NOTES

EXPLODING THE SUPERPREDATOR MYTH: WHY INFANCY IS THE PREADOLESCENT'S BEST DEFENSE IN JUVENILE COURT

LARA A. BAZELON*

In this Note, Lara 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 who are 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. In defense of her proposition, Bazelon describes the development of the infancy defense and critiques the primary justifications behind its erosion, including the Rehabilitation Theory, the Procedural Policing Theory, and the Demarcation Theory. She analyzes the ongoing trend towards treating juveniles as "miniature adults," the emphasis on punishment over rehabilitation in juvenile courts, and the psychological underdevelopment of juveniles as it relates to criminal behavior. Bazelon concludes by proposing a model statute that recognizes and attempts to account for the unique mental state of juveniles who commit serious offenses.

INTRODUCTION

For centuries, the crucial standard in determining whether to impose sanctions on a preadolescent for the consequences of his violent actions was the legal test of infancy.[1] This defense requires the state, when seeking to charge a seven to fourteen-year-old child[2] with a seri-

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1 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. 509-17 (1984) (discussing infancy defense as it developed under English and American common law).

2 While the common law infancy defense applies to children as old as 14, this paper focuses solely on children under 12. These younger juveniles, similarly distinguished under the original formulation of the infancy defense in English civil law, are, in general, mark-

ous offense, to overcome the legal presumption that the accused is not personally culpable because he lacks the mental capacity to understand "the likely physical consequences of his act or its wrongful . . . nature."[3] To rebut this presumption, the state must provide affirmative evidence that a preadolescent child is capable of formulating the requisite mens rea[4] with respect to a crime[5] in order to prove

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edly less physically and emotionally mature and thus present the strongest candidacy for the defense. See infra discussion Parts I.A, III.A-B. Only a small number of the crimes committed by juveniles—roughly six out of every one hundred—are classified as violent, and only .05% of two million juvenile arrests in the United States per year are for rape and murder. See The Real War on Crime: The Report of the National Criminal Justice Commission 131-33 (Steven R. Donziger ed., 1996) [hereinafter Real War on Crime]. Within this small subset of the juvenile delinquency population, homicide arrests for children under 12 are even more rare, constituting only 1.1% of such arrests among the overall juvenile population. This percentage translates into a small number of preadolescent violent offenders. See, e.g., Franklin E. Zimring, American Youth Violence 146-47 & 147 tbl.8.1 (1998) (citing 1995 FBI study); State of N.Y., Twentieth Annual Report of the Chief Administrator of the Courts for the Calendar Year 1997, Volume II—Family Court Statistics, tbls.92-93 (on file with the *New York University Law Review*) (documenting that of 247 designated felony petitions filed against juvenile boys in New York State in 1997, seven petitions were filed against boys under age of 12, and that of 31 designated felony petitions filed against juvenile girls in New York State in 1997, only two were filed against girls under age of 12).

But violent crimes committed by preadolescent children, while relatively infrequent occurrences, tend to emerge as sensational cases that receive a great deal of political attention and generate loud public outcry for more punitive responses to juvenile crime. See Louise Kiernan, Doors Shut on 1 Theory as Youth Prison Opens, Chi. Trib., Aug. 30, 1999, at 1 (documenting Chicago's construction of nation's first prison for preteen offenders as response to anticipated wave of preadolescent "superpredators" and noting that prison's lack of preteen occupants demonstrates "the gap between the perception of juvenile crime and its realities"); Carey Goldberg, 6-Year-Old Charged with Trying to Kill Baby, N.Y. Times, Apr. 26, 1996, at A20 (reporting district attorney's plan to prosecute six-year-old boy and two eight-year-old accomplices accused of severely beating infant, and neighbors' speculations that boys "were just born evil").

[3] 2 Paul H. Robinson, Criminal Law Defenses § 175, at 325 (1984); see also Tim A. Thomas, Annotation, Defense of Infancy in Juvenile Delinquency Proceedings, 83 A.L.R.4th 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").

[4] Mens rea is defined generally as the mental state required to make the perpetration of a blameworthy act a crime as defined by law; this definition is the applicable one for the purposes of this paper. See Wayne R. LaFave & Austin W. Scott, Handbook on Criminal Law § 2, at 7 (1972) ("[A]ction . . . alone without a bad mind cannot be the basis of criminal liability; crime requires some sort of *mens rea* (guilty mind).").

[5] It is a fundamental principle of criminal law that to warrant the punishment and stigma of a criminal conviction, a guilty act (actus reus) must be accompanied by a guilty mind (mens rea). See Model Penal Code § 2.02(1) (Proposed Official Draft 1962) (noting that, with certain limited exceptions, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense"); LaFave & Scott, supra note 4, § 2, at 7 (stating that for criminal liability to attach, law requires both "*actus reus* (guilty act)" and "*mens rea* (guilty mind)"). One significant exception to the mens rea rule is the doctrine of strict

that he did form the requisite mens rea with respect to the charged crime.[6]

The majority of courts that have considered the infancy defense have rejected it as inapplicable in juvenile court[7] by relying on three

liability, which requires only the act of physical participation for culpability to attach. See Model Penal Code § 2.05(1)(a)-(b) (Proposed Original Draft 1962) (observing that there is no mens rea requirement for some violations or for "offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears"). The vast majority of crimes, however, require that the prosecution prove the element of intent beyond a reasonable doubt. See Model Penal Code § 2.02(1); H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 20 (1968) (citing selling liquor to intoxicated individual and possessing altered passport as strict liability crimes "where it is no defence that the accused did not offend intentionally, or through negligence," but noting that "'strict liability' is generally viewed with great odium and admitted as an exception to the general rule"); Zimring, supra note 2, at 138-40 (noting that there are "branches of the substantive criminal law where individual guilt and punishment are determined almost solely by an individual's intent" and arguing that "[t]he greater the weight that the law places on the solely subjective dimensions of behavior in a particular case, the greater the mitigational potential of diminished responsibility because of immaturity").

6 See Robert E. Shepherd, Jr., Juvenile Justice: Rebirth of the Infancy Defense, Crim. Just., Summer 1997, at 45, 45 (delineating prosecution's burden of persuasion to overcome infancy defense).

7 See Jennings v. State, 384 So. 2d 104, 105 (Ala. 1980) (holding infancy defense inapplicable in delinquency proceedings against 13-year-old found delinquent in sexual assault); Gammons v. Berlat, 696 P.2d 700, 704 (Ariz. 1985) (holding infancy defense inapplicable in delinquency proceedings against 13-year-old found delinquent for sexual abuse); In re Tyvonne, 558 A.2d 661, 663 (Conn. 1989) (holding infancy defense inapplicable in juvenile court proceedings against eight-year-old found delinquent in shooting of schoolmate); State v. D.H., 340 So. 2d 1163, 1166 (Fla. 1976) (holding infancy defense inapplicable in juvenile court proceedings against nine-year-old found delinquent for breaking and entering); In re Dow, 393 N.E.2d 1346, 1348 (Ill. App. Ct. 1979) (excluding capacity findings from juvenile adjudication of nine and 11-year-old boys found delinquent in aggravated assault); In re Robert M., 441 N.Y.S.2d 860, 861 (Fam. Ct. 1981) (holding infancy defense inapplicable in juvenile court proceedings against nine-year-old found delinquent in bank robbery); G.J.I. v. State, 778 P.2d 485, 487 (Okla. 1989) (holding infancy defense could not be raised in juvenile proceeding against 13-year-old convicted of second-degree rape); In re G.T., 597 A.2d 638, 641 (Pa. Super. 1991) (holding infancy defense inapplicable in delinquency proceedings against 13-year-old found delinquent in drug offense); In re Michael, 423 A.2d 1180, 1183 (R.I. 1981) (holding infancy defense inapplicable in juvenile court proceeding against 12-year-old found delinquent in sexual assault); In re Skinner, 249 S.E.2d 746, 746 (S.C. 1978) (holding infancy defense inapplicable in delinquency proceedings against 10-year-old found delinquent in shoplifting offense). Only four states presently apply the infancy defense in juvenile court proceedings: Washington, California, Maryland, and New Jersey. See Thomas, supra note 3, at 1135 (reporting that Washington, California, and Maryland apply infancy defense in juvenile court); see also State ex rel. C.P., 514 A.2d 850, 854 (N.J. 1986) (applying infancy defense and dismissing juvenile court petition which alleged that six-year-old and nine-year-old committed aggravated sexual assault). Among these states, the standard of proof required to overcome the infancy defense varies widely, from "preponderance of the evidence," to "clear proof," "clear and convincing evidence," and "beyond a reasonable doubt." See, e.g., In re Gladys R., 464 P.2d 127, 132-33 (Cal. Ct. App. 1970) (articulating standard of proof for California version of infancy defense as "clear proof"); In re William A., 548 A.2d 130, 131 (Md.

distinct but interrelated theories, which this Note has termed the Rehabilitation Theory, the Procedural Policing Theory, and the Demarcation Theory.[8] The Rehabilitation Theory dismisses the infancy defense as irrelevant in a civil and rehabilitative legal forum.[9] The Procedural Policing Theory asserts that procedural safeguards for juveniles, mandated since the late 1960s by the United States Supreme Court, have made capacity findings an unnecessary additional protection.[10] The Demarcation Theory claims that while a child's state of mind at the time of the offense is critical to a finding of guilt, a child's capacity to attach meaning and consequence to that offense is not.[11]

This Note examines each of these doctrinal justifications for rejecting the infancy defense and critiques them as sharing a crucial flaw. Each theory permits the factfinder to infer that young children are capable of formulating a criminal intent and to use that inference, explicitly or implicitly, as a basis for finding these children delinquent. This assumption about children's criminal capacity is unsupported by the bulk of empirical research concerning the mental capabilities of preadolescents.[12] Moreover, foreclosing an inquiry into capacity may remove from consideration evidence relevant to the mens rea finding, thereby impermissibly diminishing the state's burden[13] of proving this element of the offense beyond a reasonable doubt.[14]

1988) (articulating state's burden as showing that "the surrounding circumstances demonstrate . . . beyond a reasonable doubt, that the individual knew what he was doing and that it was wrong"); *C.P.*, 514 A.2d at 854 (articulating standard of proof for New Jersey version of infancy defense as preponderance of evidence); State v. Q.D., 685 P.2d 557, 559 (Wash. 1984) (articulating standard of proof for Washington version of infancy defense as "clear and convincing").

[8] These labels have been invented by the author as a convenient shorthand for referring to three theories advanced by state courts to justify their rejection of the infancy defense in delinquency proceedings. For a detailed explication of the theoretical premises underlying the three theories, see infra Part II.B.

[9] See, e.g., *Jennings*, 384 So. 2d at 105-06 (holding that capacity findings are not relevant in juvenile court system "whose aim is rehabilitative rather than retributive").

[10] See, e.g., *Robert M.*, 441 N.Y.S.2d at 863-64 (finding that procedural safeguard of proof beyond reasonable doubt in delinquency proceedings is sufficiently probative of criminal capacity and renders infancy defense superfluous).

[11] See, e.g., *G.T.*, 597 A.2d at 639-43 (differentiating capacity from mens rea finding and holding former "irrelevant in determinations of delinquency").

[12] See infra discussion Part II.B.

[13] See In re Winship, 397 U.S. 358 (1970) (holding that prosecution must prove material elements of offense beyond reasonable doubt as constitutional matter in both juvenile delinquency proceedings and adult criminal court proceedings).

[14] See, e.g., Gammons v. Berlat, 696 P.2d 700, 704 (Ariz. 1985) (Feldman, J., concurring in part and dissenting in part) ("To try, convict, and punish [a juvenile charged with a serious crime] absent proof of his capacity to know and understand the wrongfulness of that conduct, is to invoke and apply the criminal aspects of the juvenile justice system without due process of law.").

The infancy defense, by providing a legal standard consistent with empirical data addressing the limited capabilities of preadolescent children, bases a finding of criminal intent upon probative evidence rather than the unsupportable assumption that criminal capacity inheres in children under twelve years of age. Only by retaining the distinctions between the mental capabilities of preteenage children on the one hand, and adolescents, or fully mature adults on the other, can juvenile courts ensure that the sanctions imposed are consistent with fundamental notions of fairness and due process.[15]

The importance of the infancy defense in protecting juvenile rights has been underscored in recent years by a growing trend within the juvenile justice system: the prosecution and incarceration of preadolescent children accused of committing serious violent offenses.[16] Statistics indicate that violent crimes committed by preadolescent children are relatively rare occurrences; however, these cases often become sensationalized[17] and receive a great deal of polit-

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15 An excellent example of the employment of this distinction appears in a New Jersey case, State ex rel. C.P., 514 A.2d 850 (N.J. 1986), which upheld the decision of a New Jersey Family Court judge dismissing charges of aggravated sexual assault against a six-year-old and a nine-year-old. The trial judge based his decision, in part, on expert psychiatric testimony indicating that the two boys lacked the mental capacity necessary to formulate the level of intent required to commit the crime. See id. at 854.

16 Recent cases brought in Illinois, Connecticut, and New York are instructive, but not exhaustive, examples of this phenomenon. See In re Tyvonne, 558 A.2d 661, 661-63 (Conn. 1989) (upholding delinquency finding for eight-year-old found delinquent in shooting of schoolmate); In re Dow, 393 N.E.2d 1346 (Ill. App. Ct. 1979) (affirming aggravated assault convictions of nine and 11-year-old boys found to have beaten and sodomized another boy); In re Robert M., 441 N.Y.S.2d 860, 863-64 (Fam. Ct. 1981) (upholding robbery conviction of nine-year-old in juvenile court); Susan Kuczka & Flynn McRoberts, 5-Year-Old Was Killed over Candy, Chi. Trib., Oct. 15, 1994, § 1, at 1; Gary Marx & James Hill, Kid Killers Ordered to Prison, Chi. Trib., Jan. 30, 1996, § 1, at 1 (reporting that two boys, who were 10 and 11 years old when they were found to have caused death of five-year-old Eric Morse by dropping him from fourteenth-floor window of Chicago housing project, were sentenced to state youth prison two years later).

