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The Delinquent "Toddler"

The Minimum Age of Responsibility

By Merrill Sobie

Twenty-first century juvenile justice jurisprudence has focused on the criminal responsibility of adolescents, including, notably, the interface between psychological and neurological development and social accountability. The focus has led to a growing awareness that teenagers should not be equated with or held as accountable as adults. For example, several states, including Connecticut, Illinois, and Mississippi, have raised the age of criminal responsibility from 16 or 17 to 18, with a corresponding expansion of juvenile court jurisdiction. Of potentially greater significance, the principle of diminished criminal responsibility has gained credibility. Witness, for example, the US Supreme Court holding that capital punishment cannot be imposed on persons under the age of 18 (*Roper v. Simmons*, 543 U.S. 551 (2005)), while life without the possibility of parole cannot be imposed when a juvenile has been convicted of a nonhomicide offense (*Graham v. Florida*, 130 S. Ct. (2010).) Simultaneously, several states have statutorily restricted the transfer of cases from the juvenile courts to the adult criminal court, partially reversing the late twentieth century "get tough" approach.

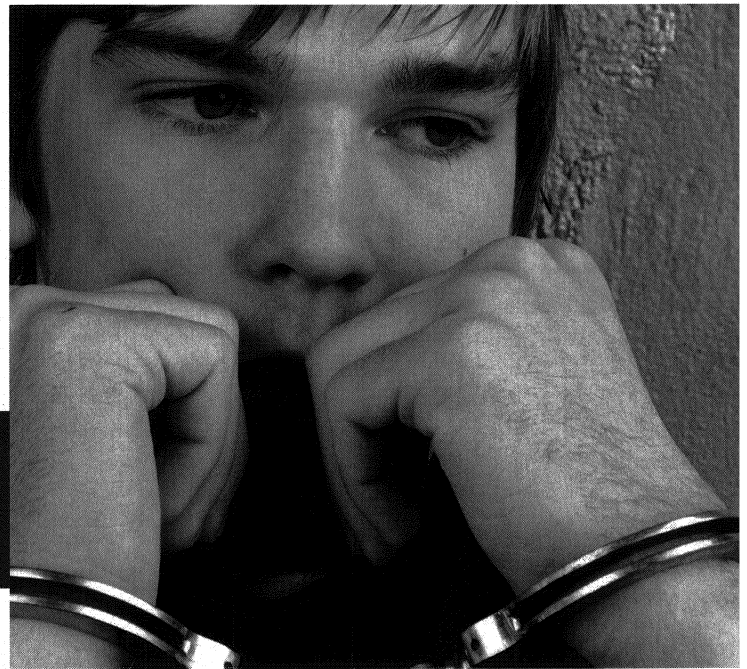
Overlooked has been the younger or preteen child. Most American states do not maintain a minimum age limitation for juvenile delinquency jurisdiction. Thirty-five states lack any statutory provision, permitting at least the theoretical prosecution of an infant. The remaining 15 have enacted statutes establishing minimum ages ranging from six to 10. The vast majority of American children under the age of 12 may be charged with criminal activity. The vast majority may consequently be subject to detention, confinement in residential institutions, and the adverse collateral consequences of a delinquency finding.

In 2008 (the most recent year of available relevant statistics), 40,748 American children under the age of

12 were referred to court for prosecution as juvenile delinquents (Nat'l Ctr. for Juvenile Justice, *Easy Access to Juvenile Court Statistics: 1985–2008*, OJJDP (2011), www.ojjdp.gov/ojstatbb/ezajcs/.) Of those, 7,752 were adjudicated as delinquent. Local court statistics confirm the national pattern. In 2010, 100 alleged offenders aged eight or nine were referred to the Maricopa County Juvenile Court in Phoenix. (See H. Ted Rubin, *Increases in the Maximum Age of Juvenile Court Jurisdiction*, 17 JUV. JUST. UPDATE 4, 14 (2011).) In Memphis, Tennessee, 113 children 10 and younger, including eight children aged five and six, were referred to court in 2009. (*Id.*) Although prosecution of the very young is not a recent development, the phenomenon may have been fuelled in recent years by the "get tough" on juvenile crime approach and the prevalence of "zero tolerance" policies by public schools (a 2001 ABA resolution condemns "zero tolerance" policies). Given the low age cohort, it is not surprising that, as the OJJDP statistics indicate, most cases are diverted, withdrawn, or dismissed. However, even children who have not been formally adjudicated suffer the deleterious repercussions of arrest, police questioning, possible detention, and the intimidating nature of judicial proceedings. And the almost 8,000 who are found to be delinquent annually confront the possibility or the reality of incarceration or the curtailment of their freedom through probationary conditions and governmental supervision.

