

JUVENILE GUNSLINGERS: A PLACE FOR PUNITIVE PHILOSOPHY IN REHABILITATIVE JUVENILE JUSTICE

I. INTRODUCTION

In 1944, we worried about our kids. We worried that they might go truant, that they might lie to us; we hoped our sons weren't the bad apples talking out of turn and cutting in line.¹ In 1994, we still worry about our kids. We worry about pregnancy, about drugs, about whether our youngsters will be knifed or shot on the way home from school.² We worry that they might be the ones pulling the trigger. Worse yet, we worry that the gun might be pointed in our direction.³

The number of juveniles arrested for murder in 1992 was more than double the number in 1984.⁴ In the vast majority of those cases, firearms were the weapons used, most of them handguns.⁵ Moreover, the youth gun culture continues to grow.⁶ Although this violent trend manifests itself in our schools and on our streets, many commentators express skepticism that the juvenile justice system is, or will be, effective in curbing the terror and tragedy.⁷ Unquestionably, we are scared, and we want somebody to do *something*.⁸

¹ See generally Thomas Toch, et al., *When Killers Come to Class: Violence in Schools*, U.S. NEWS & WORLD REP., Nov. 8, 1993 (includes survey of how times have changed between 1940 and 1990 according to public school teachers).

² *Id.*

³ *Id.*

⁴ Karen J. Cohen, *Senate Passes Kohl's Kids and Guns Bill*, STATES NEWS SERVICE, Nov. 9, 1993.

⁵ *Id.*

⁶ David Barstow, *Gun Ban Won't End the Violence*, ST. PETERSBURG TIMES, Dec. 31, 1993, Tampa Bay and State, at 1B. Of 2,508 youths questioned in a survey of ten- to nineteen-year-olds in schools across the country, fifteen percent said they had carried a handgun in the past month, nine percent said they had shot a gun at someone, and two-thirds said they could get a gun if they wanted one. *Id.*

⁷ See, e.g., Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 136 (1987); Barstow, *supra* note 6, at 1B; Diedtra Henderson, *Youth-Violence Debate Strikes an Emotional Nerve—State Panel Hears Hours of Diverse Testimony*, SEATTLE TIMES, Jan. 7, 1994, at B3; R.G. Ratcliffe, *Targeting Crime; Bush Finds a Soft Spot in Record of Richards*, HOUSTON CHRON., Nov. 14, 1993, (State) at 1.

⁸ See, e.g., 139 CONG. REG. S14,938 (daily ed. Nov. 3, 1993) (statement of Sen. Lott from Mississippi); Gregory J. Skibinski & Ann M. Koszuth, *Getting Tough with Juvenile Offenders: Ignoring the Best Interests of the Child*, 37 JUV. & FAM. CT. J. No. 5 1986, at 43, 48; Tony Freemandle, *Gun Control: New Arguments Are Finding Their Targets as Effort to Limit Arms, Ammo Gains Momentum*, HOUSTON CHRON., Dec. 5, 1993, at A1 (Dr. James Wright, one of the country's

Politicians have been responding.⁹ The public outcry for action has been met by a recent wave of legislation aimed at curbing youth violence.¹⁰ Twenty-one states now have laws prohibiting juveniles from possessing firearms,¹¹ and several states have provided for tough juvenile punishments.¹² Indeed, this reaction is representative of the contemporary trend toward a punitive juvenile justice philosophy.¹³ As the violence grows, our fear grows with it, and we become increasingly prone, when faced with young, violent offenders, to disregard the vulnerable nature of children still responsive to our counsel.¹⁴ It is our obligation, however, to distinguish between hardened youth offenders and those who may require only a solemn reminder of what the law demands, and to develop juvenile codes which appropriately effect this distinction.¹⁵

This Note provides an overview of the recent wave of legislative bans on juvenile firearm possession and argues that these measures, if properly conceived, are appropriate in the tradition of our rehabilitative juvenile justice scheme.¹⁶ Section II examines the history of the juvenile justice system in America.¹⁷ Specifically, it explains the rehabilitative tradition of that system and the contemporary infusion of notions of responsibility and accountability.¹⁸ Section III discusses the

authorities on guns and criminals, asserts that the climate for gun control is more favorable now than ever before in American history); Clifford Krauss, *Ban on Gun Sales to Minors Passes Senate Easily*, N.Y. TIMES, Nov. 10, 1993, at A1 (99 to 1 vote to enact juvenile handgun possession ban in Senate was affirmation of growing fears of juvenile violence); Patrick May, *Disarming the Kids: Tragedies Spur Colorado Crackdown on Handguns*, MIAMI HERALD, Sept. 19, 1993, at 1A (Florida citizens are scared and want something done).

⁹ See, e.g., Henderson, *supra* note 7, at B3; Richard A. Oppel, Jr., *Scared to Death: The States are Taking Initiative*, DALLAS MORNING NEWS, Jan. 2, 1994, at 1J; Sonya Vann, *Phelan Asks Referendum on Youths Having Guns*, CHICAGO TRIB., Dec. 20, 1993, (Chicagoland) at N3; Ratcliffe, *supra* note 7, at 1.

¹⁰ See *infra* note 159 and accompanying text.

¹¹ See *infra* Table.

¹² See *infra* notes 190-230 and accompanying text.

¹³ See *infra* notes 240-81 and accompanying text for an analysis of the recent reactions to juvenile gun possession and their implications regarding a more punitive philosophy of juvenile justice.

¹⁴ See SANFORD J. FOX, JUVENILE COURTS 19 (3d ed. 1984). Professor Fox suggests, for example, that proposals for turning the juvenile court into a mini-criminal court are unwise, in that for the majority of the children being treated within the juvenile justice system a punitive approach is improper. *Id.*

¹⁵ See Section V.B. for a discussion of this distinction in the context of the juvenile gun possession prohibitions.

¹⁶ See *infra* notes 156-296 and accompanying text for a discussion and analysis of juvenile gun ban legislation.

¹⁷ See *infra* notes 23-123 and accompanying text.

¹⁸ *Id.*

nexus between a recent, perceived surge in juvenile violence, and an increasingly punitive approach to juvenile justice.¹⁹ Section IV provides an overview of state legislative reactions to the particularly fearsome gun culture growing among America's youth, and outlines the state bans on juvenile gun possession as a specific response to the problem of curbing the juvenile demand for firearms.²⁰ Section V demonstrates the punitive tendencies of these statutes as manifestations of a punitive trend in juvenile justice philosophy, and assesses the utility and desirability of their approaches.²¹ This Note concludes that statutes providing mandatory penalties for gun possession by youths may represent an appropriate means by which to curb the growth of the youth gun culture, but only if they are circumspectly balanced to address the distinction between serious juvenile offenders, whose disposition may be justifiably driven by society's concerns for public safety, and less troubled youths, whose needs for rehabilitation are paramount.²²

II. CHANGING ATTITUDES IN THE JUVENILE JUSTICE SYSTEM

Throughout history, children have been subjected to, and in a sense, casualties of, a world created by adults and for adults; a world which they are often unable to comprehend, and in which they are profoundly ill-equipped to defend themselves.²³ The traditional legal disposition of delinquent²⁴ youths has been illustrative of this, yet only recently has our society acted upon the notion that we owe children a duty of protection beyond that which our legal system affords adult offenders.²⁵ To fulfill that duty, states founded the juvenile courts and

¹⁹ See *infra* notes 124-55 and accompanying text for a discussion of juvenile violence as the precipitator of public fear leading to an increased acceptance of punitive approaches to deter juvenile crime.

²⁰ See *infra* notes 156-230 and accompanying text for a discussion of the state enactments and federal proposals aimed toward keeping firearms out of the hands of juveniles.

²¹ See *infra* notes 231-96 and accompanying text for an analysis of the recent wave of juvenile firearm possession bans and their implications on the future of juvenile justice in this country.

²² *Id.*

²³ See BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 8, 8-15 (1993). Barry Krisberg, Ph.D., is President of the National Council on Crime and Delinquency ("NCCD"), and James F. Austin, Ph.D., is Executive Vice President for the NCCD. *Id.* at 211, 212.

²⁴ By common definition, a finding of "delinquency" arises when a child violates a criminal law. Fox, *supra* note 14, at 37. However, a youth may also be found delinquent for violating laws which apply only to children. *Id.* at 40.

²⁵ Judge Romae T. Powell, *Disposition Concepts*, 34 JUV. & FAM. CT. J. No. 2 1983, at 1, 1. Prior to the nineteenth century, juvenile offenders in most legal systems were processed through the court system used for adults. Gardner, *supra* note 7, at 129. The first juvenile court was opened in 1899 in Illinois. *Id.* at 130. By 1945, every United States jurisdiction as well as most European nations had created alternatives to the adult criminal process for juveniles. *Id.*

empowered them as *parens patriae*,²⁶ responsible for providing wayward youths with the conscientious guidance necessary to divert them from the path of temptation.²⁷ Unlike the criminal court system, which seeks to deter crime in large measure by punishing criminals, the juvenile courts have long been grounded upon a philosophy emphasizing the social rehabilitation of young offenders.²⁸ The first part of this section explores the philosophy of rehabilitation as it was understood prior to the establishment of the juvenile court in the United States.²⁹ The second part explores the difficulties experienced by the juvenile court in delivering on its promise of rehabilitation, and its reevaluation by the United States Supreme Court and by society as a whole.³⁰

A. *The Roots of Juvenile Justice and the Rehabilitative Ideal*

The history of the treatment of delinquent juveniles prior to the establishment of juvenile courts clearly illustrates the goals of rehabilitative theory.³¹ The first institutions established to control juvenile delinquency in the United States were the Houses of Refuge, which began in 1825 as a by-product of the economic and social dislocations of the industrial revolution.³² The underlying goal of these institutions was preventive, seeking less to punish and more to educate and train youths, mentally and morally preparing them for a productive role in society upon their release.³³ When youths reached the age of legal

²⁶ The *parens patriae* premise of the court was expressed in 1839, in *Ex parte Crouse*, which used the expression to characterize the court as the "common guardian" of the children who come before them, long before the establishment of juvenile courts. See 4 Whart. 9, 11 (Pa. 1839). Of *parens patriae*, the United States Supreme Court later remarked, "[t]he Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." *In re Gault*, 387 U.S. 1, 16 (1967).

²⁷ *Gault*, 387 U.S. at 16.

²⁸ See *infra* notes 31-56 and accompanying text.

²⁹ *Id.*

³⁰ See *infra* notes 57-123 and accompanying text.

³¹ See generally Krisberg, *supra* note 23, at 8-32 (providing an exegesis of the motivations and practices of early activists and organizations directed at the prevention of juvenile delinquency in the United States).

³² Krisberg, *supra* note 23, at 14-17. In the spirit of prevention, these early institutions accepted children who were delinquent, dependent or neglected. This is a practice still observed by most contemporary juvenile systems. *Id.* at 17.

³³ *Id.* at 17. As the Pennsylvania Supreme Court expressed in 1838, "[t]he object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates." *Crouse*, 4 Whart. at 9.

majority, their benefactors released them to apprenticeships where they could practice the trades they learned in the Houses of Refuge.³⁴

In the latter half of the nineteenth century, a new wave of reformers, referred to historically as the "Child Savers," also rejected notions of punishment for punishment's sake, and brought new inspiration to the methods employed to reform children on the road to criminality.³⁵ These reformers sought solutions for deterring deviancy which would be both more effective than mere institutionalization, and able to reach more children than the long-term institutionalized system of the Houses of Refuge.³⁶ One such solution, which involved placing delinquent youths with farming families on the western frontier, reflected a belief that providing children with moral, compassionate and hard-working role models would lead the youths to a productive future, a result unattainable by mere punishment alone.³⁷ Yet delinquency continued to rise, precipitated by massive changes in America's industrial and social structures, underscoring the imminent need for a permanent and comprehensive system for the treatment of wayward youths.³⁸

The juvenile court emerged amidst the social turmoil of the Progressive Era.³⁹ The rapid industrialization of America in the late 1800s, coupled with overwhelming immigration into the major industrial centers and the resultant growth of the poor, urban working class, heightened the concern of social reformers.⁴⁰ Faced with the public's newly acquired faith that there must be scientific explanations to perplexing social problems, social reformers found themselves pitted against social Darwinists, who believed that attempting rehabilitation of an individual is tantamount to fighting the natural process of selection itself.⁴¹ The drastic social upheavals of the Progressive Era, however, led many to doubt the wisdom of a laissez-faire approach; the

³⁴ Krisberg, *supra* note 23, at 20.

³⁵ *See id.* at 21.

³⁶ *Id.*

³⁷ *See id.* at 21-22. Among the criticisms of such programs was that the organizers neither followed-up with the children they sent west, nor administered strict measures of discipline for those who might benefit from it. *Id.* at 23.

³⁸ *See id.* at 27-29.

³⁹ Krisberg, *supra* note 23, at 27. Historians typically refer to the period from 1880 to 1920 as the Progressive Era. *Id.*

⁴⁰ *Id.* at 27. The authors suggest that the concerns for reform were driven in significant part by the concern of the reformers, as members of the social elite, that a revolt of the poor urban masses would effect a detrimental change in the economic and racial privileges to which they were accustomed. *Id.* at 27, 29.