17 Between 1996 and 1998, two cases captured the attention of the national media and generated heated public debate over the current state of the juvenile justice system.

In August 1998, two Chicago boys, aged seven and eight, were charged with sexually molesting and asphyxiating 11-year-old Ryan Harris. The decision to prosecute was based on incriminating statements obtained from the boys after several hours of police questioning outside of the presence of their parents. See Pam Belluck, Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11, N.Y. Times, Aug. 11, 1998, at A1; Maurice Possley, How Cops Got Boys to Talk, Chi. Trib., Aug. 30, 1998, § 1, at 1. Newspaper accounts described the suspects clutching bags of Skittles, smiling at their parents, drawing hearts and flowers on an attorney's legal pad, and crying while prosecutors set forth the case against them. See Maurice Possley et al., Police Say Suspects Not Too Small to Kill, Chi. Trib., Aug. 11, 1998, § 1, at 1; Lindsey Tanner, Boys, 7 and 8, To Face Murder Trial, Associated Press, Aug. 11, 1998, available in 1998 WL 6706708. On September 3, results came back from tests performed at the state police crime laboratory indicating the presence of seminal fluid on the victim's underwear. After consulting with medical experts

ical attention in response to a loud public outcry for more punitive responses to juvenile crime.[18] Indeed, such cases signal a shifting focus within juvenile court, which once viewed children "not as responsible moral agents subject to the condemnation of the community but as wards in need of care."[19] The current emphasis on affixing blame and allocating punishment reflects a reconceptualization of young children as miniature adults—rational beings with fully ripened criminal sensibilities that merit "mature" punishment.[20]

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who indicated that the boys were too young to produce semen, the prosecutors announced their decision to withdraw the murder charges. See Pam Belluck, Murder Charges Dropped Against 2 Boys in Chicago, N.Y. Times, Sept. 5, 1998, at A1.

On May 31, 1996, 11-year-old Lacresha Murray became the youngest person charged with capital murder in recent Texas history when district attorney Ronnie Earle charged that she killed a toddler in the daycare service operated by Murray's grandparents. The victim, two-and-a-half-year-old Jayla Benton, had been beaten so severely that her liver ruptured and she died of internal bleeding. See Bob Banta, Girl, 11, Arrested in Toddler's Death, Austin-American Statesman, May 31, 1996, at A1. At trial, prosecutors relied upon incriminating statements Murray made to police investigators after she had been in custody for four days and questioned without an attorney. Murray's lawyer called no witnesses. See Bob Herbert, A Child's 'Confession,' N.Y. Times, Nov. 15, 1998, § 4 (Week in Review), at 15; 60 Minutes: Juvenile Injustice?: 11-Year-Old Girl Was the Youngest Person Ever Charged with Capital Murder in Texas but Many People, Including Amnesty International, Have Doubts About Her Guilt (CBS television broadcast, Jan. 17, 1999) [hereinafter 60 Minutes: Juvenile Injustice?], available in Lexis, News library, SCRIPT file. On August 8, Murray was convicted of intentional injury to a child and criminally negligent homicide and sentenced to 20 years in prison. The judge, concerned with the fairness of the proceedings, ordered a second trial. See Juan R. Palomo, Judge Dietz Doesn't Dodge Controversy, Austin-American Statesman, Oct. 4, 1996, at B1. The second trial commenced in February 1997. A forensic expert for the defense testified that the victim was "a chronically abused and malnourished child" who probably suffered fatal injury prior to arrival at daycare. The prosecution reintroduced Murray's confession and offered a new theory, discredited by their own medical expert after the trial, that an imprint found on the toddler's chest came from Murray stomping on her while wearing tennis shoes. On February 18, Murray was again convicted of intentional injury to a child and sentenced to 25 years in prison. See Dave Harmon, Jury Finds Murray Guilty in 2nd Trial, Austin-American Statesman, Feb. 18, 1997, at A1; Bob Herbert, Without Evidence, N.Y. Times, Nov. 22, 1998, § 4 (Week in Review), at 17.

[18] See supra note 2.

[19] Ellen Ryerson, The Best-Laid Plans: America's Juvenile Court Experiment 3 (1978).

[20] See Martin L. Forst & Martha-Elin Blomquist, Cracking Down on Juveniles: The Changing Ideology of Youth Corrections, 5 Notre Dame J.L. Ethics & Pub. Pol'y 323, 361-71 (1991) (tracing growing popularity of "get-tough" approach to juvenile crime, touted as promoting "greater fairness, equality, and public protection by treating youthful offenders like adult offenders"); Mark H. Moore & Stewart Wakeling, Juvenile Justice: Shoring Up the Foundations, in Crime and Justice: A Review of Research 253, 263 (Michael Tonry ed., 1997) (analyzing increasingly punitive orientation of juvenile court as "society . . . saying that it sees in many juvenile offenders the same kind of moral culpability, and the same kind of social interest in exercising effective control over the offenders, as apply to adult offenders").

Today, a violent child may be characterized as a "superpredator":[21] a "radically impulsive, brutally remorseless" individual driven to commit acts of ruthless violence with full awareness of and indifference to the wrongfulness and consequences of such behavior.[22] While the superpredator moniker typically is used to describe violent teenage delinquents,[23] more recently, the term has been applied to preadolescent offenders.[24] The superpredator concept, which identifies acts of juvenile violence as stemming from a cold-blooded, conscienceless desire to brutalize other people, plays a dominant role in the current public discourse and formulation of policy concerning juvenile crime.[25] Real-life incidents of savage acts committed by adoles-

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21 Princeton sociologist John J. DiIulio, Jr. is widely thought to have coined the term "superpredator," and he has written extensively about its importance in understanding the source of modern day youth violence. See John J. DiIulio, Jr., The Coming of the Super-Predators, Wkly. Standard, Nov. 27, 1995, at 23.

22 See William J. Bennett et al., Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs 27 (1996). The *Body Count* authors provide this profile:

> [Superpredators are] radically impulsive, brutally remorseless youngsters . . . 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. They perceive hardly any relationship between doing right (or wrong) now and being rewarded (or punished) for it later. To these mean-street youngsters, the words "right" and "wrong" have no fixed moral meaning.

Id.

23 See id. at 26-30 (describing rising severity of youth violence). For an example of a typical exchange in the superpredator debate, compare Franklin E. Zimring, The Youth Violence Epidemic: Myth or Reality?, 33 Wake Forest L. Rev. 727, 728 (1998) (challenging predictions of "coming storm" of adolescent superpredators as distortion of statistics and "fundamentally unscientific" guesswork), with Judy Briscoe, Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth, 61 Fed. Probation 3, 3 (1997) (challenging those who deny "th[e] 'superpredator' reality" by noting that 150,000 juveniles under age of 17 are arrested annually for committing violent crimes).

24 See, e.g., Michelle India Baird & Mina B. Samuels, Justice for Youth: The Betrayal of Childhood in the United States, 5 J.L. & Pol'y 177, 177-79 (1996) (citing news accounts of 12-year-old Chicago boy who became nation's youngest inmate in high security prison following his sentencing by juvenile court judge for killing another boy and news accounts of charging of six-year-old with severe beating of infant in California as examples of "the arrival of a generation of young 'superpredators'" in opinions of journalists and politicians); Editorial, The Right Result for the Wrong Reason, Chi. Trib., Sept. 1, 1999, § 1, at 20 (discussing dubious validity of "[s]cholars' projections that a generation of preadolescent 'superpredators' was poised to wreak havoc on society" and questioning politicians' self-interested "embrace[] [of] the myth to boost their anti-crime image"); Gersh Kuntzman et al., 12-yr.-old Slashers Almost Kill Queens Kid, N.Y. Post, Aug. 14, 1999, at A4 (reporting that two 12-year-old boys slashed throat of eight-year-old with boxcutter knife requiring 75 stitches to close wound and quoting police official as saying "[t]hey're bad kids . . . they're like baby predators").

25 Although the number of violent crimes committed by preadolescents is small, the fear and outrage generated by these crimes, as well as the media attention devoted to them, has been shown to impact dramatically on the formulation of youth policy. See, e.g.,

cent and preadolescent children are used to craft the plotlines of popular talkshows,[26] prime-time news programs,[27] and television dramas.[28] These images seep back into the national consciousness to influence public opinion in "a feedback loop of reciprocal mythmaking,"[29] which enhances the perceived threat of youth vio-

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Kiernan, supra note 2, at 1 (reporting that two sensational Chicago cases in past five years, in which preadolescents were charged with murder, prompted construction of nation's first prison for preteen offenders in Illinois); Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 688-89 (1998) (noting that in past three years at least twelve states have amended laws to eradicate minimum age at which children can be transferred to adult court for prosecution, which "theoretically permit[s] seven or eight-year-olds to be waived to adult court"); Briscoe, supra note 23, at 8-10 (discussing 1995 amendments passed in Texas in response to "an increasing number of violent offenses being committed by youth under age 15" to allow children as young as ten to be sentenced to up to forty years in prison). See generally Real War on Crime, supra note 2, at 71-72 (observing that newspapers and television tend to present "a distorted view" of violence in society by "focusing most of their attention on sensational crimes rather than the vastly more numerous nonviolent offenses" and citing as example recent front page newspaper story that misrepresented statistics in inflammatory article about juvenile crime wave); Zimring, supra note 2, at 177-95 (claiming that youth violence has gained "embarrassing prominence" disproportionate to its occurrence such that "criminality has become the primary characteristic of interest to the federal legislature in planning for policy toward young persons in the next fifteen years"); discussion infra Part II.A.

26 See, e.g., The Geraldo Rivera Show: What Do You Do with Kids Who Kill? (NBC television broadcast, June 1, 1998), available in Lexis, News Library, SCRIPT file. Rivera gave the following introduction to this episode of his talkshow: "What do you do with a kid who kills? Do you put an 11-year-old on death row? This woman's 14-year-old could be sentenced next week to 45 years behind bars for the murder of . . . a girl shot down as she cradled her infant son in her arms. Do you treat a kid who kills like you treat an adult? Here's why we care."

27 See, e.g., 60 Minutes: On Trial for Murder (CBS television broadcast, Nov. 7, 1999), available in Lexis, News library, SCRIPT file (featuring investigative segment on Nathaniel Abraham, "the youngest person in the country ever to be tried as an adult for first-degree murder," who allegedly shot and killed teenager at age of 11); 60 Minutes: Juvenile Injustice?, supra note 17 (featuring investigative segment on Lacresha Murray case); NBC Nightly News: Children Are More Prone to Violence Because of Video Games and Lack of Supervision (NBC television broadcast, Mar. 27, 1998), available in 1998 WL 5279534 (discussing motivations of 11, 13, 15, and 16-year-old boys accused of shooting students and teachers in Mississippi, Kentucky, and Arkansas).

28 See ER (NBC television broadcast, Dec. 10, 1998) (depicting eight-year-old boy who killed his playmate over pair of boots); Chicago Hope (CBS television broadcast, Dec. 9, 1998) (depicting eight-year-old boy who shot his friend); Law & Order (NBC television broadcast, Sept. 29, 1999) (depicting 10-year-old girl who used rocks to bludgeon small boy to death).

29 Barbara Fedders et al., The Defense Attorney's Perspective on Youth Violence (forthcoming 2000) (manuscript at 25, on file with the *New York University Law Review*) (observing that "stock scripts" inherited from popular culture influence societal assumptions about young offenders). Following the sentencing of the two preadolescents convicted of killing a five-year-old, a recent Chicago Tribune editorial adopted the superpredator concept and made the following observation:

> Increasingly . . . the theoretical basis for our different ways of handling adult criminals and juvenile delinquents is being challenged by the harrowing reality of young 'superpredators' like Eric's killers. The violence of their

lence.[30] This phenomenon, in turn, spurs the passage of stricter laws to facilitate the prosecution and harsh punishment of juvenile offenders, including preadolescent children.[31] When prosecutors respond to public outrage and political pressure by charging preadolescents with serious crimes, these children can face years, sometimes decades, in prison.[32] The harsh conditions and lack of services characteristic of youth prisons will not provide preadolescent children, who are at a formative stage in their moral and cognitive development, with the

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> crimes and the apparent hardness of their hearts mock our notions of 'treatment' and 'rehabilitation.'
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> Increasingly, we wonder not whether they can be saved, but whether we can save ourselves from them.

Editorial, Grim Reality Check on Youth Crime, Chi. Trib., Jan. 31, 1996, § 1, at 14.

30 The notion of superpredator-produced violence as an escalating threat to public safety played a role in the 1996 presidential campaign. Republican candidate Robert J. Dole attacked Democratic incumbent William J. Clinton's juvenile crime policies as too lenient and called for proposals to prosecute juveniles as adults, while promising to help states build more juvenile prisons. See Blaine Harden, Criminal Justice Failing, Dole Says Eying Clinton, Wash. Post, May 29, 1996, at A8.

31 The trend among state legislatures to authorize more punitive sanctions, and the willingness of many courts to implement them, is well documented. See Forst & Blomquist, supra note 20, at 335-36 (asserting that "a diverse set of scholars, lawmakers, and practitioners" support transposing criminal court policies such as determinate sentencing onto juvenile court); Paul Holland & Wallace J. Mlyniec, Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise, 68 Temp. L. Rev. 1791, 1811-13 (1995) (noting that legislatures have replaced rehabilitative focus of juvenile court and "explicitly endorsed punishment [and] accountability"); Shepherd, supra note 6, at 45-46 (noting that many juveniles can expect longer deprivations of liberty pursuant to sentencing under "serious offender statutes"); see also supra notes 24-25 and accompanying text.

