III. Jurisdiction and Waiver

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Few individuals today would maintain that children should be stigmatized as criminals and committed to adult penal institutions for every reckless deed or mischievous act performed. Yet the development of a specialized judicial system empowered to exercise jurisdiction over juveniles is a peculiarly 20th-century phenomenon.[1]

At common law children under seven were deemed to be incapable of committing criminal acts.[2] Children over 7, however, were considered capable of observing society's standards of conduct, and upon violation of such standards were tried and sentenced in the same manner as adult offenders.[3] In the late 19th century, new social theories coupled with humanitarian sentiments sparked a general social reform movement. During this movement, efforts were made to liberate children accused of criminal violations from the rigors and sever-

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1. Specialized judicial control over juveniles in a limited capacity is traceable to the English Courts of Chancery. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELIN. 68, 69 (1972).

It was observed in 1846 that:

> The power of the court of Chancery to interfere with and control, not only the estates but the persons and custody of all minors within the limits of its jurisdiction, is of very ancient origin and cannot now be questioned. This is a power which must necessarily exist somewhere, in every well-regulated society . . . .
>
> It is indispensibly necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves.

Cowles v. Cowles, 8 Ill. (3 Gilm.) 435 (1846).

The first statewide juvenile court was established in Illinois in April 1899. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TASK FORCE REPORT: JUVENILE DELINQUENCY]. Since that time, every state has established some type of specialized procedure for the treatment of juveniles. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17-53 to -74 (Supp. 1973); FLA. STAT. ANN. §§ 39.01 to -.31 (1974); N.J. STAT. ANN. §§ 2A:4-1 to -4-67 (Supp. 1974).

2. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 3.

3. *Id.* For children between the ages of 7 and 14, the capacity to commit criminal acts was in the nature of presumption, rebuttable by a showing that the child could not understand the nature and quality of his act. *Id. See also* Mack, *supra* note 1, at 106.

ity of the adult penal system.[4] These new social attitudes quickly discredited the common law practice of imposing penal sanctions on children who were beyond the age of 7. Inflexible legal standards of responsibility were replaced with theories which recognized that juvenile misconduct was a social phenomenon to be treated through application of the new behavioral sciences.[5] While the child was still regarded as capable of understanding the nature and consequences of his acts,[6] recognition of his immaturity, inexperience, and impressionability led to the belief that wrongdoing resulted from misdirection, not criminality.[7] It was not long before legislative bodies reacted to this crusade by revamping the procedures used by courts in managing juvenile wrongdoers.

Generally, the enactment of juvenile court acts revised the old philosophy concerning the administration of juvenile justice in two major areas. First, juveniles accused of "criminal" misconduct were to be proceeded against in a noncriminal, nonadversary setting. An adjudication adverse to the child was not considered a determination of guilt or criminal responsibility, but rather only a finding by the court that the child was delinquent and in need of care.[8] Accordingly, it frequently has been asserted that proceedings instituted under juvenile court acts are civil and not criminal in nature.[9] As a result of this first philosophical shift, juveniles are afforded relief from criminal prosecution not by virtue of legal conceptualizations concerning criminal capacity, as under the common law, but through changes in the procedural mechanics of the judicial process.

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4. A. PLATT, THE CHILD SAVERS 6 (1969). For a discussion of the 19th-century reform movement, see A. TYLER, FREEDOM'S FERMENT 225-547 (1944).

5. *See* Graves, Langley & Norris, *The Juvenile Court and Individualized Treatment*, 18 CRIME & DELIN. 79, 81 (1972).

6. In Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931), *overruled on other grounds*, State v. Hernandez, 83 Ariz. 279, 320 P.2d 467 (1958), the Arizona supreme court construed the prior Arizona Juvenile Court Act as abrogating the common law criminal immunity afforded children under 7. The court observed that:

> [T]he purpose of the Arizona juvenile law is not to attempt to establish an arbitrary age below which the child is presumed to be ignorant of the consequences of his acts, but rather to provide a special method of treatment for minors . . . who have violated the criminal law . . . .

Id. at 111, 297 P. at 1034. While Arizona has recently enacted a new juvenile court act, ARIZ. REV. STAT. ANN. §§ 8-101 to -546.04 (1974), this construction is equally applicable.

7. *See* Graves, Langley & Norris, *supra* note 5, at 81.

8. *See* Davis, *The Jurisdictional Dilemma of the Juvenile Court*, 51 N.C.L. REV. 195 (1972).

9. *Id.* at 204 n.32. *The Model Juvenile Court Statute* provides that "[n]o adjudication by the court of the status of any child shall be deemed a conviction; no adjudication shall impose a civil disability ordinarily resulting from conviction; no child shall be deemed guilty or be deemed a criminal by reason of adjudication . . . ." S. RUBIN, A MODEL JUVENILE COURT STATUTE § 23 (1973). In Arizona, it is provided that "[a]n order of the juvenile court . . . shall not be deemed a conviction of crime or impose any civil disabilities ordinarily resulting from a conviction . . . ." ARIZ. REV. STAT. ANN. § 8-207(A) (1974). *See also* Maricopa County Appeal No. J-68100 v. Haire, 107 Ariz. 309, 486 P.2d 791 (1971); Arizona State Dep't of Pub. Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956).

A second change in legal philosophy related to the disposition of juveniles adjudged delinquent. Obviously, the imposition of penal sanctions was incongruous with the new social theories of delinquency. Retribution and punishment were no longer regarded as desirable ends of the juvenile justice process. Instead, it was recognized that the immature and impressionable nature of a young mind would render it susceptible not only to forces directing misconduct, but also to those calculated to reestablish proper behavior. Thus, the rehabilitative ideal of the juvenile court emerged. Children were neither to be regarded nor treated as criminals. Concerted efforts toward individualized treatment[10] were established as the only appropriate means for dealing with the juvenile wrongdoer, and the state, as parens patriae,[11] was no longer to condemn its children to adult punishments.[12]

Contemporary juvenile courts are authorized to exercise broad control over children who require court supervision. In the first part of this section, the nature and extent of the jurisdiction exercised by the juvenile court will be explored, and proposals for modifications will be set forth. In the second part, the power of the juvenile court to waive its jurisdiction over a child and remand him for trial in the criminal court will be analyzed. This will include a discussion of the standards for waiver of jurisdiction provided by the *Arizona Rules of Procedure for the Juvenile Court* [*Juvenile Rules*] and an assessment of the criteria used to meet these standards. Finally, the consequences of a waiver hearing will be discussed.

A. JUVENILE COURT JURISDICTION

The Arizona constitution provides that the superior court[13] shall

10. *See* State v. Shaw, 93 Ariz. 40, 46, 378 P.2d 487, 491 (1963).

11. The parens patriae authority was originally one of the prerogatives of the feudal king. Under this authority, the king, through the courts of chancery, was able to protect persons suffering from a mental disability from the unlawful acts of their guardians. *See* Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae"*, 22 S.C.L. REV. 147, 156 (1970). Gradually, the parens patriae authority evolved into an unrestricted and general power of the sovereign to assert protective jurisdiction over children and incompetents whenever necessary to promote their well-being. *See* F. SUSSMAN & F. BAUM, THE LAW OF JUVENILE DELINQUENCY 5-6 (3d ed. 1968). *See generally* Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

12. The *Uniform Juvenile Court Act* provides that its purposes shall be, *inter alia*:

> (1) to provide for the care, protection, and wholesome moral, mental, and physical development of children . . . [and]
>
> (2) consistent with the protection of the public interest, to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to substitute therefor a program of treatment, training, and rehabilitation.

UNIFORM JUVENILE COURT ACT § 1.

For an extensive discussion of the juvenile court philosophy, see A. PLATT, *supra* note 5, at 46-67, 137-72; Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in JUSTICE FOR THE CHILD 23 (M. Rosenheim ed. 1962).

13. In Arizona, the superior courts are courts of general jurisdiction. *See* ARIZ. CONST. art. 6, § 14.

exercise jurisdiction over juveniles and, while exercising such jurisdiction, shall sit as a juvenile court.[14] Thus, provisions establishing a juvenile court in Arizona relate to a separate division within an existing court of general jurisdiction, governed by special rules, rather than to the creation of a separate court of record.[15]

Although to some degree the nature and extent of juvenile court jurisdiction differs from state to state,[16] the limits of such jurisdiction generally are defined according to the status and age of the individual.[17] In Arizona, "status" refers to the classification of a youth as delinquent,[18] dependent,[19] or incorrigible.[20] The maximum age for one

14. *Id.* art. 6, § 15. It is further provided by statute that:

> In counties having more than one judge of the superior court the judges of such county shall annually . . . designate one or more judges of the superior court to hear all [juvenile] cases . . . during the ensuing year. The presiding judge shall from time to time designate such additional judges as may be necessary for the prompt disposition of judicial business before the juvenile court. In all counties where more than one judge is designated as a judge of the juvenile court the judges of such county shall also designate one such judge as the presiding judge of the juvenile court.

ARIZ. REV. STAT. ANN. § 8-202(E) (1974).

15. McClendon v. Superior Court, 6 Ariz. App. 497, 499 n.2, 433 P.2d 989, 991 n.2 (1967). Most states utilize an approach similar to Arizona's and do not establish a separate juvenile court, but rather vest jurisdiction over juveniles in the state court of general jurisdiction. *See, e.g.*, CAL. WELF. & INST'NS CODE § 550 (West 1972); ILL. ANN. STAT. ch. 37, § 701-8 (Smith-Hurd 1972); NEV. REV. STAT. § 62.030 (1971). A few states, however, have established separate courts specializing in juvenile matters. *See, e.g.*, ARK. STAT. ANN. § 45-202 (1964); CONN. GEN. STAT. ANN. § 17-54 (1958); N.Y. FAMILY CT. ACT § 113 (McKinney 1963).

16. In Arizona, the juvenile court is vested with exclusive original jurisdiction over juvenile matters. ARIZ. CONST. art. 6, § 15; ARIZ. REV. STAT. ANN. § 8-202 (1974). Some states, however, except jurisdiction over youths accused of committing certain types of offenses from the juvenile court. *See, e.g.*, LA. REV. STAT. § 13:1570(A)(5) (Cum. Supp. 1962) (no jurisdiction over youths above the age of 14 accused of a capital crime or attempted aggravated rape); MD. ANN. CODE art. 26, § 70-2(d) (Supp. 1973) (no jurisdiction over youths accused of a capital crime or robbery with a deadly weapon). These provisions provide, in effect, that in the case of a serious offense, society's demand for retribution or protection outweighs the policy of favoring juveniles with special treatment. If the rehabilitative ideal of the juvenile court is accepted, however, the nature of the offense alone should not be sufficient cause for bypassing the juvenile courts.

Other states grant to the juvenile courts jurisdiction which is concurrent with other courts. *See, e.g.*, COLO. REV. STAT. ANN. § 37-9-2 (1963) (concurrent jurisdiction over all matters involving juvenile wrongdoers); DEL. CODE ANN. tit. 10, § 922 (Supp. 1972) (concurrent jurisdiction over various phases of juvenile affairs); MICH. STAT. ANN. § 27.3178(598.2)(d) (Supp. 1973) (concurrent jurisdiction over juveniles between the ages of 17 and 18 who are addicted to drugs, idle or who associate with criminals and prostitutes).

