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COMMENTS

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JUVENILE TRANSFER IN ILLINOIS

Through its Juvenile Court Act,[1] Illinois, like every other state in the Union, has established a separate judicial system for dealing with the problems of juveniles.[2] Simply because of his status as a juvenile, the child in trouble with the law is accorded a number of special statutory rights which are not similarly available to adult offenders.[3] The statute requires that special treatment be given to juveniles who are taken into custody by law enforcement officers.[4] In an effort to protect a minor's privacy, juvenile court proceedings are not open to the public,[5] and the records of the court are kept from public scrutiny.[6] An adjudication of delinquency does not constitute a criminal conviction: a youth who is the subject of delinquency proceedings is not deemed to be a criminal, nor does he acquire a criminal record.[7] Because a minor's brush with the law is often regarded as the product of peer pressure or youthful exuberance, adjudication of delinquency does not disqualify a person from holding public office at a later time, nor does it bring forfeiture of any civil right or privilege.[8] Adjudications, dispositions, and evidence admitted in proceedings of the juvenile court may not later be used against the juvenile as evidence in any other court.[9] By largely eliminating the possibility of public scrutiny, the legislature has attempted to protect the child from being haunted in later life by the spectre of his youthful mistakes.

In addition to these protective benefits, the juvenile court provides a graduated range of options for correcting a child's antisocial behavior. In Illinois, if at an adjudication hearing a child has been formally found to be delinquent, a separate hearing is held to determine the appropriate "disposition" of his case, *i.e.*, the mode of correction to which he should be subjected.[10] All corrections within the

[1] ILL. REV. STAT. ch. 37, §§ 701-1 to 708-4 (1975).

[2] There are four basic kinds of proceedings which are conducted under the Illinois Juvenile Court Act, and in this respect the Illinois statute is representative of juvenile court acts and juvenile codes in other jurisdictions. The Illinois juvenile court is to have cognizance of proceedings "concerning boys and girls who are delinquent, otherwise in need of supervision, neglected, or dependent . . . ." ILL. REV. STAT. ch. 37 § 702-1 (1975).

A "dependent" minor is one under 18 who is without a guardian, parent or custodian, or who is not receiving proper care because of the mental or physical disability of his parent, guardian, or custodian, or whose parent, guardian or custodian wishes to terminate parental rights and responsibilities in order to allow the child to be adopted. *Id.* § 702-5. A "neglected" minor is one under age 18 who is not receiving proper support, education, or medical care from his parents, guardian or custodian, or who has been abandoned, or whose environment is injurious to his welfare. *Id.* § 702-4. A "minor in need of supervision" (commonly called "MINS") is one under 18 who cannot be controlled by his parents, guardian, or custodian, or who is habitually truant or addicted to drugs. *Id.* § 702-3.

A "delinquent" minor is one who "prior to his 17th birthday has violated or attempted to violate . . . any federal or state law or municipal ordinance . . . ." *Id.* § 702-2. In other words, delinquency proceedings are instituted against offenders under 17 years of age who are charged with having committed criminal acts. Transfer to adult court relates only to juveniles who are charged with delinquency. It must be constantly kept in mind that the Supreme Court's juvenile justice decisions (*see* text accompanying notes 52-99, *infra*) have extended constitutional procedural protections only to juveniles brought up on delinquency proceedings, not to MINS, neglect or dependency actions.

[3] These Illinois provisions are representative of similar provisions in juvenile court statutes in other jurisdictions.

[4] ILL. REV. STAT. ch. 37 §§ 702-8, 703-1, 2 (1975). Minors under 16 may not be confined in jail or police station detention facilities which are also used for adults. Minors under 17 must be kept separate from confined adults in the same facility. Photographs and fingerprints of minors under 17 may not be shared with other law enforcement agencies. Police records of all minors under 17 must be maintained separate from arrest records of adults and may not be disclosed for public inspection unless by court order. Police are authorized to take minors into temporary custody without a warrant but this is not deemed to constitute an arrest nor is a police record thereby acquired. When a minor is taken into custody without a warrant by a law enforcement officer, the officer is charged with the duty of immediately making a reasonable attempt to notify the minor's parent or guardian. Without unnecessary delay the officer is to take the minor to the nearest juvenile police officer or designated reception center for juveniles.

[5] *Id.* § 701-20(6).

[6] *Id.* § 702-10.

[7] *Id.* § 702-9(1).

[8] *Id.*

[9] *Id.*

[10] The purpose of an adjudicatory hearing is to determine whether allegations that a minor is delinquent are proved beyond a reasonable doubt and also to ascertain

juvenile court system are based upon the fundamental theory that a child is to be given rehabilitative treatment to correct his attitudes and behavior. Unlike the adult criminal system, where vestigial traces of retribution theory may still be detected, the delinquent child is not to be punished for his wrongdoings.[11] Wide flexibility exists in the juvenile system to provide treatment which is geared to the needs and problems of the individual juvenile offender.[12]

It may be thought that the presence of a juvenile court act on a state's statute books symbolizes its commitment to the proposition that, in all cases, a minor's welfare can best be served by adjudication and treatment as a juvenile. All juveniles, however, are not automatically to be tried as juveniles until they reach the statutory age for criminal court jurisdiction. In the interest of protecting the safety and welfare of the community, nearly every state has devised some mechanism by which the recalcitrant juvenile, or the juvenile charged with a particularly well-publicized crime, can be brought into the criminal court and tried as an adult. A number of terms have been used to describe this process: "waiver" of juvenile court jurisdiction, "transfer" to criminal court, "certification" to stand trial as an adult, or "removal" to criminal court. But all pertain to the same decision to relinquish juvenile court jurisdiction over a minor who is accused of committing an act which violates the criminal laws.

The consequences of waiver are of enormous significance to the juvenile. He is compelled to forfeit the statutory rights and benefits which are accorded to him under juvenile court jurisdiction. If convicted in criminal court, he will have accumulated a criminal record which will follow him for the rest of his life. He will also face the prospect of incarceration for a longer period of time in an institution where he may well be subject to attack and abuse by adult inmates.[13]

The fundamental purpose and policy of the juvenile court in Illinois is to "serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community . . . ."[14] A transfer hearing often brings these two fundamental objectives into direct confrontation with one another. In juvenile transfer, the public policy favoring protective and rehabilitative treatment for youthful offenders must be balanced against the need of society to be protected from persons—including young persons—who commit acts which threaten the safety and security of the public. Because humanitarian ideals have been so openly heralded in the juvenile court system, the opposing societal interests have often not been clearly recognized.

This comment seeks to analyze the nature and degree of due process protection accorded to juveniles in transfer proceedings in Illinois. To more fully understand the juvenile court as it exists today in Illinois and in other states, it is helpful to review the history and ideals of the juvenile court movement and to study the recent pronouncements of the United States Supreme Court in the field of juvenile justice.

I.

The genesis of the modern juvenile court[15] can be traced to Illinois. On April 21, 1899, Illinois became

whether the minor should be adjudged to be a ward of the juvenile court. *Id.* § 701-4. The purpose of a dispositional hearing is to determine "what order of disposition should be made in respect of a minor adjudged to be a ward of the court." *Id.* § 701-10.

[11] *See* text accompanying notes 15-21, *infra.*

[12] A minor in Illinois who is adjudicated delinquent may be placed on probation and released to the custody of his parents, placed under the guardianship of another person or agency, with or without probation, committed to a licensed training or industrial school, admitted for treatment for drug addiction, committed to the state's Department of Children and Family Services, or committed to the Juvenile Division of the Department of Corrections. ILL. REV. STAT. ch. 37 § 705-2(1)(a)(1)-(5) (1975).

[13] Juvenile court jurisdiction terminates at age 18. This means that regardless of the offense, a juvenile cannot be incarcerated beyond his eighteenth birthday, while an adult convicted of violating the same law faces a statutorily prescribed sentence.

[14] *Id.* § 701-2(1). A similar provision is included in the juvenile court acts of most other states.

[15] The society which produced the juvenile court idea was caught in the throes of enormously powerful social forces not previously encountered in the American experience. A basically agrarian nation, being transformed under the impact of industrialization and improved transportation, was struggling to absorb wave after wave of European immigration into its burgeoning cities. A revolution was being worked in American life, but not without great human cost.

The child in trouble was regarded by socially conscious individuals as being an innocent casualty of a system totally beyond his control. Perceiving that a system of criminal law founded upon concepts of deterrence and punishment had not stopped the spread of crime, high-minded reformers focused upon social conditions as the fundamental cause of crime. What was needed was individualized treatment and moral re-education, and to these ends, children were thought to be particularly well-suited.

The early reformers joined forces with the rising social science movement, which pledged that human problems

the first state to enact a juvenile court act, and within two months Cook County opened the doors of the nation's first juvenile court. Although the Illinois statute[16] did not provide for the creation of a new court, it did for the first time consolidate in one forum cases involving the dependency, neglect and delinquency of children.

The juvenile court idea became enormously popular, and the movement swept the country in the early decades of the twentieth century.[17] The juvenile court, born of a belief that a child could not be a criminal, was designed to function outside the criminal justice system. Salvation through treatment, not punishment, was its goal; benevolence, not due process, its procedure. To symbolize the separation of juvenile court proceedings from criminal procedures, a new procedural terminology was developed for the juvenile system.[18] To protect the child from the glare of publicity and to maximize the effectiveness of the treatment plan devised by the court's social workers and psychologists, hearings were not to be public, and all records were to be kept scrupulously confidential. Trial by jury was regarded as "inconsistent with both the law and the theory upon which the children's codes [were] founded."[19]

Born in large measure of a desire to separate the youthful offender from the deleterious effects of exposure to hardened criminals, flexible, individualized dispositions became the hallmark of the juvenile system. The juvenile court judge had wide-ranging discretion to select from an array of suitable options in constructing an appropriate, individualized plan to rehabilitate an erring child. He could

> dismiss the case, warn the juvenile, fine him, place him on probation, arrange for restitution, refer him to an agency or treatment facility, or commit him to an institution.[20]

Probation, however, was conceived to be "the keynote of the juvenile-court legislation."[21]

Yet there remained at the heart of the movement a gnawing constitutional dilemma: how could this separate system of courts for delinquent children exist without the safeguards that were guaranteed in criminal proceedings by the Constitution of the United States? The movement's advocates avoided the constitutional issue by embellishing upon the doctrine of *parens patriae*. This concept traces back to the English chancery courts, which, in the name of the King (*pater patriae*), were charged with exercising protective jurisdiction over the property interests of all the children in the realm. When chancery courts were established in America, their jurisdiction was extended to protect children who were victims of neglect or abandonment. The turn-of-the-century reformers sought to extend to children in trouble with the criminal law the benefits of a court already exercising protective equitable jurisdiction over juveniles.[22] Their goal was to deal with juvenile offenders

could be solved by a proper application of scientific methodology and technique. Together they determined to work out a plan of salvation for the child in trouble.

