

William & Mary Law Review

Volume 11 (1969-1970)
Issue 3

Article 8

March 1970

Responsibility in the Juvenile Court

Sanford J. Fox

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Juvenile Law Commons](#)

Repository Citation

Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 Wm. & Mary L. Rev. 659 (1970),
<https://scholarship.law.wm.edu/wmlr/vol11/iss3/8>

Copyright c 1970 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

RESPONSIBILITY IN THE JUVENILE COURT

Common law defenses of infancy and insanity are reviewed as they relate to children charged with crime. The decline of these defenses in the nineteenth century is traced, and a proposal is advanced that a broadened form of these defenses now be recognized in order that grossly immature and severely ill children not be branded as delinquents.

SANFORD J. FOX*

In the current climate of reexamining the roots and role of the juvenile court,¹ it is natural that fundamental questions of substantive law should reflect the same turbulence. Clearly this is so in regard to the matters of mental capacity and the legal responsibility of children charged with some form of deviance. In large part, these are questions concerning the appropriateness of the common law responsibility defenses of insanity² and infancy³ to a charge of delinquency based on criminal conduct.⁴ Responsibility also raises the enigmatic freewill question of whether *mens rea* is an element that must be proved in the juvenile court where crime is alleged.⁵

THE COMMON LAW BACKGROUND

Insanity and infancy constituted the only substantive law defenses exculpating juvenile criminals on grounds of irresponsibility. How intimately related these two have been is well illustrated by a 1641 colonial statute which anticipated that principles of religion and reason would support both defenses:

* Professor of Law, Boston College Law School; A.B., University of Illinois, 1950; LL.B., Harvard University, 1953.

1. Traditional juvenile court history, represented by H. LOU, *JUVENILE COURTS IN THE UNITED STATES* (1927), is being subjected to detailed revision. See, e.g., R. PICKETT, *HOUSE OF REFUGE* (1969); A. PLATT, *THE CHILD SAVERS* (1969). The most significant redefinition of the juvenile court's role is, of course, *In re Gault*, 387 U.S. 1 (1967); Fox, *Perspectives on Juvenile Justice Reform*, 22 *STAN. L. REV.* — (June 1970).

2. See, e.g., *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132 (1880).

3. See, e.g., *Walker's Case*, 5 N.Y. City—Hall Recorder 137 (1820).

4. This is a ground for adjudicating delinquency in all states.

5. See Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965).

Children, Idiots, Distracted Persons, and all that are strangers or new comers to our plantation, shall have such allowances as religion and reason require.⁶

Insanity and infancy continued to share common ground. Early in the evolution of American law, the infancy defense came to repeat Blackstone's eighteenth century description.⁷ Children under the age of seven could be guilty of no offense. When they reached the age of fourteen, they were treated as adults, with no special rules of irresponsibility operating in their favor. Between these two ages, a child could be found guilty only if the state could establish that he could discern "between good and evil";⁸ if a reasonable doubt were raised concerning his ability to perceive the difference, he could not be punished.⁹ Sometimes he must have known the "nature and illegality" of his act.¹⁰ These rules applied to misdemeanors as well as felonies.¹¹

On the question of irresponsibility by reason of insanity, the first cases in American criminal jurisprudence seem again to have paralleled English law. Prior to the momentous decision in *M'Naughten's Case*¹² in 1843, courts on both sides of the Atlantic often dealt with the matter of insanity as a largely undefined concept; no one test or standard prevailed by which the availability of the defense could be determined.¹³ Thus, in New York, counsel attempted to establish, by "ocular demonstration," the defense that his client was an "idiot" suffering from "downright madness."¹⁴ In 1827 a Massachusetts judge spoke merely of the "mental derangement" of a thirteen-year-old accused.¹⁵ As early as 1816 the overlap of the insanity and the infancy defenses was indicated by a jury charge in New York.

6. THE BODY OF LIBERTIES OF 1641, No. 52 in THE COLONIAL LAWS OF MASSACHUSETTS of 1660 to 1672 at 45 (W. Whitmore, ed. 1889).

7. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23 (T. Cooley, ed. 1879).

8. *Ford v. State*, 100 Ga. 63, 25 S.E. 845 (1896).

9. *Godfrey v. State*, 31 Ala. 323, 327, 70 Am. Dec. 494, 495 (1858).

10. *Benbow v. State*, 128 Ala. 1, 29 So. 553 (1901); *Price v. State*, 50 Tex. Crim. 71, 95 S.W. 901 (1906).

11. *State v. Goin*, 9 Humph. 175, 176-77 (Tenn. 1848).

12. 4 Eng. Rep. 718 (1843).

13. See S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 123-60 (1927). Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1235-36 (1966), argues that right-wrong test was in almost uninterrupted use in England since the sixteenth century.

14. *Cook's Case*, 1 N.Y. City-Hall Recorder 5 (1816).

15. *Commonwealth v. French*, Thacher's Criminal Cases 163, 165 (Mass. 1827).

After the arguments of the counsel, his Honour the mayor charged the jury, that such was the humanity of the law, that no man could be held responsible for an act committed while deprived of reason; and that a madman was generally considered, in law, incapable of committing a crime. But it is not every degree of madness or insanity, which abridges the responsibility attached to the commission of crime. In that species of madness, where the prisoner has lucid intervals; if during those intervals and when capable of distinguishing good from evil, he perpetrates an offence, he is responsible. The principal subject of inquiry, therefore, in this case is, whether the prisoner at the time he committed this offence, had sufficient capacity to discern good from evil.¹⁶

This is essentially the *M'Naughten* right-wrong test, adopted in American law one year after it was decided in the House of Lords.¹⁷ Children and insane persons were now to have such allowances as the concept of right and wrong require.¹⁸

RESPONSIBILITY IN NINETEENTH CENTURY JUVENILE JUSTICE

The 1800's was a period of incalculable importance for children because of the creation of the first juvenile reformatory in 1824,¹⁹ and the first juvenile court in 1899.²⁰ Between these events there developed a legal system of predelinquency whereby juvenile deviance—crime, poverty, begging, idleness, wandering about the streets—was

16. *Clark's Case*, 1 N.Y. City-Hall Recorder 177 (1816).

17. *Commonwealth v. Rogers*, 48 Mass. 500, 501-03 (1844). Platt & Diamond, *supra* note 13, at 1257, suggest that the right-wrong test was part of American jurisprudence much earlier in the nineteenth century.

18. The Platt & Diamond thesis that the right-wrong test is of more ancient origin than 1843 and 1844 in England and America, respectively, means that the overlap between insanity and infancy is correspondingly more ancient. They conclude from early materials that:

By the time of Elizabeth I (c. 1581), there existed a legal rationale for the exclusion of special groups from criminal responsibility. Infants and the insane both generally failed to possess the necessary mental capacity to commit a crime; they were treated as "nonpersons" because of their supposed lack of understanding, intelligence, and moral discretion. Moreover, they were not considered fit subjects for punishment since they did not comprehend the moral implication of their harmful act.

Platt & Diamond, *supra* note 13, at 1234.

19. The New York House of Refuge was opened in 1825 under an 1824 charter received by the Society for the Reformation of Juvenile Delinquents in the city of New York. Ch. 126, [1824] N.Y. Sess. Laws 110-12. See Pickett, *supra* note 1.

