ESSAYS

On Their Own: Delinquency Without Society

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I. INTRODUCTION

It is widely recognized that the juvenile justice system is undergoing profound change. The major dimension of that change involves more punishment for juvenile offenders who commit violent crimes or are chronic offenders. In order to accomplish more certain and severe punishment for such offenders, a number of legislative changes have taken place. At least a quarter of the states have amended their juvenile justice statutes to formally recognize the protection of the public, and sometimes, to hold juveniles accountable, as equal or superior goals to the traditional parens patriae rationale of protecting the best interests of the child. Nearly two-thirds of the states have moved to establish statutory limitations on the jurisdiction of juvenile courts with respect to certain violent crimes. Many states permit juvenile court judges to waive jurisdiction over certain offenders by granting concurrent discretion to prosecutors, which represents an expansion of the authority traditionally limited to juvenile court judges. Even when juveniles remain under

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2. See Mark H. Moore & Michael Tonry, Youth Violence in America, in 24 CRIME & JUSTICE: A REVIEW OF RESEARCH, supra note 1, at 1, 22.

3. See Feld, supra note 1, at 222.

4. See id. at 207.

5. See id. at 207-08. Prosecutors are afforded this power in around a dozen states, more than double the number of states a decade ago. See id. at 197, 208.

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juvenile court jurisdiction, punishments have become more severe and are being allocated in modes evocative of retributive justice, illustrated by the greater use of guidelines, mandatory minimums, and determinate sentences. Congress, which since the 1970s has pushed the states toward decriminalizing dependency cases and minimizing the harmful effects of punishment on juveniles, has recently been considering legislation that would allow juveniles to be held in adult confinement under certain conditions, even when they have not been convicted as adults. In addition, there is increasing pressure to apply the death penalty to juveniles who commit aggravated murders.

Scholars of the history of the juvenile court share the perception that this trend represents a substantial change in juvenile justice, although they offer different models of change. Thomas Bernard has argued that there are clear cycles in the history of juvenile justice, with laws becoming more punitive when the public and politicians are concerned that juvenile crime is increasing, and becoming more paternalistic and treatment-oriented when juvenile crime seems less of a threat. Simon Singer describes the recent punitive trend as a "recriminalization," which does not replace, but supplements earlier waves of "decriminalization" and "criminalization."

These changes toward a more punitive system have caused some commentators to argue for abandoning the juvenile court model altogether. If the system is going to become just as punitive as the adult system, then juvenile offenders deserve the procedural protections that they were denied when individualization and rehabilitation were well-established features of official juvenile justice policy. Many other commentators are less certain about whether the juvenile court should be abandoned or reinvented.

6. See id. at 227.
7. See id. at 224.
10. See Singer, supra note 1, at 24-25.
11. See generally Ainsworth, supra note 1 (arguing in favor of abolishing the juvenile justice system using the social constructivist theory); Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (stating a case for abolishing the juvenile justice system based upon a fundamental flaw in its conception).
12. See generally Thomas Geraghty, Justice for Children: How Do We Get There, 88 J. CRIM. L. & CRIMINOLOGY 190 (1997) (arguing that the current juvenile justice system should be retained, but that human and financial resources should be invested in the system); Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists, 1993 WIS. L. REV. 163 (1993) (stating that the status quo should be retained and substantially improved).
Four primary explanations have been offered for this change toward a more punitive system. First, the fear of juvenile crime has intensified in the last two decades. Poor young men in the inner cities have always been an object of public fear in varying degrees. In the 1980s and 1990s, that fear hit a rare peak. At the center of this fear was a real upsurge in violent behavior, especially with firearms, that took place in one large city after another contemporaneously with the spread of "crack" cocaine and the particular marketing features associated with that illegal drug during the 1980s. After a considerable decline in crime during the early 1980s in most of the country, the homicide rate in many cities soared to an all-time high in the late 1980s and early 1990s.

Careful studies of age-specific homicide rates show that juveniles were at the heart of this explosive growth, both as perpetrators and victims. Some scholars see this growth largely as a result of the widening availability of guns coupled with cultural changes that have made having a gun more attractive to certain segments of youth. Others point to the moral crises of communities with high rates of out-of-wedlock births and other perceived social ills.

A second explanation relates to the more general demand for punitive sanctions that has taken shape in the juvenile justice system over the past thirty years. The new populist politics of punishment has established a powerful circuit of media, business, and governmental entities committed to an ever-expanding prison population. As a result, the incarceration rate in the United States has quadrupled since the 1970s. The juvenile court with its residual rehabilitative rhetoric and its preference for non-incarceration sanctions was a natural target for this movement.

