

# DANGEROUS CHILDREN AND THE REGULATED FAMILY: THE SHIFTING FOCUS OF PARENTAL RESPONSIBILITY LAWS

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In a Chicago housing project, two boys, aged twelve and thirteen, dropped a five-year-old from a fourteenth story window after the victim refused to steal candy for them.<sup>1</sup> In New Jersey, a seventeen-year-old abducted and killed a forty-five-year-old teacher while fulfilling a boast to friends that he would steal a car for his birthday.<sup>2</sup> In Arkansas, a thirteen-year-old and his eleven-year-old cousin were arrested for firing on a crowd of fellow middle school students, killing five people and wounding eleven others.<sup>3</sup>

The emotional impact of cases like these suggests the power of juvenile crime to affect penal policy. As juvenile crime rates grow and outstrip adult crime rates,<sup>4</sup> juvenile penology is changing rapidly.

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<sup>1</sup> See *Violence Beyond Their Years*, U.S. News & World Rep., Feb. 12, 1996, at 6 (reporting sentencing of 12- and 13-year-old and noting new state laws intended "to treat juvenile criminals more like adults").

<sup>2</sup> See John J. DiIulio, Jr., *Crime in America*, Wall St. J. (Europe), July 17, 1996, at 6 (arguing for "[a]cknowledgment of] the banal brutality of today's criminals").

<sup>3</sup> See Rick Bragg, *5 Are Killed at School; Boys, 11 and 13, Are Held*, N.Y. Times, March 25, 1998, at A1 (noting that one of boys "reportedly avowed to kill all the girls who had broken up with him"); see also Sue Anne Pressley, *Adolescent on Trial in Toddler's Death*, Wash. Post, Aug. 6, 1996, at A3 (describing twelve-year-old charged with murdering two-year-old in an attack so savage that victim's liver was almost severed, reporting New York case involving 13-year-old boy who beat four-year-old to death with rocks, and describing incident in Virginia in which three young teens severely beat three-year-old because "she refused to cry").

<sup>4</sup> See Federal Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports for the United States 1995*, at 212, 214 (1996) (reporting 67.3% increase in juvenile violent crime between 1986 and 1995 and 31.4% increase in adult violent crime during same period; reporting 12% and 0.5% increase in juvenile and adult crimes, respectively, between 1991 and 1995); Ralph A. Rossum, *Reforming Juvenile Justice and Improving Juvenile Character: The Case for the Justice Model*, 23 Pepp. L. Rev. 823, 824 (1996) (citing 128% increase in arrest rate of juveniles for murder from early 1980s to early 1990s and noting that, in 1995, juveniles made up 12.6% of U.S. population but committed 30.9% of all crimes, including 19.4% of violent crimes). Although there have been recent drops in juvenile crime rates, see Federal Bureau of Investigation, *supra*, at 216 (charting 2.6% decrease in juvenile violent crime rate and 1.7% decrease in juvenile property crime rate between

Gone is the early twentieth century Progressive view of those like Judge Julian Mack, a founder of the juvenile court movement, who believed that the judge should sit next to the juvenile offender so that "he can on occasion put his arm around his shoulder and draw the lad to him."<sup>5</sup> Increasingly dominant is a view of juvenile offenders as "super-predators,"<sup>6</sup> who kill in "wolf packs"<sup>7</sup> and who, when caught, "show us the blank, unremorseful stare of a feral, presocial being."<sup>8</sup>

The shift in the language used to describe juvenile offenders reflects a larger change in general penal philosophy. Various commentators have characterized this change as one from "modern" schemes of penology to a new "postmodern" penology.<sup>9</sup> This new penology is defined by several trends, including a greater emphasis on managing crime than on eliminating it, a greater focus on dangerous populations than on culpable individuals, a normalization of crime and anti-crime measures, and the use of lawmaking as a symbolic activity.<sup>10</sup>

This Note argues that the appearance of postmodern penological trends in the juvenile justice context results in two problems: an attack on the autonomy of the family and a shift to a more sinister view

1994 and 1995), the significance of these drops is disputed. See Gary Fields, *Juvenile Crime Rate Falls 2.9%*, USA Today, Aug. 9, 1996, at 3A (noting that 1995 violent crime arrest rate was nonetheless second highest in history). Also, the anticipated growth in the juvenile population has led criminologist James Alan Fox to describe the current offense rates as "the calm before the crime storm." James Alan Fox, *The Calm Before the Crime Wave Storm*, L.A. Times, Oct. 30, 1995, at B5.

<sup>5</sup> Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 120 (1909), quoted in Naomi R. Cahn, *Pragmatic Questions about Parental Liability Statutes*, 1996 Wis. L. Rev. 399, 404 (1996); see also Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 Wis. L. Rev. 375, 376-78 (discussing influence of rehabilitative ideal and recognition of character-shaping influence of environment on juvenile courts).

<sup>6</sup> Jonathan Simon, *The Rhetoric of Vengeance*, *Criminal Justice Matters*, Autumn 1996, at 8-9 ("They are so called because, according to the largely unexamined assumption, the current set of violent youth act with a distinctive lack of remorse or fear of consequences apparently unprecedented among past generations . . .").

<sup>7</sup> John J. DiIulio, Jr., *The Coming of the Super-Predators*, *Wkly. Standard*, Nov. 27, 1995, at 24 (discussing seemingly high rate of homicide by groups of juveniles).

<sup>8</sup> John J. DiIulio, Jr., *Stop Crime Where It Starts*, N.Y. Times, July 31, 1996, at A15 (quoting James Q. Wilson, professor of public policy, U.C.L.A.).

<sup>9</sup> The terms "modern" and "postmodern" are used in this Note only as applied in a small body of literature examining recent trends in penology. See *infra* Part I.B; see also David Garland, *Penal Modernism and Postmodernism*, in *Punishment and Social Control* 181, 181-83 (Thomas G. Blumberg & Stanley Cohen eds., 1995) (contrasting use of term "postmodernism" as "catchall adjective to describe the various intellectual and political predicaments of an age in which foundational claims . . . are viewed as 'mere' conventions" with specific application of term in penological context); cf. Janny Scott, *Lofty Ideas That May Be Losing Altitude*, N.Y. Times, Nov. 1, 1997, at B13 ("['Postmodernism is] one of these terms that has been used so much that nobody has the foggiest idea what it means. It means one thing in philosophy, another thing in architecture and nothing in literature." (quoting Richard Rorty, philosopher, University of Virginia)).

<sup>10</sup> See *infra* Part I.B.

of children. This Note specifically examines parental responsibility laws, measures that hold parents criminally responsible for the acts of their children. These laws show a new readiness to attribute juvenile misconduct to improper parenting and to hold parents strictly liable for their children's acts, both in furtherance of protecting society from the danger presented by juveniles.<sup>11</sup> In so doing, these laws embody the postmodern trends mentioned above.

This Note analyzes recently enacted parental responsibility laws by evaluating them as a penologically postmodern phenomenon. In Part I, modern and postmodern theories of penology are compared. Part II surveys the history of laws that punish parents for the acts of their children, looking in Part II.A at older "endangering the welfare" statutes before turning in Part II.B to more recent parental responsibility laws. Part III analyzes these laws as an instance of penal postmodernism. Part III.A argues that the laws illustrate broad trends that are characteristic of penal postmodernism. Part III.B builds on this argument, asserting that the intrusion of penal postmodernism into the family context through parental responsibility laws reflects changing norms about the independence of the family and about society's vision of children.

## I

### PENAL POSTMODERNISM

#### A. *Modernism*

Modernism became the dominant model of penology between the mid-sixteenth century and the nineteenth century, as the state gained exclusive control over punishment.<sup>12</sup> The state exercised this power through new forms of discipline. The "traditional repertoire of corporal and symbolic punishments"<sup>13</sup> gave way to punishments emphasizing the deprivation of liberty through imprisonment, the use of monetary penalties, and most recently, various types of supervisory practices such as parole and probation.<sup>14</sup>

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<sup>11</sup> See *infra* Part II.

<sup>12</sup> See Garland, *supra* note 9, at 185 (noting movement of power away from "competing secular and spiritual authorities").

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* (discussing historical development of punishments). Michel Foucault characterized this change by remarking that:

By the end of the eighteenth and the beginning of the nineteenth century, the gloomy festival of punishment was dying out . . . . In this transformation, two processes were at work. . . . The first was the disappearance of punishment as a spectacle.

Modern penology drew on rationalist thought, which advocated punishment for the purpose of shaping behavior and eliminating crime rather than responding symbolically to crime.<sup>15</sup> These goals were realized in a movement “rooted in a concern for individuals, and preoccupied with such concepts as guilt, responsibility and obligation, as well as diagnosis, intervention and treatment of the individual offender.”<sup>16</sup> The importance of the crime was secondary to the need to rehabilitate or punish the criminal. Indeed, criminal acts were seen as superficial phenomena that were actually “symptoms of deeper problems.”<sup>17</sup> Criminality was abnormal, “a deviant or antisocial act”<sup>18</sup> that should be met by “ascertain[ing] the nature of the responsibility of the accused and hold[ing] the guilty accountable.”<sup>19</sup>

### B. *The Rise of Postmodernism*

The dominance of modern models of penology depended upon the view that punishment served a utilitarian purpose in eliminating crime and reforming criminals.<sup>20</sup> This view has fallen into disrepute, leading some to characterize the last twenty years as a “crisis of penological modernism.”<sup>21</sup> Many argue that modernism is being replaced by a new penal paradigm, alternately characterized

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... [The second process was the] slackening of the hold on the body. . . . Physical pain, the pain of the body itself, is no longer the constituent element of the penalty.

Michel Foucault, *Discipline and Punish* 8, 10-11 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>15</sup> See Garland, *supra* note 9, at 186 (stating goal that “punishments were to be rationally administered and made positive in their results”); see also Foucault, *supra* note 14, at 101 (discussing objectification of crime that arose with modernism).

<sup>16</sup> Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *The Futures of Criminology* 173, 173 (David Nelken ed., 1994); see also Foucault, *supra* note 14, at 16 (“If the penalty [sic] in its most severe forms no longer addresses itself to the body, on what does it lay hold? . . . [S]ince it is no longer the body, it must be the soul.”).

<sup>17</sup> Garland, *supra* note 9, at 187.

<sup>18</sup> Feeley & Simon, *supra* note 16, at 173.

<sup>19</sup> *Id.*

<sup>20</sup> See Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass 1890-1990*, at 6-7 (1993) (explaining that penal practices aimed to affect public safety directly, by reducing actual crime, and indirectly, by “creating . . . accounts of control, which tie the object of fear into the predominant vehicles of social control and order in society”).

<sup>21</sup> Jonathan Simon used this phrase as the title for the introduction to a recent work on parole. See *id.* at 1; see also David Garland, *Punishment and Modern Society* 4 (1990) (“The contemporary period is one in which penological optimism has given way to a persistent skepticism about the rationality and efficacy of modern penal institutions.”).

as “postmodern,”<sup>22</sup> “managerial,”<sup>23</sup> and “actuarial.”<sup>24</sup>

### 1. *Postmodern Trends*

The new postmodern penology differs radically from modern penology:

It is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal. . . . [I]ts aim is not to intervene in individuals' lives for the purpose of ascertaining responsibility [by] making the guilty “pay for their crime” or changing them. Rather it seeks to regulate groups as part of a strategy of managing danger.<sup>25</sup>

Several trends define the new penology. First, a focus on populations has replaced a focus on the individual. Whereas modern penology centered on the criminal, postmodern penology revolves around the crime rate and those who present a criminal risk.<sup>26</sup> This emphasis has led to crime control efforts that specifically focus on the risk presented by the “underclass,”<sup>27</sup> a group characterized by “race, crime and urban inequality.”<sup>28</sup>

A second postmodern trend is the normalization of crime, as penological efforts become “aimed less at halting proscribed activities than reducing the likelihood and seriousness of offending.”<sup>29</sup> Crime is no longer a deviant activity that can be purged altogether, but instead

<sup>22</sup> See Garland, *supra* note 9, at 192-96 (examining postmodernism in the penal realm).

<sup>23</sup> See Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, in *The Politics of Sentencing Reform* 17, 24-34 (Chris Clarkson & Rod Morgan eds., 1995) (discussing “managerialism” in context of sentencing).

<sup>24</sup> See Feeley & Simon, *supra* note 16, at 173 (noting features of development in criminal process, which they term “actuarial justice”); see also Garland, *supra* note 9, at 182, 189-92 (reviewing various commentators' descriptions of new penal paradigm).

