

Juvenile Justice Caught between the Exorcist and a Clockwork Orange

Jane Rutherford

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Jane Rutherford, *Juvenile Justice Caught between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715 (2002)

Available at: <https://via.library.depaul.edu/law-review/vol51/iss3/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

JUVENILE JUSTICE CAUGHT BETWEEN *THE EXORCIST* AND *A CLOCKWORK ORANGE*

Jane Rutherford

INTRODUCTION

Children are increasingly being tried as adults and sent to adult prisons. This trend is both punitive and cynical. Age no longer seems to be a measure of how guileless or immature a child is. Instead, age is seen as a subterfuge for malicious behavior. As the boundary between adults and children is pushed to ever younger ages, we are virtually eradicating the concept of adolescence. Ironically, this shift is occurring just as new neuroscience research is demonstrating remarkable differences between adolescent and adult brains.

The drive to treat adolescent offenders as if they were adults comes from a punitive model of juvenile justice that sees deviant children as bad, perhaps even evil, like the protagonist in the 1973 film *The Exorcist*.¹ In that movie, the adolescent girl is literally possessed by the devil. Although Satan is an uninvited guest, he manages to control the child so that she cannot resist violent impulses. Her parents are as powerless to correct her behavior as she is. Nevertheless, she poses a threat to herself and others that must be contained. Fortunately for her, the priest's exorcism is successful. Otherwise, her parents might have been tempted to "beat the devil out of her."² No one suspects that the girl will outgrow her problems or that they can be solved by changing environmental conditions. Similar concerns motivate the punitive model of juvenile justice that sees adolescent offenders as indistinguishable from older criminals who need to be punished, not coddled.

Neuroscience data, however, suggests that there are developmental differences in the brain's biochemistry and anatomy that may limit adolescents' ability to perceive risks, control impulses, understand consequences, and control emotions.³ Therefore, adolescents may be more prone to emotional outbursts and even violence. These differ-

1. *THE EXORCIST* (Warner Bros. 1973).

2. *Id.*

3. See Francis J. Lexcon & Dickon Repuci, *Effects of Psychopathology on Adolescent Medical Decision-Making*, 5 U. CHI. L. SCH. ROUNDTABLE 63, 77-78 (1998).

ences are exacerbated by psychosocial conditions that render youth more susceptible to peer influences and less likely to be deterred by consequences.⁴ Finally, because the brain is “plastic,”⁵ environment influences how individuals perceive and respond to stimuli.⁶ For example, children who have been exposed to more fear and violence may develop biochemical responses that are more likely to result in aggression.⁷ If correct, that data raises new hopes and fears: It provides hope that age and appropriate conditioning could help change violent offenders; but it raises the specter of government mind control, as in the 1971 film *A Clockwork Orange*.⁸

In the *Exorcist*, Linda Blair is an unwilling victim of Satan. In contrast, *A Clockwork Orange* portrays violent punks who enjoy wreaking havoc. They exploit a permissive environment by preying on others as a form of thrill-seeking, inflicting pain, and demolishing property for sheer fun and comradeship. In the film, society responds with intensive behavior therapy and mind-altering drugs to completely transform the punks into different people with more mainstream values. The movie is a classic because it evokes disgust both for the punks' senseless mayhem and for the invasive process of transforming them. The underlying view of deviant teens as products of their own bad values, permissive parents, and toxic culture motivates what I call the assimilative model of juvenile justice. The assimilative model is less ambivalent than *A Clockwork Orange*, however, because it celebrates the possibility that the government could alter the minds of deviant adolescents.

The current trend to use a punitive approach reflects the public fear of violent juvenile crime coupled with skepticism about the courts' capacity to reform delinquents. The assimilative model appeals to some of the same interests when it blames bad moms, toxic culture, and bad kids; hence, it may become more popular if the new neuroscience data can reassure the public that delinquents really can be transformed. Currently, courts continue to be reluctant to forcibly administer psychotropic drugs,⁹ but that distaste may diminish as more

4. See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective of Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 171 (1997).

5. Changing according to circumstances. See Erin Ann O'Hara, *Brain Plasticity And Spanish Moss in Biological Analysis*, 53 FLA. L. REV. 905, 916 (2001).

6. See Owen O. Jones, *Time-Shifted Rationality and the Law of Low's Leverage Behavioral Economics Meets Behavioral Biology*, 95 N.W.U. L. REV. 1141, 1164-65 (2001).

7. See Maureen P. Coffey, Note: *The Genetic Defense: Excuse or Explanation?* 35 WM. & MARY L. REV. 353, 399 n.11 (1993).

8. *A CLOCKWORK ORANGE* (Warner Bros. 1971).

9. See *Riggins v. Nevada*, 504 U.S. 127, 138 (1992). But see *Washington v. Harper*, 494 U.S. 210, 247 (1980).

juveniles are imprisoned for life or executed. If so, *A Clockwork Orange* may become prophetic.

Between these two extremes are several other approaches: the rehabilitative model, the restorative model, and the preventive or social control model. All of these theories of juvenile justice start with a set of precepts about appropriate behavior and then try to mold adolescents to conform to such behavior. Without much empirical information about the nature of adolescence, psychological, social, or developmental data are used only to reinforce the image of delinquents as inherently dangerous or to design ways to transform them. Whatever we learn about adolescent development is interpreted in light of these goals.

Each of the current models of juvenile justice distorts the definitions of capacity and maturity for various religious, cultural, and social reasons. Therefore, merely paying more attention to empirical data will not fully solve the problem because the data itself is likely to be interpreted in light of various cultural biases. Increased attention to the developmental data is necessary, but it will only help if it is used in ways that are less hostile to adolescents.

Therefore, I propose a shift in the underlying rationale for juvenile justice. The primary goal of juvenile justice should be to maximize the communal investment in the next generation. Techniques drawn from the current models would be applied only to the extent that they further that goal. Thus, punishment might be used only if it is the best way to help an offender develop necessary skills like impulse control. One consequence of a communal investment theory is that interventions would have to be based upon empirically demonstrated effectiveness. For example, if incarceration increases recidivism rates, it could no longer be justified. Insisting upon effective communal investment simultaneously protects the adolescents' future and public safety.

II. FIVE MODELS OF JUVENILE JUSTICE

Currently, there seem to be at least five models of juvenile justice: punitive, rehabilitative, restorative, assimilative, and preventive. All five models can be illustrated with the plot of a movie, television show, or book. *The Exorcist* suggests the punitive model (which views children as inherently bad), while *A Clockwork Orange* documents the assimilative model (which sees a bad culture enabling bad kids, coming from bad homes, who make bad choices). Similarly, the 1938

film *Boys' Town*¹⁰ captures the ethos of the rehabilitative model. Here, deviant boys are innocent victims of either absent or bad parents. These poor orphans need only to be taught how to choose good over evil, a process that is heart-warmingly easy in the supportive atmosphere provided by the kind priests who run the fancy orphanage in which the boys live. Although both the rehabilitative model and the assimilative model seek to reform deviant teens, the rehabilitative model focuses its blame only on the parents, while the assimilative model blames bad parents, bad kids, and a toxic culture. The punitive, rehabilitative, and assimilative models all assign blame and characterize teen deviance as "bad" behavior, rather than a normal part of the developmental process.

