Trial of Juveniles as Adults Under the Illinois Criminal Code

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INTRODUCTION

Since 1899, cases involving juveniles accused of crimes have generally been excluded from the jurisdiction of the criminal courts in Illinois. Section 702-7(1) of the Illinois Juvenile Court Act of 1965 provides that:

> Except as provided in this Section, no boy who was under 17 years of age or girl who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of the State or for violation of an ordinance of any political subdivision thereof. (Illinois Statutes Ch. 37 §702-7(1))

Under this statute, if a juvenile is alleged to have committed an act which would be a crime if committed by an adult, a delinquency petition is filed in the juvenile court, and the case is tried by the juvenile court judge in accordance with the special procedures outlines in the Juvenile Court Act. No criminal complaint or indictment is filed in the criminal court.

There are, however, three exceptions to this general rule. Section 702-7(5) provides that a juvenile, with the consent of counsel, may choose to waive juvenile jurisdiction and be tried as an adult in the criminal court. Section 702-7(2) provides that a juvenile accused of traffic or fish and game violations or other violations punishable only by fine may be prosecuted in the criminal courts for those

violations. And finally, Section 702-7(3) provides that a juvenile of thirteen years of age or older accused of violating a state law may be tried as an adult in the criminal court if the state's attorney so decides. Under this third exception, the state's attorney's decision is final unless the juvenile court judge objects and successfully "appeals" his loss of jurisdiction to the chief judge of the circuit court. The juvenile may not oppose the transfer if the juvenile court judge fails to object.[1]

If the state's attorney decides to prosecute the juvenile as an adult as authorized by this statute, the consequences for the juvenile are quite serious. The juvenile may be incarcerated with adults pending trial, he loses the confidentiality of juvenile court procedure and obtains a public arrest record which may affect his chances of employment even if he is acquitted by the ciminal court. If the juvenile is convicted, he faces the possibility of a longer sentence and the loss of certain civil rights.

[1] Section 702-7(3) reads as follows: "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 court 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 case is a bar to criminal proceedings based upon the conduct alleged in the petition."

On the basis of Section 702-7(3), the juvenile court in Cook County waives jurisdiction over approximately 85 juveniles each year.[2] As a result, these juveniles are tried as adults. The purpose of this research project was to examine the entire juvenile transfer process in three respects: (1) the actual practice, (2) the statute, and (3) alternatives to the present practice. The three parts of this paper correspond to these areas.

Part I describes the transfer procedure as it exists in Cook County. From the limited information available to the public, we tried to survey cases of youths who were transferred to criminal court and to examine the standards and legal procedure behind the decision to transfer. We discovered that practice in Cook County differs significantly from that outlined in the statute in that the juvenile court judge plays almost no role in the decision-making process.

Part II examines the transfer statute and the case law interpreting it to determine why the judge assumes such a minimal part in the transfer procedure. We examined the original statute and its peculiar interpretation in the courts and then the present statute with its extraordinary "appeal"

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[2]Estimate supplied by Assistant State's Attorney Maurice Dore. An additional ten or fifteen juveniles each year are transferred on their own motion. According to Mr. Wenzell of Legal Aid's Juvenile Court Branch, these cases generally involve minor offenses which the Public Defender believes will be dismissed out of hand by the Boy's Court. This project was not concerned with these transfers.

procedure. We decided that the principle reasons for the non-participation of the judges in the transfer decision are the absence of standards for the decision and the failure of the statute to guide a judge in prosecuting his objection. We concluded that these defects probably leave the statute unconstitutional.

Part III of this paper therefore examines some possible alternatives to the present Illinois procedure which might alleviate the problems shown in Part I and Part II.

PART I - PRACTICE IN COOK COUNTY UNDER THE PRESENT STATUTE

Initially we attempted to examine each of the cases transferred during the past two years to determine the age and race of the juvenile, the alleged offense, type of counsel, grounds for transfer and the ultimate disposition in the criminal court. This approach proved unsuccessful due to the refusal of the state's attorney's office at juvenile court to provide access to the necessary information. The assistant state's attorney at juvenile court keeps the only list of all juvenile cases which have been transferred to the criminal court. Although the Illinois statutes provide that the names of juveniles who have been transferred to the criminal court under Ch. 37, §702-7(3), are not confidential,[3]

[3]Illinois Revised Statutes, Ch. 37 §702-8(3) states:

> The records of law enforcement officers concerning all boys under 17 and all girls under 18 must be maintained separate from the records of arrests and may not be open to public inspection or their contents disclosed to the public except by order of the court or when the institution of criminal proceedings has been permitted under Section 2-7 . . . (emphasis added).

the chief assistant state's attorney at Juvenile Court, Maurice Dore, refused to release the list to us or to Judge McGury of the juvenile court.