<sup>25</sup> Feeley & Simon, *supra* note 16, at 173.

<sup>26</sup> See *id.* at 178 (noting concern with “the *distribution* of behaviours in the population as a whole”). As one commentator has noted: “‘Three-strikes’ laws, mandatory minimum sentences, sentencing guidelines and the like, are, relatively speaking, oriented toward the *offense*, rather than the offender . . . . The policies are oriented toward managing and controlling the ‘dangerous classes,’ not on reforming or helping . . . .” Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 *Cumb. L. Rev.* 903, 909-10 (1996-1997).

<sup>27</sup> For a discussion of the history of the “underclass,” see Simon, *supra* note 20, at 253-56 (discussing rise of perception of urban poor as “dangerous class” in early nineteenth century).

<sup>28</sup> Feeley & Simon, *supra* note 16, at 192; see also Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 *Val. U. L. Rev.* 365, 372 (1997) (claiming that Americans “see the criminal justice system as an ever-more prominent component—indeed the dominant component—of society’s response to the ‘underclass’”).

<sup>29</sup> Feeley & Simon, *supra* note 16, at 178.

is an accepted feature of contemporary society.<sup>30</sup> The resulting challenge lies not in searching for ways to eliminate crime or its causes, but rather in finding ways to manage it.<sup>31</sup>

With the normalization of crime has come a normalization of the methods of combating crime, a trend facilitated by the courts.<sup>32</sup> There is a growing acceptance of a surveillance society<sup>33</sup> and an increased willingness to extend the domain in which police may exert their authority.<sup>34</sup>

A final postmodern trend is the use of criminal laws for their symbolic value.<sup>35</sup> Such laws are political in nature, seeking only to show that legislators are aware of a problem, rather than actually seeking to address that problem. An emphasis on symbolic measures is a natural outgrowth of a feeling that the modernist emphasis on utility based penological goals has failed.<sup>36</sup> In the face of the "crisis of penological modernism,"<sup>37</sup> the very enactment of laws comes to be a critically important public demonstration of state action.<sup>38</sup>

One of the most distinctive features of postmodernism is the extent to which it is politically nonpartisan. The intellectual foundation for the new penology was the liberal due process movement of the

<sup>30</sup> See Alschuler, *supra* note 28, at 372 (stating that Americans "apparently have accepted the crime associated with poverty as permanent").

<sup>31</sup> See Garland, *supra* note 21, at 7 ("[W]hat seems to have come into question now . . . is a basic principle of modern punishment—namely the presumption that crime and deviance are social problems for which there can be a technical institutional solution.").

<sup>32</sup> See Feeley & Simon, *supra* note 16, at 180-85 (discussing how rulings indicate Supreme Court's "new way of thinking about criminal justice").

<sup>33</sup> The normalization of surveillance has been pinned on the Supreme Court's increasing willingness to characterize encounters between police and civilians as "consensual." *Id.* at 181 (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that bus passenger gave valid, uncoerced consent to search his bags when questioned by police who boarded bus)).

<sup>34</sup> One example of this trend is the enlargement of "the border 'exception' [which has] expand[ed] the power of the police to stop and search people." *Id.* at 181; see also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (finding sobriety checkpoints consistent with Fourth Amendment).

<sup>35</sup> See Simon, *supra* note 20, at 3 ("If we try to treat preference for spending on crime as a problem of rational choice we miss the important symbolic role of crime control efforts. . . . [T]he means selected for managing specific risks often represent symbolic levers with which to combat broader fears of social disorder . . .").

<sup>36</sup> See *id.* at 6-7.

<sup>37</sup> See *supra* note 21 and accompanying text.

<sup>38</sup> Similar to the symbolic enactment of statutes are newly administered forms of punishment that are themselves endowed with symbolism. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 631-34 (1996) ("The last decade has witnessed the advent of a wide variety of shaming sanctions. . . . [T]hese penalties can be grouped into four classes: stigmatizing publicity, literal stigmatization, self-debasement, and contrition."). These new forms of punishment are said to rival the deterrence and retribution based sanction of imprisonment because "they do something that conventional alternative sanctions do not do: express appropriate moral condemnation." *Id.* at 635.

1960s and 1970s, which had as its goal the elimination of discretion in the criminal justice system.<sup>39</sup> It was not until the conservative anti-crime movement that followed, however, that postmodernism came to dominate contemporary penology fully.<sup>40</sup> The enactment of sentencing guidelines, a paradigmatic example of the new penology, is illustrative: the guidelines were supported by liberals concerned about sentencing disparities and conservatives concerned about criminals not serving their full term.<sup>41</sup> Because postmodernism is still not subject to the dictates of a particular political ideology, it may bring about long lived and profoundly new types of punishment.

## 2. *The New Penology in the Juvenile Context*

Postmodern trends have changed juvenile justice. This change is illustrated by the erosion of the juvenile court, whose uniquely modern focus on the individual and on rehabilitating the individual was captured by the nation's first official juvenile court judge: "Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally . . . ."<sup>42</sup> The juvenile court was guided by the *parens patriae* doctrine, which inserted the state into the role of parent for the child deprived of proper parenting.<sup>43</sup> This allowed the state to focus directly on rehabilitation, justifying deinstitutionalization and the relaxation of judicial procedures and procedural rights.<sup>44</sup>

A more punitive stance toward juveniles has further eroded the institution of the juvenile court. The Supreme Court attacked the

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<sup>39</sup> See Feeley & Simon, *supra* note 16, at 190-92 (describing how in 1960s and 1970s, federal courts "specified reforms in law enforcement, courts and corrections" that served to "regularise procedures"). For a history of the effort to control discretion in the criminal justice system, see generally Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice, 1950-1990* (1993) (examining efforts to control discretion of police, bail judges, prosecutors, and sentencing judges).

<sup>40</sup> See Feeley & Simon, *supra* note 16, at 191-92 (arguing that death penalty and increasing incarceration laid groundwork for postmodern trends).

<sup>41</sup> See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 933 (1991) (noting bipartisan alliances in support of statute establishing Federal Sentencing Commission and in support of California's Determinate Sentencing Law).

<sup>42</sup> Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909), quoted in Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 *Cardozo L. Rev.* 1363, 1389 & n.151 (1995).

<sup>43</sup> See *id.* at 1385 ("[M]ay not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?") (quoting *Ex Parte Crouse*, 4 Whart. 2, 11 (Pa. 1839) (on *parens* power)).

<sup>44</sup> See Cahn, *supra* note 5, at 403-04 (noting that Julian Mack, founder of juvenile court movement, advocated treating juveniles in manner in which "wise and merciful father handles his own child" (quoting Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909))).

*parens patriae* doctrine in 1966, holding in *In Re Gault*<sup>45</sup> that juveniles were entitled to the same procedural protections as adults.<sup>46</sup> Later came state legislation emphasizing “protection of the public and [juvenile] accountability.”<sup>47</sup> Laws providing for certain juveniles to be tried as adults<sup>48</sup> and given longer sentences<sup>49</sup> followed. These trends continue today. Youth curfews increasingly are being adopted.<sup>50</sup> The “boot camp” movement has been applied to juvenile offenders,<sup>51</sup> and there have been proposals to incarcerate juvenile offenders with adults.<sup>52</sup> These trends complement the broader limiting of judicial discretion that marked the genesis of penal postmodernism.<sup>53</sup>

New parental responsibility laws<sup>54</sup> equally reflect the postmodern trends in contemporary juvenile justice. More recent variants of these laws mark a fundamental shift in the state’s response to the failed parent: rather than replace the failed parent in the interest of helping the child, the state, in a tacit recognition of its own inability to help the

<sup>45</sup> 387 U.S. 1 (1967).

<sup>46</sup> See *id.* at 17-18 (“The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice . . . the results have not been entirely satisfactory.” (footnotes and citations omitted)).

<sup>47</sup> Melli, *supra* note 5, at 391. One commentator writing in 1988 noted that “[w]ithin the past decade . . . ten state legislatures—almost one-quarter of states with a legislative purpose statement or preamble in their juvenile law statutes—have redefined the purpose of their juvenile courts.” Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821, 842 (1988). Feld cites several rewritten purpose statements that include language stating that juvenile laws are to “provide for the protection and safety of the public” (Cal. Welf. & Inst. Code § 202 (West Supp. 1998)); “render appropriate punishment to offenders” (Haw. Rev. Stat. § 571-1 (1993)); “protect the welfare of the community” (Tex. Fam. Code Ann. § 51.01(2) (West 1986)); and “protect the community against those acts of its citizens . . . which are harmful to others and . . . reduce the incidence of delinquent behavior” (Va. Code Ann. § 16.1-227 (Michie 1996)). See Feld, *supra*, at 844-45.

<sup>48</sup> See Melli, *supra* note 5, at 391-92. The *New York Times* reported that 700 pieces of legislation that would allow juveniles to be tried as adults were introduced in state legislatures in 1995. See Brent Staples, *The Littlest Killers*, N.Y. Times, Feb. 6, 1996, at A22.

<sup>49</sup> See Howard Davidson, *No Consequences—Re-examining Parental Responsibility Laws*, 7 Stan. L. & Pol’y Rev. 23, 23 (1996) (noting most common legislative responses to increases in juvenile crime rate).

<sup>50</sup> See Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. Rev. 131, 131, 135 (1997) (noting that over 75% of large U.S. cities have curfews and that 53 cities adopted curfews between 1991 and 1996).

<sup>51</sup> See Davidson, *supra* note 49, at 23 (discussing boot camps). Simon states that the purpose of boot camps is to “give youthful offenders shock treatment in rigorous discipline modeled directly on military training.” Simon, *supra* note 20, at 248.

<sup>52</sup> See Senator John Ashcroft, *Senate Judiciary Committee Approves Violent and Repeat Juvenile Offender Act*, Government Press Releases, July 24, 1997, available in 1997 WL 12101461 (discussing bill approved by Senate Judiciary Committee that would allow juveniles to be held in same facilities as adults provided no separate jails are available and no direct physical contact occurs between juveniles and adults).

<sup>53</sup> See *supra* note 39 and accompanying text.

<sup>54</sup> See *infra* Part II.B.

child any more than the parent can, instead punishes the parent for her or his failure.

## II

### PUNISHING THE PARENTS FOR THE WRONGDOING OF THE CHILD: “ENDANGERING THE WELFARE” STATUTES AND PARENTAL RESPONSIBILITY LAWS

Various laws have been enacted throughout the twentieth century that hold parents accountable for the acts of their children. One group of laws, enacted while modern penal trends were dominant,<sup>55</sup> targeted conduct that is “contributing to the delinquency” and “endangering the welfare” of minors.<sup>56</sup> Another group, enacted more recently during the current postmodern penal trend,<sup>57</sup> targets “improper supervision,” “failure to supervise,” and violations of “parental responsibility.”<sup>58</sup> This change in focus highlights a shift from modern statutory efforts focused on child welfare to postmodern efforts focused on protecting society from dangerous children.<sup>59</sup>

#### A. *Regulating Parental Misconduct: “Endangering the Welfare” Statutes*

Laws that punish parents for the acts of their children have existed since 1903, when Colorado became the first state to pass an “endangering the welfare” law that, although applicable to all adults, could be applied to hold parents criminally liable for their children’s acts.<sup>60</sup> By 1961, all but two states had similar

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<sup>55</sup> See *supra* Part I.A.

<sup>56</sup> See *infra* Part II.A. These laws will be referred to hereinafter as “endangering the welfare” statutes.

<sup>57</sup> See *supra* Part I.B.

<sup>58</sup> See *infra* Part II.B. These laws will be referred to hereinafter as “parental responsibility” laws.

<sup>59</sup> One of the purposes of this Note is to discuss why these modern and postmodern designations are appropriate. See *infra* Part III.A. This Part, however, only employs the modern/postmodern designations to distinguish between the statutes in terms of the penal philosophy that was dominant at the time of their enactment.

<sup>60</sup> See Gilbert Geis & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 *Notre Dame J.L. Ethics & Pub. Pol’y* 303, 305 (1991) (noting that “offense of contributing to delinquency was first incorporated in the 1903 Colorado juvenile court law”). The current version of the Colorado statute is Colo. Rev. Stat. § 18-6-701 (Supp. 1996). It applies to “[a]ny person who induces, aids, or encourages a child to violate any federal or state law, municipal or county ordinance, or court order.” *Id.* While this statute requires affirmative acts by the parent (or other adult), other statutes hold the parent guilty for certain omissions. See, e.g., Ky. Rev. Stat. Ann. § 530.060 (Michie 1990) (holding parent guilty “when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child”).

laws.<sup>61</sup> They remain in place today.<sup>62</sup>

“Endangering the welfare” statutes hold adults culpable for either contributing to the delinquency of a minor or endangering the welfare of a minor.<sup>63</sup> The statutes generally have two elements in common: the failure of a duty and the resulting misconduct of the child.<sup>64</sup> These are typically negligence crimes,<sup>65</sup> although some of the statutes require a higher level of mens rea for one or more elements of

<sup>61</sup> See James A. Kenny & James V. Kenny, *Shall We Punish the Parents?*, 47 A.B.A. J. 804, 805 (Aug. 1961).