32 These prosecutions are facilitated by the passage of new legislation in some states specifically authorizing such charging practices by lowering the minimum age at which a child may be tried as an adult or allowing juvenile courts to impose terms of incarceration that continue after the child has turned 18. These sentences require the transfer of the offender from juvenile to adult facilities, where the remainder of the sentence will be served. See 2 Myron Moskovitz & Jane Grill, Criminal Law Defenses § 175(a) (Supp. 1999) (listing states that have amended transfer statutes to lower age at which juveniles may be waived into adult court); Elizabeth S. Scott & Thomas Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. Crim. L. & Criminology 137, 151 (1997) (observing "the seemingly inexorable quality of the trend toward imposing full criminal responsibility on juvenile defendants"); see also Banta, supra note 17, at A1 (reporting that maximum sentence for murder in Texas juvenile court is 40 years and that Texas Youth Commission is empowered to send juveniles to adult prison after they are 16 years old); David Firestone, Arkansas Tempers a Law on Violence by Children, N.Y. Times, Apr. 11, 1999, at A20 (reporting that "over the last seven years, almost every state has made it easier for juveniles to be tried as adults" with result that 11 states mandate adult trials for children 13 and older who are charged with murder and 17 states have no minimum age at which children can be tried for murder as adults, or have age requirement lower than 13).

educational and therapeutic services necessary to lead law-abiding and productive lives upon release.[33]

I

COMMON LAW ORIGINS OF THE INFANCY DEFENSE AND ITS TREATMENT BY THE JUVENILE COURTS

A. The Origins of the Infancy Defense

Sir Matthew Hale, the Lord Chief Justice of the King's Bench in England from 1671 to 1676, conceived of the infancy defense as a cornerstone in the development of child-protective laws in the context of criminal proceedings.[34] In his treatise on the defense, Hale defined infants as persons under the age of eighteen and subdivided them into four categories, which correlated degree of legal responsibility with age level.[35] 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.[36]

Under the age-based system of classification, a child under seven was termed *infantia*,[37] by definition *doli incapax*[38] and barred from prosecution for a criminal offense. Between the ages of seven and eleven, a child occupied a developmental netherworld. He was not yet designated *aetas pubertati proxima*,[39] the age of criminal responsibility, but he was no longer an infant. A child within this age bracket

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[33] See Real War on Crime, supra note 2, at 134-45 (discussing failure of many juvenile prisons to provide violent children with education and support services). The author goes on to state that:

> The majority of juvenile prisons and 'training schools' in the United States are large facilities built to hold several hundred young people. About two-thirds of these large facilities house more people than they were designed to accommodate. It is extremely difficult if not impossible to rehabilitate youth in such large and overcrowded institutions.

Id. at 138; see also Forst & Blomquist, supra note 20, at 362 ("Rather than 'correcting' personality defects or improper socialization, prolonged incarceration [of juveniles] . . . can contribute to further solidification of delinquent values and an antisocial lifestyle, either in the behavior exhibited inside the institution or in the community."); Moore & Wakeling, supra note 20, at 263 (observing that juvenile court tends to treat young offenders like adult criminals by placing them in institutions that are "long on mechanisms of accountability and control and short on the educational and counseling services that could build dispositions and capabilities for citizenship").

[34] See 1 Hale, supra note 1, at 16.

[35] While civil law is normally understood to pertain to private rights of action between individuals, Hale understood it as encompassing fundamental legal precepts bearing upon matters as diverse as matrimonial contracts and criminal punishments. See id. at 16-18.

[36] See Black's Law Dictionary 570 (4th ed. 1968).

[37] 1 Hale, supra note 1, at 19.

[38] Id. at 20 (explaining that children under seven "cannot be guilty").

[39] Literally "the state approaching maturity." See id. at 18-19.

was still subject to the legal presumption of incapacity, but that presumption was now rebuttable.[40] Children twelve to fourteen were likewise presumptively *doli incapax*, but they were attributed greater physical and emotional maturity that rendered the presumption much weaker.[41] At twelve to fourteen years of age, a child was considered sufficiently mature to formulate a criminal intent and incur criminal liability for his actions.[42]

Hale explained the evidentiary showing required to prove the existence of criminal capacity within the seven to eleven-year-old age bracket as a two-fold requirement. The state had to prove that: (1) the child "had the discretion to judge between good and evil at the time of the offense committed;"[43] and (2) there existed "very strong and pregnant evidence . . . to convict one of that age, *and to make it appear he understood what he did.*"[44] The infancy defense, by defining capacity as the presence of both moral discrimination *and* comprehension of consequences, mandated a standard of proof that eclipsed a basic right-wrong test to reach the more complicated question of whether the accused could appreciate the nature and consequences of his actions.

Sir William Blackstone, who served as a judge on the English Court of Common Pleas nearly a century later, reduced Hale's concept of infancy to a single criterion, which he termed "a defect of understanding."[45] Underscoring the centrality of the accused's moral and intellectual development to any determination of culpability, Blackstone elaborated: "[T]he 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.*"[46]

Both Hale and Blackstone defined an infant's capacity for criminality, in part, as an ability to "discern between good and evil."[47] Today, some judges bypass the extensive gloss provided by common law jurists and distill a child's capacity for criminality into a blunt question as to whether the child understands the difference between right and

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[40] See id. at 18 (noting children "before ten years and a half . . . may be *doli capaces*").

[41] See id. at 18-19 (describing lesser protection accorded those designated *aetas pubertatis proxima*, but noting that *incapax doli* protection still applied). Hale emphasized that even if the prosecution proved the existence of the requisite intent necessary to try a 7 to 14-year-old as an adult, the court could temper punishment or grant a reprieve before or after judgment for a capital offense. See id. at 27.

[42] See id. at 18.

[43] Id. at 27.

[44] Id. (emphasis added).

[45] 4 Serjeant Stephens, New Commentaries on the Laws of England 18 (Edward Jenks ed., 14th ed. 1903).

[46] 4 id. at 20 (emphasis added).

[47] 4 id.; 1 Hale, supra note 1, at 25.

wrong.[48] This oversimplified and insufficiently probative test is not the searching legal inquiry envisioned by early commentators on the infancy defense.[49]

B. The Infancy Defense and the Juvenile Court

The juvenile court is a separate legal tribunal exclusively for minor children that has existed in every state in the United States since the early twentieth century.[50] Paternalistic in orientation, it was created to intervene in a child's life when parents, schools, and religious institutions had failed, by correcting wayward tendencies and instilling proper moral values without imposing the stigmatizing punishment of a criminal sanction.[51] But the rehabilitative ideal that inspired the creation of the juvenile court system was often at odds with "the vagaries of its process and harsh realities of its institutions."[52] By the 1960s, many of those who worked in the juvenile justice system be-

[48] See, e.g., Gammons v. Berlat, 696 P.2d 700, 701 (Ariz. 1985) (defining criminal capacity as ability to grasp concept of "wrongfulness"); In re Tyvonne, 558 A.2d 661, 664 (Conn. 1989) (defining infancy defense as withholding criminal sanction from children not "capable of differentiating right from wrong" and rejecting its application to eight-year-old boy).

[49] See 1 Hale, supra note 1, at 27 (stating that law requires "much more" evidence of criminal capacity to convict children under the age of twelve: "The circumstances must be inquired of by the jury, and the infant is not to be convict [sic] upon his confession [alone]"); 4 Stephens, supra note 45, at 20-21 (noting that, in past, children as young as ten had been found *doli capax*, but "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"). A number of states, including Arizona, Oregon, Minnesota, and Washington, have codified the common law defense of infancy by statute to apply to children prosecuted in adult criminal court proceedings. See *Tyvonne*, 558 A.2d at 664 (listing states that codified infancy defense). Most states, however, have declined to apply the infancy defense, even in its statutory form, to delinquency proceedings in juvenile court. Only California, Washington, Maryland, and New Jersey currently permit the infancy defense in juvenile court. See supra note 7.

[50] See Ryerson, supra note 19, at 3. The juvenile justice system began in the United States in 1899 when the first juvenile court was established in Chicago; by 1919, almost every state had some form of a juvenile court; as of 1970, there were 2662 juvenile courts spread throughout all fifty states. See Hon. David Mitchell & Sara Kropf, Youth Violence: Response of the Judiciary (forthcoming 2000) (manuscript at 9, on file with the *New York University Law Review*). While the goal of the criminal justice system was to exact retribution for the socially deviant, harmful acts of adult offenders using harsh and stigmatizing punishment, the juvenile justice system sought to rehabilitate child offenders. In justifying this differential treatment, the founders of the juvenile court system argued that children were fundamentally different from adults because they were still in a formative stage in their development and thus more amenable to treatment and rehabilitation. The juvenile court was viewed as a social agency, acting in parens patriae—with the judge (representing the state) acting as a surrogate parent for juvenile offenders in fashioning a disposition that would serve their best interests. See Baird & Samuels, supra note 24, at 189-90 (discussing interplay between juvenile courts and "parens patriae philosophy").

[51] See Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 109-13 (1909).

[52] Walkover, supra note 1, at 517-23.

lieved that the juvenile court failed to live up to the ideal that inspired its creation.[53]

The juvenile court was the product of social reformers in the late nineteenth century, who argued that it was both unjust and counterproductive to expose impressionable and inherently redeemable youngsters to the harshness of the adult criminal justice system.[54] The creation of a separate legal system to adjudicate offenses committed by juveniles reflected a growing perception that children, as an offender class, lacked the moral maturity and cognitive reasoning ability that comprised the criminal mindset of adults.[55] Reformers hoped that the same openness to outside influences that caused children to engage in deviant behavior would enable them to embrace more constructive role models.[56]

Juvenile court reformers strove to remove the taint of deviance that naturally attached itself to defendants in standard criminal proceedings by "expunging from its language the vocabulary of criminal law."[57] Proceedings were informal and the sanctions civil rather than criminal, with the presiding judge acting as benevolent caretaker rather than disciplinarian.[58] In the words of one journalist, "antiseptic nomenclature"[59] prevailed: Petitions replaced formal charges as the means of bringing those accused before the court, children received "placements" instead of punishments following adjudication, offenders were known as "delinquents" rather than convicts, and their alleged misconduct was termed an "offense," not a crime.[60] The

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[53] See Ryerson, supra note 19, at 137-62 (describing how many lost faith in paternalistic, rehabilitative theory of juvenile court when it failed substantially to reduce rates of delinquency); Forst & Blomquist, supra note 20, at 327-28 ("Although there have been sporadic criticisms of the juvenile justice system since its inception at the turn of the century, extensive and persistent complaints began to surface starting in the 1960s.").

[54] See Ryerson, supra note 19, at 16-34 (describing evolving ideology of juvenile court advocates).

[55] See, e.g., Scott & Grisso, supra note 32, at 141-42 (observing that early juvenile court reformers viewed child offenders as "young and malleable" and "ideally suited to a regime grounded in rehabilitation").

[56] See id. at 144 & n.30 (discussing malleability of young children).

[57] See Ryerson, supra note 19, at 57.

[58] See id. at 325 (quoting leading juvenile court advocate Judge Julian Mack's description of juvenile court judges' obligation "not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen").

[59] Fox Butterfield, With Juvenile Courts in Chaos, Some Propose Scrapping Them, N.Y. Times, July 21, 1997, at A1.

[60] See Ryerson, supra note 19, at 137 ("This new system of juvenile justice would eschew fixed and specific definitions of offenses for general findings of delinquency."). Delinquency was a vague term; reformers argued that a sweeping definition of delinquent conduct carried few ill effects, since the label ascribed no stigma. See Walkover, supra note 1, at 516-17 (explaining that juvenile court system was designed to offer help, not allocate

amorphous definitions of offender and offense were calculated to give courts broad discretion to tailor individualized treatment programs to meet the special needs of each child. Ideally, such treatment rarely contemplated incarceration.[61]

On the surface, it seemed that the ethos of the juvenile court was consistent with the infancy defense conception of children's limited capacity for criminal wrongdoing. The rehabilitative goals of the juvenile court, and the language it adopted to express them, strongly implied that young offenders lacked the moral and intellectual development necessary to formulate criminal intent.[62] While children could commit objectively violent, horrific crimes, they could not be legally classified as *criminal* offenders. The understanding that wrongful acts inevitably result in severe, often irreversible consequences was automatically attributed to every competent adult, but presumed not to exist in children.[63]

But while juvenile court reformers echoed the language and theory of Hale and Blackstone in articulating the limited capabilities of young children, they did not apply the infancy defense to the juvenile court forum. Although disillusion with the juvenile court set in quickly,[64] the paternalism that was its animating ideal retained rhetorical and legal force and seemed to render the prophylactic shield of the infancy defense superfluous.[65] Delving into questions of criminal capacity arguably exceeded the mandate of the court and appeared irreconcilable with the presumptions underlying its existence.[66]

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blame). A standard definition of delinquent child reads: "An infant of not more than specified age who has violated criminal laws or engages in disobedient, indecent or immoral conduct, and is in need of treatment, rehabilitation or supervision." Black's Law Dictionary 428 (6th ed. 1990). Few children could hope to escape such an all-encompassing label. See Ryerson, supra note 19, at 44-45 (listing delinquent offenses as ranging from very serious—deadly, violent acts—to what would now be classified as bad manners or minor displays of rebellion: sassing, spitting, smoking, or using foul language).

61 See Ryerson, supra note 19, at 33, 87 (describing goal of juvenile justice system as "nonpunitive, preferably noninstitutional" and normally including regular contact with kindly probation officers who made scheduled check-up visits to the home in the role of friend or benefactor).

62 See id. at 72 (suggesting that early juvenile court was viewed by some as "an expansion of the defense of infancy" incorporating defense presumption that children cannot formulate criminal intent).

63 See id.

64 See id. at 137-62 (detailing how several decades after its creation, reformers became dissatisfied with ability of juvenile court to rehabilitate offenders).

