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## The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform

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# THE EVOLUTION OF ADOLESCENCE: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE REFORM

ELIZABETH S. SCOTT\* & THOMAS GRISSO\*\*

## INTRODUCTION

The legal response to juvenile crime is undergoing revolutionary change, and its ultimate shape is uncertain. The traditional juvenile court, grounded in optimism about the potential for rehabilitation of young offenders, has long been the target of criticism, and even its defenders have been forced to acknowledge that it has failed to meet its objectives.<sup>1</sup> Beginning in the late 1960s, when the Supreme Court introduced procedural regularity to delinquency proceedings in *In re Gault*,<sup>2</sup> courts and legislatures began to slowly chip away at the foundations of the juvenile justice system.<sup>3</sup> Recent developments have accelerated and intensified that process, as policy-makers at both the state and federal level respond to public fear and anger at what is perceived to be an epidemic of youth violence, including an alarming increase in juvenile homicide.<sup>4</sup> Increasingly, critics of

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<sup>1</sup> Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165-66.

<sup>2</sup> 387 U.S. 1 (1967).

<sup>3</sup> The first wave of reform after *Gault* focused on extending procedural rights to juvenile defendants. More recent innovations have been driven by social control concerns. See *infra* notes 45-54 and accompanying text.

<sup>4</sup> For a discussion of state legislative response and proposed federal legislation, see *infra* notes 46-54. The increase in violent juvenile crime is well documented, although it has leveled off in the past few years. Between 1989 and 1993, arrests of juveniles for murder rose 45%, for robbery 37%, and for aggravated assault 37%. OFFICE OF JUV. JUST. AND DELINQUENCY PREVENTION, GUIDE FOR IMPLEMENTING THE COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 1 (1995) (citing FBI UNIFORM CRIME REPORTS (1994)) [hereinafter GUIDE]. See also Eric

the traditional juvenile justice system argue that young offenders should be subject to the same punishment as adults for the harms they cause.<sup>5</sup> The next step, which many are quite ready to take, is to abolish the separate juvenile justice system.

One way to think about the evolution of legal policies responding to youthful crime is in terms of the empirical account of adolescence that is expressed through these policies. From this perspective, the traditional (pre-*Gault*) juvenile court was shaped in important ways by a conception of errant youth as childlike, psychologically troubled, and malleable.<sup>6</sup> On this view, the job of the court was not to punish, but to rehabilitate and protect its charges. With the reform movement of the 1970s and 1980s, a less idealized view of adolescence emerged, together with a growing skepticism about the potential for rehabilitation.<sup>7</sup> Immature youth were seen as less culpable than adults, but not as blameless children. Lacking experience and judgment, young offenders needed lessons in accountability. A perusal of the current landscape of juvenile justice reform suggests a view of delinquent youth as appropriately subject to adult punishment and procedures and thus as indistinguishable in any important way from their adult counterparts.<sup>8</sup>

Our aim in this essay is to examine these changing accounts through a developmental lens, with a purpose of bringing into the policy debate on juvenile justice reform the insights of development psychology. This perspective is useful in providing a scientific measure of the empirical assumptions, intuitions, and predictions about adolescence that have always played a large role in policy formation in this context. The framework challenges two assumptions underlying the contemporary punitivist

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Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study in Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 564 (1996) (positing link between legislative actions and referral rate for juvenile homicide that increased 171% from 1985-92); THE STUDY OF JUVENILE JUSTICE REFORM, REPORT OF THE VIRGINIA COMM'N ON YOUTH TO THE GOVERNOR AND GENERAL ASSEMBLY, House Doc. No. 37, at 14-15 (1996) [hereinafter REPORT OF THE VA COMM'N ON YOUTH] (discussing juvenile violence and homicide rate). For further discussion, see *infra* note 150 and accompanying text.

For a discussion of recent state and federal initiatives to process and punish young offenders as adults, see *infra* notes 45-54 and accompanying text.

<sup>5</sup> See *infra* notes 46-57 and accompanying text.

<sup>6</sup> See *infra* notes 13-32 and accompanying text.

<sup>7</sup> See *infra* notes 33-45 and accompanying text.

<sup>8</sup> See *infra* notes 46-61 and accompanying text.

reforms. The first is what might be called the "competence assumption:" that no important differences distinguish adolescents and adults charged with crimes. Modern developmental psychology provides substantial, if indirect, evidence that adolescent choices about involvement in crime and their decisions as defendants in the legal process reflect cognitive and psychosocial immaturity. This evidence challenges contemporary juvenile justice policies which discount the importance of conventional notions of criminal responsibility and constitutional requirements for fair proceedings (neither of which the critics challenge directly).

The second premise implicit in the recent reforms might be labeled the "utilitarian assumption." It qualifies the competence assumption in holding that, even if developmental differences do distinguish adolescent and adult offenders, the enormous social cost inflicted by young criminals requires that those differences be ignored in formulating a legal response to youth crime. This assumption is challenged by evidence derived from taxonomy of adolescent delinquent behavior,<sup>9</sup> which explains much about the nature of adolescent criminal conduct and clarifies the importance of differentiating among young offenders. The modern punitivist reforms tend to treat adolescent offenders as though most are young career criminals—a premise that is true of only a small group of offenders whose delinquency in adolescence is part of a persistent pattern of antisocial behavior, often beginning in early childhood. The criminal activity of most adolescents, in contrast, reflects a relatively typical inclination to engage in antisocial behavior during this developmental stage—a tendency that desists with maturity.<sup>10</sup> Thus, policies that focus solely on the harm caused by youthful offenders may not be the optimal means to achieve the instrumentalist goals of their proponents. These policies fail to calculate the long-term social costs of categorical punishment, particularly the costs incurred by diminishing the prospects for productive adulthood of those offenders whose delinquent behavior reflects transient developmental influences.

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<sup>9</sup> This taxonomy was developed by Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993).

<sup>10</sup> See *infra* notes 63, 65 and accompanying text.

In combination, the developmental lessons produce a counterintuitive insight about the relationship among immaturity, culpability and criminal persistence, that has not yet been recognized in the formulation of juvenile justice policy. Youths who offend at a younger age (and who are thus less mature and less culpable) may be more likely to become adult career criminals than teens who first initiate even serious antisocial behavior in mid-adolescence or later. This observation poses a formidable challenge to the development of fair and effective policies responding to youth crime. It suggests that juvenile justice policy must attend to patterns of delinquent behavior and not simply to the severity of the offense, and it contributes to our conclusion that a developmental model of juvenile justice should incorporate both rehabilitative and retributive dimensions.

The following roadmap may be helpful. In Part I, we will briefly sketch the changing conceptions of adolescence that have been reflected in the evolution of juvenile justice policy over the past century. In Part II, we present a developmental framework. First, we describe the role of antisocial conduct in adolescent development, and sketch the taxonomy, which includes two rough categories of youthful criminal behavior: "adolescent-limited" and "life-course-persistent."<sup>11</sup> We then offer a positive account of developmental factors that may influence decision-making in ways that distinguish adolescents from adults.<sup>12</sup> Finally, we apply this framework, examining the impact of developmental factors on decisions to engage in criminal conduct and on decisions in the criminal process. In Part III, we explore the possible implications of developmental knowledge for criminal blameworthiness, and conclude that developmental psychology evidence supports a presumption of youthful diminished responsibility for younger and mid-adolescents. We then examine through a developmental lens

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<sup>11</sup> To break down patterns of youthful criminal conduct into two categories is an oversimplification. Some research indicates that there are several paths to adult criminal careers. See, e.g., Daniel Nagin & Kenneth Land, *Life Course Trajectories of Different Types of Offenders*, 33 CRIMINOLOGY 111 (1995) (identifying four trajectories: no convictions; adolescent limited; high-level chronic; and low-level chronic).

<sup>12</sup> These include both cognitive factors—reasoning and understanding—and factors that contribute to judgment, as this term is used in common parlance—peer influence, risk preference, and temporal perspective. See *infra* notes 75-104 and accompanying text.

the utilitarian argument that societal protection necessitates severe penalties for youthful offenders. This perspective clarifies that punitive policies may poorly serve the efficiency goals of their supporters. In Part IV, we examine the lessons of the developmental perspective for juvenile justice policy and suggest some directions for policy that is formulated in a developmental framework.

## I. CHANGING PERSPECTIVES ON ADOLESCENCE IN JUVENILE JUSTICE REFORM

In this Part we describe accounts of adolescence as reflected in juvenile justice policy during three periods in the last century. Each period, in its way, was one of reform—a time in which existing legal policy toward youth crime was challenged by a new conception of adolescence and adolescent crime. The first was the period of Progressive reform early in the century; the second was the post-*Gault* period of the 1970s and 1980s; and the third is the contemporary period.

### A. THE TRADITIONAL COURT

The creation at the turn of the century of a separate system of juvenile justice, committed to rehabilitation of young offenders, was a product of the social reform movement of that period.<sup>13</sup> It also reflected the late 19th century understanding of the nature of crime and a new recognition of psychological differences between youths and adults, which was emerging from the “new” science of psychology.<sup>14</sup>

The focus on rehabilitation came in part out of a conception of criminal conduct as a symptom of an underlying condition that required treatment, rather than as bad conduct warranting punishment.<sup>15</sup> This approach to crime influenced

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<sup>13</sup> For a discussion of that reform movement, see JANE ADDAMS, *THE SPIRIT OF YOUTH AND THE CITY STREETS* (1972) (original edition published in 1909); see also JACK HOLL, *JUVENILE REFORM IN THE PROGRESSIVE ERA* (1971).

<sup>14</sup> See generally ELLEN RYERSON, *THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* (1978); Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1970).

<sup>15</sup> A pioneer of the movement, Judge Julian Mack, acknowledged that one of the main principles underlying the Juvenile Court is that “the child offender . . . should receive at the hands of the law a treatment differentiated to suit his special needs; that the courts should be agencies for the rescue as well as the punishment of children.” Julian Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 115 (1909). He maintained that the fundamental concern of courts towards the juvenile offender should

the sentencing reform of the late 19th century, generating indeterminate sentencing policies that dominated adult criminal corrections for more than a century.<sup>16</sup> Juvenile offenders, because they were young and malleable, were believed to be ideally suited to a regime grounded in rehabilitation.<sup>17</sup> In juveniles, the "condition" that required treatment was caused by poor parental guidance, care and supervision as well as social harms associated with poverty.<sup>18</sup>

Although the Progressive conception of youth included the modern understanding of adolescence as a separate developmental stage, and of adolescents as "not fully formed" persons,<sup>19</sup> the Progressive reformers tended to describe young offenders in more childlike terms.<sup>20</sup> As Judge Ben Lindsey, a prominent early reformer, put it, the criminal prosecution of youth was an "outrage against childhood."<sup>21</sup> Lindsey argued that "our laws against crime were as inapplicable to children as they would be to idiots."<sup>22</sup> In part, this characterization may have reflected a tendency to exaggerate the differences between adult and

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be "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." *Id.* at 119-20.

<sup>16</sup> See ANDREW VON HIRSCH, *DOING JUSTICE* 32 (1976) (criticizing the broad discretion accorded to judges under this system); Richard Bonnie, *Trends in Juvenile Justice Reform*, in *DIAGNOSIS AND DEBATE* 168, 171 (Richard Bonnie ed., 1977) (describing criticism of the medical model); Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM L. & CRIMINOLOGY 471, 473-78 (1987) (describing judicial discretion under Progressive sentencing reforms).

<sup>17</sup> Martin Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 324-35 (1991). Thus, the reformers envisioned that clinicians would be an integral part of the juvenile court clinic, and that physical and psychological evaluations would determine the child's problems and needs. See Mack, *supra* note 15, at 119-20.

<sup>18</sup> See CHARLES LARSON, *THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY* 34 (1972); MURRAY LEVINE & ADELIN LEVINE, *A SOCIAL HISTORY OF HELPING SERVICES* 155-229 (1970); BEN B. LINDSEY & HARVEY J. O'HIGGINS, *THE BEAST* 82-83 (1909).

<sup>19</sup> JOSEPH KETT, *rites of passage: adolescence in america—1790 to the present* (1977).

<sup>20</sup> This point is driven home by the writings of two early reformers, Judges Julian Mack and Ben Lindsey. See LARSON, *supra* note 18; Mack, *supra* note 15, at 115; LINDSEY & O'HIGGINS, *supra* note 18, at 85. Judge Mack consistently refers to offenders as children or boys (occasionally girls), often utilizing the term "child offender." Mack, *supra* note 15, at 115. Lindsey describes the "delinquent child" as "misguided and misdirected." LARSON, *supra* note 18, at 34. Lindsey's illustrative stories often involved young boys. See also LEVINE & LEVINE, *supra* note 18, at 219-22.

<sup>21</sup> See LINDSEY & O'HIGGINS, *supra* note 18, at 85.

<sup>22</sup> *Id.* at 133.

youthful offenders, by advocates seeking to underscore the appropriateness of a more lenient legal response to youth crime. Moreover, the reformers, in fact, may have been imagining younger offenders. The jurisdiction of juvenile courts in the early years ended at age fourteen or sixteen, and the real victory for reformers was that children between the ages of seven and fourteen were no longer tried as adults.<sup>23</sup>

Under the rehabilitative model of juvenile justice, the immaturity of young defendants was important, for several reasons.<sup>24</sup> Juvenile offenders were assumed to have different capacities and needs from adults (in part due to youthful vulnerability and dependence) that warranted separate adjudicatory procedures and a differential correctional response.<sup>25</sup> The reformers also believed that the criminal acts of youthful offenders reflected their immaturity; thus, juveniles were not criminally responsible and should not be subject to the same punishment as adults.<sup>26</sup> Neither the retributive or deterrent

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<sup>23</sup> See Mack, *supra* note 15, at 108; LARSON, *supra* note 18, at 34. See also Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 505-06 (1984) (describing the common law infancy defense and its presumed irrelevance in the traditional juvenile court).

<sup>24</sup> See generally Mack, *supra* note 15, at 119-20; Forst & Blomquist, *supra* note 17, at 324-25.

<sup>25</sup> Judge Ben Lindsey described young offenders as "needing aid, encouragement, help and assistance." LARSON, *supra* note 18, at 34. See also Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991) ("[b]y the end of the nineteenth century, children increasingly were seen as vulnerable, innocent, passive, and dependant beings who needed extended preparation for life"); Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1 (1987) (the juvenile justice system developed in the late nineteenth century "in response to society's growing recognition of the special needs of errant juveniles"); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1097 (1991) ("The desirability, even necessity, for a separate court system to address the problems of young people appeared obvious, given the newly emerging view of the adolescent as an immature creature in need of adult control.").

