Punishing Children in the Criminal Law

by Cynthia V. Ward[1]

Consider the facts in this attempted murder case, which California prosecutors filed in 1996:

> Defendant told a witness that the victim's family "had been harassing him," and that in return he, Defendant, "had to kill the baby."[2] Defendant and two acquaintances then went to the victim's apartment at a time when the victim's parents were out grocery shopping and had left their infant son with his 21-year-old stepsister, who was in the bathroom and did not hear Defendant and his friends enter the house. Defendant went to the baby's bedroom, took the baby, four-week-old Ignacio Bermudez, out of his bassinet, dropped him on the floor, and proceeded to beat the infant in the head with his fists, feet, and a stick. Defendant and his accomplices then stole property from the house and departed. After the assault, Defendant threatened a female witness with harm if she reported the incident. Defendant then told a family member about the attack; the family member reported him to the authorities. Questioned about the attack, Defendant first lied about it, then eventually re-enacted the assault in a videotaped interview with police.
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> Doctors determined that Ignacio Bermudez had suffered "global" brain damage from the attack. Eighteen months after the assault, the baby was unable to see, walk, or make intelligible sounds. According to a media report at the time, "Doctors say nothing less than a miracle will restore Ignacio to health."[3] California prosecutors described Defendant as the "ringleader" in

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[2] San Francisco Chronicle, April 27, 1996, at A1 (quoting prosecutor Harold Jewett).
[3] "Life of Tears and Hope for Beaten Baby's Family," Los Angeles Times, November 2, 1997, at A1.

the attack and charged him with attempted murder.[4] The defense did not dispute the essential facts.

Is Defendant guilty?

Now consider one additional fact: At the time of his assault on Ignacio Bermudez, Defendant was six years old.[5] Should the single circumstance of age make a difference to Defendant's guilt or punishment? In this essay I evaluate the possible answers to that question.

The issue of punishing children for crime has exposed a yawning chasm between the political actors who design and enforce the law, and those in the academy who evaluate its justification and effect.[6] Over the past decade and a half the states have significantly revamped their criminal codes to make it easier to punish children who commit violent offenses.[7] The fact that a six-year-old was actually

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[4] Id. at .

[5] Id. Because of his juvenile status Defendant's full name was not used in the media, which referred to him only as "Brandon T."

[6] See, e.g., David O. Brink, "Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes, 82 Texas L. Rev. 1555 (2004) (pincite); Elizabeth S. Scott & Laurence Steinberg, "Blaming Youth," 81 Texas L. Rev. 799 (2003) (pincite); Kim Taylor-Thompson, "Symposium: Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development," 14 Stan. L. & Pol'y Rev. 143 (2003).

[7] Stephen J. Morse, Immaturity and Responsibility, 88 J. Crim. L. & Criminology 15,16 (1997) ("Since 1992, forty-seven states and the District of Columbia have made changes in their laws governing the response to serious and violent juvenile offenders. The rate at which the juvenile offender has been removed from the juvenile system and prosecuted in the criminal justice system has skyrocketed."); Richard J. Bonnie & Thomas Grisso, Adjudicative Competence and Youthful Offenders, in Youth on Trial 73, 84 (Grisso & Schwartz eds. 2000) ("Alarmed by an increase in violent offenses (especially gun homicides) by juveniles, most states during the past decade revised their codes pertaining to the adjudication of youths charged with serious and violent offenses") [footnotes omitted]; Carrie S. Fried & N. Dickon Reppucci, Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability, 25 L. & Human Behavior 45 (2001) ("The 1980s and 1990s were characterized by increasingly adult-like treatment of juveniles in the court system and increased focus on the protection of the community rather than the protection of the juvenile defendant. Between 1992 and 1995, 41 states enacted laws making it easier to prosecute juveniles in adult criminal court….Other legislative mechanisms that emphasize punishment over rehabilitation of juveniles include minimum sentencing requirements, blended sentencing that allows juveniles to be sentenced past the age of 21 years, and revision of confidentiality provisions in favor of more open proceedings and records.").

charged with attempted murder[8] reflects the change in attitude that underlies this trend: 20 years ago even the most serious cases involving children under seven were adjudicated in juvenile court, and in a non-punitive fashion.[9] The law has changed dramatically, to the point where some states have entirely rejected formal age restrictions on the prosecution of children, making juveniles of any age potentially eligible for criminal punishment on the same basis as adults.[10] And in the most serious cases, adult-sized punishment is in fact being inflicted -- even when it involves a sentence of life without parole.[11]

In short, the law has moved firmly, and almost universally, in the direction of convicting and punishing juveniles who commit violent offenses. Politicians now speak loudly in favor of "sending a message to violent criminals of all ages",[12] and of "putting these juvenile criminals where they need to be – behind bars in the adult prisons."[13] Although legislators often cite the values of deterrence and public

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[8] The court in the case dropped the charge to assault with intent to do bodily harm, before eventually deciding that the defendant, known in public only as Brandon T., was not competent to stand trial. See infra, notes and accompanying text.

[9] See, e.g., Bazelon, supra note , at .

[10] Cites; Id.; Brink; Scott & Steinberg; Morse.

[11] Cites. See also Coordinating Council on Juvenile Justice and Delinquency Prevention, "Juveniles and the Death Penalty," November 2000 ("The justice system's recent shift toward stronger punishment policies has been marked not only by increased use of the death penalty but by increases in the number of offenders – including juveniles who committed offenses prior to their 18th birthdays – being sentenced to life in prison without the possibility of parole….The overwhelming majority of American jurisdictions…allow life without parole for offenders younger than 16. Some even make it mandatory for defendants convicted of certain offenses in criminal court. In Washington State, offenders as young as 8 can be sentenced to life. In Vermont, 10-year-olds can face the sentence.") [citations omitted]. In Roper v. Simmons, of course, the United States Supreme Court made clear that defendants who were under age 18 at the time of their crimes may not be sentenced to death. Cite.

[12] John Caher, Rhetoric and Reality in the Pataki Era, The Times Union, January 18, 1998, at A6 (quoting New York Governor George Pataki). See also Michael Finnegan, Governor Urges Hard Hits on Young Criminals, Daily News (New York), December 10, 1995, at 8 (quoting Governor Pataki's statement, "It's time we take the same tough approach to juvenile crime that we take to violent crime in general.").

[13] Mark Hollis, House Weighs Treating 16-, 17-year-olds as Adults, Sun Sentinel, March 30, 2000, at 1B. See also David Judson, Juvenile Crime Legislation Expanded, Not Stiffened," Gannett News Service, October 21, 1998, at ("The main initiative to fail amid the last-minute horse-trading [in the U.S. Congress]

protection as reasons for the punitive turn toward juveniles,[14] the angry tone of the debate signals the presence of an increasingly strong retributive impulse.[15]

Whatever its source, the punitive turn represents a virtual about-face in juvenile policy, which for a century beforehand treated almost all juvenile offenders not as guilty but as disturbed, as in need not of punishment but of treatment.[16] The philosophy of redemption that led to the creation of the juvenile justice system at the beginning of the 20th century is now giving way to a renewed belief in the existence of Bad Seeds. The premise of this belief is that at least some children who commit violent crimes are innately, or at least irredeemably, evil; that they deserve to suffer as much punishment as do adults who inflict similar harms on society; and that, in the most serious cases at least, the public must be willing to lock them up for good in order to protect itself.[17]

But the punitive turn toward young offenders conflicts head-on with the received view of legal experts on juvenile crime, who almost universally believe that

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was a proposal sponsored chiefly by Rep. Bill McCollum, R.-Fla., and Sen. Orrin Hatch, R.-Utah, that would have provided states as much as $2.5 billion over five years to crack down on juvenile crime, add judges and build new youth lockups. The price of the aid, however, required states to adopt rules encouraging prosecutors to try more juveniles as adults, and in cases of particularly heinous crimes, seek the death penalty for offenders as young as 15.").

[14] See, e.g., Curtis Krueger, Senate Passes Juvenile Crime Bill Unanimously, St. Petersburg Times, March 10, 1994, at 4B ("quoting state senator Gary Siegel, R.-Longwood, favoring passage of a new bill that "cracks down" on juvenile crime: "Juveniles all over the state are aware of what we're doing and they want to see how we're going to address this epidemic increase in crime. They are waiting for our signal."); John Caher, supra note (quoting New York Governor Pataki: "Let's send a message to violent criminals of all ages: If you assault our people, you will land in prison.").