The exclusive nature of the jurisdiction of the juvenile court in Arizona is such that orders of the juvenile court take precedence over the orders of any other court on matters which may affect a juvenile who is within the jurisdiction of the court. McClendon v. Superior Court, 6 Ariz. App. 497, 499, 433 P.2d 989, 991 (1967). *See also* Marr v. Superior Court, 114 Cal. App. 2d 527, 250 P.2d 739 (Ct. App. 1952); Marmino v. Marmino, 34 Tenn. App. 352, 238 S.W.2d 105 (1950). *Contra*, Ross v. Ross, 89 Colo. 536, 5 P.2d 246 (1931).

17. For a discussion of the provisions of other state statutes relating to age and status, see Davis, *supra* note 8, at 198, 219-29.

18. For a discussion of the delinquency categorization, see text accompanying notes 22-23 *infra*.

19. For a discussion of the dependency categorization, see text accompanying notes 24-30 *infra*.

20. For a discussion of the incorrigibility categorization, see text accompanying

to be within the jurisdiction of the Arizona juvenile court is 18.[21]

1. *Status Jurisdiction*

The jurisdiction of the Arizona juvenile court extends only to children whose conduct or social condition is embraced by one of the three status categories. The first category, that of delinquency, encompasses a wide range of conduct. Such jurisdiction extends both to juveniles accused of committing acts which would be a public offense if committed by an adult and to juveniles accused of doing acts which constitute public offenses only because they are done by children.[22] Public offenses include not only violations of state law but also breaches of city or county ordinances and violations of the laws of another state if the act occurred there.[23]

The second jurisdictional authorization extends to dependent children. Dependent children are those who are in need of proper and effective supervision which cannot be obtained from a parent or guardian,[24] or who are destitute, deprived of the necessities of life, or subjected to cruel or depraved treatment.[25]

In most states, only children who are economically deprived come within the court's dependency jurisdiction. Supervision of juveniles in need of proper parental guidance and of those who are not provided with a healthy environment is obtained under a separate category, known as neglect jurisdiction.[26] Thus, the provisions of the Arizona

notes 31-42 *infra*. The status categories of delinquency, dependency, and incorrigibility are established in ARIZ. CONST. art. 6, § 15. This constitutional provision also establishes two other status categories; that of neglected children and of children accused of commiting crimes. *Id.* By statute, however, the category of neglected children has been merged with that of dependent children, ARIZ. REV. STAT. ANN. § 8-201(10)(a)-(10)(b) (1974), and the jurisdictional authorization over children accused of committing crimes has been combined with jurisdiction over delinquent children. *Id.* § 8-201(8).

Unlike Arizona, some states provide only for the assertion of jurisdiction over dependent, neglected, or delinquent children. Jurisdiction over incorrigible youths either is not provided for or is included within the definition of delinquent youths. *See, e.g.*, ARK. STAT. ANN. § 45-204 (Supp. 1973); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1973); M|ss. CODE ANN. § 43-21-5(g) (1972). It also is not uncommon for other states to include jurisdictional categories not found in Arizona. The most notable of these additional categories is entitled, "Persons in Need of Supervision" [PINS], and is similar to Arizona's incorrigibility jurisdiction. *See, e.g.*, N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1973-74); TEX. FAM. CODE § 51.03(b) (1970).

21. For a discussion of age jurisdiction, see text accompanying notes 65-81 *infra*.

22. ARIZ. REV. STAT. ANN. § 8-201(8) (1974). Acts which constitute public offenses only if committed by children are called status offenses. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 22. The most common status offenses are liquor, tobacco, and curfew violations, truancy and prohibitions against running away from home. *Id.*

23. ARIZ. REV. STAT. ANN. § 8-201(8) (1974).

24. *Id.* § 8-201(10)(a). This includes not only situations where parents or guardians are deceased, but also situations where living parents or guardians have failed to provide adequate supervision. *Id.*

25. *Id.* § 8-201(10)(b).

26. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-59 (Supp. 1973); HAWAII REV. STAT. § 571-11(2) (Supp. 1973); ILL. ANN. STAT. ch. 37, § 702-4 (Smith-Hurd 1972).

Juvenile Court Act have effected a merger between the court's neglect and dependency jurisdiction. Since dependent and neglected children generally are handled in the same manner upon disposition,[27] no undesirable consequences flow from this merger.

Arizona's dependency jurisdiction also is unique in that it supersedes the operation of the court's delinquency or incorrigibility jurisdiction in certain situations. Since juvenile court acts have been construed as abolishing the common law criminal immunity afforded children under seven,[28] for the first time such children could be proceeded against, albeit noncriminally, for violations of the law. Yet very young children may be so lacking in mental maturity that their wrongdoing is attributable solely to a failure to understand the nature and consequences of their acts. These children may need only to mature in a supervised setting; to adjudge them delinquent and attempt rehabilitation seems unnecessary.

In Arizona, this problem is avoided by an expansion of dependency jurisdiction. Thus, when a public offense is committed by a youth under the age of 8, judicial competence can be gained only through the exercise of the court's dependency jurisdiction.[29] Dependency jurisdiction also must be exercised when a child under 8 exhibits behavior which would otherwise be deemed incorrigible if displayed by an older youth.[30] By adjudging such children dependent, the court is still free to exercise supervisory powers without stigmatizing children under 8 as either delinquent or incorrigible.

Jurisdiction over incorrigible youths comprises the third basis of juvenile court jurisdiction. Incorrigibility jurisdiction is predicated in large measure upon the commission of noncriminal status offenses.[31] Thus, an incorrigible child is

> one who refuses to obey the reasonable and proper orders or directions of his parent, guardian or custodian, and who is beyond the control of such person, or any child who is habitually truant from school, or who is a runaway from his home or parent, guardian or custodian, or who habitually so deports himself as to injure or endanger the morals or health of himself or others.[32]

Because of the broad nature of the conduct proscribed, it is not surpris-

27. Such children can be placed under the supervision of the State Department of Economic Security or placed with a number of public or private agencies. *See* ARIZ. REV. STAT. ANN. § 8-241(A)(1) (1974).
28. See text accompanying notes 8-10 *supra*.
29. ARIZ. REV. STAT. ANN. § 8-201(10)(c) (1974).
30. *Id.*
31. See note 18 *supra*, for the definition of "status offenses."
32. ARIZ. REV. STAT. ANN. § 8-201(12) (1974).

ing that judicial intervention under like provisions has met frequent constitutional challenge in other jurisdictions.[33]

Traditionally, it was believed that the parens patriae authority of the state could be exercised unencumbered by constitutional restraints;[34] consequently, constitutional challenges to any aspect of juvenile court proceedings were rare. The United States Supreme Court, however, noted in *In re Gault*[35] that an adjudication hearing, although termed civil in nature and ostensibly held in a nonadversary context, nevertheless frequently resulted in the deprivation of a child's freedom.[36] Accordingly, the Court directed that juveniles must be afforded certain due process rights at the adjudicatory stage of juvenile proceedings.[37]

On the strength of the *Gault* decision, jurisdictional grants, particularly those authorizing jurisdiction over youths engaged in conduct injurious to their moral well-being,[38] were challenged as being unconstitutionally vague.[39] Some jurisdictions have determined that the *Gault* decision was not intended to undermine the state's fundamental interest in insuring the well-being of its children, and have upheld the validity of "morals clauses."[40] Others, however, have not hesitated to extend the *Gault* holding to invalidate "morals" clauses on the ground that they are unconstitutionally vague.[41] Regardless of the constitutional correctness of these decisions, the broad nature of such clauses often allows unnecessary and unwarranted intrusion into the lives of juveniles. Consequently, the existence of "morals clauses" and other broadly defined jurisdictional clauses may be objectionable as a matter of policy.[42]

33. *See, e.g.*, Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972); S*** S*** v. State, 299 A.2d 560 (Me. 1973); *In re* Jackson, 6 Wash. App. 962, 497 P.2d 259 (1972). *See generally* Comment, *Juvenile Statues and Noncriminal Delinquents: Applying the Void-For-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973).

34. *See* Cogan, *supra* note 11, at 147.

35. 387 U.S. 1 (1967).

36. *Id.* at 27.

37. Such rights include the right to counsel, notice of charges, confrontation, cross-examination and freedom from compulsory self-incrimination. *Id.* at 31-57.

38. The juvenile court statutes of many states besides Arizona provide for the exercise of jurisdiction over youths leading an immoral life. *See, e.g.*, FLA. STAT. ANN. § 39.01(10)(e) (Supp. 1974-75); MISS. CODE ANN. § 43-21-5(g) (1972); MONT. REV. CODES ANN. § 10-602(e) (1968); N.H. REV. STAT. ANN. § 169:2(II)(a) (Supp. 1973).

39. In one case, the validity of a clause extending jurisdiction over youths "beyond the lawful control and power of [their] parents" was challenged. The court held that the clause was not unconstitutionally vague. *In re* Jackson, 6 Wash. App. 962, 497 P.2d 259 (1972).

40. S*** S*** v. State, 299 A.2d (Me. 1973); State v. L.N., 109 N.J. Super. 278, 263 A.2d 150 (App. Div. 1970), *aff'd per curiam*, 57 N.J. 165, 270 A.2d 409 (1970); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

41. Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972); *In re* Daniel R., 79 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Ct. App. 1969).

42. See text accompanying notes 60-63 *infra*.

A final statutory jurisdictional category, not provided for under the Arizona constitution, encompasses all proceedings "to obtain judicial consent to the marriage, employment, or enlistment in the armed services of a child, if consent is required by law."[43] Such proceedings are unrelated to the conduct or social condition of juveniles and do not involve judicial control or supervision. Nonsupervisory jurisdiction of this nature is often more extensive in other states than it is in Arizona, and competency to adjudicate such matters as custody, guardianship, and property rights of minors is often granted.[44] Additionally, many states provide that the jurisdiction of the juvenile court shall extend to adults accused of contributing to the delinquency of minors.[45]

It is apparent from the foregoing that the juvenile court exercises extensive jurisdictional powers over juveniles. Broad jurisdictional grants are considered necessary to effect the directives of protection and rehabilitation for all juveniles in need.[46] Were these grants to be narrowed, some children vitally in need of court services might be without recourse. Recently, however, such broad jurisdictional grants have been criticized as allowing much unwarranted judicial intrusion into the lives of juveniles. In response to this criticism, certain changes have been proposed in the status jurisdiction of the court.

It has been suggested that, for jurisdictional purposes, juveniles accused of violating the law should no longer be classified as delinquent.[47] There can be little argument but that an adjudication of delinquency stigmatizes a juvenile in much the same way as would a criminal conviction.[48] A juvenile who has committed only minor offenses, and who at one time was receptive to court treatment, may be inclined to commit further wrongful acts when he discovers that friends, school officials, and the public in general persist in labeling him delinquent.[49]

43. ARIZ. REV. STAT. ANN. § 8-202(B) (1974).

44. *E.g.*, KY. REV. STAT. ANN. § 208.020(3) (1971); MASS. ANN. LAWS ch. 119, § 63 (Supp. 1973); N.H. REV. STAT. ANN § 169:32 (Supp. 1973).

45. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 22.

46. T. RUBIN & J. SMITH, THE FUTURE OF THE JUVENILE COURT: IMPLICATIONS FOR CORRECTIONAL MANPOWER AND TRAINING 5 (1968); W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS 34 (1966); TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 22-28. *See generally* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT § 8, Comment (6th ed. 1959) [hereinafter cited as STANDARD ACT]; S. RUBIN, *supra* note 9, at 5-9.

