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INTRODUCTION

The use of the fitness hearing[1] is one of the most debated issues in juvenile law today.[2] At this hearing, the juvenile court determines whether a minor is a fit and proper subject for juvenile court law. If the minor is found to be "unfit," he or she is transferred from the jurisdiction of the juvenile court to the criminal courts.

The fitness hearing controversy has generated numerous legislative proposals.[3] The California legislature in both 1975 and 1976 made significant changes in the hearing procedure.[4] These statutory efforts, however, have not resolved the basic

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1. This hearing has been given many names, including: waiver, transfer, certification, remand, removal, declination of jurisdiction and fitness hearing. *See* NATIONAL JUVENILE LAW CENTER, LAW AND TACTICS IN JUVENILE CASES § 11.2, at 251 (2d ed. 1974) [hereinafter cited as LAW AND TACTICS]. For the technically correct use of these terms in California, see Comment, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 U.C.L.A. L. REV. 988, 991 n.16 (1976) [hereinafter cited as Comment, *Juveniles*]. *See also* Advisory Council of Judges, National Council on Crime & Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME & DELINQUENCY 3, 4 (1962).

In this article, the term fitness hearing will be used to refer to the procedure whereby a juvenile may be cut off from the resources of the juvenile court.

2. Another strongly debated issue deals with what is to be done with children in need of supervision. *See* CAL. WELF. & INST. CODE § 601 (West Supp. 1977). *See generally* McNulty & White, *The Juvenile's Right to Treatment: Panacea or Pandora's Box?*, 16 SANTA CLARA L. REV. 745 (1976).

3. *See, e.g.*, Piersma, Ganousis & Kramer, *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, 20 ST. LOUIS U.L.J. 1, 88 (1975) [hereinafter cited as Piersma]. For the sections of the Model Juvenile Court Act proposed by Piersma relating to the fitness hearing, *see* app. D *infra*. During the 1975-76 regular session of the California Assembly at least three separate bills were introduced relating to the fitness hearing. *See* A.B. 2385, art. 9.5; A.B. 2672, § 22; A.B. 3001, § 15.

4. With the passage and signing of A.B. 3121 (1976 Cal. Legis. Serv. ch. 1071, § 28.5, at 4526), the law relating to fitness hearings changed for the second time in as many years. While this article will focus on the present law, CAL. WELF. & INST. CODE § 707 (West Supp. 1977), reference to the pre-1976 law and the 1976 law will be necessary. The pre-1976, 1976, and present laws are set out in appendices A, B, and C *infra*, respectively.

question raised by the fitness hearing: to what extent does this hearing serve the dual purpose of the juvenile justice system—maximizing rehabilitation of the minor and protection of the public.[5] The position taken in this article is that, in California, the fitness hearing is unnecessary and should be abolished.[6] The juvenile court should retain jurisdiction over all persons under the age of eighteen.[7]

In examining the fitness hearing it is important to keep in mind the relationship between the juvenile justice system[8] and the criminal justice system. Unique to the juvenile system is

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5. CAL. WELF. & INST. CODE § 502 (West Supp. 1977) provides:

(a) The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his own acts; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when necessary for his welfare or for the safety and protection of the public; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.

(b) The purpose of this chapter also includes the protection of the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, prosecuting attorneys and juvenile courts shall take into account such protection of the public in their determinations under this chapter.

All references to California statutes in the text will be to the Welfare and Institutions Code, unless otherwise specified.

6. The idea is not new although no one has previously worked out the details necessary for implementation. *See generally* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE ON JUVENILE DELINQUENCY, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24-25 (1967) [hereinafter cited as TASK FORCE REPORT]; Edwards, *The Rights of Children*, 37 FED. PROBATION 34, 38 (June, 1973); Sargent & Gordon, *Waiver of Jurisdiction: An Evaluation of the Process in the Juvenile Court*, 9 CRIME & DELINQUENCY 121, 128 (1963) [hereinafter cited as Sargent & Gordon].

7. This second recommendation is closely related to the thesis that the fitness hearing should be abolished. Some states, such as New York, have no fitness hearing, but instead have reduced the jurisdictional age of those eligible for juvenile court from 18 to 15. N.Y. FAM. CT. ACT § 712(a) (McKinney Supp. 1976). *See also* VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1976). Under such a system, 16- and 17-year-olds are excluded from juvenile court by their age alone.

The age of 18 should be retained because there is something to be gained by keeping younger persons in a justice system dedicated to rehabilitation. Furthermore, most 16- and 17-year-olds are now successfuly handled in juvenile court without resort to the fitness hearing. *See* text accompanying notes 119-131 *infra*.

8. *See* A. PLATT, THE CHILD SAVERS (1969) and Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) for the history of the creation of juvenile courts.

"the philosophy that erring children should be protected and rehabilitated rather than subjected to the harshness of the criminal system."[9] In California, the expressed purposes for establishing a distinct process for minors[10] include serving "the spiritual, emotional, mental, and physical welfare of the minor" as well as protecting "the public from the consequences of criminal activity."[11] Whether the interests of either the minor or the public are served by transferring selected sixteen- or seventeen-year olds out of the juvenile courts is the focus of this article.

The United States Supreme Court has observed that "the waiver of juvenile court jurisdiction is a 'critically important' action determining vitally important rights of the juvenile."[12] Several commentators consider it the most critical hearing in the juvenile court.[13] The decision to transfer jurisdiction can result in long sentences, harsh conditions or incarceration, exposure to adult felons,[14] the establishment of permanent criminal records,[15] and the loss of the special procedures, treatment,

9. TASK FORCE REPORT, *supra* note 6, at 1.

10. A separate juvenile justice system of courts, procedures and language has been created by the California Legislature. For example, there is no right to bail or a bail hearing in juvenile court; there is instead a detention hearing. CAL. WELF. & INST. CODE §§ 632-633 (West 1972). The trial stage of the juvenile process is referred to as the jurisdictional hearing, *id.* §§ 700-01 (West Supp. 1977), while the sentencing stage is called the dispositional hearing. *Id.* § 702. The charge against the minor is referred to as a petition which is brought on the minor's behalf. *Id.* § 650. The minor is not found guilty or not guilty; instead the minor is found to be or not to be a person described by sections 300, 601, or 602. *Id.* §§ 701-702.

11. *Id.* § 502. For the text of this section, *see* note 5 *supra*.

12. Kent v. United States, 383 U.S. 541, 546 (1966).

13. Clayman, *Fitness—The Critical Hearing of the Juvenile Court*, 50 L.A. B. BULL. 133 (1975) [hereinafter cited as Clayman]; Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 586 (1968) [hereinafter cited as Schornhorst]; Stamm, *Transfer Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law*, 62 KY. L.J. 122, 142-45 (1973) [hereinafter cited as Stamm]. *See* Sargent & Gordon, *supra* note 6; Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS U.L.J. 424, 428 (1968).

14. Jail is not one of the dispositions available to a juvenile court judge. CAL. WELF. & INST. CODE §§ 727, 730, 731 (West Supp. 1977). *See In re* Kirk G., 67 Cal. App. 3d 538, 136 Cal. Rptr. 706 (1977).

15. *See* CAL. WELF. & INST. CODE § 781 (West Supp. 1977). Perhaps the most important right available exclusively to the juvenile is the right to have his record sealed pursuant to § 781. The discovery that a person has a criminal record can greatly hinder any rehabilitative efforts made on his behalf. *See generally* Hayden, *How Much Does the Boss Need to Know*, 3 CIV. LIB. REV. No. 3, at 23 (1976); Schiavo, *Condemned by the Record*, 55 A.B.A.J. 540 (1969); Schwartz & Skolnick, *Two Studies in Legal Stigma*, 10 SOC. PROB. 133 (1962).

and rehabilitative programs that are available to the minor through the juvenile court process.[16] The gravity of the fitness hearing was aptly put by one commentator: "Any transfer of jurisdiction strikes at the most basic philosophical elements of the juvenile court system, for it is an admission that the system cannot or does not want to try to rehabilitate one member of the class of individuals for whom it was created."[17]

Despite these observations, the fitness hearing has been retained and expanded in California.[18] The rationales for maintaining the fitness hearing are based, in part, on the assumptions that certain youths are too hardened or dangerous to be included in the juvenile system,[19] that some have committed crimes demanding longer sentences than the juvenile justice system can offer, and that insufficient resources are available for rehabilitation within the juvenile system.[20]

Before evaluating these rationales within the context of the entire juvenile justice system, this article examines the procedural framework of the fitness hearing and recent legislative changes. In particular, the newly delineated standards for determining fitness will be discussed. Data on the use of the hearing and the standards employed in certain California counties will be analyzed. Finally, the article concludes with an argument for eliminating the fitness hearing from the juvenile justice system.