⁴¹ *Id.* at 27. The opposition faced by reformers was essentially grounded in skepticism regarding society's ability to rehabilitate a person prone to crime; that is, whether criminals are born as such, or are formed as a product of their role models, education and other experiences.

reformers won the debate, and eventually established much of the modern welfare state and criminal justice system.⁴² In the realm of juvenile justice, a second generation of Child Savers, incensed by the fact that children were punished like adults and incarcerated with hardened adult offenders, fought against the unduly harsh treatment of youths in the criminal court system.⁴³ These reformers believed that society could not fulfill its duty to the child through the simple and callous meting out of punishments.⁴⁴ Accordingly, the reformers advocated the reevaluation of juvenile justice based on the "rehabilitative ideal," a concept centered on the use of individualized diagnoses of youthful offenders, and on non-punitive treatment methods.⁴⁵

Illinois established the first juvenile court in 1899, adopting the *parens patriae* philosophy which once imbued the Houses of Refuge and the many programs of the Child Savers.⁴⁶ The court, unlike its predecessors in interest, theoretically gave juveniles special attention by means of confidential hearings and individualized dispositions directly responsive to their "best interests."⁴⁷ In principle, judges did not inquire as to the innocence or guilt of the child, but instead asked: "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁴⁸ Judges abided by the belief of rehabilitative philosophy: that the child is essentially good, and should therefore be made to feel that the state's role is as a benevolent guardian.⁴⁹

In its concern for accommodating youths based on their particular situations and needs, the juvenile court, from the apprehension of youths to their institutionalization, differed both ideologically and

Murray Levine, et al., *Juvenile and Family Mental Health Law in Sociohistorical Context*, 10 INT'L J.L. & PSYCHIATRY 91, 100 (1987).

⁴² Krisberg, *supra* note 23, at 27. The reformers of the Progressive Era effected, among other facets of contemporary criminal justice, the extensive use of indeterminate sentences and parole, the public defender movement, and the scientific study of crime. *Id.*

⁴³ *In re Gault*, 387 U.S. 1, 14, 15 (1967).

⁴⁴ *Id.* at 15.

⁴⁵ Ira M. Schwartz, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 150 (1989).

⁴⁶ Krisberg, *supra* note 23, at 30. The juvenile court concept was accepted with amazing speed such that by 1925, all but two states had some form of juvenile court. *Id.*

⁴⁷ Schwartz, *supra* note 45, at 150.

⁴⁸ Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909), *quoted in In re Gault*, 387 U.S. 1, 15 (1967); *see also* Kent v. United States, 383 U.S. 541, 554 (1966).

⁴⁹ *In re Gault*, 387 U.S. at 15. A key assumption of this rehabilitative approach is that only restorative treatment methods, and not purely punitive ones, can check criminal tendencies before they harm society. Skibinski, *supra* note 8, at 48.

structurally from the criminal justice system.⁵⁰ A crucial aspect of this separation was the informal processing of young offenders, without the distracting rigors of a criminal trial.⁵¹ Youths enjoyed no right to counsel, no privilege against self-incrimination, no right to a speedy and public trial, and no right to confrontation of the accusers, among other deprivations,⁵² and juvenile court hearings were held in private.⁵³ Hence, the juvenile court framers abandoned the procedural protections and adversarial structure of adult proceedings as unnecessary and counterproductive to the juvenile courts' specialized *parens patriae* underpinnings.⁵⁴ The juvenile court thus discarded the abrasive nature of substantive and procedural criminal law along with notions of crime and punishment.⁵⁵ Despite the benevolent intentions of the juvenile court, however, procedural abuses eventually led to a reevaluation of its informal structure, of its efficacy in treating delinquency and of the practicability of the rehabilitative ideal itself.⁵⁶

B. *The Failure of the Rehabilitative Promise*

In the early part of this century, criticism of the juvenile court focused on its seemingly unlimited discretion.⁵⁷ Indeed, as the case-loads of courts in urban areas became too much to maintain within the original operational theory of the juvenile courts, the conceptual image of the courts as cautious and caring benefactors disintegrated.⁵⁸ Individualized evaluations of young offenders became perfunctory as the amount of time afforded each child before the court decreased,

⁵⁰ *In re Gault*, 387 U.S. at 15-16.

⁵¹ Schwartz, *supra* note 45, at 151. A rationalization for the lack of procedural rigor was that the state was in essence assuming the role in which the child's parents' had ostensibly failed, and, therefore, the juvenile proceedings were "civil" in nature. As a result, the proceedings were not subject to the requirements normally placed upon a state seeking to deny a person's liberty. *Gault*, 387 U.S. at 17. As the *Gault* Court observed: "The traditional ideas of juvenile court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected?" *Id.* at 28.

⁵² *Kent*, 383 U.S. at 554. Although the United States Supreme Court observed that the right to counsel was available in some jurisdictions, the Court did not hold that the right to counsel applied to juveniles under the Sixth Amendment until one year later in *In re Gault*, 387 U.S. 1, 41 (1967).

⁵³ Schwartz, *supra* note 45, at 150.

⁵⁴ *See id.* at 150-51.

⁵⁵ *Gault*, 387 U.S. at 15.

⁵⁶ Krisberg, *supra* note 23, at 49. The Supreme Court noted in *In re Gault* that "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U.S. at 18.

⁵⁷ Krisberg, *supra* note 23, at 30.

⁵⁸ *Id.* at 31.

and the quality of probationary supervision was spread so thin as to be rendered virtually meaningless.⁵⁹ By the middle part of the twentieth century, the United States Supreme Court recognized that the juvenile courts were not performing adequately as *parens patriae*.⁶⁰ Not only were children being deprived of the procedural protections accorded to adults, but the juvenile court was failing to provide the *quid pro quo* of careful case-by-case analysis and regenerative treatment it originally promised.⁶¹

In 1966, in *Kent v. United States*, the United States Supreme Court, recognizing the imbalance in the juvenile court's structure, held that a juvenile court's decision to waive its jurisdiction, thus sending a youth to district court for trial as an adult, was unconstitutional.⁶² The juvenile defendant in *Kent* appealed a criminal court conviction for housebreaking and robbery.⁶³ The Court reasoned that the philosophical pedigree of the juvenile court as *parens patriae* could not support waiving the defendant to the adult court without appropriate justification.⁶⁴ Thus, the Court concluded that the defendant had been deprived of due process and of his right to counsel.⁶⁵

The defendant in *Kent*, a sixteen-year-old youth, was arrested for housebreaking, robbery and rape.⁶⁶ The defendant filed motions in the juvenile court for a hearing on the question of waiver of jurisdiction and for access to his probation records being held by the court.⁶⁷ The juvenile court declined to rule on these motions and waived jurisdiction without a written record of its reasoning.⁶⁸ The criminal court convicted the defendant on the six counts of housebreaking and robbery, and sentenced him to a total of thirty to ninety years in

⁵⁹ *Id.*

⁶⁰ *Kent v. U.S.*, 383 U.S. 541, 555-56 (1966).

⁶¹ *In re Gault*, 387 U.S. 1, 18 (1967).

⁶² 383 U.S. at 546, 554, 557. "Waiver" refers to the discretionary power of a juvenile court judge to transfer a youth, under circumstances defined by statutes governing the court, for trial in a criminal court, thus subjecting the child to criminal penalties. Fox, *supra* note 14, at 249. Justice Fortas wrote, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without a hearing, without effective assistance of counsel, without a statement of reasons. . . . It would be extraordinary if society's special concern for children . . . permitted this procedure." *Kent*, 383 U.S. at 554.

⁶³ 383 U.S. at 550.

⁶⁴ *Id.* at 555, 556-57.

⁶⁵ *Id.* at 557. Specifically, the Court stated that the district court's waiver order was invalid under the Juvenile Court Act of the District of Columbia "read in the context of constitutional principles relating to due process and the assistance of counsel." *Id.*

⁶⁶ *Id.* at 543.

⁶⁷ *Id.* at 545, 546.

⁶⁸ *Kent*, 383 U.S. at 546.

prison.⁶⁹ The court of appeals affirmed.⁷⁰ The defendant appealed to the United States Supreme Court on the ground that the juvenile court's waiver was constitutionally defective.⁷¹

The Supreme Court reasoned that the juvenile court's authority to function in a parental capacity does not allow it to be arbitrary in its procedure, because constitutional limitations of due process and the assistance of counsel are applicable to the juvenile court process.⁷² In dicta, the Court recognized that although the rehabilitative premise of the juvenile court is laudable, it has not adequately fulfilled its goals as *parens patriae*.⁷³ The Court asserted that, "[t]here is evidence . . . that the child receives the worst of both worlds [in the juvenile courts]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁷⁴ The Court declined, however, to rule on the general constitutionality of depriving youths of certain due process protections in return for the juvenile courts' focus on individualized treatment.⁷⁵ Instead, the Court narrowed its opinion to holding that in order for a waiver of juvenile court jurisdiction to be valid, the juvenile must be given a hearing, his counsel must be given access to information held by the court regarding his client, and the juvenile court judge must provide a written explanation of his waiver decision.⁷⁶

Commentators suggest that the most significant acknowledgment that the juvenile court had failed to live up to the "rehabilitative ideal" was issued by the United States Supreme Court the following year,⁷⁷ in *In re Gault*.⁷⁸ In *Gault*, the Court held that the Due Process Clause of the Fourteenth Amendment entitles youths in delinquency proceedings to many of the constitutional rights guaranteed to adults.⁷⁹ The juvenile court found the fifteen-year-old defendant delinquent and sent him to a reform school until his twenty-first birthday.⁸⁰ The Su-

⁶⁹ *Id.* at 550. The defendant was acquitted on the rape charges by reason of insanity. *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 552. The defendant argued several grounds for reversal, including constitutional violations, but the Court expressly limited its holding to the issue of invalid waiver. *Id.* at 551, 552.

⁷² *Id.* at 555, 557.

⁷³ *Kent*, 383 U.S. at 555-56.

⁷⁴ *Id.* at 556.

⁷⁵ *Id.* at 556, 557.

⁷⁶ *Id.* at 557.

⁷⁷ See Skibinski, *supra* note 8, at 45, 48.

⁷⁸ 87 U.S. 1 (1967).

⁷⁹ *Id.* at 33, 41, 55, 57.

⁸⁰ *Id.* at 7.

preme Court reasoned that the defendant's juvenile status could not justify the summary process used by the juvenile court to arrive at this disposition.⁸¹ Instead, the Court concluded that juveniles are entitled to notice of the charges against them, a right to counsel, a right to confrontation and cross-examination, and a privilege against self-incrimination.⁸²

The *Gault* Court recognized that a delinquency finding is criminal in nature, insofar as its consequences are comparable to those of criminal proceedings.⁸³ Additionally, it observed that although the juvenile court is based upon a premise that rigorous procedural rights are not required due to its benevolent, rehabilitative function, the juvenile court had clearly not been able to provide the careful, individualized treatment promised to its wards.⁸⁴ Consequently, the Court reasoned that the only difference actually realized between juvenile and adult proceedings was that the procedural safeguards available to adults were not provided for minors.⁸⁵ Thus, the Court found that the mere fact of the defendant's juvenile status could not justify depriving him of his basic constitutional protections.⁸⁶

Using *Gault* as a foundation, the United States Supreme Court, in the 1970s, continued to expand constitutional protections for youths based on its perception of the juvenile justice system's unfulfilled promises.⁸⁷ For example, in 1970, in *In re Winship*, the Court held that in delinquency proceedings, the Constitution requires that the standard be one of proof beyond a reasonable doubt, rather than merely a

⁸¹ See *id.* at 29.

⁸² *Id.* at 33, 41, 55, 57. In dicta, the Court implied that juveniles might also have a basis for claiming a right to a transcript of the proceedings, and a right to appellate review. *Id.* at 58.

⁸³ 387 U.S. at 36. The *Kent* Court said that juvenile proceedings are intended to be civil in nature. 383 U.S. 541, 554.

⁸⁴ *Id.* at 15, 17-18, 18 n.23. The Court quoted the Chairman of the Pennsylvania Council of Juvenile Court Judges: "Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process." *Id.* at 19.

⁸⁵ *Id.* at 28-29. The Court found it illustrative that had the defendant been convicted in an adult court for his offense, the maximum penalty would have amounted to only a \$50 fine or two months in jail. *Id.* at 29. Although the Court did not rule as to whether the due process rights owed to children are the same as those accorded to adults, it reasoned that providing basic protections would not detract from any substantive benefits sought to be conferred upon youths by the juvenile courts. *Id.* at 21, 27.

⁸⁶ *Id.* at 28, 33, 41, 55, 57.

⁸⁷ See, e.g., *In re Winship*, 397 U.S. 358, 365-66 (1970) (asserting that "good intentions" of juvenile justice do not obviate need for Due Process protections); *Breed v. Jones*, 421 U.S. 519, 528 (1975) (recognizing that "there is a gap between the originally benign conception of the system and its realities").

preponderance of the evidence.⁸⁸ In *Winship*, the trial court used a preponderance of the evidence standard to convict the defendant, a twelve-year-old boy, of stealing money from a woman's pocketbook that he found in a locker.⁸⁹ The Court reasoned that a delinquency adjudication may deprive a child of his or her liberty for many years, just as in the case of a felony prosecution of an adult.⁹⁰ Moreover, the Court recognized that the purportedly non-punitive, rehabilitative goals of the juvenile justice system could not guarantee youths protection consonant with this threat.⁹¹ The Court concluded, therefore, that notwithstanding the "good intentions" of the juvenile justice system, a child cannot be found delinquent absent proof beyond a reasonable doubt.⁹²

The United States Supreme Court again expanded juvenile rights in 1975, in *Breed v. Jones*. The *Breed* Court held that the double jeopardy principle applies to juveniles as well as to adults.⁹³ A juvenile court found the defendant in *Breed* delinquent for committing armed robbery.⁹⁴ Subsequently, the juvenile court transferred the defendant to a criminal court which convicted him of the same crime, though as an adult.⁹⁵ Following the logic of *Gault* and *Winship*, the *Breed* Court reasoned that the shortcomings of the juvenile justice system demanded a response providing juveniles with the constitutional protections previously granted only to defendants in the criminal courts.⁹⁶ Hence, the Court held that a criminal court prosecution of a juvenile subsequent to a juvenile court trial on the same charge violates the Double Jeopardy Clause of the Constitution.⁹⁷

Scholars assert that *Gault* and its progeny effected more than the granting of procedural protections to youths in the juvenile court.⁹⁸

⁸⁸ 397 U.S. at 368.