A third explanation is that the very conception of adolescence as a unique and critical phase of life, a fundamental assumption underlying the juvenile court, may be eroding. Adolescents were once treated as adults

13. See Feld, supra note 1, at 189.
15. See id. at 54.
17. See id. at 53-54; see also Jeffrey Fagan & Deanna L. Wilkinson, Guns, Youth Violence, and Social Identity in Inner Cities, in 24 Crime & Justice: A Review of Research, supra note 1, at 105, 107 (stating that guns have become an important part of modern urban life).
21. See Ainsworth, supra note 1, at 1101-04.
in terms of family and work expectations. The creation of an extended childhood and the corresponding expansion of compulsory education and other governmental interventions were proud accomplishments of the twentieth century and long appeared to be a permanent achievement of a progressive society. Observers have suggested that the discovery and creation of adolescence may have been a far less stable cultural development and may now be changing once again.\(^\text{22}\) Teenagers are now entering the labor force in larger numbers and experiencing new educational regimes with a greater emphasis on accountability and performance, due to transformations in the economic and social situations of the middle class family. Correspondingly, there appears to be a decline in the sentimentality with which the adult public views the situation of juveniles. The juvenile court would obviously seem very strange to a society that had abandoned the concept of juveniles.

Some scholars argue that all three trends are largely related to a fourth explanation, the hardening of racial animus in America.\(^\text{23}\) While classic forms of racial prejudice have clearly been stigmatized in contemporary culture, some aspects of prejudice have been transferred to the complex of fears and hostilities associated with crime in general and violence in particular. Few neighborhoods in the country would reject a Bill Cosby or a Michael Jordan. At the same time, the right of the white suburban majority to separate its children from the seemingly disorganized and disturbing children of the inner city poor has become an article of public political faith that few politicians are willing to challenge. Imprisonment is a big part of implementing that separation, and the juvenile court is an obstacle to achieving that separation.

This Essay suggests that the tendency of current legislation to treat juvenile offenders more like adults and punish both violent and chronic juvenile crime more severely is only part of the picture. The conventional view of change today suggests a movement from the paternalistic, rehabilitative juvenile court of the past toward a jurisdictionally smaller and increasingly punitive juvenile court of the future. In fact, this change seems to be occurring, but it is worth noting that both ends of this spectrum share some common features. First, both views treat juveniles primarily as individuals, whether the psychological individual in need of treatment or the moral individual in need of accountability and punish-

\(^{22}\) See generally Neil Postman, The Disappearance of Childhood (1982) (observing that childhood is disappearing as it merges into adulthood).

\(^{23}\) See Feld, supra note 1, at 189; National Research Council, A Common Destiny: Blacks and American Society 474-77 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989); Antonio McDaniel, The Dynamic Racial Composition of the United States, Daedalus, Jan. 1, 1995, at 179, 179, available in 1995 WL 12205263 (describing the shift from racial animus to concerns such as the fear of crime that are identified racially).
ment. Second, these views make juvenile crime the direct target of intervention. Third, both views place primary responsibility for controlling juvenile crime on society as a whole and, more specifically, on the state.

From this perspective, whether change is unidirectional or cyclical, successive or cumulative, it operates largely within a common framework which I will call "the social" or "society." By social I do not mean to draw a contrast with some other equally comprehensive description of reality like, for example, biological, chemical, or psychological. Rather, following a number of historians and sociologists, I define the social as a historically specific set of discourses, practices, and strategies, through which modern governments have sought to regulate collective life.24

"The social", [sic] that is to say, does not represent an eternal existential sphere of human sociality. Rather, within a limited geographical and temporal field, it set the terms for the way in which human intellectual, political and moral authorities, in certain places and contexts, thought about and acted upon their collective experience.25

We may associate the social perspective more with the paternalistic and rehabilitative ideals of the juvenile court and its liberal contemporary defenders. Conservatives, and supporters of more punitive approaches, often speak of individual responsibility and ridicule those who blame society for crime. But conservative approaches, especially those that lie behind current trends toward more severe punishment, are no less social as that word is defined in this Essay. While differing in rhetoric, style, and technique, these approaches remain committed to the idea that crime can be prevented by effective collective action that targets society as a whole and places primary responsibility on state actors.

