Pepperdine Law Review

Volume 4
Issue 3 *Juvenile Law Thematic Journal*

Article 4

5-15-1977

Certification of Juveniles To Adult Court

Joseph N. Sorrentino

Gary K. Olsen

Certification of Juveniles To Adult Court

JOSEPH N. SORRENTINO
and GARY K. OLSEN*

INTRODUCTION

The concept of a separate system of juvenile justice is embedded in the nation's law. Growing out of the progressive social movements at the turn of the century,[1] the effort to correct the abuses of incarcerating children with adult criminals gained rapid acceptance throughout the United States. By 1929, every state, the federal government, and the District of Columbia had

* Joseph N. Sorrentino, BA University of California, Santa Barbara, 1963; MA University of California, Los Angeles, 1970; JD Harvard Law School, 1967; Juvenile Court Referee, Los Angeles County, 1975; Private Practice 1970 to present. Author of: UP FROM NEVER, (1971) THE MORAL REVOLUTION, (1972) THE CONCRETE CRADLE, (1975) Gary K. Olsen, BA University of Santa Clara, 1966; J.D. University of California, Davis, 1969; Diploma in International Law with distinction, City of London College, London, England, 1968; Staff Disciplinary Attorney, State Bar of California, Los Angeles; Private practice with Olsen and Sorrentino 1972, handling over 300 juvenile court cases to date.

1. The forerunner of the early juvenile codes was the Illinois Juvenile Court Act of 1899.

created a special body of laws—a juvenile code—designed to meet the peculiar problems and needs of youth.[2]

Today American juvenile codes vary considerably in the nature and extent of the services they offer to juveniles and in the form of the institutions which dispense those services. Some states, like California,[3] establish an entire system of juvenile courts and agencies with their own facilities and permanent, full-time staff; others, like Florida,[4] merely carve out special powers and procedures for courts of general jurisdiction hearing matters pertaining to juveniles.[5] These differences, however, are slight when viewed in light of those things which the juvenile codes have long had in common. For example, the concept of *Parens patrie,*[6] under which the state may assume toward the juvenile the protective and guiding role of parent,[7] is fundamental to all juvenile codes. Above all, juvenile laws share the conviction that children are essentially good, that therefore treatment and rehabilitation must replace the emphasis on guilt and punishment which exists in adult criminal proceedings, and that the primary purpose of these laws is to secure the welfare and best interests of the child.[8]

Another shared characteristic not often considered in comparing the juvenile codes is the fact that practically all such codes contain some provision empowering a court to exclude a criminally-accused minor from the juvenile system and subject him to the normal course of criminal prosecution as an adult. Variously termed "transfer," "referral," "certification" or

2. M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A STUDY OF THE JUVENILE CODES IN THE UNITED STATES (1974) (hereinafter cited as LEVIN & SARRI). For a history of the juvenile reform movement, see Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 STAN. L. REV. 1187 (1970).

3. CAL. WELF. & INST. CODE §§ 500, *et seq.* (West 1961).

4. FLA. STAT. ANN. § 39.01(1) (West 1973).

5. A survey of the structural diversity among juvenile courts may be found in LEVIN & SARRI, *supra* note 2. 37-47.

6. The term means "parent of the country."

7. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909) summarizes the legal foundations of the juvenile system. *See also,* In re Gault, 387 U.S. 1, 16 (1967).

8. The philosophy of the juvenile system is set forth in its most authoritative form in the preambles or statements of purpose of the juvenile codes themselves. Indiana's statute is typical and reads as follows:

> The purpose of this act is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

IND. CODE § 31-5-7-1 (1971).

"waiver of jurisdiction,"[9] this process is, in some states, as old as the juvenile system itself.[10] Nonetheless, the transfer issue did not come into prominence until 1966 when the United States Supreme Court decided *Kent v. United States.*[11] In that case, the Court held that the decision whether to transfer a child to the criminal courts or to retain him within the juvenile system is "critically important"[12] to the preservation of the accused juvenile's rights and to the outcome of his case; therefore, the minor is entitled to a hearing at which he is represented by counsel, to access by his counsel to the social records and reports considered by the juvenile court, and to a statement in the record of the reasons for the court's decision.[13] Unfortunately, from the standpoint of the accused juvenile, the term "critical" barely describes the importance of the transfer decision, for if convicted, the minor not only loses the privileges of juvenile status, but faces the severe consequences of treatment as an adult. Thus,

> There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile proceeding is replaced by the publicity and normative concepts of penal law; the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobrium attached thereto by prospective employers; if convicted as an adult, the child may be detained well past his twenty-first birthday; he may lose certain civil rights and be disqualified from public employment. Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and

---

9. This article follows the common practice of using the terms interchangeably, although perhaps technically they should not be.

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

Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement,* 8 CRIME AND DELINQUENCY 3, 4 (1962), quoted in Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law,* 62 KENTUCKY L. J. 122, 141 (1973) [hereinafter cited as Stamm].

10. *E.g.,* Kentucky's transfer law was part of its first juvenile code in 1906. 1906 Ky. Acts ch. 64. Stamm, *supra*, note 9 at 125.

11. 383 U.S. 541 (1966).

12. *Id.* at 553.

13. *Id.* at 561.

> even sexual abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly.[14]

The transfer decision is important not only to the juvenile, but also to lawyers and citizens concerned with juvenile justice because it sets at odds the conflicting demands which society places on the juvenile and criminal systems—treatment and rehabilitation on the one hand, and society's protection from and punishment of the adult criminal on the other. The transfer decision involves the paradox: will the juvenile court be unable or unwilling to extend its special powers and services to one of the class of persons for whom these special powers and services were created?[15] Thus, the question of transfer touches the purpose and object of the juvenile justice system, and its resolution greatly affects the nature of that system.

At present, forty-seven states,[16] the federal government,[17] and the District of Columbia[18] have enacted statutes vesting juvenile court judges with discretion to transfer juveniles accused of crime to adult court. Only three states[19] have no provision authorizing the juvenile court to waive jurisdiction.

---

14. Shornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisted,* 43 IND. L. J. 583, 586-587 (1968) [hereinafter cited as Shornhorst]. Shornhorst figuratively characterizes certification as a sentence of "death" as a juvenile. Another commentator would regard this characterization literally: " . . . if the death penalty is successfully resurrected, the transfer hearing may in some cases be described as terminal." Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings,* 6 U. TOL. L. REV. 1, 21 (1974). *See also* Stamm, *supra*, note 9 at 143.

