

CHAPTER EIGHT — CRIMINAL LAW AND JUVENILES

The § 707 Fitness Hearing: An Argument For Retention And Reform

This Comment examines the California juvenile court procedure for transferring minors to adult court. It describes the benefits of discretionary transfer, and rebuts recent criticisms of the process. It concludes that modification of the process can eliminate most of the problems, and that therefore reform is preferable to abolishment.

Some of the toughest issues facing legislatures in the United States today concern juvenile delinquency. The incidence of crime among young people under the age of eighteen in California has increased significantly in recent years.¹ In addition, the crimes young people commit have become more violent.² Unfortunately, facilities for dealing with and helping young offenders have not kept pace with the growing crime rate. This has led to overcrowded facilities and understaffed, underfinanced rehabilitative programs.³ As a result, juvenile court detention centers increasingly are becoming mere jailhouses where rehabilitation is a myth and where the unsophisticated acquire new criminal expertise to practice on the public following release.

The public, meanwhile, is becoming frightened. Some citizens are afraid to leave their homes, while others have invested time, effort and money in an attempt to insure the security of their

¹ CAL. BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 1977, pt. 1 at 21-22 (1977). The number of juveniles arrested for alleged felonies against persons and against property, and for misdemeanors, increased between 1973 and 1977. Total juvenile arrests decreased in this period, but this is because certain "status offenses" (offenses which would not be criminal if committed by an adult, such as a curfew violation) were decriminalized and because the juvenile population decreased.

² Los Angeles County District Attorney John Van De Kamp reported that the proportion of juvenile offenders committed to the California Youth Authority (CYA) for violent offenses rose from 47.2% to 59.5% between 1966 and 1976. Los Angeles Times, Aug. 12, 1978, at 1, col. 1.

³ Ms. Pearl West, the state director of the CYA, asserted that the CYA is grossly understaffed with regard to psychiatrists and psychologists. San Francisco Chronicle, Mar. 23, 1978, at 2, col. 1.

persons and property. Many advocate a "get tough" policy toward juvenile offenders, having lost faith in the juvenile justice system's ability to reform misguided youngsters.⁴ Legislative proposals reflecting this attitude have already been enacted and more are certain to follow.⁵ One such enactment amended section 707 of the California Welfare and Institutions Code, which provides for the transfer of certain youthful offenders to adult court.⁶ The amendment encourages the use of transfer and demonstrates the legislature's belief that one way to combat juvenile delinquency is to send some minors to adult court.

The juvenile justice system provides for a fitness hearing⁷ to determine whether the minor is "a fit and proper subject to be dealt with under the juvenile court law"⁸ If the minor is

⁴ Los Angeles Times, July 11, 1978, at 1, col. 1, described the phenomenon of longer and harsher sentences for juveniles as "society's reaction to 'youth terror.'" See also San Francisco Sunday Examiner and Chronicle, Oct. 29, 1978, at 1, col. 2.

⁵ For example, consider CAL. WELF. & INST. CODE § 202 (West Cum. Supp. 1979), which defines the purpose of juvenile court law. It was amended in 1977 to include the phrase: "to protect the public from criminal conduct by minors." Section 707, which deals with the transfer of juveniles to adult court, was amended in 1976 to provide for transfer solely on the basis of the gravity and circumstances of the alleged offense. That amendment also created a rebuttable presumption in favor of transfer when the alleged offense contained the risk of great bodily harm. *Id.* § 707.

⁶ *Id.* All references to code sections refer to the California Welfare and Institutions Code, unless otherwise indicated.

⁷ The hearing which accomplishes this shift of jurisdiction has been variously termed "fitness," "waiver," "transfer," "certification," and "remand." This Comment will use these terms synonymously. In juvenile court the "adjudicatory" or "jurisdictional" hearing refers to the trial stage, and the "dispositional" hearing refers to the sentencing stage.

⁸ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979) states:

In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

not "fit," the juvenile court judge will waive jurisdiction and transfer the minor to adult criminal court.

Section 707, which authorizes this hearing, is divided into two subsections. If the alleged offense is a serious crime involving the risk of great bodily injury, section 707(b) is likely to apply.⁹ Oth-

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offense alleged to have been committed by the minor.

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such a hearing.

At least forty-four states have enacted similar statutes, ostensibly to safeguard the public and to keep hardened, criminally inclined youths out of programs designed for children, and to which the hardened juveniles would not be responsive. See Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. TOL. L. REV. 1, 21-22 (1974). See also Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 297-300 (1972).

⁹ CAL. WELF. & INST. CODE § 707(b) (West Cum. Supp. 1979) states:

In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of one of the following offenses:

- (1) Murder;
- (2) Arson of an inhabited building;
- (3) Robbery while armed with a dangerous or deadly weapon;
- (4) Rape with force or violence or threat of great bodily harm;
- (5) Kidnapping for ransom;
- (6) Kidnapping for purpose of robbery;
- (7) Kidnapping with bodily harm;
- (8) Assault with intent to murder or attempted murder;
- (9) Assault with a firearm or destructive device;
- (10) Assault by any means of force likely to produce great bodily injury;
- (11) Discharge of a firearm into an inhabited or occupied building.

(12) Any offense described in Section 1203.09 of the Penal Code, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court

erwise, the fitness hearing will be a section 707(a) proceeding. The difference between the two sections concerns the risk of non-persuasion. Under subsection (a), unless the state can show that the minor would not be amenable to juvenile court treatment and training programs, the minor remains in juvenile court.¹⁰ Subsection (b), on the other hand, creates a rebuttable presumption of non-amenability so the risk of non-persuasion falls upon the minor. In other words, the court will transfer the minor, unless the minor demonstrates amenability.

Under both subsections, the certification procedure operates as follows. First, the prosecuting attorney¹¹ must allege that the minor committed any offense other than a so-called "status" crime¹² when he or she was at least 16 years of age.¹³ Next, the

shall find that the minor is not a fit and proper subject to be dealt with under the juvenile court law unless it concludes that the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court based upon an evaluation of the following criteria:

- (i) The degree of criminal sophistication exhibited by the minor, and
- (ii) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, and
- (iii) The minor's previous delinquent history, and
- (iv) Success of previous attempts by the juvenile court to rehabilitate the minor, and
- (v) The circumstances and gravity of the offenses alleged to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and the reasons therefore shall be recited in the order. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at such hearing.

¹⁰ "Amenability" and "non-amenability" are terms of art. Section 707(a) requires that the court not transfer the minor unless it "concludes that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court . . ." The court determines amenability by evaluating the criteria listed in section 707. CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979), *set forth in note 8 supra*, and *id.* § 707(b), *set forth in note 9 supra*.

¹¹ The "petitioner" in all section 602 proceedings is the prosecuting attorney. CAL. WELF. & INST. CODE § 650(b) (West Cum. Supp. 1979).

¹² A status crime is a violation of a law which applies to the minor solely because of age, such as a curfew violation.

¹³ CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1979). Such individuals come under the terms of section 602. Section 602 does not apply to all youthful

prosecuting attorney makes a motion for a fitness hearing.¹⁴ The judge must then direct the probation officer to investigate and make a formal report to the court concerning the juvenile's "behavioral patterns and social history."¹⁵ The minor may also submit any relevant evidence to demonstrate amenability to juvenile court treatment.¹⁶ The court examines the report and recommendation of the probation officer and all other evidence and makes a finding as to the minor's fitness for and amenability to juvenile court treatment.

This Comment takes a close look at the benefits of the transfer mechanism and analyzes commentators' criticisms of the current transfer process. It evaluates a recent proposal that the fitness hearing be abolished.¹⁷ The authors conclude that much of the criticism either lacks foundation or describes problems which can be remedied. Further, the benefits of the hearing are real and substantial enough to warrant retaining the mechanism with a few significant modifications.

I. BENEFICIAL ASPECTS OF A DISCRETIONARY FITNESS HEARING

The discretionary fitness hearing, properly used, can exploit the differences between the adult and juvenile courts. It can thereby confer benefits on both the offending minor and society by promoting the deterrence of criminal activity among juveniles¹⁸ and the more effective rehabilitation of minors who are not certified.¹⁹ The hearing also facilitates the protection of society.²⁰

offenders. Minors who are beyond the control of their parents, such as runaways, come under the terms of section 601. Section 601 persons are also wards of the court, but they cannot be subjected to a fitness hearing.

¹⁴ The judge can also raise the issue *sua sponte*. *Green v. Municipal Court*, 67 Cal. App. 3d 794, 803, 136 Cal. Rptr. 710, 715 (4th Dist. 1976). H. THOMPSON, CALIFORNIA JUVENILE COURT DESKBOOK (Cal. Cont. Educ. Bar 1976) 149.

¹⁵ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979), set forth in note 8 *supra*, and also *id.* § 707(b), set forth in note 9 *supra*. *Bruce M. v. Superior Court*, 270 Cal. App. 2d 566, 75 Cal. Rptr. 881 (1st Dist. 1969) interprets section 707(a) to mandate the preparation and filing of a report. See also THOMPSON, *supra* note 14, at 153a.

¹⁶ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979).

¹⁷ Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 SANTA CLARA L. REV. 595, 619 (1977).

¹⁸ See notes 21-41 and accompanying text *infra*.

¹⁹ See notes 42-51 and accompanying text *infra*. Although this Comment considers the deterrent and rehabilitative effects of transfer separately, they are not entirely discrete. If transfer deters a minor from criminal activity, then transfer, at least to some extent, also has rehabilitated the minor.

²⁰ See notes 52-54 and accompanying text *infra*.

A. Deterrence

Although literature on the effectiveness of threatened increases in punishment as a deterrent to criminal behavior is contradictory,²¹ both logic and fact support the argument that the transfer process deters. Because this subject involves numerous variables relating to human motivation, it is not easily susceptible of empirical proof. Hence, researchers announce differing and admittedly speculative conclusions.²² Nevertheless, all researchers would agree that rational people seek to avoid unpleasant consequences, and that therefore the threat of unpleasantness tends to deter, provided the subject appreciates the threat.²³ Disagreement revolves around the extent or effectiveness of deterrence.

