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PUNISHING CHILDREN IN THE CRIMINAL LAW

*Cynthia V. Ward**

INTRODUCTION

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

Defendant told a witness that the victim's family "looked at him wrong," and that in return he, Defendant, "had to kill the baby."¹ Defendant and two acquaintances then went to the victim's apartment when the victim's parents were out grocery shopping and had left their infant son with his eighteen-year-old stepsister, who was in the bathroom and did not hear Defendant and his friends enter the house.² Defendant went to the baby's bedroom, took the baby, four-week-old Ignacio Bermudez, out of his bassinet, dropped him on the floor, and proceeded to beat the infant in the head with his fists, feet, and a stick. Defendant and his accomplices then stole property from the house and departed. After the assault, Defendant threatened a female witness with harm if she reported the incident. Defendant then told a family member about the attack; the family member reported him to the authorities. Questioned about the attack, Defendant first lied about it, then eventually re-enacted the assault in a videotaped interview with police.³

Doctors determined that Ignacio Bermudez had suffered "global" brain damage from the attack.⁴ Eighteen months after the assault, the baby was unable to see, walk, or make intelligible sounds.⁵ According to a media report at the time, "Doctors say nothing less than a miracle

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1 Greg Beck, *Suspected Baby-Beating Child To Stay in Custody*, S.F. EXAMINER, Apr. 27, 1996, at A1 (quoting prosecutor Harold Jewett).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

will restore Ignacio to health.”⁶ California prosecutors described Defendant as the “ringleader” in the attack and charged him with attempted murder.⁷ The defense did not dispute the essential facts.⁸

Is Defendant guilty?

Now consider one additional fact: at the time of his assault on Ignacio Bermudez, Defendant was six years old.⁹ Should the single circumstance of age make a difference to Defendant’s guilt or punishment?

For most of the twentieth century the law’s answer was “yes.” Pre-adolescent offenders, even violent ones, were routinely found not responsible and were instead routed through the non-punitive juvenile system, which emphasized treatment and rehabilitation over blame. But the “youth excuse” has come under strong attack in response to high levels of public concern over the violent and harmful actions of young defendants.¹⁰ Over the past two decades the states have significantly revamped their criminal codes to make it easier to punish children who commit violent offenses.¹¹ The fact that a six-year-old was

6 Mary Curtius, *Life of Tears and Hope for Beaten Baby’s Family*, L.A. TIMES, Nov. 2, 1997, at A1.

7 *Id.*

8 *Id.*

9 *Id.* Because of his juvenile status, Defendant’s full name was not used in the media, which referred to him only as “Brandon T.”

10 For example, in a television interview, former California Governor Pete Wilson explained: “We cannot ignore the fact that there are kids . . . who are committing violent adult felonies, and we cannot tolerate it. And youth is no excuse for committing murder, robbery, rape, home invasions, or for terrorizing entire neighborhoods.” *NewsHour with Jim Lehrer: Juvenile Justice* (PBS television broadcast Feb. 29, 2000), available at http://www.pbs.org/newshour/bb/youth/jan-june00/justice_2-29.html. Contrary to the impression one sometimes receives from scholarship in the field, this view has been recently expressed not only in the United States but also in Europe. See, e.g., Home Office, *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (Nov. 30, 1997), <http://www.homeoffice.gov.uk/documents/jou-no-more-excuses?wiel=html>. (“An excuse culture has developed within the youth justice system. It excuses itself for its inefficiency, and too often excuses the young offenders before it, implying that they cannot help their behaviour because of their social circumstances. . . . The system allows them to go on wrecking their own lives as well as disrupting their families and communities.”).

11 See, e.g., Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL* 73, 84 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“Alarmed by an increase in violent offenses (especially gun homicides) by juveniles, most states during the past decade revised their codes pertaining to the adjudication of youths charged with serious and violent offenses.”); Carrie S. Fried & N. Dickon Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability*, 25 *LAW & HUM. BEHAV.* 45, 45–46 (2001) (“The 1980s and 1990s were characterized by increasingly adult-like treatment of juveniles in

actually charged with attempted murder¹² reflects the change in attitude that underlies this trend: twenty years ago even the most serious cases involving children under seven were adjudicated in juvenile court, and in a non-punitive fashion.¹³ The law has changed dramatically, to the point where some states now allow judicial waiver of children into adult court at any age, at least when the child is charged with a serious offense.¹⁴ And in a small but growing number of cases, adult-sized punishment is in fact being inflicted—even when it involves a sentence of life without parole.¹⁵

The issue of punishing children for crime has exposed a divide between the political actors who design and enforce the law, and

the court system and increased focus on the protection of the community rather than the protection of the juvenile defendant. Between 1992 and 1995, forty-one states enacted laws making it easier to prosecute juveniles in adult criminal court. Other legislative mechanisms that emphasize punishment over rehabilitation of juveniles include minimum sentencing requirements, blended sentencing that allows juveniles to be sentenced past the age of twenty one years, and revision of confidentiality provisions in favor of more open proceedings and records.” (citing MELISSA SICKMUND ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS (1997)).

12 The court in the case dropped the charge to assault with intent to do bodily harm, before eventually deciding that the defendant, known in public only as Brandon T., was not competent to stand trial. *Frontline: Little Criminals* (PBS television broadcast May 13, 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/little/etc/script.html>; see *infra* Part I.A.2.b.

13 See, e.g., Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 173–80 (2000) (recounting the history of infancy defense in juvenile court).

14 See, e.g., Lisa Beresford, Note, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 800 n.135 (2000) (citing as examples the states of Alaska, Arizona, Delaware, Hawaii, Idaho, Maine, Missouri, New Hampshire, Oklahoma, Rhode Island, and South Carolina).

15 See, e.g., LYNN COTHERN, U.S. DEP’T OF JUSTICE, COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION 10 (2000), available at <http://www.ncjrs.gov/pdffiles1/ojdp/184748.pdf> (“The justice system’s recent shift toward stronger punishment policies has been marked not only by increased use of the death penalty but by increases in the number of offenders—including juveniles who committed offenses prior to their 18th birthdays—being sentenced to life in prison without the possibility of parole The overwhelming majority of American jurisdictions allow life without parole for offenders younger than age 16. Some even make it mandatory for defendants convicted of certain offenses in criminal court. In Washington State, offenders as young as 8 can be sentenced to life. In Vermont, 10-year-olds can face the sentence.” (footnotes omitted)). In *Roper v. Simmons*, 543 U.S. 551, 574 (2005), of course, the United States Supreme Court held that defendants who were under age eighteen at the time of their crimes may not be sentenced to death. See *infra* notes 37–39 and accompanying text.

those in the academy who evaluate its justification and effect.¹⁶ The law itself has moved strongly and consistently in the direction of convicting and punishing juveniles who commit violent offenses. Politicians speak loudly in favor of “send[ing] a message to violent criminals of all ages”¹⁷ and of “‘putting these juvenile criminals where they need to be—behind bars in the adult prisons.’”¹⁸ Although legislators often cite the values of deterrence and public protection as reasons for the punitive turn toward juveniles,¹⁹ the angry tone of the debate also signals the presence of a strong retributive impulse.²⁰

16 See, e.g., David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1569–73 (2004); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 829–39 (2003); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143, 158–73 (2003).

17 John Caher, *Rhetoric and Reality in the Pataki Era*, TIMES UNION (Albany), Jan. 18, 1998, at A6 (quoting New York Governor George Pataki); see also Michael Finnegan, *Governor Urges Hard Hits on Young Criminals*, N.Y. DAILY NEWS, Dec. 10, 1995, at 8 (quoting Governor Pataki’s statement: “It’s time we take that same tough approach to juvenile crime that we take to violent crime in general.”).

18 Mark Hollis, *House Weighs Treating 16-, 17-year-olds as Adults*, S. FLA. SUN-SENTINEL, Mar. 30, 2000, at 1B. (quoting Sandy Murman, Florida State Representative); see also David Judson, *Juvenile Crime Legislation Expanded, Not Stiffened*, GANNETT NEWS SERVICE, Oct. 21, 1998 (“The main initiative to fail amid the last-minute horse-trading [in the U.S. Congress] was a proposal sponsored chiefly by Rep. Bill McCollum, R-Fla., and Sen. Orrin Hatch, R-Utah, that would have provided states as much as \$2.5 billion over five years to crack down on juvenile crime, add judges and build new youth lockups. The price of the aid, however, required states to adopt rules encouraging prosecutors to try more juveniles as adults, and in cases of particularly heinous crimes, seek the death penalty for offenders as young as 15.”).

19 For example, Florida state senator Gary Siegel, R-Longwood, who favored passage of a new bill that “cracks down” on juvenile crime, was quoted as saying: “Juveniles all over the state are aware of what we’re doing and they want to see how we’re going to address this epidemic increase in crime. They are waiting for our signal.” Curtis Krueger, *Senate Passes Juvenile Crime Bill Unanimously*, ST. PETERSBURG TIMES, Mar. 10, 1994, at 4B; see also Caher, *supra* note 17 (“‘Let’s send a message to violent criminals of all ages: If you assault our people, you will land in prison.’” (quoting George E. Pataki, New York Governor)).

20 See, e.g., Scott & Steinberg, *supra* note 16, at 807. Scott and Steinberg explain that the trend toward punishing juveniles criminally “has features of moral panic” and that “the elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community. *Id.*; see also Bazelon, *supra* note 13, at 179 (“The current wave of crime reform is characterized by the sentiment that the punishment should fit the crime, not the criminal. This ‘just deserts’ approach is designed to ‘crack[] down especially hard on juvenile offenders,’ whom many believe ‘are now coddled by a

But the punitive turn toward young offenders conflicts head-on with the received view of legal scholars that important differences between children and adults—and even between older adolescents and adults—mandate separate, and gentler, treatment of juveniles who commit serious crimes.²¹

Considerable irony attends this debate. In the 1970s and 1980s, a vocal “Children’s Rights” movement argued passionately for the proposition that adolescents were as competent as adults to make many important life decisions, including the decisions to drink alcohol, to consent to medical treatment, and to have an abortion without consulting a parent.²² Accompanying this movement were behavioral studies purporting to discover that, in important and legally relevant respects, the cognitive capacities of adolescents equal those of adults²³:

Contrary to the stereotype of adolescents as markedly egocentric, for example, or as handicapped by deficiencies in logical ability, studies show that adolescents (at least, from age fifteen on) are no more likely than adults to suffer from the “personal fable” (the belief that one’s behavior is somehow not governed by the same rules

justice system that clings to a discredited belief in rehabilitation.” (quoting ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 4 (1998)).

21 See, e.g., Brink, *supra* note 16, at 1557 (“For a variety of reasons, juveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then [on a retributive theory of punishment] they are less responsible. But then the trend to try juveniles as adults mistakenly assesses the punishment juveniles deserve by the wrong or harm they have done, ignoring their diminished responsibility for this wrong or harm.”); Scott & Steinberg, *supra* note 16, at 801 (“Using the tools of developmental psychology, we examine two important dimensions of adolescence that distinguish this group from adults in ways that are important to criminal culpability. Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.”); Bazelon, *supra* note 13, at 163 (“Only by retaining the distinctions between the mental capacities 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.”); see also Bonnie & Grisso, *supra* note 11, at 93–98 (arguing on grounds both of competence and culpability that children and adolescents should not be held as responsible as adults who commit facially similar offenses).

22 See Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors*, 48 *EMORY L.J.* 65, 91–92 (1999).

23 Young children—those under the age of ten—were generally excepted from these findings; with respect to them, it was generally conceded that cognitive differences *did* justify different treatment from that accorded to adults. See, e.g., Brink, *supra* note 16, at 1570; Bazelon, *supra* note 13, at 163.

of nature that apply to everyone else, as when a cigarette smoker believes that he is immune to the health effects of smoking) and no less likely than adults to employ rational algorithms in decision-making situations. In fact, there is substantial evidence that adolescents are well aware of the risks they take²⁴

The authors go on to note that “[t]hese findings about a relative lack of differences between adolescents and adults were used by youth advocates in the 1980s to argue for the expansion of the rights afforded to minors. In particular, independent access to abortion was at the center of a vigorous moral, political, and legal debate.”²⁵

Based in large part on the lack of differences found in the informed consent literature, a number of psychologists supported the adolescent autonomy position.²⁶ In its amicus brief in the Supreme Court case of *Hodgson v. Minnesota*,²⁷ for example, the American Psychological Association (APA) cited abundant studies supporting the claim that juveniles possess sufficient maturity to decide, without adult consultation, whether or not to have an abortion.²⁸ “[B]y middle adolescence (age 14–15),” the APA report concluded, “young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems”²⁹

When, in the 1990s, such research formed the basis for the argument that adolescents ought not only to be accorded rights, but also

24 Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 407 (1999) (citing Marilyn Jacobs-Quadrel et al., *Adolescent (In)vulnerability*, 48 AM. PSYCHOLOGIST 102 (1993)).

25 *Id.* at 408.

26 *Id.* at 408–09; see also Fried & Reppucci, *supra* note 11, at 46 (“Adolescent decision making has been studied in several legally relevant contexts, including competence to make abortion decisions, consent to medical treatment and waiver of *Miranda* rights. In general, these studies have found that, past the age of 14 years, adolescents are competent decision makers under the informed-consent model as long as they are of average or above-average intelligence.” (citations omitted) (citing THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS* (1981); Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 L. & HUM. BEHAV. 129 (1992); Louis A. Weithorn, *Children's Capacities in Legal Contexts*, in *CHILDREN, MENTAL HEALTH AND THE LAW* (N. Dickon Reppucci et al. eds., 1984)).

27 497 U.S. 417, 457–58 (1990) (striking down state law requiring that minor females notify both parents and then wait forty-eight hours before having an abortion as unconstitutional because it was not reasonably related to legitimate state interests).

28 Brief for American Psychological Association et al. as Amicus Curiae Supporting Petitioner/Cross-Respondent at 18–20, *Hodson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88–1125 & 88–1309).