65 See discussion infra Parts I.C, II.B, III.A.

66 See State v. Q.D., 685 P.2d 557, 560 (Wash. 1984) ("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,

Several decades after the creation of the juvenile court, many legal practitioners, social workers, and child advocates raised concerns that the benevolent ethos of the juvenile justice system was "more rhetoric than reality."[67] The broad discretion granted to juvenile court judges to prescribe "treatment" and the lack of constitutional rights granted to delinquents under their charge often resulted in widespread abuses for which the legal system provided no remedy. Without rights to notice, counsel, or any of the basic protections provided to an adult criminal defendant, a delinquent child often was powerless to contest whatever judgment the court saw fit to pronounce.[68] In fact, juvenile court-mandated "placements" sometimes resulted in terms of imprisonment that far outlasted the harshest sentence the child could have received upon conviction in criminal court.[69]

C. *The* Gault *Revolution: Juvenile Court Reform After 1967*

1. *Constitutionalizing Juvenile Rights*

In the late 1960s and early 1970s, those advocating broader procedural protections for children found a receptive audience in the United States Supreme Court.

In 1967, the Supreme Court declared, in the landmark case of *In re Gault,*[70] that minor children possessed constitutional rights to notice, counsel, confrontation of witnesses, cross examination, and the right against self-incrimination.[71] Writing for the majority, Justice Fortas delivered a stinging critique of the juvenile court system: "The

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supra note 1, 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").

[67] Fedders et al., supra note 29; see also Susan K. Knipps, What Is a "Fair" Response to Juvenile Crime?, 20 Fordham Urb. L.J. 455, 457 (1993) (observing that paternalistic vision of juvenile court "did not live up to its rhetoric").

[68] See In re Gault, 387 U.S. 1, 4-11 (1967) (recounting trial of 15-year-old petitioner, Gerald Gault, who was adjudicated delinquent for making lewd phone calls and sentenced to six years at State Industrial School).

[69] See id. at 29 (noting that Gault, had he been over 18 at time of offense, would have received maximum punishment of $50 fine and two months in jail; as 15-year-old under juvenile court's jurisdiction, Gault was "committed to custody for a maximum of six years"). The stigmatizing and punitive effect of many juvenile court delinquency proceedings called into question the juvenile court's policy of dispensing with age-based classifications among the minor children amenable to its jurisdiction. While treating all delinquents equally—whether they were eight or 18—was consistent with the court's original mandate to save *all* children from the criminal justice system, this egalitarian policy resulted in harsh consequences when the court's protective philosophy turned punitive. See Shepherd, supra note 6, at 46 (underscoring that "relatively few cases have addressed the question of capacity based on either age or mental ability in juvenile court cases").

[70] 387 U.S. 1 (1967).

[71] See id. at 36, 41, 55, 56.

constitutional and theoretical basis for this peculiar system is—to say the least—debatable. . . . Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[72] The Court dismissed the careful labeling system of the juvenile court as mere euphemism and cited the absence of strict procedural safeguards as creating "a kangaroo court."[73]

In 1970, the Court ruled in *In re Winship*[74] that a finding of delinquency, like a finding of culpability for a criminal law violation by an adult, required an evidentiary determination of proof beyond a reasonable doubt.[75] The dissenters in *Winship*, however, expressed misgivings about the majority's expansion of juvenile rights.[76] The core concern was that, by mandating many of the same procedural due process protections for juvenile delinquents that automatically attached to adult criminal defendants, the Court would eviscerate the philosophy that justified maintaining two separate adjudicatory systems.[77]

The following year, the Court retreated from the rationale of *Gault* and *Winship* in *McKeiver v. Pennsylvania*,[78] and held that juveniles charged in a delinquency proceeding do not have a constitutional right to a trial by jury.[79] While conceding that many judges failed to fulfill the "stalwart [and] protective"[80] role envisaged for them, the Court nonetheless refused to transform the juvenile court into "a fully adversary process [that would] put an effective end to

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72 Id. at 17-18.

73 The opinion noted that, regardless of whether an offender was classified as "delinquent" instead of "criminal," or his destination termed an "Industrial School" rather than "prison," the result was the same: stigma and harsh punishment. See id. at 23-24, 27, 28.

74 397 U.S. 358 (1970).

75 Id. at 368 (holding that constitutional safeguard of proof beyond reasonable doubt applies in juvenile delinquency proceedings).

76 Mindful that *Gault* and *Winship* presented an ominous critique of the juvenile court, Chief Justice Burger, writing in dissent, articulated these concerns:

> My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. . . . We can only hope the legislative response will not reflect our own by having these courts abolished.

Id. at 376 (Burger, C.J., dissenting).

77 Id. ("I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing.").

78 403 U.S. 528 (1971).

79 Id. at 545 ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

80 Id. at 544.

what has been the idealistic prospect of an intimate, informal protective proceeding."[81]

The *Gault*, *Winship*, and *McKeiver* decisions evince an attempt by the Court to protect the rights of children without sacrificing the institution designed, however imperfectly, to fit their special needs. The Court's jurisprudence mandated some fundamental constitutional protections and withheld others in the hope that a modified upgrade in the quality of courtroom procedure would encourage the exercise of compassionate justice, thereby reinvigorating the ideal that gave purpose and relevance to a separate, nonadversarial tribunal for juveniles.[82]

2. *Criminalizing Juvenile Behavior*

In the aftermath of *Gault*, the juvenile justice system moved farther away from the hallmarks—rehabilitation and individualized treatment—that comprised the historical justification for its separate identity. The mandated procedural reforms, modeled on the adversarial system that characterized adult criminal proceedings, had a profound impact on the substantive laws of the juvenile court.[83]

Faced with rising crime rates in the early 1980s[84] and the perception that rehabilitation-based treatment was essentially unworkable, the juvenile justice system began treating delinquents less as misguided but redeemable individuals and more as a faceless army of pint-sized criminals.[85] Policymakers interpreted the systemic critique

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[81] Id. at 545.

[82] See id. at 547 (stating reluctance, "despite disappointments of grave dimensions" to jettison juvenile court system and deny states opportunity "to experiment further and to seek in new and different ways the elusive answers to the problems of the young").

[83] See Scott & Grisso, supra note 32, at 145 (noting, in wake of *Gault*, that "the procedures and purposes of the juvenile court have been radically reformed" to "reflect . . . a growing belief that juveniles are more like adults than the traditional model recognized, and that young offenders should be held accountable for their offenses").

[84] Few dispute that youth violence has increased sharply since the early 1980s, but the cause of that increase is subject to fierce debate. Several empirical studies show that, with the exception of crimes committed with handguns, juvenile crime rates have remained flat or have even decreased for 20 years. See Real War on Crime, supra note 2, at 131-33 (observing that statistics show flat juvenile crime rates when controlling for handguns); Fox Butterfield, Guns Blamed for Rise in Homicides by Youths in 80s, N.Y. Times, Dec. 10, 1998, at A29 (reporting expert's conclusion that "advent of crack cocaine, semiautomatic handguns and gangs sparked the surge in killings").

[85] See Barry C. Feld, The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 691-92 (1991) (noting that "legislative, judicial, and administrative responses to *Gault*" have caused "juvenile courts [to] converge procedurally and substantively with adult criminal courts"); Forst & Blomquist, supra note 20, at 373 ("The emerging legal framework for juvenile justice with its punitive policies toward youthful offenders exposes youths to the full liabilities of their criminal behavior by subjecting them to the processes and sanctions applicable to adults.").

that accompanied the procedural reforms as heralding a new kind of justice for children and shifted their analysis away from the delinquent's capacity for criminality to focus instead on the gravity of his offense.[86] The perception that the lenient laws of the juvenile court allowed children, literally, "to get away with murder" incited a legislative backlash that has gained increasing momentum over the past three decades.[87]

In the early 1990s, statistics indicated that the incidence of violent offenses by juveniles was continuing to rise.[88] Further emphasis by the media upon predictive statistics, which depicted a post-millennium world inhabited by a uniquely virulent and violence-prone youth,[89] contributed to the perception of a crisis precipitated by "an ever-worsening spiral of violence."[90] In response to this looming threat, legislators advocated a "get-tough" mentality that met with broad public

[86] See Scott & Grisso, supra note 32, at 148 (noting that modern-day emphasis of juvenile court "is on social control," which has resulted in meting out punishments to violent children that "approximate sanctions imposed on adults").

[87] See Forst & Blomquist, supra note 20, at 342-59 (tracing changes in philosophy of juvenile justice system in last 25 years and analyzing effect of increasingly punitive approach).

[88] The statistical rise in violent crime among juvenile offenders under 18 is well-documented and much commented upon. See Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Guide for Implementing the Comprehensive Strategy for Serious, Violent and Chronic Juvenile Offenders 1 (1995) (citing FBI Uniform Crime Reports (1994)); Bennett et al., supra note 22, at 30 (producing statistics indicating three-fold increase in number of gun homicides by juveniles since 1983); Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 Psychol. Pub. Pol'y & L. 3, 3 (1997) (citing doubling of murders by adolescents "of every age and race" over past 8 years).

[89] Franklin E. Zimring, Crying Wolf over Teen Demons, L.A. Times, Aug. 19, 1996, at B5 (criticizing Princeton public policy professor John J. DiIulio's misleading use of statistics on juvenile crime).

[90] William Ayers, A Kind and Just Parent: The Children of Juvenile Court 175 (1997). Between 1998 and 1999, for example, the rash of school shootings in small towns and rural areas across the country, from Oregon to Arkansas, received extensive coverage in the national media and prompted the publication of predictions by criminal justice experts about growing numbers of atrocities committed by young people in the future. See Timothy Egan, From Adolescent Angst to Shooting Up Schools, N.Y. Times, June 14, 1998, at A1 (reporting on multiple school shootings across United States over two-year period); Sam Howe Verhovek, 2 Are Suspects; Delay Caused by Explosives, N.Y. Times, Apr. 22, 1999, at A1 (reporting on April 20, 1999, school shooting in Littleton, Colorado, by two teenage outcasts that resulted in deaths of 14 students and one teacher); James Q. Wilson, A Gap in the Curriculum, N.Y. Times, Apr. 26, 1999, at A21 (asking, in wake of Littleton shootings, whether "we have created a new kind of adolescent culture, one that we may never be able to fix"); see also infra note 93 and accompanying text.

support.[91] The notion of separate treatment for violent juveniles connoted a leniency many no longer believed was deserved or effective.[92]

Reflecting the changing perceptions of juveniles, prominent sociologists, criminologists, and commentators began using the term "superpredator" in the mid-1990s to refer to violent juvenile offenders, a label evincing the belief that today's violent children are an altogether different breed of criminal.[93] So-called "desperados in diapers"[94] possessed of an unprecedented capacity for viciousness, children who commit violent crimes are viewed as morally vacant individuals who commit senseless acts of violence without mercy or remorse. The superpredator moniker marks a new era in the labeling of violent juveniles. The widespread use of the term by politicians,[95] scholars,[96] and the media[97] implies a validation of its concept and confers upon it a quasi-scientific legitimacy. Initially associated mainly with the oldest subset of teenage juveniles, superpredator ranks are now regarded by many as including children under twelve years old.[98]

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91 See Forst & Blomquist, supra note 20, at 342-50 (surveying state legislative enactments in multiple states to amend juvenile codes by authorizing determinate sentencing and emphasizing society's interest in holding offenders personally accountable for wrongful acts).

92 See supra notes 25, 30-32 and accompanying text.

93 The question of whether today's criminals are inherently more violent and less amenable to rehabilitation is the subject of heated debate. Compare Butterfield, supra note 84, at A29 (quoting authors of empirical studies explaining rise in youth crime as result of wider handgun availability and emphasizing that "kids' DNA has not changed"(internal quotation marks omitted)), with Bennett et al., supra note 22, at 26-27 (concluding that cultural disease of "moral poverty" breeds remorseless young criminals "far worse than yesteryear's").

94 Zimring, supra note 89, at 135.

95 See Harden, supra note 30, at A8 (quoting Republican Presidential candidate Robert J. Dole: "Some of today's newborns will become tomorrow's 14-year-old killers, superpredators, as the experts predict.").

96 See supra notes 21-24 and accompanying text.

97 See Gary Marx, Kid Killers Set to Begin Prison Life, Chi. Trib., Feb. 1, 1996, at 1 (observing that young violent offenders are "sometimes known as 'superpredators'").

98 In Chicago alone, the Ryan Harris case was only one of several high-profile murder cases involving preadolescent superpredators between 1994 and 1998. In a well-publicized 1994 incident that occurred in Chicago, two boys, aged 10 and 11, dangled and dropped five-year-old Eric Morse out of a 14-story apartment window when he refused to steal candy for them. See Kuczka & McRoberts, supra note 16, at 1; Marx & Hill, supra note 16, at 1 (reporting that Morse's killers were sentenced to state youth prison "under a new law aimed at cracking down on young criminals known as 'superpredators'"). In another 1994 Chicago incident, 11-year-old Robert "Yummy" Sandifer shot and killed a 14-year-old girl in what was believed to be a gang initiation rite. Sandifer was killed by two other boys several days later. See Julie Grace, There Are No Children Here, Time, Sept. 12, 1994, at 44 (reporting that Sandifer had been prosecuted for eight different felonies since 1993, and quoting neighborhood residents as saying "[t]hey should have hung [Sandifer] in the middle of the street" and "[h]e was the baddest of bad").