This Essay argues that there are emerging signs of a truly different direction in responding to juvenile crime, one that is in a certain sense "post-social." These new strategies differ from both the paternalistic and punitive social approaches. First, these strategies treat juveniles primarily


as a population, composed of individuals, but operating within a set of
dynamics that can best be targeted in populations and sub-populations.
Second, these strategies attempt to ameliorate juvenile crime indirectly by
targeting activities, contexts, and opportunities that promote or inhibit
juvenile crime. Third, these strategies primarily rely on the state to
mobilize other actors or categories of actors who in turn are expected to
directly affect criminal behavior by juveniles.

While these post-social strategies remain relatively small-scale and
fragmentary in contrast to the very significant and coherent shifts toward
punitiveness outlined above, they offer a glimpse of how a really
profound change in approach to juvenile crime might appear. They also
begin to suggest ways that a renewal, rather than an abolition of the
juvenile court, might become more desirable.

The remainder of this Essay outlines some of these approaches and
analyzes their logic and implications. Part II briefly describes three
practices that exemplify this trend. Part III analyzes the chief features of
these practices that point to a new approach. Part IV revisits the explana-
tions discussed above for the growing punitiveness of juvenile crime
policy to see what light these explanations shed on the emergence of
post-social approaches. Finally, Part V offers some preliminary reflec-
tions on a new kind of juvenile court that these approaches, should they
become more common, might make desirable.

II. FRAGMENTS OF A POST-SOCIAL DELINQUENCY STRATEGY

Three practices have emerged in recent years that suggest a break with
the dominant twentieth century penal strategies toward juvenile crime.
The first practice is a graffiti ordinance adopted by Miami-Dade County,
Florida, and in particular, a provision which makes it a misdemeanor for
a juvenile to be in possession of spray paint or large indelible markers
without adult supervision. The second practice is a set of recent laws
and ordinances in various states that create criminal liability for parents
who fail to prevent a range of juvenile offenses. The third practice is
a program of regular drug testing for school athletes adopted by the
Vernonia School District in Oregon.

The degree to which these approaches are likely to become common
or replace more conventional crime control strategies is beyond the scope
of this Essay. Rather, these examples are offered for analytical purposes.
Further empirical research about the prevalence of these practices would
be desirable.

27. See infra text accompanying notes 39-41.
28. See infra text accompanying notes 41-53.
A. Anti-Graffiti Ordinances

In 1994, Miami-Dade County, Florida enacted a comprehensive anti-graffiti ordinance.\textsuperscript{29} The ordinance prohibits making graffiti and imposes various responsibilities to prevent and remove graffiti. The ordinance makes it a crime to produce graffiti,\textsuperscript{30} and requires property owners to take action to promptly remove graffiti on their property.\textsuperscript{31} The ordinance also prohibits the sale of the major instrumentalities of graffiti production to minors, including spray paint and so-called “jumbo” or “broad tipped markers.”\textsuperscript{32} To further effectuate this goal, the ordinance requires store owners to keep these instrumentalities in a place that is inaccessible to the public or is subject to continuous observation.\textsuperscript{33} The ordinance also makes it a crime to possess spray paint or jumbo markers with the intent to make graffiti.\textsuperscript{34} For minors, however, the intent requirement is removed, and possessing these instrumentalities under certain circumstances is a strict liability crime. This part of the ordinance, in relevant part, reads:

(2) Possession of spray paint and markers by minors on public property prohibited. No person under the age of eighteen (18) shall have in his possession any aerosol container of spray paint or broad-tipped indelible marker while on any public property, highway, street, alley or way except in the company of a supervising adult.

(3) Possession of spray paint and markers by minors on private property prohibited without consent of owner. No person under the age of eighteen (18) shall have in his possession any aerosol container of spray paint or broad-tipped indelible marker while on any private property unless the owner, agent, or manager, or person in possession of the property knows of the minor’s possession of the aerosol container or marker and has consented to the minor’s possession while on his or her property.\textsuperscript{35}

Most of these measures are enforced with criminal or civil fines. Perpetrators only face the possibility of jail sentences for repeated violations of the graffiti-making sections and even then only for a maximum of sixty days.\textsuperscript{36}

\textsuperscript{29} See MIAMI-DADE COUNTY, FLA., CODE § 21-30.01 (Supp. 1998).
\textsuperscript{30} See id. § 21-30.01(d)(2).
\textsuperscript{31} See id. § 21-30.01(f).
\textsuperscript{32} See id. § 21-30.01(b)(2).
\textsuperscript{33} See id. § 21-30.01(b)(2)(III).
\textsuperscript{34} See id. § 21-30.01(g)(1).
\textsuperscript{35} Id. § 21-30.01(g)(2)-(3).
\textsuperscript{36} See id. § 21-30.01(g)(4).
B. Parental Responsibility Laws

In recent years, state statutes and municipal ordinances have been adopted that renew and reconfigure a practice dating back to the beginning of the twentieth century, criminal liability imposed upon adults for "contributing to the delinquency" or "endangering the welfare" of minors. According to one recent analysis, the new generation of parental responsibility laws differs in two important respects from the older tradition.

