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Is Ohio Juvenile Justice Still Serving Its Purpose?

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by

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We read about it in the newspapers: "Prosecutors Seek Adult Trial for Boy, 14, in Mall Shooting."[1] We see and hear about it on television: "Debate over Making Juveniles Stand Trial as Adults for Crimes."[2] It happens in our states, in our cities, and even in our own backyards: "Police Arrest Three Teen-Agers in Elderly Woman's Death."[3] Juvenile crime. Increasingly, America's youth are committing more and more violent crime.

On a national level in 1992, juveniles [4] accounted for 112,409 of the 641,250 violent crime arrests.[5] America's juveniles committed 16.3 % of the murders in the country and 17.5% of the total violent crimes in the United States in 1992.[6] In Ohio alone, those 17 years of age and younger comprised 12% of Ohio's total arrests for murder in 1992, and 20% of violent crime arrests.[7]

How are juvenile courts responding to these frightening statistics? Should we abandon the juvenile system altogether and transfer our children to adult courts, adult prisons, and death row? Is the criteria Ohio and other states use to determine such transfers objective, or does it permit too much judicial discretion?

This Comment begins with an introduction to the history and purpose of the juvenile justice system, and the procedure for transferring juveniles to adult courts. Part II discusses the United States Supreme Court cases that began eroding the original purpose of the juvenile court by affording juveniles some of the same constitutional rights enjoyed by adult offenders. Part III focuses on Ohio's present juvenile transfer procedure to adult court, discuss ing the broad discretionary power given to juvenile court judges in electing to do so. Part IV describes the criteria Ohio juvenile court judges use to de termine whether to transfer juveniles, showing its subjectivity and possible need for restraint. Part V provides information on Ohio's new legislation in juvenile law, effective January 1, 1996. This Comment concludes with sug gestions to reform the juvenile justice system and help it to return to accom plishing its original goal: helping children to cope with their problems and to deter them from delinquent behaviors.

I. JUVENILE COURT HISTORY AND PURPOSE

The practice of having separate courts for juveniles originated in the United States as a result of two significant events: the Industrial Revolution [8] and the Progressive Movement.[9] Prior to these events, the law treated children in the same manner as adults, and at times housed juvenile offenders in the same institutions as adult offenders.[10] In 1899, Illinois established the first juvenile court [11] and, by 1925, every state but two had established juvenile courts.[12] By 1945, every state had some type of juvenile court in place.[13]

The initial underlying philosophy of the juvenile court system was *parens patriae*.[14] This philosophy sought to rehabilitate juveniles [15] and treat the child "not as a criminal, but as a child needing care, education and protection. "[16] Juvenile court judges served to protect juveniles as they were thought unable to care for themselves.[17] The juvenile system itself sought to protect the child, through both its focus on treatment and its less decriminalized pro cedural terminology.[18] The juvenile system and its *parens patriae* philosophy remained relatively stable from its inception in 1899 through 1966.[19] In fact, the United States Supreme Court never decided a juvenile court case until 1966,[20] when it decided *Kent v. United States.*[21] *Kent* and its progeny initiated a re-examination of the juvenile system's philosophy and procedure, and the lack of constitutional rights afforded to its offenders.

Transfer of Juvenile Cases to Adult Courts History and Rationale

The procedure of transferring jurisdiction from juvenile court to adult court has existed since the establishment of the juvenile court in 1899.[22] The underlying philosophy of transfer proceedings was to evaluate the likelihood that a child could be rehabilitated within the juvenile justice system.[23] While trying to embrace most juveniles with its ability to rehabilitate, the juvenile system still recognized that there were some juveniles beyond its reach.[24] The law vested juvenile court judges with sole authority to determine whether juveniles should be transferred to the adult system.[25] Thus, transfer proceedings allow a juvenile court judge to determine if the child is amenable to treat ment within its confines and, if not, to send those unamenable to the offerings of juvenile rehabilitation to the adult courts.[26]

The number of juveniles transferred to adult court today has increased astronomically from the amount of children transferred when the juvenile sys tem was first established.[27] Some authorities believe that this increase has resulted from a changing view of children and their mental reasoning abilities.[28] Others suggest that the juvenile court uses transfer to set an example to other juveniles, and to appease the public demand for justice when children commit serious crimes.[29] Still others believe that transfer is used more often today because of its tremendous deterrent effect, as juveniles are fearful of adult courts.[30]

II. SIGNIFICANT U.S. SUPREME COURT CASES REGARDING JUVENILES

In 1966, the Supreme Court took its first juvenile case, *Kent v. United States.*[31] It involved transferring a juvenile case to adult criminal court for adjudication.[32] The Supreme Court, in an opinion by Justice Fortas, ruled the transfer procedure invalid because it was done without a hearing, without assistance of counsel and without the judge stating his reasons for transfer.[33] The Court also recognized the significance of the transfer procedure.[34] While the Court acknowledged the substantial latitude given to the juvenile court in determining if it should retain jurisdiction over a juvenile, it stressed that this latitude is not a "license for arbitrary procedure" by the court.[35] Thus, in *Kent*, the Court began to recognize that constitutional rights given to adult offenders, such as due process, should exist in the juvenile court system as well- especially in transfer

proceedings.[36] The juvenile court was beginning to act as a court rather than a parent in affording its offenders constitutional rights enjoyed by adult offenders.[37]

In an appendix to its decision, the *Kent* Court enumerated factors that a juvenile court judge might evaluate in deciding whether or not to transfer a juvenile to adult court.[38] The Court specifically noted that not all factors will apply in each case, but staff of the juvenile court must fully develop all avail able information relating to the factors when a transfer proceeding is the issue. Many states, including Ohio, incorporated these factors into their statutes and juvenile rules.

The next case to come before the Supreme Court was *In* re *Gault*,[39] another case blurring the distinctions between the juvenile and adult courts. It incorporated adult constitutional rights into the juvenile courts, further eviscerating the *parens patriae* philosophy.[40] The Supreme Court, in an opinion again penned by Justice Fortas, held that all juveniles were entitled to a constitutional right to: (1) notice;[41] (2) counsel;[42] (3) confrontation and cross-examination of witnesses;[43] and (4) invoking the privilege against self-in crimination.[44] The Court maintained that its decision would not destroy the juvenile justice system, although it drastically altered it.[45] The Court further limited its holding to only the adjudicatory hearing to delinquency proceed ings, where a criminal violation is alleged and confinement may occur.[46]

In *In re Winship,*[47] a 1970 case, the Supreme Court held that the "beyond a reasonable doubt" standard of proof applied to the adjudicatory stage of delinquency cases where a child's liberty was at stake.[48] The Court returned to the same reasons set forth in *Gault* to justify its decision.[49] Although the Court again stressed that its decision to provide juveniles with similar constitutional safeguards as adult offenders would not dismantle the juvenile system's philosophy and procedure, this case and its progeny eroded many areas in the juvenile court. The juvenile court judge's role was no longer protectorate parent of the children. Instead, a rigid, more adult-like atmo sphere attached to the juvenile system.[50]

The case of *Breed v. Jones*[51] applied yet another adult offender constitutional right to juvenile courts; that of the protection against Double Jeopardy.[52] Justice Burger and the Majority held that jeopardy attached when the juvenile court started hearing evidence at its adjudicatory proceeding.[53] The Supreme Court thus determined that the waiver hearing must occur prior to an adjudicatory hearing, or double jeopardy is violated.[54]

However, *McKeiver v. Pennsylvania*[55] marked a departure by the Supreme Court in its willingness to afford adult constitutional rights to juvenile offenders.[56] Holding that the right to trial by jury did not apply to juvenile offenders in any juvenile procedure,[57] Justice Blackmun returned to the initial reasons for the juvenile justice system: *parens patriae* and rehabilitation and treatment of the juvenile.[58] The Supreme Court feared that a jury trial would mesh the juvenile and adult systems together in such a way as to end the juvenile court informalities, and allow the adversarial procedures of the adult system to dominate.[59]

This line of Supreme Court cases afforded juveniles most of the constitutional rights granted to adult offenders. The *Kent* decision provided constitutional due process and *Gault* conferred juveniles the rights to notice, counsel, confrontation, cross-examination and self-incrimination protection. The Supreme Court's holding in *Winship* established a "beyond a reasonable doubt" standard in juvenile adjudicatory hearings, and *Breed* granted juvenile offenders the protection against double jeopardy. The *McKeiver* decision contained the one constitutional right the Supreme Court refused to extend to juvenile offenders, the right to a jury trial.

Recently, critics have become increasingly dissatisfied with the juvenile system, as they feel it is too soft on juvenile offenders.[60] They believe this has resulted from allowing juveniles "the best of both worlds;"[61] adult constitutional protections within the *parens patriae* philosophy of the juvenile system. A skyrocketing increase in juvenile violent crimes has also contributed to discontentment with the juvenile system.[62] As a result of this growing d iscontent and a "get tough" philosophy, juvenile courts are increasing the use of the transfer procedure, so that the adult courts can impose greater and harsher punishments on convicted juveniles.[63]

III. OHIO'S JUVENILE SYSTEM AND TRANSFER -- PAST AND PRESENT

The Ohio Supreme Court recognized the *parens patriae* doctrine as early as 1869.[64] Shortly thereafter, Ohio became one of the first states to enact juvenile legislation when it established the Cuyahoga County Juvenile Court in 1902,[65] and expanded the system throughout the state by 1906.[66] Prior to the United States Supreme Court decision in *Gault*, juvenile court procedure did not extend the constitutional guarantees afforded adults in the criminal system.[67] As a result of the *Gault* decision, the legislature altered the Ohio Juvenile Code and, in 1968, adopted the Modern Courts Amendment to the Ohio Constitution, allowing the Ohio Supreme Court the authority to make procedural rules.[68] As a result of this amendment, the Court created the Rules of Juvenile Procedure.[69] In 1994, the Ohio Rules of Juvenile Procedure were revised to make the Rules conform with statutory changes in the Ohio Revised Code.[70]

Both Ohio Revised Code section 2151.26 and Juvenile Rule 30 govern Ohio's juvenile transfer proceedings.[71] Both recognize the juvenile judge's discretionary transfer ability,[72] holding that the judge must find reasonable grounds to believe that: (1) the child is not amenable to rehabilitation or further care in any juvenile delinquent facility; and (2) the safety of the com munity may require legal restraint for a period extending beyond the child's majority.[73] A judge must further consider the violence of the act and whether the victim is elderly or disabled.[74]

Ohio affords the juvenile offender the constitutional rights resulting from *Kent v. United States, In Re Gault, In Re Winship,* and *Breed v. Jones.*[75] The juvenile is not given a jury trial in Ohio, just as the United States Supreme Court ruled in *McKeiver v. Pennsylvania*.[76]

In a discretionary transfer proceeding in Ohio, two hearings are held; a preliminary hearing [77] and a second hearing to determine amenability to juvenile treatment.[78] This hearing allows the juvenile judge the discretion to determine whether to transfer the juvenile to adult court. Ohio also has a mandatory transfer proceeding, where the juvenile judge must transfer to criminal court a juvenile who has committed aggravated murder or murder when the court determines that: (1) probable cause exists to believe that the child committed the act; and (2) the court had previously adjudicated the juvenile for aggravated murder or murder.[79]

Subjective Discretion of Ohio Juvenile Judges in Transfer

Although the law requires juvenile court judges to consider specific factors in determining amenability to treatment [80] and the safety of the community, the individual judge possesses almost unbridled discretion in this evaluation and final determination, especially with respect to the criteria for determining amenability to rehabilitation.[81] This discretion is subjective, based on each judge's opinion regarding the proper weight to attach to each factor of the transfer-decision criteria, if the judge even considers all of the criteria.[82] Further, the enumerated criteria for rehabilitation, although mandating that the judge "shall" consider them, are not the only guides a judge may use in making a transfer decision. Any other relevant circumstances can be considered.[83] Although the judge must state the reasons for the transfer,[84] the weight assigned each factor will not necessarily be reflected in the trans fer order, as the judge is not required to express the weight given each of the factors.[85] This leaves the juvenile in a vulnerable position. The place of sentencing will depend solely on a judge's preference for certain transfer criteria over others, as well as preference for the transfer procedure itself, and no adequate checks exist on the judge's decision.[86]

With such broad judicial discretion, the potential for abuse of transfer [87] and inconsistent transfer [88] is great. By determining whether to transfer the minor, the juvenile court judge will also determine where the juvenile will ultimately be punished, either in a juvenile facility where treatment is directed at rehabilitation,[89] or an adult facility, where retribution and punishment are often the focus.[90] Such a decision undoubtedly will affect the direction of the juvenile's life.

