

Penal Code Section 26(1): Rebuttable Presumption of a Juvenile's Incapacity to Commit a Crime—A Necessary Statute?

Penal Code section 26(1) deals with the traditional common-law presumptions of a juvenile's capacity to commit a crime. This article examines the role of this archaic statute within the modern juvenile justice system.

On the evening of February 26, 1976, a young woman was walking door to door in a neighborhood of Valinda, California, selling encyclopedias. In a poorly lighted area a thirteen year old boy attacked her. The juvenile held an eight inch knife to the woman's neck, forced her from the street and raped her. The juvenile then took three dollars from her purse and fled.¹ The police subsequently apprehended the boy and, pursuant to California's Welfare and Institutions Code section 602,² the juvenile court ordered that he be made a ward of the court.

The court of appeals reversed the juvenile court,³ however, on the basis of California Penal Code section 26(1) which provides:

All persons are capable of committing crimes except those belonging to the following classes:

One—children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.⁴

The appellate court decided that the juvenile did not know the

¹ In re Tony C., 21 Cal. 3d 888, 900, 582 P.2d 957, 964, 148 Cal. Rptr. 366, 373 (1978).

² CAL. WELF. & INST. CODE § 602 (West Cum. Supp. 1979).

Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining a crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

³ In re Tony C. (June 29, 1977) 20 Crim. 29408 [Unpub. opn.].

⁴ CAL. PENAL CODE § 26(1) (West 1970).

wrongfulness of his act and therefore could not be made a section 602 ward.⁵ Section 26(1) thus enabled the juvenile to escape juvenile court supervision despite his sexual assault on the woman.

Although the California Supreme Court reinstated the juvenile court ruling in this case,⁶ this scenario illustrates the problem section 26(1) creates in California: a juvenile who commits a wrongful act may nonetheless escape control by the juvenile justice system as a result of section 26(1).⁷ This situation is not in the best interests of the juvenile or the state.

This article examines the historical background and development of section 26(1) and determines that it has become an archaic and unnecessary rule. It next discusses the confusion created by the section 26(1) "clear proof" requirement. Finally, the article points out conflicts between the statute and some of the basic goals of juvenile law and concludes that the juvenile justice system should no longer use section 26(1) in its proceedings.⁸

⁵ In re Tony C. (June 29, 1977) 20 Crim. 29408 [Unpub. opn.].

⁶ In re Tony C., 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978). The grounds for reversal were nothing more than a different interpretation of the facts. The appellate court looked at the facts and decided they did not constitute clear proof that the boy knew the wrongfulness of his conduct. The Supreme Court looked at the same facts and interpreted those facts as constituting overwhelming proof that the boy knew his act was wrongful. Every case cannot be run up the entire appellate court ladder to get three different opinions on what is clear proof. It is doubtful that this case would even have gone to the Supreme Court but for some other important issues involved in the case.

⁷ As Sacramento Assistant District Attorney Greg Thompson explains, if the state is unable to prove the section 26(1) requirement in the section 602 proceeding, the court can do nothing with the juvenile. (Telephone interview with Greg Thompson, Assistant District Attorney, Sacramento County, November 14, 1978).

⁸ Legislative repeal of section 26(1)'s use in the juvenile hearing could easily accomplish this. Arguably, a court decree could also accomplish this since it was a court decree that initially interpreted section 26(1) to apply to section 602 proceedings. In re Gladys R., 1 Cal. 3d 855, 864, 464 P.2d 127, 133, 83 Cal. Rptr. 671, 677 (1970). The only other application of section 26(1) arises in a criminal trial where an adult charged with a sex crime against a child claims the child was an accomplice whose testimony about the crime requires corroboration. The courts use section 26(1) to determine if the child had the capacity to consent. If the court determines that the child could not consent, the child cannot be deemed an accomplice and the child's uncorroborated testimony will support a judgment of conviction. See *People v. Terry*, 180 Cal. App. 2d 48, 4 Cal. Rptr. 597 (2d Dist. 1960); *People v. Becker*, 140 Cal. App. 162, 35 P.2d 196 (2d Dist. 1934); *People v. Singh*, 62 Cal. App. 450, 217 P.2d 121 (3d Dist. 1923); *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031 (1912). The application of section 26(1) in this context is entirely different from its original purpose and its present use in the juvenile proceeding. See notes 9 to 21 *infra*. In this situation the child is the victim of the crime rather than the one committing the crime. It is only

I. AN ARCHAIC RULE

Section 26(1) was law in California when it did not have an independent juvenile justice system. It operates now, however, within a system that separately provides for juveniles. Section 26(1) must be examined within both of these contexts to adequately judge its validity.

