

5-15-1980

A Rationale For The Abolition Of The Juvenile Court's Power To Waive Jurisdiction

John Gasper

Daniel Katkin

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#), [Jurisdiction Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

John Gasper and Daniel Katkin *A Rationale For The Abolition Of The Juvenile Court's Power To Waive Jurisdiction*, 7 Pepp. L. Rev. Iss. 4 (1980)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol7/iss4/6>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

A Rationale For The Abolition Of The Juvenile Court's Power To Waive Jurisdiction

JOHN GASPER*
DANIEL KATKIN**

The juvenile court's power to waive jurisdiction which entails the transfer of juvenile offenders to adult courts presents a topic of longstanding controversy. Its rationale, one of protection of the public, has been labeled by the authors as untenable. Moreover, it is asserted that waiver of jurisdiction in such cases contravenes the very cornerstone of the juvenile court process—the doctrine of parens patriae. Three methods of transfer are seen to exist—legislative, prosecutorial, and judicial. Focusing on the latter, the authors posit an argument advocating the abrogation of the concept of waiver. Justification for this proposition is seen to flow from a presently inadequate and inappropriate adult system. It is theorized that the integration of juvenile offenders into the adult process produces adverse labeling, and enhances the likelihood of physical and emotional trauma. Additionally, it is suggested that requiring juvenile courts to hear cases that would otherwise be transferred would eliminate arbitrary decision-making in that regard, and would facilitate the diversion of status offenders to forms of treatment other than institutionalization.

I. INTRODUCTION

The development of the juvenile court was originally based on the belief that children were not totally responsible for their behavior and therefore those who violated the criminal law de-

* B.A., 1971, University of Pittsburgh; M.S., 1974, Indiana State University; Ph.D. candidate in the Justice Component of the Community Systems Planning and Development Program, Pennsylvania State University.

** B.A., 1965, City College of New York; J.D., 1968, Columbia University; Diploma in Criminology, 1969, University of Cambridge, England; Associate Professor and Program Head for the Administration of Justice Program, Pennsylvania State University.

served to be treated more benignly than adult offenders. The 19th Century "child savers," distressed by the retributive nature of the adult justice system, envisioned a therapeutic system to deal with children who broke the law.¹ Within the next thirty-five years, all but two states—Maine and Wyoming—enacted legislation to establish juvenile court systems.² The justification for this "revolutionary" development was the *parens patriae* doctrine which asserts that misbehaving children, lacking maturity and an adult sense of responsibility, ought to be helped rather than punished by society so that the child might be put "on the right path which leads toward good adult citizenship."³

Humane therapeutic treatment was to be the operational precept of juvenile justice. However, the sad reality is that the implementation of juvenile justice has been fairly characterized as an "affront to human dignity,"⁴ and the juvenile courts themselves as "more awesome in the abuse of power than the Star Chamber."⁵

Nonetheless, even the most outspoken critics of juvenile justice systems would probably agree that a misbehaving youngster is better off in a juvenile court than in the adult criminal justice system. Juvenile justice systems: 1) shield the youth from publicity; 2) protect against the consequences of adult conviction such as the loss of civil rights and disqualification for employment in the public sector; 3) limit confinement pending and subsequent to adjudication; and 4) establish a preference for treatment within the community.⁶

The "protection" of the juvenile court is not extended, however, to all children who run afoul of the criminal law. Juvenile courts have always had the power to exclude certain youths from the status "delinquent," and to have them prosecuted as adult crimi-

1. See, e.g., A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); and Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187-1239 (1970) [hereinafter cited as Fox].

2. See Handler, *The Juvenile Court and The Adversary System: Problems of Function and Form*, 1965 *WIS. L. REV.* 7.

3. J. MACK, *The Chancery Procedures in the Juvenile Court*, in *THE CHILD, THE CLINIC, AND THE COURT*, (J. Addams ed. 1927) [hereinafter cited as MACK].

4. *Senate Comm. on the Judiciary Subcomm. to Investigate Juvenile Delinquency*, 92d Cong., 1st Sess., May 3-18, 1971 (remarks by Sen. Bayh) [hereinafter cited as Bayh].

