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**Juvenile Law - Double Jeopardy - Transfer Hearings Must Be Held  
Prior to Adjudication on Merits - Breed v. Jones, 421 U.S. 519  
(1975)**

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## RECENT CASES

**Juvenile Law—Double Jeopardy—TRANSFER HEARINGS MUST BE HELD PRIOR TO ADJUDICATION ON MERITS—*Breed v. Jones*, 421 U.S. 519 (1975).**

Unlike an adult, a juvenile who is charged with violating a criminal statute may find himself prosecuted in one of two courts. If the juvenile demonstrates that he is a proper subject for the rehabilitative treatment provided by the juvenile justice system, he will be tried in the juvenile court.<sup>1</sup> On the other hand, if by reason of the seriousness of the charge, the nature of the juvenile's past record, and his social background, the court finds that he is not amenable to treatment within the juvenile system, he will be tried as an adult in the criminal court.<sup>2</sup> The determination of where the juvenile will face prosecution is made in what is

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1. The idea of rehabilitative treatment has spawned an entirely separate juvenile court system throughout the United States. In the view of the early juvenile justice reformers, the child was essentially good, and incapable of criminal responsibility. See Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). Thus proceedings in the juvenile court could not properly concern themselves with guilt or innocence. Rather, the state through the juvenile court merely sought as *parens patriae* to determine a rehabilitative treatment which would be in the child's best interests. Nationwide, juvenile court statutes reflect the rehabilitative ideal by providing that, unless certain factors are met, the juvenile must be tried in the juvenile court. See, e.g., CAL. WELF. & INST'NS CODE §707 (West Supp. 1976), which allows proceedings to continue in the juvenile court unless the court finds that the juvenile is 16 years of age or older and "would not be amenable to the care, treatment and training program available through the facilities of the juvenile court. . . ." Other state statutes presume proceedings will take place in the juvenile court unless it can be demonstrated that to do so would not be in the best interests of the minor or the public. See, e.g., Juvenile Court Act, ILL. REV. STAT. ch. 37, §702-7 (1975).

In *In re Gault*, 387 U.S. 1 (1967), the Supreme Court held that juveniles faced with adjudicatory hearings must be provided with the following procedural rights: notice of charges, right to counsel, right to confront and cross-examine witnesses, privilege against self-incrimination, right to a transcript of the proceedings, and the right to appellate review. *Id.* at 31-58. The *Gault* Court was careful to point out that the addition of these due process rights would not impair "any of the substantive benefits of the juvenile process." *Id.* at 21.

2. While the rehabilitative ideal of the juvenile system is generally upheld, see note 1 *supra*, nearly every state has provided for waiver of juvenile court jurisdiction when the juvenile appears to be an unlikely rehabilitative prospect. See M. LEVIN & R. SARRI, *JUVENILE DELINQUENCY: A STUDY OF JUVENILE CODES IN THE UNITED STATES 19-23* (1974) [hereinafter cited as LEVIN & SARRI]. For a discussion of the waiver criteria used in California see Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874 (1972). See also *L. v. Superior Court of Los Angeles County*, 7 Cal.3d 592, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972).

frequently called a transfer hearing.<sup>3</sup> Although nearly every state provides for some form of transfer hearing,<sup>4</sup> states have differed as to when the hearing should take place.<sup>5</sup> This lack of uniformity has stemmed from a disagreement as to whether jeopardy attaches in a juvenile proceeding.<sup>6</sup>

In *Breed v. Jones*,<sup>7</sup> the Supreme Court resolved this problem by holding that jeopardy attaches at the commencement of the adjudicatory hearing. Thus, in order to avoid a violation of the constitutional protection against double jeopardy, the transfer decision must be made in a separate hearing<sup>8</sup> prior to any juvenile court adjudication of the offenses

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3. Transfer hearings may be initiated by the state's attorney or the juvenile court. For a breakdown of state statutes specifying how the transfer hearing is initiated see LEVIN & SARRI, *supra* note 2, at 22-23. Some states allow the juvenile to initiate the transfer hearing. See, e.g., FLA. STAT. ANN. §39.02(b)(2) (1974); ILL. REV. STAT. ch. 37, §702-07(5) (Supp. 1975). Trial in the criminal court may afford the juvenile tactical advantages such as the right to a jury trial. LEVIN & SARRI, *supra* note 2, at 23. Cf. *McKeiver v. Pennsylvania*, 403 U.S. 529 (1970) (no right to jury trial in the juvenile court).