In contrast, the restorative model sees adolescent deviance as an unfortunate part of normal development, much like the temper tantrums thrown by toddlers. Not surprisingly, this tolerant restorative model is most frequently practiced in close-knit communities. The goal is to restore a strong sense of community by reconciling the victim and the perpetrator. In the United States, the restorative model of juvenile justice most frequently has been practiced within traditional middle-class families; so it is the standard fare of television sitcoms like *Leave it to Beaver*, *Happy Days*, and *The Cosby Show*. In the classic case, a small child steals a candy bar and the wise parent makes the child return to the store, admit the theft to the manager, and offer to "work off the debt" by sweeping up for a week. The store manager who knows his role is appropriately stern but ultimately rewards the child's hard work and honesty at the end of the week. In the happy denouement, the storekeeper explains how theft takes food off of his table and drives up prices for everyone else. Then he gives the child a candy bar because the child has "earned" it. Unlike the adolescents in *The Exorcist* or *A Clockwork Orange* who terrify the adults around them, the children in *Leave it to Beaver*, *The Cosby Show*, and *Boys' Town* are cute and wholesome. Adults are bemused by their understandable foibles, not frightened by them.

The final approach to juvenile justice is the preventive model, which is actually a form of social control more reminiscent of the novels *1984*¹¹ and *A Brave New World*.¹² Unlike the other theories that focus on individual deviance, the preventive model focuses on entire populations. In *1984* and *A Brave New World*, crime rarely occurs because the entire environment is so carefully controlled and supervised that

10. *BOYS' TOWN* (Warner Bros. 1938).

11. GEORGE ORWELL, *1984* (Alfred A. Knopf, Inc. 1949).

12. ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper & Row 1932).

the opportunity to offend never arises. Constant surveillance by “Big Brother”¹³ or suitable distractions like “the feelies”¹⁴ keep adolescents safely occupied. The social control approach does not attempt to punish, rehabilitate, restore, or assimilate any particular child. The model looks to population-wide remedies instead. For example, consider the problem of graffiti. The first step for the other models of juvenile justice would be to catch the tagger. Then, appropriate steps would be taken to craft an individual remedy (i.e., place the offender on probation or send him to scrub off the graffiti). In contrast, under the social control model, access to spray paint would be restricted by a ban on selling to minors.¹⁵ Increasingly, communities are applying the social control model with rules like curfews, restricted sales to minors, graduated drivers’ licenses, generalized drug testing, and even preventive detention. The following sections will examine several of the above models in more detail.

A. *The Punitive Model*

The punitive model of juvenile justice sees bad children as the source of the delinquency, so it focuses on punishment and retribution both to deter bad behavior and to provide justice to the victims. This model has strong religious and cultural roots that are captured in films like *The Exorcist*.

The Exorcist is only one example in a string of films that represent children and adolescents as inherently evil or possessed by the devil.¹⁶ This view of children as little beasts who must be tamed either by their parents or by society has a long history. Religiously, the antecedents are in the notions of original sin, predestination,¹⁷ and retribution. Predestination was a central tenet of the Calvinists, who were very influential in the development of American law.¹⁸ For Calvinists, children (like adults) are predestined to do God’s will, and neither age nor parental influences can change the outcome.¹⁹ Some individuals are believed to be granted God’s grace and others are believed to be

13. See generally, ORWELL, *supra* note 11.

14. See generally, HUXLEY, *supra* note 12.

15. CHICAGO, ILL., CODE § 8-16-096 (1990).

16. See, e.g., CHILDREN OF THE CORN (Studio New World, 1984); DAMIEN-OMEN II (20th Century Fox, 1978); THE BAD SEED (Warner Bros., 1956); THE OMEN (20th Century Fox, 1976); VILLAGE OF THE DAMNED (MGM, 1960).

17. See, e.g., David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1197-98 (1998).

18. *Id.*

19. *Id.* at 1197-98.

condemned to eternal suffering.²⁰ Thus, the nature of misbehaving children and delinquent juveniles is predestined.²¹ The result of this belief is a view of children as immutably damaged with little prospect for change.²² The best that can be hoped is that external efforts will control inherently disruptive and violent natures.

The Protestant ethic combined notions of predestination with a strong work ethic.²³ Because hard work could generate wealth in some cases, wealth came to be seen as evidence of diligence.²⁴ Conversely, poverty came to be associated with shiftlessness.²⁵ Consequently, some Calvinists believe that evidence of God's grace may be reflected in the wealth and status of the individual.²⁶ Hence, poor children may have been purposely cast out from the possibility of heaven. Conveniently, these notions connecting wealth and status to God's grace could be used to explain and justify slavery, racism, and distinctions based on social class.²⁷

This view of inherently evil children is not a relic of our distant past. Dramatic evidence exists of widespread demonization of children,²⁸ particularly adolescent males²⁹ who are often referred to as "super-predators," "monsters," or "gang-bangers." Not surprisingly, these characterizations are most likely to be made about children who are resisting dominant cultural norms.³⁰ A number of terms, like "super-

20. *Id.* at 1197.

21. *Id.*

22. *Id.*

23. Leonard, *supra* note 17, at 1198.

24. *Id.*

25. *Id.*

26. *Id.* at 1194; MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 161-63 (Talcott Parsons, trans. 1958).

27. See Alfreda A. Sellers-Diamond, *Disposable Children in Black Faces: The Violence Initiative as Inner-City Containment Policy*, 62 UMKC L. REV. 423, 446 (1994); Leonard, *supra* note 17, at 1194.

28. See, e.g., PETER ELIKANN, *SUPER-PREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW* (1999); Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 757 (1992) (referring to "all newborn babies" as "squalling little monsters of domination and uncontrollability"); 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 (2000); MIKE A. MALES, *FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION* (1999); MIKE A. MALES, *THE SCAPEGOAT GENERATION: AMERICA'S WAR ON ADOLESCENTS* (1996).

29. For example, the value of wrongful death awards for children is tied to age, race, and gender. Although the verdicts for the death of a white male infant are relatively high, they decline dramatically at adolescence.

30. See, e.g., Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, in READINGS IN JUVENILE JUSTICE ADMINISTRATION 78 (Barry C. Feld ed., 1999) [hereinafter JUVENILE JUSTICE] (stating "This pattern is consistent with the idea that underclass black males are viewed as a threatening group to middle-class populations and thus will be subjected to increased formal social control by the

predator” or “gang-banger,” carry silent, racially charged messages. For example, even when juvenile crime was declining, the media continued to characterize some of our children as “super-predators.”³¹ Although this term is rarely precisely defined, it is generally applied to minority youth accused of violent crimes.³² It is not reserved for repeat offenders, gang members, or older adolescents. Thus, the white high school seniors at Columbine High School who had prior criminal contacts for theft, vandalism, and hate crimes were not described as “super-predators.” Similarly, “gang-bangers” are almost always perceived to be Hispanic or black males. Hence, when a group of teenage white girls repeatedly held up convenience stores at gunpoint, the news coverage went out of its way to make the girls seem similar to other middle-class teens. The clique was never referred to as a gang nor were the girls ever called gang-bangers.

Changing the label from “delinquent” to “super-predator” or “gang-banger” has serious consequences. Once youths accused of crimes are labeled as dangerous outsiders, it is easier to adopt a punitive approach in order to protect the public.³³ Although causal links are difficult to demonstrate, at least one possible consequence is that African-Americans, Latinos, and some recent immigrants like the Hmong see ever increasing numbers of their young transferred to adult criminal courts, incarcerated, and even sentenced to death.³⁴ For example in 1997, 37.5% of the offenders incarcerated in juvenile

juvenile justice system.”) Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993) (discussing the role that resistance plays in criminal behavior); Sampson & Laub, *supra*, at 69 (suggesting that the middle-class white view of non-white youth as aggressive, sexual, and undisciplined accounts for racial disparities in the juvenile justice system).

31. The word “super-predator” was coined by the conservative criminologist, John DiIulio. See, JOHN DI IULIO ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME & DRUGS* 27 (1996).

32. A quick check of Westlaw news sources found seventy-three references to super predators in the last two years. The vast majority of them referred to either African-American or Hispanic youths.