20. [1899] Ill. Sess. Laws 131-37.

seen as prodromal to adult crime. Therefore, official intervention was thought necessary to inculcate the skills and values that might accomplish crime prevention.²¹ The concept of legal irresponsibility suffered under this system which emphasized the treatment of symptoms rather than the punishment for wrong. The effort to deal with root problems was viewed as quite different from punishing the child for whatever he might have done because of his problems. The prosecution of a child in the nineteenth century was undertaken because, as lawyer Ingersoll observed in 1835, "he manifests his unfitness for self-government and absence or abuse of domestic authority and influence Instead of being subject to, they are saved from punishment."²² It was consistent for the reformers to note again and again that children got into trouble through no fault of their own,²³ and for the courts to see this child-saving enterprise as unrelated to the defense of infancy in run-of-the-mill cases.²⁴ If a child did not know that what he did was wrong, so much more did he need to be reformed. There is evidence

21. See generally *supra* note 1.

22. FIFTEENTH ANNUAL REPORT OF THE MANAGERS OF THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS IN THE CITY OF NEW YORK 46 (1840).

23. E.g., REPORT OF A COMMITTEE APPOINTED BY THE SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE SAID CITY ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE (1823) in DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13 (Hart. ed. 1832):

The parents of these children, are, in all probability, too poor, or too degenerate, to provide them with clothing fit for them to be seen in at school; and know not where to place them in order that they may find employment, or be better cared for. Accustomed, in many instances, to witness at home nothing in the way of example, but what is degrading; early taught to observe intemperance, and to hear obscene and profane language without disgust; obliged to beg, and even encouraged to acts of dishonesty, to satisfy the wants induced by the indolence of their parents, — what can be expected, but that such children will, in due time, become responsible to the laws for crimes, which have thus, in a manner been forced upon them?

See also FOURTH ANNUAL REPORT OF THE MANAGERS OF THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS IN THE CITY OF NEW YORK (1829) in DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 149 (Hart. ed. 1832).

24. Although there are reported cases in which the infancy defense was invoked, see, e.g., Walker's Case, 5 N.Y. City-Hall Recorder 137 (1820), they arose before the entry of the predelinquency concept in American jurisprudence, signaled by the House of Refuge movement in the early 1820's. From that point on, there are no reported decisions in the nineteenth century which discuss the infancy defense except those in which there is an unambiguous criminal prosecution against the child, undiluted by any ideas that something other than the familiar relation of crime and punishment is at stake. See, e.g., cases cited in notes 8 and 9, *supra*. These were, on the whole, relatively serious offenses, not the vagrancy, begging, and petty theft sorts of deviance on which the pre-delinquency concept operated.

to suggest that while judicial inquiries paid little heed to such technical legal matters as infancy, they exclusively focused, in conformity with the predelinquency theory, on such questions as whether the child was a fit subject for "cure" by one of the nineteenth century's juvenile institutions.²⁵

Legislation, as well as legal administration, eroded the relevance and impact of the common law defenses, particularly infancy. In Illinois, for example, children first benefited from legislation that raised their absolute immunity to criminal prosecution from seven to ten.²⁶ But influenced by the predelinquency concept, subsequent legislation made children over the ages of six or eight eligible for incarceration in the reform schools.²⁷ The Industrial School acts went still further; they accepted any child *under* a certain age, entirely eliminating the notion of *any* lower age limit.²⁸ If "treatment" of children to prevent later development of criminal character was good, the earlier the process was started the better. Since, in the outlook of these schemes, children were not being punished, it was irrelevant to treat their possible irresponsibility. As Glanville Williams has recently observed, it is "the retributive theory of punishment [which] imports the doctrine of moral responsibility into the law."²⁹ When, however, children were tried according to regular criminal procedures, where the presence of a retributive theory was more discernible instead of being subjected to

25. Illinois legislation in 1863, for example, directed judges to commit boys convicted of crimes to the Chicago Reform School

who, in the opinion of the court, would be a fit and proper subject

Provided, however, that such boys only shall be committed to said reform school as in the opinion of the court are in need of and will be benefited by the reformatory influence of said school, the school being intended as an educational and reformatory institution, rather than as a prison or place of punishment.

Ch. 14, § 9, [1863] Ill. Pvt. Laws 132-38 in NINTH ANNUAL REPORT OF THE OFFICERS OF THE CHICAGO REFORM SCHOOL TO THE COMMON COUNCIL OF THE CITY OF CHICAGO 41, 44-45 (1865). For a description of how this worked while the Chicago Reform School remained in business see the statement of its last Superintendent in FIFTEENTH ANNUAL REPORT OF THE OFFICERS OF THE CHICAGO REFORM SCHOOL TO THE BOARD OF GUARDIANS 24-25 (1871).

26. ILL. REV. STAT. § 4 (1845).

27. Ch. 14, § 9, [1863] Ill. Pvt. Laws 132-38. (6 for the Chicago Reform School); § 1 [1867] Ill. Sess. Laws 38 (8 for the Reform School at Pontiac for the rest of the state). When the Chicago Reform School closed and Pontiac became a patently penal institution serving the entire state the age was again raised to ten. See An Act in Regard to the State Reform School for Juvenile Offenders, § 12, [1873] Ill. Sess. Laws 145-48.

28. E.g., § 4, [1883] Ill. Sess. Laws 169 (under 21).

29. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 16 (2d ed. 1961).

a judicial scrutiny for *incipient* criminality, the responsibility concept did appear. Sometimes this occurred with the interchangeability of insanity and infancy defenses, as might be expected from their common basis. Thus, in 1883 a Kentucky court held it error to refuse the instruction that:

[I]f the defendants broke into the store, as charged, but did so at the request of another, and in consequence of youth or mental infirmity, not perceiving the wicked character of the act or not knowing their responsibility therefor, they should acquit them of the felony.³⁰

Although comparative statistics proving the point would be difficult to assemble, it appears from the large capacity of the juvenile institutions,³¹ which had assumed the major burden of accomplishing child-reform, and their periodic overcrowding, that most of the children who were brought to court during the nineteenth century were dealt with as predelinquents for whom responsibility rules were out of place rather than as criminals to whom such rules might appropriately be applied.³² There were, then as now, few juvenile murderers, arsonists, and rapists. It can be concluded, therefore, that the law relating to responsibility had an insignificant development in the 1800's.

RESPONSIBILITY UNDER THE JUVENILE COURT ACTS

Infancy

The juvenile court acts, beginning with Illinois in 1899,³³ continued the nineteenth century concept of predelinquency which was designed to save minors, not to punish them.³⁴ Accordingly, they made

30. *McClure v. Commonwealth*, 81 Ky. L. Rptr. 448, 451 (1883).

31. In 1853 the New York House of Refuge relocated to Randall's Island in the East River where 1,000 young deviants could be housed. *TWENTY-EIGHTH ANNUAL REPORT OF THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS* 33, 39 (1853). R. PICKETT, *supra* note 1, at 139-41.

32. It is also true that many of the same children who might have been brought to court were dealt with either by imprisonment in a poorhouse or by being swept up from city streets and exported to farmers hundreds or thousands of miles away. See R. THURSTON, *THE DEFENDENT CHILD* 92-140 (1930).