Over the past two decades, politicians at the state[99] and federal level[100] have responded to public concern about rising levels of juvenile violence by passing new laws authorizing harsh sanctions such as determinate sentencing in juvenile court. Most of the new statutes also expand the jurisdiction of criminal courts by providing broad waiver provisions that facilitate the transfer of violent juveniles for trial as adult offenders.[101] Moreover, many states have rewritten the "purpose" clauses of their juvenile codes, which once defined the goal of the juvenile justice system solely in terms of the best interests of the child.[102] Today, the purpose clauses of many state codes have been expanded to include the promotion of "public safety, punishment, and individualized accountability."[103]

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99 See Forst & Blomquist, supra note 20, at 340-50 (mentioning revisions to Utah waiver statute facilitating prosecution of youthful offenders in adult court and revisions to California and Washington sentencing laws to include mandatory minimums). A Texas statute authorizes a prosecutor, upon obtaining a finding of delinquency against a juvenile for numerous offenses—ranging from aggravated assault to sexual assault, aggravated robbery, and felony injury to a child—to seek to have the juvenile committed to the Texas Youth Commission with transfer to the Texas Department of Criminal Justice for a determinate period of up to 40 years. See Tex. Fam. Code Ann. § 54.04(d)(3) (West 1996 & Supp. 1999), discussed in Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System § 6.3, at 6-10 (2d ed. 1999). In 1997, 11-year-old Lacresha Murray was charged under this provision of the Texas code on charges of fatally injuring a toddler left in the care of her grandparents. She ultimately received a 25-year prison sentence. See Harmon, supra note 17, at A1.

100 See Fox Butterfield, Republicans Challenge Notion of Separate Jails for Juveniles, N.Y. Times, June 24, 1996, at A1 (quoting Senator Orrin G. Hatch admonishing policymakers "to quit coddling these violent kids like nothing is going on. Getting some of these do-gooder liberals to do what is right is real tough. We'd all like to rehabilitate these kids, but by gosh we are in a different age.").

101 See Shepherd, supra note 6, at 45 (noting that in more than 25 states, juveniles are eligible for transfer to adult criminal court via judicial waiver, prosecutorial waiver, or statute for crimes committed before age 14, and that since 1992, "all but 10 of the states have greatly liberalized the ability of the state to try juveniles as adults, a number of them at earlier ages than previously"); Fox Butterfield, All God's Children: The Bosket Family and the American Tradition of Violence 226-27 (1997) (describing how public outcry over five-year sentence served by then 15-year-old Willie Bosket after his conviction for multiple murders prompted passage of New York's Juvenile Offender Act of 1978, which allowed children as young as 13 to be tried and sentenced as adults).

102 For a discussion of purpose clause revisions among the states, particularly in the context of the constitutional right to treatment, see Holland & Mlyniec, supra note 31, at 1801-04. New York is one example of a state that has revised its juvenile codes to reflect a more punitive philosophy. See N.Y. Penal Law § 10.00(18) (McKinney 1998) (codifying Juvenile Offender Act); Knipps, supra note 67, at 459 (noting that in 1978, New York passed Juvenile Offender Act, which created separate category of offenders (known as "JOs") eligible for prosecution in adult court and for prison sentences with mandatory minimums); see also Butterfield, supra note 100, at 227.

103 Mabel Arteaga, Juvenile Justice with a Future . . . for Juveniles, 2 Cardozo Women's L.J. 215, 219 (1995) (observing that "[m]ost states have redefined the purpose of their juvenile codes to focus on public safety, punishment and individualized accountability,"

The current wave of reform is characterized by the sentiment that the punishment should fit the crime, not the criminal.[104] This "just deserts" approach is designed to "crack[ ] down especially hard on juvenile offenders," whom many believe "are now coddled by a justice system that clings to a discredited belief in rehabilitation."[105] Reflecting much of the philosophy and substantive practices of the criminal justice system, the new model dispenses with extensive therapy and supervised probation to interpret court-ordered "treatment" as long periods of incarceration in correctional facilities.[106]

II
THE EFFECTS OF REFORM: ATTEMPTS TO REVIVE THE INFANCY DEFENSE IN THE MODERN JUVENILE COURT

A. Widespread Refusal of States to Apply the Infancy Defense in Juvenile Court

This Note proposes that there are three legal theories that courts rely upon most frequently to reject the infancy defense: the Rehabilitation Theory, the Procedural Policing Theory, and the Demarcation Theory.[107] The Rehabilitation Theory adopts the language of the juvenile court founders, identifying the court's purpose as saving wayward juveniles by providing them with individualized, therapeutic treatment programs.[108] Courts that endorse the Rehabilitation Theory contrast this objective with the criminal courts' objective of protecting society by convicting adult criminals and sending them to prison.[109] Since a judgment of delinquency cannot result in a legal

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which "has had the effect of overshadowing the original rehabilitative goals of the juvenile justice system").

104 Many in the legal profession endorse this belief. In 1980, the Joint Commission on Juvenile Standards of the Institute of Judicial Administration and the American Bar Association proposed dispensing with the rehabilitative model of juvenile justice in favor of a "Justice Model" of juvenile adjudication, which calls for punishment commensurate with the offense rather than the offender. For a discussion of the IJA/ABA Justice Model, see Forst & Blomquist, supra note 20, at 336-37.

105 Elliott Currie, Crime and Punishment in America 4 (1998); see also Feld, supra note 85, at 702 (observing that proponents of just deserts model reject individualized treatment programs as "ineffective," "unequal and unjust").

106 See, e.g., Feld, supra note 85, at 708 ("Increasingly . . . juvenile courts pursue the substantive goals of criminal law."); Holland & Mlyniec, supra note 31, at 1811-12 ("Legislatures have explicitly endorsed punishment, accountability, and other principles besides rehabilitation within the juvenile justice system.").

107 See supra note 8 and accompanying text.

108 See supra note 9.

109 See Gammons v. Berlat, 696 P.2d 700 (Ariz. 1985) (same); State v. D.H., 340 So. 2d 1163, 1165 (Fla. 1976) (holding that legislature did not intend for common law presumption concerning crimes to operate in delinquency proceedings, thereby rendering infancy de-

imposition of a criminal conviction, these courts conclude that juvenile offenders are not exposed to risks that the infancy defense was designed to address.[110]

The Procedural Policing Theory, unlike the Rehabilitation Theory, does not deny that the Supreme Court's mandated procedural reforms and subsequent legislative responses have wrought substantive changes in the type of justice administered in the juvenile court.[111] Instead, the claim is that the state's constitutionally mandated burden of proving every element of the charged offense beyond a reasonable doubt subsumes the protective function of the infancy defense.[112] By requiring the highest evidentiary standard of proof to justify a finding that the offender possessed the requisite level of intent, procedural protections police the adjudication of children charged with serious offenses.[113]

The Demarcation Theory squarely addresses the roles of capacity and mens rea in juvenile court and attempts to disentangle them by distinguishing their respective functions.[114] At its core, the analysis

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fense unnecessary); In re Michael, 423 A.2d 1180, 1183 (R.I. 1981) (explaining that "[a] juvenile is delinquent or wayward, not because the juvenile has committed a crime, but because the juvenile has committed an act that would be a crime if committed by a person not a juvenile"); In re Skinner, 249 S.E.2d 746 (S.C. 1978).

110 A stock example of the application of this reasoning appears in *State v. D.H.*, in which the Florida Supreme Court affirmed a lower court determination holding the infancy defense inapplicable to a 9-year-old charged with robbery. 340 So. 2d 1163. The *D.H.* court emphasized that the "extensive protections" provided by the juvenile court rendered capacity findings "unnecessary." Id. at 1164 (citations omitted). Moreover, the infancy defense operated to the detriment of the child by "frustrat[ing] the remedial purposes of reformation" provided by placements following a delinquency adjudication. Id. at 1165.

111 See In re Tyvonne, 558 A.2d 661, 667-68 (Conn. 1989) (acknowledging that punitive aspect of juvenile court can obscure "rehabilitative goals" but arguing that Supreme Court decisions in *Kent v. United States*, *In re Gault*, and *In re Winship* adequately safeguard children's due process rights); see also In re G.T., 597 A.2d 638, 640 (Pa. Super. Ct. 1991) (stating that constitutionally mandated beyond reasonable doubt requirement is sufficient in itself to safeguard due process rights of juveniles).

112 In a 1981 case, In re Robert M., 441 N.Y.S.2d 860 (Fam. Ct. 1981), a judge in New York Family Court relied upon logic much like that elaborated in the Procedural Policing Theory to hold that a nine-year-old boy accused of robbing a bank could not invoke the infancy defense. The court found that questions regarding the boy's formulation of criminal intent were adequately addressed in the requirement that the state prove every element in its bank robbery charge beyond a reasonable doubt—including the element of mens rea—in order to obtain a finding of delinquency. See id. at 863. The court observed that although criminal capacity was presumed, the boy nonetheless retained the right, like any adult, to rebut that presumption with affirmative evidence. For example, a showing that the accused was "grossly immature"—such as evidence showing that the boy intended to play a prank, not rob a bank—would negate the mens rea element and result in an acquittal. See id. at 863-64.

113 See id.

114 In 1991, a Pennsylvania court openly embraced the notion of a stark demarcation between mens rea and capacity determinations as applied to delinquency proceedings. See

posits that mens rea and capacity represent two distinct mental states that are relevant at different stages of a juvenile case: The former refers only to intentionality at the time of the act, while the latter measures appreciation of wrongfulness and consequences upon its completion.[115] This theory focuses on the element of intent as it is narrowly defined by the criminalized version of the offense and rejects the more nuanced view of blameworthiness advocated by the early juvenile court reformers.[116]

B. Critique of State Court Justifications for Rejecting the Infancy Defense

1. The Rehabilitation Theory

Proponents of the Rehabilitation Theory conclude that because the infancy defense was designed to protect children from the harshness of the adult criminal justice system, it is unsuitable as applied to the civil, nonpunitive forum of juvenile court.[117] A closer examination of this reasoning reveals it as fundamentally flawed.

First, the premise that the juvenile court is essentially a rehabilitative institution is untenable.[118] While it is true that the juvenile court was not designed to be a criminal forum, it closely resembles one in practice. The overwhelming consensus among criminal justice experts is that a finding of delinquency in connection with a serious violent offense is not substantially different—in terms of the punishment and stigma it confers—from a finding of guilt in a criminal court.[119]

G.T., 597 A.2d at 638. The court held that capacity was a distinct legal finding irrelevant to a mens rea determination. The court explained that mens rea measured intent at the time of the act, while capacity was a vague term connoting an ability to identify wrongful conduct and contextualize its effects in an abstract rather than a legal sense. See id.

In *Robert M.*, the court implicitly approved this analysis without adopting it by distinguishing between mens rea in its "special sense" which referred "only to the mental state required by the definition of the offence" and mens rea "in the sense of legal responsibility." 441 N.Y.S.2d at 862 (internal quotation marks omitted). The state was required only to prove the former: that the boy intended, at the time he committed the offense, to take money from the bank. Under this narrow definition of mens rea, the state was not required to show that the boy understood the legal and practical consequences of his actions.

115 See supra notes 112-13 and accompanying text.

116 See supra notes 112-13 and accompanying text.

117 See *G.T.*, 597 A.2d at 641-42 ("Delinquency proceedings are not criminal in nature but are intended to address the special problems of children who have engaged in aberrant behavior disclosing a need for special treatment, . . . rehabilitation and supervision.").

118 See supra Part I.C.2 (documenting revision of vast majority of state juvenile codes to authorize harsher punishments for violent juveniles in effort to emphasize accountability and public safety).

119 Professor Grisso notes that:

From its inception, the juvenile court's promise of comprehensive treatment services for delinquent offenders has reflected an ideal more than a reality.[120] A standard response to an adjudication of delinquency is placement in state training schools or youth correction facilities that, due to lack of funding and mismanagement, are generally "understaffed, unhealthy, and devoid of rehabilitative programming."[121] As one state court judge remarked, "to be 'awarded' to the department of corrections and put behind stone walls or iron bars is to be in prison, even if it is called 'juvenile rehabilitation.'"[122]

> The issue of adolescents' capacities as defendants has recently taken on new and pressing significance because of changes in juvenile law in almost every state during the past 10 years. [These changes] place increasing numbers of adolescents in jeopardy of punishments that are as severe as those that have typically been reserved for adults.

Grisso, supra note 88, at 5; see also Lynda E. Frost & Robert E. Shepherd, Jr., Mental Health Issues in Juvenile Delinquency Proceedings, Crim. Just., Fall 1996, at 52, 59:

> Not only can youths be subject to transfer or waiver to an adult court for trial, but juvenile adjudications increasingly may be open to public access, be reported to schools and other agencies, become part of a sex offender registry, be considered in the preparation of future adult sentencing guideline reports, and become one 'strike' in a three strikes-and-you're-out statute.

For a more comprehensive analysis of the trend toward criminalizing the juvenile justice system, see discussion supra Parts I.B-C, II.A.

120 See supra note 67.

121 Holland & Mlyniec, supra note 31, at 1791. Early versions of the juvenile codes of many states contained purpose clauses identifying the court's primary purpose as rehabilitative, which advocates construed as creating an obligation to provide an array of services, including psychiatric treatment, group counseling, health care, and education. This claim has been severely undercut by the trend to rewrite juvenile codes. Many of the revised statutes continue to mention rehabilitation, but emphases on determinate sentencing, offense-based punishment, and personal accountability have displaced it as the paramount objective. See id. at 1794. While it is dubious whether many juveniles ever were exposed to the panoply of services conceptualized in the first decades of the juvenile court's existence, today such services are not even theoretically part of many legislative programs. Juvenile courts may freely invoke the rehabilitative goal of the juvenile justice system, but without the statutory or constitutional basis to make this high-minded ideal a reality, these claims lack substantive content. See Frost & Shepherd, supra note 119, at 52 ("A number of states also have amended their juvenile codes to express purposes unrelated to the well-being of the juvenile."). Washington and Virginia provide instructive examples of this type of statutory revision. Washington's pioneering legislation, the Juvenile Justice Act of 1977, provided that one of the purposes of the juvenile court was "mak[ing] the juvenile offender accountable for his or her behavior" and imposing punishment "commensurate with the age, *crime,* and *criminal history* of the juvenile offender." Wash. Rev. Code Ann. § 13.40.010(2)(c)-(d) (West 1993) (emphases added). In 1996, the Virginia legislature added the "safety of the community and protection of the rights of victims" to its purpose clause. Va. Code Ann. § 16.1-227 (Michie 1999). Explicit legislative authorization of quasi-criminal sanctions erodes the legal foundations of the argument that individualized, therapeutic treatment is a state-created right. See, e.g., Santana v. Collazo, 714 F.2d 1172, 1177 (1st Cir. 1983) (finding no right to treatment when rehabilitation is not sole stated purpose of juvenile confinement).