33. See, e.g., BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 6 (1999)

34. Documenting the breakdowns among relevant populations is difficult because the statistics lump various groups together. See, e.g., JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 1018-19 (2000) (noting that crime statistics almost always focus on a black/white dichotomy, clumping other diverse groups together); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 499 (1993) (suggesting that Americans stereotype criminals as black and victims as white). It seems clear that race plays a significant role in determining how youth accused of crimes are treated. See Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, in *JUVENILE JUSTICE* 184, 189 (stating, “Although about one-third (34%) of the arrests for violent crimes involved white juveniles, less than one-fifth (19%) of the violent offenders against whom prosecutors filed reference motions were white.”).

facilities were African-American, 18.5 % were Hispanic, 1.5% were American Indian, 1.8% were Asian, and .03% were Pacific Islanders.³⁵ The numbers are even more dramatic for those transferred to adult court. Thus, although blacks account for only 26% of youths arrested, they are 46% of those waived to adult criminal court.³⁶ The differences cannot be explained by the nature of the offenses committed. For instance, African-American juveniles are forty-eight times more likely to be incarcerated for drug offenses than white juveniles.³⁷ For violent crimes, white youths serve the shortest sentences (193 days), blacks serve almost 24% longer (254 days), and undifferentiated Hispanics serve the longest time (305 days or 37% longer than whites).³⁸

Preconceived stereotypes of poor children as immutably lazy and predisposed to violence marked some children as outcasts and social deviants from birth. Thus, white supremacy was given a biological, as well as a religious and cultural imprimatur. Scientific theories were developed, tested, and interpreted in light of this religious and cultural preference for predestination. Thus, Darwin's theory of evolution and survival of the fittest was used to justify white supremacy,³⁹ and bi-determinists quickly focused on the brain.⁴⁰ First came the phrenologists who claimed that they could discover the keys to human character, personality, behavior, and intelligence by examining the size and shape of bumps on individuals' heads.⁴¹ Then Darwin suggested that it might be wise if revered individuals were encouraged to increase their family size.⁴² Darwin's cousin, Francis Galton, extended this idea to propose that human breeding was a solution to the crime problem, and the eugenics movement was born.⁴³ Positive eugenics, which encouraged reproduction of the elite, quickly devolved into negative eugenics, which suggested limiting reproduction of undesirables, and ultimately it developed into genocide.⁴⁴ Although Nazi excesses cast

35. Catherine A. Gallagher, *Juvenile Offenders in Residential Placement, 1997*, at <http://www.ncjrs.org/txtfiles1/fs996.txt> (visited April 26, 2000).

36. Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N. Y. TIMES, April 26, 2000, at 1, 19.

37. *Id.* at A1.

38. *Id.*

39. See, e.g., Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Sociopolitical Choices*, 11 HARV. BLACKLETTER L.J. 115, 129 (1994); Ian F. Hanley-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 15 (1994)

40. Hanley-Lopez, *supra* note 39, at 15.

41. See DEBRA NIEHOFF, *THE BIOLOGY OF VIOLENCE* 6-8 (1999).

42. *Id.* at 9.

43. *Id.*

44. *Id.* at 10.

considerable disfavor on the eugenics movement, the faith in genetics as an explanation for deviance has survived the war.⁴⁵ Thus, in 1949, the Nobel Prize for Medicine was awarded to Egas Moniz for his development of a “surgical solution to violence” that consisted of removing a portion of the brains of violent individuals.⁴⁶ Such an invasive “solution” just a few years after the holocaust demonstrates how strongly religious and cultural ideas influence the way we view science.

These eugenic ideas fit comfortably into preconceived notions of white supremacy and God-given affluence. The belief in predestination paved the way for those who use science to argue that behavior is genetically influenced, if not controlled.⁴⁷ It was a short step for some to then argue that behavior is not only genetically programmed but also racially linked.⁴⁸ For example, in 1992, Dr. Frederick Goodwin⁴⁹ called for a “Violence Initiative” to study violence in the inner cities.⁵⁰ In choosing to focus on children of the inner city, Dr. Goodwin suggested the following: that violence had a genetic component; some individuals were more vulnerable to violent impulses; these individuals could be identified at a young age; and such vulnerability might be traced to inferior social structures, so that “maybe it isn’t just careless use of the word when people call certain areas of certain cities jungles.”⁵¹ He also referred to male monkeys who were both hyper-aggressive and hypersexual.⁵² Dr. Goodwin’s racist language reveals the extent to which old religious and scientific ideas continue to taint how we interpret new data. It also suggests how strongly youth crime has become a silent icon for racially charged thinking.

Implicit in this approach is a conviction that it is “nature” not nurture that determines both individual and collective character and behavior. Nature is inborn and can be influenced but not changed.

45. *Id.* at 21.

46. See NIEHOFF, *supra* note 41, at 21.

47. See, e.g., Patricia A. Jacobs et al., *Aggressive Behaviour, Mental Sub-normality and the XYY Male*, 208 NATURE 1351 (1965); R. KOTULAK, *INSIDE THE BRAIN: REVOLUTIONARY DISCOVERIES OF HOW THE MIND WORKS* 3-4 (1996); VERNON H. MARK & FRANK R. ERVIN, *VIOLENCE AND THE BRAIN* 138-44 (1970); NIEHOFF, *supra* note 41, at 5-27 (1999) (recounting the history of genetic accounts of violence).

48. See, e.g., RICHARD HERSTEIN & CHARLES MURRAY, *THE BELL CURVE* 298-315 (1994); ARTHUR R. JENSEN, *BIAS IN MENTAL TESTING* 58 (1980).

49. Dr. Frederick Goodwin was then the director of the Alcohol, Drug Abuse, and Mental Health Administration. Sellers-Diamond, *supra* note 27, at 423.

50. *Id.*

51. NIEHOFF, *supra* note 41, at 2; Sellers-Diamond, *supra* note 27, at 449.

52. Sellers-Diamond, *supra* note 27, at 445.

Biological determinism obviously marginalizes groups that are defined by their phenotypes like race, gender, and ethnicity.

1. *Punishment as a Pillar of Hierarchy*

Indeed, a punitive model of juvenile justice is part of the foundation of a hierarchal society. It supports existing power structures within both the family and the polity. Rebellious young dissenters can readily be discarded, even incarcerated, or worse for challenging existing authority. This notion of filial obedience has ancient religious roots.⁵³ Defiance demands punishment as a sin against authority.

Although theoretically not punitive, juvenile courts stepped in to punish disobedient children, often incarcerating them for “incorrigible” behavior by acting under statutes that granted the juvenile court jurisdiction of non-offending adolescents who are “in need of supervision.”⁵⁴ These vague categories permitted parents to call the police or petition the courts to get help enforcing parental commands. Although incarceration for these status offenses theoretically is no longer permitted,⁵⁵ the practice continues in other guises, such as sentences for contempt of court.⁵⁶ The way it works is that a father calls the police because his son or, more typically, his daughter has run away. At a subsequent juvenile court hearing, the court may enter an order directing the child to obey her father or to remain in the family

53. See, e.g., Irene Marker Rosenberg et al., *Return of the Stubborn & Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511, 511-12 (1998-99). Stating,

If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: “This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard.” And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

Id. (citing *Deuteronomy* 21:18-21).

54. *Id.*

55. 42 U.S.C. § 5633 (a)(12)(A) (1988) (stating, “[J]uveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of valid court orders . . . shall not be placed in secure detention facilities or secure correctional facilities . . .”).

56. See, e.g., Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C. R.-CL. L. REV. 41, 42 (1981); Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDPA*, 12 LAW & INEQ. 429, 441 (1994).

home. If the child runs away again, the child may then be incarcerated for contempt of court.⁵⁷

These provisions are used disproportionately to incarcerate teenage girls who violate sexual taboos or exercise too much independence.⁵⁸ Hence, females who stay out all night are more likely to be considered runaways and are more often incarcerated than male runaways.⁵⁹ Additionally, over one third of all juvenile complaints against girls involve status offenses.⁶⁰ Indeed, girls currently receive longer sentences in more secure facilities than boys arrested for comparable offenses, even though girls are substantially less likely to be violent or to be recidivists.⁶¹ Not surprisingly, this gender bias fits easily with religious and cultural notions that require girls to be more subservient, chaste, and compliant than boys. Hence, the penal structure supports gender hierarchy as well.