33. [1899] Ill. Sess. Laws 131-37.

34. *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198, 201 (1905).

Speaking of the Illinois Act, Albert C. Barnes, Assistant State's Attorney in Cook County declared: "Its fundamental idea is that the State must step in and exercise

no specific mention of responsibility defenses. Unlike the nineteenth century, however, reported cases appeared in the twentieth century in which common law irresponsibility challenged the right of the state to treat children as predelinquents.

The first decision to deal with this conflict contained dictum which established somewhat peculiar procedures. It arose in Oklahoma in 1912, just three years after that state had enacted a juvenile court law. Unlike the 1899 Illinois act which contained no such provision, the Oklahoma law specifically provided that: "Such court might, in its discretion cause such child to be proceeded against in accordance with the laws governing the commission of crime."³⁵ According to *Ex parte Powell*

[t]his provision contemplates an investigation by the juvenile court of the acts complained of, with the view of determining whether or not the child committed them, and, if so, whether or not he knew the wrongfulness thereof in a criminal sense. And should the court find affirmatively, it is then within its discretion under the law, to hold such child to be proceeded with in the manner provided by law in a court having competent jurisdiction of the offense committed, certifying to such court both its findings as to probable cause, and that the child *knew* the *wrongfulness* thereof.³⁶

The court was combining the infancy defense³⁷ with the original jurisdiction of the juvenile court so as to keep cases where the infancy defense would apply *out* of the criminal court and *in* the juvenile court.³⁸ This was an efficient means of preventing criminal prosecutions that

guardianship over a child found under such adverse social or individual conditions as develop crime." Quoted from REPORT OF THE COMMITTEE ON JUVENILE COURTS OF THE CHICAGO BAR ASSOCIATION 5 (October 28, 1899).

35. The full text of the original Oklahoma juvenile court act is reproduced in *Ex parte Powell*, 6 Okla. Crim. 495, 503, 120 P. 1022, 1027 (1912).

The first juvenile court judge in Chicago, Richard S. Tuthill, assumed that even without explicit statutory authority he could do the same. In his first year on the juvenile court bench, Judge Tuthill sent 37 children to the grand jury. See the statistical report in PROCEEDINGS OF THE ILLINOIS CONFERENCE OF CHARITIES (1900) reported at SIXTEENTH BIENNIAL REPORT OF THE ILLINOIS BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES 354 (1900).

36. 6 Okla. Crim. at 506, 120 P. at 1027 (1912).

37. This had become statutory law in Oklahoma. *Id.* at 505, 120 P. at 1026.

38. The *Powell* court noted that juvenile court findings that the child knew the wrongfulness of his act did not relieve the state of proving that point again in a subsequent criminal trial. *Id.* at 506, 120 P. at 1027.

were likely to fail. The side effect, however, is that if the child did not know that his criminal conduct was wrong, he would have no defense to a charge of delinquency in the juvenile court.

Other cases have been more explicit, but have reached the same result. In *Miller v. State*,³⁹ the Court of Criminal Appeals in Texas held that the state had to prove criminal responsibility in the *juvenile* court just as it would have to prove capacity in a *criminal* trial against a juvenile. The decision is hardly precedent, however, since an earlier Texas decision had declared juvenile court proceedings to be criminal in nature.⁴⁰ There was, therefore, nothing unusual in applying the statutory defense which substantially restated the common law of incapacity. A similar result was reached under the same juvenile court statutes twenty years later in *Purvis v. State*.⁴¹ In 1943, however, the Texas juvenile court law was rewritten to declare the proceedings civil,⁴² undermining the basis for *Miller* and *Purvis*. There is no reported Texas decision dealing with incapacity in the juvenile court after 1943.

Another case, decided in 1918, arose in Tennessee.⁴³ In *State ex rel. Humphrey*, a seven-year-old boy shot and killed his nine-year-old companion. He was found delinquent in the juvenile court, and remanded to the custody of the state. His mother sought and obtained a writ of habeas corpus in the local court of general criminal jurisdiction on the grounds, *inter alia*, that the juvenile court judge had not considered her son's common law incapacity. On appeal, the Supreme Court of Tennessee ruled against this contention, although it upheld the granting of the writ because the juvenile court lacked jurisdiction over homicide offenses. As to the alleged incapacity, the court said the "age of child is not material in investigation held before the juvenile court." The opinion reasoned, in true nineteenth century predelinquency fashion, that juvenile court proceedings are not criminal; their purpose is to provide for the child's welfare; and, finally, a child is not found guilty of delinquency as though he were being found guilty of a crime. The *Humphrey* decision has been cited by other courts from time to time, but for propositions such as the benevolent purposes of juvenile courts, but never until 1970 on the question of the materiality of common law incapacity.⁴⁴

39. 82 Tex. Crim. 495, 200 S.W. 389, 392 (1918).

40. *Ex parte McDowell*, 76 Tex. Crim. 1, 172 S.W. 213, 214-15 (1914).

41. 133 Tex. Crim. 441, 112 S.W.2d 186 (1938).

42. Tex. Civil Stat. Art. 2338-1 (Vernon 1964).

43. *Juvenile Ct. of Shelby County v. State ex rel. Humphrey*, 139 Tenn. 549, 201 S.W. 771 (1918).

44. *See, e.g., Hills v. Pierce*, 113 Ore. 386, 231 P. 652 (1924).

When this question arose in federal courts, the same rejection of the infancy defense occurred. In *Borders v. United States*,⁴⁵ the charge against a twelve-year-old boy was for willfully derailing an interstate train. He elected to be proceeded against under the Federal Juvenile Court Act⁴⁶ and moved for a judgment of acquittal for failure of the government to prove his criminal capacity. The motion was denied, and the denial was upheld by the Court of Appeals.⁴⁷ Judge Jameson's opinion repeats the litany of the civil nature of delinquency proceedings, and the good will of everyone concerned in the action. In discussing incapacity, however, he declared that

[t]he [statute] was enacted with the realization that the youthful offender does not possess maturity of judgment and capacity to fully comprehend the nature or consequences of his offense. If criminal capacity must be established in precise conformity with the rules in criminal cases as a condition of a finding of delinquency, the process by which this is accomplished will undermine the predicate in realization of which the [statute] was enacted.⁴⁸

This state of the law—unanimous rejection of the infancy defense in delinquency proceedings by every court that had faced the issue—persisted until January 30, 1970. On that day the Supreme Court of California decided *In re Gladys R.*⁴⁹ The appellant was a twelve-year-old girl who had been found to be a ward of the juvenile court on the grounds that she had violated the California penal code.⁵⁰ The Supreme Court, in banc, and with one dissenting opinion, reversed the finding on two grounds. The first, with which this article is not concerned, found error in the fact that the juvenile court judge had reviewed a social

45. 256 F.2d 458 (5th Cir. 1958). Cf. *In re Smith*, 326 P.2d 835 (Okla. 1958).

46. 18 U.S.C. § 5031 *et seq.* (1964). *Nieves v. United States*, 280 F. Supp. 994 (S.D. N.Y. 1968) held the Federal Juvenile Delinquency Act unconstitutional on the ground that the juvenile's choice to be proceeded against under it, rather than in a regular criminal trial, required the waiving of his right to a jury trial.