THE FRAMEWORK OF THE FITNESS HEARING

Initiating the Fitness Hearing Process

Until recently the timing of the fitness hearing under California law was uncertain. Appellate decisions had suggested

16. *See* text accompanying notes 130-131 *infra*.

17. Stamm, *supra* note 13, at 145. Judge Bazelon has also stressed the importance of this decision: "[T]o brand a child a criminal for life is harsh enough retribution for almost any offense. But it becomes an all but inconceivable response when we realize that to so brand him may in fact make him a criminal for life." Bazelon, *Racism, Classism, and the Juvenile Process*, 53 JUDICATURE 373, 373 (1970) [hereinafter cited as Bazelon].

18. *See* note 3 *supra*.

19. The fact that the minor may have been placed on juvenile probation and then reverted to delinquent activity is closely related to this assumption.

20. *See* H. THOMPSON, CALIFORNIA JUVENILE COURT DESKBOOK § 10.4, at 149-52 (1976) [hereinafter cited as THOMPSON]; Sargent & Gordon, *supra* note 6, at 122-25; Stamm, *supra* note 13, at 150-51; Comment, *Juveniles*, *supra* note 1, at 992-93. *See also* Welfare of J.E.C. v. State, 225 N.W.2d 245 (Minn. 1975). *See* text accompanying notes 118-131 *infra*.

the issue might be considered before, during, or even after the jurisdictional hearing (trial).[21] That confusion was resolved in *Breed v. Jones*,[22] where the United States Supreme Court ruled that a minor once in jeopardy in a juvenile court proceeding may not be prosecuted on the same charge under the general criminal law. California codified that holding in 1976 by providing that the fitness hearing shall be "prior to the attachment of jeopardy."[23] The 1977 statute contains this same language.[24] As a result, the question of fitness must be decided before the first witness is sworn at the jurisdictional hearing.[25]

Fitness is raised first upon the motion of the petitioner.[26] Under prior law the petitioner was the probation department;[27] current law designates the prosecuting attorney.[28] The presence of the prosecuting attorney as petitioner at all stages of the juvenile process may be the most significant change that has occurred in the juvenile court since its inception. The prosecuting attorney will bring to juvenile court many of the practices employed in the criminal court. For example, the prosecuting attorney, familiar with the plea bargain[29] under the criminal system, may be tempted to initiate the practice of not petitioning for a fitness hearing, in discretionary cases, in exchange for an admission by the minor.[30] Such a practice could have a

21. *See* discussion and cases cited in THOMPSON, *supra* note 20, at § 10.4; Clayman, *supra* note 13, at 136.

22. 421 U.S. 519 (1975).

23. 1975 Cal. Legis. Serv. ch. 1266, § 4, at 3559 (repealed 1976). *See* apps. B & C *infra*.

24. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977). *See* app. C *infra*.

25. This conclusion is the author's interpretation of the current law. A recent case held that jeopardy had not attached under 1968 proceedings when the juvenile court judge decided to raise the fitness issue on the basis of evidence introduced at the jurisdictional hearing. *In re* Wright, 67 Cal. App. 3d 122, 136 Cal. Rptr. 481 (1977). *Cf. In re* Bryan, 16 Cal. 3d 782, 548 P.2d 693, 129 Cal. Rptr. 293 (1976) (the holding in Breed v. Jones, 421 U.S. 519 (1975), rejecting continuing jeopardy in juvenile-criminal proceedings as double jeopardy, was given retroactive effect).

26. CAL. WELF. & INST. CODE § 650(b) (West Supp. 1977).

27. 1961 Cal. Stats. ch. 1616, § 2, at 3477. *See* app. A *infra*.

28. CAL. WELF. & INST. CODE §§ 650(b), 681 (West Supp. 1977).

29. The use of the plea bargain and sentence bargain in California juvenile courts is not well documented. *See* THOMPSON, *supra* note 20, at § 8.19. From the author's observations and interviews in Santa Clara County, the practice is not often used. In fact, there appears to be a policy against plea bargaining on the part of the probation department in Santa Clara County, and sentence bargaining at the dispositional phase has been rarely practiced by the probation officers. Whether the prosecuting attorney will enter into sentence bargaining remains to be seen.

30. The prosecuting attorney, with his experience in the courts of criminal jurisdiction, is more familiar with the plea bargain and the sentence bargain than is the probation officer. *See* CAL. PENAL CODE §§ 1191-1191.5 (West 1970). In Illinois, the

chilling effect upon the minor's desire to have a contested jurisdictional hearing.

The prosecutor as petitioner decides whether the fitness issue will be raised for any eligible sixteen or seventeen year old.[31] In practice, other interested parties may request that the issue be heard.[32]

Only minors described in section 602 of the Welfare and Institutions Code[33]—those accused of violating criminal laws—are subject to the fitness hearing. Minors described by sections 300[34] (formerly section 600) and 601,[35] such as runa-

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power to petition on the question of fitness is reportedly often used to force minors to admit to a petition rather than be subjected to the fitness hearing procedures. Interview with Ron Katz, Supervisor of the Juvenile Department, Cook County Public Defender's Office, Chicago, Ill. (Dec., 1975). The author knows of no such practices by district attorneys in California. For a review of the plea bargaining tactics available to the attorney in juvenile court, see D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 311-34 (1974) [hereinafter cited as BESHAROV].

31. There has been some confusion as to the meaning of the statute. Some district attorneys interpret the statute to mean that whenever a minor is charged with one of the eleven crimes listed in CAL. WELF. & INST. CODE § 707(b) (West Supp. 1977) *(see* app. C *infra),* there must be a fitness hearing. Other district attorneys believe it is within their discretion to ask for a fitness hearing in any case. The language of the statute seems to indicate that the latter position is correct.

32. The judge probably has the power to raise the fitness issue sua sponte, even though the prosecutor does not see fit to do so. Green v. Municipal Court, 67 Cal. App. 3d 794, 136 Cal. Rptr. 710 (1976). *See also* People v. Superior Court (On Tai Ho), 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 89 (1974); Esteybar v. Municipal Court, 5 Cal. 3d 119, 485 P.2d 1129, 95 Cal. Rptr. 513 (1972); People v. Tenario, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970). It is unclear what the result would be if a judge ordered the district attorney to request a fitness hearing and the district attorney refused.

33. CAL. WELF. & INST. CODE § 602 (West Supp. 1977) provides:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

34. *Id.* § 300 provides:

> Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependant child of the court:
> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.
> (b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.
> (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.
> (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

ways, minors beyond control of one's parents, minors in need of care and curfew violators,[36] are never subject to transfer to the criminal system. Furthermore, minors must have been sixteen or seventeen years old at the time of the alleged violation before they are eligible for a fitness hearing.[37] Minors who were under sixteen years old at the commission of the alleged violation must be retained by the juvenile court, while individuals eighteen or over at that time must be prosecuted under the general law in adult criminal courts.

Rights of the Minor

Notice. The minor must receive written notice of the jurisdictional hearing,[38] but there is no explicit requirement of notice for the fitness hearing. The Supreme Court of California in *Donald L. v. Superior Court* declared that the law must be read to "require a hearing with adequate notice to the minor and his counsel on the issue of the minor's fitness for care and treatment under the Juvenile Court Law."[39] Apparently, this requirement has been satisfied in many counties by oral notification to the minor or his attorney,[40] but the statute itself is

35. *Id.* § 601 provides:

(a) Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

(b) If a school attendance review board determines that the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities, or if the minor fails to respond to directives of a school attendance review board or to services provided, the minor is then within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court; provided, that it is the intent of the Legislature that no minor who is adjudged a ward of the court pursuant solely to this subdivision shall be removed from the custody of the parent or guardian except during school hours.

36. The current law excludes curfew violations from the purview of section 602. *Id.* § 602.

37. *Id.* § 707(a). *See* app. C *infra*. It is important to note that most 16- and 17-year-olds in the juvenile court do not have a fitness hearing. *See* text accompanying notes 107-109 *infra*.

38. CAL. WELF. & INST. CODE §§ 658, 659 (West Supp. 1977).

39. 7 Cal. 3d 592, 597, 498 P.2d 1098, 1100-01, 102 Cal. Rptr. 850, 852-53 (1972).

