

2010

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Recommended Citation

Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, LOUISIANA LAW REVIEW, VOL. 71, P. 35, 2010; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 10-243 (2010). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1648

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Columbia Law School

Public Law and Legal Theory Working Paper Group

Paper Number 10-243

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August 2010

Social Welfare and Fairness in Juvenile Crime Regulation
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The question of how lawmakers should respond to developmental differences between adolescents and adults in formulating juvenile crime policy has been the subject of debate for a generation. A theme of the punitive law reforms that dismantled the traditional juvenile justice system in the 1980s and 1990s was that adolescents were not different from adults in any way that was relevant to criminal punishment—or at least that any differences were trumped by the demands of public safety.¹ But this view has been challenged in recent years; scholars and courts have recognized that adolescents, due to their developmental immaturity, are less culpable than are adults and that the principle of proportionality requires that teens be punished less severely for their criminal offenses.² Moreover, some scholars have invoked developmental research to challenge the core assumption underlying the punitive law reforms that harsh sanctions promote public safety and reduce the social cost of juvenile crime.³

In this Article we argue that a developmental model of juvenile crime regulation grounded in scientific knowledge about adolescence is *both* fairer to young offenders and more likely to promote social welfare than a regime that fails to attend to developmental research. We challenge punitive reformers who presume that public safety is enhanced and social welfare promoted if serious juvenile offenders are punished as adults- and who are unconcerned about whether their approach is compatible with principles of fair punishment. We focus here primarily on the social welfare argument for a separate and more lenient juvenile justice system grounded in a developmental framework— for several reasons. First, the argument for mitigation

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¹Matthew Wagman, *Innocence Lost in the Wake of Green: The Trend is Clear—If You Are Old Enough to Do the Crime, You Are Old Enough to Do the Time*, 49 *Catholic University Law Review* 49 (2000): 643–677, 643

² See ELIZABETH SCOTT AND LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 118-148 (2008). The Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005) announced that to impose the death penalty on a juvenile was cruel and unusual punishment in violation of the Eighth Amendment of the Constitution; although the Court offered several rationales for its conclusion, the heart of the opinion was a proportionality analysis that emphasized the developmental immaturity of adolescents. *Id.* at __. The Court based this analysis on Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 *AMERICAN PSYCHOLOGIST* 1009 (Dec. 2003). In 2019 the Court followed *Roper* in holding that sentencing a juvenile to life without parole for a non-homicide offense violates the Eighth Amendment. *Graham v. Florida*, 560 U.S. __ (2010).

³SCOTT & STEINBERG, *Id.* at 181-222. . A few scholars have gone a step further, arguing that public safety should be the *only* goal of juvenile crime regulation. See Christopher Slobogin & Mark Fondacaro, *Juvenile Justice: The Fourth Option*, *IOWA L. REV.* (2010)

on the grounds of developmental immaturity is more familiar; and although it supports less punishment, it provides no strong basis for a separate justice system.⁴ Moreover, lawmakers and the public care about accountability, but they may care even more about public safety; fears about the threat of young “superpredators” propelled the transformation of juvenile crime policy that took place in the late 20th century.⁵ Thus a regime that deals with juveniles more leniently than adults (because they deserve less punishment) is likely to fail in the political arena if public safety is imperiled. In short, the viability of the developmental model depends on evidence that the punitive response of the past generation is not only inconsistent with basic principles of fairness, but also that it has failed to minimize the social cost of juvenile crime, and that regulation based on social science research is more likely to attain this goal.

The recent reforms embodied a view that society's interests are promoted by tough incarceration policies under which more youths are dealt with in the adult system and offenders in the juvenile system are incarcerated for longer periods of time.⁶ The claim that these measures will reduce juvenile crime is critical to the social welfare justification for more punitive sanctions, but it turns out to be hard to evaluate. Juvenile crime indeed has declined since its peak in the early 1990s, but the causes of the decline are complex.⁷ As we will see, studies that have examined the impact on youth crime rates of the adoption of punitive policies yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws.⁸

Evaluating the impact of the punitive reforms also requires consideration of factors other than crime rates. First are the economic costs of tough laws which are substantial, as legislatures

⁴Barry Feld has argued for a unitary justice system in which juveniles receive a “youth discount” and receive shorter sentences. BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999); Barry Feld, *The Transformation of the Juvenile Court*, 75 *Minn. Law Review* 691(1991).

⁵This term was coined by University of Pennsylvania criminologist John DiIulio, who in 1995 predicted that the new century would bring a juvenile crime wave far worse than the 1990s. John DiIulio, Jr., *The Coming of the Super-predators*, *Weekly Standard*, Nov. 27, 1995. DiIulio later expressed regret for the hyperbole and acknowledged that the prediction had not come to pass. Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators’, Bush Aide Has Regrets* *New York Times*, Feb. 9, 2001, A19.

⁶Albert Regnery’s views were typical of critics of the traditional juvenile court who endorsed tough sanctions for young offenders.

⁷ See t.an. 48to 52 infra. For example, many states enacted punitive reforms *after* crime rates began to fall, suggesting that other factors have played a role. The adoption of Proposition 21 in California is a good example. In 2000, when the referendum making transfer easier passed, juvenile crime rates had been declining for 5 or 6 years. See SCOTT & STEINBERG, *supra* note 2 at 102-117.

⁸ See t.a.n.53 to 80 infra

and government agencies are beginning to recognize.⁹ Resources spent on building and staffing correctional facilities needed to incarcerate more juveniles for longer periods are not available for other social uses. Even assuming that tough sanctions can reduce juvenile crime, at some point the additional dollars expended may not offer enough benefit to be justified.¹⁰ Also, if less costly correctional dispositions are effective at reducing recidivism in some young offenders, then incarcerating those youths may not be justified on utilitarian grounds. Finally, included in the calculus are the intangible and sometimes iatrogenic effects of correctional programs on the future welfare of young offenders. Social welfare is affected by correctional policies and programs that either reduce or enhance the prospect that young offenders will lead satisfying lives.

In this Article, we examine empirical evidence that can inform our thinking about optimal justice policies and how social welfare is likely to be affected by various approaches. This evidence is varied; it includes studies of the economic costs of various sanctions, the deterrent impact of statutory changes, recidivism rates of different groups of offenders and the effectiveness of different kinds of programs. No single body of research provides a clear answer to our normative question, but the complex empirical account that emerges indicates that the use of adult sanctions usually does not promote social welfare, and that differential treatment of juvenile offenders is justified on consequentialist as well as retributive grounds. On our view, the research supports the conclusion that adult punishment and longer incarceration in the juvenile system have contributed somewhat to a reduction in juvenile crime, largely through incapacitation. But the costs have been high and the societal benefits likely are limited to a far smaller group of young offenders than are subject to harsh penalties under current law.¹¹

⁹ This has become a key issue in adult sentencing as well. See Rachel Barkow, *Federalism and the Politics of Sentencing*, 105 Columbia L. Rev. 1276. Barkow argues that cost considerations can function as an important constraint on punitive sentencing policies, and points to state legislatures that have retreated from harsh sentencing reforms in the face of rising costs. She points out that in the 1990s, state governments doubled the amount spent on corrections due to get-tough policies. *Id.* at 1287. For a discussion of the rising costs of juvenile crime, see t.a.n. _ to _ infra.

¹⁰ Economists find that increasing incarceration rates has diminishing marginal returns. Some amount of incarceration yields substantial benefits in terms of decreased crime, but those benefits decrease (ie fewer crimes are avoided) for each unit of increased incarceration. See *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates and Prison Economics*, January 2003. Washington State Institute of Public Policy, available at wsipp.wa.gov

¹¹ Social welfare may well be promoted by imposing tough sanctions on youths who are chronic serious offenders. These youths are classified by Terrie Moffitt as “life-course persistent offenders.” Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674 (1993). Many criminologists have found that a small percentage of juvenile offenders commit a high percentage of juvenile crimes. MARVIN WOLFGANG, ROBERT SIGLIO & THORSTEIN SELLIN, DELINQUENCY IN A

Moreover, extensive research indicates that less costly sanctions in the juvenile system, including community-based programs, may be effective at reducing recidivism.¹²

Our social welfare analysis is informed by scientific knowledge of adolescence and youth crime which reinforces the conclusion that policies based on broad use of incarceration are unlikely to minimize the social cost of juvenile crime. An important lesson of the developmental research is that most young law-breakers are normative adolescent offenders, whose criminal activities are linked to developmental forces and who can be expected to "mature out" of their antisocial tendencies.¹³ Therefore, there is no reason to assume that these youths are headed for a career in crime unless correctional interventions push them in that direction. The research also shows that social context is critically important to the successful completion of developmental tasks that are essential to the transition to conventional adult roles associated with desistance from crime. For young offenders, correctional programs shape that social context and can enhance or inhibit this process. Today, many teens without prior records are swept into the adult criminal justice system, by any account a harsh developmental environment. Even in the juvenile systems in many states, young offenders are incarcerated for long periods in prison-like facilities. Developmental research supports other evidence indicating that enthusiasm for imposing harsh sanctions on young offenders is misguided and that policies grounded in developmental research are far more likely to reduce the social cost of juvenile crime.

Developmental research not only informs policies that promote social welfare; it also provides the foundation for a regime committed to fair and proportionate punishment of young offenders. Recently, some scholars have advocated an approach to juvenile justice dedicated solely to crime reduction,¹⁴ but we are persuaded that both social welfare and fairness are essential components in a viable and stable regime. Although society's primary goal in responding to juvenile crime may well be preventive in nature, the principle of retribution is a necessary check on government power in this context. The retributive principle of proportionality functions importantly as a side constraint, limiting the duration of correctional interventions to what is deserved on the basis of the seriousness of the offense and the offender's culpability. In contrast, under a pure prevention approach, the government is free to intervene in

BIRTH COHORT (1972). DAVID FARRINGTON, LLOYD OHLIN & THORSTEN SELLIN, UNDERSTANDING AND CONTROLLING CRIME(1986) (5% commit 50% of crimes)..

¹²See t.a.n 126 to 137 infra.

¹³Moffitt calls this group "adolescent-limited" offenders. Supra note 11. See note 172 infra.

¹⁴See Slobogin & Fondacaro, supra note 3.

the lives of individual offenders to the extent deemed necessary to prevent crime.¹⁵ The potential for unfairness under that approach is substantial—both in the form of excessive punishment and in the potential for variations in responses to offenders based on considerations related to risk but not linked to the crime itself.¹⁶ This unfairness undermines the legitimacy of the justice system, and it can be avoided by incorporating proportionality as well as prevention into the developmental framework.

The essay proceeds as follows. Part I describes the increased use of incarceration in both the adult and juvenile systems under the law reforms of the last generation and examines the resulting impact on state budgets. This raises the question of whether the substantial cost increases are justified by a reduction in juvenile crime. Part II examines the theoretical basis for assuming that the reforms *should* result in lower crime rates and then offers the available empirical evidence on this issue. This evidence includes studies of the impact of legislative change as well as comparative studies of recidivism in the adult and juvenile systems; in combination, the research provides little support for the assumption that the punitive reforms have reduced crime beyond reductions attributable to incapacitation. Part III introduces scientific research on adolescence that underscores the important impact of correctional interventions and settings on developmental trajectories and on reoffending. This developmental research reinforces the conclusion that for most juveniles, long incarceration increases the social cost of crime and should be used only when public safety is at stake. The research also clarifies that some community programs can lower these costs. Part IV turns to retribution and proportionality, and applying developmental research, concludes that mitigation should be applied to the crimes of juveniles. We argue that retribution must be incorporated as a limiting principle in any legitimate and stable system of juvenile crime regulation.

I. Youths Behind Bars: The Expanding Net and its Financial Cost

We begin by taking a closer look at the implementation of the punitive law reforms in juvenile justice and their financial impact on state budgets— the most concrete costs of the legal changes. How have the new laws changed the way juveniles are actually being processed and punished? As a result of the reforms, a large number of youths who previously would have been under exclusive juvenile court jurisdiction are potentially subject to processing and punishment

¹⁵The boundary for intervention under the Slobogin and Fondacaro’s argument is the maximum age of juvenile court jurisdiction. They reject transfer to adult court. *Id.* at 114.

¹⁶ For example, longer dispositions may be imposed on offenders who lack parental support which may be relevant to treatment response.

as adults. This does not mean, however, that all or even most youths who *could* be subject to criminal prosecution today are actually tried and punished as adults. Indeed, the impact of statutes expanding the discretionary authority of judges to transfer youths has been modest.¹⁷ But the widespread enactment of legislative waiver statutes that categorically redefine juveniles as adults has resulted in adult prosecution and punishment of many youths who previously would have been kept in the juvenile system. This change, together with longer sentences in the juvenile system, has greatly increased the number of incarcerated youths in this country. This in turn has resulted in legislatures devoting a greater portion of their budgets to juvenile corrections than was true a generation ago.

