

Washington University Law Review

Volume 1970 | Issue 2

January 1970

The Criminal Responsibility of the Juvenile Murderer

Martin A. Frey

Texas Tech University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Criminal Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Martin A. Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U. L. Q. 113 (1970).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol1970/iss2/1

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1970

Spring, 1970

Number 2

THE CRIMINAL RESPONSIBILITY OF THE
JUVENILE MURDERER

MARTIN A. FREY*

Criminal intent is necessary to hold a person amenable to the criminal law for murder. At common law a child under seven was conclusively presumed to be incapable of entertaining such an intent and no evidence could be received to show capacity in fact. A child between seven and fourteen was presumed to be incapable of entertaining a criminal intent but the presumption was rebuttable by a showing to the criminal court jury that the child was of sufficient intelligence to distinguish between right and wrong and did understand the nature and illegality of his act. This presumption was extremely strong at the age of seven and diminished gradually until it disappeared entirely at the age of fourteen. A child over fourteen was in substantially the same position with regard to criminal responsibility as an adult. He was presumed to be capable of criminal intention and therefore responsible, unless he could show that he was not of sufficient capacity.¹

Juvenile courts, special courts having jurisdiction over juvenile

* Associate professor, Texas Tech University School of Law. The author acknowledges the research assistance of Scott Bush and William G. Shaw, senior law students at Texas Tech University School of Law.

1. W. CLARK & W. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* § 6.12 (6th ed. 1958); J. MILLER, *HANDBOOK OF CRIMINAL LAW* § 34 (1934); R. PERKINS, *CRIMINAL LAW* 837-40 (2d ed. 1969); Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937). For a discussion of the common law and the criminal responsibility of mental infants, see Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426 (1939); Note, *Problem of Age and Jurisdiction in Juvenile Court*, 19 VAND. L. REV. 833, 848-49 (1966).

offenders, were created which professed as their objective an intense desire to consider the child's welfare and provide for his redemption rather than punishment for his misconduct.² Behind this apparent unity of purpose, contrary positions exist. The juvenile court jurisdiction may or may not affect incapacity. If it does, the effect is to change the common law age for complete incapacity and those ages between which there is a rebuttable presumption of incapacity. If juvenile court jurisdiction does not affect incapacity, then it may only postpone criminal prosecution and punishment until the offender passes beyond the juvenile court's jurisdiction.³

I. ALLOCATION OF JURISDICTION OVER THE JUVENILE MURDERER

When a juvenile commits an act which would constitute murder under state law if committed by an adult, the allocation of jurisdiction between juvenile and criminal courts follows one of three basic patterns. (1) The criminal court has exclusive jurisdiction and the juvenile court has no jurisdiction. (2) The juvenile and criminal courts have concurrent jurisdiction up to a given age after which the criminal court has exclusive jurisdiction. (3) The juvenile court has exclusive jurisdiction up to a given age after which the criminal court has exclusive jurisdiction. This last category further divides into those states which permit the juvenile court to waive jurisdiction for juveniles over a given age and those which permit no waiver.

A. *Exclusive Criminal Court Jurisdiction*

Seven state legislatures, having established the policy that the juvenile murderer is to receive none of the benefits of juvenile court, have excluded the juvenile murderer from juvenile court jurisdiction.⁴

2. *E.g.*, CAL. WELF. & INST'NS CODE § 502 (Deering 1966); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 1 (1964); W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 6.13 (6th ed. 1958). *See generally* Westbrook; *Mens Rea in the Juvenile Court*, 5 J. FAMILY L. 121 (1965).

3. In *State v. Monahan*, 15 N.J. 34, 104 A.2d 21 (1954) compare the opinions of Justices Jacobs and Oliphant.

4. DEL. CODE ANN. tit. 10, §§ 957, 1159 (1953) (capital offenses); FLA. STAT. ANN. § 39.02(6)(c) (Supp. 1969) (offenses punishable by death after grand jury indictment returned); IND. ANN. STAT. § 9-3203 (1956), § 9-3204(1) (Supp. 1969) (crimes punishable by death or life imprisonment); MD. ANN. CODE art. 26, §§ 52(c), (e) 78(b) (1966) (crimes punishable by death or life imprisonment), *construed in* *Prevatte v. Director Patuxent Institution*, 5 Md. App. 406, 409, 248 A.2d 170, 173-4 (1968) and *Briscoe v. Warden, Md. Penitentiary*, 3 Md. App. 182, 183, 238 A.2d 204, 205 (1968); PA. STAT. tit. 11, § 256 (1965) (murder) underlying *In re Gaskins*,

This leaves the criminal court with exclusive jurisdiction. However, this exclusive jurisdiction may be restricted by the infancy presumptions. The failure of the codes in these states to make mention of any age under which there is complete incapacity or any age under which there is a rebuttable presumption of incapacity may be interpreted as a recognition of the common law presumptions. Therefore a child under seven, conclusively presumed to be unable to have formed the criminal intent necessary for murder, is excluded from criminal court jurisdiction. The child between seven and fourteen is within the criminal court's jurisdiction if the prosecution can rebut the presumption of incapacity.

B. Concurrent Jurisdiction

Eight states permit the prosecutor to determine whether the juvenile murderer under a given age should receive the benefits of the juvenile court or whether he should be prosecuted in criminal court. Above the age when the juvenile and criminal courts have concurrent jurisdiction, the criminal court has exclusive jurisdiction.⁵ While the prosecutor may decide to bring a child of any age to juvenile court, he is restricted in his decision to bring him to criminal court by the age for complete incapacity. In four states this age is seven, the same as at common law.⁶ In the other four, the age has been raised to eight,⁷ ten,⁸ twelve⁹

430 Pa. 298, 244 A.2d 662 *cert. denied*, 393 U.S. 989 (1968) (14 year old); S.C. CODE ANN. § 15-1103(9)(a) (1962) (crimes punishable by death or life imprisonment). *Cf.* State v. Gorey, 235 S.C. 301, 111 S.E.2d 560 (1959) (where 13 year old was prosecuted for murder); W. VA. CODE ANN. §§ 49-1-4(2), -5-3 (1966) (offenses punishable by death or life imprisonment), *construed in* Smith v. Winters, 124 S.E.2d 240 (W. Va. 1962). In Delaware and West Virginia, the abolition of the death penalty has had no effect on this allocation of jurisdiction. Brooks v. Taylor, 52 Del. 138, 154 A.2d 386 (1959); State *ex rel.* Campbell v. Wood, 155 S.E.2d 893 (W. Va. 1967). *See generally* Foxworth v. Wainwright, 167 So. 2d 868 (Fla. 1964) (14 at trial).

5 ALASKA STAT. § 47.10.010(a) (1962) (18 and over); ARK. STAT. ANN. §§ 45-206, -224, -241, -242 (1964), § 45-204 (Supp. 1969) (18 and over); GA. CONST. § 2-3901 (1945); GA. CODE ANN. §§ 24-2408(1), -2409 (Supp. 1969) (17 and over); IOWA CODE ANN. § 232.62 (1969) (18 and over), *construed in* State v. Stueve, 260 Ia. 787, 150 N.W.2d 597 (1967); NEB. REV. STAT. §§ 43-201(4), -202, -204, -211 (1968) (18 and over), *construed in* Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958) [14 year old with conviction indicated in Fugate v. State, 169 Neb. 420, 99 N.W.2d 868 (1959), and Fugate v. State, 169 Neb. 434, 99 N.W.2d 874 (1959)]; NEV. REV. STAT. §§ 62.020(1)(b), .040(1)(a)(5), .050, .060(1) (1967) (18 and over); VA. CODE ANN. §§ 16.1-175, -176(a) (1960), 16.1-158(1)(i) (Supp. 1968) (18 and over); WYO. STAT. ANN. §§ 14-98(b), -100(a)(4), -101 (1965) (18 and over).

