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THE WAIVER OF JUVENILE COURT JURISDICTION:
KENT REVISITED

F. THOMAS SCHORNHORST†

I. INTRODUCTION

Just as Miranda dropped Escobedo's other shoe, so did In re Gault relieve and exacerbate the apprehensions created a year earlier when the United States Supreme Court held its first "childrens hour" in Kent v. United States. Since Gault has given us so many new things to worry about, the very narrow focus of Kent—the limitations on a juvenile court's exercise of its statutory power to relinquish its jurisdiction so that certain minors may be tried as adult criminals—has been given little attention in the professional literature.

Kent presented the issue of whether a sixteen year-old boy charged with housebreaking, robbery, and rape was properly transferred from the "exclusive jurisdiction" of the District of Columbia's juvenile court to the United States District Court where he was found guilty on six counts of housebreaking and robbery, and was sentenced to a total of thirty to ninety years in prison. In cases of what would involve felonies if committed by adults, the District's juvenile act permitted the juvenile court, after "full investigation" to waive its "exclusive jurisdiction" with respect to children aged sixteen and seventeen. Kent was represented by counsel who, when informed of the possibility of waiver, requested a hearing on that issue. Counsel requested also that he be given access to his client's social service file on the ground that the information therein would have considerable bearing on the juvenile judge's decision whether

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6. Most of the commentary following Kent and preceding Gault was concerned with the anticipated extension of constitutional guarantees to juvenile delinquency adjudications. See, e.g., Paulsen, supra note 4; Comment, Criminal Offenders in the Juvenile Courts: More Bricksbats and Another Proposal, 114 U. Pa. L. Rev. 1171 (1966).
7. 383 U.S. at 550. Kent was found not guilty by reason of insanity with respect to the rape charges. 383 U.S. at 550 n.10.
to retain or relinquish jurisdiction. The judge, without ruling on the motions and without notifying Kent, his parents, or his lawyer, entered an order reciting that “after full investigation, I do hereby waive” jurisdiction. The case then embarked upon a torturous voyage, which five years later landed at the United States Supreme Court. The Court held that “read in the context of constitutional principles relating to due process and the assistance of counsel,” the District of Columbia Juvenile Court Act did not permit the “critically important” waiver decision to be made (1) without hearing; (2) without effective assistance of counsel; (3) that effective assistance of counsel required that counsel be given access to the child’s social service file; and (4) that for purposes of review, any waiver order must be accompanied by statement of reasons for that decision considerably more enlightening than the recitation of “full investigation.” Implicit in the express holding of the Court is the requirement that the child, and probably his parents, must be given adequate notice of any hearing that is to be held to determine whether the juvenile court will retain jurisdiction.

As is always the case with ground-breaking decisions, Kent raises a formidable array of collateral problems within and without the juvenile court system. This article will be concerned with the problems clustered about the narrow issue of waiver; specifically: does Kent, especially when read in light of Gault, establish constitutional requirements for waiver proceedings? In what ways may juvenile courts divest themselves, or be divested, of jurisdiction over children accused of serious offenses? What is the rationale behind provisions permitting waiver of juvenile court jurisdiction? What criteria are judges to apply when making the decision whether or not to waive? What is the effect on subsequent proceedings of an error in the waiver proceeding? If Kent is a constitutional decision, is it retroactive?

10. Attached to counsel’s motion was an affidavit signed by a psychiatrist which described Kent as a victim of severe psychopathy and recommended hospitalization for psychiatric evaluation. 383 U.S. at 545.
11. Id. at 546.
12. For a concise description of the intervening litigation see Comment, supra note 6, at 1172-74.
13. This was not, however, the end of Kent’s journey. See 383 U.S. at 564.
14. Id. at 557.
15. The phrase is from Black v. United States, 355 F.2d 104, 105 (D.C. Cir. 1965), and was declared by the Court to be the basis of its holding on the right to counsel issue. 383 U.S. at 558, 560.
16. 383 U.S. at 554, 557.
17. See Paulsen, supra note 4.
18. The various state statutes allowing for procedure similar to those considered in Kent employ descriptive terms such as “certification,” “transfer,” as well as “waiver.” For the sake of uniformity the term “waiver” will be used throughout this paper.
II. Is Kent of Constitutional Dimension?

After a careful reading of Kent and Gault, a question as to the constitutional status of the holdings in the former case would seem pure rhetoric. But there are those who remain unconvinced. Faced with the argument that Kent, or Kent and Gault read together, required appointment of counsel for an indigent juvenile who was "certified" by the juvenile court to the criminal court where he received a two-to-ten year sentence for aggravated battery, the Supreme Court of New Mexico ruled that "all that was accomplished by the certification proceeding was to transfer jurisdiction over the defendant from the juvenile court to the district court. Therefore, the "certification" was not a critical stage of the criminal proceedings which would require the appointment of counsel. Kent was distinguished on the grounds that Kent had counsel and that the case applied only to the District of Columbia. Gault was declared inapplicable because the constitutional guarantees required by that decision, including the right to appointed counsel, applied only "in proceedings for the purpose of determining delinquency, which might result in commitment to an institution in which the juvenile's freedom is curtailed." New Mexico appears to be joined in this interpretation by the Supreme Court of Appeals of Virginia and the Maryland Court of Special Appeals. However, in each of the latter cases the courts recognized that their interpretations of Kent and Gault could be erroneous, and based their holdings on the non-retroactivity of those decisions. The weight of authority, as well as the plain language of Kent and Gault,
would indicate the need for such hedging.

The following language from the *Kent* opinion does seem to support the argument that the Court was merely construing a statute:

> [t]he Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision in this case, *and we go no further.*

Read in context, however, this statement appears in reply to the urgings of amicus curiae that the Court seize the opportunity presented by *Kent* to articulate constitutional standards applicable to juvenile delinquency proceedings generally.

The specific references to procedural regularity with respect to waiver bristle with constitutional indicia. For example, the Court expressed its agreement with *Black v. United States*, that the waiver of jurisdiction was a “‘critically important’ action determining vitally important statutory rights of the juvenile.” In effect, waiver is a judicial determination that the child is beyond the rehabilitative philosophy of the juvenile court “and is ‘critically important’ for the child who may be abandoned as ‘incorrigible’ and for the society which has thus abandoned the child.” There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile Board of Educ., 267 F. Supp. 356, 370 (S.D.N.Y. 1967); *In re Harris*, 64 Cal. Repr. 319, 434 P.2d 615 (1967); *Steinhauser v. Florida*, 2 Crim. L. Rep. 2331, Dec. 12, 1967; *Summers v. State*, Ind., 230 N.E.2d 320 (1967); *State ex rel. Londerholm v. Owens*, 197 Kan. 212, 416 P.2d 259 (1966); *Smith v. Commonwealth*, 412 S.W.2d 256 (Ky. 1967); *State v. Yoss*, 10 Ohio App. 2d 47, 225 N.E.2d 273 (1967); *Dillenburg v. Maxwell*, 70 Wash. 2d 325, 422 P.2d 783 (1967); *cf. Knott v. Langlois*, R.I., 231 A.2d 767 (1967); *Paquette v. Langlois*, R.I., 219 A.2d 569 (1966). And see *State v. Naylor*, Del., 207 A.2d 1, 11 (1965), anticipating both *Kent and Gault* by ruling that unless the child is provided with counsel at the waiver hearing he is denied due process of law. Texas has responded by statute. *Tex. Rev. Civ. Stat. art. 2338-1 (Supp. 1967).*

> 26. 383 U.S. at 556 (emphasis added).

> 27. Id.


> 29. 383 U.S. at 556, 560.


> 32. The decision to waive will ordinarily include a determination that probation in the particular case is not feasible. *Kent*, for example, faced a possible death penalty for rape.
proceeding is replaced by the publicity and the normative concepts of penal law,33 the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobrium attached thereto by prospective employers;34 if convicted as an adult, the child may be detained well past his twenty-first birthday; he may lose certain civil rights and be disqualified for public employment.35 Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and even sexual, abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly.