A punitive juvenile justice system also contributes to complex economic and social structures that preserve race and class privileges. For example, the United States incarcerates more individuals than almost any other country in the world. Consequently, in the 1990s while other industrialized nations were struggling with unemployment problems and recession, the United States economy was booming with record low unemployment rates. If, however, the nonviolent offenders had been released from prison, the unemployment rates would have soared. As these individuals competed for jobs, wages for workers may have declined, thus reducing purchasing power and possibly slowing the economy. In sum, incarcerating young people enables the economy to artificially reduce unemployment, keeping economic indicators healthy and stock prices high.

Moreover, those incarcerated are disproportionately black or Latino, both when compared to the overall population and when compared to the delinquent population by offense and criminal history.⁶² In contrast, I suspect that those who benefit from higher stock prices are disproportionately wealthier and whiter than the general population. Indeed in the 1990s, a decade that substantially increased puni-

57. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 39G(c) (West 1992); N.H. REV. STAT. ANN. § 169 -D:17(V)(c) (1990).

58. See e.g., Donna M. Bishop & Charles E. Frazier, *Gender Bias in Juvenile Justice Processing: Implications of the JJDP Act*, 82 J. CRIM. L. & CRIMINOLOGY, 1162, 1163 (1992); Dalby, *supra* note 56, at 445.

59. Dalby, *supra* note 56, at 445-46.

60. Status offenses are activities that are not criminal for adults. *Id.* at 446.

61. Martha Neil, *Gender Affects Justice: Girls Face Tough Treatment for Criminal Activity*, 87 A.B.A. J. 77 (Jul. 2001).

62. See *supra* notes 34-38 and accompanying text.

tive measures, the gap between the rich and the poor in the United States reached its all time high.

My claim is not that a punitive model of juvenile justice caused this gap, but rather that it was one factor among many that contributed to it. The juvenile justice system has less impact on these economic structures than other factors. Nevertheless, one consequence of the emphasis on punishment has been to transform juvenile offenders into adult criminals, thereby increasing the possible length of their sentences and keeping them out of the workforce for longer periods of time. Moreover, incarcerated youth may not be as competitive on the job market when they are released because they have not necessarily been learning the skills nor making the contacts they need for the working world. Hence, incarcerating disproportionate numbers of outsider youths increases the competitive advantages of others.

2. *Protecting Society*

Despite these problems, the punitive system may seem necessary in order to protect society from youth violence. Indeed, all too often the victims of youth violence are also children. The clamor for punishment seems strongest for the most seriously violent crimes, while other responses seem unfair to the victim. If one teen kills another and is sent to an anger management program, it seems to be a slap on the wrist that devalues the life of the victim. Moreover, if the result seems unfair to other adolescents in the community, they may feel less bound by the rules because the rules are unfair and they carry no consequences. Hence, theoretically, punishment both deters violence and displaces self-help retribution.

It is not clear, however, whether these claims can be empirically demonstrated. In the 1990s, most juvenile crime declined but violent crime rose. The punitive approach did not seem to have much deterrent effect on the most serious crime. Similarly, with the punitive measures still in place, overall juvenile crime is on the rise again.

3. *Deterrence & Neuroscience*

Three principles from the new neuroscience research may help explain why it is so hard to deter adolescent violence. First, the prefrontal lobe of the brain that mediates emotional impulses generated by the amygdala does not fully develop until sometime between the ages of twenty-five and thirty.⁶³ The development is not like a

63. See Lisette Blumhardt, *In the Best Interest of the Child: Juvenile Justice or Adult Retribution?* 23 U. HAW. L. REV. 341, 353 (2000) (citing National Public Radio, *Gray Matters: The*

toggle switch that turns on or off at a particular age; rather, it is a gradual process. To the extent that the prefrontal lobe operates like the brakes on a car, most adolescents would be driving cars with very thin brake shoes. It is not that the entire mechanism is missing, but that it is not operating at full strength. How effective such weak brakes are depends upon how suddenly the car needs to stop. The faster the car is going and the closer it is to the object to be avoided, the harder it will be to stop.

Second, social factors like a teen's sense of status and his prior experience with violence are most likely to determine the strength of the aggressive impulse.⁶⁴ If the teen perceives a situation to be threatening, it is likely to trigger a fear response. This fear is what determines the speed of the car. The more threatened the teen feels, the harder it will be to put on the brakes. Although what threatens the teen is socially determined, there are biochemical responses associated with feelings of threat.

Third, the brain is plastic. In order to enable individuals to adapt to changing conditions but still learn from their experiences, the brain is constantly changing its biochemistry and, in some cases, even its anatomy in response to changes in the environment.⁶⁵ The more often an experience is repeated, the faster the brain responds; this is why, for example, parents nag their children to practice the piano and do their homework. Therefore, prior exposure to violence is likely to increase the sense of threat. Just as battered women become hypervigilant, aware of every slight detail that might indicate an imminent attack,⁶⁶ teens who have been exposed to violence are more likely to read an interaction as threatening. A sense of threat triggers a fight or flight response, but because the prefrontal lobe is not fully developed, it cannot fully moderate that strong emotional response.⁶⁷ Hence, most adolescent violence is reactive.

This data explains commonly observed teen behavior, as well as variance among the teen population. Because the prefrontal lobe is not fully mature, teens are almost inevitably overly emotional and subject to wide mood swings. Because the brakes do not work well on the

Teenage Brain (Feb. 9, 2000) (featuring Dr. Deborah Yurgelun-Todd, Ph.D., Director of Neuropsychology and Cognitive Neuroimaging at McLean Brain Imaging Center)).

64. C. Antoinette Clark, *Law and Order On the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L. J. 1149, 1159 (2000).

65. See Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science Synchronicity, and the Law*, 61 TENN. L. REV. 933, 966 (1994).

66. See, e.g., Lenore E.A. Walker, *Battered Women Syndrome & Self Defense*, 6 NOTRE DAME J. L. ETHICS & PUB. POL'Y 321, 324 (1992).

67. Blumhardt, *supra* note 63, at 353.

car, they are always going too fast or too slow. If a teen has had relatively little experience with violence, she is less likely to read social cues as threatening (perhaps naively so) thereby putting less strain on her prefrontal lobe. As a result, she will be more able to control her impulses. However, if a teen has had a number of violent experiences, he is likely to read cues as more threatening thereby putting a larger strain on his immature prefrontal lobe. As a result, he is more likely to react violently.

If most teen violence is reactive and based on a combination of biological and social interactions, then punishment cannot deter it. It is the prefrontal lobe that processes the concept of consequences and predicts risk. Because that portion of the brain is immature, increasing the punishment will have little effect. When the threat overwhelms the prefrontal lobe's capacity to mitigate it, the nature of the punishment is irrelevant. Hence, it is no surprise that increased punishments had no effect on the escalating violent crime of the 1990s.

In contrast, however, other less serious juvenile crime may be more deterrable. The car has brakes; they simply are not very good ones. When teens have less emotional overload, they are more capable of weighing the consequences. Hence, a teen shopping alone in a store may be able to control her impulse to steal something more easily than a six-year-old child could. However, even with property crimes, the sense of status and threat can overcome the immature prefrontal lobe. For example, when a group of teens go into a store and one dares another to shoplift, the dare may create a social threat to status. Once again, a sense of threat may diminish the teen's ability to control her impulses. That fact explains why so much adolescent crime occurs in groups or pairs. Teens are much more likely to break the law when in the company of their friends.

