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Intent in Fact, Insanity and Infancy: Elusory Concepts in the Exercise of Juvenile Court Jurisdiction

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"Juvenile delinquency," when employed as a technical term rather than merely a descriptive phrase, is entirely a legislative product. Its meaning varies from country to country and from state to state. Delinquency in one jurisdiction may be criminality in another, or it may be both delinquency and criminality in the same jurisdiction, or it may be neither. In addition, some juvenile courts have been authorized by their legislatures to determine whether the juvenile should be treated as a delinquent or as a criminal. If the decision is made that the child should be treated as a criminal, the juvenile court would waive or transfer the case to criminal court. Murder by a nine-year-old illustrates the variation. Thirty-five states in the United States treat this as delinquent conduct and bring the child to juvenile court. Nine of these states would permit the juvenile courts to waive the case to criminal court. Six states treat this as criminal conduct exclusively and require the case be brought to criminal court in the first instance. Five states treat the homicide as both delinquent and criminal conduct and give the juvenile and criminal courts concurrent jurisdiction. The remaining four states treat the child as neither delinquent nor criminal. Neither court would be given jurisdiction.[1]

Several factors play a role in determining whether the conduct is treated as delinquent, criminal, or neither. The first is the presumption of criminal incapacity. At common law a child under seven was conclusively presumed incapable of possessing criminal intent. No evidence could be received to show capacity in fact. A child between seven and fourteen was presumed incapable of entertaining a criminal intent, but this presumption was rebuttable by a showing to the criminal court jury that the child was of sufficient intelligence to distinguish between right and

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1. Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113, 119-20.

wrong, and understood the nature and illegality of his act. This presumption was extremely strong at the age of seven and diminished gradually until it disappeared entirely at the age of fourteen. A child over fourteen was in substantially the same position with regard to criminal responsibility as an adult. He was presumed to be capable of criminal intention and therefore responsible, unless he could show that he was not of sufficient capacity.[2] The maximum age for irrebuttable presumption of criminal incapacity established the minimum age for criminal court jurisdiction. Over the years about one third of the states have raised this from the common law age of seven. Several have gone as high as sixteen.[3]

The second factor is the legislative action creating juvenile courts. This legislation carved from criminal court jurisdiction a segment of cases dealing with the youngest defendants. The group removed ranged in age from the minimum age for criminal court jurisdiction to an age equivalent to the maximum age for juvenile court jurisdiction. If the maximum age for complete criminal incapacity was seven and the maximum age for juvenile court jurisdiction was sixteen, the seven to sixteen-year-olds would be removed from criminal court jurisdiction. In addition, most states dropped the minimum juvenile court age to a level below the former minimum criminal court age. Thus, the juvenile court became involved with two types of juveniles: those within the age of complete criminal incapacity and those above this age.

While many cases were brought to juvenile court alleging as the basis of jurisdiction that the juvenile committed an act which if committed by an adult would have been a crime, early juvenile courts paid little attention to the elements of the crime. Guilt or innocence was not an issue. "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[4] In 1967 the United States Supreme Court directed a change in emphasis. It stressed that

2. *See* 4 W. BLACKSTONE, COMMENTARIES *22-24; W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 6.12 (6th ed. 1958); J. MILLER, HANDBOOK OF CRIMINAL LAW § 34 (1934); R. PERKINS, CRIMINAL LAW 837-40 (2d ed. 1969) [Hereinafter cited as PERKINS]; Kean, *The History of the Criminal Liability of Children,* 53 L.Q. REV. 364 (1937). For a discussion of the common law and the criminal responsibility of mental infants, *see* Woodbridge, *Physical and Mental Infancy in the Criminal Law,* 87 U. PA. L. REV. 426 (1939); Note, *Problem of Age and Jurisdiction in Juvenile Court,* 19 VAND. L. REV. 833, 848-49 (1966).

3. *See, e.g.,* N.J. STAT. ANN. § 2A:85-4 (1969).

4. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 119-20 (1909).

prior to disposition, a finding must be made that the juvenile did commit the specific wrong, and this finding must be preceded by an adjudication hearing where the child has an opportunity to defend himself from the formal charges made against him.[5] In 1970 the high court went a step further and required that when the delinquency was predicated on conduct that would have been criminal had it been committed by an adult, proof of the specific wrong must be established beyond a reasonable doubt and not just by a preponderance of the evidence.[6] What then needs to be proven in juvenile court? If the case were tried in criminal court, the mens rea (the intent or mental element) and the actus reus (the overt act) must both be present and concur to constitute a true crime.[7] One, for example, who shoots and kills another with a rifle has not committed first degree murder if he lacked the intent to kill at the time he pulled the trigger.[8] Granted that the actus reus elements must be proven in juvenile court (and proven beyond a reasonable doubt), must the mens rea element also be proven? If the mens rea element also must be proven, could the child defeat juvenile court jurisdiction by claiming that he lacked the intent in fact, or that he lacked the ability to form the requisite intent because of insanity, or that he lacked the requisite intent due to age? This Article will explore the re-

5. In *In re* Gault, 387 U.S. 1 (1967), the Court addressed itself squarely to the adjudication aspect of the delinquency hearing. It held that the juvenile was denied due process of law because juvenile delinquency proceedings which may lead to commitment in a state institution must provide (1) written notice of the specific charge or factual allegations given to the child and his parents or guardian sufficiently in advance of the hearing to permit preparation; (2) notification to the child and his parents of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child; (3) application of the constitutional privilege against self-incrimination; and (4) absent a valid confession, a determination of delinquency and an order of commitment based only on sworn testimony subjected to the opportunity for cross-examination in accordance with constitutional requirements.