The fitness hearing has a deterrent effect because it threatens offenders, who would otherwise face only juvenile court adjudication with the possibility of adult court treatment. The threat of adult court adjudication deters because it poses far more serious risks and consequences for the offender than does the juvenile court. Most significantly, the adult court has the power to send the offenders to prison, while the juvenile court does not.²⁴

An adult court conviction also carries with it significant long-term penalties which do not attach following a juvenile court adjudication. For example, prior adult court convictions allow the adult court to lengthen future terms on future offenses under the

²¹ F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 2-3 (1973).

²² *Id.*

²³ *Id.* at 5.

²⁴ The juvenile court's options for the disposition of persons described by CAL. WELF. & INST. CODE § 602 (West Cum. Supp. 1979) are: (1) home placement; (2) foster home placement; (3) county juvenile hall placement; or (4) commitment to the Youth Authority. *Id.* §§ 727, 730 & 731. Under no circumstances can the juvenile court send a minor directly to prison.

Id. § 707.2 prevents an adult court judge from sending a minor to prison without a second determination of amenability to CYA treatment. Before the judge can sentence a minor to prison, the CYA must evaluate the minor for not more than ninety days and submit a written report concerning the youth's amenability to the training and treatment which the CYA offers. Although this procedure may substantially limit the number of minors who actually go to prison, it does not deny the adult court judge that option. The judge is not bound by the CYA's recommendation.

Furthermore, if an adult court commits the minor to the CYA, the CYA retains the power to transfer the minor directly to prison. *Id.* § 1755.5. The CYA does not have this power if the commitment was the result of a juvenile court adjudication. This option operates as a continuing threat to the minor and counteracts mistakes.

enhancement provisions of the Penal Code,²⁵ and adult court records usually may not be sealed, as in juvenile court.²⁶ Also, the California Youth Authority (CYA) normally retains jurisdiction over the minor for a longer period of time following an adult court commitment.²⁷ An adult court trial and conviction will injure the minor's reputation and status more than a juvenile court adjudication.²⁸ Furthermore, the procedures in the adult court are more formal, and the atmosphere is more serious.²⁹ Moreover, recent

²⁵ CAL. PENAL CODE § 667.5(a) (West Cum. Supp. 1979) provides for additional terms for each prior felony "conviction." Juvenile court adjudications are not "convictions." See note 53, *infra*.

²⁶ Juvenile court records may be sealed upon petition. CAL. WELF. & INST. CODE § 781 (West Cum. Supp. 1979). In adult court an individual convicted of a misdemeanor may in certain limited circumstances petition for a sealing of such adult court records. CAL. PENAL CODE § 1203.45 (West Cum. Supp. 1979). Otherwise adult court records cannot be sealed.

²⁷ CAL. WELF. & INST. CODE §§ 1769-1771, 1800-1803 (West. Cum. Supp. 1979). The fact that an adult court conviction extends the jurisdiction of the CYA is relevant because most serious juvenile offenders, whether transferred or not, are currently sent to the CYA. See notes 45-49 and accompanying text *infra*. The CYA has jurisdiction until the minor is twenty-five following an adult court conviction, but only until the minor is twenty-one following a juvenile court commitment. Note that this difference alone could be sufficient for transfer. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 715, 478 P.2d 32, 35, 91 Cal. Rptr. 600, 603 (1970). The second factor listed in section 707 provides legislative approval of the *Jimmy H.* court: CAL. WELF. & INST. CODE § 707(a)(2) (West Cum. Supp. 1979) "Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction."

²⁸ Friends, family and prospective employers, as well as the delinquent minor, will consider an adult court conviction more serious than "trouble with juvenile court": they can no longer dismiss the experience as a childhood run-in with the law, for the "kids will be kids" explanation loses its viability. The state of California, for example, holds that adult court convictions can be grounds for denial or revocation of state employment, while juvenile court findings cannot. CAL. GOV'T CODE §§ 18935(f) (West 1963) & 19572(k) (West Cum. Supp. 1979).

²⁹ Despite the new "protection of society" clause in CAL. WELF. & INST. CODE § 202 (West Cum. Supp. 1979), the purpose of California juvenile court law is still largely rehabilitation. The stated purpose of adult imprisonment for crime, on the other hand, is punishment. CAL. PENAL CODE § 1170 (West Cum. Supp. 1979). See note 48 *infra*.

Juvenile court procedure, unlike adult court procedure, suggests that a minor, as is the case with an insane person, is not capable of committing a crime. For example, juvenile court hearings are often held before a "referee" rather than a judge. The presiding judge of each county's juvenile court has the authority to appoint one or more referees and assign to them any juvenile matter. The referees must be licensed, experienced California attorneys. All decisions of a referee are subject to review by a juvenile court judge upon the minor's petition, as a matter of right. CAL. WELF. & INST. CODE §§ 247-254 (West Cum. Supp. 1979). See also notes 139-145 and accompanying text *infra*. The prosecuting attorney

Supreme Court decisions require that the juvenile court provide minors with minimal procedural due process protections, so an increase in due process protections no longer offsets the detrimental aspects of transfer.³⁰ Transfer thus threatens the minor with the harsher penalty of adult court adjudication.

Most people would probably agree that the threat of a harsher penalty deters potential offenders from committing crime. Many studies have reached a different conclusion, however, and indicate that the severity of punishment has only a negligible deterrent effect.³¹ This suggests that transfer might not be an effective deterrent.

However, two respected researchers in the field of deterrence, Franklin E. Zimring and Gordon J. Hawkins, are wary of these studies.³² They complain that the quality of research has been

files a petition against the minor rather than an indictment or information. *Id.* § 650. Finally, the juvenile court does not adjudge an offender "guilty" as in adult court, but rather rules that the minor is a person described in sections 300, 601 or 602. *Id.* § 702.

³⁰ The procedural differences between the two systems are now largely limited to the right to bail and the right to jury trial, which are present in the adult court only. A detailed history of the juvenile justice system is beyond the scope of this Comment, but a brief summary is relevant at this point. Many states enacted statutes creating separate court systems for juveniles in the early 1900's. These juvenile courts, theroretically acting in place of irresponsible, absent or incapable parents, possessed virtually unlimited power in dealing with juvenile delinquents and wayward children. Juveniles received few if any due process protections. In *Kent v. United States*, 383 U.S. 541 (1966) and in *In re Gault*, 387 U.S. 1 (1967) the Supreme Court ruled that minors were absolutely entitled to: (1) notice of the charges, (2) the effective assistance of counsel, (3) the right to confront and cross-examine witnesses, and (4) protections from the burden of self-incrimination. Thus the image of a frightened, small child standing alone before an omnipotent judge, an image reminiscent of the Star Chamber, is no longer an accurate reflection of reality. For an excellent historical discussion of this material see Comment, *Sending the Accused to Adult Court: A Due Process Analysis*, 42 BROOKLYN L. REV. 309, 310-313 (1975).

The power of either court to determine the length of the sentence is now limited by the penalties prescribed for adult offenders. Juvenile court sentences may no longer exceed the maximum sentence that could have been imposed had an adult committed the same offense. *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976); *In re Aaron N.*, 70 Cal. App. 3d 931, 139 Cal. Rptr. 258 (1st Dist. 1977). This limit on the flexibility of juvenile court sentencing has been codified. *Id.* §§ 726(c), 731 & 1766.

³¹ Law Reform Commission of Canada, *Foreward to LAW REVIEW COMMISSION OF CANADA, FEAR OF PUNISHMENT: DETERRENCE*, at vi (1976).

³² Professor Zimring is the Director of the Center for Studies in Criminal Justice at the University of Chicago Law School. Professor Hawkins is one of Professor Zimring's colleagues at the Center. They have published numerous studies, both jointly and independently.

“spotty” and that definite conclusions are unwarranted by the evidence.³³ Zimring and Hawkins suggest that a price analogy is appropriate. In this analogy, the probability of conviction multiplied by the punishment yields the “cost” to the offender. As the cost increases, they argue, offenses will decrease.³⁴ The failure of studies to clearly support this theory may be due to methodological problems³⁵ and to inadequate notice of increased penalties.³⁶ If potential offenders are not aware of the new, increased penalties, such increases cannot have a deterrent effect. It may also be true that the increases have not been significant enough. A shift in penalty from one month to one year may have a far greater effect than a shift from five years to seven years because the percentage of change is so dramatic, even though the latter shift represents more than twice as many additional months of punishment than the former.³⁷

Zimring and Hawkins also argue that a qualitative shift in the nature of the threatened punishment may be a more effective deterrent than simply lengthening the sentence. Changing the penalty for a particular crime from a fine to a jail term, or from time in the county jail to time in the state prison, they suggest, is more likely to deter.³⁸ Based on their extensive work in the field, Zimring and Hawkins conclude that as a general rule the general preventive effect of the criminal law is enhanced with the growing severity of penalties.³⁹

The Zimring and Hawkins analysis indicates that the transfer process might be an effective deterrent. Transfer causes a qualitative shift in the threatened consequence and thus may be a more effective deterrent than a mere lengthening of the threatened sentence. The differences between juvenile court and adult court are significant enough so that the “cost” to the offender increases dramatically as the possibility of transfer becomes more likely.⁴⁰ Still, transfer can never deter unless the potential offenders rec-

³³ F. ZIMRING & G. HAWKINS, *supra* note 21, at 200.

³⁴ *Id.* at 195-96.

³⁵ *Id.* at 200. For example, studies which compare crime rates among jurisdictions are unreliable because factors other than the severity of the threatened punishment may influence the crime rates. Studies which examine the changes in the crime rate following an increase in the proscribed penalty in one jurisdiction are unreliable because it is difficult to determine what the rate would have been without the increase. *Id.*

³⁶ *Id.* at 201.

³⁷ *Id.* at 202.

³⁸ *Id.* at 209.

³⁹ *Id.* at 194.

