PHYSICAL AND MENTAL INFANCY IN THE CRIMINAL LAW *

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In the middle of the eighteenth century a boy of ten years, who killed his five year old foster sister, cut up her body and buried it, washed the blood from his hands and then lied about her disappearance, was sentenced to be hanged for the murder.¹ What would be his fate today? What should be the attitude of the criminal law toward its delinquent children? In the twentieth century, a man thirty-four years of age, but with the mentality of a child of eight years, was convicted of murder in the first degree and sentenced accordingly.² His responsibility would be the same in practically every state in this country today. What is the basis for this result? Should a "mental infant" of adult age receive the same treatment as an adult of normal mentality?

The criminal law has been built upon the theory that a person should be held criminally responsible only for acts which he intends to commit.³ This in turn is based upon the theory of freedom of the will,⁴ despite modern psychological theories. This theory of the freedom of the will and the requirement of intent is still the basis of the common law of crimes; and it is almost universally held that, if there be no "intent", there can be no criminal responsibility for an act.⁵ Certain statutory crimes have made an exception to this requirement, but they are not here important.

With the "intent" element an essential one in the law of crimes, it became apparent that something had to be done about those persons who, for some reason, could not formulate the "intent" required in the particular act with which they were charged. There were three types of persons who were considered in this category in the older books—

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1. The Case of William York, FOSTER'S CROWN LAW (3d ed. 1809) 70.

2. State v. Kelsie, 93 Vt. 450, 108 Atl. 391 (1919).

3. STEPHEN, THE CRIMINAL LAW (1863) 75 *et seq.*

4. Sayre, *The Present Significance of Mens Rea in the Criminal Law* in HARVARD LEGAL ESSAYS (1934) 399; Glueck, *Ethics, Psychology and the Criminal Responsibility of the Insane* (1923) 14 J. CRIM. L. 208; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974.

5. Regina v. Tolson, 23 Q. B. D. 168 (1889); People v. Flack, 125 N. Y. 324, 26 N. E. 267 (1891); WHARTON, CRIMINAL LAW (12th ed. 1932) 207.

married women, infants of tender years, and persons who were not of sound mind.⁶ The responsibility of married women is not now so important since the widespread adoption of the various Married Women's Acts beginning about the middle of the last century. They are not here considered; for while it was generally conceded that a married woman could commit a crime, there was a presumption of compulsion if the crime were committed by her in the presence of her husband. It was not a question of an inability to formulate an intent, but rather a conclusive legal presumption that no intent was in fact formed. Thus for present purposes there have been two streams of evolution respecting incapacity to commit crimes. The first stream is independent of the second and deals with the criminal responsibility of infants. The second stream is part of the general current of tests of irresponsibility of adults. We are here concerned only with that portion of it dealing with the criminal responsibility of feeble-minded, as distinguished from mentally diseased, persons. These two streams run close together, but not parallel.

By far the greater part of what has been written on mental disorder and the criminal law has dealt mainly with the psychiatric phases of the problem—the McNaghten rules, insane irresistible impulse and moral insanity, among others.⁷ With a few exceptions,⁸ little attention has been paid by lawyers to the other phase of the problem—that of mental defect. The courts have, in recent decisions, refused to consider mental defect on any other basis than that of the typical case of insanity which means to them mental disease.⁹

6. 4 BL. COMM. *20 *et seq.*; CO. LIT. *247; DALTON, THE COUNTRY JUSTICE (6th ed. 1643) c. 95; FITZHERBERT, NEW NATURA BREVIVM (1652) *202; FOSTER'S CROWN LAW (3d ed. 1809) 70 *et seq.*; 1 HALE, PLEAS OF THE CROWN (1736) *24, *29; 1 HAWKINS, PLEAS OF THE CROWN (6th ed. Leach, 1788) 1.

7. Some of these writings are: BROWN, MEDICAL JURISPRUDENCE OF INSANITY (2d ed. 1880); W. G. H. COOK, INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY (1921); MAUDSLEY, RESPONSIBILITY IN MENTAL DISEASES (3d ed. 1876); MERCIER, CRIMINAL RESPONSIBILITY (1926); MEREDITH, INSANITY AS A CRIMINAL DEFENSE (1931); SMOOT, LAW OF INSANITY (1929); SULLIVAN, CRIME AND INSANITY (1924); 1 TAYLOR'S PRINCIPLES AND PRACTICES OF MEDICAL JURISPRUDENCE (9th ed. 1934) 756-850; WEIHOFFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933); Meagher, *Crime and Insanity: The Legal as Opposed to the Medical View, and the Most Commonly Asserted Pleas* (1923) 14 J. CRIM. L. 46; Stanley, *Disease and Crime* (1923) 14 J. CRIM. L. 103.

8. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925); GODDARD, THE CRIMINAL IMBECILE (1915); HEALY, THE INDIVIDUAL DELINQUENT (1920); Ballantine, *Criminal Responsibility of the Insane and Feeble Minded* (1919) 9 J. CRIM. L. 485; Davidson, *Mental Deficiency and Criminal Responsibility* (1935) 1 N. J. L. REV. 123; Glueck, *supra* note 4; Gordon, *Mental Deficiency and the Importance of Its Recognition From a Medico-Legal Standpoint* (1918) 9 J. CRIM. L. 404; Note (1930) 79 U. OF PA. L. REV. 209.

9. Christwell v. State, 171 Ark. 255, 283 S. W. 981 (1926); People v. Keyes, 178 Cal. 794, 175 Pac. 6 (1918); Rogers v. State, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999 (1907); Bridges v. State, 43 Ga. App. 214, 158 S. E. 358 (1931); People v. Marquis, 344 Ill. 261, 176 N. E. 314, 74 A. L. R. 751 (1931); Wartena v. State, 105 Ind. 445, 5 N. E. 21 (1886); Farris v. Commonwealth, 8 Ky. L. Rep. 217, 1 S. W. 729

As yet no article has been found comparing the criminal responsibility of children with that of feeble-minded persons. It is the purpose of this paper to trace some of the rules relating to amentia and age with reference to criminal responsibility, to show the points at which the streams converge and diverge, and to suggest changes in the existing practice where it is thought that, in the light of history and modern scientific findings, such changes would be an improvement over present methods.

I. Criminal Responsibility of Children

In both the criminal law and the law relating to civil liability, an infant or child has always occupied a more favored position than an adult. In the early history of the law, when there did not seem to be a clear-cut distinction between the criminal law and the law relating to civil liability of infants, this position was recognized and undoubtedly has had some influence upon the development of the at times rather elaborate present day statutory provisions concerning the criminal responsibility of children. The early laws are fragmentary, and the cases from the English Year Books and Plea Rolls are not always fully reported; hence, there is a certain difficulty in tracing clear-cut lines with reference to the criminal irresponsibility of children.¹⁰ As will be noted later, many of the cases decided about the same time took somewhat different views of the existing law on this point.

As far back as the Code of Hammurabi (*circa* 2250 B. C.) is found a provision imposing the death penalty for anyone to buy or receive on deposit from a minor or a slave, either silver, gold, male or female slave, ox, ass, or sheep, or anything else, except by consent of elders, or power of attorney.¹¹ This seems to show that the infant was protected from his grasping elders by the infliction of the death penalty to one so dealing with him, unless some older person were present to see that the infant or minor was not over-reached.

Two of the provisions of the Twelve Tables (*circa* 451-488 B. C.) showed a regard for youths under puberty. One section provided that anyone who at night furtively cut or caused to be grazed crops raised by ploughing should be punished by death if he were an adult; or, if under the age of puberty, he should be flogged at the discretion of the

(1886); *State v. Schilling*, 95 N. J. L. 145, 112 Atl. 400 (1920); *People v. Moran*, 249 N. Y. 179, 163 N. E. 553 (1928); *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899); *State v. Kelsie*, 93 Vt. 450, 108 Atl. 391 (1919); *State v. Schafer*, 156 Wash. 240, 286 Pac. 833 (1930); *Rex v. Alexander*, 9 Crim. App. 139 (1913).

10. The history of criminal responsibility of children in the English law is discussed in detail in Kean, *History of Criminal Responsibility of Children* (1937) 53 L. Q. REV. 364.

11. CODE OF HAMMURABI § 1; JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* (1904) 44.

prætor and made to pay double value as damages.¹² The other provision was that, if a thief were taken in manifest theft, he should be beaten with rods and adjudged a slave to the person robbed unless he were a youth; in that case, he was only to be beaten with rods at the discretion of the magistrate, and condemned to repair the damage.¹³ Again this shows a leniency toward those who were young in years and immature in development.

The Roman Law relating to the civil responsibility of children likewise showed a solicitude for them.¹⁴ A child not otherwise under paternal power could enter upon a legal transaction only with the cooperation of his tutor, *auctoritatis interpositio*, but he could not do this until he had reached a certain physical development because of the formalities required—one of them an oral declaration. He could not complete his part of the transaction until he was capable of conscious action; hence, he had to have understanding.¹⁵ Therefore, while he was an infant, there could be no *auctoritas*. Until about the fifth century A. D. this meant the inability to speak. One writer says that about 407 A. D. the age of *infantia* was fixed at seven years.¹⁶ Early in the law a distinction was made between *infantia* and lack of *intellectus*.¹⁷ If a child could speak but did not have *intellectus*, he was considered *infantiae proximus* and was originally barred from legal transactions.¹⁸ However, by the time of Gaius (*circa* 117-180 A. D.)¹⁹ a change was recorded and such a child, *infantiae proximus*, could contract with *auctoritas*.²⁰ *Tutela* ended at the age of fourteen for males.²¹ Infants under seven appear incapable of contracting any delictual liability, but it would seem that infants from seven to fourteen could become liable for delicts if they were shown to be *doli capax*.²² All this tends to show that the age of responsibility and the age of puberty were considered to coincide.²³ It seems to have some significance when it is

12. I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 9.

13. *Ibid.*

14. BUCKLAND, A TEXT-BOOK OF ROMAN LAW (2d ed. 1932) 157-8; SOHM, INSTITUTES OF ROMAN LAW (Ledlie's trans. 3d ed. 1907) 488 *et seq.*

15. BUCKLAND, *op. cit. supra* note 14, at 158.

16. *Ibid.* Sohm merely mentions that the *infans*, or child under seven, is incapacitated from all juristic acts. SOHM, *op. cit. supra* note 14, at 216.