47. Paulson, *The Delinquency, Neglect, & Dependency Jurisdiction of the Juvenile Court* in JUSTICE FOR THE CHILD 44, 45 (M. Rosenheim ed. 1962). *See* STANDARD ACT, *supra* note 46, § 8.

48. *See* TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 26. Supporters of the retention of delinquency and other juvenile classifications maintain that they serve to inform the court of the powers which may be exercised in a given case and alert the juvenile and his parents of the nature of court intervention. *Id.* at 22; Paulsen, *supra* note 47, at 46. A statement of specific charges coupled with a court-parent meeting would accomplish these purposes, however, without the need for categorization.

49. Interview with Sally Plager, Supervisor of Screening and Crisis Intervention, Pima County Juvenile Court Center, in Tucson, Feb. 19, 1973.

Thus, this stigmatization may undo whatever rehabilitative progress the court had made with the child.

Arizona has attempted to avoid this problem by categorizing juveniles committing status offenses as incorrigible rather than delinquent.[50] Yet, the term "incorrigible" hardly creates a more favorable impression of the juvenile in the eyes of the public than does the term "delinquent."[51] It is likely, then, that "incorrigible" children are stigmatized in the same manner as "delinquent" children. Assuming that the incorrigibility category lessens or avoids such stigmatization, however, the problem still remains with those children who have committed criminal offenses and who have been classified as delinquents. The solution, then, may lie not in creating or modifying categories, but in eliminating existing ones. This can be accomplished by enumerating the types of conduct over which the court is competent to act without separation into categories.[52] In this manner, classification of juveniles can be avoided without narrowing the court's jurisdictional base.

Regardless of the reasons for a child's presence before the court, the possibility of stigmatization will always exist, even if jurisdictional categories are eliminated. Judicial proceedings, by nature, carry some degree of notoriety. Thus, the remaining suggested changes relate to the total abolition of certain types of juvenile court jurisdiction.

First, elimination of jurisdiction over destitute children and children in need of proper parental supervision has been proposed by many commentators.[53] Abrogation of jurisdiction over destitute children has been suggested because "[n]o child should be subject to the jurisdiction of the court for economic reasons alone. . . . Such assistance should be provided by a social agency. Unless there is an element of neglect involved, the court's jurisdiction should not be exercised."[54] Where social agencies have developed expertise in caring for destitute children, where no legal issues are present,[55] and where the matter is one which can be handled informally, judicial intervention seems un-

50. *See* ARIZ. REV. STAT. ANN. § 8-201(12) (1974). The category of "Persons in Need of Supervision" [PINS] was created in New York State in large part to avoid the undesirable consequences resulting from categorization. *See* N.Y. JOINT LEG. COMM. ON COURT REORGANIZATION, THE FAMILY COURT ACT pt. 2, at 7 (1962), *cited in* T. RUBIN & J. SMITH, *supra* note 46, at 8.

51. T. RUBIN & J. SMITH, *supra* note 46, at 9; Paulsen, *supra* note 47, at 46.

52. *See* HAWAII REV. STAT. §§ 571-11(1)-(2) (Supp. 1973); IDAHO CODE § 16-1803 (Supp. 1973); NEV. REV. STAT. § 62.040 (1971). Both the *Standard Juvenile Court Act* and the *Model Juvenile Court Statute* avoid categorizing juveniles. *See generally* STANDARD ACT, *supra* note 46, § 8; S. RUBIN, *supra* note 9, § 5.

53. STANDARD ACT, *supra* note 46, § 8, Comment; T. RUBIN & J. SMITH, *supra* note 46, at 10; W. SHERIDAN, *supra* note 46, at 34; TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 27-28. *See generally* S. RUBIN, *supra* note 9, at 9.

54. W. SHERIDAN, *supra* note 46, at 34.

55. Where parents intentionally deprive a child of the necessities of life, legal issues may be present. In this case, however, the child may be classified as neglected.

necessary. Limiting jurisdiction only to "problem cases" would effect an economy of judicial resources and avoid adverse consequences which may accrue to the child as a result of formal court proceedings.

Questions concerning the abolition of jurisdiction over abused children, or children in need of proper guidance, are not settled so easily. Where it is alleged that a parent has abused a child or has failed to provide him with a proper environment, judicial intervention is necessary to determine facts and render any adjudication necessary, including possible termination of parental rights.[56] To the extent that the custodial rights of parents may be affected, then, jurisdiction in this area must be retained.[57] A neglected child, however, may feel that there is something improper about his situation when intervention by a judicial tribunal is necessary. In order to restrict formal judicial proceedings, social agencies should handle the dispositional aspects of individual cases.

A final proposal relates to the abrogation of provisions granting jurisdiction over youths accused of committing two types of status offenses.[58] The provisions are those conferring jurisdiction over children who are beyond the control of their parents[59] and children who are in danger of leading an immoral life.[60] In addition to the possible unconstitutionality of such provisions,[61] they may be objectionable from a policy standpoint.

Clauses granting jurisdiction over children who are considered in danger of leading an immoral life are often enforced in a discriminatory manner;[62] that is, judicial control is asserted over certain juveniles or classes of juveniles in order to "keep them off the streets," although they have not committed criminal offenses. While juvenile court jurisdiction is predicated on the need to rehabilitate and guide youths, con-

56. The Arizona juvenile court is empowered to terminate parental rights. *See* ARIZ. REV. STAT. ANN. §§ 8-531 to -544 (1974).

57. *See* TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 27.

58. S. RUBIN, *supra* note 9, at 6-7. *See* TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 25.

Status violations are a unique area of juvenile court jurisdiction. Unlike Arizona, however, many states adjudicate as delinquent, rather than incorrigible, juveniles committing status offenses. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-53 (Supp. 1973); MISS. CODE ANN. § 43-21-5(g) (1972); N.H. REV. STAT. ANN. § 169:2 (Supp. 1973).

59. *See* ARIZ. REV. STAT. ANN. § 8-201(12) (1974). Jurisdictional grants of this nature are common. *See, e.g.*, ARK. STAT. ANN. § 45-204(d) (Supp. 1973); CAL. WELF. & INST'NS CODE § 601 (West 1972); MISS. CODE ANN. § 43-21-5(g) (1972); N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1973-74).

60. ARIZ. REV. STAT. ANN. § 8-201(12) (1974). Morals clauses of this nature are also common. *See* note 38 *supra*.

61. See text & notes 33-42 *supra*.

62. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, at 25. *See generally* Note, *Juvenile Court Jurisdiction over "Immoral" Youth in California*, 24 STAN. L. REV. 568 (1972).

trol of this nature may do nothing more than create animosity on the part of the juvenile toward society and its judicial institutions. Moreover, it is often unfair and unnecessary to subject a child to the rigors of judicial proceedings solely for the exhibition of conduct which is illegal only for children and as such does not amount to an independent violation of the law.[63]

These criticisms are equally applicable to jurisdiction asserted over youths who are beyond the control of their parents or other lawful authority. Additionally, such jurisdiction has been criticized as permitting

> [i]neffective parents, overworked or ineffective school personnel and agencies unable to effectively collect evidence to establish parental neglect, to "put a record" on a youngster who, in most cases, is not the one primarily responsible for the activity involved . . . . It is also used as a "dealing" section to encourage a plea where a delinquency conviction could not be sustained.
>
> The experience of juvenile court judges has been that the intrusion of the court often accentuates and perpetuates the family schism . . . .[64]

While these arguments may be meritorious in some situations, there undoubtedly will be cases where a juvenile who falls within one of these categories would properly need court services. To these youths, a withdrawal of jurisdiction could be most injurious. For this reason, jurisdiction over these two status offenses should be retained; minimization of resulting abuses can be effected by carefully screening all cases at the intake and dispositional levels.

2. *Age Jurisdiction*

In Arizona, juvenile court jurisdiction extends to all persons under the age of 18.[65] In order to avoid the premature termination of treat-

63. Judges are often reluctant in such circumstances to hold a formal hearing unless court supervision appears absolutely necessary. Interview with the Hon. Gerald Strick, Juvenile Court Judge, Maricopa County, in Phoenix, Feb. 27, 1974. *See also* N.Y. JOINT LEG. COMM. ON COURT REORGANIZATION, THE FAMILY COURT ACT pt. 2, at 7 (1962), *cited in* T. RUBIN & J. SMITH, *supra* note 46, at 8.

64. REPORT TO THE GOVERNOR AND LEGISLATURE OF THE SPECIAL COMM. OF THE SUPERIOR COURT OF LOS ANGELES COUNTY 14 (1972), *cited in* S. RUBIN, *supra* note 9, at 7.

65. ARIZ. REV. STAT. ANN. § 8-201(5) (1974). A juvenile is over 18 the first day after his 18th birthday. *See* Farrow v. State, 258 A.2d 276 (Del. 1969); Commonwealth v. Frisby, 451 Pa. 16, 301 A.2d 610 (1973). The upper limit of juvenile court jurisdiction varies from state to state. *Under 16*: CONN. GEN. STAT. ANN. § 17-53 (Supp. 1973); N.C. GEN. STAT. § 7A-278(1) (Supp. 1973). *Under 17*: LA. REV. STAT. § 13:156 (Supp. 1972); MICH. STAT. ANN. § 27.3178(598.2)(a) (Supp. 1974); TEX. FAM. CODE § 51.02(1)(A) (1973). *Under 18*: CAL. WELF. & INST'NS CODE § 600 (West 1972); HAWAII REV. STAT. § 571-2(5) (Supp. 1973); ME. REV. STAT. ANN. tit. 15, § 15-2552 (1964).

ment of older juveniles, it was necessary to provide for the continuance of jurisdiction, previously obtained, beyond a child's 18th birthday. Consequently, in Arizona, jurisdiction obtained prior to an individual's 18th birthday continues until that person attains age 21.[66]

In many states, including Arizona, the recent change of the age of majority to 18[67] has prompted suggestions to lower the maximum age for the exercise of juvenile court jurisdiction to age 16, with continuing jurisdiction until age 18.[68] Such a proposal proceeds from the belief that the treatment of individuals through the facilities of the juvenile court should not extend beyond the age of majority. Thus, when the age of majority commonly was 21, the maximum jurisdictional age limit was fixed at age 18 in order to provide a minimum period of 3 years during which the juvenile could be rehabilitated before he reached the age of majority. Accordingly, it is contended that now that the age of majority has been established at age 18, the maximum jurisdictional age limit should be lowered to 16 in order to provide enough time for treatment of juveniles before they are legally emancipated. This argument is not persuasive. While jurisdiction, once obtained, must continue beyond the maximum jurisdictional age limit so that a reasonable time period for rehabilitation will be insured, the establishment of the age of majority as the cut off point for all court services is arbitrary. The fact that the age for legal emancipation was set at 18 reflects the belief that 16 and 17-year-old youths are not so mature as to warrant adult treatment.[69] Yet, by lowering the maximum jurisdictional age limit to 16, these youths would have to be tried in the criminal court. Until studies indicate that individuals between the ages of 16 and 18 have attained a stage of development comparable to that of adults, maximum jurisdictional age limits should not be lowered below age 18.[70]

A second source of controversy in this area concerns the point at which the age of a juvenile offender becomes fixed for jurisdictional

66. ARIZ. REV. STAT. ANN. § 8-202(D) (1974).
67. *Id.* § 1-215(4).
68. S. RUBIN, *supra* note 9, at 13.
69. At least one commentator, however, believes that persons above the age of 16 have attained a level of adult maturity. *Id.*
70. One possible way in which the maximum jurisdictional age limit could be lowered to 16 without encountering the risk of trying as adults persons over 16, who are still immature, would be to empower the adult court to remand youths between the ages of 16 and 18 to the juvenile court upon a proper showing that such person is not sufficiently developed as to be considered an adult. *See* UNIFORM JUVENILE COURT ACT § 1 (iii). This would seem to unduly burden the judicial process, however, since youths between the ages of 16-18 almost invariably would raise the defense of immaturity before the criminal court.