<sup>26</sup> See, e.g., FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 36 (1982) ("The child's immaturity was viewed as outweighing crime control considerations in determining appropriate responses to young persons who violated the law."); Martin R. Gardner, *The Right of Juvenile Offenders to Be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 191 (1989) ("The juvenile court movement assumed that young people under an articulated statutory age (sometimes as high as 21 years of age) are incapable of rational decision-making and thus lack the capacity for moral accountability assumed by the punitive model.").



purposes of the criminal law were appropriately served with this group.<sup>27</sup>

The qualities that were presumed to make juveniles less responsible than adults were not generally articulated with any precision. Since retribution is generally justified on the ground that criminal acts represent the free and rational choice to "do the bad thing,"<sup>28</sup> a rejection of retribution implicitly reflected a view that juveniles were developmentally unable to make this choice. Some observers pointed to the impulsiveness and malleability of youth as traits that were the basis of limited criminal responsibility.<sup>29</sup> Impulsiveness presumably contributes to incapacity because it impedes the ability to weigh the consequences of behavior, while malleability might make juveniles vulnerable to bad influences, particularly from peers.<sup>30</sup>

The rehabilitative approach of the traditional juvenile court presumed that state intervention could have either negative or positive effects on youthful offenders, and it emphasized the importance of preserving the future prospects of young offenders.<sup>31</sup> The Progressives, however, did not maintain that criminal conduct reflected developmental influences that would attenuate with age. Rather, the belief was that the delinquent youth was on a path to a criminal career, from which he could be diverted, through rehabilitation, or toward which he would proceed without appropriate intervention.<sup>32</sup>

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<sup>27</sup> Lee Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 BYU L. REV. 351, 361 ("Minors were said to lack the degree of maturity necessary to support firm judgments about their own culpability . . . . Nor could general deterrence be effective for young people who lacked a fully developed capacity for reasoning about costs and benefits supposed by that justification for punishment."); Forst & Blomquist, *supra* note 17, at 324 ("Underlying the Progressives' reform agenda was the assumption that minors . . . needed to complete their cognitive, social, and moral development before being expected to shoulder the burdens of adulthood.").

<sup>28</sup> See *infra* note 49 and accompanying text.

<sup>29</sup> Forst & Blomquist, *supra* note 17, at 325.

<sup>30</sup> In the reformers' minds, parents were often the culprits, mostly in failing to provide positive influence, thus leaving vulnerable children susceptible to the influences of peers. See LINDSEY & O'HIGGINS, *supra* note 18, at 82-83.

<sup>31</sup> See *State v. Benoit*, 490 A.2d 295, 299 (N.H. 1985) (stating that the purpose of the juvenile justice system is to shield children and to "prevent attachment of the 'stigma of a criminal' by reason of conduct resulting from immature judgment") (quoting *United States v. Fotto*, 103 F. Supp. 430, 431 (S.D.N.Y. 1952)).

<sup>32</sup> See Mack, *supra* note 15, at 109-10.

B. REFORMS IN THE WAKE OF *GAULT*

In the years since *In re Gault*<sup>33</sup> extended to juveniles in delinquency proceedings many procedural rights accorded to criminal defendants, both the procedures and purposes of the juvenile court have been radically reformed. In part, the changes grew out of mounting skepticism about the empirical premise that rehabilitation was effective with youthful offenders.<sup>34</sup> The reforms also reflected a growing belief that juveniles are more like adults than the traditional model recognized, and that young offenders should be held accountable for their offenses.<sup>35</sup> Focus on the seriousness of the offense rather than the needs of the youthful offender came to dominate the sentencing regime in many jurisdictions.

In the post-*Gault* period, policymakers grappled with the challenge of constructing a retributive system that recognized the youth and immaturity of juvenile offenders. The reformers of the 1970s and 1980s thought that youths were more likely to offend than adults, and attributed high crime rates among juveniles to psychological and biological factors associated with this developmental stage.<sup>36</sup> Under the post-*Gault* model of juvenile justice, juveniles were held responsible for criminal acts because they had sufficient moral judgment and capacity for self-control to justify this response.<sup>37</sup> Moreover, adolescents needed to learn

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<sup>33</sup> 387 U.S. 1 (1967).

<sup>34</sup> The reforms also grew out of a view that juvenile defendants got "the worst of both worlds," as Justice Fortes said in *Gault*, receiving neither the promised rehabilitation of juvenile court nor the procedural rights of adult defendants. *Id.* at 19 n.23.

Skepticism about rehabilitation grew, in light of the disappointing outcomes in juvenile corrections programs and the high recidivism rates among juvenile offenders. INSTITUTE OF JUDICIAL ADMINISTRATION: ABA JUVENILE JUSTICE STANDARDS, Standards Relating to Dispositions, Introduction (1982) [hereinafter ABA STANDARDS]. The Supreme Court, in extending procedural protections to juveniles charged with crimes, expressed skepticism about this premise of the rehabilitative model of juvenile justice. *Gault*, 387 U.S. at 17-19.

<sup>35</sup> Many states have revised the basis of their dispositional response to juveniles' criminal conduct from rehabilitation to retribution and accountability. See *infra* note 45 for a discussion of post-*Gault* legislation in Washington and other states.

<sup>36</sup> The importance of developmental influences on youth crime is reflected in the report of a task force of the Twentieth Century Fund, an important reform initiative of the late 1970s. FRANKLIN E. ZIMRING, TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS: CONFRONTING YOUTH CRIME 3 (1978). Zimring performed a background study for the Task Force's report on sentencing policy.

<sup>37</sup> *Id.* at 7. A premise of the retributive approach is that minors of an age that they are likely to engage in criminal behavior have a capacity for moral judgment. Other

to take responsibility for their choices, in preparation for adulthood.<sup>38</sup> However, because of youthful immaturity, the criminal choices of juveniles were seen as less culpable and thus as deserving less punishment than were those of adults.<sup>39</sup> Thus, dispositional duration could be linked to age, because age was presumed to be linked to criminal responsibility.<sup>40</sup> Differential treatment of adults and youth was also justified as a means to preserve the child's future options, a goal that presumed that delinquency did not necessarily presage adult criminality.<sup>41</sup>

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commentators have made this point. Walkover, *supra* note 23, at 543 ("adolescent children may be generally regarded as possessing the capacity to be culpable, although quite often not at the level one would expect of a mature adult"). The Juvenile Justice Standards, the most prominent reform project of the period, adopted a retributive approach to juvenile dispositions through proportionate and determinate sanctions based on the seriousness of the offense and fixed at the time of disposition. Under the Standards, sentences were shorter than those imposed on adults. See ABA STANDARDS, *supra* note 34.

<sup>38</sup> ZIMRING, *supra* note 26, at 7. Zimring argues that adolescence is a probationary period for adulthood, and that the goal of criminal intervention with youth should be to teach lessons in accountability. Zimring describes adolescents as having a "learner's permit" for adult life. *Id.* at 89-90. He argues that teens often make bad decisions (such as decisions to get involved in criminal activity) because of immature judgment and inexperience. *Id.* at 92. Sanctions should instruct about the negative consequences of such choices by holding young offenders responsible. *Id.* at 95-96.

<sup>39</sup> Thus under the Juvenile Justice Standards, juvenile sentences were shorter in duration than criminal sentences. See ABA STANDARDS, *supra* note 34, Juvenile Delinquency and Sanctions 5.2, commentary at 42. An express purpose of the Standards is to devise a delinquency code that "recognizes the unique physical, psychological, and social features of young persons in the definition and application of delinquency standards." *Id.* at 1.1, commentary at 3. The Twentieth Century Task Force also takes this approach. ZIMRING, *supra* note 36, at 7.

<sup>40</sup> ABA STANDARDS, *supra* note 34, at 2.1, commentary at 35. See also *id.* at 1.1, commentary at 19 n.5 (quoting Fred Cohen, Position Paper (Juv. Just. Standards Project, No. 18, 1974)).

A correctional system for juveniles also should contain prospective elements, attempts to promote the development of individual responsibility for lawful behavior on the part of offenders by providing opportunities for personal and social growth. The importance of this prospective element reflects the traditional legal perception of the physical dependence of the very young and the slow, slow process of intellectual and emotional maturation during adolescence. . . . Juveniles may be viewed as incomplete adults, lacking in full moral and experiential development.

*Id.* at 19.

<sup>41</sup> As Franklin Zimring comments: "The two most plausible justifications for separate treatment of adolescent offenders are the social value of giving young offenders the chance to mature and the theory that offenses committed by adolescents are less blameworthy than those committed by adults because the offender is not fully mature." ZIMRING, *supra* note 36, at 79. Implicit in Zimring's statement is an assumption that delinquent conduct may desist with maturity because it is driven by developmental forces.

Although the influence of developmental factors on criminal conduct was mostly presumed rather than analyzed, several characteristics of adolescents were understood by post-*Gault* reformers both to contribute to criminal conduct and to render adolescents less blameworthy. As compared to adults, minors were assumed to be more impulsive, to have less capacity for self control, to lack experience, and to be more inclined to focus on immediate rather than long-term consequences of their choices.<sup>42</sup> Observers also pointed to the importance of peer approval (and peer pressure), rebellion against parental authority and restrictions, and the inclination of adolescents to experiment and engage in risk-taking as developmentally-linked factors contributing to youth crime.<sup>43</sup> In combination, these traits were taken to characterize adolescence itself, and therefore to justify a conclusion that adolescent criminal conduct generally was less culpable than that of adults.<sup>44</sup>

These reform initiatives contributed to enormous changes in legal policy toward juveniles charged with crime. In the post-*Gault* generation, many legislatures have enacted retributive and more determinate sentencing provisions, in which the purpose of public protection is explicit and the seriousness of the present offense and the juvenile's prior record have become central factors.<sup>45</sup> Nevertheless, the statutory revisions until recently

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<sup>42</sup> The Twentieth Century Fund Task Force recognized that

adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. . . . It is unrealistic to view a sixteen-year-old as completely devoid of judgment and control; it is equally unrealistic to treat young offenders as if they have fully mature judgment and control.

See *id.* at 7.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> Zimring claims that a sound sentencing policy should take into account the forces that impinge on adolescent life, including the adolescent's shaky judgment and incapacity to resist peer pressure. The concept of diminished responsibility means that young offenders should be treated more leniently than adult offenders not because their acts are less dangerous but because they are less capable of controlling impulses, resisting peers, or thinking in the long-range terms that characterize mature decision-making.

*Id.* at 80.

<sup>45</sup> In 1977, the State of Washington enacted a comprehensive juvenile sentencing scheme, based on retributive and deterrent principles. Sentencing considerations in-

generally reflected the reformers' core prescription limiting retribution—that most juveniles, because of developmental immaturity, should be subject to less punishment than adult criminals.

### C. MODERN REFORMS—OBSCURING THE DEVELOPMENTAL LINES

The constraint on retribution that weighed so heavily with the post-*Gault* reformers has become considerably less important in recent years. The emphasis today is on social control—on protecting society from the harms inflicted by young offenders—and the clear trend has been toward imposing penalties on adolescents (especially those who commit violent crimes) that approximate sanctions imposed on adults.<sup>46</sup> These policies explicitly or implicitly present adolescent offenders as indistinguishable from adults, and reject the importance of youthful immaturity in the legal response to youth crime. As one advocate of “get tough” policies put it, juvenile offenders “are criminals who happen to be young, not children who happen to be criminal.”<sup>47</sup>

Some supporters of this trend challenge the notion that tough young criminals are less culpable or less mature than their adult counterparts, and argue that the juvenile justice system coddles young criminals. On this view, the traditional ac-

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clude age, seriousness of present offense, criminal record. See WASH. REV. CODE ANN. § 13.40.010(2) (West 1993). See also N.C. GEN. STAT. § 7A-646 (1993); N.J. STAT. ANN. § 2A:4A-43(a) (West 1987 & Supp. 1997) (offense, criminal record, aggravating and mitigating circumstances); OHIO REV. CODE ANN. § 2151-355 (Banks-Baldwin 1993 & Supp. 1997) (mandatory minimum sentences for serious crimes.); TEX. FAM. CODE ANN. § 54.04 (West 1996) (determinate sentences for serious felonies). See generally Feld, *supra* note 25, at 709-10. The amended statutes usually continue to describe the rehabilitative goal, but also emphasize the importance of protecting public safety and of punishing the juvenile offender. See, e.g., CAL. WELF. & INSTT. CODE § 202(a) (West 1984); IND. CODE ANN. § 31-6-1-1.1 (West 1979 & Supp. 1996).

<sup>46</sup> In 1992, for example, Massachusetts enacted a minimum sentence of 20 years for a murder delinquency adjudication. The statute provided for convicted youths to be moved at age 21 from the juvenile to the criminal correction system. MASS. GEN. LAWS ANN. ch. 119, § 72 (West 1994 & Supp. 1997). See also discussion in Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 231 (1996), and in Feld, *supra* note 25, at 709-13. Potentially far-reaching punitive federal legislation is discussed *infra* note 50.

<sup>47</sup> Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs An Overhaul*, 34 POL'Y REV. 65 (1985). See also Laura Stepp, *The Crackdown on Juvenile Crime: Do Stricter Laws Deter Youth?*, WASH. POST, Oct. 15, 1994, at A1 (quoting a Maryland legislator to have said that, “[i]f they want to do adult-type crimes, we’re going to treat them like adults”).

count of immature youngsters getting into scrapes with the law simply does not describe the savvy young offenders committing serious crimes today.<sup>48</sup> Minors who inflict serious harm are deemed to be engaging in adult-like criminal conduct, and thus are presumed to be sufficiently mature to be tried and punished as adults. According to one critic, "[s]ociety may wish to be lenient with first offenders, particularly for lesser crimes, *but there is no reason that society should be more lenient with a sixteen year old offender than a thirty year old offender.*"<sup>49</sup>

Several legislative strategies have been employed to treat juvenile offenders more like their adult counterparts. Many statutes provide for increasingly broad authority to adjudicate juveniles charged with serious offenses in adult criminal court,

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<sup>48</sup> Connecticut legislators advocating tough reforms that would allow most 14-year-olds charged with violent crimes to be tried as adults, complained that the juvenile justice system was geared more to the 1930s than to the 1990s. "Instead of youthful mischief such as vandalism, crimes committed by teenagers today are as likely to be shootings and stabbings." Matthew Daly, *House Toughens Juvenile Justice: Lawmakers Back Bill to Try Youths as Adults in Some Violent Crimes*, HARTFORD COURANT, June 4, 1995, at A1. See also Regnery, *supra* note 47, at 65; Mark Dowie, *Tough Justice, When Kids Commit Adult Crime, Some Say They Should Do Adult Time*, 13 CAL. LAW. 54 (1993). Regnery challenges the naivete of a system in which he concluded, kids were literally "getting away with murder." Juveniles commit nearly one-third of the serious crimes in America, with 16-year-old boys committing crimes at a higher rate than any other single age group. Regnery, *supra*, at 65.

<sup>49</sup> Regnery, *supra* note 47, at 68 (emphasis added). Regnery, the administrator of the Office of Juvenile Justice and Delinquency Prevention during the Reagan Administration, argued that the current theories and policies that are used to deal with juvenile crime "fail to hold offenders accountable and do not deter crime. At best they are outdated; at worst, they are a total failure, and may even abet the crimes they are supposed to prevent." *Id.* at 65. Regnery further explains that:

Criminals should be treated as criminals. It is true that environmental factors may contribute to some juvenile crimes, but this is also true of adult crimes. . . . Anyone familiar with the nature of juvenile crime will not make the argument that juvenile crimes differ in their magnitude or brutality than adult crimes; in many cases the reverse is true. So, the current approach, which makes a radical distinction between criminals under 18 and those over 18, is often counterproductive.

*Id.* at 68.

Even in the 1970s, some critics of the traditional court vehemently argued for treating juvenile criminals like adults. See ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 173-75 (1975) ("There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old mugger is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is as dead or raped as the victim of an older one. The need for social defense or protection is the same.").

either through judicial transfer or through legislative waiver.<sup>50</sup> The age of transfer has been lowered in many jurisdictions, and a broader range of felonies can lead to adjudication as an adult.<sup>51</sup> Moreover, categories of youthful offenders increasingly are statutorily defined as adults and excluded from juvenile court jurisdiction based on offense and age (rather than traits of the juvenile).<sup>52</sup> Currently, in many states, juveniles who have barely reached adolescence can be tried as adults and incarcerated in adult prisons.<sup>53</sup> Another response is to provide stiff statutory minimum sentences in juvenile court for certain offenses, often resulting in adult incarceration.<sup>54</sup> Some critics of the juvenile justice system would push this trend to its logical extreme and abolish separate juvenile courts altogether.