5. R. POUND, *FOREWARD TO YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY* xxvii (1937).

6. See *Kent v. United States*, 383 U.S. 541, 556-57 (1966).

nal defendants. This procedure, known as "waiver of jurisdiction"⁷ is critically important to the juvenile involved. When the crime is serious, it could mean the difference between being tried in a court that could impose a period of institutionalization not to exceed the duration of the offender's minority, or a court which can order life imprisonment or even execution. In *Kent v. United States*,⁸ the Supreme Court noted that a youth charged with rape in the District of Columbia actually faced such widely disparate sentencing options. The Court commented on the significance of waiver and required (more than a year before the landmark decision in *In re Gault*⁹) that decisions to waive jurisdiction be made in compliance with the following due process standards: 1) a formal hearing with the youth, represented by an attorney, who has the right to examine the court records upon which the waiver decision is made; 2) the right to cross examine the authors of the pre-sentence report; and 3) the right to notification of the court's decision.¹⁰

Unfortunately, there is reason to fear that the reforms prescribed in the *Kent* and *Gault* decisions have been imperfectly implemented. Evidence of arbitrary procedures and idiosyncratic decision-making in waiver of jurisdiction hearings still abounds.¹¹ In recent years, the professional literature has contained several proposals for additional reforms of the waiver process. Most of these proposals focus attention on developing criteria and establishing procedural safeguards.¹² This paper recommends the abo-

7. Other terms for this procedure include "transfer," "fitness," "certification," "referral," and "remand."

8. *Kent v. United States*, 383 U.S. 541, 554 (1966).

9. *In re Gault*, 387 U.S. 1 (1967).

10. *Kent v. United States*, 383 U.S. at 557-63.

11. See, e.g., CAL. DEPT. OF JUSTICE, DIV. OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, JUVENILE JUSTICE ADMINISTRATION IN CALIFORNIA 32-33 (1974), in which it is reported that in California 666 cases were transferred to adult court in 1974. Los Angeles County accounted for 19 cases (3%) of the total transfers. San Diego County, with a population less than 1/4 of Los Angeles County transferred 288 cases or 43% of the total. See also Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 SANTA CLARA LAW. 595 (1977).

12. For an analysis of immediate appellate review of waiver decisions, see Sorrentino & Olsen, *Certification of Juveniles to Adult Court*, 4 PEPPERDINE L. REV. 497, 519 (1977) [hereinafter cited as Sorrentino & Olsen]; Stamm, *Transfer of Jurisdiction in Juvenile Court*, 62 KY. L. J. 122 (1973) [hereinafter cited as Stamm]. For the issue of amenability to treatment in juvenile court see Browne, *Guidelines for Statutes for Transfer of Juveniles to Criminal Court*, 4 PEPPERDINE L. REV. 479, 493 (1977) [hereinafter cited as Browne]; Comment, *Juveniles in the Criminal Courts: A Substantive View of The Fitness Decision*, 23 U.C.L.A. L. REV. 998, 1010 (1976);

lition of the practice of sending young offenders to the adult justice system. Waiver of jurisdiction should be prohibited for three reasons: 1) the logic of the *parens patriae* philosophy suggests that society has an obligation to all children, not only those whose misbehavior is minor; 2) the waiver process is so inherently discretionary that arbitrary decision-making seems inevitable; and 3) the abolition of waiver by requiring juvenile justice systems to work with serious delinquents will generate pressure for the diversion of status offenders and delinquents (whose offenses are comparatively minor) to Youth Service Bureaus, Child Welfare agencies or other diversionary programs.¹³ It is appropriate to first present the traditional rationale for permitting waiver proceedings and the different approaches used among American jurisdictions. This discussion will be followed by a development of the arguments for eliminating waiver of jurisdiction.

II. THE RATIONALE FOR PERMITTING WAIVER OF JURISDICTION

Some youth offenders are thought to be either so dangerous that the community must be protected from them or so intractable that it is wasteful to expend the limited resources of the juvenile justice system on their care and treatment. Conventional wisdom holds that such youngsters should be treated as adult offenders.

The most potent justification for waiving children to adult criminal courts is the protection of the public. A national survey of juvenile courts has found that 64.7% of the respondents cite seriousness of the offense and protection of the public as primary justifications for waiver of jurisdiction.¹⁴ Waiver is viewed by some as a method of transferring (presumably) dangerous youngsters to courts which are capable of effecting long term incapacitation and which have not abandoned retribution and deterrence as purposes of justice.

Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U. L. REV. 604 (1972). For judicial views of waiver criteria see Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juveniles and Criminal Courts: A Policy Statement*, 8 CRIME & DELINQUENCY 3 (1962); CHILDREN'S BUREAU, U.S. DEPT. OF HEW, TASK FORCE REPORT 78 (1966); PENN. JOINT COUNCIL ON THE CRIMINAL JUSTICE SYSTEM, *THE TRANSFER OF JUVENILES TO ADULT COURT IN PENNSYLVANIA*, 23-24 (1978) [hereinafter cited as PENNSYLVANIA COUNCIL].