⁴⁰ See notes 24-30 and accompanying text *supra*.

ognize how serious transfer would be and appreciate that transfer could well happen to them. Juvenile court officers and attorneys should make every effort, therefore, to convince young offenders that transfer would be extremely undesirable.

A recent program in New Jersey demonstrates that the threat of prison can be a very effective deterrent when the minor truly comprehends and appreciates the disadvantages of prison. In the program, juveniles take a brief tour of the Rahway State Prison and then listen to inmates serving life sentences describe the brutal realities of prison life. Participating communities report that 80 to 90 percent of the 8000 juveniles who have experienced the program have "gone straight."⁴¹ Final results of the program are not yet available, but these informal findings clearly suggest that transfer can serve as an effective deterrent and rehabilitative tool.

B. Rehabilitation of Non-transferred Minors and Protection of Society

Regardless of how effectively the transfer mechanism deters, it does facilitate the rehabilitation of minors who are not transferred. The transfer hearing promotes rehabilitation by allowing the juvenile court to evaluate each youthful offender individually and thereby separate incorrigible sixteen and seventeen year-olds from those who are more likely to benefit from the juvenile court's rehabilitative programs.⁴²

Sixteen and seventeen year-olds display varying levels of maturity and sophistication, and this variability leads to differences in amenability to rehabilitative treatment.⁴³ The use of an inflexi-

⁴¹ CALIFORNIA STATE SENATE COMMITTEE ON JUDICIARY REPORT on SB 133, February 12, 1979. (Available from Senator Robbins.) SB 133 is an appropriations bill to finance the busing of section 602's (juvenile delinquents) to state prisons or county jails where the minors "shall converse with inmates and participate in such other activities as will impress upon them the undesirability of prison life." CAL. PENAL CODE § 5056 (proposed; introduced Dec. 28, 1978). The New Jersey program inspired the proposed California program.

⁴² To the extent that transfer deters youths from committing crimes, it is also rehabilitative. Minors who are deterred from criminal activity because of the threat of adult court treatment are "rehabilitated," at least for the time being.

⁴³ "Although these pathways toward maturity characterize normal development, it is possible for development to be arrested or fixated at different points along the continuum from infancy to maturity." R. TROJANOWICZ, *JUVENILE DELINQUENCY: CONCEPTS AND CONTROL* 99 (1973). Another author writes: "[T]he term juvenile delinquents includes many varied and dissimilar types An 'accidental' delinquent, the victim of social forces, needs to be treated in a very different way from another delinquent who is psychologically seriously disor-

ble age limit, such as eighteen, to conclusively determine the adjudicatory forum ignores emotional, psychological and behavioral realities. By establishing an age group subject to either juvenile or adult court jurisdiction, section 707 provides the juvenile court with some of the flexibility it needs to deal with those differences.⁴⁴

The notion that the system separates minors who are "fit and proper subjects to be dealt with under the juvenile court law"⁴⁵ from those who are not "fit" is somewhat illusory because juvenile court judges often misapply section 707. Virtually all juvenile offenders guilty of serious offenses are currently sent to the CYA regardless of the adjudicatory forum.⁴⁶ Thus, judges are transferring minors who apparently are amenable to juvenile court treatment.⁴⁷ Instead, juvenile courts should transfer minors only when there is little or no hope of their rehabilitation,⁴⁸ making prison the one appropriate facility capable of dealing with the offender.⁴⁹ Properly applied, transfer will isolate only the most dangerous juveniles and remove them from the juvenile justice system entirely. The adult court should not sentence such offenders to the CYA unless the adult court and CYA first determine that the

dered The correct treatment for one would drive the other into further delinquent behavior." L. BOVET, M.D., *PSYCHIATRIC ASPECTS OF JUVENILE DELINQUENCY* 62-63 (1970).

⁴⁴ Section 707, in limiting the class of persons subject to concurrent jurisdiction to those aged sixteen and seventeen at the time of the offense is perhaps somewhat arbitrary. According to some statistics, persons under sixteen commit a great deal of violent crime. See *San Francisco Sunday Examiner and Chronicle*, Oct. 29, 1978, at 1, col. 2. Still, a decision finding a fifteen year-old incapable of benefitting from rehabilitation is more difficult to make than is the same decision regarding a sixteen year-old.

⁴⁵ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979), set forth in note 8 *supra*, and also *id.* § 707(b), set forth in note 9 *supra*.

⁴⁶ Edwards, *supra* note 17, at 616.

⁴⁷ Responsible juvenile court judges will realize the probable adult court disposition of the minors they transfer.

⁴⁸ It is misleading to suggest that the adult court does not actively attempt to rehabilitate; it does. Still, the emphasis on rehabilitation is far more pronounced in the juvenile court than in the adult court. The rationale of juvenile court law is primarily to rehabilitate, while the stated purpose of adult imprisonment for crime is punishment. CAL. WELF. & INST. CODE § 202 (West Cum. Supp. 1979); CAL. PENAL CODE § 1170 (West Cum. Supp. 1979); see note 29 *supra*.

⁴⁹ Note the procedure for sentencing a convicted minor to prison, pursuant to CAL. WELF. & INST. CODE § 707.2 (West Cum. Supp. 1979). See note 24 *supra*. Note also that the CYA retains jurisdiction for a longer period of time if the minor has been sentenced from adult court and that this effect is by itself sufficient justification for transfer. See note 27 *supra*.

minor poses no threat to the rehabilitation of other CYA wards.

By separating incorrigible youths from those likely to benefit from rehabilitative programs the court can achieve two beneficial results. First, transfer will reserve access to the limited resources of the juvenile justice system entirely for those minors who are more likely to benefit from its programs.⁵⁰ Second, transfer will protect less sophisticated offenders from the corrupting influence of minors who exhibit adult behavior and development.⁵¹ Without this separation, the incarceration of offenders amenable to the rehabilitative programs might provide them with a criminal education rather than rehabilitation.

The transfer process also promotes earlier identification and isolation of individuals who are ill-adjusted to society. Some individuals are likely to lead a life of crime despite society's rehabilitative efforts. If the minor cannot be rehabilitated, then it is in the public's best interest to deny the individual the opportunity to commit crime.⁵² Transfer will enable the adult court to recognize incorrigible offenders sooner than if the first adult court exposure occurs only after the offender reaches the age of eighteen. In addition, as the number of prior adult court convictions increases, the individual will face longer and longer sentences.⁵³ Assuming that the person is incorrigible, longer sentences represent a benefit to society.⁵⁴

⁵⁰ See notes 98-104 and accompanying text *infra*.

⁵¹ See notes 43-44 and accompanying text *supra*.

⁵² There are inherent problems in the identification of such individuals. The transfer process, if properly applied, should isolate the incorrigibles to the extent society is capable of doing so. It should be noted, however, that the transfer process seeks only to insure that minors who act like adults are treated like adults. It does not, by itself, seek to commit a young person for a long period of time. Juvenile courts should not transfer minors if there is even the faintest hope of rehabilitation. Furthermore, even when the juvenile court does transfer a minor, it does not prevent the minor from individually changing the direction of his or her life.

⁵³ CAL. PENAL CODE § 667.5 (West Cum. Supp. 1979) requires that the court impose an additional three year terms for each prior separate prison term served following a recent (within ten years) conviction on a "violent" felony (as defined in this code section) charge. This section also requires the imposition of an additional one year term for each prior prison term served for any recent (within five years) "non-violent" felony conviction. Pursuant to CAL. PENAL CODE §§ 1203-1204 (West Cum. Supp. 1979), the probation officer may consider a defendant's prior record when preparing the pre-sentence report. The defendant's record can also be a mitigating or aggravating circumstance affecting the length of the sentence ultimately imposed.

⁵⁴ This effect is consistent with the new additional purpose of juvenile court law which is to protect society.

II. ARGUMENTS AGAINST THE FITNESS HEARING

Despite the substantial benefits of the fitness hearing, commentators have recently been critical of the entire process, claiming it has both procedural and substantive shortcomings.⁵⁵ These commentators point to the relaxed evidentiary standards in fitness hearings, the inconsistent application of transfer standards from county to county, excessive judicial sympathy for the transferred minor in criminal court, and the unclear status of a fitness determination in a future prosecution as major problems that justify abolition of section 707.⁵⁶ They also maintain that the CYA has the ability to handle hardened youths and that inadequate judicial review leaves a transferred minor without an effective remedy in cases of capricious or arbitrary transfer.⁵⁷ Many of these criticisms, however, are either unfounded or inconsequential when balanced against the benefits of a discretionary fitness hearing.⁵⁸ Appropriate reform will mitigate the few real problems mentioned by the commentators. The following discussion will analyze each of the above problems in the order they are likely to arise in a fitness hearing.

A. Evidentiary Considerations

One alleged problem with the fitness hearing is that evidence which was the basis for transfer may be inadmissible at trial in adult court. The fitness hearing, being a juvenile court dispositional procedure, is comparatively informal, with relaxed evidentiary standards.⁵⁹ The juvenile court admits all evidence that meets the basic test of relevancy and materiality.⁶⁰ The probation officer's report used by the juvenile court as the basis for a

⁵⁵ Comment, *supra* note 30; Comment, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 U.C.L.A. L. REV. 988 (1976) (substantive fitness standards must be more clearly formulated); Edwards, *supra* note 17.

⁵⁶ See notes 62, 81, 93, and 114 and accompanying text *infra*.

⁵⁷ See notes 97 and 110 and accompanying text *infra*. Most of the arguments discussed in this Comment are used by Edwards, *supra* note 17, to justify the abolition of section 707.

⁵⁸ The reforms suggested are intended to deal mostly with problems of vagueness, and non-uniform application of section 707. These reforms (the point system, see note 132 *infra*) can alleviate many of the problems suggested in this Comment, but other problems are inherent in the transfer system. Reform will not eliminate problems such as potential judicial sympathy, but the benefits of discretion in the juvenile court outweigh its inherent problems.

⁵⁹ H. THOMPSON, *supra* note 14, at 153b.