It also has been suggested that a lower jurisdictional age limit would reduce the number of transfers to the criminal court. S. RUBIN, *supra* note 9, at 14. While this is probably true, it is outweighed by the fact that many youths age 16-18 who would

purposes. The two points commonly employed are the age of the wrongdoer at the time the offense is committed and the age at a time after proceedings have been instituted.

Arizona follows the majority view that the status of an individual as either an adult or a juvenile should be determined by the age of the offender at a time after proceedings have been instituted.[71] Thus, a person who is 16 when he commits an offense nevertheless will be tried as an adult if he attains the age of 18 prior to the commencement of proceedings against him.[72] This result is based on the view that juvenile court acts were intended not to effect a substantive change in the nature of an offense, but to alter procedure only.[73] Since a child is no longer conclusively presumed to be incapable of committing criminal acts, an offense committed remains criminal in nature; however, the procedural changes implemented under the juvenile court acts preclude criminal prosecution. The importance of this distinction lies in the fact that persons over 18 who committed offenses prior to their 18th birthday probably would not be considered to be proper subjects for juvenile court treatment; and since the offense remains criminal in nature, prosecution in criminal court would be appropriate.

Under the Arizona rule, it is necessary to determine the stage of the proceedings at which an offender's age becomes fixed for jurisdictional purposes. Where proceedings are first commenced in criminal court, Arizona follows the rule that the filing of the information fixes the age of the wrongdoer for purposes of ascertaining jurisdiction.[74] Accordingly, an individual who is under age 18 at the time an information is filed is not properly within the jurisdiction of the criminal court and must be transferred to the juvenile court.[75] Where proceed-

not be transferred to the criminal court in the first instance would then be precluded from the juvenile process.

71. Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931), *overruled on other grounds*, State v. Hernandez, 83 Ariz. 279, 320 P.2d 467 (1958). *See also* Davis v. State, 259 Ala. 212, 66 So. 2d 714 (1953); Farr v. State, 199 Miss. 637, 25 So. 2d 186 (1946).

72. Where it is established that proceedings were unreasonably delayed by the state in order to defeat juvenile court jurisdiction, proceedings in the criminal court will be disallowed. *See* Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931), *overruled on other grounds*, State v. Hernandez, 83 Ariz. 279, 320 P.2d 467 (1958) (dictum); Miller v. Quatsoe, 348 F. Supp. 764 (E.D. Wis. 1972).

73. *See generally* cases cited note 71 *supra*.

74. Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931), *overruled on other grounds*, State v. Hernandez, 83 Ariz. 279, 320 P.2d 467 (1958). *See also* People v. Carlson, 360 Mich. 651, 104 N.W.2d 753 (1960); State v. Adams, 316 Mo. 157, 289 S.W. 948 (1929); State *ex rel.* Koopman v. County Court, 38 Wis. 2d 492, 157 N.W.2d 623 (1968). Other states hold that jurisdictional age is fixed at the time of trial in the criminal court. *See, e.g.*, Pruitt v. Guerry, 210 Va. 268, 170 S.E.2d 1 (1969); Sweet v. Porter, 75 Wash. 2d 869, 454 P.2d 219 (1969). Under this rule, the criminal court is competent to proceed as long as the individual exceeds the maximum jurisdictional age limit of the juvenile court by the time trial commences.

75. ARIZ. REV. STAT. ANN. § 8-222 (1974) provides for transfer of juveniles from the criminal court to the juvenile court in cases where the criminal court erroneously assumes jurisdiction over a child. Where a juvenile who is first brought before the crim-

ings are first commenced in juvenile court, however, the Arizona rule for ascertaining jurisdictional age appears to be different. Where the individual is over 18 at the time of the adjudicatory hearing in juvenile court, jurisdiction is lost, even though the individual was under 18 at the time the petition was filed in juvenile court.[76] Since age at a time after proceedings have been instituted governs jurisdictional age requirements in Arizona, proceedings may be reinstituted in criminal court.

A few jurisdictions have determined that jurisdictional age refers to the age of the individual at the time the alleged offense was committed.[77] This position is based either upon the construction of statutory provisions[78] or upon the belief that an individual committing a delinquent act at a young age should not be criminally punished merely because of the lapse of time.[79] Under this rule, persons who are beyond the maximum jurisdictional age limit when apprehended will still be within the jurisdiction of the juvenile court. In most cases, however, these individuals will be transfered to criminal court.[80] This results in a substantial waste of judicial resources and makes the Arizona rule for fixing jurisdictional age more desirable.[81]

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inal court pleads guilty without raising the defense of infancy, however, the right to a juvenile court proceeding is waived. *See* State v. Superior Court, 7 Ariz. App. 170, 436 P.2d 948 (1968). Furthermore, where proceedings are first instituted against a juvenile in the criminal court and no guilty plea is entered, and the child thereafter turns 18 without having notified the court of his infancy, a criminal court trial will not result in reversible error. *Id.* (dictum); *see* Commonwealth v. Harris, 223 Pa. Super. 11, 297 A.2d 154 (1972).

76. *See* Friedman v. Juvenile Court, 20 Ariz. App. 31, 509 P.2d 1068 (1973); *cf.* Caruso v. Superior Court, 100 Ariz. 167, 173, 412 P.2d 463, 469 (1965). Under such a rule, situations could occur where an individual would be shuffled between courts. For instance, if proceedings were first instituted in the criminal court and the offender was under 18 at the time the information was filed, the criminal court would not have jurisdiction. If, upon dismissal of the information, the juvenile court asserted its jurisdiction and the offender passed age 18 before the hearing was held, the juvenile court would be without jurisdiction. Proceedings could once again be instituted in the criminal court. A similar process would be involved when the juvenile, upon transfer from the criminal court to the juvenile court, is retransferred to the criminal court before he turned 18.

77. *E.g.*, Austin v. State, 12 Md. App. 629, 280 A.2d 17 (1971); State v. Jones, 220 Tenn. 477, 418 S.W.2d 769 (1966); State *ex rel.* Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

78. Florida defines a child as a person under 17, or any person who is charged with a violation of the law occurring prior to the time that person attains age 17. FLA. STAT. ANN. § 39.01(6) (Supp. 1973). Similar statutory provisions are found in other states. *E.g.*, IDAHO CODE § 16-1803(2) (Supp. 1973); N.Y. FAMILY CT. ACT ch. 6, § 714 (McKinney 1963). *See also* LA. REV. STAT. ANN. § 13:1569 (Supp. 1974); MICH. STAT. ANN. § 27.3178(598.3) (Supp. 1974); N.J. STATE ANN. § 2A:4-20 (1952).

79. *See* cases cited note 77 *supra*. Application of this rule could result in the extraordinary situation where an individual who is apprehended at age 30 for an offense committed when he was 16 is within the jurisdiction of the juvenile court. *See* Arrandell v. State, 60 Tex. Crim. 350, 131 S.W. 1096 (1910).

80. For the relationship of the age of an individual to the transfer process, see text accompanying notes 127-29 & 138-39 *infra*.

81. Where the offender is apprehended shortly after attaining age 18, application of the Arizona rule that age at the time proceedings are commenced determines jurisdictional age may be unfair. Thus, some statutes specify that the age of the offender at the time the offense is committed determines jurisdictional age for a certain period after

B. WAIVER OF JURISDICTION IN THE JUVENILE COURT

The broad jurisdictional powers granted to the Arizona juvenile court guarantees that care and treatment of juveniles shall not be undertaken by any other court or agency. Yet it was also necessary to maintain an alternative for special situations in which juvenile court jurisdiction would be inappropriate. In *State v. Shaw*,[82] it was observed that:

> The philosophy which inspired creation of the juvenile court, and statutes implementing it, is that the state recognizes that in the majority of cases involving antisocial behavior . . . on the part of the youthful offenders, there is both a responsibility and an opportunity for the state, through special treatment in . . . a noncriminal proceeding, to redirect and rehabilitate these young people. . . . However . . . it is also recognized that there are certain individuals . . . for whom this special treatment is futile.[83]

In order to avoid the expenditure of resources in cases where juvenile programs would be useless, the juvenile court in Arizona, and in most states, is empowered to waive its jurisdiction and transfer the action to the adult criminal court.[84] Such a transfer has been considered to be authorized by the Arizona constitutional provision that "[t]he judges [of the juvenile court] . . . in advance of any criminal prosecution of [children]. . . may, in their discretion, suspend criminal prosecution of such children."[85] The inconspicuous nature of this provision as an authorization for the juvenile court to waive its jurisdiction prompted argument that such power had not, in fact, been granted.[86] In *State v. Jiminez*,[87] however, the Supreme Court of Arizona construed the constitutional provision as providing that while the

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the maximum jurisdictional age limit is exceeded. After this point, the rule changes to provide that the age of the offender at the time proceedings are instituted determines age for jurisdictional purposes. For example, New Hampshire provides that juvenile court jurisdiction shall extend to delinquent children under 17 and to older wrongdoers if the petition is filed after the 17th birthday but before the 18th birthday for acts committed before the violator turned 17. N.H. REV. STAT. ANN. § 169:1 (Supp. 1972). For similar provisions, see MASS. ANN. LAWS ch. 119, § 72 (Supp. 1972); TEX. FAM. CODE ANN. § 51.02(1)(B) (1973); UNIFORM JUVENILE COURT ACT § 2(ii).

82. 93 Ariz. 40, 378 P.2d 487 (1963).

83. *Id.* at 46, 378 P.2d at 491.

84. The terms "transfer" and "remand" will both be used to describe the power of the court to waive its jurisdiction. Arizona and other states also provide for transfer from criminal court to the juvenile court in certain cases. Thus, it is provided: "If during the pendency of a criminal charge in any court . . . it shall be ascertained that the defendant is a child, that court shall forthwith transfer the case to the juvenile court . . . . The juvenile court shall then proceed as if a petition alleging delinquency had been filed with the juvenile court . . . on the effective date of such transfer." ARIZ. REV. STAT. ANN. § 8-222 (1974). For similar statutory provisions, see CONN. GEN. STAT. ANN. § 17-65 (1958); MINN. STAT. ANN. § 260.115(1) (1971); N.J. STAT. ANN. § 2A:4-20 (1952).