47. *United States v. Borders*, 154 F. Supp. 214 (N.D. Ala. 1957). The appellate decision amounts to little more than a statement that the position of the government and the district court are correct. For this reason the district court opinion is here cited and discussed.

48. *Id.* at 216.

49. — Cal. 3d —, 464 P.2d 127, 83 Cal. Rptr. 671 (1970).

50. Wardship was found under CAL. WELF. & INST'NS CODE § 602 (West 1966) which is limited to persons under 21 who violate the criminal law. Gladys was found to have violated section 647a of the Penal Code which provides penalties for annoying or molesting any child under the age of 18. — Cal. 3d at —, 464 P.2d at 130, 83 Cal. Rptr. at 673.

study report before a decision had been reached that Gladys had violated the law.⁵¹ Of crucial importance to the problem of responsibility, however, was the second ground for reversal. For the majority, Tobriner, J. declared:

A child under the age of 14 must appreciate the wrongfulness of her conduct in order to become a ward of the juvenile court under section 602.⁵²

Since there had been no proof that Gladys knew that what she did was wrong, the wardship could not stand. The rule that the court applied was found in that part of the Penal Code which enacts the substance of the common law defense.⁵³ But whereas *Humphrey*⁵⁴ and *Borders*⁵⁵ had found implicit in their juvenile court acts an intent to render inapplicable the common law defense, the *Gladys R.* majority read California legislative intent as precisely the opposite. The opinion rests in this respect on the assertions that "[i]f the Legislature had intended to repeal section 26 or to sever it from section 602, it could have done so expressly . . ." ⁵⁶ and that there is a presumption that statutes are not to be declared repealed by implication.⁵⁷ The court also found that the responsibility standard for children must be different

51. *Id.* at —, 464 P.2d at 130-32, 83 Cal. Rptr. at 674-76. It was noted, however, that: The court's review of the social report in advance of the jurisdictional hearing would perhaps not require reversal in a case in which the contents of the social study entirely favored the minor and his home environment. But in the present case the social study showed some inquiry into appellant's intent under section 647a and some negative indications about appellant's home environment. Hence, the court's review of the social study prior to the jurisdictional hearing, at which the jurisdictional facts were far from conclusive, constituted prejudicial error.

Id. at —, 464 P.2d at 132, 83 Cal. Rptr. at 676.

52. *Id.*

53. CAL. PENAL CODE § 26 (West 1955):

All persons are capable of committing crimes except those belonging to the following classes: . . . Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

For discussion of problems raised under subdivision five of this statute, exempting persons who were not "conscious" at the time they committed the act charged *see* Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963).

54. *Supra* note 43.

55. *Supra* note 47.

56. — Cal. 3rd at —, 464 P.2d at 133, 83 Cal. Rptr. at 677.

57. *Id.*

from that used for adults, adding that "[a] juvenile court must therefore consider a child's age, experience, and understanding in determining whether he would be capable of committing conduct proscribed by section 602."⁵⁸

Apart from these relatively mechanical considerations, the court expressed a concern for the policy problems involved in making the defense available. In keeping with the current trend of giving increased attention to the severity or punitiveness which attaches to a juvenile delinquent status, it was noted that the section 26 defense "provides the kind of fundamental protection to children charged under section 602 which this court should not lightly discard."⁵⁹ But there are, of course, consequences in providing the protection of a substantive defense, namely that the accused child goes free if he succeeds in the defense. In this regard the court noted that

"[t]he Attorney General expressed some concern that if section 26 prevents a child from being brought under the supervision of the juvenile court under section 602 'it is quite possible that no other juvenile proceeding could be initiated other than under section 602. where the act amounts to something proscribed by the Penal Code.'"⁶⁰

To this the court replied that other jurisdictional provisions of the juvenile court law, ones that were less harmful to the child, could be invoked and "the [juvenile] court might well declare the child a ward under section 600 or 601."⁶¹

58. *Id.* at —, 464 P.2d at 134, 83 Cal. Rptr. at 678. These factors have sometimes led other courts to a similar result via a conclusion that delinquency was not established. See, e.g., *In re Sanders*, 168 Neb. 458, 96 N.W.2d 218, 222 (1959) where the court observed:

There was no previous misconduct of appellant claimed or shown. It was established at the hearing that appellant had no record of improper conduct and that his school experience was acceptable and satisfactory both as to comportment and scholarship. A single violation of a law of the state by a minor does not always permit of a conclusion that the transgressor is a juvenile delinquent.

59. — Cal. 3rd at —, 464 P.2d at 134, 83 Cal. Rptr. at 678.

60. *Id.* at —, 464 P.2d at 136 n.22, 83 Cal. Rptr. at 680 n.22.

61. *Id.* at —, 464 P.2d at 135, 83 Cal. Rptr. at 679; CAL. WELF. & INST'NS CODE § 600 (West 1966) provides:

Any person under the age of 21 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and

Justices Burke and McComb approved of the reversal for the precipitous use of the social study, but dissented from the application of the Penal Code § 26(1) infancy defense. Justice Burke's opinion for the dissenters cited *Humphrey* and *Borders* and concluded that even after *Gault*⁶² "the proceedings are nevertheless conducted for the protection and benefit of the youth in question . . ." ⁶³ and reasoned that, therefore, the rationale of the earlier case law rejecting the defense was still valid. Burke also opposed the assumption made in *Tobriner's* opinion that the juvenile court would otherwise have jurisdiction over a child found "not guilty" by virtue of the operation of § 26(1) of the Penal Code. He opined that in some circumstances a child under 14 might commit a criminal offense without there being the requisite proof that he had knowledge of its wrongness, "and additional proof to bring the minor within section 600 or 601 might not be available." ⁶⁴ As to the majority's footnote citation of a recent California case declaring the insanity defense available in juvenile court § 602 proceedings,⁶⁵ Burke found that to be distinguishable in that "[p]ermitting

has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, or whose home is an unfit place for him by reason of neglect, cruelty, or depravity of either of his parents, or of his guardian or other person in whose custody or care he is.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.

Id. at § 601 provides:

Any person under the age of 21 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this State, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

62. *In re Gault*, 387 U.S. 1 (1967) holding that juvenile court proceedings must conform to Fourteenth Amendment due process requirements, including the right to counsel, privilege against self-incrimination, adequate notice, and confrontation rights.

63. — Cal. 3rd at —, 464 P.2d at 140, 83 Cal. Rptr. at 684 (Burke, J., concurring & dissenting) quoting from *In re Dennis, M.*, — Cal. 2d —, 450 P.2d 296, 303, 75 Cal. Rptr. 1, 8 (1969).

64. — Cal. 3rd at —, 464 P.2d at 140, 83 Cal. Rptr. at 684 (Burke, J., concurring & dissenting).