The statutory scheme permitting waivers "assumes procedural regularity sufficient . . . to satisfy the basic requirements of due process and fairness [and] does not confer upon the Juvenile Court a license for arbitrary procedure."36

[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.37

Since these conclusions were reached upon a reading of the statute "in the context of constitutional principles relating to due process and the assistance of counsel,"38 it is hardly conceivable that a state statute permitting a similar disposition of a child by a juvenile court having "exclusive jurisdiction" would pass constitutional muster in the absence of the minimum procedural requirements listed in Kent.39

In support of the position taken by the courts in New Mexico, Maryland, and Virginia is the fact that Kent did have counsel, and that the Supreme Court did not actually hold that counsel must be provided

34. Of course, a juvenile "record" is not without its disadvantages and appears not to be entirely "confidential." TASK FORCE REPORT 38-39.
36. 383 U.S. at 553.
37. Id. at 554.
38. Id. at 557.
for all indigent juveniles subject to waiver. But it came close. After all, the waiver proceeding is "critically important" and

[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel.40

The references to Kent in the later Gault decision which, of course, established the right to appointed counsel in juvenile delinquency proceedings if confinement is a possibility, 41 would appear to settle the issue:

[j]ust as in Kent v. United States . . . we indicated . . . that the assistance of counsel is essential for purposes of waiver proceedings so we hold now that it is equally essential for the determination of delinquency carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.42

To now discount Kent because it dealt only with a narrow issue of statutory interpretation, and then to distinguish Gault on the right to counsel issue because waiver of juvenile court jurisdiction does not result in "confinement" but in transfer to another court, 43 reaches a new apogee of judicial sophistry.

The waiver proceedings under consideration in Kent were, if anything, considered by the Court to be more important, and more demanding of the "guiding hand of counsel," because of the consequences of the waiver decision.44 It is, in essence, a sentence of "death" as a juvenile, with the subsequent proceedings in the criminal court completing the execution.

III. WAIVER PROCEEDINGS IN INDIANA

Kent had no immediate impact upon Indiana juvenile courts if the case of State v. Grubb45 can be taken as illustrative. Three juveniles, two

40. 383 U.S. at 561.
42. Id. at 36 (emphasis added). The other references to Kent, 387 U.S. at 12, 30, 57, 58 seem to indicate an assumption that the right to counsel at waiver hearings was so clear as to require no further discussion.
43. 428 P.2d 658, 659 (1967).
44. In Kent, the Court quoted with approval the holding of the Court of Appeals in Black v. United States that "[t]he need is even greater in the adjudication of waiver [than in juvenile delinquency hearings] since it contemplates the imposition of criminal sanctions." 383 U.S. at 558, quoting 355 F.2d 104, 106 (D.C. Cir. 1965).

[t]he famous Kent case has focused interest on the problems involved when the juvenile court gives up and releases a child for criminal prosecution.
aged seventeen years and the other aged sixteen years, were arrested on
April 20 and 21, 1967. They were charged with an attempt to pass
forged checks, and were lodged in the juvenile wing of the county jail.
Indiana law with respect to waiver is similar to that of the District of
Columbia. The Juvenile Court Act provides that the juvenile court shall
have "original exclusive jurisdiction, except when specifically waived by
the Court, . . . in all cases of delinquent . . . children. . . ." In cases
involving children aged fifteen, sixteen, and seventeen years "charged
with an offense which would amount to a crime if committed by an
adult" the juvenile court judge "after full investigation may waive
jurisdiction" and order the minor held for criminal prosecution.

On April 24, 1967, petitions to determine the delinquency of the
three juveniles were filed by the chief probation officer. On the same day
the juvenile court judge, in each case, signed printed forms titled
"Waiver of Jurisdiction." The "boilerplate" recited that after "full
investigation" the court "has found . . . that it should waive its juris-
diction" over the child, and that the child should be held for criminal
prosecution. The record discloses no notice given to the juveniles that a
waiver was contemplated; they were not informed of any right to counsel;
no hearing was held; and no reasons for the waiver decision were given.
Perhaps due to the informal nature of the waiver decision, the prosecutor
did not file affidavits in circuit court until May 17, 1967, twenty-seven
days after entry of the waiver order, and two days after the Supreme
Court's Gault decision. The charges were conspiracy to commit a
felony and second degree burglary. The defendants were arraigned immediately, waived counsel, and each pleaded guilty to a single felony (two pleaded guilty to the charge of burglary, and one to conspiracy).

At the time scheduled for sentencing, a representative of the local chapter of the ACLU appeared as amicus curiae, arguing that Kent and Gault required that the guilty pleas be vacated and the matter be remanded to juvenile court for compliance with the procedural requirements established by those cases. The court took the matter under advisement and later appointed counsel for each defendant to aid them in seeking appropriate relief. Since that time waiver hearings, with appointed counsel where necessary, have become the practice in this county. The practice was established prior to the ruling in Summers v. State, which held that the procedural safeguards prescribed by Kent were mandatory for all Indiana juvenile courts.

Summers was one of three recent cases in which the Indiana Supreme Court has, sua sponte, raised the question of improper waiver of juvenile court jurisdiction. In each case, criminal convictions were vacated on the ground that defective waiver of jurisdiction deprives the criminal court of subject-matter jurisdiction. In none of these cases had any officer of the juvenile court taken the first step necessary for acquisition of jurisdiction. Each juvenile court judge and the chief probation officer revealed that their actions with respect to the waiver of these juveniles were influenced by a communication from the State Department of Correction requesting that older teenagers not be sent to the Indiana Boy's School because of lack of adequate facilities. Therefore, if probation was not indicated in a particular case, waiver appeared to be the only feasible alternative. The current head of the Department of Correction has informed the writer that such a directive is no longer in force.

51. Conversations with the juvenile court judge and the chief probation officer
52. — Ind. ———, 230 N.E.2d 320 (1967).

Hicks raised the question of proper waiver procedures in counties in which there is no separate juvenile court:

[w]e feel that the only reasonable construction of [the relevant portions of the juvenile procedure statutes] requires that, in a county not having a separate juvenile court, the circuit court must sit in its capacity as a juvenile court in initially accepting jurisdiction of an alleged juvenile offender. In a case where it is not apparent at the outset of a prosecution that the defendant is below the full age of eighteen (18) years at the time of the alleged offense, upon receiving an indication of such fact the court shall halt the proceedings and transfer the case to its juvenile docket . . . and the matter should thereafter be treated in every respect in accordance with this state's juvenile procedure statutes.

The clear import of this holding is that in counties where there is no separate juvenile court, the circuit court must treat the matter of juvenile offenses as if it were two (2) separate courts—juvenile and criminal—and that such court may only place alleged juvenile offenses on its criminal docket after waiver proceedings in accordance with the juvenile procedure statutes and the ruling . . . in Summers v. State . . . Hicks v. State, supra at 761.
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juvenile court jurisdiction, i.e., the filing of a petition to determine the delinquency of the juvenile. Although not clearly articulated in any, the three cases, read together, seem to establish that a failure to conduct a proper waiver hearing, the failure to provide the juvenile with an opportunity to be represented by counsel, or the failure to accompany the waiver order with a statement of reason sufficient to permit a meaningful review, also would prevent the criminal court from acquiring jurisdiction.

Summers falls short of Kent, however, since there is no requirement that counsel be given access to the child's social history records before or during the waiver hearing. The omission was perhaps inadvertent, but even if it was intentional, the reasoning in Kent that "if a decision on waiver is 'critically important' . . . the material submitted to the judge . . . [must] be subjected, within reasonable limits . . . to examination, criticism and refutation," indicates that access to such records is a part of the due process package.