6. The codes of Alaska, Nebraska, Virginia and Wyoming do not refer to criminal incapacity for infancy and therefore can be interpreted as recognizing the common law presumptions. *Cf.* R. PERKINS, CRIMINAL LAW 841 (2d ed. 1969).

7. NEV. REV. STAT. § 194.010 (1967).

8. GA. CODE ANN. § 26-302 (1953).

9. ARK. STAT. ANN. § 41-112 (1964).

and fourteen.¹⁰ In one state where the age for complete incapacity ends at seven, the prosecutor is further restricted in that the child must be fourteen at the time of criminal prosecution.¹¹

While concurrent jurisdiction permits the prosecutor to bring the juvenile before either court, when the prosecutor chooses juvenile court a question arises whether the juvenile court can relieve itself of jurisdiction of whether jurisdiction is fixed by the prosecutor's choice. Two states purport to permit the juvenile court to waive the case to criminal court during the entire period of jurisdiction, although this power is limited in fact by the complete incapacity of children under a given age.¹² Two expressly permit waiver during the entire period of concurrent jurisdiction.¹³ Two permit the juvenile court to waive the case to criminal court during the latter period of concurrent jurisdiction.¹⁴ The others do not permit the juvenile court to waive.¹⁵ Therefore, under the third situation for the early period of jurisdiction and under the fourth situation for all cases, the criminal court will acquire jurisdiction only if the case was brought to that court in the first instance.

C. *Exclusive Juvenile Court Jurisdiction*

Thirty-five states and the District of Columbia give the juvenile court exclusive jurisdiction up to a given age and the criminal court exclusive jurisdiction beyond this age.¹⁶ At either end of the juvenile court's

10. When IOWA CODE ANN. § 232.73 (1969) is read in conjunction with § 232.72, the age of 14 limits criminal prosecution.

11. VA. CODE ANN. § 16.1-176(a) (1960).

12. ALASKA STAT. § 47.10.060 (Supp. 1969) (limited to children 7 and over by the common law); ARK. STAT. ANN. § 45-224 (1964) [limited to children 12 and over by ARK. STAT. ANN. § 41-112 (1964)].

13. IOWA CODE ANN. §§ 232.17, .72 (1969); VA. CODE ANN. § 16.1-176(a) (1960).

14. GA. CODE ANN. § 24-2410 (1959) (15 to 17), *construed in* Holmes v. State, 224 Ga. 553, 557, 163 S.E.2d 803, 807 (1968); NEV. REV. STAT. § 62.080 (1967) (16 to 18).

15. See NEB. REV. STAT. §§ 43-201 to -239 (1968); WYO. STAT. ANN. §§ 14-97 to -115 (1965).

16. ALA. CODE tit. 13, §§ 350(3), 351 (1959) (under 16); ARIZ. CONST. art. 6, § 15 (1960) and ARIZ. REV. STAT. ANN. §§ 8-202A, -223 (1956) (under 18); COLO. REV. STAT. ANN. §§ 22-1-3(4), -3(17)(a), -3(17)(b), -4(1)(a), -4(1)(b) (Supp. 1967) (10 to 16); CONN. GEN. STAT. ANN. § 17-59 (1958), § 17-53 (Supp. 1969) (under 16); D.C. CODE ANN. § 11-1551(a)(1)(A) (1967) (under 18); HAWAII REV. LAWS § 333-8(a) (Supp. 1965) (under 18); IDAHO CODE ANN. § 16-1803(1)(b) (Supp. 1967) (under 18); ILL. ANN. STAT. ch. 37, §§ 702-1, -2, -7(1), -7(2) (Smith-Hurd Supp. 1970) (females under 18; males under 17); KAN. STAT. ANN. §§ 38-802(b)(1), (c)(1), (e), -806(a)(1) (Supp. 1968) (under 18); KY. REV. STAT. ANN. § 208.020(1)(a) (1963) (under 18); LA. REV. STAT. ANN. §§ 13:1569(9), :1570A(5), :1571 (1950) (under 15); ME. REV. STAT. ANN. tit. 15, §§ 2502(4), 2551-52 (1964) (under 17); MASS. ANN. LAWS ch. 119, §§ 52, 72 (Supp. 1969) (7 to 17); MICH. STAT. ANN. § 27.3178 (598.2 Sec. 2(a)(1)) (Supp. 1969) (under 17); MINN. STAT.

range, special jurisdictional allocations occur. At the lower end of the age scale, six states provide a minimum age for delinquency below which the juvenile court has no jurisdiction.¹⁷ At the upper end of the question of waiver arises. Eight states do not permit the juvenile court to waive jurisdiction¹⁸ while the other twenty-seven states and the District of Columbia do permit waiver for older juveniles. In eighteen, the waiver age is specified within the waiver statute.¹⁹ In the remaining

ANN §§ 260.015(5)(a), .111(1) (Supp. 1969) (under 18); MISS. CODE ANN. § 7185-02(g), -03(1), -16 (Supp. 1966) (10 to 13), *construed in* Davis v. State, 204 So. 2d 270, 278 (1967); MO. REV. STAT. § 211.031(1)(d) (1959) (under 17); MONT. REV. CODES ANN. §§ 10-602(2)(b), -603(a) (1968) (under 16); N.H. REV. STAT. ANN. § 169:30(II) (1964), §§ 169:1, -2(II), (III) (Supp. 1969) (under 17); N.J. STAT. ANN. § 2A:4-20 (1952), § 2A:4-14 (Supp. 1968) (under 18); N.M. STAT. ANN. §§ 13-8-26A(1), -28 (1968) (under 18); N.Y. FAMILY CT. ACT §§ 712(a), 713, 715 (1963) (7 to 15), *construed in* People v. Stevenson, 23 App. Div. 472, 262 N.Y.S.2d 238 (1965); N.C. GEN. STAT. §§ 110-21, -23(a), (b) (1966) (under 16); OHIO REV. CODE ANN. §§ 2151.01(B)(1), (2), .02(A), .07, .023 (A)(1), .25 (Page 1968) (under 18), *construed in* State v. Carder, 9 Ohio St.2d 1, 222 N.E.2d 620, 627 (1966); OKLA. STAT. ANN. tit. 10, §§ 1101(a), 1101(b), 1112(a) (Supp. 1968) (females under 18; males under 16); ORE. REV. STAT. §§ 419.476(1)(a), .478 (1967) (under 18), *construed in* State v. Phillips, 422 P.2d 670 (Ore. 1967); R.I. GEN. LAWS ANN. §§ 14-1-3(C), -3(D), -3(F), -3(G)(6), -5(A), -28 (1956) (under 18); S.D. CODE §§ 43.0301, .0302 (1939) (under 18); TENN. CODE ANN. §§ 37-242(1), -242(2), -242(5)(a), -243(1), -250, -252, -264(1)(a), -265 (Supp. 1968) (under 14), *construed in* State *ex rel.* Donehue v. Russell, 221 Tenn. 609, 429 S.W.2d 818 (1967); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 3, 5(a), 6(b), 12 (Supp. 1968) (females 10 to 18; males 10 to 17); UTAH CODE ANN. §§ 55-10-64(3), -64(4), -77(1), -79, -86, -105 (Supp. 1967) (under 18); VT. STAT. ANN. tit. 33, §§ 632(a)(1), 632(a)(3), 633(a) (Supp. 1968) (10 to 16); WASH. REV. CODE ANN. §§ 13.04.010, .020 (1962) (under 18); WIS. STAT. ANN. §§ 48.02(3), .12(1) (1957), § 48.18(1) (Supp. 1969) (under 18). For a discussion of whether the Colorado juvenile court has exclusive or concurrent jurisdiction, see Comment, *Delinquency Jurisdiction in Colorado: Garcia and the Children's Code*, 40 U. COLO. L. REV. 80 (1967).