17. BUCKLAND, *loc. cit. supra* note 15.

18. BUCKLAND, *op. cit. supra* note 14, at 159.

19. It seems that little is known about the life of Gaius and the dates here given are only approximations. Certain early writings have, however, been quite definitely traced to him. BUCKLAND, *op. cit. supra* note 14, at 29; MUIRHEAD, ROMAN PRIVATE LAW (2d ed. 1899) 391 *et seq.*; ROBY, INTRODUCTION TO JUSTINIAN'S DIGEST (1886) clxxiv.

20. BUCKLAND, *op. cit. supra* note 14, at 159.

21. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW (1925) 99; RADIN, ROMAN LAW (1927) 119; SOHM, *op. cit. supra* note 14, at 141.

22. SOHM, *op. cit. supra* note 14, at 219.

23. RADIN, ROMAN LAW 119; SOHM, *op. cit. supra* note 14, at 142.

remembered that the common law age of qualified and absolute responsibility of children in the common law of crimes was later fixed at seven and fourteen years respectively.

In the early Anglo-Saxon laws of Ine,²⁴ who ruled from about 688 to 724 A. D., appears a provision that a ten year old child could be regarded as accessory to a theft. In the laws of Aethelstan²⁵ (*circa* 925 to 939 A. D.) is a provision that no thief shall be spared who has stolen goods worth more than twelve pence and who is over twelve years old. In his Ordinances,²⁶ the value of the stolen goods appears to be eight pence, but the age limit is the same. This seems to have been the law generally in England at the time, for Aethelstan sent word to his Bishops that he thought it cruel to put such young people to death for such slight offences "as he has learnt is the practice everywhere".²⁷ He said that he and the persons with whom he had discussed the matter thought that no one under fifteen years of age should be slain unless "he is minded to defend himself, or tries to escape and refuses to give himself up".²⁸ Aethelstan and his council were trying to mitigate the rigors of the criminal law with reference to children even at that early time. The Laws of Canute,²⁹ who reigned during or about the third decade of the eleventh century, show that much younger children had been considered capable of committing theft; in the law relating to stolen goods it was said that it had been the custom up until then for grasping persons to treat a child which lay in the cradle as being as guilty as though he were fully intelligent. Such things were thenceforth prohibited by decree.

Certain facts appear implicit in these laws. First, a very young child could be found guilty of theft; second, a child of twelve years could suffer the death penalty for theft. When it is remembered that the criminal law of those early times was rigorous and brutal, and that vengeance was probably the motive in punishment, the fact that from time to time some solicitude was felt for children has significance.

There are various mentions in the Plea Rolls and the Year Books concerning the criminal prosecution of children. In the Eyre of York in 1218-19 is found a case where a boy under ten years of age killed another boy of similar age and fled. The judgment was one of outlawry.³⁰ Another case in the same book from the Eyre of York showed

24. 7 INE, ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* (1922) 39.

25. 6 AETHELSTAN, ATTENBOROUGH, *op. cit. supra* note 24, at 157.

26. 2 AETHELSTAN I, ATTENBOROUGH, *op. cit. supra* note 24, at 157.

27. 6 AETHELSTAN, Ord. 12, § 1, ATTENBOROUGH, *op. cit. supra* note 24, at 169.

28. *Ibid.*

29. 2 CANUTE C. 76, ROBERTSON, *THE LAWS OF THE KINGS OF ENGLAND* (1925) 214 *et seq.* The exact dates of the reign of Canute appear to be uncertain. They are estimated to be around 1029 to 1034 A. D. *Id.* at 138.

30. (1937) 56 SELD. SOC. 343, pl. 942.

that a boy named Thomas, not more than seven years of age, killed a girl with a knife. The concluding sentence, "The death penalty is pardoned for the king's sake, and therefore Thomas is quit therein," was supposed to have been written in another hand from the record of the case.³¹ From the Eyre of Kent came another case where it appeared that: "An infant under the age of seven years, though he be convicted of felony, shall go free of judgment, because he knoweth not of good and evil; but after that said age he shall have etc."³² A case before Spigurnel, J., brought forth some interesting observations upon the criminal liability of children.³³ The actual case was of a youth of eighteen years who was arraigned of felony, put himself on the country, and was found guilty. The question was whether he should suffer judgment. The judge said that a boy of eleven was once found guilty before him of theft and murder of a child. It appeared in the case put that the boy had carried the body of his victim into a yard and hid it under some cabbages. He was condemned because the hiding of the body was taken as evidence of his heinous malice. Hence the judge said that the eighteen year old defendant could suffer judgment. It may be from the case put by Spigurnel, J., in his opinion that the later writers adopted the maxim that "*malitia supplebit aetatem*".

These cases show two things: 1. That a child under seven years of age might be convicted of felony but would be given a pardon. 2. That a child over that age could be convicted of a felony and sentenced to death if the surrounding circumstances showed that he knew what he was doing. If such a child did not know good from evil, he would be pardoned by the king. It is clear at this stage of the law that the judges were more interested in the mental capacity of the infant than in his chronological age. Indeed, the latter might have been as difficult to prove at that time, when there were no vital statistics kept, as it would have been to prove criminal capacity.

As there were no birth registrations in general use in those old days, the mode of proving the ages of infants was interesting. In a real property case in 1310-11 an infant was vouched in and the contention

31. Eyre of York (1218-19 A. D.), 56 SELD. SOC. 415, pl. 1134 (1937).

32. Eyre of Kent (1313-14), 24 SELD. SOC. 109 (1909).

33. Eyre of Kent (1313-14), 24 SELD. SOC. 148 (1909). A modern counterpart of this case will be found described in Auden, *Feeble-Mindedness and Juvenile Crime* (1911) 2 J. CRIM. L. 228. Dr. Auden describes the case of an eight year old boy killing and burying a little fifteen months old baby. The only differences in the cases, aside from the time element, is the outcome. Obviously there would be no hanging of the eight year old offender today. Two other cases are put by Dr. Auden and the common feature of them is the inability of the offender to conform to the canons of conduct which is demanded by a civilized community. See also Mich. 6 Edw. II, De Banco R. 195a (1312-13), 34 SELD. SOC. 43 (1917), wherein it was said, "Philip's mercy is pardoned because he is below age." See also Eyre of Derby, 4 Edw. III, 30 SELD. SOC. 124 (1914).

was that he was under age. The attorney said, "We ask judgment and pray that our client be seen in court."³⁴ In another case, "The infant was summoned, came into Court, and was adjudged to be under age by inspection of the Court. . . ."³⁵ Even girls were brought in and examined when their ages were in question with reference to infancy.³⁶ It appears, also, that sometimes the judges were not too certain of the ages of persons even after an inspection. In one case where it was essential that the age of an infant be shown to be fifteen years, his attorney said: "By the custom of the country he is under age, for he is not of the age of fifteen years; and of this we pray the ruling of the Court, and that he be seen of the Court." Bereford, C. J., replied, "You will get no decision from us, for if he were here, we could not tell whether he was fifteen years old, or more or less. . . ."³⁷

For some three hundred years past there have been various provisions for vital statistics to be kept, and the registration of births has been provided for in England for most of that time.³⁸ Vital statistics have been required in this country for some time; yet it is interesting to note that some states have adopted by statute this old rule of proving, by observation and inspection, the age of infants where it is in dispute. A Minnesota statute provides in part: "Whenever in legal proceedings it becomes necessary to determine the age of a child, he may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his examination by one or more physicians, whose opinion shall be competent evidence upon the question of his age."³⁹ This was adopted in 1885,⁴⁰ despite the fact that since 1870 Minnesota has had a compulsory birth registration statute.⁴¹ Washington has a similar provision⁴² even though some

34. *Chaloner v. Conduit*, Y. B. Hil. 4 Edw. II, f. 142 (1310-11), 26 SELD. SOC. 18 (1911).

35. *Eyre of Kent* (1313-14), 27 SELD. SOC. 160 (1912); see also Y. B. Trin. 5 Edw. II, f. 193 (1312), 33 SELD. SOC. 211 (1916); (1936) 55 SELD. SOC. 12, pl. 6; *Blunt v. Belacumbre*, Y. B. Hil. 4 Edw. II, f. 34 (1310-11), 26 SELD. SOC. 62 (1911).

36. *Zouche v. Cobham*, Y. B. Hil. 3 Edw. II, f. 14a (1310), 19 SELD. SOC. 189 (1904).

37. *Daniel v. Scadbury*, Y. B. Trin. 5 Edw. II, f. 3 (1312), 33 SELD. SOC. 130 (1916).