A. *The Common Law Background*

The common law entertained several presumptions regarding the capacity of a child to commit a crime. The law presumed conclusively that a child under the age of seven could not commit a crime.⁹ The common law also established a rebuttable presumption that juveniles between the ages of seven and fourteen were incapable of forming criminal intent.¹⁰ Finally, the law presumed that a juvenile over the age of fourteen was capable of committing a crime.¹¹

These common law presumptions have ancient origins.¹² Early English courts developed the presumptions in response to the inadequacies of the existing criminal system. Prior to their development, society's punishment of young children was unreasonably severe.¹³ For example, Blackstone cites a case in which an eight year boy was hanged for burning a barn.¹⁴ Such extreme punishment occurred because children were subject to treatment within the same criminal system as adults.¹⁵ The courts came to

when section 26(1) is applied to the juvenile proceeding that the problems discussed in this article occur.

⁹ R. PERKINS, CRIMINAL LAW 837 (2d ed. 1969) (hereinafter cited as PERKINS); *In re Gault*, 387 U.S. 1, 16 (1966). Also at common law a boy under the age of fourteen was considered conclusively incapable of committing a rape. 4 W. BLACKSTONE, COMMENTARIES *212. In California the law used to be that a child under the age of fourteen could not be convicted of rape unless his physical ability to accomplish penetration was proved as an independent fact, beyond a reasonable doubt. CAL. PENAL CODE § 262, repealed by Stat. 1978, ch. 29, § 1, p. 203, eff. March 29, 1978.

¹⁰ PERKINS, *supra* note 12, at 837. 4 W. BLACKSTONE, COMMENTARIES *22-24; *Allen v. United States*, 150 U.S. 551, 558 (1893); *Clay v. State*, 143 Fla. 204, 208, 196 So. 462, 453 (1940); *Triplet v. State*, 169 Miss. 306, 152 So. 881 (1934).

¹¹ *Id.*

¹² For discussions on the development of the juvenile justice processes, see National Council of Juvenile Court Judges, *The Philosophy and Theory of the Juvenile Court*, 23 JUV. COURT JUDGES J. 3 (1972); Comment, *A Look at the California Juvenile Court Past, Present and Future*, 1 LINC. L. REV. 166 (1966); *State v. Monahan*, 15 N.J. 34, 35, 104 A. 2d 21, 22, 48 A.L.R. 641, 643 (1954).

¹³ 4 W. BLACKSTONE, COMMENTARIES *24.

¹⁴ See also *People v. Teller*, 1 Wheeler's Criminal Cases 231, 232 (1823). In

recognize, however, that children were less mature and therefore less culpable than adults. Since punishment was based on culpability children should not be subject to the same criminal standards as adults.¹⁶ The common law courts thus developed the presumptions relating to a child's capacity to commit a crime in order to prevent a unitary criminal justice system from punishing and treating juveniles in the same manner as adults.¹⁷

California Penal Code section 26(1), enacted in 1872,¹⁸ is a modified version of the common law rule regarding the capacity of juveniles to commit crimes.¹⁹ Unlike the common law, section 26(1) does not conclusively presume that a child under the age of seven cannot commit a crime. Instead, section 26(1) provides that all children under the age of fourteen are subject to a rebuttable presumption of incapacity.²⁰ Although the specific age classifications of the common law rules and section 26(1) are different, the rationale behind the rules is the same—to protect children from the harshness and unfairness of a unitary criminal system.

