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# Parental Responsibility for Juvenile Crime

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## *Articles*

**JAMES HERBIE DIFONZO\***

### Parental Responsibility for Juvenile Crime

They ask us if we blame the parents? Who else do we blame?  
I taught my son right from wrong. My son wasn't shooting  
people up. My son was in the library doing what he was sup-  
posed to do.<sup>1</sup>

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\* Professor of Law, Hofstra University Law School. J.D., M.A., 1977, Ph.D. 1993, University of Virginia. E-mail: lawjhd@hofstra.edu. I want to express my deep appreciation to the following colleagues who spent a great deal of time helping me find and refine my arguments: Robin Charlow, Janet Dolgin, Eric Freedman, Mitchell Gans, John DeWitt Gregory, Bernard Jacob, Lawrence Kessler, Stefan Krieger, Theo Liebmann, Andrew Schepard, Kathryn Stein, and David Yellen. This article could also not have been written without the valuable assistance of Angel Aton, Lana Booker, Tricia Kasting, and Gary Moore, nor without the intellectual and emotional support of Ruth Stern.

<sup>1</sup> Michael Shoels, father of a victim of the 1999 Columbine High School shootings, quoted in Lisa Belkin, *Parents Blaming Parents*, N.Y. TIMES MAG., Oct. 31, 1999, at 62.

I'm sorry. Like Shakespeare says, "Good wombs hath borne bad sons."<sup>2</sup>

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<sup>2</sup> Eric Harris, one of the two Columbine High School killers, *quoted in* Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, at 48-49 (quoting WILLIAM SHAKESPEARE, THE TEMPEST act 1, sc. 2).

## INTRODUCTION: THE CRIME OF POOR PARENTING

A movement is afoot to hold parents criminally responsible for the delinquent acts of their children. This effort is part of a larger movement inducing parents to undertake greater responsibility for their wayward children and threatening increased legal sanctions if they fail. In addition to the criminal parental responsibility laws analyzed in this Article, parents face greater statutory civil penalties for property damage caused by their children, eviction from public housing if criminal activity has occurred in their homes, and increased exposure to civil lawsuits filed by victims of youth violence. Within this larger campaign, the criminal parental responsibility laws effectively convert the status of parenting a juvenile delinquent into a public welfare offense.

These related developments broadening the law's regulation of parenting are responses to, and best seen in the context of, the current criminalization of juvenile delinquency.<sup>3</sup> A decade ago, states began enacting pervasive measures to remove violent children from their parents and from the protection of the juvenile court in reaction to the then growing crime rate. Propelled further by the publicity surrounding numerous tragic shootings committed by youths, states have augmented their provisions transferring jurisdiction over youth violence from juvenile to criminal court in an expanding range of cases. Statistically, these precipitating incidents have by now been subsumed within the overall reduction in the national crime rate, both juvenile and adult. However, the popular reaction to the brief peak of juvenile violence continues to drive punitive legislation aimed at treating violent children as adults. To this end, transfer provisions resolve the conflict between the desire to protect dependent children and the aim of punishing violent children by treating the latter as adults and not as children.

The removal of this population from juvenile court protection and treatment is grounded on the premise that the predatory nature of certain youth crime demonstrates the workings of a mature mind impervious to rehabilitation. The current juvenile justice "counter-reformation"<sup>4</sup> seeks to substitute retribution and

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<sup>3</sup> See generally Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197 (1993); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 583-86 (2000).

<sup>4</sup> See Gregory A. Loken & David Rosettenstein, *The Juvenile Justice Counter-*

deterrence for what it considers the discredited dream of the juvenile court. As a result, the legal system increasingly treats both violent and non-violent youths as adults. However, extending the net of parental responsibility over juvenile delinquency through parental responsibility laws paradoxically pivots on the opposite rationale: the very immaturity of youthful deviants justifies society in holding parents criminally responsible for failing to properly supervise their children. The legislative and popular currents so outlined flow in different directions. On the one hand, they conceive of adolescents as, on the one hand, mature actors possessed of an efficient free will and, on the other, as malleable dependents subject to parental control.

But adolescents are neither autonomous nor automatons. They may best be described as "semiautonomous" juveniles approaching adulthood. They have not fully achieved the emotional maturity of adulthood, nor are their actions totally within parental control. Further, both the treatment of juveniles as "automatic adults" and the criminalization of parental supervision rely on the criminal law to perform tasks for which it is ill-suited. Indeed, an examination of the effects both trends are having upon society suggests failure. First, with respect to the criminalization of juvenile delinquency, studies involving matched sets of juveniles consistently show that transfer into the adult criminal system has proven counterproductive, as measured by the increased recidivism rate, the severity of the subsequent offense, and the lessening of the time between release and rearrest.<sup>5</sup> Moreover, these "automatic adults" are ineligible for the more age-appropriate social services offered through juvenile probation. Second, in considering parents who find themselves in criminal court defending against charges of inadequate parenting, the traditional sanctions of the criminal law have failed to address the problems faced by these parents, their children, or the victims of their children's delinquencies. In the movements discussed in this Article, the philosophy, legal tools, and methodologies of the criminal court have replaced their family law and juvenile court counterparts. From a practical point of view, the

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*Reformation: Children and Adolescents as Adult Criminals*, 18 QUINNIPIAC L. REV. 351 (1999) (describing the challenge to the traditional basis of juvenile court's delinquency jurisdiction); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390-91 (citing popular belief that a derelict juvenile justice system has fostered the boom in juvenile crime).

<sup>5</sup> See text at notes 142-52, *infra* (describing studies).

resulting system is unworkable: the court enforcing the parental responsibility law lacks jurisdiction over the child, while the court adjudicating juvenile delinquency has no viable method to involve the parents.

Commentators have generally either praised or decried the ascription of criminal responsibility to poor parenting, and have focused on the constitutional and policy implications of this expansion of the criminal law.<sup>6</sup> This Article seeks to further the analysis of this trend in two ways. First, it examines the laws treating juvenile delinquents as if they were adults in light of the legal provisions exposing parents to criminal liability for their failure to properly supervise those same child offenders. Second, it proposes two alternative resolutions to the tension between rendering parents immune from consequences of and concern for their children's delinquent acts, and subjecting the parents to unwarranted criminal liability. The first proposal recognizes the success of the therapeutic jurisprudence movement and suggests that parents be involved in the family group conference approach, thereby empowering both the victim and the community to resolve the damage caused by the delinquent act. The second proposal suggests that parents be made parties to juvenile delinquency dispositions involving their children, so that the courts can, through appropriate orders, monitor the parents' efforts in furthering the reformation of their child.

In Part I, this Article analyzes the "criminalization"<sup>7</sup> of juvenile delinquency. The juvenile justice counter-reformation has made substantial headway in reversing the idea of special protections for children who are accused of committing serious crimes. But the debate over how to deal with violent youth has been drastically reshaped over the past century. Earlier reforms minimized punishment and emphasized therapeutic intervention in the children's lives.<sup>8</sup> The current retributive juvenile justice movement, by contrast, features assertions about a dramatic increase in the present rate and malevolence of juvenile crime,<sup>9</sup> demographic estimates that predict a coming flood of "super-

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<sup>6</sup> See articles cited in notes 153-57, *infra*.

<sup>7</sup> See generally Feld, *supra* note 3, at 197.

<sup>8</sup> See text at notes 35-38, *infra* (describing the early juvenile court reforms).

<sup>9</sup> See Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 40 (1998) ("Many believe that juvenile crime is increasing, that juvenile crime is becoming more violent, that juvenile crime is more often directed at persons than at property, that juveniles prey on eld-

predators,"<sup>10</sup> and the thesis that violent youthful acts demonstrate both the maturity of the perpetrators and their defiance of the rehabilitative processes of the juvenile court.<sup>11</sup> However, all three of these foundational propositions are demonstrably false.<sup>12</sup> This demonstration in Part I is critical to the next step of the analysis presented in this Article. Because the "super-predator" crisis is largely a myth, the criminal parental responsibility laws are unnecessary, and the alternative methods proposed in this Article to increase parental involvement in their children's delinquency cases can appropriately address the problem.

Part II analyzes the parental responsibility laws, which have become popular legal weapons deployed in an effort to force parents to control their children's anti-social behavior. These laws hold parents criminally responsible when their children commit delinquent acts. Their premise is the empirically unsubstantiated assumption that juvenile delinquency results primarily from improper parental supervision. These laws ignore the behavioral and developmental evidence that suggests a far more complex interrelationship between parents, their teenagers, and their deviance. Moreover, the laws frequently depend on strict liability in order to criminalize the unproven parental failure to properly supervise a wayward child. The statutory framework often determines that the child's commission of one or more delinquent acts entirely serves—even in the absence of any formal adjudication of juvenile delinquency—to prove their parents' neglect of the duty of proper supervision, thereby providing a sufficient predicate for the imposition of criminal sanctions. Punishing parents on the generalized and unproven assumption that they bear ac-

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erly and on females, and that juveniles more often attack strangers than acquaintances.").

<sup>10</sup> See JOHN DI IULIO, *HOW TO STOP THE COMING CRIME WAVE 1* (1996) ("By the year 2010, there will be approximately 270,000 more juvenile super-predators on the streets than there were in 1990.").

<sup>11</sup> This emancipation-by-act viewpoint is reflected in the political campaign catchphrase, "adult crime, adult time." Keith Bradsher, *Michigan Boy Who Killed at 11 is Convicted of Murder as Adult*, N.Y. TIMES, Nov. 17, 1999, at A1; Paula R. Brummel, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids*, 16 LAW & INEQ. J. 541, 541 (1998); see also R. Robin McDonald, *Punishing Choices: How to Try Teens Charged with Major Crimes?*, ATLANTA J. & CONST., Aug. 19, 1999, at 1F ("[R]ising juvenile crime in the past decade has disillusioned the public and law enforcement authorities about the ability of the juvenile justice system to deal with teen robbers, rapists and killers.").

<sup>12</sup> See text at notes 56-95, 111-52, *infra*.

tual, causal responsibility for juvenile delinquency results in an unconstitutional violation of the parents' due process rights and effectively converts poor, or simply unlucky, parenting into a public welfare offense.

Part III proposes a reasoned approach to legal intervention in the relationship between parental supervision and juvenile crime, one that addresses the needs of community safety as well as the future course of the delinquent juvenile. Two possible avenues are evaluated. One direction suggests jettisoning a parental culpability analysis *in toto*. This first approach fully respects parents' prerogatives with regard to the raising of children. It suggests that the issue of parental involvement in juvenile court may best be addressed within the perspective of the emerging movement in therapeutic jurisprudence, including voluntary family group conferences, mediation, teen courts, and other forms of alternative dispute resolution emphasizing restorative justice. The second, and quite different option, assumes that policymakers will continue to insist on some version of culpability analysis for parental responsibility in juvenile delinquency cases. If so, this Article proposes that the law turn away from the inappropriate imposition of criminal jurisdiction over parents as conferred by the parental responsibility laws, and instead invest the juvenile court with the power to assert jurisdiction over parents in the dispositional phase of delinquency proceedings. The delinquency jurisdiction of family courts can more effectively serve to accommodate the legitimate concerns of the parental responsibility laws.<sup>13</sup>

While these two suggested avenues of reform are quite distinct, they share a conception of juvenile and family courts as principally civil courts concerned with ensuring the welfare of families and their communities, rather than as primarily criminal courts oriented to administering a penal code for children. The suggested reforms do not promise rapid success in restoring disrupted families and curbing juvenile delinquency. They make a start, however, at assaying a more principled effort both to respond to the actual level of maturation exhibited by our children as they struggle through adolescence, and to respect the need to

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<sup>13</sup> Because this suggested resolution accommodates the legitimate interests of society in regulating parental supervision, parental responsibility laws that impose criminal liability on parents stemming from the delinquent acts of their children should be repealed. See text at notes 258-367, *infra* (discussing and critiquing parental responsibility laws).



hold both juveniles and their parents appropriately accountable for their actions.

## I

### MATURATION-BY-CRIME: PUNISHING JUVENILES AS IF THEY WERE ADULTS

The legal system's treatment of crimes committed by children has come under enormous criticism in recent years.<sup>14</sup> A score of recent and nationally-publicized incidents involving school children—one as young as six years old—killing classmates and teachers has galvanized public criticism of the way American society handles juvenile delinquency.<sup>15</sup> The legislative and media

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<sup>14</sup> See, e.g., BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 289 (1999) [hereinafter FELD, *BAD KIDS*] ("Juvenile courts attempt to combine social welfare and criminal social control in one agency and inevitably do both badly because of the inherent contradiction in those two missions."); Loken & Rosettenstein, *supra* note 4, at 352 (describing the juvenile counter-reformation as centered on the proposition that "children who commit serious crimes should be treated virtually the same as adults"); Lisa Stansky, *Age of Innocence*, 82 A.B.A. J. 60, 66 (1996) ("You have a system that was designed for shoplifters, truants, and joyriders that is now filled with rapists and murderers and people shooting each other with guns.") (quoting Kent Sheidegger, legal director of the Criminal Justice Legal Foundation); James C. Howell & Barry Krisberg, *Conclusion*, in *SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDERS* 275, 275 (James C. Howell et al. eds., 1995) (describing the "currently popular response of state legislatures and other policymakers that translates into punishment at the expense of prevention and treatment and at increasing reliance on the criminal justice system while decreasing reliance on the juvenile justice system"); *Bad Boys*, WALL STREET J., Sept. 28, 1993, at A18. ("Set up some 30 [sic] years ago to protect immature kids who might get arrested for truancy, shoplifting or joy riding, [the juvenile justice system] is ill equipped to deal with the violent children of the 1990s who are robbing, raping and murdering.").

<sup>15</sup> See Lynn A. Foster, *School Shootings and the Over-Reliance upon Age in Choosing Criminal or Juvenile Court*, 24 VERMONT L. REV. 537, 537-38 (2000) (discussing recent school shootings and adverse public reaction); Daniel E. Traver, *The Wrong Answer to a Serious Problem: A Story of School Shootings, Politics and Automatic Transfer*, 31 LOY. U. CHI. L.J. 281, 281-82 (2000) (same); Christine Cox, *Kids and Violence: A Resource Guide, Where Have U.S. School Shootings Happened?*, at <http://www.msnbc.com/news/297184.asp#BODY> (last visited Oct. 4, 2001) (interactive map of recent school shootings); Scott Gold et al., *2 Killed, 13 Hurt in School Shooting*, L.A. TIMES, Mar. 6, 2001, at 1 (describing shooting episode by fifteen-year-old at his high school); Jon Nordheimer, *Seventh-Grade Boy Held in Killing of Teacher*, N.Y. TIMES, May 27, 2000, at A8 (describing shooting of a teacher by a thirteen-year old armed with a "typical Saturday night special"); Richard Willing, *When Children Kill, Who Takes the Blame? Experts Examine Youths' Actions in Serious Crimes*, USA TODAY, Mar. 2, 2000, at A3 (discussing the difficulty of assessing responsibility for juvenile crime); *Boy, 6, Accused in Classmate's Killing*, N.Y. TIMES, Mar. 1, 2000, at A14 (detailing accusation that a first-grader killed a classmate with .32 caliber handgun); Timothy Egan, *What Makes Kids Kill? Student*

reaction to these violent incidents has intensified the perception that juvenile lawbreaking has dramatically increased.<sup>16</sup> However, the vast majority of youthful crime is nonviolent,<sup>17</sup> and school shootings are themselves atypical of youth violence.<sup>18</sup> In fact, both juvenile and adult crime rates have strikingly declined in recent years.<sup>19</sup>

American society is in the midst of a sea change in its perception of juvenile delinquents and their parents. The most arresting recent development is the law's reconceptualization of child offenders as violent predators warranting retribution rather than as our wayward sons and daughters in need of a guiding hand. Throughout most of the twentieth century, juvenile delinquents were perceived as "vulnerable and in need of protection and redirection rather than of punishment."<sup>20</sup> At least until the Supreme Court's imposition of more formal juvenile court procedures in *Kent v. United States*,<sup>21</sup> *In re Gault*,<sup>22</sup> and *In re*

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*Shootings Share Similar Threads*, ANCHORAGE DAILY NEWS, June 21, 1998, at F1 (discussing school shootings).

<sup>16</sup> See Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 977, 982-86 (1995) (describing the public's overestimation of juvenile crime rates, the legislative reaction, and the contribution of mass media to this view); Conward, *supra* note 9, at 40 (same); HOWELL ET AL., *supra* note 14, at vii (discussing the "misperception of the extent of juvenile delinquency and the relative proportion of violent crime committed by juveniles").

<sup>17</sup> FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* xi (1998).

<sup>18</sup> See Ctr. for the Study and Prevention of Violence, *The Youth Violence Problem* (1999), at <http://www.colorado.edu/cspv/factsheets/factsheet16.html> (last modified June 18, 1999) (noting that recent school shootings are atypical of youth violence).

<sup>19</sup> See generally *THE CRIME DROP IN AMERICA* (Alfred Blumstein & Joel Wallman eds., 2000); see also Pam Belluck, *Blighted Areas Are Revived as Crime Rate Falls in Cities*, N.Y. TIMES, May 29, 2000, at A1 (linking urban renaissance to the "historic drop in violent crime"). The sharp reduction in crime rates is discussed in the text at notes 60-86, *infra*.

<sup>20</sup> Janet L. Dolgin, *The Age of Autonomy: Legal Reconceptualizations of Childhood*, 18 QUINNIPIAC L. REV. 421, 422 (1999); see also Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991) [hereinafter Feld, *Transformation*] ("By the end of the nineteenth century . . . children increasingly were seen as vulnerable, innocent, passive, and dependent beings who needed extended preparation for life."); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1097 (1991) [hereinafter Ainsworth, *Re-Imagining Childhood*] ("The desirability, even necessity, for a separate court system to address the problems of young people appeared obvious, given the newly emerging view of the adolescent as an immature creature in need of adult control."); see generally VICTORIA GETIS, *THE JUVENILE COURT AND THE PROGRESSIVES* (2000).

<sup>21</sup> 383 U.S. 541 (1966) (holding that in transferring juveniles to the adult system, courts must provide the "essentials of due process").

*Winship*,<sup>23</sup> the juvenile court's role was accepted as paternalistic rather than legalistic.<sup>24</sup> The children subject to its delinquency jurisdiction were likewise envisioned as "childlike, psychologically troubled, and malleable."<sup>25</sup> But now, at the turn of the millennium, youthful malefactors, especially those charged with serious offenses, are "widely viewed as essentially incorrigible."<sup>26</sup> Impressions of troubled youth have decidedly altered: the image "is not . . . Dennis the Menace. It's Billy the Kid."<sup>27</sup> Thus, a

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<sup>22</sup> 387 U.S. 1 (1967) (detailing the constitutional rights juveniles must be afforded in hearings which could result in an institutional commitment).

<sup>23</sup> 397 U.S. 358 (1970) (holding that in delinquency proceedings, the state must prove its case beyond a reasonable doubt).

<sup>24</sup> See Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1372-1406 (1995).

<sup>25</sup> Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997).

<sup>26</sup> Dolgin, *supra* note 20, at 448.

<sup>27</sup> Linda Valez, *Juvenile Criminals May Not Be as Dangerous as We Think*, ARIZ. REPUBLIC, May 23, 1997, at B6 (quoting U.S. Rep. Roy Blunt). Professor Dolgin has cataloged some of the terms employed by the media to characterize the youth involved in these killings, including "bad seeds," juveniles infected by a "lethal virus," and "fledgling psychopaths." Dolgin, *supra* note 20, at 445-46; see also WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996) ("America is now home to thickening ranks of juvenile 'super-predators'—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience."); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 15 (1997) (depicting image of "teen offenders as hostile predators, the products of unfortunate environments and perhaps heredity, who have little or no human sympathy or regard"). Legislators and the media have also coined the term "super-predators" to refer to children who have committed violent crimes. ZIMRING, *supra* note 17, at 4-5; see also Jennifer M. O'Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1305 (1996) (suggesting that the increase in juvenile crime "deepened punitive sentiment" toward juveniles); Jennifer Vogel, *Throw Away the Key: Juvenile Offenders Are the Willie Hortons of the 90s*, UTNE READER, July-Aug. 1994, at 56, 56 ("Politicians and the major media, having discovered a boom market in the public frenzy for bigger jails and longer sentences, have made juvenile offenders the Willie Hortons of the '90s."); Clare Kittredge, *Some See Adolescence as the Age of Violence*, BOSTON GLOBE, Mar. 4, 2001, at 1 ("Probably the most dangerous mammal on the planet is the adolescent male.") (quoting Charles McCafferty). One further sign of this deepened punitive sentiment is the call by Texas state representative Jim Pitts for the death penalty for children as young as ten who commit murder. Jack Kresnak, *Punishing Criminal Kids Is Balancing Act for Courts*, DETROIT FREE PRESS, Feb. 11, 1999, at 1A. Imposition of capital punishment on a child as young as ten years old would constitute a violation of the U.S. Constitution. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding

century of legal wisdom and a juvenile justice system that was designed to "protect children from the harsh punishments of the adult criminal system"<sup>28</sup> has been substantially reconsidered.<sup>29</sup> A profusion of laws has been enacted to arm communities in their fight against juvenile criminality, a development that has transformed the focus of juvenile courts from a baseline examination of the best interests of the child to an overarching concern with public safety, child punishment, and individualized accountability.<sup>30</sup>

One measure of this concern is the sharp diminution in the

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that executions of offenders age fifteen and younger at the time of their crimes are unconstitutional). The frequent newspaper headlines and journal article titles evoking bloodlust also exemplify the trend. See, e.g., *Juveniles: A Kill or Be Killed Generation*, RICHMOND TIMES-DISPATCH, Sept. 8, 1995, at A1; Peter Annin, 'Superpredators' Arrive: Should We Cage the New Breed of Vicious Kids?, NEWSWEEK, Jan. 22, 1996, at 57; Paul J. McNulty, *Natural Born Killers? Preventing the Coming Explosion of Teenage Crime*, POL'Y REV., Winter 1995, at 84.

<sup>28</sup> *In re G.T.*, 597 A.2d 638, 642 (Pa. Super. Ct. 1991); see also *Breed v. Jones*, 421 U.S. 519, 528 (1975) (contrasting the juvenile justice system with the criminal process, emphasizing the former as a "distinctive procedure and setting to deal with the problems of youth"); *State ex rel. Camden v. Gibson* Circuit Court, 640 N.E.2d 696, 697 (Ind. 1994) ("while the legal obligations of children must be enforced to protect the public, children within the juvenile justice system must be treated as persons in need of care, treatment, rehabilitation, and protection"); *In re Felder*, 93 Misc. 2d 369, 373 (N.Y. Fam. Ct. 1978) ("The premise . . . was that children were not criminal offenders, and, if properly treated could be saved from a life of crime."); *In re E.Q.*, 839 S.W.2d 144 (Tex. Crim. App. 1992) ("The civil juvenile justice system was established in part to insulate minors from the harshness of criminal prosecutions, to promote rehabilitation over punishment, and to eliminate the taint of criminal conviction after incarceration by characterizing such actions as delinquent rather than criminal."); Scott & Grisso, *supra* note 25, at 138 (noting that the juvenile court's traditional "job . . . was not to punish, but to rehabilitate and protect its charges").

<sup>29</sup> See *Juvenile Justice: Reform After One Hundred Years*, 37 AM. CRIM. L. REV. 1409, 1411 (1999) ("[T]he juvenile justice systems of the nation . . . are broken.") (quoting U.S. Rep. Bill McCollum); Margaret Talbot, *The Maximum Security Adolescent*, N.Y. TIMES MAG., Sept. 10, 2000, at 41 ("The juvenile justice system, founded on the idea that childhood is a distinct stage of life, is being dismantled, with more and more teenagers imprisoned alongside adults.").

<sup>30</sup> See Howard Davidson, *No Consequences—Re-examining Parental Responsibility Laws*, 7 STAN. L. & POL'Y REV. 23, 23 (1995-96) (observing that the three most common legislative responses to juvenile crime are "1) increasing penalties, including finite and lengthier periods of incarceration for young offenders; 2) lowering the age and other prerequisites for transferring juveniles accused of serious crimes from juvenile to adult court . . . ; and 3) funding new detention and correctional centers as well as 'boot camps' with rigid, military-like regimens"); see also Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference it Makes*, 68 B.U. L. REV. 821, 842 (1988) [hereinafter Feld, *Principle of the Offense*] (discussing the "changing sentencing practices of the juvenile court" from a focus on the best interests of the juvenile to a focus on the offense committed).

support for the belief that juvenile offenders deserve their own legal bailiwick; i.e., a venue where treatment is encouraged over punishment.<sup>31</sup> The title of the 1998 annual report of the Coalition for Juvenile Justice questions whether the juvenile court's one hundredth anniversary should be marked as "a [c]elebration or a [w]ake."<sup>32</sup> The sense that juvenile courts are not up to the task of punishing children who commit adult-sized crimes leads

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<sup>31</sup> The case for and against elimination of the juvenile court has been put forward and defended in a large number of forums. An illustrative selection of the discursive pleadings includes Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997) (proposing "to abolish the juvenile court and to formally recognize youthfulness as a mitigating factor in criminal sentencing" in an "integrated criminal justice system"); Lawrence L. Koontz, Jr., *Reassessment Should Not Lead to Wholesale Rejection of the Juvenile Justice System*, 31 U. RICH. L. REV. 179, 189 (1997) (arguing that "the inability of the juvenile justice system, or of the criminal justice system, to be a panacea for the evils it sets out to address is not a justification for abandoning or even lessening the effort"); David Yellen, *Juvenile Justice Reform: What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 579 (pointing out "that as imperfect as the juvenile justice system is, the adult criminal justice system is likely to be worse for most juveniles charged with criminal misconduct"); Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995) (the assumptions behind the two-tiered juvenile and criminal court system engender many of the serious shortcomings of the juvenile court and exacerbate problems with the criminal court); Michael Kennedy Burke, Comment, *This Old Court: Abolitionists Once Again Line up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027, 1031 (1995) (arguing that "increased punishment of juvenile offenders or the abolition of the juvenile system . . . is not the answer to the problems that the juvenile courts are facing"); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163 (benefits of the flawed juvenile court nevertheless outweigh procedural shortcomings because the criminal court cannot adequately protect the immaturity and vulnerability of minors); Ainsworth, *Re-Imagining Childhood*, *supra* note 20, at 1083-85 (contemporary society no longer views juveniles the same way as the original founders of the juvenile court viewed juveniles, and juveniles would benefit from the procedural safeguards in adult criminal court); Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 155 (1990) (stating that despite the presence of good arguments for abolishing the juvenile justice system the loss of control over status offenses and the loss of public and private resources available to the juvenile courts cuts in favor of keeping the juvenile justice and criminal systems separate); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990) (because of the schizophrenia of the juvenile court system, abolishing the juvenile court will promote juvenile rights); Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989) (juvenile court should implement more procedural protections than criminal court).

<sup>32</sup> COALITION FOR JUVENILE JUSTICE, A CELEBRATION OR A WAKE? THE JUVENILE COURT AFTER 100 YEARS (1998).

to the view that minors who commit serious felonies have emancipated themselves from the realm of juvenile justice. This view is exemplified by the words of a judge upon sentencing a 15-year old boy to life in prison for murder: "I do not perceive you to be a child . . . [y]our monstrous act made you an adult."<sup>33</sup> The theory that juveniles emancipate themselves by committing serious crimes is inconsistent with established legal procedures to which minors may resort in seeking to emancipate themselves.<sup>34</sup>

### A. *The Invention of the Super-Predator*

#### 1. *A Rhetorical Construct*

Only recently have violent juveniles been viewed as predatory. To be sure, the legal system has long struggled with the appropriate response to violent acts committed by juveniles, and in an important sense we are witnessing only the latest phase of the debate.<sup>35</sup> However, some generalizations may be fairly made. Prior to the latter third of the twentieth century, deviant children were predominantly viewed as appropriate subjects for rehabilitation by virtue of their dependent status within their families and society. The juvenile court was viewed as the capable agent of that reformation at the "nexus where psychology and philanthropy were to combine and place a rational and loving hand on wayward youth."<sup>36</sup> In a 1963 review of "contributing to delin-

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<sup>33</sup> *15-Year-Old Boy Gets Life in Prison for Killing Girl*, CHI. TRIB., Aug. 21, 1999, at 19.

<sup>34</sup> See Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REF. 239 (1992) (describing statutory emancipation process allowing minors to attain legal adulthood before reaching the age of majority); CAL. FAM. CODE §§ 7000-7143 (West 1994) (discussing Emancipation of Minors Law).

<sup>35</sup> The historiography of juvenile justice reform in America is quite lengthy. A selected list of relevant works would include GETIS, *supra* note 20, *passim*; FELD, *BAD KIDS*, *supra* note 14, at 46-108; Dolgin, *supra* note 20, at 421-84; Simon, *supra* note 24, at 1372-1406; J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855 (1995); JOHN R. SUTTON, *STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981* (1988); ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977); STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920* (1977); ROBERT M. MENNEL, *THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940* (1973).

<sup>36</sup> Simon, *supra* note 24, at 1364.

The juvenile court law assumes that official action is necessary when a child is alleged to have committed a violation of law or is in danger of deviant behavior, but the chief object is not to administer punishment in accor-

quency" statutes, the author postulated the pre-*Gault* norms: "Few persons would be truculent enough to quarrel with the basic aims of the juvenile court movement, or to take issue with the ideal of regenerating wayward youths without subjecting them to the often rigid, punitive, and distressing vagaries of adult criminal procedure."<sup>37</sup> Indeed, juvenile justice reform could, until recently, be fairly characterized as a "turn from punitive justice to an avowedly therapeutic style of social control."<sup>38</sup>

The procedural reforms mandated by the Supreme Court in the 1960s and 1970s were propelled by a strong skepticism about the efficacy of the juvenile court's ability to provide procedural fairness or to foster substantive rehabilitation.<sup>39</sup> In turn, these holdings presaged a rapid re-examination of the influences on, and appropriate legal response to, offending youth. The more retributive jurisprudential turn of the 1970s and 1980s resulted from the emerging belief among reformers that juveniles were possessed of adequate moral reasoning and self-control to warrant holding them responsible for their actions, albeit at a lower level than adults.<sup>40</sup> Greater reliance on determinate sentencing

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dance with the nature and seriousness of the offense. Punishment may be administered, but the main considerations are guidance, care, protection, and rehabilitation. Therefore, the determination of guilt, or the degree of guilt, is not so important a matter as it is in a criminal court. The welfare of the child is the chief concern.

MARTIN NEUMEYER, *JUVENILE DELINQUENCY IN MODERN SOCIETY* 332 (3d ed. 1961) (presenting the perspective of a pre-*Gault* juvenile delinquency text); see also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 332-33 (1999) [hereinafter Feld, *Race and the "Crack Down" on Youth Crime*] ("The idea of childhood is socially constructed, and during this modernizing era the upper and middle classes promoted a new ideology of children as vulnerable, fragile and dependent innocents who required special attention and preparation for life."). A similar therapeutic view of the role of the state vis-a-vis the family pervaded other early twentieth century enactments such as compulsory education laws and child labor controls. See Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. J. 489, 498 (1996).

<sup>37</sup> Gilbert Geis, *Contributing to Delinquency*, 8 ST. LOUIS U. L.J. 59, 60 (1963). The juvenile justice counter-reformation has by now "been truculent enough to quarrel" with each of the norms so confidently articulated by Professor Geis. Specifically, the counter-reformation movement has contravened the aspirations of the juvenile court movement, the ideal of rehabilitation (at least for violent youth), and the reluctance to process juvenile offenders in the adult criminal system.

<sup>38</sup> SUTTON, *supra* note 35, at 2.

<sup>39</sup> See *In re Gault*, 387 U.S. 1, 19 n.23 (1967) (suggesting that in failing to provide rehabilitative services or procedural rights, juvenile courts had given children "the worst of both worlds").

<sup>40</sup> See Scott & Grisso, *supra* note 25, at 145-48; FRANKLIN E. ZIMRING, TWENTI-

schemes for juveniles demonstrated this accommodation to retributive and deterrent concerns. These reforms strained, but still sustained, a core belief that developmental immaturity should be factored into the determination of the appropriate sanction, and that the rehabilitative potential of every child should be socially shielded and nurtured.<sup>41</sup>

Today, violent children are no longer viewed as salvageable<sup>42</sup> and the current slew of juvenile justice measures emphasizing retribution and emancipation-by-crime form the core of the counter-reformation. Contemporary jurisprudence emphasizes a punitive style of social control, and has transformed the juvenile offender from a rehabilitative subject to a retributive object. Concern for preserving the special legal status of childhood is ebbing. Calls to abolish the juvenile court provide one measure of this phenomenon.<sup>43</sup> Another sign of the noticeable shift in the wind is an infusion of the concept of juvenile accountability into the purpose clauses of many states' juvenile codes. For instance, Kansas recently amended its juvenile offenders code to emphasize its "primary goal . . . to promote public safety, hold juvenile offenders accountable for such juvenile's behavior and improve the ability of juveniles to live more productively and responsibly in the community."<sup>44</sup> Similarly, changes to the Wisconsin juvenile justice code aim to create a "system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively."<sup>45</sup>

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ETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS: CONFRONTING YOUTH CRIME 3-7 (1978) [hereinafter ZIMRING, CONFRONTING YOUTH CRIME]; INSTITUTE OF JUDICIAL ADMINISTRATION: ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO DISPOSITION, INTRODUCTION (1982) [hereinafter ABA STANDARDS] (adopting a retributive approach through proportionate and determinate dispositions founded on the seriousness of the offense and fixed at the time of disposition, but keeping juvenile sentences shorter than those recommended for adults).

<sup>41</sup> See ZIMRING, CONFRONTING YOUTH CRIME, *supra* note 40, at 89-96 (viewing adolescence as a probationary period for adulthood); ABA STANDARDS, *supra* note 40, at 3 (expressing the aim of acknowledging the "unique physical, psychological, and social features of young persons in the definition and application of delinquency standards").

<sup>42</sup> Dolgin, *supra* note 20, at 448.

<sup>43</sup> See articles cited in note 31, *supra*.

