* Gaes, et al., *supra* note 102, at 410–11 (noting that problems with research methodology raise question of whether conclusions can be drawn regarding effectiveness of treatment); Wind, *supra* note 63, at 105 (discussing concern that research results may have been altered by methodological flaws in research methods). *But see* Thomas J. Reed, Article, *The Re-Birth of the Delaware Rules of Evidence: A Summary of the 2002 Changes in the Delaware Uniform Rules of Evidence*, 5 DEL. L. REV. 155, 172 n.36 (stating that many past studies on sexual offender treatment did include a control group of untreated offenders).

[104] *See* Andrew A. Hammel, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOFSTRA L. REV. 775, 810 (1995) (proposing that treatment of sex offenders may not be worth the time or money due to disappointing results); Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT. R. 64, 6–7 (1997) (discussing inconclusiveness of research indicating that recidivism rates are reduced by treatment); Lisa Kavanaugh, Note, *Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better?*, 35 HARV. C.R.-C.L. L. REV. 509, 527 (2000) (stating that there is little evidence that treatment is effective in reducing sex offender recidivism rates).

[105] *See* Vieth, *supra* note 63, at 51 (suggesting that fear of being labeled homosexual causes boys not to report sexual victimizations); *see also Recidivism CSOM*, *supra* note 97, at 3–4 (explaining that various studies have shown that large numbers of sexual

experts believe that there is a class of serious sex offenders, both juvenile and adult, that simply cannot be rehabilitated.[106]

Due to the conflicting studies on recidivism and rehabilitation of juvenile sex offenders, there is no clear answer whether juvenile sex offenders can be rehabilitated or not. Since there are some studies that indicate that juvenile sex offenders can be rehabilitated,[107] we should at least give juvenile sex an opportunity for rehabilitation before we impose strictly punitive measures on them.

Despite the lack of conclusive information on the potential success of rehabilitation and treatment, it should be noted that there are certain significant differences between juvenile and adult sex offenders that support the conclusion that juvenile sex offenders would benefit from rehabilitative juvenile facilities. First, many experts believe that juvenile sex offenders respond better to treatment options as opposed to adult sex offenders.[108] Second, it is argued that juvenile sex offenders "possess a less deeply ingrained sexual deviant pattern than do adult offenders."[109] Third, because of their age, juvenile sex offenders are still learning and exploring their sexuality.[110] In sum, there

assaults go unreported due to fear of being further victimized, being punished by offender and/or offender's family and friends, not being believed, and being traumatized by criminal justice system); Wind, *supra* note 63, at 109–110 (noting that if victim is within offender's family, the event will often go unreported).

[106] *See* Jean Peters-Baker, Comment, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management*, 66 UMKC L. REV. 629, 647 (suggesting that "fixated pedophiles" are not receptive to treatment and pose serious danger to public); Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?* 86 K.Y. L.J. 477, 490 (1997) (finding that recidivism rates are unaffected by treatment). *But see* Martin & Pruett, *supra* note 65, at 310 (noting that modern treatments may eventually prove to have substantial affect on recidivism).

[107] *See* Martin & Pruett, *supra* note 65, at 310–13 (discussing effectiveness of treatment, specifically multi-component programs, but also noting that further studies are needed to evaluate new treatments); *see also* Thakur, *supra* note 67, at 105 (stating that treatments currently used in juvenile court system are ineffective and do not rehabilitate offenders). *But see* Wind, *supra* note 63, at 105 (noting that research on recidivism in juvenile sex offenders indicates that rehabilitation is successful, but that these studies may have methodological flaws).

[108] *See* Hiller, *supra* note 71, at 291 (noting that those who work with juvenile sex offenders, such as child psychologists, believe that between 70% and 90% of juvenile sex offenders can be rehabilitated with proper treatment); Wind, *supra* note 63, at 105–06 (suggesting that adolescent sex offenders respond to treatment better than adults). *But see* Thakur, *supra* note 67, at 103 (noting that society's belief that adolescents are likelier to be rehabilitated is diminishing).

[109] Wind, *supra* note 63, at 103.

[110] *See* Thakur, *supra* note 67, at 99 (observing that juvenile sex offenders may be wishing to fulfill inappropriate sexual fantasies); Wind, *supra* note 63, at 105–06 (stating

is support for giving juvenile sex offenders a chance to be rehabilitated in juvenile facilities.

III. PROPOSED SOLUTION

As stated earlier, juvenile sex offenders commit very harmful and injurious crimes. Our present juvenile system is not adequately handling such criminals. This note proposes changes in three distinct areas of the current juvenile law. These areas are on which waiver provision should be utilized, the court in which the juvenile is prosecuted in and what sentence should be imposed. Collectively, these three changes will provide for the most effect means in adjudicating juvenile sex offenders.

A. *Waivers*

1. Different Models of Waivers

In order to reform the juvenile court system, we first must understand how our present law operates with respect to juvenile offenders. Under current law, all cases involving juveniles begin in juvenile court.[111] The juvenile's case either stays in juvenile court or is transferred to adult criminal court through a waiver of the juvenile's jurisdiction.[112] There are different types of waivers, and jurisdiction varies as to which type or types they employ.[113]

that adolescent sexual fantasies have not become a permanent part of adolescent's identity). *But see* Martin & Pruett, *supra* note 65, at 283–84 (noting that research has invalidated theory that all adolescents who act out sexually are just exploring).

[111] *See* Wind, *supra* note 63, at 82–85 (discussing emergence of juvenile court system and system's purpose); *see also* Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdictions*, 64 FORDHAM L. REV. 2425, 2430 (1996) (noting that as of 1945 every state had a juvenile court). *See generally* Kamenstein, *supra* note 27, at 2108–10 (summarizing history of juvenile court justice system).

[112] *See* Martin & Pruett, *supra* note 62, at 310, 325–28 (noting that one of two main issues in dealing with juvenile sex offender is whether juvenile court that has jurisdiction over an individual should maintain jurisdiction or transfer him to criminal court); *see also* Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 509–10 (1995) (finding and explaining development, whereby juveniles are increasingly being waived into adult criminal justice system); Slaten, *supra* note 56, at 831–32 (discussing generally how juvenile enters criminal court through waivers of jurisdiction).

[113] *See* Marcy R. Podkopacz & Barry C. Feld, *Criminology: The Back-Door to Prison: Waiver Reform: "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1000 (2001) (listing various waivers court's can use to waive juvenile's jurisdiction); *see also* Guttman, *supra* note 112, at 520–22 (noting that states use different waivers and combinations of waivers). *See generally* Slaten, *supra* note 56, at 831–34 (summarizing waivers and noting that states apply them differently).

The different waiver provisions vary as to who gets to control the waiver and the criteria necessary for the waiver.[114] Generally, there are four basic types of waivers: 1) judicial waivers; 2) legislative waivers / statutory exclusions;[115] 3) prosecutorial waivers / direct file; and 4) reverse waiver / transfer back waivers.[116]

Judicial waivers are the most common type of waiver device used.[117] Statutes authorizing judicial waivers confer authority on the juvenile court judge to decide whether or not to waive jurisdiction to adult court.[118] Judicial waivers can be discretionary, mandatory, or presumptive.[119]

Many states have legislative waivers or statutory exclusions.[120] Under this scheme, the juvenile court's original

[114] *See* Slaten, *supra* note 56, at 831–37. (observing that in prosecutorial waivers, prosecutor makes decision to waive jurisdiction; while in judicial waivers, it is judge's decision); *see also* Guttman, *supra* note 112, at 520–29 (discussing various actors in different waiver processes and problems inherent in each waiver). *See generally* Sabo, *supra* note 111, at 2436–45 (explaining how each waiver mechanism works).

[115] *See* Slaten, *supra* note 56, at 835–36 (discussing that legislative waivers and statutory exclusion essentially mean same thing and operate in same way, as juvenile court's original jurisdiction is removed over certain individuals, meaning that certain juveniles are "excluded" from juvenile court); *see also* Thakur, *supra* note 67, at 106 (noting that legislative waivers act to bring certain crimes within jurisdiction of criminal court); *Sabo*, *supra* note 111, at 2444–45 (stating that legislative waivers target crimes that are serious or violent, and generally targets repeat offenders).