122 Gammons v. Berlat, 696 P.2d 700, 705 (Ariz. 1985) (Feldman, J., concurring in part and dissenting in part). Judge Feldman further argued that, by excluding capacity findings,

Moreover, even if the characterization of the modern day juvenile court as an essentially benevolent, rehabilitative institution is credible, another more significant flaw in the Rehabilitation Theory remains. The infancy defense was designed to protect against the risk of a due process violation that occurs when a child is convicted of an offense for which, due to his cognitive and emotional immaturity, he could not form the requisite level of intent.[123] This risk is not lessened because the adjudication takes place in juvenile court instead of criminal court since the same evidentiary standards prevail in both fora.[124] When charged with committing adult-defined crimes, a preadolescent without the protection of the infancy defense bears the same risk of conviction upon insufficient evidence, regardless of whether the outcome of the proceedings is a six-month rehabilitative program or a six-year stint in prison. Whenever a mens rea finding for a preadolescent defendant is reached without considering evidence that he "understood what he did,"[125] the outcome is fundamentally unfair whether it occurs in juvenile court or in an adult criminal proceeding.

2. *The Procedural Policing Theory*

Courts that adopt the Procedural Policing Theory, asserting that constitutionally mandated procedural rights will adequately police the application of substantive law in juvenile court, rely on inadequate safeguards. While *Gault* and *Winship* both extend essential protections to accused persons, the characteristic inability of a preadolescent defendant to comprehend the purpose of those protections prevents him from functioning effectively to safeguard his due process rights. This section examines the *Gault* and *Winship* holdings to illustrate how the pretrial and in-trial procedural protections currently available to juveniles are insufficiently rigorous to protect against delinquency findings based on insufficient evidence.

The privilege against self-incrimination, which *Gault* explicitly recognized,[126] is arguably most critical for juveniles at the pretrial stage of the delinquency proceedings, when they are taken into cus-

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juvenile courts were permitted to "invoke and apply the criminal aspects of the juvenile justice system without due process of law." Id. at 704.

123 See 1 Hale, supra note 1, at 26-27 (explaining function of infancy defense as predicate evidentiary finding that accused did not have capacity to understand consequences of his actions).

124 See In re Winship, 397 U.S. 358, 364-65 (1970).

125 1 Hale, supra note 1, at 26.

126 See 387 U.S. 1, 55 (1967) ("We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.").

tody and interrogated.[127] The Court emphasized that any confession obtained in the investigatory stage of delinquency proceedings must be carefully scrutinized to ascertain that it was voluntary, and not the product of "force or . . . psychological domination."[128] Yet, empirical studies show that such overbearing of will occurs all too frequently with juveniles.[129]

Few children under twelve years of age can comprehend the nature of their rights, or even what a "right" is,[130] regardless of whether

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[127] The *Gault* decision did not squarely address "the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process." Id. at 13. Nevertheless, *Gault*'s analysis of Fifth Amendment protections against involuntarily obtained confessions and the privilege against self-incrimination at trial necessarily extend to the pretrial stage. See id. at 47 ("One of [the Fifth Amendment's] purposes is to prevent the state . . . from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.").

[128] 387 U.S. at 47. *Gault* held that, in light of *Miranda*, "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." Id. at 55. Significantly, however, nowhere in its examination of the issue did the Court explicitly require police to read Miranda warnings to juvenile suspects before questioning them in a custodial interrogation. See id. at 42-57.

In Fare v. Michael C., 442 U.S. 707 (1979), the Court held that the admissibility of juvenile confessions obtained in police custody was governed by the same "totality of the circumstances test" that applied to adult defendants. See id. at 724-26. In *Fare*, the Court included the juvenile's "age, . . . capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" among a list of factors to be considered when applying the totality of the circumstances test. Id. at 725. The Court, however, vested determinations concerning the weight and relevance of these factors with the juvenile courts. Most state courts have declined to adopt the *Fare* standard, with the result that, while Miranda warnings are not explicitly mandated for juvenile defendants, "virtually all of the courts that have passed on the question of the applicability of the Miranda safeguards to the juvenile process have concluded that the safeguards do apply." Davis, supra note 99, § 3.12, at 3-77; accord State v. Nicholas S., 444 A.2d 373, 376-78 (Me. 1982) (noting that *Fare* majority's "belief that juvenile courts are capable of applying the totality of the circumstances analysis so as to take into account the special concerns that are present when juveniles are in custody . . . has been questioned by commentators and rejected by various jurisdictions in favor of some form of a *per se* exclusionary rule whenever certain initial safeguards such as the presence of a parent have not been met"); Commonwealth v. Henderson, 437 A.2d 387 (Pa. 1981) (applying state law standard to hold juvenile's confession per se inadmissible when he was given no opportunity to consult with interested adult, despite Supreme Court's direction to reconsider case "in light of *Fare*"); see also In re Michael B., 197 Cal. Rptr. 379 (Ct. App. 1983) (holding that juvenile court judge erred in admitting at trial statements by accused taken in violation of his Miranda rights).

[129] See infra notes 131-34.

[130] See Grisso, supra note 88, at 11 (noting study suggesting that "delinquent youths bring to the defendant role an incomplete comprehension of the concept and meaning of a right"); see also Barbara M. Stilwell et al., Moral Valuation: A Third Domain of Conscience Functioning, 35 J. Am. Acad. Child & Adolescent Psychiatry 230, 236 (1996) (characterizing children aged 7 to 11 as deriving system of moral valuation from authority, so that they "look to adults for protection and trust them to provide the rules for new circumstances"). See generally Grisso, supra note 88, at 10 (understanding legal right involves

a parent or guardian is present when it is explained to them.[131] Moreover, experts who have tested the ability of children to understand Miranda rights have concluded that preadolescents are much more likely to incriminate themselves than teenagers or adults.[132] Researchers attribute this disparity to the cognitive and emotional immaturity of preadolescents, which renders them unable to appreciate the gravity of their situation or the legal consequences of their statements.[133]

As the Court observed in *Gault*, because young children are unusually susceptible to suggestion and false promises, their statements often are not credible.[134] Preadolescents are more likely than their teenage and adult counterparts to incriminate themselves during a custodial interrogation out of fear and an impulsive instinct "to get it over with,"[135] in the unrealistic expectation that the process will end with their cooperation.[136] Courts will admit such incriminating state-

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ability to perceive it as legal entitlement, not as "mandates that are made and controlled by persons in authority").

131 In fact, sometimes the presence of a parent can operate to the detriment of the child. The juvenile court in *Nicholas S.* found that a 14-year-old boy had understood his rights, which were explained to his mother in his presence. See 444 A.2d at 376. The state supreme court reversed, relying on the fact that the boy had made no express waiver and had testified in the delinquency proceedings that the police officers had read the warnings to his mother while telling the accused that it was not necessary that he understand them. See id. at 376, 379; see also *Michael B.*, 197 Cal. Rptr. at 387 (holding that nine-year-old's waiver of Miranda rights was not knowing and voluntary when waiver was cosigned by parents and mother was present at interrogation).

132 A recent study testing the ability of juveniles to understand their privilege against self-incrimination found that the youngest group tested, children aged 10 to 12, understood their rights no better than mentally retarded adults and significantly less well than their 13 to 15-year-old counterparts. See Grisso, supra note 88, at 12. In another article on the same topic, Grisso explained the critical difference between children and adult perceptions of rights: "[A]dults typically see a legal right as an 'entitlement,' which is provided to them by law and cannot be revoked. In contrast, research suggests that children think of a right as 'conditional'—something that authorities allow them to have, but that could also be retracted." Thomas Grisso, Juvenile Competency to Stand Trial, Crim. Just., Fall 1997, at 4, 7. In the same article, Grisso concluded: "It is only around ages 13 or 14 that youths develop the capacity to think of a right as 'belonging' to them, which they may assert or waive." Id. at 7.

133 See Grisso, supra note 132, at 8-9 (noting several studies showing that "preadolescents are significantly less capable of imagining risky consequences of decisions and are more likely to consider a constricted number and range of consequences").

134 See In re Gault, 387 U.S. 1, 52 (1967) (observing that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"). The Court went on to list cases in which juvenile court findings of delinquency had been overturned on appeal, on the grounds that the accused juveniles' confessions were involuntary or inherently untrustworthy. See id. at 52-55.

135 *Michael B.*, 197 Cal. Rptr. at 387 (reporting that suspect told his parents "he would say whatever the officers wanted him to say because he wanted to get it over with").

136 The "temporal perspective" that triggers this type of risk calculation in young people is documented in psychological research. See Scott & Grisso, supra note 32, at 164 (noting

ments at trial, even those of dubious validity, if a proper warning preceded the confession.[137] Ironically, statements obtained as a result of an accused's inability to appreciate the meaning of his rights or the consequences of waiving them are used to prove that the accused acted rationally and knowingly in committing the charged offense.[138]

At trial, all juveniles are protected by *Winship*'s requirement that the state prove the requisite level of intent beyond a reasonable doubt.[139] However, even if the state can prove the mens rea element required under the statutory definition of the offense, this evidence alone may be insufficiently probative to establish blameworthiness in young children. This is because the state need not prove that a preadolescent defendant appreciated the wrongfulness and consequences of his actions, but only that he intended to act at the time that he acted. A two-step process has been shortened by half.[140]

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that juveniles "discount the future more than adults do, and . . . weigh more heavily short-term consequences of decisions[,] . . . a response that in some cases can lead to risky behavior").

137 See, e.g., *Michael B.*, 197 Cal. Rptr. at 382 (noting trial court finding that nine-year-old's incriminating statements were admissible at trial after police officer properly Mirandized him even though boy was "hyperventilating," "crying," and given unidentified "shot" of medication and valium prior to interrogation).

138 The questioning of 11-year-old Lacresha Murray by Texas police provides a striking example of the coercive power of custodial interrogations, particularly when the accused is young and ignorant of her rights. See 60 Minutes: Juvenile Injustice?, supra note 17 ("[Murray] was taken by police from her home, taken to a facility, [and] stayed there . . . for four days."). During a tape-recorded interrogation, Murray was asked to sign a confession stating her responsibility for the baby's death. "Can you read pretty good?" she was asked. Murray replied, "No, but I try hard." Murray then read over the confession and asked, "What is that word? Home-a-seed?" The detective did not respond. Later, the following dialogue ensued:

> Sergeant Pedraza: "That's all true and correct. Am I forcing you to sign that?"
> Murray: "Yeah."
> Pedraza: "Wha—?"
> Murray: "No."
> Pedraza: "Then you are doing this voluntarily."

Id.; see also Bob Herbert, A Child's 'Confession,' N.Y. Times, Nov. 15, 1998, § 4, at 15; Bob Herbert, Texas Justice, N.Y. Times, Nov. 26, 1998, at A39.

139 See In re Winship, 397 U.S. 358, 364 (1970).

140 In re Tyvonne, 558 A.2d 661 (Conn. 1989) is instructive in illustrating the consequences of a court's foreshortened mens rea inquiry for preadolescent children. In this case, an eight-year-old boy found a pistol while playing in the schoolyard. The following day, he showed the gun to several other children at the school, who concluded that it was a toy. The victim in particular insisted that the gun was a fake, and she challenged the boy to prove otherwise, shouting: "Shoot me! Shoot me!" The boy responded: "I'll show you it's real" and discharged the weapon, wounding her. Shouting that he had been telling the truth, the boy ran away. See id. at 662.

The court in *Tyvonne* held that the infancy defense did not apply in juvenile delinquency proceedings. See id. at 666. Thus, in order to prove the element of intent, the state had to show that the boy fired the gun intending to cause serious injury (or death) to the

3. *The Demarcation Theory*

To disprove the Demarcation Theory's premise that the infancy defense is a separate legal issue unrelated to the element of intent, it is necessary to explain how capacity findings inform a delinquency determination when the accused is a preadolescent. While it is true that capacity and mens rea constitute separate evidentiary findings, subject to different legal standards of proof, the two concepts are not entirely distinct.[141] Instead, they are inextricably bound up in a two-step process in which the initial finding proves not that the element of intent was present, but, more fundamentally, that its formation was possible.[142]

Courts holding that capacity findings are irrelevant to mens rea determinations for juveniles effectively assume that "there are no psychological differences between [juvenile] and adult offenders that are important to criminal responsibility."[143] Empirical data and practical experience strongly undermine this assumption.[144] Psychological and scientific research confirm what parental experience and common sense have long intuited: Young children process information in a manner that differs markedly from the way that adults process information.[145] Uncompleted cognitive and moral development inhibits preadolescents' comprehension of complicated concepts and limits their capacity for logical reasoning and sound judgment. Child psychologists describe children between the ages of seven and eleven as occupying a transitional mental stage, in which the dictates of external

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victim. Had the court required a capacity finding as a predicate for proving mens rea, the state would have carried the additional burden of proving that the accused understood the nature and consequences that his action entailed. To meet this burden, the state might have demonstrated, through psychiatric testimony, that the boy understood the concept of death as an irreversible condition that flowed naturally from the act of discharging a firearm pointed at another person. It seems plain that deliberative inquiry into a young child's cognitive and moral development is more probative of his ability to formulate the requisite intent than a presumption that the accused, at eight years old, was a rational actor with full awareness of the significance of his actions.

141 See State v. Q.D., 685 P.2d 557, 561 (Wash. 1984) (noting that "[c]apacity to be culpable must exist in order to maintain the specific mental element of the charged offense"). But see In re G.T., 597 A.2d 638, 640 (Pa. Super. Ct. 1991) (arguing that mens rea and capacity findings are "entirely distinct").

