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Transfer of 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

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TRANSFER OF 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

I. INTRODUCTION

This article is not another generic meditation on the evolution and prospects of the juvenile court movement. After almost three-quarters of a century,[1] it should be common knowledge, especially among judges and lawyers, that juvenile courts exist because every legislature in the country has seen fit to institutionalize the societal consensus that children who run afoul of the law should be treated differently than adults and given an opportunity to be helped and rehabilitated rather than abandoned to the retributive social machinery of the adult criminal justice system.[2] This longstanding philosophy of the juvenile court movement has been articulated by the Kentucky Court of Appeals on

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[1] Kentucky enacted its first juvenile code in 1906, KY. ACTS ch. 64 [1906], and modeled its statute after an earlier law passed by Illinois in 1899.

[2] Some years ago, Judge Orman Ketcham elaborated a mutual compact theory of juvenile justice and held the mutuality of the compact to have been predicated upon the five following guarantees made by the state to the child: (1) hearings would be promptly held, easily understood, fair, and compatible with, if not part of, the treatment process; (2) if the child was found to be an offender against society, there would be no stigma attached to the finding or any record which could be considered criminal in nature; (3) an attempt would be made to strengthen family ties and the child would be removed from the home only when the welfare of the child or the interests of the community demanded such action; (4) if indicated by the findings of the hearing, the child's subsequent treatment, if not undertaken in the natural home, would as closely as possible approximate that which should have been given by the natural parents; and (5) when removal from home and close supervision was required, the destructive effects of imprisonment upon habits, attitudes, and aspirations would be minimized by therapeutically oriented restrictions. In return for these assurances, the child and his parent gave up certain constitutional rights to due process of law. It was because of a failure by the state to live up to the demands of the compact that the United States Supreme Court redefined and restored these constitutional rights to children during the late 1960's and early 1970's. Ketcham, *The Changing Philosophy of the Juvenile Justice System*, 20 JUV. CT. JUDGES J. 59 (1969).

[3] Baker v. Smith, 477 S.W.2d 149 (Ky. 1972); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Robinson v. Kieren, 216 S.W.2d 925 (Ky. 1949); Mattingly v. Commonwealth, 188 S.W. 370 (Ky. 1916); Washington v. Commonwealth, 136 S.W. 1041 (Ky. 1911); and Marlow v. Commonwealth, 133 S.W. 1137 (Ky. 1911).

more than one occasion,[3] and the General Assembly has, over the years, found it to be so consistent with the public interest that it has enacted numerous juvenile court laws which have developed into the present Chapter 208 of the *Kentucky Revised Statutes* [hereinafter cited as KRS].[4]

The depth of commitment to this philosophy has always been open to some question, however, because from the time of the enactment of its first juvenile code in 1906,[5] Kentucky, like nearly every other state, has included a provision which makes it possible

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[4] All of this has not been sufficient, however, to achieve a widespread understanding and proper administration of these laws. This is largely due to the tradition of informality, the principle of confidentiality regarding juvenile court proceedings, and, up until very recently, an overwhelming absence of attorneys in the courts which gave rise to the attendant random procedures and infrequent appeals which accompany such a dearth of adversary presence. These unique aspects of juvenile justice seem to have seriously curtailed the education of public officials and private citizens alike regarding the juvenile court experiment. Its very structure has long isolated it from public scrutiny and judicial or legislative attention. This is not to say that a great deal of good has not been done by the courts or that many children have not been saved who might otherwise have been lost to careers of criminal enterprise. The modern preoccupation with the defects of the juvenile justice system has too often overlooked the long list of achievements for which this solitary and experimental forum of individualized justice must be given credit. There remains, however, much that is haphazard and whimsical about juvenile court processes. This capricious circumstance persists even after the Supreme Court pronouncements which preciptated the modern juvenile court revolution, and it seems to stem from a misunderstanding of the essence of juvenile court philosophy and a misapplication of the means which must be employed in the attempt to attain the goals envisioned by the founders of the juvenile court movement. These issues, and the ways in which Kentucky is trying to meet them, are discussed in an article and book which will be available in late summer, 1973, Stamm, *Child Advocacy and Legislative Reform in Kentucky*, 24 JUV. JUSTICE 3 (1973), and M. STAMM, LAW AND CHILD ADVOCACY IN KENTUCKY JUVENILE COURTS (1973), through the Kentucky Department for Human Resources. These problems are also examined in Allen, *The Juvenile Court and the Limits of Justice*, 11 WAYNE L. REV. 676, 680 (1965); Bazelon, *Racism, Classism and the Juvenile Process*, 53 J. AM. JUD. SOC'Y 373 (1970) [hereinafter cited as Bazelon] and Ferguson, *Some Kangaroo Aspects of our Juvenile Courts*, 45 CAL. ST. B.J. 85 (1970). Judge Bazelon observes that there has been too much concern for procedure, while treatment and rehabilitation, the substance of juvenile justice, have gone unattended. This has been caused by an overreaction to the *Kent, Gault, and Winship* decisions, *infra*, which place certain procedural restrictions upon juvenile courts. Many have overlooked the important parts of those decisions which preserve the *parens patriae* elements and tradition of the court precisely because they are the bases for treatment and rehabilitation which make juvenile courts unique forums of justice. This uniqueness will be preserved, however, only if there is the care, treatment, and rehabilitation intended by juvenile court legislation in this country. Procedural due process will not preserve it because, in the absence of good rehabilitative programs, the juvenile court will be little more than a form devoid of substance. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 534, 548 (1971); *In re* Winship, 397 U.S. 358, 366-67 (1970); *In re* Gault, 387 U.S. 1, 21-23 (1967); and Kent v. United States, 383 U.S. 541 (1966). The same problems and misunderstanding also seem to persist in Canada. Parker, *Transfer of Juvenile Cases to Adult Courts*, 48 CAN. B. REV. 336 (1970).

[5] KY. ACTS ch. 64 [1906].

to prosecute children in adult courts.[6] Lack of adequate guidelines for the application of this provision has resulted in recurrent abuse, if not outright subversion and circumvention, of the juvenile justice system.[7] This problem exists at the expense of the immeasurable social cost incurred when any child is unnecessarily subjected to the rigors of public criminal prosecution. Judge Bazelon's cogent observations were directly in point when he said that:

> To brand a child a criminal for life is harsh enough retribution for almost any offense. But it becomes an all but inconceivable

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[6] This is currently found in KY. REV. STAT. § 208.170 (1962) [hereinafter cited as KRS]. Other state provisions are found at: ALA. CODE tit. 13, § 364 (1958); ALASKA STAT. § 47.10.060 (1962); ARIZ. REV. STAT. ANN. § 8-202 (Supp. 1971); ARK. STAT. ANN. §§ 45-241, 45-242 (1947); CAL. WELF. & INST'NS CODE § 707 (West 1972); COLO. REV. STAT. ANN. § 37-19-3(2) (Supp. 1965); CONN. GEN. STAT. REV. § 17-60a (Supp. 1971); DEL. CODE ANN. tit. 11, § 2711 (Supp. 1970); D.C. CODE ANN. § 11-1553 (1967); FLA. STAT. ANN. § 39.02 (Supp. 1973); GA. CODE ANN. § 24A-2501 (Supp. 1971); HAWAII REV. STAT. § 571-22 (Supp. 1972); IDAHO CODE § 16-1806 (Supp. 1973); ILL. REV. STAT. ch. 37, § 702-7 (1972); IND. ANN. STAT. § 9-3214 (Burn's Supp. 1972); IOWA CODE § 232.72 (1971); KAN. STAT. ANN. § 38-808 (1972); LA. REV. STAT. ANN. § 13:1570 (1968); ME. REV. STAT. ANN. tit. 15, § 2611 (1964); MD. ANN. CODE art. 26, § 70-16 (1973); MASS. GEN. LAWS ANN. ch. 119, § 61 (1965); MICH. COMP. LAWS ANN. §§ 764-27, 712A.4 (Supp. 1973); MINN. STAT. ANN. § 260.125 (1971); MISS. CODE ANN. § 7185-15 (1942); MO. ANN. STAT. § 211.071 (Supp. 1972); MONT. REV. CODES ANN. § 10-603 (Supp. 1971); NEB. REV. STAT. § 43-202 (1968); NEV. REV. STAT. §§ 62-060, 62-080 (1971); N.H. REV. STAT. ANN. §§ 169:21, *as amended* 169:21-A (Supp. 1972); N.J. STAT. ANN. § 2A:4-15 (1952); N.M. STAT. ANN. § 13-14-27 (Supp. 1972); N.C. GEN. STAT. § 7A-280 (1969); N.D. CENT. CODE § 27-20-34 (Supp. 1972); OHIO REV. CODE ANN. § 2151.26 (Page 1968); OKLA. STAT. ANN. tit. 10, § 1112 (Supp. 1972); ORE. REV. STAT. § 419.533 (1971); PA. STAT. ANN. tit. 11, § 50-325 (Pordon 1973); R.I. GEN. LAWS ANN. §§ 14-1-7, 14-1-7.1 (Supp. 1972); S.C. CODE ANN. § 15-1171 (Supp. 1971); S.D. CODE §§ 26-8-22.7, 26-11-4 (Supp. 1972); TENN. CODE ANN. § 37-234 (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 2338-1 (Vernon 1971); UTAH CODE ANN. § 55-10-86 (Supp. 1973); VA. CODE ANN. §§ 16.1-176, 16.1-176.2, 16.1-177, 16.1-177.1 (Supp. 1973); WASH. REV. CODE ANN. §§ 13.04.120-.200 (1972); W. VA. CODE ANN. § 49-5-14 (1966); WIS. STAT. ANN. § 48.18 (West Supp. 1973); WYO. STAT. ANN §§ 14-101, 14-115.38 (Supp. 1971); 18 U.S.C. § 5032 (1969). New York and Vermont repealed their transfer statutes in 1967.

[7] The Kentucky Department of Child Welfare reports that about two percent of the state's juvenile cases are being transferred to criminal court. If the figure seems low, it is because the juvenile courts in Kentucky do rely on the Department to provide rehabilitative services to almost all the children who come into court. It does not, however, mean that all those who are sent to criminal court are sent lawfully or even because they cannot be helped by the juvenile court. Very often it is because they are black, "outsiders", not subject to fine in juvenile court, or because their cases present so many legal and political issues to the lower court that it simply transfers jurisdiction to the adult forum which may, in the end, give the child the same sort of probationary disposition he could have obtained in the juvenile court. The Bureau of Corrections reports that there are about 50 children in prison and countless others under its supervision because of criminal court convictions. This whole situation could be improved considerably by imposing guidelines on the power to transfer children to adult courts. (Figures obtained from the respective agencies during June, 1973.)

> response when we realize that to brand him may in fact make him a criminal for life. The stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth. More important, casting a youthful offender to the wolves who prowl adult jails may well dash any hope that he will mature to be a civilized man. On the other hand, there is some hope that a youth can be recalled from the wrong road he has started down—whether by psychiatric help, a changed environment, proper schooling, or even just attention and understanding.[8]

The juvenile court system was established to provide these humanitarian alternatives. Consequently, it is inconceivable that casual invocation of the processes and sanctions of the criminal law was intended by the General Assembly when it enacted the transfer provision. However, this provision has endured with its *substance* neither challenged in the Court of Appeals nor altered by the General Assembly.[9] The critical nature of this provision and its implications for the intended functions of the rehabilitative forum of juvenile court and the retributive arena of criminal

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[8] Bazelon, *supra* note 4. This hope is predictated on a belief that the child who is not as yet a completely formed person, and is malleable enough to realize his mistakes, can actively participate in his own rehabilitation, and eventually live a purposeful and lawful life. Kittrie, *Can the Right to Treatment Remedy the Ills of Juvenile Process?*, 57 GEO. L.J. 848, 853-54 (1969).

[9] Although the substance of this provision and the policy considerations underlying its inclusion in the juvenile code are of vital significance, they have never been discussed in Kentucky case law. Of the roughly 73 appellate cases dealing with delinquent minors, 50 have involved the issue of transfer of jurisdiction and all 50 have been directed at *procedural* defects rather than at the substantive question of whether or not and under what conditions it can be deemed in the best interests of both the child and society that he be prosecuted in the criminal court. *See* Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972); Bailey v. Commonwealth, 468 S.W.2d 304 (Ky. 1971); Anderson v. Commonwealth, 465 S.W.2d 70 (Ky. 1971); Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. 1970); Lowry v. Commonwealth, 424 S.W.2d 841 (Ky. 1968); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961); Young v. Knight, 329 S.W.2d 195 (Ky. 1960); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); Hensley v. Commonwealth, 280 S.W.2d 540 (Ky. 1955); Vanhoose v. Commonwealth, 264 S.W.2d 72 (Ky. 1954); Childers v. Commonwealth, 239 S.W.2d 255 (Ky. 1951); Gipson v. Commonwealth, 226 S.W.2d 758 (Ky. 1950); Curnutt v. Commonwealth, 224 S.W.2d 170 (Ky. 1949); Robinson v. Kieren, 216 S.W.2d 925 (Ky. 1949); Lewis v. Commonwealth, 186 S.W.2d 416 (Ky. 1945); Johnson v. Commonwealth, 176 S.W.2d 104 (Ky. 1943); Crawford v. Commonwealth, 95 S.W.2d 12 (Ky. 1936); Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936); Tomlinson v. Commonwealth, 87 S.W.2d 376 (Ky. 1935); Commonwealth v. McIntosh, 78 S.W.2d 320 (Ky. 1935); Wooton v. Commonwealth, 75 S.W.2d 556 (Ky. 1934); Watson v. Commonwealth, 57 S.W.2d 39 (Ky. 1933); Grise v. Commonwealth, 53 S.W.2d 362 (Ky. 1932); Carsons v. Commonwealth, 47 S.W.2d 997 (Ky. 1931); White v. Commonwealth, 47 S.W.2d 548

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justice have not been sufficiently analyzed until very recent times.[10] It is one of those things which has always been done according to "tradition," and little question has been raised about

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(Ky. 1932); Ashley v. Commonwealth, 33 S.W.2d 614 (Ky. 1930); Hall v. Commonwealth, 21 S.W.2d 799 (Ky. 1929); Angel v. Commonwealth, 21 S.W.2d 150 (Ky. 1929); Eldridge v. Commonwealth, 17 S.W.2d 403 (Ky. 1929); Newsome v. Commonwealth, 13 S.W.2d 1046 (Ky. 1929); Asher v. Commonwealth, 299 S.W. 568 (Ky. 1927); Tipton v. Commonwealth, 298 S.W. 990 (Ky. 1927); Goodfriend v. Commonwealth, 288 S.W. 330 (Ky. 1926); Meade v. Commonwealth, 282 S.W. 781 (Ky. 1926); Cloyd v. Commonwealth, 278 S.W. 595 (Ky. 1925); Cody v. Commonwealth, 276 S.W. 970 (Ky. 1925); Hayes v. Commonwealth, 276 S.W. 160 (Ky. 1925); Baughman v. Commonwealth, 267 S.W. 231 (Ky. 1924); Harman v. Commonwealth, 263 S.W. 733 (Ky. 1924); Clark v. Commonwealth, 256 S.W. 398 (Ky. 1923); Thompson v. Commonwealth, 255 S.W. 852 (Ky. 1923); Compton v. Commonwealth, 240 S.W. 36 (Ky. 1922); Waters v. Commonwealth, 188 S.W. 490 (Ky. 1916); Mattingly v. Commonwealth, 188 S.W. 370 (Ky. 1916); Commonwealth v. Davis, 185 S.W. 73 (Ky. 1916); Talbott v. Commonwealth, 179 S.W. 621 (Ky. 1915); Commonwealth v. Franks, 175 S.W. 349 (Ky. 1915). This is awesome testimony to the fact that somehow the real importance and function of the juvenile court were lost upon those judges and lawyers who should have most diligently labored to maintain its integrity. No one seems to have ever asked the crucial questions: If we have juvenile courts, then why do we permit the prosecution of children in adult courts? And if we are going to permit some children to be prosecuted as criminals, then under what specific conditions will this be allowed? It seems that these issues would have occurred to someone in either Watson v. Commonwealth, 57 S.W.2d 39 (Ky. 1933), in which two young boys, 11 and 13 years of age, were convicted of manslaughter in circuit court; or Thomas v. Commonwealth, 189 S.W.2d 686 (Ky. 1945), in which an 11 year old boy was convicted in circuit court of raping a 5 year old girl. Neither their ages nor their offenses were indicative of an inability to be helped by the juvenile court. The modern attention being given to this question is evidence that due process is indeed an evolving and fluid concept, because today not only the procedure but the very substance of transfer proceedings are the subject of widespread attention and concern. The argument is simply that juvenile courts exist to help and rehabilitate children, not to abandon them to the adult courts as was done in the two examples above and which is still being done in too many cases everyday.

[10] *See* note 4 *supra*. The issues involved in the transfer of children to adult criminal courts have been painstakingly analyzed in the following articles: Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME & DELINQUENCY 3 (1962) [hereinafter cited as Advisory Council of Judges]; Bazelon, *supra* note 4; Croxton, *The Kent Case and Its Consequence*, 7 J. FAM. L. 1 (1967) [hereinafter cited as Croxton]; Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113 [hereinafter cited as Frey]; Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers*, 52 A.B.A.J. 923 (1966) [hereinafter cited as Gardner]; Haviland, *Daddy Will Take Care of You: The Dichotomy of the Juvenile Court*, 17 KAN. L. REV. 317 (1969) [hereinafter cited as Haviland]; Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 HOUSTON L. REV. 709 (1972); McJean, *An Answer to the Challenge of Kent*, 53 A.B.A.J. 456 (1967) [hereinafter cited as McJean]; Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 KAN. L. REV. 55 (1969) [hereinafter cited as Mountford & Berenson]; Parker, *Transfer of Juvenile Cases to Adult Courts*, 48 CAN. B. REV. 336 (1970); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Resteiner, *Delinquent or Criminal: The Problems of Transfers of Jurisdiction*, 24 JUV. JUSTICE 2 (1973) [hereinafter cited as Resteiner]; Sargent & Gordon, *Waiver of Jurisdiction: An*
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the substance or significance of the transfer provision as long as proper procedure was ostensibly followed.[11]

This state of affairs has been changing rapidly, however, because, in the years since *Kent v. United States*,[12] the laws per-

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Evaluation of the Process in the Juvenile Court, 9 CRIME & DELINQUENCY 121 (1963) [hereinafter cited as Sargent & Gordon]; Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583 (1968) [hereinafter cited as Schornhorst]; Speca & White, *Variations and Trends in Proposed Legislation on Juvenile Courts*, 40 U. MO. KAN. CITY L. REV. 129 (1972); Note, *Juvenile Justice—Exclusion from the Juvenile Process of Certain Alleged Felons*, 53 B.U.L. REV. 212 (1973) [hereinafter cited as Note, 53 B.U.L. REV. 212 (1973)]; Note, *Rights and Rehabilitation in Juvenile Courts*, 67 COLUM. L. REV. 281 (1967) [hereinafter cited as Note, 67 COLUM. L. REV. 281 (1967)]; Note, *In Iowa, Statutory Due Process Requires a Separate Hearing on the Question of Transfer Before a Juvenile Court May Properly Waive Jurisdiction to the Criminal Court*, 22 DRAKE L. REV. 213 (1972) [hereinafter cited as Note, 22 DRAKE L. REV. 213 (1972)]; Note, *Double Jeopardy and the Waiver of Jurisdiction in California Juvenile Courts*, 24 STAN. L. REV. 874 (1972) [hereinafter cited as Note, 24 STAN. L. REV. 874 (1972)]; Note, *Juvenile Waiver Statute: Delegation of Legislative Powers to Judiciary*, 1973 WIS. L. REV. 259 [hereinafter cited as Note, 1973 WIS. L. REV. 259]; Comment, 21 BAYLOR L. REV. 333 (1969); Comments, 9 NATURAL RESOURCES J. 310 (1969); Comment, 30 OHIO ST. L.J. 132 (1969); Comment, 16 ST. LOUIS U.L.J. 604 (1972); Comment, 12 ST. LOUIS U.L.J. 424 (1968); Comment, 40 S. CAL. L. REV. 158 (1967); Comment, 114 U. PA. L. REV. 1171 (1966); Comment, 5 WILLAMETTE L.J. 157 (1968); Comment, 1968 WIS. L. REV. 551. Legal commentators in Kentucky have heretofore only cursorily surveyed the issues involved in the transfer process or in handling juveniles in adult courts. *See* Note, *The Juvenile Offender: Some Problems and Possible Solutions*, 53 KY. L.J. 781 (1965); *The 1967-68 Kentucky Court of Appeals Review: Rights of Juveniles*, 56 KY. L.J. 285, 360 (1968) [hereinafter cited as The 1967-68 Kentucky Court of Appeals Review]; and Note, *Juvenile Courts: Kentucky Law in Need of Revision*, 59 KY. L.J. 719 (1971) [hereinafter cited as Note, 59 KY. L.J. 719 (1971)]. The 1965 note is remarkable for its shortsighted, punitive, and formalistic view of the administration of juvenile justice, especially as to those children who should be sent to criminal court.

[11] *See* note 8 *supra*.