[116] *See* Sabo, *supra* note 111, at 2445 (explaining mechanics of reverse waiver); Slaten, *supra* note 56, at 831–32 (listing different types of waivers). *See generally* Thakur, *supra* note 67, at 106 (positing that prosecutorial waiver is most controversial waiver).

[117] *See* Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problems of Serious Juvenile Crime: A Case Study of Texas: 1973-1995*, 23 AM. CRIM. L. 563, 571 (1996) (noting that judicial waiver is most common type used); *see also* Slaten, *supra* note 56, at 832 (discussing judicial waivers); Thakur, *supra* note 67, at 106 (outlining judicial waiver procedure).

[118] *See, e.g.,* Ariz. Rev. Stat. Ann. § 8-327(C) (1999) (authorizing judge to transfer juvenile "[I]f the judge finds by a preponderance of the evidence that probable cause exists to believe that the offense was committed, that the juvenile committed the offense and that the public safety would best be served by the transfer of the juvenile for criminal prosecution. . ."); D.C. Code Ann. § 16-2307(a) (2001) (allowing for prosecution to request transfer to juvenile court under certain specified circumstances). *See generally* Guttman, *supra* note 112, at 531–41 (discussing judicial waiver, its benefits, and disadvantages via Massachusetts case).

[119] *See* 42 Pa. C.S. § 6355 (2004) (stating that certain acts, such as murder, necessitate transfer to criminal court); *see also* Slaten, *supra* note 56, at 832–34 (noting that discretionary waivers allow juvenile court to decide on an individual basis whether or not to waive jurisdiction, mandatory waivers allow juvenile judge only to decide whether or not juvenile has met statutory requirements, and presumptive waivers confer presumption of criminal prosecution if specified type of case or combination of factors is present). *See generally* Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 983–85 (2003) (discussing effects of presumptive and mandatory waiver).

[120] *See* Randall T. Salekin, et al., *Juvenile Waiver to Adult Criminal Courts: Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment*, 7

jurisdiction is automatically removed in certain specified circumstances.[121] Instead, adult criminal court has original jurisdiction. Such cases are "excluded" from juvenile court.[122] States have different statutorily prescribed triggering events.[123] Most often, a statute will remove jurisdiction based on the juvenile's age and / or the charges facing the juvenile.[124] For example, in Georgia, the criminal court had jurisdiction over juveniles between the ages of thirteen and seventeen who are charged with one of the listed offenses, including murder and rape.[125]

PSYCH. PUB. POL. AND L. 381, 382 (1999) (stating that forty-seven states have some type of transfer provision and more than half of such states provide for statutory exclusion); *see also* Eric J. Fritch and Craig Hemmins, Note, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973–1995*. 23 AM. J. CRIM. L. 563, 580 (1996) (stating that thirty-six state legislatures have commanded that juvenile courts cannot take on certain criminal cases); Amy M. Thorson, Note, *From Parens Patriae to Crime Control: A Comparison of the History and Effectiveness of the Juvenile Justice Systems in the United States and Canada*, 16 ARIZ. J. INT'L & COMP. L. 845, 854 (1999) (noting that number of states with statutory exclusions has increased nine fold since 1975).

121 *See* Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 181 (1994) (explaining that legislative waivers remove transfer decision from juvenile judges and instead make transfer automatic); *see also* Rose, *supra* note 119, at 978 (adding that judge is stripped of his discretion under automatic waiver); Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 401 (2001) (recapitulating that transfer is automatic based on two determinants: defendant's age and type of crime involved).

122 *See* Martin & Pruett, *supra* note 65, at 326 (noting that matters dealing with certain crimes are "excluded from juvenile court jurisdiction"). *See generally* Jensen, *supra* note 121, at 182 (stating that under most waiver policies, the offenses usually excluded from juvenile court are violent crimes and other felonies); Slaten, *supra* note 56, at 834 (discussing statutes that exclude juveniles charged with violent crimes from juvenile court jurisdiction).

123 *See* Slaten, *supra* note 56, at 835 (noting that Vermont excludes juveniles as young as ten years old while in Mississippi, jurisdiction is excluded for juveniles ages thirteen and older charged with felony or capital crime); *see also* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 584 (2000) (highlighting that states have lowered age necessary to trigger transfer hearing and broadened category of crimes that could induce transfer); Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 804 (explaining that in Oregon, "the juvenile court can waive any minor under age fifteen for murder, first degree rape, first degree sodomy, and first degree unlawful sexual penetration").

124 *See, e.g.*, C.R.S. 19-2-518(1)(a)(I) (2003) (providing for transfer to criminal court in Colorado if defendant is twelve or thirteen and has been charged with committing class one or two felony "or a crime of violence," or fourteen or older and has been charged with committing any felony); O.C.G.A. § 15-11-28(b)(2)(A) (bestowing exclusive jurisdiction on criminal court in Georgia for juveniles aged thirteen through seventeen who have been charged with one or more of listed offenses); W. Va. Code § 49-5-10(d) (2003) (allowing hearing for waiver if defendant is at least fourteen years old and has been charged with one of listed crimes).

125 *See* O.C.G.A. § 15-11-28(b)(2)(A) (listing felonies that can result in transfer to criminal court). *See generally* Miller v. State, 571 S.E.2d 788, 793-94 (Ga. 2002) (affirming

Prosecutorial waivers, also known as direct files or concurrent jurisdiction, have become more popular in recent years.[126] This system gives the juvenile court and the criminal court concurrent jurisdiction over certain juvenile defendants.[127] While states vary as to over which defendants both courts will have jurisdiction over, it is usually based on the age of the defendant and the charges.[128] Prosecutorial waivers place all of the power in the prosecutor's hands.[129] The prosecutor has discretion to decide whether he wants to file charges against the juvenile in either juvenile court or criminal court.[130]

validity of O.C.G.A. §15-11-28(b)(2)(A)); State v. Ware, 574 S.E.2d 632, 633 (Ga. Ct. App. 2002) (stating that state has authority to transfer matter to criminal courts under O.C.G.A. §15-11-28(b)(2)(A)).

126 *See OJJDP Statistical Briefing Book* (1999), *available at* http://ojjdp.ncjrs.org/ojstatbb/html/qa088.html (noting that fourteen states and District of Columbia had concurrent jurisdiction provisions that granted discretion to prosecutors to file certain cases in either juvenile court or criminal court); *see also* Russell K. Van Vleet, *Will the Juvenile Court System Survive?: The Attack on Juvenile Justice*, 564 ANNALS 203, 204-5 (1999) (stating that Arizona recently passed statute that gave prosecutors option of automatically filing in criminal court); Juan Alberto Arteaga, Note, *Juvenile (In)justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1054–55 (2002) (noting that Congress tried to pass bill that would give prosecutors discretion to file juvenile cases in criminal court, but bill eventually died in conference).

127 *See* Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 53 (1998) (explaining that, "[i]n states that have concurrent jurisdiction statutes, while prosecutor's decision to try juvenile in criminal court is subject to judicial review, it is not generally required to be based upon detailed criteria, and is accorded significant amount of deference"); *see also* Martin & Pruett, *supra* note 65, at 327 (noting that concurrent jurisdiction is shared between juvenile court and criminal court over certain offenses); Lisette Blumhardt, Comment, *In the Best Interests of the Child: Juvenile Justice or Adult Retribution?* 23 U. HAWAII L. REV. 341, 348 (2000) (stating that effort to give concurrent jurisdiction was measure to "overhaul the juvenile justice system").