85. ARIZ. CONST. art. 6, § 15.

86. State v. Jiminez, 109 Ariz. 305, 306, 509 P.2d 198, 199 (1973).

87. 109 Ariz. 305, 509 P.2d 198 (1973).

child originally is subject to the jurisdiction of the juvenile court, "[t]he judges of the juvenile court are empowered in their discretion to suspend criminal prosecution of [the child]. . . . Conversely, the judges may refuse to suspend criminal prosecution of such child, in which event he will be prosecuted in the criminal court as an adult."[88] Thus, it is now established that article 6, section 15 of the Arizona constitution authorizes the transfer of cases from the juvenile court to the adult criminal court.[89]

In order to facilitate analysis of the juvenile court transfer process, a survey of three Arizona counties—Cochise, Maricopa and Pima—was conducted. The survey consisted of personal interviews with court officials, and of a questionnaire which was submitted to three juvenile court judges, three members of the county attorney's office, two public defenders and 19 probation officers. Additionally, individual files of transferred juveniles from Maricopa and Pima counties were studied.

1. *Requirements for Waiver*

While the Arizona constitution empowers the juvenile court to waive its jurisdiction, it provides no standards for determining the circumstances justifying the exercise of such power. The decision whether to transfer is left solely to the discretion of the juvenile court judge. Furthermore, the constitution is silent as to the procedural aspects of the transfer process. But in order to protect the juvenile, it is necessary to establish criteria which will insure meaningful review of waiver orders and to establish regular procedures for the conduct of transfer proceedings. A waiver of jurisdiction means that the juvenile is no longer entitled to the special protection and rehabilitative efforts offered by the juvenile court. What first began as a benevolent and ostensibly nonadversary proceeding by the state as parens patriae ends in an abandonment of the juvenile and his ultimate exposure to the full force of the adult criminal justice system. Consequently, while the number of transfers is relatively small,[90] the process is a very imporant part of the juvenile justice system.

88. *Id.* at 306, 509 P.2d at 199.

89. The Arizona constitutional provision as interpreted in *Jiminez* is unique in that it implies that a juvenile wrongdoer brought before the juvenile court is originally amenable to criminal prosecution. This reverses the usual belief that juvenile proceedings are, from their inception, civil in nature.

90. In Maricopa County during 1973, the court held a total of 9,809 hearings on juvenile matters. Of those, only 90 were transfer hearings and of these 90 hearings, 47 resulted in a transfer to adult court. Thus, actual transfers accounted for only approximately .5 percent of all court proceedings. Annual statistics were not available for Pima and Cochise counties. Respondents to the questionnaire administered, however, esti-

In *Kent v. United States*,[91] the Supreme Court directed that before transfer to criminal court can occur, a juvenile must be afforded a hearing with representation by counsel and access to any records compiled in his case. Additionally, the Court stated that if the hearing resulted in a decision to transfer, a full written statement of the judge's reasons for his decision must be provided to the juvenile to facilitate review.[92] While the basis for the *Kent* decision is subject to debate,[93] the Court termed the transfer hearing a "critically important" stage of juvenile court proceedings.[94]

In an apparent response to the *Kent* decision, the Supreme Court of Arizona promulgated rules of procedure for the transfer of juveniles to criminal court.[95] The rules establish not only procedural requirements of the transfer process, but also substantive requirements which must be satisfied before a juvenile can be transferred for prosecution in criminal court. The procedural requirements implemented by the court rules basically mirror those enumerated in the *Kent* decision. The probation officer or county attorney is required to notify all interested parties and counsel if a transfer to criminal court appears probable.[96] This preliminary finding of probability is based on the age and social history of the child, as well as on the nature of the alleged offense.[97] Such a finding, however, is required for notice purposes only. In order for a transfer hearing to be scheduled, it is necessary that a motion be submitted to the juvenile court. While the rules of proce-

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mated that in Pima and Cochise counties .1 percent of all juveniles cases were transferred.

The lower percentage of transfers in Pima County has been attributed to the fact that actions against older juveniles are often delayed in Pima County until the maximum jurisdictional age limit has been passed. This practice occurs less frequently in Maricopa County. Interview with Palmer Schumacher, Deputy County Attorney, Maricopa County, in Phoenix, March 1, 1974.

91. 383 U.S. 541 (1966).

92. *Id.* at 549.

93. The *Kent* case involved the transfer of a 16-year-old child pursuant to the provisions of the Washington, D.C. juvenile code. Some authorities maintain that the decision resulted only from an interpretation of the statutory provisions. *See, e.g.*, People v. Handley, 51 Ill. 2d 229, 282 N.E.2d 131 (1972); Lujan v. District Court, — Mont. —, 505 P.2d 896 (1973). Most authorities, however, believe that *Kent* was mandated by the due process clause of the United States Constitution. *See, e.g.*, Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); State v. McArdle, — W. Va. —, 194 S.E.2d 174 (1973). Arizona has determined that the *Kent* decision was constitutionally mandated and thus applies to transfer proceedings in Arizona. State v. Yard, 109 Ariz. 198, 507 P.2d 123 (1973). For further discussion of the *Kent* decision see, Croxton, *The Kent Case and Its Consequences*, 7 J. FAMILY L. 1 (1967); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583 (1968).

94. 383 U.S. at 556.

95. *See* ARIZ. R.P. JUV. CT. 12. The requirements for transfer in most states are established by statute rather than by court rules. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-60(a) (Supp. 1973); FLA. STAT. ANN. § 30.02(6)(a) (Supp. 1973); MINN. STAT. ANN. § 260.125 (1971).

96. ARIZ. R.P. JUV. CT. 12.

97. *Id.* For the relationship of these factors to the transfer decision, see text accompanying notes 127-139 *infra*.

dure do not indicate the proper party to initiate such proceedings, this function generally is performed in Pima, Maricopa and Cochise counties by the county attorney, usually on advice of a probation officer.[98] Once a transfer hearing has been scheduled, the probation officer is directed to conduct an investigation and to compile a report concerning the child's social background, prior delinquency history, and any other matters which may be relevant to the transfer decision.[99] By practice, in all three counties studied, the probation officer also includes a recommendation to the court, based upon his investigation, as to whether jurisdiction should be waived.[100] In conformity with the requirements of *Kent*, the Arizona juvenile court rules direct that the probation officer's report be made available to all parties and counsel prior to the transfer hearing.[101] Thus, the *Juvenile Rules* and the standard practice observed in Pima, Maricopa and Cochise counties, ensure that the juvenile is afforded the full range of prehearing procedural rights required by the *Kent* decision.

Unlike the procedural aspects of the transfer process, however, confusion and controversy are encountered in the area of the substantive requirements which must be met to support a juvenile court waiver order. While *Kent* was concerned primarily with the procedural requirements of the transfer process, an appendix to the opinion enumerated certain criteria which a judge should consider in determining whether jurisdiction should be waived.[102] Thus, the Court indicated that it would be advisable to provide substantive requirements to limit the discretion of the judge.

98. Two states provide for mandatory waiver of juvenile court jurisdiction when requested by the juvenile or his parents on advice of counsel. FLA. STAT. ANN. § 39.02 (5)(b)(2) (Supp. 1974-75); ILL. ANN. STAT. ch. 37, § 702-7(5) (Smith-Hurd Supp. 1974).

The juvenile may request to be transferred in order to gain a jury trial, to secure a lesser penalty, such as a fine, or to avoid the possibility of adjudication in juvenile court for a status offense if there is not enough evidence to establish delinquency. IJA-ABA JUV. JUSTICE STANDARDS PROJECT pt. 3, *Court Structure and Procedures* 11 (Proposed Tent. Draft); Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 U. KAN. L. REV. 55, 66 (1969).

All of the respondents to the survey indicated that they did not favor mandatory transfer on motion of the juvenile. The consensus was that the jurisdiction of the juvenile court should not be defeated solely to afford the juvenile a strategically favorable position. It also was noted that the state maintains an interest in protecting a child from a criminal conviction even if it is invited by the juvenile.

99. ARIZ. R.P. JUV. CT. 12.

100. Interview with William Newman, Probation Officer, Maricopa County Juvenile Court Center, in Phoenix, Mar. 1, 1974; interview with Donald Orr, Chief Probation Officer, Cochise County Juvenile Court, in Bisbee, Ariz., Mar. 22, 1974; interview with Alex Valdez, Probation Officer, Pima County Juvenile Court Center, in Tucson, Feb. 19, 1974. It is difficult to determine the weight which the judge attaches to the probation officers' recommendation. A slight majority of the respondents to the survey indicated that such a recommendation was important. A sizable minority (48 percent), however, stated that the probation officer's recommendation had little influence on the judge's ruling.

101. ARIZ. R.P. JUV. CT. 12.

102. 383 U.S. at 565-68.

In response to this need for restricting the unlimited discretion of the judge, the *Juvenile Rules* provide four requirements which must be met before the jurisdiction of the juvenile court can be waived and the action transferred to the criminal court.[103]

a. *Probable Cause.* The first determination which a juvenile judge presiding at a transfer hearing must make is whether there is probable cause to believe that an offense was committed and that the juvenile was involved in its commission.[104] At this stage, a transfer hearing is similar to a preliminary hearing in the criminal court.[105] Oftentimes, the finding of probable cause is waived by the juvenile,[106] usually on condition that he be charged with a lesser offense or that the county attorney refrain from arguing in favor of transfer.[107] Thus, a process similar to that of plea bargaining may take place at this stage of the transfer proceedings.[108] Where no waiver is made, however, probable cause must be established by competent evidence. The probation officer, therefore, is precluded from offering any statements concerning the child's guilt or innocence in his report to the court.[109]

The juvenile court statutes of most other states do not require a finding of probable cause before a transfer to the criminal court can be made, and courts generally have held that the absence of this requirement is not a violation of due process.[110] While a finding of prob-

103. ARIZ. R.P. JUV. CT. 14. It does not appear that the standards enumerated in the *Kent* decision were provided as a matter of constitutional principle. One court, however, has determined that an authorization for transfer which lacks statutory guidelines constitutes an unconstitutional delegation of legislative powers to the judiciary. People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972). The argument propounded was that the power to establish exceptions to the jurisdictional base of the court lies with the legislature and that if such power is to be delegated, sufficient standards must be provided. The court observed that "[i]f the legislature is to treat some persons under the age of 17 differently from the entire class of such persons, excluding them from the beneficient processes and purpose of our juvenile courts, the legislature must establish suitable and ascertainable standards whereby such persons are to be deemed adults . . . ." *Id.* at 71, 199 N.W.2d at 222. The *Fields* decision is particularly interesting in that, as in Arizona, rules of procedure promulgated by the state supreme court established standards for the waiver of jurisdiction. The court stated that in order to validate a delegation of powers to the judiciary to create exceptions to its jurisdiction, the standards would have to be created by the legislature and not the court. Should this argument prove successful in Arizona, it may be necessary for the legislature to enact standards.

104. ARIZ. R.P. JUV. CT. 14(a).

105. *In re* Anonymous Juvenile Court No. 6358-4, 14 Ariz. App. 466, 470, 484 P.2d 235, 239 (1971).

106. Such waiver is authorized under the *Juvenile Rules*, ARIZ. R.P. JUV. CT. 14(a).

107. Interview with Palmer Schumacher, *supra* note 90; interview with Dushan Vlhaovich, prosecuting attorney, Cochise County, in Bisbee, Ariz., Mar. 27, 1974; interview with Karen Zizmor, Ass't Public Defender, Pima County Juvenile Court Center, in Tucson, Feb. 19, 1974.

108. *In re* Anonymous Juvenile Court No. 6358-4, 14 Ariz. App. 466, 470, 484 P.2d 235, 239 (1971).

109. Interview with William Newman, *supra* note 100; interview with Donald Orr, *supra* note 100; interview with Alex Valdez, *supra* note 100.

