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BLAMING YOUTH

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In March of 2001, a 14 year old Florida boy named Lionel Tate was sentenced to life in prison without parole for killing 6 year old Tiffany Eunick, during a wrestling match that took place when Lionel was 12 years old. Lionel was convicted of first degree murder on the ground that the killing was the result of “aggravated child abuse,” a crime that contemplates injury of a child by an adult caretaker. See, e.g., William Claiborne, 13-Year-Old Convicted in Shooting: Decision to Try Youth As an Adult Sparked Juvenile Justice Debate, WASH. POST, Nov. 17, 1999, at A3; Mike Clary, Teen's Life Sentence Sparks Juvenile Punishment Debate, CHI. TRIB., Mar. 21, 2001, § 1, at 11.A; Mike Clary, Boy's Life Term Puts Focus on Youth Punishment, L.A. TIMES, Mar. 20, 2001, at 1A.

Although the verdict and Lionel’s sentence received considerable public support, many people are troubled about a justice system that is ready to send a 14 year old offender to prison for life. The debate is not about whether Lionel killed Tiffany, or even whether he represents a threat to public safety. Rather, the contested issue is whether adolescents who commit crimes should be subject to the same punishment as their adult counterparts.

This essay addresses the question of how law makers should think about immaturity in assigning criminal punishment to young offenders. For reasons that have much to do with the peculiar history of juvenile justice policy, basic questions about the culpability of young law violators, and the extent to which they can fairly be held responsible for their crimes, have
received surprisingly little attention in policy debates or in the academic literature. During most of the 20th century, young offenders were dealt with in a separate system, one that held to the view that the disposition of its charges was not governed by the criminal law. In the rhetoric of the traditional juvenile court, youths who committed crimes were blameless children in need of treatment; responsibility and punishment were not part of the vocabulary of juvenile justice. This model has become largely obsolete in the last generation. Since the late 1980s, a wave of punitive law reform has brought many young offenders into the adult criminal justice system. These reforms are worrisome; they have been carried out in a highly politicized climate, driven by exaggerated public fears that seem to be reinforced by illegitimate racial attitudes. In the conceptual void created by traditional juvenile justice policy, important changes in the processing and punishment of a unique class of law violators have proceeded with little attention to conventional constraints that limit punishment under criminal law doctrine and theory.

Our goal in this essay is to begin to fill this void by analyzing the culpability of young offenders within a broader framework of criminal law doctrine and theory. The starting point is the core principle of penal proportionality - the foundation of any legitimate system of state punishment. Proportionality holds that fair criminal punishment is measured not only by the amount of harm caused or threatened by the actor, but also by his blameworthiness. Thus, the question we address is whether, and in what ways, the immaturity of adolescent offenders is relevant to their blameworthiness, and, in turn, to appropriate punishment for their criminal acts. The answer requires a careful examination of the developmental capacities and processes that are relevant to adolescent criminal choices and also of the sources of excuse and mitigation in the criminal law in assessing blame. Our analysis leads us to reject both the traditional excuse-based
model of juvenile justice and the contemporary full-responsibility approach. Instead, we argue that a model under which immaturity mitigates responsibility, but does not excuse the criminal acts of youths who are beyond childhood, is more compatible with conventional theories of criminal responsibility and the standard doctrines and practices of the criminal law.

Using the tools of developmental psychology, we examine two important dimensions of adolescence that distinguish this group from adults in ways that are important to criminal culpability. First, the scientific evidence indicates that teens are simply less competent decision-makers than adults, largely because typical features of adolescent psycho-social development contribute to immature judgment. Adolescents’ capacities for autonomous choice, self-management, risk perception and calculation of future consequences are deficient as compared to adults, and these traits influence decision-making in ways that can lead to risky conduct. Second, adolescence is a developmental period in which personal identity and character are in flux and begin to take shape through a process of exploration and experimentation. Youthful involvement in crime is often a part of this process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity. Most young law violators do not become adult criminals, because their youthful choices are shaped by factors and processes that are peculiar to (and characteristic of) adolescence.

Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation. Contemporary theorists debate whether the source of criminal responsibility - and the basis for excuse and mitigation - ultimately derives from the actor’s choice or his character. See infra notes 49-63 and accompanying text. See Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 LAW & HUM. BEHAV. 221, 229-35 (1995) (describing developmental factors that contribute to immature judgment); Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence: Psycho-social Factors in Adolescent Decision-making, 20 LAW & HUM. BEHAV 249 (1996) (providing evidence that age differences in maturity of judgment account for differences in responsible decision-making).

Contemporary theorists debate whether the source of criminal responsibility - and the basis for excuse and mitigation - ultimately derives from the actor’s choice or his character. See infra notes 79 - 91 and accompanying text. This characterization of the two dominant perspectives seems to be well recognized. For an excellent description of the debate, see R.A. Duff, Choice, Character, and Criminal Liability, 12 LAW & PHIL. 345 (1993). Michael Moore, a choice theorist, has described the choice and
theorists measure criminal blameworthiness by focusing on the actor’s capacity for rational choice and opportunity to conform to the law.\(^\text{8}\) Character theorists argue that culpability is reduced when the actor can negate the inference that his act derived from bad character.\(^\text{9}\) Although neither character or choice theorists focus seriously on immaturity as a basis of diminished responsibility, our analysis demonstrates that a model of juvenile justice that acknowledges the immature judgment and unformed character of young actors fits comfortably within both of these frameworks.

The mitigation-based model that we advance is also consistent with criminal law doctrine and practice. Excuse and mitigation are available to two kinds of wrongdoers: those who are very different from ordinary people (because of endogenous incapacity such as mental disorder), and those who are ordinary people whose acts were responses to extraordinary circumstances or were aberrant in light of their past reputations and conduct.\(^\text{10}\) Young offenders in a real sense belong in both groups. Adolescent decision-making capacity is diminished as compared to adults due to psycho-social immaturity. At the same time, the scientific evidence supports that most young law breakers are quite different from typical criminals in that normal developmental

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\(^{10}\) This characterization is based loosely on an observation by Sanford Kadish. See Sanford Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 265 (1987). In our analysis we describe three categories of mitigation--diminished capacity, extraordinary circumstances and good character. *See infra* notes 92-95 and accompanying text.
forces, and not defective character, drive their criminal conduct. An important source of mitigation in criminal law—evidence that the criminal act did not derive from bad moral character—is as applicable to youths as to upstanding adults who succumbed to pressure or acted aberrantly.

The Essay proceeds as follows. In Part I, a brief historical account of the legal response to youth crime reveals how law makers have rejected the traditional juvenile justice model based on non-responsibility in favor of a regime of full responsibility. In both cases, scant attention has been paid to conceptual links between criminal responsibility and the capacities and circumstances of adolescence. In the contemporary context, the lack of a theoretical or doctrinal framework has contributed to highly politicized law reform. In Part II, we examine the dimensions of adolescent development that are important to youthful criminal involvement and that distinguish adolescent choices in this context from those of their adult counterparts. Part III turns to the role of excuse and mitigation in criminal law and to the conditions that can reduce culpability. We conclude that mitigation rests on evidence of impaired choice or on the ability to negate the implicit presumption of bad character. In the last Part, we draw on this analysis to offer a mitigation model of juvenile justice, one that can form the basis of a separate system of justice that deals fairly with young offenders, without unduly compromising public protection.

I. YOUTH CRIME REGULATION: A CAUTIONARY TALE OF POLICY WITHOUT THEORY

Policy makers have seldom paid much attention to the link between developmental immaturity and criminal responsibility or sought to tailor the law’s response to fit the

11 A small proportion of young offenders mature into adult criminals, and are distinguishable from the “typical” young offenders whose crimes reflect transitory developmental influences. See infra notes 76 - 78 and accompanying text.

12 See notes 86 to 89 infra and accompanying text. See Jerome Michael & Herbert Wechsler, A Rationale of the Law of Homicide II, 37 COLUM. L. REV. 1261 (1937) (describing provocation doctrine as allowing actors to demonstrate that their conduct reflects extraordinary circumstances, not bad character.)
blameworthiness of young offenders. The Progressive social reformers who established the juvenile court in the late 19th century classified young offenders as blameless children and sought to remove them altogether from the reach of the criminal law. Contemporary law makers have rejected forcefully the paternalism of traditional juvenile justice policy and have reclassified many young offenders as adults. Modern regulation, however, exhibits a similar lack of concern about whether the treatment of young offenders comports with criminal law policies and principles. The recent reforms provide a cautionary tale about the perils of developing criminal justice regulation without these constraints.

A. Juvenile Justice Policy: A History of Binary Categories

The binary classification of young law violators as either blameless children or culpable adults represents an application of a more general regulatory approach toward minors. Although the age boundary between childhood and adulthood varies in different legal contexts, lawmakers generally treat each status as a binary category; in the construction of legal childhood, developmental differences between infants and adolescents get little attention. In most regulatory contexts, this simple classification scheme works quite well, even though it distorts developmental reality. As the following historical account suggests, however, the use of binary categories has not worked well as a framework for juvenile justice policy, whether young offenders are treated as children, as they were in the traditional juvenile justice system, or as adults, as they increasingly are today. Binary classification has reinforced simplistic understandings of young offenders’ criminal responsibility. Moreover, this taxonomy has shaped contemporary discourse about juvenile justice in undesirable ways. Because the debate proceeds as though the policy options are limited to the choice between adult and child status, questions about the mitigating effects of immaturity in assessing criminal responsibility are seldom addressed.

At common law, the infancy defense excused young children from all criminal

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13 See generally Elizabeth S. Scott, The Legal Construction of Adolescence, 29 Hofstra L. Rev. 547, 558-62 (2000) (arguing that, in most contexts, this approach is administratively simple, relatively efficient, and creates a clear signal for those who deal with young persons)(hereinafter cited as Legal Construction).
responsibility, on the ground that they lacked the capacity to understand the wrongfulness of their conduct. The defense was narrowly drawn, however. The presumption that children lacked criminal responsibility could be rebutted for youths between the ages of 7 and 14, and at age 14, offenders were conclusively presumed to have the moral capacity of adults.¹⁴ Thus, common law courts constructed two dichotomous groups - - innocent children and fully responsible adults. Young lawbreakers who were not excused were subject to the same punishment as adult criminals.¹⁵

The Progressive reformers who established the juvenile court envisioned a regime for the adjudication and disposition of young criminals in which the criminal law and its procedures would play little part. The new court was part of an ambitious program to expand the boundaries of childhood,¹⁶ and it offered the law’s protection to older youths as well as young children. All delinquents were described as wayward but innocent children whose parents had failed them, who could redirected under the court’s firm guidance. The reformers thus created a new vocabulary of juvenile justice, one from which words like punishment, blame, and responsibility were expunged.¹⁷

Two related claims were at the heart of the rehabilitative model of juvenile justice: that

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¹⁴ Andrew Walkover, The Infancy Defense in the New Juvenile Court, 31 UCLA L. REV. 503, 510-12 (1984) (citing 1 M. HALE, PLEAS OF THE CROWN 22-26 (1778) and 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23-24 (1769)). A child between the ages of 7 and 14 could be convicted of a crime and subject to adult punishment if the prosecutor demonstrated that he understood the wrongfulness of his conduct. The test was similar to that of the M’Naghten version of the insanity defense.


¹⁶ The Progressives had an ambitious program of reform that aimed to establish broad based paternalistic policies. Other reforms included restrictions on child labor, school attendance laws and the creation of a child welfare system. For a discussion of Progressive era reforms directed at children, see generally MURRAY LEVINE AND ADELINE LEVINE, A SOCIAL HISTORY OF HELPING SERVICES: CLINIC, COURT, SCHOOL AND COMMUNITY 23 (1970); JOSEPH KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 221-27 (1977).

young offenders were misguided children rather than culpable wrongdoers, and that the sole purpose of state intervention was to promote their welfare through rehabilitation.\textsuperscript{18} The first claim was supported only by rhetoric; the conceptual architects of the court were not seriously interested in the link between criminal responsibility and immaturity. This idealized description of young lawbreakers may have made sense in light of the reformers’ political goals, but it came to seem naive and implausible - - at least as applied to older adolescents charged with serious crimes.\textsuperscript{19} As to the second claim, it is likely that acceptance of the “wayward child” ideal was always predicated on the promised effectiveness of rehabilitation in reducing youth crime and protecting society.\textsuperscript{20} As the 20th century progressed, the rehabilitative model was discredited,\textsuperscript{21} together with the image of the adolescent offender as a blameless child.