15. Stamm, *supra*, note 9 at 145.

16. ALA. CODE tit. 13, § 364 (1958); ALASKA STAT. § 47.10.060 (1971); Ariz. Juv. Ct. R. 12, 14 (Supp. 1976); COLO. REV. STAT. § 19-3-108 (Supp. 1969); Del. Fam. Ct. R. 170 (1974); FLA. STAT. ANN. § 39.02(5) (West Supp. 1972); GA. CODE ANN. § 24A-2501 (1971); HAWAII REV. STAT. § 571-22 (Supp. 1971); IDAHO CODE § 16-1806 (Supp. 1971); ILL. REV. STAT. ch. 37, § 702-7(3) (Supp. 1972); IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1972); IOWA CODE ANN. § 232.72 (West 1969); KAN. STAT. § 38.808 (Supp. 1971); KY. REV. STAT. ANN. § 208.170 (Baldwin 1969); LA. REV. STAT. ANN. § 13:1571.1 (West 1951); ME. REV. STAT. tit. 15, § 2611(3) (1964); MD. ANN. CODE art. 26, § 70-16 (Supp. 1971); MISS. CODE ANN. § 43-21-33 (1972); MO. ANN. STAT. § 211.071 (Vernon 1962); MONT. REV. CODES ANN. § 10-1229 (Supp. 1975); NEV. REV. STAT. § 62.080 (1973); N.H. REV. STAT. ANN. § 169.21 (1964); N.J. REV. STAT. § 2A: 4-48 (1952); N.M. STAT. ANN. § 13-14-27 (Supp. 1972); N.C. GEN. STAT. § 7A-280 (1969); N.D. CENT. CODE § 27-20-34 (Supp. 1971); OHIO REV. CODE ANN. § 2151.26 (Page Supp. 1971); OKLA. STAT. tit. 10. § 1112(b) (1971); ORE. REV. STAT. § 419.533 (1971); PA. STAT. ANN. tit. 11, § 50-325 (1965); R.I. GEN. LAWS § 14-1-17 (Supp. 1971); S.C. CODE §§ 15-1281.12 to .13 (1962); S.D. COMPILED LAWS ANN. § 26-11-4 (Supp. 1971); TENN. CODE ANN. § 37-234 (Supp. 1971); TEX. FAM. CODE ANN. § 54.02 (Vernon 1975); UTAH CODE ANN. § 55-10-86 (Supp. 1971); VA. CODE. § 16.1-176 (Supp. 1971); WASH. REV. CODE § 13.04.120 (1974); W. VA. CODE § 49-5-3 (1965); WIS. STAT. ANN. § 48.18 (West Supp. 1972); WYO. STAT. § 14-115.38 (Supp. 1971).

17. 18 U.S.C. § 5032 (1969).

18. D.C. CODE § 16-2307 (Supp. 1972).

19. Vermont does not provide for transfer of cases originally brought in the

This article surveys the current laws governing transfer of juveniles to criminal court. With the possible exception of the recently enacted California certification statute[20] which serves

juvenile court. But where a child is transferred from the criminal court to the juvenile court, the latter may retransfer the case upon a finding that the child is not in need of juvenile treatment and rehabilitation. Since it appears that retransfer occurs after the child has been found guilty by the criminal court, the juvenile court proceeding violates the rule of *Breed v. Jones* (see text accompanying note 111, *infra*) and is unconstitutional. VT. STAT. ANN. tit. 33 § 655 (1973).

In Nebraska the county attorney, not the juvenile court, decides whether the child may be tried as an adult. But the child may petition the criminal court for transfer back to the juvenile system. NEB. REV. STAT. § 43-202.1-.2 (1971).

New York has no transfer statute. N.Y. PENAL LAW § 30 (McKinney 1909) states that no criminal responsibility attaches to acts of those under the age of 16 at the time of commission. Thus, criminal acts of those 16 and over are prosecuted in adult court.

20. CAL. WELF. & INST. CODE § 707(a) (West 1976). In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years or age or older, of any criminal statute or ordinance except those listed in subdivision (a) upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

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

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

(3) The minor's previous delinquent history.

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

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

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

(b) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, one of the following offenses: (1) Murder; (2) Arson of an inhabited building; (3) Robbery while armed with a dangerous or deadly weapon; (4) Rape with force or violence or threat of great bodily harm; (5) Kidnapping for ransom; (6) Kidnapping for purpose of robbery; (7) Kidnapping with bodily harm; (8) Assault with intent to murder or attempted murder; (9) Assault with a firearm or destructive device;

as a point of reference for many of the current (but not always desirable) trends in this rapidly-changing area,[21] this article does not examine any one of these statutes in great depth. Furthermore, it does not attempt an exhaustive theoretical analysis of the many complex issues involved generally in the certification process.[22] Instead, this article adopts a broad perspective, highlighting important problems and providing a background for further consideration of these and other issues. The discussion begins with an overview of the transfer laws, including a look at the distinction between legislative and judicial waiver and a description of the minimum age and offense requirements which bring the laws into operation. It then focuses upon the

---

(10) Assault by any means of force likely to produce great bodily harm; (11) Discharge of a firearm into an inhabited or occupied building, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court shall find that the minor is not a fit and proper subject to be dealt with under the juvenile court law *unless* it concludes that the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court based upon an evaluation of the following criteria:

(i) The degree of criminal sophistication exhibited by the minor, and

(ii) Whether minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, and

(iii) The minor's previous delinquent history, and

(iv) Success of previous attempts by the juvenile court to rehabilitate the minor, and

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

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and reasons therefore shall be recited in the order. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at such hearing.

21. The transfer laws have been the object of much recent state legislative activity. Thirty-nine states have enacted revisions within the past ten years, thirty-two within the past five. Only eight of the states having transfer laws—Alabama, Massachusetts, Minnesota, Nevada, New Hampshire, South Carolina and South Dakota—have not revised them within the past ten years.

22. *See* Schornhorst, *supra* note 14 and Stamm, *supra* note 9. The Stamm article presents a collection of the literature of waiver of jurisdiction in juvenile court, note 10 at 128. For analysis of the certification procedure in California, *see* Note, *Separating the Criminal From the Delinquent: Due Process in the Certification Procedure,* 40 So. CAL. L. REV. 158 (1967); Note, *Certification of Minors to the Juvenile Court: An Empirical Study,* 8 S.D.L. REV. 404 (1971); Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts,* 24 STAN. L. REV. 874 (1972); Clayman, *Fitness—The Critical Hearing of the Juvenile Court,* 50 L.A.B. BULL. 129 (1975); Note, *Juveniles in the Criminal Courts: Substantive Views of the Fitness Decision,* 23 U.C.L.A. L. REV. 988 (1976); THOMPSON, JUVENILE COURT DESKBOOK (1972).

substantive standards of criteria created by the statutes to guide the juvenile court in making the certification decision and summarizes some of the major criticisms of these standards. The final discussion deals with what occurs during and after certification, e.g., requirements of notice, standard of proof at the hearing, rights of appeal and attempts to preserve certain privileges of juvenile status following adjudication in adult court. The conclusion offers observations regarding significant trends and suggested improvements.