<sup>44</sup> KAN. STAT. ANN. § 38-1601 (2000). The statute further listed "public safety" as the first objective of Kansas juvenile justice policies. *Id.*

<sup>45</sup> WIS. STAT. ANN. § 938.01 (West 2000); see also N.C. GEN. STAT. § 7B-1500 (1999) (noting that one of the purposes of the code shall be to provide "swift, effec-



## Between 1992 and 1997, forty-seven states and the District of

tive dispositions that emphasize the juvenile offender's accountability for the juvenile's actions"); WASH. REV. CODE ANN. § 13.40.010 (West Supp. 2001) (requiring that the juvenile justice system make the juvenile offender responsible for his or her actions). Oregon's juvenile justice purpose statute elaborates this understanding of how the legal system now regulates delinquency:

The Legislative Assembly declares that in delinquency cases, the purposes of the Oregon juvenile justice system from apprehension forward are to protect the public and reduce juvenile delinquency and to provide fair and impartial procedures for the initiation, adjudication and disposition of allegations of delinquent conduct. The system is founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community. The system shall provide a continuum of services that emphasize prevention of further criminal activity by the use of early and certain sanctions, reformation and rehabilitation programs and swift and decisive intervention in delinquent behavior. The system shall be open and accountable to the people of Oregon and their elected representatives.

OR. REV. STAT. § 419C.001 (1999); see also Feld, *Principle of the Offense*, *supra* note 30, at 852-91 (citing numerous similar legislative revisions to juvenile code purpose clauses).

Nuances sometimes fall victim to generalizations, and it is important to keep in mind that juvenile justice codes have not wholly abandoned individualized concern for children in the shift to concentrate on public safety and juvenile accountability. A closer look at one state juvenile code examines this modern legislative rebalancing of priorities. The Wisconsin juvenile justice code lists seven "equally important" purposes. WIS. STAT. ANN. § 938.01(2). Some of these correspond to traditional juvenile court idealizations of youth, but the code also espouses a new emphasis on public safety. One section illustrates this blended emphasis by retaining the individualized focus on the juvenile, but with the goal of ensuring that youth develop competencies for law-abiding life: "An individualized assessment of each alleged and adjudicated delinquent juvenile [is required], in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community." WIS. STAT. ANN. § 938.01(2)(c). Another provision similarly weighs the needs of the juvenile on the scales of social accountability, declaring that in crafting the "most effective dispositional [plan]," a judge must "respond to a juvenile offender's needs for care and treatment," but only when such a response is "consistent with the prevention of delinquency, each juvenile's best interest and protection of the public." WIS. STAT. ANN. § 938.01(2)(f). Other provisions forthrightly express the new prominence of deterrence and retribution in juvenile justice. See, e.g., WIS. STAT. ANN. § 938.01(2)(a) ("To protect citizens from juvenile crime."); *id.* § 938.01(2)(b) ("[T]o hold each juvenile offender directly accountable for his or her acts."). Finally, one provision is consonant with the notion of minimizing the differences between juvenile and adult criminal proceedings. Victims and witnesses in juvenile court are generally to be "afforded the same rights as victims and witnesses of crimes committed by adults." WIS. STAT. ANN. § 938.01(2)(g). On the whole, Wisconsin's juvenile code has not surrendered the goal of child "rehabilitation" (although the word is absent from section 938.01, which sets out the "legislative intent and purposes" of the juvenile justice code). But child reformation has survived only as subsumed within the larger goal of public protection and individual accountability.

Columbia enacted punitive juvenile justice legislation.<sup>46</sup> These provisions included laws making it easier to transfer children from the juvenile to the criminal court (forty-five states); laws enlarging the sentencing options for juvenile or criminal courts in cases dealing with youth (thirty-one states); and laws lessening or abrogating the obligation of confidentiality that traditionally inhered in juvenile proceedings (forty-seven states).<sup>47</sup> Additionally, the discrepancy between the level of sanctions imposed on adult and child offenders has greatly diminished in cases involving violence.<sup>48</sup>

Contemporary discourse about juvenile justice has largely replaced the image of the delinquent with that of the super-predator, and this shift carries significant legal consequences. Rhetoric about a social phenomenon simultaneously reflects and influences legal reality, as discourse is "the central art by which community and culture are established, maintained, and transformed."<sup>49</sup> The term "juvenile delinquent" is redolent of the antiquated rhetoric of the founders of the juvenile court, those judges and other reformers who assumed the role of benevolent parent and wise social worker rolled into one. These leaders sought to persuade young miscreants to acknowledge their folly and choose the path of betterment.<sup>50</sup> By contrast, today's dehu-

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<sup>46</sup> HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 89 (1999) [hereinafter OJJDP REPORT]. English justice has undergone a similar transformation. See Eric D. Sentlinger, Comment, *V v. United Kingdom: Is It a "New Deal" for Prosecuting Children as Adults*, 16 CONN. J. INT'L L. 117, 117 (2000) (noting that in the 1990s the United Kingdom commenced prosecuting children accused of committing serious crimes in adult criminal courts).

<sup>47</sup> OJJDP REPORT, *supra* note 46, at 89.

<sup>48</sup> See Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 231 (1996); Feld, *Transformation*, *supra* note 20, at 709-13.

<sup>49</sup> James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

<sup>50</sup> See, e.g., Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) ("Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, morally . . ."). Judge Mack recommended treating a troubled juvenile in the manner in which a "wise and merciful father handles his own child." *Id.* Judge Ben B. Lindsay, another early advocate of the juvenile court movement, described young offenders as "needing aid, encouragement, help and assistance," CHARLES LARSEN, *THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY* 34 (1972), and saw his judicial role toward them as "part educator, part artist, and part physician," McNulty, *supra* note 27, at 86. Born of the Progressive compulsion to adapt govern-

manizing discourse reflects altered ideological assumptions about youthful deviance. But the rhetorical broadsides also further the transformations in the cultural dynamic within which society situates adolescent violence.<sup>51</sup> Legislation attuned to the new zeitgeist frequently follows.

Since the juvenile reforms which heralded the twentieth century devised rhetorical constructs to emphasize the divorce of juveniles from the adult system, it is not surprising that the counter-reformation a century later should seek to reverse that discursive project. From the beginning of a separate juvenile jurisprudence, the expressive legal canvas provided a field apart for children in trouble: "Prosecutor became prosecuting attorney, the defendant child a ward of the state, a judgment of guilt not a conviction but adjudication of status, and the offender not a criminal, but a juvenile delinquent."<sup>52</sup> Recent Connecticut legis-

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mental means to therapeutic ends, the juvenile court staked out the "shadowy ground between legal tribunal and social agency." ANDREW J. POLSKY, *THE RISE OF THE THERAPEUTIC STATE* 66 (1991); see also *In re Gault*, 387 U.S. 1, 15-16 (1966) ("The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."); Jeffrey K. Day, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399, 402 (1992) (observing that the Progressives perceived the juvenile court as therapeutic). A cultural signpost to the changing dynamic of society's regard for lawbreaking youth may be found in *West Side Story*. Stephen Sondheim's lyrics to "Gee, Officer Krupke," depicting the turmoil of mid-twentieth century juvenile delinquents, ring quite nostalgically in the contemporary ear, even when voicing retributive sentiments:

Eek! Officer Krupke, you've done it again.

This boy don't need a job, he needs a year in the pen.

It ain't just a question of misunderstood;

Deep down inside him, he's no good!

*WEST SIDE STORY* (MGM 1961); see also LEONARD BERNSTEIN ET AL., *WEST SIDE STORY: THE SONGS* (1995). "Today, the whole idea of 'juvenile delinquency' seems soft and flabby; it conjures up joyriding, stealing apples, truancy. 'Youth crime' is another matter." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 449 (1993).

<sup>51</sup> See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 195 (1990) ("These cultural patterns structure the ways in which we think about criminals, providing the intellectual frameworks (whether scientific or religious or commonsensical) through which we see these individuals, understand their motivations, and dispose of their cases. Cultural patterns also structure the ways in which we feel about offenders."); Dolgin, *supra* note 20, at 448 ("While society, though with less and less conviction, continues to value images of children as fragile, affectionate and precious, children responsible for serious crimes are imagined as absolutely and eternally separate from decent community.").

<sup>52</sup> Frederick J. Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719, 722 (1952).

lation, however, typifies the modern trend in no longer referring to juveniles as “adjudicated” delinquents, but rather as “convicted.”<sup>53</sup> Rhetorical conversion logically follows from this conceptual modulation. Those who spearheaded the juvenile court movement conceived of delinquency as an illness and determined the causes of crime to stem from squalid human and material environments.<sup>54</sup> They believed that delinquency could, and should, be treated rather than condemned. By contrast, the counter-reformation’s call for personal accountability suggests that the state is no longer interested in treating recalcitrant youth, but rather in ensuring that juveniles bear the brunt of both the penal and rhetorical consequences of “conviction.”<sup>55</sup>

## 2. *The Reality of Juvenile Crime Rates*

The current dark vision of child deviants derives, in large part, from the perceived lethal nature associated with contemporary juvenile delinquency,<sup>56</sup> as well as from misinterpretations of the

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<sup>53</sup> CONN. GEN. STAT. § 46b-140 (West 1995 & Supp. 2001); see generally Craig Hemmons et al., *The Rhetoric of Juvenile Justice Reform*, 18 QUINNIPIAC L. REV. 661 (1999) (examining the language of juvenile justice code purpose clauses).

<sup>54</sup> See generally Mack, *supra* note 50, at 104-07; PLATT, *supra* note 35; Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of Parens Patriae*, 1838-98, 28 CRIME & DELINQ. 410 (1982).

<sup>55</sup> The drive to re-stigmatize delinquent youth is also evident in the reversal of the long-standing policy favoring the expungement of juvenile delinquency records. See Conward, *supra* note 9, at 58-61. The original reformers insisted on imbuing juvenile proceedings with confidentiality in order to preserve the child from legal and social stigma. See Robert B. Acton, *Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J. LAW & POL’Y 277, 300 n.84 (1996). The focus has now shifted from deflecting public gaze at youthful indiscretions to weighing “the price we pay for cleaning the slate.” T. Markus Funk, *The Price We Pay for Cleaning the Slate*, L.A. TIMES, Aug. 29, 1997, at B9; see also T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REF. 885 (1996); Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3 (1992).

<sup>56</sup> See Mirah A. Horowitz, *Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 LAW & CONTEMP. PROBS. 133, 134 (2000) (“As a result of both the increase in the juvenile homicide rates and the increase in highly publicized school shootings, Americans are demanding harsher punishments for the juveniles that commit them.”); James C. Howell et al., *Trends in Juvenile Crime and Youth Violence*, in HOWELL ET AL., *supra* note 14, at 5 (“The current perception of a crisis in juvenile violence is due, in large part, to the fact that America’s youth are being killed in record numbers.”); ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 17, at 4 (focus of concern is on “young males who carry guns and not infrequently discharge them”).

trends in juvenile arrest and crime victimization data.<sup>57</sup> Teenagers charged with homicide present the worst nightmare scenario for the juvenile justice system.<sup>58</sup> Indeed, the ostensible impotence of the juvenile court is linked to its failure to “deal with a new breed of aggressive young offender[s].”<sup>59</sup>

The actual demographics of youth crime in the past two decades do not, however, conform to this dogma of ever-spiraling violent criminality. Rather, the data inscribe a more complex image. To be sure, the overall increase in violent juvenile crime between the late-1980s and the mid-1990s was substantial. After a period of relative stability from the early 1970s through 1988, the juvenile violent crime arrest rate jumped in 1989 to the highest level since the 1960s (the earliest period for which comparable nationwide data is available).<sup>60</sup> This arrest rate then surged upward, climbing 62% in the years between 1988 and 1994.<sup>61</sup> The call for tougher measures to combat juvenile crime initially appears reasonable in light of this apparent statistical escalation.

However, National Crime Victimization Survey (NCVS) data tell a considerably different story. As with the arrest statistics, the rate of victimization increased in the 1990s, although not by as great a proportion as the arrest data.<sup>62</sup> By 1995, however, the victimization measure had leveled to its traditional level.<sup>63</sup> After reviewing the NCVS figures, the 1999 *National Report* by the Department of Justice, Office of Juvenile Justice and Delinquency Prevention (the *OJJDP Report*) concluded that “the rate of serious offending as of the mid-1990s was comparable to that of a generation ago.”<sup>64</sup> Moreover, the decline in arrest rates—

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<sup>57</sup> See text at notes 80-95, *infra*.

<sup>58</sup> Franklin E. Zimring, *The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Contexts*, 6 VA. J. SOC. POL'Y & L. 437, 437 (1999).

<sup>59</sup> Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case For Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 630 (1994); see also Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 336 (1997) (observing that the spiraling predatory nature of adolescent crime has radically diminished the rehabilitative potential of the juvenile justice system).

<sup>60</sup> OJJDP REPORT, *supra* note 46, at 120. Violent crime index offenses include murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* at 112.

<sup>61</sup> *Id.* at 120.

<sup>62</sup> *Id.* at 130. On possible explanations for the differences between the two measures of criminality, and on the greater accuracy of the NCVS data, see *id.* at 130-32 and JOEL DYER, *THE PERPETUAL PRISONER MACHINE* 31-36 (2000).

<sup>63</sup> OJJDP REPORT, *supra* note 46, at 130.

<sup>64</sup> *Id.*

the traditional criminological measure—after the early 1990s has been markedly steep. The rate of serious violent crimes, such as rape, sexual assault, robbery, and aggravated assault, committed by juveniles dropped by one-third between 1993 and 1997, ultimately returning to levels comparable to the relatively stable juvenile crime rate between 1973 and 1989.<sup>65</sup>

The data also reveal significant variation in the types of crimes at issue. Juvenile arrest rates for rape and robbery between 1980 and 1996 display no distinctive trend, alternately rising and falling throughout the period.<sup>66</sup> Aggravated assault arrest rates in 1996 were 50% higher than in 1980, but much of that increase may be attributed to improvements in communications technology and developing police reporting methodologies, which skew comparisons between earlier and later reporting patterns.<sup>67</sup> Additionally, the broad expanse of behavior which may be characterized as aggravated assault suggests the lack of specificity of police reporting standards within that crime category.<sup>68</sup> Murder statistics experienced an unquestionably significant rise. During the period from 1987 to 1994, the total number of annual murders by juveniles doubled.<sup>69</sup> This increase, however, appears to have been entirely firearm-related.<sup>70</sup> The very nature of gun

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<sup>65</sup> *Id.* at 62.

<sup>66</sup> ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 17, at 32-33.

<sup>67</sup> *Id.* at 32-33, 38-47. Zimring suggests that for the period beginning in 1980, "there is significant circumstantial evidence from many sources that changing police thresholds for when assault should be recorded and when the report should be for aggravated assault are the reason for most of the growth in arrest rates." *Id.* at 39. Technological advances also distort timeline comparisons. For example, in 1973 tracking problems allowed police to report to the FBI only 421,000 of the 861,000 aggravated assaults initially reported. In 1988, enhanced computational techniques enabled police to pass along to the FBI statistics on 910,000 of the 940,000 assaults reported that year. UNDERSTANDING AND PREVENTING VIOLENCE 414 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993); *see also* THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 4 (Steven R. Donziger ed., 1996) ("Most criminologists consider UCR [Uniform Crime Report] figures inaccurate because they tend to exaggerate fluctuations in crime—a fact that is at least partly responsible for the public misperception that crime is rising."). *But see* OJJDP REPORT, *supra* note 46, at 131 (disagreeing with the proposition that changes in police reporting procedures drove the rise in aggravated assaults).

<sup>68</sup> *See, e.g.*, OJJDP REPORT, *supra* note 46, at 145 (suggesting that conduct chargeable as aggravated assault may include a gang drive-by shooting which wounds the victim, as well as holding up a chair and threatening to throw it at a teacher).

<sup>69</sup> *Id.* at 54.

<sup>70</sup> *Id.* at 54, 133; *see also* Delbert Elliott, Youth Violence: An Overview (1994), at <http://www.colorado.edu/cspv/infhouse/youth-vio.html> (last visited Oct. 4, 2001)

violence, which is inherently lethal, suggests that the relatively larger number of deaths was due to a proportionally smaller number of episodes. Indeed, a very small cohort of youthful killers was responsible for the substantial increase in the murder rate.<sup>71</sup> Even within the murder category, however, the 1987-1993 increase in juvenile crime had almost reversed and returned to its former level by 1997.<sup>72</sup> Finally, most juveniles who are arrested face charges involving offenses and less serious infractions, not violent crimes.<sup>73</sup> In addition, juvenile property crime rates remained fairly stable, even showing a slight decrease, between 1980 and 1997.<sup>74</sup>

Recently plummeting juvenile crime rates comprise a subset of the steep decline in the total crime rate. Violence by adults diminished by 25% between 1993 and 1997.<sup>75</sup> National crime rates in 1998 reflected a decline, sometimes conspicuously so, from rates in 1973. Overall rates of robbery and aggravated assault were equivalent in 1992 and 1973, homicide arrest rates in 1993 matched those of 1973, and burglary rates showed a deep decline through the 1980s.<sup>76</sup> In fact, the pace of declining crime rates is quickening. After 3% annual decreases in 1996 and 1997, the

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("[T]his dramatic increase in the lethality of adolescent violence is explained almost entirely by the increased use of handguns in these violent exchanges."); FELD, *BAD KIDS*, *supra* note 14, at 205 (same). The symbiosis between gun use and fatal results exemplifies the "instrumentality" effect. See Phillip J. Cook, *The Technology of Personal Violence*, 14 CRIME & JUST. 1 (1991); FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

<sup>71</sup> See ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 17, at 35-38. This small group of youthful killers, practically vanished by 1997, should not be confused with the spurious claims of a large "kill or be killed" generation of super-predators. See articles cited in note 27, *supra*.

<sup>72</sup> OJJDP REPORT, *supra* note 46, at 133. The number of murder offenders in each age group from fourteen to seventeen dramatically declined from 1994 to 1997. The number of such offenders age seventeen declined 31%; age sixteen, 37%; age fifteen, 52%; age fourteen, 57%; and under age fourteen, 51%. *Id.* at 53.

<sup>73</sup> MICHAEL A. JONES & BARRY KRISBERT, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY* 10 (1994).

<sup>74</sup> OJJDP REPORT, *supra* note 46, at 126; FELD, *BAD KIDS*, *supra* note 14, at 199-200 (noting that between 1980 and 1996, the youth arrest rate for property crimes declined 7.1 percent).

<sup>75</sup> OJJDP REPORT, *supra* note 46, at 62-63. The overall crime rate decreased 14% between 1994 and 1998. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CRIME AND VICTIM STATISTICS*, available at <http://www.ojp.usdoj.gov/bjs/cvict.htm> (last revised Oct. 1, 2000).

<sup>76</sup> Eric R. Lotke, *Youth Homicide: Keeping Perspective on How Many Children Kill*, 31 VALPARAISO L. REV. 395, 396 (1997).

modified annual crime index total, which includes both violent and property crimes, decreased 6% in 1998 and 7% in 1999.<sup>77</sup> Table 1 reflects this quarter-century rise and fall in violent crime. The parabola of overall violent crime, and also of its rape, robbery, and aggravated assault components, has arched dramatically below 1973 levels. Recently released findings confirm the sharp downward direction of crime rates. From 1998 to 1999, the overall violent crime rate decreased 10%, and the property crime rate declined 9%.<sup>78</sup> Significantly, both the rise and fall of juvenile crime have paralleled the trajectory of adult crime.<sup>79</sup> Thus, within the overall national crime rate, juveniles did not stand out as a particularly predatory cohort.

Misinterpretations of this demographic data resulted in predictions of the emergence of a hitherto undiscovered, malignant breed of juvenile malefactor. In 1996, for instance, U.S. Representative William McCollum testified, in front of the House of Representatives Subcommittee on Early Childhood, Youth and Families, that America should "[p]ut these demographic facts together and brace [itself] for the coming generation of 'super-predators.'"<sup>80</sup> Prominent culture critic William J. Bennett predicted that, because the statistical cohort of adolescents was going to significantly increase during the decade, "the violent upsurge will probably accelerate."<sup>81</sup> In a 1995 study (updated in 1997), criminologist James A. Fox concluded "that the growth in juvenile population in the next decade will cause a dramatic increase in the level of juvenile violence."<sup>82</sup> Studies have sug-

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<sup>77</sup> Press Release, Federal Bureau of Investigation, UCR 1999 Preliminary Annual Report (May 7, 2000), available at <http://www.fbi.gov/ucr/prelim99.pdf> (last visited Oct. 4, 2001). The offenses included in the modified crime index total are the violent crimes of murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson. Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program, available at <http://www.fbi.gov/ucr/faqs.htm> (last visited Oct. 4, 2001).

<sup>78</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION 1999, at 1 (2000).

<sup>79</sup> OJJDP REPORT, *supra* note 46, at 130.

<sup>80</sup> U.S. Representative William McCollum, Statement Before the Economic and Educational Opportunities Committee's Subcommittee on Early Childhood, Youth and Families (Apr. 30, 1996), available at LEXIS, Legislation & Politics Library, Hearing File; see also OJJDP REPORT, *supra* note 46, at 130.

<sup>81</sup> WILLIAM J. BENNETT, THE INDEX OF LEADING CULTURAL INDICATORS 31 (1994).

<sup>82</sup> James A. Fox, Trends in Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending 1-5 (Mar. 1996), at <http://www.ojp.usdoj.gov/bjs/abstract/tjvfox.htm> (last visited Oct. 4, 2001); see also



gested that mass media reporting techniques and other factors influence the public perception about crime more than the actual level of victimization.<sup>83</sup> The "body count school of crime journalism" encourages a sense of "vicarious victimization"<sup>84</sup> that prefers fear to facts.<sup>85</sup> Domsday headlines in cases involving teenagers abounded in the last years of the 1990s.<sup>86</sup>

The generation of adolescent super-predators was not discovered, it was invented. Since youth and adult criminalization rates run on roughly parallel tracks, it is hard to justify selecting the juvenile category as presenting a new genus of violent criminal. In fact, the age cohort consisting of persons between the ages of thirty and fifty exhibited the greatest increase in rates of aggravated assault in the early 1990s,<sup>87</sup> yet "[n]o one has argued that there is a new breed of middle-aged superpredator."<sup>88</sup> Contrary

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DiIULIO, *supra* note 10, at 1 (predicting approximately 270,000 more "juvenile super-predators" in 2010 than in 1990). One "crime consultant" worried that even if increasing numbers of youths were incarcerated, the projected violator totals were so high that "we can't build enough prisons to keep all of them locked up." Ted Gest & Victoria Pope, *Teenage Time Bomb: Violent Juvenile Crime Is Soaring—and It Is Going to Get Worse*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 28 (quoting Donna Hamparian).

<sup>83</sup> See Robert E. Shepherd, Jr., *Film at Eleven: The News Media and Juvenile Crime*, 18 QUINNIPIAC L. REV. 687 (1999); Pamela Wilcox Roundtree, *A Reexamination of the Crime-Fear Linkage*, 35 J. RES. CRIME & DELINQ. 341 (1998); Allen Liska & William Baccaglini, *Feeling Safe by Comparison: Crime in the Newspapers*, 37 SOC. PROBS. 360 (1990). Recently, some media outlets have begun attempting to portray children more objectively. See David Shaw, *Kids Are People Too, Papers Decide*, L.A. TIMES, July 11, 2000, at A1 ("[T]he vast majority of America's youths are not in trouble. They're not suffering or causing suffering. They're not violent, not poor, not illiterate, not on drugs. They're not being abused or neglected, killed or maimed. What they're doing is leading normal lives. You just wouldn't know it from reading the newspaper—or looking at television news.").

<sup>84</sup> Thomas C. Castellano, *Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments*, 23 S. ILL. U. L.J. 427, 432 (1998).

<sup>85</sup> See Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 37-38 (1997). Eschholz reports that "both television and newspapers have been found to greatly overrepresent the incidence of violent crime [because] crime stories are inexpensive, flashy, and politically safe." *Id.* Complaints about media sensationalization of juvenile crime are, of course, not new. See, e.g., NEUMEYER, *supra* note 36, at 15 (charging in 1961 that "[e]xaggerated newspaper accounts of certain crimes committed by juveniles have led to the belief that offenders are depraved individuals").

<sup>86</sup> See, e.g., *Juveniles: A Kill or Be Killed Generation*, *supra* note 27, at A1; McNulty, *supra* note 27.

<sup>87</sup> OJJDP REPORT, *supra* note 46, at 130.

<sup>88</sup> *Id.* at 130-31. The same point may be illustrated by reference to the rate at which juveniles are murdered. The statistical curves reflecting youth homicide victims and youth homicide offenders are similar, both peaking in 1993 and falling by 1997 to the lowest point in the decade. More than three quarters of the juveniles

to popular impressions, neither the rates for adult nor juvenile arrests qualifies either group for the obloquy of the super-predator label.<sup>89</sup>

Youth violence arrest rates normally do not rise or fall for prolonged periods of time. Rather, trends frequently reverse, and then reverse again.<sup>90</sup> Arrest rates often notably shift after short bursts in one direction or the other, so that prognostications based on short-term patterns are not reliable. Nor are rates of youth offenses statistically connected to the rates of change in the youth population.<sup>91</sup> From 1987 to 1994, arrests for violent crime by juveniles skyrocketed while their population grew only marginally.<sup>92</sup> From 1994 through 1997, the juvenile population continued its slow increase, but arrests nose-dived.<sup>93</sup> Cultural changes and policy decisions have a greater impact on juvenile crime rates than population trends. As the *OJJDP Report* concluded, "demography is not destiny."<sup>94</sup> In fact, the core of recent punitive legislation has been driven by the myth of a generation of adolescent super-predators.<sup>95</sup>

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murdered were killed by adults, yet no public alarm was raised about adult super-predators preying on children. *Id.* at 16, 55. Note that of arrests for violent crime, juveniles account for 18.7%, adults for 81.3%. FELD, *BAD KIDS*, *supra* note 14, at 201; *see also* MIKE A. MALES, *FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION* 13 (1999) (suggesting that in news reports "depicting a peace-loving, healthy adult society besieged by barbaric brats," both sides of the equation are misrepresented).

<sup>89</sup> FELD, *BAD KIDS*, *supra* note 14, at 207 (both rates seesawed within a normal plus or minus 10 percent rate that has typified crime rates since the late 1970s).

<sup>90</sup> ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 17, at 33-34; *see also* FELD, *BAD KIDS*, *supra* note 14, at 197 ("Rates of crime, youth crime, and violence fluctuate markedly over time.").

<sup>91</sup> ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 17, at 49-65.

<sup>92</sup> OJJDP REPORT, *supra* note 46, at 134.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* Media recognition of the impact of the diminishing juvenile crime rate has been mixed. Compare Jack Kresnak, *Serious Juvenile Crime Down in Wayne County*, DETROIT FREE PRESS, Aug. 25, 1999, at 1A (noting that rates of serious youth crime have dramatically decreased, "a trend that runs counter to the public's widespread fear of out-of-control violent juveniles") with McDonald, *supra* note 11, at 1F (referring to the adverse impact of the supposed rise in juvenile crime in the past decade). Confidence in the statistical accuracy of the plunging crime rate should be somewhat tempered, however, by evidence that some of the decrease is due to police yielding to pressure to demonstrate victory in the "war on crime" by fabricating lower crime rates. DYER, *supra* note 62, at 33-34; Fox Butterfield, *Police React to Pressure for "Improved" Statistics*, N.Y. TIMES, Feb. 16, 1999 (police promotions and pay raises that were once linked to escalating crime rate have, in the 1990s, become increasingly tied to statistics showing that crime has been reduced).

<sup>95</sup> The man perhaps most responsible for the articulation of the superpredator

TABLE 1  
NUMBER OF VICTIMIZATIONS PER 1,000 POPULATION AGE 12  
AND OVER, 1973-1998\*

YEAR	TOTAL VIOLENT CRIME	MURDER	RAPE	ROBBERY	AGGRAVATED ASSAULT	SIMPLE ASSAULT
1973	47.7	0.1	2.5	6.7	12.5	25.9
1974	48.0	0.1	2.6	7.2	12.9	25.3
1975	48.4	0.1	2.4	6.8	11.9	27.2
1976	48.0	0.1	2.2	6.5	12.2	27.0
1977	50.4	0.1	2.3	6.2	12.4	29.4
1978	50.6	0.1	2.6	5.9	12.0	30.0
1979	51.7	0.1	2.8	6.3	12.3	30.3
1980	49.4	0.1	2.5	6.6	11.4	28.8
1981	52.3	0.1	2.5	7.4	12.0	30.3
1982	50.7	0.1	2.1	7.1	1.5	29.8
1983	46.5	0.1	2.1	6.0	9.9	28.3
1984	46.4	0.1	2.5	5.8	10.8	27.2
1985	45.2	0.1	1.9	5.1	10.3	27.9
1986	42.0	0.1	1.7	5.1	9.8	25.3
1987	44.0	0.1	2.0	5.3	10.0	26.7
1988	44.1	0.1	1.7	5.3	10.8	26.3
1989	43.3	0.1	1.8	5.4	10.3	25.8
1990	44.1	0.1	1.7	5.7	9.8	26.9
1991	48.8	0.1	2.2	5.9	9.9	30.6
1992	47.9	0.1	1.8	6.1	11.1	28.9
1993	49.1	0.1	1.6	6.0	12.0	29.4
1994	51.2	0.1	1.4	6.3	11.9	31.5
1995	46.1	0.1	1.2	5.4	9.5	29.9
1996	41.6	0.1	0.9	5.2	8.8	26.6
1997	38.8	0.1	0.9	4.3	8.6	24.9
1998	36.0	0.1	0.9	4.0	7.5	23.5

\* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY CRIME TRENDS, 1973-1998 (2000).

myth has now admitted that his prediction of a wave of juvenile violence was mistaken. John DiIulio defended his research, but admitted that his conclusions were wrong. Elizabeth Becker, *As Ex-Theorist on Young 'Suprapredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. Franklin Zimring, a DiIulio critic, responded to his concession with some acerbity: "His prediction wasn't just wrong, it was exactly the opposite . . . . His theories on superpredators were utter madness." *Id.*

B. "That Malice Which is to Supply Age"<sup>96</sup>

1. *Transfer to Adult Court: Developmental Bases*

Waiver policies also posit a developmental basis for the treatment of a child as an adult. This aspect of the juvenile counter-reformation insists that children's maturity, as evidenced by their criminal behavior, makes it appropriate to hold them responsible for criminal acts on the same basis as adults. A separate dispositional scheme would thus be unnecessary. However, the theory that children demonstrate maturation and autonomy by the commission of criminal acts has tenuous roots in the common law. The infancy doctrine, also known as the *doli incapax* principle,<sup>97</sup> traditionally provided that children under seven were absolutely immune from prosecution.<sup>98</sup> Note that the infancy defense is not generally available in juvenile court.<sup>99</sup> Such young children were assumed to lack the mental capacity to appreciate the wrongfulness of their conduct and to develop the mental state required to commit a crime.<sup>100</sup> Thus, these children could not be legally responsible for their actions.<sup>101</sup> At the other end of traditional childhood, those who had reached the age of fourteen were pre-

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<sup>96</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*23-24. The wisdom of using a youth's malevolence as a proxy for maturity is discussed in the text at notes 97-123, *infra*.

<sup>97</sup> See Lisa Micucci, *Responsibility and the Young Person*, 11 CAN. J.L. & JURIS. 277, 281-82 (1998).

<sup>98</sup> See SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 16-28 (1680) (discussing origins of infancy defense dating back to Roman era); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509-17 (1984) (discussing infancy defense as it developed under English and American common law); A.W.G. Kean, *The History of Criminal Liability in Children*, 53 LAW Q. REV. 364, 364, 370 (1937) (same).

<sup>99</sup> See *State v. Q.D.*, 685 P.2d 557, 560 (Wash. 1984) (en banc) ("The infancy defense fell into disuse during the early part of the century with the advent of reforms intended to substitute treatment and rehabilitation for punishment of juvenile offenders. This *parens patriae* system, believed not to be a criminal one, had no need of the infancy defense."); Walkover, *supra* note 99, at 516 (observing that under paternalistic theory of juvenile court, there was no need "to determine whether the child had the capacity to act in a culpable fashion"); Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 162 (2000) (elaborating the rationales for preclusion of the infancy defense in juvenile court: as out of place in a civil case in a rehabilitative forum; as a redundant shield in light of the procedural safeguards now in place for juveniles; and as not bearing on the issue of the child's state of mind at the time of the offense, in contrast to the child's capacity to attach meaning and consequences to that offense).

<sup>100</sup> Kean, *supra* note 98, at 370.

<sup>101</sup> *Id.*

sumed to be capable of criminal responsibility and, thus, were treated as adults.<sup>102</sup>

Children between the ages of seven and fourteen benefitted from a tempered version of the infancy defense. Youth in these in-between ages were not considered accountable for their misdeeds, because they were presumed to lack the mental capacity to understand "the likely physical consequences of [their] act or its wrongful . . . nature."<sup>103</sup> However, this presumption was rebuttable.<sup>104</sup> In order to proceed criminally in such a case, the prosecutor bore the burden of proving that the particular child was indeed mentally capable and thus could legally be charged with the criminal act.<sup>105</sup> Relevant factors included evidence of the youth's plan and method of execution, as well as prior similar conduct.<sup>106</sup> The fact that the youth tried to hide the crime, either physically or by lying, was also pertinent to the question of legal responsibility.<sup>107</sup> The inquiry might also extend into the child's environment, intelligence, education, and moral underpin-

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<sup>102</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 351-52 (1972).

<sup>103</sup> 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 325 (1984); *see also* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 4.11, at 366; ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 826, 936 (3d ed. 1982); Tim A. Thomas, Annotation, *Defense of Infancy in Juvenile Delinquency Proceedings*, 83 A.L.R. FED. 1135, 1137-38 (Supp. 1997) (noting that infancy defense developed under common law as presumption that "the accused lacked the capacity to commit a crime due to his youth").

<sup>104</sup> 1 LAFAVE & SCOTT, *supra* note 103, § 4.11, at 366; PERKINS & BOYCE, *supra* note 103, at 936.