Attempts to locate alternative sources proved unsuccessful. The juvenile court clerk's office apparently records the cases among dismissals of delinquency petitions, thus mixing them with hundreds of dismissals for other purposes. Neither the public defender nor the criminal court clerk's office keeps a record of which cases are transferred from the juvenile court. The ages of individuals who have been indicted are not necessarily recorded until they are sentenced, making discovery of transferred juveniles from the ordinary court files impossible. The records kept at the jail, which do include age, are confidential. Thus access to complete information on juveniles tried as adults proved impossible without the state's attorney's cooperation.

As a result, the sources used to analyze the decision to try juveniles as adults in Cook County were limited to the results of interviews, observation of one waiver hearing, newspaper clippings and the criminal court files of cases which came to the attention of the press.

Interviews

Interviews were conducted with Assistant State's Attorney Maurice Dore, Judge John McGury, acting Presiding Judge of the Juvenile Court, Lewis Wenzell of Legal Aid's juvenile court office, a staff member of the Citizen's

Committee on the Juvenile Court and Mrs. Jill McNulty of the staff of the Illinois Committee on the Diagnosis and Evaluation of Criminal Defendants. These people described the transfer procedure without major contradiction.

The decision to transfer a juvenile to criminal court is made by the state's attorney's office at juvenile court. This decision is made shortly after the juvenile's arrest (usually before the first court appearance) and is based on whatever facts are available, principally the police reports. The state's attorney is not allowed to speak with the juvenile and receives no reports from social workers or probation officers. The usual case for transfer is the serious felony directed against the person - many of the transferred cases involved juveniles accused of murder. The juvenile's prior record (or lack of same) or prospects for rehabilitation are not determinative. The standard used by the state's attorney's office appears to be the seriousness of the alleged offense.

An assistant state's attorney files a motion with the juvenile court "to find that it has no objection to the removal of this cause. ..." This motion is supported by three principal allegations: (1) that there is a delinquency petition pending against the named minor; (2) that the minor is thirteen years of age or older; and (3) that the delinquency petition alleges commission of acts which constitute crimes under Illinois state law. There may be additional allegations about the juvenile's prior record or adult co-defendants.

A hearing is held on this motion before a juvenile court judge.[4] According to Lewis Wenzell of Legal Aid, this hearing is often perfunctory; he said neither the attorney for the juvenile nor the juvenile court judge really knows the standard against which the state's attorney's decision is to be measured, and the outcome of the hearing is relatively certain. Judicial objection is not a serious obstacle to transfer.[5] If the judge fails to object, the juvenile has no right to object or to appeal.

According to Maurice Dore of the State's Attorney's office, the most important consequence of transfer to criminal court is that the juvenile is given a felony record. When asked about longer sentences given adults, he stated that neither the length of the sentence nor the place of detention are particularly important factors in his decision, because the juvenile will be sent to the Illinois Youth Commission (now a part of the Department of Corrections) if he is convicted. The same agency processes juveniles who

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4 Motions to quash criminal indictments filed with the criminal court and appellate cases indicate that there have been transfers in the past without hearings in the juvenile court.

5 In fact, Mr. Wenzell told us that he believed there had been only two instances of objections by the juvenile court judge since the present statute was enacted: in the first instance, the juvenile court judge's objection was overruled by Chief Judge Boyle, and in the second instance, the juvenile court judge's objection was withdrawn.

who have been declared delinquent in the juvenile court. None of those interviewed, however, including the state's attorney, believed that access to the procedural advantages of the criminal court (most notably to the right to a jury trial) outweighed the disadvantages of a felony record and the risk of lengthy incarceration.

Observation of a Hearing

The "waiver hearing"[6] which we observed followed the pattern described in the interviews. The three juveniles involved were charged in the delinquency petition with the murder of a cabdriver. All three were black and about age 16. A fourth youth, aged 17, was in adult custody.

The facts as alleged by the state were that the four youths had decided to rob a taxicab. Two of them stood guard down the block while the other two (one juvenile and the adult) tried to hail a cab. The cab drove on by, and the adult fired a shotgun as it passed, killing the driver. The three juveniles were accused of murder under the felony-murder rule.

The state's presentation at the waiver hearing consisted of this account of the facts as related by a homicide

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[6]The term "waiver hearing" is the name which is generally used for hearings on the issue of transferring a juvenile to criminal court. The "waiver" apparently refers to the judge's waiver of jurisdiction, not to any voluntary waiver of juvenile status by the juvenile.

detective, and the reading of each youth's juvenile record. In addition, the state's attorney stated that it would be more convenient for the state to try these juveniles with their adult co-defendant.

Two of the three juveniles were represented by private counsel. The third was represented by the public defender. The public defender objected to the hearing on the basis of Kent v. United States, infra, page 16, but he acknowledged that the state claimed Kent was not law in Illinois. Neither attorney had any success at blocking the transfer.