OVERVIEW OF THE TRANSFER LAWS

Legislative Waiver

In a minority of states it is the legislature, not the juvenile court, which determines whether a juvenile will be tried in criminal court. Called "legislative waiver"[23] such cases in fact do not involve a waiver of jurisdiction at all; rather, the legislature merely excludes the accused child from the jurisdiction of the juvenile court. Commencing with the filing of charges, all proceedings under such systems occur as if the defendant were an adult. Most often this form of transfer is utilized when a juvenile is charged with a specified crime, ranging from murder[24] to "aggravated delinquency."[25] Some states withhold juvenile court jurisdiction as to youths charged with any crime punishable by death[26] or life imprisonment.[27]

Certainly, the object of legislative waiver is to circumvent the certification hearing in the juvenile court and facilitate an otherwise complex and time consuming process. Nonetheless, while it may appear an efficient means of responding to the alarming increase in juvenile crime,[28] its cost to society is measured by the inherent admission that certain children cannot be

23. Schornhorst, *supra* note 14 at 596.
24. PA. STAT. ANN. tit. 11, § 50-102(2) (Purdon Supp. 1976).
25. KAN. STAT. § 21-3611(3) (1964).
26. The abolition of capital punishment has not invalidated these provisions. *See, e.g.,* Lycans v. Borden Kircher, 222 S.E. 2d 14 (W. Va. 1975).
27. *E.g.,* LA. REV. STAT. ANN. § 13-1570(A) (5) (West 1968); N.C. GEN. STAT. § 7A-280 (1969); W. VA. CODE § 49-5-3 (1973).
28. Almost 60% of all persons charged with burglarly in 1974 were under eighteen years of age. Juveniles comprised 34% of those accused of robbery, 23% of those accused of rape. Federal Bureau of Investigation, CRIME IN THE UNITED STATES, 1974 (1975).

helped. The only interest served in such cases is the public's need for protection from these children.

This problem becomes more troubling in view of the fact that often such legislative waiver statutes contain no minimum age provision. Consequently, any child who comes under these laws must stand trial in criminal court regardless of age. Indiana, for example, has recently enacted a legislative waiver statute[29] which redefines "child" by excluding from that class all persons charged with first degree murder, thus making possible the tragic and absurd result that a ten year old could be tried in criminal court and, if convicted, be imprisoned with adults.[30]

Judicial Waiver

The great majority of laws governing transfer call for an exercise of discretion on the part of the juvenile court. These laws usually include standards to guide the judge in reaching his decision. Most also provide that before a juvenile may be certified for transfer, he must meet certain minimum standards regarding his age and the offense charged.

Minimum Age Requirement

In nine jurisdictions[31] no minimum age is stated. Theoretically, any child, no matter how young, may be prosecuted as as adult. More commonly, however, a minimum age is set which approaches the upper age limit of the juvenile court's jurisdiction. Thus, in sixteen state and federal jurisdictions,[32] including California, a child must be at least sixteen before transfer can occur; in seven jurisdictions,[33] the minimum age is fifteen; thirteen states[34] have a minimum age of fourteen; and in Illinois and Mississippi, the minimum age is thirteen. In several states the minimum age varies with the offense charged. In Tennessee, for example, a child is normally eligible for transfer if he is sixteen or older.[35] However, a child charged with murder, rape,

29. IND. CODE § 31-5-7-3 (Supp. 1975).

30. *See* Notes, *Survey of Recent Developments,* 9 IND. L. REV. 197, 234 (1975).

31. Alaska, Arizona, Arkansas, New Hampshire, Oklahoma, South Dakota, Washington, West Virginia, Wisconsin.

32. California, Delaware, Hawaii, Idaho, Indiana, Kansas, Kentucky, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, Tennessee, Wisconsin and the federal government.

33. District of Columbia, Georgia, Louisiana, Michigan, Ohio, Texas, Vermont.

34. Alabama, Colorado, Connecticut, Florida, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, Pennsylvania, Utah.

35. TENN. CODE ANN. § 37-234 (Supp. 1971).

robbery with a deadly weapon and kidnapping may be transferred at the age of fifteen. Indiana makes a similar provision in its law, except that the minimum age for serious offenses drops from sixteen to fourteen.[36] In Maryland the minimum age requirement, normally fourteen years, is dropped entirely where there are charges punishable by death or life imprisonment.[37] South Carolina's minimum age of fourteen years is omitted where the juvenile is accused of one of an assortment of specified crimes including murder, perjury and larceny.[38]

Nine states have amended their minimum age provisions within the past ten years. Indiana, New Mexico, North Dakota, and Virginia have increased the minimum age by one to two years, while Connecticut, Hawaii and Illinois have moved from no minimum age to age requirements of fourteen to sixteen years. The trend toward a higher minimum age may indicate a desire that the transfer process be restricted to—or focused upon those older juveniles who are nearing the age limit of the juvenile's court's original jurisdiction[39] and will soon automatically face prosecution as adults. For example, West Virginia has replaced a fixed minimum age (sixteen) in favor of an indefinite standard (below eighteen years), but only the District of Columbia has lowered its minimum age requirement (from sixteen to fifteen years old). Thus while the juvenile's age is not, and should not be,[40] the sole factor to be considered in making the transfer decision, its importance has increased in the past few years.

A significant problem with the minimum age element of the transfer decision is the lack of agreement among the states as to which event should be looked to to establish the significant age. Although twenty-five[41] jurisdictions having a minimum age re-

36. IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1972).
37. MD. ANN. CODE art. 26, § 70-16 (Supp. 1971).
38. S.C. CODE ANN. § 15-1281.12 (1962).
39. In approximately two-thirds of the states this age limit is eighteen years; nowhere is it less than sixteen. Note, *Certification of Minors to the Juvenile Court: An Empirical Study,* 8 S.D.L. REV. 404, 411 (1971).
40. In a survey of juvenile court judges in Arizona, most thought that age, by itself, should not be a sufficient reason to transfer a juvenile. *Juvenile in America: Special Project,* 16 ARIZ. L. REV. 235, 315 note 129 (1974).
41. California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Mon-

quirement look to the juvenile's age at the time of the commission of the alleged offense, fourteen[42] consider the age at the time of the filing of charges or the time of the waiver proceedings. Thus, in Michigan,[43] where the minimum age for transfer is fifteen, a child fourteen years old at the time of the wrongful act may be transferred if his birthday occurs before he is apprehended and charged. This enables the imaginative prosecutor to circumvent the juvenile system by delaying the filing of charges until the juvenile has reached the age necessary to become eligible for transfer, a practice which became so common that it earned the name "Texas style" waiver[44] after its firm acceptance in the juvenile and appellate courts of that state.[45] The Texas legislature has since enacted a statute[46] which specifies that the child must have attained the minimum age at the time of the alleged offense before juvenile court jurisdiction may be waived. However, the abuse is likely to continue, as courts in jurisdictions determining the applicable age at the time of charging or proceeding on the offense generally support this method, basing their decisions on the wording of the statute[47] and on the theory that the existence of juvenile court jurisdiction at the time of commission does not substantively change the nature of the criminal offense.[48]

Like the minimum age requirements, many statutes contain minimum offense standards whereby eligibility for transfer depends on the gravity of the offense charged. A few states allow transfer only of cases involving specific crimes. In Connecticut[49] only juveniles accused of murder may be tried as adults.

---

tana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia.

42. Alabama, Colorado, Florida, Indiana, Hawaii, Maryland, Michigan, Mississippi, Nevada, Oregon, Rhode Island, South Carolina, Utah, Wisconsin.