First, traditional laws were framed in broad terms concerning the welfare of children, encompassing both delinquent as well as nondelinquent circumstances. In contrast, the new laws tend to target specific acts by juveniles directly associated with criminality, such as associating with members of street gangs; engaging in sexually indecent activities, prostitution, underage drinking, or gambling; violating curfew ordinances; possessing firearms; and being habitually truant. Second, while traditional laws predicated criminal conviction of the parent on a mens rea of at least negligence, contemporary laws often impose strict liability requiring only proof of parental status and the specific prescribed juvenile acts without any additional showing of a culpable mental state for conviction, although some laws permit an affirmative defense of lack of knowledge about the acts or the inability to prevent them.

C. Drug Testing Without Individualized Suspicion

In 1989, Vernonia School District 47J in Vernonia, Oregon implemented a "Student Athlete Drug Policy," which was upheld by the United States Supreme Court against a Fourth Amendment challenge in Vernonia School District 47J v. Acton. The policy was described in Justice Scalia's majority opinion as follows:

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the
season the names of the athletes are placed in a “pool” from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested the same day, if possible.42

The policy was adopted in response to a growing perception by teachers and administrators in the school district that student drug use was becoming widespread, particularly among student-athletes whose relative prestige was thought to add to the allure of drugs for others.43 These observers saw a correlation between the rise of a drug culture and the growing problem of disciplinary reports, disruptions, and incivility.44 The summary of the district court, also quoted by Justice Scalia, is worth quoting in full here:

[T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached ‘epidemic proportions.’ The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff’s direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student’s misperceptions about the drug culture.45

The goal of the program was to eliminate the drug culture fueling the rebellion by deterring drug use by influential students. In order to accomplish this deterrence, those athletes refusing to participate in the drug testing program were ineligible to participate in athletics.46 Those athletes who did participate in the program and whose urine tested positive for drugs faced an escalating scale of sanctions.47 On the first positive test, the student could either agree to participate in an “assistance program” that included weekly drug testing, or face a suspension from athletics for the remainder of both the current season and the next athletic season.48 On the second positive test, the student was automatically suspended for the remainder of the current season as well as the next athletic season.49 On the third offense, the suspension would continue for the next two athletic seasons.50

42. Id. at 650.
43. See id.
44. See id.
45. Id. at 649 (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).
46. See id. at 650.
47. See id. at 651.
48. See id.
49. See id.
50. See id.
III. ELEMENTS OF A POST-SOCIAL JUVENILE CRIME POLICY

In one rather obvious way, all three anti-crime measures mentioned in Part II differ from the punitive trend because they do not involve serious crimes or particularly severe punishments. With their focus on crimes of vandalism, drug use, truancy, and the like, they seem to harken back to an earlier day when juvenile crime seemed less serious. But at the same time, the measures differ rather markedly from the traditional model of the juvenile court. For the most part, they do not focus on individualized diagnosis and treatment. This section analyzes three key ways in which these "post-social" measures differ from both the paternalistic and the punitive justifications of traditional social strategies against juvenile crime.

A. Actuarial Justice

In an earlier work with Malcolm Feeley, we used the term "actuarial justice" to describe a trend in contemporary crime policy toward targeting populations and sub-populations rather than individuals.\(^{51}\) The shift from rehabilitation to retribution, deterrence, and incapacitation, whether for adults or juveniles, tends to take for granted the centrality of the individual to penal strategies. But a closer examination suggests that the rhetoric of holding individuals accountable often disguises a deeper strategic shift toward control at the level of groups and populations. I believe all three of the approaches described in this Essay represent such a shift.