⁸⁹ *Id.* at 360.

⁹⁰ *Id.* at 366.

⁹¹ *Id.* at 365-66.

⁹² *Id.* at 365-66, 368.

⁹³ *Breed v. Jones*, 421 U.S. 519, 541 (1975). The Double Jeopardy Clause protects criminal defendants from multiple trials and convictions on the same charge. *Id.* at 532.

⁹⁴ *Id.* at 521, 522.

⁹⁵ *Id.* at 525.

⁹⁶ *Id.* at 528-29.

⁹⁷ *Id.* at 541.

⁹⁸ See, e.g., Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 161 (1984) (asserting that these cases effected a movement in the juvenile courts toward the ideology of the criminal courts); Gardner, *supra* note 7, at 134 ("*Gault*, *Winship*, and *Breed* significantly call into question the rehabilitative pedigree of juvenile justice."); ELLEN RYERSON, *THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 150 (1978) (observing United States Supreme Court's recognition of juvenile courts' failure to live up to rehabilitative ideal).

Specifically, these cases articulate that the juvenile justice system, although founded on rehabilitative ideals, is actually punitive in practice.⁹⁹ Moreover, some commentators suggest that there may be an emerging willingness by the United States Supreme Court, as illustrated in 1984 in *Schall v. Martin*, to accept the arguably punitive treatment of youths in the juvenile justice system.¹⁰⁰

In *Schall*, the Court held that the pretrial detention of youths accused of committing crimes is not punitive in nature, and represents a legitimate means of protecting youths and protecting society from those youths.¹⁰¹ *Schall* involved a class action suit brought by three youths incarcerated prior to trial under the provisions of the New York Family Court Act.¹⁰² The Court reasoned that the importance of crime prevention outweighed the statute's potentially punitive effects, especially in light of the high rate of recidivism among juveniles.¹⁰³ Hence, the Court held that the pretrial detention provisions were constitutional.¹⁰⁴

The *Schall* opinion considers the cases of three fourteen-year-old youths: Gregory Martin, Luis Rosario and Kenneth Morgan.¹⁰⁵ Martin was held fifteen days under the pretrial detention statute.¹⁰⁶ Rosario, with three prior delinquency petitions on his record, was apparently held in pretrial detention for twenty days.¹⁰⁷ Morgan, who had been

⁹⁹ *Breed v. Jones*, 421 U.S. at 528; *In re Winship*, 397 U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 27, 49-50 (1967); Feld, *supra* note 98, at 161.

¹⁰⁰ Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199, 200, 209 (1992); see also Krisberg, *supra* note 23, at 50 (asserting that *Schall v. Martin* heralded more conservative approach by Supreme Court regarding children's rights).

¹⁰¹ *Schall v. Martin*, 467 U.S. at 268, 271. Justice Rehnquist stated for the Court, "We cannot conclude from this record that . . . pretrial detention 'is imposed for the purpose of punishment' rather than as 'an incident of some other legitimate governmental purpose.'" *Id.* at 271 (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)).

¹⁰² *Id.* at 258, 259, 260-61. The class consisted of thirty-four juveniles being held in detention awaiting trial at the time of filing. *Id.* at 261.

¹⁰³ *Id.* at 264-65.

¹⁰⁴ *Id.* at 281.

¹⁰⁵ *Id.* at 258, 259.

¹⁰⁶ *Schall*, 467 U.S. at 259. Martin was arrested for robbery, assault and criminal possession of a weapon, after a late-night incident during which he and two friends hit a youth on the head with a loaded gun and stole his jacket and sneakers. *Id.* at 257.

¹⁰⁷ *Id.* at 259-60. Rosario was detained under the statute pending trial for the robbery and assault of two men: Rosario and four others allegedly put a gun to the head of one man, and beat both men about the head with sticks. *Id.* at 259. The maximum period of detention under the New York statute is seventeen days. *Id.* at 270. Justice Rehnquist's opinion states the total number of days over which Martin and Morgan were held: fifteen and eight days, respectively; but in the case of Rosario, the opinion merely recites that probable cause for pretrial detention was found on March 20, and that on April 11, Rosario was released to his father. *Id.* at 259-60.

arrested on four previous occasions, was detained for eight days.¹⁰⁸ Martin filed a *habeas corpus* class action on behalf of the three youths, seeking a declaratory judgment that pretrial detention of minors under the New York statute violated the Due Process Clause of the Fourteenth Amendment.¹⁰⁹ The District Court for the Southern District of New York agreed with the petitioners, and the United States Court of Appeals for the Second Circuit affirmed.¹¹⁰

The Supreme Court granted certiorari and reversed.¹¹¹ The Court reasoned that the prevention of crime is a weighty social objective which "persists undiluted" in the juvenile context, particularly in light of the high rate of recidivism among juveniles.¹¹² The Court also noted that every state allowed some form of pretrial detention of juveniles.¹¹³ Additionally, the Court reasoned that there was no express intent to punish on the part of the State, and that the provisions of the statute permitting a maximum pretrial detention of seventeen days were not excessive in relation to its public safety objective.¹¹⁴ Thus, the Court held that the New York statute providing for pretrial detention of juveniles was a legitimate exercise of state power through the juvenile court.¹¹⁵

In summary, that the juvenile court was originally founded upon non-punitive, rehabilitative notions is well recognized.¹¹⁶ But in the view of the United States Supreme Court this pedigree may amount to only so much history.¹¹⁷ Indeed, the Court clearly opines in *Kent*, *Gault*, *Winship* and *Breed* that the "rehabilitative ideal" has not been real-

Hence, it seems that Rosario was held for twenty days, a period longer than the statutory allowance. *See id.*

¹⁰⁸ *Id.* at 260. Morgan was arrested for robbery and grand larceny for trying to rob a fourteen-year-old girl and her brother by threatening to blow their heads off. *Id.*

¹⁰⁹ *Id.* at 260-61.

¹¹⁰ *Id.* at 261, 262. The District Court felt that the trial record was "replete" with examples of arbitrary and capricious detentions committed pursuant to the statute, and concluded that preventative detention in this situation amounted to punishment without a finding of guilt. *Id.* at 262 n.12. Likewise, the Court of Appeals concluded that the true purpose of the pretrial detention allowed by the statute was punitive, and not regulatory in nature. *Id.* at 271.

¹¹¹ *Schall*, 467 U.S. at 281.

¹¹² *Id.* at 264, 265.

¹¹³ *Id.* at 266-67.

¹¹⁴ *Id.* at 264, 269.

¹¹⁵ *Id.* at 281.

¹¹⁶ *See, e.g.,* *Breed v. Jones*, 421 U.S. 519, 528, 529 (1975); *In re Winship*, 397 U.S. 358, 365 (1970); *In re Gault*, 387 U.S. 1, 15 (1967); *Kent v. United States*, 383 U.S. 541, 555-56 (1966); Gardner, *supra* note 7, at 130; Skibinski, *supra* note 8, at 44-45; Fox, *supra* note 14, at 1-2.

¹¹⁷ *Kent*, 383 U.S. at 555-56; *Gault*, 387 U.S. at 17-18; *Winship*, 397 U.S. at 365; *Breed*, 421 U.S. at 528.

ized.¹¹⁸ As these decisions illustrate, the Court's response has been to arm juveniles with Constitutional protections previously unavailable to them, as a means of combating the potential punitive effects of the juvenile justice system.¹¹⁹ Scholars suggest, however, that *Schall* may mark an attitude shift.¹²⁰ Writing for the Court in *Schall*, Justice Rehnquist asserted that the goal of protecting society justifies the conservative reaction embodied by pretrial detention of juveniles, even though detention may later be found to be unwarranted.¹²¹ Thus, scholars have interpreted *Schall* as signaling a less progressive approach to handling juveniles than the stance previously assumed by the Court in *Gault*, *Winship*, and *Breed*.¹²² Additionally, the Court's reaction seems to mirror the pervasive attitude of the public, which is, understandably, experiencing an increasing sense of vulnerability and fear.¹²³

III. THE JUVENILE GUN CULTURE AND DEMANDS FOR ACTION

From the folds of the morning paper, reasons for fear come in colors.¹²⁴ Moreover, according to recent statistics, the picture painted by the media is fairly accurate.¹²⁵ Specifically, the 1980s yielded a seventy-nine percent increase in the number of juveniles who committed murders with guns.¹²⁶ Between 1987 and 1991 alone, the number arrested for murders involving guns rose eighty-five percent.¹²⁷ Similarly, the number of juveniles convicted for all violent crimes increased by fifty percent during the same period.¹²⁸

¹¹⁸ *Breed*, 421 U.S. at 528; *Winship*, 397 U.S. at 365; *Gault*, 387 U.S. at 17-18; *Kent*, 383 U.S. at 555-56.

¹¹⁹ *Breed*, 421 U.S. at 541; *Winship*, 397 U.S. at 368; *Gault*, 387 U.S. at 33, 41, 55, 57.

¹²⁰ See *supra* note 100 and accompanying text.

¹²¹ See *Schall v. Martin*, 467 U.S. 253, 273 (1984) (adopting this proposition from language used by New York Court of Appeals).

¹²² See *supra* note 100 and accompanying text.

¹²³ See, e.g., Skibinski, *supra* note 8, at 43-44, 45-46.

¹²⁴ See, e.g., Freemantle, *supra* note 8, at A1; Henderson, *supra* note 7, at B3; Ratcliffe, *supra* note 7, at 1; May, *supra* note 8, at 1A.

¹²⁵ See, e.g., 140 CONG. REC. S742 (daily ed. Jan. 25, 1994) (incorporating into Congressional Record a four-part series written by Des Moines Register on juvenile crime).

¹²⁶ Sen. Carol Moseley-Braun & Laura Lee, *Juvenile Justice: Should 13-Year-Olds Who Commit Crimes With Firearms Be Tried As Adults?*, A.B.A. J., Mar. 1994, at 46. (from Sen. Moseley-Braun's article debating how to address juvenile violence).

¹²⁷ 139 CONG. REC. S15,019 (daily ed. Nov. 4, 1993) (statement of Sen. Byrd from West Virginia) (this compares to an increase of only twenty-one percent among individuals over eighteen years of age). Additionally, the FBI reports that juvenile arrests for murder, robbery and assault increased by fifty percent from 1988 to 1992. Toch, *supra* note 1, at 34.

¹²⁸ 139 CONG. REC. S15,019 (daily ed. Nov. 4, 1993) (statement of Sen. Byrd of West Virginia).

In schools, where America's children spend the greater part of their days, an estimated 270,000 guns accompany youths to class daily.¹²⁹ In fact, a recent survey conducted by the University of Michigan indicates that nine percent of eighth graders reportedly choose a gun, knife or club to bring to school at least once a month.¹³⁰ As one commentator noted, although children once settled disputes with their fists, youths today are settling them with bullets.¹³¹ Indeed, at least forty-five school systems—including elementary schools—now use metal detectors to screen incoming students.¹³² Moreover, inner city schools have appended "drive-by-shooting drills" to their traditional fire drills in order to cope more effectively with the recent rise in urban juvenile warfare.¹³³ All told, more than three million crimes a year are committed in or near America's 85,000 public schools.¹³⁴

When the afternoon bell rings, the violence only escalates. Americans during the period from 1960 to 1981 witnessed a nearly 250% increase in juvenile arrests for violent crime.¹³⁵ Youth firearm murders reportedly increased by ninety-seven percent from 1984 to 1987 alone.¹³⁶ The FBI reports that juvenile arrests for murder, robbery and assault increased by fifty percent from 1988 to 1992.¹³⁷ Today, although juveniles represent less than fourteen percent of the population in this country, they account for nearly twenty-five percent of individuals arrested for major violent crimes such as homicide, rape, robbery and felonious assault.¹³⁸

In 1991, 122,000 juveniles were arrested for violent crimes, the largest number in U.S. history. *Id.* For purposes of these statistics, "violent crimes" include murder, forcible rape, armed robbery and aggravated assault. *Id.*

¹²⁹Toch, *supra* note 1, at 31. During the 1991-1992 school year, 1,403 weapons were confiscated in the Los Angeles unified School District, a twenty-seven percent increase over the previous year. Daniel B. Wood, *Growing Violence by Youths Leads to a National Debate Over School-Safety Measures*, CHRISTIAN. SCI. MONITOR., Jan. 29, 1993, at 1, 4. Of those weapons, 373 were guns, thirty-three of which were confiscated in elementary schools. *Id.*

¹³⁰Toch, *supra* note 1, at 35 (citing University of Michigan survey).

¹³¹140 CONG. REC. S742 (daily ed. Jan. 25, 1994) (quoting Hon. George Stigler, a judge in Iowa).

¹³²Toch, *supra* note 1, at 34-35.

¹³³*Id.* at 32.

¹³⁴*Id.* at 31. It has been estimated that 282,000 students and 5,200 teachers are physically attacked each month. Gardner, *supra* note 7, at 140.

¹³⁵Gardner, *supra* note 7, at 140. This increase in juvenile arrests was more than twice that for adults during the same period. *Id.*

¹³⁶See *Youth Homicide and School Violence at Record Levels, New Center Research Shows*, HANDGUN CONTROL SEMI-ANNUAL PROGRESS REPORT (Handgun Control, Inc., Washington, D.C.), Jan. 1991, at 6.

¹³⁷Toch, *supra* note 1, at 34.

¹³⁸Gardner, *supra* note 7, at 140.