The collapse of the rehabilitative model of juvenile justice left something of a conceptual vacuum. For a period in the 1970s and 1980s, it seemed that a new model might emerge, one that avoided the traditional rhetoric and grounded criminal responsibility in a more accurate account of adolescence. During this period, reform groups designed model regulations that combined proportionate juvenile justice dispositions with interventions aimed at preparing young

\textsuperscript{18} A core tenet of the new court’s philosophy (and key to the reformers’ political strategy) was that delinquent and neglected children were very similar and warranted similar treatment. Judge Mack’s famous challenge is representative: “Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?” Mack, \textit{id.} at 107.

\textsuperscript{19} In practice it likely was always more rhetoric than substance. From the beginning, youths who committed serious crimes were sent to correctional facilities. \textit{See} LINDSEY & O’HIGGINS, \textit{supra} note 17.

\textsuperscript{20} As the Supreme Court noted in \textit{In re Gault}, “the high crime rates among juveniles . . . could not lead us to conclude that . . . the juvenile justice system, functioning free of constitutional inhibitions as it had largely done, is effective to reduce crime or rehabilitate offenders.” 387 U.S. 1, 22 (1967).

\textsuperscript{21} In part, this was because little evidence suggested that rehabilitation worked to reduce crime, but also because it harmed the interests of young offenders. \textit{Gault} made clear that the rehabilitative model’s failure to recognize adequately the state’s interest in punishment and public protection was the source of procedures and practices that deprived youngsters of the core protections that adult defendants enjoyed, and that this ultimately harmed their interests. \textit{Id}. For a discussion of how juvenile court procedures and dispositional structure were grounded in the rehabilitative model, see W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, \textit{IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICA JUVENILE COURTS} 15-21 (1972) (describing how the theory of rehabilitation was reflected in the procedural scheme of the court). For a scathing critique of the procedural structure of the juvenile court, \textit{see} FRANCIS ALLEN, \textit{THE BORDERLAND OF CRIMINAL JUSTICE} (1964).
offenders for conventional adult roles.\textsuperscript{22} State legislatures revised their juvenile codes to incorporate accountability and public protection as objectives of juvenile dispositions.\textsuperscript{23} Before these initiatives were effectively translated into a comprehensive modern youth crime policy, however, they were overwhelmed by a new wave of reforms under which young criminals increasingly were classified as adults.

The contemporary reforms were partly responsive to periods of increased violent juvenile crime in the 1980s and early 1990s, a trend that understandably intensified concern about public safety.\textsuperscript{24} This period was also marked by criticism of the juvenile court and a loss of confidence in its capacity to serve young offenders and also effectively protect the public.\textsuperscript{25} Advocates for reform ridiculed the paternalistic rhetoric of the traditional court; young offenders now were described as hardened criminals and “superpredators.”\textsuperscript{26} Although this characterization has been challenged, most participants in the debate seem to assume that young offenders either would be treated as children in juvenile court or sent to prison to serve “adult time for adult crime.” Given this choice, law makers and the public have opted for public protection over leniency.\textsuperscript{27} Legislatures across the country have enacted statutes that lower the age at which youths can be


\textsuperscript{23} Many state legislatures revised the policy preambles of juvenile codes to emphasize that accountability was an important purpose of juvenile sanctions. See e.g. WASH. REV. CODE ANN. § 13.40.010(2)(a), (c) (West 1993 & Supp. 2001); 42 PA. CONS. STAT. ANN. § 6301(b)(2) (West 2000).

\textsuperscript{24} The most alarming increase was in the rate of youth homicide, which doubled during this period. Many observers argue that the increased availability of guns played a large role. See Franklin E. Zimring, American Youth Violence 45 (1998).

\textsuperscript{25} In one study in 1989, 70% of those questioned said that violent youth crime was caused by lenient treatment by juvenile courts. Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics 157(Timothy J. Flanagan & Kathleen Maguire eds. 1991)[Hereinafter Sourcebook].

\textsuperscript{26} William J. Bennett, et al., Body Count 9 (1996)

\textsuperscript{27} See Jane B. Sprott, Understanding Public Opposition to a Separate Youth Justice System, 44 (3) Crime & Delinq. 399 (1998) (study shows that public support prison for juveniles because juvenile system is too lenient.) In a Gallop poll, 50% responded that juveniles should get the same punishment as adults for their first offense. See David W. Moore, Majority Advocate Death Penalty for Teenage Killers, 348 Gallop Poll Monthly, September 1994, 2 at 3.
During this period, most states lowered the age at which youths can be tried as adults, and legislative waiver became more common (automatic adjudication in criminal court above the jurisdictional age for some offenses). Some states adopted blended sentencing for serious offenses, under which youths would complete sentences in adult prison. In Texas, for example, about two dozen felonies carry up to 40 year blended sentences. For a discussion of the Texas reforms in 1995 initiated by Governor George Bush, see Paul Duggan, George Bush: The Texas Record, WASH. POST, Nov. 9, 1999 A1. See discussion of legislative trend in Scott, Legal Construction, supra note 13 at 584 - 85; Thomas Grisso, Juvenile Competency to Stand Trial, 12 CRIM. JUST. 4, 5-6 (1997).


Id. at 31-45. Moral panics are not exclusively a modern phenomenon. Examples include the Salem witch trials, prohibition, and the public response to child sexual abuse in day care and to claims of satanic ritual abuse. Id at 57-61. A good example of law reform as a response to moral panic is the enactment of “Meghan’s” laws in many states, which require a wide range of convicted sex offenders to make their criminal history known to neighbors. This reform followed the killing of a New Jersey girl by a neighbor who was a sex offender. N.J. STAT. ANN. § 2C:7-6 (West Supp. 2002). See Daniel M. Filler, Making the Case for Megan's Law: A Study in Legislative Rhetoric, 76 Ind. L.J. 315, 317-18 (2001) ("Recently, some commentators have suggested that Megan's Law reflects
The response to juvenile crime over the past decade fits this pattern well. The evidence suggests that public perceptions about the magnitude of the threat are greatly exaggerated, and the fears apparently have not been allayed by a steady decrease in the rate of juvenile crime (including violent crime) since the mid-1990s. Indeed, much of the “get tough” legislation reclassifying juveniles charged with serious crimes has been enacted since 1995, after the crime rate began to decline. As in other moral panics, politicians and the media have played a key role in stimulating public fears, and the public has reacted by demanding greater protection through tougher legislation. The process often seems to be triggered by high profile juvenile crimes, such as school shootings or other violent crimes with child victims. Although such incidents are uncommon, they are publicized vividly and repeatedly by the media, and become highly salient reminders of the terrible costs of youth crime. Through processes familiar to cognitive psychologists, collective perceptions of the threat become distorted, as alarmed public discourse is reinforced by vivid images of the crime and the victims.

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32 Surveys reveal that Americans believe that juveniles are responsible for a far greater portion of crime than is in fact the case. See D. Moore, supra note 27 at 2 (poll found average estimate that juveniles were responsible for 43% of violent crime – three times the actual percent). The high rates of juvenile homicide, which fueled the punitive trend, declined steeply beginning in the mid-1990s. See Frank Zimring, American Youth Violence 36 (1998). See Robert E. Shepherd, Jr., Recapturing the Child in Adult Court, 16 CRIM. JUST. 58, 58 (2002) (describing the continuing public misperception that an “epidemic” of juvenile crime exists, despite the actual decline in juvenile crime rates).

33 Despite steady decline in both adult and youth crime, legislative reforms of juvenile crime codes have continued. For example, in 2000, when the rate of violent juvenile crime in California was lower than it had been in years, a large majority of California voters passed Proposition 21, mandating adult criminal prosecutions of 14 year olds for a wide variety of offenses. See Jim McLain, “System Bracing for Kids in Adult Court,” Ventura County Star March 16, 2000 A1 (discussion of predicted impact of broader prosecutorial authority under Proposition 21 to charge juveniles as adults). See also George Mgdesyan, Gang Violence and Crime Prevention Act of 1998, 3 J. Legal Advoc. & Prac. 128, 136-37 (citing statistics showing a 30% drop in California’s juvenile felony arrest rate and a 50% drop in arrests for homicide between 1990 and 2000).

34 Fears that children are at risk often trigger moral panics. See supra note 31. The Arkansas legislature responded to the killing of several students and a teacher in a Jonesboro middle school by 11 & 13 year old boys by lowering the age at which youths can be tried as adults. See Chauncey E. Brummer, Extended Juvenile Jurisdiction: The Best of Both Worlds?, 54 Ark. L. Rev. 777, 806-810 (2002)

35 The public response can be understood as involving a familiar cognitive bias, described by psychologists as the availability heuristic. Availability can lead individuals to exaggerate the likelihood of salient events and can be readily brought to mind. See Daniel Kahnemann & Amos Tversky, Judgment Under Uncertainty: Heuristics
This account, although it sheds light on the recent changes in public and political opinion and the resulting law reforms, does not fully explain the current hostility toward young offenders and readiness to punish them as adults. This trend represents a shift in attitude in a relatively short period of time, and it stands in sharp contrast to paternalistic social attitudes and legal policies toward children and adolescents in virtually every other context. The pervasive assumption that adolescents are incapable of making competent decisions and should be protected from their own immature judgment is readily set aside when the question is whether young law breakers should be held fully responsible for their crimes. It is ironic, for example, that Lionel Tate can be sentenced to life in prison at an age when he can not work, execute a binding contract, or make any important decisions on his own behalf.

A troubling explanation for the puzzling hostility toward young law violators is that attitudes are driven by racial and ethnic bias. Minority youths are disproportionately represented in the justice system, and it is likely that many people envision young criminals as members of

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Timur Kuran and Cass Sunstein argue that this bias is key to understanding how public perceptions of risk become exaggerated, and they offer many examples of the phenomenon (Love Canal, the pesticide alar). See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999). In the context of youth crime, the text suggests how public perceptions of the threat are amplified by extensive coverage in the media, and attention by politicians, experts and the public. Under the Kuran - Sunstein model, a cascade of collective opinion is triggered, as individuals are persuaded of the seriousness of the threat-- and then they too join in the outcry. Those who are skeptical may remain silent rather than voicing unpopular opinions and risking social disapproval. On this view, public opinion based on distorted perceptions gains momentum and contributes to public pressure on politicians and policy makers to institutionalize the public's concerns by enacting legislation that responds to the threat.

