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JUVENILE JUSTICE WAIVER STANDARDS IN NEW JERSEY

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Survey of State Waiver Statutes

Lawmakers are aware that juvenile crime is no longer restricted to property crimes such as vandalism and car theft. Juvenile delinquency now encompasses all types of violent crimes.[1] The juvenile justice system in most states was created with rehabilitative, not punitive, measures in mind. It is increasingly obvious that rehabilitation often is not the answer for some juveniles. States have enacted waiver statutes[2] to combat the increase in serious juvenile crime.

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[1] Violent crimes such as murder, robbery, and arson come under the rubric of juvenile delinquency in many states. *See, e.g.*, CAL. WELF. & INST. CODE § 707 (West Supp. 1977).

[2] A representative sample of states which have enacted waiver statutes includes: CAL. WELF. & INST. CODE § 707 (West Supp. 1977); CONN. GEN. STAT. ANN. §§ 17-60a to -60b (West Supp. 1977); DEL. CODE tit. 10, § 938 (1975 & Cum. Supp. 1976); FLA. STAT. ANN. § 39.09(2) (West Supp. 1977); GA. CODE ANN. §§ 24A-1201, -2501 (1977); IDAHO CODE § 16-1806 (Supp. 1977); ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd Supp. 1978); IND. CODE § 31-5-7-14 (1976); KY. REV. STAT. § 208.170 (1977); MD. CTS. & JUD. PROC. CODE ANN. § 3-804 (Supp. 1977); MASS. ANN. LAWS. ch. 119, § 61 (Michie Law. Co-op Supp. 1977); MICH. COMP. LAWS ANN. § 712.4 (Supp. 1977-1978); MINN. STAT. ANN. § 260.125 (West 1971); MO. ANN. STAT. § 211.071 (Vernon 1959); NEV. REV. STAT. § 62.080 (1975); N.H. REV. STAT. ANN. § 169:21a (Supp. 1975); N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979); OHIO REV. CODE ANN. § 2151.26 (Page 1976); OKLA. STAT. ANN. tit. 10, § 1102 (West Supp. 1977-1978); OR. REV. STAT. § 419.533 (1977); PA. STAT. ANN. tit. 42, § 6355 (Purdon 1977); R.I. GEN LAWS § 14-1-7 (Supp. 1977); UTAH CODE ANN. § 78-3a-25 (1977); VA. CODE § 16.1-269 (Supp. 1977); WASH. REV. CODE ANN. § 13.04.120 (1962).

"Waiver of jurisdiction" statutes, or "reference for prosecution" statutes, as they are sometimes referred to, allow a juvenile, under certain circumstances, to be transferred to the adult criminal court. In some states, jurisdiction may be waived where the charge would be a felony if the offense was committed by an adult.[3] Once probable cause has been established, and, in the opinion of the court, the best interests of the child and the public would be protected by such a transfer, the juvenile will be tried in the adult criminal court as if that juvenile were an adult.[4] Several other states permit the juvenile court to waive jurisdiction in any case where the alleged offense, if committed by an adult, could be dealt with in a criminal court.[5] Even where a waiver statute has been enacted, however, not all juveniles are automatically waived over.[6]

Juveniles who are younger than the proscribed minimum age are not waived at all, despite the surrounding circumstances or the gravity of the offense. In Illinois, a juvenile as young as thirteen years old may be waived over to the criminal court if it is not in the best interest of the minor or the public to proceed in juvenile court.[7] In Nevada, however, juveniles below

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[3] IDAHO CODE § 16-1806 (Supp. 1977-1978); KY. REV. STAT. § 208.170 (1977); MICH. COMP. LAWS ANN. § 712A.4 (Supp. 1977-1978); MO. ANN. STAT. § 211.071 (Vernon 1959); NEV. REV. STAT. § 62.080 (1975); N.H. REV. STAT. ANN. § 169:21a (Supp. 1975); OHIO REV. CODE ANN. § 2151.26 (Page 1976); UTAH CODE ANN. § 78-3a-25 (1977).

[4] *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.4 (Supp. 1977-1978) which provides:

> . . . .
>
> (3) Before the court waives jurisdiction, it shall determine if there is probable cause to believe that the child committed an offense which, if committed by an adult, would be a felony.
>
> (4) Upon a showing of probable cause, the court shall conduct a hearing to determine whether or not the interests of the child and the public would be served best by granting a waiver of jurisdiction to the criminal court. . . .

See also OHIO REV. CODE ANN. § 2151.26(A)(2)(Page 1976); IDAHO CODE § 16-1806(5)(Supp. 1977); *compare* Kentucky, where the standard is reasonable cause, KY. REV. STAT. § 208.170(1) (1977).

[5] These are samples of the states allowing waiver: CAL. WELF. & INST. CODE § 707 (West Supp. 1977); GA. CODE ANN. §§ 24A-1201,-2501 (1977); ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd Supp. 1978); IND. CODE § 31-5-7-14 (1976); MASS. ANN. LAWS ch. 119, § 61 (Michie/Law. Co-op Supp. 1977); MINN. STAT. ANN. § 260.125 (West 1971); OKLA. STAT. ANN. tit. 10, § 1102 (West Supp. 1977-1978); OR. REV. STAT. § 419.533 (1977); R.I. GEN LAWS § 14-1-7 (Supp. 1977); WASH. REV. CODE ANN. § 13.04.120 (1962).

[6] Under the N.J. court system, a juvenile may be transferred, in certain circumstances, to an adult criminal court. This transfer is termed a "waiver," and the process of transferring the juvenile is defined as "waived over."

[7] ILL. ANN. STAT. ch. 37, §§ 702-7(3), (5) (Smith-Hurd Supp. 1978) is an example of a non-automatic waiver statute.

sixteen years old will not be waived over, no matter how serious the offense.[8]

Most waiver statutes are discretionary. The discretion may be vested entirely with the juvenile court judge,[9] or the Legislature may enumerate the criteria that must be fulfilled before waiver will be allowed.[10] Even where these statutory criteria exist, the juvenile court is vested with discretion to determine if, in fact, they are met.[11]

In a minority of states, instead of waiver, the original jurisdiction of the juvenile court excludes certain serious offenses.[12] In jurisdictions that use exclusion, any child charged with the pertinent offenses, usually serious vio-

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[8] NEV. REV. STAT. § 62.080 (1975); *accord,* CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977); DEL. CODE tit. 10, § 938(c) (Cum. Supp. 1976); N.H. REV. STAT. ANN. § 169:21a (Supp. 1975); OR. REV. STAT. § 419.533(1) (a) (1977). In Rhode Island, a child 16 years or older who has been found delinquent for having committed two offenses after his 16th birthday, which "would render said child subject to indictment if he were an adult," will be prosecuted for all subsequent offenses in criminal court. R.I. GEN LAWS § 14-1-7 (Supp. 1977).

[9] *See, e.g.,* GA. CODE ANN. §§ 24A-1201, -2501 (1977); MO. ANN. STAT. § 211.071 (Vernon 1959); N.H. REV. STAT. ANN. § 169:21a (Supp. 1975); R.I. GEN LAWS § 14-1-7 (Supp. 1977).

[10] *See, e.g.,* CAL. WELF. & INST. CODE § 707 (West Supp. 1977); IDAHO CODE § 16-1806(8) (Supp. 1977); KY. REV. STAT. § 208.170(3) (1977); MASS. ANN. LAWS ch. 119, § 61 (Michie Law. Co-op Supp. 1977); MICH. COMP. LAWS ANN. § 712A. 4(4) (Supp. 1977-1978). Waiver statutes vary in their specificity of enumerated criteria. MICH. COMP. LAWS ANN. § 712A.4(4) (Supp. 1977-1978) provides that:

> (4) [I]n making the determination, the court shall consider the following criteria:
>
> (a) The prior record and character of the child, his physical and mental maturity, and his pattern of living.
>
> (b) The seriousness of the offense.
>
> (c) Whether the offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.
>
> (d) The relative suitability of programs and facilities available to the juvenile and criminal courts for the child.
>
> (e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender.

Compare OHIO REV. CODE ANN. § 2151.26 (Page 1976), which requires that:

> (3) After an investigation including a mental and physical examination of such child . . . that there are reasonable grounds to believe that:
>
> (a) He is not amenable to care and rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
>
> (b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.

[11] *See, e.g.,* IDAHO CODE § 16-1806(g) (Supp. 1977) (amount of weight to be given to enumerated criteria left to discretion of juvenile court judge).

[12] *See, e.g.,* DEL. CODE tit. 10, § 938(a) (1975); IND. CODE § 31-5-7-14 (1977); MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d) (Supp. 1977).

lent crimes, is subject to the jurisdiction of the adult criminal court.[13] Juveniles who commit less serious offenses may be waived over to the adult criminal court at the discretion of the juvenile court judge.[14] A court exercising criminal jurisdiction has neither the right, nor the power, to try a child who is within the jurisdiction of a juvenile court and who has not been waived by the juvenile court. In those states that employ exclusion, waiver by a juvenile court is not necessary in order to prosecute the child alleged to have committed certain capital crimes.[15] By limiting the original jurisdiction of the juvenile court, the Legislature has determined that a juvenile who has committed a capital offense is capable of being tried as an adult.[16]

Transfer of cases from juvenile court, whether done by exclusion or waiver, reflects a realization that chronological age alone is not a proper standard for the degree of danger represented by certain offenders. The existence of a waiver statute does not mean the waiver is accomplished as readily or as often as it might appear.[17] Regardless of the wording of the statute,

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[13] Delaware law provides:

> (a) A child shall be proceeded against as an adult where:
>
> (1) The acts alleged to have been committed constitute first-degree murder, rape, or kidnapping;
>
> (2) The child has reached his sixteenth birthday and is not amenable to the rehabilitative processes available to the court;
>
> (3) The General Assembly has heretofore or shall hereafter so provide.

DEL. CODE tit. 10, § 938(a) (1975). In Maryland, the law provides:

> (d) The court does not have jurisdiction over:
>
> (1) A child 14 years old or older alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident. . . .
>
> (2) A child 16 years old or older alleged to have done an act in violation of any provision of the State Vehicle Law or any other traffic law or ordinance. . . .
>
> (3) A child 16 years old or older alleged to have done an act in violation of any provision of law, rule, or regulation governing the use or operation of a boat. . . .
>
> (4) A child 16 years old or older alleged to have committed the crime of robbery with a deadly weapon as well as all other charges against the child arising out of the same incident. . . .

MD. CTS. & JUD. PROC. ANN. § 3-804(d) (Supp. 1977).

[14] DEL. CODE tit. 10, § 938(c) (Cum. Supp. 1977).

[15] Aye v. State, 17 Md. App. 32, 299 A.2d 513 (1973); Bean v. State, 234 Md. 432, 199 A.2d 773 (1964); State *ex rel.* Imel v. Mun. Court, 225 Ind. 306, 72 N.E.2d 357 (1947).

[16] In Indiana, the jurisdiction of the juvenile court is limited to delinquent children and excludes those children who have committed acts which, if committed by adults, would be crimes punishable by death or life imprisonment; therefore, prosecution of a child under the age of 18, charged with such an offense, is governed by the procedure which would prevail if there were no juvenile court act. State *ex rel.* Imel v. Mun. Court, 225 Ind. 306, 307, 72 N.E.2d 357, 358 (1947).

[17] In a typical six-month period in Essex County, New Jersey, only one juvenile was waived in approximately 3,000 cases. Interview with Margaret Padovano, Assistant Prosecutor

the criteria most directly affecting the decision to waive jurisdiction are based upon the rehabilitative prospects for the juvenile.[18] Most juvenile courts were established with an eye to remove the youthful offender from the criminal court process. The aim was to correct and change behavior, not punish it. Where the possibility exists for rehabilitation, a juvenile will not be transferred into the adult criminal system, but rather will remain within the authority of the juvenile court. The ultimate determination is usually left to the juvenile court judge[19] as other courts are reluctant to take away the umbrella of protection that the juvenile court affords.

The New Jersey Waiver Statute: Legislative History

Under New Jersey common law, it was settled that an infant under the age of seven years was incapable of committing a crime.[20] The offender was not punished for any capital offense, whatever the circumstances, because of the belief that the child was not yet able to judge good from evil.[21] Between the years of seven and fourteen, an infant was deemed incapable of committing a crime; but, this presumption was rebuttable. Thus, the presentment of strong evidence tending to show maturation would destroy the presumption.[22] This evidence must have included proof that the infant was able to distinguish good from evil and was able to comprehend the nature and quality of his acts. The presumption of incapability was very strong when the child was seven, but the presumption decreased as the child matured, being virtually non-existant by the time the infant reached the age of fourteen.[23] As a result, in two New Jersey cases decided in the early part of the nineteenth century, children as young as ten years old were put to death. The courts believed that they were capable of appreciating the nature and quality of their acts, and found that they should be punished accordingly.[24]

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of the Juvenile Division of the Essex County Prosecutor's Office in Newark, New Jersey (Dec. 21, 1977).

[18] State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972) (waiver of jurisdiction must be based upon a specific finding that the juvenile is not amenable to rehabilitative treatment under juvenile court jurisdiction).

[19] People v. Allgood, 54 Cal. App.3d 434, 126 Cal. Rptr. 666 (Ct. App. 1976). The ultimate question of the rehabilitative potential of a minor is dealt with under the provisions of juvenile court law within the discretion of the juvenile court judge. People v. Curry, 31 Ill. App.3d 1027, 335 N.E.2d 515 (App. Ct. 1975) (whether a minor treated under provisions of Juvenile Court Act or prosecuted as an adult is a judical matter involving discretion).

