The Jurisdictional Dilemma of the Juvenile Court

Samuel M. Davis

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INTRODUCTION: GENESIS OF JUVENILE COURT JURISDICTION OVER CRIMINAL CONDUCT

Certain premises descriptive of the philosophical underpinnings of the juvenile court are now considered self-evident.[1] They begin with the observation that establishment in this country of a separate system of courts to deal with the problems of children and youth occurred in the midst of a spirit of benevolence, social justice, and concern for the welfare of young people. A fundamental concept was that children were not to be dealt with as criminals, but rather, that through the *parens patriae* power of the state, they were to be treated as wards of the state, capable of being rehabilitated.[2] Since delinquency was primarily a social phenomenon, reclamation was to occur through application of the tools of the social sciences rather than the familiar paraphernalia of the criminal process.[3] Because the juvenile process was geared to protection, not punishment, the juvenile proceeding was conceptualized as a civil and not as a criminal proceeding.[4] Indeed, it was regarded as a higher form of justice than that obtainable in the criminal courts.[5]

The above principles are uniformly recognized as the *raison d'être* of the juvenile court by those having any familiarity with the workings of the juvenile process. While some voices may be heard today in de-

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[1]The question flowing from this statement is logical: If these truths are self-evident, why are they the subject of inquiry and discussion, or, for that matter, why do they need restating at all? The answer is not so obvious. The basic principles fundamental to the juvenile court's philosophy, long taken for granted with the assumption that they have achieved full fruition, are not uniformly manifested in modern juvenile court jurisdiction. For this reason they must be recounted, and present juvenile court jurisdiction must be reexamined in light of the restatement of old principles.

[2]*See, e.g.*, Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

[3]H. LOU, JUVENILE COURTS IN THE UNITED STATES 1-2 (1927).

[4]*See, e.g., Ex parte* Sharp, 15 Idaho 120, 96 P. 563 (1908).

[5]Alexander, *Constitutional Rights in the Juvenile Court*, in JUSTICE FOR THE CHILD 82, 84-85 (M. Rosenheim ed. 1962).

rogation of what the juvenile court has *become*,[6] few are heard to decry overtly the very existence of such a court or to question seriously the underlying premises.[7] Nevertheless, there are subtle indications that many states have never *fully* accepted the notion of specialized treatment of juveniles who have violated the criminal code. Commission of a delinquent act[8] which would be criminal if committed by an adult represents only one aspect of juvenile jurisdiction; the juvenile court also deals with truants, incorrigibles, runaways, and other "wayward" children.[9] Most states have treated the latter conduct with solicitude and

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[6]*See In re* Winship, 397 U.S. 358, 375-76 (1970) (Burger, C.J., dissenting); *In re* Gault, 387 U.S. 1, 78-81 (1967) (Stewart, J., dissenting). *See also* Alexander, *supra* note 5, at 92.

[7]Dean Wigmore, however, had very strong feelings that criminal offenses were simply none of the juvenile court's business, and to the extent the juvenile court attempted to deal with criminal matters, its existence was detrimental to the criminal law's objective of controlling human behavior. Wigmore, *Juvenile Court vs. Criminal Court*, 21 ILL. L. REV. 375 (1926).

[8]Most modern juvenile court codes limit the classification of "delinquency" to acts that are in violation of state or federal law or local ordinance. ARIZ. REV. STAT. ANN. § 8-201(8) (Supp. 1971); CAL. WELF. & INST'NS CODE § 602 (West 1972); COLO. REV. STAT. ANN. § 22-1-3(17)(a) (Supp. 1967); D.C. CODE ANN. § 16-2301(7) (Supp. IV, 1971); FLA. STAT. ANN. § 39.01(11) (Supp. 1972); GA. CODE ANN. § 24A-401(e)(1) (1971); ILL. ANN. STAT. ch. 37, § 702-2 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. §§ 38-802(b)(1)-(2) (Supp. 1971); MD. ANN. CODE art. 26, § 70-1(g) (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, § 52 (1965); NEB. REV. STAT. § 43-201(4) (1968); N.Y. FAMILY CT. ACT § 712(a) (McKinney 1963); N.C. GEN. STAT. § 7A-278(2) (1969); N.D. CENT. CODE § 27-20-02(2) (Supp. 1971); OHIO REV. CODE ANN. § 2151.02 (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1101(b) (Supp. 1972); R.I. GEN. LAWS ANN. § 14-1-3(F) (1970); S.D. COMPILED LAWS ANN. § 26-8-7 (Supp. 1971); TENN. CODE ANN. § 37-202(3) (Supp. 1971); VT. STAT. ANN. tit. 33, § 632(2)(3) (Supp. 1972); WASH. REV. CODE ANN. § 13.04.010 (1962); WIS. STAT. ANN. § 48.12(1) (Supp. 1972); WYO. STAT. ANN. § 14-115.2(*l*) (Supp. 1971).

The old formulations, however, typically include in the classification of "delinquency" not only what would otherwise be criminal conduct, but also incorrigibility, truancy, running away from home, being in need of supervision, and any number of classifications relating to the child's physical, mental and moral well-being. ALA. CODE tit. 13, § 350(3) (1959); ARK. STAT. ANN. § 45-204 (Supp. 1971); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1972); DEL. CODE ANN. tit. 10, § 1101 (1953); IND. ANN. STAT. § 9-3204 (Supp. 1972); IOWA CODE ANN. § 232.2(13) (1969); LA. REV. STAT. ANN. §§ 13:1569(9), 13:1570(A)(6) (Supp. 1972), §§ 13.1570(A)(3)-(5) (1968); MINN. STAT. ANN. § 260.015(5) (1971); MISS. CODE ANN. § 7185-02(g) (Supp. 1971); MONT. REV. CODES ANN. § 10-602(2) (Supp. 1971); N.H. REV. STAT. ANN. § 169:2(II) (Supp. 1971); N.J. STAT. ANN. §§ 2A:4-14(1)-(2) (1952); PA. STAT. ANN. tit. 11, § 243(4) (1965); S.C. CODE ANN. § 15-1103(9) (1962); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1971); W. VA. CODE ANN. § 49-1-4 (1966).

The remaining jurisdictions do not attempt to classify conduct as "delinquent" or otherwise, but rather list all forms of conduct subject to juvenile court jurisdiction in one general group. ALASKA STAT. § 47.10.010(a) (1962); HAWAII REV. STAT. § 571-11 (Supp. 1971); IDAHO CODE § 16-1803 (Supp. 1971); KY. REV. STAT. ANN. § 208.020(1) (1972); ME. REV. STAT. ANN. tit. 15, § 2552 (1964); MICH. STAT. ANN. § 27.3178(598.2)(a) (Supp. 1972); MO. ANN. STAT. § 211.031 (1962); NEV. REV. STAT. § 62.040(1) (1971); N.M. STAT. ANN. § 13-8-26 (1968); ORE. REV. STAT. § 419.476(1) (1971); UTAH CODE ANN. §§ 55-10-77(1)-(2) (Supp. 1971); VA. CODE ANN. § 16.1-158 (Supp. 1972).

[9]As pointed out in note 8 *supra*, a number of jurisdictions treat this type of behavior as "delinquent" conduct. *See* statutes cited note 8 *supra*. Those jurisdictions that limit "delinquency" to conduct that, if committed by an adult, would be criminal, treat other forms of misbehavior as

benevolence and have paid proper respect to the philosophical aims of the *parens patriae* theory.

The function of the juvenile court, however, involves more than teaching manners to sassy children; its primary function relates to law enforcement.[10] It is precisely in the exercise of this function that many states are less willing to indulge in the traditional dual concepts of diminished capacity and the promise of rehabilitation. Some jurisdictions, for example, exclude certain more serious offenses from juvenile court jurisdiction,[11] and others give the criminal court or the prosecutor authority to decide in which court the case should be commenced.[12] Still

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a separate classification, designated variously as "persons in need of supervision," "unruly children," "wayward children" and the like. ARIZ. REV. STAT. ANN. § 8-201(15) (Supp. 1971); CAL. WELF. & INST'NS CODE § 601 (West 1972); COLO. REV. STAT. ANN. § 22-1-3(18) (Supp. 1967); D.C. CODE ANN. § 16-2301(8) (Supp. IV, 1971); FLA. STAT. ANN. § 39.01(12) (Supp. 1972); GA. CODE ANN. § 24A-401(g) (1971); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd Supp. 1972); KAN. STAT. ANN. § 38-802(d) (Supp. 1971); MD. ANN. CODE art. 26, § 70-1(i) (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, § 52 (1965); NEB. REV. STAT. § 43-201(5) (1968); N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1972); N.C. GEN. STAT. § 7A-278(5) (1969); N.D. CENT. CODE § 27-20-02(4) (Supp. 1971); OHIO REV. CODE ANN. § 2151.022 (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1101(c) (Supp. 1972); R.I. GEN. LAWS ANN. § 14-1-3(G) (1970); S.D. COMPILED LAWS ANN. § 26-8-7.1 (Supp. 1971); TENN. CODE ANN. § 37-202(5) (Supp. 1971); VT. STAT. ANN. tit. 33, § 632(a)(18) (Supp. 1972); WASH. REV. CODE ANN. § 13.04.010 (1962); WIS. STAT. ANN. § 48.12(2) (Supp. 1972); WYO. STAT. ANN. § 14-115.2(n) (Supp. 1971).

The juvenile court also exercises jurisdiction over neglected and dependent children, but since this article is addressed to misbehavior of children, rather than to areas of conduct or status over which they have no control, neglect and dependency are not covered here.

[10]Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700, 1701 (1967).

[11]COLO. REV. STAT. ANN. § 22-1-3(17)(b) (Supp. 1969) (excludes crimes of violence punishable by death or life imprisonment when committed by children 14 years of age or older); DEL. CODE ANN. tit. 10, § 1159 (1953) (excludes capital offenses); D.C. CODE ANN. § 16-2301(3)(A) (Supp. IV, 1971) (excludes enumerated felonies when committed by children 16 years of age or older); LA. REV. STAT. ANN. § 13:1570(A)(5) (1968) (excludes capital offenses and crime of attempted aggravated rape, when committed by child 15 years of age or older); MISS. CODE ANN. § 7185-15 (1952) (excludes crimes punishable by death or life imprisonment when committed by child 13 years of age or older); N.C. GEN. STAT. § 7A-280 (1969) (transfer to criminal court mandatory where child is charged with capital offense); S.C. CODE ANN. § 15-1103(9)(a) (1962) (excludes crimes punishable by death or life imprisonment); W. VA. CODE ANN. § 49-1-4(2) (1966) (excludes capital offenses); *see* MD. ANN. CODE art. 26, § 70-2(d)(1) (Supp. 1971) (excludes crimes punishable by death or life imprisonment committed by children 14 years of age or older, unless the case has been transferred to the juvenile court from the criminal court as provided).

One apparent argument for such exclusionary statutes is that the community may be outraged at commission of the more serious offenses, no matter what the age of the offender, and it may feel a need to express its social and moral disapprobation through the medium of the criminal sanction. *See* Paulsen, *The Delinquency, Neglect, & Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD 44, 62 (M. Rosenheim ed. 1962). This represents an abandonment, or at least a suspension in certain cases, of the commitment to the rehabilitative ideal and a return to the purely retributive concepts prevalent in the nineteenth century. *See* 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1883).

[12]*E.g.*, ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1972) (empowering state's

other jurisdictions grant the criminal court discretion to transfer to the juvenile court an older group of children beyond the juvenile court's original jurisdiction, rather than giving the juvenile court original jurisdiction over such persons with discretion to transfer to the criminal court.[13] A further device to limit the jurisdiction of the juvenile court over offenses committed by children is the practice of setting a lower jurisdictional age limit for delinquent children than is used to establish age jurisdiction for other classifications of conduct.[14] Perhaps the most disturbing phenomenon is the failure of some jurisdictions to confer

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attorney to make this decision); WYO. STAT. ANN. § 14-115.12 (Supp. 1971) (complaint alleging delinquency is to be referred to the county prosecutor, who decides whether the public's interests demand judicial action). In addition, *see* MD. ANN. CODE art. 27, § 594A (1971), which grants the criminal court discretion, in cases in which a child 14 years of age or older is charged with a crime punishable by death or life imprisonment, to transfer the case to the juvenile court or retain jurisdiction and try it as a criminal matter.

[13]ALA. CODE tit. 13, § 363 (1959) (maximum age limit for original juvenile court jurisdiction is 16; criminal court has discretion to transfer to juvenile court children who have reached their 16th birthday but are under 18 years of age); VT. STAT. ANN. tit. 33, §§ 635(a)-(b) (Supp. 1972) (maximum age limit for original juvenile court jurisdiction over delinquent child is 16; criminal court has discretion to transfer to juvenile court a child who was over 16 but under 18 years of age at time offense was committed); *cf.* MICH. STAT. ANN. § 27.3178(598.2)(d) (Supp. 1972) (maximum age limit for original juvenile court jurisdiction generally is 17; juvenile court and criminal court have concurrent jurisdiction over 17-to 19-year-old children charged with certain enumerated offenses or conduct).

[14]New Hampshire sets 17 as the maximum age limit for jurisdiction over children alleged to be delinquent on the basis of violations of law, but prescribes 18 as the maximum jurisdictional age for children alleged to be delinquent on the basis of a wayward status or incorrigible behavior. N.H. REV. STAT. ANN. § 169:2(III) (Supp. 1971).