29 *Id.* at 19 (footnotes omitted).

assigned *responsibility* (including criminal responsibility) for their behavior, the children's movement found that studies demonstrating the substantially equal capacities of adolescents and adults

proved to be a double-edged sword. How could adolescents be mature enough to make their own decisions about abortion, but not mature enough to face the consequences of committing armed robbery or using marijuana? The very existence of a separate justice system for juveniles is predicated in part on the assumption that the basic competencies of adolescents and adults differ in fundamental ways that affect judgment. If adolescents and adults are equally capable decision-makers, the argument that adolescents suffer from "diminished responsibility" is called into question. Indeed, the very same evidence that had been used to advocate for young people's autonomy in medical decision-making could provide—and has provided for recent calls to treat juvenile delinquents as adults within our legal and penal systems.³⁰

The argument against juvenile liability becomes even more difficult when one considers that the threshold capacities required for criminal responsibility may well be *lower* than those required competently to exercise some rights for which children's advocates have fought. As Professor Stephen Morse has insightfully explained, the crimes for which children are subject to punishment as adults are almost always intentional crimes involving the knowing infliction of serious harm on a victim.³¹ Adolescents as well as adult offenders know that the acts do inflict such harm.³² It seems facially incoherent to argue (1) that the adolescent who intentionally shoots and kills his teacher should not be held responsible because he lacks even the fundamental capacity to realize that shooting someone will inflict serious

30 Cauffman, et al., *supra* note 24, at 408–09.

31 Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 53–54 (1997) ("Adolescent criminal conduct for the most part involves the intentional infliction of harm: the offender intentionally killed, inflicted grievous bodily harm, raped, stole, destroyed, or burned. That is, it is the adolescent's conscious objective to cause in the immediate future precisely the harm the law prohibits. Unless serious adolescent offenders are specially unlucky or unskillful, they are practically certain to produce the harm that is their conscious objective, and they know it."). This is not always the case, of course. For example, a case in New York this spring involved a nine-year-old charged with manslaughter for stabbing her girlfriend to death during a dispute over a ball. Associated Press, *Girl, 9, Charged with Stabbing 11-year-old Pal*, May 31, 2005, <http://www.msnbc.msn.com/id/8044197> (last visited Sept. 29, 2006).

32 See, e.g., Morse, *supra* note 31, at 54. ("The intentional harmdoer knows that the conduct invades the interests of others; those interests may be given little value or otherwise ignored or rationalized away, but they must be present to the adolescent's mind.").

harm, and (2) that adolescents as a class have sufficient maturity and judgment to decide whether or not to have an abortion. Reduced to its essentials, the claim seems to be that adolescents should be treated as adults for the purposes of distributing rights and benefits, and as children for the purposes of assigning responsibility and punishment. But what justifies that view? Since the very same traits and characteristics—the capacity for instrumental reasoning, an appreciation of the consequences of acting, the ability to assess the moral underpinnings of one's decision—undergird the arguments for rights and for responsibilities, it is difficult to see what principle or principles support such a theory.

Nonetheless, a burgeoning literature seeks routes around this problem, arguing against equal treatment of adolescents in the criminal law and for the retention of a rule that distinguishes children as a class and treats them as non-culpable, or less culpable, for their otherwise criminal offenses.³³ The scholarship does this either by making the case that the studies so heavily relied upon by the children's autonomy movement were, after all, badly flawed;³⁴ or by arguing that even if those studies were not inherently flawed on their own terms, they did not take account of all relevant adolescent differences, and that once such additional differences are considered, it becomes clear that adolescents should *not* be criminally punished on the same terms as adults.³⁵ Most recently, scholars holding this view have hailed the

33 See, e.g., Brink, *supra* note 16, at 1585; Cauffman et al., *supra* note 24, at 404; Scott & Steinberg, *supra* note 16, at 801; Bazelon, *supra* note 13, at 162.

34 See, e.g., Cauffman et al., *supra* note 24, at 406–07 (“Most studies of cognitive development that used the informed consent framework have found few major differences between adults and youth about fifteen years of age and older. However, the foundation of this empirical work is fragile, as most of the investigations suffer from various methodological limitations, including small, unrepresentative, usually white, middle class samples of youth taking part in laboratory studies rather than in studies that compare adolescent and adult performance under conditions that adequately resemble daily life.”); *id.* at 408 (“Based in large part on the lack of differences found in the informed consent literature, a number of psychologists supported the adolescent autonomy advocates’ position. Their assessment of the research was not unanimously supported, however, as critics warned that the limitations of extant research failed to justify strong policy arguments about adolescents’ equivalence to adults.”); *id.* at 411 (“It is our position that the conclusion that adolescent judgment is equivalent to that of adults is both tenuous and ill suited for legal policymaking.”).

35 See, e.g., *id.* at 411 (“We posit that if psychosocial factors are taken into consideration in addition to the cognitive factors that are typically assessed, significant differences between adolescents and adults will emerge. Such differences reflect genuine differences in capacities . . . [that] provide a psychological basis for drawing legal distinctions between adolescents and adults.”); Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in *YOUTH ON TRIAL*, *supra*

arrival of brain-imaging studies that trace the behavioral differences between adolescents and adults to differences in brain development between the two groups.³⁶ In 2005 the United States Supreme Court entered the fray, holding in the case of *Roper v. Simmons*³⁷ that a defendant who was not yet eighteen at the time he committed intentional murder could not constitutionally be executed for his crime because, in large part, relevant differences between juveniles and adults make the former less culpable for crime.³⁸ To the extent that the Court's rationale transcends the specific context of capital punishment,³⁹ the Court has joined forces with the scholarly wing of the debate and, in a meaningful sense, divided the law from itself.

In general, the "difference" scholars have limited their discussion to comparing adolescents with adults. Most take as a starting assumption that young children should not be held criminally responsible under any circumstances. Thus, in general the debate in the litera-

note 11, at 325, 326–37 (differences in adolescents' "maturity of judgment" may justify different treatment by the criminal law); Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL*, *supra* note 11, at 291, 293 (differences in adolescent decision-making capacity justify different treatment by the criminal law). At a couple of points, Elizabeth Scott and Laurence Steinberg suggest that those who believe juveniles should be held responsible for crime may be motivated by racism. See Scott & Steinberg, *supra* note 16, at 809 ("A troubling explanation for the puzzling hostility toward young law violators is that attitudes are driven by racial and ethnic bias."); *id.* at 837 ("A developmentally-informed boundary constraining decisionmakers represents a collective pre-commitment to recognizing the mitigating character of youth in assigning blame. This concern is critical, given the evidence that illegitimate racial and ethnic biases influence attitudes about the punishment of young offenders and that decisionmakers appear to discount the mitigating impact of immaturity in minority youths.").

36 See, e.g., Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 327 (2006); Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 697–98 ("[N]ew understandings of the developing brain lead to the conclusion that children should not be subject to the same sorts of punishment that may be appropriate for adult offenders."); see also *infra* text accompanying notes 123–26 (concluding that studies alone cannot determine when to hold someone criminally responsible).

37 543 U.S. 551 (2005).

38 *Id.* at 569–75 (detailing differences between juveniles and adults that, in the Court's view, lessen the criminal culpability of the former).

39 It may not. As the basis for its holding the Court discussed differences between juveniles and adults that, in its view, explained why defendants under the age of eighteen "cannot with reliability be classified among the worst offenders"—that is, among those offenders who merit the death penalty. *Id.* at 553. The Court did not address the question of whether juvenile offenders should be criminally liable at all. *Id.* at 569.

ture focuses on whether offenders of age fourteen or older ought to be excluded from criminal liability as a class.⁴⁰

But this age-circumscribed discussion, while important in some ways, ultimately fails to engage either the dimensions or the nationwide attraction of the punitive turn toward children in the criminal law. As noted above, that move toward punishing children as adults does not merely address the question of whether the age of criminal responsibility should be lowered to fifteen or fourteen. In at least twenty-eight states, the minimum age at which a child can be transferred to adult court is under fourteen,⁴¹ and in some states there is no lower limit at least for the most serious offenses.⁴² Indeed, the most controversial cases in recent years involve serious crimes committed by much younger children who, like Ignacio Bermudez's attacker, seem at the time of their acts to "know what they are doing."⁴³ Increasingly the law allows such cases to be prosecuted, and such defendants to be punished, in the criminal system. This punitive turn toward pre-adolescent children is the latest sign that the law has repudiated the philosophy of redemption which generated, and long animated, the juvenile justice system, and is replacing it with a belief in the necessity of punishing "Bad Seeds."⁴⁴ At least in part, this belief

40 See, e.g., Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550 (2000) ("[A] justice policy that treats adolescence as a distinct legal category not only will promote youth welfare, but will also advance utilitarian objectives of reducing the costs of youth crime."); Scott & Steinberg, *supra* note 16, at 799 (analyzing the case of Lionel Tate).

41 See, e.g., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE 17 (1999) (listing minimum age for judicial waiver in the various states).

42 See, e.g., Beresford, *supra* note 14, at 800 n.135.

43 See, e.g., *infra* note 52 and accompanying text (recounting case of Nathaniel Abraham). Consider, also, the case of Eric Morse, a five-year-old boy who in 1994 was thrown off a building to his death by two other boys, aged ten and eleven after he refused to steal candy for them. For a detailed account of the murder of Eric Morse, see LLOYD NEWMAN ET AL., *OUR AMERICA* 87-155 (1997).

44 Contrary to the received scholarly view, our European allies have experienced a similar development during the past quarter century. See, e.g., *CONFRONTING YOUTH IN EUROPE* 25 (Jill Mehlbye & Lode Walgrave eds., 1998) (noting that in Europe "[t]he age of criminal responsibility varies a lot. In England young delinquents from the age of 10 can be prosecuted for their offences. In Scotland this is theoretically possible from the age of 8. In Ireland this is even the case from the age of 7."); *id.* at 22-23 ("Shortly after the critical sixties and seventies, macro-evolutions in European societies deeply influenced juvenile delinquency and the way to deal with it. . . . Public opinion and governments were inclined towards an increased punitive approach to delinquency. The pure rehabilitative model appeared more and more to be naïve. As a consequence, attention to the 'justice' element in dealing with juvenile offenders became more important, including a stricter punishment-orientation."); Maud

is premised on the retributive intuition that some children who commit violent crimes are innately, or at least irredeemably, evil, and that they deserve to suffer as much punishment as do adults who inflict similar harms on society.⁴⁵ But the continuing controversy over the issue indicates that, whatever the law may now allow, as a society we are not yet fully convinced of the Bad Seed theory. When it comes to punishing children for crime, age does still make a difference.

If the behavior of Brandon T. would otherwise qualify him as criminally responsible, should the single fact of his age change that legal status? If so, why? If not, why do we still flinch at the thought of a six-year-old being sent to prison for a brutal, and admittedly intentional, act? Beyond the specific issue of juvenile liability, cases such as that of Brandon T. offer the chance to think more broadly about the elements of criminal responsibility and the arguments that justify and sustain criminal punishment.

Two intuitions fuel widespread scholarly opposition to punishing children for crime. Not coincidentally, they are the same two beliefs that gave rise to the juvenile justice system more than a century ago. The first goes to the elements of responsibility, claiming that children lack the threshold understanding and cognitive capacity to be “guilty” for a harmful act.⁴⁶ The second focuses not on mental capacity per se, but on children’s inherent potential for growth and change.⁴⁷ Whatever a child has done, (s)he is still a child, a person who will someday grow up to be an adult. To inflict a long term of punishment on a child is, ultimately, to visit suffering on a different being—the adult whom the child will become—from the person who committed the act. That, the argument goes, is unjust.

Frouke de Boer-Buquicchio, Deputy Sec. Gen., Council of Eur., Kilbrandon Lecture: Justice for Europe’s Children (Dec. 1, 2003), available at <http://www.gccs.gla.ac.uk/pages/kilbrandon.htm>. (noting, and regretting, that “the age of criminal responsibility varies considerably across Member States from as young as age 7 up to age 18”).

45 For example, Florida state senator Ander Crenshaw has been quoted as saying: “There are some [juvenile] offenders who are lost, . . . [t]hey have no sense of remorse, they are defiant by nature and they are never going to change.” Krueger, *supra* note 19. Additionally, when interviewed on *Frontline*, psychiatrist Martin Blinder, who had interviewed the six-year-old who attacked Ignacio Bermudez, opined: “The problem, to me, stems from my conviction that this sort of character disorder, and certainly a character disorder of this early severity, is probably largely genetic. There is something to be said for the phrase ‘natural born killer.’ It’s my view that most of what I found was predestined by his genetic endowment.” *Frontline: Little Criminals*, *supra* note 12.

46 See *infra* Part I.A.2.a–b.

47 See *infra* Part II.A.

In this Article, I use the case of Brandon T. to examine both of these intuitions about punishing children for crime. In Part I, I discuss the elements of criminal responsibility and examine the bases for what I call the Culpability Thesis—the claim that children, by definition and as a class, do not possess the understanding, experience, and cognitive capacities necessary to be held criminally liable. I conclude that none of these arguments mandates the conclusion that children must be categorically excluded from criminal responsibility.

