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Transfer Between Courts Under the Indiana Juvenile Code

ROBERT BATEY*

The Indiana Juvenile Code,¹ proposed by the Juvenile Justice Division of the Indiana Judicial Study Commission in 1977 and adopted by the state legislature in 1978,² becomes effective on October 1, 1979.³ In the words of the Juvenile Justice Division, the General Assembly delayed the Code’s effective date “to allow for more public input.”⁴

This delay for public comment and criticism is particularly appropriate because of the nationwide attention currently being focused on the juvenile justice system by the work of the Juvenile Justice Standards Project. The Project, a joint effort of the Institute of Judicial Administration and the American Bar Association throughout the 1970’s,⁵ promulgated standards “cover[ing] the entire field of juvenile justice administration”⁶ which are “intended to serve as guidelines for action by legislators, judges, administrators . . . and others responsible for or concerned with the treatment of youths . . .”⁷

In the interim between the Indiana Juvenile Code’s enactment and its effective date, those “concerned with the treatment of youths” in Indiana ought to compare the Code’s provisions with the proposals of the Juvenile Justice Standards Project. This article makes such a comparison with respect to one isolated but significant topic, the transfer of a juvenile to criminal court for prosecution as an adult. The Code’s provisions on transfer in relation to the Project’s proposals are first analyzed.

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The article was completed prior to enactment of the 1979 Amendments to the Juvenile Code, which incorporated some recommendations of this article. Editor’s notes will indicate such changes.

¹IND. CODE §§ 31-6-1-1 to 31-6-10-4 (Cum. Supp. 1979).
³JUVENILE JUSTICE DIVISION, INDIANA JUDICIAL STUDY COMMISSION, PROPOSED AMENDMENTS TO THE INDIANA JUVENILE CODE iv (1978).
⁴IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, TRANSFER BETWEEN COURTS v-vi (Tent. Draft, 1977) [hereinafter cited as TRANSFER STANDARDS].
⁵Id. at v.
⁶Id.
making recommendations for amendment of the Indiana Juvenile Code. The article then addresses a question overlooked both in the passage of the Indiana Juvenile Code and in the formulation of the Project's standards on transfer between courts: what should be the post-transfer status of a juvenile's pre-transfer confession? Due to the importance of this question, the article proposes both judicial and legislative additions to the Indiana Juvenile Code.

**INDIANA TRANSFER PROVISIONS**

The first step in creating a juvenile court system is to limit severely the criminal courts' jurisdiction over the acts of minors. The Indiana Juvenile Code takes this step by granting the juvenile courts “exclusive original jurisdiction” over any child alleged to have committed a delinquent act; a delinquent act is any act committed before the juvenile's eighteenth birthday which "would be a crime if committed by an adult." The Code emphasizes this exclusive original jurisdiction in the juvenile court by directing that any original criminal proceedings cease immediately upon a determination that the defendant falls within the jurisdiction of the juvenile court.

These provisions exactly parallel the recommendations of the Juvenile Justice Standards Project. The transfer standards advocate exclusive original jurisdiction in the juvenile court over “any person whose alleged conduct would constitute an offense... if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.” Thus, the Code and the standards agree that the upper limit of juvenile court jurisdiction should be the juvenile’s eighteenth birthday and that the appropriate point at which to measure age for jurisdictional purposes is the time of the commission of the allegedly delinquent act.

The Indiana Juvenile Code, like the transfer standards, does allow non-original criminal court jurisdiction over the acts of a child. If the juvenile court “waives [its] jurisdiction,” trial and conviction in a criminal court

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9 Id. § 31-6-4-1(a)(1). There are a few exceptions to this definition of “delinquent act”: the juvenile court has no jurisdiction over a child who violates any law regarding the use of automobiles (when the child is at least 16 years of age), snowmobiles, and watercraft or any law “protecting fish or wildlife.” Id. § 31-6-2-1(b).
10 Id. § 31-6-2-2(a). The only step a criminal court may take after making such a determination is to seek extradition of a fleeing juvenile accused of a felony. Id. § 31-6-2-1(e). Upon extradition, the child must be sent to the juvenile court. Id. § 31-6-2-2(b).
11 TRANSFER STANDARDS § 1.1(A). Section 1.1(A) recommends original jurisdiction in the juvenile court. Sections 1.1(B) and 1.1(C) make that jurisdiction exclusive by prohibiting the criminal courts from exercising original jurisdiction over juveniles while permitting the exercise of non-original jurisdiction. Id. § 1.1(B), 1.1(C).
12 For a defense of both positions, see id. § 1.1(A) commentary.
13 IND. CODE § 31-6-2-4(a)(Cum. Supp. 1979). The Code speaks consistently of “waiver” of jurisdiction by the juvenile court, rather than “transfer” of the juvenile to the criminal court. Because this “waiver” label is easily confused with the label given the problem of a juvenile’s waiver of rights, see id. § 31-6-7-3, the term “transfer” will be used in this article.
become possible. This provision for transfer to criminal court has obvious significance for the juvenile.

It would of course be theoretically possible to establish a juvenile court without making any provision for transfer. However, as the Juvenile Justice Standards Project recognizes, the no-transfer goal is an unrealistic one, due to the public pressure for transfer that individual cases can generate. Thus, the Project recommends some provision for transfer, while adding that transfer should occur only rarely.

The means by which the standards attempt to effect this limitation are substantive and procedural restrictions on the transfer process. With respect to these restrictions, the standards and the Indiana Juvenile Code begin to diverge significantly, suggesting that the Indiana General Assembly is less committed than the Juvenile Justice Standards Project to the proposition that transfer should occur only infrequently.