38. The registration of christenings began in 1538 in England. This record presumably would include the date of birth of the child. In 1603 the Church of England adopted Canon 70 which made the keeping of such record by the clergy compulsory. 1 PHILLIMORE, ECCLESIASTICAL LAW (1873) 649 *et seq.* One writer evidently assumes that these parish registers were registers of births as well as christenings, and this would appear to be logical. SHELFORD, MARRIAGE & DIVORCE (1841) 806. But see the forms given in one of the early statutes, which does not provide space for the date of birth. 52 GEO. III, c. 146 (1812). But see 6 & 7 GEO. IV, c. 86 (1836); 37 & 38 VICT., c. 88 (1874); 24 HALSBURY, LAWS OF ENGLAND (1912) 436 *et seq.*

39. MINN. STAT. (Mason, 1927) § 9913.

40. MINN. PENAL CODE (1885) § 17.

41. Minn. Gen. Laws (1870) c. 25, § 4; MINN. STAT. (Mason, 1927) § 5356.

42. Wash. Laws 1909, c. 249, § 5; WASH. REV. STAT. (Remington, 1932) tit. 14, § 2257.

eighteen years earlier it had enacted a birth registration statute.⁴³ Of course such provision might be important and useful where the age of a person is an essential element in a case and he had been born in some other state or country where no such records were kept. However, the court may find itself in much the same position of Bereford, C. J., in the fourteenth century.

The early writers on the criminal law in England, probably because of the abstract method of thinking in vogue during that time, began to seek for definite age lines. Fitzherbert, in the early part of the sixteenth century, observed that an infant of fourteen years "hath discretion adjudged within such age"; and if he commits a felony at that age he shall be hanged for it, although his lease, feoffment or grant was not valid until he reached twenty-one years; the reason for the latter being that he had "not perfect discretion or knowledge what he ought to do, or what is to his profit, or disadvantage before such age. . . ." ⁴⁴ Pulton, about a hundred years later, said that an infant of eight or nine years might commit murder "if it may appeare (by hiding of the person slaine, or by any other act) that the abundance of his malice doth exceede the tendernesse of his yeares. But if an Infant of tender and yonger yeares doe kill a man, this is no felonie, because he wanteth discretion and understanding, and the Lawe will impute it to the ignorance which commeth to him by nature." ⁴⁵ About the same time Lambard declared that an infant under the age of twelve years could not be punished for homicide unless it appeared by "some evident token" that he had understanding of good and evil.⁴⁶ Dalton observed that an infant of eight years of age could commit homicide, and if the circumstances showed that he had knowledge of good and evil, he could be hanged for it, but an infant "of such tender yeares, as that hee hath no discretion or intelligence, if he kill a man, that is not felony in him." ⁴⁷ Sir Edward Coke said that an infant under fourteen, which in law is of the age of discretion, should not be punished.⁴⁸ Staundford maintained that the age of discretion should be twelve.⁴⁹

After a review of the civil laws, Sir Matthew Hale, writing during the third quarter of the seventeenth century, adopted three age lines

43. WASH. LAWS 1891, c. 98, §§ 3, 5, 7; WASH. REV. STAT. (Remington, 1932) tit. 40, §§ 6011, 6012. A similar statute is found in New York. N. Y. PENAL CODE (Gilbert, 1935) § 817. Cf. *Matter of Serafino*, 66 How. 178 (N. Y. 1883).

44. *NEW NATURA BREVIVM* (1652) 505.

45. *PACE REGIS E REGNI* (1610) f. 117, par. 37.

46. *EIRENARCHA* (ed. 1619) 232.

47. DALTON, *THE COUNTRY JUSTICE* (6th ed. 1643) 298-9.

48. 3 CO. INST. *4. In his edition of Littleton, Coke says that the age of discretion is fourteen. CO. LITT. *247b.

49. STAUNFORD, *PLEAS OF THE CROWN* (1607) Lib. 1, c. 9.

for children: ⁵⁰ 1. The age of puberty and above. 2. The age closest to puberty. 3. Infancy. Though there was a difference in the age limits in marriage laws between men and women, it being twelve in women and fourteen in men, he said that the age of puberty with reference to criminal liability should be the same for men and women, i. e., fourteen.⁵¹ With reference to capital punishment, one above fourteen years of age was subject to it. A child between the ages of twelve and fourteen was not "regularly" to be convicted or have judgment against him as a felon, although in special cases where the facts warranted it, he was to be subject to the death penalty.⁵² As an illustration, he cited the case before Spigurnel, J., of the boy who killed his companion and was later hanged. From the ages of seven years to twelve years, an infant who committed felony was presumed to be not guilty and was to be so found, unless it appeared that he had discretion to judge between good and evil. If it appeared "by strong and pregnant evidence and circumstances" that he had such discretion, he could receive the death penalty. But the evidence, according to Hale, must be very strong, and it must appear that the infant defendant knew what he did; and much stronger evidence on that was required when the infant was from seven to twelve years of age than would be required from twelve to fourteen years. Even in these cases he thought it prudent for the judges to respite execution until the king's pleasure be known. Furthermore, the infant under the age of seven could not be guilty of any crime whatever and would be acquitted, which would show that a pardon was no longer necessary at that time.⁵³

Some forty years after Hale had written, Hawkins laid down the rules of responsibility of infants as it came to be known generally: below seven there could be no guilt, above fourteen the infant was to be judged as an adult, and between seven and fourteen there was a presumption against the capacity of the infant to commit crime. This presumption increased in strength in inverse proportion with the decrease and tenderness of the offender's years. Yet he could be sentenced to death if the jury found that he had the necessary discretion and was conscious of the nature and malignity of his act. For, said Hawkins, ". . . the capacity of contracting guilt is measured more by the apparent strength of the offender's understanding than by years and days . . ." ⁵⁴ This latter statement is important when considered

50. 1 HALE, PLEAS OF THE CROWN (1736) *16 *et seq.*

51. *Id.* at *25.

52. *Id.* at *26.

53. *Id.* at *24 *et seq.*

54. 1 HAWKINS, PLEAS OF THE CROWN (6th ed. Leach, 1788) 1, n. 1. See comment on Hawkins by Professor Winfield, WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY (1925) 325-26.

in the light of remarks by modern judges in cases where it has been urged that the "mental age" of a defendant should bring him within these age lines.

Despite the "strong presumptions" which Hale and Hawkins said prevailed against the guilt of infants, a boy of ten years was convicted and sentenced to death in 1748 for killing a little girl of five.⁵⁵ He had killed her, cut up her body and buried it in the barnyard. Then he had tried to wash the blood from his clothes. The court thought, after careful investigation, that the boy should not be spared merely on account of his age. It felt that he was of sufficient discernment to know the heinousness of his crime. Nevertheless, the judges were prevailed upon to grant several respites from the execution of the sentence, and in 1757 the youth was given a pardon by the king on condition that he enter the navy.

From the foregoing it appears that the courts and commentators were not following any definite path toward a given determined end with reference to the criminal liability of children. The age lines were not reached once and for all after a careful consideration of the whole field. The age of infancy in Roman Civil Law was arbitrarily set at seven during the early part of the fifth century.⁵⁶ It probably affected the common law through the Canon Law.⁵⁷ The age of puberty denoted physical maturity, and soon fourteen was adopted as the age at which one might marry and beget children; hence, it would seem that he should be responsible for his actions at that time although in the common law it seemed to require more understanding to make a valid feoffment or grant than one ordinarily had at fourteen. Throughout the whole period it is important to note that the courts were more concerned with the capacity of the infant to know what he was doing than it was with his chronological age. Probably the mode of juristic thinking at the time, together with the coming of birth registrations, had some influence upon setting the age line of responsibility arbitrarily at fourteen.⁵⁸ Hale tried to soften the rigor of the law by making an intermediate line at twelve years below which line there would be a stronger presumption of incapacity than above it. This view still has some effect on the law.⁵⁹

55. The case of William York, FOSTER'S CROWN LAW (3d ed. 1809) 70. The case was tried in 1748 and the pardon finally granted in 1757.

56. *Supra* note 18.

57. VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE (2d ed. 1929) 117; WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY (1925) 54 *et seq.*

58. Cf. POUND, INTERPRETATION OF LEGAL HISTORY (1923) 5; Kean, *The History of the Criminal Liability of Children* (1937) 53 L. Q. REV. 364.

59. State v. George, 20 Del. 57, 54 Atl. 745 (1902); State v. Aaron, 4 N. J. L. 231 (1818); Law v. Commonwealth, 75 Va. 885 (1881).

With reference to the modern age lines governing the responsibility of infants, there is much diversity of authority. Some states in this country have adopted the common law rules by statute.⁶⁰ Other states have adopted them by decision, merely following the common law rule.⁶¹ Hawaii adopted the common law age lines, but provided that between the ages of seven and fourteen years the competency of the infant to commit the offense charged and the fact that the defendant acted with intelligence and understanding of the nature of the act should be determined from the evidence without the benefit of any presumption whatever.⁶² By statute the age of absolute irresponsibility varies in this country from seven years in some states to twelve years in others.⁶³ In still other states the age of twelve years is fixed at which the presumption of incapacity ceases.⁶⁴ In England in 1933 the age of eight years was fixed as the minimum at which one could be held responsible for a criminal act.⁶⁵

In India, an infant below seven years of age is absolutely *doli incapax*. He cannot be held criminally responsible for the consequences of his acts. Between seven and twelve years there is a qualified responsibility; and if it is shown that infants between these ages have attained the requisite degree of understanding to discriminate between right and wrong, they may be held guilty. The age of absolute responsibility is lowered in India from fourteen to twelve "as it was considered that children born in the tropics sometimes attain the requisite understanding at that age. This fact is recognized by the Indian Majority Act . . . which has fixed the age of eighteen as the ordinary period for attaining majority—three years less than the age of majority under English law."⁶⁶

60. MINN. STAT. (Mason, 1927) § 9913; MONT. REV. CODE (1935) § 10729; N. Y. PENAL CODE (Gilbert, 1935) § 816; OKLA. STAT. (1937) § 152; UTAH REV. STAT. (1933) 103-1-40.

