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TOWARD AN INTEGRATED THEORY OF DELINQUENCY RESPONSIBILITY

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I. INTRODUCTION

Promulgation of the *Institute of Judicial Administration - American Bar Asso-*

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ciation Juvenile Justice Standards (*IJA-ABA Standards* or *Standards*)[1] has renewed debates[2] about juvenile justice. This article examines one aspect of that dialogue, the function of criminal law responsibility principles in juvenile delinquency doctrine. The use of infancy, insanity, and diminished capacity defenses are analyzed in relation to delinquency doctrine and practices.

Section II reviews the foundations of juvenile justice philosophy. Case law examples are used to illustrate the incongruities between criminal law and juvenile justice. Section III presents an overview of the criminal responsibility doctrines. Section IV explores the adaptation of these doctrines to delinquency adjudication. The final section sets forth the recommended theory for integrating the responsibility principles into delinquency jurisprudence.

II. JUVENILE COURT PHILOSOPHY

Divergence of juvenile justice doctrine from the adult criminal justice system is undisputed.[3] Abundant historical evidence indicates that the juvenile court was intended to liberate the child from the punitive aspects of the adult system.[4] Relaxed procedural requirements structured to promote rehabilitation of the minor[5] became a normative feature of the delinquency system. As the juvenile court matured, however, critics increasingly cited due process deficiencies as a cause of juvenile injustice. The courts responded by incorporating certain adult due process rights into delinquency adjudication.[6]

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1. INSTITUTE OF JUDICIAL ADMINISTRATION - AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS (1982) [hereinafter STANDARDS]. The standards are reported in multiple volumes organized by substantive topics, *e.g.*, IJA-ABA STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS. For a history of the project and a summary of its product, see B. FLICKER, IJA-ABA STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS (2d ed. 1982).

2. Drafting the recommended principles for the IJA-ABA STANDARDS was rife with conflict. The National Council of Juvenile Court Judges, for instance, vehemently opposed many project recommendations, especially those aimed at eliminating distinctions between juvenile and adult procedures. *See* Fox, *Philosophy and the Principles of Punishment in the Juvenile Court*, 8 FAM. L.Q. 373, 373 n.1 (1974).

3. *See* Fox, *supra* note 2; Zimring, *Pursuing Juvenile Justice: Comments on Some Recent Reform Proposals*, 55 J. URB. L. 631 (1978). For an historical perspective, see Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELINQ. 457 (1973). *See generally* Note, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (classic exposition of early juvenile court doctrine).

4. *See* Fox, *supra* note 3, at 1187 (challenges the revisionist views of A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969)); *but see* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977). *See* Schultz, *supra* note 3, at 459-72 (reconciles the Fox-Platt theories).

5. Delinquency doctrine has supported the proposition that the salient treatment needs of the juvenile require informal adjudicatory rules. It was believed that the formalism of the criminal court interfered with the benevolence of intervention. Additionally, jurisdictional authorities have been broadly defined to encompass assorted disapproved activities. For example, "status" conduct, such as truancy, incorrigibility, and promiscuity permitted official intervention. As observed by Fox, *supra* note 2, at 378: "[T]he commission of crime was the opportunity to save a young life—the nature of the crime was inconsequential."

6. *See* Schultz & Cohen, *Isolationism in Juvenile Court Jurisprudence*, in PURSUING JUSTICE FOR THE CHILD 20-42 (M. Rosenheim ed. 1976); McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457 (1981); Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27

Current ground rules of juvenile justice are governed by the landmark case of *In re Gault*.[7] In *Gault*, the Supreme Court criticized the informality of the juvenile court and announced that the basic due process protections for adults, the fourteenth amendment and the Bill of Rights, applied to children.[8] The Court adopted an analytic framework for evaluation of the constitutional rights of juveniles and made it clear that the laudatory rehabilitative emphasis of juvenile justice would not prevent scrutiny of procedural and substantive rules. Although the Court has not required the identical adult protections for the adjudication of delinquents,[9] the *Gault* concept has become the dominant influence in juvenile court jurisprudence.[10] In the post-*Gault* era, juvenile rights are evaluated by reference to both the unique characteristics of the juvenile justice system and to the constitutional mandates of the adult system.

Thus, describing the essence of juvenile justice is a slippery task because of the system's unique values and procedures.[11] At a minimum observers agree that the juvenile court combines civil and criminal law principles to promote the "best interests" of the child and the community.[12] Social control objectives are undeniably present, supported by *parens patriae* and police

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U.C.L.A. L. REV. 656 (1980). Schultz and Cohen evaluate the distinctions, searching for a new direction. Although inclined initially to recommend abolition of the juvenile court, the authors propose a more moderate conclusion: "What does need to be abandoned is whatever isolates the juvenile court from the mainstream of jurisprudence, which includes criminal law and civil commitment law." Schultz & Cohen, *supra* at 41. The IJA-ABA STANDARDS project, *supra* note 1, with which Schultz and Cohen were affiliated, reflects that ideology.

7. 387 U.S. 1 (1967).

8. *Id.* at 13.

9. Although lower courts have at times assumed that *Gault* required a "functional equivalence" of the adult protection, Rosenberg, *supra* note 6, at 660-718 shows that subsequent Supreme Court doctrine indicates otherwise. *See also infra* note 117. Notwithstanding the evolution of that doctrine, lower courts continue to cite *Gault* as commanding equivalence within the juvenile justice system and this erroneous perspective is often labeled as "a *Gault* analysis." In fact, as observed by Rosenberg, *supra* note 6, at 660-73, *Gault* itself combined functional equivalence and fundamental fairness analyses.

10. *See generally* Schultz & Cohen, *supra* note 6.

11. In *Gault* the Supreme Court described the juvenile court as "a peculiar system . . . unknown to our laws in any comparable context." 387 U.S. at 17.

12. *See* F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 48-58 (1964); Hazard, *The Jurisprudence of Juvenile Deviance*, in PURSUING JUSTICE FOR THE CHILD 3-19 (M. Rosenheim ed. 1976); Rubin, *Retain the Juvenile Court? Legislative Developments, Reform Directions, and the Call for Abolition*, 25 CRIME & DELINQ. 281 (1979); Susmann, *Practitioner's Guide to Changes in Juvenile Law and Procedure*, 14 CRIM. L. BULL. 311 (1978). These authorities refute the common misunderstanding that the sole responsibility of the juvenile court is the ascertainment and protection of the interests of the child. Although supporting this goal, juvenile courts frequently reinforce community values. *See also* IJA-ABA STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS, Standard 1:1 (1980) [hereinafter STANDARDS RELATING TO JUVENILE DELINQUENCY]:

> The purposes of a juvenile delinquency code should be:
>
> a. to forbid conduct that unjustifiably and without excuse inflicts or risks substantial harm to individual or public interest;
>
> b. to safeguard conduct that is without fault or culpability from condemnation as delinquent;
>
> c. to give fair warning of what conduct is prohibited and of the consequences of violation;
>
> d. to recognize the unique physical, psychological, and social features of young persons in the definition and application of delinquency standards.

power principles.[13] Because accomplishment of social goals is regulated by legal principles, the juvenile court, notwithstanding its social welfare fabric, is a legal institution subject to constitutional standards.[14]

This curious mixture of social objectives and adult criminal law principles often produces incongruous results. For example, since adult proceedings strictly enforce the due process requirement of fair notice, criminal laws must provide adequate forewarning to the potential violator.[15] In the event of statutory ambiguity, prohibitory terms are generally construed in favor of the defendant.[16] Nevertheless, these criminal law principles were compromised in *In re A.*[17] In this case a juvenile was adjudicated delinquent for possessing a toy pistol during a probation-supervised group therapy session.[18] Conceding that the conduct did not constitute a violation of any adult criminal law, the appellate court nonetheless sustained the finding of delinquency. The act was found to amount to "deportment endangering the morals, health or general welfare of said child," a statutorily proscribed behavior giving jurisdiction to the juvenile court.[19]

In addition to jurisprudential differences between criminal law and delinquency adjudication, juvenile courts occasionally adopt incongruent jurisdictional doctrines. In the case of *In re Sanders*,[20] the Nebraska Supreme Court applied a *de minimis* principle to narrow jurisdiction and exculpate a minor charged with slapping another youth. The court's reasoning demonstrates operation of the principle:

> The charge that appellant was a delinquent child because of this alleged occurrence or otherwise was not established. . . . 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.[21]

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13. *See* N. KITTRIE, THE RIGHT TO BE DIFFERENT 108-68 (1971). The state, in the role of *parens patriae*, acts as guardian of citizens under a legal disability to act for themselves. West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

14. Although the Supreme Court adheres to this characterization of the juvenile court, it evaluates application of due process protections on a case-by-case basis. For instance, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court rejected the right to a jury trial at a delinquency adjudication, reasoning that right to jury trial was not essential to accurate factfinding. The opinion noted that there are many other acceptable methods to ascertain facts. *Id.* at 543. For an excellent analysis of the constitutional methodology, see generally Rosenberg, *supra* note 6.

15. Lambert v. California, 355 U.S. 225, 228-29 (1957).

16. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 10, at 72-74 (1972). *See also* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, Standard 1.1(C).

17. 130 N.J. Super. 138, 325 A.2d 837 (1974).

18. The youth had furnished another toy weapon to a friend who brandished his toy pistol during the session. A., however, had not waved his toy weapon. *Id.* at 138-39, 325 A.2d at 837-38.

19. The petition in delinquency alleged the specific deportment of "possessing an offensive weapon, to wit: a Univerk, Vulcanic .22 caliber toy pistol." *Id.*

20. 168 Neb. 458, 96 N.W.2d 218 (1959).

21. *Id.* at 464, 96 N.W.2d at 222. Presumably, this act of judicial nullification would be currently unnecessary due to the emergence of diversionary programs. *See* Cressey & McDermott, *Diversion from the Juvenile Justice System*, in JUVENILES IN JUSTICE 228-34 (H. Rubin ed.

In general, the post-*Gault* trend has been to conform the procedures of delinquency adjudication to the principles governing the adjudication of criminal guilt. Illustrative is the 1978 Rhode Island Supreme Court decision of *In re John Doe*.[22] The court held that where the juvenile asserted self-defense to the charge of murder, the burden of proof shifted to the prosecution to disprove self-defense beyond a reasonable doubt.[23] By its ruling, the court adopted the Supreme Court's decisions rejecting the criminal law rule that the defendant must prove self-defense by a preponderance of the evidence.[24] It is noteworthy that the state court recognized this due process right in a delinquency adjudication, thus implying the equivalency of juvenile and adult procedural rights.

Despite this general trend, juvenile and adult procedures are by no means identical. As an example of the dissimilarity between juvenile justice and criminal law objectives is *In re Dewayne H.*,[25] a juvenile case involving non-compliance with a mandatory rule that dispositional (sentencing) hearings be held within thirty days after adjudication. Excusing the infraction, the Maryland Court of Appeals reasoned:

> The State as the representative of the general public has an interest in seeing that this juvenile is rehabilitated so that he becomes a useful citizen and in no way a menace to society. In that circumstance it simply does not follow that the proper sanction for violation of the rule is dismissal of the proceeding.[26]

A 1976 Texas decision also demonstrates adherence to distinct juvenile law principles.[27] Texas criminal law required corroboration of accomplice testimony to sustain a conviction. Characterizing the requirement as a mere "statutory rule of evidence," the Texas Supreme Court found no constitutional infringement in excluding juveniles from the scope of the protection. A sharply worded dissent[28] argued that the corroboration rule applied *a fortiori* in delinquency proceedings in light of the heightened solicitude for juveniles.[29]

Thus, the juvenile court has retained some autonomy, separating it from the mainstream of adult criminal law. Although *Gault* and its progeny

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1980). *See also* Binder & Binder, *Juvenile Diversion and the Constitution*, 10 J. CRIM. JUST. 1 (1982) (legal issues relating to diversion).

22. 120 R.I. 732, 390 A.2d 920 (1978).

23. *Id.* at 742, 390 A.2d 926.

24. *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). For an excellent analysis of these cases and the underlying doctrines, see Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law Cases*, 88 YALE L.J. 1325 (1979).

25. 290 Md. 401, 430 A.2d 76 (1981). The hearing was held on the 31st day and the cause of the delay was not evident from the record.

26. *Id.* at 407, 430 A.2d at 80.

27. *In re* S.J.C., 533 S.W.2d 746 (Tex. 1976), *cert. denied*, 429 U.S. 835 (1976).

28. 533 S.W.2d at 749 (McGee, J., dissenting). The case was decided by a 4-3 vote.