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

In reaching these conclusions I rely on, and make repeated reference to, the excellent work of Stephen Morse on the subject of juvenile responsibility for crime.⁴⁸ Professor Morse’s insights as to the proper standard of criminal culpability generally—as to the application of that standard to adolescents, and, as to the significance to criminal guilt of differences between adolescents and adults—have added greatly to the otherwise lopsided scholarly literature on this important subject. But, like virtually every other commentator on the subject, Professor Morse limits his analysis to the issue of criminal liability for adolescents, and explicitly and categorically excludes young children—even those who, like Brandon T., have committed violent crimes that have inflicted serious harm—from responsibility on the ground that “the issue of full or substantial responsibility is not seriously in contention for young children.”⁴⁹ The current structure of the criminal law argues otherwise, and, I contend, only by allowing ourselves to think deeply about cases such as those of Brandon T.—

48 See Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2006); Morse, *supra* note 31.

49 Morse, *supra* note 31, at 52.

involving young children who do, in fact, commit heinous offenses—can we understand, and do justice to, the reasons for the punitive turn toward children in the criminal law.⁵⁰

Ultimately, this Article seeks a rational account of the law of criminal responsibility as it actually is, and particularly of the emerging view that children, even young children, can and should be criminally punished for seriously harmful acts. It is tempting to dismiss this profound change in the law with the thought that legislators who favor expansion of juvenile liability are simply playing politics, responding to public concern about juvenile crime in order to get re-elected and with no thought to the underlying values involved. It is true that legislative concern about juvenile crime has sometimes followed controversial cases involving horrific acts by very young defendants.⁵¹ But what this reveals is not the superficial nature of politics; instead, it demonstrates the weakness of the rationales that have traditionally supported a separate juvenile justice system. When a six-year-old plans, strategizes, and ultimately inflicts a terrible harm on someone it immediately and graphically gives the lie to the idea that children cannot possess the requisite mental capacity to inflict intentional harm. When an eleven-year-old caps a record of twenty-three felonies by murdering another child in cold blood at the direction of his gang, it calls into serious question our assumption that all children can be redeemed from a life of crime and, whatever they have done and with whatever intent, should be treated rather than punished.⁵² And when

50 *Id.*

51 Perhaps the single largest generator of public concern was a series of school shootings that took place in the late 1990s. Most of the shootings involved adolescent males, and some involved even younger children. See, e.g., *Juvenile Violence Time Line*, WASH. POST ONLINE, 2000, <http://www.washingtonpost.com/wp-srv/national/longterm/juvmurders/timeline.htm> (recounting (among others) the murders committed at school by fourteen-year-old Barry Loukaitis in 1996; sixteen-year-old Luke Woodham and fourteen-year-old Michael Carneal in 1997; thirteen-year-old Mitchell Johnson, eleven-year-old Andrew Golden, fourteen-year-old Andrew Wurst, eighteen-year-old Jacob Davis, fifteen-year-old Kipland Kinkel, and fourteen-year-old Quinshawn Booker in 1998; eighteen-year-old Eric Harris and seventeen-year-old Dylan Klebold at Columbine High School in 1999).

52 The case is that of Robert “Yummy” Sandifer, as described in PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 135 (2d ed. 2002) (“By age 11, [Yummy Sandifer] has compiled rap sheet of 28 crimes, all but five of which are felonies.”). Robinson’s account goes on to describe the murders of sixteen-year-old Kianta Britten and fourteen-year-old Shavon Dean, by eleven-year-old Sandifer at the direction of his gang. *Id.* Also consider the Michigan case of eleven-year-old Nathaniel Abraham, who was tried and convicted as an adult for a 1997 murder which he committed by shooting his victim while perched in a tree. Before the murder, Nathaniel “was already a suspect in nearly two dozen crimes, including burglary, larceny, home invasion, arson,

such events repeatedly contradict our assumptions about culpability, it is hardly surprising if the public, and the lawmakers it elects, begin to question the accuracy of those assumptions.

It is not only legislators' punitive response to horrific acts by children that should hold our attention; it is the revelation, graphically and unarguably revealed by this change in laws, that the two rationales which have supported the juvenile justice system for more than a century may well be dead wrong. That is the reality to which the law has responded by expanding juvenile liability for crime.

But even conceding the above, the law's punitive response is not the only possible one. For those many citizens who favor a robust theory of criminal responsibility but also cringe at the idea of sending a six-year-old to prison no matter what (s)he has done, the collapse of the traditional rationales for excusing juveniles offers an invaluable chance to test out the intuition that children should, nonetheless, be excused from criminal responsibility. Can that intuition still be justified, and if so, on what basis?

If the argument in this Article is correct, a valid basis for a categorical "youth excuse" will *not* be found in the rubrics of difference, redemptive potential, or lack of mental capacity. In Part III, I suggest a new and different justification—one that is grounded not in behavioral or brain differences but in the law's own treatment of, and consequent obligation toward, all children.

I. BRANDON T. AND THE ELEMENTS OF CRIMINAL RESPONSIBILITY

Suppose that when you first read the description of the attack on Ignacio Bermudez you agreed that the perpetrator was guilty of a serious crime, that the charge of attempted murder seemed appropriate in the case. How did you then react when you read that Brandon was six years old at the time of the attack? Was your reaction the same as that of Harold Jewett, the California prosecutor who brought the attempted murder charge against Brandon? "It doesn't matter whether you're 6 or you're 106," said Jewett in an interview.⁵³ "If you do something that hurts someone else, with knowledge of the wrongfulness of it, you're responsible for it, period."⁵⁴ Or did the single fact of Brandon's age make you hesitate? If the latter, why? Did Brandon's age give you pause because you think it should matter to his criminal liability; or because you think that regardless of liability he should not be

threatening classmates, beating two teenagers with metal pipes, and snatching a woman's purse at gunpoint." Beresford, *supra* note 14, at 785 n.9.

⁵³ *Frontline: Little Criminals*, *supra* note 12.

⁵⁴ *Id.*

criminally punished; or for some other, independent reason? This Part addresses the first possibility, which I call the Liability Thesis.

A. *The Liability Thesis: Mens Rea in Children*

One reason offered in favor of exempting children from criminal liability is that they lack the capacity to be mentally culpable.⁵⁵ Young children in particular, according to this argument, are not capable of forming the requisite intent, or mens rea, to be responsible even for their otherwise criminal acts. This view has a long history. Even before the creation of separate juvenile courts in the late-nineteenth century, children younger than seven at the time of their acts were treated as not responsible for crime, largely on the theory that young children lack the capacity to form mens rea, or culpable intent.⁵⁶ The assumption that juveniles lack the requisite mens rea for criminal responsibility was also a core reason for removing them from the criminal justice system entirely and creating a separate, non-punitive adjudication structure for dealing with juvenile crime.⁵⁷ But what does it mean to say that a person lacks the capacity to form mens rea? To answer that we need to work from a theory of what mens rea is and what capacities it requires.

55 See Morse, *supra* note 31, at 52.

56 For example, consider the seventeenth-century writings of Sir Matthew Hale on the use of the insanity defense in England.

[Hale] assigned or withheld legal accountability for criminal activity according to whether or not the child was *doli capax*—possessed of the intelligence and comprehension to form the blameworthy intent necessary for the commission of a crime. Under the age-based system of classification [devised by Hale], a child under seven was termed *infantia*, by definition *doli incapax* and barred from prosecution for a criminal offense.

Bazelon, *supra* note 13, at 168–70. Andrew Walkover traces this idea back to the common law and notes that “[a]t common law the infancy defense was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts.” Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 512 (1984). See generally Bazelon, *supra* note 13, at 190 (arguing that the same standard should apply today to juvenile offenders who were under age seven at the time of their otherwise criminal behavior).

57 See, e.g., Stephen Bates Billick, *Developmental Competency*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 301, 302 (1986) (“The founding premise of the juvenile justice system was that juveniles were incompetent to commit crimes with the same intent as adults because of maturational immaturity . . .”).

1. The Elements of Criminal Responsibility

Criminal law doctrine affords two routes to understanding the elements of responsibility. The first focuses on what the state must prove to show mental culpability in a criminal trial; the second assumes that the state can prove the elements of a crime,⁵⁸ and outlines conditions under which the defendant might nonetheless argue in favor of exculpation.⁵⁹

The first route is fairly straightforward. To make out a prima facie case the state must show that the defendant did the act which caused the originally prohibited harm, and that at the time of the act, the defendant possessed the requisite mental state for commission of the crime. The Model Penal Code sets out four standards of mental culpability—conscious purpose, knowledge, recklessness, and negligence.⁶⁰ Thus, if the state can show beyond a reasonable doubt that the defendant had the conscious purpose at the time of doing the acts he's charged with doing and of causing the harm he caused, then the state has proven mens rea.⁶¹ Where defendant lacks such intent (either because he has no capacity to form intent, or for some other reason), and such intent is a required element of the crime with which (s)he is charged, (s)he has a defense "on the elements," which is another way of saying that the state's case will fail for lack of mens rea.⁶²

But even when the state has demonstrated that the defendant committed the act with criminal "intent," the defendant may nonetheless avoid liability if he or she can successfully advance an affirmative excuse or justification.⁶³ The premise of a justification defense is that although the defendant's behavior normally would violate the law, the

58 See, e.g., Robert E. Shepard, Jr., *Juvenile Justice: Rebirth of the Infancy Defense*, CRIM. JUST., Summer 1997, at 45, 45 ("[Most states have] greatly liberalized the ability of the state to try juveniles as adults.").

59 MODEL PENAL CODE § 3.01 (1962).

60 *Id.* § 2.02. A fifth standard, of strict liability, eliminates the mens rea requirement for some (minor) crimes. See *id.* § 2.05.

61 *Id.* Under Model Penal Code section 2.02(5), higher levels of mens rea suffice to prove lower levels. Thus,

[w]hen the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Id.

62 See *id.* § 2.02(j).

63 See *id.* §§ 3.01–.04, 4.01.

defendant did the right thing in the particular situation facing him or her. The paradigmatic case for justification is self-defense—the defendant acknowledges that he intentionally killed the victim under circumstances in which defendant reasonably believed that the victim presented an immediate threat of death or serious bodily injury.⁶⁴ In that situation (and assuming defendant's claim can be proven), we say that the defendant's act was justified, that it was the right thing to do under the circumstances.⁶⁵

The other form of affirmative defense is excuse. When defendant lays claim to an excuse she acknowledges that (1) the state can prove *mens rea* (as well as causation and *actus reus*), and that (2) what she did was wrong—her behavior cannot be justified under the law.⁶⁶ Nevertheless, defendant asks to be exonerated from criminal responsibility on the grounds of some personal defect or lack of capacity that would render it unjust to convict her of a crime. The paradigm here is the excuse of insanity, on the Model Penal Code's definition of which defendant may escape criminal liability if, (1) as a result of a mental disease or defect, (2) Defendant lacks "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."⁶⁷ Notice that this suggests the necessity of certain threshold capacities—to appreciate the wrongfulness of one's act, and to have the ability to control one's conduct to the extent of complying with the law—before criminal liability may be imposed. In addition, the affirmative excuse of duress illuminates the law's assumption that persons guilty of a crime have acted voluntarily and not under coercion by another person.⁶⁸

64 See, e.g., *id.* § 3.04(2)(b) ("The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . .").

65 See also *id.* § 3.02 (explaining that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged).

66 See, e.g., *id.* §§ 2.04, 2.08, 4.00 (discussing the excuses of ignorance, mistake, intoxication, and mental disease).

67 *Id.* § 4.01.

68 See, e.g., *id.* § 2.09 ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.").

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

a. Brandon T. and Threshold Culpability

If the above discussion is correct, the law assumes the presence of three threshold capacities when a person is charged with a crime. These are (1) instrumental rationality, which in turn requires the capacity to form the conscious purpose to do a thing, to correlate that intent with actions capable of achieving it, and to follow through by performing those actions which cause the criminal harm;⁶⁹ (2) the capacity to understand the difference between acting rightfully and acting wrongfully; and (3) the capacity to refrain from acting wrongfully which essentially assumes that defendant did not act under overpowering compulsion (from inside or outside) that left him with no choice but to do wrong.

Is it true that, as a class and by definition, children lack the threshold level of these capacities required for criminal liability? Consider, again, the case of Brandon T. Evidence in that case indicated that Brandon (1) held a grudge against the parents of Ignacio Bermudez; (2) determined to kill Ignacio in order to revenge himself on the baby's parents for "harassing him;" (3) recruited accomplices; (4) waited until Ignacio's parents were out of the house; and (5) went to the baby's room where he brutally beat Ignacio, inflicting enormous and irreparable damage.⁷⁰ After the attack, Brandon T. (1) stole a very popular "Big Wheel" tricycle from the Bermudez house; (2) warned a potential witness, a little girl, "You better not tell anybody what I did;" (3) initially lied to police by saying that he didn't do it; and (4) eventually confessed and reenacted the entire event on videotape.⁷¹

It seems clear from the facts that at the time he attacked Ignacio Bermudez, Brandon T. (1) intended to perform the acts that harmed Ignacio (he did not accidentally knock the baby out of its bassinet; he intentionally threw the baby on the floor); (2) did those intentional actions with the conscious purpose of harming the baby (when he took the baby out of the bassinet and dropped him, he did not think that Ignacio would fly out of the room; he knew the baby would fall to the floor and that the fall would harm him); (3) knew that if he were caught by authorities he would get into trouble; and (4) took precau-

69 See Morse, *supra* note 31, at 25 (reasoning that rationality is the ability to perceive accurately and reason instrumentally); *infra* text accompanying notes 87-90.

70 Beck, *supra* note 1.

71 *Id.*

tions to prevent this from happening. On its face, Brandon's act was intentional and premeditated—not compelled or coerced—and the acts were done with the knowledge that if he were caught he would probably be punished.

b. Competence, Character, and Autonomy

From the perspective of criminal liability, is anything missing from this picture? Consider the following argument: Both the elements (*actus reus* and *mens rea*) and the affirmative defenses (which can exculpate despite the undisputed existence of the elements) assume, and proceed from, a background standard that not only dictates the doctrinal content of the existing grounds for exculpation but also offers an independent basis for gauging the responsibility (or non-responsibility) of particular defendants or group of defendants. In the context of juvenile responsibility for crime, Professor Stephen Morse has applied the standard of “normative competence.”⁷² Professor Morse describes normative competence as “the most . . . important prerequisite to being morally responsible”⁷³ and defines it as “the general capacity to understand and be guided by the reasons that support a moral prohibition we accept.”⁷⁴ An agent is normatively *incompetent* (and thus not morally responsible) when he or she “either . . . is unable rationally to comprehend the facts that bear on the morality of his action or is unable rationally to comprehend the applicable moral or legal code.”⁷⁵ Rationality, in turn,

is the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering. Put yet another way, it is the ability to act for good reasons and it is always a good reason not to act (or to act) if doing so (or not doing so) will be wrong.⁷⁶

⁷² Morse, *supra* note 31, at 24.