Oklahoma defines "child" as a person under 18 years of age. OKLA. STAT. ANN. tit. 10, § 1101(a) (Supp. 1972). This jurisdictional age is applicable in the case of a child in need of supervision, *id.* § 1101(c) (Supp. 1972), as well as a dependent or neglected child, *id.* § 1101(d) (Supp. 1972). But a "delinquent child" formerly was defined as a male under the age of 16 or a female under the age of 18. Ch. 282, § 101(a), [1968] Okla. Sess. L. 444 (repealed 1972). In a recent federal case, however, this classification scheme was held violative of the equal protection clause of the United States Constitution, although on a different basis. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). The basis of the court's decision was the unconstitutional differential treatment of males and females according to age. *Id.* at 20.

Vermont sets 16 as the maximum age limit for exercising jurisdiction over delinquent children, but permits a maximum age limit of 18 in the case of neglected children and unmanageable children. VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1972).

In a slightly different vein, South Carolina prescribes 16 as the maximum age limit in counties having a domestic relations court and 17 in counties having a juvenile domestic relations court. S.C. CODE ANN. § 15-1103(7) (1962). Counties having a city with a population over 70,000 according to the official [current?] U.S. Census have a domestic relations court, and counties having a city with a population between 60,000 and 70,000 according to the U.S. Census of 1940 have a juvenile domestic relations court. *Id.* § 15-1103(1) (1962). A similar statutory scheme in Maryland, prescribing a jurisdictional age of 18, except in the city of Baltimore, where, until July 1, 1971, the jurisdictional age was to be 16 years of age, was held unconstitutional on the basis of the equal protection and due process clauses. Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971), *aff'g* 316 F. Supp. 22 (D. Md. 1970).

upon the juvenile court exclusive jurisdiction; instead they provide that in some cases the jurisdiction of the juvenile court is concurrent with that of the criminal court.[15] Regardless of their form, all of these provisions manifest a basic mistrust of the juvenile court and represent the absence of a firm commitment to the juvenile court's rehabilitative philosophy.[16]

This limited faith on the part of legislatures (and in some instances, the courts) is exasperating. Their interpretation of what occurs in the juvenile process is distorted; they seem to be saying that the redemptive philosophy of the juvenile court is laudable when dealing with "wayward" youth or childish pranks, but that when serious criminal offenses are committed, the rehabilitative ideal must be abandoned in favor of the retributive processes of the criminal law. Under a statute removing certain offenses from the jurisdiction of the juvenile court, the legislature thus decides *ab initio* those cases in which society's interests demand punishment as an adult. When the criminal court or prosecutor is authorized to decide in which court the case will be brought, decision-making power is delegated to the party least qualified to make such decisions.[17]

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[15]Concurrent jurisdiction comes in many forms and degrees. In some instances the juvenile and criminal courts are expressly given concurrent urisdiction over all children within the jurisdictional age limit of the juvenile court. In others concurrent jurisdiction exists only with respect to a particular age group, usually older children. In still others, concurrent jurisdiction is authorized over any child charged with a certain offense or one of a class of offenses. Concurrent jurisdiction also may occur on the basis of some combination of the above factors.

In whatever form or degree, the following jurisdictions provide for concurrent jurisdiction between the juvenile and criminal courts: *Arkansas*, ARK. STAT. ANN. §§ 45-224, -241 (1964); *California*, CAL. WELF. & INST'NS CODE §§ 604(a)-(b) (West 1972); Delaware, DEL. CODE ANN. tit. 11, §§ 2711, 2712 (Supp. 1970); *Florida*, FLA. STAT. ANN. § 39.02(6)(c) (Supp. 1972); *Idaho*, IDAHO CODE §§ 16-1806(1)(a)-(b) (Supp. 1971); *Illinois*, ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1972); *Indiana*, IND. ANN. STAT. § 9-3213 (1956); *Michigan*, MICH. STAT. ANN. § 27.3178(598.2)(d) (Supp. 1972); *Nevada*, NEV. REV. STAT. § 62.050 (1971); *Pennsylvania*, PA. STAT. ANN. tit. 11, § 256 (1965); *South Dakota*, S.D. COMPILED LAWS ANN. § 26-11-3 (1967); *Virginia*, VA. CODE ANN. §§ 16.1-175, -176.1 (1960), § 16.1-176(a) (Supp. 1972); *Wyoming*, WYO. STAT. ANN. §§ 14-115.4, .12 (Supp. 1971).

[16]One of the most oppressive examples is to be found in Georgia's new Juvenile Court Code. The Code provides that a delinquent or unruly child found by the court not to be amenable to rehabilitation or treatment may be committed to the Department of Corrections, which is the agency that deals with adult offenders. GA. CODE ANN. § 24A-2304 (1971). This section is in direct conflict with the very next section, which provides that no child shall be committed to a penal institution. *Id.* § 24A-2401(a) (1971). Probably added as an afterthought, the provision allowing commitment to the Department of Corrections is outrageous and is inconsistent and incompatible with the aims and purposes of the juvenile court. The decision evaluating the child's amenability to the juvenile court processes is properly made at the waiver stage, not at the disposition stage following adjudication.

[17]*See* Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 311-13 (1967).

No offenses or classifications of offenses should be withheld from juvenile court jurisdiction. Each case involving a juvenile should originate in the juvenile court, whose judge is a far better qualified functionary to decide in which court the case should be heard.[18] In those cases in which the interests of society and the interests of the child suggest that he is not an appropriate object of juvenile court treatment,[19] the juvenile court judge should be able to waive jurisdiction and transfer the child to criminal court.[20] The importance of this procedure is twofold: The juvenile court initially should make the decision regarding handling of the case, and the decision should be made only after a hearing has

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[18]The presumption is that the child is amenable to treatment as a juvenile, and only upon a showing that he is not should he be transferred to criminal court. The juvenile court judge is simply better able to make such a decision. *See* Paulsen, *supra* note 11, at 63.

[19]Perhaps the most relevant criterion is whether, in the opinion of the juvenile court judge, the child is amenable to treatment or rehabilitation. There are other considerations as well. In an appendix to Kent v. United States, 383 U.S. 541 (1966), the Supreme Court suggested the following criteria as helpful in a waiver decision:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the [criminal court].
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile . . . .
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-67.

The above criteria have been accommodated as closely as possible in the new District of Columbia Juvenile Court Code. D.C. CODE ANN. § 16-2307(e) (Supp. IV, 1971). A number of other jurisdictions have excellent waiver criteria also. *E.g.*, ALASKA STAT. § 47.10.060(d) (1962); MD. ANN. CODE art. 26, § 70-16(b) (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(h) (1971).

[20]Most jurisdictions provide for waiver of jurisdiction and certification or transfer of the case to the appropriate court having jurisdiction over the offense. ALA. CODE tit. 13, § 364 (1959); ALASKA STAT. § 47.10.060 (1962); ARK. STAT. ANN. § 45-224 (1964); CAL. WELF. & INST'NS CODE § 603 (West 1972); COLO. REV. STAT. ANN. § 22-1-4(4)(a) (Supp. 1969); D.C. CODE ANN. § 16-2307 (Supp. IV, 1971); FLA. STAT. ANN. §§ 39.02(6)(a)-(b) (Supp. 1972); GA. CODE ANN. § 24A-2501 (1971); HAWAII REV. STAT. § 571-22(a) (Supp. 1971); IDAHO CODE § 16-1806(1) (Supp. 1971); ILL. ANN. STAT. ch. 37, § 702-7(5) (Smith-Hurd Supp. 1972); IND. ANN. STAT. § 9-3214 (Supp. 1972); IOWA CODE ANN. § 232.72 (1969); KAN. STAT. ANN. § 38-808 (Supp. 1971);

been held on the question of waiver and transfer.[21]

The above discussion, quite general by intention, was necessary to establish certain minimum standards of juvenile court jurisdiction—both as to how jurisdiction is to be defined and how it is to be exercised. The first basic premise is that in defining jurisdiction the sociological and correctional principles that support the juvenile court remain constant whatever the type of juvenile conduct involved. Therefore, no exceptions (such as commission of specific offenses or commission of felony or capital offenses) to juvenile court jurisdiction are justified or supportable by logic or reason. Second, in the exercise of juris-

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KY. REV. STAT. ANN. § 208.170(1) (1972); ME. REV. STAT. ANN. tit. 15, § 2611(3) (1964); MD. ANN. CODE art. 26, § 70-16 (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, § 61 (1965); MICH. STAT. ANN. § 27.3178(598.4) (Supp. 1972); MINN. STAT. ANN. § 260.125(1) (1971); MISS. CODE ANN. § 7185-15 (1952); MO. ANN. STAT. § 211.071 (1962); MONT. REV. CODES ANN. § 10-603(c) (Supp. 1971); NEV. REV. STAT. § 62.080 (1971); N.H. REV. STAT. ANN. § 169:21 (1964); N.J. STAT. ANN. § 2A:4-15 (1952); N.M. STAT. ANN. § 13-8-27 (1968); N.C. GEN. STAT. § 7A-280 (1969); N.D. CENT. CODE § 27-20-34 (Supp. 1971); OHIO REV. CODE ANN. § 2151.26 (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1112(b) (Supp. 1972); ORE. REV. STAT. § 419.533(1) (1971); PA. STAT. ANN. tit. 11, § 260 (1965); R.I. GEN. LAWS ANN. § 14-1-7 (Supp. 1971); S.C. CODE ANN. § 15-1171 (1962); S.D. COMPILED LAWS ANN. § 26-11-4 (Supp. 1971); TENN. CODE ANN. § 37-234 (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 6(b)-(j) (1971); VA. CODE ANN. § 16.1-176 (Supp. 1972); WASH. REV. CODE ANN. § 13.04.120 (1962); W. VA. CODE ANN. § 49-5-14(3) (1966); WIS. STAT. ANN. § 48.18 (Supp. 1972); WYO. STAT. ANN. § 14-115.38 (Supp. 1971).

[21]Kent v. United States, 383 U.S. 541, 557 (1966), set forth two basic requirements regarding waiver proceedings: first, the child has a right to a waiver hearing, and secondly, the child has a right to be represented by counsel at such hearing. The *Kent* decision initially was limited in scope since it was seemingly based on an interpretation of the requirements under the District of Columbia waiver statute, rather than on constitutional principles. However, following references to *Kent* in *In re* Gault, 387 U.S. 1, 12 (1967), the weight of authority now is said to favor the proposition that the principles stated in *Kent* are of constitutional dimensions. United States *ex rel.* Turner v. Rundle, 438 F.2d 839, 842 (3rd Cir. 1971) and cases cited therein at 842 n.11.

In any event, at the very minimum most of the jurisdictions that permit waiver of jurisdiction require by statute a hearing on the waiver decision. COLO. REV. STAT. ANN. §§ 22-1-4(4)(a), 22-3-8 (Supp. 1969); D.C. CODE ANN. § 16-2307(d) (Supp. IV, 1971); FLA. STAT. ANN. § 39.02(6)(a) (Supp. 1972); GA. CODE ANN. § 24A-2501(a)(1) (1971); HAWAII REV. STAT. § 571-22(a) (Supp. 1971); IDAHO CODE § 16-1806(1) (Supp. 1971); IOWA CODE ANN. § 232.72 (1969); MD. ANN. CODE art. 26, § 70-16(a) (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, § 61 (1965); MINN. STAT. ANN. § 260.125(2)(c) (1971); MONT. REV. CODES ANN. § 10-603(c) (Supp. 1971); N.C. GEN. STAT. § 7A-280 (1969); N.D. CENT. CODE § 27-20-34(1)(b) (Supp. 1971); OHIO REV. CODE ANN. §§ 2151.26(A)-(B) (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1112(b) (Supp. 1972); S.D. COMPILED LAWS ANN. § 26-11-4 (Supp. 1971); TENN. CODE ANN. § 37-234(a) (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(c) (1971); VA. CODE ANN. § 16.1-176(a) (Supp. 1972); WYO. STAT. ANN. § 14-115.38 (Supp. 1971).

Some jurisdictions have reached the same result by judicial decision. In addition to the cases cited in United States *ex rel.* Turner v. Rundle, *supra* at 842 n.11, *see* People v. Fields, 30 Mich. App. 390, 186 N.W.2d 15 (1971); Hopkins v. State, 209 So. 2d 841 (Miss. 1968).

diction, the juvenile court is the only appropriate body to decide which individuals are not amenable to treatment as juveniles and should instead be treated as adult offenders. Both of these principles are the *sine qua non* of a sound concept of juvenile court jurisdiction and of a full and total commitment to the juvenile court philosophy.

Yet these principles are not always evidenced in modern juvenile court practice. An examination of the available relevant data reveals the conclusion that the fault is not wholly that of the legislatures. Despite their occasional lack of faith in the efficacy of the juvenile process,[22] legislatures generally have sought to confer upon the juvenile court exclusive jurisdiction regarding children alleged to be delinquent on the basis of criminal conduct.[23] To further safeguard the exclusive jurisdiction of the juvenile court, legislatures have inserted provisions compelling any other court before which a child charged with a criminal offense might initially appear to transfer the case to the juvenile court for further proceedings.[24]

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[22]*See* notes 11-15 *supra* and accompanying text.