Up to this time, the youthful offender was tried in criminal court, just like an adult, although the child was given the benefit of several historic presumptions. At common law, a child under seven years of age was presumed to be incapable of entertaining the intent necessary for criminal responsibility. (However, by the late nineteenth century some states had reduced the age for criminal responsibility to as low as seven. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) [hereinafter cited as Mack]). Between the ages of seven and fourteen, he was likewise presumed incapable of criminal intent, but this presumption could be rebutted upon a showing that the individual child possessed the capacity to understand the consequences of his behavior. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, 2 (1967) [hereinafter cited as TASK FORCE REPORT]. The child was prosecuted exactly as an adult would be, and if found guilty, would be similarly punished.

> The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then of visiting the punishment of the state upon it.

Mack, *supra*, at 106.

It was the prospect of incarceration of children with adult criminals which first aroused the conscience of social reformers, and the final push for a separate juvenile court system was preceded by the successful establishment in a number of states of separate confinement facilities for juveniles, which emphasized rehabilitative training and treatment rather than punishment. TASK FORCE REPORT, *supra*, at 3.

[16] Juvenile Court Act [1899] Ill. Laws 131.

[17] Within twelve years of the enactment of the Illinois statute, twenty-two other states had followed suit. TASK FORCE REPORT, *supra* note 15, at 3.

[18] *Id.*

[19] CHILDREN'S BUREAU (Pub. No. 121), JUVENILE COURT STANDARDS 5 (1928).

[20] TASK FORCE REPORT, *supra* note 15, at 5.

[21] Mack, *supra* note 15, at 116.

[22] Professor Monrad G. Paulsen has noted that social reformers frankly did not "mind that the doctrine of the crown as *parens patriae* had [historically] been applied only to protect children in respect to their property against the acts of greedy adults or to assure a child a proper

"as a wise and merciful father."[23] They viewed the child as being essentially good, and thus particularly amenable to being saved and rehabilitated at the hands of a benevolent and kindly state.

The child, unlike the adult, was deemed to have no right to liberty in the constitutional sense. He was instead entitled to a right to custody in which he could grow and develop. And where this protective and nurturing custody could not be effectively provided by the natural parent, the state was obligated to step in.[24]

The juvenile court, then, was to save and to rescue, not to punish. It was emphatically not a criminal court, and therefore the Constitution's guarantees of procedural due process became irrelevant. It became popular to express this idea by defining juvenile court proceedings as "civil" and not "criminal" in nature.[25] It was because juvenile proceedings were designed to be "informal" and "non-adversary" that the lawyer was almost completely excluded from the juvenile courtroom.[26] The dominant role in representing the child's interests was to be played by the social worker, not the lawyer. These fundamental assumptions were by and large to control the operations of the juvenile court system for the next sixty years.

II.

From the early days of the movement, the juvenile court idea was not without critics who were convinced that the absence of constitutional protections could in no way be justified, particularly in delinquency proceedings. In 1905 the Pennsylvania Supreme Court was confronted with a challenge to the constitutionality of that state's Juvenile Court Act.[27] It was argued that juvenile court proceedings violated the due process clause and denied the right to jury trial on criminal charges. The court summarily dismissed these contentions by declaring that the due process clause and the right to jury trial applied only in *criminal* proceedings and the juvenile system had been created to spare children the hardships of criminal trials. In heady language, the court went on to defend the ideals and procedures adopted in the juvenile system.[28]

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upbringing." Although the *parens patriae* concept had never before been used "to immunize a child against the consequences of criminal conduct," nevertheless in the eyes of the reformers, "[i]t was close enough to do a job." Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 173 [hereinafter cited as Paulsen].

[23] Mack, *supra* note 15, at 107.

[24] Judge Mack declared that the child was

> to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because . . . the unwillingness or inability of the natural parents to guide [the child] toward good citizenship . . . compelled the intervention of the public authorities.

Id.

[25] This view was devastatingly refuted by the majority opinion in *In re* Gault, 387 U.S. 1, 50–51 (1967). *See* text accompanying notes 81–91, *infra*.

[26] An article written in 1950 by two third-year students at the University of Pittsburgh School of Law began by noting that although there was little offered in the law school curriculum to acquaint students with the methods and goals of the juvenile court, such knowledge was not really very necessary because "[t]he lawyer is less likely to face a situation involving a juvenile court proceeding [in that] many such cases are disposed of without benefit of counsel." The authors went on to note that the rare occasions when a lawyer was called upon to practice in the juvenile court could indeed be

> a source of embarrassment and loss of prestige to the lawyer. His objections may be perfectly valid under the ordinary rules of procedure, and yet be wholly inapplicable in the proceedings in which he is involved.

Ellrod and Melany, *Juvenile Justice: Treatment or Travesty?* 11 U. PITT. L. REV. 277 (1950).

In describing the philosophy of the early pioneers of the juvenile court movement, the President's Commission concluded:

> Lawyers were unnecessary—adversary tactics were out of place, for the mutual aim of all was not to contest or object but to determine the treatment plan best for the child. That plan was to be devised by the increasingly popular psychologists and psychiatrists; delinquency was thought of almost as a disease to be diagnosed by specialists and the patient kindly but firmly dosed.

TASK FORCE REPORT, *supra* note 15, at 3.

Noting the vigor with which the movement's founders banished the lawyer from the juvenile courtroom, a leading contemporary juvenile court judge declared:

> In the exuberant belief that court-ordered social service was the answer to all the ills of youth, law was forgotten and lawyers were summarily dismissed from the hallowed halls of the children's court to assure that salvation, lilac scent and the social-work supervisor would reign supreme.

Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U. L. REV. 585, 586 (1965).

[27] Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905).

[28] [The Juvenile Court Act] is not for the punishment of offenders but for the salvation of children . . . whose salvation may become the duty of the state. . . . No child . . . is excluded from its beneficient provisions. Its protecting arm is for all . . . who may need its protection.

> To save a child from becoming a criminal, or from continuing in a career of crime . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. . . . [T]he state, when compelled as *parens patriae*, to take

A prophetic critical view was expressed in a note published in the Columbia Law Review in 1927. The student author observed that in spite of both the social science emphasis to be found in delinquency proceedings and "the attempt to make such a trial civil by calling it civil,"[29] delinquency proceedings nevertheless retained a great deal of the flavor of a criminal trial. Since a child faced the possibility of restraint both before and after an adjudication of delinquency, he was in reality subject to a deprivation of liberty. The author suggested that such deprivation was being effected without due process of law: "wide opportunity for arbitrary injustice in the juvenile court because of informal hearings is painfully apparent."[30] It was recommended that "constitutional guarantees . . . be retained as a check on the danger of unintentional oppression resulting from the misuse or abuse of the juvenile court machinery."[31]

In a time of American social turbulence, criticism of the juvenile court system became genuinely widespread. In the period following World War II, some began to express doubt that the *parens patriae* philosophy could adequately protect the public from what was perceived as an onslaught of juvenile criminality.[32] Others simultaneously expressed a reaction against the virtually unchecked discretion of the juvenile court, with the resulting potential for abuse and arbitrariness.[33] Skepticism regarding the theoretical validity and effectiveness of juvenile proceedings was being voiced in popular magazines as well as legal publications.[34] Most significantly, however, doubts about the juvenile system were being generated from the appellate bench.

Writing fourteen years before the first pronouncement of the United States Supreme Court in the area of juvenile justice, Judge White of the California District Court of Appeals pointed to an undeniable similarity between juvenile and criminal proceedings, and identified the resulting constitutional anomaly.[35] For all practical purposes, an adjudication of delinquency was the equivalent of a criminal conviction because it amounted to a "blight upon the character . . . and a serious impediment to the future of . . . [a] minor."[36] The end result of a delinquency proceeding and a criminal conviction was the same: deprivation of liberty. Although noting that the juvenile court was designed to have only salutary effects, Judge White warned that the juvenile court should never "be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult."[37]

In a ringing dissent from the opinion of the majority of the Pennsylvania Supreme Court in *In re Holmes*,[38] Justice Musmanno observed that the ideals and rhetoric of the juvenile courts simply did "not square with the realities of life."[39] He dismissed as a "most disturbing fallacy . . . the notion that a Juvenile Court record does its owner no harm."[40] Adjudication as a juvenile delinquent had in reality come to constitute a social stigma which would

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the place of the father . . . [is not] required to adopt any process as a means of placing its hand upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.

Id. at 53, 62 A. at 199, 200.

An article appearing in 1926 took the Pennsylvania Supreme Court's decision severely to task, suggesting that the court turned its back on the Constitution in order to appease the mass of public opinion which had rallied behind the enactment of the juvenile court statute. It was only by artful evasion that the court had been able to avoid concluding that many provisions of the Pennsylvania Juvenile Court Act were clearly unconstitutional. *Children's Commission of Pennsylvania, The Legal Foundations of the Jurisdiction, Powers, Organization, and Procedures of the Courts of Pennsylvania in Their Handling of Cases of Juvenile Offenders and of Dependent and Neglected Children,* 1926 ANNALS 28.

[29] Note, *Rights of Juveniles to Constitutional Guarantees in Delinquency Proceedings,* 27 COLUM. L. REV. 968, 970 (1927).

[30] *Id.* at 974.

[31] *Id.*

[32] Infants under the age of 21 years, according to statistics, perpetrate a high percentage of the heinous crimes committed throughout the country, and the situation has reached such serious proportions that it is a threat to the public welfare and safety of law-abiding citizens. . . . [T]he time has come to examine the underlying philosophy of the treatment of juvenile offenders.

State v. Monahan, 15 N.J. 34, 59, 104 A.2d 21, 36 (1954) (dissenting opinion).

[33] TASK FORCE REPORT, *supra* note 15, at 29.

[34] *See,* Ellrod and Melany, *Juvenile Justice: Treatment or Travesty?* 11 U. PITT. L. REV. 277 (1950); Rubin, *Protecting the Child in the Juvenile Court,* 43 J. CRIM. L.C. & P.S. 425 (1952); Note, *Due Process in the Juvenile Courts,* 2 CATH. U. L. REV. 90 (1952); and especially the milestone article by Professor Monrad G. Paulsen, Paulsen, *Fairness to the Juvenile Offender,* 42 MINN. L. REV. 547 (1957). Two significant articles in the popular media were *We Need Not Deny Justice to our Children,* Civil Liberties Record of the Greater Philadelphia Branch ACLU, Feb. 1956, and *What Nobody Knows About Juvenile Delinquency,* HARPERS 1958.

[35] *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952).

[36] *Id.* at 789, 241 P.2d at 633.

[37] *Id.* at 790, 241 P.2d at 633.

[38] 379 Pa. 599, 109 A.2d 523 (1954).

[39] *Id.* at 612, 109 A.2d 528.

[40] *Id* at 612, 109 A.2d 529.

forever "be there to haunt, plague and torment." [41] Justice Musmanno similarly regarded as fallacious the reasoning of those who believed the juvenile process to be "simply an administrative procedure because its purpose eventually is to provide education, care and supervision." [42] Ultimately:

> [F]airness and justice certainly recognize that a child has the right *not* to be a ward of the State, *not* to be committed to a reformatory, *not* to be deprived of his liberty, if he is innocent. The procedure for ascertaining the guilt or innocence of a minor may be designated a hearing or a civil inquiry . . . but in substance and form it is a trial . . . . [43]

In 1956 the Court of Appeals for the District of Columbia began to display a serious concern for the procedural rights of juveniles. Over the next six years there followed a series of decisions which significantly expanded the procedural protections to be accorded juveniles in delinquency proceedings before the District of Columbia juvenile courts. The most significant of these cases was to be *Kent v. United States,* [44] the United States Supreme Court's first juvenile justice decision.