29. If anything, it is more logical under the protective concept of *parens patriae* that the legislature and courts should be more cautious with regard to the requirements the concept [equivalency of due process protections for juveniles] demands; especially prior to attaching to the juvenile the stigmas of being institutionalized and being declared a delinquent.

Id. at 750 (citation omitted).

have incorporated large segments of adult criminal law into juvenile justice, the transformation is incomplete. Juvenile justice continues to maintain an independence which permits procedural flexibility.

III. RESPONSIBILITY IN CRIMINAL LAW: AN OVERVIEW

A. *Infancy*

Originating in the common law, the doctrine of infancy functioned to excuse immature minors from criminal responsibility.[30] Age presumptions were established to govern the criminal law liability of this protected class. "Children under the age of seven are conclusively presumed to be without criminal capacity,"[31] children seven to fourteen years are rebuttably presumed to lack criminal capacity, and children fourteen years or older are treated as fully responsible.[32] The crux of the infancy doctrine is the principle that to be accountable, a youth must be able "to know what he is doing and that it is wrong."[33] In addition, successful invocation of the infancy defense requires proof that any cognitive impairments relate to the act at issue.[34]

The practical value of the infancy doctrine is significant. Successfully invoked, it produces an acquittal and the defendant is excused from further social control.[35] Although American courts initially endorsed the concept of infancy,[36] the advent of the juvenile court has diminished its significance.

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30. *See generally* Kean, *The History of the Criminal Liability of Children*, 53 LAW. Q. REV. 364 (1937).

31. W. LAFAVE & A. SCOTT, *supra* note 16, § 46, at 351.

32. *Id.* Reference throughout this article to the notion of capacity relates to the ability of a juvenile to perceive and understand legal concepts and to conform his behavior to the dictates of law. Theoretically, a distinction exists between evidence of an individual's capacity and evidence that he acted within that capacity on a certain occasion. In assessing responsibility of an actor with regard to a designated offense, this distinction may be crucial. It is submitted, however, that the significance is sometimes overstated. As Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. AND PSYCHIATRY 271, 281 (1979), astutely observes, "[i]f a defendant lacks the capacity to perform a mental operation, it may be conclusively presumed that he or she *did not* perform that operation on any given occasion." (emphasis in original) (citation omitted). *Cf.* Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1065 (1975) (impossible to determine by reconstructive examination the exact state of mind of the defendant).

33. W. LAFAVE & A. SCOTT, *supra* note 16, § 46, at 352. LaFave & Scott, offer this phrase as "the most modern definition." *Id.* Alternative definitions include: knowledge of wrongdoing, "a mischievous inclination, an intelligent design and malice in the execution of the act, a consciousness of the wrongfulness of the act, and knowledge of good from evil." *Id.* (citations omitted).

34. Carr v. State, 24 Tex. App. 562, 7 S.W. 328 (1888).

> Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime.

Id. at 562, 7 S.W. at 328.

35. Unlike an insanity acquittal, courts do not resort to automatic social control commitment. For a discussion of the insanity procedure, see *infra* notes 58-60 and accompanying text. Upon infancy acquittal in criminal court, the prosecution may refer the matter to juvenile courts for further adjudication. The constitutional guarantee of freedom from double jeopardy, however, may prohibit this action. For an analysis of the juvenile courts' response to the infancy concept, see *infra* text accompanying notes 75-114.

36. W. LAFAVE & A. SCOTT, *supra* note 16, § 46, at 351-53.

Establishment of delinquency jurisdiction has removed the youthful offender from the adult system except in aggravated circumstances.[37] Thus, the doctrine's only current criminal law relevance is to juveniles under the age of fourteen charged as adults by virtue of waiver provisions.[38]

Illustrative of the doctrine's restricted use is *Adams v. State*,[39] a case involving a juvenile, just under fourteen, charged with felony murder.[40] Adams had participated in the fatal robbery and had furnished the murder weapon to a codefendant. The trial judge denied the defense of infancy based on his assessment of the youth's courtroom demeanor[41] and the youth's admissible confession; the appellate court approved the trial court's careful evaluation of the issue.[42]

B. *Insanity*

Although insanity is a controversial topic in criminal law,[43] its ideological foundations are firmly established. The law presumes that free will exists and that man exercises choice in ordering his conduct.[44] Persons committing criminal acts, consciously choosing the "bad" path, are believed to deserve penal sanctions. Society has different social expectations, however, for the impaired offender who is unable to cognitively and volitionally[45] partici-

37. For both serious offenses and chronic delinquents, criminal court authority may still be obtained by means of juvenile court waiver of jurisdiction. Waiver may be effected by direct filing of a complaint in criminal court or by an order of the juvenile court relinquishing its jurisdiction. The latter procedure, requiring an adversarial "transfer hearing," is the more common practice. *See generally* IJA-ABA STANDARDS RELATING TO TRANSFER BETWEEN COURTS (1980).

38. This practice is permitted in only four states: Arizona, Illinois, Arkansas, and Washington. In the other states the juvenile court's jurisdiction over children 14 and younger is exclusive regardless of the offense charged. *Id.* at 18.

39. 8 Md. App. 684, 262 A.2d 69 (1970), *cert. denied*, 400 U.S. 928 (1970).

40. For a lucid explanation of the felony murder doctrine, see W. LAFAVE & A. SCOTT, *supra* note 16, § 71, at 545-61. Essentially, the doctrine imputes homicide liability to felonious conduct resulting in an unintended death caused during commission of the underlying felony.

41. The youth had testified during pretrial motions and the trial judge was impressed by Adams' demeanor, conduct, and appreciation of the proceedings. 8 Md. App. at 689, 262 A.2d at 72.

42. *But see* People v. Roper, 259 N.Y. 170, 181 N.E. 88 (1932) (the mechanical application of the infancy doctrine in juvenile felony murder). New York statutes authorized waiver to adult criminal court only for offenses punishable by death or life imprisonment. Although murder constituted such an offense, the underlying crime, robbery, did not satisfy the criterion. Reasoning that robbery could only amount to a delinquent act, the Court of Appeals ruled that the felonious intent required to instigate the felony murder doctrine was unproven. Circumstances attendant to the youth's conduct and deportment were excluded from examination. *Id.* at 173, 181 N.E. at 91.

43. A. GOLDSTEIN, THE INSANITY DEFENSE (1967). "The insanity defense is caught up in some of the most controversial ideological currents of our time." *Id.* at 20; *see also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131 (1968) ("[t]here is no more hotly controverted issue in the criminal law . . . .").

44. Pound, *Introduction in* F. SAYRE, CASES ON CRIMINAL LAW xxxvi-vii (1927), *quoted in* Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719, 725 n.28 (1973). "Historically, our substantive criminal law is based on a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Id.*

45. Involition may excuse the defendant from criminal liability. In addition, the absence of voluntariness may negate the *actus reus* of an offense. The classic example is automatism in which the actor's bodily movements are unconsciously stimulated. *See* W. LAFAVE & A. SCOTT,

pate in the deliberation process. The legally insane defendant is declared not responsible for his conduct and excused from the consequences of the criminal law.[46] Since he is incapable of making "proper" choices, he is blameless and undeserving of the moral condemnation of the criminal law.[47]

Not every cognitive and volitional impairment, however, will exculpate the offender. The insanity doctrine is narrowly circumscribed to include only impairments arising from mental disorder,[48] and only the most severe disorders activate the defense.[49] In short, successful invocation of the insanity defense requires proof of a mental disorder proximately causing negation of free will with respect to the conduct charged. Mere interference with cognitive and volitional processes is insufficient.[50] Furthermore, despite cogent arguments that the exercise of free will is equally frustrated by social and cultural impairments,[51] the law withholds exculpation for disabilities not associated with mental disorder.[52]

Legal insanity is measured by various standards. The principal options include the *McNaughtan* rule,[53] irresistible impulse,[54] the *Durham* or product

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supra note 16, § 44, at 337-41; Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 447 (1980). *See also* H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 44-65 (1979) (insanity and involuntariness).

46. For a broad examination of the responsibility topic, see Lilly & Ball, *A Critical Analysis of the Changing Concept of Criminal Responsibility*, 20 CRIMINOLOGY 169-84 (1982).

47. For a discussion of the function of fault in criminal law, see Strong, *Fault Threat, and the Predicates of Criminal Liability*, 1980 WIS. L. REV. 441.

48. The dominant standard for defining mental disorder (commonly phrased as mental disease or defect) was adopted by the United States Court of Appeals for the District of Columbia in McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962). The court reasoned that "what psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility." *Id.* at 851. Thus the court fashioned its own standard: "[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *Id.* at 851. Many authorities also subscribe to the Model Penal Code caveat excluding "[any] abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 401(2) (proposed Official Draft 1962). *But see* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, at 34, rejecting that exclusion in the belief that psychiatrists concluding a defendant is mentally disordered will invariably discover additional symptoms.

49. *See* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 640 (1978).

50. Although traditional insanity tests require absolute negation of the requiste capacities, the Model Penal Code formula introduces the quality of continuousness into the assessment. *See* MODEL PENAL CODE § 401(1) (Proposed Official Draft 1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial* capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (emphasis added).

51. *See* Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 520 (1968); *cf.* Diamond, *Social and Cultural Factors as a Diminished Capacity Defense in Criminal Law*, 6 BULL. AM. A. PSYCHIATRY & L. 195 (1978). *See also* United States v. Brawner, 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part, dissenting in part) (rejecting medical model).

52. *See* United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972).

53. [I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). Historical investigation has determined that the correct spelling is "McNaughtan." *See* R. MORAN, KNOWING RIGHT FROM WRONG xi-xiii

rule,[55] and ALI standards.[56] The *McNaughtan* rule is limited to cognitive incapacity, while the irresistible impulse test is restricted to volitional impairment. Since both the *McNaughtan* and irresistible impulse tests constrain the use of expert testimony, courts have searched for broader measures to maximize the benefits of psychiatric opinion.[57] Currently in vogue is the ALI test authorizing reliance on either cognitive or volitional incapacity.

Although adult criminal responsibility may be nullified by one of these insanity tests, the defendant found not guilty by reason of insanity is generally subjected to quasi-penal commitment.[58] Because of the risk of repeated conduct, the insanity acquittee is involuntarily committed for mental health treatment, usually by special procedures applicable to this "dangerous" defendant class.[59] In effect, the insanity acquittee is excused from the stigma of criminal labeling but not from the social control of the criminal law.[60]

C. *Diminished Capacity*

Seeking an alternative to the all-or-nothing insanity defense, courts and legislatures have created partial exculpation doctrines grouped under the heading diminished capacity. Terminology[61] may include partial responsibility, limited responsibility, insane mens rea,[62] and partial insanity. The

(1981). Moran's study refutes the alternative version proposed in Diamond, *On the Spelling of M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964).

54. "Broadly stated, this rule requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct." W. LAFAVE & A. SCOTT, *supra* note 16, § 37, at 283.

55. "Under what is usually referred to as the *Durham* rule, adopted by the Court of Appeals for the District of Columbia, an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* § 38, at 286.

56. *See supra* note 50.

57. In large part, the *Durham* or product rule was formulated to remove perceived obstacles preventing effective use of psychiatric opinion. Mental health professionals contended that the language of the traditional tests distorted psychiatric concepts. Less than two decades after announcing the *Durham* decision, however, the District of Columbia court withdrew that standard in favor of the ALI test. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). (The product test had proved unsuccessful in improving the fit between psychiatric concepts and legal responsibility). A plethora of legal publications have discussed the *Brawner* decision. *See, e.g.*, R. ARENS, INSANITY DEFENSE (1974); *Symposium*, United States v. Brawner, 1973 WASH. U.L.Q. 17-154.

58. *See generally* Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 (1981).

59. Although jurisdictions differ in regard to the methods of obtaining commitment of insanity acquittees, only a minority use conventional civil commitment standards. *Id.* at 605-06.

60. In fact, insanity acquittees are often confined for periods disproportionate to their acts. Releasing authorities are loathe to risk return to the community of "dangerous" insanity acquittees. *See generally* Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal Insane,"* 123 U. PA. L. REV. 258 (1974); Kaplan, *The Mad and the Bad: An Inquiry Into the Disposition of the Criminally Insane*, 2 J. MED. & PHIL. 244 (1977). During the 1981-82 term the United States Supreme Court agreed to review the constitutional contours of insanity commitments. *See* Jones v. United States, 432 A.2d 364 (D.C. 1981), *cert. granted*, 102 S. Ct. 999 (1982).