110. *In re* Murphy, 15 Md. App. 434, 291 A.2d 867 (1972) (sole issue at transfer hearing is fitness of juvenile to be tried within juvenile court system; this can be decided without finding of probable cause); Stephenson v. State, 204 Kan. 80, 460 P.2d 442 (1969).

able cause may not be constitutionally mandated, it nevertheless seems advisable, since a child should not be subjected to the rigors of the criminal justice system without some evidence of guilt.[111]

b. *Amenability to Rehabilitation.* The second requirement for transfer under the *Juvenile Rules* is a finding that "the child is not amenable to treatment or rehabilitation as a delinquent child" within the juvenile court.[112] The exact basis for this standard is difficult to discern,[113] although it obviously reflects the belief that if the juvenile court system cannot perform its primary function, rehabilitation, it should not be used. Yet, even though a child cannot be rehabilitated within the juvenile court system, it may be desirable to retain jurisdiction in order to avoid placing him in contact with hardened adult criminals. More importantly, however, since the juvenile court is designed to protect society's interest in rehabilitating its children, retention of jurisdiction should remain the rule, not the exception.[114] Accordingly, in order to prevent an easy defeat of juvenile court jurisdiction, the state should have the burden under this second requirement to demonstrate not only that the child is beyond rehabilitation, but also that a transfer would be in the best interests of the child. In order to defeat a transfer, the child should not be required to show that he would benefit if jurisdiction was retained. This can be accomplished by requiring an additional finding that the best prospects for treatment of the child lie with the adult criminal justice system.[115] Nevertheless, inquiry into the nature of the treatment facilities available in the adult

111. Despite this, 36 percent of the survey group favored abolition of Arizona's required finding of probable cause. One commentator has suggested that a required finding of probable cause serves society's interests rather than the juvenile's. Thus, such a finding enables the court to render an adjudication of incorrigibility or dependency if it appears that there is not enough evidence for a conviction in the criminal court. *See* Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS U.L.J. 424, 442 n.83 (1968).

112. ARIZ. R.P. JUV. CT. 14(b)(1). For similar provisions, see *e.g.*, HAWAII REV. STAT. § 571-22 (Supp. 1973); ILL. ANN. STAT. ch. 37, § 702-7(3)(a)(5) (Smith-Hurd Supp. 1974); MINN. STAT. ANN. § 260.125(2)(d) (1971). The elements under this and the remaining two transfer requirements must be established to a degree of probable cause and reasonable grounds of belief. ARIZ. R.P. JUV. CT. 14(b); *cf.* H. v. Superior Court, 3 Cal. App. 3d 709, 478 P.2d 32, 91 Cal. Rptr. 600 (1970); State v. Williams, 75 Wash. 2d 604, 606, 453 P.2d 418, 420 (1969) (must have "substantial" evidence to support transfer order).

113. Eighteen percent of those surveyed agreed with the statement that a juvenile not amenable to treatment should be transferred since the only remaining reason for keeping him within the juvenile system is to punish him or to isolate him from society and these functions are best served by the adult penal system. Ten percent agreed with the statement that juveniles are accorded special treatment because they have the capacity for rehabilitation, and when it appears that rehabilitation cannot be achieved, special treatment should cease. Another 10 percent felt that juveniles not amenable to treatment should be transferred in order to isolate them from youths who could be treated. Sixty-two percent expressed no opinion as to the reasons for transferring a juvenile who is not amenable to treatment.

114. *See* Atkins v. State, — Ind. —, 290 N.E.2d 441 (1972).

115. *See* CONN. GEN. STAT. ANN. § 17-60(a)(4) (1958).

criminal system is not required under the rules, and is not considered in practice.[116]

Many cases arise where a child is considered to be amenable to treatment, but the juvenile justice system is not equipped to help him.[117] A transfer requirement that necessitates a finding that the child is beyond rehabilitation would, if strictly construed, preclude a waiver of jurisdiction in this case, even though superior facilities exist within the criminal system. To avoid this possibility, the Arizona requirement also provides that the child's rehabilitative prospects are to be considered with reference to the treatment facilities available to the juvenile court.[118] This requirement, however, has been criticized as allowing a child to be deemed not amenable to treatment solely because the rehabilitative techniques and treatment facilities of the juvenile court are antiquated or inadequate.[119] In such cases, it may be unfair to subject a juvenile to a criminal trial merely because funds are unavailable to improve and expand facilities. Again, this unfairness could be avoided by requiring an additional finding that the best prospects for a juvenile's treatment lie with the criminal justice system.

The limitation under this second requirement of the *Juvenile Rules*, that a child's prospects for rehabilitation are to be considered in light of the facilities currently available to the juvenile court, coupled with the fact that an evaluation of the treatment methods of the criminal court is not required, allows many juveniles to be deemed unamenable to treatment. If all other requirements are met, then, transfer to criminal court would be permitted. Standard practice in Pima, Maricopa and Cochise counties, however, limits the number of cases in which transfer, although authorized under the *Juvenile Rules*, actually occurs.

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116. One judge interviewed noted that, at one time,he would evaluate the facilities of the adult criminal system to determine if the juvenile could be helped there; if not, he would retain jurisdiction. Now, however, he first looks to see if the child could be helped within the juvenile court system; if not, he will, if the other requirements are met, transfer the case to criminal court. Interview with the Hon. Gerald Strick, *supra* note 63.

117. Interview with Alex Valdez, *supra* note 100.

118. ARIZ. R.P. JUV. CT. 14(b)(1). The court observed in State *ex rel.* Juvenile Dep't v. Johnson, 11 Ore. App. 313, 501 P.2d 1011 (1972):

> Rehabilitation is the end result of a process which requires among many things trained personnel and physical resources designed and operated to that end.
>
> . . . .
>
> [T]he court [has] the right and indeed the duty to give careful consideration to the nature, type and program of juvenile facilities.

Id. at 317-18, 501 P.2d at 1013-014.

119. *See* Advisory Council of Judges: National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELIN. 3, 6 (1962); Sargent & Gordon, *Waiver of Jurisdiction—An Evaluation of the Process in the Juvenile Court*, 9 CRIME & DELIN. 121, 124 (1963); Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U.L.J. 604, 610 (1972). All of the respondents to the survey indicated that while facilities were overcrowded in their jurisdiction, this would not directly affect the outcome of a transfer hearing.

All of the respondents to the survey expressed a firm belief that transfer is a necessary evil, to be utilized only when all possible alternatives have proved ineffective. Thus, even if the juvenile court is not equipped to handle a particular case, transfer to criminal court will be avoided if workable programs outside of the juvenile court system exist. Drug abuse is one such area where noncourt services often are utilized.[120] While the juvenile justice system generally is not equipped to rehabilitate drug addicts, the existence of community drug abuse programs in which the juvenile can be placed often will prevent a waiver of jurisdiction. Further, where available resources appear inadequate, placement in out-of-state facilities is usually attempted before a transfer is sought.[121] At this point, counsel for the juvenile can have a substantial impact on the outcome of a transfer hearing by convincing the court that workable alternatives to a jurisdictional waiver exist. In order to do this, it is necessary for counsel to be familiar with various state and county programs as well as out-of-state placement services.

The major source of disagreement under this requirement among court personnel concerns the criteria to be used in determining whether a juvenile is amenable to treatment. Generally, four criteria are used by the judges in making their determination. First, 63 percent of the group surveyed indicated that the level of maturity and sophistication of the juvenile is an important but not decisive factor in determining whether a child is amenable to treatment within the juvenile court system.[122] Admittedly, it is probable that an individual under 18 who has attained a level of adult maturity would not respond to rehabilitative methods designed for less mature minds. The problem, however, lies in providing a method for determining the stage of development a given juvenile has achieved. In practice, the life style of the child can be decisive;[123] the fact that a juvenile is self supporting, living away from home, serving in the armed forces,[124] associating with adults as peers,[125] or displaying other behavior which approaches that of an adult lifestyle has been determinative. While these factors certainly are relevant to the issue of maturity, they should not be conclusive. Admit-

120. Interview with Sally Plager, *supra* note 49.

121. Pima County makes extensive use of out-of-state placement. Interview with Alex Valdez, *supra* note 100. Maricopa County, for various reasons, rarely places juveniles out of state. Interview with William Newman, *supra* note 100. This factor was offered as another reason for the higher percentage of transfers in Maricopa County. *See* material cited note 90 *supra.*

122. Thirty-seven percent indicated that the juvenile's level of maturity was either unimportant or not considered at all at the transfer hearing.

123. *See In re* Pima County Juvenile Action No. 35834-1, 20 Ariz. App. 10, 509 P.2d 1047 (1973).

124. *Id.*

125. *Id.*

tedly, no infallible formula for measuring maturity exists; however, testimony of psychologists or psychiatrists certainly would be a more reliable indicator of maturity than evidence of the juvenile's lifestyle.[126]

The second criterion used in determining rehabilitative capacity is the child's age. While this criterion also relates to the maturity of the child, it is important to the issue of amenability to treatment for another reason. The juvenile court can retain jurisdiction over a child only until his 21st birthday.[127] Where the predicted time for rehabilitation is long, juvenile court jurisdiction may have to be surrendered before treatment is completed. Thus, an older juvenile who ultimately might be rehabilitated may be deemed not to be amenable to treatment if a possibility exists that treatment would have to extend beyond his 21st birthday. Again, counsel must be familiar with rehabilitative methods when the duration of the treatment period is in issue. Respondents to the survey unanimously agreed that the age of the juvenile is critically important to the transfer decision.[128] Nevertheless, since probation officers or other experts only can speculate as to the time period necessary for rehabilitation, the court should be cautious in concluding that an older juvenile cannot be rehabilitated before attaining age 21.[129]

A third criterion considered is the juvenile's past history of delinquency. Again, those surveyed unanimously stated that this factor is of crucial importance in determining whether a child can be treated successfully within the juvenile system.[130] An extensive history of delinquency and participation in court programs indicates, in most cases, that rehabilitative efforts have failed. In some cases, however, such past contacts with the court may indicate only that more extensive court services are necessary. The court, then, also must inquire into the nature and quality of the treatment employed in the past. The judge,

126. *Id.*; *see* Mukulovsky v. State, 54 Wis. 2d 699, 196 N.W.2d 748 (1972). Although such expert testimony is not required, 81 percent of the survey group stated that a judge should not render a transfer decision without first considering reports of psychologists and psychiatrists.

127. ARIZ. REV. STAT. ANN. § 8-246(A) (1974).

128. Indeed, many respondents stated that they did not know of any cases where a juvenile under the age of 16 had been transferred. An examination of the individual files of transferred juveniles from Pima and Maricopa counties confirmed that no juveniles under the age of 16 were transferred during 1972 or 1973. Conversely, youths over 18 are rarely treated in juvenile programs in Arizona. *See* section VI, "Probation," *infra*, at 372.

129. In *In re* Pima County Juvenile Action No. 35834-1, 20 Ariz. App. 10, 509 P.2d 1047 (1973), the court held that in determining whether to waive jurisdiction, it is proper to consider the length of time the juvenile court has to rehabilitate a child. *Id.* at 13-14, 509 P.2d at 1050-051. Although it may be valid as one of the factors to be considered, 95 percent of the respondents stated that the age of the juvenile should not, by itself, be a sufficient reason to transfer a juvenile.

130. Thirty-six percent, in fact, stated that a juvenile should never be transferred if he has no past delinquency record.

in the sound exercise of discretion, also must determine how many and what types of past delinquent acts are necessary to support a finding that a child is not amenable to treatment.