If transferred to criminal court and sentenced to an adult facility, both the juvenile and society feel dramatic impacts. The juvenile's physical and emotional well-being will be greatly affected as he may be forced to spend time with adult prison offenders.[91] Society feels the aftermath of the juvenile's adult confinement as, upon his return to society, the juvenile has become a harder, more violent [92] and recidivistic offender. Further, sentencing of juveniles to adult facilities offers no guarantee of a reduction in the juvenile crime rate, as stricter adult crime policies have not reduced the adult crime rate whatsoever; in fact, the adult crime rate has increased significantly.[93] The only effect harsher and stricter policies have provided the nation is a quadrupling in the number of persons imprisoned since 1980,[94] inordinate spending on the building of more prisons [95] and a world-renowned reputation as the country with the highest rate of incarceration [96] with a total prison population of 1.1 million.[97]

Thus, a juvenile court judge's unbridled and unchecked decision to transfer a juvenile to an adult court that imposes adult commitment will only add to already overcrowded, overspent and overburdened adult system and institutions. It will return to society more violent offenders and result in in creased crime.[98]

With statistics like those mentioned, it is obvious that change is necessary. While the juvenile system's adversaries argue for its complete abolition,[99]

proponents argue for its reform.[100] Others argue for a restriction on the juvenile court judge's discretion in making the transfer decision.[101] However, this will only push the juvenile problems off to the already overtaxed and ineffec tive adult system, with no guarantee of crime rate reduction in either area.[102] Further, if it is remembered that the juvenile system's aim is to rehabilitate and treat the child,[103] the juvenile court judge's discretion should not be so limited that accomplishment of the system's goals is rendered impossible. Despite the juvenile system's aims, Ohio's new legislation reflects the trend toward the "get tough" philosophy on crime by restricting the discretion of the juvenile court judge in transfer decisions.[104]

Ohio's New Juvenile Legislation

The Ohio Legislature has amended Ohio Revised Code section 2151.26 as a step toward reforming the juvenile system and to appease the public's out rage with juvenile crime.[105] This amendment imposes restraints on the

juvenile judge's current transfer power in two ways. First, it mandates juvenile transfer under more circumstances than the current statute.[106] Secondly, it imposes additional factors for a judge to consider that favor transfer of a juvenile to adult court.[107]

The current mandatory transfer statute provides that a judge must transfer the juvenile to adult court after it finds probable cause exists to believe the child committed the act charged, and only when the child has a previous adjudication of an act constituting murder or aggravated murder if done by an adult.[108] The new amendment restricts not only the judge's discretion regard ing transfer based on the age of the juvenile offender,[109] but also limits the judge's discretion regarding the offenses for which the judge may decide transfer will occur. The effect of the new mandatory bind-over provisions on the Department of Youth Services [110] and the Department of Rehabilitation and Corrections [111] has been analyzed, and suggests a substantial savings for the former and a moderate expenditure for the latter (assuming no additional facility space is necessary).[112] The mandatory transfer decision has its opponents [113] and supporters,[114] but appears to indicate a step in the right direction as it removes the older, repeat violent offenders from the juvenile system.

The second restraint on the juvenile judge's power to transfer involves the discretionary or permissive bind-over procedures.[115] The amendment requires a juvenile judge to continue to consider those factors enumerated in the current statute,[116] but also specifies that if certain criteria exist, the judge must favor transfer of the juvenile to adult court.[117]

The enumerated criteria are not subjectively-based factors, such as those in Juvenile Rule 30,[118] but are factors that are determined as objective facts.[119] Thus, a juvenile court cannot hide its own subjectivity behind these criteria when a transfer decision is made, or the juvenile offender is kept within the juvenile system. The fiscal effect of this revision is minimal.[120]

Another reform to the current juvenile statute worth mentioning is in the area of adult courts imposing sentences on juvenile offenders bound over to them. The current legislation allows for juveniles to be housed with adult offenders,[121] while the new legislation mandates that the Department of Rehabilitation and Corrections separate those juveniles between the ages of fourteen and eighteen years from the adult population.[122]

Juvenile System's Identity Crisis and Waste of Resources: Solutions

Ohio is making a great effort to work toward a solution to the juvenile system's identity and philosophy problems through this new legislation. It restricts judicial discretion in some respects,[123] but leaves discretion untouched in areas where it is most necessary.[124] Additional reform is necessary, especially in conserving juvenile treatment and resources for those on whom it works best.

Although experts have suggested many solutions to the problems of ineffective juvenile justice, from total abolition of the system [125] to leaving the system as it is,[126] some court officials recognize that the system accomplishes its goals with those offenders it was intended to help, but fails the repeat violent offender who it was not designed to serve.[127] If the juvenile system continues to allow these repeat violent offenders to stay within its confines, it is only depleting its time, energy and resources, and neglecting those it was designed to serve; the first-time, nonviolent child that makes a mistake.[128]

Based on the premise that the juvenile system was created to deal only with certain types of juvenile offenders, the best solution to reinstate the juvenile court's identity is to create a transitional system for the repeat violent juvenile offender.[129] This will remove the strain from the current juvenile system, yet still recognize and respect that the minor is a child and not a criminal.[130] However, Ohio's juvenile system, as that of most states, does not possess the extra funding to create such a system.[131] Perhaps the money saved each year in the juvenile treatment and adjudication areas from the implementation of mandatory transfers could be applied toward the creation of the transitional system,[132] which will still remain a part of the juvenile system, yet be separate and apart with its own court system and sentencing unit.[133]

IV. CONCLUSION

Juvenile justice is alive, well and starting to revive in Ohio. Ohio has begun the transformation of the juvenile court back to its original philosophy by providing for mandatory transfers in cases of serious repeat juvenile of fenders. Though it limits the discretion of juvenile judges, it also reflects the philosophy of the system that the juvenile court serves to protect and treat the child.[134] By limiting the discretion of the juvenile

court in such situations, the new legislation is only recognizing what the first juvenile court recognized in 1899: that certain juvenile offenders were beyond its reach.[135] Perhaps the next step in Ohio juvenile law reform will be to provide a transitional system for those beyond the reach of the system.[136]

1. John Gillie, *Prosecutors Seek Adult Trial for Boy, 14, In Mall Shooting,* THE NEWS TRIB., Aug. 30, 1995, at B4.

2. *NBC Nightly News* (NBC television broadcast, Sept. 20, 1994), *available at* 1994 WL 3519114 (discussing how Houston, Texas is dealing with young violent offenders by requesting juvenile judges to certify the young offenders to stand trial as adults for their crimes).

3. *Police Arrest 3 Teen-Agers in Elderly Woman's Death From Wire Reports,* THE PLAIN DEALER, Oct. 22, 1993, at 3B. In Austintown, Ohio, police arrested three seventeen-year-old boys who beat Rose Bertolini, age 72, to death after she arrived home and interrupted a burglary in progress. *Id.*

4. The term "juveniles" in this Comment refers to those persons under the age of eighteen years old.

5. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1993) [hereinafter Sourcebook]. Violent crimes include the crimes of murder, forcible rape, robbery, and aggravated assault, according to the U.S. Department of Justice. *See* SOURCEBOOK. Table 4.8 in the Sourcebook charts a breakdown of arrests, by offenses charged and age, for 1992 in the United States. *Id.* Of the 11,893,153 total arrests made in 1992, juveniles constituted 1,943,138 of that group, with those under 15 years old representing 689,877 of the persons arrested. *Id*. at Table 4.8. What staggering statistics for our country.

6. SOURCEBOOK, *supra* note 5. Those under the age of 15 committed 5.3% of the violent crimes, while those 13-14 years old committed 3.9%. *Id.* The SOURCEBOOK even depicts a 1.2% listing for those children aged 10-12 years old for violent crime, and a .2% listing for those under the age of 10. *Id.*

7. CRIME STATE RANKINGS 1994: CRIME IN THE 50 UNITED STATES 40 (Kathleen O'Leary et al. eds., 1994). In 1992, Ohio ranked 26th out of the 50 states in its reported arrests of minors for murder, and 19th of the 50 states in reported arrests of minors for violent crimes. *Id.*

Locally, in 1994, Summit County Juvenile Court reported 3,922 official delinquency cases filed and 1,560 status offender cases. 1994 ANNUAL REPORT, COUNTY OF SUMMIT COURT OF COMMON PLEAS, Juvenile Division (1994). A child is considered delinquent when he is under the age of 18 years and violates a law or regulation that would be a crime if committed by an adult. A child is defined as a status offender when he violates a law that applies only to a child, such as truancy. *Id.*

In 1993, Mahoning County Juvenile Court reported 1,357 official delinquency cases and 128 "unruly" or status offender cases. 1992-1993 BIANNUAL REPORT, MAHONING COUNTY COURT OF COMMON PLEAS, Juvenile Court Division (1993). In 1992,

Mahoning County reported 208 arrests of juveniles for homicide and assault crimes, with 8 of those juvenile arrests for murder. 1992 REPORT ON JUVENILE DELINQUENCY OFFENSES, MAHONING COUNTY COURT OF COMMON PLEAS, Juvenile Court Division (1992).

8. DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR JUVENILE JUSTICE 35 (1991). The Industrial Revolution not only transformed America from a predominately agricultural economy to one based on factories, but it also brought European immigrants to the United States to work in the industrial trades. *Id.* The Progressives worried about and wanted to help the children that these immigrants brought with them, as they often wandered the streets, leading wasteful, crime-ridden lives. *Id.*

9. CHAMPION & MAYS, *supra* note 8, at 35, 38. The Progressive sought two objectives from their "Child Saving Movement" to help the immigrant children: to instill the appropriate moral values in the children, and to temper the harsh treatment of juveniles by the law. *Id*. The Progressives felt that the law should recognize one's age as a mitigating circumstance. *Id.*

10. CHAMPION & MAYS, *supra* note 8, at 38. The courts did not discriminate between child and adult offenders in determining capacity to commit a crime or the severity of the punishment. *Id.* Thus, children who committed murder were tried as adults for murder. However, common law principles of mental capacity developed to relieve children in different age groups from criminal responsibility for their acts. *See* FRANCIS B. MCCARTHY & JAMES G. CARR, JUVENILE LAWS AND ITS PROCESSES (1980). Common law established three categories of capacity regarding age. First, children under age 7 lacked capacity to commit criminal acts. *Id.* Second, the law presumed that children between ages 7 and 14 possessed no capacity to commit criminal acts, but it was a rebuttable presumption. *Id.* Finally, the law held those children 14 years old and above to the same standards of capacity and responsibility for criminal acts as adults. *Id.* For application of such principles, see State v. Mary Doherty, 2 Tenn. 79 (1806) (12-year-old girl indicted for murder of her father).

11. Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131. The Act contained four features that influenced the juvenile court system. WILLIAM A. KURTZ & PAUL C. GIANELLI, OHIO JUVENILE LAW 9 (3d ed. 1994). The Act established distinct procedures for juvenile cases; developed a separate court for those children under 16 years who were alleged delinquent, neglected or dependent; equipped probation officers with investigatory and supervisory powers over juveniles and their cases; and forbade detention of a child under age 12 and mandated segregation of adults and juveniles when housed in the same facility. *Id.*

12. Charles Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis,* 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985). The only two states that had not created juvenile courts in 1925 were Maine and Wyoming. *Id.*

13. Thomas & Bilchik, *supra* note 12, at 451. Even the federal system had some form of juvenile system at this time.

14. KURTZ & GIANELLI, *supra* note 11, at 10. *Parens patriae* means literally "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). It means that "the state is the higher or the ultimate parent of all of the dependents within its borders." Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). The early reformers envisioned the *parens patriae* concept as one where the State acted as parent for juveniles in its system and treated juvenile delinquency as a disease. Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System* ," 22 PEPP. L. REV. 907 (1995). The Reformers believed that the State should play the role of doctor, diagnosing and treating the child's delinquency "disease" with expert help to cure it. *Id.* Reformers justified separation of juveniles from society and adult offenders based on the idea that the "disease" of delinquency may be contagious and treatment of the disease may require separation to assure its success. *Id.*

15. KURTZ & GIANELLI, *supra* note 11, at 10. It was noted at the time that the purpose of the juvenile justice system "is not to punish but to save." *Id*. (citing Flexner & Oppenheimer, *The Legal Aspect of the Juvenile Court,* 9 Children's Bureau Pub. No. 99 (1922)).

16. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 18 (1927). The Reformers reasoned that separate juvenile courts were necessary because the adult criminal courts' primary focus was not the best interests of this particular child, but whether the individual committed the crime. Mack, *supra* note 14, at 107.

17. Allison Boyce, Note, *Choosing the Forum: Prosecutorial Discretion and* Walker v. State*,* 46 ARK. L. REV. 985 (1994). The juvenile judge's role was not to determine guilt or innocence, but to "prescribe treatment." *Id*. at 987.

18. CHAMPION & MAYS, *supra* note 8, at 38. Warrants for arrest in the juvenile system are termed petitions, trials are called hearings, and sentences are dispositions. *Id.* The juvenile court also protects its offenders through informally-held private hearings, with all players in the system focusing mainly on ways to help the child. *Id.* The proceedings are non-adversarial, as all parties are acting in the best interests of the child. *Id.* at 39.

19. KURTZ & GIANELLI, *supra* note 11, at 12. Authorities describe this time as one where:

> [J]uvenile courts operated without legal oversight or monitoring. Many would say that juvenile courts in this period were not really courts at all. There was little or no place for law, lawyers, reporters and the usual paraphernalia of courts; this is not at all surprising because the proponents of the Juvenile Court movement had specifically rejected legal institutions as appropriate to the rehabilitation of children.

WADLINGTON ET AL., CASES AND MATERIALS ON CHILDREN IN THE LEGAL SYSTEM 198 (1983).

20. KURTZ & GIANELLI, *supra* note 11, at 12.

21. 383 U.S. 541 (1966) (holding certain constitutional rights afforded adults in the criminal justice system applied to juveniles in the juvenile justice system).

22. KURTZ & GIANELLI, *supra* note 11, at 137. Transfer of jurisdiction, also known as waiver, certification or bind-over, involves a juvenile court surrendering its jurisdiction over a juvenile case and transferring it to the criminal court for adjudication. *Id.* All states allow this practice, but each vary in its procedure and standards for determining if transfer should occur. *Id.* There are two types of waiver statutes judicial waiver and legislative offense exclusion. *See* Barry C. Feld, *The Transformation of the Juvenile Court* , 75 MINN. L. REV. 691 (1991). Judicial waiver involves a juvenile court hearing where the judge determines if cause exists to believe the juvenile committed a crime, his amenability to the rehabilitative efforts of the juvenile system and the threat to public safety. *Id.* at 491; MCCARTHY & CARR, *supra* note 10, at 365. Many argue that such authority vested in a juvenile court judge is too subjective and without basis, as the juvenile court judge lacks the clinical means and ability to predict future dangerousness of the juvenile and his/her threat to public safety. Feld, *supra,* at 703-04. Legislative exclusion of the offense provides the juvenile judge with no power to determine if the case belongs in juvenile or adult court. *Id.* Rather, the legislature excludes juveniles charged with certain, usually severe, offenses from juvenile court jurisdiction. *Id.* at 706.

23. Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict The Prosecutor's Choice* , 14 AM. CRIM. L. REV. 29, 30-31 (1976). The transfer proceeding represents a "safety valve" for the juvenile court because it allows the juvenile judge to send juveniles who are unamenable to rehabilitation within the juvenile treatment period (usually until age 21) to the adult courts. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?,* 25 CONN. L. REV. 57, 62-63 (1992).

24. Boyce, *supra* note 17, at 987. However, only under the most extreme circumstances has transfer to adult courts occurred. CHAMPION & MAYS , *supra* note 8, at 60-61. These circumstances include cases where juveniles have committed violent, personal offenses, such as heinous crimes or aggravated crimes, or older juvenile offenders who have a long, extensive history in the juvenile system and are not responding to the juvenile treatments. *Id.*

25. CHAMPION & MAYS, *supra* note 8, at 61. This authorization left juvenile judges with unlimited discretion in transferring juveniles to adult courts. *Id.* The *Kent* decision reduced this discretion and altered the juvenile court system. *Id.* at 62.

26. KURTZ & GIANELLI, *supra* note 11, at 137. The purpose of the transfer proceedings, as an Ohio court described it, is:

> [T]o protect the public in those cases where rehabilitation appears unlikely and circumstances indicate that if the charge is ultimately established society would be better served by the criminal process by reason of the greater security which may be achieved or the deterring effect which that process is thought to accomplish.

In re Mack, 260 N.E.2d 619, 620-21 (Ohio Ct. App. 1970).

27. The number of juveniles transferred to adult court per year by a county, during the time when juvenile court was first established, averaged around fifteen cases, or one percent of the total amount of juvenile cases. *See* Feld, *infra* note 59. That number has significantly increased with the "get tough" philosophy demanded by the public. The National Center for Juvenile Justice estimated that approximately 176,000 juvenile cases were transferred to adult courts nationwide. Joanne C. Lin et al., *Youth Violence: Redefining the Problem, Rethinking the Solutions,* 28 CLEARINGHOUSE REV. 357, 366 (1994) (citing AMERICAN PSYCHOLOGICAL ASS'N, COMMISSION ON VIOLENCE AND YOUTH: PSYCHOLOGY'S RESPONSE 42 (1993)). This estimate excludes cases where a prosecutor directly filed in adult court, bypassing the juvenile system altogether, or those cases automatically heard in adult court due to the legislative offense exclusion. Smith & Dabiri, *infra* note 61.

28. Mark Dowie, *When Kids Commit Adult Crimes, Some Say They Should do Adult Time* ,13 CALIF. LAW. 55, 58 (1993). The author observes that "[a] new conceptual framework is emerging that seems to assume contemporary children not only act but reason like adults. Commit a heinous crime, and you are an adult for the purpose of prosecution." *Id.*

29. Feld, *supra* note 22, at 706. Feld notes that:

> [J]udicial waiver serves important political and organizational functions for juvenile courts. By relinquishing a small fraction of its clientele and portraying these juveniles as the most intractable and dangerous in the system, juvenile courts create symbolic scapegoats, appear to protect the public, preserve their jurisdiction over the vast bulk of juveniles, and deflect more comprehensive criticisms.

Id.

30. Randall W. Besta & Paul J. Wintemute, *Young Offenders in Adult Court: Are We Moving in the Right Direction?,* 30 CRIM. L.Q. 476, 488 (1988). The authors suggest that inherent benefits exist in transferring juveniles to adult court, such as deterrence, as most juveniles are afraid of going to adult court, and the fact that if the case is transferred, a criminal court judge is believed more capable than a juvenile judge of determining who is dangerous to society.

Id.

31. 383 U.S. 541 (1966) (initiating the idea that juveniles were entitled to constitutional rights enjoyed by adults in the criminal court system). The opinion referred to the constitutional rights of due process when Justice Fortas stated, "we do hold that the [transfer] hearing must measure up to the essentials of due process and fair treatment." *Id.* at 562.

32. *Id.* at 552. Sixteen-year-old Morris Kent was arrested after his fingerprints, taken on a previous visit to the juvenile court, were found in the apartment of a woman who was raped and robbed by an unknown intruder. Police interrogated him for seven straight hours without notifying his parents that he was in custody, and without notifying the court that Morris was in custody. This was a violation of the District of Columbia's juvenile code. *Id.* at 544 n.1. Other violations of the code included detention of Morris in a receiving home for one week without arraignment, lack of judicial determination of probable cause for arresting Morris and waiver of Morris' juvenile case to adult court. *Id.* at 545-47. The juvenile court judge ordered waiver to adult court without expressed reasons, despite contrary recommendations by a defense psychiatrist and Juvenile Court staff, as well as a Juvenile Probation report and a Social Service file unavailable to defense at the time a motion was made to see the file. *Id.* at 547. Further, the juvenile court judge entered an order stating that, after full investigation, he was waiving jurisdiction to adult court, but made no findings whatsoever for such an investigation. *Id.* at 546.

33. *Id.* at 552, 556. The Court did not decide whether Kent should have been transferred, as it vacated the court of appeals affirmance of the district court's order and remanded the case back to the district court for a *de novo* hearing on the waiver issue. *Id.* at 565. If that court finds waiver inappropriate, then it should vacate Kent's conviction. If that court rules waiver appropriate, then the court may make a judgment after ruling on motions by each party. *Id.*

34. *Id.* at 556. "It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." *Id.* One commentator, discussing the importance of the transfer proceeding, stated: "[t]he critical nature of such a proceeding is symbolized by the fact that the first juvenile case to draw the scrutiny of the United States Supreme Court was a transfer of jurisdiction in *Kent v. United States.*" Robert E. Shepard, Jr., *Transfer of Waiver of Jurisdiction*, CRIM. JUST. 28, 29 (1988).

35. *Kent*, 383 U.S. at 553 ("At the outset, it [juvenile court latitude] assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'").

36. *Id.* at 554 ("[B]ut there is no place in our system of law for reaching a result of such tremendous consequences without ceremony without hearing, without effective assistance of counsel, without a statement of reasons."). The Court reasoned that if the

adult courts would not conduct proceedings in this manner, then the juvenile court, with its particular protections for children, would certainly not allow this procedure. *Id.*

37. Martin, *supra* note 23, at 67. This case obligated the states' juvenile courts to afford constitutional due process when deciding whether to transfer juveniles to adult court. *Id.* at 68.

38. The factors enumerated in *Kent* included:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney);
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime;
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions;
>
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent v. United States, 383 U.S. 541, 566-67 (1966). The factors are classified into two categories danger to the public and amenability to treatment. CHAMPION & MAYS, *supra* note 8, at 63. Opponents argue that these factors do not limit the latitude of the juvenile court judges as they are "broad, standardless grants" that "do not provide objective indicators to guide discretion." Barry C. Feld, *Bad Law Makes Hard Cases: Reflections*

on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default , 8 LAW & INEQ. J. 1, 15 (1989). This subjectivity allows inequities to occur without checks and balances. *Id.* Waiver statutes of one jurisdiction are interpreted differently from court to court within the jurisdiction. *Id.*

39. 387 U.S. 1 (1967). This decision markedly altered the nature of juvenile court proceedings and juvenile justice itself. It is considered the leading juvenile case with respect to constitutional law. JOSEPH J. SENNA & LARRY J. SIEGEL, JUVENILE LAW: CASES AND COMMENTS 270 (1976). *Gault* provided juvenile offenders with many of the basic constitutional rights that adults enjoy, including the right to counsel, notice, cross-examination of witnesses and self-incrimination privileges.

The facts of *Gault* involved the police taking fifteen-year-old Gerald Gault and his friend into custody after a neighbor filed a verbal complaint alleging that the pair called her on the telephone and made lewd and indecent remarks to her. *Gault,* 387 U.S. at 4. Gerald at the time was already on probation for accompanying another juvenile who stole a wallet from a lady's purse. *Id.* When police picked Gerald up, they took him to a detention home. *Id.* Meanwhile, Gerald's parents, who were at work when their son was detained, did not discover his whereabouts until they searched the neighborhood later that evening. *Id.* They went to the detention home and were then notified of the allegations against Gerald, and that a hearing would be held the next afternoon. *Id.*

The Gaults were not served with a formal notice of the charges against Gerald until the day of the habeas corpus proceeding, some three months after the initial hearing. *Id.* The notice provided no factual information for the court action taken against Gerald and at the initial hearing, the neighbor who brought the complaint was not present, no transcript or recording was made of the hearing and Gerald was not represented by counsel. *Id.* at 5-6. The Court kept Gerald at the detention home following the initial hearing, and for three additional days, without providing a reason for the detention. *Id.* at 6. An officer then mailed a note to the Gaults stating that the delinquency hearing for Gerald would continue on a specified date. *Id.* During this later hearing, the juvenile court judge adjudicated Gerald "delinquent" based on the Arizona Adult Criminal Code section declaring one guilty of a misdemeanor when using vulgar or obscene language in the presence or hearing of a child or a woman. *Id.* at 8. The penalty for this violation for an adult was a $5 to $50 fine. *Id.* at 9. The juvenile court judge justified his adjudication against Gerald through a definition of delinquency in the code as "one who is habitually involved in immoral matters" and disturbing the peace. *Id.* Gerald's previous "immoral matter" was a juvenile referral two years prior regarding Gerald's possibly stealing a baseball glove and lying to police about it. *Id.* However, no hearing was held on the matter, and no accusation was made, as insufficient grounds existed to file a petition. *Id.* The juvenile court judge committed Gerald to State Industrial School until age 21. *Id.* at 8. Arizona law did not permit appeals in juvenile cases. *Id.* at 9. The Gaults filed a writ of habeas corpus, but the Superior Court and the Arizona Supreme Court denied the motion. *Id.*

Before the United States Supreme Court, the Gaults sought to invalidate the Arizona Juvenile Code on its face, or in its application, because it was contrary to the Due Process Clause of the Fourteenth Amendment. *Id.* at 10. It was argued that the Code violated the Fourteenth Amendment as a child was taken from his parents' custody and sent to an institution by a juvenile court judge, acting with unlimited and unbridled discretion to deny the child his basic rights of notice of the charges, right to counsel, right to confrontation and cross -examination, privilege against self-incrimination, right to a transcript of the proceedings and right to appellate review. *Id.* The Court held that a juvenile should retain all of the above rights, except the right to a transcript and appellate review. *Id.* at 33-34, 36, 55, 56. The juvenile did not possess a basic constitutional right to a recording of the proceedings nor appellate review, as this would place a burden on habeas corpus by forcing the appellate courts, as well as the juvenile judges, to reconstruct a record. *Id.* at 58.

40. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes,* 78 J. CRIM. L. & CRIMINOLOGY 471, 483 (1987). Feld states that:

> [d]espite the Supreme Court's reluctance to hasten the demise of the juvenile court in *McKeiver,* its earlier decisions in *Gault* and *Winship* imported the adversarial model and the primacy of legal guilt as a constitutional prerequisite to coercive intervention and drastically altered the form and function of the juvenile court. By emphasizing procedural regularity in the determination of criminal guilt as a prerequisite to a delinquency disposition, the Court altered the focus of the juvenile court from the Progressive's emphasis on the "real needs" of a child to proof of the commission of criminal acts.

Id.

41. *In re* Gault, 387 U.S. 1, 33-34 (1967). The Court described adequate and timely notice required for juveniles as "notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *Id.* at 33. Gerald Gault and his parents were deprived such notice as formal notice of the charges was not given to them until the initial hearing, which was a hearing on the merits in this case. *Id.* Gerald was held at a detention home after police picked him up, and it was not until later in the evening, after his parents returned home from work, that they searched for their son and discovered that he was in custody. *Id*. at 5. Gerald's mother and brother went to the detention home, and then learned of the incident and that a hearing was to be held the next afternoon. *Id.*

42. *Id*. at 36. The Court held that "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* The Court concluded that in situations where the child's freedom is restricted, the child and his parents have to be notified of the child's right to counsel or, if they are indigent, that an attorney will be appointed for them. *Id.* at 41. In this case, although Mrs. Gault testified that she knew she could have hired an

attorney for the juvenile hearing, the Court ruled this was not waiver of the right to counsel as it was necessary for the court to confront Mrs. Gault with her right to an attorney, her right to have an attorney appointed for her if they were indigent, and the consideration of whether or not she was waiving the right to counsel. *Id.* at 42.

43. *Id.* at 56. The Court held that without a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of delinquency and an order committing Gerald to a state institution for a maximum of six years. *Id.* No difference existed in affording juveniles these rights than in providing them to adults under the Constitution. *Id.* In the present case, the complainant, Mrs. Cook, was not present to be cross-examined by Gerald, nor did she speak to the juvenile judge at any time. *Id.*

44. *Id.* at 55. Gerald had admitted to the juvenile judge at the habeas corpus proceeding that he made some of the indecent remarks, but conflict existed as to just what Gerald admitted, because witnesses at the proceeding testified differently regarding what Gerald had confessed, and no record or transcript of the proceeding was taken. *Id.* at 43. Regarding the self-incrimination privilege, Justice Fortas emphasized that it means more than merely preventing the use of coerced and thus unreliable confessions. *Id.* at 47. Justice Fortas observed that, "one of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *Id.* He further held that the language of the Fifth and Fourteenth Amendments state that no person "shall be compelled in any criminal case to be a witness against himself," and juvenile delinquency proceedings may lead to state institutional commitment and thus could be determined criminal in nature. *Id.* at 50. Also, juvenile proceedings may lead to waiver to adult criminal courts. *Id.* at 50-51.