4. See generally LEVIN & SARRI, *supra* note 2, at 19.

5. See, e.g., CAL. WELF. & INST'NS CODE ANN. §707 (West Supp. 1976) (the transfer decision may occur at any time during or after the adjudicatory hearing); MASS. GEN. LAWS ANN. ch. 119, §61 (1969) (court may order the juvenile to be transferred after a hearing on the complaint) (emphasis added); ILL. REV. STAT. ch. 37, §702-7(3) (1975) (transfer decision must occur prior to any hearing on the merits of the offense charged).

6. Courts have differed as to whether jeopardy attaches to juvenile adjudicatory hearings. Those finding that jeopardy attaches include: *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), *cert. denied*, 421 U.S. 999 (1975); *Rice v. District of Columbia*, 385 F.2d 976 (D.C. Cir. 1967); *Anonymous v. Superior Court*, 10 Ariz. App. 243, 457 P.2d 956 (1969) (dictum); *People v. Int. of P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971); *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *In re J.J.*, 132 N.J. Super. 464, 334 A.2d 80 (1975); *Funesca v. Judges of the Family Court of the County of Kings*, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (1969); *Garrison v. Jennings*, 529 P.2d 536 (Okla. Crim. 1974); *In re Knox*, 532 P.2d 245 (Ore. App. 1975); *Collins v. State*, 429 S.W.2d 650 (Tex. Civ. App. 1968).

Lower courts holding that jeopardy does not attach to juvenile proceedings include: *Jones v. Breed*, 343 F.Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974), *appeal aff'd*, 421 U.S. 519 (1975); *In re Bradley*, 259 Cal. App.2d 253, 65 Cal. Rptr. 570 (1968); *Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958); *In re Juvenile*, 306 N.E.2d 822 (Mass. 1974); *State ex rel. Arbeiter v. Reagan*, 427 S.W.2d 371 (Mo. 1968); *Brooks v. Boles*, 151 W. Va. 576, 153 S.E.2d 526 (1967).

7. 421 U.S. 519 (1975).

8. The California statute at issue in *Breed* allowed the juvenile court to make the transfer decision at any time during the adjudicatory hearing. Statutes which expressly require transfer hearings to be held prior to adjudication on the merits are: D.C. CODE ENCLYC. ANN. §1-2307(d) (Supp. 1975); GA. CODE ANN. §24 A-250(a) (Supp. 1974); ILL. REV. STAT. ch. 37, §702-7(3) (1975); MD. ANN. CODE art. 26, §70-16(a) (1969); MICH. STAT. ANN. §27.3178 (2) (Supp. 1974); MINN. STAT. ANN. §260.125 (1963); MISS. CODE ANN. §43-21-31 (1972); MONT. REV. CODES ANN. §10-1229 (Supp. 1975); N.H. REV. STAT. ANN.

charged.<sup>9</sup>

Gary Steven Jones was adjudicated a delinquent for having committed acts which, if committed by an adult, would constitute the crime of robbery.<sup>10</sup> Upon a subsequent finding that Jones was unfit for treatment as a juvenile, the juvenile court ordered that he be prosecuted for the same conduct in the adult criminal court.<sup>11</sup> Thereafter Jones was convicted despite counsel's argument that the criminal proceedings violated Jones' constitutional right against double jeopardy.<sup>12</sup> Jones eventually petitioned for a writ of habeas corpus in the federal district court. His petition was denied.<sup>13</sup> The Ninth Circuit Court of Appeals reversed,<sup>14</sup> holding that constitutional guarantees such as the right against double jeopardy are so fundamental to notions of fairness that to deny them would destroy confidence in the judicial system.<sup>15</sup>

The Supreme Court, in affirming the Ninth Circuit, left the determination of the actual basis or criteria for the transfer decision to the states. As to the necessary procedural rights to be accorded juveniles during the hearing, the Court was content to rest upon its decision in *Kent v. United States*.<sup>16</sup> The *Kent* Court found the transfer hearing to be a "critically important"<sup>17</sup> portion of juvenile proceedings. It was re-

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§169.21 (1964); N.M. STAT. ANN. §13-14-27 to 27.1 (Supp. 1975); N.D. CENT. CODE §27-20-34 (1974); OKLA. STAT. ANN. tit. 10, §1112(b) (Supp. 1975); PA. STAT. ANN. tit. 11, §50-325 (Supp. 1975); TENN. CODE ANN. §37-234 (Supp. 1975); TEX. FAM. CODE §54.02 (1973); VA. CODE ANN. §16.1-176(2) (Supp. 1974); WYO. STAT. ANN. §14-115.38 (Supp. 1975).

