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I. INTRODUCTION

Juvenile justice reforms over the last decade have created an enormous potential for transferring juveniles to criminal court.[1] This potential became glaringly apparent between 1992 and 1995 when forty-one states adopted new laws or expanded existing ones that expedited the prosecution of juveniles in criminal courts.[2] The pervasiveness of these reforms and the potential

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1. *See* Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 138 (1998). The reform agenda are multifaceted, and their rationales are complicated. *See id.*

2. *See* PATRICIA TORBET ET AL., NATIONAL CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3 (1996). This has been done by either lowering the age of juvenile court jurisdiction or by increasing the number of offenses or offender types that are excluded from juvenile court jurisdiction. *See id.* at 4. Torbet and her colleagues report that between 1992 and 1995, 32 states, which already had legislative exclusion provisions, modified their statutes either to lower the age of juvenile court juris-

magnitude of their effect could mark the beginning of the end of a separate system of justice for juveniles.[3]

In another article in this issue, Lanza-Kaduce and colleagues present data indicating that recent changes in Florida's transfer laws have had little impact on the number of offenders who were transferred.[4] Florida, however, might be somewhat unique in that changes in the law of transfer, including indictments, voluntary waiver, involuntary judicial waiver, and prosecutorial direct file, have long been a part of efforts to reform Florida's juvenile justice system. This article is intended to provide a socio-legal history of the transfer laws in Florida, not only the most recent reforms but also transfer provisions dating back nearly fifty years.[5] Multiple changes involving a mix of instrumental, expressive, and systems or institutional factors have occurred during this time. The goals of our analysis are to explore the underlying reasons for Florida's transfer reforms in particular and to improve our understanding of the dynamics of legal reform in general.

The impetus behind juvenile justice reform movements is often attributed to perceptions of increased juvenile crime, especially serious violent crime and to disenchantment with a perceived leniency in juvenile justice treatment.[6] Policymakers want to "get tough" not only to control juvenile crime (an instrumental effort) but also to reflect their frustration with what many of them consider to be the pampering of offenders by the juvenile justice system (an expressive function). In other words, both instrumental

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diction, or increase the number of offenses excluded, or both. *See id.* Reforms similar to the ones reflected in this last national trend had occurred earlier in some states. New York and Florida are two cases in point. In some respects, it can be argued that the broad societal forces present during this last decade, that is, high crime rates and concerns about the ineffectiveness of rehabilitation in crime control, were similarly present in the late 1970s when these states reformed their juvenile justice systems.

3. *See* Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to the Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 929 (1995); Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1085 (1991); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990); Barry C. Feld, *Abolish the Juvenile Court: Affirming Personal Responsibility*, 2 JUV. JUST. UPDATE 4, 4 (1996); Francis Barry McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196, 196 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1126 (1977).

4. *See* Lonn Lanza-Kaduce et al., *Juvenile Transfers in Florida: The Worst of the Worst*, 10 U. FLA. J.L. & PUB. POL'Y 277-312 (1999).

5. For a legal history of New York's youthful offender act over the long term, see SIMON I. SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM (1996).

6. *See* THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 4 (1992); M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 54 (1986).

and expressive rationales seem to support the reform movement.[7]

In an analysis of the recent reform of New Mexico's Children's Code, Mays and Gregware argue that the instrumental crime control function does not explain the legal changes because the state had experienced only "a relatively minor increase in the number of youthful offenders" in the preceding years.[8] They also argue that the reforms are "more than a simple reflexive reaction to public get-tough pressure."[9] The reforms also constitute a "systems response" by juvenile court stakeholders in that small changes are initiated from within the juvenile justice system in order to discourage larger reforms by others that might threaten their survival as a separate system.[10] "Public perceptions that the juvenile justice system [was] failing threaten[ed] not only the benevolent, regenerative ideal under which most in the system operate[d], but also the public resources allocated to support that ideal."[11] The juvenile justice system was protected best, according to Mays and Gregware, by acquiescing to the "get tough" reform agenda, which, in any event, would affect only a minimal number of cases (have little instrumental function) but would placate public and political dissatisfaction (an expressive function).[12]

The New Mexico research has sensitized us to the prospect that "systems responses" might help us understand legal change.[13] More theoretical discussions of law formation raise the same prospect. One legal anthropologist in particular, Bohannan, suggests that law is inherently "out of phase" with other societal institutions and norms, and this might be an impetus for further legal change.[14] According to Bohannan, even when law merely attempts to reinstitutionalize customary practices of other social

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7. *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE 11 (1963). Gusfield distinguishes between law formation that is instrumental because it seeks to change conditions in society and law formation that is primarily an expression of frustration or sentiment. *See id.*

8. G. Larry Mays & Peter R. Gregware, *The Children's Code Reform Movement in New Mexico: The Politics of Expediency*, 18 L. & POL'Y 179, 186 (1996).

9. Mays & Gregware, *supra* note 8, at 187.

10. *Id.*

11. *Id.* at 187-88.

12. *See id.* M.A. Bortner has previously recognized how transfers to adult court could be functional for juvenile justice organizations. *See* Bortner, *supra* note 6, at 54. Donald Dickson's analysis of the enactment of marijuana laws also illustrates how organizational interests can affect legislation. *See* Donald T. Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, 16 SOC. PROBS. 143-56 (1968). We adopt the "systems response" language of Mays and Gregware because broader institutional concerns, like treatment philosophy and the role of judges, that cut across organizations, may be as important as the narrower organizational interests of juvenile justice practitioners. *See* Mays & Gregware, *supra* note 8, at 186.

13. *See* Mays & Gregware, *supra* note 8, at 186.

14. Paul Bohannan, *The Differing Realms of the Law*, *in* THE SOCIAL ORGANIZATION OF LAW 306, 311 (Donald Black & Maureen Mileski eds., 1973).

groups, it changes those customary practices, if for no other reason than the need for law to deal with issues in ways that are justiciable.[15] Thus the law becomes out of phase with the very customs it addresses.

We will apply and extend Bohannan's reasoning. When legal reforms attempt to alter and not merely reinstitutionalize the customary practices of other institutions, like the juvenile justice system, we would expect the problem of phase, or the lack of congruence between law and other institutional practices and norms, to be marked. Bohannan probably would not be surprised to see various ongoing institutional adjustments both during and after the legal reform. Indeed, we suggest that such "system responses" might be inevitable in law formation and reform, but we are reluctant to predict their nature or direction.

II. LEGISLATIVE AND LEGAL HISTORY OF KEY TRANSFER PROVISIONS

The early history of juvenile case processing in Florida provided, in practice, a sort of blended jurisdiction over juveniles charged with criminal offenses. The legislative intent of the relationship between the juvenile and criminal courts can be inferred from a 1911 statute.[16] The statute provided that a court having jurisdiction over a child who was less than sixteen years of age and charged with certain crimes could turn the child over to a probation officer to be dealt with as a delinquent at any time.[17] If the child later proved to be "incorrigible, or incapable of reformation, or dangerous to the welfare of the community," the child could be sentenced as though the criminal charge had not been suspended.[18] The thrust of the statute was to permit transfer of cases from the criminal court to the juvenile court at disposition; this is now termed "reverse waiver."[19] The reverse waiver option was not available to juveniles who were charged with rape, murder, manslaughter, robbery, arson, burglary, or an attempt to commit any of these crimes.[20] The emphases on the dispositional rather than the adjudicatory aspects of the case and on the directional flow of the transferred cases from criminal court to juvenile court distinguish early practices from more recent ones.[21] Law and practice relating to juvenile offenders followed this guideline for four decades.

It was not until 1951 that Florida enacted laws that established a

15. *See id.* at 310-11.
16. *See* 1911 Fla. Laws ch. 6216, §§ 9-10.
17. *See id.*
18. *Id.*
19. *See id.*
20. *See id.* § 10.
21. *Compare id.* §§ 9-10, *with* FLA. STAT. §§ 985.226-.227 (1998).

constitutional juvenile court and specified related procedures.[22] The law's focus had clearly shifted to a separate juvenile court. The original 1951 juvenile justice laws have undergone major revisions in every succeeding decade.[23] Our analysis examines revisions that involved major shifts in policy or practice relating directly to transfer.