43. MICH. COMP. LAWS § 27.3178 (Supp. 1972) reads in part:

> Where a child who has attained the age of 15 years so accused of any act the nature of which constitutes a felony, the judge of probate . . . may waive jurisdiction pursuant to this section upon motion of the prosecuting attorney, whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offense.

44. Schornhorst, *supra* note 14 at 600.

45. In Foster v. State, 400 S.W. 2d 552 (Tex. Crim. App. 1966) a fifteen year old was accused of auto theft and held in juvenile detention until he reached seventeen, at which time he was charged with murder arising out of the same incident.

46. TEX. FAM. CODE ANN. § 54-02 (Vernon 1975).

47. State v. Little, 241 Or. 557, 407 P.2d 627 (1965), *cert. denied*, 385 U.S. 902 (1966). *See* Comment, 5 WILLIAMETTE L.J. 157 (1968).

48. *See* Annotation: 89 A.L.R. 2d 506 (1963). *Also* Miller v. Quatsoe, 348 F. Supp. 764 (E.D. Wis. 1972) which held that where age is fixed at the date of the filing of a complaint, this filing cannot be delayed in order to avoid juvenile court jurisdiction.

49. CONN. GEN. STAT. ANN. § 17-60a (1972).

Montana[50] permits transfer involving various grave offenses including possession of explosives and criminal sale of dangerous drugs for profit. However, a majority of states do not so closely limit the instances in which transfer may occur. In thirteen jurisdictions[51] an accusation of any felony qualifies a child for trial in criminal court. In twenty-two states,[52] including California, a charge of any crime—felony, misdemeanor or violation of a local ordinance—brings the transfer law into operation.

The purpose of the broad minimum offense requirement is possibly to enhance the discretionary authority of the juvenile court by bringing all cases involving criminal charges within its transfer power. The practical effect, however, may be to heighten the importance of the accused juvenile's age. The result is that an older juvenile accused of a less serious offense but approaching the juvenile court's age limit may be transferred while his younger counterpart facing more serious charges may not be.

Substantive Criteria

Attendant to its decision in *Kent v. United States*, the United States Supreme Court quoted a policy memorandum of the District of Columbia Juvenile Court, prepared in 1959, which set forth guidelines[53] to be considered by courts in deciding

50. MONT. REV. CODES ANN. § 10-1229 (Supp. 1975).

51. District of Columbia, Hawaii, Idaho, Michigan, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Texas, Utah.

52. Alaska, Arkansas, California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, Wyoming.

53. The determining factors which will be considered by the judge in deciding whether the juvenile court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

whether to waive jurisdiction over a child accused of crime. These guidelines have been widely incorporated into the transfer laws of the states, about half of which have enacted standards modeled upon or substantially similar to those set forth in *Kent*.

Generally, the *Kent* guidelines and their progeny emphasize the seriousness and nature of the alleged offense and the amenability of the child to rehabilitation and treatment within the juvenile system. Their purpose is the apparently neutral goal of separating the child offender from the adult criminal, or put another way, of selecting out the type of person the juvenile system was not designed to treat. The theory behind these guidelines is that a transferred juvenile should be the one not likely to benefit from the approach and programs the system offers, and thus a waiver of jurisdiction actually serves such juvenile's interests. However, considered from the perspective of the juvenile facing trial in criminal court, the aim of these guidelines can only be to secure his punishment and society's retribution for his alleged act. This follows logically from the fundamental difference between the juvenile system and the adult criminal process:

> The only thing that criminal courts can do that juvenile courts cannot do is put a child in the penitentiary to accomplish 'rehabilitation' which the juvenile court felt it could not provide. Adult criminal processes, however, conform the sentence to the crime. Sentences therefore are determinant, and it is frequently said that determinant sentences are anti-rehabilitative. This is certainly the case where children are concerned, because it is the youngest who are always victimized in prison; the weakest who are hurt by the strongest; and the most innocent who are defiled by the most depraved. If they are not exploited, they will certainly become more aggressive out of the need for self-protection. It would seem, then, that since prison is not relied upon to rehabilitate anyone, but simply 'to teach him a lesson,' the transfer process is ultimately reduced to simple retribution.[54]

---

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U. S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

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

383 U.S. 541, 556-557.

54. Stamm, *supra* note 9 at 146.

This goal of retribution and punishment may be more clearly seen by comparing the transfer laws to find whose interests, the juvenile's or the community's, the legislature has designated for the judge to consider in the decision whether to waive jurisdiction. Of the thirty-two states whose laws specifically include this consideration[55], nineteen[56] require the court to look exclusively to the interests of the community, while two[57] call attention to both the child and the community, and eight[58] allow regard to either. Only one state—Oregon—considers solely the interests of the child in the transfer decision.

Another criticism of the guidelines set forth in *Kent* is that while they attempt to make explicit what the juvenile court judge is supposed to determine at the waiver hearing, they in fact contain a variety of highly-subjective criteria which do little to limit the judge's broad discretion. Statutory refinements of *Kent* have been unable to correct this shortcoming.[59] An example of the vagueness inherent in these standards is the requirement that the child be amenable to the rehabilitative efforts of the juvenile system. In short, the search for amenability relies too heavily on the fallible conclusions of the probation officer and behavioral scientists who investigate and report to the court on the child's sophistication and maturity, his emotional attitude and disposition toward his environment.

> The diagnosis and prognosis of a child's amenability to treatment is delicate work, to say the least. Even where treatment is concerned, diagnosis during the early stages is very tentative and may be proven or disproven during the course of treatment. Prognosis is, therefore, even more tentative, and one is forced to conjecture about how any prognosis can be entertained in the absence of diagnosis and treatment. Both develop and change over a period of time with the intake of new data. They do not remain constant. However, behavioral scientists have, as one writer put it, 'duped' everyone into believing that

55. California's transfer law does not (see note 21, *supra*).

56. Arizona, Connecticut, Delaware, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Montana, New Jersey, New Mexico, North Dakota, Oklahoma, Ohio, Pennsylvania, Tennessee, Texas, Virginia.

57. Georgia and Kentucky.

58. Colorado, Illinois, Iowa, Minnesota, North Carolina, South Carolina, Utah, Wisconsin.

59. The standards contained in California's new transfer law (see note 21, *supra* are criticized in Note, *Juveniles in the Criminal Courts: Substantive View of the Fitness Decision,* 23 U.C.L.A. L. REV. 988 (1976). The waiver statute of Texas has been cited as the best statutory effort yet. *See* Schornhorst, *supra* note 14, at 604 note 127.

they can perform both these facts with certainty and almost on the spot.[60]

Partly due to these weaknesses of the amenability test, the transfer decision has become not "a scientific evaluation of whether the youth will respond successfully to a juvenile court disposition, but a front for society's insistence or retribution or social protection."[61] Thus statutes embodying the *Kent* criteria can become avenues for a juvenile court's abuse of discretion, as where a judge elects transfer because of a community's desire for retribution, rather than because the juvenile system may be unsuited to the needs of a young offender.[62]

Apart from its vagueness, the amenability standard is also suspect because it almost always refers to treatment in *available* facilities.[63] Conceivably, by reason of this qualification, a child may suffer total deprivation of the treatment and rehabilitative programs offered by the juvenile system due to the state's failure to provide adequate facilities at the time the transfer decision is made. This problem was brought to light in a Minnesota case[64] where a juvenile court found that "no program exists or has been designed which can rehabilitate" the child accused of armed robbery and "he is therefore not amenable to treatment as a juvenile and must be referred before prosecution as an adult."[65] Reversing the decision of the juvenile court, the Supreme Court of Minnesota found the present unavailability of a program specifically designed for hardcore, sophisticated, aggressive delinquents an insufficient basis for transfer for adult court and remanded the case so the juvenile court could search for alternative existing programs and inquire into the feasibility of constructing an effective program for the juvenile in question and others like him.[66]

In addition to the problem of a lack of available resources there may also be a lack of resourcefulness on the part of juvenile courts in conceiving of alternatives within the juvenile system.[67] That is, even where there may be facilities available, a

60. Stamm, *supra* note 9 at 162.

61. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME 24 (1967).

62. Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards,* 16 ST. LOUIS L. J. 604, 611 (1972).

63. In California the court must find that "the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court . . ." CAL. WELF. & INST. CODE § 707 (West Supp. 1972).

64. J.E.C. v. State, 225 N.W. 2d 245 (Minn. 1975).

65. *Id.* at 246.

66. *Id.* at 243.

67. Note, *Substantive View of the Fitness Decision,* 23 U.C.L.A. L. REV. 988, 1006 (1976).

juvenile may be transferred because the judge or juvenile system personnel were ignorant of or unreceptive to these alternative means of treatment. Instead of the general available facilities requirement, there perhaps should be a requirement that the court in its decision list the specific options for treating the juvenile and state why each is inappropriate.[68]

Despite the shortcomings of the *Kent* guidelines, they at least offer some statutory limitation on the discretion of the juvenile court and some standards for reviewing the correctness of the transfer decision. In many states the criteria governing the transfer decision are so vague as to present no standards at all. In Alabama,[69] for example, transfer is proper where the child "cannot be made to lead a correct life and cannot be properly disciplined" under the juvenile laws. Six states[70] have standards as amorphous as Alabama's. Five more provide only that transfer may be ordered at the discretion of the judge,[71] while four states offer no standards or guidelines whatsoever beyond the requirement that the hearing include a "full investigation" of the facts pertaining to the transfer decision.[72] The result is that juvenile judges must devise their own guidelines; and because such standards are unavailable in printed form, the juvenile and his counsel are handicapped in their preparation of a defense at the transfer hearing.[73] Not surprisingly, efforts have been made to create clearer standards through the appellate process, but the courts of these jurisdictions have generally refused to supply them. Indeed, the courts of five states,[74] at least one from each of the three groups described above, have

68. In Atkins v. State, 290 N.E. 2d 441 (1972) the Supreme Court of Indiana invalidated a waiver order failing to state reasons sufficient to permit meaningful review, in part because the order did not justify waiver as the only alternative open to the juvenile court. *See also* People v. Joe T., 48 Cal. App. 3d 114 (1975) which held that certifying a minor to adult court without considering and reejecting youth authority treatment in the record was an abuse of discretion.

69. ALA. CODE tit. 13, § 364 (1958).

70. Iowa, Massachusetts, North Carolina, Oregon, South Caroline, Utah.

71. Arkansas, Missouri, Nevada, South Dakota, Washington.

72. Florida, Mississippi, New Hampshire, Rhode Island.

73. Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281, 314 (1967).

74. Lewis v. State, 86 Nev. 889, 467 P.2d 114 (1970). Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949), In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974), State v. Little, 241 Or. 557, 407 P.2d 627, *cert. denied* 385 U.S. 902 (1965), State in Interest of Salas, 520 P.2d 874 (1974).

found their law sufficiently explicit to withstand constitutional attacks on grounds of due process and equal protection. Only occasionally has a court found a transfer statute deficient and on its own fashioned a more detailed criteria, as did the Supreme Court of Idaho in *State v. Gibbs.*[75] In that case, the Idaho court expanded statutory language that the child must not be "treatable in any available institution" to include a list of specific criteria that the juvenile court must consider before waiving jurisdiction.

PROCEDURAL ASPECTS OF THE TRANSFER LAWS

Who Makes the Transfer Decision?

Although the decision to transfer is normally made by the juvenile court, it may also fall to one of the other two parties involved in the waiver procedure: the prosecuting authority or the juvenile himself. Seven states[76] and the federal government specifically provide that the accused child may request trial as an adult. But since the sixth amendment guarantees a jury trial to every criminal defendant, these provisions may be superfluous and merely underscore the harsh bargain a child faces in choosing adult treatment; i.e., to obtain the full constitutional safeguards attaching to a criminal trial, he must forfeit the enormous benefits and privileges of juvenile status.[77]

Of greater significance is the prosecutor's role in the transfer proceeding.[78] It has already been shown how, under the legislative waiver statutes, the charging of certain offenses results in the automatic and mandatory trial of the juvenile as an adult. In such cases the legislature has in effect placed the transfer determination in the hands of the prosecutor, who decides whether to accuse the child of one of these selected crimes. By choosing the offense, the prosecutor at the same time selects for the child the forum in which he will be tried. Under some statutes, the prosecutor need not charge a specific offense to invoke a particular forum but is expressively given authority to choose between

75. 94 Idaho 908, 500 P.2d 209 (1972).

76. Florida, Illinois, Louisiana, Nevada, New Jersey, Pennsylvania, Virginia.

77. Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968) found this choice unconstitutional. Defendant, 16 years old, asserted his right to a jury trial. The government contended that by seeking the sentencing and other privileges of the Federal Juvenile Delinquency Act, the defendant waived this right. *Held* the Attorney General could not proceed against him as a juvenile without affording him his constitutionally protected jury trial.

78. *See generally*, Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice,* 14 AMER. CRIM. L. REV. 29 (1976).

juvenile and adult court in filing an accusation. In Nebraska,[79] the county attorney may prosecute any child in the adult court for any felony violation; in Wyoming[80] the prosecutor may file in the adult court for any criminal charge. Prosecutorial waiver may also occur, as in Arkansas,[81] where the legislature makes the criminal court's jurisdiction concurrent with that of the juvenile court for certain classes of crimes. Regardless of the legislative device, the result is clearly that the juvenile is deprived of a neutral exercise of discretion in the transfer decision. The ultimate decision is not based on statutory guidelines and, in most cases, there is no appeal.[82]

Fortunately, however, there are indications of a trend away from this method of effecting transfer. There have been enacted in recent years no new laws significantly broadening the prosecutor's role in the waiver proceedings. To the contrary, Illinois and the federal government have repealed their prosecutorial choice laws, while Nebraska has legislation pending which would restore the waiver decision to the juvenile court.[83]

Procedure in the Transfer Hearings

Most legislatures have attempted to include the procedural rights found applicable to the transfer hearing in *Kent v. United States*[84] within their transfer statutes. However, because the *Kent* opinion did not make clear whether its holding was of constitutional dimension or applied only to waiver hearings within the District of Columbia where the case arose, these rights have not been universally applied. Indeed, as of 1974,