But Summers goes beyond Kent in several important respects. The United States Supreme Court did not rule that the erroneous waiver order deprived the district court of jurisdiction. Summers specifies that at the waiver hearing the juvenile shall have "the right to confrontation of witnesses against him; the right to present evidence . . . of any circumstances that would entitle him to the benefits that might be afforded to him by the provisions of the Juvenile Act." Kent disclaimed any attempt to set specific requirements for hearing beyond the requirement that it "measure up to the essentials of due process and fair treatment." Summers, on the other hand, suggests criteria to be applied by the juvenile court in reaching a waiver decision. Finally, Summers held that a prosecuting attorney may petition the juvenile court for waiver of jurisdiction in a case where he believes "a juvenile offense in a


56. Id. "Statutory requirements have been held to be jurisdictional for more than one hundred years in Indiana." The court also observed in Summers "that it is only after . . . hearing that a transfer to the Lake Criminal Court may be lawfully made." Ind. at 325. Cf. Hicks v. State, 230 N.E.2d 757, 759 (Ind. 1967), describing Summers as holding "that before a criminal court could obtain jurisdiction of such offender." (Emphasis added.) Edward v. State, 231 N.E.2d 20, if committed by an adult, the juvenile court must properly waive its own exclusive jurisdiction of such offender." (emphasis added). Edwards v. State, 231 N.E.2d 20, 21 (Ind. 1967).

57. 383 U.S. 541, 563 (1967).

58. The jurisdictional point was argued on behalf of Kent, but ignored by the Court.

59. 230 N.E.2d at 325.

60. Kent v. United States, 383 U.S. 541, 562 (1967). The Court added an appendix listing criteria suggested by the judge of the Juvenile Court of the District of Columbia, id. at 565-68, but gave no indication of its views as to the propriety of these criteria.

particular instance has specific prosecutive merit." This adds a procedure not authorized by the Juvenile Court Act. It is hoped that, if valid, such power will be exercised circumspectly to prevent waiver proceedings from taking on the appearance of a tug-of-war between the prosecutor and the defense attorney, with the child in the middle, and the juvenile court judge standing by as referee.

There is an additional problem in states like Indiana where the juvenile court judge sits also as the judge of the court of general jurisdiction. If such a judge conducts the waiver hearing, he will have completely familiarized himself with the past record of the accused. This would seem to disqualify him from sitting either as judge in the juvenile delinquency proceeding if jurisdiction is retained, or as judge in the criminal trial if jurisdiction is waived.

IV. THE RATIONALE OF WAIVER

A. Persons Subject to Waiver

The waiver decision affects only those minors who have committed acts which, if committed by a person over the maximum age for original juvenile court jurisdiction (usually eighteen), would be criminal. Although the statutes of the various states vary with respect to age and category of offense, it is usually the older teenager charged with a serious crime who will be the subject of a waiver decision. In the 1965 crime reports, analyzed by the President's Commission on Law Enforcement and Administration of Justice, the fifteen to seventeen year-old-age group (the most vulnerable to waiver) emerged as a significant statistical category. The arrest rate for this group for the most serious offenses (wilful homicide, forcible rape, robbery and aggravated assault) was

62. 230 N.E.2d at 326.

63. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967). Indeed, the fifteen to seventeen age grouping reflects the highest overall arrest record. The rate for 1965 was 8,050 per 100,000 population, compared with the next highest rate of 7,539.6 arrests per 100,000 population for the eighteen to twenty age group. The eleven to fourteen year old group showed a rate of 3,064.4 arrests per 100,000 population. Id. 56, Table 1.

The Report qualifies these figures in recognizing that the juvenile contribution to the overall crime problem might be distorted if the figures are used as the only guide. First, juveniles are more easily apprehended than adults. Second, the more pronounced tendency of juveniles to act in groups when committing crimes may produce numbers of arrests significantly in excess of the crimes actually committed. Third, juveniles are most frequently arrested for petty larceny, fighting, disorderly conduct, liquor-related offenses, and conduct not in violation of the criminal law such as curfew violation, truancy, incorrigibility, or running away from home. Id. 56. However, insofar as the figures reflect arrests for the more serious crimes, they reveal a large number of persons potentially subject to a waiver decision.
222.8 per 100,000 population, or fourth highest for all age groupings. As to the serious property crimes, including burglary, larceny, and motor vehicle theft, the fifteen to seventeen year-old-age group compiled an arrest rate of almost twice that of any other age grouping.

Also, the relinquishment of juvenile court jurisdiction may seriously be contemplated only with respect to those who previously have been before the juvenile court and who have demonstrated a tendency to recidivate. These persons will have filtered through the informal screening process designed to separate most cases for disposition at the pre-judicial stage. However, this informal process can hardly be depended upon to isolate every person for whom the individualized, rehabilitative methods of the juvenile justice system are still relevant. The juvenile court judge must exercise great care to make sure that community indignation directed at a particular offense or offender, or loose procedures based upon presumed good faith of the juvenile system personnel, do not replace a very deliberate evaluation of the individual case.

At the judicial stage, whether the decision is made to waive or retain jurisdiction, the juvenile court is acting as a court of last resort. The decisions in cases like Kent and Gault which have infused procedural regularity into juvenile proceedings are, in effect, recognitions of reality:

> [t]he juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with the threatening conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore

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64. The eighteen to twenty age group reflected the highest arrest rate for these crimes (299.8 per 100,000 population). The twenty-one to twenty-four group was second (296.6 per 100,000), and the twenty-five to twenty-nine age group was third (233.6 per 100,000). Id.

65. Id. The rate was 2,467 arrests per 100,000 population, compared with the next highest rate of 1,452 arrests per 100,000 population in the eighteen to twenty age group. The Report notes a significant increase in criminal-type juvenile delinquency in recent years:

> [b]etween 1960 and 1965, arrests of persons under 18 years of age jumped 52 percent for wilful homicide, rape, robbery, aggravated assault, larceny, burglary, and motor vehicle theft. During the same period arrests of persons 18 and over for these offenses rose only 20 percent. This is explained in large part by the disproportionate increase in the population under 18 and in particular, the crime-prone part of that population—the 11 to 17 year old age group.

Id.

obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it.  

Since in those cases in which waiver is contemplated some type of confinement is foreseen if the accused's guilt is established, the choice is between a juvenile institution and some type of adult correctional facility. Although, practically speaking, there may be no great difference in the administration of either institution, the decision to waive carries with it significant consequences beyond the type of institution in which the youth is to be confined.

Compounding the waiver problem is the fact that, beyond the juvenile system, a great majority of the states make no special provision for young offenders. The waiver decision must be made with the realization that the youth will, in all likelihood, be sent to an adult prison where no special rehabilitative and guidance programs will be available. Even if the youth is treated leniently by the trial court as a first (adult) offender, his conviction record is indelible. A young man between fifteen and twenty-five years of age is still too young for the human trash pile to which "ex-cons" are too often relegated.

In the federal system, Congress has sought to meet this problem through the Youth Corrections Act. The statute gives federal judges discretion to commit convicted federal offenders below the age of twenty-two to the custody of the Attorney General for special treatment as youth offenders. In such cases, no matter what penalty is contemplated by the criminal statute which has been violated, the Youth Corrections Act requires conditional release within four years of the date of conviction, and unconditional discharge no later than six years from date of conviction. The maximum period may be extended at the time of initial sentence in cases where the judge determines that additional treatment and supervision may be required. The Act contemplates individual classification of youth offenders and segregation of these offenders in facilities specially equipped to provide "treatment" which is defined as

67. CHALLENGE, supra note 63.
69. See text accompanying notes 30-35, supra.
70. Luger, The Youthful Offender, TASK FORCE REPORT (Appendix G) 119, 121. Also see NATIONAL COUNCIL ON CRIME & DELINQUENCY, NATIONAL SURVEY ON YOUTHFUL OFFENDERS (Feb. 1966).
71. See Lemert, The Juvenile Court—Quest and Realities, in TASK FORCE REPORT (Appendix D) 91, 101.
73. 18 U.S.C. §§ 5010, 5017(c) (1964).
"corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders."74 In addition to these special considerations, the Act provides that upon his unconditional discharge by the Youth Correction Division, the youth offender's criminal conviction is automatically set aside and he is to be issued a certificate to that effect.75 Similar discretionary provisions with respect to young adult offenders between the ages of sixteen and twenty-two are proposed by the American Law Institute.76