⁷³ *Id.* at 24–25.

⁷⁴ *Id.* at 25.

⁷⁵ *Id.*

⁷⁶ *Id.* Notice that, on Morse's view, it is not necessary that the defendant acted for good, generalizable reasons at the time of the crime. Most offenders presumably do not or they would not have offended. The general normative capacity to be able to grasp and be guided by reason is sufficient. Professor Morse includes within his conception of normative competence the requirement of empathy—in his view a defendant who lacks “the ability to empathize and to feel guilt or some other reflexive reactive emotion” lacks normative competence and should not be criminally responsible. *Id.* at 26. As Morse acknowledges, this requirement is not now a feature of the actual criminal law—the lack of a conscience is not a valid basis for being excused from criminal liability.

Professor Morse seems to propose normative competence as a background standard against which the criminal liability of all defendants, including adolescent defendants, can validly be measured.⁷⁷

But Morse makes it clear that he considers pre-adolescent children to be normatively incompetent because of their age. He argues that since young children “lack many of the necessary attributes of rationality” and “infrequently commit serious crimes, . . . the issue of full or substantial responsibility is not seriously in contention for young children.”⁷⁸ Morse simply concludes, without analysis, that young children are by definition normatively *incompetent* and that they ought therefore to be excluded from criminal responsibility as a class.⁷⁹

Why is Brandon T. normatively incompetent under the standard laid down by Morse? Thinking about this question exposes a perplexing problem with the standard of normative competence itself. Upon close inspection, the standard quickly becomes maddeningly elusive, offering no clear solution to the problem of responsibility. Consider its key terms. To be “normatively competent” (and thus criminally responsible) a defendant must possess “the general capacity to understand and be guided by the reasons that support a moral prohibition we accept.”⁸⁰ The phrase “general capacity” apparently refers to defendant’s abilities as demonstrated in his or her everyday behavior, not necessarily to his or her behavior at the time of the crime. The question for Morse is does this defendant, in general, possess the “capacity to understand and to be guided by [good] reasons”?⁸¹ If not, then defendant is not responsible. If so, defendant is responsible, although his behavior at the time of the crime may well have demonstrated that he also has the capacity to understand and be guided by *bad* reasons.⁸²

But how ought one to apply this standard? To a large degree—as Morse acknowledges—the judgments of rationality and normative competence in any particular case will rest on moral and political intuitions that must remain contingent and debatable.⁸³ “Nonetheless,”

77 *Id.* at 25.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 24–25.

82 *Id.* at 25–26.

83 *Id.* at 25 (“What is the content of rationality that responsibility requires? As part of the normative, socially constructed practice of blaming, there cannot be a self-defining answer. A normative, moral and political judgment concerning the content and degree of rationality is necessary.”).

he argues, “some guid[ance] is possible,”⁸⁴ and it would seem that some definition of the basic terms in the standard is necessary in order for it to have any content at all.

Consider that in assessing culpability the law generally looks to what a defendant was thinking, to his or her mental state at the time of the act, not to the defendant’s capacities outside of that time frame. If the defendant was delusional and killed someone because of a delusion, then (s)he should presumably be excused. If not, not. In many or most such cases, the defendant will turn out to have pre-existing mental and/or emotional difficulties, and to the extent these have been documented and can be presented at trial, such facts may add credence to the defendant’s claim that (s)he was delusional at the time of the act. But, for example, if defendant has long been paranoid schizophrenic but kills someone for a wrongful, but non-delusional, reason, this is no excuse although defendant’s mental illness may, in general, affect his or her ability to understand and obey the law.⁸⁵ Conversely, if defendant in general has the capacity to understand and obey the law but became delusional in this case, the defendant should, presumably, be excused and (evidentiary issues aside) the relevance of his or her general capacities is, at best, unclear.

Second, what does it mean to say that a defendant has, or does not have, the “capacity to understand and to be guided by [good] reasons”?⁸⁶ On Morse’s view, rationality is the key. Rational comprehension involves “the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering.”⁸⁷ Fine. But again, what does this mean? What does it mean to say that a defendant possesses the general *ability* to perceive accurately (to perceive *what* accurately?); to get the facts right (*which* facts?); and to reason instrumentally, including weighing the facts appropriately? (Appropriately? Again, which facts, and according to what conception of appropriateness?) On what basis do we decide that a defendant has

84 *Id.*

85 *See, e.g.,* Clark v. Arizona, 126 S. Ct. 2709 (2006). Eric Clark was a paranoid schizophrenic who was found guilty of first degree murder. After announcing to classmates that he wanted to kill a police officer, Clark drove a pickup truck at dawn to a neighborhood near his home, then blared the radio while circling the block. When Officer Jeffrey Moritz responded to calls by the residents, Clark shot him dead. Announcing his verdict of guilty to murder, the judge at Clark’s bench trial took note of the fact that, although he had allowed Clark to present evidence directly connecting his admitted paranoid schizophrenia to the killing of the police officer, no such evidence had been presented. *Id.* at 2716–18.

86 Morse, *supra* note 31, at 24–25.

87 *Id.* at 25.

these general abilities, when (s)he has been accused of an act that seems to demonstrate their absence? Answers to such questions are key to understanding how the standard would work out in particular cases.

Now consider the standard of normative competence as applied to the case of Brandon T. In Morse's view, the law, in deciding whether or not Brandon T. is criminally responsible, looks to his general capacity for rationality.⁸⁸ Does Brandon T., in general, possess "the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering?"⁸⁹ According to Morse, a defendant may possess these capacities—and thus be deemed responsible for purposes of the criminal law—although (s)he failed to demonstrate them at the time of his or her alleged criminal act.⁹⁰ But consider, in this respect, the capacities Brandon T. *did* demonstrate in his attack on Ignacio. Motivated by his desire to hurt Mr. and Mrs. Bermudez,⁹¹ Brandon T. accurately perceived that harming Ignacio would injure his parents; devised a plan under which he could gain access to the baby; waited for the right moment (when Ignacio's parents were not present) to carry out the plan; and after successfully putting the plan into action, took steps to avoid what he knew would be the unpleasant consequences of getting caught.⁹² In short, Brandon T. clearly demonstrated instrumental rationality, knowledge of wrongfulness, a quite sophisticated knowledge of how to cause pain to one's enemies, and the executive capacity to unite his desire for revenge on Ignacio's parents with a plan that successfully put that desire into effect. Given what seems to be a powerful case in favor of holding Brandon responsible, the burden shifts here—why, despite these facts, should he *not* be criminally responsible?

Despite Brandon T.'s demonstrated abilities to perceive accurately, reason instrumentally, and assess the facts and situation appropriately (given the end he had in view), perhaps one might argue that

88 *See id.* at 24–25.

89 *Id.*

90 *Id.* at 25–26.

91 The desire alone, Morse concedes, does not prove Brandon's irrationality. *See, e.g., id.* at 27 ("[E]ven if desires can be construed as irrational, irrational desires do not deprive the agent of normative competence unless they somehow disable the rational capacities just addressed or they produce an internal hard choice situation distinguishable from the choices experienced by people with equally strong, rational desires."). Neither of these exceptions would seem to apply to cases such as that of Brandon T.

92 *See Beck, supra* note 1.

Brandon T. nonetheless lacked “the ability to act for good reason” that is requisite to a finding of normative competence.⁹³ One could attempt this conclusion in two ways. First, one might import a component of virtue into one’s conception of rationality by arguing, for example, that key terms in the definition of normative competence—such as “accurately” and “appropriately”—refer not merely to defendant’s ability to recognize his preferences and to take action that maximizes the likelihood those preferences will be realized, but go also to the merits of those preferences—perceiving “accurately” means perceiving that hurting a baby is a monstrous thing to do, and weighing the facts “appropriately” means (for example) putting less weight on one’s grudge against the Bermudez family than on the probable harm one will cause by beating their child. In short, the standard might require that defendant possess a recognizable moral code as well as the threshold mental capacity to identify and effectively to act upon his preferences. The capacity “to understand *and be guided by* good . . . reason[s]” necessarily implies that defendant has accepted those reasons and has the mental wherewithal to apply them, in general, to his decisions.⁹⁴

But this version of the standard would work very troubling changes on the criminal law. Consider the virtue-based standard as applied to three defendants, *D1–D3*. By hypothesis *D1* has the general capacity to understand and be guided by the reasons that support moral/legal prohibitions, which means that (s)he has accepted the relevance of such reasons and can, in general, apply them in making decisions. *D2* and *D3* lack the general capacity to understand and be guided by good reason, but the lack takes two different forms: (a) *D2* is legally insane, while (b) *D3* has consciously rejected good in favor of evil—for example *D3* lacks the capacity for empathy and remorse, and without those threshold capacities *D3* is unable to understand or be guided by good reason.⁹⁵

Now consider the relative criminal liability of *Ds 1–3* under the virtue-based version of normative competence. *D1*, the defendant

93 Morse, *supra* note 31, at 25.

94 *Id.* at 23 (emphasis added).

95 In theory we might imagine two subspecies of *D3*, *D3(a)* and *D3(b)*. One can coherently imagine *D3(a)*, who once possessed the capacity for empathy and remorse, but made the choice to suppress them in order to acquire wealth, position, or power. For the purposes of moral evaluation such a defendant might merit different treatment than *D3(b)*, who lacks empathic ability but may or may not have adopted affirmatively evil values. However, in the case of a *D* whose lack of empathy, however acquired, leads him or her to commit violent offenses against innocent others, *Ds 3(a)* and *3(b)* may be functionally identical for the purposes of the criminal law.

who possesses and (in general) displays the capacity to be guided by good reasons is criminally responsible although the crime (s)he committed presumably failed to demonstrate such capacity. If *D2* is insane, (s)he merits an excuse under the virtue-based standard, and this result is entirely uncontroversial. In that situation the standard adds nothing to existing doctrine or to the particular debate over juvenile responsibility under the law.⁹⁶ But Morse would go much farther, mandating that *D3* must also be excused.⁹⁷ And this is what makes the virtue based standard so troubling. *D1*, the defendant who in general has the capacity to act on good reasons because (in part) (s)he accepts the moral standards they represent, is criminally responsible. *D3*, who does not accept the good reasons supporting the moral prohibitions of the law because his lack of empathic ability has deprived him of a conscience (and he therefore lacks an internal counterbalance to his violent and evil desires) and therefore lacks the "capacity" to understand and be guided by them, is not criminally responsible under the virtue-based conception.

The standard of normative competence represents Professor Morse's attempt to lay out a proper basis for evaluating the blameworthiness of all defendants.⁹⁸ He must be saying, therefore, that *D3* is less blameworthy for his or her criminal actions than is *D1*. But this seems wrong. Suppose that *Ds 1* and *3* are charged with intentional murder. *D1* understands and accepts that killing is wrong, but allowed her intense hatred of a particular victim, *V1*, to overcome that moral prohibition. *D3* raped *V3* because he felt like it, and then killed her in order to prevent her from testifying against him for the rape. On what grounds could we plausibly conclude that *D3* is less blameworthy for his actions than *D1*?⁹⁹

96 Presumably everyone agrees that where a juvenile defendant is legally insane that defendant, like any other defendant, merits an excuse. The debate about juvenile liability concerns cases in which the defendant is concededly *not* insane but is nevertheless developmentally different from adults in various ways deemed relevant. On the ultimate relevance of such differences to the law, *see infra* text accompanying notes 127–30.

97 Morse, *supra* note 31, at 26 ("After much thought, I have come to the conclusion that normative competence should require the ability to empathize and to feel guilt or some other reflexive reactive emotion.").

98 *See, e.g., supra* notes 72–74 and accompanying text.

99 Indeed, an initial intuition might be that *D1* is clearly *less* culpable than the others, since almost by definition he would seem to lack the ability to do the kind of deliberate and premeditated murder that *D3* might commit. *D1*'s capacity to commit such a murder has in fact been defined away by the virtue standard; the most serious form of homicide of which *D1* would appear capable would be one in which his moral restraint is overcome by a strong emotion such as rage or fear—and thus becomes the

This seems to be where Morse's normative requirement of empathic ability comes in. A second, and potentially related, way of finding Brandon T. to be normatively incompetent would be to add a requirement of empathic ability to the responsibility standard. Morse might argue, for example, that *D3* should be excused from criminal responsibility on grounds of fairness because the lack of capacity to feel empathy and remorse makes *D3* "not amenable to reason."¹⁰⁰ This does seem to be a key link, in Morse's mind, between responsibility in general and responsibility in children.¹⁰¹

Since Professor Morse acknowledges that psychopathy is not in fact a basis for excuse under the criminal law as it exists,¹⁰² Morse's empathy argument expressly moves the discussion from the descriptive to the prescriptive. And the prescription seems profoundly wrong. The result of making empathetic capacity a necessary component of normative competence would be that those offenders, like *D3*, who lack remorse and fellow feeling would be excused from criminal liability and punishment on those grounds. And this would be a pernicious result, for at least three reasons.

First, while it seems to be the case that many violent criminals are psychopaths, it is *not* the case that all psychopaths are criminals. Indeed, recent evidence indicates that psychopaths exist in all walks of life, many quite legal.¹⁰³ If such research is true, it may well be the

possible basis for a partial excuse due to provocation or extreme emotional disturbance.

100 Morse, *supra* note 31, at 26 ("Perhaps people who lack the capacity for empathy and guilt—the so-called 'psychopaths'—are particularly immoral and deserve special condemnation rather than excuse, but this does not seem fair. To the best of our knowledge, some harmdoers simply lack these capacities and they are not amenable to reason. They may be dangerous people, but they are not part of our moral community."); *see also* MODEL PENAL CODE § 4.01(2) (1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mutual disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.").

101 Professor Morse identifies the capacity for empathy as a "critical distinguishing variable" and argues that if adolescents "lack the general capacity for empathy that is a component of full moral agency . . . then adolescents as a class may be less responsible moral agents in general and might deserve mitigation, if not full exoneration." Morse, *supra* note 31, at 60. Morse goes on to acknowledge, however, that the law does not excuse (adult) psychopaths on grounds of their lack of empathy. *Id.* at 61. "On my theory of responsibility," he adds, "such people should be excused and I wish to proceed as if the law followed." *Id.*

102 *Id.* at 60–61.

