Adolescence and the Regulation of Youth Crime

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Adolescence and the Regulation of Youth Crime

Elizabeth S. Scott*

I am delighted to be a part of this symposium on Law & Adolescence. I am going to talk today about adolescent development and juvenile justice policy—or more specifically, about why policy that is grounded in scientific knowledge about adolescence and the role of criminal activity during this developmental period is better than the contemporary approach, which often pays little attention to differences between adolescents and adults—better for young offenders and better for society.

My talk is based on a book on juvenile justice policy that I am currently writing with Larry Steinberg, a developmental psychologist who is a leading expert on adolescence. For about 10 years, Larry and I have worked together on an interdisciplinary research network sponsored by the MacArthur Foundation—the Research Network on Adolescent Development and Juvenile Justice.1 The purpose of the Network has been to examine how scientific knowledge about adolescence and juvenile crime can usefully inform policy and practice, to determine where there are gaps in that knowledge and to develop and conduct research studies that can fill those gaps and inform policymaking in this area. The book offers a framework for youth crime policy that we have developed through our work in the Network. Our thesis is that scientific knowledge about adolescence and youth crime is critically important as a foundation for satisfactory juvenile justice policy and that (for the most part) this premise translates into a legal regime that

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*This essay was presented as a keynote lecture at the Conference on Law and Adolescence at the Beasley School of Law at Temple University on March 17, 2006. As noted, the lecture draws on many years of collaborative work with Laurence Steinberg, and is based on a forthcoming co-authored book on juvenile justice policy.

1Larry Steinberg is the director of the Network and is the Laura Carneal Distinguished Professor of Psychology at Temple University.
deal with young offenders as an intermediate legal category of persons—neither children nor adults.

The idea that developmental knowledge about adolescence is relevant to the regulation of youth crime has been largely ignored in the punitive law reforms of the past generation—but lately this perspective has been getting attention. Last year, the United States Supreme Court in *Roper v. Simmons* held that imposing the death penalty on offenders for crimes committed as juveniles is unconstitutional under the 8th Amendment prohibition of cruel and unusual punishment. The Court offered several bases for this conclusion—but the heart of Justice Kennedy’s opinion is a proportionality analysis that draws on an article Larry Steinberg and I wrote in the *American Psychologist* in 2004. In the article, we argued that the scientific knowledge about adolescence supports the position that the criminal choices of young offenders—even 17 year olds—are less blameworthy than those of adults. This afternoon, I will talk about *Simmons* and the developmental argument for mitigation that the Court adopted—(fleshing out some parts that Justice Kennedy did not include) and then apply the mitigation framework more broadly to juvenile crime policy. I also hope to show that the case for a justice regime based on developmental knowledge is grounded not only in fairness to young offenders—which ultimately may not carry the day in the political arena—but in a pragmatic calculation of

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the interests of the rest of society. And finally, I will suggest that this is a good time to begin a new era of law reform in the area of juvenile justice.

A. The Culpability of Adolescent Criminal Choices: the Argument for Mitigation

The story of Simmons is familiar—at least to this audience. The Supreme Court agreed to accept certiorari two years after it held in Atkins v. Virginia that imposing the death penalty on mentally retarded persons is unconstitutional under the 8th Amendment. Simmons came to the Court after the Missouri Supreme Court found that state’s juvenile death penalty statute unconstitutional under Atkins. Chris Simmons was probably not the juvenile that child advocates would have chosen to challenge the death penalty. He was 17 years old when he and a friend broke into a woman’s home and then brutally murdered her by taping her up & throwing her in a near-by river. There were different accounts of why the youths killed their victim. Some testimony suggested that Chris panicked when the victim recognized him— but there was also a report that— weeks before the killing, he had said he wanted to kill someone. In general, to be honest, Chris was not a person likely to arouse much sympathy. So—in a state like Missouri with a death penalty, why shouldn’t he be eligible?

The answer to this question, according to the Court, lies in the bedrock principle of proportionality—which holds, [as many of you may remember from your 1st year Criminal Law class], that criminal punishment should be based not only on the harm caused, but also on the

4Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (holding that mentally retarded persons have educed culpability, and thus executing them would be a violation of the 8th Amendment prohibition of cruel and unusual punishment).

5Brenna—this might be in Liz Emens S. Ct. Rev. Article.
blameworthiness of the offender. In capital cases, the harm is as bad as it gets—a nasty murder. The Court in *Simmons* found, however, that executing Chris Simmons and other juveniles would violate the 8th Amendment because adolescents under the age of 18—due to their immaturity—are not among the “worst offenders” for whom the punishment of death is reserved.

Drawing on research in developmental psychology, the Court pointed to several dimensions of adolescence that distinguish young offenders from adults in ways that mitigate culpability. These include deficiencies in decisionmaking ability, greater vulnerability to external coercion and the relatively unformed nature of adolescent character. Although the Court did not elaborate, each of these attributes of adolescence corresponds to a conventional source of mitigation in criminal law—and together they offer strong evidence that young offenders are not as culpable as adults. Let’s look at each of these.

First, consider diminished capacity. Under standard criminal law doctrine, actors whose decision-making capacities are impaired—by mental illness or retardation for example—are deemed less blameworthy than typical offenders. If the impairment is severe, their crimes are excused. There is considerable evidence that children and adolescents are less capable decision-makers than adults in ways that are relevant to their criminal choices.

Although few would question this claim as applied to children, the picture is more
complicated for offenders such as Chris Simmons who are 16 or 17 years old. The capacities for reasoning and understanding improve significantly from late childhood into adolescence, and by mid-adolescence, most teens are close to adults in their ability to reason and to understand information (what you might call “pure” cognitive capacities)– at least in the abstract. The reality, however, is that they are likely less capable than are adults in using these capacities in making real-world choices – partly because of lack of experience and partly because teens are less efficient than adults in processing information. In life– and particularly on the street, the ability to quickly marshal information may be essential to competent decisionmaking.

Also, other aspects of psychological development that affect decisionmaking lag behind cognitive development and undermine adolescent competence. The research documents what most parents of adolescents already know– the decisions of teenagers are subject to psychosocial and emotional influences that contribute to immature judgment which can lead them to make bad choices. [It’s probably not surprising that I first became interested in these issues when my daughter Christy was about 14 years old. An orthopedist suggested that if Christy’s mild scoliosis got worse she might need to wear a body brace. Her response basically was that she would rather spend her life as a pretzel than wear a body brace.]

Christy understood as well as any adult what the surgeon was telling us about her

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9Brenna– Cite (maybe one of the papers L Steinberg sent us) ??