[12] 383 U.S. 541 (1966). This landmark case held that the transfer proceeding is a critically important proceeding for the child which demands a hearing, the effective assistance of counsel who must have access to the reports which bear upon the question of whether or not the child should be transferred, the right to cross-examine the authors of those reports, and a statement of reasons from the judge why the child must be transferred to the criminal court and deprived of his benefits as a child. The case has definite constitutional dimensions which have been the subject of some debate. *See* Schornhorst, *supra* note 10, at 588. It is not necessary to enter into this debate, however, because *Kent* is important for other reasons. It opened some eyes to the abuses that were present in the juvenile courts and helped bring some philosophical and procedural consistency to juvenile court practices at the state level. Of singular importance was the inclusion, in the Appendix to the opinion, of eight factors which should receive some consideration during the decision-making process on the question of transfer. The elements were: (1) the seriousness of the alleged offense to the community and whether the protection of the community requires waiver; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted; (4) the prosecutive merit of the complaint, *i.e.*, whether there is evidence upon which a grand jury may be expected to return an indictment; (5) the desirability of trial and disposition of the entire offense in one court when the juvenile's associates in

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mitting the prosecution of children in adult courts have come under intense scrutiny by both courts and commentators.[13] The national concern about improvement in criminal justice administration and an increasing recognition that this reform depends to some degree on a more enlightened use of the juvenile courts have moved both courts and legislatures to construct long-overdue safeguards around the laws permitting children to be transferred to the jurisdiction of criminal courts.[14]

Kentucky has begun to confront many of the pressing issues of modern criminal justice administration. Some of these initiatives have drawn national attention and inquiry because they are new and realistic approaches to serious problems.[15] The proper utilization of the power to transfer children to the jurisdiction of criminal courts is important to the overall integrity of this reform.

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the alleged offense are adults who will be charged with a crime; (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) the record and previous history of the juvenile, including previous contacts with juvenile authorities, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to the court, or prior commitments to juvenile institutions; and (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court. While most of these elements share the same defects as those discussed in section III (D), *infra*, their inclusion in *Kent*, together with the language of the opinion, began a serious revaluation of the transfer process which has been very instrumental in adding a new depth to the integrity of juvenile court processes.

[13] *See* note 10 *supra* and note 24 *infra*.

[14] At least 32 states have, either by statute, case law, or a combination of the two, erected such provisions to protect the child from an abuse of judicial discretion in the transfer process. The states are: Alabama, Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. *See* note 6 *supra* for statutory references and note 24 *infra* for judicial interpretations.

[15] The 1972 General Assembly gave impetus to a number of significant reforms. KY. ACTS ch. 77, § 1 [1972] amended KRS § 208.430 and placed restrictions on the discretion of the Department of Child Welfare in its handling of certain classes of children who have been in juvenile court. The intent was to de-emphasize the use of institutions and to work with more children in normal community environments. KY. ACTS ch. 202, § 1 [1972] amended KRS § 208.110 and provided new rules for hearings related to the pre-adjudication detention of children subject to the jurisdiction of the juvenile court. KY. ACTS ch. 325, § 1 [1972] amended KRS § 208.060 and established landmark guidelines for hearings in juvenile court. KY. ACTS. ch. 239, § 1 created KRS § 208.275 and provided for the expungement of juvenile court records. KY. ACTS ch. 240, § 1 [1972] amended KRS § 208.380 and gave children the same right to appeal juvenile court decisions possessed by adults. KY. ACTS ch. 353, § 1 [1972] created Chapter 31 of KRS and provided for a statewide public defender system. KY. ACTS ch. 291, § 1 [1972] amended KRS § 439.320 and reformed the parole board. KY. ACTS ch. 292, § 1 [1972] created KRS
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This law operates at the juncture of juvenile and adult justice, and it must function in such a way that the processes and sanctions of criminal justice, as opposed to the rehabilitative programs of juvenile court, will be brought to bear on as few children as possible. If a child can be helped within the juvenile justice system, then help and rehabilitation, rather than transfer to the criminal court, should be forthcoming.

> It would appear that the interests of the state might always require a prosecution where there has been a relatively serious crime committed. A criminal prosecution is the only way that the state can be certain that the offender will be given a long sentence. The interests of the child, however, may require rehabilitative treatment at a facility for juveniles rather than a long sentence in a penal institution. The interests of the child appear to come into direct conflict with the interests of the community. The conflict arises, however, not from the result desired, but from the methods to be employed in reaching that result. Society wants to be assured that the particular juvenile will not repeat his act. This it hopes to accomplish by imprisonment for a very long period of time. But the interests of the child also require cessation of his deviant behavior. This end, hopefully, can be reached through the use of rehabilitative treatment. If the desired result can be reached by either imprisonment or rehabilitation, the spirit of the juvenile codes demands rehabilitation over imprisonment. The juvenile codes were written in order to mitigate the harsh consequences resulting from the criminal prosecution of children. If the interests of society are allowed to justify such a criminal prosecution, it would appear that the purposes of the juvenile codes are being circumvented.[16]

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§ 439.555 and provided for the conditional release and supervision of felons. KY. ACTS ch. 293, §§ 1 *et seq.* [1972] created KRS §§ 439.580-.630 and provided for work release and the use of community correctional centers for felons. KY. ACTS ch. 290, § 1 [1972] amended KRS § 439.550 to allow probated misdemeanants to be supervised by the Department of Corrections or some other welfare or fiscal court agency. KY. ACTS ch. 294, § 1 [1972] created KRS § 439.177 and provided for the parole of misdemeanants. KY. ACTS ch. 295, § 1 [1972] created KRS § 439.179 and provided for the work and educational release of misdemeanants. KY. ACTS ch. 385, §§ 1 *et seq.* [1972] created KRS §§ 433A *et seq.* and provided a new penal code for Kentucky. KY. ACTS ch. 71, §§ 1 *et seq.* created KRS §§ 15.410-.510 and provided for incentives and pay increases for police personnel. Senate Bill 170, which would have amended KRS § 208.170 and provided for a realistic transition between juvenile and criminal courts by reforming the law on transfer of jurisdiction, did not pass. This ironic oversight made possible the continuation of abuses inimical to both systems of justice.

[16] Mountford & Berenson, *supra* note 10, at 64-65.

The respective economies, philosophies and objectives of juvenile and criminal justice demand that a strict screening for rehabilitative potential take place prior to the submission of any child to the jeopardies of adult justice, and that children be tried in adult criminal courts solely as a last resort.

The purpose of this article is to examine the status of transfer of jurisdiction in the context of Kentucky's present efforts to reform the overall administration of justice. Developments both here and in other jurisdictions will be analyzed to determine what is needed to bring Kentucky abreast of the evolving standards of juvenile justice. Integrity will be a recurrent theme, because if Kentucky's incipient essays in criminal justice reform are to stand on a firm foundation, and its dual systems of juvenile and adult justice are to perform as the General Assembly intends and the Commonwealth's best interest requires, then a proper formulation and administration of the law of transfer cannot be overlooked.

II. THE DOCTRINE OF PARENS PATRIAE AND THE RIGHT TO TREATMENT IN JUVENILE COURT

A. *The Traditional Point of Departure*

The doctrine of *parens patriae* has endured as a touchstone for courts and legislatures alike during the nearly 75 years of juvenile court activity in this country.[17] Volumes of cases speak of the court's rehabilitative mission,[18] and statutory formulations are replete with provisions for the care, treatment, and rehabilitation of children within the court's purview.[19] Nevertheless, schol-

[17] Discussions on all aspects of this doctrine are found in: Allen, *The Juvenile Court and the Limits of Justice*, 11 WAYNE L. REV. 676 (1965); FOX, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Ketcham, *Legal Renaissance in the Juvenile Courts*, 60 NW. U.L. REV. 585 (1965); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97 (1951); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57, GEO. L.J. 848, 871-76 (1969); Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U.L. REV. 62, 62-68 (1969); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); McJean, *supra* note 10; Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAM. L. 151 (1961); Parker, *Some Historical Observations on the Juvenile Court*, 9 CRIM. L.Q. 467 (1967); Paulson, *The Juvenile Court and the Whole of the Law*, 11 WAYNE L. REV. 597 (1965); Rendleman, *Parens Patriae: From Chancery to Juvenile Court*, 23 S.C.L. REV. 205 (1971); Rubin, *The Juvenile Court System in Evolution*, 2 VAL. U.L. REV. 1 (1967).

[18] Kentucky's contribution to this precedent is found at note 3 *supra*.

[19] The words of KRS §§ 208.110, 208.130, 208.140, 208.200, 208.275,

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ars continue to debate whether this application of the doctrine can be supported by the precedents of legal history. It would be much more useful if this academic energy were expended in essays on how the doctrine might be more effectively utilized to remedy the problems which caused it to be appropriated by the juvenile court movement in the first place.

The doctrine has been established beyond question as the pole star of the juvenile court movement, and there seems to be little chance that its status will be diminished so long as legislatures retain juvenile courts. The Supreme Court reviewed the status of *parens patriae* in the course of imposing certain procedural requirements on the juvenile court process and stated explicitly that the doctrine is not inconsistent with procedural due process and is to be recommended to the states as the basis for further experimentation with the institution of juvenile justice.[20] Only recently, however, have the more obvious and far-reaching implications of this doctrine been investigated, and these investigations raise serious issues for the juvenile justice system.[21]

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208.330, 208.400, 208.403, 208.410, 208.420, 208.430, and 208.520 are characteristic of this legislative language and expression of intent.

> This statutory context creates a presumption in favor of disposing of juvenile matters within the juvenile system and makes waiver to criminal court jurisdiction a last resort to be used only when the juvenile court after full hearing determines that the range of dispositions available within the juvenile system are not adequate in the particular case to serve the child's welfare and the best interests of the state. Waiver to criminal court is then to be the exception and as such is to be explicitly justified in the waiver order.

Atkins v. State, 290 N.E.2d 441, 443 (Ind. 1972). It has been held that when a state operates dual systems of juvenile and criminal justice with dual procedures and penalties, there are constitutional protections to which a child can turn in order to protect his right to be accorded the benefits of the juvenile court. Miller v. Quatsoe, 332 F. Supp. 1269 (E.D. Wis. 1971). Due process and equal protection of the law are two which readily come to mind.

[20] McKeiver v. Pennsylvania, 403 U.S. 528, 534, 548 (1971); *In re* Winship, 397 U.S. 358, 366-67 (1970); and *In re* Gault, 387 U.S. 1, 21-23 (1967). The Supreme Court also spoke, in Prince v. Massachusetts, 321 U.S. 158, 167-68 (1944), of the importance of the doctrine of *parens patriae* as a necessary ingredient in the relationship between the state and the child.

[21] Actually, as early as 1938 courts had addressed the essential issue involved in sending a child to the criminal court. The Ohio case of *In re* Lindberg Heist, 11 Ohio Op. 537 (Juv. Ct. 1938), held that no matter how serious the offense, a judge is not justified in transferring a case to the criminal courts unless the child's own good and the best interests of the state cannot be attained by the juvenile court's retention of jurisdiction. Since juvenile courts are vested with original and exclusive jurisdiction of the child and are intended to seek the rehabilitation of the child, only in exceptional cases should the juvenile court relinquish its jurisdiction over the child. *See* Comment, 30 OHIO ST. L.J. 132, 135 (1969). No one seems to have understood the import of this message until about 30 years later.

B. *The Modern Claim of a Right to Treatment in Juvenile Court*

Some of the principal questions recently raised with respect to juvenile courts have been: If the court is based on a philosophy of treatment and rehabilitation, what does this mean for those children who are being sent to criminal courts? What considerations must go into the decision of the juvenile court to turn its back on a child? What distinguishing characteristic of a child will allow such drastic action to be taken in a manner consistent with the programs and philosophy of the court? How can the transfer process be made into a rational juvenile court procedure? What is its proper place, if any, in the scheme of juvenile justice?

These questions constitute part of the subject matter of a growing literature on the right to treatment both within and without the field of juvenile law.[22] This issue is of special significance where the transfer of a child to criminal court is concerned.[23] The doctrine of *parens patriae* has provided the rationale for many cases which have attempted to provide some logic and coherence to the transfer process and to make it compatible with the philosophy of the juvenile court. Since transfer of jurisdiction is a juvenile court decision, it must be made relative to the ends for which the juvenile court was established: treatment, rehabilitation, and the best interest of the child. It is only when these objectives cannot be accomplished within the juvenile justice system that there can be any rational basis for transferring the child to criminal court.[24] This principle

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[22] Concern about the legal problems involved in civil commitments for treatment and rehabilitation began in the field of mental health and spread to the area of juvenile law because of the similarity in purpose between the two kinds of commitments. A pioneer article that brought the mental health dilemma to public attention in 1960 was Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960). He returned to this topic in Birnbaum, *The Right to Treatment–Some Comments on Implementation,* 10 DUQUESNE L. REV. 579 (1972). A comprehensive collection of cases and articles can be found in KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971), and NATIONAL JUVENILE LAW CENTER, ST. LOUIS UNIVERSITY SCHOOL OF LAW, SELECTED BIBLIOGRAPHY FOR RIGHT TO TREATMENT (1972).

[23] It is an elaboration of the ramifications of the doctrine of *parens patriae* which provides a point of departure for the legal literature dealing with the issues surrounding the transfer of children to criminal court. *See* note 10 *supra.*

[24] *E.g.,* Kent v. United States, 383 U.S. 541 (1966); Brown v. Cox, 467 F.2d 1255 (4th Cir. 1972); U.S. v. Tate, 466 F.2d 432 (D.C. Cir. 1972); Powell v. Hocker, 453 F.2d 659 (9th Cir. 1971); Strickland v. United States, 449 F.2d 1131 (D.C. Cir. 1971); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); Haziel v. U.S., 404 F.2d 1275 (D.C. Cir. 1968); United States v. Bland, 330 F. Supp. 34 (D.D.C. 1971); Redmon v. Peyton, 298 F. Supp. 1123 (E.D. Va. 1969); Rudolph

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follows from an uncomplicated analysis of the *parens patriae* doctrine and its role both as the philosophical foundation of the juvenile court movement and the cornerstone of the right to treatment.[25]

The magic words in this analysis are *right* and *treatment.* The former, which inheres in the child's statutory right to be dealt with according to the provisions of the juvenile code, is designed to guarantee that the humanitarian ends of care and rehabilitation are served. The essence of this philosophy was expressed at the beginning of the juvenile court movement:

> Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[26]

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v. State, 238 So.2d 542 (Ala. 1970); Hall v. State, 226 So.2d 630 (Ala. 1969); Seagroves v. State, 189 So.2d 137 (Ala. 1966); Duck v. State, 176 So.2d 497 (Ala. 1965); P.H. v. State, 504 P.2d 837 (Alaska 1972); *In re* Maricopa County, Juvenile Action No. J-72804, 504 P.2d 501 (Ariz. 1972); L. v. Superior Court of Los Angeles County, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972); B. v. Superior Court of Los Angeles County, 478 P.2d 37, 91 Cal. Rptr. 605 (1970); People v. McFarland, 95 Cal. Rptr. 369 (Cal. 1971); H. v. Superior Court of Los Angeles, 478 P.2d 32, 91 Cal. Rptr. 600 (1970); People v. Arauz, 85 Cal. Rptr. 266 (Cal. 1970); Richerson v. Superior Court, 70 Cal. Rptr. 350 (Cal. 1968); Gagliano v. State, 234 So.2d 159 (Fla. 1970); J.E.M. v. State, 217 So.2d 135 (Fla. 1968); Hayes v. Gardner, 504 P.2d 810 (Idaho 1972); State v. Gibbs, 500 P.2d 209 (Idaho 1972); Atkins v. State, 290 N.E.2d 441 (Ind. 1972); Summers v. State, 230 N.E.2d 320 (Ind. 1967); State v. Halverson, 192 N.W.2d 765 (Iowa 1971); In Interest of Brown, 183 N.W.2d 731 (Iowa 1971); In Interest of Patterson, 499 P.2d 1131 (Kan. 1972); Templeton v. State, 447 P.2d 158 (Kan. 1968); Franklin v. State, 285 A.2d 616 (Md. 1972); Walker v. State, 235 So.2d 714 (Miss. 1970); Kline v. State, 464 P.2d 460 (Nev. 1970); *In re* Jackson, 257 N.E.2d 74 (Ohio 1970); State v. Yoss, 225 N.E.2d 275 (Ohio 1967); State *ex rel.* Juvenile Department of Marion County v. Johnson, 501 P.2d 1011 (Ore. 1972); State v. Weidner, 487 P.2d 1385 (Ore. 1971); Knott v. Langlois, 231 A.2d 767 (R.I. 1967); Peyton v. French, 147 S.E.2d 739 (Va. 1966); State v. McArdle, 194 S.E.2d 174 (W. Va. 1973).

[25] It would be inappropriate to indulge in a detailed analysis of the right to treatment issue in this article because it would entail an extensive digression inimical to the continuity demanded by an essay of this rather concentrated purview. It is important, however, that this emerging right be fully understood so that the critical nature of the transfer proceeding will be obvious to those who confront it. Therefore, a short summary of the right to treatment issue will be rendered prior to the detailed consideration of the transfer process and the problems which beset that law.

[26] Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 107 (1909). It is very difficult not to quote this early proponent of the juvenile court when looking for

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Children had no such claim to special treatment at the common law.[27] This right, created by legislative decree, was not tendered lightly because it entailed a considerable divestment of jurisdiction from the normal processes of the criminal law.[28] It has endured for almost 75 years, becoming increasingly meaningful for the children who enjoy its protections.

The *treatment* to which the child has a right inheres in the doctrine of *parens patriae*.[29] The juvenile court has never been

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pointed language on the aims and essence of juvenile justice. It is interesting, however, to read him in conjunction with Ketcham, *The Changing Philosophy of the Juvenile Justice System*, 20 JUV. CT. JUDGES J. 59 (1969). Judge Mack's optimism is reflected upon by an author looking at the realities of juvenile justice 70 years after its inception in the United States based on the implementation of the "mutual compact" between the state and the child. Note 2 *supra*. Relative to this interaction between the state and the child, one author has rather optimistically stated that: "The democratic concepts of individual integrity and rehabilitation of the child embody the philosophy of the juvenile justice system." Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U.L. REV. 62, 78 (1969). Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944), also speaks of the role of *parens patriae* in a democratic society. This is a sound philosophical point of departure taken from the announced principles and values of this country. It has, however, received much more lip service than actual support during the last three-quarters of a century. This is evidenced by the long tradition of haphazard diagnostic and dispositional work followed by ill-advised or badly structured probations, inappropriate institutions, foster homes, and poor follow-up supervision which have caused many children to be called "untreatable." Sargent & Gordon, *supra* note 10, at 124. The situation described in In Interest of Patterson, 499 P.2d 1131 (Kan. 1972), is all too typical. Add to this the fact that many juvenile courts are operated by procedures entirely prejudicial to the child, and it becomes fairly obvious that no one is really sure that Judge Mack's vision cannot be realized. The means to reach it have simply not been traditionally employed, either in the courts or in the treatment agencies. The modern juvenile court revolution seems to be changing a lot of these abuses, however, and perhaps juvenile justice will yet attain the goals for which it was established.

[27] This was recently brought home in a most drastic way when the Oklahoma transfer law ran into trouble with the courts and it was held that in the absence of the law the sole test for determining whether or not a child should stay under juvenile court jurisdiction would be whether or not he knows right from wrong. Freshour v. Turner, 496 P.2d 389 (Okla. 1972). *See also* Schaffer v. Green, 496 P.2d 375 (Okla. 1972), for a good discussion of the "7-14" rule with respect to transfer proceedings and the question of responsibility for the commission of public offenses. Broadway v. Beto, 338 F. Supp. 827 (N.D. Tex. 1971), State v. Broadman, 267 A.2d 592 (Del. 1970), and *In re* Correia, 243 A.2d 759 (R.I. 1968) also held that children have no special rights under the common law and that a legislature can give and take juvenile court privileges as it sees fit. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), however, held that the establishment of different ages for boys and girls with respect to a transfer statute (16 for boys and 18 for girls) does not provide equal protection of the law.

[28] KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED TRERAPY (1971), provides a detailed study of the development and problems of this divestment.

[29] Stated in its simplest terms, the right to treatment means that those children who are able to be helped by the court have a right, by virtue of the juvenile
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equated with a criminal court. It is a civil forum, and its dispositions are civil, indeterminate, and aimed at the treatment and rehabilitation of the child.[30] The only legitimate basis for distinguishing among children, for the purpose of determining who will be extended the protections of the juvenile court and who will be denied its regenerative good will, is whether they are amenable to rehabilitation under the aegis of the court's philosophy and resources.[31]

This places a heavy burden on the juvenile court and the state to make available the kinds of rehabilitative options necessary to give this principle the substance implied by the legislative appropriation and judicial interpretation of the doctrine of *parens patriae*. Any other interpretation does violence to the institution of juvenile justice and makes it an arbitrary forum where those who are most in need of its care and solicitude can be abandoned at the whim of the court. This is very often the case where transfer of jurisdiction is involved and that is why the right to treatment and the benefits of juvenile court jurisdiction are so important to the child facing a possible trip to the criminal court. If such children do not have a right to claim treatment from the court, then juvenile courts serve little purpose in this age of justice reform.