Criminal courts also appear to have adopted the view that youth is not an important factor in distinguishing juveniles from

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<sup>50</sup> See Thomas Grisso, *Juvenile Competency to Stand Trial*, 12 CRIM. JUST. 4, 5-6 (1997) (describing the shift in many states from discretionary judicial transfer to a "waive[r] exclusion" which automatically places certain offences under the jurisdiction of the adult criminal justice system even where a perpetrator is a juvenile). Grisso notes that fully 90% of all states have toughened their juvenile justice laws in recent years. *Id.* at 5. For an exhaustive listing and classification of current juvenile justice statutes, see Ainsworth, *supra* note 25, at 1106-12; Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 29 (1995).

A bill currently before Congress, if enacted, would expand the impact of this trend. S.10, 105th Cong. §206(b) (1997). The Violent and Repeat Juvenile Offender Act provides that juveniles age 14 and above can be tried and punished as adults, at the discretion of the United States Attorney in federal court. More importantly, the bill includes a provision for incentive block grants (in the amount of \$650,000,000 per year) to be awarded to states that establish similar procedures for youths charged under state law with crimes of violence, offenses involving controlled substances, or unlawful possession of a firearm.

<sup>51</sup> See, e.g., GA. CODE ANN. § 15-11-5 (1995) (providing for transfer at age 13). Some states have no minimum age of transfer. See Grisso, *supra* note 50, at 6; Grisso, *supra* note 46, at 231.

<sup>52</sup> See Feld, *supra* note 16, at 489; Fritsch & Hemmens, *supra* note 50, at 29-31.

<sup>53</sup> See statutes described in Fritsch & Hemmens, *supra* note 50, at 32-33. Georgia recently enacted a statute authorizing the adjudication of 12-year-old defendants as adults. See GA. CODE ANN. § 15-11-5 (1995).

<sup>54</sup> For a discussion of the Massachusetts statute, see *supra* note 46. New York has several "designated felonies" which carry long sentences for juveniles. Governor Pataki proposes to expand the list and to expand crimes for which children as young as 13 years can be tried as adults. James Dao, *New York's Top Democrat Takes Tougher Stance on Juvenile Crime*, N.Y. TIMES, Dec. 10, 1996, at A5. A legislative Commission in Virginia has recently recommended an extension to age 25 of dispositional jurisdiction in the juvenile correctional system to deal with serious offenders. REPORT OF THE VA COMM'N ON YOUTH, *supra* note 4, at 8.

adults. Despite some predictions to the contrary, adult criminal courts do not seem to respond to juvenile offenders more leniently than to adult criminals.<sup>55</sup> Studies have found that adolescents charged with serious offenses are convicted at about the same rate as adults and, if convicted, receive sentences of similar severity.<sup>56</sup>

This approach to juvenile criminal conduct seems to rest on an assumption of adolescent competence, implicitly holding that there are no psychological differences between adolescent and adult offenders that are important to criminal responsibility or to participation in an adult criminal proceeding. Usually the issue is not addressed, and the argument for tough sanctions focuses on the harm caused by youthful predators.<sup>57</sup> However, those who would treat young offenders as adults appear to assume that almost all juveniles meet any standard for maturity that might be relevant.

Despite the seemingly inexorable quality of the trend toward imposing full criminal responsibility on juvenile defendants, the account of adolescence that is embedded in the punitivist reforms has generated discomfort and controversy.<sup>58</sup>

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<sup>55</sup> Barry Feld in his article in this symposium argues for a reduced sentencing scheme for juvenile offenders in his proposed unified criminal court. Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997). Evidence to date suggests that political pressures make such a result unlikely. See studies cited in Grisso, *supra* note 46, at 242 (concluding that the public does not consider defendant age as a strong mitigating factor for serious offenses).

<sup>56</sup> See Grisso, *supra* note 46, at 231 (citing studies).

<sup>57</sup> See Regnery, *supra* note 47, at 68; VAN DEN HAAG, *supra* note 49, at 173-75.

<sup>58</sup> Discomfort is even more acute when cases arise involving pre-adolescent offenders committing serious violent crimes. The highly publicized case of Robert ("Yummy") Sandifer, an 11-year-old Chicago boy who killed another child (perhaps to impress gang members) is a good example. See John McCormick, *Death of a Child Criminal*, NEWSWEEK, Sept. 12, 1994, at 45. Robert's history was a story of abuse, family instability, and serious problem behavior from an early age. At the time of his death, his rap sheet included 23 felonies. In the aftermath of the case (Robert himself was killed a few days after his offense, probably by gang members fearing that he would implicate them), many who were involved in the case expressed frustration about the lack of secure treatment facilities to deal with cases like Robert's. *Id.* Few observers, however, suggested that an effective "solution" to cases like this, or to the social problems that they reveal, is to impose adult criminal punishment on pre-teen offenders. See, e.g., Editorial, *Stopping Young Offenders*, ATLANTA J. & ATLANTA CONST., May 16, 1997, at A18 (arguing that punishing juvenile offenders as adults "is a formula for creating juveniles who—after being abused or 'educated' in the adult system—emerge more hardened and vicious than when they went in."); see also MARTIN WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* 252 (1972) (suggesting that juvenile offenders punished as adults "commit more serious crimes [later in life] with



Many observers continue to emphasize the importance of youthful immaturity as an important limitation on criminal responsibility.<sup>59</sup> Even some proponents of the abolition of the juvenile court, such as Barry Feld, argue that minors are less capable of sound judgment, because of impulsiveness and a reduced capacity to appreciate the consequences of their acts, and thus are less culpable than adult offenders.<sup>60</sup> Feld concludes that the

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punished as adults "commit more serious crimes [later in life] with greater rapidity than those who experience a less constraining contract with the judicial and correctional systems.").

<sup>59</sup> Commentators challenge the assumptions about youth underlying recent policy, and argue that characteristic developmental traits may be relevant to decisions to engage in criminal conduct. See, e.g., Grisso, *supra* note 50, at 9 (listing authorities that studied and analyzed juvenile competency); Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 420 (1991) (traits which justify "treating young law violators differently than old ones" include "the diminished capacity of youth and their universally understood attributes—imperfect judgment, immature attitudes, impulsivity, [and] the difficult-to-resist need to please their peers"); Gardner, *supra* note 26, at 195-96 ("Developmental differences generally render adolescent persons less culpable or criminally responsible than their adult counterparts. Adolescent persons lack life experience and thus might be best viewed as 'semi-autonomous,' 'incomplete adults.' It is therefore unrealistic and unfair to hold them to adult responsibility standards."); Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L J.L. & PSYCHIATRY 129, 142-43 (1987); Teitelbaum, *supra* note 27, at 389 ("[A]dolescence is often marked by identity confusion and preoccupation with appearances in the eyes of others, and by a concern with the present rather than with long-term implications of conduct. Adolescents often are, in short, more vulnerable to peer pressure, more impulsive, and less thoughtful of consequence than adults. Our awareness of these characteristics should make us even less ready to rely on the categorical inferences of culpability that the criminal law incorporates.") (citations omitted); Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 158 (1989) ("It is unfair to hold adolescents accountable for their behavior at the same level that we hold adults. When the state has systematically denied adolescents experience in decision-making, it is unreasonable for society to expect the same quality of decision-making from adolescents that it expects from adults."); Forst & Blomquist, *supra* note 17, at 371-72 (comparing juvenile dispositions to the regulations imposed for drinking alcohol, driving, and marriage because both "seek to protect young people from the full consequences of judgments that reflect their current state of immaturity and inexperience."); *Id.* at 327 (Adolescents "have yet to obtain the full complement of judgment and maturity the legal system attributes to individuals who have reached the age of majority and who are to be held fully blameworthy for their acts of wrongdoing. . . . [This] implies that youths should continue to be treated differently from adults, even when by appearance and behavior, they may seem adult-like.").

<sup>60</sup> Feld and other critics argue that the juvenile court does not accord youthful defendants the most basic legal safeguards and that it employs unjust procedures which often treat similarly situated juveniles differently. These proponents argue that juveniles subject to adult criminal proceedings will benefit from the array of procedural protections that are afforded to adult criminal defendants. See Feld, *supra* note 25, at 722-25; Ainsworth, *supra* note 25; Katherine H. Federle, *The Abolition of the Juvenile*

immaturity of juvenile offenders can be accommodated at sentencing.<sup>61</sup> Thus, the intuitions about the immaturity of youth that drove the early Progressive founders of the court and the post-*Gault* reformers continue to be expressed today. Currently, however, these concerns tend to be overwhelmed in the debate by accounts of the social costs of a system that fails to restrain young offenders whose age alone distinguishes them from adult criminals.

## II. YOUTHFUL OFFENDING IN A DEVELOPMENTAL FRAMEWORK

Developmental psychology offers a useful perspective from which to examine and evaluate the changing conceptions of adolescence that have been reflected in the legal responses to juvenile crime during this century. It also clarifies the role that delinquent behavior may play in adolescence. In this Part, we clarify that many youths engage in criminal activity during adolescence but do not persist into adulthood—a phenomenon that can be explained most satisfactorily in developmental and social terms.<sup>62</sup> We then narrow the focus to examine developmental influences on decision-making that may distinguish the choices of adolescents from those of adults. Our interest here is in factors that may affect the understanding, reasoning and—perhaps most importantly—the judgment of youths who engage

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*Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990).

<sup>61</sup> See, e.g., Feld, *supra* note 25, at 723-34:

Without a juvenile court, an adult criminal court that administers justice for young offenders could provide children with all the procedural guarantees already available to adult defendants and additional enhanced protections because of the children's vulnerability and immaturity. . . . The only virtue of the contemporary juvenile court is that juveniles convicted of serious crimes receive shorter sentences than do adults. Youthfulness, however, has long been recognized as a mitigating, even if not an excusing, condition at sentencing. The common law's infancy defense presumed that children below age fourteen lacked criminal capacity, emphasized their lack of fault, and made youthful irresponsibility explicit. Youths older than fourteen are mature enough to be responsible for their behavior, but immature enough as to not deserve punishment commensurate with adults.

See also Ainsworth, *supra* note 25, at 1130-31 ("[T]he ordinary criminal justice system could and undoubtedly would adapt to the extension of their jurisdiction over minors" and adult sentences would not "necessarily ignore the fact of youth as a mitigating factor."); Melton, *supra* note 59, at 152 ("[T]he absence of a juvenile court does not eliminate the possibility of fully or partially exculpating juveniles on the basis of their immaturity.").

<sup>62</sup> We explore this phenomenon and sketch a theoretical account developed by Terrie Moffitt linking adolescent antisocial behavior to societal constraints on the assumption of adult roles. See Moffitt, *supra* note 9.

in criminal conduct. Finally, we explore how these developmental influences may affect choices made in the criminal justice context—both choices associated with criminal conduct and choices made by youthful defendants in the criminal process.

#### A. ANTISOCIAL BEHAVIOR AS A PART OF ADOLESCENCE

Substantial evidence indicates that many adolescents become involved in criminal activity in their teens and desist by the time they reach young adulthood. Beginning in early adolescence, criminal behavior increases through age sixteen and declines sharply from age seventeen onward.<sup>63</sup> Self-report studies indicate that most teenage males engage in some criminal conduct, leading criminologists to conclude that participation in delinquency is "a normal part of teen life."<sup>64</sup> For most adolescent delinquents, desistance from antisocial behavior also seems to be a predictable component of the maturation process.<sup>65</sup> Only a small group of young offenders will persist in a life of crime.<sup>66</sup>

A representative sample of adolescents involved in criminal activity will include a large group whose antisocial conduct is

<sup>63</sup> Richard Jessor & Shirley L. Jessor, *PROBLEM BEHAVIOR AND PSYCHOSOCIAL DEVELOPMENT: A LONGITUDINAL STUDY OF YOUTH* (1977); David P. Farrington, *Offending from 10 to 25 Years of Age*, in *PROSPECTIVE STUDIES IN CRIME AND DELINQUENCY* (K. Teilman Van Deusen & S.A. Mednick eds., 1983); Moffitt, *supra* note 9, at 675 fig.1.

<sup>64</sup> See Moffitt, *supra* note 9, at 675; Delbert Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, 32 *CRIMINOLOGY* 1, 5 (1994) (The Am. Soc'y of Criminology 1993 Presidential Address). Official crime rates, of course, are much lower, since self-reports include much undetected crime.

<sup>65</sup> See Edward Mulvey & John La Rosa, *Delinquency Cessation and Adolescent Development*, 56 *AM. J. ORTHOPSYCHIATRY* 212 (1986); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 *AM. J. SOC.* 552 (1983); see also Moffitt, *supra* note 9, at 675; Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 *SCI.* 985 (1987); David Farrington, *Age and Crime*, in 7 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH*, 189 (Michael Tonry & Norval Morris eds., 1986). It is worth noting that the studies deal with male offenders. Thus, the statements in the text only describe male behavior.

<sup>66</sup> Marvin Wolfgang's famous study found that 6% of the juvenile population committed over 2/3 of all serious juvenile crime and over half of all juvenile offenses. WOLFGANG ET AL., *supra* note 58, at 89 tbl.6.2. According to this study, there was a probability of 80% that boys arrested more than five times would continue to be arrested numerous times, well into their adult years. *Id.* at 163. Wolfgang's results were replicated in subsequent studies. See, e.g., PAUL TRACY ET AL., *DELINQUENCY CAREERS IN TWO BIRTH COHORTS* 90 (1990). Another study, looking at a broader range of offenders, found that 2/3 of all violent crimes were committed by just 7% of criminals. Mortimer Zuckerman, *War on Crime, By the Numbers*, *U.S. NEWS & WORLD REP.*, Jan. 17, 1994, at 68-69. See also Regnery, *supra* note 47, at 67.

"adolescence-limited" and a much smaller group whose conduct is "life-course-persistent."<sup>67</sup> Although some youths in the latter group initiate antisocial behavior in adolescence, many display a variety of problem behaviors, beginning early in life and persisting through adolescence into adulthood.<sup>68</sup> Of those whose adolescent delinquent conduct is a continuation of earlier antisocial behavior, many, although certainly not all, will become career criminals. However, as Moffitt points out, most youths who engage in delinquent conduct have little notable history of antisocial conduct in childhood; nor will the conduct continue into adulthood.<sup>69</sup> Involvement in criminal activity and other antisocial behavior begins in adolescence and tends to follow a "natural onset and recovery process."<sup>70</sup>

The developmental forces that contribute to the onset and desistance of delinquent adolescent behavior are not well understood. Moffitt offers a plausible etiological theory under which the tendency of adolescents to engage in antisocial behavior can be understood as linked to the gap experienced by contemporary youth between early biological maturity and late

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<sup>67</sup> See Moffitt, *supra* note 9. Mulvey and Aber support this view, describing adolescent delinquents as "a mix of 'novices, amateurs and persisters.'" Edward Mulvey & Mark Aber, "Growing Out" of Delinquency: Development and Desistance, in THE ABANDONMENT OF DELINQUENT BEHAVIOR: PROMOTING THE TURNAROUND 99, 100 (Richard L. Jenkins & Waln K. Brown eds., 1988). Nagin and Land describe a more complex taxonomy. See Nagin & Land, *supra* note 11.