<sup>62</sup> See Ala. Code § 13A-13-6 (1997) (“Endangering welfare of child”); Del. Code Ann. tit. 11, § 1102 (Supp. 1996) (“Endangering the welfare of a child; class A misdemeanor”); Haw. Rev. Stat. § 709-904 (1993) (“Endangering the welfare of a minor in the second degree”); Ky. Rev. Stat. Ann. § 530.060 (Michie 1990) (“Endangering welfare of minor”); Me. Rev. Stat. Ann. tit. 17-A, § 554 (West Supp. 1997) (“Endangering the welfare of a child”); Minn. Stat. Ann. § 260.315 (West 1992) (“Contributing to need for protection or services or delinquency”); Miss. Code Ann. § 97-5-39 (1995) (“Contributing to the neglect or delinquency of a child”); Mo. Ann. Stat. § 568.050 (West Supp. 1998) (“Endangering welfare of a child in the second degree”); Mont. Code Ann. § 45-5-622 (1997) (“Endangering the welfare of children”); Nev. Rev. Stat. § 201.110 (1995) (“Penalties” section of “Crimes Against Public Decency And Good Morals: Contributory Delinquency And Neglect Of Children” chapter); N.H. Rev. Stat. Ann. § 639:3 (1996) (“Endangering Welfare of Child or Incompetent”); N.M. Stat. Ann. § 30-6-3 (Michie 1994) (“Contributing to delinquency of minor”); N.Y. Penal Law § 260.10 (McKinney 1989 & Supp. 1997-1998) (“Endangering the welfare of a child”); Okla. Stat. Ann. tit. 21, §§ 858.1-3 (West 1996 & Supp. 1998) (“Causing, aiding, abetting or encouraging minor to be in need of supervision;” “Neglect of minor adjudicated delinquent, in need of supervision or deprived;” and “Causing, aiding, abetting or encouraging minor to become delinquent, in need of supervision, or dependent and neglected—Penalty”); 18 Pa. Cons. Stat. Ann. § 4304 (West Supp. 1997) (“Endangering welfare of children”); S.D. Codified Laws § 26-9-1 (Michie Supp. 1997) (“Contributing to abuse, neglect or delinquency or causing child to become child in need of supervision as misdemeanor”); Va. Code Ann. § 18.2-371 (Michie 1996) (“Causing or encouraging acts rendering children delinquent, abused, etc.; penalty”); W. Va. Code § 49-7-7 (1996) (“Contributing to delinquency or neglect of a child”); see also Model Penal Code § 230.4 (1987) (“Endangering Welfare of Children”).

<sup>63</sup> See, e.g., Del. Code Ann. tit. 11, § 1102 (Supp. 1996) (holding parent liable for knowingly acting in manner likely to injure child, intentionally causing child to become neglected, or knowingly contributing to delinquency of child); W. Va. Code § 49-7-7 (1996) (imposing liability on “person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child”). For examples of the various activities to which the statutes can be applied, see *infra* note 69.

<sup>64</sup> See, e.g., Ky. Rev. Stat. Ann. § 530.060 (Michie 1990) (stating that parent is guilty after “fail[ure] or refus[al] to exercise reasonable diligence in the control of child to prevent him from becoming a neglected, dependent or delinquent child”). As the Kentucky statute illustrates, most of these statutes actually apply to more situations than just child delinquency. See *id.* As these other applications are not relevant to the subject matter of this Note, however, they will not be discussed here.

<sup>65</sup> See *Pearson v. State*, 601 So. 2d 1119, 1126 (Ala. Crim. App. 1992) (noting that, whereas child abuse statute requires intentional conduct, endangering welfare statute requires only negligence); Cahn, *supra* note 5, at 410 (noting lack of actus reus element of crimes and presence of negligence mens rea element).

the crime,<sup>66</sup> and they are almost all punished as misdemeanors.<sup>67</sup> The statutes have received favorable treatment when challenged, with courts often overlooking arguable defects in the statutes in light of their important public policy role.<sup>68</sup>

“Endangering the welfare” statutes have been applied against more than the parents of juvenile offenders. The statutes are broadly phrased in terms of the welfare of the child, allowing them to cover a range of parental or other adult wrongdoings.<sup>69</sup> This contrasts with more recent parental responsibility laws, which are specifically targeted against the parents of juvenile offenders.

### *B. Managing the Dangerous Child: Parental Responsibility Laws*

In the last ten years, states and municipalities have enacted a number of parental responsibility laws<sup>70</sup> that are noteworthy for their increased emphasis on holding parents guilty for the wrongdoing of their children. These laws evolved from “endangering the welfare” statutes. A brief examination of their history is instructive before turning to the two factors that most differentiate parental responsibility laws from “endangering the welfare” statutes: the degree to which the new laws specify which juvenile acts indicate improper parenting and the way in which some parental responsibility laws lessen the parental mens rea needed to establish guilt.<sup>71</sup>

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<sup>66</sup> See, e.g., N.H. Rev. Stat. Ann. § 639:3 (1996) (providing that “person is guilty . . . if he knowingly endangers the welfare . . . by purposely violating a duty of care” (emphasis added)).

<sup>67</sup> See, e.g., Ala. Code § 13A-13-6 (1997) (“Class A misdemeanor”). But see N.M. Stat. Ann. § 30-6-3 (Michie 1994) (“fourth degree felony”).

<sup>68</sup> See Geis & Binder, *supra* note 60, at 306 (noting courts’ willingness to tolerate vagueness in statutes in light of state’s serious interest in protecting juveniles).

<sup>69</sup> See, e.g., *State v. Crossetti*, 628 A.2d 132, 134 (Me. 1993) (finding adult guilty of endangering welfare of 14-year-old niece after adult “fostered, condoned, and encouraged” niece to engage in sex with boyfriend); *People v. Scully*, 513 N.Y.S.2d 625, 626 (Crim. Ct. 1987) (finding father guilty of endangering welfare of child for allowing drug addicted spouse to live with infant during period when infant was abused).

<sup>70</sup> There are only a handful of arguably postmodern parental responsibility laws that have been enacted at the state level. See *infra* Part II.B.1-4. A significant number of these laws have been enacted as city ordinances. See *infra* notes 86, 101.

<sup>71</sup> After considering these two factors, the postmodern laws divide into those that more specifically define improper parenting, those that lessen the standard of parental mens rea necessary for a finding of guilt, and those that embody both of these factors. See *infra* Part II.B.2-4.

## 1. *The Recent History of Parental Responsibility Laws*

Illinois passed an "improper supervision" law in 1961.<sup>72</sup> Rhode Island has a similar law that has not been substantively amended since 1956.<sup>73</sup> Both statutes adopted a relatively conventional standard of mens rea<sup>74</sup> but were novel in terms of detailing the juvenile acts for which parents could be held responsible. While the juvenile acts listed may have reflected relatively uncontroversial contemporary notions of proper parenting, the specificity with which the statutes detailed the acts was unique.<sup>75</sup>

New Mexico's parental responsibility law<sup>76</sup> was novel in the intent level it set to determine parental guilt. Although the statute was conventionally worded, in 1974 an appellate court held that "the legislative intent was to make the commission of the act of contributing to the delinquency of a minor a crime without regard to intent."<sup>77</sup> Relying on the fact that "[i]nfants have generally been a favored class for special protection,"<sup>78</sup> the court read a strict liability requirement in the statute.

These statutes were exceptional until 1988, when California passed its much heralded Street Terrorism Enforcement and Prevention Act.<sup>79</sup> In the name of fighting gang violence, the Act amended California's existing "contributing to the delinquency" statute by stating that parents could be punished for "omitting the performance of . . . reasonable care, supervision, protection, and control over their

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<sup>72</sup> Act of Aug. 1, 1961, 1961 Ill. Laws 2454 (codified as amended at 720 Ill. Comp. Stat. Ann. 640/1-2 (West 1993)).

<sup>73</sup> See R.I. Gen. Laws § 11-9-4 (1994).

<sup>74</sup> See, e.g., 720 Ill. Comp. Stat. Ann. 640/1 (West 1993) (requiring that parent "knowingly permit[]" juvenile's activity).

<sup>75</sup> See *id.* (penalizing parent of child who "associate[s] with known thieves, burglars, felons, narcotic addicts or other persons of ill repute, visit[s] a place of prostitution, commit[s] a lewd act, commit[s] an act tending to break the peace or violate[s] a municipal curfew ordinance"). The Rhode Island law penalizes a parent who permits or suffers such child to habitually associate with vicious, immoral, or criminal persons, or to grow up in ignorance, idleness, or crime, or to wander about the streets of any city in the nighttime without being in any lawful business or occupation, or to enter any house of ill fame, policy shop, or place where any gambling is carried on or gaming device is operated, or to enter any place where intoxicating liquors are sold.

R.I. Gen. Laws § 11-9-4 (1994)

<sup>76</sup> See N.M. Stat. Ann. § 30-6-3 (Michie 1994).

<sup>77</sup> *State v. Gunter*, 529 P.2d 297, 298 (N.M. Ct. App. 1974). Although certiorari was denied in *Gunter*, see 529 P.2d 274 (N.M. 1974), the New Mexico Supreme Court later stated in dicta that it had "tacitly approved" the lower court's holding. See *State v. Pitts*, 714 P.2d 582, 584 (N.M. 1986).

<sup>78</sup> *Gunter*, 529 P.2d at 298.

<sup>79</sup> Act of Sept. 23, 1988, ch. 1256, § 2, 1988 Cal. Stat. 4178, 4182 (codified at Cal. Penal Code §§ 186.20-.28, 272 (West Supp. 1998)).

minor child.”<sup>80</sup> The revised statute was promptly challenged on vagueness and overbreadth grounds, but in 1993 the California Supreme Court upheld its constitutionality.<sup>81</sup>

Since the California statute was enacted, other states and municipalities have enacted parental responsibility laws in various forms. These laws typically vary along two criteria: the specificity with which they define improper parenting and the mens rea standard they set for establishing parental guilt.

## 2. *Statutes that Specifically Define Juvenile Wrongdoing*

In 1995, Louisiana enacted an “improper supervision” statute that punishes parents for a number of specific acts on the part of their children.<sup>82</sup> In particular, a parent can be punished for allowing a child to “associate with a person known by the parent” to be a member of a street gang, a convicted felon, a drug user or dealer, or a possessor of an illegal weapon.<sup>83</sup> Also, the parent can be found guilty when the child does one of the following: enters a place known by the parent to house “sexually indecent activities or prostitution,” “underage drinking or gambling,” “illegal drug use or distribution,” or illegal weapons; violates a local curfew ordinance; or is habitually truant without an excuse.<sup>84</sup> The statute is relatively conventional in setting the mens rea at “criminal negligence.”<sup>85</sup> Some municipalities have passed ordinances similar to the Louisiana statute.<sup>86</sup>

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<sup>80</sup> *Id.* The amendment added a specific definition of parental duty. Previously, the statute applied generally to acts or omissions by any person that contributed to the delinquency of a minor. See *id.*

<sup>81</sup> See *Williams v. Garcetti*, 853 P.2d 507, 509-17 (Cal. 1993) (holding that statute provided sufficient notice, did not allow arbitrary enforcement, and was not overbroad in infringing on right of intimate family association).

<sup>82</sup> See Act of June 21, 1995, No. 702, § 2, 1995 La. Acts 1854, 1855-56 (codified at La. Rev. Stat. Ann. § 14:92.2 (West Supp. 1997) (“Improper supervision of a minor by parent or legal guardian”)).

<sup>83</sup> See La. Rev. Stat. Ann. § 14:92.2 (West Supp. 1997).

<sup>84</sup> See *id.*

<sup>85</sup> *Id.* The Louisiana legislature has defined criminal negligence as “when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.” La. Rev. Stat. Ann. § 14:12 (West 1997).