A. *Indictment*

The first transfer reform after the 1951 juvenile court enactment[24] came in 1955 when a statutory provision relating to the indictment of juveniles was added.[25] This procedural change required the waiver to criminal court of any child, regardless of age, who was charged with an offense punishable by death or life imprisonment and who had been indicted by a grand jury on that charge.[26] The law reverted to its earlier 1911 position that disallowed putting juveniles charged with certain heinous crimes under the jurisdiction of the juvenile court.[27]

The 1955 mandatory waiver of indicted juveniles was later amended to divest the juvenile court of any jurisdiction in such cases. In 1967, the statute was amended to strip the juvenile court of jurisdiction in any case where a child of any age was indicted by a grand jury for an offense punishable by death.[28] Therefore, in cases punishable by death, the juvenile court had no jurisdiction and the child was handled in all respects as an adult.[29] Two years later, this provision was expanded to include cases where the juvenile was indicted for an offense punishable by life imprisonment.[30]

The 1967 and 1969 provisions for automatic divestiture of juvenile court jurisdiction in capital and life cases were revisited in 1973.[31] This time the legislature decided to place juveniles who were charged with an offense punishable by death or life imprisonment in the juvenile court unless an

22. *See* FLA. STAT. § 39.02 (1951).

23. *See* FLA. STAT. § 39.02(6) (1955); FLA. STAT. § 39.02(6)(c) (1967); FLA. STAT. § 39.02(5)(c) (1975); FLA. STAT. § 39.04 (2)(e)4. (1981); FLA. STAT. § 39.052(2)(a) (Supp. 1994); FLA. STAT. § 985.227(1) (1997).

24. *See* FLA. STAT. § 39.02 (1951).

25. *See* FLA. STAT. § 39.02(6) (1955).

26. *See id.*

27. *Compare* FLA. STAT. § 39.02(6) (1995) (removing jurisdiction from juvenile court for death penalty crimes), *with* 1911 Fla. Laws ch. 6216, § 10 (disallowing juvenile court jurisdiction for specific serious crimes).

28. *See* FLA. STAT. § 39.02(6)(c) (1967).

29. *See id.*

30. *See* FLA. STAT. § 39.02(6)(c) (1969).

31. *See* FLA. STAT. § 39.02(5)(c) (1973).

indictment was returned by the grand jury.[32] In such cases, an adjudicatory hearing in juvenile court could not commence until fourteen days after the accused was taken into custody unless the State Attorney advised the court in writing that an indictment would not be sought, or unless the grand jury refused to indict the juvenile.[33] If the grand jury failed to act within fourteen days after the offender was taken into custody, the court could proceed with the juvenile case.[34] The fourteen-day delay in juvenile court jurisdiction in capital and life cases was amended to twenty-one days in 1978.[35] The statutes relating to indictment have not changed substantially in the last twenty years.

Other than the relatively focused procedural changes just discussed, the availability of indictments against juveniles for an offense punishable by death or life imprisonment has remained mostly constant during this century. Florida's position seems to be consistent with long-standing transfer provisions throughout the country; cases involving the most serious offenses, that is, those punishable by life in prison or death, are generally removed from the jurisdiction of the juvenile court.[36]

B. *Voluntary Waiver*

Voluntary waiver provides a way for a juvenile to initiate the transfer to adult court. In Florida, the first statutory reference to a juvenile's right to demand waiver of juvenile court jurisdiction and transfer to criminal court appeared in 1951.[37] The law required that the demand be made by the juvenile prior to the commencement of the hearing in juvenile court.[38] It was probably inevitable that someone would recognize the lack of congruence between a philosophy justifying a separate court for less responsible juveniles and a provision that gives juveniles the right to waive

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32. The quick legal change between 1969 and 1973 could evidence what Bohannan would describe as an adjustment to a phase problem. *See* Bohannan, *supra* note 14, at 311. The 1969 provision was out of phase with practice because systems responses to juveniles had to be made before the formal charges were determined.

33. *See* FLA. STAT. § 39.02(5)(c) (1975).

34. *See id.*

35. *See* FLA. STAT. § 39.02(5)(c) (Supp. 1978). This also might indicate an adjustment to a phase problem. Fourteen days may not have been sufficient time, in practice, to determine how to proceed in serious cases.

36. *See* Mays & Gregware, *supra* note 8, at 182; *see also* Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 1999) (forthcoming); David S. Tanenhaus, *The Evolution of Waiver in the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra*.

37. *See* FLA. STAT. § 39.02(6) (1951).

38. *See id.*

themselves into criminal court. The institutional response was an amendment in 1967[39] to require that the juvenile be joined by at least one parent, or a guardian, or legal counsel to make the demand.[40] If these conditions were met, the juvenile court was required to transfer the juvenile's case for processing as an adult.[41] Voluntary waiver was added to Florida's constitution in 1968,[42] and has remained unchanged for the past thirty years.[43]

C. *Involuntary Judicial Waiver*

The first form of involuntary waiver available in most states, including Florida, involved judicial waiver. In 1951, when juvenile courts in Florida were first constitutionally authorized, they were required to transfer for adult prosecution any juvenile over sixteen years of age who was charged with a capital offense.[44] Beyond this requirement, juvenile court judges were given complete discretion to waive juvenile jurisdiction of any other alleged delinquent over the age of fourteen who was charged with a felony.[45] The law was amended in 1967 so that juvenile court judges could, without a hearing, automatically waive jurisdiction of juveniles charged with any state or federal law, or any city ordinance relating to the operation of a motor vehicle.[46] The automatic waiver placed these juveniles in the court that had jurisdiction over adults who were similarly charged.[47]

The 1994 reforms introduced a *presumptive* judicial waiver provision for juveniles who had three prior adjudications or adjudications withheld for felonies, one or more of which involved violence against a person, or the use or possession of firearms.[48] Prosecutors were required to file a motion for waiver unless they gave reasons for not doing so, and judges were required to grant the waivers unless they stated reasons why such a transfer should not

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39. *See* FLA. STAT. § 39.02(6)(b) (1967).

40. The coincidence between the enactment of this amendment and the developments reflected in *Kent v. United States*, 383 U.S. 541 (1966), and *In Re Gault*, 387 U.S. 1 (1967), might not have been accidental. These cases represented a new awareness of problems associated with procedural rights for juveniles. *See In Re Gault*, 387 U.S. at 30; *Kent*, 383 U.S. at 562.

41. *See* FLA. STAT. § 39.02(6)(b) (1967).

42. *See* FLA. CONST. art. I, § 15 (1968).

43. *See* FLA. STAT. § 985.226 (1997).

44. *See* FLA. STAT. § 39.02 (1951).

45. *See id.*

46. *See* FLA. STAT. § 39.02(1)(a) (1967).

47. *See id.* This change in the law of involuntary judicial waiver illustrates how problems of phase may engender legal adjustments. Formal waiver procedures were an inefficient way to handle juvenile traffic offenders, which was an inevitable consequence of the American automobile culture. The law was out of phase with the times.

48. *See* FLA. STAT. § 39.052(2)(c) (Supp. 1994).

take place.[49] Presumptive judicial waiver could have increased the number of transfer cases in Florida by almost fifty percent.[50] In practice, however, the impact was negligible,[51] which illustrates that the presumptive waiver provision was expressive in effect and perhaps even in purpose.

1. Waiver Hearing

For many years no statutory guidelines for waiver decisions existed. Instead, transfer decisions were left exclusively to the discretion of juvenile court judges. These provisions remained unchanged until 1967 when, in response to the Supreme Court's decision in *Kent v. United States*,[52] the Florida legislature amended them, requiring a hearing in juvenile court before a judicial waiver could occur.[53] Under the revised provisions, the juvenile court could not waive jurisdiction without a written order finding that it was in the best interest of the public to do so.[54] If such a finding was based on social histories or psychological or psychiatric reports, then the juvenile and his or her parents or guardian and counsel had the right to examine the reports and to question the parties responsible for preparing them at the waiver hearing.[55]

Significant statutory changes with regard to waiver hearings were again enacted in 1973.[56] One change required that two questions be addressed by the court in a waiver hearing: Was there probable cause to believe that the juvenile committed the offense charged? Were there reasonable prospects for rehabilitation before the juvenile reached the age of majority?[57] The 1973 changes also established, for the first time, that a court had to consider the following factors in deciding the prospects for rehabilitation: the nature of the presenting offense; the nature and extent of the juvenile's delinquency

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49. *See id.* § 39.052(2)(a)(e).