<sup>105</sup> *See* Robert E. Shepherd, Jr., *Juvenile Justice: Rebirth of the Infancy Defense*, CRIM. JUST., Summer 1997, at 45 (detailing prosecution's burden of persuasion to overcome infancy defense); *see also* Bazelon, *supra* note 99, at 159-62 (Bazelon advocates the implementation of a reformulated infancy defense by juvenile courts. The defense would create a protective presumption for juveniles ages seven to eleven charged with serious offenses. This presumption would require the state to prove that the charged juvenile had both the capacity to possess and was in possession of the charged crime's requisite *mens rea*. The defense would grant similar protection to juveniles over the age of eleven who could demonstrate lack of capacity sufficient to justify such a presumption.).

<sup>106</sup> *See, e.g.*, *People v. Harold M.*, 144 Cal. Rptr. 744 (Cal. Ct. App. 1978) (holding that because the fourteen-year-old defendant had appeared in the juvenile court for the same offenses on two previous occasions within several months, evidence was sufficient to justify the conclusion that minor's knowledge of the wrongfulness of his actions had been clearly proved).

<sup>107</sup> PERKINS & BOYCE, *supra* note 103, at 936; *see also* Kean, *supra* note 98, at 369-70 (citing examples in fourteenth- and fifteenth-century England wherein young children were found to have understood the gravity of their action by attempting to conceal their deeds).

nings.<sup>108</sup> Blackstone highlighted the juvenile's moral and intellectual development as the fulcrum of the culpability assessment: "The capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."<sup>109</sup> It is in this limited context of establishing the lower age boundary for criminal liability that Blackstone made his famous remark that, while children as young as ten had been found *doli capax*, "in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction."<sup>110</sup>

The juvenile counter-reformation appears to have purloined a misapprehended version of Blackstone's dictum as its mandate. The movement maintains that malicious behavior may "supply age" in the context of assessing the appropriateness of replacing a treatment-oriented program with a retributive sanction. But this rendering confuses malevolence with maturity. Children are developmentally different from their elders, as research finds and public opinion concurs, and that difference suggests the need for a different yardstick with which to measure juvenile and adult transgressions.<sup>111</sup> Youthful decision-making is qualitatively different than adult judgment, and warrants a more solicitous approach.<sup>112</sup> Adolescent development includes progress through arenas of cognitive capacity (knowing right from wrong) as well as volitional control (demonstrating mastery over self). Further, children and adults diverge in terms of moral formation<sup>113</sup> and

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<sup>108</sup> See Walkover, *supra* note 98, at 559-60; see, e.g., *Nino v. Gladys R.*, 464 P.2d 127 (Cal. 1970) (holding, *inter alia*, that the jury should consider whether the defendant understood the wrongfulness of her actions).

<sup>109</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*23-24.

<sup>110</sup> *Id.*

<sup>111</sup> See I. SCHWARTZ ET AL., PUBLIC ATTITUDES TOWARD JUVENILE CRIME AND JUVENILE JUSTICE: IMPLICATIONS FOR PUBLIC POLICY (1992).

<sup>112</sup> See Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1610 (1992) ("[T]he intuition behind paternalistic policies is that developmentally linked traits and responses systematically affect the decisionmaking of adolescents in a way that may incline them to make choices that threaten harm to their own and others' health, life, or welfare, to a greater extent than do adults."); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) (suggesting that limitations on children's socio-cognitive development place substantial obstacles in achieving their empowerment).

<sup>113</sup> See, e.g., Lawrence Kohlberg & R. Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 HUM. DEV. 93 (1969); LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STATES AND THE IDEA OF JUSTICE (1981).

ego development.<sup>114</sup> Youthful decision-making competencies have been evaluated for "psychosocial maturity," "judgment," and "temperance," and in each case behavioral science has found children less developed than adults.<sup>115</sup> Finally, the tendency to take risks denotes one of the principal dissimilarities between youths and adults. Divergences between the adult's and the child's life experience and temporal outlook affect the number and level of hazards undertaken. Unrealistic optimism in balancing the likelihood of success versus the prospects for failure characterizes adolescence,<sup>116</sup> because juveniles generally have difficulty meshing a speculative future outcome into their strong presentist outlook.<sup>117</sup> While these research findings do not comprise a paean to impulsiveness, they do indicate the normality of impetuous, sensation-seeking acts attributable to hormonal or psychological changes.<sup>118</sup> Risk-taking helps to shape teenage identity; in fact, frequent risk-taking is a "normative, healthy, de-

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<sup>114</sup> See, e.g., Daniel K. Lapsley et al., *Self-Monitoring and the "New Look" at the Imaginary Audience and Personal Fable: An Ego-Developmental Analysis*, 3 J. ADOLESCENT RES. 17 (1988) (investigating the relationship between self-monitoring and ego development in early and late adolescents and comparing the relationship in different age groups); Patricia E. Ortman, *Adolescents' Perceptions of and Feelings About Control and Responsibility in Their Lives*, 23 ADOLESCENCE 913, 913 (1988) (discussing the difference between perceptions of control and responsibility in adolescents while discussing "implications for the development of social responsibility").

<sup>115</sup> See generally STUART T. HAUSER, *ADOLESCENTS AND THEIR FAMILIES: PATHS OF EGO DEVELOPMENT* (1991); Scott & Grisso, *supra* note 25; Lawrence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psycho-Social Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996); Elizabeth Cauffman & Lawrence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763 (1995); Scott, *supra* note 112, at 1607.

<sup>116</sup> See generally DONNA SCHNEIDER, *AMERICAN CHILDHOOD: RISKS AND REALITIES* (1995); William Gardner, *A Life-Span Rational Choice Theory of Risk Taking*, in ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 3 (1992); Scott, *supra* note 112, at 1610, 1642-52; Steinberg & Cauffman, *supra* note 115, at 252, 261-62.

<sup>117</sup> See William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, in NEW DIRECTIONS FOR CHILD DEVELOPMENT 17, 25-26 (William Gardner et al. eds., 1990).

<sup>118</sup> See HAUSER, *supra* note 115, at 3 ("Powerful forces are fired by the significant hormonal shifts associated with adolescence, which in turn are responsive to the stresses inherent in this transition [from childhood to adulthood]."); Steinberg & Cauffman, *Maturity of Judgment in Adolescence: Psycho-Social Factors in Adolescent Decision Making*, *supra* note 115, at 258-62; Cauffman & Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, *supra* note 115, at 1780.

velopmental behavior for adolescents."<sup>119</sup>

As children age, they move from dependency toward autonomy. Most teenagers are best described as semiautonomous.<sup>120</sup> Far from having achieved maturity, their moral characters are unfinished, and many remain particularly vulnerable to peer and other external influences.<sup>121</sup> "Most adolescent decisions to break the law or not take place on a social stage where the immediate pressure of peers urging the adolescent on is often the real motive for most teenage crime."<sup>122</sup> Resisting peer pressure is a social faculty essential to adherence to legal norms, yet many teenagers have not yet matured to the point of having developed that resistance.

Because adolescents are not fully autonomous moral agents, it would be unjust to hold them responsible as if they were. Nor, of course, should their unfolding development render them immune from the consequences of their actions. But the dichotomous distinctions enforced by the waiver statutes divide youth into two mutually exclusive camps: candidates for rehabilitation and targets for retribution. This artificial bifurcation disregards the developmental continuum in which most adolescents live before maturing into law-abiding adults. Automatic waiver policies are also logically unsatisfactory, because they propose a procedural answer to a substantive question. To the quandary of how to deal with seriously problematic youth, they respond with the pretense that such adolescents are adult equivalents. This answer fails to satisfy either the just desserts goals of the juvenile counter-reformation, or the need for a reasoned approach to the issue of families with troubled youth.

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<sup>119</sup> LYNN E. PONTON, *THE ROMANCE OF RISK: WHY TEENAGERS DO THE THINGS THEY DO* 6 (1998).

<sup>120</sup> See Mark H. Moore and Stewart Wakeling, *Juvenile Justice: Shoring up the Foundations*, 22 CRIME & JUST. 253, 262 (1997); JOSEPH F. KETT, *rites of passage: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT* 14-36 (1977) (describing historical model indicating that the stages of life for youth progress unevenly from dependence to semidependence to independence).

<sup>121</sup> Moore & Wakeling, *supra* note 120, at 262; see also Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981) ("adolescents commit crimes, as they live their lives, in groups").

<sup>122</sup> Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 488 (1998); see also Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 36, at 386 ("Because of the social context of adolescent crime, young people require time, experience, and opportunities to develop the capacity for autonomous judgment and to resist peer influence.").



## 2. *Transfer to Adult Court: Practical Consequences*

The transfer of arrested youth into adult criminal courts represents an effort to reconfigure the juvenile justice system primarily along behavioral lines rather than by relying on age criteria. Shifting jurisdiction over the offender from juvenile to criminal court purports to resolve the conflict between the goals of protecting dependent children and punishing violent children by declaring the latter to be adults. Youth charged with certain offenses are thus categorically deemed beyond the rehabilitative promise of juvenile court. Transfer to the criminal justice system symbolizes a metamorphosis from “redeemable youth”<sup>123</sup> into “unsalvageable adult.”<sup>124</sup> Pervasive fear of adolescent criminals has led to the concomitant popular view that juvenile courts effectively serve to funnel rather than to filter youth crime. Some critics have questioned the core of the juvenile court philosophy, the basic belief in “the difference between youth and adults.”<sup>125</sup> Together, these precepts have fueled calls for reconsideration and even elimination of juvenile court jurisdiction.<sup>126</sup>

Society faces a deep quandary in dealing with seriously problematic youth. One popular resolution declares that the commission of a seriously violent act signals the developmental transition of the offender from adolescence to adulthood.<sup>127</sup> But in what sense can this be true? There is no social science research to support the premise that anti-social behavior evidences the successful navigation of the passage into adult maturity. To the contrary, the violation of social norms by young people has always been regarded—as the Supreme Court observed in 1979—as proof of the want of maturity, “grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>128</sup> Although the notion that a child matures into

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<sup>123</sup> Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Courts: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 184 (1996).

<sup>124</sup> *Id.*

<sup>125</sup> *An Evolving Juvenile Court: On the Front Lines with Judge J. Dean Lewis*, JUVENILE JUSTICE, Dec. 1999, available at <http://www.ncjrs.org/html/ojjdp/jjjournal/1299/1.html> (last visited Oct. 4, 2001) (quoting Judge J. Dean Lewis).

<sup>126</sup> See text at notes 31-32, *supra*.

<sup>127</sup> See text at note 34, *supra*.

<sup>128</sup> *Bellotti v. Baird*, 443 U.S. 622, 635-36 (1979); see also Morse, *supra* note 27, at 58 (observing that immature behavior is a normal developmental characteristic of adolescents, but not of adults); Foster, *supra* note 15, at 555 (discussing the fact that

adulthood through the commission of a heinous crime is psychologically invalid, other possible interpretations of the individual developmental process may not be dismissed so easily.

The argument has been made that the justice system labels children as adults and transfers them to criminal court, not because the juveniles have reached a level of development equal to adulthood, but rather because society considers them disposable.<sup>129</sup> A less polemical look at the issue, however, suggests other rationales, ones more sympathetic to the frustrating tension inherent in dealing with children whose vicious acts put the juvenile court philosophy to its gravest test. Indeed, it is the very severity of the violence, not any aspect of a supposedly mature mind, which appears to compromise the original child-saving thesis of the juvenile court.<sup>130</sup> The modern counter-reformers do not ascribe sophisticated or intricate characteristics to super-predators.<sup>131</sup> Rather, they react in a retributive manner to the occurrence of what they deem an unprecedented level of violence. In doing so, they appear to make related assertions about predatory teenagers, i.e., they are not "rehabilitatable," and so the criminal court will more effectively protect society from their recidivism than the juvenile court will,<sup>132</sup> and, these adolescents are not so different from adults as to warrant a separate dispositional regime.<sup>133</sup> Although the argument that violence equals

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the minimum age at which different states hold children accountable as adults ranges from ten to seventeen years old and that "[t]here is no indication in the legislative history that these age determinations are grounded in knowledge of when children are capable of cognitively forming criminal intent or understanding the consequences of their behavior"); Lynn Trimble, *Adult Penalties, Zero Tolerance Ignore Facts of Kids and Crime*, ARIZ. REPUBLIC, Mar. 13, 2001, at B7 ("Do adult crime, do adult time. Catchy slogan. Lousy idea.").

<sup>129</sup> Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 509 (1995).

<sup>130</sup> On the child-saving origins of the juvenile court, see PLATT, *supra* note 35; DiFonzo, *supra* note 35, at 855.

<sup>131</sup> Thus, for instance, the complaint is not heard that super-predators plan and execute complex fraudulent schemes. What drives the juvenile counter-revolution is fear of quotidian, rapacious street crime. See articles cited at note 27, *supra*.

<sup>132</sup> See, e.g., Dolgin, *supra* note 20, at 448 (suggesting that children are now seen as unamenable to rehabilitation); Deborah L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903 (1996) (supporting harsher sanctions against juveniles in an effort to reduce recidivism).

<sup>133</sup> See generally Eric K. Klein, Note, *Dennis The Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 373 (1998) (stating that the government and society seem to believe

maturity may not be viable, other assertions of the counter-reformation can be critically analyzed.

States began responding to the widespread perception of a major escalation in youth crime in the 1970s and 1980s in many ways. One legislative initiative lowered the age at which children enter the juvenile system, thus extending jurisdiction to a younger group of offenders who had never previously been at risk of delinquency adjudications.<sup>134</sup> A far more popular measure consisted of reformulating jurisdictional waiver provisions to promote retribution rather than rehabilitation in the decision to transfer juveniles to criminal court.<sup>135</sup> By 1996, all the states but one had amended their laws to allow either criminal court prosecution of children aged fourteen or older charged with serious felony offenses, or at least the sentencing of these children to criminal punishment by the juvenile court.<sup>136</sup> Many states have reduced the age at which they may transfer youth from juvenile to criminal court.<sup>137</sup> This modification allows criminal courts to sentence children to periods of incarceration extending beyond the traditional terminal point of juvenile court jurisdiction.<sup>138</sup> Legislatures have also expanded the catalog of criminal charges which allow and, in many cases, require criminal courts to as-

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that "[t]he solution has become to lock up early the children who have displayed a propensity for crime and keep them locked up for a long time").

<sup>134</sup> See Linda Szymanski, *Lower Age of Juvenile Court Delinquency Jurisdiction*, in *SNAPSHOT 2* (Nat'l Ctr. for Juvenile Justice ed., 1997).

<sup>135</sup> See Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1043 n.31 (1995) (listing statutes allowing or requiring authorities to transfer juveniles to adult institutions); Eric J. Fritsch & Craig Hemmons, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 17 (1995); PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 17 (1996); Feld, *Race and the 'Crack Down' on Youth Crime*, *supra* note 36, at 368.

<sup>136</sup> LINDA A. SZYMANSKI, NAT'L COUNCIL FOR JUVENILE JUSTICE, U.S. DEP'T OF JUSTICE, *SNAPSHOT, PROSECUTING FOURTEEN-YEAR OLDS IN CRIMINAL COURT* (1997). Hawaii is the exception, setting the minimum age at sixteen. HAW. REV. STAT. § 571-22 (Supp. 2000).

<sup>137</sup> See Foster, *supra* note 15, at 538-39, 563-64.

<sup>138</sup> See Brummel, *supra* note 11, at 541. For illustrations of the effect of these provisions, see *15-Year-Old Boy Gets Life in Prison for Killing Girl*, *supra* note 33, at 19; Bradsher, *supra* note 11, at A1; Mitch Martin, *3rd Teenager Is Sentenced in Cross-Burning*, CHI. TRIB., June 9, 2000, at 3; Editorial, *Juvenile Crime Riddle Has No Easy Answers*, ASHEVILLE CITIZEN-TIMES, Mar. 2, 2000, at A6; Associated Press, *Youth Incarcerations Doubled in 12 Years*, DESERET NEWS (Salt Lake City, Utah), Feb. 28, 2000, at A2.

sume jurisdiction over child defendants.<sup>139</sup> Finally, the mechanism of the transfer decision itself has been altered. States employ three basic approaches: judicial waiver, prosecutorial forum choice, and legislative offense exclusion. Recent legislation has increasingly reduced the role of discretionary waiver, in which juvenile judges or prosecutors make case-by-case decisions on the propriety of transferring a child offender to criminal court.<sup>140</sup> Instead, states have more frequently relied upon statutory exclusion principles, by which youth accused of one or more specified offenses are either automatically transferred out of juvenile court, or by which the prosecutor initially brings the case in criminal court.<sup>141</sup>

Jurisdictional waiver represents a policy decision to impose upon certain youth harsher sentences than are allowable in juvenile court, and also to forego the rehabilitative options available to those youth in that court.<sup>142</sup> Policymakers assume that public safety will be enhanced by the transfer of these juveniles into

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<sup>139</sup> See, e.g., Foster, *supra* note 15, at 538-39, 563-64 (giving examples of changes in Vermont law intended to crack down on juvenile crime including: subjecting children age ten or older to juvenile court regardless of the offense, subjecting children under ten who commit murder to possible juvenile court action, transferring children age ten or older to criminal court for the commission of certain crimes, extending juvenile court jurisdiction to age twenty-one, and requiring that courts charge fourteen- to sixteen-year-olds who commit certain crimes in criminal court).

<sup>140</sup> *Id.* at 549, 556-58 (discussing new legislation and how statutory age distinctions in juvenile law always inherently involve line drawing between children "only one day apart in age"; also discussing how statutory age limits in juvenile law prescribe the punishment for certain offenses and how the punishment varies with age). These age distinctions take out of the judges' hands the ability to look at a specific act committed by a child and transfer it to criminal court where the offender would receive a stricter sentence. See generally Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29 (1976) (contrasting prosecutorial with judicial waiver); McCarthy, *supra* note 59, at 670 ("State legislatures have been responsive . . . to and have increasingly begun to restrict the jurisdiction of the court, or have provided vehicles that make it easier for juveniles to be transferred to the criminal courts for prosecution as adults."); Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 301 (1991) (championing judicial waiver with statutory criteria and hearings with due process protections).

<sup>141</sup> See Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 182 (1994). States often include homicide, forcible rape, kidnaping, armed robbery, and burglary in their legislative waiver statutes. *Id.*; see also Ross, *supra* note 135, at 1043; Fritsch & Hemmons, *supra* note 135, at 17; OJJDP REPORT, *supra* note 46, at 171.

<sup>142</sup> See FELD, BAD KIDS, *supra* note 14, at 208.

criminal court.<sup>143</sup> However, most empirical research into the effects of waiver policies has shown that jurisdictional transfer frustrates rather than furthers public safety. These studies have concluded that transfer policies "increase the likelihood, the rate, and the severity of reoffending and . . . decrease the time to rearrest."<sup>144</sup> For instance, a large Florida study compared the recidivism of juvenile offenders who were transferred to criminal court with a matched sample of delinquents retained in the juvenile system.<sup>145</sup> Recidivism was analyzed in terms of rate of repeat offending, seriousness of the new crime, and time between release and reoffense. By every recidivism measure examined, reoffending was greater among transfers than among the matched controls.<sup>146</sup>

Studies in Utah and South Carolina found that extremely large proportions of cases considered for waiver involved youth with no prior juvenile adjudications. In Utah, the proportion of such cases was 82%; in South Carolina, 72%.<sup>147</sup> The lack of a juvenile placement history for such transferees suggests at a minimum that their intractability to juvenile court processes had not been established. Moreover, on a national scale, more juveniles were waived into criminal court for property offenses<sup>148</sup> than for crimes against the person from 1987 to 1992. Thereafter, the positions were reversed, although recently the gap has narrowed.

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<sup>143</sup> See, e.g., Mills, *supra* note 132, at 903.

<sup>144</sup> Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 148 (1998).

<sup>145</sup> *Id.* at 147-54.

<sup>146</sup> *Id.* The study found that transferees reoffended approximately 30% more frequently than matched children who stayed in the juvenile system. *Id.* An earlier study examining matched fifteen- and sixteen-year-old robbery and burglary offenders in New York and New Jersey found no significant differences in burglary cases, but uncovered a consistent pattern of higher recidivism for robbery offenders processed in criminal court. Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanction on Recidivism Among Adolescent Felony Offenders*, in HOWELL ET AL., *supra* note 14, at 238, 245-52. One additional result of criminalizing delinquency is the limitation of participation into the future labor market for the juveniles so publicly stigmatized. See Richard B. Freeman, *Crime and the Employment Status of Disadvantaged Youths*, in URBAN LABOR MARKETS AND JOB OPPORTUNITY 201 (George E. Peterson and Wayne Vroman eds., 1991). In turn, diverting such youth from avenues to legitimate employment leads to their pursuit of illegal enterprise in order to generate income. *Id.*

<sup>147</sup> OJJDP REPORT, *supra* note 46, at 181.

<sup>148</sup> See Barry C. Feld, *Juvenile and Criminal Justice Systems' Response to Youth Violence*, 24 CRIME & JUST. 189, 201 (1998); Jensen, *supra* note 141, at 185.

In 1996, crimes against the person accounted for 43% of waived cases, and property cases 37%.<sup>149</sup>

Moreover, the question whether criminal courts deal more harshly with adolescents than juvenile courts has generally been answered in the negative. One four-state analysis reported that most juveniles waived to adult court received sentences of probation.<sup>150</sup> Given the youth and inexperience of these defendants, it is likely that criminal court judges and juries viewed juvenile misdeeds more leniently than adult violations.<sup>151</sup> But even those transferred juveniles who are incarcerated "quickly reoffend at a higher rate than the nontransferred controls, thereby negating any incapacitative benefits that might have been achieved in the short run."<sup>152</sup> In fact, as this Article has suggested, the need for super-punitive measures to combat an explosion of serious teenage crime is simply a screed expounding a false premise. The problem of teenage delinquency is quite real, but far less ominous than the creators of the super-predator myth have postulated. Accordingly, as the next section argues, the criminal parental responsibility laws are not only improper but unnecessary; and, finally, the solutions suggested in this Article's third and final section are better suited to the task of properly assessing parental responsibility for juvenile crime.

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<sup>149</sup> OJJDP REPORT, *supra* note 46, at 170-71. A Pennsylvania study found that most children transferred to adult court were charged with property offenses; moreover, many of these children had no prior juvenile placements. John H. Lemon et al., A Study of Pennsylvania Juveniles Transferred to Criminal Court (1991) (unpublished manuscript prepared for the Pennsylvania Juvenile Court Judges Commission).

<sup>150</sup> Dean J. Champion, *Teenage Felons and Waiver Hearings: Some Recent Trends, 1980-88*, 35 CRIME & DELINQ. 577 (1989).

<sup>151</sup> *Id.* at 583-84; Robert M. Emerson, *On Last Resorts*, 87 AM. J. SOC. 1 (1981); Feld, *Principle of the Offense*, *supra* note 30, at 842. The empirical literature also reports some contrary findings. Some studies show violent juvenile offenders receiving adult sentences considerably longer than are likely or even possible in juvenile court. Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259 (1987); see also Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93 (1990). A California study found that juveniles who committed violent crimes received more severe sanctions in adult court than they would have received in juvenile court. Carole Barnes & Randall S. Franz, *Questionably Adult: Determinants and Effects of the Juvenile Waiver Decision*, 6 JUST. Q. 117 (1989). However, the reverse was true for property offenders. *Id.*

<sup>152</sup> Bishop et al., *supra* note 144, at 183; see also Gerard F. Glynn, *Arkansas' Missed Opportunity for Rehabilitation: Sending Children to Adult Courts*, 20 U. ARK. LITTLE ROCK L.J. 77 (1997).

## II

CRIME-BY-PARENTING: PUNISHING PARENTS FOR  
THEIR CHILDREN'S MISDEEDS

A substantial portion of the perceived increase in juvenile crime has been laid at the feet of asserted flaws in parenting.<sup>153</sup> The accusation is blunt: "[P]arents are largely to blame for the delinquent acts of their children."<sup>154</sup> Parental responsibility laws have become popular mechanisms designed to induce increased parental control of their children by holding parents criminally responsible when their children commit delinquent acts. These laws implicitly presume parental omnipotence, and result in "parents being punished not for their own acts or omissions, but for those of their children."<sup>155</sup> They often allow for inadequate parental supervision of children to be shown solely by one or more juvenile delinquency contacts, and include sanctions such as periods of incarceration and fines, requirements to attend counseling and parental education classes, and orders for the parents to make restitution to the victims of their child's delinquency.<sup>156</sup>

Contemporary criminal laws sanctioning parental supervision stem from older enactments penalizing adults for contributing to the delinquency or endangering the welfare of minors.<sup>157</sup> These

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<sup>153</sup> See, e.g., Courtney L. Zolman, *Parental Responsibility Acts: Medicine for Ailing Families and Hope for the Future*, 27 CAP. U.L. REV. 217, 219 (1998) (holding parents primarily responsible for their children's criminal behavior); RITA KRAMER, AT A TENDER AGE 270 (1988) (arguing that parents should be criminally liable when their children break the law); Davidson, *supra*, note 30, at 23 ("Far too many courts, as well as family and youth service agencies have either undervalued or ignored the role parents play in their children's severe misbehavior and what can and should be done about it.").

<sup>154</sup> Zolman, *supra* note 153, at 219.

<sup>155</sup> S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PENN. L. REV. 1123, 1160 (1991). "Not only do [these laws] often fail to recognize varying levels of parental authority as the age of the child changes, they also assume the same degree of control no matter the nature of the child's actions or in what forum they occur." *Id.*; see also Moore & Wakeling, *supra* note 121, at 274 (asserting that the laws' exclusive focus on parenting as the cause of delinquency).

<sup>156</sup> See text at notes 216-304, *infra* (discussing criminal parental responsibility laws).

<sup>157</sup> See Gilbert Geis & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 305-15 (1991). While the older laws focused on a parent or guardian contributing to children's delinquency or endangering their welfare, the recent enactments target "improper supervision," "failure to supervise," and violations of "parental responsi-

forerunners have their genesis in the laws initially propagating the juvenile court philosophy. The earliest appeared in Colorado's first juvenile court enactment in 1903, which included a provision punishing adults for "contributing to the delinquency of children."<sup>158</sup> Judge Ben B. Lindsey, who was most responsible for its passage, termed it "the adult delinquent law,"<sup>159</sup> and believed it was "the most important feature" of the new juvenile court statute.<sup>160</sup> The law specified that any parent or guardian "responsible for, or by any act encouraging, causing or contributing to the delinquency of such child" was guilty of a misdemeanor.<sup>161</sup> Punishment included imprisonment for up to one year, a fine not to exceed \$1,000, or both.<sup>162</sup> The statute also authorized the court to suspend the sentence and "impose conditions upon any person found guilty."<sup>163</sup>

Embodying "the broad purpose . . . to stamp out juvenile delinquency at its roots,"<sup>164</sup> contributing-to-delinquency laws quickly spread throughout the United States, and today exist in

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bility." Paul W. Schmidt, *Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws*, 73 N.Y.U. L. REV. 667, 675 (1998). For discussions of contributing to delinquency laws, see *id.* at 675-77; Peter D. Garlock, *Contributing to the Delinquency of Minors*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 240 (Stanford H. Kadish ed., 1983); Glenn W. Soden, *Contributing to Delinquency: An Exercise in Judicial Speculation*, 9 AKRON L. REV. 566 (1976); Derryck H. Dittman, *Contributing to Delinquency Statutes—An Ounce of Prevention?*, 5 WILAMETTE L. REV. 104 (1968); and MODEL PENAL CODE § 230.4 (1985) ("Endangering Welfare of Children"). Contributing-to-delinquency laws and endangering-the-welfare statutes are largely interchangeable. This Article will generally refer to them as contributing-to-delinquency laws.

<sup>158</sup> 1903 Colo. Sess. Laws 198 (codified as amended at COLO. REV. STAT. 18-6-701 (2000)); see also James H. Pershing, *Juvenile Court Law and Procedure in Colorado*, 1924 COLO. BAR ASS'N 232, 259; Homer H. Clark, *Juvenile Delinquency in Colorado: The Law's Response to Society's Need*, 31 ROCKY MT. L. REV. 1 (1958). "The whole spirit of and purpose of the [juvenile court] law is to help and assist the child in the home, where it needs assistance, and to compel the parents to perform their duty where they are neglecting the child." Ben B. Lindsey, *The Juvenile Law of Colorado*, 18 GREEN BAG 126, 129 (1906) (emphasis omitted).

<sup>159</sup> *Id.* at 127.

<sup>160</sup> *Id.* Lindsey noted that the adult delinquency law was intended "to compel careless homes to take care of their children." *Id.*

<sup>161</sup> COLO. REV. STAT. § 18-6-701.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Commonwealth v. Jordan*, 7 A.2d 523, 527 (Pa. Super. Ct. 1939). The Jordan court expressed its support of the contributing-to-delinquency law by adding that "no court should be astute in finding reasons to relieve those who violate its provisions." *Id.* at 528.



every state except Maine.<sup>165</sup> Courts have generally interpreted these vaguely-worded "mandates . . . [as] salutary measures designed to protect children,"<sup>166</sup> and so have afforded their provisions broad sway, enforcing criminal regulation of conduct toward a child "in an unlimited variety of ways which tends to produce or encourage or to continue conduct of the child which would amount to delinquent conduct."<sup>167</sup> Although these statutes primarily address affirmative parental misconduct, a parent may also be convicted for omissions under certain circumstances.<sup>168</sup> In many jurisdictions, parents may be convicted of contributing to the delinquency of their child even though the child has not been formally adjudicated a delinquent.<sup>169</sup>

Typically, contributing-to-delinquency offenses are crimes of negligence,<sup>170</sup> although some statutes demand a higher level of *mens rea* for one or more elements of the offense.<sup>171</sup> They are

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<sup>165</sup> See Geis, *supra* note 37, at 63-64 (stating that at that time only Maine and Georgia remained outside this legislative tent). Georgia recently passed a law entitled "Contributing to the delinquency, unruliness, or deprivation of a minor." GA. CODE ANN. § 16-12-1 (Supp. 2000).

<sup>166</sup> *Commonwealth v. Randall*, 133 A.2d 276, 280 (Pa. 1957), *cert. denied*, 355 U.S. 954 (1958); *see also* *State v. McKinley*, 202 P.2d 964, 967 (N.M. 1949); *State v. Harris*, 141 S.E. 637 (W. Va. 1928).

<sup>167</sup> *Commonwealth v. Stroik*, 102 A.2d 239, 241 (Pa. Super. Ct. 1954).

The ways and means by which the venal mind may corrupt and debauch the youth of our land . . . are so multitudinous that to compel a complete enumeration in any statute designed for protection of the young . . . would be to confess the inability of modern society to cope with the problem of juvenile delinquency.

*State v. McKinley*, 202 P.2d 964, 967 (N.M. 1949); *see also* *People v. Calkins*, 119 P.2d 142, 144 (Cal. Dist. Ct. App. 1941); *People v. Dritz*, 259 A.D. 210 (N.Y. App. Div. 1940). Paul W. Alexander, a prominent juvenile and domestic relations judge, ridiculed the boundlessness of these laws in comically suggesting that under a contributing to delinquency statute "you could convict a drunk for staggering out of a saloon so that a passing child could see his condition and go imitate him." *State v. Crary*, 155 N.E.2d 262, 264 (Ohio Ct. C.P. 1959).

<sup>168</sup> See, e.g., KY. REV. STAT. ANN. § 530.060 (Michie 1999) (declaring parent guilty "when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child").

<sup>169</sup> Ludwig, *supra* note 52, at 725, 737-45 (state-by-state listing).

<sup>170</sup> See, e.g., *Pearson v. State*, 601 So. 2d 1119, 1126 (Ala. Crim. App. 1992), *cert. denied*, No. CR 90-1405, 1992 Ala. LEXIS 1104, at \*1 (Ala. July 31, 1992) (distinguishing between the intentional conduct required for violation of the child abuse statute and the negligent behavior sufficient to make out the charge of endangering the welfare of a child).

<sup>171</sup> See, e.g., N.H. REV. STAT. ANN. § 639:3 (1996) (providing for conviction of a person who "knowingly endangers the welfare . . . by purposely violating a duty of

generally punished as misdemeanors,<sup>172</sup> but not always.<sup>173</sup> Contributing-to-delinquency laws also cast a broad net to encompass harmful conduct to children, committed not only by parents and caretakers, but by any adult.<sup>174</sup> Recent enactments by states and municipalities have significantly altered the focus of legal proscriptions in order to hold parents criminally responsible in connection with their children's behavior. These newer parental responsibility laws evince radically diminished concern with child welfare and instead concentrate on the protection of society.<sup>175</sup> At the heart of both sets of laws, however, is an inflated view of parental influence on delinquency, and an inadequate appreciation of the uneven developmental road followed by most adolescents.

#### A. *A Complex Relationship, Overly Simplified*

The juvenile court enactments and their companion contributing-to-delinquency laws reflected a unified view of parent-child relationships. As noted above, the initial revolution in the law's treatment of delinquent youths involved both the removal of children from exposure to the adult world of criminal courts, and the substitution of "parental" guidance in the shape of juvenile judges and their social work staffs.<sup>176</sup> But if the children were displaced from the traditional courts, so too were their families dislodged as the central caretakers and rule makers for those children.<sup>177</sup> The ostensibly more lenient regime of the juvenile court was justified on grounds that troublesome youth were generally a product of troubled environments.<sup>178</sup> Since parents were

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care"); see generally Ludwig, *supra* note 51, at 726-31 (discussing cases in terms of the required burden of proof).

<sup>172</sup> See, e.g., ALA. CODE § 13A-13-6 (1994) ("Class A misdemeanor").

<sup>173</sup> See, e.g., N.M. STAT. ANN. § 30-6-3 (Michie 1994) ("fourth degree felony").

<sup>174</sup> See, e.g., State v. Crosetti, 628 A.2d 132, 134 (Me. 1993) (affirming conviction of uncle for endangering the welfare of his fourteen-year-old niece when he "fostered, condoned, and encouraged" her to have sex with her boyfriend); Paul W. Alexander, *What's This About Punishing Parents?*, 12 FED. PROBATION 23, 23 (1948) (reporting that in a study of 1,027 contributing-to-delinquency cases brought between 1937 and 1946, slightly more than half the defendants were non-parents).

<sup>175</sup> See text at notes 216-304, *infra* (discussion of parental responsibility laws).

<sup>176</sup> See text at notes 14-34, *supra*.