Gallop polls in the 1950s showed strong opposition to imposing the death penalty on juveniles - - in contrast to more recent polls. See D. Moore, *supra* note 27 at 2,4 (1994 poll shows 60 % favor death penalty for teenage murderers, in contrast to 11% in 1957). More lenient attitudes toward young offenders began to harden in the 1980s, and today there is substantial public support for punishing young offenders as adults. See, e.g., *SOURCEBOOK*, supra note _ (examining a national study in which 65% of respondents favored treating juveniles accused of violent crimes the same as adults); D. Moore, *supra* note 27 at 3 (Gallop pool shows 50% support treating juveniles as adults for 1st offense; 83% for 2nd or 3rd offense); Jane B. Sprott, *Understanding Public Views of Youth Crime and the Youth Justice System*, 38 CAN. J. CRIMINOLOGY 271, 281-85 (1996) (describing a Canadian study in which 88% of respondents believed juvenile court sentences were “too lenient,” and 57% of this subset of respondents also opposed having a separate juvenile justice system).

minority groups.\footnote{38See Barbara Allen-Hagen, Off. Juv. Just. & Delinquency Prevention (OJJDP), Children in Custody at 3 (1991)(Minorities made up 60% of children in custody in 1989); Melissa Sickmund et al., OJJDP, Juvenile Offenders and Victims: 1997 Update on Violence 31 (1997) (disproportionate numbers of black juveniles transferred to criminal court for person and drug offenses); Nat'l Crim. Just. Ass'n, U.S. Dept of Justice, Juvenile Justice Reform Initiatives in the States: 1994-1996 Program Report 4 (1997)(Black juveniles made up 12.5% of the population in 1994, but accounted for nearly 29% of juvenile arrests, and more than half of the arrests for violent crime, including 59% of juvenile homicide arrests). Evaluating disproportionate representation of minority youths in the justice system is a tricky business. Most analysts believe that the phenomenon reflects both higher offending rates and differential responses to minority and white youths by system participants, including police, prosecutors, judges and corrections officers.} If so, racial stereotypes may override paternalistic responses to youth and immaturity. If people do not identify young offenders as “kids,” because they are not their kids, they may react with an unsympathetic detachment that is not usually directed toward youth. Through this lens, young offenders are simply criminals, and harsh punishment is the right response to their crimes.

Many observers argue that racial and ethnic bias plays a pervasive, if largely invisible, role in shaping public attitudes toward young offenders, and that it also influences the media, politicians and actors in the justice system. Although the extent to which prejudice shapes opinion and practice is quite uncertain, the research evidence supports the view that it plays a pernicious role.\footnote{39See Donna M. Bishop & Charles E. Frazier, The Influence of Race in Juvenile Justice Processing, 25 J. Res. Crime & Delinquency 242, 258 (1988)(indicating that African American youths are more likely to be recommended for formal processing, referred to court, adjudicated delinquent, and given harsher sentences than comparable whites). A 2002 Michigan State University study comparing white to Latino youths found sentencing disparities for similar drug crimes. See Francisco Villarruel, Donde Esta la Justicia? A Call to Action on Behalf of Latino and Latina Youths in the U.S. Justice System, WWW.icf.msu.edu. The research suggests that the media plays a role in reinforcing racial bias. Franklin D. Gilliam, Jr. & Shanto Iyengar, Prime Suspects: The Influence of Local Television News on the Viewing Public, 44 Amer. J. Pol. Science 560 (2000) (study shows that “crime script” of local T.V. news, in which race and violence are prominent, increases hostility among white viewers toward African Americans). See generally Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 134-48 (1995).} African American youths are perceived as being more mature, more dangerous and more deserving of punishment than are comparable white youths.\footnote{40Some of the evidence of racial bias is indirect. Minority youths charged with similar crimes and otherwise matched to white youths are treated more harshly. See Donna M. Bishop & Charles E. Frazier, The Influence of Race in Juvenile Justice Processing, 25 J. Res. Crime & Delinquency 242, 258 (1988)(indicating that African American youths are more likely to be recommended for formal processing, referred to court, adjudicated
immaturity as a factor in criminal punishment becomes less of a puzzle in a social context in which the population of the justice system is disproportionately minority youths and those youths are deemed to represent a substantial threat to society.

This account of the formulation of modern juvenile justice policy suggests that it is a politicized process, driven by distorted perceptions of the threat and possibly by illegitimate social attitudes. These deficiencies are troubling in themselves and warrant remedial attention. They are also symptomatic of a deeper deficiency, which is that contemporary youth crime policy lacks a theory and a conceptual framework in which regulation can be formulated and evaluated. Ironically, this void was created in large part by the dominance in the 20th century of a model of juvenile justice that rejected the relevance of criminal law doctrine and principles to delinquency dispositions. With the discrediting of the rehabilitative model, contemporary law makers have created a regime for punishing immature lawbreakers that is driven by political forces, unconstrained by the conventional limits on punishment embedded in the criminal law. In sharp contrast to the complex elaboration of excuse and mitigation generally found in the criminal law, little is offered when it comes to how the condition of immaturity should affect punishment.41

delinquent, and given harsher sentences than comparable white youths). See also Bishop & Frazier, supra note 38. Other evidence is more direct. George S. Bridges & Sara Steen, Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 AMER. SOCIOLOGICAL. REV. 554, 561-64 (Study shows that probation officers were more likely to make internal (character-related) attributions for the offenses of black juveniles, and external (environmental) attributions for the crimes of white juveniles); Sandra Graham, Racial Stereotypes in the Juvenile Justice System, Presentation at Conference of American Psychology-Law Society, March 9, 2002 (subjects who were unconsciously primed to expect that a perpetrator in a crime vignette was African-American were harsher in their judgments of the perpetrator’s culpability and deserved punishment) (paper on file with authors).

41 Consider, for example, the relationship between mental disorder and criminal responsibility. Several versions of the insanity defense have been offered over the past 150 years, and courts and commentators have explored the extent to which mental illness can mitigate blameworthiness under doctrines such as diminished capacity. See generally, RICHARD J. BONNIE, ET. AL., supra note 5 at 445-56, 477-502. Mental disorder as excuse from criminal responsibility has been a topic of great interest to criminal law scholars. See generally, Michael Moore, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); JOEL FEINBERG, DOING AND DESERVING: ESSAYS ON THE THEORY OF RESPONSIBILITY 272-92 (1970); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982).

Although mental disorder and immaturity (insanity and infancy) are often classified together as excuses due to endogenous incapacity, immaturity is ignored in the literature of criminal responsibility. Criminal law theorists assume without inquiry that the immaturity of youth functions to mitigate or excuse young actors from responsibility for their crimes, but also appear to assume that this conclusion has little contemporary importance in
and no contemporary framework has replaced the traditional rehabilitative model.

II. ADOLESCENT DEVELOPMENT AND INVOLVEMENT IN CRIME

In order to construct a modern juvenile justice framework, we first examine the attributes of childhood and adolescence that distinguish young offenders from their adult counterparts in ways that are relevant to their criminal choices. Scientists who study adolescence view this stage as a bridge between childhood and adulthood. During this period, various decision-making capacities develop, but not at a uniform rate. By mid-adolescence, cognitive capacities for reasoning and understanding are probably close to those of adults, although teens are likely less skilled in using these capacities to make real life decisions. In psycho-social development, however, teens mature more slowly. This contributes to what in common parlance would be called immature judgment, the tendency of adolescents to make choices that are harmful to themselves or others. The ways in which psycho-social factors influence decision-making and the kinds of choices adolescents make depend, in part, on the social context in which they find themselves. Adolescence is also a stage of individuation and identity formation, processes closely linked to psycho-social development. Individuals do not develop a coherent sense of identity until young adulthood, and adolescence is characterized by exploration, experimentation, and fluctuations in self-image. This movement from a fluid and embryonic sense of identity to one that is more stable and well-developed is paralleled by developments in the realms of

42 In part, adolescents lack skills in decision-making because they lack the experience of adults. Individuals are better able to use complex reasoning abilities in familiar situations. See S. Ward and William Overton, Semantic Familiarity, Relevance, and the Development of Deductive Reasoning, 26 DEVELOPMENTAL PSYCHOLOGY 488(1990).

43 See generally discussion in Scott, et. al., & Steinberg and Cauffman, supra note 6.
morality, values, and beliefs.\textsuperscript{44}

In this Part, we examine the dimensions of psychological and social development that are the basis of our claim that adolescent involvement in crime differs from that of adults in ways that are important to assessments of culpability. First, several features of cognitive and psycho-social development are likely to shape adolescent choices (including criminal choices) in ways that distinguish them from adults and that undermine competent decision-making. Second, the relationship between psycho-social development and the forming of personal identity in adolescence is important to understanding unique features of youthful criminal activity. Our analysis clarifies that typical adolescent criminal conduct is qualitatively different from that of adults\textit{ because} it is driven by developmental forces that are constitutive of this developmental stage.

A. Cognitive and Psycho-social Development

1. Understanding and Reasoning

The most familiar developmental factors related to decision-making capacity are reasoning and understanding, basic elements of cognitive development. It is generally recognized that these capacities increase through childhood into adolescence, and that pre-adolescents and younger teens differ substantially from adults in their cognitive abilities (although there is great variability among individuals). These cognitive developments, described in rich detail by Piaget and his followers, are undergirded by increases in specific and general knowledge, gained through education and experience, and by improvements in basic information-processing skills, including attention, short- and long-term memory, and organization.\textsuperscript{45}

\textsuperscript{44}LAURENCE D. STEINBERG, ADOLESCENCE, 305-14 (6th ed. 2002) (summarizing research on the development of moral reasoning and religious and political beliefs, indicating a consolidation of values during the middle and late adolescent years)

\textsuperscript{45}The key advances that take place during this period are gains in deductive reasoning, in the ability to think about hypothetical situations, in the ability to think simultaneously in multiple dimensions, in the ability to think abstractly, and in the ability to think about the process of thinking (“metacognition”) See generally JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT (3d ed. 1993) (describing different areas of cognitive development in
By mid adolescence, tentative scientific evidence supports that adolescents’ capacities for understanding and reasoning in making decisions roughly approximate those of adults. These findings from laboratory studies are only modestly useful however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decision makers must rely on personal experience and knowledge. For these reasons, it is uncertain whether adolescent cognitive capacity as it affects choices relevant to criminal conduct is comparable to that of adults.

2. Judgment Factors in Decision-making

Psycho-social development proceeds more slowly than cognitive development in adolescence. As a consequence, even when adolescent cognitive capacities come close to those of adults, youthful decision-making may differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include a) peer orientation, b) attitudes toward and perception of risk, c) temporal perspective, and d) capacity for self management. Whereas cognitive capacities shape the process of decision-making, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.

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46 The evidence is tentative for two reasons. First, it is based in part on Piaget’s stage theory of cognitive development, which has been challenged by modern cognitive scientists. Cognitive psychologists now accept that skills develop at different rates in different domains, and competence to make one kind of decision can not be generalized. See SIEGLER, id.; Flavell, id. Second, the claim is tentative because it is supported by a group of small research studies, conducted in laboratory settings, that for the most part involved middle class subjects and no adult control groups. See discussion and critique of studies, in Scott, et. al., supra note 6 at 224-6. For a thoughtful scientific critique of advocacy claims that youths’ decision-making capacities are adultlike, see Gardner, Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights, 44 AM. PSYCHOLOGIST 895 (1989).

47 Research generally indicates that there is often a gap between intellectual competence and performance, that is affected by a host of factors, including familiarity with the content area of the task used to measure intellectual performance See generally W. S. Ward and William Overton, Semantic familiarity, relevance, and the development of deductive reasoning, 26 DEVELOPMENTAL PSYCHOLOGY, 488 (1990).

48 See generally discussion in Scott et al. & Steinberg & Cauffman, supra note 6.
Substantial research evidence supports the conventional wisdom that teens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age 14, and declines slowly during the high school years. Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents might make choices in response to direct peer pressure. More indirectly, adolescents’ desire for peer approval (and fear of rejection) affects their choices, even without direct coercion. Finally, peers may provide models for behavior that adolescents believe will assist them to accomplish their own ends.

Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since this will affect the extent to which individuals consider the long-term consequences of their actions in making choices. It is well established that over an extended period between childhood and young adulthood, individuals become more future-oriented. Adolescents tend to discount the future more than adults do, and to weigh more heavily short term consequences of decisions - both risks and benefits - in making choices. There are several

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49 See Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 CHILD DEV. 841, 848 (1986) (research showing age differences in susceptibility to peer pressure); Scott, et, al., supra note 6 at 229-30; Steinberg & Cauffman, supra note 6 at 257-9. Changes in susceptibility to peer pressure may reflect changes in individuals’ capacity for self-direction or, as some theorists have suggested, changes in the intensity of pressure that adolescents exert on each other. B. Bradford Brown, Peer Groups and Peer Cultures, in AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliott eds. 1990).