It is obvious that classifications with respect to age are arbitrary, and arguments can be made to extend such treatment to persons aged twenty-five or thirty or, for that matter, any age. However, the most recent statistical analysis indicates that sixteen to twenty-three year-olds are a significant group with respect to felony arrests.77 Also, a study of 1,000 federal prisoners revealed a pronounced negative correlation between youth at the time of initial arrest and rate of recidivism, with a significant proportion of the recidivists within the sixteen to twenty-three year age grouping.78 The experts reporting to the President's Commission concluded that specialized treatment for young offenders beyond juvenile court age, or within the waiver range, would be in the best interests of society as well as of the offender.79

One cannot be very optimistic about the success of youth offender programs in jurisdictions which have been unable or unwilling to provide even the minimum correctional facilities and personnel for juveniles. However, insofar as the youthful offender acts call for vacation of con-

74. 18 U.S.C. § 5006(g) (1964).
75. 18 U.S.C. § 5021 (1964). But the Act provides a double-edged sword, permitting longer confinement for persons subject to the Act than does the statute they are alleged to have violated. Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958).
76. Model Penal Code § 6.05 (Proposed Official Draft 1962). Provisions are made for a maximum term of four years, and the sentencing alternative may be utilized regardless of the degree of felony involved.
77. Luger, supra note 70, at 120. In 1964, this age group was responsible for 27 percent of total arrests in the United States. . . . These youths accounted for 26 percent of all murder and non-negligent manslaughter, 34 percent of all robbery, 29 percent of all aggravated assault, 44 percent of burglary, breaking and entering, 36 percent of all larceny, and 53 percent of all auto thefts.
78. Id. at 120-21 citing D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).
79. Luger, supra note 70 at 121: There is no reason to expect automatic insensitive handling of young offenders because of specialized laws and programs, as long as alternatives and varied resources are at the authorities' disposal. There is much more risk in attempting to deal with this population without taking cognizance of the differentiating pressures, problems, and potential of young offenders. Personnel specifically prepared and knowledgeable about this group are required. Special measures need to be incorporated, in keeping with the individuality of treatment and emphasis on rehabilitation that are traditionally the cornerstones of our efforts with young offenders.
victions (or, better yet, expungement of all records with respect to the offense), they will aid the resocialization of the offender who, hopefully, will have been subjected to some rehabilitative efforts during the period of his confinement.

B. Forms of Waiver

The statutes of the several states reflect a wide range of judgments with respect to the persons who will be afforded the special considerations of the juvenile justice system. For purposes of this discussion these judgments are treated as waiver decisions, and are classified as follows: (1) legislative waiver; (2) judicial waiver; (3) prosecutor's choice; and (4) waiver—Texas style.

1. Legislative Waiver

All juvenile acts set a maximum age, usually between sixteen and twenty-one, beyond which juvenile court jurisdiction does not extend. This, of course, represents a deliberate legislative choice with respect to those young persons who are, in all cases, to be treated as adult criminals. In addition, many states provide that, regardless of age, juvenile courts shall have no jurisdiction over very serious forms of criminal conduct calling for penalties of death or life imprisonment. Other states prescribe a minimum age at which the criminal court shall have jurisdiction of a capital or other serious offense, with all other offenses remaining subject to juvenile court jurisdiction. Even in those jurisdictions where juvenile treatment for serious crimes is excluded, criminal prosecutions will be barred with respect to children presumed too young to be capable of crime. Also, new concepts of "cruel and unusual punishment" emanating from the now famous case of Robinson v. California would appear to have a limiting effect upon a state's ability to punish children in the pre-low-teen age range in spite of any finding of capacity.

81. E.g., LA. REV. STAT. ANN. § 13: 1570A(5) (1968), excluding juvenile court jurisdiction over a child fifteen years of age or older charged with a capital offense, or assault with intent to commit rape. Montana provides for criminal jurisdiction for children over sixteen charged with murder, manslaughter, rape or attempted rape, aggravated assault, robbery, burglary while possessing a deadly weapon, arson, and carrying a deadly weapon with intent to assault. For other offenses juvenile court jurisdiction extends to age eighteen. MONT. REV. CODE ANN. §§ 10-602 (Supp. 1967).
82. The common law rule is that children below the age of seven are incapable of committing crimes, and between the ages of seven and fourteen there is a rebuttable presumption of incapacity. The age of absolute incapacity has been raised above seven in several jurisdictions. MODEL PENAL CODE § 4.10, Comment at 14-15 (Tent. Draft No. 7, 1957). See State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954).
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The exclusion of even the most serious crimes seems incompatible with the avowed rehabilitative aims of the juvenile court system. The serious offenses withheld legislatively from the juvenile court are those for which public demand for punishment will be greatest. But the argument that the demand for public airing of such offenses will be tempered by lenient treatment of the very young is not very comforting. Neither should the argument that the retention of juvenile jurisdiction over these offenses will invoke the hostility of those howling for vengeance deter a humanitarian approach. A set of properly formulated waiver procedures will provide the necessary safeguards, both for the public and for the juvenile.

2. Judicial Waiver

In the great majority of states, juvenile courts are vested with exclusive jurisdiction over juveniles up to a stated age, but with power to divest themselves of jurisdiction within certain age ranges. The waiver of jurisdiction is sometimes permitted only with respect to felonies, but in many jurisdictions it is permitted for any criminal offense. Many states permit waiver at any age; others permit waiver from the specific ages twelve, thirteen, fourteen, fifteen and sixteen.

Modern recommendations for juvenile courts suggest exclusive jurisdiction for all offenses committed by children under the age of sixteen, with waiver of jurisdiction allowed for sixteen and seventeen year olds whose offenses would amount to felonies if committed by adults (adults

85. See Lemert, supra note 71, at 100.
87. Alaska, Arizona, Arkansas, California (but see discussion of conflicting provisions of California law on this point in Comment, supra note 84, at 1207), Kentucky (felony only), Maine, Maryland, Missouri, New Hampshire (felony only), Ohio (felony only), Oklahoma, South Carolina, South Dakota, Washington. But see notes 82, 83, supra and accompanying text.
88. Minnesota.
89. Mississippi (felony only).
90. Alabama, Florida (felony only), Hawaii (felony only), Massachusetts, New Mexico (felony only), North Carolina (felony for which penalty is not more than ten years in prison—other felonies with greater punishments subject to criminal prosecution in first instance), North Dakota, Pennsylvania (offense punishable by imprisonment in a state penitentiary), Utah, Virginia.
91. Georgia (but see Whitman v. State, 96 Ga. App. 730, 101 S.E.2d 621 (1957), interpreting statute in light of state constitution and finding concurrent jurisdiction in criminal court), Indiana, Michigan (felony only), Texas (felony only).
92. Delaware, District of Columbia (felony only), Idaho (felony only), Kansas (felony only), Nevada (felony only), New Jersey, Oregon, Rhode Island, Tennessee (felony only), Wisconsin.
being defined as persons eighteen years of age and over). These suggestions are defensible so long as proper procedural safeguards are observed, and appropriate criteria are applied in reaching the waiver decision. In addition, however, special sentencing provisions should be made for youthful offenders falling outside the ambit of juvenile court jurisdiction.

In some states criminal courts may be given original jurisdiction over older teenagers accused of crime, but with the option of sending the case to juvenile court for disposition. Although the Kent holding does not extend to such a procedure, it would seem that in any case where an offender might be eligible for juvenile court treatment, the court should hold a hearing to determine whether the retention of criminal court jurisdiction is warranted.

3. Prosecutor’s Choice

The Illinois Juvenile Court Act contains a unique waiver provision which allows the prosecutor to determine in which court a minor over the age of thirteen years is to be charged. If a juvenile judge objects to the removal of a case from his jurisdiction, the chief judge of the circuit must decide in which court the juvenile is to be tried.