50. *See* Lanza-Kaduce et al., *supra* note 4, at 278. The number of cases increased from 6800 in 1987 to 10,000 in 1996.

51. *See* Charles E. Frazier et al., *Get-Tough Juvenile Justice Reforms: The Florida Experience*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1999, at 167-84 (forthcoming).

52. 383 U.S. 541; *see supra* note 40 and accompanying text. Much of Florida's ongoing tinkering with transfer began 30 years ago in the wake of Supreme Court decisions in *Gault* and *Kent*. *See supra id.* Those decisions imposed formality on customary juvenile practices that, until then, had been fraught with unbridled discretion and had been steeped in informality (especially in contrast with other areas of law). *See In Re Gault*, 387 U.S. at 30; *Kent*, 383 U.S. at 562. We suspect that the imposition of formality has aggravated problems of phase that, in turn, have effected legal changes. Bohannan states that "the more highly developed the legal institutions, the greater the lack of phase." Bohannan, *supra* note 14, at 311.

53. *See* FLA. STAT. § 39.02 (1967).

54. *See id.* § 39.02(6)(a).

55. *See id.* This legal change can be seen as an institutional response to bring Florida law in accord with the *Kent* decision. *See supra* note 40 and accompanying text.

56. *See* FLA. STAT. § 39.09 (1973).

57. *See id.* § 39.09(2)(c).

record; the nature of past treatment efforts and the juvenile's response; and the techniques, facilities, and personnel available to the court for rehabilitation.[58]

Prior to the hearing, a written report addressing these factors had to be prepared by the youth agency.[59] The individuals responsible for preparing the report were subject to questioning by the offender's attorney at the hearing.[60] If the court found no reasonable prospects for rehabilitation before the juvenile reached the age of majority, the court was also required to state in a written order its reasons.[61]

The statutory criteria for an involuntary waiver hearing were substantially revised again in 1975.[62] The new criteria were completely in phase with the *Kent* criteria.[63] With the exception of two noteworthy changes in 1978, the statutory provisions governing waiver hearings that were enacted in 1975[64] are essentially those that are in effect today.[65]

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58. *See id.* § 39.09(2)(d).
59. *See id.* § 39.09(2)(e).
60. *See id.*
61. *See id.* § 39.09(2)(f).
62. *See* FLA. STAT. § 39.09 (1975).
63. *See Kent*, 383 U.S. at 566-67.
64. *See* FLA. STAT. § 39.09(2)(c)-(d) (1975).
65. Currently, law regulating conduct of a waiver hearing is found in section 985.226(3) of the Florida Statutes. *See* FLA. STAT. § 985.226(3) (1997). The following specific statutory criteria must be considered by the court in ruling on a request by a state attorney for an involuntary waiver of juvenile court jurisdiction and transfer of the case to the criminal court for prosecution as an adult:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community is best served by transferring the child for adult sanctions.
> 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. [Whether there is] probable cause [based on] the report, affidavit, or complaint.
> 5. The desirability of trial and disposition of the entire offense in one court when the child's associates in the alleged crime are adults or children who are to be tried as adults.
> 6. The sophistication and maturity of the child.
> 7. The record and previous history of the child, including:
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> > a. Previous contacts with the department, the Department of Corrections, the former Department of Health and Rehabilitative Services, the Department of Children and Family Services, other law enforcement agencies, and courts;
> > b. Prior periods of probation or community control;
> > c. Prior adjudications that the child committed a delinquent act or violation of law, greater weight being given if the child has previously been found by a court to have committed a delinquent act or violation of law involving an offense classified as a felony or has twice previously been found to have committed a delinquent act or violation of law involving an offense classified as a misdemeanor; and

The first adjustment made in 1978 instructed the juvenile court to give greater weight to the prior record of juveniles during waiver hearings.[66] Juveniles targeted were either those who previously had committed a felony or those who previously had committed two delinquent acts and were charged with a second felony or third delinquent act.[67] The second change replaced the probable cause requirement with the more general standard of considering the prosecutorial merit of the complaint before the juvenile court judge could grant the waiver.[68]

2. Prosecutorial Inroads

A major turning point in Florida's approach to selecting juveniles for involuntary transfer and prosecution as adults came in 1973.[69] For the first time, state attorneys were given the authority, which prior to *In Re Gault*[70] was held by county or municipal staff working under juvenile court judges, to seek transfers of juveniles charged with criminal types of offenses.[71] State attorneys also were granted, for the first time, the discretion to file a motion requesting the waiver of juvenile court jurisdiction for juveniles fourteen years of age or older.[72] The category of offenses for which waivers were available also changed. Prior law had limited a judge's discretion to cases in which the youth was charged with a *felony* offense, but the 1973 changes allowed state attorneys to request a waiver hearing whenever a juvenile's alleged conduct if committed by an adult also would be a violation of law as a *felony or misdemeanor*.[73] Despite some shifts in

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d. Prior commitments to institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child, if the child is found to have committed the alleged offense, by the use of procedures, services, and facilities currently available to the court.

Id. § 985.226(3)(c).

In each case, a study and written report on the applicable statutory criteria must be prepared by the Department of Juvenile Justice and submitted to the court, the state attorney, the child, the child's parents or legal guardian, and the child's counsel prior to a hearing. *See id.* § 985.226(3)(d). A hearing on the waiver motion is required, and all parties have a right to question the persons responsible for the information in the written report. *See id.* A decision to involuntarily transfer a youth pursuant to these provisions must be in a written order that includes findings of fact with respect to the statutory criteria. *See id.* Such an order is reviewable on appeal. *See id.* § 985.226(3)(e).

66. *See* FLA. STAT. § 39.09(2)(c)7. (Supp. 1978).
67. *See id.*
68. *See id.* § 39.09(2)(c)4.
69. *See* FLA. STAT. § 39.09(2)(a) (1973).
70. *In Re Gault*, 387 U.S. at 1.
71. *See* FLA. STAT. § 39.09(2)(a) (1973).
72. *See id.*
73. *See id.*

direction over the next few years, placing the authority to transfer with prosecutors would become the mainstay of Florida's reform movement.

Just two years later the waiver provisions were amended as part of a major piece of legislation that dominated the attention of the legislature during the 1975 regular session.[74] One important difference between the approach taken by the Senate and the House of Representatives was whether to mandate that a state attorney file a motion for waiver in cases involving certain repeat, serious and violent offenses.[75] The House version of the legislation[76] did not include the mandatory state attorney waiver language, but the bill coming out of the Senate did.[77] The differences between the House and Senate bills had to be reconciled by a conference committee, which settled for the Senate position on this issue.[78]

As a result of the 1975 change, state attorneys were required, for the first time, to file a motion for waiver in all cases in which a juvenile had previously been adjudicated delinquent for murder, rape, sexual battery, armed robbery, or aggravated assault and was facing charges for any of those offenses for a second or subsequent time.[79] The impact of this change was undoubtedly greater than anticipated. Arguably, the impact was the driving force behind even more significant changes that were on the horizon.

The number of juveniles tried as adults increased from 381 in 1974 (before the mandate) to 865 in 1976 (after the mandate).[80] The flood of new mandatory waiver hearings, combined with the added complexity of those hearings, had a tremendous impact on the work load of the juvenile justice system — a work load that most likely was unappreciated by the legislative committees on Health and Rehabilitative Services through which

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74. *See* 1975 Fla. Laws ch. 75-48, § 22.

75. *Compare* Fla. H.B. 1956, 3d Leg., Reg. Sess. (1975), *with* Fla. Comm. Substitute for Fla. S.B. 165, 3d Leg., Reg. Sess. (1975).