79. NEB. REV. STAT. § 43-202.01 (1971).
80. WYO. STAT. § 14-115.4 (Supp. 1975).
81. ARK. STAT. ANN. § 45-405, 45-420 (Supp. 1975).
82. Courts have consistently found that the prosecutor's decision whether to proceed against a child in juvenile or adult court is no different from the decision to seek or not seek an indictment or charge a greater or lesser offense, therefore it is within the traditional scope of prosecutorial discretion. Cox v. United States, 473 F.2d 334 (4th Div. 1972), *cert. denied,* 414 U.S. 869 (1973); Bland v. U.S., 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 909 (1973). This concept that the prosecutor's choice is an executive and not a judicial function should not apply to the certification process because the choice terminates rather than initiates that process. *See* Mlyniec, *supra* note 78 at 46.
83. Note, *Juvenile Court Reform: The Juvenile Offender After L.B. 620,* 54 NEB. L. REV. 405 (1975).
84. *See* notes 11-13, *supra*, and their accompanying text.

eighteen states did not statutorily require that a child be afforded a hearing before the juvenile court waived jurisdiction.[85] Through legislative amendment or court decision[86] that number has today been reduced to eight.[87] Evidently, in these states a juvenile may be transferred without ever having had an opportunity to present a defense on the issue of transfer.

The laws of the thirty-nine states mandating a waiver hearing vary widely as to notice requirements. In eleven jurisdictions there is no statutory requirement that the child be given notice of the hearing, nor has such provision generally been read into these statutes by the courts. While this is no basis for the conclusion that notice of the waiver hearing is never supplied in these states, it at least illustrates the remiss approach often taken by legislatures toward the due process rights of the juvenile in the certification procedure. Additionally, most notice requirements provide that the accused be informed of the date and place of hearing only three days in advance.[88] Several states require five days notice, and in Montana and Louisiana,[89] the accused is afforded at least ten days preparation for this most important proceeding. At least ten[90] jurisdictions further require that the notice advise the child and his parents or guardian of the purpose of the transfer proceeding and courts have strictly enforced this requirement, holding that failure to observe it will invalidate the hearing.[91]

As evidenced by its lack of provision for a separate, noticed hearing, the California transfer law is not a model of the statutory protections and rights to be afforded an accused child. For example, it does not grant a right to assistance of counsel, although in this respect it is far from exceptional: only three

85. Levin and Sarri, *supra* note 2 at 21 (1974).

86. In California the hearing on certification was made mandatory in Donald L. v. Superior Court, 7 Cal. 3d 592 (1972). This state's new certification statute still does not necessitate a transfer hearing.

87. Alabama, Arkansas, Mississippi, Nevada, New Hampshire, South Carolina, Washington, Wisconsin.

88. This may be insufficient time to prepare for the complex issues that often arise at the waiver hearing, hence a denial of due process. Packel, *A Guide to Pennsylvania Delinquency Law,* 21 VILLANOVA L. REV. 1, 19 (1975).

89. LA. REV. STAT. ANN. § 13:1571.1(3) (West 1951); MONT. REV. CODES ANN. § 10-1229(c) (Supp. 1975).

90. Delaware, Georgia, Idaho, Michigan, North Dakota, Pennsylvania, Texas, Virginia, Wyoming.

91. *E.g.*, Reed v. State, 125 Ga. App. 568, 188 S.E.2d 392 (1972), State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972) (invalidating transfer where the summons to the child and his parents for interviews for the investigative report did not state nature and purpose of the proceeding).

states[92] expressly grant this right in their transfer statutes. Where it exists, this right is often established through court decision,[93] or is found elsewhere in the juvenile code, as in California.[94] More often the transfer laws speak to a corollary right established in *Kent*, that the child's counsel have access to the social records and probation reports considered by the juvenile court at the hearing. Eight jurisdictions[95] confer this right by statute. The Deleware law[96] represents its minimal expression, providing for access before or at the commencement of a hearing; other laws, like Arizona's,[97] assure access at least before the hearing, while two states[98] extend the right by permitting cross-examination of the authors of the reports.

Another protection not found in the California statute but appearing in the statutes of at least fifteen[99] jurisdictions is the requirement that the juvenile court must find probable or reasonable cause that the child committed the unlawful act before it may proceed with the transfer hearing. A concern for the juvenile's civil liberties as well as his privilege of treatment within the juvenile system suggests that a court should take the drastic measure of waiver of jurisdiction only after it has at least determined reasonable grounds to believe that the child has committed the offense.

> Because the waiver process subjects a juvenile to adult criminal proceedings, the basis for the waiver should include the criteria that are of paramount importance in the adult system. In other words, the first question to be determined by the criminal judge is probable cause, and therefore, probable cause should be examined in waiver procedures. Many juvenile statutes do not guarantee probable cause hear-

92. DEL. FAM. CT. R. 170(c) (1974); LA. REV. STAT. ANN. § 13:1571.3 (West 1951); MICH. COMP. LAWS § 27.3178(5) (Supp. 1972).

93. *E.g.*, Powell v. Sheriff of Clark County, 85 Nev. 684, 462 P.2d 756 (1969).

94. CAL. WELF. & INST. CODE § 634 (West 1972). *Also, e.g.*, COLO. REV. STAT. § 19-1-106 (Supp. 1969).

95. Arizona, Colorado, Delaware, District of Columbia, Kansas, Michigan, North Carolina, Texas, Virginia. Again, in California the right was created by the Supreme Court. Donald L. v. Superior Court, 7 Cal. 3d 592, 598, 498 P.2d 1098, 1101, 102 Cal. Rptr. 850, 853 (1972).

96. DEL. FAM. CT. R. 170(c) (1974).

97. ARIZ. JUV. CT. R. 12 (Supp. 1971).

98. COLO. REV. STAT. § 19-3-108(3) (Supp. 1969); KAN. STAT. § 38.808(b) (Supp. 1971).

99. Alaska, Arizona, Colorado, Connecticut, Georgia, Indiana, Michigan, Montana, New Mexico, North Carolina, Pennsylvania, Tennessee, Virginia, Wyoming.

> ings and . . . suitability for treatment (becomes) a major, or the sole, basis for transfer in many states.[100]

Significantly, courts have often held that rules of evidence at such probable cause hearings may be considerably relaxed. In Alaska, Indiana and Washington the juvenile court may admit hearsay;[101] Arizona, on the other hand, comparing the juvenile court proceeding to a preliminary examination in adult court, requires that a probable cause determination be founded upon competent evidence to the same extent as any other formal hearing.[102]

It may be noted also that in three states the probable cause determination regarding commission of the offense must by statute be conducted in a separate hearing.[103] The practical result may be that the probable cause requirement becomes an invitation to plea bargaining, as where the juvenile stipulates to probable cause in exchange for reduced charges or the withdrawal of the motion to transfer.[104]

Related to the issue of the degree of proof is the question of who bears the burden of showing whether or not transfer should occur. Reviewing courts have consistently placed the burden upon the state, reasoning that because the juvenile system exists for the benefit of the child, the state must show that the particular individual would not benefit from treatment within the system. In an Indiana decision[105] the court relied on the statement of purpose of the Indiana juvenile code[106] to find a statutory presumption that a child is to be treated within the juvenile system, that waiver is exceptional and must explicitly appear in the record as an alternative of last resort.[107] Other

100. LEVIN & SARRI, *supra* note 2 at 22. The courts of many states whose laws do not call for a showing of probable cause have found this not to be a violation of due process. *E.g.*, In re Murphy 15 Md. App. 434, 291 A.2d 867 (1971), Stephenson v. State, 204 Kan. 80, 460 P.2d 442 (1970).