California and North Dakota differ from the other 33 states and the District of Columbia in that these two give the juvenile court exclusive jurisdiction up to 18 and the juvenile and criminal court concurrent jurisdiction from 18 to 21. CAL. WELF. & INST'NS CODE §§ 602-604 (Deering 1969); N.D. CENT. CODE §§ 27-16-08, -09 (1960).

17 COLO. REV. STAT. ANN. § 22-1-3(17)(a) (Supp. 1967) (under 10); MASS. ANN. LAWS ch. 119, § 52 (Supp. 1969) (under 7); MISS. CODE ANN. § 7185-17 (1953), § 7185-02(g) (Supp. 1967) (under 10); N.Y. FAMILY CT. ACT §§ 712(a), 713 (1963) (under 7); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3, 5 (1964) (under 10); VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1968) (under 10).

18. See COLO. REV. STAT. ANN. §§ 22-1-1 to -16 (Supp. 1967); CONN. GEN. STAT. ANN. §§ 17-53 to -74 (1968), §§ 17-53 to -74 (Supp. 1969); LA. REV. STAT. ANN. §§ 13:1561 to :1599 (1968); MISS. CODE ANN. §§ 7185-01 to -26 (Supp. 1969); MONT. REV. CODES ANN. §§ 10-601 to -633 (1968), *construed in* State *ex rel.* Dahl v. District Ct., 333 P.2d 495 (Mont. 1958); N.Y. FAMILY CT. ACT §§ 711-18 (1963), §§ 711-18 (Supp. 1968); N.C. GEN. STAT. ANN. §§ 110-21 to -44 (1966), §§ 110-21 to -30 (Supp. 1967) VT. STAT. ANN. tit. 33, §§ 631 to 666 (Supp. 1968).

19. ALA. CODE tit. 13, § 364 (1959) (14 to 16), *construed in* Duck v. State, 228 Ala. 138, 176 So. 2d 497 (1965); CAL. WELF. & INST'NS CODE § 707 (1969) (16 to 18); HAWAII REV. LAWS § 571-22 (a) (1968) (16 to 18); IDAHO CODE ANN. § 16-1806(1)(a) (Supp. 1969) (16 to 18); ILL. ANN. STAT. ch. 37, § 702-7(3), (4) (Smith-Hurd Supp. 1970) (females 13 to 18; males 13 to 17); KAN. STAT.

ten, the statutes purport to permit the juvenile court to waive jurisdiction to criminal court for all juveniles within its exclusive original jurisdiction²⁰ although this power is limited in fact by the irrebuttable presumption of incapacity for children under a given age.²¹

D. Jurisdictional Summary

The following chart (Table 1) depicts jurisdiction based on age for the offense of murder when the age at commission and the age at prosecution fall within the same segment of jurisdictional allocation.

ANN. § 38-808 (1964) (16 to 18); MASS. GEN. LAWS ANN. ch. 119, § 61 (Supp. 1969) (14 to 17), *construed in* Commonwealth v. Chase, 348 Mass. 100, 202 N.E.2d 300 (1964); MICH. STAT. ANN. § 27.3178 (598.4) (1962) (15 to 17), *construed in* People v. Hoerle, 3 Mich. App. 693, 143 N.W.2d 593 (1966); MINN. STAT. ANN. § 260.125(1) (Supp. 1970) (14 to 18); MO. REV. STAT. § 211.071 (1959) (14 to 17), *construed in* State v. Jalbo, 333 S.W.2d 279, 284 (Mo. 1960); N.J. STAT. ANN. § 2A:4-15 (1952) (16 to 18), *applied in* State v. Loray, 46 N.J. 179, 215 A.2d 539 (1965), *and* State v. Tuddles, 38 N.J. 565, 186 A.2d 284 (1962); N.M. STAT. ANN. § 13-8-27 (1968) (14 to 18); N.D. CENT. CODE § 27-20-34 (Supp. 1969) (16 to 18); ORE. REV. STAT. § 419.533 (1) (1967) (16 to 18); R.I. GEN. LAWS ANN. § 14-1-7 (1956) (16 to 18); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 5, 6 (1964) (females 15 to 18; males 15 to 17), *construed in* *In re* Buchanan, 433 S.W.2d 787 (Tex. Civ. App. 1968); UTAH CODE ANN. § 55-10-86 (Supp. 1967) (14 to 18); WIS. STAT. ANN. § 48.18(1) (Supp. 1968) (16 to 18). For a discussion of the Wisconsin waiver statute, see Comment, *Waiver of Jurisdiction in Wisconsin Juvenile Courts*, 1968 Wis. L. Rev. 551.

20. ARIZ. CONST. art. 6, § 15 (Supp. 1969) and ARIZ. REV. STAT. ANN. § 8-222A (1956), *construed in* Eymen v. Superior Ct., 9 Ariz. App. 6, 448 P.2d 878 (1968); D.C. CODE ANN. § 11-1553 (1967); KY. REV. STAT. ANN. § 208.070(1) (1962), *construed in* Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959); ME. REV. STAT. ANN. tit. 15, § 2611(3) (1969), *cf.* State v. Hathaway, 161 Me. 255, 211 A.2d 558 (1965), (where 12 year old was criminally tried for murder); N.H. REV. STAT. ANN. § 169:21-a (Supp. 1969); OHIO REV. CODE ANN. § 2151.26 (Page 1968); OKLA. STAT. ANN. tit. 10, § 1112(b) (Supp. 1969); S.D. CODE § 43.0310 (1939); WASH. REV. CODE ANN. § 13.04.120 (1962). For a discussion of waiver in Ohio, see Comment, *Waiver of Jurisdiction in Juvenile Courts*, 30 OHIO ST. L.J. 132 (1969). See generally, Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. Cal. L. Rev. 158 (1967).

In Tennessee if the child is under 14 and the juvenile court judge has probable cause that he is guilty of murder, the judge may remand him to criminal court. If the child is over 14, the judge must remand him to criminal court. TENN. CODE ANN. § 37-265 (Supp. 1969). *Accord*, State *ex rel.* Donehue v. Russell, 221 Tenn. 609, 429 S.W.2d 818 (Tenn. 1967). In either case, the criminal court cannot prosecute without receiving authorization from the juvenile court. In the latter, this is true even though the criminal court is ultimately the only court that could proceed against the offender. For a discussion of waiver in Tennessee, see Note, *Problem of Age and Jurisdiction in Juvenile Court*, 19 VAND. L. REV. 832, 842, 850-62 (1966).