To understand the problems that section 26(1) creates, it is necessary to understand the way it operates. Section 26(1) applies only to juveniles under the age of fourteen in section 602 proceedings.²¹ A section 602 proceeding is a wardship hearing which

this case there are examples cited where a 13 year old girl was burnt for killing her mistress; and a 10 year old boy was hung for killing one of his companions.

¹⁶ PERKINS, *supra* note 9, at 837.

¹⁷ The author is using the term "unitary system" here to refer to the criminal justice system prior to the development of the separate juvenile court system. The term "dual system" will refer to the criminal justice system containing both a juvenile and adult criminal process.

¹⁸ CAL. PENAL CODE § 26(1) (West Cum. Supp. 1979). Section 26(1) was based on the New York Penal Code sections 18 and 19, CAL. PENAL CODE § 26(1) (McKinney's Cum. Supp. 1978). These New York statutes, in turn, were codified as a form of the common law presumptions regarding capacity. Section 18 was a direct codification of the conclusive presumption that a child under seven could not commit a crime. Section 19 limited the applicable range for the rebuttable presumption of incapacity for ages seven to twelve. NEW YORK PENAL CODE §§ 18 and 19, THE CODE OF CRIMINAL PROCEDURE AND PENAL CODE OF THE STATE OF NEW YORK (1906).

The New York legislature realized that unless they made a special provision, children subjected to the harshness of the criminal process would lose a chance for reform and a normal life thereafter. *People v. Pollack*, 154 App. Div. 716, 139 N.Y.S. 831 (1913); H. ROTHBLATT, *CRIMINAL LAW OF NEW YORK*, at 387 (1971). Thus, New York adopted various infancy statutes and among them were sections 18 and 19 of the PENAL CODE.

¹⁹ CAL. PENAL CODE § 26(1) (West 1970). *In re Gladys R.*, 1 Cal. 3d 855, 863, 464 P.2d 127, 133, 83 Cal. Rptr. 671, 677 (1970).

²⁰ *Id.*

²¹ *In re Gladys R.*, 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 735 (1970).

applies to children under the age of eighteen who have violated a law which defines a crime.²² Under section 26(1), the state has the burden of proving that the juvenile, in a section 602 proceeding, knew the wrongfulness of the act at the time he or she violated the law.²³ If the state cannot meet its burden, the juvenile cannot be found to be a ward of the state under section 602. Consequently, unless jurisdiction over the juvenile is obtainable under some other provision,²⁴ he or she will escape any control by the juvenile justice system.²⁵

B. The Modern Dual System

The common law justification for the rebuttable presumption of incapacity, upon which section 26(1) is based, is obsolete. Under the common law criminal system, the fact that courts punished children and adults alike, made the presumptions regarding capacity a necessary safeguard. Today, however, the criminal justice system treats adults and children separately.²⁶

The state deals with juvenile offenders under the age of eighteen exclusively within the juvenile system absent extraordinary circumstances to warrant transferring the offender to the adult criminal system. Even with the presence of extraordinary circumstances, the juvenile must be at least sixteen years old to be transferred to adult court.²⁷ The reason for this dual system is identical to the reason for the common law presumptions of incapacity incorporated in section 26(1): the criminal system should

²² CAL. WELF. & INST. CODE § 602 (West Cum. Supp. 1979). See note 2 *supra*.

²³ *In re Cindy E.*, 83 Cal. App. 3d 393, 401, 147 Cal. Rptr. 812, 815 (4th Dist. 1978); *In re Harold M.*, 78 Cal. App. 3d 380, 390, 144 Cal. Rptr. 744, 749 (2d Dist. 1978); Telephone interview with Greg Thompson, Assistant District Attorney, Sacramento County, November 14, 1978.

²⁴ For example, the state might obtain wardship under CAL. WELF. & INST. CODE §§ 300 or 601 (West Cum. Supp. 1979). See notes 58-59 *infra*.

²⁵ For a discussion of the difficulties of obtaining wardship under the alternative wardship sections, see text accompanying notes 64-69 *infra*.

²⁶ See *In re R.C.*, 39 Cal. App. 3d 887, 894, 114 Cal. Rptr. 735, 739 (1st Dist. 1974), where the court explained that the differing needs and characteristics of adult offenders and juveniles justify the maintenance of a separate and different system of justice for each of the two classes.