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statute and the doctrine of *parens patriae*, to the care and rehabilitation afforded by the court. Strict safeguards should protect that right, but there are none in force under Kentucky's present transfer law. It is only when a child cannot be helped by the court that it becomes reasonable to reluctantly look outside the juvenile justice system for some other means to deal with the child, and neither age, offense, prior record, nor any other factor can serve, without further investigation into the child's capacity to be helped by the court, as a rational basis of distinction if the court is to keep intact its integrity as an institution established to look after the best interests of children and to provide for their care, treatment, and rehabilitation. *See* note 17 *supra*, especially McJean, Simms, and Kittrie. The word "treatment" comes to juvenile court from *parens patriae* practices and traditions which existed before juvenile courts were established. Criminological and scientific preoccupations and theories have cast "treatment" in terms of a medical model based on disease and cure. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971). The word and much of the underlying connotation persist today. The treatment goal of the court is based on the doctrine of *parens patriae* which becomes, thereby, the cornerstone of the right to treatment. Simms, *The Courts, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 33, 45-49 (1972). Kittrie calls the right to treatment the "price tag" without which the powers of parens patriae may not be exercised. Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 882 (1969).

[30] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 546-48 (1971); *In re* Gault, 387 U.S. 1, 15-16 (1967); Kent v. United States, 383 U.S. 541, 554-55 (1966); and Dryden v. Commonwealth, 435 S.W.2d 457, 461 (Ky. 1968).

[31] Note, 67 COLUM. L. REV. 281 (1970), *supra* note 10, at 317, and Croxton, *supra* note 10, at 8.

III. AN OVERVIEW OF THE TRANSFER PROCESS: PROCEDURAL FORM IN SEARCH OF SUBSTANCE

A. *Definition of the Procedure*

There are three basic ways by which a child can end up in criminal court: (1) a juvenile judge can transfer him as a matter of discretion; (2) selected serious crimes may simply be removed from the jurisdiction of the juvenile court; and (3) a prosecutor may have the discretion to file charges against him in criminal court rather than juvenile court.[32] These may be viewed as judicial, legislative and prosecutorial forms of transferring jurisdiction.[33]

Judicial transfer describes a context in which the juvenile courts have a discretionary power, beginning toward the upper age level of their jurisdictional grant, to transfer children to criminal court for disposition as adults. Sometimes this is possible only when felonies are concerned, but it often includes any crime.[34] Traditionally exercised in the absence of any clear guidelines relating to who could or should be transferred, it was recently held in *People v. Fields*[35] to entail an unlawful legislative delegation of power and discretion to the judiciary. The argument was that the judiciary has been enabled to decide who shall be tried for crimes, traditionally a legislative function, in the absence of any criteria governing this determination. The *Fields* court observed, in part, that the traditional delegation of this power can no longer be upheld because transfer decisions are not being made on the basis of uniform and easily discernible standards. The reasons for transfer vary greatly from one judge to another and therefore the law is not evenly administered. Should the *Fields* rationale be adopted in other jurisdictions, it could force legislatures to infuse even more regularity into juvenile court proceedings by establishing clear standards and guidelines for the transfer of jurisdiction.[36]

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[32] Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 310.

[33] Schornhorst, *supra* note 10, at 596.

[34] *Id.* at 597.

[35] 199 N.W.2d 217 (Mich. 1972); *contra* Lewis v. State, 478 P.2d 168 (Nev. 1970). The Fields case is discussed in Note, 1973 WIS. L. REV. 259, *supra* note 10, and Resteiner, *supra* note 10. Definite criteria are needed to prevent a judicial deviation from the legislative purpose behind juvenile court laws. State v. Gibbs, 500 P.2d 209, 216 (Idaho 1972).

[36] Note, 1973 WIS. L. REV. 259, *supra* note 10, at 263. The Resteiner article, *supra* note 10, was written by a Michigan judge who points out a number of interesting local problems involved in the *Fields* case.

Legislative transfer is really a misnomer because rather than transferring certain children to criminal court jurisdiction, the legislature has merely excluded them from the jurisdiction of the juvenile court. The chief, in fact the only, criticism of this approach is that if all offenses are not initially subject to management within the juvenile justice system, there is an inherent incompatibility with the avowed philosophy of the juvenile court.[37] It is tantamount to saying that children who commit certain offenses cannot be rehabilitated and must be sent to criminal court to protect the public safety and common good. There is no evidence that this procedure is in the best interest of either the child or society; rather, there is a mountain of demonstrable data indicating that it is deleterious to both.

Prosecutorial transfer provisions allow the prosecutor to exercise discretion over the choice of which children shall be tried as adults. The critical determinant is where the charges are filed. This form of transfer has been criticized for being inherently subject to political manipulation and unrealistically assuming that a single individual can dispassionately weigh the interests of the child and the state at the same time. It is an arbitrary method, and the discriminatory choices allowed by this form of transfer run counter to due process and equal protection of the laws. It is subject to many of the same criticisms directed at judicial transfer.[38]

There is one other form of transfer which has been called "Texas style"[39] because of the foothold it obtained in Texas juvenile court practice. This procedure allowed the prosecutor to sit on charges until the child became an adult, and then prosecute him in criminal court; or charge him with one of several offenses in juvenile court while he is a minor, have him put in a training school, and then indict him for the other offenses when he reaches majority. This abuse was initially made possible in Texas because the courts held that the age at the time of trial rather than at the time of the offense was controlling. This practice was finally

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[37] Schornhorst, *supra* note 10, at 596-97. Judicial reactions to these exclusions are found in Note, 53 B.U.L. REV. 212 (1973), *supra* note 10. A review of the transfer statutes, note 6 *supra*, will show a great divergence of views indicative of more or less adherence to the tenets of juvenile court philosophy.

[38] Schornhorst, *supra* note 10 at 598.

[39] *Id.* at 599.

amended in Texas. However, other states still extend such an invitation to those who would so abuse the forum of juvenile justice.[40]

The primary criticism of determining juvenile court jurisdiction by age at the time of the proceedings is that it allows the purposes of juvenile legislation to be frustrated by delays, which often result in the prosecution of the child as an adult. It has been observed that when the age at trial rather than the age at the time of the offense is controlling, the common law of incapacity may no longer apply, thus effectively terminating the use of incapacity as a defense.[41] It has been suggested that both the jurisdictional problem with respect to age and the societal need to salvage these young citizens would be well served by providing specialized treatment for young offenders beyond juvenile court age and within the range of those who are liable to transfer.[42] This might provide both for the child's or young adult's interest in being helped to constructive citizenship and society's need to see that its laws are not frustrated by the chronology of offense and trial.

The judicial form of transfer is most prevalent, and the procedure is variously referred to as a transfer of jurisdiction, a certification or transfer to the grand jury or criminal court, a waiver of rights, or a waiver to the grand jury. The juvenile court generally speaks in terms of sending the child to criminal, circuit, or adult court, or simply "holding him over." This descriptive language touches the basic aspect of the procedure in that it informs everyone that a movement is taking place. In this case,

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[40] *Id.* at 602. This problem is also discussed in Comment, 5 WILLIAMETTE L.J. 157 (1968) and Courtade, *supra* note 10. Kentucky could well be faced with a similar problem because of cases like Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. 1970), and Lowry v. Commonwealth, 424 S.W.2d 841 (Ky. 1968). The *Lowry* court noted that its ruling was in accord with a majority of jurisdictions, and this seems to indicate that a majority of courts lose touch with the dictating principles of juvenile justice when confronted with this question.

[41] *See* Comment, 5 WILLIAMETTE L.J. 157, 158 (1968). Such a law has serious implications for the processes of juvenile justice because such a great percentage of felony arrests are made on children between the ages of 16-23. Schornhorst, *supra* note 10, at 592, 595. This group also constitutes a great number of those who return to crime after prior contact with the court. Note also that it has been held that juvenile court procedures cannot be delayed in order to prosecute a child when he attains the age of majority. Miller v. Quatsoe, 348 F. Supp. 764 (E.D. Wis. 1972).

[42] Schornhorst, *supra* note 10, at 595, and Comment, 5 WILLAMETTE L.J. 157 (1968).

a child is being moved from juvenile court into the criminal justice system. This process is literally a "transfer" of jurisdiction over a case from the juvenile forum to the criminal court.

> The court is not "waiving" some right or power; rather it is considering retention of jurisdiction. Only on the findings of a hearing does it *transfer* the case, which it does by *certifying* that certain criteria have been met and that consequently the criminal court is empowered to take jurisdiction.[43]

When this is done properly, it should be based on a judicial determination of fact that the child is beyond the capabilities of the rehabilitative resources of the juvenile court.[44] This is the only basis upon which a transfer can ever be justified, and the decision should therefore be accompanied by caution, circumspection, and detailed investigation.

The two basic judicial approaches to the transfer of jurisdiction have been described as jurisdictional and dispositional. A jurisdictional judge will use the elements of age and the nature of the offense as the basis of his decision, while the dispositional judge will weigh all factors against the possibility of helping the child through some means at the disposal of the juvenile court. While the dispositional approach is certainly more consistent with the philosophy of juvenile court, there is room for abuse in both methods. The dispositional judge might not transfer the child if he feels that the child may be released because of a failure to prosecute, the posting of bail, an acquittal or probation. He wants to help the child *too* much. This often puts very difficult or perhaps even innocent children into juvenile programs. However, these programs should be geared to match the child, not vice versa. The jurisdictional judge is not so treatment oriented, however, and is pleased to have another court take over his problems.[45]

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[43] Advisory Council of Judges, *supra* note 10, at 4.

[44] Schornhorst, *supra* note 10, at 586, and Comment, 12 ST. LOUIS U.L.J. 424, 440 (1968). It is this fact-finding process which must be greatly improved by providing safeguards and establishing standards so that there can be some basis and record upon which to review the discretion of the juvenile judge in his decision to transfer a child to criminal court.

[45] Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 316. The dynamics of the juvenile court decision-making process are superbly explored in R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT (1969) and W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972).

> The legislative choice of the timing of the transfer hearing has some bearing on whether juvenile judges are likely to espouse a jurisdictional or dispositional view. Transfer hearings may be held either upon receipt of the initial petition or after the court has held an adjudicative hearing and determined that the youth committed the offense alleged. In the former case, the transfer decision will not be colored by evidence of the instant crime and is therefore less likely to be dispositionally motivated than would be the case if the judge had already satisfied himself of the youth's guilt. However, this early hearing deprives the judge of information which may be helpful to the transfer decision; indeed, the nature of the youth's participation in the crime may, if the youth is a first offender, be the only available evidence of criminal maturity. The delayed hearing makes this information available, but also introduces into the determination the judge's subjective belief in the guilt of the juvenile. It is true that requiring evidence of guilt prior to transfer may protect a youth from the rigors of an unnecessary criminal trial. But the fact of guilt may itself improperly influence the judge's transfer decision by diverting his attention from more revealing evidence of the youth's susceptibility to rehabilitation. Because the post-adjudication transfer hearing introduces this further consideration, it is apt to foster a dispositional approach.[46]

These considerations should be kept in mind by lawmakers who seek to reform the laws on transfer of jurisdiction and make them more consistent with the philosophy of the juvenile court.

No matter how this process is denominated or described, it is best defined by characterizing it as the most critical stage of the juvenile justice process. Courts and legal commentators alike agree on this significant point.[47] The determination that the transfer stage is "critical" finally gained Morris Kent the right to counsel, and the factors to be considered in transferring a child, set forth in the Appendix to the Supreme Court's opinion, drew

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[46] Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 318. This procedure was evidently followed in Rudolph v. State, 238 So.2d 542 (Ala. 1970); Seagroves v. State, 189 So.2d 137 (Ala. 1966); and *In re* Jackson, 257 N.E.2d 74 (Ohio 1970).

[47] Kent v. United States, 383 U.S. 541, 556 (1966); Smith v. Commonwealth, 412 S.W.2d 256, 259 (Ky. 1967). This is a point of departure for the articles at note 10 *supra*, and is particularly well set forth in Schornhorst, *supra* note 10, at 586-94. Representative cases are found at note 24 *supra*.

national attention to the substance of the transfer proceeding.[48] This attention was long overdue.[49]

There is every reason in the world to call this the most critical stage of the system. The transfer law constitutes a line on the other side of which lies the threshold to the criminal justice system. On the juvenile court side of that line, there is an arrangement of individualized justice therapeutically oriented to the best interest of the child.[50] On the other side lies a system of criminal process and sanction predicated, for the most part, on punishment and the best interest of society. The difference between one side and the other may well mean the difference between five years under juvenile jurisdiction and life imprisonment.[51] The sides are two wholly different worlds, and the liabilities of the adult system are so great that every effort should be made to keep children within the jurisdiction of the juvenile court.

Those cases in which transfer is contemplated usually foresee some type of confinement if the child's guilt or delinquency is established. It becomes a choice, therefore, between a juvenile institution and some type of adult correctional facility, and while there may often be little difference in the administration of either institution, the decision to transfer a child to criminal court carries significant consequences beyond the type of institution in which the youth is to be confined.[52]

> There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdic-

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[48] *Kent* was one of the "critical stage" decisions of the 1960's which saw the enormous expansion and elaboration of the right to counsel. The standards set forth in the Appendix to that decision were taken from a Policy Memorandum (No. 7, 1959) of the District of Columbia Juvenile Court. The rescission of this memorandum was noted in U.S. v. Caviness, 239 F. Supp. 545, 551 (D.D.C. 1965), which was decided before the *Kent* case. The "critical stage" philosophy remained after this rescission, however, both because of *Kent v. United States* and other District of Columbia cases, such as U.S. v. Tate, 446 F.2d 432 (D.C. Cir. 1972), and Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968). District of Columbia Juvenile Court Rules 108 and 109 now contain a much less definite transfer standard.

[49] There was almost no attention given to the question of standards or a child's right to be kept under juvenile court jurisdiction prior to the *Kent* case. Two exceptions are Duck v. State, 176 So.2d 497 (Ala. 1965), and *In re* Lindberg Heist, 11 Ohio Op. 537 (Juv. Ct. 1938). Note the great majority of post-*Kent* dates on the articles collected at note 10 *supra*, and the cases collected at note 24 *supra*. The *Kent* case began a revolution of its own which is really separate from that initiated by *In re* Gault, 387 U.S. 1 (1967), which brought due process to delinquency hearings.

[50] *See* notes 3 and 24 *supra*.

[51] Croxton, *supra* note 10, at 3.

[52] Schornhorst, *supra* note 10, at 594.

> tion as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile proceeding is replaced by the publicity and normative concepts of penal law; the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobium attached thereto by prospective employers; if convicted as an adult, the child may be detained well past his twenty-first birthday; he may lose certain civil rights and be disqualified for public employment. Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and even sexual, abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly.[53]

The problems inherent in incarcerating children with adult criminals are compounded by the fact that most states have no special programs for young offenders.[54] The decision to transfer must therefore be made with the realization that the child will probably be sent to an adult prison where no special rehabilitative and guidance programs will be available. Even if he is not treated harshly by the trial court—in which case he should never have been sent to the criminal court in the first place—he will be unable to erase the record of his conviction.[55] This may well be determinative of whether he becomes a content, constructive, law-abiding citizen who is an asset to the community, or a restless, destructive, alienated renegade whose criminal activity tears at the fabric of society and makes him a burden on the state, either within or without the walls of its penal institutions.[56]

The stakes are very high in a transfer proceeding. Will the child be extended the regenerative resources of the juvenile court by its retention of jurisdiction or be started on the first step

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[53] *Id.* at 586-87. These are all possibilities and realities under Kentucky law and in Kentucky institutions.

[54] Kentucky has some such facilities, but they in turn have long waiting lists.

[55] Schornhorst, *supra* note 10, at 594.

[56] There is an economic aspect of crime which has not been sufficiently impressed upon the public. Suffice it to say that the combined cost of criminal activity and criminal justice responses is staggering compared to the sums it would take to begin to alleviate the causes of crime both in society and in its "correctional" institutions. Taxpayers, paradoxically, have traditionally chosen to support the most costly of these alternatives, however, and almost with relish. Of late, however, the relish has bittered and more palatable forms of addressing the problems of crime and corrections have emerged.

of a lgal and social journey to the human trash pile[57] to which ex-convicts and other criminal defendants are so often relegated? These consequences can make the decision to transfer ". . . in essence, a sentence of 'death' as a juvenile, with the subsequent proceedings in the criminal court completing the execution."[58] These are the attributes which make a transfer of jurisdiction the most critical stage of juvenile justice procedures.

B. *The Paradoxical Nature of Transfer Provisions*

Depending on the point of view one takes, the existence of a transfer provision will seem a more or less paradoxical inclusion in the scheme of juvenile justice. 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. The very existence of juvenile court is predicated upon recognition of the fact that a child is capable of rehabilitation no matter what he may have done and that he has a *right* to expect no less than that society, through the special establishment of juvenile court, will seek to identify and treat the root causes of the trouble in which he is involved rather than seek retribution against him.

The historical inadequacy of juvenile correctional and rehabilitation programs in the United States forces one, however reluctantly, to submit to the existence of transfer laws and the role they play when a child must make the transition from juvenile to adult court. As long as good rehabilitative programs remain conspicuously absent for those children subject to transfer, there will have to be some way to maintain an effective jurisdiction over the child to preserve the interests of justice, if not of juvenile court philosophy or the child. The inadequacy, however, will not be remedied by reliance on the transfer process. The need is for programs that will make it unnecessary to abandon these children at all.[59]

Considering what is at stake, it would seem that one might expect to find these grave and far-reaching procedures carefully

[57] Schornhorst, *supra* note 10, at 594.
[58] *Id.* at 588.
[59] Sargent & Gordon, *supra* note 10, at 128.

defined and subject to rigorous procedural and investigative safeguards to protect the child's interests. This is not always the case. One might also expect to find a clear statement of the purpose for permitting a child to be sent to the criminal courts, but few jurisdictions have undertaken to explicitly delineate the policies underlying the procedure. Justifications are tendered in lieu of reasoned policy analysis.[60]

The absence of standards and clearly articulated policies compels one to ask for what reason society has seen fit to include transfer provisions in the scheme of juvenile justice. The only thing that criminal courts can do that juvenile courts cannot do is to put a child in the penitentiary to accomplish "rehabilitation" which the juvenile court felt it could not provide. Adult criminal processes, however, conform the sentence to the crime. Sentences therefore are determinate, and it is frequently said that determinate sentences are anti-rehabilitative. This is certainly the case where children are concerned, because it is the youngest who are always victimized in prison; the weakest who are hurt by the strongest; and the most innocent who are defiled by the most depraved. If they are not exploited, they will certainly become more aggressive out of a need for self-protection.[61] It would seem, then, that since prison is not relied upon to rehabilitate anyone, but simply "to teach him a lesson," the transfer process is ultimately reduced to simple retribution. And since the best lesson traditionally taught in prisons is how to be a better offender, the use of prisons for anything short of the permanent removal of an individual from the ranks of society is seemingly a most ill-advised action. Stacks of reports and evaluations of our present penal system attest to this reality, as do the rates of recidivism among those who have tenanted the "reformatories" of this country. If anything should be obvious, it should be the hopelessness of this traditional recourse as a means of protecting and promoting the general welfare of society and its citizenry.

The only way criminal courts can act to fulfill the societal

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[60] Comment, 114 U. PA. L. REV. 1171, 1206 (1966). It is very easy to find the legislative and judicial rationales for creating and upholding juvenile court legislation, but it is impossible to trace down anything to explain why transfer provisions were included in these laws. Even the venerable and oft-cited Judge Julian Mack seems to have taken them for granted. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 108-09 (1909).

[61] Sargent & Gordon, *supra* note 10, at 125.

demands underlying a transfer of jurisdiction is to treat the child as an expendable human statistic and give him a life sentence. Such sentences, however, are only handed down in the most extraordinary cases,[62] and one is finally compelled to ask what logic there is in the use of probation or a minimum security facility for a child who was transferred out of court because he was too "dangerous" and a "security risk"? Such a child should have been kept in juvenile court.[63]

This means that community expectations will seldom be fulfilled by transfer to the criminal court. Why, then, do judges continue to do it? It has been suggested that communities are still not convinced of the value of juvenile court and continue to demand retribution for public offenders. If this punitive appetite is not fed from time to time, the resultant frustration might mean the undoing of the juvenile justice system. The transfer process becomes the safety valve through which this community pressure is released.[64] This is clearly a gesture of retribution, however, and inconsistent with the philosophy of the juvenile court. One author has stated bluntly that it is neither philosophical consistency nor studied policy considerations which support the practice of transferring jurisdiction, but rather:

> . . . a compromise of principle dictated by the unwillingness of society to pay the price necessary to find out whether our theories of justice for the juvenile are at all valid. Waiver, therefore, remains an unsatisfactory, but nevertheless practical, means of ridding the juvenile court of persons whom it is not equipped to handle, and, more likely than not, has mishandled in the first place. Secondly, as indicated by the reported cases, waiver usually is not a scientific evaluation of whether the youth will respond successfully to a juvenile

[62] *Id.* at 126. If society is truly concerned about reforming and deterring the public offender, and the broad consensus about the miserable condition of our penal system is accurate, then the sort of analysis engaged in here is important because it says that almost no child should ever be subjected to the criminal system unless he is given at least a life sentence without a chance for parole. The Kentucky Court of Appeals has held, however, that to so sentence a child is cruel and unusual punishment. Anderson v. Commonwealth, 465 S.W.2d 70 (Ky. 1971); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968).