<sup>177</sup> The extent to which the ideology of the juvenile court movement sought to replace parents of troubled children with the state itself is suggested by Judge Lindsey: "We seek to make the child a co-worker with the state for his own salvation, which, of course, in the end, is the salvation of the state; for the child is the state and the state is the child." Lindsey, *supra* note 158, at 127.

<sup>178</sup> Although the children so characterized are also found within the juvenile

primarily responsible for the households in which delinquents were raised, those parents needed to be held accountable for their failures, or at least legally dissuaded from fostering future delinquents. Accordingly, contributing-to-delinquency statutes were enacted to prevent parents, and other adults in the orbit of the protected children, from leading youth astray.<sup>179</sup> Although obviously an overstatement, the apogee of this view was: "There are no delinquent children; there are only delinquent parents."<sup>180</sup>

The question of parental influence over children's anti-social behaviors is quite complex, although often it is overly simplified in a reductionist effort to blame parents for their children's wrongs.<sup>181</sup> As with the controversy over the proper disposition of violent juveniles, the present argument over the causal relationship between parenting and juvenile delinquency reprises a debate at least a half-century old. In 1948, Judge Paul W. Alexander observed that the "world is now full of people who have just discovered that juvenile delinquency is largely traceable to delinquent parents, and who would curb the former by punishing the latter."<sup>182</sup> He published the results of an informal study of 500 parents charged with the crime of contributing-to-delinquency, concluding that it is "generally impossible to punish the parent without at the same time punishing the child or the rest of

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court's jurisdiction in PINS (Persons in Need of Supervision) cases, this Article will generally focus on juvenile delinquency matters, as these have provoked the greatest outcry against the juvenile court which this Article predominantly addresses.

<sup>179</sup> Professor Geis has argued that the juvenile court laws' "benevolent philosophy and their patient and compassionate ideal regarding the treatment of youth" were at odds with the subsequent imposition of penal sanctions upon parents. Geis, *supra* note 37, at 67. He suggested that the contributing laws created a "scapegoat upon whom to impose the abrogated punitive sanctions." *Id.* at 68; *see also* Irving Arthur Gladstone, *Spare the Rod and Spoil the Parent*, 19 FED. PROBATION 37, 40 (1955) [hereinafter Gladstone, *Spare the Rod*] (reporting the view that contributing laws reflect a community's effort to assuage its guilt at permitting juvenile delinquency "by finding a scapegoat in the person of these parents"); Frank E. Harper, *To Kill the Messenger: The Deflection of Responsibility Through Scapegoating (A Socio-Legal Analysis of Parental Responsibility Laws and the Urban Gang Family)*, 8 HARV. BLACK LETTER L.J. 41, 41 (1991) (calling the proposal of measures to hold parents responsible for the acts of their children "telling of society's misguided approaches to addressing certain serious problems").

<sup>180</sup> Ludwig, *supra* note 52, at 719.

<sup>181</sup> *See* Kim Murphy & Melissa Healy, *When the Sins of the Child Point to Parents, Law's Grip Is Tenuous*, L.A. TIMES, Apr. 30, 1999, at A1 (detailing nation-wide legislative campaign to hold parents more criminally culpable and civilly liable for their children's misdeeds).

<sup>182</sup> Alexander, *supra* note 174, at 23.

the family”<sup>183</sup> and finding “no evidence that punishing parents has any effect whatsoever upon the curbing of juvenile delinquency”<sup>184</sup> or in “deter[ing] other parents from contributing.”<sup>185</sup>

The other side of the debate was equally certain: “Punish the parents, they say. Jail them. Fine them. Hold them to account for the misdeed of their children, and the rising trend of juvenile delinquency will be reversed.”<sup>186</sup> Legislation often recapitulated this account of cause-and-effect, seeking to sanction the parents in an effort to restrain juvenile delinquency.<sup>187</sup> In the 1950s, Federal Bureau of Investigation Director J. Edgar Hoover maintained that “the abdication of parental responsibility is resulting in the tragic anarchy of juvenile delinquency.”<sup>188</sup> He admitted that isolating a sole cause for delinquency was difficult, but reported that parental misfeasance “is reflected with monotonous regularity in case after case as a basic causal factor.”<sup>189</sup> Hoover expressed the belief that juvenile delinquency would decline “if

<sup>183</sup> *Id.* at 28.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*; see also Alice B. Freer, *Parental Liability for Torts of Children*, 53 KY. L.J. 254, 264 (1965) (reporting study by the U.S. Department of Health, Education and Welfare that indicated that from 1957 to 1962, the sixteen states with civil parental liability laws showed a 27.5% increase in their delinquency rates, marginally higher than the national increase of 26% over the same period).

<sup>186</sup> Helen L. Witmer & Elizabeth Herzog, *And What About the Parents of Juvenile Delinquents?*, 19 FED. PROBATION 17, 17 (1955); see also Gladstone, *Spare the Rod*, *supra* note 179 (summarizing the arguments on both sides of the issue of punishing parents for juvenile delinquency); James A. Kenny & James V. Kenny, *Shall We Punish the Parents?*, 47 A.B.A. J. 804 (1961). The public today remains deeply divided on this issue. In a national poll, 48% of the respondents agreed that the parents of juvenile offenders should be fined or imprisoned, while an equal percentage disagreed. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1993, at 197 tbl.2.51 (Kathleen Maguire & Ann L. Pastore eds., 1994).

<sup>187</sup> See Michael A. Axel, *Statutory Vicarious Parental Liability: Review and Reform*, 32 CASE W. RES. L. REV. 559, 577 (1982).

<sup>188</sup> J. Edgar Hoover, *Punish the Parents?*, 89 ROTARIAN 24, 24 (1956). Ten years earlier, Hoover had opined that “in most cases when juveniles are brought before the courts, . . . we should go a step further and fix responsibility for adult delinquency.” Alexander, *supra* note 174, at 23.

<sup>189</sup> Hoover, *supra* note 188, at 25. Hoover itemized the components of the abdication of parental responsibility: “broken home; lack of parental supervision; over-protective parents; drunken parents; overindulgent mother; overly strict father; parent works nights; poor home conditions; parental neglect; lack of religious training; no discipline; depraved home environment.” *Id.* at 26. Hoover’s list is mirrored in the professional literature of the era: “an element of oversight, carelessness, disinterest, or ineptitude in the discharge of parental duties appears in almost every case.” George W. Smyth, *The Juvenile Court and Delinquent Parents*, in THE PROBLEM OF DELINQUENCY 970, 970-71 (Sheldon Glueck ed., 1959).

parents could in some manner be shocked into a realization of their full responsibility.”<sup>190</sup> He noted with approval cases in which parents had been incarcerated and received suspended jail sentences as a result of failing to properly discharge their parental obligations.<sup>191</sup> A 1954 U.S. Children’s Bureau conference was dedicated to ascertaining the level of parents’ responsibility for juvenile delinquency, and then determining solutions to the problem.<sup>192</sup> It achieved consensus only as to the “multiplicity of elements to be dealt with in connection with juvenile delinquency, the fact that no single source can be singled out for blame and no single method relied on for improvement.”<sup>193</sup> Decades of further research have not bettered that formulation.<sup>194</sup>

More recent studies confirm that parental control of children’s actions—particularly adolescent behavior—is far weaker than generally believed. The nurture-nature debate has recently emphasized the critical importance of children’s genetic inheritance. While parental efforts to effect how their offspring mature are certainly important, children’s personalities are now seen as more the product of their genetic makeup than of their family environment.<sup>195</sup> Numerous studies have shown that “the in-

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<sup>190</sup> Hoover, *supra* note 188, at 25.

<sup>191</sup> *Id.* Sol Rubin, Counsel to the National Council on Crime and Delinquency, characterized this reasoning as the “more frantic approach,” since it appeared to acknowledge that, although delinquency’s causes were complex, “the whole thing can be attributed to the parents anyway.” SOL RUBIN, CRIME AND JUVENILE DELINQUENCY: A RATIONAL APPROACH TO PENAL PROBLEMS 21 (rev. 3d ed. 1970).

<sup>192</sup> See PARENTS AND DELINQUENCY (Helen L. Witmer ed., 1954) (report of the conference).

<sup>193</sup> Witmer & Herzog, *supra* note 186, at 23-24. Witmer was the Director of the Division of Research, and Herzog a Social Science Research Consultant, at the U.S. Children’s Bureau. They agreed with one psychiatrist’s summary of the proceedings:

Perhaps we can sum up by saying we should explore every way that can possible help to mobilize parents’ interest in reducing delinquency. We should try authoritative methods if they seem necessary in particular cases. We should try working out substitutes for parents when their interest seems nonexistent. We should reject blind punishment and accept the necessity of finding more effective ways to help parents be effective parents. If we do this, we shall begin to get somewhere with the problem.

*Id.* at 24.

<sup>194</sup> See, e.g., Rosie Mestel, *Triggers of Violence Still Elusive*, L.A. TIMES, Mar. 7, 2001, at A1 (describing long-term studies which identify a multiplicity of risk factors leading to youth violence).

<sup>195</sup> Auke Tellegen et al., *Personality Similarity in Twins Reared Apart and Together*, 54 J. PERSONALITY & SOC. PSYCHOL. 1031 (1988); Thomas J. Bouchard, Jr. et al., *Sources of Human Psychological Differences: The Minnesota Study of Twins Reared Apart*, 250 SCIENCE 223 (1990).

terfamilial variance in personality is about the same as the intrafamilial variance—once you control for genes. . . . Childhood events—even childhood trauma—and childrearing appear to have only weak effects on adult life.”<sup>196</sup> Given the predominance of genetic disposition over behaviors learned at home, it may be unreasonable to hold parents responsible for their children’s actions.<sup>197</sup>

The parent-child bond is complex and not totally understood. Moreover, the biological and social factors that might lead a child to commit violent anti-social acts are profoundly imbricated.<sup>198</sup> One study documented that “experiences in infancy which result in the child’s inability to regulate strong emotions are too often the overlooked source of violence in children and adults.”<sup>199</sup> Such a finding suggests that parental involvement at the pre-toddler stage can have significant effects in channeling a child’s social development. This conclusion provides scant support for the criminal parental responsibility laws’ two interrelated premises: First, that the misbehavior of an adolescent “is primarily due to the parents’ actions or inactions and not to other factors,”<sup>200</sup> and second, that parents can control anti-social be-

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<sup>196</sup> MARTIN E.P. SELIGMAN, *WHAT YOU CAN CHANGE & WHAT YOU CAN’T* 236-37 (1995).

<sup>197</sup> See Younger, *supra* note 36, at 513. Anecdotal evidence also supports the conclusion in the text. Professor Dolgin has pointed out that media portraits of a series of children, apprehended in violent—and often fatal—school shootings in the late 1990s, generally show them “to have had caring parents and to have been raised in prototypic small, American towns.” Dolgin, *supra* note 20, at 484 n.93. Kipland Kinkel, a fifteen-year-old who killed his parents and then killed or wounded two dozen classmates, personifies the research finding that devoted parenting is no match for a pathological personality. Kinkel was widely reported as the child of very caring parents, but apparently was “incapable of participating in communal bonds because of some flaw deep within his own being.” *Id.* at 445. The parents of the victims of the Columbine killings have sued the parents of the two killers, Eric Harris and Dylan Klebold. Although little is known about the type of relationship that the two boys had with their parents, letters to the families of the victims from the Harrises and the Klebolds suggest that the parents did not know their children were on the verge of doing so heinous a crime. The Klebolds’ letter states “We never saw anger or hatred in Dylan until the last moments of his life when we watched in helpless horror with the rest of the world.” Lisa Belkin, *Parents Blaming Parents*, N.Y. TIMES MAG., Oct. 30, 1999, at 60, 62.

<sup>198</sup> See ROBIN KARR-MORSE & MEREDITH S. WILEY, *GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE* 299-300 (1997).

<sup>199</sup> *Id.* at xiii.

<sup>200</sup> Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 624 (1997).

havior by their teenagers.<sup>201</sup> Another hallmark study, led by criminologist Dorothy O. Lewis, also highlighted the impact of brain deficits and early trauma upon later juvenile criminality:

In reviewing the medical histories of violent juvenile delinquents, Lewis found a significantly higher incidence of neuropsychiatric and cognitive impairments among the most aggressive offenders, including hyperactivity, impulsivity, attention deficits, and learning disabilities. Both prenatal complications and serious accidents or injuries appeared often in their histories. The parts of the brain responsible for judgment, impulse control, and reality testing are disproportionately impaired in this population, along with the capacity for empathy and the ability to accurately interpret the actions and intent of other people.<sup>202</sup>

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<sup>201</sup> [Contributing-to-delinquency laws] are based upon an assumption that delinquency has certain and known causes. More particularly, contributing statutes proceed from an assumption that delinquency is caused by the acts of adults. Thus, to prevent delinquency, the obviously oversimplified solution of the contributing statutes was to prohibit those acts which cause or tend to cause delinquency. But the actuality is that neither the layman nor the experts know what acts cause delinquency or can predict that delinquency will follow upon an act being committed in the presence of a child.

Dittman, *supra* note 157, at 119.

<sup>202</sup> KARR-MORSE & WILEY, *supra* note 198, at 11 (citing Dorothy O. Lewis et al., *Child Abuse, Delinquency, and Violent Criminality*, in *CHILD MALTREATMENT THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT* 707 (Dante Cicchetti & Vicki Carlson eds., 1989)). Lewis' research also documented the difficulty of disentangling the interwoven elements of causation:

Lewis found that neither exposure to early violence nor internal factors alone predicts adult violence. She also found that the combination of one vulnerability with an abusive family was not predictive of adult violence. While each of these factors is a clear warning signal that a child may be on a course toward violence, Lewis found that adult criminal violence resulted from the interaction of two or more internal factors (i.e., cognitive and/or neuropsychiatric deficits) with early negative family circumstances.

*Id.* at 10-11.

The research findings are, of course, not monolithic. Some research suggests that an inadequate childrearing technique constitutes one predictive factor in delinquency. D.P. Farrington & D.J. West, *The Cambridge Study in Delinquent Development: A Long-term Follow-up Study of 411 London Males*, in *CRIMINALITY: PERSONALITY, BEHAVIOR, AND LIFE HISTORY* 115-38 (H.J. Kerner & G. Kaiser eds., 1990). Other evidence advances the common-sense proposition that parents may have some influence even over their older children. See, e.g., Mark Soler, *Interagency Services in Juvenile Justice Systems*, in *JUVENILE JUSTICE AND PUBLIC POLICY* 134, 139-40 (Ira M. Schwartz ed., 1992) (describing program designed to strengthen family ties within families of youth offenders). Parent training programs have been "shown to be effective in reducing antisocial behavior over short periods in small scale studies." NAT'L RESEARCH COUNCIL, *UNDERSTANDING AND PREVENTING VIOLENCE* 388 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993) (summarizing studies). But this National Research Council study emphasized the significance of the brevity of both interventions and benefits, and noted that children in

Apart from reinforcing the preeminence of the genetic role, research also supports the dominance of children's peer groups over their parents in shaping the juvenile personality.<sup>203</sup>

There is, of course, no question that parenting *influences* children's behavior.<sup>204</sup> But the idea that parents may exercise sufficient *control* over their children, particularly adolescents, is unproven by any research. "[W]e simply do not . . . know enough to state with confidence that the way a specific parent raises a child is the legal cause of a child's violent behavior."<sup>205</sup> One commentator seeking the elusive justification for the parental liability laws observed that, since they lack "empirical validation of their efficacy," their adoption "appears based entirely on folk wisdom that parents should be 'in control' of their children at all times."<sup>206</sup>

Moreover, by imposing all the burdens on the parents, such laws may also teach children the wrong lesson on taking responsibility: that the parent, and not the child, is primarily at risk for the child's delinquent behavior.<sup>207</sup> Some parents may, of course, react to the threat of criminal sanctions stemming from their children's delinquencies by "over-parenting," that is, by either severely restricting their child's freedom of action or by excessively punishing the child. Punishment of the parents, in this context, will likely "embitter[ ] and brutalize[ ] more often than it reforms

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socially-disadvantaged families are less likely to continue to reap the rewards over time. *Id.* at 389.

<sup>203</sup> See generally JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* (1998).

<sup>204</sup> See, e.g. Patterson & Dishion, *Contributions of Families and Peers to Delinquency*, 23 *CRIMINOLOGY* 63 (1985); Loeber & Dishion, *Early Predictors of Male Delinquency: A Review*, 94 *PSYCHOL. BULL.* 68 (1983); SHELDON GLUECK & ELEANOR GLUECK, *UNRAVELING JUVENILE DELINQUENCY* (1950).

<sup>205</sup> Andrew Schepard, *Parental Responsibility: The Columbine Aftermath*, N.Y. L.J., July 8, 1999, at 4. For the same reason, Professor Schepard opposes expansion of parents' civil liability, because "it attempts to make parents guarantors of their children's good behavior even though we cannot say with confidence that what the parents do causes the way the child behaves." *Id.*

<sup>206</sup> Chapin, *supra* note 200, at 654.

<sup>207</sup> See James Alan Fox & Jack Levin, *Playing Hooky*, CHI. SUN-TIMES, Jan. 2, 2000, at 45 (Fox and Levin criticize laws that hold parents criminally responsible for their children's truancy as "send[ing] the wrong message to wayward youngsters who are all too eager to escape the blame for their misconduct. By aiming the legal sanctions at Mom and Dad, we teach children that they need not feel personally responsible for their truancy—that only their parents need to change, not them."); Michele L. Casgrain, *Parental Responsibility Laws: Cure for Crime or Exercise in Futility?*, 37 WAYNE L. REV. 161, 187 (1990) (suggesting that parental responsibility acts backfire by showing children "that they are not responsible for their own acts").



and rehabilitates.”<sup>208</sup> Conversely, other parents may react by “under-parenting,” that is, by seeking to divest themselves of accountability for seriously recalcitrant children by filing un-governability or similar petitions in order to transfer responsibility for their children to the state, or by encouraging children to emancipate themselves through other statutory means.<sup>209</sup> Parental responsibility laws may thus “backfire by persuading more parents to distance themselves from their difficult youngsters rather than face the possibility—if they fail—of being fined or spending time behind bars.”<sup>210</sup> Neither “over-parenting” nor “under-parenting” benefits the child, the parents, or the larger community.

Sometimes the problems are insurmountable, even for the best parents.<sup>211</sup> Parental efforts to channel their children toward productive lives may be counterproductive: “in the most serious cases, the child will have developed behaviors primarily aimed at undermining adults’ attempts to bring about change in the child’s behaviors.”<sup>212</sup> Laws that effectively punish parents for their children’s errant behavior will likely convert parents and children into adversarial parties in the home, the environment in which that stance is least helpful. Fining or even briefly jailing parents may deprive not only the child whose conduct triggered the court’s action, but also any siblings, of at least some measure of

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<sup>208</sup> Ludwig, *supra* note 52, at 733.

<sup>209</sup> See, e.g., N.Y. FAM. CT. ACT, §§ 732-733 (McKinney 1999) (authorizing parents to file petition seeking court supervision and/or treatment of their child by alleging that the child “is an habitual truant or is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his parents”); Sandra Evans, *Desperate Parents Cast Unruly Children into Hands of a Burdened Government*, WASH. POST, Sept. 3, 1991, at A1 (describing relief for custody petitions filed in Virginia by parents who “can no longer cope”); Sanger & Willemssen, *supra* note 34, at 299 (suggesting that “[h]eighted parental concern over vicarious liability” because of the “statutory trend . . . increasing the number of ways and the number of areas in which parents became accountable for their children’s behavior” may lead to greater use of statutory emancipation procedures).

<sup>210</sup> Fox & Levin, *supra* note 207, at 45.

<sup>211</sup> See, e.g., Reif Loeber & Magda Stouthammer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, in 7 CRIME & JUSTICE 33 (Michael H. Tonry & Norval Morris eds., 1986) (“[s]ome children develop multiple problem behaviors over time that are difficult to eradicate fully, even for the most skilled parents”); Geis & Binder, *supra* note 157, at 321 (“[T]he inadequacy of the [parental responsibility] laws—indeed, their nasty and vicious nature—lies in their imputation of willfulness and negligence to parents who often are doing the best that they can.”).

<sup>212</sup> Loeber & Stouthammer-Loeber, *supra* note 211, at 33.

the parents' financial and personal support.<sup>213</sup> In vetoing a parental responsibility bill in 1956, New York Governor Averell Harriman articulated the theory that these laws may cause more harm than good. Prosecuting parents when their children commit delinquent acts might "lead to strains in families where relationships already are tense and might even give to troublesome delinquents a weapon against their parents which they would not hesitate to use."<sup>214</sup> None of this suggests that parents are insignificant figures in their children's lives. However, by any research standard, the question of a linkage between parenting and delinquency is far more complex than these laws acknowledge.<sup>215</sup>

## B. Parenting as a Public Welfare Offense

### 1. Background and Overview

The new generation of parental responsibility laws have refocused the criminal law's treatment of parental involvement in juvenile delinquency.<sup>216</sup> The legal spotlight has shifted from the

<sup>213</sup> See Note, *Criminal Liability of Parents for Failure to Control Their Children*, 6 VAL. U.L. REV. 332, 349 (1972).

<sup>214</sup> Averell Harriman, *Veto Message*, in PUBLIC PAPERS OF AVERELL HARRIMAN, FIFTY-SECOND GOVERNOR OF THE STATE OF NEW YORK 240 (1956); see also Kenny & Kenny, *supra* note 186, at 808 (suggesting that "in some cases 'punish the parents' laws would only encourage more juvenile delinquency"); Penelope D. Clute, "Parental Responsibility" Ordinances—Is Criminalizing Parents When Children Commit Unlawful Acts a Solution to Juvenile Delinquency?, 19 WAYNE L. REV. 1551, 1551 (1973) (reprinting comic strip imagining a conversation between a father and teen-aged son:

Father: . . . the city's got a new law that says that if you get into trouble the cops come after me!

Son: No kidding! You mean if I get caught doing something wrong you gotta do time?

Father: That's right.

Son: Gimme five bucks or I'll toss a brick through a window and get you thrown in jail.

Father: You can't do that! That's blackmail!

Son: Hey, that's right. And blackmail's against the law. That makes me a juvenile delinquent. I better go give myself up . . .

Father: Wait a minute, son. How much did you want . . . ?).

<sup>215</sup> Recent studies have linked increased juvenile delinquency to high levels of lead in children's blood. E.g., *Lead Tied to Juvenile Delinquency*, May 15, 2000 (MSNBC news article on file with author). Other studies have associated high-quality day care with reducing delinquency. Jason Kandel, *Child Care in Crisis; Report Links Crime to Lack of Access to Good Child Care*, L.A. DAILY NEWS, Mar. 15, 2001, at N1.

<sup>216</sup> A number of contemporary parental responsibility laws have been enacted at the state level, along with a potpourri of municipal ordinances. See Schmidt, *supra* note 157, at 674-75 (suggesting that these statutes and ordinances constitute

problem of child protection to seeking protection from the problem child. Accordingly, the new laws governing parenting evince only passing reference to the traditional rehabilitative foundations of juvenile justice, in which both the parents and the broader society were primarily concerned with the welfare of the child. Instead, they focus on the failure to comply with parental duties. They are intended to induce action, and to punish parents for failure to act, with the hope of preventing further injury to those whom the parent's child has already harmed and to other potential victims.<sup>217</sup> Many of these laws target improper parenting methods with a degree of specificity sharply in contrast to the vague locutions contained in the contributing-to-delinquency statutes.<sup>218</sup> As well, some of these novel enactments rely on strict criminal liability in lieu of the *mens rea* of negligence needed to establish guilt.<sup>219</sup>

The enlargement of parental criminal responsibility parallels an expansion in the civil liability parents face as a consequence of their children's acts.<sup>220</sup> A brief examination of the present

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"postmodern" treatment of parental responsibility issues: "rather than replace the failed parent in the interest of helping the child, the state, in a tacit recognition of its own inability to help the child any more than the parent can, instead punishes the parent for her or his failure").

<sup>217</sup> California provides one of the most prominent illustrations of this changing juvenile justice milieu. In 1988, California changed its parental responsibility laws as a part of the Street Terrorism Enforcement and Prevention Act, whose premise was that "the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." 1988 Cal. Stat. 4179. The punitive nature of the legislation was elaborated in measures establishing criminal penalties for gang participation and allowing sentence enhancements for gang-related conduct; defining certain buildings in which gang activities take place as nuisances subject to injunction, abatement, or damages; and prohibiting terrorist threats of death or great bodily injury. *Id.* The parental role was quite circumscribed. No longer trusted to supervise their children as they thought best, parents were deputized to assist the state in raising them as it thought best. As the state supreme court approvingly noted, the statute enlisted parents as "active participants in the effort to eradicate . . . gangs." *Garcetti v. Williams*, 853 P.2d 507, 510 (Cal. 1993).

<sup>218</sup> See, e.g., R.I. GEN. LAWS § 11-9-4 (1994) (discussed in text at note 241, *infra*).

<sup>219</sup> See, e.g., N.M. STAT. ANN. § 30-6-3 (Michie 1994) (discussed in text at notes 244-45, *infra*).

<sup>220</sup> For a fuller treatment of the topic of parental civil liability, see Zolman, *supra* note 153; A. Dale Ihrle III, *Parental Delinquency: Should Parents be Criminally Liable for Failing to Supervise Their Children?*, 74 U. DET. MERCY L. REV. 93 (1996); Vivian M. Chang, *Legislative Review: The Juvenile Crime Omnibus*, 27 ARIZ. ST. L.J. 313 (1995); Geis & Binder, *supra* note 157; Dana E. Prescott & Cynthia L. Kundin, *Toward a Model Parental Liability Act*, 20 CAL. W. L. REV. 187 (1984); Axel, *supra* note 187; Richard G. Kent, *Parental Liability for the Torts of Children*,

course of parental civil liability will illuminate the issue at hand, for both civil and penal legislation respond to similar social needs and legal priorities. At common law, parents could not properly be sued for harm caused by their children's intentional behavior unless the damages resulted from parental action or omission.<sup>221</sup> The parent-child relationship by itself provided no platform on which to base recovery: "there is no general responsibility for the rearing of incorrigible children."<sup>222</sup> The specific circumstances under which parents could be held civilly responsible at common law paralleled some of the conditions precedent for modern criminal liability. The parent's behavior became actionable if he or she directed or later ratified the act,<sup>223</sup> if the child was acting

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50 CONN. B.J. 452, 455-64 (1976). The expansion of parental civil liability may also be seen in lawsuits filed against parents of school shooters, and in state-imposed charges on parents for costs in connection with their children's delinquency treatment. See Stephanie Simon, *Kids, Guns and Parental Responsibility*, L.A. TIMES, Mar. 19, 2001, at A1 (describing civil suit); Vivian Wakefield, *Juvenile Justice Now Comes with a Price Tag*, FLORIDA TIMES-UNION, Mar. 8, 2001, at A1 (describing new Florida law charging parents \$50 per day for residential treatment and \$20 per day for home or secure detention).

<sup>221</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1984).

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 316 (1965); see generally Chapin, *supra* note 200, at 629-38. As with most common law doctrines, the rule of limited parental liability was strictly construed, and that stringency did not escape criticism. Writing in the 1920s, Wigmore complained of the strictness of the common law rule:

[T]his is a period in which parents do very little forbidding . . . . [T]he pernicious philosophy of education, now dominant, which apotheosizes self-expression, is interpreted to permit the child to make an unrestrained fool of himself in as many ways as his immature impulses may dictate. But that philosophy does not excuse parents for letting the child make a nuisance of himself to others.

John H. Wigmore, *Torts—Parent's Liability for Child's Torts*, 19 ILL. L. REV. 202, 205 (1924).

<sup>222</sup> *Linder v. Binder*, 270 N.Y.S.2d 427, 430 (N.Y. Sup. Ct. 1966); see also *Steinberg v. Cauchois*, 249 A.D.2d 518 (N.Y. App. Div. 1937) (holding that the parent-child relationship is by itself an insufficient basis for tort liability; without a finding of negligence against the parent, the parent is not liable for torts committed by the child); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280 (Tex. Civ. App. 1975) (same); *General Ins. Co. of Am. v. Faulkner*, 130 S.E.2d 645 (N.C. 1963) (same).

<sup>223</sup> See, e.g., *Sharpe v. Williams*, 20 P. 497 (Kan. 1889) (parental liability for

as the parent's agent;<sup>224</sup> was entrusted with a dangerous instrumentality, such as a firearm<sup>225</sup> or automobile;<sup>226</sup> or if the parent's negligence proximately caused the harm,<sup>227</sup> such as if the parent failed "reasonably to restrain the child from vicious conduct, when the parent has knowledge of the child's propensity toward such conduct."<sup>228</sup>

No matter how heinous the behavior of the child, unless the case fit within one of the specified exceptions, the heart of the common law rule precluded parental liability without fault. *Moore v. Crumpton*<sup>229</sup> clearly illustrates this principle. A severely physically and psychologically troubled seventeen-year old boy abused alcohol and drugs, then broke into the plaintiff's home and raped her. The trial court reflected on the "modern American family tragedy"<sup>230</sup> that the case represented, but granted summary judgment for the seventeen-year-old's parents. Acknowledging the reality of an adolescent's family life, the court concluded that "[s]hort of standing guard over the child twenty-four hours a day, there was little that the defendant father could do to prevent [his son] from leaving the home after the father was asleep."<sup>231</sup>

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child's tort established since parent's offer to pay half the cost of child's "ducking" the teacher in frozen creek deemed a ratification).

<sup>224</sup> See, e.g., *Corley v. Lewless*, 182 S.E.2d 766 (Ga. 1971) (child's tort committed while on errand for parent).

<sup>225</sup> See, e.g., *Huston v. Konieczny*, 556 N.E.2d 505, 509 (Ohio 1990) ("Parents may incur liability when they negligently entrust their child with an instrumentality (such as a gun or car) which . . . may become a source of danger to others."); *Mazzilli v. Selger*, 99 A.2d 417 (N.J. 1953) (involving a suit against the parents of a nine-year-old who shot a gun and shot plaintiff in the face); *Hunt v. Hicks*, No. 98-CA-72, 1999 Ohio App. LEXIS 1660 (Ohio Ct. App. March 7, 1999); see also John Kip Cornwell, *Preventing Kids from Killing*, 37 Hous. L. Rev. 21, 55-59 (2000) (discussing provisions holding parents criminally responsible for negligently allowing children access to firearms).

<sup>226</sup> See, e.g., *Gossett v. Van Egmond*, 155 P.2d 304 (Or. 1945) (parental liability found where a twenty-year-old mentally retarded man, who had been denied a license by the state, was permitted to drive by his parents and then killed an eleven-year-old while driving).

<sup>227</sup> See, e.g., *Ellis v. D'Angelo*, 253 P.2d 675, 679 (Cal. Ct. App. 1953) ("a parent may become liable for an injury caused by the child where the parent's negligence made it possible for the child to cause the injury complained of").

<sup>228</sup> *Steinberg v. Cauchois*, 249 A.D.2d 518, 519 (N.Y. App. Div. 1937).

<sup>229</sup> 295 S.E.2d 436 (N.C. 1982). The case was decided on a common law, rather than a statutory, basis. *Id.* at 439.

<sup>230</sup> *Id.* at 443.

<sup>231</sup> *Id.* at 442. But see *Payless Drug Stores Northwest, Inc. v. Brown*, 722 P.2d 31, 35 (Or. Ct. App. 1986) (rejecting the argument that "a parent can only avoid vicari-

The revival of interest in juvenile delinquency reform in the 1950s included statutory expansion of the common law limits on parental civil liability.<sup>232</sup> All fifty states now have statutes imposing some type of vicarious tort liability on parents for damages resulting from their children's acts.<sup>233</sup> These statutes generally emphasize delinquency prevention over compensation.<sup>234</sup> Even though distributive justice—apportioning the loss to the tortfeasor's family rather than the victim's—logically supports these statutes' rationale, deterring juvenile delinquency supplies a far more important rationale for these laws.<sup>235</sup> For example, Georgia's enactment specifically avers its aim "to provide for the public welfare and aid in the control of juvenile delinquency, not to provide restorative compensation to victims."<sup>236</sup> The New Jersey Supreme Court affirmed these laws' consonance with the "resurgence of the belief that parents should take responsibility for their children's activities."<sup>237</sup>

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ous liability by impossibly close supervision of a child and that to penalize the parent for acts which he cannot prevent is 'clearly unreasonable'").

<sup>232</sup> Hawaii and Louisiana had substantially anticipated the statutory changes of the 1950s. See *Bryan v. Kitamura*, 529 F. Supp. 394, 396 (D. Haw. 1982) (citing section 1288 of the Compiled Laws of the Hawaiian Kingdom (1884), which contained the codification of the Hawaiian statutes of 1846 including the original parental responsibility statute); *Wallace v. Bucher*, 308 So. 2d 270, 272-76 (La. 1975) (discussing parental responsibility for acts of their children under the Louisiana Code from 1808 on).

<sup>233</sup> See Pamela K. Graham, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1725-26 (2000).

<sup>234</sup> See L. Wayne Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability"*, 20 ST. MARY'S L.J. 69, 73 (1988) (noting that many states enact these statutes to "curb juvenile delinquency"). The relatively low damages caps included in these laws provides a telling indication that restitution is only a secondary statutory aim. See *id.* at 71-75 (indicating limits ranging from a low of \$250 in Vermont to a high of \$15,000 in Texas, with the average cap approximately \$2,500).

<sup>235</sup> See Chapin, *supra* note 200, at 633 ("[T]he rationale which is given in the cases for the enactment of these statutes is primarily the reduction of juvenile delinquency; it is presumed that the threat of civil damages will encourage parents to better supervise their children, and that better supervision of children will reduce juvenile tortious acts.").

<sup>236</sup> GA. CODE ANN. § 51-2-3(c) (1998).

<sup>237</sup> *Board of Educ. v. Caffiero*, 431 A.2d 799, 807 (N.J. 1981), *appeal dismissed*, 454 U.S. 1025 (1981). States are not, of course, always of one mind in articulating their legislative purposes. For example, the statutory aspiration behind New York's parental responsibility act, N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1999), has appeared in several guises: to decrease vandalism against public property, to create a meaningful recourse for injured parties, and to compel parents to supervise their children more closely and develop the latter's respect for the property of others. N.Y. LEGISLATIVE ANNUAL 178-79 (1977); N.Y. LEGISLATIVE ANNUAL 107 (1979).