45. *In re* Gault, 387 U.S. 1, 21 (1967). "The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Id.* Justice Black, in his dissent, commented on the majority opinion by stating that "[t]his holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in this Nation." *Id.* at 60 (Black, J., dissenting). If this holding did not totally change the juvenile justice system, it at least clouded the distinctions between it and the adult system.

46. *Id.* at 13. It is suggested that the *Gault* Majority sought to formalize the juvenile court procedures in the adjudicatory delinquency phase without impacting upon the juvenile system's emphasis on individualized rehabilitation in other proceedings. *See* Rossum, *supra* note 14. Rossum states that the *Gault* Court failed to decide the most controversial issue in the case: "whether dispositions should be related to specific acts." *Id.* Ohio answered this question in State v. Watson, 547 N.E.2d 1181 (Ohio 1989) (holding a juvenile judge can consider the specific facts of a case in deciding whether or not to transfer the case to adult court). In 1994, Ohio codified this decision in Juv. R. 30(F)(6) (Baldwin 1995).

47. 397 U.S. 358 (1970). This case involved a twelve-year-old boy who stole $112.00 from a women's purse located in a locker. The petition charged Samuel Winship with delinquency, because if an adult had committed this act the charge of larceny would apply. *Id.* at 360. The New York Family Court judge admitted that proof beyond a reasonable doubt was lacking in the case, but held that such proof was not required by the Fourteenth Amendment and instead relied on the New York Family Court Act standard of preponderance of the evidence. *Id.* The Winships argued that the Fourteenth Amendment required proof beyond a reasonable doubt in juvenile delinquency adjudications involving confinement, but did not succeed. *Id.*

48. *Id.* at 368. The Court, per Justice Brennan, held that the reasonable doubt standard, like those constitutional rights enumerated in *Gault* , is required in an adjudicatory hearing where a child's liberty may be at stake. *Id.*

49. *Id.* at 365-66. The Court reiterated the position it stressed in *Gault* that:

> civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

In Re Gault*,* 387 U.S. 1, 36 (1967). Justice Brennan also believed, as stressed in *Gault*, that providing juveniles with the constitutional protection of proof beyond a reasonable doubt would not destroy the juvenile system's unique protections and aspects. *Winship*, 397 U.S. at 366.

50. *See* Rossum, *supra* note 14. The standards of procedure the Court required in these cases also negatively affected the juvenile system's goal of rehabilitation of the offender. *Id.* The decisions set forth a new way of looking at the juvenile. In most instances, the juvenile is no longer considered not responsible for his acts because he lacks the mental capacity required for the crime. *Id.* A shift away from offender-oriented treatment of the juvenile occurred after these cases and a growing trend toward focusing on the offense emerged. *Id.*

51. 421 U.S. 519 (1975). This case involved a petition against a seventeen-year-old boy, alleging that he committed an act with a deadly weapon, that if committed by an adult, would establish the crime of robbery. *Id.* The juvenile court conducted an adjudicatory hearing and, after hearing Jones and two prosecution witnesses, determined that the allegations against Jones were true. *Id.* at 522. At a later disposition hearing, the juvenile judge, after evaluating the probation officer's report and testimony on the case, declared Jones unfit for treatment under the juvenile system as he was unamenable to its care and treatment and ordered that the adult criminal court prosecute him. *Id.* at 524. Jones unsuccessfully argued that the Double Jeopardy Clause prevented trying him at the juvenile adjudicatory hearing and then trying him again in adult court. *Id.* The California

Superior Court convicted Jones of robbery and committed him to the California Youth Authority. *Id.* at 525.

52. *Id.* at 537. The *Breed* Majority held that prosecuting a juvenile in adult court for the same offense after a juvenile adjudicatory proceeding violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. *Id*. at 537-38.

> We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.

Id. at 537-38. This does not mean, however, that a state cannot gain "substantial" evidence that the juvenile committed the offense before deciding to transfer the juvenile. The state can do so as long as it is not done in an adjudicatory procedure. *Id.* at 538 n.18. Commentators note that, at this point, the Court believed that enough was proven to be wrong with the juvenile justice system warrant application of some of the constitutional protections guaranteed to adult criminal defendants. FRANK W. MILLER ET AL., THE JUVENILE JUSTICE PROCESS 468 (2d ed. 1976).

53. *Breed,* 421 U.S. at 529.

> We believe that it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Id. The Court compared the adjudicatory hearing to a criminal prosecution, noting little difference in the consequences between the two, as both produce strain on the individual, insecurity and anxiety, i.e., risks that the Double Jeopardy Clause strives to insulate from offenders. *Id.* at 530-31.

54. *Id.* at 537. Once again, it is stated that providing this constitutional requirement will not mitigate the juvenile system and its unique procedures and philosophy. *Id.* Justice Burger noted that most state courts had already required that transfer proceedings occur prior to the adjudicatory hearing, and those that did not had experienced problems with the procedures. *Id.* The only additional burden placed upon the juvenile court, as a result of this decision, would be duplication of some of the relevant evidence proven at the transfer proceeding to show unfitness if the juvenile court held a transfer hearing and rejected waiver to adult court. *Id.* at 539. The Court mitigates this burden by the fact that

those cases that are transferred will require no more of the juvenile court's energy or resources. *Id.*

55. 403 U.S. 528 (1970). This case involved consolidation of several cases. Joseph McKeiver, aged sixteen, was charged with robbery, larceny and receiving stolen goods, after participating with other juveniles in following three teens and taking twenty-five cents from them. At his adjudicatory hearing in juvenile court, an attorney represented Joseph and requested a jury trial, which the Family Court judge denied. *Id.* at 535. A second case involved Edward Terry, aged fifteen, who was charged with conspiracy and assault and battery of a police officer, after striking a police officer with a stick and his fists when the officer stopped a fight that Terry and his friends were watching. *Id.* at 535-36. His attorney's request for a jury trial was denied as well. *Id.* at 535. Another case consolidated involved 46 African-American children, ages eleven to fifteen, charged with willfully impeding traffic after they held a series of demonstrations in protest of school assignments and school consolidations. The Family Court in that case also denied the attorney's request for a jury trial. *Id.* at 537. The Supreme Court of Pennsylvania held that no right to a jury trial existed in juvenile court. *Id.* at 535-36.

56. *Id.* at 528. The Court decided this case in 1971, before the *Breed* case. It was thought that expansion of juvenile rights ended when the Court ruled on *McKeiver.* SENNA & SIEGEL, *supra* note 38, at 228. *Breed* represents continuing Court expansion of constitutional protections to juveniles on a case-by-case basis. *Id.*

57. *McKeiver*, 403 U.S. at 545. Justice Blackmun concluded that "Despite all of these disappointments [in the juvenile justice system], all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." *Id.* Many critics of this opinion believe that the Sixth Amendment right to a jury trial should extend to juveniles. *See* Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230 (1993) (making the argument that it is necessary to have not only a jury trial in the juvenile courts, but also a public jury trial). *See also* Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts* , 20 WM. MITCHELL L. REV. 835 (1994).

58. *McKeiver,* 403 U.S. at 550. Noting that what might appear down the road may be a merger of the juvenile system into the adult criminal system, Justice Blackmun did not give affirmance to such an action for this case. *Id.* at 551.

59. SENNA & SIEGEL, *supra* note 38, at 329. The *McKeiver* Court failed to consider "the possible advantages due to increased formality in juvenile proceedings; whether its earlier decision in *Gault* had effectively foreclosed renewed concern with flexibility and informality; nor why formality at the adjudication stage was incompatible with therapeutic dispositions." Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 830 (1988). Feld notes that in *McKeiver*, the Court was hesitant to expedite the destruction of the juvenile system, even though the *Gault* and *Winship* decisions already began the

juvenile court's change in procedure and substance. *Id.* at 831. Although holding that juveniles who requested a jury trial were not constitutionally entitled to one, the Court left the decision to allow jury trials in juvenile courts up to the states. CHAMPION & MAYS, *supra* note 8, at 130. As a result, about one-fourth of the states now have legislation allowing jury trials in juvenile courts. *Id.*

60. CHAMPION & MAYS, *supra* note 8, at 135. In fact, 83% of Americans believe that two and three-time juvenile offenders should receive sentences equal to adult offenders, and many believe that juveniles who commit murder should receive the death penalty. Patricia Edmonds, *To Some, Ultimate Penalty is Ageless*, USA Today , Sept. 28, 1994, at 11A. Some critics even support total abolition of the juvenile court system. *See* Janet E. Ainsworth, *Re-imagining Childhood and Reconstructuring the Legal Order: The Case for Abolishing the Juvenile Court* , 69 N.C. L. REV. 1083 (1991). Ainsworth suggests that changing perceptions of childhood in the late twentieth century have "undermine[d] the ideological legitimacy of a separate juvenile court system." *Id.* at 1084. Other opponents to the juvenile justice system contend that because minors participate in many illegal adult activities, they should be held accountable for their actions. *See* Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability* , 21 OHIO N.C. L. REV. 481 (1994).

61. Although some believe that this combination of constitutional guarantees in the parent -like atmosphere of the juvenile court gives a great advantage to juveniles, data suggests the contrary. As Justice Fortas, in *Kent v. United States* , recognized: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. 541, 556 (1966). Even though the safeguards in juvenile court resemble the criminal courts' procedural protections, "in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults." Feld, *supra* note 22, at 692. Feld argues that a separate juvenile court is no longer necessary because of the merging of the adult protections into the juvenile system, thereby eliminating differences in the approach of the two systems to its offenders. *Id*. at 693.

62. Between 1983 and 1992, juveniles contributed to a 25% increase in murders, forcible rapes and robberies. Howard N. Snyder, OJJDP, U.S. Dept. of Justice, *Are Juveniles Driving the Violent Crime Trends?* (Fact Sheet No. 16, May 1994). The Honorable George Bundy Smith, Associate Judge for the Court of Appeals of New York, and Justice Gloria M. Dabiri, of the Supreme Court of the State of New York, have noted that juveniles are committing more serious crimes, and at a much younger age. George Bundy Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents* , 3 J. L. & POL'Y 347, 360 (1995). In this article, the authors present the debate of the arguments between those who propose treating juveniles as adults in the adult system and those who support the rehabilitative approach of the juvenile court system for all juveniles. *Id.* at 348.

63. CHAMPION & MAYS, *supra* note 8, at 135. Despite the increased use of transfer, the authors conclude that it is merely a facade, as leniency for the juvenile appears at all stages in the adult court. *Id.* The transfer merely gives "the appearance of greater toughness in dealing with juvenile offenders." *Id.* Others believe that adult courts are just as tough on juvenile transferees as on adult offenders. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995). The judge considers the age of the transferee, but it does not play a significant role in the judge's sentencing decision.

64. Prescott v. State, 19 Ohio St. 184 (1869) (acknowledging the philosophy with regards to the state's power to commit juveniles to reform schools). Prosecutor McCollum favored the reformatory laws that allowed the juvenile system to confine the juvenile offender to a reformatory for a period beyond the age of twenty-one. If a longer sentence was necessary to rehabilitate the juvenile offender, the juvenile system could maintain the youth until the age of twenty-five. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995).

65. 95 Ohio Laws 785 (1902).

66. KURTZ & GIANELLI, *supra* note 11, at 22. *See also* 99 Ohio Laws 192 (1908); 98 Ohio Laws 314 (1906); 97 Ohio Laws 561 (1904). This system stayed intact until Ohio adopted the Standard Juvenile Court Act in 1937. KURTZ & GIANELLI , *supra* note 11, at 22.

67. The following cases held that the constitutional guarantees do not apply in a juvenile court setting: Cope v. Campbell, 196 N.E.2d 457 (Ohio 1964) (right to representation by counsel), *overruled by In re* Agler, 249 N.E.2d 808 (Ohio 1969); *In re* Darnell, 182 N.E.2d 321 (Ohio 1962) (right to trial by jury); *In re* State v. Shardell, 153 N.E.2d 510 (Ohio Ct. App. 1958) (right to protection against self-incrimination); State *ex rel* Peaks v. Allaman, 115 N.E.2d 849 (Ohio Misc. 1952) (right to bail). These rights did not apply to juvenile court procedures for the same reasons traditionally contended, because the juvenile system acts as a parent to the child, and is unique in nature as it provides for rehabilitation of the child and is not criminal in nature. KURTZ & GIANELLI, *supra* note 11, at 22.

68. KURTZ & GIANELLI, *supra* note 11, at 24. This conferred on the Court only the ability to create procedural rules, not substantive rules. However, the line between procedure and substance is thin, and the authors suggest that distinguishing between the two depends on the context in which the words are used. *Id.* Article IV, Section 5(B) of the Ohio Constitution provides that "[t]he Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." OHIO CONST., art. IV, § 5(B). With this authority granted to the Ohio Supreme Court, it began to create the Juvenile Rules.

69. Juv. R. 47(A) (Baldwin 1995) (providing that the Juvenile Rules took effect on July 1, 1972).

70. KURTZ & GIANELLI, *supra* note 11, at 25. The authors suggest that this revision ignored the intention that the Juvenile Rules and the Ohio Revised Code section relating to juveniles govern different legal ideas. *Id.* at 26.

71. No dissension exists between the statute and the rule, even though provisions found in one are not always found in the other. In fact, the Ohio Supreme Court has held that the two should be construed together. *See* State v. Watson, 547 N.E.2d 1181 (Ohio 1989).