In urban and rural areas across the country, society is perceiving the increasingly violent nature of juvenile crime.¹³⁹ Everywhere, people are trying to come to grips with the emergence of a youth culture with little regard for human life.¹⁴⁰ Indeed, the increasing use of firearms in acts of juvenile violence has caused a pronounced upsurge in fear.¹⁴¹ Small business owners fear that they may be robbed at any moment.¹⁴² Parents fear that their children may be shot at school.¹⁴³ Entire communities live in the shadow of unremitting, random acts of youth violence.¹⁴⁴

Moreover, the high rates of recidivism experienced by juvenile correction programs can only serve to exacerbate the public's anxi-

¹³⁹ See, e.g., 139 CONG. REC. S14,938 (daily ed. Nov. 3, 1993) (statement of Sen. Lott); Ira M. Schwartz, et al., *Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy*, 13 HAMLINE L. REV. 241, 249 (1991). In a nationally conducted scientific poll, eighty-two percent of those surveyed believed that juvenile crime had increased in their respective states during the last three years. *Id.* Of those surveyed, sixty-two percent felt that the increase was substantial. *Id.*; see also John King, *Violence: Many Lawmakers Rethink Views on Firearm Restrictions*, L.A. TIMES, Oct. 24, 1993, at A10; Jodi Mailander, *Parents Toughen Juvenile Penalties*, MIAMI HERALD, Oct. 7, 1993, (Local), at 2B; May, *supra* note 8, at 1A; Oppel, *supra* note 9, at 1J.

¹⁴⁰ 140 CONG. REC. S742 (daily ed. Jan. 25, 1994) (commenting on cold-blooded and remorseless character of violent juvenile crime); JOSEPH F. SHELEY & JAMES D. WRIGHT, GUN ACQUISITION AND POSSESSION IN SELECTED SAMPLES, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEPT. OF JUSTICE 10 (1993) (researchers were struck less by the juveniles' ability to obtain firearms than by their apparent willingness to pull the trigger). The Department of Justice study is based on a 1991 survey of 758 young men in schools and 835 in correctional facilities in California, New Jersey, Louisiana and Illinois. SHELEY & WRIGHT, *supra*, at 1. The authors warn that the results obtained are technically not generalizable because the study focused on serious juvenile offenders and students from schools in high-risk areas. *Id.* at 3; see also Curtis Krueger, *Judge in Rage Over Juvenile Justice*, ST. PETERSBURG TIMES, Nov. 24, 1993, (Tampa Bay and State), at 4B (defendant youth in juvenile court threatened to shoot judge); Mailander, *supra* note 139, at 2B (citing murder of British tourist in North Florida by group of juveniles, and slaying of homeless man in Miami by thirteen-year-old boy).

¹⁴¹ See, e.g., SHELEY & WRIGHT, *supra* note 140, at 2; Barstow, *supra* note 6, at 1B; Freemantle, *supra* note 8, at A1 (Dr. James Wright, one of the nation's authorities on guns and criminals, asserts that climate for gun control is more favorable now than ever before in American history: "People have had it."); Krauss, *supra* note 8, at A1 (99 to 1 vote to enact juvenile handgun possession ban in Senate was affirmation of growing fears of juvenile violence); May, *supra* note 8, at 1A; Roy Romer, *If You're Under 18, Hand Over That Gun*, DETROIT FREE PRESS, Nov. 2, 1993, (EDP), at 11A (Governor of Colorado explains reasons for new juvenile gun possession ban). According to Tim Moore, head of Florida's Department of Law Enforcement, people are "frightened and we need to take some drastic measures quickly." May, *supra* note 8, at 1A.

¹⁴² Barstow, *supra* note 6, at 1B (owner of the Handy Corner Food Store in Baskins, Florida, carries a gun in his waistband).

¹⁴³ See Mailander, *supra* note 139, at 2B; see also Toch, *supra* note 1, at 32.

¹⁴⁴ See *supra* note 140 and accompanying text; see also, Jerry Buckley, *The Tragedy in Room 108: An Angry Teen Killed His Teacher and Forever Changed a Kentucky Town*, U.S. NEWS & WORLD REP., Nov. 8, 1993, at 41.

ety.¹⁴⁵ A recent federal study of juvenile courts concluded that less than one-third of the juveniles accused of violent acts actually remain in custody; and even those who are enrolled in the best rehabilitation programs available are likely to resume their criminal paths.¹⁴⁶ One estimate places the typical juvenile recidivism rate at seventy percent or higher.¹⁴⁷ A direct consequence of this may be, as one scholar suggests, a heightened disillusionment with the juvenile justice system in general.¹⁴⁸

As society's fear of juvenile violence grows, its willingness to embrace a punitive juvenile justice agenda grows with it.¹⁴⁹ Indeed, studies have demonstrated that an overwhelming majority of society would support tough criminal penalties for juveniles as a means of making the streets safe again.¹⁵⁰ Thus, the historically rehabilitative underpinnings of the juvenile justice system seem ready to give way to a new philosophy incorporating punishment as the central mode of deterrence.¹⁵¹

As many political figures have noted, one thing is certain: the public's fear of the rise in juvenile violence must be addressed.¹⁵² The principle issue, however, is how this will be done.¹⁵³ Commentators have recognized that society's increasing willingness to adopt a punitive stance has already played an important role in the shaping of things

¹⁴⁵ See *Schall v. Martin*, 467 U.S. 253, 265 (1984); Gardner, *supra* note 7, at 136; Toch, *supra* note 1, at 37.

¹⁴⁶ See Toch, *supra* note 1, at 37. Those who do not remain in custody are put on probation or set free. *Id.* An estimated three percent are waived to adult court for trial. *Id.*

¹⁴⁷ See Toch, *supra* note 1, at 37.

¹⁴⁸ Gardner, *supra* note 7, at 136. Martin Gardner suggests that the failure of rehabilitative theory created a conceptual void, clearing the way for punitive theory to take its place. *Id.*

¹⁴⁹ See 140 CONG. REC. S742 (daily ed. Jan. 25, 1994) (asserting that the American people now support mandatory minimum sentences); Schwartz, *supra* note 139, at 251. The authors' study has shown that the fear of being the victim of violent crime is closely related to punitive attitudes toward juvenile offenders. *Id.*

¹⁵⁰ Schwartz, *supra* note 139, at 258 (discussing authors' study as well as previous studies that establish link between public fear and willingness to accept punitive measures for deterring juvenile crime).

¹⁵¹ Gardner, *supra* note 7, at 131-32. "[A] revolution in substantive theory is presently taking place as one jurisdiction after another expresses disenchantment with the rehabilitative ideal and embraces explicitly punitive sanctions as appropriate for youthful offenders." *Id.*

¹⁵² See, e.g., 139 CONG. REC. S14,938 (daily ed. Nov. 3, 1993) (statement of Sen. Lott from Mississippi). As Senator Herbert H. Kohl put it: "Violent crime in America is not just escalating, it has exploded. From our inner cities to our rural communities it is all the same. A world of threats and brutality and death. Our citizens are tired of living in fear and they want Congress to do something about it." Karen J. Cohen, *Feingold One of Four Rejecting Crime Bill*, STATES NEWS SERVICE, Nov. 19, 1993.

¹⁵³ 139 CONG. REC. S14,938 (daily ed. Nov. 3, 1993) (statement of Sen. Lott from Mississippi); Moseley-Braun, *supra* note 126, at 46-47 (debate over how to address juvenile crime problem).

to come.¹⁵⁴ Indeed, this notion has been manifesting itself in recent actions by various state legislatures, particularly in the area central to the most disturbing statistics—gun control.¹⁵⁵

IV. ADDRESSING SOCIETY'S FEARS: A PUBLIC SAFETY RESPONSE TO JUVENILE VIOLENCE

Central to the growing fear of juvenile violence is the gun control problem.¹⁵⁶ In particular, there is an ample supply of firearms available through legal and illegal means from which to satisfy an increasing demand by juveniles for guns.¹⁵⁷ Consequently, as the modern romance between youths and guns escalates, a widespread concern for public safety now dominates the gun control debate.¹⁵⁸ The state legislatures have reflected this theme through the enactment of laws which address both the supply and demand sides of the gun control equation.¹⁵⁹ Thus, these laws may be grouped into two categories: (1) provisions which prohibit gun sales to youths, or which discourage legal owners of guns from allowing youths access to them; and (2) provisions which prohibit juveniles from possessing guns under penalty of law.¹⁶⁰

A. *Targeting Supply: An Overview of State Legislative Reactions*

The first group of laws attempts to curb the supply of guns to juveniles.¹⁶¹ State legislatures have typically employed two principle

¹⁵⁴ See, e.g., Freemantle, *supra* note 8, at A1 (shift in public attitudes made firearm ban possible in Arizona); Romer, *supra* note 141, at 11A (frightened Colorado citizens provided impetus for new juvenile gun possession ban).

¹⁵⁵ See *supra* note 154 and accompanying text.

¹⁵⁶ Romer, *supra* note 141, at 11A.

¹⁵⁷ SHELEY & WRIGHT, *supra* note 140, at 10.

¹⁵⁸ Freemantle, *supra* note 8, at A1 (noting that National Rifle Association's Bill of Rights stance has been rejected by Arizona Legislature). Roy Romer, Governor of Colorado, expressed the reasons for Colorado's new youth handgun possession ban in public safety terms: "For the sake of our children and our neighborhoods, we had to at least try to get handguns out of the hands of teenagers." Romer, *supra* note 141, at 11A.

¹⁵⁹ See, e.g., COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database) (possession of handgun by minor is illegal); § 18-12-108.7 (selling a handgun or recklessly allowing juvenile to possess a handgun is class four felony punishable by two to eight years imprisonment plus a \$2000 to \$5000 fine under § 18-1-105); 1993 Fla. Sess. Law Serv. 790.17(2)(A) (LEXIS, Codes Library, Fcode File) (transfer or sale of firearm to youth under eighteen is felony); 790.22(5)(2)(A) (possession of firearm by minor is illegal).

¹⁶⁰ See, e.g., COLO. REV. STAT. § 18-12-108.7; 1993 Fla. Sess. Law Serv. 790.17. For the purposes of this Note, discussion will be limited to the recent measures taken to prohibit youths from possessing guns once the supply has provided them with the opportunity for possession. See *infra* Table for complete citations and brief synopses of statutes prohibiting minors from possessing handguns or other firearms.

¹⁶¹ See, e.g., COLO. REV. STAT. § 18-12-108.7 (selling a handgun or recklessly allowing juvenile

methods of accomplishing this goal.¹⁶² The first involves measures prohibiting the sale of guns to juveniles, and the second provides harsh criminal penalties for those who intentionally or negligently allow juveniles access to firearms.¹⁶³ Both seek to end the acquisition by juveniles of guns easily accessible in the home, or in the home of a friend; or through the help of an older, more experienced acquaintance who can purchase a firearm for them through legal channels or on the street.¹⁶⁴ The findings of a recent study by the Department of Justice, however, indicate that such measures are unlikely to erect serious obstacles to violent youths seeking firearms.¹⁶⁵

In particular, the Department of Justice reports that forty-one percent of the male students interviewed in inner-city schools asserted that they would have no trouble getting a gun.¹⁶⁶ Likewise, of the incarcerated male juvenile offenders surveyed, seventy percent believed they would have no trouble obtaining another gun once they were freed.¹⁶⁷ Although many of the guns obtained by these urban youths are purchased through legitimate channels, many derive from untraceable sales or trades on the street, or from the robbing of legal gun owners or through other illegal channels.¹⁶⁸ Indeed, the Justice Department has recognized that the approximately seventy-two million handguns legitimately possessed by private owners in this country

to possess a handgun is class four felony); 1993 Fla. Sess. Law Serv. 790.17 (transfer or sale of firearm to youth under eighteen is felony).

¹⁶² See *supra* note 159 and accompanying text.

¹⁶³ See *supra* note 159 and accompanying text.

¹⁶⁴ See, e.g., 1993 Fla. Sess. Law Serv. 790.17, 790.18, 790.22. Recently enacting measures allowing fines or imprisonment of parents and other adults who allow guns into the hands of youths, the Florida legislature stated, "it is the will of the Legislature and all Floridians that parental . . . accountability, and responsibility become the key to solving our existing broken juvenile criminal justice system." *Id.* (Preamble to Committee Substitute for House Bill No. 91-C). Indeed, a recent study by the Department of Justice found that there were guns in the homes of sixty-nine percent of the students surveyed. SHELEY & WRIGHT, *supra* note 140, at 4. Additionally, forty-two percent of those surveyed attested to having friends who regularly carried guns. *Id.* at 4.

¹⁶⁵ SHELEY & WRIGHT, *supra* note 140, at 6, 10 (assessing the modern youth gun culture); see also H.R. REP. NO. 389, 103d Cong., 1st Sess. 1 (1993). In its recommendation to the House of Representatives to pass a law prohibiting possession of handguns by minors, the Committee on the Judiciary found that: "Firearms and ammunition, and handguns in particular, move easily in interstate commerce, as documented in numerous hearings. . . ." *Id.*

¹⁶⁶ SHELEY & WRIGHT, *supra* note 140, at 5-6. Another twenty-four percent said they would only experience a little trouble. *Id.* at 6.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.* at 6. A 1986 study estimates that only one out of six male handgun owners obtained their most recent handgun through legal means. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 185 (1986). Sheley & Wright conclude that controls imposed at the point of retail sales would be largely ineffective by themselves, because violent juveniles rarely obtain their guns through such customary channels. SHELEY & WRIGHT, *supra* note 140 at 10.

represent a huge pool from which juvenile demand may be satisfied.¹⁶⁹ Likewise, the black market in firearms assures that an urban youth with the desire for virtually any variety of firearm need only get in touch with the right person and pay the right price.¹⁷⁰ Thus, it appears that firearms will continue to be readily available to youths, despite the state enactments directed at prohibiting that access.¹⁷¹

Scholars suggest that the only definitive solution to juvenile gun possession and use lies in convincing youths that they do not want guns.¹⁷² Conceivably, this could be effected through some form of social counseling and education, or through the coercive power of the law, by establishing penalties for gun possession designed to quell the juvenile demand for guns.¹⁷³ Many states, however, have chosen to address the problem by attacking the demand by juveniles for guns.¹⁷⁴ This approach is illustrated by the second group of laws, those comprised of statutes prohibiting minors from possessing guns and providing tough penalties for violations.¹⁷⁵

¹⁶⁹ *Id.* at 10.

