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Francis Barry McCarthy
University of Pittsburgh

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THE ROLE OF THE CONCEPT OF RESPONSIBILITY IN JUVENILE DELINQUENCY PROCEEDINGS

FRANCIS BARRY McCARthy*

To what side soever we turn our eyes, we are presented with a confused scene of contradictions, uncertainty, hardships, and arbitrary power. In the present age, we seem universally aiming at perfection; let us not therefore neglect to perfect the laws on which our lives and fortunes depend.

Voltaire

The juvenile justice system is caught in a crosscurrent of conflicting philosophies. Contemporary thought perceives the juvenile court simultaneously as an instrument of social control designed to deal with the criminal activities of children and as a therapeutic institution providing assistance, guidance and treatment to children in need. While these objectives would not necessarily seem to be mutually exclusive, in both practice and theory the juvenile court has frequently been torn between the traditional theories and purposes of the criminal law, and those provided by a medical model which sees criminal or delinquent behavior as the product of a sickness or disease. This dilemma is more apparent in the juvenile court than in any other social institution.

The juvenile court found its principal formative impetus in a growing dissatisfaction with the criminal process. Reformers devised an alternative system which called extensively upon the behavioral and social sciences to diagnose the causes of crimes committed by children and to fashion means through which these causes could be eliminated at the outset, or through which the effects or symptoms could be treated and cured. In this respect, legal institutions almost completely relegated responsibility for the operation of the juvenile court to the behavioral sciences. While the "symptom" which was the basis for the official intervention by

* Assistant Professor of Law, University of Pittsburgh. A.B., 1967, Stonehill College; J.D., 1971, Boston College; LL.M., 1975, Columbia University.

1 See note 29 and accompanying text infra.
the juvenile court generally remained defined in terms of criminal acts, the content and significance of these acts were determined almost exclusively by behavioral science standards. Consequently, juvenile courts abandoned many fundamental principles of the criminal law.

Many students of juvenile law consider the juvenile court's departure from the principles of the criminal law to be the mark of enlightenment since the criminal law is thought to be based on anachronistic concepts. It is suggested here, however, that a substantial amount of the wisdom of the criminal law which was incorporated through centuries of development, along with the valuable interests that it protected, has been too cavalierly dismissed.

The exclusive focus of this article is upon proceedings in which delinquency is determined, even though the juvenile court generally possesses a broad jurisdiction which covers a variety of matters other than delinquency. There is, however, a fundamental difference between delinquency proceedings and those involving dependency, neglect, or some other domestic problems. These latter proceedings attempt to resolve matters usually concerned with the whole fabric of a family situation and the problems involved therein. A delinquency proceeding, by contrast, has as its primary jurisdictional base the actions of the child. It is quite possible that a child who is engaging in antisocial conduct is doing so because of problems at home. In this sense, the inquiries of all these proceedings may be directed toward solving similar problems, but this is not necessarily the case. Quite often children are found to be delinquent in instances in which there would be no occasion for intervention by a juvenile court under its dependency or neglect jurisdiction. In such instances the child has done an act which amounts merely to a crime.

Since the conduct upon which delinquency is based is usually criminal in nature, and since the dispositional alternatives available to the juvenile court frequently resemble the punishment imposed upon adults, it is necessary to determine to what extent the jurisprudence of the criminal law is or should be applicable to a delinquency proceeding. This analysis is not undertaken with the belief that the criminal law has arrived at a state of perfection or that it possesses all the answers to the problems of delinquency.

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2 See National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act § 2(2) (1968). See also note 42 and accompanying text infra.
3 See note 58 and accompanying text infra.
4 See note 42 and accompanying text infra.
5 See note 156 and accompanying text infra.
However, this article suggests that the principles of the criminal law reflect important social values of which the juvenile law should be ever mindful.

Recently the efforts of both the President's Commission of Law Enforcement and Administration of Justice6 and the United States Supreme Court7 have directed substantial attention to the juvenile justice system. The decisions, legislation, and articles which have grown out of these efforts have centered almost exclusively upon the procedural aspects of the juvenile justice system. Such considerations are, of course, extremely important; but they alone do not address a variety of other problems inherent in a legal system that deals with youthful offenders, nor can they determine the proper substantive bases upon which societal intervention should be authorized. In many respects, an exclusive preoccupation with procedural safeguards can result in a situation not unlike that described in Samuel Butler's Erewhon, in which the man was tried with what might be perceived as the fullest of due process rights for the offense of having contracted consumption.

In an attempt to move beyond purely procedural limitations, therefore, this article seeks to determine the role which the concept of criminal responsibility, or mens rea, should play in a juvenile delinquency proceeding. Without presuming to effect any changes in dispositional alternatives, this article seeks to illuminate the principles of law which authorize governmental intervention in the life of a child and his family to determine under what circumstances a government has license to deprive a child of his liberty. To achieve this, a brief survey will be made of the common law rules of responsibility and the way these rules have been applied in the juvenile courts. Then, through a consideration of the writings of several philosophers, principles will be identified which suggest that the concept of responsibility has a definite role to play in juvenile law.

I. THE PRINCIPLES OF RESPONSIBILITY

A. Responsibility in the Criminal Law

It is a fundamental principle of Anglo-American criminal law that both actus reus and mens rea must be established before an individual may be convicted of a criminal offense. Actus reus refers to the conduct, (taking and carrying off of the property of another),

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7 See cases at notes 48-52 and accompanying text infra.
and sometimes the consequences (death of a human being) pro-
scribed by the criminal law.\(^8\) In general, this doctrine requires
act\(^9\) by the individual which consists of a voluntary bodily move-
ment.\(^10\) This doctrine excludes from the criminal process those
events or results which, although prohibited by the criminal law,
are the product of an involuntary action, such as a convulsion or a
spasm, or which occur under conditions which render the action
involuntary, such as unconsciousness, sleep, or hypnosis.\(^11\)

In addition to the physical element of a crime, actus reus, the law
also requires that mens rea, the mental element of the crime, be
established. It is very difficult to state concisely or precisely what
constitutes the mental element of crimes, partly because require-
ments may vary from one crime to another.\(^12\) However, mens rea
can be simply defined as the intention to do the act which society
has made penal,\(^13\) or the intent to do the act with knowledge of the
circumstances that make the act a criminal offense.\(^14\) Only when
both actus reus and mens rea are present can an individual be held
criminally responsible. At common law this was true for children
as well as for adults.

The law, however, has always dealt with children in a somewhat
different manner than their adult counterparts. The common law
principles of capacity regarding age can be perceived as developing
three major categories.\(^15\) First, children under seven had no crimi-

\(^8\) For a discussion of the historical development of the doctrine of actus reus in which it is
shown that the term itself is of relatively recent origin, see J. HALL, GENERAL PRINCIPLES
OF CRIMINAL LAW 222-28 (2d ed. 1960). The doctrine itself is much older than its terminol-
gy and is a firmly rooted principle of criminal law.

\(^9\) Omissions may also be characterized as acts. Although there are differences between
acts and omissions, they are not central to our discussion here. See W. LAFAVE & A.
SCOTT, HANDBOOK ON CRIMINAL LAW 182 (1972).

\(^10\) Id. at 179.

Model Penal Code have made the following observations: "People whose involuntary
movements threaten harm to others may present a public health or safety problem, calling
for therapy or even for custodial commitment; they do not present a problem of correction."

\(^12\) This point was illustrated by Professors LaFave and Scott: "Crimes may be classified,
according to their mental aspects, into (1) crimes requiring subjective fault, (2) crimes
requiring objective fault, and (3) crimes imposing liability without fault. The principal types
of mental culpability in crimes requiring fault are (1) intention, (2) knowledge, (3) reckless-
ness, and (4) negligence." W. LAFAVE & A. SCOTT, supra note 9, at 191.

\(^13\) See HALL, supra note 8, at 71, citing Stallybrass, in THE MODERN APPROACH TO

\(^14\) Id., citing Devlin, Statutory Offenses, 4 J. SOC. PUB. TEACHERS L. 213 (1958). This
definition excludes strict liability crimes, but these are virtually nonexistent in juvenile
court.

\(^15\) Under Roman law a child was not responsible until he or she had attained the age of
seven. It does not appear that infancy was a defense in the early stages of the common law.
However, children were usually pardoned for their transgressions. By the tenth century, a
statute prohibited the capital punishment of children under fifteen unless surrender was
refused or an escape was attempted. By the fourteenth century it was established that a child
was not criminally responsible until he or she reached the age of seven. In 1338 it was
determined that a child over seven was also presumed to lack capacity to commit a crime.
During this period the age at which the presumption of incapacity ceased to operate was not
nal capacity. Second, children were held to the same standards as adults when they attained the age of fourteen. Third, children between the ages of seven and fourteen were presumed to be without capacity, but this presumption could be rebutted in an individual case. 16

These principles formed the basis of the law of responsibility for children as it developed in the United States, 17 and they were frequently adopted in many of the early commentaries on American criminal law. 18 In addition, the American case law developed special rules of evidence which in some instances were designed to protect children further. In both State v. Aaron 19 and State v. Bostick, 20 the court fashioned special exclusionary rules regarding the use of the extrajudicial confessions of children who were being criminally prosecuted. In many respects, therefore, the law was highly solicitous of children and as the law developed the prosecution needed to show not only that the child had the requisite intent to commit the offense (mens rea), but also that he had the capacity to form that intent.