103 *See, e.g.*, Belinda Jane Board & Katarina Fritzon, *Disordered Personalities at Work*, 11 *PSYCHOL., CRIME & L.* 17, 18–25 (2005) (comparing personality traits of successful business managers and patients at Broadmoor Hospital, one of Britain's highest se-

case that most psychopaths—that is, most people who lack the capacity to feel empathy and remorse—demonstrate both the inclination and the capacity to stay on the right side of the law. Since, by definition, they do not obey the law because they respect other people or because breaking the law would make them feel guilty, presumably they obey it for other reasons. Among those reasons are the costs associated with being criminally prosecuted and punished for committing a crime. Excusing psychopaths from criminal punishment would dramatically reduce the strength of this disincentive, and therefore dramatically reduce the psychopath's interest in remaining law-abiding.

Professor Morse's argument focuses more on the deontological bases for punishment—the question of whether defendant deserves punishment or not—than on utilitarian ones. But the point is important because it suggests that the common view of psychopathy and its relationship to crime is quite impoverished. We often discuss psychopaths as though their deficits—in the capacities for empathy and remorse—constitute a sufficient explanation of their criminal misdeeds. But this is in fact a highly debatable assumption. Consider a psychopathic killer like Ted Bundy, who was executed in Florida in 1989 after confessing to the murders of more than thirty women.¹⁰⁴ In the public mind, Bundy has come to symbolize the psychopath, a person who is relentlessly self-focused, manipulative, and incapable of empathy or remorse. But these deficits by themselves are not a sufficient explanation of Bundy's murderous career. Again, most psychopaths (if psychopathy is defined this way) do not commit violent crimes,¹⁰⁵ and most certainly do not travel coast to coast for the purpose of murdering women. What explains the difference between Bundy and the law-abiding psychopath is not the absence of empathy and remorse,

curity hospitals). Business managers scored higher than patients on measures of histrionic, narcissistic and compulsive personality; such traits are thought to reflect psychopathic characteristics such as superficial charm, lack of empathy, and perfectionism. *Id.* at 25. Unlike the Broadmoor patients, the business managers scored lower on antisocial, borderline, and paranoid personality traits, indicating lower levels of aggression, impulsivity, and mistrust. *Id.* The authors suggest that the business managers may be examples of “[s]uccessful psychopaths . . . people with psychopathic [personality disorder] patterns, but without the characteristic history of arrest and incarceration.” *Id.* at 18–19 (quoting Donald R. Lynam et al., *Self-Reported Psychopathy: A Validation Study*, 73 J. PERSONALITY ASSESSMENT 110, 111 (1999)).

104 John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 486 n.5 (1996).

105 See Board & Fritzon, *supra* note 103, at 18–19 (noting growing empirical research into “successful” psychopaths who avoid arrest and incarceration).

but that absence *combined with the presence of the desires to hurt, kill, and do other kinds of serious harm to people*. What prompted Bundy to kill was not the mere absence of empathy for his victims or anticipatory remorse for killing them; but the absence of those things *combined with the presence of the desire to kill women*. Most people, whether psychopaths or not, do not have this desire. Bundy deserved criminal punishment not because he was a psychopath but because he possessed the affirmative intent to, and did, commit murder, while recognizing that the acts he did were blameworthy and would be condemned by society.

It may of course be true that lack of empathic ability makes it more difficult for a psychopath to obey the law, in the sense that one barrier to law-breaking—what we call “conscience”—is missing from the psychopath’s mental toolkit. But, as Morse acknowledges, the fact that some people find it more difficult to obey the law than others is not, and should not be, valid grounds for an excuse from criminal responsibility.¹⁰⁶ The criminal law is properly indifferent to such claims. A defendant will not be heard to argue that he should be excused for an otherwise criminal action because he has a very impulsive temperament; because he is quick to anger and has a strong tendency toward violent expression of his rage; or, even because he suffered an abused and loveless childhood and never learned to treat others with care and respect. Yet all of these things can make it more difficult—in many cases *much* more difficult—for defendants to resist their desire to harm. Why is lack of a conscience different in kind from these other character and personality defects, such that the particular defect of lack of empathy should be singled out as the basis for excuse and these other lacks may not? Considering the very great harm of which psychopathic criminals are capable and that they do, in fact, inflict on society, more thought must be given to these questions before legally sane psychopaths are excused from criminal responsibility.

Nor is such an excuse necessarily implied by the normative competence standard itself. One could make a quite compelling argument that Ted Bundy easily met the standard—that he possessed, and consistently demonstrated, the “ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the

106 Morse, *supra* note 31, at 28 (“Those who are fortunate enough to be especially brave and those who are of average braveness will be able to meet [the standard of normative competence] quite readily. Those who are of less than average dispositional firmness will have more trouble resisting when they should. Still, if we judge that the person had the general capacity to comply with the reasonable firmness standard, even if it is harder for her than most, then she will be held responsible if she yields when a person of reasonable firmness would have resisted.”).

facts appropriately and according to a minimally coherent preference ordering."¹⁰⁷

Thus, the standard of normative competence offers no clear and valid basis on which to excuse Brandon T. from criminal responsibility. And Morse's proposal to make responsibility dependant on the capacity for empathy would produce the untenable and unwarranted result that the most dangerous, violent, and evil-minded criminals among us would be excused from responsibility for their criminal actions.

But what if children as a group lack empathic capacity, or have less of it than adults? Shouldn't such a (temporary) disability absolve, or at least reduce, their liability for crime, on the grounds that this lack makes it more difficult for them to obey the law? As a normative matter this is an interesting question—but it requires an additional argument explaining why children should be excused on those grounds although adults possessing the same defect are not. Beyond that, and as a descriptive matter, it strikes me as quite implausible to say that children, even children as young as six, lack a threshold level of empathy as a group. The vast majority of children do not attempt to murder other people, and recent evidence indicates that those who do are both quite rare and are much more likely than other children to become psychopaths and/or lifelong criminal offenders.¹⁰⁸ To the extent that refraining from doing violent harm to others requires some threshold level of empathy, the burden of proof should be placed on those who would claim that children as a group lack this quality.

B. *The Relevance of Facts and Contact*

But perhaps the above moves too quickly. Even on a minimalist account such as the one offered here, it must be true that criminal responsibility requires some understanding of at least certain facts and context. After all, the mens rea of conscious purpose requires that the defendant understand *and intend* the probable consequences of his actions.¹⁰⁹ Homicide, for example, is often defined by state statute as the "unlawful killing of a human being."¹¹⁰ In a homicide case,

107 *Id.* at 25.

108 See *infra* notes 159–61.

109 MODEL PENAL CODE § 2.02(2)(a) (1962) ("A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . .").

110 See, e.g., CAL. PENAL CODE § 187(a) (West 1999).

a defendant cannot be guilty of murder or attempted murder unless he or she understood, at the time of the killing, what it means for a person to die. If a defendant really believes that when you kill someone they come back to life the next day, it would be wrong to hold him guilty of murder or attempted murder since he doesn't comprehend an essential fact about the harm resulting from his purpose and his actions. At a minimum, understanding the "essential facts" about killing someone requires the knowledge that when someone dies they are gone for good. The younger children are, the less likely they are to understand such facts, and—the argument might go—this lack of understanding should render young children non-culpable for homicide or attempted homicide.

In the case of Brandon T., the evidence conflicted on the question of whether he understood what it means to kill or to die. On the one hand, Brandon's own father had been murdered when the child was four. Brandon knew that his father had died violently and the child was given to fantasizing about the event.¹¹¹ On the other hand, Brandon's defense attorney and at least one court appointed expert concluded that the boy did not understand what it meant to kill a person, and on the basis of those opinions the court ultimately amended the criminal charge from attempted murder to assault with intent to commit bodily harm.¹¹² Thus, the case offers no convincing

111 *Frontline: Little Criminals*, *supra* note 12 (interviewing Brandon T.'s defense attorney, John Burris).

112 *Id.*; *see also* Curtius, *supra* note 6 (describing how "[t]he case faded from public view only after a Juvenile Court referee ruled that the assailant could not understand his offense"). It is noteworthy, however, that psychiatrist Martin Blinder, one of three mental health professionals who interviewed Brandon T. in order to evaluate his competency, found the boy competent to stand trial. In an interview with *Frontline*, Dr. Blinder described the process by which he reached that decision:

I must say, in truth, I was surprised after I completed my assessment to find the 6-year-old competent. My bias going in was, "This is ridiculous. How can a 6-year-old be competent to stand trial? How could he have even understood what he was doing, no less what a trial is all about?" But the kids watch television and they watch the cop shows and they watch the lawyer shows and they have—they may not watch them like they watch "Sesame Street," but kids are tremendously aware these days. So this kid certainly was aware that he was in deep trouble and that there were certain procedures that were likely to befall him.

...

He understood that society considered what he had done wrong, which is why he was being locked up at juvenile hall. He knew the judge's task. He knew his lawyer was there to help him. He knew the prosecutor was going to gather the evidence against him. And he understood that if things didn't go his way, he might not go home to see his mommy for a long, long time. So

argument that six-year-olds as a class must be exempted from liability for homicide. The question of exemption hinges on the answer to the prior question of what exactly a defendant must know about death and about killing before he or she may be criminally blamed for a homicide. At a minimum, it seems clear that defendant must understand some things about the nature of the harm (s)he inflicted: that killing someone causes their permanent departure, perhaps. On such a threshold view defendant is chargeable if (s)he (1) understands that killing someone ends their life, which means at least that he or she is gone forever, and (2) that society considers this wrong.

The discussion thus far should alert us to the presence of a broader issue. As a general matter, we might hypothesize that a person may be found criminally responsible only if (s)he understands the facts requisite to the harm that motivates the criminal prohibition (s)he is charged with violating. Thus, murder is criminally prohibited because killing someone removes the person permanently from the world and this inflicts a terrible and irreparable loss, not only on the person killed but also on those attached to and/or dependent on that person. Defendant must at least understand (1) the fact of the injury, (2) its permanence, and (3) that inflicting this loss is considered wrong. There was some evidence that Brandon T. did in fact understand all these things, and under such a standard he could therefore be held responsible.

It is of course possible to embellish the theory in a way that would exclude more, or all children from liability, but doing so would necessitate a comparison with the standards of criminal responsibility as applied to defendants generally. One could argue, for example, that in order to be held liable for homicide a defendant must know not only that killing someone is considered wrong and that it removes the person permanently, but that doing this violates rights possessed by the victim, specifically the right not to be murdered. On this theory it might well make sense to exempt many or all pre-adolescent children (certainly children as young as Brandon T.) from liability for homicide on the ground that they are unlikely to understand the process of and the effect of a victim's death, and are also unlikely to comprehend what a "right" is and why society might enforce it. But quite clearly we do not apply this richer standard when an adult defendant is charged with homicide. Suppose adult defendant *AD* is charged with murder and there is no doubt that *AD* did the acts that caused

despite his juvenility, I felt that he grasped the essentials of what a trial proceeding was, why he was going to be tried and what the penalties might be.

Frontline: Little Criminals, supra note 12.

the victim's (*V*) death. *AD* could not defend the murder charge on the ground (1) that although his killing of *V* means that *V* is gone from the earth and will not return, *V* is now in Heaven living with God and therefore *AD*'s action was justified because he actually conferred a net benefit on *V*; or on the ground (2) of *AD*'s (genuine) belief that people do not, in fact, have a "right" to life or even a right not to be arbitrarily killed—their continued existence depends solely on their ability to defend themselves against any and all attacks by others. For the purpose of prosecuting *AD* for murder, it would simply not matter how sincere or well-documented *AD*'s belief in the afterlife, or in the law of the jungle, happened to be—the law does not inquire, or admit into its official inquiry, the details of defendant's beliefs in death unless those beliefs are otherwise relevant to an already existing excuse such as insanity. Needless to say, neither of the beliefs described above would alone merit such an excuse.

C. Other Differences as Basis for the Youth Excuse

Some would argue that whatever the evidence in favor of finding intent, there are other differences in cognitive, emotional, and social capacity between children and adults, and these differences are so great that it is simply unjust for the criminal law to hold children to the same standard of behavior as adults. This argument is the thrust of much recent scholarship in the area of juvenile culpability.¹¹³ In general, the scholarship focuses on differences between adolescents and adults, attempting to demonstrate that adolescents are less averse to risk, more likely to value short-term benefits over long-term costs, and more likely to be influenced by their social environment than adults,¹¹⁴ and that these differences ought to serve either as a complete bar to criminal liability for juveniles,¹¹⁵ or as a partial bar to such

113 See Brink, *supra* note 16, at 1557–58; Scott & Steinberg, *supra* note 16, at 801; Bazelon, *supra* note 13, at 162.

114 See, e.g., Scott & Steinberg, *supra* note 16, at 812–16; *id.* at 813 (“[E]ven when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspectives, and (d) capacity for self-management. While cognitive capacities shape the process of decisionmaking, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.”).

115 See, e.g., Brink, *supra* note 16, at 1585 (“The trend to try juveniles as adults is inconsistent with retributive, rehabilitative, and deterrent rationales for punishment and with the related rationales for having a separate system of juvenile justice in the first place. A sound criminal jurisprudence requires that we stop treating juvenile offenders as little adults.”).

liability.¹¹⁶ The scholarship usually draws on behavioral studies demonstrating that adolescents as a class have weaker future-orientation than do adults as a class; that they take more health and safety risks than do adults as a class; and that they are more impulsive than adults as a class.¹¹⁷ These differences, the argument concludes, reduce adolescent blameworthiness and (thus) criminal culpability.¹¹⁸

Most recently this difference-based approach has received a public relations boost from medical technology. To the behavioral studies demonstrating some differences between adolescents and adults with respect to things like risk taking and long term focus are now added studies of brain function that allegedly support those conclusions. Advances in brain imaging technology have allowed researchers to observe the ways in which the brain changes from childhood, through adolescence, and into adulthood. Studies indicate that the brain matures throughout adolescence, and indeed well into adulthood.¹¹⁹ In particular, recent studies suggest that development of the brain's frontal lobe, which is a key factor in regulating impulses in adults, is not complete until some time after age twenty one.¹²⁰

However, as Professor Morse has correctly pointed out, the legal relevance of such information is far from clear.¹²¹ First, this very same brain research indicates that brain maturation peaks at least several years beyond age eighteen, the legal age of majority. A possible implication of this finding is that the legal age of majority should be raised, say to twenty-two or twenty-five, by which time the brain is more fully

116 See, e.g., Scott & Steinberg, *supra* note 16, at 800 (advocating "a model under which immaturity mitigates responsibility—but does not excuse the criminal acts of youths who are beyond childhood").