¹⁷⁰ David C. Anderson, *Street Guns: A Consumer Guide*, N.Y. TIMES, Feb. 14, 1993, (Magazine), at 20. The author illustrates the astounding array of weapons available on the illegal market, ranging from "street sweepers" (rapid-firing shotguns), to "Saturday night specials." *Id.* at 20-23. According to the author, the guns are accessible to nearly everyone due to their low price. *Id.* at 22.

¹⁷¹ SHELEY & WRIGHT, *supra* note 140 at 6, 10.

¹⁷² *Id.* at 10. After concluding that most of the at-risk youths surveyed believe that they need guns for protection, Sheley and Wright suggest that "[t]he problem is less one of getting guns out of the hands of juveniles and more one of reducing motivations (for the sample, primary self-preservation) for youth to arm themselves in the first place." *Id.* at 7, 10.

¹⁷³ *See id.* at 10; *supra* note 160 and accompanying text.

¹⁷⁴ *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993); COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database); 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Codes Library, Flcode File). The preamble to the legislative bill enacted into law recently in Florida, banning the possession of firearms by minors, states the reasons for Florida's action:

Whereas, the love affair between juveniles and firearms has reached an all time high here in Florida, and Whereas, the courts, the Legislature, and law enforcement cannot be the sole solution to stem our rising juvenile crime statistics, and Whereas, it is the will of the Legislature and all Floridians that parental involvement, accountability, and responsibility become the key to solving our existing *broken juvenile justice system*, and Whereas, it is the will of Floridians all across this great state of ours that juveniles who violate laws pertaining to the illegal use of firearms be dealt with in a *swift and certain and severe manner*. . . ."

Fla. H.B. 91-C (Preamble to Committee Substitute for House Bill no. 91-C) (enacted) (LEXIS, Legis Library, Sttext File) (emphasis added).

¹⁷⁵ *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993); COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database); 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Codes Library, Flcode File).

B. Targeting Demand: State Prohibitions of Gun Possession by Juveniles

1. The Movement Toward State Firearm Possession Bans

To date, twenty states have enacted statutes prohibiting minors as a class from possessing handguns and other firearms and dangerous weapons,¹⁷⁶ six of them within the past year alone.¹⁷⁷ Political figures cite the fearsome character and unremitting persistence of violent juvenile crime as the driving force behind these enactments.¹⁷⁸ It is therefore not surprising that, as noted by the state legislatures in the acts themselves, these laws are being enacted specifically as public safety measures,¹⁷⁹ often in response to recent, well-publicized crimes by juveniles.¹⁸⁰ Florida, for example, took legislative action after four teenagers allegedly shot a British tourist at a North Florida highway rest stop.¹⁸¹ Likewise, the Colorado legislature acted in the aftermath of the wounding of a six-year-old Denver youth from a drive-by shooting, and following a year in which a fourteen-year-old was shot by another youth for his Colorado Rockies jacket, and a sixteen-year-old was killed for his Denver Broncos jacket.¹⁸² Commentators suggest that

¹⁷⁶ See ALASKA STAT. § 11.61.220 (Supp. Oct. 1993); ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993); ARK. CODE ANN. § 5-73-119 (Michie 1993); CAL. PENAL CODE § 12101 (West 1992); COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database) (see §§19-2-703, 708 for source of penalties beyond mandatory five day detention); 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Codes Library, Fcode File); MINN. STAT. ANN. § 97B.021 (West 1987); NEB. REV. STAT. § 28-1204 (1989); NEV. REV. STAT. ANN. § 202.300 (Michie 1986); N.J. REV. STAT. ANN. § 2C:58-6.1 (West 1982); N.Y. PENAL LAW § 265.05 (McKinney 1989); N.C. GEN. STAT. § 14-269.7 (1993); N.D. CENT. CODE § 62.1-02-01 (Supp. 1993); OR. REV. STAT. § 166.250 (1990); R.I. GEN. LAWS § 11-47-33 (1981); UTAH CODE ANN. § 76-10-509 (Supp. Jan. 1994); VT. STAT. ANN. tit. 13, § 4008 (1974); VA. CODE ANN. § 18.2-308.7 (Michie Supp. 1993); W. VA. CODE § 61-7-8 (1992); WIS. STAT. ANN. § 948.60 (West Supp. 1993). See *infra* Table for a summary of each of the firearm possession bans and their associated penalties.

¹⁷⁷ ARIZ. REV. STAT. ANN. § 13-3111; COLO. REV. STAT. § 18-12-108.5(1)(a); 1993 Fla. Sess. Law Serv. 790.22; N.C. GEN. STAT. § 14-269.7 (1993); UTAH CODE ANN. § 76-10-509.4 (amending dangerous weapons statute to include handguns and other firearms); VA. CODE ANN. § 18.2-308.7.

¹⁷⁸ See *supra* notes 139-41 and accompanying text.

¹⁷⁹ See *supra* note 158 and accompanying text; see also Colo. H.B. 1001, 59th Gen. Assem., 1st Extraordinary Sess., Section 16 (1993) (WESTLAW, CO-ST-ANN Database) (enacted). The Colorado legislature confirmed that, "The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." *Id.* One scholar argues that with the failure of the *parens patriae* model of juvenile justice, the police power underpinnings of the criminal justice system will find fertile ground in juvenile justice terrain. Gardner, *supra* note 7, at 134.

¹⁸⁰ Barstow, *supra* note 6, at 1B; Hugh Dellios, *West Seeks to Tame Gun Violence Among Young*, CHI. TRIB. Dec., 19, 1993, at 23; May, *supra* note 8, at 1A; Oppel, *supra* note 9, at 1J.

¹⁸¹ Barstow, *supra* note 6, at 1B.

¹⁸² Dellios, *supra* note 181, at 23; May, *supra* note 8, at 1A. In the case of Broderick Bell, the six-year-old Denver youth, "[t]he scenario was right out of a B movie: Girl gang member, veiled

even in Arizona, where it is still legal to walk through the streets with a loaded pistol strapped to the hip, the public's increasing fear of juvenile violence led to the enactment of a juvenile gun possession ban.¹⁸³

The second reason underlying the recent expansion in youth gun possession bans, perhaps inextricably linked to the first, is the legislatures' recognition that the juvenile justice system is not sufficiently addressing violent juvenile crime.¹⁸⁴ For example, the Florida legislature, in enacting a new youth gun possession ban, stated that what is being addressed in this legislation is a "broken juvenile criminal justice system."¹⁸⁵ Indeed, many are calling not just for improved methods of dealing with violent youths, but for "swift and certain and severe" punishment of those youths.¹⁸⁶ Scholars suggest that this reaction is neither new nor restricted to the realm of juveniles carrying guns.¹⁸⁷ But society's increased willingness to supplant the rehabilitative assumptions of traditional juvenile justice theory with punitive methods of deterrence has provided a powerful force behind the move toward enacting the new youth gun possession laws.¹⁸⁸

in a blue bandanna, hanging from a cruising car, squeezing off rounds as part of an initiation. . . . The 9mm slug entered [Broderick's] forehead, lodging at the back of his skull." May, *supra* note 8, at 1A.

¹⁸³ Freemantle, *supra* note 8, at A1 (noting that an anti-possession statute would not have been possible in Arizona only a few years ago). Additionally, in Utah, legislators took action in the wake of two tragedies: first, the fatal shooting of a youth, attending a concert with his girlfriend, at the hands of a gang member; and second, two weeks later, the serious injury of a man by gunfire at the state's annual fair. Oppel, *supra* note 9, at 1J (quoting Salt Lake City mayoral aide Thom Dillon: "It was a shock to the city. These two highly publicized events really brought things home. Everybody goes to the state fair, and people send their kids to concerts.").

¹⁸⁴ See, e.g., *supra* note 174 and accompanying text (Preamble to Committee Substitute for Florida House Bill No. 91-C).

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*; see also 140 CONG. REC. S742 (daily ed. Jan. 25, 1994) (asserting that the American people now support mandatory minimum sentences); Mailander, *supra* note 139, at 2B (parents' group in Florida calls for mandatory imprisonment of juveniles caught with guns); May, *supra* note 8, at 1A (quoting Colorado state Senator Paul Weissman, lamenting insignificance of Colorado's mandatory five-day detention period for juveniles convicted of possessing guns: "For a lot of these kids, doing five days in jail is like gaining a merit badge.").

¹⁸⁷ See Gardner, *supra* note 7, at 137. The author asserts that "[w]here earlier theorists were embarrassed by the fact that punitive sanctions visited suffering upon the offender, the 'renaissance of retribution' in the 1970s and 80s marked an era in which many commentators, legislators, and judges, with wide-ranging political views, came to justify punishment largely *because* it results in suffering." *Id.* (emphasis in original).

¹⁸⁸ See, e.g., *supra* notes 175, 184 and accompanying text.

2. The State of the Art in Juvenile Firearm Possession Prohibitions: Arizona, Florida, and Colorado¹⁸⁹

As the attached Table illustrates, the statutes prohibiting youths from possessing firearms, whether enacted last year or decades ago, are woven with common threads.¹⁹⁰ Although the lowest maximum age provided by a state for application of its gun ban is fourteen, the majority of the bans apply to juveniles under the age of eighteen.¹⁹¹ Likewise, whereas a few of the statutes apply broadly to "dangerous weapons" or narrowly to "handguns," most of the statutes prohibit the possession of "firearms," a classification including handguns, but not all dangerous weapons.¹⁹² Additionally, all of the states provide exceptions or defenses to the bans.¹⁹³ The penalties authorized by the youth gun possession statutes, however, do not bear such uniformity, although they may be classified into three categories: (1) those which provide for an adjudication of juvenile delinquency upon violation; (2) those which classify possession by a juvenile as a misdemeanor or felony; and (3) those which provide specific punishments for the offending youth.¹⁹⁴ Although statutes providing penalties in the first two categories may lead to dispositions associated with findings of juvenile delinquency for an offense which would not be a crime if committed by an adult,¹⁹⁵ these statutes do not mandate specific punitive measures.¹⁹⁶ In contrast, the third category, only recently appearing through legislative actions of Arizona, Florida and Colorado, all of which passed youth gun possession bans during 1993, represents the

¹⁸⁹ See *infra* Table for a summary of the weapons prohibited by the statutes, the ages over which the statutes apply, the exceptions to the bans, as well as a capsulation of the type of penalties provided.

¹⁹⁰ See, e.g., COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database) (enacted in 1993); W. VA. CODE § 61-7-8 (1992) (enacted in 1989); R.I. GEN. LAWS § 11-47-33 (1981) (enacted in 1950).

¹⁹¹ See *infra* Table.

¹⁹² See *infra* Table. Although the statutes differ in their definitions of prohibited types of weapons, "handgun" generally includes pistols, revolvers, and other short-barreled hand-held guns using shot; "firearm" generally includes handguns and other guns; and "dangerous weapon" includes handguns, other firearms, as well as dangerous implements which may include throwing stars, metallic knuckles and the like. See, e.g., WIS. STAT. ANN. § 948.60 (West Supp. 1993) (applying to dangerous weapons); COLO. REV. STAT. § 18-12-108.5(1)(a) (applying to handguns); 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Codes Library, Fcode File) (applying to firearms).

¹⁹³ See *infra* Table.

¹⁹⁴ *Id.*

¹⁹⁵ See Fox, *supra* note 14, at 37-40 (stating that whereas a child normally may be adjudicated "delinquent" for committing an act which would be a crime if committed by an adult, a child may also be found delinquent for committing an offense under a law that applies only to children).

¹⁹⁶ See *infra* Table.

modern trend of providing specific punitive penalties for youths possessing guns.¹⁹⁷

Arizona's statute, for example, prohibits possession of firearms by unemancipated minors under the age of eighteen.¹⁹⁸ For possession of an unloaded firearm, the statute specifically provides that, in addition to penalties provided by other weapons statutes, the juvenile will be fined a maximum of \$250, and for possession of a loaded firearm, a maximum of \$500.¹⁹⁹ Additionally, for loaded or unloaded firearm offenses, the court may order the revocation or suspension of the youth's driver's license.²⁰⁰ Both penalties apply equally to first offenders and subsequent offenders alike, as well as to those youths already endowed with lengthy juvenile court records.²⁰¹

The gun possession prohibition recently enacted in Florida makes possession of a firearm by a youth under the age of eighteen illegal.²⁰² The specific consequences of possessing or using a firearm during the commission of a crime under the new law depend on two factors: (1) whether the offense is a first or subsequent violation; and (2) whether the youth is charged under a Florida law involving possession or use, other than under the new law itself.²⁰³ The penalty for conviction of a first offense of possessing a firearm includes 100 hours of mandatory, supervised community service, and the revocation of the youth's driver's license for up to one year.²⁰⁴ For a subsequent offense, the statute mandates 100 to 250 hours of community service, and driver's license revocation for up to two years.²⁰⁵

¹⁹⁷ *Id.*

¹⁹⁸ ARIZ. REV. STAT. ANN. § 13-3111(A) (Supp. 1993). See *infra* Table for a synopsis of exceptions provided in the Arizona law. Although the legislature makes no particular finding regarding the potentially heightened threat in Arizona's urban areas, the law provides that it is only applicable in the more urbanized counties of Pima and Maricopa. § 13-3111(H). Specifically, the wording of the statute limits its application to counties of 500,000 or more persons, and allows other counties to adopt an ordinance identical to the statute. *Id.*

¹⁹⁹ *Id.* at § 13-3111(D), (G).

²⁰⁰ *Id.* at § 13-3111(D).

²⁰¹ See *id.* at § 13-3111.

²⁰² 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Codes Library, Fcode File). See *infra* Table for a synopsis of exceptions provided in the Florida law.