The defenses available under the common law also illustrate the rules regarding the responsibility of children. 21 Both the defenses of infancy and insanity, which excluded children from legal liability, were permitted for juvenile criminals and were perceived as being intimately related, often by statute. 22

The insanity and infancy defenses shared a common path of development. The various tests used to determine incapacity under the infancy defense usually mirrored those used for insanity. The M'Naghten 23 right-wrong test for insanity was adopted in Ameri-

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16 Id. at 351-52. The authors also point out that the age of responsibility may have earlier been fixed at twelve, at least for capital offenses. Id. at 352 n.7.
17 See State v. Doherty, 2 Tenn. 79 (1806); Walker's Case, 5 City-Hall Recorder 137 (New York City 1820).
18 See, e.g., I. Browne, The Elements of Criminal Law 5 (1892); J. P. Bishop, Commentaries on the Criminal Law chp. 13 (1796); R. Burns, Abridgment of the American Justice 248 (2d ed. 1792).
19 4 N.J.L. 231 (1818).
20 4 Del. (4 Harr.) 563 (1845).
22 This fact was demonstrated by a colonial statute in 1641 which provided: "Children, Idiots, Distracted Persons, and all that are strangers or new comers to our plantation, shall have such allowances as religion and reason require." The Body of Liberties of 1641, No. 52, in The Colonial Laws of Massachusetts of 1660-1672, at 45 (Whitmore ed. 1889), quoted in Fox, supra note 21, at 660.
can law to serve as the test for infancy as well.\textsuperscript{24} Infancy, as a
defense peculiar to children, provides an excellent reference within
which principles of responsibility can be explored. One can more
fully comprehend the principles of responsibility in the law by
examining those who are excluded from liability.\textsuperscript{25} Thus, if a child
was not blameworthy, or could not have been deterred because she
did not know the nature or illegality of her actions, then it was, of
course, quite logical to conclude that she was not a proper subject
for punishment.\textsuperscript{26}

It is important to note, however, that the absence of infancy and
insanity is not coextensive with the concepts of criminal responsi­

\textsuperscript{24} See Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 501-03 (1844). It has been
suggested that the right-wrong test was part of American jurisprudence much earlier. See
Platt & Diamond, The Origins of the "Right and Wrong" Test of Criminal Responsibility
and Its Subsequent Development in the United States: An Historical Survey, 54 CALIF. L.
REV. 1227, 1257 (1966). For some earlier examples in which this nexus can be seen, see
Commonwealth v. French, Thacher's Criminal Cases 163, 165 (Mass. 1827); Clark's Case, 1
City-Hall Recorder 177 (New York City 1816).

\textsuperscript{25} H.L.A. Hart has added much to an understanding of the principles of punishment by
employing precisely this sort of approach. See H.L.A. Hart, Punishment and Responsi­

\textsuperscript{26} See Benbow v. State, 128 Ala. 1, 29 So. 533 (1901); Price v. State, 50 Tex. Crim. 71, 95
S.W. 901 (1906).

\textsuperscript{27} Fpx, supra note 21, at 659. There is no real doubt that Professor Fox understands the
distinction being made in the text. He is dealing with a very narrow issue, in which context
this statement's intent is quite clear. It is important to keep in mind the broader sphere
within which these concepts are operating, however.
infancy are found to possess the necessary mens rea. This point is one that anyone who has studied criminal law even in the most cursory way would grasp immediately. Nevertheless, some writers on juvenile law have apparently confused these two principles.\footnote{See discussion note 63 and accompanying text infra.}

It is important to note that the principles of criminal liability at common law applied equally to both adults and children. In both instances the criminal sanction was imposed only upon proof of the commission of an offense and all the requisite elements, including mens rea, of that offense. The only difference between the child and the adult was that the former was aided by a presumption which had the same force for those children between the ages of seven and fourteen as that which would be occasioned by the prima facie showing of insanity by an adult. If this obstacle to prosecution were overcome, the principles of criminal responsibility for adults and children were identical.

**B. Responsibility in the Juvenile Court**

During the nineteenth century a movement arose to seek alternative means of dealing with children apart from the criminal process. The historical development of this reform movement and the motivations of its members are the subjects of considerable dispute.\footnote{For an example of this debate, compare the historical accounts found in In re Gault, 387 U.S. 1, 14-18 (1967), with that found in A. PLATT, THE CHILD SAVERS 46-74 (1969). See also, Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970).}

Traditional accounts characterized the participants as high-minded individuals possessing only laudable humanitarian ambitions. More recently, commentators have portrayed these "crusaders" as cunning rascals intent only upon protecting and feeding their own selfish interests.\footnote{See Fox, supra note 29, at 1225-28.} Whether their efforts were prompted by noble or base motives, they nevertheless achieved a significant change in legal principles and institutions.

The first major accomplishment of the early reformers is generally recognized as the founding of the New York House of Refuge in 1824. The act which established the House of Refuge granted the Manager of the Society for the Reformation of Juvenile Delinquents\footnote{This society was earlier known as the Society for the Prevention of Pauperism. For an account of the society's previous activities, see Fox, supra note 29, at 1189-92.} the power "to receive and take into the House of Refuge . . . all such children as shall be taken up or committed as vagrants, or convicted of criminal offenses . . . as may . . . be proper ob-
jects. . . .” The act required that commitment to the House of Refuge be made by a court of competent jurisdiction.

The concern of the reformers, however, extended far beyond simply those children who were criminal or incorrigible. The child-savers, as these Victorian reformers came to be called, desired to protect and salvage those children who were the victims of vicious environments, unfortunate heredity, or cruel treatment at the hands of parents, guardians, or employers. These reformers saw the city slums as havens for the penniless and criminal, reflecting the lowest forms of degradation and misery; they saw the juvenile inhabitants of these areas as “moral wrecks” and “intellectual dwarfs.”

The reformers grew impatient while waiting for court adjudication, a prerequisite to their aid of these unfortunates. Their sentiment was that the best possible system of juvenile justice should not separate the adjudicative and treatment functions. The reformers therefore urged the possibility of examining the potential disposition of the child before or during the trial stage. Charles Cooley, a noted scholar of the time, observed that if a child is going to enter upon a criminal career, “let us try to catch him at a tender age, and subject him to rational social discipline, such as is already successful in enough cases to show that it might be greatly extended.” The concept of predelinquency was already manifest in an 1823 report of the Society for the Prevention of Pauperism in the City of New York:

Many of these are young people on whom the charge of crime cannot be fastened, and whose only fault is, that they have no one on earth to take care of them, and that they are incapable of providing for themselves. Hundreds, it is believed, thus circumstanced, eventually have recourse to petty thefts; or, if females, they descend to practice of infamy, in order to save themselves from the pinching assaults of cold and hunger.

It was felt that “traditional forms of punishment and redemption were not appropriate for persons who were not deserving of moral recognition.” Such children were not individuals but merely the products of their environments.

Further, the child-savers were appalled by the operation of the

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33 A. PLATT, supra note 29, at 36-43.
34 Id. at 40-41.
35 C. COOLEY, NATURE V. NURTURE IN MAKING OF SOCIAL CAREERS 405 (1896), quoted in A. PLATT, supra note 29, at 28.
36 SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE (1823), reprinted in Fox, supra note 29, at 1191 n.25.
37 A. PLATT, supra note 29, at 28.
criminal process on children. The fact that children could be given long prison terms, could be confined with hardened adult criminals, or could be placed in penal institutions at all, greatly offended the reformers, who felt that society owed a duty to children which extended beyond a simple concept of justice. They saw society's role as not merely ascertaining whether the child was guilty of an offense but also asked, "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career[?]" 38 They focused their efforts, therefore, on removing from the child-saving institutions any idea of retribution, which they saw as solely cruel and barbaric.

In 1899 the Illinois legislature gave the first official legislative recognition to the juvenile court as a tribunal to serve as a specialized court concerned with children. The enabling legislation articulated the spirit of the reformers. "This act shall be liberally construed to the end that its purpose may be carried out, to wit, the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents. . . ." 39

The Illinois Act served as a model for legislation in other states. 40 As early as 1928 all but two states had adopted a juvenile court system. 41 Such legislation authorized broad governmental intervention in circumstances which had previously been ignored by the judicial system. 42

39 The act provided that the juvenile court was to have jurisdiction over any child who:

- is destitute or homeless or abandoned; or
- dependent upon the public for support, or
- has not proper parental care or guardianship; or
- who habitually begs or receives alms; or
- who is found living in any house of ill fame or with any vicious or disreputable person; or
- whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such a child; and
- any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.

Act of April 21, 1899, Ill. Laws 131. For a discussion of the regressive side of this act, see Fox, Juvenile Justice Reform, supra note 29, at 1221-30.
40 Juvenile courts were established in Wisconsin (1901), New York (1901), Ohio (1902), Maryland (1902), and Colorado (1903).
41 A. Platt, supra note 29, at 139.
42 Broadly defined jurisdiction remained until very recently. In 1959 Frederick Sussmann compiled the following list of acts or conditions included in delinquency definitions or descriptions. They are presented in decreasing order of frequency.

1. Violates any law or ordinance
2. Habitually truant
3. (Knowingly) associates with thieves, vicious or immoral persons
4. Incorrigible
5. Beyond control of parent or guardian
6. Growing up in idleness or crime
7. So deports self as to injure or endanger self or others
8. Absents self from home (without just cause) without consent
9. Immoral or indecent conduct
The theory behind such widespread jurisdiction was that the state would assume the role of a beneficent parent who would act in the best interest of the child. Legislatures found support for this idea in the chancery doctrine of parens patriae and in cases such as Regina v Gyngell,\(^43\) where it was stated:

[T]he jurisdiction . . . arising as it does from the power of the Crown delegated to the Court of Chancery, . . . is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again, the term “welfare” in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do.\(^44\)

In line with this approach, reformers asserted that delinquency proceedings were equitable or civil in nature. Thus, the whole body of criminal jurisprudence was irrelevant to the administration of juvenile justice. Since punishment was not a consequence of delinquency proceedings and only those dispositions which would best

\(^{10}\) (Habitually) uses vile, obscene or vulgar language (in public place)
\(^{11}\) (Knowingly) enters, visits house of ill repute
\(^{12}\) Patronizes, visits policy shop or gaming place
\(^{13}\) (Habitually) wanders about railroad yards or tracks
\(^{14}\) Jumps trains or enters car or engine without authority
\(^{15}\) Patronizes saloon or dram house where intoxicating liquor is sold
\(^{16}\) Wanders streets at night, not on lawful business
\(^{17}\) Patronizes public poolroom or bucketshop
\(^{18}\) Immoral conduct around school (or in public place)
\(^{19}\) Engages in illegal occupation
\(^{20}\) In occupation or situation dangerous or injurious to self or others
\(^{21}\) Smokes cigarettes (or uses tobacco in any form)
\(^{22}\) Frequents place whose existence violates law
\(^{23}\) Is found in place for permitting which adult may be punished
\(^{24}\) Addicted to drugs
\(^{25}\) Disorderly
\(^{26}\) Begging
\(^{27}\) Uses intoxicating liquor
\(^{28}\) Makes indecent proposal
\(^{29}\) Loiters, sleeps in alleys, vagrant
\(^{30}\) Runs away from state or charity institution
\(^{31}\) Found on premises occupied or used for illegal purposes
\(^{32}\) Operates motor vehicle dangerously while under the influence of liquor
\(^{33}\) Attempts to marry without consent, in violation of law
\(^{34}\) Given to sexual irregularities

F. SUSSMANN, LAW OF JUVENILE DELINQUENCY 21 (rev. 2d ed. 1959).
\(^{43}\) 2 Q.B. 233 (1893).
\(^{44}\) Id. at 248. The fact that the jurisdiction of the Chancery Court as parens patriae was exercised almost exclusively in cases where the property rights of minors were in jeopardy was ignored. See THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2 (1967).
aid the child's development were to be permitted, there was no need to follow the rigid definitions of the criminal law, or the procedural safeguards necessary in criminal prosecutions. Such formalities would only hamper or impede the provision of help to the child.