<sup>68</sup> Marvin Wolfgang's study supports this taxonomy. WOLFGANG ET AL., *supra* note 58, at 130-40; Martin Wolfgang et al., *Juvenile and Adult Criminal Careers*, in FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 196 (1987) (follow-up study on the original birth cohort project tracking the subjects' criminal careers into adulthood and finding juvenile delinquency to be the strongest predictor of adult criminality). Delbert Elliott's self report study links early age of first offense with adult criminal conduct. See Elliott, *supra* note 64, at 14. A self-report study by Delbert Elliott reports that for youths whose first arrest is before age 12, 5 in 10 go on to adult criminal careers. For those whose first arrest is between ages 12 and 14, 3 in 10 persist in crime as adults, and for those whose first offense is after 14, only 1 in 10 go on to adult criminal conduct. Delbert Elliott et al., *Self-Reported Violent Offending*, 1 J. OF INTERPERSONAL VIOLENCE 472 (1986).

Although Moffitt and others have divided adolescent offenders into the two categories described in the text, others have suggested that this is an oversimplification. Particularly, the taxonomy omits adolescents that initiate antisocial behavior in adolescence and persist into adulthood. See *supra* discussion in note 11.

<sup>69</sup> See Moffitt, *supra* note 9, at 685.

<sup>70</sup> Mulvey & Aber, *supra* note 67, at 100-02 (arguing that research should focus on the developmental mechanisms associated with cessation of delinquency).

social maturity and independence.<sup>71</sup> Moffitt argues that adolescents are striving for elusive autonomy from parental and adult authority in a context in which most privileges of adult status are withheld. Many adolescents may be inclined to mimic their antisocial peers, who appear to have attained adult status in many ways.<sup>72</sup> Through antisocial conduct, the adolescent attenuates the ties of childhood and demonstrates that he can act independently. Under Moffitt's theory, youthful antisocial risk-taking acts are personal statements of independence by individuals who are precluded from yet assuming legitimate adult roles.<sup>73</sup> Desistance in young adulthood is explained under the theory as the adaptive response to changed contingencies, as more legitimate adult roles become available. Delinquent behavior becomes costly rather than rewarding, as many young adults perceive that it threatens now-available conventional opportunities and may foreclose future goals. In short, they come to realize that they have something to lose.<sup>74</sup>

#### B. REASONING AND JUDGMENT IN ADOLESCENT DECISION-MAKING

In this Part, we shift the focus from a general explanatory account of youthful involvement in crime to an examination of particular developmental influences on individual decision-making that may shape the choices of youthful actors in ways that distinguish them from adults.<sup>75</sup> Most familiar, and of par-

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<sup>71</sup> Moffitt, *supra* note 9, at 686-87. The maturity gap is not a modern phenomenon, but the period of youthful dependency is longer in contemporary society than in earlier periods. See KETT, *supra* note 19, at 114-16, 243.

<sup>72</sup> For example, Moffitt argues that life-course persistent boys, already engaging in a deviant lifestyle, are sexually active at an earlier age, less subject to parental and adult authority, are able to attain possessions through theft, and generally seem to "go their own way, making their own rules." Moffitt, *supra* note 9, at 687.

<sup>73</sup> *Id.* at 688-89.

<sup>74</sup> *Id.* at 690. Moffitt distinguishes adolescent-limited delinquents entering adulthood from life-course-persistent youths on a number of grounds that account for the failure of youths in the latter group to desist in their antisocial behavior when they become adults. Adolescents for whom delinquency is limited to this developmental stage will not bear the cumulative effects of lifelong antisocial conduct. Typically, they will have engaged in delinquent activity for a shorter time and of a less serious nature than will their life persistent counterparts, and thus may be less likely to have experienced damaging consequences. They are also more likely to have acquired social and academic skills that prepare them for adult roles. Finally, their delinquency does not reflect deeply entrenched personality disorder as may often be true of life-course-persistent offenders. *Id.* at 690-91.

<sup>75</sup> For reviews of research comparing the reasoning and decision-making capacities of adolescents and adults, see Leon Mann et al., *Adolescent Decision-making: The Devel-*

ticular importance in assessing the competence of younger adolescents to participate in criminal proceedings, are elements of cognitive development—reasoning and understanding. More salient to decisions about participation in criminal conduct are psychosocial factors such as peer influence, temporal perspective (a tendency to focus on short-term versus long-term consequences), and risk perception and preference. These psychosocial factors may affect decision-making in powerful ways that may distinguish juveniles from adults. We designate these psychosocial influences as “judgment” factors, and argue that immature judgment in adolescence may contribute to choices about involvement in crime.<sup>76</sup> This framework is largely consistent with Moffitt’s theory, but focuses on internal dynamic influences on adolescent decision-making that are associated with this developmental stage, whereas Moffitt’s emphasis is on changing external contingencies.

### *1. Cognitive Capacity: The Process of Decision-making*

It is generally recognized that decision-making capacities increase through childhood into adolescence and that, although there is great variability among individuals, preadolescents and younger teens differ substantially from adults in their abilities. Development occurs along several lines. The capacities to process information and to think hypothetically develop into adolescence, and cognitive performance improves generally due to knowledge gained in specific domains. Moreover,

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*opment of Competence*, 12 J. OF ADOLESCENCE 265 (1989); LITA FURBY & RUTH BEYTH-MAROM, OFFICE OF TECHNOLOGY ASSESSMENT, RISK TAKING IN ADOLESCENCE: A DECISION-MAKING PERSPECTIVE (1990).

<sup>76</sup> The judgment framework that we describe was developed and applied to adolescent decision-making by Elizabeth Scott, N.D. Reppucci and Jennifer Woolard in earlier work. See Elizabeth S. Scott et al., *Evaluating Adolescent Decision-making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision-making*, 37 VILL. L. REV. 1607 (1992). The impact of psychosocial factors on adolescent decision-making was further developed by Lawrence Steinberg and Elizabeth Cauffman. See Lawrence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-making* 20 LAW & HUM. BEHAV. 249 (1996). For further discussion of the Steinberg and Cauffman approach, see *infra* note 92. See also Elizabeth Cauffman, *Maturity of Judgment: Psychosocial Factors in Adolescent Decision-making* (1996) (unpublished Ph.D. dissertation, Temple University) (on file with authors) (study finding differences in influence of psychosocial factors on decision-making between adolescents and adults).

cognitive skills acquired earlier mature and develop into adolescence.<sup>77</sup>

The question of how adolescents' capacities for understanding and reasoning in making decisions compare with that of adults has received much attention among policy analysts and children's rights advocates in recent years—although largely *not* in the context of juvenile justice policy. Proponents of broader self-determination rights for minors, drawing on child development theory and empirical research, have argued that, by about age fourteen, adolescents' cognitive decision-making abilities are similar to those of adults.<sup>78</sup> This argument holds that adolescents are capable of making informed and competent deci-

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<sup>77</sup> Developmental theorists have posited that cognitive development progresses throughout childhood until mid-adolescence. See *infra* note 80 (discussing Piaget). Although Piaget's stage theory is questioned by modern cognitive psychologists, see *infra* note 85, it is generally accepted that developmental change in cognitive development occurs through the early teen years.

Flavell and his colleagues provide an excellent account of developments from middle childhood to adolescence in their text on cognitive development. See JOHN FLAVELL ET AL., *COGNITIVE DEVELOPMENT* (3d ed. 1993). They emphasize the following areas of development, some of which are mentioned in the text: Adolescents are more likely to approach a decision/problem by focusing on the possible and to think hypothetically, whereas elementary school children focus on the real and think concretely. *Id.* at 139-40. Adolescents have more knowledge in various specific knowledge domains, which is linked to better cognitive performance in these domains. *Id.* at 142-46. Information processing capacity increases with age. *Id.* at 146-49. Adolescents have more advanced metacognition (cognition about cognition). *Id.* at 149-54. They have a more developed "sense of the game" (what it means to think well versus poorly). Finally, the cognitive capacities that emerge in childhood improve with development over time. *Id.* at 156-59.

Some research about medical decision-making supports the conclusion that younger children and young adolescents are likely to engage in a simpler decision-making process than mid-adolescents and adults. See, e.g., Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982); Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEV. 538 (1981).

<sup>78</sup> See, e.g., Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99 (1983); Patricia King, *Treatment and Minors: Issues Not Involving Lifesaving Treatment*, 23 J. FAM. L. 241, 252-53 (1984-85); Stephen B. Billick, *Developmental Competency*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 301, 306-08 (1986); Brief for Amicus Curiae American Psychological Ass'n In Support of Appellees, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-805) (arguing against parental notification of adolescent abortion decision, in part on ground that adolescents have similar decision-making competence); Brief for Amicus Curiae American Psychological Ass'n In Support of Appellees, *Zbaraz v. Hartigan*, 484 U.S. 171 (1987) (No. 85-673).

sions about medical treatment and other matters, and should have the legal authority to do so.<sup>79</sup> The evidence for these claims is drawn in part from Piaget's stage theory of cognitive development<sup>80</sup> and from several empirical studies of minors' ability to understand and reason about medical and abortion decisions,<sup>81</sup> to understand treatment issues in psychotherapy,<sup>82</sup> and to understand their Fifth Amendment rights and the meaning of *Miranda* waivers.<sup>83</sup>

Together, this scientific research and theory support the claim that adolescents are more competent decision-makers than has been presumed under paternalistic policies, but the scientific evidence for the claim that their cognitive decision-making capacity is comparable to that of adults is unclear. We and others have made this argument elsewhere,<sup>84</sup> and thus we will sketch only the most salient points. First, Piaget's strict stage theory of cognitive development is no longer accepted among cognitive psychologists.<sup>85</sup> Further, the studies that support the claim of competence are small and mostly involve mid-

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<sup>79</sup> Informed consent doctrine requires that medical decisions be based on knowing, voluntary and intelligent (competent) consent. See Scott, *supra* note 76, at 1624.

<sup>80</sup> Under Piagetian theory, by about age 14, minors reach the stage of formal operations, the stage of cognitive development in which the capacity for adult-like reasoning is attained. FLAVELL ET AL., *supra* note 77; BARBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* (1952). Formal operations includes the ability to think hypothetically, and to compare alternatives in making decisions, a critical component of rational decision-making. A fuller discussion of these the theory and research is included in Scott et al., *supra* note 76, at 224-26.

<sup>81</sup> See studies cited *supra* note 78.

<sup>82</sup> Nancy Kaser-Boyd et al., *Children's Understanding of Risks and Benefits of Psychotherapy*, 15 CLINICAL CHILD PSYCHOL. 165 (1986); Nancy Kaser-Boyd et al., *Minors' Ability to Identify Risks and Benefits of Therapy*, 16 PROF. PSYCHOL. 411 (1985) [hereinafter Kaser-Boyd et al., *Minors' Ability*].

<sup>83</sup> THOMAS GRISSO, *JUVENILES' WAIVER OF MIRANDA RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* (1981); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

<sup>84</sup> Scott, *supra* note 76; Grisso et al., *supra* note 25, at 15; Grisso, *supra* note 50, at 7-9; Grisso, *supra* note 46, at 233-35. These critiques draw on the impressive analysis of William Gardner and his colleagues, William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895 (1989).

<sup>85</sup> The key challenge is to the idea that cognitive development is stage-like, in the sense that children at a given stage engage in characteristic reasoning across task domains. Rather, skills seem to develop at different rates in different domains, and competence to make one kind of decision cannot be generalized. ROBERT SIEGLER, *CHILDREN'S THINKING* 49-57 (2d ed. 1991); FLAVELL ET AL., *supra* note 77, at 114.



dle class subjects of average intelligence.<sup>86</sup> Only a handful compare the decision-making of minors with that of adults.<sup>87</sup> Finally, the studies of adolescent decision-making have been conducted in laboratory settings in which the decision is hypothetical and "pre-framed" in the sense that all relevant information is provided to the subjects.<sup>88</sup> This format yields little useful data about how decisions are made in informal unstructured settings (such as the street), in which decision-makers must rely on their own experience and knowledge in making choices. Moreover, research offers little evidence of how minors may function relative to adults in stressful situations in which decisions have salience to their lives.<sup>89</sup>

In sum, scientific authority indicates that, in general, the cognitive capacity for reasoning and understanding of preadolescents and many younger teens differs substantially in some regards from that of older teens and adults. Tentative authority also supports the conclusion that, by mid-adolescence, youthful capacities for reasoning and understanding approximate those of adults. Whether and how these capacities are employed, however, may be quite variable, and adolescent performance is not necessarily like that of adults in various contexts. Because the research was largely undertaken in structured settings, the findings may be more useful in shedding light on questions about competence to stand trial than on cognitive capacity as it affects choices relevant to criminal conduct.<sup>90</sup>

## 2. *Judgment Factors in Decision-making*

Psychosocial developmental factors may also influence decision-making by adolescents in ways that are relevant to competence to stand trial and criminal responsibility. Particularly salient in this context might be factors such as (1) conformity

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<sup>86</sup> See Grisso, *supra* note 46, at 233. Thus differences in understanding and reasoning can be found between delinquent adolescents and adults with lower IQ and lower socio-economic background, but not when both groups are of average intelligence. *Id.*

<sup>87</sup> See *supra* note 75.

<sup>88</sup> See discussion of studies in Scott, *supra* note 76, at 1631-36.

<sup>89</sup> Steinberg and Cauffman suggest that stress and moodiness may be factors in adolescent decision-making. Steinberg & Cauffman, *supra* note 76, at 261-62.

<sup>90</sup> Choices about participation in the proceedings are made in a structured setting in which information can be provided, whereas on the street, the youth must rely on his own knowledge and experience.

and compliance in relation to peers, (2) attitude toward and perception of risk, and (3) temporal perspective. If these factors influence decision-making, the impact is not on cognitive competence, narrowly defined,<sup>91</sup> but rather on "judgment" (as the term is used in common parlance).<sup>92</sup> The traditional presumption (in juvenile justice and in many other policy areas) that minors are not fully accountable and need legal protection rests in part on a view that their judgment is immature. In essence, the intuition is that developmentally-linked predispositions and responses systematically affect decision-making of adolescents in ways that may incline them to make choices that threaten harm to themselves and to others. Whereas cognitive competence affects the process of decision-making, immature judgment is reflected in outcomes, in that developmental factors influence values and preferences, which in turn shape the cost-benefit calculus. The influence of these factors (peer influence, attitude toward risk, and temporal perspective) will change as the individual matures and values and preferences change—resulting in different choices.

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<sup>91</sup> Under informed consent standards, which have formed the framework in which competence is analyzed, only cognitive capacities of reasoning and understanding are implicated. See Scott, *supra* note 76, at 1625.

<sup>92</sup> The judgment framework that follows was developed by Scott, Reppucci and Woolard. See Scott et al., *supra* note 76, at 226-35. Other researchers who have examined these issues are Larry Steinberg and Elizabeth Cauffman. See Steinberg & Cauffman, *supra* note 76, at 250. Based on an examination of the developmental research and theory, Steinberg and Cauffman have developed a more complex framework which conceptualizes three decision-making domains that affect judgment: responsibility; temperance; and perspective. *Id.* at 252. Responsibility involves the development of autonomy and independence (an important factor of which is declining susceptibility to peer influence), growth of coherent identity, and ego development. *Id.* at 253-58. The second domain, temperance, involves impulsiveness and the inclination to engage in risky activities. *Id.* at 258-59. Within this domain, a tendency toward sensation-seeking, physiological changes of adolescence and emotional volatility are offered to explain adolescents' greater tendency to take risks. *Id.* at 259-62. The third domain, perspective, involves the ability to temporal perspective and the ability to see how one's actions affect others and the ability to compare alternative consequences. *Id.* at 262-63. All of these dimensions of perspective involve "decentration," the ability to shift from more obvious (central) considerations, to more subtle or remote ones. *Id.* at 263.