<sup>86</sup> See Corpus Christi, Tex., Code § 33-48 (1985) (providing that parental duties include “[k]eeping illegal drugs and illegal firearms out of the home; [p]roviding reasonable supervision of the minor child; and [f]orbid[ding] the minor from keeping stolen property, or illegally possessing firearms or illegal drugs” (subsection letters omitted)); Elgin, Ill., Mun. Code tit. 10, ch. 10.66 (1995) (punishing parents who “willfully, knowingly or recklessly permit any minor” to possess “illegal drugs or drug paraphernalia,” or “commit an act tending to break the peace,” violate curfew, or “engage in street gang related criminal activity”); see also Peter Applebome, *Parents Face Consequences As Children’s Misdeeds*

Whereas the Louisiana statute refers to a number of punishable juvenile activities, several states have recently enacted laws dealing specifically with guns. These statutes punish parents whose children illegally possess or use firearms.<sup>87</sup> While some of these statutes follow the form of traditional laws by holding parents responsible for recklessly providing the child with the gun,<sup>88</sup> others punish the parent for knowing the child had the gun (regardless of the source) and for failing to act on this knowledge.<sup>89</sup> The gun statutes encourage parents to report criminal acts of their children, either by making failure to report an element of the crime,<sup>90</sup> or by making prompt reporting an

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Rise, *N.Y. Times*, Apr. 10, 1996, at A1 (noting that “dozens” of other Chicago suburbs have passed ordinances similar to Elgin’s in “last two years”).

<sup>87</sup> See Colo. Rev. Stat. § 18-12-108.7 (Supp. 1996) (“Unlawfully providing or permitting a juvenile to possess a handgun—penalty”); Conn. Gen. Stat. Ann. § 29-37i (Supp. 1997) (“Responsibilities re storage of loaded firearms with respect to minors”); Del. Code Ann. tit. 11, § 1456 (1995) (“Unlawfully permitting a minor access to a firearm; class A misdemeanor”); Fla. Stat. Ann. § 784.05 (West 1992 & Supp. 1998) (“Culpable negligence”); Ky. Rev. Stat. Ann. § 527.110 (Michie Supp. 1996) (“Unlawfully providing handgun to juvenile or permitting juvenile to possess handgun”); Mich. Comp. Laws Ann. § 750.235a (West Supp. 1997) (“Parent of a minor who violates this chapter, misdemeanor violation, conditions; penalties; defense; definitions”); N.J. Stat. Ann. § 2C:58-15 (West 1995) (“Access by minors to loaded firearm; disorderly persons offense; exceptions”); N.C. Gen. Stat. § 14-315.1 (1993) (“Storage of firearms to protect minor”); Okla. Stat. tit. 21, § 858 (Supp. 1997) (“Parent or guardian whose child commits crime of possession of firearm on school property—Administrative penalty”); Tenn. Code Ann. § 39-17-1312 (Supp. 1996) (“Inaction by parents or guardians of minors illegally possessing a firearm”); Utah Code Ann. § 76-10-509.6 (1995) (“Parent or guardian providing firearm to violent minor”).

The statutes that do not explicitly include status as a parent or other legal guardian as part of the criteria for establishing liability arguably make parental status an element indirectly, by allowing the defendant to prove that the minor “obtain[ed] the firearm as the result of an unlawful entry by any person.” Del. Code Ann. tit. 11, § 1456(b)(2) (1995); see also Fla. Stat. Ann. § 784.05(3) (West Supp. 1998) (stating “subsection does not apply . . . [i]f the minor obtains the firearm as a result of an unlawful entry by any person”); N.J. Stat. Ann. § 2C:58-15(b) (West 1995) (“This section shall not apply . . . [u]nder circumstances where a minor obtained a firearm as a result of an unlawful entry by any person.”).

<sup>88</sup> See, e.g., Del. Code Ann. tit. 11, § 1456(a) (1995) (assigning guilt when person “intentionally or recklessly stores or leaves a loaded firearm within the reach or easy access of a minor and where the minor obtains the firearm and uses it to inflict serious physical injury or death upon the minor or any other person”).

<sup>89</sup> See, e.g., Ky. Rev. Stat. Ann. § 527.110 (Michie Supp. 1996) (assigning guilt to parent when, *inter alia*, parent “permits the juvenile to possess a handgun knowing that there is a substantial risk that the juvenile will use a handgun to commit a felony offense”); see also Utah Code Ann. § 76-10-509.6 (1995) (assigning guilt when parent “permit[s] the possession of a firearm by [] any minor who has been convicted of a crime of violence or any minor who has been adjudicated in juvenile court for an offense which would constitute a crime of violence if the minor were an adult”).

<sup>90</sup> See, e.g., Tenn. Code Ann. § 39-17-1312 (Supp. 1996) (holding parent liable when parent “fails to report [child’s possession] to the appropriate school or law enforcement officials”).

affirmative defense.<sup>91</sup> Also, parents may be found guilty if they fail to take preventive measures while knowing of a child's delinquent or criminal acts.<sup>92</sup> Unlike the broader parental responsibility statutes, which are generally misdemeanors,<sup>93</sup> the handgun statutes are frequently felonies.<sup>94</sup>

### 3. *Statutes that Eliminate Parental Intent*

In 1995, Oregon enacted an "improper supervision" statute that essentially established a strict liability standard for parental guilt.<sup>95</sup> The critical elements of the statute are that "the person is the parent . . . of a child under 15 years of age," and that the child either "[c]ommits an act that brings the child within the jurisdiction of the juvenile court," "[v]iolates a curfew," or "[f]ails to attend school."<sup>96</sup> The only limitations on this no-fault culpability are affirmative defenses available to the parent.<sup>97</sup>

Idaho recently enacted a similar statute allowing "[a]ny county or city" in the state to "establish and enforce the offense of failure to supervise a child."<sup>98</sup> The statute specifies that ordinances created under this provision would hold parents strictly liable absent their ability to prove an affirmative defense.<sup>99</sup>

### 4. *Hybrid Laws*

The Oregon and Louisiana statutes are the only parental responsibility laws enacted at the state level, but these laws have been influ-

<sup>91</sup> See, e.g., Mich. Comp. Laws Ann. § 750.235a(3) (West Supp. 1997) ("It is a complete defense to a prosecution under this section if the defendant promptly notifies the local law enforcement agency or the school administration that the minor is violating or will violate this chapter . . .").

<sup>92</sup> See, e.g., Colo. Rev. Stat. § 18-12-108.7 (Supp. 1996) (criminalizing behavior of "any parent or legal guardian of a person under eighteen years of age who knows of such juvenile's conduct which violates section 18-12-108.5 and fails to make reasonable efforts to prevent such violation").

<sup>93</sup> See supra note 67.

<sup>94</sup> See, e.g., Fla. Stat. Ann. § 784.05(3) (West Supp. 1998) (making crime "felony of the third degree").

<sup>95</sup> See Act of July 17, 1995, ch. 593, § 1, 1995 Or. Laws 1544, 1544 (codified at Or. Rev. Stat. § 163.577 (1995) ("Failing to supervise a child")).

<sup>96</sup> Or. Rev. Stat. § 163.577(1) (1995).

<sup>97</sup> See id. § 163.577(3)-(4) (allowing defenses to parent who proves that parent "[i]s the victim of the act," "[r]eported the act to the appropriate authorities," or "took reasonable steps to control the conduct of the child at the time the person is alleged to have failed to supervise the child").

<sup>98</sup> See Act of Mar. 20, 1996, ch. 359, § 1(1), 1996 Idaho Sess. Laws 1207, 1207-09 (codified at Idaho Code § 32-1301(1) (1996)).

<sup>99</sup> See Idaho Code § 32-1301(3) (1996) (providing defenses for parent who reported wrongdoing, was victim of wrongdoing, or took reasonable steps to control behavior of child).

enced by highly publicized municipal ordinances.<sup>100</sup> Some of these ordinances are even more radical than the Oregon and Louisiana statutes, as they combine the specificity of the Louisiana statute with the relaxed mens rea standard of the Oregon statute.<sup>101</sup> These hybrid laws may not remain local phenomena, as at least seven states have proposed parental responsibility statutes that also combine the specificity of the Louisiana statute with the mens rea requirement of the Oregon statute.<sup>102</sup>

Together, the various parental responsibility laws reflect the state's heightened willingness to define proper parenting and to hold parents liable for deviations from this definition. While the laws vary considerably, they share a common focus on juvenile outcomes rather than on the skills that constitute proper parenting.<sup>103</sup> This focus makes these recent laws uniquely postmodern.

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<sup>100</sup> See Maya Blackmun, *The Parent Trap*, *Oregonian* (Portland), Aug. 13, 1995, at C1 (reporting that Oregon statute was "modeled partly on [a municipality's] ordinance").

<sup>101</sup> The St. Clair Shores, Michigan, ordinance, passed on July 26, 1994, punishes parents for failure to "exercise reasonable parental control," but notes that any misdemeanor or violation of the city's code by a minor "shall be prima facie evidence that said parent or guardian failed to exercise reasonable control." St. Clair Shores, Mich., Code of Ordinances § 20.565 (1994). The law provides a lengthy, nonexclusive list of duties that constitute "reasonable parental control." See *id.* § 20.563 (providing that parental duties include "prevent[ing] the minor from committing any delinquent act," keeping illegal drugs and firearms out of home, locking up legal firearms, knowing town curfew and requiring child to follow it, requiring regular school attendance, arranging for supervision for child when absent, taking reasonable precautions to prevent destruction of property, forbidding minor from keeping stolen or illegal property and from associating with known delinquents, and seeking help from "appropriate governmental authorities . . . in handling or controlling the minor, when necessary").

Salt Lake City has had a similar ordinance in place since September 20, 1995. See Salt Lake City, Utah, Code §§ 11.60.010-060 (1995) ("Failure to supervise a child").

<sup>102</sup> See H.R. 2099, 90th Leg., 1st Sess. (Ill. 1997) (unenacted) (proposing offense of "failure to supervise a child"); L. 597, 94th Leg., 1st Sess. (Neb. 1995) (unenacted) (proposing offense of "contributing to the delinquency" for parents who fail to control behavior of minor after notice that minor has been involved in one of delineated crimes); S. 1051, 111th Leg., 2d Sess. (S.C. 1996) (unenacted) (expanding definition of parental neglect to include failure to exercise reasonable control after issuance of order in child's adjudication); H.R. 2347, 99th Leg., 2d Sess. (Tenn. 1996) (unenacted) (proposing offense of "failing to supervise a child"); S. 2602, 99th Leg., 2d Sess. (Tenn. 1996) (unenacted) (same); H.R. 2219, 54th Leg., 2d Sess. (Wash. 1996) (unenacted) (proposing "civil infraction of failing to supervise a child"); S. 108, 72d Leg., 2d Sess. (W. Va. 1996) (unenacted) (proposing offense of "failing to supervise a child").

<sup>103</sup> The laws uniformly take some wrongdoing of the child's as evidence of improper parenting rather than focusing on specific acts of parenting engaged in by the adult. The exception is the almost omnipresent defense of showing that the parent took reasonable steps to control the behavior of the juvenile. See, e.g., Or. Rev. Stat. § 163.577(4) (1995). Some of the laws do seem to reflect more of a concern for the parenting skills than for the outcomes themselves. Compare La. Rev. Stat. Ann. § 14:92.2(2) (West Supp. 1997) (sanctioning parents whose children violate curfew, are habitually truant, or enter premises known by parent to house illegal drug activity, underage drinking or gambling, or illegal

### III PARENTAL RESPONSIBILITY LAWS AS A POSTMODERN PHENOMENON

The "endangering the welfare" statutes were enacted when modern penal trends were dominant and the parental responsibility laws were enacted when postmodern trends were dominant. These two penal philosophies shape the differences between these two types of laws. As embodied in the parental responsibility laws, postmodern trends are reshaping two existing cultural norms: views about the family and views about the child.<sup>104</sup>

#### *A. Recent Parental Responsibility Laws as a Postmodern Phenomenon*

The recent parental responsibility measures illustrate several broad postmodern trends. The laws combine an emphasis on risk management with a focus on controlling dangerous populations, where juveniles are the dangerous population and their crime rate is the risk. The laws also help normalize crime, expanding the scope of state policing by introducing penology into the family context. Finally, the laws represent a symbolic response to a perceived social problem.