10Social science research confirms that adolescents differ from adults in several ways that contribute to immature judgment– in their attitudes toward risks, the weight attached to short-term versus long-term consequences, and in peer conformity and susceptibility to peer influence. Elizabeth S. Scott, Judgment and Reasoning in Adolescent Decisionmaking, 37 VILL. L. REV. 1607, 1642 (1992); Elizabeth S. Scott et al., Evaluating Adolescent Decisionmaking in Legal Contexts, 19 LAW AND HUMAN BEHAV. 221, 229 (1995); Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence: Psycho-social Factors in Adolescent Decisionmaking, 20 LAW & HUMAN BEHAV. 249 (1996) (providing evidence that age-linked differences in maturity of judgment account for differences in decisionmaking).
condition, the medical options and the consequences of choosing or not choosing the recommended procedure. But, as her response suggests, teens tend to lack what developmentalists call “future orientation,” that is, as compared to adults, adolescents are more likely to focus on the here-and-now and less likely to think about the long-term consequences of their choices or actions—and when they do, they are inclined to assign less weight to future consequences than to immediate risks and benefits. Over a period of years between mid-adolescence and early adulthood, individuals become more future oriented. There is every reason to believe that by age 21, Christy might have made a different decision in the interest of her future health.

Substantial research evidence also supports the conventional wisdom that teens are more oriented toward peers and responsive to peer influence than are adults. Several studies show that susceptibility to peer influence, especially in situations involving pressure to engage in antisocial behavior, increases between childhood and mid-adolescence, peaks around age 14, and declines slowly during the late adolescent years. Increased susceptibility to peer pressure in early adolescence tends to peak around age 14 and decline to lower levels during the late adolescent years. This pattern is consistent with findings that conformity peaks in 9th grade in situations involving anti-social behavior; Phillip R. Costanzo & Marvin E. Shaw, Conformity as a Function of Age Level, 37 CHILD DEV. 967, 967-75 (1966) (confirming the hypothesis that conformity increases up to adolescence and declines afterwards); Laurence Steinberg & Susan B Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 CHILD DEV. 841, 848 (1986).
adolescence may reflect changes in individuals’ capacity for self-direction (as parental influence declines), as well as changes in the intensity of pressure that teens exert on each other. Some studies suggest that adolescents who engage in certain types of antisocial behavior may enjoy higher status among their peers as a consequence—perhaps because they appear to be independent of adult authority. The net result is that adolescents are more likely than either children or adults to change their decisions and alter their behavior in response to peer pressure.

Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, desire for peer approval (and fear of rejection) affects adolescent choices, even without direct coercion. Teens appear to seek peer approval especially in group situations. Thus, perhaps it is not surprising that young offenders are far more likely than adults to commit crimes in groups.13

Consider the case of Timothy Kane, a 14 years old junior high school student who never had any contact with the justice system until one Sunday afternoon in January, 1992. Tim was playing video games with a group of friends, when a couple of older youths suggested that they break into a neighbor’s house. Tim agreed to go along. Upon entering the house, the boys were surprised to find the elderly neighbor and her son at home—whereupon the two older boys killed them, while Timothy watched from under the dining room table. Interviewed years later as he

(presenting research demonstrating age differences in susceptibility to peer pressure); Scott et al. supra note 4 at 229-30; Steinberg & Caufman, supra note 4, at 257-59. NORMAN SPRINTHALL & W. ANDREW COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW 269 (2d ed. 1988).

served a life sentence under Florida’s draconian felony murder law, Timothy explained that he went along because he didn’t want to stay behind alone— and he didn’t want to be called a “scaredy-cat.” I would argue that Timothy’s fatal decision to get involved in the break-in was— more than anything else— the conduct of a 14 year old worried about peer approval.

Justice Kennedy in Simmons noted another psychosocial factor that contributes to immature judgment— adolescents are both less likely to perceive risks and less risk-averse than adults. Thus, it is not surprising, perhaps, that they enjoy engaging in activities like speeding, unsafe sex, excessive drinking, and committing crimes more than adults. The story is actually a bit more complicated. In the abstract— on paper & pencil tests—, adolescents are capable of perceiving risks almost as well as adults. In the real world however, risk preference and other dimensions of psycho-social immaturity interact to encourage risky choices.

Another story— this one about a colleague’s son— makes this point aptly. At 2 a.m. one Sunday morning, 14- year-old Ben and several friends secretly left the house where they were spending the night to visit one of the boys’ girlfriends, who lived nearby. When they arrived at

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15Simmons, 553 U.S. at 569.

16Early researchers such as Jean Piaget developed theories of cognitive development, under which mid-adolescents’ abilities to think about problems hypothetically and weigh and compare consequences were similar to adults. See generally BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1952) (describing cognitive development in children between 11 and 15 years of age); JOHN H. FLAVELL, COGNITIVE DEVELOPMENT 92-101 (2d ed. 1985) (describing generalizations drawn from Piaget’s theories); ROBERT S. SIEGEL, CHILDREN’S THINKING 20-21, 26-38 (2d ed. 1991) (describing different developmental stages outlined by Piget). Piaget focused on “pure” cognitive development, however, and modern researchers contend that adolescents’ perceptions of risks are more complicated because psycho-social development proceeds more slowly than cognitive development. See Laurence Steinberg, Risk Taking in Adolescence: What Changes and Why?, 1021 ANN. N.Y. ACAD. SCI., 51-58 (2004) (noting that although after age thirteen there are no age differences in risk perception, adolescents are far more likely to take risks than adults due to a desire for novel experiences and a slower development of self-regulatory capabilities, attributes that continue to develop into late adolescence and adulthood.).
the girl’s home, they threw pebbles at her window to wake her. Unfortunately, this set off a burglar alarm, which sounded a siren and sent a silent dispatch to the local police station. Upon hearing the siren, the boys ran-- right into a patrol car that was racing toward the house. Instead of stopping and explaining their situation to the police, Ben and his friends panicked and scattered. One of the boys was apprehended by the police and taken home. The others returned to the house where they were spending the night.

The next morning, Ben’s father received a phone call from the girl’s parents, explaining what had happened. After picking Ben up and lecturing him about the dangers of running away, in the dark, from armed police who thought they had interrupted a burglary, his father asked him, rhetorically, “What were you thinking?” “That’s the problem, Dad,” Ben said. “I wasn’t.”

It seems probable that the presence of his friends, together with distress created by the arrival of the police, overwhelmed the decision-making capacities of an otherwise intelligent and law-abiding teenager. In a laboratory study, Ben likely would have identified risks of this situation as well as any adult. The lesson of the story is that risk assessment (and decision making) on the street may present challenges to teens greater than those faced by adults.