61. Terms have been used imprecisely and interchangeably. *See generally* Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCIENCE 313 (1971); Lewin, *supra* note 32; Morse, *supra* note 32.

62. This term was coined by Morris, *supra* note 51, at 518-19. For criticism of the term as "internally contradictory," see Monahan, *supra* note 44, at 728-29.

aim is development of mitigating theories allowing formal reduction of the grade of the defendant's offense to take into account his "diminished" criminal capacity.

Two general mitigatory theories may be identified. The first theory will be referred to as technical mens rea and the second as partial or diminished capacity. Technical mens rea relates to the mens rea or culpable mental state that is an essential element of common law crimes. Under this theory, in order to sustain a conviction, the prosecution is obliged to prove beyond a reasonable doubt that the defendant formed the culpable mental state contained in the definition of the crime. By virtue of this evidentiary diminished capacity, or technical mens rea doctrine,[63] the defendant may introduce psychological evidence bearing upon his incapacity to form the requisite mental state of the offense.[64] Although the principle has been utilized primarily in murder prosecutions to negate premeditation and deliberation,[65] recent developments indicate this restriction may be discarded.[66] Moreover, courts may be receptive to expanding the scope of inquiry to include any evidence relevant to the formation of technical mens rea.[67] Thus, the mens rea variant represents a straightforward proof question as well as a responsibility issue.[68]

In addition to the evidentiary aspect of mens rea, the question of disposition is pivotal. The technical mens rea variant, extended logically, requires

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63. The mens rea phrase is often used to express two different criminal law concepts. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968), lucidly describes the dual uses noting:

> [T]here are two principal categories of *mens rea* which should be distinguished.
>
> . . . .
>
> The *first* category we can call *mens rea* in its special sense. In this sense *mens rea* refers only to the mental state which is required by the definition of the offence to accompany the act which produces or threatens the harm. . . .
>
> The *second* category of *mens rea* qualifications to liability is that of legal responsibility, which includes the familiar defences of legal insanity and infancy (emphasis in original).

Id. at 274-75.

For purposes of this article the term technical mens rea is used to describe the initial construct.

64. *See supra* note 32.

65. *See, e.g.*, Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976). In some jurisdictions, the doctrine is limited to negation of specific intent elements. Clearly, this decision reflects policy rather than logic since mental disorder is capable of interfering with any mens rea state. By restricting the doctrine to specific intent crimes characterized by lesser included general intent offenses, the doctrine avoids complete exculpation of the defendant. In this manner, it supplements the insanity defense as a mitigatory device. *See* Arenella, *supra* note 61, at 828-29; Morse, *supra* note 32, at 275-77. For an explanation of general intent, see *infra* note 192.

66. *See* People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 264 (1978) (authorizing use of diminished capacity to negate specific intent to commit theft in a burglary prosecution); Hendershott v. People, 653 P.2d 385 (Colo. 1982) (permitting the use of expert evidence to negate the mens rea for general intent crimes).

67. *See* Morse, *supra* note 32, at 276. Morse contends that diminished capacity is not a special defense but a derivative of the general proposition that the prosecution must prove each element of the offense beyond a reasonable doubt.

68. Unquestionably, Morse, *supra* note 32, at 275-76, Arenella, *supra* note 61, at 829, and others are correct in asserting that the question is ultimately one of proof. However, the doctrine is clearly intended to perform a responsibility function by allowing offenders who fall outside the insanity category to assert a diminished responsibility. For precisely this reason, courts have been unwilling to recognize the concept as a general mens rea principle.

exculpation. If the proffered evidence negates the existence of the mens rea state and if no lesser included offense is proven, the defendant is entitled to acquittal. Since legislatures and courts have been disturbed by this prospect, they have illogically restricted the doctrine to specific intent crimes[69] due to fear that socially dangerous offenders will escape social control. By contrast, the second mitigatory theory of partial or diminished responsibility is a more limited concept. Developed in the context of homicide prosecution, the doctrine performs an ameliorative function for the sane but mentally disordered defendant deemed to be "less culpable than his normal counterpart who commits the same criminal act."[70] The fact-finder is permitted only to reduce the grade of the offense to a homicide category with less drastic penal consequences.[71] Properly analyzed, this theory represents a mini-insanity defense.[72]

Thus, the term diminished capacity encompasses several theories pertaining to the adjudication of mentally disordered defendants.[73] The issues are conceptually complex, affording no simple doctrinal solution. Furthermore, the paramount influence of social control, inextricably woven into responsibility principles, compounds the difficulty of the search for clarity. Although commentators propose workable models,[74] judicial expressions of diminished capacity remain in disarray.

IV. Responsibility in Delinquency Adjudication

The role of responsibility principles in juvenile justice has been problematic. Traditionally, the guiding philosophy of the juvenile court has been rehabilitation.[75] According to this view, the goal of juvenile justice is to secure the proper treatment for delinquent youth. Since punishment is not encompassed in this philosophy, no theoretical basis exists for doctrines which excuse criminal responsibility.

The *Gault* decision has led to a re-analysis of juvenile justice. Observers have argued that if the reality of delinquency adjudication involves punishment, then incorporation of the criminal "defenses" of infancy, insanity, and diminished responsibility may be appropriate.[76] With increasing frequency

69. *See, e.g.*, State v. Doyon, 416 A.2d 130 (R.I. 1980); *contra* Hendershott v. People, 653 P.2d 385 (Colo. 1982).

70. Arenella, *supra* note 61, at 829 (footnote omitted).

71. Transplanted from the United Kingdom, the doctrine authorizes reduction of murder to manslaughter. *Id.* at 830, notes that no American jurisdiction has formally adopted the concept.

72. Dix, *supra* note 61, at 322, analyzes the doctrine's use of offense grades to accomplish mitigation.

73. It has been strongly suggested that limitation of diminished capacity to mental disorder incapacities is illogical. Social, cultural, and other impairments may justify mitigation of outcome. *See generally* Diamond, *supra* note 51.

74. *See* Arenella, *supra* note 61, at 849-65; Morse, *supra* note 32, at 290-96.

75. *See generally* Fox, *supra* note 2.

76. *See generally* Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659 (1970); McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181 (1976). For a pre-*Gault* analysis advocating development of responsibility principles, see Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965).

courts have been asked to decide these questions and establish principles of delinquency responsibility.

A. *Infancy*

1. Doctrinal Foundations

The establishment of a separate juvenile justice system recast the function of the infancy doctrine. At issue is the appropriate role of a doctrine developed to prohibit *criminal* prosecution of immature youths within a system that disavows criminal law aims. The logical conclusion is that the *per se* exclusion of juveniles from criminal courts eliminates the rationale for an infancy doctrine in juvenile justice.[77]

In fact, most courts have adopted that position. An early Tennessee case[78] sets forth the judicial exegesis. Seven-year-old Harry Humphrey killed a playmate[79] and was adjudicated a delinquent child. On appeal, counsel for Humphrey argued that the common law presumption of incapacity had not been abolished by the recent (1911) juvenile court act. The court disagreed. Rejecting the infancy doctrine, the Tennessee Supreme Court declared, "[t]he child is not found guilty of delinquency as though guilty of a crime."[80] The opinion emphasized the non-punitive, social welfare nature of delinquency adjudication.[81]

After *Gault* there was a split of opinion regarding application of the infancy defense. Proponents classify the infancy defense as a standard criminal law defense interposed to contest proof beyond a reasonable doubt. They submit that since the *Gault* command of fundamental fairness has been construed to require proof of the delinquency allegation beyond a reasonable doubt,[82] the principle necessarily includes disproof of recognized criminal law defenses.[83]

Opponents conceptualize the infancy defense as an ameliorative device

77. Different arguments, however, apply with respect to the role of infancy in transfer hearings leading to criminal court jurisdiction. *See* P. LOW, J. JEFFRIES, & R. BONNIE, CRIMINAL LAW 646-51 (1982).

As a practical matter, waiver cases usually involve youths least eligible for infancy pleading, such as those charged with serious crimes and exhibiting persistent anti-social histories. *See* ACADEMY FOR CONTEMPORARY PROBLEMS, YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS (1982); Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 HOUS. L. REV. 709, 710-11 (1972); Note, *Certification of Minors to the Juvenile Court: An Empirical Study*, 8 SAN DIEGO L. REV. 404, 413-14 (1971).

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

79. The exact circumstances of the homicide were undetermined. Reviewing the record, the court stated that: "There appears to have been some controversy as to whether the killing was accidental or designed. The judge . . . came to the conclusion from the evidence that a crime had been committed . . . ." *Id.* at 551-52, 201 S.W. at 772.

80. *Id.* at 556, 201 S.W. at 773.

81. Juvenile Court of Shelby County v. State *ex rel.* Humphrey, 139 Tenn. 549, 201 S.W. 771 (1918). Employing identical reasoning, the federal courts uniformly have denied infancy claims in regard to federal delinquency prosecutions. *See* Borders v. United States, 256 F.2d 458, 459 (5th Cir. 1958).

82. *In re* Winship, 397 U.S. 358, 364 (1970).

83. The constitutional dimensions of criminal law defenses are uncertain as a result of recent Supreme Court rulings. *See* Jeffries & Stephan, *supra* note 24.

aimed at prohibiting adult criminal prosecution of immature minors. They adhere to the reasoning of pre-*Gault* juvenile authorities rejecting the doctrine. These opponents contend that although *Gault* is conceded to require fundamental due process protections, the infancy doctrine, as a policy principle designed to mitigate adult consequences, is outside *Gault*'s constitutional ambit.[84]

2. Decisions

a. Availability of the Doctrine

Post-*Gault* decisions[85] have produced conflicting outcomes reflecting the doctrinal split. In *Commonwealth v. Durham*,[86] a nine-year-old successfully argued that infancy is a principle independent of the criminal law and that its rationale has been strengthened by the *Gault* guarantee of fundamental fairness. Application of the infancy defense in juvenile court was also endorsed by the California Supreme Court in the case *In re Gladys R.*[87] The significance of the ruling is evident from the existence of an uninterrupted series of appellate decisions construing its commands.[88]

Other courts have subscribed to the dominant, pre-*Gault* repudiation of infancy as a delinquency principle. Illinois,[89] Maryland,[90] Florida,[91] Alabama,[92] and Rhode Island[93] decisions support that proposition. The reasoning advanced by the Alabama Supreme Court is representative:

> [W]hile *Gault* required procedural safeguards to be applied to juvenile proceedings, it did not attempt to define the jurisdiction of

84. Although favoring the application of the infancy defense from a doctrinal standpoint, the IJA-ABA Standards nevertheless exclude infancy from its responsibility principles. The Standards expressed concern that the delinquent excused by virtue of immaturity could be subjected to civil commitment solely on the basis of undeveloped moral capacities. *See* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, at 33. Considerable sentiment existed in favor of incorporating the infancy concept into the standards but disagreement concerning the appropriate dispositional outcome was insurmountable. Telephone interview with John M. Junker, Reporter for the IJA-ABA STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS (Apr. 22, 1982) [hereinafter Interview with Standards Reporter]. However, the Standards did adjust the common law capacity presumptions, raising the minimum age level for delinquency jurisdiction to 10 years. JUVENILE DELINQUENCY AND SANCTIONS STANDARDS *supra* note 12, Standard 2.1(A).

85. Unfortunately, many noteworthy juvenile court rulings concerning responsibility principles are unreported. Only by means of empirical study have researchers been able to document the practices. *See, e.g.*, Donovan, *The Juvenile Court and the Mentally Disordered Juvenile*, 45 N.D.L. REV. 222 (1969).

86. 255 Pa. Super. 539, 389 A.2d 108 (1978). *See In re* Andrew M., 91 Misc. 2d 813, 398 N.Y.S.2d 824 (1977).

87. 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970). Fox, *supra* note 76, at 668-72, criticizes the California Supreme Court's analysis. Fox notes that notwithstanding the reference to constitutional doctrine, the holding relies upon a statutory interpretation that he rates as being "far from persuasive."

88. *See infra* text accompanying notes 95-113.

89. *In re* Carson, 10 Ill. App. 3d 384, 295 N.E.2d 740 (1973). *See also In re* Dow, 75 Ill. App. 3d 1002, 393 N.E.2d 1346 (1979) (supporting *Carson* rationale).

90. *In re* Davis, 17 Md. App. 98, 299 A.2d 856 (1973).

91. State v. D.H., 340 So. 2d 1163 (Fla. 1976). This consolidated opinion resolved a conflict among Florida intermediate appellate courts addressing the issue.