128 *See, e.g.*, § Fla. Stat. §985.226 (2003) (providing that Florida has both legislative waivers and direct file provisions). *See generally* Fla. Stat. § 985.227(1)(a) (stating that in Florida a prosecutor can directly file in criminal court if defendant is fourteen or fifteen years of age and charged with one of listed offenses, such as arson, sexual battery, or robbery); Charles E. Frazier et al., *Will the Juvenile Court System Survive?: Get-Tough Juvenile Justice Reforms: The Florida Experience*, 564 ANNALS 167, 168 (1999) (stating that judicial waiver statutes formally in force in Florida were "cumbersome and time-consuming").

129 *See* Klein, *supra* note 36, at 395–96 (arguing that prosecutorial waivers lack appropriate standards, may be applied arbitrarily, and may allow prosecutors to abuse their discretion); *see also* Arteaga, *supra* note 126, at 1062 (arguing that giving prosecutor ability to make these decisions presents conflict of interest problem in deciding what charges to bring); Brenda Gordon, Note, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 223 (1999) (noting that prosecutors can abuse their discretion by "overcharging" defendants in order to gain upper hand in plea bargains).

130 *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME. & JUST. 81, 92 (2000) (observing that prosecutors have "discretionary authority" to choose forum in which they wish to prosecute juvenile if juvenile meets set criteria); *see also* Salekin et al., *supra* note 120, at 382 (stating that when charge is filed directly in

The last type of waiver, known as reverse waiver or transfer back, occurs after the juvenile has already been waived into criminal court.[131] Here, the criminal court judge holds a hearing to decide whether or not to waive the juvenile's jurisdiction back to the juvenile court.[132] Reverse waivers have been set up specifically to protect a juvenile against an inappropriate waiver.[133] In states with prosecutorial waivers, reverse waivers can serve as a check against abuse of discretion by prosecutors.[134]

2. Proposal: Statutory Exclusion or Mandatory Judicial Waiver

In order to have those juveniles meeting the set criteria prosecuted in criminal court, there must be a waiver provision. Due to differences amongst the various types of waivers, not all waivers would effectively accomplish this goal. The waivers that most effectively insure that individual juveniles are adjudicated

criminal court, no input is received from a judge); Kimberly S. May, Note, *Shifting Away From Rehabilitation:* State v. Ladd's *Equal Protection Challenge to Alaska's Automatic Waiver Clause*, 15 ALASKA L. REV. 367, 388 (1998) (stating that since system that allows for prosecutorial waiver gives prosecutor total discretion, need for judicial waiver hearing non-existent).

131 *See* Salekin et al., *supra* note 120, at 382 (observing that reverse transfers require a hearing); Guttman, *supra* note 112, at 522 (noting that some cases can be "removed" to family or juvenile courts from criminal courts); *see also* Paula R. Brummel, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids*, 16 LAW & INEQ. 541, 558 (1998) (relaying that reverse transfer provision is meant to be check against decisions by prosecutors to excessively charge).

132 *See* Sabo, *supra* note 111, at 2445 (noting that if a prosecutor directly files charges against a juvenile in criminal court, the criminal court judge may conduct a hearing to decide whether or not to waive the juvenile's jurisdiction back to juvenile court); *see also* Steven A. Drizin & Allison McGowen Keegan, *The Aftermath of the Lionel Tate Case: Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager*, 28 NOVA L. REV. 467, 540–41 (2004) (indicating that reverse waiver hearings serve as a check before prosecuting a juvenile as an adult); Slaten, *supra* note 112, at 838–39 (2003) (describing the process of a reverse waiver hearing).

133 *See* Slaten, *supra* note 56, at 838 (noting objective of reverse waivers to avoid "excessive prosecution"); *see also* Hughes v. State, 653 A.2d 241 (Del. 1994) (declaring that unless there is an option for reverse waiver, statutory exclusion based on age violates due process). *But see* Bishop, *supra* note 130, at 125 (arguing that shifting decision making from juvenile court judge to criminal court judge does not make sense).

134 *See* Tanenhaus & Drizin, *supra* note 24, at 694 (finding that reverse transfers are important in jurisdictions with direct file or mandatory waiver provisions because reverse transfers serve as a check against abuse of discretion); Slaten, *supra* note 56, at 838 (explaining purpose of reverse waivers to be "protective device" to counteract any potential abuse of discretion or flaws in waiver process); *see also* Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 989 (2002) (noting courts' emphasis on importance of reverse waivers because they offset unfairness that can result from statutory waivers).

in the appropriate forum are either statutory exclusion or mandatory judicial waiver.[135] Both of these waivers allow for the least amount of discretion.[136] Discretionary judicial waivers and prosecutorial waivers / direct file give either the judge or the prosecutor too much discretion.[137] As a result, there is inconsistent adjudication of similar crimes.[138] Similarly situated defendants are not given the same treatment.[139] On the other hand, mandatory judicial waivers and statutory exclusions give the judge and prosecutor virtually no discretion.[140] These two types of waivers allow for the most consistent adjudication of

[135] *See* Klein, *supra* note 36, at 390 (explaining that statutory exclusions work by having legislature remove juvenile court's jurisdiction over certain defendants); *see also* Marissa A. Savastana, Comment, *Tattle-Telling on the United States: School Violence and the International Blame Game*, 21 PENN ST. INT'L L. REV. 649, 666 (2003) (noting effectiveness of statutory exclusion in allowing prosecution of serious juvenile offendors as adults); Chamberlin, *supra* note 121, at 400 (differentiating between different types of judicial waivers, including those mandatory due to specific legislation).

[136] *See* Klein, *supra* note 37, at 374 (acknowledging intent by legislatures to impose statutory exclusion to remove judicial discretion); Guttman, *supra* note 112, at 521 (calling attention to lack of discretion available under statutory exclusion). *Cf.* Sabo, *supra* note 111, at 2439 (noting that under prosecutorial waivers, prosecutor has broad discretion as to court in which to file claim).

[137] *See* Feld, *supra* note 56, at 478 (describing judicial waiver statutes as "standardless grants of sentencing discretion"); *see also* Tanenhaus & Drizin, *supra* note 24, at 668 (referring to Florida's direct file legislation as giving "unfettered" discretion to prosecutors); Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 275 (2000) (raising concern that prosecutorial waivers leave "ripe the possibility for unchecked abuse of discretion").

[138] *See* Feld, *supra* note 56, at 492 (describing subjective standards involved in judicial waivers that make them impossible to administer without causing discriminatory effect); Beth Wilbourn, Note, *Waiver of Juvenile Court Jurisdiction: National Trends and the Inadequacy of the Texas Response*. 23 AM. J. CRIM. L. 633, 639 (1996) (noting inconsistent and unfair judgments resulting from judicial waivers); *see also* Jensen, *supra* note 121, at 192–93 (observing that a study of judicial waivers found youth in urban and suburban areas were waived to criminal court more often and for more serious crimes than rural youth).

[139] *See* Jensen, *supra* note 121, at 194 (finding large amount of minority youths were waived as opposed to non-minority juveniles); *see also* Jeffrey Fagan & Elizabeth Piper Deschenes, *Criminology: Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 327 (1990) (describing discretionary standards of judicial waivers and discovering a "high degree of variation in transfer decisions"); Wilbourn, *supra* note 138, at 639 (remarking on criticism that judicial waivers grant excessive discretion which thereby prevents consistency).

[140] *See* Klein, *supra* note 37, at 374 (highlighting that purpose of statutory exclusion is to limit discretion); *see also* Guttman, *supra* note 112, at 521 (explaining absence of discretion for prosecutors and judges with respect to statutory exclusion due to limits set by legislature on cases that can be brought in juvenile court); Thorson, *supra* note 120, at 854 (characterizing statutory exclusion as an "attempt to curb the discretion of juvenile court judges").

similar defendants charged with similar crimes.[141] While both types of waivers achieve similar results, there are differences in both the mechanism of the waiver and the court of original jurisdiction.[142]

a. Statutory Exclusion

Statutory exclusion provisions work by automatically excluding certain juveniles from the juvenile court's original jurisdiction.[143] Common provisions exclude certain juveniles by either their age and / or type of offense with which the juvenile is charged.[144] If the juvenile meets the criteria, the prosecutor has no choice but to file charges in the adult criminal court.[145] Under my proposal, the statutory exclusion provision will work to exclude juveniles age sixteen and older who are charged with one of the statutorily defined sexual offenses from the juvenile justice system. It will also keep those juveniles who are younger than sixteen or who

141 *See* Klein, *supra* note 37, at 391 (arguing that proponents of statutory exclusion believe statutory exclusions bring "greater equity and predictability to the transfer process"); Thorson, *supra* note 120, at 854 (noting that statutory exclusion provides for more "consistent and predictable results" that are "less arbitrary and discriminatory"). *See generally* Klein, *supra* note 37 (presenting effective benefits of statutory exclusion, such as a means of attaining "retribution, deterrence, and selective incapacitation" and "rational, easily administered method of deciding what youths need to be prosecuted as adults").