Another (compatible) account of why adolescents take more risks than adults is that they may evaluate both the risks and benefits of risky activity differently. Psychologists refer to the outcome of weighing risks and benefits as the “risk-reward ratio”; the higher the ratio, the less likely an individual is to engage in the behavior in question. Studies suggest that, in calculating the risk-reward ratio that guides decision-making, adolescents may discount risks— and assign
greater weight to the rewards of a choice than do adults. In studies involving gambling games, teens tend to focus more on potential gains relative to losses than do adults. So, for example, in deciding whether to speed while driving a car, adolescents may weigh the potential rewards of the behavior (e.g., the thrill of driving fast, peer approval, getting to one’s destination quickly, etc.) more heavily than adults, and discount the risks (having an accident, getting a ticket). What distinguishes adolescents from adults in this regard, then, is not the fact that teens are less knowledgeable about risks, but, rather, that they attach different value to the rewards that risk-taking provides.

Emerging evidence suggests that the special salience of rewards to adolescents may be driven by the hormonal changes of puberty. In particular, the tendency of adolescents to seek more novelty and to require higher levels of stimulation to achieve pleasure than do adults may have a hormonal basis. Although most of the relevant brain research on this question comes from animal studies, there is some support for the notion that developments in the limbic system of the brain around puberty may account for at least part of this change in reward-seeking that occurs in adolescence.

In addition to age differences in susceptibility to peer influence, future orientation, and risk assessment, adolescents and adults also differ with respect to their ability to control

17See Gardner & Herman, Adolescent AIDS Risk Taking at 24 (noting that adolescents focus less on protection against losses and more on opportunities for gains in making choices, which is why they are more likely to engage in risky behavior such as unprotected sex); See also Lita Furby & Ruth Beyth-Marom, Risk Taking in Adolescence: A Decisionmaking Perspective, 12 DEV. REV. 1, 1-2 (1992) (describing decision making about risky behavior in a rational decisionmaking model).

impulsive behavior and choices. Thus, the conventional wisdom that teens are more reckless than adults is supported by research on developmental changes in impulsivity and self-management. In general, studies show gradual but steady increases in the capacity for self-direction through adolescence, with gains continuing through the high school years. Research also indicates that adolescents are subject to more rapid and extreme mood swings (both positive and negative) than are adults. [Not surprising to many parents]. Although the connection between moodiness and impulsivity is not clear, it is likely that extreme levels of emotional arousal (either anger or elation) are associated with difficulties in self-control. Although more research is needed, the available evidence indicates that adolescents may have more difficulty regulating their moods, impulses, and behaviors than do adults.

These psycho-social and emotional factors contribute to immature judgment in adolescence and likely play a role in decisions by teens to engage in criminal activity. It is easy to imagine how individuals whose choices are subject these developmental influences – susceptibility to peer influence, poor risk assessment, sensation seeking, a tendency to give more weight to short-term consequences of choices and poor impulse control – might decide to engage in criminal conduct.

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 nearby convenience store. The

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20Studies tend to show a gradual increase in an individual’s self direction and ability to control impulsivity. The gains occur gradually over the course of adolescence and continue through the final years of high school. Ellena Greenberger, Education and the Acquisition of Psycho-Social Maturity, in The Development of Social Maturity (David C. McClelland ed., 1982).

21Reed Larson et al., Mood Variability and the Psycho-Social Adjustment of Adolescents, 9 J. Youth & Adolescence, 469, 488 (1980) (presenting a study finding wider mood fluctuations among adolescents than adults).
youth doesn’t really go through a formal decision making process, but he “chooses” to go along, even though he has mixed feelings. Why? First and most important, like Tim Kane, he may assume that his friends will reject him if he declines to participate - - a negative consequence to which he attaches substantial weight in considering alternatives. He does not think of options to extricate himself - - although a more mature person might do so. This 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 exciting. 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.22

This account is consistent with the general developmental research 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. [If none of this sounds familiar in regard to the teens in your life, then you’re very fortunate.] 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– although, for obvious reasons, getting direct evidence about decision-making on the street may be impossible. Of course, not every teen gets involved in crime- that depends on a lot of things, including social context. But the important point is that these psycho-social and emotional influences on decisionmaking are normative–as psychologists use this term- that is, typical of adolescents as a group and developmental in

22This account is adapted from Elizabeth S. Scott and Thomas Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 NW. U. J. CRIM. L. & CRIMINOLOGY 137, 166 (1997).
As I have suggested, research in the last few years indicates that some of these psychological factors may have biological underpinnings. Very recent studies of brain development show that important structural changes take place during adolescence in the frontal lobes, most importantly in the prefrontal cortex. This region of the brain is central to what psychologists call “executive functions”-- advanced thinking processes that are employed in planning ahead, regulating emotions, controlling impulses and weighing the costs and benefits of decisions before acting. Thus, the immature judgment of teens to some extent may be a function of hard wiring.

That immaturity is mitigating of culpability as a form of diminished decision-making capacity is not controversial, at least as a general proposition – even the Simmons dissenters accept this point. What is not so obvious is that two other sources of mitigation in criminal law also apply to adolescents– and reinforce the conclusion that young offenders are less

23Almost 80% of teen age boys report having engaged in criminal activity for which they could be incarcerated. National Youth Survey. See discussion at t.a.n. to infra. (Brenna– can we find & cite this survey instead of just citing Moffitt? ).

24Spear, supra note 15 at 423 (noting that the ability to perform complicated planning and decisionmaking may be immature well into middle or late adolescence). Research suggests that changes in the prefrontal cortex occur into late adolescence and play a role in the maturation of an adolescent’s ability to self-regulate. Steinberg, Risk Taking in Adolescence at 57. See also ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 35 (2001)(noting that the prefrontal cortex, which affects planning, organizing, and understanding consequences is one of the last parts of the brain to develop).

25In her dissent, Justice O’Connor agreed that the proportionality issues raised by the majority implicated Eighth Amendment concerns. Brenna– do dissenters say anything about immature decisionmaking as mitigating? Also check Thompson v. Okla & Stanford v. Ky. (Earlier juvenile DP decisions) She argued that rather than establishing a categorical rule, individual juries should give “appropriate mitigating weight to the defendant’s immaturity.” Simmons, 553 at 602-03. General sentencing guidelines often consider youth and immaturity to be mitigating factors. See FLA. STAT. ANN. § 921.0026 (West 2001) (including impaired cognitive/volitional capacity, mental disorder, domination by another, and youth); KAN. STAT. ANN. § 21-4637(b), (e), (g)-(h) (1995) (including 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) (including extreme emotional distress, domination by another, impaired cognitive/volitional capacity and age).
The defense of duress is available to a defendant who faces a threat of death or bodily harm in a situation that he or she has no reasonable opportunity to avert the harm other than committing the crime with which he is charged. RICHARD J. BONNIE ET AL., supra note 5 at 478-92 (discussing duress as a situational defense available only where external circumstances are extremely coercive; ie. Harm to reputation is not adequate).