92. Jennings v. State, 384 So. 2d 104 (Ala. 1980).

93. *In re* Michael, 423 A.2d 1180 (R.I. 1981).

> state juvenile courts, or to define the offenses which would bring juveniles under that jurisdiction. . . . Our legislature . . . removed capacity to understand the wrongfulness of one's conduct from the elements which the state is required to prove in adjudicating a juvenile delinquent. This it may do without transgressing constitutional barriers.[94]

b. Scope of the Doctrine

The courts' application of the infancy doctrine involves inquiry into the individual circumstance of each case. In jurisdictions recognizing the infancy doctrine, courts are required to evaluate the juvenile's appreciation of his conduct. Although age is an important factor in this determination, some courts temper their evaluation with consideration of other factors, such as intelligence, education, and background. California decisions demonstrate this flexible approach. The following cases construing the *Gladys R.* infancy defense application, depicts the doctrine as flexible, expansive, and dependent on individual circumstances.

In re Michael John B.[95] involved a delinquency allegation of burglary of an automobile. The facts revealed that the nine-year-old respondent had assisted friends in entering the vehicle and removing a pack of cigarettes. Overruling the trial court's finding of capacity, the appellate court cited the minimal evidence, consisting of a colloquy between the youth and the arresting officer:

> Murphy asked Michael if he knew right from wrong, if he knew it was wrong to break into cars and steal. Michael said yes. Murphy asked Michael how he would feel if someone took something that meant a lot to him. Michael said he never had anything that meant a lot to him, so it really didn't matter.[96]

In re Tony C.[97] demonstrated the variation among California courts in applying the doctrine. The intermediate appellate court reversed the trial court's finding of capacity for a thirteen-year-old charged with rape concluding:

> Neither the custodial parent's testimony, which is likely to be self-serving, nor the minor's statements describing his understanding, are sufficient to establish this important element . . . [A] minor may conduct himself . . . with a hopelessly confused state of mind, particularly in the area of sexual activity, which has always been a source of particular concern to the emerging adolescent.[98]

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94. Jennings v. State, 384 So. 2d 104, 106 (Ala 1980).

95. 44 Cal. App. 3d 443, 118 Cal. Rptr. 685 (1975).

96. *Id.* at 445, 118 Cal. Rptr. at 686. *See also In re* Carl L., 82 Cal. App. 3d 423, 147 Cal. Rptr. 125 (1978). Ten-year-old Carl threw matches into a neighbor's garage destroying the building. The capacity evidence consisted of the father's testimony that "he had, on several occasions, warned Carl that his fire-setting activities were wrong and should be stopped." *Id.* at 425, 147 Cal. Rptr. at 126. Ruling that "substantial testimony" had been adduced to show capacity, the intermediate appellate court distinguished its previous *Michael John B.* opinion. *Id.*

97. 71 Cal. App. 3d 303, 139 Cal. Rptr. 429 (1977), *vacated*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

98. 71 Cal. App. 3d 313, 139 Cal. Rptr. at 438 (citation omitted).

Affirming the trial court, the California Supreme Court[99] adopted a different mode of analysis, concentrating upon the objective evidence of the circumstances of the offense:

> Tony's constant use of the threat of deadly force demonstrates that he knew his victim would not submit to sexual intercourse without being exposed to great bodily harm. His conduct in taking her to a secluded location behind a fence on a dead-end street shows he was aware that he had to accomplish his intended deed in private in order to minimize the risk of detection and punishment. And his act of asking the victim if she intended to call the police, followed by his flight from the scene, manifested both knowledge of the illegality and consciousness of guilt.[100]

Tanya L.,[101] a twelve-year-old, was adjudicated delinquent for concealing credit cards stolen by her older sister. Asserting incapacity, she denied knowledge of the wrongfulness of her conduct. The defense was rejected based on the appellate court's evaluation of the circumstances:

> She saw her older sister charge goods that could not be paid for. . . . When Tanya's father appeared, she said "Dad, I have some cards here. What do I do with these?" The court could use this question and infer that she knew she should not be possessing those cards and that it was wrong to do so.[102]

In the case *In re Harold M.*,[103] a thirteen-year-old juvenile was convicted of conspiracy to commit burglary. Evidence was introduced showing six overt acts by Harold in furtherance of the conspiracy. In determining infancy, the trial court relied upon evidence of two prior, sustained delinquency petitions alleging property crimes. Declaring the evidence both proper and sufficient, the appellate court rejected the juvenile's two contentions that there was insufficient evidence to prove conspiracy[104] and that a thirteen-year-old could not comprehend that "simply the act of agreeing to do something wrong is itself wrong."[105]

Recent decisions indicate judicial routinization of the capacity issue. *In re Cindy R.*[106] considered the type of evidence necessary for prima facie satisfaction of the infancy burden.[107] The appellant advanced the interpretation that "the court must receive and consider evidence of factors independent of the acts charged in the petitions"[108] and submitted that no evidence was adduced "regarding her intelligence, education, experience, or moral frames

99. 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978). The court affirmed the trial court in part, and reversed in part.

100. *Id.* at 901, 582 P.2d at 964, 148 Cal. Rptr. at 373. *See also In re* Gregory S., 85 Cal. App. 3d 206, 149 Cal. Rptr. 216 (1978) (minor manifested understanding of wrongfulness of his conduct by his flight from police and his conflicting versions of events).

101. *In re* Tanya L., 76 Cal. App. 3d 725, 143 Cal. Rptr. 31 (1977).

102. *Id.* at 729-30, 143 Cal. Rptr. at 34.

103. 78 Cal. App. 3d 380, 144 Cal. Rptr. 744 (1978).

104. *Id.* at 387, 144 Cal. Rptr. at 748.

105. *Id.*

106. 83 Cal. App. 3d 393, 147 Cal. Rptr. 812 (1978).

107. Under the *Gladys R.* doctrine, the prosecutor was required to prove capacity by "clear proof." *In re* Gladys R., 1 Cal. 3d at 867, 464 P.2d at 136, 83 Cal. Rptr. at 680.

108. 83 Cal. App. 3d at 401, 147 Cal. Rptr. at 815.

of reference."[109] Rejecting psychological testimony as an unnecessary requirement, the court reasoned:

> We see no reason to engraft this additional requirement . . . . [I]t would be an idle act, not to mention a wasteful one, to require the court to take evidence on each and every one of the items . . . . In some cases perhaps evidence regarding all of the factors is necessary . . . in others the age of the child, observation of her in the courtroom, and evidence of her conduct during the crimes charged in the petition are . . . adequate to establish that she knew her acts were wrong.[110]

Finally, *In re Clyde H.*[111] demonstrates that in difficult cases, courts may conduct a probing examination of capacity. Eleven-year-old Clyde threw a brick at an infant neighbor, inflicting minor head trauma. The evidence indicated that the child's brick throwing was chronic and he had been cautioned repeatedly concerning the seriousness of the behavior. Despite expert testimony supporting the stepfather's opinion that Clyde only partially understood the admonition and intelligence tests revealing an intelligence quotient of sixty-seven with little ability to conceptualize or generalize,[112] the appellate court reviewed the conflicting testimony and sustained the trial court's judgment that the capacity burden had been satisfied.[113]

3. Analysis

The previously discussed discisions reflect an atheoretical approach to evaluation of the infancy issue. The current emphasis of the California courts, the only jurisdiction with considerable case law on the subject, is on the juvenile's objective conduct. If the instant behavior or a pattern of past behavior indicates the juvenile's understanding of the quality of the acts, measured by common-sense standards, the courts are inclined to deny application of the doctrine. By adopting this position, the California courts adhere to an individualized application of the infancy doctrine based on objective behavior, while avoiding the practical consequences of receiving detailed psychological and social evidence. Although psychological literature offers relevant guidelines for assessing youthful maturity levels,[114] Cali-

109. *Id.*

110. *Id. See also In re* Patrick W., 84 Cal. App. 3d 520, 148 Cal. Rptr. 735 (1978). Considering the argument that the trial court could not use the circumstances of the offense as capacity evidence, the appellate court reasoned, "[t]o prohibit evidence as to the child's conduct on the occasion in question would often result in omission of the only truly relevant evidence on the subject." *Id.* at 527, 148 Cal. Rptr. at 739.

111. 92 Cal. App. 3d 338, 154 Cal. Rptr. 727 (1979).

112. Interpreting the testing and interview data, the psychologist described Clyde's cognitive style as conceptually blunted. She testified, " [a]ppellant will learn by example and apply to that example, I think. He cannot generalize, so if he hits A with a rock, maybe, and I say maybe, he will learn that he is not supposed to hit A with a rock, but he may hit B with a rock." *Id.* at 342, 154 Cal. Rptr. at 729.

113. After discussing the evidence thoroughly, the appellate court ruled, "[a]s sole judge of the credibility of witnesses and the weight of the evidence, the trial judge was not required to accept any inference from conflicting evidence that appellant did not understand these warnings." *Id.* at 344, 154 Cal. Rptr. at 730 (citations omitted).

114. Beginning with Piaget's seminal study of moral development, psychological investigators have examined the cognitive and ethical capacities of children to execute decisions. J.

fornia courts prefer behavioral evidence and limit evidence of psychological and social capacities for purposes of the infancy "defense."

B. *Insanity*

1. Doctrinal Foundations

Proponents of extension of the insanity doctrine to juvenile justice rely on straightforward syllogistic reasoning. Harrington and Keary are representative.[115] First, they argue that the right to plead insanity is included within the constitutional ambit of due process because of its nearly universal acceptance in adult jurisprudence.[116] Citing *Gault*, they further submit that juveniles are owed the same measure of fundamental fairness guaranteed adult criminal defendants.[117] Proponents add that the policy interests represented by the adult insanity defense apply equally to delinquency.

It is argued further that labeling delinquency a treatment rather than a penal proceeding is not a sufficient basis on which to withhold elemental safeguards.[118] The liberty deprivation experienced by the adjudicated juvenile is not redeemed by the change in labels.[119] Proponents also belittle the contention that the social welfare of the child is harmed by a finding of insanity. They counter that alternative non-delinquency jurisdiction may be used to secure treatment for the child,[120] which may accomplish the same social results.

To dispute these contentions, it may be argued that the traditional

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PIAGET, MORAL JUDGMENT OF THE CHILD (M. Gabain trans. 1965). *See generally* Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 151-235 (T. Mischel ed. 1971). Scharf, for example, claims that delinquents, compared to matched non-delinquents and to adults, adhere to a different, less sophisticated understanding of legal events and social order. Scharf, *Law and the Child's Evolving Legal Conscience*, in 1 ADVANCES IN LAW AND CHILD DEVELOPMENT 1-30 (R. Sprague ed. 1982).

115. Harrington & Keary, *The Insanity Defense in Juvenile Delinquency Proceedings*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 272 (1980). *Accord*, McCarthy, *supra* note 76, Popkin & Lippert, *Is There a Constitutional Right to the Insanity Defense in Juvenile Court?*, 10 J. FAM. L. 421 (1971).

116. Two jurisdictions, however, have recently abolished the insanity defense, substituting the concept of the technical mens rea defense based on mental disorder. *See* IDAHO CODE § 18-207 (1982). MONT. CODE ANN. § 46-14-201 (1981). The recent insanity verdict in the case of John W. Hinckley, Jr., has stimulated additional interest in abolition of the defense. Wash. Post, June 24, 1982, at A6, cols. 1-3.

117. Rosenberg, *supra* note 6, at 660-73, characterizes this interpretation of *Gault* as the "dual maximal" test incorporating values of fundamental fairness and functional equivalence to adult safeguards. She adds that in recent juvenile decisions the Supreme Court has attached less constitutional significance to functional equivalence. *Id.* at 673-94.

118. The *Gault* decision emphasized preventing treatment labels from masking the ultimate consequences of juvenile justice system involvement. Appraising the nature of the consequences, the Court noted, "[t]he fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time." 387 U.S. at 27.

119. *Cf.* Parham v. J.R., 442 U.S. 584 (1979) (involuntary mental health commitments of juveniles). In *Parham*, the Court distinguished mental hospitalization from delinquency confinement in terms of liberty deprivation consequences. *See* Garvey, *Children and the Idea of Liberty: A Comment on the Civil Commitment Cases*, 68 KY. L.J. 809 (1980).