13. See, e.g., N. SHERWOOD, *THE YOUTH SERVICE BUREAU—A KEY TO DELINQUENCY PREVENTION* (1972). See also R. GEMIGNANI, *Youth Service Systems Diverting Youth from The Juvenile Justice System*, 36 FEDERAL PROBATION 4, 48 (1976), which devoted the entire issue to the concept of diversion from the juvenile justice system.

14. R. SARRI & R. VINTER, *National Assessment of Juvenile Corrections Project*, in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 134 (1975) [hereinafter cited as SARRI & VINTER].

A second justification for waiving jurisdiction is derived from the limited resources of juvenile justice systems. While comparatively few in number, truly dangerous and/or intractible youngsters require costly security measures¹⁵ which are incompatible with the programs of the juvenile justice system. Providing custody and treatment to these juveniles would require a re-allocation of resources away from programs for less serious delinquents who are presumably more likely to reform. Also, if allowed to participate in the same programs as the majority of youth offenders, those more serious delinquents might, through their bad influence, "contaminate" the less serious offenders.¹⁶

It is worth noting at this point that these justifications for the waiver process are based on a cluster of assumptions, some of which are questionable and others which are clearly specious. It is unclear, for example, whether youngsters sent to trial as adult offenders actually receive longer terms of incarceration than the juvenile courts might have imposed. An adjudicated delinquent can be confined until the end of his minority, which is typically two to six years for an "older" delinquent; very few first-time adult offenders (which would be the status of a child waived to criminal court) receive longer sentences. A study of youths waived by juvenile courts in Pennsylvania reveals that in 1977, only 24% (n = 67) of the total "waiver" population (n = 279) were sentenced to adult correctional institutions. An additional 23% (n = 64) of these youths were sentenced to a county jail (ordinarily for a short term); an equal number (64) were placed on probation or some form of community-based supervision.¹⁷ While the study fails to indicate either the length of sentences or the specific offenses for a given disposition, this tantalizing bit of evidence suggests that punishments imposed by criminal courts on youthful offenders are less severe than proponents of waiver realize.

Furthermore, there is no plausible basis to hypothesize that the

15. In 1974, the national average cost per offender year for state juvenile institutions was \$11,675. The 1974 national average costs per offender year for state related community based residential programs was \$5,501. See R. VINTER, G. DOWNS and J. HALL, *JUVENILE CORRECTIONS IN THE STATES: RESIDENTIAL PROGRAMS AND DEINSTITUTIONALIZATION—A PRELIMINARY REPORT* (1979).

16. This historical antecedent of this concern for the welfare of other less serious juvenile offenders can be traced back to the House of Refuge, established in 1824, which *denied* admission to youths who could not be rescued so as to prevent them from "contaminating the saving process." See Fox, *supra* note 1, at 1190.

17. Nearly 20% (n = 57) of the dispositions were unknown, pending, or at large. PA. COUNCIL, *supra* note 12, at 21.

waiver of a small number of youth offenders to the criminal courts might contribute to general deterrence. One need merely note how little evidence exists to support the proposition that capital punishment, which is more drastic than waiver of jurisdiction deters crime.¹⁸ Many experts believe that deterrence can only be achieved when the imposition of punishments is comparatively certain.¹⁹ And, since few cases actually result in waiver of jurisdiction, it seems unlikely that many potential offenders are intimidated by the possibility. For example, only nine out of 242 substantiated cases of rape in Pennsylvania in 1975 resulted in waiver to the adult criminal courts.²⁰

The central assumption upon which the justifications for permitting waiver of jurisdiction are based is that it is possible to distinguish accurately between ordinary delinquents and the truly dangerous and/or intractable. Unless this distinction can be proven, the waiver process will inevitably be arbitrary and unfair. This alleged distinction is examined below.

III. WAIVER PROCEEDINGS; THE INEVITABILITY OF CAPRICE AND ERROR²¹

There are three types of waiver by which jurisdiction over a juvenile can be transferred to a criminal court: 1) legislative; 2) prosecutorial; and 3) judicial.²²

A. Legislative Waiver

In thirteen jurisdictions certain serious offenses are excluded from the jurisdiction of the juvenile court by statute.²³ In Pennsylvania, for example, a youth charged with homicide, regardless of age, must be prosecuted in the criminal court.²⁴ In New York, fourteen and fifteen year olds charged with crimes ranging from

18. See, e.g., J. GIBBS, *CRIME, PUNISHMENT & DETERRENCE*, (1975).

19. Advocates of determinate sentencing for adults argue that the certainty of punishment is more important as a deterrent than the severity of punishment. See THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976). See also Geerken & Grove, *Deterrence: Some Theoretical Considerations*, 9 L. & SOC'Y. REV. 497 (1975).