142 See *Q.D.*, 685 P.2d at 560-61 (observing that state has burden of proving capacity separately from specific mental element of crime, because capacity is "general determination" underlying plausibility of mental element).

143 Scott & Grisso, supra note 32, at 151.

144 See infra notes 146-52.

145 See, e.g., Scott & Grisso, supra note 32, at 160-61 (listing developmental factors that exert disproportionate influence on juveniles' decisionmaking abilities). The authors concluded: "[S]cientific authority indicates that, in general, the cognitive capacity for reasoning and understanding of preadolescents and many younger teens differs substantially . . . from that of older teens and adults." Id. at 160.

authority begin to take on qualities of personal ownership.[146] Commands from parents and teachers, previously learned by rote and lacking independent authenticity, are questioned, tested against personal experience, and ideally, embraced.[147]

The difference between a child who has barely begun the transition and a child who has completed it has profound implications for assigning criminal responsibility. A pretransition child understands "rightness" and "wrongfulness" as words learned by rote, without fixed meaning outside of externally imposed applications.[148] Criminal sanctions lack moral significance for such children, who are capable of repeating mechanically, "I did a bad thing," but cannot appreciate *why* that particular action was wrong. The deterrent/corrective effect of assigning legal responsibility, imposed through punishment, ripens only when juveniles "found guilty understand why they are being punished."[149]

The integration of the internal and external rules necessary to enable preadolescent children to understand for themselves the wrongfulness and consequences of their conduct is a slow, confusing, and "dissonant"[150] process. This is true of the most privileged child, raised in an "optimal" environment, which is emotionally and economically stable, and offers the educational and extracurricular activities of a "normal" childhood.[151] The internal-external transition can be doubly difficult for children from disadvantaged backgrounds, who commit a disproportionate number of violent crimes.[152] Research shows that

146 See Barbara M. Stilwell et al., Conceptualization of Conscience in Normal Children and Adolescents, Ages 5 to 17, 30 J. Am. Acad. Child & Adolescent Psychiatry 16, 19-20 (1991).

147 See id.

148 See Barbara M. Stilwell et al., Moral-Emotional Responsiveness: A Two-Factor Domain of Conscience Functioning, 33 J. Am. Acad. Child & Adolescent Psychiatry 130, 130 (1994) (observing that by age seven, children can repeat concrete moral mandates from "commands and behavioral reinforcements of elders").

149 Elissa P. Benedek, Adolescent Homicide/Victims and Victimizers, in Clinical Handbook of Child Psychiatry and the Law 216, 219 (Elissa P. Benedek & Diane H. Schetky eds., 1991).

150 Stilwell et al., supra note 146, at 19 (observing that preadolescent children "have a tentativeness about their explanations as they grapple to organize their moral life experiences" and that they consult their own feelings but also rely to some extent on authority figures for validation, which makes it "obvious they are in the dissonant midst of a transition from external to internal understanding").

151 See id. at 20 (describing study sample of children as "optimal in terms of economic and family stability, intellectual endowment, academic opportunity, and exposure to ethically stimulating situations").

152 During their formative years, many juvenile delinquents suffer from prolonged exposure to poverty, neglect, and abuse, and observe their parents or relatives engaging in criminal activity. See Currie, supra note 105, at 81-101 (discussing multiple studies and

these children often have underdeveloped cognitive skills[153] and are more likely to adopt the inappropriate norms that constitute their everyday experience.[154] Thus, while most preadolescents struggle to learn the reasoning and analytic skills necessary to make moral choices meaningful, both in a personal and global sense, children from disadvantaged backgrounds tend to struggle harder, and with less success.[155]

The undeveloped reasoning capacity generally characteristic of preadolescents hampers their ability to imagine hypothetical situations arising out of a contemplated action, a function critical to evaluating whether that action will be "more or less desirable or painful in life."[156] This phenomenon has been addressed repeatedly in delinquency proceedings by mental health experts, who testify that preadolescent children have a limited capacity to appreciate the irreversibility of their actions or pinpoint why their behavior is criminal.[157] In the vast majority of jurisdictions that preclude the infancy

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statistics indicating correlation between violent youths and abuse/neglect during formative years).

153 See Grisso, supra note 88, at 8 ("Delinquent populations have a mean level of intellectual performance and educational experience that is below average, and they include a disproportionate number with developmental disabilities and mental disorders.").

154 See Currie, supra note 105, at 91-101 (noting correlation between economically/emotionally deprived upbringing and "impaired cognitive development, behavior problems, and early failure in school").

155 Several accounts narrating the stories of children cycled through the juvenile justice system make clear that children raised in poverty, without stable authority figures to care for and instruct them, are particularly vulnerable to involvement in criminal activity. See generally Ayers, supra note 90 (chronicling experiences as detention center teacher, and observations of Juvenile Court as poor tool for solving crisis facing youth); Peter S. Prescott, The Child Savers (1981) (examining process of justice as applied to children in New York City's juvenile justice system); Butterfield, supra note 100, at A1 (developing account of violence in the United States through examination of life and family of Willie Bosket).

156 Grisso, supra note 132, at 9.

157 This problem is illustrated by a psychiatrist's courtroom testimony during the adjudication of nine-year-old Michael, accused of killing his playmate with criminal negligence:

> I don't think that Michael had a clear understanding that—the possibility for [death] existed at the time . . . .
>
> Children think of life as—and of death in terms of the games they play and the television programs they see, and the things that go on around them in the general world, not in the direct sense of permanence of the destruction that happens, that can happen in certain situations. . . . And it's not uncommon for children of nine, who have lost relatives to death . . . to wonder about where their relatives are, and when they'll come back.

In re Michael B., 197 Cal. Rptr. 379, 385 (Ct. App. 1983); cf. State v. Linares, 880 P.2d 550, 554 (Wash. Ct. App. 1994) (noting teacher's testimony that 11-year-old understood rules, but not consequences of breaking rules). Of course, psychiatric testimony can also support the state's case. See, e.g., In re Manuel L., 13 Cal. Rptr. 2d 845, 847 (Ct. App. 1992) (psychiatrist testifying that 11-year-old knew actions were wrong).

defense,[158] however, these evaluations may be refused,[159] or given nominal consideration.[160]

The concept of mens rea as a one-step evidentiary finding, focusing exclusively on a preadolescent's mind-set at the time of an offense, is too constricted to address the complicating factors posed by the incomplete mental development characteristic of this age group properly. By presuming the basic question of criminal capacity, juvenile courts contradict empirical research indicating that moral and cognitive reasoning skills are incompletely developed in preadolescent children, which impairs their ability to formulate a criminal intent.

III
REDESIGNING THE INFANCY DEFENSE FOR THE MODERN JUVENILE COURT: A SUGGESTED STATUTORY MODEL

The critiques set forth in Part II.B emphasize the centrality of the infancy defense in safeguarding the due process rights of preadolescents. However, the infancy defense, as defined by common law, contains ambiguities and weaknesses that dilute its effectiveness. This Note proposes a Model Statute that codifies the structural and substantive reforms discussed below to make the infancy defense a viable legal tool. The Model Statute seeks to remedy the three basic problems with the common law infancy defense, which are discussed in detail below: (1) an insufficiently particularized age-based classification; (2) an overly vague definition of the substantive content of the presumption and a lack of procedural guidelines in applying it; and (3) an absence of any legal consequence when the defense applies.

A. The Infancy Defense Reformulated: A Model Statute

I. LIMITATIONS ON PROCEEDINGS AGAINST JUVENILES; REQUIRED SHOWING OF INTENT AND CAPACITY

(a) In any delinquency or criminal proceeding,
  (1) no person under the age of seven shall be charged with any offense;[161]

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158 Only California, Washington, Maryland, and New Jersey permit the infancy defense in juvenile court. See supra note 7 and accompanying text.

159 See In re G.T., 597 A.2d 638, 639 (Pa. Super. Ct. 1991) (holding psychiatric testimony inadmissible in juvenile delinquency proceeding to show lack of capacity to form mens rea).

160 See Commonwealth v. Kocher, 602 A.2d 1308, 1315 (Pa. 1992) (holding that trial court abused its discretion by rejecting nine-year-old's petition to transfer out of adult court after two mental health experts testified that defendant could not form intent to kill).

161 Under the common law infancy defense, children under seven were conclusively presumed incapable of formulating a criminal intent and could not be charged with any crime.

(2) no person under the age of twelve shall be tried in adult court for any offense, including murder; and

(3) No person between the ages of seven and eleven shall be adjudicated delinquent for any violent or nonviolent offense unless the state can show beyond a reasonable doubt that:

(A) at the time of the commission of the charged offense, the accused intended to commit that particular offense;

(B) the accused understood the nature of the offense and/or the practical meaning of his actions; and

(C) the accused appreciated the consequences of his actions.

(b) Any showing of an accused's capacity for legal responsibility under subsection (a)(3) must include, at a minimum, proof beyond a reasonable doubt that the accused is competent to understand the offense as defined under the relevant legal statute.

(c) A person twelve years of age or older shall enjoy a presumption of incapacity if such person shows, by clear and convincing evidence, extraordinary circumstances, such as a gross developmental abnormality, which render such a presumption appropriate.

II. REPORT REQUIREMENTS FOR DELINQUENCY DETERMINATION

A determination by the court that a child between the ages of seven and eleven may not be adjudicated a delinquent for any charged offense may only be made on the basis of a report that shall include at a minimum:

(a) testimony and written report of at least one mental health professional, whose evaluation of the accused is based upon sufficient interviews and review of appropriate background information, containing:

(1) an assessment of the accused's cognitive and moral development; and

(2) the accused's ability to understand the nature of the proceedings against him;

(b) testimony, if available, from at least one teacher or caretaker who is not a relative of the accused; and

(c) certification, based upon appropriate testing instruments, that the accused does not suffer from a mental impairment.

III. LIMITATIONS ON SENTENCING OF JUVENILES

A juvenile court may not sentence persons between the ages of seven and eleven who qualify successfully for the infancy defense to any institution in which the accused is denied access to educational

See Allen v. United States, 150 U.S. 551, 558 (1893) (stating common law rule that children below seven years of age were "conclusively presumed to be incapable of committing the crime"); 1 Hale, supra note 1, at 19-20 (noting that infant below seven years of age cannot be capitally punished because "he cannot be guilty").

services, health care, and psychological counseling, including state "training" or "industrial" schools, or a state's Department of Youth Correction Services.

IV. RECLASSIFICATION OF VIOLENT JUVENILE OFFENDERS

(a) The juvenile court has the authority to prescribe rehabilitative treatment for violent juvenile offenders between the ages of seven and eleven who qualify successfully for the infancy defense by reclassifying them as Persons in Need of Supervision (PINS).

(b) Treatment under subsection (a) may include:

(1) mandatory participation in an after-school program;

(2) intensive family and/or individual therapy;

(3) long-term probation with home visits by the officer; or

(4) mandatory enrollment in a treatment program for drug or alcohol addiction.

B. Clarification of the Age-Based Application

The Model Statute reintroduces a tiered presumption of incapacity, which applies with greater force to children between the ages of seven and eleven.[162] This age-based distinction was the centerpiece of the infancy defense under the English common law,[163] but is absent from the United States version, which applies the presumption of incapacity to children aged seven to fourteen without gradation.[164]

While any age-based classification is somewhat arbitrary and thus unable to accommodate the idiosyncrasies of individual development, the English common law measurement of culpability is well supported by modern empirical data. Scientific and psychological studies often classify stages of maturity exactly according to, or within close approximation of, these age groupings.[165]

More importantly, the Model Statute retains a measure of flexibility by allowing for a capacity finding to give greater or lesser weight to the age-based presumption in contravention of the classification system when extraordinary circumstances require it.[166] In unique cases, the state may successfully rebut the presumption of incapacity by showing exceptional cognitive sophistication in a ten-year-old, but

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162 See Model Statute §§ I-II.

163 See supra notes 37-42 and accompanying text.

164 See Carol Campaigne et al., Capacity of Children to Commit Crime, 29 Am. Jur. 2d Evidence § 238 (1994) (articulating United States common law definition of capacity).

165 See, e.g., Stilwell et al., supra note 146; Stilwell et al., supra note 148; Stilwell et al., supra note 130; supra note 148 and accompanying text; see also Grisso, supra note 88; Grisso, supra note 132.

166 See Model Statute § I(c).

fail to overcome the same presumption with a grossly immature fourteen-year-old.[167]

C. Substance and Procedure

The standard of proof required to overcome a presumption of incapacity varies widely among the four states that permit the infancy defense to be raised in juvenile court.[168] California requires the state to show that "at the time of committing the act charged, the child knew its wrongfulness;"[169] Washington requires that "the individual understood the act and its wrongfulness;"[170] New Jersey mandates "competent evidence that juvenile defendants are capable of each and every element" of the charged offense;[171] and in Maryland, "'the surrounding circumstances must demonstrate . . . that the individual knew what he was doing and knew that it was wrong.'"[172]

Each of these more particularized definitions of capacity relies principally on a showing that the juvenile "knew" that his actions were "wrong." While this standard provides some helpful guidance, without further elaboration, it is too vague. A more specific and concrete articulation of the substantive inquiry, such as the one proposed in the Model Statute, prevents the capacity inquiry from collapsing into an insufficiently probative right-wrong test.[173] True blameworthiness does not arise simply from a seven-year-old's ability to repeat a vague, externally imposed instruction that some acts are "good" and some acts are "bad."[174] To prove criminal culpability, the state must demonstrate that preadolescent children possess an additional layer of

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167 Id.; see also In re Robert M., 441 N.Y.S.2d 860, 863 (Fam. Ct. 1981) (noting approvingly Professor Sanford Fox's article advocating policy of protecting "grossly immature" or "developmentally abnormal" adolescents by requiring finding of capacity before proceeding with delinquency adjudication (citing Sanford J. Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970))).