101. In re P.H., 504 P.2d 837 (Alaska 1972); Clemons v. State, 317 N.E.2d 859 (Ind. App. 1974); In re Sheppard v. Rhay, 73 W.D. 2d 739 (1968). *Contra,* In re Brown, 183 N.W. 2d 731 (Iowa 1971). (Holding that juvenile court must exclude evidence not found in the record unless it is subject to objection and cross-examination. But the "record" may include an investigative report on the child's amenability to treatment which is often full of hearsay and conclusions, and Iowa law does not permit the child to cross-examine the author of that report.

102. In re Anonymous, 14 Ariz. App. 466, 484 P.2d 235 (1971).

103. Arizona, Michigan, North Carolina.

104. Note, *Juvenile Justice in Arizona: A Special Project,* 16 ARIZ. L. REV. 203, 311 (1974).

105. Atkins v. State, 290 N.W.2d 441 (Ind. 1972).

106. *See* note 8, *supra.*

107. Atkins interpreted a statute which suggested that sometimes the burden shifts to the juvenile to show that transfer is inappropriate. The statute provided that children fourteen or older charged with any crime *may* be transferred *if*

jurisdictions have not taken the state's burden this far. One California decision, for example, has held that the state need not demonstrate affirmatively that none of the various treatment options available within the juvenile court system would be adequate to serve the child's needs. The court stated that "We do not believe that the state is required to bear so heavy a burden before the juvenile court can determine that a minor is unfit to be treated as a juvenile."[108] A Pennsylvania court[109] has held that a juvenile charged with murder has the burden to show that he does not belong in criminal court and that he needs and is amenable to the rehabilitative programs of the juvenile system. However, such cases are rare, and juvenile courts may be expected to continue to fix the burden of proof on the state.

A procedural protection which the California statute does include is that the transfer decision must precede the attachment of jeopardy[110] in the adjudication of the juvenile's guilt as to delinquency or criminal charges. This provision incorporates the rule announced in *Breed v. Jones*[111] that the double jeopardy clause of the fifth amendment is fully applicable in juvenile court proceedings. Even before *Breed* only Alabama, Massachusetts and West Virginia required that the child be adjudicated a delinquent before transfer could occur.[112] Today the

---

the offense was heinous or of an aggravated character or part of a repetitive pattern of offenses; but for children sixteen or older charged with one of a variety of serious crimes, the court *shall* order transfer unless certain circumstances appear, e.g., the case has no specific prosecutive merit. IND. CODE ANN. § 31-5-7-14 (Burns Supp. 1972).

108. People v. Browning, 45 Cal. App. 3d 125, 139, 119 Cal. Rptr. 420, 429 (1975). *See also*, J.T.P. v. State, 544 P.2d 1270 (Okla. 1975), which stopped short of affirmatively placing the burden on the state, finding merely that the state may not rely on a presumption that a serious offender is not receptive to rehabilitative treatment.

109. Commonwealth v. Pyle, 342 A.2d 101 (Pa. Supp. 1975).

110. In a jury trial jeopardy attaches when the jury is empanneled and sworn. Illinois v. Sommerville, 410 U.S. 458 (1973). In a trial without a jury, double jeopardy arises when the court begins to take evidence. Wade v. Hunter, 336 U.S. 684 (1949).

111. 421 U.S. 519 (1975).

112. 421 U.S. at 539, note 19. *Breed* overrules the Alabama decisions requiring that adjudication precede transfer, Rudolph v. State, 286 Ala. 189, 238 So. 2d 542 (1970). Alabama's statute does not fix the point at which transfer must occur. Massachusetts and West Virginia have pending curative legislation. *See* Note, 11 NEW ENGLAND L. REV. 169 (1976), Note, 78 W. VA. L. REV. 428 (1976).

laws of over half of the states contain language in conformity with *Breed*.[113]

EVENTS FOLLOWING TRANSFER

Recidivism

The twenty-one states which follow the standards for transfer suggested in *Kent* consider the juvenile's record and history of contacts with the juvenile and law enforcement authorities as a major criterion at the transfer hearing. In many other remaining states whose laws more generally direct the juvenile court to weigh the safety of the community, the juvenile's record and history of contact also become a matter of important consideration. Thus, a juvenile who, once having been transferred to criminal court, again finds himself accused of crime during his minority may well expect his recidivism to count heavily against him in any subsequent transfer hearing.

In a survey among nearly two hundred juvenile court judges to determine what considerations ought to be undertaken at the transfer hearing, the juvenile's record and prior contacts with the police, the court and other official agencies was the second most frequently mentioned criterion, following only the seriousness of the offense.[114] Six states have adopted in their transfer laws provisions designed to deal severely with the recidivist. In Rhode Island and Delaware[115] waiver of jurisdiction is permanent: once transferred, a child must be prosecuted as an adult for all future offenses, regardless of their nature. The Kansas statute[116] permits the judge to make the original waiver order applicable to any subsequent unlawful act. The remaining laws[117] direct the judge to summarily review the recidivist's case before transferring him to the adult court, but none provide for a hearing and only Oregon requires the judge to reconsider any of the usual criteria, e.g., amenability to treatment with the juvenile system.

113. New Mexico's statute [N.M. STAT. ANN. § 15-14-27 (Supp. 1974)] has been praised for its thoroughness in protecting the juvenile from double jeopardy, while Florida's [FLA. STAT. ANN. § 39.02(5) (West Supp. 1972)] has been cited as a similar but faulty attempt at effective legislation. Whitebread and Batey, *Juvenile Double Jeopardy*, 63 GEO. L. J. 857, 864-69 (1975).

114. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME, Appendix B, Table 5 (1967).

115. R. I. GEN. LAWS § 14-1-7 (Supp. 1971); DEL. FAM. CT. R. 170 (1974).

116. KAN. STAT. § 38.808 (Supp. 1971).

117. HAWAII REV. STAT. § 571-22 (Supp. 1971); MD. ANN. CODE art. 26, § 70-16 (Supp. 1971); OR. REV. STAT. § 419.533 (1971).