21. The District of Columbia, Kentucky, Maine, New Hampshire, Ohio, South Dakota and Tennessee make no statutory reference to complete criminal incapacity based on infancy and therefore the common law age of 7 appears to apply. Oklahoma codifies the common law age of 7. OKLA. STAT. ANN. tit. 21, § 151(1) (1958). Arizona codifies the rebuttable presumption of criminal incapacity under 14 which implies recognition of the common law age of 7 for complete criminal incapacity. ARIZ. REV. STAT. ANN. § 13-135 (1956). Washington raises the age to 8. WASH. REV. CODE ANN. § 9.01.111 (1961).

TABLE I

		0	3	6	9	12	15	18	21
Alabama		✓	✓	✓	✓	✓	✓	✓	✓
Alaska		✓	✓	✓	✓	✓	✓	✓	✓
Arizona		✓	✓	✓	✓	✓	✓	✓	✓
Arkansas		✓	✓	✓	✓	✓	✓	✓	✓
California		✓	✓	✓	✓	✓	✓	✓	✓
Colorado		✓	✓	✓	✓	✓	✓	✓	✓
Connecticut		✓	✓	✓	✓	✓	✓	✓	✓
Delaware		✓	✓	✓	✓	✓	✓	✓	✓
District of Columbia		✓	✓	✓	✓	✓	✓	✓	✓
Florida		✓	✓	✓	✓	✓	✓	✓	✓
Georgia		✓	✓	✓	✓	✓	✓	✓	✓
Hawaii		✓	✓	✓	✓	✓	✓	✓	✓
Idaho		✓	✓	✓	✓	✓	✓	✓	✓
Illinois	male	✓	✓	✓	✓	✓	✓	✓	✓
	female	✓	✓	✓	✓	✓	✓	✓	✓
Indiana		✓	✓	✓	✓	✓	✓	✓	✓
Iowa		✓	✓	✓	✓	✓	✓	✓	✓
Kansas		✓	✓	✓	✓	✓	✓	✓	✓
Kentucky		✓	✓	✓	✓	✓	✓	✓	✓
Louisiana		✓	✓	✓	✓	✓	✓	✓	✓
Maine		✓	✓	✓	✓	✓	✓	✓	✓
Maryland		✓	✓	✓	✓	✓	✓	✓	✓
Massachusetts		✓	✓	✓	✓	✓	✓	✓	✓
Michigan		✓	✓	✓	✓	✓	✓	✓	✓
Minnesota		✓	✓	✓	✓	✓	✓	✓	✓
Mississippi		✓	✓	✓	✓	✓	✓	✓	✓
Missouri		✓	✓	✓	✓	✓	✓	✓	✓
Montana		✓	✓	✓	✓	✓	✓	✓	✓
Nebraska		✓	✓	✓	✓	✓	✓	✓	✓
Nevada		✓	✓	✓	✓	✓	✓	✓	✓
New Hampshire		✓	✓	✓	✓	✓	✓	✓	✓

		0	3	6	9	12	15	18	21
New Jersey		0	3	6	9	12	15	18	21
New Mexico		0	3	6	9	12	15	18	21
New York		0	3	6	9	12	15	18	21
North Carolina		0	3	6	9	12	15	18	21
North Dakota		0	3	6	9	12	15	18	21
Ohio		0	3	6	9	12	15	18	21
Oklahoma	male	0	3	6	9	12	15	18	21
	female	0	3	6	9	12	15	18	21
Oregon		0	3	6	9	12	15	18	21
Pennsylvania		0	3	6	9	12	15	18	21
Rhode Island		0	3	6	9	12	15	18	21
South Carolina		0	3	6	9	12	15	18	21
South Dakota		0	3	6	9	12	15	18	21
Tennessee		0	3	6	9	12	15	18	21
Texas	male	0	3	6	9	12	15	18	21
	female	0	3	6	9	12	15	18	21
Utah		0	3	6	9	12	15	18	21
Vermont		0	3	6	9	12	15	18	21
Virginia		0	3	6	9	12	15	18	21
Washington		0	3	6	9	12	15	18	21
West Virginia		0	3	6	9	12	15	18	21
Wisconsin		0	3	6	9	12	15	18	21
Wyoming		0	3	6	9	12	15	18	21

- Neither court has jurisdiction
- Juvenile court has jurisdiction
- Juvenile court has jurisdiction with waiver
- Criminal court has jurisdiction
- Juvenile and criminal court have jurisdiction
- Juvenile and criminal court have jurisdiction with juvenile court waiver

1. *Delinquency Jurisdiction*

Except for the seven states which exclude murder from juvenile court jurisdiction, the majority give the juvenile court jurisdiction at the earliest possible opportunity. Only six establish a minimum age for jurisdiction (See Table 2).

TABLE 2

Age	Number of Jurisdictions
0	38
7	2
10	4
No jurisdiction at any age	7

Minimum age at which juvenile court jurisdiction begins for murder

Except for the same seven states which exclude murder from juvenile court jurisdiction, the vast majority give the juvenile court jurisdiction until between sixteen and eighteen. The greatest concentration is at eighteen. Three states, Illinois, Oklahoma and Texas, provide a higher age for girls than for boys. This maximum age includes the age when the juvenile court's exclusive jurisdiction ends, the age when the juvenile court's jurisdiction ends even though it has been concurrent with criminal court jurisdiction, and the age when juvenile court jurisdiction ends although prior to that time it could have waived the case to criminal court (See Table 3).

TABLE 3

Age	Number of Jurisdictions
No jurisdiction at any age	7
13	1
14	1
15	2
16	7
17	8
18	26
21	2

Maximum age at which juvenile court jurisdiction ends for murder

2. *Criminal Jurisdiction*

The minimum age for criminal jurisdiction is the earliest age at which the criminal court could prosecute the offender for murder. It includes the age when the criminal court's exclusive jurisdiction begins, the age when the criminal court's jurisdiction begins even though concurrent with juvenile court jurisdiction, and the age when the juvenile court, although having exclusive jurisdiction, could waive to criminal court. Two distinct groups exist: those that permit criminal prosecution at age seven, the age under which there was an irrebuttable presumption of incapacity at common law, and those that permit criminal prosecution at a much older age (between fourteen and sixteen) (See Table 4).

TABLE 4

Age	Number of Jurisdictions
7	20
8	1
9	0
10	1
11	0
12	1
13	2
14	9
15	4
16	13
17	0
18	0

Minimum age at which criminal court jurisdiction could begin for murder

3. *The Relationship between Juvenile and Criminal Jurisdiction*

The possible existence of juvenile or criminal jurisdiction is not necessarily an "either-or" proposition. Both may exist for the same age offender due to concurrent jurisdiction between juvenile and criminal courts or to the allocation of waiver power to juvenile court. The co-existence of juvenile and criminal jurisdiction is a fact in thirty-six jurisdictions. In thirteen, dual jurisdiction may occur for children as young as seven, although in nineteen it begins between fourteen and sixteen (See Table 5).

TABLE 5

Age	Number of Jurisdictions
7	13
8	1
9	0
10	1
11	0
12	1
13	1
14	9
15	2
16	8

Minimum age at which juvenile and criminal court jurisdiction may co-exist

II ALLOCATION OF JURISDICTION OVER THE JUVENILE MURDERER WHEN THE AGE AT COMMISSION AND THE AGE AT PROSECUTION DO NOT COINCIDE

All jurisdictions have at least one age line which separates one type of jurisdictional allocation from another. A problem arises when the offense has been committed when the offender was below this age but prosecution did not begin until he was above the age.