Indeed, understanding that threats to social status trigger the strongest feelings of aggression and depression also explains the peculiarly strong effects of peer influence on teens. The data shows that adolescents are far more concerned with how their peers perceive them than either younger children or adults.⁶⁸ Unfortunately, and perhaps as a consequence, this is also the stage at which these peer relationships seem most unstable.

4. *Bullying*

Read together, then, this data supports the emerging realization that bullying has an enormous impact on adolescents and that the im-

68. See Elizabeth Cauffman & Lawrence Steinberg, *The Cognitive and Effective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1775 (1995).

pact is cumulative. Frequently, bullying is merely a euphemism for actual physical violence and repeated harassment. Moreover, because the threat is a loss of status, the bullying may be harmful even when it is not violent. It might be argued that all children are bullied at some point, so bullying fails to explain much. However, that claim fails to account for the cumulative effects of bullying. Because of plasticity, the more frequent the experience, the graver the harm. Also, because of the powerful nature of violence as a force for conditioning the fight or flight reflex, the more physically abusive the bullying, the more serious the harm is. Finally, because the source of the problem is a loss of status, it explains why hazing in fraternities may not create quite the same effects. There, the hazing is a sort of welcoming rather than a serious shaming. It also explains why the military academies haze for a full year. Their purpose is to train individuals who will be willing to fight. Given what we are learning about how the brain develops and interacts with the environment, it is not so surprising to learn that so many of those who are bullied lash out either by attempting suicide or, more rarely, murder.

5. *Culpability & Free Will: Excuses*

Even if adolescents cannot be deterred, there might be an argument for punishment as a form of just desserts. Justice might demand that a proportional cost be imposed on the offender to offset the serious harm to the victim. This theory has religious roots as well.⁶⁹ However, it also has pragmatic components because the risk of under-enforcement of crime is vigilantism. If we do not want other adolescents retaliating, we need to provide an acceptable form of justice.

Nevertheless, the neuroscience and developmental data seem to suggest that the “abuse excuse” may be genuine. Because the brain is plastic, it constantly adapts so it can respond more quickly in the future. Hence, children who have been exposed to violence have “practiced” their fight or flight response, will more easily perceive other’s behavior to be threatening, and feel that threat more strongly. It will be harder for their immature prefrontal lobes to control these stronger impulses. In essence, their ability to control their impulses in these situations is more like the six-year-old child alone in the candy store. Neither is culpable because neither is fully capable of controlling her impulses.⁷⁰

69. See e.g., *Exodus* 21:29 (“An eye for an eye . . .”).

70. See e.g., *Kansas v. Crane*, 122 S. Ct. 867 (2002); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1994); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Even the most punitive sense of justice acknowledges that there are some individuals who are not responsible for their acts. For example, a four-year-old child who finds a gun and kills his playmate is not likely to be charged with a crime. The principle is that criminal culpability must be linked to the capacity to make a meaningful choice. Hence, those who cannot tell right from wrong are not culpable,⁷¹ and those who are incapable of controlling their impulses are not culpable.⁷²

Once again, the law has been strongly influenced by religion. Free will is at the core of this heritage. Religiously, those who believe in free will believe in the possibility of individual choice for good and evil. Individuals are only morally culpable for their actions when they have freely chosen them. Hence, the important question for children is when free will emerges. Traditional Catholic doctrine held that sufficient understanding arose to enable a child to exercise reason at the age of seven, but that true free will that rendered a child fully culpable did not emerge until a child was fourteen years old. Similarly, according to Jewish tradition, a child becomes a religious adult at thirteen. The Catholic theory was that at seven a child was able to reason well enough to confess sins so that she could receive communion. At age fourteen, she was mature enough to make a commitment to join the church permanently and be confirmed in the faith if she had memorized the catechism. Somewhat similarly, the Jewish tradition assumed that at age thirteen a boy was both mature enough and well-versed enough in the Torah to be counted as one of the *minion*, a group of ten men necessary to hold services. Of course, memorizing religious doctrine and learning to read and interpret Hebrew texts are not measures of full maturity. None of these decisions required the child to exercise impulse control in threatening situations, a much more relevant standard for determining criminal culpability.

Nevertheless, these religious notions continue to influence both the law and the manner in which we interpret science. Hence, until recently, many states did not permit children under the age of seven to be charged with a crime nor did they permit adolescents under the age of thirteen or fourteen to be tried in an adult criminal court. Although the law was not based on any developmental data, early work by Piaget seemed to confirm these age frames with research that demonstrated a large leap in cognitive capacities at age six or seven and a further jump in ability to master abstract thought around the

71. *McNaughton's Case*, 8 Eng. Rep. 718 (H.L. 1843).

72. *Zimring*, 527 U.S. at 585.

age of fourteen.⁷³ But Piaget, like the religious traditions, focused on the ability to think and learn, as opposed to the ability to accurately value risk and consequences or the ability to control strong emotional impulses like threat. It turns out that the ages of seven and fourteen are much more likely to predict when a child is ready for elementary or secondary education than his ability to resist violent impulses.

By now, the ages of six-seven and thirteen-fourteen have become icons of maturity for many purposes. They even influence how we interpret new scientific data. For example, when Cauffman and Sternberg studied adolescent psychosocial skills, they found that only the top quarter of teens had mastered particular skills by age fourteen.⁷⁴ Moreover, they found that most adolescents in the juvenile justice system come from the bottom half of teens on any maturity scale. Nevertheless, they recommended age fourteen as the cut-off point for waiver to adult court. Applying their own data, that would mean that virtually none of the adolescents waived to adult court would be psychosocially mature.

The question is whether juveniles are mature enough to make the necessary choices, or whether their impulse control is sufficiently impaired so that they are not fully culpable, especially in conditions of threat. That question raises constitutional issues. The notion of free will was imported into the political theory that influenced our constitutional rights. Locke argued that liberty is inherent in human nature.⁷⁵ In order to justify this view, Locke argued that humans were born both free and rational.⁷⁶ Children were difficult to fit in this scheme of inherently rational free actors. If children were free and rational, how could their duty to obey their parents and teachers be supported? And if children were not free and rational, then when did freedom and rationality emerge? Locke answered that children were subject to parental control because they lacked the ability to reason that would develop with age. Liberty inhered in the human condition because of the inborn capacity to develop reason, but full liberty did not arise until reason was fully developed at adulthood.⁷⁷

But how did reason develop? Surely, not all individuals developed reasoning abilities identically. Nurture provided a ready answer: Children developed as a result of the tender care their mothers be-

73. Cauffman & Steinberg, *supra* note 68, at 1768.

74. *Id.* at 1769.

75. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288-89 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, TWO TREATISES]

76. *Id.*

77. *Id.*

stowed on them during crucial developmental stages. Nurture enabled liberals to argue that free will and liberty were inherent, but not inevitable. Those who lacked appropriate nurture might never fully develop the necessary reason.

B. Neuroscience: Nature and Nurture

The newest form of this infant determinism cites research from neuroscience. This brain research comfortably blends nature and nurture into mutually reinforcing systems. The theory is that the genetically determined biochemistry of the brain responds to external stimuli. If the stimuli are positive, then the brain develops well and appropriate behaviors and capacities emerge. If, however, the environmental stimuli are absent or negative (as with lead poisoning or family violence) then the brain does not develop as well.⁷⁸ Because the brain is "plastic," physically formed by the experience it undergoes, the same infant could develop different brain structures with different biochemical reactions if it is exposed to different environments: "The structure and function of the developing brain are determined by how experiences, especially within interpersonal relationships, shape the genetically programmed maturation of the nervous system. In other words, human connections shape the neural connections from which the mind emerges."⁷⁹

Infants are born with exponentially more genetic possibilities than they can use in constructing their brains.⁸⁰ The process of selecting which genetic material gets incorporated is determined by the environment.⁸¹ Plasticity arises in part because the brain is rapidly forming new connections between cells during the early period between birth and age two. The space in which these connections occur are called synapses. Babies are born with approximately the same number of synapses as adults.⁸² By the time the synaptic density peaks at about age two, children will have fifty percent greater densities of synapses than adults. Thereafter, synaptic density declines gradually until it reaches adult levels in a process called pruning.