50 Susceptibility to peer influence involves two processes, social comparison and conformity. Through social comparison, adolescents measure their own behavior by comparing it to others. Conformity influences adolescents to adapt their behavior and attitudes to that of their peers. Substantial research supports these influences. See generally N. SPRINGHALL & W.A. COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW (1988); Thomas J. Berndt, Developmental Changes in Conformity to Peers and Parents, 15 DEVELOPMENTAL PSYCHOL. 608 (1979); Philip R. Costanzo & Marvin E. Shaw, Conformity as a Function of Age Level, 37 CHILD DEV. 967 (1966).


plausible explanations for this age gap in future orientation. First, owing to cognitive limitations in their ability to think in hypothetical terms, adolescents simply may be less able than adults to think about events that have not yet occurred (i.e., events that may occur sometime in the future). Second, weaker future orientation of adolescents may reflect their more limited life experience. For adolescents, a consequence five years in the future may seem very remote; teens may simply attach more weight to short term consequences because they seem more salient to their lives.\footnote{See William Gardner, \textit{A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent Risk Taking} 78-79, (Nancy J. Bell & Robert W. Bell eds. 1993).}

Research evidence also suggests that adolescents differ from adults in their perception of and attitude toward risk.\footnote{William Gardner & Janna Herman, \textit{supra} note 52; Michael L. Matthews & Andrew R. Moran, \textit{Age Differences in Male Drivers’ Perception of Accident Risk: The Role of Perceived Driving Ability}, 18 \textit{Accident Analysis & Prevention} 299, 309-11 (1986); Maya Tester et al., \textit{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); Scott, \textit{supra} note 6 at 230.} It is well established that adolescents and young adults generally take more health and safety risks than do older adults, by engaging more frequently in behavior such as unprotected sex, drunk driving and criminal conduct.\footnote{See Lita Furby & Ruth Beyth-Marom, \textit{Risk Taking in Adolescence: A Decision-making Perspective}, 12 \textit{Developmental Rev.} 1, 1-2 (1992) (presenting a rational-decision-making model of adolescent risky behavior).} Moreover, a synergy likely exists between adolescent peer orientation and risk taking; considerable evidence indicates that people generally make riskier decisions in groups than they do alone.\footnote{This phenomenon is known as the “risky-shift” and has been observed in adults (who are less subject to peer influence. Jerald M. Jellison & John Riskind, \textit{Attribution of Risk to Others as a Function of Their Ability}, 20(3) \textit{J. Personality & Soc. Psychol.} 413 (1971) (study demonstrates that adults take more risks in groups than when alone).} In general, adolescents are less risk averse than adults, generally weighing rewards more heavily than risks in making choices.\footnote{Gardner & Herman, \textit{supra} note 52; Lola L. Lopes, \textit{Between Hope and Fear: The Psychology of Risk}, 20 \textit{Advances Experimental Soc. Psych.} 255 (1987).} This may relate in part to limits on youthful time perspective; taking risks is more costly for those with a stake in the future. Finally, adolescents may have different values and goals than do adults, leading them to calculate risks and rewards differently. For example, the danger of risk
taking could constitute a reward for an adolescent but a cost to an adult.\textsuperscript{58}

The widely-held stereotype that adolescents are more impulsive than adults is supported by the (relatively sparse) research on developmental changes in impulsivity and self-management over the course of adolescence. In general, studies show gradual but steady increases in individuals’ capacity for self-direction throughout the adolescent years, with gains continuing through the final years of high school.\textsuperscript{59} Impulsivity, as a general trait, increases between middle adolescence and early adulthood and declines thereafter, as does sensation-seeking.\textsuperscript{60} Research also indicates that adolescents have more rapid and more extreme mood swings (both positive and negative) than adults,\textsuperscript{61} although the connection between moodiness and impulsivity is not clear. Although more research is needed, the available evidence supports the notion that adolescents may have more difficulty regulating their moods, impulses, and behaviors than do adults.

Although most of the developmental research on cognitive and psycho-social functioning involves psychological studies, mounting evidence suggests that some of the differences between adults and adolescents are organic in nature. Research on brain development, although in its early stages, suggests that regions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood.\textsuperscript{62} At puberty, changes in the limbic system - - a part of the brain that is central in the processing and regulation of emotion - - may stimulate adolescents to seek higher levels of novelty and to take more risks; and may

\textsuperscript{58}Moreover, peer rejection (for not taking risks) is likely to be weighed more heavily by teens than adults.

\textsuperscript{59}Ellen Greenberger, \textit{Education and the Acquisition of Psycho-social Maturity, in The Development of Social Maturity}, (David C. McClelland ed. 1982)(showing gradual gains in self-reliance over the course of adolescence).

\textsuperscript{60}Steinberg & Cauffman, \textit{supra} note 6 at 260.

\textsuperscript{61}Reed Larson, et al., \textit{Mood Variability and the Psycho-social Adjustment of Adolescents}, 9 J. YOUTH & ADOLESCENCE 469 (1980) (study finds wider mood fluctuations among adolescents than adults.).

contribute to increased emotionality and vulnerability to stress. At the same time, patterns of
development in the prefrontal cortex, which is active during the performance of complicated
tasks involving planning and decision-making, suggest that these higher-order cognitive
capacities may be immature well into middle adolescence. One scientist has likened the
psychological consequences of brain development in adolescence to “starting the engines without
a skilled driver.”

For most adolescents, the characteristic developmental influences on decision-making
will change in predictable ways. As the typical adolescent matures into adulthood, he becomes a
more experienced and competent decision-maker; susceptibility to peer influence attenuates, risk
perception improves, risk averseness increases, time perspective expands to focus more on long
term consequences, and self management improves. These developments lead to changes in
values and preferences. As the adolescent becomes an adult, he is likely to make different
choices from his youthful self, choices that reflect more mature judgment.

3. Developmental Factors and Decision Making about Offending

How might developmental factors that contribute to immaturity of judgment influence
young actors to participate in criminal activity? Consider the following scenario. A teen hangs
out with his buddies on the street, when, on the spur of the moment, someone suggests holding
up a near- by convenience store. The youth doesn’t really go through a formal decision making
process, but he “chooses” to go along, even if he has mixed feelings. Why? First and most
important, he may assume that his friends will reject him if he declines to participate — a
negative consequence to which he attaches considerable weight in considering alternatives. He
does not think of options to extricate himself — although a more mature person might do so. This


64 For an analysis of the impact of cognitive and psycho-social immaturity on adolescent decision-making
generally, see Elizabeth S. Scott, Reasoning and Judgment in Adolescent Decision-making, 37 VILLANOVA
L.REV.1607, 1647-57 (1992). The scenario in the text is adapted from Elizabeth S. Scott & Thomas Grisso, The
Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY
may be because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the “adventure” of the hold-up and the possibility of getting some money are appealing. These immediate rewards (together with peer approval) weigh more heavily in his decision than the (remote) possibility of apprehension by the police. He never considers the long term costs of conviction of a serious crime.

This scenario has some empirical support in research on youthful criminal activity. For example, unlike adult criminals, adolescents usually commit crimes with peers, although precise mechanisms by which peer orientation shapes criminal behavior are not well understood. Researchers have also linked desistance from crime in late adolescence to improved future orientation and to changing patterns of peer relationships. Beyond this, the account is consistent with the general developmental research on peer influence, risk preference, impulsivity, and future orientation, and it suggests how factors that are known to affect adolescent decision-making in general are likely to operate in this setting. As a general proposition, it is uncontroversial that teens are inclined to engage in risky behaviors that reflect their immaturity of judgment. Overall, it seems very likely that the psycho-social influences that shape adolescents decision-making in other settings contribute to their choices about criminal activity as well.

4. Psycho-social Development in Social Context

The psycho-social factors that influence decision-making are an important component of youthful criminal choices. Whether teens become involved in crime and what crimes they commit depend on other ingredients as well, including opportunity and social context.

65 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) As suggested supra note 56, even adults make riskier choices in groups. Consider mob behavior, for example.

Adolescent peer orientation makes youths who live in high-crime neighborhoods susceptible to powerful pressures to join in criminal activity, and compliance may be more typical than resistance. Jeffrey Fagan and others have described how strong social norms within urban adolescent male subcultures prescribe a set of attitudes and behaviors that often lead to violent crime. Moreover, avoiding confrontation when challenged by a rival results in a loss of social status and ostracism by peer affiliates, which in itself can create vulnerability to physical attack.\(^{67}\) Fagan’s research suggests that ordinary youths in poor urban neighborhoods face coercive peer pressure and sometimes tangible threats that propel them to get involved in crime and make extrication difficult.

The coercive impact of social context is exacerbated because adolescents are subject to legal and practical restrictions on their ability to escape these criminogenic settings. Financially dependant on their parents or guardians and subject to their legal authority, adolescents cannot escape their homes, schools, and neighborhoods. At least until age 16, a web of legal restrictions on their liberty prevents adolescents from doing what we might expect of an adult in the same context – move to another location in which the pressures to offend are lessened. Because adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy, and are more restricted in their capacity to avoid coercive criminogenic influences than are adults.\(^{68}\)

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\(^{68}\) At some level, many adult criminals can point to the impact of social context on their involvement in crime. Arguments that the actor’s “rotten social background” is exculpatory also focus on constraints of this kind. See generally Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 Law & Ineq. J. 9 (1985) (arguing for such a defense). However, the formal legal and structural restrictions on minors (which are removed when the minor reaches adulthood) distinguish them from adults who are also from impoverished backgrounds. See note 115 infra.
B. The Formation of Personal Identity and Experimentation in Crime

The emergence of personal identity is an important developmental function of adolescence, and one in which the aspects of psycho-social development discussed earlier play a key role. During this period, youths begin to separate from their parents and take steps toward autonomous personhood. Developmental psychologists describe two interrelated processes: individuation, the process of establishing autonomy from one’s parents; and identity development, the process of creating a coherent and integrated sense of self.\(^{69}\) A predictable developmental sequence can be described: most pre-adolescents strive to please their parents and other adults by complying with their wishes and parroting adult beliefs and values. During early and middle adolescence, youths individuate from parents, a process that can involve a certain amount of risky behavior reflecting rebellion and a shift in orientation from parents to peers. By late adolescence, individuation is complete, autonomy from both parental and peer influence is achieved, and the individual is well on the way toward the establishment of personal identity.\(^{70}\)

Adolescence has often been described as a period of “identity crisis” - an ongoing struggle to achieve self-definition.\(^{71}\) According to developmental theory, the process of identity development is a lengthy one that involves considerable exploration and experimentation with different behaviors and identity “elements.” These elements include both superficial characteristics, such as style of dress, appearance, or manner of speaking, as well as deeper phenomena, such as personality traits, attitudes, values, and beliefs. As the individual experiments, she gauges the reactions of others as well as her own satisfaction, and through a process of trial and error, over time selects and integrates the identity elements of a realized self.


\(^{70}\) ERIKSON, Id. Although both processes are ongoing throughout this period, individuation is a more salient task in early and middle adolescence (when individuals struggle for independence from parental control) and identity development is more important in late adolescence and young adulthood. See A. Waterman, Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research, 18 Developmental Psychology 341 (1982) (reviews research on identity development); STEINBERG, supra note 44 at 255-85 (describing development of identity) and 286-315 (describing development of autonomy).

\(^{71}\) See generally ERIKSON, supra note 69.
Not surprisingly, given adolescent risk preferences (perhaps combined with rebellion against parental values in the course of individuation), identity experimentation often involves risky, illegal, or dangerous activities - - alcohol use, drug use, unsafe sex, delinquent conduct, and the like. For most teens, this experimentation is fleeting; it ceases with maturity as identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.\textsuperscript{72} Thus, making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business.

While individuation, exploration, and experimentation are ongoing from early adolescence, coherent integration of the various retained elements of identity into a developed "self" does not occur until late adolescence or early adulthood.\textsuperscript{73} Elements of adult personhood include social and political attitudes, moral values, occupational commitments, religious beliefs, and personal habits and lifestyle choices.\textsuperscript{74} Until at least late adolescence, the values, attitudes, beliefs, and plans expressed by adolescents are likely to be tentative and exploratory expressions, rather than enduring representations of personhood.