72. OHIO REV. CODE ANN. § 2151.26(A)(1) (Baldwin 1995) (see *infra* note 77 for text); Juv. R. 30(D) (Baldwin 1995) (see *infra* note 77 for text). Only Revised Code § 2151.26 recognizes mandatory transfers. OHIO REV. CODE ANN . § 2151.26(A)(2) (Baldwin 1995) (see *infra* note 77 for text).

73. OHIO REV. CODE ANN. § 2151.26(A)(1)(c)(i), (ii) (Baldwin 1995) (*infra* note 77); Juv. R. 30(D) (Baldwin 1995) (*infra* note 77). Discretionary transfers are more common, while mandatory transfers usually indicate a more serious crime, such as murder or aggravated murder. In determining the safety of the community, the juvenile court judge may consider the nature of the offense, the existence of aggravating circumstances, and the extent of any apparent pattern of anti-social conduct. State v. Oviedo, 450 N.E.2d 700, 705 (Ohio Ct. App. 1982) ("In the absence of specific guidelines in regard to this second factor [safety of the community] it is appropriate for the court to consider the nature of this offense, the existence of aggravating circumstances, and the extent of any apparent pattern of anti-social conduct."). *See also* State v. Carter, 272 N.E.2d 119 (Ohio 1971) (In transfer order to adult court, the juvenile judge cited aggravated character of the offense of armed robbery.); State v. Harris, No. 81AP-299, 1981 WL 3505 (Ohio Ct. App., 10th Dist., Oct. 6, 1981) (court may consider the nature of the offense, which here included aggravated kidnapping and rape).

74. OHIO REV. CODE ANN. § 2151.26(B)(1) (Baldwin 1995). This section provides:

> The Court, when determining whether to transfer a case pursuant to division (A)(1) of this section, shall determine if the victim of the delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act and whether the act alleged, if actually committed, would be an offense of violence, as defined in section 2901.01 of the Revised Code, if committed by an adult. Regardless of whether or not the child knew the age of the victim, if the court determines that the victim was sixty-five years of age or older or permanently and totally disabled, that fact shall be considered by the court in favor of transfer, but shall not control the decision of the court. Additionally, if the court determines that the act alleged, if actually committed, would be an offense of violence, as defined in section 2901.01 of the Revised Code, if committed by an adult, that fact shall be

> considered by the court in favor of transfer, but shall not control the decision of the court.

Id.

Revised Code § 2901.01(I) defines an offense of violence as:

> (1) A violation of sections 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.34, 2921.35, 2923.12 and 2923.13 of the Revised Code;
>
> (2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section listed in division (I) (1) of this section;
>
> (3) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;
>
> (4) A conspiracy or attempt to commit, or complicity in committing, any offense under division (I) (1), (2), or (3) of this section.

OHIO REV. CODE ANN. § 2901.01(I) (Baldwin 1995).

75. *See supra* notes 31-38 and accompanying text (material on *Kent v. United States)*. For the Ohio statute and juvenile rule containing similar criteria to those enumerated in *Kent*, see OHIO REV. CODE ANN. § 2151.26(A) and (B) (Baldwin 1995), *infra* notes 77 and 74 and accompanying text; Juv. R. 30(D) and (F) (Baldwin 1995), *infra* notes 77 and 78 and accompanying text.

For material on *In Re Gault,* see *supra* notes 39-46 and accompanying text. OHIO REV. CODE ANN. § 2125.26(D) (Baldwin 1995) provides the right to notice:

> Notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) of this section shall be given to the child's parents, guardian, or other custodian and his counsel at least three days prior to the hearing.

Id. Juv. R. 30(C) (Baldwin 1995) also acknowledges the right:

> Notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) or (B) of this rule shall be given to the state, the child's parents, guardian, or other custodian and the child's counsel at least

> three days prior to the hearing, unless written notice has been waived on the record.

Id. For right to counsel, *see* OHIO REV. CODE ANN. § 2151.352 (Baldwin 1995), which in relevant part provides:

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120 of the Revised Code.

Id. Although no Ohio statute or juvenile rule directly states the confrontational rights of juveniles, it is implied from the negative right of the juvenile offender to be excused from attendance at the hearing in Revised Code § 2151.35(A) and Juvenile Rule 27(A). KURTZ & GIANELLI, *supra* note 11, at 193. Although no statutory or juvenile rule provision discusses or grants the right to the self-incrimination privileges, an Ohio appeals court held that incriminating matters or statements made by a juvenile in relation to submission to a mental examination could not be used against him for any procedure other than the examination. State *ex rel* a Juvenile v. Hoose*,* 539 N.E.2d 704 (Ohio Ct. App. 1988).

See supra notes 46-50 and accompanying text (information relating to *In Re Winship).* Ohio sets out a "reasonable grounds to believe" standard with respect to amenability to rehabilitation and the safety of the community. *See* OHIO REV. CODE ANN. § 2151.26(A)(1)(c) (Baldwin 1995) (*infra* note 77 and accompanying text).

See supra notes 57-54 and accompanying text (regarding *Breed v. Jones* and the right of protection of juveniles against double jeopardy in transfer proceedings held after a child already found delinquent at the adjudicatory hearing). Ohio lacks a statute and juvenile rule directly providing such a protection, but Ohio appellate courts have ruled that the double jeopardy protection applies in certain juvenile procedures. *See* Sims v. Engle, 619 F.2d 598 (6th Cir. 1980), *cert. denied,* 450 U.S. 936 (1981) (holding that delinquency finding after transfer hearing was violation of double jeopardy protection). The statute allowing such procedure was amended shortly thereafter. *See* KURTZ & GIANELLI, *supra* note 11, at 163.

76. Ohio statutes and juvenile rules are in agreement with the decision in *McKeiver v. Pennsylvania* that juveniles are not entitled to a jury trial. For information regarding *McKeiver,* see *supra* notes 55-59 and accompanying text. *See also* OHIO REV. CODE ANN. § 2151.35(A) and Juv. R. 27(A) (Baldwin 1995) (both providing in relevant part, "[t]he court shall hear and determine all cases of children without a jury."). Judge Saundra J. Robinson of the Summit County Juvenile Court agrees that juveniles should not be afforded a constitutional right to a jury trial as the juvenile process is not considered criminal, but treatment-oriented. She also believes that the juvenile courts are ill-equipped to handle jury trials, as more money, judges, magistrates and other personnel

would be needed. Interview with Judge Saundra J. Robinson, Summit County Juvenile Court, Akron, OH (Sept. 27, 1995).

77. KURTZ & GIANELLI, *supra* note 11, at 147. At this hearing, the juvenile court judge determines if probable cause exists to believe that the child committed a felony, and that the child is the person who committed the felony. *Id.* at 140-41. Both OHIO REV. CODE ANN. § 2151.26(A) (Baldwin 1995), and Juv. R. 30(A) and (D) (Baldwin 1995), address this hearing. OHIO REV. CODE ANN. § 2151.26 (A) provides:

> (A) (1) Except as provided in division (A) (2) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:
>
> > (a) The child was fifteen years of age or older at the time of the conduct charged;
> >
> > (b) There is probable cause to believe that the child committed the act alleged;
> >
> > (c) After an investigation, including a mental and physical examination of the child made by a public or private agency or a person qualified to make the examination, and after consideration of all relevant information and factors, including any fact required to be considered by division (B) (2) of this section, that there are reasonable grounds to believe that:
> >
> > > (i) He is not amenable to care or rehabilitation or further care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
> > >
> > > (ii) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.

Id. Juv. R. 30(A) (Baldwin 1995) provides:

> In any proceeding where the court may transfer a child fifteen or more years of age for prosecution as an adult, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act alleged would be a felony if committed by an adult. The hearing may be upon motion of the court, the prosecuting attorney, or the child.

Id. Juv. R. 30(D) (Baldwin 1995) states:

> The proceedings may be transferred if the court finds there are reasonable grounds to believe both of the following:
>
> (1) The child is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
>
> (2) The safety of the community may require that the child be placed under legal restraint for a period extending beyond the child's majority.

Id.

If probable cause is determined to exist, the procedure is continued until a full investigation is conducted. *See* OHIO REV. CODE ANN . § 2151.26(A)(1)(c) (Baldwin 1995). Juv. R. 30(B) (Baldwin 1995) also provides for an investigation:

> If the court finds probable cause, it shall continue the proceedings for full investigation. The investigation shall include a mental and physical examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, a hearing shall be held to determine whether to transfer jurisdiction.

In both the statute and the rule, if the minor is under the age of fifteen, the child must remain in the juvenile system. If fifteen or older, the child may be transferred to the criminal court. If the child had previously committed aggravated murder or murder, and is alleged to have done so again, the judge must transfer the case to criminal court, regardless of the age of the juvenile. OHIO REV. CODE ANN . § 2151.26(A)(2) (Baldwin 1995). Further, discretionary transfer can only occur if the complaint (petition) alleged that the juvenile committed an act that would be a felony if committed by an adult. Ohio Rev. Code Ann. § 2151.26(A) (Baldwin 1995); Juv. R. 30(A) (Baldwin 1995).

78. The juvenile judge at the second hearing evaluates the juvenile's amenability to rehabilitation within the juvenile system. OHIO REV. CODE ANN . § 2151.26(A)(1)(c)(i) (Baldwin 1995). If the juvenile is considered amenable, then a adjudicatory hearing is held on the merits of the case, which is similar to the adult criminal trial. Juv. R. 30(E) (Baldwin 1995) provides that "[i]f the court retains jurisdiction, it shall set the proceedings for hearing on the merits." *Id.*

Mixed opinions exist as to whether the same judge in the amenability hearing can hear the merits in the subsequent procedure. Some argue that it is unfair for the same judge to conduct the adjudicatory hearing, while others contend that no partiality exists. *See* INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION STANDARDS RELATING TO TRANSFER BETWEEN COURTS 49 (1980).

Juv. R. 30(F) (Baldwin 1995) sets forth the factors that the juvenile judge uses in evaluating amenability to rehabilitation:

> In determining whether the child is amenable to the treatment or rehabilitative processes available to the juvenile court, the court shall consider the following relevant circumstances;
>
> > (1) The child's age and mental and physical condition;
> >
> > (2) The child's prior juvenile record;
> >
> > (3) Efforts previously made to treat or rehabilitate the child;
> >
> > (4) The child's family environment;
> >
> > (5) The child's school record;
> >
> > (6) The specific facts relating to the offense for which probable cause was found, to the extent relevant to the child's physical or mental condition.

Id.

79. OHIO REV. CODE ANN . § 2151.26(A)(2) (Baldwin 1995) provides:

> After a complaint has been filed alleging that a child is a delinquent child for committing an act that would constitute aggravated murder or murder if committed by an adult, the court at a hearing shall transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, if the court determines at the hearing that both of the following apply:
>
> > (a) There is probable cause to believe that the child committed the alleged act.
> >
> > (b) The child previously has been adjudicated a delinquent child for the commission of an act that would constitute aggravated murder or murder if committed by an adult.

Id.

It is assumed by the legislature in creating the crimes requiring mandatory transfers that the juvenile system cannot impose punishments that are severe enough. CHAMPION & MAYS, *supra* note 8, at 70. By placing the limits on the juvenile courts, legislatures have responded to public concern and attitudes regarding serious juvenile offenders. *Id.* In fact, many Americans believe that juveniles should receive adult penalties if a court convicts them two or more times. *See* Edmonds, *supra* note 60.

80. Juv. R. 30(F) (Baldwin 1995). In *State v. Douglas* , a sixteen-year-old male was charged with the crimes of rape and robbery, after forcing an eleven-year-old boy to have oral and anal sex with him and stealing the boy's jacket and calculator. 485 N.E.2d 711, 711 (Ohio 1985). The juvenile court bound Douglas over to adult court without specifically addressing in its journal entry its written findings regarding the factors of Juvenile Rule 30(E) (now currently (F)). *Id.* at 712. The Ohio Supreme Court held that the court must consider each of the factors in Juvenile Rule 30(E) (now currently (F)), but it need not make written findings as to the factors as long as credible evidence exists to support the transfer. *Id*. The court also held that each and every one of the factors need not be resolved against the juvenile before transferring jurisdiction. *Id.* at 713. "Although the better practice would be to address each factor, as long as sufficient, credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion." *Id.* at 712.

Before *State v. Watson,* Juvenile Rule 30(F) (then (E)) contained only five factors the courts considered when determining amenability to treatment. 547 N.E.2d 1181, 1184 (Ohio 1989). As a result of *Watson*, the rule was amended in 1994 to include a sixth factor; "the specific facts relating to the offense for which probable cause was found, to the extent relevant to the child's physical or mental condition." Juv. R. 30(F)(6) (Baldwin 1995). For text of preceding five factors as well as the added factor considered to determine amenability to juvenile rehabilitation, see *supra* note 67.