[23]*See* ALA. CODE tit. 13, § 351 (1959); COLO. REV. STAT. ANN. §§ 22-1-4(1)(a)-(b) (Supp. 1967) (except for children 14 and older charged with crimes of violence); CONN. GEN. STAT. ANN. § 17-59 (Supp. 1972); FLA. STAT. ANN. § 39.02(1)(a) (Supp. 1972); GA. CODE ANN. § 24A-301 (1971); HAWAII REV. STAT. § 571-11(1) (Supp. 1971); IDAHO CODE § 16-1803 (Supp. 1971); KAN. STAT. ANN. § 38-806(a)(1) (Supp. 1971); LA. REV. STAT. ANN. § 13:1570(A)(5) (1968) (except for children 15 or older charged with a capital offense or attempted aggravated rape); ME. REV. STAT. ANN. tit. 15, §§ 2551-52 (1964); MD. ANN. CODE art. 26, § 70-2(a) (Supp. 1971) (except for children 14 or older charged with a crime punishable by death or life imprisonment); MICH. STAT. ANN. § 27.3178(598.2)(a) (Supp. 1972); MINN. STAT. ANN. § 260.111(1) (1971); MISS. CODE ANN. § 7185-03 (Supp. 1971) (except for children 13 or older charged with a crime punishable by death of life imprisonment); MO. ANN. STAT. § 211.031 (1962); MONT. REV. CODES ANN. § 10-603 (Supp. 1971e; NEV. REV. STAT. § 62.040(1) (1971) (except for children charged with a capital offense); N.H. REV. STAT. ANN. § 169.29 (1964); N.J. STAT. ANN. § 2A:4-14 (1952); N.M. STAT. ANN. §§ 13-8-26 to -27 (1968); N.Y. FAMILY CT. ACT § 713 (McKinney 1963); N.C. GEN. STAT. § 7A-279 (1969) (except for children charged with a capital offense); N.D. CENT. CODE § 27-20-03 (Supp. 1971); OHIO REV. CODE ANN. § 2151.23(A) (Page Supp. 1971); ORE. REV. STAT. § 419.476(1) (1971); PA. STAT. ANN. tit. 11, § 244 (1965) (except for children charged with murder and children over 16 but under 18 charged with any offense); R.I. GEN. LAWS ANN. § 14-1-5 (1970); S.C. CODE ANN. § 15-1171 (1962) (except for children charged with offenses punishable by death or life imprisonment); TENN. CODE ANN. § 37-203(a)(1) (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 5(a) (1971); UTAH CODE ANN. § 55-10-77(1) (Supp. 1971); VT. STAT. ANN. tit. 33, § 633(a) (Supp. 1972); VA. CODE ANN. §16.1-158(1)(i) (1960) (except, in some cases as provided, for children 14 or older charged with a felony offense); WASH. REV. CODE ANN. § 13.04.030 (1962); W. VA. CODE ANN. § 49-5-3 (1966) (except for children charged with a capital offense); WIS. STAT. ANN. § 48.12(1) (Supp. 1972).

The exceptions have been covered elsewhere. *See* statutes cited note 15 *supra.*

[24]ALA. CODE tit. 13, § 363 (1959); CAL. WELF. & INST'NS CODE § 604(a) (West 1972) (children under 18 years of age); CONN. GEN. STAT. ANN. § 17-65 (1960); FLA. STAT. ANN. § 39.02(3) (1961); GA. CODE ANN. § 24A-901 (1971); HAWAII REV. STAT. § 571-12 (1968); IDAHO CODE

In the face of such a clear expression of intent, it is therefore alarming that the courts in some instances have viewed these attempts to confer exclusive jurisdiction on the juvenile court as an encroachment upon the jurisdiction of the criminal court.[25] It is not true, however, that all courts have jealously resisted the grant of exclusive jurisdiction to the juvenile court. Indeed, in most cases in which the question has been confronted, the courts have preserved the exclusive jurisdiction of the juvenile court.[26] This good record notwithstanding, the fact that a number of state courts have offended the concept of exclusive jurisdiction is at once disturbing and surprising, since the courts were among the earliest supporters of the juvenile court and its ameliorative processes.[27]

Georgia in particular furnishes an unhappy example of how the juvenile court's jurisdiction has been curtailed and its capacity to deal with juvenile problems hampered, despite the presence of clear legislative intent. The Georgia scheme of concurrent jurisdiction, fashioned by the courts, touches on all the problem areas: the maximum age of

§ 16-1804 (Supp. 1971) (except where child is 16 or older and is charged with a felony offense, or 18 or older and charged with any offense committed before becoming 18); IND. ANN. STAT. § 9-3213 (1956) (except where child over 16 is charged with a capital offense); IOWA CODE ANN. § 232.64 (1969); LA. REV. STAT. ANN. § 13:1571 (1968) (except where child 15 or older is charged with a capital offense or attempted aggravated rape); MICH. STAT. ANN. § 28.886 (Supp. 1972), § 27.3178(598.3) (1962); MINN. STAT. ANN. § 260.115 (1971); MO. ANN. STAT. § 211.061(2) (1962); MONT. REV. CODES ANN. § 10-610 (Supp. 1971); NEB. REV. STAT. § 43-211 (1968); NEV. REV. STAT. § 62.050 (1971) (except where capital offense is charged); N.J. STAT. ANN. § 2A:4-20 (1952); N.M. STAT. ANN. § 13-8-28 (1968); N.D. CENT. CODE § 27-20-09 (Supp. 1971); OHIO REV. CODE ANN. § 2151.25 (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1112(a) (Supp. 1972); ORE. REV. STAT. § 419.478 (1971); PA. STAT. ANN. tit. 11, § 256 (1965) (except where child is charged with murder; also, transfer of child over 16 but under 18 is discretionary); R.I. GEN. LAWS ANN. § 14-1-28 (1970); S.C. CODE ANN. § 15-1188 (1962) (except where child is charged with offense punishable by death or life imprisonment); TENN. CODE ANN. § 37-209 (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 12 (1971); UTAH CODE ANN. § 55-10-79 (Supp. 1971); VT. STAT. ANN. tit. 33, § 635(a) (Supp. 1972); VA. CODE ANN. § 16.1-175 (1960) (however, if court is a court of record it may, after investigation prescribed in *id.* § 16.1-176(b) (1960), proceed with trial of case); W. VA. CODE ANN. § 49-5-3 (1966) (except where child is charged with a capital offense).

[25]*See, e.g.*, Jackson v. Balkcom, 210 Ga. 412, 80 S.E.2d 319 (1954); State v. Lindsey, 78 Idaho 241, 300 P.2d 491 (1956); State v. McCoy, 145 Neb. 750, 18 N.W.2d 101 (1945).

[26]People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967); Mallory v. Paradise, ___Iowa ___, 173 N.W.2d 264 (1969); Commonwealth v. Franks, 164 Ky. 239, 175 S.W. 349 (1915); State v. Connally, 190 La. 175, 182 So. 318 (1938) (except over children 15 or older charged with capital offenses or offense of attempted aggravated rape, as provided by statute); State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957); Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952); State *ex rel.* Boyd v. Rutledge, 321 Mo. 1090, 13 S.W.2d 1061 (1929); State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963) (except over children charged with capital offenses, as provided by statute); Gibson v. State, 47 Wis. 2d 810, 177 N.W.2d 912 (1970).

[27]*See, e.g., Ex parte* Sharp, 15 Idaho 120, 96 P. 563 (1908).

juvenile court jurisdiction, the age of criminal responsibility, the age at which jurisdiction over a child may be waived, and the interrelationship between all of these age factors in terms of dividing juvenile and criminal jurisdiction. Because the Georgia example deals with all of these problems and does so in a clear historical context, it will be used as a matrix within which to examine and analyze the jurisdictional dilemma generally.

AN EXAMPLE OF SHARED JURVENILE COURT JURISDICTION— THE GEORGIA EXPERIENCE

Intended Jurisdiction under the New Juvenile Court Code

With at least one notable exception,[28] Georgia's new Juvenile Court Code[29] on its face contains none of the evils described above. Patterned after the Uniform Juvenile Court Act, it is a model of progressive juvenile court philosophy and procedure.

The present age jurisdiction under the new Code is seventeen, although it will be increased to eighteen on July 1, 1973.[30] As under the old act,[31] and in keeping with traditional juvenile court concepts,[32] the new Code reaffirms the notion that a juvenile proceeding is not to be

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[28]*See* note 16 *supra.*

[29]GA. CODE ANN. tit. 24A (1971). For a complete discussion of the new Code in its entirety, *see* Clark, *The New Juvenile Court Code of Georgia,* 7 GA. ST. B.J. 409 (1971).

[30]GA. CODE ANN. § 24-A-401(c) (1971).

[31]No. 215, § 19, [1951] Ga. Laws 302, *as amended* No. 1021, § 10 [1968] Ga. Laws 1026-27, provided as follows: "No action taken against a child under the provisions of this Chapter shall be denominated as a criminal action nor an adjudication as a conviction; nor shall any child be charged with crime or convicted by any court, except as provided in this Act."

[32]Virtual unanimity exists on the premise that juvenile court proceedings are of a civil and not criminal nature. Almost all jurisdictions expressly recognize, in one form or another, the civil nature of juvenile proceedings. ALA. CODE tit. 13, § 378 (1959); ARIZ. REV. STAT. ANN. § 8-207(A) (Supp. 1971); CAL. WELF. & INST'NS CODE § 503 (West 1972); COLO. REV. STAT. ANN. § 22-1-9 (Supp. 1967); CONN. GEN. STAT. ANN. § 17-72 (1958); D.C. CODE ANN. § 16-2318 (Supp. IV, 1971); HAWAII REV. STAT. § 571-49 (1968); MASS. GEN. LAWS ANN. ch. 119, § 53 (1965); MICH. STAT. ANN. § 27.3178(598.1) (1962); MINN. STAT. ANN. § 260.211(1) (1971); MISS. CODE ANN. § 7185-08 (1952); MO. ANN. STAT. § 211.271(1) (1962); MONT. REV. CODES ANN. § 10-611(4) (Supp. 1971); NEB. REV. STAT. § 43-206.03(5) (1968); NEV. REV. STAT. § 62.190(3) (1971); N.H. REV. STAT. ANN. § 169:20 (1964); N.M. STAT. ANN. § 13-8-65 (1968); N.Y. FAMILY CT. ACT § 781 (McKinney 1963); N.D. CENT. CODE § 27-20-33 (Supp. 1971); OHIO REV. CODE ANN. § 2151.01(B) (Page Supp. 1971); OKLA. STAT. ANN. tit. 10, § 1127(b) (Supp. 1972); ORE. REV. STAT. § 419.543 (1971); PA. STAT. ANN. tit. 11, § 261 (1965); S.C. CODE ANN. § 15-1202 (1962); TENN. CODE ANN. § 37-233(a) (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13(d) (1971); VT. STAT. ANN. tit. 33, § 662(a) (Supp. 1972); VA. CODE ANN. § 16.1-179 (1960); WASH. REV. CODE ANN. § 13.04.240 (Supp. 1971); WIS. STAT. ANN. § 48.38 (1957); WYO. STAT. ANN. § 14-115.39 (Supp. 1971).

regarded as a criminal proceeding.[33] The Code invests the juvenile court with exclusive, original jurisdiction over all juvenile matters and provides that it shall be the sole court for initiating action regarding any child alleged to be delinquent, unruly, or deprived.[34] A "delinquent child" under the Code is one "who has committed a delinquent act and is in need of treatment or rehabilitation."[35] The definition of "delinquent act" is substantially limited to violations of state or federal law or local ordinance,[36] with no attempt to exclude more serious offenses as some jurisdictions have done.[37]

To emphasize further that the juvenile court's jurisdiction over criminal-like conduct is exclusive, the Code provides:

> If it appears to any court in a criminal proceeding or a quasi-criminal proceeding that the defendant is a child, the case shall forthwith be transferred to the juvenile court together with a copy of the accusatory pleading and other papers, documents, and transcripts of testimony relating to the case. It shall order that the defendant be taken forthwith to the juvenile court or to a place of detention designated by the court, or release him to the custody of his parent, guardian, custodian, or other person legally responsible for him, to be brought before the court at a time designated by that court . . . .[38]

In the case of a child who is fifteen or older, jurisdiction may be waived and the case transferred to criminal court. Waiver and transfer can occur, however, only after the judge has held a waiver hearing and

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[33]GA. CODE ANN. § 24A-2401(a) (1971). This provision is somewhat more limited than under the previous Act. It provides as follows: "An order of disposition or other adjudication in a proceeding under this Code [Title 24A] is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment." The non-punitive nature of the juvenile court is also reflected in the statement of purpose of the Code. *Id.* § 24A-101 (1971).

[34]*Id.* § 24A-301 (1971). The terms "delinquent," "unruly," and "deprived" are defined elsewhere in the Code. *Id.* §§ 24A-401(e)-(h) (1971).

[35]*Id.* § 24A-401(f) (1971).

[36]*Id.* § 24A-401(e)(1) (1971). "Delinquent act" also includes two other categories of conduct: (1) "disobeying the terms of supervision contained in a court order which has been directed to a child who has been adjudicated delinquent or unruly," and (2) "patronizing any bar where alcoholic beverages are being sold, unaccompanied by the child's parent, guardian or custodian; or possessing alcoholic beverages." *Id.* §§ 24A-401(e)(2)-(3) (1971). "Delinquent act" does not include an offense applicable only to a child (except as provided in subsection (2) relating to alcoholic beverages) or a juvenile traffic offense as defined elsewhere in the Code. *Id.* § 24A-401(e)(1) (1971). Juvenile traffic offenses are covered under § 24A-3101 of the Code.