This resurgent belief has influenced parallel modifications in criminal law. Contemporary laws criminalizing parental supervision are characterized by two traits: a greater specificity as to the forbidden actions which will trigger parental liability, and sometimes the jettisoning of any *mens rea* requirement for the parents' conviction. Illustrations of the first feature are contained in two early statutes, one enacted in Rhode Island in 1956<sup>238</sup> and the other in Illinois five years later.<sup>239</sup> These edicts criminalized "improper supervision," which—unlike earlier proscriptions in contributing-to-delinquency statutes<sup>240</sup>—received detailed definition, at least with regard to the juvenile behaviors for which the parent could be held responsible. The Rhode Island provision inventoried the disallowed conduct:

permit[ting] . . . such child to habitually associate with vicious, immoral, or criminal persons, or to grow up in ignorance, idleness, or crime, or to wander about the streets of any city in the nighttime without being in any lawful business or occupation, or to enter any house of ill fame, policy shop, or place where any gambling is carried on or gaming device is operated, or to enter any place where intoxicating liquors are sold.<sup>241</sup>

The Illinois statute rivaled Rhode Island's attention to detail, but it cataloged a slightly different but overlapping set of evils, penalizing the parent of a child who "associates with known thieves, burglars, felons, narcotic addicts or other persons of ill repute, visits a place of prostitution, commits a lewd act, commits an act tending to break the peace or violates a municipal curfew ordinance."<sup>242</sup> A similar legislative itemization typifies modern parental responsibility laws on both the state and local levels.<sup>243</sup>

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<sup>238</sup> See R.I. GEN. LAWS § 11-9-4 (1956) (current version at R.I. GEN. LAWS § 11-9-4 (1994)).

<sup>239</sup> 1961 Ill. Laws 2454 (codified as amended at 720 ILL. COMP. STAT. ANN. 640/1-2 (West 1993)).

<sup>240</sup> The initial Colorado contributing-to-delinquency law, which served as a model for the type, broadly penalized "any act encouraging, causing or contributing to the delinquency of such child." COLO. REV. STAT. 18-6-701 (2000).

<sup>241</sup> R.I. GEN. LAWS § 11-9-4.

<sup>242</sup> 720 ILL. COMP. STAT. ANN. 640/1.

<sup>243</sup> See, e.g., LA. REV. STAT. § 14:92.2 (West Supp. 2001) (establishing criminal liability for a parent who allows a child to "associate with a person known by the parent" to be a member of a street gang, a convicted felon, a drug user or dealer or a possessor of an illegal weapon); CORPUS CHRISTI, TEX., CODE § 33-48 (1985) (providing that parental duties include "[k]eeping illegal drugs and illegal firearms out of the home; . . . and [f]orbidding the minor from keeping stolen property, or illegally possessing firearms of illegal drugs"); DETROIT, MICH., ORDINANCES, ch. 23, §§ 33-6-1, 33-6-2 (1987) (punishing parents who fail to "exercise reasonable control to pre-

A 1974 New Mexico provision anticipated the modern shift to strict liability, the other key aspect of some modern criminal parental responsibility statutes. While the New Mexico statute did not specify the level of intent required for conviction of a parent,<sup>244</sup> a state appellate court interpreted the law as holding parents strictly liable, relying on the long-standing "special protection" enjoyed by children.<sup>245</sup> Recent criminal laws have

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vent the minor from committing an delinquent act," and providing listing of five categories of prohibited parental acts); ELGIN, ILL., MUN. CODE tit. 10, ch. 10.66 (1995) (punishing parents who "wilfully, knowingly or recklessly permit any minor" to possess "illegal drugs or illegal drug paraphernalia," or "commit an act tending to break the peace," violate curfew, or "engage in street gang related criminal activity"); see also Peter Applebome, *Parents Face Consequences as Children's Misdeeds Rise*, N.Y. TIMES, Apr. 10, 1996, at A1 (observing that "dozens" of other Chicago suburbs had recently passed ordinances similar to Elgin's). Note that many of the enumerated activities in each statute are themselves ill-defined, and that the proscribed parental conduct is almost always defined in terms of allowing specified juvenile behaviors to occur. What distinguishes these laws from their contributing-to-delinquency predecessors is not their success at spelling out the components of parental malfeasance, but their attempt in doing so. Traditional contributing-to-delinquency laws generally modeled their text upon the spare Colorado statute, whose text is quoted in note 240, *supra*.

Many states have passed criminal responsibility laws detailing the parental duties with respect to juveniles' possession of guns. See, e.g., COLO. REV. STAT. § 18-12-108.7 (2000) ("Unlawfully providing or permitting a juvenile to possess a handgun—penalty"); CONN. GEN. STAT. ANN. § 29-37i (West Supp. 2001) ("Responsibilities re storage of loaded firearms with respect to minors"); DEL. CODE ANN. tit. 11, § 1456 (1995) ("Unlawfully permitting a minor access to a firearm; class A misdemeanor"); FLA. STAT. ANN. § 784.05 (West 2000) ("culpable negligence"); KY. REV. STAT. ANN. § 527.110 (Michie 1999) ("Unlawfully providing handgun to juvenile or permitting juvenile to possess handgun"); MICH. COMP. LAWS ANN. § 750.235a (West Supp. 2001) ("Parent of minor guilty of misdemeanor; conditions; penalty; defense; definitions"); N.J. STAT. ANN. § 2C:58-15 (West 1995) ("Access by minors to loaded firearm; disorderly persons offense; exceptions"); N.C. GEN. STAT. § 14-315.1 (1999) ("Storage of firearms to protect minors"); OKLA. STAT. ANN. tit. 21, § 858 (West Supp. 2001) ("Parent or guardian whose child commits crime of possession of firearm on school property—Administrative penalty"); TENN. CODE ANN. § 39-17-1312 (Supp. 2000) ("Inaction by persons eighteen (18) years of age or older including parents or guardians, knowing a minor or student illegally possessing a firearm"); UTAH CODE ANN. § 76-10-509.6 (Supp. 2000) ("Parent or guardian providing firearm to violent minor"); see generally Richard M. AuBuchon, *Juveniles, Firearms and Crime: Extending Criminal Liability to Parents in Oklahoma and Beyond*, 36 TULSA L.J. 435 (2000).

<sup>244</sup> The statute reads, in part: "Contributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years." N.M. STAT. ANN. § 30-6-3 (Michie 1994).

<sup>245</sup> State v. Gunter, 529 P.2d 297, 298 (N.M. Ct. App.), cert. denied, 529 P.2d 274 (N.M. 1974). Oddly, the court also relied on the near-impossibility of enumerating all the "ways and means by which the venal mind may corrupt and debauch the youth of our land." *Id.* (quoting State v. McKinley, 202 P.2d 964 (N.M. 1964)).



similarly subjected parents to strict criminal liability on the basis of their children's acts;<sup>246</sup> furthermore, a substantial increase in the number of bills to be introduced in state legislatures making parents culpable for their children's criminal acts has been predicted.<sup>247</sup> Several states have adopted strict criminal parental liability in enforcing compulsory school attendance laws.<sup>248</sup> Parental responsibility laws imposing strict liability have also been enacted on the municipal level.<sup>249</sup>

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Since the only issue addressed in the case involved establishing the requisite criminal intent needed for conviction, the question of specifying the multitudinous means for achieving the proscribed ends was neither before the court nor relevant to its inquiry.

<sup>246</sup> See, e.g., 1995 Or. Laws 1544, 1544 (codified at OR. REV. STAT. § 163.577(1) (1999) ("Failing to supervise a child")); 1996 Idaho Sess. Laws 1207, 1207-09 (codified at IDAHO CODE § 32-1301(1) (Michie Supp. 2001)). Although this type of parental responsibility statute basing the liability of the parent on the act of the child is relatively new, it is not unprecedented. From 1927 to 1953, a Minnesota statute decreed that the "[f]act that a child has been adjudged more than once to be a delinquent on account of the conduct occurring while in the custody of his parents . . . shall be presumptive evidence that such parents . . . are responsible for his last adjudicated delinquency." 1927 Minn. Laws ch. 192, § 7, *repealed* by 1953 Minn. Laws ch. 436, § 1.

<sup>247</sup> Joyce Howard Price, *Killers' Parents Denied Immunity as Liability Trend Grows in U.S.*, WASH. TIMES, May 2, 1999, at C7 (citing the opinion of a representative of the National Conference of State Legislatures). For examples of recently proposed but unenacted bills, see H.R. 2099, 90th Leg., 1st Sess. (Ill. 1997) (unenacted) (proposing offense of "failure to supervise a child"); L. 597, 94th Leg., 1st Sess. (Neb. 1995) (unenacted) (proposing offense of "contributing to the delinquency" for parents who fail to control behavior of minor after notice that minor has been involved in one of delineated crimes); S. 1051, 111th Leg., 2d Sess. (S.C. 1996) (unenacted) (expanding definition of parental neglect to include failure to exercise reasonable control after issuance of order in child's adjudication); H.R. 2347, 99th Leg., 2d Sess. (Tenn. 1996) (unenacted) (proposing offense of "failing to supervise a child"); S. 2602, 99th Leg., 2d Sess. (Tenn. 1996) (unenacted) (same); H.R. 3172, 75th Leg. (Tex. 1997) (unenacted) (proposing offense "if the parent with gross negligence fails to perform a parental duty to prevent the parent's child from engaging in delinquent conduct"); H.R. 2219, 54th Leg., 2d Sess. (Wash. 1996) (unenacted) (proposing "civil infraction of failing to supervise a child"); S. 108, 72d Leg., 2d Sess. (W. Va. 1996) (unenacted) (proposing offense of "failing to supervise a child").

<sup>248</sup> See, e.g., TENN. CODE ANN. §§ 49-6-3001 to 49-6-3009 (holding parents strictly liable and providing criminal penalty, including jail term, for truancy of their children; also providing that certain children are excused from compulsory attendance); ARIZ. REV. STAT. ANN. § 15-802 (West Supp. 2000) (same); N.C. GEN. STAT. §§ 115C-378, 115C-380 (same); CAL. EDUC. CODE §§ 48291-48293 (West 1993 & Supp. 2001) (similarly providing for criminal complaint against parents of truant children, punishable by fines). The practice of incarcerating and fining parents under compulsory school laws is becoming more prevalent. See Monica Mendoza, *Truancy Crackdown Irritates Some*, FORT WORTH STAR-TELEGRAM, Feb. 2, 2001, at 1.

<sup>249</sup> See, e.g., ST. CLAIR SHORES, MICH., ORDINANCES § 20.560 *et seq.* (2001) [here-

## 2. Employing Strict Criminal Liability against Parents

Although primitive English law was most likely grounded in nearly absolute liability for harm,<sup>250</sup> the common law gradually and firmly evolved the position Blackstone summarized over two centuries ago, that “to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will.”<sup>251</sup> Beginning in the middle of the nineteenth century, however, legislatures began crafting laws imposing criminal liability without fault.<sup>252</sup> These laws often emanated from a conviction that the increasingly urbanized and industrialized pace of modern life demanded legal regulations that could be enforced quickly, without the “old cumbrous machinery of the criminal law, designed to try the subjective blameworthiness of individual offenders.”<sup>253</sup> Often these laws

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inafter ST. CLAIR SHORES ORDINANCES]; SILVERTON, OR., ORDINANCES § 9.24.019 *et seq.* (1997) [hereinafter SILVERTON ORDINANCES]; SALT LAKE CITY, UTAH, ORDINANCES § 11.60.030 *et seq.* (Ordinance 68-95 § 1 (part)) (1995) [hereinafter SALT LAKE CITY ORDINANCES]; see also Steve Pardo, *Parents of Truants Targeted: Hazel Park Imposes \$500 Fine 90 Days in Jail if Their Kids Miss Too Many Days of School*, DETROIT DAILY NEWS, Apr. 19, 1999, at C4 (describing Hazel Park, Michigan ordinance prescribing criminal penalties for parents of children with excessive school absences).

<sup>250</sup> 2 FREDERICK POLLACK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 470 (2d ed. 1898); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 976-77 (1932). But the question is not free from doubt. See Richard C. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 338 n.4 (1989) (citing sources).

<sup>251</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*21. The maxim, “actus non facit neum nisi mens sit rea” can be found in COKE, *THIRD INSTITUTE* 107 (1641), although similar verbal formulations are much older. Sayre, *Mens Rea*, *supra* note 246, at 988. In the words of one of our most notable criminal law treatise writers, “[t]here can be no crime large or small without an evil mind.” 1 BISHOP, *CRIMINAL LAW* § 287 (9th ed. 1930).

<sup>252</sup> Singer, *supra* note 250, at 340-73; Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56-67 (1933) [hereinafter Sayre, *Public Welfare Offenses*]; 1 LAFAYETTE & SCOTT, *supra* note 102, § 3.8, at 340. In *Lambert v. California*, 355 U.S. 225, 228 (1957), the Supreme Court acknowledged the breadth of this historical development in observing the “wide latitude [of] the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.”

<sup>253</sup> Sayre, *Public Welfare Offenses*, *supra* note 252, at 69; see Singer, *supra* note 250, at 337 (“Over the past two centuries, the criminal law’s concerns with the moral blameworthiness of the criminal defendant has declined drastically.”). Although the debate is beyond the scope of this Article, Professor Singer disagreed with Dean Sayre’s assertion that (in Singer’s words), “strict liability statutes were children of the Industrial Revolution.” *Id.* at 339; cf. Sayre, *Public Welfare Offenses*, *supra* note 252, at 68-69 (cataloging ills of modernity calling for more extensive and less hamstrung regulation); *Morissette v. United States*, 342 U.S. 246, 253-54 (same). Rather, Singer argued that strict liability was initially intended to close a loophole in tort law

originated out of a sense that the public interest would be better served if prosecutors were freed from the burden of establishing individual culpability.<sup>254</sup> Given the relatively minor penalties generally,<sup>255</sup> but not always,<sup>256</sup> attached to strict liability offenses, the balance between a generalized public welfare and an individualized assessment of blameworthiness has been overwhelmingly tilted in favor of the community interest in these laws.<sup>257</sup>

Contemporary parental responsibility laws often aim at the same target, seeking to effect salutary social change while discarding traditional culpability concerns. Parents now have a two-fold obligation: to care for their children<sup>258</sup> and to control them.<sup>259</sup> The difference between these two categories is critical to understanding the nature and impact of the new laws. The

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and then to impose Victorian morality, and was not crafted with public welfare offenses in mind. Singer, *supra* note 250, at 339-40.

<sup>254</sup> 1 LAFAYE & SCOTT, *supra* note 102, § 3.8, at 340-41.

<sup>255</sup> Cardozo declared that "[p]rosecutions for petty penalties have always constituted in our law a class by themselves." Tenement House Dep't of N.Y. v. McDevitt, 109 N.E. 88, 90 (N.Y. 1915) (opinion by Judge Cardozo).

<sup>256</sup> See *People v. Buttrey*, 651 P.2d 1075 (Or. 1982) (affirming strict liability felony conviction for driving while license suspended); see also Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067-70, 1080-81 (1983) (criticizing *People v. Buttrey* and other cases expanding the range of strict criminal liability crimes).

<sup>257</sup> Strict criminal liability remains an extremely controversial phenomenon. See Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 821 (1992) (suggesting that the rationale behind strict liability has become controversial); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, n.310 (1992) (same); Perkins, *supra* note 257 (same); Frank J. Vandall, *Applying Strict Liability to Professionals: Economic and Legal Analysis*, 59 IND. L.J. 25, 40 (1983).

<sup>258</sup> See, e.g., CAL. WELF. & INST. CODE § 300 (West Supp. 2001) (detailing the many ways that children can fall under the jurisdiction of the juvenile court allowing the court to declare children dependents of the court; the list includes but is not limited to children who have suffered or are at a substantial risk of suffering physical or emotional abuse, neglect, and sexual abuse); N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1999) (parents have an affirmative duty to provide adequate food, clothing, shelter, education, and medical care). "Parents are obligated to provide proper guidance and guardianship of their children and are vulnerable to legal sanction for failure to meet minimum standards of care." *Holodook v. Spencer*, 324 N.F.2d 338, 338 (N.Y. 1974); see also *Commonwealth v. Michaud*, 451 N.E.2d 396, 399 (Mass. 1983) (duty to provide food); *People v. Lynch*, 208 N.W.2d 656, 660 & n.7 (Mich. Ct. App. 1973) (same); *Commonwealth v. Barnhart*, 497 A.2d 616, 620-21 (Pa. Super. Ct. 1985) (duty to obtain medical assistance); *State v. Williams*, 484 P.2d 1167, 1170-71 (Wash. Ct. App. 1971) (same).

<sup>259</sup> See, e.g., CAL. WELF. & INST. CODE §§ 601-602 (West 1998 & Supp. 2001) (providing that children who habitually fail to obey their parents or guardians while violating any curfew ordinances based on age and children who have four or more trancies within a school year are subject to juvenile court jurisdiction and the court can deem the children wards of the court). These statutes make it clear that parents

first-named duty reflects the traditional focus on "forces external to the child that affect the child's own welfare."<sup>260</sup> Parental liability in this area is generally defined by the contributing-to-delinquency legislation that expanded the common law duty. Thus, the typical obligation not to "fail[ ] or refuse[ ] to exercise reasonable diligence in the control of [a] child to prevent him from becoming a neglected, dependent or delinquent child,"<sup>261</sup> concentrates the parents on their preeminent duty to safeguard their child's well-being. The community interest in avoiding the socially deleterious consequences of neglected, dependent, and delinquent minors is secondary to the child protection core of these statutes.<sup>262</sup>

By contrast, the parental duty to control the child centers on the "child's actions and their effect on third parties,"<sup>263</sup> and forms the subject matter of the parental responsibility laws. This transition is significant, for it "highlights a shift from modern statutory efforts focused on child welfare to postmodern efforts focused on protecting society from dangerous children."<sup>264</sup> Contemporary parental responsibility laws are "intended to address situations where parents have failed to act responsibly and reasonably in the supervision of their minor children to the detriment of the general public."<sup>265</sup> A recent Salt Lake City ordinance articulates the centrality of the parental obligation to protect the public by controlling their children:

The increasing number of criminal episodes committed by children . . . demonstrates the breakdown of meaningful parental supervision of children. Those who bring children into the world or assume a parenting role, but fail to effectively train, guide, teach and control them, should be accountable at

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who fail to control their children can lose the guardianship of their children to the court. *Id.*

<sup>260</sup> *Williams v. Garcetti*, 853 P.2d 507, 511 (Cal. 1993).

<sup>261</sup> KY. REV. STAT. ANN. § 530.060 (Michie 1999); *see also* N.Y. PENAL LAW § 260.10(2) (McKinney 1999) (same); ALA. CODE § 13A-13-6 (1994) (same); N.D. CENT. CODE § 14-09-22 (2000) (stating that a parent is guilty of endangering the welfare of a minor if he "fails to exercise reasonable diligence" in preventing child from breaking the law or engaging in conduct detrimental to the "health or morals" of the child or others or for "failing to exercise reasonable diligence" in preventing the child from associating with "vagrants").

<sup>262</sup> *See* Geis & Binder, *supra* note 157, at 306 (noting that contributing-to-delinquency and endangering-the-welfare laws reflected the primacy of the state's interest in protecting juveniles).

<sup>263</sup> *Williams v. Garcetti*, 853 P.2d 507, 511 (Cal. 1993).

<sup>264</sup> Schmidt, *supra* note 157, at 675.

<sup>265</sup> ST. CLAIR SHORES ORDINANCES § 20.561 (2001).

law. Those who need assistance and training should be aided. Those who neglect their parenting duties should be encouraged to be more diligent through criminal sanctions, if necessary.<sup>266</sup>

In 1995, Oregon enacted an "improper supervision" statute that imposed criminal liability on a parent whose child either "[c]ommits an act that brings the child within the jurisdiction of the juvenile court," "[v]iolates a curfew," or "[f]ails to attend school."<sup>267</sup> The statute provided for no-fault culpability unless the parent established certain affirmative defenses.<sup>268</sup> The following year Idaho enacted a statute permitting its cities and counties to "establish and enforce the offense of failure to supervise a child."<sup>269</sup> The statute directed that ordinances drafted under this provision would hold parents strictly liable unless they prove an affirmative defense.<sup>270</sup>

A variety of municipal ordinances similarly punish parents for their children's delinquencies.<sup>271</sup> These laws generally itemize parental obligations, and often impose strict criminal liability. In reciting a table of "thou shalts," these ordinances aim both at supplying the parent with a punch-list of obligations and at ordaining a measuring rod for parental failure. For example, the Parental Responsibility Ordinance of the City of St. Clair Shores, Michigan, prefaces its catalog of obligations with a general direction to parents to obey the "continuous duty . . . to exercise reasonable control to prevent the minor from committing any delinquent act."<sup>272</sup> In referring only to the prevention of delinquency, the law demonstrates a difference from contributing-to-delinquency laws, which, despite their title, always include a legislative concern with the neglect or abuse of the parent's own child. This focus on social benefit, and concomitant indifference to individual child welfare, is representative of this legislative genre.<sup>273</sup> The ordinance defines a minor as any person under the

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<sup>266</sup> SALT LAKE CITY ORDINANCES § 11.60.010 (1995).

<sup>267</sup> 1995 Or. Laws 1544 (codified at OR. REV. STAT. § 163.577 (1999) ("[f]ailing to supervise a child")).

<sup>268</sup> OR. REV. STAT. § 163.577(3)-(4).

<sup>269</sup> 1996 Idaho Sess. Laws 1207, 1207-09 (codified at IDAHO CODE § 32-1301(1) (Michie Supp. 2001)).

<sup>270</sup> IDAHO CODE § 32-1301(3).

<sup>271</sup> See ordinances cited in note 243, *supra*.

<sup>272</sup> ST. CLAIR SHORES ORDINANCES § 20.563(a).

<sup>273</sup> See Schmidt, *supra* note 157, at 675. Some parental responsibility laws still hew to a concern for the child's well-being, although they merge this consideration with a focus on the protection of society. See, e.g., SALT LAKE CITY ORDINANCES

age of eighteen years residing with a parent,<sup>274</sup> and recites the “continuous duty of the parent of any minor to exercise reasonable control to prevent the minor from committing any delinquent act.”<sup>275</sup> The ordinance then elaborates several parental obligations included within the general duty:

1. To keep illegal drugs or illegal firearms out of the home and legal firearms locked in places that are inaccessible to the minor.
2. To know the Curfew Ordinance of the City of St. Clair Shores, and to require the minor to observe the Curfew Ordinance . . . .
3. To require the minor to attend regular school sessions and to forbid the minor to be absent from class without parental or school permission.
4. To arrange proper supervision for the minor when the parent must be absent.
5. To take the necessary precautions to prevent the minor from maliciously or wilfully destroying real, personal, or mixed property which belongs to the City of St. Clair Shores, or is located in the City of St. Clair Shores.
6. To forbid the minor from keeping stolen property, illegally possessing firearms or illegal drugs, or associating with known juvenile delinquents, and to seek help from appropriate governmental authorities or private agencies in handling or controlling the minor, when necessary.<sup>276</sup>

Based on the foregoing portions of the ordinance, a parent’s conviction requires proof that the parent violated the “continuous duty . . . to exercise reasonable control.”<sup>277</sup> Proof of a viola-

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§ 11.60.020(D)-(E) (punishing contributing to a minor’s delinquency as well as abusing, neglecting, or abandoning the child “in any manner likely to cause the child unnecessary suffering or serious injury to his/her health or morals”); DEL. CODE ANN. tit. 11, § 1102 (1998) (punishing contributing to the delinquency as well as punishing the person for “act[ing] in a manner likely to be injurious to the physical, mental or moral welfare of the child”).

<sup>274</sup> ST. CLAIR SHORES ORDINANCES § 20.562(b).

<sup>275</sup> *Id.* § 20.563(a). A “delinquent act” is defined as one in violation of federal, state, or municipal law, as well as any act “which would cause or tend to cause the minor to come under the jurisdiction of the [juvenile court].” *Id.* § 20.562(a). Traffic violations are excluded from this definition. *Id.*

<sup>276</sup> *Id.* § 20.563(b); *see also* DETROIT, MICH., ORDINANCES ch. 23, § 33-6-2 (1987) (listing similar provisions).

<sup>277</sup> ST. CLAIR SHORES ORDINANCES § 20.563(a). The required parental control! is designed to prevent the minor from committing any delinquent act. Thus, it is arguable that a parent’s conviction requires proof that the child committed a delinquent act, in addition to proof of parental failure to exercise reasonable control. However, it is unlikely that the ordinance would be so construed, since a child’s delinquency adjudication is generally unnecessary to a parent’s conviction for contributing to the delinquency of that child. *See* State v. Fuchs, 751 So. 2d 603, 608 (Fla. Dist. Ct. App.

tion of any of the six specified duties subsumed within the general duty would also suffice. The ordinance also provides that a violation by a child constituting a misdemeanor or civil infraction "shall be *prima facie* evidence that said parent or guardian failed to exercise reasonable parental control."<sup>278</sup> Thus, the ordinance also allows the conviction of the parent for the conduct of the child, unless the "*prima facie*" case is rebutted by the parent.<sup>279</sup>

Compulsory school attendance provisions constitute another category of contemporary parental responsibility laws reflecting the transition from primary concern for child welfare to a focus

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1999), *rev'd*, 769 So. 2d 1006 (Fla. 2000) (construing a statute that provided that "[i]t shall not be necessary for any court exercising juvenile jurisdiction to make an adjudication that any child is delinquent . . . in order to prosecute a parent" for contributing to the delinquency of a minor); *see also* *Senf v. State*, 622 So. 2d 435, 440 (Ala. Crim. App.), *cert. denied*, 622 So. 2d 435 (Ala. 1993) (holding parent liable for contributing to the delinquency of a minor and stating that "Alabama subscribes to the majority view that a defendant may be convicted of contributing to the delinquency of a child regardless of whether the child actually commits a delinquent act or has been adjudicated delinquent on the underlying offense"); *People v. Owens*, 164 N.W.2d 712, 716 (Mich. Ct. App. 1968) ("prior adjudication of delinquency by the juvenile court is not a prerequisite to defendant's conviction" for contributing to the delinquency of a minor); SALT LAKE CITY ORDINANCES § 11.60.040 (providing that an adjudication of the child's delinquency is unnecessary a conviction of the parent for failure to supervise the child).

<sup>278</sup> ST. CLAIR SHORES ORDINANCES § 20.565(a). Moreover, parental civil liability for "damages caused by commission of any delinquent act" follows automatically from parental criminal responsibility. *Id.* § 20.565(b).

<sup>279</sup> Drafting problems confound the interpretation of another portion of the ordinance. Parents are commanded to forbid the minor from "associating with known juvenile delinquents," *id.* § 20.563(b)(6), but the ordinance does not identify by whom the delinquent must be "known." Moreover, what makes this provision virtually impossible for even the most scrupulous parent to obey, is that the "juvenile delinquent" that is to be shunned is defined in the ordinance not by reference to the customary legal meaning as a juvenile adjudicated as such, but rather quite broadly as a child "whose behavior interferes with the rights of others or menaces the welfare of the community." *Id.* § 20.562(e). This drafting morass is avoidable. Compare the paucity of standards for complying with St. Clair Shores' "known juvenile delinquent" provision with the relative specificity of the same concept in Louisiana's improper supervision statute. The latter law forbids allowing the child to associate with a person "know by the parent or custodian":

- (a) To be a member of a known criminal street gang as defined in [another Louisiana statute].
- (b) To have been convicted of a felony offense.
- (c) To be a known user or distributor of drugs in violation of the Uniform Controlled Dangerous Substances Law.
- (d) To be a person who possesses or has access to an illegal firearm, weapon, or explosive.

LA. REV. STAT. ANN. § 14:92.2(A)(1) (West Supp. 2001).

on public safety. Laws regulating excessive school absences have traditionally been characterized as measures "to ensure the proper education of children."<sup>280</sup> Minimum attendance standards were aimed at benefitting schoolchildren by preventing [them] from being kicked out and to save them from the street.<sup>281</sup> Consistent with the community protection stress of general parental responsibility laws, contemporary anti-truancy provisions target the prevention of crime by truant children.<sup>282</sup> Criminal sanctions for parents as a result of their children's truant behavior are common.<sup>283</sup>

Anti-truancy laws frequently hold parents strictly liable for a criminal offense when their children miss excessive amounts of school. For example, the city of Hazel Park, Michigan, recently passed an ordinance punishing parents criminally for the excessive absence of their children from school.<sup>284</sup> The law imposes criminal penalties on the parents, including a possible \$500 fine and up to ninety days in jail.<sup>285</sup> Tennessee has passed a similar truancy law applicable on the state level.<sup>286</sup> Like the Hazel Park ordinance, Tennessee law incorporates jail time into its truancy

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<sup>280</sup> *Commonwealth v. Smoker*, 54 Lanc. Rev. 181, *aff'd*, 110 A.2d 740 (Pa. Super. Ct. 1954).

<sup>281</sup> *Richardson v. Fentress County Sch. Bd.*, 840 S.W.2d 940 (Tenn. Ct. App. 1992).

<sup>282</sup> See *Brigham City Considering Jail Time for Truants' Parents*, DESERET NEWS (Salt Lake City, Utah), Apr. 7, 1999, at A12 (The article cites an argument by a police chief supporting a law sanctioning parents that ordinance holding parents criminally responsible—with fines up to \$750 and jail terms up to ninety days—for children's school absences would help diminish burglaries and thefts: "Daytime crime is related to truancy. We need to keep those kids where they're supposed to be.").

<sup>283</sup> See *Murphy & Healy*, *supra* note 181, at A1 (noting that "[i]n recent years, parents of 40,000 truant children have been threatened with prosecution under" California law, which exposes parents upon conviction to imprisonment for up one year and to a fine of up to \$2,500); Patti Waldmeir, *Jail Sentences Hit Parents of Truants*, FINANCIAL TIMES (London), May 30, 2000, at 9 (describing Pennsylvania effort to incarcerate parents of truants); Joe Lambe, *Parents Indicted; Children Truant*, KANSAS CITY STAR, Apr. 5, 2000, at B1 (detailing criminal indictments of parents based on their children's truancy); Robyn Meredith, *Truants' Parents Face Crackdown Across the U.S.*, N.Y. TIMES, Dec. 6, 1999, at A1 (same). Nor is this phenomenon limited to the United States. See *Lucie Morris, Guilty of Being a Bad Parent: Truant's Mother Is First to Be Sent on a Jack Straw Course*, DAILY MAIL (London), July 13, 2000, at 1 (detailing the first arrest and subsequent disposition under new plan to prosecute parents of truants in England).

<sup>284</sup> See *Pardo*, *supra* note 249, at C4.

<sup>285</sup> *Id.*

<sup>286</sup> See TENN. CODE ANN. §§ 49-6-3001 to 49-6-3009 (Supp. 2000).



statutes.<sup>287</sup> Other states have passed similar statutes with penalties ranging from fines to jail terms.<sup>288</sup>

In addition to relying on strict criminal liability, both general parental responsibility laws and compulsory attendance provisions utilize what appears, at first glance, to be vicarious liability. These laws are often structured so that specified undesirable behavior on the part of the child—with no culpable action or omission of duty by the parent—constitutes the entire basis for the parent's conviction.<sup>289</sup> For example, Oregon's "failing to supervise a child" statute permits the conviction of the parent if the child does one of three things: violates a law or ordinance of the United States, a state, county, or city;<sup>290</sup> violates any curfew law;<sup>291</sup> or fails to attend public school regularly.<sup>292</sup> Idaho's enabling statute contains similar provisions.<sup>293</sup> The Parental Responsibility Ordinance of St. Clair Shores, Michigan, proclaims that the adjudication of a minor as responsible for a misdemeanor or violation "shall be prima facie evidence that said parent or guardian failed to exercise reasonable parental control," which constitutes a violation of the ordinance by the parent.<sup>294</sup> A Silverton, Oregon, ordinance declares a parent or guardian guilty of the offense of failing to supervise a minor if "the child has been found on private property or premises open to the public in violation of any provision of [the] Silverton Municipal

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<sup>287</sup> *Id.*

<sup>288</sup> See ARIZ. REV. STAT. ANN. § 15-802 (West Supp. 2000) (providing for incarceration for parents whose children violate school attendance laws); N.C. GEN. STAT. §§ 115C-378, 115C-380 (1999) (same); CAL. EDUC. CODE §§ 48291, 48293 (West 1993 & Supp. 2001) (similarly providing for criminal complaint against parents of truant children, punishable by fines).

<sup>289</sup> Note that the type of parental responsibility laws discussed in this section do not involve accomplice liability. From early times, parents' accomplice liability was governed by the general principles of such liability, and parents were liable as accomplices only when they intentionally assisted their children in the commission of a crime. 4 WILLIAM BLACKSTONE, COMMENTARIES \*34-35.

<sup>290</sup> OR. REV. STAT. §§ 163.577(1)(a), 419C.005(1) (1999).

<sup>291</sup> See *id.* § 163.577(1)(b).

<sup>292</sup> See *id.* §§ 163.577(1)(c), 339.010. All unexcused absences are considered in estimating whether the child is attending school regularly. Attendance is deemed irregular if the child has eight unexcused half-day absences over a four-week period. *Id.* § 339.065(1). Exceptions are made for students who attend private or parochial schools. See *id.* § 339.030(1).

<sup>293</sup> IDAHO CODE § 32-1301(2) (Michie Supp. 2001).