[20] State v. Guild, 10 N.J.L. 163, 174 (Sup. Ct. 1828); State v. Aaron, 4 N.J.L. 230, 238 (Sup. Ct. 1818).

[21] State v. Aaron, 4 N.J.L. at 238-39 (Sup. Ct. 1818).

[22] *Id.* at 239.

[23] *Id.*

[24] State v. Guild, 10 N.J.L. 163 (Sup. Ct. 1828); State v. Aaron, 4 N.J.L. 230 (Sup. Ct. 1818).

By the end of the nineteenth century, legislatures began to reevaluate the treatment of juveniles. One of the most notable advances to come out of this reevaluation was the establishment of juvenile courts.[25] The New Jersey Legislature, in 1903, established county courts for juvenile offenders which consisted of the judges of the courts of common pleas.[26] This system was modified in 1912 to provide, in first class counties, for the creation of separate juvenile courts.[27] Prior to the establishment of juvenile courts, the Legislature recognized that children should be confined in separate institutions. It established the New Jersey State Home for Boys in 1865,[28] and the New Jersey State Home for Girls in 1871.[29] In 1900, the Legislature gave courts the power to sentence juveniles to a state home for acts which today would be considered juvenile delinquency.[30]

The precursor of the modern juvenile justice statute was enacted in 1929.[31] This statute established the juvenile and domestic relations courts[32] and defined their jurisdiction over children under sixteen years of age.[33] Although the acts of 1903[34] and 1912[35] had expressly excluded the crimes of murder and manslaughter from juvenile court jurisdiction,[36] the

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[25] *See generally* State v. Monahan, 15 N.J. 34, 37, 104 A.2d 21, 22-23 (1954); Gottlieb, *The Origin and Development of the Juvenile Courts*, 40 N.J.L.J. 358 (1917).

[26] An Act establishing a court for the trial of juvenile offenders and defining its duties and powers, ch. 219, 1903 N.J. Laws 477 (revised 1929) (current version at N.J. STAT. ANN. 2A:4-48 (West Supp. 1978-1979)).

[27] An Act providing for the creation of Juvenile Courts in counties of the first class, and defining the jurisdiction and powers thereof, ch. 353, 1912 N.J. Laws 605 (revised 1929) (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

[28] An Act to establish and organize the State Reform School for Juvenile Offenders, ch. CCCCLXXIX, 1865 N.J. Laws 886.

[29] An Act to establish a State Industrial School for Girls, ch. CCCCXXVIII, 1871 N.J. Laws 78.

[30] An Act respecting juvenile offenders, ch. 183, 1900 N.J. Laws 469 (repealed 1903) (commitment of vagrant or incorrigible children to public institutions).

[31] An Act to establish juvenile and domestic relations courts, defining their jurisdiction, powers, and duties, and regulating procedure therein (Revision of 1929), ch. 157, 1929 N.J. Laws 274 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

[32] *Id.* § 2.

[33] *Id.* §§ 2, 6.

[34] An Act establishing a court for the trial of juvenile offenders and defining its duties and powers, ch. 219, 1903 N.J. Laws 477 (revised 1929) (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

[35] An Act providing for the creation of Juvenile Courts in counties of the first class and defining the jurisdiction and powers thereof, ch. 353, 1912 N.J. Laws 605 (revised 1929) (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

[36] An Act establishing a court for the trial of juvenile offenders and defining its duties and powers, ch. 219, 1903 N.J. Laws 477 (revised 1929) (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

1929 revision contained no comparable exclusion.[37] In 1935, the Supreme Court of New Jersey dealt with a constitutional challenge to the juvenile

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Section one of this statute provided:

> 1. When a boy or girl under the age of sixteen years shall be arrested upon complaint of any crime (*Except murder or manslaughter*) [emphasis added], or of being a disorderly person, or being habitually vagrant or being incorrigible, it shall be lawful for the magistrate before whom he or she shall be taken to forthwith commit said boy or girl to the county jail to await trial as such trial is hereinafter provided, or to parole him to await trial, upon such conditions as the said magistrate shall determine, and forthwith send the complaint to the clerk of the court for the trial of juvenile offenders established; *provided, however* [emphasis in original], this act shall not apply to any case where two or more are jointly charged with the commission of some crime and one of them is over the age of sixteen years.

Compare An Act providing for the creation of Juvenile Courts in counties of the first class and defining the jurisdiction and powers thereof, ch. 353, 1912 N.J. Laws 605 (revised 1929) (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)). Section five of the 1912 statute provided that:

> 5. "Delinquent child" shall include any child under sixteen years of age who violates any penal law or municipal ordinance, or who commits any act or offense for which he could be prosecuted in a method partaking of the nature of a criminal action or proceeding (*except the crimes of murder or manslaughter*), or who is a disorderly person, or habitually vagrant, or incorrigible, or immoral or who knowingly associates with thieves or other vicious or immoral persons, or is growing up in idleness or crime, or knowingly visits gambling places or patronizes other places or establishments, his admission to which constitutes a violation of law, or idly roams the streets at night, or who is a habitual truant from school, or who so deports himself or is in such condition or surroundings or under such improper and insufficient guardianship or control as to endanger the morals, health or general welfare of said child.

(emphasis added).

[37] *Compare* the language quoted in note 36, *supra, with* the language of section two of An Act to establish juvenile and domestic relations courts, defining their jurisdiction, powers and duties, and regulating procedure therein (Revision of 1929), ch. 157, 1929 N.J. Laws 274 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)):

> 2. A juvenile and domestic relations court is hereby established in each county of the State and is vested with exclusive jurisdiction to hear and determine all cases against a child under sixteen years who shall commit any of the hereinafter mentioned offenses when under the age of sixteen years, (a) who violates any penal law or municipal ordinance, or (b) who commits any act or offense for which he could be prosecuted in a method partaking of the nature of a criminal action or proceeding, or (c) who is a disorderly person, or (d) habitually vagrant, or (e) incorrigible, or (f) immoral, of (g) who knowingly associated with thieves or vicious or immoral persons, or (h) is growing up in idleness or crime, or (i) knowingly visits gambling places, or patronizes other places or establishments, his admission to which constitutes a violation of law, or (j) idly roams the streets at night, or (k) who is a habitual truant from school, or (l) who so deports himself as to endanger the morals, health or general welfare of said child.

The omission of the parenthetical matter from the 1929 statute indicates that the Legislature meant to vest the newly created juvenile and domestic relations court with exclusive

justice law.[38] The court in, *In re Daniecki*, held that the juvenile and domestic relations court had no jurisdiction to try a juvenile for murder or any other indictable offense.[39] The court concluded that a juvenile charged with murder was triable only in the court of oyer and terminer.[40] Accordingly, the Legislature took steps to reverse this holding. Within the same year, it amended the juvenile justice statute. The Legislature allowed high misdemeanors, misdemeanors, or other offenses committed by anyone sixteen years old or younger to be labelled "delinquency" and to come under the exclusive jurisdiction of the juvenile courts.[41] The Legislature also negated

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jurisdiction over juvenile offenders. *But see In re* Daniecki, 117 N.J. Eq. 527, 528-30. 177 A. 91, 91-92 (Ch. 1935), *aff'd*, 119 N.J. Eq. 359, 183 A. 298 (E. & A. 1936).

[38] *In re* Daniecki, 117 N.J. Eq. 527, 177 A. 91 (Ch. 1935), *aff'd* 119 N.J. Eq. 359, 183 A. 298 (E. & A. 1936), involved a juvenile who was indicted, tried, and convicted of murder in the court of oyer and terminer. After sentencing, the juvenile petitioned for a writ of habeas corpus to discharge him from the custody of the criminal court on the ground that he was under 16 years of age at the time the act was committed, and, therefore, the court of oyer and terminer was without jurisdiction to try him.

[39] *Id.* at 529, 177 A. at 92.

[40] The courts of oyer and terminer were comparable to the county courts and had jurisdiction to try the more serious criminal cases where an indictment was required.

[41] An Act to amend an act entitled "An act to establish juvenile and domestic relations courts, defining their jurisdiction, powers and duties, and regulating procedure therein" (Revision of 1929), approved April twenty-second, one thousand nine hundred and twenty-nine, ch. 284, 1935 N.J. Laws 914 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)), [hereinafter cited as An Act to amend "An act to establish juvenile and domestic relations courts"]. Section two, which established the jurisdiction of the juvenile and domestic relations court, provided that:

> 2. A juvenile and domestic relations court is hereby established in each county of the State and is vested with exclusive jurisdiction to hear and determine all cases of juvenile delinquency.
>
> Juvenile delinquency is hereby defined as the commission by a child under sixteen years of age of any act which when committed by a person of the age of sixteen years or over would constitute:
>
> (a) A felony, high misdemeanor, misdemeanor, or other offense, or
>
> (b) The violation of any penal law or municipal ordinance, or
>
> (c) Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding, or
>
> (d) Being a disorderly person, And also the following acts on the part of a child under the age of sixteen years:
>
> (e) Habitual vagrancy, or
>
> (f) Incorrigibility, or
>
> (g) Immorality, or
>
> (h) Knowingly associating with thieves or vicious or immoral persons, or
>
> (i) Growing up in idleness or delinquency, or
>
> (j) Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of law, or

the common law presumptions regarding the capability of commission of crimes by infants by providing that persons under the age of sixteen were deemed incapable of committing a crime.[42] Two years later the question was raised again as to whether a fifteen year old was triable for murder in the same manner as an adult.[43] Notwithstanding the legislative enactments of two years before,[44] the court of errors and appeals answered in the affirmative.[45]

(k) Idly roaming the streets at night, or

(l) Habitual truancy from school, or

(m) Deportment endangering the morals, health or general welfare of said child.

The intention of the Legislature in adding subparagraph (a) of section two was to vest exclusive jurisdiction over juveniles once and for all in the juvenile and domestic relations court. By specifically including the commission of felonies, high misdemeanors, misdemeanors, and other offenses within the jurisdiction of the juvenile court, the Legislature believed that the effects of *Daniecki* were overcome. There was a clear indication to the supreme court that murder and manslaughter belonged within the jurisdiction of the juvenile court.

[42] A Further Supplement to an act entitled "An act for the punishment of crimes" (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety-eight, ch. 285, 1935 N.J. Laws 916 (current version at N.J. STAT. ANN. § 2A:85-4 (West Supp. 1978-1979)).

[43] State *In re* Mei, 122 N.J. Eq. 125, 192 A. 80 (E. & A. 1937), presented essentially the same set of facts as *Daniecki*. Despite the attempts by the Legislature to change the effect of *Daniecki* by amending the 1929 act, the court again held that the juvenile court did not have jurisdiction.

[44] *Id.* at 126-27, 192 A. at 82. The supreme court several years later in State v. Monahan, 15 N.J. 34, 41, 104 A.2d 21, 24-25 (1954), quoted from Senator Wolber who introduced S. 330, 159 N.J. Legis., (1935) and S. 331, 159 N.J. Legis., (1935) which later became An Act to amend "An act to establish juvenile and domestic relations courts," ch. 284, 1935 N.J. Laws 914 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)), and A Further Supplement to an act entitled "An act for the punishment of crimes," ch. 285, 1935 N.J. Laws 916 (current version at N.J. STAT. ANN. § 2A:85-4 (West 1969)), who stated that:

> The purpose of the two bills is to vest exclusive jurisdiction in the juvenile and domestic relations courts over all children who, while under the age of sixteen years, commit any offense which would constitute crime under the law as it now stands.
>
> A recent decision of the New Jersey Court of Chancery declares the existing provisions having the same purpose, unconstitutional because they deprive the defendant of the right to indictment and jury trial. These bills eliminate the objection by providing that juvenile delinquency does not constitute crime and the penalties for crime cannot be imposed.
>
> The purpose is to effectuate the social policy already expressed in the juvenile and domestic relations court law of confining the handling of juvenile delinquents to specialists in the field. These bills merely correct a possible technical defect in the existing act, pointed to by the Chancery decisions. The act was drawn by the New Jersey Crime Commission pursuant to a resolution adopted by the New Jersey State Conference on Crime.

[45] State *In re* Mei, 122 N.J. Eq. 125, 129, 192 A. 80, 83 (E. & A. 1937).

In 1937, the Legislature recodified and compiled the existing law in New Jersey when they enacted the Revised Statutes of 1937.[46] In response to the prior decisions of the court of errors and appeals, the juvenile justice law was recodified as it had existed in 1929 absent the 1935 amendment.[47]

The New Jersey Waiver Statute: Legislative History After the Recodification

It was in 1943 that the Legislature amended the Revised Statutes to include the deleted 1935 amendment.[48] This 1943 amendment enlarged the

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[46] An Act to provide for the revision and consolidation of the public statutes of this State, ch. 73, 1925 N.J. Laws 244 (current version at N.J. STAT. ANN. § 1:10-1 (West 1939). *See also* LAW REVISION AND LEGISLATIVE SERVICES COMMISSION, MANUAL FOR USE IN DRAFTING LEGISLATION FOR INTRODUCTION IN THE NEW JERSEY LEGISLATURE, 3, 13-17 (April 1977).

[47] *Compare* the language in the law of 1929, *supra* note 37, *and* the language in the 1935 amendment, *supra* note 44, *with* the language used in the recodification of 1937, N.J. REV. STAT. § 9:18-12 (1937):

> The juvenile and domestic relations court shall have exclusive jurisdiction to hear and determine all cases against a child under sixteen years who, when under the age of sixteen years, shall:
>
> a. Violate any penal law or municipal ordinance;
>
> b. Commit any act or offense for which he could be prosecuted in a method partaking of the nature of a criminal action or proceeding;
>
> c. Be a disorderly person;
>
> d. Be habitually vagrant;
>
> e. Be incorrigible;
>
> f. Be immoral;
>
> g. Knowingly associate with thieves or vicious or immoral persons;
>
> h. Be growing up in idleness or crime;
>
> i. Knowingly visit gambling places, or patronize other places or establishments, his admission to which constitutes a violation of law;
>
> j. Idly roam the streets at night;
>
> k. Be an habitual truant from school; or
>
> l. So deport himself as to endanger his own morals, health or general welfare.