61. State v. George, 20 Del. 57, 54 Atl. 745 (1902); Heilman v. Commonwealth, 84 Ky. 457, 1 S. W. 731 (1886); State v. Aaron, 4 N. J. L. 231 (1818); State v. Barnett, 179 N. C. 735, 102 S. E. 711 (1920); Williams v. State, 14 Ohio 222 (1846); Law v. Commonwealth, 75 Va. 885 (1881). Note (1897) 36 L. R. A. 196.

62. HAWAII REV. LAWS (1935) c. 152, §§ 5320, 5321.

63. For age seven years as the line of absolute irresponsibility, see *supra* note 60. Eight years: NEV. COMP. LAWS (Hillyer, 1929) § 9952; 4 WASH. REV. STAT. (Remington, 1932) tit. 14, § 2257. Nine years: TEX. STAT. (Vernon, 1936) Penal Code, art. 30. Ten years: COLO. STAT. ANN. (Courtright's Mills, 1933) c. 48, § 4; GA. CODE (1933) § 26-302; ILL. REV. STAT. (Cahill, 1937) c. 38, § 591. Twelve years: ARK. DIG. STAT. (Pope, 1937) § 2927. It would appear that between these ages and fourteen years there is a rebuttable presumption of incapacity. Allen v. United States, 150 U. S. 551 (1893); Dove v. State, 37 Ark. 261 (1881).

64. MINN. STAT. (Mason, 1927) § 9913; N. Y. PENAL CODE (Gilbert, 1935) § 817; WASH. REV. STAT. (Remington, 1932) § 2257.

65. Children and Young Person's Act, 1933, 23 GEO. V, c. 12, § 50.

66. 1 GOUR, THE PENAL LAW OF INDIA (5th ed. 1926) § 677.

In the Philippine Islands the minimum age of criminal responsibility is nine years.⁶⁷ Between nine and fifteen years there is no responsibility unless the infant acted with discernment. An infant under eighteen who is found guilty is not sent to prison but to some charitable institution.⁶⁸ If he proves incorrigible there, he is sent to a correctional institution, but under a lesser sentence than is provided for the adult convicted for the same offense.⁶⁹ The Italian Penal Code provides that a person who, at the moment of committing an act, is under fourteen years of age, shall not be chargeable with it.⁷⁰ It is interesting to note that, despite the fact that children mature earlier in Italy and the Philippines than in the more temperate climates, the age of irresponsibility is greater there than in Minnesota and Washington.⁷¹

The French law provides that one under thirteen years of age cannot be held criminally responsible, while from the ages of thirteen to eighteen years there is a limited type of punishment inflicted.⁷² The German Penal Code sets fourteen years of age as the minimum at which a child can be held criminally responsible for the consequences of his acts.⁷³ From fourteen to eighteen years, a child is liable only if he has an insight into both the illegality and the punishability of the act. He has to have maturity of mental development *and* maturity of will.⁷⁴

It has been suggested that the establishment of juvenile or children's courts, with consequent provisions that children under certain specified ages shall not be guilty of any crime (usually with some exceptions such as murder or treason) but shall be held responsible as "delinquents" only, will do away to a great extent with the age lines of responsibility of infants.⁷⁵ This has had some effect upon the criminal responsibility of children, but in the cases exempted the question still arises.⁷⁶ For instance, if a child under sixteen were to commit murder while in the perpetration of a robbery—usually an offense of murder in the first degree—should he be held under the juvenile delinquency

67. PHILIPPINE REV. PENAL CODE (1933) art. 12. See *United States v. Maralit*, 36 Phil. 155 (1917); *United States v. Agadas and Sabacahan*, 36 Phil. 246 (1917).

68. PHILIPPINE REV. PENAL CODE (1933) art. 80.

69. *Ibid.* art. 68.

70. CODICE PENALE, tit. 4, c. 1, art. 97 (1931).

71. *Supra* note 64.

72. DALLOZ, CODES D'AUDIENCE (1934) Code Penal art. 66.

73. JUGENDGERICHTSGESETZ §§ 1, 2. I am indebted to Doctor Anton Chroust, Research Fellow of Harvard Law School 1937-38, who translated these sections for me.

74. *Ibid.* § 3.

75. MILLER, CRIMINAL LAW (1934) § 34.

76. For instance the N. Y. PENAL CODE (Gilbert, 1935) § 2186, exempts acts which are punishable by death or life imprisonment.

acts, or should he come within the crime of murder in the first degree which is often exempted from those statutes? ⁷⁷

It appears, in conclusion, that the modern law is in much the same confusion with reference to the ages of criminal responsibility of children as was the old law. Upon only one thing are all jurisdictions agreed and that is that there should be some mitigation of the rules of criminal law with reference to the responsibility of children. All are agreed that children below seven should not be punished, and some jurisdictions say that it should range from that to fourteen years of age. The age lines do not always appear to coincide with the probable age of puberty in the different zonal climates. This would seem to reflect new theories of criminal responsibility in many of the jurisdictions and would appear to be a break with historical dogma. There is much variation between the extremes. Between whatever age is set as the minimum, however, and that which is set as the maximum, the view seems to be that in order to hold a child within those ages responsible criminally for the consequences of his acts, the state must show that he had sufficient mental capacity to know what he was doing and that it was wrong.⁷⁸

II. Intelligence Tests—Responsibility of Mental Infants

Early in the law it was recognized that idiocy was a factor negating criminal responsibility, with complete ignorance as its hall-mark.⁷⁹ The terms "imbecile" and "moron" do not appear in the early cases and down to the present time do not seem to have definite legal significance.⁸⁰ Since the development of intelligence tests psychologists have

77. *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932); Goldsmith, *Legal Evidence in the New York Children's Courts* (1934) 3 BROOKLYN L. REV. 24; Notes (1934) 3 BROOKLYN L. REV. 293, (1932) 32 COL. L. REV. 1238. In general see LOU, *JUVENILE COURTS* (1927).

78. *Supra* note 24; *State v. George*, 4 Penne. 57, 54 Atl. 745 (Del. 1902); *State v. Aaron*, 4 N. J. L. 231 (1818); *Law v. Commonwealth*, 75 Va. 885 (1881); see *Allen v. United States*, 150 U. S. 551, 558 (1893).

79. BRYDALL, *NON COMPOS MENTIS OR THE LAW RELATING TO NATURAL FOOLS, MAD FOLKS, AND LUNATICK PERSONS* (1700) 6; CO. LITT. *247b; DALTON, *THE COUNTRY JUSTICE* (1643) c. 95; 1 HALE, *PLEAS OF THE CROWN* (1736) **29, 30. FITZHERBERT, *THE NEW NATURA BREVIVM* (1652) **202, 233: "And he who shall be said to be a sot and idiot from his birth, is such a person who cannot accompt or number twenty pence, nor can tell who was his father, or mother, nor know how old he is, etc. so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss: But if he have such understanding that he know and understand his letters, and to read by teaching or information of another man, then it seemeth he is not a Sot, nor a natural Idiot." Note that here Fitzherbert was not considering the criminal law, but rather the *Writ de Idiota Inquirendo*. 1 BL. COMM. *303; cf. *Lindsley's Case*, 44 N. J. Eq. 564, 15 Atl. 1 (1888). Obviously "intelligence" and "criminal capacity" are not synonymous; but a measure of the intelligence of a defendant should be a factor to aid the trier of fact in determining whether the defendant had capacity to formulate or entertain the intent required in the particular act with which he is charged.

80. *State v. Kelsie*, 93 Vt. 450, 108 Atl. 391 (1919); *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (1918) *semble*.

attributed to these terms certain well defined meanings.⁸¹ In this country these meanings were first promulgated authoritatively in 1910.⁸² In England they are based upon social considerations.⁸³

With the advent of intelligence tests it might be expected that there would be some modification of the criminal law with respect to responsibility of those of low mentality. The first intelligence test was probably formulated by Galton in England about 1883.⁸⁴ It was brought into general use after the development of the Binet-Simon test in 1905. Since that time there have come the Stanford Revision of the Binet-Simon test, the Army Alpha method of group testing, and other tests of various types, devised to conform to different situations.⁸⁵ It would do no good at this time, nor is this the proper place, to enter into a discussion of the techniques and methods of using these tests. Their use has been both praised and condemned.⁸⁶ They have been constantly improved with a view to adapting them to different circumstances, and a great body of data has been built up around them and their results.⁸⁷ From such data it would seem that the results of these tests should more accurately indicate the relative intelligence of the person tested than would the older means of general reputation in the community, testimony of physicians after a cursory examination, or the general appearance of the defendant on the witness stand. Relative intelligence should have some bearing upon the ability to form a criminal intent. This in turn would be directly controlling on the question of criminal responsibility or capacity, which is the problem in which the court is directly interested in most criminal cases. For that reason it was quite obvious that the courts would, sooner or later, have to take cognizance of the results of intelligence or mental tests. Just what effect the results of these tests should have upon the question of criminal capacity was the problem which the courts had to decide. It

81. 12 ENCYC. BRIT. (14th ed. 1929) 387; COOK, *INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY* (1921) 11 *et seq.*

82. 9 ENCYC. BRIT. (14th ed. 1929) 140.

83. 3 & 4 GEO. V, c. 28 (1913).