20. PA. DEPT. OF JUSTICE, *PENN. JUVENILE COURT DISPOSITIONS 1975*, 16 (1976).

21. *Title Borrowed from C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

22. Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L. J. 583, 596 (1968) [hereinafter cited as Schornhorst]. It was Schornhorst who first coined the terms "judicial" "legislative" and "prosecutorial" to describe the three forms of waiver.

23. Arkansas, Colorado, Delaware, District of Columbia, Florida, Indiana, Louisiana, Maryland, Mississippi, New York, North Carolina, Pennsylvania, West Virginia. See SARRI & VINTER, *supra* note 14, at 135.

24. 42 PA. CONS. STAT. § 6302 (1978).

attempted kidnapping and burglary to rape and murder are automatically prosecuted in criminal, rather than family court.²⁵ On its face, this method of determining jurisdiction appears to assure equity by limiting the possibilities for discretionary decisionmaking. There is always the possibility, however, that the purposes of such legislation may be subverted when the original charges are being filed. It is even possible, for example, that a youth may be allowed to plea bargain in order to remain within the jurisdiction of the juvenile court.

B. Prosecutorial Waiver

In Arkansas, Nebraska and Wyoming²⁶ prosecutors have the option of filing charges against a youth in either juvenile or criminal court. This form of waiver presumes that the prosecutor's office²⁷ can effectively and impartially determine which youths should be tried and punished as adults. There is reason to fear that the po-

25. Effective 9/1/78, the New York Legislature amended the Penal law, Family Court Act and the Criminal Procedure Law to enact the most encompassing legislature waiver procedure in the country. Under New York Law a youngster in the following age brackets who commits the offenses designated below, must be waived according to listed statutory sections:

<u>AGE</u>	<u>OFFENSE</u>	<u>SECTION OF PENAL LAW</u>
13-15	Murder 2°	125.25 PL
14-15	Assault 1°	120.10 PL
		Subsections 1 & 2
14-15	Manslaughter 1°	125.20 PL
14-15	Rape 1°	130.35 PL
		Subsections 1 & 2
14-15	Sodomy 1°	130.50 PL Subsections 1 & 2
14-15	Kidnapping 1°	135.25 PL
14-15	Burglary 1°	140.30 PL
14-15	Burglary 2°	140.25 PL Subsection 1
14-15	Arson 1°	150.20 PL
14-15	Arson 2°	150.15 PL
14-15	Robbery 1°	160.05 PL
14-15	Robbery 2°	160.15 PL
14-15	Attempted murder 2°	
	Attempted Kidnapping 1°	110.00 PL

26. T. VEREB, *WAIVER/TRANSFER/CERTIFICATION OF JUVENILES TO A CRIMINAL COURT*, NATIONAL CENTER FOR JUVENILE JUSTICE, (1978).

27. For a general description of the prosecutor's office, see G. COLE, *POLITICS AND THE ADMINISTRATION OF JUSTICE* 111 (1978). For an organizational analysis of the prosecutor's office see J. EISENSTEIN and H. JACOB, *FELONY JUSTICE* 45-48 (1977).

litical nature of the prosecutor's office coupled with the lack of procedural safeguards associated with this method of waiver will result in arbitrary and/or unfair decisions. It is a political fact of life that prosecutors must be concerned with their conviction rates. Therefore, there is the possibility that they might be inclined to waive cases to criminal court when their evidence is strong, and leave them in the juvenile court when their evidence is weak. Prosecutorial waiver decisions are particularly susceptible to political pressure (district attorneys generally run for reelection more often than judges) and pressure from the police with whom prosecutors must maintain cordial working relations.²⁸

C. Judicial Waiver

The most prevalent form of waiver rests the power to determine jurisdiction in the juvenile court.²⁹ National differences abound with regard to age and offense criteria used in this form of waiver. In some states, the juvenile court cannot waive jurisdiction over very young offenders,³⁰ however nine states³¹ set no minimum age at which a youth may be waived to adult court. Other states limit waiver to felonies,³² however, many have no such stipulation.³³ In this scheme, waiver of jurisdiction is a matter for the juvenile court's discretion, and there is reason to believe that the exercise of such considerable discretionary power will inevitably result in unjustifiable inequities which will now be examined.