Note that the recodification deletes subparagraph (a) of An Act to amend "An act to establish juvenile and domestic relations courts," *supra* note 41, in response to the court's decision in *In re* Mei.

[48] An Act concerning the juvenile and domestic relations court, enlarging the jurisdiction thereof, and amending section 9:18-12 of the Revised Statutes, ch. 97, 1943 N.J. Laws 319 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)). Section one of this amendment provided the following definition of juvenile delinquency:

> Juvenile delinquency is hereby defined as the commission by a child under sixteen years of age of any act which when committed by a person of the age of sixteen years or over would constitute:
>
> (a) A felony, high misdemeanor, misdemeanor, or other offense, or
>
> (b) The violation of any penal law or municipal ordinance, or
>
> (c) Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding, or

jurisdiction of the juvenile court to include juveniles of sixteen and seventeen years of age. The amended statute was an intermediate approach under which an offense could be dealt with as a crime or as juvenile delinquency.[49] In 1946, the statute was amended again.[50] The purpose of the 1946 amendment was to extend the statutory age of "juvenile delinquency"

(d) Being a disorderly person, And also the following acts on the part of the child under the age of sixteen years:
(e) Habitual vagrancy, or
(f) Incorrigibility, or
(g) Immorality, or
(h) Knowingly associating with thieves or vicious or immoral persons, or
(i) Growing up in idleness or delinquency, or
(j) Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of law, or
(k) Idly roaming the streets at night, or
(l) Habitual truancy from school, or
(m) Deportment endangering the morals, health or general welfare of said child.

A comparison of this definition with the definition provided by the amendment of 1935, *supra* note 43, shows that they are essentially the same.

[49] *Id.* § 1 also provides:

> The court shall also have exclusive jurisdiction to hear and determine all cases of persons between the ages of sixteen and eighteen who shall commit any of the above-enumerated offenses, if the complaint in such cases shall be certified by the grand jury with the approval of the prosecutor of the pleas, or by the prosecutor of the pleas, or by a judge of the court of quarter sessions or special sessions, to the said judge of the juvenile and domestic relations court; *provided*, that no such certification shall be made unless prior thereto the grand jury, the prosecutor of the pleas or the judge of the court of quarter sessions or special sessions, as the case may be, shall have caused an investigation to be made by the chief probation officer of the county and his report thereon filed with such grand jury, prosecutor of the pleas or judge. In all cases so certified to the juvenile and domestic relations court, it shall be the duty of the prosecutor of the pleas to forward to the juvenile and domestic relations court the complaint, all statements of witnesses and other documents pertaining to the complaint.

(Emphasis in original).

This provision had the effect of vesting exclusive jurisdiction in the juvenile and domestic relations court at the discretion of the prosecutor. The decision of whether to grant jurisdiction to the juvenile and domestic relations court was actually determined by the prosecutor and no hearing was held to allow the juvenile to present arguments against the prosecutor's decision. Note that the only background provided to aid the prosecutor in his decision was an investigation made by the probation officer.

[50] An Act concerning the jurisdiction, practice and procedure of the juvenile and domestic relations courts, and amending sections 9:18-12, 9:18-14, 9:18-18, and 9:18-31 of the Revised Statutes, ch. 77, 1946 N.J. Laws 267 (current version at N.J. STAT. ANN. §§ 2A:4-44 to -48 (West Supp. 1978-1979)) [hereinafter cited as An Act concerning the jurisdiction, practice and procedure of the juvenile and domestic relations courts].

from sixteen to eighteen years[51] but to leave to the juvenile court judge the determination as to whether such a person charged with a major offense should be dealt with as an adult offender.[52] The Legislature, in dealing with juvenile court jurisdiction over persons between the ages of sixteen and eighteen, stated that the juvenile court may refer the matter to the prosecutor for criminal trial where the offense was of a heinous nature.[53] No comparable provision was adopted with respect to children under sixteen.[54] This evidenced the legislative purpose of preserving the exclusive jurisdiction of the juvenile court in these instances.[55] It appeared that the 1946

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[51] *Id.* § 1.

[52] The court in State v. Smigelski, 137 N.J.L. 149, 58 A.2d 780 (Sup. Ct. 1948), in deciding whether an indictment against a juvenile for murder should be quashed, and the defendant transferred to the juvenile and domestic relations court, said:

> The claim of prosecutor is that the act in question gives the Juvenile and Domestic Relations Court exclusive jurisdiction over all cases of juvenile delinquency and that it was necessary that all charges against prosecutor be made in that court, and that the matter could go to the court of oyer and terminer only in compliance with the provisions of the 1946 amendment, which action would be taken by the Juvenile Court.
>
> It would appear that the purpose of the 1946 act was to extend the age of juvenile delinquents from 16 to 18 years, but to leave it to the court to determine whether a person between 16 and 18 years of age, charged with an offense, should be dealt with as an adult offender, and affording the accused the same opportunity for action by a grand jury as is given to an accused adult.

137 N.J.L. at 150-51, 58 A.2d at 780-81.

[53] Section one of the 1946 amendment, An Act concerning the jurisdiction, practice and procedure of the juvenile and domestic relations courts, *supra* note 50, also contained language that would allow the juvenile court judge to waive jurisdiction in certain cases:

> If it shall appear to the satisfaction of the court that the case of any person between the ages of sixteen and eighteen years should not be dealt with by the court, either because of the fact that the person is an habitual offender, or has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society, then the court may refer such case to the prosecutor of the pleas of the county wherein the court is situate.

Compare this approach *with* the 1943 amendment, *supra* note 50. Here the waiver of the juvenile is at the discretion of the juvenile court judge, unlike the previous amendment which left the decision in the hands of the prosecutor.

[54] With the enactment of An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, and amending N.J.S. 2A:85-4 and P.L. 1973, c. 306, ch. 364, 1977 N.J. Sess. Law Serv. 988 (West 1978) (codified at N.J. STAT. ANN. §§ 2A:4-48 to -49, :85-4 (West Supp. 1978-1979)) [hereinafter cited as An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years]. The age for waiver has been reduced to 14 years old; children under the age of 14 years are still subject to the jurisdiction of the juvenile court.

[55] *See, e.g.*, State *in re* Steenback, 34 N.J. 89, 98, 167 A.2d 397, 401 (1961); State v. Monahan, 15 N.J. 34, 43, 104 A.2d 21, 26 (1954); *accord*, State *ex rel.* J.W., 106 N.J. Super. 129, 132-34, 254 A.2d 334, 335-36 (Union County Ct. 1969).

amendment had vested exclusive jurisdiction in the juvenile court for all offenses committed by a juvenile under the age of eighteen, subject to the discretion of the juvenile court judge. In 1948, however, the supreme court ruled that the court of oyer and terminer had not been divested of its jurisdiction in murder cases.[56] In response to the supreme court's refusal to quash an indictment against a juvenile, the Legislature amended the juvenile justice statute[57] to give clear indication to the courts of the Legislature's desire to vest in the juvenile court exclusive jurisdiction to hear all cases against juveniles.[58] The waiver provision remained essentially the same.[59] It allowed the juvenile court judge to exercise discretion if it appeared, to the satisfaction of the court, that the juvenile should not be dealt with by the juvenile court.[60]

When the statutes relating to civil and criminal justice were revised in 1951,[61] the Legislature reenacted comprehensive declarations that a person under the age of sixteen shall be deemed incapable of committing a crime.[62] Furthermore, juvenile delinquency included any act which, if committed by an adult, would be a felony, high misdemeanor, misdemeanor, or other offense.[63] The Legislature also enacted a separate waiver provision[64] allowing the juvenile court to exercise discretion as to jurisdic-

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[56] State v. Smigelski, 137 N.J.L. 149, 58 A.2d 780 (Sup. Ct. 1948).

[57] An Act concerning juvenile delinquency, and amending section 9:18-12 of the Revised Statutes, ch. 284, 1948 N.J. Laws 1191 (current version at N.J. STAT. ANN. §§ 2A:4-44 to 49 (West Supp. 1978-1979)).

[58] Legislative action was swift. *Smigelski*, 137 N.J.L. 149, 149, 58 A.2d 780, 780 (Sup. Ct. 1948), was decided on May 10, 1948; the 1948 amendment became effective on July 27, 1948.

[59] *Compare* the language of the 1946 amendment, *supra* note 50, *with* the language of the 1948 amendment, *infra* note 60.

[60] Section One of the 1948 amendment, *supra* note 57, contained the following waiver provision:

> If it shall appear to the satisfaction of the court that the case of any person between the ages of sixteen and eighteen years should not be dealt with by the court either because of the fact that the person is an habitual offender, or has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society, than the court may refer such case to the prosecutor of the pleas of the county wherein the court is situate.
>
> Such case will thereafter be dealt with in exactly the same manner as any other criminal case involving an adult offender.

[61] An Act to Adopt a Supplement to the Revised Statutes, ch. 344, 1951 N.J. Laws 1453 (current version at N.J. STAT. ANN. §§ 2A:4-1 to -13, :4-22 to -41 (West 1969), :4-42 to -67 (West Supp. 1978-1979)).

[62] N.J. STAT. ANN. § 2A:85-4 (West 1969), amended by An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, *supra* note 54.

[63] N.J. STAT. ANN. § 2A:4-14 (West 1969) (repealed 1973).

[64] N.J. STAT. ANN. § 2A:4-15 (West 1969) (repealed 1973).

tion. Discretion was used when the court believed that the circumstances of the offense required the imposition of a sentence rather than the disposition permitted by the juvenile court.[65] Under the revised waiver statute, the judge could exercise discretion in the case of a juvenile who was a habitual offender[66] or one who had been charged with an offense of a heinous nature.[67] When either of these criteria was met, jurisdiction could be transferred to the county prosecutor.[68]

This waiver statute was repealed in 1973[69] by the enactment of a new waiver statute[70] to conform to United States Supreme Court decisions re-

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[65] *Id.* The waiver provision provided:

> If it shall appear to the satisfaction of the juvenile and domestic relations court that a case of juvenile delinquency as defined in section 2A:4-14 of this title committed by any juvenile of the age of 16 or 17 years, should not be dealt with by the court, either because of the fact that the person is an habitual offender, or has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society, then the court may refer such case to the county prosecutor of the county wherein the court is situate.

[66] State v. Tuddles, 38 N.J. 565, 573-74, 186 A.2d 284, 288-89 (1962).

[67] *Compare* State v. Vaszorich, 13 N.J. 99, 110-11, 98 A.2d 299, 304-05 (1953) (statute expressly authorizes waiver of any case involving a minor between 16 and 18 years of age charged with an offense of a heinous nature) *with* State v. Loray, 46 N.J. 179, 190-91, 215 A.2d 539, 545-46 (1965) (a heinous offense is not in itself enough to justify referral; the statute requires a determination that the circumstances require an imposition of a sentence).

[68] *See, e.g.*, State v. Loray, 46 N.J. 179, 191, 215 A.2d 539, 545 (juvenile waived over); State v. Tuddles, 38 N.J. 565, 573-75, 186 A.2d 284, 288-89 (1962) (juvenile waived over); State *in re* Steenback, 34 N.J. 89, 98, 167 A.2d 397, 401 (juvenile not waived over).

[69] An Act concerning juveniles, jurisdiction and proceedings in the juvenile and domestic relations court and repealing portions of the statutory law, ch. 306, 1973 N.J. Laws 828 (codified at N.J. STAT. ANN. §§ 2A:4-42 to -67 (West Supp. 1978-1979)). Section 27 of the above act repealed N.J. STAT. ANN. § 2A:4-15 (West 1969).

[70] *Id.* § 7, which provides:

> Referral to other court without the juvenile's consent. The juvenile and domestic relations court may, without the consent of the juvenile, waive jurisdiction over a case and refer that case to the appropriate court and prosecuting authority having jursidiction if it finds, after hearing, that:
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> a. The juvenile was 16 years of age or older at the time of the charged delinquent act;
>
> b. There is probable cause to believe that the juvenile committed a delinquent act which would consitute homicide, treason if committed by an adult or committed an offense against the person in an aggressive, violent and willful manner or committed a delinquent act which would have been a violation of the Controlled Dangerous Substances Act (P.L. 1970, c. 226; C. 24:21-19) if committed by an adult and the juvenile, at the time he committed the act, was not addicted to a narcotic drug as that term is defined in section 2 of the Controlled Dangerous Substances Act (P.L. 1970, c. 226; C. 24:21-2); and

garding juvenile justice.[71] The new statute was part of an entire article enacted by the Legislature.[72]

There have been various attempts to amend the waiver statute since its enactment.[73] Recently, a bill changing the age for waiver was passed by

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c. The court is satisfied that adequate protection of the public requires waiver and is satisfied there are no reasonable prospects for rehabilitation of the juvenile prior to his attaining the age of majority by use of the procedures, services and facilities available to the court.

[71] *See* notes 136-141 *infra* and accompanying text.