142 *See* Conward, *supra* note 127, at 54 (describing various mechanisms that will ultimately lead to same result. For instance, a juvenile offender may be statutorily required to be tried in criminal court, or the decision may have been within discretion of the judge); *see also* Slaten, *supra* note 56, at 834 n.117 (finding that juvenile court does not have original jurisdiction in statutory exclusion cases while juvenile court does initially have original jurisdiction in mandatory judicial waiver cases). *See generally* Taylor, *supra* note 134 (suggesting that legislature sets guidelines for prosecutor to determine court in which to file charge).

143 *See* Conward, *supra* note 127, at 52 (describing "automatic transfer" of certain offenses to criminal court); Guttman, *supra* note 112, at 521 (explaining mandatory exclusion of certain juveniles from juvenile court); *see also* Patricia Torbet, et. al., *State Responses to Serious and Violent Juvenile Crimes*, Office of Juvenile Justice and Delinquency Prevention, at 3 (1996) (defining statutory exclusion provisions).

144 *See* Reader, *supra* note 35, at 489 (discussing Ohio's recently adopted bill that allows some discretion, but not with respect to statutory mandated age and offense); *see also* Torbet, et al., *supra* note 143, at 3 (observing that New Hampshire and Wisconsin lowered their upper age to sixteen, which effectively excludes all seventeen-year olds from juvenile court's jurisdiction); Guttman, *supra* note 112, at 521 (describing age and offense limitations set by statutory exclusion. For instance, legislatures often set an "upper age limit" to cut off juvenile court jurisdiction.).

145 *See* Guttman, *supra* note 112, at 525 (stating that prosecutor has "no choice" if offense meets requirements); Slaten, *supra* note 56, at 834–35 (explaining that case involving juvenile accused of statutorily excluded offense must be filed in criminal court, leaving prosecutor with no discretion); *see also* Jensen, *supra* note 121, at 182–83 (discussing Idaho's Legislative Statute which mandates that juveniles fitting specific age and crime requirements automatically be sent to criminal court).

are not charged with a serious offense in the juvenile justice system. Finally, it leaves the prosecutor virtually no discretion.

b. Mandatory Judicial Waiver

Under mandatory judicial waivers, the juvenile court has original jurisdiction over the defendants.[146] In a hearing, a juvenile court judge decides whether or not to waive the juvenile's jurisdiction.[147] A mandatory judicial exclusion sets out certain criteria that, if met by the particular defendant, require a waiver of jurisdiction.[148] The judge has no discretion.[149] The judge's job is simply to decide whether or not the juvenile meets the statutory requirements.[150] Under my proposal, the only two requirements that have to be met are age and type of offense. The judge should not to take into account any other factors, such as whether or not the juvenile has a prior record or if the crime

146 *See* Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CINN. L. REV. 245, 247 n.18 (1988) (noting that judicial waiver occurs when juvenile court strips itself of its original jurisdiction); *see also* Podkopacz & Feld, *supra* note 113, at 1000 (noting that, under judicial waivers, juvenile courts have jurisdiction to transfer accused to adult criminal courts); Slaten, *supra* note 56, at 832 (specifying that under mandatory judicial waivers, juvenile courts have exclusive authority to waive jurisdiction to adult court, and that a juvenile cannot be transferred to criminal court without juvenile court's approval).

147 *See, e.g.*, FLA. STAT. ANN. § 985.226(3) (2003) (describing waiver hearing); *see also* Podkopacz & Feld, *supra* note 113, at 1000–01 (describing how juvenile court judge could decide whether to waive jurisdiction after are hearing to weight accused's rehabilitative potential and his or her danger to society); Slaten, *supra* note 56, at 832 (explaining how a hearing takes place where juvenile court judge decides whether the juvenile should be prosecuted in criminal court).

148 *See* Salekin, et al., *supra* note 120, at 382 (clarifying that in a statutory exclusion, mandated age and crime types are automatically outside juvenile court jurisdiction); *see also* Sabo, *supra* note 111, at 2427–28 (stating that legislative waivers statutorily excludes a juvenile from juvenile court jurisdiction due to juvenile's criteria of age and offense); Slaten, *supra* note 56, at 833 (noting that certain mandatory waivers require only the judge to find that probable causes exists to determine if juvenile committed crime in the statute).

149 *See* Jensen, *supra* note 121, at 181 (discussing statutory waiver policy which removes transfer decision from juvenile court judge); Sabo, *supra* note 111 at 2444–45 (explaining that this type of waiver is not discretionary and based solely on statutorily defined criteria); Guttman, *supra* note 112, at 521 (stating that statutory exclusion leaves no discretion to judges).

150 *See* Bishop, *supra* note 130, at 92 (explaining that juvenile court does not have jurisdiction over juveniles that meet statutory criteria set out in mandatory waiver provisions); *see also* Salekin, et al., *supra* note 120, at 382 (noting that statutory exclusions leave juvenile court judges without input, other than determining whether juvenile fits age and crime type requirements); Slaten, *supra* note 56, at 834 (specifying that statutory exclusion removes juvenile court's jurisdiction over certain individuals who meet certain age and offense characteristics).

was against a person or property.[151] If the juvenile is sixteen years or older and charged with one of the statutorily defined sexual offenses, then the judge must waive jurisdiction. If the criteria are not met, then the juvenile will remain in juvenile court.

B. Proper Court for Adjudication

1. Criminal Court vs. Juvenile Court

Whether a juvenile is prosecuted in juvenile court or in adult criminal court is paramount to the juvenile. There are certain significant differences between the two venues. First, juvenile proceedings are generally closed and confidential, while criminal proceedings are public.[152] The names and addresses of juvenile defendants are usually not printed by public media.[153] Additionally, juvenile records are generally sealed.[154] In other

[151] *See* Kent v. United States, 383 U.S. 541, 566–67 (1966) (creating *Kent* factors which help states decide whether to waive jurisdiction by including factors other than age and type of offenses); *see also* Jensen, *supra* note 121, at 182–83 (discussing Idaho Legislative Waiver Statute which automatically waives jurisdiction based only on age and crime of offender); Sabo, *supra* note 111 at 2443–44 (citing that majority of thirty-seven states' legislative waiver target solely offense and age of juvenile and does not consider his or her individual circumstances).

[152] *See* Brummer, *supra* note 31, at 789 (commenting that juvenile court system is known for its confidentiality and secrecy); *see also* Klein, *supra* note 36, at 376 (explaining that juvenile hearings were kept secret and files sealed to avoid criminal stigma); Danielle R. Oddo, Note, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong With the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 107 (1998) (distinguishing juvenile proceedings from adult criminal trials based on general informality and exclusion of public).