Every civilized society must recognize a child's immaturity when considering the question of criminal capacity. Regardless of the harm caused by the juvenile delinquent, the state must use some other means than the machinery used for administration of adult criminal justice when dealing with the juvenile delinquent. PERKINS, *supra* note 9, at 837.

²⁷ CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1979) provides procedures for transferring juveniles over 16 to adult court. See also Comment, *The Section 707 Fitness Hearing: An Argument for Retention and Reform*, this issue.

base punishment on culpability and since children are less mature than adults, they should receive different treatment. Using separate courts permits the juvenile system to provide treatment more suitable to juveniles. For example, juvenile delinquents are not subject to the same penal institutions as adults;²⁸ a juvenile court hearing is informal and non-criminal in nature;²⁹ a juvenile delinquent is not subject to capital punishment;³⁰ and the public is excluded from the juvenile court proceeding.³¹

With these developments, the contemporary juvenile justice system has eliminated the problems which originally justified adoption of section 26(1). Since the statute is no longer necessary for the purpose for which it was originally adopted, it is now obsolete.

II. CLEAR PROOF REQUIREMENT

Despite the fact that the primary original justification for section 26(1) is obsolete, proponents of section 26(1) argue that it nevertheless has a valuable current function because it limits a judge's discretion in the adjudication of section 602 wardship.³² This limitation on a judge's discretion is the section's requirement that "clear proof" of the juvenile's knowledge of wrongfulness exist for a section 602 adjudication. The clear proof requirement, as the courts have construed it, prevents a juvenile from being made a ward unless the age, experience, knowledge and conduct of the child demonstrate by clear proof that the child knew the wrongfulness of the act committed.³³

The problem with the clear proof requirement is that the concept of clear proof is itself uncertain and vague.³⁴ The courts have

²⁸ CAL. WELF. & INST. CODE §§ 207, 208 (West Cum. Supp. 1979).

²⁹ CAL. WELF. & INST. CODE § 203 (West Cum. Supp. 1979).

³⁰ CAL. PENAL CODE § 190.5 (West Cum. Supp. 1979).

³¹ CAL. WELF. & INST. CODE § 676 (West 1972); CAL. R. CT., rule 1311(3).

³² One of the justifications used by the Supreme Court in applying section 26(1) to the section 602 proceeding was an unwillingness to entrust the juvenile court with unfettered discretion in wardship adjudications. *In re Gladys R.* 1 Cal. 3d 855, 866, 464 P. 2d 127, 136, 83 Cal. Rptr. 671, 680 (1970). The author is using the term "proponents" to refer to the judges or commentators advancing the particular argument in the cited article or case.

³³ *Id.* at 867, 464 P. 2d at 137, 83 Cal. Rptr. at 680.

³⁴ For examples of controversial decisions involving the clear proof requirement see *In re Tanya L.* 76 Cal. App. 3d 725, 143 Cal. Rptr. 31 (2d Dist. 1977), where a 12 year old girl was made a ward under section 602 for participating in the concealment of stolen credit cards with her 17 year old sister. The state presented two items of evidence that the court felt constituted clear proof that

never firmly decided where the clear proof requirement sits on the continuum between a preponderance of the evidence standard and proof beyond a reasonable doubt.³⁵ The cases applying the clear proof requirement generally have just reiterated the language of the requirement without elucidation, leading to inconsistent results.³⁶

Having no firm guideline, the result is that judges, in practice, have considerable discretion in determining when the requirement is met. In Sacramento County, for example, section 26(1) is a difficult barrier that the state must overcome in order to obtain a section 602 wardship adjudication.³⁷ In Santa Barbara County, on the other hand, it is extremely difficult to prevent a juvenile from being made a section 602 ward despite section 26(1).³⁸ This disparity in results reveals that section 26(1) does not adequately monitor a judge's discretion. To the contrary, section 26(1) gives judges an opportunity to implement their own preferences while appearing to apply an objective guideline.