65. *In re M.G.S.*, 267 Cal. App. 2d 329, 72 Cal. Rptr. 808 (Ct. App. 1969). The insanity defense can be found in CAL. PENAL CODE § 26(3) (West 1955).

the defense of insanity . . . does not deprive the minor of needed care . . . whereas holding subdivision One of section 26 applicable in such a proceeding can, as we have seen, deprive minors of needed care.”⁶⁶

It is important to note what both the majority and the dissenters had in common. Both were concerned lest a child exculpated by § 26(1) of the Penal Code simply walk out of the juvenile court scot free. The court's emphasis on the availability of other jurisdictional basis for preventing this situation evinces as much concern for “needed care” as does Burke's explicit reference to the problem of § 26(1) insulating the child from such care. Although neither side mentioned it, surely the thought must have crossed the minds of the judges that public safety may also be involved in the decision to free a child who is unaware that it is wrong to sexually molest another youngster.⁶⁷ Furthermore, both sides agreed that the central purpose of juvenile court proceedings was to provide for the welfare of children coming before the court: the majority saw the major welfare need in terms of the protection from the harshness of a 602 wardship and its likelihood of institutional commitment, while the dissenters defined the welfare need as a matter of insuring *some* jurisdiction over the child.

It is the crucial question of whether the Penal Code § 26(1) should be applied to § 602 proceedings that divides the court. The argument adopted by the majority concerning legislative intent is far from persuasive. It is true that the § 26(1) defense was on the books at the time the juvenile court law was adopted, but why assume that the legislature intended it to apply in the juvenile court proceedings? As the *Humphrey* and *Borders* decisions prove, there was an equally available rationale that would render § 26(1) immaterial; the legislature might just as well have been thinking along the lines later articulated by the courts that considered the question. Moreover, if there is anything to the supposition that legislative supporters of the original juvenile court law were genuinely concerned with helping children in trouble, then it makes little sense to attribute to them the simultaneous intent to insulate these same children from the help by means of a § 26(1) defense. Those

66. — Cal. 3rd at —, 464 P.2d at 141-42, 83 Cal. Rptr. at 685-86 (Burke, J., concurring & dissenting). As an example of the authority to provide needed care when insanity is established, Burke cites CAL. WELF. & INST'NS CODE § 705 (West 1966) which, however, only deals with temporary commitment for observation and recommendation.

67. A third issue in the case was whether a child may violate CAL. PENAL CODE § 647a (West 1955) which “applies only to offenders who are motivated by an unnatural or abnormal sexual interest or intent.” The court reached an affirmative conclusion. — Cal. 3rd at —, 464 P.2d at 137, 83 Cal. Rptr. at 681.

legislators would hardly have thought of the helping facilities, such as reform schools, as being of the same repressive and punitive nature that the majority of the court seems to assume them to be. It is difficult to avoid concluding that the matter of legislative intent is little more than a crutch to support the policy decision the court had arrived at through other means.

The policy itself does make sense—much more than does that of the dissenters who would choose to rely on the *Humphrey* and *Borders* position. There are formidable problems of whether and when the alternative jurisdictions (sections 600 and 601) would be available which the majority does not discuss at all; but for the present, we will concede the assumption that a juvenile court judge may simply choose whether it will be law violation (§ 602), neglect (§ 600) or some form of petty juvenile nuisance (§ 601) that will be the basis for the proceedings and judgment. Given the case of a child who has violated the penal law, but who is so grossly immature (in social and psychological respects)⁶⁸ that he fails to recognize that it was wrong to do so, are there any reasons why he should be dealt with on a basis other than that of a juvenile delinquent under section 602? Although they were not mentioned in the opinion of the court, there are various reasons why the developmentally abnormal juvenile should not be treated as a juvenile delinquent.

From the inception of a separate system of justice for juveniles in America, it has been its great shortcoming that the acknowledged helplessness of some children in the social and familial conditions in which they are forced to grow up, has never received adequate recognition in the law. Invocation of the lack of criminal capacity issue would finally make relevant the *not-his-fault* factors in proceedings to determine whether he is responsible for the harm he has produced.

Dealing with the grossly immature child who commits a crime on the basis of his immaturity rather than as a consequence of his criminal behavior presents the opportunity for gaining practical advantages as well. Once the court has secured jurisdiction over the child, no matter on what basis, it is standard procedure for the court and the agencies it is authorized to call upon, to use what resources are available to attempt to help the child—in this case to bring him to a more advanced stage of moral development and maturity. In this two-step process of

68. The majority noted that: "In the instant case we are confronted with a 12-year-old girl . . . [who has] the social and mental age of a 7-year-old." — Cal. 3rd at —, 464 P.2d at 136, 83 Cal. Rptr. at 680.

establishing jurisdiction and embarking on a helping process, there is value to be gained in consistency. If the child is first condemned as being anti-social and only a bit less depraved than his adult counterpart convicted of *pure* crime—a value judgment which seems implicit in a finding of juvenile delinquency or wardship in California under § 602, then it is not unlikely that the child will perceive an element of hypocrisy in the offer of help that follows the finding. Probably, he would tend to see the world as a series of consistencies in which what is offered as help becomes colored or even dominated by the condemnation he has just experienced. His cooperation in any disposition plan is, in such circumstances, going to be less than enthusiastic to the great detriment of the treatment phase of the juvenile court process. If the proceedings initially were designed to determine the nature and scope of the immaturity and the treatment plan similarly oriented, then this problem of fostering hypocrisy might greatly diminish.

There is a further practical aspect to the question of which basis of jurisdiction is appropriate. The fact that the juvenile justice system, from courts to correctional facilities, has been subjected to a continuous fiscal starvation is too well known to require either documentation or extensive discussion. If the system is seen as an organized effort to help children, then the whole thing seems quite paradoxical. But if it is recalled that “juvenile delinquent” has traditionally referred to anti-social children, trespassers on middle-class norms, and junior enemies of the community, then it is more understandable that the public has been reluctant to open its purse for the benefit of those who stand poised against it. What the law has done is to choose from among the characteristics of certain children, not their lack of a decent education (through no fault of their own), or their location in dilapidated slum housing (through no fault of their own), or their unattended to health problems (through no fault of their own), *etc.*, but the instance of conduct in which they violated the penal law. So long as the legal system thus isolates and highlights that aspect of the child which rationally calls for the least sympathy, and ignores the conditions of his life that would evoke a desire to help, the law simply serves to reinforce the severity of public attitudes. Were it, however, to shift its emphasis and make its overriding concern the immaturity of the child and the conditions that have given rise to it, then at least this process of reinforcement would lose some of its vigor and perhaps might even be replaced by legal and public attitudes of understanding and sympathy that could

lead, in turn, to nourishment instead of starvation of the helping process.