In *Watson*, a fifteen-year-old boy was convicted in criminal court for involuntary manslaughter and aggravated murder, after beating a boy in the head and body with a baseball bat and his fists. 547 N.E.2d at 1182-83. The juvenile court relinquished its jurisdiction on the basis of unamenability to juvenile treatment, even though the juvenile had no prior record, Anthony Watson's teachers testified that he caused no major discipline problems in school and was an average student, and relatives testified to his good character. *Id.* at 1183. Anthony argued that the juvenile court erred in consideration of the factor of safety of the community in determining his unamenability to juvenile treatment. He contended that the court is limited to considering only those factors enumerated in Juvenile Rule 30(F). *Id*. at 1183-84. The Ohio Supreme Court disagreed and held that the Rule requires evaluation of all the listed factors, but does not proscribe consideration of other relevant factors not enumerated. *Id.* at 1184. The court also held that the seriousness of the act is important in determining the child's amenability within the juvenile system. A juvenile who commits a major felony may need more time for rehabilitation than other juveniles, because inadequate time may exist to rehabilitate a juvenile offender within the juvenile system. Further, the nature of the act may be determinative of the child's mental health. *Id.* The Court concluded that "[g]enerally the greater the culpability of the offense, the less amenable will the juvenile be to rehabilitation." *Id.*

81. In *State v. Carmichael,* the Ohio Supreme Court acknowledged that the juvenile court should have "considerable latitude to determine whether it should retain jurisdiction." 298 N.E.2d 568, 569 (Ohio 1973), *cert. denied*, 414 U.S. 1161 (1974). The court also held that the investigation to determine amenability "is not required to show that the child

cannot be rehabilitated as a juvenile but only that there are reasonable grounds to believe that he cannot be rehabilitated." *Id.* at 572.

82. Feld, *supra* note 38, at 15 (commenting "[j]udicial waiver statutes, couched in terms of amenability to treatment or dangerousness, are effectively broad, standardless grants of sentencing discretion characteristic of the individualized, offender-oriented dispositional statutes of the juvenile court."). Another commentator criticizes: "[t]he substantive standards are highly subjective, and the large number of factors that may be taken into consideration provides ample opportunity for selection and emphasis in discretionary decisions that shape the outcome of individual cases." Franklin Zimring, *Notes Toward a Jurisprudence of Waiver*, *in* READINGS IN PUBLIC POLICY 169, 193 (John Hall et al. eds., 1981) (compilation of articles regarding prosecuting juveniles in adult court). By emphasizing one criteria over the other and giving it more weight, juvenile judges can usually justify the decision made to transfer or not to transfer. TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, TWENTIETH CENTURY FUND, CONFRONTING YOUTH CRIME 56 (1978).

Judge Saundra Robinson considers the totality of the circumstances as it is necessary to protect all juvenile offenders, especially first-time offenders. She states that the age of the juvenile, the prior delinquent history, the family support and the nature of the offense are important factors to consider. Interview with Judge Saundra J. Robinson, Summit County Juvenile Court, Akron, OH (Sept. 27, 1995). Prosecutor Donna McCollum agrees with Judge Robinson's evaluation, giving most weight to the age, prior delinquent history and seriousness of the offense. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995).

83. State v. Watson*,* 547 N.E.2d 1181, 1184 (Ohio 1989). The Court rejected the argument that the juvenile judge could consider only the factors enumerated in the law: "[t]here is no requirement that each, or any, or the five [now 6] factors in Rule 30 (E) [currently (F)] be resolved against the juvenile so long as the totality of the evidence supports a finding that the juvenile is not amenable to treatment." *Id.* The Court further provided:

> Rule 30 calls for a broad assessment of individual circumstances. Mechanical application of a rigidly defined test would not serve the purposes of the public or the juvenile. Further, reduction of the bindover decision to a formula would constrain desirable judicial discretion. We agree with appellant that Rule 30(E) requires consideration of all the listed factors, but we discern nothing in the rule, or in the policy it serves, which prohibits consideration of other relevant factors.

Id.

84. OHIO REV. CODE ANN . § 2151.26(F) (Baldwin 1995) provides:

> Upon such transfer, the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for any disposition that the court is authorized to make for a like act committed by an adult.

Id. Juv. R. 30(H) (Baldwin 1995) also recognizes that the judge's reasons for transfer must be stated by providing that "[t]he order of transfer shall state the reasons for transfer." *Id.*

85. State v. Douglas, 485 N.E.2d 711, 712 (Ohio 1985). The Ohio Supreme Court held:

> Neither R.C. 2151.26 nor Juv. R. 30 requires the juvenile court to make written findings as to the five [now 6] factors listed in Juvenile Rule 30 (E) [current (F)]. The rule simply requires the court to consider these factors in making its determination on the amenability issue. Although the better practice would be to address each factor, as long as sufficient, credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion.

Id.

86. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1009 (1995). Feld, Centennial Professor of Law at the University of Minnesota, notes that "[t]he inherent subjectivity in waiver criteria permits a variety of inequalities and disparities to occur without any effective check," and suggests that "[e]mpirical analyses provide compelling evidence that judges apply waiver statutes in an arbitrary, capricious and discriminatory manner." *Id.* In Feld's latest article, he discusses the Minnesota Juvenile Justice Task Force, reviewing its operation, purposes, recommendations and legislative changes. He critiques, supports and supplies insightful research into the transfer decision and its uselessness, among many other juvenile law topics. *See id*. Feld proposes the elimination of juvenile courts altogether, but believes that the court at sentencing should consider the age of the offender. He calls it "short sentences for short people." Mark Curriden, *Hard Times for Bad Kids*, 81 A.B.A.J. 69 (1995) (discussing the "get tough" measures to help curb increasingly serious juvenile crime, with particular focus on Minnesota and its revamped juvenile justice system).

87. Feld, *supra* note 38, at 46. One need not look further than our own state of Ohio to see the abuse of such discretion. In *In the Matter of: Aaron Smith* , Aaron, a seventeen-year-old Michigan resident, was charged in Ohio with knowing possession of cocaine, and felonious assault. No. L-91-090, 1991 WL 270418 (Ohio Ct. App., 6th Dist., Dec. 20, 1991). The evidence presented at the amenability hearing consisted of a psychologist's testimony that Aaron was amenable to juvenile treatment and had a good attitude. The psychologist testified that Aaron desired to cooperate and try counseling. She believed

that a severe learning disability explained Aaron's poor attendance at school, and that it could be treated within the juvenile system. *Id.* at *3. Aaron's church pastor offered to supervise him in the community, and relatives and former employers wrote letters of Aaron's loyalty and reliability. *Id.* A forensic psychologist was inconclusive as to whether Aaron was amenable within the juvenile system, but concluded that the seriousness of the offense warranted transferring the case to adult court. Also, she believed Aaron to be a youth under another name whom the juvenile system failed to rehabilitate. *Id.* at *4. The Lucas County Court of Appeals ordered transfer of Aaron to the criminal court and justified its order on the basis that he had not attended school for the previous two years. Other factors determining transfer included the seriousness of the crime and the fact that Michigan law, where Aaron was a resident, would consider him an adult. *Id.* The Lucas County Court of Appeals ruled that "although some of the evidence would have justified a contrary decision, we will not second guess the juvenile court's discretion in such matters." *Id.* at *4. Here, overwhelming evidence existed favoring amenability within the juvenile system. But despite that evidence and the judge's acknowledgment that the case could have gone either way, Aaron lost an opportunity for rehabilitation because the juvenile judge decided he should not be in the juvenile justice system.

88. *See* Feld, *supra* note 59, at 492. Feld notes, "[t]he empirical reality is that judges cannot administer these discretionary statutes on a consistent, evenhanded basis. Within a single jurisdiction, waiver statutes are inconsistently interpreted and applied from county to county and court to court." *Id.* How can the juvenile justice system's purpose and aims be met when such inconsistent applications exist?

89. *See* Rossum, *supra* note 14. In Ohio, the juvenile court judge has the discretion to invoke a number of dispositions if a child is not transferred to adult court, but retained in juvenile court. The judge may place the child on probation, OHIO REV. CODE ANN. § 2151.355(A)(2) (Baldwin 1995); commit the child to a county or private facility, such as a school or camp operated by the county or a private agency, OHIO REV. CODE ANN. § 2151.355(A)(3) (Baldwin 1995); commit the juvenile to the Ohio Department of Youth Services for institutionalization, OHIO REV. CODE ANN. § 2151.355(A)(4) (Baldwin 1995); impose a fine on the juvenile, OHIO REV. CODE ANN. § 2151.355(A)(7) (Baldwin 1995); order the child to pay restitution for property damage, OHIO REV. CODE ANN. § 2151.355(A)(8) (Baldwin 1995); suspend or revoke a driving permit or driver's license from the child, OHIO REV. CODE ANN. § 2151.355(A)(9) (Baldwin 1995); impose electronic monitoring on the child, OHIO REV. CODE ANN. § 2151.355(A)(10) (Baldwin 1995); and make any further order upon the child that is proper, except placing the juvenile in a facility with adult offenders, OHIO REV. CODE ANN. § 2151.355(A)(11) (Baldwin 1995).

90. Feld , *supra* note 59, at 486 (acknowledging that in the adult system, the "just desserts" philosophy has replaced rehabilitative efforts).

91. OHIO REV. CODE ANN . § 2151.311(C)(2) (Baldwin 1995) provides:

> If a child has been transferred to an adult court for prosecution for the alleged commission of a criminal offense, the child is convicted of a criminal offense, and sentence is imposed upon the child subsequent to the conviction, the child, during the period of time that he is subject to that sentence and for any action related to that sentence, may be held in a state penal institution, reformatory institution, or other place where an adult convicted of crime, under arrest, or charged with crime is held.

Id. Juveniles incarcerated in adult facilities are victimized more often that those who return to juvenile facilities. Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 1-14 (1989). In addition, juveniles have more difficulties in adjusting to adult facilities, as evidenced by a study of juveniles incarcerated in Texas Department of Corrections' adult facilities, where juvenile inmates were twice as likely as the adult population to be problem inmates. Marilyn D. McShane and Frank P. Williams III, *The Prison Adjustment of Juvenile Offenders*, 35 CRIME AND DELINQ. 254-69 (1989).

92. Boyce, *supra* note 17, at 995. Incarceration in an adult facility may increase a juvenile's violent tendencies upon return to society, if they were exposed to prison violence. Paul Marcotte, *Criminal Kids*, 76 A.B.A.J. 61, 65 (1990).

93. *See* Elaine R. Jones, *The Failure of the "Get Tough" Crime Policy*, 20 U. DAYTON L. REV. 803 (1995) (noting that as a result of the "Get Tough" policy of recent years in America, all we have to show for it is a growth in the rate of violent crimes by almost thirty-three percent between 1982 and 1991).

94. *1,133,000 American Prisoners by 1994,* OVERCROWDED TIMES, May 1990, at 1. In 1980, only approximately 330,000 people in the United States were incarcerated. In 1972, only around 196,000 inmates comprised the prison population in the United States. *See* Tan C. Proband, *48,334 More Prisoners in 1991,* OVERCROWDED TIMES, Aug. 1992, at 1.

95. Today experts estimate that over $20 billion dollars each year is spent on incarceration. *See* Jones, *supra* note 93. Building more prisons to house juvenile and adult offenders is not the answer, as evidenced by the past 10-15 years. Incarceration serves the purpose of incapacitation, but these individuals return to society armed with the knowledge and attitudes taught and shown them in prison. *Id.*

96. *Id.* The United States has a growth rate of prison population that is ten times greater than that of the general population. Michael N. Castle, *Intermediate Sanctions and Public Opinion*, OVERCROWDED TIMES , May 1991, at 13.

97. The National Council on Crime and Delinquency made this estimation. This figure is three-and-a-half times more than the prison population in 1980, when 330,000 individuals were in prison. Jones, *supra* note 93.

98. Marcotte, *supra* note 92, at 65.

99. *See* Ainsworth, *supra* note 60, at 1118. Ainsworth argues that:

> Once the imagined nature of childhood changed and the child-adult dichotomy blurred, however, the ideological justification for a separate juvenile jurisprudence evaporated. With its philosophical underpinnings no longer consonant with the current social construction of childhood, the juvenile court now lacks a rationale for its continued existence other than sheer institutional merit.

Id. She believes that allowing juveniles to be tried in the adult courts will better protect them, as all of the constitutional guarantees denied them in juvenile court, such as a jury trial and record of the proceedings, will apply. *Id.* at 1121-30.

Feld argues for abolition of the juvenile justice system as well. *See* Feld, *supra* note 86; Curriden, *supra* note 86. Feld sees the modern juvenile court, after applying the constitutional guarantees afforded adults to juveniles, as nothing more than "scaled-down, second-class criminal courts for young people." Feld, *supra* note 83, at 966.

Other opponents argue for abandonment of the juvenile system because juveniles are scared of the adult system, which may deter future criminality by the young offenders. Randall W. Besta & Paul J. Wintemute, *Young Offenders in Adult Court: Are We Moving in the Right Direction?,* 30 CRIM. L.Q. 476, 480-81 (1988). The authors recommend trying juveniles in the adult system, but impose sentences to juvenile facilities until the juvenile reaches the age of majority. *Id.* at 481. Regarding the effect of the adult court on the juvenile, one study confirmed that juveniles are afraid of adult court. *See* Barry Glassner et al., *A Note on the Deterrent Effect of Juvenile vs. Adult Jurisdiction*, 31 SOCIAL PROBLEMS1219 (1983). Data concluded that juveniles quit committing crimes at age 16, under the mistaken belief that that is when they can go to jail. *Id.* Further, data showed that those juveniles 16 years and older found younger children to commit crimes for them because they felt "too old" to commit them themselves, obviously believing that adult punishment could ensue. *Id.*

100. Proponents for the continuation of the juvenile system agree that reforms are necessary, but total abolition is not in the best interest of the children. Further, trying all juveniles in adult courts would have devastating effects on them, and the adult courts would not consider the juvenile's age when imposing a sentence. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS . L. EV. 163, 165-66 (1993). *But cf.* Feld, *supra* note 59, at 500-01 (arguing that when the juvenile judge transfers the child to adult court for more stringent punishment, the criminal courts usually respond by imposing more lenient sentences than the juvenile court would and usually treat most juveniles in the adult system as first-time offenders). Local juvenile officials disagree with Feld's assertion that youth offenders receive more lenient sentences based on age. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995). In all of

cases transferred from juvenile court to criminal court, the judge did not give leniency to the juvenile because of his age. In fact, most juveniles bound over to criminal court received substantial sentences, some as long as forty years. *Id.*

Other proponents argue that education is the key for deterring young offenders from a life of crime and association with the juvenile system. Bruce I. Wolford & LaDonna L. Koebel, *Reform Education to Reduce Juvenile Delinquency* , 9 CRIM. JUST. 2, 3 (1995). McCollum advocates preventive education and programming for children and early offenders. The programs in the juvenile system now are targeted at unruly first-time offenders and do not work on the older, more experienced, repeat offenders. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995).