6. *In re* Winship, 397 U.S. 358 (1970); *see* Ivan V. v. City of New York, 407 U.S. 203 (1972) (*Winship* held to apply retroactively).

7. *See* PERKINS, *supra* note 2, at 834. The phrase "crime" or "true crime" must be distinguished from "public torts" or "civil offenses." For a discussion of the distinction, *see id.* at 740.

8. [T]here are two components of every crime: One of these is objective, the other is subjective; one is physical, the other is psychical, one is the *actus reus*, the other is the mens rea. Although two or more offenses may have the same objective component, as in the case of murder and manslaughter, the *actus reus* generally differs from crime to crime. In murder it is homicide; in burglary it is the nocturnal breaking into the dwelling of another; in uttering a forged instrument it is the act of offering as good an instrument which is actually false. In like manner the mens rea differs from crime to crime. In murder it is malice aforethought; in burglary it is the intent to commit a felony (and under some statutes an intent to commit any public offense); in uttering a forged instrument it is "knowledge" that the instrument is false plus an intent to defraud.

Id. at 743 (footnote omitted).

lationship of these three aspects of mens rea as they affect juvenile court jurisdiction.

I. INTENT IN FACT

The basic tenet of the juvenile courts is that the state in a delinquency proceeding acts as parens patriae and not as an adversary. The duty of the state is not to prosecute but to bring the child and his parents or guardians before an experienced and humane judge who shall inquire into the situation and who shall, when fully advised, do that which is best for the child's future. The best interest of the child is always of paramount consideration. Because these courts proceed as parens patriae and not as prosecutor and judge, the proceedings are "civil" in nature and not "criminal." Since they are civil, the child is not being prosecuted for the "crime" even though the "crime" is the basis on which the delinquency petition is formulated. The important element is that the child committed the anti-social act. Intent in fact is irrelevant.[9]

This view is not universal. Others consider intent in fact relevant in the determination of delinquency. Juvenile delinquency should not be determined upon the basis of the child's accidental deed.[10] A well-worn phrase is "[e]ven a dog distinguishes between being stumbled over and being kicked."[11]

Each view overstates its position. Something more than the mere commission of an anti-social act is necessary. Otherwise a child could be declared delinquent based on a crime that technically was not committed and could be institutionalized when there is no mental perspective that needs rehabilitation. Unfettered discretion for the declaration of delinquency and institutionalization would be in the hands of the judge. Penalty for the commission of the anti-social act would be the order of the day. On the other hand, something less than the highest mental element should be required. In order to fulfill the mission of the juvenile court—rehabilitation—the child must be brought within the juvenile court's jurisdiction so the court's remedies may be brought to bear before it becomes too late.

The logical starting point in the search for the mental element

9. *See In re* L.B., 99 N.J. Super. 589, —, 240 A.2d 709, 712-13 (Juv. & Dom. Rel. Ct. 1968); *cf. In re* Steenback, 34 N.J. 89, 102, 167 A.2d 397, 403 (1961). *But see* State v. J.M., 110 N.J. Super. 337, 265 A.2d 553 (App. Div. 1970), *rev'd*, 57 N.J. 442, 273 A.2d 355 (1971).

10. *In re* Winburn, 32 Wis. 2d 152, 163-64, 145 N.W.2d 178, 184 (1966).

11. This phrase has been attributed to O. HOLMES, THE COMMON LAW 3 (1881), and has subsequently been cited, for example, in *In re* Winburn, 32 Wis. 2d 152, 164, 145 N.W.2d 178, 184 (1966).

for juveniles is the mental element required for conviction of any particular crime by an adult. For various offenses the mens rea may consist of: (1) the intent to do the deed which constitutes the actus reus of that offense;[12] (2) something distinctly less than this intent;[13] (3) something distinctly more than this intent;[14] or (4) something other than this intent which cannot be designated as distinctly either more or less than the intent itself.[15] While some mental element should be required in juvenile court, the variety of mens rea would not have the same relevance as in criminal courts. There is no need for overkill since the juvenile court lacks an inherent conception of the more severe penalty.[16] The key in combining the mens rea and the actus reus

12. For the crime of making a mold in the similitude of the genuine coins of the United States, the mental element essential to guilt is the intent to make the mold. It is not necessary for the prosecution to show that the mold was made for the purpose of counterfeiting United States money, or to be sold to another who might so use it; nor can the defendant excuse his deed by showing that no improper use was to be made of the mold. As such an object could not be produced by negligence, the element of criminal negligence is not involved.