These approaches to waiver are of doubtful validity in light of the controls which the Supreme Court, through Kent, has placed upon a

94. See text accompanying notes 117-128, supra.
95. See, e.g., Ala. Code tit. 13, § 363 (1958), permitting transfer to juvenile court of sixteen and seventeen year olds if the criminal court deems “it to be in the interest of justice or the public welfare....”
96. But see text at note 100, infra.
[a] juvenile alleged to have committed one or more acts in violation of a law of the United States not punishable by death or life imprisonment, and not surrendered to the authorities of a state, shall be proceeded against as a juvenile delinquent if he consents to such procedure, unless the Attorney General, in his discretion, has expressly directed otherwise.
In such event the juvenile shall be proceeded against by information and no criminal prosecution shall be instituted for the alleged violation.
18 U.S.C. § 5032 (1964). A three judge panel of the United States District Court for the Southern District of New York has ruled the federal act unconstitutional insofar as election to be treated as a juvenile under the act deprives the accused of trial by jury. Nieves v. United States, 2 Crim. L. Rptr. 2481 (1968).
juvenile judge’s exercise of a similar discretionary power. It would indeed be strange if this critically important decision can now be left wholly to the prosecutor who cannot be expected to weigh objectively the welfare of the child against the need to protect society from the child. The possibilities for arbitrary and discriminatory choice allowed by this method of waiver render it contrary to principles of equal protection as well as due process of law.99

Another objection to leaving the waiver decision to the prosecutor is well stated by the United States Court of Appeals for the District of Columbia in *Harrison v. United States*:

> [t]he question presented by the teenager accused of serious crime is undoubtedly baffling, and there are no clear answers. Particularly vexing are the problems presented by the sixteen or seventeen year old adolescents precocious in criminal propensity. The problem of which of them should be waived is of such breadth and complexity, that the responsibility for the waiver determination was deliberately assigned to the judge of the Juvenile Court and not to the prosecutorial arm of the government. The “full investigation” by the judge specified in the statute, is not confined to an awareness of the offense at hand, but includes evaluation of the juvenile and his record, made by the judge with the benefit of the contribution of assistants with special background in the social sciences.100

Perhaps the requirements of *Kent* would be satisfied under the Illinois and Iowa “prosecutor’s choice” procedure, if the judge before whom the case is brought for criminal trial were to ascertain whether the defendant is subject to juvenile court jurisdiction, and hold a hearing to determine whether the case should be remanded to the juvenile court or retained by the criminal court. However, this does not meet the objection of *Harrison* that such a decision requires the expertise of the juvenile judge. On the whole, the prosecutor’s choice method of waiver, even if reviewed by the trial court, is unsatisfactory and probably unconstitutional.

4. **Waiver—Texas Style.**

Until the Texas legislature in 1967 passed a statute that may be regarded as a model for compliance with *Kent*,101 the Texas courts

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100. 359 F.2d 214, 224-26 (D.C. Cir. 1965). See also the remarks of Judge E. Barrett Prettyman quoted 359 F.2d at 225 n.8.
permitted what was perhaps the most transparent of all practices designed to avoid juvenile court jurisdiction over children charged with serious crimes. Under Texas law, adult jurisdiction for boys begins at age seventeen.\textsuperscript{102} Interpreting prior law, the Texas courts held that age at time of trial, and not at the time of the offense, determined whether a person was subject to juvenile court jurisdiction.\textsuperscript{103} Until 1965, Texas juvenile courts had exclusive jurisdiction of boys under seventeen years and girls under eighteen years; there was no provision for waiver.\textsuperscript{104} With respect to serious offenses, usually homicides, Texas prosecutors developed the technique of waiting until the child passed juvenile court age and then initiating proceedings in the criminal courts. This procedure was recognized by the courts.\textsuperscript{105} Also permitted was a practice whereby the offender would be committed to juvenile custody on delinquency charges, usually connected with the alleged offense, to await his seventeenth birthday.\textsuperscript{106} Only when the charge upon which the offender was committed to juvenile custody was the same as the one later relied upon for criminal prosecution did the Texas courts react with a finding of a denial of due process of law.\textsuperscript{107}

In 1965, the Texas legislature reacted by amending the juvenile act to provide for waiver of juvenile court jurisdiction with respect to a child over sixteen years of age. Added to this was a provision obviously aimed at the dilatory tactics described above: "and no child under sixteen (16) years of age at the time of the offense is committed shall be prosecuted as an adult at any later date unless transferred by the Juvenile Court, and all such offenses committed by children not so transferred

\begin{itemize}
  \item \textsuperscript{102} TEX. REV. CIV. STAT. art 2338-1 (Supp. 1967) (18 for girls).
  \item \textsuperscript{103} Foster v. State, 400 S.W.2d 552 (Tex. Crim. 1966). See generally, Comment, \textit{Age and Related Jurisdictional Problems of the Juvenile Courts}, 36 TEX. L. REV. 323 (1958). The question whether juvenile court jurisdiction is to be determined by age at time of offense, or by age at the time of legal proceedings depends upon the manner in which a court chooses to interpret the governing statute. The cases are collected in Annot., 89 A.L.R.2d 507 (1963). There is an excellent discussion of this problem in \textit{Model Penal Code}, Comments to § 4.10 at 6-21 (Tent. Draft No. 7, 1957).
  \item \textsuperscript{104} The 1967 amendment to the Texas Juvenile Act specifies that age at time of the alleged offense is determinative of juvenile court jurisdiction. TEX. REV. CIV. STAT. art 2338-1 (Supp. 1967).
  \item \textsuperscript{105} See \textit{Model Penal Code} \textit{supra} note 103, at 12.
  \item \textsuperscript{106} Peterson v. State, 156 Tex. Crim. 105, 235 S.W.2d 138, cert. denied, 341 U.S. 932 (1950); Comment, \textit{supra} note 103, at 332-33.
  \item \textsuperscript{107} Foster v. State, 400 S.W.2d 552 (Tex. Crim. 1966).
\end{itemize}
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shall be subject to disposition by the Juvenile Court only."108 However, this portion of the statute was declared to be in violation of the Texas constitution in Foster v. State.109 A fifteen-year-old boy was arrested in 1963 for the murder and robbery of an older man. Shortly thereafter he was committed to a juvenile institution. His delinquency was determined upon his having committed "theft from a person"—i.e., he took, the murder victim’s wallet.110 Two years later, having reached the age of seventeen, he was returned to the criminal court, tried for murder and given a life sentence. On appeal, the defendant argued that the 1965 amendment to the juvenile act barred his trial as an adult since he was under sixteen years of age at the time the offense was committed. The court held that the amendment relied upon by defendant was unconstitutional because it "is so indefinitely framed and of such doubtful construction that it cannot be understood. . . ."111 As to the necessity for transfer of jurisdiction, the court accepted the certification of the trial judge that the juvenile court never assumed any jurisdiction for murder, and, since the youth was then past seventeen years of age, juvenile court jurisdiction was no longer possible.112

The Texas court stuck to its guns even after Kent. In Ex parte Miranda,113 two youths, aged fifteen and sixteen years, were arrested for murder in December, 1965 (after the effective date of the statute permitting waiver of juvenile court jurisdiction). They were committed to a juvenile institution on charges unconnected with the alleged murder. No mention of the murder charge appeared in the juvenile court record, and no waiver determination regarding that charge was made with respect to either youth. They were returned to the criminal court after each had passed his seventeenth birthday. Application for writs of habeas corpus were made on their behalf alleging that the state was in possession of sufficient information to prosecute them for the murder at the time of the original hearing in juvenile court, and that the state could then have requested that they be waived to the adult court to stand trial for that crime. Relying on Kent, they argued that they were deprived of a hearing in juvenile court regarding the transfer of the murder case to criminal court. On appeal from a denial of their petitions, the Texas Court of Criminal Appeals found Kent could be "distinguished on the facts"114 but did not bother to explain how or why. The court held that the 1965

110. Id. at 556.
111. Id. at 558.
112 Id.
113. 415 S.W.2d 413 (Tex. Crim. 1967) (decided two days after Gault).
114. Id. at 415.
amendment with respect to waiver proceedings in juvenile court was merely permissive and did not require the juvenile court to determine whether jurisdiction over the murder charges should be retained by the juvenile court or waived. Since the youths had by now passed juvenile court age, "waiver of jurisdiction by the Juvenile Court no longer applies."