²⁰³ 1993 Fla. Sess. Law Serv. 790.22(5), (7)-(10). Regardless, the new law states that a minor found guilty of possessing a firearm will be subjected to the specific penalties of the new law in addition to any other penalties provided by other statutes. *Id.* at 790.22(5)(A).

²⁰⁴ 1993 Fla. Sess. Law Serv. 790.22(5). The driving privilege will be revoked if it is currently being exercised, and any current suspension will be extended, for up to one year. *Id.* Likewise, if the offender is too young to drive, or otherwise temporarily ineligible to drive, the court will order the state to withhold issuing a driver's license for a year beyond the time when the offender becomes eligible. *Id.*

²⁰⁵ *Id.* at 790.22(5)(B).

The new legislation provides that law enforcement authorities must detain juveniles charged with possession of a firearm under a separate statute until the preliminary hearing.²⁰⁶ Moreover, if the court finds a child to be a "clear and present danger to himself or the community," it may extend the period of secure detention.²⁰⁷ Furthermore, the new statute states that youths ultimately found to have committed a crime involving a firearm (other than mere possession under the new possession statute), who are not placed in a residential commitment program, must be detained for a mandatory period of five days and perform 100 hours of community service.²⁰⁸ The statute increases the mandatory detention period to ten days upon conviction for a subsequent offense of this nature.²⁰⁹ These mandatory punishments provide the "certain and severe" punishment intended by the Florida Legislature, as illustrated in the preamble to the new legislation, to aid Florida's failing juvenile justice system.²¹⁰ They ensure that if youths committing violent crimes with guns are not sent to rehabilitation facilities, they will at least be incarcerated for a predetermined, definite period.²¹¹

Florida's juvenile gun possession ban was framed in the wake of Colorado's recent enactment, which commentators tout as the high watermark of youth gun possession statutes.²¹² Similar to the Arizona and Florida laws, the Colorado legislation provides that a juvenile under eighteen who possesses a handgun or other firearm commits a misdemeanor upon a first offense, and a felony upon a subsequent offense.²¹³ Unlike the Arizona and Florida laws, however, the Colorado statute provides that prior to the preliminary hearing, there exists a

²⁰⁶ *Id.* at 790.22(8).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 790.22(9).

²⁰⁹ *Id.* at 790.22(9)(B). The 100 hours of community service is still required and may be increased to 250 hours. *Id.* For a first or subsequent offense, and where no commitment to a residential commitment facility is ordered, the youth's driving privileges will be revoked. *Id.* at 790.22(9), (10).

²¹⁰ See *supra* note 174 and accompanying text (Preamble to Committee Substitute for Florida House Bill No. 91-C).

²¹¹ 1993 Fla. Sess. Law Serv. 790.22(9); see *supra* note 174 and accompanying text (Preamble to Committee Substitute for House Bill No. 91-C) (expressing desire of legislature to allow more "certain" detention penalties for violent youth crime).

²¹² Barstow, *supra* note 6, at 1B; May, *supra* note 8, at 1A. The constitutionality of the presumption set up by the law has been questioned, and the issue is now awaiting review by the Colorado Supreme Court. Dellios, *supra* note 181, at 23. However, it would seem that since the presumption is rebuttable, and defendants would in any event have to persuade a judge that they are not dangerous to society in order to avoid detention, this statute may not be far removed from the one held constitutional in *Schall v. Martin*. See 467 U.S. 253, 270, 281 (1984).

²¹³ COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database) (no distinction

rebuttable presumption that juveniles taken into custody on the charge of illegal possession of a handgun are a danger to themselves and to the community, and a judge may order their incarceration pending adjudication.²¹⁴ In other words, this presumption shifts the burden on defendant minors to disprove that they are a danger to the public, prior to the determination of their guilt or innocence.²¹⁵ If they cannot disprove the presumption, they may be immediately detained for up to sixty days before trial, even if they are later found innocent.²¹⁶

Once tried and convicted of illegally possessing a firearm, juveniles face mandatory incarceration under the Colorado law.²¹⁷ That is, first-offenders who are adjudicated as juvenile delinquents must be sentenced to a *minimum mandatory period* of five days of incarceration.²¹⁸ When combined with a potential period of sixty days in detention prior to trial, the mandatory sentence allows the state to incarcerate a first offender for up to sixty-five days for being caught with a gun.²¹⁹ Furthermore, the statute provides that the sentencing judge, at his or her discretion, may extend the five-day mandatory sentence for a first offense to as long as forty-five days.²²⁰ Thus, the sentencing structure potentially extends the pretrial and post-adjudication detention period to nearly three months.²²¹

In conjunction with enacting the possession statute, the Colorado legislature also authorized the construction of a military-style training camp, available at the discretion of the sentencing judge for those youths sentenced to Colorado's Department of Institutions.²²² The statute provides that this alternative sentence is a substitute for the mandatory five-day detention and potential forty-five days of detention.²²³ Specifically, a youth convicted for a first offense of illegal handgun possession may be placed in a sixty-day program of intensive physical training and discipline.²²⁴ Second or subsequent offenses, however,

between offenses involving loaded or unloaded firearms). See *infra* Table for a comparison to the Arizona and Florida laws.

²¹⁴ *Id.* at § 19-2-204.

²¹⁵ See *Id.*

²¹⁶ *Id.* at § 19-2-205 (requiring trial within sixty days of order to hold juvenile without bail).

²¹⁷ *Id.* at § 19-2-703.

²¹⁸ An amendment to § 19-2-703 enacted as part of the legislative package containing the juvenile handgun possession ban eliminated a previously available option of ten days of public service. *Id.* at § 19-2-703(1)(e) (Supp. 1993), *amended by*, § 19-2-703 (1)(e) (WESTLAW, CO-ST-ANN Database).

²¹⁹ *Id.* at § 19-2-204, 205, 703 (WESTLAW, CO-ST-ANN Database).

²²⁰ *Id.* at § 19-2-703(h) (Supp. 1993).

²²¹ *Id.*

²²² *Id.* at § 19-2-708.

²²³ COLO. REV. STAT. § 19-2-708(3)(a) (WESTLAW, CO-ST-ANN Database).

²²⁴ *Id.* This statute provides for a two-phase program: (1) first, youths are placed in an 80-bed,

mandate out-of-home commitment of one year or more.²²⁵ Moreover, the statute creates the possibility that a subsequent offense may lead to as much as a two-year jail term.²²⁶

In summary, through recent enactments, state legislatures have begun responding to their constituents' fears regarding juvenile violence.²²⁷ Whereas some of these actions attempt to curb the supply of guns to youths by providing criminal sanctions for adults who allow children access to firearms, attention has recently focused on measures intended to reduce the juvenile demand for guns.²²⁸ This shift is typified by the juvenile gun bans passed in Arizona, Florida and Colorado.²²⁹ The implications of these recent enactments on the juvenile justice system's traditional rehabilitative philosophy, however, remain unclear.

V. JUVENILE GUN POSSESSION PROHIBITIONS AS A MANIFESTATION OF THE TREND TOWARD A PUNITIVE PHILOSOPHY OF JUVENILE JUSTICE: A CALL FOR CIRCUMSPECTION

With society's fear of juvenile violence building to a crescendo, lawmakers have struggled with ways to keep guns out of children's hands.²³⁰ Although the traditional American conception of juvenile justice argues that outright coercion is not an option,²³¹ there is a

military-styled boot-camp for 60 days of intensive discipline and physical training; (2) next, youths participate in a community reintegration program involving job training and classroom education components. *Id.* at § 19-2-708(3)(b).

²²⁵ *Id.* at § 19-2-801(1), (2) (Supp. 1993). Colorado's "Mandatory Sentence Offender" statute provides that if a youth is adjudicated a juvenile delinquent twice, he or she will be committed to an out-of-home facility for at least one year, unless the sentencing judge feels that a period of less than one year is more appropriate. *Id.* Additionally, Colorado's "Repeat Juvenile Offender" statute provides that if a youth is adjudicated a juvenile delinquent for a felony subsequent to a finding of delinquency for any other offense, then he or she may be detained for a minimum term to be specified at the discretion of the sentencing judge. *Id.* at § 19-2-802(1), (2) (Supp. 1993). Because "repeat offenders" by definition are also "mandatory sentence offenders" under the Colorado definition, their sentences will presumably be at least as tough as those provided by § 19-2-801(2). *See id.* at §§ 19-2-801, 802. A second offense of illegal possession of a handgun by a minor is a class 5 felony in Colorado, thus submitting a second or subsequent offender to the punishments provided for "repeat juvenile offenders". *Id.* at § 18-12-108.5(1)(c)(II) (WESTLAW, CO-ST-ANN Database).

²²⁶ *See* COLO. REV. STAT. § 19-2-801(2)(a) (1993). A person who is eighteen years of age or older at the time of sentencing for a second adjudication of juvenile delinquency for possessing a handgun when they were a minor may be sentenced to a maximum of two years in county jail. *Id.*

²²⁷ *See supra* note 154 and accompanying text.

²²⁸ *See supra* note 159 and accompanying text.

²²⁹ *See supra* note 198 and accompanying text.

²³⁰ *See supra* notes 159-75 and accompanying text.

²³¹ Skibinski, *supra* note 8, at 48 (traditional notions of juvenile justice dictate that redirection

modern recognition that juvenile codes were constructed during a period in our country's history when truancy, and not violent crime, was the central problem and concern.²³² Faced with levels of youth violence unknown to that era, many policy makers and commentators argue that tougher, more punitive methods than those acceptable to traditional concepts of juvenile justice are needed to address today's problem.²³³

The recent juvenile gun possession laws are manifestations of this call for punishment.²³⁴ Decidedly punitive in form and effect, they represent a trend toward deterring violent youths through punishment.²³⁵ These laws are not, however, evidence that traditional notions of individualized treatment and rehabilitation will soon be excised from the foundations of juvenile justice in America.²³⁶ Undoubtedly, juvenile justice, in the context of the youth gun possession bans, can utilize notions of both rehabilitation and punishment so as to derive the benefits available from each.²³⁷ The answer lies in structuring the law so that it circumspectly addresses both those youths who may only need a reminder of what the law demands, and those who need more.²³⁸

A. *The Punitive Trend*

The statutes passed by Arizona, Florida and Colorado in 1993 do not accord well with traditional notions of juvenile justice.²³⁹ By merely depriving youths of liberties and privileges, they are not well focused on understanding a youth's background and circumstances, or on the

is only attainable through understanding an individual youth's problems and providing them with benevolent guidance).

²³² Gregory Freeman, *Alderman Tries to Fight Arms*, ST. LOUIS POST-DISPATCH, Nov. 23, 1993, (War Page), at 9C.

²³³ See, e.g., 139 CONG. REC. S15,019 (daily ed. Nov. 4, 1993) (statement of Sen. Byrd from West Virginia advocating harsh and certain punishments for violent youths); 139 CONG. REC. S14,939 (daily ed. Nov. 3, 1993) (statement of Sen. Lott from Mississippi advocating swift and certain punishment, and mandatory sentencing for violent crimes); Ratcliffe, *supra* note 7, at 1. Mark Sanders, who works for Republican businessman and Texas politician Rob Mosbacher asserts that the contemporary effect of outdated juvenile codes is to propagate "a system that tries to deal with Dennis the Menace pulling flowers out of a garden when they're actually kids who kill people." Ratcliffe, *supra* note 7, at 1.

²³⁴ See *infra* notes 240-65 and accompanying text.

²³⁵ See *infra* notes 240-74 and accompanying text.

²³⁶ See *infra* notes 275-81 and accompanying text.

²³⁷ See *infra* Section V.B.

²³⁸ See *infra* Section VI.

²³⁹ Professor Martin Gardner suggests that where early theorists found the infliction of punishment upon juveniles an embarrassment, punishment is now resorted to for the mere fact that it results in suffering. Gardner, *supra* note 7, at 137.

concomitant goal of providing children with the individualized treatment they need to become productive members of society. In this manner, they address society's need for public safety at the expense of the rehabilitative needs of individual children. In short, the new laws represent a philosophy of deterrence through punishment.

This assertion becomes clear when the provisions of the statutes are viewed with an eye focused on whose "needs" they serve.²⁴⁰ That is, whereas a genuine concern with treating children prone to misconduct surely addresses juveniles' needs, a preoccupation with simply confining troubled youths more often and for longer periods focuses more on the needs of the state.²⁴¹ The events precipitating the enactment of the juvenile gun possession bans, the terms of the statutes, and the statements of their drafters serve to illustrate that the statutes' foremost purposes are to address the states' public safety concerns.²⁴² Florida and Colorado, for example, enacted their prohibitions on the crest of public anxieties following particularly violent crimes by juveniles with guns.²⁴³ Likewise, Arizona's ban was a result of heightened fear.²⁴⁴ The public cried out for punishment, and the legislators echoed those cries.²⁴⁵ This demonstrates that the intent of the bans was to voice the outrage of the public, and to show juveniles the seriousness with which society views indiscretions involving guns.

Moreover, the sanctions mandated by the statutes offer little toward rehabilitating youths, but a great deal toward deterring them through official coercion.²⁴⁶ Colorado's juvenile gun possession ban is illustrative.²⁴⁷ It provides incarceration as the central solution.²⁴⁸ In fact, under the Colorado law, an innocent youth can be held for as long as sixty-five days before being found innocent.²⁴⁹ Surely, this approach effects very little toward rehabilitating even a guilty youth; for as one scholar has observed, a juvenile can seldom be said to benefit from a term of incarceration.²⁵⁰ Detention does, however, keep the juvenile off the street or the public out of danger. Indeed, although the United

²⁴⁰ See Fox, *supra* note 14, at 47-48 (exploring whose needs, the state's or the child's, are involved in addressing delinquent youths).

²⁴¹ See *id.*

²⁴² See *supra* notes 176-229 and accompanying text.

²⁴³ See *supra* notes 178-83 and accompanying text.