A. The Trend Toward Incarceration

In some states, the tough reforms seem to have had little effect on the adjudication and disposition of young criminals. For example, emerging evidence suggests that California's Proposition 21, which greatly expanded the categories of youths susceptible to criminal court adjudication, has had a more modest impact on prosecutorial and judicial practices than was predicted by either supporters and opponents.¹⁸ In other states, however, the impact of tougher laws has been substantial. During the 1980s and 1990s, many states categorically lowered the age of criminal court jurisdiction for a broad range of serious crimes and a few states lowered the general jurisdictional age from 18 to 17 or 16. In this way, groups of juveniles have been reclassified categorically as adults for purposes of criminal prosecution.¹⁹

More information is available about youths who are tried as adults as a result of discretionary judicial transfer than those who are subject to criminal prosecution under legislative waiver or automatic transfer statutes. The number of youths transferred by judges fell

¹⁷See t.a.n. 19 *infra*.

¹⁸ For a discussion of Proposition 21, see SCOTT & STEINBERG, *supra* note 2 at 102 to 117. See Anna Gorman, *Few D.A.s Use New Power to Try Juveniles as Adults*, L.A. TIMES at 1 (Aug. 8, 2004)

¹⁹ Wisconsin, New Hampshire and Wyoming have lowered the general jurisdictional age in the past generation. Altogether, 14 states set the upper boundary of the juvenile court jurisdictional age below age 18. HOWARD SNYDOR & MELISSA SICKMOND, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT*, available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. As of 2004, 29 states categorically exclude certain juveniles from juvenile court jurisdiction. These include states that set the jurisdictional age below 18, generally or for felonies, as well as states that mandate that youths charged with specific serious crimes be tried as adults. Fifteen states make judicial waiver mandatory for certain offenses, if certain criteria are met. See Patrick Griffin, *National Overviews*, STATE JUVENILE JUSTICE PROFILES. NAT'L CENTER FOR JUV. JUSTICE (2006). Rhode Island lowered the jurisdictional age from 18 to 16 and then raised it again six months later. Ray Henry, *Rhode Island Lawmakers Repeal Law Imprisoning Teens*, Assoc. Press, Oct. 31, 2007.

from a high of 12,000 in 1996 to about 7,000 in 2002.²⁰ The percentage of transfer cases that involve violent offenses against persons was slightly higher than property and drug offenses.²¹ A large proportion of transferred teens are 16 or 17 years old; judges are less likely to transfer youths aged 15 or younger, although the number of youths under age 15 who were transferred doubled between 1985 and 2002.²² African American juveniles are far more likely to be transferred than their white counterparts. Statistics from the 1990s indicated that more than 60% of transferred youths were convicted of their offenses and, of those convicted, about 70 % were incarcerated in prison or jail.²³

A far larger number of youths under the age of 18 are subject to criminal prosecution under legislative waiver statutes than are subject to judicial transfer, but we lack good statistics on how many youths are subject to adult punishment under these statutes.²⁴ Thirty eight states mandate adult criminal prosecution for some categories of young defendants under the age of 18 (based on the offense charged) and about a dozen set the age of general jurisdiction for adult criminal prosecution at age 16 or 17 when youths are legal minors for most other purposes.²⁵ According to recent estimates, about 250,000 teens, mostly 16 and 17 year olds, are automatically subject to criminal prosecution and punishment annually under legislative jurisdictional and waiver statutes.²⁶

Youths who are convicted in criminal court are more likely to be incarcerated for their offenses, and, according to recent studies, are confined for substantially longer periods on

²⁰ SNYDOR & SICKMOND, .id. at 186.

²¹ Id. Transfer for drug offenses have increased substantially since the mid-1980s.

²²Id. At 186. . Twenty-three states have no minimum age for transfer to criminal court; the rest have minimum ages ranging from 10 to 15 years of age. *Id.*, available at <http://www.ncjj.org/stateprofiles/overviews/transfer5.asp> 11/1/09.

²³Id.

²⁴ The absence of age data on youths categorically classified as adults is due to the fact that information about age is usually not included in statistics about criminal charges, convictions and sentences of adults.

²⁵ See [ncjj.org/stateprofiles/overviews](http://www.ncjj.org/stateprofiles/overviews), at note 18 supra. In New York, for example, general juvenile court jurisdiction ends at age 16 and jurisdiction for murder ends at age 13. *Id.*

²⁶ Id.

average than those who are sentenced in juvenile court.²⁷ Much of the best empirical data on these issues (and generally on the impact of juvenile justice policies and practices) is produced by the Washington State Institute for Public Policy.²⁸ In one study, Institute researchers compared average minimum sentence lengths before and after the 1994 enactment of a statute automatically transferring to adult court 16 and 17 year old youths charged with certain violent crimes, that previously had been subject to discretionary judicial transfer. The researchers found sentences to be 50% longer for crimes that met the automatic transfer criteria than under the judicial waiver regime, when fewer than 25% of youths charged with these crimes were tried as adults.²⁹ Fifteen per cent of youths automatically transferred to adult court received sentences of 5 years or more, whereas no youths retained in juvenile court before 1994 received such lengthy sentences.³⁰ Because jurisdiction in the juvenile correctional system in most states ends by age 21 or earlier, some youths who are prosecuted as adults receive sentences many times as long as the maximum period of confinement in a juvenile facility.

That is not to say that young offenders today are subject to lenient treatment in the juvenile system; delinquency dispositions have also become harsher under the recent policy reforms. Youths are more likely to be confined in secure juvenile facilities and confined for longer periods than a generation ago. According to another Washington study, confinement rates in that state's juvenile system increased by 40% during the 1990s— during a period when

²⁷ The Washington Institute of Public Policy has found that youths tried as adults receive substantially longer sentences. See Robert Barnoski, CHANGES IN WASHINGTON STATE'S JURISDICTION OF YOUNG OFFENDERS: EXAMINING THE IMPACT, WASH. INSTITUTE FOR PUBLIC POLICY <http://www.wsipp.wa.gov>: January 2003 at 16-20. Barnoski found that under Washington's discretionary transfer law, youths who were transferred received an average sentence of almost 6 years as compared to those retained in juvenile court who received less than a year. The combined average was 1.78 years. After the enactment of the state's automatic transfer law (under which all youths were tried as adults), the average was 2.8 years. See note _ supra. See also Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, 18 L & Policy Rev. 77 (1996). In a comparative study, Fagan found that 46% of youths convicted of robbery were sentenced to prison or jail for first offenses in New York, while, in New Jersey, 18% of those processed as juveniles were incarcerated. For a discussion of Fagan's study, see t.a.n._ to 77infra.

²⁸ This research institute was created by the state legislature to study the cost effectiveness of justice system (and other social) legislation and policies, primarily in Washington, but nationally as well. The institute conducts sophisticated and comprehensive research that is an important source of information in evaluating the costs and benefits of legal regulation. <http://www.wsipp.wa.gov>.

²⁹ See Barnoski, supra note 26 at 17-18. The study examined cases over a two and one half year period before the enactment of the statute (January 1, 1992 to July 1, 1994) and a similar period after enactment (January 1, 1998 to July 1, 2001). In the "before" group, 738 youths were retained in juvenile court and 175 transferred. In the "after" group, 690 youths were tried as adults.

³⁰ Id at 17-18. Under discretionary transfer, 35% of transferred youths received a sentence of 5 years or more, but less than 25% of youths were transferred.

serious crime rates fell by 50%. In the late 1980s, 2.5 out of 1000 Washington youths were confined in juvenile facilities; a decade later the confinement rate increased to 3.5 youths per 1000.³¹

The upshot is that the best available evidence indicates that the punitive reforms have resulted in substantial increases in the incarceration of juveniles, both in the adult criminal justice system and in the juvenile system. In an era in which juvenile crime rates have declined, more young law breakers are subject to incarceration and for longer periods, due primarily to the combination of legislative waiver laws and tougher sanctions in the juvenile system.

B. The Economic Costs of the Punitive Reforms

The debate about the merits of the punitive reforms has focused primarily on whether the increased use of incarceration has reduced juvenile crime and, to a lesser extent, on their impact on young offenders. Interestingly, until recently, the economic costs associated with the increased use of incarceration of juveniles received relatively little attention in the policy debates.³² Economic expenditures are the most concrete costs of the policies we are examining, and evaluating the benefit of any crime reduction impact requires that we know the financial cost incurred. The headline is that the impact on state budgets of the recent justice reforms has been substantial. Moreover, although juvenile crime has declined significantly since the early 1990s, the costs of responding to youthful criminal activity have risen substantially. According to a careful analysis of the costs and benefits associated with one state's policies responding to juvenile crime, serious juvenile crime declined by 50% between 1994 and 2001, while expenditures in the juvenile justice system increased by 43%.³³

Not surprisingly, this increase in spending is due largely to the expanded use of incarceration as the preferred (or required) sanction for young offenders. Longer sentences in both the juvenile and criminal systems and the use of incarceration in place of community sanctions add up to higher justice system costs. The cost of incarcerating a youth for a year in the juvenile system varies in different states, depending on labor costs and the quality and kinds

³¹ Steven Aos, *The Juvenile Justice System in Washington State: Recommendations to Improve Cost Effectiveness*; Wash. State Institute for Public Policy <http://www.wsipp.wa.gov>; October 2002 at 2..

³²In the past few years, legislatures have begun to examine the budgetary burden of harsh sanctions. This issue has become quite prominent in deliberations about adult sentencing policy as legislatures across the country have revised and moderated harsh sentencing regimes in response to evidence that criminal justice system costs had doubled in the 1990s. See Rachel Barkow, *supra* note 9; D. WILHELM & N. TURNER, "IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?" JUNE 2002, (VERA INSTITUTE.).

³³ See Aos, *supra* note 30 *supra*.

of programs provided. Costs range from \$215,000 in New York youth prisons, \$100,000 in California, almost \$90,000 in Virginia, \$58,000 in Florida, to \$45,000 in Washington.³⁴ A year of imprisonment in the adult system is less expensive than a year of incarceration in the juvenile system, in part because prisons are less likely to provide educational and counseling services and have a higher ratio of inmates to staff. Cost estimates per prisoner range from \$25,000 to 40,000 per year.³⁵ But, as we have suggested, criminal sentences generally are longer than juvenile dispositions— and therefore are often costlier.³⁶

The recent reforms have also generated increased procedural costs. In the juvenile system, many cases that would have been dealt with informally 20 years ago are subject to formal adjudication in juvenile court today.³⁷ Increased costs are also associated with prosecution and adjudication in criminal court. The procedural protections afforded defendants and the time expended by judges, attorneys, jurors and law enforcement agents combine to make criminal trials very expensive. Even when convictions are based on plea agreements, the costs are far greater than are those of delinquency proceedings, which, even in the post-*Gault* era, tend to be more informal, briefer, and simpler.

*

State governments today spend more money prosecuting and punishing juveniles than they did in the early 1990s, when juvenile crime rates were far higher. These expenditures are funded either by higher taxes or by shifting funds from other programs. Governors and legislatures are usually reluctant to raise taxes, and thus they may cut allocations for public

³⁴ In Virginia, a 2005 report by the Department of Juvenile Justice reported that the per capita cost of holding one juvenile for a year was \$88,271. Virginia Dep't of Juvenile Justice, DATA RESOURCE GUIDE: FISCAL YEAR 2005, APPENDIX. See also Barnoski, *supra* note 26 (describing yearly per youth cost of juvenile facility as almost \$45,000). Mayor Michael Bloomberg recently announced that New York City would greatly reduce the number of youths incarcerated in “youth prisons,” citing a cost of \$215,000 per year per youth. Julie Bosman, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. Times, Jan. 20, 2010 at <http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html?scp=1&sq=bloomberg%20juveniles&st=cse>

³⁵ Costs in Washington were estimated at about \$36,000. See Barnoski, *supra* note 26. Prisons have lower costs per prisoner than juvenile facilities for several reasons. First, prisons are larger than juvenile facilities and thus can reduce costs from economies of scale. The ratio of staff to inmates is usually much lower in juvenile facilities, in part because inmates are not confined as restrictively. Moreover, juvenile facilities generally have more counselors and teachers, and generally to offer more programming to inmates.

³⁶ In Washington, the average cost of confinement per youth increased from \$65,000 under the discretionary transfer regime to \$75,000 under the automatic transfer law. See Barnoski, *supra* note 26 at 20.

³⁷ SNYDOR & SICKMOND, 2006, *supra* note 18.

schools or social programs so that adequate funds are available for incarcerating juveniles.³⁸ Are these expenditures justified? From the perspective of social welfare, the answer depends on whether two conditions are met— first, that the economic costs of incarceration policies (together with other indirect costs that we will explore shortly) are offset by greater public benefits in terms of reduced crime, and second, that these policies are more effective at accomplishing this goal than other, less costly, policies.³⁹ In the pages that follow we explore these conditions and conclude that the evidence does not justify incarceration policies under current law.