[63] Sargent & Gordon, *supra* note 10, at 125. If juvenile courts can't do anything *for* the child, it is futile to look to the criminal courts to do so. See the text accompanying note 53 *supra* for examples of the harm done to one who is punished rather than "helped."

[64] *Id.* at 126.

court disposition, but a front for society's insistence on retribution or social protection.[65]

The two important elements of this observation concentrate on the concern for social protection engendered by the juvenile court's inability or reluctance to handle *all* the children who come within its jurisdiction. There is substance to this comment because the juvenile justice system does not have an entirely enviable record of providing for the young people it has dealt with over the years. It has too often forced treatment on those who did not need it, *i.e.*, status and lesser public offenders, while denying it to those about whom it should have been most concerned, *i.e.*, the serious but salvagable young public offenders routinely transferred to criminal court.[66] It has been forcefully argued that the juvenile justice system discriminates against its most needy clientele because of its treatment of the black, the poor, and the deprived.[67] These are the children who are most liable to be transferred because of previous appearances in court. They are also the ones who are most in need of social integration and rehabilitation and most likely to have anti-social tendencies reinforced by contact with adult offenders.[68] These are not the children of judges, lawyers, lawmakers, professionals, or others of "acceptable" social status and economic standing. When the well-to-do child gets into trouble, his parents are allowed to handle it out of court and to get private help. The courts are generally willing to accept this even when serious cases are involved. Therefore, the children from "acceptable" families do not suffer from the lack of juvenile court facilities. The dispossessed are forced to bear this burden by the double-standard of justice in the juvenile court, and the paradox is thereby transmuted into an unequal protection of the law.[69]

The paradox which permits a child to gain adult status through criminal process becomes even more obvious when it is noted that no matter how exemplary a child is as a student, citizen,

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[65] Schornhorst, *supra* note 10, at 602. The discussion of the collection of reasons why judges send children to criminal courts, *infra*, will offer considerable support for this point of view.

[66] Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process*, 57 GEO. L.J. 848, 860-61 (1969).

[67] Bazelon, *supra* note 10, at 376.

[68] Comment, 114 U. PA. L. REV. 1171, 1209 (1966).

[69] Bazelon, *supra* note 10, at 377.

patriot, breadwinner or whatever, he cannot obain the privileges and responsibilities of adulthood. He cannot vote; he cannot marry, enter the armed services, or obtain a driver's license without parental permission; he cannot contract; he cannot buy certain films, books or drinks; he cannot enjoy many other rights and duties of adult status. Through the doctrine of "emancipation" a child can become liable for his or her own financial support. This is a tenuous status, however, and carries with it none of the other indicia of legal majority. The model child simply cannot enhance his legal status in any way.

However, let him break the law by an otherwise felonious act and the juvenile justice system has made it a relatively simple matter to strip him of his fragile minority and submit him to the processes of the criminal law. Would it not be more in the interest of society to recognize the positive accomplishments of its children and offer adult rights and responsibilities to those who would shoulder them and treat as children those who had demonstrated an inability to comport with the norms of adult society?[70] Instead of this seemingly logical approach to defining adult status, there are laws which severely restrict the lawful activities of children and, at the same time, treat them as adult criminals in other circumstances. This situation works hardships on children and results in a number of problems both for them and for the rest of society. Perhaps the greatest paradox of all is that many parents have helped enact and interpret the laws and determine what resources shall be made available to the very court which, acting as parent substitute, sends so many children to the criminal courts.

These several observations are offered for the assistance they might provide in grasping the totality of the problem involved in the transfer law and process. A strict adherence to the principles of juvenile law and philosophy would obviously warrant its elimination, and, indeed, this has been suggested.[71] For the

[70] They would not have to be excluded from the jurisdiction of the juvenile court at the same time. The malleability of their youth would still be an asset in their rehabilitation should they violate the law.

[71] Sargent & Gordon, *supra* note 10, at 128, say that once the underlying motivations to punish are understood, there will be little need to transfer because the decision-making process will be purified of one of its most debasing elements. *See also* Schornhorst, *supra* note 10, at 595, who says that special provisions should be made for the 16-25 year old offender in accord with the rehabilitative

(Continued on next page)

present, transfer provisions must be endured as a continuing part of juvenile justice for at least the foreseeable future. Since that is so, the administration of such laws must be examined and made to conform as much as possible to the traditional juvenile court tenets of care, treatment, rehabilitation, and the best interest of the child. This can be done by viewing transfer to criminal court as a last resort and restricting transfer laws so that they affect only children who are completely beyond the rehabilitative potential of the juvenile court.

C. *Traditional Rationalizations and Justifications for the Transfer of Children to Criminal Courts*

In 1962, the Advisory Council of Judges of the National Council on Crime and Delinquency published the results of a survey which indicated several reasons why children were being sent to criminal courts: (1) the presence of an issue of contestable fact which would prolong a juvenile proceeding; (2) a serious offense occurring after previous correctional treatment; (3) a feeling that the child's case was hopeless; (4) a desire to punish the child for his attitude; and (5) the superior resources for treatment and benefit to public safety which the criminal court possessed over the juvenile court.[72] Subsequently, in 1965, Sargent and Gordon reported finding, in addition to those factors collected by the Advisory Council, that juvenile judges sent children to criminal court because they felt there were some children who just were not children.[73] A later and more comprehensive survey, conducted in 1966 by the Children's Bureau of the U.S. Department of Health, Education and Welfare for the President's Commission on Law Enforcement and the Administration of Justice, revealed more specific criteria: (1) seriousness of alleged offense, (2) record and history of the juvenile, including prior contacts

(Footnote continued from preceding page)
philosophy of the juvenile court and society's best interest. Removing them from criminal process would severely curtail the need for a transfer provision. It might be added that simply educating the courts and the public to the problems involved in the incarceration of young offenders might serve to reduce the numbers of those transferred to criminal courts. *Id.* at 586-87.

[72] Advisory Council of Judges, *supra* note 10, at 5, and Schornhorst, *supra* note 10, at 603. Note that the stud.es cited in notes 77-79 *infra* were completed either before or so soon after the *Kent* case as not to be influenced by the reappraisal of the law which that case engendered.

[73] Sargent & Gordon, *supra* note 10, at 122-23.

with police, courts or other official agencies, (3) aggressive, violent, premeditated or wilfull manner in which the offense was committed, (4) the sophistication, maturity and emotional attitude of the child, (5) the proximity of the child's age to the maximum age of juvenile court jurisdiction, (6) more appropriate procedures, services and facilities for the likelihood of reasonable rehabilitation, available in the adult court, (7) the possible need for a longer period of incarceration, (8) evidence apparently sufficient for a grand jury indictment, (9) the fact that the child's associates in the alleged offense will be charged with crime in an adult court, (10) the effect of the judgment of waiver on the public's respect for law enforcement and law compliance, and (11) the community's attitude toward the specific offense. A majority of the courts polled by the Children's Bureau agreed that at least four factors should control the decision to transfer. These were: (1) age, (2) seriousness of the offense, (3) seriousness of prior offenses, and (4) a discouraging treatment prognosis. A significant number also felt that the potential effect of the offender on others in a juvenile institution should be a consideration.[74] A survey conducted in Wisconsin turned up 22 different reasons being employed as bases for transferring children to criminal courts, as well as the fact that there was no uniformity among judges on why they transferred a child to adult court. This study found one judge making the decision to transfer, in part, on the basis of whether the child would be harmed by the acquisition of a criminal record,[75] while a study on the effect of the *Gault* decision in Kentucky revealed that a certain hostility to the presence of counsel was likely to result in the child being sent to criminal court.[76] The reasons used in the juvenile courts in this country are endlessly varied and probably as equally unrelated to rehabilitative potential as many of the factors already catalogued.

The Advisory Council of Judges observed that all but one of

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[74] CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE 78, Appendix B, Table 5 (1966). Collections of these factors and those at notes 72-73, *supra*, are also found in the contexts of other discussions of the transfer question in Schronhorst, *supra* note 10, at 603; Comment, 30 OHIO ST. L.J. 132 (1969); Comment, 16 ST. LOUIS U.L.J. 604, 609-13 (1972); Comment, 114 U. PA. L. REV. 1171, 1208 (1966); Comment, 1968 WIS. L. REV. 551.

[75] Comment, 1968 WIS. L. REV. 551.

[76] *See* Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300 (1971). The Kentucky authors called the appointment or presence of counsel a "kiss of death."

the criteria it collected were in direct conflict with juvenile court philosophy.[77] The same is true for all but one of the eleven factors collected by the U.S. Children's Bureau. The only non-conflicting criterion centers on the concern for the likelihood that the procedures, services and facilities available in the adult court might be more appropriately suited to the reasonable rehabilitation of the child and the safety of the public. If juvenile court decisions are to be consistent with juvenile court philosophy, this is the only reason of all those collected which maintains the integrity of the juvenile court by its concern for the rehabilitation of the child.[78]

While the rehabilitative orientation of the one factor which had at least theoretical validity makes it consistent with traditional juvenile court philosophy and potentially a justifiable criterion for transfer, an analysis of the persistent realities of modern adult criminal processes and correctional programs destroys any credibility or attraction it might otherwise possess. Criminal courts generally have few, if any, rehabilitative resources superior to those of the juvenile court.[79] Their facilities and programs are under continuing national indictment as anti-rehabilitative schools of crime.[80] Further, adult procedures and sanctions may damage beyond repair the child's potential for a life of useful and constructive citizenship.[81] A juvenile court's interest in a child's rehabilitation will rarely, if ever, be served by sending that child to adult court. No matter how poorly the goal of rehabilitation is achieved by some juvenile courts, it is generally an improvement on most options available within the adult system. This means that juvenile courts cannot be content to live with justifications which do harm to the children they serve. As one author has all too pointedly stated:

> When the juvenile court washes its hands of a child, it throws him on the scrap-heap of prison and gains nothing by employing euphemisms to describe this tragedy. On the contrary,

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[77] Advisory Council of Judges, *supra* note 10, at 5.

[78] The contribution of Sargent & Gordon, *supra* note 10, Buss, *supra* note 10, and Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300, 319 (1971), show the outer limits of inconsistency employed in justifying the transfer decision.

[79] Sargent & Gordon, *supra* note 10, at 124.

[80] *Id.* at 126.

[81] Schornhorst, *supra* note 10, at 586-87.

> it loses a great deal. As long as the juvenile court practices the self-deception that allows it to believe in the existence of facilities "elsewhere," it will not face squarely the need to develop for itself the tools it requires to care for these children.[82]

Since there is little to justify a belief that the adult system can handle the rehabilitative mission of the juvenile court, the one seemingly valid reason for transfer must be discounted as a serious justification for sending children to criminal court.

The other reasons noted are also deserving of attention and response. To those who opine that some children are not children, it might well be asked what they consider the test of maturity. Is it physical or emotional maturity, or both? A clinical diagnosis purporting to answer this question would be subject to skepticism, because:

> . . . it is doubtful that competent clinicians could be found who would be willing to devise a test whose purpose was to find out whether a child is "mature" enough to be tried in criminal court and sent to prison. Many clinicians believe that, in view of the present state of our penal system, no adult, let alone a child, should be sent to prison.[83]

What about the meaning of "hopeless" when it is used to describe a child sent to criminal court? It probably means, in reality, that the child cannot or has not responded to previous rehabilitative measures utilized by the juvenile court. If this is the case, it would be better to re-evaluate the measures than to call the child "hopeless." More than likely, nothing was ever done for the child which was geared to help him become socially rehabilitated. Nevertheless, when the juvenile court feels it has exhausted its alternatives on the child, it often dumps him into the adult system and expects the criminal court to complete its job.[84] If the juvenile court is powerless to help, then what can the criminal court do? If the community offers no help to the juvenile court, will it offer more to the criminal court?

Disposing of other factors, it might be said that the likelihood of a prolonged or difficult hearing does not justify transfer be-

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[82] Sargent & Gordon, *supra* note 10, at 125.
[83] *Id.* at 123.
[84] *Id.* at 123-24. *See also* Advisory Council of Judges, *supra* note 9, at 7.

cause the juvenile judge should be as qualified as the criminal judge to conduct a full hearing on issues of fact.[85] Transfer as a punishment for a child's attitude cannot be justified, because adolescence is marked by numerous attitudes which are at variance with the predilections and expectations of adult society. Considered alone, it is a very questionable index of criminal maturity. The court exists to rehabilitate and help every child it can, and it is antithetical to the tenets of the juvenile court tradition to send a child to criminal court because of his attitude. The same may be said of a threat of waiver for any purpose, *i.e.,* forcing a child to give up his rights to plead guilty.[86]

Likewise, to abandon a child just because he commits a single very serious offense[87] or breaks the law after being in an institution is contrary to juvenile court philosophy, because the court is rejecting both the child and any further attempts to help him. Such rejection implies the inadequacy either of judicial personnel or of court resources, and it is the child who suffers for their deficiencies. Of all the factors collected by the U.S. Children's Bureau, none of them taken by itself or in combination with others is sufficient to transfer the child *as long as he can be helped within the juvenile court system.* A realistic concern for the child's rehabilitation must buttress any decision to send a child to criminal court.

These expressed reasons for waiver do not stand up well under a scrutinizing test for integrity, and they constitute a troublesome deviation from consistent juvenile court philosophy at the most critical stage of the court's processes. There are other reasons which probably more accurately tell the story. These are not always expressed, but they undoubtedly include discrimination on the basis of class and color,[88] public pressure and judicial-

[85] This is hardly the case in Kentucky, since about 90 percent of the juvenile bench possesses no legal training whatsoever. KENTUCKY CRIME COMMISSION, DELINQUENCY IN KENTUCKY 63 (1969). The ramifications of this situation are discussed in Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study,* 10 J. FAM. L. 300 (1971).

[86] For an article which seems to espouse the use of transfer and confinement in an adult institution as a threat, see Haviland, *supra* note 10, at 321.

[87] Actually, the serious "one-shot" offender may be more responsive to treatment than the habitual thief whose offenses are so common that they go unnoticed. Comment, 12 ST. LOUIS U.L.J. 424, 440-41 (1968).

[88] Bazelon, *supra* note 10, at 376-77, and Note, 59 KY. L.J. 719 (1971), *supra* note 10, at 732.

political manipulation and capitulation,[89] hostility to the presence of counsel,[90] and other unarticulated reasons for abandoning a child to the criminal justice system.[91] It has even been suggested that children are sometimes transferred because the court needs a scapegoat for itself and for the community.[92] The basic elements of this method of transfer are revenge and displacement of guilt, *i.e.*, no one wants the child to get away with what others have had to repress, and anyway, the child has not cooperated or been successfully rehabilitated by previous court dispositions.[93]

Those who proffer the psychological motivations of revenge and displacement of guilt as over-riding influences in the transfer decision also suggest that:

> . . . precisely these unconsciously motivated elements produce effects that account for many of the inconsistencies and ambiguities of juvenile court procedure. Perhaps they may be responsible for some of the treatment "failures" too.[94]

Practices inconsistent with juvenile court philosophy and ambivalent attitudes toward children the court is supposed to help may well be motivated by the existence of these unconscious inclinations at all levels of the juvenile justice system. Understanding the motives might make the inconsistencies and indiscretions more susceptible to resolution.

For whatever reasons a decision to transfer is made, it is certainly clear that:

> . . . broad 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

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[89] Sargent & Gordon, *supra* note 10, at 125. Note, 59 KY. L.J. 719 (1971), *supra* note 10, at 732; Comment, 12 ST. LOUIS U.L.J. 424, 437 (1968).

[90] *See* Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300 (1971).

[91] Comment, 114 U. PA. L. REV. 1171, 1211-12 (1966).

[92] Sargent & Gordon, *supra* note 10, at 125, and Comment, 40 S. CAL. L. REV. 158, 163 (1967).

[93] Sargent & Gordon, *supra* note 10, at 127.

[94] *Id.*

> where it is extremely easy for him to make arbitrary decisions. He can, for example, justify his decision to waive on the naked finding that the interest of the state requires a prosecution.[95]

It may well be the lack of such standards, rather than wanton abuse of discretion, which allows the interests of retribution and public protection to get more attention than they actually merit. This leads to an unequal administration of the law and a quandary for appellate courts which must try to decide, with the same absence of any standards, whether a juvenile judge has acted arbitrarily and abused judicial discretion in transferring a given child to the criminal court.[96] The many values to be served in dealing with children and the rest of society must be meshed with the overall goals of juvenile justice and incorporated into a clear set of standards for those who administer its philosophy at the transfer proceeding.

D. *The Need for Explicit Standards in the Transfer Proceeding: How Substance May be Added to Form*

1. *The Inadequacy of Traditional Standards*

The salient deficiency in all of the proffered rationales for transfer is that they are not consistent with the basic philosophy and purpose of the juvenile court as a major premise and point of departure.[97] If the *raison d'etre* of the juvenile court is to rehabilitate children who come into contact with the law, then none of the other reasons collected here are significant or in harmony with juvenile court philosophy if a child can be helped and socially rehabilitated by the processes and resources of the juvenile court.

Commentators writing close to the time of *Kent* picked and chose from the standards revealed by the surveys and proposed one or a number of them as guides to be used by judges in the transfer proceeding. The Advisory Council of Judges of the

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[95] Mountford & Berenson, *supra* note 10, at 64.

[96] Comment, 114 U. PA. L. REV. 1171, 1209 (1966).

[97] The same thing can be said of most of those set forth in the Appendix to *Kent*. The value of the *Kent* case, however, was to focus on the critical nature of the transfer proceeding and demand that certain standards be met. The result was that counsel, courts, and legislators started thinking about how to make transfer proceedings consistent with juvenile court philosophy. *See* note 10 *supra*.

National Council on Crime and Delinquency proposed that three criteria should be considered in the waiver decision. These were (1) the prior record and character of the minor, his physical and mental maturity, and his pattern of living; (2) the type of offense, *i.e.*, whether it demonstrated viciousness or involved force or violence; and (3) the comparable adequacy and suitability of facilities available to the juvenile and criminal courts.[98] Others suggested longer lists including (1) psychological and educational rehabilitation programs which might be helpful, (2) the child's record, noting that length does not necessarily mean he cannot be helped, (3) the motives and attitudes of the youth as well as his participation in past offenses, (4) whether or not the child supports himself with the proceeds of crime or is merely a thrill-seeker, (5) whether the child is a follower or an instigator, (6) whether the crime was accompanied by exceptional violence, (7) whether the child is a threat to others, (8) whether it was a crime against a person or property, one against a person being more heavily weighed, (9) whether the child was responsive to former rehabilitative programs, (10) whether the child has ever been committed to the state—if not, transfer would be almost impossible, (11) the family background, (12) the child's age, (13) his overall maturity, (14) his degree of sophistication, (15) whether the child needs institutionalization or probation, and (16) the strength of the prosecutor's case.[99] Still other writers have added that the court must not only consider what the child did, but why he did it, before transfer can be considered.[100]

It has been suggested that the problem with these proposed criteria is that their use is very often based on a lack of information compounded by random selection in the absence of a clearly articulated guiding principle. There is a great need for research into the nature and interconnections of these factors because judges and others are now proceeding on the basis of too many false assumptions.[101] The point of departure for this investigation, which will touch the consistency of juvenile court philosophy as much as the findings of modern day science, might well be the proposition that all standards previously articulated are merely

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[98] Advisory Council of Judges, *supra* note 10, at 7.
[99] Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 314-16.
[100] Mountford & Berenson, *supra* note 10, at 62.
[101] Schornhorst, *supra* note 10, at 606.

subparts of a much larger and more critical question which in fact embodies the sole criterion upon which the consideration of transfer can be based. It is only by asking this crucial question and giving a subservient role and perspective to traditional standards that the integrity of the juvenile court can be preserved at the transfer proceeding.

2. *The Emerging Standard of Amenability to Treatment and Rehabilitation within the Juvenile Justice System*

Juvenile court philosophy, the doctrine of *parens patriae,* and the care and treatment intended by juvenile court legislation demand that the court address itself to the single question of *whether the child is amenable to treatment and rehabilitation within the juvenile justice system and according to the tenets of juvenile court philosophy.*[102] Others have suggested that a second question be added, *viz.*, whether the juvenile system has the necessary means of treatment,[103] but that element could provide a convenient subterfuge for those jurisdictions who choose to provide only the most meager resources for treatment and rehabilitation. This would result in a test which would see almost every older child submitted to the criminal justice system. The criterion most consistent with the principles upon which the court stands is simply whether the child can be helped with rehabilitation rather than retribution. If it is established that he can be so rehabilitated, then it is up to the courts to order appropriate care and treatment for him rather than allow him to be sent to criminal court. There is simply too much room for compromise in the viewpoint that:

> . . . juvenile court is a court of law charged, like other agencies of criminal justice, with protection of the community against threatening conduct. Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with the threatening conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore

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[102] Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 317. This gives a child up to the age of 21 to be rehabilitated according to KRS § 208.200(1).

[103] Croxton, *supra* note 10, at 8.