The three juveniles had completely different records of referrals to the juvenile court: the public defender's client had been referred twice and had had both charges dismissed; the first of the private attorney's clients had a record of ten referrals, many for violent crimes, and two "social orders" (delinquency findings), both of which had been stayed; the second of the private attorney's clients only had two referrals, one of which resulted in a social order which had also been stayed. Yet despite these disparate records (the subject of lengthy argument by the public defender on behalf of his client), and despite their different roles in the crime as alleged by the state, jurisdiction over all three youths was waived by the judge.

In addition to dismissing the delinquency petition (clearing the way for a criminal indictment), the judge, at

the request of the state, revoked the stay of the social orders on the prior offenses for the two juveniles represented by the private attorney. This action effectively placed those two juveniles in custody for their prior acts so that they would not be released on bond by the adult court. This argument for revoking the stays was made by the state's attorney.

The police officers who had attended the hearing had warrants for the juveniles with them, and the three were transferred from the Audy Home to Cook County Jail the same day.

The proceeding which the author observed had seven obvious problems: (1) the lack of objective standards for the decision; (2) the apparent predisposition of the court to allow the state's motion to transfer; (3) the lack of differentiation between individual juveniles; (4) the lack of differentiation when examining the juvenile's record between referrals to juvenile court which had been dismissed and referrals resulting in social orders; (5) consideration of illegitimate factors in deciding to transfer such as convenience to the state of single trial with an adult co-defendant; (6) request for vacating prior stay of mittimus in order to prevent bond at criminal court; and (7) automatic transfer of the juveniles to Cook County jail.

Survey of Cases

Although a complete analysis of what happens after a juvenile is transferred was rendered impossible by the state's attorney's decision not to release the list of juveniles, the author was able to compile a list of the names of eighteen juveniles transferred in 1969 and 1970 from newspaper accounts of murders and crimes involving juveniles in Chicago. The criminal court files in seventeen of these cases were examined to determine what happened once the juvenile reached criminal court. The file in the other case was not available.

The following table gives the results of that survey:

Age (at the time of alleged offense)	13 years:	2
	14 years:	0
	15 years:	9
	16 years:	6
Race:	White:	1
	Black:	15
	Puerto Rican:	1
Charge:	Murder:	13
	Aggravated Battery; Attempted Murder:	2
	Intimidation:	2
Months in jail prior to trial or bond:	1 month :	1
	2 months:	1
	3 months:	7
	4 months:	0
	5 months:	3
	6 months:	1
	7 months:	0
	8 months:	1
	9 months:	1
	Uncertain:	2

Disposition:	Plea of guilty; reduced charge:	2
	Plea of guilty; same charge:	1
	Bench trial, found guilty:	2
	Jury trial found guilty:	2
	Total convicitions	7
	Dismissal of Charges:	4
	Bench trial, found not guilty	2
	Jury trial, found not guilty	2
	Total Acquittals or Dismissals	8
	Pending	2

Sentences (of the seven convictions):

Murder:	14-15 years (bench trial) 14-16 years (bench trial) 30-60 years (jury trial)
Voluntary Manslaughter:	1-5 years (jury trial, white defendant) 1-10 years (plea guilty)
Aggravated Battery:	1-3 years (plea guilty)
Intimidation:	3 years probation, 90 days time served (bench trial)

Although these figures are admittedly incomplete, it would appear that the juvenile, once transferred to criminal court, enters the same bargain-style criminal justice system which applies to adults. As a result it appeared in one of the cases that a 13-year old had to weigh the relative merits of a jury trial for attempted murder as compared to a bench trial for attempted murder as compared to a plea of guilty to aggravated battery, and then add in the effect of his choice on sentencing. Another 13-year old, who sought a jury trial and was eventually acquitted, went through the agony of the state's deliberation on whether or not it would seek the death penalty. These episodes are a far cry from the policy of the

Juvenile Court Act expressed in Section 701-2(2):

> "This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court."

The cases of juveniles tried as adults which are available for public scrutiny would lead one to believe that the state's attorney's conviction rate (less than 50%) is not particularly good in these cases. This low conviction rate can only be the product of inadequate screening of cases during the transfer procedure. When one considers the length of time that these youths were incarcerated prior to trial (an average of over four months) and the serious consequences of a felony arrest record, one must question the propriety of allowing the state's attorney's office to remove a youth from the protection of the Juvenile Court Act with no opportunity for him to object and no real judicial supervision.

In addition, one is forced to question whether the fact that sixteen out of seventeen of the juveniles who were transferred were non-white means that being black or of Spanish descent increases a juvenile's chances of being sent to criminal court and ultimately of being sentenced for a longer period of time.

PART II - THE STATUTE

The obvious difference between the procedure for transferring juveniles in Cook County and that set out by the

Illinois statute is that the juvenile court judge abstains from taking an active role in the decision-making, leaving the decision within the absolute discretion of the state's attorney.

This difference is caused by two main factors: (1) out-dated judicial interpretations of the statute, and (2) the lack of explicit guidelines in the statute for the procedure and grounds for objection by the judge. These two factors have resulted in the problem shown in the observed hearing and the survey of cases, that is, the uneven application of the law.