[15] Cites; e.g., Scott & Steinberg, Bazelon, Brink (perceiving, and condemning, this impulse).

[16] Cites to sources, note 12.

[17] See, e.g., Hollis, supra note (quote Florida state senator Ander Crenshaw, R.-Jacksonville: "There are some [juvenile] offenders who are lost. They have no sense of remorse, they are defiant by nature and they are never going to change."); "Frontline: Little Criminals," aired May 13, 1997 (In an interview aired during the program, psychiatrist Martin Blinder, who had interviewed the boy who attacked Ignacio Bermudez, opined: "The problem, to me, stems from my conviction that this sort of character disorder, and certainly a character disorder of this early severity, is probably largely genetic. There is something to be said for the phrase 'natural born killer.' It's my view that most of what I found was predestined by his genetic endowment.").

important differences between children and adults – and even between older adolescents and adults – mandate separate, and gentler, treatment of juveniles who commit serious crimes.[18]

Considerable irony attends this debate. In the 1970s and 1980s a vocal "Children's Rights" movement argued passionately for the proposition that adolescents were as competent as adults to make many important life decisions, including the decisions to drink alcohol, to consent to medical treatment, and to decide to have an abortion without consulting an adult.[19] Accompanying this movement were studies purporting to measure the cognitive capacities of children and, in many instances, equating them with those of adults:[20]

> "Contrary to the stereotype of adolescents as markedly egocentric, for example, or as handicapped by deficiencies in logical ability, studies show that adolescents (at least, from age fifteen on) are no more likely than adults to suffer from the 'personal fable' (the belief that one's behavior is somehow not governed by the same rules of nature that apply to everyone else, as when a cigarette smoker believes that he is immune to the health effects of smoking) and no less likely than adults to employ rational algorithms in decision-making situations. In fact, there is substantial evidence that adolescents are well aware of the risks they take."[21]

[18] See, e.g., Scott & Steinberg, Bazelon, Brink, supra; see also Grisso & Schwartz, Youth on Trial, supra note (arguing on grounds both of competence and culpability that children and adolescents should not be held as responsible as adults who commit facially similar offenses).

[19] Cites.

[20] Young children – those under the age of 10 – were generally excepted from these findings; with respect to them, it was generally conceded that cognitive differences *did* justify different treatment from that accorded to adults. Cites.

[21] Elizabeth Cauffman, Jennifer Woolard, & N. Dickon Reppucci, Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability, 18 Q.L.R. 403, 407-08 (1999).

The authors go on to report that "[t]hese findings about a relative lack of differences between adolescents and adults were used by youth advocates in the 1980s to argue for the expansion of the rights afforded to minors. In particular, independent access to abortion was at the center of a vigorous moral, political, and legal debate. Based in large part on the lack of differences found in the informed consent literature, a number of psychologists supported the adolescent autonomy position."[22]

In its amicus brief in the Supreme Court case of *Hodgson v. Minnesota*,[23] for example, the American Psychological Association (APA) cited abundant studies supporting the claim that juveniles possess sufficient maturity to decide, without adult consultation, whether or not to have an abortion. "[B]y middle adolescence (age 14-15)," the APA report concluded, "young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."[24]

When, in the 1990s, such research formed the basis for the argument that adolescents ought not only to be accorded rights, but also assigned *responsibility* (including criminal responsibility) for their behavior, the children's movement found that studies demonstrating the substantially equal capacities of adolescents and adults

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[22] Id. at 408. See also Carrie S. Fried & N. Dickon Reppuci, Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability, 25 Law & Human Behavior 45 (2001) ("Adolescent decision making has been studied in several legally relevant contexts, including competence to make abortion decisions…consent to medical treatment…and waiver of Miranda rights….In general, these studies have found that, past the age of 14 years, adolescents are competent decision makers under the informed-consent model…as long as they are of average or above-average intelligence….").

[23] 497 U.S. 417 (1990) (case description).

[24] Brief for APA as *Amicus Curiae*, O.T. 1989, No. 88-805 etc., at 18-20.

"proved to be a double-edged sword. How could adolescents be mature enough to make their own decisions about abortion, but not mature enough to face the consequences of committing armed robbery or using marijuana? The very existence of a separate justice system for juveniles is predicated in part on the assumption that the basic competencies of adolescents and adults differ in fundamental ways that affect judgment. If adolescents and adults are equally capable decision-makers, the argument that adolescents suffer from 'diminished responsibility' is called into question. Indeed, the very same evidence that had been used to advocate for young people's autonomy in medical decision-making could provide – and has provided for recent calls to treat juvenile delinquents as adults within our legal and penal systems."[25]

The problem becomes especially difficult when one considers that the threshold capacities required for criminal responsibility may be no higher -- may well be lower – than those required competently to exercise other rights for which children's advocates have fought. As Stephen J. Morse has insightfully pointed out, the crimes for which adolescents, and sometimes children, are now being tried and punished as adults are almost always intentional crimes involving the knowing infliction of serious harm on a victim.[26] Adolescents know, certainly as well as many adult offenders, that the acts do inflict such harm.[27] It is difficult to argue

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[25] Cauffman et al., Justice for Juveniles, supra note , at 408-09.

[26] Stephen J. Morse, Immaturity and Responsibility, 88 J. Crim. L. & Criminology 15,53-54 (1997) ("Adolescent criminal conduct for the most part involves the intentional infliction of harm: the offender intentionally killed, inflicted grievous bodily harm, raped, stole, destroyed, or burned. That is, it is the adolescent's conscious objective to cause in the immediate future precisely the harm the law prohibits. Unless serious adolescent offenders are specially unlucky or unskillful, they are practically certain to produce the harm that is their conscious objective, and they know it.").

[27] See, e.g., id. ("The intentional harmdoer knows that the conduct invades the interests of others; those interests may be given little value or otherwise ignored or rationalized away, but they must be present to the adolescent's mind.")

simultaneously that the adolescent who intentionally shoots and kills his teacher should not be held responsible because he lacks even the fundamental capacity to realize that shooting someone will inflict serious harm, and that adolescents as a class have sufficient maturity and judgment to decide whether or not to have an abortion. The argument seems facially incoherent, to say at once that the law should, and should not, treat adolescents as adults. Specifically, the argument reduces to the claim that adolescents should be treated like adults for the purposes of distributing rights and benefits, and that they should be treated like children for the purposes of assigning responsibility and punishment.[28] That bifurcated approach would be justified on an underlying theory that the goal of law should be to maximize children's rights and minimize their responsibilities. But since the very same traits and characteristics – the capacity for instrumental reasoning, an appreciation of consequences of acting, the ability to assess the moral underpinnings of one decision or another -- underlie the arguments for rights and for responsibilities,[29] it is difficult to see on what principle or principles such a theory would rest.

Nonetheless, a burgeoning literature seeks routes around this problem, typically arguing against equal treatment of adolescents in the criminal law and for the retention of a rule that distinguishes children as a class and treats them as non-culpable, or less culpable, for their otherwise criminal offenses. The scholarship does this either by making the case that the studies so heavily relied upon by the

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[28] See, e.g., Bazelon, supra note (attempting to distinguish arguments favoring children's rights from those favoring adolescent responsibility for crime).
[29] Cites, supra.

children's autonomy movement were, after all, badly flawed;[30] or by arguing that even if those studies were not inherently flawed on their own terms, they did not take account of all relevant adolescent characteristics, and that once such characteristics are considered, it becomes clear that adolescents should *not* be criminally punished on the same terms as adults.[31]

In general, the scholars have limited their discussion to comparing adolescents with adults. Most appear to accept the proposition that young children should not be held criminally responsible under any circumstances.[32] Thus, to the extent there is

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[30] See, e.g., Cauffman et al., Justice for Juveniles, supra note , at 406-07 ("Most studies of cognitive development that used the informed consent framework have found few major differences between adults and youth about fifteen years of age and older. However, the foundation of this empirical work is fragile, as most of the investigations suffer from various methodological limitations, including small, unrepresentative, usually white, middle class samples of youth taking part in laboratory studies rather than in studies that compare adolescent and adult performance under conditions that adequately resemble daily life."); id. at 408 ("Based in large part on the lack of differences found in the informed consent literature, a number of psychologists supported the adolescent autonomy advocates' position. Their assessment of the research was not unanimously supported, however, as critics warned that the limitations of extant research failed to justify strong policy arguments about adolescents' equivalence to adults."); id. at 411 ("It is our position that the conclusion that adolescent judgment is equivalent to that of adults is both tenuous and ill suited for legal policymaking.").