76. *See* Fla. H.B. 1956.

77. *See* Fla. Comm. Substitute for Fla. S.B. 165, *supra* note 75.

78. *See* Fla. S.J. 380, 388-89 (May 26, 1975) (discussing Conference Comm. Report on Committee Substitute for Fla. S.B. 165 and 1975 Fla. Laws ch. 75-48). The current provisions of Florida law relating to judicial waivers are not substantially different than they were following the 1975 changes. *See* FLA. STAT. § 985.226 (1997). This may be because direct-file provisions have made judicial waiver largely irrelevant. Virtually all transfers occurring in Florida today are accomplished by direct file and grand jury indictment. *See* Frazier et al., *supra* note 51, at 178.

79. *See* FLA. STAT. § 39.09(2) (1975).

80. *See* REPORT OF THE AD HOC SUBCOMM. ON CHILDREN AND YOUTH OF THE FLA. H.R. COMM. ON HEALTH & REHABILITATIVE SERVICES, Feb. 8, 1978, at 59 (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.) [hereinafter CHILDREN AND YOUTH REPORT]. The 1975 revisions had also significantly broadened the statutory criteria that the court was required to consider in determining whether the child should be transferred. *See* FLA. STAT. § 39.09(2)(c) (1975).

the bills had moved.[81] Prosecuting attorneys, who now had to prepare and conduct waiver hearings in juvenile court and criminal prosecutions in adult court, and juvenile court judges, whose waiver cases more than doubled, both felt the work-load crunch. The fact that some of these juveniles had previously been waived probably made acceptance of the increased work load even more difficult. This increase in waiver cases was bound to attract the legislature's attention as prosecutors and judges sought relief from the added work-load pressures.[82] Significantly, the fallout from the 1975 mandate appears to have set the stage for a legislative initiative to authorize the direct filing of a bill of information, which has the effect of placing a case in the criminal court, by the prosecuting attorney as an alternative to involuntary

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81. For most of the last three decades, Florida's juvenile justice system was part of the Department of Health and Rehabilitative Services (HRS). HRS was the largest single state bureaucracy (and one of the largest in the nation) and was responsible for all welfare and health programs. Juvenile justice constituted only a small part of this large organization. The department was explicitly a social service agency and was probably dominated by a social work perspective. All legislative bills worked through the various committees and subcommittees dealing with HRS to get to the floor for consideration. When the legislators on these committees considered transfer legislation, they dealt with HRS personnel who were probably less familiar with the interplay between law and criminal justice practices — a circumstance that most likely contributed to problems of phase.

82. *See* CHILDREN AND YOUTH REPORT, *supra* note 80; INTERIM STUDY REPORT OF THE FLA. H.R. COMM. ON HEALTH & REHABILITATIVE SERVICES AD HOC SUBCOMM. ON JUV. JUST., app. A, at 1 (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.) [hereinafter INTERIM STUDY REPORT]. The name of the Ad Hoc Subcomm. on Juvenile Justice was changed to the Ad Hoc Comm. on Children and Youth while the study was in progress. *See* Ad Hoc Comm. on Children and Youth meeting minutes of Nov. 16, 1977 (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.).

The broad direct-file powers of prosecutors are interesting in another light. They might have been part of a general effort to streamline the administration of justice. A number of other legal reforms were initiated during this period, the effect of which was to reduce the time and costs of processing as well as opportunities for challenges. For example, shortly before the establishment of broad direct-file authority in juvenile cases, direct filing of another sort was introduced in the criminal courts. *See* FLA. R. CRIM. PROC. 3.120. Adults arrested and charged by information with noncapital crimes were subject to jailing and other forms of restraint without any opportunity for a probable cause determination. *See id.* When this practice was challenged in the federal courts, the state defended it on the grounds that a prosecutor's decision to file constituted a probable cause determination. *See* Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975). The U.S. Supreme Court ultimately rejected this argument, but it also rejected the appellant's contention that a defendant is entitled to an adversarial preliminary hearing. *See id.* The Court mandated only a simple ex parte determination of probable cause for arrest and otherwise approved of Florida's streamlined processing practices. *See id.* Unlike the vast majority of states, which provide for independent review of prosecutorial filing decisions through either preliminary hearings or presentations to a grand jury, JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 486 (American Casebook Ser. 1995), to this day Florida grants neither except in capital cases. In sum, understanding the reasons for the grant of direct-file authority to prosecutors in juvenile cases may be part of a larger institutional response — one to increase prosecutorial powers and to foster more efficient processing in both juvenile and adult courts.

judicial waiver.[83]

D. *Discretionary Direct Filing of an Information*

The first attempt to ease the work load came during the 1976 legislative session. A number of bills were introduced that would have either excluded certain offenses from juvenile court jurisdiction or mandated, under certain circumstances, the transfer of juveniles to adult court.[84] Out of this assortment of ideas, a single piece of legislation emerged. House Bill 1300 attempted to give state attorneys two means by which to transfer juveniles to adult court while bypassing a waiver hearing.[85] The first option would have permitted a state attorney to file an information directly in the criminal court against any juvenile sixteen years of age or older who was alleged to have committed a capital offense, a crime punishable by life imprisonment, a felony of the first degree, or a felony of the second degree.[86]

The second option would have given a state attorney the option of seeking a grand jury indictment against a juvenile charged with any felony.[87] In making its decision on whether to return an indictment against a juvenile, the grand jury was required to consider a report by the social services agency applying the *Kent* criteria then contained in statute.[88] The first option under House Bill 1300 would have allowed a state attorney to preempt both the grand jury's role in those cases punishable by death or life imprisonment and the juvenile's right to have the grand jury consider the case.[89] The second option would have permitted a state attorney to preempt the juvenile court judge's opportunity to consider the *Kent* criteria and the juvenile's right to have the juvenile court judge examine those criteria.[90] Under either scenario, the state attorney's role in the process would have been greatly enhanced while the juvenile court judge's role effectively would have been eliminated. In an apparent attempt to balance the expanded new authority given to prosecutors, House Bill 1300 also authorized a criminal court judge to dismiss an information or indictment and treat the offender as

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83. *See* Frazier et al., *supra* note 51, at 178. With the availability of the direct-file option, the use of the waiver procedure declined steadily from 1978 to 1994 and has declined even more since then with the expansion of the direct-file option to juveniles who were fourteen or fifteen years of age. Judicial waivers now account for less than one percent of transfers in Florida. *See id.*

84. *See* INTERIM STUDY REPORT, *supra* note 82, app. A, at 1.

85. *See* Fla. H.B. 1300, 4th Leg., Reg. Sess. (1976).

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

a juvenile when the judge had determined that the circumstance so justified.[91] These built-in contradictions might help explain why, on final passage of House Bill 1300, a substantial number of members dissented in both chambers of the legislature.[92] The bill was vetoed by Governor Reubin Askew on June 23, 1976.[93] In his veto message the Governor stated as follows:

> House Bill 1300 is essentially an attempt to make it easier for prosecutors in Florida to try 16 and 17 year olds as adults. It emerged from a widespread feeling of frustration with the performance of our criminal justice system *[by which he meant the criminal and juvenile justice systems]* as it relates to these older juveniles. Many feel that our present system is inadequate in confronting the problems posed by juvenile crime. And I agree. But the answer will not be found in efforts to transfer more juveniles to the adult corrections system.[94]

In this message, the Governor recognized the significance of the new role outlined for prosecutors and the potential such legislation had for putting still more juveniles in the adult corrections system. His veto message, however, reframed the rationales. It focused more on general dissatisfactions with the system's ability to control juvenile crime (an instrumental concern) than on the institutional response to work-load problems associated with mandatory waiver and the reappearance of previously waived juveniles. Governor Askew emphasized two basic flaws in the bill. First, he believed the provision that allowed prosecutors to file an information against a juvenile in a capital case violated the constitutional requirement of a grand jury indictment in capital cases.[95] Second, the Governor was troubled by the fact that there was no requirement that state attorneys consider the *Kent* criteria or otherwise explain a direct-file decision, as judges were required to do.[96] The Governor was concerned that a criminal court judge was allowed to dismiss an information or indictment without having to either consider the

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91. *See id.*

92. The Senate vote on final passage was 22 yeas and 16 nays. *See* Fla. S.J. 505-07 (Reg. Sess. 1976). The House vote on final passage was 91 yeas and 17 nays. *See* Fla. H.J. 1075 (Reg. Sess. 1976).