⁶⁰ *Id.*

minor's transfer to adult court may therefore contain hearsay, documentation of prior offenses, opinion evidence, and other information that might not be available to a criminal trial court.⁶¹ At least one commentator expresses concern that the juvenile court will transfer a minor on the basis of all the evidence but that the adult court will acquit the minor because of more restrictive rules of evidence.⁶² Thus an adult court could acquit a transferred minor, who otherwise would have been committed to the CYA by the juvenile court, solely as a result of evidentiary differences in the two systems.⁶³

This criticism of the fitness hearing, however, fails to recognize two important facts. First, although the result posited by the commentators may have occurred in the past, it is no longer possible, because the legislature amended the juvenile court law in 1976 to require juvenile adjudicatory proceedings to observe the rules of the California Evidence Code regarding admissibility of evidence.⁶⁴ Therefore, although evidentiary standards are relaxed in the dispositional transfer hearing, the juvenile court must apply the same strict evidentiary rules in the adjudicatory hearing as the adult court applies in a criminal trial and presumably would reach the same result.⁶⁵

Secondly, adult court acquittals of transferred minors reflect defects in the prosecution's case; such acquittals are neither the result of nor a problem with the transfer process. Because the purpose of the certification hearing is to determine amenability to juvenile court rehabilitation and not to adjudicate guilt, the juvenile court judge must have the flexibility to consider all information relevant to the minor's ultimate disposition.⁶⁶ A minor

⁶¹ After receipt of an accusatory pleading, the probation officer must file a petition to the juvenile court. After filing the petition, the probation officer generally prepares a probation report, based on an investigation of the offender's background and personal life. The report usually contains a certification recommendation based on the offender's behavioral patterns. *Id.* at 146-48, CAL. WELF. & INST. CODE § 656 (West Cum. Supp. 1979).

⁶² These arguments about evidentiary considerations are discussed in Edwards, *supra* note 17, at 605-07.

⁶³ Prior to 1976, the juvenile court law stated that "any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible . . ." CAL. WELF. & INST. CODE § 701 (West 1972), 1961 Cal. Stats. 3482, ch. 1616, § 2.

⁶⁴ The text now reads: "The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." CAL. WELF. & INST. CODE § 701 (West Cum. Supp. 1979).

⁶⁵ An adjudicatory hearing is equivalent to a criminal trial at the adult level.

⁶⁶ The purpose of section 707 is to determine whether the minor is a "fit and proper subject to be dealt with under the juvenile court law." CAL. WELF. & INST.

who is not amenable to juvenile court treatment should stand trial like any criminal defendant, evidence problems notwithstanding.

A more serious potential problem is that because it precedes adjudication, the juvenile court judge inevitably must make the transfer decision largely on the basis of mere allegation. Section 707 specifies the factors which the juvenile court judge can consider. These factors include, among others, criminal sophistication, previous delinquent history, and the success of previous rehabilitative efforts.⁶⁷ The juvenile court, however, can transfer the minor solely on the basis of the crime charged.⁶⁸ The minor has no opportunity to disprove the facts of the alleged crime, nor the extent of his or her involvement.⁶⁹ Therefore, the minor may be innocent, yet must stand trial in adult court. Even if the adult court acquits the minor, the juvenile court in a later proceeding may consider the earlier transfer as evidence of non-amenableity.⁷⁰

A possible solution to this problem would be a legislative amendment requiring the juvenile court "prosecution"⁷¹ to make a showing of probable cause prior to transfer analogous to that required at the preliminary hearing stage in an adult criminal court.⁷² In such a hearing, the prosecution must demonstrate sufficient evidence of the accused's guilt to warrant further proceedings.⁷³ Without such a showing, the state must drop the charges

CODE § 707(a) (West Cum. Supp. 1979). California courts have held that "the issue of fitness might be held before the hearing on the jurisdictional issue of whether the minor violated a criminal statute," indicating that these are two different procedures. *Donald L. v. Superior Court*, 7 Cal. 3d 592, 597, 498 P.2d 1098, 1101, 102 Cal. Rptr. 850, 853 (1972).

⁶⁷ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979), set forth in note 8 *supra*.

⁶⁸ The juvenile court judge has the power to transfer "based on any one or a combination of the factors set forth above" *Id.*

⁶⁹ "[T]he mere allegation of criminal conduct or reference to a police report or other case summary could be the evidentiary basis connecting the minor to the alleged criminal conduct." Edwards, *supra* note 17, at 606. Edwards' concern is that the unfounded allegations will be responsible for the minor's presence in adult court.

⁷⁰ See the discussion on the future effect of transfer, notes 114-25 and accompanying text *infra*. Neither courts nor the legislature have settled the effect of an earlier transfer in a later proceeding.

⁷¹ The juvenile court does not find a minor guilty, and the state does not operate as a prosecutor, in the same sense as the terms are used in the criminal court. See note 29 *supra*.

⁷² Several states presently require such a showing. Rudstein, *supra* note 8, at 299.

⁷³ "The preliminary examination serves as a second weeding out process to

against the defendant. No such procedure now exists at the certification level in California juvenile courts.⁷⁴

A pre-transfer probable cause hearing, however, will not be necessary to insure fairness if the juvenile courts apply the proper certification standards.⁷⁵ Although the crime charged is often the most important factor in the transfer decision, other factors are also important, as discussed above.⁷⁶ For the most part, those

eliminate groundless charges of grave offenses and to determine whether a public offense has been committed and whether there is reasonable cause to believe the accused is guilty." CALIFORNIA CRIMINAL LAW PRACTICE (Cal. Cont. Educ. Bar 1964) 234.

⁷⁴ All that is required for the fitness hearing is a "motion of the petitioner made prior to the attachment of jeopardy." CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979). The motion can be made "at any time during a hearing on a section 602 petition alleging violation of a criminal law." Donald L. v. Superior Court, 7 Cal. 3d 592, 597, 498 P.2d 1098, 1101, 102 Cal. Rptr. 850, 853 (1972). No showing of probable cause is required. Of course, if a minor is transferred to adult court, there will be a probable cause hearing prior to trial. But the minor must be transferred before probable cause is determined, and may be prejudiced in future adjudications because of the binding effect of transfer.

⁷⁵ A probable cause hearing is undesirable because "fitness" is at issue, not guilt. In addition, a probable cause hearing would create conceptual as well as practical problems and would confuse the clear distinction between disposition and adjudication. "The adjudicatory or jurisdictional phase determines whether the allegations of the petition are sustained. If the allegations are sustained, the hearing moves on to the dispositional phase." R. BOCHÉS AND J. GOLDFARB, CALIFORNIA JUVENILE COURT PRACTICE, (Cal. Cont. Educ. Bar 1968, Supp. 1977) 107 [hereinafter cited as CAL. JUVENILE CT. PRACTICE]. CAL. WELF. & INST. CODE § 702 (West Cum. Supp. 1979) requires determination of adjudication prior to disposition. See *In re Hurlic*, 20 Cal. 3d 317, 572 P.2d 57, 142 Cal. Rptr. 443 (1977), which held that a certification hearing is to determine if the minor is fit for treatment in the juvenile facilities, not to adjudicate guilt.

An alternative reform which would affect both aspects of the evidentiary problem would be to alter the juvenile structure so as to grant prison sentencing authority to the juvenile court. Enactment of a proposal such as this would essentially eliminate the need for a fitness hearing. In spite of the appealing simplicity of this idea, it would be impractical to implement because of the right to jury trial and the right to bail required prior to a prison sentence. These rights would have to be extended to the juvenile offender in potential prison sentence cases. See note 30 and accompanying text *supra*.

⁷⁶ See note 67 and accompanying text *supra*. Section 707 lists five separate factors to be considered by the juvenile court judge, but any or all of them can be criteria for transfer. "Juvenile court law is very clear in providing that the question of transfer is to be evaluated in terms of the minor, not the offense. The approach of the courts, nevertheless, is often oriented toward the offense." CAL. JUVENILE CT. PRACTICE, *supra* note 75, at 124. "Under current law a minor accused of a serious crime can be found unfit solely on the circumstances and gravity of the alleged offense . . ." Edwards, *supra* note 17, at 605.

factors, such as previous delinquent history and success of previous rehabilitative efforts, involve facts and not allegations. Thus, if the courts properly apply these factors to individual cases, a showing of probable cause will not be necessary, because the court will have evaluated the minor and not the crime.

The current juvenile court law, however, does not require a full consideration of all the relevant factors to determine amenability. As noted above, the juvenile judge may base the decision on only one factor. A change in the law, therefore, is necessary. Because the court determines amenability rather than guilt, the law should *require* the juvenile court judge or referee to consider all relevant factors before making a section 707(a) transfer.⁷⁷ The juvenile court should not transfer a minor solely on the basis of the crime charged unless the crime is one of the twelve enumerated in section 707(b).⁷⁸ These crimes include murder, robbery, rape, kidnapping, assault, and other crimes likely to result in bodily injury. In such a situation, the crime is of such a serious nature that it should be the principal consideration in transfer.⁷⁹

⁷⁷ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979). The term "707(a) transfer" means a transfer when the crime charged is not a section 707(b) crime.

⁷⁸ Section 707(b) lists twelve offenses, which, when charged, create a presumption of transfer. CAL. WELF. & INST. CODE § 707(b) (West Cum. Supp. 1979), *set forth in* note 9 *supra*. This suggestion does not preclude a juvenile court judge from considering the section 707(a) factors in a section 707(b) case, but it does preclude a transfer for a non-section 707(b) crime without a full consideration of the section 707(a) factors.

All twelve offenses are likely to cause bodily injury, and it is appropriate that they are included in this section. A possible addition to this list would be the sale of dangerous drugs to other minors. This is also a serious crime that is likely to cause bodily injury, and indicates criminal sophistication on the part of the minor. Inclusion of this crime should depend on the comparable drug rehabilitation programs available in the juvenile and adult systems.