[31] See, e.g., id. at 411 ("We posit that if psychosocial factors are taken into consideration in addition to the cognitive factors that are typically assessed, significant differences between adolescents and adults will emerge….such differences reflect genuine differences in capacities [that] provide a psychological basis for drawing legal distinctions between adolescents and adults."); Elizabeth Scott, Criminal Responsibility in Adolescence: Lessons from Developmental Psychology, in Grisso & Schwartz, Youth on Trial, supra note, at 291 (differences in adolescent decision-making capacity justify different treatment by the criminal law); Elizabeth Cauffman & Laurence Steinberg, Researching Adolescents' Judgment and Culpability, in id. at 325 (differences in adolescents' "maturity of judgment" may justify different treatment by the criminal law). Scott & Steinberg suggest that those who believe juveniles should be held responsible for crime may be motivated by racism. See, e.g., Scott & Steinberg, supra note , at 809 ("A troubling explanation for the puzzling hostility toward young law violators is that attitudes are driven by racial and ethnic bias."); id. at 837 ("A developmentally informed boundary constraining decisionmakers represents a collective pre-commitment to recognizing the mitigating character of youth in assigning blame….This concern is critical, given the evidence that illegitimate racial and ethnic biases influence attitudes about the punishment of young offenders and that decisionmakers appear to discount the mitigating impact of immaturity in minority youths.") [citations omitted]. Most of the "evidence" they cite consists of statistics indicating that a disproportionate percentage of children detained in public facilities are minorities – a fact that, as they go on to acknowledge in footnotes, is susceptible of both racist and non-racist interpretations. See, e.g., id. at notes 47-49.

[32] See, e.g., Cites, including even Morse, supra note , at 52 (dismissing the idea of criminal liability for young children, concluding that since such children "lack many of the necessary attributes of rationality" and "infrequently commit serious crimes," "the issue of full or substantial responsibility is not seriously in contention for young children.").

debate in the literature, it focuses on whether adolescents – those age 14 or older – ought to be excluded from criminal liability as a class.[33]

But this age-circumscribed discussion, while important in some ways, ultimately fails to address either the dimensions or the basic attractions of the punitive turn toward children in the criminal law. As noted above, that trend does not merely address the question of whether the age of criminal responsibility should be lowered to 15 or 14. Indeed, the most troubling cases that have arisen in recent years involve criminal charges against much younger children who commit serious crimes, and who like Brandon T. Ignacio Bermudez's attacker, seem at the time of their acts to "know what they are doing."[34] The younger the defendant, the more disturbed we are by the idea of his being convicted and punished like an adult.

But why? What does it mean to say that a defendant "knew what he was doing" when he committed a crime at the age of six? What does, and should, the criminal law require in order to hold someone guilty of a crime? Cases like tBrandon T. may offer the purest chance to think through these questions.

Two intuitions seem to ground our uneasiness about punishing children for crime. The first goes to the elements of responsibility, claiming that children lack the threshold understanding and cognitive capacity to hold them "guilty" for a harmful act. The second focuses not on mental capacity *per se*, but on children's inherent potential, as children, for growth and change. Whatever a child has done, he is still a child, someone who will someday grow up to be an adult. To inflict life-long

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[33] Cites.
[34] E.g., Yummy Sandifer, Eric Morse cases in Chicago.

punishment on a child is, ultimately, to visit suffering on someone – the adult whom the child will become – who is a different sort of being from the person who committed the act. This, the argument goes, is unjust.

In this essay I use the case of Brandon T. to interrogate both of these intuitions about punishing children for crime. In Part One I set out the elements of criminal responsibility and examine the various potential bases for what I call the Liability Thesis – the claim that children, by definition and as a class, do not possess the understanding, experience, and cognitive capacities necessary to be held liable for crime. I conclude that none of these arguments forces the conclusion that children must be categorically excluded from criminal responsibility.

Working from the conclusion in Part One that children can be criminally responsible, I move on in Part Two to examine the "Redemption Thesis" -- the claim that, whatever their mental state and understanding at the time of the harmful act, children's capacity for redemption should exculpate them from criminal responsibility. I distinguish the issue of corrigibility from that of liability and acknowledge that, although not directly relevant to responsibility, corrigibility could matter a lot to the separate question of how much convicted criminals should be punished for crime. I conclude, though, that the Redemption Thesis – particularly to the extent it is used to draw a bright-line between adults and juveniles for purposes of the criminal law – is more complex than it appears. If the capacity for redemption really is a value that should inform criminal punishment, it is a value that cuts *against* separating children and adults for purposes of the criminal law.

Finally, in Part Three I suggest that the criminal law must find ways to accommodate both the reality that children can possess criminal *mens rea*, and the desire to make room, once again, for the possibility of redemption from crime.

I. Brandon T. and the Elements of Criminal Responsibility

Suppose that when you read the description of Brandon T's attack on Ignacio Bermudez, you initially agreed that Defendant was guilty of a serious crime, that the charge of attempted murder seemed appropriate in the case. How did you then react when you read that Brandon was only six at the time of the attack? Was your reaction the same as that of Harold Jewett, the California prosecutor who brought the attempted murder charge against Brandon? "It doesn't matter whether you're 6 or you're 106," said Jewett. "If you do something that hurts someone else, with knowledge of the wrongfulness of it, you're responsible for it, period."[35] Or did the single fact of Brandon's age make you hesitate? If the latter, why? Did Brandon's age give you pause because you think it should matter to his criminal liability, or because you think that regardless of liability he should not be criminally punished, or for some other, independent reason? In this Part, I address the first possibility, which I label the Liability Thesis.

A. The Liability Thesis: Mens Rea in Children

One reason that we are uneasy about holding juveniles liable for crime is that we doubt their capacity to be mentally culpable. Young children, the argument goes,

[35] Frontline, "Little Criminals," supra note .

are not capable of forming the requisite intent, or *mens rea*, to be criminally responsible. This view has a venerable history. Even before the creation of separate juvenile courts in the late nineteenth century, children younger than seven at the time of their acts were treated as not responsible for crime, largely on the theory that young children lack *mens rea*, the capacity to form culpable intent.[36] The assumption that juveniles lack the requisite *mens rea* for criminal responsibility was also a core reason for separating them from the criminal justice system entirely and creating a separate, non-punitive adjudication structure for dealing with juvenile crime.[37] But to say that a person lacks the capacity to form *mens rea*? To answer that we need to work from a theory of what *mens rea* is and what capacities it requires.

1. The Elements of *Mens Rea*

The body of criminal law doctrine offers two routes to understanding the elements of responsibility. The first looks at what the state must prove to show mental culpability in a criminal trial; the second at what defendant might argue in favor of exculpation, even assuming that the state can prove criminal intent.

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[36] See, e.g,, Bazelon, supra note, at 168-70 (Recounting history of infancy defense in England. Discussing the Seventeenth Century writings of Sir Matthew Hale, Bazelon notes that "Hale assigned or withheld legal accountability for criminal activity according to whether or not the child was doli capax – possessed of the intelligence and comprehension to form the blameworthy intent necessary for the commission of a crime. Under the age-based system of classification [devised by Hale], a child under seven was termed infantia, by definition doli incapax and barred from prosecution for a criminal offense."); Andrew Walkover, The Infancy Defense in the New Juvenile Court, 31 U.C.L.A. L. Rev. 503 (1984) (tracing this idea back to the common law and noting, "At common law the infancy defense was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts."). See generally Bazelon, supra note (arguing that the same standard should apply today to juveniles offenders who were under age seven at the time of their otherwise criminal behavior).