> obliged to employ all means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it.[104]

Under such an interpretation of the nature of the juvenile court, it would be all too easy to use the criminal court as a standard against which the resources of the juvenile court were measured. Adherence to juvenile court philosophy could then be justified as long as juvenile programs placed "greater emphasis" upon rehabilitation than those in criminal court. *Parens patriae* does not mean greater emphasis; it means dedication to a principle that children are to be helped and rehabilitated and that this is the overwhelming and foremost concern of the court charged with that task. In that work, reliance cannot be placed merely on what is at hand. The courts must be always looking for and shaping new forms of assistance and care. This is especially true where the serious youthful offender is concerned, and it will serve no one to merely try to do more than is being done in the criminal courts.

3. *Elements Necessary for an Honest Appraisal of a Child's Amenability to Treatment*

The phrase "amenability to treatment" is just as susceptible to subjective interpretation and subsequent abuse as the older standards used to make the decision on transfer of jurisdiction. Consequently, it must be looked upon not as a test in itself, but rather as a concept which organizes and unifies the philosophy of the juvenile court at its most critical stage and objectifies a standard against which other factors relative to the child's situation can be judged. Courts may then ask: Does the child's age make him unable to be helped by the juvenile justice system; or does

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[104] Schornhorst, *supra* note 10, at 593. Compare this view of the court with that expressed in text accompanying notes 8 and 16 supra. Compare this view of the court with those expressed in text accompanying notes 8 and 16 *supra*. Clearly, the words chosen to explain the court's purpose can be very influential in the way the court itself is administered. The Schornhorst definition seems to be a considerable departure from the long tradition which has made the "best interest of the child" the paramount concern of the court. *E.g.*, Peyton v. French, 147 S.E.2d 739 (Va. 1966). Schornhorst does find support, however, in Mikulovsky v. State, 196 N.W.2d 748 (Wis. 1972). It might be suggested that as long as juvenile courts continue to rely on this sort of reasoning they will not be able to confront the serious issues involved in the problems of finding methods to rehabilitate young offenders. The "merely greater emphasis" idea is just too inviting a subterfuge for avoiding the responsibilities of the court.

the offense, his attitude, the ages of his associates or the fact that they will be charged in criminal court, his past record, his family background, the availability of evidence sufficient for an indictment, the community's attitude toward the offense and the child, or the need for a scapegoat indicate that the *child* cannot be helped within the confines of juvenile court philosophy? Neither these nor other very pertinent questions can be properly asked or answered in the absence of some formality because broad general statutes, originally drafted with *parens patriae* as a backdrop, today need strict procedural rules to form a framework into which the substance of *parens patriae* can be poured. This is especially true of the transfer proceeding.[105]

This formality has both procedural and testimonial aspects. It has been suggested that procedural formality would be served by (1) specific notice to the child as to the kind of proceeding faced, so that preparation and evidence can go to the issue of transfer rather than adjudication;[106] (2) a separate investigation and hearing, prior to any adjudication of delinquency, confined to the question of the child's amenability to treatment within the juvenile system; (3) adequate legal representation both for the court officers and the child; (4) a limitation of evidence to that which is relevant to the question of amenability to treatment; (5) evidentiary and procedural safeguards sufficient to assure a proper and reliable judicial finding; (6) provision for different judges in waiver and adjudicatory hearing, at least when requested; and (7) prohibition of any prosecution once the juvenile court has decided to adjudicate the case.[107] Such protections would more clearly define the proceedings, protect the child in accordance with juvenile court philosophy, and reduce confusion with regard to the issue of double jeopardy.[108]

Testimonial formality can be implemented by requiring a detailed investigation into the child's amenability to treatment

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[105] Note, 22 DRAKE L. REV. 213 (1972), *supra* note 10, at 220.

[106] *Id.* at 214. A failure to give such notice may be sufficient to overturn any transfer of jurisdiction which ensues. Reed v. State, 188 S.E.2d 392 (Ga. 1972); State v. Gibbs, 500 P.2d 209, 215-16 (Idaho 1972); and State v. Halverson, 192 N.W.2d 765 (Iowa 1971).

[107] Courtade, *supra* note 10; Schornhorst, *supra* note 10, at 599; Comment, 12 ST. LOUIS U.L.J. 424, 462 (1968); and Comment, 5 WILLIAMETTE L.J. 157-58 (1968).

[108] *See* note 171 *infra.*

and rehabilitation. This is crucial to a determination of the transfer question and becomes a paramount necessity because:

> [t]he prime intention of the juvenile court movement in this country was to have and rehabilitate the youthful offender so as to mold him into a socially constructive citizen rather than subject him to the deleterious features of the criminal process. Therefore, since treatment is provided within the statutory scheme, it seems only reasonable that the juvenile has a right to an investigation to determine his amenability to treatment.[109]

Since the decision to transfer involves a judgment that the child is incompatible with the juvenile system, it is extremely difficult, if not impossible, to reach this conclusion without a presentation and testing of all relevant evidence. A proper hearing and detailed investigation are therefore indispensable to the decision-making process where transfer of jurisdiction is under consideration. Statutes which still provide that the decision to transfer shall be made only after an investigation, but are silent as to the nature of the investigation and the manner of conducting it, are inadequate to meet the demands of statutory due process which is consistent with juvenile court philosophy. Courts can no longer be allowed to consider the investigation as merely an administrative function to be done in any way they see fit, if it is done at all.[110]

An investigation equal to the task of serving as the basis for a decision on whether to transfer a child to criminal court has two main components. One might be called the general informational component which provides data on age, family background, prior contacts with the court or official agencies, education, employment, the nature of the presently alleged offense, and other indicia which are a matter of record. The other component might be loosely called the scientific component because it informs the court about the prospects for the child's treatment and rehabilita-

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[109] Comment, 16 ST. LOUIS U.L.J. 604, 616 (1972). The *Kent* court agreed with this proposition and many others have followed that leadership. Kent v. United States, 383 U.S. 541, 553 (1966). States agreeing with this principle are found in note 24 *supra*. It is discussed from a defense standpoint in Comment, 12 ST. LOUIS U.L.J. 424, 439 (1968).

[110] Comment, 12 ST. LOUIS U.L.J. 424, 427, 440 (1968).

tion. The former category of information is restricted to a fairly routine collection of records, while the latter must use this same information in conjunction with other subtle investigations of the child's inner life, dispositions, and potential in order to develop an opinion on the crucial question of whether the child can be helped by the juvenile court.

The diagnosis and prognosis of a child's amenability to treatment is delicate work, to say the least. Even where treatment is concerned, diagnosis during the early stages is very tentative and may be proven or disproven during the course of treatment. Prognosis is, therefore, even more tentative, and one is forced to conjecture about how any prognosis can be entertained in the absence of diagnosis and treatment. Both develop and change over a period of time with the intake of new data. They do not remain constant. However, behavioral scientists have, as one writer put it, "duped" everyone into believing that they can perform both these feats with certainty and almost on the spot.[111] It is perhaps more reasonable to agree with those professionals who say that:

> Although we often brand patients as "untreatable" with apparent aplomb, such matters reduce themselves to questions of what treatment means, definition of agency function, motivation, and other practical considerations.[112]

Caution about undue reliance on science has therefore been voiced in some quarters,[113] while optimistic confidence is expressed in others.[114] The optimists point out that they can help determine the child's potential for rehabilitation, as well as his background and whether the offense was committed in an aggressive and premeditated manner.[115] The conservatives, whose candor fosters credibility, say that class differences between the child and the psychodiagnostician, the generally disorganized style of the offender as opposed to the organization of testing,

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111 Croxton, *supra* note 10, at 9.
112 *Id.*
113 Harari & Chwast, *Class Bias in Psychodiagnosis of Delinquents*, 10 CRIME & DELINQUENCY 145 (1964), and Croxton, *supra* note 10.
114 Hayes & Solway, *supra* note 10.
115 *Id.* at 709-11.

and the low verbal and imaginative skills of the youth pose great problems to those who work with children from the juvenile court.[116]

> How he perceives and interprets a given piece of behavior will depend to a great degree on who he is, his own life experience, his value system, and most importantly, perhaps, where he received his training, and within which theoretical system he operates. Today there are a vast variety of such systems and methods which, more or less, contain their own esoteric vocabulary and frame of reference. The proponents of each claim success though each interprets behavior differently. To subject a behavioral scientist to a rigorous cross examination is not merely to question his data collection system and his facts, but also to question all of his basic theoretical assumptions for which he has very little empirical data.[117]

In view of these variables which have so much impact on the conclusions reached about the child's amenability to treatment, the law would do well to recognize that it is virtually impossible to predict that any child cannot benefit from *proper* treatment within the juvenile system.[118] The child should be given the benefit of the doubt raised by the diagnostic-prognostic dilemma of science vis-a-vis the question of his "treatability." Needless to say, findings and conclusions should be subjected to the most rigorous examination and analysis. Several opinions might well serve this end, together with the probing of competent and informed counsel.

The court's probation and social rehabilitation functions should likewise be examined carefully, because the juvenile court often merely wants to abandon children by transferring them to criminal court. There should be a detailed investigation of the child's past treatment. What was its nature? How frequently were efforts made to work with him? Was he really given a chance to "resocialize," or was he placed on probation or in a training school and then forgotten? What was done for him when he returned home from a juvenile institution? How well has the

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[116] Harari N *Chwast, Class Bias in Psychodiagnosis of Delinquents,* 10 CRIME & DELINQUENCY 145 (1964).

[117] Croxton, *supra* note 10, at 8.

[118] *See* Comment, 12 ST. LOUIS U.L.J. 424, 457 (1968).

state comported itself and looked after the child while standing *in loco parentis* to him?[119]

No stone should be left unturned in the search for information to assist in making the decision on whether to transfer jurisdiction over a child, and no matter which factors are considered, they must always be held up to the only standard which is consistent with the philosophy upon which the court is predicated: is the child amenable to treatment and rehabilitation within the juvenile justice system and according to the tenets of juvenile court philosophy?

IV. AN ANALYSIS OF THE TRANSFER OF JURISDICTION UNDER KENTUCKY LAW

A. *Introduction*

The preceding discussion should be of special interest to those involved in enacting, interpreting, and administering Kentucky's juvenile laws, inasmuch as the Commonwealth's transfer law suffers from almost every defect it catalogues. It was enacted over ten years ago and has yet to be revised or interpreted to incorporate the recent developments which have taken place in the United States Supreme Court, the Kentucky Court of Appeals, precedents from other jurisdictions, and the extensive legal literature which has grown up around the transfer question. The statute is presently taken at face value, literally construed, and used in a way that often disregards the child's rights and the court's responsibilities under juvenile court legislation.

Local precedent has done little more than establish that the transfer of jurisdiction is a critical stage of juvenile court litigation which demands that the child be represented by counsel[120] and

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[119] Schornhorst, *supra* note 10, at 605. There is not enough attention given to the shortcomings of court probation programs and state care for committed children, especially when they return from institutional treatment. They are generally abandoned when they are most in need. This is a particularly vulnerable spot in the services provided by the Kentucky Department for Human Resources. The overall crisis in good programs was candidly noted in the case of *In re* Patterson, 499 P.2d 1131 (Kan. 1972). The court was faced there with a serious dilemma which had been brought about by the state's failure to provide proper programs for children subject to its care.

[120] Smith v. Commonwealth, 412 S.W.2d 256, 259 (Ky. 1967). The Kentucky Court of Appeals gave no other reason than the *Kent* decision for its holding in *Smith*, and one commentator has observed that ". . . in the absence of a definitive

(Continued on next page)

afforded the benefits of strict adherence to the statutory *procedures* established for the transfer of jurisdiction.[121] The recent case of *Whitaker v. Commonwealth*[122] provides a ray of hope that the substance of the transfer proceeding will come under increasing scrutiny by the Court of Appeals, but until the issues involved in the transfer of jurisdiction are fully understood by those concerned with the administration of juvenile justice in Kentucky, it is doubtful that the proper issues will ever be raised with consistency in any court.

B. *Two Procedural Perspectives of the Transfer Proceeding*

KRS § 208.170(1) provides for two basic kinds of hearings on the transfer question.[123] On the one hand, the proceeding can be considered a normal juvenile court hearing on the facts in which "transfer of jurisdiction" is one possibility among the dispositions available to the court. This is probably the best way to handle the hearing because no child should be referred to circuit court unless the juvenile court is certain that the child in fact committed the offense alleged. It would be inconsistent with the spirit of juvenile law to subject a child, who is only probably guilty of the alleged offense, to adult processes and penalties. The child who is only probably guilty has not yet been shown to need any assistance from the court, much less that he is beyond its rehabilitative philosophy. Hence, there should be a hearing on

(Footnote continued from preceding page)
statement by the Kentucky Court of Appeals, the assumption must be made that *Smith* somehow absorbed the entire holding of *Kent*, and future Kentucky juvenile court waiver proceedings must conform to the standards announced therein." 1967-68 Kentucky Court of Appeals Review, *supra* note 10, at 363. As it turned out, the *Smith* decision had almost no effect on the way these proceedings were handled. This is exemplified by the recent case of Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972).

[121] Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); and Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936).

[122] 479 S.W.2d 592 (Ky. 1972). This case held that the juvenile court must set forth "sufficient reasons" for the transfer of jurisdiction. It did not, however, give any hint as to what those reasons might be. It can be argued, therefore, that if *Smith* incorporated *Kent*, the standards, or factors, are those announced in the appendix to the *Kent* decision. Under present Kentucky law, it would seem that the "sufficient reasons" standard establishes a case by case approach devoid of any objective guidelines for the general education and utilization of the juvenile courts in the state.

[123] This is discussed to some extent in Comment, 9 NATURAL RESOURCES J. 310, 314 (1969).

the facts.[124] Waiver, or transfer, could then be treated as a disposition pursuant to KRS §§ 208.060(4), 208.140(1), and 208.190. This sort of procedure would make the provisions of KRS § 208.170(2) much more useful and logical than they are at the present time.

The transfer proceeding can also be looked upon simply as a hearing to decide whether there is probable cause sufficient to warrant the transfer of a certain child of a certain age, charged with a certain offense, from juvenile court to circuit court. The implications for adequate preparation and representation by counsel are obvious. This would be a completely different hearing from the one described above, and a lawyer faced with a possible transfer proceeding should immediately make a motion that the court and prosecution decide about the possibility of transfer. An attorney cannot adequately prepare such a case unless he knows what sort of hearing will take place. In this instance, no full hearing on the facts would be required; and the offense would not have to be proven beyond a reasonable doubt. It would be basically a probable cause hearing at which a decision for or against transfer would be made.

Some attorneys prefer to bypass both of these alternatives and simply move that the case be transferred to the grand jury. They do this for the understandable reason that they will either come away with no indictment, or, if one is returned, they hope to get a better ruling on the relevant law from the circuit judge. This is a legitimate tactical assumption for an attorney who has a serious case and wants to rely on the legal training of the circuit judge for a ruling on a technical point of law.[125] There seems to

[124] There is considerable merit to this approach, as was pointed out in Note, 67 COLUM. L. REV. 281 (1967), *supra* note 10, at 318. It tends to aid in a decision-making process more in accord with the philosophy of the court than one based simply on a probable cause proceeding at which the question of the child's amenability to treatment within the juvenile justice system is also in issue.

[125] Only about 10 percent of Kentucky's juvenile judges have any legal training and there is a serious problem when it comes to ruling on the law, if indeed the law is even observed. *Compare* the findings in KENTUCKY CRIME COMMISSION, DELINQUENCY IN KENTUCKY 63 (1969) and Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300 (1971), with McCune & Skoler, *Juvenile Court Judges in the United States, Part I: A National Profile*, 11 CRIME & DELINQUENCY 121, 123-25 (1965), which reported that 71 percent of a national sample of 3524 juvenile judges had earned law degrees, 77 percent were admitted to the bar, and 50 percent had education over the LL.B. or J.D. level. This fact, together with the typical administration of the transfer law in Kentucky, would provide a strong motivation to seek a transfer to a higher court. The tactic is of questionable legal validity, however.

be reason to question the propriety of such a motion, however, because the juvenile court cannot simply waive its duty to provide a unique forum for the child's case nor can it compromise the child's rights to be heard in that forum. Since granting the motion would entail a transfer of jurisdiction to the criminal court, the motion would have to be accompanied by a sufficient showing that the child was beyond the control of the juvenile court and not amenable to its rehabilitative resources and philosophy. It is very doubtful that such a motion could ever be made or granted in the absence of all other attendant procedures called for by case law.[126]

Even if such a motion was legal, it would entail a calculated risk. The case might be lost, and even if the child were probated, a record which would follow the child through life would still be created. The liabilities involved in having such a record have been discussed previously, and they are good reasons why every effort should be made to have the matter disposed of in juvenile court. If the original inclination to move for transfer is based on the disparity between dispositions involved in juvenile and criminal courts, the reformative course to follow would be to sue for a proper treatment disposition under juvenile court auspices rather than surrender the child to the rigors of adult processes.

C. *Primary and Secondary Jurisdiction in the Juvenile and Criminal Courts*

Juvenile courts in Kentucky have been vested with exclusive, original jurisdiction over all children except those 16 or older who have been charged with a moving motor vehicle offense.[127]

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[126] *See* note 129 *infra*, especially Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961), which deals with this precise point. However, in *In re* Maricopa County, Juvenile Action No. 72804, 504 P.2d 501 (Ariz. 1973), it was held that defense counsel can waive the probable cause aspect of a transfer proceeding and move directly to a consideration of whether or not the child should be kept under juvenile court jurisdiction. This would probably be valid in Kentucky, as well, because it is the retention of jurisdiction which is the critical issue involved in transfer. *But see* People v. Shaw, 279 N.E.2d 729 (Ill. 1972), which indicated that a child can waive all juvenile proceedings relative to transfer and move directly to adult court processes.

[127] KRS § 208.020(1)(a). This exception is a gross inconsistency in an otherwise good jurisdictional statute because it permits even minor moving motor vehicle offenses to be treated as criminal offenses and the children to be fined or jailed with adults. This would not be allowed in a case of grand larceny, however, because the juvenile court would have jurisdiction and the protections of the court would obtain. This aspect of the statute should be changed because the effects of jail and criminal sanction are the same regardless of the crime to which they are attached.

The acquisition of jurisdiction is governed by several statutes,[128] and it has been held that the procedures for acquiring and transferring jurisdiction must be rigidly adhered to by the courts, because the statutes governing these proceedings establish jurisdictional limitations and not mere personal rights which may be waived.[129]

There is no concurrent jurisdiction over a child charged with a public offense. The juvenile court has exclusive, original jurisdiction which may only be surrendered by an act of discretion which has been circumscribed by statutory and constitutional prescriptions. There is no requirement that jurisdiction *ever* be transferred to the circuit court. The circuit court, therefore, has only limited and secondary jurisdiction which depends upon proper steps having been taken in the juvenile court to effect the transfer of jurisdiction over the child. Jurisdiction is not to be presumed to obtain in the circuit court, but must be affirmatively established by the record of the hearing in juvenile court.[130]

These rigid procedural requirements will be meaningless to

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[128] KRS § 208.020(1)(a); KRS § 208.060; KRS § 208.070; KRS § 208.110; KRS § 208.140; KRS § 208.170; KRS § 208.190.

[129] Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961), makes this precise point. The requirement of rigid adherence to statutory procedure is also found in Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); and Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936).

[130] KRS § 208.170(1) is permissive, and this fact was observed in Smith v. Commonwealth, 412 S.W.2d 256, 259 (Ky. 1967). The nature of the respective jurisdictions is discussed in Heustis v. Sanders, 320 S.W.2d 602, 605 (Ky. 1959), and the need for an affirmative showing of propriety in the juvenile court pointedly reiterated in Gipson v. Commonwealth, 226 S.W.2d 758 (Ky. 1950). These problems came up in various ways in the cases of Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972); Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); Childers v. Commonwealth, 239 S.W.2d 255 (Ky. 1951); Robinson v. Kieren, 216 S.W.2d 925 (Ky. 1949); Mauk v. Commonwealth, 104 S.W.2d 955 (Ky. 1937); Crawford v. Commonwealth, 95 S.W.2d 12 (Ky. 1936); Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936); Wooten v. Commonwealth, 75 S.W.2d 556 (Ky. 1934); Watson v. Commonwealth, 57 S.W.2d 39 (Ky. 1933); Grise v. Commonwealth, 53 S.W.2d 362 (Ky. 1932); Ashley v. Commonwealth, 33 S.W.2d 614 (Ky. 1930); Angel v. Commonwealth, 21 S.W.2d 150 (Ky. 1929); Tipton v. Commonwealth, 298 S.W. 990 (Ky. 1927); Goodfriend v. Commonwealth, 288 S.W. 330 (Ky. 1926); Cloyd v. Commonwealth, 278 S.W. 595 (Ky. 1925); Cody v. Commonwealth, 276 S.W. 970 (Ky. 1925); Harman v. Commonwealth, 263 S.W. 733 (Ky. 1924); Clark v. Commonwealth, 256 S.W. 398 (Ky. 1923); Compton v. Commonwealth, 240 S.W. 36 (Ky. 1922); Johnson v. Commonwealth, 195 S.W. 818 (Ky. 1917); Waters v. Commonwealth, 188 S.W. 490 (Ky. 1916); and Talbott v. Commonwealth, 179 S.W. 621 (Ky. 1915). The simple conclusion to be drawn from these cases is that there must be proper proceedings in juvenile court before the circuit court can ever acquire jurisdiction.

the child, however, unless they are complemented by serious substantive considerations undertaken within the confines of the court's jurisdiction and relative to the decision on whether to transfer the child to criminal court.