117 *Id.* at 829–30.

118 *Id.*

119 See, e.g., Gruber & Yurgelun-Todd, *supra* note 36, at 324; Lee Bowman, *New Research Shows Stark Differences in Teen Brains*, SCRIPPS HOWARD NEWS SERVICE, May 11, 2004 ("In fact, the brain's gray matter has a final growth spurt around the ages of eleven to thirteen in the frontal lobes of the brain, the regions that guide human intellect and planning. But it seems to take most of the teen years for youngsters to link these new cells to the rest of their brains and solidify the millions of connections that allow them to think and behave like adults.").

120 For example, consider a study led by Nitin Gogtay of the National Institute of Mental Health in which researchers performed magnetic resonance imaging every two years on thirteen people between the ages of four and twenty-one. The results indicated that the frontal lobes of the brain were the last to develop fully, and that the brain changes continued up to age twenty-one, the oldest age examined. See, e.g., Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596, 596 (2004).

121 Morse, *supra* note 48, at 406.

developed.¹²² Even further, the studies now trumpeted as demonstrating “stark differences” between adolescent and adult brains also show that brain development continues well into a person’s forties and fifties.¹²³ At what point in a person’s brain development does (s)he become criminally responsible? The studies themselves cannot answer that question. Instead, they simply expose us to the truth that ultimately, criminal responsibility is a matter of moral judgment rather than of scientific fact-finding.¹²⁴ Indeed, many scientists warn against the use of brain imaging technology to determine moral or legal culpability.¹²⁵ They caution that no existing technology can prove a causal connection between brain structure and particular behavior, and that imaging should not, therefore, be forced into the service of assigning, or excluding, any particular person from legal responsibility.¹²⁶

122 Beckman, *supra* note 120, at 596 (“Some say [brain] growth maxes out at twenty. Others . . . consider 25 the age at which brain maturation peaks.”); *see also* Bowman, *supra* note 119 (“[S]ome scientists would put off the age of legal majority to 22 or 23.”).

123 Bowman, *supra* note 119 (“Even in adulthood, the wiring job is not completely done. Imaging done on the brains of people in their 40s and 50s show there’s another surge of connections being made, perhaps in response to menopause or to prepare the brain to better compensate for the loss of brain cells as we age.”).

124 Professor Morse has made the same point. *See, e.g.*, Morse, *supra* note 31, at 20 (“[A] legally responsible agent is a person who is so generally capable, according to some contingent, normative notion both of rationality itself and of how much capability is required. . . . These are matters of moral, political, and ultimately, legal judgment, about which reasonable people can and do differ.”).

125 *See, e.g.*, Bowman, *supra* note 119 (“[R]esearchers say that while it’s possible to gain general understanding about brain development and function from the images, the notion that medicine, law enforcement or anyone else should work from some ideal, normal brain model is troubling. ‘Each individual is not an exact map, and the difficulties in determining what the range of variations are is really dangerous. The data is incredibly easy to be over-interpreted,’ said Sonia Miller, a New York attorney who specializes in cases dealing with new technologies.”); *see also id.* (“Dr. Peter Bandettini, a brain-imaging researcher at the National Institutes of Health, said the science of understanding what small structures and chemicals are doing within the brain is far from a gold standard for mental function or age. ‘Right now, I personally think you’d get more information about a person’s mental age by going to a set of behavioral tests.’”).

126 Beckman, *supra* note 120, at 599 (“‘We couldn’t do a scan on a kid and decide if they should be tried as an adult,’ [Sowell] says.”); *see also id.* (“Although many researchers agree that the brain, especially the frontal lobe, continues to develop well into teenhood and beyond, many scientists hesitate to weigh in on the legal debate. Some, like [Jay] Giedd [of the NIMH], say the data ‘just aren’t there’ for them to confidently testify to the moral or legal culpability of adolescents in court.”).

The fact of difference does not, by itself, mandate any particular moral or legal result. As Professor Morse has explained, variations in ability or behavior between persons do not mandate differences in legal treatment or responsibility. Differences are only relevant to the extent that they impact on a pre-existing standard of responsibility. That standard cannot be dictated by the differences. Instead, the differences must be measured against the standard in order to determine the responsibility of any particular defendant or group of defendants.¹²⁷

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

A substantial minority of adults is similar to mid-to-late adolescents on the variables that distinguish the age cohorts as classes. As noted, although the means may significantly differ, there is a great deal of overlap between the distributions. A regrettable number of adults are immature and have dreadful judgment. Yet we do not excuse that minority of adults. Why, therefore, should adolescents be treated differently? Adults obviously have more experience with the consequences of their behavior and more life experience generally and some mature as a result, but many do not. Impulsive or peer oriented adults probably have always "learned" less from experience than their more mature counterparts. Moreover, it does not take much life experience to understand how killing, raping, burning, stealing, and so on affects others. To understand the consequences of these actions does not require the sophistication and moral subtlety that only experience can provide.¹²⁸

127 See, e.g., Morse, *supra* note 31, at 49 ("The question of juvenile responsibility is not simply whether juveniles are generally different from adults. Surely they are in many ways. The real issue is whether they are morally different, and the resolution of that issue depends on whether a moral theory we accept dictates that the variables that behaviorally distinguish juveniles should also diminish their responsibility."); *id.* at 50 ("If responsibility is treated as a matter of retrospective moral evaluation, as I suggested it essentially is and should be, then the plasticity or amenability to treatment of a variable is irrelevant to whether it diminishes moral responsibility. Responsibility should be mitigated or excused if a variable that diminishes responsibility was operative at the time of harmdoing, whether or not this characteristic is alterable, and vice versa. It is hard to imagine what moral theory would suggest that plasticity per se should reduce responsibility. To the extent that fault is a necessary or sufficient condition for full responsibility, plasticity is irrelevant.").

128 *Id.* at 58. Also see, Norvin Richards, *Criminal Children*, 16 LAW & PHIL. 63 (1997), who rejects arguments that adolescents should be presumptively nonculpable for crime because of their relative lack of life experience:

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

Thus, the mainstream literature on juvenile responsibility makes a core, and erroneous, assumption: that if children as a class think differently from adults as a class, these differences ought to matter to children's criminal responsibility. But this simply does not follow. Indeed, it is hard to see why the mere fact that there exist differences in judgment and decision-making capacity between juveniles and adults is at all relevant to the question of juvenile liability for crime. Instead, the core questions ought to be, (1) what are the threshold capacities required for criminal liability, and (2) do juveniles have those capacities?¹²⁹ This inquiry, in turn, has both normative and descriptive dimensions. With respect to the normative dimension—upon what threshold capacities *should* the law insist before holding someone guilty of a crime?—many different answers are possible, and the issue of differences between juveniles and adults is only derivatively relevant. With respect to the descriptive dimension—what threshold capacities does the law *in fact* insist upon before holding someone criminally liable?—comparisons between all juveniles and all adults are much less relevant than comparisons between juvenile and adult *criminals*. To answer the descriptive question what we need to know is not whether juveniles differ from adults but whether adults who have been convicted and punished for committing serious crimes differ, as a class and in relevant ways, from juveniles who have committed substantively identical acts. Surely no one would be surprised to discover that as a group, violent adult felons possess weaker future orientation, are less risk-averse, and are more impulsive than either adults or

Take murder, for example. The main thing wrong with murdering someone is that you take this person's life against his will. [Adolescents] certainly know that much about it. Indeed, if they did not know they were taking someone's life against his will they would not be guilty of murder at all, but of some lesser crime What we need is an extra, additional wrong done in committing murder, a wrong that adolescents do not realize they are doing because they lack experience in life. There are no obvious candidates.

Id. at 72–73.

129 See, e.g., *supra* Part I.A.2.

juveniles generally.¹³⁰ The harder question is, do violent adult offenders demonstrate significantly different levels of future orientation, risk aversion, and impulsivity than do juveniles who commit the same offenses? Only if *that* question can be answered in the affirmative might such differences be allowed to affect the criminal blameworthiness of individuals in either class.

Finally, consider the argument that adolescents may be more susceptible to environmental influence, from peers and surrounding social pressures, and are therefore more likely to feel pressured into criminal acts than are adults.¹³¹ From the perspective of culpability for crime, this argument seems to cut both ways. If juveniles are more likely to be influenced by the signals from their environment, and they otherwise possess the threshold capacities for criminal responsibility, then perhaps the law should focus on sending strong *anti*-“criminogenic”¹³² signals to the class of potential juvenile offenders. In this connection, evidence indicates that juvenile offenders are often well aware that the law treats them more leniently than it does adults, and that some are quite willing to take advantage of this fact. Street gangs, for example, actively recruit young children for criminal acts because they know that such children are unlikely to be convicted and punished as criminals.¹³³ And some individual offenders are no less savvy. Recall the murder by Christopher Simmons, which became the subject on appeal of the Supreme Court’s recent holding in *Roper v. Simmons*,¹³⁴ that defendants who are under age eighteen at the time

130 See, e.g., Morse, *supra* note 31, at 53 (acknowledging that, as a class, adolescents are less risk-averse, more impulsive, and are more susceptible to peer pressure than adults).

It is crucial to remember, however, that a finding of a statistically significant difference between groups does not mean that there is no overlap between them. In fact, the adolescent and adult distributions on these variables overlap considerably; large numbers of adolescents and adults are indistinguishable on measures of these variables.

Id.

131 See, e.g., Scott & Steinberg, *supra* note 16, at 832 (“[A]dolescents in high crime neighborhoods are subject both to unique social pressures that induce them to join in criminal activity and to restrictions on their freedom that tangibly limit their ability to escape. These restrictions are constitutive of a well-defined legal status resulting from youthful dependency that substantially limits autonomy.”).

132 See, e.g., *id.* (“[T]hose whom psychologists call normative adolescents may well succumb to the extraordinary pressures of a criminogenic social context.”).

133 For example, Paul Robinson recounts the case of Robert “Yummy” Sandifer, who joined the “Black Disciples” in Chicago at age eight by explaining: “Young members like Robert are prized because they are immune from detention for more than 30 days.” ROBINSON, *supra* note 52, at 134.

134 543 U.S. 551 (2005).

of their crimes may not be executed.¹³⁵ Simmons, who was seventeen at the time of his crime, informed two friends that he wanted to murder someone by breaking into the victim's house, tying the victim up, and throwing the victim off a bridge.¹³⁶ According to the account offered by Justice Kennedy in his majority opinion for the Court, Simmons and one of his friends then selected Shirley Crook as their victim and carried out their plan to the letter.¹³⁷ Before the murder, Simmons had confidently informed his friends that they could "get away with it" because they were juveniles.¹³⁸ To the extent that juveniles are especially sensitive to the criminogenic elements in their environment, perhaps failing to punish blameworthy adolescent offenders for crime actually adds to the pathological content of that environment?

Evidence of juvenile responsiveness to environmental influence raises another core issue—that of corrigibility, or the potential for rehabilitation among juvenile offenders. That is the subject of Part II, to which I now turn.

II. THE REDEMPTION THESIS: PUNISHMENT AND REHABILITATION

I noted above that the almost universal academic opposition to juvenile criminal liability is rooted in two widely held intuitions, one involving children's potential *guilt* and the other involving their potential *redeemability*.¹³⁹ Part I evaluated the Culpability Thesis; in this Part I examine the Redemption Thesis, the idea that even when the state can prove the elements of a crime and can show that at the time of the criminal act a juvenile offender was mentally culpable, it is wrong to punish juveniles for crime because they have a greater capacity than adults to reform and become productive, non-offending citizens.

135 *Id.* at 569.

136 *Id.* at 556.

137 *Id.* at 556–57. ("Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.")

138 *Id.* at 556.

139 *See supra* text accompanying notes 46–47.