Seen from this perspective, the clear proof requirement creates more problems than it solves. It has failed to serve its purpose of limiting judicial discretion and has imposed a burden of proof

Tanya knew the wrongfulness of her conduct. Tanya saw her sister use the credit cards to buy clothes and she asked her father what to do with the credit cards. To these facts the court applied the "age, experience, knowledge test" and determined the clear proof requirement was met. See also *In re Michael B.*, 44 Cal. App. 3d 443, 118 Cal. Rptr. 685 (2d Dist. 1975), where the appellate court reversed the juvenile court finding of wardship. The court applied the same "clear proof" test as did the juvenile court to the same facts and determined that the clear proof was absent. The point to be gleaned from a reading of these cases is that even when applying the clear proof test, the wardship decree is still very much a discretionary decision. See also text accompanying notes 1-6 *supra* for the discussion of *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

³⁵ *In re Cindy E.*, 85 Cal. App. 3d 393, 398 147 Cal. Rptr. 812, 814 (4th Dist. 1978). When a "clear proof" requirement is applied in other areas of juvenile law the same difficulties arise regarding the quantum of necessary proof, see Comment, *Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing,"* 14 SAN DIEGO L. R. 1155 (1977).

³⁶ See, e.g., *In re Gladys R.*, 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); *In re Cindy E.*, 83 Cal. App. 3d 393, 147 Cal. Rptr. 812 (4th Dist. 1978); *In re Harold M.*, 78 Cal. App. 3d 380, 144 Cal. Rptr. 744 (2d Dist. 1978); *In re Tanya L.*, 76 Cal. App. 3d 725, 143 Cal. Rptr. 31 (2d Dist. 1977); *In re Michael B.*, 44 Cal. App. 3d 443, 118 Cal. Rptr. 685 (2d Dist. 1975).

³⁷ Interview with Bob Collins, Sacramento County Juvenile Court Assistant District Attorney in Sacramento, California (April 4, 1978).

³⁸ Interview with Robert H. Glogow, Santa Barbara County Juvenile Court Public Defender, in Goleta, California (June 28, 1978).

requirement on the state that defies definition and leads to inconsistent results.

III. CONFLICT WITH GOALS OF JUVENILE LAW

Section 26(1) also conflicts with two main policy areas of the juvenile justice system. First, section 26(1) is inconsistent with the juvenile system's focus on providing care, guidance, and rehabilitation to the juvenile delinquent. Second, section 26(1) conflicts with the juvenile system's policy of protecting the public from the wrongful acts of juveniles by allowing juveniles who could be prevented from becoming hardened criminals to escape control by the juvenile system.

These conflicts stem from the separate development of section 26(1) and the juvenile justice system.³⁹ At its inception, section 26(1) was one of the few provisions dealing with children in California's criminal system.⁴⁰ Since the legislature enacted section 26(1), however, California has developed an elaborate, independent system to administer juvenile justice.⁴¹ Section 26(1), as a holdover from a previous era, is unneeded and in discord with the juvenile justice system.

A. Conflict with the Focus on Guidance and Rehabilitation

Despite changing attitudes about the role of the juvenile system,⁴² its main roles are still to provide guidance and rehabilitation for the juvenile offender⁴³ and at the same time maintain a

³⁹ Section 26(1) was enacted in 1872 prior to the development of the juvenile justice system. CAL. PENAL CODE § 26(1) (West 1970). The first juvenile justice system was not even adopted in the United States until 1899 in Cook County, Illinois. PERKINS, *supra* note 9, at 841.

⁴⁰ In enacting section 602 of the Welfare & Institutions Code, the legislature must have considered the pre-existing section 26(1). At that, the section constituted practically the only special provision for children in the entire legal system. *In re Gladys R.*, 1 Cal. 3d 855, 864, 464 P.2d 127, 133, 83 Cal. Rptr. 671, 677 (1970).

⁴¹ See CAL. WELF. & INST. CODE §§ 200 to 2006. These sections codify the numerous and complex goals, functions and procedures of the juvenile justice process.