9. The Court stated:

We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law . . . .

421 U.S. at 537-38.

10. *Id.* at 521. See CAL. PEN. CODE §211 (West 1972).

11. 421 U.S. at 523-24.

12. Jones filed for habeas corpus relief in the juvenile court, and upon denial of that petition, sought habeas corpus relief in the California Court of Appeal. Viewing the events in the juvenile and criminal court as only one proceeding, the court found no denial of Jones' constitutional right against double jeopardy. *In re J.*, 17 Cal.App.3d 704, 95 Cal. Rptr. 185 (1971). The Supreme Court of California denied Jones' petition for a hearing. 421 U.S. at 525.

13. The district court found that important distinctions between juvenile proceedings and criminal trials justified denial of Jones' double jeopardy claim. *Jones v. Breed*, 343 F.Supp. 690, 696 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974), *appeal aff'd*, 421 U.S. 519 (1975).

14. *Jones v. Breed*, 497 F.2d 1160 (9th Cir. 1974), *aff'd*, 421 U.S. 519 (1975).

15. *Id.* at 1165.

16. 383 U.S. 541 (1966).

17. *Id.* at 556.

quired to measure up to the "essentials of due process and fair treatment."<sup>18</sup> At the hearing juvenile defendants were thus guaranteed the right to counsel, the right of access to social records and probation reports, and the right to a written statement of reasons for the juvenile court decision.<sup>19</sup> Unfortunately, the rationale set out in *Kent* was not uniformly followed by lower courts; indeed, many simply limited its reach to an interpretation of a District of Columbia statute<sup>20</sup> and thus evaded the due process requirements of *Kent*.<sup>21</sup>

Although *Breed* affirmed the procedural protections established in *Kent*, it did not entirely rectify defects in the substance of the transfer hearing. Transfer hearings have been criticized as being merely summary procedures in which little attention is paid to relevant information pertaining to the juvenile's background, his amenability to treatment, and other factors.<sup>22</sup> In fact, many courts have upheld the validity of

18. *Id.* at 562.

19. *Id.* at 557.

20. D.C. CODE ENCYCL. ANN. §16-2307(d) (Supp. 1975).

21. Although it can be argued that the *Kent* decision is limited to "the construction of a statute applicable only to the District of Columbia," 383 U.S. at 568, the Court in *In re Gault*, 387 U.S. 1 (1967), emphasized the broad reach of the *Kent* opinion. In deciding whether due process protections should apply to juveniles faced with adjudicatory hearings in the juvenile court, the Court referred to *Kent*: "Although our decision turned upon the language of the statute, we emphasized the necessity that 'basic requirements of due process and fairness' be satisfied in such proceedings." *Id.* at 12, citing *Kent v. United States*, 383 U.S. at 533. Despite the *Gault* Court's assertion that standards of basic fairness should apply regardless of the particular juvenile court statute involved, many lower courts narrowly limited the due process reach of *Kent*. See, e.g., *United States ex rel. Bombacino v. Bensinger*, 498 F.2d 875 (7th Cir.), cert. denied, 419 U.S. 1019 (1974); *Cox v. United States*, 473 F.2d 334 (4th Cir.), cert. denied, 414 U.S. 869 (1973); *Holmes v. State*, 224 Ga. 553, 163 S.E.2d 803 (1968); *People v. Sprinkle*, 56 Ill.2d 257, 307 N.E.2d 161, cert. denied, 417 U.S. 935 (1974).

22. See generally THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as TASK FORCE REPORT] which states:

The substance behind the procedure . . . remains unrecognized for what it really is: Not a scientific evaluation of whether the youth will respond successfully to a juvenile court disposition, but a front for society's insistence on retribution or social protection. . . . Determining amenability to treatment involves evaluation of such qualities as criminal sophistication, about which information is difficult to acquire and harder to assess.