[37]*See* statutes cited note 11 *supra.*

[38]GA. CODE ANN. § 24A-901 (1971). For similar provisions in other jurisdictions *see* statutes cited note 24 *supra.*

has found reasonable grounds to believe (1) that the child committed the delinquent act alleged, (2) that he is not amenable to treatment or rehabilitation, (3) that he should not be committed as a mentally retarded or mentally ill child, and (4) that the interests of the community demand that he be restrained or disciplined.[39]

The operation of these statutes may be tested by a hypothetical example. Suppose a sixteen-year-old child is taken into custody by the police on reasonable grounds that he has committed murder. The following would seem to be indicated under the Georgia Juvenile Court Code: (1) The child is under seventeen and is therefore within the exclusive jurisdiction of the juvenile court. (2) The juvenile court is the sole court for *initiating* action against the child. (3) If the child is by mistake or for any reason taken before another court, that court must immediately transfer him to the juvenile court. (4) Whether the child comes originally before the juvenile court or is transferred to the juvenile court from another court as required, the juvenile court may waive jurisdiction over the child and transfer the child to superior court, if waiver and transfer appear appropriate. (5) Only in the event of such waiver and transfer by the juvenile court is the superior court authorized to proceed against the child as an adult. Moreover, in the event the child were under fifteen, the superior court would never be authorized to proceed against him, since the juvenile court would have exclusive, original jurisdiction that may not be waived.

The above would appear to be true, based on the clear meaning of the pertinent statutes read together. But very serious doubt exists whether this would be the case at all. Under the example above, the superior court could take jurisdiction of the case if it so desired and proceed against the child as if he were an adult, and it would not be compelled to transfer the case to the juvenile court. How can this be possible when the Code clearly provides otherwise? The probable result today under the new Code has antecedents in the experience under the old Juvenile Court Code.

Jurisdiction Under the Juvenile Court Act of 1951[40]

The Juvenile Court Act of 1951[41] provided for exclusive original

[39]*Id.* § 24A-2501 (1971). Compare the criteria from Kent v. United States, 383 U.S. 541 (1966), quoted in note 19 *supra*. *See also* the waiver criteria contained in the statutes cited note 19 *supra*.

[40]The jurisdictional dilemma under the Juvenile Court Act of 1951 has been treated briefly in Trotter, *The Georgia Juvenile Court Act of 1951*, 26 GA. B.J. 411, 414-16 (1964) and Comment,

jurisdiction in the juvenile court over any child under seventeen living or found within the county who was alleged to have violated state, federal, or local law.[42] The language of the statute, based on the 1949 Standard Juvenile Court Act, came under attack almost immediately. In *Hampton v. Stevenson,*[43] the exclusive jurisdiction provision of the Act of 1951 was challenged on the ground that it was unconstitutional in light of a jurisdictional grant in the Georgia Constitution that provided: "The Superior Courts shall have exclusive jurisdiction . . . in criminal cases where the offender is subjected to loss of life, or confinement in the penitentiary . . . ."[44] The petitioner had been adjudicated a delinquent in juvenile court and was alleging that the adjudication was invalid, since under the constitutional provision mentioned the superior court had exclusive jurisdiction of felony offenses. The allegation of delinquency was that the petitioner had stabbed another person with a butcher knife. The court avoided a direct jurisdictional confrontation by holding that the proceedings in juvenile court are civil and not criminal in nature and are therefore not in conflict with the constitutional grant of exclusive jurisdiction to the superior courts.[45] The court thus left the inevitable jurisdictional conflict unresolved, with no portent of how it might be answered.

The General Assembly, meeting in November of 1953, was aware of the conflict and was also concerned about a notorious case in that same year involving the rape of an eighteen-year-old white female by a black youth.[46] The defendant was convicted and sentenced to death by

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Problem of Age and Jurisdiction in Juvenile Court, 19 VAND. L. REV. 833, 843-44 (1966). A more recent treatment of the present jurisdictional conflict is Henritze, *Persisting Problems of Georgia Juvenile Court Practice,* 23 MERCER L. REV. 341, 349-55 (1972).

[41]No. 215, [1951] Ga. Laws 291.

[42]No. 215, § 9(1), [1951] Ga. Laws 297 (amended 1953).

[43]210 Ga. 87, 78 S.E.2d 32 (1953). *See also* Whitman v. State, 96 Ga. App. 730, 101 S.E.2d 621 (1957).

[44]GA. CONST. art. VI, § IV, ¶ 14.

[45]No. 215, § 19, [1951] Ga. Laws 302 (amended 1968) provided that no action taken against a child under the provisions of the Act was to be regarded as a criminal action. The court in *Hampton* clearly held that since a juvenile proceeding was a civil proceeding, the provisions of the Georgia Constitution relating to the superior court's criminal jurisdiction were inapplicable. Impliedly the court was saying that the juvenile court was the proper and sole court to hear such matters. The real test remained, however. Where the superior court had taken jurisdiction over a juvenile alleged to have committed a criminal offense, would the rationale in *Hampton* logically compel a similar result—*i.e.,* that juvenile matters were civil matters and a matter solely for determination by the juvenile court?

[46]State v. Jackson, Crim. No. F-135 (Baldwin County Super. Ct., Aug. 28, 1953). The Supreme Court report of the case, Jackson v. Balkcom, 210 Ga. 412, 80 S.E.2d 319 (1954), does not reflect the age of the black youth, except to state that he was under 16 years of age.

the Superior Court of Baldwin County. A collateral attack of the death sentence was pending before the Georgia Supreme Court. There was apparently some feeling that the defendant might have been able to avoid criminal prosecution for the rape since he was within the exclusive jurisdiction of the juvenile court.[47] To remove this possibility the General Assembly amended the Act of 1951 by deleting the exclusive jurisdiction provision[48] and reducing the minimum age for transfer from juvenile court to superior court from sixteen to fifteen.[49]

The drafters of the Juvenile Court Code of 1971 failed to mention this history in their comments to the new age jurisdiction provision. The comment following section 24A-301 says only, "The jurisdiction under 24A-301 is exclusive; Georgia Code Ann., former 24-2408, merely gave the juvenile court original jurisdiction without commenting upon exclusiveness."[50] This statement, while not patently incorrect, is certainly imprecise and misleading. It would lead the reader to believe that something new has been added to the new Code that will broaden the jurisdiction of the juvenile court. While this *ought* to be the case, whether in fact it is remains to be seen. In any event, the remaining history of the provision in the Act of 1951 lends greater significance to the current dilemma.

The case that caused the 1953 amendment was decided by the Supreme Court of Georgia during its January 1954 term. In *Jackson v. Balkcom*,[51] the court held that jurisdiction to try a person accused of a

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[47]Even in 1953 with the question still unresolved, superior courts were taking jurisdiction over youth otherwise within juvenile court age jurisdiction, in felony cases. Otherwise the defendant in the case mentioned would not have been before the Superior Court of Baldwin County at all, since a literal reading of the statutes would indicate that the juvenile court had exclusive, original jurisdiction over children under 17 and that the superior court could obtain jurisdiction only upon transfer from the juvenile court.

To some extent a pervasive feeling still exists to the effect that youth who commit serious offenses, especially inflammatory offenses such as rape, ought to be treated as criminals. Unfortunately, this feeling exists among some juvenile court judges. At the 10th Annual Workshop for Juvenile Court Judges, held during October 5-7, 1971, in Athens, Georgia, the chief topic for discussion was the effect of the new Juvenile Court Code. The Code was analyzed section by section, including § 24A-2701(b), which limits the duration of commitment orders to two years (subject to renewal upon hearing). One judge who had just heard a rape case involving a white female victim and several black youths, was heard to lament, "Now I have a boy [obviously under the age of 15, or this judge would have transferred him to superior court] who has just been *convicted* [this was the judge's word, not the writer's] of rape and aggravated sodomy. You mean I can only send him away for two years?"

[48]No. 555, § 3, [1953] Ga. Laws Nov.-Dec. Sess. 89 (superseded 1971).

[49]No. 555, §§ 1-2, [1953] Ga. Laws Nov.-Dec. Sess. 88-89 (superseded 1971).

[50]GA. CODE ANN. § 24A-301, Comment (1971).

[51]210 Ga. 412, 80 S.E.2d 319 (1954).

crime punishable by death or imprisonment was vested by the state constitution in the superior court, and that any provisions of the Act of 1951 that were intended to withhold this jurisdiction were unconstitutional. The court restated the conclusion reached in *Hampton* that juvenile proceedings were civil and not criminal in nature, but based its holding on the fact that the age of criminal responsibility under then existing Georgia law was fourteen[52] and that nothing contained in the Act of 1951 changed or superseded this provision. Even though the rape in *Jackson* occurred on August 28, 1953, when the defendant was under sixteen years of age and before the amendment in November 1953, the court concluded that the trial and death sentence were valid because jurisdiction to try persons charged with felonies who are accountable under the law was fixed by the Georgia Constitution to be in the superior court.[53]

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[52]Former Code § 26-301 ([1833] Ga. Laws 143) provided that a person "who has arrived at the age of 14 years, or before that age if such person know the distinction between good and evil" was accountable under the law, following the common law rule that a child between the ages of 10 and 14 is presumed to be incapable of committing a crime, a presumption that could be rebutted. Ford v. State, 100 Ga. 63, 25 S.E. 845 (1896) (mem.). The new Criminal Code, however, provides: "A person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime." GA. CODE ANN. § 26-701 (1971).

At this point an oddity occurs. Former § 26-302, ([1833] Ga. Laws 143) using language identical to the present § 26-701, provided that a child under the age of 10 "shall not be considered or found guilty of any crime or misdemeanor." The effect of this section was to create a conclusive presumption of incapacity to commit crime on the part of a child under 10. Clemmons v. State, 66 Ga. App. 16, 19, 16 S.E.2d 883, 885 (1941). The Committee Notes to the present § 26-701 note the similarity in language and state that § 26-701 is "to have the same effect" as former § 26-302. This would seem to suggest that a child below the age of 13 is conclusively presumed to be incapable of committing a crime. But elsewhere the Committee Notes suggest that the effect of § 26-701 is to lower the age of *rebuttable* presumptive capacity to commit crime from 14 years to 13 years.

The two views seem to be inconsistent, but what the Notes are really saying is that a child under the age of 13 has an absolute defense in a criminal prosecution, but nevertheless may be proceeded against as a juvenile in a juvenile proceeding. Thus, despite the language of the Notes, such a child is incapable of committing a *crime* but is not incapable of committing a *delinquent act*.

Thus a distinction may be drawn between a *crime* and a *delinquent act*. The thesis of this article is that this distinction operates to give the juvenile court exclusive jurisdiction over all *delinquent acts* committed by children; the superior court does not have jurisdiction over *crimes* committed by children, since, when committed by a child, such an act is not a *crime* but a *delinquent act*. Only if the juvenile court waives jurisdiction and transfers the child to superior court should the superior court ever acquire jurisdiction over a child accused of committing an offense. Only in this sense can the juvenile court and superior court be said to have concurrent jurisdiction over juveniles who commit felony offenses.

[53]Thus any jurisdiction actually exercised by the juvenile court over persons between the ages of 14 (age of criminal accountability under the then law) and 17 (maximum age jurisdiction under the Act of 1951) who were charged with felonies was permissive only. Actual jurisdiction was vested

In *Armstrong v. State*[54] the Georgia Court of Appeals affirmed the voluntary manslaughter conviction of a fourteen-year-old girl and restated the position taken in *Jackson v. Balkcom:* any part of the Juvenile Court Act of 1951 intended to displace the jurisdiction of the superior court over an offender within the age of accountability who had committed an offense punishable by death or imprisonment was unconstitutional and would not be given effect.

What has emerged out of these decisions is a very shaky *entente* between the juvenile court and superior court whereby the court first obtaining jurisdiction over a child between the ages of thirteen and sixteen (inclusive) may, if it wishes, retain jurisdiction over the child and proceed to final judgment.[55] Thus, it is apparent from a reading of *Jackson v. Balkcom* that if a child initially appears before the superior court, it is not mandatory that that court transfer the case to the juvenile court as provided under both the Act of 1951[56] and the new Code.[57]

The Continuing Jurisdictional Problem under the Juvenile Court Code of 1971

By resurrecting the exclusive jurisdiction provision and including it in the new Juvenile Court Code, the legislature set the stage for potential

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in the superior court in such cases, and jurisdiction by the juvenile court in felony cases was exercised only with the tacit permission of the superior court, which always reserved the right to try the case itself. The superior court apparently could bring a criminal prosecution against the juvenile even after he had been adjudicated a delinquent in juvenile court. Whitman v. State, 96 Ga. App. 730, 101 S.E.2d 621 (1957). This appears to be against the weight of current authority, which is to the effect that juveniles have a right not to be placed twice in jeopardy for the same offense. *See, e.g.*, Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968); Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965); Richard M. v. Superior Court, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); Tolliver v. Judges of the Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Sup. Ct. 1969); Collins v. State, 429 S.W.2d 650 (Tex. Ct. Civ. App. 1968). *See also* GA. CODE ANN. § 24A-2501(c) (1971), which provides: "No child, either before or after reaching 17 years of age (18 years of age after July 1, 1973), shall be prosecuted for an offense previously committed unless the case has been transferred as provided in this section."

[54]90 Ga. App. 173, 82 S.E.2d 51 (1954).

[55]*See* Jackson v. Balkcom, 210 Ga. 412, 80 S.E.2d 319 (1954) (child unable to complain of improper jurisdiction in superior court); Hampton v. Stevenson, 210 Ga. 87, 78 S.E.2d 32 (1953) (child unable to complain of improper jurisdiction in juvenile court). An obvious exception would be in the case of a youth under the age of 15, in which case if the juvenile court obtains original jurisdiction it *must* retain jurisdiction since the new Code permits waiver of jurisdiction only in cases where the youth is 15 or older. GA. CODE ANN. § 24A-2501(a)(4) (1971).