#### *1. Management of Criminal Risk*

Risk management and the control of dangerous populations are central aspects of postmodern penology,<sup>105</sup> as noted by the alternative designation of the penology as "actuarial justice."<sup>106</sup> The recent parental responsibility laws' emphasis on dangerous populations and managing criminal risk is apparent in the preambles to some of the municipal ordinances, which state that the laws were enacted in response to the "increasing number of criminal episodes committed by children,"<sup>107</sup> the "proliferation of illegal activity by minors,"<sup>108</sup> and the fact that violent juvenile criminals are "the fastest growing seg-

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storage or possession of firearms), with Or. Rev. Stat. § 163.577(1) (1995) (sanctioning parents only when juvenile commits offense or violates truancy or curfew laws).

<sup>104</sup> See *infra* Part III.B (arguing that postmodern aspects of recent laws are leading to lower degree of family autonomy and changed view of child in society).

<sup>105</sup> See *supra* notes 25-28 and accompanying text.

<sup>106</sup> See Feeley & Simon, *supra* note 16, at 173 ("[Postmodern penology] is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness.").

<sup>107</sup> Salt Lake City, Utah, Code § 11.60.010 (1995).

<sup>108</sup> Silverton, Or., Ordinance No. 94-132 (Jan. 1, 1995).

ment of the criminal population in the U.S.”<sup>109</sup> This language indicates that parents are being policed not because of the effect their improper parenting is having on their children, but rather because of the effects their children are having on society.

The most important way in which these laws manage risk is by holding parents strictly liable for the criminality of their children.<sup>110</sup> Oregon’s statute is typical: the elements of the crime are being a parent and having a child who has committed an act of delinquency, truancy, or curfew-breaking.<sup>111</sup> The statute shifts the burden of proving criminal guilt and innocence—instead of predicating guilt on the state’s showing of intentional wrongdoing by the parent, the statute predicates innocence on the parent’s showing of intentional proper parenting.<sup>112</sup>

Inasmuch as the Oregon statute and similar laws create a strict liability standard,<sup>113</sup> they represent a new rationale of risk manage-

<sup>109</sup> Cincinnati, Ohio, Res. No. R/144-1994 (Oct. 26, 1994) (encouraging Ohio General Assembly to adopt parental responsibility legislation).

<sup>110</sup> See Or. Rev. Stat. § 163.577(1) (1995) (providing that parent commits offense by being parent of child that, inter alia, commits offense bringing child within jurisdiction of juvenile court); Silvertown, Or., Ordinance No. 94-132(1) (Jan. 1, 1995) (holding parent guilty whose child violates city code); Salt Lake City, Utah, Code § 11.60.020 (1995) (assigning liability, inter alia, to parent whose “child has committed three or more delinquent acts within a two calendar year period”); see also Idaho Code § 32-1301 (1996) (empowering municipalities to enact parental responsibility ordinances holding parents guilty who have child under age of 16 who commits offense).

<sup>111</sup> See Or. Rev. Stat. § 163.577(1) (1995).

<sup>112</sup> See id. § 163.577(3), (4) (allowing affirmative defense for parent who “took reasonable steps to control the conduct of the child,” was “the victim of the act,” or “[r]eported the act to the appropriate authorities”).

<sup>113</sup> It can be argued that these laws do not actually establish a strict liability standard of guilt; at first glance, there seems to be little difference between holding parents liable for negligently failing to prevent their children from becoming delinquent, as many of the modern statutes do, see, e.g., Ala. Code § 13A-13-6 (1997) (assigning guilt to parent who “fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming . . . a ‘delinquent child’”), and holding parents strictly liable while allowing them affirmative defenses. Viewed this way, the statutes may be characterized as merely taking “legislative notice” of the fact that juvenile criminality is such an aberration that it necessarily results from wrongful acts by the parent. The affirmative defense of having taken “reasonable steps” to control the behavior of the child, which many of the recent laws allow, supports this contention. See, e.g., Or. Rev. Stat. § 163.577(4) (1995) (“[I]t is an affirmative defense that the person took reasonable steps to control the conduct of the child at the time the person is alleged to have failed to supervise the child.”). But see Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401, 411 (1993) (discussing *United States v. United States Dist. Court*, 858 F.2d 534 (9th Cir. 1988) (Kozinski, J.), where the court “found a good faith defense compatible with the concept of a strict liability crime”).

This argument misses the radical reorientation in penological focus represented by these laws. What distinguishes them is their assignment of the burden of proof. See id. at 421 (noting that one justification for strict liability doctrine is that it eases prosecution’s burden of proving intent). To demonstrate guilt, the prosecutor must only establish paren-

ment: that juvenile crime is a "public welfare" concern. The Supreme Court, in rejecting a claim that a person could be held strictly liable for conversion of government property in *Morissette v. United States*,<sup>114</sup> noted that strict criminal liability generally applies only for "public welfare offenses."<sup>115</sup> Public welfare offenses "are not in the nature of positive aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a

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tal status and juvenile wrongdoing; the parent is then left with the burden of showing prior actions on her or his part that alleviate this guilt. If unable to meet this burden, the parent is held liable without the state having to prove any requisite parental intent; i.e., the parent is held strictly liable.

These laws are too outcome based to embody any standard of guilt other than strict liability. The laws hold parents guilty when the child commits an act that in some way directly harms society (i.e., is a crime), rather than when the parent commits a specified act that may indicate improper parenting or a lack of parental responsibility. See, e.g., Or. Rev. Stat. § 163.577 (1995) (holding parents liable for juveniles' delinquent acts, curfew violations, and truancy).

<sup>114</sup> 342 U.S. 246 (1952).

<sup>115</sup> *Id.* at 255; see also Levenson, *supra* note 113, at 419 (listing driving above speed limit, sale of alcohol to children, and improper handling of nuclear waste as "public welfare" offenses).

Another category of strict liability crime is "morality offenses." *Id.* at 422-23 (listing statutory rape, adultery, and bigamy, and noting that these are justified on similar grounds as "public welfare" offenses). These include statutory rape and felony murder. See, e.g., Ga. Code Ann. § 16-6-3 (1996) (defining statutory rape crime as engaging in sexual intercourse with person under age of 16 who is not spouse of alleged offender); N.Y. Penal Law § 125.25(3) (McKinney Supp. 1997-1998) (holding person guilty of second degree murder who, regardless of intent, causes death of another during commission or attempt of one of delineated crimes). These laws are also driven by risk management; the culpability for the crime comes from engaging in certain societally undesirable activities that the state has determined carry a risk of harm sufficient to place strict liability for that harm upon the actor. In the case of felony murder, the undesirable activity is engaging in a felony, and the risk being managed is that a killing will occur while engaged in a felony. In the case of statutory rape, the undesirable activity is the violation of community sexual morality, with the managed risk being that of parents losing control over their daughters. See Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way Into the Twenty-First Century*, 46 Ala. L. Rev. 47, 54 (1994) (discussing English precursor statute to modern statutory rape laws and stating "[i]t is *crucial* to recognize that this statute did *not* view the girl as the victim—the offense was against parental control, not against the female"); see also Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. Crim. L. & Criminology 15, 27 (1994) (arguing that offense of statutory rape originated as means of protecting virginity).

The difference between those statutes and many of the contemporary parental responsibility enactments lies in the activity that indicates an undertaking of risk. See Levenson, *supra* note 113, at 424 (distinguishing between "public welfare" offenses and morality offenses by noting that latter apply when "defendant's conduct is already morally questionable" and noting that although "the limits of the law may seem to permit [certain behavior, i]f the defendant crosses those limits, intentionally or unintentionally, society will seek to punish the defendant's behavior"). Rather than being an act that itself is inherently endowed with the risk of wrongdoing, parenting is generally viewed as a positive act that, if anything, should be encouraged. Endowing the act with risk suggests the beginning of a reorientation of this view.

duty.”<sup>116</sup> These offenses arise from the state’s need to hold individuals strictly accountable for the activities of certain industries, because of their position within those industries and because of the potential the industries have to inflict great harm upon society.<sup>117</sup> When applied in the parent-child context, this rationale reshapes society’s view of children.<sup>118</sup> Children are treated as equivalent to a dangerous industry whose managers—parents—must be strictly regulated to ensure that none of the potential harm to society represented by children is realized.

In addition to holding parents strictly liable, the parental responsibility laws also manage risk by incorporating risk elements into the statutes. For example, many of the firearm statutes explicitly include the risk of the child committing a violent act with a firearm in the definition of the crime.<sup>119</sup> Culpability and risk management are merged by defining parental duty more stringently when there is a known risk presented by the juvenile.

Finally, the laws attempt to manage both short and long term juvenile risk. While the laws punish parents for the immediate acts of their children, implicit in the laws is the belief that they can control activities that, if left unchecked, would lead to worse activities.<sup>120</sup> This

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<sup>116</sup> *Morissette*, 342 U.S. at 255.

<sup>117</sup> See *id.* at 254 (classifying these industries as those “that affect public health, safety or welfare”); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (holding president of corporation liable for mislabeled drugs although he was unaware of corporate wrongdoing). Levenson lists other goals of strict liability laws, including their role in “shift[ing] the risks of dangerous activity to those best able to prevent a mishap.” Levenson, *supra* note 113, at 419. Interestingly, these laws do not actually shift the risk of juvenile crime, as children are still held criminally accountable for their improper actions. See *supra* notes 47-52 and accompanying text (discussing increasingly punitive treatment of juvenile offenders); see also Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 *Santa Clara L. Rev.* 621, 629-32 (1997) (discussing common law and statutory civil remedies against parents of juvenile offenders). Instead, these laws create a new type of risk, that of improper parenting.

<sup>118</sup> See *infra* text accompanying notes 188-89 (arguing that application of strict liability to parents of dangerous children suggests reorientation in view of children).

<sup>119</sup> See, e.g., *Colo. Rev. Stat. § 18-12-108.7* (Supp. 1996) (establishing crime of providing gun when parent is “aware of a substantial risk that such juvenile will use a handgun to commit a felony offense”).

<sup>120</sup> There seems little other way to reconcile the goals the statutes promise with their petty sanctions. See *infra* text accompanying notes 131-44. A municipal police chief claimed that his town’s ordinance was accepted for precisely this reason—because it was seen by the community as a means of stopping petty juvenile criminals before they become much worse. See Blackmun, *supra* note 100; see also Maya Blackmun, *Parental Responsibility Bill Advances, Oregonian* (Portland, Or.), Apr. 15, 1995, at A1 (quoting sponsor of Oregon’s state bill as saying that “[i]f we don’t find a way to intervene early in these young people’s lives, we’re going to have a hell of a corps of hardened criminals 10 years from now”).

is risk management at its most sophisticated, involving intervention before the risk is fully realized.

With risk management comes a focus on those dangerous populations that present the risk that needs managing. Parental responsibility laws present a somewhat unique twist to this focus on dangerous populations. Although the laws apply sanctions to the parents of juvenile offenders, they do this in order to control the juveniles themselves. Parental responsibility laws thus indirectly manage a dangerous population by policing parents to induce them to govern their children better.

The closest analogue to such indirect policing is increased judicial tolerance of drug testing: in recognition of the gravity of drug offenses, the Supreme Court has shown great tolerance for proactive efforts to police drug crimes, in spite of Fourth Amendment objections.<sup>121</sup> Drugs and the war against them are frequently cited as driving the new penology.<sup>122</sup> The fear of rampant juvenile crime could be an equally driving force. In this context, juvenile policing extends the frontier of control further than drug policing by forcing one population to regulate another.<sup>123</sup> Fear of juvenile criminals, like the fear of drugs, may thus significantly expand the borders of the new penology.

## 2. *Normalizing Crime: The Expanding Net of Police Regulation*

Parental responsibility laws illustrate another broad postmodern trend—the normalization of crime. Rather than dealing with individual offenders, these laws make themselves part of the operation of a basic social unit, the family. The laws blame the family for crime and, as a solution, govern the relationship between parents and children.<sup>124</sup>

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<sup>121</sup> See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (holding that employees' Fourth Amendment rights were not violated by Customs Service policy of only promoting employees who successfully completed drug test); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624, 633 (1989) (upholding regulations allowing railroads to administer drug tests, without warrant or reasonable suspicion, to employees who are engaged in safety sensitive jobs).

<sup>122</sup> See Nils Christie, *Crime Control as Industry* 66 (2d ed. 1996) (noting role of "war against drugs" in strengthening state control and in rapidly increasing prison population); see also Alschuler, *supra* note 41, at 920 ("No other area of federal prosecution has consumed as many public resources or attracted as much attention in recent years as drug crime.").

<sup>123</sup> Whereas drug testing involves *allowing* one nonpolice population to regulate another, parental responsibility laws *force* one nonpolice population to regulate another. See *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (opposing drug testing of Customs Service employees in absence of evidence showing risk of drug use among these employees).