The reformers articulated no real distinction between neglected children and delinquent children. They felt that all children under fourteen "may be classed together . . . for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment." The objective of the philosophy was that the government provide the necessary help and guidance to children who might otherwise embark upon a life of crime. The theory was prediction-oriented because it sought to direct potential offenders toward lives as good citizens. Whether the child had already committed a crime or whether he was simply growing up in poverty or idleness had no real significance other than to serve as a signal that he might one day be the grist of the criminal law mill. The reformers viewed the child's status or conduct, in almost medical terms, as the symptom of an oncoming disease.

This view of governmental obligations and solicitude has served as a justification for the juvenile justice system to the present. Although there have been numerous attacks launched against the system on a variety of grounds, most have been successfully met by the mere incantation of the "best interest of the child" refrain. The juvenile justice system was not significantly rocked until 1967 when the United States Supreme Court decided what has been hailed as a landmark case, In re Gault. That case, which involved entirely procedural issues, held that a child charged with a criminal offense in the juvenile court must be provided with some of the safeguards available in a criminal prosecution. The subsequent Supreme Court cases of In re Winship, McKeiver v. Pennsylvania, and Breed v. Jones further delineated the pro-

45 M. Carpenter, What Should Be Done for the Neglected and Criminal Children of the United States (1885), quoted in Fox, supra note 29, at 1193.
46 It has been suggested that there was a darker side to this philosophy. For a more detailed discussion of the regressive side of this movement, see Fox, supra note 29, at 1193-95.
47 See, e.g., In re Gault, 387 U.S. 1 (1967).
49 The Court held that the child must be afforded 1) Notice of the charges, 2) Right to counsel, 3) Right to confrontation and cross-examination, and 4) Privilege against self-incrimination. The Court refused to declare a constitutionally required right to a transcript of the proceedings, or to appellate review.
51 403 U.S. 528 (1971) (no right to jury trial).
52 421 U.S. 519 (1975) (double jeopardy applicable to juvenile proceedings).
cedural aspects which were to be observed by the juvenile court. The Court attempted to walk a narrow line between what it recognized as the obviously laudatory objective of the juvenile court and what it recognized as the clearly penal character of the dispositions being made by those courts. Since the statute which provided for Gault’s commitment and the whole history of juvenile court commitments in general were perceived as civil in nature, the Supreme Court stopped short of declaring a delinquency proceeding to be a criminal prosecution. The Court made it clear, however, that a "proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." 53

These decisions had the immediate effect of giving certain rights to a child against whom a petition alleging delinquency was lodged. Several states subsequently undertook a revision of their juvenile court statutes in an attempt to establish different categories of children whose conduct was called into question and the procedures for and means of dealing with these children. 54 Previously, in many states the category of delinquent included behavior by children which was deemed offensive or dangerous but which was not criminal. 55 When the revisions of these codes were undertaken, many states reserved the category of "delinquent" for those instances in which the conduct was such that it amounted to a criminal offense. 56 Legislators felt that the Gault decision would cover only these cases. Other categories were established to cover the non-criminal conduct of children which would remain the object of scrutiny by the juvenile court. 57

Even though most states now require the child to commit an act which would amount to a crime if she were an adult before the child may be found delinquent, they have attached very little significance to the general principles of criminal liability in substantive law terms when a determination of delinquency is being made. It is not entirely clear in juvenile law today whether the government must establish that the child possessed the requisite mens rea to

53 387 U.S. 1, 36.
54 See, e.g., OHIO REV. CODE § 2151.01 (Page 1973) which went into effect in 1969.
55 See note 48 supra.
56 Typical is the Uniform Juvenile Court Act which provides that a "'delinquent act' means an act designated a crime under the law, including local [ordinances] or resolutions of this state, or of another state if the act occurred in that state, or under federal law . . . ." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT § 2(2) (1968).
57 The Uniform Juvenile Court Act uses the category "'unruly.'" The Comment to the section states: "'The 'unruly child' category is needed to limit the disposition that can be made of a child who is in need of treatment or rehabilitation, but who has committed no offense applicable to adults . . . ." Id. at § 2(4).
commit the offense, or simply whether she performed an act which was proscribed by the criminal law regardless of her intent. Part of the uncertainty stems from the language legislators employed when defining delinquency.

The New York Family Court Act, for example, defines a juvenile delinquent as "a person over 7 and less than 16 years of age who does any act which, if done by an adult would constitute a crime." By its choice of words, did the New York legislature intend to focus exclusively on the actus reus element of an offense? The legislature may only have been attempting to set a finding of delinquency apart from a criminal conviction and chose those words to impart that significance. A strict statutory interpretation, however, could conclude that mens rea is irrelevant to a finding of delinquency.

It is not necessary to strain at statutory construction, however, for cases have arisen which indicate the juvenile court has departed from the traditional principles of responsibility. In *In re DiMaggio*, a thirteen-year-old boy was found delinquent after he had discharged a revolver and injured another child. The juvenile court specifically found that DiMaggio did not willfully discharge the gun, that he did not intend to inflict any injury, and that what had occurred was purely accidental. The court nevertheless found the child to be delinquent. The court did begin to perceive the implications of such a holding and avoided confronting the mens rea and actus reus problems by finding that the child had violated a law requiring all persons in possession of certain firearms to have a permit. The boys father, who owned the gun, had a valid permit, but since the child did not have a permit when he "possessed" the gun, he had committed an offense under the law.

It is unclear from the opinion whether the court considered the offense to be one of strict liability for which no intent was necessary. The court did, however, discuss the question of whether the child was presumed to know the firearms law, and concluded that although it was a fiction, the child was nevertheless bound by that presumption. By employing this device the court demonstrated its appreciation of the problems involved but chose to skirt them.

In another case, the attitude of the juvenile court concerning responsibility became evident when held up to scrutiny by an appellate court. In *In re Glassberg*, a juvenile court had also

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58 NEW YORK FAMILY COURT ACT § 712(a) (McKinney 1970) (emphasis added).
60 *Id.* at 614.
61 *Id.* at 615.
found a child delinquent on the basis of an accidental shooting. In this case, however, the Supreme Court of Louisiana reversed the judgment and held that intent was a necessary element to establish the offense of delinquency. While this case ostensibly holds that mens rea and actus reus are required in a delinquency action, the decision of the juvenile court provides some evidence which shows the tendency to ignore these requirements in order to provide treatment to a child seen to be in need.

DiMaggio and Glassberg are the only reported decisions which have been found which determine whether mens rea, or the volitional aspect of actus reus is required in juvenile court. Further, no reported decisions have been found, other than cases dealing with infancy or insanity, in which a defense of the criminal law was presented which would make the child’s act excusable or justifiable.

Although many defenses in the criminal law serve to negate the mental element of an offense, it is by no means certain which defenses a juvenile court will recognize. A juvenile court, for example, might be quite willing to accept the defense of ignorance or mistake of fact which would, in some circumstances, eliminate a culpable intent. If a child honestly thought that he was entering his grandmother’s house, for instance, when in fact the child was entering the home of another, it would seem unlikely that any juvenile court would find him delinquent based on an unlawful entry. However no reported decisions have been found showing whether this defense would be available, or whether if the child needed some treatment, even if it were independent of this act, the act would still serve as a basis for a finding of delinquency. No reported decisions address the use of other defenses under the criminal law by juvenile courts, regardless of whether the defense arose from the mental element of the offense, or from a social policy, such as that involved in the case of duress.

One unpublished opinion candidly discussed the role of mens rea in juvenile proceedings. In In re Betty Jean Williams, the court held that because the purpose of the juvenile court was to provide treatment, the principle of mens rea was inappropriate. The court reasoned that mens rea was an adjunct of punishment and consequently was unnecessary when punishment was not involved. Although In re Betty Jean Williams predated the Gault decision by

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63 See note 67 and accompanying text infra.


65 The Court stated:
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
almost a decade, there has been no apparent change in attitude since *Gault*. This can be seen in the manner in which courts have dealt with the defenses of infancy and insanity.

Until 1970 when *In re Gladys R.*[^66] was decided, there was unanimous rejection of the infancy defense by every court that faced the issue.[^67] The Supreme Court of California, however, concluded that infancy was a defense to a delinquency proceeding.[^68] This decision, however, turned entirely upon a peculiar California statute,[^69] and does not appear to have gained acceptance elsewhere.