Like most laws, Miami-Dade County's anti-graffiti ordinance applies to individuals. Its logic, however, is thoroughly group-based. Graffiti is an activity associated with youth. All minors are therefore viewed as a high-risk for graffiti-making. This group logic is also illustrated by the strict liability feature of the statute that criminalizes minors in possession of specific graffiti-making instrumentalities.\(^{52}\) The requirement of proving a culpable mental state has long been recognized as a critical component of the common law's respect for individuality.\(^{53}\) Strict liability reflects a presumption of risk associated with particular classes


\(^{52}\) See MIAMI-DADE COUNTY, FLA., CODE § 21-30.01(h)(2) (Supp. 1998).

\(^{53}\) See, e.g., Morissette v. United States, 342 U.S. 246, 251-52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."); United States v. Dotterwich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting) ("It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing.").
and activities. The very decision to make only minors subject to strict liability reveals that lawmakers were concerned about the group nature of graffiti risk.

The new parental responsibility laws share the strict liability features discussed earlier. They also reflect a clear case of categoric laws which condition criminal liability, not on any particular past acts by an individual, but on the categories of minors and their parents. Likewise, the group nature of the Vernonia School District drug testing policy is self-evident. Indeed, the gravamen of the dispute between Justice Scalia’s majority opinion and Justice O’Connor’s dissent involved the appropriateness of mass search techniques versus an arguably traditional constitutional preference for individualized suspicion.54

The actuarial quality of these measures stands in marked contrast to the logic of both the new retributive turn in juvenile crime policy and the traditional parens patriae model. The argument for trying juveniles in the adult courts and imposing severe punishment upon them is usually based on a model of responsibility that holds individuals morally accountable and individually deters them by the threat of stiff punishments. Strict liability crimes, like Miami-Dade County’s spray paint and jumbo marker possession ordinance and the group drug testing policy adopted by the Vernonia School District, ignore, or even reject, the model of juveniles as morally responsible individuals or self-regulating interest maximizers. The renewed growth of parental responsibility statutes is even more telling in this regard. The whole idea of penalizing parents would seem to suggest the absence of responsible agency in the juvenile. Rather, as one commentator points out, “[c]hildren 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.”55

At the same time, these new strategies reflect an abandonment of the individualizing clinical quality of the traditional parens patriae juvenile court.56 These laws and programs do not promote an effort to acquire in-depth knowledge about juvenile offenders and their unique social, psychological, or other problems. Rather they operate on a categoric logic that associates particular activities or groups with particular harms.

54. “For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment.” Acton, 515 U.S. at 667 (O’Connor, J., dissenting). In contrast, Justice Scalia saw a compelling justification for a group-based search because the problem itself was group-based. “It seems to us self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.” Id. at 663.

55. Schmidt, supra note 37, at 686.

56. See Simon, supra note 1, at 1389-92.
B. Governing at a Distance

Nikolas Rose has used the term "governing at a distance" to capture a trend in advanced liberal societies away from direct command and control regulatory structures and toward strategies that govern indirectly through mediating circumstances or actors.\(^{57}\) Criminal law is perhaps the classic example of a direct command and control structure. Criminal law prohibits and punishes those who attempt, do, or cause particular activities or results. The punitive trends in juvenile crime policy follow this logic by making the offense itself the key trigger in excluding or waiving juvenile jurisdiction.\(^{58}\)

All three of the practices discussed in Part II are suggestive of efforts to govern at a distance. Rather than focusing on particular harms and forbidding them, the practices attempt to regulate harm by criminalizing its causes or correlates. The Miami-Dade County ordinance criminalizes making graffiti, but it also criminalizes simply being in possession of the instrumentalities associated with graffiti (spray paints and jumbo markers).\(^{59}\) Indeed, even though graffiti itself may constitute a criminal harm, its real value is its indirect relationship to other kinds of harms, including gang conflict and the fear it strikes into law-abiding community members.

The parental responsibility laws self-evidently criminalize behavior because of its effect on other juvenile offenses like drug use, truancy, and curfew violations. The new laws make this point clearer by eliminating any need for the prosecution to demonstrate a "bad act" like "endangering the welfare" of a minor, but instead predicate liability simply on the occurrence of the juvenile's "bad act."\(^{60}\)

The Vernonia School District's drug testing policy was not aimed at preventing drug use for its own sake, but was aimed at the presumed links between drug use and the drug culture and what was rather remarkably defined as a "rebellion" by students who were increasingly disruptive in class.\(^{61}\)

\(^{57}\) See Rose, Governing "Advanced" Liberal Democracies, supra note 24, at 41-42.