Numerous studies suggest that the philosophy of the judge is the paramount determinant of juvenile court operations.³⁴ In

28. See, e.g., J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 199 (1966). According to Skolnick, the police can influence the prosecutor, because as one former prosecutor phrased it, "It is hard to say no to a cop." See also R. EMERSON, *JUDGING DELINQUENTS* 42-45 (1970).

29. See, e.g., Browne, *supra* note 12, at 481; Schornhorst, *supra* note 20 at 597; Sorrentino & Olsen, *supra* note 12, at 504; Stamm, *supra* note 12, at 140.

30. SARRI & VINTER, *supra* note 14, at 134; Sorrentino & Olsen, *supra* note 12, at 503-05. Some updating was necessary to ensure accuracy.

The minimum age at which a child can be waived to adult court is 13 in Illinois and Mississippi, 14 in Alabama, Colorado, Connecticut, Florida, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, and Utah; 15 in District of Columbia, Georgia, Louisiana, Michigan, Ohio, Texas and Vermont.

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

32. District of Columbia, Hawaii, Idaho, Michigan, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, and Utah. *Id.*

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

34. See, e.g., V. STADETON & L. TEITELBAUM, *IN DEFENSE OF YOUTH*, (1972); and Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 1 CRIM. L. BULL. 544.

those states not regulated by statute it sometimes happens that a particular judge finds certain types of crimes especially odious and waives youths accused of such crimes to the criminal courts when other juvenile court judges would have been willing to retain jurisdiction.³⁵ Furthermore, it may be that conservative "law and order" judges tend to waive youths with greater frequency than their more liberal counterparts.³⁶

As judges are not completely insulated from political pressure, there are circumstances under which a judge may feel compelled to waive a delinquent to criminal court to demonstrate responsiveness to the public's alarm and fear about youthful crime.³⁷ Pressures of this type are occasionally exacerbated by media campaigns. *New York Magazine*, for example, ran a cover story entitled *How Fifteen-Year-Olds Get Away With Murder*,³⁸ which argued that the leniency of family courts had precipitated an epidemic of youthful violence by fostering the attitude that the authorities are unable or unwilling to respond to youthful misconduct.

There are also interorganizational pressures. The police, whose cooperation is often needed by the juvenile court (and who are often perceived collegially as co-participants in the administration of justice by judges) sometimes argue vociferously against "saving" law-breakers by treatment as juveniles.³⁹ Probation officers

35. See, e.g., R. EMERSON, *JUDGING DELINQUENTS* 12 (1969) [hereinafter cited as Emerson]; See also Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 1 CRIM. L. BULL. 544 (1971) [hereinafter cited as Duffee & Siegel]; V. STAPLETON & L. TEITELBAUM, *IN DEFENSE OF YOUTH* (1972) [hereinafter cited as STAPLETON & TEITELBAUM]; Canon & Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. OF FAM. L. 300 (1978) [hereinafter cited as Canon & Kolson].

36. The authors are led to this speculation by interviews with several judges and casual perusal of data from The Pennsylvania Juvenile Court Judges Commission.

37. See, e.g., Sargent & Gordon, *Waiver of Jurisdiction: An Evaluation of the Process in The Juvenile Court*, 9 CRIME & DELINQUENCY 121 (1963). Sargent and Gordon contend that when children commit violent crimes, strong community pressure is brought to bear on the judge to send the child to criminal court. The judge, who may be made an ex-judge by the electorate, is not always able to resist this pressure.

38. Pileggi, *How Fifteen-Year-Olds Get Away With Murder*, *NEW YORK*, June 13, 1977, at 36. See also, Morgan, *They Think I Can Kill Because I'm 14*, in D. KATKIN, D. HYMAN and J. KRAMER, *DELINQUENCY AND THE JUVENILE JUSTICE SYSTEM* (1976) [hereinafter cited as KATKIN, HYMAN & KRAMER].