93. *See* Fla. H.J. 1419 (Reg. Sess. 1976).

94. Veto of Fla. H.B. 1300 (letter from Gov. Reubin Askew to Sec'y of State Bruce Smathers, June 23, 1976, at 4) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.) [hereinafter Veto Message]. The Governor's message does not mention the need to find relief from work load pressure, which seems to have been a motive for the direct-file provisions that were enacted into law two years later.

95. *See* FLA. CONST. art. I, § 15 (1968); Veto Message, *supra* note 94, at 2.

96. *See* Veto Message, *supra* note 94, at 3.

Kent criteria or provide a written explanation for the decision to dismiss.[97]

Governor Askew also noted that the Florida House of Representatives had just adopted legislation directing a comprehensive study of juvenile laws to be acted on by the legislature during the 1977 session.[98] While pledging his full support for that effort, the Governor admonished the legislature, stating that this study should be "careful, cautious, and comprehensive" so as to protect the rights of accused juveniles while protecting society from the harm caused by juvenile crime.[99] Governor Askew balanced concern about liberty interests against instrumental statements of crime control, but he ignored the work-load dynamics that might require an institutional adjustment.

The study of the juvenile justice system that was promised in 1976 was indeed comprehensive, and it continued throughout and beyond the 1977 legislative session.[100] The study gathered input in several ways. For example, the Supreme Court of Florida sponsored a two-day conference on juvenile laws in December 1976.[101] Public hearings on the same topic were held in Miami in January 1977 and in St. Petersburg in February 1977.[102] Input was also obtained from a survey of more than 1100 juvenile justice system stakeholders, a review of the juvenile laws in other states, a statistical analysis of the relationship between delinquency and a number of social variables, and a special study of the judicial waiver process.[103] Finally, numerous legislative committee and subcommittee meetings were held to receive public testimony and comment. The study culminated in a report issued by the Ad Hoc Committee on Children and Youth on February 8, 1978.[104]

The issues addressed at the Supreme Court's conference included procedures for waiver to adult court.[105] The Ad Hoc Committee's staff report on the conference indicates discussion of and dissatisfaction with

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97. *See id.*; FLA. STAT. § 39.09(2)(d)1.-8. (1975).

98. *See* Veto Message, *supra* note 94, at 4.

99. *See id.*

100. The study was legislatively mandated in the 1976 Regular Session and was ongoing during the 1977 Regular Session; the first opportunity for the legislature to act on the study report was the 1978 Regular Session.

101. *See* CHILDREN AND YOUTH REPORT, *supra* note 80, at 86.

102. The agenda for these hearings included representatives of the judiciary, prosecuting attorneys, public defenders, law enforcement, state and local social services agencies, and school officials, and also afforded an opportunity for comment from the public. *See id.* at 81-82, 84.

103. *See id.* at 86-93.

104. *See id.*

105. *See* AD HOC SUBCOMM. ON CHILDREN AND YOUTH OF THE FLA. H.R. COMM. ON HEALTH & REHABILITATIVE SERVICES STAFF REPORT: ORLANDO CONFERENCE ON JUVENILE JUSTICE (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.).

waiver requirements in cases where a juvenile had previously been waived to adult court.[106] This emphasis focused on the institutional problems associated with earlier changes in the law. Again, the main complaint was that waiver hearings were mandated in cases in which juveniles were facing a second or subsequent charge for a violent crime, even where the prior charge for a violent offense had resulted in a decision to waive the case to criminal court.[107] Although the outcome of such waiver hearings was predictable, the prosecutors and judges still had to go through the motions and the hearings. Thus, one of the recommendations was the enactment of a "once waived, always waived" statutory provision.[108]

The stakeholder survey[109] covered a number of other key issues, including the age range for juvenile court jurisdiction and the confidentiality of juvenile records.[110] But the most relevant issue to our considerations here concerned the legal mechanisms by which juveniles accused of a violation of law could be transferred from the juvenile to the criminal division of the circuit court for prosecution as adults.[111] More than 63% (N=410) of the survey respondents favored retaining the then current system under which juveniles could be transferred to adult court through a grand jury indictment or a judicial waiver.[112] The committee staff noted that this showing of preference was made even more significant because nearly 80% (N=49) of the respondents had given no response to this question.[113]

There was no reference to survey findings in favor of retaining the waiver hearing process in the report by the Ad Hoc Committee on Children and Youth.[114] The report did note, however, that critics of the waiver hearing believed that "[i]t was . . . cumbersome, time-consuming, and function[ed] as a 'mini-trial' considering factors which ha[d] often been previously determined at a detention hearing."[115] It appears there was no

106. *See id.* at 7.
107. *See id.*
108. *Id.*
109. *See* INTERIM STUDY REPORT, *supra* note 82, at 6; CHILDREN AND YOUTH REPORT, *supra* note 80, at 87; *see also* the survey instrument with a cover letter from the chairman dated Dec. 6, 1976 and an undated staff analysis of the responses received to the juvenile justice questionnaire consisting of 18 numbered pages and 9 unnumbered attachments [hereinafter Analysis of Juvenile Justice Questionnaire], *available in* the working papers of the AD HOC SUBCOMM. ON CHILDREN AND YOUTH OF THE FLA. H.R. COMM. ON HEALTH & REHABILITATIVE SERVICES (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.).
110. Analysis of Juvenile Justice Questionnaire, *supra* note 109, at 5-6 (questions 10, 12), 16-18 (questions 59-64).
111. *See id.* at 6-8 (questions 14-20).
112. *See id.* at 8 (question 20).
113. *See id.*
114. *See* CHILDREN AND YOUTH REPORT, *supra* note 80.
115. *Id.* at 59.

consensus to completely eliminate waiver hearings,[116] but there was a good deal of interest in expediting transfers in some cases.[117] Specifically, the interest was in expediting the process by which older juveniles, who had prior delinquency records and who had not responded favorably to juvenile system interventions, could be transferred for prosecution as adults.[118]

As the 1978 session approached, the preferred means for expediting the waiver process became clear. Both the House of Representatives and the Senate developed a package of juvenile justice reforms that included provisions granting state attorneys, in certain cases, the authority to file an information on juveniles directly in the criminal division of the circuit court.[119] The legislative solution to institutional problems associated with the work-load pressures and the targeting of specific kinds of offenders always seems to bring legislators back to placing more authority with state attorneys.[120]

Several groups submitted written recommendations with respect to procedures for prosecuting juveniles as adults and processing subsequent cases; some of the suggestions stopped far short of focusing on prosecutors. The Florida Conference of Circuit Judges, for example, adopted a resolution recommending statutory changes providing that a juvenile who previously had been waived for prosecution as an adult should thereafter be treated as an adult for all alleged violations of the law.[121] This was a clear and simple solution to the problem of work-load pressures, and it would not have shifted any new authority to prosecutors. The Juvenile Justice and Delinquency Prevention Task Force of the Governor's Commission on Criminal Justice Standards and Goals recommended a similarly cautious response.[122] With respect to draft legislation under consideration by the Senate, the Governor's Commission recommended the following:

> (1) that the minimum age for waiver be sixteen years, because the juvenile justice system was better equipped to deal effectively with

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116. *See* Analysis of Juvenile Justice Questionnaire, *supra* note 109, at 8 (question 20) (over 63% of survey respondents favored retaining the waiver procedure).

117. *See id.* at 8 (question 21) (nearly 70% of survey respondents favored changing the waiver procedure for youth who had previously been waived).

118. *See id.* at 6-8 (questions 14-20).

119. *See* Fla. S.B. 119, 4th Leg., Reg. Sess., § 7 (1978); Fla. H.B. 1956, 4th Leg., Reg. Sess., § 2 (1978).