This description suggests that the three judgment factors in our decision-making framework are each core factors in the three domains in the more complex Steinberg and Cauffman framework. In an empirical study comparing psychosocial influences on adolescents and adults decision-making in these three domains, Cauffman found differences in maturity of judgment between adolescents and adults based on differences in psychosocial development. Cauffman, *supra* note 76.

### a. Peer Influence

It is widely assumed that peer influence plays an important role in adolescent crime,<sup>93</sup> and evidence supports the claim that teens are more subject to this influence than are adults.<sup>94</sup> Peer influence seems to operate through two means: social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others.<sup>95</sup> Social conformity to peers, which peaks at about age fourteen, influences adolescents to adapt their behavior and attitudes to that of their peers.<sup>96</sup> Peer influence could affect adolescent decision-making in several ways. In some contexts, adolescents might make choices in response to direct peer pressure. More indirectly, adolescent desire for peer approval could affect the choices made, without any direct coercion.<sup>97</sup> Finally, as Moffitt suggests, peers may provide models for behavior that adolescents believe will assist them to accomplish their own ends.<sup>98</sup>

### b. Attitude Toward Risk

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<sup>93</sup> Gang activity is largely an adolescent phenomenon, and generally adolescents are more likely to commit crimes with peers than are adults. Much adolescent offending is not formal gang activity, but rather small informal groups of two or three youths. Solo offending becomes dominant by the mid-twenties. See Albert Reiss, Jr. & David Farrington, *Advancing Knowledge About Co-offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360 (1991) (describing the pervasive importance of peer influence on adolescent crime).

<sup>94</sup> Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841 (1986). Although the trend of peer influence through childhood and adolescence has been studied, little research has simultaneously studied peer influence on adolescents and adults. See Steinberg & Cauffman, *supra* note 76, at 254.

<sup>95</sup> N. SPRINTHALL & W.A. COLLINS, *ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW* (1988).

<sup>96</sup> J.S. COLEMAN, *THE ADOLESCENT SOCIETY* (1961); Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 611 (1979) (finding that social conformity peaks in 9th grade for situations involving anti-social behavior); Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967 (1966).

<sup>97</sup> For example, an adolescent might engage in a particular conduct only because she believes that peers will approve.

<sup>98</sup> See *supra* note 72 and accompanying text.

Research evidence also indicates that adolescents differ from adults in their attitude toward and perception of risk.<sup>99</sup> It is well established that adolescents and young adults generally take more risks with health and safety than do older adults by engaging more frequently in behavior such as unprotected sex, drunk driving and criminal conduct.<sup>100</sup> This inclination may result because adolescents are less aware of risks than are adults,<sup>101</sup> because they calculate the probability of risks differently, or because they value them differently.<sup>102</sup> In some contexts, adolescent risk preferences may be linked to other developmental factors. For example, adolescents may be more averse than adults to risking social ostracism.

### c. Temporal Perspective

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<sup>99</sup> See, e.g., William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, in *ADOLESCENT RISK TAKING* 78-79 (Nancy J. Bell & Robert W. Bell eds., 1993); William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, in *ADOLESCENTS IN THE AIDS EPIDEMIC* 24 (William Gardner et al. eds., 1990); Peter Finn & Barry W.E. Bragg, *Perception of the Risk of an Accident by Young and Older Drivers*, 18 *ACCIDENT ANALYSIS PREVENTION* 289, 296 (1986); Michael L. Matthews & Andrew R. Moran, *Age Differences in Male Drivers' Perception of Accident Risk: The Role of Perceived Driving Ability*, 18 *ACCIDENT ANALYSIS & PREVENTION* 299, 309-11 (1986); M. Tester et al., *Experimental Studies of the Development of Decision-making Competence*, in *CHILDREN, RISKS, AND DECISIONS: PSYCHOLOGICAL AND LEGAL IMPLICATIONS* (Symposium materials, Annual Convention of the Am. Psychological Ass'n, New York, Aug. 1987).

<sup>100</sup> Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-making Perspective*, 12 *DEV. REV.* 1, 11-18 (1992).

<sup>101</sup> Lewis, *supra* note 77, at 541-42 (reporting study that found that younger adolescents thought of fewer risks of plastic surgery than did older adolescents and adults). The belief that adolescents do not perceive risks accurately is supported by Elkind's work, suggesting that adolescents perceive themselves as invulnerable from harm. David Elkind, *Egocentrism in Adolescence*, 38 *CHILD DEV.* 1025 (1967). Other researchers have challenged the invulnerability hypothesis. Quadrel, Fischhoff and Davis, for example, found that adolescents did not perceive themselves to be more invulnerable to certain risks (pregnancy, for example) than did their parents. Marilyn Jacobs Quadrel et al., *Adolescent (In)vulnerability*, 48 *AM. PSYCHOLOGIST* 102, 106-07, 111-12 (1993). However, since the study did not provide data about the accuracy of each group's perception of its own vulnerability to the particular risk, it sheds little light on whether teens' perceptions are distorted. Thus, teens and their mothers may have similar perceptions about their own vulnerability to the risk of unwanted pregnancy (i.e., both groups may think they are at little risk), but teens may in fact be far more vulnerable.

<sup>102</sup> Compared to adults, adolescents tend to focus less on protection against losses and more on opportunities for gains in making choices. See Gardner & Herman, *supra* note 99, at 26-27; see also Furby & Beyth-Marom, *supra* note 100, at 7. An example of how adolescents may value risks differently, though they calculate the same likelihood as adults, might be the youth who thinks, "I know I'm likely to get killed, but I'd rather take the risk than be rejected by my friends."

Differences between adults and adolescents in attitude toward risk are related to differences in temporal perspective. Adolescents seem to discount the future more than adults do, and to weigh more heavily short-term consequences of decisions—both risks and benefits—a response that in some circumstances can lead to risky behavior.<sup>103</sup> This tendency may be linked to the greater uncertainty that young people have about their future, an uncertainty that makes short-term consequences seem more salient.<sup>104</sup> It may also reflect the difference in experience between teens and adults. It may simply be harder for an adolescent than for an adult to contemplate the meaning of a consequence that will have an impact ten or fifteen years into the future.

In general, the fact that adolescents have less experience than adults seems likely to affect decision-making in tangible and intangible ways. Although the relative inexperience of adolescents has not been contested as a general proposition, the relevance of inexperience to decision-making and judgment is uncertain.

#### C. THE IMPACT OF DEVELOPMENTAL FACTORS ON DECISION-MAKING ABOUT OFFENDING

The research evidence on the impact of immaturity of reasoning and judgment on adolescent decision-making is sketchy, and, thus, assertions about the effects must be very tentative.<sup>105</sup> With this caveat, it seems probable that developmental factors associated with adolescence could affect decision-making in several ways. First, adolescents may use information differently from adults. They may consider different or fewer options in thinking about their available choices or in identifying conse-

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<sup>103</sup> See Gardner & Herman, *supra* note 99, at 25-26. As Gardner and Herman point out, the strong tendency of adolescents to focus on immediate consequences can lead to risky behavior, because only the immediate and not the long term negative consequences of a choice are weighed in making choices. *Id.* Thus, adolescents may be more inclined to engage in risky sexual behavior without thinking about AIDS or pregnancy. The high rate of suicides among adolescents may also relate to temporal perspective.

<sup>104</sup> *Id.*

<sup>105</sup> Preliminary research by Cauffman supports the proposition that psychosocial factors influence maturity of judgment in decision-making in ways that distinguish adults and adolescents. See Cauffman, *supra* note 76. However, far more empirical research support is needed to clarify the extent and scope of these influences.

quences when comparing alternatives.<sup>106</sup> The extent and sources of the differences in use of information are unclear. It is plausible that dissimilar and more limited experience and knowledge, as well as attitudes toward risk, temporal perspective, and peer influence, are all implicated. These differences may be most evident in unstructured informal settings, where information is not provided, and individuals must make choices based on their own knowledge and experience.<sup>107</sup> Thus, adolescents on the street, who are making choices that lead to criminal conduct, may be less able than adults to consider alternative options that could extricate them from a precarious situation. Secondly, substantial theoretical arguments hold that while older adolescents may have adult-like capacities for reasoning, they may not deploy those capacities as uniformly across different problem-solving situations as do adults,<sup>108</sup> and they may do so less dependably in ambiguous or stressful situations.<sup>109</sup> Finally, adolescents, for developmental reasons, could differ from adults in the subjective value that is assigned to perceived consequences in the process of making choices.<sup>110</sup> Influenced by the developmental factors that we have described, adolescents may weigh costs and benefits differently (or view as a benefit what adults would count as a cost).<sup>111</sup>

These developmentally driven differences could be important to choices about participation in crime. Consider the fol-

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<sup>106</sup> Catherine Lewis's study of the extent to which youths, aged 11 to 18, recognize risks of cosmetic surgery supports this statement, and indicates that the range of alternatives considered in making choices increases through adolescence. See Lewis, *supra* note 77, at 541-43.

<sup>107</sup> It is for this reason that one of us has argued elsewhere that research on decision-making using an informed consent framework (in which all salient information is provided to subjects) may not get at differences between adults and adolescents. See Scott, *supra* note 76, at 1631-36.

<sup>108</sup> See generally FLAVELL ET AL., *supra* note 77; ROBERT S. SEIGLER, *CHILDREN'S THINKING* (2d ed. 1991).

<sup>109</sup> Leon Mann, *Stress, Affect, and Risk-Taking*, in *RISK-TAKING BEHAVIOR* 201, 212-13 (J. Frank Yates ed., 1992); Irving Janis, *Decision-making Under Stress*, in *HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS* 69 (Leo Goldberger & Shlomo Breznitz eds., 1982); Steinberg & Cauffman, *supra* note 76, at 262.

<sup>110</sup> See Furby & Beyth-Marom, *supra* note 100, at 6; Gardner & Herman, *supra* note 99, at 24-26; Pamela Porter Kulbok et al., *Life Style and Patterns of Health and Social Behavior in High-Risk Adolescents*, 11 *ADVANCES IN NURSING SCI.* 22 (1988).

<sup>111</sup> Alida C. Benthin et al., *A Psychometric Study of Adolescent Risk Perception*, 16 *J. ADOLESCENCE* 153, 164-65 (1993); Sarah E. Hampson et al., *Adolescent Alcohol-Related Risk-Taking: Exploring Structural Relations Among Risk Perceptions, Personality, and Risk-Taking* (1992) (unpublished manuscript, on file with authors).

lowing example. A youth hangs out with his buddies on the street. Someone suggests holding up a nearby convenience store. The boy's decision to go along with the plan may proceed in the following way. He has mixed feelings about the proposal, but doesn't think of ways to extricate himself—although perhaps a more mature person might develop a strategy. The possibility that one of his friends has a gun and the consequences of that may not occur to him. He goes along, mostly because he fears rejection by his friends, a consequence that he attaches to a decision not to participate—and that carries substantial negative weight. Also the excitement of the hold-up and the possibility of getting some money are attractive. These weigh more heavily in his decision than the cost of possible apprehension by the police, or the long-term costs to his future life of conviction of a serious crime.<sup>112</sup>

The example presents, in our view, a quite plausible account of the influence of the developmental factors that we have described on the decisions of adolescents to engage in criminal conduct.<sup>113</sup> The choice, although it may reflect a lack of knowledge and experience, may not be irrational, because the youth is choosing the option that promotes subjective utility, given his values. The decision does, however, implicate immaturity of judgment—at least from a societal perspective—because it causes harm to a victim, and threatens harm to the youth himself.

If these influences on decision-making are developmental and not simply reflective of individual idiosyncratic preferences for risk-taking, they should abate with maturity. This prediction is consistent with the pattern of desistance from delinquent conduct in late adolescence or early adulthood that we have described.<sup>114</sup> In general, it is reasonable to argue that the developmental factors of peer influence, temporal perspective, and

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<sup>112</sup> Travis Hirshi and Michael Gottfredson assert that criminal conduct is defined by a lack of concern for long-term consequences, but challenge whether this tendency is subject to developmental influence after childhood. Travis Hirshi & Michael Gottfredson, *Rethinking the Juvenile Justice System*, 39 CRIME & DELINQ. 262, 263 (1993). Certainly, other evidence suggests that it is linked to developmental maturity. Steinberg & Cauffman, *supra* note 76, at 266; Scott et al., *supra* note 76, at 238-39.

<sup>113</sup> The account is drawn from the research and theory about adolescence that we have described. No research of which we are aware has directly studied adolescents' decision-making in the context of crime.

<sup>114</sup> See *supra* notes 71-74 and accompanying text.

risk perception and preference contribute to delinquent behavior and that their declining influence contributes to desistance. Although the factors contributing to desistance have not been adequately studied, researchers have linked desistance in late adolescence to a longer-term perspective and to changing patterns of peer relationships.<sup>115</sup> As Moffitt postulates, young adults may cease to commit crimes because they come to understand that the decision to offend carries the risk of lost future opportunities.<sup>116</sup> In other words, a cost-benefit calculus leads to a conclusion that choosing crime no longer maximizes subjective utility.

What is not clear is whether the source of the change is exogenous or endogenous. Moffitt seems to suggest that the calculus shifts because external contingencies change.<sup>117</sup> A focus on psychosocial influences that contribute to immaturity of judgment suggests that desistance can be linked to developmental maturation. Based on the developmental research and theory that we have described, we are inclined to believe that much adolescent participation in crime is the result of interaction between developmental influences on decision-making and external contingencies that affect individuals during this stage. Very recent studies have begun to demonstrate the relationship between psychosocial developmental factors and the quality of youths' choices compared to those of adults.<sup>118</sup> Further research is required, however, to determine the degree to which these developmental factors directly affect the decisions of youths participating in delinquent activity.

#### D. THE IMPACT OF DEVELOPMENTAL FACTORS ON DECISION-MAKING IN THE CRIMINAL PROCESS

Increasingly, under the legislative reforms of recent years, youths who are charged with crimes are tried as adults, or face severe punishment for their offenses even if they are tried in juvenile court.<sup>119</sup> In this context, it becomes relevant to ask whether developmental factors are likely to influence the ca-

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<sup>115</sup> See Mulvey & LaRosa, *supra* note 65, at 231, 218-20.

<sup>116</sup> See Moffitt, *supra* note 9, at 690.

<sup>117</sup> *Id.* at 690-91.

<sup>118</sup> See, e.g., Cauffman, *supra* note 76 (finding differences in influence of psychosocial factors on decision-making of adolescents and adults).

<sup>119</sup> See *supra* notes 50-54 and accompanying text.



pacities of youthful defendants to participate in their defense. The importance of this inquiry is clear in light of the constitutional requirement that criminal defendants be competent to participate in the proceedings against them.<sup>120</sup> Historically, questions of competence to stand trial have arisen in cases involving mentally ill and mentally retarded defendants. As younger defendants face adult criminal proceedings and punishment, cases involving trial incompetence due to immaturity are likely to increase.

Richard Bonnie has described two broad types of abilities associated with the defendants' legal competence to participate in criminal proceedings.<sup>121</sup> The first is the capacity to assist counsel. This involves the defendant's ability to understand and appreciate the meaning of the legal procedure and her rights within that process, and the ability to assist counsel in developing a defense.<sup>122</sup> The second concept is decisional competence, referring to defendants' capacities for reasoning and judgment needed to make decisions in the process, including decisions to waive important rights.<sup>123</sup> In these areas of ability, developmental immaturity may impede the capacity of juvenile defendants to participate in criminal proceedings. As compared to the scant empirical data about youthful decisions to offend,<sup>124</sup> substantial research has examined different dimensions of juveniles' capacities as they could affect their participation in trials. A recent comprehensive review of research suggests that delinquent adolescents are at risk of being less competent partici-

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<sup>120</sup> *Dusky v. United States* established the constitutional test for determining whether a defendant is competent to stand trial under the due process clause of the Fourteenth Amendment. 362 U.S. 402, 402 (1960). The *Dusky* test requires that the defendant be able to understand the charges against him and to assist his attorney in his defense. *Id.*

<sup>121</sup> Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 294 (1992).