Appeal

In view of the extreme importance of the certification proceeding and of the highly subjective nature of the juvenile court's decision, it would seem obvious that adequate review should be made available to a transferred child. Yet far too often the procedures for review are unsatisfactory, mainly because the majority of states do not permit immediate and direct appeal from the juvenile court, but require the accused to await the outcome of the criminal trial. Consequently, not only has the child already lost the privileges of juvenile status—e.g., anonymity, limitation of confinement to the period of minority[118]—but in certain instances the mere passage of time will prevent him from re-entering the juvenile system, making appeal meaningless at best.[119]

Fifteen states[120] provide that only "final orders" are appealable from the juvenile court. It thus falls to the judiciary to interpret whether a transfer order is final. Generally, courts have held it is not final on the grounds that certification is but a single step in the criminal process and errors in that step can be effectively reviewed, in consolidation with all other issues, in the direct appeal from the criminal conviction.[121]

At least four states,[122] on the other hand, provide by statute that the transfer decision is a final order, and therefore may be immediately and directly appealed. The California statute is silent on the issue, yet it has been held that the waiver determination, although not appealable, may be reviewed by writ.[123] Regardless of the form, it should be clear that

118. Kent v. U.S., 383 U.S. 541, 556-557 (1966).

119. In a recent Texas case a sixteen-year-old boy appealed an order certifying him to the criminal court. The court of appeal held that certification was improper, but found itself unable to remand the case to the juvenile court because the defendant had turned seventeen and fell outside the juvenile court's jurisdiction. Hight v. State, 487 S.W.2d 256 (Tex. Supp. 1972). *See also*, Note, 4 ST. MARY'S L.J. 405 (1972).

120. District of Columbia, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Mississippi, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, Virginia.

121. Commonwealth v. Owens, 435 Pa. 96, 254 A.2d 639 (1969); *contra*, State v. Yoss, 20 Ohio App. 2d 46, 251 N.E.2d 680 (1967).

122. Arizona, Louisiana, Maryland, Oregon.

123. People v. Browing, 45 Cal. App. 3d 125, 119 Cal. Rptr. 420 (1975).

> Appeal procedures in cases where the juvenile court has waived its jurisdiction must be swift and efficient. It does little to enhance a juvenile's contention that his case should be handled in a juvenile court if he passes the jurisdictional age limit for the juvenile courts while his case is on appeal. Further, there is little the juvenile court can do to rehabilitate or control an older individual. The entire rationale of the juvenile court system is defeated if the appeal is not handled expeditiously.[124]

Preservation of Juvenile Rights

An encouraging trend in legislation related to waiver of jurisdiction is the effect to preserve to juveniles some of the privileges of juvenile status in the event of transfer; California Law is exemplary.[125] Section 707.2 prohibits in most cases the incarceration of a person under eighteen years old in the state prison. Under Section 707.3 where criminal charges are dismissed or found to be untrue in the adult court, then further proceedings, if any must occur in juvenile court. Similarly, in the District of Columbia,[126] jurisdiction of the juvenile court is automatically restored in the absence of a guilty plea or verdict in the adult court. Iowa, Kansas and Wyoming[127] permit the return of a convicted child to the juvenile court for purposes of

---

124. Mountford and Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court,* 18 KAN. L. REV. 55, 68 (1969).

125. CAL. WELF. & INST. CODE §§ 707.2, 707.4 (West Supp. 1976). §702.2. Except as provided in Sections 1731.5 and 1737.1, no minor who was under the age of 18 years when he committed any criminal offense, and who has been found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Section 707, shall be sentenced to the state prison, except upon petition filed pursuant to Article 5 (commencing with Section 1780) of Division 2.5. Of those persons eligible for commitment to the Youth Authority, prior to sentence the court may remand such persons to the custody of the California Youth Authority not to exceed 90 days for the purpose of evaluation and report.

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

§ 707.4. In any case arising under this article in which there is no conviction in the criminal court and the minor is not returned to juvenile court pursuant to Section 707.3, the clerk of the criminal court shall report such disposition to the juvenile court, to the probation department, to the law enforcement agency which arrested the minor for the offense which resulted in his remand to criminal court, and to the Department of Justice. Unless the minor has had a prior conviction in a criminal court, the clerk of the criminal court shall deliver to the clerk of the juvenile court all copies of the minor's record in criminal court and shall obliterate the minor's name from any index or minute book maintained in the criminal court. The clerk of the juvenile court shall maintain the minor's criminal court record as provided by Article 13 (commencing with Section 825) of this chapter until such time as the juvenile court may issue an order that they be sealed pursuant to Section 781.

126. D.C. CODE § 16-2307(h) (Supp. 1972).

127. IOWA CODE ANN. § 232.72 (West 1969); KAN. STAT. § 38.808 (Supp. 1971); WYO. STAT. ANN. § 14-115-38 (Supp. 1971).

disposition, and the Iowa statute expressly authorizes the convicting court to set aside a guilty plea or conviction if the juvenile has successfully served one year's probation.

California also attempts to restore the anonymity of the juvenile proceeding by requiring the expungement and sealing of the minor's criminal record in cases where no conviction was obtained in adult court.[128] Alaska[129] goes even further in this respect and allows for sealing of records even where the minor was convicted, provided he has completed his sentence and the convicting court is satisfied that the punishment assessed has had its intended rehabilitative effect.

CONCLUSION

This article has sought to provide an overview of the statutes governing transfer of juvenile court jurisdiction in the United States. The existence of these laws points to the failure of the juvenile justice system to realize the principles upon which it was founded. Recent efforts to change the laws to achieve a more successful system indicate trends in conflict. In one direction are statutes designed to protect the rights and preserve the privileges of the juvenile: the application of the double jeopardy clause, the beginnings of a move away from prosecutorial discretion, and most significant of all, restoration of the benefits of the juvenile system should the child be found innocent of crime, or if guilty, should he achieve rehabilitation through treatment as an adult. On the other hand, the broader impression to be gained from the present state of the waiver statutes is that transfer is as easy to obtain now as ever before and is becoming increasingly easier. The maintenance of broad categories of crimes under which transfer is permissible and numerous specific offenses under which it is mandatory; the broad discretion

128. CAL. WELF. & INST. CODE § 707-3 (West Supp. 1976). Whenever any charge, the alleged circumstances and gravity of which were relied upon pursuant to Section 707, is dismissed or found untrue by the court of criminal jurisdiction, the minor shall be returned to juvenile court for trial or disposition of any lesser charge which may remain outstanding against him if the minor consents to being returned to the juvenile court. In any other case, the minor may be returned to juvenile court for the trial or disposition of any charge pending against him if he consents to being returned to the juvenile court. If jeopardy has attached in the criminal proceeding, the case shall not be returned until a verdict or finding has been made as to each pending charge.

129. ALASKA STAT. § 47.10.060 (1971).

of the juvenile court judge made even broader by the persistent vagueness of the transfer criteria, and by the absence of a probable cause standard in the application of these criteria, evidence this trend.[130] Although these trends are not necessarily incompatible, in order to achieve harmony the former must keep pace with the latter. That is, the statutes must show a greater concern for the rights of the accused child, a recognition that the importance of the transfer decision is more than "critical", it is absolute. This may be achieved, for example, by observing formal rules of evidence at the transfer hearing, or by providing a right of immediate and direct appellate review of the waiver decision.

130. *See*, THOMPSON, 1 JUVENILE COURT DESKBOOK, 151 (1972).