\(^{58}\) See Feld, supra note 1, at 190.

\(^{59}\) See D.P. v. State, 705 So. 2d 593, 597 (Fla. Dist. Ct. App. 1997) ("[A] legislative body could rationally conclude that the subject prohibition of possession by minors of spray paint and jumbo markers without supervision on public property or permission of the private-property owner would serve to control and limit incidences of graffiti.").

\(^{60}\) Schmidt, supra note 37, at 680-81.

C. Beyond the Sovereign State

David Garland has recently argued that there is an emerging trend in criminal justice away from direct state responsibility for controlling crime and toward a growing delegation of responsibility to a variety of private actors. The point is not simply whether an agency is defined as public or private. The juvenile justice context has always been a system in which private agencies and actors have played an important role in the delivery of services. But even when private agencies and actors have played an important role in juvenile justice, they have acted as agents of a state that has exclusive responsibility. Indeed, the whole theory of parens patriae turns on this idea of sovereignty.

The approaches described above all reflect efforts to address juvenile crime not simply with the aid of private actors, but also by off-loading responsibility for controlling crime onto actors that are either private or particularistic, or both. The Miami-Dade County ordinance includes a traditional state-centered command and control model prohibition on making graffiti, but it also creates a responsibility for property owners, store owners, and parents to prevent and remove graffiti. The parental responsibility statutes self-evidently seek to mobilize parents to detect, report, and prevent juvenile crime. As one commentator notes, these laws "indirectly manage a dangerous population by policing parents to induce them to govern their children better." The Vernonia School District drug testing policy, in effect, turns student-athletes into involuntary enforcers. Their compelled abstinence is harnessed to pull other students out of the drug culture because their social influence as "role models" was thought to promote drug use.

IV. The Death of the Social

Many of the same social changes that lie behind the trend toward punitiveness for serious and chronic juvenile offenders may also lie behind the emergence of post-social strategies to combat juvenile crime. Juvenile delinquency and the juvenile court were products of the new forms of expertise and the new ambition for governments associated with Progressive Era reforms in the United States. These reforms brought "society" to the center of governmental strategies during the twentieth century. The decline of the juvenile court and the sense that "juvenile

63. See Simon, supra note 1, at 1378-84.
64. See MIAMI-DADE COUNTY, FLA., CODE § 21-30.01(f) (Supp. 1998).
65. See Schmidt, supra note 37, at 687.
66. See Vernonia Sch. Dist., 515 U.S. at 650.
delinquency" no longer adequately describes the threat posed by youthful offenders reflects in part the decline of "society" as a locus of expertise and center of government intervention, a process that has led some to speak of the "Death of the Social." 67

In a famous quote, Margaret Thatcher called into question the existence of society, pointing instead to the domains in which the approaches discussed in this Essay operate. In an interview with the magazine Woman's Own on October 31, 1987, Thatcher was quoted as saying: "There is no such thing as society. There are individual men and women, and there are families. And no Government can do anything except through people, and people must look to themselves first. It's our duty to look after ourselves and then to look after our neighbour." 68

From the beginning of the nineteenth century through the formal creation of a juvenile court in the early twentieth century, juvenile crime has been a central focus of reformers seeking to broaden the social responsibilities of government. The birth of the correctional prison, one of the dominant political technologies created to allow government to exercise power directly on the social body, was promoted through the specter of juvenile crime. 69 Juvenile crime was also seized upon by Progressive Era reformers to promote broad expansions of the government's role in family life, including the juvenile court, the regulation of child labor, and the expansion of compulsory education. 70 In a sense, one can understand the juvenile as the idealized subject of social governance, with adults (especially in the liberal versions of social governance) generally conceded a right to autonomy, except in the degree to which an adult can be viewed as dependent like a juvenile, such as an insane person, patient, or prisoner.

From this perspective, the shifts from treatment to punishment, from paternalistic rhetoric to the rhetoric of social defense and responsibility, are predictable variations within a broad social rationality of governance in which the juvenile figures as the easy case. The strategies discussed earlier in this Essay are even more important as a result of this shift. These "post-social" approaches to juvenile crime suggest an abandonment of efforts to govern juvenile crime through comprehensive measures operating through and in the entire society. Instead, they point to a strikingly different rationality for governing juvenile crime in which there

67. See Rose, The Death of the Social?, supra note 24, at 330; see also Baudrillard, supra note 24, at 82-83 (noting that the social is dying).
68. Interview by Margaret Thatcher with the magazine Women's Own (Oct. 31, 1987), in The Collected Speeches of Margaret Thatcher 576 n.1 (Robin Harris ed., 1997).
is a fragmentation of control into separate domains and regulation takes advantage of specific institutions of the sort that Thatcher would point to: families, firms, and neighborhoods.