D. *The Predicates of Transfer*

1. *Age and Offense*

Kentucky has a judicial form of transfer which is generally invoked according to jurisdictional rather than dispositional inclinations.[131] These factors spell out an operational format which provides for a very uneven administration of the law. The basic reference is KRS § 208.170(1), which states that:

> If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and, at the time of commission of the offense, the child was sixteen (16) years of age or older, or was less than sixteen years of age, but the offense was murder or rape, including being an accessory to either of said offenses before the fact, and the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.[132]

This subsection sets forth the bases for transfer: age, offense and, to some vague extent, the court's opinion that the best interests of the child and the public require a criminal trial.

The age of the child before the juvenile court has been one of the most litigated issues in Kentucky juvenile law, and it has been generally determined that the time of the offense rather than the date of the hearing is controlling. The burden of estab-

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[131] See the discussion at III (A) *supra.*

[132] KRS § 208.170(1). An upper jurisdictional age of at least 16 years is supported by the Standard Juvenile Court Act (6th ed. 1959) and the MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962). The exceptions for murder and rape are unnecessary deviations from this standard, especially since they pertain to younger children who are much more amenable to rehabilitation.

lishing age rests with the child and his representatives.[133] This seems a simple enough guideline, but there are some problems when a child attains majority[134] between the time of the offense and the date of the hearing, or before he is apprehended. The recent case of *Lowry v. Commonwealth*[135] held that a circuit court can proceed against an 18 year old person who, as a child, committed an offense over which the juvenile court never took jurisdiction. This is patently bad law because of the mechanism provided for circumventing and subverting the statutory intent that children be given the benefits of juvenile court legislation.[136]

The *Lowry* opinion is notable for the lack of detailed policy considerations which should have accompanied such a weighty ruling. The cursory treatment given a rule which makes it possible to simply disregard the juvenile court and the intent of the juvenile statute was further compounded by the fact that almost no mention was made of the many prior cases which had clearly held that a child's age at the time of the offense is controlling and that the only way the circuit court can obtain jurisdiction is by lawful transfer from the juvenile court.[137] These cases are certainly more consistent with the intent of juvenile court legislation, and they were not overruled by *Lowry*.

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[133] Robinson v. Kieren, 216 S.W.2d 925 (Ky. 1949), held with a confident finality that the age at the time of the offense was controlling. *Accord,* Jones v. Commonwealth, 282 S.W.2d 57 (Ky. 1955); Vanhoose v. Commonwealth, 264 S.W.2d 72 (Ky. 1954); Childers v. Commonwealth, 239 S.W.2d 255 (Ky. 1951); Johnson v. Commonwealth, 176 S.W.2d 104 (Ky. 1943); Crawford v. Commonwealth, 95 S.W.2d 12 (Ky. 1936); Commonwealth v. McIntosh, 78 S.W.2d 370 (Ky. 1935); White v. Commonwealth, 47 S.W.2d 548 (Ky. 1932); Ashley v. Commonwealth, 33 S.W.2d 614 (Ky. 1930); Hall v. Commonwealth, 21 S.W.2d 799 (Ky. 1929); Eldridge v. Commonwealth, 17 S.W.2d 403 (Ky. 1929); Cloyd v. Commonwealth, 278 S.W. 595 (Ky. 1925); Cody v. Commonwealth, 276 S.W. 970 (Ky. 1925); Wilson v. Commonwealth, 271 S.W. 1055 (Ky. 1925); Harman v. Commonwealth, 263 S.W. 733 (Ky. 1924); Clark v. Commonwealth, 256 S.W. 398 (Ky. 1923); Thompson v. Commonwealth, 255 S.W. 852 (Ky. 1923); McQueen v. Commonwealth, 244 S.W. 681 (Ky. 1922); Johnson v. Commonwealth, 195 S.W. 818 (Ky. 1917); Fuson v. Commonwealth, 190 S.W. 1095 (Ky. 1917); and Mattingly v. Commonwealth, 188 S.W. 370 (Ky. 1916).

[134] KRS § 2.015.

[135] 424 S.W.2d 841 (Ky. 1968).

[136] The office of the Attorney General agreed with this rule in KY. OP. ATT'Y GEN. 65-68. Neither the Court of Appeals nor the Office of the Attorney General seems to have perceived the manner in which a rule of this kind can destroy the exclusivity and integrity of the jurisdiction given to the juvenile court. See the discussions at III (A) *supra.*

[137] *See* note 130 *supra,* and especially Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); Robinson v. Kieren, 216 S.W.2d 925, 928 (Ky. 1949); and Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936).

Mattingly v. Commonwealth,[138] was cited in Lowry, but the integrity of its holding was completely passed over. The *Mattingly* court had faced the jurisdictional issue of whether age at the time of the offense or age at the time of the hearing would control, and had answered with an opinion that was fully cognizant of the intent of juvenile legislation. The court said:

> Upon the question of jurisdiction the only point raised here that is not concluded by former decisions of this court is the suggestion that the age at the time of trial, rather than at the time the crime was committed, should prevail. This suggestion, however, is, in our judgment, unsound from the very terms of the statute as well as upon reason. The statute defines a "delinquent" child to be one who, of the ages specified, commits any of the acts named, including the crime charged here, and then vests in county courts of the state exclusive jurisdiction to try such "delinquent" children. They become "delinquent" children, by the commission of the act denounced, when the acts are committed, and the jurisdiction then vests exclusively in the county court, which court, having thus acquired exclusive jurisdiction, cannot be ousted by its failure to act. The very purpose of this law, as has been declared by this court upon more occasions than one, is to provide for the protection and care of juvenile offenders in a humanitarian effort to prevent them from becoming outcasts and criminals, rather than to inflict punishment for their delinquencies. To hold that the officers charged with the execution of the law may defer action until the offending child has passed the age thus protected by the statute, and then prosecute him as a criminal, and not a juvenile, would defeat the very purpose of the law, and cannot be sanctioned.[139]

Although the *Mattingly* opinion squarely confronts the critical problem and the open invitation to abuse raised by the *Lowry* decision, *Lowry* still poses an obvious threat to the integrity of the juvenile court which cannot be overlooked by those who seek to bring the practices of the court into line with its philosophical foundations.[140]

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[138] 188 S.W. 370 (Ky. 1916).

[139] *Id.* at 371.

[140] The same thing can be said of Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. 1970), which followed *Lowry*. The *Mattingly* court was much closer to the first decades of the juvenile justice movement and much more imbued with the philosophy which attended that reform.

2. *The Best Interests of the Child and the Public*

The elements of age and offense are not nearly so important as the opinion of the juvenile court regarding the necessity for criminal prosecution, and it is, therefore, the end of the first sentence of KRS § 208.170(1) which becomes the focal point of the transfer proceeding:

> . . . and [if] the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed.

This part of the statute takes on a special meaning because of the specialized nature and objectives of the juvenile court. It should therefore be noted that Kentucky law requires a conjunctive demonstration by the court that both the interests of the child *and* the public will be served by transferring the child to criminal court. It is practically impossible, however, to make such showing in view of the current state of adult correctional programs and practices. This means that if transfer provisions are going to persist in the face of these adult institutional realities, there must be some standards established which will guide and curb the discretion of Kentucky judges who may now, on the face of the law, transfer children almost at will. This type of provision raises such problems that it has become the subject of widespread attention in legal literature and litigation in other jurisdictions.[141]

In *Smith v. Commonwealth*,[142] the Court made a passing reference to the required standards, but concluded that nothing could have prevented Smith's transfer anyway.[143] There was evidently some reconsideration in *Whitaker v. Commonwealth*,[144] because there the Court said that "sufficient reasons" had to be set forth

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[141] *See* nn. 10 & 24 *supra*.

[142] 412 S.W.2d 256, 260 (Ky. 1967).

[143] *Id.* The Court's evaluation of Smith's situation is open to serious question in view of traditional juvenile court philosophy. Its reasoning seems to indicate either adherence to a purely jurisdictional approach to transfer proceedings, or an approach based on a consideration of reasons which neither separately nor in combination can point to the hopelessness of the child's rehabilitative potential under juvenile court methods.

[144] 479 S.W.2d 592 (Ky. 1972).

in an order transferring a child to criminal court.[145] Once again, the Court failed to elaborate the reasons, and once again passed up an opportunity to put some regularity into the most critical proceeding in Kentucky juvenile law by defining the precise conditions under which a child can be transferred to criminal court for prosecution as an adult. Where legislative standards are lacking, as in Kentucky, the Court of Appeals could derive these important guidelines from the structure and purpose of the juvenile justice system itself. If this task should fall to the judiciary, it should not hesitate to provide detailed and objective criteria which can be readily used by the juvenile courts, and which are badly needed to enhance the equal administration and protection of the law and to provide a basis for meaningful appellate review of transfer orders.[146] The same urgency can be suggested to the General Assembly if it has the opportunity to clear up this problem area.

While Kentucky awaits these standards, the real crisis of abuse in transfer proceedings may be mitigated to some extent by the existing provisions and implications of KRS § 208.140 which prescribe a condition precedent to the disposition of children brought before the juvenile court. It states that:

> Before making disposition of the case of a child brought before the juvenile court, whether by petition pursuant to KRS 208.070 or by reason of having been taken into custody pursuant to KRS 208.110, the judge shall cause an investigation to be made, concerning the nature of the specific act complained of, and any circumstances surrounding the child

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[145] *Id.* at 595.

[146] This is discussed particularly well in Atkins v. State, 290 N.E.2d 441, 442 (Ind. 1972), and State v. Gibbs, 500 P.2d 209. 216 (Idaho 1972). The United States Supreme Court has said:

> Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made.

Kent v. United States, 383 U.S. 541, 561 (1966). This procedure is equally incumbent upon Kentucky juvenile courts by virtue of KRS §§ 208.140(1), 208.190, and the cases cited at note 121 *supra,* which call for rigid adherence to statutory procedures. The only problem in Kentucky is that there is some question about the availability of any provision by which the transfer order can be reviewed prior to further adult proceedings in the criminal court. It might be suggested that *Kent* urged this process upon the courts or simply assumed that such an order was inherently liable to review by some established procedure of the juvenile courts.

> which throw light on the future care and guidance which should be given the child. The investigation shall include an inquiry into the child's age, habits, school record, general reputation and everything that may pertain to his life and character. The investigation shall also include an inquiry into the home conditions, life and character of the person having custody of the child. The result of the investigation shall be reported in writing to the judge previous to the final hearing of the child's case, and shall become a part of the record of the proceedings.

This language is augmented by the provisions of KRS § 208.190 which require that:

> When a child before the juvenile court, whether by petition pursuant to KRS 208.070 or by reason of having been taken into custody pursuant to KRS 208.110, is found by the court to come within the purview of KRS 208.020 the court shall so decree and in its decree shall make a finding of the facts upon which the court exercises its jurisdiction over the child. If the court finds that the child does not come within the purview of KRS 208.020, the child shall be discharged and the proceedings dismissed.

Taken together, these two subsections require that when the juvenile court exercises *any* jurisdiction over a child--and transferring jurisdiction is clearly the most far-reaching power the court can exercise--it must do so on the basis of an investigation made into *all* the circumstances surrounding the child and render a decision which both incorporates the results of that investigation and is consistent with the rehabilitative philosophy of the juvenile court. Any other kind of decision would be a clear abuse of discretion, a failure to abide by the procedures set forth in Chapter 208 of KRS, and subject to reversal upon review by a higher court.

The presence of counsel, the right of access to reports and information used by the judge in making the decision to transfer, and the right to cross-examine the authors of such reports and information give the child substantial means with which to challenge a potential transfer to criminal court. The role of counsel in defending a child faced with possible adult prosecution has been defined as one in which:

> [t]he best interests of the juvenile become clear, and counsel's duty is to protect those interests. A decision to transfer is

> nothing more than an initial step in a criminal prosecution. If the interests of society demand such action, the state must bear the burden of proof, and counsel for the juvenile must use all fair and honorable means to present every defense the law of the land permits to secure for his client the benefits of the juvenile system. His primary duty is to protect the child against action by the juvenile court which is beyond its discretion.[147]

This fairly defines the role of the defense lawyer with respect to a transfer proceeding under Kentucky's present law because that law clearly places the burden of justifying the transfer upon the court itself and places the child in a position of countering the judicial allegation that he must be handled in criminal court. Where the transfer to criminal court is initiated by the judge, as in Kentucky, the law should be changed to place this burden on the prosecutor. He could then present his reasons why transfer is needed, the child could respond, and the judge could rule.[148] It also places a burden on the defense attorney to raise points that make the court aware of the vital issues involved in a proceeding which sends a child to the grand jury and criminal court. The complexities of the transfer proceeding and its potentially adverse and far-reaching effects on the child make it obvious that an attorney who represents a child faced with transfer confronts a situation considerably different from a normal juvenile court proceeding and must be especially well prepared for it.[149]

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[147] Comment, 12 ST. LOUIS U.L.J. 424, 428 (1968). Some courts have defined an active role for counsel seeking a retention of juvenile court jurisdiction over their client-children. Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968), saw this role as one where counsel seeks out a plan or range of plans which may persuade the court that the welfare of the child and safety of the community can be served without transferring jurisdiction. Be that as it may, it has been held as late as 1971 that the presence of counsel at the transfer proceeding is not important. *In re* Flowers, 289 A.2d 430 (Md. 1971).

[148] This was held a proper allocation of the burdens at the transfer proceeding in the cases of Rudolph v. State, 238 So.2d 542 (Ala. 1970); Seagroves v. State, 189 So.2d 137 (Ala. 1966); People v. McFarland, 95 Cal. Rptr. 369, 17 Cal. App. 3d 807 (1971); and *In re* Brown, 183 N.W.2d 731 (Iowa 1971).

[149] If counsel cannot defend the case properly, he should say so, and that means removing himself from the case or seeking assistance in the work of defense. It would be unethical to follow any other course of action. ABA CODE OF PROFESSIONAL RESPONSIBILITY ETHICAL CONSIDERATION 6-3 and DISCIPLINARY RULE 6-101 obligate counsel to be honest with himself, his client, and the court. One of the big reasons for the transfers in Kentucky is that often counsel is not aware of the law or the issues and routinely treats the proceedings as if they were preliminary hearings in criminal court—which they emphatically are not. That means that a lot of young defendants are receiving inadequate representation by counsel. The Office of the Public Defender should take special note of this problem.

The child subject to possible transfer has a special right to a thorough investigation into his rehabilitative potential, and it is particularly incumbent upon the court to procure all the relevant details when the drastic action of transfer is under consideration. The "sufficient reasons" test of *Whitaker*[150] means at least, in the absence of judicially or legislatively established guidelines, that the totality of circumstances enumerated by KRS § 208.140(1) must render a negative prognosis vis-a-vis the child's potential for rehabilitation. Since the juvenile judge cannot lawfully make a decision on a child's case without such an investigation and such information, it seems clear that KRS § 208.170(1) is circumscribed by standards already contained in KRS § 208.140(1) and that no decision to transfer can lawfully be made when these factors, taken within the context of the court's saving mission, indicate that the child can be rehabilitated. The provisions of KRS § 208.170(1) must therefore be read in conjunction with those of KRS §§ 208.140(1), 208.190, and cases like *Edwards*,[151] *Heustis*,[152] *Benge*,[153] *Smith*,[154] *Kent*,[155] and *Whitaker*[156] in order to arrive at an acceptable procedural and substantive format for evaluating the best interests of the child and the public under the current provisions of Kentucky law. It is only when this procedure is followed that jurisdiction can be legally transferred to the circuit court in accordance with the requirement of rigid adherence to statutory procedures established for the acquisition and transfer of jurisdiction.

E. *The Appealability of a Juvenile Court Decision to Transfer Jurisdiction over a Child*

The gravity of the transfer situation clearly demands that there be some way to obtain immediate review of the decision to deprive a child of any further protections of the juvenile court and submit him to the criminal process. Those who say adequate protection is provided by a right to appeal from a criminal court

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150 479 S.W.2d 592 (Ky. 1972).
151 Edwards v. Commonwealth, 94 S.W.2d 25 (Ky. 1936).
152 Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959).
153 Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961).
154 Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967).
155 Kent v. United States, 383 U.S. 541 (1966).
156 Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972).

conviction lose sight of the fact that the child will have to forfeit all of the special rights and protections of the juvenile court and submit to the publicity and impersonality of the adult criminal proceeding in order to eventually exercise that right. Even if there is an aquittal or dismissal, the child still stands to lose a great deal and be put through a lot of unnecessary inconvenience and exposure. There is need for some immediate remedy to stop the machinery of criminal justice while a review of the juvenile court decision is sought. This is especially true under Kentucky's subjective transfer processes; review must be readily available if the ends of juvenile justice are to be preserved.[157]

There are six basic ways to challenge a defective waiver of jurisdiction, but all are not suited to the need for immediate review. The child may (1) make a motion to dismiss the indictment, (2) seek a writ of prohibition, (3) seek a writ of habeas corpus, (4) appeal from a subsequent conviction in criminal court, (5) appeal directly and immediately from the decision to waive him to criminal court, and (6) petition for post-conviction relief through Rule 11.42 of the Kentucky Rules of Criminal Procedure.[158] One might well find the child using every one of these remedies in an effort to preserve his rights as a juvenile, because Kentucky's present law of appeal from the juvenile court does not clearly provide for an appeal of the transfer order, and no legal precedent has even been set in Kentucky courts to resolve the matter. The result is that not only does Kentucky have a poor transfer law, but a review of the actions of the juvenile courts which invoke that law against children is almost impossible

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[157] Appeal procedures in cases where the juvenile court has waived its jurisdiction must be swift and efficient. It does little to enhance a juvenile's contention that his case should be handled in the juvenile court if he passes the jurisdictional age limit for the juvenile courts while his case is on appeal. Further, there is little the juvenile court can do to rehabilitate or control an older individual. The entire rationale of the juvenile court system is defeated if the appeal is not handled expeditiously.
Mountford & Berenson, *supra* note 10, at 68.

[158] The problems of appeal in the juvenile courts is discussed in Comment, 13 ST. LOUIS U.L.J. 90 (1968); Schornhorst, note 10 *supra;* Mountford & Berenson, note 10 *supra.* It might also be possible to enjoin certain of the administrative actions involved in getting the child before the grand jury; *e.g.,* sending the transfer order to the Commonwealth Attorney or preventing the child from being taken before the grand jury. This would be merely an auxiliary device useful in facilitating the implementation of the procedures which will actually get the issue of the defective transfer before a reviewing court.

to obtain at the time it is needed.[159] This entire situation indicates that Kentucky does not completely subscribe to the proposition that children are supposed to have special rights under the juvenile code. If they do have such rights, they ought to be able to review every decision of the juvenile court in an effort to ensure that those rights are protected from the abuse of judicial discretion. It is obvious that the transfer decision, the most drastic action available to a juvenile judge, must be subject to appellate review *prior* to the commencement of any of the processes of the criminal justice system to which the child has been transferred, if the integrity of the juvenile justice system is to be maintained.

Kentucky's present appeal statute for juvenile courts states that:

> An appeal to the circuit court may be taken as a matter of right from the juvenile session of the county court from all orders and judgments whereby any infant, or other person, shall be restrained of his liberty, or placed in the custody of any institution, or fined or punished in any manner. The appeal shall be taken in the manner provided in the Rules of Criminal Procedure, and the circuit court shall, in the best interest of the child, hear such cases as soon as reasonably possible.[160]

It is undecided in Kentucky whether the transfer order comes within the definition of those juvenile court orders which may be appealed to the circuit court. The following example may demonstrate the complex problems encountered when counsel tries to challenge an order of transfer under the current state of the law and indicate the need for an immediate appeal in the transfer situation.

Suppose there is a situation in which an improper transfer is followed immediately by a grand jury indictment, a bail hearing, and the setting of a date for arraignment. This is not an uncommon situation, and it has happened in the space of one hour in some Kentucky courts. The child is well into the criminal system

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[159] This is especially true since the right to a trial *de novo* given by Kentucky's juvenile court appeal statute is inadequate to determine the question of the propriety of a transfer order rendered in juvenile court. The *de novo* aspect of the circuit court jurisdiction on appeal should be directed, in the transfer situation, to a new hearing on the issue of transfer or a review of the record and order from the juvenile court. This will make transcription a necessity in the transfer proceeding.

[160] KRS § 208.380(1) (Supp. 1972).

before he can even say the word "appeal," and, if the word is mentioned, the response is usually that the child can appeal when the circuit court is done with him. As indicated earlier, this belated appeal won't protect the child's rights under the juvenile code.

If the child is poor and cannot make bail, he will be locked up pending arraignment and trial in adult court. It is only in this situation that the writ of habeas corpus can be pursued and the issues raised as to the legality of the transfer order which brought about the child's incarceration.[161] If the child is out on bail, however, other avenues must be explored. The writ of prohibition will only be useful after the indictment is handed down, and if an appeal has not been filed, the writ may well be denied because all the remedies at law have not been exhausted. The remedies at law, however, are inadequate to protect the child's rights, because if an appeal is filed on the basis of a defective transfer of jurisdiction, it may well be docketed for hearing after the criminal trial on the charges against the child. This could entail time in prison before the appeal of the defect in the juvenile court order was ever heard. Winning such an appeal would be a shallow victory for the child because, by that time, the child would have been totally deprived of all the rights he possessed under juvenile court jurisdiction, and prevailing on appeal would do little to restore them to him.