⁴² The vast amount of literature on juvenile justice is almost unanimous on the opinion that the system is failing at its purposes. Campbell, *Feathers in the Aquarium and Fish Scales in the Bird Cage; One Judge's Personal View of the Juvenile Justice System*, 1 J. JUV. JUST. 79, 80 (1977); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967); Young, *Is the Juvenile Court Successful?*, 22 JUV. COURT J. 55 (1971).

⁴³ This intent is shown by the fact that when the Welfare & Institutions Code

non-criminal proceeding.⁴⁴ Section 26(1) undermines these roles.

The justification for section 26(1) in this context is that section 26(1) prevents the state from unfairly subjecting juveniles to a "criminal stigma" associated with being a section 602 ward.⁴⁵ This stigma attaches because section 602 wardship applies only to children who have violated a criminal statute and are thus regarded as criminals. Arguably, section 26(1) prevents this criminal stigma from attaching to juveniles who have committed criminal acts because only those who have been shown by clear proof to know the wrongfulness of their act are made section 602 wards and thus subject to the stigma.

Contrary to its purpose, however, section 26(1) emphasizes rather than decreases the criminality of a section 602 wardship proceeding and adjudication. Because the state has the burden of proving the section 26(1) requirement,⁴⁶ a prime focus of its case is on proving that the juvenile knowingly acted in a criminal manner. The state must show that the child not only acted criminally but that the child did so with a wrongful intent—that the child has a criminal mind. Consequently, section 26(1) increases rather than decreases the stigma of criminality which a section 602 proceeding and adjudication attaches to a juvenile offender.

At the same time that it heightens the criminal stigma of section 602 proceedings, section 26(1) provides little or no additional protection to the rights of the juvenile. Since the United States Supreme Court's decision in *In re Gault*,⁴⁷ the requirements of procedural due process have been applicable to juvenile court proceedings thereby assuring fundamental fairness in the pro-

underwent wholesale changes in 1977, the care and guidance functions were still highly emphasized. 1977 Cal. Stats. 1546, Ch. 910 (codified at CAL. WELF. & INST. CODE § 202). See also *In re Dennis J.*, 72 Cal. App. 2d 755, 140 Cal. Rptr. 463 (2d Dist. 1977), where the court reaffirmed the policy that juvenile court proceedings are designed for the rehabilitation of minors, and the punishment for criminal offenses is left for adult criminal court.

⁴⁴ CAL. WELF. & INST. CODE § 203 (West Cum. Supp. 1979) states:

An order adjudging a minor to be a ward of the court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.

⁴⁵ *In re Gladys R.*, 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970). The court based its decision of applying section 26(1) to section 602 proceedings partly on the recognition of the criminal overtones involved with section 602 proceedings. In another case, *In re Michael B.*, 44 Cal. App. 3d 443, 118 Cal. Rptr. 685 (2d Dist. 1975), the court refused section 602 wardship on the grounds of section 26(1) because it felt that the criminal stigma of the section 602 adjudication was not warranted under the circumstances.

⁴⁶ See note and text accompanying note 23 *supra*.

⁴⁷ 387 U.S. 1 (1967).

ceeding. The state must give the juvenile adequate notice of charges, assistance of counsel, opportunity for confrontation, cross examination, and the privilege against self-incrimination.⁴⁸ Where the state charges a juvenile with an act which would constitute a crime if committed by an adult, the section 602 proceeding requires proof beyond a reasonable doubt.⁴⁹ Section 26(1), therefore, provides little or no protection for the juvenile that procedural due process does not already provide.⁵⁰

Admittedly, the procedural due process requirements in juvenile proceedings also contribute to the criminal overtones in the proceeding.⁵¹ The legislature and the courts, however, have continued to stress the importance of the informal, non-criminal nature of the juvenile court hearing.⁵² Thus, any unnecessary emphasis on the criminal nature of the proceeding should be eliminated.

B. Conflict with Goal of Protecting the Public

When the legislature amended the Welfare and Institutions Code in 1977, it added a significant new provision which states that one of the major functions of the juvenile court is to protect the public from the wrongful acts of juveniles.⁵³ Section 26(1)

⁴⁸ *Id.* See also *In re F.*, 11 Cal. 3d 249, 255, 520 P.2d 980, 989, 113 Cal. Rptr. 170, 173 (1974); *In re Francis W.*, 42 Cal. App. 3d 892, 898-899, 117 Cal. Rptr. 277, 280 (5th Dist. 1974).