[56]No. 215, § 10(1), [1951] Ga. Laws 298. The Act of 1951 was amended in 1968, however, to give a juvenile an apparent absolute right to be tried as an adult, presumably to counter the result reached in Hampton v. Stevenson, 210 Ga. 87, 78 S.E.2d 32 (1953). No. 1020, § 4, [1968] Ga. Laws 1021.

[57]GA. CODE ANN. § 24A-901 (1971).

renewal of the jurisdictional question raised in *Jackson v. Balkcom.* Under that decision serious doubt exists whether exclusive jurisdiction in the juvenile court can be realized, since any attempt to withhold by statute the constitutionally granted exclusive jurisdiction of the superior court to try felony offenses would be unconstitutional. Certainly present practice would indicate that juvenile court judges have conceded a share of their jurisdiction to the superior court in cases alleging a violation of law punishable by death or imprisonment.[58]

From the standpoint of juvenile jurisdiction, this *entente* has resulted in a particularly invidious practice. As has been pointed out, the court first taking jurisdiction may retain jurisdiction. But suppose we have a child who is thirteen or older but who has not yet reached his fifteenth birthday. Suppose further that the juvenile court has knowledge about the child that would indicate that he is not amenable to treatment as a juvenile: the child has a prior record, has not responded to previous rehabilitative efforts, and is now charged with a serious offense. If the juvenile court takes original jurisdiction, it must retain jurisdiction since the child is below the waiver age. The juvenile court judge in such a case could informally request the district attorney to proceed against the child as an adult.[59]

This practice operates as an informal waiver procedure. Such a back-door waiver procedure denies the child a waiver hearing and abdicates juvenile court responsibility to make a finding based on reasonable grounds to believe that the child committed the act, that he is not amenable to treatment by the juvenile court, and that the interests of the community require that the child be treated as an adult.[60] Some may be comforted in the knowledge that such a child would be transferred to the superior court anyway, even if jurisdiction over the child were

[58]This conclusion was reflected in the private comments of Judge Aaron Cohn of the Muskogee County Juvenile Court, a past President of the Georgia Council of Juvenile Court Judges, at the 10th Annual Workshop for Juvenile Court Judges held in Athens, Georgia, on October 5-7, 1971. Judge Cohn was of the opinion that nothing in the new Code changed the existing prerogative of the superior court to treat a violation of law (*i.e.*, a felony offense) by a child as a criminal act and to proceed against the child as if he were an adult.

[59]This practice was acknowledged by Judge Cohn in his comments referred to in note 58 *supra.* Viewed in light of the existing system, it is the best that juvenile court judges can do; what is deplorable is the system itself, which forces such a practice upon the judges. The feeling of the judges is that the waiver age ought to be lowered from 15 to 13, as reflected in the consensus of those judges present at the 10th Annual Workshop for Juvenile Court Judges held in Athens, Georgia, on October 5-7, 1971. This action, if enacted by the legislature, would afford each child a waiver hearing in accord with the requirements of Kent v. United States, 383 U.S. 541 (1966).

[60]GA. CODE ANN. § 24A-2501(a)(3) (1971).

waivable, and that the waiver hearing is a mere procedural formality. Such a practice, however, is in direct contradiction to the spirit of *Kent v. United States.*[61]

This concept of concurrent jurisdiction is based strictly on the decision in *Jackson v. Balkcom.* In this respect, however, the Georgia courts are not alone in the position they have taken. Idaho's Code, for example, contains an exclusive jurisdiction provision[62] and also provides that if, during pendency of a criminal charge against a minor in another court, it appears that the minor was under eighteen at the time the act was committed, the court shall transfer the case to the juvenile court.[63] The latter provision does not apply, however, when the minor is sixteen or older and is charged with a felony offense,[64] or when the minor is eighteen or older and is charged with any crime allegedly committed before he became eighteen.[65] The intent of these statutes seems clear enough. However, the exclusive jurisdiction provision in a former identical statute was held unconstitutional[66] because it attempted to remove from the district court jurisdiction to prosecute such persons for felony offenses.[67]

The current provision in the Nebraska Code grants the juvenile court *original* jurisdiction.[68] While it does not use the word "exclusive" in the grant of jurisdiction, the Code does require other courts before which a child might initially appear to transfer such child to the juvenile court upon learning that he is a child under the age of eighteen or was

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[61]383 U.S. 541 (1966); *see* note 21 *supra.*

[62]IDAHO CODE § 16-1803 (Supp. 1971). The jurisdictional age is 18, *id.* § 16-1802(c) (Supp. 1971), although jurisdiction also extends to persons 18 or older charged with violations of law that occurred before they attained the age of 18. *Id.* § 16-1803(2) (Supp. 1971).

[63]*Id.* § 16-1804 (Supp. 1971).

[64]*Id. See also id.* § 16-1806(1)(a) (Supp. 1971).

[65]*Id. See also id.* § 16-1806(1)(b) (Supp. 1971).

[66]The constitutional provision affected was IDAHO CONST. art. 5, § 20, which granted jurisdiction over felony offenses to the district court.

[67]State v. Lindsey, 78 Idaho 241, 244-46, 300 P.2d 491, 493-94 (1956). In the *Lindsey* case, however, the minor was handled as a juvenile, and *he* was the party who sought to be treated as an adult. To this extent, the *Lindsey* case resembles the Georgia case of Hampton v. Stevenson, 210 Ga. 87, 78 S.E.2d 32 (1953), although in *Lindsey* the Idaho court confronted and answered the jurisdictional question dodged by the Georgia court in *Hampton.* The *Lindsey* case seems to be limited, however, to cases in which the juvenile wishes to waive his right to be treated as a juvenile and to assert his right to be tried as an adult. In Georgia the same result was reached by legislative enactment following the *Hampton* case, permitting the juvenile to assert his right to be tried as an adult. No. 1020, § 4, [1968] Ga. Laws 1021.

[68]NEB. REV. STAT. § 43-202 (1968). The juvenile court is a division of the district court sitting in cases arising under the Juvenile Court Act.

under the age of eighteen at the time the act was committed.[69] Nevertheless, the Nebraska courts have held that the juvenile court does not have exclusive jurisdiction over children under eighteen years of age and that other courts have concurrent jurisdiction when a juvenile is charged with a violation of law. A complaint may properly be brought against a child by the county attorney in a court having general criminal jurisdiction, and that court may proceed to judgment in the case.[70]

All of these decisions bear a certain similarity in terms of their expressed rationale. Consequently they are equally vulnerable to the same arguments. Certainly the viability of the rationale in *Jackson v. Balkcom* in regard to the present Georgia Juvenile Court Code is open to question. The crux of the *Jackson* decision was as follows:

> While there is language in . . . the Juvenile Court Act of 1951 which might indicate that it was the intention of the General Assembly to give original jurisdiction to the juvenile courts in all cases pertaining to criminal charges against persons less than seventeen years of age, there is nothing in the act which would have the effect of repealing Code § 26-301, which states the age of criminal responsibility to be "14 years, or before that age if such person know the distinction between good and evil." Jurisdiction to try persons charged with felonies, who are accountable under the law, is fixed by the Constitution to be in the superior courts.[71]

There are several arguments that could be offered against application of this same reasoning to the present Juvenile Court Code. First, in terms of the application of the criminal law, the age of criminal responsibility is now set at thirteen, and the presumption is conclusive (rather than rebuttable) that no one under thirteen is capable of committing a crime.[72] Establishing an age of accountability only indicates capacity to commit a *crime.* There is nothing inconsistent between establishing an age of accountability under the criminal law at thirteen and setting a juvenile jurisdiction age limit at, for example, seventeen. This does not represent, as the court in *Jackson* suggested, an attempt to raise the age of accountability to seventeen.[73] It merely indicates a

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[69]*Id.* § 43-211 (1968). The jurisdictional age is set at 18. *Id.* § 43-201(4) (1968).

[70]State v. McCoy, 145 Neb. 750, 760-61, 18 N.W.2d 101, 106 (1945), citing the Georgia case of Johnson v. State, 43 Ga. App. 474, 159 S.E. 295 (1931). *See also* Fugate v. Ronin, 167 Neb. 70, 75-76, 91 N.W.2d 240, 243-44 (1958).

[71]210 Ga. at 414, 80 S.E.2d at 320.

[72]GA. CODE ANN. § 26-701 (1971); *see* note 52 *supra* for the effect of the new statute.

[73]*But see* Wheeler v. Shoemake, 213 Miss. 374, 57 So.2d 267 (1952), wherein the Mississippi Supreme Court held that the legislature, by enacting the Youth Court Act, in effect declared that

preference that the initial decision of how the child should be treated should be made by the juvenile court,[74] and if the court feels that a child is not amenable to treatment and rehabilitation, it may waive jurisdiction after a hearing and transfer the case to the superior court, which will then have jurisdiction to try the juvenile as an adult.[75] The juvenile, then under the jurisdiction of the criminal law and over thirteen, will be deemed capable of committing a crime and will be an appropriate subject for the criminal process.

Other jurisdictions faced with the same question have resolved the problem in a manner that is at once constitutionally sound and consistent with the principles and purposes of modern juvenile court philosophy. The Minnesota Constitution, for example, provides: "The district courts shall have original jurisdiction . . . [in all criminal cases] where the punishment shall exceed three months' imprisonment or a fine of more than one hundred dollars . . . ."[76] A statutory grant of jurisdiction, however, confers upon the juvenile court original, exclusive jurisdiction.[77] Moreover, any court before which a child might initially appear is required to transfer such child to the juvenile court upon learning that he is a child subject to the juvenile court's jurisdiction.[78] Waiver of jurisdiction is authorized in the case of a child fourteen or older at the time the act was allegedly committed.[79]

A seventeen-year-old child[80] was convicted in district court (a court of general criminal jurisdiction, as set forth in the above constitutional provision) without any waiver proceedings occurring in the juvenile court. In a subsequent post-conviction proceeding,[81] the Minnesota Supreme Court held that the district court was without jurisdiction. The court further held that the Juvenile Court Act did not deprive the district court of jurisdiction but simply furnished procedures (i.e., waiver procedures) that must be followed before the criminal jurisdiction of the

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a child under the age of 18, which is the jurisdictional age limit of the juvenile court (MISS. CODE ANN. § 7185-02 (1952)), is not criminally responsible unless the juvenile court decides to waive jurisdiction and transfer the case to circuit court. 213 Miss. at 399, 57 So. 2d at 279.

[74]Hence, the new Code confers upon the juvenile court *exclusive, original* jurisdiction. GA. CODE ANN. § 24A-301 (1971).

[75]*See* GA. CODE ANN. § 24A-2501 (1971) for provisions relating to the waiver hearing.

[76]MINN. CONST. art. 6, § 5. An amendment to this section has been proposed and will be passed upon in the 1972 general election, but its only change is to grant the district court jurisdiction over *all* criminal cases. Ch. 957, § 1, [1971] Minn. Laws 2030.

[77]The current provision is MINN. STAT. ANN. § 260.111(1) (1971).

[78]The current provision is *Id.* § 260.115 (1971).

[79]The current provision is *Id.* § 260.125(1) (1971).

[80]The jurisdictional age in Minnesota is 18. *Id.* § 260.015(2) (1971).

[81]State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957).

district court could attach. The court therefore found no conflict between the constitutional grant of jurisdiction to the district court and the statutory grant of jurisdiction to the juvenile court.[82]

Similarly, the Mississippi Constitution provides: "The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court . . . ."[83] The juvenile court by statute is granted original, exclusive jurisdiction.[84] While children thirteen years of age or older charged with commission of a crime punishable by life imprisonment or death are expressly excluded from the juvenile court's jurisdiction,[85] no child under thirteen may be the subject of a criminal prosecution.[86] In the case of a child thirteen years of age or older charged with a felony offense, jurisdiction may be waived and the case certified to the circuit court for criminal prosecution.[87]

A child under the age of eighteen[88] was convicted in circuit court of grand larceny. In a post-conviction proceeding[89] he attacked his conviction on the ground that the circuit court lacked jurisdiction over him. In an exhaustive treatment of all previous juvenile court acts, the Mississippi Supreme Court concluded that the Youth Court Act in effect declares that a person under the age of eighteen is not criminally responsible unless the Youth Court after investigation waives jurisdiction and transfers the case to the circuit court.[90] A provision for waiver and transfer was held to be within the constitutional police powers of the legislature.[91] Moreover, the court noted that the Youth Court Act declares that a proceeding in juvenile court is not a criminal proceeding but is civil in nature.[92] Since it was not a civil proceeding known at common law, it did not come within the ambit of the constitutional grant of jurisdiction, which is confined to civil matters known at common law.[93]

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[82]*Id.* at 250-51, 82 N.W.2d at 237-38. *See also* State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); State *ex rel.* Pett v. Jackson, 252 Minn. 418, 90 N.W.2d 219 (1958).

[83]MISS. CONST. art. 6, § 156.

[84]MISS. CODE ANN. § 7185-03 (Supp. 1971).

[85]*Id.* § 7185-15 (1952).

[86]*Id.* § 7185-17 (1952).

[87]*Id.* § 7185-15 (1952).

[88]The jurisdictional age of the juvenile court in Mississippi is 18. *Id.* § 7185-02(c) (1952).

[89]Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952).

[90]In Oklahoma, the determination of a child's criminal responsibility is a part of the waiver decision. OKLA. STAT. ANN. tit. 10, § 1112(b) (Supp. 1972).

[91]213 Miss. at 399, 57 So. 2d at 279.