Happily (or perhaps I should say hopefully), the Texas legislature has put an end to this:

[i]f the juvenile court retains jurisdiction, the child is not subject to prosecution at any time for any offense alleged in the petition or for any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the proceeding.\[116\]

Since counsel is now required in all juvenile proceedings involving waiver of jurisdiction or determinations of delinquency involving potential confinement, even Texas judges should no longer be able to claim ignorance of the true nature of the juvenile's offense.

C. Waiver Criteria

As already will have become apparent, waiver of juvenile court jurisdiction is a compromise of principle dictated by the unwillingness of society to pay the price necessary to find out whether our theories of justice for the juvenile are at all valid.\[117\] Waiver, therefore, remains an unsatisfactory, but nevertheless practical, means of ridding the juvenile court of persons whom it is not equipped to handle, and, more likely than not, has mishandled in the first place. Secondly, as indicated by the reported cases, waiver usually is "not a scientific evaluation of whether the youth will respond successfully to a juvenile court disposition but a front for society's insistence on retribution or social protection."\[118\]

Kent introduces procedural regularity, but gives no indication of the Supreme Court's views regarding the propriety of waiver in particular cases. The question is, of course, one of assessing the disadvantages of waiver with respect to the child in light of the dispositional alternatives available to the juvenile court, and the threat (present or future) to society represented by the child. It is an unenviable task. Perhaps it is true that the ability to sort out cases comes to a juvenile judge as the

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115. Id. See Solis v. Texas, 418 S.W.2d 265 (Civ. App. 1967), for another prosecutor's ploy to preserve a murder case involving fifteen year old boys.
118. TASK FORCE REPORT 24.
result of his "experience gleaned from cases of thousands of delinquents," but this "seaman's eye" approach is no longer acceptable under the Kent standards. Judges must now give reasons for their waiver decisions, and those reasons will be evaluated by other judges. Therefore, we must try to identify acceptable waiver criteria. In so doing, we may determine the content of the waiver hearing.

In a 1962 survey of fifty juvenile court judges, the following factors were listed as influencing the waiver decision: (1) issues of contestable fact which would prolong a juvenile hearing; (2) serious offense occurring after previous correctional treatment; (3) the case is hopeless; (4) the child needs to be punished for his attitude; (5) the advantage in resources for treatment and public safety lies with the criminal court rather than the juvenile court. All but the last of the listed criteria were deemed by the evaluators to be in conflict with juvenile court philosophy. A more recent and wider survey conducted by the Children's Bureau of the United States Department of Health, Education and Welfare for the President's Commission on Law Enforcement and Administration of Justice revealed more specific criteria. They are listed below in order of reported frequency of use:

1. Seriousness of the alleged offense.
2. Record and history of the juvenile, including prior contacts with police, court or other official agencies.
3. Aggressive, violent, premeditated, or wilfull manner by which the offense was committed.
4. Sophistication, maturity, emotional attitude of the juvenile.
5. Proximity of juvenile's age to maximum age of juvenile court jurisdiction.
6. More appropriate procedures, services, and facilities available in the adult court for the likelihood of reasonable rehabilitation.
7. The possible need for a longer period of incarceration.
8. Evidence apparently sufficient for a grand jury indictment.
9. The juvenile's associates in the alleged offense will be charged with a crime in an adult court.
10. Effect of judgment of waiver on public's respect for law enforcement and law compliance.
11. Community attitude toward the specific offense.

120. Advisory Council of Judges, supra note 117, at 5.
121. Id. at 5-7.
122. Task Force Report 78, Appendix B, Table 5. The sample included 207 juvenile courts serving populations of 100,000 or over. Responses with respect to criteria were received from 176 courts.
In *Summers v. State*, the Indiana Supreme Court faced its "responsibility to delineate guidelines for the juvenile courts re waiver orders." An offense committed by a juvenile may be waived to a criminal court if, among other unspecified things,

the offense has specific prosecutive merit in the opinion of the prosecuting attorney; or it is heinous or of an aggravated character, greater weight being given to offenses against the person than to offenses against property; or, even though less serious, if the offense is part of a repetitive pattern of juvenile offenses which would lead to a determination that the said juvenile may be beyond rehabilitation under the regular statutory juvenile procedures; or where it is found to be in the best interest of the public welfare and for the protection of the public security generally that said juvenile be required to stand as an adult offender.

These criteria are taken from the appendix to the *Kent* opinion setting forth a policy memorandum prepared by the District of Columbia Juvenile Court in 1959. However, at the time *Kent* was decided these published standards had been withdrawn, apparently due to disagreement as to their propriety.
Although the Indiana court stated its criteria in the disjunctive, the context does not seem to indicate that any one criteria would, in itself, be sufficient support for a waiver of juvenile court jurisdiction. Each is highly variable from case to case. For example, we would not expect waiver in the case of a sixteen-year-old honor student who has no previous history of anti-social conduct but who commits a serious assault on his chemistry teacher and sets fire to the laboratory. On the other hand, the seventeen-and-one-half-year-old drop-out, with a long record, with experience in correctional institutions, and who has been given several genuine opportunities to benefit from juvenile treatment, and who is stealing car radios not only for fun, but for profit, would seem a proper candidate for waiver.  

Most authorities seem to agree that the waiver decision should, at least, be a function of the four variables of age, seriousness of offense, seriousness of prior offenses, and discouraging treatment prognosis. Also, the potential effect of the offender on the others in a juvenile institution should be considered. In view of the generally unsatisfactory state of juvenile rehabilitative efforts throughout the country, counsel for the child should always explore exactly what has been done for the complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.  

(g) After full investigation and hearing the juvenile court shall retain jurisdiction of the case unless it determines that, because of the seriousness of the offense or the background of the offender, the welfare of the community requires criminal proceedings.

(h) In making the determination under Subsection (g) of this section, the court shall consider, among other matters:

1. whether the alleged offense was against person or property, with greater weight in favor of waiver given to offenses against the person;
2. whether the alleged offense was committed in an aggressive and premeditated manner;
3. whether there is evidence upon which a grand jury may be expected to return an indictment;
4. the sophistication and maturity of the child;
5. the record and previous history of the child;
6. the prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.


128. Quaere: What if such a juvenile were to have been illegally arrested and incriminating evidence seized in such manner as to render it inadmissible in a criminal trial? Or what if he gave a confession to police as the result of unlawful interrogation? If it appears to the juvenile judge that a criminal conviction is unlikely due to the probable exclusion of the tainted evidence, may he retain jurisdiction of the child? Would not such retention be prompt more by punitive motives that a desire to rehabilitate? Would it be a denial of equal protection of the laws? May a juvenile demand waiver in such circumstances? See Harrison v. United States, 359 F.2d, 214, 229 n. 17 (D.C. Cir. 1965). Perhaps these questions will be rendered moot by the extension of the exclusionary rules to the juvenile proceeding in the post-Gault era. See generally, Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Fam. L.Q. 1 (1967).
child in the past. What was the nature of prior treatment? How frequent were efforts made to work with him? Was he really given a chance to "resocialize," or was he placed on probation or in a "training" school and then forgotten?

The problem of waiver cannot be reduced to any simple formula, and reviewing courts have their work cut out for them when it comes to facing up to challenges to the factual basis of the juvenile court's waiver decision. The criteria now finding general acceptance are based upon assumptions which in turn may be based upon further assumptions and even ignorance. A great deal of empirical research will be necessary before we can begin to talk with any degree of sophistication about "waiver criteria."