<sup>294</sup> ST. CLAIR SHORES ORDINANCES § 20.565(a) (2001). The ordinance lists no affirmative defenses, although presumably the parents could rebut the "prima facie" case. *Id.*

code.”<sup>295</sup> Salt Lake City’s ordinance provides for conviction of the parent when the child has “committed three or more delinquent acts within a two-calendar-year period, which events have been referred to the juvenile court.”<sup>296</sup> An ordinance for Fairburn, Alabama, provides that parents of repeated curfew violators may be jailed for sixty days and fined \$500.<sup>297</sup> Ordinances enacted in Madison Heights and Roseville in Michigan go even further, providing for jails terms of up to ninety days and a fine of up to \$500 for the parent of any child who, within a twelve month period, commits two or more criminal acts, or four moving traffic violations.<sup>298</sup> A parent whose child violates the curfew laws in Holly, Michigan, may be jailed for one year and fined \$500.<sup>299</sup>

A parent’s conviction under a parental responsibility law premised on the behavior of a minor child does not demonstrate the operation of pure vicarious liability, since the parent is not being convicted for the precise delinquent act committed by the child.<sup>300</sup> Pure vicarious liability is the criminal law analogy to *respondeat superior* in tort law.<sup>301</sup> Normally employed in a business regulatory context, the *respondeat superior* doctrine holds employers vicariously liable for the tortious conduct of their employees who are acting within the scope of their duty.<sup>302</sup> Pure vicarious criminal liability operates in the same manner, resulting in the imposition of criminal sanction upon employers for criminal acts committed by their employees.<sup>303</sup> But the operation of

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<sup>295</sup> SILVERTON ORDINANCES § 9.24.010 (1997). The ordinance lists two defenses and two affirmative defenses. See *id.* § 9.24.020.

<sup>296</sup> SALT LAKE CITY ORDINANCES § 11.60.020(B)(1) (1995).

<sup>297</sup> See *Where You Live*, ATLANTA J. & CONST., Oct. 18, 1997, at 4E (citing ordinance).

<sup>298</sup> CODE OF ORDINANCES FOR MADISON HEIGHTS, MICH. §§ 8-221 to 8-223 (2001); ROSEVILLE, MICH., ORDINANCES §§ 8.214-216 (2001).

<sup>299</sup> See Ihrie, *supra* note 220, at 102 n.55 (discussing the Holly ordinance); Anjali J. Sekhar, *Holly Teen Pays Fine for Curfew Violation*, DETROIT NEWS, July 6, 1996, at C2 (detailing prosecutions under the parental responsibility clause of the Holly ordinance).

<sup>300</sup> See Clute, *supra* note 214, at 1569 (“[P]arents are not being punished for their children’s acts, but *because* of them. If a child is caught shoplifting, the parent is not charged under the larceny statute, but under the parental responsibility ordinance . . .”) (alteration in original).

<sup>301</sup> 1 LAFAVE & SCOTT, *supra* note 102, § 3.9, at 352.

<sup>302</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501-02 (5th ed. 1984).

<sup>303</sup> See, e.g., *People v. Jackson*, 440 N.W.2d 39 (Mich. Ct. App. 1989), *appeal denied*, 435 Mich. 860 (1990); *State v. Beaudry*, 365 N.W.2d 593 (Wis. 1985); see *gener-*

pure vicarious liability and the version found in parental responsibility laws are so analogous as to fairly subsume their formal difference within their functional sameness. The two scenarios involve the complete absence of both *mens rea* and *actus reus* on the part of the individual, which the law holds responsible for the violation. Essential to both is the status of the violator, be it employer or parent. The triggering mechanism in each consists of unlawful behavior by someone for whom the law has made the violator responsible. It is thus more accurate to view parental responsibility laws as having crafted an alternative version of vicarious liability.<sup>304</sup>

### 3. *Constitutional and Policy Concerns*

While pure vicarious criminal liability has sometimes been extended beyond the business context,<sup>305</sup> it has a short leash outside its conceptual home. Only one appellate case has examined a statute directly seeking to impose pure vicarious criminal liability upon parents for the acts of their children. In *State v. Akers*,<sup>306</sup> the New Hampshire Supreme Court reviewed the convictions of two defendants related to the illegal operation of snowmobiles. The snowmobiles had been improperly driven by the defendants' children, and the prosecution had shown neither *mens rea* nor *actus reus* on the part of the parents. The statute in question directed that parents be held criminally responsible for any offense committed by their children.<sup>307</sup> The state supreme court rejected the argument that the convictions should be upheld pursuant to the state's vicarious criminal liability provi-

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ally Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

<sup>304</sup> It may also be argued that by cloaking this alternative form of vicarious liability in the legal garb of parental responsibility, these laws attempt to forestall the opprobrium with which critics often treat both pure vicarious liability and status crime.

<sup>305</sup> See 1 LAFAYE & SCOTT, *supra* note 102, § 3.9, at 354.

<sup>306</sup> 400 A.2d 38 (N.H. 1979).

<sup>307</sup> N.H. REV. STAT. ANN. § 269-C:24, IV (Supp. 1977) (current version at N.H. REV. STAT. ANN. § 215-A:29, VII (1996)). The statute, which pertained to the operation and licensing of off-highway recreational vehicles, provided that "parents or guardians or persons assuming responsibility will be responsible for any damage incurred or for any violations of this chapter by any person under the age of 18." *Id.* The court interpreted the statute as "impos[ing] criminal liability on parents for the acts of their children without basing liability on any voluntary act or omission on the part of the parents." *Akers*, 400 A.2d at 39.

sion,<sup>308</sup> which was taken directly from the Model Penal Code<sup>309</sup> and rendered an actor criminally liable for the conduct of another when the former "is made accountable for the conduct of such other person by the law defining the offense."<sup>310</sup> The court noted that this provision normally applied in scenarios featuring employees and agents, and "no suggestion is made that it was intended to authorize imposing vicarious criminal liability on one merely because of his status as a parent."<sup>311</sup> The court briefly explored the religious and moral bases of parenthood in order to emphasize the inappropriateness of the convictions in this case. In so doing, the court concluded, "we are convinced that the status of parenthood cannot be made a crime."<sup>312</sup>

In *Doe v. City of Trenton*,<sup>313</sup> a New Jersey appeals court examined a municipal ordinance's presumption that a parent was criminally responsible for the misbehavior of a child who twice within a year was adjudged guilty of violations of the public peace. The ordinance in question indicated the presumption's effect as follows: "it shall be presumed, subject to rebuttal by competent evidence that the parents of said minor during said period of time, allowed, permitted or suffered said minor to commit a violation of the public peace."<sup>314</sup>

The court noted that the use of presumptions in criminal cases raised issues of constitutional dimension related to the Due Process Clause.<sup>315</sup> Fundamentally, presumptions "must possess certain qualities of trustworthiness,"<sup>316</sup> and the court took guidance in United States Supreme Court precedent: "A criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than

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<sup>308</sup> N.H. REV. STAT. ANN. § 626:8, II(b) (1996).

<sup>309</sup> MODEL PENAL CODE § 2.06(2)(b) (1985).

<sup>310</sup> N.H. REV. STAT. ANN. § 626:8, II(b).

<sup>311</sup> *Akers*, 400 A.2d at 40.

<sup>312</sup> *Id.* The dissenting opinion insisted on the legislature's authority to create a "public welfare" offense consisting of being the parent of a law-breaking minor, and would have accordingly upheld the imposition of strict and vicarious criminal liability in this case. *Id.* at 40-41. Alternatively, the dissent would have read the statute as requiring for conviction evidence that the parent voluntarily participated in the minor's illegal conduct. *Id.*

<sup>313</sup> 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 380 A.2d 703 (N.J. 1977).

<sup>314</sup> *Id.* at 1202.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

not to flow from the proved fact on which it is made to depend."<sup>317</sup>

In considering the application of the Trenton ordinance, the court found that having two prior juvenile adjudications within one year does not render it more likely than not that the second resulted from parental negligence.<sup>318</sup> The presumed fact, "parental responsibility for delinquent acts of the child," does not naturally flow from the proved fact, "a second adjudication within one year."<sup>319</sup> The court relied on expert opinion in concluding that "parental actions are but a single factor in the interaction of forces producing juvenile misconduct."<sup>320</sup> Accordingly, the appellate court struck down the ordinance as not comporting with due process.<sup>321</sup>

Surprisingly, *State v. Akers*<sup>322</sup> and *Doe v. City of Trenton*<sup>323</sup> are the only two appellate cases which have considered the constitutionality of criminal parental responsibility laws that impose strict liability.<sup>324</sup> In both *Akers* and *City of Trenton*, the laws in question were struck down as unconstitutional.<sup>325</sup> These decisions were almost certainly correctly decided, and when examined in the light of the Supreme Court's exposition of the applicable constitutional doctrine, they strongly counsel that the current wave of parental responsibility laws similarly violate the Due Process Clause.

In 1970, the Supreme Court constitutionalized the presumption of innocence.<sup>326</sup> *In re Winship* established the proposition that the Fourteenth Amendment and the Sixth Amendment right

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<sup>317</sup> *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

<sup>318</sup> *City of Trenton*, 362 A.2d at 1203.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* The court observed that while Euripides declared that the gods often visit the iniquities of the fathers upon the children, "we are not yet prepared to say that the converse ought to be so." *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> 400 A.2d 38 (N.H. 1979).

<sup>323</sup> 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 380 A.2d 703 (N.J. 1977).

<sup>324</sup> In *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1993), the California Supreme Court upheld the constitutionality of the parental responsibility law enacted as part of the Street Terrorism Enforcement Act. But the court interpreted the relevant provision, section 272 of the California Penal Code, as requiring proof of criminal negligence on the part of the parents, which the court defined as "'aggravated, culpable, gross, or reckless.'" *Id.* at 513 (quoting *People v. Penny*, 285 P.2d 926, 937 (Cal. 1955)).

<sup>325</sup> *Akers*, 400 A.2d at 39; *City of Trenton*, 362 A.2d at 1203.

<sup>326</sup> *In re Winship*, 397 U.S. 358 (1970).

to counsel, taken together, entitle a criminal defendant to a jury determination that he is guilty, beyond a reasonable doubt, of "every fact necessary to constitute the crime with which he is charged."<sup>327</sup> In *Mullaney v. Wilbur*, the Supreme Court held unconstitutional a state's practice of requiring that homicide defendants prove by a preponderance of the evidence that they killed in a sudden heat of passion, based on adequate provocation.<sup>328</sup> As the Court later explained, *Mullaney* invalidated a statutory scheme whereby a "presumption subject to rebuttal relieved the State of its due process burden to prove every element of the crime beyond a reasonable doubt."<sup>329</sup> In *Patterson v. New York*, the Court trimmed a possibly overbroad reading of *Mullaney*, declining to require a state to disprove beyond a reasonable doubt "every fact constituting any and all affirmative defenses related to the culpability of an accused."<sup>330</sup> However, *Patterson* left untouched the rule forbidding "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed."<sup>331</sup> Thus, while legislatures may freely choose the elements which define crimes, the Court placed a limit upon state authority to reallocate the traditional burden of proof.<sup>332</sup> Indeed, *Patterson* reaffirmed the essence of the *Mullaney* holding "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."<sup>333</sup>

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<sup>327</sup> *Id.* at 364.

<sup>328</sup> 421 U.S. 684, 698-702 (1975).

<sup>329</sup> *Jones v. United States*, 526 U.S. 227, 240 (1999).

<sup>330</sup> 432 U.S. 197, 210 (1977). In *Patterson*, the Court upheld a New York murder statute that shifted the burden of proving the mitigating circumstance of severe emotional distress to defendant, because extreme emotional disturbance bears no direct relationship to any element of murder. *Id.* at 201-02.

<sup>331</sup> *Id.* at 215.

<sup>332</sup> *Id.* at 210.

<sup>333</sup> *Id.* at 215. The Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), confirms that the *Mullaney-Patterson* inquiry appropriately frames the Constitutional question at issue in these laws. "[I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be required to question whether the revision was constitutional under this Court's prior decisions [in *Patterson* and *Mullaney*]." *Id.* at 490. While neither *Apprendi* nor another recent case, *Jones v. United States*, 526 U.S. 227 (1999), directly addressed the constitutional issue presented by the parental responsibility laws, these decisions reaffirm the Court's commitment to maintain the

In determining what facts must be proved beyond a reasonable doubt, "the state legislature's definition of the elements of the offense is usually dispositive."<sup>334</sup> The legislative authority may reallocate burdens of proof by labeling as affirmative defenses at least some elements of crimes, but "there are obvious constitutional limits beyond which the States may not go in this regard."<sup>335</sup> One major limit on legislative discretion is that a state's definition of an offense violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>336</sup>

Criminal parental responsibility laws rely on presumptions and affirmative defenses to facilitate a parent's conviction. A presumption is normally defined as "a standardized practice under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."<sup>337</sup> As in civil cases, presumptions in criminal cases are frequently used to shift the burden of proof or the burden of persuasion. But presumptions in criminal law implicate constitutional guarantees that proof sufficient for conviction be found beyond a reasonable doubt.<sup>338</sup> Where the elements of a crime are A, B, and C, the use of a presumption allows the prosecution to adduce proof on A and B and suggest to the fact finder that it may therefore infer the existence of C.<sup>339</sup> A *prima facie* case operates in a fashion similar to a criminal presumption, since it allows for conviction

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"jury tradition that is an indispensable part of our criminal justice system," *Apprendi*, 530 U.S. at 497, as well as its sense that "the relative diminution of the jury's significance would merit Sixth Amendment concern," *Jones*, 526 U.S. at 248.

<sup>334</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

<sup>335</sup> *Patterson*, 432 U.S. at 225. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that where the legislature provides additional penalties for recidivism, proof of the prior convictions is not ordinarily an issue for trial and thus need not be treated as an element of the crime to be proved beyond a reasonable doubt. *Id.* at 246.

<sup>336</sup> *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996) (state provision allocating burden to criminal defendant of proving incompetence to stand trial by clear and convincing evidence offended defendant's "fundamental right not to stand trial while incompetent" and therefore violated the Due Process Clause). *But see, e.g.*, *Medina v. California*, 505 U.S. 437, 446 (1992) (state law allocating burden to criminal defendant of showing incompetence to stand trial by preponderance of evidence does not offend fundamental principle of justice and thus does not violate due process).

<sup>337</sup> 2 JOHN W. STRONG ET AL., *MCCORMICK ON EVIDENCE* § 346, at 463 (5th ed. 1999).

<sup>338</sup> *See* John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1335-37, 1388 (1979).

<sup>339</sup> 2 STRONG ET AL., *supra* note 337, § 346, at 463.

upon a showing of specified proof which, if unrebutted, allows the fact-finder to infer the guilt of the defendant.<sup>340</sup> For example, one such law declares that “[a]n adjudication that said minor has violated a provision of this code which is a misdemeanor or a finding that said minor is responsible for a violation of this code which is deemed a civil infraction shall be *prima facie* evidence that said parent or guardian failed to exercise reasonable parental control.”<sup>341</sup>

A permissive presumption allows the trier of fact to infer one element of the crime from proof of another.<sup>342</sup> In *County Court of Ulster County v. Allen*, the Supreme Court cautioned that a presumption will be constitutionally invalid if it undermines the factfinder’s responsibility to ascertain the existence of the essential element of a crime beyond a reasonable doubt.<sup>343</sup> Permissive presumptions satisfy constitutional standards only if the connection between the “basic” facts proved and the presumed “ultimate” fact is rational, either on its face or as applied.<sup>344</sup> A rational connection exists if it is more likely than not that the presumed fact flows from the proven facts.<sup>345</sup> As discussed in Section III.A., the key operating assumption of the parental responsibility laws, that all parents have the power to effectively control their teenage children, is palpably untrue.<sup>346</sup>

Cases evaluating permissive presumptions generally focus on common-sense, life experience expectations.<sup>347</sup> A presumption

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<sup>340</sup> 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2494, at 378-80 (James Chadbourn rev. 1987) (stating that *prima facie* can be likened to a presumption).

<sup>341</sup> ST. CLAIR SHORES ORDINANCES § 20.565(a) (2001).

<sup>342</sup> *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979). An ordinance indicating that proof of an adjudication of juvenile delinquency makes out a *prima facie* case of a violation of the parental responsibility law resembling a permissive presumption.

<sup>343</sup> *Id.* at 144-45.

<sup>344</sup> See *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *Allen*, 442 U.S. at 157-60.

<sup>345</sup> *Allen*, 442 U.S. at 165.

<sup>346</sup> See Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 415-16 (“The reality is . . . that parents have no such control and therefore [their] responsibility is irrelevant . . . [E]ven where there are harmonious relationships, children may no longer be capable of being influenced by their parents.”); Christine T. Greenwood, *Holding Parents Criminally Responsible for the Delinquent Acts of Their Children: Reasoned Response or “Knee-Jerk Reaction”?*, 23 J. CONTEMP. L. 401, 429 (1997) (same).

<sup>347</sup> See, e.g., *Barnes v. United States*, 412 U.S. 837, 845, 846 n.11 (1973) (presumption of knowledge of stolen nature of property was rationally related to proof of defendant’s unexplained possession of recently stolen property because “common



that a violation of law by a minor results from a failure of parental supervision violates this type of ordinary expectation. That a child has committed a delinquent act does not naturally suggest that the parent has violated the law's standard of parental obligation. Thus, rendering parents criminally responsible when their children disobey the law converts the parents into guarantors of their children's lawfulness, a status not rationally derivable from the fulfillment of parental duty.

Drafters of some of the parental responsibility laws apparently recognized the unprecedented expansion of strict liability that these provisions represent, for several of these laws contain burden-shifting provisions to mitigate the naked imposition of absolute liability. Affirmative defenses are those that shift to defendants both the burdens of production and persuasion. The accused must prove by a preponderance of the evidence that the defense exists, and defendants bear the risk of nonpersuasion; the jury is instructed to resolve uncertainty against them.<sup>348</sup> The constitutionality of a law allocating the burden of proof of an affirmative defense to the defendant depends on how a legislature defines the elements of the crime.<sup>349</sup> In the parental responsibility laws, the specifics of whatever actions parents took or failed to take become relevant only if the parents avail themselves of the statutorily-defined affirmative defenses.<sup>350</sup> Defendant parents may adduce proof that they took reasonable steps to properly supervise their children,<sup>351</sup> and that they reported

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sense and experience" support the inference that "petitioner must have known or been aware of the high probability that the checks were stolen"); see also David A. Nicolaisen, *Proof Issues*, 88 GEO. L.J. 1471, 1478 n.1979 (2000) (citing cases).

<sup>348</sup> See 2 STRONG ET AL., *supra* note 337, § 346, at 463; Jeffries & Stephan, *supra* note 338, at 1334-35.

<sup>349</sup> See *Patterson v. New York*, 432 U.S. 197, 210 (1997).

<sup>350</sup> See, e.g., OR. REV. STAT. §§ 163.577(3)-(4) (1999) (holding parents strictly liable for violation, and providing for affirmative defenses); IDAHO CODE § 32-1301 (Michie Supp. 2001) (authorizing cities and counties to enact parental responsibility ordinances containing provisions akin to those in OR. REV. STAT. § 163.577); PA. STAT. ANN. tit. 24, § 13-1333 (West 1992) (holding parents strictly liable for violations of compulsory attendance law, providing for fines and jail terms, and allowing parents to establish affirmative defenses).

<sup>351</sup> See, e.g., OR. REV. STAT. § 163.577(4) (affirmative defense that the defendant "took reasonable steps to control the conduct of the child at the time the [defendant] is alleged to have failed to supervise the child."); IDAHO CODE § 32-1301(3)(b) (same); SILVERTON ORDINANCES § 9.24.020 (2001) (same); SALT LAKE CITY ORDINANCES § 11.60.030(C) (1995) (same). This affirmative defense may be analogized to a good faith defense, which has been proposed as one way to soften the harsh impact of strict liability. See Laurie L. Levenson, *Good Faith Defenses: Reshaping*

their child's delinquent acts to the police or other authorities,<sup>352</sup> or that they were the victims of their child's act.<sup>353</sup>

These affirmative defenses may appear to soften the rigidity of the parental criminal responsibility laws, but they cannot rectify the irrational premise of these laws. The underlying assumption of these laws remains the untenable proposition that the parent's criminal failure to supervise a child is to be inferred by the commission of one or more delinquent acts by the child. At bottom, these laws allow prosecutors to charge parents for the acts of their children, relieving the state or municipality of any need to establish a connection between the parental conduct or omission

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*Strict Liability Crimes*, 78 CORNELL L. REV. 401, 404 (1993). A good faith defense would allow those who otherwise would be strictly liable to show that "they operated under an honest and reasonable mistake of fact because they took affirmative steps to comply with the law but were misled in their efforts." *Id.* at 405. However, the affirmative defense provided in the parental responsibility laws only resembles the second prong of the proposed general good faith defense. Although parents need to prove that "they took affirmative steps to comply with the law," there is no requirement for them to show that they were acting under an "honest and reasonable mistake of fact." *Id.*

<sup>352</sup> See, e.g., OR. REV. STAT. § 163.577(3)(b); IDAHO CODE § 32-1301(3)(a)(ii); SILVERTON ORDINANCES § 9.24.020(2); SALT LAKE CITY ORDINANCES § 11.60.030(B). Providing an affirmative defense to parents who report their children to the police is consistent with the aspect of contemporary laws seeking to enlist parents as "active participants in the effort to eradicate . . . gangs." *Garcetti v. Williams*, 853 P.2d 507, 510 (Cal. 1993). Whether it is always consistent with good parenting to turn one's children over to the authorities is not addressed in the laws. See Kenneth Alvin Kalvig, *Oregon's New Parental Responsibility Acts: Should Other States Follow Oregon's Trail?*, 75 OR. L. REV. 829, 838 (1996) (arguing that sometimes good parenting involves dealing with the child's problem within the family, rather than reporting it to the police).

The Salt Lake City ordinance contains the proviso that the parent must have reported the delinquent act "at or near the time" the child committed it. SALT LAKE CITY ORDINANCES § 9.24.020(2). By contrast, Louisiana's improper supervision statute lists no affirmative defenses, but includes a clause stating that the child's parents and guardians may not be convicted if they sought the assistance of proper authorities "upon acquiring knowledge that the minor has undertaken [the prohibited] acts." LA. REV. STAT. ANN. § 14:92.2(D) (West Supp. 2001). Although this provision is not stated as an affirmative defense, it may operate as one in practice. The statute is silent on whether the issue of seeking assistance from the authorities need be raised by the prosecution or the defense, and what burden of proof and/or burden-shifting devices apply.

<sup>353</sup> See, e.g., OR. REV. STAT. § 163.577(3)(a) (affirmative defense that the defendant "[i]s the victim of the act that brings the child within the jurisdiction of the juvenile court"); IDAHO CODE § 32-1301(3)(a)(i) (same); SALT LAKE CITY ORDINANCES § 11.60.030 (same).

One ordinance supplies two affirmative defenses not found in any other law: that the child's violation occurred in the parent's presence, and that the child's violation occurred on the parent's property. SILVERTON ORDINANCES § 9.24.020.

and the child's delinquent act. The defendant parents then must bear the burden of proving that they are innocent parents who should not be convicted.<sup>354</sup>

By the constitutional standards set forth above, the parental responsibility laws discussed in this Article violate due process. In presuming parents guilty of one offense merely because their children have committed a different offense, they effectively discard the presumption of innocence, in violation of the longstanding rule that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."<sup>355</sup> Similarly, the laws in question relieve the prosecution of the burden of establishing any connection between any behavior by the parent and the harm addressed by the statute. In so doing, these laws discard the proviso that the Constitution places beyond permissible legislative reach the power to decree that "mere proof of the identity of the accused[ ] should create a presumption of the existence of all the facts essential to guilt."<sup>356</sup> In this respect, the parental responsibility laws constitute proscribed "status offenses."<sup>357</sup>

In public policy terms, the prime reason to reject the current formulation of parental responsibility laws is their incipient transformation of poor parenting, or sometimes even good parenting, into a new public welfare offense. Public welfare offenses have been termed "administrative misdemeanors,"<sup>358</sup> and that phrase encapsulates the bureaucratic convenience rationale for this legal regime.<sup>359</sup> Dean Sayre's description of the process has not lost its cogency even after nearly seventy years:

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<sup>354</sup> See Mike Ward, *Punishing Parents for their Kids' Misdeeds; An Oregon Ordinance is Model for a New Texas Statute*, AUSTIN AM.-STATESMAN, Jan. 2, 1996, at A1 ("Control is not something you just switch off and on. And the terrible thing is that it switches the burden of proof. The parents have to show their way of raising their kids was prudent.") (quoting Jossi Davidson); see also Ronald J. Allen, *Foreword: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 642 (1997) ("Statutes must meet some minimal level of rationality to survive due process analysis.").

<sup>355</sup> *McFarland v. Am. Sugar Rfg. Co.*, 241 U.S. 79, 86 (1916).

<sup>356</sup> *Tot v. United States*, 319 U.S. 463, 469 (1943).

<sup>357</sup> See *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (cruel and unusual punishment to impose criminal penalty for mere status of being drug addict). But see *Powell v. Texas*, 392 U.S. 514, 531-32 (1968) (not cruel and unusual punishment to impose criminal penalty for public intoxication upon an alcoholic compelled to drink).

<sup>358</sup> Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 636 (1942).

<sup>359</sup> See Sayre, *Public Welfare Offenses*, *supra* note 252, at 69.

[T]he new emphasis being laid upon the protection of social interests fostered the growth of a specialized type of regulatory offense involving a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent.<sup>360</sup>

But raising children is not an industry, and our repugnance at the notion of overriding the interests of innocent parents intimates that parenting can never be a regulatory offense. One of the arguments advanced to justify the imposition of strict liability in public welfare offenses is the inherent dangerousness, and consequent heavy regulation, of the line of work engaged in by a defendant, and the lack of compulsion in that defendant's choice of that field of endeavor.<sup>361</sup> Whatever merit this argument may otherwise have,<sup>362</sup> it subverts our most revered social norms to craft a legal device on the premise that parenthood is an essentially dangerous activity. Parenting is an inherently positive endeavor, whose social utility has always been deemed paramount. Indeed, the substantive liberty interest protected by the Due Process Clause "provides heightened protection against governmental interference with certain fundamental rights and liberty interests," including the interest of parents in the care, custody, and control of their children.<sup>363</sup>

It is also unacceptable to suggest that blameless parents must suffer the indignity of criminal conviction in order to satisfy the demands for a more punitive policy toward juvenile delinquents. The principle of "tough luck" at the heart of strict liability for public welfare offenses is particularly inadequate as a description

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<sup>360</sup> *Id.* at 68.

<sup>361</sup> See, e.g., Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512 (Sanford H. Kadish ed., 1983); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 735-39 (1960); Steven S. Nemerson, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1543-46 (1975).

<sup>362</sup> See Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 268-69 (1987) (suggesting that this argument is deeply flawed because engaging in legitimate business cannot serve as a basis for blame).

<sup>363</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (describing the interest of parents in caring for their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that the protected liberty interest includes the right of parents "to direct the upbringing and education of children"); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (holding that the Due Process Clause includes parents' liberty interest in "establish[ing] a home and bring[ing] up children").

of the legal regulations with which an enlightened polity treats parenthood.<sup>364</sup> Nor do offenses under the parental responsibility laws fit under the rubric of those moral crimes which, along with public welfare offenses, have traditionally been exempted from the *mens rea* requirement.<sup>365</sup>

Indeed, the fundamental reason why strict liability should never be the standard for evaluating offenses associated with parenting is precisely the legal importance and moral necessity of good parenting. By inappropriately relying on the imposition of strict and vicarious liability, and by reversing the burden of proof, parental responsibility laws presumptively convict the parent and only afterwards evaluate the parenting. Despite the allowance of some affirmative defenses, parental responsibility laws primarily focus on "juvenile outcomes rather than on the skills that constitute proper parenting."<sup>366</sup> The parental responsibility laws neither distinguish, nor even make a serious effort to differentiate, harmful from appropriate parenting. When parents truly commit crimes against their children, they should be subject to full legal condemnation. Eliminating *mens rea* considerations from parenting offenses ironically denigrates the social duty to condemn, both legally and morally, despicable behavior such as child abuse that strikes at the heart of the social order.<sup>367</sup>

### III

#### THE PROPER PLACE OF PARENTAL RESPONSIBILITY IN DEALING WITH JUVENILE CRIME

Part I of this Article reviewed the juvenile justice counter-ref-

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<sup>364</sup> See Kadish, *supra* note 362, at 267. One perhaps unintended extension of the "tough luck" principle in the enforcement of these laws applies to the question of which parent in a two-parent family police will charge. There is some evidence that sometimes the parent criminally charged is simply the first parent the police find. Carol Sternhell, *If Johnny Breaks the Law, Should Mommy Go to Jail*, GOOD HOUSEKEEPING, Mar. 1996, at 69-70.

<sup>365</sup> These crimes included bigamy, adultery, and statutory rape. See Levenson, *supra* note 351, at 424 (distinguishing between "public welfare" infractions and morality offenses by noting that the latter focus on a situation where a "defendant's conduct is already morally questionable").

<sup>366</sup> Schmidt, *supra* note 157, at 682.

<sup>367</sup> Cf. Santillanes v. State, 849 P.2d 358, 365 (N.M. 1993) ("when moral condemnation and social opprobrium attach to the conviction of a crime, the crime should typically reflect a mental state warranting such contempt"); MODEL PENAL CODE § 2.05 cmt. (1985) ("Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.").

ormation and argued that the fear of a generation of super-predators was unwarranted.<sup>368</sup> Part II critiqued parental responsibility laws that expose a wide array of innocent acts and omissions to criminal liability.<sup>369</sup> The argument of this Article thus far advances two interim conclusions: (1) that the case for treating juvenile delinquents as predatory criminals has been grossly overstated, and far less punitive means are appropriate for the vast majority of children committing delinquent acts; and (2) that punishing parents on the generalized assumption that they bear principal responsibility for juvenile delinquency is also unjustifiable, and so another route for increasing parental involvement in juvenile delinquency must be sought. Juvenile criminality is, of course, a serious problem, and parental involvement with wayward youth is very important. What is needed, however, is a reasoned approach to legal intervention in the relationship between parental supervision and juvenile crime, which addresses the needs of community safety as well as the future course of the delinquent.

In this final Part of the Article, I consider and evaluate two different directions for the law to take in inducing and/or regulating parental involvement in the disposition of children's delinquency cases. One direction involves jettisoning a culpability analysis *in toto*. This approach fully respects the parental prerogatives with regard to the raising of their children, and suggests that the issue of parental involvement in juvenile court may best be addressed within the perspective of the emerging movement in therapeutic jurisprudence, including *voluntary* family group conferences, mediation, teen courts, and other forms of alternative dispute resolution which emphasize restorative justice. The second direction, with which this Article concludes, addresses the question of the appropriate liability for parental misconduct in relation to juvenile delinquency. If policymakers believe that parental liability needs to be assessed in delinquency cases, I propose that they turn from the inappropriate assertion of criminal law jurisdiction over parents of juvenile delinquents and instead invest the juvenile court with the power to assert jurisdiction over parents in the dispositional phase of delinquency proceed-

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<sup>368</sup> See text at notes 14-152, *supra*.

<sup>369</sup> See text at notes 153-367, *supra*.

ings.<sup>370</sup> Central to both approaches is a reconception of juvenile and family courts as principally civil courts concerned with insuring the welfare and regulating the conduct of family members, rather than as primarily criminal courts oriented to administering a penal code for criminally susceptible children and their parents.<sup>371</sup>

#### A. *Involving Parents in their Children's Delinquency Cases: A Therapeutic Jurisprudence Approach*

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent.<sup>372</sup> Restructuring legal processes by applying behavioral science knowledge to accomplish therapeutic outcomes, without diluting the traditional canons of justice, lies at the core of this new jurisprudential approach.<sup>373</sup> A related movement, restorative justice, focuses on crimes as interpersonal conflicts that must be addressed by empowering the victims, communities, and even the offenders themselves in order to repair the injury.<sup>374</sup> Therapeutic jurisprudence and restorative jus-

<sup>370</sup> Initially, in this context, I consider and reject making parents parties in child protective proceedings. See text at notes 419-518, *infra*.

<sup>371</sup> See Mark H. Moore, *The Future of the Juvenile Court: A Theoretical Framework That Fits*, in 6 CTR. FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN 140, 141 (1996); Martha Minow, *The Public Duties of Families and Children*, in THE ROLE OF THE JUVENILE COURT 3 (Francis X. Hartmann ed., 1987).

<sup>372</sup> David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259 (1994) [hereinafter Wexler, *An Orientation*]; THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990) [hereinafter THE LAW AS A THERAPEUTIC AGENT].

<sup>373</sup> See Wexler, *supra* note 372, at 259-60 ("Therapeutic considerations are but one category of important consideration, as are autonomy, integrity of the factfinding process, and community safety."); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Research Tool*, in ESSAYS IN THERAPEUTIC JURISPRUDENCE 303 (David B. Wexler & Bruce J. Winick eds., 1991) ("If the therapeutically-appropriate legal arrangements are not normatively objectionable on other grounds, those arrangements may point the way toward law reform.").

<sup>374</sup> See Amanda L. Paye, *Communities Take Control of Crime: Incorporating the Conferencing Model into the United States Juvenile Justice System*, 8 PAC. RIM L. & POL'Y J. 161, 165-88 (1999); Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1 (1998); RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996); MARK S. UMBREIT, VICTIM MEETS OFFENDER (1994); Daniel W. VanNess, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251 (1993); Morgan D. Reynolds, *Restorative Justice, American Style*, BRIEF ANALYSIS (Nat'l Ctr. for Policy Analysis, Dallas, Tex.), Mar. 15, 2001, available at <http://www.ncpa.org/ba/ba353/ba353.html> (last visited Oct. 15, 2001); Linda Espenshade, *State Supports Restorative Justice*, LANCASTER INTELLIGENCER-JOURNAL (Lancaster, Pa.), Jan. 25, 2001, at A7. But see Stephen Hooper & Ruth Busch, *Domestic Violence and Restor-*

tice are the "two vectors"<sup>375</sup> of a growing interdisciplinary movement that considers the law itself as a social force and focuses on the therapeutic or non-therapeutic impact of legal intervention.<sup>376</sup> This viewpoint distinguishes the court's role as facilitating positive outcomes and fortifying family relationships. In its modern phase, therapeutic jurisprudence originated in the mental health law field,<sup>377</sup> but its applications have been extended to many other fields,<sup>378</sup> including criminal prosecutions<sup>379</sup>

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*ative Justice Initiatives: The Risks of a New Panacea*, WAIKATO L. REV., vol. 4, issue 1, 1996, at 101, available at [http://www.waikato.ac.nz/law/wlr/special\\_1996/4\\_hooperbusch.html](http://www.waikato.ac.nz/law/wlr/special_1996/4_hooperbusch.html) (last visited Oct. 5, 2001) (suggesting caution and limits to application of restorative justice mechanisms in domestic violence cases).