The Origin of the Present Illinois Waiver Statute

The peculiar decision-making process provided in this statute, with its turnabout of the roles of judge and state's attorney (the state's attorney decides and the judge objects and "appeals") is the product of a legislative compromise after the state's attorneys in Illinois insisted that they had always had the power to decide which juveniles should be subject to the jurisdiction of the juvenile court. This misconception stemmed from out-dated judicial interpretations of the prior transfer statute.

The original juvenile court act passed in 1899 did not include a waiver provision. The jurisdictional portions of the act provided that in counties with a population greater than 500,000 the judges of the circuit court should designate

one circuit court judge to hear all cases arising under the juvenile court act, including petitions involving delinquent children (Illinois Statutes 1903, Ch. 23, §171). A delinquent child was defined to include:

> "Any child under the age of sixteen (16) who violates any law of this State or any city or village ordinance ..." (Ch. 23 §169).

The juvenile court act went on to require that justices of the peace or police magistrates transfer cases involving children who were under 16 years of age to the juvenile court (Ch. 23 §178).

These provisions did not, however, entirely eliminate the practice of indicting juveniles for crimes and trying them as adults. In 1904, T. D. Hurley, in a pamphlet entitled "Juvenile Courts and What They Have Accomplished," quoted Assistant State's Attorney Howard O. Sprogle:

> "The effect of the Juvenile Court upon the number of cases coming before the Criminal Court is very patent," explained Mr. Sprogle. "About 2,000 cases a year are handled by Judge Tuthill of children between the ages of ten and sixteen. Of this number, perhaps ten or twelve a year are sent to the Grand Jury by Judge Tuthill for indictment for the purpose of having them sent to Pontiac, when that institution seems to be the proper place for them. These ten or twelve cases which invariably come to the Criminal Court from Judge Tuthill's court and from no other sources, are the only cases of youthful criminals handled by the Grand Jury. It would be safe to say that 200 cases a year less are handled by the Grand Jury since the existence of the juvenile court than came under its notice before the

new law went into effect."[7]

Apparently these indictments after waiver of juvenile jurisdiction were not challenged, but in 1907 an amendment was added to the Juvenile Court Act making the practice of trying juveniles as adults a formal alternative to juvenile court treatment as delinquents. This amendment, the predecessor to the present waiver section, stated that:

> "[t]he court may in its discretion in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this State governing the commission of crimes or violations of city, village, or town ordinance. In such case the petition filed under this act shall be dismissed." (Illinois Statutes 1908, Ch. 23 §177a, 1963 Statutes, Ch. 23 §2014.)

This amendment, which would appear to radically change the scope of mandatory juvenile jurisdiction, passed without controversy or even mention in the newspapers, a fact which must be explained by the existence of a de facto practice of trying some juveniles as adults at the time it was passed.

A common sense reading of the waiver statute passed in 1907 would lead one to believe that the decision to waive jurisdiction over a juvenile was to be made by the juvenile court judge (as was the practice when the statute was passed). The Illinois Supreme Court did not, however, interpret this statute in that manner. In People v. Fitzgerald, 322 Ill. 54, 152 N.E. 542 (1926), the Illinois Supreme Court

[7] Publication of the Visitation and Aid Society, January, 1904, p.30.

decided that Section 177a only applied to juveniles who had already been judged delinquent and that either the juvenile court or the criminal court had jurisdiction over a juvenile who had not yet been judged delinquent. On this theory, the court upheld the criminal conviction of a juvenile who had never been referred to the juvenile system.

In 1935, when faced with the waiver problem in two cases involving juveniles who had previously been judged delinquent, the Supreme Court changed its stance. The court declared that the juvenile court could in no way limit the jurisdiction of the criminal court on constitutional grounds. The decisions in these two cases, People v. Lattimore, 362 Ill. 206, 199 N.E. 275 (1935) and People ex rel Malec v. Lewis, 362 Ill. 229, 199 N.E. 276 (1935), were based on a constitutional theory explained in a third case, People v. Feinberg, 348 Ill. 549, 181 N.E. 437 (1932). The theory behind these cases was that under the 1870 Illinois Constitution, the Recorder's Court or Criminal Court for Cook County was retained separately from the circuit courts for the county (Sections 8 and 26 of 1870 Illinois Constitution). The juvenile court was a part of the circuit court. On the basis of this constitutional distinction, the Supreme Court stated:

> "[t]he juvenile court is a court of limited jurisdiction. The legislature is without authority to confer upon an inferior court the power to stay a court created by the Constitution from proceeding with the trial of a cause jurisdiction of which is expressly granted to it by the Constitution." People v. Lattimore, 362 Ill. 206, 208-9.

The practical result of the Lattimore case was that the decision to prosecute a juvenile as an adult was left by default in the complete discretion of the state's attorney.