A similar pattern emerges when the insanity defense is considered. Although several cases have raised the issue, it is far from clear how extensively this defense is recognized.[^70] In *In re H. C.*,[^71] the court held that insanity was not a bar to a finding of delinquency. In support of this conclusion, the court pointed out, “The inquiry is and must be, ‘Was the act committed?’ To hold insanity applicable as a defense to adjudicate would handcuff the court, run contrary to the basic theory of juvenile proceedings, and not be in the best interests of the juvenile himself.”[^72]

Other cases have recognized insanity as a defense, but this position has not gained any appreciable acceptance because the resolution of the cases tended to turn either upon special statutes in that jurisdiction or upon special circumstances.[^73]

[^69]: The court found applicable to delinquency proceedings a statute which provided that all persons are capable of committing crimes except those belonging to the following classes: “[C]hildren under the age of fourteen in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.” CAL. PENAL CODE § 26 (West 1955). This holding rested upon a questionable interpretation of legislative intent. See Fox, supra note 67, at 668-72.
[^70]: See Donovan, *The Juvenile Court and the Mentally Disordered Juvenile*, 45 N.D.L. REV. 222 (1939). Donovan points to ten instances in which the insanity defense was raised but does not reveal the rate of success. *Id.* at 233 n.33.
[^72]: *Id.* at 595, 256 A.2d at 328.
[^73]: See, e.g., *In re Winburn*, 32 Wis.2d 152, 145 N.W.2d 178 (1966), where the court found that juvenile court procedures authorized incarcerating juveniles for purposes other than treatment.
The problem of determining the applicability of the mens rea doctrine and, consequently, the availability of several defenses in the juvenile court is complicated by the intake procedure employed by the juvenile court which allows for early diversion of the children from the system, thus, frequently precluding confrontation of these issues. Undoubtedly, the major difficulty in assessing the applicability of mens rea is caused by the general lack of official reporting of juvenile cases. As a result, it is unclear what the state of the law is in most jurisdictions, and perhaps even less clear what the state of the law should be.

II. RESPONSIBILITY IN CLASSICAL PHILOSOPHIES

Whether the principles of criminal responsibility which are embodied in the term mens rea should apply to the juvenile court is a question which does not lend itself to a simple solution. Indeed, the use of the concept of responsibility as a valid element in adult criminal law has been the subject of considerable debate. Lady Barbara Wooton is one of the leading proponents of the position which seeks to eliminate mens rea as a necessary element for societal intervention in adult cases. She has made arguments to abolish the principle of mens rea which in many respects sound much like those employed to justify the operations of the juvenile court. Indeed, she has proposed the model which might be seen as a prototype for the juvenile court.

Lady Wooton has insisted that the whole philosophy of criminal responsibility is a mistake. She suggests that the criminal law would be much more effective and more sensible if the court considered the state or condition of a criminal defendant's mind only at a dispositional state of the proceedings. That is, if it could be shown that the defendant did indeed kill another person, the state should be authorized to deal with that individual. In attempting to deal with the person, the state's primary purpose would be to

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74 See S. Fox, JUVENILE COURTS IN A NUTSHELL 151 (1971).
75 See notes 64-65 and accompanying text supra.
76 This is amply demonstrated in the debate which took place between then Judge Burger and Judge Bazelon in Kent v. United States, 130 U.S. App.D.C. 343, 401 F.2d 408 (1968). In that case the question arose whether a mentally disturbed child should be civilly committed or proceeded against in the juvenile court. The majority, per Bazelon, concluded that civil commitment was the appropriate vehicle, not a delinquency action.
determine whether it is likely that such an event will occur again. If it is, the state must devise some means of preventing such future behavior. Presumably, Lady Wooton would also permit the state to treat an individual for any other problems he might have which could result in future antisocial behavior, even if the problems were not the cause of this particular event.

Lady Wooton's contention is that mens rea enters the criminal process at the wrong place. She maintains that it is a useless practice to attempt to determine the state of the defendant's mind at the time of the offense. The actor's state of mind at the time of the offense is only relevant to the extent that it bears upon the likelihood of future inappropriate conduct.

The challenges to the principles of criminal responsibility illustrate that the bases of these principles must be understood to determine the proper ambit of the concept of responsibility and to ascertain whether it should be operative in the juvenile court in a delinquency proceeding. Any theory of criminal responsibility must, of necessity, be derived from an analysis of the aims or purposes of the criminal law itself. Since the criminal law has generally employed sanctions or punishments to deal with transgressors, the initial question therefore is why we punish. It is only after this has been decided that we can determine whom society may legitimately punish. At the heart of the question of who may be punished is the concept of responsibility. Several writers have addressed these questions and it will be helpful, therefore, to examine and consider the implications of their diverse philosophical theories.

The first group is discussed under the heading of a "better person" theory. The second includes both the classical and modern utilitarian philosophy. Both of these groups find a justification for punishment in the ends which are served by it. In this sense the philosophies are teleological, (oriented toward ends or purposes). The third group differs significantly from the first two and is considered under the heading of retribution. The discussion is not intended as a full exposition of these schools of thought, but rather

80 Lady Wooton has written:

If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident. The question of motivation is in the first instance irrelevant.

But only in the first instance. At a later stage, that is to say, after what is now known as a conviction, the presence or absence of guilty intention is all-important for its effect on the appropriate measures to be taken to prevent a recurrence of the forbidden act. The prevention of accidental deaths presents different problems from those involved in the prevention of wilful murders.

Id. at 52-53.
as a method to simply isolate certain principles against which the concept of responsibility can be examined.

A. Better Person Theory

The frame of reference for the first group of teleological philosophers is that of the individual himself. Plato saw crime as being closely analogous to sickness and believed that an individual could be cured only through punishment.\(^{81}\) Ideas similar to this can be found in the writings of Aristotle\(^{82}\) and Hegel.\(^{83}\) The central theme is that punishment operates to make an individual a better person. The objective is not to coerce the wrongdoer into simply avoiding certain kinds of behavior, but to drive home to him the moral implications of the conduct, thereby making the person more moral.

As noble as such an ambition might be in the sphere of private ethics, there is room for some substantial reservations about allowing such a philosophy to serve as a societal justification for the practice of punishment.\(^{84}\) The real issue is whether the purpose of the criminal law, and perhaps even law in general, is to make people morally upright or merely to stop them from engaging in certain kinds of activity. The "better person" theorists seem to subscribe to the former objective, while as a society, we seem more inclined to the latter. Although society hopes that an individual will recognize the moral implications of his actions, it appears that the major concern is with outwardly directed behavior.

B. Utilitarian Theories

In contrast to those who saw punishment as serving a useful purpose for the individual, a second group of writers justify punishment on the basis of the good it achieves for society at large. Within this school of thought, known as utilitarianism, there are several different sub-groups which seek to justify punishment with an eye toward the same general objective but which proceed from differing basic assumptions. For example, one may proceed on the


\(^{82}\) Aristotle, Nichomachean Ethics, bk. III, ch. 5.


\(^{84}\) Of course there may be some doubt that either Plato or Aristotle offered it as a societal justification. It is helpful, however, if a perspective on the problem can be maintained. That is, even if one does not subscribe fully to their system of private ethics, there are points relevant to our discussion which are nevertheless applicable.
basis of a view of man which is highly rationalistic. A second may adopt a totally deterministic perspective. And yet a third might argue that both rationality and determinism play important parts. Despite these differences, all find a justification for punishment in the useful purposes it serves for society. For this reason they are discussed together.

The classical utilitarian theory finds its most forceful expression in the writings of Jeremy Bentham. His theory of punishment may be seen as a narrower aspect of a much larger general theory of ethics. In terms of governmental operation, Bentham and other classical utilitarians seek to promote the greatest good for the greatest number, or conversely to reduce the greatest amount of suffering for the greatest number. The criminal law, and hence punishment, are devices which may be employed to accomplish this end.

The classical utilitarian theory of punishment relies upon a view of humanity in which reason will always dictate the course of action. In contrast, more recent writers, such as B. F. Skinner and Karl Menninger, have argued that behavior often results from previous conditioning, disease, or other external causes quite independent of the faculty of reason. It is much more enlightening to examine the specific means through which utilitarians achieve their objectives, rather than simply to discuss the philosophies in a vacuum.

1. Incapacitation — The simplest and most obvious means of preventing the commission of an offense is through the use of physical restraint. So long as a person is confined, there will be little likelihood of his committing any crimes against society at large. There may, therefore, be instances in which an individual is so likely to commit serious offenses that the only means of dealing

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85 As stated by Bentham:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.


86 See, e.g., G. E. MOORE, ETHICS 1 (1912).

87 In Bentham's words:

The business of government is to promote the happiness of the society by punishing and rewarding. That part of its business which consists in punishing is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment.

BENTHAM, supra note 85.


with him is by permanent incarceration. In the case of a psychopathic killer, for example, the only effective means of preventing future deaths may be indefinite confinement.  

Undoubtedly, other factors beyond merely restraining an individual are involved in considering the purposes of the criminal law. It is important to note at this point, however, that even in a system of juvenile justice, it may be necessary to resort to this idea on occasion. This fact was recognized by the President's Commission on Law Enforcement and Administration of Justice.  

It is important to consider how compatible such a theory is with a philosophy which seeks only to serve the best interest of a child.

2. Deterrence—The idea of deterrence is central to the purpose of preventing criminal actions in a utilitarian philosophy. Classical utilitarians argue that either the threat or the actual imposition of punishment will inhibit most of the members of society from engaging in criminal activity. Two different types of deterrence can be achieved by the threat or imposition of punishment and are generally referred to as special and general deterrence.

a. Special Deterrence—In the classical theory utilitarians relied upon a hedonistic pleasure-pain model in which an individual would calculate the "cost" of the crime. If the individual were forced by the government to realize that the pain or "cost" of the crime, namely the punishment, was not worth the pleasure or benefit of the crime, then presumably she would cease engaging in that conduct.

A number of criticisms have been raised regarding the practice of special deterrence. The first line of criticism derives from the empirical studies which have been done on recidivism rates among offenders, and which indicate that the theories do not hold up in practice. Studies which have attempted to evaluate the perform-
ance of juvenile institutions have also cast doubt upon their effectiveness. However, there is a variety of reasons which may account for high recidivism rates other than simply the failure of special deterrence.