V. THE EFFECT OF ERRONEOUS WAIVER OF JUVENILE COURT JURISDICTION

A. Remedies for the Juvenile

Counsel may challenge a waiver of juvenile court jurisdiction in a variety of ways, including a motion to dismiss the subsequent indictment;\(^\text{129}\) appeal from a subsequent criminal conviction;\(^\text{130}\) writ of prohibition;\(^\text{131}\) and, of course, habeas corpus.\(^\text{132}\) In cases where an objection to improper waiver is timely raised, the problems are not great since the case can be remanded to juvenile court for a proper hearing. In some cases this may result in the juvenile court's retention of jurisdiction.

A number of state courts have held that where a juvenile court is granted exclusive jurisdiction, failure to comply properly with the waiver provisions of the juvenile act deprives the criminal court of jurisdiction. As a result, all subsequent criminal proceedings are void,\(^\text{133}\) and objec-

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130. Summers v. State, 230 N.E.2d 320 (Ind. 1967); but see State v. Biggs, 420 P.2d 71 (Ore. 1966), holding that the waiver order was itself appealable and the right to challenge was lost by failure to assert that right until after criminal conviction; contra, Brekke v. People, 233 Cal. App. 2d 196, 43 Cal. Rptr. 553 (1965).
132. Some courts have fashioned an end run on the problem of improper waiver by finding the legislative grant of "exclusive jurisdiction" to juvenile courts with respect to juvenile offenses to be unconstitutional in light of a provision in the state constitution granting to district or circuit courts exclusive jurisdiction in all "criminal" cases. Garcia v. District Ct., 157 Col. 432, 403 P.2d 215 (1965); Whitman v. State, 96 Ga. App. 730, 101 S.E.2d 621 (1957). Other Georgia cases to the same effect are criticized in Herman, Scope and Purposes of Juvenile Court Jurisdiction 48 J. Crim. L. & Criminology 590, 602 (1958). Is the "obvious answer . . . that cases tried in the juvenile court are not 'criminal cases' . . . and that exclusive original jurisdiction with power to waive was given to the juvenile court so that it could determine whether the case was to be a criminal case . . . ?" Herman, supra at 602.
133. E.g., Flynn v. Superior Ct., 3 Ariz. App. 354, 414 P.2d 438 (1966); Trujillo v. Cox, 75 N.M. 257, 403 P.2d 696 (1965); State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); other cases are collected in Annot., 48 A.L.R.2d 663, 686-93 (1955), and later supplements.
tions going to the jurisdiction of the criminal court can be raised long after conviction, and even long after the accused has reached adulthood. Virginia, for example, which has been unwilling to give full recognition to Kent,\(^\text{134}\) has held that notice, hearing, and appointment of guardian ad litem (but not necessarily counsel) are statutory prerequisites to the waiver of juvenile court jurisdiction. But since the hearing and effective assistance of counsel requirements of Kent are now constitutionally a part of every waiver statute,\(^\text{135}\) disregard thereof would likewise seem to deprive the criminal court of jurisdiction and render subsequent criminal convictions void. This appears to be the present state of the law in Indiana.\(^\text{136}\) Therefore, judges before whom young people are brought for criminal trial must make careful inquiry as to their age, and as to whether any waiver order has been entered in full accord with the relevant statute and with Summers and Kent. Judges should not rely on counsel to stimulate such inquiry.

Other courts have determined waiver orders to be non-jurisdictional and, therefore, not rendering void subsequent criminal convictions.\(^\text{137}\) Therefore in the case of a juvenile, where the record does not support the waiver of juvenile court jurisdiction, the trial or appellate court may remand for a proper waiver hearing. If waiver is then found to have been warranted, the conviction will stand.\(^\text{138}\) However, in certain circumstances, a trial court may modify its sentence in the light of the information developed on remand, or it may even require a new trial if necessary to avoid prejudice to the accused.\(^\text{139}\)

Since many juvenile courts permit retention of juvenile jurisdiction, once obtained, until the person reaches age twenty-one,\(^\text{140}\) the person may still be treated as a juvenile on remand in spite of the fact that original jurisdiction of the juvenile court may have extended only to persons under eighteen years of age. This point is somewhat complicated

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134. See text accompanying notes 19-44, supra.
135. Id.
138. This procedure seems to have the approval of the United States Supreme Court. Kent v. United States, 383 U.S. 541, 564 (1966).
in Indiana by reason of the Summers and Hicks cases, which require the proper filing of a petition to determine the delinquency of the accused before the juvenile court can acquire jurisdiction in its own right. The juvenile act requires a “preliminary investigation” and authorization of the delinquency petition by the court “if [it] shall determine that formal jurisdiction should be acquired.” Does this mean that a hearing must be held to determine whether a petition should be filed in the first place? And may the jurisdiction of the juvenile court, and any subsequent court to which the case may be transferred, be challenged if it appears that the requisite preliminary investigation and specific authorization requirements were not observed? Where a delinquency petition is not filed before waiver as in Summers and Hicks, and the child reaches the age of eighteen years before challenging his conviction in criminal court, what is to be done with him?

B. The Problem of Juvenile Geriatrics

By the time the Supreme Court decided that Morris Kent was improperly transferred from the jurisdiction of the juvenile court to the district court, he had passed the age of twenty-one. Because of this, his attorneys argued that his conviction be vacated and the indictment dismissed. Unwilling to approve such “drastic relief,” the Court remanded the case to district court for a nunc pro tunc hearing on the propriety of the waiver:

[i]f that court finds that waiver was inappropriate, petitioner’s conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment

141. Cases cited note 136 supra.
143. Kent v. United States, 383 U.S. 541, 565 (1966). The District of Columbia Juvenile Act permits the district court to convene itself as a juvenile court to determine the propriety of the exercise of criminal jurisdiction over a sixteen or seventeen year old juvenile. D.C. CODE ANN. § 11-914 (1961), now § 11-1553 (Supp. IV, 1965). IND. ANN. STAT. § 9-3214 (Supp. 1966) confers a similar power upon trial courts to which a juvenile case is waived. In other words, an attorney may request a circuit or criminal court to convene itself as a juvenile court to hear de novo the evidence on waiver, and, if juvenile court jurisdiction is deemed proper, the court may dispose of the case as though it were a juvenile court. Presumably, the case could be remanded to the juvenile court in counties where these courts have separate judges. See Watkins v. United States, 373 F.2d 681 (D.C. Cir. 1966).
144. 383 U.S. at 565; accord, Knott v. Langlois, 231 A.2d 767 (R.I. 1967). As to the possible nature of “such motions” and “further proceedings” see Black v. United States, 355 F.2d 104, 107-08 (D.C. Cir. 1965).
Another court, which has considered waiver defects to be non-jurisdictional, has followed a similar line. The Supreme Court of Washington in *Dillenburg v. Maxwell*\(^4\) granted a prisoner's petition for habeas corpus on the ground that he was not afforded a proper hearing before juvenile court jurisdiction was relinquished. Insofar as remedies were concerned, the court held that in cases where the petitioner was under the juvenile court age limit, the matter should be remanded to the juvenile court for a proper hearing. If the case is there deemed to have been waived improperly, the criminal conviction must be vacated, but the petitioner will remain amenable to juvenile court disposition. When it appears that the petitioner is past juvenile court age, he is to be remanded to the trial court for a proper hearing on the propriety of waiver, and if determined *nunc pro tunc* that waiver was appropriate, the conviction will stand “unless intervening events have so prejudiced the constitutional rights of the convicted person as to compel a different result.”\(^4\)\(^7\) But, if waiver is found to have been *inappropriate* for the person who is now past juvenile court age “he is then amenable to prosecution as an adult, and a new trial should be granted to him.”\(^4\)\(^8\) In Virginia, where waiver defects are considered jurisdictional, its highest court has ruled that in a case where a petitioner is over twenty-one years at the time his conviction is voided for non-compliance with mandatory waiver procedures, he is amenable to new indictment.\(^4\)\(^8\)

These results proceed from the view that age at time of trial, rather than at the time of the offense, is controlling as to juvenile court jurisdiction.\(^4\)\(^9\) Such rulings would raise serious speedy trial issues where

\(^{145}\) 70 Wash. 2d 325, 422 P.2d 783 (1967).