PERKINS, *supra* note 2, at 750 (footnotes omitted).

13. Mens rea which is distinctly less than an intent to commit the *actus reus* is best exemplified by those offenses which may result from criminal negligence, such as involuntary manslaughter. The *actus reus* of manslaughter is homicide, and if homicide results quite unintentionally, but from criminal negligence, it is manslaughter. This is true, moreover, even where the death is caused, not by positive action, but by the criminal negligent omission of a legal duty.

Id. (footnotes omitted).

14. Larceny is a typical example of a crime in which the mens rea is something distinctly more than an intent to do the *actus reus.* An intentional trespassory taking and carrying away of the chattel of another is not larceny if it is only a temporary (though wrongful) "borrowing."

Id.

15. Mens rea which is other than an intent to commit the *actus reus* and yet something which cannot be designated as distinctly either more or less than this intent itself, finds an excellent illustration in the crime of murder. The *actus reus* of murder is homicide, but the mental element of this offense (malice aforethought) is such that in one case an intentional killing may not be murder, whereas in another case an unintentional homicide may constitute this crime. For example, a killing (though without legal justification or excuse) may be intentionally caused in the sudden heat of passion engendered by such provocation that the offense will be not murder but voluntary manslaughter, while on the other hand the robber who kills the person he is attempting to rob is guilty of murder even if the killing was quite accidental.

Id. at 750-51 (footnotes omitted).

16. The particular criminal offense with which an adult offender is charged often depends upon the kind of criminal intent that can be proved. For example, the difference between first degree murder, second degree murder, and manslaughter is largely a matter of difference in the kind of *mens rea* which can be proved. The kind of offense with which the adult is charged governs the length and kind of punishment which may be meted out by the courts. Since a certain punishment is related to a certain crime, the importance of *mens rea* in distinguishing between different offenses is unquestionable in the usual criminal case. This is not true in the juvenile court. Once a

elements lies in the selection of the offense. The choice of the crime on which to base the delinquency petition should reflect the child's mental element at the time of the commission of the anti-social act.

Evaluation of the mental state of the child is not new. The competency of an infant to testify in criminal court, especially in a sex offense case where the child was the victim, illustrates that when the need for evaluation arises, it has become possible.[17] Pre-juvenile court decisions also illustrate that the mental state of a juvenile can be probed.[18] Even some juvenile courts have dis-

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justification for action is shown in a juvenile proceeding, the treatment of the youth is individualized depending upon his needs. The disposition made by the judge has no necessary relation to the offense committed except insofar as it gives an insight into the youth's problems and the kind of treatment that might assist in his rehabilitation. Thus, assuming the judge does not waive jurisdiction to the criminal courts, the distinction between murder and manslaughter becomes much less important in the juvenile court. The difference in the *mens rea* requirement in burglary and housebreaking loses its significance. The examples could be multiplied, but there seems to be no necessity to do so in order to make the point that this difference makes *mens rea* much less important in juvenile court proceedings than in criminal proceedings.

Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAMILY L. 121, 137 (1965).

It would be unrealistic to state that the crime charged in a delinquency petition lacks relevancy. *In re* Glassberg, 230 La. 396, 405, 88 So. 2d 707, 711 (1956), noted that the charge may be important in determining the disposition:

> [T]he Juvenile Court concluded that the appellant was a delinquent in that he committed the crime charged in the petition of aggravated battery (a conclusion which, in our opinion, was incorrect) and, as a consequence, placed him on probation for three years. We cannot say that the same action would have been taken by the court had appellant been charged as and adjudged a delinquent for his having committed negligent injury only, a crime of far less magnitude than aggravated battery as indicated by the penalty provided for each offense.

17. Texas illustrates the adaptation. In 1857 Texas raised the irrebuttable presumption of criminal incapacity from seven to nine and lowered the rebuttable presumption for criminal incapacity from fourteen to thirteen. TEX. PEN. CODE art. 36 (1857). Subsequently, the Texas Court of Criminal Appeals reversed a rape conviction based on the testimony of the seven-year-old victim:

> [I]f a person cannot be punished for perjury, who takes an oath as a witness, such an oath is not binding, and such person cannot be a witness in a case involving life or liberty; and a conviction based in whole or in part upon the testimony of such a witness cannot be sustained. . . . We respectfully call the attention of the Legislature to this condition, as it may follow in many cases, especially injuries committed on children of tender years, that the guilty party may escape punishment, however intelligent the witness may be, and however capable of understanding the nature and obligation of an oath, simply because such a witness does not testify under the pains and penalties of perjury, which is required by our Constitution.

Freasier v. State, 84 S.W. 360, 360-61 (Tex. Crim. App. 1904). The following year the legislature responded by amending the infancy statute so that persons under nine could be competent as witnesses. This was accomplished by permitting the child to testify "when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath . . . ." ch. 59, § 1, [1905] Tex. Laws 83.