The logic of the Lattimore case remained the law until passage of the 1962 Judicial Amendment to the Illinois Constitution. That amendment provided for a unified court system, abolishing the constitutional distinction between the circuit and criminal courts in Cook County. In its 1963 report, the Citizens Committee on the Family Court, a committee appointed by the Executive Committee of the Circuit Court of Cook County, stated:

> "It is believed in some quarters that adoption of the 1962 Judicial Amendment to the Illinois Constitution has put to rest the rule of the Lattimore case. This would mean that henceforth the Judge of the Family Court (not the State's Attorney). will determine whether that Court will exercise jurisdiction over a juvenile offender or, in the judge's discretion, in serious instances transfer the case for prosecution as a criminal case. This change is long overdue and would be consistent with the intent of our Family Court Act when initially adopted."[8]

However, the reversion of power to the juvenile court judge failed to materialize and the practice of allowing the state's attorney to decide who was to be prosecuted as an adult continued even after the 1962 Judicial Amendment.

In 1965, the present Juvenile Court Act was proposed to the Illinois Legislature. The original House Bill included

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[8]Report of the Citizens Committee on the Family Court, pp.33-35, July 1963

a new version of the waiver statute in an effort to return the waiver decision to the judge:

> "(3) If a petition alleges commission by a minor 16 years of age or over of an act which constitutes a crime under the laws of this State and the court after investigation 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. If criminal proceedings so permitted 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 case is a conclusive indication that the court has determined that no criminal proceedings shall be permitted." (74th General Assembly, House Bill 513.)

This statute would have made two substantial changes. First, it would have raised the age of possible criminal responsibility from thirteen to sixteen. And second, it would have placed the final decision on waiver of juvenile jurisdiction with the juvenile court judge.

The Cook County State's Attorney at that time, Daniel Ward, and other Illinois state's attorneys opposed the proposed Juvenile Court Act because of these two changes and one other (a section barring use of a confession made by a juvenile unless it was made in the presence of his parent, guardian, custodian or attorney). Their principal argument on the waiver statute was apparently that this decision had "always" been within the state's attorney's discretion. The Chicago Tribune,

June 10, 1965, reported that passage of the entire Juvenile Court Act had come to depend upon compromise with the state's attorneys on these issues. The result of the compromise was the present statute with the initial decision to be made by the state's attorney with a possibility of "appeal" by the juvenile court judge to the Chief Judge in the county.

The Constitutionality of the Present Illinois Waiver Statute

The 1965 statute has not yet been construed by the Illinois Supreme Court. In 1968, the Supreme Court followed the Lattimore decision in People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466, but the waiver of jurisdiction in the Hester case arose under both the pre-1962 Judicial Article and the prior waiver statute. The Illinois Appellate Court has decided one case since the 1965 Juvenile Court Act, People v. Carlson, 108 Ill.App.2d 463, 247 N.E.2d 919 (1969). In the Carlson case, the Appellate Court relied solely on Hester and Lattimore and upheld the waiver statute. This decision would appear to have been erroneous since both Hester and Lattimore were based upon the pre-1962 Judicial Article as well as the prior waiver statute.

The only reported waiver case which the Illinois Supreme Court has decided which was based on the new statute was ultimately decided on a procedural point. The case of People v. Jiles, 43 Ill.2d 145, 251 N.E.2d 529, was an appeal

from the dismissal of the juvenile court petition after the juvenile court judge failed to object to waiver of jurisdiction. The waiver statute was challenged on three constitutional grounds: first, that the two juveniles involved were denied due process in that they did not receive a judicial hearing on the question of transfer; second, that there were no standards to guide the judge or state's attorney; and third, that they were denied equal protection of the law because the waiver statute was so vague and ambiguous that men would differ in its application. The Illinois Supreme Court avoided a decision on these issues by deciding that the order dismissing the juvenile petition was not an appealable order.

The Illinois Supreme Court will probably be called upon to render a new decision on the waiver of juveniles sometime in the future. An appeal of the waiver of juvenile jurisdiction by juveniles who were tried by the criminal court is currently pending before the Illinois Supreme Court, People v. Handley, No. 43300. The Jiles decision gives some hints as to what their decision may be. In Jiles the court did acknowledge that 1962 Judicial amendment did change the underlying law from that considered in Lattimore and Hester. Yet the court acknowledged the unified court system only to support its holding that the judge's failure to object was not an appealable order. The Court also stated, in dicta, two theories in support of the present Illinois law. The first

argument was summarized by the court in a sentence:

> "... while 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." 251 N.E.2d 529, 531.

The second argument was a "what's fair for the defendant is fair for the state" argument. This argument is that since the juvenile himself is allowed to waive the jurisdiction of the juvenile court if he wants to (Ch. 37 §702-7(5)), the state must be allowed to waive it for him if it wants to (251 N.E.2d 529, 531). This argument is reminiscent of Anatole France's statement:

> "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in streets, and to steal bread."[9]

It has never been a principle of American criminal jurisprudence that the state has equal rights with the accused.