101. Feld, *supra* note 86, at 1013 (suggesting that "[r]ather than relying on judicial discretion, the legislature should propound more objective waiver criteria to integrate juvenile and criminal court sentencing objectives, and to reduce the gap in intervention when youths make the transition between the two systems."). Feld recognizes that "Adolescence is a developmental continuum, and young people are not irresponsible children one day and responsible adults the next," *id.* at 1011, but nonetheless proposes abandoning the juvenile system altogether. *See* Curriden, *supra* note 86, at 69. It appears to be juvenile justice professionals themselves who vehemently oppose any effort to limit their discretion. *See* Rossum, *supra* note 14. Dr. Rossum, and Christopher Manfredi of McGill University, conducted a national survey regarding the juvenile crime problem and the juvenile system's handling of the problem. *See* RALPH A. ROSSUM ET AL., JUVENILE JUSTICE REFORM: A MODEL FOR THE STATES 113, 124-62 (1987). Of the 8,355 criminal justice professionals responding, most believed that juvenile crime is a serious problem and that the system handles the problem ineffectively. However, that same majority opposed change in the system, and supported continuance of the juvenile court's informality and discretionary power. *Id.* at 157-60. Dr. Rossum concludes that:

> the respondents are willing to accept juvenile courts that are more offense-oriented, so long as their own discretion is preserved. Put in the least-flattering light, they are more willing to hold juveniles responsible for their acts than they are to hold themselves accountable for what they are doing to these juveniles.

Rossum, *supra* note 14.

102. *See supra* notes 93-97 and accompanying text for information relating to the increase in adult crime rates even though stricter policies and sentences have been instituted. The juvenile crime rate is not reduced by increased transfers to the adult system either, as Feld indicates in *supra* note 59, at 515-16 (noting that increased certainty of adult punishment of juveniles finds no decline in juvenile crime arrests).

103. Juvenile Judge Saundra J. Robinson believes that her juvenile court is meeting its aim. She stresses that the difference between the juvenile justice system and the adult

system is that the juvenile system treats the juvenile as a child needing help, not as a criminal. Justice Sandra Day O'Connor supports Judge Robinson's assessment. Juvenile proceedings, in contrast to adult proceedings, have traditionally aspired to be "intimate, informal [and] protective." One reason for the traditional informality of juvenile proceedings is that the focus of sentencing is on treatment, not punishment. The presumption is that juveniles are still teachable and not yet "hardened criminals." United States v. R.L.C., 112 S. Ct 1329, 1343 (1992) (O'Connor, J., dissenting) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971)).

Judge Robinson believes that discretion for the juvenile judge is absolutely necessary for the juvenile judge to serve the juvenile system's aim. She believes that most juveniles are guilty of "aggravated stupidity," meaning that most do not think before they act and give into peer pressure and their own selfishness. She comments, "We have selfish kids today." Interview with Judge Saundra J. Robinson, Summit County Juvenile Court, Akron, OH (Sept. 27, 1995).

104. *See infra* note 105 (regarding amendment of the statute as a "get tough" response to crime in Ohio). For specific portion of amendment dealing with restrictions on juvenile judge discretion by use of mandatory transfers, see Amended Substitute House Bill Number 1, § 2151.26(B) (1995) [hereinafter H.B. 1].

105. Representative Thomas, sponsor of this measure, calls the legislation a "comprehensive reform of Ohio's juvenile justice laws." OHIO SENATE JUDICIARY ON H.B. 1, 121ST GENERAL ASSEMBLY, at 2 (5/31/95). Although the new legislation amends twenty-eight statutes of the Ohio Revised Code relating to the juvenile court system's operation and procedures, this Comment limits itself to concentration only in areas relating to transfer and sentencing. Representative Thomas further commented that "Ohioans are fed up with increasing crime among teenagers," and noted that the largest increase in violent crime is committed by those between 16 and 18 years old. *Id.*

106. Before setting out a summary of the text of H.B. 1, § 2151.26(B), it is necessary to define Category One offenses and Category Two offenses as they are used in this section and other H.B. 1 sections. H.B. 1, § 2151.26(A) provides definitions of Category One offenses and Category Two offenses. Category One offenses include violations of Ohio Revised Code §§ 2903.01 (aggravated murder), 2903.02 (murder), or any attempt to commit aggravated murder or murder. H.B. 1, § 2151.26(A)(1). Category Two offenses include violations of Ohio Revised Code §§ 2903.03 (voluntary manslaughter), 2905.01 (kidnapping), 2907.02 (rape), 2907.12 (felonious sexual penetration), 2909.02 (aggravated arson), 2911.01 (aggravated robbery), 2911.11 (aggravated burglary), or a violation of 2903.04 that is a first degree aggravated felony (involuntary manslaughter). H.B. 1, § 2151.26(A)(2).

According to H.B. 1, § 2151.26(B) mandates that the juvenile court transfer the juvenile to adult court if, after a complaint is filed alleging the juvenile committed an act that would be considered a crime if committed by an adult and after a hearing, it determines

that the child was fourteen years of age or older, probable cause exists to believe the child committed the offense charged, and one of the following applies:

> (1) the juvenile previously pleaded guilty to or was convicted of a felony in criminal court.
>
> (2) The juvenile's place of residence would consider him/her an adult for criminal prosecution purposes without having to utilize the juvenile transfer process.
>
> (3) The juvenile is charged with a Category One offense and at least one of the following applies:
>
> > (a) The juvenile was sixteen years of age or older at time of commission of the act.
> >
> > (b) The juvenile was previously adjudicated delinquent and committed to the Department of Youth Services for a prior Category One or Category Two offense.
>
> (4) The juvenile is charged with a Category Two offense, other than kidnapping, was sixteen years of age or older at the time of committing the act, and at least one of the following applies:
>
> > (a) The juvenile was previously adjudicated delinquent and committed to the Department of Youth Services for a prior Category One or Category Two offense.
> >
> > (b) The juvenile possessed a firearm during the commission of the act and either displayed it, waved it, indicated possession of it, or used it when committing the act.

H.B. 1, § 2151.26(B).

Attorney General Betty Montgomery testified, at a House Judiciary and Criminal Justice committee meeting regarding this legislation, that between 1988-92, murder charges relating to juveniles have increased by 101%, and serious crimes have increased by 68% with seventeen as the peak age for arrests. HOUSE JUDICIARY AND CRIMINAL JUSTICE COMMITTEE MEETING REGARDING SUBSTITUTE HOUSE BILL NUMBER 1 (4/18/95). This legislation targets older, repeat juvenile offenders, and essentially says that the juvenile system will not tolerate their violent behavior anymore. However, as mentioned earlier, the automatic bindover only shuffles the problem off to another system that is too underfunded and overburdened to deal with it. *See supra* notes 93-98 and accompanying text.

107. *See infra* notes 115-120 and accompanying text.

108. *See supra* note 79 and accompanying text (current 2151.26(A)(2)).

109. H.B. 1, § 2151.26(B), lowers the age of mandatory transferees from age fifteen or older in the current statute to age fourteen or older. Perhaps the age of fourteen was used as it reflects the common law distinction made of capacity based on age, where those fourteen years of age and older were held to the same standards of capacity and responsibility for criminal acts as adults. *See supra* note 10. Dr. William W. Friday, a clinical psychologist, opposed both the ages of fourteen and fifteen when he testified at the House Judiciary and Criminal Justice Committee Meeting in May, 1995, arguing that "fourteen and fifteen year-olds should not be bound over to the adult system because they do not have the ability to predict the outcome of their behavior." HOUSE JUDICIARY AND CRIMINAL JUSTICE COMMITTEE MEETING REGARDING SUBSTITUTE HOUSE BILL NUMBER 1 (5/9/95). After reading a story in a Sacramento newspaper in 1992, California Attorney General Dan Lungren called his legislative director, Jack Stevens, and asked him to draft a bill to lower the transfer age for juveniles accused of murder from age sixteen to age fourteen. Mark Dowie, *When Kids Commit Adult Crimes, Some Say They Should Do Adult Time* , 13 CALIF. LAW. 55 (1993). The story that motivated Attorney General Lungren involved a twenty-five year-old college student, Michael Cannon, who was waiting for a train when two fifteen year-olds tried to rob him. Cannon told the boys he had no money and, as a consequence, one of the boys shot him at point-blank range in the forehead. Cannon died with eight cents in his pocket. After the boys were arrested, all one said was "Sorry it happened to the dude." *Id.* The bill, AB 136, which was drafted by Assemblyman Charles Quackenbush (R-Cupertino), received much debate and sparked a great deal of controversy. Dowie comments that this bill "signifies a change in thinking about children and crime. Children are increasingly seen as less innocent, more capable of distinguishing good conduct from bad, less likely to be changed for the better as the legal emphasis shifts from protecting and reforming the child to protecting society." *Id.* at 56. Dowie also observes that this age lowering demonstrates an assumption that today's children "not only act but reason as adults." *Id.* at 58.

110. LEGISLATIVE BUDGET OFFICE, FISCAL NOTE & LOCAL IMPACT STATEMENT OF SUB. H.B. 1, MANDATORY BINDOVER, EFFECTS ON DEPARTMENT OF YOUTH SERVICES (5/31/95). The Legislative Budget Office [hereinafter LBO] used the Department of Youth Services [hereinafter DYS] 1994 intake statistics to estimate the fiscal impact mandatory bind-over would have on it. This analysis discovered that 102 juveniles in 1994 would have been subject to the new mandatory bind-over provisions. *Id.* Factoring in the $100 daily cost of confining each juvenile at DYS, the LBO projected a $3.6 million savings for DYS in the first year of implementation of mandatory bind-over, a $4.66 million savings in the second year, and a $4.76 million savings in the third year. *Id.*

111. LEGISLATIVE BUDGET OFFICE, FISCAL NOTE & IMPACT STATEMENT ON SUB. H.B. 1, MANDATORY BINDOVER, EFFECTS UPON THEDEPARTMENT OF REHABILITATION AND CORRECTION (5/31/95). The LBO determined the effect of the mandatory bind-over provisions on the Department of Rehabilitation and Correction

[hereinafter DRC] by first assuming that all 102 juveniles projected to be subject to mandatory transfer in 1994 would receive sentences of incarceration in DRC. *Id.* The average annual cost of housing per DRC inmate was estimated at $13,682, but when only small additions to the population are made, a variable cost of $3,650 is assessed per inmate. *Id.* LBO estimated the additional cost to DRC after the first year of implementation of this new provision to be $372,000, after the fourth year to be $1.4 million, after the ninth year to be $2.6 million and after the fifteenth year the amount would stabilize at $2.7 million. *Id.* This figure does not take into account any additional prison space that would be necessary for DRC to build in order to house more inmates over the years. *Id.*

112. LEGISLATIVE BUDGET OFFICE, FISCAL NOTE & IMPACT STATEMENT ON SUB. H.B. 1, MANDATORY BINDOVER, EFFECTS UPON THE DEPARTMENT OF REHABILITATION AND CORRECTION (5/31/95). LBO estimates that the DRC will have to build additional prison space six years after this legislation becomes effective, costing an extra $30-40 million. *Id.*

113. The mandatory bind-over provision has its opponents, who argue that such a procedure is contrary to the established philosophy of the juvenile courts to treat juveniles as children in need of treatment. NANCY MCMILLEN, COUNCIL ON CHILDREN, YOUTH AND FAMILIES' LEGAL COMMITTEE AND JUVENILE JUSTICE POLICY AND REVIEW COMMITTEE OF THE FEDERATION FOR COMMUNITY PLANNING AND DONNA HAMPARIAN, OHIO COALITION FOR BETTER YOUTH SERVICES, HOUSE JUDICIARY AND CRIMINAL JUSTICE COMMITTEE ON H.B. 1 (4/25/95). These two opponents criticized the effects that the mandatory bind-over provision would create, such as overcrowding and docket congestion, and a higher recidivism rate than the already high rate for children tried as adults. Ms. McMillen also noted that plea bargains would increase in the juvenile system so that offenders could stay within its confines, thus defeating the legislation's purpose. *Id.*

114. Many support the mandatory provision as it allows judges a simple transfer procedure for those juveniles who commit serious crimes, which preserves the resources of the juvenile system for those who may be reformed. CAROL RAPP ZIMMERMAN, OHIO YOUTH SERVICES, SENATE JUDICIARY COMMITTEE (7/11/95). Juvenile Prosecutor Donna McCollum advocated the mandatory transfer as well, indicating that the juvenile system is not equipped or funded to deal with the violent repeat juvenile offenders. Interview with Donna McCollum, Mahoning County Juvenile Court Prosecutor, Youngstown, OH (Sept. 20, 1995).