*Id.* at 24-25. For a discussion of some "impermissible" factors which enter into a juvenile court judge's decision to transfer see Note, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U.L.J. 604 (1972). See also CHICAGO LAW ENFORCEMENT STUDY GROUP, DISCRETION IN JUVENILE JUSTICE: STUDY OF TRIAL OF JUVENILES AS ADULTS IN COOK COUNTY, April 1975 (unpublished manuscript on file with Urban Affairs Office, Evanston, Ill.) (factors which enter into the transfer decision may

statutes which set out "the best interest of the child" as the sole criterion for the transfer decision.<sup>23</sup> Such a nebulous standard is difficult for even the most thorough and efficient juvenile court judge to apply.<sup>24</sup>

In addition to the Court's deferral to the states to establish appropriate criteria for the transfer decision, the Court gives little guidance as to the quantum of evidence of the crime charged which must be introduced to support a transfer decision. Apparently, use of either probable cause or substantial evidence receives the Court's support.<sup>25</sup> Although enough evidence is needed to insure that the state's charge is not frivolous,<sup>26</sup> evidence of the crime charged should not play a major role since

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include race, the quality of legal representation, and the presence or absence of an adult co-defendant, as well as several "legitimate" factors).

23. Statutes allowing transfer if it would be in "the best interest of the child" have been held not to violate due process by virtue of being unduly vague. Generally, courts have found that the purposes behind the juvenile rehabilitative system provide sufficient guides for juvenile court judges in the transfer decision, and the due process requirement of a written statement of reasons for the transfer protects the juvenile from arbitrary and discriminatory decision-making. *See, e.g.,* Clemons v. State, 317 N.E.2d 859, 861 (Ind. C.A. 1974). *But see* United States *ex rel.* Bombacino v. Bensinger, 498 F.2d 875, 878 (7th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (due process does not require a juvenile to be given a written statement of reasons for the transfer decision). For state court decisions upholding statutes challenged for vagueness *see* Briggs v. United States, 226 F.2d 350 (D.C. Cir. 1955) (statute contained no standards for transfer determination); *L. v. Superior Court of Los Angeles County*, 7 Cal.3d 592, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972) (no standards); *In re Juvenile*, 306 N.E.2d 822 (Mass. 1974).

24. TASK FORCE REPORT, *supra* note 22, considered and rejected various alternatives to the transfer proceeding. These included proposals such as lowering the juvenile court age limit to 16 and eliminating waiver entirely, or creating an intermediate court to deal with youths from 16 to 21. *Id.* at 25. The Task Force concluded that "waiver may well be a necessary evil, imperfect but not substantially more so than its alternatives." *Id.* The Report noted that "reasons and procedures for waiver have typically been vague if enunciated at all," and observed that "effort should be made to make it [transfer] as fair and frank as possible." *Id.*

25. We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offence charged, so long as the showing required is not made in an adjudicatory proceeding. . . . The instant case is not one in which the judicial determination was simply a finding of, *e.g.*, probable cause. Rather, it was an adjudication that respondent had violated a criminal statute.

421 U.S. at 538 n.18.

26. Because of the grave sanctions which face the juvenile in criminal court, the state should not be able to conceal its case from the juvenile in order to compel a guilty plea. *See Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. Rev. 1 (1974):

If the clause requires non-disclosure of the prosecutor's full case in juvenile court, weaknesses will be known to him alone and hidden from the juvenile and the court. This concealment, in turn, provides the prosecutor with a substantial

the issue to be determined at the hearing is ultimately the juvenile's amenability to rehabilitation as opposed to his culpability. Additionally, introduction of considerable evidence of the crime, especially if this is the sole issue contested in the transfer hearing, may subject the juvenile to the equivalent of two adjudicatory proceedings.<sup>27</sup>

The transfer hearing is a critical stage in the juvenile proceeding<sup>28</sup> because it will result in a choice between two entirely different models of treatment: punishment in the criminal court versus rehabilitation in the juvenile court.<sup>29</sup> Although this distinction may at times appear to be a matter of form over substance, it is important to realize that the theory of rehabilitative treatment is recognized by the courts as a means by which a juvenile may limit or challenge the conditions of his confinement.<sup>30</sup> Transfer to the criminal court means that a juvenile may be

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opportunity to obtain pleas to the delinquency petition where he is aware that his case presents problems on proof. As long as he is limited to and can meet the minimal standard of probable cause, he can either threaten or institute a transfer proceeding as a coercive tactic to compel a plea.