Despite the Illinois Supreme Court's maneuvering, the three serious constitutional problems surrounding the entire transfer proceeding which were raised in Jiles remain: (1) the lack of an adequate hearing upon which to base a decision to prosecute the juvenile as an adult, (2) the lack of standards to guide the state's attorney in his initial decision to ask for waiver, the juvenile court judge in his decision whether or not to object and the chief judge in his ultimate disposition,

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[9] Quoted by J. Cournos in A Modern Plutarch, p. 27 (1928).

and (3) the vagueness and ambiguity of the statute which result in uneven application of the law.

(1) The Constitutional Requirement of a Hearing

An adequate hearing is required by the due process clause of the Fourteenth Amendment to the Constitution before one juvenile may be selected out and treated differently by the State. In Kent v. United States, 383 U.S. 541 (1966), the Supreme Court of the United States reviewed the case of a juvenile in the District of Columbia who was accused of housebreaking, robbery and rape. The juvenile court judge had waived jurisdiction over Kent without an adequate investigation or a hearing and without allowing Kent's attorney an opportunity to effectively object to the waiver. The judge made no findings and gave no reasons for the waiver. The Supreme Court reversed and remanded the case in an opinion which sets forth the minimum procedural safeguards required by the Constitution: (a) if criminal charges are brought against a juvenile, the juvenile is entitled to a judicial due process hearing before the juvenile court relinquishes its jurisdiction; and (b) the juvenile court must record the reasons for its decision with sufficient particularity to permit meaningful review. The United States Supreme Court based its decision in Kent on the proposition that "there is no place in our system of law for reaching a result of such tremendous consequence without ceremony -

without hearing, without effective assistance of counsel, without a statement of reasons." 383 U.S. at 554.

While the holding in the Kent case was based on an interpretation of the District of Columbia statute, the reasoning in the case was firmly grounded in constitutional principles. The court concluded:

> "We believe that this result is required by the statute read in the context of constitutional principles related to due process ..." Kent v. United States, 383 U.S. 541, 557 (emphasis added.)

A year later in a case reviewing a state court decision, In Re Gault, the Supreme Court again emphasized that the Kent decision was based on federal constitutional principles applicable to the states:

> "Although our decision turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings." 387 U.S. 1, 12 (1967).

The quality of the hearing required by Kent was concisely described by the Indiana Supreme Court in Summers v. State, 230 N.E.2d 320, 324-25 (Ind. 1967):

> "Further we hold in accordance with Kent that the appellant Summers should have a full hearing in the Lake Juvenile Court. He should have the right to confrontation of the witnesses against him, and the right to present evidence, if any be available to him, of any circumstances that would entitle him to the benefits that might be afforded to him by the provisions of the Juvenile Act. And it is only after such hearing that a waiver and order of transfer to the Lake Criminal Court may be lawfully made."

Consistent with Kent, the Indiana Court also required a statement of the reasons for transfer:

> "sufficient to demonstrate unequivocally that the strict statutory requirement of a full investigation and hearing has been met and that a conscientious determination of the question of waiver has been made. We require that the reasons for the order of waiver should be stated with sufficient specificity to permit a meaningful review."

With substantial unanimity, state courts reviewing the question have read the hearing requirements of Kent as constitutional inhibitions when read in light of In Re Gault, that must be incorporated into the removal provisions of their own juvenile court acts. Consequently, the following states have held that a hearing is constitutionally required before a juvenile can be removed to a criminal court: Washington, Dillenburg v. Maxwell, 413 P.2d 940 (Wash. 1966); Florida, Steinhauer v. State, 206 So.2d 25 (Fla. 1967); Kentucky, Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Pennsylvania, Commonwealth ex rel. Freeman v. Superintendent of State Correctional Institutions at Camp Hill, 242 A.2d 903 (Pa.Super. 1968); Rhode Island, In Re Correra, 243 A.2d 759 (R.I. 1968); California, In Re Harris, 434 P.2d 615 (Cal. 1968)(en banc); New Mexico, Peyton v. Nord, 437 P.2d 716 (N.M. 1968); Mississippi, Hopkins v. State, 206 So.2d 841 (Miss. 1968); Tennessee, In Re Houston, 428 S.W.2d 303 (Tenn. 1968); and Nevada, Kline v. State, 464 P.2d 460 (Nev. 1970).