[153] The Supreme Court has ruled on the constitutionality of releasing juvenile's names. In *Oklahoma Publishing Co. v. District Court of Oklahoma*, the Court struck down a pretrial order that enjoined reporters who attended a juvenile proceeding from publishing the name or photograph of the juvenile defendant involved in the proceeding. Okla. Publ'g Co. v. District Ct. of Okla., 430 U.S. 308, 311–12 (1977). In *Smith v. Daily Mail Publishing*, the Court struck down a West Virginia statute that imposed a fine and imprisonment on any newspaper that published a juvenile defendant's name without first obtaining the juvenile court's permission. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104–05 (1979). The Court struck down the statute as an invalid prior restraint on speech because the asserted interest of protecting a juvenile's anonymity was not sufficient enough to pass constitutional muster. *Id.* at 104–05. In the Mepham hazing incident, The Daily News and The Post both printed the names of the juvenile defendants. *See Calabrese*, *supra* note 9, at 11. Other newspapers, such as *The New York Times*, did not print their names. *See generally* Healy, *supra* note 7, at B6.

[154] *See* In Re Gault, 387 U.S. 1, 22–25 (1967) (noting that while Court ultimately decided case on procedural grounds, it did note that is was appropriate to keep juvenile proceedings closed to public and to keep their records confidential); *see also* Feld, *supra* note 56, at 477 (stating that records were always sealed in juvenile cases for youth's

words, a juvenile who is prosecuted in juvenile court does not have to deal with the embarrassment, shame, stigma, and lasting consequences that often accompanies a public criminal trial.[155] Given the traditional goal of rehabilitation, such practices make sense.

While these considerations are important, the most significant difference between the two courts lies in the sentences they can give. Juvenile sentences differ greatly from adult sentences in two key aspects: the length of the sentence and the nature of the facility in which the sentence is served.[156] First, juvenile sentences generally cannot last beyond the juvenile court's jurisdiction, which is generally at twenty-one years of age.[157] As a result, juvenile sentences can be considerably less than adult sentences.[158] Second, juvenile sentences place the offenders in

benefit); Klein, *supra* note 36, at 376 (noting that, historically, juvenile records have been sealed).

[155] *See* Chamberlin, *supra* note 121, at 404 (reasoning that juvenile proceedings are closed to public to protect juveniles "from being labeled as criminals"); *see also* Klein, *supra* note 36, at 376 (rationalizing that records were kept under seal to avoid the stigma of criminal conviction); Oddo, *supra* note 152, at 108 (quoting Justice Rehnquist in *Smith v. Daily Mail Publishing* stating, "the prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his conduct").

[156] *See* Melli, *supra* note 54, at 378–80 (explaining differences between criminal and juvenile systems); *see also* Brummer, *supra* note 31, at 791 (examining specialized sentences and facilities for juvenile offenders); Chamberlin, *supra* note 121, at 394–95 (discussing theories and philosophies behind separating both justice systems).

[157] *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 895 (1988) (citing that juvenile court only authorizes confinement until offender has reached age of twenty-one years and can last no longer than his or her twenty-first birthday); *see also* John B. Leete, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: Treatment and Rehabilitation or Hard Time: Is the Focus of Juvenile Justice Changing*, 29 AKRON L. REV. 491, 504 (1996) (stating that juvenile courts have jurisdiction until age twenty-one); Cathi J. Hunt, Note, *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, 631–32 (1999) (observing that many states have added statutes that have extended criminal court's jurisdiction).

[158] *See* Chin, *supra* note 62, at 298 (noting that juvenile justice system punishes an offender less severely than if he were an adult because juvenile can not be held accountable for his act); *see also* David Yellen, *Forward: The Enduring Difference of Youth*, 47 KAN. L. REV. 995, 996 (1999) (stating that core rationale behind juvenile justice system, that intellectual and psychological differences between children and adults, warrant more lenient and supportive treatment for juvenile offenders). *Compare* N.Y. PENAL LAW § 70.00(2) (Consol. 2004) *with* N.Y. PENAL LAW § 70.05(2) (Consol. 2004) (announcing requisite punishments for various grades of felonies for adults and juveniles). *But see* Janet Ainsworth, *Struggling for a Future: Juvenile Violence, Juvenile Justice: Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 941 n.65 (1995) (observing that juvenile sentences are not always longer than adult sentences); Knipps, *supra* note 23, at 460 (citing New York study that found only 4% of juvenile offenders arrested received adult sentences that would have been longer than juvenile sentence, though vast majority of arrested juveniles received either no sentence or were removed to Family Court).

special juvenile facilities.[159] Juvenile facilities are very different from adult prisons.[160] Adult prisons are more violent and less safe than juvenile facilities.[161] Juvenile facilities are set up with the goal of rehabilitation, while adult prisons focus more on punishment.[162] These facilities have more rehabilitative resources and programs than adult prisons have.[163]

159 *See* N.Y. CORRECT. § 71(1)(b) (Consol. 2004) (stating that "males under the age of twenty-one at the time sentence is imposed shall not be received at the same correctional facility as males who are over twenty-one at the time sentence is imposed"); N.Y. EXEC. LAW § 508 (Consol. 2004) (creating separate facilities for juvenile offenders and describing procedures and regulations of confinement); *see also* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 232 (1998) (describing various juvenile facilities, such as long term public facilities, privately operated facilities, ranches, camps, boot camps, and training schools as well as percentage of confinement in such facilities).

160 *See* Martin L. Forst & Martha-Elin Bloomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 361 (1991) (noting that while juvenile facilities are not perfect rehabilitative and therapeutic facilities we would like to think they are, they are less violent then adult prisons); Thorson, *supra* note 120, at 862 (noting that juveniles housed in adult prisons do not receive diet, discipline, exercise and educational needs that they would in a juvenile facility); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEPT. OF JUSTICE, BULLENTIN JUVENILES IN CORRECTIONS (June 2004) *at* http://www.ncjrs.org/html/ojjdp/202885/page13.html (noting that generally, security is not as elaborate in juvenile facilities as in adult prisons and that guiding principle is to place juvenile offenders in least restrictive placement alternative).

161 *See* Feld, *supra* note 159, at 234 (conceding that despite their deplorable conditions, juvenile facilities probably remain less harsh and abusive than most adult prisons); *see also* Arteaga, *supra* note 126, at 1077 (youths incarcerated in adult prisons are five times more likely to be sexually assaulted than those youths in juvenile facilities); Lisa M. Flesch, Note, *Juvenile Crime and Why Waiver is Not the Answer*, 42 FAM. CT. REV. 583, 590 (2004) (stating that adult prisons are *much more* violent than juvenile correctional facilities).

162 *See* ARK. CODE ANN. § 9-27-32(3) (Michie 2003) (stating that one of purposes of Juvenile Code is "to protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution . . ."); Susan A. Burns, Comment, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335, 357–58 (1996) (stating that treatment in juvenile facilities focus on rehabilitation while adult prisons focus on retribution and punishment); Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and Your Out!*, 75 OR. L. REV. 1223, 1243 (1996) (stating that adult prisons highlight punishment and retribution, while juvenile facilities focus on rehabilitation and individualized treatment).

163 *See* Holly Beatty, Comment, *Is the Trend to Expand Juvenile Transfer Statutes Just an Easy Answer to a Complex Problem?*, 26 U. TOL. L. REV. 979, 1014 (1995) (noting that adult facilities lack educational and recreational programs whereas juvenile correctional facilities have more meaningful programs that encourage personal growth); Guttman, *supra* note 112, at 528 (noting that transfer of juvenile to an adult prison destroys any chance of rehabilitation since the adult system has abdicated any rehabilitative ideal). *But see* Feld, *supra* note 157, at 895 (arguing that while the general public believes youth facilities to be "benign and therapeutic," harsh reality is that they are often actually punitive in nature with widespread violence, aggression, and rape).

2. Proposal: Forum Depends on Age of Offender and Nature of Offense

The next question this proposal addresses is which forum is proper for juvenile adjudication of sexual offenses. The answer to that question should depend on both the age of the offender and the nature of the offense. Under my proposal, juveniles who are sixteen years and older, and who have been charged with a statutorily defined sexual offense should be prosecuted in the criminal court.[164] Those juveniles who do not meet those two criteria should remain in the juvenile court system.