⁷⁹ This Comment suggests a change in the statutory wording from transfer "based on any one or a combination of the factors set forth above . . ." to transfer "based on a combination of *all* the factors set forth above, unless the crime charged is one listed in subsection (b) [section 707(b)], in which case the crime will be the principle factor to consider . . ." CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979). The legislature gave the crimes in section 707(b) special prominence by including them in the statute in 1977. This Comment recognizes the seriousness of those crimes, hence the suggestion above only applies in section 707(a) cases.

This change would emphasize the dispositional rather than the adjudicatory nature of the transfer hearing. It would of course be impossible to enforce judicial adherence to a complete evaluation under section 707(a), but the duty to do so would be clear. It is interesting to note that prior to 1976, section 707 specifically said that "the offense, in itself, shall not be sufficient to support a

This legislative enactment would prevent relaxed evidentiary standards in juvenile court from resulting in unfairness to the juvenile in a section 707(a) transfer situation. The juvenile should be in adult court because of lack of amenability to juvenile court rehabilitation, and not because of the likelihood that the juvenile committed the crime charged. The transfer decision should be valid even if the minor has not committed a crime. Presumably, then, the court will only transfer a minor who is mature enough to face an adult court trial. The mere act of being tried before an adult court, therefore, should not harm the minor, even if the criminal allegations upon which the transfer was based are untrue. The adult court will acquit a minor who did not commit the crime, and that minor will undergo none of the legal disabilities associated with a criminal conviction.⁸⁰

B. *Inconsistent Application of Transfer Standards*

The next problem a juvenile court judge encounters in a transfer hearing is what standards to apply to the minor in determining amenability. Standardization of the factors considered by the juvenile courts in making transfer decisions would decrease the problems created by judges inconsistently applying the existing standards under section 707.⁸¹ One commentator maintains that this inconsistency is a justification for abolishing the transfer process.⁸² The wide discretion that section 707 vests in juvenile court judges allows for potentially capricious or arbitrary transfer. Only stricter standards can eliminate this tangible problem with California's transfer process.

Prior to 1976, the standards of section 707 were extremely vague.⁸³ In effect, these standards granted judges considerable discretion. This, in turn, permitted individual biases to surface in fitness determinations, with a resulting lack of uniformity in

finding that the minor is not a fit and proper subject" CAL. WELF. & INST. CODE § 707 (West 1972), 1961 Cal. Stats. 3485, ch. 1616, § 2.

⁸⁰ See note 24 and accompanying text *supra*.

⁸¹ The permissive language of section 707(a), *set forth in* note 8 *supra*, allows the juvenile judge to consider any or all of the amenability factors, and assign any weight to the factors deemed appropriate. The study discussed at note 85 *infra* is an example of the resulting inconsistency of section 707 application.

⁸² Edwards, *supra* note 17, at 619.

⁸³ The statute did not list any factors to consider in determining amenability. The only guidance was that "the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court." CAL. WELF. & INST. CODE § 707 (West 1972), 1961 Cal. Stats. 3485, ch. 1616, § 2.

decisions, and unfairness to some juveniles.⁸⁴ For example, a study of two counties in 1971 and 1972 showed a wide disparity of treatment, with each county stressing entirely different factors.⁸⁵

In 1976, the California legislature responded to this problem with an amendment listing five specific factors to be considered in determining amenability.⁸⁶ In 1977, another amendment to section 707 made transfer mandatory, absent an explicit finding of amenability, upon commission of certain enumerated crimes.⁸⁷ This latter amendment, in effect, shifts the burden of proving amenability to the minor in such cases. It is likely that the two recent amendments will help in standardizing the treatment of juvenile offenders in California.⁸⁸ Nevertheless, the present law still allows for too much judicial discretion in the fitness determination.⁸⁹

The problem of inconsistency arises from the implementation of the law, as well as from the law itself. A juvenile court judge has substantial leeway in the use of referees, and there is no requirement that referees must have juvenile justice experience.⁹⁰ Varying degrees of reliance on referees and low levels of experi-

⁸⁴ Edwards, *supra* note 17, at 611. Section 707 was challenged as being unconstitutionally vague but survived the challenge. *Donald L. v. Superior Court*, 7 Cal. 3d 592, 601, 498 P.2d 1098, 1104, 102 Cal. Rptr. 850, 856 (1972).

⁸⁵ This is an unpublished study of Santa Clara and Alameda Counties (M. Wald, *Characteristics of Minors Found Unfit in Two Counties*) cited in Edwards, *supra* note 17, at 611. The gist of the study is that different criteria for transfer are applied by different counties. Santa Clara County transfers were generally based on an "adult life style," while Alameda County transfers were based on the seriousness of the offense and the failure of previous rehabilitative efforts. *Id.* at 612.

⁸⁶ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979). The five factors essentially codify those suggested in *In re Jimmy H.*, 3 Cal. 3d 709, 478 P.2d 32, 91 Cal. Rptr. 600 (1970).

⁸⁷ CAL. WELF. & INST. CODE § 707(b) (West Cum. Supp. 1979), *set forth in* note 9 *supra*.

⁸⁸ *See* note 85 *supra*. Wald's study took place prior to the 1976 and 1977 amendments which greatly particularized the transfer process. It is now more difficult for a juvenile court judge or referee to make a capricious determination and justify it under the law, because of the factors provided for the judge, and the requirement that factors leading to the transfer be "recited in the order of unfitness." CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979).

⁸⁹ There is still too much leeway in the law, because the judge can consider any or all of the amenability factors and give them any weight he or she feels is appropriate. *See* notes 91-92 *infra*.

⁹⁰ For a discussion of judicial standards and a proposal for reform, *see* note 141 and accompanying text *infra*.

ence and competence of referees can lead to improper application of transfer standards.

In addition, the legislative standards for the application of section 707 are still too vague. While the five basic criteria a court can consider are explicit in the statute, the weight any individual judge or referee will give to these factors may vary greatly.⁹¹ One reason for such variance is the permissive language of section 707(a).⁹² The statute does not provide guidance for the juvenile court judge or referee as to what factors they should consider in a given case, or how strongly each factor should figure in the amenability determination. Hence, there is a need for further standardization, a need which the proposed reforms in this Comment can fill.

C. *Judicial Sympathy*

Even if proper transfer standards are applied, it is possible that a minor transferred to adult court will have the benefit of misplaced judicial sympathy, and protection of the public will suffer.⁹³ For example, where the juvenile is a first offender in adult court, the judge can release him or her on bail prior to trial, and may be more inclined to do so because of the minor's age.⁹⁴ The juvenile court, on the other hand, does not recognize a right to bail. Therefore, the juvenile system may in some situations provide more immediate protection for society than adult court.⁹⁵

This argument underestimates the competence of criminal court judges, who can be expected to weigh the risks to society before granting leniency to juveniles. The judicial attitude to-

⁹¹ Section 707(a) merely lists the relevant factors; any or all of them may be used in the determination, and to any extent. CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979). This accounts for the disparity of juvenile treatment within California. See note 85 *supra*.

⁹² "A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law *may* be based on any one or a combination of the factors set forth above" CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979) (emphasis added). *But see* note 79 *supra*.

⁹³ This argument is advanced in Edwards, *supra* note 17, at 616.

⁹⁴ CAL. CONST. art. I, § 6 provides that "all persons are entitled to be released on bail except when charged with a capital offense, and when proof is evident or the presumption great." CAL. CRIMINAL LAW PRACTICE 74 (Cal. Cont. Educ. Bar 1964). This right has not been extended to juvenile proceedings. See note 30 and accompanying text *supra*.

⁹⁵ See note 30 *supra*. However, this protection difference is limited to the period between arrest and trial. In addition, the juvenile court's goal of protecting the public is not intended to provide society with *more* protection against juveniles than against adults. See note 29 *supra*.

wards juveniles is impossible to quantify, but there is no evidence that the criminal court judge evaluates the juvenile unlike any other criminal defendant for the purposes of bail determination, with the same attendant risks. Presumably, the judge is capable of weighing these risks for a seventeen year-old as well as for a nineteen year-old. In addition, most minors whom the juvenile court finds unfit are on trial for serious, violent crimes, and this fact alone will tend to mitigate judicial sympathy induced by the offender's age.⁹⁶

D. Commitment to the California Youth Authority

Regardless of the benefits of the transfer process itself, the dispositional alternatives of the juvenile court must differ from the adult court in order for section 707 to have a realistic impact on juvenile justice. One argument against section 707 is that it is unnecessary because the juvenile court system has adequate facilities to deal with "hardened" youthful offenders.⁹⁷ If this is true, there is no reason to sentence offenders under eighteen to prison when they can be treated adequately in the CYA, especially in light of the fact that few transferred minors are actually sent to prison under the present system.⁹⁸ Under this reasoning, the juvenile courts should handle all youths under eighteen, because the same dispositional option (the CYA) is available to the juvenile court and to the criminal court.

The final disposition for most transferred minors is in a CYA facility because section 707.2 requires that the convicting adult court remand the minor to the CYA for evaluation prior to a state prison sentence.⁹⁹ Nevertheless, the law does not require that

⁹⁶ Cases arising under section 707(b) all involve violent crimes, and the presumption is of non-amenability. "Some attorneys believe that the new legislation [section 707(b)] does little more than formalize the process the juvenile courts have previously been following"; i.e., transfer on the basis of serious crimes. CAL. JUVENILE CT. PRACTICE, *supra* note 75, at 41. On violent crime, see generally *People v. Bell*, 17 Cal. App. 3d 949, 95 Cal. Rptr. 270 (2d Dist. 1971) (1st degree murder); *Brian W. v. Superior Court*, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978) (kidnapping and murder); *People v. Browning*, 45 Cal. App. 3d 125, 119 Cal. Rptr. 420 (2d Dist. 1975) (murder, robbery, burglary).

⁹⁷ Edwards notes the wide range of dispositional alternatives offered by the CYA and contends that they are adequate. Edwards, *supra* note 17, at 617.

⁹⁸ *Id.* at 616.