The Illinois Supreme Court has observed that limiting Kent to the District of Columbia "was effectively removed by the court's admonition in Gault that neither the Fourteenth Amendment nor the Bill of Rights is for adults only." In Re Urbasek, 38 Ill.2d 535, 539-40 (1968). Yet in contrast to the constitutional safeguards prescribed by Kent and Gault, Section 702-7(3) describes a confusing three-step process for determining whether jurisdiction over a juvenile 13 years or over is to be in Juvenile Court or the criminal court. The Section commences by stating, "The State's Attorney shall determine the court in which that minor is to be prosecuted," and then adds, as if it had been an afterthought, "if the Juvenile Court Judge objects" to removal "the matter shall be referred to the chief judge of the circuit for decision and disposition." Finally, if an indictment has been returned before the State's Attorney advises the juvenile court judge of his determination to proceed criminally, the Section would seem to require a dismissal of the Juvenile Court proceeding regardless of judicial objections, for it provides that "(i)f criminal proceedings are instituted, the petition shall be dismissed." (emphasis added)

When compared to the requirements of the Kent case, Section 702-7(3) falls short of the due process requirements in many vital respects. It does not give juvenile respondents a right to a judicial due process hearing on the issue of transfer. Although the Section contemplates possible objections

by the juvenile court judge, he has no duty to inquire into a proposed transfer or hear the juvenile on the question. If he chooses to hold a hearing, on his own motion or otherwise, the section clearly seems to place on the juvenile the burden of proving that the State's Attorney's determination to transfer is wrong instead of giving the State's Attorney, as the moving party, the burden of justifying transfer. If the section provides a hearing before the chief judge, which is not itself apparent, it would appear to be a hearing between the state's attorney and the juvenile court judge, held only if the latter has seen fit to take an interest in the transfer and objects to it. And it is a proceeding in which the juvenile court judge would seem to have the burden of supporting his objections to transfer, not a proceeding between the State and the juvenile with the burden on the State. Finally, the section unbalances the procedural remedies available to the state and the juvenile. If the juvenile court judge objects to transfer, the state may seek review of the issue by the chief judge of the circuit. Juveniles have no such right when the juvenile court judge fails to object. Yet, despite these shortcomings, the Supreme Court of the State of Illinois implied in the Jiles case that the requirement of these safeguards does not apply to Illinois because Illinois has an executive officer (the state's attorney) make the waiver decision rather than a judicial officer (43 Ill.2d 145, 148).

No State can so easily evade the requirements of the

process in a decision which has such far reaching effects on an individual's life and liberty as the decision to try a juvenile as an adult does. The Fourteenth Amendment applies to all aspects of state government, not simply to courts.

As Kent and Gault emphasize, a decision of such magnitude is plainly and pre-eminently a judicial one, not to be entrusted to an executive official, not even the state's attorney. It cannot be made "without ceremony - without hearing, without effective assistance of counsel, without a statement of reasons." Obviously, the state's attorney supplies none of these. As and to the extent Section 702-7(3) purports to confer judicial powers on an executive officer, it is therefore invalid. People ex rel Isaacs v. Johnson, 26 Ill.2d 268 (1963). Illinois Constitution, Art. III..

(2) The Constitutional Requirement of Standards Guiding the Exercise of Discretion

Section 702-7(3) not only improperly assigns the power to exclude juveniles from the protection of the Act, it is totally lacking in standards on which to base such exceptions from the otherwise exclusive jurisdiction of Juvenile Court. The Illinois Supreme Court has repeatedly held that a statute cannot grant such powers without standards. Thus, the opinion in Kough v. Hoehler, 413 Ill. 409, 420 (1952), states:

> "Any law which rests in the discretion of administrative officers the power to determine whether the law shall or shall not be

> enforced with reference to individuals in the same situation, without any rules or limitations for the exercise of such discretion, is unconstitutional."

And in People ex rel Duffy v. Hurley, 402 Ill. 562, 572 (1949), the Illinois Supreme Court declared:

> "It is ... a settled rule that one of the purposes of our constitution is to protect every citizen in his personal and property rights against the arbitrary action of any person or authority, and a statute which subjects any person's rights to the discretion of either without any rule or provision in the law to control the said officer or authority is a violation of due process."

Yet vagueness and the lack of standards pervades every aspect of Section 702-7(3). The same failure to define standards infects the roles of the juvenile court judge and the chief judge of the circuit. This lack of specificity renders Section 702-7(3) unlawful for it is the "general rule" that "a statute which requires the performance of an act in terms so uncertain and puzzling that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application transcends due process of law." People ex rel Duffy v. Hurley, 402 Ill. 562, 573 (1949). See People v. Yonker, 351 Ill. 139 (1933).

(3) The Constitutional Requirement of Equal Protection in the Application of a Law

The failure of Section 702-7(3) to provide a rational procedure and standards for the transfer decision necessarily means that the section provides no rational basis for

discriminating between juveniles 13 and over who receive the benefit of Juvenile Court and those who do not. The result is a denial of equal protection. Since there are no consistent standards to govern the decision of the State's Attorney, the juvenile court judge, and the chief judge, the officials who fill these roles and their successors may place substantially different interpretations on the meaning of this section. It is probable, then, that Section 702-7(3) will be applied differently to juveniles who are similarly situated; for uneven application is concomitant with unguided and arbitrary conduct.