This account of identity development in adolescence informs our understanding of patterns of criminal conduct among teens. Criminal behavior is rare in childhood and early adolescence. Onset typically occurs during a period in which adolescents separate from parents and parental influence, and become more focused on peers. The incidence of antisocial behavior

\textsuperscript{72} See notes 75 - 78 infra and accompanying text.

\textsuperscript{73} See ERIKSON, supra note 69 at 70; Waterman, supra note . Initial descriptions of the identity crisis of adolescence did not distinguish among between early, middle, and late adolescence. Erikson described adolescence as a single period of development. Empirical research suggests, however, that most identity development occurs late in the adolescent period. Compare generally Erikson, supra note 69, with research reviewed by STEINBERG, supra note 44 at 273-279.

\textsuperscript{74} See STEINBERG, supra note 44 at 386 -315 (reviewing research that shows parallel timetables for developments in the domains of identity, values, morality, political beliefs, and religious commitment during late adolescence).
increases through age sixteen and declines sharply from age seventeen onward. Most teenage males engage in some criminal activity, leading psychologist Terrie Moffitt to describe it as “a normal part of teen age life.” However, only a small group of young offenders will persist in a life of crime. Based on these patterns, Moffitt offers a taxonomy of adolescent antisocial conduct, in which typical teenage lawbreakers are described as “adolescence-limited” offenders, while a much smaller group are described as “life-course-persistent” offenders. Most youths in the first group have little notable history of antisocial conduct in childhood, and, predictably, in late adolescence or early adulthood they will “mature out” of their inclination to get involved in criminal activity. This pattern supports the conclusion that much youth crime represents the experimentation in risky behavior that is a part of identity development, behavior that desists naturally as individuals develop a stable sense of identity and maturity of judgment.

One reason the typical delinquent youth does not grow up to be an adult criminal is that the developmentally-linked values and preferences that drive his criminal choices as a teenager change in predictable ways as he matures. Adolescents are not yet the persons they will become—persons whose choices reflect their individual values and preferences. As the typical adolescent offender matures, he becomes an adult with personally defined commitments and values and a

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75 Richard Jessor & Shirley L. Jessor, Problem Behavior and Psycho-social Development: A Longitudinal Study of Youth (1977); David P. Farrington, Offending from 10 to 25 Years of Age, in Prospective Studies of Crime and Delinquency 17 (K. Teilman Van Deusen & S.A. Mednick eds., 1983); Moffitt, supra note 47, at 675.

76 Moffitt, supra note 66 at 678.


78 Moffitt, supra note 66 at 682 - 84. Although some “life-course-persistent” offenders initiate antisocial behavior in early adolescence, Moffitt claims that many display a variety of problem behaviors beginning early in life and persisting through adolescence into adulthood. Many of these, although certainly not all, will become adult career criminals. See Mulvey & Aber, id.; Wolfgang et al., id.
stake in his own future plans. He is no longer inclined to get involved in crime because his adult values (components of his personal identity) no longer lead him in that direction. Indeed, there is no reason to believe that the young actor’s adult self would endorse his youthful choices.

The upshot is that the criminal conduct of most young wrongdoers is quite different from that of typical adult criminals. It is fair to assume that most adults who engage in criminal conduct act upon subjectively defined preferences and values, and that their choices can fairly be charged to deficient moral character. This can not fairly be said of the crimes of typical juvenile actors, whose choices, while unfortunate, are shaped by development factors that are constitutive of adolescence. To be sure, some adolescents may be in the early stages of developing a criminal identity and reprehensible moral character traits - - Moffitt’s life course persistent offenders - - but most are not. The criminal choices of typical young offenders differ from those of adults, not only because the choice, qua choice, is deficient as the product of immature judgment, but also because the adolescent’s criminal act does not express the actor’s bad character.

III. EXCUSE AND MITIGATION IN CRIMINAL LAW

In contrast to the binary categories that define the criminal responsibility of juveniles, under general criminal law doctrine blameworthiness often varies along a continuum. The default position, of course, is a presumption that adult criminal actors are fully responsible for their wrongful acts. But the law frequently departs from this position to excuse defendants from criminal liability altogether or to mitigate blame and punishment. In this Part, we examine criminal law theory and doctrine to clarify the attributes of offenders and the circumstances surrounding harmful acts that reduce or eliminate culpability. These lessons will allow us, in the next Part, to locate adolescent offenders within this framework of conventional doctrine and theory.

A. Criminal Law Theories of Responsibility and Excuse

As a preliminary matter, it is important to be clear about why excuse and mitigation play
an important role in defining criminal responsibility and punishment. How can two offenders who cause the same harm (an insane killer and his sane counterpart, for example) fairly not be subject to the same punishment? The answer lies in the importance of the foundational criminal law principle of penal proportionality. This principle directs that punishment be proportionate not only to the amount of harm caused (or threatened), but also to the culpability of the offender. Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on attributes of the actor or the circumstances of the offense.

This leads to the question of what makes one actor’s conduct more or less blameworthy than that of another. In response, criminal law scholars offer a variety of positive and normative theories of culpability and excuse. Choice and character theorists often seek to explain criminal law treatment of excuse and mitigation, paying close attention to the doctrines of duress, defense against aggression, provocation, and insanity, as well as other factors that may affect deserved punishment. This inquiry rests on the (quite plausible) intuition that understanding why actors are deemed not culpable (or less culpable than the typical actor) illuminates the meaning of culpability. Not surprisingly, choice and character theorists offer different positive accounts of the role and purposes of these doctrines and draw different inferences about their optimal reach.

Choice theorists adopt a model of culpability based on rationality and volition, positing the responsible moral agent as one who has the capacity to make a rational choice and a “fair

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79 See notes 7-9 supra. For a general description of various theories, see generally Jeremy Horder, Criminal Culpability: The Possibility of a General Theory 12 Law & Philosophy 193 (1993). Some theorists offer alternatives to choice and character-based theories. Jean Hampton, for example, argues that defiance is the source of culpability. See Jean Hampton, Mens Rea, 7 Social Phil. & Policy 1 (1990).

80 In analyzing culpability, some theorists group as “excuses” all exculpatory defenses--i.e. voluntary act, self defense, and mistake, as well as those that fit in the doctrinal category. See S. Kadish, Excusing Crime, supra note 10. For purposes of this analysis, the boundary between justification and excuse is not as important as it is often assumed to be in criminal law, because the focus is on factors that reduce or eliminate culpability. See generally Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897 (1984). Insanity and duress are often analyzed as representative of incapacity and situational excuses. See Duff, supra note 7; M. Moore, supra note 7; and Brandt, supra note 9.
opportunity” to choose the law-abiding course.\textsuperscript{81} On this view, the legitimacy of criminal punishment is diminished if an actor’s choice departs substantially from this autonomy model.\textsuperscript{82} The actor whose decision-making capacity is extremely compromised or whose opportunity to make a different (non-criminal) choice is severely limited may not even meet the minimum threshold conditions of culpability; he will be excused from criminal responsibility altogether.\textsuperscript{83} Thus, the insanity defense excuses the actor whose capacity to understand the wrongful nature of his act is so distorted as to negate moral agency; and an actor whose will is overborne by threats of physical harm may be excused on grounds of duress. Other actors who are subject to less severe deficiencies in their decision making capacity, or to compelling (but not overwhelming) pressures and constraints that limit their freedom of choice, may pass the minimum threshold of responsibility, but be judged less culpable and deserving of less punishment than the typical criminal actor.

Character theory holds that blameworthiness is premised on an implicit but powerful inference that the wrongful act is the product of the actor’s bad character. This premise is evident, not in standard determinations of responsibility and punishment (which include no inquiry into character), but in the defenses that negate or reduce culpability and in the apportionment of blame at sentencing.\textsuperscript{84} A defensible version of character theory maintains the focus on criminal conduct as the object of punishment, but holds that the culpability of the criminal act varies depending not simply on the quality of the choice, but on its meaning as an expression of the actor’s moral character.\textsuperscript{85} Thus, an actor who is coerced to offend under a

\begin{enumerate}
\item \textsuperscript{81}See H.L.A. Hart, supra note 8 at 152; M. Moore, supra note 7 at 31-35.
\item \textsuperscript{82}Stephen Morse has described the conditions for excuse as non-culpable irrationality and non-culpable “hard-choice.” See Morse, supra note 3 at 24.
\item \textsuperscript{83}Similarly, the actor who did not choose to cause harm, but acted under a mistake of fact may be exculpated.
\item \textsuperscript{84}Thus, for example, George Fletcher states, “The only way to work out a theory of excuses is to suggest that the excuse represents a limited, temporal distortion of the actor’s character.” George Fletcher, Rethinking Criminal Law at 802 (1978).
\item \textsuperscript{85}Some character theorists argue that the ultimate purpose of criminal law is to punish bad character per se (rather than bad acts), a claim that has been the target of much (legitimate) criticism. Nicola Lacey and Michael Bayles, supra note 9, adopt this view. See Michael Moore’s critique of character theory, supra note 7 at 49-58.
\end{enumerate}
threat of injury does not act on the basis of bad character if the threat is such that a person of good character would likely succumb to the same pressure. The insane actor’s choice is an expression of his mental illness and not of bad character. Under character theory, both exogenous and endogenous forces that subvert the inference that the criminal act reflects bad moral character have exculpatory or mitigating importance in assessing culpability.

Character theory is more controversial than choice theory, in part because it seems to invite an open-ended assessments of blame on the basis of criteria that are only indirectly linked to the wrongful act. By limiting the inquiry about culpability to the connection between the quality of the actor’s decision and her conduct, choice theory invites a more bounded assessment. Yet, although its normative appeal may be contested, character theory has considerable explanatory power in some areas of doctrine and practice. First, evidence that the crime was aberrational in light of the actor’s established character is explicitly a basis for mitigation of punishment. See discussion of mitigating character evidence at sentencing, notes 103 infra and accompanying text.

Beyond this, excuse and mitigation often seem to require not only that the actor’s reason and will were overborne, but that the reaction was not morally deficient - - i.e., that a person of good character would react similarly. For example, provocation is a mitigating defense to a murder charge, but only if the angered response was reasonable under the circumstances, and not simply because the actor was subjectively unable to control his rage.

Duff, criticizes this extreme position, and affirms that conduct is the focus of punishment, but argues that criminal liability can only be explained in terms of a link between act and character. See Duff, supra note 7 at 359-62; 372. See also Horder, supra note 79 (arguing that under character theory, excuse is warranted if person of good character would act as accused did); Dan Kahan & Martha Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996) (arguing that the moral quality of emotions that undermine rationality and volition determines whether they are exculpatory.)

R.A. Duff explains why focusing solely on choice as the source of criminal liability can not explain excuses such as duress and insanity. On his view, what makes a criminal actor fully culpable is that the act flowed from an intelligible set of attitudes, concerns, and values, and displayed improper indifference to others’ interests or the law’s values - - all aspects of character. What makes an action “out-of-character” (and less culpable) is that it does not reflect character at all - -i.e. is not related to attitudes, structures of value and motives that are aspects of the individual’s continuing identity as a person. See Duff, supra note 7 at 359-61; 378-9.