The transfer standards recommend several substantive limits on transfer: (1) the juvenile must have been sixteen or seventeen years of age at the time of the alleged delinquency; (2) the juvenile must have been adjudicated delinquent for an act that would be a crime if committed by an adult; (3) the juvenile must reside in the jurisdiction of the criminal court; (4) the juvenile must have been charged with a crime for which the maximum penalty is life imprisonment; and (5) the juvenile must have been charged with a crime for which the maximum penalty is imprisonment of one year or more.

The Indiana Juvenile Code follows the customary rule, allowing dispositional jurisdiction over an adjudicated delinquent only until age 21. However, the Indiana Juvenile Code does not provide for a three-year limitation on all juvenile court dispositions, as the transfer standards do. The reason offered for preferring a definite term is that such a provision reduces the desirability of transfer when a juvenile near the maximum age for disposition appears before the juvenile court. The Indiana Juvenile Code also makes no provision with regard to the statute of limitations, thus adopting the limitations rules applicable in criminal court.

Another divergence between the standards and the Code concerns the applicability of the statute of limitations. The transfer standards advocate a different statute of limitations for juveniles, in part to avoid the problem of the older juvenile, who because of his age is a prime candidate for transfer. The Indiana Juvenile Code, however, makes no provision with regard to the statute of limitations, thus adopting the limitations rules applicable in criminal court.

[1]Id. § 31-6-3-5(a).
[2]See TRANSFER STANDARDS § 1.1(C) commentary. The commentary uses as an example New York's no-transfer scheme. In that state, criminal court jurisdiction over a delinquent was not possible, N.Y. FAM. CT. ACT § 712 (McKinney Supp. 1978); id. § 713 (McKinney 1975). However, "delinquent" was defined to include only those 15 years of age or younger at the time of the alleged delinquency. Id. § 712(a) (McKinney Supp. 1978). The implication is that the demand for criminal prosecution of some young offenders, which demand transfer of jurisdiction would ordinarily satisfy, resulted instead in a lowering of the upper limit of juvenile court jurisdiction. For an elaboration of this argument, see Whitebread & Batey, Transfer Between Courts: Proposals of the Juvenile Justice Standards Project, 63 VA. L. REV. 221, 235-38 (1977).
[4]"Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court . . . ." Id. at 6-7 (Introduction); accord, id. § 1.1(C) commentary.
[5]Id. at 7.
[6]There are other divergences of less significance. The standards express a preference for a three-year limitation on all juvenile court dispositions, id. § 1.2(A), rather than the customary granting of dispositional authority until the juvenile reaches a certain age. One reason offered for preferring a definite term is that such a provision reduces the desirability of transfer when a juvenile near the maximum age for disposition appears before the juvenile court. Id. commentary.

The Indiana Juvenile Code follows the customary rule, allowing dispositional jurisdiction over an adjudicated delinquent only until age 21. IND. CODE § 31-6-2-3(Cum. Supp. 1979); see also IND. CODE §§ 11-1-2-10, 11-4-5-5 (1976). Accordingly, a person 20 years old charged with having committed a crime the day before his 18th birthday would be subject to the juvenile court's dispositional jurisdiction only for the time between his adjudication as a delinquent and his 21st birthday; the temptation to transfer such a person to criminal court would be substantial.

Another divergence between the standards and the Code concerns the applicability of the statute of limitations. The transfer standards advocate a different statute of limitations for juveniles, TRANSFER STANDARDS § 1.3, in part to avoid the problem of the older juvenile, who because of his age is a prime candidate for transfer. Id. commentary. The Indiana Juvenile Code, however, makes no provision with regard to the statute of limitations, thus adopting the limitations rules applicable in criminal court. See IND. CODE § 31-6-4-1(a)(1)(Cum. Supp. 1979) (defining as delinquent any "act that would be a crime if committed by an adult").
at the time of the alleged crime;\textsuperscript{29} (2) there must be probable cause to believe that the juvenile has committed a crime punishable by more than twenty years' imprisonment;\textsuperscript{31} and (3) there must be "clear and convincing evidence [that] the juvenile is not a proper person to be handled by the juvenile court."\textsuperscript{22} This third determination itself requires four separate findings: (A) that the alleged offense was a serious one;\textsuperscript{23} (B) that the juvenile has a prior record of offenses involving significant bodily injury;\textsuperscript{24} (C) the likely inefficacy of available juvenile dispositions, as evidenced by prior dispositions;\textsuperscript{25} and (D) the superiority of the dispositional alternatives available in criminal court.\textsuperscript{26} Under the standards, failure to meet any one of these requirements bars transfer to criminal court.

The Indiana Juvenile Code creates far fewer substantive obstacles to transfer. A prosecutor\textsuperscript{27} can seek transfer to criminal court under any of three provisions. If the charge against the juvenile is murder, transfer is required upon determinations that the juvenile was ten years old or older at the time of the commission of the alleged crime, that there is probable cause to believe the juvenile committed the crime, and that treating the juvenile as an adult "would be in the best interests . . . of the safety and welfare of the community."\textsuperscript{28} If the crime charged is not murder, but a Class A or B felony,\textsuperscript{29} the juvenile court should transfer if the juvenile was sixteen or seventeen years of age at the time of the crime, if probable cause to believe that the child committed the act is found, and if transfer

\textsuperscript{29}Transfer Standards § 1.1(C).

\textsuperscript{31}Id. § 2.2(A). The standard requires probable cause to believe the juvenile has committed a "class one juvenile offense," which is elsewhere defined as a "criminal [offense] for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of twenty years." Id. § 2.2(B) commentary.

\textsuperscript{22}Transfer Standards § 2.2(A)(2).