A. *Exclusive Criminal Court Jurisdiction*

In the seven states that give the criminal court exclusive jurisdiction, the age line is the age below which there is an irrebuttable presumption of incapacity on the part of the child. These states appear to follow the common law age of seven.²² Insofar as the common law of capacity or incapacity is concerned, the age of the accused at the time of the alleged offense controls and not that at the time of the indictment of the trial.

B. *Concurrent Jurisdiction*

In the eight concurrent jurisdiction states, there are two and sometimes three age lines. The first is between exclusive juvenile court jurisdiction and concurrent jurisdiction.²³ In seven states the age is that

²² R. PERKINS, CRIMINAL LAW 840 (2d ed. 1969).

²³ Alaska (7); Arkansas (12); Georgia (10); Iowa (14); Nebraska (7); Nevada (8); Virginia (14); Wyoming (7). For Iowa see IOWA CODE ANN. §§ 232.72, .73 (1969).

below which there is an irrebuttable presumption of incapacity on the part of the child. Since this deals with incapacity at the time of the offense, the age at commission and not the age at prosecution should control. In the eighth, Virginia, the age line is seven years above the common law age for complete incapacity. Since this latter period does not deal with incapacity at the time of the offense, the age at prosecution and not the age at commission may control.²⁴

The second line exists in two states and is based on the age during concurrent jurisdiction when the juvenile court may waive jurisdiction to criminal court.²⁵ The question is whether the juvenile court may waive an offender who is now above the waiver age although the offense was committed below the waiver age. This is not a problem of giving the criminal court new jurisdiction since it already had existing concurrent jurisdiction. On this basis, jurisdiction based on the age at prosecution may be justified.

The third line is between concurrent jurisdiction and exclusive criminal court jurisdiction.²⁶ Does the juvenile court still have jurisdiction to prosecute, even though not exclusive, once the offender has passed what normally would have been the bounds of juvenile court jurisdiction? Five states extend the juvenile court's concurrent jurisdiction until the offender turns twenty or twenty-one²⁷ while the other three give no extension.²⁸ No state extends the juvenile court's jurisdiction beyond minority.

C. *Exclusive Juvenile Court Jurisdiction*

In the thirty-six exclusive juvenile court jurisdictions, there can be from one to three age lines. The analysis can be simplified by considering separately those states that do and those that do not provide waiver.

24. See VA. CODE ANN. § 16.1-176(a) (1960). Note that this provision refers to the present age of the offender and not his age at the time of commission of the offense.

25. Georgia (15); Nevada (16).

26. Alaska (18); Arkansas (18); Georgia (17); Iowa (18); Nebraska (18); Nevada (18); Virginia (18); Wyoming (18).

27. GA. CODE ANN. § 24-2409(1) (1959) (extended from 17 to 21); IOWA CODE ANN. §§ 232.63, .64 (1969) (extended from 18 to 21); NEV. REV. STAT. § 62.040(1)(b) (1967) (extended from 18 to 21); VA. CODE ANN. § 16.1-158(4) (1960) (extended from 18 to 21); WYO. STAT. ANN. § 14-100(b) (1965) (extended from 18 to 20).

28. ALASKA STAT. §§ 47.10.010, .290(6) (1962); ARK. STAT. ANN. § 45-204, -224 (Supp. 1967); NEB. REV. STAT. §§ 43-201(4), -202, -211 (1969).

1. *No waiver*

Of the eight states that do not permit the juvenile court to waive jurisdiction, the first line exists in four and is between no jurisdiction and exclusive juvenile court jurisdiction.²⁹ The remaining states place no minimum limit on juvenile court jurisdiction. Since incapacity is not involved because the problem is one of juvenile and not criminal court jurisdiction, the question of whether the juvenile court has jurisdiction once the child passes this age for prior acts must be answered on other grounds. The legislative purpose in establishing a minimum age for juvenile court jurisdiction would be of utmost significance.

The second line is between exclusive juvenile court and exclusive criminal court jurisdiction. This line exists in all eight states although the age at which the line is drawn differs.³⁰ When the offender's age at commission was within the exclusive jurisdiction of the juvenile court but his age at prosecution was such that had he now committed the offense he would be within the exclusive jurisdiction of the criminal court, the allocation of jurisdiction varies. (1) Five states do not extend the juvenile court's jurisdiction. Except for one,³¹ these states permit the criminal court to prosecute once the offender has passed the age separating juvenile from criminal court jurisdiction.³² (2) Two states extend juvenile court jurisdiction through minority. One permits the criminal court to prosecute once the offender has passed his minority³³

29. Colorado (10); Mississippi (10); New York (7); Vermont (10).

30. Colorado (16); Connecticut (16); Louisiana (15); Mississippi (13); Montana (16); New York (15); North Carolina (16); Vermont (16).

31. Mississippi does not extend the juvenile court's jurisdiction. MISS. CODE ANN. §§ 7185-02(g), -03(1), -15, -16 (Supp. 1968). However, MISS. CODE ANN. § 7185-17 (1952) does provide for complete criminal incapacity under 13, the age which coincides with the maximum age for juvenile court jurisdiction.

32. COLO. REV. STAT. ANN. §§ 22-1-3(4), -3(17)(a), (b), -4(1)(a), (b) (Supp. 1967); CONN. GEN. STAT. ANN. §§ 17-59, -65 (1958), § 17-53 (Supp. 1969); MONT. REV. CODES ANN. §§ 10-602(2)(b), -603(a), (b), -604, -610 (1968); N.C. GEN. STAT. § 110-21 (1966). The only limit on how far back the criminal court may go is the age of complete criminal incapacity. Except for Colorado which raised the age to 10 (COLO. REV. STAT. § 40-1-4 (1964)), the common law age of 7 would be applicable. Montana has codified the common law age for complete criminal incapacity. MONT. REV. CODES ANN. § 94-201(1) (1969).

33. The jurisdictional provision in Louisiana extends juvenile court jurisdiction to include the minor between 15 and 21 who has committed the offense prior to becoming 15. LA. REV. STAT. § 13:1570(B) (1950). This provision is accompanied by one which requires the criminal court to transfer these cases to juvenile court. LA. REV. STAT. ANN. § 13:1571 (1968). Since there is no required transfer when the person is 21 or over, it can be concluded that the criminal court may retain the case and proceed with prosecution. The only limit on the criminal court is the age below which there is complete criminal incapacity. This age is set in Louisiana at 10. LA. REV. STAT. § 14:13 (1951).

while the other does not.³⁴ (3) One state vests the juvenile court with exclusive jurisdiction regardless of the offender's present age³⁵ and prohibits the criminal court from prosecuting once the offender passes normal juvenile court jurisdiction age.³⁶

Comparing the age below which there is complete incapacity with the maximum age for exclusive juvenile court jurisdiction, only three states coincide (See Table 6).

TABLE 6

State	Complete Incapacity	Exclusive Juvenile Court Jurisdiction
Colorado	10	16
Connecticut	7	16
Louisiana	10	15
Mississippi	13	13
Montana	7	16
New York	15	15
North Carolina	7	16
Vermont	16	16

Comparison of the age of complete incapacity with that of exclusive juvenile court jurisdiction

Thus in five of the eight states, juvenile court jurisdiction merely postpones criminal prosecution until the offender passes beyond the juvenile court's authority.