[37] See, e.g., Stephen Bates Billick, M.D., "Developmental Competency," 14 Bull. Am. Acad. Psychiatry Law 301,302 (1986) ("The founding premise of the juvenile justice system was that juveniles were incompetent to commit crimes with the same intent as adults because of maturational immaturity….").

The first route is fairly straightforward. To make out a case for mental culpability the state must show that at the time of his or her criminal act, the defendant possessed the requisite mental state for commission of the crime. The Model Penal Code sets out four standards of mental culpability – conscious purpose, knowledge, recklessness, and negligence – and a fifth, strict liability, that essentially eliminates the *mens rea* requirement for some (minor) crimes.[38] Thus, if the state can show beyond a reasonable doubt that the defendant had the conscious purpose at the time of doing the acts he's charged with doing and of causing the harm he caused, then the state has proven *mens rea*.[39] Where defendant lacks the capacity to form such intent, he has a defense "on the elements," which is another way of saying that the state's case will fail for lack *mens rea*.[40]

Even when the state has demonstrated criminal intent – the presence, say, of conscious purpose to do the charged acts and cause the harm – the defendant may nevertheless avoid liability if he or she successfully advances an affirmative defense either of excuse or justification. The premise of a justification defense is that although the defendant's behavior normally would violate the law, the defendant did the right thing in the particular situation facing him or her. The paradigmatic case for justification is self- defense; under which defendant acknowledges that he intentionally killed the victim under circumstances in which the victim presented an

[38] Cite to MPC.

[39] MPC Sec. 2.02. Under MPC Sec. 2.02(5), higher levels of *mens rea* suffice to prove lower levels. Thus, "When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely."

[40] See, e.g., Voluntary Intoxication and Diminished Capacity, which may exculpate defendant if they negative an element of the offense. E.g., MPC Sec. 2.08.

immediate threat of death or serious bodily injury.[41] In that situation (assuming defendant's claim can be proven), we say that the defendant's act was justified, that it was the right thing to do under the circumstances.[42]

The other form of affirmative defense is excuse. When defendant lays claim to an excuse she acknowledges that (1) the state can prove *mens rea* (as well as causation and *actus reus*), and that what she did was wrong -- that it would not be the basis for a justification defense. Nevertheless, Defendant asks to be exonerated from criminal responsibility on the grounds of some personal defect or lack of capacity that would render it unjust to convict her of a crime. The paradigm here is the excuse of insanity, on the Model Penal Code's definition of which Defendant may escape criminal liability if, (1) as a result of a mental disease or defect, (2) Defendant lacks "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[43] This suggests the necessity of certain threshold capacities – to appreciate at least the wrongfulness of one's act, and to have the ability to control one's conduct to the extent of complying with the law – in order to be convicted of a crime. In addition, the affirmative excuse of duress illuminates the law's assumption that persons guilty of a crime have acted voluntarily and not under coercion by another person.[44]

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[41] MPC cite.
[42] See also MPC Sec. 3.02, Choice of Evils Defense.
[43] Model Penal Code Sec. 4.01.
[44] Duress. See, e.g., Model Penal Code Sec. 2.09, under which "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use

2. Do Children as a Class Lack the Capacities Required for Criminal Liability?

If the above discussion is correct, the law assumes the presence of three threshold capacities when a person is found guilty of a crime. These are (1) instrumental rationality, which in turn requires the capacity to form the conscious purpose to do a thing, to correlate that intent with actions rationally capable of achieving it, and to follow through by performing those actions which cause the criminal harm;[45] (2) the capacity to understand the difference between acting rightfully and acting wrongfully; and (3) the capacity to refrain from acting wrongfully, which essentially assumes that D did not act under overpowering compulsion that left him with no choice but to do wrong.

Is it true that, as a class and by definition, children lack the threshold level of these capacities required for criminal liability? Consider, again, the case of Brandon T. Evidence in that case indicated that (1) Brandon held a grudge against the parents of Ignacio Bermudez; (2) He determined to kill Ignacio in order to revenge himself on the baby's parents for "harassing him"; (3) he recruited accomplices, (4) waited until the parents were out of the house, and (5) went to the baby's room where he brutally beat the infant, inflicting tremendous and apparently irreparable damage. After the attack Brandon T. (6) stole a very popular "Big Wheel" tricycle from the Bermudez house, (7) warned a potential witness, a little girl, "You better not

[45] Stephen Morse's conception of instrumental rationality is similar, cite here.

tell anybody what I did"; (8) initially lied to police by saying that he didn't do it, and (9) eventually confessed and reenacted the entire event on videotape.[46]

It is noteworthy that psychiatrist Martin Blinder, one of three mental health professionals who interviewed Brandon T. in order to evaluate his competency to stand trial for the attack, found the boy competent to stand trial.[47] In an interview with *Frontline*, Dr. Blinder described the process by which he reached that decision:

> "I must say, in truth, I was surprised after I completed my assessment to find the 6-year-old competent. My bias going in was, 'This is ridiculous. How can a 6-year-old be competent to stand trial? How could he have even understood what he was doing, no less what a trial is all about?' But the kids watch television and they watch the cop shows and they watch the lawyer shows and they have – they may not watch them like they watch 'Sesame Street', but kids are tremendously aware these days. So this kid certainly was aware that he was in deep trouble and that there were certain procedures that were likely to befall him….He understood that society considered what he had done wrong, which is why he was being locked up at juvenile hall. He knew the judge's task. He knew his lawyer was there to help him. He knew the prosecutor was going to gather the evidence against him. And he understood that if things didn't go his way, he might not go home to see his mommy for a long, long time. So despite his juvenility, I felt that he grasped

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[46] Asked by police why he beat Ignacio, Brandon responded, "'Cause I decided to." Life of Tears and Hope, Los Angeles Times, supra note . According to psychiatrist Martin Blinder, who was asked by the criminal court to evaluate Brandon's competency to stand trial for the beating, "I asked him why he did it. He said, 'Well, I was there. It was interesting. It seemed like the thing to do.' He had no remorse for what he did."

[47] Frontline, "Little Criminals," supra note .

the essentials of what a trial proceeding was, why he was going to be tried and what the penalties might be."[48]

A competency finding is of course different, both in substance and in purpose, from a finding of mental culpability for the crime. A finding of competency determines that the defendant, at the time of trial, understands the charges against him and can assist in his own defense.[49] *Mens Rea*, on the other hand, refers specifically to the defendant's degree of mental culpability at the time of the offense and with respect to its accomplishment. Nevertheless, it seems clear from Dr. Blinder's interview with Brandon, as well as from Brandon T's statements and videotaped interview with police, that at the time he attacked Ignacio Bermudez, Brandon (1) intended to do the acts that harmed Ignacio (he did not accidentally knock the baby out of its bassinet; he intentionally threw the baby on the floor); (2) did those intentional actions with the conscious purpose of harming the baby (when he took the baby out of the bassinet and dropped him, he did not think that Ignacio would fly out of the room; he knew the baby would fall to the floor and that the fall could harm him); and (3) knew that if he were caught by authorities he would get into trouble, and took precautions to prevent this from happening. On its face, it appears that Brandon's act was intentional and premeditated; was not compelled or coerced; and was done with knowledge of the fact that it was wrong.

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[48] The other experts, including child psychologist Edward Hyman, disagreed with Dr. Blinder's competency finding. But, at least in his interview with Frontline, Dr. Hyman's rationale focused not on Brandon T's individual capacities but on Hyman's opposition to holding six-year-olds criminally liable as a policy matter. See, e.g., id. (interview with Dr. Hyman, who opined: "There's a real question in my mind, not in terms of soft, humane factors, but rather just in terms of what developmental studies tell us about children, whether a 6-year-old should even be involved at any level in the juvenile justice system.").
[49] Cite to Dusky.

From the perspective of liability, what is missing from this picture?

One might argue as follows. The *mens rea* of conscious purpose requires that the defendant understand *and intend* the probable consequences of his actions.[50] Thus, a defendant cannot be guilty of attempted murder unless he or she understands what it means to kill someone. If defendant really believes that when you kill someone they come back to life the next day, it would be wrong to hold him guilty of murder, or attempted murder, since he doesn't comprehend an essential fact about the harm resulting from his purpose and his actions. At a minimum, understanding the "essential facts" about killing someone requires the knowledge that when someone dies they are gone for good. The younger children are, the less likely they are to understand such facts, and this lack of understanding should render young children non-culpable.