120. Fox, *supra* note 76, at 680-82, rejects the insanity defense itself, but proposes adoption of an analagous procedure designed to obtain appropriate care. Moreover, Fox would include the grossly immature as well as the mentally ill juvenile as eligible candidates for his procedure. *Id.* at 683.

function of criminal responsibility principles, excusing those who are morally blameless from penal consequences, is inapposite to delinquency adjudications which have no penal consequences. Furthermore, recognition of such a defense for behaviorally disordered juveniles would frustrate treatment goals. Advocates of this position propose that criminal responsibility be considered systematically at disposition. In contrast to the adult system, juvenile disposition ordinarily focuses on moral factors, selecting sanctions aimed at refining personal moral codes. By deferring the criminal responsibility inquiry to the dispositional stage, the system would take simultaneous account of responsibility and treatment principles.

Opponents of extending the insanity defense to juvenile proceedings further argue that the major premise of the proponents' syllogism may be subject to challenge. Although the insanity defense has been constitutionalized by state courts,[121] the Supreme Court has not incorporated it within the concept of due process.[122] In fact, the Court has evinced a reluctance to decide the question,[123] and existing precedents are unfavorable to the proponents' position of constitutional status of the insanity defense.[124]

2. Decisions

a. Availability of the Doctrine

Several appellate courts have examined the competing arguments of the applicability of the insanity defense in delinquency adjudication. Relying on policy and constitutional principles, the decisions generally endorse the insanity doctrine. In addition, survey data[125] and unreported judicial practices[126] indicate further support for the concept.

In the Wisconsin case of *In re Winburn*,[127] antedating *Gault*,[128] uncontroverted expert testimony concluded that the conduct of the fifteen-year-old charged with murder was the product of psychotic mental illness.[129] The

121. *See* Sinclair v. State, 132 So. 581 (Miss. 1931); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

122. *See* Wales, *An Analysis of the Proposal to Abolish the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 702-04 (1976). *See also* Powell v. Texas, 392 U.S. 514 (1968). In dicta, the *Powell* Court noted, "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536.

123. *See* Rivera v. Delaware, 429 U.S. 877 (1976). The case concerned the constitutionality of a Delaware statute requiring a criminal defendant asserting insanity to prove the contention by a preponderance of the evidence. The Court dismissed the appeal for want of a substantial federal question.

124. Although Davis v. United States, 160 U.S. 469 (1895), established the rule for federal courts that the prosecution must prove sanity beyond a reasonable doubt, the Court has restricted the holding to the federal system. In Leland v. Oregon, 343 U.S. 790 (1952), the Court upheld an Oregon statute requiring the defendant to prove his sanity beyond a reasonable doubt. The Court was urged to reconsider *Leland* in Rivera v. Delaware, 429 U.S. 877 (1976).

125. *See* Donovan, *supra* note 85, at 234.

126. *See* Popkin & Lippert, *supra* note 115, at 431 n.40.

127. 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

128. The Wisconsin court relied upon Kent v. United States, 383 U.S. 541 (1966), which affirmed the right to counsel at juvenile court waiver hearings. Although restricted in scope, the *Kent* decision laid the doctrinal foundations for incorporation of adult due process protections. *Gault* was decided during the next Supreme Court Term.

129. The psychiatrists disagreed, however, regarding satisfaction of the *McNaughtan* test. 32 Wis. 2d at 155, 145 N.W.2d at 179.

Wisconsin Supreme Court acknowledged that "the juvenile law is not to be administered as a criminal statute, and the rules of criminal procedure are not to be engrafted upon the children's code."[130] Nonetheless, the court emphasized the punitive realities of delinquency sanctions. The possibility of liberty deprivation was held to require fair treatment for the juvenile and the opinion reasoned that due process included the insanity plea.[131]

> Is it fair to convict of crime when the defendant [sic] . . . is unable to exercise the restraints upon his conduct that would enable him to conform to acceptable standards. It would seem incongruous that this great outpouring of concern should be lavished only upon adults who may be criminals while the children whom we profess to be particular objects of solicitude are bypassed.[132]

A New Jersey trial court opinion reached the opposite result in *In re H.C.*,[133] another homicide prosecution. The court considered *Winburn* but found its reasoning both flawed and inapposite to New Jersey delinquency proceedings.[134] Several arguments were combined in the court's analysis. The opinion stressed that treatment and rehabilitation, not punishment, were the consequences of delinquency adjudication.[135] Moreover, without entering an order of adjudication based on the instant conduct, the juvenile court would lack jurisdiction to enforce orders of treatment.[136] The opinion adopted a limited view of *Gault*, restricting its constitutional reach to procedural and substantive "individual rights." The court found the insanity defense to be a social policy rather than a due process safeguard for individual rights. *H.C.* was disapproved by a New Jersey appellate decision, *In re R.G.W.*[137] The court's analysis was uncomplicated. Noting that the New Jersey legislature, subsequent to *H.C.*, enacted a statute granting juveniles "all defenses available to adults,"[138] the opinion found this statutory authority controlling.

The Louisiana Supreme Court considered the juvenile insanity issue in the 1978 case of *In re Causey*.[139] The Louisiana court examined the pre and post-*Gault* United States Supreme Court delinquency decisions in *Winship* and *McKeiver* for constitutional guidance.[140] These cases were interpreted as mandating access to safeguards amounting to a guarantee of fundamental fairness. With regard to the insanity defense, the Louisiana Supreme Court reasoned:

> The only courts ever squarely confronted with the issue have held

130. *Id.* at 156, 145 N.W.2d at 180.
131. *Id.* at 163-64, 145 N.W.2d at 183-84.
132. *Id.* at 164, 145 N.W.2d at 184.
133. 106 N.J. Super. 583, 256 A.2d 322 (1969).
134. *Id.* at 596, 256 A.2d at 328.
135. *Id.* at 597, 256 A.2d at 329.
136. The opinion did not consider alternative bases of jurisdiction. *See infra* note 145 and accompanying text.
137. 135 N.J. Super. 125, 342 A.2d 869 (1975), *aff'd*, 70 N.J. 185, 358 A.2d 473 (1976) (per curiam).
138. N.J. STAT. ANN. § 2A:4-60 (West 1981).
139. 363 So. 2d 472 (La. 1978).
140. *Id.* at 474 (citing McKeiver v. Pennsylvania, 403 U.S. 528 (1970); *In re* Winship, 397 U.S. 358 (1970)).

> that, at least in adult proceedings, the denial of the right to plead insanity, with no alternative means of exculpation or special treatment for an insane person unable to understand the nature of his act, violates the concept of fundamental fairness implicit in the due process guaranties [sic].[141]

The *Causey* opinion held that "the right to plead insanity, *absent some other effective means of distinguishing mental illness from moral culpability*, is also fundamental."[142] Although alternatives were not presented, the court's reasoning indicated a willingness to entertain options compatible with juvenile justice principles.

A similar fundamental fairness rationale was used in a California intermediate appellate court decision, *In re M.G.S.*[143] The opinion declared, "[a] deprivation of the right to present such a defense [insanity] violates the constitutional guarantee of due process of law . . . ."[144] Ruling that a successful insanity defense amounted to exculpation extinguishing jurisdiction, the court considered alternative jurisdictional bases. Without deciding its application in the instant case, the court noted that California's dependent child jurisdiction includes juveniles found to be physically dangerous to the public.[145]

In addition to the New Jersey *H.C.* opinion, only one reported appellate decision, *In re C.W.M.*,[146] has rejected application of the insanity defense in delinquency adjudication. In an extensive analysis, the District of Columbia Court of Appeals acknowledged a conceptual distinction between technical mens rea and responsibility doctrines. As for *Gault* and its progeny, the court determined the *McKeiver* logic[147] apposite and reasoned, "[w]e find the central question is whether the insanity defense serves some function essential to fundamental fairness that cannot otherwise be performed adequately by other procedures in the juvenile justice system."[148] Unlike the Louisiana Supreme Court, the District of Columbia court found alternative procedures available to ensure fundamental fairness. The existing laws and regulations were determined to provide adequate options for rehabilitation of the mentally disordered juvenile.[149] The court further ruled that the constitutional mandate of fundamental fairness must be considered at disposition. To assure fairness in result, the mentally disordered delinquent is guaranteed the

141. 363 So. 2d at 474 (citations omitted). *But see supra* notes 121-24 and accompanying text.

142. 363 So. 2d at 476 (emphasis added).

143. 267 Cal. App. 2d 329, 72 Cal. Rptr. 808 (1968).

144. *Id.* at 336, 72 Cal. Rptr. at 811. The Nevada Supreme Court has also endorsed the insanity defense in delinquency adjudications. *In re* Two Minor Children, 95 Nev. 225, 592 P.2d 166 (1979). Relying on *Gault*, the court concluded that "the concepts of due process and fairness mandate permitting juveniles to plead and have tried the defense of insanity." *Id.* at 230, 592 P.2d at 169 (citations omitted). The Montana Supreme Court is in accord. *See In re* Stapelkemper, 172 Mont. 192, 562 P.2d 815 (1977).

145. 267 Cal. App. 2d at 337, 72 Cal. Rptr. at 812 n.3. *See infra* note 159.

146. 407 A.2d 617 (D.C. 1979).

147. *See supra* note 14.

148. 407 A.2d at 621.

149. To assure that the delinquent's mental capacity is in fact considered in relation to disposition, the court mandated evaluation of "the mental health of the child at the time of the offense as well as at the time of the hearing." *Id.* at 623.

same release and treatment benefits afforded the adult found not guilty by reason of insanity.[150]

b. Scope of the Doctrine

Determining the substance of the insanity standard has been a principal theme of criminal justice debate.[151] By contrast, jurisdictions approving the insanity plea in delinquency proceedings have devoted minimal attention to the issue, implying that the insanity standard's criteria are to be found in the penal law.

In the adult system, mental disorder, however denoted,[152] constitutes a necessary predicate to the insanity defense.[153] Despite the commendable efforts of psychiatry to improve its classification system,[154] the meaning of mental disorder has proven to be an anathema in the insanity context.[155] The potential for confusion of terminology in juvenile justice is greater. For example, developmental immaturity is occasionally confused with psychopathology, and transient conditions are often assumed to represent fixed disorders.[156] Accurate classification of the emotional state of an adolescent is especially challenging.[157] Courts have not addressed this issue directly, and

150. *Id.* at 625. *See infra* notes 165-67 and accompanying text.

151. *See, e.g.*, the leading case of United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). *See also supra* notes 53-57 and accompanying text. For a summary of the contours of the debate, see H. FINGARETTE & H. HASSE, *supra* note 45, at 15-65.

152. The American Psychiatric Association has recorded an official preference for the term "mental disorder." *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5-6 (3d ed. 1980) [hereinafter cited as DSM-III]. *See also supra* note 48.

153. *See supra* notes 48-50 and accompanying text.

154. DSM-III, *supra* note 152, represents the psychiatric profession's latest attempt to refine diagnostic standards in relationship to evolving scientific knowledge. *See* Spitzer, Williams & Sokol, *DSM-III: The Major Achievements and an Overview*, 137 AM. J. PSYCHIATRY 151 (1980). Criticism of earlier DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS editions. has often been acerbic, challenging the validity of mental health diagnostic methods. *See, e.g.*, Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968). The authors opine, "[b]ecause of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there." (footnote omitted). *Id.* at 80. One persistent critic has discounted the ability of *DSM-III* to correct such deficiencies. *See* J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 130-58 (3d ed. 1981).

155. H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 26-27 (1972), documents various categories of psychiatric opinion:

> (1) There is no such medical entity as mental disease, or we would do well not to use the phrase.
> (2) Mental disease is psychosis but not neurosis.
> (3) Mental disease is any significant and substantial mental disturbance, or is any condition at all that is authoritatively dealt with by the psychiatrist or physician treating mental conditions.
> (4) Mental disease means substantial social maladaptation, or incompetence, or both as judged by legal criteria.
> (5) Mental disease is the failure to realize one's nature, capacities, or true self.

156. *See* Achenbach, *Psychopathology of Childhood: Research Problems and Issues*, 46 J. CONSULTING & CLINICAL PSYCHOLOGY 759 (1978); Hornick, *Healthy Responses, Developmental Disturbances, and Stress or Reactive Disorders, II: Adolescence*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1366 (A. Freedman & H. Kaplan ed. 1967).

157. Hornick, *supra* note 156, at 1366, observes:

> Adjustment reactions of the adolescent are the rule rather than the exception. . . . It

the few decisions considering "mental disorder" questions in juvenile insanity adjudications have not established general principles for application of the doctrine to children.[158]

c. Dispositional Outcomes

Decisions applying the infancy defense rarely discuss disposition; however, in insanity cases, courts are more apt to consider ultimate outcome for the juvenile offender. Again, California is the forerunner in confronting this issue.[159] Its statute governing use of the insanity defense in delinquency proceedings establishes a presumption in favor of mental health treatment.[160] Unlike the adult criminal justice system,[161] social control is subordinated to treatment. Outpatient treatment, in lieu of institutional confinement, may be ordered for the juvenile at the discretion of the court.[162] Analyzing the

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is vital to a valid interpretation of any adolescent behavior that it be seen in its developmental process against a background that includes the physiology and psychology of adolescence, the family dynamics, and the wider scope of culture itself.