In *Shioutakon v. District of Columbia* [45] the court held effective assistance of counsel to be essential in delinquency proceedings in the District of Columbia. The court's analysis was based on the recognition that personal liberty was at stake in a delinquency proceeding, and therefore the assistance of counsel in juvenile court was just as necessary as in criminal proceedings. [46] *Green v. United States* [47] held that once a juvenile had been transferred to criminal court, his substantial rights were adversely affected when the criminal court judge allowed the juvenile court's transfer order to be admitted into evidence against him.

Two of the court of appeal's decisions dealt directly with the transfer process itself. During this period the District of Columbia Code allowed for waiver of juvenile jurisdiction only following a "full investigation" by the juvenile court. [48] The Court of Appeals began its process of interpreting this statutory directive in 1964, when it held in *Watkins v. United States* [49] that in transfer proceedings a juvenile's attorney was entitled to have access to the social record concerning his client which had been compiled by officers of the juvenile court. One year later in *Black v. United States,* [50] the court declared the waiver of juvenile court jurisdiction to be a "critically important" [51] stage in proceedings against a juvenile charged with committing a crime, and therefore found that assistance of counsel was essential in transfer hearings.

By 1965 the Court of Appeals for the District of Columbia Circuit had extended a number of procedural safeguards to the District's juvenile court system. Of particular importance was the fact that the court focused upon the transfer process as well as the procedures for adjudicating delinquency. It is to be noted, however, that these transfer decisions were based upon interpretation of the District of Columbia's juvenile court statute, and not upon the United States Constitution. Yet in the context of juvenile transfer there remained a number of unresolved procedural issues, and it was against this background that *Kent v. United States* was to emerge.

III.

Morris A. Kent, Jr. was sixteen years old when he was arrested in 1961 for housebreaking, robbery and rape. He was already familiar with the District of Columbia juvenile court, having been on probation since he was fourteen. After his apprehension by police, his mother retained counsel to represent him. [52] Early in the proceedings, counsel made known an intention to oppose Kent's transfer to

[41] *Id.*

[42] *Id.* at 613, 109 A.2d 529.

[43] *Id.* at 613–14, 109 A.2d 529. *See also In re* Poff, 135 F. Supp. 224 (D.D.C. 1955).

[44] 383 U.S. 541 (1966).

[45] 236 F.2d 666 (D.C. Cir. 1956).

[46] *Shioutakon* was followed by Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959) and Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961), both of which dealt with the proper treatment of juvenile court admissions in subsequent criminal proceedings.

[47] 308 F.2d 303 (D.C. Cir. 1962). Even a cautionary instruction was held not to limit the danger "that the jury would draw the inference that a judicial officer has already concluded that the accused is guilty . . . " *Id.* at 304.

[48] If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult . . . .
D.C. CODE § 11–914 (1961).

[49] 343 F.2d 278 (D.C. Cir. 1964).

[50] 355 F.2d 104 (D.C. Cir. 1965).

[51] *Id.* at 105.

[52] Kent's transfer took place four years prior to the Court of Appeals' decision in *Black, supra* note 50, where juveniles were held to have the right to have court-appointed counsel in transfer proceedings.

stand trial as an adult—he believed his client was amenable to rehabilitation under the treatment facilities of the juvenile court. Without holding a hearing, however, the juvenile court judge entered an order reciting that, pursuant to "full investigation," he was waiving juvenile court jurisdiction and transferring Kent to the jurisdiction of the District Court.[53] The judge had not conferred with Kent, his mother or defense counsel. No reasons for the transfer decision were given. Subsequently Kent was indicted by a grand jury and brought to trial on charges of housebreaking, robbery and rape. Although a jury found him not guilty of rape by reason of insanity, the sixteen-year-old was found guilty of housebreaking and robbery and was sentenced to 30 to 90 years confinement. At least part of his sentence was to be spent in mandatory commitment to a mental hospital.

The conviction was affirmed by the Court of Appeals for the District of Columbia Circuit.[54] On appeal, and later before the United States Supreme Court, Kent argued that his transfer to adult court resulted from an invalid waiver of juvenile court jurisdiction. The Supreme Court upheld Kent's contention that the waiver order had been improperly made. Since the transfer was reviewable in the District Court upon a motion to dismiss the indictment, the Court defined the task before it as determining the standards to be applied in such a review.

Writing for the majority,[55] Justice Fortas concluded that Kent was "entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court."[56] In Kent's case the consequences of transfer were enormous: if juvenile jurisdiction were retained he faced a maximum five years' confinement; upon transfer to the district court he was confronted with a possible sentence of death.

The Court observed that although the juvenile court should have considerable latitude in making transfer decisions, such latitude could not be total or complete, but should provide:

> procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation."[57]

Citing to the District of Columbia Circuit's prior decisions in *Black*[58] and *Watkins*,[59] the Court declared that:

> [I]t is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile.[60]

The majority held that the statutorily prescribed "full investigation" into the advisability of waiving juvenile court jurisdiction encompassed three procedural rights. First, the statutory standard required that a juvenile be given a hearing prior to the entry of a transfer order. Second, the statute allowed for counsel to have access to the probation and social reports which the judge would presumably consult in making a transfer decision.[61] Finally, to assure "meaningful appellate review"[62] of transfer orders, the Court held that the term "full investigation" required the juvenile court judge to accompany a transfer order with a statement of reasons explaining

[53] *See* note 51, *supra*.

[54] Kent v. United States, 343 F.2d 247 (D.C. Cir. 1964).

[55] Four justices joined Mr. Justice Fortas in the majority. Mr. Justice Stewart filed a dissenting opinion in which Justices Black, Harlan and White joined. The dissent would have vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of that court's own subsequent decisions in *Watkins* and *Black*, discussed in text accompanying notes 49 and 50 *supra*, respectively. The dissent cited to the Court's customary practice of leaving undisturbed those decisions of the District of Columbia Circuit which concerned "the import of legislation governing the affairs of the District." 383 U.S. at 568. Remand was felt to be advisable because *Watkins* and *Black* "may have considerably modified the court's construction of the [District of Columbia juvenile court] statute." *Id.*

[56] 383 U.S. at 557.

[57] *Id.* at 553.

[58] *See* note 50, *supra*.

[59] *See* note 49, *supra*.

[60] 383 U.S. at 556.

[61] The court of appeals had held that counsel had no right to have access to these records, noting that counsel's role in a transfer hearing was simply that of presenting

> to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations.

343 F.2d at 258.

Such reports had long been regarded as confidential communications running between the staff and the judge. The piercing of this veil of confidentiality was regarded by Professor Paulsen as one of the most significant aspects of the *Kent* decision. *See* Paulsen, *supra* note 22, at 179–81.

[62] Meaningful [appellate] review requires that the reviewing court should review. It should not be remitted to assumptions. . . . It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made.

383 U.S. at 561.

his decision. The Court summarized its conclusions by declaring that:

> [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.[63]

Portions of the Supreme Court's opinion resound with the tones of due process, particularly the pronouncement that the holding was required by a reading of the relevant statutory provision "in the context of constitutional principles relating to due process and the assistance of counsel."[64] Constitutional overtones are undeniably present in *Kent*, yet the holding cannot be regarded as being of constitutional dimension. *Kent* must be taken for what the majority clearly intended it to be: a case of statutory interpretation.[65] The Court was explicit in delineating the scope and source of its holding:

> The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for decision of this case, and *we go no further*.[66] (Emphasis added.)

It is apparent that the Court in *Kent* was concerned with the way in which the implementation of procedural requirements would affect those benefits which could still be realized from the juvenile system's less formal, child-centered method of approach. One argument against extending procedural protections to the juvenile court was that the introduction of formalized procedure would eliminate the ability of the juvenile court to function in a flexible and individually-oriented manner. It was also contended that the system's resources would be overborne should procedural regularity be required. The Court concluded that the transfer hearing did not have to conform to all the procedural standards of a criminal trial, but instead "may be informal."[67] Similarly, the statement of reasons which was to accompany each transfer order need not be "formal" nor need it "necessarily include conventional findings of fact."[68] The statement simply must indicate that the court had carefully considered the transfer question and it must set forth the reasons behind the order to permit meaningful appellate review.[69] *Kent* was an attempt to balance the need for procedural safeguards for juveniles, on the one hand, against the remaining benefits and available resources of the juvenile system, on the other.[70]

In an appendix to the opinion of the Court, the majority included a policy memorandum which had been promulgated (but subsequently rescinded) by the juvenile court of the District of Columbia.[71] The memorandum delineated the criteria which were to

[63] 383 U.S. at 554.

[64] *Id.* at 557.

[65] In the years immediately following the Court's decision in *In re Gault*, *supra* note 25, it was enthusiastically suggested that *Gault* had raised *Kent* to the level of a constitutional requirement. In answer to the question of whether the requirements of *Kent* were now of constitutional dimension, Professor Schornhorst wrote:

> To now distinguish *Kent* because if dealt only with a narrow issue of statutory interpretation, and then to distinguish *Gault* on the right to counsel issue because waiver of juvenile court jurisdiction does not result in "confinement" but in transfer to another court, reaches a new apogee of judicial sophistry.

Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*. 43 IND. L. J. 583, 588 [hereinafter cited as Schornhorst].

[66] 383 U.S. at 556.

[67] *Id.* at 561.

[68] *Id.*

[69] The Court specified that the statement must be:

> sufficient to demonstrate that the staturory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; it must set forth the basis for the order with sufficient specificity to permit meaningful review.

383 U.S. at 561.

[70] This may be seen as presaging the analytical framework which the Court was to refine in its later juvenile justice decisions when it sought to determine whether a particular procedural right was to be extended to the juvenile court system. *See* text accompanying notes 90–96 *supra*.

[71] The determinative 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).
>
> 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

govern the decision to waive juvenile court jurisdiction. The District of Columbia juvenile court staff was to "develop fully all available information which may bear upon [these] criteria and factors . . . ." [72] The judge was instructed to "consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer . . . for trial . . . under adult procedures . . . ." [73]

By including these standards in an appendix, the Court indicated that the criteria for transfer decision-making were not to be considered a part of the holding itself. The criteria, however, were to take on significant importance when challenges to transfer proceedings began to be raised in state courts. [74]

Kent marked the first time the United States Supreme Court had directly scrutinized the internal proceedings of the juvenile court system. The language of the majority contained overtones of doubt and skepticism regarding the quality of justice which was being dispensed in the juvenile system, declaring that the theory of the juvenile court was "rooted in social welfare philosophy rather than in the *corpus juris*," and warning that "the admonition to function in a parental relationship [was] not an invitation to procedural arbitrariness." [75] The Court referred to recent studies and articles which questioned whether the performance of the juvenile system measured well enough against its "theoretical purpose" to allow immunity from constitutional guarantees to continue. [76] It concluded that:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. [77]

Kent's counsel had presented a number of arguments based on due process grounds in urging the Court to reverse their client's conviction. [78] The Court chose not to reach these constitutional issues, deciding the case instead on procedural error. However, the Court noted that the due process issues raised basic questions which struck at the heart of the premises upon which the juvenile system had originally been founded and by which it still continued to justify its existence. The dicta of *Kent* laid the groundwork for the constitutional indictment of juvenile delinquency proceedings which was to follow in the Court's later juvenile justice decisions. [79] The Court's doubts appeared to be strongest where there was no indication that the benefits of juvenile court treatment were in any way realistically compensating for the deprivation of procedural rights. [80]

In *In re Gault* [81] the Court was directly confronted with the constitutional due process issues which it

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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. at 566–67.