In the case of Brandon T., the evidence conflicted on the question of whether he understood what it mean to kill. On the one hand, Brandon's own father had been murdered when the child was four. Brandon knew that his father had died violently and was given to fantasizing about the event.[51] On the other hand, both his defense attorney and at least one court-appointed expert concluded that Brandon did not understand what it meant to kill a person, and ultimately the court amended the criminal charge from attempted murder to assault with intent to commit bodily harm.[52] It seems clear from the evidence that Brandon *did* understand what it

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[50] Cites.
[51] Frontline, "Little Criminals," surpra note , at (interview with Brandon T's defense attorney, John Burris).
[52] Id. at ; See also Los Angeles Times piece, supra note , at .

meant to hurt someone, both in the physical sense and in the emotional one (his understanding of the latter seems clearly revealed by the calculation that injuring their baby would visit serious harm on the baby's parents). Thus, while it may be the case that his youth was a valid excuse for some crimes – those requiring an understanding of concepts such as death, of which children may not be fully aware at young ages – the argument thus far does not excuse Brandon from criminal liability *per se.*

But, it is argued, whatever the evidence in favor of finding intent, there are other differences in cognitive, emotional, and social capacity between children and adults, and these differences are so great that it is simply unjust for the criminal law to hold children to the same standard of behavior as adults. This argument is the thrust of much recent scholarship in the area of juvenile culpability.[53] In general, the scholarship focuses on differences between adolescents and adults, attempting to demonstrate that adolescents are less averse to risk, more likely to value short-term benefits over long-term costs, and more likely to be influenced by their social environment than adults,[54] and that these differences ought to serve either as a complete bar to criminal liability for juveniles,[55] or as a partial bar to such liability.[56] Thus, the fact that adolescents have weaker future-orientation than do adults as a

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[53] See, e.g., Bazelon, supra note ; Brink, supra note ; Scott and Steinberg, supra note .
[54] See, e.g., Scott & Steinberg, supra note , at 812-16; id. at 812 ("even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspectives, and (d) capacity for self-management. While cognitive capacities shape the process of decisionmaking, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.").
[55] See, e.g., Bazelon; Brink.
[56] See, e.g., Scott & Steinberg.

class; that they take more health and safety risks than do adults as a class; and that they are more impulsive than adults as a class, reduces their blameworthiness and thus their criminal culpability.[57]

Stephen Morse has raised one important objection to this line of thinking. Professor Morse writes,

"Adolescent criminal conduct for the most part involves the intentional infliction of harm: the offender intentionally killed, inflicted grievous bodily harm, raped, stole, destroyed, or burned. That is, it is the adolescent's conscious objective to cause in the immediate future precisely the harm that the law prohibits. Unless serious adolescent offenders are specially unlucky or unskillful, they are practically certain to produce the harm that is their objective, and they know it."[58]

Thus, the fact that adolescents and adults may be somewhat different in ways that affect their general judgment and decision-making capacity does not answer the question of whether adolescents ought to be held liable for serious crime. Further, writes Professor Morse,

"A substantial minority of adults is similar to mid-to-late adolescents on the variables that distinguish the age cohorts as classes. As noted, although the means may significantly differ, there is a great deal of overlap between the distributions. A regrettable number of adults are immature and have dreadful judgment. Yet we do not excuse that minority of adults. Why, therefore, should adolescents be treated differently? Adults obviously have more experience with the consequences of their

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[57] Id. at .
[58] Morse, supra note , at 53-54.

behavior and more life experience generally and some mature as a result, but many do not. Impulsive or peer-oriented adults probably have always 'learned' less from experience than their more mature counterparts. Moreover, it does not take much life experience to understand how killing, raping, burning, stealing, and so on affects others. To understand the consequences of these actions does not require the sophistication and moral subtlety that only experience can provide."[59]

Of course it may be the case that some, many, or even most children lack the necessary capacities to be held guilty of crime. But if this is true it serves only as an argument for evaluating juvenile defendants individually (as we do all other defendants) for the purpose of deciding whether or not they meet the test of criminal responsibility. This question is usually decided during the criminal adjudication process, not by a bright-line *a priori* rule that bars, or even presumptively bars, children from criminal responsibility.

Indeed, it is hard to see why the mere fact of differences in judgment and decision-making capacity between juveniles as a class and adults as a class is relevant to the question of juvenile liability for crime. The core questions ought to be, what are the threshold capacities required for criminal liability, and do juveniles have those capacities? This inquiry has both a normative and a descriptive dimension. With respect to the normative dimension – upon what threshold capacities *should* the law insist before holding someone guilty of a crime? -- many

[59] Id. at . See also Richards, supra note , at (Rejecting arguments that adolescents should be presumptively non-culpable for crime because of their relative lack of life experience. "Take murder, for example. The main thing wrong with murdering someone is that you take this person's life against his will. [Adolescents]…certainly know that much about it. Indeed, if they did not know they were taking someone's life against his will they would not be guilty of murder at all, but of some lesser crime….What we need is an extra, additional wrong done in committing murder, a wrong that adolescents do not realize they are doing because they lack experience in life. There are no obvious candidates.").

different answers are possible, and the issue of differences between juveniles and adults is only distantly and derivatively relevant. With respect to the descriptive dimension – what threshold capacities does the law *in fact* insist upon before holding someone criminally liable? – comparisons between juveniles as a class and adults as a class are less relevant than would be comparisons between juvenile and adult *criminals*. To answer the descriptive question what we need to know is not whether juveniles differ from adults but whether adults who have been convicted and punished for committing serious crimes differ, as a class and in relevant ways, from juveniles who have committed such crimes. Would any of us be surprised to discover that as a group, violent adult felons possess weaker future orientation, are less risk-averse, and are more impulsive than either adults or juveniles generally? Surely not.[60] And if that is so, it becomes much less clear that differences between adults and juveniles in general ought to matter to the criminal blameworthiness of individuals in either class.

Finally, consider the argument that adolescents may be more susceptible to environmental influence, from peers and surrounding social pressures, and are therefore more likely to feel pressured into criminal acts than are adults.[61] From the perspective of culpability for crime, this argument seems to cut both ways. If juveniles are more likely to be influenced by the signals from their environment, and they otherwise possess the threshold capacities for criminal responsibility, then

[60] See, e.g., Morse, supra note, at 53 (acknowledging that, as a class, adolescents are less risk-averse, more impulsive, and are more susceptible to peer pressure than adults. "It is crucial to remember, however, that a finding of a statistically significant difference between groups does not mean that there is no overlap between them. In fact, the adolescent and adult distributions on these variables overlap considerably; large numbers of adolescents and adults are indistinguishable on measures of these variables.").
[61] See, e.g., Scott & Steinberg, Bazelon citing studies to this effect.

perhaps the law should focus on sending strong *anti*-"criminogenic"[62] signals to the class of potential juvenile offenders. In this connection, evidence indicates that juvenile offenders are often well aware that the law treats them more leniently than it does adults, and that some are quite willing to take advantage of this fact. Street gangs, for example, actively recruit young children for criminal acts because they know that such children are unlikely to be convicted and punished as criminals.[63] And some individual offenders are no less savvy. Recall the murder by Christopher Simmons, which became the subject on appeal of the Supreme Court's recent holding, in *Roper v. Simmons*,[64] that defendants who are under age eighteen at the time of their crimes may not be executed. Simmons, who was 17 at the time of his crime, informed two friends that he wanted to murder someone by breaking into the victim's house, tying the victim up, and throwing the victim off a bridge.[65] According to the account offered by Justice Kennedy in his majority opinion for the Court, Simmons and one of his friends then selected Shirley Crook as their victim and carried out their plan to the letter: "Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and

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[62] See, e.g., Scott & Steinberg, supra note , at 832 ("those whom psychologists call normative adolescents may well succumb to the extraordinary pressures of a criminogenic social context.").
[63] See, e.g., Paul H. Robinson, Criminal Law Case Studies 134 (2d edition 2002) (recounting the case of Robert "Yummy" Sandifer, who joined the "Black Disciples" in Chicago at age eight: "Young members like Robert are prized because they are immune from detention for more than 30 days.").
[64] 125 S. Ct. 1183 (2005).
[65] Id. at 1187.

threw her from the bridge, drowning her in the waters below."[66] Before the murder Simmons had confidently informed his friends that they could "get away with it" because they were juveniles.[67] To the extent that juveniles are especially sensitive to the criminogenic elements in their environment, could it be that failing to punish them for crime actually contributes to the pathological nature of that environment?