18. For a discussion of intent in fact in early Texas cases, *see* Binkley v. State, 51 Tex. Crim. 54, 100 S.W. 780 (1907); Simmons v. State, 50 Tex. Crim.

missed delinquency petitions for lack of intent in fact. *In re Glassberg*[19] presents an excellent example. Glassberg, age thirteen, was adjudged a delinquent in juvenile court in that he committed aggravated battery on a fourteen-year-old girl by shooting her in the face with a rifle. The Supreme Court of Louisiana reversed, set aside the juvenile court judgment and dismissed the proceedings. It defined aggravated battery as the intentional use of force or violence on the person of another committed with a dangerous weapon. General criminal intent was necessary to sustain the charge (specific intent was unnecessary). General criminal intent would have been present whenever there was specific intent or when the circumstances indicated that the offender, in the ordinary course of human experience, must have averted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. To warrant a conclusion that criminal intent was present and therefore aggravated battery was committed, a showing that Glassberg intended to injure the girl was not essential. It was only necessary to prove that he voluntarily committed the act which resulted in her injury. The existence of general criminal intent could have been concluded if proof were made that he had voluntarily pulled the trigger of the gun to discharge it, for then he would have intentionally committed an act which under the circumstances might reasonably be expected to result in criminal consequences—a battery on one of the children with whom he was playing at the time. However, according to the evidence, Glassberg's pointing of the gun in the general direction of the girl and the discharging of it with the resulting injury were wholly accidental acts. The court concluded that Glassberg may have been grossly negligent in his handling of a loaded gun in the presence of other children, but this was not the same as having the general criminal intent essential for the crime of aggravated battery.[20]

527, 97 S.W. 1052 (1906); Price v. State, 50 Tex. Crim. 71, 94 S.W. 901 (1906); Allen v. State, 37 S.W. 757 (Tex. Crim. App. 1896); Keith v. State, 33 Tex. Crim. 341, 26 S.W. 412 (1894); Carr v. State, 24 Tex. Ct. App. 562, 7 S.W. 328 (1888); Parker v. State, 20 Tex. Ct. App. 451 (1886); Wusnig v. State, 33 Tex. 651 (1871).

19. 230 La. 396, 88 So. 2d 707 (1956).

20. *See* People in the Interest of J.S.C., 493 P.2d 671 (Colo. App. 1972) (theft: trial court erred in excluding the juvenile's testimony on intent); In the Interest of Landorf, 7 Ill. App. 3d 89, 287 N.E.2d 21 (1972) (reckless conduct in the shooting of a companion: evidence did not support conclusion that juvenile acted recklessly); State v. Melanson, 259 So. 2d 609 (La. App. 1972) (possession of stolen goods: no evidence that the juvenile intentionally received or concealed the items or that they were received or concealed under circumstances which indicated that he knew or had good reason to believe that the items were the subject of a burglary or theft); State in the Interest of Emerson, 250 So. 2d 439 (La. App. 1971) (receiving stolen goods: evidence did not show an intention to retain possession); In the Matter of Riffin, 69 Misc.

II. INSANITY

The cornerstone for juvenile court reasoning, the parens patriae philosophy coupled with the "civil" nature of the proceedings, applies to both insanity and intent in fact. At this point divergence occurs. Intent in fact deals with "is this a prosecution for a crime"; insanity purports to deal with a comparison of rights. Since juvenile court proceedings have not been considered criminal, the child has not been entitled to the rights of a criminal defendant. By considering insanity a defense to a crime and thus a right of a defendant in a criminal case, to provide the child with this right would amount to arming him with a criminal right.[21] The child, however, need not phrase his request as one for a criminal right. Instead the claim could be made for a fundamental due process right to fair treatment. This applies to civil as well as to criminal proceedings. Using this approach the ques-