<sup>122</sup> For example, the defendant must be able to communicate and understand relevant information. *Id.* at 297.

<sup>123</sup> *Id.* at 298-99. Waiver of the right to remain silent, the right to counsel, and the right to testify are examples. Perhaps the most important decision that most defendants make involves whether to plead guilty under a plea agreement.

<sup>124</sup> Research on decision-making in that unstructured "natural" context of course encounters far greater obstacles.

pants in their defense then are adults, and that this risk is especially great for youths under the age of fourteen.<sup>125</sup>

Studies on youths' understanding of matters related to trials, such as the roles of participants and the trial process, have found that youths under the age of fourteen typically are deficient in their knowledge of the legal process and its basic purposes.<sup>126</sup> In contrast, few differences in basic understanding of trial-related matters have been observed between adolescents fourteen to seventeen years of age and adults, when the populations studied were "average" adolescents. Similarly, a conventional grasp of the nature of legal rights typically has developed by mid-adolescence.<sup>127</sup> Moreover, fundamental abilities of sensation, perception, and memory ordinarily have matured by early adolescence, suggesting that adolescents on average should be as capable as adults of providing accurate information to their attorneys from their experience.

Delinquent youths, however, are more likely than average to have disabilities—for example, emotional disturbances, learning and attention deficit disorders, or poorer intellectual capacities—that may contribute to delays in the development of capacities for understanding, communication, and the ability to attend to the trial process as it unfolds.<sup>128</sup> Studies of delinquent youths' understanding of the trial process and capacity to assist counsel have found important deficiencies, often distinguishing these juveniles from adults and from "average" adolescents. Compared to adults, both delinquent and non-delinquent adolescents who have lower intelligence test scores, problematic educational histories, learning disabilities, and mental disorders

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<sup>125</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, PSYCH., PUB. POL'Y & L. (forthcoming 1998). The present discussion summarizes Grisso's more detailed review of research on these questions.

<sup>126</sup> E.g., GARY B. MELTON ET AL., PREPARING SEXUALLY ABUSED CHILDREN FOR TESTIMONY: CHILDREN'S PERCEPTIONS OF THE LEGAL PROCESS (1992); Judy Cashmore & Kay Bussey, *Children's Conceptions of the Witness Role*, in CHILDREN'S EVIDENCE IN LEGAL PROCEEDINGS 177, 179-80 (J.R. Spencer et al. eds., 1990); Amye Warren-Leubecker et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 158, 176-81 (S. Ceci et al. eds., 1989).

<sup>127</sup> Gary B. Melton, *Children's Concepts of Their Rights*, 9 J. CLIN. CHILD PSYCH. 186, 189 (1980).

<sup>128</sup> Grisso et al., *supra* note 25, at 10 ("In addition to mental retardation . . . , mental illness and other disorders have been noted in almost all existing cases [involving juvenile offenders].") (emphasis in original).

have shown poorer comprehension of basic information about the legal process.<sup>129</sup> Other evidence has suggested that delinquent youths' experience with courts, attorneys, and law enforcement officers does not reliably compensate for these tendencies toward poorer understanding of information related to the trial process and rights.<sup>130</sup>

Defendants must also be able to make decisions in the trial process, and thus, reasoning and judgment capacities are implicated, as well as understanding. The direct evidence is sketchy about how adolescents compare with adults in their capacities to reason about important legal decisions and in their valuation of the consequences of those decisions. As we have described, capacities associated with reasoning and problem solving are in a formative stage in the primary school years.<sup>131</sup> One study, for example, found that youths between ten and thirteen-years-of-age were significantly less likely than older adolescents to think "strategically" about pleading decisions, when hypothetical conditions varied as to evidence of guilt and seriousness of accusa-

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<sup>129</sup> For example, in one study of comprehension of Miranda rights, mean performance of low-IQ (70 or below) 15 to 19-year-olds was poorer than that of average-IQ 10 to 12-year-olds. See Grisso, *supra* note 50, at 7-8; Grisso, *supra* note 83, at 1152-56; see also Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629, 643-47 (1995); Richard Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of Their Rights*, 34 JUV. & FAM. CT. J. 49, 53 (1983); Michele Peterson-Bidali & Rona Abramovitch, *Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?*, 34 CAN. J. OF CRIMINOLOGY 139 (1992); Barbara Zaremba, *Comprehension of Miranda Rights by 14-18 Year Old African-American and Caucasian Males With and Without Learning Disabilities* (1992) (unpublished Ph.D. Dissertation, College of William & Mary) (on file with author).

More delinquent youths than adults perceived rights as "conditional"—something that one was "allowed to do"—rather than as entitlements. S. Wall & M. Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359 (1985); GRISSE, *supra* note 83; Lawrence, *supra*, at 53-56.

<sup>130</sup> Grisso, *supra* note 83, at 1155 (number of prior arrests was not related to delinquent youths' performance on tests of understanding of Miranda rights); Cowden & McKee, *supra* note 129, at 655; Lawrence, *supra* note 129, at 53-56 (understanding of trial process and trial participants roles was not related to delinquent youths' degree of past involvement with justice system). But see A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 48 (1970) (delinquent youths had a better grasp of Miranda rights on average than did non-delinquent youths). Grisso pointed out that the degree of understanding of law-related information increased with prior court experience only for white juveniles and only when the number of prior arrests was above the average juvenile rap sheet. Grisso et al., *supra* note 25, at 13.

<sup>131</sup> See, e.g., FLAVELL ET AL., *supra* note 77 and accompanying text.

tions.<sup>132</sup> Research finding younger adolescents to be less capable of imagining risky consequences during hypothetical problem solving,<sup>133</sup> and to consider a more constricted number and range of consequences,<sup>134</sup> also suggests that they may have difficulty considering the merits of plea agreements and making other decisions about their defense. As we have indicated, most studies have found few differences between older adolescents (ages fifteen to seventeen) and adults in formal decision-making functions.<sup>135</sup> Again, however, most of these studies have involved non-delinquent youths, without documented disabilities, processing hypothetical rather than real decision problems (in non-stressful settings), focused on medical treatment rather than criminal or delinquency adjudication.<sup>136</sup>

Beyond the formal ability to understand and process information, youthful judgment may differ from that of adults in ways that could affect the ability to assist counsel and to make decisions. How defendants respond to attorneys' advice and weigh the consequences of their choices in the trial process may be affected by psychosocial factors such as peer and adult influence, temporal perspective, and risk preference and perception. Such differences might influence youths' judgments about the value of accepting plea bargains<sup>137</sup> and of waiving important rights in the legal process. In one study, for example, delinquent youths, in considering the waiver of *Miranda* rights, focused more than adults on immediate consequences of waiver (release from custody) rather than the impact of the decision on later events in court.<sup>138</sup> A more subtle issue is the effect of psychosocial factors on the attorney-client relationship, particu-

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<sup>132</sup> Michele Peterson-Bidali & Rona Abramovitch, *Grade Related Changes in Young People's Reasoning About Plea Decisions*, 17 LAW & HUM. BEHAV. 537, 544-45 (1993).

<sup>133</sup> Kaser-Boyd et al., *Minors' Ability*, *supra* note 82, at 414, 416; Lewis, *supra* note 77, at 541.

<sup>134</sup> Grisso, *supra* note 46, at 234 (describing recent findings on such phenomena among delinquents as fatalism, inability to frame problems in a larger context and inadequate perception of alternatives).

<sup>135</sup> See *supra* note 78 and accompanying text.

<sup>136</sup> See *supra* notes 81-83 and accompanying text.

<sup>137</sup> For example, will risk preference and temporal perspective influence juveniles to be more likely than adults to "take a chance" by going to trial in the hopes of acquittal, rather than accepting a guilty plea and lighter sentence?

<sup>138</sup> GRISSE, *supra* note 83. This was significantly more likely for younger adolescents than for older adolescents. Grisso, *supra* note 83, at 1155, 1157.

larly on the inclination to trust the attorney and to value her advice, as compared, for example, to advice from peers.

In the trend toward treating more and younger juveniles charged with crimes as adults, little attention has been paid to whether youthful defendants can competently participate in the process. Yet it is uncontroversial that competence is a critical requirement for fair criminal proceedings. The research evidence suggests that many youths may be less competent than adults to assist counsel and make important decisions in their defense.

### III. THE DEVELOPMENTAL FRAMEWORK AND CRIMINAL PUNISHMENT

#### A. CRIMINAL RESPONSIBILITY AND PSYCHOLOGICAL IMMATURITY

It seems likely that developmental influences relating to understanding and judgment affect adolescent choices to commit crime in ways that distinguish most young offenders from their adult counterparts. Although individual adult and juvenile offenders may vary, decision-making factors associated with age that affect decision-making provide a basis for differentiating between the two categories of offenders. Moreover, the fact that delinquent behavior desists for most adolescents as they approach adulthood strongly suggests that criminal conduct, for most youths, is associated with factors peculiar to adolescence. Thus, evidence from developmental psychology challenges the account of adolescence offered by the modern punitive reformers, who generally discount the idea that relevant differences exist between youthful and adult offenders. This evidence also suggests that the Progressives' account of youth involved in crime as childlike and blameless actors in need of treatment is skewed. In our view, when analyzed in the framework of conventional criminal excuse doctrine, the developmental evidence supports a presumption of *diminished* responsibility for adolescent offenders—but not a *lack* of responsibility.

Analysis of how the differences between youthful and adult offenders should count in formulating a legal response to juvenile crime can usefully begin by looking to the accepted underpinnings of adult criminal responsibility. The criminal law posits that the offender is a rational actor, autonomously choosing "to do the bad thing" on the basis of personal values and

preferences.<sup>139</sup> The legitimacy of punishment is undermined if criminal choices depart substantially from this autonomy model.<sup>140</sup> If youthful choices to offend are based on diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened. Psychology, in providing evidence that developmental psychosocial factors may shape decision-making well into adolescence, lends support to the intuitive conclusion that immature offenders are less culpable than their adult counterparts.

It is important, however, not to overstate the practical importance of whatever differences may exist between adolescents and adults.<sup>141</sup> Although much rhetoric about free will and blameworthy choice surrounds the issue, criminal responsibility defenses are very narrowly drawn under established doctrinal standards for evaluating the quality of criminal choice. Many adult defendants whose choices reflect serious impairment, or coercion, or other exogenous influences are nevertheless convicted and punished for their crimes. For example, although mental disability and disorder are not uncommon among criminals,<sup>142</sup> the modern insanity defense is available only to defendants with severe cognitive impairment that renders them unable to understand or appreciate the nature and quality of their wrongful conduct.<sup>143</sup> Poverty and parental failure to inculcate appropriate norms are likely to exert strong influence on criminal choices, and are outside the offender's control, and yet

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<sup>139</sup> The premise that the criminal is an autonomous decision-maker is integral to both retributive and deterrent theories of punishment. RICHARD J. BONNIE ET AL., CRIMINAL LAW 7-8, 13 (1997). See also Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1268 (1976) (arguing that holding actors responsible "treats all persons as autonomous and capable of that most human capacity, the power to choose").

<sup>140</sup> At some level this underlies all exculpatory defenses, including the insanity defense. It also supported the common law infancy defense. See Walkover, *supra* note 23.

<sup>141</sup> It should be clear from the previous discussion that currently we have no reliable direct empirical information about the extent or exact nature of the differences.

<sup>142</sup> John Monahan, *Clinical and Actuarial Predictions of Violence*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 305-08 (D. Faigman et al. eds., 1997).

<sup>143</sup> See BONNIE ET AL., *supra* note 139, at 467-76. Only 0.25% of criminal defendants successfully assert an insanity defense. See H. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 50-53 (1993).

are deemed irrelevant to adult culpability. In short, despite the theoretical commitment to requirements of free will and rational choice, in practice, only a small group of offenders whose choices are extremely compromised are fully excused from criminal liability.

When analyzed in this doctrinal framework, developmental differences affecting decision-making are likely to be substantial enough to provide categorical excuse from responsibility only for very young juveniles, who are qualitatively different from adults in moral, cognitive, and social development. Certainly by mid-adolescence, the differences between adolescent and adult decision-making are more subtle than those that distinguish the adult offenders whose crimes are excused under current law from other adult offenders. A categorical presumption of adolescent nonresponsibility, such as that which was endorsed by the traditional juvenile justice system, is hard to defend on grounds of immaturity alone.<sup>144</sup>

On the other hand, the perspective on adolescent criminal conduct offered by developmental psychology also challenges the retributive arguments of modern advocates of punitive policies. A claim that juvenile offenders deserve equivalent punishment to that imposed on adults presumes that no substantial differences exist that undermine the legitimacy of imposing equal measures of retribution on the two groups.<sup>145</sup> On this point, the evidence disputes the conclusion that most delinquents are indistinguishable from adults in any way that is relevant to culpability, and supports the creation of two distinct culpability categories—although, of course, there will be outliers in both groups. In short, the predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders.

The developmental evidence supports the argument of the post-*Gault* reformers of the 1970s and 1980s that a presumptive

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<sup>144</sup> The assumption of traditionalists that individual juveniles do not bear responsibility for their criminal acts is extremely offensive to those advocating tough policies. For example, Alfred Regnery describes derisively a report of the Carter Administration's Justice Department that attributes delinquency to the effect of large impersonal institutions such as schools, social service agencies, employment channels, and courts on youthful development. See Regnery, *supra* note 47, at 65.

<sup>145</sup> See *id.* at 68. (observing that "there is no reason that society should be more lenient with a 16-year-old first offender than a 30-year-old first offender").

diminished responsibility standard be applied to juveniles. Moreover, other dimensions of the developmental picture strengthen the argument for reduced accountability. Because of inexperience and immature judgment, youths will make many mistakes during this period. Thus, as Franklin Zimring has argued, adolescence can usefully be conceptualized as a probationary period, in which young decision-makers learn to make responsible choices, without bearing the full costs of their mistakes.<sup>146</sup> This approach argues for a legal response to crime that signals that choices have consequences, and that bad behavior is punished, but not as severely as is appropriate with older offenders (who have been given the opportunity to learn to make better choices).<sup>147</sup>

Not surprisingly perhaps, some of these themes can be discerned in responses to adult offenders whose conduct suggests reduced culpability. The behavioral traits and inexperience that in general characterize youthful offenders as a group may be relevant for grading purposes at sentencing of individual adult criminals. The "immature" offender, whose acts were influenced by others, who is a first offender, or who "made a mistake" out of inexperience and can be expected to have "learned her lesson," may receive a reduced sentence, based on an official judgment that her crime is less culpable and deserves less punishment than does that of a seasoned criminal.<sup>148</sup> In the case

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<sup>146</sup> See ZIMRING, *supra* note 26, at 89-90. Zimring uses the metaphor of the learners permit to capture this probationary period.

<sup>147</sup> *Id.* at 5 ("To impose full responsibility because adolescents have begun to make life choices is much like expecting every new bride to be an instant Betty Crocker. It isn't realistic and it isn't fair."). Zimring also observed that "[e]qual treatment for wrong-doing seems inappropriate to the transitional status of the [adolescent] . . . who must be protected from the full burden of adult responsibilities, but pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood." *Id.* at 96. This approach also underscores the flawed foundation of the rehabilitative model of juvenile justice, in its premise that punishment was inappropriate.