⁴⁹ *In re Winship*, 397 U.S. 258 (1970).

⁵⁰ Since *Gault* assures the fundamental fairness of the wardship proceeding, the argument that § 26(1) is needed to prevent a juvenile from unfairly being made a ward of the court is invalid. One of the main rationales the court put forth in *Gladys R.* for using section 26(1) in section 602 hearings is that it assures juveniles will not unfairly be made court wards. *In re Gladys R.*, 1 Cal. 3d 855, 895, 464 P.2d 127, 134, 83 Cal. Rptr. 671, 678 (1970); See also 59 CALIF. L. REV. 209 (1971).

⁵¹ The Supreme Court in *Gault* specifically recognized the problem of the stigma involved in wardship adjudications. The court expressed its hope, however, that the application of the due process requirements in juvenile court would not interfere with the unique benefits of the juvenile court. *In re Gault*, 387 U.S. 1, 22-24 (1967).

⁵² CAL. WELF. & INST. CODE § 203 (West Cum. Supp. 1979). The Supreme Court specifically addressed this subject in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The court noted the concern that juvenile hearings were becoming ever more similar to adult criminal trials. The court was unwilling, however, to give up on the basic concept of rehabilitation in the juvenile courts. *Id.* at 548.

⁵³ 1977 Cal. Stats. 1546, ch. 910 (codified at CAL. WELF. & INST. CODE § 202(b)). Section 202(b) states:

The purpose of this chapter also includes the protection of the public from the consequences of criminal activity, and to such pur-

frustrates the policy of this new provision. Only when the court finds that juveniles clearly know the wrongfulness of their acts may it adjudicate them section 602 wards and give them the guidance and rehabilitation the juvenile process provides.⁵⁴ Those juveniles who have committed seriously wrongful acts but who are not found to possess the necessary criminal state of mind are likely to be free from any supervision by the juvenile system.⁵⁵ Because section 26(1) prevents the juvenile system from exercising control over these juveniles, they receive no sanctions for their wrongful acts and no guidance or rehabilitation to prevent them from acting wrongfully in the future.⁵⁶

Proponents of section 26(1) nonetheless claim that retention of that section is necessary. They argue, first, that section 26(1) prevents juveniles, such as first time offenders, from coming into contact with other section 602 wards who are hardened criminals.⁵⁷ Proponents also argue that if the section 26(1) requirement is not met the state can easily obtain wardship of the juvenile offender under Welfare and Institution Code section 300⁵⁸ or sec-

pose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this chapter.

⁵⁴ See text accompanying notes 32-38 *supra*.

⁵⁵ See text accompanying notes 23-25.

⁵⁶ Another of the primary functions of the juvenile court is to teach juveniles responsibility for their acts. CAL. WELF. & INST. CODE § 202. (West Cum. Supp. 1979). Stecklee, *Aftermath of Apprehension: Juvenile Court Judge's Response*, 25 PROSPECTUS 25, 26 (1969). This cannot be done if the court is unable to maintain authority over the child.

⁵⁷ *In re Gladys R.*, 1 Cal. 3d 855, 867, 464 P.2d 127, 136, 83 Cal. Rptr. 671, 680 (1970); Note, 59 CALIF. L. REV. 205 (1971).