A. *Culpability v. Corrigibility*

Opponents of juvenile liability argue that “only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood. Thus, predicting the development of relatively more permanent and enduring traits on the basis of risky behavior patterns observed in adolescence is an uncertain business.”¹⁴⁰ Once again, this addresses the wrong question. It is certainly true that most risk taking juveniles turn out to be productive and law abiding adults. But this fact alone does not justify excluding juveniles as a class from criminal responsibility. Instead, we must first answer a much more relevant question: What percentage of violent juvenile offenders—juveniles who have killed someone, or seriously attempted to do so, or have committed armed robbery or assault and battery on another person—turn their lives around and become peaceful and law abiding adults? If virtually all such juveniles do so, then a persuasive case might be made for sentencing juvenile cases on a treatment, rather than a punishment, model. If, on the other hand, most such juvenile offenders continue to inflict serious harms on society until they are stopped by force from doing so, then the redemption-based case for exempting juveniles from punishment becomes much weaker.¹⁴¹

It should be clear that a defendant’s corrigibility—the relative ease with which an offender or class of offenders might turn their lives around—cannot determine a defendant’s *culpability* for an act already

140 Scott & Steinberg, *supra* note 16, at 819–20.

141 See, e.g., Benjamin B. Lahey et al., *Relation of Age of Onset to the Type and Severity of Child and Adolescent Conduct Problems*, 27 J. ABNORMAL CHILD PSYCHOL. 247, 247 (1999) (“Numerous researchers have reported a robust inverse relation between the age of a youth’s first conviction and his or her total number of convictions through early adulthood. Youths who are first convicted earlier are convicted more times not only because they began their ‘criminal careers’ earlier but also because they are convicted at higher rates at all ages into early adulthood. It is important to note that the same inverse association has been found between age of onset and self-reported delinquent behavior in several community samples. This is important, as self-reports of delinquency avoid the biases in detection, prosecution, and conviction that are inherent in official statistics.” (citations omitted)); *id.* at 248 (“Moffitt coined the terms ‘adolescent-limited’ and ‘life-course persistent’ delinquency for these two groups of youths. She hypothesized that youths who first engage in antisocial behavior during childhood do so for different reasons than youths who first engage in antisocial behavior during adolescence. . . . [Although it should not be regarded as a closed question], the notion that there is an inverse relation between the age of onset of antisocial behavior and the severity and persistence of antisocial behavior has had a major impact on theories of delinquent behavior and the taxonomy of [conduct disorders].” (citations omitted)).

done.¹⁴² But corrigibility and culpability are often confused in this context—even by the United States Supreme Court, which declared in *Roper v. Simmons* that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”¹⁴³ But this must be wrong. To the extent that a defendant’s personal blameworthiness informs our decision about her criminal guilt for an already completed act—and few would deny that it does¹⁴⁴—the likelihood of *future* criminal actions (or law abidingness) cannot decide the liability issue. Ultimately, the decision as to liability rests on our judgments about the person’s mental culpability at the time he or she did the act charged; mental culpability, in turn, centers on what the person understood, desired, and was capable of doing at that moment in time or during preparations beforehand. Thus, statistics purporting to show that young children in general are more amenable to treatment than adults, or that most adolescents grow out of the tendency to engage in impulsive or risky behavior, add nothing to the general debate about the elements of liability.

But this should *not* drive the issue of redemptive potential from the criminal process altogether. Although corrigibility cannot answer the question of liability for crime, it may well influence the decision as to how much punishment a convicted criminal should receive. This seems an avenue worth exploring, not least because if the discussion in Part I of this Article is correct, *mens rea* offers only a very unstable

142 See, e.g., Morse, *supra* note 31, at 50 (“If responsibility is treated as a matter of retrospective moral evaluation, as I suggested it essentially is and should be, then the plasticity or amenability to treatment of a variable is irrelevant to whether it diminishes moral responsibility. Responsibility should be mitigated or excused if a variable that diminishes responsibility was operative at the time of harmdoing, whether or not this characteristic is alterable, and vice versa. It is hard to imagine what moral theory would suggest that plasticity per se should reduce responsibility.”).

143 *Roper*, 543 U.S. at 570.

144 See, e.g., Morse, *supra* note 31, at 16–17 (“I make the assumption, which is almost universally shared in Anglo-American criminal jurisprudence, that desert based on moral fault is at least a necessary pre-condition for just punishment. If youths are to be adjudicated and punished like adults, it is therefore crucial to address the desert of youthful offenders.”); Scott & Steinberg, *supra* note 16, at 800 (“The starting point [of our argument] is the principle of penal proportionality, which is the foundation of any legitimate system of state punishment. Proportionality holds that fair criminal punishment is measured not only by the amount of harm caused or threatened by the actor, but also by his blameworthiness.”); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *YOUTH ON TRIAL*, *supra* note 11, at 271, 272 (“A host of subjective elements affect judgments of deserved punishment even though the victim is just as dead in each different case.”).

bar to criminal liability. If children may only be excluded from criminal punishment to the extent that they are unable to form intent, then only very young children—younger than six-year-old Brandon T.—may be categorically excluded. But to a significant degree, our uneasiness about punishing children for crime rests not on the intuition that children are incapable of intentional action, but on the intuitive judgment that children are more easily reformed than adults—that to send someone to prison for life for an act, even a monstrous act, committed while a juvenile is to waste a life that might well have been productive if allowed to grow to adulthood outside of prison.¹⁴⁵

B. *Should Corrigibility Affect Punishment?*

From the discussion above we can import the interim principle that a defendant's capacity for rehabilitation enters the equation once culpability has been established and the law is seeking to resolve the question of punishment. "Is this person criminally responsible for what he did?" is quite a different question from: "Should we punish this person for what he did?" Our collective answer to that second question has undergone dramatic changes over the past century.

The recent punitive turn toward juveniles in the criminal law, derives its core energy not from statistical differences between children and adults, but from a sea change in our beliefs about crime and criminals generally. The system of juvenile justice arose only secondarily because of children's perceived "differences;" its primary source of inspiration was a view of human nature that could hardly be more different from the view that now dominates our system of criminal punishment.

1. The Reign of Redemption

The change is evident in the title of Frank Allen's well known book, *The Decline of the Rehabilitative Ideal*.¹⁴⁶ A century ago, belief in the criminal law as an agent of redemption reigned; that belief has now virtually disappeared from the practices of the criminal law.¹⁴⁷ And the decline of that ideal in general may explain the criminal law's punitive turn toward children in particular.

145 As Stephen Morse points out, on a purely retributive theory of punishment this might not matter. Morse, *supra* note 31, at 50. But on a mixed theory, under which both retributive and utilitarian concerns enter into the kind and degree of criminal punishment inflicted—the likelihood of reform might be a valid or even important factor on the utilitarian side of the calculus. *Id.* at 50–51.

146 FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

147 *Id.* at 32–33.

More than two decades ago, Frank Allen foresaw this trend and made it the basis for his Storrs Lectures at Yale. Allen wrote: "Although judgments may vary about precisely how far support for rehabilitative theories of penal treatment has eroded . . . the central fact appears inescapable: the rehabilitative ideal has declined in the United States: the decline has been substantial, and it has been precipitous."¹⁴⁸ Allen contrasts that decline with the near universal endorsement of that ideal, by lawmakers, courts, reformers, and the academy, at the beginning of the twentieth century.¹⁴⁹ In their book *Reaffirming Rehabilitation*,¹⁵⁰ authors Francis T. Cullen and Karen E. Gilbert trace the belief in rehabilitation to the rise of the Progressive movement in the United States in the early 1900s.¹⁵¹ The Progressives united strong opposition to retributivism¹⁵² with a transcendent optimism about the possibilities of a just state and—particularly relevant here—of redeeming criminals via treatment rather than punishment. Cullen and Gilbert wrote:

The flavor of the Progressives' perspective is well illustrated in these 1912 remarks by Warren F. Spaulding, Secretary of the Massachusetts Prison Association: "Each criminal is an individual, and should be treated as such. . . . Character and not conduct is the only sound basis of treatment. Fundamental in the new scheme is . . . individualism. In the old system, the main question was, What did he *do*? The main question should be, What *is* he? There can be no

148 *Id.* at 10.

149 *Id.* at 5 ("Appreciation of the decline of the rehabilitative ideal in the 1970s requires an accurate understanding of its dominance in the United States for most of the twentieth century."). Among other examples, Allen notes the U.S. Supreme Court holding in *Williams v. New York*, 337 U.S. 241 (1949), declaring that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." ALLEN, *supra* note 146, at 5 (quoting *Williams*, 337 U.S. at 248). Allen adds, "There can be no doubt that Justice Black's dictum expressed the enlightened opinion, not only of the judiciary, but also of the public at large." *Id.*

150 FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (1982).

151 *Id.* at 73–81.

152 *Id.* at 75–76 ("At the turn of the century, Charlton T. Lewis voiced sentiments that would be echoed repeatedly in the years to come when he asserted that '[t]he method of apportioning penalties according to degrees of guilt implied by defined offenses is as completely discredited, and is as incapable of a part of any reasoned system of social organization, as is the practice of astrology or . . . witchcraft.'" (quoting Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 18 (1889))). Lewis prophesied, "the time will come when the moral mutilations of fixed terms of imprisonment will seem as barbarous and antiquated as the ear-lobbing, nose-slitting and head amputations of a century ago." Lewis, *supra*, at 29.

intelligent treatment until more is known than the fact that a man did a certain thing. It is as important to know why he did it."¹⁵³

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

[T]he Progressives succeeded in a major renovation of the criminal justice system. Within the space of two decades, their innovations reformulated sentencing practices in the direction of indeterminacy, established the new bureaucratic structures of probation and parole, *created a separate system of juvenile justice*, introduced wide discretionary powers throughout the legal process, and reaffirmed the vitality of the rehabilitative idea. At the end of their era, nearly all of the elements of the criminal justice system familiar to today's students of crime control were securely in place. Of equal significance, the Progressives bequeathed a powerful rationale for the individualized treatment of offenders that would dominate American correctional policy until very recent times.¹⁵⁴

Note the implication: The non-punitive, treatment focused juvenile justice system was not created in isolation from the criminal justice process for adults, but merely as one part of the Progressives' general plan to restructure the criminal law around the goal of rehabilitation. Cullen and Gilbert wrote that "the Progressives' therapeutic model received its most complete expression in the measures formulated to control delinquent behavior."¹⁵⁵ The juvenile justice system was just one manifestation—albeit a very important one—of a widespread redemption-oriented ideology, an ideology that "received its most complete expression" in the non-punitive treatment of youthful offenders.¹⁵⁶

2. The Origin of Separation

But then what, on the Progressive model, explains the actual separation of juvenile offenders, and their separate treatment by the criminal law? Despite the widespread popularity of the redemptive approach in the early and mid-twentieth century, adult offenders were never actually exempted from criminal guilt and punishment; only juveniles were.

153 CULLEN & GILBERT, *supra* note 150, at 77 (alteration in original) (emphasis added) (quoting Warren F. Spaulding, *The Treatment of Crime—Past, Present, Future*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 376, 378 (1912)).

154 *Id.* at 81 (emphasis added).

155 *Id.* at 80.

156 *Id.*

To some extent this difference in treatment of juveniles and adults simply reflected the limits of the politically possible rather than any core difference in punishment rationales. The Progressives envisioned a system under which punishment would take a back seat to rehabilitation for *all* criminal offenders, but even during the heyday of this vision the pull of retribution was strong enough to prevent the replacement of punishment with treatment for everyone.¹⁵⁷

It also seems true, however, that the fundamental principle underlying Progressive reform proposals for the criminal law generally—that is, their belief in the redemptive potential of all human beings—does suggest a basis for distinguishing between adults and juveniles within a general framework of a corrections policy oriented toward rehabilitation. If (as the Progressives believed) humans generally have the capacity for redemption, and if that capacity justifies a therapeutic (as opposed to retributive) system of criminal sentencing, then youthful offenders may have an even stronger case for treatment, and against punishment, than do adults as a group. Remember that with respect to the question of criminal *culpability*, the scholarship argues that children *lack* relevant capacities, such as the ability to form intent, or maturity of judgment. That lack, it is contended, ought to absolve them from criminal responsibility, or at least diminish their responsibility, for crime.¹⁵⁸ But when we move to the issue of *punishment*, the children's rights argument takes on the opposite thrust. Children, it is argued, have a *greater* capacity than adults in at least one area—the capacity for change. Children are in process, are acutely susceptible to environmental influences and such influences can greatly affect their ultimate choices, behavior, and moral convictions. If even adult criminal offenders have significant capacity for reform and rehabilitation (as the Progressives believed), then it seems to follow that children must possess such capacity to a greater, and perhaps to a much greater, degree.

C. Age and Corrigibility

It is tempting to conclude that even if children are sometimes responsible for crime, it might not be good policy to punish them, or at least to punish them as much as we do adults. On the widely accepted assumptions that (1) the state should limit the amount of de-

¹⁵⁷ See, e.g., *id.* at 81 (“The Progressives’ version of a criminal justice system fully dedicated to the rehabilitation of criminal offenders was never achieved. While the framework of a therapeutic state had been erected, the substance in many instances was lacking.”).

¹⁵⁸ See *supra* Part I.A.2.

liberate suffering it inflicts on people to that amount that achieves its legitimate policy goals *and no more*, and that (2) one of the most important goals of punishment is that of specific deterrence, children's greater redemptive potential may justify lesser punishment for the crimes they commit.

But is it true that children as a class do, in fact, have more redemptive potential than do adults as a class? Some recent research indicates that this intuition may be baseless—that some youthful offenders, particularly those who begin committing serious crimes as young children, may be quite difficult, or even impossible, to rehabilitate. As one recent article summarized the problem:

Numerous researchers have reported a robust inverse relation between the age of a youth's first conviction and his or her total number of convictions through early adulthood. Youths who are first convicted earlier are convicted more times not only because they began their "criminal careers" earlier but also because they are convicted at higher rates at all ages into early adulthood. It is important to note that the same inverse association has been found between age of onset and self-reported delinquent behavior in several community samples. This is important, as self-reports of delinquency avoid the biases in detection, prosecution, and conviction that are inherent in official statistics. Among 11- through 18-year-old boys who had engaged in any delinquent behavior, Tolan found that the half of the sample with younger ages of onset (<12 years) reported higher levels of almost all types of delinquent behaviors during adolescence than the half of the sample with later ages of onset. Similarly, in a subset of female and male youths from the . . . National Youth Survey, Tolan and Thomas found that youths who reported first engaging in delinquent acts before age 12 were more likely to engage in serious offenses and to continue to engage in delinquent behavior during the 3 years following the onset of delinquent behavior.¹⁵⁹

Such findings, indicating "an inverse relation between age of onset and the frequency, seriousness, and persistence of delinquency,"¹⁶⁰ re-

159 Lahey et al., *supra* note 141, at 247 (citations omitted).

160 *Id.*; see also Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 690 (1993) (discussing the tendency of some adolescents over others to continue their delinquent behavior into adulthood). Professor Lahey credits Moffitt with coining the terms "adolescent-limited" and "life-course persistent" to describe two quite different developmental pathways of delinquent activity and goes on to explain:

[Y]ouths who first engage in antisocial behavior during childhood do so for different reasons than youths who first engage in antisocial behavior during adolescence. Specifically, childhood-onset conduct problems result from

inforce one intuition that seems to fuel the punitive turn of the criminal law toward juveniles—that there are in fact “Bad Seeds,” who show their criminal proclivities early, have little or no capacity for remorse or reform, and who will continue to inflict harm on society until the criminal law puts them out of commission. Individual cases in which very young children commit atrocious crimes may reinforce this impression.¹⁶¹

According to psychiatrist Martin Blinder, six-year-old Brandon T. was clearly in danger of becoming a “life-course persistent” offender.¹⁶² For Dr. Blinder—who evaluated Brandon to determine his competency to stand trial for the assault on Ignacio Bermudez—the signs were so marked in Brandon that, despite his youth, Blinder felt confident in diagnosing him as a “psychopath in the making.”¹⁶³ Consider this exchange between Dr. Blinder and an interviewer for the television program *Frontline*:

Q: [W]hat were your first impressions of [Brandon T.]?