Jeffery Fagan & Deanna Wilkinson, The Role of Firearms in Violence “Scripts:” The Dynamics of Gun Events Among Adolescent Males, 59 LAW & CONTEMP. PROBS. 55, 64-66 (1996) (describing the way in which the peer social context coerces youths to follow set scripts that can lead to violent confrontation). Conformity in these situations is enforced with the threat of severe sanctions such as violence and loss of social status. Id. at 63-64. See also Jeffery Fagan, Context and Culpability in Adolescent Crime, 6 VA. J. SOC. POL’Y & L. 507, 535-38 (1999) (describing how coercive social contexts influence the criminal choices adolescents); Jeffery Fagan, Contexts of Choice by Adolescents in Criminal Events, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 376 (Thomas Grisso and Robert Schwartz, eds., University of Chicago 2000) (arguing that social context predicts violent adolescent behavior).

The first source of mitigation involves situations in which a person offends in response to extreme external pressures. (Think about the defenses of provocation and duress.) The criminal law does not require exceptional forbearance or bravery; a defense (or a reduced sentence) may be available if an ordinary (ie “reasonable”) person might have responded to the situation in the same way the defendant did. Because of the coercive circumstances, the actor is deemed less blameworthy than other offenders.

In Simmons, the Court recognized that “ordinary” adolescents are subject to peer pressure to a far greater extent than adults-- including pressure to commit crimes. As I have suggested, most juvenile crimes, including Chris Simmons’ murder, are committed in groups – while most adult criminals act alone. In some high-crime neighborhoods, peer pressure to commit crimes is so powerful that only exceptional kids escape. As Jeffrey Fagan and others have found, in these settings, resisting this pressure can result in loss of status, ostracism– and vulnerability to physical assault. The circumstances many teens face in these social contexts are similar to those involved in claims of duress, provocation, necessity or domination by co-defendants–and are appropriately deemed mitigating of culpability. The case for mitigation on

26The defense of duress is available to a defendant who faces a threat of death or bodily harm in a situation that he or she has no reasonable opportunity to avert the harm other than committing the crime with which he is charged. RICHARD J. BONNIE ET AL., supra note 5 at 478-92 (discussing duress as a situational defense available only where external circumstances are extremely coercive; ie. Harm to reputation is not adequate).

27Jeffery Fagan & Deanna Wilkinson, The Role of Firearms in Violence “Scripts:” The Dynamics of Gun Events Among Adolescent Males, 59 LAW & CONTEMP. PROBS. 55, 64-66 (1996) (describing the way in which the peer social context coerces youths to follow set scripts that can lead to violent confrontation). Conformity in these situations is enforced with the threat of severe sanctions such as violence and loss of social status. Id. at 63-64. See also Jeffery Fagan, Context and Culpability in Adolescent Crime, 6 VA. J. SOC. POL’Y & L. 507, 535-38 (1999) (describing how coercive social contexts influence the criminal choices adolescents); Jeffery Fagan, Contexts of Choice by Adolescents in Criminal Events, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 376 (Thomas Grisso and Robert Schwartz, eds., University of Chicago 2000) (arguing that social context predicts violent adolescent behavior).
this ground seems all the more compelling because, unlike adults, adolescents as legal minors are not free to leave their schools, homes and neighborhoods. When teens cross the line to legal adulthood, of course, the formal disabilities of youth are lifted. Young adults can avoid the pressure by removing themselves from the social setting in which avoiding involvement in crime is difficult. Thus, it is reasonable that adults can not claim this kind of situational mitigation.

A third source of mitigation in criminal law is evidence that a criminal act was out-of-character. At sentencing, offenders can often introduce evidence of their general good character to demonstrate that the offense was an aberrant act. Here mitigation applies to the crimes of young offenders as well– not because of their good character per se – but because their characters are unformed.

Beginning with Erik Erikson, psychologists have explained that an important developmental task of adolescence is the formation of personal identity—a process linked to psycho-social development, that for most teens extends over several years until a coherent “self” emerges in late adolescence or early adulthood. During adolescence, identity is fluid—values, plans, attitudes and beliefs are likely to be tentative as teens struggle to separate from their parents and figure out who they are. This process involves a lot of experimentation, which for

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28 The criminal behavior must “represent a marked deviation by the defendant from an otherwise law-abiding life.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.20, cmt. n.1(c)(1998). State sentencing guidelines also allow mitigation based on past reputation and character. See FLA. STAT. ANN. § 921.0026 (2)(h)(j) (West 2001) (allowing mitigation if the crime was an isolated incident and the defendant has shown remorse); MASS. GEN. LAWS ANN. ch. 211E § 3(d)(13)-(14), (16) (2001) (allowing mitigation based on family ties, character, family responsibilities and personal history); N.C. GEN. STAT. § 14A1340.16(e)(12)(2001) (allowing mitigation for community reputation).

29 Research suggests that most identity development occurs late in the adolescent period. LAURENCE STEINBERG, ADOLESCENCE 273-79 (6th ed. McGraw-Hill 2002). A coherent sense of identity in the areas of ideological values and beliefs, occupation, and interpersonal relations typically does not solidify before age 18. Id. at 263-64.
many kids means engaging in the risky activities I’ve described– including involvement in crime. Self-report studies have found that 80-90% of teen age boys admit to committing crimes for which they could be incarcerated.30

But, the typical teen-age delinquent does not grow up to be an adult criminal. The statistics consistently show that 17 year olds commit more crimes than any other age group–after that age, the crime rate declines steeply.31 Most adolescents literally grow out of their antisocial tendencies as they attain psycho-social maturity and individual identity becomes settled. How many adults look back on their risky adventures or mishaps as teenagers with chagrin and amazement? [Maybe some of us??] Almost every time I teach my Children in the Legal System course, I hear confessions from upstanding law students about their delinquent exploits as adolescents– often with expressions of gratitude at their good fortune in emerging relatively unscathed.