168 See supra note 7 and accompanying text.

169 In re Michael B., 197 Cal. Rptr. 379, 388 (Ct. App. 1983) (interpreting California Penal Code).

170 State v. Q.D., 685 P.2d 557, 560-61 (Wash. 1984) (en banc) (interpreting statutory definition of infant capacity).

171 State ex rel. C.P., 514 A.2d 850, 854 (N.J. Super. Ct. Ch. Div. 1986) (interpreting New Jersey statute).

172 In re William A., 548 A.2d 130, 131 (Md. 1988) (quoting Adams v. State, 262 A.2d 69, 72 (Md. Ct. Spec. App. 1970)) (interpreting common law).

173 See Model Statute § II.

174 For example, a small child may know that it is "bad" to play with matches, without comprehending that a lighted match can make a fire that in turn can cause serious damage to buildings and permanent injury to people.

understanding—the ability to extrapolate concrete consequences from abstract rules by applying them correctly to real-life situations.[175]

Because each individual is a unique combination of abilities and deficits, it is impossible to discern a bright-line rule as to what such a showing would entail.[176] However, a functional test should provide guidelines concerning the state's evidentiary burden. The Model Statute, for example, requires the state to prove capacity in a two-part showing, which incorporates evaluations from mental health professionals and educators whose testimony analyzes the child's: (1) level of cognitive and moral development; and (2) ability to understand the substance and potential consequences of the legal proceedings.[177]

The common law infancy defense is silent as to the quantum of proof required to overcome a presumption of incapacity.[178] States vary as to the applicable burden of proof needed to rebut the presumption of incapacity: California requires "clear proof,"[179] Washington requires clear and convincing evidence,[180] New Jersey requires a "preponderance of the evidence,"[181] and Maryland appears to endorse the "beyond a reasonable doubt" standard.[182]

Although capacity is not an element of the offense, "frequently, the same facts required to prove mens rea will be probative of capac-

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175 Such a showing may be provided by a thorough psychiatric evaluation performed shortly after the child was charged with the offense. See Model Statute § II. The testimony of the mental health professional who performed the evaluation may be critical at trial for several reasons. First, this person can authenticate the contents of the psychiatric report at trial. Second, he or she can testify to the child's level of maturity at the time of the offense, which may differ significantly from the child's physical, emotional, and intellectual maturity at the time of trial, if several months, or even years, have elapsed in the interim.

176 "Capacity determinations, by their nature, are fact-specific inquiries and must be determined on a case by case basis." State v. Linares, 880 P.2d 550, 557 (Wash. Ct. App. 1994).

177 Such evidence could always be supplemented with the testimony of the child himself, should he choose to take the stand; however, the Fifth Amendment prohibits the state from compelling a child to testify on his own behalf. See In re Gault, 387 U.S. 1, 42-57 (1967) (holding that Fifth Amendment privilege against self-incrimination applies to juveniles); *Linares*, 880 P.2d at 553-54 (same).

178 Hale's requirement of "very strong and pregnant evidence" could arguably be met by a variety of evidentiary standards, including preponderance of evidence, clear and convincing proof, or proof beyond a reasonable doubt. See 1 Hale, supra note 1, at 27.

179 In re Gladys R., 464 P.2d 127, 132 (Cal. Ct. App. 1970).

180 See State v. Q.D., 685 P.2d 557, 561 (Wash. 1984) (en banc) (holding that state must rebut presumption of incapacity by clear and convincing evidence).

181 State ex rel. C.P., 514 A.2d 850, 854 (N.J. Super. Ct. Ch. Div. 1986).

182 While the Maryland court did not explicitly endorse a specific standard of proof, it defined as the "most modern" articulation of the state's burden a showing that "'the surrounding circumstances . . . demonstrate, beyond a reasonable doubt, that the individual knew what he was doing and that it was wrong.'" In re William A., 548 A.2d 130, 131 (Md. 1988) (quoting Adams v. State, 262 A.2d 69, 72 (Md. Ct. Spec. App. 1970)).

ity . . . . Capacity to be culpable must exist in order to maintain the specific mental element of the charged offense."[183] The evidentiary overlap between findings of capacity and mens rea, combined with the critical role of a capacity finding in preventing a conviction obtained in violation of due process, indicate that the state should prove capacity beyond a reasonable doubt.[184] A less rigorous burden of proof might collapse the two-step evidentiary inquiry—(1) *can* the accused form the mens rea and (2) *did* the accused form the mens rea—into a single factual finding, so that the state would be relieved of developing evidence over and above that needed to establish the element of intent required under the definition of the offense.

D. Consequences

Perhaps the most problematic feature of the common law infancy defense is that it operates to bar any legal consequence arising from an act of wrongdoing. Immunity from criminal sanction, gained from successfully raising the infancy defense, prevents the court from exercising any type of intervention in a child's life. Thus, if the infancy defense is widely available and successfully utilized, many disturbed, violent preadolescents will not receive the rehabilitative, therapeutic treatment that they need. Instead, these children will be discharged to their homes and communities to grow up incorporating the wrong lessons: that there are no consequences for their behavior, and that, as individuals, they do not merit society's attention. State and local governments need to develop effective treatment programs for these children who, if spared punitive sanction but offered no therapeutic alternative, are likely to continue to engage in violent behavior.[185]

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[183] *Q.D.*, 685 P.2d at 561.

[184] See Model Statute § I(a)(3). A less rigorous standard can result in capacity findings on the basis of a minimum of evidence. For example, in *State v. Linares*, the accused, an 11-year-old boy, was charged with breaking into a school and taking a radio. See 880 P.2d 550, 554-55 (Wash. Ct. App. 1994). At his capacity hearing, the arresting officer testified that Linares had confessed. Aside from the officer, three other witnesses, two of the boy's teachers, and a school psychologist, testified that the boy did not understand the consequences of his actions. The psychologist also testified that the boy had a low IQ and "difficulty processing and getting into long-term memory things." Id. at 555 (internal quotation marks omitted). The boy was convicted and the conviction was upheld on appeal. See id. at 557.

[185] Juvenile court systems in several states have taken the lead in helping and supporting communities to develop alternative or supplemental programs to incarceration. See Mitchell & Kropf, supra note 50, at 25-26. One such program is Project LIFE (Lasting Intense Firearms Education) in Indianapolis, which educates juveniles who have been found delinquent for weapons violations and placed on probation. The juvenile court in Indianapolis supports the program and mandates that juveniles attend its sessions, which involve the juveniles and their families in discussions about the juveniles' involvement with guns and the circumstances surrounding the particular arrest. Because the sessions occur

Of course, juveniles charged with violent offenses who successfully claim the infancy defense are not adjudicated delinquent and therefore cannot be compelled to enter treatment programs without violating the *Winship* doctrine.[186] However, as the Model Statute proposes,[187] these preadolescents may be reclassified under state juvenile codes as dependent children,[188] or, in cases indicating severe mental or emotional disturbance, involuntarily committed to a state hospital under civil law.[189] Both options are problematic: the former because the court's directives for the child are often difficult to enforce,[190] the

after the adjudicatory process has been completed, juveniles and their families can discuss the specifics of the crime without fear of reprisal. See id. at 26.

A pilot program begun in Cleveland, Ohio, employs Multi-Systemic Therapy (MST) to try to reach repeat juvenile offenders or to prevent first-time offenders from committing crimes in the future. The program involves approximately one hundred juveniles, juvenile court judges, caseworkers, social workers, and other community actors. Over a three- to four-month period, caseworkers visit these juveniles at home and in school to check on their progress and provide services, such as family therapy and alcohol or drug counseling, to help them with the underlying problems that contributed to their delinquent behavior. Notably, the MST program in Cleveland costs approximately $5000 per child, while the yearly cost of keeping a child in a state correctional institution is $35,000. See id. at 26-27.

A third type of program, called COMPASS (Community Providers of Adolescent Services), has begun in Massachusetts. In this program, probation officers, social workers, or representatives from social service agencies, called "TRACKERS," are each assigned to seven juveniles who have been adjudicated delinquent and committed to the Massachusetts Department of Youth Services until the age of 18. The trackers communicate with the juveniles on a near daily basis, in an effort to provide long-term support services and community outreach to this group of offenders. Some courts may replace detention with an involvement in the COMPASS program. See id. at 27-28. For a more extensive description of these specific projects and other post-adjudicatory programs, see id. at 25-31.

186 397 U.S. 358 (1970); see also discussion supra Part I.C.1.

187 See Model Statute § IV.

188 Many state statutes refer to dependent children as Children in Need of Supervision (CINS) or Persons in Need of Supervision (PINS). Provisions among states vary, but many jurisdictions prohibit the commitment of dependent children to institutions or youth correctional facilities. See generally Davis, supra note 99, § 6.4. The Uniform Juvenile Court Act, a model code of juvenile laws developed by a conference of juvenile justice experts, provides that "[i]f the child is found to be unruly the court may make any disposition authorized for a delinquent child except commitment to [the state department or state institution to which commitment of delinquent children may be made]." Uniform Juvenile Court Act § 32 (1968), reprinted in Davis, supra note 99, app. A.

189 Civil law commitment of troubled children to mental institutions "apparently is on the rise" due to the lack of alternative treatment facilities in many states and is "fueled by the tremendous growth in the number of for-profit mental hospitals" and the greater access to health insurance to pay for this type of care. Davis, supra note 99, § 6.4, at 6-26.

190 PINS provisions for a child's care and rehabilitation are often "toothless," in that the court cannot hold the child accountable for refusing to cooperate with its mandate, if the PINS statute does not allow the court to place a child in a locked facility for noncompliance or continued incorrigibility. See, e.g., Matter of Jennifer G., 695 N.Y.S.2d 871, 876 (Fam. Ct. 1999) (lamenting absence of judicial power to remand children to secure detention under PINS proceedings as undermining court's ability to help child by imposing punishment).

latter because the permissible duration of commitment may far exceed any criminal sentence.[191] However, if preadolescents classified as dependent were placed in intensive treatment programs rather than simply put on probation,[192] and if preadolescents committed to institutions had to be released after a statutorily specified maximum amount of time,[193] the biggest deficits associated with these placements could be corrected.

Legislation prescribing treatment programs for preadolescents adjudicated dependent or committed to psychiatric facilities should carefully define the permissible range of rehabilitative institutions to exclude youth prisons and other types of incarceration that provide no access to education, medical care, and mental health services.[194] Ideally, such legislation should also provide a variety of treatment alternatives to allow juvenile courts the flexibility to assign each child to the program most responsive to his particular needs.[195] While an extensive discussion of such treatment programs is beyond the scope of this Note, among the possible alternatives are community-based programs, which combine supervised after-school activities with group therapy sessions "designed to focus on each child's problem and to direct the resources of the group toward dealing with those problems."[196] These programs reflect the recognition that the most

191 See Davis, supra note 99, § 6.6, at 6-31 (noting that "[i]n some jurisdictions, a child may be [civilly] committed to an institution for the remainder of his majority . . . . This indeterminate sentencing often means that a child may be committed for a longer period than would be possible in the case of his adult counterpart charged with committing the same offense.").

192 The probation system, described as the policy of allowing a juvenile offender to return home "under probation, subject to the guidance and friendly interest of the probation officer," was envisaged by juvenile court founders as "the keynote of juvenile-court legislation." Mack, supra note 51, at 116. However, the lack of resources and qualified, committed officers hamper the effectiveness of most state probation departments, which has led many to decry the probation system as a failure. See, e.g., Ryerson, supra note 19, at 95 (characterizing juvenile court probation system as "ill-equipped, poorly supervised, inefficient, and philosophically backward effort").

193 See, e.g., Davis, supra note 99, § 6.6 (discussing Uniform Juvenile Court Act § 36(b), which states that no order committing juvenile to institution shall exceed two years). To obtain an extension of that order, the state must request a new hearing to determine if further commitment is necessary. See id.

194 See Model Statute § III.

195 See Davis, supra note 99, § 6.3, at 6-14 (noting that successful rehabilitation effort recognizes that "responses to juvenile problems must be flexible and varied").

196 Id. § 6.3, at 6-13. For a thorough and enlightening discussion of "multi-systemic" alternatives to juvenile probation or incarceration, see Currie, supra note 105, at 101-08, 167-72. Currie argues that programs that treat children "in isolation from the broader social environment which surrounds them" are "prescription[s] for failure" and that the best-designed programs treat offenders within the home, at school, and in the larger community setting. See id. at 105.

successful rehabilitation adopts a "multi-systemic"[197] approach designed to address the many issues confronting young offenders: dysfunctional family dynamics, poor performance at school, and problematic interactions with peers.[198]

CONCLUSION

In the United States today, the threat that preadolescent children will be prosecuted as adults has been largely alleviated by the juvenile court, and yet the infancy defense is arguably more critical to the protection of juvenile rights than ever before. The substantive and procedural criminalization of the juvenile justice system leaves preadolescents in a strange no-man's land. They are accorded neither the full-blown constitutional protections of adult defendants, nor rewarded with the non-stigmatizing, rehabilitative services that were once the promise of the separate system created to serve their particular needs. Given the current trend, which characterizes violent adolescents and, more recently, violent preadolescents as unredeemable superpredators and demands their prosecution, conviction, and long-term incarceration, it is critical that juvenile courts respond with a dispassionate, deliberative inquiry that weighs all of the relevant factors in determining the legal responsibility properly assigned to these individuals.

The infancy defense is vital to this task. A presumption of incapacity ensures that the state will not convict any child who does not understand that what he did was criminal. Reformulated for the modern juvenile court, the infancy defense helps to ensure that the due process rights of society's most disturbed and vulnerable children are not the latest casualties in our war against crime.

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197 Currie, supra note 105, at 105 (describing "multisystemic therapy" (MST) approach to juvenile rehabilitation).

198 See Davis, supra note 99, § 6.3, at 6-14 ("Following analysis and evaluation of data accumulated over several years in [a] Massachusetts program, one study concluded that community-based treatment was a viable and preferable alternative to institutional treatment.").