<sup>124</sup> This is not unprecedented. One commentator has noted that "endangering the welfare" laws have been enforced more frequently during times of rising juvenile crime. See Cahn, *supra* note 5, at 406-07 (stating that prosecutions under endangering welfare statutes have been more frequent at beginning and middle of century). A study of nineteenth cen-

Thus, crime control is made part of the day to day life of the family. Crime is no longer viewed as a strictly deviant activity that must be stopped, but is instead seen as something that will always exist and that must therefore be managed effectively.<sup>125</sup>

In addition to norms about family autonomy and about the child discussed below,<sup>126</sup> parental responsibility laws may reshape other constitutional norms. The strict liability the laws impose has been criticized as constituting excessive punishment in violation of the Eighth Amendment.<sup>127</sup> The laws have also been attacked as vague and overbroad<sup>128</sup> and as a violation of substantive due process rights.<sup>129</sup> To the extent that the laws survive these constitutional challenges,<sup>130</sup> they will be at the fore of the new penology's general restructuring of constitutional norms.<sup>131</sup>

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tury France cites instances where the family was regulated because of children. See Jacques Donzelot, *The Policing of Families* 84 (Robert Hurley trans., Pantheon Books 1979) (1977) (noting that laws allowed state to "penetrate into families from the angle of violations committed by children"); *id.* at 85 ("Leaning on one another for support, the state norm and philanthropic moralization obliged the family to retain and supervise its children if it did not wish to become an object of surveillance and disciplinary measures in its own right."). This Note argues that what is unique about postmodern parental responsibility laws is the purpose of the regulation—not to help children but to control dangerous children and their crime rates.

<sup>125</sup> See *supra* text accompanying notes 29-33.

<sup>126</sup> See *infra* Part III.B.

<sup>127</sup> See Cahn, *supra* note 5, at 414 (arguing that difficulty in "show[ing] a conclusive relationship between parental omissions and juvenile delinquency" might make application of parental guilt "cruel and unusual").

<sup>128</sup> See *id.* at 412-15 (discussing unsuccessful vagueness and overbreadth challenges to California's statute); S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children*, 139 U. Pa. L. Rev. 1123, 1141-44 (1991) (arguing that laws may provide insufficient notice of wrongdoing and may wrongly prohibit permissible activity).

<sup>129</sup> See Cahn, *supra* note 5, at 414-15 (arguing that, to justify regulating parent-child relationship, statutes must be narrowly tailored); Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. Cal. L. Rev. 859, 873 (1991) (same).

<sup>130</sup> New Mexico's parental responsibility statute has been construed as providing culpability without an intent element for over 20 years. See *State v. Gunter*, 529 P.2d 297, 298 (N.M. Ct. App. 1974) (finding "act of contributing to the delinquency of a minor a crime without regard to intent"); see also *State v. Pitts*, 714 P.2d 582, 584 (N.M. 1986) (endorsing *Gunter* strict liability interpretation of statute). California's statute has been upheld against vagueness and overbreadth challenges. See *Williams v. Garcetti*, 853 P.2d 507, 509-17 (Cal. 1993). By and large, however, the new laws have not yet been challenged fully. See Chapin, *supra* note 117, at 653 (noting lack of appellate cases challenging municipal ordinances).

<sup>131</sup> See Feeley & Simon, *supra* note 16, at 180 (stating that "[t]he Court is engaged in rethinking the values of constitutional criminal jurisprudence from an orientation deeply informed by actuarial justice").

### 3. *Law as a Symbolic Activity*

Symbolic lawmaking, or lawmaking for the sake of political statement as opposed to laws actually enacted to reduce crime rates, plays an important role in postmodern penology.<sup>132</sup> The symbolic utility of parental responsibility laws<sup>133</sup> is evident from the relatively benign sanctions the enactments allow, sanctions that are truly minor when compared to the controversy they have generated.<sup>134</sup> For example, the Silverton, Oregon ordinance has received not only national<sup>135</sup> but also international coverage.<sup>136</sup> In spite of this, the ordinance carries a maximum penalty of a \$1000 fine.<sup>137</sup>

The same symbolism is present in prosecutions under the laws.<sup>138</sup> Susan and Anthony Provenzano were prosecuted under the St. Clair Shores, Michigan ordinance.<sup>139</sup> In a case that enjoyed national coverage, they were charged with failing to prevent their sixteen-year-old son from burglarizing homes and churches and keeping a marijuana

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<sup>132</sup> See *supra* text accompanying notes 35-38.

<sup>133</sup> Although the laws are in many ways symbolic measures, they also represent an expansion of state power to regulate the family. See *infra* Part III.B. These contradictory assertions may be reconciled by viewing passage of the laws as an initial act, one that is first undertaken for symbolic reasons but that once undertaken carries nonsymbolic consequences. The laws are an extension of state power because they allow further regulation of the family, whether by imposing duties on parents or through other means.

<sup>134</sup> See, e.g., La. Rev. Stat. Ann. § 14:92.2(B) (West Supp. 1997) (penalizing offenders with fine "not less than twenty-five dollars and not more than two hundred fifty dollars" or imprisonment "for not more than thirty days"). The firearm statutes, however, sometimes do carry stiffer penalties. See, e.g., Colo. Rev. Stat. § 18-12-108.7(1)(b) (Supp. 1996) (classifying as "class 4 felony" offense of providing gun to juvenile or knowingly allowing juvenile to possess gun); *id.* § 18-1-105 (assigning to class 4 felony punishment of fine between \$2,000 and \$500,000 and/or imprisonment between two and six years).

<sup>135</sup> See, e.g., Laurel Shaper Walters, States to Parents: Pay for Your Children's Crimes, *Christian Sci. Monitor*, Apr. 1, 1996, at 3 (reporting on success of Silverton ordinance as model for Oregon law).

<sup>136</sup> See e.g., Ann Treneman, *Independent* (London), June 9, 1996, available in 1996 WL 9932023 (reporting on Silverton ordinance in London newspaper).

<sup>137</sup> See Silverton, Or., Ordinance No. 94-132(6) (Jan. 1, 1995). Other parental responsibility laws provide for similar lenient sanctions. See, e.g., La. Rev. Stat. Ann. § 14:92.2(B) (West Supp. 1997) (allowing fines of \$25 to \$250 and/or imprisonment of up to 30 days; alternatively allowing sentence to be suspended if parent undertakes 40 hours of community service and/or "court-approved family counseling").

<sup>138</sup> Data on the frequency of prosecutions under these statutes seems to be uniformly anecdotal. See, e.g., J. Todd Foster, Truancy Law Snares Mother, *Oregonian* (Portland), Oct. 30, 1996, at A3 (noting first prosecution under Oregon statute of parent for truancy of child); Treneman, *supra* note 136 (noting prosecution of parents under Silverton ordinance for children being caught with cigarette and marijuana).

<sup>139</sup> See Should Parents Be Responsible for the Crimes of Their Children?, *Jet*, May 27, 1996, at 14 (describing case).

plant in his closet.<sup>140</sup> The final sentence consisted of fines of \$100 for each parent plus court costs of \$1000.<sup>141</sup>

The symbolism is also apparent in claims about the effectiveness of the laws. Although only two parents had been convicted under the Silverton ordinance in the year following its enactment,<sup>142</sup> the town claimed a surprisingly high drop in juvenile crime.<sup>143</sup> The first prosecution under California's revised "contributing to the delinquency" statute may provide a more illustrative example of the actual effectiveness of the laws. A woman whose twelve-year-old son had participated in the gang rape of another minor was prosecuted in a case that was, again, highly publicized.<sup>144</sup> The case against the woman was dropped two months later when authorities discovered that the woman had already attended a parenting course.<sup>145</sup> As one commentator noted, "Articles in the popular press suggest that convictions under such statutes are rare, and that they are used as a threat to encourage parents to control their children."<sup>146</sup>

Ultimately, what is important about these laws may not be the credibility of claims about their effectiveness, but rather society's perception of their impact on the crime rate.<sup>147</sup> This is in line with their symbolic function. The laws are fulfilling their symbolic function of exerting a direct influence on crime rates as opposed to merely punishing individual criminals.

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<sup>140</sup> See, e.g., Kathy Lally, Punish Thy Mothers and Fathers, *Baltimore Sun*, May 21, 1996, at 2A (noting case's "coverage on Court TV and in newspapers across the country"); cf. Treneman, *supra* note 136 (noting prosecutions under Silverton ordinance of "Carely Brock, whose 16-year-old son was caught smoking a cigarette, and Oscar Perez, whose son was found with marijuana").

<sup>141</sup> See *Should Parents Be Responsible for the Crimes of Their Children?*, *supra* note 139, at 14.

<sup>142</sup> See Mike Dorning, In Growing Trend, If a Child Does Crime, Parents May Do the Time, *Chicago Trib.*, Dec. 11, 1995, at 11 (noting that few prosecutions had been brought under law).

<sup>143</sup> A report prepared by the police department, included in the city ordinance mail-out package, claimed a 39% reduction in all juvenile crime in the year following enactment. See *City of Silverton Police Dep't, Juvenile Arrest Comparison: Jan.-Dec. 1994-1995 (1996)* (noting 41% drop in nonviolent crimes and 46% reduction in violent crimes).

<sup>144</sup> See Geis & Binder, *supra* note 60, at 315 (reporting that upon discovering family pictures of woman's children engaging in gang related poses and carrying weapons, investigating detective declared "[i]t was obvious that the mother was just as much part of the problem because she condoned this activity").

<sup>145</sup> See *id.* The statute under which the woman was prosecuted carried maximum sanctions of "a fine not exceeding two thousand five hundred dollars" and imprisonment "for not more than one year." Cal. Penal Code § 272 (West Supp. 1998).

<sup>146</sup> Chapin, *supra* note 117, at 653.

<sup>147</sup> See Feeley & Simon, *supra* note 16, at 175 (arguing that punishment enables government to signal degree of inappropriateness of certain conduct).

A final aspect of the symbolic nature of the laws is the fact that in many instances they directly respond to high profile juvenile crimes. An extreme example is the proposed Illinois parental responsibility statute, dubbed the "Hillary Norkog Family Responsibility Law,"<sup>148</sup> after a youth who was fatally stabbed by a seventeen-year-old acquaintance.<sup>149</sup> Rather than seeking to punish individual offenders, the parental responsibility laws attempt to affect perceptions of crime in a highly visible way.

### *B. Changing Sociolegal Norms: Problematic New Visions of the Family and the Child*

To the extent that parental responsibility laws illustrate the postmodern trends of risk management, control of dangerous populations, normalization of crime, and symbolic lawmaking, the laws can be characterized as a postmodern phenomenon. As a postmodern phenomenon, these laws reflect an ongoing reshaping of sociolegal norms, particularly norms about the family and the child. The laws reduce family autonomy without clearly producing any reduction in juvenile crime.<sup>150</sup> At the same time, they contribute to a view of children that prevents rehabilitation of juvenile offenders.

#### *1. Reconceptualized Notions About Family*

The family relationship has always held a unique place in American society; most notably, it has been held to merit constitutional protection. The Supreme Court has deemed family autonomy to be a fundamental liberty interest protected by the Fourteenth Amendment<sup>151</sup> and has consistently articulated a vision of strong family autonomy.<sup>152</sup> Commentators throughout American history have

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<sup>148</sup> H.R. 2099, 90th Leg., 1st Sess. (Ill. 1997) (unenacted).

<sup>149</sup> See Michael Dizon, *Parental Criminal Liability Plans Walk a Fine Line*, Chi. Trib., June 19, 1996, at 2C (describing enactment of broad parental responsibility ordinances in Chicago suburbs after tragic murders by juveniles).

<sup>150</sup> See *infra* note 195 (citing sources questioning actual effectiveness of laws).

<sup>151</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (recognizing that Fourteenth Amendment liberty interests include right of governance over children).

<sup>152</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) (recognizing constitutional protection of family relationships, childrearing, and education); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing integrity of family unit in Fourteenth Amendment's Equal Protection and Due Process Clauses and in Ninth Amendment); see also Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 Wm. & Mary L. Rev. 995, 1070 (1992) (applying legal realist analysis to *Meyer*, noting that case was only eight pages and cited "virtually no precedent to support its major

justified family autonomy in terms of natural law,<sup>153</sup> property rights,<sup>154</sup> custodial protection of juvenile rights,<sup>155</sup> the necessity of maintaining a free democracy,<sup>156</sup> and, more recently, as a response to the injustices of slavery.<sup>157</sup>

Strong views of family autonomy are not limited to the judiciary. Legislative efforts to preserve family autonomy from state intervention are becoming more prominent. A few states have passed parental rights provisions while more states are proposing such legislation.<sup>158</sup> A "Parental Rights and Responsibilities Act" also has been proposed in Congress recently.<sup>159</sup>

What makes parental responsibility laws novel is the way in which they reconceptualize these notions of family autonomy. Many of the laws have already been challenged or are being challenged as invasions of this protected relationship.<sup>160</sup> In spite of this, parental re-

propositions"). But see Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 242 (1997) (arguing that, except for broad "dictum" language, "the Court has given states no guidance in deciding what kind of circumstances warrant official intervention to supplant or supervise a family's child rearing").