Further, in most instances special deterrence is not the only justification for the practice of punishment. Even in the classical utilitarian philosophy several other reasons justify the imposition of punishment. If special deterrence offers some additional sub-benefit to these other theories, that can only be a factor in its favor. Moreover, if the goal of rehabilitation or treatment is part of or an ally of the theory of special deterrence, the fault may be with the present inability to provide effective treatment rather than with the theory which indicates that it ought to be provided. We must inquire whether our inability to provide treatment discredits any justification predicated upon it. Such a consideration is of paramount concern to a justification of juvenile court practice, where the sole objective, theoretically, is to do what is in the best interest of the child. If treatment cannot be supplied, it follows that any intervention by the juvenile court which is premised exclusively on treatment is unjustifiable.

A second objection to the idea of special deterrence is the extent to which a utilitarian might go in order to accomplish it. In a classical Benthamite model, punishment is viewed as an evil, and only that amount of punishment which will make the pain slightly greater than the pleasure of the offense is justified.

If a relatively trivial offense could be deterred only by a rather harsh punishment, and if no greater damage would be done to sentences have a high rate of reconviction, perhaps as much as fifty percent. Superficially, this well-documented fact does appear to raise substantial questions about the efficacy of special deterrence.

Id. Most of the studies have concluded that the actual effects of punitive measures do not live up to the theory of special deterrence. When the focus is shifted to treatment type programs, it may be that the practice does not live up to the theory. See, G. Hughes, Social Justice 215 (1968); W. Eldridge, Narcotics and the Law 154 (2d ed. 1967). See Lerman, Evaluative Studies of Institutions for Delinquents, reprinted in Delinquency and Social Policy, at 236-49 (P. Lerman ed. 1970).

Professor Packer has identified several factors which should be considered. They include the character of the individuals, the types of offenses, and the severity of the punishment. H. Packer, supra note 90, at 46.

The punishment should be only that which is absolutely necessary. Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A Proposition which may be made more general, thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded: that is, upon the necessity of defending the public liberty, entrusted to his care. from the usurpation of individuals; and punishments are just in proportion, as the liberty preserved by the sovereign, is sacred and valuable.

society by punishing the offender rather than not punishing him, would it be justifiable? Although Bentham provides certain standards regarding the degree of punishment which may be imposed, it is not at all certain that they resolve this question.100

Indeed, it seems that a true utilitarian position requires approval of a harsh punishment if it is the only means of eliminating the conduct which society has determined must be eliminated. This problem is updated and complicated further by the proposal regarding penal reform made by Dr. Karl Menninger to the American Bar Association. After outlining a variety of proposals, Dr. Menninger stated:

[A psychiatric perspective] entails certain radical changes in penal practice including (a) substitution of the idea of treatment, painful or otherwise, for the idea of retributive punishment, (b) the release of prisoners upon discharge or parole only after complete and competent psychiatric examination with findings favorable for successful rehabilitation, to which end the desirability of resident psychiatrists in all penal institutions is obvious, (c) the permanent legal detention of the incurably inadequate, incompetent and anti-social, irrespective of the particular offense committed, (d) the use of this “permanently custodial group” for the advantage of the State — to earn their keep.101

With the exception of the permanent custodial aspect of this statement, it seems that Menninger’s proposal could be substituted for the working plan of most juvenile courts today. The question which is merely raised at this point is whether “treatment, painful or otherwise,” is justified “irrespective of the particular offense.” Would, for example, the making of an obscene phone call justify “treatment” for a possible six-year period?102

b. General Deterrence— The utilitarian idea of general deterrence is predicated upon the value of a threat as a means of social control. Criminal legislation is seen as an announcement to society that certain actions are not allowed. Through this announcement and through the accompanying threat which sets forth the consequences which will befall an individual who engages in this conduct, society attempts to insure that fewer of these acts will take

102 See In re Gault, 387 U.S. 1 (1967). This discussion leads to the question of proportionality between crime and punishment. Although this is intimately related to a sense of justice, it is somewhat beyond the scope of this article. It does, nevertheless, raise interesting problems which should be explored.
place. 103 To a large extent the effectiveness of such an endeavor depends upon the members of the community performing an arithmetic evaluation of pain versus pleasure; if the cost outweighs the benefit to be derived from crime, then, presumably, individuals will not pursue criminal behavior. 104

Critics argue, however, that such theories, which rely upon rational calculation, are based on a shallow psychological model, 105 and that in reality members of society are driven largely by unconscious motives, acting without reflection upon the rational principles of the pleasure-pain formula. Although there is a great deal of validity to the claim that the classical utilitarian model does not give a complete picture of human nature, perhaps the psychological critics of that model have not given a complete picture either. 106 It is quite possible that both rational and unconscious motives exist in most human conduct.

The question which naturally arises in the context of general deterrence is to what extent would there be violation of the law if the threats of criminal sanctions were removed. In the majority of cases people might refrain from the commission of crimes on moral grounds quite independent of any threats of penalty. However, the criminal law itself may provide a valuable stimulus to the socialization process through which patterns of behavior are formed. Through these processes the law may illuminate moral considerations and subconsciously and consciously reinforce decisions regarding moral conduct in the same way that other institutions of society, such as the family, the school, the church, and the com-

104 Much has been written regarding the certainty of apprehension as a factor which can determine whether an individual engages in criminal conduct. Obviously, this is another factor which may be necessary to insert in the pleasure-pain formula. It does not, of course, deny the validity of the theory itself. See, e.g., H. Packer, supra note 90, at 40-41; Michael & Wechsler, supra note 21, at 1264-70.
106 Professor Packer has illustrated the problems involved in the following way:

The psychological critics reject the reality of [the Benthamite model]. In doing so, they substitute for it a model of man as governed by largely unconscious drives .... The psychological model, if I may call it that, represents the criminal as murderer — and not as murderer for profit but as perpetrator of the crime of passion. He is the man who kills on impulse because he hates his father, he is sexually inadequate, he lacks control, and so forth .... The Benthamite model may well be a more nearly accurate representation of the acquisitive criminal; the burglar, the embezzler, the con man. Perhaps the purest modern instance is the man who cheats on his income tax.

H. Packer, supra note 90, at 41. To expand upon Professor Packer's point, it must also be quite obvious that once one chooses the model of an individual who has broken the law, the majority of society has been excluded from consideration. The validity or effectiveness of the theory of general deterrence is, therefore, not necessarily discredited by pointing to those for whom it has not accomplished its purpose since it may have operated effectively in the majority of cases.
Further, although there have been few instances from which empirical conclusions can be drawn regarding this question, those few occasions in which threats of criminal sanctions have been removed seem to indicate that moral convictions alone do not suffice to keep the crime rate down. One example occurred in 1919 when the Liverpool police force went on strike. The following official report was made:

The strike was accompanied by threats, violence and intimidation on the part of lawless persons. Many assaults on the constables who remained on duty were committed. Owing to the sudden nature of the strike the authorities were afforded no opportunity to make adequate provision to cope with the situation. Looting of shops commenced about 10 p.m. on August 1st, and continued for some days. In all about 400 shops were looted. Military were requisitioned, special constables sworn in, and police brought in from other centers.

Although many authorities support the theories of general deterrence, there has been great reluctance on the part of the juvenile court even to acknowledge an acquaintanceship with it. There would perhaps be grounds for a charge of philosophical inconsistency if a system which asserted as its sole concern the best interest of a child were found to be engaged in an attempt at intimidating others by punishing a child when her "best interests" would not counsel it. It should be recognized, however, that even if the focus remained solely on the child, the manner in which a child, or many children, are treated by the court filters back to the community and generates general deterrence as a byproduct.

Few would seriously suggest that a child ought to be punished simply to deter others from engaging in a particular sort of behavior. This thought, however, raises a fundamental question in

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108 H. Mannheim, Social Aspects of Crime in England Between the Wars 156-57 (1940). Denmark experienced a similar situation in 1944 when German forces arrested the entire police force. During the remainder of the occupation period all policing was performed by an improvised unarmed watch corps, who were ineffective except in those instances when they were able to capture the criminal red handed. The general crime rate rose immediately, but there was a great discrepancy between the various types of crime. Unfortunately, none of the reports tells us whether the rise in criminality was due to increased activity among established criminals or whether non-criminals participated as well.
110 See Fox, Philosophy and the Principles of Punishment in the Juvenile Court, 8 Fam. L. Q. 373, 383-84 (1974).
111 Conversely if no deterrence is perceived it will be reflected in the community. See Morgan, They think "I can kill because I'm 14," N.Y. Times, Jan. 19, 1975, Magazine, at 9.
terms of the utilitarian philosophy, namely who may be punished? The standard utilitarian answer to the question is: only an offender who has broken the law.\textsuperscript{111} While such an answer sounds very much like the retributionist response,\textsuperscript{112} it could also be justified on totally utilitarian grounds.\textsuperscript{113}

Nevertheless, a number of writers have expressed suspicion of the utilitarian limitations on the question of who may be punished as well as on the question of the extent to which an individual may be punished.\textsuperscript{114} The major criticism is that a utilitarian philosophy would seem to justify the punishment of an innocent person, if other crimes could be averted by such punishment. In this respect, therefore, utilitarianism may not be capable of fully answering the question of who may be punished in terms that are entirely acceptable. There can be little doubt that for a government to embark upon a practice of punishing innocent people, or even to do it in only one instance, smacks of injustice. It may be that an explanation of the moral notions inherent in this sense of injustice must be sought outside the utilitarian framework.