[72] *Id.* at 567.

[73] *Id.* at 567–68.

[74] For the reaction in Illinois, *see* text accompanying notes 100–134 *infra*.

[75] 383 U.S. at 554–55.

[76] 383 U.S. at 555. The Court in *Kent*, as well as in *In re* Gault, 387 U.S. 1 (1967), made particular reference to Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

[77] 383 U.S. at 556.

[78] To support the reversal of his conviction, Kent argued that 1) he had been unlawfully detained and interrogated by police, 2) he had been deprived of liberty for about a week without a determination of probable cause (which would have been required to detain an adult), 3) he was interrogated in the absence of counsel or his parents, 4) he had been given no warning of his right to remain silent or his right to counsel, 5) he was fingerprinted in violation of the intent of the Juvenile Court Act while unlawfully detained. 383 U.S. at 551.

[79] In a major article on the *Kent* decision written in 1966, Professor Paulsen declared that:

> The court's opinion . . . does not actually hurl constitutional thunderbolts at the nation's juvenile courts and police practices respecting juveniles, [but] it does raise a warning of turbulent weather ahead.

Paulsen, *supra* note 22, at 183.

[80] While there can be no doubt of the original laudable purpose of the juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

383 U.S. at 55–56.

[81] 387 U.S. 1 (1967).

had chosen not to decide the year before in *Kent*. The question before the Court in *Gault* was that of determining "the precise impact of the due process requirement" on delinquency proceedings in juvenile courts.[82] Citing to the forewarning he had given in his *Kent* opinion, Mr. Justice Fortas for the majority[83] emphatically declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[84] After reviewing the origins of the juvenile court movement, the Court laid to rest a number of the arguments which had been advanced to justify the absence of procedural safeguards in the juvenile system. Although it did not deny the lofty notions and good intentions of the early social reformers, the Court declared that their efforts had led to a "peculiar system for juveniles, unknown to our law in any comparable context," having a theoretical basis which was debatable "to say the least."[85] The doctrine of *parens patriae* was in reality nothing more than a rationalization developed by the pioneers of the movement to explain away the absence of constitutionally-required procedures in their new system.[86]

The Court also found it to be increasingly apparent that the results produced under the juvenile system were not satisfactory. The Court cited the high rate of recidivism within the juvenile system and the alarming statistics on juvenile crime, and concluded that the absence of constitutional protections neither reduced crime nor led to effective rehabilitation of offenders.

Because the end result of juvenile proceedings was likely to be either incarceration or some other form of deprivation of liberty, the Court went on to declare that, given those consequences,

> [I]t would be quite extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process."[87]

Four specific procedural safeguards were held to be constitutionally required in delinquency proceedings: the right to notice of charges, the right to assistance of counsel, the right to confrontation of witnesses, and the privilege against self-incrimination.

Yet in spite of the broad sweep of the majority's language, the actual holding of *Gault* was rather narrow. The Court specifically declared that its holding was to apply only to delinquency adjudication proceedings and not to dispositional hearings.[88] The Court made a point of asserting that valuable aspects were still to be found within the jurisdiction of the juvenile court[89] and was careful to note that the four procedural rights being extended to juveniles in *Gault* would not impair "the features of the juvenile system which its proponents have asserted are of unique benefit."[90]

Gault clearly does not stand for the proposition that a child in delinquency proceedings must be accorded the full panoply of procedural safeguards guaranteed by the Constitution to adults in criminal proceedings.[91] It cannot be doubted, however, that *Gault* was to mark the beginning of a new era in the history of the juvenile court system: zealous social workers and juvenile court judges would no longer be permitted to ignore the Constitution of the United States.

The Supreme Court has decided three additional

[82] *Id.* at 14.

[83] *Gault*, like *Kent*, was a 5-4 decision. Joining Mr. Justice Fortas in the majority were Chief Justice Warren, and Justices Douglas, Clark and Brennan. Separate concurring opinions were written by Justice Black and Justice White. Justice Harlan filed an opinion in which he concurred in part and dissented in part. Justice Stewart wrote a dissenting opinion.

[84] 387 U.S. at 13.

[85] *Id.* at 17.

[86] The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. . . . [T]here is no trace of the doctrine in the history of criminal jurisprudence.

Id. at 16.

[87] *Id.* at 27-28.

[88] *Id.* at 27. *See* note 10 *supra*.

[89] Among such "valuable aspects" the Court enumerated the following: 1) the fact that juveniles are processed and treated under a system separate from adults; 2) the effort made by the juvenile system to avoid classifying a juvenile as a criminal; 3) the fact that an adjudication of delinquency does not result in any civil disability or in disqualification from civil service appointment; 4) the emphasis placed in the juvenile system on the good will, compassion, and kindliness of the juvenile court judge. However, the Court seriously disputed the credibility of the juvenile system's claims to confidentiality and secrecy, noting that the claim of secrecy was more often rhetoric than reality because the records of the juvenile court in most jurisdictions could be disclosed at the judge's discretion. *Id.* at 23-27.

[90] *Id.* at 22.

[91] The *Gault* case did not present the questions of whether the right to bail, the right to jury trial, or the right to a standard of proof beyond a reasonable doubt—all of which were available to adults—should be accorded to juveniles as well. Because *Gault* was before it on a petition for habeas corpus, the Court held it did not need to reach the question of whether the Constitution required there be a right to obtain appellate review of delinquency adjudications. Similarly, because it was not deciding the question of the right to appellate review, the Court held it did not need to decide whether the failure to provide a transcript of a delinquency hearing was a denial of due process. *Id.* at 58.

juvenile justice cases since *Gault:* In *In re Winship* [92] the Court extended another procedural right to the juvenile defendant by holding that in delinquency proceedings juvenile offenders were constitutionally entitled to the standard of proof beyond a reasonable doubt. In *McKeiver v. Pennsylvania,* [93] however, the Court declined to hold that jury trials were constitutionally required in juvenile delinquency proceedings. The 4-3 decision was based upon the plurality's conclusion that a jury trial was not a "necessary component of accurate factfinding." [94] The opinion sought to support this conclusion by analogizing to several types of cases where jury trial was not required: military trials, cases in equity, probate, deportation and workmen's compensation cases. [95] *Breed v. Jones,* [96] however, extended the juvenile's rights and held that a juvenile is unconstitutionally subjected to double jeopardy if he is transferred to stand trial as an adult in criminal court following an adjudication at the juvenile level.

The Supreme Court has continued to apply and refine its balancing approach in these later decisions. The fact that a given right has been previously held to be constitutionally required in proceedings against adults is no talisman which automatically assures the extension of that right to the juvenile system. Particularly in *McKeiver* and *Breed* the Court manifested concern that the already severely taxed resources of the juvenile system should not be overwhelmed by the introduction of formalized procedures.

Gault, Winship and *Breed* have brought about a substantial "constitutional domestication" [97] of juvenile court delinquency procedures. Supreme Court involvement in delinquency proceedings has largely eliminated the possibility of the sort of procedural arbitrariness which had come to characterize the juvenile system in the pre-*Gault* era. As a result of these decisions, minors in delinquency proceedings in both federal and state juvenile courts now enjoy most of the procedural rights which are available to adults. [98]

Unlike its holdings regarding delinquency proceedings, the Supreme Court's only decision on juvenile transfer was not based upon the Constitution. *Kent v. United States* rested upon the interpretation of a statute—the Juvenile Court Act of the

[92] 397 U.S. 358 (1970).

[93] 403 U.S. 528 (1971).

[94] *Id.* at 543.

[95] The logic of this conclusion evaporates when it is noted that military trials do not arise under the Constitution, and the remaining cases are not examples of criminal proceedings involving the possible deprivation of personal liberty. The plurality, however, also expressed particular concern that requiring jury trials would "provide an attrition of the juvenile court's assumed ability to function in a unique manner." *Id.* at 547. This part of the opinion can well be regarded as constituting an implicit recognition that the enormous increases in cost and delay which accompany the right to jury trial might well have overstressed the limited resources of the juvenile system.

[96] 421 U.S. 519 (1975). The Court's analysis in *Breed* focused on the by now familiar conclusion that the consequences of juvenile adjudication approach in seriousness those of a criminal prosecution. The end result of each proceeding is the same: incarceration for the purpose of enforcing the criminal law. The risk of such incarceration was precisely the sort of risk which the term "jeopardy" had been held to define. Furthermore, application of the constitutional guarantee against being twice put in jeopardy for the same offense would not unduly tax the capabilities of the juvenile court system. Through the simple device of requiring that transfer proceedings be conducted prior to an adjudicatory hearing, the juvenile system could effectively assure the protection against double jeopardy.

[97] The phrase was coined by Mr. Justice Fortas in *Gault,* when the majority declared that "the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication." 387 U.S. at 22.

[98] Juveniles, of course, do not enjoy the right to trial by jury in delinquency proceedings under the holding of *McKeiver v. Pennsylvania. See* text accompanying notes 93-95, *supra.*

It is unlikely if the sixth amendment right to a public trial will ever be found to be constitutionally required in the juvenile system. Although it may be argued that public trials would expose questionable procedures to community scrutiny, private hearings and confidential records serve a significant protective purpose in juvenile court proceedings. By denying the public access to juvenile deliberations, it is hoped that the individual juvenile will be spared from the sort of publicity that could limit the effectiveness of his rehabilitation and perhaps jeopardize his entire future as well.

It is uncertain whether the fourth amendment exclusionary rule will ever be extended to the juvenile court system. Application of the rule would greatly complicate juvenile proceedings in that large amounts of time and money would be consumed in arguing motions to suppress evidence alleged to have been illegally seized. It is also apparent that the present Supreme Court is gradually cutting back on the sweep of the rule announced in Mapp v. Ohio, 367 U.S. 643 (1961). *See* Stone v. Powell, 96. S. Ct. 3037 (1976). Thus it is unlikely that the Court, as a practical matter, would require the juvenile courts to apply the exclusionary rule.

One of the most interesting issues in the field of juvenile rights litigation today concerns the right to treatment, particularly in reference to minors in need of supervision (MINS). *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972). *See also* O'Connor v. Donaldson, 422 U.S. 563, (1975); Wyatt v. Stickney, 325 F. Supp. 781 (N.D. Ala. 1971); Wald and Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs,* 12 AM. CRIM. L. REV. 125 (1974).

District of Columbia. Thus, unlike the later decisions, *Kent* does not carry the force of constitutional compulsion and each state has remained free to determine the extent of procedural protection to be accorded juveniles in transfer decision making.[99]

IV.