See also Nicholi, *The Adolescent*, in THE HARVARD GUIDE TO MODERN PSYCHIATRY 519-40 (A. Nicholi ed. 1978).

158. In one case the California Supreme Court addressed use of mental retardation as a means of demonstrating legal insanity and adopted the adult standard. *See In re* Ramon M., 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978). Earlier that year the California Supreme Court had adopted the ALI test for adult insanity proceedings. *See* People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). In *Ramon M.*, the court concluded, "[t]he ALI test with its reference to 'mental defect' was carefully drafted to encompass any defense based upon the idiocy or mental retardation of the defendant [sic]." 22 Cal. 3d at 422, 584 P.2d at 526, 149 Cal. Rptr. at 389. The court also adopted for juveniles the adult standard for defining "mental disease or defect." *Id.* at 427, 584 P.2d at 530, 149 Cal. Rptr. at 393. Elaborated on in McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1972), the standard requires proof of "[any] abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Note, however, that this standard requires both cognitive and volitional impairment. This duality conflicts with the ALI test itself requiring either cognitive incapacity ("either to appreciate the criminality of his conduct") or volitional incapacity ("or to conform his conduct to the requirements of law"). *See supra* note 50. Presumably, drafting of the *McDonald* standard in the conjunctive represents judicial oversight.

159. *See Gladys R.*, 1 Cal. 3d at 864-66, 464 P.2d at 134-36, 83 Cal. Rptr. at 678-80. The California Supreme Court recommended that trial courts substitute alternative juvenile court jurisdictional bases suitable to accomplishment of treatment objectives. Although the court contemplated resort to both status offense and dependency jurisdictional bases, a preference was expressed for the status offense category. Contemporary juvenile justice jurisprudence rejects the status offense model, however, and favors dependency actions for regulating non-criminal circumstances. *See* IJA-ABA STANDARDS RELATING TO NON-CRIMINAL MISBEHAVIOR (Tentative Draft 1977).

Fox, *supra* note 76, in his proposal for a partial responsibility doctrine for grossly immature and mentally ill juveniles, recommends "care and protection" and involuntary civil commitment actions. Although preferring the minimalist "care and protection" intervention, Fox would allow the more stringent sanctions for juveniles displaying "aggressive and dangerous defiance of other people's rights." *Id.* at 681-82.

160. [I]f the court finds that the minor was insane at the time the offense was committed, the court, unless it shall appear to the court that the minor has fully recovered his sanity, shall direct that the minor be confined in the state hospital for the care and treatment of the mentally disordered . . . or the court may order the minor to undergo outpatient treatment. . . .

CAL. WELF. & INST. CODE § 702.3(b) (West Supp. 1981).

161. *See supra* notes 58-60 and accompanying text.

162. For a general description of delinquency civil commitment practices, see Donovan, *supra* note 85, at 246-48; Rubin, The Emotionally Disturbed Juvenile Offender-An Interim Re-

statute in *People v. Superior Court*,[163] the California court sustained the legislative purpose of providing dispositional authority to the juvenile court subsequent to insanity exculpation.[164]

In the case of *In re C.W.M.*,[165] the District of Columbia court considered the issue of disposition. The court reviewed the general dispositional requirements for mentally disordered delinquents and found the provisions satisfactory. Essentially, the applicable provision authorized involuntary inpatient civil commitment, reviewable at six month intervals.[166] To assure use of the procedure, the decision held that "the [juvenile] Division *must* consider, at the dispositional hearing the mental health of the child at the time of the offense, as well as at the time of the hearing."[167] Although denying the insanity defense, the District of Columbia's decision attempted to create an equivalent to an insanity commitment.

Other decisions applying the insanity defense in delinquency adjudication have not addressed the dispositional issue.[168] Presumably, those courts have concluded that the juvenile court is empowered with sufficient jurisdictional authority to accomplish equitable results for the juvenile insanity acquittee. Although the data are scattered, there is some empirical evidence to confirm that proposition.[169]

3. Analysis

In general, the decisions are characterized by an unsatisfactory analysis of the insanity question. Citing *Gault* most courts grant juveniles the right to plead insanity. In nearly every instance, the analysis is summary and devoid of the reasoned thinking ordinarily exercised in major constitutional and policy decisions. The courts do not address in depth the doctrinal functions of the insanity defense in relation to the special characteristics of juvenile justice.[170] Additionally, the courts fail to address the application of the in-

port, 17-19 (Report Prepared for Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention and Nat'l Ass'n of Juvenile Justice Administrators Jan. 1981).

163. 95 Cal. App. 3d 380, 157 Cal. Rptr. 157 (1979).

164. Whether the petition be viewed as sustained and in effect suspended when the minor is found not guilty by reason of insanity, or declared "not true" by reason of such finding, we hold that a finding of not guilty by reason of insanity on a 602 petition [delinquent act] does not per se deprive the juvenile court of the power to make an otherwise valid commitment order under section 702.3, and that such petition carries with it continuing jurisdiction justifying disposition under the latter section.

Id. at 391, 157 Cal. Rptr. at 164.

165. 407 A.2d 617 (D.C. 1979).

166. *Id.* at 623 n.13.

167. *Id.* at 623 (emphasis in original). Harrington & Keary, *supra* note 115, at 277-78, misinterpret this element of the holding. They criticize the opinion by arguing that the dispositional mode of insanity consideration ignores both juveniles no longer mentally ill and juveniles sane at the time of the offense but currently mentally ill. The quoted portion of the opinion contradicts that interpretation, however, requiring mandatory consideration of the mental state at both intervals.

168. *But see supra* note 136 and accompanying text.

169. To obtain treatment results, courts may invoke dependency and neglect and civil commitment procedures. *See* Donovan, *supra* note 85, at 234-35; Popkin & Lippert, *supra* note 115, at 431 n.40.

170. Advocating incorporation of adult responsibility principles into delinquency adjudication, McCarthy, *supra* note 76 at 207-19, offers an equally unsatisfactory analysis. Although he

sanity defense. The decisions are largely silent with respect to the insanity standard and dispositional procedures.

D. *Diminished Capacity*

1. Doctrinal Foundations

Scant attention has been paid to the function of the diminished capacity doctrine in juvenile delinquency. With respect to the partial responsibility theory of diminished capacity, culpability determinations are intrinsic to juvenile dispositional decisionmaking. The identical mitigating factors used by this theory to distinguish between grades of offenses are routinely incorporated into delinquency outcome determinations.[171]

Diminished capacity in the technical mens rea sense requires a different analysis. The technical mens rea defense is properly analyzed as a proof rather than as a responsibility question.[172] Statutory offenses, whether crimes or delinquent acts, ordinarily require proof of a defined culpable mental state.[173] Because *Winship* demands proof of all delinquency offense elements beyond a reasonable doubt, mens rea has acquired constitutional dimension.[174] This principle does not require extended case analysis unless courts confuse the technical mens rea and responsibility doctrines.[175]

In delinquency adjudication, technical mens rea has received minimal scrutiny. When considered, the issue is usually analyzed within the familiar *Gault* framework. Juvenile courts are reluctant to separate the technical mens rea from the wider scope of criminal responsibility.[176] Occasionally,

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devotes considerable attention to the function of responsibility principles, McCarthy's examination of constitutional doctrine is superficial. Furthermore, McCarthy's investigation of his proposal's impact is incomplete.

171. *See generally* L. Cohen, Juvenile Dispositions: Social and Legal Factors Related to the Processing of Denver Delinquency Cases (Utilization of Criminal Justice Statistics Project, Analytic Report 4 1975); Scarpitti & Stephenson, *Juvenile Court Dispositions-Factors in the Decision-Making Process*, 17 CRIME. & DELINQ. 142 (1971).

172. *See infra* notes 201-02 and accompanying text.

173. *See* W. LAFAVE & A. SCOTT, *supra* note 16, § 27, at 191-95; *id.* § 31, at 218-23.

174. *See generally* Jeffries & Stephan, *supra* note 24. STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, have implicitly proposed this rule for juveniles. Although the IJA-ABA Standards do not expressly adopt the principle, its drafters assumed that constitutional doctrine required the result. Interview with Standards Reporter, *supra* note 84. Moreover, the Standards propose that a mens rea state be required to substantiate even minimal culpability and that liability without fault be abolished. *See* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, Standard 3.1.

175. *See, e.g.*, Fisher v. United States, 328 U.S. 463 (1946). In *Fisher*, the Supreme Court rejected an appeal to fashion a diminished capacity doctrine for the District of Columbia. The petitioner contended that mental deficiency, short of legal insanity, was relevant to disproving the premeditation-deliberation element of first-degree murder. The Court interpreted the argument in terms of the responsibility doctrine, which it categorized as a matter of local concern. For an analysis of *Fisher*'s contemporary viability, see Comment, *Mens Rea and Insanity*, 28 ME. L. REV. 500, 525-29 (1976).

176. *See In re* Betty Jean Williams, No. 27-220-J (Juv. Ct., D.C. Oct. 20, 1959) (*quoted in* Westbrook, *supra* note 76, at 121-22). Judge Ketcham declared:

> Counsel's motion also states that an assessment of respondent's mental state as of the time of the alleged delinquency is required. This appears to involve a serious misconception of the philosophy and spirit of the Juvenile Court Act. . . . Free will, evil intent, moral responsibility and proof of guilt beyond a reasonable doubt are the language of the criminal code.

Id. at 121.

however, decisions focus on the mens rea states and utilize the *Winship* rule.

2. Decisions

Notwithstanding the conceptual distinction between technical mens rea and responsibility questions, courts persist in consolidating the doctrines, sometimes understandably. A classic example involves a criminally negligent act committed by a juvenile. In *State v. Peterson*,[177] a fifteen-year-old was convicted in criminal court of manslaughter arising from a reckless driving episode.[178] On appeal, Peterson claimed that the trial court had erred in refusing his tendered instruction asserting age as a factor in determining the criminal negligence mens rea.[179] Emphasizing the objective standard of criminal negligence, the Minnesota Supreme Court affirmed the conviction, reasoning that "[w]here intent is an ingredient . . . the age and mentality of the accused should be taken into account. This may be also true where judgment and understanding affects the criminality . . . . Intent or knowledge is not an ingredient of [the statute charged]."[180]

People v. Nichols,[181] involving a thirteen-year-old prosecuted in criminal court, posed a more orthodox subjective mens rea issue. The emotionally unstable adolescent had abducted a five-year-old for sexual purposes and impulsively murdered the child. Accepting a plea of guilty, the trial court entered a judgment of first-degree murder. The appellate court disagreed, finding insufficient evidence of premeditation-deliberation. The opinion cited Nichols' panic and shame arising from the belief that the victim would inform adults of the illicit sexual conduct and characterized the behavior as "desperate and frantic."[182]

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177. 153 Minn. 310, 190 N.W. 345 (1922).

178. The reckless character of the minor's driving was undisputed. The principal fault was excessive speed for the prevailing conditions. *Id.* at 312, 190 N.W. at 346.

179. The indictment charged "manslaughter, through culpable negligence in the operation of an automobile" and the prosecution submitted as its case-in-chief evidence of the defendant's excess rate of speed. *Id.*, 190 N.W. at 346.

180. *Id.*, 190 N.W. at 346. STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12 adopts the defendant's position. Standard 3.2 states:

> Where an applicable criminal statute or ordinance penalizes risk-creating conduct, it should be a defense to juvenile delinquency liability that the juvenile's conduct conformed to the standard of care that a reasonable person of the juvenile's age, maturity, and mental capacity would observe in the juvenile's situation.

181. 88 Cal. App. 2d 221, 198 P.2d 538 (1948).

182. Eschewing reliance upon the objective criterion of "length of time available for deliberation," the court examined the totality of the minor's cognitive and emotional circumstances to assess the premeditation-deliberation formula. The opinion noted, " [t]his crime was committed by a 13-year old girl, with a mental age of 11, who was mentally and emotionally defective, who had a natural tendency toward cruelty to animals, and who was then going through a period of extreme mental and emotional stress." *Id.* at 228, 198 P.2d at 542. These data were interpreted as explanatory of an impulsive, immature reaction, inconsistent with the objective standards of premeditation-deliberation.