\section*{C. Retributivist Theory}

The classical theory of retribution states that punishment possesses intrinsic worth in and of itself. In this system the punishment of an individual is not justified on the basis of some ulterior purpose, such as deterrence or reformation, but rather on the theory that punishment of the deserving is alone a good which goes far beyond society or the individual offender.\textsuperscript{115} Most retributivist

\begin{itemize}
\item \textsuperscript{111} This is directly connected with the theory which would justify society’s determination of what conduct should be proscribed. See J. S. Mill, \textit{On Liberty} 13 (1857).
\item \textsuperscript{112} See note 116 and accompanying text infra.
\item \textsuperscript{113} It could be argued that if the individual has not violated the law then no special deterrent end would be served. Further, it might be contended that punishing innocent persons would be destructive of social good unless the fact of their innocence was kept totally secret. Finally, a utilitarian might suggest that by punishing only those persons who have violated the law precious social interests, such as predictability of the consequences of one’s actions and general social stability, are promoted. For a discussion of some of the social values involved, see L. Fuller, \textit{The Morality of Law}, 33-91 (1964). Although Fuller is discussing something quite different from the concept of responsibility, his arguments set forth many excellent positions for the utilitarians.
\item \textsuperscript{115} This idea has been stated as follows: Punishment is the denial of wrong by the assertion of right, and the wrong exists in the self, or will, of the criminal; his self is a wrongful self, and is realized in his person and possessions: he has asserted in them his wrongful will, the incarnate denial of right; and in denying that assertion, and annihilating, whether wholly or partially, that incarnation by fine, or imprisonment, or even by death, we annihilate the wrong and manifest the right; and since this, as we saw, was an end in itself, so punishment is also an end in itself.
\end{itemize}

theories find their support in the writings of Immanuel Kant. Kant maintained that the only proper justification for punishing a person is that a crime has been committed.\textsuperscript{116} Crime in this sense means the unlawful act of a free and responsible agent. Second, the only manner and degree of punishment is that which is equal to the crime.\textsuperscript{117} These propositions must be understood together; through them Kant set out the conditions precedent of punishment, and the degree of punishment that is justifiable. Kant would permit the use of punishment as a means of reformation of an individual after these specified conditions have been met, but such a purpose would not ab initio justify punishment.\textsuperscript{118} It is important that punishment be perceived not as the product of some questionable purpose which results from a choice on the part of society, but rather as a result of the criminal's own choice.\textsuperscript{119} A person must, therefore, never be treated merely as a means to some other end; the person must be the end.

Retributivists see the criminal as acting in accordance with a wrong maxim, which if universalized would destroy freedom.\textsuperscript{120} By punishing, a society is pointing out the wrongfulness of the maxim. At all times, however, the focus is on the individual's freedom.

A pure retributive system would involve the adopting of the maxim acted upon by the criminal and the turning of it on him. Since he has claimed that the maxim can be universalized, he warrants treatment in accordance with the maxim. Thus, if he has taken the property of others, then his property should be taken, and so forth. What we do to the criminal is simply to accept him on his own terms.\textsuperscript{121} To embark upon a program of inflicting useless suffering because it is "deserved," however, would not seem to be the most noble endeavor a civilized nation could engage in. It should be apparent that avoiding this end was one of the major concerns of the early reformers and the later proponents of the juvenile justice system. Perhaps with their predominant concern over the retributivist mandates of who must be punished, the reformers sacrificed some important precepts as to who may be punished when they discarded the retributionist theory.

\textsuperscript{116} I. KANT, THE PHILOSOPHY OF LAW, Pt. II, 195-98 (Wiltastive trans. 1887).
\textsuperscript{117} Id.
\textsuperscript{118} See E. PINCOFFS supra note 100, at 15.
\textsuperscript{119} Id. at 8.
\textsuperscript{120} Id. at 9.
\textsuperscript{121} Id.
III. A PERSPECTIVE ON JUVENILE RESPONSIBILITY

A. The Role of Responsibility in the Juvenile Court

A remarkable feature of the entire system of juvenile justice is that, unlike the criminal law, the juvenile system goes about its business with an avowed single-mindedness. A single principle has charted the direction of the juvenile court; almost all disputes which have arisen in this area have been resolved by resort to the philosophy of doing what is in the best interests of the child. Indeed, we might question whether this "philosophy" is even a philosophy in traditional jurisprudential terms. It might be more accurate to say that it is no more than "a statement of benign motives of judges or corrections administrators, or . . . a declaration of legislative intent behind the enactment of juvenile legislation."122

It should be evident that the objectives of the juvenile court, when viewed in terms of the classical philosophies, arise from teleological considerations. The concern for doing that which is in the best interest of the child can be analyzed as deriving from certain aspects of the theories of both the utilitarian and "better person" philosophies. Although juvenile courts have clearly departed from classical utilitarianism, as illustrated by their reluctance to acknowledge general deterrence as a justification for the disposition of a child,123 the concern with education, treatment, and rehabilitation, however, can be seen as updated versions of both the "better man" and utilitarian ideas.124 Neither substantial documentation nor extensive analysis is required to demonstrate that the juvenile court in theory attempts through its dispositions to promote the greatest "happiness" for both the child and society.

The retributivist notion of punishment as a just dessert is completely lacking from the general aims of juvenile justice. Indeed, the entire child-saving movement can be characterized as a rejection of a jurisprudence of guilt and blameworthiness and an adoption of one of reformation.125 While guilt and blameworthiness may

122 Fox, Philosophy and the Principles of Punishment in the Juvenile Court, 8 Fam. L. Q. 373, 379 (1974).
123 See note 103 and accompanying text supra.
124 The teleological origins are even more apparent when one moves from a consideration of delinquency to an examination of the categories of "unruly" or "persons in need of supervision." In these instances, conduct such as truancy, use of alcohol or tobacco, etc. serves to illustrate the types of concern involved.
125 See Fox, supra note 122, at 377. The whole movement toward juvenile reform may also be seen in the trends in the general sphere of corrections. See D. Rothman, The Discovery of the Asylum 130-54 (1971).
still be important concepts in any plan for rehabilitation or treatment, it is clear that in the context of juvenile justice they derive from a teleological origin.\(^\text{126}\) The Kantian mandate that transgressors must be punished has no support in the philosophy of juvenile justice.\(^\text{127}\)

The abandonment of retributivist theories has had a direct correlation with the diminishing significance attached to the criminal law concept of responsibility in juvenile law. As juvenile courts substituted the idea of treatment for punishment, they showed a progressive concern for obtaining jurisdiction over any child for whom they felt treatment would be beneficial. While the conduct of the child that would trigger societal intervention continued to be defined in terms of the acts proscribed by the criminal law, less and less attention was paid to the mental elements of those crimes.

One of the easiest areas into which the courts could extend and justify their jurisdiction on the basis of treatment was the insanity defense. If a child was sick and not responsible for her actions, there was all the more reason for the court to intercede, since the whole purpose for the existence of a separate juvenile justice system was to provide assistance to children in need.\(^\text{128}\) This was an understandable development, particularly in light of the apparent disenchantment in some quarters with the insanity defense in the adult criminal law.\(^\text{129}\) If the defense of insanity were the only aspect of the concept of responsibility to be discarded as a result of the treatment philosophy, the departure from common law principles would not be too great. The juvenile court’s preoccupation with treatment objectives, however, has had a similar effect in other areas.

While reported cases are scarce, Frederick Wiseman provided evidence of the extent of the impact of the treatment philosophy upon another traditional common law defense, in a 1971 cinéma verité documentary entitled Juvenile Court. The film followed the actual operation of a juvenile court in Memphis, Tennessee through a series of cases that came before it. In one case a child was adjudged delinquent in spite of the judge’s concession that

\(^{126}\) Whether such concepts as guilt and blameworthiness are really helpful aids to rehabilitation is more a psychiatric or psychological question than one of jurisprudence.

\(^{127}\) But see, They Think, “I can kill because I’m 14,” supra note 110. Revenge is also something that may have to be taken into account. See H.M. Hart, The Aims of the Criminal Law, 23 L. & CONTEMP. PROB. 401 (1958). It should be noted that there has been a good deal of disenchantment with this particular retributive idea throughout the entire system of criminal law. See, e.g., J. Mitford, Kind and Usual Punishment (1971).


self-defense was probably established.\textsuperscript{130} While recognizing that self-defense was involved, the judge concluded that other factors indicated that the youth needed help.\textsuperscript{131} As a result, a child, whose actions would probably have been justifiable in terms of the criminal law, was committed to the youth authorities of Tennessee as a delinquent.

A similar line of reasoning to support a child's commitment for treatment could easily be constructed to justify the abolition of other defenses, such as ignorance or mistake. In terms of the juvenile court philosophy, the court might envision that a child needs treatment to make him aware of his misapprehension of certain facts, even though such misapprehension would ordinarily exculpate the child from criminal liability. Indeed, in one such case mens rea, or the intent to commit the act itself, was considered irrelevant.\textsuperscript{132}

Thus, while juvenile justice has adopted an objective which derives from utilitarian considerations, in some instances there has been a marked departure from the traditional utilitarian limitations embodied in the concept of responsibility which are placed upon this objective. Both classical and modern utilitarians have seen mens rea as a device through which other values that are vitally important to society are respected. These include, among other things, the predictability of the consequences of one's actions, social stability, and, perhaps most importantly, principles of freedom and liberty. Within the utilitarian framework, a primary endeavor is to prevent the occurrence of criminal acts. It has been recognized that this objective can succeed only in cases in which the individual understands what he is doing and can feel the significance of the sanction imposed upon violators.\textsuperscript{133} It is unlikely, therefore, that society could deter an individual who either did not intend to do the act or who did not appreciate the wrongfulness of the act. In addition, it does little good for individuals in positions similar to that of the actor to see the actor punished for something he did not intend to do. Official intervention under these circumstances could lead to a perception of the entire system as dependent on the capriciousness of fate. If it is impossible for a person to avoid the sanction, the integrity of the legal system

\begin{itemize}
\item \textsuperscript{130} The facts of the case were not clearly presented in the film, but apparently the child had used the family gun to defend himself against an aggressor who entered his family's home.
\item \textsuperscript{131} These other factors were not specified in the film, although the judge did display some displeasure with the fact that the parents had left the gun in a place accessible to the youth.
\item \textsuperscript{132} See notes 64-65 and accompanying text supra.
\item \textsuperscript{134} See A. Goldstein, The Insanity Defense 12-15 (1967).
\end{itemize}
suffers and may lead inevitably to a total denial of individual freedom.