⁵⁸ CAL. WELF. & INST. CODE § 300 (West Cum. Supp. 1979) (originally enacted as CAL. WELF. & INST. CODE § 600, amended by 1976 Cal. Stats. 4759, ch. 1068). Section 300 states:

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

tion 601,⁵⁹ the alternative wardship provisions.⁶⁰

Although these arguments are valid considerations, they do not adequately justify the continuation of the section 26(1) requirement. First of all, juvenile judges have considerable discretion in tailoring the treatment of juveniles to their individual needs.⁶¹ A judge can arrange for any section 602 ward to avoid contact with other section 602 wards.⁶² A judge can order the same type of treatment under section 602 as juveniles receive under section 601.⁶³ Thus, under the current system, section 602 wards are not automatically thrust into the midst of hardened juvenile offenders and the protection of section 26(1) is merely illusory.⁶⁴

Secondly, proponents of section 26(1) fail to recognize that the

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

(d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

⁵⁹ CAL. WELF. & INST. CODE § 601 (West Cum. Supp. 1979) states:

(a) Any person under the age of 18 years who persistently or habitually refused to obey the reasonable and proper orders or directions of his parents, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

(b) If a school attendance review board determines that the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities, or if the minor fails to respond to directives of a school attendance review board or to services provided, the minor is then within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court; provided, that it is the intent of the Legislature that no minor who is adjudged a ward of the court pursuant solely to this subdivision shall be removed from the custody of the parent or guardian except during school hours.

⁶⁰ *In re Gladys R.*, 1 Cal. 3d 855, 867, 464 P.2d 127, 136, 83 Cal. Rptr. 671, 680 (1970); Note, 59 CALIF. L. REV. 205 (1971).

⁶¹ CAL. WELF. & INST. CODE § 730 (West Cum. Supp. 1979).

⁶² *Id.*

⁶³ *Id.* Some examples of this type of treatment include committing such minors to the care or custody of some reputable person of good moral character, to some association or society that cares for such minors, or to a probation officer to be placed in a suitable family home or private institution. CAL. WELF. & INST. CODE § 727 (West Cum. Supp. 1979).

⁶⁴ Note that this reasoning also fails to consider that truly hardened juvenile delinquents who are 16 or over are transferred to adult court. See note 27 *supra*.

scope of sections 300 and 601 differs from the scope of section 602.⁶⁵ Section 300 encompasses only those children who are destitute, parentless or lack adequate parental care.⁶⁶ Section 601 applies only to juveniles who are under eighteen years of age who persistently refuse to obey their parent or guardian, or who are truant, or who habitually refuse to obey school authority.⁶⁷ These sections therefore may not apply to juveniles whose only qualification for wardship is the commission of a wrongful act.⁶⁸ Thus, the difference in scope of the wardship sections may prevent juveniles who violate a criminal statute from qualifying under either section 300 or section 601 after section 602 wardship has been denied. The juvenile process would be powerless to deal with these juveniles who would merely be lost in the gaps between the several wardship proceedings.⁶⁹

CONCLUSION

The repeal of section 26(1) would serve the best interests of both the state and the juvenile. The juvenile would benefit because the focus of juvenile court proceedings would be on guidance and rehabilitation rather than on the criminality of the act. Furthermore, a greater assurance would exist that children committing criminal acts would receive that guidance and rehabilitation that the juvenile justice system offers with no loss of the child's constitutional right to due process.

The state would benefit because it would no longer have to bear the extra burden of the section 26(1) requirement of proving by *clear proof* that the child knew the wrongfulness of his or her wrongful act. Removal of this additional burden will have the dual effect of allowing the state to provide the necessary guidance to juveniles who are not yet hardened criminals but are on the

⁶⁵ See notes 2, 58-59 *supra*.

⁶⁶ See note 58 *supra*.

⁶⁷ See note 59 *supra*.

⁶⁸ In re Gladys R., 1 Cal. 3d 855, 870, 464 P.2d 127, 139, 83 Cal. Rptr. 671, 683 (Burke, J., concurring and dissenting opinion) (1970). As illustrations consider: a 12 year old boy exhibits a loaded gun in a threatening manner in the presence of another, and the evidence does not show his conduct was the result of a mental or physical deficiency, disorder or abnormality; a 13 year old girl is caught possessing marihuana; a 13 year old boy commits statutory rape with a willing 13 year old girl in a private place. In each of these cases, a juvenile court might well conclude that the minor did not come within section 602 but they may also not come under either section 300 or section 601.

⁶⁹ *Id.* at 872, 464 P.2d at 140, 83 Cal. Rptr. at 684.

road to becoming so and providing to the public greater protection from juvenile crimes.

Cesar C. Sarmiento