[92]MISS. CODE ANN. § 7185-08 (1952).

[93]213 Miss. at 399-400, 57 So. 2d at 279.

Likewise, the Georgia statute is not an attempt to *withhold* jurisdiction from any court. It is not so much a question of *where* the case will be heard as it is a qustion of *who* is best qualified to decide where the case will be heard. The waiver decision is a correctional decision and should be made only by the juvenile court after a hearing. If, as the court said in *Jackson v. Balkcom,* it "is entirely in sympathy with the beneficient purposes" of the juvenile court,[94] it must be willing to let the juvenile court decide in which cases the interests of the community as well as those of the child suggest that he should be transferred to the superior court.

The second argument against present application of the reasoning in *Jackson v. Balkcom* arises out of the first. Establishment of an age of accountability under the criminal law has reference only to capacity to commit a *crime.* Likewise, the constitutional grant of jurisdiction to superior courts refers to *criminal* cases. Under the new Juvenile Court Code not only are juvenile proceedings of a civil nature; the act of a child that is designated a crime under local, state, or federal law is a *delinquent act*[95] and not a crime, and makes the child a delinquent child, not a criminal.[96]

Again, other jurisdictions have recognized the distinction between a crime and a delinquent act[97] and on this basis have forged a clear separation of juvenile and criminal jurisdiction. The West Virginia Constitution, for example, grants to the circuit courts "original and general jurisdiction . . . of all crimes and misdemeanors."[98] Except in the case of children charged with offenses punishable by life imprisonment or death,[99] the juvenile court by statute is given exclusive jurisdiction over cases involving children[100] accused of criminal violations.[101] Jurisdiction over a child sixteen years of age or older may be waived and the case transferred to the appropriate court having criminal jurisdiction.[102]

Under this statutory scheme a fifteen-year-old child was convicted

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[94]210 Ga. at 414, 80 S.E.2d at 320.

[95]GA. CODE ANN. § 24A-401(e)(1) (1971).

[96]*Id.* § 24A-401(f) (1971).

[97]The distinction drawn is real and valid and fundamental to the rehabilitative purposes of the juvenile court. *See* People ex rel. Terrell v. District Court, 164 Colo. 437, 444-45, 435 P.2d 763, 766 (1967).

[98]W. VA. CONST. art. VIII, § 12.

[99]W. VA. CODE ANN. § 49-1-4(2) (1966).

[100]A child is a person under 18 years of age. *Id.* § 49-5-2 (Supp. 1972).

[101]*Id.* § 49-5-3 (1966).

[102]*Id.* § 49-5-14(3) (1966).

in the circuit court of breaking and entering and was sentenced to a term in the state penitentiary. In a post-conviction proceeding,[103] he claimed that the circuit court was without jurisdiction to sentence him. The West Virginia Supreme Court of Appeals noted that there was no provision in the Code for waiver of jurisdiction and transfer to circuit court of children *under* sixteen years of age. Therefore, it felt that the legislature must have intended that such children were incapable of commission of crime, except for capital offenses. Granting exclusive jurisdiction in such cases to the juvenile court was held not to divest the circuit court of its criminal jurisdiction, because by definition the conduct complained of was not a crime at all.[104]

The same result has been reached by the Colorado courts. The Colorado Constitution provides: "The district courts . . . shall have original jurisdiction in all . . . criminal cases . . . ."[105] The juvenile court by statute is granted exclusive, original jurisdiction in children's cases,[106] except for children fourteen and older charged with commission of crimes of violence punishable by life imprisonment or death.[107] Jurisdiction over children fourteen or older charged with felony offenses may be waived.[108] The statutes further provide that with the exception of a child fourteen or older charged with commission of a crime of violence punishable by life imprisonment or death, a child may be charged with a felony only upon waiver of jurisdiction as provided.[109] A child is a person under the age of eighteen.[110]

Two seventeen-year-old Colorado youths were charged by indictment with felony offenses in the district court. They filed a motion to dismiss or, in the alternative, to transfer the proceedings to juvenile court. Upon the court's denial of the motion, they brought an original

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[103]State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

[104]147 W. Va. at 683-85, 130 S.E.2d at 198-99. In accord, the Minnesota Code provides that a violation of law by a child under the age of 18 is not a crime unless jurisdiction is waived as provided by statute and the case is transferred for prosecution as a criminal matter. MINN. STAT. ANN. § 260.215(1) (1971). To the contrary, however, the Missouri Supreme Court has said that violation of the criminal law by a person within the jurisdictional age limit of the juvenile court is still a crime; the Juvenile Court Act simply made it also an act of delinquency. State *ex rel.* Boyd v. Rutledge, 321 Mo. 1090, 1099, 13 S.W.2d 1061, 1065 (1929). Perhaps the respective dates of these pronouncements explain the difference between them.

[105]COLO. CONST. art. VI, § 9(1).

[106]COLO. REV. STAT. ANN. §§ 22-1-4(1)(a)-(b) (Supp. 1967).

[107]The current provision is *id.* § 22-1-3(17)(b) (Supp. 1969).

[108]The current provision is *id.* § 22-1-4(4)(a) (Supp. 1969).

[109]The current provision is *id.* § 22-1-4(4) (b) (Supp. 1969).

[110]*Id.* § 22-1-3(3) (Supp. 1967).

proceeding[111] in the Colorado Supreme Court challenging the district court's jurisdiction. That court was of the opinion that the provisions of the Children's Code did not operate to divest the district court of its jurisdiction, because, by its terms the grant of jurisdiction to the district court extended to criminal cases. A delinquency proceeding, however, is not a criminal case even when when the allegation of delinquency rests upon conduct that if committed by an adult would be felonious. On the basis of this qualitative distinction, the court held that the jurisdictional provisions of the Children's Code were not in conflict with the constitutional grant of jurisdiction to the district court.[112]

This suggests that when a child, as defined by the Georgia Juvenile Court Code,[113] commits an act that would be criminal if committed by an adult, he is initially to be regarded as a subject for juvenile court jurisdiction. At this initial stage he has not committed a *crime,* and the case is not a *criminal* case. The child must be brought before the juvenile court, or if he has been brought before some other court, he must immediately be transferred to the juvenile court as commanded by statute.[114] The case does not become a *criminal* case subject to the superior court's constitutional jurisdiction unless the case is transferred to the superior court following a waiver hearing as provided in the Code.[115] Once the case becomes a criminal case to be tried by the superior court, then the age of criminal responsibility becomes a relevant consideration.[116]

The preceding discussion is consistent with the aims and purposes of the juvenile court and the constitutional grant of jurisdiction to the superior court. An appropriate solution that would leave little doubt of legislative intent would be to amend the Georgia Constitution specifically to remove juveniles from the jurisdiction of the superior court except upon waiver from the juvenile court.[117] In any event, clarification

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[111]People *ex rel.* Rodello v. District Court, 164 Colo. 530, 436 P.2d 672 (1968).

[112]164 Colo. at 535, 436 P.2d at 675. *See also* People *ex rel.* Terrell v. District Court, 164 Colo. 437, 444-45, 435 P.2d 763, 766 (1967).

[113]GA. CODE ANN. § 24A-401(c) (1971).

[114]*Id.* § 24A-901 (1971).

[115]*Id.* § 24A-2501(a) (1971).

[116]*See* note 52 *supra.*

[117]In fact an amendment to the Georgia Constitution was proposed by resolution in the 1972 session of the General Assembly and will appear on the ballot in the 1972 general election. Article VI, § VI, ¶ I of the Georgia Constitution would read as follows: "The Superior Courts shall have exclusive jurisdiction in . . . criminal cases where the offender is subjected to loss of life or confinement in the penitentiary except in the case of juvenile offenders as provided by law . . . ." No. ____, [1972] Ga. Laws 1544-45.

is needed in the area of age jurisdiction: the present age limit of juvenile court jurisdiction is seventeen;[118] the minimum age for waiver is set at fifteen;[119] and the age of criminal responsibility is set at thirteen.[120] This proliferation of age factors has contributed to the problem, and until some effort is made to understand the interaction between the various ages, the problem will persist. In the section that follows, the respective functions of the age limitations and their interrelationships within the confines of the juvenile-criminal systems will be explored further and an alternative solution will be proposed.[121]

THE AGE FACTOR IN JUVENILE JURISDICTION

As seen in the previous discussion, the court in *Jackson v. Balkcom* placed great reliance on the conclusion that the only limitation on superior court jurisdiction to try felony offenses, insofar as children under seventeen were concerned, was that such a child, in order to be accountable, had to be thirteen years of age or older. If a child was accountable he could be tried in the superior court, and no provision of the Juvenile Court Act of 1951 could withhold that jurisdiction. For example, under the statute describing murder as a crime,[122] no exception is made regarding to whom the statute will apply. On its face it applies to all persons committing such an act. The only limitation affecting a child is that persons under the age of thirteen are deemed incapable of committing the act of murder or any other crime.[123] Therefore, any child who is thirteen or older is a proper subject of superior court jurisdiction, regardless of anything said in the Juvenile Court Code to the effect that the juvenile court shall have jurisdiction over all persons under seventeen charged with committing such an act.

What this interpretation overlooks, however, is that the Juvenile Court Code provides that murder, when committed by a person under seventeen, is not a crime but a delinquent act.[124] Establishing the juvenile jurisdiction age limit at seventeen changes the *nature of the act,* whereas establishing an accountability age limit at thirteen merely relates to the *capacity* to commit the act. By virtue of being under seventeen, a child

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[118]GA. CODE ANN. § 24A-401(c) (1971).

[119]*Id.* § 24A-2501(a)(4) (1971).

[120]*Id.* § 26-701 (1971).

[121]To some extent the age factors have already been examined. *See* note 52 *supra.*

[122]GA. CODE ANN. § 26-1101 (1971).

[123]*Id.* § 26-701 (1971).

[124]*Id.* § 24A-401(e)(1) (1971); *see* notes 95-116 *supra* and accompanying text.

initially is an object of juvenile court jurisdiction; his age classification changes the definitional status of his act. The age of accountability, for purposes of juvenile court jurisdiction, has no meaning, no relevance, and no application.[125] On the other hand, if the juvenile court upon investigation decides that the case is appropriate for waiver of jurisdiction and transfer to the superior court, the jurisdictional shield is withdrawn from the child, and he becomes vulnerable to the usual application of the criminal law. The juvenile court thus returns him to the posture he would have assumed had the juvenile court not existed. The initial relevance of the seventeen-year-old age limitation disappears, and the age of accountability assumes new relevance. Since the child is over thirteen, he is regarded under the criminal law as capable of committing a crime and can be tried as an adult.

These two age limitations are easily understood in their relationship to one another. Confusion occurs only when the waiver age (fifteen in Georgia) is considered as a part of the formula. It has nothing to do with jurisdiction or accountability. Its only relevance is that the juvenile court cannot waive jurisdiction over a child unless he is at least fifteen years old.[126] If jurisdiction is exercised properly and all persons under seventeen are first referred to the juvenile court as anticipated in the Juvenile Court Code, then no child thirteen or fourteen years of age will ever be transferred to the superior court since the statute does not permit waiver of jurisdiction in such cases. This *does* create a conflict between the age of accountability and the permissible waiver age. The practical effect is to raise the age of accountability from thirteen to fifteen years of age, which frustrates the intent of the Criminal Code and creates disharmony between the juvenile and criminal systems.

This conflict results in some cases arbitrarily being withheld from the superior court's jurisdiction.[127] Moreover, it does violence to the

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[125]*See* discussion in note 73 *supra; cf. In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970), which held that in a juvenile proceeding the court must consider whether the child appreciated the wrongfulness of her act in determining whether the child should be adjudicated a ward of the state (the child was under the age of 14, which is California's age of presumptive incapacity). Thus California takes the view that the age of accountability is a relevant factor in a juvenile proceeding as well as a criminal proceeding. This is clearly not the case in Georgia. *See* note 52 *supra.*

[126]GA. CODE ANN. § 24A-2501(a)(4) (1971).

[127]It makes no more sense arbitrarily to withhold a certain class of cases—those involving 13 and 14 year-olds—from superior court jurisdiction than it does to exclude certain classes of offenses—*e.g.*, crimes punishable by death or imprisonment—from the juvenile court's jurisdiction. There may be factors in a 13 or 14 year-old child's case that suggest he is not amenable to treatment or rehabilitation, but under the present statutory scheme the juvenile court judge has no choice. He is bound by statute to retain jurisdiction once it is assumed.

argument offered earlier that the juvenile court merely seeks to be the sole decisionmaking functionary that determines in which court the case should be heard. Prohibition of waiver in cases involving the thirteen- to fifteen-year-old age group exceeds this function and results in inevitable conflict. Out of this conflict *Jackson v. Balkcom* was born, and the concurrent jurisdiction spawned by *Jackson* in turn created the informal, backdoor waiver process alluded to earlier.[128] One of two things must occur to relieve the pressure on the system: either the age of accountability must be raised to fifteen or the waiver age must be lowered to thirteen. The former solution is probably not realistic in terms of the kind of legislative opposition it would have to overcome.[129] The juvenile court judges seem to favor the latter solution.[130]

Of course, the conflict can always be resolved by the courts although the Georgia courts have not displayed in this matter a propensity for conflict resolution. Two decisions[131] by Colorado and West Virginia courts, however, deserve mention at this point because they demonstrate an acute understanding of the age factors and juvenile jurisdictional concepts involved.