[72] An Act concerning juveniles, jurisdiction and proceedings in the juvenile and domestic relations court and repealing portions of the statutory law, *supra* note 69, replaces Article 3, N.J. STAT. ANN. §§ 2A:4-14 to -21 with Article 6, N.J. STAT. ANN. §§ 2A:4-42 to -49 (West Supp. 1978-1979). The purpose of the new legislation was threefold: (1) to preserve the unity of the family whenever possible; (2) to protect the juvenile who commits delinquent acts from the stigma of criminal prosecution by substituting an adequate program of supervision; and (3) to separate the juvenile from the family environment only when necessary. N.J. STAT. ANN. § 2A:4-42 (West Supp. 1978-1979).

The new waiver statute listed certain criteria that must be met before the juvenile court could waive its jurisdiction. The juvenile was required to be over the age of 16 (later changed to 14 years of age, *see* note 72, *supra*); and there must be probable cause to believe that the juvenile committed the delinquent act. N.J. STAT. ANN. § 2A:4-48 (b) (West Supp. 1977-1978). *See also* State *in re* J.F., 141 N.J. Super. 328, 332, 358 A.2d 217, 219 (App. Div. 1976); *accord*, State v. Van Buren, 29 N.J. 548, 557, 150 A.2d 649, 654 (1959). The court must also be satisfied that the public interest would be best protected by the waiver and that there are no reasonable prospects for the juvenile's rehabilitation. N.J. STAT. ANN. § 2A:4-48 (c) (West Supp. 1978-1979). *See also* State *in re* A.R., 144 N.J. Super. 384, 387, 365 A.2d 942, 943 (App. Div. 1976).

[73] During the 1976-1977 legislative session, six bills were introduced, two in the Senate and four in the Assembly, which would have affected the waiver statute: S. 1807, 197th N.J. Legis., 1st Sess. (1976) (would lower from 16 to 14 years old, the age at which a person would be deemed legally capable of committing a crime); S. 1545, 197th N.J. Legis., 1st Sess. (1976) (would require the juvenile and domestic relations court to waive jurisdiction involving juveniles over 16 years of age for certain delinquent offenses); A. 3590, 197th N.J. Legis., 2d Sess. (1977) (would change the jurisdiction over cases involving offenses against the person by juveniles in certain circumstances from the juvenile and domestic relations court to courts with jurisdiction over the offense if committed by adults); A. 1641, 197th N.J. Legis., 1st Sess. (1976) (would lower from 16 to 14 years old, the age of responsibility for criminal acts by a juvenile); A. 1390, 197th N.J. Legis., 1st Sess. (1976) (would lower from 16 to 14 years old, the age at which a person would be deemed legally capable of committing a crime); A. 959, 197th N.J. Legis., 1st Sess. (1976) (would require referral of certain juvenile cases by the juvenile and domestic relations court to the appropriate court and prosecuting authority having jurisdicton).

During the present session, two bills are pending in the Assembly which seek to change the waiver statute: A. 782, 198th N.J. Legis., 1st Sess. (1978) (would require the juvenile and domestic relations court to waive jurisdiction over a case involving a juvenile 16 years old or over for certain delinquent acts); A. 667, 198th N.J. Legis., 1st Sess. (1978) (would change the jurisdiction over cases involving offenses against the person by juveniles in certain circumstances from juvenile and domestic relations courts to courts with jurisdiction over the offense, if committed by an adult).

the Legislature[74] and signed into law by the Governor.[75] Under this amendment, a juvenile who was fourteen years or older at the time the charged delinquent act was committed may now be waived over to the criminal court at the discretion of the juvenile court judge.[76]

Early Judicial Decisions

Historically, the criminal court was responsible for trying juvenile offenders violating the criminal laws. An examination of the case law throughout the colonial period and until the nineteenth century reveals that New Jersey punished both child and adult offenders in an identical manner.[77] The common law was thought to protect juvenile offenders from criminal conviction; however, there were some cases where it did not, resulting in devastating consequences.[78] An example of the sanctions that were utilized in 1828 is evidenced by the case of *State v. Aaron.*[79] In *Aaron,* an infant was found guilty of murder in the court of oyer and terminer. Although the supreme court was cognizant of the defendant's age and the common law principles concerning criminal capacity of children,[80] it affirmed the trial court. The penal sanctions used against the juvenile in *Aaron* were reinstituted in *State v. Guild.*[81] In *Guild,* the court held that a thirteen year old could be hung

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[74] A. 1641, 197th N.J. Legis., 1st Sess. (1976), was passed in the Assembly on Nov. 28, 1977 by a vote of 54 to 1; it passed in the Senate on Dec. 15, 1977 by a vote of 28 to 1. N.J. Legis. Index, March 6, 1978.

[75] An act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, *supra* note 54.

[76] *Id.*

[77] *Compare* State v. Aaron, 4 N.J.L. 230 (Sup. Ct. 1818) (10 year old put to death for murder) *with* State *in re* J.F., 141 N.J. Super. 328, 358 A.2d 217 (App. Div. 1976) (juvenile not waived over to the criminal court for felonious conduct).

[78] For an examination of the more drastic cases of juvenile treatment in criminal offenses during the 1800's, *see* Blackstone, *Commentaries on the Laws of England* (1921).

[79] 4 N.J.L. 230 (Sup. Ct. 1818).

[80] Affirming the trial court, Chief Justice Kilpatrick, writing for the majority, set forth the principles of the common law. He wrote that a child under seven years of age "cannot have the discretion to discern between good and evil" and is thus incapable of committing a crime; between the ages of seven and fourteen he is subject to a rebuttal of incapability; after fourteen he is presumed capable. *Id.* at 238.

The court, in this instance, found a sufficient record from the lower court to justify a rebuttal of incapability. The court relied heavily on testimony that the defendant had a better than average intelligence and an exceptionally cunning nature. *But see* N.J. STAT. ANN. § 2A:85-4 (West 1969) (amended by An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, *supra* note 42).

[81] 10 N.J.L. 163 (Sup. Ct. 1828). In this case, the New Jersey court was to decide whether a confession originally held inadmissible had sufficiently tainted a subsequent voluntary confession, so as to make it equally inadmissible. The court concluded that the length of time between the proper warning and the original confession was sufficient to dispel any

for a felony committed when he was twelve years old. These two cases are examples of the punishment a juvenile would face when convicted of criminal misconduct. Although most of the nineteenth century witnessed identical criminal treatment for both child and adult offenders, some steps were taken by the Legislature toward separate confinement of adults and juveniles.[82]

At the turn of the century, sociological and psychological precepts began to influence judicial considerations. A fusion of ideas from these disciplines led to the employment of additional protection for juveniles.[83] In the early 1900's, the New Jersey Legislature reevaluated the efficacy of trying juveniles in the criminal courts. The Legislature concluded that child and adult offenders should be differentiated prior to trial rather than after trial.[84]

Throughout the nineteenth century, every attempt by the Legislature to develop an independent juvenile justice system was hampered by judicial decisions.[85] The courts began to show displeasure with the juvenile court legislation in the case of *In re Daniecki*.[86] In that case, the court of errors and appeals had occasion to consider whether a fifteen year old boy, charged with murder, was triable in the criminal court as an adult. The court carefully scrutinized the 1929 statute,[87] which expanded the jurisdiction of the

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delusive hopes or fears that the second confession would be admissible. Although the court took issue with the illegality of the confession, there was not much concern that the juvenile offender was only 12 years old; the concern was with the technicalities of the law.

[82] An Act to authorize the establishment of a house of refuge, 1850 N.J. Laws 125 (repealed 1852); An Act to establish and organize the State Reform School for Juvenile Offenders, *supra* note 28; An Act to establish a State Industrial School for Girls, *supra* note 29.

[83] One of these added protections took form in the establishment of juvenile courts. The first juvenile court in this country was established in Cook County, Illinois. This court was created by an 1899 act which provided that juvenile offenders were to be considered wards of the state under the control of the juvenile court. The act also provided for an informal proceeding which sought as a goal the rehabilitation rather than the punishment of the juvenile offender. After the adoption of this juvenile court system, other states enacted comparable legislation. Gottlieb, *The Origin and Development of the Juvenile Court,* 40 N.J.L.J. 358-60; *see also* YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY (2d ed. 1952).

[84] An Act establishing a court for the trial of juvenile offenders and defining its duties and powers, *supra* note 26 (established county courts for juvenile offenders consisting of judges of the court of common pleas); An Act providing for the creation of Juvenile Courts in counties of the first class and defining the jurisdiction and powers thereof, *supra* note 27 (courts manned by special juvenile court judges established in the first class counties); An Act to establish juvenile and domestic relations courts, defining their jurisdiction, powers, and duties, and regulating procedure therein, *supra* note 31 (established first juvenile and domestic relations courts with jurisdiction over children under 16 years of age).

[85] For a discussion of the statutory end of the tug-of-war, *see* notes 36-50, *supra* and accompanying text.

[86] 117 N.J. Eq. 527, 177 A. 91 (Ch. 1935), *aff'd,* 119 N.J. Eq. 359, 183 A. 298 (E. & A. 1936).

[87] An Act to establish juvenile and domestic relations courts and defining their jurisdiction, powers, and duties, and regulating procedure therein, *supra* note 31.

juvenile court, and concluded that there was no legislative intent to include the commission of murder within the purview of the juvenile court.[88] The court held that the youthful offender was to be tried only in the criminal court for an indictable offense.[89] Additionally, the court expressed a sweeping view that the Legislature did not have the power to vest jurisdiction in the juvenile court to try an indictable offense without a jury.[90] The *Daniecki* decision had a devastating effect on the juvenile court movement because its holding limited the actual scope of the juvenile court and obfuscated the intent of the Legislature to establish an independent court system to adjudicate juvenile cases.[91]

In the case of *State in re Mei,* [92] the issue of the jurisdictional scope of the juvenile court became a major controversy. In *Mei,* the court was asked to determine whether a fifteen year old could be tried in an adult proceeding on the alleged charge of premeditated murder. The court, to some degree, resurrected the proposition set forth by the *Daniecki* court.[93] Notwithstanding the expressed language contained in the 1935 amendment to the juvenile court statute, the court held that the juvenile was triable in the criminal court.[94] The court did not suggest that the Legislature intended to exclude murder from its comprehensive enactments and did not adopt the position

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[88] The court stated through Vice-Chancellor Backes:

> It is inconceivable that the legislature intended to make the juvenile court a sanctuary for juvenile felons, in this instance a murderer by subdivision "(b) who commits any act or offense for which he could be prosecuted in a method partaking of the nature of a criminal action or proceeding," and yet it significantly omitted from the revision of 1929, the proviso to "An act establishing a court for juvenile offenders and defining its duties and powers" (P.L. 1903, p. 477), that "this act shall not apply to any case where two or more are jointly charged with the commission of some crime and one of them is over the age of sixteen years;"

117 N.J. Eq. at 529, 177 A. at 92.

[89] 117 N.J. Eq. at 530, 177 A. at 92. In demonstrating the belief that the Legislature did not consider murder an offense under the purview of the juvenile court, the court stated:

> It may well be that the Legislature may vest in the juvenile court or, in any other court, jurisdicition to try indictments for crimes, but that is beside the mark. The point is that the act under review did not establish a court competent to try indictments for a crime.

Id.

[90] 117 N.J. Eq. at 531, 177 A. at 92. In the opinion of the court, the Legislature could not enact legislation which was in contradiction to expressed constitutional guarantees, and particularly in this case, the right to a jury trial. *Id.*

[91] Siegler, *Exclusive Jurisdiction in the Juvenile Court,* 62 N.J.L.J. 285 (1939).

[92] 122 N.J. Eq. 125, 192 A. 80 (E. & A. 1937); *see also* State v. Smigelski, 137 N.J.L. 149, 58 A.2d 780 (Sup. Ct. 1948).

[93] 122 N.J. Eq. at 129, 192 A. at 81-83.

[94] 122 N.J. Eq. at 128-129, 192 A. at 82-83; An Act to amend "An act to establish juvenile and domestic relations courts," *supra* note 41.

expressed in *Daniecki,* that the statute granting the juvenile court jurisdiction over heinous offenses was unconstitutional. The *Mei* court promulgated a novel approach by stating that the charge of murder is a heinous offense and must remain a crime within the purview of the constitution, regardless of what name or treatment is appended to it by the Legislature.[95] The *Mei* court asserted that there was an absence of constitutional power which no legislation could remedy.

The view established by the *Daniecki* court was subsequently rejected in *State v. Goldberg*[96] where a fifteen year old defendant was charged with assault with intent to kill. Under a *Daniecki* analysis, this offense would subject the defendant to adult punishment; however, the court held that this crime, although heinous, was within the exclusive jurisdiction of the juvenile court.[97] Shortly after the *Goldberg* decision, a number of legislative enactments were advanced to reaffirm the statutory purpose of vesting exclusive jurisdiction over children sixteen years old or younger in the juvenile courts.[98] The *Daniecki* rationale was again rejected in *In re Lewis*.[99] The *Lewis* court, speaking through Justice William Brennan, then of the New Jersey supreme court, emphasized that the statutory policy for the treatment of juvenile offenders was directed toward their rehabilitation, not their punishment. The fact that if the offense was committed by an adult it would warrant conviction and punishment was not controlling.[100]

The controversial expanse of the waiver statute came to a head in the case of *State v. Vaszorich.*[101] In *Vaszorich,* the court considered whether a seventeen year old defendant in a murder prosecution could be tried in an adult proceeding after he had been waived by the juvenile court.[102] The court found the juvenile was not to be processed in juvenile court under the provisions of the juvenile and domestic relations court act,[103] for it had properly waived its jurisdiction.[104] Although the decision in *Vaszorich* upheld the

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[95] 122 N.J. Eq. at 129, 192 A. at 93.

[96] 124 N.J.L. 272, 11 A.2d 299 (Sup. Ct. 1940), *aff'd sub nom.*, State v. Goldberg, 125 N.J.L. 501, 17 A.2d 541 (E. & A. 1940).