\textsuperscript{23}Id. § 2.2(C)(1). The commentary specifically contemplates that some offenses punishable by more than 20 years' imprisonment—as, until recently, possession of marijuana was in some jurisdictions—will not be viewed as serious. Id. commentary, at 39.

\textsuperscript{20}Id. § 2.2(C)(2).

\textsuperscript{24}Id. § 2.2(C)(3).

\textsuperscript{25}Id. § 2.2(C)(4).

\textsuperscript{21}Both the Indiana Juvenile Code, IND. CODE § 31-6-2-4(b) to -4(d)(Cum. Supp. 1979), and the transfer standards, Transfer Standards § 2.1(C), allow only the prosecutor to initiate the transfer process.

\textsuperscript{28}Id. § 31-6-2-4(c)(Cum. Supp. 1979). The statute states the "best interests" test in the negative: the court should transfer, unless staying in juvenile court is in the best interests of the community. The statute also requires that staying in juvenile court be "in the best interests of the child," but this is true in virtually every case. Id.

\textsuperscript{29}Class A felonies are punishable by imprisonment "for a fixed term of thirty (30) years with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances," IND. CODE § 35-50-2-4 (Cum. Supp. 1979); Class B felonies are punishable "for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Id. § 35-50-2-5. Class A or B felonies specified in IND. CODE § 35-48-4 (entitled: Offenses Relating to Controlled Substances) cannot be the basis for transfer under this provision. IND. CODE § 31-6-2-4(d)(1)(Cum. Supp. 1979).
is "in the best interests . . . of the safety and welfare of the community . . . ."\textsuperscript{30}

A prosecutor unable to obtain transfer under either of these two provisions has a third option under the Code. The juvenile court may\textsuperscript{31} transfer a child charged with any act that is "heinous or aggravated" or "part of a repetitive pattern,"\textsuperscript{32} provided the court first finds that the juvenile was fourteen or older at the time of the alleged commission, that there is probable cause to believe the child committed the crime, that trial as an adult "is in the best interests of the safety and welfare of the community," and that the child is "beyond rehabilitation under the juvenile justice system."\textsuperscript{33}

The differences between these provisions and the transfer standards are evident. Under the Indiana Juvenile Code, transfers of fourteen and fifteen-year-olds to criminal court will frequently occur,\textsuperscript{34} while the standards recommend transferring only those sixteen or older.\textsuperscript{35} Furthermore, any crime—apparently even a misdemeanor—can be transferred to criminal court under the Indiana Juvenile Code;\textsuperscript{36} in contrast, the transfer standards require that the crime charged carry a possible sentence of more than twenty years before transfer is even possible.\textsuperscript{37}

While the Code and the standards apply similar probable cause tests,\textsuperscript{38} their tests for judging the propriety of juvenile court treatment are definitely at odds. The propriety test articulated by the transfer standards\textsuperscript{39} focuses entirely on the juvenile and his relationship to the

\textsuperscript{30} Juvenile Code § 31-6-2-4(d). But for the age and offense specifications, subsection (d) tracks the language of subsection (c).

\textsuperscript{31} This transfer provision uses permissive language—"the juvenile court may waive jurisdiction," \textit{id.} § 31-6-2-4(b)—while the other transfer provisions are mandatory: "the juvenile court shall waive jurisdiction." \textit{Id.} § 31-6-2-4(c), -4(d). The apparent significance is that a decision not to transfer under the mandatorily phrased provision is subject to challenge in the same way that a decision to transfer could be challenged, while a no-transfer decision under the permissive language is objectionable only as an abuse of discretion. \textit{Cf.} Transfer Standards § 2.2(C) commentary, at 37-41 (transfer permitted but not required).

\textsuperscript{32} Ind. Code § 31-6-2-4(b)(1)(Cum. Supp. 1979). In judging whether an alleged crime is heinous or aggravated, "greater weight [should be] given to acts against the person than against property." \textit{Id.} § 31-6-2-4(b)(1).

\textsuperscript{33} \textit{Id.} § 31-6-2-4(b).

\textsuperscript{34} See text accompanying notes 28-33 \textit{supra}. While the murder prosecution of a child even younger than 14 could also occur, see text accompanying note 28 \textit{supra}, such an event seems inconceivable.

\textsuperscript{35} See text accompanying note 20 \textit{supra}.

\textsuperscript{36} See text accompanying notes 28-33 \textit{supra}. If the misdemeanor charged is heinous or aggravated or part of a repetitive pattern, transfer is possible. \textit{Ind. Code} § 31-6-2-4(b)(Cum. Supp. 1979).

\textsuperscript{37} See text accompanying note 21 \textit{supra}.\textsuperscript{38}

\textsuperscript{38} There is, however, one difference worth noting in the use of the Code's and the standards' probable cause tests. The Indiana Juvenile Code allows the criminal court receiving the transferred juvenile to rely on the probable cause determination made at the transfer hearing. \textit{Ind. Code} § 31-6-2-4(g)(Cum. Supp. 1979). The standards reject this substitution, requiring a separate determination of probable cause in the criminal court. Transfer Standards § 2.2(D). This is primarily because of its value to the defendant as a discovery device. \textit{Id.} § 2.2(D) commentary.

\textsuperscript{39} See text accompanying notes 22-26 \textit{supra}.
juvenile court system. The fundamental inquiry appears to be whether the child can still benefit from the special treatment available in that system.\(^{40}\)

The Indiana Juvenile Code, on the other hand, gives more attention to the interests of the public than to the condition of the juvenile. When a juvenile is charged with a major felony, the only important question to be answered at the transfer hearing is, what do the safety and welfare of the community require?\(^{41}\) Only when the crime charged is less than a major felony is it appropriate to inquire into the juvenile’s capacity for rehabilitation.\(^{42}\)

This emphasis on the public interest in criminal prosecution is not new: for years, many states have allowed courts to consider the public interest when determining transfer.\(^{43}\) It is disheartening that states have maintained this allowance even in the face of the Juvenile Justice Standards Project’s vigorous criticism of it.