The Defense of Insanity

Cases in which the insanity defense is raised by a child charged with crime are rare.⁶⁹ This is true despite the fact that, in the antebellum period at least, it was widely believed by American psychiatrists that insanity was prevalent among the pauper-immigrants in the cities, the group whose children were prosecuted in the courts. As a well-known 1854 report stated: "Insanity is, then, a part and parcel of poverty; and wherever that involves any considerable number of persons this disease is manifested."⁷⁰ Perhaps parents were reluctant to suggest the possibility of their children's insanity in view of the belief that the affliction was hereditary.⁷¹ Alternatively, the reluctance may have been due to the attachment of a relatively greater social stigma to the insane than to the criminal. Certainly, a factor which largely contributed to the paucity of children's cases in which insanity was pleaded must have been the difficulty of distinguishing this from the incapacity defense. Theoretically, insanity required a mental disease from which sprang the inability to distinguish right from wrong; the infancy defense had no such requirement. Thus, infancy was easier to establish. Procedurally, infancy was also more appealing, since the child had a presumption of incapacity in his favor which required an acquittal unless affirmatively overcome by the state's proof of his capacity. In the insanity situation, on the other hand, sanity was assumed and, if no one raised it, the child could legally be convicted. Finally, there was a difference in outcome that must have exerted a strong influence. If acquitted by reason of insanity, the child risked being taken to an insane asylum.⁷² Success in establishing infancy, however, was an absolute exoneration, and he was free to go home. Not only was there good reason for children and their parents to avoid pleading insanity,

69. See Donovan, *The Juvenile Court and the Mentally Disordered Juvenile*, 45 N.D. L. REV. 222, 233-34 (1939).

70. MASSACHUSETTS COMMISSION ON LUNACY, 1854, REPORT ON INSANITY & IDIOCY IN MASSACHUSETTS, 45, 52-55 (1855).

71. N. DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES, 7-8, 108-13 (1964).

72. *Id.* Early American law on commitment of persons acquitted by reason of insanity is not entirely clear. It seemed to follow as a matter of course in *Commonwealth v. Meriam*, 7 Mass. 168 (1810); but in *Traux's Case*, 1 N.Y. City-Hall Recorder 44 (1816), this sort of acquittal led only to the suggestion by the court that the accused remain with his friends. In England, commitment was authorized by the Safe Custody of Persons Charged with Offenses Act, 39 & 40 Geo. 3, c. 94 (1800).

but, as was noted in regard to infancy, the concept that children charged with crime were in fact being taken under an official wing for an underlying disorder of which crime was merely a symptom, served to de-emphasize, in the eyes of officials, the legal significance of mental abnormality. This predelinquency orientation was strongly supported by the view that insanity, like crime and poverty, was based on a moral derangement which could be educated out of the children.⁷³ There was, therefore, no more reason to exclude them from the "benefits" of this education when they were mentally abnormal and insane, than when they were developmentally abnormal and immature.

The first juvenile court statutes contained as little codification of the insanity defense as they did of infancy. Development of court clinics, staffed by psychiatrists and psychologists,⁷⁴ further isolated the facts of mental abnormality from the principle of irresponsibility by reason of insanity. The psychological diagnosis reached by the clinicians became the primary technique for uncovering the disorder of which crime was the symptom. When scientific analysis of the child came to the aid of the juvenile court judge, it became even more appealing than it had been in the 1800's to treat the child on the basis of what he was, rather than for what he had done. To release him for what he was, mentally abnormal and legally insane, would be to retard the progress of science. Much of this survives today. A California juvenile court judge indicates that [d]ue to [the] non-criminal nature of the Juvenile Court delinquency proceedings, the [insanity] would merely be another factor to be considered in determining the treatment needed for the child."⁷⁵

The insistence on the noncriminal nature of delinquency proceedings is a losing battle. With increasing frequency judges are coming to accept the view expressed by the Supreme Court of Wisconsin in 1966:

The philosophy behind the juvenile act is rehabilitation and treatment, but what may appear to a juvenile worker or judge as treatment may look like punishment to the juvenile. Irrespec-

73. See N. DAIN, *supra* note 71, at 111.

74. The founding of the first court clinic is described in Healy & Bronner, *The Work of the Judge Baker Foundation*, in HARVEY HUMPHREY BAKER, *UPBUILDER OF THE JUVENILE COURT* 123-31 (1920).

75. Donovan, *supra* note 69, at 233. See also *In re M.G.S.*, 267 Cal. App. 2d 329, 72 Cal. Rptr. 808 (Ct. App. 1969); *In re Turner*, 56 Misc. 2d 638, 289 N.Y.S. 2d 652 (Family Ct. 1968).

tive of what we call the juvenile procedure, and no matter how benign and well intended the judge who administers the system, the juvenile procedures, to some degree at least, smack of "crime and punishment." While the primary statutory goal is the best interest of the child, that interest is, as it should be, conditioned by the consideration of "the interest of the public." The interest of the public is served not only by rehabilitating juveniles when that is possible, but the interest of the public is also served by removing some juveniles from environments where they are likely to harm their fellow citizens. Retribution, in practice, plays a role in the function of the juvenile court. The judgments of juvenile courts do serve as deterrents to the conduct of at least a segment of our juvenile society, not because those juveniles fear rehabilitation, but because they fear incarceration and punishment. Despite all protestations to the contrary, the adjudication of delinquency carries with it a social stigma. This court can take judicial notice that in common parlance "juvenile delinquent" is a term of opprobrium and it is not society's accolade bestowed on the successfully rehabilitated. It is common knowledge also that juvenile records do not, in fact, have a confidential status. Peace officers' records may be communicated to school authorities and to other law enforcement agencies. The Federal Bureau of Investigation has no difficulty in ascertaining whether an individual has a juvenile record. A juvenile record may be a substantial handicap to one who seeks employment with the United States Government. The confidentiality of records, even if kept inviolate, is no real safeguard to the ex-delinquent for, if asked whether he was ever so adjudged, he will be morally obliged to admit it whether or not that status was adjudicated by due process and fair play.⁷⁶

With this view of the juvenile justice system, it is not surprising that Wisconsin upheld a juvenile court's dismissal of a delinquency petition on grounds of insanity and approved commitment of the child to a state hospital.⁷⁷ The opinion upholding insanity as a defense to a delinquency charge was also supported by noting that *mens rea* must be proved in juvenile court as clearly as in a criminal trial. "It is an implied premise of every criminal complaint or juvenile petition that the accused is sane," according to Justice Heffernan, "but when that premise is challenged by evidence raising a reasonable doubt of the

76. *Winburn v. State*, 32 Wis. 2d 152, 161-62, 145 N.W.2d 178, 182-83 (1966).

77. *Id.* at 156, 145 N.W.2d at 179-80.

defendant's sanity, it becomes the obligation of the state to establish responsibility."⁷⁸ Insanity is not, in Wisconsin, an affirmative defense which the child must establish, but rather proof that "there was a failure to form the requisite intent,"⁷⁹ meaning that only a reasonable doubt concerning the *mens rea* need be raised by the evidence of insanity.

While applicability of the insanity defense has been similarly recognized elsewhere,⁸⁰ especially in view of the *Gault* pressure to emulate criminal proceedings,⁸¹ the *Winburn* position has not gone unchallenged. The New Jersey case of *In re H.C.* in 1969, expressly refused to follow *Winburn*, and held that insanity is not a defense to an adjudication of delinquency.⁸² The court found that recent developments in juvenile court law fell short of requiring a finding of "not delinquent" when the legal test of insanity was met:

The thrust of recent decisions is toward protection of the juvenile, in areas where penal sanctions may be imposed, in a manner similar to the protection afforded adults in criminal proceedings. The policy basis of those rulings registers concern that espousal of and reliance on the *parens patriae* doctrine could, in individual situations, result in arbitrary action lacking fundamental fairness through which the power of the state is brought to bear upon an individual with the consequence of incarceration. As I see it, the objective is not to question the philosophy of juvenile jurisdiction or to hamper the rehabilitative and protective action of the juvenile court. Rather, it is to insure that juveniles receive fair treatment and are not handled as second class citizens, under the guise of social benevolence. Thus, the courts have sought to insure that a juvenile is afforded certain of the procedural safeguards inherent in due process and available to adults, such as counsel, adequate notice and the like. Similarly, the courts have sought to protect a juvenile from state action bearing upon the question of whether an offense has been committed and of whether its detection and proof was fairly accomplished without invasion of individual rights. This area in-

78. *Id.* at 165, 145 N.W.2d at 184.