40. In Santa Clara County, for instance, written notice of a fitness hearing is not provided. *See* Clayman, *supra* note 13, at 135, who notes that Los Angeles County, on

silent. If the fitness hearing is to be retained, this procedural flaw should be remedied by requiring written notice of the hearing to the minor and his attorney sufficiently in advance to allow for adequate preparation.[41]

Another procedural difficulty concerns the specificity of the notice. The statute does not require the petitioner to indicate which of the five statutory grounds[42] are the bases for the unfitness claim. Furthermore, it is not clear if the court would be restricted to consideration of the grounds set out in the notice.[43]

Right to counsel. The minor is entitled to representation by counsel at the fitness hearing.[44] The minor and his attorney also have the right to present any relevant evidence during the hearing[45] and to call witnesses, including expert witnesses, on the minor's behalf.[46]

The accused minor can waive his right to have an attorney at the fitness hearing, as he can at any stage of the juvenile proceedings.[47] Some minors proceed through the fitness hearing without counsel.[48] The minor can also consent to the recommendation of fitness and not contest the issue.[49] It is doubtful,

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the other hand, requires written notice.

41. A recently published model juvenile statute would require written notice 72 hours prior to the fitness hearing. Piersma, *supra* note 3, at 94. The model act, as it relates to waiver hearings, is reproduced in app. D *infra*. *See also* CAL. JUV. CT. R. 1346(b), which requires written notice five judicial days prior to the fitness hearing. *See In re* J.T., 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1974) (parent must be given notice of specific allegations in a dependency proceeding under CAL. WELF. & INST. CODE § 300 (West Supp. 1977) (formerly § 600)).

42. CAL. WELF. & INST. CODE § 707(a)(1)-(5) (West Supp. 1977). *See* app. C *infra*.

43. For instance, if the district attorney noticed that the minor was unfit based upon "the degree of criminal sophistication exhibited by the minor," *id.* § 707(a)(1), and there was insufficient evidence as to that ground, would the district attorney be precluded from bringing up another ground not previously noticed?

44. Kent v. United States, 383 U.S. 541 (1966). *See In re* Harris, 67 Cal. 2d 876, 879, 434 P.2d 615, 617, 64 Cal. Rptr. 319, 321 (1967), where the California Supreme Court stated that the principles set down in *Kent* were of a constitutional dimension.

45. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977). *See* app. C *infra*.

46. On the use of expert witnesses at the fitness hearing, see Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714-15, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603, (1970); People v. Allgood, 54 Cal. App. 3d 434, 454-55, 126 Cal. Rptr. 666, 680 (1976).

47. CAL. WELF. & INST. CODE § 700 (West Supp. 1977).

48. BUREAU OF CRIMINAL STATISTICS, DIVISION OF LAW ENFORCEMENT, CALIFORNIA DEP'T OF JUSTICE, JUVENILE PROBATION IN CALIFORNIA 39 (1973). Professor Wald reports that in 27.5% of all fitness hearings in Santa Clara County in 1971-72 the minor had no attorney. (unpublished data on file with Professor Michael Wald, Stanford Law School).

49. There are certain situations, however, in which the minor may wish to be transferred to the criminal courts. *See* LAW AND TACTICS, *supra* note 1, § 11.2, at 252.

however, that any minor understands the importance of a fitness hearing or the full consequences of transfer to the criminal courts.[50] Until such time as a full, understandable explanation of what is at stake can be developed by the courts, no minor should be permitted to waive his right to an attorney at a fitness hearing. In other words, if the hearing is to be retained, there should be an attorney present representing the minor.[51]

Standards for Determining Fitness

The question of which standards should govern the determination of fitness has been a source of contention in California as well as in other jurisdictions.[52] The basic difficulty lies in the vagueness of the standards.[53] The pre-1976 California statute gave little guidance as to which factors the juvenile court could or could not consider in determining the fitness question. Neither the gravity of the offense nor the fact that the minor denied the petition was sufficient to support a finding of unfitness.[54] Moreover, a combination of offense and denial was likewise insufficient to support a finding of unfitness.[55]

Case law provided the California juvenile courts with more specific guidelines concerning the fitness determination. The following factors have been mentioned by appellate courts as relevant: (a) the minor's behavior pattern, including any delin-

50. *See generally* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970).

51. The representation by counsel means nothing less than the right to effective assistance of counsel. *See* Geboy v. Gray, 471 F.2d 575 (7th Cir. 1973) (minor's waiver was invalid because of counsel's lack of zeal); *In re* Barker, 17 Md. App. 714, 720, 305 A.2d 211, 217 (1973) (counsel's duty is to search for a plan or range of plans which may persuade the court that the welfare of the child and the safety of the community can be served without waiver of jurisdiction). These cases suggest that if the minor is to be permitted to represent himself at the fitness hearing, not only should he be able to understand the consequences of this hearing, but, as an attorney, he must also be zealous and effective in his search for an alternative plan to an unfitness finding.

52. *See generally* S. DAVIS, RIGHTS OF JUVENILES 112-16 (1974); LAW AND TACTICS, *supra* note 1, at 255-61; Schornhorst, *supra* note 13, at 602-06; Stamm, *supra* note 13, at 150-64.

53. One commentator described the former California law as "hopelessly vague." Boches, *Juvenile Justice in California: A Re-evaluation*, 19 HASTINGS L.J. 47, 96 (1967). *See also* Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970).

54. CAL. WELF. & INST. CODE § 707 (West 1972) (current version at West Supp. 1977); *see* app. A *infra*.

55. Bruce M. v. Superior Court, 270 Cal. App. 2d 566, 572, 75 Cal. Rptr. 881, 885 (1969).

quency;[56] (b) the length of treatment required;[57] (c) the nature of the crime allegedly committed;[58] (d) the circumstances and details surrounding its commission;[59] (e) the minor's degree of sophistication, particularly as relating to criminal activities;[60] (f) any expert testimony the court in its discretion permits to be heard;[61] (g) candor and contrition on the part of the minor;[62] and (h) whether the minor was amenable to a Youth Authority commitment.[63] In addition, *Kent v. United States* offers an appendix listing criteria the United States Supreme Court considered important in determining fitness.[64]

Under the present law, in order to determine whether the minor would be "amenable to the care, treatment and training program available through the facilities of the juvenile court"[65] the court may consider any one or a combination of the following criteria:

> (1) The degree of criminal sophistication exhibited by the minor.
> (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
> (3) The minor's previous delinquent history.
> (4) Success of previous attempts by the juvenile court to rehabilitate the minor.
> (5) The circumstances and gravity of the offense alleged to have been committed by the minor.[66]

It is important to note that under the current law a minor

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56. Jimmy H. v. Superior Court, 3 Cal. 3d 709, 714, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970).

57. *Id.* at 715, 478 P.2d at 35, 91 Cal. Rptr. at 603.

58. *Id.* at 716, 478 P.2d at 36, 91 Cal. Rptr. at 604.

59. *Id.*

60. *Id.*

61. Donald L. v. Superior Court, 7 Cal. 3d 592, 599, 498 P.2d 1098, 1102, 102 Cal. Rptr. 850, 854 (1972).

62. Bryan v. Superior Court, 7 Cal. 3d 575, 587, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972), *cert. denied*, 410 U.S. 944 (1973).

63. People v. Joe T., 48 Cal. App. 3d 114, 120, 121 Cal. Rptr. 329, 332 (1975) (the juvenile court must consider all programs available through the facilities of the court before making a finding of unfitness). For a Minnesota case that goes even further, see Welfare of J.E.C. v. State, 225 N.W.2d 245 (Minn. 1975).

64. 383 U.S. 541, 566-67 (1966); *see* Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DE PAUL L. REV. 23 (1976).

65. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977); *see* app. C *infra*.

66. *Id.* That section provides that the "determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based *on any one* or a combination of [these] factors . . . ." (emphasis added).

accused of a serious crime can be found unfit solely on the circumstances and gravity of the alleged offense, whereas previously this standard alone had been held to be an insufficient basis for a finding of unfitness.[67]

While the current standards may appear broad, the *Juvenile Court Rules,* prepared under the auspices of the Judicial Council of California,[68] will broaden the standards still further. After listing the five statutory standards, those rules suggest to juvenile court judges and referees that they may consider "[a]ny other relevant factors found by the court and specifically recited in its order."[69]

The Burden of Proof and Evidentiary Considerations

Under the 1976 statute and earlier case law the petitioner had the burden of proof to show by substantial evidence that the minor was not amenable to treatment under the juvenile system.[70] Under the current law, when the petitioner raises the fitness question and the minor has been accused of one of the crimes listed in Section 707(b),[71] the burden shifts to the minor who must demonstrate that he is amenable to treatment in the juvenile court.

Focus upon the burden of proof, however, is somewhat misleading. In all cases the juvenile probation officer must prepare a social report[72] concerning the minor's behavioral patterns.[73] In practice, the evidence contained in that report becomes the burden which one side or the other must overcome. Thus, unless the minor or the district attorney can produce sufficient evidence to counter the contents and recommendations in the probation officer's report, that social report will generally prevail.