C. Blended Sentencing

1. Overview of Blended Sentencing

Blended sentencing statutes first came into effect in the early 1990's.[165] The concept of blended sentencing is an innovative way to combine the original aims of the juvenile court system, namely rehabilitation, with the retributive goals of punishment.[166] There are several different models, but what is common to all of them is the ability to consider both juvenile and / or adult sentences. For example, one model allows the judge to impose both a juvenile

164 *See, e.g.,* N.Y.P.L. §§ 130.00 – 130.90 (defining sex offenses and requiring that in certain offenses such as sodomy and rape in second degree, that defendant be at least eighteen years old); *see also* People v. Burch, 120 N.Y.S.2d 82, 84 (App. Div. 1953) (holding that rape in second degree is not an inferior degree of crime of rape in first degree because legal and factual elements are different between two degrees, such as age of defendant, an essential element). *See generally* 34 N.Y. JUR. 2D *Criminal Law* § 3904 (explaining that many statutes defining sex crimes are framed to incorporate the age of perpetrator as an element and can in fact be criticial in determining the the degree of the offense).

165 *See* Brummer, *supra* note 31, at 794 (noting that New Mexico enacted an extended jurisdiction statue in 1995, shortly after Minnesota's enactment); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 986–88 (1995) (discussing Minnesota's Juvenile Task Force's work in the early 1990's); Smallheer, *supra* note 26, at 278 (calling Minnesota's sentence prototype the "pioneer" of blended sentencing provisions).

166 *See* Brummer, *supra* note 31, at 792 (arguing that Minnesota enacted blended sentences to balance rehabilitative goals with increased public call for protection); *see also* Christian Sullivan, *Juvenile Delinquency in the Twenty-First Century: Is Blended Sentencing the Middle Road Solution for Violent Kids?*, 21 N. ILL U.L. REV. 483, 495 (2001) (arguing that blended sentencing furthers goals of rehabilitation, accountability, and public protection); Chamberlin, *supra* note 121, at 409–10 (arguing that blended sentences allow juvenile a chance to rehabilitate while still protecting public).

sentence and an adult sentence.[167] At the end of the juvenile sentence, the juvenile is reevaluated.[168] If the juvenile is deemed rehabilitated, then the judge will stay the adult sentence.[169] If not, the juvenile then serves his adult sentence in an adult correctional facility.[170] There is no one set type of blended sentencing statute. Other blended sentencing statutes only allow the judge a choice of which type of sentence he or she wishes to impose, i.e. either juvenile or adult.[171] There are various models that differ among the states.[172] The different models vary as to

[167] *See* Sarah M. Cotton, Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK L. REV. 563, 580–81 (1999) (noting that, while types of sentences imposed and which judge imposes sentence varies amongst five different blended sentence models, under one model, juvenile court is able to impose both a juvenile and an adult sentence). *See generally* MINN STAT. § 260B.130(4)(a)(1–2) (2003); MONT. CODE ANN. § 41-5-1604 (2003).

[168] *See* Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 42 (1999) (describing that prior to juvenile's eighteenth birthday, court must hold hearing to determine whether to release offender or transfer him to an adult facility); Torbet, et al., *supra* note 143, at 14 (noting that at age of 17.5 juvenile court must hold hearing to evaluate whether to release juvenile or commit him to adult prison); Moore, *supra* note 58, at 134 (explaining that under Texas's blended sentence statute, juvenile court reevaluates youth prior to his eighteenth birthday in order to determine if he should be released from juvenile facilities, paroled, or sent to an adult prison).

[169] *See* Torbet, et al., *supra* note 143, at 14 (stating that juvenile in Texas could only be released after hearing by committing juvenile court); Moore, *supra* note 58, at 133–4 (explaining that court has option to release juvenile on parole or commit him to an adult correctional facility). *See generally* TEX. HUM. RES. CODE ANN. §§ 61.079, .084 (2004) (explaining options and procedures for transferring or releasing a juvenile offender).

[170] *See* Audrey Dupont, *Tenth Circuit Survey: Juvenile Law: The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U. L. REV. 255, 270 (2000) (observing that stayed adult criminal sentence may be revoked); Kinkeade, *supra* note 168, at 42 (describing that prior to juvenile's eighteenth birthday, court must hold hearing to determine whether to release offender or transfer him to adult facility); Smallheer, *supra* note 26, at 276 (noting when juvenile can be transferred to an adult correctional facility under blended sentencing scheme).

[171] *See* Conward, *supra* note 127, at 64 n.170 (discussing court systems of New Mexico and Florida, which both use exclusive blended sentencing, and enacted youthful offender sanction that gives judge that authority over sentence); Torbet et al., *supra* note 143 at 12–14 (explaining that exclusive models of blended sentencing allow judge to impose either an adult or juvenile sentence), *see also* NATIONAL CRIMINAL JUSTICE ASSOCIATION, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES [1994-1996] 47 (1997) (noting that in Florida, judge's determination is made after receiving a report from the Department of Corrections and Department of Juvenile Justice).

[172] *See* MELISSA SICKMUND & HOWARD N. SNYDER, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 108 (1999) (illustrating different kinds of blended sentence options used by variety of states); *see also* Mich. Comp. Laws Ann. § 712A.18 (1)(e)(m) (2003) (allowing criminal court judge to impose juvenile sentence, an adult sentence, or blended sentence that would consist of both); N.M. Stat. Ann. § 32A-2-20 (A) (2004) (stating that "the court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender").

which venue the juvenile is prosecuted in and which judge imposes the sentence.[173]

There are five basic models of blended sentencing statutes.[174] The Juvenile-Exclusive model provides for the juvenile to be prosecuted in juvenile court, but the juvenile judge can impose either a juvenile sentence or an adult sentence.[175] The Juvenile-Inclusive model allows for the juvenile judge to impose a sentence involving both the juvenile and the adult correctional facilities.[176] Under the Juvenile-Contiguous Blend model, the juvenile court can impose a sentence that lasts beyond the age of the juvenile court's jurisdiction.[177] The juvenile court later determines if the remainder of the juvenile sanction should be imposed in an adult correctional facility.[178] The Criminal-

[173] *See* Chamberlin, *supra* note 121, at 404, (noting that under Kansas's extended jurisdiction statute, juvenile judge imposes sentence); Moore, *supra* note 58, at 131 (explaining that criminal exclusive model of sentencing gives authority of imposing sentence to criminal court judge, while juvenile exclusive model gives authority to juvenile court judge); *see also* Feld, *supra* note 159, at 241–43 (describing different venues that impose blended sentences in states that have adopted one of models).

[174] *See* Torbet, et al., *supra* note 143 at 13 (diagramming five different models of blended sentencing statutes); *see also* Jeffrey A. Butts, Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border between Juvenile and Adult Justice*, *in* BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS CRIMINAL JUSTICE 2000 VOL. 2 188 (C.M. Friel ed., 2000) (stating that various models of blended sentencing schemes achieved great deal of popularity, spreading to 20 states); Cotton, *supra* note 167, at 580 (noting that five models are either exclusive or inclusive).

[175] *See* Brummer, *supra* note 31, at 795 (defining juvenile exclusive); *see also* N.M. Stat. Ann. §32A-2-20 (2003) (determining that court has discretion to order juvenile or adult sentence); Smallheer, *supra* note 26, at 280 (discussing choices available to juvenile court judge under juvenile exclusive blending sentencing system).

[176] *See, e.g.*, Ark. Code Ann. § 9-27-506 (2003) (stating that juvenile judge who finds a juvenile delinquent must order a juvenile disposition, and suspend it pending court review). *See* also *see also* Tanenhaus & Drizen, *supra* note 24, at 695 n.223 (describing juvenile inclusive blended sentencing as a model that allows adult sentence to be imposed if there is a parole violation or revocation); Cotton, *supra* note 167, at 580–81 (observing that Connecticut uses this approach which allows for both juvenile and adult sentences).