79. *Id.*

80. Donovan, *supra* note 69, at 233 n.33, reports ten instances where the defense has been "raised"; no data is provided on the success rate.

81. See, e.g., *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969), holding that a juvenile court must conduct a hearing to determine probable cause before a child may be held in pre-trial detention.

82. 106 N.J. Super. 583, 256 A.2d 322 (Morris County Juv. & Dom. Rel. Ct. 1969).

cludes matters such as entrapment, coerced confessions, search and seizure, and wire tapping. All of these procedural and substantive matters properly bear upon the adjudicative phase of juvenile proceedings.

The "defense" of insanity does not fall within those areas of constitutional concern over individual rights. It is a special type of defense which concedes that an act has been committed, properly detected and properly established. This is certainly the case here. The accused juvenile, 15 years of age, did perform the physical acts which resulted in the violent deaths of two children. Moreover, the propriety of the methods used in detecting and proving these facts are not questioned.

The defense of insanity, then, as applied in adult proceedings, reflects a social policy that offenders lacking mental capacity in law to commit a criminal act for which penal consequences—including death or life imprisonment—could otherwise be imposed, should not be held legally, morally or socially accountable for their acts. The focus is thus not upon the commission of the act itself but upon the penal consequences of it.⁸³

The equal protection objection to ruling out the defense of insanity was disposed of by viewing the effect of the defense in adult cases as immunizing insane criminals from the normal penal consequences of their conduct. These consequences included the fact of conviction which "brings the deterrent and punitive, as well as the rehabilitative aspects of criminal process into play." A finding of delinquency, on the other hand, does not produce penal consequences, for it

triggers the authority of the juvenile court to utilize the powers it has, consistent with the proclaimed protective and rehabilitative interests of the tribunal. After adjudication, N.J.S. 2A:4-37, N.J.S.A. authorizes the use of broad powers to provide for treatment and rehabilitation of juvenile offenders. Unlike the adult criminal courts, the juvenile court may make use of any public or private facility or institution appropriate and available under the circumstances. This includes private residential school placement, public or private mental hospitals, public and private institutions, and facilities for the training of the mentally retarded and the emotionally and physically handicapped. If anti-social acts are committed by children as a result of emotional disturbances, mental retardation or deficiency, or defect of reason due to

83. 256 A.2d at 326-27.

mental disease, the court is charged by statute with providing the proper treatment, rehabilitative measures or therapy.⁸⁴

Two additional points arose from the *In re H.C.* rejection of the insanity defense. Concerning the punishment and stigma arising solely from being adjudged a juvenile delinquent, the New Jersey court noted that young Winburn had been committed to the state hospital by the same court that had dismissed the delinquency charge against him, raising the "question whether Winburn was in reality less stigmatized by the label 'insane' which the court placed on him than he would have been as a juvenile delinquent."⁸⁵ Finally, the court felt pressed to avoid accepting a rule of law that would preclude an adjudication of delinquency because

[a]bsent adjudication, the court cannot act to exercise its *parens patriae* role to aid a juvenile offender. The inquiry, is and must be "Was the act committed?" To hold insanity applicable as a defense to adjudication would handcuff the court, run contrary to the basic theory of juvenile proceedings, and not be in the best interests of the juvenile himself.⁸⁶

In spite of the fact that one case accepted the insanity defense and the other rejected it, the similarities between *Winburn* and *H.C.* are more striking than their differences. In both instances the boys ended up in the state hospital.⁸⁷ Each court ordered that the boy must be discharged from the hospital without its permission.⁸⁸ The mental abnormalities in each case were recognized as requiring *some* significant differentiation of these boys from the typical juvenile delinquent. Each court was, moreover, faced with the stigma problem in insoluble terms. The finding of being delinquent or being mentally ill presents little to choose from, although there is some reason to believe that, given the option, children would prefer to be known as a delinquent. The juvenile courts in both states were concerned that the result of a decision should not be the outright release of an insane child. In de-

84. *Id.* at 327-28.

85. *Id.* at 328 n.6.

86. *Id.* at 328.

87. *Id.*

88. The New Jersey court concluded that: "The juvenile will be adjudicated delinquent. Pending review of the probation report and the availability of other proper facilities, he will be committed to Greystone Park State Hospital for psychiatric treatment." 256 A.2d at 329. See also 32 Wis. 2d at 165, 145 N.W.2d at 180.

termining whether the boy was insane, both the New Jersey and Wisconsin juvenile courts relied on the test used in adult criminal trials (*M'Naughten* in both states).

Not surprisingly, these seemingly conflicting insanity decisions evince concern for the same issues as do the cases dealing with the infancy defense most recently by the Supreme Court of California. They also perpetuate an unsatisfactory judicial process for mentally abnormal children. If there is anything left of the *parens patriae* view, it ought to extend to protecting children from the stigma of adjudication unless there is some compelling reason to the contrary, such as the need to preserve the deterrent role of juvenile court adjudications. In the realm of the mentally ill or the grossly immature, what minimal need of that sort that might exist can properly be dispensed with through efforts to avoid handicapping the future healthy development of children brought to the court.

The insanity cases and the infancy cases continue to share the use of the right-wrong test. In the former cases, the test is an extremely inept tool for measuring the mental abnormalities with which the juvenile court should be concerned. The right-wrong standard does serve to identify some wrongdoers whose mental condition suggests an absence of *mens rea*.⁸⁹ Reformulations of the insanity standard seek, moreover, to achieve recognition that there are other offenders whose mental abnormalities also serve to demonstrate a lack of *mens rea*, and who are beyond the influence of legal proscriptions.⁹⁰ Were the juvenile court concerned only with the *mens rea* question or with the need to provide deterrence, then it might be appropriate for it to adopt one or another of the currently popular tests of criminal insanity. It would be a relatively simple matter to provide that any child acquitted by reason of insanity may be committed to a mental hospital. This is essentially the Wisconsin scheme, applied in *Winburn*. The major concern of the court, however, should be the future welfare of the children before it. This concern is not fully discharged by an outcome strongly tainted with connotations of behavioral or mental depravity. There is no reason why an effort should not be made to avoid such an outcome. Juvenile court jurisdiction normally includes look-

89. MODEL PENAL CODE 156 (Tent. Draft No. 4, 1955): "Absent these minimal elements of rationality, condemnation and punishment are obviously both unjust and futile."