According to the transfer standards, the problem with weighing the public interest is that it diverts attention away from the juvenile, to the desires of the community:

The presumption in favor of juvenile court jurisdiction requires that the juvenile “deserve” transfer. Transfer must be justified on the basis of the juvenile and his or her actions and personal history. A “public interest” basis for transfer looks to something external to the juvenile. To the extent that the public interest means political considerations, these standards reject such considerations as a proper element in the transfer decision . . . .\(^{44}\)

A judicial decision to transfer a juvenile to criminal court because a criminal conviction would assure the safety of frightened citizens, or set a good example for the community, or satisfy the public desire for revenge, is an inappropriate use of the juvenile justice system. A court should transfer only when the child’s situation shows that juvenile court treat-

\(^{40}\)The commentary to the standards indicates that the propriety test identifies persons not “amenable to treatment” in the juvenile court. TRANSFER STANDARDS § 2.2(C) commentary. For those unwilling to accept the rehabilitative ideal presupposed by talk of “amenability” and “treatment,” the commentary offers other rationales for the test. Id. However, the language of section 2.2(C) — not a proper person to be handled by the juvenile court — evidences that section’s primary concern with the juvenile’s amenability to treatment as a child. Id.

\(^{41}\)See text accompanying notes 28-30 supra.

\(^{42}\)See text accompanying notes 31-33 supra. While it at least directs the court’s attention to the proper question, the “beyond rehabilitation” test is fatally deficient in that it does not specify the minimum showing necessary to find that a juvenile is beyond rehabilitation. See IND. CODE § 31-6-2-4(b)(4)(Cum. Supp. 1979); cf. TRANSFER STANDARDS § 2.2(C) (elaborating the propriety test into four specific requirements).

\(^{44}\)The commentary to the transfer standards counts 27 states which permit a judge making a transfer decision to assess the public interest in that decision. Id. § 2.2(C) commentary.

\(^{44}\)Id.
Despite the vehemence of this attack, states continue to include the public interest as a consideration in transfer. Indiana is the sixth state to revise significant portions of its transfer statute after promulgation of the standards without accepting the standards' recommendation to disregard the public interest in criminal prosecution. Perhaps this trend is not surprising; after all, legislatures are designed to respond to "political considerations," which makes them likely to devise other governmental processes attuned to those same considerations. Yet those concerned about juvenile justice still hope for something better.

Besides recommending substantive obstacles to transfer, the Juvenile Justice Standards Project also advocates giving the juvenile various procedural rights with which to oppose transfer. Strict time requirements are established: a prosecutorial decision to seek transfer must be made no more than seven days after a petition alleging delinquency is filed, a transfer hearing must be held within another ten days, and a judicial decision must be reached not more than ten days after the hearing. As a further spur to resolution of the transfer question, the standards recommend that the transfer decision be immediately appealable. Thus, if prosecutorial or judicial delay does not end the transfer dispute, appellate review will.

The Indiana Juvenile Code provides some, but certainly not all, of these procedural rights to the juvenile. A transfer hearing must be held within twenty days of the filing of the petition if the juvenile is in custody and within sixty days, if he is not. The Code establishes no other time requirements with regard to transfer. Furthermore, the Juvenile Code allows an appeal only from a final order, and a transfer decision is not a final order. As the commentary to the transfer standards indicates, the failure to allow an immediate appeal can delay effective review of a transfer decision for years, if not forever.


5The action of the Georgia legislature is particularly striking. In 1978, that legislature removed from its transfer statute a provision conditioning transfer on a finding that the juvenile was not amenable to treatment as a child. This of course is the test which the transfer standards had specifically advocated in 1977.

6Crowning the defects in the Code's reliance on the public interest in criminal prosecution is the fact that such interest need only be shown by a preponderance of the evidence. IND. CODE § 31-6-7-13(a)(Cum. Supp. 1979). The standards would require the state to show the impropriety of juvenile court treatment by clear and convincing evidence. TRANSFER STANDARDS § 2.2(C).

7TRANSFER STANDARDS § 2.1(C)-2.1(E).

8Id. § 2.4(A). The appeal must be taken no later than seven days after the juvenile judge renders decision. Id.

9IND. CODE § 31-6-7-6(b)(Cum. Supp. 1979).

10See id. § 31-6-7-17. [Shortly before publication, the restrictive "final order" language was deleted by An Act to Amend IC 33-5-10, and IC 35-46-1 Concerning Juvenile Law, Pub. L. No. 276, § 47, 1979 Ind. Acts ______. ED.]

11TRANSFER STANDARDS § 2.4(A) commentary.
In addition to the rights to a speedy transfer decision and to an immediate appeal, the Juvenile Justice Standards Project also advocates a full set of procedural rights exercisable by the juvenile at the transfer hearing. The juvenile should have counsel at the hearing, and an indigent juvenile should have counsel at state expense. The burden of going forward should be on the prosecutor, with the juvenile having the right to respond. The juvenile’s rights to confront the witnesses against him and to remain silent should be observed. As part of the right to remain silent, the juvenile also should have the right to control the use of his statements: in order to encourage candor at the transfer hearing, the juvenile should be able to bar any subsequent use of his statements at that hearing.

Finally, the transfer standards contemplate that the prosecution will use expert opinion to prove the impropriety of treating the juvenile as a child. Accordingly, the standards grant the juvenile the rights to question any such expert, to inspect all data on which the expert bases his opinion, and to call an expert witness (at state expense if the juvenile is indigent) to refute the testimony of the prosecution’s expert.