⁹⁹ No minor who was under the age of 18 years when he committed any criminal offense and who has been found not a fit and proper subject to be dealt with under the juvenile court law shall be sent to prison unless he has first been remanded to the custody of the California Youth Authority for evaluation and report

the CYA be the final disposition for a transferred minor.¹⁰⁰ At the present time, the CYA and convicting court retain discretion to sentence a minor to prison under appropriate circumstances.¹⁰¹

Additionally, there are tremendous overcrowding and funding problems at all California juvenile facilities, including the CYA, with the result that officials can give only minimal attention to rehabilitative programs because of security concerns.¹⁰² These pressures have forced the juvenile court law away from rehabilitation as the primary goal and toward the protection of society.¹⁰³ The early release of delinquents and the closing of locally operated juvenile probation camps in the wake of funding cutbacks caused by the passage of Proposition 13,¹⁰⁴ California's property tax initiative, highlight the overcrowding problems.¹⁰⁵ Local juvenile officials either set these youths free or sent them to state CYA facilities.

In light of the current overcrowding and high juvenile crime rate, it is unlikely that California juvenile facilities will be able to adequately detain and care for all the juveniles sent through

CAL. WELF. & INST. CODE § 707.2 (West Cum. Supp. 1979). See note 24 and accompanying text *supra*.

¹⁰⁰ The remand to the CYA is only for evaluation. This is basically a second determination of amenability. The CYA authorities can then send the minor to prison. See *People v. Benefield*, 67 Cal. App. 3d 51, 136 Cal. Rptr. 465 (1st Dist. 1977).

¹⁰¹ CAL. WELF. & INST. CODE § 707.2 (West Cum. Supp. 1979).

¹⁰² There has been a 48.7% increase in commitments to the CYA from 1973 to 1977. CAL. BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 1977, pt. 2, table 19 at 34 (1977). Professor Fox mentions the "increasingly disproportionate relationship between the amount of delinquent conduct and the amount of judicial resources available to deal with it." S. FOX, JUVENILE COURTS 134 (2d ed. 1977). See statement by Pearl West, *supra* note 3.

In an interview with the authors, Tom McGee, a regional official of the CYA (Sacramento, Nov. 1, 1978), acknowledged that funding is a constant problem, and that the CYA at that time had 152 more juveniles than the budget permitted.

¹⁰³ A recent independent study commissioned by the CYA said that the purpose of the CYA should be to "protect society from the consequences of criminal activity." *Los Angeles Times*, Aug. 12, 1978, at 1, col. 1. Pearl West thinks that it is necessary to "recognize the concept of punishment" as well as rehabilitation in the CYA mandate. *San Francisco Chronicle*, Mar. 23, 1978, at 20, col. 1. See note 3 *supra*.

¹⁰⁴ CAL. CONST. art. 13A, §§ 1-6 (West Cum. Supp. 1979).

¹⁰⁵ See *Los Angeles Times*, June 22, 1978, at 3, col. 6, discussing increased CYA commitments because of county probation camp cutbacks; *San Francisco Chronicle*, June 15, 1978, at 6, col. 1, reporting the release of fifty juvenile offenders from Hidden Valley Ranch because of Proposition 13 budget cuts.

the system in the future. Although the actual numerical impact of transfer may be small,¹⁰⁶ it would be a mistake to automatically burden the juvenile facilities with all juvenile offenders, when some juveniles derive no benefit from the juvenile programs and are a drain on scarce resources.¹⁰⁷

Although the majority of transferred minors remain in CYA facilities, discretion to send the minor to prison is necessary to separate the most violent offenders from the other CYA detainees and to retain a sanction with possible deterrence value.¹⁰⁸ An influx of the more hardened youths, even the small percentage of those who are presently sent to prison, could damage the already overburdened juvenile rehabilitation programs. Increased security pressures would divert CYA resources from rehabilitation to incarceration.¹⁰⁹ Abolishing the section 707 transfer process would do a great disservice to those who can benefit from the CYA rehabilitative efforts.

E. Judicial Review and the Future Effect of Transfer

Once the fitness hearing is completed and the sentencing court makes a disposition, inadequate judicial review of the determination becomes a potential problem. The fitness determination itself is not an appealable order, either at the time rendered or following the subsequent conviction.¹¹⁰ The only way to challenge

¹⁰⁶ Transfer is only used in the extreme juvenile case, but retention of the process allows the sentencing court to allocate the burden between overcrowded prisons, and overcrowded juvenile facilities. The availability of less crowded facilities is a factor the court can consider in sentencing the offender to the CYA or to prison. Presumably, a minor will not benefit from overcrowded juvenile rehabilitation programs.

¹⁰⁷ In one sense, some juveniles actually benefit from the adult correctional system. Incarceration protects them from committing crime, and they benefit in the long run by "paying their debt to society." In addition, society benefits in the protective sense.

¹⁰⁸ The McGee interview, note 102 *supra*, indicated that a large percentage of transferred minors end up in the CYA. The deterrence value of the transfer sanction is of course problematical, but any deterrent effect on youth crime is welcome. See notes 21-41 and accompanying text *supra*.

¹⁰⁹ One commentator has noted that "state and local governments have been unwilling or unable to devote necessary legislative energies and funds to the task of rehabilitating juvenile offenders." Comment, *Substantive View of the Fitness Decision*, *supra* note 55, at 1004. Further security requirements for those who are presently sent to prison under section 707 would create even more of a drain on rehabilitative resources.

¹¹⁰ *People v. Chi Ko Wong*, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976). An appellate court can only review the criminal trial record, and not

the fitness determination is by a writ of prohibition or mandamus prior to trial.¹¹¹ Unfortunately, judicial determination of the validity of the writ can be a slow process, and the question may become academic as the juvenile grows older pending appeal.¹¹² These strict rules can leave the juvenile without a practical remedy in cases of judicial bias or error.

Modifications in the transfer process will not solve the problem of inadequate judicial review. As the focus of this Comment is the transfer process, an analysis of the California review process is beyond its scope, and any meaningful modification would affect more than just the certification hearing. Given this inherent problem, the best way to minimize the injustice resulting from inadequate judicial review, short of an extensive reform of the California review process, is to reduce the chance for prejudicial error. Also, it is important that in the event of such error, the transfer record will reveal the inappropriateness of the transfer. An equitable standardization of the factors relied on by the juvenile court judge or referee and the application of a point system, such as the one suggested below, could greatly assist in achieving these ends.¹¹³

A final shortcoming now present in the transfer process is that the statute does not indicate whether an amenability decision is a final determination which will be binding if the offender is rearrested on a new charge while still a juvenile.¹¹⁴ The two year discretionary period is short, and the situation described above does not often arise. Nevertheless, if a minor is subjected to a second transfer hearing between his or her sixteenth and eigh-

"prior proceedings before a juvenile court." *Id.* at 712, 557 P.2d at 895, 135 Cal. Rptr. at 401.

¹¹¹ See *Donald L. v. Superior Court*, 7 Cal. 3d 592, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972); *Bryan v. Superior Court*, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972). The petition must be filed within fifteen days of the determination of unfitness. CAL. R. CT. 1348(k), as amended 1977.

¹¹² The passage of time would not render the issue technically moot because the decision is based on a fixed date and age. But as a practical matter, the minor may be growing less amenable to juvenile court treatment during the appeal.

¹¹³ A main contention of this Comment is that proper application of a point system, *set forth in note 132 infra*, would reduce capricious transfer, and channel judicial discretion. Nevertheless, the point system cannot eliminate judicial bias.

¹¹⁴ Under present law, a prior transfer would presumably be just one factor to be considered under "previous delinquent history" in section 707(a)(3) and "success of previous attempts at rehabilitation" in section 707(a)(4). CAL. WELF. & INST. CODE § 707(a)(3)(4) (West Cum. Supp. 1979).

teenth birthdays, the juvenile court must decide what effect to give the previous certification decision. The court might ignore the previous determination, treat it as a rebuttable presumption of amenability (or non-amenability), or consider it to be conclusive of the issue.

A recent California Court of Appeal decision, *In re Dennis J.*,¹¹⁵ indicates that in appropriate cases, California courts may hold that previous certification determinations are binding in later proceedings.¹¹⁶ In this case, the juvenile authorities initially charged the minor with possession of marijuana and burglary. Prior to the hearing on these charges, the minor was charged additionally with rape, burglary, and robbery in connection with a different event.¹¹⁷ The judge transferred the minor to adult court for the serious charges but retained juvenile jurisdiction over the minor for the initial charges. The appellate court vacated the later finding of fitness, holding that the minor must stand trial on all charges in adult court.¹¹⁸

The holding in *Dennis J.*, that the juvenile court should not determine a minor's amenability for different crimes, suggests that once a minor is found unfit for the juvenile system, that minor will always be unfit.¹¹⁹ This principle is consistent with the theory behind the fitness hearing: that it is a determination of amenability, not an adjudication of guilt.¹²⁰ A proper decision to transfer is based on criminal maturity, which will not decrease as the minor grows older.¹²¹ If a minor is transferred on the basis of *all* the factors under section 707(a), the mere fact that the adult

¹¹⁵ 72 Cal. App. 3d 755, 140 Cal. Rptr. 463 (2d Dist. 1977).

¹¹⁶ *Id.* at 762, 140 Cal. Rptr. at 467.

¹¹⁷ *Id.* at 758, 140 Cal. Rptr. at 464-65. The more serious charges are all section 707(b) crimes.

¹¹⁸ "In exercising its jurisdiction the juvenile court cannot treat and rehabilitate part of the minor while leaving another part to the rehabilitation processes of the regular criminal justice system. Either the juvenile court or the adult criminal court must deal with the whole individual." *Id.* at 760, 140 Cal. Rptr. at 466.

¹¹⁹ Although *Dennis J.* does not raise the exact question of how to handle a previously transferred minor who is subsequently arrested, the case does hold that the minor should be dealt with as a whole individual. This Comment does not completely embrace the *Dennis J.* reasoning. Any presumption created by the earlier transfer should be rebuttable. See note 66 and accompanying text *supra*.