But the evidence of juvenile responsiveness to environmental influence raises another core issue – that of corrigibility, or the potential for rehabilitation among juvenile offenders. That is the subject of Part Two, to which we now turn.

I. The Redemption Thesis: Punishment and Rehabilitation

A. Culpability v. Corrigibility

Opponents of juvenile liability argue that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood. Thus, predicting the development of relatively more permanent and enduring traits on the basis of risky behavior patterns observed in adolescence is an uncertain business."[68] Even assuming this is true, however, its relevance to the question of juvenile liability for crime is uncertain. The correct question is not, how many risk-taking adolescents turn out to be productive adults? The most relevant question is, what percentage of violent juvenile offenders – juveniles who have killed someone, or seriously attempted to do so, or have committed armed robbery or assault and battery on

[66] Id. at 1188.
[67] Id. at 1187.
[68] Scott & Steinberg, at 819-20.

another person – turn their lives around and become peaceful and law-abiding adults?

Furthermore, it is difficult to see how the issue of corrigibility – the relative ease with which an offender or class of offenders might turn their lives around – can determine a defendant's *culpability* for an act already done.[69] To the extent that a defendant's personal blameworthiness necessarily informs our decision about her criminal guilt – and no one would deny that at least as a descriptive matter, it does[70] -- the likelihood of future criminal actions (or law-abidingness) cannot make that decision. Ultimately, the decision on liability rests on our judgments about the person's mental culpability at the time he or she did the act charged, and mental culpability centers on what the person understood, desired, and was capable of doing at that moment in time or during preparations beforehand. Thus, statistics purporting to show that young children in general are more amenable to treatment than adults,[71] or that most adolescents grow out of the tendency to engage in impulsive or risky behavior, add nothing to the general debate about criminal culpability.

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[69] See, e.g., Morse, supra note , at 50 ("If responsibility is treated as a matter of retrospective moral evaluation, as I suggested it essentially is and should be, then the plasticity or amenability to treatment of a variable is irrelevant to whether it diminishes moral responsibility. Responsibility should be mitigated or excused if a variable that diminishes responsibility was operative at the time of harmdoing, whether or not this characteristic is alterable, and vice versa. It is hard to imagine what moral theory would suggest that plasticity per se should reduce responsibility.").

[70] See, e.g., Scott & Steinberg, supra note , at 800 ("The starting point [of our argument] is the principle of penal proportionality, which is the foundation of any legitimate system of state punishment. Proportionality holds that fair criminal punishment is measured not only by the amount of harm caused or threatened by the actor, but also by his blameworthiness."); Franklin E. Zimring, Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in Youth on Trial: A Developmental Perspective on Juvenile Justice 271 (Grisso & Schwartz eds, 2000) ("A host of subjective elements affect judgments of deserved punishment even though the victim is just as dead in each different case.").

[71] Cites, e.g., Grisso & Schwartz, Scott & Steinberg, Bazelon, Brink.

But this should *not* drive the issue of amenability to treatment from the criminal justice process altogether. Although corrigibility cannot answer the question of liability for crime, it may well influence the decision as to how much punishment a convicted criminal should receive. This seems an avenue worth exploring, not least because if the above discussion is correct, *mens rea* offers only a very unstable bar to criminal liability. If children may only be excluded from criminal punishment to the extent that they are unable to form intent, then only very young children – younger than six-year-old Brandon T. – may be categorically excluded. But to a very large degree, our uneasiness about punishing children for crime rests not on the intuition that children are incapable of intentional action, but on the intuitive judgment that children are more easily reformed than adults – that to send someone to prison for life for an act, even a monstrous act, committed while a juvenile is to waste a life that might well have been productive if allowed to grow to adulthood outside of a prison.

B. <u>Should Corrigibility Affect Punishment?</u>

From the discussion above we can import the interim principle that a criminal's capacity for rehabilitation enters the equation when we move beyond culpability and seek to resolve the question of punishment. Is this person responsible for what he did? is quite a different question from, Should we punish this person for what he did? Our collective answer to that second question has undergone revolutionary changes over the past century.

In order to comprehend the recent punitive turn toward juveniles in the criminal law, we should start not by reciting statistical differences between children and

adults, but by re-examining the change in our beliefs about crime and criminals generally. The system of juvenile justice arose only secondarily because of children's perceived "differences"; its primary source of inspiration was a view of human nature that could hardly be more different from the view now dominating the criminal law.

1. The Reign of Redemption

The change is evident in the title of Frank Allen's well-known book: *The Decline of the Rehabilitative Ideal.*[72] A century ago, belief in the criminal law as an agent of redemption reigned; that belief has now virtually disappeared from the practices of the criminal law. I argue here that the decline of that ideal in general explains the criminal law's punitive turn toward children in particular.

More than two decades ago, Frank Allen foresaw this trend and made it the basis for his Storrs Lectures at Yale. Allen wrote: "Although judgments may vary about precisely how far support for rehabilitative theories of penal treatment has eroded…the central fact appears inescapable: the rehabilitative ideal has declined in the United States: the decline has been substantial, and it has been precipitous."[73] Allen contrasts that decline with the near-universal endorsement of that ideal, by lawmakers, courts, reformers, and the academy, at the beginning of the Twentieth Century.[74] In their book *Reaffirming Rehabilitation*,[75] authors Francis T. Cullen and

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[72] Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (Yale Univ. Press 1981).
[73] Id. at 10.
[74] Id. at 5-7 ("Appreciation of the decline of the rehabilitative ideal in the 1970s requires an accurate understanding of its dominance in the United States for most of the twentieth century." Among other examples, Allen notes the U.S. Supreme Court holding in *Williams v. New York*, declaring that "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." Allen adds, "There can be no doubt that Justice

Karen E. Gilbert trace the belief in rehabilitation to the rise of the Progressive movement in the United States in the early 1900's.[76] The Progressives united strong opposition to the retributive view of punishment that, until then, had long dominated American criminal law,[77] with a transcendant optimism about the possibilities of a just state and -- particularly relevant here -- of redeeming criminals via treatment rather than punishment. Cullen & Gilbert write:

> "The flavor of the Progressives' perspective is well illustrated in these 1912 remarks by Warren F. Spaulding, Secretary of the Massachusetts Prison Association: 'Each criminal is an individual, and should be treated as such….Character and not conduct is the only sound basis of treatment. Fundamental in the new scheme is…individualism. In the old system, the main question was, What did he do? The main question should be, What is he? There can be no intelligent treatment until more is known than the fact that a man did a certain thing. It is as important to know why he did it."[78]

As Cullen and Gilbert note, the Progressives' belief in individualized treatment had a profound impact on the criminal law:

Black's dictum expressed the enlightened opinion, not only of the judiciary, but also of the public at large.").

[75] Francis T. Cullen & Karen E. Gilbert, Reaffirming Rehabilitation (Anderson Publishing Co. 1982).

[76] Id. at 73-81.

[77] Id. at 75-76 ("At the turn of the century, Charlton T. Lewis voiced sentiments that would be echoed repeatedly in the years to come when he asserted that "[t]he method of apportioning penalties according to degrees of guilt implied by defined offenses is as completely discredited, and is as incapable of a part of any reasoned system of social organization, as is the practice of astrology or…witchcraft." Lewis prophesied, "the time will come when the moral mutilations of fixed terms of imprisonment will seem as barbarous and antiquated as the ear-lopping, nose-slitting and head amputations of a century ago.") citations omitted]

[78] Id.at 77.