A final criterion, related to past delinquent conduct, concerns the juvenile's relationship with other authorities, most notably, parents and school officials. Eighty percent of the respondents felt that the child's relationships with these authorities, as indicative of general antisocial behavior, are important to the youth's rehabilitative prospects. Yet, this belief seems questionable. A child's relationships with parents and school officials do not necessarily bear a significant relationship to his responsiveness to treatment. In fact, disrespect for authority would appear to be the type of juvenile problem which the court is particularly suited to handle. To apply this behavior against the child as a reason for withholding court services is antithetical to the philosophy of the juvenile court. Therefore, the criterion of the juvenile's relationships with authorities should receive only minimal, if any, consideration by the court.

Thus, a juvenile who is relatively sophisticated and mature, above the age of 16, has an extensive history of delinquent conduct and contacts with the court, and maintains poor relationships with persons of authority is likely to be considered beyond the rehabilitative resources of the juvenile justice system. Of course, not all of these factors will be present in every case. The judge, therefore, must utilize discretion in determining whether sufficient factors are present to reasonably conclude that the child is not amenable to treatment. In this regard, responses to the survey conducted indicated that the most important factors are the child's age and his past history of delinquency.[131]

c. *Safety of the Public.* The third requirement for transfer provides for a finding that the "safety or interest of the public requires that the child be transferred for criminal prosecution."[132] The appropriateness of such considerations has been questioned,[133] generally on the belief that juvenile court jurisdiction, being granted in large measure because children possess the capacity to be rehabilitated, should be defeated only if rehabilitation cannot be achieved. This position, however, assumes that society, in establishing separate courts to administer juvenile affairs, intended to leave certain other interests unprotected. On the contrary, provisions in many juvenile codes for concur-

131. In *In re* Pima County Juvenile Action No. 35834-1, 20 Ariz. App. 10, 509 P.2d 1047 (1973), however, the Arizona court of appeals upheld a transfer even though the juvenile had no history of delinquency.

132. ARIZ. R.P. JUV. CT. 14(b)(3).

133. *See* Mountford & Bereson, *supra* note 98, at 62; Sargent & Gordon, *supra* note 119, at 124; Comment, *supra* note 199, at 609.

rent or exclusive jurisdiction in adult court over juveniles accused of certain serious crimes[134] indicates that society was not to be left unprotected against dangerous juveniles. Accordingly, consideration of the public interest during the transfer proceeding is appropriate.

As in the area of amenability to treatment, the major problem encountered under this requirement for transfer is the establishment of proper criteria for determining when the protection of society or the public interest in general demands a criminal court trial. Responses to the survey indicate that two criteria serve as the primary basis for a determination that a juvenile is dangerous to the public.

The first criterion is the nature of the alleged offense. Consideration of this factor proceeds from the belief that a juvenile who has committed a serious offense is likely to continue committing such offenses and therefore must be securely incarcerated.[135] The group surveyed unanimously stated that the seriousness of the alleged offense is a crucial factor under this standard.[136] Generally, those offenses deemed serious in nature involved crimes against persons, such as murder, rape, and aggravated assault. Respondents also noted that an offense is considered serious if it is committed in an aggressive, violent, premeditated, or willful manner.[137]

The second criterion under this requirement is, again, the age of the juvenile. A younger juvenile who can be committed to a juvenile maximum security facility may be retained within the juvenile system. If a child is nearing the age of majority, however, and it is felt that incarceration must extend beyond the age of 21 in order to adequately protect society, a transfer may follow.[138] In this regard, 60 percent of the survey group would favor prohibition of transfer if facilities existed for the incarceration of older "problem youths" and such restraint could extend beyond the age of 21.[139] Since in many instances age provides only a speculative basis for determining a future threat to society, the court should be cautious in applying this criterion.

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134. See note 16 *supra*.

135. For studies indicating that this belief is not empirically sound, see section II, "Detention," *supra*, at 272.

136. The primary argument against consideration of the offense alleged is that mitigating circumstances may have been present. Comment, *supra* note 119, at 611. Since a transfer hearing does not result in an adjudication of guilt, these mitigating circumstances may not be revealed until after trial in the criminal court.

137. The individual juvenile files viewed in Maricopa and Pima counties revealed that juveniles who were not accused of committing violent crimes against persons were, nevertheless, often transferred. Burglary and sale of narcotics were the nonviolent crimes most frequently alleged against transferred juveniles.

138. Even if a juvenile need not be incarcerated for an extended period, the repondents indicated that a transfer may result if it appears that he will be disruptive in a juvenile security facility.

139. If incarceration could extend beyond age 21, due process may require that the commitment of juveniles be for a definite period of time rather than an indefinite period as is now the practice. Interview with the Hon. Gerald Strick, *supra* note 63.

A third consideration which has received discussion by some commentators,[140] is the existence of a measurable public opinion that the juvenile should be tried as an adult. While the Arizona transfer requirement necessitating a finding that the public interest demands a transfer arguably may embrace the situation where public pressure to transfer is asserted, this factor should not affect the outcome of a transfer hearing. To allow public opinion to be a factor in determining if a child should be stripped of the protection of the juvenile court would undermine the autonomy of the juvenile system and obstruct the performance of its essential functions. The judge, not the public, must determine, from all the circumstances surrounding a case whether the public interest necessitates a criminal trial. In so doing, he should not be influenced by public sentiment, and transfer a juvenile in order to protect the system from charges of "criminal coddling."[141] Additionally, to allow public opinion to influence the outcome of a transfer hearing may violate the child's due process right to a hearing before an impartial tribunal. The group surveyed maintained that public pressure to waive jurisdiction is of negligible or no importance in affecting the transfer decision.

d. *The Mentally Incompetent.* The final requirement provided by the *Juvenile Rules* requires a finding that the juvenile is not committable to an institution for mentally deficient, mentally defective, or mentally ill persons.[142] Requirements precluding the transfer of mentally ill children have met with favor since the *Kent* decision. In holding that a child in need of psychiatric treatment could not be transferred to criminal court even in the absence of a statutory prohibition to that effect, Judge Bazelon, in the second *Kent* decision,[143] observed that:

> [T]he juvenile who is very sick seems to receive less care from the juvenile court. Since it may not be possible to guarantee that a very sick adolescent will recover by the time he is twenty-one, he will invariably be subjected to all the strains and stresses of a criminal prosecution, with only the hope that the Government will not succeed in its efforts and that he may ultimately receive treatment pursuant to [the Juvenile Code].[144]

140. Sargent & Gordon, *supra* note 119, at 125; Comment, *supra* note 111, at 437. *See* TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 1, App. B, Table 5, at 78; Comment, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. CAL. L. REV. 158, 164 (1967).

141. *See* Sargent & Gordon, *supra* note 119, at 125-26; Comment, *supra* note 111, at 437.

142. ARIZ. R.P. JUV. CT. 14(b)(2). For similar standards see HAWAII REV. STAT. § 571-22 (Supp. 1973); IDAHO CODE § 16-1806(b) (Supp. 1973); MD. ANN. CODE art. 26, § 70-16(b)(2) (Supp. 1974); UNIFORM JUVENILE COURT ACT § 34(a)(4)(iii).

143. Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968).

144. *Id.* at 412. Conversely, Judge Burger (now Chief Justice of the Supreme Court) felt that the possibility of a juvenile having mental disorder should not disable a judge

Where competent evidence is adduced that a juvenile is committable to a mental institution, subjugation of the child to the adult criminal system does not serve the interests of either society or the juvenile. Accordingly, a required finding of mental competence is a necessary requirement for transfer.

A possible source of future controversy in this area concerns whether the civil or criminal standard of commitment applies under this requirement. Arizona's civil standard provides for commitment to a mental institution where, because of a psychological disorder, a person is likely to be dangerous to himself or to the person or property of others and is in need of supervision.[145] The criminal standard ignores the propensities of the defendant, requiring commitment only when he is unable to understand the nature of the proceedings or to assist in his own defense.[146] When the court in the second *Kent* decision[147] addressed this issue, it concluded that the civil nature of juvenile court proceedings and the public policy of avoiding criminal prosecution of juveniles when society could otherwise be protected demanded that a civil standard of commitment apply in determining if a child is in need of institutionalization.[148] This reasoning seems sound and should be followed in Arizona.

The allocation of cases between the juvenile and adult courts should be made on a basis broad enough to take into account both the functions to be served by the two courts and any individual interests which may be affected. Arizona's requirements for transfer[149] and the

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from transferring a child, since the criminal court is still competent to protect the juvenile. *Id.* (Burger, J., dissenting).

145. ARIZ. REV. STAT. ANN. § 36-501(6) (1974). A finding of dangerousness is required not only under the civil standard of commitment, but also under the third transfer requirement when determining if the safety of the public demands a criminal prosecution. See text accompanying notes 132-141 *supra*. Accordingly, if a juvenile is deemed dangerous to the public, the third transfer requirement would be satisfied and, if all other requirements were met, jurisdiction could be waived. This same finding of dangerousness, however, would mean that the fourth transfer requirement, relating to mental competency, could not be satisfied and the court would be directed to retain jurisdiction over the child.

146. ARIZ. R. CRIM. P. 11.1.

147. Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968).

148. *Id.* at 412. Judge Burger dissented, stating that the civil standard of commitment was not designed to apply to individuals, even juveniles, who were accused of violating the criminal law. *Id.* at 412 (Burger, J., dissenting).

149. Many states require the satisfaction of certain factors in addition to those required in Arizona. Thus, minimum age limits for transfer have been established. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 702-7 (Smith-Hurd 1972) (over 13); MINN. STAT. ANN. § 260.125(2) (1971) (over 14); N.J. REV. STAT. § 2A:4-15 (1951) (over 16). The members of the group surveyed all were opposed to the enactment of a similar minimum age limit in Arizona since to do so may preclude a transfer in a case where it is needed.

Many states have established both a minimum age limit and a qualification as to the nature of the offense for which transfer is authorized. *See, e.g.*, HAWAII REV. STAT. § 571-22 (Supp. 1973); IDAHO CODE § 16-1806(a) (Supp. 1973); NEV. REV. STAT. § 62.080 (1957) (child must be over 16 and charged with an offense which if committed by an adult would be a felony). A few states specify a minimum age limit which is waived if the offense alleged against the juvenile is of a certain nature. KY. REV. STAT.

criteria used thereunder[150] allow for this wide interplay. The requirements provide for consideration of the safety of the public, a function which is best handled, in most cases, by commitment to penal institutions. On the other hand, since society also maintains an interest in rehabilitating its children, the juvenile must first be deemed not amenable to treatment and not committable to a mental institution before jurisdiction can be waived. Finally, the juvenile's personal interest in remaining within the juvenile system is considered through the standard practice in the three counties studied of exhausting all alternatives before transfer is sought.

2. *Consequences of the Waiver Hearing*

In addition to the obvious possibility of a waiver of jurisdiction,[151] the conduct of a transfer hearing affects the course of subsequent judicial proceedings, whether they be held in the juvenile or criminal court, in two major ways. First, should a transfer ensue, any extrajudicial statements made by a child to police or court officers while under the jurisdiction of the juvenile court are not admissible in criminal court unless made voluntarily and with full knowledge that any such statements could be used in an adult criminal proceeding.[152] Stringent standards for the admissibility of statements in criminal court are necessary since a youth, not suspecting that criminal proceedings may be instituted, may cooperate fully with juvenile court officials in the belief

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ANN. § 208.170 (1970) (child must be over 16 to be transferred unless the offense alleged is murder or rape); MD. ANN. CODE art. 26, § 70-16(a) (Supp. 1973) (child must be over 14 unless the crime alleged carries a penalty of death or life imprisonment).