84. For a discussion of the history of intelligence tests see 12 ENCYC. BRIT. (14th ed. 1929) 461; 10 ENCYC. SOC. SCI. (1933) 323. See also SMITH, *THE PSYCHOLOGY OF THE CRIMINAL* (1922) c. 2.

85. HEALY, *THE INDIVIDUAL DELINQUENT* (1915) c. 6; TERMAN, *THE MEASUREMENT OF INTELLIGENCE* (1916) 51 *et seq.*

86. Ballantine, *Criminal Responsibility of the Insane and Feeble Minded* (1919) 9 J. CRIM. L. 485; Wallin, *Who is Feeble-Minded?* (1916) 6 J. CRIM. L. 706; Kohs, *"Who is Feeble-Minded?"* (1916) 6 J. CRIM. L. 860; Wallin, *"Who is Feeble-Minded?" a Reply to Mr. Kohs* (1916) 7 J. CRIM. L. 56.

87. For a general discussion of intelligence tests, their history, development, and use in the law, the following are interesting: 12 ENCYC. BRIT. (14th ed. 1929) 461; GAULT, *CRIMINOLOGY* (1932) 96 *et seq.*; HEALY, *THE INDIVIDUAL DELINQUENT* (1915) c. VI; KERR, *FORENSIC MEDICINE* (1935) 181 *et seq.*; ROSANOFF, *MANUAL OF PSYCHIATRY* (1927) 500 *et seq.*; SMITH, *THE PSYCHOLOGY OF THE CRIMINAL* (1922) c. II; TERMAN, *THE MEASUREMENT OF INTELLIGENCE* (1916); Kuhlmann, *A Further Extension and Revision of the Binet-Simon Scale* (1918) 8 J. CRIM. L. 890.

presented a case where a new scientific device was brought before them, and their decision could be based upon either of two competing premises: 1. to liken it to old circumstances and decide by analogy; 2. to recognize it as a new situation and decide it upon the basis of new discoveries and socially desirable ends.

Dr. Goddard says that the testimony of experts relating to intelligence tests and their results were first used in the case of *People v. Gianini* in New York in 1914.⁸⁸ Gianini was sixteen years old with the mentality of a ten or twelve year old child, which would place him as a high grade imbecile, according to Dr. Goddard. When he reached the fifth grade in school, Gianini dropped down in his standings because he had reached his intellectual limit. One day he enticed his teacher to visit his father about his school work, lied as to where he lived, got her to walk farther into the country and brutally killed her by hitting her with a monkey-wrench and then cutting her throat. He dragged her body off the road and went home. He slept well that night, then made an ineffectual attempt to escape, an attempt which showed lack of planning or direction. When apprehended, he readily confessed without any emotion. The state contended that the killing was done deliberately and in cold blood. Dr. Goddard showed that every action was typical of an imbecile, and the jury found that he was not guilty on the ground of criminal imbecility. The facts of this case could be duplicated a number of times where the defendant was found guilty with the very reason given by the court that the crime showed cunning, planning and premeditation.⁸⁹

As has already been discussed, there is a presumption at common law regarding the criminal irresponsibility of children; and age lines have now been crystallized in all jurisdictions. With the results of intelligence tests available in "mental ages", there arose a question whether one who was over the chronological age of fourteen, but who was less than that in mental age, should have the benefit of the presumption of incapacity. This presented the courts with a problem that could

88. GODDARD, *THE CRIMINAL IMBECILE* (1915). In this book Dr. Goddard discusses three cases, from widely separated parts of the country, of imbeciles and their crimes, showing that the acts, while appearing in certain aspects to be the product of a mature mind, yet because other acts were present, the entire crime was typical of an imbecile's way of doing things.

89. Cf. the following cases: "We cannot, therefore, recognize the distinction (between weak-mindedness and insanity and idiocy) which is sought to be ingrafted on the law. It would lead to endless metaphysical discussions on the philosophy of the mind. Besides, experience teaches that, in point of fact, the cunning and crafty are much more likely to conceal and misrepresent the truth, than those who are less gifted. It is the trite observation of all travelers, that if you wish to learn the truth with respect to the health of a country, you must interrogate the children and servants about the matter." *Studstill v. State*, 7 Ga. 2, 12 (1849); *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (1918); *Woodruff v. State*, 164 Tenn. 530, 51 S. W. (2d) 843 (1932); *Rodgers v. State*, 28 S. W. 685 (Tex. Crim. App. 1894).

be solved in one of two ways: (1) by generalizing and saying that the rule of infant's irresponsibility had always been measured by chronological age, thus *apparently* following the doctrine of *stare decisis* without more; or (2) by looking into the historical origin of the rule to determine why it was adopted, and then determining whether, in view of modern scientific knowledge, it should be applied in this new situation. The results of the cases are interesting.

*State v. Saxon*⁹⁰ appears to be the first case to raise the point. There the defendant was physically and by chronological age an adult. He shot and killed his wife. On his trial for murder, in which he was convicted, his counsel requested the court to charge the jury, "If you find that the mentality of the accused was very low, and not as high in some departments as a child of six years old, then your verdict should be acquittal." The instruction was rejected. The Supreme Court of Connecticut said that it was not error, that it was not pointed out in what departments the defendant's mentality was less than that of a child of six years which would relieve him from criminal responsibility. The court went further, however, and said that, "A child, even if the average one be taken, furnishes at best a poor criterion by which to test the mentality of a person of full age."⁹¹ It did not say whether that statement was based upon its opinion merely, or whether it was based upon psychological investigation. At best it was just "talk".

The next case chronologically was *People v. Oxnam*⁹² in California. Here the defendant, seventeen or eighteen years of age, was convicted of murder while in the perpetration of a burglary. He was sentenced to death. On a motion for a new trial, one of the grounds was newly discovered evidence which consisted of affidavits of four doctors, at least two of them Ph.D.'s and experts in the use of intelligence tests. Their statements were to the effect that the defendant was a low grade moron, "about eight" or "less than ten" years in mental age as shown by the Binet-Simon or the Stanford Revision of the Binet-Simon test, and that these tests were the most satisfactory for determining the mental age of a person. The court said that no satisfactory reason was shown why this evidence was not presented on the trial, that under the generally prevailing rule of procedure the absence of such a showing would not warrant the court in granting a new trial.

90. 87 Conn. 5, 86 Atl. 590 (1913). It is interesting to note that Dr. Goddard said that intelligence tests were first used in evidence in the *Gianini* case in New York in 1914. This case was tried over a year before the *Gianini* case and there appears testimony of a mental age. The facts in the opinion do not disclose how that conclusion was reached.

91. *Id.* at 16, 86 Atl. at 595.

92. 170 Cal. 211, 149 Pac. 165 (1915). To same effect, *People v. Day*, 199 Cal. 78, 248 Pac. 250 (1926).

But the court again went further and said that, regardless of the above, "we are satisfied that we cannot properly hold, in the light of all the evidence given on the trial, that the showing made by the affidavits was such as to make it manifest that a different result would or should be reached on the question of defendant's mental capacity in view of the alleged newly discovered evidence." ⁹³ As a result the court affirmed the conviction.

It will be noted that these two cases did not pass directly upon the effect of mental ages and the analogy to the ages of infant's irresponsibility. They do, however, reflect the attitude of the courts toward low mentality, and seem to show that it is to be considered on a par with the legal test of insanity.

The Vermont court was first confronted with the exact question. In *State v. Kelsie* ⁹⁴ the defendant was thirty-four years old. He was charged with murder and convicted. A psychiatrist testified as an expert that the defendant had a mentality of a child of only eight years. He was further asked: "How would that classify him?" The answer was, "As an imbecile." On objection this was stricken out and the expert was not allowed to testify that the defendant was an imbecile. The Supreme Court of Vermont held that this was not error as it would not add anything to the testimony already given, and furthermore, that the term "imbecile" has no fixed meaning in law and would require definition. With reference to the purpose of this evidence the court said:

"The purpose of this evidence is apparent. At common law an infant under the age of seven years was conclusively presumed to be incapable of committing crime. Between seven and fourteen he was presumed to be incapable. . . . So if common law rules were to be applied, the respondent had by this evidence, if believed, raised a presumption of his incapacity, and made a jury question of it. If the witness had added that he regarded Kelsie an imbecile, the statement would have afforded the jury no additional aid in estimating the man's mentality . . . the law makes no distinction between imbecility and insanity. . . ." ⁹⁵

The court then said that the test to be applied is the ordinary test which in Vermont embraces the power to resist an impulse to commit the act charged. It will be noted that the court did not directly pass upon the

93. *People v. Oxnam*, 170 Cal. 211, 217, 149 Pac. 165, 168 (1915). Note that this was a capital case. Compare the statement in *Andersen v. State*, 43 Conn. 514 (1876), where in a similar situation the court said that unsoundness of mind is not susceptible of direct proof, and that all the acts of the defendant bearing upon the question are important for decision. Hence the court said that it could not hold that more evidence, offered on petition for new trial where a life was at stake, would not tend to raise a reasonable doubt in the minds of the trier of the facts, and awarded a new trial.

94. 93 Vt. 450, 108 Atl. 391 (1919).

95. *Id.* at 452, 108 Atl. at 392. It will be noted that this is the ordinary test of insanity in Vermont. *Doherty v. State*, 73 Vt. 380, 50 Atl. 1113 (1901).

question, but it is apparent from the affirmance of the conviction that it did not approve giving an adult with an infantile mental age the benefit of the common law rules as to infant's irresponsibility.