115. In summary, H.B. 1, § 2151.26(C)(1), provides that, in those circumstances where transfer is not mandatory, a juvenile court may transfer a case to adult criminal court after a complaint is filed alleging a juvenile to be delinquent for committing an act that would be a felony if committed by an adult, and after the court determines all of the following:

> (a) The juvenile's age was fourteen years or older at the time of commission of the act charged.
>
> (b) Probable cause exists to believe that the juvenile committed the act charged.
>
> (c) After an investigation of the juvenile, including a mental examination and consideration of all other relevant factors, the court finds reasonable grounds exist to believe that both of the following exist:
>
> > (i) The juvenile is not amenable to the care or rehabilitation provided in the juvenile system.
> >
> > (ii) For the safety of the community, it may be necessary to place the juvenile in the system and perhaps keep the juvenile in that system beyond the age of majority.
>
> (2) When determining whether to order the transfer of a case for criminal prosecution to the appropriate court having jurisdiction of the offense pursuant to division (C) (1) of this section, the court shall consider all of the following factors in favor of ordering transfer of the case:
>
> (a) A victim of the act charged was five years of age or younger, regardless of whether the child who is alleged to have committed the act knew the age of the victim;
>
> (b) A victim of the act charged sustained physical harm to the victim's person during the commission of or otherwise as a result of the act charged.
>
> (c) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, or used the firearm to facilitate the commission of the act charged, other than a violation of section 2923.12 of the Revised Code.
>
> (d) The child who is alleged to have committed the act charged has a history indicating a failure to be rehabilitated following one or more commitments.

Id.

116. Those factors summarized in *supra* note 102 are almost identical to those of the current statute. One difference that exists is the lowering of the age to consider transfer from fifteen years to fourteen years. *See supra* note 104 and accompanying text (discussion on ramifications and current debate of lowering of age). The only other

difference, beside the imposition of the additional factors in favor of transfer, is the removal of the words "physical examination" from the language referring to the investigation that must be conducted to consider the amenability of the juvenile and the threat to public safety. *See supra* note 77 (current statutory language). In H.B. 1, § 2151.26(C)(1)(c), the only examination expressed in the language is a mental examination. However, the language is not exclusive of other examinations, as it provides:

> After an investigation, including a mental examination of the child made by a public or private agency or a person qualified to make the examination, and after consideration of all relevant information and factors to be considered under division (C)(2) of this section, that there are reasonable grounds to believe that both of the following criteria are satisfied:
>
> (i) The child is not amenable to care or rehabilitation or further care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children.
>
> (ii) The safety of the community may require that the child be placed under legal restraint, including, if necessary, for the period extending beyond the child's majority.

H.B. 1, § 2151.26(C)(2).

117. H.B. 1, § 2151.26(C)(2), requires the juvenile judge to consider all of the following factors, if they exist, in favoring transfer of the juvenile to adult court:

> (a) The victim was five years of age or younger.
>
> (b) The victim suffered physical harm due to the commission of the act.
>
> (c) The juvenile offender possessed a firearm when committing the act and displayed, waved, indicated possession of a firearm, or used it to facilitate the commission of the act.
>
> (d) The juvenile offender has a previous commitment to the juvenile system and the history indicates that rehabilitation within the system has failed.
>
> (e) The victim was sixty-five years of age or older or permanently and totally disabled.

Id.

All of these factors are new, except subsection (e), which is contained in current Revised Code § 2151.26(B)(1). For text of this section, see *supra* note 74.

Legislators most likely drafted and approved subsection (a) as a response to the increasing rate that children are becoming victims of violent crimes. Teenagers are more than twice as likely to become violent crime victims. Joanne C. Lin et al., *Youth Violence: Redefining the Problem, Rethinking the Solutions,* 28 CLEARINGHOUSE REV. 357, 357-58 (1994) (citing AMERICAN PSYCHOLOGICAL ASS'N, COMMISSION ON VIOLENCE AND YOUTH, VIOLENCE AND YOUTH, PSYCHOLOGY'S RESPONSE 42 (1993)). In 1992, approximately 4,000 children were murdered in our country. Lin, *supra,* at 357 (citing FBI, CRIME IN THE UNITED STATES: 1992 UNIFORM CRIME REPORTS tbl 2.4 (1993)). It is estimated that one million children between the ages of twelve and nineteen are raped, robbed or assaulted per year. Lin, *supra,* at 357 (citing NATIONAL GOVERNORS' ASS'N, KIDS AND VIOLENCE 1 (1994)).

Subsection (b) probably represents a stance against the increasing violence and injury associated with juveniles playing a larger role in committing more violent crimes. For statistics regarding just how large a role juveniles play, see *supra* note 5-7 and accompanying text (indicating arrest of 112,409 juveniles for violent crimes out of the 641,250 violent crimes committed, and involvement in 16.3% of the total murders and 17.5% of the total violent crimes in the United States in 1992).

Subsection (c) most likely represents the increasing use of firearms by juveniles in the commission of crime. Between 1985 and 1994, the homicide rate for teens involved in firearm -related deaths increased over 150%. Lin, *supra* at 358 (citing Delbert Elliott, *Youth Violence: An Overview*, Address at the Aspen Institute's Children and Violence Conference (Feb. 1994)). Estimates reveal that gunfire injures or kills 30-67 children each day and, in 1991, 5,356 children died as a result of gunfire. THE CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 64 (1994).

118. *See supra* note 78 and accompanying text (Juvenile Rule 30 factors and discussion).

119. Age is an objective fact and two of the factors in H.B. 1, § 2151.26(C)(2), are based on merely discovering the age of the victim. *See supra* note 117. The physical harm section is objective, as emotional harm is not included in it, and perhaps a doctor's opinion can substantiate those injuries unable to be observed with the human eye. The firearm language of H.B. 1, § 2151.26(C)(2)(C), may be a problem in objectivity although it appears otherwise upon first glance. For text, see *supra* note 117. It is true that the judge must only determine if the juvenile possessed a gun at the time of the act and if such possession was indicated in committing the crime. Judge Saundra Robinson believes that the language of this section is unclear regarding "indicating possession," and makes a valid point. Interview with Judge Saundra J. Robinson, Summit County Juvenile Court, Akron, OH (Sept. 27, 1995). For example, if a child had a gun in his pants while committing the act, and it slipped out while committing the offense, would this section

apply in favor of transfer, as it may "indicate possession?" That may seem to be up to the judge, thus allowing the subjectivity that the statute appears to try to eliminate.

120. LEGISLATIVE BUDGET OFFICE, FISCAL NOTE & LOCAL IMPACT STATEMENT OF SUB. H.B. 1, PERMISSIVE BINDOVER (5/31/95). The LBO concedes that the lowering of the age at which bindover is permitted, and the factors favoring bind-over, could produce an increase in the number of juveniles transferred under the permissive bind-over provision. *Id.* However, under the current permissive bindover law, the LBO notes that most offenders bound over are older in age, and provides support through a 1992 statistic wherein only ten children of two hundred eighty bound over were age fifteen. *Id.* Further, the LBO believes that the new factors incorporated into the permissive bind-over favoring transfer are already currently considered by judges in making the transfer decision, although not enumerated. *Id.* Despite these two favorable considerations, the LBO nonetheless predicts a small increase in juvenile transfers to adult courts. Fiscal effects resulting from this increase are greater adjudication costs, decreased costs to DYS and county juvenile systems for those bound over, and increased costs to adult systems for those bound over to it. *Id.*

121. *See supra* notes 91 and 92 and accompanying text (the current statutory section and a discussion of effects of such incarceration).

122. H.B. 1, § 2151.23(H)(2) provides:

> The Department of Rehabilitation and Correction shall house an inmate who is fourteen years of age or older and under eighteen years of age in a housing unit in a state correctional institution separate from inmates who are eighteen years of age or older, if the inmate who is under eighteen years of age observes the rules and regulations of the institution and does not otherwise create a security risk by being housed separately. When an inmate attains eighteen years of age, the Department may house the inmate with the adult population of the state correctional institution. If the Department receives too few inmates who are under eighteen years of age to fill a housing unit in the state correctional institution separate from inmates who are eighteen years of age or older, the Department also may assign to the housing unit inmates who are eighteen years of age or older and under twenty-one years of age.

Id.

123. Juvenile judge discretion is limited in deciding what to do with those children ages fourteen and older who commit certain violent crimes and have previous delinquent or adult histories for enumerated violent crimes. *See supra* note 106 and accompanying text (mandatory transfer amendment and criteria).

124. The new legislation imposes no additional burdens on a juvenile judge's discretion in deciding how best to adjudicate a child who is a first-time offender or who has

committed a nonviolent offense. *See supra* note 115 and accompanying text (discretionary transfer amendment). Additional factors are imposed that a juvenile judge must consider in deciding to transfer a juvenile, but these are more objective determinations rather than subjective evaluations. *See supra* note 117 and accompanying text (factors imposed and a discussion of their objectivity). Allowing discretion in this manner returns the juvenile judge to the position for which the juvenile court was createdto help rehabilitate and treat the juvenile offender. For discussion of the juvenile court philosophy and its fading success, see *supra* notes 8-63, and 99-104 and accompanying text.

Judge Smith and Judge Dabiri note the importance of the juvenile judge's discretion: "Judges, therefore, must be creative and flexible in fashioning dispositional orders which are tailored to address the individual needs of the juvenile." Smith & Dabiri, *supra* note 62, at 374. They also conclude that although the juvenile judges role has changed throughout the years, "the judge who deals with criminal behavior by juveniles has a unique role to play by using his or her authority and influence to turn those potentially or actually delinquent children into productive citizens of our society." *Id.* at 378.

125. *See supra* notes 60-62, 99 and accompanying text (discussion on abolition of the juvenile system altogether).

126. *See supra* note 103 and accompanying text (Judge Saundra J. Robinson's opinion that the juvenile system is currently accomplishing its goals).

127. Interview with Donna J. McCollum, Mahoning County Juvenile Court Prosecutor (Sept. 20, 1995). Prosecutor McCollum believes that the juvenile system does work for the majority of juvenile offenders, such as the first-time young offender, but the older repeat violent offender consumes most of the juvenile court's time, energy and resources, without much success in deterring the youth from recidivism. *Id.*

128. *See supra* notes 103, 127. Richard N. White, Magistrate of the Mahoning County Juvenile Court, agrees with Prosecutor McCollum and cites many juvenile programs designed for first-time offenders that first-time offenders are not even able to use, as the repeat offenders are kept within the system and use these programs, even though they have no treatment or deterrent effect on them. Interview with Richard N. White, Mahoning County Juvenile Court Magistrate Place (Sept. 5, 1995).

129. Carol Rapp Zimmerman, of Ohio Youth Services, agrees that a transitional system may be necessary for serious offenders. HOUSE JUDICIARY AND CRIMINAL JUSTICE COMMITTEE ON SUB. H.B. 1 (4/18/95). Feld discusses the proposal of a transitional system in Minnesota by its Task Force and its effectiveness. Feld, *supra* note 82, at 1038-42. The new system will be a "more graduated juvenile justice system that establishes a new transitional component between the juvenile and adult systems . . . ." *Id.* at 1038. The new system applies to serious juvenile offenders and allows juvenile judges new dispositional methods. *Id.*

130. One commentator notes that, "Until the voting public can look beyond the 'just desserts' approach to juvenile justice, the juvenile crime rate in the United States will continue to escalate." Sharon K. Hamric-Weis, *The Trend of Juvenile Justice in the United States, England, and Ireland,* 13 DICK. J. INT'L L. 567, 577 (1995).

131. Judge Martin, in listing criteria needed to help make the juvenile system effective once again, named at the top of the list "adequate funding for our youth correctional authorities" and "an experienced, caring and well-trained judiciary." Martin, *supra* note 23, at 89.

132. For LBO study and projections of money the juvenile treatment facility would save, see *supra* notes 110-111.

133. Sentencing juveniles to adult facilities has a dramatic and far-reaching effect on a juvenile. *See supra* notes 89-92 and accompanying text (examples of such effects). For this reason, such sentencing should be imposed only in rare instances, such as when a juvenile in the transitional system refuses treatment approaches or shows no signs of improvement from such treatment. Judge Martin believes that "laws that seek to transfer out of the juvenile system only those juveniles who are truly not amenable to treatment are far more likely to create a safer future for our society than laws that dispatch children who commit crimes into the jungle of contemporary adult corrections." Martin, *supra* note 23, at 89-90. He challenges that "[n]o informed person can seriously contend that an individual emerging, as virtually all prisoners ultimately do, from adult confinement will be less of a threat to society than the juvenile with a personalized treatment plan, retained in the juvenile system, subject to periodic review, for as long as that system requires to attain its rehabilitative goal." *Id.* at 91. A transitional system with treatment more intense than in the juvenile system, yet with the ability to punish if amenability is not effected, will provide even more confidence for society upon the release of these individuals. Feld comments that such a system will "give the juvenile one last chance at success in the juvenile system, with the threat of adult sanctions as an incentive not to re-offend." Feld, *supra* note 86, at 1038.

134. In 1936, the Ohio Supreme Court held that "[m]isdeeds of children are not looked upon in the Juvenile Court as crimes carrying conviction, but as delinquencies which the state endeavors to rectify by placing the child under favorable influences by the employment of other corrective measures." Malone v. State, 200 N.E. 473, 478 (Ohio 1936). The Court reemphasized the goal of the juvenile justice system when it held that:

> The Juvenile Court stands as a monument to the enlightened conviction that wayward boys may become good men and that society should make every effort to avoid their being attained as criminal before growing to the full measure of adult responsibility. Its Existence, together with the substantive provisions of the Juvenile Code reflects the considered opinion of society that childish pranks and other youthful indiscretions, as well as graver offenses, should seldom warrant adult sanctions and that the decided emphasis should be upon individual, corrective treatment.

In re Agler, 249 N.E.2d 808, 810 (Ohio 1969).

135. *See supra* note 24 and accompanying text.

136. *See supra* note 129 and accompanying text. Ms. Zimmerman is on the right track to resuscitating the juvenile system's original goals.