> "[T]he Progressives succeeded in a major renovation of the criminal justice system. Within the space of two decades, their innovations reformulated sentencing practices in the direction of indeterminacy, established the new bureaucratic structures of probation and parole, *created a separate system of juvenile justice*, introduced wide discretionary powers throughout the legal process, and reaffirmed the vitality of the rehabilitative idea. At the end of their era, nearly all of the elements of the criminal justice system familiar to today's students of crime control were securely in place. Of equal significance, the Progressives bequeathed a powerful rationale for the individualized treatment of offenders that would dominate American correctional policy until very recent times."[79]

Note the implication here: The non-punitive, treatment-focused juvenile justice system was created *not* in isolation from the criminal justice process for adults, but merely as one part of the Progressive plan to restructure the criminal law around the goal of rehabilitation. Cullen and Gilbert write that "the Progressives' therapeutic model received its most complete expression in the measures formulated to control delinquent behavior"[80] The juvenile justice system was just one manifestation – albeit a very important one -- of a widespread redemption-oriented idealogy – an ideology that "received its most complete expression" in the non-punitive treatment of youthful offenders.

But what, on the Progressive model, explains the actual separation of juvenile offenders, and their separate treatment by the criminal law? Despite the widespread popularity of the redemptive approach in the early and mid 20th Century, adult

[79] Id. at 81. [emphasis added]
[80] Id. at 80.

offenders were never actually exempted from criminal guilt and punishment; only juveniles were.

To some extent this difference in treatment of juveniles and adults is ephemeral, representing the limits of the politically possible rather than any core difference in punishment rationales. The Progressives had a vision under which punishment would take a back seat to rehabilitation for *all* criminal offenders, but even during the heyday of this vision the pull of retribution was strong enough to prevent the replacement of punishment with treatment for everyone.[81] It also seems true, however, that the fundamental principle underlying Progressive reform proposals for the criminal law generally – that is, their belief in the redemptive potential of all human beings – does suggest a basis for distinguishing between adults and juveniles within a general framework of a corrections policy oriented toward rehabilitation.

If (as the Progressives believed) humans generally have the capacity for redemption, and if that capacity justifies a therapeutic (as opposed to retributive) system of criminal sentencing, then youthful offenders may have an even stronger case for treatment, and against punishment, than do adults as a group. Remember that with respect to the question of criminal *culpability*, the scholarship argues that children *lack* relevant capacities, such as the ability to form intent, or maturity of judgment. That lack, it is contended, ought to absolve them from criminal

[81] See, e.g., Cullen & Gilbert, supra note , at 81 ("The Progressives' version of a criminal justice system fully dedicated to the rehabilitation of criminal offenders was never achieved. While the framework of a therapeutic state had been erected, the substance in many instances was lacking."). Id. at 81.

responsibility, or at least diminish their responsibility, for crime.[82] But when we move to the issue of *punishment*, the children's rights argument takes on the opposite thrust. Children, it is argued, have a *greater* capacity than adults in at least one area – the capacity for change. Children are in process, are acutely susceptible to environmental influences and such influences can greatly affect their ultimate choices, behavior, and moral convictions.[83] If even adult criminal offenders have significant capacity for reform and rehabilitation, then it seems to follow that children must possess such capacity to a greater, and perhaps to a much greater, degree.

It is tempting to conclude that even if children are sometimes responsible for crime, it might not be good policy to punish them, or at least to punish them as much as we do adults. On the (widely accepted) assumptions that (1) the state should limit the amount of deliberate suffering it inflicts on people to that amount that achieves its legitimate policy goals *and no more*, and that (2) one of the most important goals of punishment is that of specific deterrence, children's greater redemptive potential seems to justify lesser punishment for the crimes they commit.

C. Age and Corrigibility

One might question the assumption that children as a class do, in fact, have more redemptive potential than do adults as a class. In fact recent research indicates that, with respect to some children at least, this assumption may be unjustified. Instead, the truth may be that some youthful offenders, particularly

[82] See supra, notes and accompanying text (Bazelon, Brink, Scott & Steinberg).
[83] Cites, supra, incl. Youth on Trial.

those who begin committing serious crimes as young children, may be quite difficult, or even impossible, to rehabilitate. One recent study summarized the problem:

> "Numerous researchers have reported a robust inverse relation between the age of a youth's first conviction and his or her total number of convictions through early adulthood. Youths who are first convicted earlier are convicted more times not only because they begin their 'criminal careers' earlier but also because they are convicted at higher rates at all ages into early adulthood. It is important to note that the same inverse association has been found between age of onset and self-reported delinquent behavior in several community samples. This is important, as self-reports of delinquency avoid the biases in detection, prosecution, and conviction that are inherent in official statistics. Among 11- through 18-year-old boys who had engaged in any delinquent behavior, Tolan (1987) found that the half of the sample with younger ages of onset (less than 12 years) reported higher levels of almost all types of delinquent behaviors during adolescence than the half of the sample with later ages of onset. Similarly, in a subset of female and male youths from the …National Youth Survey…Tolan and Thomas (1995) found that youths who reported first engaging in delinquent acts before age 12 were more likely to engage in serious offenses and to continue to engage in delinquent behavior during the 3 years following the onset of delinquent behavior."[84]

Such findings, indicating "an inverse relation between age of onset and the frequency, seriousness, and persistence of delinquency,"[85] reinforce one intuition

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[84] Lahey, et al., "Relation of Age of Onset to the Type and Severity of Child and Adolescent Conduct Problems," Journal of Abnormal Child Psychology, March 1999.

[85] Id. See also Terrie Moffitt, Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol Rev. 674, 690. Moffitt is credited with coining the terms

that seems to fuel the punitive turn of the criminal law toward juveniles – that there are such things as "Bad Seeds," who show their criminal proclivities early, have no capacity for remorse or reform, and who will continue to inflict harm on society until society puts them out of reach.[86] Individual cases in which very young children commit atrocious crimes seem to reinforce this impression.[87]

According to psychiatrist Martin Blinder, six-year-old Brandon T. was clearly in danger of becoming a "life-course persistent" offender. For Dr. Blinder, the signs were so marked in Brandon that, despite his youth, Blinder felt confident in diagnosing him as a "psychopath in the making."[88] Consider this exchange between Dr. Blinder and an interviewer for the television program *Frontline:*

> "Q: [W]hat were your first impressions of [Brandon T.]?
>
> "Blinder: My first impression was a perfectly ordinary, smiling, outgoing young man. There was nothing about his demeanor or his appearance to

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"adolescent-limited" and "life-course persistent" to describe two quite different developmental pathways of delinquent activity: "[Y]ouths who first engage in antisocial behavior during childhood do so for different reasons that youths who first engage in antisocial behavior during adolescence. Specifically, childhood-onset conduct problems result from early neuropsychological deficits that cause cognitive delays, impulsivity, and difficult temperament. In the presence of adverse childrearing environments, these characteristics contribute to the origins of conduct problems. In contrast, the adolescent-onset group does not have predisposing neuropsychological dysfunction. Their delinquent behavior arises through the imitation of some of the nonaggressive antisocial behaviors of youths with childhood onsets. They do so during adolescence because it is a period of heightened peer influence and conflict regarding adult privileges."

[86] Cites, quotes here.

[87] See, e.g., the case of Eric Moses in Chicago; after Eric refused to steal candy for them, a 10- and 11-year-old offenders dropped him from a building, killing him. See also Robinson, supra note , at 134-35 (recounting the case of Robert "Yummy" Sandifer, who at age 11 murdered two teenaged gang rivals. Of Sandifer's childhood, Robinson writes: "Robert's direction of development shows itself early. During a hospital stay when he is not yet 3, a social worker says something that angers him. He grabs a toy knife and charges the woman, screaming 'Fuck you, you bitch.' He jabs the rubber knife into the woman's arm, saying 'I'm going to cut you.'…His first officially recorded offense, at age 9, is an armed robbery. By age 11, [Yummy Sandifer] has compiled a rap sheet of 28 crimes, all but five of which are felonies. His short detentions become less frequent when, because of his violence toward other detained children, Family Services refuses to accept even temporary custody.").

[88] Frontline, "Little Criminals," supra note , at .

suggest that we were dealing with either a dangerous fellow, or one who was wrestling with mental retardation or some obviously disabling psychiatric disorder.