39. Emerson found that the juvenile court is susceptible to pressure from law enforcement agencies. The juvenile court must maintain a good working relationship with the police to divert inappropriate cases, reciprocity demands that the ju-

also argue for waiver in some cases. There is evidence which links these stances by policemen and probation officers to the demeanor of the youth: contemptuous youngsters are likely to be perceived as hard-core delinquents who need (or deserve) harsh treatment.⁴⁰

There is even evidence to suggest that administrative convenience is sometimes the basis for a decision to waive jurisdiction.⁴¹ Even more alarming is the evidence that judges sometimes initiate waiver proceedings in order to discipline or embarrass defense attorneys whose vigorous advocacy exceeds the norms developed by proponents of *parens patriae*.⁴²

It is clear that systems of justice based on discretionary power are invitations to arbitrary and capricious decision-making which result inevitable, it seems, in inequitable disparities in the imposition of punishments.⁴³ Indeed, that was precisely the concern underlying the Supreme Court's decision in *Kent v. United States*⁴⁴ which held that waiver hearings must incorporate due process safeguards. However, fifteen years after that decision, barely half of the states have legal guarantees of probable cause hearings before waiving jurisdiction.⁴⁵ Further, the National Assessment of Juvenile Corrections found that only fourteen states routinely hold such hearings.⁴⁶ Studies of the implementation of the Supreme Court's *Gault* decision which ordered the infusion of due process safeguards into delinquency proceedings, corroborate the view that the juvenile justice system is reluctant to abandon its discretionary powers.⁴⁷

venile court acts as a "back up agency" if so requested. See EMERSON *supra* note 35, at 39.

40. See, e.g., A. CICOUREL, *THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE* 220 (1968). See also, EMERSON, *supra* note 35, at 125.

41. See, e.g., Keiter, *Criminal or Delinquent: A Study of Juvenile Cases Transferred to the Criminal Court*, *CRIME & DELINQUENCY* 528, 534 (1973). Keiter found that in Cook County, Illinois the administrative efficiency of keeping companion cases together where a hardened recidivist juvenile offender was involved with a juvenile who had a negligible prior record, frequently led to the transfer of both cases.

42. See, e.g., STAPLETON & TEITELBAUM, *supra* note 35; Canon & Kolson, *supra* note 35; DUFFEE & SIEGEL, *supra* note 35.

43. See, e.g., FAIR AND CERTAIN PUNISHMENT, *supra* note 19.

44. *Kent v. United States*, 383 U.S. 541 (1966).

45. According to the National Assessment of Juvenile Corrections Project, as of Jan. 1, 1972 only 27 states have statutory guarantees of a hearing before transfer: Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Minnesota, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming. SARRI & VINTER, *supra* note 14, at 135.

46. *Id.* at 134.

47. See, e.g., STAPLETON & TEITELBAUM, *supra* note 35; DUFFEE & SIEGEL, *supra* note 35; Canon & Kolson, *supra* note 31; Sprowls, *Discretion and Lawlessness*, (1979) (unpublished doctoral dissertation at Pennsylvania State University).

The reform efforts of the past thirteen years suggest that it may be impossible to devise a system for waiving jurisdiction which is not likely to result in discretionary and unfair decisions. That is one good reason to abolish waiver. There are two others: 1) society's *parens patriae* attitude of responsibility to help troubled children and 2) the possibility of facilitating other desirable reforms in the administration of juvenile justice.

IV. *PARENS PATRIAE* AND THE ABOLITION OF WAIVER

The elegance and humanity of the *parens patriae* concept made it attractive to the turn-of-the-century reformers who created the first juvenile courts. Julian Mack (one of the first juvenile court judges) put it nicely:

There is a . . . [fine and noble] legal conception hidden away in our history that . . . [should be] involved for the purpose of dealing with the youngster that has gone wrong. That is the conception that the State is the higher parent; that it has an obligation, not merely a right, but an obligation, toward its children; and that is a specific obligation to step in when the natural parent, either through viciousness or inability, fails so to deal with the child, that it no longer goes along the right path that leads to good sound adult citizenship.⁴⁸

Implicit in the *parens patriae* doctrine is the belief that delinquents are created by environmental conditions. Even though the theory that criminality is an inborn characteristic was forcefully argued by academic criminologists at the turn of the century, the reformers refused to accept that criminals are born; rather they saw delinquency as evidence of parental failure to provide a sufficiently loving and properly stimulating environment.⁴⁹ Society, they argued, ought to help rather than punish children who are in trouble, because it is society's responsibility to provide a healthful environment in which youth may be raised. Because juvenile delinquency is an outgrowth of society's failure to so provide, it is inappropriate for society to then punish youth offenders. *Parens patriae* was the central principle from which a host of social reformers argued for the creation of children's courts and therapeutic justice.⁵⁰

However great the criticism of modern juvenile justice systems may be, the moral argument for special regenerative care and

48. MACK, *supra* note 3, at 311-12.

49. See, e.g., Fox, *supra* note 1.

50. These reformers include Jane Addams, Julia Lathrop, Julian Mack, and Ben Lindsay. See, e.g., KATKIN, HYMAN & KRAMER, *supra* note 38, at 249-80.