120. *See* TORBET ET AL., *supra* note 2, at xv-xvi.

121. *See* Recommendations Regarding Potential Juvenile Law Legislation Adopted by the Florida Conference of Circuit Judges (Oct. 11, 1977) (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 371, Tallahassee, Fla.) [hereinafter Recommendations].

122. *See* Statement of the Juvenile Justice and Delinquency Prevention Task Force on Draft Senate Bill 119, at 4-5 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 651, Tallahassee, Fla.) [hereinafter Statement].

young offenders;
(2) that procedures for indictments should be eliminated so that judicial waiver would be the only process by which a child could be transferred to the criminal justice system; and
(3) because of the serious consequences of transferring a child to the adult system, it should never be imposed without a waiver hearing, and therefore the direct filing of an information was strongly opposed.[123]

Despite the clear preference of Florida's Conference of Circuit Judges[124] and the Governor's Commission[125] for retaining juvenile court jurisdiction and strengthening judicial discretion over waiver, the original version of the Senate bill included neither of these provisions.[126] Indeed, the bill provided for the direct filing of an information on a juvenile who was sixteen or seventeen years of age at the time of the alleged offense when in the judgment of the state attorney, adult sanctions should be considered or imposed.[127] The original Senate bill was also somewhat contradictory in tone. On the one hand, it incorporated significant prosecutorial discretion in the transfer process.[128] On the other hand, it also included ambiguous, if not internally contradictory, provisions requiring a criminal court judge to transfer the case back to juvenile court upon a showing by the juvenile that he:

(1) had not previously been found to have committed a delinquent act that was classified as a felony and been committed to state custody; or,
(2) had not twice previously been found to have committed misdemeanors for which he was committed to state custody; and
(3) was under the age of 16 when the offense charged was committed.[129]

A later version of the Senate bill deleted this last requirement, which appeared to be in conflict with provisions setting age limits on a state attorney's discretion to direct-file charges against juveniles.[130] This version

123. *Id.*
124. *See* Recommendations, *supra* note 121.
125. *See* Statement, *supra* note 122.
126. *See* Fla. S.B. 119, 4th Leg. (1978).
127. *See id.* § 7.
128. *See id.*
129. *Id.*
130. *Compare id.* (requiring the circuit judge to transfer the case back to juvenile court upon a showing by the juvenile that he or she had not been convicted twice of a misdemeanor and was under the age of 16 when the current offense allegedly was committed), *with* Fla.

of the legislation also proposed to repeal the mandate that a state attorney file a motion for waiver in repeat violent offender cases, that is, those in which a juvenile, previously adjudicated delinquent for murder, rape, sexual battery, armed robbery, or aggravated assault, was being charged with one of those offenses for a second or subsequent time.[131] Instead, prosecutors were given the option of direct filing an information in such cases.[132] Without a doubt, the structure of the juvenile justice system and its traditional dependence on a strong judicial role was on the brink of a major change.

The Senate legislation was all the more portentous because the 1978 Florida House of Representatives was considering a very similar bill.[133] The House bill contained the same age restrictions but avoided the constitutional problems of the 1976 House Bill 1300 by excluding cases involving capital or life felonies.[134] It allowed state attorneys to direct file an information, but their discretion was limited to cases in which the juvenile had two prior findings of delinquency and one prior commitment for an act that if committed by an adult would have been a felony.[135] Both 1978 bills provided that once a juvenile had been transferred for adult prosecution by any means and had been found to have committed the offense charged (or a lesser offense), the juvenile was to be treated as an adult for any subsequent violation of law.[136]

The record indicates that the compromise reached by the conference committee split the difference between proponents of the traditional juvenile court philosophy, which centered on judicial discretion and control, and those favoring prosecutorial authority as a means of reducing work loads.[137] The *Kent* criteria[138] and the sentence-back option that passed in the final version

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Committee Substitute for S.B. 119, 4th Leg., § 7 (1978) (requiring the circuit judge to transfer the case back to juvenile court upon a showing by the juvenile that he had not been convicted twice of a misdemeanor regardless of age when the current offense was committed).

131. *See* Fla. S.B. 119, § 7.

132. *See id.*

133. *See* Fla. H.B. 1956, 11th Reg. Sess. (1978).

134. *See id.* § 2.

135. *See id.*

136. *See id.*; Fla. S.B. 119, § 3.

137. *See* 1978 Fla. Laws ch. 78-414, § 7. *Compare* Senate Staff Analysis and Economic Statement on Committee Substitute for S.B. 119, at 4 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 651, Tallahassee, Fla.), *with* March 29, 1978 meeting minutes, FLA. H.R. COMM. ON HEALTH & REHABILITATIVE SERVICES (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 370, Tallahassee, Fla.) *and* attachment entitled Revision of ch. 39 — Explanation of Substantive Changes, at 2 [hereinafter ch. 39 — Explanation of Substantive Changes]. Although these comments were addressed to a House of Representatives proposed committee bill (subsequently Fla. H.B. 1956), they are instructive because the provisions relating to direct filing of an information were very similar to those that became law following the 1978 session.

138. *See supra* notes 40 & 52 and accompanying text.

appears to be a token concession to the traditionalists.[139] The institutional response to address work-load pressures that had started the process seemed to be giving way to more instrumental concerns relating to combating the juvenile crime problem in general.[140]

Direct-file provisions were part of a comprehensive reform of Florida's juvenile justice system considered in 1978.[141] The Senate and House bills regarding transfer were at odds so a conference committee offered a compromise position that would be acceptable to both.[142] This compromise allowed the direct filing of an information on a juvenile who was sixteen or seventeen years of age at the time of the alleged offense if, in the judgment of the state attorney, the public interest required that adult sanctions be considered or imposed.[143] Under the compromise, a juvenile against whom a direct information was filed (not the criminal court judge) could challenge the action of the state attorney in the criminal court and have the case transferred back to the juvenile court.[144] To do so, however, the juvenile had to prove a negative; he or she had *not* previously been found to have committed two delinquent acts, one of which involved an offense classified as a felony under Florida law.[145]

With respect to the provisions relating to direct filing of an information against certain juveniles, the 1978 legislation that became law closely resembled the bill that had been initially proposed by the House Committee on Health and Rehabilitative Services that year.[146] An explanation of proposed changes prepared for the members of that committee sheds light on the rationale for the direct-file provisions that were enacted in 1978.[147] The explanation echoes the instrumental language of Governor Askew's 1976 veto

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139. *See* 1978 Fla. Laws ch. 78-414, § 7.

140. The instrumental aspect of this change can be appreciated by looking at the general increase in juvenile arrests in Florida until the mid-1990s as well as the increases in the number of transfers in the state until about the same period. *See* JUVENILE JUSTICE ADVISORY BOARD, 1996 ANNUAL REPORT AND JUVENILE JUSTICE FACT BOOK 46, 66 (1996) [hereinafter 1996 ANNUAL REPORT]; JUVENILE JUSTICE ADVISORY BOARD, 1994 ANNUAL REPORT AND JUVENILE JUSTICE FACT BOOK 51 (1994).

141. *See supra* notes 98-140 and accompanying text.

142. *See* FLA. S.J. 764, 765 (June 2, 1978) (statement of the conference committee) (recommending that the House of Representatives and the Senate compromise on the provisions relating to direct filing of an information).

143. *See* FLA. STAT. § 39.04(2)(e)4. (Supp. 1978); 1978 Fla. Laws ch. 78-414, § 7.

144. *See* FLA. STAT. § 39.04(2)(e)4. (Supp. 1978).

145. *See id.*

146. *Compare* Fla. H.B. 1956, § 2 (1998), *with* 1978 Fla. Laws ch. 78-414, § 7; *see also supra* note 137 and accompanying text. The House staff's explanation of changes proposed in the House legislation focused on the direct-file provisions. On the other hand, the Senate Staff Analysis seems to place equal emphasis on the "once waived, always waived" change, and the new procedures relating to the disposition of juveniles transferred for prosecution as adults. *See infra* note 150 and accompanying text.