State v. Schilling,⁹⁶ decided by the New Jersey court, is the first case really to decide the point. This was a murder case, the defense insanity. The defendant was twenty-eight years of age, but had a mental age of eleven. He asked the court to charge the jury that, if it found him to have a mental age under twelve years, he would be presumed to be incapable of committing a crime and the burden would be on the state to show capacity before they could convict him. This is the same type of instruction to which an infant under the chronological age of twelve would be entitled. The trial court refused so to charge, and the appellate court held that such refusal was not reversible error. The court said that the burden of proof of the issue of mental incompetency is upon the adult defendant if he wishes to rely upon it as a defense. Further, the opinion definitely rejected the view that a mental age below fourteen could raise a presumption of incapacity. The following statement of the New Jersey court shows the method of approach adopted:

"There is a vast difference between a child at the age of eleven years and that of a man of twenty-eight, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years, requiring the state to rebut it. When a man reaches manhood the presumption is that he possesses the ordinary mental capacity normally pertaining to his age. . . . *The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind*, and it is a merciful rule established by the courts due to his tender years, but that reason does not apply when he comes to manhood. Deficiency of intellect is a species of insanity, and when that is set up as a defense for crime the burden is on the accused to prove it, the presumption being that he is sane."⁹⁷

The court, for its authority as to criminal irresponsibility of children, relied upon *State v. Aaron*,⁹⁸ a case decided by the same court 102

96. 95 N. J. L. 145, 112 Atl. 400 (1920). There is a trenchant dissent in this case by three of the justices, where Swayze, J., says: "To me the case of idiocy or mental incapacity is as much for the jury on the question of criminal intent as in the case of insanity. Shocking as the case is, I cannot bring myself to sustain a conviction which I think is not based on a proper statement of the law." *Id.* at 157, 112 Atl. at 406. See GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 195 *et seq.*; Davidson, *Mental Deficiency and Criminal Responsibility* (1935) 1 N. J. L. REV. 123.

97. *State v. Schilling*, 95 N. J. L. 145, 148, 112 Atl. 400, 402 (1920). (*Italics supplied.*)

98. 4 N. J. L. 231 (1818).

years before. As Professor Sheldon Glueck has pointed out,⁹⁹ the *Aaron* case is not authority for the reasons given by the court in the *Schilling* case. The court in the *Aaron* case specifically said that the criminal responsibility of a child between the ages of seven and fourteen depends upon the discernment of the infant to know right from wrong; his mental capacity is all important. In this connection, Southard, J., in the *Aaron* case said:

"The distinctions, which have been taken in the books, as to the age, when crimes may be committed and the criminal punished, are in no inconsiderable degree arbitrary. The great subject of inquiry in all cases ought to be, the legal capacity of the prisoner; and this is found in some, much earlier than others. The real value of the distinctions, is, to fix the party upon whom the proof of this capacity lies. . . . If the intelligence to apprehend the consequences of acts; to reason upon duty; to distinguish between right and wrong; if the consciousness of guilt and innocence be clearly manifested, then this capacity is shown: in the language of the books, the accused is *capax doli*, and as a rational and moral agent, must abide the results of his own conduct."¹⁰⁰

It is to be noted that in the *Aaron* case the court relied almost entirely upon Hale's *Pleas of the Crown* for its authority. And it must be remembered that Hale stressed the mental capacity of the infant defendant, for in talking of *insane* persons he said, ". . . such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."¹⁰¹ Hawkins, following Hale, said that the criminal responsibility of an infant is based more upon the strength of the offender's understanding than by his years and days.¹⁰² Furthermore it will be noted that, historically, the adoption of age lines of the responsibility of infants did not just happen; they were adopted only after centuries of speculation and variance in the rulings of the courts of the various countries, and were based upon three things: 1. the inability of an infant to speak; 2. capacity of an infant to know what he was doing and to know right from wrong; 3. the influence of the idea that puberty meant maturity and consequent responsibility.¹⁰³ Hence the court in the *Schilling* case was historically incorrect in its statement of reasons for its decision. When it is remembered that the intelligence of a person is measured somewhat by his perceptions, reactions to stimuli, memory, ability to grasp situations and

99. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 196.

100. *State v. Aaron*, 4 N. J. L. 231, 245 (1818).

101. 1 HALE, *PLEAS OF THE CROWN* (1736) *30.

102. 1 HAWKINS, *loc. cit. supra* note 54.

103. 1 STEPHEN, *loc. cit. supra* note 12.

the correlation of previous experiences, it will at once be seen that his mental age and intelligence quotient do shed some light upon the "strength of the offender's understanding".

The *Schilling* case was followed some two years later in a case where the chronological and mental ages were similar.¹⁰⁴ A defense expert testified that the defendant was subnormal mentally, also suffering from epilepsy. During cross-examination on the question of mental ages, he said that the average mental age of men in the Army was twelve years. Concerning this testimony the appellate court said:

" . . . thereby clearly demonstrating, as he frankly admitted (he said, 'It was not worth shucks as applied to adults'), what has been the observation of practically all our judges . . . that the so-called mental age theory of the experts, at least as applied to adults,¹⁰⁵ is based upon so arbitrary and unnatural a scale of ages as a standard as to be utterly misleading to a layman and practically useless, if not worse than useless, in the administration of justice by trial by jury."¹⁰⁶

The court further said that the mental and medical experts of the *state* were unanimous in declaring the defendant a normal man both physically and mentally. Here are presented some of the difficulties in these cases in the use of intelligence tests as diagnostic aids in the determination of feeble-mindedness. First, there was a conflict between the experts, but that is common, and even lay witnesses are not always agreed whether their neighbor is weak-minded or insane. Then there was a graver question, upon the theory of which the experts have somewhat disagreed: the question of the application of mental ages to adults.¹⁰⁷ This raises a problem that is vital in these cases—whether the evidence of the results of the mental tests alone should be sufficient to determine a mental age for use in criminal cases. It is suggested that in most cases, and certainly in those concerning adults, corroborative evidence should be availed of by the experts before an opinion is expressed. This would require not only a thorough mental examination but also consideration of other factors, such as physical condition, family history, and ability to take one's place in society. Some psychologists have suggested that this should be done in most, if not all, cases.¹⁰⁸

104. *State v. Ehlers*, 98 N. J. L. 236, 119 Atl. 15 (1922).

105. See SMITH, *THE PSYCHOLOGY OF THE CRIMINAL* (1922) 33; Kohs, *supra* note 86; Richmond, *The Criminal Feeble-Minded* (1931) 21 J. CRIM. L. 537; Richmond, *The Criminal Feeble-Minded* (1931) 48 MED. L. J. 10, 15; Wallin, articles cited *supra* note 86.

106. *State v. Ehlers*, 98 N. J. L. 236, 242-3, 119 Atl. 15, 18 (1922).

107. *Supra* note 105.

108. GODDARD, *THE CRIMINAL IMBECILE* (1915) 86; Doll, *On the Use of the Term "Feeble-Minded"* (1918) 8 J. CRIM. L. 216; Newkirk, *On the Diagnosis of Feeble-Mindedness* (1913) 4 J. CRIM. L. 278. See Note (1916) 6 J. CRIM. L. 757.

Obviously the person making the mental test for the purpose of testifying should be an expert in that field and should be able to qualify as such on the trial. In a Montana case¹⁰⁹ a school teacher, twenty-two years of age, used the Binet-Simon test upon the defendant, eighteen years old, who was charged with murder. On the trial she was asked, in effect, what was the mental age of the defendant. An objection was sustained. The court held that under the Montana statute,¹¹⁰ she was not a competent witness to express an opinion upon this point. The court further said that "low mentality would neither excuse nor justify his offense. The defendant was a witness in his own behalf, and the jury were thus afforded opportunity to observe his apparent degree of intelligence. It heard his incoherent and meaningless replies to questions asked, and needed no assistance, if any were required, in gauging his mental capacity. . . ." ¹¹¹ While it is dangerous in this situation to allow the testimony of persons not qualified as experts to go to the jury, it might well be asked whether even then it would not be a more nearly correct method, whether the real facts might not be more nearly reached by such tests than by the testimony of lay witnesses and the observations of a lay jury who see the defendant only from the disadvantageous position of the witness stand.

In *Commonwealth v. Stewart*¹¹² the question of an adult's mental age below fourteen raising the presumption of incapacity was first presented in Massachusetts, and the court refused to apply the common-law rule of infant's incapacity. Three years later, in 1929, it was directly raised again.¹¹³ A psychiatrist was asked by the defense, after the proper foundation had been laid, what was the mental age of the defendant, as a result of "your psychometric tests". The court sustained an objection to it; on appeal this was held not to be error, the appellate court saying, "This rebuttable presumption . . . refers to the physical age of the child and does not extend to one beyond the age of fourteen years."¹¹⁴ The court cited the *Schilling* and *Kelsie* cases, among others, as authority for its ruling.

109. *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927).

110. MONT. REV. CODE (1921) § 10531. "Facts which may be proved on trial. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

9. The opinion of a witness . . . of a question on science, art, or trade, when he is skilled therein.

10. The . . . opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given."

Cf. Terman, *The Binet Scale and the Diagnosis of Feeble-Mindedness* (1917) 7 J. CRIM. L. 530, 534.

111. *State v. Schlaps*, 78 Mont. at 578, 254 Pac. at 862.

112. 255 Mass. 9, 151 N. E. 74, 44 A. L. R. 584 (1926).

113. *Commonwealth v. Trippi*, 268 Mass. 227, 167 N. E. 354 (1929), 43 HARV. L. REV. 138, 24 ILL. L. REV. 600 (1930), (1930) 5 NOTRE DAME LAWY. 98.