treatment for misbehaving youngsters is as strong today as it was at the turn of the century. If the proposition that delinquency is a product of social conditions has not been proven by social science, neither has it been disproven. If, as a people, we believe that children can be shaped and molded, then it is still appropriate to view delinquency as a call for help rather than a justification for punishment. To the extent that is true, there can be no ethical justification for distinguishing between more and less serious delinquents. If society has an obligation to provide for the care of its children, that obligation ought to extend to all children—even and (perhaps particularly) to those who are serious problems for society. Waiver of jurisdiction is fundamentally at odds with the philosophy on which the existence of juvenile justice systems is based.

Furthermore, the consequences of waiver are likely to be physically and/or emotionally destructive to the youth involved, and thus to the community as well. The only dispositional alternatives not available to the juvenile courts are the county jails and maximum security correctional institutions. This is due to the tremendous potential for exploitation of youthful offenders by adult inmates,⁵¹ given the inmate social systems emphasis on possessing and exercising coercive power.⁵² The effects of institutionalization on adult inmates have been well documented,⁵³ thus the effects on youths may be presumed to be similar, if not more marked. Integrating youthful offenders into a county jail⁵⁴ or adult prison environment cannot achieve anything worthwhile.

Considerations of this nature may not be sufficient in their own right to justify the abolition of the practice of waiving jurisdiction. The argument becomes more potent, however, when we recall the inevitability of capriciousness and arbitrary decision-making inhering in the process through which youngsters will be selected for such destructive treatment. An additional argument will now

51. See, e.g., R. KORN & L. McCORKLE, *CRIMINOLOGY AND PENOLOGY* 525 (1959).

52. For an account of the horrible conditions in one urban jail, see A. DAVID, *Sexual Assaults in the Philadelphia Prison Systems*, in *CORRECTIONS: PROBLEMS AND PERSPECTIVES* 64-75 (D. Peterson & C. Thomas eds. 1975).

53. See e.g., E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES*, (1961); G. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1971); D. CLEMMER, *THE PRISON COMMUNITY*, (1966).

54. The Report of the President's Task Force on Prisoner Rehabilitation called the common jail "the most glaringly inadequate institution on the American correctional scene." *REPORT OF THE PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION* (1970).

For an analysis of jails generally, see R. GOLFARB, *JAILS: THE ULTIMATE GHETTO* (1976). See also R. MCGEE, *OUR SICK JAILS*, 35 *FEDERAL PROBATION* 3 (1971).

be developed: the abolition of waiver will encourage other needed reforms in the administration of juvenile justice.

V. THE ABOLITION OF WAIVER WILL FACILITATE THE DIVERSION OF PETTY OFFENDERS

During the past twenty years juvenile justice systems have been subjected to scathing denunciations by journalists, scholars, judges, politicians, administrators, and concerned citizens.⁵⁵ Between 1965 and 1971 the constitutionality of juvenile court procedures received four major challenges. On three occasions the Supreme Court held that the rights of children were being violated.⁵⁶ For example, in *Kent v. United States*, Mr. Justice Fortas observed that:

[t]here 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.⁵⁷

Institutions for delinquents have been characterized as cruel and ineffective places not only by liberal critics of the juvenile justice system but also by respectable journalists and mainstream politicians.⁵⁸ Concern about the inadequacy of juvenile justice systems has been intensified with the growing acceptance of positions derived from the labelling theory—namely, that the imposition of stigmatizing labels such as “delinquent” may propagate deviant self-concepts and exacerbate patterns of law-breaking behavior.⁵⁹ As Milton Luger, a prominent juvenile justice administrator put it: “too many. . . [delinquents] get worse [while] in our care.”⁶⁰

55. See, e.g., H. JAMES, *CHILDREN IN TROUBLE: A NATIONAL SCANDAL*, [hereinafter cited as JAMES]; Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal*, 53 J. OF CRIM. LAW, CRIMINOLOGY AND POLICE SCI. 226 (1972); O. KETCHAM, *The Unfulfilled Promise of The American Juvenile Court*, in *JUSTICE FOR THE CHILD* (M. Rosenheim ed. 1962); L. RICHETTE, *THE THROWAWAY CHILDREN*, (1969) [hereinafter cited as RICHETTE].

56. *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juveniles do not have a right to a jury trial in juvenile court).

57. 383 U.S. at 555-56.