Reasonable provocation reduces murder to manslaughter. Jerome Michael and Herbert Wechsler describe the reasonableness requirement as a measure of character. “Provocation . . . cannot be measured by the intensity of the passions aroused in the actor by provocative circumstances. It must be measured by the probability
Similarly, the coward will be unable to establish self defense or duress, however genuine her fear.\textsuperscript{89}

Our purpose in this essay is not to take sides in the ongoing debate over the explanatory power and normative appeal of competing theoretical perspectives on culpability. We tend to agree with the view that neither choice nor character theorists provide a comprehensive account of culpability, and that both perspectives offer insights of varying persuasiveness in different doctrinal contexts.\textsuperscript{90} The important point for our purposes is that an analysis of adolescent culpability within either of these theoretical frameworks points to the conclusion that young actors are less culpable than are typical adults. In a framework that focuses only on choice, young law violators are poorer decision-makers with more restricted opportunities to avoid criminal choices than are adults. Under an approach in which bad moral character is the ultimate source of culpability, ordinary adolescents, whose identity is in flux and character unformed, are less culpable than typical adult criminals on this account.\textsuperscript{91}

\begin{footnotesize}
\begin{enumerate}
\item Compared to the self defense claim of Bernard Goetz (who claimed that he feared for his life when he opened fire on four young black men who approached him on the subway) with that of a battered woman who kills a partner. People v. Goetz, 497 N.E.2d 41 (N.Y. 1986)(requiring objectively reasonable belief of threat). If these cases are treated differently, it is not simply on the basis of subjective differences in the fear experienced by the actors. Kahan and Nussbaum point out that a woman who robs a bank in the face of a threatened beating may be excused on grounds of duress, while one who allows her child to be harmed in the face of the same threat will likely fail. The will of both actors is subject to the same coercive force, but one is revealing deficient character, while the other is not. Kahan & Nussbaum, supra note 85, at 333-37. Cf. People v. Romero, 13 Cal. Rptr. 2d 332, 340 (Cal. Ct. App. 1992) (holding that expert testimony on Battered Woman Syndrome could have persuaded a reasonable jury to accept a duress defense to a robbery charge).
\item As R.A. Duff put it, choice theory is too arid and character theory is too rich. Choice theorists err in denying the relevance of the link between the act and the actor’s underlying personal identity, while (many) character theorists wrongly discount the importance of the criminal act. See Duff, supra note 7 at 367-8.
\item R.A. Duff’s description of less culpable “out of character” acts as reflecting no character at all aptly describes adolescent actors. See Duff, supra note 7 and 87 at 378.
\end{enumerate}
\end{footnotesize}
B. Excuse and Mitigation in Criminal Law Doctrine

1. Categories of Excuse and Mitigation

We suggested at the outset that excuse and mitigation are available to two kinds of actors who are unlike “typical” criminals, but in very different ways--those with deficient decision-making capacities, and those who are “ordinary persons” who offend in response to extraordinary circumstances. In the first group are actors whose culpability for wrongful acts is reduced or excused due to endogenous traits or conditions that undermine their decision-making capacity, impairing their ability to understand the nature and consequences of their wrongful act. The primary focus here has been on mental disability and disorder, and the defenses of insanity, diminished capacity, and extreme emotional disturbance are doctrinal expressions of this type of culpability-reducing condition.\(^{92}\) Two types of excuse or mitigation are available to actors in the second group. First, culpability is reduced or negated when, due to exogenous circumstances surrounding the offense, the actor faces a difficult choice that leads her to engage in harmful conduct, and her response is reasonable under the circumstances (as measured against expected responses of ordinary people).\(^{93}\) On this account, the doctrines of duress, provocation, necessity, and self defense are exculpatory or mitigating because the actor can explain the criminal act in terms of extraordinary exogenous pressures and not moral deficiency.\(^{94}\) The link between bad act and bad character is more explicitly negated in the other category of culpability-reducing evidence invoked by ordinary persons; where the conduct is aberrant or “out of character” in light of the actor’s reputation and prior conduct, it is deemed less culpable and can be the basis of discounted punishment.\(^{95}\) Thus, effectively, the criminal law recognizes three rough categories of

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\(^{92}\) At common law, infancy was described as this type of excusing condition. See note 14 supra and accompanying text.

\(^{93}\) The difficulty may be due to threats directed at the actor or others, or to other harms that can be avoided only by engaging in the harmful act.

\(^{94}\) See Michael & Wechsler, supra notes 12 & 88 at 1278-82. Not all of these are doctrinally classified as excuses, but all result in reduced (or negated) culpability, because the actor’s response was reasonable as a response to exogenous circumstances. Defenses against aggression are classified as justification, but, the actor’s conduct is justified as a reasonable response to a threat by his victim. See R. BONNIE, ET AL., supra note 5 at 325-57.

\(^{95}\) Good character alone (without evidence of sufficiently compelling extraordinary circumstances) is never the basis of outright excuse from criminal responsibility. One could argue that this third type of mitigation is not a distinct category, but rather functions as a weaker version of the other two, in cases in which the evidence (of
culpability-reducing conditions: incapacity, coercive circumstances and out-of-character behavior.

2. Proportionality and Mitigation

The line between excuse and mitigation is significant because it defines the categorical boundary of criminal responsibility. In assessment of the culpability of behavior, however, most mitigating conditions are of the same kinds as those that excuse and the differences are a matter of degree. 96 Not surprisingly, defenses that excuse actors altogether from criminal liability are very narrowly drawn. 97 Culpability is mitigated when a harmful act is sufficiently blameworthy to meet the minimum threshold of criminal responsibility, but the actor’s capacity or circumstances are compromised (or good character is evident) enough to warrant less punishment than the typical offender. For example, mental disorder that distorts the actor’s decision-making, but is not severe enough to support an insanity defense, can reduce the grade of an offense or result in a less punitive disposition. 98 Under this approach, mitigation plays an important role in implementing the principle of penal proportionality in the criminal law, without sacrificing the policy objectives of

96 See H.L.A. Hart, supra note 8 at 16 (describing indistinct boundaries among excuse, justification and mitigation). All excusing conditions can be mitigating in their less extreme form, although some sources of mitigation, such as provocation and aberrant conduct are not the basis of excuse.

97 For example, the defense of duress is available only when the actor faces an imminent threat of death or serious physical injury that “a person of reasonable firmness” would be unable to resist. See U.S. v. Willis, 38 F3d 170 (5th Cir. 1994). An offense committed in response to a lesser threat (to property, for example) could constitute mitigation, but not excuse.

98 Some jurisdictions recognize homicide defenses of diminished capacity or partial responsibility, that either negate a mens rea element or reduce murder to manslaughter. See discussion in R. BONNIE, ET AL., supra note 5 at 538-40. Under the Model Penal Code, the actor’s extreme mental or emotional disturbance reduces the homicide to manslaughter. MODEL PENAL CODE SECT. 210.3 (1) (B). This provision seems to combine diminished capacity or temporary insanity with provocation. Although the sufficiency of the emotional disturbance is to be evaluated on the basis of its reasonableness, reasonableness itself is assessed from the subjective viewpoint of the actor. Mental illness is also a general mitigation factor at sentencing. See U.S. SENTENCING GUIDELINES Sect. 5K2.13; KAN. STAT. ANN. § 21-4637(h) (1995); NEB. REV. STAT. § 29-2523(2)(g) (1995 & Supp. 2001). In the recent trial of Andrea Yates, the Texas mother who killed her 5 children, the jury rejected Yates’ insanity plea, but declined to impose the death penalty, in light of her serious mental illness. Jim Yardley, Mother Who Drowned Five Children in Tub Avoids a Death Sentence, N.Y. TIMES, March 16, 2002 at A1.
public protection and deterrence.

Proportionality (and implicitly mitigation) is embedded in the substantive criminal law, particularly in mens rea doctrine and the law of homicide.\textsuperscript{99} Mitigation also plays a key role at sentencing, where a broad range of factors can be considered in the judgment about deserved punishment.\textsuperscript{100} Sentencing guidelines routinely include mitigating factors relevant to culpability that can be grouped roughly in the three categories described above. First, endogenous factors relating to the quality of the actor’s decision-making capacity include impaired cognitive or volitional capacity due to mental illness or retardation, extreme emotional distress, youth, lack of sophistication, susceptibility to influence or domination, or evidence that the crime was unplanned and spontaneous.\textsuperscript{101} Typical mitigating factors relating to external circumstances include duress, provocation, perceived threat, extreme need and domination that are not severe enough to

\textsuperscript{99} Basic mens rea doctrine grades culpability on the basis of the actor’s intentions and awareness of risk-creating circumstances. See MODEL PENAL CODE SECT. 2.02. Moreover, under specific intent doctrine, an actor with a particular purpose is deemed more culpable (and deserves more punishment) than one who engages in the same conduct without that purpose. See R. BONNIE ET. AL., supra note 5 at 133. The law of homicide operates through an elaborate grading scheme under which punishment for the most serious of harms varies dramatically, depending upon the blameworthiness of the actor. Thus, the actor who kills intentionally is deemed less culpable when he does so without premeditation and deliberation, because his choice reveals less consideration of the consequences of his act and less commitment to the evil purpose. One who kills in response to provocation or under extreme emotional disturbance is guilty only of manslaughter. The actor who negligently caused the victim’s death commits a less serious crime than she who intended to kill. See MODEL PENAL CODE SECT. 210. See generally Michael & Wechsler, supra note 12.

\textsuperscript{100} These factors may also be important to the law’s preventive purposes. Often, mitigating factors are responsive to both retributive and preventive purposes. For example, the actor who offends in response to duress or the actor who demonstrates good character is less culpable and also less likely to offend again than the typical offender. However, retributive and preventive purposes may sometimes cut in opposite directions. Some factors such as mental disorder may be mitigating of culpability but suggest that the actor represents a threat to public safety. This is a claim sometimes made about immaturity as a mitigating factor, by way of justifying adult punishment for young offenders.

\textsuperscript{101} For representative sentencing guidelines that include these mitigating factors, see e.g. FLA. STAT. ANN. § 921.0026 (West 2001) (impaired cognitive/volitional capacity, mental disorder, domination by another, and youth); KAN. STAT. ANN. § 21-4637(b), (e), (g)-(h) (1995) (extreme mental distress, mental disorder, domination by another, impaired cognitive/volitional capacity, and age); NEB. REV. STAT. § 29-2523(2)(b)-(d), (g) (1995 & Supp. 2001) (extreme mental distress, domination by another, impaired cognitive/volitional capacity, and age).

In Adkins v Virginia, the Supreme Court held that the death penalty is disproportionate punishment for mentally retarded offenders. The court described the diminished capacity of this group as the basis for a categorical of reduced culpability. 122 S.Ct.2242, 2250-52 (2002).
constitute a defense.\textsuperscript{102} The third category recognizes mitigation when the criminal act was out of character for the actor.\textsuperscript{103} For example, a reduced sentence might result if the crime was a first offense or an isolated incident, if the actor expressed genuine remorse or tried to mitigate the harm, if he had a history of steady employment, fulfillment of family obligations and good citizenship, or, more generally, if the criminal act was aberrant in light of the defendant’s established character traits and respect for the law’s values. Under this category, the actor’s settled identity as a moral person is deemed relevant to the assessment of blame.

The excuse and mitigation categories that we have described would be explained quite differently by character and choice theorists. Under character theory, each category can be understood as reducing culpability by negating or weakening the premise that the criminal act derives from attitudes and structures of value that are aspects of the individual’s continuing identity as a person. Choice theorists, in contrast, would link mitigation and excuse on the basis of incapacity and coerced circumstances to the requirement of rational and voluntary choice, and would reject the legitimacy of the third category altogether. We are persuaded by our sketch of criminal law doctrines of excuse and mitigation that, as a descriptive matter, both the quality of the criminal choice and extent to which it reflects the actor’s bad character are important in assessments of blame.

\textsuperscript{102} N.J. STAT. ANN. § 2C:44-1(b)(3)(1995 & Supp. 2001) (provocation); § 2C:44-1(b) (13) (undue influence by older person); N.C. GEN. STAT. § 15A-1340.16(e)(1) (duress, coercion, threat insufficient to constitute defense but reducing culpability); § 15A-1340.16(e) (8) (provocation) (2001); TENV. CODE ANN. § 40-35-113(2) (1997) (provocation); § 40-35-113 (12) (duress or domination not sufficient to constitute defense); CAL. CASE RULE 4.423 (defendant motivated by desire to provide necessities for family or self).