*Id.* at 49.

27. On the theory that the transfer hearing is a non-adjudicatory proceeding, courts have generally rejected arguments that in a transfer hearing, introduction of evidence of the crime committed is a bar to subsequent criminal prosecution. *See, e.g.,* *People v. DePoy*, 40 Ill.2d 433, 240 N.E.2d 616 (1968); *People v. Wilson*, 7 Ill.App.3d 158, 287 N.E.2d 211 (1st Dist. 1972). On the other hand, courts have recognized that use of such evidence tends to make the hearing somewhat adjudicatory in nature. The Massachusetts Supreme Judicial Court, in a case decided after *Breed*, rejected a juvenile defendant's arguments that in a transfer hearing introduction of evidence of the crime charged barred later prosecution in criminal court for the same conduct. However, the court recognized that its decision, as well as *Breed*, only succeeded in eliminating "technical jeopardy."

[W]hile *Breed* eliminated what might be termed the technical double jeopardy problem of subjecting a juvenile to two adjudicatory proceedings, it does little to alleviate the practical problem of twice subjecting a juvenile to the strain of marshaling his resources against the state.

*Stokes v. Commonwealth*, 336 N.E.2d 735 (1975). *See also* *United States ex rel. Bombacino v. Bensinger*, 498 F.2d 875 (7th Cir.), *cert. denied*, 419 U.S. 1019 (1974), where the Seventh Circuit observed that the Illinois statute did not require the prosecutor to show probable cause in the transfer hearing, and "had evidence of that character been presented, it might have had the effect of commencing an adjudicatory proceeding, thus barring subsequent criminal prosecution." *Id.* at 878 n.11.

28. The critical nature of the transfer decision was noted both in *Kent v. United States*, 383 U.S. at 556, and *Breed v. Jones*, 421 U.S. at 535. *See also* *Powell v. Hocker*, 453 F.2d 652 (9th Cir. 1971); *Kemplen v. Maryland*, 428 F.2d 169, 174 (4th Cir. 1970).

29. *See* note 1 *supra*.

30. *See, e.g.,* *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973). The district court issued a preliminary injunction to enjoin practices in schools supervised by the Texas Youth Council because they were in violation of the juvenile's right to treatment which was found to be based upon the due process clause of the fourteenth amendment. For a

incarcerated beyond his minority,<sup>31</sup> and that in capital cases he may face the death penalty.<sup>32</sup> Conviction in a criminal court means a criminal record, perhaps involving substantial loss of rights in adulthood.<sup>33</sup>

The Court's decision not to define standards for the transfer hearing may be attributable in part to its newly articulated fear of administratively overburdening the juvenile court system. *Breed* is the first juvenile due process decision which has deliberately weighed the value of adding new constitutional rights for juvenile defendants against the resulting cost and burden incurred by the juvenile court system.<sup>34</sup>

Prior to *Breed* the criteria used by the Supreme Court to determine the applicability of due process rights to juvenile proceedings included whether the right was essential to due process and fair treatment,<sup>35</sup> whether it would prejudice the uniquely rehabilitative purposes of the juvenile court system,<sup>36</sup> whether the right would be of assistance in the

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discussion of this case and the constitutional right to treatment generally see Note, *The Establishment of a Constitutional Right to Treatment for Delinquent Children*, 26 BAYLOR L. REV. 366 (1974). See also Long v. Powell, 388 F. Supp. 422 (N.D. Ga. 1975) (finding that commitment of a juvenile to an institution known to be inadequate in providing juvenile rehabilitation was fundamentally unfair).

31. All proceedings under the juvenile court acts, including incarceration of the juvenile, terminate when the juvenile reaches the age of majority. See, e.g., Juvenile Court Act, ILL. REV. STAT. ch. 37, §705-11. See generally BESHAROV, JUVENILE JUSTICE ADVOCACY 173-83 (1974); TASK FORCE REPORT, *supra* note 22, at 4.