90. "The draft accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than impairment of cognition." *Id.* at 157.

ing after the welfare of neglected children who are emotionally ill,⁹¹ and could easily extend to those mentally deranged children who commit delinquent acts. It would be bound neither to commit, release nor order any other predetermined disposition, but could, free of deterrence and condemnation considerations, do its best to provide for the individual needs of the child. If therapy is called for, that process stands to benefit by an effort to divest the offer of help from the accusatory, punitive, and stigmatizing elements in the *Winburn* and *H.C.* alternatives. Where the elements of parental fault involved in a neglect proceeding are not present, the court should be authorized to vest the case in public or private child-care agencies, just as it would in cases initially brought to it on a non-delinquency basis. Placing the child under care and protection authority also raises the possibility that more can be done for one presented as an emotionally disturbed child, than for a person characterized as a mentally ill delinquent. But, if there is some potential to be exploited in helping children in a complex of troubles, then it makes little sense to limit that effort to instances where the emotional problems relate directly to the presence of *mens rea* and deterrence. These elements from criminal jurisprudence are present, but are of secondary importance in the juvenile court.⁹² What is at stake is the nature of society's interest in mentally abnormal children who commit delinquent acts, and the question of whether in appropriate cases the delinquency can be *ignored*, not by the predicate of an insanity acquittal, but truly be ignored and stricken from the child's record is most significant to the future development of the child. The juvenile court ought to be given broad discretion to quash the delinquency petition, substituting a care and protection petition when there is evidence of mental abnormality. This solution recognizes that while public welfare is sometimes in conflict with the child's interests, the recognition of a broad, exculpatory concept of irresponsibility, proposed here, seeks to focus on the fact that normally, such community interests are minimal. There is no *a priori* reason why, out of the many problems a child may be experiencing, society must always select a delinquent act as the basis for its action toward him. It is also true -

91. See, e.g., N.Y. FAMILY CT. ACT § 312 (McKinney 1963).

92. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967):

The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. . . . What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it.

that there may be cases where severe mental illness may accompany such an aggressive and dangerous defiance of other people's rights that care and protection jurisdiction might not provide adequate public security. The juvenile court might lack authority to order the degree of physical restraint or long-term treatment that would be called for. In such a situation a resort to civil commitment proceedings would appear to be the best solution.⁹³

THE RESPONSIBLE AND THE IRRESPONSIBLE CHILD

The proposal thus far advanced is that proof of the commission of delinquent acts ought not to dictate that a child be treated as a delinquent in all cases. The act may be part of immaturity or mental abnormality, rather than delinquency, which ought to command the attention of the court. There already has been some recognition of a need for this sort of flexibility. The Model Rules for Juvenile Courts, for example, provides that a petition may be amended by the court "at any time before an adjudication."⁹⁴ The comment to this rule suggests that "[t]he power to amend the petition can also be used in appropriate cases to convert a delinquency petition to a neglect petition; such amendments avoid giving the child a record of delinquency."⁹⁵ The New York Family Court Act contains similar authority, although phrased in terms of "substitution" rather than amendment. Section 716 provides:

- (a) On its own motion and at any time in the proceedings the court may substitute a neglect petition . . . for a petition to determine whether a person is in need of supervision.
- (b) On its own motion and at any time in the proceedings, the court may substitute a neglect petition . . . for a petition

93. This was the result required by the D.C. Court of Appeals in response to the issue, as put by Bazelon, C. J.: "In particular we must determine what obligations juvenile authorities, acting as *parens patriae*, have with respect to mentally disturbed adolescents." *Kent v. United States*, 401 F.2d 408, 409 (D.C. Cir. 1968). Burger, J. dissented on the ground that the decision of the juvenile court to waive the psychotic Kent to a criminal trial was a matter for its discretion. 401 F.2d at 412, 415. The Uniform Juvenile Court Act, § 35 (1968) requires resort to civil commitment when evidence of mental illness appears at a *dispositional* hearing, strongly implying thereby that the court is to go ahead and reach a delinquency finding regardless of the appearance of such evidence at the adjudicatory hearing. It is this branding of mentally ill children as delinquents that this paper proposes is unnecessary and wrong.

94. MODEL RULES FOR JUVENILE COURTS rule 8 (1969).

95. *Id.* rule 8, Comment.

to determine delinquency or for a petition to determine whether a person is in need of supervision.⁹⁶

The Uniform Juvenile Court Act of 1968 provides no authority to amend or substitute so as to convert the proceedings from delinquency to something else.⁹⁷ Even the provisions of the New York law and the recommended rules are defective, however, in that they provide absolutely no policy guides as to when, and for what purpose, the amendment or substitution is to be made. While it is beyond the scope of this article to deal with all the possible circumstances that might support a petition change, the intent here is to urge that when responsibility is absent, the change is in order, and that the two common law conceptions of responsibility be broadened so as to maximize the opportunities for flexibility.

What is needed is a relatively simple statute authorizing a "waiver down" to another sort of petition or referral to another agency. Needed also is a rule that when evidence relating to immaturity or mental condition is introduced, the burden passes to the state to show that it is the delinquent act, not the other conditions, which ought to govern the choice of jurisdiction or the referral options under which the court is to proceed, and to show that no change should be made regarding the delinquency petition. Promotion of individualized justice for children, as important as that might be, is not the sole reason for requiring a juvenile court to use its discretion in determining this question. It is also a matter of seeking to prevent the juvenile court from becoming just one more tribunal at the bottom of the judicial hierarchy where minor crimes are charged and justice is dispensed on an assemblyline basis. There is more risk of this degeneration now than ever before. The President's Crime Commission has made major recommendations concerning how cases might be kept out of the adjudicatory phases of the juvenile court, and out of court entirely. The proposals for Youth Service Bureaus and consent decree procedures⁹⁸ reflect a judgment that, upon entering the portals of the juvenile court

96. N.Y. FAMILY COURT ACT § 716 (McKinney 1963).

97. The Act does, however, relate to a class of children called "deprived," defined as being "without . . . care . . . necessary for his . . . mental, or emotional health, . . . and the deprivation is not due primarily to the lack of financial means of his parents." UNIFORM JUVENILE COURT ACT § 2(5)(i). The Act also, impliedly, rules out insanity as a defense, since § 35 provides for an examination and possible civil commitment, only at a disposition hearing, or a waiver hearing. Strangely, there is no comment to § 35.

98. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 83, 84 (1967).

hearing room, the best advice is "abandon hope all ye who enter here." Cognate recommendations for greater use of procedural formalities⁹⁹ further serve to create an image of the juvenile court as a child-devouring dragon against whom every weapon from the legal armory needs to be invoked. There are still likely to be large numbers of children coming before the court, and the reforms relating to pre-court screening should not divert attention from the need to continue screening out cases where punitive consequences are inappropriate, even when the cases have gone as far as a hearing on the merits. Legislation is needed to insure that the inherently punitive features of the juvenile court are not overused in the court.¹⁰⁰

99. *Id.* at 85-87.

100. The means by which petitions are changed or substituted need to be constructed with an awareness that the process may border on violation of double jeopardy limits. See *Benton v. Maryland*, 395 U.S. 784 (1969); *Tolliver v. Judges of Family Court*, 59 Misc.2d 104, 298 N.Y.S.2d 237 (Sup. Ct. 1969). If petitions are not substituted or amended but jurisdiction is found on a basis not alleged, it must be borne in mind that the Supreme Court of the United States has already held that: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). In brief, the drafting problems involved in providing for the "waiver down" are substantial. In *re Gladys R.* did not consider the questions of double jeopardy or variance. The most relevant part of the California juvenile court law, CAL. WELF. & INST'NS CODE § 678 (West 1966), merely says that the rules governing variance and amendments of pleadings in civil actions shall apply.