Professor Dailey argues that the state is allowed to intervene most in the family context by "continually shap[ing] and promot[ing] a particular vision of family life" through definitions of what constitutes a family. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 *Tul. L. Rev.* 955, 956 (1993).

<sup>153</sup> See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 *Va. L. Rev.* 2401, 2407 (1995) (discussing view of parental rights at beginning of twentieth century); see also *Black's Law Dictionary* 1026 (6th ed. 1990) (defining natural law as "a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man").

<sup>154</sup> See Woodhouse, *supra* note 152, at 1042 (positing "property model of parenthood . . . [because] it is useful in clarifying the historic responses of parents and judges to legislative and court interventions in the family").

<sup>155</sup> See, e.g., 142 *Cong. Rec.* H5653-04 (daily ed. May 30, 1996) (quoting Representative Largent offering following justification for Parental Rights and Responsibilities Bill: "The best advocates for children today—and the most unappreciated—are moms and dads standing together for their children."); Gary L. Bauer, *Parental Rights are Fundamental*, *Headway*, Feb. 1997, at 7 (arguing that, "[w]hile it is indisputable that children have rights, parents traditionally have been considered the proper custodians of these rights").

<sup>156</sup> See Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 *B.U. L. Rev.* 765, 773 (1973) (arguing that government control of family life would allow government "to influence powerfully, through socialization, the future outcomes of democratic political processes").

<sup>157</sup> See Davis, *supra* note 152, at 248 (arguing that to conceptualize "family liberty" as response to slavery is to understand it "as a mechanism of democracy").

<sup>158</sup> See Joyce Price, *Issue is Catching Fire; U.S. State Measures Result of Groundswell*, *Wash. Times*, Jan. 29, 1997, at C5 (noting that three states recently passed parental rights legislation, in addition to two dozen states currently considering such measures).

<sup>159</sup> See H.R. 1946, 104th Cong. (1995) (proposing "Parental Rights and Responsibilities Act of 1995").

<sup>160</sup> See Cahn, *supra* note 5, at 414-15 (stating that challenge to laws would be evaluated under compelling interest standard but noting that challenges "have generally been unsuccess-

sponsibility laws are being passed and upheld,<sup>161</sup> and they could attract support from both ends of the political spectrum.<sup>162</sup> This illustrates a postmodern willingness to weaken a constitutional norm to extend the state's penal power into a realm that previously was regulated only when an overriding societal interest was at stake. As juvenile crime becomes normalized, there is a greater tolerance for the state dictating specifically what constitutes proper and improper parenting.<sup>163</sup> The previous social norm against improper parenting is now a crime as a relationship that was formerly protected from state interference becomes increasingly subject to state policing.

Earlier laws that held parents responsible for the criminal acts of their children allowed the prosecutor and judge considerable discretion in dealing with the parent by defining the crimes as a failure of parental duty<sup>164</sup> or parental diligence.<sup>165</sup> Many of the new laws are much more specific. The Louisiana law<sup>166</sup> applies liability to parents who, through criminal negligence, permit a child to violate curfew, be truant, enter certain undesirable places,<sup>167</sup> or associate with undesirable persons.<sup>168</sup> The law limits the prosecutor's discretion in deciding whether to bring charges by listing those instances in which charges should be brought. More importantly, the judge is similarly con-

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cessful"); Weinstein, *supra* note 129, at 871-81 (analyzing enactments as infringement on substantive due process protection of privacy in family affairs).

<sup>161</sup> See Cahn, *supra* note 5, at 415 (noting success of abuse and neglect statutes in meeting constitutional challenges).

<sup>162</sup> The laws' emphasis on holding parents responsible for their children might be attractive to conservatives. At the same time, the laws might be characterized by some liberals as being pro-child at the expense of the parent. See Davidson, *supra* note 49, at 23 (presenting "child advocate's view that parents whose actions or indifference contribute to their children's violent and destructive behavior must be held to a legally appropriate standard of responsibility, with civil and criminal sanctions imposed where warranted").

<sup>163</sup> In discussing their view of the "new penology," Feeley and Simon note the importance of systemic knowledge and internal rules. See Feeley & Simon, *supra* note 16, at 178 (discussing "rise of formal systems of internal rules"). Systemic knowledge is important in the context of the recent parental responsibility laws, where the system's valuation of proper parenting exclusively in terms of juvenile criminality replaces more traditional normative judgments of proper parenting.

<sup>164</sup> See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 554 (West Supp. 1997) (establishing guilt of person who "recklessly endangers the health, safety or welfare of a child under 16 years of age by violating a duty of care or protection").

<sup>165</sup> See, e.g., N.Y. Penal Law § 260.10 (McKinney 1989 & Supp. 1997-1998) (assigning guilt to parent who "fails or refuses to exercise reasonable diligence" in controlling child).

<sup>166</sup> See La. Rev. Stat. Ann. § 14:92.2(2) (West Supp. 1997).

<sup>167</sup> See *id.* (punishing parent for allowing child to enter premises known by parent to house illegal firearms, illegal drug use, underage drinking, gambling, or sexually indecent activities).

<sup>168</sup> See *id.* § 14:92.2(1)(a)-(d) (punishing parent for allowing child to associate with person parent knows is felon, member of criminal street gang, user or distributor of illegal drugs, or who has "access to an illegal firearm").

strained. This limiting of discretion is characteristic of the new penology,<sup>169</sup> but in this context it is problematic because it intrudes on family autonomy.

The laws back up this broader explication of what constitutes improper parenting with criminal sanctions for those parents who fail to conform to the newly articulated norms. In so doing, they represent a departure from a history of only applying penal sanctions to parents in instances of "abuse or severe neglect."<sup>170</sup> In the name of increased risk control, a realm previously beyond state control is being brought under the ever widening penal net.

The parent-child familial relationship thus has been opened up to the state: as juvenile crime has become normalized, the boundary of crime has expanded into the family. What makes the parental responsibility laws uniquely postmodern is the way in which they change the parent-child relationship—instead of exposing the parent-child relationship for the purposes of protecting the child, the relationship is interfered with to control the dangerous externality presented by the child.

By attempting to manage risk rather than address problems presented by specific individuals, the laws have become driven only by group outcomes. This focus allows parents who are blameless to be found guilty while missing parents who may deserve punishment but are fortunate enough to have children who never offend.<sup>171</sup> Parenting is reconceptualized by this risk management, as parents are treated less as protectors of children and more as protectors of public welfare, who are policed through strict liability<sup>172</sup> and are given explicit indicators of how to parent properly.<sup>173</sup>

The extent to which lawmakers are willing to sacrifice established sociolegal conceptions of the family for the new risk rationale is apparent in their inducement of parents to report their children's viola-

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<sup>169</sup> See Feeley & Simon, *supra* note 16, at 191 (discussing how "judicial mandates to regularise procedures contributed to the effort to systematise the criminal process and rationalise the system," both characteristics of the new penology). See generally Walker, *supra* note 39, at 146-48 (discussing achievements to date in efforts to limit discretion).

<sup>170</sup> Humm, *supra* note 128, at 1128 (noting historical reluctance to criminalize lax parenting).

<sup>171</sup> This imprecise targeting of guilty parents has led to arguments that the laws are unconstitutionally overbroad. See, e.g., Humm, *supra* note 128, at 1142-44 (arguing parental responsibilities laws are subject to overbreadth challenges); Eric Freedman, *Sins of the Son Visited On Parents*, *Nat'l L.J.*, May 27, 1996, at A6 (quoting Howard Simon, executive director of ACLU of Michigan, challenging laws as overbroad).

<sup>172</sup> See *supra* text accompanying notes 110-18.

<sup>173</sup> See, e.g., *supra* notes 83-84 and accompanying text (discussing Louisiana statute).

tions. Several of the firearm statutes<sup>174</sup> and parental responsibility laws<sup>175</sup> follow the lead of Oregon's "failing to supervise a child" statute in providing defenses to parents who "[r]eported the act to the appropriate authorities."<sup>176</sup> Encouraging parental reporting of juvenile wrongdoing not only externally violates the private domain of the family, but it also encourages its violation from within. The state is providing parents with incentives to join the state in *criminally* policing their own children, thus acting to sever the traditional parent-child relationship.

## 2. *Reconceptualized Notions About the Child*

As noted above, parental responsibility laws are postmodern in the way they attempt to manage the criminal risk presented by juvenile offenders. By characterizing juveniles as a risk that needs management, the laws not only recharacterize family autonomy, they also recharacterize the state's conception of the child. The state's conception of the child is central to its treatment of both juvenile crime<sup>177</sup> and its recognition of parental rights.<sup>178</sup> As this conception changes,

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<sup>174</sup> See Mich. Comp. Laws Ann. § 750.235a(3) (West Supp. 1997) ("It is a complete defense to a prosecution under this section if the defendant promptly notifies the local law enforcement agency or the school administration that the minor is violating or will violate this chapter."); Tenn. Code Ann. § 39-17-1312 (Supp. 1996) (holding parent liable when parent knowingly "fails to report [child's possession of firearm] to the appropriate school or law enforcement officials").

<sup>175</sup> See, e.g., La. Rev. Stat. Ann. § 14:92.2 (West Supp. 1997) (stating that "[n]o parent or legal guardian shall be guilty of a violation of this Section if, upon acquiring knowledge that the minor has undertaken acts . . . the parent or legal guardian seeks the assistance of local, parish, or state law enforcement officials"); Salt Lake City, Utah, Code § 11.60.030(B) (1995) (allowing affirmative defense to parents who "[r]eported the act or event to appropriate governmental authorities at or near the time the child committed the wrongful or delinquent act").

<sup>176</sup> Or. Rev. Stat. § 163.577(3)(b) (1995).

<sup>177</sup> Professor Melli argues that the early juvenile court movement saw children as "more vulnerable than adults, but also more amenable to change" thus making "them better prospects for rehabilitation." Melli, *supra* note 5, at 377. She characterizes the juvenile court reform of the last decade as reflecting a new "focus on issues of accountability and retributive justice." *Id.* at 390. She traces this new focus to "public reaction to an increase in serious crime by juveniles and to a public perception that the increase is somehow related to the failure of the juvenile court." *Id.* at 390-91 (footnote omitted).

Thus, while commentators have recognized that the modern *parens patriae* attitude toward the child had dual aims of providing guidance and protecting society, see, e.g., Claudia Worrell, Note, Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the *Parens Patriae* Doctrine, 95 *Yale L.J.* 174, 176 (1985) (discussing *parens patriae* doctrine), the modern attitude was animated by a desire to protect juveniles and to rehabilitate, see *id.* at 176-77 (noting that rehabilitative goal of modern doctrine justified different procedural protections for adult and juvenile offenders and that "greater degree of care and protection" required by juveniles justified their lesser degree of liberty).

<sup>178</sup> For example, much of the rationale for family autonomy and parental rights is the way in which strong parental rights further the best interests of the child. See, e.g., Prince

methods of fighting juvenile crime change,<sup>179</sup> and, as noted above, family autonomy becomes more limited.<sup>180</sup>

Concern for children's welfare motivated modern efforts to regulate parenting.<sup>181</sup> Indeed, the *parens patriae* view of the state as an alternative parent for the child in need animated the modern institution of the juvenile court.<sup>182</sup> Postmodern parental responsibility laws, on the other hand, with their focus on juvenile activity, conceptualize the child in a different way: rather than viewing the child as a dependent who requires protection, they view the child as a dangerous instrumentality that needs to be controlled. While the modern responsibility statutes are worded in terms of the harm to the child and improper acts by the parent,<sup>183</sup> the postmodern laws are concerned with the effect of the juvenile's activity<sup>184</sup> and therefore focus on the improper acts of the juvenile.<sup>185</sup> This distinction is apparent in the level of guilt the statutes require: while modern statutes almost uniformly require at least negligence,<sup>186</sup> postmodern statutes much more frequently set a strict liability standard of parental guilt.<sup>187</sup>

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v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." (footnotes omitted)); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing parental "right of control [balanced against] the natural duty of the parent to give his children education suitable to their station in life").