147. *See* Ch. 39 — Explanation of Substantive Changes, *supra* note 137, at 2.

of House Bill 1300 and states that a major concern is the need "to more efficiently and effectively remove hard core, repeat offenders from the juvenile justice system."[148] The staff analysis notes that direct file serves the crime control goal and concludes that "the underlying assumption is that such a [juvenile] is unresponsive to rehabilitative efforts, and accordingly should be considered for placement in the adult correctional system for the protection of society."[149]

A Senate staff analysis and an economic assessment of the new law offer little additional insight into the complex and shifting rationale for the direct-file provisions upon which the legislature finally agreed. However, the analysis does suggest that in order to win approval for the direct-file language, as a compromise, the provisions governing sentencing of juveniles who were successfully prosecuted as adults were completely revamped.[150] The pertinent point made in the analysis is that all of the waiver criteria formerly considered by a juvenile court judge would have to be considered by a criminal court judge at the end of the trial of a juvenile prosecuted as an adult.[151] This change appears to have been designed to preserve a role for the judge, albeit, the criminal court judge, and a place for the *Kent* criteria[152] in sentencing decisions for transferred juveniles.

The direct-file provisions enacted in 1978[153] remained unchanged until 1981 when the right to challenge a state attorney's direct-file decision was limited to cases in which a juvenile was charged with a misdemeanor.[154] To reverse a transfer, a juvenile still had to prove a negative: either that he had *not* previously been found to have committed two delinquent acts or that *none* of his prior delinquencies had involved an offense classified as a felony.[155] In 1990, the legislature shifted the burden for meeting eligibility for transfer in these cases to the prosecutor.[156] This change eliminated the awkward requirement that a juvenile prove a negative in order to challenge the direct-file decision in misdemeanor cases.[157]

The authority of prosecutors to direct file an information has existed

148. *Id.*
149. *Id.*
150. *See* Staff Analysis and Economic Statement on Committee Substitute for S.B. 119, *supra* note 137, at 4.
151. *See id.* at 3-4.
152. *See supra* notes 40 & 52 and accompanying text.
153. *See* FLA. STAT. § 39.04(2)(c)4. (Supp. 1978).
154. *See* FLA. STAT. § 39.04(2)(c)4. (1981).
155. *See id.*
156. *See* FLA. STAT. § 39.047(4)(e)5. (Supp. 1990).
157. *See id.* These seemingly minor amendments illustrate Bohannan's point that law is often out of phase in ways that require institutional adjustments to make cases more justiciable. *See* Bohannan, *supra* note 14, at 311.

since 1978.[158] However, the range of cases over which this authority can be exercised has expanded, especially because of legislation enacted in 1994.[159] The discretion of prosecutors to direct file was extended to fourteen- and fifteen-year-old adolescents who were charged with any of fourteen "qualifying" offenses, that is, arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated assault, aggravated stalking, murder, manslaughter, bombing, armed burglary, aggravated battery, lewd and lascivious acts with a child, and using a firearm in the commission of a felony.[160] Although the 1994 direct-file reform widened the net to allow many more cases to be transferred,[161] it was rarely used.[162] Thus, this provision seems to have been largely expressive rather than instrumental, especially in terms of its impact. This view is reinforced by data from interviews with prosecutors about the 1994 reforms.[163] Even though prosecutors have not used the lower age provisions, most report an interest in lowering the minimum age even further.[164]

E. *Mandatory Direct Filing of an Information*

The 1978 legislation that first granted direct-file discretion to prosecutors also included a change in waiver provisions that had the effect of creating a de facto mandate for direct filing in certain cases.[165] The law required that a prosecutor file either a waiver motion in juvenile court or an information in criminal court in any case involving a child fourteen years of age or older who had previously been charged with murder, sexual battery, armed or strong-armed robbery, aggravated battery, or aggravated assault and who was currently charged with a second or subsequent offense of a similar nature.[166] Faced with choosing either a mandatory waiver hearing or a mandatory filing of an information, the choice for prosecutors would have been obvious in most, if not all, cases. In 1994, mandatory direct file was expanded.[167] A new provision was added for juveniles who had three prior adjudications (or adjudications withheld) for felonies arising out of different offense occasions and for which they had already served three distinct residential commitments.[168] The 1994 reforms were, in part, a reaction to

158. *See* FLA. STAT. § 39.04(2)(c)4 (Supp. 1978).
159. *See* FLA. STAT. § 39.0587 (Supp. 1994).
160. *See id.* § 39.0587(1)(e)a.-n.
161. *See* Lanza-Kaduce et al., *supra* note 4, at 279.
162. *See* Frazier et al., *supra* note 51, at 172.
163. *See id.* at 178.
164. *See id.*
165. *See* FLA. STAT. § 39.09(2)(a) (Supp. 1978).
166. *See id.*
167. *See* FLA. STAT. § 39.0587 (Supp. 1994).
168. *See id.*

a number of crimes that had been perpetrated by juveniles, and a general sense that juvenile crime was out of control.[169]

In the 1990s, one offense that seemed to attract juveniles and outrage adults was motor vehicle theft. Many Floridians who were victims of motor vehicle theft and their insurers, were said to have complained loudly and often to their legislators. In 1996, the legislature responded by adding a new category of offense to the mandatory direct-file provisions of law.[170] Prosecutors were required to file an information against a juvenile, regardless of age, who was accused of any criminal wrongful taking of a motor vehicle, for example, car jacking or grand theft of a motor vehicle, that resulted in bodily injury or death.[171] If the juvenile seriously injured or killed a person not involved in the underlying offense, while the juvenile had possession of a stolen vehicle, transfer was mandatory.[172] In all such cases the driver and all willing participants in the stolen motor vehicle at the time of the injury or death, that is, anyone who had participated in the car theft, were subject to mandatory transfer to adult court.[173]

This provision is not likely to have any instrumental impact on motor vehicle thefts by juveniles because it presumes too much. First, the provision presumes that juveniles perceive the risk of accident to be high. Second, it presumes that juveniles know the details of the law. Last, it presumes that either the risk or the law matters to juveniles when they steal a car. Since the prosecutors already have discretionary authority to direct file against sixteen- and seventeen-year-olds,[174] the goals of this provision are more likely expressive than instrumental. Instrumental crime control goals seem to have yielded to purely expressive ones once the transfer provisions were sufficiently broad to allow adult prosecution for all serious cases. Interestingly, however, this happened in Florida at a time when most other states

169. *See* Frazier et al., *supra* note 51, at 169. Several of these crimes evinced strong official reactions that made headlines. *See id.* This is the only clear example among the many reforms in Florida's transfer law where the reform followed dramatic press coverage. Most studies of law formation in juvenile and criminal law note that the press plays a major role in the process. *See* SINGER, *supra* note 5, at 46-74; John Hagan, *The Legislation of Crime and Delinquency: A Review of Theory, Method, and Research*, 14 L. & SOC'Y REV. 603, 623-25; Richard C. Hollinger & Lonn Lanza-Kaduce, *The Process of Criminalization: The Case of Computer Crime Laws*, 26 CRIMINOLOGY 101, 105-07 (1988); Mays & Gregware, *supra* note 8, at 186-89. The archives and legislative history sources in Tallahassee occasionally include press clippings, but usually cover the legislative progress of various bills rather than dramatic crime stories. We cannot rule out the possibility that individual legislators reacted to press coverage in the other Florida reforms, but the retained records we were able to recover do not indicate that they had.

170. *See* FLA. STAT. § 985.227(2)(c) (1997).

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.* § 985.227(1)(b).

were just beginning to address the juvenile crime problem in an instrumental way.[175] In short, Florida began getting tough with juvenile offenders almost inadvertently in the wake of reforms aimed at solving a practical institutional problem. These get tough reforms became instrumental and continued later in expressive form well beyond the time when a practical need existed for them. Throughout Florida's juvenile justice history there appears to have been a lack of connection between particular reforms and the targeted problems — they were out of phase.