Blinder: My first impression was a perfectly ordinary, smiling, outgoing young man. There was nothing about his demeanor or his appearance to suggest that we were dealing with either a danger-

early neuropsychological deficits that cause cognitive delays, impulsivity, and difficult temperament. In the presence of adverse childrearing environments, these characteristics contribute to the origins of conduct problems. In contrast, the adolescent-onset group does not have predisposing neuropsychological dysfunction. Their delinquent behavior arises through the imitation of some of the nonaggressive antisocial behaviors of youths with childhood onsets. They do so during adolescence because it is a period of heightened peer influence and conflict regarding adult privileges.

Lahey et al., *supra* note 141, at 248.

161 See, e.g., the case of Robert Sandifer, who at age eleven murdered two teenaged gang rivals. ROBINSON, *supra* note 52, at 134. Of Sandifer’s childhood, Paul Robinson writes:

Robert’s direction of development shows itself early. During a hospital stay when he is not yet 3, a social worker says something that angers him. He grabs a toy knife and charges the woman, screaming “Fuck you, you bitch.” He jabs the rubber knife into the woman’s arm, saying “I’m going to cut you.”

...

... His first officially recorded offense, at age 9, is an armed robbery. By age 11, [Yummy Sandifer] has compiled a rap sheet of 28 crimes, all but five of which are felonies. His short detentions become less frequent when, because of his violence toward other detained children, Family Services refuses to accept even temporary custody.

Id. at 134–35.

162 *Frontline: Little Criminals*, *supra* note 12.

163 *Id.*

ous fellow, or one who was wrestling with mental retardation or some obviously disabling psychiatric disorder.

. . .

Q: And following your examination, what diagnosis did you arrive at?

Blinder: I felt that he was a psychopath in the making. We tend to reserve such a label for adults and we talk about juveniles who act out in violent ways as suffering a conduct disorder. The use of the term psychopath or antisocial personality is perhaps prematurely pejorative and we don't ordinarily see the necessary signs and symptoms in one so young and someone so small. So we don't use that terms [sic] . . . when we talk about juveniles. I certainly have never used that term before. But this young man was so evidently suffused with all of the findings, that, when they fully blossomed later in life, will call for this diagnosis, that I was comfortable in talking about him having a nascent sociopathic personality. Or a psychopath in the making.¹⁶⁴

164 Interview with Dr. Martin Blinder, Forensic Psychiatrist, *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/little/interviews/blinder1.html>. Asked to speculate about Brandon T.'s probable future, Dr. Blinder's prognosis was grim:

I can say that the personality characteristics that I found in this young boy, that seemed to drive him, and the absence of any inhibiting factors, the absence of empathy for his fellow kid and some of the other diagnostic features [that] are so common in individuals who do go forward in a life of violence and a life of crime, that I think we should have a great concern that we will indeed be faced with what to do with this fellow on down the road. . . . When he has his freedom and he has a bit of heft to him, I think statistically there is some likelihood that he will act in a criminal fashion. Whether or not . . . this young man will definitively grow up to be John Dillinger, I can't say. But I think had I examined John Dillinger when he was 6 years old, I would have seen qualities very much like what I saw in this young man.

Id.

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

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

It may, in short, be true that at least some juvenile offenders—those who begin committing serious crimes while children and who demonstrate neither empathy toward others nor remorse for the harm they inflict—may be difficult or impossible to rehabilitate. And this may be true although such youngsters are not legally insane; although they may appear to be normal in many ways; and although they may understand that society condemns their actions and that, if caught, the consequences of those actions could be extremely unpleasant.

To the extent this is correct, it becomes more difficult to justify a system of juvenile justice that treats all children as non-responsible and/or as non-punishable. Such a system makes the conscious determination to allow youthful defendants who intentionally commit serious crimes to remain outside the system of criminal punishment solely because of their age. And that decision requires a stronger justification than has yet been offered to support it—especially because a system under which children are evaluated individually, and the decision to punish them is made individually, would seem to be a more rational method of balancing the legitimate interests of youthful defendants against society's need for protection from violent offenders of any age.

This conclusion follows whatever the ultimate source, or cause, of a particular juvenile's criminal behavior. Because children are so visibly under the control of adults, we tend to excuse their bad behavior on the ground that the adults in their lives—or the societal environment in which they grow up—are the parties “really” responsible for their acts.¹⁶⁵ But even setting aside the criminal law's general dislike of assigning vicarious responsibility for crime, this approach proves too much. A substantial, perhaps an overwhelming, percentage of adults convicted of serious crimes such as murder, rape, and aggravated assault, suffered significant abuse as children and could persuasively argue that the abuse is causally related to their criminal actions as adults. If we excuse children from punishment on the ground that they have suffered from abuse, then we are intellectually compelled to consider the identical argument in a case involving a severely abused adult for whom the abuse is at least a but-for cause of the crimes with which he is charged.

Id. Psychopaths are specifically excluded, in the Model Penal Code and state criminal codes, from eligibility for the insanity defense on grounds of psychopathy. See, e.g., MODEL PENAL CODE § 4.01(2) (1962) (excluding psychopaths from successfully advancing the insanity defense solely on grounds of psychopathy); see also TEX. PENAL CODE ANN. § 8.01(b) (Vernon 2003) (excluding abnormality manifested only by criminal or antisocial behavior from the insanity defense).

¹⁶⁵ See *supra* notes 112–14, 128 and accompanying text.

CONCLUSION

Consider the argument thus far. First, Part I concluded that the longstanding basis for excluding juveniles as a class from criminal liability—that children and adolescents as a class are incapable, or are less capable, than adults of forming criminal intent—is not true. Using the case of Brandon T. as a core example, I argued that even young children can and do commit terrible crimes while possessing the threshold capacities necessary for criminal responsibility. From this perspective, the recent trend in the law—its increasing refusal to insulate all juveniles, merely because of age, from criminal responsibility—is not irrational; on the contrary, it simply acknowledges that the concept of *mens rea*, as it has been descriptively applied in our criminal law, contains no internal bar to criminal responsibility for children.

In Part II, assuming the potential for culpability, I explored the most important basis for excluding juveniles from criminal *punishment*—namely, that juveniles as a class have a greater capacity for redemption than adults as a class. I discussed recent evidence indicating that at least some juveniles—those who lack empathy, are not remorseful for the harms they inflict, and begin violent lives of crime before age twelve—may be difficult or impossible to rehabilitate. Once again, if this is true then the punitive turn toward juveniles appears rational. It seems rational to acknowledge (1) that such persons deserve punishment, and (2) that society has a strong interest in funneling them through the criminal process, to the extent of incarcerating them for long periods in order to prevent them from inflicting further harm on innocent victims. Moreover, representing such incarceration as punishment rather than as treatment could have anti-criminogenic effects on violent juveniles and/or on juvenile risk-taking generally.¹⁶⁶

166 Thus, for “adolescent-limited” offenders, whose behavior is marked by, and motivated by, life-stage specific concerns such as peer influence and increased taste for risk, criminal sentencing might focus on maximizing the potential for redemption. For “life-course-persistent” offenders, society’s interest in self-protection might dictate the infliction of more suffering, either because stronger tactics are required to turn such juveniles around, or because we are prepared to acknowledge that rehabilitation is impossible in some cases; that some young offenders will continue to inflict harm unless they are permanently removed from society. Of course it may often be difficult—in some cases it might even be impossible—to tell with certainty which juveniles are redeemable and which are not. Even if we begin the inquiry by acknowledging that some young offenders will end as psychopaths, and even if we have an inkling about who they might be, the law should reach a very high level of certainty about such things before incarcerating a teenager for life.

Why, then, do most of us still cringe at the thought of sending a six-year-old to prison, or to execution—even for an admittedly horrendous and intentional act? It is not because children can't act intentionally; they can. It is not only because children are more redeemable than adults; not all are, it would seem; and if most are, there is still the question of desert, of culpability for the act done, whatever one hopes for reform in the future. We can hope that clearing away the debris left by the failed Culpability and Redemption theses will *not* have the effect of sending numberless troubled children to prison, but will instead lead to a deeper exploration of the widespread intuition that, despite the fact that they can do horrible and intentionally harmful acts, children should not be punished criminally, at least to the same degree and in the same way as adults.

What explains the enduring strength of that intuition? I want to suggest one possible answer. It's an answer that the law should take seriously because it addresses a core tension in the way the law itself treats children, and thus invites a specifically legal response.

Consider, on the one hand, the law's general attitude toward the rights and status of children. Although the law of crime prohibits adults from torturing children or subjecting them to abuse, the law also affirmatively, and vigorously, enforces the rights of parents to direct the rearing, physical care, education, discipline, and external environment of their children.¹⁶⁷ Thus, assuming no evidence of parental abuse, children normally have no legal recourse when their parents decide to divorce, move, change their children's school, discipline their children, direct their religious education, or monitor their social lives. The law—the United States Constitution itself—defends *parents'* rights to make such decisions,¹⁶⁸ and thus enforces the con-

167 See, e.g., James Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights," 82 CAL. L. REV. 1371, 1372 (1994) ("For those who would have the State use its power and resources to improve the lives of children, parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices and to state efforts to assume greater authority over the care and education of children. Legal commentators, whatever their views on the proper distribution of child-rearing authority between parents and the State, universally assume that parents should have some rights with respect to the raising of their children." (footnote omitted)). My thanks to Professor Dwyer for comments that helped clarify the thinking in this section.

168 The Supreme Court has affirmed the rights of parents in a long line of decisions beginning in the 1920s. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the 14th Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting

finement of children to their families until the age of majority. No other group of (unconvicted and uncommitted) persons is thus involuntarily subordinated, by law, to the power and authority of other individuals.

At the same time it enforces the control of children by the family, the law—as this Article makes clear—increasingly treats children as autonomous adults for the purposes of criminal conviction and punishment. A strong argument can be made that this is both profoundly contradictory and patently unjust. Substantial empirical evidence supports the widespread intuition that most children who commit violent crimes come from backgrounds featuring core environmental and resource deficits as well as serious abuse and/or deprivation within their families.¹⁶⁹ As noted, absent evidence of serious abuse, the law enforces the confinement of children to those families. Unlike adult criminals who, whatever their sufferings as children are not, by definition, living in legally-enforced subjection to their parents at the time of their crimes, children of poverty—that is, most children who commit violent offenses—have been prematurely and often continuously exposed to environments that make it all but impossible for such children to internalize the values implicit in the criminal law and to adopt those values as their own. It seems unjust, in that context, to hold children—especially young children who have had the least opportu-

that custody, care, and nurture of children reside first in the parents, “[a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (noting that the Constitution protects liberty of parents and guardians to direct the upbringing and education of children under their control); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the Fourteenth Amendment protects rights of parents to direct education of their children).

169 See, e.g., Patrick F. Fagan, “*The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*” 1 (Heritage Found., Backgrounder No. 1026 (1995), available at <http://www.heritage.org/Research/Crime/BG1026.cfm> (“A review of the empirical evidence in the professional literature of the social sciences gives policy-makers an insight into the root causes of crime. Consider, for instance: Over the past thirty years, the rise in violent crime parallels the rise in families abandoned by fathers. High-crime neighborhoods are characterized by high concentrations of families abandoned by fathers. State-by-state analysis by Heritage scholars indicates that a 10 percent increase in the percentage of children living in single-parent homes leads typically to a 17 percent increase in juvenile crime. The rate of violent teenage crime corresponds with the number of families abandoned by fathers. The type of aggression and hostility demonstrated by a future criminal often is foreshadowed in unusual aggressiveness as early as age five or six. . . . On the other hand: . . . Even in high-crime inner-city neighborhoods, well over 90 percent of children from safe, stable homes do not become delinquents. By contrast only 10 percent of children from unsafe, unstable homes in these neighborhoods avoid crime.”).

nity to perceive and make use of any exit options available—fully responsible as criminals, even for violent acts that inflict significant harm.

Significantly, this is not a concern rooted in psychological or behavioral differences between children, or adolescents, and adults. Whatever differences in ability, temperament, or proclivities separate children from adults, it is almost certainly true that some children, even pre-adolescent children, do possess the capacity to form intent, do have a threshold understanding of the harm they intend to inflict, and do possess the ability to assemble the means and execute on a plan to commit that harm. Holding such children criminally responsible is not unjust because of any innate internal differences between children and adults—but because of the different *treatment* of children by the law, the law's confinement of children to criminogenic situations from which those children, unlike adults, have little or no opportunity to escape. The law contributes to the predicament in which they grow up, and the law, therefore, should acknowledge that contribution by making it relevant to the question of criminal responsibility when the defendant is a child.

Other defenses of the “youth excuse” are of course possible; a full exploration of such arguments is not possible here. If this Article has offered a rational account of the national trend toward making juveniles liable for crime and punishing them seriously for serious crime, then it would seem that the traditional grounds for the “separation thesis”—the idea that children should be segregated from adults for the purpose of adjudicating crime and deciding punishment—have broken down under the pressure of the undeniable truth that children do commit terrible crimes and that the prospects for redeeming at least some juvenile criminals may well be just as grim as the prospects of redeeming adults. If so, and to the extent we still seek separate and less punitive treatment for juvenile offenders, other—and more persuasive—grounds must be found on which to base such separation. But the rationale supporting that must begin by acknowledging that neither the doctrinal elements of the criminal law nor the redemptive rationale for imposing punishment erect structural bars to convicting and punishing children for crime.