One of the most hotly contested debates is what significance to attach to the enormous explosion of synapse formation in the first few

78. See ROBERT H. BLANK, *BRAIN POLICY: HOW THE NEW NEUROSCIENCE WILL CHANGE OUR LIVES AND OUR POLITICS* 33 (1999).

79. DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 14 (1999).

80. See NIEHOFF, *supra* note 41, at 33-34.

81. See BLANK, *supra* note 78, at 33.

82. JOHN T. BRUER, *THE MYTH OF THE FIRST THREE YEARS* 75 (1999).

years of life. Some argue that this is a critical period of development; therefore, parents and society should invest large resources at this critical juncture.⁸³ Implicit in this argument is the notion that the failure to fully stimulate an infant (with Mozart, mobiles, or Mom) will have permanent negative consequences, diminishing the child's potential.⁸⁴ Hence, under this theory, neuroscience leads back to immutability.

Others argue that although a minimal level of stimulation is necessary to trigger normal brain development, extraordinary efforts are unnecessary.⁸⁵ These scholars suggest that brain development is not frozen irrevocably at age three, but that it continues throughout life.⁸⁶ The brain continues to change in response to changes in its environment, so that later experiences often overcome early ones both for better and worse.⁸⁷ Indeed, there is significant evidence that more learning occurs during the process of pruning synapses than in the process of building them.⁸⁸ Moreover, different areas of the brain are on different timelines for synapse creation and pruning.⁸⁹ We know that the executive function that affects impulse control, the ability to make sound judgments as to risks, and the ability to juggle multiple tasks does not develop until much later, and full development is not complete until adulthood.⁹⁰ As John Bruer so colorfully paraphrased, "[A] lot can happen between [the] high chair and [the] electric chair."⁹¹ Thus, these scholars read the neuroscience data to limit the myth of immutability.

III. PASSING THE BLAME

The myth of immutability allocates both responsibility and blame for child deviance. If children are blank slates, someone is responsible for filling in the details. Early mistakes belong to the scribe, not the slate. If, however, children are merely unchangeable genetic acci-

83. See HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (1996); SIEGEL, *supra* note 79, at 13; STARTING POINTS: MEETING THE NEEDS OF YOUNG CHILDREN (Carnegie Task Force Report, 1994).

84. See SIEGEL, *supra* note 79, at 13.

85. See generally BRUER, *supra* note 82, at 29; JEROME KAGAN, *THREE SEDUCTIVE IDEAS* (1998); NIEHOFF, *supra* note 41, at 118-25.

86. See BRUER, *supra* note 82, at 76-80.

87. See *id.* at 153-54; Ross Thompson, *Early Sociopersonality Development*, in 3 *HANDBOOK OF CHILD PSYCHOLOGY* 25-104 (William Dumor & Nancy Eisenberg eds., 5th ed. 1998).

88. Thompson, *supra* note 87, at 74.

89. *Id.* at 75-76.

90. See, e.g., Sidney J. Segalowitz et al., *Cleverness and Wisdom in 12-Year-Olds: Electrophysiological Evidence for Late Maturation of the Frontal Lobe*, 8 *NEUROPSYCHOLOGY* 279 (1992).

91. See BRUER, *supra* note 82, at 58.

dents, then children themselves must bear the brunt of managing their imperfect temperaments.

A. *Bad Mothers*

The myth of immutability has deep cultural roots in the doctrine of infant determinism that views children as permanently formed by early experiences.⁹² Originating in the beginning of the eighteenth century in Europe, infant determinism supported the doctrine of separate spheres by identifying child rearing as the natural biological role of women, displacing prior employment.⁹³ Together, these doctrines underscored the essential role of a mother's care for her baby as virtually shaping the kind of person the child would become. Because a mother's care for her child was so influential, it gave upper-middle class women a kind of power that reinforced the role of women as keepers of the moral future.⁹⁴ Those women who could devote their undivided attention to nurturing their children held higher status, while those forced to work outside the home or who left their children in care were perceived as "unnatural" or selfish.⁹⁵ Consequently, the poor who were largely comprised of recent immigrants and people of color quickly became perceived to be inferior mothers who raise unalterably defective children.

Infant determinism helped to balance the tension between two competing worldviews: nature versus nurture. Infant determinism carved out a middle ground, giving room for the influence of mothers but holding the "incorrigible" child responsible for his behavior once it had become fixed.

Not surprisingly, most "incorrigible" children turned out to be poor, immigrants, or people of color. Their mothers were inferior by definition: they worked outside the home; they left their children in the care of relatives, older children, or unrelated caretakers; they permitted their children greater freedom; and they did not instill the proper "civic virtues."

Thus, the child-savers of a century ago sought to "save" these unfortunate children from their toxic environments (either large cities or Indian reservations). The mechanisms of salvation are familiar: the

92. See *Id.* at 29; KAGAN, *supra* note 85, at 120-22.

93. BRUER, *supra* note 82, at 29-30; KAGAN, *supra* note 85, at 122.

94. This role as moral guardians of the culture provided one of the primary motivations for granting the vote to women. See AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920* 42-74 (1965); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1482-83 (1998).

95. BRUER, *supra* note 82, at 30.

“orphan” trains that shipped immigrant Catholic children from the large cities to the West to work on Protestant farms and ranches⁹⁶ and the Indian schools that removed children from their families and consciously tried to force assimilation to white culture by cutting their hair, banning traditional dress and language, and mixing children of different tribes.⁹⁷

Indeed, assimilation to the dominant culture was both the implicit and explicit purpose of the progressive movement of child-savers a century ago.⁹⁸ Delinquency was understood as a form of resistance to mainstream culture. It was not the fault of the poor, innocent children but of their misguided parents who failed to fulfill their civic duty to teach their children to be sufficiently obedient to white, middle-class norms. If parents could not or would not produce compliant children, the children would be relocated. The juvenile court was simply another mechanism to save these children from their bad parents and environments. Hence, the model was rehabilitative.

However, these efforts to reconfigure children into the mold of the mainstream culture were not fully successful. Resistance arose not only from parents who consistently challenged the definitions of their children as “orphans” and delinquents, but also from the children themselves who often failed to be compliant to majoritarian norms even in the face of relocation.⁹⁹ How were the child-savers to explain such failures? The answer must be that sometimes the damage done from the early environment was simply too severe to be corrected: infant determinism. Those who rejected nurture in favor of nature responded that such failures were inevitable. For determinists, nature placed a ceiling on the growth that could be expected from nurture.

B. *Bad Kids*

The old debate between nurture and nature assigned blame differently. Those who believed nurture was determinative blamed deviance on bad mothers. Those who believed in nature blamed bad kids. Now those who believe in neuroscience, which emphasizes the interaction between nature and nurture, can blame both bad moms and bad kids. For those caught in the current thrall of “get tough on

96. See generally, e.g., MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* (1992).

97. See, e.g., DAVID H. DEJONG, *PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES* 107-109, 116 (1993) (describing forced assimilation); PEREA ET AL., *supra* note 34, at 862.

98. FELD, *supra* note 33, at 5, 45 (1999).

99. See, e.g., HOLT, *supra* note 96, at 63 (noting resistance from children who fled their placements).

crime," it does not matter whether a youth misbehaves because of destiny or environment. Either way, he is a bad kid.