Juvenile transfer in Illinois illustrates a number of due process problems which have continued to exist because the holding in *Kent* was not cast in constitutional terms. At the time of *Kent* and for a number of years thereafter, the Illinois Juvenile Court Act[100] created a method of transfer which was virtually unique to Illinois.[101] Under the structure of the Illinois court system, the juvenile division and the criminal division are considered co-equal branches within the county circuit court.[102] The Illinois Juvenile Court Act permitted the prosecutor to choose the forum in which to institute proceedings against a juvenile alleged to have committed a criminal act. The judiciary was accorded a decidedly secondary role.

Once the prosecutor had determined that criminal charges were to be pressed, a motion to that effect was brought before the juvenile court judge. The judge was given the opportunity only to "object" to the prosecutor's choice of forum. If he raised no objection, juvenile jurisdiction ended automatically, and the case was removed to the criminal division for prosecution. The making of such an objection, however, did not automatically guarantee that juvenile jurisdiction would be retained. An objection brought about a referral of the transfer question for decision by the chief judge of the county circuit court. The chief judge in turn designated a special juvenile court judge to conduct an investigation and hearing into the propriety of the prosecutor's decision. Should this judge find it to be in the best interests of neither the child nor the public at large to proceed with the case in juvenile court, a transfer order would issue.

In reality, however, this complex series of referrals from judge to judge would only rarely be called into play. Because the decision to institute criminal court proceedings was totally a matter of prosecutorial discretion,[103] a hearing under the Illinois statute was required only where the juvenile court judge objected to the prosecutor's determination. A study of all 1971 cases in Cook County in which a juvenile was charged with murder or involuntary manslaughter revealed that the judge objected to transfer in only 7.2% of the cases.[104]

[99] For an excellent summary of the various state juvenile codes, *see* M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A STUDY OF JUVENILE CODES IN THE U.S. (1974) [hereinafter cited as LEVIN & SARRI].

[100] If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the State's Attorney shall determine the court in which that minor is to be prosecuted; however if the Juvenile Court Judge objects to the removal of a case from the jurisdiction of the Juvenile Court, the matter shall be referred to the chief judge of the circuit for decision and disposition. If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.

ILL. REV. STAT. ch. 37 § 702-7(3) (1967). Section 702-7(3) was amended in 1973 by P.A. 77-2096 and P.A. 78-341.

[101] The distinctiveness of the Illinois procedure did not escape the attention of a number of commentators. *See* Schornhorst, *supra* note 65; Professor Paulsen also observed that the Illinois Juvenile Court Act presented "an interesting problem. . . . Must the prosecutor now hold a hearing if *Kent* has announced constitutional principles?" Paulsen *supra* note 22, at 182 n.61. Levin and Sarri noted Illinois was only one of four states where "the prosecutor plays a major role in transfer proceedings: only he is empowered to request waiver." LEVIN & SARRI, *supra* note 99, at 22-23. Illinois was also noted as being one of only six states where transfer was either not allowed, or where the decision was not made by the juvenile court judge. Two of those six states, New York and Vermont, had very low ages for original jurisdiction of the criminal court (15 and 16 respectively). *Id.* at 21.

[102] Prior to 1964, the juvenile court of Cook County was a court of separate jurisdiction. In 1964, the former juvenile court and the former criminal court became divisions of a single unified court. ILL. REV. STAT. ch 37 § 701-8 (1975).

[103] In a discussion of transfer as a matter for prosecutorial discretion, Professor Schornhorst, with particular reference to Illinois, observed:

> These approaches to waiver are of doubtful validity in light of the controls which the Supreme Court, through *Kent*, has placed upon a juvenile judge's exercise of a similar discretionary power. It would indeed be strange if this critically important decision can now be left wholly to the prosecutor who cannot be expected to weigh objectively the welfare of the child against the need to protect society from the child. The possibilities for arbitrary and discriminatory choice allowed by this method of waiver render it contrary to principles of equal protection as well as due process of law . . . . On the whole, the prosecutor's choice [of] method of waiver . . . is unsatisfactory and probably unconstitutional.

Schornhorst, *supra* note 65, 598-99.

It must be recalled, however, that the author viewed *Kent*, when read in light of *Gault*, as approaching the level of a constitutional requirement. *See* note 65, *supra*.

[104] CHICAGO LAW ENFORCEMENT STUDY GROUP, DISCRETION IN JUVENILE JUSTICE: A STUDY OF TRIAL OF

The consequences of transfer were largely the same no matter where a juvenile lived, that is, the juvenile facing transfer in Illinois stood to forfeit the same sorts of statutory rights and benefits which Morris A. Kent, Jr., had lost when he was transferred to stand trial in the criminal court of the District of Columbia.[105] "[T]he determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the [adult court]" was just as "critically important"[106] for the child in Illinois as for the child in the District of Columbia. In the overwhelming majority of cases in Illinois, however, a youth would be compelled to relinquish his statutory rights to juvenile treatment solely as a result of a prosecutor's decision.

This method for the transfer of juveniles to adult court was clearly at variance with the method which had been approved by the United States Supreme Court for application in the District of Columbia in the *Kent* case. Although *Kent* did not carry the force of constitutional compulsion and thus could not itself bring about a change in the transfer practices of the various states, even such a limited pronouncement by the Supreme Court was enough to inspire court challenges to the Illinois transfer statute.

In 1967, shortly after *Kent* and *Gault,* the Illinois Supreme Court in *In re Urbasek*[107] held that due process required that the standard of proof beyond a reasonable doubt be applied in juvenile court delinquency proceedings. The *Urbasek* opinion contained language which strongly suggested that *Gault* had implicity raised the *Kent* holding to the level of a constitutional requirement. Although *Kent* was limited in its application to the juvenile courts of the District of Columbia, such a limitation had been

> effectively removed by the court's admonition in *In re Gault* that neither the fourteenth amendment nor the Bill of Rights is for adults only.[108]

This conclusion on the part of the Illinois Supreme Court gave rise to an argument that even if *Kent* alone could not compel a change in the Illinois transfer process, *Kent* and *Gault* when read together could accomplish that objective.[109] *Kent* itself had also contained language which suggested that due process issues of constitutional magnitude were presented in the context of a transfer proceeding. The Court had explicitly stated that the three procedural safeguards it was requiring in transfer proceedings in the District of Columbia were necessitated by reading the Juvenile Court Act "in the context of *constitutional principles* relating to due process and the assistance of counsel."[110] [Emphasis added.] Prosecutorial discretion is not a fair substitute for judicial discretion; therefore, it could be argued that the Illinois transfer statute did not afford juveniles a full measure of procedural due process. Following the *Urbasek* decision, a succession of constitutional challenges against the provision was launched in the Illinois appellate courts.

In *People v. Jiles*[111] a direct appeal had been taken from a transfer order, *prior* to the commencement of criminal proceedings, on the ground that the Illinois transfer statute violated due process. Jiles maintained that the statute was vulnerable on three counts: first, because it failed to give guidance to the juvenile court judge or to the parties regarding the issues to be considered in a transfer determination. The statute was similarly silent as to the nature of the burden of proof and by whom it was to be carried. Second, it was argued that the statute constituted an invalid delegation of legislative power, since no standards for decision-making were included in the statute itself. Finally, Jiles urged that the transfer statute was both vague and ambiguous and thus violated both the due process and equal protection clauses. The Illinois Supreme Court, however, did not reach these constitutional questions. The court instead chose to rest its decision on

JUVENILES AS ADULTS IN COOK COUNTY (1975) [hereinafter cited as STUDY GROUP REPORT]. For this study, the Chicago Law Enforcement Study Group in 1972 obtained permission to analyze the records of the Juvenile Court of Cook County. Their report gave several reasons why their study had been limited to cases involving murder. First, such a classification had in part been dictated by the materials which had been made available to their researchers. Second, the cases involving murder fit well into the methodological ideal of obtaining a sample that contained cases in which transfer had been ordered as well as cases in which juvenile jurisdiction had been retained. Third, it had been established in an earlier study that the great majority of decisions to transfer were made in cases involving murder. *See* MAXIME, MILLER, & STREIT, THE RIGHT TO REMAIN A JUVENILE (1972). The Study Group concluded that it was therefore "safe to generalize about the juvenile transfer process as a whole from looking at the murder cases." STUDY GROUP REPORT at 8.

[105] *See* text accompanying notes 3–10 *supra.*

[106] 383 U.S. at 560.

[107] 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

[108] *Id.* at 539–40, 232 N.E.2d at 718. It will be noted that Illinois was in the vanguard of states which required a standard of proof beyond a reasonable doubt in delinquency proceedings prior to the Supreme Court's holding in *Winship, see* note 92 *supra.*

[109] *See* text accompanying notes 81–87 *supra.*

[110] 383 U.S. at 557.

[111] 43 Ill.2d 145, 251 N.E.2d 529 (1969).

the procedural ground that the case had been improperly presented for review.

The opinion of the court, written by Justice Schaefer, held that no direct appeal could be taken from a transfer order in Illinois. Direct appeal was found to be unavailable for two reasons. First, a transfer order could not be a final order, given the fact that the juvenile division and the criminal division were co-equal branches within the same county circuit court. Second, the Illinois legislature had chosen to provide for transfer largely on the basis of prosecutorial discretion, and a decision to prosecute is not subject to judicial review.

The *Jiles* court took a very narrow view of *Kent:* the Supreme Court's holding was regarded as having express application only in the District of Columbia, and not in analogous proceedings under the juvenile court acts of the fifty states. While acknowledging that

> it may be highly desirable to commit to the judge of a specialized juvenile court the determination of whether or not a particular juvenile is to be prosecuted criminally, we are aware of no constitutional requirement that a state must do so.[112]

The Illinois legislature had "chosen not to do so," and had established its own "unique" transfer mechanism, with "the role of the judge . . . sharply diminished."[113] In such circumstances, the mandates of *Kent* were simply not "particularly relevant."[114]

The next challenge to the Illinois transfer procedure was decided by the state supreme court in 1972. In *People v. Bombacino*[115] the juvenile court judge had entered no objection to the prosecutor's decision to initiate criminal proceedings against a sixteen year old boy accused of voluntary manslaughter. The boy was subsequently brought to trial as an adult in criminal court. Following a jury trial, he was found guilty and sentenced to a prison term of from one to five years. On appeal, Bombacino relied on *Kent* in attacking the constitutionality of the Illinois Juvenile Court Act. The principal argument was that he had been denied due process of law because the statute did not require the juvenile court judge to conduct a hearing in all cases where the prosecutor sought to initiate proceedings against a juvenile in criminal court.

The Illinois Supreme Court rejected this contention. The court relied upon *Jiles* in holding that the Illinois legislature had chosen to vest the prosecutor with power to select the forum in which to proceed against a juvenile accused of committing a criminal offense. The court concluded that the role of the juvenile court judge in Illinois was so greatly diminished as not to require a due process hearing "at this stage of the proceeding."[116] Bombacino's petition for certiorari to the United States Supreme Court was denied.[117]

Shortly after *Bombacino,* the Illinois Supreme Court announced its decision in the case of *People v. Handley.*[118] On appeal from a conviction for murder, Handley and his co-defendants contended that the criminal court lacked jurisdiction to try them because the 1967 transfer statute was unconstitutional. The constitutional challenge was unmistakably framed in terms of the procedural requirements which the United States Supreme Court had endorsed in *Kent.* It was argued that the Illinois statute was constitutionally infirm because 1) it did not specify the standards on which a transfer decision was to be based, 2) it did not require a hearing, and 3) it did not require a record of the juvenile court judge's reasons for not objecting to the waiver of juvenile jurisdiction. It was additionally urged that vesting the state's attorney with the power to transfer without any statutory standards to guide and limit his disrection was a deprivation of due process and a denial of equal protection.