2d 761, 330 N.Y.S.2d 850 (Family Ct. 1972) (evidence did not support the conclusion that the ten-year-old boy possessed the requisite reckless intent in assaulting the victim); *In re* Bogart, 45 Misc. 2d 1075, 259 N.Y.S.2d 351 (Family Ct. 1963) (evidence did not support the conclusion of negligence while engaged in hunting that resulted in the death of another); *accord,* State v. Suchy, 58 Ohio Op. 2d 376, 277 N.E.2d 459 (C.P. 1971) (use of a juvenile to purchase or possess a hallucinogen as an aid in the apprehension and prosecution of the seller of the hallucinogen); *cf.* United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968) (transportation of stolen vehicle: evidence supported conclusion that the juvenile transported the vehicle with knowledge that it was stolen); *In re* C.D.H., 7 Cal. App. 3d 230, 86 Cal. Rptr. 565 (1st Dist. 1970) (assault with a deadly weapon: evidence supported conclusion that the juvenile intentionally shot the victim); *In re* T.R.S., 1 Cal. App. 3d 178, 81 Cal. Rptr. 574 (4th Dist. 1969) (evidence supported conclusion that the eleven-year-old, judged by the standards of a boy of his age, mental capacity, experience and intelligence, was criminally negligent in handling a firearm that resulted in the death of another); *In re* Bradley, 258 Cal. App. 2d 253, 65 Cal. Rptr. 570 (2d Dist. 1968) (evidence supported the conclusion that the juvenile intentionally acted with a wanton and reckless disregard of the possible result of his conduct); Mack v. State, 125 Ga. App. 639, 188 S.E.2d 828 (1972) (armed robbery and murder: evidence supported the conclusion that 14-year-old was acting as a lookout); In the Matter of D.M.L., 293 A.2d 277 (D.C. App. 1972) (aiding and abetting unauthorized use of motor vehicle: evidence was sufficient to warrant an inference that the juvenile had actual knowledge that the vehicle was being used without the owner's consent); *In re* Hitzemann, 281 Minn. 275, 161 N.W.2d 542, 545 (1968) (the inference of intent to exercise dominion for theft could be drawn from the fact that the youth was caught in the act of walking off with the property); In the Interest of J.M., 57 N.J. 442, 273 A.2d 355 (1971), *rev'g* 110 N.J. Super. 337, 265 A.2d 553 (App. Div. 1970) (evidence supported the conclusion of intent to use hypodermic needle and eyedropper for subcutaneous injection of narcotic drugs); *In re* Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368 (Family Ct. 1970) (3d degree assault: evidence supported conclusion of intentional physical injury to a person or reckless causing of physical injury to another person); *In re* Turner, 56 Misc. 2d 638, 289 N.Y.S.2d 652 (Family Ct. 1968) (murder: evidence supported conclusion that fifteen-year-old boy intentionally caused the deaths of his mother and his maternal grandmother by shooting them with a rifle); State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972) (common law robbery: evidence sufficient to show a felonious intent on the juvenile's part permanently to deprive the victim of his money and to convert it to his own use).

21. *See In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct. 1969).

tion becomes "does the denial of the insanity defense in juvenile court constitute a denial of fair treatment?"

The thrust of recent decisions protecting juveniles has registered concern that the parens patriae doctrine could result, in individual situations, in arbitrary action that lacks fundamental fairness. The objective of these cases has not been to question the philosophy of juvenile jurisdiction nor to hamper the rehabilitative and protective action of the court. Rather, these cases have sought to insure that juveniles are not handled as second-class citizens under the guise of social benevolence. The courts have rendered protection to juveniles on questions concerning whether the offense has been committed and whether its detection and proof have been fairly accomplished without the invasion of individual rights.[22]

Insanity concedes that an act has been committed, properly detected and properly established. 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 not on the commission of the act itself but on its penal consequences.

Does this social policy also apply in juvenile proceedings? The penal consequences between juvenile and criminal proceedings differ. An adjudication of delinquency is hardly the same as a finding of guilt in a criminal proceeding. While the criminal conviction brings into play the deterrent and punitive, as well as the rehabilitative aspects of the criminal process, conflict exists over whether the disposition after the delinquency adjudication will be solely rehabilitative or rehabilitative, deterrent and punitive. If the latter, then, although the emphasis would be different, the penal consequences of the two proceedings would be similar. Similar consequences should lead to the conclusion that a similar social policy should prevail. This in turn should be reflected in the applicability of an insanity defense to juvenile proceedings.[23]

22. *See In re* Winship, 397 U.S. 358 (1970); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967); *In re* H.C., 106 N.J. Super. 583, —, 256 A.2d 322, 326-27 (Juv. & Dom. Rel. Ct. 1969); *see also* Kent v. United States, 383 U.S. 541 (1966).

23. The parens patriae concept has been criticized as a pipe dream. While the state is supposed to proceed as parens patriae, juvenile courts lack the

The rehabilitation versus rehabilitation, deterrence, and punishment discussion veils the true problem. That is, would the court be able to exercise its parens patriae power if it permits the use of the insanity defense. If insanity prevents the court from acting, then insanity will be considered irrelevant. This is illustrated in the situation where the court must declare the child delinquent before it can aid the child. With this approach, the adjudicatory phase becomes crucial to the whole juvenile process. 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 interest of the juvenile himself. Without adjudication, the court could not exercise its parens patriae role.[24]

This is not to suggest that an "insanity defense" has no bearing in juvenile proceedings. It may impose a limitation on the dispositionary aspect of juvenile matters. Where insanity is not a defense to adjudication, a juvenile who has been adjudicated delinquent based on an anti-social act committed while insane should not be subjected to penal sanctions. If an adult may avoid penal sanctions—that is, incarceration in a prison or reformatory because of mental disease—a child with the same afflic-

personnel, facilities and techniques to perform adequately as representatives of the state in a parens patriae capacity, at least with respect to the child charged with a law violation. The result is that he receives the worst of both worlds. He gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

The fact that the proceedings are civil and not criminal has been criticized as unrealistic. What may appear to the juvenile worker and judge as treatment may look like punishment to the juvenile. Irrespective of what the procedure is called, and no matter how benign and well intended the judge who administers the system is, the juvenile procedures, to some degree at least, smack of crime and punishment. Also, while the primary statutory goal is the best interest of the child, that interest is 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 also 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 since the judgments of juvenile courts do serve as deterrents to the conduct of at least a segment of our juvenile society, not because they fear rehabilitation but because they fear incarceration and punishment. In addition the adjudication of delinquency does carry with it a social stigma and the child may be administratively transferred to an adult institution. The conclusion that may be drawn from all of this is that the traditional concepts of crime and punishment have not in fact been eliminated. Even with these vestiges of crime and punishment still existing, the courts have avoided changing the juvenile court label from civil to criminal. If the label of the juvenile court proceedings were changed to criminal, then the entire philosophy of juvenile courts, with its avowed purpose of being an antithesis of criminal prosecution, would be rejected. As a result the courts would have no choice but to grant the child all of the rights available to adults in criminal cases. *See In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