II. The Effectiveness of Punitive Policies: Do Harsh Sanctions Reduce Crime?

We turn now to the question of whether youth crime policies based on expansive use of incarceration are effective in accomplishing the goal of reducing youth crime. If so, several kinds of benefits follow that may justify the increase in government spending. Economists include in cost-benefit evaluations of crime policies the benefit to potential victims of crimes that are not committed: Less crime will reduce costs that can include (depending on the crime) lost possessions, physical pain and psychological distress, lost productivity, medical expenses and lost lives. Less crime also enhances the well-being of citizens generally. The residential real estate market illustrates the fact that people attach a monetary value to feeling safe as they go about their lives— comparable housing is cheaper in high-crime neighborhoods than in those where crime rates are low. Desistance from a life of crime (or avoidance of criminal activity altogether) also offers intangible value to youths— in terms of their future well being and productivity. Youths who are deterred from involvement in crime (or from re-offending) are likely to experience benefits from lives that are more likely than those of young criminals to include educational achievement, stable employment and rewarding intimate relationships.⁴⁰ Finally, state expenditures on the operation of the justice system should decline if crime is

³⁸ George Allen, Governor of Virginia during the 1990s, cut state health and education funding while substantially increasing the budget of the Department of Corrections. Several prison construction projects were undertaken during Allen's administration. See *Virginia Legislature Rejects Tax Cuts*, N.Y. TIMES at A21, Feb 5, 1995.

³⁹ According to some estimates, one year of incarceration in the juvenile system costs between five and ten times as much (depending on incarceration costs) as a year of community-based services, that, as we will see have been found to be very effective in reducing future offending. See t.a.n. 125 to 137 *infra*.

⁴⁰ Youths who persist in criminal activity tend to have poor educational outcomes, unstable relationships in adulthood, and poor employment records; they also tend to be poor parents to their own children, who are more likely to get involved in criminal activity than other children. See Terrie Moffitt, Avshalom Caspi, & Michael Rutter, *Measured Gene-Environment Interactions in Psychopathology. Concepts, Research Strategies, and Implications for Research, Intervention, and Public Understanding of Genetics*, 1 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 5-27 (2006).

reduced, including not only the costs of operating correctional facilities and programs, but also the costs of law enforcement and criminal proceedings.

Thus a critical question is whether harsh sanctions, which represent a substantial financial investment, are an effective means of reducing crime, as proponents argue. To answer that question, we first describe the political background of the period of punitive reforms, and briefly describe why proponents thought tough policies would effectively reduce crime. We then look at the empirical evidence on whether the claims have merit. This evidence is varied and includes studies of the impact of legal change on crime rates and studies of the impact of different correctional settings on reoffending.

A. The Traditional Regime and the Failure to Prevent Crime

To the punitive reformers of the late 1980s and 1990s, violent juvenile crime was a critical threat to social welfare, one that was caused largely by the failure of rehabilitation and the lax response to crime by traditional juvenile courts.⁴¹ On the view of critics, the juvenile court was a "revolving door;" the typical young offender received a slap on the wrist from the judge and was soon out on the street again engaging in criminal activity –until he got caught and returned to court– and on and on. Youths were virtually invited to engage in criminal activities by a regime that used community probation as the standard sanction. A delinquency charge carried no deterrent threat because youths knew that no serious consequences would follow the adjudication.⁴²

The perception that juvenile court judges were unduly lenient was due in part to the naive rhetoric that surrounded the traditional regime rather than to the reality of the juvenile justice system. In fact, many youths who committed serious crimes were confined in secure correctional facilities. However, there is some merit to the critics' challenge that the system failed to deter youths from engaging in criminal activity. Much anecdotal evidence indicates that young criminals of a generation ago assumed that they were insulated from punishment by virtue of their status as juveniles, and this may have encouraged some to engage (or persist) in delinquent activities. Police officers reported that they were taunted during arrests by youths

⁴¹ See SCOTT & STEINBERG, *supra* note 2 at 94-96.

⁴² Politicians have often justified tougher laws on the ground that the juvenile system presented no threat to young criminals. Missouri Governor Mel Carnahan praised a new law removing the minimum age for adult prosecution of young drug dealers, suggesting that youths were lured into the drug trade because they saw no possible risks. "Now these teenagers will know there's a risk, and it is real time in prison." Mark Schlinkmann & Kim Bell, *Carnahan Signs Juvenile Crime Bill: Allows Trial as Adults in Serious Cases*, ST. LOUIS POST DISPATCH, June 3, 1995 at B1.

calling “I’m a juvie,” as though this meant they had a free pass to engage in criminal activity. According to conventional wisdom, “adult” members of criminal gangs frequently assigned to juveniles tasks that might result in arrest. Even Chris Simmons, whose death sentence the Supreme Court overturned in 2005, was reported to believe that as a juvenile he would be treated leniently.⁴³ Thus, it is hard to deny that the traditional juvenile system not only failed in its rehabilitation mission, but also was unsuccessful in deterring crime and incapacitating young criminals.

There was another dimension to the claim that legal reforms were necessary to protect the public from young criminals. In the 1990s, some observers predicted that, unless tough policies were enacted, the country would face an even larger wave of violent youth crime in the first decade of the 21st century as a large cohort of children born in the early 1990s became teenagers. Several criminologists promoted this view, including John DiIulio, who warned politicians and the public of a "coming generation of super-predators," youths without moral sensibilities who would roam the streets in gangs, terrorizing the public with their violent and senseless rampages.⁴⁴ Thus, the policy goal of crime prevention took on an unprecedented urgency in the face of this overwhelming threat and politicians embraced tough incarceration policies as the means of protecting the public.

How did the punitive reformers think harsh sanctions would reduce crime? As first year law students learn in their Criminal Law class, several preventive rationales justify criminal punishment and may be offered in support of harsh juvenile crime policies.⁴⁵ First, the threat of punishment can generally deter future crime by discouraging youths from ever getting involved

⁴³ For an insightful analysis of *Simmons*, see Elizabeth Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 S.Ct. REV. 51.

⁴⁴ John DiIulio, *supra* note 5. DiIulio describes superpredators, as youths who grow up in extreme "moral poverty," without the care and love of responsible parents who teach their children right from wrong. This leads them to be radically present-oriented, such that they perceive no connection between crime and later punishment, and radically self-regarding, with no feeling for their victims. He predicts tens of thousands of young superpredator will roam the streets in the next decade, committing heinous violent acts for trivial reasons. "They live by the meanest code of the meanest streets, a code that reinforces, rather than restrains, their violent, hair-trigger mentality." Although DiIulio's prescription for dealing with the crisis was to bring religion into these youths' lives, others who adopted the image and repeated the frightening predictions, argued for harsh justice policies. See statement by McCollum, 1996 Testimony before House Committee, quoted in FRANKLIN. ZIMRING, AMERICAN YOUTH VIOLENCE at 4-5.

⁴⁵ See R. BONNIE, A. COUGHLIN, J. JEFFRIES, P. LOW ET AL. CRIMINAL LAW (2nd ed.) 11-30.

in criminal activity.⁴⁶ Policies that emphasize incarceration may also serve a specific deterrence function, influencing youths who fear future punishment not to re-offend after they are released. Here the idea is that the experience of being in prison is sufficiently unpleasant that young offenders will be motivated to stay out of trouble in the future. Moreover, imprisonment prevents crime by incapacitating offenders; young criminals who are locked up can not be out on the streets committing crimes. Finally, in theory at least, imprisonment could reduce future crime by rehabilitating young offenders so that they will mend their criminal ways, although rehabilitation has not been emphasized by the reformers.⁴⁷

Preventive rationales for criminal punishment need not be excessively punitive, of course. Some modern theorists accept that deterrence is the primary justification for punishing criminals, but may disagree about what *level* of punishment is appropriate—on grounds of cost-effectiveness or compatibility with other values. As we discuss in Part IV, some legal theorists support that prevention of crime is a legitimate justification for criminal punishment, but argue that the appropriate amount of punishment is limited by the retributive principle of proportionality.⁴⁸ But politicians in the 1980s and 1990s often seemed unconcerned with fairness constraints, arguing that harsh punishment of juveniles was necessary to contain the epidemic of youth crime.

B. Changing Crime Rates and the Effectiveness of Punitive Policies

Supporters of the recent reforms may point to the fact that juvenile crime has declined substantially since the early 1990s as evidence of their success in achieving their crime-reduction goal. On this account, youths who might be inclined to engage in criminal activity are deterred because they now realize that real consequences will follow. Bad kids who didn't get the

⁴⁶ Jeremy Bentham famously described general deterrence as the primary goal of criminal punishment. JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* (1830). According to Bentham, “The punishment suffered by the offender presents to everyone an example of what he himself will have to suffer if he is guilty of the same offense.” *Id.* at -20. Critics of traditional policies argued that the leniency of juvenile courts failed to deter youths from involvement in crime.

⁴⁷ Supporters of recent reforms generally do not emphasize rehabilitation—perhaps viewing it as tainted by association with the traditional juvenile system, which was premised on a goal of rehabilitation.

⁴⁸ HERBERT PACKER, *THE LIMIT OF THE CRIMINAL SANCTION* 66, 180 (1968); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1982)(retribution not a defining principle but a limiting principle of criminal punishment). Thus, although sentencing shop lifters to life in prison might effectively deter this crime, this punishment would be unfair on proportionality grounds. Similarly, a prediction that an individual will commit a crime, however accurate, is insufficient, in the absence of conduct, as a basis of criminal punishment. H.L.A. Hart argued that retributive principles are important in a consequentialist system because they will contribute to widespread public acceptance. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 180 (1968). We discuss this issue further in Part IV.

message are locked up (and will learn from the experience to stay out of trouble in the future). So, to what extent does the decline in criminal activity indicate that the reform policies are working?

Although crime rates should fall if tough sanctions in fact deter crime, criminologists who study both adult and juvenile crime emphasize that we can not assume that changes in crime rates are caused by changes in penal policy affecting the harshness of punishment. Historical reviews indicate that crime rates fluctuate over time and that many factors contribute to the variations. Criminologists agree that crime rates fell (from extraordinarily high rates) for much of the 19th century and began to rise again in the mid-20th century. There is no agreement, however, about what explains this trend.⁴⁹ Demographics may be an important factor; some experts have suggested that crime rates are correlated with the percentage of teens and young men in the population at a given time.⁵⁰ Others point to cultural and religious influences. James Q. Wilson and Richard Herrnstein, for example, have argued that declining crime rates in the 19th century were a product of a period of religious revivalism and moral awakening that affected patterns of socialization of children in families, schools and communities.⁵¹ Some criminologists attribute the sharp rise in juvenile homicide in the late 1980s to the easy availability of cheap guns.⁵² Why were teens able to get firearms so easily? The explanation may lie partly in developments in technology and marketing and partly in the successful lobbying efforts of the National Rifle Association.

Crime rates are statistically complex and, during any period, many factors can influence individual decisions about getting involved in criminal activity that in the aggregate constitute crime rates. Changes in justice policies might be important, but assertions that declining juvenile crime rates demonstrate that punitive policies have been effective are naive— particularly in light

⁴⁹ Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the 21st Century*, in MICHAEL TONRY & JOAN PETERSILIA, EDs., *PRISONS, CRIME AND JUSTICE: A REVIEW OF RESEARCH* 3-4 (1999).

⁵⁰ James Fox & Alex Piquero, *Deadly Demographics: Population Characteristics and Forecasting Homicide Trends*, 49 *CRIME & DELINQUENCY* 339 (2003).

⁵¹ See JAMES Q. WILSON & RICHARD HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985). The argument that today's young criminals are "superpredators," in part, is the mirror image of this argument. According to adherents, these youths lack any sense of moral responsibility because none was instilled by their parents. See *supra* note 43.

⁵² See ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 43. According to F.B.I. statistics, homicides by juveniles involving guns increased dramatically in the late 1980s and early 1990s, but other homicides did not— the rate of homicides not involving guns continued at a steady relatively low rate. U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS: SUPPLEMENTARY HOMICIDE REPORTS 1976-92*.

of the fact that crime rates began to decline in many states before legal reforms were enacted.⁵³

C. Does Deterrence Work? On Legal Reform and Crime Rates

Although broad claims about the causes of fluctuations in crime rates are speculative, social scientists have produced a large body of research (mostly focusing on adults) that probes the deterrent effects of criminal sanctions. Perceptual deterrence studies (based on self-report) provide the most direct evidence of the impact of anticipated punishment on individuals' decisions not to engage in criminal activity, but their reliability is uncertain and their findings are mixed. Moreover, the extent to which expressed intentions predict behavior is unclear.⁵⁴ Other researchers focus on more indirect evidence, seeking to link changes in crime rates to particular statutory enactments or changes in law enforcement practices, while controlling, to the extent possible, for other factors that influence crime rates.⁵⁵ These studies either examine crime rates immediately before and after a policy reform or compare crime rates in states that have adopted enhanced penalties with others that have not.

Experts on deterrence agree that simply having a system of law enforcement and criminal punishment has a general deterrent effect on crime—there would be a lot more crime if there were no criminal justice system.⁵⁶ However, as Daniel Nagin, a leading expert on deterrence research has emphasized, getting useful information about the marginal deterrent impact of particular policy changes is an uncertain business.⁵⁷ Studies of the effectiveness of specific policies on criminal behavior have mixed findings. For example, various studies of three-strike laws have found a crime-reduction effect in some states, but not in others, and some have found

⁵³California's Proposition 21 was adopted after 5 years of falling crime rates. See SCOTT & STEINBERG, *supra* note 2 at 105.

⁵⁴ Daniel Nagin, *Criminal Deterrence Research at the Outset of the 21st Century*, in Michael Tonry, CRIME AND JUSTICE 12-23; R. Paternoster & A. Piquero, *Reconceptualizing Deterrence. An Empirical Test of Personal and Vicarious Experiences*, 32(3) J. RESEARCH IN CRIME AND DELINQUENCY 251(1995). Perceptual deterrence studies are useful as a means to understand how perceptions about the risk and severity of criminal punishment affect expressed intentions about offending. The limitation of this type of research is that the relationship between responses to questions in a study and criminal behavior is uncertain, either because study subjects are not candid or because the actual choice about criminal activity is driven by other factors.