\textsuperscript{103} The Federal Sentencing Guidelines were amended to include “aberrant behavior” as a mitigating factor, factor. U.S. SENTENCING GUIDELINES §5K2.20. Such behavior must “represent a marked deviation by the defendant from an otherwise law-abiding life.” State guidelines also include mitigating factors based on past reputation and character. State guidelines also include mitigating factors based on past reputation and character. See, e.g., FLA. STAT. ANN. § 921.0026(2)(h)(j) (West 2001) (isolated nature of the incident, for which defendant has shown remorse, compensation of the victim); MASS. GEN. LAWS ANN. ch. 211E § 3(d)(16) (Supp. 2001) (character and personal history; community ties; family responsibilities); N.C. GEN. STAT. § 15A-1340.16(e)(12) (2001) (good character or good reputation in community); CAL. CASE RULE 4.423 (defendant made restitution to victim).
IV. A MITIGATION MODEL OF JUVENILE JUSTICE

In this part, we analyze how law makers can accommodate the unique attributes of adolescent wrongdoers in a framework grounded in conventional criminal law doctrine and theory. A fair system of juvenile justice will respond to youth crime by imposing punishment that is proportionate to the blameworthiness of young offenders. And, under standard criminal law measures, the criminal acts of typical adolescents are less culpable than those of their adult counterparts. A separate system of justice grounded in a mitigation model coherently harmonizes the treatment of young offenders with the response to mitigating conditions generally under the criminal law.

A. Locating Adolescence on the Excuse - Mitigation Continuum

As a preliminary matter, a culpability line should be drawn between children and adolescents. The very small group of offenders who are pre-adolescents should be excused from responsibility for their crimes – as they presumptively were at common law. Excusing children who commit crimes is compatible with the conventional drawing of the responsibility boundary in criminal law. The cognitive decision making capacity of pre-adolescent children is so different from that of adults that they are appropriately grouped with actors suffering from severe disability.  

The differences that distinguish adolescents from adults are more subtle -- mitigating, but not exculpatory. Most obviously, cognitive and psycho-social immaturity undermines youthful decision-making in ways that reduce culpability. Beyond this, because their criminal acts are influenced by normal developmental processes, typical adolescents are different from fully responsible adults whose crimes are assumed to be the product of bad moral character. In this regard, young offenders are more appropriately identified with actors who succumb to coercive

104 In practice, this would mean that children would be subject only to purely rehabilitative interventions, and not subject to criminal punishment. Secure confinement would be appropriate on civil commitment grounds, but not in correctional facilities. Child welfare interventions could result in state custody in cases in which parents are unable to supervise and control children.
pressure or demonstrate that their criminal acts were out of character, and who are less culpable because their responses are those of ordinary persons.

1. Immature Judgment and Diminished Capacity

The adolescent who commits a crime typically is not so deficient in his decision-making capacity that he can not understand the immediate harmful consequences of his choice or its wrongfulness, as might be true of a mentally disordered person or a child. Yet, in ways that we have described, the developmental factors that drive adolescent decision-making predictably contribute to choices based on immature judgment. Due to these developmental influences, youths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and overvaluing (by adult lights) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic and developmental in nature (rather than an expression of personal values), and they undermine decision making capacity in ways that are accepted as mitigating of culpability. Thus, youthful criminal choices may share much in common with those of adults whose decision-making capacities are impaired by emotional disturbance, mental illness or retardation, vulnerability to influence or domination by others, or failure to understand fully consequences of their acts.

To some extent, law makers, by including youth or immaturity as a mitigating factor under many sentencing statutes, implicitly acknowledge that immature judgment mitigates the culpability of young decision-makers. Only in the context of capital punishment, however, has the rationale for treating youthful immaturity as a mitigating condition been articulated. Within the larger

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106 The Supreme Court has made clear that a broad range of mitigating evidence must be admitted in a capital sentencing proceeding. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982) (mitigating evidence of turbulent family history and emotional disturbance must be admitted). The Court has struck down statutes that limited discretion at sentencing by excluding most mitigating evidence. Compare Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that statute imposing mandatory death sentence under certain conditions was unconstitutional) with Gregg v. Georgia, 428 U.S. 153, 163-64 (1976) (upholding statute that allowed broad-ranging mitigating evidence at capital sentencing).
death penalty debate, the question of whether juveniles should ever be executed is hotly contested. In practice, the execution of juveniles is either formally prohibited or a rare occurrence, a pattern that acknowledges that young offenders are not fully responsible, at least not to the extent of deserving the ultimate punishment. Of the 18 states with minimum age restrictions on the imposition of the death penalty, 12 states set the age at 18. Twenty states have no minimum age, but the execution of juveniles is extremely rare. The Supreme Court has declined to hold that the death penalty is categorically disproportionate punishment for all juveniles, but in Thompson v. Oklahoma, the Court prohibited the execution of youths whose offenses occurred before their 16th birthday. In his plurality opinion, Justice Stevens focused on the immature judgment of adolescents in explaining why such punishment would violate the principle of proportionality - - and thus, the Eighth Amendment prohibition of cruel and unusual punishment:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis of this conclusion is too obvious to require extensive explanation. Inexperience, less intelligence and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons that juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Although the judgment of blameworthiness that is at issue in the death penalty context occupies an extreme pole on the culpability continuum, Justice Stevens’ analysis of the relationship between immature judgment and blameworthiness is applicable generally to the criminal
punishment of young actors. The youthful characteristics identified by Justice Stevens impede decision-making in crime settings in which the death penalty is not at issue. Moreover, under the logic of Thompson, contemporary reformers have it backwards when they argue that youths can be classified as adults for serious crimes but not for minor offenses. Thompson supports the conclusion that the importance of recognizing the reduced culpability of young criminals grows as the stakes increase. Thompson also recognizes that immaturity can be categorically mitigating of culpability, and that individualized consideration of this factor may be inadequate protection. This is an important point, in that it suggests a difference between youth as a mitigator and other factors that reduce culpability, a point to which we will return shortly.

2. Adolescent Offenders as “Ordinary Persons”

That immaturity is mitigating as a type of diminished capacity may be, in Justice Stephens’ words, “too obvious to require extensive explanation.” What is less obvious is that the other sources of mitigation in criminal law also illuminate key differences between adolescents and typical criminals. Adolescent offenders are indeed different from the rest of us, but they (or most of them) are also ordinary persons - - although not ordinary adults. This is not to say, of course, that all adolescents will commit crimes, or that those who do are without blame. It is to say, however, that what psychologists call normative adolescents may well succumb to the extraordinary pressures of a criminogenic social context. Beyond this, the typical adolescent can be distinguished from most criminals, and aligned with ordinary persons whose crimes deserve less

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111 It might seem that youths who kill are less likely to qualify for mitigation on grounds of immaturity, either because they are more mature than youths who engage in less serious criminal conduct, or because their acts reflect a settled criminal identity. But such an inference can not be drawn in an era in which guns are readily available and are a key status symbol in some peer settings. See generally Franklin E. Zimring & Gordon Hawkins, Crime is Not the Problem: Lethal Violence in America (1997)(arguing that increases in violent crime, particularly homicide is due to lax firearms gun policies).

112 The legislative trend has been to maintain exclusive juvenile court jurisdiction for less serious offenses, but to assume without inquiry that public protection warrants adult punishment for more serious offenses. See supra note 28 and accompanying text.

113 In Stanford v. Kentucky, the Court declined to extend this categorical approach to youths who are age 16 or older, emphasizing that individualized consideration of immaturity and youth would be part of every capital sentencing provision involving a minor. 492 U.S. 361 (1989).

than full punishment, in that his wrongful act does not derive from attitudes and structures of value that are part of his continuing identity as a person - - i.e. it is not an expression of bad character. Here again, immature youths are not like ordinary adults - - fully realized selves who have internalized the law’s values. Instead, their crimes are a costly manifestation of influences and processes characteristic of a discreet stage in human development. If we consider youthful culpability against the predicted responses of an “ordinary adolescent,” its mitigating character becomes clear.

a. Situational Mitigation and the Context of Adolescence

As we have suggested, adolescents in high crime neighborhoods are subject both to unique social pressures that induce them to join in criminal activity, and to restrictions on their freedom that tangibly limit their ability to escape. These restrictions are constitutive of a well defined legal status that limits autonomy and that results from their dependency. Beyond this, ordinary adolescents lack the life skills and psycho-social capacities that would allow them to respond to the extraordinary circumstances they face in these social contexts. [Indeed, ordinary adults might well succumb to these pressures.] These circumstances are similar in kind to those involved in claims of duress, provocation, necessity, or domination by co-defendants, and appropriately are deemed mitigating of culpability. When adolescents cross the line to legal adulthood, the formal disabilities of youth are lifted; young adults can avoid the situational pressures they face by removing themselves from the criminogenic setting. Moreover, normal maturation enables individuals to cope with circumstances that are overwhelming in adolescence. Thus, adults have no claim of situational mitigation on the ground that they are restricted to a social setting in which avoiding crime is difficult.115

115 The inability to escape distinguishes adolescents from adult offenders who might argue that they are less culpable than other criminal actors because of their rotten social background”, or “toxic social context” Some have argued for a defense available to adult lawbreakers who grew up in crime-inducing settings where they received no inculcation in pro-social norms and lacked opportunities to succeed in socially acceptable ways, on the ground that these social forces combine to constrain their freedom to avoid crime. See Delgado, supra note 68. Among the judiciary, Judge David Bazelon argued that impoverished background should be recognized as mitigating. David Bazelon, The Morality of the Criminal Law, 49 S. CAL. L. REV. 385 (1976). This defense generally has been rejected by law makers or scholars, in part because of the high social cost incurred if a defense were available to a large open -ended category of adult offenders otherwise indistinguishable from the norm. More
The framework we employ for analyzing the culpability of juveniles in response to extraordinary circumstances uses as a baseline the reactions of ordinary adolescents. Under the conventional standard, criminal conduct is less culpable if an ordinary (“reasonable”) person (with a typical set of adult psychological and moral capacities) might be led respond similarly when subjected to the same unusual pressures as the wrongdoer. Yet, this baseline can be criticized for failing to accommodate responses to external pressures that are reasonable for adolescents.\textsuperscript{116} The psychological attributes that normal adolescents bring to their experience increase the challenges they face in responding to crime-inducing social contexts. The baseline adjustment clarifies that many adolescents responding to external circumstances are similar to ordinary adults who claim situational mitigation, in the sense that their criminal choices can be explained in terms of exogenous pressures rather than individual moral deficiency.

\textbf{b. Development, Character, and Culpability}

The criminal law’s recognition that actors are less blameworthy when they can negate the inference that their bad acts reflect bad moral character has a broader importance in assessing the culpability of typical young offenders. In one sense, to be sure, young wrongdoers are not like ordinary adults whose acts are less culpable on this ground. The criminal choice of the typical adolescent can not be evaluated by comparing it to his previously established good character, because his personal identity is in flux and his character has not yet stabilized. Yet, like the adult actor who establishes mitigation, it can be said that the adolescent’s harmful act does not express his bad character; indeed, it does not manifest “character” at all\textsuperscript{117} — but something else — in this


\textsuperscript{117} See Duff at notes 7 & 98 supra. The inference, of course, is that if the wrongful act \textit{do} reflect “character,” it is bad character—settled dispositions and values that lead to actor to engage in crime.
Indeed, measuring youthful criminal conduct against the adult self of the young offender would usually result in mitigation, given that most adolescent criminals will mature into adults with attitudes and values that are respectful of the prohibitions of the criminal law. Although such a prediction can not be made accurately on an individual basis, its accuracy in the aggregate warrants a separate classification for juveniles. See infra note 128 and accompanying text.

This is not to say, of course, that this youthful conduct is morally neutral or beyond the youth’s control. Most adolescents do not commit serious crimes, and those who do are culpable, although not as culpable as adults.