At the international level, most countries have established
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minimum jurisdictional ages. (The UN Convention on the Rights of the Child requires that member states enact an unspecified age threshold.) In the developed world, the minimum age ranges from 10—for example, in Great Britain and Switzerland—to 15 in countries such as Norway and Finland. Fourteen is not uncommon, as in Germany, Italy, and Russia.

Historically, the lack of a minimum age in the United States dates from the establishment of the juvenile courts in the early twentieth century. In the prejuvenile court era, the common law infancy defense was applicable, precluding the prosecution of children below the age of seven. Further, children above age seven but below age 14 were presumed to lack the capacity to discern the distinction between good and evil and hence the criminal intent necessary to sustain a conviction. Sir William Blackstone, the preeminent eighteenth century common law authority, commented that the presumption could be rebutted only by evidence proving that the child possessed the requisite capacity "beyond all doubt and contradiction," a burden of proof substantially greater than the customary criminal standard of "beyond a reasonable doubt." Blackstone continued

by observing that, although not unknown, the conviction of a child below age 14 was a rare event. The infancy defense effectively insulated almost all children for acts committed when they were less than 14 years of age.

The twentieth century watershed creation of the juvenile courts spelled the demise of the infancy defense.

The issue of whether the infancy defense had any role to play in juvenile proceedings arose fairly quickly, and the decisions have almost uniformly resolved against recognition of the infancy defense in juvenile proceedings. Most of the decisions rest on the premise that the rehabilitative ideal and *parens patriae* doctrine upon which the juvenile court was founded are based, first and foremost, on the notion that the child is being helped, not punished. (Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 KAN. L. REV. 687, 721 (2006).)

That view has largely persisted, *see, e.g., In re Tyvonne*

M., 558 A.2d 661 (Conn. 1989), although in recent decades a handful of state courts have resurrected the defense. The California Supreme Court, for example, has held that the Delinquency Code "should apply only to those who are over 14 and may be presumed to understand the wrongfulness of their acts and to those under the age of 14 who clearly appreciate the wrongfulness of their conduct." (*In re Gladys R.*, 464 P.2d 127 (Cal. 1970).) (Whether the proof need be "beyond all doubt and contradiction" is another matter.) In most states, however, every child is subject to prosecution, regardless of age.

Maintaining a system that is essentially "age blind" raises, or at least should raise, several legal issues. One is competency, generally defined as the ability to understand the proceedings and materially assist in one's defense. How many six-year-olds or, for that matter, 10-year-olds understand judicial proceedings and possess the ability to fully assist counsel? Second, the principle of specific intent or *mens rea* is deeply ingrained in criminal law jurisprudence. How many children below the age of 12 (or perhaps 14) possess the *mens rea* we require when the offender is older? Another issue is diminished responsibility. We increasingly apply the principle when adjudicating a 15-year-old as opposed to a 20-year-old, but have yet to develop diminished responsibility standards when adjudicating an eight-year-old as opposed to a 15-year-old. (An eight-year-old, like his or her older brethren, is usually subjected to the full restrictive panoply of juvenile delinquency dispositions.) And just what purpose is served? Does anyone believe that prosecuting a seven-year-old deters other seven-year-olds from committing similar acts, or that society needs protection against seven-year-old predators? An analysis of these principles is beyond the scope of this short article. Suffice

to say that the American legal system has given scant attention to the underlying purposes and principles of the penal law as applied to the very young offender.

Establishing a minimum age for delinquency prosecution would not necessarily evade the problem of dealing with the occasional violent or lawless acts committed by young children. Countries that follow the norm of placing an age floor under the prosecution of children treat the complained of incident as a child welfare matter instead of a juvenile justice issue. An assault or theft committed by a 10-year-old may raise child protective issues or may prove the need for family counseling and therapy (although minor criminal acts by the very young may be just part of growing up). Services appropriate for that age group are within the domain of social service systems rather than the juvenile justice system. Referring the child for juvenile delinquency prosecution, as happens to approximately 40,000 children each year, is manifestly unfair and counterproductive, like swatting a fly with a sledge hammer.

The ABA Juvenile Justice Standards recommend a minimum age of 10, quite an improvement over the current practice of no minimum age (1 JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS, Standard 2.1, (1980).) Other experts have advocated a floor of age 12, *see* Rubin, *supra*, which would place the United States firmly within the international consensus. Regardless of the specific age threshold, the time is long past to abolish the century old prosecution of toddlers who, regardless of their individual aptitudes, cannot possibly fully understand the consequences of their acts, cannot adequately defend themselves (even with counsel), and cannot possibly benefit from restrictive dispositions tailored to the older adolescents. ■