⁵⁵ For example, in the 1990s, researchers studied patterns of criminal activity responding to recently enacted "three strikes" laws, which mandate a life sentence on conviction of a third felony. Several types of deterrence research are described by Nagin, *id.* at 2.

⁵⁶ Nagin, *id.*; ANDREW VON HIRSCH, *DOING JUSTICE* 37-44 (1976).

⁵⁷ Nagin, *Id.* at 4-7, describing impediments to evaluating effectiveness of policies.

that criminal activity actually increased following the enactment of the enhanced penalties.⁵⁸ Some studies find an initial deterrent effect of new policies (such as drunk driving laws) that erodes over time.⁵⁹

One explanation for the varied and inconsistent research findings is that many factors contribute to effective deterrence besides the severity of sanctions. Certainty of apprehension and punishment appears to be far more important to deterrence than severity of sanction; potential offenders who fear they will get caught are more likely to be deterred than those who think they will not.⁶⁰ If law enforcement is ineffective or harsh sentences under the new laws are infrequently imposed or unpredictable, potential offenders may view the risk of arrest and punishment as low, and enhanced penalties will have little deterrent impact. Of course, would-be criminals must also be aware of the increased sanctions in some general way for deterrence to work. Further, the punishment must represent a substantial threat to the individual, in terms of both loss of liberty and social stigma. If many associates are subject to the sanctions, their deterrent effect may be diluted.⁶¹ Finally, the added cost to the actor represented by the threat of punishment (along with other costs) must outweigh the anticipated gains of the crime. Ultimately, deterrence theory presumes a rational decisionmaker who weighs the expected benefits of criminal activity against the risk and perceived consequences of apprehension and punishment. Conditions affecting this calculus may vary in different localities and among different groups of offenders, contributing to variability in the deterrent effect of new sentencing policies. The upshot is that we have no clear picture of how enhanced criminal sanctions, standing alone, impact criminal activity.⁶²

Even assuming that harsh criminal penalties generally have a deterrent effect on criminal activity, it is uncertain whether juveniles will respond similarly to adults. Two factors that might differentially affect the responses of youths would appear to be in tension with one another. First, because of their psychosocial immaturity, youths may be less responsive to the impact of

⁵⁸ Anthony Doob & Cheryl Webster, *Sentencing Severity and Crime*, 30 *CRIME AND JUSTICE* 143 N 42 (MICHAEL TONRY, ED. (2003).

⁵⁹ H.L.ROSS, *DETECTING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (1982).

⁶⁰Nagin, *supra* note 53 at 12-19.

⁶¹ Thus, if criminal arrests and convictions are common in a neighborhood or peer group, the associated stigma may be diluted. See Nagin, *supra* note 53.

⁶² Some criminologists go a step further, arguing that the evidence supports the conclusion that harsh sanctions do not deter crime. See Doob & Webster, *supra* note 57.

criminal penalties than adults. Developmental influences on decisionmaking that are likely implicated in youthful decisions to get involved in crime— an inclination to take risks, a tendency to focus on immediate rather than future consequences, susceptibility to peer influence, and impulsivity⁶³— in combination may also lead youths to discount or ignore the prospect of harsh punishment. Approval by anti-social peers may be a particularly important influence that undercuts the deterrent effect of severe sanctions. A self-report study of inner-city youths by Wanda Foglia found that the threat of legal sanctions had little impact on delinquent behavior but that peer behavior had a powerful impact, both through concern about social sanctions and through internalized norms.⁶⁴

Although the psychosocial immaturity of adolescents may undercut the deterrent impact of severe sanctions, the breadth of the changes in the juvenile justice regime over the past generation may influence modern juveniles to consider the prospect of punishment in ways that delinquents in earlier generations did not. If youths thought they were insulated from criminal liability because of their juvenile status under the traditional regime, they now may be more likely to perceive that this is not so. As we have suggested, the *existence* of a justice system that punishes crimes has a general deterrent effect, even if the marginal deterrent effect of particular policies is uncertain. The rhetoric of rehabilitation surrounding the traditional juvenile court may have led youths to perceive a world that was effectively without legal accountability, a perception that the punitive reforms may well have altered.

A small number of studies have sought to gauge the deterrent effect of legislative waiver statutes lowering the age of criminal court jurisdiction in different states— with mixed results.⁶⁵ Simon Singer and his colleagues studied the impact of New York's statute categorically lowering the age of criminal court jurisdiction and found no effect on juvenile crime rates over a 10 year

⁶³ See discussion t.a.n. 146 to 149 *infra*. These developmental psychosocial factors contribute to immature judgment in adolescents and likely play a role in the criminal choices of juvenile offenders. See SCOTT & STEINBERG, *supra* note 2 at 130-134; Elizabeth Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

⁶⁴ Wanda Foglia, *Perceptual Deterrence and the Mediating Effect of Internalized Norms Among Inner-City Teenagers*, 34 (4) J. RESEARCH IN CRIME AND DELINQUENCY 414 (1997).

⁶⁵ Richard Redding provides a comprehensive review of the research on the impact of adult punishment on deterrence and on recidivism by juvenile offenders. Richard Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*. 1 YOUTH VIOLENCE AND JUVENILE JUSTICE 128 (2005).

period.⁶⁶ A study that compared Idaho, a state that adopted a legislative waiver statute, with Montana and Wyoming, that did not, found that crime rates rose in Idaho and declined in the neighboring states.⁶⁷ However, Stephen Levitt examined juvenile crime rates over a 15 year period from 1978 to 1992, analyzing crime rate changes when juveniles reach the age at which they become subject to criminal court jurisdiction. Levitt found that in states with lenient juvenile systems, rates for violent crime declined sharply at the jurisdictional age when youths faced adult sanctions, while crime rates rose when youths attained adult legal status in states with strict juvenile systems and more lenient adult regimes. Levitt concluded that the threat of harsh punishment has a substantial deterrent effect and that much of the increase in juvenile crime in the late 1980s and early 1990s can be attributed to lenient juvenile sanctions.⁶⁸

Levitt's study is the most comprehensive effort to link changes in juvenile crime rates with severity of sanctions in several jurisdictions. His finding that crime rates decline when youths move from a very lenient juvenile justice system into the adult system is not surprising; it is consistent with our suggestion that youths who perceive that they are insulated from criminal liability in the juvenile system may be deterred when they confront a regime of tough sanctions or, put differently, with the general view that the existence of a criminal justice system has some deterrent effect. The finding that crime rates increase rather dramatically when youths move from a tough juvenile system to a lenient adult system is far more puzzling. We are unfamiliar with states in which criminal court sanctions systematically are more lenient than juvenile court dispositions and Levitt does not identify which states he classifies in this way.⁶⁹

In sum, the research on the general deterrent effect of legal regulation on juvenile crime is sparse and gives no clear answer to the question of whether legislative waiver laws and other punitive measures reduce juvenile crime. The evidence that the reforms have contributed to the

⁶⁶ The study examined juvenile crime rates four years before and six after the enactment. Simon Singer & David McDowell, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOCIETY REV. 521 (1988).

⁶⁷ Eric Jenson & Linda. Metsgar, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQUENCY 96 (1994)

⁶⁸ Steven Levitt, *Juvenile Crime and Punishment*, 106 (6) J. POLITICAL ECONOMY 1158 (DEC. 1998).

⁶⁹ Levitt calculated the relative punitiveness of each state's adult and juvenile system and then examined the time path of criminal involvement before and after the age of majority. His measure of the relative punitiveness of a state's adult and juvenile system involved comparing the ratio of adult prisoners to adult violent crime in a state to the number of juvenile delinquents to juvenile violent crimes. This measure has been criticized by Doob & Webster, *supra* note 57, who question in part on the basis that the statistics on which the calculus is based are unreliable. Further, the 23% jump in violent crime from age 17 to 18 in states where the transition is to a more lenient adult system is puzzling, given that the criminal system is universally harsher than the juvenile system.

decline in crime rates is weak. Although Levitt offers some indirect support for the idea that the transformation of youth crime policy has had a deterrent impact, most other researchers have not found support for the conclusion that particular punitive laws deter youths from engaging in criminal conduct.

D. Specific Deterrence– Do Punitive Laws Reduce Recidivism?

Some researchers have sought to measure the specific deterrent effect of the punitive reforms on juvenile crime by examining whether criminal prosecution and punishment reduces recidivism. Given that the recent legal changes have altered dramatically the risks facing youths who get involved in crime, it would be useful to know whether youths who experience harsh punishment then alter their future behavior. These offenders know about the risk of punitive sanctions and they know that they may be caught and punished. Are they more likely to desist from criminal activity than those who are dealt with more leniently? The answer should be "yes" according to deterrence theory– and advocates for adult punishment.

Research based on interviews of young offenders indicates that being tried in criminal court causes some youths to understand for the first time that their criminal conduct had serious consequences.⁷⁰ As a youth in one study explained, "When you're a boy, you can be put into a detention home. But you can go to jail now. Jail ain't no place to go."⁷¹ However, it is not clear whether or to what extent actual involvement in crime is affected by this awareness. Another study found that youths interviewed upon release from prison reported intentions not to get involved in crime again, but that follow-up analysis of recidivism rates suggested that they had not adhered to their plans.⁷² Moreover, some researchers have found that youths in prison are less likely to forswear future criminal activity than their counterparts in juvenile facilities.⁷³ Lawrence Sherman and others have argued that juveniles who are punished as adults become defiant at the perceived injustice of the severe sanctions they receive and reject the system as

⁷⁰ Richard Redding, & Elizabeth Fuller, *What do Juveniles Know about Being Tried as Adults? Implications for Deterrence*, 55 JUV. & FAM. CT. JOURNAL 35 (SUMMER 2004). They quotes one youth. "Before I thought that since I'm a juvenile I could do just about anything and just get six months." Id at 39.

⁷¹ Barry Glassner, Margret. Ksander, Bruce. Berg & Bruce Johnson, *A Note on the Deterrent Effect of Juvenile v. Adult Jurisdiction*, 31 SOCIAL PROBLEMS 219 (1983).

⁷² Anne Schneider & Laurie Ervin, *Specific Deterrence, Rational Choice and Decision Heuristics: Applications in Juvenile Justice*, 71 SOC. SCI. QUARTERLY 585 (SEPT. 1990).

⁷³ Donna Bishop & Charles Frazier, *Consequences of Transfer* in JEFFREY FAGAN & FRANKLIN ZIMRING, *THE CHANGING BORDERS OF JUVENILE JUSTICE* 227 at 250. See also Martin Forst, Jeffrey. Fagan & T.Scott Vivona, *Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1 (1989).

illegitimate.⁷⁴ In short, it is not clear whether youths who are tried and punished as adults learn the lessons that policy makers aim to teach in a way that deters their anti-social conduct.

Another method of evaluating the specific deterrence effect of adult sanctions is to compare recidivism rates of youths prosecuted and punished in the adult system with those who are sanctioned as juveniles. Most studies undertaking this comparison have found higher recidivism rates among juveniles tried and punished as adults. However, these studies often are seriously flawed by selection bias in that the two groups of youths differed in *other* ways that may have affected recidivism. For example, transferred youths may have been involved in more serious criminal activity or had more serious criminal records, and thus have been more likely to recidivate *ex ante*.⁷⁵ In other studies, differences in the length of the incarceration period make comparison difficult.⁷⁶ But two studies in the 1990s tried with more success to control for these differences. One group of researchers led by Donna Bishop and Charles Frazier compared a group of 2700 Florida youths transferred to criminal court, mostly based on prosecutor's discretionary authority under Florida's direct-file statute with a carefully matched group of youths retained in the juvenile system.⁷⁷ In another study, Jeffrey Fagan and his colleagues compared 15 and 16 year old youths charged with robbery and burglary in several counties in metropolitan New York and in demographically similar counties in New Jersey.⁷⁸ The legal

⁷⁴ Lawrence Sherman, *Defiance Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30(4) J. RESEARCH IN CRIME AND DELINQUENCY 445 (1993).

⁷⁵ See e.g., Marcy Podkapacz and Barry Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 L. CRIM. LAW & CRIMINOLOGY 449 (1996). In this study, the authors concluded that the transfer process selected on the basis of seriousness of the offense. These youths also had more serious criminal records. The researchers found that the 58% of the youths waived to criminal court committed new offenses within 2 years of incarceration versus 42% of youths retained in juvenile court.

⁷⁶ An example is a study by Robert Barnoski examining the effect on recidivism of adult sentencing under Washington's statute mandating adult processing of youths charged with certain crimes. The study found that adult sanctions had no short-term effect on re-offending. See Robert Barnoski, *supra* note 26 at 21-23. The study is of limited value because, at the time of the study, only 23% of the youths sentenced under the automatic transfer statute had been released. Further, because the statutory change was relatively recent (and because many youths in the study were still incarcerated), it was not possible to compare long term effects on recidivism.