<sup>148</sup> VON HIRSCH, *supra* note 16. Evidence of this kind is routinely presented at sentencing under indeterminate sentencing prescriptions. It is also the kind of evidence that would be deemed important in a capital sentencing proceeding. See *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (in capital sentencing, court, in imposing sentence, must be allowed to consider, "as mitigating factors character, prior record, age, . . . and . . . relatively minor part in the crime"); cf. 28 U.S.C.A. § 994 (West 1996). Under the determinate approach of the Federal Sentencing Guidelines, factors such as the offender's role in the offense can be taken into account in sentencing. Section 1B1.3(b) of the Guidelines links the determination of a sentence to the relevant conduct of the defendant in commission of the offense. See RODGER W. HAINES, *FEDERAL*



of adults, lesser punishment acknowledges an individual deficiency, a failure to attain an adult level of maturity and experience. For utilitarian reasons, however, such leniency will be cautiously exercised, lest the presumption of free will would completely collapse. Most adults are presumed to act on the basis of individual values and preferences. With minors, in contrast, criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility.<sup>149</sup>

#### B. A SOCIAL COST PERSPECTIVE ON JUVENILE CRIME

Contrary to what we have called the "utilitarian assumption" underlying current policies, a developmental perspective suggests that the goal of crime reduction is also served by attending to developmental dimensions of criminal behavior. In the current climate of public anxiety about violent youth, many policymakers are persuaded that society must treat immature youthful offenders as a class more severely because of the mag-

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SENTENCING GUIDELINES HANDBOOK: TEXT AND ANALYSIS 61 (1997). The commentary stresses that "the focus is on the specific acts and omissions for which the defendant is to be held accountable . . . ." *Id.* That the offender is a career criminal is a basis for increasing the sentence. *Id.* at 553 (§ 4A); *id.* at 604 (§ 4B1.3). Although the definition of "career offender" includes only persons who were at least 18-years-old at the time of the instant offense, *id.* at 590 (§ 4B1.1), the Guidelines provide for taking into account at sentencing defendant's offenses committed prior to age 18, regardless of whether the defendant was tried as an adult or in the juvenile justice system. *Id.* at 562 (§ 4A1.2(d)).

<sup>149</sup> As the text suggests, if diminished responsibility defenses are not available to these offenders, the distinction can be justified in part on their greater opportunity over time to develop mature judgment. This view was supported in *In re Causey*, 363 So. 2d 472, 476 (La. 1978):

[M]any juveniles, "sane" as well as "insane," "normal" as well as "retarded," are incompetent to assist in their own defense, at least by normal adult standards. This, indeed, is a large part of the rationale for the special juvenile system. Where a juvenile is "incompetent" primarily because of his tender years, it might be unnecessary and perhaps unwise to substitute the full-dress examinations and hearings designed for adult incompetents . . . .

However, according to Grisso, this view was seldom, if ever, articulated by other courts. Grisso, *supra* note 25, at 9. Ultimately, the case for applying a presumption of reduced culpability to juveniles, but not making such a standard available to adults on an individual basis is justified most persuasively on utilitarian grounds. See *supra* notes 141-44; *infra* notes 157-64.

nitude of social harm caused by juvenile offenders.<sup>150</sup> A developmental perspective reveals that, despite its superficial appeal, this position is short-sighted, even in terms of the reformers' objectives. On purely instrumentalist grounds, effective policy will attend to the developmental character of much youth crime, and to the divergent patterns of offending represented by the two groups described earlier—those youths whose criminal behavior is limited to adolescence, and those whose delinquency is part of a life-course persistent pattern.

### 1. *The Instrumentalist Argument for Tough Sanctions*

Political arguments for tough juvenile sanctions combine a retributive claim that juvenile and adult offenders deserve analogous punishment, with a utilitarian argument that such policies will reduce crime. Even if a strong claim that the criminal choices of adolescents and adults are the same is rejected, as we have suggested it should be, many are ready to discount the extent and relevance of developmental differences in assessing criminal responsibility.<sup>151</sup> Although only the most fervent advocates of punitive policies are comfortable punishing children, regardless of age, like their adult counterparts,<sup>152</sup> many more conclude that the principles limiting criminal punishment

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<sup>150</sup> Several statistics support the view that youth violence inflicts significant social costs. The National Crime Victimization Survey in 1991 found that juveniles committed 28% of crimes against persons. See Delbert Elliott, *Youth Violence: An Overview*, Center for the Study of Youth Policy, Univ. of Pennsylvania (1993). Rates of violent juvenile crime, particularly homicide have increased dramatically in recent years. See discussion *supra* note 4; see also HOWARD SNYDER & BARBARA SICKMUND, *JUVENILE OFFENDERS & VICTIMS: NATIONAL REPORT*, NAT'L CENTER OF JUVENILE JUSTICE (1995); Barbara Allen-Hagen & Melissa Sickmund, *Juveniles and Violence: Offending and Victimization*, JUV. JUST. DIG., Aug. 4, 1994, at 1; Glenn Pierce & James Alan Fox, *Recent Trends in Violent Crime: A Closer Look* (1992) (unpublished manuscript, on file with Northeastern Univ. Dep't of Criminology).

<sup>151</sup> VAN DEN HAAG, *supra* note 49; Regnery, *supra* note 47; Dowie, *supra* note 48. Virginia's Governor George Allen, in promoting a bill in the state legislature that would automatically treat youths of 14 and older charged with murder or rape as adults, said that such youths "know the difference between right and wrong. This will send the message that we're not just going to give you a slap on the wrist for committing violent felonies." Peter Baker, *Virginia Bill Takes Hard Line on Youth Crime*, WASH. POST, Feb. 1, 1996, at 1-2. Allen initially proposed trying every violent juvenile age 14 and over as an adult, but he withdrew this proposal to get legislative passage. *Id.* The compromise legislation combined the harsh punishment advocated by Republicans with rehabilitative components. *Id.*

<sup>152</sup> See *supra* note 58 and accompanying text (discussing the reaction to the killing by 11-year-old Robert "Yummy" Sandifer).

are not unduly strained by ignoring the impact of immaturity on adolescent criminal choices.<sup>153</sup>

In the current climate, any modest developmental claim for leniency seems to be far outweighed by the importance of reducing the social threat of adolescent crime. In general, the criminal law balances autonomy-based constraints on retribution against the social cost of excusing conduct that inflicts harm. How the balance is struck depends in part on the magnitude of the perceived harm.<sup>154</sup> Many observers believe that, although youthful immaturity may have served to justify a differential response to the criminal conduct of minors in a more peaceful time,<sup>155</sup> today the stakes are too high to retain a system that sacrifices social protection.<sup>156</sup> In response to the evidence that violent youth crime has escalated in recent years,<sup>157</sup> the recent legal reforms have shifted the balance toward greater social protection.

From an instrumentalist perspective, the argument against counting youth as a mitigating factor in applying criminal sanctions seems to be even more compelling, because the developmental factors at issue are likely to contribute to the inclination to commit crimes. On this view, if adolescents tend to be risk-preferring actors who discount future consequences in favor of immediate gratification, they present a greater threat than do older offenders, and the social interest in constraint is more compelling.<sup>158</sup> Through this lens, a system that responds leni-

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<sup>153</sup> As we have suggested, by mid-adolescence the impact of developmental factors on decision-making is not analogous to the distortions of perception and cognition caused by severe mental illness that is required to support an insanity defense. Thus, many may find the differences relatively insubstantial. See *supra* notes 142-44 and accompanying text.

<sup>154</sup> Thus, only negligence or recklessness must be shown to establish *mens rea* for most crimes. To require that the defendant's purpose to cause the harm be proven would exclude too many offenders. See, e.g., MODEL PENAL CODE § 2.01 (1962).

<sup>155</sup> See Daly, *supra* note 48, at A1.

<sup>156</sup> Thus immaturity is treated as analogous to poverty, inadequate socialization by parents, or emotional distress. All may contribute to criminal choices but are not exculpatory on social cost grounds, since large numbers of offenders would be affected. In contrast, only a handful of offenders are excused by reason of insanity. See STEADMAN ET AL., *supra* note 143, at 50-53.

<sup>157</sup> See *supra* note 4 and accompanying text. This trend has been linked to the widespread availability of guns. See GUIDE, *supra* note 4.

<sup>158</sup> Demographic data supports that 16-year-olds commit more crime than any other age cohort. A rapid decline begins at age 17. See Moffitt, *supra* note 9, at 675; Mulvey & Aber, *supra* note 67, at 100.

ently to its most dangerous offenders appears to be muddled and inefficient.

## 2. *Utilitarian Policies Through a Developmental Lens*

The assumption underlying the current trend holds that a rigorously punitive approach is the optimal means to accomplish the goal of reducing the social cost of youth crime. At one level the "cure" seems promising, given the objectives. Young offenders who are incarcerated in prison cannot be on the streets committing crimes. The developmental analysis in Part II, however, suggests that the utilitarian assumption is flawed and that punitive policies may not be the optimal means to limit the costs of juvenile crime.

A policy response designed to minimize social cost will recognize the substantial societal interest in facilitating desistance in delinquents whose crimes are adolescence-limited, and in preserving their future prospects. Most delinquent youths will grow into useful (or at least not criminal) citizens if they survive this stage without destroying their life chances. When and whether they emerge into productive adulthood is likely to be at least in part a function of the system's response to their adolescent criminal conduct.<sup>159</sup> It seems likely, although it has not been demonstrated, that categorically imposing adult criminal penalties on adolescents will increase the likelihood that they will become career criminals, or at least that it may delay desistance.<sup>160</sup> Moreover, even if desistance is not directly affected by a criminal sentence, the future educational, employment and social productivity of those youths whose crimes are adolescent-limited behavior is likely to be negatively affected, either directly or indirectly.<sup>161</sup> Policy that attends to this developmental pattern

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<sup>159</sup> Moffitt suggests that desistance of antisocial behavior may be delayed if access to conventional adult roles is impeded as a result of the delinquent conduct. See *supra* note 9 and accompanying text.

<sup>160</sup> See Jeffrey Fagan, *The Comparative Advantages of Juvenile Verses Criminal Court Sanction on Recidivism among Adolescent Felony Offenders*, J.L. & SOC. POL'Y (forthcoming Winter 1997). The difficulties in studying these effects are daunting. What is needed is controlled longitudinal research in which youths are randomly assigned adult criminal and juvenile penalties. Further, the juvenile intervention must not be equivalently punitive; ideally, it would be tailored to provide "room to reform." Recidivism and other productivity measures would then be studied over a number of years.

<sup>161</sup> The direct impact involves time spent in prison by individuals who have matured and no longer represent a threat. It also involves the response of employers,

would give these delinquent minors "room to reform," protecting them from the most severe consequences of choices based on immature judgment.<sup>162</sup>

A modest claim, based on our developmental analysis, is that the broad use of adult criminal penalties against youths may carry social costs that currently are being left out of the calculus, when such penalties are applied to normative adolescent offenders. The social benefits that proponents of tough penalties promise are not likely to be realized because two assumptions underlying the policies appear to be erroneous: that most youths who commit serious crimes are young career criminals; and that adult penalties will not generate severe iatrogenic effects that harm those who would otherwise outgrow their inclination to engage in criminal conduct.

As to the small group of delinquents whose conduct is likely to persist into adulthood, the picture is quite different. The research suggests that many adolescents in this group are likely to offend at an earlier age,<sup>163</sup> and that their criminal conduct is frequent, chronic and more likely to be violent than is that of their delinquent peers.<sup>164</sup> Thus, purely on social cost grounds, early and severe punitive sanctions may seem to be justified once a "differential diagnosis" identifies an offender as belonging to this group.<sup>165</sup> However, such a response may be shortsighted, even aside from the formidable problem of false positive identification given our current level of knowledge,<sup>166</sup> and

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educational institutions and others to a criminal record. The indirect impact involves whatever lasting psychological effects of the prison experience and record have on the individual's choices, goals, and identity after release.

<sup>162</sup> ZIMRING, *supra* note 36, at 7, 79-81. See also ZIMRING, *supra* note 26, at 73, 91 (developing this idea further).

<sup>163</sup> See *supra* note 68 and accompanying text.

<sup>164</sup> A frequently quoted statistic that brings this point home is that 5-6% of chronic offenders commit over 50% of crime. See, e.g., D. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME (1986); see also WOLFGANG ET AL., *supra* note 58, at 88 (6% of offenders commit over 50% of crimes).

<sup>165</sup> Moffitt argues that such a diagnosis may be possible through an examination of pre-adolescent behavior, since life-course-persistent offenders are far more likely to have a long history of troublesome childhood behavior, such as behavioral problems in school, learning problems, etc. Moffitt, *supra* note 9, at 678.

<sup>166</sup> Other than early onset of antisocial behavior, few clear indicators identify offenders as life-course persistent versus adolescence-limited delinquents. For example, although early adolescent offenders are more likely to engage in violent offenses than are adolescents who first offend in mid-adolescence, violent offenses are not typical of either group, and some adolescence-limited offenders also commit violent crimes. See *id.* at 691, 695. Thus, violent offending, per se, would not be helpful to a clinician or

the moral constraints on punishment of the youngest offenders.<sup>167</sup> The enormous social cost inflicted by a lifelong career in crime—or by lifelong incarceration—argues for continuing to invest in developing early and comprehensive remedial interventions. Although knowledge currently is inadequate to the task, and simple prescriptions seem unlikely, a long-term strategy for dealing with this group that relies only on incarceration is not likely to be effective.

This conclusion does not signify that the optimal legal response to youth crime is “benign neglect.” Although some sociologists have advocated a minimalist approach to intervention as the best means to avoid turning delinquents into career criminals,<sup>168</sup> this is not a desirable response on several grounds. First, the prediction on which it is premised is simply wrong as applied to life-course-persistent offenders, the group threatening the greatest harm. As to the larger group of adolescent offenders, lessons in accountability are important. As Franklin Zimring has argued, adolescents need to learn from their foolish youthful choices so that they can successfully assume adult roles.<sup>169</sup>

#### IV. LESSONS FOR JUVENILE JUSTICE POLICY

The analysis to this point suggests that a developmental perspective may be usefully employed in formulating legal responses to juvenile crime. In this part, we will sketch a few policy lessons that we take from the analysis, and suggest directions for future innovation and research. Our aim is not to provide a detailed policy blueprint, but rather to suggest the

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court in making a differential diagnosis. Moreover, although early onset of criminal conduct is a good predictor, only 45% of teens who first offend before age 11 will go on to become life-course criminals. See Elliott, *supra* note 64, at 14.

<sup>167</sup> See *supra* notes 139-44 and accompanying text. Moreover, as we have indicated, the youngest offenders, who may be least appropriately subject to punishment on retributive grounds, are perhaps most likely to become careerists. Substantial research evidence indicates that age of first arrest is a good predictor of future criminal career. Life-course-persistent delinquents tend to be arrested at a younger age than their adolescence-limited delinquent counterparts. Rolf Loeber & Thomas Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCHOL. BULL. 68, 78-79 (1983); Mulvey & La Rosa, *supra* note 65, at 213; WOLFGANG ET AL., *supra* note 58, at 103.

<sup>168</sup> The identification and labeling of youths as delinquent, on this view, is self-reinforcing. EDWIN M. SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* (1973).

<sup>169</sup> See ZIMRING, *supra* note 26, at 89-90.

contours of a system for responding to juvenile crime that is informed by developmental knowledge. We accept as a starting point that a central objective of any viable contemporary system is to reduce the social cost of youth crime, through means that conform to conventional limits on retribution and notions of procedural fairness. These goals function as constraints on the generation of policies under a developmental model of juvenile justice.