[97] State v. Goldberg, 124 N.J.L. at 278-79, 11 A.2d at 303.

[98] An Act concerning the juvenile and domestic relations court, enlarging the jurisdiction thereof and amending section 9:18-12 of the Revised Statutes, *supra* note 48; An Act concerning the jurisdiction, practice and procedure of the juvenile and domestic relations courts, *supra* note 50; An Act concerning juvenile delinquency and amending section 9:18-12 of the Revised Statutes, *supra* note 57.

[99] 11 N.J. 217, 94 A.2d 328 (1953).

[100] *Id.* at 224, 94 A.2d at 331-32.

[101] 13 N.J. 99, 98 A.2d 299 (1953).

[102] *Id.* at 110, 98 A.2d at 304.

[103] N.J. REV. STAT. §§ 9:18-12 to -37 (1937) (recodified at N.J. STAT. ANN. §§ 2A:4-14 to -21 (West 1969)) (repealed 1973).

[104] 13 N.J. at 110, 98 A.2d at 304. The court did not perceive any merit in the argu-

validity of the statute permitting the juvenile court to waive its jurisdiction in cases of some heinous offenses or habitual offenders,[105] strongly conflicting opinions remained as to how juveniles should be tried in homicides and other heinous offenses.[106]

The Monahan Decision and its Aftermath

It was not until the landmark case of *State v. Monahan* that murder committed by a juvenile was considered to be under the exclusive jurisdiction of the juvenile court. In *Monahan,* a fifteen year old boy participated in a robbery during which his father killed two people. The boy was tried and sentenced to death by the criminal court. The juvenile appealed on the ground that the motion for his transfer to the juvenile court was improperly denied.[108] The state argued that because the homicide occurred during the commission of a robbery, the child should be tried with his father for felony murder.[109] The issue was whether a fifteen year old participant in a robbery, where a co-felon had committed a murder, could be tried in county court. The court indicated that the judiciary was not to act in the capacity of a Legislature merely because the court believed a law was judicially unwise.[110] The court further noted that although the juvenile court was

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ment that the juvenile should have been tried in the juvenile court. The court also claimed that in light of the *Mei* decision, the juvenile court was without jurisdiction to try a murder case.

[105] *See* N.J. STAT. ANN. § 2A:4-15 (West 1969) (repealed 1973).

[106] The conflicting opinions alluded to in the text are discussed by the court in State v. Monahan, 15 N.J. at 45, 104 A.2d at 27. Here, the court indicated that these conflicts are multi-dimensional. The court clarified this position by stating that some parties:

> [c]ontent themselves with expressions which couple their natural outrage and sympathy for the juvenile court movement; they fail to suggest any alternative except, perhaps, a return to the days when eight- and ten year-old boys and a 13-year-old girl were tried and executed for arson and murder.
>
> Others take the view that although the juvenile court movement is soundly based and should be strengthened, it should nevertheless be confined to non-heinous offenses, at least where older children are concerned; in other words, errant children should receive supervision and correction but only so long as they have not erred too greatly.

Id.

[107] 15 N.J. 34, 104 A.2d 21 (1954).

[108] *Id.* at 35, 104 A.2d at 22. The infant-defendant contended that he should have been transferred to the juvenile and domestic relations court on the ground that N.J. STAT. ANN. § 2A:85-4 (West 1969) and N.J. STAT. ANN. § 2A:4-14 (West 1969) include murder within the exclusive jurisdiction of the juvenile court.

[109] The state's arguments were grounded on the statutory schemes of N.J. STAT. ANN. §§ 2A:113-1 to -2. 15 N.J. at 35, 104 A.2d at 21-22.

[110] The court, in an abbreviated examination of the legislative enactments, stated: "Matters of statutory policy are the exclusive concern of the Legislature and executive branches which are fully accountable to the electorate acting at the polls; and statutory enactments may

statutorily allowed to waive jurisdiction over children between the ages of sixteen and eighteen, a similar provision was not adopted with respect to juveniles under sixteen years of age.[111] Based on this reasoning, the court concluded that the Legislature intended murder, and other heinous offenses committed by juveniles under sixteen years, to fall under the exclusive jurisdiction of the juvenile court.[112]

Several years after *Monahan,* the due process ramifications inherent in the juvenile waiver procedure were examined in *State v. Van Buren.*[113] In that case, a seventeen year old defendant, whose only part in a robbery was driving the get-away car, was charged with murder. The juvenile court waived jurisdiction over the defendant and transferred the case to the county prosecutor. Thereafter, the grand jury returned an indictment against the infant defendant, and he was assigned counsel by the court. The defendant appealed his transfer on several grounds. He contested the authority of the juvenile court to transfer a juvenile to a criminal proceeding without a preliminary hearing, and protested the absence of a determination as to the defendant's rehabilitative prospects prior to the transfer.[114] The county court responded to the defendant's allegations by noting that in a waiver proceeding, a juvenile court does not determine guilt or juvenile delinquency. The appellate court stated that the decision to transfer a juvenile is actually premised on whether, in the discretion of the juvenile court judge, the nature of the offense and the age limitation satisfy the statutory criteria.[115] The court added that if the provisions of the statute were met, the judge should also consider whether the protection of society demands the juvenile's waiver. The court did not intend to restrict the discretion of the juvenile court judge in his decision to waive certain juvenile offenders; however, the court did claim that in order to institute fairness in the waiver

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not be properly nullified in whole or in part simply because the judicial branch thinks them unwise." *Id.* at 45-46, 104 A.2d at 27.

[111] In 1954, the *Monahan* court was of the opinion that since waiver did not apply to juveniles under sixteen years, they would statutorily be deemed juvenile delinquents. Furthermore, the court found that since juvenile delinquency as defined by N.J. STAT. ANN. § 2A:4-14 (repealed 1973) (current definition of juvenile delinquency codified at N.J. STAT. ANN. § 2A:4-44 (West Supp. 1977-1978)), included "any act which if committed by an adult would constitute a felony, high misdemeanor, misdemeanor or other offense," murder was an includable offense. *Id.* at 43, 104 A.2d at 26.

[112] *Id.* at 46, 104 A.2d at 27.

[113] 29 N.J. 548, 150 A.2d 649 (1959).

[114] *Id.* at 533, 150 A.2d at 651; *but see* An Act concerning the juvenile and domestic relations court, enlarging the jurisdiction thereof and amending section 9:18-12 of the Revised Statutes, ch. 97, 1943 N.J. Laws 319, *supra* note 48.

[115] 29 N.J. at 554, 150 A.2d at 652. For the statutory criteria permitting waiver of juvenile court jurisdiction in 1959, *see* N.J. STAT. ANN. § 2A:4-14 (West 1969) (repealed 1973).

process, a hearing would be required.[116] The court found untenable the defendant's contention that the ultimate test prior to the waiver of a juvenile was the offender's capacity for rehabilitation.[117]

In holding that a waiver hearing was essential to satisfy the demands of due process, the *Van Buren* court created the constitutional framework for guaranteeing the procedural due process rights of juveniles. The *Van Buren* decision required that a juvenile have a hearing and an opportunity to present facts to rebut the information which led the court to relinquish its jurisdiction.[118] Although the court compelled the juvenile court to hold a waiver hearing and permit the juvenile to present facts,[119] the *Van Buren* majority foresaw no necessity for requiring a finding of probable cause.[120]

Shortly after the *Van Buren* decision, the courts again had to wrestle with the issue of whether the structure of the waiver hearing as designed by the *Van Buren* court afforded the juvenile sufficient protection so as to comport with due process of law. This particular issue was considered in *State v. Tuddles,*[121] where two defendants were charged with murder committed in the commission of a robbery. As a consequence of their respective ages, the defendants were charged with juvenile delinquency. A summons was served upon defendant Watson and his mother, directing them to appear at the juvenile court to answer the complaint against him. The summons mentioned the defendant's right to be represented by counsel, but there was no indication from the record that the court offered representation of counsel to

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[116] The court claimed that for the juvenile court proceedings to comply with due process, a hearing must be conducted to determine "the preliminary nature of the question and the criteria for decision . . . ." 29 N.J. at 555-56, 150 A.2d at 652-53.

[117] 29 N.J. at 557, 150 A.2d at 654. The court stated that:

> [I]f our Legislature had intended that capacity for rehabilitation under the Juvenile Delinquency Act be the sole criterion, it would have so stated in such simple terms. Rather it specified incorrigibility as one basis for transfer, that is, in its reference to "habitual offenders," and then added a distinct, alternative ground, to wit, if the juvenile "has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society."

[118] 29 N.J. at 558, 150 A.2d at 655. According to the *Van Buren* decision, the juvenile court judge must inform the juvenile of the grounds that the court relied upon to transfer its jurisdiction. The court also held that the truth of the charge was not an issue; its existence was sufficient.

[119] 29 N.J. at 560, 150 A.2d at 654. The court's holding created parameters for the inquiry at the juvenile waiver hearing. The court stated that "[t]he purpose of [the waiver hearing] is not to suggest that a preliminary inquiry under N.J.S. 2A:4-15 is the same as the preliminary hearing required to be accorded to persons charged with crime under R.R. 3:2-3." *Id.* at 560, 150 A.2d at 655.

[120] *But see* N.J. STAT. ANN. § 2A:4-48(b) (West Supp. 1978-1979) which requires a finding of probable cause prior to waiver; *accord,* MICH. COMP. LAWS ANN. § 712A.4(3)-(4) (Supp. 1977-1978); OHIO REV. CODE ANN. § 2151.26(A)(2) (Page 1976).

[121] 38 N.J. 565, 186 A.2d 284 (1962).

the defendant, nor did it explain the court's power to appoint counsel if the juvenile could not retain his own.[122] Without the defendant having obtained counsel, the court held a hearing to determine whether the defendant should be transferred to an adult proceeding. At the conclusion of the hearing, the court referred the case to the prosecutor.

At the time of the Watson hearing, the co-defendant, Tuddles, had not been apprehended. A preliminary waiver hearing was held in his absence, with only Tuddles' father in attendance. On the day following the hearing, Tuddles' case was transferred to the procecutor's office.

After their respective referrals, both defendants were assigned counsel. Through their counsel, each defendant moved for a new hearing before the juvenile court. Tuddles' justification for a new hearing was premised on the fact that he had a right to be personally present at his hearing to provide reasons why the juvenile court should retain jurisdiction. Immediately thereafter, Watson made a similar motion and contended that he was entitled to a new hearing because of the absence of counsel at his original hearing. In denying both motions, the juvenile court reasoned that since it had already waived these defendants, it no longer had jurisdiction to conduct new waiver hearings.[123] Both defendants appealed the juvenile court's denial of a new hearing. While the cases were on appeal, the supreme court certified the cases on its own motion.[124]

In addressing Tuddles' claim, the supreme court relied on the rationale of the *Van Buren* decision: the juvenile court could only adequately fulfill the purposes of the required hearing if the defendant was personally present to dispute the facts that led the juvenile court to waive its jurisdiction.[125] Watson contended that he was denied due process because the hearing was held in the absence of counsel. The court held that when representation by counsel is absent at a hearing, the interests of society and the juvenile are inadequately protected.[126] The combined effect of *Tuddles* and *Van Buren* significantly protected the due process rights of juveniles. The *Tuddles* court, however, clearly stated that those rights were not constitutional in their formulation, but rather, emanated from the development of the common law.[127]

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[122] *Id.* at 568, 186 A.2d at 285. The exact phrasing of the summons was "[t]he family may engage legal counsel if it desires so to do."

[123] *Id.* at 570-71, 186 A.2d at 286.

[124] *Id.* at 568, 186 A.2d at 285.

[125] 38 N.J. at 573-74, 186 A.2d at 288. The court stated that a juvenile would be prejudiced if absent from the preliminary hearing. The court went on to state: "There is more at stake than the juvenile's interests; the interest of society as *parens patriae* depends upon the intelligent exercise of discretion by an informed judicial mind . . . . It demands that a hearing be held with the juvenile present." *Id.* at 574, 186 A.2d at 288.

[126] 38 N.J. at 577, 186 A.2d at 290.

[127] *Id.*

Constitutional Considerations

The United States Supreme Court decision in *Kent v. United States*[128] brought procedural due process rights for juveniles under the protection of the Constitution. Prior to *Kent*, the decisions of juvenile court judges to transfer a juvenile to an adult proceeding were in large part discretionary. Although the court in *Kent* was construing a juvenile statute and not considering the constitutional rights of juveniles, the dictum of the opinion was adopted subsequently as the foundation for the constitutional rights of juveniles.[129] In *Kent*, the Court concluded that the juvenile court procedures adopted by the District of Columbia did not comply with the requirements of due process. The Court mandated that for a juvenile transfer or referral hearing to satisfy due process, a juvenile must not only be given a hearing, but must be accorded the effective assistance of counsel and a statement of reasons underlying the court's decision to waive its jurisdiction.[130]

The next United States Supreme Court case governing the constitutional rights of juveniles was *In re Gault*.[131] This case involved a fifteen year old boy who was charged with making lewd telephone calls. The defendant was adjudicated a delinquent and was committed to a reformatory until he reached the age of majority. On a habeas corpus petition, the appellant challenged the Arizona Juvenile Code and the particular procedures used in his case.[132] The Court, speaking through Justice Fortas, emphasized that the due process clause has a definitive role in juvenile delinquency proceedings since the unbridled discretion of a juvenile court judge is a poor substitute for procedural due process.[133]

The Court reversed the Arizona supreme court and held that in order for there to be compliance with due process, "[n]otice must be given sufficiently

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[128] 383 U.S. 541 (1966). This case involved a 16 year old defendant who was charged with rape. The juvenile court procedures only required the judge to make a very cursory finding before waiving a juvenile to the adult criminal court. The Court concluded that the statute insufficiently protected the juvenile's rights and did not satisfy due process. *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167 (1966) for a discussion and analysis of the *Kent* decision.