⁷⁷ Donna Bishop, Charles Frazier, Lon Lanza-Kaduce, & Lawrence Winner, *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* 42(2) CRIME & DELINQUENCY 171-91 (1996); Bishop & Frazier, *supra* note 72.

⁷⁸ Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, 18 L & POLICY REV. 77 (1996); Jeffrey Fagan, Aaron Kupchik, and Akiva Liberman, *Be Careful What You Wish For: The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, Columbia Law School, Pub. Law Research Paper No. 03-61. Available at SSRN: <http://ssrn.com/abstract=491202> (2003).

settings differed in that New York juveniles who are charged with robbery and burglary are automatically dealt with in the adult system at age 15 under that state's legislative waiver statute, while in New Jersey, transfer is rarely used and the juvenile court retains jurisdiction over almost all youths charged with these crimes.

Fagan found that youths convicted of robbery in criminal court were re-arrested and incarcerated at a higher rate than those who were dealt with in the juvenile system, but that rates were comparable for burglary, a less serious crime. The risk of re-arrest within 3 years of "street time" was 29% lower for the New Jersey youths convicted of robbery in juvenile court than for the New York juveniles who were dealt with in the criminal system. The study also examined the number of days until re-arrest and found a similar pattern; the youths sentenced for robbery in criminal court re-offended sooner than their juvenile court counterparts (457 days after first release for the criminal court offenders versus 553 days for juvenile court offenders.) There was no difference between the two groups convicted of burglary. Recidivism was not affected by sentence length; longer sentences were not more effective at deterring recidivism than shorter sentences. The upshot is that youths convicted of robbery who were punished as adults were more likely to recidivate than youths who were dealt with in the juvenile system.⁷⁹

The Florida study also suggests that juvenile sanctions may reduce recidivism more effectively than criminal punishment. This study measured only re-arrest rates and found lower rates for youths who were retained in juvenile court than youths who were transferred. The follow-up period in this study was relatively brief— less than two years.⁸⁰ During this period, 29% of the transferred youths were rearrested as compared to 19% of the youths in the juvenile system. The researchers also calculated yearly re-arrest rates, which was .54 offenses per year for the transferred group versus .32 for the retained youths. Transferred youths who were rearrested were apprehended sooner after their release than juvenile system youths— 135 days after release versus 227 days. Youths who were incarcerated in the adult system received longer sentences; the mean number of days served was 245 versus 90 days served by those who were incarcerated in the juvenile system. As in the New York-New Jersey study, longer sentences did not have a deterrent effect.

The studies finding that adult punishment may contribute to recidivism in young offenders charged with violent crimes seem to undercut the claimed crime-reduction benefits of

⁷⁹ Fagan, et. al., Id. Robbery is classified as serious violent crime because it involves a threat of the use of force. Burglary does not and for this reason is a less serious crime.

⁸⁰ The period for measuring recidivism was from the date of case closing in 1987 until December 31, 1988.

the recent reforms. The findings should be viewed with caution however. In both studies, the two groups of offenders (or the two settings in Fagan's study) may differ from one another in subtle ways other than in the sanction the youths received. These researchers have mitigated this problem far better than earlier studies; Fagan by comparing two jurisdictions that dealt with the same offenses differently and Bishop and Frazier by matching each youth with a counterpart on several variables, including criminal charges, number of prior referrals, and most serious prior offense. Nonetheless, it is possible that, in Florida, prosecutors used other more subtle distinctions as a basis of filing charges in criminal court such that more antisocial youths were dealt with in the adult system. Moreover, as the researchers concede, the police may have monitored youths who had been in the criminal system more closely than others, resulting in a higher re-arrest rate. In Fagan's study, New York prosecutors have charging discretion that may have affected the composition of the study cohort. For example, 15 year old youths who seemed less culpable may have been charged with lesser crimes than robbery, so that they would not be prosecuted as adults. Thus, the cohort of young robbers in that state may be more serious offenders than in New Jersey, where almost all youths are retained in the juvenile system, giving prosecutors little reason to discriminate in their charging decisions.⁸¹ Moreover, law enforcement may be more aggressive and effective in New York than in New Jersey, leading to higher re-arrest rates in the former jurisdiction.

Given these limitations, it is fair to ask whether these studies are helpful in determining whether young offenders subject to tough sanctions are more or less likely to offend in the future. But, at a minimum, this research provides no support for the contention that criminal punishment will effectively reduce recidivism. Indeed, almost all of the rather sparse empirical evidence points to the conclusion that it does *not* have this effect. Absent randomized experiments, in which offenders convicted of the same crimes are randomly assigned to either adult or juvenile sanctions (experiments that few, if any, jurisdictions would permit), non-experimental evidence from studies like those of Fagan and Bishop and Frazier provide the best available evidence, and they do not support sanctioning juveniles as adults. Ultimately, the advocates of punitive policies have very little empirical evidence to support their claims about the benefits of tough policies.

E. Lowering Juvenile Crime Rates Through Incapacitation

⁸¹ Further, it is difficult to explain why recidivism rates did not differ for burglary offenders in the New York-New Jersey study.

Youths who are inclined to commit crimes are constrained from doing so if they are incarcerated. Thus, although it is unclear whether harsh sanctions generally deter youths from criminal activity or reduce recidivism, imprisonment certainly can reduce crime through incapacitation.⁸² Supporters of the recent reforms may point to this reality as powerful evidence that tough sanctions indeed can reduce crime— despite the lack of evidence that young criminals are deterred. The unassailable logic is that the more time young criminals spend in prison, the less time they are on the street getting in trouble.

Although this prescription is logical, it is problematic as social policy. Incapacitation is effective (in the short term at least), but it is very costly as a means of preventing crime. Deterrence operates by influencing the choices of potential offenders, and thus, if it is effective, the overall economic and social cost of crime should be reduced; fewer prison cells are needed, fewer victims are created and youths live their lives in more socially (and personally) beneficial ways. In contrast, as we have seen, confinement of youths for long periods in correctional facilities carries a high economic cost and other social costs as well— particularly if the specific deterrent effect is weak or incarceration itself contributes to re-offending.

There's another important consideration to be weighed. Almost all incarcerated youths *will* be released at some point to rejoin society; thus the impact of incarceration on re-offending and generally on offenders' future lives must be considered in calculating its costs and benefits. For some youths, the risk of recidivism is high at the outset (based on prior record, for example), and, if they have caused serious harm through their criminal activity, the costs of extensive incapacitation may be justified on social welfare grounds. But many youths are not in this category, and, as lawmakers expand the category of young offenders who are subject to harsh sanctions to include moderate-risk offenders, the marginal benefits of incapacitation decline. At some point, the cost of sanctions involving long periods of incarceration will exceed the benefits, particularly if these costs include increasing the risk of reoffending in the future.

F. Summary

⁸² It is sometimes difficult to distinguish whether fluctuations in crime rates in response to changes in criminal sanctions are a result of incapacitation or deterrence, and deterrence studies have sometimes been critiqued on this ground. For example, Steven Levitt in a study of the impact of a federal court mandate that Alabama reduce its prison population to prevent overcrowding, concluded that an increase in crime that followed the judicial order was a largely the result of weakened deterrence. Steven Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 QUARTERLY J. ECONOMICS 319 (1996). Anthony Doob & Cheryl Webster challenge this conclusion, arguing that, because many prisoners were released and prison was used more sparingly in response to the court order, many criminals were on the street where they were free to commit crimes. See Doob & Webster, note 57.

The research that we have reviewed provides no clear answer to the question of how much the criminalization of juvenile justice policy has contributed to the declining crime rate of the past decade. Our review leads us to conclude that the punitive reforms likely *have* had some effect, at least in the short term, through increased incapacitation (both in the adult and juvenile systems) and possibly through general deterrence as well. Theory and research on adults support the view that a justice regime that signals to youths that they will be held accountable for their misdeeds may deter crime more effectively than one in which they think their status as juveniles shields them from punishment.⁸³ It is not at all clear, however, whether the legal changes of the past generation are optimal or excessive as the means of bringing about changed perceptions. A juvenile system grounded in accountability and certainty of sanction may shape perceptions in ways that influence behavior as effectively as the current regime with a more modest budgetary impact and fewer collateral costs.

Beyond this, the evidence does not support the claims by supporters of the punitive reforms that juveniles will be deterred by tough sanctions or that the reforms are responsible for the decline in juvenile crime rates that began in the mid-1990s. In many states, such as California, juvenile crime rates had been steadily declining for several years *before* legislatures enacted tough reforms.⁸⁴ Moreover, although the research findings are mixed, most studies find no evidence that the enactment of automatic transfer laws has discouraged youths generally from getting involved in crime. Somewhat more surprisingly, perhaps, the research does not indicate that those young offenders who are sentenced to prison for violent offenses are less likely to offend upon release by virtue of that experience; indeed, the studies that exist suggest that they have higher recidivism rates than their counterparts in the juvenile system and that sentence severity does not appear to affect recidivism. In short, the argument that public safety will be promoted if youths get “adult time for adult crime” has little empirical support. Given that this claim is at the heart of the preventive argument for harsh sanctions, the case for get-tough policies is far weaker than its supporters acknowledge.

III. Adolescent Development and Optimal Justice System Interventions

The dearth of evidence supporting the effectiveness of tough sanctions in deterring

⁸³ This would be compatible with the uncontroversial view among criminologists that having a criminal justice system has a general deterrent effect- as compared to a world without criminal sanctions. See note 53. See Redding & Fuller, *supra* note 69 at 39.

⁸⁴SCOTT & STEINBERG, *supra* note 2 at 105.

youthful criminal activity becomes less puzzling when we consider the responses of young offenders in light of the scientific knowledge about adolescence. First, as we have suggested, due to their psychosocial immaturity, teens on the street deciding whether to hold up a convenience store may simply be less capable than adults of considering the sanctions they will face. Thus, the developmental influences on decisionmaking that likely shape their decisions to get involved in criminal activity may also make adolescents less responsive to the threat of criminal sanctions.⁸⁵ Beyond this, however, sanctions themselves may vary in their impact on the future developmental trajectories of adolescents in ways that are important to recidivism. The research supports the conclusion that prison provides an aversive social context that inhibits youths from accomplishing developmental tasks of adolescence essential to the transition to non-criminal adulthood. In contrast, the juvenile system potentially can do a better job of responding to developmental needs. Although long incarceration in any institutional setting (adult or juvenile) is unlikely to have a beneficial impact on development, many juvenile facilities and community programs offer youths developmental settings that can facilitate healthy maturation. In general, scientific knowledge about adolescence reinforces the lesson that a legal regime that aims to reduce recidivism will deal with most young offenders in the juvenile system.

In this Part, we first explore lessons from developmental psychology and criminology that have important implications for correctional policy in a regime that aims to reduce crime. Then in light of this knowledge, we examine adult prisons and juvenile programs as contexts for development. Finally we ask the question, “What characterizes the programs that are effective in reducing crime in young offenders?” The evidence is clear that programs that are grounded in developmental science have superior outcomes, and that they offer good value for society’s investment in crime reduction.

A. Lessons from Developmental Research

The developmental research offers two lessons that together underscore the importance of correctional interventions in shaping the trajectories of young offenders’ lives. First, many adolescents engage in criminal activity, but a relatively small percentage of these are inclined to become career criminals. Developmentalists explain that risky experimentation is a part of identity formation for many teens. Thus, psychologist Terrie Moffitt has observed, for adolescent

⁸⁵ This raises the question of whether imposing *harsher* sanctions on juveniles than on adults might be justified as necessary to achieve comparable levels of deterrence. This response would be problematic, of course, on proportionality grounds, if juvenile offenders, due to developmental immaturity, are less culpable than adults. On social welfare grounds, increasing punishment ultimately seems unlikely to be an effective means of reducing the social cost of juvenile crime, given the high costs of incapacitation and the predicted impact on recidivism of adult punishment.

boys, getting involved in criminal activity is “a normal part of teenage life.”⁸⁶ But most youths mature out of their criminal tendencies; only about five percent are incipient career criminals.⁸⁷ Criminologists find that the crime rate peaks at age 17 and then declines steeply.⁸⁸ The upshot is that much adolescent criminal activity is “normative” behavior as psychologists use this term, and not indicative of bad character or criminal predisposition. In responding to criminal conduct of juveniles, society has an important interest in facilitating their transition to non-criminal adulthood.

The second lesson of developmental science is just as important to achieving the goal of reducing the social cost of juvenile crime. Mid- and late adolescence is a period in which individuals normally make substantial progress in acquiring and coordinating skills in several areas that are essential to functioning in the conventional roles that are part of self-sufficient adulthood. First, individuals begin to acquire basic educational and vocational skills to enable them to function in the workplace as productive members of society. They also acquire the social skills necessary to establish stable intimate relationships and to cooperate in groups. Finally they must begin to learn to behave responsibly without external supervision and set meaningful personal goals for themselves. For most individuals, the process of completing these developmental tasks extends into early adulthood, but making substantial progress in adolescence is important.

This process of development toward psychosocial maturity is one of reciprocal interaction between the individual and her social context. Healthy social contexts provide "opportunity structures" that facilitate normative development, but social contexts can also undermine this process.⁸⁹ Several environmental conditions are particularly important— the presence or absence of an authoritative adult parent figure; association with prosocial or antisocial peers; and participation (or not) in educational, extracurricular or employment activities that facilitate the development of autonomous decision-making and critical thinking skills. For

⁸⁶ See Moffitt, *supra* note 11.