Once again, the Indiana Juvenile Code grants some, but not all, of these procedural rights. At a transfer hearing, the juvenile has a right to legal representation, which will be provided to any juvenile unable to afford such representation. The juvenile also has the rights to cross-examine the prosecution’s witnesses and to call witnesses of his own, as well as the right not to be a witness against himself. However, the Code does not grant any protection to statements made by the juvenile at the transfer hearing. As a result, a juvenile who offers his own testimony to show that he is not “beyond rehabilitation” runs the risk that the prosecutor will subsequently use that testimony against him.

In addition to the risk thrust upon the juvenile at the hearing, the Indiana Juvenile Code does not contain special provisions with regard to the use of expert opinion in the transfer process. This is understandable since the Code does not contemplate that such opinion will be necessary.

19Id. § 2.3(A), 2.3(B).
20Id. § 2.3(E), 2.3(F).
21Id. §§ 2.3(H), 2.3(I).
22Id. § 2.3(I) commentary. Thus, a juvenile can confess at the transfer hearing, in an attempt to show that he still can benefit from juvenile court treatment, without running the risk that the confession will convict him after he is transferred to criminal court.
23Id. § 2.3(C), 2.3(D), 2.3(G).
24IND. CODE § 31-6-3-1(b)(Cum. Supp. 1979). This right to counsel may be waived by a juvenile and a parent “with no interest adverse to the child” if they both act “knowingly and voluntarily” after “meaningful consultation.” Id. § 31-6-7-3(a). The transfer standards, in contrast, do not allow waiver of the right to counsel. TRANSFER STANDARDS§ 2.3(A) commentary.
25IND. CODE § 31-6-7-2(a)(Cum. Supp. 1979). A financially capable parent can be held responsible for the costs of counsel appointed for his child. Id. §§ 31-6-4-18(b), 31-6-7-2(c).
26Id. § 31-6-5-1.
27See text accompanying notes 31-33 supra.
to a determination of transfer.\textsuperscript{41} It is evident that expert testimony is irrelevant in establishing the juvenile’s age and the crime alleged, in determining probable cause and in weighing the best interests of the community. However, when the prosecution must also show that the juvenile is “beyond rehabilitation,”\textsuperscript{62} expert opinion seems highly important. Yet, if the prosecutor plans to use such evidence, the juvenile has only limited methods for discovering the expert’s planned testimony\textsuperscript{63} and only his own resources to support a search for contradictory expert opinion.\textsuperscript{44}

The foregoing comparison exposes some significant defects in the Indiana Juvenile Code’s transfer provisions. These defects should be remedied by amendment. Indiana juveniles under sixteen should not be eligible for transfer, nor should any juvenile charged with a crime other than a major felony.\textsuperscript{65} Furthermore, the court determining transfer should not consider the public interest in criminal prosecution, but rather should evaluate the juvenile’s amenability to the treatment available in the juvenile court.\textsuperscript{66} With regard to procedure, the most important changes necessary are provisions (1) making transfer orders immediately appealable;\textsuperscript{67} (2) protecting the juvenile’s statements at the transfer hearing;\textsuperscript{68} and (3) offering an indigent juvenile the services of an expert witness to contest the amenability-to-treatment issue.\textsuperscript{69} These amend-

\textsuperscript{41}Such opinion is necessary prior to disposition, and the juvenile court can obtain it after adjudication by requesting a predisposition report. \textit{IND. CODE} § 31-6-4-15(a) (Cum. Supp. 1979). The juvenile’s access to a predisposition report can be limited. \textit{Id.} § 31-6-4-15(f).

\textsuperscript{42}See text accompanying notes 31-33 \textit{supra}.

\textsuperscript{43}The law of discovery in criminal cases applies to delinquency cases, including transfer hearings. \textit{IND. CODE} § 31-6-7-11(a) (Cum. Supp. 1979).

\textsuperscript{44}One further difference in procedural rights exists. The standards permit the juvenile to disqualify the hearing judge from presiding at the subsequent proceeding, whether juvenile or criminal. \textit{TRANSFER STANDARDS} § 2.3(J). Under the Code, a judge can be disqualified only “for good cause shown.” \textit{IND. CODE} § 31-6-7-9 (Cum. Supp. 1979).

\textsuperscript{45}Amendment of \textit{INDIANA CODE} § 31-6-2-4 will produce the desired results. Subsections (b) and (c) should be deleted. See text accompanying notes 27-28, 31-33 \textit{supra}; murder should be added to the list of crimes justifying transfer under subsection (d). See text accompanying notes 29-30 \textit{supra}. [Shortly before publication murder was added to the list of crimes in subsection (d). The amendment failed to delete subsections (b) and (c). An Act to Amend IC 33-46-1 Concerning Juvenile Law, Pub. L. No. 276, § 6, 1979 Ind. Acts ______, Ed.]

\textsuperscript{46}Accordingly, the General Assembly should remove from § 31-6-2-4 all reference to the “best interests . . . of the community.” See text accompanying notes 28, 30, 33 \textit{supra}. That consideration should be replaced with the “beyond rehabilitation” test. See text accompanying note 33 \textit{supra}. The amending legislation should particularize the meaning of “beyond rehabilitation.” See note 42 \textit{supra}.

\textsuperscript{47}\textit{IND. CODE} § 31-6-2-4(Cum. Supp. 1979), the transfer statute, can be so amended or the legislature could add to § 31-6-7-17, the appeals statute, an indication that a transfer decision is a final order and thus subject to appeal [See note 50 \textit{supra}. Ed.]