All evidence that is relevant and material is admissible in

67. *See* note 53 and accompanying text *supra.*

68. CAL. JUV. CT. R. (effective July 1, 1977).

69. CAL. JUV. CT. R. 1348(b)(2)(F).

70. *See* People v. Arauz, 5 Cal. App. 3d 523, 85 Cal. Rptr. 266 (1970).

71. Section 707(b) is reproduced in app. C *infra.*

72. On the technical problem relating to the juvenile court judge's review of a social report relating to the fitness question prior to the jurisdictional hearing, see THOMPSON, *supra* note 20, at § 10.4.

73. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977). *See* app. C *infra. See also* Bruce M. v. Superior Court, 270 Cal. App. 2d 566, 572-73, 75 Cal. Rptr. 881, 885-86 (1969). The minor and his attorney are entitled to review any social records, including the social report.

a fitness hearing.[74] Under this relaxed evidentiary standard, all parties may submit social reports including opinions, progress reports, and other kinds of hearsay evidence.[75] Because the court is focusing on the person before it rather than on the legal question—did something happen—the fitness determination more closely resembles the dispositional hearing than it does the jurisdictional hearing.[76]

This broad standard of admissibility gives rise to a related problem. Section 707(a)(5) allows the court to decide the fitness question solely on the circumstances and gravity of the alleged offense,[77] but it does not indicate how the court is to determine the extent to which the minor was involved in the alleged offense. Thus, the mere allegation of criminal conduct or reference to a police report or other case summary[78] could be the evidentiary basis connecting the minor to the alleged criminal conduct. Moreover, under the current statute, the court is not precluded from basing a finding of unfitness upon illegally obtained evidence, illegally seized contraband or hearsay.

Thus, the court can find that the minor was involved in certain delinquent behavior on the basis of evidence that would never be admitted at the jurisdictional hearing—and would certainly never be admitted at a criminal trial. Yet, under current law, this type of record is sufficient to exclude the minor from the juvenile system.

This problem stems from the failure to provide some kind of evidentiary hearing prior to the fitness determination. At other crucial junctures in both the juvenile and criminal justice

74. THOMPSON, *supra* note 20, at § 10.7, notes that "[t]here appear to be no limitations upon the evidence that the court may consider at the remand or referral hearing, other than the basic tests of *relevancy* and *materiality* to the issue presented" (emphasis in original).

75. *See id.* at § 9.4. *See also* People v. Chi Ko Wong, 18 Cal. 3d 698, 717-21, 557 P.2d 976, 988-91, 135 Cal. Rptr. 392, 404-07 (1976) (hearsay evidence used to support a finding of unfitness).

76. *Compare* CAL. WELF. & INST. CODE § 706 (West 1972) *with id.* § 701 (West Supp. 1977). Section 701 states in part: "The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." *See* People v. Chi Ko Wong, 18 Cal. 3d 698, 717-18, 557 P.2d 976, 988-89, 135 Cal. Rptr. 392, 404-05 (1976). *See also* M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 144-46 (1974) [hereinafter cited as PAULSEN & WHITEBREAD]; Edwards, *The Defense Attorney at the Dispositional Hearing: The Need for Social Worker Assistance*, 34 NLADA BRIEFCASE 48 (1976) [hereinafter cited as Edwards].

77. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977). *See* app. C *infra*.

78. In practice, the court may review an offense report or summary prepared by the probation officer, but hear no testimony. Defenses available to the minor and legal questions such as the admissibility of certain evidence are not considered.

systems, some kind of probable cause hearing is mandated before action may be taken by the court. Before a juvenile court can detain a minor, he or she can demand a probable cause hearing.[79] Similarly, before a magistrate can hold a criminal defendant to answer and bind him over for arraignment in superior court, the defendant has the right to a preliminary hearing.[80] In both hearings, a factual basis must be established before the court can take further action. Yet at the critical fitness hearing a court may find a minor unfit for the juvenile system without considering evidence on the circumstances and gravity of the alleged offense. The failure to provide some kind of probable cause hearing prior to the fitness determination is a serious problem.[81] If the fitness hearing is to be retained, a right to a prior probable cause hearing should be established.

Finding of Unfitness

The juvenile court must exercise discretion in finding a minor unfit,[82] and such a finding must be based on substantial evidence.[83] The minor is entitled to a statement of reasons supporting the order of remand to the criminal justice system.[84] The failure to give this statement of reasons, although an error of constitutional dimensions, may be harmless error.[85]

The finding of unfitness is not an appealable order[86] but it has been frequently litigated either after completion of the

79. *See, e.g., In re* William M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970); *In re* Dennis H., 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971); *In re* Macidon, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966). *See also* Hoffman & McCarthy, *Juvenile Detention Hearings: The Case for a Probable Cause Determination,* 15 SANTA CLARA LAW. 267 (1975).

80. CAL. PENAL CODE §§ 858-883 (West Supp. 1977).

81. Many states provide such a hearing. For the law in other jurisdictions, see PAULSEN & WHITEBREAD, *supra* note 76, at 146-47. *See also* Piersma, *supra* note 3, at 94. The provision for such a hearing in the Model Juvenile Court Act is set out in app. D *infra.*

82. Richardson v. Superior Court, 264 Cal. App. 2d 729, 734-35, 70 Cal. Rptr. 350, 353 (1968).

83. Jimmy H. v. Superior Court, 3 Cal. 3d 709, 713-14, 91 Cal. Rptr. 600, 602-03, 478 P.2d 32, 34-35 (1970).

84. Kent v. United States, 383 U.S. 541, 557 (1966); *accord,* Juan T. v. Superior Court, 49 Cal. App. 3d 207, 211, 122 Cal. Rptr. 405, 407 (1975); *see* Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States,* 26 DE PAUL L. REV. 23, 40-46 (1976).

85. People v. Chi Ko Wong, 18 Cal. 3d 698, 722-23, 557 P.2d 976, 992, 135 Cal. Rptr. 392, 408 (1976).

86. *In re* Brekke, 233 Cal. App. 2d 196, 43 Cal. Rptr. 553 (1965). Thus, if the minor is found unfit, he would be taken through the entire criminal process and his case finally adjudicated before the fitness determination could be appealed.

case[87] or by a writ of mandamus after the fitness determination.[88] The California Supreme Court recently clarified some of the confusion surrounding the appeal of the fitness hearing. In *People v. Chi Ko Wong*, the court held that an order pursuant to section 707 may not be appealed after a criminal conviction, nor may it be attacked by a motion pursuant to section 995 of the California Penal Code.[89] This order may be challenged only by an extraordinary writ in collateral proceedings prior to the commencement of the trial on the charges for which the defendant was found unfit.[90]

Appellate proceedings can stretch on for months or years before a final determination is made.[91] Such litigation raises the additional problem of what is to be done with the minor found to be fit after a lengthy court battle.[92] Whether the minor is ultimately found fit or unfit, the protracted proceedings will generally work to the disadvantage of the minor since he is growing older and more mature and will probably be less able to benefit from any juvenile court program.

Return to Juvenile Court

One continuing problem the Legislature has yet to resolve satisfactorily concerns the situation where a minor sent to the adult system is thereafter returned to juvenile court. The 1976 statute created a complicated set of procedures allowing such a return when the "circumstances and gravity of the offense"

87. *E.g.*, People v. Joe T., 48 Cal. App. 3d 114, 121 Cal. Rptr. 329 (1975).

88. *E.g.*, Jimmy H. v. Superior Court, 3 Cal. 3d 709, 478 P.2d 32, 91 Cal. Rptr. 600 (1976); Juan T. v. Superior Court, 49 Cal. App. 3d 207, 122 Cal. Rptr. 405 (1975); Bruce M. v. Superior Court, 270 Cal. App. 2d 566, 75 Cal. Rptr. 881 (1969).

89. 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976). *See also* People v. Benefield, 67 Cal. App. 3d 51, 136 Cal. Rptr. 465 (1977); People v. Rising Sun, 55 Cal. App. 3d 1024, 128 Cal. Rptr. 281 (1976); People v. Allgood, 54 Cal. App. 3d 434, 126 Cal. Rptr. 666 (1976); People v. Browning, 45 Cal. App. 3d 125, 119 Cal. Rptr. 420 (1975).

90. 18 Cal. 3d at 714, 557 P.2d at 986, 135 Cal. Rptr. at 402. Furthermore, the court noted, "[a] defendant who fails to avail himself of such a timely review will be deemed to have waived any challenge to the propriety of the certification." *Id.*

91. The history of Morris Kent, petitioner in Kent v. United States, 383 U.S. 541 (1966), gives an indication of the potential length of time involved. Kent was arrested in 1961 when he was 16 years old. His case went through the courts until the United States Supreme Court rendered its decision in 1966. Then the case was remanded for further proceedings which were reported in 1968. Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968).