Although the Colorado jurisdictional provisions have been covered previously,[132] it might be helpful to recount them briefly. The maximum jurisdictional age of the juvenile court is eighteen.[133] Except for children fourteen and older charged with commission of crimes of violence punishable by life imprisonment or death,[134] the juvenile court has exclusive original jurisdiction over children alleged to be delinquent on the basis of criminal conduct.[135] Jurisdiction may be waived in the case

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[128]*See* notes 59-61 *supra* and accompanying text.

[129]Such a change would follow closely on the heels of a recent revision of the Georgia Code that abrogated the use of conclusive and rebuttable ages of capacity in favor of a single age of accountability. GA. CODE ANN. § 26-701 (1971). *See* note 52 *supra* for a discussion of former § 26-301 ([1833] Ga. Laws 143) and the effects of the revision. Moreover, as the Committee Notes following § 26-701 suggest, age 13 probably represents the oldest age for capacity that would meet with general acceptance.

[130]This was the consensus of the judges who attended the 10th Annual Workshop for Juvenile Court Judges held in Athens, Georgia, on October 5-7, 1971. The judges agreed to press the legislature to amend the new Code to permit waiver of children as young as 13 to establish a waiver age that corresponds with the age of criminal responsibility. This would resolve the present conflict.

[131]People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

[132]*See* notes 106-110 *supra* and accompanying text.

[133]COLO. REV. STAT. ANN. § 22-1-3(3) (Supp. 1967).

[134]*Id.* § 22-1-3(17)(b) (Supp. 1969). The age limitation was changed from 16 to 14 in the 1968 amendments to the Children's Code. Ch. 45, § 1, [1968] Colo. Laws 54. For an explanation of the age change *see* note 136 *infra.*

[135]*Id.* §§ 22-1-4(1)(a)-(b) (Supp. 1967).

of a child fourteen or older charged with commission of a felony offense[136] although at the time of decision the waiver age was sixteen.[137] The Code further provides that, except for a child fourteen or older charged with commission of a crime of violence punishable by life imprisonment or death, no child may be charged with a felony other than in the manner provided.[138]

Confronted with this melange of age factors, the Colorado Supreme Court in *People ex rel. Terrell v. District Court*[139] held that the legislature, by enacting exclusive means for handling children below a certain age, intended to bar institution of felony charges against a child under sixteen years of age.[140] In effect the court raised the age of criminal responsibility from ten years of age, as provided elsewhere by statute,[141] to sixteen years of age, thus placing at the same level the age of accountability and the waiver age. This conclusion is compelled by logic once a delinquency proceeding is distinguished from a criminal case on the basis of age jurisdiction.[142]

The West Virginia example is in virtually all respects identical. Again, the jurisdictional provisions were covered earlier,[143] but briefly are as follows. Children charged with offenses punishable by life imprisonment or death are excluded from consideration as delinquent children,[144] but otherwise the juvenile court has exclusive jurisdiction in all cases in which a child is accused of a criminal violation.[145] A child is a person under eighteen years of age.[146] Jurisdiction may be waived in the case of a child sixteen or older, and the case may be transferred for criminal prosecution.[147]

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[136]*Id.* § 22-1-4(4)(a) (Supp. 1966). Since the waiver age was lowered from 16 to 14 as a part of the 1968 amendments to the Children's Code, ch. 45, § 2, [1968] Colo. Laws 54, it is safe to assume it was lowered as a reaction to the decision in question, People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967).

[137]People *ex rel.* Terrell v. District Court, 164 Colo. 437, 442-43, 435 P.2d 763, 765 (1967).

[138]COLO. REV. STAT. ANN. § 22-1-4(4)(b) (Supp. 1969).

[139]164 Colo. 437, 435 P.2d 763 (1967).

[140]*Id.* at 441-43, 435 P.2d at 764-65. Since the age classification has since been changed by the legislature from 16 to 14, the court's decision now applies to children under 14 years of age rather than children under 16 years of age. *See* COLO. REV. STAT. ANN. § 22-1-4(4)(b) (Supp. 1969).

[141]COLO. REV. STAT. ANN. § 40-1-4 (1963).

[142]*See* the court's discussion in 164 Colo. at 443-45, 435 P.2d at 764-66.

[143]*See* notes 99-102 *supra* and accompanying text.

[144]W. VA. CODE ANN. § 49-1-4(2) (1966).

[145]*Id.* § 49-5-3 (1966).

[146]*Id.* § 49-5-2 (Supp. 1972).

[147]*Id.* § 49-5-14(3) (1966).

In *State ex rel. Slatton v. Boles*,[148] the West Virginia court noted that no provision was made for waiver of jurisdiction over a child under sixteen years of age. Since the legislature chose to use age as a dividing line for classification purposes, the court reasoned that it must have intended that a person under the age of sixteen was incapable of committing crime. The court therefore held that the age of accountability, except in capital cases, had been elevated to sixteen, the waiver age.[149] Again, the age of accountability and the waiver age assume the same level once criminal and juvenile jurisdiction are clearly separated on the basis of age.

The draftsmen of the Model Penal Code were aware that, in terms of juvenile court jurisdiction, the age of criminal responsibility has little importance in the majority of states. Juvenile court acts generally supplant criminal court jurisdiction over children above the age of criminal responsibility who might otherwise be held accountable for their criminal acts in a criminal court. They also recognized the interrelationship between the jurisdiction of the juvenile court and the age of accountability in criminal court and treated the problem of the age of accountability in terms of allocating jurisdiction between the juvenile and criminal courts. Their draft is as follows:

> (1) A person shall not be tried for or convicted of an offense if:
> (a) at the time of the conduct charged to constitute the offense he was less than sixteen years of age [in which case the Juvenile Court shall have exclusive jurisdiction]; or
> (b) at the time of the conduct charged to constitute the offense he was sixteen or seventeen years of age, unless:
> (i) the Juvenile Court has no jurisdiction over him, or,
> (ii) the Juvenile Court has entered an order waiving jurisdiction and consenting to the institution of criminal proceedings against him.[150]

The draftsmen noted that the penal laws traditionally had always fixed ages of absolute and presumptive incapacity to commit crime. The juvenile court acts, while merely superimposed on existing provisions, had established their own jurisdictional age limits and thus reflected

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[148]147 W. Va. 674, 130 S.E.2d 192 (1963).

[149]*Id.* at 682-86, 130 S.E.2d at 197-200.

[150]MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962). Subsection (2) of § 4.10 provides for transfer from criminal court to juvenile court of proceedings against a person within the age group described in subsection (1).

entirely new policy. While the law establishing an age of criminal responsibility has remained relatively stable for centuries, its practical significance has progressively diminished because of the gradual extension of jurisdiction by the juvenile court over children above the age of accountability. The Model Penal Code provision was drafted to emasculate the legal issue of criminal capacity and to hold an individual under sixteen accountable only in juvenile court, where the traditional concept of incapacity had no application. By conferring upon juvenile courts exclusive jurisdiction over persons under sixteen, the Model Penal Code allows the juvenile court to achieve its avowedly ameliorative ends in the area of conduct where the need for amelioration is most crucial — serious offenses. This is also the policy behind giving the juvenile court decisionmaking responsibility for determining whether juvenile or criminal proceedings should be maintained in cases of persons sixteen and seventeen years of age.[151]

The Model Penal Code formulation indicates that an age of criminal responsibility was made an archaic concept by enactment of juvenile court laws, which were unknown to the common law. Having an age of accountability is neither helpful nor appropriate in light of juvenile court jurisdictional age limits and waiver procedures. For example, the problem in Georgia could be satisfactorily resolved as follows. The statute[152] relating to the age of accountability should be abolished outright. At the same time, the waiver age limit of the juvenile court could be lowered from fifteen to thirteen years of age, as the juvenile court judges have suggested,[153] or could be maintained at its present level.[154] Assuming the latter choice, this would have the effect of granting to the juvenile court exclusive jurisdiction over all children under the age of fifteen. Such a child could never be the subject of a criminal prosecution, since the juvenile court would not be authorized to waive jurisdiction over the child. Nor could the superior court take original jurisdiction over such a child since the Juvenile Court Code provides that any child under the age of seventeen coming before another court must be transferred forth-

[151]MODEL PENAL CODE § 4.10, Comment (Tent. Draft No. 7, 1957).

[152]GA. CODE ANN. § 26-701 (1971).

[153]*See* note 130 *supra.*

[154]If one must think in terms of age of accountability, this would have the effect of raising the age of accountability to 15. *See generally* People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963). The difficulties of achieving this end in Georgia have been discussed elsewhere. *See* note 129 *supra* and accompanying text.

with to the juvenile court.[155] Under the new formulation this transfer would be mandatory upon the superior court since the main supporting pillar of the *Jackson v. Balkcom* decision—the age of accountability—would have been removed.[156]

With respect to the remaining cases of children between the ages of fifteen and seventeen, the juvenile court would have original jurisdiction. The juvenile court would be the sole functionary to decide in which court action should be commenced against the child. If a child under seventeen were brought before another court for any reason, that court would be required to transfer the child to the juvenile court, even if it meant only that the juvenile court would transfer the child back to the court in which the proceeding originated.

Realistically, there are cases in which the offender should be transferred to superior court to be tried as an adult. Identifying these cases is an enormous, very critical task, for it is true, as the draftsmen of the Uniform Juvenile Court Act suggest, that "whether or not to transfer is one of the most important decisions the juvenile court makes . . . ."[157] It is important that the juvenile court and not some other court be the body to make the waiver decision. In this respect Georgia is not alone in re-examining the efficacy of concurrent jurisdiction between juvenile and criminal courts. A critic of the proposed Pennsylvania Juvenile Court Act (which, like Georgia, follows the basic outline of the Uniform Juvenile Court Act) also takes to task the criminal court jurisdiction allowed by the proposed act: "to allow an adult criminal court to determine in the manner specified . . . which persons should be granted the juvenile court privileges is violative of these [*Kent v. United States*[158]] due process requirements."[159] At least under the proposed jurisdictional formulation suggested for Georgia, the juvenile court would not be in the position of abnegating its waiver decisionmaking responsibility by engaging in a backdoor waiver process for children between the ages of thirteen and fifteen, as is the case now. Under the proposed jurisdictional structure, each child as to whom waiver is a

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[155]GA. CODE ANN. § 24A-901 (1971).

[156]The presence of a statute establishing an age of criminal responsibility and the apparent conflict between that statute and the statute setting a juvenile court jurisdictional age limit seems to be the only rational basis for the *Jackson* decision. *See* notes 71-116 *supra* and accompanying text for an analysis and evaluation of the *Jackson* decision.

[157]UNIFORM JUVENILE COURT ACT § 34, Comment.

[158]383 U.S. 541 (1966).

[159]Note, *Proposed Pennsylvania Juvenile Act*, 75 DICK. L. REV. 235, 240 (1971).

possibility would receive a waiver hearing on that question. At least he would receive his day in court on the issue of waiver, as contemplated by the *Kent* decision. All other children as to whom waiver would not be a possibility — those under the age of fifteen — in any event would be treated in the juvenile court.

As previously pointed out,[160] the committee notes following the provision setting the age of criminal responsibility[161] adopt in spirit the above proposal. While intended to explain the effect of the new age of accountability, the notes are an effective argument against the necessity of having an age of accountability at all. The effect of the present section is to create a conclusive presumption of incapacity to commit *crime* on the part of a child under the age of thirteen. He may nevertheless be subject to the jurisdiction of the juvenile court since the committee notes adopt the distinction that a delinquent act based on conduct described as a crime by local, state, or federal law,[162] is not a *crime*; hence incapacity to commit a *crime* is not a relevant consideration in the juvenile court.[163]

Georgia thus uses the age of criminal responsibility as a dividing line between exclusive juvenile court jurisdiction (below thirteen) and the area of concurrent jurisdiction shared with the superior court (thirteen to seventeen). The age of accountability is an inappropriate dividing line, however, because it is essentially a tool of the criminal law, a product of an era when there were no special courts to deal with children. Enactment of the juvenile court laws, with their special age jurisdiction provisions, marked the conceptual demise of the age of accountability as a useful tool. In a delinquency proceeding, it is simply no longer relevant.[164]

The Model Penal Code provision mentioned above offers a more acceptable solution. It abandons the concept of age of accountability in favor of establishing a general jurisdictional age limit (eighteen) and an

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[160]*See* note 52 *supra*.

[161]GA. CODE ANN. § 26-701 (1971).

[162]*See id.* § 24A-401(e)(1) (1971).

[163]*Id.* § 26-701, Comment (1971). Again, however, one should be aware of the California case of *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970), in which the California Supreme Court held that evidence should have been submitted to prove that a 12-year-old girl appreciated the wrongfulness of her act before she could be adjudicated a ward of the state (14 is California's age of presumptive incapacity).

[164]*See* MODEL PENAL CODE § 4.10, Comments (Tent. Draft No. 7, 1957). *See generally* People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

intermediate age level (sixteen), below which the juvenile court has exclusive, original jurisdiction that is not waivable and above which (sixteen to eighteen) it has original jurisdiction that may be waived in certain cases on decision of the juvenile court.[165] In those jurisdictions in which the juvenile jurisdictional provisions operate as intended, the same result is in effect achieved.[166] Since the courts of Georgia,[167] Idaho,[168] and Nebraska,[169] however, have not been as vigilant as others in preserving intact the original, exclusive jurisdiction of the juvenile court, perhaps the legislatures of those states will consider adopting the Model Penal Code provisions and freeing the juvenile jurisdictional provisions to function as intended.