See also People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) involving a similar determination. Fifteen-year-old Dennis Wolff, a seriously disturbed juvenile obsessed with sexual ideation, murdered his mother. He believed it was necessary to kill his mother in order to use the family home for sexual activities. Significant planning preceded the homicide. Reversing the jury verdict of first-degree murder, the California Supreme Court ruled "[t]he true test must include consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act." *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287. (emphasis in original).

The following cases illustrate various judicial determinations of technical mens rea. The eleven-year-old in the case of *In re T.R.S.*[183] was adjudicated delinquent on the basis of a finding of criminally negligent homicide. While playing with a neighbor, T.R.S. discharged a loaded weapon from a distance of four feet. The appellate court combined subjective and objective factors in assessing the reasonableness of the conduct. With respect to the child's frame of mind, the court cited his propensity for playing with firearms despite adult warnings. For the objective test, the opinion employed the standard of "a boy of his age, mental capacity, experience, and intelligence. . . ."[184]

A recent New York trial court opinion[185] considered the mens rea of a nine-year-old charged with bank robbery. Acknowledging that the offense required proof of a specific intent, the court ruled that the appropriate evidence had been adduced.[186] To evaluate the mental state, the court utilized a broad concept of mens rea incorporating the factor of maturity.[187]

Finally, a Rhode Island decision, *In re Michael*,[188] emphasizes another variant of the doctrine. The twelve-year-old asserted the absence of mens rea as a defense to rape.[189] Characterizing the issue as "the mental state that is required by the definition of the offense to accompany the act that produces or threatens the harm,"[190] the court evaluated the evidence and declared that the mens rea had been proven.[191] Furthermore, the court refused to consider a diminished capacity claim based on immaturity, noting that the Rhode Island construction of the doctrine did not apply to general intent offenses,[192] such as the instant violation.[193]

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183. 1 Cal. App. 3d 178, 81 Cal. Rptr. 574 (1969).

184. *Id.* at 181, 81 Cal. Rptr. at 575 (citations omitted).

185. *In re* Robert M., 110 Misc. 2d 113, 441 N.Y.S.2d 860 (1981).

186. *Id.* at 117, 441 N.Y.S.2d 863.

187. "Moreover, if the Respondent offers evidence that any combination of factors, including immaturity, negatives the requisite specific intent, he will be exonerated . . . ." *Id.* at 116, 441 N.Y.S.2d at 863 (footnote omitted).

188. 423 A.2d 1180 (R.I. 1981).

189. In addition, Michael asserted the infancy doctrine. *See supra* note 93 and accompanying text.

190. 423 A.2d at 1183.

191. The court stressed the calculated manner by which the respondent lured the five-year-old victim into a park in order to commit the offense. He had asked her to assist him to "catch birds' eggs." *Id.*

192. The phrase "general intent" is troublesome because of its multiple meanings in the criminal law. *See* W. LA FAVE & A. SCOTT, *supra* note 16, § 28, at 201:

> Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of *mens rea* . . . . Or, "general intent" may be used to encompass all forms of the mental state requirement . . . . Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion.

Arenella, *supra* note 61, at 828 n.7, provides a simplified definition: " 'General intent' crimes require only that the individual voluntarily commit the forbidden act."

In *Michael*, the Rhode Island Supreme Court described a general-intent offense as one which "requires proof that the defendant intended to do the proscribed act, that it was done unlawfully, and that it was not done inadvertently." 423 A.2d at 1183.

193. For persuasive criticism of the limitation to specific intent crimes, see Arenella, *supra* note 61, at 832 n.25; Morse, *supra* note 32, at 276-77. *See also* Hendenshott v. People, 653 P.2d 385 (Colo. 1982).

3. Analysis

When courts are able to separate the culpability question from the more general framework of responsibility, the decisions indicate a relatively sophisticated examination of mens rea states. Analyzing the capacity of the juvenile to form the requisite mens rea, the courts take into consideration relevant subjective and objective factors. The child's maturity and judgment receive particular attention and the courts are sensitive to emotional and psychological evidence.

Particularly noteworthy is the willingness of courts to adapt the objective criminal mens rea standards to the individual circumstances of the juvenile. Although reported cases are infrequent, a number of opinions reflect a sensitivity to the age issue, thus demonstrating the capacity of juvenile justice to creatively apply criminal law principles to achieve just results. The relative paucity of reported decisions, however, qualifies these observations.

Diminished capacity represents a novel concept in delinquency adjudication. Only occasionally have courts reviewed the application of the technical mens rea doctrine to juveniles. Moreover, partial responsibility has been ignored. Nevertheless, the contemporary trend toward determinancy in delinquency dispositions, replicating adult sentencing standards, may stimulate interest in the doctrine.

V. TOWARD AN INTEGRATED THEORY

A. *Preliminary Observations*

The writings of authorities in the juvenile justice field demonstrate that questions of juvenile responsibility are not remote. Courts struggle to assimilate the adult principles of infancy, insanity, and diminished capacity into the juvenile justice system. The task is complicated by the penal assumptions underlying the principles; each of the doctrines was established to fulfill an exculpatory or mitigatory function relating to punishment. Occasionally the doctrinal fit is neat, but more often the criminal law responsibility justifications are incompatible with juvenile court practices. Since major differences exist among penal aims and patterns of disposition, evidence supports establishment of specialized juvenile justice responsibility principles.[194]

An appropriate starting point to develop an integrated theory of delinquency responsibility is to identify the purposes of delinquency intervention.

194. Identical reasoning was employed by the IJA-ABA Standards project in its formulation of delinquency sanctioning principles. Although disavowing traditional juvenile court dogma and adopting criminal law proportionality values, the Standards insisted upon a sense of separation between juvenile justice and criminal justice jurisprudence. The sentiment is captured in a footnote appearing in IJA-ABA STANDARDS RELATING TO DISPOSITIONS (Approved Draft 1980) at 19 n.5. (quoting Cohen, *Position Paper (Juvenile Justice Standards Project*, No. 18, 1974)):

> Juveniles may be viewed as incomplete adults, lacking in full moral and experimental development, extended unique jural status in other contexts, and deserving of the social moratorium extended by this and all other societies of which I am aware. Thus, removal of the treatment rationale does not destroy the rationale for a separate system or for the utilization of an ameliorative approach; it does, however, require a different rationale.

The *IJA-ABA Standards* provide a valuable frame of reference. The Dispositions Standards decree:

> The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of juveniles, and that give juveniles access to opportunities for personal and social growth.[195]

This statement of purpose proposes two fundamental principles: that the characteristics of a juvenile demand individualized consideration and that disposition is intended to maximize developmental capacities. According to this scheme, personal culpability becomes an organizing principle of delinquency, determining the nature of the remedial consequences for the delinquent child.[196] Although acknowledging the punitive effects of delinquency sanctions, the *IJA-ABA Standards* do not abandon the forward-looking purpose of juvenile justice intervention.[197]

In addition to different emphases in penal values, juvenile and adult courts implement responsibility principles dissimilarly. In the adult system, culpability decisions are centralized in adjudication.[198] The responsibility decision made at adjudication is subject to only partial amelioration at the subsequent sentencing hearing. In effect, if the mentally disordered and immature offender is convicted in criminal court, he is likely to be punished by the imposition of unambiguously punitive consequences.[199]

In the juvenile justice system, on the other hand, culpability principles

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195. IJA-ABA STANDARDS RELATING TO DISPOSITIONS, *supra* note 194, Standard 1.1.

196. In a significant departure from juvenile justice tradition, the IJA-ABA Standards urge a proportionality standard. Sanctioning limits are fixed in relationship to culpability. *See* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, at 34-45. Compare the traditional view espoused, *supra* note 5.

197. IJA-ABA STANDARDS RELATING TO DISPOSITIONS, *supra* note 194, Standard 2.1, states: "In choosing among statutorily permissible dispositions, the court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability . . . ."

198. In traditional penal models, adjudication is the fulcrum of responsibility determination. Infancy, insanity, and diminished capacity decisionmaking occur at this stage. The insurgence of determinate sentencing may accelerate this operation, since sentencing decisions focus upon non-individualistic culpability factors. *See* Monahan & Ruggiero, *Psychological and Psychiatric Aspects of Determinate Criminal Sentencing*, 3 INT'L J.L. & PSYCHIATRY 143 (1980). *But see* Weissman, *Determinate Sentencing and Psychiatric Evidence: Due Process Examination*, 27 ST. LOUIS U.L.J. 347 (1983).

199. *But see* the "guilty but mentally ill" concept authorizing a treatment disposition for sane but mentally ill adult offenders. This provision provides that the duration of treatment confinement cannot exceed the maximum penal term prescribed for the offense of conviction. *See generally*, Note, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J.L. & MED. 237 (1981); Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289 (1981); Comment, *Insanity-Guilty But Mentally Ill-Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351 (1979); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 U. DET. J. URB. L. 471 (1976); Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188 (1978). For comments on effect of "guilty but mentally ill" verdict, see *Guilty But Insane Just Means Guilty*, NEWSWEEK, Apr. 4, 1983, at 78.

See also B. WOOTTON, CRIME AND THE CRIMINAL LAW chs. 2 & 3 (1963) (Lady Wootton's proposal that mens rea be abolished in favor of a behavioral remedial approach). Wootton's

are usually applied at the dispositional phase. The basic task of delinquency disposition is to fashion the remedy most suited to improving the juvenile's ability to function in the community. Although questions of community safety, retribution, and general deterrence are involved in the decisionmaking, these values are subordinated to the function of constructing an appropriate remedial "program."[200] Since the court systematically incorporates assessment of personal culpability into its remedial evaluation, the juvenile justice system is able to implement responsibility principles more efficiently and delinquents are routinely accorded the benefits of responsibility theory.

Thus, the characteristics of the juvenile justice system encourage a fresh examination of responsibility principles. Adult concepts and practices need not be accepted blindly. If the objective is to establish doctrines that satisfy constitutional mandates of fundamental fairness, promote the dictates of juvenile justice, and recognize the unique psychological and developmental capacities of minors, mechanical adaptation to the adult dogma is unnecessary.

B. *Recommendations*

1. Diminished Capacity

a. Technical Mens Rea

There can be no quarrel with the proposition that the juvenile is entitled to have each element of the offense, including the specified mens rea, proven beyond a reasonable doubt. *Winship* requires nothing less. Whether the incapacity is biological or psychological in origin, evidence of the inability to form the mens rea is a proper means of disputing guilt.[201] Exulpatory evidence probative of a mens rea state is only one category of defense evidence and no valid theory can be proposed to restrict its introduction.[202]

If as Morse contends, "most mens reas are rather simple states that require little intelligence or cognitive capacity,"[203] then the relationship between intelligence and formation of mens rea is of minor practical significance.[204] The previously cited cases[205] belie that characterization

scheme has been discredited as too radical a departure from criminal law principles. *See* Kadish, *supra* note 63, at 285-90; Monahan, *supra* note 44, at 733-38.

Norval Morris has recently proposed a thoughtful paradigm for incorporating mental condition into sentencing. *See* N. MORRIS, MADNESS AND THE CRIMINAL LAW 128-76 (1983).

200. Notwithstanding the infusion of proportionality and determinancy principles into its jurisprudence, the Standards do not abrogate the forward-looking purposes of disposition; a humanistic commitment to youth is maintained. *See supra* note 195 and accompanying text.

201. Adopting this position, Morris, *supra* note 51, at 519, declares, "[e]vidence of mental illness would be admissible as to the *mens rea* issue to the same limited extent that deafness, blindness, a heart condition, stomach cramps, illiteracy, stupidity, lack of education, 'foreignness,' drunkenness, and drug addiction are admissible." (footnote omitted).

202. The Model Penal Code subscribes to this position declaring: "Evidence that the defendant suffered from mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." MODEL PENAL CODE, § 4.02(1) (Proposed Official Draft 1962).

203. Morse, *supra* note 32, at 277.

204. Considerable disagreement exists among commentators examining the nexus between psychological testimony and proof of mens rea states. Arenella, *supra* note 61, states, "the only type of mental abnormality that could establish such incapacity would be a severe mental disa-

with respect to juveniles. Furthermore, examination of psychological investigations[206] indicates that some children may be unable to comprehend simple commands of the law and that, at a minimum, juveniles possess unequal cognitive and reasoning skills. Immaturity and, to a lesser degree, mental illness are valid factors in determining a juvenile's capacity to form mens rea states.[207]

Several significant issues require additional comment. The *IJA-ABA Standards Relating to Juvenile Delinquency and Sanctions* ban delinquency liability without fault.[208] The Standards emphatically reject the notion that delinquency liability can be imposed without demonstration of culpability. Strict liability is construed to be offensive to values favoring individualized assessment of the juvenile's circumstances.[209] Although this decision is a policy rather than a constitutional judgment, its logical foundation is solid and the principle merits endorsement.