24. *See In re* H.C., 106 N.J. Super. 583, — n.5, 256 A.2d 322, 328 n.5 (Juv. & Dom. Rel. Ct. 1969).

tion should not be treated more harshly because he is a juvenile. This accords with the purpose and effect of recent Supreme Court decisions and with the social policy inherent in the original philosophy of the juvenile court movement. It promotes and protects the juvenile's best interests, and it permits the juvenile court to function as intended. Under this approach, juvenile authorities are in a position to provide for the child not the worst of both worlds, but some of the best of both worlds. From the one, "the protection accorded adults," in that if a child is legally insane, no penal sanctions may be imposed; at the same time, from the other he may receive "the solicitous care and regenerative treatment postulated for children" in the exercise of the court's authority to use any available treatment and rehabilitative facilities for a juvenile "offender."[25]

Not all juvenile courts are forced to ignore insanity as a defense. The techniques available differ. Some states permit their juvenile courts to dismiss the delinquency petition on the merits by reason of insanity. Unlike the juvenile court that has no power to exercise its parens patriae role without an adjudication of delinquency, this approach permits a special adjudication. The inquiry initially concentrates on "was the act committed?" This is followed by the defense that it was committed when the child was insane. The adjudication, then, is equivalent to the criminal response of not guilty by reason of insanity. With this decision, the court does not lose jurisdiction. Like the adult court, it may commit the child to a mental institution.[26]

A similar technique requires the filing of a delinquency petition but authorizes commitment prior to the need for adjudication on the petition. *In re Winburn*[27] illustrates the application of this approach. A petition for delinquency was filed charging fifteen-year-old Winburn with first degree murder. At the adju-

25. *Id.* at —, 256 A.2d at 328-29.

26. *See In re* Gladys R., 1 Cal. 3d 855, 874, 464 P.2d 127, 141-42, 83 Cal. Rptr. 671, 685-86 (1970) (concurring and dissenting opinion); *see also In re* Turner, 56 Misc. 2d 638, 645-46, 289 N.Y.S.2d 652, 659-60 (Family Ct. 1968); State v. Farrell, 209 S.W.2d 642 (Tex. Civ. App. 1948). The technique for pleading non-delinquent by reason of insanity may not be available in some jurisdictions due to statutory drafting. For example, N.J. STAT. ANN. 2A: 163-3 (1953), which authorizes commitment of an adult acquitted by reason of insanity, applies only to indictable offenses and is not applicable in juvenile cases. *See In re* H.C., 106 N.J. Super. 583, — n.5, 256 A.2d 322, 328 n.5 (Juv. & Dom. Rel. Ct. 1969).

In *In re* Winburn, 32 Wis. 2d 152, 165, 145 N.W.2d 178, 184 (1966), the Wisconsin Supreme Court held that the juvenile judge had the duty to dismiss the delinquency petition on its merits when the fact of insanity was proved. This would make the case appear to be authority for this view of non-delinquent by reason of insanity. It is, however, better authority for the next technique—commitment prior to the need for adjudication.

27. 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

dication hearing, Winburn's guardian ad litem invited the court's attention to the fact that there was some question whether his ward "understands the nature and quality of his acts at this time." The juvenile judge ordered that the child undergo a psychiatric examination.[28] After the report was made, the judge ordered a hearing into the juvenile's mental condition.[29] The child was adjudged mentally ill and ordered committed. Since the child already had been committed, the juvenile court dismissed the delinquency petition on its merits by reason of insanity. Since the dismissal of the delinquency petition occurred after he was committed, this approach must be distinguished from the prior approach where commitment was derived from the type of dismissal.[30]

Unlike the previous two techniques where the filing of a delinquency petition is at least the minimum requirement for initiation of the juvenile process, a third technique is to extend juvenile court jurisdiction beyond the delinquency concept. The juvenile court is provided with jurisdiction to commit the insane child without proof of delinquency. For example, in California, the juvenile court has jurisdiction to adjudge a minor to be a dependent child of the court "[w]ho is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality."[31] This avoids the wait for the necessary actus reus required for the crime and makes the aid of the court available as soon as proceedings are instituted.[32]

III. INFANCY

The third concept, infancy, adds a new facet to the intent problem. Unlike the lack of intent in fact and the lack of intent due to the inability to formulate the intent in fact, infancy does not consider ad hoc the existence of intent. The infancy defense is based on the policy decision that *all* children below a given age should be treated as if they did not have the requisite intent. While intent in fact and insanity could be applied to all children

28. *See* WIS. STAT. ANN. § 48.24 (1957).