One consideration remains to be discussed. For purposes of juvenile court jurisdiction, should the child's age be determined as of the time the offense was committed or as of the time the proceeding is instituted? Suppose a child commits an offense while he is within the range of juvenile age jurisdiction, but action is not brought against him until after he is beyond the jurisdictional age limit. What should be done with him? The draftsmen of the Model Penal Code suggest that the age at the time of commission of the offense is most relevant because of the child's diminished capacity at that time to commit the wrong. Why, they ask, should the mere passage of time operate to deny the juvenile court jurisdiction over the case?[170]

Most jurisdictions ostensibly take the approach suggested by the Model Penal Code.[171] Others, however, seem to favor determination of jurisdiction according to the age of the person at the time proceedings

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[165]MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962).

[166]*See* cases cited note 26 *supra*. The decisions in the following cases are especially well reasoned: People *ex rel.* Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967); State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957); Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

[167]Jackson v. Balkcom, 210 Ga. 412, 80 S.E.2d 319 (1954).

[168]State v. Lindsey, 78 Idaho 241, 300 P.2d 491 (1956).

[169]Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958); State v. McCoy, 145 Neb. 750, 18 N.W.2d 101 (1945).

[170]MODEL PENAL CODE § 4.10, Comment (Tent. Draft No. 7, 1957).

[171]*E.g.*, CAL. WELF. & INST'NS CODE § 604(a) (West 1972); FLA. STAT. ANN. § 39.02(3) (1961); HAWAII REV. STAT. § 571-12 (1968), § 571-11(1) (Supp. 1971); IND. ANN. STAT. § 9-3213 (1956); LA. REV. STAT. ANN. §§ 13:1570(B), 13:1571 (1968); MD. ANN. CODE art. 26, § 70-2(e)(1) (Supp. 1971); MASS. GEN. LAWS ANN. ch. 119, § 72A (1965); MINN. STAT. ANN. § 260.115 (1971); MO. ANN. STAT. § 211.061(2) (1962); MONT. REV. CODES ANN. §§ 10-603(b), -610 (Supp. 1971); NEB. REV. STAT. § 43-211 (1968); NEB. REV. STAT. § 62.050 (1971); N.H. REV. STAT. ANN. § 169:2(III) (Supp. 1971); N.J. STAT. ANN. § 2A:4-20 (1952); N.M. STAT. ANN. § 13-8-28 (1968); N.Y. FAMILY CT. ACT § 714(a) (McKinney 1963); OKLA. STAT. ANN. tit. 10, § 1112 (a) (Supp.

are commenced.[172] In still other instances, the intent is not clear.[173] The draftsmen of the Model Penal Code suggest that when the statutes are silent the courts tend to favor determination of age jurisdiction as of the time of the proceeding.[174]

The difficulty with the solution proposed by the draftsmen is that, while commission of the act may have been reflective of the child's capacity at that time, reality suggests that he may no longer be amenable to the rehabilitative treatment afforded by the juvenile process because of his present age. The decision has correctional implications. Not only may this child not be responsive to treatment, but he may pose a problem to effective treatment of other, younger children.[175] On the other hand, it may seem unfair to make such a decision without consideration of factors other than age. For that reason, the best approach would authorize the juvenile court to assume original jurisdiction over all youths between the maximum age limit and twenty-one years of age (or the age of majority), in cases where the offense occurred during the period when the youth was within the jurisdictional age range. The juvenile court probably would waive jurisdiction over most of these

1972); PA. STAT. ANN. tit. 11, § 256 (1965); R.I. GEN. LAWS ANN. § 14-1-28 (1970); UTAH CODE ANN. § 55-10-79 (Supp. 1971; VT. STAT. ANN. tit. 33, § 635(a) (Supp. 1972); VA. CODE ANN. § 16.1-175 (1960); W. VA. CODE ANN. § 49-5-3 (1966); WYO. STAT. ANN. § 14-115.4(b) (Supp. 1971).

[172]These statutes generally require transfer of a child to the juvenile court if it appears to the transferring court that he is a child or is at that time below the jurisdictional age of the juvenile court. *E.G.*, ALA. CODE tit. 13, § 363 (1959); CONN. GEN. STAT. ANN. § 17-65 (1960); GA. CODE ANN. § 24A-901 (1971); IOWA CODE ANN. § 232.64 (1969); N.D. CENT. CODE § 27-20-09 (Supp. 1971); OHIO REV. CODE ANN. § 2151.25 (Page Supp. 1971); ORE. REV. STAT. § 419.478 (1971); S.C. CODE ANN. § 15-1188 (1962); TENN. CODE ANN. § 37-209 (Supp. 1971); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 12 (1971).

[173]*E.g.*, MICH. STAT. ANN. § 28.886 (Supp. 1972) provides that if during pendency of a criminal proceeding in another court, the court learns that the defendant is under 17 years of age, the case must be transferred to the juvenile court. This would suggest that jurisdiction is determined as of the time of the hearing. However, the Code elsewhere provides for transfer if it appears to such court that the person was under 17 years of age at the time the act was committed. *Id.* § 27.3178 (598.3) (1962).

[174]MODEL PENAL CODE § 4.10, Comment (Tent. Draft No. 7, 1957). The draftsmen show the following as favoring this interpretation: Davis v. State, 259 Ala. 212, 66 So.2d 714 (1953); Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931); People v. Ross, 235 Mich. 433, 209 N.W. 663 (1926); Farr v. State, 199 Miss. 637, 24 So.2d 186 (1946); State v. Adams, 316 Mo. 157, 289 S.W. 948 (1926); Ex parte Albiniano, 62 R.I. 429, 6 A.2d 554 (1939); Smith v. State, 99 Tex. Crim. 432, 269 S.W. 793 (1925); State v. Melvin, 144 Wash. 687, 258 P. 859 (1927).

They list the following as *contra* the interpretation: United States v. Fotto, 103 F. Supp. 430 (S.D.N.Y. 1952); White v. Commonwealth, 242 Ky. 736, 47 S.W.2d 548 (1932); State v. Cable, 181 N.C. 554, 107 S.E. 132 (1921); Sams v. State, 133 Tenn. 188, 180 S.W. 173 (1915).

[175]Paulsen, *supra* note 11, at 58-59.

cases and transfer them to criminal court, but an examination of considerations in addition to age may in some cases indicate that a youth would be responsive to treatment as a juvenile. Of course, if such person is beyond the age of majority at the time he appears before the criminal court, such court has proper jurisdiction.[176]

CONCLUSION

Legislatures, and to some extent the courts, have paid homage to the rehabilitative ends of the juvenile court but at the same time have sought, either by statutory design[177] or court decision,[178] to compromise and make exceptions to the jurisdiction of the juvenile court.[179] These attempts represent a paternalistic, solicitous attitude toward the function of the juvenile court and a mistrust of its basically ameliorative aims. This attitude indicates a substantial skepticism of the role of the juvenile court as a law enforcement agency; certainly its capacity to deal with more serious offenders is often doubted. A prevalent attitude conceives the juvenile court as a social agency whose function is to adjust minor difficulties between the child and the law. This view of the role of the juvenile court would inevitably conflict with the apparent need of the community to express disapproval of antisocial conduct through the medium of the criminal sanction.[180]

The attitude characterized above represents an essentially emotional reaction, which is heavily influenced by the two factors of age and seriousness of the offense. The older the offender or the more serious the offense (or some combination of the two), the stronger will be the emotional response of the community. The response of the community may be particularly intense in reaction to an individual case and may even find public expression in the form of legislative action or court decision. In Georgia, for example, public response clearly prompted the 1953 amendment to the Act of 1951 eliminating exclusiveness of juvenile court jurisdiction[181] and may have influenced the decision in *Jackson v. Balkcom*.[182]

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[176]*See, e.g.*, State v. Dehler, 257 Minn. 549, 555, 102 N.W.2d 696, 702 (1960); State *ex rel.* Pett v. Jackson, 252 Minn. 418, 422, 90 N.W.2d 219, 222 (1958); State *ex rel.* Knutson v. Jackson, 249 Minn. 246, 253, 82 N.W.2d 234, 239 (1957).

[177]*See* notes 11-15 *supra* and accompanying text.

[178]*See, e.g.*, Jackson v. Balkcom, 210 Ga. 412, 80 S.E.2d 319 (1954); State v. Lindsey, 78 Idaho 241, 300 P.2d 491 (1956); State v. McCoy, 145 Neb. 750, 18 N.W.2d 101 (1945).

[179]Such attempts have been criticized by those close to the juvenile court movement. *See, e.g.*, S. RUBIN, CRIME AND JUVENILE DELINQUENCY 50-51 (2d ed. 1961).

[180]*See* note 11 *supra*.

[181]No. 555, § 3, [1953] Ga. Laws Nov.-Dec. Sess. 87.

[182]The *Jackson* case certainly bore all of the traits of a controversial case that could be expected

President legislative policy, however, reflects a preference that the jurisdiction of the juvenile court should be exclusive as well as original.[183] The question remains whether the court decisions are still an impediment to exclusive jurisdiction under the new juvenile court codes or whether current philosophy dictates a different result today. The argument has been advanced here that available information suggests that the cases ought to be decided differently today.

First of all, most jurisdictions have classified what otherwise would be a crime as a delinquent act.[184] A delinquent child is not a criminal nor is his act under these circumstances regarded as a criminal act.[185] Juvenile court jurisdictional provisions have not only changed the definitional nature of a child's conduct; they have served as well to change the conceptual nature of the proceeding. A delinquency proceeding is not a criminal case.[186] Since the constitutional grants of jurisdiction to other courts refer to jurisdiction over "criminal cases,"[187] it is difficult to imagine how a court could conceive that the juvenile court jurisdic-

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to arouse a strong visceral reaction from the community. Although the defendant was under 16 years of age at the time, the offense he had committed was rape, an especially emotion-generating offense in the South, where, at least until Furman v. Georgia, 92 S. Ct. 2726 (1972), it was still punishable by death. *See, e.g.*, GA. CODE ANN. § 26-2001 (1971). Moreover, the time was 1953 and the seriousness of the matter was compounded by the fact that the defendant was black and the victim was white. The jury expressed its repugnance by sentencing the youth to death by electrocution. This was a tragic case by any measure, for it was precisely to avoid this sort of result that juvenile court laws were enacted. *See* discussion in State v. Monahan, 15 N.J. 34, 36-37, 104 A.2d 21, 22 (1954).

The significance of the *Jackson* case to juvenile jurisdiction is that it sanctioned concurrent jurisdiction with the superior court over offenses punishable by death or life imprisonment. Since that time, cases involving less emotion and less community reaction have been tried by the superior court. *See, e.g.*, Jones v. State, 119 Ga. App. 105, 166 S.E.2d 617 (1969) (defendant, 16 years of age, was convicted of burglary and larceny for breaking and entering and stealing beer, candy, cigarettes, and a small amount of cash). While the emotionalism is gone, the rule of law remains.

[183]For expression of legislative policy in the three states whose courts have rejected the concept of exclusive jurisdiction in the juvenile court, *see* GA. CODE ANN. § 24A-301 (1971); IDAHO CODE § 16-1803 (Supp. 1971); NEB. REV. STAT. §§ 43-202, -211 (1968).

[184]*See* statutes cited note 8 *supra*. In particular, since Georgia and Nebraska are two of the states whose courts have declared that the jurisdiction of the juvenile court is not exclusive, *see* GA. CODE ANN. § 24A-401(e)(1) (1971); NEB. REV. STAT. § 43-201(4) (1968).

[185]The civil nature of a juvenile proceeding is almost universally recognized. *See* statutes cited note 32 *supra*.

[186]*See* People *ex rel.* Rodello v. District Court, 164 Colo. 530, 535, 436 P.2d 672, 675 (1968); People *ex rel.* Terrell v. District Court, 164 Colo. 437, 444-45, 435 P.2d 763, 766 (1967); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 683-85, 130 S.E.2d 192, 198-99 (1963); MINN. STAT. ANN. § 260.215(1) (1971).

[187]*See, e.g.*, GA. CONST. art. VI, § IV, ¶ 1; IDAHO CONST. art. 5, § 20.

tional provisions are in conflict with the criminal court's jurisdiction to try criminal cases.[188]

Secondly, the concept of age of criminal responsibility is an anachronism and has no modern relevance in light of juvenile court laws. It should be abandoned in favor of establishing an intermediate age level below which the juvenile court would have exclusive, original, and non-waivable jurisdiction and above which the juvenile court would have exclusive, original jurisdiction that in certain cases could be waived.[189]

In any event, the important consideration is that if a child is to be tried in a criminal court, a statutory scheme ought to be devised whereby the allocation of jurisdiction is more certain and does not depend upon subjective factors.[190] The presumption ought to be that the child is entitled to be treated as a juvenile unless some reason exists to suggest otherwise. The larger question is concerned with *who* should make the decision regarding how the child is to be handled. It is no doubt true, as the Court of Appeals for the District of Columbia Circuit stated in *Black v. United States*,[191] that "[t]reatment as a juvenile is not a statutory bounty which can be withdrawn lightly."[192] Indeed, the thrust of this article is that it should not be "withdrawn" at all, but only waived upon the decision of the juvenile court.

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[188]For decisions holding that there is no conflict of jurisdiction *see* note 26 *supra*.

[189]*See, e.g.*, MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962).

[190]Consideration of subjective factors, *e.g.*, prior record, age, seriousness of offense, etc., is appropriate at the waiver hearing in juvenile court, but it is not appropriate at the beginning stages of a case when neither court has assumed jurisdiction. The superior court may be too inclined, because of community pressure, to take the more infamous cases.

[191]355 F.2d 104 (D.C. Cir. 1965).

[192]*Id.* at 105.