The research supports that much juvenile crime stems from experimentation typical of this developmental stage rather than moral deficiencies reflecting bad character. It is fair to assume that most adults who engage in criminal conduct act on subjectively defined values and preferences – and that their choices can be charged to deficient moral character. Thus an impulsive adult whose “adolescent” traits” lead him to get involved in crime is quite different from a risk-taking teen. Adolescent traits are not typical of adulthood. The values & preferences

30Brenna– see if you can get the National youth survey Terrie Moffitt, Adolescent-Limited and Life Course Persistent Anti-Social Behavior: A Developmental Taxonomy, 100 PSYCHOL. REV. 674, 675(1993) (describing certain criminal activity as a “normal part of teen life”).

that motivate the adult criminal are not developmental, but characterological—a part of personal identity. This cannot be said of the crimes of typical juvenile offenders, whose choices, while unfortunate, are shaped by developmental factors that are constitutive of adolescence. Like the adult who offers evidence of good character, most adolescent offenders lack a key component of culpability—the connection between the bad act and the offender’s bad character. The Court in Simmons recognized this, rejecting the notion that we can be confident that “even a heinous crime by an adolescent is the product of an irretrievably depraved character.” 32

The reality, of course, is that not all young offenders grow up to be persons of good character—some grow up to be criminals. Psychologist Terrie Moffitt, in a major longitudinal study, has placed adolescent offenders in two rough categories: A large group of what she calls “adolescent-limited” offenders—typical delinquents whose involvement in crime begins and ends in adolescence—and a much smaller group that she labels “life-course persistent offenders.” 33 The latter are youths whose antisocial conduct often begins in childhood and continues through adolescence into adulthood; many are in the early stages of criminal careers. In adolescence, the criminal conduct of kids in these two groups looks pretty similar, but the underlying causes and the prognosis are different.

This raises an important issue: Even if adolescents (including 17 year olds) generally are less mature than adults, why shouldn’t immaturity be considered on an individualized basis as is

32Simmons, 553 U.S. at 570.

33 “Life-course persistent offenders,” in Moffitt’s taxonomy are youths who develop a pattern of behavioral problems and other difficulties early in life, that persist through adolescence into adulthood. These youths may be subject to inadequate parenting and may experience early neurological problems and learning difficulties. They may exhibit behavioral problems as children and get involved in criminal conduct at an earlier age than do adolescent-limited offenders. For life-course persistent offenders, antisocial behavior in adolescence is part of a pattern that is likely to extend into adulthood. Brenna—can you check Moffitt for early traits/symptoms of LCPOs and edit adjust? Moffit, supra note 25at 682-85.
typical of most mitigating conditions? Not all adolescent offenders are unformed youths whose crimes are driven by developmental forces – some may not deserve lenient treatment on the basis of immaturity. This question was critical in the context of the juvenile death penalty – but it is also important in the broader arena of juvenile justice policy. In his Simmons dissent, Justice Scalia argued that there was no reason to abandon the practice of allowing capital juries to evaluate the immaturity of juveniles on a case-by-case basis.34

Without question, individual adolescents vary in the pace of psychological development and character formation. The problem with individualized assessment is that we currently lack the diagnostic tools to evaluate psycho-social maturity and identity formation on an individualized basis so as to separate savvy young career criminals from ordinary adolescents. Justice Kennedy noted the potential for error in distinguishing incipient psychopaths from youths whose crimes reflect, as he described it, “transient immaturity,” and he expressed concern that the brutality of the offense might often overwhelm consideration of youth and immaturity. [Indeed, the prosecutor had argued to the jury that Chris Simmons’ youth was not mitigating, but aggravating. – A point that Elizabeth Emens explores in her wonderful Supreme Court Review article on Simmons.]35

There is an important lesson here that extends beyond the death penalty. Courts in some areas have begun to use a psychopathy checklist (a variation of an instrument developed for

34 Simmons, 553 at 620-21 (arguing that an individual determination by juries is at the foundation of America’s justice system).

35 Brenna—Does note deal with bracketed material? I think Emens Sup. Ct. Review essay is out. Cite also place in her eassy describing pros’r statement. Simmons, 553 at 573 (citing from Steinberg and Scott, Less Guilty at 1014-18); Elizabeth Emens, Roper v. Simmons and Age Discrimination, Sup. Ct. Rev. (forthcoming 2006) (explaining that where aggravating aspects such as youth and immaturity threaten to overwhelm the juror’s ability to consider mitigation, a categorical rule protecting juveniles is needed)).
adults) in an effort to identify adolescent psychopaths— for transfer or sentencing purposes.\textsuperscript{36}

This practice is fraught with the potential for error— and, for this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals age 18 and older— evaluating antisocial traits and conduct in adolescence is just too uncertain.\textsuperscript{37}

There is something else to worry about if maturity is litigated on a case-by-case basis. Research evidence suggests that racial and ethnic biases influence attitudes about the punishment of young offenders; thus, decision-makers may be inclined to discount the mitigating impact of immaturity in minority youths.\textsuperscript{38} The integrity of any individualized decision-making process is vulnerable to contamination from racist attitudes or from unconscious racial stereotyping that operates even among those who may lack overt prejudice.\textsuperscript{39} There is evidence that African American youths are viewed as more mature than same-aged white kids, and all offenders will

\textsuperscript{36} Elizabeth Cauffman Jennifer Skeem, \textit{Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory}, 21 BEHAV. SCI. & L. 737 (2003)(questioning the validity of methods used to identify adolescent psychopaths); Daniel Seagrave & Thomas Grisso, \textit{Adolescent Development and the Measurement of Juvenile Psychopathy}, 26 L. & HUMAN. BEHAV. 219, 224 (noting that traits which may resemble adult psychopathy may be the result of normal adolescent development, resulting in a misdiagnosis).

\textsuperscript{37} \textit{AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS}, (4th ed. 1994) (listing age 18 as the minimum age requirement to diagnosis a patient with an antisocial personality disorder or psychopathy).

\textsuperscript{38} M.A. Bortner, Marjorie S. Zatz & Darnell F. Hawkins, Race and Transfer: Empirical Research and Social Context, in The Changing Borders of Juvenile Justice 277, 280 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (explaining that minority youths are most often transferred and punished as adults because they are seen as the worst offenders). \textit{See also} Donna M. Bishop & Charles E. Frazier, \textit{The Influence of Race in Juvenile Processing}, 25 J. RES. CRIME & DELINQ. 242, 242-58 (1998)(noting that African-Americans are more likely to be recommended for formal processing, referred to court, adjudicated as delinquent, and given harsher punishments than “comparable” whites).