\textsuperscript{48}Such a provision should be included in the transfer statute, § 31-6-2-4, with an explanation of the relationship of this new provision to § 31-6-7-3(c) (“knowing and voluntary” statements which are nevertheless inadmissible against a juvenile can be used to impeach the juvenile’s subsequent testimony). The standards recommend against this use of the juvenile’s transfer hearing statements. \textit{TRANSFER STANDARDS} § 2.3(I).

\textsuperscript{49}While the General Assembly could add such a provision to the transfer statute, § 31-6-2-4, a better location would be § 31-6-7-2, which now deals with the appointment of counsel for indigents in juvenile court.
ments would greatly improve the transfer process in Indiana by causing that process to resemble more clearly the model envisioned by the Juvenile Justice Standards Project.

**POST-TRANSFER STATUS OF A PRE-TRANSFER CONFESSION**

There is an important issue which the transfer standards do not address: the effect of transfer from juvenile to criminal court on the use, after transfer, of a juvenile’s statements made prior to the transfer hearing. The standards do protect the juvenile’s admissions at the hearing itself, but they are silent with regard to previous statements by the child.

The reasoning which motivates a juvenile to incriminate himself at the transfer hearing is that candidly admitting one’s past misconduct helps to convince the court that rehabilitation is still possible and transfer therefore improper. This same reasoning applies from the very moment the juvenile is taken into custody. Openness and contrition can win leniency from the police, from the juvenile court intake officer, or from the prosecutor, each of whom can act to forestall transfer. The juvenile who incriminates himself for this reason runs the risk that he will not persuade any of the relevant officials, and thus will find himself in criminal court where his candor will be powerful evidence against him. Once in criminal court, the previously candid juvenile can only seek to suppress his confession on the grounds available to all criminal defendants. But should his status as a juvenile at the time of the admissions provide any other basis for excluding them as evidence against him?

Indiana law does not currently provide an answer to this question. While the Supreme Court of Indiana has dealt repeatedly with the general problem of juvenile confessions, no attention has been given to

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8Transfer Standards § 2.3(I). See text accompanying note 55 supra.
9See id. § 2.3(I) commentary.
10For example, under the Indiana Juvenile Code a policeman has implicit discretionary authority not to take a juvenile into custody and not to report his crime to the juvenile court intake officer. IND. CODE §§ 31-6-4-4(b), 31-6-4-7(a)(Cum. Supp. 1979). While the intake officer must report all allegations of crime to the prosecutor, he can recommend informal adjustment to the prosecutor. Id. § 31-6-4-7(d). Even if both the arresting and intake officers recommend transfer, the prosecutor has discretion not to seek transfer and even not to file a petition alleging delinquency. Id. §§ 31-6-2-4, 31-6-4-9(a).
11Any involuntary statement of a defendant will be suppressed; involuntariness is judged on a totality-of-the-circumstances basis, with age an important circumstance. See, e.g., Gallegos v. Colorado, 370 U.S. 49 (1962) (confession of 14 year-old held incommunicado for five days involuntary); Haley v. Ohio, 332 U.S. 596 (1948) (confession of 15 year-old after interrogation from 12:00 midnight to 5:00 a.m. involuntary). A criminal defendant can also seek exclusion because his interrogators violated one of the rules enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), and Massiah v. United States, 377 U.S. 201 (1964).
12In Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972), the state supreme court held that a juvenile could not waive his rights to counsel and to remain silent until both he and a parent had been informed of these rights and had consulted about their waiver. Id. at 439, 288 N.E.2d at 142. The court grounded this holding on the need for “[c]learly defined pro-
this particular facet of that problem. Nor does the Indiana Juvenile Code speak to the issue.78

Other jurisdictions have spoken, however. The first, and certainly most provocative, answer to the question posed by pre-transfer confessions came from the United States Court of Appeals for the District of Columbia. In 1961, in Harling v. United States,79 that court held that a juvenile’s responses to interrogation prior to transfer were not under any circumstances admissible against him in the subsequent criminal trial.77 Recognizing that “principles of ‘fundamental fairness’ govern . . . procedures” in the juvenile court, the District of Columbia Circuit explained that “[i]t would offend these principles to allow admissions made by the child in the non-criminal and non-punitive setting of juvenile proceedings to be used later for the purpose of securing his criminal conviction and punishment.”78

This total ban on post-transfer use of a pre-transfer confession was highly controversial;79 the controversy ultimately produced a statute in the District of Columbia circumventing the Harling rule in major prosecutions.80 Nevertheless, Harling became the rallying cry of transferred juveniles, as court after court was asked to adopt a similar rule.

The courts’ responses were almost universally negative. The most favorable reaction came in Arizona where the state supreme court adopted a modified Harling rule in 1967, only to abandon it in 1971. In State v. Maloney,81 the 1967 case, the Arizona court cited Harling approvingly but refused to accept Harling’s complete ban on the use of pre-transfer confessions as criminal evidence; rather, the court required that, prior to questioning the juvenile, the police warn him (and his parents) of the possibility of transfer.82 Just four years later, however, the Arizona Supreme Court overruled Maloney, permitting admission into evidence

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89D.C. CODE ENCYCL. § 16-230 (West 1973) (removing from juvenile court jurisdiction children 16 or older charged with murder, rape, burglary, or armed robbery).
102 Ariz. 495, 433 P.2d 629. Besides relying on Harling, the Maloney court also justified its warning requirement by citing an Arizona statute to the effect that “evidence given in the juvenile court shall not be admissible as evidence against the child in any proceeding in another court.” Id. at 498, 433 P.2d at 628 (citing ARIZ. REV. STAT. ANN. § 8-228(B) (1955); current version id. § 8-207 (1970)). While an expansive construction of “evidence given in the juvenile court” might justify Harling’s total ban on pre-transfer confessions, it is difficult to see how any interpretation of this language could support Maloney’s warning requirement.
in a criminal trial a juvenile’s confession obtained without any warning of the possibility of transfer.\(^8\)