114. *Id.* at 230, 167 N. E. at 356.

The State of Washington has a statute which provides, in effect, that any person who commits a crime while insane, or in a condition of mental irresponsibility, shall be deemed criminally insane.¹¹⁵ In a case in 1929 the defendant, chronological age of twenty-four years, murdered a girl. He was charged with the murder, pleaded insanity or mental irresponsibility, was found guilty and sentenced to be hanged.¹¹⁶ His attorney filed a motion to have the court appoint a commission to inquire into his sanity, thereby hoping to invoke the old rule that one cannot have sentence executed against him if he is insane at the time set for execution of the sentence. In support of his motion, the defendant's attorney filed two affidavits; the first from a physician with twenty years of experience in insanity cases, the other from the superintendent of the state custodial school where the defendant had been an inmate for some three and a half years. The first affidavit was to the effect that the defendant had been feeble-minded from childhood, that his mental condition was one which gradually grew worse instead of better, that he was then mentally irresponsible and incapable of distinguishing between right and wrong, and that this condition would continue. The affidavit from the superintendent of the custodial school described the mental condition of the defendant as that of a low grade moron, his chronological age twenty-four years, his mental age nine years. The trial court refused to appoint a lunacy commission, and this was held not to be error since it did not show an abuse of discretion. It is interesting to note that the court said that the test of insanity is the ability to distinguish between right and wrong with reference to the act under discussion, and that the term "mental irresponsibility" means something less than total or permanent insanity, but implies nothing not included in criminal insanity. Further, said the court, it cannot be held as a matter of law that a boy of nine years of age, or a person with a corresponding mentality, is incapable of mental capacity and moral freedom to do or to abstain from doing a criminal act. The conviction was affirmed, but the court mentioned that the trial court still had the power to impanel a jury to try the question of insanity.

From these cases, it is apparent that morons, imbeciles, and sometimes idiots, are considered to be on the same plane as normal persons; and the same tests of criminal irresponsibility are applied as in the ordinary cases of insanity.¹¹⁷ Through what appears to be a misconception of history, the first court passing upon the question held that adults of

115. WASH. REV. STAT. (Remington, 1932) § 2173.

116. *State v. Schafer*, 154 Wash. 322, 282 Pac. 55 (1929); s. c., 156 Wash. 240, 286 Pac. 833 (1930).

117. Gordon, *Mental Deficiency and the Importance of Its Recognition From a Medico-Legal Standpoint* (1918) 9 J. CRIM. L. 404.

a mental age under fourteen were not entitled to the presumption of incapacity that would apply to infants of that chronological age, and this has been cited and followed by later courts.

Some commentators support the ruling of the courts,¹¹⁸ others have advocated the contrary rule.¹¹⁹ One of the objections advanced to using mental ages is that a criminal, knowing that the lower mental age he exhibits will redound to his benefit, will purposely make a low score, thus negating the effect of the test. The same might be said, however, of the ordinary interview and the examination according to other methods made by a physician without special training in psychiatry. Certainly such a clever defendant would make "incoherent answers" in court to impress a jury with his imbecility.

The real answer to the objection, however, is the fact that in at least two cases, the results of intelligence tests have been used by the state to rebut the defense of insanity or mental defect. In *State v. Wade*¹²⁰ in Connecticut the defendant was charged with murder and his defense was insanity. By this was meant that he was subnormal mentally in that he had a defective mental constitution with deficient self-control so that he could not take his place in society. In rebuttal the state called an expert in mental diseases who testified that he had applied the Stanford revision of the Binet-Simon intelligence test and that the defendant had a mental age of between nine and half and ten and a half years, which was that of a high grade moron—a "stupid individual" as the court put it. Although some eight years before the Connecticut court¹²¹ had intimated that these mental ages would not raise the presumption of incapacity in favor of the defendant as it would for an infant, the evidence was important in showing that the defendant did have the capacity to know right from wrong with reference to his acts.

The *Wade* case involved another point which suggests the possibility of a further use of intelligence tests in certain circumstances. The state's attorney in this case offered the testimony of two psychiatrists concerning the mental age of three of the state's witnesses as shown by the results of the Binet-Simon test, the same one applied to the defendant, so that the jury could compare, in their own minds, their estimates

118. Herzog, *Should Mental or Physical Age Rule as to Criminal Responsibility?* (1929) 46 MED. L. J. 98. But cf. HERZOG, *MEDICAL JURISPRUDENCE* (1921) 425; Davidson, *Mental Deficiency and Criminal Responsibility* (1935) 1 N. J. L. REV. 123.

119. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 197; HERZOG, *loc. cit. supra* note 118.

120. 96 Conn. 238, 113 Atl. 458 (1921). This case was tried on the plan suggested by Doctor Goddard in his book, *The Criminal Imbecile*, but the result was different from the *Gianini* case, *supra* note 88.

121. *State v. Saxon*, 87 Conn. 5, 86 Atl. (1913), cited *supra* note 90.

of the mental character and intelligence of the witnesses with that of the defendant in an effort to discredit the testimony of the experts for the defense as to the relative mental ability of the defendant. The court rejected the evidence on the ground that it would open the door to collateral issues. It felt that expert medical evidence, while an indispensable aid to justice, might be carried too far on fine spun theories from the "real issues", and go beyond the point where the truth would be served. In an unreported case, however, such evidence was important, and evidently admitted.¹²² In California a man was indicted for incest with his two daughters, ages about fourteen and sixteen years old. The girls were interrogated separately and told the same stories of their father's debauchery. The defense was to the effect that an irate housekeeper, the children's mother being dead, had coached them to tell the stories. Their tests, by the Terman revision of the Binet-Simon test, showed that they were borderline cases. The older girl had trouble getting through the grammar school, saying that until she was relieved from her father's excesses she couldn't work. The younger girl could not pass the tests beyond the ten-year group and couldn't remember things of ordinary knowledge and use. Her lack of memory showed that she could not have been coached as the father claimed. He was convicted and sent to the penitentiary.

In *Clark v. State*¹²³ the defendant, nineteen years of age, charged with murder, was convicted and sentenced to the electric chair. His defense was insanity. To rebut this defense the state had a psychologist from the Bureau of Juvenile Research examine him mentally. The expert used three tests: the Stanford revision of the Binet-Simon scale, the Ohio literacy test, and the Parteus-Maze test. Under the first one, the defendant showed a mental age of thirteen years and three months; under the second, fourteen to fifteen years; and under the third, that of a child of ten. Hence, in reply to a question the expert testified that the defendant was potentially normal, saying that, if he had examined him under normal circumstances, this would have been higher. The court added, "As the defendant was nineteen years of age, this testimony was significant."¹²⁴ What was meant by this statement is not clear from the case. It may have indicated that the court was thinking of the age lines of responsibility for infants. The case is important, however, for the use of different tests demonstrates a method of exposing the malingerer and thus answers empirically one objection to the use of intelligence tests to show mental age when the subject is over

122. Note, *Intelligence Testing and Testimony* (1917) 8 J. CRIM. L. 594.

123. 23 Ohio App. 474, 156 N. E. 219 (1926).

124. *Id.* at 477, 156 N. E. at 220.

fourteen in order to raise the presumption of incapacity that exists in favor of an infant of like chronological age.

From the comparatively few reported cases where intelligence tests have been used it is apparent that the courts have, in most instances, refused to consider the newer findings in psychology, and have been guided by their own precedents and preconceptions as to what demonstrates a capacity to commit crime. Many times the evidence upon which the courts base their opinions as showing cunning, malice, or premeditation, would be shown by the psychologists, from case histories of hundreds of children, to be the very things which an infant of corresponding chronological age would do. A comparison of the *Gianini* case, discussed by Dr. Goddard,¹²⁵ with the statements of some of the courts to the effect that imbecility is not insanity or a defense unless it shows an incapacity to distinguish right from wrong with reference to the act in question,¹²⁶ or, in some cases, volitional control, shows the retardant effects of *stare decisis* upon this branch of the criminal law. Through all these decisions stalks the ghost of *McNaghten's* case,¹²⁷ although it did not decide any of these points and is factually distinguishable from every case involving feeble-mindedness in any degree.

As the courts are coming to recognize that the old rule asserting that a deaf and dumb person is an idiot no longer applies in the light of present-day knowledge,¹²⁸ might not a new generation of jurists, schooled in the newer trends of jurisprudence and the social sciences, recognize that there is a middle ground of responsibility¹²⁹ for persons

125. GODDARD, *op. cit. supra* note 8.

126. *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934); *Bridges v. State*, 43 Ga. App. 214, 158 S. E. 358 (1931); *Rogers v. State*, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999 (1907); *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927); *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457 (1909); *Hogue v. State*, 65 Tex. Crim. App. 539, 146 S. W. 905 (1912); *Rodgers v. State*, 28 S. W. 685 (Tex. Crim. App. 1894); *Rex v. Alexander*, 23 Cox C. C. 604 (1913); SULLIVAN, CRIME AND INSANITY (1924) 181 *et seq.*

127. "A rule [*McNaghten's* case] of such importance, which has become so completely imbedded in the administration of the criminal law, must be considered as no longer subject to challenge." *State v. Close*, 106 N. J. L. 321, 333, 148 Atl. 764, 769 (1930).

128. Holmes, *Law in Science and Science in Law* (1899) 12 HARV. L. REV. 443, 454, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1921) 210, 227.