92. For an understanding of the procedural problems involved in the review of unfitness findings, see Note, *Review of Improper Juvenile Transfer Hearings*, 60 VA. L. REV. 818 (1974). *See also* Schornhost, *supra* note 13, at 606-10.

were found to be untrue or the charge was reduced in adult court.[93]

The section proved to be unworkable and was probably ignored or misunderstood by judges and attorneys alike.[94] The complexities were numerous. A magistrate at a preliminary hearing was in the position to modify a superior court finding of unfitness, and with the consent of the minor, return the case to juvenile court. A superior court judge, again with the minor's approval, could return the case to juvenile court either prior to the attachment of jeopardy or after a verdict or finding has been made as to each pending charge. Thereafter there was nothing to prevent the juvenile court from finding the minor unfit once again, based on different factors.

The current law repeals this section.[95] Now a minor found unfit must remain in the courts of criminal jurisdiction. The new law, while avoiding the complexities of the 1976 scheme, has the potential for great unfairness. The gravity of the offense might be the most important or exclusive basis for the unfitness finding. Yet, if further inquiry at the preliminary examination or trial shows the original charges were exaggerated or unfounded, the minor will find himself out of the juvenile system,[96] with all the attendant disadvantages.[97]

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93. 1975 Cal. Legis. Serv. ch. 1266, § 7, at 3560 (repealed 1976). *See* § 707.3 in app. B *infra*.

94. *In re* Stanley, 62 Cal. App. 3d 71, 131 Cal. Rptr. 608, *modified*, 62 Cal. App. 3d 1030 (1976), gives an indication of how some closely related statutory provisions were treated. In that case the minor was found unfit and remanded to the criminal courts on charges of first degree murder and robbery. Pursuant to a plea bargain, the defendant pleaded guilty to second degree murder. Neither the prosecutor, defense counsel, nor the court was aware of § 707.2, which prohibited the minor from being sent to state prison on such a plea. The court attempted to send the defendant to state prison, but the court of appeal held that it could not. Section 707.2 has been substantially amended again. CAL. WELF. & INST. CODE § 707.2 (West Supp. 1977). *See* app. C *infra*.

95. 1975 Cal. Legis. Serv. ch. 1266, § 7, at 3560 (repealed 1976).

96. Other technical problems have not been addressed by either the legislators or commentators. Consider the minor who is found unfit and whose case is settled in the criminal courts. Subsequently, he is arrested before his eighteenth birthday on a new violation. Presumably the case must be filed in the juvenile court, but thereafter, is the earlier determination of unfitness controlling in the second case? Would it depend on the grounds of the previous finding and the results in the adult criminal system?

97. The adoption of some kind of probable cause hearing prior to making the fitness determination might alleviate some of this unfairness. *See* text accompanying notes 74-81 *supra*.

Conclusion

This overview of the procedural aspects of the fitness hearing reflects a complicated, cumbersome, time-consuming, and error-latent process. Although the changes suggested above would alleviate some of the procedural difficulties, such modifications might also add further complexity to the proceedings. Unless there are significant policy justifications for the fitness hearing, its continued retention seems questionable. The article turns now to a review of the available data on fitness hearing practices in California. This data reflects whether minors throughout the state are being treated similarly at the fitness hearing.

VARIATIONS IN FITNESS HEARING PRACTICE

Given the importance of the fitness hearing to the minor, one might expect some consistency as to when these hearings are held, how often minors are found unfit for the juvenile court, and what factors judges utilize to determine fitness. Despite efforts to establish precise standards,[98] the fitness decision remains within the broad discretion of the juvenile court.[99] One commentator has observed, "The reader should not be misled by the careful formulation of these criteria into believing that they are anything more than the articulated description of a highly subjective process."[100] The following data confirm this conclusion.

No statewide data have been published on the number of

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98. *See* text accompanying notes 56-67 *supra*.

99. BESHAROV, *supra* note 30, at 254-59; PAULSEN & WHITEBREAD, *supra* note 76, at 139-44. Two commentators have noted:

> Obviously, such criteria leave much to the discretion of the juvenile judge. On the one hand, nebulous guidelines give the juvenile judge the freedom to decide each case on its individual merits. The judge is free to consider any and all information that anyone brings to his attention, and he may be in a good position to consider the needs of each particular child. On the other hand, such broad discretion puts the judge in a position where it is extremely easy for him to make arbitrary decisions.

Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 KAN. L. REV. 55, 64 (1969). *See also* TASK FORCE REPORT, *supra* note 6, at app. B, table 5. The analysis of the varying criteria reveals a serious lack of relevancy and uniformity. Mountford & Berenson, *supra* at 78.

100. BESHAROV, *supra* note 30, at 258. *See also* Comment, *Juveniles*, *supra* note 1, at 999. However vague the standards may appear to be, they have thus far withstood constitutional attacks. *E.g.*, Donald L. v. Superior Court, 7 Cal. 3d 592, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972).

fitness hearings in each California county.[101] An in-depth study for Alameda and Santa Clara counties in 1971-72[102] reported for Alameda County (estimated population 1,096,900)[103] 31 initial fitness hearings[104] in which the minor was found unfit out of an estimated 2,200 cases.[105] In Santa Clara County (estimated population 1,178,900) there were 235 initial fitness hearings in which the minor was found unfit out of an estimated 1,600 cases.[106] The ratio of findings of unfitness to the total number of cases was ten times higher in Santa Clara County than in Alameda County in the same two-year period.

The number of minors found unfit and remanded to adult court varies widely by county throughout the state. In 1974, out of a total of 55,388 reported cases, there were 666 remands to adult court from initial petitions.[107] San Diego County (estimated population 1,509,900) had 288 or 43% of the total remands, whereas Los Angeles County (estimated population 6,961,200) had 19 or 3% of the total.[108] Contra Costa, Kern, Orange, Sacramento, and San Francisco counties together

101. The figures prepared by the Bureau of Criminal Statistics include only the number of minors actually found unfit. Letter from Roland F. Hartley, Chief, Bureau of Criminal Statistics, California Department of Justice, Division of Law Enforcement, to Leonard P. Edwards (Dec. 9, 1976) (data on the initial and subsequent petitions remanded to adult court from juvenile court in California, 1975) [on file at SANTA CLARA L. REV.].

102. M. Wald, Characteristics of Minors Found Unfit in Two Counties (unpublished study on file with Professor Wald, Stanford Law School) [hereinafter cited as Wald Study].

103. Population statistics are taken from BUREAU OF CRIMINAL STATISTICS, CALIFORNIA DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 1974: LAW ENFORCEMENT COMPONENT PROGRAM REPORT (CRIMES AND ARRESTS) (1975).

104. An initial fitness hearing is the first such hearing for that minor. A subsequent fitness hearing occurs later, generally on a separate petition.

105. There were no records kept of fitness hearings per se; the records reflect only the instances where a minor was found unfit. According to Professor Wald, there were approximately 10% more fitness hearings in Alameda County in which the minor was found to be fit—thus the total number of fitness hearings is 34 or 35. This 10% figure is based upon estimates from judges and probation officers.

106. According to Professor Wald, the total number of fitness hearings in Santa Clara County (including those hearings in which the minor was found fit) was approximately 248-250, 5% greater than the number of minors found unfit. Approximately 40 minors were found unfit more than once during this period in Santa Clara County. *See* note 96 *supra*.

107. CALIFORNIA DEP'T OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, JUVENILE JUSTICE ADMINISTRATION IN CALIFORNIA 32 (1974). There were 98 remands out of a total of 26,613 cases of subsequently petitioned minors. *Id.* at 38.

108. *Id.* at 32-33.

remanded only 11 minors to adult court.[109]

This wide disparity in unfitness rates indicates that judges from county to county may be applying very different criteria in deciding whether to find a minor unfit.[110] This impression is confirmed by Professor Wald's in-depth study of Alameda and Santa Clara Counties. For example, Professor Wald found that in Santa Clara County most minors found unfit were male (90%), close to 18 years of age (more than half were 17 years 6 months or older), had committed relatively minor offenses (15% major traffic, 8% auto theft, 8% petty theft, 6% minor traffic, 10% burglary), and usually did not commit a crime involving a weapon or physical injury to the victim. Moreover, 53% of the minors were not on probation at the time of the offense. Only 30% were enrolled in school, however.[111]

In comparison, the Alameda County minors found unfit were equally divided between males and females, the males almost always were charged with a serious felony while the females were generally charged with prostitution. The minors were, on the average, six months younger than their Santa Clara counterparts and most were wards of the court. Most of the males were attending school, but this was not true of the females.[112]

Overall, it appears that the court in Santa Clara County was concerned primarily with the age of the minor and whether he or she was living an "adult" life style, while the court in Alameda County was concerned principally with the seriousness of the offense and the failure of previous rehabilitative efforts.[113]

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109. *Id.* The 1975 figures released by the Bureau of Criminal Statistics confirm the great variations among counties. Statewide (with 24 counties reporting no remands) there were 608 remands to adult court from initial petitions. Of those, 337 were from San Diego County alone. Los Angeles County statistics were not reported. Letter from Roland F. Hartley, Chief, Bureau of Criminal Statistics, California Department of Justice, Division of Law Enforcement, to Leonard P. Edwards (Dec. 9, 1976) [on file at SANTA CLARA L. REV.].