<sup>179</sup> See Melli, *supra* note 5, at 391-92 (reviewing state amendment of legislative purpose statutes to emphasize protection of public and juvenile accountability, increase in number of juveniles appearing in criminal court as result of age waivers, greater use of proportional sentencing, and authorization of short-term secure detention to "emphasize the importance of immediate accountability").

<sup>180</sup> See *supra* Part III.B.2.

<sup>181</sup> See, e.g., State v. Bachelder, 565 A.2d 96, 97 (Me. 1989) (upholding Maine's modern "endangering the welfare" statute and stating: "It cannot be doubted in this instance that the children's natural mother, with whom they live, has . . . a duty and that her duty extends to caring for [her children's] health, safety and mental welfare.").

<sup>182</sup> See Melli, *supra* note 5, at 378-79 (noting role of judge as "concerned father").

<sup>183</sup> See, e.g., Del. Code Ann. tit. 11, § 1102 (Supp. 1996) (speaking of parental acts "likely to be injurious to the physical, mental or moral welfare of the child"); Haw. Rev. Stat. § 709-904 (1993) (defining "endangering the welfare of a minor" as "recklessly allow[ing] another person to inflict serious or substantial bodily injury on the minor" or "knowingly endanger[ing] the minor's physical or mental welfare by violating or interfering with any legal duty of care or protection owed such minor").

<sup>184</sup> See *supra* notes 107-09 and accompanying text.

<sup>185</sup> See, e.g., Or. Rev. Stat. § 163.577 (1995) (holding parents responsible for child's acts that violate delinquency, curfew, and truancy laws).

<sup>186</sup> See, e.g., N.Y. Penal Law § 260.10 (McKinney 1989 & Supp. 1997-1998) (finding guilty parent who "knowingly acts," "directs or authorizes such child," or "fails or refuses to exercise reasonable diligence"); Pa. Cons. Stat. Ann. tit. 18, § 4304 (West 1985) (finding parent who "knowingly endangers the welfare" guilty).

<sup>187</sup> See *supra* text accompanying notes 95-99.

The strict liability of the parental responsibility laws reflects the postmodern risk management view that has recharacterized juveniles as a dangerous instrumentality. The postmodern thesis suggests that with penology's increasing focus on the management of dangerous populations, juvenile crime may be viewed as a "public welfare offense," demanding the increased application of strict liability against those who fail to control the risk presented by juveniles. A regulatory outlook is consistent with the current rhetoric about juvenile offenders.<sup>188</sup> By describing juveniles as "severely morally impoverished,"<sup>189</sup> the modern rhetoric casts juveniles as a risk that needs to be regulated rather than as individuals who can be held accountable for their wrongdoing. By attempting to manage criminal risk, these laws change society's view of children in two ways: they restructure the parent's role from one of guaranteeing the safety and welfare of children to one of protecting society from dangerous children, thereby creating a new view of juvenile dangerousness.

When the recharacterized state view of juveniles that the new laws represent is coupled with the postmodern emphasis on the underclass, it produces potentially grave results.<sup>190</sup> At the fore of the juvenile population boom that will occur in the next twenty-five years are black males, youths already more likely to suffer from both the determinants (poverty, family breakdown, and poor education) and the outcomes (crime) of membership in the "dangerous class."<sup>191</sup> Also, recent changes in juvenile justice have resulted in the juvenile system being "even more concentrated with young males of minority ethnic and racial backgrounds."<sup>192</sup> These factors have led to the fear that parental responsibility laws will disproportionately impact the minor-

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<sup>188</sup> See *supra* text accompanying notes 6-8.

<sup>189</sup> DiIulio, *supra* note 7, at 24.

<sup>190</sup> Cf. Geis & Binder, *supra* note 60, at 316 (positing middle class fear of minority crime as driving force behind statutes).

<sup>191</sup> See Ted Gest, *Crime Time Bomb*, U.S. News & World Rep., Mar. 25, 1996, at 28 (showing 61% of juvenile homicide arrestees in 1994 to be African Americans).

<sup>192</sup> Simon, *supra* note 42, at 1402. Simon notes that "many [states] have narrowed the scope of formal juvenile court actions with the possibility of detention to juveniles charged with a crime," resulting in the system being more concentrated with members of the "underclass." *Id.* (citing increase in numbers of African American (+30%) and Hispanic (+32%) juveniles taken into custody, and decrease in number of white (-26%) juveniles taken into custody). Simon asserts that this change "makes it easier for the system to take on an explicitly punitive visage." *Id.*

ity underclass,<sup>193</sup> thereby exacerbating the postmodern result of a recharacterized state view of children.<sup>194</sup>

In this regard, the laws are not only open to challenge in terms of their effectiveness,<sup>195</sup> but are also subject to a more conceptual challenge: if the laws target an underclass of children and their parents who are definitionally dysfunctional, they inherently shift the debate from rehabilitation to a more heartless "waste management" perspective.<sup>196</sup> The most problematic aspects of the targeting of the "underclass" might be overcome if the targeting did involve some rehabilitation. While these laws seem to contain rehabilitative elements<sup>197</sup> (which, along with their benign sanctions, place them in stark contrast to the postmodern trend of massive increases in incarceration<sup>198</sup>), the rehabilitative elements of these laws need to be placed in context. The laws do nothing to counter the increasing number of young offenders or to provide them with direct rehabilitation. Instead, they only offer rehabilitation to parents now subject to criminal sanctions for acts that were previously policed only in extreme cases.

While an obvious defense of the laws from a children's rights perspective is that they are favorable to children by laying blame on parents,<sup>199</sup> the laws need to be considered in their broader postmodern context. By reconceptualizing juveniles as a dangerous instrumentality, parental responsibility laws contribute to views that allow juveniles to receive harsher sentences and to be treated more like adults in the criminal context. As this happens, control completely replaces reform as the dominant paradigm of juvenile justice.

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<sup>193</sup> See Cahn, *supra* note 5, at 418-19 (arguing that statutes will adversely impact single mothers)

<sup>194</sup> See Simon, *supra* note 42, at 1367 (arguing that "the enduring racial coding of sympathy . . . may help explain why a White majority society finds it easier to get tough with juveniles in the [increasingly racially identified] system").

<sup>195</sup> See Cahn, *supra* note 5, at 416 (questioning laws' ability to effect any actual improvement in parenting); see also Chapin, *supra* note 117, at 624 (noting lack of data on effectiveness of laws and noting that existing data indicates ineffectiveness).

<sup>196</sup> See Feeley & Simon, *supra* note 16, at 193 ("The concept of an underclass, with its connotation of a permanent marginality for entire portions of the population, has rendered the traditional goal of reintegration of offenders incoherent, and laid the groundwork for a strategy that emphasizes efficient management of dangerous populations."); Simon, *supra* note 20, at 259 ("[M]any of the young men who encounter the criminal justice system will likely become its lifetime clients. It follows that methods must be deployed to allow this population to be maintained securely at the lowest possible cost." (citation omitted)).

<sup>197</sup> See, e.g., La. Rev. Stat. Ann. § 14:92.2 (West Supp. 1997) (including as possible sanction "attendance at a court-approved family counseling program by both a parent or legal custodian and the minor").

<sup>198</sup> See Christie, *supra* note 122, at 168-70 (discussing ever growing expansion of prison system as part of new "control" rationale); Feeley & Simon, *supra* note 16, at 174-75 (noting rise of incapacitation as "predominant model of punishment" under new penology).

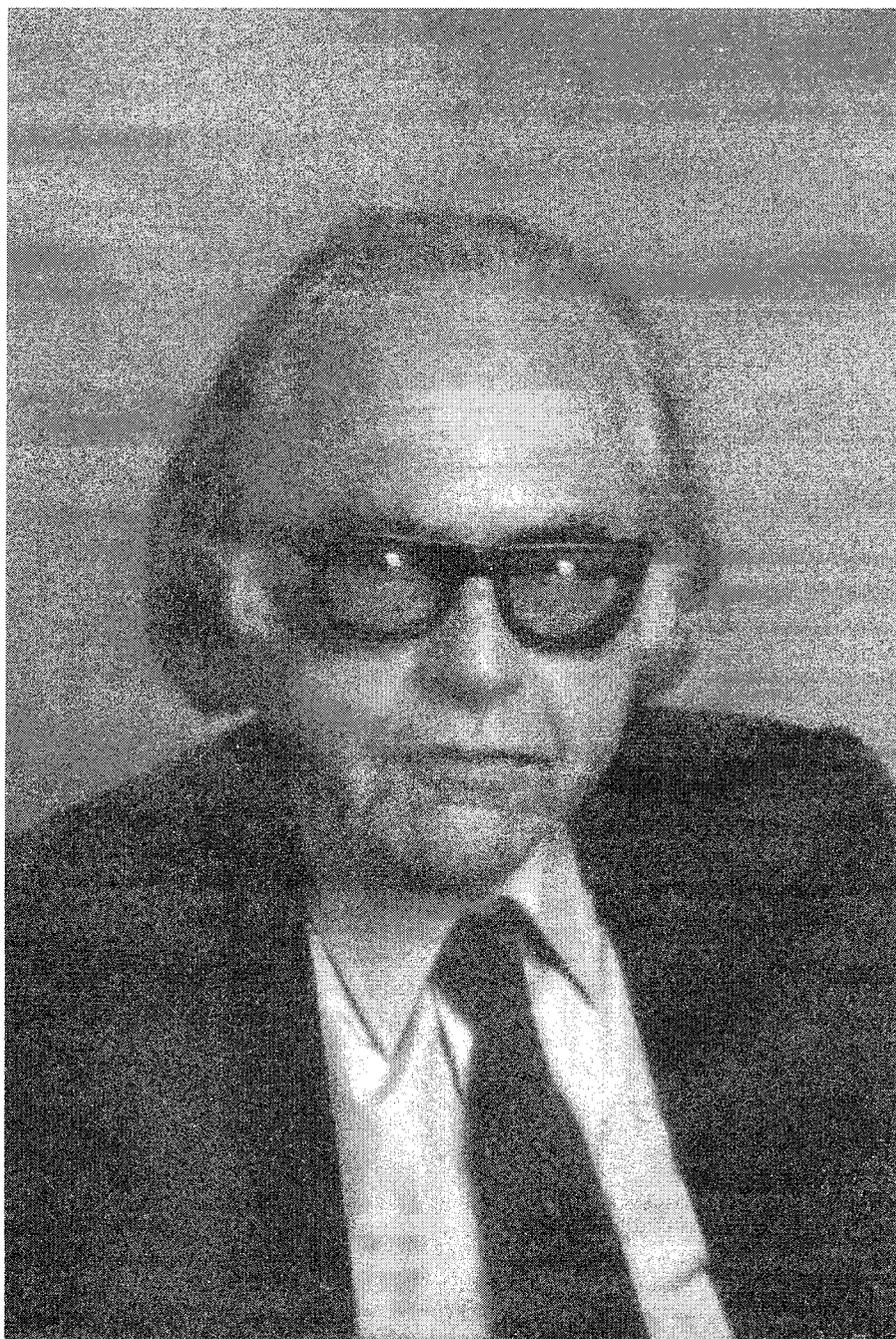
<sup>199</sup> See *supra* note 162.

## CONCLUSION

Parental responsibility laws are a postmodern phenomenon for a number of reasons: they reflect a rationale of risk management, viewing juveniles as a dangerous population that requires parental management; they normalize crime by expanding the boundary of policing into the family context; and they are examples of symbolic lawmaking. The postmodern influence in this context is problematic because of the way it reconceptualizes the family and the child. Family autonomy is limited by these laws. The image of the child is changed from one of a vulnerable, rehabilitable individual who requires the protection of the state and is owed a duty of care by the parent, to an image of the child as a danger to society, with the parental duty in the form of a mandate to protect society from the danger presented by the child.

The ways in which these laws reorient views of the family and of the child have been largely unexamined as parental responsibility laws have been enacted. Unfortunately, like other postmodern penal strategies, these laws could enjoy great longevity because of their potential to command bipartisan support. While commentators on the right may view them as an effective means of crime control, some on the left may see them as a shelter against the storm of increasing punishment of juveniles. From both perspectives, they are destined for failure in their present form. The laws have been enacted in response to a justified concern over juvenile violence. Sadly, the "new penology" and the parental responsibility statutes that are an outgrowth of it provide only attention to the problem, leaving actual redress for measures in the future that the laws may only foreshadow.





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1923-1997