[129] *See, e.g.*, McKiver v. Pennsylvania, 403 U.S. 528 (1971); Benton v. Maryland, 395 U.S. 784 (1969); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[130] 383 U.S. at 557-63.

[131] 387 U.S. 1 (1967). *See generally* Dozen & Resnick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1 (1967).

[132] The Court's examination of the juvenile proceedings revealed that the petition filed with the juvenile court was never served on the Gaults; the petition itself never made reference to any factual basis for judicial action; and the complainant was not present at the hearing. 387 U.S. at 5.

[133] *Id.* at 18; *see* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

in advance of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded and it must set forth the alleged misconduct with particularity."[134] In reaffirming the *Kent* holding, the *Gault* decision supplied juveniles with the constitutional right to confront and cross-examine witnesses.[135]

The 1970's witnessed an increasing concern over the constitutional rights of juveniles. An initial issue concerned the appropriate burden of proof to apply in juvenile court proceedings. The Supreme Court answered this issue in *In re Winship.*[136] Prior to *Winship,* a majority of jurisdictions had permitted juvenile disposition on the preponderance of the evidence standard. This case presented the Court with the issue of whether proof beyond a reasonable doubt is among "the essentials of due process and fair treatment"[137] required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult. The Court in an expansive opinion found that "the requirement of proof beyond a reasonable doubt has a vital role in our criminal procedure since interests of immense importance are at stake for the accused."[138] Here the Court held that since the due process clause requires proof beyond a reasonable doubt in a criminal case, and since a juvenile adjudged delinquent would be subject to possible loss of liberty, due process demands that the juvenile court use the standard of proof beyond a reasonable doubt in a delinquency hearing.[139]

Although many constitutional safeguards were accorded juveniles by *Gault,* the Supreme Court refused to extend the right to trial by jury for juveniles in the case of *McKeiver v. Pennsylvania.*[140] Another area of major concern to juvenile justice advocates involved double jeopardy protections. In 1969, the Supreme Court incorporated, via the fourteenth amendment, the constitutional guarantee against double jeopardy in state cases.[141] The protection against double jeopardy did not become a fundamentally protected

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[134] 387 U.S. at 33.

[135] *Id.* at 59.

[136] 397 U.S. 358 (1970).

[137] This language originated in the majority opinion of *Kent.* The *Gault* Court decided that, although the fourteenth amendment does not require that the hearing at the delinquency determination stage conform with all requirements of a criminal trial or even of usual administrative proceedings, the due process clause did require application during the adjudicatory hearing of the "essentials of due process and fair treatment." 387 U.S. at 30.

[138] The Court explained that with the possibility the accused may lose his liberty upon conviction and because of the certainty that the conviction would stigmatize him, and no individual should be condemned when there is a reasonable doubt about his guilt. 397 U.S. at 363-64.

[139] 397 U.S. at 364, 368.

[140] 403 U.S. 528 (1971).

[141] Benton v. Maryland, 385 U.S. 784 (1969).

constitutional right for juveniles until the Supreme Court decision in *Breed v. Jones.*[142] In *Breed,* the Court concluded that when a juvenile court held an adjudicatory hearing, the juvenile could not subsequently be prosecuted for the same act in a criminal proceeding, even if the juvenile court had decided that the offender was not suitable for juvenile treatment. According to the opinion of the Court, since both adults and juveniles may be incarcerated, the fifth amendment must provide a juvenile with the same safeguards as those afforded an adult offender.[143]

New Jersey Court Decisions After Gault

Breed v. Jones set to rest most of the controversy surrounding double jeopardy and the juvenile offender. The remaining question is whether the previous adjudication of the alleged offense constitutes a jeopardizing proceeding.[144] An examination of the New Jersey juvenile waiver proceedings does not readily demonstrate any double jeopardy infringements. According to the New Jersey case law as far back as the *Van Buren* decision, the transfer procedure is to a large extent governed by statute, with a final analysis of whether to waive or transfer a juvenile to an adult proceeding an admixture of statutory criteria and judicial discretion.[145] However, at no time in the developing history of the case law has a waiver or transfer proceeding been considered an adjudication of individual guilt or a determination of juvenile delinquency.[146] The irony of the waiver statute is that although it was

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[142] 421 U.S. 519 (1975). For a detailed review and analysis of the juvenile's privilege against multiple threats of prosecution, *see* Milton, *Post-Gault: A New Prospective for the Juvenile Court,* 16 N.Y.L.F. 57 (1970); Comment, *Double Jeopardy and the Juvenile,* 11 FAM. L.J. 605 (1971); Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 WM. & MARY L. REV. 266 (1972); Whitebread & Batey, *Juvenile Double Jeopardy,* 63 GEO. LAW J. 857 (1975).

[143] The Court emphasized that although the juvenile court was conceived with the goal of rehabilitation rather than punishment, if a juvenile is adjudicated a delinquent, the reformatory commitment is a form of incarceration. From that proposition the Court concluded that there is nothing to distinguish a juvenile court hearing from a traditional adult prosecution. 421 U.S. at 530-31.

[144] For an analysis of the different juvenile proceeding that might be considered jeopardizing, *see* Whitebread & Batey, *Juvenile Double Jeopardy,* 63 GEO. L. REV. at 882.

[145] According to the New Jersey case law, the transfer of a juvenile to a criminal proceeding is not a disposition of a complaint. The courts have explained that for a transfer to take place, it must appear "to the satisfaction" of the juvenile court that the person is "an habitual offender" or "has been *charged* with an offense which *may* require imposition of a sentence rather than disposition permitted by this chapter for the welfare of society." (emphasis added) State v. Van Buren, 29 N.J. at 554, 150 A.2d at 651. Subsequent to the *Van Buren* decision, the waiver statute was repealed and a new waiver statute enacted, *supra* note 69 (current version at N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979)).

[146] From the very inception of the requirement for a juvenile waiver hearing in the State of New Jersey, it is clear that the juvenile court judge does not pass upon the guilt of a party or upon the delinquency of the juvenile. State v. Van Buren, 29 N.J. at 554, 150 A.2d at 652.

designed to give the juvenile court more flexibility in the handling of juvenile cases, the waiver statute has instead served as a refuge for those juveniles who want the juvenile court to retain jurisdiction over them. This general problem is caused by the judicial interpretation of the waiver statute.

In the reported case law, there is evidence that juvenile court judges, on occasion, have refused to permit waiver of the juvenile regardless of his or her age or the nature of the offense. An example of this retentive behavior by the juvenile courts is revealed by the case of *State in re J.F.*[147] In that case, a juvenile defendant had two juvenile delinquency complaints filed against him: one complaint charged him with murder, and the other complaint charged him with atrocious assault and battery. The state made a motion for the juvenile to be transferred to the prosecutor; the motion was denied and the state appealed. The state argued that, given the nature of the offense, the statutory criteria for waiver[148] had been met and the judge erred in denying the motion. The appellate court scrutinized the record from the juvenile court, in order to determine whether the juvenile court judge had a sufficient factual basis for retaining jurisdiction over the defendant. The appellate court opinion reminded juvenile court judges that, in dealing with severe offenses committed by juveniles, the protection of society must be a prime consideration when deciding whether or not to waive jurisdiction.[149] The court concluded that all criteria for waiver under the statute had been satisfied.[150] The court further held that societal protection could

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The court reinforced its position in State *in re* B.T., 145 N.J. Super. 268, 273, 367 A.2d 887, 889 (App. Div. 1976) when it said:

> Since the result of a preliminary judicial proceeding as involved herein does not adjudicate the guilt of the accused, the type of permissible evidential material used by the court in reaching its conclusion is not circumscribed by the limited evidential rules applied at trial. See *State v. Ferrante*, 111 *N.J. Super.* 299 (App. Div. 1970); *State v. Price*, 108 *N.J. Super.* 272 (Law Div. 1970). See also *Fed. R. Crim. P.* 5.1 (a); *James v. State*, 254 *So.*2d 838, 839 (*Fla. Dist. Ct. App.* 1971), *cert.* den., 409 *U.S.* 985, 93 S. Ct. 334, 34 *L. Ed.* 2d 249 (1972).

[147] 141 N.J. Super. 328, 358 A.2d 217 (App. Div. 1976).

[148] N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979). The state rested its argument on the fact that in light of the statutory criteria: (1) the juvenile was 16 years old at the time of the delinquent act; (2) there was probable cause to believe that the juvenile committed a delinquent act that would constitute a homicide, if committed by an adult, or committed an offense against a person in an aggressive, violent, and willful manner; (3) the adequate protection of the public requires such waiver; and (4) there are no reasonable prospects for rehabilitation of the juvenile by the use of the proceedings, services, and facilities available to the court by law. 141 N.J. Super. at 330-31, 358 A.2d at 219.

[149] 141 N.J. Super. at 332, 358 A.2d at 219.

[150] The court, speaking through Judge Horn, stated: [W]e consider the elements required to be present to authorize the transfer of cases to the prosecutor. We find (1) the juvenile was 17 years of age and (2) the probable cause was clearly evident. *Id.* at 333, 358 A.2d at 220. The court also included in its consideration the details surrounding the commission of the

only be preserved in this particular case if the juvenile was tried in a criminal proceeding. The contrary finding by the juvenile court judge constituted an abuse of his discretion.[151]

The *J.F.* decision, in effect, instructed the juvenile judge to be less restrictive in examining the various factors that must be weighed in a decision to relinquish jurisdiction. In its analysis, the *J.F.* court reverted to the very basis of the waiver procedure—the protection of society.

Both the premise and goal for which the waiver process was created, were in a large part destroyed by *State in re G.T.*[152] In this case, three juveniles were charged with acts of delinquency, including robbery, murder, and rape. The juvenile court waived its jurisdiction over them; the juveniles appealed the orders of transfer. The issue formulated on appeal was directed to a more precise definition of the term "age of majority."[153] The court held that in relation to other parts of the 1973 Juvenile Act, for rehabilitative purposes, twenty-one would be the "age of majority."[154]

Impact of State in re G.T.

The case of *State in re G.T.*[155] has had a formidable impact on the implementation of the New Jersey juvenile court waiver statute.[156] Until *State in re G.T.*, the term "age of majority" as it related to the rehabilitative potential of a juvenile, pursuant to subsection (c) of the waiver statute,[157] had never been clearly defined. As a consequence of this legislative oversight, the question of whether eighteen years old or twenty-one years old would constitute the "age of majority" in determining the reasonable prospects of rehabilitation was left for the judiciary to determine.

In an attempt to exact the plain meaning of the statutory language, the court examined the legislative history of the statute, but was unable to discover what the Legislature intended by the term "age of majority" because the earlier provisions of the waiver statute did not mention rehabilitation as a precondition for waiver. The examination of a number of other statutes

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crime and found them to be extraordinarily vicious. Furthermore, the court noted that the heinous nature of the offense satisfied sections (3) and (4) of the waiver statute. *Id.*

[151] 141 N.J. Super. at 333-34.

[152] 143 N.J. Super. 73, 362 A.2d 1171 (App. Div. 1976), *certif. denied*, 71 N.J. 532, 366 A.2d 687 (1976).

[153] 143 N.J. Super. at 75, 362 A.2d at 1172. The term "age of majority" is set forth in N.J. STAT. ANN. § 2A:4-48(c) (West Supp. 1978-1979).

[154] 143 N.J. Super. at 79, 362 A.2d at 1174. *See also* N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979).

[155] 143 N.J. Super. 73, 362 A.2d 1171 (App. Div. 1976), *certif. denied*, 71 N.J. 532, 366 A.2d 687 (1976).

[156] N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979).

[157] *Id.* § :4-48(c).

containing the term "age of majority" and promulgated at the same time as the revised waiver statute, revealed that eighteen years old was the age of majority for most civil rights and legal disabilities under the law.[158] Despite this finding, the *G.T.* court concluded that for the purposes of N.J. Stat. Ann. § 2A:4-48 (c), the age of majority would be twenty-one years old.[159] In justifying their position, the court stated:

> [S]ince the delinquents with whom we are concerned will be more than 16 years of age at the time of disposition it would be unduly restrictive to hold that the likelihood of rehabilitation must be evaluated in terms of the shortest interval before they reach 18. Some will be approaching 18 at the time of disposition and others will have passed their 18th birthday, depending on their age when the offense was committed and the time it takes for disposition of the particular case.[160]

An interpretation of the legislation mandating that a juvenile not rehabilitated by eighteen years of age be prosecuted as an adult was deemed restrictive and unreasonable. This holding was premised on the theory that if the Legislature had intended eighteen years old to be the age of majority pursuant to subsection (c) of the waiver statute,[161] the Legislature would have phrased the statute to reveal that intention.[162] The court found it significant that the present waiver statute utilized the term "age of majority" rather than specifying eighteen years of age. This absence of particularized

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[158] *See* An Act concerning the powers, obligations and legal capacity of certain minors in certain cases, and supplementing Title 9 of the Revised Statutes, ch. 81, 1972 N.J. Laws 457 (current version at N.J. STAT. ANN. §§ 9:17B-1 to -3 (West Supp. 1978-1979)).