\(^{146}\) *Id.* at 789. The court gave no indication of what such “intervening events” might be.

\(^{147}\) *Id.* (emphasis added).

\(^{148}\) Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966).

\(^{149}\) Consider *Model Penal Code*, comments to § 4.10 at 19-20 (Tent. Draft No. 7, 1957):

> [a]s to offenders under 16 at the time of the offense it is implicit in the treatment of the exclusive jurisdiction of the juvenile court as a substitute for the old rule of incapacity that age, at the time of the offense should be determinative. It would obviously conflict with the ameliorative purpose of the 16 year criterion to permit passage of time between offense and prosecution to sustain a criminal proceeding; time worked no such effect in cases of non-age at common law.

But as to persons aged sixteen and seventeen, the drafters recognized that age at time of proceeding should, on balance, control in spite of the danger of “Texas style” waiver. The other alternative would be to clothe such persons with immunity if the offense was not discovered until after they reach eighteen. But, so long as juvenile courts are vested with jurisdiction to deal with the offender, the age at time of act should be decisive. It can then waive jurisdiction in appropriate cases. But what of a person who commits an offense at age seventeen and is over the age of juvenile court jurisdiction at the time of the criminal proceeding?

>[The Code] will in that case permit a criminal prosecution to proceed.
considerable time has intervened before the original conviction and the second trial.\textsuperscript{160} Also, it seems implicit from \textit{Kent} that if the waiver determination is found, on the merits, to have been erroneous, the offender has been deprived of significant benefits under the juvenile act, and the state should not be allowed to hold him to account for its own error. This was, of course, premised on findings of fact to be developed at a \textit{nunc pro tunc} hearing. But even this approach provides very little protection to the person who should have been retained by the juvenile court, but who now stands convicted of a serious offense. Judges understandably will be reluctant to find that waiver was not warranted in the first place. On balance, the better approach seems to be that of the United States Court of Appeals for the Ninth Circuit which ruled that a California judge’s waiver order with respect to a seventeen-year-old boy not represented by counsel entitled the prisoner to unconditional release when, six and one-half years later, he sought a writ of habeas corpus: “the appellee, at age 17, enjoyed California legal rights which were incident to his youth. These rights have gone with the passage of time and are irretrievable.”\textsuperscript{151}

VI. Is \textit{Kent} Retroactive?

A. The Response of the Courts

The most important aspect of \textit{Kent}, the right to counsel at the time of waiver, should be given retroactive effect.\textsuperscript{162} Research has disclosed no case in which a court faced specifically with the retroactivity of \textit{Kent}, as opposed to \textit{Gault}, has ruled in favor of retroactivity.\textsuperscript{163} However, some

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This, to be sure, does not afford protection against delay in the commencement of proceedings to avoid juvenile court jurisdiction. That danger is, however, greatest in the very cases where the termination of such jurisdiction is extremely close at hand, and these . . . will be the cases where the juvenile court would be most prone to waive. In other situations we believe that the requirement of speedy trial and statute of limitation will normally give adequate protection to defendants.


\textsuperscript{150} \textit{But see} State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960) (murder conviction voided seventeen years after invalid waiver of juvenile court jurisdiction and retrial on a 1941 indictment not a denial of speedy trial).

\textsuperscript{151} Wilson v. Reagan, 354 F.2d 45 (9th Cir. 1965).


courts have sustained collateral attacks upon pre-\textit{Kent} convictions because of lack of counsel at the time juvenile court jurisdiction was waived.\textsuperscript{154}

It is true that most of the significant constitutional decisions of the past few years have been deemed by the Supreme Court to be prospective only.\textsuperscript{155} However, in the most significant of all right to counsel cases, \textit{Gideon v. Wainwright},\textsuperscript{156} the ruling was fully retroactive. This was later explained by the Court to be necessary "because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.' "\textsuperscript{157}

In denying retroactive effect of the right to counsel aspect of \textit{Kent}, the state courts' reasoning proceeds as follows: (1) although the purpose of the \textit{Kent} and \textit{Gault} rules with respect to counsel is to promote full and fair hearings, there is no reason to assume that waiver and delinquency hearings have been unfair in the past; (2) juvenile authorities have long relied upon the old methods; (3) retroactive application of \textit{Kent} would seriously disrupt the administration of justice (i.e., turn loose or require retrial of prisoners who have been convicted at an early age but who have now reached adulthood);\textsuperscript{158} (4) waiver of juvenile court jurisdiction has always been subject to review in subsequent proceedings in which the defendant was represented by counsel; and (5) since a defendant has always had a right to counsel in the criminal proceedings, denials of that right in juvenile courts have not resulted in convicting the innocent.\textsuperscript{159}

In answer to these arguments it can be said that (1) the waiver of jurisdiction practices in the several states have been anything but fair;\textsuperscript{160} (2) customary reliance upon practices that are basically unfair and which

\textsuperscript{159} \textit{In re Harris}, 64 Cal. Rptr. 319, 322, 434 P.2d 615, 618 (1967).
have affected significantly the rights of unknown numbers of young people is an argument in favor of retroactivity rather than against it; (3) we are told by experts that, statistically, the number of waivers is very small—moreover, before assuming "disruption," a state can gauge the precise level of disruption by ascertaining how many people in its penal institutions had been committed at a time when they were potentially subject to juvenile court jurisdiction; (4) before Kent there was no reason to raise questions concerning waiver, and, in many cases, this probably never entered counsel's mind (even after Kent); and (5) denial of the right to counsel may often have made the difference between a child's being treated as an adult criminal rather than as a juvenile. Also, the fact-finding process at the waiver level has been demonstrated by the cases to have significantly lacked integrity.

B. Retroactivity in Indiana

Even though Summers and Hicks involved direct appeals, the Indiana Supreme Court's interpretation of the relevant statutes, and its findings of a lack of jurisdiction in the criminal court due to invalid waiver, appear to be wholly retroactive. Any prisoner now serving in an Indiana correctional institution who was waived from juvenile court to criminal court without assistance of counsel, should be eligible for release. Those who already have served their sentences under convictions void due to invalid waiver of juvenile court jurisdiction may apply to have those convictions vacated.

C. A Possible Compromise

Courts which fear the disruptive influence of Kent's retroactivity may adopt the approach of the United States Supreme Court and the Supreme Court of Rhode Island, and grant hearings to determine nunc pro tunc the propriety of the earlier waiver. Such hearings must be in accord with the procedural requirements of Kent. In those jurisdictions where waiver defects are jurisdictional (e.g., Indiana), if, after such hearing, the waiver is deemed to have been appropriate, the state may proceed with a new trial only in those cases where the statute of limitations has not run and where the constitutional right to speedy trial will not be

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163. Cases cited note 160 supra.
164. See text accompanying notes 53-62 supra.
165. See note 144, supra, and accompanying text.
infringed. Where waiver is found to have been unwarranted on the facts, a person still subject to juvenile court jurisdiction may be remanded to that court for further disposition. If the person has passed juvenile court age, he should be released unconditionally.

VII. CONCLUSION

The problems surrounding the waiver of juvenile court jurisdiction over older children so that they must stand trial as adults are perhaps miniscule when viewed in conjunction with all the problems involved in the administration of criminal justice. However, for those who are touched by the decision it is indeed critically important. Until that great day when the light shines through; when we learn whether we can really rehabilitate children or, for that matter, anybody else; when we are thoroughly convinced by those who argue that rehabilitative concepts should replace completely our punitive approaches with respect to persons accused of crime; and when we are willing to foot the bill for all of this, the waiver of juvenile court jurisdiction in "appropriate cases" will remain a necessary part of the juvenile-criminal process.

The message of Kent, Gault and Summers with respect to waiver is that no longer is the presumed "expertise" of the juvenile judge to be relied upon without proof of the proper employment of that knowledge. We, as lawyers and judges, must now learn considerably more about young people so that we may begin to "tell it like it really is!"

166. Model Penal Code, supra note 149.