110. *See* Wald Study, *supra* note 102. The disparity may also indicate that the various counties have entirely different policies relating to the use of fitness hearings.

111. *Id.*

112. *Id.*

113. *Id.* The degree of variation in the use of the fitness hearing and the standards applied by the courts in making a fitness determination as reflected by the above findings are consistent with other studies in California and in other states. *See* LAW AND TACTICS, *supra* note 1, at § 11.4; PAULSEN & WHITEBREAD, *supra* note 76, at 139-44; Comment, *Juveniles, supra* note 1, at 1009-10; Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U.L.J. 604, 611-13 (1972).

Although there are no data available on fitness hearing practices under the new statute, the pattern under former procedures seems clear. It is evident that the decision to hold a fitness hearing and the outcome of that hearing varies greatly between counties, judges, probation departments and attorneys. Some counties resort to the fitness hearing much more frequently than do others. Some minors are singled out for fitness hearings, most are not. A minor's chances of being found unfit may vary according to the county in which he is petitioned, and more specifically, may depend on the juvenile resources and facilities available in the county. It is not always the seriousness of the crime or the potential long-term sentence that governs fitness decisions, rather it is the minor's social setting (particularly schooling) and his prior contact with the juvenile court that seem to have the most significance to the juvenile judge.[114]

The inconsistencies in determining fitness are not surprising when one considers the vague statutory standards coupled with the differing performances and attitudes of the participants in the fitness hearing process. A judge's finding that a particular minor is unfit for the juvenile system may be influenced by the probation officer who prepares the social report.[115] Under the new law, the policies and practices of the prosecutor will also influence the number of fitness hearing petitions filed.[116] On the other hand, a finding of fitness may be prompted by the diligent defense attorney who presents an alternative program for the minor within the juvenile justice system.[117] The inconsistent use of the fitness hearing from county to county and from judge to judge, together with the wide disparity in the standards applied to find a minor unfit further underscore the need to question the basic premises for maintaining this complex transfer process. We turn now to an examination of those assumptions.

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114. *Contra,* Keiter, *Criminal or Delinquent? A Study of Juvenile Cases Transferred to the Criminal Court,* 19 CRIME & DELINQUENCY 528, 530-32 (1973).

115. The probation officer's use of the social report as an adversarial document is reported in R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT 16-19, 106-141 (1969) and Fogel, *The Fate of the Rehabilitative Ideal in California Youth Authority Dispositions,* 15 CRIME & DELINQUENCY 479 (1969). Fogel notes, "an analysis of the final report upon which the child was committed to the CYA shows that, in nine of the ten cases . . . commitment was the probation officer's intended outcome." *Id.* at 484.

116. *See* text accompanying notes 28-30 *supra.*

117. Geboy v. Gary, 471 F.2d 575 (7th Cir. 1973); BESHAROV, *supra* note 30, at 259-60. *See also* Edwards, *supra* note 76.

IS THE FITNESS HEARING NECESSARY?

Several justifications for transferring certain minors to he criminal system by the use of the fitness hearing have been advanced.[118] The most pervasive justification for transfer is that some youths are too vicious and hardened to receive any benefit from the rehabilitative programs offered by the juvenile system. Closely connected to this premise is the belief that the juvenile system cannot incarcerate and punish minors for sufficiently long periods of time and, thus, the public is not adequately protected from dangerous and violent youths. This justification is based upon the misconceptions that the juvenile court mollycoddles violent youths, that the system is not concerned with the protection of the public, and that there are not sufficient facilities available to the juvenile court capable of confining dangerous minors in a secure setting.

It is not true that the juvenile court treats hardened youthful offenders lightly. In California, the juvenile court has for many years been faced with the problem of what to do with violent and dangerous young persons.[119] While the juvenile court is founded upon an ideal of rehabilitation, it must and does deal with youngsters who, for the protection of themselves or others, need to be incarcerated. The California juvenile justice system has long recognized what one commentator wrote in 1964: "In a great many cases the juvenile court must perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behavior. It must reassert the norms and standards of the community . . . by such measures as it has at its disposal."[120]

Similarly, it is not true that the juvenile court cannot commit dangerous minors to appropriate facilities for long periods of time. Minors committed to the Youth Authority generally can be kept there for as long as adults committed to prison for the same conduct.[121] Under the 1977 law, a sixteen- or

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118. *See* text accompanying notes 19-20 *supra.*

119. *See* CALIFORNIA DEP'T OF THE YOUTH AUTHORITY, CHARACTERISTICS OF CALIFORNIA YOUTH AUTHORITY WARDS 1 (1973) [hereinafter cited as 1973 CHARACTERISTICS], which revealed that as of June 30, 1973, there were 239 wards in the Youth Authority for homicide and 775 for robbery. The 1974 profile showed 257 in custody for homicide and 1,036 for robbery. CALIFORNIA DEP'T OF THE YOUTH AUTHORITY, CHARACTERISTICS OF CALIFORNIA YOUTH AUTHORITY WARDS 1 (1974).

120. F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 53 (1969).

121. CAL. WELF. & INST. CODE § 1769 (West Supp. 1977) provides:

seventeen-year-old committed to the Youth Authority for a crime not listed in section 707(b) may be kept until his twenty-first birthday; if he has violated one of these crimes he may be committed and kept to his twenty-third birthday. In either case, sections 1800-1803 provide that a minor may be incarcerated beyond the statutory limits for successive two year periods.[122] One need only compare these periods of time to the sentences of the Uniform Determinate Sentencing Act of 1976[123] to realize that there are few crimes which would result in a longer period of incarceration in the adult system.[124]

(a) Every person committed to the authority by a juvenile court shall, except as provided in subdivision (b), be discharged upon the expiration of a two-year period of control or when the person reaches his 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800).

(b) Every person committed to the authority by a juvenile court who has been found to be a person described in Section 602 by reason of the violation, when such person was 16 years of age or older, of any of the offenses listed in subdivision (b) of Section 707, shall be discharged upon the expiration of a two-year period of control or when the person reaches his or her 23rd birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800).

It was recently held that the principle of People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (defendant cannot be denied liberty beyond the maximum jail term permitted by statute), does not extend to minors committed to the California Youth Authority from juvenile court. *Contra*, *In re* Aaron, 66 Cal. App. 3d 564, 136 Cal. Rptr. 102 *rehearing granted*, (1977).

The current law is that a minor may not be kept in confinement longer than an adult for the same charge. CAL. WELF. & INST. CODE § 726(c) (West Supp. 1977) provides in part:

> In any case in which the minor is removed from the physical custody of his parent or guardian as the result of an order or wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense which brought the minor under the jurisdiction of the juvenile court.

122. CAL. WELF. & INST. CODE §§ 1800-1803 (West 1972); *id.* § 1769 (West Supp. 1977). Furthermore, the Youth Authority may petition the court for commitment when "the date of discharge occurs before the expiration of a period of control equal to the maximum term prescribed by law" for the convicted offense. The court may then commit the person to state prison. *Id.* §§ 1780-1783 (West 1972). Note that there is no section comparable to §§ 1800-1802 which would permit imprisoned adults to be kept beyond the maximum length of their sentences.

123. Uniform Determinate Sentencing Act of 1976, 1976 Cal. Legis. Serv. ch. 1139, at 4752.

124. For instance, under the Uniform Determinate Sentencing Act robbery in the first degree can be punished by a sentence of two, three or four years in the state prison. CAL. PENAL CODE § 213 (West Supp. 1977). A 16-year-old who is sent to the Youth

It is interesting to note that under present practice most minors transferred to adult court who are accused and found guilty of serious crimes are committed to the Youth Authority anyway. Under the 1976 law only unfit minors whose prescribed sentence was death or life imprisonment could have been sent to state prison by the courts of criminal jurisdiction.[125] The present law makes it possible for the criminal courts to sentence any sixteen- or seventeen-year-old who has been found unfit to prison only after he has first been remanded to the custody of the California Youth Authority for evaluation and report.[126] The court may then sentence the minor to prison only if, after considering the report, the court finds the minor is not a suitable subject for commitment to the Youth Authority.[127] In practice, this section should result in most remanded minors being sent to the Youth Authority.[128]

It should also be kept in mind that the dangerous or violent minor who is found unfit is usually eligible for bail under the criminal system and for that reason may be out of custody while awaiting trial. He is also a first-time offender in the adult system and may receive favorable treatment from the prosecutor or judge because of his age.[129] The criminal system may provide less protection for society from the dangerous minor than does the juvenile system.