In utilitarian terms, therefore, the doctrine of mens rea can be seen as the vehicle through which other values are respected. However, in a utilitarian philosophy freedom may simply be one value to be considered along with many others. Thus, freedom could become a relativistic idea that could be compromised when balanced against other values. For example, compromise has occurred in the criminal law where liability is strict or absolute. Here the relatively slight penalty, even for an unintentional violation such as a minor traffic offense, is offset by the danger from the conduct and injury that could result to society. It must be recognized that a valuable ideal has been sacrificed to the public good. 134 While strict liability offenses may not present any great danger to the general ideal of freedom, it is at this point that one also encounters the dilemma of punishing the innocent to achieve some other good, such as general deterrence. 135

By contrast, the retributivist places the same limitations upon governmental activity but in a way that is independent of social purposes. The only condition upon which a theory of retribution would permit coercive societal intervention is that the individual had been convicted of a crime that was the product of his will. 136 In a retributivist view, regardless of the beneficial consequences which could be achieved, only after a conviction is society justified in interfering with an individual’s liberty or property. To do otherwise is to deny the values of freedom and humanity 137 and to treat an individual merely as a means and not as an end. 138

When the early juvenile justice theorists rejected the retributivist philosophy as an aim of the juvenile court, it appears that they and those that have followed them also felt compelled to reject the limitations which that philosophy places upon governmental intervention. 139 However, they failed to realize that retribution could be denied as an aim of the juvenile court while still accepting the limitations articulated therein. 140 As in the utilitarian philosophy,

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134 See H.L.A. Hart, supra note 25, at 4-10.
135 See note 114 and accompanying text supra.
136 See E. Pincoffs, supra note 100, at 81-94. The retributivist philosophy would also permit societal intervention for the mentally ill for two reasons. First, the individual is not a free rational being and therefore is not morally responsible. Secondly, generally the requirement that the individual is dangerous to himself or others must be demonstrated. The combination of these two factors would justify the intervention.
138 I. Kant, supra note 116, at 195-98.
139 See note 37 and accompanying text supra.
140 That is, as a principle of distribution. See H.L.A. Hart, supra note 25. Of course, it might be suggested that theorists knew precisely what they were doing and were thereby able to expand governmental authority into previously circumscribed areas.
the concept of freedom which prohibits overzealous governmental intervention is at the heart of the retributivist limitation. The effect, therefore, of a complete rejection of retribution has been a significant dilution of the principle of freedom.

In our society freedom has always been and is today highly valued. Yet, acknowledgement of this fact does not require an abandonment of teleological objectives but rather recognition that both philosophies represent important values. A teleological approach demands that any governmental intervention be designed to serve useful purposes while the principles of retribution protect an individual's freedom. Jointly, therefore, these two philosophies provide rules of exclusion which determine whether governmental action is justifiable. Accordingly, intervention should be confined to those instances in which both theories argue that it is justified. In other words, if we view the justifications offered by both philosophies as intersecting circles, intervention should be justified only in cases which come within the area that is mutually shared. Governmental action is therefore justifiable only against those persons who have committed an offense and for whom such action would serve a useful purpose.

While it is not always easy to ascertain the objectives sought by the adult criminal process, because of other conflicting values, the problem need not be as difficult in the juvenile court, which has already recognized a primary social purpose limitation. The Uniform Juvenile Court Act defines a delinquent child as one "who has committed a delinquent act and is in need of treatment or rehabilitation." All that would be necessary, therefore, to outline the objectives of the juvenile justice system is the additional recognition of the standard derived from principles of freedom and liberty, and established by the concept of responsibility. These are not only part of a metaphysical philosophy but are the fundamental underpinnings of our entire society.

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141 It has been pointed out that:
In modern times, the doctrine of inviolable rights and fundamental liberties of the individual and social groups — as freedom of religion, liberty of thought, respect for human dignity aside from every racial discrimination, etc. — has clearly confirmed the view that law is limited by principles of moral order. Indeed, such principles are often regarded as the very foundation of legal order, and therefore represent the basic criteria of its interpretation.

142 A simple instance of conflict might exist, for example, between the theories of special and general deterrence. It is easy to imagine a situation where in order to serve the ends of general deterrence ideas of special deterrence are abandoned. In addition, it is difficult to gauge just how prominent ideas such as revenge are in the criminal law. These circumstances might, therefore, complicate the use of this model for adults.

143 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT § 2(3) (1968).
The issue which must now be faced is whether there are significant differences between children and adults; and if so, whether this leads to the conclusion that the doctrine of mens rea is inappropriate in juvenile proceedings.

B. Punishment v. Treatment

A problem which might be encountered when urging that the juvenile court recognize the concept of responsibility arises from the suggestion that the concept of responsibility in both utilitarian and retributive philosophies derives from a rationale of punishment. The juvenile court is presumably not concerned with punishment but rather with assistance and treatment. The question, therefore, is whether a treatment philosophy suggests that mens rea should be eliminated. It would be tempting to simply say that the juvenile justice system is in fact punishing children under the guise of treatment. The President's Commission on Law Enforcement and Administration of Justice, as well as some of the reported decisions provide ample evidence of the punitive nature of many juvenile institutions. This evidence, however forceful, does not completely meet the objection to using the concept of responsibility. By contrasting the processes of the adult criminal law with those of the juvenile justice system, however, the parallel between the adult's punishment and the juvenile's treatment can be seen.

To begin with, the behavior which results in a finding of delinquency is defined in terms of the criminal code. The apprehension through which a juvenile is called to the system's attention is accomplished almost exclusively by the police. The determination of whether the child engaged in the proscribed activity is conducted before a judicial tribunal, and proof of identification of the youth who committed the act must be made beyond a reasonable doubt. Moreover, the dispositional alternatives available to the juvenile court include probation and commitment to juvenile

144 The National Council of Juvenile Judges expressed the basic premise of juvenile court jurisdiction. "Children are different from adults and deserve not only due process protection but also the benefit of individualized dispositions based on the needs of the child . . . ." Resolution of the National Council of Juvenile Judges. (July 11, 1974), reprinted in Fox, Philosophy and the Principles of Punishment in the Juvenile Court, 8 FAM. L.Q. 373 (1974). See also Mack, supra note 38.


147 Such a provision is found in almost every juvenile court act. See note 42 supra.


institutions, which are frequently highly penal.\textsuperscript{150} Most of the "treatment" personnel see themselves as operating within a correctional system.\textsuperscript{151} In addition, a stigma attaches to a delinquent in a manner similar to an adult criminal.\textsuperscript{152}

In discussing the treatment-punishment dichotomy, it must be recognized that a semantic digression has been encountered. If what one has in mind as punishment involves the rack and the wheel, then, of course, the treatment provided by the juvenile court cannot be considered punishment. Indeed, by that test there is very little punishment being meted out even in maximum security adult institutions. If, however, punishment is viewed as an interference with an individual's liberty, through official coercion, predicated upon an infraction of the criminal code, then the juvenile court is clearly engaged in the business of punishment.

H.L.A. Hart has frequently pointed out that by defining punishment too narrowly, problems that warrant discussion are often erroneously obscured.\textsuperscript{153} This is precisely what has resulted from the juvenile court's polarization of treatment and punishment.

Even if the juvenile court only made dispositions for psychiatric or psychological care in appropriate cases, there would still be grounds for objection to the sole use of the treatment philosophy. The most forceful reason to oppose such disposition becomes clear when it is remembered that a system for the civil commitment of the mentally ill is already in existence. Under the laws providing for civil commitment, the standards that authorize intervention are quite different from those employed by the juvenile court.\textsuperscript{154} It is also interesting to note that there is considerable reason to believe that most delinquent children are not in need of psychiatric or psychological care.\textsuperscript{155} More pragmatically, the basis used in

\textsuperscript{150} See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 141-54 (1967).

\textsuperscript{151} Sheridan, Juveniles Who Commit Non-Criminal Acts: Why Treat in a Correctional System?, 31 Fed. Prob. 26 (1967). It is interesting that arguments are now being made to exclude from the juvenile court jurisdiction children who have not committed criminal acts because they do not deserve punishment. Id.

\textsuperscript{152} Sheridan has noted the magnitude and consequences of this stigma:

\begin{quote}
Despite all measures, statutory or otherwise, to protect from stigma the youngster who is a product of the correctional system, it is well known that such stigma exists to almost as great a degree as in the adult field. It may act as a bar to employment or enlistment in the armed services. It may even continue to be a handicap for years. There is, for example, the case of the family whose application for public housing was turned down partly on the basis that the husband committed minor offenses as a juvenile.
\end{quote}

\textsuperscript{153} H.L.A. Hart, supra note 25, at 6.


\textsuperscript{155} For an excellent discussion of the appropriateness of mental health care for delinquents, see Miller & Kennedy, Adolescent Delinquency and the Myth of Hospital Treatment, 12 Crime & Delinquency 38 (1966).
juvenile court for determining whether a child is in need of treatment should be observed. Section 29 of the Uniform Juvenile Court Act provides, "In the absence of evidence to the contrary, evidence of the commission of acts which constitute a felony is sufficient to sustain a finding that the child is in need of treatment or rehabilitation." 156

By focusing exclusively on the potential of a treatment disposition, the juvenile justice system has created more problems than it has resolved, for it has never confronted the fundamental question of responsibility. Hence, the question of whom the system may legitimately operate against is never directly faced.

C. A Child's Capacity for Judgment

The doctrine of mens rea is predicated on a view of the individual as a free, moral agent, capable of rational activity. Therefore, while the purpose of the requirement of mens rea appears to have great force when applied to adults, when attention is directed toward children it could be argued its impact is dissipated.