Philosophers have examined the importance of changing identity over time for personal responsibility. Derek Parfit argues that an individual’s responsibility for conduct may attenuate over time as personal identity changes, and that at some point, the “later self” becomes a fundamentally different person, whose responsibility for the earlier self’s act is questionable. See generally Derek Parfit, Later Selves and Moral Principles, in PHILOSOPHY AND PERSONAL RELATIONS 137 (A. Montefiore ed., 1973). The criminal law is ordinarily not interested in whether an individual’s identity has changed since he committed the offense. However, occasionally, when many years elapse between the crime and the apprehension, and the actor has lived an exemplary life in the interim, reservations are expressed about whether full retribution is warranted.
The transition to adulthood is also quite different from the kind of transformation often seen in prisoners, of the “jailhouse conversion” variety, which may be viewed with suspicion. Some young adults may simply be slow to mature; their crimes are less culpable on this account. As time passes, however, their adolescent traits can fairly be ascribed to personal identity. Whether the immaturity of young adults should count as mitigation may depend on our confidence in discerning whether the traits are developmental or characterological. As we argue infra, there is much to recommend a categorical approach, as individualized assessment of immaturity may be error-prone.

An individualized assessment of the immaturity of the offender focusing on culpability could either inform the charging decision, the evaluation of a modern infancy defense or the sentencing judgment. Under the common law infancy defense, judgments about whether immaturity was exculpating were made on an individualized basis for youths between the ages of 7 and 14 years. See supra notes 14 - 15 and accompanying text. Inquiry could be also directed toward a youth’s competence to stand trial (which is not necessarily related to culpability), which

B. Categorical Mitigation - - Juvenile Justice as a Separate System

If, in fact, adolescent offenders are generally less culpable than their adult counterparts, how should the legal system recognize their diminished responsibility? At a structural level, an important policy choice is whether immaturity as a mitigating condition should be considered on an individualized basis, as is the typical in other criminal law contexts, or as the basis for a
separate category of young offenders. Traditional juvenile justice policy employed a categorical approach, that continues in a diluted form in the contemporary juvenile court and correctional system. As the boundary between the juvenile and adult system becomes more porous, however, evaluation of immaturity as a mitigator increasingly takes place (if at all) on an individualized basis in a transfer hearing or at sentencing.\footnote{124}

The uniqueness of immaturity as a mitigating condition argues for the adoption of (or renewed commitment to) a categorical approach in this context. Other mitigators - - emotional disturbance and coercive external circumstances, for example - - affect criminal choices with endless variety and idiosyncratic impact on behavior. Thus individualized consideration of mitigation is appropriate where these phenomena are involved.\footnote{125} In contrast, the capacities and processes associated with adolescence are characteristic of individuals in a relatively defined group, whose development follows a roughly predictable course to maturity, and whose criminal choices are predictably affected in ways that are mitigating of culpability. Although individual variations exist within the age cohort of adolescence, of course, coherent boundaries can delineate a minimum age for adult adjudication, as well as a period of years beyond this when a strong presumption of reduced culpability operates to keep most youths in a separate system.\footnote{126} The age boundary is justified if the presumption of immaturity can be applied confidently to most individuals in the group. This approach offers substantial efficiencies over one in which immaturity is assessed on a case- by-case basis, particularly since mitigation claims would be a part of every criminal adjudication involving a juvenile.

\footnote{124} In modern criminal proceedings, immaturity is considered only in the sentencing determination, if at all. \footnote{125} Mental retardation, in contrast, may justify a more categorical approach, as the Supreme Court recognized in in death penalty context in \textit{Adkins v. Virginia}. \textit{See supra} note 101. \footnote{126} We are reluctant to recommend specific age boundaries for juvenile court jurisdiction, because other considerations besides reduced culpability will go into this judgment (such as public safety and protection of the future prospects of young offenders. \textit{See infra} note 134 and accompanying text. Our goal is to provide the theoretical framework for a separate mitigation category based on immaturity, not to define the precise boundaries of this system.
Adopting a mitigation framework does not mean that all youths are less mature than adults in their decision-making capacity or that all juveniles are unformed in their identity development. Some individuals exhibit mature judgment at an early age (most are not offenders, however), and for others, antisocial tendencies that begin in childhood continue in a stable pattern of criminal conduct that defines their characters as an adult. Adult punishment of mature youths might be fair if these individuals could be identified with some degree of certainty. But we currently lack the diagnostic tools to evaluate psycho-social immaturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who will repudiate their reckless experimentation as adults. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.

A developmentally-informed boundary constraining decision-makers represents a collective pre-commitment to recognize the mitigating character of youth in assigning blame. Otherwise, immaturity often may be ignored when the exigencies of a particular case engender a punitive response; indeed, it is likely to count as mitigating only when the youth otherwise presents a sympathetic case. This is a critical concern, given the evidence that illegitimate racial and ethnic biases influence attitudes about the punishment of young offenders and that decision-makers appear to discount the mitigating impact of immaturity in minority youths. The integrity and legitimacy of any individualized decision-making process is vulnerable to contamination from racist attitudes or from unconscious racial stereotyping that operates even among individuals who may lack overt prejudice. In the death penalty context, the Supreme Court implicitly has

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127 Moffitt labels this small group life course persistent offenders. See supra notes 77-78 and accompanying text.

128 For example, Moffitt identifies a pattern of dysfunction and antisocial tendencies beginning in early childhood in life-course-persistent offenders that distinguishes them from adolescent-limited offenders. Id. But some portion of children who have serious behavior problems in childhood do not become antisocial adults. See Rolf Loeber & Magna Stouthamer-Loeber, Development of Juvenile Aggression and Violence, 53(2) AMER. PSYCHOLOGIST 242 (1998)(arguing that research demonstrates that some violent children discontinue violence before reaching adulthood).

129 See supra notes 38 - 40 and accompanying text.

130 See Graham, supra note 40.
recognized that categorical restrictions on individualized blaming judgments are sometimes necessary to safeguard against racism.\textsuperscript{131} Similarly, a structural boundary that hinders adult adjudication of young offenders is justified as a counterweight to this pernicious influence.

Categorical recognition of the mitigating impact of immaturity provides the conceptual framework for a separate justice system for juveniles, but does not in itself dictate a particular set of institutional arrangements.\textsuperscript{132} A variety of arrangements, including a systematic sentencing discount for young offenders in adult court, might satisfy the demands of proportionality.\textsuperscript{133} Ultimately, the case for a separate system rests on utilitarian considerations as well as on proportionality concerns. The social cost of youth crime will be minimized by policies that attend to the impact of punishment on the future lives and prospects of young offenders. The research supports that a separate juvenile court and correctional system are more likely than the adult system to offer an environment in which youths can successfully “mature out” of their antisocial tendencies.\textsuperscript{134} Thus, to a considerable extent, social welfare and fairness converge to support a separate juvenile justice system grounded in mitigation.

\textsuperscript{131} The best example is the prohibition against imposing the death penalty for rape, which historically was available in many southern states, and probably most often imposed when black men raped white women. In \textit{Coker v. Georgia}, the Supreme Court held that imposing the death penalty for rape was disproportionate punishment in violation of the 8th Amendment. 433 U.S. 584 (1977).

\textsuperscript{132} As a practical matter, it is fair to describe the reduced culpability of youth as a necessary, but not sufficient, condition for the establishment of a separate system.

\textsuperscript{133} Barry Feld argues for a unified criminal justice system under which young offenders get a youth discount at sentencing. \textit{BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT} 302-03 (1999).

\textsuperscript{134} Research evidence indicates that adult punishment of adolescents may contribute to recidivism. Jeffrey Fagan has compared youths serving prison sentences in one jurisdiction with a sample matched for seriousness of offense serving in juvenile corrections in an adjacent state. He found higher recidivism rates among imprisoned youths. See Jeffrey Fagan, \textit{The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders}, 18(1) L. & POLICY 77 (1996). Advocates for tougher sanctions duck this problem by (apparently) assuming that most young offenders are criminal careerists. The evidence that we have described contradicts this assumption. \textit{See supra} notes 75 to 78 and accompanying text. \textit{See generally} Scott & Grisso, \textit{supra} note _ (arguing for mitigation-based policies on utilitarian grounds); F.\textit{ZIMRING, AMERICAN YOUTH VIOLENCE, supra} note 25 at 81-83. (arguing that giving young offenders’ “room to reform” should be a goal of youth crime policies).
This is not to say that youths should never be subject to adult punishment. A policy that treats immaturity as a mitigating condition is viable only to the extent that public protection is not seriously compromised. Immature offenders can be a threat to public safety and public tolerance of youthful misconduct, as we have seen, is tenuous at best. Moreover, proportionate punishment and public protection are both important purposes of the criminal law. At some point, public safety concerns dictate that young recidivists who inflict large amounts of social harm must incapacitated as adults. This response may undermine proportionality to some extent, but, in practice, the sacrifice is likely to be modest. The small group of youths who are recidivist violent offenders are generally older teens and they are more likely than other adolescent law breakers to be young career criminals of settled dispositions. That is not to say that we should “throw away the key” when we incapacitate these youths. Given the uncertainty of predicting adult character during adolescence, efforts should be made to protect against iatrogenic prison effects and to invest in the future post-incarceration lives of even serious chronic offenders. Nonetheless, a mechanism to protect society from harms caused by dangerous youths is a critically important safety valve for a well functioning juvenile justice system based on mitigation.

Implementing a mitigation-based model of juvenile justice will require significant shifts in crime policy, but it will not require a radical overhaul of the juvenile justice system itself. Despite (and probably because of) the scathing criticisms about its inadequacies, the juvenile system has undergone substantial change in the past generation, evolving toward one that increasingly emphasizes accountability and public protection. Although the public image of the modern juvenile court continues to be distorted by the traditional rhetoric, delinquents in juvenile court are increasingly subject to proportionate punishment for their offenses.

Nonetheless, a large gap separates contemporary youth crime policy from one that is

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135 Under few, if any, modern juvenile codes is rehabilitation described as the principal goal of delinquency interventions. Many include policy statements that include accountability and community protection as goals. See e.g. VA CODE ANN § 16.1-227 (4) (Michie 1996; Cum. Supp. 2001)(purpose of juvenile code is protect community against juveniles’ harmful acts, to reduce incidence of juvenile crime, and to hold offenders accountable for their acts). See also statutes cited in note 23 supra.
optimally grounded in mitigation, in large part because the purposes and rationale of the contemporary juvenile system lack a coherent theory. First, rather than seeking to systematically reform the system pursuant to a goal of tailoring dispositions to the culpability of young offenders, lawmakers have incorporated accountability and public protection in a piecemeal fashion, mostly in response to political pressures. More importantly, in response to those same forces, the boundary between the juvenile and adult systems has become very porous under recent reforms. Youths can be subject to adult adjudication and punishment today for a broad range of crimes, including many, such as car theft and drug transactions, that appear to be quintessential adolescent behavior.  

Young criminals can also be tried as adults for their first offenses, which may well be experimental behavior that would not be repeated.

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Our goal in this Essay has been to develop a theoretical framework for youth crime policy that is based on the empirical reality of adolescence and that also is compatible with the standard notions of culpability embodied in the criminal law. Both traditional and contemporary lawmakers have ignored the relationship between immaturity and criminal responsibility, with unfortunate results. Our analysis shows that scientific evidence supports that most adolescents are less mature than adults in ways that distinguish their criminal choices, and that this youthful immaturity mitigates culpability but does not excuse young law violators from criminal responsibility. Because it is solidly grounded in criminal law doctrine and theory, a mitigation-based model of juvenile justice offers a legitimacy that neither the traditional rehabilitative model nor the recent full-responsibility reforms can claim. Moreover, the approach that we propose can accommodate the seemingly conflicting goals of protecting public safety and responding to the attributes of this unique group of wrongdoers, without abandoning basic criminal law principles.

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136 See e.g. Ill. Comp. Stats. Ann. Sect. 405/5-4.(6)(a)(15 year old charged with selling drugs in school is not a minor); Ark. Stats. Ann. Sect. 9-27-318 (14 year old can be charged as adult for soliciting minor to join criminal street gang).