We take three core points from the developmental psychology evidence to be of potential importance to juvenile justice policy. First, on average, adolescents' decision-making abilities, especially related to judgment, have not matured to a level characteristic of adults. This gap is likely to be substantial with younger teens, and, for this group, is likely to include greater differences in understanding and reasoning as well as judgment. These differences are important both to culpability and to competence to stand trial. Second, younger adolescent offenders are likely to present a higher risk of becoming career criminals than are teens who initiate criminal conduct in mid-adolescence. And finally, delinquent behavior itself is shaped by developmental influences, and most adolescents desist as they age. The following sections suggest some ways in which an optimal legal response to youth crime will attend to these developmental considerations.

#### A. RESPONDING TO CRIMES OF YOUNGER ADOLESCENT OFFENDERS

##### *1. Limiting Criminal Court Jurisdiction*

The developmental evidence supports a conclusion that, as a general matter, younger teens are sufficiently different from adults in cognitive and psychosocial development that they should not be tried or punished in the adult criminal justice system. First, the argument for diminished responsibility is more compelling as applied to younger teens. Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility. Beyond this, the research indicates a substantial risk that many (perhaps most) younger adolescents may be substantially less competent to stand trial

than are their adult counterparts.<sup>170</sup> Thus, concerns about procedural fairness and about diminished culpability both point in the direction of a categorical exclusion of younger adolescents from adult criminal adjudication.<sup>171</sup>

The procedural fairness issue deserves further comment. The debate about juvenile justice reform has rarely focussed on this dimension of the trend toward trying ever-younger defendants as adults. Upon reflection, it presents formidable problems. The prohibition against trying incompetent defendants historically has been raised in cases involving mentally ill defendants, who, upon a finding of incompetence to stand trial, typically are hospitalized so that they may be restored to competence.<sup>172</sup> It is quite unclear what should happen to a youthful defendant who is unable to participate adequately in his defense due to developmental immaturity. Should the criminal adjudication be suspended for some indefinite period of time until he matures? During the intervening period, should he be confined, even though he has not been convicted of a crime? If not, what is the alternative? The questions posed suggest the difficult issues that will arise if younger adolescents are routinely subject to adult criminal adjudication. It seems far wiser to minimize the problem by categorically excluding from adult criminal adjudication younger teens, whose immaturity is most likely to impair their competence to function as defendants in criminal courts.

## 2. *Recognizing and Responding to High-Risk Juveniles*

The conclusion that younger teens, because of their immaturity, should not be subject to criminal adjudication and punishment does not mean that a minimalist response to their offenses is indicated. As we have indicated, young adolescent

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<sup>170</sup> See review of research in Grisso, *supra* note 125; see also authorities cited *supra* notes 127, 130.

<sup>171</sup> It is premature (given the status of the research) to be prescriptive about the minimum age for criminal adjudication, and to an extent, of course, the line will depend on how much difference between youths and adults society is willing to tolerate. In our view, until age 15, developmental differences (based on current knowledge) are sufficient to raise substantial issues of procedural and substantive fairness.

<sup>172</sup> See, e.g., VA. CODE ANN. § 169.1 (Michie 1995). Once restored to competence, the defendant stands trial. *Id.* Procedures for evaluating defendants for competence to stand trial and for dealing with those who are found incompetent are regulated by statute.



offenders are at considerably greater risk of becoming chronic serious offenders than are those whose delinquency begins a few years later,<sup>173</sup> because the criminal conduct of these younger teens is less likely to be part of a typical developmental process that will progress to a stage of natural recovery and desistance. Their behavior is more likely to reflect a nascent personality disorder, developing over time through the interaction of individual vulnerabilities and environmental factors.<sup>174</sup> Currently, when younger teens first offend, we cannot discern those who will proceed to criminal careers. Further research is needed to distinguish these youths from young juveniles whose crimes reflect transient developmental influences.<sup>175</sup> Nonetheless, pre-adolescent and early adolescent criminal conduct is a sufficiently important predictor so as to place these youths in a high-risk category that warrants serious attention.<sup>176</sup>

It is in responding to these young offenders that a revitalized concept of rehabilitation is important in a contemporary model of juvenile justice. Rehabilitative interventions with pre-adolescent and young adolescent offenders should be far more

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<sup>173</sup> See *supra* note 164 and accompanying text. Loeber provides ample evidence from numerous studies of what he calls the "early onset hypothesis," which holds that youths who begin criminal activity in preadolescence and early adolescence are at more risk for a delinquent career than those who start later. This group has a higher crime rate (number of convictions), commit more serious offenses and have longer careers. Rolf Loeber, *The Stability of Antisocial and Delinquent Child Behavior: A Review*, 53 CHILD DEV. 1431, 1437-39 (1982). See also Moffitt, *supra* note 9, at 683-84 (describing the childhood pattern of antisocial behavior in life-course persistent offenders); Elliott, *supra* note 64, at 14.

<sup>174</sup> Moffitt offers an account of the early stages of this process. The young child who has neuropsychological deficits that make him difficult to manage may have parents who are poorly equipped to respond in a beneficial corrective way. Instead, problem behavior at home and at school is reinforced and negative responses contribute to failure to acquire adequate academic and social skills. See Moffitt, *supra* note 9, at 683-84.

<sup>175</sup> Research indicates that factors such as the age of onset, and variety and frequency of problem behavior are linked to its stability and persistence and that chronic offenders are likely to have a history of antisocial behavior going back to early childhood. Loeber, *supra* note 173, at 1431-32; Moffitt, *supra* note 9, at 677-78. The problem is that we cannot yet predict which of those young offenders who present this pattern will become adult criminals. For an effort to build on the typology, and to develop criteria for identifying children who will become chronic offenders, for treatment purposes, see Donald Lynam, *Early Identification of Chronic Offenders: Who are the Fledgling Psychopaths?*, 120 PSYCHOL. BULL. 209 (1996). Lynam argues that children who manifest hyperactivity-impulsivity-attention deficit disorder together with conduct problems are at high risk for future chronic offending. *Id.* at 214.

<sup>176</sup> See authorities cited *supra* in note 167.

intensive than has been the traditional response. Indeed, in some sense, the traditional dispositional regime has it backwards, in its tendency to intervene minimally with younger offenders and more assertively with older adolescents.<sup>177</sup> Thus, a response that waits until these offenders are older and identified as chronic violent offenders misses the opportunity to remediate at a point when the possibility for rehabilitation is more promising than it will be later.<sup>178</sup>

It is fair to say that we have not yet developed effective rehabilitative interventions for these very young offenders, although a few delinquency programs have reported promising results in recent years.<sup>179</sup> On the other hand, we also have not yet invested substantially in developing intensive and comprehensive interventions directed at the multiple problems that these youths face. Such an effort requires a serious long-term commitment of societal resources, and until it is undertaken, it cannot be said that "nothing works."<sup>180</sup> Given the long term social cost of failure to make the investment—costs that include both the wasted lives of these youths and the harm they inflict on society—it seems well worth it.

In our view, these comprehensive interventions should explicitly be part of the response to juvenile crime, though the interventions may have educational, mental health, and social service components. Investment in intensive rehabilitative interventions that is closely linked to public protection from juvenile crime may be more palatable to legislators and to the

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<sup>177</sup> This response makes sense, of course, if the sole purpose of intervention is retribution.

<sup>178</sup> By age 18, antisocial personality disorder is well established and prospects for rehabilitation are very poor. See Moffitt, *supra* note 9, at 684; Loeber, *supra* note 173, at 1431-32.

<sup>179</sup> See David Tate et al., *Violent Juvenile Delinquents: Treatment Effectiveness and Implications for Future Action*, 50 AM. PSYCHOLOGIST 777, 779 (1995). These authors found that multisystemic therapy (MST) shows promise with violent young offenders. This therapy seems promising as a model for the kind of comprehensive intervention that could be effective with life-course-persistent offenders. It is directed at solving the youth's multiple problems in many contexts—family, peers, school and neighborhood. Follow-up studies at two and four years suggested that offenders who participated in MST had a lower arrest rate and self report rate than the control group. See Scott W. Henggeler et al., *Family Preservation Using Multisystemic Treatment: Long-Term Followup to a Clinical Trial with Serious Violent Offenders*, 2 J. CHILD & FAM. STUD. 283 (1983).

<sup>180</sup> Robert Martinson, *What Works: Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974).

public. Some proposals for juvenile justice reform have combined a "get tough" response to juvenile crime with recommendations for an investment in comprehensive services to younger children who demonstrate problem behaviors.<sup>181</sup> It is surely true that a long-term solution requires such an investment. The problem is that, in the political process, the punitive policies survive and proposals for funding comprehensive services for younger children may never be implemented. A first step is to reinforce the link between social protection through crime reduction and intensive rehabilitation of very young offenders.

If comprehensive remediation efforts are unsuccessful, at some point society's interests in protection will dominate in determining the legal response. However, since rehabilitative intervention with persistently antisocial youths is unlikely to result in a "quick fix," this determination of failure should not be made prematurely. A commitment to rehabilitation reinforces the constraints on punishment of young offenders that we have described, making a powerful case against subjecting fourteen-year-old repeat offenders to adult criminal punishment.

#### B. INTERVENTIONS WITH ADOLESCENCE-LIMITED OFFENDERS

An important insight of the developmental analysis is that neither the rehabilitative model (with its treatment focus) nor the criminal justice model (with its single minded focus on punishment) provides the conceptual tools to respond effectively to a large category of adolescent offenders: those whose first offenses occur in the mid-adolescent years. In the contemporary context, the most important practical implication of adopting the developmental framework is the recognition that severe sanctions imposed on adolescents whose crimes reflect transient developmental influences are unlikely to serve the interest of either society or of offenders. In policy terms, this should translate into a presumption against adult criminal adjudication and sanctions for first offenses by these juveniles, even for serious crimes. Contrary to the assumption of current law, if reducing social cost is important, the case for this more "lenient" response holds as powerfully for older (and thus presumably more competent) youths as for younger adolescents. Indeed, as we have demonstrated, the mid-adolescent first offender with no

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<sup>181</sup> See REPORT OF THE VA COMM'N OF YOUTH, *supra* note 4.

prior history of problem behavior is less likely than his younger counterpart (especially with such a history) to represent a substantial threat to society later in adulthood.

Under a developmental model, delinquency interventions directed at adolescents whose crimes are likely to reflect transient developmental influences serve multiple purposes. First, a developmental model recognizes the importance of lessons in accountability; slaps on the wrist fail to serve this purpose. Second (and linked to the first), the objective of protecting society would not be discounted. The fact that many youthful offenders will desist in their criminal activity as they mature does not justify a license to offend during adolescence. Third, the systemic response would be tailored to protect rather than to damage the prospects for a productive future of adolescents whose desistance is probable.

The future opportunities of juvenile offenders can be protected in several ways, including some that were designed to serve this purpose under the traditional juvenile justice system. Thus, policies of maintaining the anonymity of juvenile defendants in the press and of giving accused juveniles the right to choose a closed hearing may limit the stigma of delinquency status and its lasting impact.<sup>182</sup> The sealing of juvenile justice records reduces the likelihood that the young adult who has desisted from crime will be haunted by the mistakes of his youth in employment and educational contexts.<sup>183</sup> Dispositional programs that emphasize education and the acquisition of job skills will encourage future productivity and may facilitate the process of assuming adult roles.

The developmental model also suggests directions for future innovations in juvenile justice research and policy. First,

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<sup>182</sup> Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Proceedings*, 68 TEMP. L. REV. 1897, 1901 (1996).

<sup>183</sup> For an example of the impact of publicity on a juvenile's future, consider the much publicized case of Gina Grant, whose admission to Harvard University was withdrawn when Harvard learned that she had withheld information (or dissembled) about the fact that she had killed her mother at age 14. The information came from media coverage of the story. Some observers were troubled by the fact that Gina had received no punishment for her offense, and perhaps viewed the later sanction as modest punishment. See *Student Who Killed Her Mother Loses Offer From Harvard*, BOSTON GLOBE, Apr. 8, 1995, at A04.

On the other hand, societal protection justifies access to juvenile records if the criminal conduct persists in adulthood.

criminological research to date has focused on the etiology of delinquency; little attention has been directed toward the process of "maturing out" of delinquency or of the mechanisms that contribute to desistance.<sup>184</sup> The developmental framework clarifies the importance of seeking to understand this process and of beginning to develop interventions that may accelerate desistance—or at a minimum that do not delay the process.<sup>185</sup>

A very different type of policy initiative would draw on developmental knowledge about adolescent decision-making to structure incentives that could discourage participation in criminal activity. Currently, we can only hypothesize about the influences on decision-making in this context, based on knowledge of traits that shape adolescent choices in other settings. However, a better understanding of the process by which adolescents make choices to participate in crime could be useful in formulating prophylactic responses. Indeed, some current policies seem to be directed toward deterrence, based on intuitions about the influences affecting juvenile choices. For example, curfew regulations discourage youths from gathering together at night, partly in recognition of the role that peer influence may have on individual choice. A more sophisticated understanding of decision-making may contribute to more effective efforts to influence youthful choices about involvement in crime.

#### C. DIFFERENTIAL TREATMENT IN A SEPARATE SYSTEM

The most effective means to implement the lessons from developmental psychology is to maintain a system of adjudication and disposition that is separate from the adult criminal justice system. First, a juvenile court can better recognize and accommodate the reduced culpability and more limited trial competence of younger offenders. Moreover, a separate juvenile correctional system is more likely to utilize dispositional strategies, goals, and approaches that are grounded in developmental knowledge. Commitment to the development of in-

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<sup>184</sup> See Mulvey & Aber, *supra* note 67; see also David Farrington et al., *A 24 Year Follow-Up of Men From Vulnerable Backgrounds*, in *THE ABANDONMENT OF DELINQUENT BEHAVIOR*, *supra* note 67, at 155.

<sup>185</sup> If Moffitt's theory holds, programs that prepare delinquents for adult roles may facilitate the process of desistance of antisocial behavior. See Moffitt, *supra* note 9, at 690-95.

tensive rehabilitative interventions for young offenders and to the protection of the future prospects of youths whose crimes are adolescent-limited offers the long term promise of lowering the social cost of youth crime more effectively than the blanket punitive policies that are currently in vogue. We think that it is unlikely that either juvenile offenders or society will be better served by a unified criminal justice system—even one that treats minors more leniently for sentencing purposes.<sup>186</sup> The ability or inclination of the criminal justice system to tailor its response to juvenile crime so as to utilize the lessons of developmental psychology is questionable. The evidence suggests that political pressure functions as a one-way ratchet, in the direction of ever-stiffer penalties. Programs designed for adolescents and sentencing distinctions between adults and juveniles will be much harder to maintain in a unified system in which juveniles are otherwise treated as adults; it seems predictable that the lines between age groups will become blurred.

The argument for separate treatment of juvenile offenders becomes weaker when the offender is older and persists in serious criminal activity. Policies regarding the adjudication of chronic serious adolescent offenders in the criminal justice system are subject to considerable debate, which generally reflects political and ideological differences. The empirical evidence and theoretical insights from developmental psychology and criminology provide no answers about the contours of an optimal policy. For a broad range of juvenile offenders however, utilitarian and retributive arguments converge to support adjudication and disposition in a separate juvenile justice system. Such a system, grounded in developmental principles, not only can function more coherently and effectively to achieve the complex societal objectives at stake, but also stands as a powerful symbol that most young offenders are different from their adult counterparts.

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<sup>186</sup> See Feld, *supra* note 55.