[177] *See* Moore, *supra* note 58, at 133–34 (noting that Texas determinate sentencing scheme is most influential example of the juvenile contiguous blend sentencing system); *see also* Smallheer, *supra* note 26, at 281 (observing that numerous states including Massachusetts, Texas, South Carolina, and Rhode Island, use this approach); Connie Hickman Tanner, *Arkansas's Extended Juvenile Jurisdiction Act: The Balance of Offender Rehabilitation and Accountability*, 22 U. ARK. LITTLE ROCK L. REV. 647, 648 (2000) (describing system used by Arkansas as a partial juvenile contiguous model with respect to capital and first degree murder).

[178] *See* Conward, *supra* note 127, at 64 n.170 (describing system in Massachusetts, in which juvenile court makes decision, based on, but not limited to factors imposed by statute); *see also* Smallheer, *supra* note 26, at 281 (charging juvenile court with duty of deciding whether or not adult sentence should be stayed). *See generally* COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S DEP'T OF JUSTICE, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 28 (1996) (describing Texas statute, which gives juvenile court authority to impose a

Exclusive and Criminal-Inclusive models are the same as their juvenile counterparts, except that the juvenile is prosecuted in the criminal court.[179] It is then the criminal court judge who imposes the sentence.[180]

2. Proposal: Criminal Inclusive Model of Blended Sentencing

Using either waiver provision, certain juveniles will be adjudicated in the criminal court.[181] The next issue that must be determined is what will be the appropriate sentence. For these juveniles, the criminal inclusive model of blended sentencing should be applied.[182] The criminal court judge will have the option either to impose a blended sentence or an adult sentence, but he cannot impose solely a juvenile sentence.[183] If the judge

transfer from a juvenile facility to an adult facility and gives juvenile full due process and procedural rights due to criminal defendant).

179 *See* Torbet, *supra* note 143, at 14 (detailing criminal exclusive and inclusive models); Cassandra S. Shaffer, Comment, *Inequality within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 176, 177 (2002) (explaining similarities between criminal and juvenile systems of exclusive/inclusive sentencing); *see also* Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK. L. REV. 563, 581 (arguing that exclusive and inclusive models of blended sentences differ in court that has jurisdiction to make sentencing decisions).

180 *See* Torbet, *supra* note 143, at 14 (observing that under criminal exclusive model, criminal court judge considers a set of statutorily defined factors to determine whether or not a juvenile or adult sanction should be imposed); *see also* Smallheer, *supra* note 26, at 282–84 (explaining that criminal inclusive model, in contrast to criminal exclusive, criminal court judge imposes a juvenile sentence, suspending adult sanctions unless juvenile violates a condition of his juvenile sanction); Moore, *supra* note 58, at 134 (stating that both criminal inclusive and criminal exclusive models allow criminal court to impose sanctions).

181 *See* Podkopacz & Feld, *supra* note 113, at 1000–10 (discussing waiver provisions and use of provisions with blended sentencing statutes); Torbet, *supra* note 143, at 5 (diagramming states which use a judicial or presumptive waiver); *see also* HOWARD N. SNYDER ET AL., U.S. DEP'T OF JUSTICE, JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES 1 (2000) (noting that majority of judicial waivers in jurisdictions are based on juvenile's age and previous court history).

182 *See* Moore, *supra* note 58, at 135–36 (advocating inclusive models of blended sentencing because of its effectiveness as a tool for rehabilitation); Torbet, *supra* note 143 at 14 (noting that only two states, Arkansas and Missouri, have this type of sentencing provisions which allows criminal court to impose sanctions involving both juvenile and adult correctional facilities). *But see* Smallheer *supra* note 26, at 286 (discussing criticism of inclusive models of sentencing, namely that it will result in larger number of incarcerated juveniles).

183 *Compare* Smallheer, *supra* note 26, at 280 (explaining that under juvenile exclusive model, juvenile court has option to impose either a juvenile sentence or a criminal sentence) *with* Torbet, *supra* note 143, at 13 (finding that juvenile exclusive and criminal exclusive models of blended sentencing allow judge to impose only a juvenile sentence). *See* Conward, *supra* note 127, at 64 n.170 (discussing juvenile contiguous model, which gives judge option of issuing a sanction that may last beyond jurisdiction of the juvenile court).

imposes a blended sentence, it will include both a juvenile sentence and an adult sentence.[184] The juvenile sentence will have a determinative length, e.g. one year, within the juvenile court's jurisdiction. For example, if the defendant is seventeen years old, the juvenile sentence cannot last beyond his twenty first birthday. Thus, a judge can sentence a seventeen year old to two years in a juvenile facility. The juvenile sentence will not simply end when the juvenile turns eighteen or twenty-one. They will instead have a set sentence. When the juvenile part of the sentence is up, there will be a hearing to reevaluate the juvenile.[185] If the juvenile is deemed rehabilitated, then the adult part of the sentence will be stayed.[186] If he or she is not rehabilitated, then the juvenile will serve his adult sentence in an adult correctional facility.[187]

D. Why This Proposal is the Best Option

The combination of blended sentences and waiver options in this proposal provides for the most adequate and effective way to

[184] *See* Cotton, *supra* note 167, at 580 (explaining that "blended sentencing allows the adult criminal judge or the juvenile judge to impose both a juvenile sentence and, subsequently, an adult sentence"); *cf.* People v. Petty, 469 Mich. 108, 113 (Mich., 2003) (clarifying that judge's have "option of imposing either a juvenile disposition, an adult sentence, or a blended sentence, i.e., a delayed sentence pending defendant's performance under the terms provided by a juvenile disposition); Brummer, *supra* note 31, at 821–22 (arguing that "The application of blended sentencing as an alternative for addressing serious juvenile criminal conduct should be limited to juveniles who are of sufficient age to be tried initially in adult criminal court.").

[185] *See* Kent v. United States, 383 U.S. 541, 554 (1966) (stating that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons"); Brummer, *supra* note 31, at 796 (explaining that under both inclusive models, judge must monitor juvenile in order to decide whether to impose the adult sentence or not); *see also* Cotton, *supra* note 167, at 567 (referring to *Kent* for proposition that "a child being waived to adult criminal court was entitled to a hearing, consistent with the notions of due process").

[186] *See* Brummer, *supra* note 31, at 778 (explaining that under blended sentencing guidelines "the adult sentence is stayed until the completion of the terms of the juvenile disposition"); *see also* Smallheer, *supra* note 26, at 276 (suggesting that "typical blended sentencing provisions enable a juvenile court judge to impose both a juvenile disposition and a stayed adult criminal sentence when a juvenile offender is found guilty of a crime"); Moore, *supra* note 58, at 131 (noting that adult sentence will be stayed if juvenile complies with sentence and has responded to rehabilitation).

[187] *See* Brummer, *supra* note 31 at 818-19 (noting that, in Arkansas, if juvenile is not amenable to rehabilitation, judge can use any alternative sentence available to court); Smallheer, *supra* note 26, at 262 (describing Minnesota approach that punishes violators of juvenile system with implementation of adult sentence); Moore, *supra* note 58, at 135 (observing that under Missouri's criminal exclusive model, if a juvenile violates conditions of his sentence, then he can be transferred to adult sentence).

deal with all juvenile sex offenders. By using waiver provisions that provide for the least amount of discretion, we help guarantee more consistent adjudications for similar crimes. Juveniles who are under the age of sixteen are afforded the complete benefits of the juvenile system while still having a full opportunity to rehabilitate.[188] Those who are over sixteen and have committed one of the statutorily defined offenses still have the chance to benefit from the juvenile justice system through the implication of blended sentences.[189] Finally, juveniles whom the system has failed by not rehabilitating them can be sent to adult prisons to serve a stricter punishment for their crimes, along with those juveniles who are simply not receptive to rehabilitation.