⁸⁷ See note 11, *supra* (describing studies finding that a small percent of youths commit most crimes). Moffitt labeled this group “life course persistent offenders.” Id.

⁸⁸ Alex Piquero, David Farrington & Alfred Blumstein, *The Criminal Career Paradigm: Background and Recent Developments*, 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 359-506 (2003).

⁸⁹ Urie Bronfenbrenner & Morris, *The Ecology of Environmental Process* in *Handbook of Child Psychology* (1998); He Len Chung, Michelle Little, and Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in *ON YOUR OWN WITHOUT A NET: THE TRANSITIONS TO ADULTHOOD FOR VULNERABLE POPULATIONS* (D. Wayne Osgood, E. Michael Foster, Constance Flanagan, and Gretchen Ruth, eds.) (2005)

the youth in the justice system, the correctional setting becomes the environment for social development and may affect whether he makes the transition to conventional adult roles successfully.⁹⁰

Normative teens who get involved in crime do so, in part, because their choices are driven by developmental influences typical of adolescence. In theory, they should desist from criminal behavior and mature into reasonably responsible adults as they attain psycho-social maturity. We have indirect evidence that many young offenders follow this process as predicted; the crime rate drops off sharply in late adolescence, and the research shows that desistance is often linked to achieving stable employment or a satisfying marriage.⁹¹ Whether youths successfully make the transition to conventional adult roles, however, depends in part on whether their social context provides opportunity structures for successfully completing the developmental tasks described above.⁹²

The correctional environment may influence the developmental trajectories of normative adolescents in the justice system in important ways. Factors such as the attitudes and roles of adult supervisors, the identity and behavior of other offenders, and the availability (or lack) of good educational, skill building and rehabilitative programs shape the social context of youths in the adult and juvenile system. These social influences may affect the inclination of young offenders to desist or persist in their criminal activities. The correctional context may also facilitate or impede their development into adults who can function adequately in society— in the workplace, in marriage or other intimate unions, and as citizens.

B. Prisons as Developmental Settings

In most states, youths in prison are dealt with like other inmates, receiving few (or no) special accommodations or programs in recognition of their developmental needs. Many features

⁹⁰Chung, Little & Steinberg, *Id.*

⁹¹ John Laub & Robert Sampson, *Understanding Desistance from Crime*, in M. Tonry, *Crime and Justice*; ROBERT SAMPSON & JOHN LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993); JOHN LAUB & ROBERT SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES* (2003). Sampson and Laub treat marriage and employment as fortuitous exogenous events that facilitate desistance. It seems more likely that some youths are able to succeed in these adult roles because they have attained psychosocial maturity, while others who fail to successfully complete developmental tasks do not make this transition.

⁹² Laurence Steinberg, He Chung, & Michelle Little, *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 1 *YOUTH VIOLENCE AND JUVENILE JUSTICE* 21 (2004).

of the typical prison make it a harmful environment for adolescent offenders.⁹³ First, prisons are generally much larger institutions than juvenile facilities. According to one estimate, more than 40% of prisons house more than 500 prisoners; many have an inmate population of more than 1000.⁹⁴ Even the largest training schools house on average about 125 youths, and other residential programs are far smaller.⁹⁵ Institutional size affects the experience of inmates in several ways. In large institutions, violence levels are higher, staff-inmate relationships are more impersonal and the organizational structure is more rigid.⁹⁶ Researchers have found that recidivism rates among juvenile offenders increase with the size of the institution.⁹⁷

The function of prison is to punish and confine criminals and that purpose is reflected in the organization and staffing. More than two-thirds of prison employees are uniformed guards and other security staff whose job is to maintain order and security by monitoring inmates. Although some educational and counseling programs may be provided, these services are not readily available and are often add-ons— provided by adjunct staff and not integrated into prison life. Some states provide special instructional programs in prison for minors, but this is by no means the norm, and young prisoners have no right to educational services comparable to those offered non-institutionalized youths.⁹⁸ One study reported that the teacher-to-student ratio in

⁹³ Donna Bishop and Charles Frazier have provided an excellent comparison of youths' experience in prison and juvenile facilities, based on their research and other studies. Our discussion of these issues draws on their account. See Bishop and Frazier, note 72 at 251-61. Another useful study by Forst, Fagan and Vivona compared reports of their incarceration experience by youths on release from prison with that of youths on release from training schools. See *supra* note 72.

The authors of one national survey summarized their findings by reporting that they found “little evidence of efforts to customize programs for youthful offenders.” James Austin, Kelly Johnson, & Maria Gregoriou, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT*, U.S. Department of Justice (Washington, DC, 2000).

⁹⁴ BUREAU OF JUSTICE STATISTICS. *CORRECTIONAL POPULATION IN THE UNITED STATES, 1995*, U.S. DEPARTMENT OF JUSTICE (1997).

⁹⁵ Dale Parent, et. al. *Conditions of Confinement. Juvenile Detention and Correctional Facilities*, NATIONAL INSTITUTE OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1994).

⁹⁶ Kenneth Adams, *Adjusting to Prison Life*, in 16 *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, ED. MICHAEL TONRY (1992).

⁹⁷ Richard Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works - and What Doesn't*. WASHINGTON, DC: AMERICAN YOUTH POLICY FORUM (2003).

⁹⁸ In *Tunstall v. Bergeson*, 141 Wash. 2d. 201 (2000), the Washington Supreme Court found that juveniles held in adult facilities had no right to general elementary or secondary educational services at the same level of quality as their non-institutionalized peers. See also *Handberry v. Thompson*, 436 F.3d 52, 71 (2d. Cir. 2006).

prison was 1:100, and that fewer than 40% of inmates received any academic instruction.⁹⁹ Counseling, therapeutic and occupational training staff generally are scarce in prison; fewer than 10% of prisoners in one study were involved in any kind of counseling program.¹⁰⁰

These dimensions of prison organization shape the experience of youths incarcerated in the adult system in ways that are likely to undermine healthy psycho-social development. First, adult authority figures are unlikely to have a positive influence. Researchers report that correctional officers, whose job is to maintain security, have impersonal, authoritarian and often hostile relationship with inmates. Not surprisingly, young prisoners, in turn, express hostility toward staff, who are perceived as being unconcerned about inmates' welfare and uninterested in helping young inmates to develop social skills, improve relationships or deal with problems.¹⁰¹ Further, with little in the way of education, occupational training or rehabilitation, many prisons provide minimal positive structure for inmates' daily lives. In these facilities, much time is spent in cells or in the prison yard with other prisoners, under the surveillance of guards on the perimeter.¹⁰²

Frequent opportunities for interaction among prisoners together with distant relationships with staff combine to create an aversive developmental context. Although youths are separated from adults in some prisons, this is not the case in most facilities.¹⁰³ According to reports by young prisoners, experienced criminals teach them strategies and methods for engaging in criminal activity and avoiding detection.¹⁰⁴ Young inmates are also more likely to be victimized than older prisoners or than their counterparts in juvenile facilities; ten times as many youths in

⁹⁹ Allen Beck, et. al, *Survey of State Prison Inmates* 1991, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE (1993)

¹⁰⁰ Bishop & Frazier, *supra* note 72 at 256. Bishop & Frazier suggest that the custodial staff tend to view treatment professionals with suspicion and hostility. Their role is not integral to the operation of the prison.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Austin, Johnson & Gregoriou, *supra* note 92. States with Youthful Offender statutes, like New York separate youths in adult prisons from adults. Austin and colleagues found that juvenile and adult prisoners were separated in 13% of facilities. For a guide to developmentally based treatment of juveniles in adult prisons (emphasizing separation from adult prisoners), see AMERICAN BAR ASSOCIATION, *YOUTH IN THE CRIMINAL JUSTICE SYSTEM* (2001).

¹⁰⁴ Bishop & Frazier, *supra* note 72 at 257.

prison report sexual assaults as youths in juvenile facilities.¹⁰⁵ In some facilities, young prisoners who are targets of older predators are isolated for their own protection, apparently because isolating victims is easier than restraining attackers.¹⁰⁶ Most prisoners decline to report victimization to prison officials; to do so is a serious violation of prison norms against snitching and may only increase vulnerability to attack. Young prisoners often attempt to protect themselves from victimization by responding aggressively to threats, which can result in disciplinary sanctions.¹⁰⁷

In general, juvenile inmates engage in more misconduct and are subject to administrative segregation and disciplinary sanctions (such as exclusion from work assignments, programs, and good-time credits) far more often than older prisoners. To some extent, the aggressive misconduct of young inmates probably reflects the reality that some youths in prison are tough antisocial individuals. However, developmental influences may also be a factor. Being more sensitive to peer approval than are adults, adolescents may engage in aggressive conduct to prove their toughness and masculinity and thereby attain higher peer status.¹⁰⁸

The upshot is that the experience of imprisonment is more aversive for adolescents than for older prisoners. Unlike adults, adolescents are in a formative developmental stage that powerfully influences the future trajectory of their lives. Prisons provide barren and hostile environments for developing essential capacities and skills that are necessary for making the transition to conventional adult roles. In most facilities, little effort is made to prepare youths to function in the workplace as adults or to develop the interpersonal skills necessary to establish stable intimate relationships. Prisons also function as apprentice programs for professional careers in crime. The available adult authority figures are guards who are distant and hostile, and many adult prisoners either threaten young prisoners or influence them to become more proficient criminals.

Moreover, the harmful effects of imprisonment follow young offenders after they are

¹⁰⁵ Marilyn McShane & Frank Williams, *The Prison Adjustment of Juvenile Offenders*, 35V CRIME & DELINQUENCY 254 (1989).

¹⁰⁶ *Id.*

¹⁰⁷ Bishop & Frazier, *supra* note 72 at note 33. See also Richard McCorkle, *Preventive Precautions to Violence in Prison*, 19 CRIMINAL JUSTICE & BEHAVIOR 160 (1992).

¹⁰⁸ Bishop & Frazier offer this hypothesis, *Id.* At 257-58. See also McShane & Williams, *supra* note 104. These researchers found that serious and violent juvenile offenders in prison engaged in misconduct at a rate twice that of similar offenders age 17 to 21.

released in ways that amplify its negative impact on psycho-social development. A felony conviction is a stigmatic signal that carries legal disabilities such as disenfranchisement and exclusion from military service (which has been found to be another pathway to desistance for young offenders¹⁰⁹). Just as important are the informal handicaps that undermine the ability of young felons to move into conventional adult roles. Disclosure of a criminal record is mandatory in many settings and often the criminal conviction will bar educational opportunities and meaningful employment. Further, a youth who has been in prison may find it much harder to develop social relationships with peers who are not involved in crime. Thus, youths who serve time in prison are severely handicapped in their efforts to find meaningful legal employment or to establish a stable intimate relationship or marriage, the two most important factors associated with desistance from involvement in crime.

C. Juvenile Facilities as Developmental Settings

Juvenile facilities are far from optimal as settings for healthy adolescent development under the best conditions, and many institutions for young offenders are almost indistinguishable from prisons. Some facilities, however, provide young offenders with programs, supervision, and supportive correctional environments that, in combination, are less likely to harm their prospects for becoming productive adults— and, at their best, may contribute positively to the transition from antisocial adolescent to normative adult. In other words, prisons and juvenile facilities tend to differ in several ways that may be important to their developmental impact on confined youths. These differences may shed light on the question of why youths who are imprisoned do not appear to be more effectively deterred than youths in the juvenile system despite the aversive nature of the prison experience.

Although the regulation of youth crime has become harsher over the past generation, juvenile facilities and programs in many states continue to recognize that convicted youths are adolescents with developmental needs. Thus, juvenile facilities tend to offer environments that are less purely custodial than typical prisons. In many juvenile facilities, a relatively large number of line staff perform educational and counseling duties. Ninety five per cent of training schools have a ratio of at least one teacher per fifteen youths and two-thirds have one counselor for every ten youths.¹¹⁰ Even in states that have enthusiastically embraced punitive reforms, the programs and organization of juvenile facilities often is based on a developmental therapeutic model. For example, in Florida, which transfers many youths and imposes harsh sentences on

¹⁰⁹ Sampson & Laub found that military service, along with marriage and stable employment, was another pathway to desistance for many young offenders. Shared Beginnings, *supra* note 90 at 41-51.

¹¹⁰ See Parent et. al., *supra* note 94.

juveniles,¹¹¹ juvenile correctional programs are based on empirically-validated cognitive behavioral principles that guide staff behavior and staff-resident interaction.¹¹² Residents' daily schedules include academic classes, skills training, counseling and recreational activities.¹¹³

There is some evidence that these distinctive programmatic aspects of the juvenile system affect the social environment of youths in ways that contribute positively to psychological development. Self-report studies find that youths in juvenile facilities have far more positive attitudes about staff than do young prisoners in the adult system. In general, the former group report that staff are concerned about their welfare, encourage them to participate in programs, and attempt to help them develop social skills and solve problems.¹¹⁴ Offenders in juvenile facilities are also more likely than youths in prison to say that they intend to avoid criminal activity in the future. When asked to evaluate programs, youths reported benefitting the most from long term intensive programs in which they developed relationships with caring counselors, particularly programs that were directed at improving social skills and self control.¹¹⁵ In effect, these youths reported that staff in their facilities provided social conditions and experiences that research indicates facilitate the attainment of psycho-social competence. As we will see shortly, the characteristics of programs that youths found most helpful are those that researchers have correlated with reduced recidivism.¹¹⁶

D. Youths in Community-Based Programs

Even under contemporary law, a large percentage of youths serve all or part of their

¹¹¹ In 2010, the United States Supreme Court reviewed two cases in which Florida youths received sentences of Life Without Parole for non-homicide offenses and found this sentence to be unconstitutional for juveniles under the Eighth Amendment. Most of the cases in which this sentence was imposed were Florida cases. See *Graham v. Florida*, 560 U.S. __ (2010)..