The court held that all these issues had been effectively disposed of in *Bombacino.* Reliance on *Kent* was again held to be inappropriate, given the particular distinctions between the transfer statute in Illinois and that existing in the District of Columbia.

Furthermore, the court held that it was not constitutionally necessary for the statute to provide standards to guide the state's attorney in choosing the forum in which to proceed against a juvenile. It was imperative that the state's attorney, in the interests of the administration of justice, be accorded "a large measure of discretion"[119] in the performance of his duties. The court observed that the state's attorney could be presumed to consider the purposes of the Juvenile Court Act in deciding the forum in which to initiate proceedings against a youthful offender.[120]

[112] *Id.* at 148–49, 251 N.E.2d at 531.
[113] *Id.* at 149, 251 N.E.2d at 531.
[114] *Id.* at 148, 251 N.E.2d at 530.
[115] 51 Ill.2d 17, 280 N.E.2d 697 (1972).
[116] *Id.* at 20, 280 N.E.2d at 699.
[117] 409 U.S. 912 (1972).
[118] 51 Ill.2d 229, 282 N.E.2d 131 (1972).
[119] *Id.* at 233, 282 N.E.2d at 135.
[120] (1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve

Thus, the court seemed to imply that the prosecutor's discretion would not be altogether unguided.

In *People vs. Sprinkle*[121] the Illinois transfer statute was alleged to be an unconstitutional deprivation of due process because it did not provide for a judicial hearing on whether juvenile court jurisdiction ought to be waived. The state supreme court refuted this challenge by observing that the due process clause of the fifth amendment had historically been interpreted as guaranteeing a hearing only in cases involving judicial or quasi-judicial decision-making. Under the Illinois statute, however, transfer was not a matter for judicial or quasi-judicial decision; it was left to prosecutorial discretion.

> [T]he...legislature...[has] reasonably vested in the State's Attorney, rather than the judge of the juvenile court in a judicial proceeding, the responsibility of deciding whether the offender should be proceeded against as an adult or as a juvenile.[122]

The court went on to note that the guarantee of a hearing included in the fifth amendment's due process clause

> has never been held applicable to the process of prosecutorial decision making. If it were so held, the prosecutorial function would be vitally impaired.[123]

The constitutionality of the Illinois transfer statute was also upheld by the United States Court of Appeals for the Seventh Circuit in 1974.[124] When the United States Supreme Court declined to review his conviction for manslaughter, Joseph Bombacino petitioned for habeas corpus in the United States District Court for the Northern District of Illinois. The lower court ordered him released from custody because it found the Illinois transfer provision to be constitutionally unsound. But in an opinion written by Judge John Paul Stevens,[125] the appellate court agreed with the prior interpretation of the Illinois Supreme Court that *Kent* had rested explicitly on the language of the District of Columbia Juvenile Court Act. Acknowledging that other language in *Kent,* especially when read in conjunction with *Gault,*[126] suggested that transfer proceedings must comport with due process requirements, the court observed that on balance there was

> some uncertainty about the impact of the Due Process Clause on the procedure followed by a state in determining whether to transfer a youth from the jurisdiction of the juvenile court to that of a court of ordinary jurisdiction.[127]

Citing Justice Schaefer's opinion in *Files,* the court noted, however, that there was also "respectable authority"[128] to support the proposition that a legislature could properly provide that transfer determinations be left to the discretion of the prosecutor.

> Under this view, procedural safeguards would not be constitutionally required unless the state elected to provide for judicial participation in the transfer decision.[129]

Bombacino made two procedural objections to his transfer to criminal court; first, that he was not provided an evidentiary hearing, and second, that no statement of reasons was given by the juvenile court judge to explain why he supported the prosecutor's decision to commence criminal proceedings. To the first contention, the court replied that an evidentiary showing of probable cause was unnecessary under the Illinois statute, and that the record showed that Bombacino had, in fact, been given an opportunity to present evidence on his own behalf at the transfer proceeding.[130]

> and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

ILL. REV. STAT. ch. 37 § 701-2 (1975).

[121] 56 Ill.2d 257, 307 N.E.2d 161 (1974).

[122] *Id.* at 260, 307 N.E.2d at 162.

[123] *Id.* at 261, 307 N.E.2d at 163.

[124] Bombacino v. Bensinger, 498 F.2d 875 (7th Cir. 1972).

[125] Now an Associate Justice of the United States Supreme Court.

[126] The court acknowledged that the two cases "indicated that [transfer] proceedings must comport with the basic requirements of the Due Process Clause . . . ." 498 F.2d at 876-77.

[127] *Id.* at 877.

[128] *Id. See also* Cox v. United States, 473 F.2d 334 (4th Cir. 1973), in which the *en banc* panel of the Fourth Circuit upheld the constitutionality of allowing the prosecutor's discretion to control the transfer process.

[129] 498 F.2d at 877.

[130] Furthermore, the court noted, nothing in either "the *Kent* opinion or in the concept of fundamental fairness . . . [mandated] such a hearing before the jurisdiction of the juvenile court may be waived." 498 F.2d at 878.

Regarding the second objection, the court held that due process did not require a statement of reasons to accompany a transfer order. In the court's view, the need for a statement of reasons in any type of proceeding had to be "evaluated in . . . light of the function [which] such a statement was to perform."[131] Three specific contexts were cited in which courts had held that a statement of reasons was necessary to assure due process of law. A statement explaining a decision was necessary 1) in situations where a layman was unrepresented by counsel, 2) to obtain meaningful appellate review, and 3) where a person needed to know the standards of the decision-maker to which he must conform his future conduct.[132] None of these special circumstances were presented by the Illinois juvenile transfer process. The court of appeals admitted that a statement of reasons was of "significant value. . .because [it] reduces the risk that a decision may be, or may appear to be arbitrary."[133] It concluded, however, that a statement of reasons could not be "constitutionally mandated simply as a safeguard against real or apparent arbitrariness."[134]

V.

Although the Illinois process of transfer by prosecutorial decision survived numerous assaults in both state and federal courts, the Illinois legislature, seeking to bring the transfer statute more in line with the procedure recommended in *Kent,*[135] enacted a new transfer provision which became effective in 1973:

> If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigation and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.
>
> In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority.[136]

The 1973 statute has eliminated the possibility of transfer simply on the basis of the prosecutor's decision to institute proceedings in criminal court. The responsibility for transfer decision-making now rests with the juvenile court judge. The judge must conduct an investigation and hearing whenever the state's attorney requests the waiver of juvenile jurisdiction over a minor accused of having committed a criminal act. A determination of probable cause must be made at the transfer hearing, and specific criteria to guide the judge in his decision are included in the statute.

In providing for transfer to be a matter for judicial decision based upon investigation and hearing, the Illinois legislature has taken a step toward compliance with the procedures recommended by the Supreme Court in *Kent.* But conspicuously absent from the new Illinois transfer statute are two elements which were integral parts of the *Kent* decision: there is no requirement that a statement of reasons for the transfer accompany the judge's order permitting criminal prosecution, and the statute does not provide a mechanism for direct appellate review of a transfer order prior to the commencement of proceedings in criminal court.

In the absence of provisions for appellate review and a statement of reasons, it may be argued that the current transfer provision has simply substi-

[131] *Id.* at 878.

[132] *Id.* at 878–79. *See* King v. United States, 492 F.2d 1337 (7th Cir. 1974) (importance of providing uncounselled layman with a written explanation of a denial of parole); United States v. Lemmens, 430 F.2d 619 (7th Cir. 1970) (importance of providing statement of reasons for denying Selective Service reclassification); Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973) (importance of statement of reasons in the context of prison disciplinary proceedings).

[133] 498 F.2d at 878.

[134] *Id.* at 878–79.

[135] The amended section closely parallels the transfer provision of the District of Columbia Juvenile Court Act, D.C. Code sec. 11–11533 et seq., (1969), as interpreted by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966). The *Kent* case held that the "waiver decision was one of critical importance" to the juvenile involved, and, therefore, the guarantee of due process requires that he be afforded certain procedural protections in waiver proceedings.

COUNCIL COMMENTARY, COUNCIL ON THE DIAGNOSIS AND EVALUATION OF CRIMINAL DEFENDANTS, Prepared in connection with the Unified Code of Corrections, ILL. REV. STAT. ch. 37 §702–7(3) (1975).

[136] ILL. REV. STAT. ch. 37 § 702–7(3) (1975).

tuted the unchecked discretion of the juvenile court judge for that of the prosecutor. The 1973 statute does include a series of standards designed to guide the judge in arriving at a transfer decision, which may preserve the statute against challenges for vagueness. The remaining question is whether these standards, in the absence of a required statement of reasons, can assure that the judge's decision will comport with appropriate standards of due process and fundamental fairness.

The criteria set forth in the present statute appear largely to have been based upon those appended to the Supreme Court's opinion in *Kent.*[137] They represent a variety of factors which need to be addressed in an attempt to balance the best interests of the child against the societal interests present in a transfer determination. The criteria, however, are neither clearly nor precisely defined.[138] There is no indication, for example, of what is to be included in the "previous history of the minor."[139] If the minor's past juvenile court record is to be taken as the equivalent of "previous history," a question of fundamental fairness is immediately presented. A minor's juvenile court record may well contain a wide variety of information relating to non-delinquent as well as delinquent behavior. In addition to prior adjudications and dispositions of delinquency petitions, the record may include information on prior MINS[140] proceedings against the minor and pre-judicial involvements as well. Such non-delinquent behavior can be seen as having little relevance to a determination of whether or not a juvenile should be tried as an adult under the criminal laws. Including non-delinquent behavior in the minor's previous history leaves open the possibility that the transfer decision might be unduly influenced by the accumulation of his prior "bad acts."

Similarly, no elaboration is given to the terms "best interests of the minor" and "security of the public."[141] Although generalized notions come to mind, the terms are so open-textured that, standing alone, they are susceptible to a wide variety of interpretations. Without some explanatory statement by the judge, it is impossible to ascertain the specific considerations which support his conclusion that a transfer order is warranted in any given case.

Additional difficulties are presented by the wording of the fifth criterion: "whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor."[142] This portion of the statute may be seeking to address the question of whether an individual juvenile is amenable to rehabilitation under juvenile jurisdiction. The entire juvenile system has historically been posited on the belief that juveniles were particularly susceptible to being rehabilitated through non-punitive treatment and therapy. This belief was reflected in the final criterion cited with approval by the Supreme Court in *Kent:* whether or not a juvenile was a likely prospect for "reasonable rehabilitation" at the juvenile level.[143] The Illinois provision, however, may also be interpreted as directing the juvenile court judge to ascertain whether there is room to accommodate the minor within a particular juvenile court program or institution. Under the basic treatment philosophy of the juvenile court, query if transfer can ever be justified simply because the state has not allocated the resources to provide rehabilitation facilities.[144]

There is no provision in the transfer statute which gives guidance as to how the individual criteria are to be weighted. In a typical transfer hearing, it may not be uncommon for evidence on two or more of the

[137] *See* note 71 *supra.*

[138] There is an absence of critical literature on the 1973 Illinois juvenile transfer statute. The criticisms which follow were in large measure developed during the course of a seminar in juvenile law taught in Spring, 1976, at the Northwestern University School of Law.