Several critiques arise. First, of course, it is unclear what constitutes a bad kid. Deviance can only be defined as different from some norm of expected behavior. Thus, in the animal studies on aggression that have figured so prominently in this research, researchers find that they need to define "usual aggression."¹⁰⁰ They define it as "intrusive on, rather than part of, the usual social order."¹⁰¹ That definition raises the issue of whose social order is used: (1) the child's peer group (2) the dominant majoritarian culture or (3) the ethnic, racial, or neighborhood subculture to which the child belongs. For example, what constitutes self-defense as a necessary response to a threat may be defined differently by different groups. A young victim who is routinely victimized may perceive threats that are invisible to others who are less familiar with their tormentors. Just as domestic violence victims learn to watch for the signals of aggression, child victims also learn to be vigilant. Being street-smart often entails a willingness to stand up for yourself, rather than back down from a fight. What appears street-smart, brave, and wise to a youth and his peer group may be treated as unwarranted aggression by others. Deviance can only be measured by some set of norms that are almost necessarily rejected by those labeled as deviant.¹⁰²

The researchers recognized the contextual nature of aggression when they narrowed their definition further to specify that aggression is excessive if it is unpredictable, disproportionate, and fails to contribute to dominance or social status.¹⁰³ According to these criteria, adolescent violence may not be excessive. Predictability is circular. Teens and others come to expect whatever level of violence becomes common. For example, high school shootings that would have been considered unheard of a decade or so ago are now becoming all too predictable. Mere predictability does not help evaluate what level of violence is tolerable. Proportionality is not much more helpful, as it is subject to the same risks of escalation. The amount of violence necessary to protect yourself or your status in a peer group varies with the amount of force others are using. Hence, we have seen teens graduate

100. Gary W. Kraemer & Susan Clarke, *Social Attachment, Brain Function, and Aggression*, in UNDERSTANDING AGGRESSIVE BEHAVIOR IN CHILDREN 121, 125 (Craig F. Ferris & Thomas Grisso, eds., 1996).

101. *Id.*

102. Ken Jacobson, *Suggested Theoretical Model for Interventions to Stop Group-based or Group-motivated Adolescent Aggressive Behavior* 360, 362, in UNDERSTANDING AGGRESSIVE BEHAVIOR IN CHILDREN 121, 125 (Craig F. Ferris & Thomas Grisso, eds. 1996).

103. Kraemer & Clarke, *supra* note 100, at 125; NIEHOFF, *supra* note 41, at 76-77.

from fists to chains to knives to pistols to semi-automatic arsenals. Finally, adolescents' violence often enhances their social position or their dominance within the group. It demonstrates their bravery, unwillingness to tolerate disrespect, power and strength, and independence from adult regulation and control.

Adolescence necessarily entails distancing from adult values and typically involves increased risk-taking and greater emphasis on peer relationships.¹⁰⁴ As teens struggle to differentiate themselves from their families, they move toward creating their own subcultures of resistance that is often defined by dress, hairstyles, adornment, music, diet, language, and disobedience. In the context of these subcultures, adolescents often behave in more antisocial ways than they would on their own.¹⁰⁵ Indeed, the rates of criminal behavior, ranging from petty theft to homicide, are very high for all adolescent males, regardless of race, ethnicity, or social class.¹⁰⁶ Relatively little of this adolescent crime, however, involves violence to persons.¹⁰⁷ Moreover, most of this adolescent crime is self-limiting; it does not reflect a life-long drift toward crime, but will spontaneously stop as the individual matures.¹⁰⁸ The decisions about which of these rebellious acts should attract official intervention are rife with cultural, racial, ethnic, and class influences. As a result, deciding which kids are bad kids is problematic.¹⁰⁹

At one end of the extreme, however, are those juveniles who seriously endanger or kill others. By most measures of deviance, these acts require some significant intervention. For them, the question is not so much whether their behavior should trigger a societal response, but what the response should be. Here, the debate about nature/nurture/neuroscience has real meaning. Those who see these youths as irretrievably bad kids are pushing toward ever more restrictive and punitive approaches.

104. Cauffman & Steinberg, *supra* note 68, at 1780; Scott & Grisso, *supra* note 4, at 137.

105. Arja Huttunen, Christina Salmivalli, & Kirsti M.J. Lagerspetz, *Friendship Networks and Bullying in Schools*, in UNDERSTANDING AGGRESSIVE BEHAVIOR IN CHILDREN 354, 358 (Craig F. Ferris & Thomas Grisso eds., 1996); Jacobson, *supra* note 102, at 362.

106. Scott & Grisso, *supra* note 4, at 137.

107. Most juveniles transferred to adult courts are accused of property or drug crimes. DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 77 (1991); MICHAEL A. JONES & BARRY KRISBERG, IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY 33, fig. 16 (1994);

108. Scott & Grisso, *supra* note 4, at 172.

109. See, e.g., Jeffrey Blustein, *Intervention with Excessively Aggressive Children*, in UNDERSTANDING AGGRESSIVE BEHAVIOR IN CHILDREN 308, 311-12 (Craig F. Ferris & Thomas Grisso, eds., 1996).

IV. LEGAL IMPLICATIONS

If behavior, violence in particular, is genetically or biologically determined, then it will be extremely difficult to change. It may be functionally immutable. Certainly any efforts to change it will be extremely costly, both financially and socially. Since we may be unable or unwilling to engage in genetic engineering, suggested solutions include long prison terms, post-prison incarceration for some offenders,¹¹⁰ and the death penalty. If, however, behavior is partially environmentally determined, then rehabilitation is at least theoretically possible.

A. *The Rehabilitative Model*

Those who believe in nurture created a juvenile court system based on a rehabilitative model. Unfortunately, by almost any measure, it has been a failure. It failed to rehabilitate, operating a system of youth prisons and courts with inferior procedural protections instead.¹¹¹ Consequently, studies have indicated that the juvenile delinquents who are least likely to become adult criminals are those who do not get caught.¹¹²

Moreover, the discretionary system of juvenile justice has contributed to disparate results for girls,¹¹³ African-Americans,¹¹⁴ Hispanics, and the poor.¹¹⁵ One mechanism has been findings of incorrigibility. Juvenile judges are given the power of indeterminate sentencing, ostensibly so they can fit the treatment to the individual child's needs. The consequence is that a judge can incarcerate a child for indefinite terms up to the age of majority and, sometimes, beyond. This sentencing discretion has been particularly problematic in findings of incorrigibility for repeat offenders.¹¹⁶ Because poor neighborhoods are

110. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

111. *In re Gault*, 387 U.S. 1 (1967); FELD, *supra* note 33, at 245-46.

112. FELD, *supra* note 33, at 246.

113. See, e.g., Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1276 (1989) (stating, "Even though female juveniles have less extensive prior records and are involved in less serious types of delinquency than are male offenders, still a larger proportion of female juveniles are detained.").

114. *Id.* at 1262 (stating, "[A]fter controlling for present offense and prior record, discretionary individualization may be synonymous with racial discrimination.").

115. *Id.* at 1263 (stating, "Thomas and Cage conclude that when legal variables are held constant, the juvenile court's individualized justice 'typically applies harsh sanctions to blacks, those who have dropped out of school, those in single parent or broken homes, [and] those from lower socioeconomic backgrounds . . .'").