¹²⁰ See note 66 and accompanying text *supra*.

¹²¹ A minor's criminal maturity is based on his or her total criminal experience, which cannot decrease just because of transfer. Generally a rearrested minor has become more criminally mature by the very fact of arrest.

court acquitted the minor will not alter the determination of amenability.

This result, however, does not dictate automatic transfer in all rearrest cases. There are several possible results of a fitness hearing and the effect on future prosecutions should vary accordingly. If the juvenile court holds a fitness hearing and finds the minor to be amenable, this determination should not bind a future court. The minor may have become more criminally mature in the interim period. The later court should treat the previous decision only as evidence of amenability at an earlier time.

If the earlier court transferred the minor on the basis of a serious crime under section 707(b), conviction for that crime should create a rebuttable presumption of non-amenability in a future hearing.¹²² The earlier transfer is clearly strong evidence of the minor's lack of amenability. However, if the minor is not convicted in adult court, the previous determination should not be considered by the later juvenile court. A minor whom the juvenile court transfers solely on the basis of the crime charged and whom the adult court finds innocent (or at least does not find guilty) should not suffer future legal disability.¹²³

Regardless of conviction or acquittal, a juvenile court transfer on the basis of all the factors under section 707(a) should create a rebuttable presumption of non-amenability for a future hearing. Juvenile court consideration of all the factors bearing on the minor's maturity and independence will be extremely relevant to a fitness determination, even if the adult court acquitted the minor.

Any presumption created in the above situations should be rebuttable,¹²⁴ because it is possible that a minor could reform, especially after exposure to adult court the first time. In addition, the opportunity for rebuttal should be available if the juvenile court transferred the minor under section 707(a), and the adult court acquitted the minor. He or she may have been transferred largely on the basis of the crime, even though the juvenile judge

¹²² CAL. WELF. & INST. CODE § 707(b) (West Cum. Supp. 1979).

¹²³ In a section 707(b) determination, the court would not have necessarily considered all the factors of amenability under section 707(a). See note 68 *supra*. However, this proposal to treat the future effect of a transfer under section 707(a) and 707(b) differently depends on legislative implementation of the suggestion that the juvenile court must consider all factors for transfer unless a section 707(b) crime is charged. See note 78 and accompanying text *supra*.

¹²⁴ A rebuttable presumption is the only true presumption. A conclusive presumption is really a substantive rule of law; the term is a misnomer. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 804 (2d ed. 1972).

considered other factors. In short, the law should grant the judge limited discretion to redetermine amenability in order to avoid injustice in an individual case.¹²⁵

A statutory amendment prescribing the weight the juvenile court is to give a previous transfer would eliminate the ambiguity that now exists, but many of the other problems discussed above remain as long as the standards for transfer are unclear. Inconsistent application of transfer standards creates serious inequities for juveniles throughout California,¹²⁶ and the review process cannot correct these inequities.¹²⁷ Therefore, there is a need for future standardization such as that which the following point system can provide.

III. PROPOSED REFORMS

A. *The Point System*

The point system suggested below should help standardize the amenability decisions made by the juvenile court judge or referee. The point system approach is based on a program used by San Francisco County to determine whether to release a criminal defendant on his or her own recognizance (O.R.) prior to trial.¹²⁸ The staff of the O.R. Project routinely prepares an "O.R. Project Report" at the request of the defendant. This report is used by the judge to simplify and standardize release.¹²⁹

¹²⁵ The judge should state reasons for overcoming the presumption. The most likely reason would be that the earlier transfer had a dramatic effect on the juvenile's attitude and behavior. Nevertheless, the presumption would be hard to overcome, because in spite of the juvenile's "new attitude," he or she is still charged with a subsequent crime. A presumption of non-amenability would only be fair to the juvenile if the initial determination was correct. Implementation of the procedures suggested at the conclusion of this Comment would greatly increase accurate determinations.

¹²⁶ See notes 81-92 and accompanying text *supra*.

¹²⁷ See notes 110-13 and accompanying text *supra*.

¹²⁸ A copy of the San Francisco "O.R. Project Report" is on file at the U.C. Davis Law Review Office. Most counties use a form similar to San Francisco's to rate the defendants' chances of showing up for trial if released on their own recognizance.

¹²⁹ The report includes such factors as employment, past record, years at present address, family ties, and the crime charged, with the staff member assigning numerical values to each of the factors. In order to be released on own recognizance, a defendant must have: a) a San Francisco Bay Area address where he or she can be reached, and b) a desirable minimum of five points from the report. The judge still has discretion to deny O.R. if the minimum point value is achieved, and O.R. can be granted to a defendant without the minimum number of points. However, the project will not recommend O.R. for someone

California should adopt a similar system to determine a minor's amenability to treatment in the juvenile system. A state-wide point system would eliminate much of the uncertainty under section 707 and increase standardization of the transfer process.¹³⁰ The point system would assign various numerical values to all factors that have a bearing on the minor's maturity, independence, and ultimately, amenability. The point values would aid the court in determining how much weight to give each factor. The factors suggested in this Comment are grouped under the five basic criteria in section 707(a): criminal sophistication, chances of rehabilitation, previous delinquent history, success of previous rehabilitative efforts, and circumstances and gravity of the offense.¹³¹ The exact values placed on each factor would require further study and some experimentation, but the format detailed in the footnote covers the relevant information in an amenability determination.¹³² This Comment proposes testing the

who has achieved less than five points. This report acts on the average as a good indicator of the probability that the individual will appear at trial.

Letter from Gregory Pagan, Public Defender for the City and County of San Francisco (Jan. 25, 1979), on file at the U.C. Davis Law Review office.

¹³⁰ See discussion of inconsistent application of the transfer process, notes 81-92 and accompanying text *supra*.

¹³¹ CAL. WELF. & INST. CODE § 707(a) (West Cum. Supp. 1979).

¹³² This is an example of the kind of system that the legislature could develop. Each of the factors and subfactors present in the minor's situation have a given positive point value. The total point value achieved is compared with an absolute scale; a given number creates a presumption of amenability:

A) CRIMINAL SOPHISTICATED AND MATURITY (Emancipation)

1. Does the minor live with parent(s)?
2. Do the parents acknowledge control?
3. Is the minor single?
4. Is the minor employed full-time?
5. Is the minor seventeen years old or younger?
6. Is the minor a full time student?
7. Does the minor have little or no adult criminal contact?

B) CAN THE MINOR BE REHABILITATED PRIOR TO THE EXPIRATION OF JUVENILE COURT JURISDICTION?

1. Is the minor young enough so that the predicted rehabilitation time is less than the allowable incarceration period under juvenile law?

C) PREVIOUS DELINQUENT HISTORY

The probation officer would have to assign a number based on:

1. The number of previous section 602 determinations.
2. The number of previous adjudications of guilt (convictions).
3. Amount of time in juvenile court custody.

A more complete delinquent history would warrant a lower number.

system in a few selected counties, making alterations to the factors and point values, and instituting the amended system on a statewide basis. The principal benefit of a point system is that it can provide juvenile court judges with a guide. The system is intended to limit, not to abolish discretion.

The danger of any system that places numerical values on human interactions, however, is that the system will sacrifice human judgment and discretion for the sake of mechanical simplicity. If the transfer standards grant the juvenile court judge or referee limited discretion to evaluate the intangible factors acting on the juvenile, this mechanization can be prevented.¹³³ Hence, a point system such as the one suggested would only create a re-

D) SUCCESS OF PREVIOUS ATTEMPTS AT REHABILITATION

The probation officer would have to assign a number based on:

1. Reports from previous officers and CYA authorities.
2. Current probation officer evaluation.
3. Behavior while incarcerated.
4. Interaction with other juveniles.

E) CIRCUMSTANCES AND GRAVITY OF THE OFFENSE

1. Was the offense one not listed in section 707(b)?
2. Is the prison term for adult conviction less than two years?
3. Did the minor avoid causing bodily injury?
4. Did the minor avoid causing property damage?
5. Was the minor less involved than others (an accomplice as opposed to a principal)?

The elements of criminal sophistication and maturity under "A" above are derived in part from H. THOMPSON, *supra* note 14, at 151. Judge Thompson discusses several factors dealing with maturity, such as emancipation, living apart from parents, no longer attending school, or entering the armed forces. "The minor may be married and self supporting, a situation for which the juvenile system was not designed." Thompson deals with the behavioral patterns of the minor under the general rubric of emancipation. "If the court finds that the minor, for all practical purposes is emancipated, the very foundation of effective juvenile court probationary services is absent." *Id.* at 153.

In *Kent v. United States*, the United States Supreme Court listed the important factors in the transfer decision, including "The sophistication and maturity of the Juvenile as determined by the consideration of his home, environmental situation, emotional attitude and pattern of living." 383 U.S. 541, 567 (1966). The Supreme Court felt that the personal injury/property damage distinction (See "(E) 4." above) was also an important factor in the waiver decision. "Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted." *Id.* at 567.

¹³³ Such intangibles include but are not limited to the minor's appearance at the hearing, the minor's cooperativeness, and the sincerity of the minor. In essence, this amounts to the judge's subjective evaluation of the youth.

buttable presumption of amenability.¹³⁴ The juvenile court judge would retain discretion to certify to adult court based on an analysis of the minor's demeanor and personality, factors that cannot be quantified in the point system.

Nevertheless, the point system can still operate as a check on total discretion of the juvenile court judge. Before a judge can overcome a presumption established by the point system, he or she will have to take into account all relevant factors, including the probation officer's recommendation¹³⁵ and the point system outcome. The judge must then attempt to articulate the intangibles prompting such a decision. Presumably, an improperly justified statement could provide the basis for appeal by extraordinary writ.