Other state courts were less roundabout in their rejection of Harling. In California,\(^4\) Florida,\(^5\) Illinois,\(^6\) Nebraska,\(^7\) and New Mexico,\(^8\) state supreme courts explicitly refused to follow the lead of the District of Columbia Circuit Court. Instead, these courts judged only whether the juvenile’s pre-transfer confession was voluntary, as indicated by the totality of the confession’s circumstances.\(^9\) The fact that the child was still within the jurisdiction of the juvenile court at the time of his statement was merely one of those circumstances. Without mentioning the Harling rule, courts in another seven states also showed their unwillingness to adopt any test specifically designed to deal with criminal court use of a juvenile’s confession.\(^9\)

As an extreme solution, the involuntariness standard surpasses the Harling rule: the latter may overly restrict the use of a pre-transfer confession, but the former is definitely far too permissive.\(^9\) Since 1966, courts in a few jurisdictions have developed a compromise between these two extremes.

*State v. Gullings,*\(^9\) a 1966 decision of the Oregon Supreme Court, involved a juvenile arrested for burglary, who was immediately informed of his rights and of the fact that the state could use anything he said in a “criminal prosecution” against him.\(^9\) After Gullings confessed, the juvenile court transferred him to criminal court, where he urged adoption of the Harling rule. The state supreme court accepted the reasoning underlying Harling’s total ban on pre-transfer confessions, but concluded “that an absolute prohibition is not required so long as it is made clear to

\(^{8}\) *State v. Hardy*, 107 Ariz. 583, 491 P.2d 17 (1971) (16 year-old accused of arson and 28 counts of murder). The court cited Rule 18 of the Arizona Rules of Procedure of the Juvenile Court as authority for overruling Maloney, noting that the conditions for admitting confessions in juvenile court proceedings did not include a warning of the possibility of transfer. *Id.* at 584, 491 P.2d at 17-18. Because it relates only to juvenile proceedings, the rule seems irrelevant to the issue faced in *Maloney*.


\(^{9}\) *State v. Francois*, 197 So. 2d 492 (Fla. 1967).


\(^{9}\) See note 73 supra.

\(^{9}\) See *State v. Oliver*, 160 Conn. 85, 273 A.2d 867 (1970); *Crawford v. State*, 240 Ga. 321, 240 S.E.2d 824 (1977); *State v. Cross*, 223 Kan. 803, 576 P.2d 696 (1978); *Hayden v. Commonwealth*, 563 S.W.2d 720 (Ky. 1978); *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971); *Braziel v. State*, 529 S.W.2d 501 (Tenn. Crim. App. 1975); *Mullin v. State*, 505 P.2d 305 (Wyo. 1973). Most of these cases reject the argument that a juvenile cannot confess unless a parent or counsel is present; the fact that the juvenile confessed alone is just one of the factors to be considered.

\(^{9}\) E.g., in *People v. Lara*, the court found voluntary the confession of an indigent, poorly educated Mexican-American juvenile interrogated while suffering from “lack of sleep and excessive drinking.” 67 Cal. 2d at 326, 432 P.2d at 210, 62 Cal. Rptr. at 594.

\(^{9}\) *244 Or. 173*, 416 P.2d 311 (1966).

\(^{9}\) *Id.* at 175. 416 P.2d at 312.
the juvenile that criminal responsibility can result and that the questioning authorities are not operating as his friends but as his adversaries. Based on the arresting officer's warning and Gullings' failure to introduce any evidence showing that he did not understand his jeopardy, the court affirmed the conviction.

The Gullings test differs significantly from the involuntariness standard. Rather than surveying all the circumstances of a pre-transfer confession, the Gullings test focuses on whether the juvenile knew transfer was possible and whether he knew his interrogators had more in mind than his rehabilitation. If these two circumstances are not present, no amount of voluntariness, as shown by other factors, can render the confession admissible. Iowa, Minnesota, Missouri, and Washington have all adopted versions of the Gullings test.

In addition to these states, a few more appear likely to follow Gullings when an appropriate case arises. They are jurisdictions which have already shown their willingness to require more of a juvenile confession than that it simply be voluntary. Courts in these states also require the presence of a lawyer or a parent and an opportunity for the juvenile to consult with this adult. Indiana is one of these states.

Thus, it seems likely that the Indiana courts will adopt the Gullings test without legislative prodding. A court willing to bar otherwise voluntary juvenile confessions, because no sympathetic adult was present, quite probably will also feel hostile to confessions obtained from a juvenile unaware of the possibility of transfer or of the true intent of his questioners.

The Indiana courts should take this step. Adopting Gullings will protect the juvenile when he (and the sympathetic adult present) are either gullible enough to disregard the possibility of transfer or unaware of the possibility of transfer. However, the Gullings test will do nothing to aid the juvenile, fully aware of the possibility of transfer, who nevertheless

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81Id. at 178-79, 416 P.2d at 313.
82Id. at 179-82, 416 P.2d at 313-15.
83The rule adopted in Gullings is both more and less than a warning requirement like Maloney's. See text accompanying notes 81-83 supra. The Gullings test is more because it requires actual comprehension of the situation, rather than just the routine delivery of a form of words. It is less, because such comprehension can be proved even when there has been no warning.
84State v. Allen, 224 N.W.2d 237 (Iowa 1974).
85State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973).
86State v. Wright, 515 S.W.2d 421 (Mo. 1974).
90If the courts fail to adopt the Gullings test, the General Assembly should, by adding a new provision to IND. CODE § 31-6-7-3(Cum. Supp. 1979).
decides to be forthcoming, in order to convince the authorities that he should not be transferred. Should the legislature\textsuperscript{104} grant any additional protection to a juvenile in this situation?