In addition to the above waivers, blended sentencing is the ideal sentencing option for juvenile sex offenders for numerous reasons. Foremost, it retains the rehabilitative nature of the juvenile court system while allowing for stricter punishments for more serious crimes. Juveniles who are given blended sentences have the access to rehabilitative programs in juvenile facilities that they would not get if they were in adult prison.[190] Juvenile

[188] *See* Mills, *supra* note 26, at 903 (noting that "The juvenile court system was originally designed to rehabilitate juvenile offenders"); *see also* Smallheer, *supra* note 26, at 261 (arguing that abandoning rehabilitation for younger children is a foolish proposal); Cotton, *supra* note 167, at 588 (noting that at common law, "children ages seven to fourteen were rebuttably presumed to be incapable of responsibility for their actions").[188] *See* Mills, *supra* note 26, at 903 (noting that "The juvenile court system was originally designed to rehabilitate juvenile offenders"); *see also* Smallheer, *supra* note 26, at 261 (arguing that abandoning rehabilitation for younger children is a foolish proposal); Cotton, *supra* note 167, at 588 (noting that at common law, "children ages seven to fourteen were rebuttably presumed to be incapable of responsibility for their actions").

[189] *See* Brummer, *supra* note 31, at 822 (concluding that using blended sentences "protects society and at the same time creates incentives for rehabilitation"); *see also* Smallheer, *supra* note 26, at 261 (explaining Minnesota blended sentence system in that the convict receives benefits of longer, more intensive juvenile sentence along with threat of adult sentence if there is a violation); Cotton, *supra* note 148, at 580 (explaining that blended sentences are a way to "detain juveniles who may be too young for imprisonment in adult jails at the time of the offense, but who have committed a crime that cannot and does not warrant incarceration for only a few years").

[190] *But see* Theresa Glennon, J.D., *The Stuart Rome Lecture Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10, 32 (2002) (proposing that black youth "are much more likely to be sent to public juvenile facilities, primarily locked local detention facilities or locked state correctional facilities, which are generally more restrictive and more prison-like than private facilities); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation of Children Accused of Crime*, 62 MD. L. REV. 288, 333 (2003) (arguing that conditions of today's juvenile facilities have not substantially changed since 1970's when many facilities were found to encourage barbaric policies such as regular beatings and isolation of inmates); Tanenhaus & Drizin, *supra* note 24, at 697 (arguing that blended sentences afford juveniles opportunity to

facilities are also a lot safer than adult prisons.[191] It can be very dangerous to send a young teenager to adult prison.

Additionally, blended sentences serve as an incentive. More specifically, the threat of an adult sentence serves as an incentive for the juvenile to rehabilitate.[192] If a juvenile knows that they can be sent to adult prison, it will provide the juvenile with added motivation to cooperate and take full advantage of the rehabilitation programs that the juvenile facility offers. This will also encourage good behavior from the juveniles while they are at the juvenile facility, creating an incentive not to cause additional problems.

It can be argued that while the threat of the adult sentence serves as an incentive to rehabilitate, many juveniles will not actually be rehabilitated. It is feasible that a juvenile will behave while in the juvenile facility just so that they can be released without actually being rehabilitated. A juvenile may participate in the rehabilitative programs offered by the facility with an eye towards release and not because they are trying to rehabilitate. While this may be the case in some instances, it is unlikely that this will always happen. We will have to rely on our juvenile facilities to identify and handle such individuals.

Blended sentences also serve a deterrence function. First, the threat of an adult sentence serves as an individual deterrent for would-be juvenile offenders.[193] Second, blended sentencing serves

rehabilitate, however, whether they are able to will depend on quality of facility they are in. Unfortunately, many facilities do not have effective programs aimed at rehabilitating a juvenile offender).

[191] *See* Arteaga, *supra* note 126, at 1076–78 (discussing how juveniles in an adult prison are more likely to experience sexual assault and violence as opposed to juvenile facilities); *see also* Rose, *supra* note 119, at 987 (noting that "incarcerating juveniles in adult prisons, surrounded by polished, career criminals, is certain to mold and develop the juvenile offender's criminal skills and attitude to a greater extent than incarceration in juvenile correctional facilities"); Ellie D. Shefi, Note, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REF. 653, 664 (Spring, 2003) (arguing that "adult correctional facilities simply are not equipped to deal with the special needs of young offenders" due to adult correction system's focus on punishment rather than rehabilitation).

[192] *See* Brummer, *supra* note 31, at 779 (positing that blended sentences shift responsibility to juvenile for their own rehabilitation); Tanenhaus & Drizin, *supra* note 24, at 695 (arguing that blended sentencing give juveniles both incentive and opportunity to "earn their way out of the adult sentence"); *see also* Hunt, *supra* note 157, at 640 (observing that a youth can be transferred to criminal court after a juvenile hearing if he poses a public safety threat).

[193] *See* Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 ND J. L. ETHICS & PUB POL'Y 1, 28 (2002) (finding that "there is a consistent pattern of higher rates of criminal offending among

general deterrence goals.[194] Juveniles will know that if they commit these injurious crimes, they are not necessarily merely going to be sent to a juvenile facility until they are twenty one.[195] Finally, the imposition of an adult sentence will serve retributive needs for stricter, more punitive sentences for more serious crimes.[196]

IV. CONCLUSION

Currently, there are flaws in our juvenile court system that must be fixed. Namely, the court which prosecutes the juvenile and the punishments being given are not always the best options. By implementing a statutory exclusion or a mandatory judicial waiver for certain sexual offenses committed by juveniles sixteen years and older, we can assure that the juvenile is being adjudicated in the proper forum. Young teenage sexual offenders need to be given the means and the opportunity to rehabilitate, and juvenile facilities can provide for such rehabilitation.

adolescents punished as adults compared to adolescents punished as juveniles"); *see also* Chamberlin, *supra* note 121, at 404 n.119 (arguing that even a suspended adult sentence will serve as a deterrent); Hunt, *supra* note 157, at 629 (noting that blended sentences often lead to lengthier sentences which will serve deterrence goals).

[194] *But see* David M. Altschuler, Ph.D., *Tough and Smart Juvenile Incarceration: Reintegrating Punishment, Deterrence and Rehabilitation*, 14 ST. LOUIS U. PUB. L. REV. 217, 219 (1994) (arguing that "while it may be desirable for punishment by incarceration to have a deterrent impact, strictly speaking it need not do so to justify its use"); David O. Brink, Essay, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1566 (May, 2004) (noting importance of considering deterrence and other forward thinking goals in sentencing, but that these goals do not give "plausible answers to the questions whom to punish and how much to punish"); Alison Marie Grinnel, Notes and Comments, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 N.Y.L. SCH. J. HUM. RTS. 635, 653 (Spring, 2000) (commenting that "although incarceration is a useful tool for incapacitating the offender and, thereby protecting society by physically removing the defendant from the community, it very rarely promotes deterrence").

[195] *See* Smallheer, *supra* note 26, at 289 (concluding that blended sentences heighten motivation of juvenile offender through threat of an adult sentence); Mary E. Spring, Comment, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351,1376 (1998) (noting that extended jurisdiction provisions will not allow chronic or serious juvenile offender to "scoff at the system"). *But see* Podkopacz & Feld, *supra* note 113, at 1128 (arguing that "despite the profound statutory reforms, no amount of juvenile or criminal justice legislative tinkering with the boundaries of youth or adulthood will significantly reduce the amount of crime in the community, offenders' probabilities of recidivism, or increase public safety").

[196] *See* Grinnel, *supra* note 194, at 657 (noting that "punishing juvenile offenders through imprisonment satisfies society's need to hold juveniles accountable for their actions"); *see also* Smallheer, *supra* note 26, at 289 (finding that blended sentences can promote rehabilitation while satisfying need to ensure accountability of juvenile offender); Hunt, *supra* note 157, at 669 (describing the public safety benefits of blended sentencing).

Blended sentencing will further enhance the chances of effectively treating juvenile sex offenders. Blended sentencing will serve as an incentive for the juvenile to rehabilitate and a deterrent for the individual to commit another offense, as well as for potential future juvenile offenders. In cases where the juvenile is not rehabilitated, the juvenile sex offender will serve a stricter adult sentence. This will also serve to protect the public from such offenders. In sum, this proposal adequately addresses the needs for treatment and punishment of the juvenile sex offender.