2. Waiver

Of the twenty-eight jurisdictions that permit the juvenile court to waive jurisdiction, the first line exists in two and is between no jurisdiction and exclusive juvenile court jurisdiction.³⁷ Juvenile court

34. The jurisdictional provision in Vermont extends juvenile court jurisdiction to include the minor between 16 and 21 who has committed the offense prior to becoming 16. VT. STAT. ANN. tit. 13, §§ 633(a), 634 (Supp. 1968). This provision is accompanied by one which requires the criminal court to transfer all persons, regardless of whether they are presently below or above 21, to juvenile court if the offense was committed when the defendant was under the age in which the juvenile court had exclusive jurisdiction. VT. STAT. ANN. tit. 13, § 635(a) (Supp. 1968). Since the criminal court could not retain the case, it would have no jurisdiction to proceed. On the other hand, the juvenile court would also have no jurisdiction to proceed once the offender reached his majority. This result would be that neither could act.

35. N.Y. FAMILY CT. ACT §§ 713, 714(a), (b) (1963).

36. *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956) (14 at commission—23 at trial).

37. Massachusetts (7); Texas (10).

jurisdiction for prior acts could be justified since this does not involve a question of incapacity. The remaining twenty-six place no minimum limit on juvenile court jurisdiction.

The second line is within the exclusive juvenile court jurisdiction period and represents the earliest age at which the juvenile court may waive to criminal court. This line exists in all twenty-eight jurisdictions.³⁸ In fourteen where the minimum age for waiver coincides with the maximum common law or statutory age for complete incapacity, waiver may occur only when the offense was committed during the waiver age.³⁹ In the other fourteen jurisdictions, the majority base waiver on the age at prosecution and either expressly provide that the age at waiver is the controlling factor⁴⁰ or impliedly approve waiver because their waiver provisions do not provide otherwise.⁴¹ In those states which prohibit waiver, statutes specifically provide that the act must have been committed during the waiver age.⁴² The minimum age for waiver then establishes a new maximum age for complete incapacity.⁴³

38. Alabama (14); Arizona (7); California (16); District of Columbia (7); Hawaii (16); Idaho (16); Illinois (13); Kansas (16); Kentucky (7); Maine (7); Massachusetts (14); Michigan (15); Minnesota (14); Missouri (14); New Hampshire (7); New Jersey (16); New Mexico (14); North Dakota (14); Ohio (7); Oklahoma (7); Oregon (16); Rhode Island (16); South Dakota (7); Tennessee (7); Texas (15); Utah (14); Washington (8); Wisconsin (16).

39. Arizona, District of Columbia, Kentucky, Maine, New Hampshire, Ohio, South Dakota and Tennessee appear to rely on the common law age of 7. Oklahoma codifies the common law age of 7. OKLA. STAT. ANN. tit. 21, § 152(1) (1958). The other five states raised the age: Washington to 8 [WASH. REV. CODE ANN. § 9.01.111 (1962)]; Illinois to 13 [ILL. ANN. STAT. ch. 38, § 6-1 (Smith-Hurd 1964)]; Minnesota to 14 [MINN. STAT. ANN. § 609.055 (1964)]; Texas to 15 [TEX. PENAL CODE art. 30, § 1 (Supp. 1969)]; New Jersey to 16 [N.J. STAT. ANN. § 2A:85-4 (1953)]. In addition to the fact that the waiver age coincides with the maximum age for complete criminal incapacity, Illinois, Minnesota and Texas expressly provide in their waiver statute that the act must have been committed during the waiver age. ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1970); MINN. STAT. ANN. § 260.125(1) (Supp. 1970), *construed in* State v. Dehler, 102 N.W.2d 696, 701-02 (Minn. 1960); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 5(a), 6(b) (Supp. 1969).

40. IDAHO CODE ANN. § 16-1806(1)(a) (Supp. 1969); ORE. REV. STAT. § 419.533(1)(a) (1967), *construed in* State v. Little, 407 P.2d 627 (Ore. 1965) (15 at commission—16 at waiver).

41. ALA. CODE tit. 13, § 364 (1958); HAWAII REV. LAWS § 333-13(a)(1) (Supp. 1965); MICH. STAT. ANN. § 27.3178(598.4) (1962) *construed in* People v. Carlson, 360 Mich. 651, 104 N.W.2d 753 (1960) (age when child is accused in juvenile court is critical age); MO. REV. STAT. § 211.071 (1959); N.M. STAT. ANN. § 13-8-27 (1968); N.D. CENT. CODE § 27-16-13 (1960); R.I. GEN. LAWS ANN. § 14-1-7 (1956); UTAH CODE ANN. § 55-10-86 (Supp. 1967); WIS. STAT. ANN. § 48.18(1) (Supp. 1968).

42. CAL. WELF. & INST'NS CODE § 707 (Supp. 1968); KAN. STAT. § 38-808(b) (Supp. 1968); MASS. ANN. LAWS ch. 119, § 61 (Supp. 1969).

43. California (16); Kansas (16); Massachusetts (14). *But see* CAL. PEN. CODE § 26 (1955) (provides a rebuttable presumption of criminal incapacity under 14).

The third line is between exclusive juvenile court and exclusive criminal court jurisdiction. This line exists in all but two jurisdictions,⁴⁴ although the age at which the line is drawn differs.⁴⁵ When the offender's age at commission was within the exclusive jurisdiction of the juvenile court but his age at prosecution was such that had he now committed the offense he would be within the exclusive jurisdiction of the criminal court, the allocation of jurisdiction varies. (1) Eleven states do not extend the juvenile court's jurisdiction. These states permit the criminal court to prosecute once the offender has passed the age separating juvenile from criminal court jurisdiction.⁴⁶ The question then becomes how far back may the criminal court go. In eight of these states, the minimum waiver age corresponds to the common law or statutory age under which there is an irrebuttable presumption of incapacity.⁴⁷ This age then becomes the lowest age to which the criminal court may go back. In the other three the minimum waiver age does not correspond to the common law or statutory age under which there is an irrebuttable presumption of incapacity. These states permit the criminal court to go back to the maximum common law age for complete incapacity which is lower than the minimum waiver age.⁴⁸ The result is that offenders who could not have been brought to

44. In California and North Dakota, this line does not exist because the period of exclusive juvenile court jurisdiction (under 18) is followed by a period of concurrent jurisdiction (18 to 21) instead of exclusive criminal court jurisdiction. CAL. WELF. & INST'NS CODE §§ 602-604(a) (1966); N.D. CENT. CODE § 27-16-08(2) (1960).

45. Alabama (16); Arizona (18); District of Columbia (18); Hawaii (18); Idaho (18); Illinois (17 for boys and 18 for girls); Kansas (18); Kentucky (18); Maine (17); Massachusetts (17); Michigan (17); Minnesota (18); Missouri (17); New Hampshire (17); New Jersey (18); New Mexico (18); Ohio (18); Oklahoma (16 for boys and 18 for girls); Oregon (18); Rhode Island (18); South Dakota (18); Tennessee (14); Texas (17 for boys and 18 for girls); Utah (18); Washington (18); Wisconsin (18).

46. ALA. CODE tit. 13, §§ 350(3), 351, 363 (1959); ARIZ. CONST. art. 6, § 15 (1960) and ARIZ. REV. STAT. ANN. §§ 8-202A, -223 (1956); KY. REV. STAT. ANN. § 208.020(1)(a) (1962); ME. REV. STAT. ANN. tit. 15, §§ 2502(4), 2551 (1964), 2552 (Supp. 1970); OHIO REV. CODE ANN. §§ 2151.23(A)(1), .25 (Page 1968); ORE. REV. STAT. §§ 419.476(1)(a), .478 (1967); S.D. REV. CODE §§ 43.0302, .0318 (1939); TENN. CODE ANN. §§ 37-243(1), -252 (Supp. 1969); TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 5(a), 12 (Supp. 1969); WASH. REV. CODE ANN. § 13.04.010 (1962); WIS. STAT. ANN. § 48.12(1) (1957).