As a practical matter, the minor's probation officer is the best person to complete the point system evaluation. The officer is the person most familiar with the minor's personal situation and, in any event, must complete a report recommending disposition prior to the hearing.¹³⁶ The point evaluation should only be a part of the probation officer's report. The officer's recommendation might differ from the point system outcome, but, like a judge or referee, the officer too would have to justify such a recommendation. The point system outcome is not intended to reduce the role of the probation officer in the transfer determination. The juvenile court judge should not ignore the officer's experience in dealing with juvenile offenders. The officer's report should reflect, as much as possible, the non-quantitative factors important in the section 707 process.

Application of the point system should channel judicial discretion in the transfer determination. A judge who faithfully consid-

¹³⁴ A rebuttable presumption is preferable to a conclusive presumption because of the fear that individualized treatment of the juvenile would be subordinate to mechanical categories. Judicial distaste for such categories can be seen in *Donald L. v. Superior Court*: "[A]ny attempt to explicate the standards with greater particularity appears not merely unnecessary but undesirable as likely to set up mechanical categories which the spirit of the law forbids." 7 Cal. 3d 592, 601, 498 P.2d 1098, 1104, 102 Cal. Rptr. 850, 856 (1972).

Of course ingenious judges have always proved adept at getting around presumptions. Hopefully, a juvenile judge facing such a presumption will be forced to objectively analyze the minor before overcoming the presumption.

¹³⁵ See note 136 *infra*.

¹³⁶ The probation officer files a petition in accordance with section 656 upon receipt of an accusatory pleading. CAL. WELF. & INST. CODE § 604(3)(c) (West Cum. Supp. 1979). Section 656 lists the seven requirements of a proper petition on behalf of the minor. CAL. WELF. & INST. CODE § 656 (West Cum. Supp. 1979). See H. THOMPSON, *supra* note 14, at 146-47.

ers the point system recommendation will be limited to the relevant factors. Capricious transfers or transfers prompted solely by public opinion will occur less often.¹³⁷ Such a limitation will increase standardization, and decrease the need for judicial review resulting from bias or error. The point system will also simplify what has become a time consuming and burdensome process.¹³⁸ It will allow for the creation of a relatively simple, well tested system that will aid the probation officer and the judge in the amenability determination.¹³⁹

B. State Regulation

The legislature should also consider implementing a program of training, minimum standards, and increased communication for the juvenile court judges. The proposed statutory standards for transfer will only be as fair and uniform as the individuals who apply those standards. An upgrading of qualifications and supervision of juvenile court judges and referees is necessary to standardize the transfer process and provide a more equitable system for California's juvenile offenders. Where there is little coordination between juvenile departments and referees are untrained in juvenile justice, a point system alone can do little to improve the transfer process. Such problems as ignorance of the Welfare and Institutions Code provisions, failure to appreciate the standards for transfer, and unfamiliarity with the effect of transfer on the juvenile are all possible with untrained referees. Only state regulation of the juvenile justice personnel can alleviate these problems.¹⁴⁰

¹³⁷ One commentator has noted that "[T]he process of decision may be distorted if a particular offense has aroused public opinion: well publicized cases usually result in pressure on the juvenile authorities to permit prosecution in the adult criminal courts." Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 793 (1966).

¹³⁸ Edwards, *supra* note 17, at 618, claims that the fitness hearing is one of the most "complicated and cumbersome of juvenile court proceedings," and feels that it would be fairer to abolish the process than to attempt to modify it. *Id.* at 619 n. 139. This Comment disagrees, and contends that the proposed point system would greatly simplify the process.

¹³⁹ Nevertheless, the judge or referee should not give "rubber stamp" approval to the point system recommendation.

¹⁴⁰ The danger of abuse in the referee system, especially where the referees are non-lawyers, is clearly present. If the referee is untrained in the law (whether or not he has a degree or license), *Gault's* promise of fundamental fairness and *Winship's* mandate of the reasonable doubt standard can be quickly eroded.

Carr, *supra* note 8, at 15 (footnotes omitted). Because California referees do not

Another beneficial change would be to require that all transfer hearings be held before a judge since the use of referees can create problems of unfairness and inconsistency. Juvenile court judges now appoint referees to serve at their pleasure.¹⁴¹ Until very recently, many juvenile court referees operated without formal legal training.¹⁴² Under current law, a referee must have been admitted to practice law in the state for a period of not less than five years.¹⁴³ But, as noted earlier, there is no requirement that the referee have any experience in juvenile justice.¹⁴⁴ There is still no program of coordination for referees and judges, and the use of referees varies greatly from judge to judge.¹⁴⁵ Although, in practice, transfer hearings are usually heard by a judge rather than a referee, this should be an absolute requirement because of the serious consequences of transfer.¹⁴⁶

Increased communication between state officials and local judges will encourage these kinds of changes. This communica-

have to be experienced in juvenile justice, *see note 142 infra*, these problems of inexperience can create problems of unfairness for the juvenile.

¹⁴¹ There are no restrictions on a judge's reliance on a referee. CAL. WELF. & INST. CODE § 247 (West Cum. Supp. 1979).

¹⁴² The only requirement was that the referee have five years of legal experience. CAL. WELF. & INST. CODE § 553 (West 1972), 1961 Cal. Stats. 3466, ch. 1616, § 2, now repealed by section 247, *id.* *See Gough, Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3 (1967) (deploring overuse of referees); Smith, *A Profile of Juvenile Court Judges in the United States*, 25 JUV. JUST. 27 (1974). Smith discusses a 1973 study of juvenile court judges and compares it to one from 1963. In the aggregate, education and legal experience have increased, but there are still very few strict standards, and many juvenile court referees are not bar admittees, and spend less than 25% of their time on juvenile justice matters. *Id.* at 38. *See also* CAL. JUVENILE CT. PRACTICE, *supra* note 75, at 15.

¹⁴³ *Id.*

¹⁴⁴ CAL. WELF. & INST. CODE § 247 (West Cum. Supp. 1979).

¹⁴⁵ *See generally* CAL. JUVENILE CT. PRACTICE, *supra* note 75, at 28 (1968) and at 3 (Supp. 1977); Gough, *supra* note 142.

¹⁴⁶ *See* CAL. JUVENILE CT. PRACTICE, *supra* note 75, at 30. This requirement would not be necessary if the overall quality of the referees was more carefully controlled. On serious consequences, *see note 24 and accompanying text supra*. Another beneficial change would be a statutory requirement that all referees have a minimum amount of experience in juvenile justice, preferably as practicing attorneys. Referees should be familiar with both the procedural and philosophical differences between the juvenile justice system and the adult criminal system. An alternative to eliminating referee use would be to increase the training and experience standards for the referees. On the differences between the two systems, *see generally* H. THOMPSON, *supra* note 14, at 2; S. FOX, *supra* note 102, at 1-20.

tion should include formal meetings, state sponsored programs, and state review of local procedures. The principle function of the juvenile justice system should be to provide fair and uniform adjudication for all California juvenile delinquents. Tighter state control of the juvenile justice system is the most effective means to accomplish this goal.

CONCLUSION

The legislature should retain section 707 as an important tool in the hands of the juvenile court judge. The judicial discretion in the statute, as long as it is properly exercised, provides juvenile law with the necessary flexibility to deal fairly with the idiosyncrasies of each case and of each juvenile. If the legislature were to abolish the transfer process, California would lose the beneficial aspects of the process: deterrence, rehabilitation, and protection of society.

In spite of the benefits of the discretionary transfer process, there are problems of fairness and uniformity in the present operation of the law which require remedial legislation. Different counties, and indeed different courts within a county, apply varying standards for transfer. The minors who are transferred face serious consequences in terms of sentencing, records, and loss of future opportunity. Nevertheless, a standardized point system process can alleviate the problems of implementing section 707 to a large extent.

In summary, this Comment proposes:

1) statewide implementation of a point system; probation officers would prepare individual juvenile reports based on this system, and juvenile court judges would use it as a guide in making transfer determinations;¹⁴⁷

2) state regulation of training and communication between juvenile court referees, and a specific statutory requirement that only judges can preside over a transfer hearing;¹⁴⁸

3) a statutory requirement that the juvenile judge must consider all of the amenability factors of section 707 prior to transfer unless the crime charged is one of the twelve enumerated in section 707(b);¹⁴⁹

4) codification of the principle that once the juvenile court transfers a minor pursuant to section 707(b), and the adult court convicts that minor, a rebuttable presumption of non-

¹⁴⁷ See note 132 and accompanying text *supra*.

¹⁴⁸ See note 140 and accompanying text *supra*.

¹⁴⁹ See note 78 and accompanying text *supra*.

amenability will arise for future offenses committed prior to the minor's eighteenth birthday. If the minor is transferred pursuant to section 707(a), the presumption arises regardless of conviction.¹⁵⁰

These proposals would of course require legislative action. This Comment urges consideration and study of these proposals because the discretionary transfer process is an imaginative and beneficial way to deal with the problem of differences in juvenile maturity and should be retained. Reform can minimize most of the problems with the transfer process, and the beneficial aspects of the fitness hearing outweigh those problems that remain. Legislative enactment of the proposals in this Comment may be costly, but the legislature should investigate the benefits California can derive from a more equitable system.¹⁵¹

In conclusion, it is important to emphasize that the point system is not simply a "get tough" policy for juvenile delinquents.¹⁵² Instead, the point system modification of the transfer process is a legislative means of establishing a discretionary sliding scale of determining majority for the purpose of criminal liability. Such discretion is essential for an equitable juvenile justice system, but this discretion must be applied in a uniform manner. Hence, while this Comment supports the transfer process under section 707, reforms of the kind suggested above are necessary for the continued validity of that process.

Kenneth A. Olmsted
Mark L. Perry

¹⁵⁰ See note 122 and accompanying text *supra*.

¹⁵¹ The initial expense of research and development would be the most substantial. The day to day operational costs would be minimal. Perhaps the most expensive proposal is state training for referees. The benefits of fairness to the juvenile and society as a whole outweigh the cost of such a program.

¹⁵² Granted, much of this Comment deals with the benefits of a procedure that can send minors to prison. However, this procedure should be used less often than it now is, while still being available as the juvenile court's harshest sanction in appropriate cases.