32. Had the Supreme Court upheld the procedure in the District of Columbia whereby juveniles are transferred to criminal courts, Kent might have faced the death penalty. 383 U.S. at 554 n.17. *But cf.* Furman v. Georgia, 408 U.S. 239 (1972) (death penalty, as applied, is unconstitutional).

33. Criminal conviction and arrest records may severely limit an individual's job opportunities and credit possibilities, and may eliminate altogether his right to vote. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

34. For factors entering into prior Supreme Court decisions which have applied due process rights to juvenile proceedings see notes 35-38 and accompanying text *infra*. Although not mentioned by the majority, the dissent in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), suggests that administrative cost was not far from the Court's consideration. *Id.* at 561-62. See also Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561 (1972).

35. See, e.g., *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

36. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967). Compare *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (court finding that addition of jury trial right would disrupt beneficial aspects of juvenile system by changing juvenile proceedings into an adversary process), with *Breed v. Jones*, 421 U.S. 519, 535 (1975) (court finding that giving double jeopardy protection to juvenile courts would not diminish flexibility and informality of the juvenile court system).

factfinding process,<sup>37</sup> whether it was commonly granted in many jurisdictions, and whether the opinions of experts justified inclusion of the right in such proceedings.<sup>38</sup> The *Breed* opinion, in addition to considering most of these factors, examines the expected costs of granting protection against double jeopardy.<sup>39</sup>

With the caveat that the judiciary should not impose on the juvenile court requirements which would "so strain its resources as to endanger its unique function,"<sup>40</sup> the Court found several ways to justify the added costs of holding transfer hearings prior to adjudicatory hearings. Since the reasons for or against transfer will be recognized quickly in most cases, the hearing will occupy a small amount of the juvenile court's time, thus necessitating only a minor commitment of resources.<sup>41</sup> Resources used to hold the transfer hearing prior to adjudication are counterbalanced by the result that, after transfer, no further proceedings are required in the juvenile court.<sup>42</sup> In addition, there are currently a large number of jurisdictions which already require that the transfer hearing take place prior to the adjudicatory hearing, and they are performing the task with no major inefficiencies.<sup>43</sup> Finally, the Court found that in instances where transfer hearings had been held and transfer rejected, the elimination of the threat of a criminal prosecution would render the juvenile more willing to admit the charge against him, thus dispensing with the need for time-consuming adjudicatory hearings.<sup>44</sup>

The *Breed* rationale reaches more deeply into the administrative concerns of the juvenile court than any other juvenile due process case

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37. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). See generally Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 267 (1972).

38. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-46, 548 (1971) (TASK FORCE REPORT, *supra* note 22, and state statutes used to support decision that imposition of right to jury trial in juvenile proceedings would retard rehabilitative goals); *In re Gault*, 387 U.S. 1, 37-41 (1967) (right to counsel in adjudicatory hearings supported by evidence from court decisions, experts, and legislatures).

39. 421 U.S. at 533-39.

40. *Id.* at 537.

41. *Id.* at 538. Petitioner *Breed* had argued that the requirement of a transfer hearing would produce three hearings in every juvenile case:

Thus, the preliminary fitness or transfer hearing will add a third hearing in every juvenile court case where transfer is considered and rejected, whereas only two hearings—jurisdictional and dispositional—need be held if transfer may be constitutionally treated as a dispositional alternative.

Brief for Petitioner at 40, *Breed v. Jones*, 421 U.S. 519 (1975).

42. 421 U.S. at 539.

43. *Id.* at 538.

44. *Id.* at 539. The Court supplies no basis for its assertion that the juvenile will be more likely to plead guilty after transfer is rejected.

decided previously. Although there is a hint of such a concern in prior Supreme Court opinions,<sup>45</sup> it does not reach fruition until *Breed*. Indeed, the *Breed* Court seems to be making every effort to expose and resolve every conceivable burden that might be incurred by its decision.

Nevertheless, the Supreme Court has often held that a state's concern with efficiency and speed cannot outweigh constitutional values.<sup>46</sup> It would be startling indeed if the courts were to deny due process rights in criminal proceedings on the grounds of administrative burden.<sup>47</sup> Yet the Court in *Breed* appears to be ready to accept such arguments in the context of juvenile adjudicatory proceedings.