\textsuperscript{39} Brenna—This is a published article in \textit{Law & human Behavior} Sandra Graham & ???, \textit{Racial Stereotypes in the Juvenile Justice System}, Presentation at Conference of American Psychology-Law Society (Mar. 9, 2002) (transcript on file with the authors) (showing that law enforcement subjects who were unconsciously primed to expect that a perpetrator in a crime vignette was African-American were harsher in their judgments in the perpetrator’s culpability and deserved punishment). \textit{See also} Bishop & Frazier, \textit{supra} note 33 at 242-48.
look more like adults at the time of sentencing than at the time of the crime.

B. Applying the Mitigation Principle to Juvenile justice Policy

The juvenile death penalty is an interesting issue that has captured public attention in the wake of Simmons— but in practical terms it is not the most important context in which to ask the question of whether juveniles should face the same procedures and punishment as adults. [According to Simmons, 123 juveniles had been sentenced to death since 1990— but many thousands have been tried and punished as adults]. The developmental evidence that I have described indicates that adolescent offenders, because of their developmental immaturity, differ from their adult counterparts in ways mitigate culpability and there is good reason to recognize this difference through categorical classification of young offenders. I’d like to turn now to the implications of these conclusions for juvenile crime policy generally.

At the outset, I should say something about why this issue has become so salient in recent years. Beginning in the late 1980s, major reforms in youth crime policy have transformed a justice system that viewed most teens as youngsters whose crimes were the product of immaturity into one that often holds young offenders to the same standards of criminal accountability it imposes on adults. This movement is based on an unexamined assumption that whatever differences exist between adults and adolescents are immaterial in devising legal responses to youth crime. In fact, some advocates for tough policies (like the Simmons prosecutor) seem to view young offenders as more culpable— and certainly more dangerous— than adult criminals. John DiUilio’s famous description of “super-predators” in the mid-1990s

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40Simmons, 553 U.S. at 570.
captured the image of teenage criminals as a major threat to society. DiUilio, a criminologist, coined this term in an article predicting that the new century would bring a wave of juvenile crime far worse than the 1990s. John DiUlio, The Coming of the Super-Predators, WEEKLY STANDARD, Nov. 27, 1995.

Legislatures across the country have rushed to enact tough laws lowering the age at which juveniles can be tried and punished as adults for a broad range of crimes and broadening prosecutorial discretion to charge youths in adult court. Perhaps the most important changes have come in the form of legislative waiver statutes, under which many youths who are legal minors for most other purposes are categorically treated as adults when they are charged with certain crimes. This has resulted in the wholesale transfer of youths into the adult criminal system—over 200,000 a year by most estimates. At the same time, juvenile court dispositions have become more like prison sentences—often extending well into adulthood. Questions about whether juveniles should be subject to the same punishment as adults get a lot of attention in high profile murder cases—such as that of Lionel Tate, the 12 year old Florida boy who was given a life sentence (later reversed) for killing a 6 year old neighbor girl—but the issue also arises in many more mundane cases.

41DiUilio, a criminologist, coined this term in an article predicting that the new century would bring a wave of juvenile crime far worse than the 1990s. John DiUlio, The Coming of the Super-Predators, WEEKLY STANDARD, Nov. 27, 1995.

42Elizabeth S. Scott, Legal Construction of Adolescence, 29 HOFSTRA L. REV. 547, 584-85 (2000) (describing the legislative trend of lowering the age at which adult prosecution can occur, either through judicial transfer or legislative waiver. See note 43 infra.; Patricia Torbet et al., NAT’L CTR. FOR JUVENILE JUSTICE: STATE RESPONSES TO SERIOUS & VIOLENT JUVENILE CRIME 4 (1996) (describing trend in expanding prosecutorial authority to directly file charges in criminal court.

43Legislative waivers mandate an automatic adjudication in adult criminal court at a jurisdictional age below the age of majority for specific offenses or in general. In the 1980s and 1990s, these laws became much more common. Scott, Legal Construction of Adolescence at 585. In California, for example, after age 14 juveniles are automatically tried as adults for murder, rape, and several other sexual offenses. See CAL. WELF. & INST. CODE § 707(b), (e).

44See State v. Tate, 854 So.2d. 44 (Fla. Dist. Ct. App. 2003); See also Michael Browning et al., Boy, Age 14, Gets Life in T.V Wrestling Death: Killing of 6-Year-Old Playmate Wasn’t Just Horseplay Florida Judge Says, CHICAGO SUN TIMES, Mar. 19, 2001 at 1. Lionel Tate’s conviction was overturned in 2004, and he was released. In 2005 he violated his parole for holding up a pizza delivery boy, and was sentenced to thirty years in prison in 2006. Terry Aguayo, Youth Who Killed at 12 Gets 30 Years for Violating Probation, NEW YORK TIMES, Mar. 19, 2006 at A21.
involving drug sales and property crimes.

These reforms were fueled by rising juvenile crime rates—and particularly homicide rates—in the late 1980s and early 90s—a legitimate source of concern. In part, the legal changes reflected disillusionment with the traditional juvenile court and the view that, while the juvenile system may have met the needs of a simpler time when kids got into schoolyard fistfights, it was not up to the task of dealing with today’s young criminals who use guns to commit serious crimes. Politicians ridiculed the system and pointed to high recidivism rates as evidence that rehabilitation was a failure. Supporters of the court sometimes seemed to invite criticism. As youth crime rates rose, paternalistic descriptions of young criminals as wayward children who would respond to the caring treatment of the juvenile court began to sound naive.

Proponents of more punitive policies for juveniles cast the available options as being either adult punishment or a “slap on the wrist,” suggesting that if teens are not held fully responsible for their crimes, they would bear no criminal responsibility at all. Child advocates often seem to accept these constrained choices. Thus in the policy debate, both sides appeared to agree that youths charged with crimes would either be treated as children in juvenile court or tried and punished as adults. Across the country, lawmakers opted for public protection by

45In a 1989 study, 70% of those questioned stated that the leniency of the juvenile system was a cause of violent youth crime. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 157 (Timothy Flanagan & Kathleen Maguire, eds. 1990).

46See, e.g. Alfred S. Regnery, Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul, 34 POL’Y REV. 65, 68 (1985) (“[T]here is no reason that society should be more lenient with a 16 year old first offender than a 30 year old first offender.”); Virginia Ellis, Lungren to Seek Lower Age for Trial as Adult, L.A. TIMES, Jan. 15, 1993 at A3 (quoting California Attorney General Dan Lungren: “[I]f you commit an adult crime, you’d better be prepared to do adult time.”); Jon. R. Sorensen, Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails, BUFFALO NEWS, Dec. 10, 1995 at A16 (quoting New York Governor Pataki: “Adult crime should mean adult time.”).
redefining adolescent offenders (or many of them) as adults.