²⁴⁴ See *supra* note 184 and accompanying text.

²⁴⁵ See *supra* notes 182-84.

²⁴⁶ See *supra* notes 190-230.

²⁴⁷ See *supra* notes 213-27.

²⁴⁸ See *supra* notes 215-22.

²⁴⁹ See *supra* note 220 and accompanying text.

²⁵⁰ See Fox, *supra* note 14, at 47-48.

States Supreme Court, in *Schall v. Martin*, held that pretrial detention is not presumptively punitive, the Court recognized the importance of detention in preserving the public safety.²⁵¹ Thus, although there is little connection between the Colorado provisions and serving the rehabilitative needs of juveniles allegedly possessing guns, there is a strong connection to serving the public's needs by protecting it from juveniles' criminal conduct.²⁵²

Similarly, the Arizona juvenile gun possession ban clearly seeks to inhibit potentially violent youths by punishing them, as opposed to treating them.²⁵³ The gist of the statute is to deprive offending youths of two adolescent pleasures—driving privileges and spending money.²⁵⁴ In light of these relatively light sanctions, the statute appears to be directed only toward juvenile “fence-sitters,” youths who might choose to involve themselves in the growing gun culture if not somehow deterred.²⁵⁵ A remedy that rehabilitative theory suggests to aid these potential delinquents, however, is individualized counseling.²⁵⁶ Under this traditional philosophy, a juvenile court would need to inquire as to how the youth arrived at this juncture, and how that child's needs could best be addressed.²⁵⁷ Instead, the Arizona statute adopts categorical, unindividualized punishments to be applied to all juveniles, regardless of their past influences or current stage of development.²⁵⁸ Indeed, the statutory notes included in the statute indicate that the legislature which enacted the ban was more concerned with the certainty of its punishments, than with the case-by-case needs of youths who violate it.²⁵⁹

Clearly addressing itself to public safety concerns at the expense of children's needs, the Florida legislature expressly states its punitive stance within the preamble to its youth gun possession prohibition.²⁶⁰ In the words of the bill, later enacted into law, the legislature intended “that juveniles who violate laws pertaining to the illegal use of firearms

²⁵¹ 467 U.S. 253, 268 (1984). The Court based its conclusion that pretrial detention is not presumptively punitive in part on the assertion that the statute in that case evinced no intent to punish. *Id.* The Federal District Court concluded, however, that the effect of pretrial detention was no less punitive than that of post-trial incarceration. *Id.* at 262 n.12.

²⁵² See *supra* note 180 and accompanying text.

²⁵³ See ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993) (statutory text and Historical and Statutory Notes).

²⁵⁴ See *supra* notes 199–202 and accompanying text.

²⁵⁵ Barstow, *supra* note 6, at 1B (quoting Michael Ramage, General Counsel for the Florida Department of Law Enforcement).

²⁵⁶ Schwartz, *supra* note 45, at 150.

²⁵⁷ See *supra* note 48 and accompanying text.

²⁵⁸ ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993).

²⁵⁹ *Id.* (Historical and Statutory Notes).

²⁶⁰ See *supra* note 175 and accompanying text.

be dealt with in a swift and certain and severe manner . . . ,” and that they should be subject to “stricter, harsher, and more certain penalties. . . .”²⁶¹ Likewise, the Florida preamble cites the legislature’s concern over the explosion of the juvenile gun culture in Florida and the desire of Florida citizens to address this problem.²⁶² Not a word is said of the need to reach and assist those youths amenable to counsel.²⁶³ Thus, it seems clear that the Florida legislature placed greater importance on the needs of the public.²⁶⁴

The punitive stance taken by the recent juvenile handgun possession bans is being heralded as a view of things to come.²⁶⁵ Colorado’s new law, in particular, is hailed by some as a watershed.²⁶⁶ Indeed, shortly after Colorado passed its state-of-the-art juvenile gun possession package in September 1993, twenty-five states requested information regarding its details.²⁶⁷ By the end of 1993, Arizona, Florida, North Carolina, Utah and Virginia had enacted prohibitions on the possession of guns by juveniles.²⁶⁸ Nor does it appear that these will be the last.²⁶⁹

Especially compelling is that of these recent laws, three were enacted in western states where guns have traditionally been as much a part of life as the open range itself, such that few would have predicted the acceptance of youth gun control measures until only recently.²⁷⁰ Undoubtedly, these surprising reactions pose a clear indication of the magnitude of the fear that violent juvenile crime has

²⁶¹ Fla. H.B. 91-C (Preamble to Committee Substitute for House Bill no. 91-C) (enacted) (LEXIS, Legis Library, Sttext File).

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *See id.*; see also Fox, *supra* note 14, at 47–48.

²⁶⁵ May, *supra* note 8, at 1A.

²⁶⁶ *Id.*

²⁶⁷ King, *supra* note 139, at A10.

²⁶⁸ *See supra* note 178 and accompanying text. Only the statutes enacted by Arizona and Florida follow the lead of Colorado in providing mandatory punishments. *See infra* Table.

²⁶⁹ At the time of publication, many states were considering youth gun possession prohibitions. *See, e.g.*, Kan. H.B. 2663, 75th Legis., 2d Sess. (1994) (LEXIS, Legis Library, Sttext Database) (would prohibit handgun possession by juveniles); Mass. S.B. 179, 179th Gen. Ct., 1994 Reg. Sess. (LEXIS, Legis Library, Sttext Database) (would require mandatory minimum incarceration of one year for juvenile convicted of possessing firearm); Minn. S.B. 1919, 78th Legis. Sess., 1993–94 Reg. Sess. (LEXIS, Legis Library, Sttext Database) (would ban firearm possession by juveniles convicted of violent crimes); Miss. H.B. 604, 162d Leg., 1994 Reg. Sess. (LEXIS, Legis Library, Sttext Database) (would prohibit handgun possession by juveniles); Mo. H.B. 1525, 87th Legis. Assem., 2d Sess. (1994) (LEXIS, Legis Library, Sttext Database) (would prohibit youths younger than seventeen from possessing concealable firearms); Tenn. H.B. 2152, 98th Gen. Assem. (1994) (LEXIS, Legis Library, Sttext Database); *see also* N.J. A.B. 30, 206th Legis., 1st Sess. (1994) (LEXIS, Legis Library, Sttext Database) (would provide mandatory penalties for juveniles adjudicated delinquent for certain subsequent offenses of illegally possessing a firearm, which is already a crime in New Jersey).

²⁷⁰ Freemantle, *supra* note 8, at A1. Florida, which passed a ban on juvenile possession of firearms last November, is also a pro-gun enclave. *Id.*

inflicted on the public psyche.²⁷¹ Thus, it seems likely that states without the apparently deep-rooted western attachment to firearms may soon act to ban youths from possessing guns. This expectation is bolstered by the fact that several non-western states are currently considering Colorado's measures in creating or modifying their own juvenile gun bans.²⁷² Additionally, many policy makers have been voicing the need for Congress to get involved, and it appears that Congress has not turned a deaf ear.²⁷³

It is possible that the punitive reaction to juveniles possessing guns is part of a "renaissance of retribution" in the juvenile justice system

²⁷¹ See, e.g., May, *supra* note 8, at 1A (quoting Sarah Brady: "Let's face it. Colorado's a state where people love their guns. But even there, they're so fed up with violence they want something done."); Oppel, *supra* note 9, at 1J (In Utah, where popular culture is such that a quarter of the population hunt deer every year, a strong impetus was required to prompt both the state legislature and Salt Lake City to enact tougher new juvenile gun laws).

²⁷² See *supra* note 270.

²⁷³ Recently, the House of Representatives recognized that because the supply of guns inevitably forces the character of gun control as an interstate issue, the states' attempts at a more punitive stance on juvenile gun control require the uniformity achievable only through federal action. See H.R. 3098, 103d Cong., 1st Sess. (1993) (enacted, Nov. 20, 1993). The House found that: "Individual States and localities find it impossible to handle the problem by themselves; even States and localities that have made a strong effort to prevent, detect, and punish crime find their effort unavailing due in part to the failure or inability of other States and localities to take strong measures." *Id.* Acting upon this recognition, the House passed H.R. 3098, prohibiting the possession of handguns by persons younger than eighteen, and providing that convicted juveniles will be fined, imprisoned for up to one year, or both, if convicted for handgun possession. *Id.* If the offending youths have not previously been convicted under state or federal law of possessing a handgun, the court must sentence them to probation, and may not sentence them to incarceration. *Id.* (this "Youth Handgun Safety Act of 1993" is still pending consideration by the Senate Committee on the Judiciary, S. 1087, 103d Cong., 1st Sess. (1993)). Hence, the bill is mild compared to the Colorado legislation, but it is nonetheless a direct reflection of the growing willingness to punish violent youths, rather than rehabilitate them in the traditional sense, in that it favors increased punitive sanctions against repeat offenders. Perhaps as an indication of things to come, H.R. 3098 includes a provision directing the Attorney General to study existing state juvenile handgun legislation and develop a model law to be disseminated to state authorities. *Id.*

According to Senator Biden of Delaware, it appears that Congress has accepted a punitive philosophy: "There is a mood here that if someone came to the floor and said we should barb wire the ankles of anyone who jaywalks, I think it would pass." Krauss, *supra* note 8, at A1. A representative example is the amendment to the Omnibus Crime Control and Safe Streets Act of 1968, passed by the House of Representatives on November 19, 1993. See H.R. 3351, 103d Cong., 1st Sess. (1993). The bill states that "[i]t is the sense of the Congress that States should impose mandatory sentences [for juveniles] for crimes involving the use of a firearm or other weapon on school property or within a 100-yard radius of school property." *Id.* If enacted by the Senate, the amendment would provide authorization for "alternative methods of punishment" for young offenders, aimed specifically at preventing crime and reducing recidivism. *Id.* In particular, it is directed at punishing "young offenders who can be punished more effectively in an environment other than a traditional correctional facility." *Id.* The amendment has all the earmarks of a deterrence-based, punish-for-punishment's-sake drive for accountability and certainty of punishment for young offenders.

as it moves ideologically toward becoming a criminal court system.²⁷⁴ Arguably, the juvenile rights granted by the United States Supreme Court through *In re Gault* and its progeny were also responses to this movement.²⁷⁵ But in spite of an increased acceptance of punitive philosophy, the juvenile justice system has traditionally been, and should continue to be, as much concerned with persuading "fence-sitters" to stay on the proper side of the fence as it is with rehabilitating or punishing youths who have already crossed over and into social deviancy.²⁷⁶ Thus, the juvenile gun possession bans should not be interpreted as foreshadowing an abandonment of the rehabilitative ideal. Rather, they embody society's recognition that the mere status of being a child should not always exempt a youth from punishment.

It is important to recognize that none of the new statutes providing mandatory punishments for juvenile gun possessors are tantamount to placing a youth in the criminal justice system, even upon repeat offenses.²⁷⁷ Juveniles are still subject to the rehabilitative efforts of the court, with the additional requirement that some mandatory punishment be suffered.²⁷⁸ In other words, the statutes add punitive measures to the system, but do not remove rehabilitative ones.²⁷⁹ The statutes merely reflect the pragmatic attitude that society has become too accustomed to juvenile behavior that it should not tolerate, and that some form of punishment should accompany counseling and other treatments when youths commit violent offenses.²⁸⁰

Although authorizing grants to be used by states and localities to fight juvenile crime, it likely conditions the award of these monies on whether the state has enacted laws providing sanctions for juveniles who possess firearms, or are convicted of crimes involving the use of a firearm on school property, and which ban firearms in a 100-yard radius of schools. *See id.* Specifically, the amendment states that the Director of the Bureau of Justice Assistance "consider[s] as an important factor" in awarding funds to states whether they have such laws or policies in effect throughout the state. *Id.*

²⁷⁴ *See* Gardner, *supra* note 7, at 135-37.

²⁷⁵ *See supra* notes 77-155 and accompanying text.

²⁷⁶ *See* Fox, *supra* note 14, at 19. Professor Fox appears to agree, asserting that suggestions for turning the juvenile court into a mini-criminal court are unwise, in that for the majority of the children being treated within the juvenile justice system a punitive approach is improper. *Id.*

²⁷⁷ *See supra* notes 190-230 and accompanying text.

²⁷⁸ *Id.*

²⁷⁹ More precisely, the rehabilitative abilities of the juvenile court remain intact except to the degree that merely introducing mandatory penalties to juvenile justice is repugnant to rehabilitative philosophy. *See* Skibinski, *supra* note 8, at 48 (key assumption of rehabilitative philosophy is that only restorative treatment methods, and not punitive ones, can check criminal tendencies before they harm society).

²⁸⁰ *See Remarks by President Bill Clinton at the Fund-Raiser for Senator Daniel Patrick Moynihan*, FED. NEWS SERV., Dec. 13, 1993. ("We are getting used to a lot of behavior that is not good for us. . . . We tolerate all kinds of things nobody else would put up with.").

B. *A Problem of Underinclusion or Overinclusion*

After acknowledging a place for punitive philosophy in the rehabilitative framework of the juvenile justice system, juvenile justice must focus on the risks inherent in applying mandatory, and consequently nonindividualized, penalties such as those employed by Arizona, Florida and Colorado. Particularly, the statutes risk overinclusiveness—needlessly or excessively punishing fence-sitters in attempting to reach the more hardened delinquents—or, conversely, underinclusiveness—not providing meaningful penalties for the more hardened offenders in an effort to avoid excessively punishing those youths merely in need of a reminder. The basic difficulty arises from the inability to know where to draw the line for either class.