The possibility of uneven application itself violates the Equal Protection Clause because it is the rule that "any law which vests in the discretion of administrative (or judicial) officers the power to determine whether the law shall or shall not be enforced with reference to individuals in the same situation, without any rules or limitations for the exercise of such discretion, is unconstitutional." Kough v. Hoehler, 413 Ill. 409, 420 (1952).

PART III - ALTERNATIVES

In Illinois, the decision whether to prosecute a juvenile as an adult or a juvenile is made by the state's attorney. The juvenile himself may not challenge this decision directly. The juvenile court judge may not block the state's attorney's decision without an appeal to the chief judge.

The peculiar state of the law in Illinois is more the result of accident than design. The decision to prosecute a juvenile as an adult originally rested with the juvenile court judge; but due at first to a technicality in the state constitution and then later to the state's attorney's desire to maintain the status quo, the decision went by default to the state's attorney. Under the present statute, the decision is made without an adequate hearing and in the absence of standards insuring even-handed application of the law. As a result of these defects, the Illinois waiver statute is probably unconstitutional and not salvageable by judicial interpretation. Although the Illinois Supreme Court has not yet thoroughly examined the statute with regard to these issues, it must consider the constitutional defects eventually and will probably follow the course of the other state courts which have accepted the Kent decision as binding.

However, the Illinois legislature may change the waiver statute prior to its consideration by the Illinois Supreme Court. Many alternative manners of handling the waiver problem are available.

The most obvious solution is to return to the pre-Lattimore procedure under which the judge rather than the state's attorney makes the decision to transfer. This is the type of statute many states have enacted. The Council on the

Diagnosis and Evaluation of Criminal Defendants, authorized by the Illinois General Assembly, has drafted this type of waiver provision as a part of its proposed code of corrections for Illinois.

The final version of the statute proposed by the Council reads:

> "(3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a felony under the laws of this State and, on motion of the state's attorney, the court 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. An order under this Section is a final appealable order. If criminal proceedings so permitted 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."

This statute would be a considerable improvement over the present statute in that it provides for an investigation and a hearing, a decision by the juvenile court judge before initiation of any criminal prosecution, and an appeal directly from the juvenile court judge's order.

However, the problems of vagueness and the lack of standards remain in the proposed amendment. These problems

might be rectified by judicial interpretation along the lines of Kent and other lower court decisions which have outlined due process requirements for the waiver hearing. However, judicial clarification is a slow and often haphazard process in comparison to drafting a comprehensive statute.

A second alternative for the legislature would be to eliminate the need for extensive judicial interpretation by incorporating the holdings of Kent and the cases which followed it into the language of the statute itself. A model statute incorporating Kent follows.

Model Illinois Waiver Statute

(3)(a) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime (felony/crime of violence?) under the laws of this State, the court may, after written notice of the time, place and purpose to the juvenile, his attorney and the two nearest relatives of the juvenile known to be within the country, hold a hearing to determine whether jurisdiction of the juvenile court under Section 2-1 and 2-7 should be waived.

(b) At the waiver hearing the court shall

(i) provide counsel if the minor is indigent or allow the minor to retain counsel,

(ii) allow the minor's attorney to examine any police, court or probation records considered by the court,

(iii) allow the minor the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine adverse witnesses.

(c) After full investigation, the court may waive jurisdiction if it finds that there are reasonable grounds to believe that

(i) the minor committed the delinquent act alleged; and

(ii) the minor is not amenable to rehabilitation as a juvenile through available facilities; and

(iii) the minor is not committable to an institution for the mentally retarded or mentally ill; and

(iv) the interest of the community require that the minor be placed under legal restraint or discipline.

(d) The offense, in itself, shall not be sufficient to support a finding of (c)(ii) above.

(e) An order of waiver shall

(i) specify the factual basis for waiver or jurisdiction, and

(ii) be considered a final order, terminating the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the petition.

(f) Taking of evidence in an adjudicatory hearing in any case is a bar to criminal proceedings based upon the conduct alleged in the petition.

Statutes such as this one have been enacted in other states[10] and proposed by the National Conference of Commissioners on Uniform State Laws in the Uniform Juvenile Court Act.[11]

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[10] See Schornhorst, "The Waiver of Juvenile Court Jurisdiction: Kent Revisited," 43 Indiana Law Review 543.

[11] Approved by the American Bar Association at its Meeting at Philadelphia, Pennsylvania, August 7, 1968.

A third alternative is to eliminate the entire problem by setting an absolute age in the definition of juvenile under which no youth may be tried as an adult. This could be done by simply repealing Section 702-7(3) altogether.

Further alternatives to these three approaches may be created by varying the age for mandatory juvenile court jurisdiction (e.g., to age 16 or 18) and the offenses which the state's attorney may transfer (only violent felonies or capital crimes). All of these alternatives should be drafted to comply with the constitutional requirements of Kent and with explicit standards to guide their application.

END