Finally, it is not true that the juvenile system does not have adequate facilities for violent youths. The range of dispositional alternatives available to the juvenile court judge in

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Authority for a similar robbery can be kept there until he is 23, a total of seven years. If the minor were found to be a person described in CAL. WELF. & INST. CODE §§ 1800-1803 (West 1972), he might be kept even longer. However, under the revised juvenile court law, the length of physical confinement for a minor in a § 602 case cannot be greater than the maximum term for an adult convicted of the same offense. CAL. WELF. & INST. CODE § 726 (West Supp. 1977). Considering the complexities involved in computing an adult's sentence under the Uniform Determinate Sentencing Act, one hesitates to predict how the juvenile court will set the maximum time in a § 602 case.

125. CAL. WELF. & INST. CODE § 707.2 (West Supp. 1977). *See* app. B *infra*. *See also In re* Stanley, 62 Cal. App. 3d 71, 131 Cal. Rptr. 608 (1976).

126. CAL. WELF. & INST. CODE § 707.2 (West Supp. 1977). *See* app. C *infra*. The court may send such a minor to prison even though the fitness hearing took place prior to January, 1977, so long as sentencing is after January, 1977. People v. Benefield, 67 Cal. App. 3d 51, 136 Cal. Rptr. 465 (1977).

127. CAL. WELF. & INST. CODE § 707.2 (West Supp. 1977). *See* app. C *infra*.

128. The criminal court judge will probably continue to show great reluctance to send a 16- or 17-year-old to prison when such an excellent facility as the Youth Authority is available.

129. *Inequities Cited in Adult Trials for Juveniles*, St. Louis Post-Dispatch, Dec. 1, 1975, at 3C, col. 2.

California is broad. The California Youth Authority, county ranches and camps, private and public institutions, group and foster homes, and special probationary programs afford the court the varied resources necessary to deal with the most hardened and violent minors and to deal with those who pose no threat to society.[130] The Youth Authority alone offers a range of alternatives, from the strictest lock-up facilities to community programs and forestry camps with lower security.[131]

The unique characteristic of these alternatives is their orientation toward rehabilitation and individualized treatment.[132] The juvenile justice system is based on the premise that rehabilitative efforts have their greatest impact on violent offenders when they are young.[133] Thus, it is particularly important for the juvenile system, rather than the criminal system, to work with these dangerous minors.[134] The criminal justice system offers nothing but exposure to older, often more sophisticated criminals. The juvenile justice system is the best opportunity our state has to divert these young people from a career in crime.[135]

Another justification advanced for the fitness hearing is that the chronological age of a person is an arbitrary standard for distinguishing those who should be dealt with by the juvenile system from those who should be within the adult system.

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130. For a description of the different alternatives, see THOMPSON, *supra* note 20, at §§ 9.7-.18.

131. The court, in People v. Hunnon, 5 Cal. 3d 330, 335, 486 P.2d 1235, 1238, 96 Cal. Rptr. 35, 38 (1971), observed: "The Youth Authority has a wide variety of means at its disposal to deal effectively with youthful offenders, and it cannot be said with accuracy that the agency is at the mercy of incorrigible minors." For example, in June, 1973, there were 239 wards in California Youth Authority custody for homicide and 775 for robbery. 1973 CHARACTERISTICS, *supra* note 119. Clearly, the Youth Authority handles commitments of the most serious kind.

132. *See In re* Gault, 387 U.S. 1, 22 n.30 (1967); Stamm, *supra* note 13, at 145.

133. This premise has recently been questioned in Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984 (1976). However, the confidentiality of juvenile records and the opportunity the juvenile has to have them sealed, provides him with an opportunity to start life as an adult with a clean slate. *See* note 15 *supra*. This important rehabilitative process is available only to the juvenile. *See* Edwards & Sagatun, *A Study of Juvenile Record Sealing in California*, 4 PEPPERDINE L. REV. 524 (1977).

134. As one commentator has observed:

> Although the courts and legislators have not regarded this phenomenon [trial in adult court of violent crimes committed by 16- and 17-year-olds] as a particular problem, . . . the welfare of our society as well as the welfare of the youth accused of violent crimes is best served by keeping the youth within the juvenile system.

Note, *Waiver of Jurisdiction and the Hard-Core Youth*, 51 N.D.L. REV. 655, 655-56 (1975) (footnote omitted).

135. *See* Bazelon, *supra* note 17.

Thus, it is argued that persons exhibiting adult characteristics (completed school, living away from parents, married, etc.) are more like adults and should go before the adult court. On the contrary, the sixteen- or seventeen-year-old minor living away from home, married and working—at a difficult transition from childhood dependence to adult independence—is probably more amenable to treatment and more in need of the assistance the juvenile probation department can offer. The suggestion that the adult probation department can provide these supportive services while juvenile probation department cannot is unpersuasive. Juvenile probation officers are known for their dedication, hard work and excellent achievements. Because of their unique skills and experience, the juvenile probation officers can offer more to the adult-like sixteen- and seventeen-year-olds than can their counterparts in the adult system. Furthermore, there is no standard in the current law permitting a remand to the criminal system on such criteria[136]—and thus it cannot be said to present a legal justification for the fitness hearing.[137]

Some would justify the fitness hearing by arguing that the juvenile system should limit its jurisdiction to those minors for whom there are sufficient rehabilitative resources available. A finding of unfitness has never been made in California because no rehabilitative facilities in the juvenile justice system existed for that minor. Given the breadth of programs available at the Youth Authority, no such problem should arise.[138]

CONCLUSION

When the justifications for the fitness hearing are examined within the context of the juvenile justice system and the facilities available to the juvenile court, they appear to be of

136. When the legislature specifies the precise grounds on which the finding of unfitness may be based, it is contrary to long-standing rules of legislative construction to permit judges to resort to unspecified grounds to justify their findings. "Under the maxim of 'expressio unius est exclusio alterius,' the enumeration of acts, things, or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things, or persons." 45 CAL. JUR. 2D *Statutes* § 133 (1958).

Thus, as in § 707 where the statute has designated the specific grounds on which a juvenile court judge may base a finding of unfitness, the judge may not resort to other unnamed grounds. To permit the contrary would allow the judge to act in opposition to the expressed mandate of the legislature.

137. *See also* THOMPSON, *supra* note 20, at § 10.4. *But see* CAL. JUV. CT. R. 1348(b)(2)(F).

138. *See* text accompanying notes 130-31 *supra*.

questionable validity. Clearly, the arguments against this hearing weigh in favor of its elimination. The fitness hearing is one of the most complicated and cumbersome of juvenile court proceedings, replete with procedural and substantive problems.[139] There is a lack of uniformity in the utilization of the fitness hearing and inconsistencies in the standards applied at that hearing. Further, inadequate notice to the minor specifying the reasons for the hearing presents significant problems. The flexible evidentiary standards create the Catch-22 dilemma that a finding of unfitness can be based on the nature of the alleged offense before any determination of the extent to which the minor is involved in the offense.

If the fitness hearing were abolished all these problems would disappear. The savings in time, energy and litigation within the entire justice system would be significant. Most importantly, all young offenders would be assured of receiving equal treatment under the same justice system. The elimination of the fitness hearing would provide fairer treatment to the minor and increased efficiency within the juvenile justice system. Abolition of this hearing would be a conscious investment in all young people who come before the California juvenile courts.

As Judge Skelly Wright has aptly observed,

> [T]here is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration. We will inevitably hear from the Blands and Kents again, and the kind of society we have in the years to come will in no small measure depend on our treatment of them now.[140]

When the complications and legal hazards inherent to the fitness hearing are added to the rehabilitative advantages of

139. Most critics of the fitness hearing suggest that it could be improved by making standards more definite, by examining each case more carefully and by employing procedural techniques which would ensure careful consideration of each minor before the court. *See* Stamm, *supra* note 13, at 131-32, 134-38; Comment, *Juveniles, supra* note 1, at 1010-16. While well-motivated, these commentators would burden the juvenile justice system with lengthy proceedings in every fitness case. Perhaps they would insist on a 90-day diagnostic study in every case pursuant to CAL. WELF. & INST. CODE § 704 (West 1972)? Rather than further complicating and lengthening the hearing, its abolition would be a simpler and fairer remedy.