In answering this question, it should be remembered that the state has an interest in encouraging the juvenile to behave in this way. Open acknowledgment of one’s past conduct and of its wrongfulness is the first step toward rehabilitation.\textsuperscript{105} Given the rehabilitative goals of the juvenile court, young offenders in particular should be given every opportunity to take this step. Yet the possibilities of transfer and of the post-transfer use of pre-transfer statements combine to discourage the juvenile from being candid. Even the child initially inclined to confess thinks twice before doing so, and the silence that frequently follows such thought becomes a major obstacle to rehabilitation.\textsuperscript{106}

For these reasons, the General Assembly should act to encourage a juvenile’s candor even when transfer is a possibility. One means of accomplishing this would be legislative adoption of a Harling-like ban on the admission in criminal court of pre-transfer confessions. North Dakota has such a provision in its transfer statute: “Statements made by the child after being taken into custody and prior to... the service of notice [of a transfer hearing] are not admissible against him over objection in the criminal proceedings following the transfer.”\textsuperscript{107}

\textsuperscript{104}Given the judicial reception of Harling, see text accompanying notes 79-80 supra, the Gullings test is the most protection a court can provide without additional legislative direction. Therefore, if there is to be a supplement to this test, the legislature must enact it.

\textsuperscript{105}Cf. Brady v. United States, 397 U.S. 742, 753 (1970): An adult defendant who pleads guilty “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.”

\textsuperscript{106}Chief Justice Weintraub of the Supreme Court of New Jersey wrote in In re Carlo, 48 N.J. 224, 244, 225 A.2d 110, 121 (1966) (concurring opinion): The object of the juvenile process is to make men out of errant boys. In that process we must build upon the truth. A juvenile should be led to believe the decent thing is to come clean, to face the music. A father, inquiring as to possible misconduct of his son, would feel a bit absurd if he told the son... that he has a right not to answer... . That scene would be absurd for a couple of reasons, and one is that that is no way to teach integrity.

Chief Justice Weintraub was arguing against recognition of a juvenile’s right to silence, a position discredited by In re Gault, 387 U.S. 1 (1967). However, Weintraub’s goal of “teach[ing] integrity” is not inconsistent with the juvenile’s right to silence. See Kastigar v. United States, 406 U.S. 441 (1972) (authorities may compel testimony if its subsequent use is barred).

\textsuperscript{107}N.D. CENT. CODE § 27-20-34(4) (Supp. 1977). If the General Assembly chooses to emulate the North Dakota example, it should make its intentions clear, because some courts have been hesitant to believe that legislators would embrace a Harling-like rule. In United States v. Spruille, 544 F.2d 303 (7th Cir. 1976), the Seventh Circuit Court of Appeals could not believe that Congress had adopted a total ban on post-transfer use of pre-transfer confessions. Id. at 305-07. Other circuit courts of appeals have come to the same conclusion. United States v. Smith, 574 F.2d 707 (2d Cir. 1978); United States v. Cheyenne, 558 F.2d 902 (8th Cir. 1977). This conclusion was reached despite the plain language of Congress that “[s]tatements made by a juvenile prior to... a transfer hearing... shall not be admissible at subsequent criminal prosecutions.” 18 U.S.C. § 5032 (1976).
Such a statute would raise all the controversy and criticism which Harling generated. To avoid this, the General Assembly might choose to bar from criminal court only those pre-transfer statements made to juvenile court personnel. In 1973, Alabama had a statute of this sort, which provided: "No . . . admission or confession of [an alleged delinquent] to the probation officer or court . . . shall be given or heard in any . . . criminal . . . proceeding whatever . . . ."¹⁰⁸

A similar statutory provision under the Indiana Juvenile Code would bar the admission in criminal court of any pre-transfer statement made in the presence of the juvenile court intake officer,¹⁰⁹ the prosecutor,¹¹⁰ or the juvenile judge.¹¹ Such a provision, in combination with a legislatively or judicially adopted Gullings test, would allow limited interrogation by the police to obtain evidence usable in any court, while still providing the juvenile a protected opportunity to demonstrate his amenability to treatment as a child. The juvenile would thus have a choice between confessing completely, confessing to the juvenile court only, and not confessing at all. Offering the juvenile such a choice would be a sensible encouragement of candor, and an amendment to that effect would measurably improve the Indiana Juvenile Code.

¹⁰⁸ ALA. CODE tit. 13, § 377 (1940) (superseded by ALA. CODE § 12-15-67 (1975)). For an interpretation of the prior statute, see Clarke v. State, 51 Ala. App. 222, 283 So. 2d 671 (1973), cert. denied, 292 Ala. 716, 289 So. 2d 808 (1974). The statute applicable in federal juvenile proceedings, see note 107 supra, has been read to the same effect, protecting "statements made by a juvenile to court related personnel in connection with a transfer hearing." United States v. Spruille, 544 F.2d 303, 305 (7th Cir. 1976) (citing 18 U.S.C. § 5032 (1976)).

¹⁰⁹ For a discussion of the intake officer's role in transfer, see note 72 supra.

¹¹⁰ Since convincing the prosecutor not to seek transfer will be important to many juveniles, see note 72 supra, the Code should classify the prosecutor as part of the juvenile court apparatus for the purposes of this provision.

¹¹¹ The state legislature should combine any such provision with the previously recommended prohibition on the post-transfer use of a juvenile's transfer hearing testimony, see note 68 supra, placing both in IND. CODE § 31-6-2-4(Cum. Supp. 1979), the Code's transfer statute.