[139] ILL. REV. STAT. ch. 37 § 702–7(3) (1975).

[140] "Minors in Need of Supervision." *See* note 2 *supra.*

[141] ILL. REV. STAT. ch. 37 § 702–7 (1975).

[142] *Id.*

[143] *See* note 71 *supra.*

[144] A case dealing with this very question was recently decided by the Supreme Court of Minnesota. In *In re* Welfare of J.E.C., 225 N.W.2d 245 (1975), the juvenile court judge had transferred a seventeen-year-old to stand trial on criminal charges because there was no presently existing facility designed for the rehabilitation and treatment of sophisticated hard-core juveniles. In remanding the case to the juvenile court for further decision, the court stated:

> The crucial question...in this case is whether the court may refer appellant for adult prosecution for the reason that "no program exists or has been designed which can rehabilitate Respondent, with adequate protection for the public, prior to his twenty-first birthday." In other words, is this reason sufficient to sustain the conclusion that appellant "is therefore not amenable to treatment as a juvenile and must be transferred for prosecution as an adult?"

The court's decision to remand was based upon its conclusion that

> there can be no doubt but what our laws pertaining to the treatment and commitment of juveniles, theoretically at least, are grounded on that theory that appellant, and others like him have a *right to rehabilitative treatment.*

Id. at 249 (emphasis added).

statutory standards to point in conflicting directions. For example, the state's attorney may contend that, when taken together, the circumstances surrounding the present offense and the minor's previous experiences with juvenile court treatment programs suggest that he is no longer amenable to rehabilitation at the juvenile level. Defense counsel, on the other hand, may call as a witness a psychologist who testifies that the minor is a likely prospect for successful rehabilitation through treatment in a juvenile court program or institutional facility. Which of the statutory criteria is to be determinative in such a situation? The argument has been advanced that a juvenile court act represents the existence of a presumption in favor of juvenile treatment—a presumption which must be clearly rebutted by competent evidence before a transfer order can issue.[145]

The criteria for decision-making which are enumerated in the statute may be of assistance to both parties in preparing for a transfer hearing. It is nevertheless apparent that these criteria are by no means an exclusive catalogue of the elements which make up a decision to transfer, because the court is instructed to consider the six designated factors "among others." Thus it is possible for the judge to consider additional factors of his own choosing. These subjective factors may have a profound influence on the judge's final decision. Without a statement of the reasons explaining the transfer order, it is impossible to ascertain whether the judge has taken cognizance of subjective factors in arriving at a decision. It also becomes difficult for counsel effectively to prepare his client's case when he cannot be certain of the criteria upon which the judge's decision will be based.

Finally, and perhaps most significantly, the statute is silent as to what, if any, evidentiary burden must be met regarding the criteria at the transfer hearing. There is no indication that the juvenile court judge is obligated to hear evidence from both parties on each and every one of the standards. The statute appears to countenance the possibility that a transfer order could issue without any evidence having been presented on one or more of the designated factors. Neither is any indication given as to what kind of testimony is to be presented at the hearing. The statute allows for the admission of the opinions of a non-expert witness, as well as for the admission of hearsay. There is no indication of whether the state bears the burden of presenting evidence to counter specific contentions made on the juvenile's behalf, particularly on the issue of the availability of treatment at the juvenile court level.

In the only published appellate opinion thus far available for a case arising under the new transfer statute, the court of appeals rejected the contention that the juvenile court judge was obligated to receive evidence on the specific factors listed in the statute. In *People v. Banks*[146] the fifteen-year-old defendant, who had been convicted of armed robbery, argued that his transfer hearing had been improper because the court had no evidence before it regarding two of the statutory standards: whether facilities were available within the juvenile system for his treatment and rehabilitation, and whether his best interests required prosecution as an adult. The appeals court noted that under the statute, the courts were simply required to "consider" the enumerated factors, not to take evidence on them.

> There is no specific requirement that detailed evidence be taken on each, nor does the statute direct the judge to weigh factors in a certain manner or achieve some predesigned balance. . . . We do not read the statute to require the judge to consider evidence beyond his own knowledge of available facilities and his conclusion as to the effectiveness of treatment of the particular minor in these facilities.[147]

That the 1973 transfer provision has largely substituted the unchecked discretion of the judge for

[145] A stout defense of the view that the presumption in favor of juvenile court treatment must be clearly rebutted before juvenile jurisdiction may properly be waived is found in Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968). Judge Bazelon wrote:

> "The essential scheme of the Juvenile Court Act is . . . that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases." [citation omitted] The divide between the Juvenile Court with its promise of non-punitive rehabilitation and the harsher world of the District Court is one not lightly to be crossed . . . .
>
> Since the presumption of the statutory framework is that juveniles are to be treated as juveniles, the "full investigation" required before waiver to the adult court must explore all the possible dispositions short of waiver by which the "welfare [of the child] and the best interests of the District" [citation omitted] . . . may be secured . . . . The trial judge in even an adversary criminal trial has a responsibility to protect the administration of justice. [citation omitted] . . . Far more is this true under the Juvenile Court Act, where the *parens patriae* principle which justifies some tempering of the adversarial nature of the process reinforces the duty of the judge to insure that the child receives the full benefits promised by the statutory scheme.

Id. at 1278–79.

[146] 29 Ill. App.3d 923, 331 N.E.2d 561 (1975).

[147] *Id.* at 926, 331 N.E.2d at 563.

that of the prosecutor seems to be further substantiated by the actual manner in which the transfer hearing is conducted. A report of the Chicago Law Enforcement Study Group,[148] based upon a study of transfer proceedings in Cook County in 1973, contained a description of a typical juvenile court transfer hearing under the new statute.

The hearing begins with an inquiry into probable cause (criterion 1), based upon the testimony of a police officer. Frequently the arresting officer does not personally appear—an investigator delivers an account of probable cause, which is largely based upon hearsay. Then a court official reads into the record an account of the juvenile's prior brushes with the law (criterion 4: "prior history"). The judge will next ask questions of the probation officer, concluding by inquiring whether the officer knows of any "facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor" (criterion 5), and whether the officer has "an opinion as to whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority" (criterion 6).[149] At this point the state's case is usually concluded and counsel for the juvenile presents witnesses on behalf of his client. The report observed that in many instances, only character witnesses are called to testify on the juvenile's behalf, and character witnesses may only testify to his reputation in the community. Occasionally experts will testify as to their views of the juvenile's mental health and amenability to juvenile rehabilitation. At the close of the evidence the juvenile court judge rules on the prosecutor's motion to transfer. It is merely granted or dismissed. An explanation of the decision or a statement of reasons is not offered.

The study group concluded that although the proceeding is "loosely structured around the six criteria specified in the statute,"[150] "the manner of consideration of each criterion is so superficial that there is no basis for a meaningful transfer decison."[151] To illustrate the superficial quality of the evidence, the report noted that consideration of the child's past history is routinely limited to a simple recitation of his juvenile court record. Evidence regarding the availability of treatment and rehabilitation through the juvenile court is generally not presented by psychologists or other trained personnel familiar with the operations of such programs and facilities, but is instead elicited through the conclusory opinions of a probation or parole officer who generally lacks the professional training and expertise to answer this question knowledgeably or meaningfully.[152]

The fundamental due process issue in juvenile transfer is not whether or what particular standards the legislature might prescribe to guide the process of judicial decision-making. The ultimate issue is whether the judge's ruling is based upon facts and findings which establish that the decision was meaningfully made. This cannot be assured by statutory standards alone. The standards can best serve only to augment more basic procedural guarantees.

The issue of statutory standards confronted the Supreme Court of Michigan in the case of *People v. Fields*.[153] Since 1939 the Michigan Probate Code[154] had provided that where a minor was accused of having committed a felony, the probate judge "after investigation and examination"[155] could waive jurisdiction over the minor and order him to be transferred to stand trial in a court of general criminal jurisdiction. Fields challenged the constitutionality of the provision on the grounds that it contained no standards to guide the judge in the exercise of his discretion. Although the statute was upheld by both the trial court and the court of appeals,[156] the state supreme court struck down the provision in 1972.

The court concluded that by allowing certain juveniles to be excluded from the "beneficent processes and purposes of the juvenile courts,"[157] the legislature was in effect treating certain members of

[148] STUDY GROUP REPORT, *supra* note 104, at 54–59.

[149] *Id.* at 56.

[150] *Id.* at 54.

[151] *Id.* at 57.

[152] *Id.* at 58.

[153] 391 Mich. 206, 216 N.W.2d 51 (1954).

[154] In Michigan, juvenile jurisdiction is vested in the county probate court, and legislation relevant to such jurisdiction is contained in the Michigan Probate Code.

[155] At the time, the appropriate statutory provision read:

> In any case where a child over the age of 15 years is accused of any act the nature of which constitutes a felony, the judge of probate of the county wherein the offense is alleged to have been committed may, after investigation and examination, including notice to parents if address is known, and upon motion of the prosecuting attorney, waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offense.

[Mich.] Pub. Acts 1944, no. 54 [1944] (Ex. Sess.) *as amended by* [Mich.] Pub. Acts 1946, no. 22 [1946] (Ex. Sess.) (amended 1969 and 1972).

[156] People v. Fields, 30 Mich. App. 390, 186 N.W.2d 15 (1971).

[157] 388 Mich. 66, 77, 199 N.W.2d 217, 222 (1972).

the class of juveniles differently from others of the same class. Therefore, the court held that

> the Legislature must establish suitable and ascertainable standards whereby such persons are to be deemed adults and treated as such subject to the processes and penalties of our criminal law.[158]

On rehearing, the court affirmed its earlier decision.[159] However, a thoughtful and well-reasoned dissent was filed by Justice Charles Levin. The dissent agreed with the majority that the issue before the court was one relating to the proper exercise of discretionary power. There was a "need to formalize criteria outlining an ordered structure within which discretionary power may be exercised."[160] In the absence of an articulated set of criteria for transfer decision-making, none of the participants in the judicial process could be certain of the grounds on which the decision was to be based.

The thrust of the dissent, however, was that the absence of *legislative* guidelines did not render the statute *per se* unconstitutional. In Justice Levin's view, the larger significance of *Kent* was not to be found in the Supreme Court's concern for standards in decision-making, but rather in the fundamental emphasis which the Court had placed upon

> the importance of judicial review and the need for a supportive record and for specific, not *pro forma,* fact finding as safeguards against haphazard or arbitrary decision making.[161]

The dissent considered these requirements to be fairly well met under the challenged Michigan transfer procedures. First, appellate review of transfer decisions was statutorily available in Michigan.[162] Second, state procedural rules required that a statement by the judge of the facts and reasons prompting his decision had to accompany a transfer order.[163] Regarding standards for decision-making, Justice Levin observed that the Michigan juvenile court judiciary, over a fifty year period of experience with the transfer process, had developed criteria to be applied in arriving at transfer decisions. These judge-made criteria had come to be law themselves in the sense that, "like the rules of the common law, [they] were handed down from one judge to another."[164]

The dissent concluded that the statutory enumeration of standards, standing alone, "will not eliminate errors in human judgment and in decision making."[165] Legislatively established standards were not a sufficient procedural protection against "the arbitrary exercise of power and unjustified discrimination in its administration."[166] The issue at the heart of juvenile transfer was one of judicial discretion, and Justice Levin found that:

> The primary safeguards against abuse of discretion by . . . judges . . . are the rights to an evidentiary hearing after proper notice, to representation by counsel and to judicial review upon a transcribed record of the judge's decision elucidated with a statement of facts found and reasons for decision.[167]

Michigan procedures incorporated these due process safeguards, and criteria for decision-making had been developed by the judiciary over a fifty-year period of experience in juvenile transfer proceedings. The dissent concluded that there was therefore nothing unsound in the Michigan transfer statute, and that it was not constitutionally imperative that legislative standards be included in the provision.