[159] 143 N.J. Super. at 79, 362 A.2d at 1174. The court reasoned that most dispositions, other than commitment to an institution for rehabilitation, are limited in duration and elapse when a juvenile reaches 18 years of age. *Id.* at 77, 362 A.2d at 1173. *See* N.J. STAT. ANN. § 2A:4-63 (West 1969). The court also reasoned that just because, for most legal disabilities, 18 years of age is the age of majority, that alone is not sufficient to hold that 18 years of age should be the age of majority pursuant to N.J. STAT. ANN. § 2A:4-48(c) (West Supp. 1978-1979). 143 N.J. Super. at 78, 362 A.2d at 1173-74.

[160] 143 N.J. Super. at 78, 362 A.2d at 1173-74.

[161] The court in its explanation of legislative intent stated:

> [I]f the Legislature intended "age of majority" as used in N.J.S.A. 2A:4-48(c) to coincide with age 18, it could have said so or it could have used the phrase, "prior to his becoming an adult," utilizing the definition given to the term adult in a proceeding provision of the same law.

Id. See N.J. STAT. ANN. § 2A:4-43(b) (West Supp. 1978-1979). This subsection provides that an "adult" is an individual 18 years of age or over.

[162] 143 N.J. Super. at 78, 362 A.2d at 1174.

language means that the Legislature intended an age other than eighteen to be the age of majority.[163]

The decision in *G.T.* did not realistically appraise the pragmatic effects of juvenile court waiver. In making twenty-one years old the age of majority pursuant to subsection (c) of the waiver statute, the *G.T.* decision created substantial problems for juvenile court judges. As a result of the *G.T.* decision, the judge must, in evaluating the reasonable prospects for rehabilitation, consider an extensive time interval. For example, a juvenile at age sixteen has a five year rehabilitative potential, and a juvenile at age seventeen has a four year prospect for rehabilitation. Consequently, juvenile court judges are almost perfunctorily retaining jurisdiction over juveniles otherwise suitable for waiver under the statutory prescription. Many juvenile court judges justify their cautious behavior, contending that it is speculative to assume that a juvenile cannot be rehabilitated within a period of four or five years. The substantive problem with this justification is that it negates the reality of juvenile delinquency. The fact that a juvenile may have a rehabilitative prospect of four years, does not presumptively demonstrate that a juvenile who commits a number of violent offenses will not simply return to society and resume the aberrant behavior.

There is substantial evidence which reveals that the most aggressive and violent offenses are committed by juveniles who are classified as "repeaters."[164] These repeaters are habitual offenders who have committed serious and violent crimes, and as a result of their delinquent conduct have been confined in various levels of the reformatory system. The frightening reality is that these habitual juvenile offenders are continually allowed to pass through the endless revolving door of the reformatory system, despite the fact that they may have amassed a juvenile record that includes offenses that would be armed robbery, manslaughter, and murder if committed by an

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[163] An underlying analysis of the holding shows the court finding significance in the fact that there was a distinction between the term "age of majority" and 18 years of age when examining the waiver statute as part of the whole juvenile justice act. According to the *G.T.* court, "[a]ge 18 was used consistently throughout the act to mark the boundary between criminal conduct and that which may be treated as juvenile delinquency. To evaluate possibilities of rehabilitation, however, the term age of majority was used, signifying a distinction between that term and age 18." 143 N.J. Super. at 78, 362 A.2d at 1173-74.

[164] An examination of the current case law, both reported and unreported, evidences that a shocking number of violent, aggressive, and willful crimes against persons are committed by juvenile offenders. The juveniles that have committed these serious offenses have not been waived to the criminal court, although they satisfy the conditions of waiver. *See* Newark Star-Ledger, Mar. 19, 1977, at 6, col. 4; Newark Star-Ledger, July 21, 1977, at 24, col. 1; *cf.* State *in re* A.R., 144 N.J. Super. 384, 365 A.2d 924 (App. Div. 1976), (juvenile court waived its jurisdiction over a juvenile charged with possession of a dangerous weapon and robbery. The juvenile appealed the order of his transfer. The appellate court held that the offense of carrying a weapon was not a waivable offense under the present waiver statute).

adult. This judicial hesitation to relinquish juvenile court jurisdiction, a consequence of the judicial mandate established by the *G.T.* decision, has undercut the design of the juvenile waiver statute. This single decision which underlies the interpretative analysis of the waiver statute has placed a stranglehold on the ability of the juvenile court judge to waive jurisdiction even where the circumstances clearly warrant it. In effect, the *G.T.* decision and the accompanying formula have eroded the purposes of juvenile waiver.

The Recent Amendment to the Waiver Statute

With the enactment of the recent amendment to N.J. Stat. Ann. § 2A:4-48, the Legislature has lowered the age jurisdiction from sixteen years old to fourteen years old.[165] As a result, juveniles, fourteen years old and older, may be waived to the adult criminal court if all the other criteria for statutory waiver are satisfied.[166] This amendment appears to be a compromise based on several possible changes in the waiver statute that have been proposed in the Legislature during the last session.[167] This amendment must be viewed alongside the recent decision of *State in re G.T.* insofar as it held that when viewing the reasonable prospects of rehabilitation, the age of majority, as referred to in the waiver statute, is twenty-one, rather than eighteen.[168] This result forces the juvenile court judge, prior to this amendment, to predict whether it would be possible for rehabilitation to occur within a five year time interval, that is, assuming the juvenile is sixteen at the time of disposition.[169] The amendment extends this time period. Now, in order to waive a juvenile, the judge must find that it is improbable that the juvenile can be rehabilitated within seven years. No judge could find that a juvenile could not be rehabilitated within seven years, and thus, there will be even greater hesitancy for waiver.[170] Ironically, an amendment meant to treat juveniles more

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[165] An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, *supra* note 54.

[166] These other criteria include probable cause that the juvenile committed the delinquent act and the opinion of the court that both the public interest would be best protected by the waiver and that there are no reasonable prospects for the juvenile's rehabilitation. N.J. STAT. ANN. § 2A:4-48(b) to (c) (West Supp. 1978-1979).

[167] *See* note 74 *supra.*

[168] 143 N.J. Super. at 79, 363 A.2d at 1174.

[169] *See* State *in re* B.T., 145 N.J. Super. at 277-78, 367 A.2d at 892-93; State *in re* A.R., 144 N.J. Super. at 386-88, 365 A.2d at 943-44.

[170] For example, if the court were faced with the decision of whether to waive its jurisdiction over a 14 year old, the court would be hard pressed to find that the existing procedures, services, and facilities available to the court could not rehabilitate the child before he attained 21 years of age. Interview with Margaret Padovano, Assistant Prosecutor of the Juvenile Division of the Essex County Prosecutor's Office, Newark, New Jersey (Dec. 21, 1977).

harshly actually provides greater leniency. Viewing this amendment with the topical case law indicates that this legislation lacks force and effect.

New Jersey Waiver and Model Waiver Standards: A Comparison

A Joint Commission on Juvenile Justice Standards, as part of an ongoing series designed to cover the spectrum of problems associated with juvenile justice laws, has published a tentative draft of standards for a model waiver statute.[171] These standards are also intended to formulate guidelines for the resolution of some existing conflicts concerning the treatment of youths. Sections which relate to standards for transfer between the courts establish guidelines to alleviate the problems of jurisdictional waiver previously set forth.[172] While New Jersey has not formally adopted these statutory standards, many of the provisions have been incorporated through judicial decision.[173]

The model standards are divided into two parts. The first section of the standards enumerates several preconditions for the establishment of juvenile court jurisdiction.[174] The jurisdictional standard addresses two major issues: the maximum age of juvenile court jurisdiction[175] and the point at which the juvenile's age becomes relevant.[176] Standard 1.1 A. proposes that all accused persons seventeen years old and younger should be subject to the juvenile court jurisdiction.[177] The jurisdictional delineation is based on the juvenile's age at the time the offense allegedly occurred.[178]

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[171] Institute of Judicial Administration, American Bar Association, Juvenile Standards Relating to Transfer Between Courts, 1977 (tent. draft) [hereinafter cited as Standards Relating to Transfer Between Courts] (reproduced in *app.*, at 100).

[172] *Id.*, *app.*, at 100.

[173] Standards Relating to Transfer Between Courts §§ 1.1 A. B. *supra* note 171, *app.*, at 100. *See* State *in re* F.W., 130 N.J. Super. 513, 327 A.2d 697 (Juv. & Dom. Rel. Ct. of Hudson County 1974).

[174] Standards Relating for Transfer Between Courts § 1.1 B. *supra* note 171. The Institute proposes that the presumed age of criminal incapacity be 15 years of age. *Id.* The New Jersey Legislature has recently amended N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979) by making the age of criminal responsibility 14 years old. *See also* Goodlet v. Goodman, 34 N.J. 358, 169 A.2d 140, *cert. denied*, 368 U.S. 855 (1961); State *in re* Steenback, 34 N.J. 89, 167 A.2d 397 (1961).

[175] Standards Relating to Transfer Between Courts, § 1.1B., *supra* note 171, *app.*, *at* 100.

[176] *Id.* § 1.1C.

[177] *Id.* § 1.1A; *Compare* N.J. STAT. ANN. § 2A:4-43 (West Supp. 1978-1979), which in pertinent part states:

> As used in this Act:
>
> a. "Juvenile" means an individual who is under the age of 18 years.
>
> b. "Adult" means an individual 18 years of age or older.

See also N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979); Compton v. Compton, 109 N.J. Super. 5, 262 A.2d 43 (App. Div. 1970) (wherein the court held that the juvenile and

Standard 1.1 B. gives the juvenile court exclusive jurisdiction over persons who were fifteen years of age or younger at the time of the alleged offense.[179] This standard reflects a determination that fifteen year olds are, or at least should be, juveniles for purposes of juvenile court jurisdiction. A similar irrebuttal presumption has been created in New Jersey through the statutory enactment of N.J. Stat. Ann. § 2A:85-4.[180] This statute has recently been amended to lower the defining age of adult criminal responsibility to fourteen years of age.[181]

Standard 1.1 C. prohibits criminal court jurisdiction over any person who was sixteen or seventeen at the time of the alleged offense unless juvenile court jurisdiction has been waived.[182] New Jersey also provides that the ultimate decision of waiver rests with the juvenile judge.[183] The judge's discretionary decision is not without review; the appellate court can determine whether judicial discretion has been abused.[184]

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domestic relations court was a statutory court whose jurisdiction is limited to the subject matter set forth in the statute).

[178] *Accord,* State *in re* Smigelski, 185 F. Supp. 283 (D.N.J. 1960) (where the United States District Court construed the juvenile and domestic relations court law to mean that the age of the accused at the time of offense is determinative of jurisdiction rather than the age of the accused at the time of petition); *but see* KY. REV. STAT. ANN. § 208.020 (Baldwin 1969) and MICH. COMP. LAW ANN. § 712A.2 (Supp. 1974) (in these two states the controlling jurisdictional age is when the juvenile court proceedings are initiated); *Compare* N.H. REV. STAT. ANN. § 169:1 (Supp. 1973) (the New Hampshire Legislature has adopted a two-prong approach which looks to age at the time of the alleged act and age at the time of adjudication).

[179] Standards Relating to Transfer Between Courts § 1.1 B., *supra* note 171. *See also* ARIZ. REV. STAT. § 13-35 (1956) (statute presumes lack of criminal responsibility in children 13 years old or under, but the prosecution can rebut the presumption with a showing that at the time the act was committed, the juvenile knew of its wrongfulness). *Compare* IDAHO CODE § 16-1806(1)(b) (Supp. 1973) and D.C. CODE ENCYCL. § 16-2307(a)(3) (West 1973) (these two statutes do not permit a juvenile offender to be subject to criminal prosecution unless he is 18 years of age or older at the time of trial). *See generally* Hays & Soliway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults,* 9 HOUS. L. REV. 709, 710 (1972) (the authors express the view that waiver was sought most often in the last two years of juvenile court jurisdiction).

[180] N.J. STAT. ANN. § 2A:85-4 (West Supp. 1978-1979) states: "A person under the age of 16 years is deemed incapable of committing a crime."

[181] An Act concerning jurisdiction for certain crimes committed by juveniles over the age of 14 years, *supra* note 54.

[182] Standards Relating to Transfer Between Courts § 1.1 C., *supra* note 171.

[183] N.J. STAT. ANN. § 2A: 4-48 (West Supp. 1978-1979) gives the juvenile court judge the discretion to waive a juvenile offender provided that the juvenile satisfies the statutory criteria.

[184] *See* State *in re* J.F., 141 N.J. Super. 328, 358 A.2d 277 (App. Div. 1976) (the appellate court held that it could determine whether the juvenile court judge abused his discretion in not waiving jurisdiction).

The Juvenile Standards Project places other limitations on the juvenile court. Standard 1.2 does not permit a juvenile court disposition resulting from a single episode to exceed a three year period.[185] New Jersey has similarly established a statutory maximum for juvenile court disposition;[186] the order of disposition must be terminated when the juvenile offender reaches the age of eighteen. An exception occurs when an adjudication of juvenile deinquency is based on an offense which if committed by an adult offender[187] would constitute any form of homicide.[188] In such cases, the juvenile offender is subject to indeterminate confinement. According to Standard 1.2 B. the juvenile court does not have jurisdiction to adjudicate subsequent conduct of any person over seventeen years of age. The juvenile court, however, does retain jurisdiction to administer or modify its diposition of any juvenile offender.[189] In New Jersey, the juvenile court is permitted by statute, to retain jurisdiction over any case in which it has entered an order of disposition, for the duration of that disposition.[190] The statute does not expressly mention the issue of subsequent adjudications, but contains a broad-based provision that allows the juvenile court, by its own order, to retain jurisdiction in any other case.[191]

Standard 1.3 establishes a three year statute of limitations in most cases.[192] This standard incorporates the adult statute of limitations only if these adult statutes of limitation provide periods shorter than three years, or

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[185] Standards Relating to Transfer Between Courts § 1.2, *supra* note 171.