¹¹² Cognitive behavior therapy is the basis for many successful delinquency programs. See __ to __ *infra*. J. Platt & M. Prout, *Cognitive-Behavioral Theory and Interventions for Crime and Delinquency* in *BEHAVIORAL APPROACHES TO CRIME AND DELINQUENCY: A HANDBOOK OF APPLICATION, RESEARCH, AND CONCEPTS*, 477-497 (Edward Morris and Curtis Braukmann, eds (1987)).

¹¹³ See Bishop & Frazier, *supra* note 72.

¹¹⁴ Forst, Fagan & Vivona; Bishop & Frazier, *supra* note 72.

¹¹⁵ Bishop & Frazier, *supra* not 72.

¹¹⁶ See 125 to 137 *infra*.

delinquency dispositions in their communities, rather than in correctional facilities.¹¹⁷ For many offenders, community sanctions may be optimal— lower in cost than confinement in a correctional facility and offering a better context for navigating the transition to productive adulthood. Many normative adolescents will be better off if they are not removed from their families, schools and communities. For non-delinquent youths, these social environments provide the opportunity structures for completing the developmental tasks that are the basis of psychosocial maturity. Residential facilities, even those that are organized to respond to adolescents' developmental needs, are generally not ideal settings for acquiring the skills necessary to make a successful transition to adulthood, particularly if youths are confined for long periods. Delinquent youths will ultimately return to the community and must be able to function in the social contexts that constitute their world.

An obvious problem with community sanctions for many delinquent youths is that their families, peer groups, neighborhoods and/or schools may undermine rather than support healthy psycho-social development. Criminologists explain that toxic social contexts contribute to youthful offending.¹¹⁸ Unless something changes in the setting or in young offenders ability to avoid negative influences, they are likely to continue their involvement in criminal activity. Youths whose friends are involved in crime, whose parents are deficient, and whose schools are dangerous settings that lack resources may find it hard to stay in the community and *not* get into criminal activity again. Thus, an important goal of any community-based disposition is to minimize the impact of negative social contexts by providing delinquent youths with tools to deal in self-protective ways with their social environment, and also to facilitate and reinforce settings that promote healthy development.¹¹⁹ As we will see shortly, these strategies characterize programs that are successful at reducing recidivism.

¹¹⁷ See SNYDOR & SIGMUND, 2006, *supra* note 18, citing Office of Juvenile Justice & Delinquency Prevention statistics that 54% of youths receive some form of probation. Community sanctions today extend to many youths who a generation ago were processed informally and diverted from the justice system. In Boston, for example, probation officers visit their charges' homes unannounced in the evening hours to check on compliance with curfews. See *Operation Night Light—Boston, MA*, in *Promising Strategies to Reduce Gun Violence*, Office of Juvenile Justice and Delinquency Prevention (1999), Profile No. 33 at www.ojjdp.ncjrs.org. Some research suggests, however, that closely supervised probation is not associated with lower recidivism rates. See Aos, *The Juvenile Justice System in Washington State*, *supra* note 30.

¹¹⁸ Jeffery Fagan, *Context and Culpability in Adolescent Crime*, Va. J. SOCIAL POLICY AND LAW 6 (1999): 535–538; Jeffery Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in YOUTH ON TRIAL, THOMAS GRISSO & ROBERT SCHWARTZ, EDS (2000).

¹¹⁹ One of the most successful community-based programs, Multi-Systemic Therapy, uses an ecological approach. See *t.a.n.* 128 to 130 *infra*.

The goal of changing the interaction between the youth and his social environment is also important for the offender who returns to his community after a period of incarceration. A "reentry" period of structured supervision and support can enhance the youth's ability to function in his community in ways that minimize the likelihood that he will simply reconnect with anti-social peers and resume his involvement in criminal activity. The developmental benefits of programs in correctional facilities can be lost when youths return to their communities and neighborhoods, unless they receive support during the transition. Recent research indicates that youths who have been released from institutional placement are more likely to re-offend when they return to environments characterized by bad parenting and, especially, the presence of antisocial peers.¹²⁰ Increasingly, effective correctional programs include intensive community probation to assure that interventions have a lasting impact.

Community sanctions grounded in developmental knowledge are quite different from those employed by the traditional juvenile court, where loosely supervised probation was a standard disposition for less serious and first-time offenders. If offenders who are subject to community sanctions are not carefully supervised and if the criminogenic influences in their social environment are not addressed, many will not desist from criminal activity. Moreover, an important lesson of the deterrence research is that young offenders must understand that they will be punished for the harms they cause. The traditional courts, in meting out community probation (and little else) to many young offenders, failed to communicate this message and apparently achieved little deterrence. Some localities have found that sanctions that include not only therapeutic and skill-building programs, but also compensation to victims, community service, close supervision and enforcement of probation conditions such as curfews and orders to avoid anti-social peers are more effective in promoting accountability and reducing recidivism.¹²¹ Supporters of harsh sanctions are suspicious of community-based programs, in part because they assume that public protection requires incarceration of many young offenders. Whether this is true depends in part on the effectiveness of community-based programs in reducing recidivism. While traditional probation has not been successful at achieving this goal, developmental knowledge suggests that interventions that alter criminogenic social contexts and provide youths with developmental tools that can assist them to attain psychosocial maturity may be more effective. If community interventions are effective in reducing re-offending with youths who

¹²⁰Edward Mulvey, Maryfrances Porter, & He Len Chung, *Building Pathways out of Crime and Delinquency for Serious and Violent Juvenile Offenders*, Arizona Juvenile Justice Symposium (2002): 16–20.

¹²¹ Snyder & Sickmund, *supra* note 18. Figures shows increase in formal v. informal processing since mid-1980s.

otherwise would be confined, they may be superior on public welfare grounds, given that they are less costly financially and less disruptive to young offenders' lives. We turn next to the empirical evidence, which indicates that some community based programs indeed are effective at reducing crime.

E. What Works with Young Offenders?

The evidence we have presented thus far generally supports a policy of retaining most young offenders in the juvenile system as more likely to promote public welfare than the contemporary approach of punishing many youths as adults. But juvenile correctional facilities and programs vary greatly. Some youths are incarcerated in prison-like training schools, while others receive loosely supervised probation—neither of which are likely to be effective at changing antisocial behavior. An important question therefore is what the juvenile system can offer young offenders that *will* be effective at reducing recidivism.

Until the 1990s, most researchers who study juvenile delinquency programs might well have answered that the system had little to offer in the way of effective therapeutic interventions; the dominant view of social scientists in the 1970s and 80s was that "nothing works" to reduce recidivism with young offenders.¹²² Today the picture is considerably brighter, in large part due to a substantial body of research produced over the past 15 years showing that many juvenile programs, both in the community and in institutional settings, have a substantial crime-reduction effect; for the most promising programs, that effect is in the range of 20% to 30%.¹²³ Moreover, by applying meta-analysis, a relatively new quantitative method for coding, analyzing, and accurately comparing the findings of many related studies, researchers are able to sort the types of interventions that are promising from those that are ineffective and to clarify the attributes of effective programs.¹²⁴ An increased focus on research-based programs and on careful outcome

¹²² DOUGLAS LIPTON, ROBERT MARTINSON & MELANIE WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975). Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *PUBLIC INTEREST* 22 (1975); Panel on Research on Rehabilitative Techniques, Nat. Research Council, *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* (Susan Martin & Robin Redner, eds. 1981).

¹²³PETER GREENWOOD, *CHANGING LIVES* (2006); Steve Aos, Polly Phipps, Robert Barnoski, & Roxanne Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* Washington State Institute for Public Policy 1–74, at [\(www.wsipp.wa.gov\)](http://www.wsipp.wa.gov).(2001)(hereinafter *Comparative Costs*).

¹²⁴ See Mark Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Young Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 *VA. J. SOC. POL. & L.* 611(1999). Researchers began to use meta-analysis to evaluate the effectiveness of juvenile programs in about 1990, and numerous meta-analyses have been undertaken. See studies described in *Id.* at note 6. Lipsey's analyses of juvenile programs is very comprehensive and he is prominent among researchers using this now widely-used methodology. See also Aos et. al. *Id.*

evaluation allows policymakers to assess accurately the impact on recidivism rates of particular programs to determine whether the economic costs are justified. In a real sense, these developments have revived rehabilitation as a realistic goal of juvenile justice interventions.

In general, successful programs are those that attend to the lessons of developmental psychology, seeking to provide young offenders with supportive social contexts and to assist them in acquiring the skills necessary to change problem behavior and attain psycho-social maturity. In his comprehensive meta-analysis of 400 juvenile programs, Mark Lipsey found that among the most effective programs in both community and institutional settings were those that focused on improving social development skills— in the areas of interpersonal relations, self control, academic performance and job skills.¹²⁵ Some effective programs focus directly on developing skills to avoid anti-social behavior, often through cognitive behavioral therapy, a therapeutic approach with substantial empirical support.¹²⁶ For example, Aggression Replacement Training is a cognitive-behavioral intervention that focuses on anger control, pro-social skill development and moral reasoning. Other interventions that have been shown to have a positive effect on crime reduction focus on strengthening family support. In Functional Family Therapy, for example, therapists work in youths' homes to improve emotional connections between parents and children and strengthen parents' abilities to provide structure and limits for their children. This approach explicitly recognizes the importance of authoritative parenting for healthy development, as does Multidimensional Treatment Foster Care, an intervention that has been found to be quite effective with high-risk and chronic offenders. This program places youths with trained and supervised foster parents for 6 to 12 months, while they also engage in family therapy with their own parents. This program involves close supervision and treatment in the home, school and community, adult mentoring, and separation from

¹²⁵ Mark Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?* In J. McGuire, *WHAT WORKS? REDUCING REOFFENDING*. (1995). Lipsey found a broad range of programs to have some effectiveness at reducing recidivism [although results are not always consistent]— from formal restitution to therapeutic wilderness interventions to "wraparound" programs that combine intensive supervision with individualized treatment provided by collaborative interagency teams.

¹²⁶ Cognitive behavioral therapy is employed in many juvenile correctional programs, both in residential facilities and community settings. It is a problem-focused approach that is designed to help individuals identify beliefs, thoughts and behaviors that contribute to their problems— in the case of delinquent youths, to alter contributors to criminal conduct. It has been used extensively with youths with substance abuse problems that are linked to their criminal conduct. See Aaron Beck, *Prisoners of Hate: THE COGNITIVE BASIS OF ANGER, HOSTILITY AND VIOLENCE* (1999); JUDITH BECK, *COGNITIVE THERAPY: BASICS AND BEYOND* (1995); Mark Lipsey, Gabrielle Chapman, and Nana Landenberger, *Research Findings From Prevention and Intervention Studies: Cognitive-Behavioral Programs for Offenders*, The American Academy of Political and Social Science (1995).

delinquent peers.¹²⁷

One of the most successful interventions with violent and aggressive youths is multi-systemic therapy (MST), a community-based program that has been replicated and evaluated repeatedly for almost 20 years with many groups of juvenile offenders. MST is thoroughly grounded in developmental knowledge, combining cognitive behavioral therapy with an ecological approach that deals with individual youths in the multiple social contexts in which they live— their families, peer groups, schools and communities, addressing the factors that contribute to criminal conduct across these settings. MST therapists work in teams with small caseloads of four to six families, providing intensive in-home services. The focus of treatment is to empower parents with skills and resources to support their children in avoiding problem behaviors and to give youths the tools to cope with family, peer and school problems that can contribute to reinvolvement in criminal activity.¹²⁸ Controlled studies of MST have shown it to be among the most effective justice system treatments. One study compared chronic and violent offenders receiving MST with a randomly assigned group who received the standard treatment of supervised probation, and found that MST reduced rates of both re-offending and incarceration in this group of very high risk offenders. The MST youths had significantly lower recidivism rates over a 59 week period despite the fact that they remained in the community an average of 73 days more than youths in the control group during that period.¹²⁹ Moreover, a two year follow-up study showed that youths who received MST continued to re-offend at a substantially lower rate than those who got standard dispositional treatment (although the rates for both groups were relatively high).¹³⁰

¹²⁷See discussion of these successful programs in PETER GREENWOOD, *supra* note 124; Robert Barnoski, *Outcome Evaluation of Washington State's Research-Based Programs for Juvenile Offenders*, Washington State Institute for Public Policy (Olympia, Wash., 2004): 1–20, at [www.wsipp.wa.gov.](http://www.wsipp.wa.gov/) (hereinafter *Outcome Evaluations*).