A. The High Cost of Failure

The proliferation of violent crime among juveniles has been identified as a primary cause of public demands to abandon treatment and emphasize severe punishment for violent and chronic juvenile offenders. The inability of traditional juvenile sanctions to control this outbreak of violent crime also has led to a collapse in the public’s confidence in the state and a concomitant effort to off-load difficult problems onto private actors. Severe punishments place the state’s credibility as an authority in doubt by making clear the degree to which juveniles and other offenders are prepared to disregard these threats. Most of the post-social approaches discussed in Part II have the advantage of being low-profile. To the extent that these approaches achieve a diminution of crime, they do so without calling on society as a collective actor and staking the state’s credibility on their success.

One can see, for example, in the rather bizarre discussion of rebellion surrounding the Vernonia School District’s drug testing policy, a real sense that the credibility of school authorities was being fatally compromised. To the extent that the policy allows easy enforcement—absent a drug test, an athlete cannot participate in sports—it provides an easy measure for the school authorities to produce results. Parental responsibility statutes also emphasize the failure of other responsible actors, namely families, for a problem that the state once assumed—the very point of parens patriae.

The Miami-Dade County graffiti ordinance helps ease the difficulty of fighting juvenile crime by selecting easier enforcement targets. It is easier to catch juveniles in possession of spray paint or jumbo markers

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71. See Moore & Tonry, supra note 2, at 7.
72. As Bruce Jackson has noted, criminal justice often faces the problem of an essentially negative task, producing less of something, crime, while other agencies like schools, hospitals, and the military “are all deeded to doing something (teaching the kids, curing the sick, making a war).” BRUCE JACKSON, LAW AND DISORDER: CRIMINAL JUSTICE IN AMERICA 299 (1984). But drug testing programs produce something, drug tests. The tendency of contemporary criminal justice agencies to shift from difficult-to-accomplish goals, like safe streets, to easy-to-accomplish internal performance measures, like the number of drug tests taken, is a feature of what Malcolm Feeley and I have called “the new penology.” See Malcolm Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 CRIMINOLOGY 449, 458-63 (1992) (discussing the emerging trend in penal measures).
than in the act of making graffiti. Indeed, the very focus on graffiti itself shifts the target of government effort to removing the signs of gang criminality from the far harder task of removing gang criminality altogether.

B. The Rise of the Underclass

Barry Feld has argued that the transformation of the juvenile court into a more punitive institution is driven largely by the fact that the primary subjects of the juvenile court are the increasing populations of racial minorities living in areas of hardened urban poverty. Support for a rehabilitative, paternalistic juvenile court reflected some identification with its subjects, or at least the belief that they could be successfully integrated into the American economy and society. The emergence of post-social strategies also may reflect a broad disinvestment from the idea that minority youth from areas of hardened urban poverty can be integrated into a unified social order that is governed by common norms and rules. In each case, we see the proliferation of measures that replace the goal of common order maintenance with targeted and temporary behavioral controls. These measures neither seek nor reinforce common normative understandings between the controllers and the controlled.

In a powerful essay addressing the way social order is maintained differently in middle class and underclass communities, the ethnographer Elijah Anderson argues that the former is regulated by a "code of civility" that depends on and reproduces processes of internalizing shared understandings, while the latter is regulated by a "code of the street" that depends on external signals, crude exclusions, and the potential for violent sanctions. For example, stores in middle-class areas rely on mutual trust between customers and merchants to prevent property from being stolen, while stores in poorer neighborhoods rely on bars and constant surveillance. In middle-class communities, people encountering strangers can rely on the code of civility to regulate conduct, while in

73. "Indeed, the state candidly concedes in its brief that the absence of a scienter requirement is a necessary law enforcement tool. According to the state, unless the graffiti artist is caught in the act, the ordinance is difficult to enforce." D.P. v. State, 705 So. 2d 593, 602 n.8 (Fla. Dist. Ct. App. 1997) (Green, J., dissenting).

74. See Feld, supra note 1, at 200, 231-32. His latest book makes the case even more strongly that public willingness to support more punitive sanctions for juveniles reflects an underlying prejudice toward minority youth. See generally BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) (stating that the identification of juvenile justice with racial minorities has led to increasingly negative attitudes toward the system by whites).