<sup>375</sup> Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 97 (1998).

<sup>376</sup> Because of their substantial conceptual overlap for purposes of the present discussion, the terms "therapeutic jurisprudence" and "restorative justice" will be used interchangeably in this section. *Id.* at 97-98 (suggesting a "welding together of the two models into one . . . [in order to] make the movement more effective").

<sup>377</sup> See THE LAW AS A THERAPEUTIC AGENT, *supra* note 372, at 9. Therapeutic jurisprudence can be traced to the sociological model of jurisprudence pioneered by Roscoe Pound. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 446 n.33 (1999) (citing Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)).

<sup>378</sup> See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 184 (1997) ("In less than a decade, therapeutic jurisprudence, which began as a scholarly approach to mental health law, has emerged as a mental health approach to law generally.").

<sup>379</sup> See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833 (2000); Hora et al., *supra* note 380; Pamela L. Simmons, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZAGA L. REV. 237 (1999/2000); Peggy Fulton Hora & William G. Schma, *As Demonstrated by Drug Courts, Judges Can Improve the Psychological Well Being of People Subject to the Legal Process and, in Turn, Make Their Own Jobs More Rewarding*, JUDICATURE, July-Aug. 1998, at 8; Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998); Martin I. Reisig, *Restorative Rehabilitation: Drug Courts, Community Corrections and Restorative Justice*, MICH. B.J., Feb. 1998, at 172; Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, 32 CRIM. L. BULL. 342 (1996); Ira K. Packer, *The Court Clinic System in Massachusetts: A Therapeutic Approach vs. a Rights-Oriented Approach*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 291 (1994); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993); David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 LAW & PSYCHOL. REV. 43 (1990). But see Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1440 (2000) (expressing criticism of "fuzzy-headed notions about 'restorative justice' and 'therapeutic jurisprudence'" fueling the rapid spread of drug courts).



and family law cases.<sup>380</sup>

The therapeutic agency of law is particularly applicable to proceedings involving families in crisis.<sup>381</sup> Utilizing alternative forms of dispute resolution (ADR), family members are encouraged to meet in confidential settings with trained professionals in an attempt to resolve the legal and social issues that have brought them to court.<sup>382</sup> Such techniques can include family group conferencing,<sup>383</sup> mediation,<sup>384</sup> peer or teen courts,<sup>385</sup> com-

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<sup>380</sup> See, e.g., Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998) [hereinafter Babb, *Fashioning an Interdisciplinary Framework*]; Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997) [hereinafter Babb, *Application of an Ecological and Therapeutic Perspective*].

<sup>381</sup> See Babb, *Fashioning an Interdisciplinary Framework*, *supra* note 380, at 472-73. On the law's "prescriptive focus" in this area, see David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). Many scholars assert that to have a positive effect on family members' behavior, and thereby achieve a therapeutic outcome, family law remedies must reflect an integrated approach to family legal issues, such as contained within the many proposals for a unified family court. See, e.g., Symposium, *Unified Family Courts*, 32 FAM. L.Q. 1 (1998); Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2003 (1993).

<sup>382</sup> Leonard P. Edwards, *The Future of the Juvenile Court: Promising New Directions*, in 6 CTR. FOR THE FUTURE OF CHILDREN, *THE FUTURE OF CHILDREN* 131, 134 (1996). One such program, New Jersey's Juvenile Conference Committees, provides for a group of from six to nine citizens appointed by the family court to meet with offenders, their families, victims, and concerned others to discuss the delinquent act and recommend an agreed-upon disposition. David B. Rottman & Pamela Casey, *Therapeutic Jurisprudence Forum: A Response to Scheff: Don't Write-Off the Courts*, 67 REV. JUR. U.P.R. 653, 654 (1998). Agreements include "counseling, community service, restitution, school attendance, school grades, and curfews." *Id.* at 655. The program, which has "both a therapeutic jurisprudence and restorative justice agenda," aims "to prevent future misconduct through early and appropriate intervention provided in the juvenile's own neighborhood." *Id.* at 654-55. Local residents substitute for the court and its staff; and participation in the program is voluntary. *Id.* at 654.

<sup>383</sup> See Jennifer Michelle Cunha, *Family Group Conference: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283 (1999); Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REF. 57 (1997); T. Wachtel, *Family Group Conferencing: Restorative Justice in Practice*, JUV. JUST. UPDATE, Aug.-Sept. 1995, at 1-13.

<sup>384</sup> See Mark William Bakker, *Repairing the Breach and Reconciling the Discor-dant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479 (1994); Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343 (1992) (documenting the growing practice of court-connected mediation); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 373 (1980) ("[t]hinking about competence in terms of the ability of courts to reach and enforce

munity courts,<sup>386</sup> day treatment programs,<sup>387</sup> and settlement conferences.<sup>388</sup> The common theme uniting these alternatives is a reordering of the processes by which decisions are made about the case. ADR techniques do not seek to evade the responsibility of the court to decide cases, but reserve the process of determining a court-imposed resolution until it is clear that the family members—aided by the court’s social science support staff—are unable to come to their own solution.<sup>389</sup>

The retributive concepts that have dominated the juvenile justice counter-revolution focus on the offender’s just desserts, and the punitive measures adopted have often been presented as responsive to crime victims.<sup>390</sup> However, retribution only indirectly addresses the crime victims’ concerns, except inasmuch as it assumes that victims always desire the offender to receive a

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decisions misses perhaps their most important function: providing a framework within which parties negotiate and bargain”); James F. Morris, Cobb Juvenile Court Mediation, at <http://www.kuesterlaw.com/cobb/c9601a.htm> (last visited Oct. 5, 2001) (“Having children involved as active participants in promoting just outcomes in neighborhood and family disputes is an important way to encourage young people to be just.”).

<sup>385</sup> See Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 522-25 (1998).

<sup>386</sup> See John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811 (2000).

<sup>387</sup> Bruce I. Wolford et al., *Day Treatment: Community-Based Partnerships for Delinquent and At-Risk Youth*, JUV. & FAM. J. 35 (1997); Stephen A. Campbell, *Alternatives in the Treatment of Juvenile Offenders: Current Options and Trends*, 19 J. JUV. L. 318, 331 (1998).

<sup>388</sup> See Edwards, *supra* note 382, at 134.

<sup>389</sup> See *id.* (“The principal role of the court will be to monitor and approve the agreements worked out by the parties and to make appropriate orders.”); Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 411 (2000) (referring to an “emerging national consensus that family courts should have a strategy that encourages parents to reduce and manage their conflicts, not just serve as a forum for litigating about them”).

<sup>390</sup> See Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 76 (1999) (stating that states getting tougher with juvenile offenders is partly “a consequence of the public’s frustration with perceived and actual increases in the incidence of juvenile crime”). Beschle discusses “the recasting of retribution as being grounded, not merely in the victim’s or the community’s need for revenge, but rather in the notion that a free choice to do harm must include a willingness to accept the negative consequences of punishment.” *Id.* at 82; see generally Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000) (discussing revival of retribution as the central purpose of punishment).

punitive sanction.<sup>391</sup> Restorative justice provides a restitutive alternative to both retributive and rehabilitative justice.<sup>392</sup> Restorative concepts provide a victim-oriented response to crime that supplies a forum for the victim, the offender, their families, and community representatives, to address the criminal harm and possible remedies:

Restorative justice emphasizes the importance of providing opportunities for more active involvement in the process of offering support and assistance to crime victims; holding offenders directly accountable to the people and communities they have violated; restoring the emotional and material losses of victims (to the degree possible); providing a range of opportunities for dialogue and problem solving to interested crime victims, offenders, families, and other support persons; offering offenders opportunities for competency development and reintegration into productive community life; and strengthening public safety through community building.<sup>393</sup>

A brief analysis of a potential role for parents of juvenile of-

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<sup>391</sup> See MARK S. UMBREIT, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS 2 (2000) (referring to the contrast between family group conferencing and the justice system's "retributive, offender-driven principles"); Gordon Bazemore, *Will the Juvenile Court System Survive?: The Fork in the Road to Juvenile Court Reform*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 85 (1999) ("While the punitive approach to crime may appease the public demand for retribution, it is not concerned with reintegrating offenders or with restoring peace and a sense of safety in communities.").

<sup>392</sup> John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 3 (1999).

<sup>393</sup> UMBREIT, *supra* note 391, at 1. Illustrations of restorative justice programs and techniques include crime repair crews, victim intervention projects, family group conferencing, victim-offender mediation, peacemaking circles, victim panels that address offenders, sentencing circles, community reparative boards, offender competency development programs, victim empathy classes and victim-directed community service for offenders, community-based support groups for both crime victims and offenders. *Id.* Restorative justice has been described as a "major development in criminological thinking" symbolized in the insight that "the more evil the crime, the greater the opportunity for grace to inspire a transformative will to resist tyranny with compassion." Braithwaite, *supra* note 392, at 1-2. Restorative justice is, thus, a further extension of the principle of privatization which has moved the field of family law "toward private rather than state-imposed decisionmaking." Babb, *Application of an Ecological and Therapeutic Perspective*, *supra* note 380, at 785. The increased privatization accompanying restorative justice initiatives is not accidental; to the contrary, advocates call for the formal legal system to enter into "a partnership with communities based upon a new response to youth crime more reliant on citizens, community groups and socializing institutions than on juvenile justice professionals in expert roles." Bazemore, *supra* note 391, at 82; see generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996).

fenders in family group conferences and mediation serves to illustrate both the promise of, and limits to, using a therapeutic jurisprudence approach to induce greater parental involvement as an alternative to the imposition of criminal liability through parental responsibility laws. Family group conferencing (FGC) programs were initially developed in New Zealand and have received considerable attention in many countries, including the United States.<sup>394</sup> FGC principles are a staple of social work practice, and have long been employed in family therapy and community development work.<sup>395</sup> In dealing with delinquency cases, FGC involves the community most affected by the crime—the victim, the offender, and their families—joined together by a facilitator to determine the best resolution following a delinquent act.<sup>396</sup> According to the restorative justice theory, the burden for responding to unlawful conduct does not primarily belong to the state, but rather to the victim, the offender, and the community as a whole.<sup>397</sup> Participation by all involved is voluntary and the offender must admit culpability in order to take part.<sup>398</sup> FGC aims to secure an apology from the offender to the victim, acknowledge community censure, and work out an agreement to rectify the harm both to the victim and to the community.<sup>399</sup>

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<sup>394</sup> RICHARD A. MENDEL, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 20 (2000); UMBREIT, *supra* note 391, at 3; Braithwaite, *supra* note 392, at 2-3; Lowry, *supra* note 383, at 64-65; Edwards, *supra* note 382, at 135; Wachtel, *supra* note 383, at 1-13; David B. Moore, *Shame, Forgiveness, and Juvenile Justice*, 12 CRIM. JUST. ETHICS 3, 25 (1993); R. WILCOX ET AL., FAMILY DECISION MAKING: FAMILY GROUP CONFERENCING (1991).

<sup>395</sup> Lowry, *supra* note 383, at 65.

<sup>396</sup> See UMBREIT, *supra* note 391, at 2. The juvenile justice systems of New Zealand and Australia turned to restorative justice models, such as family group conferencing, after finding that welfare programs and retribution-oriented sanctions "failed to change behavior, despite a continued and heavy reliance on detention." Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada—Finding Middle Ground in Criminal Justice?*, 6 CRIM. L.F. 576, 579 (1995). Indeed, most restorative justice advocates have turned against traditional approaches to juvenile crime "as a result of persistent empirical evidence of the failures of the welfare and justice models." Braithwaite, *supra* note 392, at 3.

<sup>397</sup> Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1261 (1994); see also Scheff, *supra* note 375, at 100 (Scheff suggests conferencing in cases involving youth gangs, since the format encompasses "bringing together gang members with the families and officials of a neighborhood or community. Such a meeting might lead to discussion, and even resolution, of more fundamental problems than just the particular offense that led to the conference.").

<sup>398</sup> UMBREIT, *supra* note 391, at 2. FGC is thus not designed to replace the adjudicatory process, but rather serves as an alternative dispositional hearing.

<sup>399</sup> See Bazemore, *supra* note 391, at 96.

What role do the parents of the juvenile offender have in FGC? These parents are part of the community that was harmed, but they also have a special role to play in assisting their child in the process of acknowledging the harm and beginning the process of making amends. The parents of the offender are often in a position to facilitate the reintegration of their child into the community, a prime focus of the restorative justice/therapeutic jurisprudence movement. But the question of the family court's authority over parents and other family members is "[p]erhaps the greatest uncertainty about the family court model."<sup>400</sup> Following the premise that restoring family functioning is essential to the family court's mission, some commentators point out that, because our legal system is already committed to imposing the least restrictive alternative in delinquency dispositions, it is already "implicitly relying on parents and caretakers to shoulder the burden of effectively supervising young offenders."<sup>401</sup> Further, this argument suggests that, to the extent that the American juvenile justice system adopts FGC, "the principle that parents and caretakers should be parties before the court in juvenile cases is being implicitly embraced."<sup>402</sup>

Victim-offender mediation is another restorative justice concept currently advanced as a better alternative for the resolution of some delinquency cases.<sup>403</sup> Mediation in juvenile cases is touted as a method to more effectively give voice to, and serve the needs of, the crime victim, the community, and the of-

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<sup>400</sup> Mark H. Moore & Stewart Wakeling, *Juvenile Justice: Shoring Up the Foundations*, 22 CRIME & JUST. 253, 280 (1997).

<sup>401</sup> *Id.* at 281.

<sup>402</sup> *Id.* at 282. This last argument is somewhat strained, and confuses voluntary parental involvement with mandatory party status. However, many family court judges are apparently convinced of their authority to exercise jurisdiction over parents in the absence of statutory authorization. Survey results indicate that 76% of judges who hear delinquency cases believe that they have the power to enforce an order to parents through their contempt power. *Id.* For an argument on *explicitly* why and how to render parents parties in juvenile delinquency cases, see text at notes 476-522, *infra*.

<sup>403</sup> See CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE (2000); Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005 (1998); Marianne McConnell, *Mediation—An Alternative Approach for the New Jersey Juvenile Justice System?*, 20 SETON HALL LEGIS. J. 433 (1996); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 401 (1980).

fender.<sup>404</sup> Victims and offenders “assume active, problem-solving roles and negotiate an agreement that is intended to restore the material and psychological losses of the victim while impressing upon the offender the ‘human impact’ of his criminal conduct.”<sup>405</sup> Seen as “more therapeutic than judgmental,”<sup>406</sup> mediation has the ability “to produce long-term changes and greater satisfaction for victims . . . [and] increase offender accountability.”<sup>407</sup> Unfortunately, the parental role in victim-offender mediation has not yet been well-defined.<sup>408</sup>

A therapeutic jurisprudence approach contemplates a deviation from, or a least a reformulation of, the traditional advocacy model of adjudication.<sup>409</sup> The adversary system and the frequently protracted nature of court proceedings “can further

<sup>404</sup> McConnell, *supra* note 403, at 436.

<sup>405</sup> Beauregard, *supra* note 403, at 1010.

<sup>406</sup> McConnell, *supra* note 403, at 454.

<sup>407</sup> *Id.* at 454-55; see Mark S. Umbreit & Robert B. Coates, *The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States*, 43 JUV. & FAM. CT. J. 1 (1992) (“Crime victims were significantly less upset about the crime and less fearful of being revictimized by the same offender after they were able to meet their offender in mediation.”); Mark S. Umbreit & Robert B. Coates, *Cross-Site Analysis of Victim-Offender Mediation in Four States*, 39 CRIME & DELINQ. 565, 565-66 (1993) (face-to-face mediation allows offenders to “take direct responsibility for their actions”).

<sup>408</sup> *Cf.* McConnell, *supra* note 403, at 459 (“Parents attend the mediation but stay in the background and do not participate except in instances where their input is needed, such as payment of restitution.”). Anecdotal evidence suggests a frequently beneficial outcome to juvenile mediations which include parents.

In many situations the parents of the juveniles . . . had not engaged in a serious problem solving discussion until they met at the courthouse. The mediation service is particularly valuable and successful in these situations because the parents, as well as the juveniles, have an opportunity to listen to the concerns of the other side and to accept responsibility for communicating and resolving futures issues without going to court.

William A. Funari, *How Does Mediation Get a Place on the Litigant's Philosophical Map and What Happens When It Gets There?*, 20 HAMLINE J. PUB. L. & POL'Y 325, 346 (1999). Stronger evidence than such narratives, and more rigorous analysis, are needed to fully flesh out the parental role in the mediation of juvenile cases. One problem untouched in the literature is the role-conflict between parent and mediator in a dispute mediated between the juvenile offender and the victim. Certainly, the offender's parent should not play the role of a neutral mediator, but as yet unanalyzed is the effect upon the mediation process on the interaction between the mediator and the parent.

<sup>409</sup> THE LAW AS A THERAPEUTIC AGENT, *supra* note 372, at 18. “In a major break from traditional legal proceedings, the members of the drug court focus their attention on the addict's recovery—not on the merits of the case.” Simmons, *supra* note 379, at 259. “Utilizing a therapeutic jurisprudential approach, drug courts use sanctions [for treatment noncompliance] not to simply punish inappropriate behavior but to augment the treatment process.” Hora, *supra* note 377, at 469.

splinter already fragmented family relationships.”<sup>410</sup> This anti-therapeutic aspect of the current legal system must be balanced against the dangers of sacrificing individual rights in pursuit of communal goals.<sup>411</sup> Advocates for a therapeutic vision of law have historically underestimated the dangers of directiveness and the concomitant risk of lessening autonomy.<sup>412</sup> Mediation programs have been criticized as inherently coercive, especially for juveniles, who may “feel either vulnerable or powerless.”<sup>413</sup> Whether mediating with parents or with adult victims, juveniles suffer from an “inherently unequal bargaining position,”<sup>414</sup> due to their relative age, education, and life experience.<sup>415</sup>

In sum, therapeutic jurisprudence provides a suitable matrix within which to locate the desire to increase parental involvement in delinquency cases. Moreover, actively engaging parents in the quest for restorative justice has the potential for improving

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<sup>410</sup> Babb, *Application of an Ecological and Therapeutic Perspective*, *supra* note 380, at 801.

<sup>411</sup> See Packer, *supra* note 379, at 291 (Packer points out that, although therapeutic considerations are not designed to “trump” a rights-based analysis, “at some point the implications of the two approaches will diverge. It is at this point which we must choose between them.”).

<sup>412</sup> See J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 520 (1994) (“Therapeutic divorce represented compelled nondivorce, holding families together through ‘directive’ psychiatry.”); J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535 (1994) (detailing the development of therapeutic divorce reform and early family courts and suggesting why the effort failed). Champions of the modern therapeutic jurisprudence movement do, however, disavow any intent to discard the law’s focus on individual rights; rather, they insist on an equal place at law’s table for considerations of the law’s impact on the well-being of those subject to legal process. Professors Wexler and Winick “emphasize that therapeutic jurisprudence does not embrace a vision of law . . . as serving exclusively or primarily therapeutic ends.” *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 373, at xi.

<sup>413</sup> Beauregard, *supra* note 403, at 1016. The presence of the offender’s parents in the mediation may add to the pressure. While this additional leverage against the juvenile offender may satisfy retributive concerns, it undermines the voluntary basis of mediation. *Id.* at 1017 (discussing “safeguards . . . to prevent the juvenile offender from being ‘clubbed’ into an agreement with the victim”).

<sup>414</sup> Debra Baker, *Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining*, 27 U. TOL. L. REV. 897, 898 (1996).

<sup>415</sup> *Id.* at 913. Additionally, an agreement in which one party is a juvenile may have enforceability problems. Contract law generally provides the basis for enforcing mediated agreements, and juveniles generally lack the capacity to contract. See NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT’S GUIDE TO MEDIATION AND THE LAW* 157 (1993) (“Because mediated agreements are typically agreements settling legal claims, they will be subject to a series of contract doctrines applying to settlement agreements.”).

the legal system's approach to the child offenders, their victims, and the community as a whole. Although parental participation may not be compelled, options such as family group conferences and victim-offender mediation suggest innovative ways to integrate parents into their children's delinquency dispositions.

### *B. Making Parents Parties to their Children's Delinquency Dispositions*

Some policymakers may, however, wish to retain a method to impose liability upon parents for failing to discharge their responsibilities adequately when their children violate the criminal law. Accordingly, this section constructs an alternative system for enforcing parental cooperation in the disposition of their children's delinquency cases. I propose that parents be made parties to all juvenile delinquency actions at the disposition stage, so that they can be subject to appropriate court orders to further the reformation of their children. Because this suggested resolution accommodates the legitimate interests of society in regulating parental supervision, I also advocate the repeal of all parental responsibility laws that impose criminal liability on parents stemming from the delinquent acts of their children.

Family and juvenile courts already exercise broad jurisdiction over parents. New York's family court, for example, may make orders respecting parents in proceedings as diverse as child support,<sup>416</sup> paternity,<sup>417</sup> permanent termination of parental rights,<sup>418</sup> adoption,<sup>419</sup> custody and visitation,<sup>420</sup> guardianship,<sup>421</sup> PINS (persons in need of supervision),<sup>422</sup> family offenses,<sup>423</sup> conciliation,<sup>424</sup> and child abuse and neglect.<sup>425</sup> Nevertheless, such courts have lacked authority to regulate the behavior of parents in juvenile delinquency proceedings.<sup>426</sup> In light of juvenile courts' tradi-

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<sup>416</sup> N.Y. FAM. CT. ACT art. 4 (McKinney 1999).

<sup>417</sup> See *id.* art. 5.

<sup>418</sup> See *id.* art. 6.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> See *id.* art. 7.

<sup>423</sup> See *id.* art. 8.

<sup>424</sup> See *id.* art. 9.

<sup>425</sup> See *id.* art. 10; see generally James Garbarino, *The Incidence and Prevalence of Child Maltreatment*, in FAMILY VIOLENCE 219 (Lloyd Ohlin & Michael Tonry eds., 1989) (discussing governmental responses to child maltreatment); MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN (1988) (same).

<sup>426</sup> New York's Family Court Act, for example, requires the child's parent or



tional purposes, the absence of this authority is hardly surprising. These tribunals were established, in the words of the 1909 New York Juvenile Code, to "consider the child not as upon trial for commission of a crime, but as a child in need of care and protection of the state."<sup>427</sup> This phrasing aptly limits both the goal of diverting youth from the criminal courts and the idea that the state would now take charge of supervising the child's welfare.<sup>428</sup> The parents were thus rendered formally superfluous in the juvenile proceedings. "Juvenile courts . . . [exist] to be parents to the kids, and that includes all the things parents do."<sup>429</sup> Legislatures focused on parents only as possible impediments to the public experiment in juvenile rehabilitation, as evidenced by the fact that no role was specified for the parents in the new laws, except as potential defendants in contributing-to-delinquency cases.<sup>430</sup>

By contrast, criminal parental responsibility laws were born of multiple aims, all oriented at increasing parental accountability for juvenile crime and the state's role in managing dangerously violent youth.<sup>431</sup> They have emerged from the same legislative impulse responsible for the common redefinitions of juvenile

guardian to "be present" at any hearing, but directs that the proceedings may continue in such adult's absence "if reasonable and substantial effort has been made to notify such parent or other person." N.Y. FAM. CT. ACT § 341.2(3). With the exception of this notice provision, the Family Court Act is silent as to any authority the court may exercise over the delinquent's parents or guardians.

<sup>427</sup> N.Y. PENAL LAW 1909 § 2186, cited in DOUGLAS J. BESHAROV & MERRIL SOBIE, PRACTICE COMMENTARIES, N.Y. FAM. CT. ACT § 301.1, at 13-14 (1999).

<sup>428</sup> In approving Pennsylvania's first modern juvenile court law, that state's supreme court affirmed the salvific mission of the state with regard to damaged children, since parental supervision had already failed:

Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. . . . Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority, and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails.

Commonwealth v. Fisher, 62 A. 198 (Pa. 1905).

<sup>429</sup> T.R. Goldman, *Senate's Juvenile Crime Bill Gets Bashed from All Sides*, TEX. LAW., Mar. 9, 1998, at 4 (quoting Howard Snyder of the National Center for Juvenile Justice).

<sup>430</sup> N.Y. LAWS 1905 ch. 655. But the parental role was not prominent even in this arena, as the contributing-to-delinquency law was very rarely enforced. Irving A. Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOK. L. REV. 172, 177-85 (1955) [hereafter, Gladstone, *Legal Responsibility of Parents*].

<sup>431</sup> See Schmidt, *supra* note 157, at 683 ("The [parental responsibility] laws combine an emphasis on risk management with a focus on controlling dangerous populations, where juveniles are the dangerous population and their crime rate is the risk.

code purposes: "to protect the community against those acts of its citizens . . . which are harmful to others and . . . reduce the incidence of delinquent behavior."<sup>432</sup> Other indications, however, suggest that rehabilitation retains a major role in juvenile justice.<sup>433</sup> Although the rhetorical friction generated by this debate often causes the penal principles to polarize in the public mind, logically there is no unsolvable conflict between the dual goals of community protection and malefactor rehabilitation. Too often in the past, we have sacrificed one goal for the other and achieved neither. For example, as discussed above, treating juvenile offenders as adults in the name of social protection has, instead, increased recidivism, lessened rehabilitation, and diminished public safety.<sup>434</sup> The goals of crime suppression and individual reformation may, in fact, be harmonized, as long as we "reject the false binary choice that the juvenile justice system must seek to punish or rehabilitate, but not both."<sup>435</sup>

### 1. *The Feasibility of Regulating Parental Responsibility in Child Protective Proceedings*

Parental misconduct that causes harm to children is always

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The laws also help normalize crime, expanding the scope of state policing by introducing penology into the family context.").

<sup>432</sup> V.A. CODE ANN. § 16.1-227 (Michie 1999); see text at notes 44-45, *supra* (discussing revisions to juvenile purpose clauses).

<sup>433</sup> See Hon. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 58 (1992) (noting that support for the shift from rehabilitation to punitive measures in juvenile justice has not been universal and discussing how "longer juvenile sentences are only justified by a rehabilitative purpose"). Even the revised juvenile code purpose clauses tend to retain rehabilitation as a goal, merely incorporating the original purpose of the juvenile court with the modern emphasis on accountability. See, e.g., WIS. STAT. ANN. § 938.01 (West 2000) (aiming to help juvenile offenders to "live responsively and productively"); OR. REV. STAT. § 419C.001 (1999) (stating that the juvenile justice system in Oregon will continue to provide services that focus on "prevention," "reformation," and "rehabilitation").

<sup>434</sup> See text at notes 123-152, *supra*.

<sup>435</sup> David Yellen, *Sentencing Discounts and Sentencing Guidelines for Juveniles*, 11 FED. SENTENCING REP. 285, 288 (1999). This point about the axiomatic compatibility of the community's interests and the juvenile's was aptly made by a family court in 1944:

Whether the establishment of the Children's Court was intended objectively to protect the community against misconduct of children in the first instance, or to salvage youth in the second instance, is immaterial. The community cannot be protected unless delinquent youth is properly subjected to therapy which would rehabilitate, retrain, and change the attitude of mind of the child [and] give him a sense of social responsibility.

*In re Kingsley*, 183 Misc. 727, 49 N.Y.S.2d 947 (N.Y. Dom. Rel. Ct. 1944).

subject to the overall control of the criminal sanctions governing crimes against persons, such as homicide and assault. Contributing-to-delinquency statutes are specifically designed to address acts or omissions of parents that result in cognizable injury to children.<sup>436</sup> Nevertheless, criminal court actions against parents in cases involving their children are comparatively rare; the bulk of the legal system's regulation of parenting occurs in family courts, particularly in the child abuse and neglect jurisdiction.<sup>437</sup> Would child protective proceedings provide a suitable home for entertaining the concerns of the parental responsibility laws? This subsection explores that question.

The abuse and neglect jurisdiction of family court centers on harm to children, and its provisions generally provide clear standards for measuring the injury and facilitating the establishment of responsibility. The child is always the subject of the judicial inquiry, and the parent or guardian is generally labeled the "respondent," against whom the allegations are lodged.<sup>438</sup> New York's Family Court Act, for example, contains detailed definitions of "abused child" and "neglected child," to allow for the determination of a linkage between the parental misconduct and the harm to the child.<sup>439</sup>

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<sup>436</sup> See text at notes 154-75, *supra*.

<sup>437</sup> See DOUGLAS J. BESHAROV, PRACTICE COMMENTARIES, N.Y. FAM. CT. ACT § 1011, at 289 (1999) [hereinafter BESHAROV, PRACTICE COMMENTARIES]; Garbarino, *supra* note 425; WALD ET AL., *supra* note 425.

<sup>438</sup> "[A]lthough the purpose of the proceedings is the protection of the child, its initial focus is on judging the allegations made against the parents." BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1012, at 304. The following discussion in the text illustrates the point by reference to New York's Family Court Act.

<sup>439</sup> Section 1012 of the New York Family Court Act defines those terms as follows:

"Abused child" means a child less than eighteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed [a sex offense] against such child . . . allows, permits or encourages such child to engage in any act [involving prostitution]; commits [incest]; or allows such child to [engage in a prohibited sexual performance] . . .

The relative precision of the definitions reflect the drafters' effort to craft careful guidelines to prevent "unwarranted state intervention into private family life,"<sup>440</sup> as it is unquestioned that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of society."<sup>441</sup> Parents have a fundamental right to raise their children, and state intercession may only be justified to protect a child's life, health, or safety.<sup>442</sup> Accordingly, a child must be either harmed or under imminent danger of being harmed before abuse or neg-

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N.Y. FAM. CT. ACT § 1012(e) (McKinney 1999).

"Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter or [specified] education . . . , or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or

(ii) who has been abandoned . . . by his parents or other person legally responsible for his care.

*Id.* § 1012(f).

"Impairment of emotional health" includes: a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

*Id.* § 1012(h).

<sup>440</sup> BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1012, at 320.

<sup>441</sup> Ginsberg v. New York, 390 U.S. 629, 639 (1968).

<sup>442</sup> Matter of Katherine C., 122 Misc. 2d 276, 471 N.Y.S.2d 216 (N.Y. Fam. Ct. 1984). Mere speculation about the dangers to the children posed by the parents is

lect proceedings may be brought.<sup>443</sup> This requirement helps ensure that the family court concentrates on the actual or rapidly-approaching injury on the child, rather than on "parental behavior which might not enjoy the court's approval."<sup>444</sup>

Because the parents are responding to allegations that they abused or neglected their child,<sup>445</sup> the state and the parents meet in an adversarial contest in a child protective proceeding. The law governing such a proceeding was designed "to provide a due process of law for determining when the state . . . may intervene against the wishes of a parent on behalf of a child so that his needs are properly met."<sup>446</sup> Since the power of the state is arrayed against them, parents are allowed the assistance of counsel, to be appointed by the court if they qualify.<sup>447</sup> Parents are also not required to cooperate with the child protective agency investigating them.<sup>448</sup> The fact-finding hearing is a full-fledged adversarial proceeding, in which parents are entitled to "the essential of due process and fair treatment,"<sup>449</sup> including a full opportunity to present and cross-examine witnesses.<sup>450</sup> The dispositional hearing must similarly afford the parents their procedural rights.<sup>451</sup>

The power of the family court to sanction the parents is limited, however, consistent with the child-centered remedial course of the statute. A judge may issue a warrant directing the appear-

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insufficient. *Matter of Bryan L.*, 149 Misc. 2d 899, 565 N.Y.S.2d 969 (N.Y. Fam. Ct. 1991).

<sup>443</sup> See, e.g., N.Y. FAM. CT. ACT § 1012.

<sup>444</sup> BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1012, at 320. Concentrating on the parents' behavior would increase the likelihood that state intervention "entail substituting a judge's view of child rearing for that of the parents." Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1013-14 (1975).

<sup>445</sup> See, e.g., N.Y. FAM. CT. ACT § 1031.

<sup>446</sup> *Id.* § 1011.

<sup>447</sup> See *id.* § 1033-b.

<sup>448</sup> See *In re Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (N.Y. Fam. Ct. 1968). If the court relies on the child protective investigation report in reaching its decision, the parents must have "an opportunity to review [the report] or to offer evidence in rebuttal." *In re Bercaw*, 248 A.D.2d 881, 881 (N.Y. App. Div. 1998).

<sup>449</sup> *In re Fisher*, 79 Misc. 2d 905, 906, 361 N.Y.S.2d 596 (N.Y. Sup. Ct. 1974).

<sup>450</sup> See *In re Herbert F.*, 56 A.D.2d 601 (N.Y. App. Div. 1977). A jury trial is not allowable, however. See *In re Walsh*, 64 Misc. 2d 293, 315 N.Y.S.2d 59 (N.Y. Fam. Ct. 1970).

<sup>451</sup> See, e.g., *In re Robert Hanson*, 51 A.D.2d 696, 379 N.Y.S.2d 415, 417 (N.Y. App. Div. 1979); *In re Darlene T.*, 271 N.E.2d 215 (N.Y. 1971).

ance of the parent in court.<sup>452</sup> A parent may also be ordered to provide non-testimonial evidence, such as blood, urine, hair, or other materials from his or her body.<sup>453</sup> But the dispositional hearing is aimed at determining the proper treatment plan to benefit the child, not at framing legal sanctions against the parents.<sup>454</sup> In this context, "the remedial powers of the Family Court can be more effective than the punitive powers of the Criminal Court in preventing further abuse or neglect."<sup>455</sup> Five dispositional alternatives are available: suspended judgment, release of the child to the parents, placement of the child in foster care, an order of protection, and supervision of the parents.<sup>456</sup>

What happens if the parents violate an order of protection,<sup>457</sup> or fail to comply with the terms of the order of disposition?<sup>458</sup> Wilful failure of the parents to comply with such orders may lead to a reconsideration of the court's disposition, which may in turn result in the placement of the child away from the parents' custody.<sup>459</sup> If, after a hearing, the court is satisfied "by competent proof"<sup>460</sup> that the parent violated the order of protection or probation supervision "wilfully and without just cause,"<sup>461</sup> the court is authorized to revoke the prior disposition and enter "any order that might have been made at the time the order of supervision or of protection was made."<sup>462</sup> The court may also commit the

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<sup>452</sup> N.Y. FAM. CT. ACT § 1037. Under certain circumstances, the proceedings may proceed in the parent's absence. *Id.* § 1042.