There is some hope in making a motion to dismiss the indictment, but, unless this is based on a *procedural* defect in the juvenile court proceedings, the chances for a favorable ruling are slim. Indictments challenged on the basis of defects in the *substance* of the juvenile court transfer hearing will generally be subject to argument before judges totally unfamiliar with the special and technical rights which are part of the juvenile law. While the motion to dismiss is entirely in order, chances are that counsel will ultimately have to turn to the extraordinary remedies of habeas corpus or a writ of prohibition in order to secure his client's rights.

[161] Robinson v. Kieren, 216 S.W.2d 925 (Ky. 1949), was a habeas corpus proceeding to get a child out of the penitentiary to which he had been sentenced by a circuit court after an illegal transfer from the lower court. This was much too late to protect his rights as a juvenile. The opinion recites a typical transfer order which is devoid of almost all the elements necessary to properly vest jurisdiction in the circuit court.

A possible review might also be obtained through Rule 11.42 of the Kentucky Rules of Criminal Procedure, by petitioning for post-conviction relief from criminal sanction and incarceration. This remedy stands at the end of a long line of possible procedural devices, and thus is of highly questionable value where the protection of juvenile rights are concerned. However, it is one of the three ways which has been utilized to review the adequacy of a transfer proceeding under Kentucky law. Each of these was highly inappropriate to handle the serious matter of protecting the integrity of the child's right to juvenile court processes.[162]

All but one of the remedies considered are either inadequate to protect the child's rights or are extraordinary interventions in a process which would be more efficiently, appropriately and traditionally resolved by a simple right to immediate appeal. The present law makes the "appeal" of a transfer decision a lawyer's nightmare because it can entail the pursuit of just about every remedy which is available in the courts. This situation makes it painfully obvious that Kentucky must, either by judicial interpretation or legislative revision, provide for an immediate appeal of the transfer decision which stops all the processes of the criminal law until it has been decided where the child should be tried and what rights extended to him. If transfer of jurisdiction is not an appealable order, then it makes the proceeding little more than a preliminary hearing in adult court, the abuse of which cannot be challenged until a criminal trial has taken place and the child has been deprived of all his special rights under the juvenile code.

It is inappropriate that the normal processes of the law should have to be replaced by extraordinary remedies in order to correct abuses or regularize procedures which could be much better regulated by the time-honored device of appeal. Where the issue of the appealability of the transfer order has come up in other states, there is a definite trend in favor of making it appealable because of its finality with regard to the juvenile court's jurisdictional concern for the child.[163] Kentucky would do well to estab-

[162] *Id.*; Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967) was a proceeding under KY. R. CRIM. P. 11.42; and Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972) was an appeal of a conviction in criminal court.

[163] Transfer orders were held appealable in: Seagroves v. State, 189 So.2d 137 (Ala. 1966); P.H. v. State, 504 P.2d 837 (Alaska 1972); Graham v. Ridge,

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lish a similar rule and clear up an area of juvenile law which is presently beset with a chaos uncommon to the modern procedures available for resolving disputes among reasonable men.[164]

F. *Pre-indictment Considerations*

A child has no right to bail in juvenile court.[165] When he is transferred from juvenile court, however, he gains the same right to bail possessed by an adult.[166] This right must be guaranteed by the juvenile court, and the child must be taken before the circuit judge immediately after the transfer order is made so that bail can be properly set.[167] Establishing certain amounts of bail for specified crimes, in the absence of hearings, is not permitted; each case must be handled individually.[168] This is the manner in

(Footnote continued from preceding page)
489 P.2d 24 (Ariz. 1971); M. v. Superior Court, 75 Cal. Rtpr. 881 (Cal. 1969); Gagliano v. State, 234 So.2d 159 (Fla. 1970); *In re* John Doe 1, 444 P.2d 459 (Hawaii 1968); Franklin v. State, 448 P.2d 25 (Kan. 1968); Aye v. State, 299 A.2d 513 (Md. 1973); Franklin v. State, 285 A.2d 616 (Md. 1972); Thomas v. State, 271 A.2d 197 (Md. 1970); State v. Yoss, 225 N.E.2d 275 (Ohio 1967); State *ex rel.* Juvenile Dep't of Marion Co. v. Johnson, 501 P.2d 1011 (Ore. 1972); *In re* Weidner, 487 P.2d 1385 (Ore. 1971); State v. Little, 407 P.2d 627 (Ore. 1965); *In re* Houston, 428 S.W.2d 303 (Tenn. 1968); and State v. McArdle, 194 S.E.2d 174 (W. Va. 1973). However, such an order was held not to be appealable in People v. Jiles, 251 N.E.2d 529 (Ill. 1969); Commonwealth v. Owens, 254 A.2d 639 (Pa. 1969), and *In re* T.J.H., 479 S.W.2d 433 (Mo. 1972).

[164] There is a long tradition of appeal from *juvenile* court orders under Kentucky law. Dating back to 1932, it has provided children with a right which many states have only recently made available. *See* the discussion in Joseph v. Commonwealth, 310 S.W.2d 279, 280 (Ky. 1958). This law was revised in 1972, note 160 *supra,* but some of the older precedents seem to carry over and apply under the new law. For instance, jurisdictional issues can be raised for the first time in the Court of Appeals. Wooten v. Commonwealth, 75 S.W.2d 556 (Ky. 1934); Mattingly v. Commonwealth, 188 S.W. 370 (Ky. 1916); and Waters v. Commonwealth, 188 S.W. 490 (Ky. 1916). The circuit court has no authority to even entertain an appeal unless the juvenile court exercises its jurisdiction over the case. Wade v. Commonwealth, 303 S.W.2d 905 (Ky. 1957); Compton v. Commonwealth, 240 S.W. 36 (Ky. 1922). The appeal is considered an extension of the juvenile procedures. Therefore, there is no right to a jury trial. Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968) and KY. OP. ATT'Y GEN. 70-701. The child shall be tried as a juvenile and, if the appeal is lost by the child, this acts as an affirmation of the decision made in the juvenile court. The circuit court does not seem to have any authority to enter a new disposition. Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968); KY. OP. ATT'Y GEN. 70-701; Tunget v. Commonwealth, 320 S.W.2d 796 (Ky. 1959); and Wooten v. Commonwealth, 75 S.W.2d 556 (Ky. 1934). In view of all this precedent, there would certainly be no novelty in extending the right to appeal to the most critical stage of juvenile court proceedings.

[165] KRS § 208.110(1) (Supp. 1972). Baker v. Hamilton, 477 S.W.2d 149 (Ky. 1972).

[166] KRS § 208.170(2)(d); KY. OP. ATT'Y GEN. 72-381.

[167] KY. OP. ATT'Y GEN. 72-381.

[168] KY. OP. ATT'Y GEN. 72-703 was addressed to multi-county districts in which courts do not meet continuously and grand juries are not always in session. This is very important because often a child is transferred while the circuit court

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which the immediate question of bail for the transferred child is to be resolved according to present law.

Regardless of whether he is able to post bond, the transferred child enters an area where his legal status is not adequately defined by present Kentucky law. This is because there are several provisions which seem to keep his status as a child intact even though he is in adult criminal court. The first of these is KRS § 208.170(1) which says, in part, that no child is to be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court. This has a directly negative bearing on the power of police and others to photograph and fingerprint him, or create any kind of criminal record on him, until after he has been convicted in criminal court.[169] The second is KRS § 208.170(2)(a) which allows the grand jury to recommend to the circuit judge that the child be committed to the Department for Human Resources. A third provision, KRS § 208.170(2)(b), permits the circuit judge to commit the child to the department at any time during the proceedings in criminal court. This can also be done according to the provisions of KRS § 199.375(2)(d). The provisions of KRS § 208.170(2)(c) are equally inconclusive about the child's status when they provide that if the grand jury or circuit judge have not acted in accord with KRS § 208.170 (2)(a) and (b), then the child shall be tried as any other adult. The judge can still stop the proceedings at any time and commit the child to the Department for Human Resources under the provisions of KRS § 208.170(2)(b). It would seem that in view of these several subsections, a very strong argument can be made that a child is entirely a child until indictment, trial, and conviction in circuit court.[170]

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or grand jury are out of session and he is forced to sit in jail, without bail, until the next session commences. Juvenile judges set bail at times, but not always. This opinion would curtail even that activity. It might be more realistic to give juvenile judges the power to set bail on a transferred child. This would clear up some hardships which are bound to occur in multi-county districts.

[169] This is discussed in KY. OP. ATT'Y GEN. 66-253 in the context of KRS §§ 208.170(1), 208.110(1), 17.110(1), 17.110(2), 208.170(2)(a), (b), and (c). The Attorney General's opinion held that elimination fingerprints and photographs could be used to help decide the issue of delinquency in the juvenile court, but that they were protected by the same confidentiality which surrounds all juvenile court matters. This is discussed further in KY. OP. ATT'Y GEN. 68-289.

[170] Note 132 *supra*. It seems paradoxical that the law does not provide for a clear status, but leaves the child to flounder in a legal limbo where he has all sorts of rights but no protections vis-a-vis the question of his childhood. The criminal

(Continued on next page)

These provisions are all problematical in that they entail further decisions concerning the child's amenability to rehabilitation and the propriety of dealing with him in adult court, which should be conclusively resolved before he leaves the jurisdiction of the juvenile court. This is an unnecessary and anomalous burden for the criminal court because it is accustomed to operating according to means and ends different from those of juvenile court. Nothing is gained by submitting the question of "amenability to treatment" to a grand jury or circuit judge functioning within the context of the criminal processes. They are deprived, as was the juvenile judge, of any standards by which to order their opinion and will ultimately have to rely, again like the juvenile court from which the child came, upon subjective evaluations in determining whether to keep the child in criminal court or remand him to the juvenile justice system.

This dilemma could be wholly resolved by providing appropriate procedures and standards for transfer proceedings, accompanied by a subsequent right to seek immediate and unencumbered review of any order of transfer wrongfully entered against the child. While this issue remains unresolved, however, the child and his counsel must be aware of these procedural technicalities and the implications they have for securing the best interest of the child by a return to juvenile court jurisdiction.

G. *Proceedings Before the Grand Jury and Circuit Court*

The discussions above settle, as far as is presently possible, the questions of jail, bail and the nebulous status of the child as he moves towards and through the grand jury and circuit court. The grand jury processing is controlled by KRS § 208.170(2)(a), which states that:

> When juvenile court so transfers a case to the circuit court:
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> If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the de-

(Footnote continued from preceding page)
court is therefore asked to administer two different and conflicting philosophies of justice with regard to a problem that could have been resolved by the use of objective transfer standards in the juvenile court and the right to an immediate appeal of the transfer order.

> partment. If the court believes that such commitment would be proper, it may order the child committed to the department.

It has been held that using the words "adjudged guilty" in a transfer order does not necessarily mean that the juvenile court (1) has found the child guilty, (2) is restricted to disposing of the child by probation or commitment, or (3) is precluded from transferring the child to circuit court.[171] It has also been held that the juvenile court's failure to give the circuit court or its prosecuting officers a copy of a prior transfer order before the return of an indictment is not fatal to the circuit court's jurisdiction.[172] Another case held that a child can be indicted and tried only on the offense that was transferred from juvenile court.[173] This rule is a guard against the potential abuse of the transfer proceeding entailed in preferring a more serious charge against a child in order to have him transferred to circuit court, and then reducing the charge once the child is before the superior tribunal.

The provisions of KRS § 208.170(2)(a) pose some problems if taken literally because they permit the recommendation of commitment for a child against whom nothing has been proven beyond a reasonable doubt. It also places a duty on the prosecuting officer to advise the grand jury that it can recommend the child for commitment by the circuit court. If the grand jury is not so advised, it would seem that the indictment of the child would be invalid because the grand jury would not have been aware of all the options pertinent to the child's case.

There is some question about the power of the grand jury or the circuit court to refer a case, improperly before either body, back to the juvenile court. It has been held that when a case is improperly before the circuit court, it cannot be transferred back

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[171] Lewis v. Commonwealth, 186 S.W.2d 416 (Ky. 1945). The double jeopardy elements of this ruling are obvious, and it is clearly a strained opinion in view of KRS § 208.200. The degree to which the double jeopardy issue becomes important in the case where transfer takes place after adjudication depends on the context of the proceeding and the known liabilities at the beginning of a hearing in which transfer is one disposition among several. *See* Note, 24 STAN. L. REV. 874 (1972), *supra* note 10, and Comment, 11 J. FAM. L. 603 (1972).

[172] Baughman v. Commonwealth, 267 S.W. 231 (Ky. 1924).

[173] Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961). It might be hard to meet the requirements of this rule in the absence of the appropriate information from the juvenile court, especially in view of the requirements of KRS §§ 208.140(1) and 208.190.

to juvenile court, but must be dismissed.[174] This is a harsh rule in practice because it would surely incline the circuit court to overrule technical objections to its jurisdiction if it was without power to remand the case to juvenile court.

The provisions of KRS § 208.170(2)(b) present the same problems as those of subsection (2)(a). It reads:

> When juvenile court so transfers a case to the circuit court:
>
> If, during any stage of the trial in the circuit court, the child, or his parent or guardian so requests, the judge in his discretion may stop the trial and commit the child to the department.

This again raises the possibility of commitment without proof of an offense beyond a reasonable doubt. While this might be used to good advantage by the child who stands a chance of being found guilty and sentenced by the circuit court, it could result in the incarceration of an innocent child against whom no case had been proven. It might be used to force the acceptance of a commitment in lieu of adult trial and possible conviction, and the liabilities imposed by a criminal record would make that an attractive offer. In any event, it has been held that a parent or responsible adult must request the circuit court to commit the child under this subsection; the judge may not do it on his own motion.[175]

These two provisions present a definite possibility for abuse. The only way they can be utilized in a manner at all consistent with the principles of juvenile justice would be if the child were first found, in juvenile court, to have committed an otherwise felonious act and was then transferred to the grand jury.[176] This format was proposed to the General Assembly in 1972 but was rejected for reasons wholly unrelated to its substance.[177]

When the circuit court has established its jurisdiction over

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[174] Commonwealth v. Franks, 175 S.W. 349 (Ky. 1915).

[175] *See* Lewis v. Commonwealth, 186 S.W.2d 416 (Ky. 1945), and KY. OP. ATT'Y GEN. 70-701.

[176] Note that KRS § 208.170(2)(e) makes these commitments indeterminate to the age of 21 years. This means they are civil commitments aimed at the rehabilitation rather than the punishment of the child. They are the same as juvenile court commitments. This being the case, the decision to commit the child is the proper subject matter of the juvenile court and provision should be made so that it can be fully determined in that forum.

[177] S.B. 170, Ky. Gen. Ass., Reg. Sess. (1972).

the child and determined whether it is going to retain that jurisdiction, the provisions of KRS § 208.170(2)(c) become effective. The statute provides that:

> When juvenile court so transfers a case to the circuit court:
>
> If neither of the procedures specified in paragraphs (a) and (b) of this subsection are employed, the child shall be tried as any other defendant.

This seems to be the first point at which the child becomes an adult in the eyes of the law. It does not mean, however, that he cannot revert, through the judge's discretionary use of the provisions of KRS § 208.170(2)(b), to childhood and the protective programs set for children. This is always a possibility and it should not be lost sight of at any time during proceedings before the grand jury or circuit court.

H. *Dispositions from the Circuit Court*

The Kentucky Court of Appeals has held that it is cruel and unusual punishment to sentence a child to life without possibility of parole.[178] The General Assembly has been similarly moved to provide an alternative to the harshness of prison life by making it possible, under certain circumstances, for children convicted in circuit court to be committed to the Department for Human Resources. This can be done pursuant to KRS § 208.180 which permits unconditional commitment up to the age of twenty-one years for children whose circuit court sentences will run out before they reach 21, and a similar type of commitment, with subsequent surrender of jurisdiction to the Bureau of Corrections, for those whose sentences run beyond the age of twenty-one years.

When this law can be used, the procedures for making it as effective as possible can be worked out between the Department for Human Resources and the Bureau of Corrections. These are important alternatives because they represent the child's last

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[178] Anderson v. Commonwealth, 465 S.W.2d 70 (Ky. 1971); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968). KY. OP. ATT'Y GEN. 64-440 says that the fine of a juvenile in circuit court may not be probated after a rendition of the final judgment in that court. KY. OP. ATT'Y GEN. 40510 (1957) says that a child placed in a juvenile institution, incident to a circuit court sentence, gets "good time" for time spent in the juvenile institution and forfeits time if he escapes. Since the provisions of KRS § 208.180 are seldom used, and the opinions are so old, they are of questionable value.

chance to be placed under juvenile justice jurisdiction rather than in prison.

V. A PROPOSAL FOR REFORM

A. *Introduction*

The present provisions and interpretations of Kentucky's transfer law provide demonstrably inadequate guidelines for determining whether the juvenile court shall retain jurisdiction over the serious young offender. The criticisms of legal commentators who have addressed the transfer issue are almost universally applicable to Kentucky, and this fact places it far outside the circle of a growing majority of states which have acted to bring transfer laws into line with modern developments in juvenile court practice and philosophy.[179] The time is long overdue for Kentucky to take similar steps to reform its law of transfer and thereby infuse a renewed integrity into an otherwise progressive system of juvenile justice.

B. *The Inadequacy of the Tentative Provisions of the Kentucky Penal Code*

This badly needed reformation will not be served, however, by the ill-considered provisions contained in the legislative package which constitutes the new Kentucky Penal Code.[180] The tentative amendment of KRS § 208.170 does nothing more than establish 16 as the minimum age at which a child can be considered for transfer to the criminal courts.[181] It provides neither objective standards nor regularized procedure for determining the critical issues involved in the transfer of jurisdiction, and the most that can be said for it is that while it does improve the law by taking away the power to transfer children under 16 years of age, it should be scrapped in favor of more substantial reform.

A related section in the new penal code places part of the transfer issue within the concept of criminal responsibility and provides that the defense of "immaturity" shall be available to

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[179] *See* note 14 *supra*.

[180] KY. ACTS ch. 185, §§ 1-307 (1972) (effective 7-1-74). The proposed revisions of Kentucky's transfer law are found in §§ 39 and 294.

[181] KY. ACTS ch. 385, § 294 (1972) (effective 7-1-74). The present law sets the same age, but provides that in the event of murder, rape, or accessory thereto, a child under 16 may be transferred to criminal court. KRS § 208.170(1).

every child up to the age of eighteen years who commits an offense over which the juvenile court both takes and retains jurisdiction.[182] The Commentary to this section points out that children under 16 are not relieved of accountability for their offenses, but rather are placed under the exclusive jurisdiction of the juvenile court for the adjudication and disposition of their offenses. As long as juvenile court can acquire and exercise jurisdiction, the age at the time of the offense is controlling. If a child was under 16 at the time of the offense, then he must be treated as a juvenile when brought under juvenile court jurisdiction even though he is over 16 at the time he is charged.[183]

The consistency of this provision breaks down rapidly beyond this point, however, because if a child committed an offense when he was less than 16 and is not charged until he is over 18, the law would permit him to be prosecuted in criminal court simply because juvenile court jurisdiction over the child would have terminated at the age of 18.[184] The Commentary seems to imply that the child could still raise the defense of immaturity in adult court and that the state would have to prove its absence beyond a reasonable doubt.[185] This would be an improvement in the traditional law of presumptions regarding incapacity,[186] but it would also leave the door wide open to potential prosecutorial abuse, such as delaying or instituting incomplete prosecutions of known charges in order to eventually bring the child into criminal court after the attainment of majority. The end result of practice

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[182] KY. ACTS ch. 385, § 39 (1972) (effective July 1, 1974).

[183] KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 505, Commentary (Final Draft 1971).

[184] *Id.* at 57. There is an unexplained desire to preserve the unfortunate rule of Lowry v. Commonwealth, 424 S.W.2d 841 (Ky. 1968), without any investigation of its ramifications.

[185] KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 505, Commentary, at 56 (Final Draft 1971).