47. Arizona (7); Kentucky (7); Maine (7); Ohio (7); South Dakota (7); Tennessee (7); Texas (15); Washington (8). The Texas and Washington ages have been raised from the common law age of 7 by statute. TEX. PEN. CODE art. 30, §§ 1, 2 (Supp. 1968); WASH. REV. CODE ANN. § 9.01.111 (1961).

48. Although the waiver age in Alabama was 14 to 16 and the waiver age in Oregon and Wisconsin was 16 to 18, the criminal court may go back to age 7, the common law age for complete criminal incapacity. This result is due to the fact that these states base waiver on the age at prosecution and not on the age at commission. ORE. REV. STAT. § 419.533(1)(a) (1967) expressly provides that the age at waiver is the controlling factor. ALA. CODE tit. 13, § 364 (1958) and WIS. STAT. ANN. § 48.18(1) (Supp. 1969) impliedly approve waiver based on age at prosecution because their waiver provisions do not provide otherwise.

criminal court or be waived to criminal court at the time of the commission of the offense, could now be brought directly to criminal court for prosecution due to his change in age. (2) Thirteen extend juvenile court jurisdiction through minority. Seven permit the criminal court to prosecute once the offender has passed his minority⁴⁹ while the other six do not.⁵⁰ In the seven that permit criminal prosecution, the question then arises how far back may the criminal court go. In three where the minimum waiver age corresponds with the age below which there is an irrebuttable presumption of incapacity, the criminal court may go back to this age.⁵¹ Where the minimum waiver age does not correspond with the common law age, the remaining four states permit

49 The jurisdictional provision extends juvenile court jurisdiction to include the minor between 18 and 21 who has committed the offense prior to becoming 18. D.C. CODE ANN. § 11-1551(a)(2) (1967); HAWAII REV. LAWS § 333-8(a) (1968); IDAHO CODE ANN. § 16-1803(2) (Supp. 1969); MINN. STAT. ANN. §§ 260.015(2), .111(1) (Supp. 1970); N.H. REV. STAT. ANN. § 169:1 (Supp. 1970) (offense committed prior to becoming 17); N.M. STAT. ANN. § 13-8-26A(1) (1968), *construed in* Trujillo v. State, 79 N.M. 618, 447 P.2d 279 (1968) (17 at commission—24 at trial); UTAH CODE ANN. § 55-10-77(1) (Supp. 1969). This provision normally is accompanied by one which requires the criminal court to transfer these cases to juvenile court. D.C. CODE ANN. § 11-1552 (1967); HAWAII REV. LAWS § 333-9 (1968); IDAHO CODE ANN. § 16-1804 (Supp. 1969); MINN. STAT. ANN. § 260.115(1) (Supp. 1969), *construed in* State v. Dehler, 102 N.W.2d 696, 702 (Minn. 1960) (although no note of MINN. STAT. ANN. § 260.215(1) (Supp. 1969) is taken); N.M. STAT. ANN. § 13-8-28 (1968); UTAH CODE ANN. § 55-10-79 (Supp. 1969). Since there is no required transfer when the person is 21 or over, it can be concluded that the criminal court may retain the case and proceed with prosecution. Although New Hampshire has no comparable transfer statute, the same result may be reached by considering its jurisdictional statute.

50. The jurisdictional provisions extend juvenile court jurisdiction to include the minor between 18 and 21 who has committed the offense prior to becoming 18. ILL. ANN. STAT. ch. 27, §§ 702-1, 702-2, 705-2 (Smith-Hurd Supp. 1969) (offense committed by boy prior to becoming 17 or by girl prior to becoming 18 and with no kind of dispositional order available for adults); KAN. STAT. ANN. §§ 38-806(b), (c) (1964); MICH. STAT. ANN. § 27.3178(598.5) (1962) (juvenile court jurisdiction terminates at 19); MO. REV. STAT. § 211.031(2) (1959) (offense committed prior to becoming 17); OKLA. STAT. ANN. tit. 10, §§ 1102, 1112 (Supp. 1969-70) (juvenile court jurisdiction terminates at 21 for males and 18 for females); R.I. GEN. LAWS ANN. §§ 14-1-5A, -6 (1956) These provisions normally are accompanied by one which requires the criminal court to transfer *all persons*, regardless of whether they are presently below or above 21, to juvenile court if the offense was committed when the defendant was within the ages in which the juvenile court had exclusive jurisdiction. KAN. STAT. ANN. § 38-815(d) (1964); MICH. STAT. ANN. § 27.3178(598.3) (Supp. 1969); MO. REV. STAT. § 211.061(2) (1959); OKLA. STAT. ANN. tit. 10, § 1112 (Supp. 1969); R.I. GEN. LAWS ANN. § 14-1-28 (1956). Since the criminal court could not retain the case, it would have no jurisdiction to proceed. This result is expressly provided in ILL. ANN. STAT. ch. 37, § 702-7(1) (Smith-Hurd Supp. 1970). On the other hand, the juvenile court would also have no jurisdiction to proceed once the offender reached his majority. The result would be that neither court could act.

51. District of Columbia (7); Minnesota (14) (MINN. STAT. ANN. § 609.055 (1964)); New Hampshire (7).

the common law age to govern.⁵² Under this view, it becomes possible for an offender, who at the time of commission could not have reached criminal court, to be prosecuted criminally for his prior acts. In the six states that do not permit the criminal court to prosecute once the offender has passed his minority, criminal prosecution for acts committed prior to the waiver age is also possible in three states, although criminal prosecution must commence prior to majority.⁵³ (3) Two states vest the juvenile court with exclusive jurisdiction regardless of the offender's present age.⁵⁴ Thus the criminal court may prosecute only after waiver by the juvenile court. In both states, the juvenile court may not waive when the offence was committed prior to the waiver age.⁵⁵

Comparing the age below which there is complete incapacity with the minimum waiver age, seventeen of the twenty-eight jurisdictions coincide (See Table 7).

52. Idaho (minimum waiver age of 16) expressly provides that the age at waiver and not at commission is to control. IDAHO CODE ANN. § 16-1806(1)(a) (Supp. 1969). In Hawaii (16), New Mexico (14) and Utah (14), by not providing otherwise in their waiver provisions, impliedly approve that the age at waiver is controlling. HAWAII REV. LAWS § 333-13(a)(1) (Supp. 1965); N.M. STAT. ANN. § 13-8-27 (1953); UTAH CODE ANN. § 55-10-86 (Supp. 1969). The fact that acts committed prior to waiver age may lead to criminal prosecution signifies that the minimum waiver age is not to be taken as a new age for complete criminal incapacity. Instead, the age is procedural. The criminal court may then go back to the common law age of 7. Hawaii and Utah codify the common law. HAWAII REV. LAWS § 703-1, -2 (1968); UTAH CODE ANN. § 76-1-41 (1953).