As the watershed in youth gun possession statutes, Colorado's law arguably strikes the balance, if at all, on the side of overinclusiveness. This can be seen from the fact that although a mandatory period of detention for a first-offender may seem appropriately symbolic for deterring fence-sitters, a minor found with a gun may endure a total of sixty-five days of detention, in a worst-case scenario, even though the minor has no juvenile court record.²⁸¹ On the other hand, a first-offender with no significant record would probably be able to rebut the presumption that they are a danger to society, thereby avoiding the potential sixty-day pretrial detention.²⁸² Even so, it is apparent that in its desire to provide for public safety considerations, the Colorado legislature made a choice to risk incarcerating those who might not deserve or require so harsh a reprimand, in order to avoid setting truly dangerous youths free.²⁸³

Ameliorating the effect of this choice, however, is the realization that Colorado's statute incorporates a balance absolutely essential to any youth gun ban aimed at inhibiting potential delinquents. Several aspects of the ban illustrate this. First, although a first offender faces a mandatory incarceration period of five days, the judge has discretion to increase this period to up to forty-five days for first offenders with unrelated violations on their records.²⁸⁴ Where the judge deems appropriate, a juvenile may also be sentenced to a sixty-day boot camp.²⁸⁵

²⁸¹ See *supra* note 220 and accompanying text.

²⁸² See *id.*

²⁸³ See Colo. H.B. 1001, 59th Gen. Assem., 1st Extraordinary Sess., Section 16 (1993) (WESTLAW, CO-ST-ANN Database) (enacted). In fact, the Colorado legislature stated that "[t]he general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." *Id.*

²⁸⁴ See *supra* note 222 and accompanying text.

²⁸⁵ See *supra* note 225 and accompanying text.

Upon second or subsequent offenses, the juvenile court judge has the discretion to utilize these possibilities, or to place the youth in an out-of-home facility for treatment and guidance for up to two years.²⁸⁶ Hence, the Colorado law appropriately balances the need to punctuate the seriousness of a gun possession offense for a fence-sitter, with the equally important goal of punishing and attempting the rehabilitation of more serious offenders.

Unlike Colorado's provisions, the Florida possession ban appears to take an underinclusive stance. Under the Florida statute a first-offender endures a mandatory penalty of 100 hours of community service.²⁸⁷ This seems to indicate that the Florida legislators were concerned solely with fence-sitters, for there is no significant distinction in punishment available for offenders with substantial prior records, or with respect to subsequent offenses. But it is clear from the events leading to the law's enactment, as well as from the legislative history, that Florida citizens and legislators were concerned with far more serious juvenile offenders.²⁸⁸ The Florida ban, therefore, although appropriate in its stance toward fence-sitters, is underinclusive in that it does not provide the "stricter, harsher, and more certain penalties" that the legislature intended for hardened youth offenders.²⁸⁹

Likewise, the Florida statute does not embody the intelligent balance employed by the Colorado law. That is, by merely increasing the community service hours to 250 for a subsequent offender, the Florida lawmakers did not draw the distinction which the Colorado drafters seem to have made: that a second or subsequent offender is more than a mere fence-sitter, and merits both a harsher penalty and a more rigorous attempt at treatment. Thus, although the Florida law may effectively deter some youths considering involvement with firearms, the juveniles who are returned to court, having been unimpressed with their first encounter, will find no significantly greater threat confronting them. Similarly, youths charged with gun possession who already have lengthy records, though not involving a gun possession conviction, will experience the same sanctions borne by first-time juvenile defendants. The Florida statute fails to achieve the appropriate balance.

The Arizona ban may demand scrutiny under a different lens. As the state legislature asserted, it was not concerned with the overwhelming majority of youths who do not resort to violence with guns.²⁹⁰ In

²⁸⁶ See *supra* note 227 and accompanying text.

²⁸⁷ See *supra* note 205 and accompanying text.

²⁸⁸ See *supra* note 175 and accompanying text.

²⁸⁹ See *supra* note 262 and accompanying text.

²⁹⁰ ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993) (Historical and Statutory Notes). The Arizona legislature stated that:

accordance with this, and in recognition of Arizona's tradition of liberal gun possession rights, Arizona's juvenile gun possession prohibition is relatively lenient on offenders, and may not be as underinclusive as the resounding backdrop of public fear in America seems to imply.²⁹¹ Nevertheless, the Arizona ban evinces a stark lack of balance, in that it makes no distinction between first and subsequent offenses, and contains no special provisions indicating a more serious stance toward juveniles who have previously been adjudicated as delinquents, and who are subsequently found guilty of possessing a gun.²⁹² The result is that hardened juvenile offenders receive the same punishment for possessing a firearm as first-offenders.²⁹³

For many, Colorado's approach is a long awaited step in the right direction.²⁹⁴ But others feel that even in Colorado, legislators have not gone far enough.²⁹⁵ Arguably, as punitive as the new youth gun bans are, they will be largely ineffective without other provisions addressing the issues of poverty, the exploitation of violence by the media, the unchecked supply of guns flowing into the United States, and other important social variables inextricable from the equation of youth violence. This may very well be correct, but should not be used to detract from the point that for many fence-sitters, a brief and indelible experience with the coercive power of the legal system may sufficiently inhibit future indiscretions.²⁹⁶ To this end, punitive juvenile gun possession bans are useful. In considering the adoption of these measures, the most important guideline for state legislatures is that of proper balance. In this sense, Colorado's new law provides an appropriate

The legislature finds that:

1. The overwhelming majority of minors in this state who keep and bear arms do so responsibly and in a law-abiding manner under the supervision of parents or guardians.

2. A minute number of juvenile offenders disproportionately threaten the public peace through their unlawful use or threatening exhibition of deadly weapons or dangerous instruments.

...
Id. (Historical and Statutory Notes at § 2(A)(1), (2)).

²⁹¹ See *supra* notes 179-84 and accompanying text.

²⁹² See *supra* notes 199-202 and accompanying text.

²⁹³ *Id.*

²⁹⁴ See, e.g., Barstow, *supra* note 6, at 1B. Where loopholes in the law once existed to allow gun wielders to avoid arrest or even confiscation of their weapons, recent Florida and Colorado laws at least provide the police the ability to disarm juveniles who might commit mayhem. *Id.*

²⁹⁵ See, e.g., May, *supra* note 8, at 1A. Colorado state senator, Paul Weissman shares the view of many that "[a]ny kid that'll look you in the eye and shoot you dead isn't going to give a damn about this new law" *Id.*

²⁹⁶ See Fox, *supra* note 14, at 19-20.

model to be considered by states facing equivalent crises with the youth gun culture.

VI. CONCLUSION

The juvenile justice system in America has from its inception been directed toward the rehabilitation and treatment of wayward youths. But as the United States Supreme Court has long recognized, the good intentions of the "rehabilitative ideal" have not been realized. Moreover, youth violence has increased both in volume and seeming remorselessness. There is no doubt that the expanding youth gun culture has driven the public into a heightened state of fear.

Accordingly, the reaction of policy makers has been one preoccupied with increasing public safety. Indeed, the contemporary trend accepts harsh sanctions for juveniles as a means of deterring their violent behavior. This trend has been manifested in a recent wave of juvenile gun possession bans employing mandatory penalties to curb youths' desires to carry guns.

Mandatory penalties represent an important method of attacking the demand side of the gun equation. That is, where the question is how to persuade those youths who are still reachable that they want nothing to do with the juvenile gun culture, statutes such as Colorado's may embody a means by which to extinguish the desire for a gun. Admittedly, the approach appears to be one of coercion and intimidation. But whereas society has little ability to choose whether it is subjected to the violent acts of our children, those children can choose whether or not to handle guns. It is plausible that a spoonful of the law's inherently coercive power will effect the proper choice for many youths. Thus, public safety concerns may correctly place the punitive balance on the side of overinclusion when, as was accomplished by the Colorado legislature, the law circumspectly addresses both those youths who may only need a reminder of what the law demands, and those who need a little more.

BRIAN R. SUFFREDINI

Table

STATE	PROHIBITION	AGE(s) PROHIBITED	PRIMARY EXCEPTIONS	PENALTIES
Alaska ALASKA STAT. § 11.61.220 (Supp. Oct. 1993)	Possession of Firearm	Under 16 yrs (unemancipated)	Consent of parent or guardian	Class B Misdemeanor
Arizona* ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993)	Possession of Firearm	Under 18 yrs (unemancipated)	1. Accompaniment by parent or hunting instructor 2. On property of minor or parent 3. If 14 or older: hunting, marksmanship	1. Unloaded Firearm: Fine, \$250 or less, and possible revocation of driver's license 2. Loaded Firearm: Fine, \$500 or less, and possible revocation of driver's license
Arkansas ARK. CODE ANN. § 5-73-119 (Michie 1993)	Possession of Handgun	Under 18 yrs	1. On property of minor 2. Education 3. Hunting	First Offense: Class A Misdemeanor; Second Offense: Class D Felony:
California CAL. PENAL. CODE § 12101 (West 1992)	Possession of Firearm	Under 18 yrs	Accompaniment or written consent of parent or legal guardian	Misdemeanor: Punishable upon second and subsequent offenses by imprisonment for up to one year
Colorado COLO. REV. STAT. § 18-12-108.5(1)(a) (WESTLAW, CO-ST-ANN Database)	Possession of Handgun	Under 18 yrs	1. Education 2. Marksmanship 3. Hunting 4. With permission on property of parent.	Any Offense: Raises presumption of danger to community and merits pretrial detention First Offense: Class 2 Misdemeanor: <i>Mandatory five days detention, which may be increased to 45 days; or 60 day boot camp</i> Second Offense: Class 5 Felony: <i>1 year or more out-of-home detention, in addition to other penalties at discretion of judge</i>

STATE	PROHIBITION	AGE(s) PROHIBITED	PRIMARY EXCEPTIONS	PENALTIES
Florida 1993 Fla. Sess. Law Serv. 790.22 (LEXIS, Legis Library, Fistat)	Possession of Firearm	Under 18 yrs	1. Unloaded Firearm at his Home 2. Marksmanship 3. Hunting	<u>First Offense</u> : Misdemeanor of 1st Degree Minor's name and address may be released for publication; Mandatory 100 Hrs Community Service; and revocation of driving license for up to 1 year <u>Second Offense</u> : Mandatory 100-250 Hrs Community Service; and revocation of driving license for up to two yrs
Minnesota MINN. STAT. ANN. § 97B.021 (West 1987)	Possession of Firearm	Under 16 yrs	1. Accompaniment by Parent or Guardian 2. On property of minor or parent 3. Supervised marksmanship, education	Finding of Juvenile Delinquency
Nevada NEV. REV. STAT. ANN. § 202.300 (Michie 1986)	Possession of Firearm	Under 14 yrs	Adult Supervision	Misdemeanor
Nebraska NEB. REV. STAT. § 28-1204 (1989)	Possession of Handgun	Under 18 yrs	Supervised Education	Class III Misdemeanor
New Jersey N.J. REV. STAT. ANN. § 2C:58-6.1 (West 1982)	Possession of Firearm	Under 18 yrs	1. Accompaniment by Parent or Guardian or holder of firearm permit 2. Supervised marksmanship 3. Hunting with license	Finding of Juvenile Delinquency

STATE	PROHIBITION	AGE(s) PROHIBITED	PRIMARY EXCEPTIONS	PENALTIES
New York N.Y. PEN. LAW § 265.05 (McKinney 1989)	Possession of Firearm	Under 16 yrs	Hunting	Finding of Juvenile Delinquency
North Carolina N.C. GEN. STAT. § 14-269.7 (1993)	Possession of Firearm	Under 18 yrs	1. Supervision during Educational or Recreational activity 2. Emancipated Minor in their residence 3. Hunting	Misdemeanor
North Dakota N.D. CENT. CODE § 62.1-02-01 (Supp. 1993)	Possession of Handgun	Under 18 yrs	Education, Marksmanship, Hunting with Adult SupervisionClass A Misdemeanor	Class A Misdemeanor
Oregon OR. REV. STAT. § 166.250 (1990)	Possession of Firearm	Under 18 yrs	1. Firearms other than handguns, if given to minor by parents or with their consent 2. Temporary use for hunting, marksmanship, "or any other lawful purpose."	Class A Misdemeanor
Rhode Island R.I. GEN. LAWS § 11-47-33 (1981)	Possession of Firearm	Under 15 yrs	Supervised marksmanship with permit	Finding of Juvenile Delinquency

STATE	PROHIBITION	AGE(s) PROHIBITED	PRIMARY EXCEPTIONS	PENALTIES
Utah UTAH CODE ANN. § 76-10-509 (Supp. Jan. 1994)	Possession of Dangerous Weapon	Under 18 yrs	1. Permission or Accompaniment of parent or guardian 2. Marksmanship 3. Hunting 4. Under 14 yrs must be accompanied by adult	First Offense: Class B Misdemeanor Subsequent Offenses: Class A Misdemeanor <u>Possession of Sawed-Off Rifle or Shotgun</u> <u>or full Automatic Weapon: Third Degree</u> Felony
Vermont VT. STAT. ANN. tit. 13, § 4008 (1974)	Possession of Handgun	Under 16 yrs	Consent of parent or guardian	Finding of Juvenile Delinquency
Virginia VA. CODE ANN. § 18.2-308.7 (Michie Supp. 1993)	Possession of Firearm	Under 18 yrs	1. On property of by minor or parent 2. Written permission of property owner on which minor possesses firearm 3. Supervised marksmanship or education 4. Hunting	Class 1 Misdemeanor
West Virginia W. VA. CODE § 61-7-8 (1992)	Possession of Deadly Weapon	Under 18 yrs (unmarried and unemancipated)	1. On property of minor or parent 2. On another's property with permission 3. Hunting	Finding of Juvenile Delinquency
Wisconsin WIS. STAT. ANN. § 948.60 (West Supp. 1993)	Possession of Dangerous Weapon	Under 18 yrs	Supervised Marksmanship or Education	Class A Misdemeanor

*Application only in counties with populations of more than 50,000 persons (i.e., the urban counties of Pima and Maricopa). ARIZ. REV. STAT. ANN. § 13-3111 (Supp. 1993).