"Q: And following your examination, what diagnosis did you arrive at? "Blinder: I felt that he was a psychopath in the making. We tend to reserve such a label for adults and we talk about juveniles who act out in violent ways as suffering a conduct disorder. The use of the term psychopath or antisocial personality is perhaps prematurely pejorative and we don't ordinarily see the necessary signs and symptoms in one so young and someone so small. So we don't use that term…when we talk about juveniles. I certainly have never used that term before. But this young man was so evidently suffused with all of the findings, that, when they fully blossomed later in life, will call for this diagnosis, that I was comfortable in talking about him having a nascent sociopathic personality. Or a psychopath in the making."[89]

Asked to speculate about Brandon T.'s probable future, Dr. Blinder's prognosis was grim:

"I can say that the personality characteristics that I found in this young boy, that seemed to drive him, and the absence of any inhibiting factors, the absence of empathy for his fellow kid and some of the other diagnostic features [that] are so common in individuals who do go forward in a life of violence and a life of crime, that I think we should have a great concern that we will indeed be faced with what to do with this fellow on down the road…When he has his freedom and he has a bit of heft to him, I think statistically there is some likelihood that he will act in a criminal fashion. Whether or not…this young man will definitively grow up to be John

[89] Id.

> Dillinger, I can't say. But I think that had I examined John Dillinger when he was 6 years old, I would have seen qualities very much like what I saw in this young man."[90]

Asked "what can be done with a 6-year-old like this?", Dr. Blinder's response was no more hopeful:

> "What do you do with a 6-year-old like this? One thing that works is that you sequester them. So that they no longer have the society to attack. There are obviously a variety of ethical, moral and psychological reasons why this may not be a good or a permanent solution. But it's very tempting. To make sure that they don't have the opportunity to do the kind of damage that we know they are capable of. They are, at least theoretically, responsive to long-term psychotherapeutic intervention….The problem, to me, stems from my conviction that in this sort of character disorder – and certainly a character disorder of this early severity – it is probably largely genetic. Yes, certainly, being raised in a violent neighborhood and in a violent or less than optimum home…these things are not therapeutic….But if it brings to the table, if you will, a certain genetic structure, it's very difficult to modify that through behavioral or psychotherapeutic techniques."[91]

If this research and these individual cases offer any guidance at all, it may be true that at least some juvenile offenders, those who begin committing serious crimes while children and who demonstrate neither empathy toward others nor remorse for the harm they inflict, may be extremely difficult, or even impossible, to rehabilitate.

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[90] Id.
[91] Id.

And this may be true although such youngsters are not legally insane; although they may appear to be normal in many ways; and although they may understand that society condemns their actions and that, if caught, the consequences of those actions could be extremely unpleasant.[92]

Certainly this evidence, if true, gives rational content to the recent punitive turn toward juveniles in the criminal law. If some juveniles – in particular those who begin committing serious crimes as children – are unredeemable "Bad Seeds," and if such Bad Seeds are identifiable as such, then it becomes difficult to justify a system of juvenile justice that treats all children as non-responsible and/or as non-punishable. A system under which children are evaluated, and the decision to punish them made individually would seem to be a logical response to this reality.

And this conclusion seems to follow whatever the ultimate source, or cause, of a particular juvenile's criminal behavior. Because children are so visibly under the control of adults, we tend to excuse their bad behavior on the ground that the adults in their lives – or the societal environment in which they grow up – are the parties "really" responsible for their acts.[93] But, even setting aside the criminal law's general dislike of assigning collective responsibility for crime, this approach proves too much. A substantial, perhaps an overwhelming, majority of those convicted of serious crimes such as murder, rape, and aggravated assault, suffered significant abuse as children and could persuasively argue that the abuse is causally related to their criminal actions. If we excuse children from punishment on the ground of abuse,

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[92] Cites, supra, re: Brandon T.
[93] Cite to Scott & Steinberg on this point.

then we are intellectually compelled to consider the identical argument in a case involving a severely abused adult for whom the abuse is at least a but-for cause of the crimes with which he is charged.

II. Conclusion: Uniting Culpability with Redemption

Consider the two conclusions developed thus far. First, in Part One I concluded that the longstanding basis for excluding juveniles as a class from criminal liability – that children and adolescents as a class are incapable, or are less capable, than adults of forming criminal intent – was not true. Using the case of Brandon T. as a core example, I argued that even young children can and do commit terrible crimes while possessing the threshold capacities necessary for criminal responsibility. From this perspective, the recent trend in the law – its increasingly refusal to insulate all juveniles, merely because of age, from criminal responsibility is not irrational – on the contrary, it simply acknowledges that the concept of *mens rea*, as it has been descriptively applied in our criminal law, does not bar children from being held criminally responsible.

In Part Two I explored the most important basis for excluding juveniles as a class from criminal *punishment* – namely, that juveniles as a class have a greater capacity for redemption than adults as a class. I discussed recent evidence indicating that at least some juveniles – those who lack empathy, are not remorseful for the harms they inflict, and begin violent lives of crime before age 12 – may be extremely difficult, or even impossible, to rehabilitate. Once again, if it is true that

some children are Bad Seeds, then the punitive turn toward juveniles appears rational in this light. It seems only rational to acknowledge that society has a strong interest in treating such juveniles as adults in the criminal process, to the extent of incarcerating them for long periods in order to prevent them from inflicting further harm. With respect to other juvenile offenders, the law might be justified in treating their offenses as life-stage related and focusing their criminal sentences on maximizing the chance, perhaps through treatment-oriented methods, that they will develop the skills and self-control to become productive and law-abiding adults. [94]

Of course it may often be difficult – in some cases it might even be impossible – to tell with certainty which juveniles are redeemable and which are not. Even if we begin the inquiry by acknowledging that some young offenders will end as psychopaths, and even if we have an inkling about who they might be, the law should reach a very high level of certainty about such things before incarcerating a teenager for life.

How might the criminal law acknowledge, and work within, the framework of both these conclusions? A full discussion of this question is beyond the scope of this short essay. But it seems clear from the argument thus far that nothing internal to the concepts of criminal intent, and of corrigibility, would bar their joint adoption as core precepts of criminal punishment. It would not be in any way incoherent to

[94] Thus, for "adolescent-limited" offenders, whose behavior is marked by, and motivated by, life-stage specific concerns such as peer influence and increased taste for risk, criminal sentencing might focus on maximizing the potential for redemption. For "life-course-persistent" offenders, society's interest in self-protection might dictate the infliction of more suffering, either because stronger tactics are required to turn such juveniles around, or because we are prepared to acknowledge that rehabilitation is impossible in some cases; that some young offenders will continue to inflict harm unless they are permanently removed from society

organize responsibility and punishment for crime around a universal standard of responsibility on the one hand, and a belief in the possibility of redemption on the other. The choice to make juveniles responsible is separate from the choice to punish them as adults.

A criminal justice system structured in this way would pull *against* treating juveniles and adults differently, either on grounds of responsibility or of punishment. Just as the Progressive vision of juvenile justice was closely tied to an overall belief in the human potential for redemption, the reintroduction of corrigibility as a central element of punishment implicitly tests the separation issue again: If corrigibility is a major factor with respect to juvenile offenders, shouldn't it also be a factor for adults convicted of crime? Just as there are some juveniles who may *not* have the capacity for redemption, there are some adults who *do*, and who on the same rationales that support rehabilitation for children who commit crimes, ought to be offered the chance, as adults, to show that their changed hearts and minds make them no longer a danger to society. Professor Stephen Morse makes the point well:

> "I find it hard to understand why adolescents and similar adults should not be treated morally alike. If we believe that all adults who possess the usually distinguishing adolescent characteristics can fairly be held accountable, and thus permit no individualized mitigating or excusing claims, I see no good reason why…adolescents as a class should be held less accountable on the basis of these characteristics. Conversely, if we believe these variables do sufficiently undermine the capacity for normative competence to warrant mitigation or excuse for…adolescents as a class, then adult wrongdoers

> should be permitted to make individualized excusing claims based on these variables."[95]

We should not grab at any possible difference between juveniles and adults that could justify treating them separately. What we seek, instead, is a way of reconciling -- in the criminal law generally – the two intuitions that (1) persons ought to be held responsible for their intentional criminal acts, and that (2) the criminal law should recognize that people can and do change for the better, and should offer the chance of redemption to *all* individuals, whatever their age, who can prove that they have done so.

[95] Morse, supra note , at 59.