During the early stages of childhood it is clear that a child is not responsible for her actions. Only as a child grows does she begin to develop a sense of right and wrong and acquire the ability to distinguish between them. The best example to portray this growth is probably the development of property concepts and the idea of stealing. 157 Gradually, however, education and an awareness of social demands cause a shift toward the development of honesty. 158 At precisely what point a child is capable of distinguishing between right and wrong and is able to act on the basis of the distinction is not something that is susceptible to general statement

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156 Uniform Juvenile Court Act, supra note 2, § 20(b).
157 As Anna Freud has pointed out:
The ideas of "mine" and "not mine" which are indispensable concepts for the establishment of adult "honesty," develop very gradually, keeping step with the infant's gradual progress toward achievement of individual status. They apply first, probably, to the child's own body, next to the parents, then to the transitional objects, all of which are cathexed both narcissistically and with object love. Significantly enough, as soon as the concept of "mine" emerges in the child's mind, he begins to guard his possessions fiercely and jealously against any interference. The notion of "being deprived of" or "stolen from" is understood by him long before the opposite one, that other people's property has to be respected. Before the latter becomes meaningful, the child has to extend and intensify his relationships to his fellow beings and to learn empathy with their attachment to their property. Whatever the rate of progress in this respect, the concepts of "mine" and "yours" as such have little influence over the young child's behavior, since they conflict with very powerful desires for appropriation.
158 Id. at 118.
by either psychology, psychiatry, or law. The common law recognized this problem and incorporated a large degree of flexibility into the infancy defense. Through various presumptions the immature child was protected, and a child could be held responsible only after it was established that she could distinguish between right and wrong.159

The infancy defense, however, has not been applied in juvenile court proceedings,160 and few juvenile courts specify the lower age limits of the court's jurisdiction.161 Thus, in theory, from the day a child is born, in most jurisdictions, she could be proceeded against as a delinquent. There are, however, no reported cases involving an attempt to charge delinquency against a child under the common law immunity age of seven.162 Good sense seems to have prevailed, at least so far.

At the other end of the spectrum, every state sets a maximum age for the jurisdiction of the juvenile court. The most frequent maximum age is eighteen.163 The effect of juvenile court legislation with no minimum age and a high maximum age, such as eighteen, is to eliminate the infancy defense for all within the group, while at the same time creating an almost conclusive presumption of incompetence. Before the law, all members of this class are in the same position.164 The teachings of the behavioral sciences, as well as common sense, indicate that there is a considerable difference in the mental and emotional makeup of an infant and a fifteen-, sixteen-, or seventeen-year-old youth. The objection that children do not possess the requisite moral judgment and should be treated differently from adults ignores the point that most of the youths over whom the juvenile court exercises its jurisdiction probably do have the ability to distinguish between right and wrong and to conform their conduct accordingly. Studies on the subject of the moral judgment of children,165 indicate that the concept of responsibility plays an important role not only in the law, but in psychology as well.166 Consequently, there may be little reason to distinguish between an adult and a child on the basis of the capability of either to make responsible judgments. In cases where the capabil-

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159 See note 15 and accompanying text supra.
161 S. Fox, JUVENILE COURTS IN A NUTSHELL 15 (1971).
162 Id. at 18.
163 Id. at 22.
ity is lacking, traditional principles for determining responsibility found in the common law appear to be in accord with the behavioral sciences. The values protected by the concept of responsibility should not be surrendered, therefore, on the basis of a distinction that may not exist in reality or for which adequate account has already been taken.

**D. The Liberty of Children**

The central issue thus becomes whether the principles of freedom and liberty that are at the core of the doctrine of mens rea should be applicable to children as well as adults, vis-a-vis state intervention because of their conduct. The United States Supreme Court recognized this argument in the *Gault* case, in which Justice Fortas wrote:

> ... a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions — that is, if the child is 'delinquent' — the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. 167

There can be little doubt that society has often treated children as chattels of the family unit, with no separate status. 168 In addition, society has frequently been highly solicitous of the welfare of children. Legislatures have enacted child labor, compulsory school attendance, and vaccination laws to look after the interests of children. There has also been, however, a distinct recognition that children have fundamental rights. The United States Supreme Court has held that several constitutional rights must be afforded children. 169 Many of these rights, however, could be viewed as simply the mechanical application of formality to proceedings in order to insure the trustworthiness of the outcome. When requiring that such safeguards as notice of the proceedings, confrontation and cross-examination of witnesses, or the right to counsel be provided, 170 the freedom of children is not necessarily recognized. These safeguards may be used only because they offer one of the best methods to obtain all the facts in any given dispute, in an orderly fashion, and in a way which assures full appreciation of

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167 *In re* Gault, 387 U.S. 1, 17 (1967).
169 For a brief summary of these rights, see Wisconsin v. Yoder, 406 U.S. 205, 243-44 (1972) (Douglas, J., dissenting).
170 All of these rights were found to be applicable to juveniles in *In re* Gault, 387 U.S. 1 (1967).
their significance. To a lesser extent, the same is true with regard to affording an individual a privilege against self-incrimination.\footnote{171} Certain police practices, for example, might make a confession obtained under circumstances of custodial interrogation unreliable.\footnote{172} By requiring observation of the privilege against self-incrimination, however, there also appears to be a recognition that the individual is a person whose liberty is important; and that if the government wishes to deprive the person of his liberty, it should be able to do so only upon the basis of competent evidence and without the coerced assistance of the accused. A similar respect for the fundamental value of liberty can be seen in the requirement that the government establish its case by proof which is beyond a reasonable doubt.\footnote{173} Such a standard impresses upon the trier of fact that a decision of grave consequence is being made. The state should be entitled to interfere with a person's freedom only if there is no reasonable doubt on the issue of whether the person committed the offense. The prohibition against being twice put in jeopardy\footnote{174} also displays a concern for the freedom of children by pointing to the limits within which government intervention is justified. A clear example which shows that children share in the value of freedom that is cherished by our society is the protection afforded them by the first amendment guarantee of free speech.\footnote{175} Finally, the right of a minor child to obtain an abortion over parental objection\footnote{176} demonstrates that a child is a free person under the Constitution.

The Supreme Court through its holdings has recognized that children are entitled to be treated as individuals who enjoy the rights of liberty. It is especially necessary to respect this value when the state is attempting to deprive a child of his freedom on the basis of a criminal law violation. The Court has stated that "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."\footnote{177} By requiring that procedural rights be afforded children, the Supreme Court has recognized that the ideas of freedom and liberty from which these constitutional limitations derive also apply to children.

It is, to a certain extent, unfortunate that such forceful action by the Supreme Court was necessary to compel an awakening to the

\footnote{171}This right has also been held applicable to juveniles. \textit{In re Gault}, 387 U.S. 1 (1967).
fact that children share in society's fundamental ideals. It is particularly ironic that the freedom of children has recently come into question under criminal law in the context that it has. It was only through "humanitarian" efforts of juvenile court legislation that children were forced to surrender their right to liberty, a right that had been recognized throughout the course of the common law. The freedom of children became an issue solely as a result of the early reformers and the theorists of the juvenile court and even then not because of any well-reasoned philosophical analysis but, more likely, simply because of a misapprehension of the role of the retributive theories of punishment.

The Supreme Court has recently remarked concerning the double jeopardy requirement that "[u]nder our decisions we can find no persuasive distinction . . . between the proceeding conducted in [a delinquency action] and a criminal prosecution, each of which is designed 'to vindicate [the] very vital interest in enforcement of common law.' "178 It has been realized, therefore, that the same interests are involved in both a delinquency adjudication and a criminal prosecution. What is needed now in the juvenile justice system is an appreciation of the role that the concept of responsibility has played in the criminal law.

Much of the discussion in this article has focused on the realities of juvenile justice. Even in the most idealized system of justice, however, the concept of responsibility has a place. Freedom, which is the foundation of the doctrine of mens rea, is an ideal that must stand with all others in our society and be shared in by all. To ignore the wisdom of generations which is contained in the jurisprudence of the criminal law is, therefore, also to ignore the highest values of our society.

IV. CONCLUSION

The early juvenile justice reformers were extremely concerned about the imprisonment and punishment of children by the criminal courts of their time. Such punishment of children was frequently viewed as cruel and barbaric, and almost always seen as futile. These reformers, therefore, agitated and lobbied to remove children from the prisons and other penal institutions in which they were found. They were not content, however, with simply altering the dispositional alternatives available for children. The reformers

succeeded in establishing an entirely separate juvenile justice system, in which the principles of the criminal law were deemed to be irrelevant because only guidance and assistance were to be provided.

In the 150 years that have elapsed since the beginning of the juvenile justice reform movement, adult penology has adopted many of the treatment and rehabilitative goals that were once the hallmark of the juvenile system. In addition, many of the failings and abuses of juvenile justice have come to light and now demand correction. Indeed, it might even be suggested that the juvenile court experiment has created more problems than it has solved and consequently should be abandoned.

Nevertheless, the President's Commission on Law Enforcement and the Administration of Justice, while being mindful of the difficulties involved, has recommended that the juvenile court should continue to exist as a separate agency.\(^{179}\) Perhaps it is not yet time to abandon the special intake procedures or the other benefits available to children in the juvenile court. Perhaps even by virtue of its separate status the juvenile court is made constantly aware of its primary objective to aid children whenever possible. It is undoubtedly the time, however, to attempt to put the house in order.

The United States Supreme Court has begun to reshape the juvenile court through its holdings that require procedural regularity in an attempt to guard against unjustifiable intervention in the lives of children by government. If there is a concern over the expansive and abusive powers of the state, however, it is not necessary to rediscover the wheel. The principles of the criminal law, particularly those embodied in the doctrine of mens rea and actus reus, were applied in the common law specifically as limitations on governmental activity. What is needed now is a recognition that whether one adopts a utilitarian or a retributivist theory of law, the concept of responsibility has an important role to play. Through it the ideal of freedom upon which our society is founded is not only observed but protected. By recognizing that the concept of responsibility has an important function in a delinquency proceeding, the juvenile court will be adhering not only to an abstract metaphysical theory but to the goal to which our entire system of justice is dedicated.

\(^{179}\) President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 9 (1967).