76. See id. at 70-71.
poor communities, individuals treat even the most minimally hostile gesture, or "dissing in the language of the street,"77 as a serious challenge that must be immediately responded to with counter-hostility or even violence. "[T]here is a sense [in such communities] that you are on your own, that what protects you from being violated is your own body, your own ability to behave the right way, to look as though you can handle yourself, and even to be able to defend yourself."78

Post-social strategies of controlling juvenile crime seem to reflect a pervasive sense that the code of the street rather than the code of civility is the operative reality in which control is exercised. Efforts to produce adherence to common norms of civility are being abandoned. In their own way, these measures may even mimic the logic of street code. Strict liability offenses, like possessing spray paint or being the parent of a curfew-violating juvenile, treat the intentions of the other as irrelevant, and instead treat the behavior alone as a serious enough indication of risk to warrant punitive sanctions. Likewise, the drug testing regime introduced by the Vernonia School District reflected a perception that the student body was in a state of "rebellion,"79 which is another occasion in which codes of the street replaced codes of civility.

C. The End of Childhood as a Social Category

Although youth, as a special status in society, is subject to cultural change, we should be cautious before we ascribe the waning support for a paternalistic juvenile court to the end of childhood or adolescence. When we look away from the largely impoverished juveniles, who comprise the major business of the juvenile court, we see little evidence that the special standing of youth has changed. Indeed, among privileged classes, its particular pleasures and exemptions seem to expand well into the lifecycle. Rather, a special protective status for youth may be a creature of a society that can afford to and chooses to treat all of its communities as part of a unified and integrated social order. When that order breaks up or when the mission of government increasingly protects only certain fragments of that social order against others, then youth only survives in those communities and within those specific private arrangements that can afford it. The youths outside those spaces will be "on

77. "Many of the forms that dissing can take may seem petty to middle-class people (maintaining eye contact for too long, for example), but to those invested in the street code, these actions become serious indications of the other person's intentions." Id. at 81.
78. Id. at 74.
their own," to use Anderson's evocative phrase, and easily redefined as monsters.80

V. CONCLUSION: RE-SOCIALIZING JUVENILE CRIME CONTROL

It is too easy to sound only condemnatory when trying to describe a new trend. In fact, there is much in the emerging post-social strategies discussed here that is promising. First, most of these approaches are preventive, they aim at altering the conditions that support and reproduce serious juvenile crime. Second, most of the approaches aim at maintaining and reinforcing existing community links with troubled juveniles, rather than severing them in the name of justice or social defense. Third, they are low-key measures that, if carried out properly, add little to the stigmas that already surround juvenile delinquents and their communities.

The most troubling aspect of these approaches is that they lack any real commitment to an equal concern for all of our young people. It is worth remembering that the expansion of the social as the locus of government was carried out to provide greater levels of security for lower social and economic classes of society, while demanding heightened levels of responsibility from these populations. Post-social responses to juvenile crime slip all too easily into treating some juveniles as means rather than ends, and providing many with nothing more than evocations of primary institutions, such as schools, families, and neighborhoods, that are simply unable to make a difference to troubled juveniles. Moreover, they remove any real accountability by government for the results produced.

But this may also point us toward a new potential for the juvenile court, or some other agency invented to take its place, as an important concentration of government responsibility and power over juveniles. As Mark Moore and Michael Tonry note, "the juvenile court controls a potentially important community asset: namely, the right to use the authority of the state to exercise control over youthful offenders and (perhaps) those private and public actors who are responsible for their care."81 This asset might be used to link together new responsibilities imposed on juveniles, parents, and communities, with resources critical to making these tasks achievable. In this role, the traditional parens patriae powers of the court to take jurisdiction over the affairs of troubled juveniles could be used as an accountability check on govern-

80. As Franklin E. Zimring points out, "[w]hen terms like 'juvenile superpredator' and 'feral presocial being' are used in debates about youth crime, they have a special rhetorical purpose to set the object of the description apart from other young persons and from the protection of youth development policy." Franklin E. Zimring, Toward a Jurisprudence of Youth Violence, in 24 CRIME & JUSTICE: A REVIEW OF RESEARCH, supra note 1, at 477, 483.

81. Moore & Tonry, supra note 2, at 23.
ment itself, assuring that the inherently fragmented nature of post-social crime control strategies does not leave certain juveniles and whole communities on their own.