[186] N.J. STAT. ANN. § 2A: 4-63 (West Supp. 1978-1979) (statute provides for the termination of the juvenile court order of disposition).

[187] N.J. STAT. ANN. § 2A:4-43(b) (West Supp. 1978-1979).

[188] N.J. STAT. ANN. § 2A:4-61(h) (West Supp. 1978-1979) which in pertinent part states:

> If a juvenile is adjudged delinquent the juvenile and domestic relations court may order any of the following dispositions:
>
> . . . .
>
> h. Commit the juvenile to a suitable institution maintained for the rehabilitation of delinquents for an indeterminate term not to exceed 3 years; except, that, any time an adjudication of juvenile delinquency is predicated upon an offense which, if committed by a person of the age 18 years or over would constitute any form of homicide as defined in N.J.S.A. 2A:113-1, 2A:113-2, 2A:113-4, or 2A:113-5 then the period of confinement shall be indeterminate and shall continue until the appropriate paroling authority determines that such person should be paroled . . . .

But see KAN. STAT. § 38-806(b) (Supp. 3, 1973) and R.I. GEN LAWS § 14-1-6 (1956) (these two states provide for the retention of dispositional jurisdiction until the juvenile's 21st birthday).

[189] *See* Standards Relating to Transfer Between Courts § 1.2 B., *supra* note 171.

[190] N.J. STAT. ANN. § 2A:4-52 (West Supp. 1978-1979).

[191] *Id.*

[192] *See* Standards Relating to Transfer Between Courts § 1.3, *supra* note 171.

if they provide no limitations period for specified serious criminal offenses. New Jersey's juvenile courts have been in the forefront in applying the criminal statute of limitations to juvenile court proceedings. In the case of *State in re B.H.*,[193] the juvenile court held that the one year limit on prosecutions under the Disorderly Persons Act restricted the filing of juvenile petitions after one year. The court indicated that: "[T]he lapse of the statutory period for prosecution is not a procedural defense; it is a substantive and jurisdictional . . . ."[194]

The dictum, however, in *State in re K.V.N.* endorses the Institute's view. The periods of limitations often vary by offense in New Jersey.[196] As previously mentioned, the New Jersey court employs various limitations according to the particular offense; whereas, Standard 1.3 embodies the view that the acts occuring more than three years before the filing of a petition are not valid indicators of a juvenile's social adjustment.[197]

The second section of the standards enumerates guidelines to be employed in the waiver process. Standard 2.1 establishes time requirements for all levels of the juvenile justice system that would involve waiver.[198]

Standards 2.1 A. requires the clerk of the juvenile court to give the prosecuting attorney prompt written notice of the filing of petitions against sixteen and seventeen year olds with class one juvenile offenses.[199] Standards 2.1 B. through 2.1 E. similarly require prompt consideration and resolution of waiver motions.[200] These standards are necessary since any delay can have an adverse impact on the juvenile regardless of the outcome of the juvenile court proceeding. The problems of delay are multiplied dur-

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[193] 112 N.J. Super. 1, 270 A.2d 72 (Bergen County Juv. & Dom. Rel. Ct. 1970).

[194] *Id.* at 4, 270 A.2d at 74.

[195] 112 N.J. Super. 544, 271 A.2d 921 (Hudson County Juv. & Dom. Rel. Ct. 1970), *aff'd*, 116 N.J. Super. 580, 283 A.2d 337 (App. Div. 1971), *aff'd*, 60 N.J. 517, 291 A.2d 577 (1972).

[196] New Jersey employs a one year statute of limitations for disorderly conduct, N.J. STAT. ANN. 2A:169-10 (West Supp. 1978-1979), but a five year limit for most other penal offenses (N.J. STAT. ANN. § 2A:159-2 (West Supp. 1978-1979)).

[197] The Institute's drafters strongly believe that being a juvenile does not justify intervention that adults who have engaged in similar criminal conduct to do not experience. They conclude that juveniles should receive the benefit of any adult limitations period shorter than three years. Institute of Judicial Administration, American Bar Association, Juvenile Standards Relating to Transfer Between Courts, 1977 (tent. draft) at 23.

[198] Standards Relating to Transfer Between Courts § 2.1, *supra* note 171.

[199] *Id.* § 2.1 A. A "class one juvenile offense" is defined as a criminal offense for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of 20 years. Institute of Judicial Administration, American Bar Association, Juvenile Delinquency and Sanctions, 1977 (tent. draft) at 7-8.

[200] Standards Relating to Transfer Between Courts § 2.1 B. to E., *supra* note 171.

ing the waiver process.[201] The New Jersey juvenile court procedure differs markedly from that advocated in the juvenile justice standards.

The New Jersey juvenile courts, by statute, initiate the waiver of juvenile offenders.[202] Pursuant to the language of statute, the juvenile court judge makes a determination as to whether the juvenile should be waived. Following this decision, the case is referred to the prosecutor's office. Although the New Jersey case law has clothed the juvenile with due process protections, delay in a waiver hearing has been considered neither a denial of due process nor a denial of a speedy trial.[203]

Standard 2.1 F. prohibits consideration of waiver after the adjudicatory proceedings have begun. The New Jersey courts have not considered this narrow issue. The appellate court, however, in a recent case held that double jeopardy did not attach when a juvenile court judge declared a mistrial and transferred the case to another judge.[204] This approach is compatible with that of *Breed v. Jones*.[205] The initial judge heard testimony from the offender that indicated the offense was more severe than originally presumed. The court found this a case of "manifest necessity" and barred the claim of double jeopardy.

Standard 2.2 details the "necessary findings" which are required for the waiver of a juvenile offender.[206] Standard 2.2 A. establishes a two-prong test for waiver to the criminal court. The juvenile court must find probable cause to believe that the juvenile committed a class one juvenile offense,[207] and the court must decide by clear and convincing evidence that the juvenile is not a proper person for juvenile court handling.[208] The New Jersey statutory law pertaining to the treatment of juveniles contains provisions requiring probable cause that are somewhat analogous to those enumerated in the standards.[209] There is no statute in New Jersey which mandates a

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[201] The problems of delay are accentuated in the waiver proceeding. The juvenile of an unresolved transfer decision is virtually placed in limbo; he can neither be adjudicated by the criminal court nor the juvenile court until the waiver motion is decided.

[202] N.J. STAT. ANN. 2A:4-48 (West Supp. 1978-1979).

[203] State *in re* G.T., 143 N.J. Super. 73, 362 A.2d 1171 (App. Div. 1976) the court found that a juvenile was not denied due process of or a right to a speedy trial by reason of a two and one-half month delay between the offense and the waiver hearing.

[204] State *in re* C.V., 146 N.J. Super. 573, 370 A.2d 490 (App. Div. 1977), *certif. denied*, 74 N.J. 258, 377 A.2d 663 (1977).

[205] 421 U.S. 519 (1975).

[206] Standards Relating to Transfer Between Courts § 2.2, *supra* note 171.

[207] *Id.* § 2.2 A.

[208] *Id.*

[209] *See* N.J. STAT. ANN. § 2A:4-48(b) (West Supp. 1978-1979), which in pertinent part states:

> [T]he juvenile and domestic relations court may, without the consent of the juvenile, waive jurisdiction over a case and refer that case to the appropriate court and prosecuting authority having jurisdiction if it finds, after hearing, that:

finding of clear and convincing evidence prior to the relinquishment of jurisdiction.

Standard 2.2 C. is based upon the drafters' intent that the juvenile court should waive jurisdiction only over extraordinary juveniles in extraordinary factual circumstances. Standard 2.2 C. defines those circumstances.[210] The standards create a presumption that juveniles should be under the jurisdiction of the juvenile court. The requirements of Standard 2.2 C. must be met before the presumption can be overcome.

In New Jersey, the waiver statute establishes certain criteria that must be met before a juvenile can be waived.[211] Under the New Jersey waiver statute, the juvenile can be referred to the criminal court, without the juvenile's consent, where the juvenile is between fourteen and eighteen years of age.[212] The juvenile court must also be satisfied that the public requires waiver[213] and that there are no reasonable prospects for rehabilitation.[214] Although the New Jersey waiver statute does not speak in terms of rehabilitation to the exclusion of public interest, the underlying case law has remolded the statute so as to emphasize rehabilitation at the expense of the protection of the public.[215]

The New Jersey Legislature might consider the adoption of a statutory scheme resembling Standard 2.2 C. This statutory formulation would allow the juvenile court judge greater flexibility in the decision of whether or not to waive jurisdiction. Even though the drafters of the standards do not advocate the public interest approach and have not drafted the language to accommodate a public interest rationale, they do not preclude waiver if the juvenile has demonstrated a clear propensity for violent conduct. If waiver were permitted in New Jersey along some of the guidelines established in 2.2 C., then the protection of society would be weighted more heavily than the rehabilitation function as was intended in *State v. Van Buren.*[216]

Standards 2.3 A. and B. require that the juvenile be represented by counsel.[217] These guidelines further require that the juvenile receive written

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. . . .

b. There is probable cause to believe that the juvenile committed a delinquent act which would constitute homicide, treason if committed by an adult or committed an offense against the person in an aggressive, violent and willful manner

. . . .

[210] Standards Relating to Transfer Between Courts § 2.2 C., *supra* note 171.

[211] N.J. STAT. ANN. § 2A:4-48 (West Supp. 1978-1979).

[212] *Id.* § :4-48(a).

[213] *Id.* § :4-48(c).

[214] *Id.*

[215] *See* State *in re* G.T., 143 N.J. Super. 73, 362 A.2d 1171 (App. Div. 1976); *compare* State v. Van Buren, 29 N.J. 548, 150 A.2d 649 (1959).

[216] 29 N.J. 548, 150 A.2d 649 (1959).

[217] Standards Relating to Transfer Between Courts § 2.3, *supra* note 171.

notice of the right to counsel within five court days before the waiver hearing. Even prior to *In re Gault,* the New Jersey case law reflected the view that if a juvenile defendant was not represented by counsel, the offender was denied due process of law.[218]

Conclusion

The current New Jersey legislation and the existing case law pertaining to juveniles makes the effective disposition of juvenile delinquents impossible. There is an immediate need for legislation that will mandate more severe sentencing for juveniles who commit heinous offenses. The enumerated standards derived from the IJA-ABA project suggest a concrete starting point for the reformation of the juvenile justice system. There is recognition that the present juvenile reformatory system is inadequate to rehabilitate the juvenile "repeater." In order to protect the members of society who become likely victims of these juvenile offenders, the juvenile courts must waive their jurisdiction over the offender when the juvenile offenders' record reflects that he cannot be rehabilitated by the reformatory system.

This article should not be interpreted as advocating waiver of all juveniles to criminal court notwithstanding the severity of the offense. This approach is as ludicrous as the juvenile court retaining jurisdiction over all juvenile offenders regardless of the nature of the crime. It is suggested that the juvenile be waived when shown not to be an appropriate subject for juvenile rehabilitation. Legislation that merely lowers the age of juveniles is nothing more than societal appeasement. Effective legislation must aid in the search for real solutions to the juvenile deliquency problem. To have striking curtailment of juvenile delinquency, there must be rehabilitation in the early stages of aberrant juvenile behavior. If this approach is unsuccessful and the juvenile becomes a "repeating" offender, the offender then must be waived to a criminal proceeding. This is the most effective means of protecting both the juvenile and society.

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[218] *See* State v. Loray, 46 N.J. 179, 215 A.2d 539 (1965); State v. Tuddles, 38 N.J. 565, 186 A.2d 284 (1963); State *in re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct., Morris County, 1969).

APPENDIX

STANDARDS

PART I: JURISDICTION

1.1 *Age limits.*

A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.

B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fifteen years of age.

C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was sixteen or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

1.2 *Other limits.*

A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed thirty-six months.

B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

1.3 *Limitations period.*

No juvenile court adjudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

PART II: WAIVER

2.1 *Time requirements.*

A. Within two court days of the filing of any petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen

years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.

B. Within three court days of the filing of any petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen years of age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

C. Within seven court days of the filing of any petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within twenty-four hours after the filing of such motion in the juvenile court.

D. The juvenile court should initiate a hearing on waiver within ten court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.

E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within ten court days after conclusion of the waiver hearing.

F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any adjudicatory hearing relating to any transaction or episode alleged in that petition.

2.2 *Necessary findings.*

A. The juvenile court should waive its jurisdiction only upon finding:

1. that probable cause exists to believe that the juvenile has committed the class one juvenile offense alleged in the petition; and

2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.

B. A finding of probable cause to believe that a juvenile has committed a class one juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.

C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence, of:

1. the seriousness of the alleged class one juvenile offense;

2. a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury;

3. the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and

4. the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems and whether they are, in fact, available. Expert opinion should be considered in assessing the

likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court.

D. A finding of probable cause to believe that a juvenile has committed a class one juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

2.3 *The hearing.*

A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least five court days before commencement of the waiver hearing.

B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least five court days before commencement of the waiver hearing.

C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing.

D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.

E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.

F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.

G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.

H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.

I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent criminal proceeding.

J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

2.4 *Appeal.*

A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within seven court days of the decision of the juvenile court.

B. The appellate court should render its decision expeditiously, according the findings of the juvenile court the same weight given the findings of the highest court of general trial jurisdiction.

C. No criminal court should have jurisdiction in any proceeding relating to any transaction or episode alleged in the juvenile court petition as to which a waiver motion was made, against any person over whom the juvenile court has waived jurisdiction, until the time for filing an appeal from that determination has passed or, if such an appeal has been filed, until the final decision of the appellate court has been issued.