29. *See* WIS. STAT. ANN. § 48.14(3) (1957) which provides:

> If a child is before the court, alleged to be a delinquent . . . and it appears that the child may be . . . mentally ill, the court may order a hearing to determine whether the child is . . . mentally ill . . . .

30. For a discussion of the constitutionality of the approaches taken in *In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct. 1969) and *In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966), *see* Popkin & Lippert, *Is There a Constitutional Right to the Insanity Defense in Juvenile Court?*, 10 J. FAMILY L. 421 (1971).

31. CAL. WELF. & INST'NS CODE § 600(c) (West 1972).

32. *Cf. In re* M.G.S., 267 Cal. App. 2d 329, 337 n.3, 72 Cal. Rptr. 808, 812 n.3 (2d Dist. 1968).

in juvenile court, the infancy defense, if applicable, might apply differently to children of various age groups. For example, if the jurisdiction retained the common law ages for the infancy presumptions at seven and fourteen and if its juvenile court had exclusive jurisdiction from birth to age sixteen, then three categories would exist. The child under seven could claim the common law presumption of complete criminal incapacity and thus could not be charged with delinquency based on any offense that would require intent. The child between seven and fourteen could claim the common law presumption of criminal incapacity and the state would have the burden of rebutting the presumption with proof of capacity. The child between fourteen and sixteen would be beyond the age of incapacity and would receive no benefit from the infancy presumption.

The applicability of the infancy defense to juvenile court proceedings should depend on whether the purpose underlying the infancy defense is compatible with the nature of the juvenile court. The infancy defense was conceived prior to the conception of the juvenile court.[33] Its purpose at common law was to prevent the punishment by any criminal prosecution whatever of an infant under the age of discretion.[34] Assuming that the purpose of the juvenile court is rehabilitation and not punishment, the infancy defense would be incompatible with delinquency proceedings.[35] To hold otherwise would engraft a series of exceptions to juvenile court jurisdiction. A typical jurisdictional statute may currently read:

> The juvenile court shall have exclusive original jurisdiction in proceedings concerning any child under 16 who violates any law of this state of the grade of felony.

To hold the infancy defense applicable would change the statute to read:

> The juvenile court shall have exclusive original jurisdiction in proceedings concerning any child *over 7* and under 16 who violates any law of this state of the grade of felony; *provided that in cases where the child is between 7 and 14 the state must rebut the presumption of incapacity.*

33. The infancy defense may be traced back to at least the time of Blackstone. *See* 4 W. BLACKSTONE, COMMENTARIES *22-24. *See generally* JUVENILE OFFENDERS FOR A THOUSAND YEARS (W. Sanders ed. 1970). The first juvenile court act came into existence in Illinois in 1899. *See* Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909).

34. *See* 4 W. BLACKSTONE, COMMENTARIES *22.

35. *See In re* H.C., 106 N.J. Super. 583, — n.3, 256 A.2d 322, 327 n.3 (Juv. & Dom. Rel. Ct. 1969), which held the infancy defense inapplicable to juvenile court proceedings. *See also In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970) (rebuttable presumption of infancy defense applicable to juvenile court proceedings).

While this would define the presumptions when the juvenile's age at commission of the offense coincides with his age at the time of the proceedings, it would not resolve the allocation of presumptions when the ages do not coincide. Presumably a child under seven at the time of the commission, that is, the child with the irrebuttable presumption of incapacity, could not be brought before the juvenile court for that offense once he has passed the age of seven. It would seem that he always could claim the irrebuttable presumption of incapacity. The child between fourteen and sixteen who committed an offense while between seven and fourteen may not always be in such a favored position. Whether he could claim the rebuttable presumption of incapacity would depend on whether the jurisdiction permits the age at commission or the age at the time of the proceedings to control.[36] If the age at the time of the proceedings governs, then he would not have claim to the rebuttable presumption of incapacity.

While the discussion concerning the application of the infancy defense to juvenile court proceedings is hypothetical, the infancy defense does result in a factual interaction between juvenile and criminal court jurisdiction. For example, a statute that purports to permit the juvenile court to waive jurisdiction to the criminal court for *all* juveniles within its exclusive original jurisdiction is limited in fact by the irrebuttable presumption of incapacity. If the juvenile court does waive, the criminal court is without jurisdiction due to the presumption of incapacity.[37] Secondly, if the juvenile court has exclusive jurisdiction of children under sixteen and the court uses the age at the time of commission of the offense to determine whether the juvenile or criminal court has jurisdiction, then setting the age for criminal incapacity, whether it be irrebuttable or rebuttable, at an age below sixteen would be futile. Since the criminal court would never see a defendant who was charged with committing an offense while under sixteen, the presumption could be claimed by no one. The infancy defense then becomes a relic of the pre-juvenile court era.[38]

IV. CONCLUSION

The concept of intent in fact relates to the proposition that juvenile court jurisdiction is being based on the commission of a crime.

36. *Compare* People v. Oliver, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956) (age at commission) *with* People v. Carlson, 360 Mich. 651, 104 N.W.2d 753 (1960) (age when accused) *and* State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948) (age at the proceedings).