140. United States v. Bland, 472 F.2d 1329, 1349 (D.C. Cir. 1972) (dissenting opinion), *cert. denied*, 412 U.S. 909 (1974).

keeping a violent youth within the juvenile system, the case for abolition of this hearing becomes very persuasive. The juvenile justice system has much to gain and a host of problems to lose by eliminating the opportunity to transfer sixteen- or seventeen-year-olds to the criminal system.

Appendix A

Pre-1976 Law*

Section 707. At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness.

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* 1967 Cal. Stats. ch. 1357, § 1, at 1357.

Appendix B

The Law from January 1, 1976—December 31, 1976*

Section 707. In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of any criminal statute or ordinance, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(a) The degree of criminal sophistication exhibited by the minor.

(b) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(c) The minor's previous delinquent history.

(d) Success of previous attempts by the juvenile court to rehabilitate the minor.

(e) The circumstances and gravity of the offense alleged to have been committed by the minor.

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such hearing.

Section 707.1. If the minor is declared not a fit and proper subject to be dealt with under the juvenile court law, the district attorney or other appropriate prosecuting officer shall acquire the authority to file an accusatory pleading against the

* 1975 Cal. Legis. Serv. ch. 1266, §§ 4-8, at 3559.

minor in a court of criminal jurisdiction. The case shall proceed from that point according to the laws applicable to a criminal case, provided, that unless the juvenile court specifically orders the individual minor delivered to the custody of the sheriff upon a finding that the safety of the public or of the inmates of the juvenile hall cannot be otherwise protected, the minor, if detained, shall remain in the juvenile hall pending final disposition by the criminal court. If a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are being held, it shall be ordered that the proceedings upon such prosecution resume.

Section 707.2. Except as provided in Section 1731.5 and 1737.1, no minor who was under the age of 18 years when he committed any criminal offense, and who has been found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Section 707, shall be sentenced to the state prison, except upon petition filed pursuant to Article 5 (commencing with Section 1780) of Division 2.5. Of those persons eligible for commitment to the Youth Authority, prior to sentence the court may remand such persons to the custody of the California Youth Authority not to exceed 90 days for the purpose of evaluation and report.

With the exception of past or present wards of the authority, no person shall be returned to the court by the authority unless he has been remanded to the Youth Authority for diagnosis and report, and personally evaluated.

Section 707.3. Whenever any charge, the alleged circumstances and gravity of which were relied upon pursuant to Section 707, is dismissed or found untrue by the court of criminal jurisdiction, the minor shall be returned to juvenile court for trial or disposition of any lesser charge which may remain outstanding against him if the minor consents to being returned to the juvenile court. In any other case, the minor may be returned to juvenile court for the trial or disposition of any charge pending against him if he consents to being returned to the juvenile court. If jeopardy has attached in the criminal proceeding, the case shall not be returned until a verdict or finding has been made as to each pending charge.

Section 707.4. In any case arising under this article in which there is no conviction in the criminal court and the minor is not returned to juvenile court pursuant to Section 707.3, the clerk of the criminal court shall report such disposition to the juvenile court, to the probation department, to the

law enforcement agency which arrested the minor for the offense which resulted in his remand to criminal court, and to the Department of Justice. Unless the minor has had a prior conviction in a criminal court, the clerk of the criminal court shall deliver to the clerk of the juvenile court all copies of the minor's record in criminal court and shall obliterate the minor's name from any index or minute book maintained in the criminal court. The clerk of the juvenile court shall maintain the minor's criminal court record as provided by Article 13 (commencing with Section 825) of this chapter until such time as the juvenile court may issue an order that they be sealed pursuant to Section 781.

Appendix C

The Current Law—as of January 1, 1977*

Section 707. (a) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offense alleged to have been committed by the minor.

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such hearing.

(b) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of one of the following offenses:

* CAL. WELF. & INST. CODE (West Supp. 1977).

(1) Murder;
(2) Arson of an inhabited building;
(3) Robbery while armed with a dangerous or deadly weapon;
(4) Rape with force or violence or threat of great bodily harm;
(5) Kidnapping for ransom;
(6) Kidnapping for purpose of robbery;
(7) Kidnapping with bodily harm;
(8) Assault with intent to murder or attempted murder;
(9) Assault with a firearm or destruction device;
(10) Assault by any means of force likely to produce great bodily injury;
(11) Discharge of a firearm into an inhabited or occupied building, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court shall find that the minor is not a fit and proper subject to be dealt with under the juvenile court law unless it concludes that the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court based upon an evaluation of the following criteria:
(i) The degree of criminal sophistication exhibited by the minor, and
(ii) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, and
(iii) The minor's previous delinquent history, and
(iv) Success of previous attempts by the juvenile court to rehabilitate the minor, and
(v) The circumstances and gravity of the offenses alleged to have been committed by the minor.
A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and reasons therefor shall be recited in the order. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at such hearing.

Section 707.1. If the minor is declared not a fit and proper subject to be dealt with under the juvenile court law, the district attorney or other appropriate prosecuting officer shall acquire the authority to file an accusatory pleading against the minor in a court of criminal jurisdiction. The case shall proceed from that point according to the laws applicable to a criminal case, provided, that unless the juvenile court specifically orders the individual minor delivered to the custody of the sheriff upon a finding that the safety of the public or of the inmates of the juvenile hall cannot be otherwise protected, the minor, if detained, shall remain in the juvenile hall pending final disposition by the criminal court. If a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are being held, it shall be ordered that the proceedings upon such prosecution resume.

Section 707.2. Prior to sentence, the court of criminal jurisdiction may remand the minor to the custody of the California Youth Authority for not to exceed 90 days for the purpose of evaluation and report concerning his amenability to training and treatment offered by the Youth Authority. No minor who was under the age of 18 years when he committed any criminal offense and who has been found not a fit and proper subject to be dealt with under the juvenile court law shall be sentenced to the state prison unless he has first been remanded to the custody of the California Youth Authority for evaluation and report pursuant to this section and the court finds after having read and considered the report submitted by the Youth Authority that the minor is not a suitable subject for commitment to the Youth Authority.

Section 707.3 is repealed.

Section 707.4. In any case arising under this article in which there is no conviction in the criminal court, the clerk of the criminal court shall report such disposition to the juvenile court, to the probation department, to the law enforcement agency which arrested the minor for the offense which resulted in his remand to criminal court, and to the Department of Justice. Unless the minor has had a prior conviction in a criminal court, the clerk of the criminal court shall deliver to the clerk of the juvenile court all copies of the minor's record in criminal court and shall obliterate the minor's name from any index or minute book maintained in the criminal court. The clerk of the juvenile court shall maintain the minor's criminal court record as provided by Article 13 (commencing with Sec-

tion 825) of this chapter until such time as the juvenile court may issue an order that they be sealed pursuant to Section 781.

Appendix D

Model Juvenile Court Act*

Section 13. Transfer Of Jurisdiction To Criminal Court.

(1) Upon motion of the prosecutor, the juvenile court may transfer to a criminal court jurisdiction of a child who is alleged to have committed an offense on or after the child's sixteenth birthday, which if committed by an adult would be a felony. The court shall conduct a hearing to determine whether jurisdiction of the child should be transferred to criminal court.

(2) The transfer hearing shall be conducted not more than 10 days after the petition is filed.

(3) Written notice of the transfer hearing shall be given to the child, his counsel, and the child's parents or guardian not less than 72 hours before the hearing.

(4) When a hearing is ordered under this section the court shall order the juvenile court worker to prepare a predisposition study as provided in section 15 of this chapter. The report of the predisposition study shall be submitted to the court prior to the hearing and a copy shall be made available to the child, his counsel, and the child's parent or guardian.

(5) At the hearing the court shall first determine whether probable cause exists to believe the child committed the alleged offense. Incompetent evidence is not admissible in a hearing conducted under this submission.

(6) Upon a finding of probable cause, the court shall consider the following:

(A) The seriousness of the offense;

(B) The nature and extent of the child's past record of adjudicated offenses, if any;

(C) The resources designed to care for and assist children.

(7) The juvenile court may transfer jurisdiction of the child to a criminal court if the court finds clear and convincing evidence that both of the following apply:

(A) The offense allegedly committed by the child evidences a pattern of conduct which constitutes a substantial danger to the public.

* Piersma, Ganbousis & Kramer, *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, 20 ST. LOUIS U.L.J. 1, 88, 94 (1975).

(B) There are no reasonable prospects for rehabilitating the child through resources designed for the care and assistance of children.

(8) If the juvenile court transfers jurisdiction of the minor to a criminal court, the court shall issue a written transfer order containing specific findings and reasons for the order.

(9) If jurisdiction of the child is not transferred to criminal court, the judge conducting the transfer hearing shall not preside at a subsequent adjudicative hearing concerning the offense alleged in the petition.

(10) Testimony of a respondent at a transfer hearing conducted pursuant to this section shall not be admissible in a trial in criminal court.