The remaining issue concerns the disposition of a juvenile acquitted as a result of a psychological mens rea defense. In terms of strict criminal law theory, the juvenile is entitled to unconditional exculpation and jurisdiction is extinguished. If the juvenile court wishes to reinstitute jurisdiction to accomplish social welfare purposes, use of a non-delinquency jurisdictional authority, such as dependency, is permissible.[210] Use of an automatic commitment procedure, similar to an adult insanity commitment, however, violates the theory of a mens rea defense.[211]

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bility that substantially interfered with the defendant's reality-testing functions." *Id.* at 834-35 (footnote omitted).

Dix, *supra* note 61, at 324-27, is more sanguine. While skeptical concerning the ability of psychological testimony to aid in the determination of mens rea, he admits that, "[s]ome states of mind do lend themselves to the type of analysis that mental health personnel feel is appropriate." *Id.* at 325.

Lewin, *supra* note 32, at 1064-65, is considerably more optimistic. He reasons,

> [i]ndeed it would seem that if psychiatry offers anything of value in this area, it is in describing the functional processes of the mind and, if trained in psychodynamic principles, in identifying the unconscious factors that motivated the defendant and prevented him from forming the requisite specific state of mind.

Id. (footnote omitted). *See* Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563 (1980) (extended discussion of the unconscious and its function in criminal law).

205. *See supra* notes 177-193 and accompanying text.

206. *See supra* note 114 and accompanying text. *See also* Keaszy & Sales, *An Emperical Investigation of Young Children's Awareness and Usage of Intentionality in Criminal Situations*, 1 LAW & HUM. BEHAV. 45 (1977).

207. However, the proposed model rejects the California variant set forth in People v. Nichols, 88 Cal. App. 2d 221, 198 P.2d 538 (1948). *See also supra* note 182. That approach departs from a technical mens rea analysis by interjecting notions of diminished responsibility. Under the California doctrine, courts admit evidence portraying the defendant as less capable in a moral sense to form the requisite mens rea. As observed by Arenella, *supra* note 61, at 831, "the diminished capacity variant is, in essence, the diminished responsibility model in mens rea clothing." *Accord*, Morse, *supra* note 32, at 288. *See also* Dix, *supra* note 61, at 328 (a creative approach to enlargement of the mens rea inquiry).

208. STANDARDS RELATING TO JUVENILE DELINQUENCY , *supra* note 12, Standard 3.1.

209. Additionally, the Standards commentary posits that "[I]ts impact will be predictably modest, since nearly all of the traditional offenses require proof of mens rea . . . . [B]ecause strict liability is most commonly used in a regulatory context, juveniles are unlikely to be charged with such offenses." *Id.* at 28.

210. *See supra* note 159 indicating judicial approval of this concept in other responsibility contexts.

211. By way of illustration, consider the example of an adult charged with the offense of

b. Partial Responsibility

Despite cogent arguments in support of a partial responsibility doctrine in the adult justice system,[212] the rationale is inapposite to juvenile justice. In the adult system, the doctrine mitigates punishment for the sane but impaired offender by reducing the grade of the offense. Without this type of ameliorative mechanism, the less culpable but sane defendant is subject to the identical punishment reserved for the fully responsible offender.[213]

These premises are invalid in the juvenile system. Sanctions are individualized according to a number of social, psychological, and criminological factors; the grade of the offense, although influential, is not determinative of the ultimate consequences.[214] Adherence to the *IJA-ABA Standards'* principle that culpability be included in the dispositional calculus will provide adequate protection to the partially impaired juvenile.[215] Moreover, the expanded dispositional culpability doctrine, which is proposed in the following section,[216] offers superior ameliorative advantages to the impaired juvenile.

2. Infancy and Insanity

For purposes of this analysis, the parallel responsibility doctrines of infancy and insanity are combined. These doctrines share the common purpose of exculpation based on specified incapacities.

Essentially, criminal law authorities propose two models of incorporating criminal law responsibility principles into delinquency adjudication. The "adult-equivalency" model adopts intact the criminal law theory. The applicable adult standard and accompanying practices are transferred to the juvenile system. The alternative proposal, the "substituted protections" model, repudiates the adult standards and recommends a substitute theory with accompanying procedures recast for juvenile justice. The goal of this model is to achieve constitutional fairness within the framework of juvenile justice.

The "substituted protections" model is not only preferable in terms of

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reckless burning or exploding as set forth by the MODEL PENAL CODE § 220.1(2) (Approved Draft 1962). The prohibition requires that the defendant "purposely start[s] a fire or causes an explosion." If purpose is not proven by the evidence and the defendant is shown to be merely negligent, the defendant is acquitted. Surely, automatic commitment for social control purposes would be objectionable.

If the evidence adduced during the trial, however, indicated that the juvenile was dependent and neglected or mentally ill, the court should be authorized to order further observation for purposes of considering alternative jurisdictional bases for treatment.

212. *See generally* Morse, *supra* note 32.

213. In adult criminal law, penal consequences are correlated with the grade of offense. Although the sentencing tribunal is typically granted discretion to adjust the sanction within the grade, its flexibility may be limited. This is particularly true in homicide prosecutions in which the most serious grades offer little sentencing flexibility and bear serious consequences. The development of partial responsibility as a homicide doctrine is partially due to this restricted flexibility. *See* Dix, *supra* note 61, at 321-24.

214. *See supra* note 171.

215. STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, Standard 1.1(D). Although the Standards introduce the concept of determinancy into juvenile sanctions, the aim is to limit disproportionate consequences based on treatment notions. The Standards encourage the use of diminished culpability evidence in selecting an individualized disposition.

216. *See infra* notes 217-29 and accompanying text.

policy, but also satisfies constitutional requirements.[217] The juvenile court, notwithstanding the commendable achievements of due process reform, remains a unique social institution. The juvenile court's specialized task demands a discriminating jurisprudence because it is not dealing with miniature adults but children experiencing distinct developmental phases. Blindly engrafting criminal law doctrines on the juvenile system does not ensure fulfillment of the interests of children or society.

Responsibility principles for juveniles should encompass a wide spectrum of incapacities. Restricting responsibility to orthodox expressions of mental disorder and intellectual impairment subverts fundamental principles of juvenile law. Juvenile justice doctrine espouses a qualified free-choice model of conduct[218] and recognizes the "unique physical, psychological, and social features of young persons."[219] Therefore, proof of any incapacity diminishing the juvenile's ability to morally appreciate delinquency prohibitions[220] or to volitionally conform with the dictates of law[221] merits formal attention.

Although responsibility principles affecting exculpation are generally applied at adjudication, the practice is not sacrosanct. It is based on particular notions of the function of the criminal law,[222] concepts less compelling in juvenile jurisprudence.[223] It is submitted that the transfer of responsibility determinations to the dispositional phase of delinquency extends more effective protection to the juvenile. In this manner, incapacity due to infancy or insanity may be introduced as evidence of lack of culpability to appropriately temper social control consequences.

The essence of this "substituted protections" model is routine consideration at disposition of proffered evidence indicating the presence or absence of moral appreciation and volition. Moreover, to ensure a fair and cognizable

217. The Supreme Court is disinclined to include responsibility principles within its concept of due process. Even the most optimistic advocates of a constitutional law of criminal responsibility are reserved in their judgment of Supreme Court willingness to entertain the argument. *See, e.g.*, Wales, *supra* note 122, at 702-04. Although state courts and the juvenile decisions reported *supra* text accompanying notes 126-50 support the incorporation of responsibility into due process, Supreme Court precedent does not encourage this view point.

218. *See generally* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, Standards 1.1, 3.5.

219. *Id.* Standard 1.1(D).

220. The source of the incapacity may be a mental disorder or a developmental disability. The emphasis of the criterion should be upon the quality of the functional impairment; thus, restriction to a particular origin is unwarranted.

221. Satisfaction of this criterion may be achieved by reference to social and cultural influences. *See supra* note 51. "Adverse social and subcultural background is statistically *more* criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice . . . ." (emphasis in original). Morris, *supra* note 51, at 520. Diamond, *supra* note 51, at 203, emphasizes that "[t]he evidence would have to be specific to the defendant, directly related to his thinking and decisional capacities in the context of the crime of which he is charged."

222. *See* W. LAFAVE & A. SCOTT, *supra* note 16, § 36, at 269-74. *See also* Monahan, *supra* note 44 (expanded discussion of insanity rationale).

223. *See* IJA-ABA STANDARDS RELATION TO DISPOSITIONS, *supra* note 194, at 15-20. Although delinquency jurisprudence has adopted criminal law concepts, notable distinctions remain. Retribution and deterrence, linchpins to the insanity doctrine, are accorded diminished significance in delinquency jurisprudence. The theory of juvenile delinquency control, whether defined by traditional notions or by the revised IJA-ABA Standards, lacks the punitive emphasis of the criminal law.

result, the court should be required to incorporate the culpability determination into its dispositional order. After evaluating the culpability evidence, if the court decides that responsibility was impaired to a substantial degree,[224] the court should be obligated to impose civil treatment sanctions.[225] Lesser impairments evidencing a "diminished responsibility" should merit disposition within the ordinary range of delinquency sanctions but encumbered by a social control discount proportionate to the reduction in culpability.[226]

Although the "substituted protections" model is contrary to the general weight of authority, particularly in the insanity defense context, its advantages are distinct. Its expanded scope avoids the artificial limits of the medical model and permits the introduction of any evidence probative of incapacity. By authorizing a set of dispositional authorities correlated with levels of impairment, the model provides flexibility to the juvenile court.[227] The substantially impaired juvenile is treated as a non-delinquent and receives appropriate care without reference to the preventive detention procedure used by the adult system.[228] Although continuing to be adjudicated as a delinquent, the partially impaired juvenile receives a sanction adjusted to his degree of culpability.[229]

C. *Concluding Remarks*

Just results may be attained by adoption of this integrated theory of delinquency responsibility. Unless proof of mens rea and actus reus are established beyond a reasonable doubt, the impaired juvenile is not liable for his misconduct. If, however, liability is imposed, additional safeguards provide protection for the juvenile. Culpability becomes an organizing principle of dispositional decisionmaking, and separate judicial treatment is available to juveniles displaying a broad spectrum of incapacities.

The aim of this integrated theory is to establish balanced principles accommodating individual and societal interests in a manner responsive to both constitutional and policy interests. The unification of these principles

224. In effect, this standard is the equivalent of the IJA-ABA Standards' measure of incapacity. *See* STANDARDS RELATING TO JUVENILE DELINQUENCY, *supra* note 12, Standard 3.5.

225. *See* the approach adopted in *In re* C.W.M., 407 A.2d 617 (D.C. 1979) discussed *supra* notes 149-150 and accompanying text. Other civil remedies may also be utilized, such as the substitution of non-delinquency jurisdictional authorities. *See supra* note 159 and accompanying text.

226. To the degree that delinquency codes adopt the proportionality recommendations of the IJA-ABA Standards and similar proposals, this concept gains increased importance. As in the adult system, the grade of offense will regulate the range of penal consequences and the notion of culpability will assume the pivotal role.

227. *See supra* note 84. The dilemma conceived by the IJA-ABA Standards approach is disingenuous. The juvenile justice system is equipped with sufficient dispositional options to avoid irrational outcomes.

228. STANDARDS RELATING TO JUVENILE DELINQUENCY, Standard 3.5, *supra* note 12, adopts the Model Penal Code insanity test, it neglects to specify procedures for disposition of the juvenile acquitted by this procedure. The drafters presumed that juvenile courts would resort to procedures similar to those used for adult insanity acquittees. Interview with Standards Reporter, *supra* note 84.

229. Thus, the model responds to the query: "Do legally sane but mentally abnormal offenders deserve the same punishment as normal offenders whose behavior is essentially similar?" Morse, *supra* note 32, at 273.

with the fundamentals of delinquency jurisprudence is essential. Instead of mechanically adopting adult responsibility doctrines, the proposed model utilizes the principles founded in the juvenile justice system. Despite divergence from the principles of adult criminal law, the model fulfills the constitutional standard of fundamental fairness. Moreover, the model's integrative quality offers the potential benefits of minimizing doctrinal distortion and avoiding ad hoc results.