[186] Kentucky now uses the theologically inspired, but legally inadequate, "7-14-21" rule and is as enamored of its mystique as most of the other jurisdictions in the United States. Spurlock v. Commonwealth, 223 S.W.2d 910 (Ky. 1949); Thomas v. Commonwealth, 189 S.W.2d 686 (Ky. 1945); and Watson v. Commonwealth, 57 S.W.2d 39 (Ky. 1933), held that children below the age of 7 are incapable of crime, and that those between the ages of 7 and 14 should be acquitted of crime unless their presumed incapacity is rebutted by a showing, beyond a reasonable doubt, that they knew what they were doing and proceeded with the required intent. This is one of those situations over which every protection of the law should be thrown and every doubt resolved in favor of the child. *See* Elmore v. Commonwealth, 138 S.W.2d 956, 961 (Ky. 1940).

under this provision could considerably undermine the juvenile court establishment with respect to the older child.[187]

Part of this problem can be resolved by providing that no child will be amenable to prosecution in criminal court for any offense which should have been within the comprehension of reasonably circumspect and vigilant juvenile court officials at the time he was a minor and therefore made the subject matter of proceedings under the juvenile law. The rest of the problem must be resolved by means other than those which simply consign the child to criminal court because an offense he committed as a minor is not discovered until after the attainment of majority. The most realistic approach to this problem is simply to expand the jurisdiction of the juvenile court to cover this situation and to give such an individual the right to traditional juvenile court dispositions if it is established that he is amenable to a rehabilitative rather than punitive disposition. Such an individual would be old enough to hold a job and engage in many socially rehabilitating community activities not open to younger children who are normally disposed of in juvenile court. The device of probation could be used with great effectiveness in these situations, and the greater access to work and the stabilizing influence of other required adult obligations could, when coupled with appropriate counselling, serve in the place of the institutional care often rendered to children. This is the lot of most of those who are disposed of in circuit court anyway, but since the individual discussed here would be granted these benefits under the aegis of juvenile court philosophy, he would not suffer the creation of a criminal record, trial in circuit court, or any of the other liabilities concomitant to the criminal process. He could be dealt with in juvenile court under an expanded jurisdiction over young offenders and be subject to the Bureau of Corrections during the period of probation.

Such an expansion of jurisdiction to the age of 21 is not as novel as it seems and would be consistent with existing provisions of the juvenile law which allow a child to be kept under juvenile court or Human Resources jurisdiction for treatment and rehabili-

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[187] This is discussed at III(A) and IV(D)(1) *supra*.

tation until the age of 21.[188] If the law presently envisages that a person of 20 may be under juvenile justice jurisdiction, it could easily expand the jurisdictional purview of KRS § 208.020(1)(a) to bring him under the juvenile court for all purposes the juvenile court could promote without a transfer of jurisdiction to the criminal forum.

This expanded jurisdiction would make even smoother the transition from child to adult status relative to the correction of public offenses. It would also pay respect to the current emphasis on the value of providing special programs for the young adult offender to preclude his destruction by the traditional excesses of penal institutionalization. This would not be a very difficult matter under the reformed scheme of rehabilitative programs allowed by some of Kentucky's newest laws and increasingly available through the Bureau of Corrections. These dispositional approaches are utilized even now, and all that remains is to put them under a jurisdiction which is legally untainted with the publicity and documentation of the traditional criminal court.

If this ambitious project is determined to be infeasible, then the jurisdiction of the juvenile court should at least be expanded so that the person whose offense as a child is not discovered until after he attains majority can still avail himself of the rehabilitative philosophy and attendant benefits of juvenile court that he would have had a right to as a child. If the law is not reformed in some manner consistent with these observations, the arbitrary prosecution of young adults for crimes they committed as children will make a travesty of the integrity of juvenile justice and its designated mission among the young people of Kentucky.

Those young offenders shown to be in need of penal incarceration, however, would be tried under the normal processes of the criminal law as unfit subjects for juvenile court methodology. This could be done through the same sort of transfer proceeding which sends children to adult court.

Inasmuch as the tentative provisions of the Penal Code addresses itself to none of these questions, its proposed contributions to the reform of the law of transfer should likewise be

[188] KRS § 208.200(1).

shelved in favor of a more comprehensive revision which would take into account all of the substantive and procedural problems attending the critical determination of which court should hear the child's case. This sort of formulation would have been most appropriately included as part of the Penal Code proposals, but an overwhelming concern about correcting the problems in the administration of criminal justice with respect to adults resulted in an almost complete disregard of the present juvenile law which allows children to be inappropriately processed under adult provisions.[189] It would seem that those who put so much effort into the reformation of criminal programs and processes would have been concerned that these resources be used only for those who really need them.

This is especially true in Kentucky where there are separate state agencies responsible for juvenile and adult offenders. The issues of economy and duplication of services alone demand that each agency do what it was established to do. The same thing can be said of the juvenile and criminal courts, because when a child is unnecessarily tried in circuit court, and even more unnecessarily put into prison, the economy and integrity of the administration of justice suffer along with the child. The clear legislative intent behind the establishment of these several arms of the administration of justice is not being given full effect by the present mismanagement of the system which results from the abuse of the transfer law. The Penal Code proposals do nothing to correct this imbalanced and wasteful administrative approach. What is needed is a provision which will not only protect the interests of children and the public, but will also serve to curtail the unnecessary utilization of criminal justice processes and sanctions against children who can be helped within the confines of

[189] One is forced to ask about the logic behind trying to reform adult criminal justice and reduce the adult criminal population without doing something about the laws and problems which affect children. It is futile to continue spending money on detection, apprehension, correction, and incarceration, while doing little about prevention. Oddly enough, however, that is the way the spending priorities of federal crime fighting money have been set. This is reflected across the country, as well as in Kentucky, by the low Crime Commission expenditures on preventive programs for children. A possible explanation for the current approach to the reform of criminal justice in Kentucky, vis-a-vis the juvenile court, is that it might be necessary to reform adult corrections, the penal code, and the judiciary before trying to figure out what to expect from a reformation of the juvenile court. It must be hoped and urged that it does not take too long to get all of this into a proper perspective.

the juvenile justice system of this state. Kentucky's recent investment of time, money, and effort in revitalizing these two areas of justice cannot now be undermined by the shortsighted formulation of an important law.

C. *An Outline of Reform*

Kentucky needs a law which addresses all of the issues involved in the transfer of jurisdiction. Such a law should contain the following elements, in addition to the other statutory and constitutional prescriptions which already apply to juvenile proceedings:

1. The age of 16 years should be the minimum age at which transfer of jurisdiction can be considered. This is consistent with national recommendations and has been tentatively approved in the Kentucky Penal Code.[190] This should be amplified to provide both that (a) no child can be charged after the age of 18 for offenses which should have been known to and prosecuted by reasonably circumspect and vigilant juvenile court officials during the period of his minority, and (b) no child over the age of 18, who is charged with an offense committed but undetected during his minority, can be prosecuted in circuit court until he is given the same rights he would have enjoyed as a minor had he been adjudicated as such. This includes the same kind of transfer

190 *See* notes 132 and 180 *supra*. The element of responsibility must be qualified somewhat in juvenile court because of age and also because of the doctrine of *parens patriae* which is predicated in part on an aspect of incompetence in those it shields. Accordingly, some authors report a trend to move farther and farther away from the common law age of 7. Frey, *supra* note 10; Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965). Others, however, see a trend toward making it possible to transfer more children by placing lower age groups and fewer crimes under juvenile court jurisdiction. They say this reflects a concern for law and order which is coupled with a concentration on better juvenile court services and new ways of helping children. If these better programs do not work and prove the experiment, then it will be easier to put the children into criminal courts. Speca & White, *supra* note 10. This analysis is somewhat suspect in view of (1) the at least 32 states that have fairly strict, pro-child, transfer laws, *see* note 14 *supra*, and (2) the continuing buildup of precedent which makes it more and more difficult to transfer a child to criminal court if there is any hope of helping him within the juvenile justice system. Age and offense may be important predicates in the law of transfer, but the "amenability to treatment" test is a considerable obstacle for those law and order elements who would lock up every child. Those who see a rise in the age limit of juvenile court jurisdiction note that it extends even to the child accused of murder and that this indicates that the states are beginning to show some confidence in their juvenile justice systems and are willing to choose redemption over punishment, even with regard to very serious crimes. *See* Frey, *supra* note 10.

hearing available to a child, if it is felt that he may be more appropriately dealt with according to criminal court processes. This would resolve all the problems and abuses engendered by the present age-at-time-of-offense or age-at-time-of-trial dilemma.[191]

2. A felony offense should be a minimum prerequisite for a transfer proceeding. This is consistent with present law and the tentative amendment found in the amended statutory provisions accompanying the Kentucky Penal Code legislation.[192] It has been observed that a generic categorization of "felony" often includes crimes of minor social significance,[193] and that further, since those children who commit crimes against property seldom need to be locked up in a penitentiary, the transferability of a young offender should be restricted to felonious crimes against persons.[194] These are matters which are inherently amenable to the decision-making processes of the transfer proceeding, since social or personal consequence would certainly be a factor to consider relative to the need to invoke criminal sanctions against the offender.

3. Transfer of jurisdiction should become a disposition under KRS § 208.200 and require a finding, beyond a reasonable doubt, that a child had indeed committed a felonious act. This would make it impossible to send a child to criminal court who only probably committed a felony and who might be determined, on the basis of that hypothetical offense, to be beyond the rehabilitative potential of the juvenile justice system. A juvenile court should be sure the child committed the offense before it proceeds to abandon its jurisdiction over him.[195] Making the transfer of jurisdiction a disposition under the present provisions of KRS § 208.200 would also solve certain double jeopardy questions which arise when adjudications are made and the transfer

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[191] *See* the discussion and suggested resolution of this problem at IV(D) and V(B) *supra.*

[192] *See* notes 132 and 180 *supra.* KY. ACTS ch. 385, § 265 (1972) (effective 7-1-74) lists the various classes of felonies and the sentences attached to them.

[193] Hall, *Science and Morality of Criminal Law,* 9 ARIZ. L. REV. 360 (1968); Kadish, *The Crisis of Overcriminalization,* 7 AM. CRIM. L.Q. 17 (1968); and Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code,* 68 COLUM. L. REV. 1425 (1968).

[194] *See generally* Schornhorst, *supra* note 10, at 597-98.

[195] *See* text accompanying note 46 *supra.*

laws then invoked.[196] If it is not made a disposition, then it should be at least given the status of a "probable cause" hearing. This has a much more stringent legal denotation than the present "reasonable cause" phraseology.

4. Under either format, the prosecutor, and not the judge, should be responsible for making the motion to transfer jurisdiction. The present procedure is inherently prejudicial against the child because the judge often signs the petition which brings the child before the court, and then initiates and rules on the question of transfer.

5. A separate hearing should be required to resolve issues involved in transferring jurisdiction. This could be included under KRS § 208.060(2) and (4) if the transfer of jurisdiction became a disposition, or it could be specifically called for in the event that it were merely made, in part, a probable cause hearing at which amenability to rehabilitation was also in issue. If the latter situation prevailed, adequate notice specifically identifying the transfer hearing and the issues of probable cause and amenability to rehabilitation should be required.[197]

6. The test for transferability should be simply whether the child can be rehabilitated before he is 21 years old or whether the stringent measures of the criminal law will be needed for the protection of society. The age of 21 is the maximum age of the child over which both the juvenile court and the Department for Human Resources can exercise jurisdiction. The catalogue of considerations that should go into this evaluation is adequately set forth in KRS § 208.140(1), and a detailed investigation of this nature should be a required part of every transfer hearing. The capacity to be rehabilitated is the critical fact which must be demonstrated and, if it is so shown, no collection of other factors can be sufficient to justify a transfer of jurisdiction.

7. The establishment of a right to treatment should be in-

[196] It could be argued, under a case like Lewis v. Commonwealth, 186 S.W.2d 416 (Ky. 1945), that when a judge finds a child "guilty" in juvenile court, he is bound by the dispositional alternatives under KRS § 208.200(1) and may not transfer jurisdiction to criminal court. The *Lewis* court did not agree, and its position can be supported by the language of KRS § 208.170(1) which provides that a judge can elect to transfer a child at any time during the proceedings in juvenile court. This situation may nevertheless be amenable to challenge on the basis of double jeopardy.

[197] This is obviously necessary for the adequate preparation of and representation by counsel.

cluded in the transfer law and in another section of KRS Chapter 208 as a statement of the means by which the well-defined goals of Kentucky's juvenile justice system will be attained. A reformation of the transfer law should focus on the inclusion of this already inherent right of those under juvenile court jurisdiction, because the vital substance of this right has too long been relegated to secondary status as a result of the inordinate preoccupation with procedural due process which has often been the hallmark of modern juvenile justice.

The history of this right has depended almost exclusively upon the judiciary for its ad hoc expansion and enforcement. It is currently the subject of a considerable amount of litigation in the courts, and it is only a matter of time before challenges based on theories of cruel and unusual punishment, unequal protection of the law, and denials of procedural and substantive due process[198] result in a comprehensive imposition of the right upon the juvenile courts of this country. This will happen because legislatures and executives have generally failed to take action on the issue.

It would therefore be appropriate for the General Assembly of Kentucky, a state with one of the most progressive rehabilitation programs for young people in the country, to be the first to grant such a right of treatment to its youth. It would be especially fitting since Kentucky is presently working very hard, pursuant to recent legislative and executive initiatives, to upgrade the entire system of processing and correcting those who violate the laws of the Commonwealth. The importance of this right needs the prestige which can be imparted to it by legislative recognition and formulation, and this will depend on defining it in a way that the public can both understand and accept. That interest can not be disregarded, and it will only be served if the right to treatment for young offenders is grounded on the realistic capabilities of the state to stand behind the obligation incurred by establishing such a right. This means that the right must be amenable to judicial scrutiny and enforcement by executive agencies.[199]

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[198] Comment, 16 ST. LOUIS U.L.J. 340 (1971).

[199] *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process,* 57 GEO. L.J. 848 (1968). Unless necessary precautions are taken to

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8. Since the prosecution will make the motion to transfer, it should also bear the burden of showing the need for transfer, as well as the child's inability to be rehabilitated. The child should be allowed the right of confrontation and cross examination and should be able to put on testimony rebutting that of the prosecution.

9. A transcript of the transfer hearing should be made to aid any appellate review that might be necessary.

10. When a transfer of jurisdiction is ordered, it should be accompanied by a detailed written statement from the judge setting forth the reasons upon which the transfer was based. These reasons should show by a preponderance of evidence the child's inability to be rehabilitated by the court. This could be required under KRS § 208.190.[200]

11. The order of transfer should become a final, appealable order for the purposes of KRS § 208.380(1). A notice of appeal filed under that statute should stop all further processes of the criminal law. This would allow the propriety and sufficiency of the transfer order to be thoroughly tested on appeal before the processes of the criminal law were invoked against the child. Once this was done, the child's status in circuit court would be clearly defined as that of an adult. Appeal should be by a *de novo* hearing on the issue of transferability.

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guarantee that the recognition of the right to treatment, the establishment of its criteria, and the machinery for its enforcement are carefully formulated, public dissatisfaction and inter-agency bickering may ensue, and one more opportunity for the law's constructive contribution to social engineering will fail to materialize. *Id.* at 885. This is not an argument that professional behavioral scientists should alone decide what to do with the child and for the child. *Id.* at 857. That was the drastic mistake made at the inception of the juvenile court movement when courts and lawyers left the handling of children to psychologists and social workers. Neither they nor the legal profession can be proud of the institutional tradition and disregard of basic rights which arose out of that unguarded surrender of children's care to the almost dictatorial powers of social service agencies. The problems of the juvenile court were legal problems then just as they are now, and neither the legal profession nor the courts can any longer turn their backs on that reality. Gardner, *supra* note 10. Courts may determine a need for rehabilitation by a finding of delinquency, and may hand the child over to an agency so the child can be helped in that rehabilitation. But the courts must also be ready to enforce the right to rehabilitation when it is brought to their attention that those responsible for aiding the child are, in fact, derelict in their duty. Social service agencies need the strictest sort of monitoring because they are helping people, and, where children are concerned, people who are helpless and defenseless against the abuses that can be perpetrated on them by the agents of rehabilitation.

[200] The necessity of such a statement is set forth in note 146 *supra*.

12. No child should be allowed to be transferred and taken before a grand jury within the same 72 hour period. This would solve the post-transfer legal entanglements now made possible because counsel does not have adequate time under present law to file the notice of appeal before the criminal processes can be commenced.

13. In all cases, the indictment should be limited to the offense for which the child was transferred. If the transfer proceeding follows a probable cause format, any reduction to a lesser charge after indictment should result in the child being sent back to juvenile court. There should be no misdemeanors prosecuted against children sent to circuit court through a transfer hearing based on probable cause.

These are the minimum considerations and elements that should go into the reformation of Kentucky's transfer law. This approach would regularize the proceeding and make it possible to reach a final, proper determination of the child's status before he starts his journey through the criminal process.

The increasing availability of specialized resources for the serious young offender should make it more and more unnecessary to resort to the use of Kentucky's transfer law. Changes in court procedures and treatment programs effected by the 1972 juvenile court legislation have made this possible, and these programs now need to be buttressed by a strong transfer law which will guarantee that as many children as possible will be kept within reach of rehabilitative programs which are among the best in the country.

The social service agencies of state government will play a major role in the outcome of many of these developing issues because, under the structure of Kentucky's juvenile court law, they bear a paramount responsibility, in partnership with the courts, for seeing that the right to treatment is guaranteed to children who come before the juvenile courts. The reorganization of state government[201] can go a long way toward closing the

[201] Governor Wendell H. Ford created the new Department for Human Resources by Executive Order 73-777, August 29, 1973. It merges the old departments of Child Welfare, Economic Security, Health, and Mental Health, as well as the myriad boards, commissions, and advisory bodies related to those departments. Hopefully, this will have a constructive impact on the juvenile justice system of Kentucky.

treatment gaps which have often made the work of juvenile justice personnel so difficult. If it provides good programs, there will be less need to turn to the criminal courts. Children cannot continue to be punished because the state fails to provide for them. The ultimate parent must shoulder its part of the responsibility to make juvenile justice work so that the transfer of children to criminal courts may someday be eliminated altogether.

ADDENDUM

Fortunately, while this article was in the final stages of preparation for publication, the need for a better transfer procedure was given official recognition by both the Kentucky Court of Appeals and the Office of the Attorney General. The Court took a major step forward in the case of *Hopson v. Commonwealth*[202] by demanding adherence to certain *specific* procedural formalities found in KRS Chapter 208 and including a requirement that a dispositional investigation be conducted according to the provisions of KRS § 208.140(1). That decision marked the first time that the Court has dealt in any detail with what is essentially the *substantive* crux of the whole transfer proceeding.

It is only fair to say, however, that a lot of detail is still needed to define just what will be acceptable as "sufficient reasons" for transferring a child to criminal court, but the judicial requirement of the KRS § 208.140(1) investigation has added a promising new perspective to the transfer question.[203] Hopefully, the Court of Appeals or the General Assembly will soon give the children and lower courts of this state an even clearer set of guidelines which will pay due respect to the basic principles of the juvenile court movement in Kentucky.[204]

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[202] ——— S.W.2d ——— (Ky. 1973), No. 73-548, rendered October 26, 1973. Actually the Court had just recently dodged the issue of guidelines for transfer proceedings a month prior to the *Hopson* decision. In Baker v. Commonwealth, ——— S.W.2d ——— (Ky. 1973), No. 73-25, rendered September 28, 1973, the Court noted that: "We need not here consider what those necessary steps are because whatever they may be, this record contains nothing to suggest that any of them were taken." The Court found that Baker had been unlawfully transferred. *Hopson* was the second such decision in one month. Perhaps the issue is becoming ripe enough for a significant pronouncement by the Court.

[203] This has been, as the article points out, the required statutory procedure for many years. However, it has never received such an explicit recognition by the Court of Appeals.

[204] A proposal has been prepared for submission to the 1974 General Assem-

(Continued on next page)

The Office of the Attorney General, obviously impressed with both the *Hopson* opinion and the increasing volume of appeals involving defective juvenile court orders, has moved decisively to provide a clarification of the procedures outlined and implied by the *Hopson* decision. On October 31, 1973, just five days after the Court's decision in *Hopson v. Commonwealth,* the Attorney General issued Opinion of the Attorney General 73-762 to all the county judges and county attorneys of the Commonwealth. He set forth a step-by-step outline of the correct procedure for transferring jurisdiction from juvenile court and touched directly on the substance of the proceeding by saying that it should only be used as a last resort. Hopefully, this excellent opinion will serve to correct some of the abuses now taking place in many of our juvenile courts.

It was also during the final days of preparing this article for publication that the author discovered a recent United States Supreme Court decision which seems to have considerable impact on the appealability of transfer orders, an issue which is discussed at length in this article. The holding and discussion of precedent in *Hensley v. Municipal Court,*[205] while dealing with habeas corpus actions in federal court, bear directly on the extent to which the transferred child is "restrained of his liberty" for the purposes of an appeal pursuant to KRS § 208.380(1).[206] The *Hensley* opinion and the numerous related cases it discusses provide a strong argument that the transferred child does have standing to seek immediate appeal under Kentucky juvenile law. If this analysis is correct, then the procedural chaos surrounding the proper appeal of a transfer order should be reduced considerably.

(Footnote continued from preceding page)
bly which incorporates all the latest developments in the transfer area. If enacted, it would give Kentucky the fairest and most comprehensive transfer law of any state in the country. It would also nearly complete the important work of updating Kentucky's juvenile code which was begun by the 1972 General Assembly. The transfer law was bypassed in 1972, and a serious gap was left in the substantial effort to reform our overall criminal justice system. It cannot be bypassed again without jeopardizing the integrity of a broad reform to which so many people have given so much time and effort. Children and the juvenile courts simply cannot be forgotten.

[205] ——— U.S. ———, 36 L.Ed.2d 294, 93 S.Ct. ——— (1973).

[206] It would make little difference that the child had been released on bail, because the provisions of KY. R. CRIM. P. 4.24 place him in very tenuous circumstances and create a condition in which he could be deemed to be "in custody" or "restrained of his liberty" under both the *Hensley* decision and in cases cited in support of that opinion.