150. Other criteria which the survey group indicated were not considered in determining whether jurisdiction should be waived were: (1) the desirability of disposing of the matter in a single proceeding where the juvenile associated with adults in committing the alleged offense; (2) the nature of the case indicates that a prolonged trial may be necessary; and, (3) the juvenile's family unit is unstable, precluding future parental supervision. While the first two of these factors were sanctioned in the *Kent* decision, 383 U.S. 541, 566 (1966), they relate to expediency only and as such should not receive consideration.

151. If jurisdiction is waived, the court, in conformity with the *Kent* decision, must publish a written statement of the reasons for its decision in order to facilitate review. ARIZ. R.P. JUV. CT. 14(c). The reasons enumerated must be specific. In State v. Yard, 109 Ariz. 198, 507 P.2d 123 (1973), the Supreme Court of Arizona invalidated a transfer where the only reason offered in support of the transfer order was that the best interests of the juvenile and of the state would be served by a criminal prosecution. *Id.* at 202, 507 P.2d at 127.

In Arizona, a transfer order is a final order of the court from which an appeal can be taken. Graham v. Ridge, 107 Ariz. 387, 489 P.2d 24 (1971). *Contra,* Commonwealth v. Owens, 435 Pa. 96, 254 A.2d 639 (1969); *In re* T.J.H. 479 S.W.2d 433 (Mo. Sup. Ct. 1972). The Arizona rule is the more desirable since the juvenile should not have to endure a criminal court trial in order to appeal a transfer order.

152. ARIZ. R.P. JUV. CT. 18. This rule actually specifies the requirements for admissibility of statements in juvenile court proceedings. In State v. Hardy, 107 Ariz. 583, 491 P.2d 17 (1971), however, the court held that rule 18 also sets the standard for the admissibility of statements in criminal court.

that leniency will result.[153] Moreover, as the Supreme Court of Arizona observed in *State v. Maloney*:[154]

> [I]f admissions obtained in juvenile proceedings *before* waiver of jurisdiction may be introduced in an adult proceeding *after* waiver, the juvenile proceedings are made to serve as an adjunct to and part of the adult criminal process. This would destroy the Juvenile Court's *parens patriae* relation to the child and would violate the noncriminal philosophy which underlies the Juvenile Court Act.[155]

To avoid these undesirable consequences, rigid adherence to the standards for admissibility must be observed during proceedings in the adult criminal justice system.[156]

The second consequence attaching after a transfer hearing has been held is the possibility of prejudice to the juvenile if jurisdiction is not waived by the juvenile court, and the child subsequently is adjudicated before the same judge who conducted the transfer hearing.[157] The *Juvenile Rules* contemplate a bifurcated procedure for adjudication and disposition. Thus, the adjudication hearing must precede the dispositional hearing.[158] The separation of the two hearings ensures that the report of a child's social history, which often contains considerable hearsay, is not viewed by the judge prior to the adjudication hearing. In this manner, the judge is precluded from examining sociological data in considering the factual issue of whether the child has committed the alleged acts.[159]

Where a transfer hearing is held first, however, the judge conducting the hearing studies a report containing social data on the child prepared by a probation officer[160] prior to rendering a decision. In all

153. *See* State v. Councilman, 105 Ariz. 145, 148, 460 P.2d 640, 643 (1969).

154. 102 Ariz. 495, 433 P.2d 625 (1967).

155. *Id.* at 497, 433 P.2d at 627, *quoting* Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961) (emphasis in original).

156. Some states offer the juvenile further protection by completely prohibiting the use in criminal court of any statements made while the juvenile was within the jurisdiction of the juvenile court. CONN. GEN. STAT. ANN. § 17-73 (1958); MD. ANN. CODE art. 26, § 70-16(f) (Supp. 1973); *see* Bryan v. Superior Court of Los Angeles County, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831, *cert. denied*, 410 U.S. 944 (1972).

157. Maricopa County conducts an adjudication hearing within minutes of the transfer hearing if jurisdiction over the juvenile is retained. Interview with Palmer Schumacher, *supra* note 90. In Pima and Cochise counties, the transfer and adjudication hearings usually are separated by 2-5 days. Interview with Dushan Vlhavovich, *supra* note 107; interview with Karen Zizmor, *supra* note 107.

158. ARIZ. R.P. JUV. CT. 6, 7, 8(a). However, no time lapse is required between the two hearings. In Pima and Maricopa counties, the two hearings are usually partitioned if the charges are contested. Interview with Palmer Schumacher, *supra* note 90; interview with Karen Zizmor, *supra* note 107. In Cochise County the parties generally agree not to separate the adjudication and dispositional hearings. Interview with Dushan Vlhaovich, *supra* note 107.

159. The *Juvenile Rules* provide that the probation officer's report shall be submitted to the court subsequent to adjudication but prior to the dispositional hearing. ARIZ. R.P. JUV. CT. 9. On the bifurcated hearing, *see* Glen, *Bifurcated Hearings in the Juvenile Court*, 16 CRIME & DELIN. 255 (1970).

160. *See* ARIZ. R.P. JUV. CT. 12.

three counties surveyed, the juvenile court judge who conducts a transfer proceeding which results in a retention of jurisdiction very often presides at the subsequent adjudication hearing. This practice defeats the policies implemented by the bifurcated procedure. The judge's consideration of the child's social history during the transfer proceeding may lead to the formulation of opinions concerning the juvenile which color the factual findings made at the adjudication hearing.[161] In order to protect against any possible prejudice to the juvenile resulting from the introduction of social reports at the waiver hearing, the judge conducting such a hearing should be precluded from subsequently presiding over the adjudication of the same child.[162]

C. CONCLUSIONS AND RECOMMENDATIONS

The *Juvenile Rules* establish specialized procedures directed toward the protection and rehabilitation of children and their return to society free from the taint of criminality. In order to ensure that these procedures will be applied to all children in need of care and treatment, the juvenile court is entrusted with broad jurisdictional powers. In Arizona, such jurisdiction is exclusive and original in nature and extends to all children under the age of 18 who are classified as delinquent, dependent, or incorrigible.

The exclusive nature of the juvenile court's jurisdiction, however, is not absolute. Where specialized treatment of juveniles would be inappropriate, the juvenile court in Arizona is authorized to waive its ju-

161. For example, where the judge discovers that the child has an extensive history of delinquent conduct, the tendency may be to adjudge the child incorrigible when a showing of delinquency in the immediate case cannot be made. Nevertheless, 90 percent of the survey group felt that consideration of social history at a transfer hearing would not be prejudicial to the juvenile at the adjudication hearing. A California court, however, has held that it is reversible error for a judge to review social reports prior to adjudication. *In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (Ct. App. 1971).

162. Arizona does provide for a discretionary assignment of the action to another judge after a transfer hearing. ARIZ. R.P. JUV. CT. 14(d). *See generally* UNIFORM JUVENILE COURT ACT § 34(e).

On the prejudicial aspects which can result from a nonbifurcated proceeding, see Frey & Bubany, *Pre-Adjudication Review of the Social Record in Juvenile Court: A Low Visibility Obstacle to a Fair Process*, 12 J. FAMILY L. 391 (1973); Note, *Inferential Impeachment: The Presence of Parole Officers at Subsequent Juvenile Adjudications*, 55 MARQ. L. REV. 349 (1972).

A third consequence, which may result subsequent to a transfer hearing in other states, is the exposure of the juvenile to double jeopardy. A few states allow a transfer to occur at anytime during juvenile court proceedings, even after an adjudication hearing has been held. *See* CAL. WELF. & INST'NS CODE § 875 (West 1972); KY. REV. STAT. § 208.170 (1970). Where the child has once been adjudicated in juvenile court and then is transferred and retried in criminal court, double jeopardy may result. In Arizona, the transfer hearing must be held before the adjudication hearing. ARIZ. R.P. JUV. CT. 12. Thus, the possibility of placing the juvenile in double jeopardy cannot occur. *See generally* Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874 (1972); Note, *Juvenile Courts—In Iowa, Statutory Due Process Requires a Separate Hearing on the Question of Transfer Before a Juvenile Court May Properly Waive Jurisdiction to the Criminal Court*, 22 DRAKE L. REV. 213 (1972).

risdiction and remand a child for prosecution in the criminal court. Prior to a transfer, a juvenile must be afforded notice and a full hearing. While cooperation with the court may be of benefit to the child during some stages of the juvenile proceedings, the transfer hearing must remain adversary in nature. The child is, in effect, fighting for his life within the juvenile justice system. Consequently, counsel for the juvenile must not be passive. Familiarization with rehabilitative techniques and treatment facilities is necessary to adequately represent the juvenile's position.[163] At the transfer hearing, the judge must determine if the evidence offered satisfies the requirements for transfer set forth in the *Juvenile Rules*. Such requirements mandate findings that probable cause exists to believe that the child committed the offense alleged, that the child is not amenable to treatment in light of existing facilities of the juvenile court system, that the safety or interest of the public demands that the child be prosecuted as an adult, and that the child is not committable to a mental institution. The respondents to the survey were generally in agreement as to the factors which must be present to meet these standards, although some disagreement was expressed as to the weight given each factor. Those factors deemed important to the satisfaction of the transfer requirements were the age of the child, his maturity and sophistication, his history of delinquency, his relationships with persons of authority, and the nature of the offense alleged against him.

Since the interests of both the child and society usually demand that a criminal prosecution of the child be avoided and that treatment remain exclusive to the juvenile system, the jurisdiction of the juvenile court should not be defeated easily. In this regard, strict adherence to Arizona's waiver requirements will result in a transfer only in the most extreme cases. The requirements are flexible enough to allow for a balancing of a wide range of factors. At the same time, however, they are narrow enough to preclude a waiver in cases where neither the interests of the juvenile nor society would be served.

The transfer power of the juvenile court has not escaped criticism.[164] Given the existence of such power, it may become less burdensome to transfer problem juveniles than to attempt rehabilitation. As a result, efforts to upgrade the quality of treatment facilities would

163. Eighty percent of the survey group felt that the presence of counsel had little or no effect on the outcome of a transfer hearing. This may be due to counsel's unfamiliarity with the transfer process. Yet, it would seem that many issues arise during the course of a transfer hearing which counsel's persuasion could be instrumental in settling. For an excellent article on the role of counsel in the transfer process, see Comment, *Representation of the Juvenile Delinquent in Waiver Proceedings*, 12 ST. LOUIS U.L.J. 424 (1968).

164. *See* Sargent & Gordon, *supra* note 119.

be hindered. Yet, since cases will always exist where a juvenile is both totally unresponsive to even the most advanced rehabilitative methods and is dangerous to society if left unsecured, the juvenile court must remain competent to waive its jurisdiction. In order to prevent the waiver power from becoming an "easy out" for the juvenile court, a transfer order should be entered only when no workable alternatives exist, and only when the judge, after a painstaking evaluation of the facts of each case in light of Arizona's standards for transfer, reasonably can conclude that a transfer to criminal court is in the best interests of both society and the juvenile.