<sup>453</sup> *See id.* § 1038-a. The statute requires that the order authorizing the taking of such non-testimonial evidence be preceded by a probable cause finding that the evidence is reasonably related to establishing the abuse or neglect allegations, and that the taking be conducted "in a manner not involving an unreasonable intrusion or risk of serious physical injury" to the parent. *Id.*

<sup>454</sup> *See id.* § 1052.

<sup>455</sup> BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1011, at 289.

<sup>456</sup> N.Y. FAM. CT. ACT § 1052(a). There are three other dispositional alternatives not mentioned in the principal disposition statute. *Id.* § 1052. The court may also grant an adjournment in contemplation of dismissal. *Id.* § 1039. A petition may also be dismissed because the court's "aid is not required." *Id.* § 1051(c). Finally, an abandoned child may be discharged to the Commission of Social Services. *Id.* § 1059.

<sup>457</sup> *See id.* §§ 1054, 1056.

<sup>458</sup> *See id.* §§ 1054, 1057.

<sup>459</sup> *See id.* § 1072(a). For example, in *In re George C.*, 122 A.D.2d 943 (N.Y. App. Div. 1986), the court determined that release of the neglected child to the custody of his mother would only be appropriate if she were closely supervised and ordered to attend an alcohol-related rehabilitative program.

<sup>460</sup> N.Y. FAM. CT. ACT § 1072(a).

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

parent to jail for up to six months.<sup>463</sup> But this incarceration option turns out, both in terms of juvenile court philosophy and actual practice, to be much less than it appears.

The purpose clause of the child protective proceedings article of New York's Family Court Act sets out the law's design:

to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being [and] . . . to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.<sup>464</sup>

The proceedings are civil in nature<sup>465</sup> and are to be clearly distinguished in purpose and intent from criminal actions. They are not designed "to punish offenders for acts against their victims, but to protect their victims from further harm."<sup>466</sup> Specifically, the family court must protect them not "merely as victims, but as victimized children."<sup>467</sup> Given the family court's child-centered philosophy, judges "are loath to order jail for an offending parent."<sup>468</sup> Courts prefer to conduct proceedings to consider the disposition anew, rather than to determine sanctions against the parent. A hearing focused on options for the child's care and placement is more in keeping with the court's mission to safeguard the child's welfare.<sup>469</sup> Moreover, reconsidering the disposition allows the court to obtain more contemporaneous information about the status of the child.<sup>470</sup> In serious cases, the court "usually removes the child from the parent's custody."<sup>471</sup> In practice, incarceration is almost never enforced as a sanction against the parents for wilful noncompliance.<sup>472</sup>

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<sup>463</sup> See *id.* § 1072(b).

<sup>464</sup> *Id.* § 1011.

<sup>465</sup> *In re Diane B.*, 96 Misc. 2d 798, 800, 409 N.Y.S.2d 648 (N.Y. Fam. Ct. 1978).

<sup>466</sup> *In re Maureen G.*, 103 Misc. 2d 109, 113, 426 N.Y.S.2d 384 (N.Y. Fam. Ct. 1980).

<sup>467</sup> *Id.* Child protective proceedings focus on children as members of a family, and on their "protection from harm caused by persons whose responsibility for said children is based on some *de jure* or *de facto* parental relationship with them." *Id.*

<sup>468</sup> BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1072, at 328.

<sup>469</sup> See *id.* §§ 1071-1072, at 325-28.

<sup>470</sup> *Id.*

<sup>471</sup> See *id.* § 1072, at 328.

<sup>472</sup> *Id.* Quiescence is also suggested by the paucity of reported decisions interpreting section 1072(b), the section allowing for the imposition of a jail term. In the three decades since the section's enactment in 1970, only three reported cases have involved jail sentences imposed on parents. Two of these cases involved thirty day sentences. *Duquette v. Ducatte*, 102 A.D.2d 904, 477 N.Y.S.2d 1002 (N.Y. App.

Of course, most parents would consider losing custody of their child to constitute an enormous sanction. Indeed, the law proceeds on the assumption that maintaining and regaining custody of their child will provide sufficient motivation for parents who have neglected or abused their children to comply with the court's directives. The point here is merely that, by contrast with the sanctions contained in the criminal parental responsibility laws, child protective proceedings seem virtually uninterested in sanctioning parents directly.

On the surface, child protective proceedings might appear an attractive destination in which to relocate the substance of the criminal parental responsibility laws. Child protective statutes are intimately concerned with parenting. Indeed, they provide a legal definition of minimally competent parenting to be enforced by the family court.<sup>473</sup> However, the core concerns of the two statutes are radically different. At the heart of the parental responsibility laws resides the parental role in the harm to society posed by the parents' child. By contrast, the *sine qua non* of a child protection proceeding is the assertion that the parents have harmed their own child. At the same time, parental responsibility proceedings are relatively unconcerned with the welfare of the parent's child; in a child protection case, that child's welfare is nearly the exclusive focus. Finally, while the sanctions in criminal parental responsibility cases are often punitive ones directed at the parents in order to safeguard community safety, the ultimate remedy available to a court in a child protection proceeding is removal of the child for the child's own safety. Given this evaluation of child protective proceedings, they do not seem a likely forum into which the concerns of parental responsibility laws

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Div. 1984); *Matter of Felicia R.*, 92 A.D.2d 743, 461 N.Y.S.2d 85 (N.Y. App. Div. 1983). The third involved unusual circumstances showing a particular depravity. A father committed a sex offense against his daughter, for which he was convicted in criminal court and sentenced to the state penitentiary. He was also served with a family court order of protection demanding that he initiate no further contact with his daughter. He violated that order from prison, causing great emotional distress to the child. Under these circumstances, the family court sentenced the father to six months in jail, to be served after the conclusion of his state incarceration. *Ulster County Dep't of Soc. Services v. Clarence A.*, 152 Misc. 2d 945, 578 N.Y.S.2d 807 (1991). A veteran family court attorney informed the author that in twelve years of a very active practice in New York City's family courts, she did not encounter one case involving the jailing of a parent under this section.

<sup>473</sup> See N.Y. FAM. CT. ACT § 1012; BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1012, at 326 (there is a "minimum baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet").



may reasonably be interjected.<sup>474</sup> Delinquency proceedings provide a more promising alternative.<sup>475</sup>

## 2. *Parents as Parties in Juvenile Delinquency Dispositions*

Another way to involve parents directly in the consequences of their children's delinquent behavior is to make them parties to the dispositional components in juvenile delinquency proceedings involving their children.<sup>476</sup> Establishing jurisdiction over

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<sup>474</sup> A child protective proceeding may also focus on a child who evidences "substantially diminished psychological or intellectual functioning in relations to . . . control of aggressive or self-destructive impulses . . . or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy." N.Y. FAM. CT. ACT § 1012(h). This jurisdictional lever may not easily be used to convert the proceeding into one centered on parenting, however. In addition to the general non-punitive orientation of the family court act, the child's impairment as described in this section must "be clearly attributable to the unwillingness or inability of the [parent] to exercise a minimum degree of care toward the child." *Id.* Invoking the court's jurisdiction on this basis would thus require clear proof of "the causal relationship between the parent's action or inaction and the child's emotional condition." BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1012, at 377.

<sup>475</sup> PINS (Persons in Need of Supervision) proceedings provide yet another possible jurisdictional hook for rendering parents parties to their children's family court cases. *See, e.g.*, N.Y. FAM. CT. ACT art. 7. The vast majority of PINS petitions are brought by the children's parents or other caretakers, alleging that the children are habitual truants or "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." *Id.* § 712(a). Although victims and witnesses of a child's acts which arguably warrant PINS intervention are authorized to bring a petition, *id.* § 733(c), they rarely do so. BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 733, at 68. PINS proceedings are inappropriate for extending jurisdiction over the parents, because the anti-social conduct at issue in these matters involves "noncriminal, status offenses." BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, art. 7, at 3. Most status offenses are not even formally processed through the court. Up to 80% of all such cases are diverted to community service programs or handled in other fora without the filing of a petition. *See* Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations*, in 6 CTR. FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN 4, 13 (1996). The court's delinquency jurisdiction also reaches a far greater audience, as delinquency represents almost two-thirds of the juvenile court docket, while status offenses account for only 15 percent. H. Ted Rubin, *The Nature of the Court Today*, in 6 THE FUTURE OF CHILDREN 40, 44 (1996). Finally, PINS jurisdiction is designed to "benefit a person in need of supervision, not to protect the general public from him." *Certo v. State*, 53 A.D.2d 971, 385 N.Y.S.2d 824 (N.Y. App. Div. 1976); *see also In re R.*, 67 Misc. 2d 452, 323 N.Y.S.2d 909 (N.Y. Fam. Ct. 1971) (citing the overall purpose to rehabilitate children and make services available to them, "not to vindicate private wrongs").

<sup>476</sup> Traditionally, the only parties to a delinquency proceeding were the state and the child, and so the court lacked jurisdiction over the parents. *See, e.g.*, N.Y. LAWS 1905 ch. 655 (stating that there is no role for parents in juvenile delinquency law except in contributing to the delinquency of a minor proceedings). The proposal in the text contemplates the parents becoming parties only at the dispositional stage of

parents will allow the juvenile or family court to craft and enforce orders requiring the parents to participate actively in developing a plan for their child's rehabilitation and for the cessation of the child's anti-social behavior. Family courts are both more experienced and more effectively staffed than criminal courts to handle parental responsibility cases and the juvenile delinquency petitions that trigger the legal action.

Moreover, even though parental responsibility laws invoke criminal jurisdiction, their sanctions are primarily aimed at inducing parents to act more responsibly toward their children's upbringing, rather than at punishing the parents through traditional criminal sanctions.<sup>477</sup> This conclusion is not intended to gainsay the odiousness of the stigma attached to the parent as a defendant in a parental responsibility criminal action whose consequences might include a lifetime criminal record. Additionally, the risk of jail and fines is real, although somewhat attenuated. Indeed, the fact that these criminal laws aim to involve parents more in stemming juvenile crime, and that, as will be discussed in this section, many non-punitive alternatives exist that would more effectively attack the problem, highlights the inappropriateness of using a criminal sanction when a non-criminal one would suffice. Shifting the entire proceeding into family court will thus accommodate the aims of the parental responsibility laws and do so both more effectively and without the stigma of a criminal conviction.

Two examples from typical sentencing provisions found in these laws will illustrate the trend. The Oregon parental responsibility statute imposes criminal liability, but predominantly displays a scheme of graduated sanctions whose overall tenor is ameliorative rather than punitive.<sup>478</sup> On a parent's first convic-

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the delinquency. It would be inappropriate for the parents to become parties at the fact-finding hearing, since this stage is comparable to the trial phase of an adult criminal proceeding, with the state bearing the burden of proving the allegations in the delinquency petition beyond a reasonable doubt. *See, e.g., N.Y. FAM. CT. ACT § 342.2* (outlining the guidelines for "[e]vidence in fact-finding hearings").

<sup>477</sup> *See, e.g., Chapin, supra* note 200, at 658-59 (citing evidence that California's 1988 amendment to its contributing-to-delinquency law was aimed at forcing parents of gang members into parenting classes, rather than at obtaining criminal convictions against the parents); Zolman, *supra* note 153, at 219 (arguing that the "rationale behind . . . these laws [is] the deterrence of delinquency and help for struggling parents," as opposed to the punitive purposes that many see as the impetus for these laws).

<sup>478</sup> OR. REV. STAT. § 163.577 (1999).

tion under the statute, the court may not order restitution,<sup>479</sup> but must instead suspend imposition of the sentence and "warn the person of the penalty for future convictions of failing to supervise a child."<sup>480</sup> On a second conviction, the court may, with the parent's consent, suspend imposition of the sentence and "order the person to complete a parent effectiveness program approved by the court."<sup>481</sup> The parental responsibility ordinance of St. Clair Shores, Michigan, manifests a similar pattern of slowly spiraling penal sanctions largely unrelated to the actual parent-child relationship.<sup>482</sup> It differs from the Oregon statute primarily in that it authorizes terms of incarceration.<sup>483</sup> A first conviction carries a fine of between \$75 and \$100.<sup>484</sup> Upon a second conviction, the fine may range from \$100 to \$500, and the parent may be sentenced to probation "with the condition that the parent participate in, through completion, a court approved, community based treatment program (such as parenting skills, family services, employment and training, etc.)."<sup>485</sup> Alternatively, the court may impose a thirty-day sentence of incarceration.<sup>486</sup> Conviction on a third and subsequent violation subjects the parent to a fine of between \$200 and \$500, along with imprisonment for ninety days.<sup>487</sup> While the sanctions in these two sample laws directly affect the parents, they only obliquely impact the parent-child relationship at the heart of the problem. The sentencing options in these criminal laws treat effective child supervision as a general parenting problem to be addressed with generic parent education, rather than as an opportunity to train the individual parents to work with their child in a supervised effort to effect change in the condition that engendered the delinquent act. None of these sanctions, in short, involves the parents with their own child.

The reason for this odd dissonance between the theoretical fo-

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<sup>479</sup> See *id.* § 163.577(6)(b).

<sup>480</sup> *Id.* § 163.577(6)(a).

<sup>481</sup> *Id.* § 163.577(7)(a). Upon satisfactory completion of the parent effectiveness program, the court may discharge the parent. *Id.* But if the parent fails to so complete the program, the court may impose a sentence authorized by this section. *Id.* A sentence under this subsection may be suspended only once. See *id.* § 163.577(7)(b). The maximum sanction for violation of the statute is a fine of up to \$1,000, the maximum fine for a class A violation. See *id.* § 163.577(9).

<sup>482</sup> ST. CLAIR SHORE ORDINANCES § 20-560.

<sup>483</sup> See *id.* § 20-565.

<sup>484</sup> See *id.* § 20-565(c).

<sup>485</sup> See *id.* § 20-565(d).

<sup>486</sup> *Id.*

<sup>487</sup> See *id.* § 20-565(e).

cus on parenting and the concrete delinquency of the child is surprisingly simple: the court enforcing the parental responsibility law lacks jurisdiction over the child, while the court adjudicating juvenile delinquency has no power over the parents. Thus, the efforts of each court to deal with the problem of youth crime and parental responsibility will likely be fractured. Balkanizing the problem in this fashion magnifies the risk of conflicting sanctions and directions to parent and child by uncoordinated courts.<sup>488</sup> Such lack of coordination also multiplies the cost to the families involved in tracking one family problem in two separate court systems. Finally, the legal system itself is burdened in the scheduling of multiple court sessions and in the taxing of separate resource caches in the different courts called upon to deal with the consequences of an accusation that the parents' improper supervision led to the child's delinquent act. Centralizing legal oversight of the risks and duties of parents and their children in one court would not only improve judicial efficiency, but would also allow a single court system to dovetail the efforts of both halves of the family-in-trouble equation. The family court is in the best position to supervise both the management of the juvenile's treatment program and the parents' role in furthering the welfare of the child, thereby most effectively protecting society while assisting the youth in developing into a law-abiding and productive individual.<sup>489</sup>

Allowing the family court to exercise jurisdiction over the parents is only the beginning of the inquiry. What sorts of powers should the court be permitted to exercise over the parents? First, we must recognize that the principal goal of this integrated jurisdictional scheme is to change the child's behavior, not the parent's. To justify invoking judicial power over the parents in juvenile delinquency cases, the resulting orders to parents must be tailored to assist in the child's reformation. Thus, for example, appropriate legislation could require that parents work with the juvenile probation department in crafting a plan for the

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<sup>488</sup> See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998) (advocating the holistic approach of unified family courts as a substantial improvement over scattered proceedings in family and criminal cases); see generally Symposium, *Unified Family Courts*, 32 FAM. L.Q. 1, 1-199 (1998).

<sup>489</sup> Although it would involve more logistical problems than the proposal articulated in the text, it may also be justifiable to craft a similar scheme in some cases involving transfer of the juvenile to adult court.

child's treatment. Parents could be mandated to accompany their child to, and participate in, educational or counseling programs aimed at remedying the circumstances that engendered their child's delinquent behavior. Parental obligations in this regard could be monitored by the family court and compliance could be enforced through the court's contempt power.

The exercise of the contempt power is, of course, laden with constitutional and logistical burdens. Courts intending to hold recalcitrant parents in contempt must ensure that indigent parents be provided with counsel. Nationwide, the juvenile court attorneys who would likely be called upon to represent parents in these cases already handle overwhelming caseloads. The overburdened system thus "impede[s] both access to counsel and quality of representation."<sup>490</sup> Making parents parties in juvenile delinquency cases also represents a significant expansion of state supervision into the lives of families, triggered by the filing of a delinquency petition. Moreover, the focus of a contempt hearing would likely shift the court's attention from the welfare of the child to an evaluation of the wilfulness of the parent's disobedience of the court order. Worse yet, the necessities of conducting a contempt hearing in our adversary system might pit the parent against the child in an attempt to allocate blame for a disposition plan gone awry.

Despite these very serious reservations, on balance, the contempt power might still serve a useful purpose. The proposed contempt sanction is intended to replace the parental responsibility laws' inappropriate and nearly standardless exercise of criminal jurisdiction over poor or simply unlucky parents. In sharp contrast to those laws, parents made parties to a delinquency disposition would be put on notice that failure to comply with a specific dispositional program—which they would have had a hand in formulating—subjects them to contempt proceedings. The specificity of notice reflecting the clear standard of behavior, reinforced by the parental involvement in crafting the treatment option, should serve as both an inducement to compliance and a deterrent to wilful noncompliance. Moreover, family court judges should be trusted to exercise appropriate judgment in deciding whether the parent's lack of compliance with a court order is realistically amenable to reparation by the mechanism of a contempt proceeding. If a contempt proceeding is commenced,

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<sup>490</sup> Rubin, *supra* note 475, at 48.

the parent's attorney may be able to broker a resolution aimed at furthering the court's intent to have the parents involved in a beneficial program for the child. Finally, even if the parents are held in contempt, the range of sanctions available to a court is broad, and includes reformulation of the parental obligation to better serve the needs of the child and the purposes of the delinquency disposition.

Other limitations upon the exercise of jurisdiction over the parents would be required. As discussed above, the premise of laying responsibility for juvenile delinquency primarily at the feet of parental supervision is fallacious.<sup>491</sup> Accordingly, in delinquency cases the court should not have the authority to sanction the parents in any manner, except for their failure to comply with orders directly relating to the child's welfare.<sup>492</sup> The court should have no power to enforce sanctions which may generally be advantageous to the parents, such as ordering them into counseling programs or substance abuse treatment for themselves, even though the court may be of the opinion that the children would also benefit. To avoid the overreaching nature of the parental responsibility laws, the court's authority in this expanded delinquency jurisdiction must be carefully tailored to the goal of child reformation. The proposed expanded delinquency jurisdiction would not supply the proper forum to consider whether the parent's conduct has harmed the child. Family and criminal courts have ample power over the parents through the commencement of proceedings involving child abuse,<sup>493</sup> neglect,<sup>494</sup> and a panoply

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<sup>491</sup> See text at notes 176-215, *supra*.

<sup>492</sup> States clearly have the constitutional authority to impose duties upon parents related to the care of their children. Courts have long upheld the constitutionality of contributing-to-delinquency statutes "on the broad policy ground that the welfare of youth is such a vital state interest that the legislature must write statutes in general terms that preserve the flexibility necessary to handle the problem of juvenile delinquency effectively." Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 452 (1991); see also *State v. Cialkowski*, 227 N.W.2d 406 (Neb. 1975); *State v. Harris*, 141 S.E. 637 (W. Va. 1928); *McDonald v. Commonwealth*, 331 S.W.2d 716 (Ky. Ct. App. 1960); *People v. Deibert*, 256 P.2d 355 (Cal. Ct. App. 1953). The proposed assertion of jurisdiction over parents in the dispositional phases of delinquency cases is analogous to the long-standing constitutional authority of states to impose civil liability upon parents for their children's tortious acts. See, e.g., *Bd. of Educ. v. Caffiero*, 431 A.2d 799, 807 (N.J. 1981) (upholding civil statute).

<sup>493</sup> See, e.g., BESHAROV, PRACTICE COMMENTARIES, *supra* note 437, § 1011, at 289; N.Y. FAM. CT. ACT art. 10 (McKinney 1999) (discussing the child abuse and neglect jurisdiction of the family court over parents).

of other criminal law sanctions.<sup>495</sup> Only in these proceedings may parental misconduct be properly considered, in fora which both regulate the baseline of proper parenting and afford the parents procedural rights to contest the accusation.<sup>496</sup>

Some states have begun experimenting with expanding the jurisdiction of courts in delinquency cases in order to integrate parents into the resolution of their children's delinquency problems. The results have been mixed. Oregon has promulgated a statute authorizing the court hearing the juvenile's case to subject the parent or guardian to the jurisdiction of the court<sup>497</sup> and to "[o]rder the parent or guardian to assist the court in any reasonable manner in providing appropriate education or counseling for the youth."<sup>498</sup> Despite this promising start, however, the Oregon statute exemplifies both the best and the worst of this expanded jurisdictional power, as well as an inappropriate penalty clause. A close reading of this statute will serve to illustrate both the strengths and risks of this new approach to delinquency disposition.<sup>499</sup>

On the positive side, the Oregon statute directs parents to become intimately involved in their child's case. For example, if their child is placed on probation, the parents may be required to enter into a contract with the juvenile department and to assist in developing a plan concerning the "supervision and implementation of the youth's probation."<sup>500</sup> This plan must be "reasonably

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<sup>494</sup> N.Y. FAM. CT. ACT art. 10.

<sup>495</sup> See, e.g., Garbarino, *supra* note 425.

<sup>496</sup> The line drawn in the text is admittedly a fine one. It may sometimes be difficult to distinguish between, on the one hand, a treatment program aimed at the child and requiring the parent's involvement, and on the other, a similar program aimed at the parent in an effort to improve the parent's behavior and thus benefit the child. However, the principled difference to bear in mind is that the first option legitimately asserts state power over delinquency respondents, triggered by their misconduct, and calls upon the parents to further their traditional role as caretakers. The second option, however, arrogates judicial power to amend parents' behavior in a case in which those parents have not been convicted of any act authorizing state intervention.

<sup>497</sup> OR. REV. STAT. § 419C.570(1)(a) (1999). The parents may be made parties to the dispositional stage of the proceedings, not to the adjudicatory stage. See *id.* § 429C.285.

<sup>498</sup> See *id.* § 419C.570(1)(a)(A).

<sup>499</sup> Similar statutes in other states are not as comprehensive. See, e.g., IND. CODE ANN. § 31-37-15-1 (Michie 1997); N.M. STAT. ANN. § 32A-2-28 (Michie Supp. 1999); COLO. REV. STAT. § 19-2-113 (2000). Thus, the Oregon statute provides a better window into the analysis of the benefits and weaknesses of this new approach.

<sup>500</sup> OR. REV. STAT. §§ 419C.570(1)(a)(C), 419C.570(1)(b).

calculated to provide the supervision necessary to prevent further acts of delinquency given the individual circumstances of the youth.”<sup>501</sup> After the juvenile department and the parents have agreed on an individualized program for the child, it must be reviewed and ratified by the court, which then incorporates the plan into the probation order.<sup>502</sup> These provisions appropriately involve parents in their child’s reformation, and do so in a much more direct way than the generalized and uncoordinated sanctions usually applied in parental responsibility cases.

However, the statute also authorizes the court to enforce sanctions directly against the parents under the questionable rationale that their behavioral deficiencies have led to the child’s delinquency. Although such efforts are well-meaning and intended to assist the child, orders of this type constitute a misunderstanding of the appropriate basis for expanding delinquency jurisdiction and propel the courts into the same errors of overreaching that epitomize the parental responsibility laws. Oregon judges are authorized by this new statute to make a finding that “the parent’s or guardian’s addiction to or habitual use of alcohol or controlled substances has significantly contributed to the circumstances bringing the youth within the jurisdiction of the court in a [delinquency] proceeding.”<sup>503</sup> The statute provides no guidance to the court on how to make such a finding. It is difficult, particularly given the wealth of research on the complexity of the causes of juvenile delinquency,<sup>504</sup> to imagine the standards under which such a determination might be made in a delinquency case.<sup>505</sup>

Once the court makes the finding of a connection between the parent’s substance abuse and the child’s delinquency, “the court may conduct a special hearing to determine if the court should

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<sup>501</sup> See *id.* § 419C.570(1)(b).

<sup>502</sup> *Id.* The parents may also be assessed all or part of the cost of a mental health assessment or screening of their child. *Id.* § 419C.570(1)(a)(B).

<sup>503</sup> *Id.* § 419C.575.

<sup>504</sup> See text at notes 176-215, *supra*.

<sup>505</sup> To reiterate, this Article argues that a finding that a parent’s conduct has endangered the child’s welfare may be appropriate in a criminal case or in a child abuse or neglect proceeding, but not in a juvenile delinquency proceeding. Child protective proceedings in family court focus on harm to the child by the parent (as opposed to harm to a third party by the child), and, in that context, provide for consideration of the impact of a parent’s abuse of drugs or alcohol on the welfare of the child. See, e.g., N.Y. FAM. CT. ACT §§ 1012(f)(i)(B), 1046(a)(iii) (McKinney 1999).



order the parent or guardian to participate in treatment and pay the costs thereof.”<sup>506</sup> Recognizing that such a finding fundamentally alters the parent’s role in the child’s delinquency case, converting it into a fully adversarial one between the state and the parent, the statute designates that certain procedural rights attend the decision of the court to conduct the “special hearing.”<sup>507</sup> Notice of the hearing “shall be by special petition and summons to be filed by the court and served upon the parent or guardian.”<sup>508</sup> A contested evidentiary hearing is probably contemplated, as the statute provides for the participation of an attorney for the parent. The court must appoint counsel for the parent if he or she qualifies under the standards applicable if the parent were a criminal defendant.<sup>509</sup> The dispositional order must be in writing and “contain appropriate findings of fact and conclusions of law.”<sup>510</sup> At the hearing, the “best interest of the child” standard is determinative: “If . . . the court finds it is in the best interest of the youth for the parent or guardian to be directly involved in treatment, the judge may order the parent or guardian to participate in treatment.”<sup>511</sup>

The statute also authorizes the court to require the parents to attend educational or counseling programs aimed at improving parenting skills, if the court finds that a deficiency in such skills “has significantly contributed to the circumstances bringing the youth within the jurisdiction of the court”<sup>512</sup> and that the parents’ participation would be “consistent with the best interests of the youth.”<sup>513</sup> Although the process is similar to that followed before the parent may be ordered to attend drug or alcohol treatment, the threshold requirements are relaxed. No notice, appointment of counsel, or hearing are required. While the lack of procedural protections in this portion of the statute reflects the view that counseling and educational programs do not infringe on individual liberty to the same extent as substance abuse treat-

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<sup>506</sup> OR. REV. STAT. § 419C.575.

<sup>507</sup> *Id.* Given the variety of strategies for and possible outcomes of the hearing, such a decision by the court may place the parent’s interests in opposition to the child’s interests as well as to those of the state.

<sup>508</sup> *Id.*

<sup>509</sup> *See id.* §§ 419C.575, 135.050.

<sup>510</sup> *See id.* § 419C.575. “The judge shall state with particularity, both orally and in the written order of the disposition, the precise terms of the disposition.” *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* § 419C.573(1)(a)(A).

<sup>513</sup> *See id.* § 419C.573(1)(a)(B).

ment, the court's orders in this area are subject to the same objection. Counseling is not necessarily less intrusive than substance abuse treatment. All orders of this nature are problematic, because sanctions should be placed on the parents only in cases in which the parents behavior may be causally shown, through proceedings admitting of appropriate proof, to have resulted in harm to the child. In those cases, criminal endangerment or child protective proceedings should be brought against the parents, so that these serious allegations may be subject to adequate proof. The focus of parental involvement in delinquency cases should be on the child's own treatment and on the parents' role in facilitating their child's development.

Finally, the Oregon statute unnecessarily restricts the ability of the court to enforce its orders. Rather than allow the court to enforce its legitimate orders through its contempt power, the state legislature chose to affix a monetary penalty to violation of court orders in these cases. A parent or guardian who violates a court order in the delinquency proceeding is subject to pay up to \$1,000.<sup>514</sup> Disallowing the use of the contempt sanction results in lessened weight to the sanction for noncompliance for parents of both the high and low-end economic classes. A \$1,000 penalty is negligible to an upper-class parent, and likely impossible to collect from a poor parent.<sup>515</sup> The inappropriate use of monetary sanctions to punish noncompliance is a feature of several other states' efforts in this area.<sup>516</sup> By contrast, some statutes acknowl-

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<sup>514</sup> See *id.* §§ 419C.570(2), 419C.573(2). The penalty paragraph contained in section 419C.573(2) describes payment of the sum as "an alternative to a contempt proceeding." *Id.* The statute does not label the sum which is to be paid as either a fine or court cost, nor does it indicate whether the parent so ordered is entitled to a show cause hearing or to any other procedural rights prior to the issuance of the violation judgment.

<sup>515</sup> See Barbara Kantrowitz et al., *Now, Parents on Trial*, NEWSWEEK, Oct. 2, 1989, at 54 ("Most parents of the 1.6 million minors arrested last year are too poor to pay the fines.") (quoting Howard Snyder, a director of the National Center for Juvenile Justice).

<sup>516</sup> For example, an Ohio statute requires a parent whose child has been adjudicated delinquent to enter into a recognizance with sufficient surety in the amount of not more than \$500, conditioned on the faithful discharge of the child's probation conditions. OHIO REV. CODE ANN. § 2151.411(B) (Anderson Supp. 2000). If the child violates the terms of probation or is adjudicated delinquent based on a second incident, the court will conduct a hearing to determine if the failure "to subject the child to reasonable parental control" or "faithfully to discharge the conditions of probation of the child on the part of that parent" is "the proximate cause of the act or acts of the child upon which the second delinquent child adjudication is based or upon which the child is found to have violated the conditions of the child's proba-

edge the importance of courts' ability to enforce compliance of their orders with contempt.<sup>517</sup> There is no reason to limit a court's ability to enforce its orders in delinquency cases.

As the preceding discussion has suggested, there are problems with the expansion of the delinquency jurisdiction of the family court into the realm of regulating parental responsibility. On balance, however, it appears to offer a solid opportunity for legal reform in this area.<sup>518</sup> The approach involves parents in delinquency cases in a significantly different manner than prevailing practice allows. This innovation concentrates on deterring and preventing juvenile delinquency, and on appropriately involving parents with the process of reforming their child. Parental responsibility laws that hold parents criminally liable essentially for the acts of their children should be repealed. In their place, we should expand the delinquency jurisdiction of the family courts to make parents parties to dispositional proceedings involving their children.

### CONCLUSION

For some years, we have witnessed a campaign against juvenile offenders and their parents, a crusade in which both juvenile delinquency and poor parenting have been criminalized. Adolescents have been declared adults by virtue of their anti-social acts and their parents have been infantilized by the over-regulation in parental responsibility laws. At bottom, we have adopted a categorization of juveniles as either mature and appropriately subject

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tion." *Id.* If the court so finds, it may declare all or a part of the recognizance forfeited. *Id.*; see also WYO. STAT. ANN. § 14-6-244 (Michie 2001) (requiring parent who has failed or neglected to reasonably control juvenile, and whose conduct is the proximate cause of the crimes the child committed, to post bond in amount up to \$500 when child adjudicated delinquent is placed on probation; parent forfeits bond if the juvenile commits a subsequent delinquent act or is found to be in contempt of court or to have violated the terms of his probation, and the court, after a hearing, finds that the child's act was proximately caused by the failure or neglect of the parent or guardian to subject the juvenile to reasonable parental control).

<sup>517</sup> See, e.g., OHIO REV. CODE § 2151.411(C)(1) (authorizing contempt sanction for willful failure of parent to comply with order in delinquency case); N.M. STAT. ANN. § 32A-2-28(C) (Michie Supp. 1999) (same); ARIZ. REV. STAT. ANN. §§ 8-247, 8-308(B) (West Supp. 2000) (same); COLO. REV. STAT. § 19-2-113(1)(a) (2000) (same).

<sup>518</sup> Cf. Mark H. Moore, *The Future of the Juvenile Court: A Theoretical Framework That Fits*, in 6 CTR. FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN 140, 142-45 (1996) (discussing jurisprudential principles for a "family bankruptcy court").

to the adult criminal justice system, or as immature and the sole products of parental care. This bifurcation serves neither the needs of society nor that of our youth.

This Article has argued against the notion that children who commit serious crimes have thereby attained the cognitive, emotional, and moral maturity of adults, whose autonomous acts are properly subject to the full force of the criminal law. The rationale for transferring some limited numbers of violent youth to criminal court must be premised upon an analysis of the individual child's rehabilitative potential and of the harm to society. This Article has equally disputed the premise of the parental responsibility laws, that juvenile delinquency may normally be attributed to a failure of parental supervision. The range and relative strength of influences upon adolescent development precludes general reliance on any single-factor analysis. Parents undeniably have the primary burden and responsibility to raise their children, and the expansion of the public welfare offense category to include unlucky parenting violates core concerns of our criminal jurisprudence, not least of which is the unfairness and unconstitutionality of applying strict criminal liability to judgment calls involving the supervision of errant adolescents.

A more effective and logically consistent method to involve parents both in dealing with current and in preventing future juvenile offenses must be found. Either of the two alternatives presented in this Article would improve upon the coarse and derisory instrument of the criminal parental responsibility laws. Parental participation in cases involving juvenile delinquency could be increased through the use of family group conferences and other methods developed by the therapeutic jurisprudence movement to reconnect offenders to their victims and the broader community in a productive, restorative manner. Alternatively, parents could be made parties in the dispositional phase of delinquency proceedings against their children. In this way, courts could supervise the juvenile's rehabilitation as assisted by the parents, who would be integrally involved. While neither of these proposals is perfect, either alternative better serves the needs of society as well as of individual families than does the conversion of alleged poor parenting into a public welfare offense.

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