116. See, e.g., Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 313 (1999).

more closely patrolled and officers are more likely to arrest a black or Hispanic child than a white child for the same offense, these children are more likely to have repeat contacts with the system. These repeat contacts are likely to become grounds for longer and longer sentencing, out of all proportion to the nature of the offense alleged.¹¹⁷ Finally, depending on the region, girls are far more likely to be incarcerated or detained for status offenses or sexual misbehavior than boys.¹¹⁸

Incarceration and long pretrial detentions have serious consequences if we believe neuroscientific data that suggests that environmental stimuli affect brain physique and chemistry throughout adolescence. If so, then incarcerating children who are already at risk endangers them in both the short and long term. The studies that suggest that contact with the juvenile justice system increases the likelihood of further deviant behavior lend some support to that view. Indeed, a rehabilitative model can only justify intervention if (1) it is limited to those who cannot function safely without it and (2) if the treatment and rehabilitation available in the institution is sufficient to overcome the negative impact of isolation and loss of stimulation. Thus, neuroscience buttresses the arguments for mandatory treatment.¹¹⁹

The treatment model is not entirely benign however. As neuroscience holds more sway, neuroscientific responses garner more supporters. These responses vary from increased usage of drugs like Ritalin for controlling children's hyperactivity to surgical interventions and implants. Given the problematic history of intervention both for mental patients¹²⁰ and outsider groups, this prospect should cause some concern. First, because outsiders, including persons of color and the poor, are disproportionately labeled as deviant, they will be disproportionately labeled as defective or diseased. That stigma

117. These repeat contacts are likely to become grounds for longer and longer sentencing, out of all proportion to the nature of the offense alleged. Frank Scruggs, *Symposium: Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, 19 FLA. ST. U.L. REV. 591, 601 (1992).

118. MELISSA SICKMUND ET AL., U.S. DEPT. OF JUSTICE JUVENILE COURT STATISTICS 21-24 (1998).

119. See, e.g., Slobogin, *supra* note 116, at 324; Roy G. Spece, Jr., *Preserving the Right to Treatment: a Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 33-46 (1978).

120. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the forced sterilization of an alleged mental incompetent). In fact, the woman forced to be sterilized in *Buck v. Bell* actually was the daughter of a prostitute who had born a child out of wedlock. *Id.* at 207.

reinforces notions of biological white supremacy.¹²¹ Second, because the alleged defect amounts to impaired judgment or loss of free will, it carries both greater social stigma and has serious political ramifications. Recall that for liberal political thinkers, liberty is based on the capacity to rationally exercise free will. Therefore, those who lack rational free will have no claim to liberty. Hence, one scholar has suggested that the solution for “high-risk” juveniles, like incurable sexual predators, should be to be *preventive* detention and treatment.¹²² Interpreting deviance and resistance to social norms as illness poses serious risks to outsiders.¹²³

What to do then with youths who commit serious acts of violence and are not treatable within the juvenile system, but who pose significant risk to themselves or others? The traditional answer was that if they were not “amenable to treatment,” then it might be appropriate to transfer them to adult court and adult correctional facilities.¹²⁴ The juvenile system was only designed for treatment, not punishment. It is no surprise that most of those who are found to be unamenable to treatment are blacks or Hispanics. Part of the reason for the disparity is that wealthier parents who either have better health insurance or more resources can provide private psychiatric treatment when public treatment is unavailable. Moreover, when white adolescents are seriously violent, they are typically described as sick, while blacks and Hispanics are described as predators or gang-bangers. Predators and gang-bangers need punishment, not treatment.

B. *The Punitive Model*

The current get tough on crime approach has been to inject more punishment into the juvenile jails and harsh boot camps,¹²⁵ while sending more and more juveniles over to adult courts to be treated as

121. See, e.g., Blustein, *supra* note 109, at 308 (noting the cultural contingency of definitions of conduct disorders and noting the risk such definitions pose to outsider groups).

122. Christopher Slobogin, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WISC. L. REV. 185, 196 (1999).

123. John E. Richters, *Disordered Views of Aggressive Children*, in UNDERSTAND AGGRESSIVE BEHAVIOR IN CHILDREN 208 (Craig F. Ferris & Thomas Grisso eds., 1996) (classifying aggression as a mental disorder).

124. *Kent v. United States*, 383 U.S. 541, 566-67 (1966).

125. Some boot camps are so harsh they have been cited as examples of human rights violations. Moreover, the evidence seems to suggest that boot camps fail at least as measured by recidivism rates. See, e.g., Rod Smith, *Issues in Juvenile Justice: Toward a More Utilitarian Juvenile Court System*, 10 U. FLA. J.L. & PUB. POL'Y. 237, 243 (1999).

adults.¹²⁶ Proposition 21 in California is just one of a series of state statutes and initiatives that have shifted juveniles to the adult system.

One of the primary motivations for punishment is deterrence. Although deterrence might sometimes work as a general proposition, it is arguably less effective with juveniles.¹²⁷ Adolescents lack the responsibility, perspective, impulse control, and judgment that adults have.¹²⁸ They tend to overvalue short-term benefits, undervalue long-term costs, react more to peer pressure, and foresee fewer consequences of their actions.¹²⁹ In a word, they have not developed the executive functions associated with the full development of the frontal lobe that occurs in late adolescence or early adulthood.¹³⁰ Hence, deterrence and punishment are less effective.

Deterrence also works better the more that an individual has to lose. Hence, for adolescents who expect a rosy future if they manage to stay out of trouble, the consequences of a conviction are momentous: It may keep them out of a good college or prevent them from getting a valuable job. For those who cannot imagine college or high paying jobs in their future, the risk is smaller. Therefore, to the extent that deterrence works for adolescents, it is more effective for middle-class students.

If deterrence fails, then punishment simply becomes retributive. Increasingly, victims are demanding retribution as a repayment for the pain inflicted. However, once again, statistics reveal significant disparities along racial and ethnic lines. As I mentioned earlier, although blacks account for only 26% of youths arrested, they are 46% of those waived to adult criminal court.¹³¹ Nothing in the retributive approach justifies such racially charged results.

The disparate impact is particularly troubling given how harsh the results are. All too often adult court means adult sentences in adult correctional facilities. Although adults must be separated from juveniles in federal correctional facilities,¹³² several states continue to

126. See, e.g., Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 521 (1995); Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 128-43 (1997); Jonathan Simon, *On Their Own: Delinquency Without Society*, 47 U. KAN. L. REV. 1001 (1999) (noting that almost two thirds of the states have now adopted provisions limiting juvenile court jurisdiction).

127. See Slobogin, *supra* note 116, at 327, 33.

128. Cauffman & Steinberg, *supra* note 68, at 1788.

129. *Id.*

130. Segalowitz, *supra* note 90, at 279.

131. Butterfield, *supra* note 36, at A1.

132. 18 U.S.C. § 5039c (1985).

incarcerate juveniles in adult prisons.¹³³ Here, the argument from neuroscience is even stronger. If adolescent brains are developing physically and chemically as a result of environmental stimuli, then adult prison must be one of the worst possible alternatives. It is likely to be counterproductive both in the present and the future.¹³⁴ Thus, the more punitive approaches fail to protect society at large.

V. CONCLUSION

The myth of immutability, which states that children are formed early and cannot be changed, has been with us for hundreds of years. Unfortunately, we cling to it even in the face of significant scientific evidence that brains continue to be molded by environmental stimuli throughout life. Thus, some read the neuroscience literature selectively to reinforce notions of immutability to justify harsh punitive approaches to youth deviance.

The implicit focus on immutability creates a false dichotomy that places resistant adolescents in a lose-lose situation: (1) They can claim to be capable of changing, in which case they have chosen to be "bad" and should be punished or (2) they can claim that they are incapable of changing, in which case they should be segregated more or less permanently to protect the rest of society. Even when the issue is not incarceration, the focus on immutability pressures members of diverse cultures either to prove they can change by assimilating to the majoritarian norm or admit their lack of capacity that justifies subordinated status. Those children who obey authoritarian patriarchal structures are rewarded, while those who challenge or resist it are labeled incorrigible or worse.¹³⁵ It becomes a vehicle to impose hopelessness on an entire population from an early age.

133. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§5601-785 (1994).

134. Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in *SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS* 238 (James C. Howell et al., eds., 1995) (noting the higher recidivism rate of juveniles processed through the adult system).

135. This model is consistent with conflict theory that sees criminal justice as enforcing middle-class values on outsider populations. See *FELD*, *supra* note 33, at 75-78.