37. *See* Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113, 118.

38. *See id.* at 126, 131.

By charging delinquency based on a crime and deleting proof of intent in fact, the courts have permitted the pleading of one charge and the proving of another. If the concept of crime is so detestable when discussing juveniles, then it, and not the concept of intent in fact, should be eliminated as a concept in juvenile court. Acts alone that may show anti-social conduct could be used for juvenile court jurisdiction. Homicide, the killing of one human being by another human being, could serve as an example. A child who commits a homicide could be designated within the juvenile court's jurisdiction. The mens rea element that would normally differentiate between homicides (murder, manslaughter or justifiable homicide) would be eliminated. The first question for the court would be whether the child committed the homicide. An affirmative answer would place the child within the court's jurisdiction for disposition. The court would then receive evidence to determine "what had best be done in his interest and in the interest of the state to save him from a downward career." By eliminating the mens rea element from the definition of juvenile court jurisdiction, the proof of the charge would be consistent with the pleading and the original tenet of the juvenile court could be revived.

This approach would be objectionable in that the child is labeled a delinquent regardless of whether the act was an accident. The relevancy of accident would be held for disposition. Therefore intent in fact should be as much an element in the proof of the case as are the actus reus elements. Care must be taken, however, in selecting an offense where the intent can be proven. Otherwise the jurisdiction of the juvenile court will be defeated. Without jurisdiction, the court is powerless to help the child. The problem is not as great as it would seem at first inspection. Since the juvenile court, unlike the criminal court, should be unconcerned with degree of penalty, the most severe crime need not be chosen. A lesser crime will give the juvenile court the same jurisdiction over the child.

The juvenile court cannot and has not ignored the insane child. The alternatives are not between ejecting the insane child out into the street or casting off insanity as a defense. The alternatives are in the techniques used to help the child. The techniques are dictated by the various legislative structures. The most direct way of permitting the juvenile court to aid the insane child is legislative extension of the court's jurisdiction beyond delinquency. This avoids the need for the delinquency adjudication and permits rapid commitment. The California statute is typical:

> Any person under the age of 18 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:
>
> . . . .
>
> (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.[39]

In those states that do not provide such an extension of juvenile court jurisdiction,[40] the courts have no choice but to work through the delinquency adjudication. Three variations may be illustrated. The first requires a delinquency petition to be filed as a prerequisite for the juvenile court to order a mental examination. After a hearing on the mental examination, the child may be committed. The delinquency adjudication stage need not be reached.[41] The second requires a delinquency petition to be filed and the court to hold an adjudication hearing. The court then may find the child not a delinquent child by reason of insanity. The child is then subject to a similar disposition as an adult who has been found not guilty by reason of insanity.[42] The third variation does not permit an adjudication of "not a delinquent child by reason of insanity." These juvenile courts adjudicate the child solely on the actus reus elements of the offense. This labels the child a delinquent. Once the adjudication of delinquency has been made, the court has the power to consider the child's insanity and commit him to a mental institution.[43] Thus, all methods consider insanity with similar results. The difference is technique.

The common law and statutes that provide the infancy defense were conceived prior to the conception of the juvenile court. While they interact with juvenile statutes, they lose their relevance because of the existence of the juvenile court. Confidence that the juvenile court is the appropriate forum for handling the juvenile who has committed a crime and effective drafting of juvenile court legislation will end the need for the infancy defense. This requires exclusive juvenile court jurisdiction with age being based on the age at the time of the commission of the offense.[44]

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39. CAL. WELF. & INST'NS CODE § 600(c) (West 1972).

40. For example, there is no statutory authority in New Jersey for commitment to a mental hospital except under the civil commitment procedure, unless there has been an adjudication of delinquency. *See In re* H.C., 106 N.J. Super. 583, — n.5, 256 A.2d 322, 328 n.5 (Juv. & Dom. Rel. Ct. 1969).

41. *See In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

42. *See* State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948).

43. *See In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct. 1969).

44. Exclusive juvenile court jurisdiction may be coupled with a waiver provision. The waiver should be from a group whose age at the time of commis-

If the juvenile court lacks necessary support to terminate the use of the infancy defense in criminal court, then the infancy statute should be brought into the twentieth century. The typical statute now provides that "a person under the age of seven years is deemed incapable of committing a crime." While this was sufficient when there was only a criminal court, the advent of the juvenile court requires the statute to be changed to mean that a person under seven shall not be charged with the crime in criminal court. The crime, however, may form the basis for a delinquency petition in juvenile court. The elements of the crime are the same as if the charge were brought in criminal court.

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sion was above the age for the irrebuttable presumption. Whether it is above the age for the rebuttable presumption is a policy decision. The jurisdictional statute should be coupled with a transfer-back statute. The latter requires all courts, other than the juvenile court, to transfer delinquency cases to the juvenile court. *See* STANDARD JUV. CT. ACT § 9 (Nat'l Council on Crime & Del. 6th ed. 1959). Without an effective transfer-back statute, exclusive juvenile court jurisdiction may become jurisdiction concurrent with that of the criminal court.