III. CONCLUSION

This study examined the evolution of transfer in the state of Florida since the inception of a separate juvenile court nearly fifty years ago. Other studies of juvenile law formation have focused on broad issues, like the emergence of the juvenile system itself,[176] or on specific reforms at specific times, like the 1993 revision of New Mexico's Children's Code.[177] By focusing on the various legal changes in one area of law over the long term, we gained a different perspective on the cumulative give-and-take in the process of law formation. Although we had previously analyzed the instrumental and expressive dimensions of Florida's 1994 transfer reforms,[178] we were frankly surprised at how important "systems responses" were in the long-term evolution of Florida's law of transfer. We often found that legal changes reflected efforts to adjust to institutional or organizational problems, or what Bohannan might refer to as problems of phase.[179] This was true for law formation of the various methods of transfer used in Florida. Several examples demonstrate this point.

Indictment procedures created problems of phase that had to be addressed. For example, after legislators removed all juvenile justice jurisdiction from cases in which indictments were expected,[180] they had to reinstate it in 1973 to give prosecutors the time necessary to seek indictments.[181] The first time period allowing fourteen days proved to be inadequate,[182] so they adjusted the time to twenty-one days in 1978.[183]

Voluntary waiver also required institutional adjustments. Earlier

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175. *See* Charles E. Frazier et al., *Juveniles in Criminal Court: Past and Current Research from Florida*, 18 QUINNIPIAC L. REV. (forthcoming 1999).

176. *See* ANTHONY PLATT, THE CHILD SAVERS (1969). For a review of criminal and juvenile law formation studies, see Hagan, *supra* note 169.

177. *See* Mays & Gregware, *supra* note 8.

178. *See* Lanza-Kaduce et al., *supra* note 4, at 277-312.

179. *See* Bohannan, *supra* note 14, at 311.

180. *See* FLA. STAT. § 39.02(6)(c) (1967); FLA. STAT. § 39.02(6)(c) (1969).

181. *See* FLA. STAT. § 39.02(5)(c) (1973).

182. *See id.* § 39.02.

183. *See* FLA. STAT. § 39.02(5)(c) (Supp. 1978).

provisions that gave juveniles the independent authority to demand waiver were inconsistent with the larger juvenile justice logic that juveniles had limited capacity to make mature choices.[184] In 1967, the legal adjustment required that the juvenile be joined in the demand by a parent, guardian, or legal counsel.[185]

Transfer via involuntary judicial waiver procedures also required institutional responses to make adjustments when legal efforts were perceived to be out of phase with practice or societal norms. Judicial waiver hearings did not comport with America's automobile culture so waiver hearings were bypassed and waiver became mandatory for juveniles charged with various traffic offenses beginning in 1967.[186] This institutional adjustment insulated the juvenile court from being overwhelmed by numerous traffic cases.

The preceding examples illustrate the role of institutional adjustments in dealing with problems of phase as a source of legal change and reform. The socio-legal history of transfer in Florida identified numerous other examples of this pattern. The most critical change, the institutionalization of prosecutorial discretion in transfer that eventually led to direct file,[187] itself began as an institutional adjustment to work-load pressures that were created by previous legislative tinkering.[188]

In 1973, the Florida legislature mandated judicial waiver hearings for various repeat violent offenders.[189] The waiver hearing work load for prosecutors and judges more than doubled in the year after the reform.[190] An institutional adjustment was inevitable, but the original legislative efforts at adjustment[191] misfired, in part, because they were not sufficiently focused on the immediate work-load problem. These legislative efforts opened areas of conflict and raised constitutional questions. In fact, the initial legislative attempt to adjust was vetoed by Governor Askew.[192] However, in the process, he reframed the rationale of the reform effort and transformed the issue into one of instrumental crime control instead of one aimed at relieving work-load pressures.[193] Eventually, in 1978, legislators gave direct-file authority to prosecutors, addressing both the work-load problem and instrumental crime control issues.[194] The new law was

184. *See* FLA. STAT. § 39.02(6) (1951).
185. *See* FLA. STAT. § 39.02(6)(b) (1967).
186. *See id.* § 39.02(1)(a).
187. *See supra* notes 84-164 and accompanying text.
188. *See supra* notes 80-83 and accompanying text.
189. *See* FLA. STAT. § 39.02(5)(c) (1975).
190. *See supra* notes 80-83 and accompanying text.
191. *See* FLA. STAT. §§ 39.02(1)(a), (6)(b) (1967).
192. *See* Veto Message, *supra* note 94.
193. *See id.* at 4.
194. *See* FLA. STAT. § 39.02(2)(a) (Supp. 1978).

effective in minimizing the use of waiver hearings and in transferring more delinquents to criminal court. By 1992-93, the number of transfer cases in Florida swelled to an annual rate of over 7200,[195] after which it stabilized at somewhat lower rates. After 1978, the proportion of transfer cases handled by judicial waiver declined steadily to only one percent of all transfers in any given year.[196]

The instrumental intent and effect of early direct-file provisions on the processing of juveniles did not translate into a change in crime or delinquency rates.[197] Moreover, the instrumental aspects of the early direct-file provisions seemed to give way to later reforms that were expressive in effect and probably in purpose. The 1994 reforms provided the clearest evidence of this transformation from instrumental to expressive law.[198] This legislation passed in an environment in which transfer rates, which had been high, had peaked and had begun to decline and stabilize.[199] Results of prosecutor surveys[200] suggested that the rates probably stabilized because prosecutors already had ample authority to direct file all juveniles they believed were deserving. The expanded transfer revisions of 1994 potentially made at least 13,000 more cases per year eligible for criminal court prosecution.[201] Despite their potential to have a large impact, the reforms had little. Thus, the 1994 reforms, which included direct-file authority over fourteen- and fifteen year-olds, mandatory direct file of offenders who had not benefited from multiple prior residential placements, and a presumptive waiver requirement for repeat violent offenders, are less easily understood in instrumental terms. The same reform package that expanded transfer also severed juvenile justice from a larger social welfare agency and directed the new Department of Juvenile Justice to pursue punishment and accountability rather than treatment and rehabilitation.[202] The "going rate" or the most

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195. *See* Frazier et al., *supra* note 51, at 168.

196. *See id.* at 178; The Florida Department of Juvenile Justice (visited Mar. 26, 1999) <http://www.djj.state.fl.us>.

197. *See* Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996); Lanza-Kaduce et al., *supra* note 4, at 277; Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Re-examining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548, 548-49 (1997).

198. *See supra* notes 159-65 and accompanying text.

199. *See* Frazier et al., *supra* note 51, at 171.

200. *See id.* at 178-79.

201. *See* Frazier et al., *supra* note 51, at 170.

202. The contrast between Florida and New Mexico is instructive. In New Mexico, the juvenile justice stakeholders sacrificed a few serious offenders to transfer for expressive purposes in order to preserve the traditional juvenile justice treatment ideal and protect their claim to resources for maintaining services for the many. *See* Mays & Gregware, *supra* note 8, at 180. In Florida, it appears that juvenile justice stakeholders sacrificed their official commitment to the rehabilitative ideal for all juvenile offenders but maintained a separate system for them. In so doing, Florida juvenile justice stakeholders probably enhanced their

appropriate sanction for juveniles in need of punishment could now be satisfied in either the criminal or juvenile justice systems.[203] Because of the 1994 remaking of the juvenile justice system, the expanded direct-file and mandatory-waiver authority might have been an unnecessary addition to the transfer arsenal. The juvenile justice system had adapted itself to serve some of the same expressive functions of criminal justice.

Our socio-historical analysis of the long-term and multifaceted legal changes in Florida's transfer laws demonstrates the importance of Bohannan's insight: law's efforts to institutionalize and reinstitutionalize practices and norms also create new problems of adjustment that will stimulate additional lawmaking. Law, at once, can be instrumental, expressive, and adaptive to what Bohannan called "problems of phase." Individual legal reforms can also reflect purposes and produce impacts that are wildly divergent from those originally envisioned. Therefore, Florida's transfer history may be very instructive to policymakers in states just beginning transfer reforms.

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new organization's claim to resources and their own occupational security.

203. *See* SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS 40 (4th ed. 1998).