129. *People v. Moran*, 249 N. Y. 179, 163 N. E. 553 (1928). *Contra*: *Commonwealth v. Devereaux*, 257 Mass. 391, 153 N. E. 881 (1926). In *People v. Koehn*, 207 Cal. 605, 609, 279 Pac. 646, 648 (1929) the jury interlined in the verdict, where it found a man guilty, but who was obviously mentally defective, ". . . and for obvious reasons, ask the Honorable Court to exercise leniency in the measure of punishment to be inflicted." Partial responsibility seems to be the rule in New Jersey. *Schilling v. State*, 95 N. J. L. 145, 112 Atl. 400 (1920). Sub-mentality has been used by an appellate court as a mitigating factor in reviewing sentence where it has power to review a sentence. *Cryderman v. State*, 101 Neb. 85, 161 N. W. 1045 (1917); Ballantine, *Criminal Responsibility of the Insane and Feeble Minded* (1919) 9 J. CRIM. L. 485; Keedy, *Criminal Responsibility of the Insane—A Reply to Professor Ballantine* (1921) 12 J. CRIM. L. 14; Weihofen, *Partial Insanity and Criminal Intent* (1930) 24 ILL. L. REV. 505; Note (1930) 79 U. OF PA. L. REV. 209.

mentally weak, and that the testimony of real experts in this field should be taken and given some credence in the decision of cases? Should the old doctrines still rule and require that a mentally defective person either be held to a full degree of responsibility for his acts, as is a normal person, or else be entirely acquitted? Should the physically adult "mental infant" be accorded the same treatment as the "physical infant"? The answers to these questions will depend to a great extent upon the theory of treatment of offenders. If that theory is the protection of society, as it would probably have to be in these cases, would it not be much better to recognize that there is such a person as a mentally defective delinquent who is not insane according to the prevailing legal tests, and place such a person in a hospital, colony, or school for the feeble-minded where he could be accorded humane treatment instead of either acquitting him and permitting him to return to society, or convicting him and sending him to prison. Many, if not most, of our prisons are overcrowded, without adequate facilities for segregation of this type of inmate. The known susceptibility of mental defectives to perversion and suggestion would hardly make imprisonment in the typical prison desirable.

Massachusetts and New York have special institutions for the segregation of defective delinquents. Other states, where conditions warrant, might well profit by their experience in this field. The methods of commitment and release from these institutions must be safeguarded, however, so that the rights of the individual, as well as of society, will be protected.¹³⁰

Coupled with the proper methods of segregation of this type of offender is the duration of the sentence of those convicted, or the period of confinement of those committed prior to conviction. In either case the only effective protection to society can be realized through the adoption of the wholly indeterminate sentence or commitment¹³¹ which would make release from the institution depend entirely upon the condition of the offender and his amenability to treatment. The question of release

130. A critical survey of these institutions and some suggestions for improvement in procedure and management will be found in Robinson, *Institutions for Defective Delinquents* (1933) 24 J. CRIM. L. 352. Valuable comments upon the workings of the Massachusetts law governing psychiatric examination of persons accused of crime may be found in Glueck, *Psychiatric Examination of Persons Accused of Crime* (1927) 36 YALE L. J. 632; Overholser, *Psychiatry and the Courts in Massachusetts* (1928) 19 J. CRIM. L. 75; Overholser, *Two Years' Experience with the Briggs Law* (1928-1930) of *Massachusetts* (1932) 23 J. CRIM. L. 415.

131. Most states have statutes providing for a partially indeterminate sentence, i. e., a specified minimum and maximum. Butler, *The Operation of the Indeterminate Sentence and Parole Law* (1916) 6 J. CRIM. L. 885; Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System* (1925) 16 J. CRIM. L. 9; Note (1928) 18 J. CRIM. L. 580.

should be determined by a board, skilled in deciding such questions and wholly free from political control.¹³²

The need for such an approach to this problem is graphically illustrated in a recent case reported in the newspapers.¹³³ One "Red" LeMaster, a man of twenty-seven years, was shot and killed while attempting to escape from a holdup of a filling station. Police records in Huntington, West Virginia, showed that he had first encountered the police when he was sixteen years old. He was arrested at that time for auto theft. His examination by a competent psychologist showed him to be a moron of the mental age of ten years and it was recommended that he be placed in an appropriate institution, or guarded closely. This was not done, and he was in court four more times in the next five years: first, for criminal assault, for which he was placed on probation; second, for breaking parole, for which he was sentenced to six months in jail; third, for armed robbery, he received a one-year sentence in the penitentiary; lastly, for armed robbery for which he was sentenced to six years in the state penitentiary. Seven armed robberies, one attempted robbery, and one breaking and entering were traced to him within approximately two weeks of his death at the hands of the police. One expression of sentiment aroused by this case was a cogent newspaper editorial demanding action in the form of modernization of the penal laws.¹³⁴

132. Cf. Dession, *Psychiatry and Criminal Justice* (1938) 47 YALE L. J. 319, 333, 335. See also Overholser, *The Place of Psychiatry in the Criminal Law* (1936) 16 B. U. L. REV. 322, 343; *Report of the Conference on Criminal Law Administration* (1935) 9 U. OF CIN. L. REV. 317, 474.

133. Herald-Advertiser, Huntington, W. Va., Feb. 27, 1938, p. 1, col. 6, 7.

134. "CRIMINAL NEGLIGENCE. An Editorial. Russell LeMaster was as much a victim of society's negligence as of his own criminal tendencies.

Eleven years ago this man was examined and classified as a moron by psychiatrists who recommended that he be confined in an institution for his own well-being as well as for the public safety.

That was in 1927 soon after LeMaster, then a lad of 16, had made his first of six appearances before the so-called bar of justice.

Court officials either were unable or unwilling to carry out the examiner's recommendation with the result that LeMaster's Bertillon card bears the following shameful record:

- 1927. Arrested for automobile theft. Probated.
- 1927. Arrested for criminal assault. Probated.
- 1929. Arrested for violating parole. Six months in county jail.
- 1930. Arrested for armed robbery. One year in state penitentiary.
- 1932. Arrested for armed robbery. Six years in state penitentiary.
- 1938. Killed by police after committing a series of armed robberies.

We call that record shameful because it is an indictment of West Virginia's entire system of criminal law. Here was a lad of sixteen who had demonstrated his inability to lead anything but an anti-social life, who had been pronounced sub-normal, incapable of judging between right and wrong and who merited incarceration in an institution from which there would have been no escape, no parole, no release on termination of a 'sentence'.

Friday night LeMaster paid the price that a negligent society set upon his head eleven years ago. His family will continue to pay in sorrow and shame until time obliterates even a memory of Russell LeMaster's tragic career.

Under the criminal law as it now stands in most states, mental defectives such as LeMaster are held to the same responsibility as mentally normal adults and are either acquitted entirely or convicted, without reference to their mental condition, which should be the important factor in the determination of their treatment for the protection of society. LeMaster became progressively worse. Despite the recommendation of the psychologist, he was allowed to go at large, an economic loss to society, a personal danger to its members, and a shame to his family. Such cases are common; yet most of our courts and legislatures will not consider the actual facts, clinging rather to the outmoded shibboleths of the past.

III. Summary and Conclusions

Children have always enjoyed a favored position before the law. Definite age lines by which to measure responsibility were not set until the seventeenth or eighteenth century, and through all the old cases the courts were more interested in the capacity of the child to entertain malice than they were in his chronological age. Today different jurisdictions have adopted varying age lines of responsibility for children. There does not appear to be any thread of logic running through these different ages, for countries in the warmer zones have, in certain instances, adopted higher age limits of absolute irresponsibility than have some of our temperately located states. The adoption of juvenile delinquency laws and the establishment of juvenile courts has, to some extent, made the question of the age lines of responsibility of children of less importance than it was during the last century. But in the cases which are exempted from juvenile delinquency laws and the jurisdiction of juvenile courts, the question is still important.

Since the development and improvement of intelligence tests during this century, the attempt to use the "infantile mental age" of an adult so as to bring him within the rules relating to the criminal irresponsibility of children has been quite generally rejected by the courts. The leading cases on the point did not consider the historical origin and reasons for the rule of irresponsibility of children, but said merely that the rule applies only to the physical age. Because of the doctrine of *stare decisis* in the common law, these cases are followed generally; consequently a physical adult with the intelligence of an infant is held to the same standard of responsibility as a normal adult. A new use for men-

Think about this case, you people who have it within your power to modernize this state's treatment of criminals.

Ask yourselves if it is reasonable to open the doors of our institutions—jails, prisons, penitentiaries, asylums, reformatories—for the release of men who cannot possibly avoid the bog of criminalism. Can there be more than one answer?" *Herald-Advertiser* (Huntington, W. Va.), February 27, 1938, p. 1, col. 7.

tal tests, that of estimating the "remembering" ability of a witness, suggests an additional useful purpose which they may serve in appropriate cases in the future.

While it is recognized that psychologists and psychiatrists are not entirely in accord as to the accuracy of the results when mental tests are administered to adults and the results given in mental ages, the courts should none the less make greater use of them, coupled with other information that case-workers and physicians could supply, in determining the criminal capacity of defendants, as well as for the individualization of treatment of mentally defective persons.

The troublesome question of criminal capacity of an offender might be avoided entirely as a point of substantive criminal law if each person who committed anti-social acts were to be treated according to his condition rather than by determining whether or not he had the requisite "intent" to commit the act with which he was charged. If the mental capacity of an offender were to be considered administratively, that is, considered by a board of skilled persons in determining what disposition should be made of him for the greatest protection to society, the trial by combat of alienists and other experts would be avoided, to the gain of society, the enhancement of the prestige of the criminal law, and the fairer and more humane treatment to all offenders.