This reasoning suggests that the enumeration of statutory standards for judicial decision-making is not in itself an adequately protective guarantee against procedural arbitrariness in juvenile transfer proceedings. The essential protection against arbitrary judicial decision-making is appellate review, and, to assure meaningful review, provision for a judicial statement of reasons. Where a decision is left in the hands of a single judge, the possibility of ap-

[158] *Id.*

[159] People v. Fields, 391 Mich. 206, 216 N.W.2d 52 (1974).

[160] *Id.* at 225, 216 N.W.2d at 58.

[161] *Id.* at 242, 216 N.W.2d at 66.

[162] An order waiving juvenile jurisdiction is appealable by right to the circuit court. MICH. COMP. LAWS § 712A.22 (1973).

[163] MICH. JUV. CT. R. 11.6 provides:

> If a waiver order is issued such order shall be accompanied by or include a written statement of the court setting forth findings forming the basis for entry of the order.

[164] During the years . . . before this case arose, many requests for waiver of jurisdiction were considered by the probate judges of this state. Out of their decisions criteria developed for the exercise of this power. Those criteria, like the rules of the common law, were handed down from one judge to another. In this manner the criteria so developed came to be law. This is the process by which the common law (and indeed a great amount of statutory law, so much of which is assimilative of the common law) was formed.

391 Mich. at 235, 216 N.W.2d at 62 (Levin, J., dissenting).

[165] *Id.* at 251, 216 N.W.2d at 70.

[166] *Id.*

[167] *Id.*, 216 N.W.2d at 71.

pellate review becomes an "all-important element in the decision making process." [168] Where there is no appellate review from a judicial decision, "the judge becomes a monarch from whose ruling—good, bad or indifferent—there is no recourse." [169]

Unlike their Michigan counterparts, juvenile court judges in Illinois have not had decades of prior experience in making transfer decisions. To this end, the formulation of criteria by the legislature may indeed have been particularly appropriate in Illinois. The Illinois legislature, however, has actually provided only one of the necessary components in the package of procedural measures which protects against arbitrariness in the juvenile transfer process. Criteria to guide the exercise of judicial discretion are essentially of little value unless they serve to complement the availability of appellate review.

Starting with *People v. Jiles*[170] the Illinois Supreme Court consistently held that appellate review of transfer decisions was not available in Illinois, and that, as a consequence, no statement of reasons needed to be provided to explain the decision to transfer. This rationale continued to be reiterated by the appellate courts as they refuted subsequent constitutional challenges to the 1967 transfer statute.[171]

These prior decisions are completely undercut by the 1973 transfer statute. The new statute, by removing the transfer decision from the hands of the prosecutor and resting it with a juvenile court judge who is charged with conducting an investigation and hearing, has effectively eliminated the fundamental justification for the denial of appellate review. Because transfer is now a judicial decision, appellate review must now be made available to assure against the unchecked exercise of judicial discretion.

Although a transfer order is "final" in the sense that it spells a complete termination of all statutory benefits and protections accorded under juvenile court jurisdiction, it is not considered to be a "final order" of the circuit court as a whole. A transfer order works only a lateral removal from one division to another within the same court. Since the transfer order cannot be a final order, direct appeal prior to the commencement of criminal court proceedings is not available. Under the new statute, however, the transfer order now represents the ruling of a judge of the juvenile division of the circuit court. Therefore, on an appeal from a subsequent criminal conviction, the transfer order is as open to challenge as the rulings made by the judge who presides at the trial in the criminal division. Although admittedly unwieldy and hardly as expeditious as may be desired,[172] under the 1973 statute opportunity for appellate review on the merits of a transfer order is for the first time available in Illinois.

The holding of the United States Court of Appeals for the Seventh Circuit in the *Bombacino* case is similarly undercut. The federal appellate court had ruled that due process did not require a statement of reasons in transfer proceedings in Illinois. Heavy reliance in *Bombacino v. Bensinger*[173] was placed upon the *Jiles* court's conclusion that there could be no appellate review of a decision based upon prosecutorial discretion. Since the old statute "confined [the judge] to supervising the exercise of prosecutorial discretion," denial of a statement of reasons was not considered fundamentally unfair because of the limited nature of the role of the judiciary "in this case."[174] Where the judiciary is now accorded full decision-making authority under the new statutory provision, a "different case" is presented, and *Bombacino* cannot control. The very language of *Bombacino* appears to imply that due process safeguards are in fact required where transfer is a matter for

[168] *Id.* at 216, 216 N.W.2d at 53. The language is taken from the opinion of the court.

[169] *Id.* at 216–17, 216 N.W.2d at 53.

[170] *See* text accompanying notes 111–14 *supra*.

[171] *See* text accompanying notes 115–34 *supra*.

[172] It may be questioned whether this delayed form of appellate review is sufficiently protective of a minor's right to the protective benefits of the Juvenile Court Act. Without the availability of direct appeal from a transfer order, a juvenile who is transferred by reason of a mistaken or arbitrary decision will not be able to secure review until *after* he has been exposed to criminal court jurisdiction. This issue has arisen in connection with discussions of a recent Ohio decision, *In re* Becker, 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974). In *Becker* the Ohio State Supreme Court held that there could be no direct appeal from a transfer order in Ohio because a transfer order was not considered to be a final appealable order. (The court placed heavy reliance on Justice Schaefer's *Jiles* opinion in arriving at its decision.) In a note critical of the *Becker* decision, a commentator suggested that forcing a juvenile to wait to obtain appellate review until after he has been convicted in criminal court goes against the entire purpose of having a separate juvenile court system. Such a delayed form of appellate review, it was argued, is not sufficiently protective of a minor's right to the advantages accorded him under the Juvenile Court Act. Without the availability of direct appeal from a transfer order, a juvenile who is transferred by reason of mistake or arbitrariness is unable to secure review until after he has been compelled to confront the very system and procedures from which juvenile jurisdiction seeks to shield him. Note, *Juvenile Court and Direct Appeal from Waiver of Jurisdiction in Ohio,* 8 AKRON L. REV. 499, 518 (1975).

[173] *See* text accompanying notes 124–34 *supra*.

[174] 498 F.2d at 879.

judicial decision: "procedural safeguards would not be constitutionally required *unless the state elected to provide for judicial participation*...." [175] The Illinois legislature has now provided for such participation by the judiciary.

With appellate review available, it becomes imperative that the reviewing court be able to review. It should not be "remitted to assumptions" [176] regarding the facts and reasons which entered into the judge's decision to issue a transfer order. Nowhere in the Illinois transfer process is provision made for a statement of reasons to accompany a juvenile court transfer order. Without it, procedural protection against the abuse of judicial discretion cannot be deemed to be adequate.

There are several possible options which may be utilized to cure this defect in the Illinois transfer procedure. The legislature, of course, can specifically amend the statute to include a provision requiring a judicial statement of reasons. State procedural rules could be set forth which would require that a statement of reasons accompany all transfer orders. [177] Or perhaps, as in the District of Columbia, [178] the juvenile court judges themselves could agree on a set of guidelines which would require that a statement of reasons for transfer to be provided.

The situation, however, could well be rectified by judicial decision. In *Kent* the statutory standard of "full investigation" was interpreted as requiring a hearing and a judicial statement of reasons to assure meaningful appellate reivew of transfer determinations within the District of Columbia. Under the present Illinois statute, the judge is similarly charged with conducting an "investigation," as well as a hearing, and there is an opportunity for appellate review. It may well be argued that the current procedure in Illinois now stands in such close proximity to that of the District of Columbia that the full range of *Kent* safeguards must logically be extended.

Conclusion

In light of *Breed v. Jones* [179] a transfer hearing may not become a full evidentiary hearing inquiring into the juvenile's guilt or innocence. The transfer decision therefore must necessarily be based upon the informed discretion of the juvenile court judge. Whether juvenile jurisdiction is waived or retained, the proceedings which follow a transfer hearing may well result in a deprivation of liberty. The fact that a transfer hearing is an intermediate step towards the possible end cannot justify according it a lower level of procedural protection than exists in either deliquency proceedings or adult criminal processes.

Two separate interests are represented in every transfer hearing: the interests of the minor and the interests of society. The transfer hearing determines whether the minor must forfeit the considerable advantages and protections that are his as a matter of right under the Juvenile Court Act. It has been noted that the precise nature of society's interest in juvenile transfer is often not recognized for what is truly is: that what lies behind the transfer decision is not a scientific determination of whether a youth can respond to juvenile treatment but rather "society's insistence on retribution or social protection." [180] In the final analysis transfer represents a confrontation between the juvenile's statutory right to be treated as a juvenile, and the right of society to be protected from him. Given the grave importance of these two interests, it becomes imperative that a transfer determination comport with recognized standards of procedural regularity to insure against the possibility of arbitrariness and abuse.

The Illinois transfer statute, though a well-meaning attempt to bring the state's transfer procedure into conformity with the requirements endorsed by the United States Supreme Court in *Kent v. United States*, has not gone far enough to assure an adequate level of procedural protection. The primary advance over the former statutory provision lies in the fact that transfer in Illinois is now a matter for judicial decision based upon investigation and hearing. Under the present procedure, however, the hearing may well be reduced to a recitation of the statutory list of criteria to be considered in decision-making. The criteria themselves are very loosely defined. There is no statutory obligation for detailed evidence to be taken on the individual criteria. The state is under no burden to refute specific evidence which might be presented on the juvenile's behalf regarding his amenability to juvenile court treatment. As written, the statute accords virtually unchecked discretion to the juvenile court judge.

Review of the juvenile court judge's transfer

[175] *Id.* at 877 (emphasis added).

[176] *See* note 62 *supra*.

[177] This is the procedure adopted in Michigan. *See* note 163 *supra*.

[178] *See* the policy memorandum of the District of Columbia juvenile court, discussed in text accompanying notes 71–73 *supra*.

[179] *See* text accompanying note 96 *supra*.

[180] Task Force Report, *supra* note 15, at 24.

decision, though cumbersome, is now available for the first time in Illinois. But the statute does not provide that a statement of reasons must accompany the judge's transfer order. Without such a statement of reasons, the reviewing court may well be reduced to making assumptions regarding the bases for the transferring judge's decision. In light of the fact that under the Illinois procedure appellate review may not come until several years after the initial transfer determination, it becomes all the more imperative that the juvenile court judge's reasons for transfer be clearly and timely expressed.