Supporters may present these reforms as a coherent policy response to a new generation of dangerous young criminals. But close inspection reveals that often the process has had the hallmarks of a moral panic, in which politicians, the media and the public have reinforced each other in a pattern of escalating alarm about the seriousness of the threat of youth violence and the urgent need to respond. Sometimes the process is triggered by a high-profile crime that stirs public fears. In Arkansas, for example, legislative reforms lowering the minimum age of criminal adjudication for juveniles followed the Jonesboro school shootings in which two youths, ages 11 and 13, killed six school mates and a teacher. Seldom is reform undertaken with the kind of thoughtful deliberation one might expect to inform legal and institutional changes of such importance.

As my earlier analysis demonstrates, this legal trend move offends proportionality–a core principle of criminal law. The developmental psychology evidence does not support a justice system that treats young offenders as children whose crimes are excused, but it does support a mitigation-based model that treats adolescents as a separate legal category of offenders who are less blameworthy and deserve less punishment than typical adult offenders. The

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47 ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 1 (1994). Goode and Ben-Yehuda have written an authoritative analysis of the phenomenon. They describe the elements of a moral panic as follows: Great community concern focused on a particular type of deviant behavior, an exaggerated perception of the harm threatened, a general hostility towards the offenders throughout the community, and a sense of urgency about the need for action in response. The public response to child sexual abuse at various times, often triggered by a salient incident, has often had the attributes of a moral panic.

48In Jonesboro, Andrew Gooden and ???, ages 11-and 13, brought guns to school and killed a teacher and four Right number of victims?? Change this or text. young girls outside of a middle school. Rick Bragg, Judge Punishes Arkansas Boys Who Kill 5, NEW YORK TIMES, August 12, 1998 at A1. After the incident, Arkansas passed the Extended Juvenile Jurisdiction Act, which enabled prosecutors to charge any child with murder, as long as he appeared to possess the requisite mental state and understood the criminal consequences of his conduct. ARK. CODE ANN. § 9-27-501(Lexis 1999) (stating that a prosecutor may charge a child under 13 with murder if “the state has overcome presumptions about the lack of fitness to proceed and lack of capacity.”).
distinction between excuse and mitigation seems straightforward, but it is often misunderstood. Even Justice Scalia, who should know better, makes this error in his *Simmons* dissent. In criticizing the majority for (in his view) finding juveniles to lack responsibility, Scalia seemed to forget that, having escaped the death penalty, Simmons would spend the rest of his life in prison.49

C. The Utilitarian Case for Developmentally-Based Policies

In reality, although the scientific evidence of adolescent immaturity is compelling, it is unlikely that principle alone will dictate youth crime policy. Ultimately, the most compelling argument for a separate less punitive system for dealing with young criminals rests on utilitarian grounds. An important lesson of the research on juvenile crime by Moffitt and others is that most delinquent youths, even those who commit serious crimes, are “adolescent-limited” offenders who are likely to mature out of their anti-social tendencies. These youths are not headed for careers in crime—unless correctional interventions push them in that direction. Thus, it is critical that youth crime policy not lose sight of the impact of sanctions on the future life prospects of young offenders. Effective sanctions that invest in the human capital of young offenders are likely to promote the interests of society as well as those of the youths themselves, as long as public safety is not unduly compromised.

Supporters of the recent reforms argue that tough policies promote social welfare by protecting the public from the harm of youth crime. Their calculus is distorted, however, because it exaggerates the threat (in part by not acknowledging the steady decline in juvenile crime rates

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49 *Simmons*, 553 U.S. at 614-17.
for more than a decade)\(^{50}\) and because it discounts (or fails to include) the potential costs of harsh punishment. For starters, the concrete economic costs of incarcerating youths are substantial; dollars spent on prisons are not available for education or other social programs—a fact that some state legislatures are beginning to recognize, particularly in the context of adult sentencing policy.\(^{51}\) But just as important are the human costs. Although research on the impact of adult incarceration on normative adolescent offenders is not yet extensive, the available evidence suggests that imprisonment undermines social maturation and educational progress and likely contributes to recidivism. Psychologists view adolescence as a critical developmental stage during which youths acquire competencies, skills and experiences essential to the successful transition to conventional adult roles. If the experience of youths in the correctional system disrupts educational and social development severely, it may irreversibly undermine prospects for gainful employment, successful family formation and engaged citizenship.\(^{52}\) My point is that under a valid utilitarian calculus, policies and programs will be measured by asking

\(^{50}\)California, legislators passed Proposition 21 in 2000, significantly expanding the category of youths who could be subject to adult prosecution and punishment; at the time, youth crime rates had been steadily declining for years. In San Diego county, for example, juvenile felony charges dropped by 43 percent during the period between — & —. James R. Milliken & Edwin Kofler, A Better Way to Combat Juvenile Crime, SAN DIEGO UNION-TRIBUNE, February 27, 2000 at G3. See George Mgdesyan, Gang Violence and Crime Prevention Act of 1998, 3 J. LEGAL ADVOC. & PRAC. 128, 136-37 (2001)(citing statistics showing a 30 percent drop in California’s juvenile felony arrest rate and a 50 percent drop in arrests for homicide between 1999(IS this right—it seems too short a period) and 2000). See also Frank E. ZIMRING, AMERICAN YOUTH VIOLENCE 36 (1998)(noting that the rates of juvenile homicide declined steeply beginning in the mid 1990s; Robert E. Shepherd, Jr., Recapturing the Child in Adult Court, 16 CRIM. JUST. 58, 58 (2002)(describing the public’s misperception that an “epidemic” of juvenile crime exists, despite a decline in juvenile crime rates).

\(^{51}\)Rachel Barkow, Federalism and the Politics of Sentencing, 105 COLUM. L. REV. 1276, 1285-88 (noting that some states have repealed or scaled back tough sentencing laws and that some legislatures are now required to analyze the fiscal implications of correction programs and reforms and ).

not only whether the public will be safer in the short run, but also whether youths after their involvement in the justice system will be more— or less— likely to desist from criminal activity, to stay in school, to get steady employment as adults and to develop long term relationships that bring stability to their lives.

The effectiveness of juvenile correctional programs has been the subject of debate for decades and, until recently most researchers were quite pessimistic about the ability of such programs to have a positive influence on young offenders. The findings of a much cited study by Lipton, Martinson & Wilks in the mid-70s can be (and often has been) summarized in two words— “Nothing Works.” In the past decade or so, however, new programs (such as Scott Hengelaar’s multi-systemic therapy) and more sophisticated methods of statistical analysis have contributed to a brighter picture. A growing body of programmatic outcome research indicates that interventions that invest in the human capital of young offenders can enhance their prospects for becoming productive adults and diminish the risk of recidivism.