More than one third of the persons apprehended for crime in this country are juveniles.<sup>48</sup> Courts and experts have uniformly recognized that a lack of resources has stymied the rehabilitative goals of the juvenile system.<sup>49</sup> If the Court should use that same premise of lack of resources and administrative overload to limit further expansion of juvenile due process rights, the juvenile will be locked in an impossible trap. He gets neither the procedural advantages accorded an adult nor the rehabilitative treatment he is entitled to as a juvenile.

The double jeopardy clause of the fifth amendment is now, after *Breed*, fully applicable to juvenile proceedings. *Breed*, at first glance, may be construed as another decision in the tradition of *In re Gault*,<sup>50</sup> a tradition which has steadily expanded juvenile due process rights. On closer scrutiny, however, it becomes clear that the cost and burden of these rights looms larger and larger in the Court's consideration. The Court's deference to the states to define the appropriate criteria for the transfer decision is one indication of its desire to avoid the additional expenditure of juvenile court resources. Nevertheless, in light of the

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45. See note 34 *supra*.

46. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (state's interest in speed and efficiency cannot outweigh the putative father's right to a hearing on his fitness as a parent); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (state's interest in speed and efficiency cannot outweigh welfare recipient's due process right to an evidentiary hearing before the termination of benefits).

47. In the adult criminal context, administrative concerns surface when the court decides that the proceeding in question is "not part of a criminal prosecution." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (no constitutional right to counsel at parole revocation hearing because it would impose direct costs and serious collateral disadvantages).

48. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 184-87 (1974).

49. See, e.g., *Kent v. United States*, 383 U.S. 541, 555-56 (1966). See also PRESIDENT'S COMMISSION, *supra* note 33, at 79-81.

50. 387 U.S. 1 (1967).

Court's growing recognition of the criminal nature of juvenile proceedings,<sup>51</sup> it can hardly be expected that more time, cost and effort will not be asked of the juvenile justice system in the future.

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**Settlements—Loan Agreements as Settlement Devices—AFFIRMATIVE DUTY TO DISCLOSE LOAN AGREEMENT TO THE COURT AND TO THE REMAINING DEFENDANTS—*Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 337 N.E.2d 23 (1975).**

The Illinois Supreme Court approved loan agreements as a method of apportioning liability for damages between joint tortfeasors in the 1973 case of *Reese v. Chicago, B. & Q. R.R.*<sup>1</sup> Two years later, however, in *Gatto v. Walgreen Drug Co.*,<sup>2</sup> the court reevaluated its position on loan agreements and imposed limitations as to their use. Unfortunately, the court did not consider all of the problems which are inherent in these agreements. This Note will argue that the court should extend its *Gatto* holding to void loan agreements as against public policy because they undermine the adversary system and because they shift liability between joint tortfeasors without respect to culpability.

A loan agreement is one of many methods of apportioning liability between joint tortfeasors in Illinois tort actions. Contribution,<sup>3</sup> an in-

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51. The *Breed* Court, noting the failure of the juvenile justice system to live up to its benign ideals, cited with approval prior Court responses which have been "to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions." 421 U.S. at 528-29.

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1. 55 Ill.2d 356, 303 N.E.2d 382 (1973). In *Reese*, plaintiff sued the railroad and crane manufacturer for the death of her husband, a railroad employee. The railroad entered into a loan agreement/covenant not to sue and was dismissed before trial. A verdict was entered against the crane manufacturer, and the trial court set off the amount paid by the railroad against the verdict, holding that the agreement was a covenant not to sue and therefore deductible. On appeal, the Illinois Supreme Court decreed that the amount paid by the railroad was a loan and could not be set off against the judgment amount. The court held that loan agreements were a valid settlement tool in Illinois. To avoid the possibility of undermining the adversary process, the court held further that loan agreements could be admitted into evidence, and cross-examination would be allowed to establish a witness' knowledge of the agreement.

2. 61 Ill.2d 513, 337 N.E.2d 23 (1975), *petition for cert. filed sub nom Gatto v. Calumet Flexicore Corp.*, 44 U.S.L.W. 3494 (U.S., Feb. 18, 1976) (No. 75-1173).

3. Contribution is the allocation of payment of a judgment between joint tortfeasors.