58. See JAMES, *supra* note 55; RICHETTE, *supra* note 55; Bayh, *supra* note 9.

59. On the labeling interactionist perspective see generally, E. LEMERT, *SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* (1951); H. BECKER, *OUTSIDERS STUDIES IN THE SOCIOLOGY OF DEVIANCE*, (1963); K. ERIKSON, *WAYWARD PURITANS* (1966). For an analysis of the labeling perspective as applied to the juvenile justice system, see E. SCHUR, *LABELING DEVIANT BEHAVIOR* (1971); E. SCHUR, *RADICAL NONINTERVENTION* (1973).

60. See JAMES, *supra* note 55.

Those concerns, that juvenile justice is unfair, ineffective, and sometimes cruel and counter-productive have fueled a recent interest in diverting minor offenders away from the potentially stigmatizing and injurious processes of juvenile courts. In almost all jurisdictions, professionals are planning and attempting to implement diversionary programs designed to divert young offenders away from the formal processes of juvenile justice systems. Books, monographs, articles, and research reports about diversion are inundating periodical literature.⁶¹ The National Advisory Commission of Criminal Justice Standards and Goals was sufficiently convinced of the worth of diversionary programs to suggest that the rate of delinquency cases coming to court should be reduced by fifty percent between 1973 and 1983.⁶² The Federal Juvenile Justice and Delinquency Prevention Act of 1974⁶³ denies federal funds to state programs which do not take steps to remove "status" offenders from detention centers and reform schools. Yet juvenile courts are permitted to arbitrarily transfer their more serious cases to the criminal courts, while still displaying considerable enthusiasm for intervening in the lives of petty offenders (with whom, no doubt, it is much more pleasant to work).

The focus of contemporary reform movements is to keep children out of the juvenile justice system so as to protect them from stigmatization and other criminogenic influences. The abolition of waiver is compatible with this goal. If juvenile courts cannot waive jurisdiction, the system will be forced to deal with serious offenders, and fewer resources will remain available for status offenders and youths guilty of other comparatively minor transgressions. Thus, the abolition of waiver may be an effective way to create pressure within juvenile justice systems to rid themselves of youngsters who ought to be diverted.

VI. CONCLUSION

Whatever rhetoric may be used to justify the waiver of juveniles to adult criminal courts, the major purpose of such a strategy can only be to protect the public from presumably dangerous offenders. Yet there is clear evidence that many waived

61. See, e.g., R. CARTER & M. KLEIN, *BACK ON THE STREET: THE DIVERSION OF JUVENILE OFFENDERS* (1976); and KATKIN, HYMAN & KRAMER, *supra* note 38. Journal articles on diversion include: Bullington, *A Critique of Diversionary Juvenile Justice*, *CRIME & DELINQUENCY* (1978); Kelly, Schulman & Lynch, *Centralized Intake and Diversion*, 27 *JUVENILE JUSTICE* 3 (1976); Cole, *Diversion and the Juvenile Court: Competition or Cooperation*, 27 *JUVENILE JUSTICE* 33 (1976). See also, 22 *CRIME & DELINQUENCY* 393-498 (1976).

62. See, e.g., NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *A NATIONAL STRATEGY TO REDUCE CRIME* 23-25 (U. S. Gov't. 1973).

63. Pub. L. No. 93-415.

juveniles are comparatively minor offenders; and there is substantial reason to speculate that many serious offenders are acquitted because of stricter enforcement of due process standards in the criminal courts. In addition, those convicted may be treated leniently as first time adult offenders, thus actually undermining the safety of the public. Furthermore, it is all too likely that decisions to waive juveniles will inevitably be the result of arbitrary and capricious processes.

The fact that the criminological literature contains many calls for the reformation of waiver processes indicates that these problems are well recognized by professionals and scholars. This paper has demonstrated that none of the plans thus far offered for reform are adequate to resolve these problems. Because the problems associated with waiver are so serious and the prospects for reform so bleak, it is submitted that the best strategy to be pursued by advocates of fair, equal, and effective juvenile justice is the abolition of the practice of waiving jurisdiction to criminal courts.

In addition, it should be noted that waiver of jurisdiction is incompatible with the philosophy of juvenile justice, which holds that misbehaving children ought to be helped rather than punished. Sending a child to adult penal institutions can hardly be therapeutic for him, nor is it likely to be constructive to the community to which he will eventually return.

Finally, the abolition of waiver may force juvenile justice systems to work with difficult youngsters and thus create pressure for the diversion of minor offenders. There is reason to believe that this would be beneficial for all juvenile offenders.