53 DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975). See Mark Lipsey, Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders: An Inquiry Into the Effectiveness of Practical Programs, 6 VA. J. SOC. POL’Y & L. 611, 612 (quoting Martinson, “with few isolated exceptions, the rehabilitative efforts that have been reported have had no appreciable effect on recidivism.”).

54 Scott Hengelaar Multi-systemic therapy is a community-based program that targets delinquent and antisocial youths. It focuses on the individual youth, the family as well as the school and community context. Outcome research supports the effectiveness of multi-systemic therapy in reducing recidivism. Meta-analysis of is a method of statistical analysis that allows researchers to disaggregate and examine variables across a large number of program outcome studies. Meta-analysis can reveal factors contributing to program effectiveness more accurately than individual outcome studies. See Mark Lipsey, Another article or book—may be cited in 53.

This does not mean that we should return to the traditional juvenile justice system—accountability and punishment are essential components in the legal response to juvenile crime. But, both adult prisons and juvenile correctional programs can hold young offenders accountable— and a separate juvenile system is better situated to respond in ways that promote positive youth development.

Under a mitigation model, most young criminals would be dealt with in the juvenile system. From a developmental perspective, punishing a 16 year old car thief or small time drug dealer as an adult is short-sighted – because these are typical adolescent crimes. But a justice policy that takes mitigation seriously is viable only to the extent that public protection is not seriously compromised. Some adolescent criminals cause a great deal of harm and are not particularly deserving of mitigation— older violent recidivists, for example— these youths should be tried and punished as adults. This safety valve is essential to the stability of the juvenile justice system. A lesson of the collapse of the rehabilitative model is that an effective legal regime must pay attention to the public’s legitimate concerns about safety.

This is a good time to reflect on youth crime policy. The alarm that fueled the punitive reforms has subsided as juvenile crime rates have fallen for several years. Even supporters of tough policies have had second thoughts. John DiIulio, who coined the term “super-predators” in the mid-1990s, recently expressed regret about this characterization of young offenders and acknowledged that his predictions about the threat of juvenile crime had not been realized.56

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56During an interview in which he expressed regret for advocating teen prison sentences and condemning them as superpredators, John DiIulio stated, “If I knew then what I know now, I would have shouted for the prevention of crimes.” Elizabeth Becker, *As Ex-Theorist on “Superpredators,” Bush Aide Has Regrets*, NEW YORK TIMES, Feb. 9, 2001 at A19.
Moreover, recent research suggests that the public may be less enthusiastic about punitive policies than politicians seem to believe. Last year my colleagues and I conducted what is called a “contingent valuation survey” in which we probed how much 1500 Pennsylvania residents were willing to pay (through increased taxes) for either incarceration or rehabilitation programs for juveniles. The alternatives were described—accurately, according to the research—as offering a similar prospect of crime reduction. We found that participants were willing to pay more for rehabilitation than for punishment—a mean of $98.00 for rehabilitation vs $81.00 for incarceration. Of course, this kind of survey is somewhat artificial—since the willingness-to-pay question was hypothetical—nonetheless, these findings should be interesting to policy makers, particularly in light of facts about the two options that we did not disclose to our participants—that a year of juvenile incarceration actually costs five times as much as a year-long rehabilitation program.

Our study, and other recent survey evidence suggest that the public cares about safety but is quite open to programs in the juvenile system as a way of reducing juvenile crime.

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57 Note to editors—This paragraph can be included only if the symposium issue will come out after the article reporting the study is published. If it is to be published before November, I will have to substitute something. The study is reported in D. Nagin, et. al., Public Preferences for Rehabilitation versus Incarceration of Young Offenders: Evidence from a contingent Valuation Study, Criminology & Public Policy Nov. 2006.

58 Pennsylvania Department of Public Welfare, Children, Youth and Families Bulletin #00-02-05 (Per-Diem Rates\ Location of Facilities (2004)

59 Recent polls demonstrated strong public support for rehabilitation programs and the belief that young offenders are less culpable than adults. Julian Roberts, Public Opinion and Youth Justice, in YOUTH CRIME AND YOUTH JUSTICE: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 512 (Michael Tonry & Anthony N. Doob eds., 2004). A 2002 nation-wide poll revealed that 85 percent of respondents favored rehabilitative programs over prison sentences for juvenile offenders. Douglas E. Abrams, Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety, 84 OR. L. REV. 1001, 1072 (2005). In a 2003 Louisiana poll, seventy-eight percent of those polled believed that juvenile justice should focus on rehabilitative programs, while seventy-six percent of those polled believed such programs would be less expensive than incarceration.
Politicians claim that the public demands “get-tough” policies, but this may often be a transitory response to highly publicized crimes– the moral panic I described earlier. The evidence suggests that, in calmer times, public opinion is far less punitive. Thus, the political risk that policymakers face in responding cautiously to public pressure in the wake of these incidents may not be as great as they might surmise.

There is some evidence that legislatures also are having second thoughts about the punitive laws that they have enacted in the past generation. This may be partly in response to lower juvenile crime rates and partly in recognition of the reality that adult prosecution and punishment of juveniles carry high costs. In several states, punitive laws have been repealed or scaled back. In 2005, for example, Illinois repealed a statute mandating adult prosecution of 15 year olds charged with selling drugs near schools.60 Lawmakers may be ready today to approach juvenile justice policy more thoughtfully than they have in a generation. If so, a large body of recent research that was not available 20 years ago offers insights about adolescence and about young offenders. My hope is that this scientific knowledge can influence the direction of juvenile justice policy.

Surveys conducted in Georgia suggested similar public support for rehabilitative programs, where only 15 percent of those polled expressed the belief that punishment should be the main goal of the juvenile justice system. Id. at 1073.

60 ILL. COMP. STATS. ANN. § 405/5-130(1)(a)(2006). See also Scott Ehler, State Legislative Affairs Update, CHAMPION, Dec. 29, 2005 at 48. In 2005, Delaware amended an automatic transfer statute requiring youths accused of robbery and burglary to be sent to criminal court. The new law limited the conditions under which young offenders could automatically be transferred to criminal court. Id. The Connecticut legislature enacted a new law in 2005 affording juveniles a presumptive youthful offender status for lower level offenses, which would preserve the confidentiality of their offenses and set a maximum sentence of four years. Id.