53. In Michigan, Missouri and Rhode Island the minimum waiver age does not coincide with the common law age for complete criminal incapacity nor is there a raising of the common law age by statute. In these states the waiver statutes do not specifically provide that the act must have been committed during the waiver age. MICH. STAT. ANN. § 27.3178(598.4) (1962); MO. REV. STAT. § 211.071 (1959); R.I. GEN. LAWS ANN. § 14-1-7 (1956). The conclusion is that the criminal court may acquire jurisdiction on juvenile court waiver, up to the time when the offender reaches his majority, for offenses which occurred prior to the juvenile court's waiver age.

In Illinois and Oklahoma the minimum waiver age does coincide with the maximum statutory age for complete criminal incapacity. ILL. ANN. STAT. ch. 38, § 6-1 (1964) (age 13); OKLA. STAT. ANN. tit. 21, § 152(1) (1958) (age 7). In Kansas the waiver statute specifically provides that the act must have been committed during the waiver age. KAN. STAT. ANN. § 38-808(b) (1964) (minimum waiver age 16). Illinois has a similar statute. ILL. REV. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1970).

54. MASS. GEN. LAWS ANN. ch. 119, §§ 72, 72A, 74 (Supp. 1969); N.J. STAT. ANN. § 2A:4-20 (1952), § 2A:4-14 (Supp. 1968), construed in *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959) (defendant now 21); cf. *Johnson v. State*, 18 N.J. 422, 114 A.2d 1, cert. denied, 350 U.S. 942 (1955); Note, *Double Jeopardy and Due Process in the Juvenile Courts*, 29 U. PITT. L. REV. 756, 765 (1968).

55. MASS. GEN. LAWS ANN. ch. 119, § 61 (1965) permits waiver only when the offense was committed during the waiver age. N.J. STAT. ANN. § 2A:85-4 (1953) sets the maximum age for complete criminal incapacity at 16, the minimum age for waiver. See *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959) (14 at commission—21 at juvenile court trial).

TABLE 7

Jurisdiction	Complete Incapacity	Minimum Waiver Age	Exclusive Juvenile Court Jurisdiction
Alabama	7	14	16
Arizona	7	7	18
California	16	16	18
District of Columbia	7	7	18
Hawaii	7	16	18
Idaho	7	16	18
Illinois	13	13	17 for boys 18 for girls
Kansas	16	16	18
Kentucky	7	7	18
Maine	7	7	17
Massachusetts	14	14	17
Michigan	7	15	17
Minnesota	14	14	18
Missouri	7	14	17
New Hampshire	7	7	17
New Jersey	16	16	18
New Mexico	7	14	18
North Dakota	7	14	18
Ohio	7	7	18
Oklahoma	7	7	16 for boys 18 for girls
Oregon	7	16	18
Rhode Island	7	16	18
South Dakota	7	7	18
Tennessee	7	7	14
Texas	15	15	17 for boys 18 for girls
Utah	7	14	18
Washington	8	8	18
Wisconsin	7	16	18

Comparison of the age of complete incapacity with the age of minimum waiver

In the eleven where maximum age for complete incapacity does not coincide with the minimum waiver age, the allocation of exclusive jurisdiction to the juvenile court merely serves to postpone criminal prosecution until the child ages. In the three where juvenile court jurisdiction is not extended beyond what was normally allocated, the criminal court may prosecute once exclusive juvenile court jurisdiction

ends for offenses occurring as far back as the common law age for complete incapacity. In four the juvenile court's jurisdiction is extended until twenty-one at which time the criminal court may then prosecute for offenses occurring as far back as the common law age for complete incapacity. In three states the juvenile court's jurisdiction is extended to twenty-one and the criminal court may not prosecute above twenty-one, the criminal court may still prosecute for offenses occurring prior to the waiver age if the juvenile court waives to criminal court when the offender is under twenty-one. The eleventh state is a special situation since concurrent jurisdiction follows exclusive juvenile court jurisdiction.

III. THE CHANGE IN ATTITUDE

The change in attitude toward the juvenile murderer is reflected by the upward shift in the age of complete incapacity (See table 8).

TABLE 8

Age	Number of Jurisdictions	Jurisdictions
7	34	
8	2	Nevada, Washington
9	0	
10	3	Colorado, Georgia, Louisiana
11	0	
12	1	Arkansas
13	2	Illinois, Mississippi
14	3	Iowa, Massachusetts, Minnesota
15	2	New York, Texas
16	4	California, Kansas, New Jersey, Vermont

Maximum age for irrebuttable presumption of incapacity to commit murder

The shift in Illinois occurred in 1961 when the age was raised from ten to thirteen.⁵⁶ Iowa revised its juvenile court act in 1965 and

56. ILL. ANN. STAT. ch. 38, § 6-1 (Smith-Hurd 1964).

In approaching the redraft of these provisions the Committee sought to accomplish two purposes: first, the raising of the minimum age of criminal capacity; second, the elimination of the presumption of incapacity thereby withholding from the jury an unsatisfactory and uncongenial task. The solution arrived at is the simple proposition providing that criminal capacity shall not be deemed to exist below the age of thirteen. Persons falling in this

amended this revision in 1967 to raise the age from seven to fourteen.⁵⁷ Texas raised the age from ten to fifteen in 1967.⁵⁸ In New Jersey, the change came in 1954 when the state supreme court rejected a prior interpretation which held that a child seven and over could be prosecuted criminally for murder and ruled instead to uphold the statute which made a child under sixteen incapable of murder.⁵⁹ This then would be consistent with the Model Penal Code's recommended age of sixteen for immaturity excluding criminal conviction.⁶⁰

These states and the others which have increased the age of incapacity have shown confidence in their juvenile court system by choosing redemption over punishment. Whether the juvenile court has been given the staff, facilities and resources to redeem is another question. The upward shift in the age of criminal responsibility may indicate that the states are willing to take a less punitive approach to the juvenile murderer.

category and committing acts which would otherwise be criminal thus fall within the exclusive cognizance of the Family Court to be treated according to the provisions of the Family Court Act. . . . Persons thirteen years of age and over are treated as possessing criminal capacity. This does not mean, of course, that all children in the latter category will be tried in the criminal courts. Selection of persons for treatment in the Family Court until they have reached the ages of seventeen or eighteen will continue to be governed by the same criteria that presently obtain.

Id., comment at 211.

57. Prior to 1967, the juvenile and criminal court had concurrent jurisdiction from seven to eighteen. IOWA CODE ANN. § 232.62 (1969), construed in *State v. Stueve*, 260 Iowa 1023, 150 N.W.2d 597 (1967). In 1967, § 232.61 was repealed and §§ 232.63 to .73 enacted. Although § 232.62 was retained, § 232.63 would appear to replace § 232.61 under the *State v. Stueve* interpretation and §§ 232.72, .73 would restrict §§ 232.17, .62 and thus raise the age to 14.

58. The purpose of this Act is to give the juvenile court exclusive jurisdiction in cases where children below the age of 15 years violate penal laws of the grade of felony; and to provide a procedure and grounds for the juvenile court to waive jurisdiction and transfer children for criminal proceedings in cases involving offenses committed by children 15 years of age or older; and to prevent children being proceeded against in both the juvenile court and district court or criminal district court for offenses committed while of juvenile age. This Act is necessary because a portion of a similar Act was declared unconstitutional in *Foster v. State*, 400 S.W.2d 552 (Tex. Crim. App. 1966), because the court was unable to determine the purpose and intent of the Legislature.

TEX. REV. CIV. STAT. ANN. art. 2338-1 (Supp. 1968), comment at 107.

59. *State v. Monahan*, 15 N.J. 34, 104 A.2d 21 (1954).

60. MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962).