¹²⁸ Scott Henggeler, Gary Melton, & Linda Smith, *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, (hereinafter *Family Preservation*), 60 J.CHILD AND FAMILY STUDIES 953 (1992). One role of MST therapists is to expand natural social support systems for the family (extended family, neighbors, church members, etc.) and to remove impediments to effective functioning (parents' substance abuse, stress). See MULTI-SYSTEMIC THERAPY, OJJDP MODEL PROGRAMS GUIDE [http:// www.dsgonline.com/mpg2.5/TitleV-MPG-Table-Ind-Rec.asp?id=363](http://www.dsgonline.com/mpg2.5/TitleV-MPG-Table-Ind-Rec.asp?id=363).

¹²⁹Henggeler, et. al., Id.

¹³⁰Scott Henggeler, Gary Melton, Linda Smith, Sonja Schoenwald, & Jerome Hanley, *Family Preservation Using Multisystemic Treatment: Long-Term Follow-up to a Clinical Trial with Serious Juvenile Offenders*, 2 J.CHILD AND FAMILY STUDIES 283 (1993). Eighty percent of the control group had re-offended, compared with 60 percent of the group receiving multisystemic therapy.

Not all juvenile programs are effective at reducing crime. Two popular programs – military boot camps and "scared straight" programs, in which youths are taken to adult prisons and lectured on the perils they face if they persist in their criminal ways, actually increase recidivism; young offenders who participate in these programs commit more crimes than other youths.¹³¹ Moreover, even effective programs can fail if they are not well implemented. Some studies have found substantial variations in recidivism rates due to differences in the quality of staff and compliance with program protocols.¹³² This suggests that general replication in the justice system of effective "model programs" may sometimes not produce the positive results that program developers achieve. Beyond this, duration of the treatment and amount of contact time are often positively correlated with effectiveness. Lipsey's meta-analysis found that those programs that exceeded the mean in these dimensions were more effective at reducing recidivism than briefer programs that involved less contact.¹³³

Many treatment programs in the justice system are more expensive than standard probation or parole, the alternative to which they often are compared. MST, for example, costs approximately \$5000 per youth.¹³⁴ How can policymakers decide whether the benefits of particular programs justify their cost to taxpayers? Recently state governments have begun to focus on the cost effectiveness of criminal and juvenile sanctions, and have enlisted economists to calculate whether the benefits of various programs, as measured by the value to taxpayers and crime victims of the programs' expected effect on crime, is greater than their costs. A comprehensive cost-benefit analysis of 400 programs aimed at crime reduction found that several of the juvenile justice programs we have described offered taxpayers the best return for dollars invested— better than programs aimed at adult criminals and better than early childhood and school prevention programs (although the latter have other goals besides crime prevention).¹³⁵ For example, based on research showing that MST reduces recidivism by about 30%, taxpayers gain about \$31,000 in subsequent criminal justice system savings for each program participant– or more than \$6 for each dollar spent. When the value to potential crime

¹³¹Aos, et. al. *Comparative Costs*, supra note 123.

¹³² Robert Barnoski, *Outcome Evaluation*, supra note 127 at 1–20. In one study, for example, youths in Functional Family Therapy with incompetent therapists had higher recidivism rates than controls, while recidivism declined by 20% for those with competent therapists. *Id.*

¹³³Mark Lipsey, et. al, supra note 126. Multisystemic therapy averages sixty hours of contact over a four-month period, and therapists are always on call. MULTISYSTEMIC THERAPY, supra note 128.

¹³⁴Aos et. al. *Comparative Costs*, supra note 123.

¹³⁵*Id.*

victims is included, the benefit rises to \$131,918, or \$28 for each dollar spent.¹³⁶ The cost-benefit ratio for Functional Family Therapy, Aggression Replacement Training and Multidimensional Treatment Foster Care were also very favorable.¹³⁷ The upshot is that a range of intensive programs in the juvenile system have proved effective if they are faithfully and competently implemented with appropriately targeted youths. These programs offer good value for taxpayers' dollars spent and the benefits in terms of crime reduction far exceed the costs.

This promising research on juvenile justice programs challenges the claim that punitive policies promote social welfare by reducing youth crime. Cost-conscious policymakers who care about reducing crime would be well advised to invest in these research-based programs as a key element in the legal response to juvenile crime. The fact that some of the most cost-effective interventions are community-based programs suggests that community sanctions can play an important role in a contemporary regime that is quite different from that of probation and parole in the traditional system. This not to say, however, that all young offenders should remain in the community. Even though some programs such as MST have been shown to reduce recidivism even in serious and chronic offenders, there may be good reasons to place in residential facilities some youths who commit serious violent crimes or who are repeat offenders. Very few studies of justice system programs to date have compared community-based sanctions with incarceration, and thus the impact of incapacitation periods on crime rates has rarely been included in the calculus. Some youths simply present too much of a risk to public safety to stay in the community. Moreover, the threat of incarceration may have an impact on general deterrence that would be diluted in a regime that seldom uses confinement as a sanction. However, community sanctions are appropriate for many youths, and others can benefit from community-based interventions as part of the transition from residential programs. Extensive use of programs that have demonstrated effectiveness is a good investment for a state aiming to advance social welfare through its juvenile justice policies.

The developmental and programmatic research we have described provides a key rationale for maintaining a system of juvenile justice separate from the adult system. The question of whether maintaining a separate system for juveniles is important or desirable has been the subject of policy debate in recent years, with conservatives and even some progressive

¹³⁶Id.

¹³⁷Id. For FFT, the recidivism effect is somewhat less than for MST. The average cost is \$2,161 and value to taxpayers is about \$14,000 per participant; \$59,000 per participant if benefit to victim is included. Thus the benefit per dollar spent is \$29. On the other hand, because “scared straight” programs increase recidivism, taxpayers *lose* an average of \$6,500 in increased costs for each participant; \$24,500 if costs to crime victims are calculated. Id.

academics arguing for dismantling the juvenile system. For example, Barry Feld has argued for a unitary system in which juveniles would serve shorter sentences for their crimes in recognition of their reduced culpability and also be housed separately from adult inmates.¹³⁸ Such a regime would satisfy the requirements of fair punishment. But a key lesson of the research we have reviewed is that a regime that aims to reduce crime will treat most juvenile offenders differently from their adult counterparts; even youths who must be incarcerated for public safety reasons should be confined in facilities that provide a social context, programs and services very different from adult prisons. A separate juvenile system is far more likely than a unitary system to create a developmentally appropriate social environment and provide research-based interventions— and generally, to recognize that differential treatment of adolescent offenders is the key to crime reduction.

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To this point, we have examined youth crime policy through a consequentialist lens, a perspective from which the primary policy goal is to promote social welfare, and particularly to prevent future crime. Many supporters of punitive policies argue that achieving this goal requires the extensive use of incarceration of young offenders in both the adult and juvenile systems. We have found little support for this claim. Indeed, most of the evidence points to the conclusion that the social costs of criminalization outweigh the benefits. Extensive use of incarceration is expensive; juvenile justice expenditures have risen steeply in response to policy shifts in this direction. This cost is justified only if these policies are more effective at public protection than less costly alternatives. But the existing research data provides little support for the notion that tough sanctions function effectively to deter crime, either generally or in their impact on young offenders.

The evidence that adult punishment of young offenders is likely to encourage antisocial behavior and undermine the prospect of normative development is reinforced by developmental knowledge about adolescence. The scientific research supports that for most adolescents, the inclination to get involved in criminal activity is a product of developmental influences that will diminish with maturity. Developmental research also emphasizes the importance of social context during adolescence, and correctional programs can either promote or inhibit healthy development depending on the social context they provide. Treatment programs in the juvenile system that apply the lessons of developmental research have been shown to be cost-effective means of reducing recidivism. This evidence suggests that rehabilitation, discredited as the foundation of the traditional juvenile system, has a revitalized role to play in contemporary

¹³⁸FELD BAD KIDS, *supra* note 4.

regime that aims to promote the welfare of society as well as that of young offenders.

IV. Retribution as a Limiting Principle in Regulating Juvenile Crime

We have shown that regulation that is grounded in scientific knowledge of adolescence is more likely to prevent juvenile crime and reduce its social cost than an approach that ignores differences between juveniles and adults. In this Part, we argue that the developmental model also promotes fairness and legitimacy in juvenile justice policy. In a justice system committed to fairness, punishment is limited to sanctions that are proportionate to the harm of the offense and the culpability of the young offender. Developmental knowledge clarifies most youths, due to their developmental immaturity, are less blameworthy than their adult counterparts and thus should receive more lenient punishment.

Both crime reduction and fair punishment are important purposes of crime regulation, and we think both are essential to a stable and satisfactory system of youth crime regulation.¹³⁹ Fairness alone is an inadequate basis for formulating policy because, as we have suggested, fairness can be accommodated within a unitary criminal justice system by giving youths discounted sentences.¹⁴⁰ Only if lawmakers also aim to reduce crime and promote social welfare is it important to have a separate system that responds to the developmental needs of young offenders. But crime prevention alone is also inadequate as a regulatory purpose. Under the developmental model, retribution functions importantly as a limiting principle and source of legitimacy. Commitment to fair retribution constrains the authority of the government to intervene in the lives of young offenders as it pursues its preventive purposes by mandating that the duration and harshness of sanctions be limited to what the offender deserves on the basis of the offense itself.¹⁴¹ This constraint is necessary to prevent excessive punishment and to avoid exacerbating sentencing disparities that already threaten the legitimacy and political stability of the justice system. It also promotes confidence in the legal system as well as public acceptance of criminal sanctions.¹⁴²

¹³⁹We developed this dual approach in SCOTT & STEINBERG, *supra* note 2.

¹⁴⁰*Id.* at 147; BARRY FELD, *supra* note 4.

¹⁴¹See discussion of criminal law scholars who have argued that retribution should function as a limiting principle both to constrain state authority and to promote public acceptance of criminal sanctions, *supra* note 47. See also Albert Alschuler, *The Changing Purposes of Criminal Punishment*, U CHICAGO L. REV. 7-8 (2003).

¹⁴²H.L.A. Hart argued that retribution should be retained for this purpose. See note 47, *supra* at 180-83.

This part begins with a brief analysis of the culpability of adolescent offenders, which confirms that developmental factors influence youthful criminal choices in ways that mitigate blame under conventional criminal law principles and doctrines. We then argue that retribution, as embodied in the proportionality principle is essential as an element of a satisfactory model of juvenile justice, challenging the argument for a regime based on prevention alone. Finally this part addresses the question of whether policies that promote social welfare will be compatible with proportionality, and generally with principles of fair punishment. We conclude that tensions exist between prevention and retribution, but can usually be reconciled.

A. Developmental Research and the Culpability of Young Offenders

In general, factors that reduce culpability under the criminal law can be grouped in three rough categories. The first category include endogenous impairments and deficiencies in the actor's decisionmaking capacity that affect his choice to get involved in criminal activity. Mental illness and retardation are in this category, as is developmental immaturity. Under the second category, an actor may be less culpable if he engaged in the criminal conduct in response to extraordinary coercive circumstances that a reasonable person would be unable to resist. The third category of mitigation applies when the actor can show that the criminal act was not the product of bad character. Each of these sources of mitigation applies to the crimes of juvenile offenders and together support a regime that deals with most juveniles as an intermediate category of offenders— not as adults but also not as children.¹⁴³

1. Deficiencies in decisionmaking. Developmental research indicates that adolescents differ from adults in their decisionmaking capacities in ways that affect their criminal choices, due to both cognitive and psychosocial immaturity, but the deficiencies are more subtle than those that characterize younger children. By age 14 or 15, most adolescents have the capacities for reasoning and understanding comparable those of adults—when measured in laboratory studies.¹⁴⁴ But there is reason to believe that in unstructured real-world settings, such as those in which decisions about criminal activity are made, teenagers do not process information as efficiently as adults and may be more susceptible to stress and emotional arousal.¹⁴⁵

¹⁴³This section summarizes earlier work arguing that mitigation should be applied to the criminal conduct of young offenders. See SCOTT AND STEINBERG, *supra* note 2. See also Scott and Steinberg, *Blaming Youth*, *supra* note 62.

¹⁴⁴Daniel Keating, *Cognitive and Brain Development*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY, R. LERNER & L. STEINBERG, EDS. (NEW YORK, 2ND ED., 2004).

¹⁴⁵See S. Ward & W. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 DEVELOPMENTAL PSYCHOLOGY 488 (1990). Adolescent decision-making under stress is often poorer than in hypothetical situations, and research suggests that the effects of stress on decision-making are more marked

More importantly, perhaps, several psychosocial developmental factors influence adolescents' decisionmaking in ways that contribute to immature judgment. First, teenagers are more susceptible to peer influence than are adults.¹⁴⁶ They also differ from adults in future orientation, being less inclined to weigh future consequences than are adults and more likely to focus on the here and now.¹⁴⁷ Third, adolescents differ in their assessment of and attitude toward risk. Teens tend to value rewards more than risks and sometimes to count as a reward what an adult would view as a risk.¹⁴⁸ And fourth, teens tend to be more impulsive than adults, having more difficulty regulating their moods, impulses and behavior.¹⁴⁹

In combination, these developmental factors are likely to influence juveniles' decisions to get involved in criminal activity in ways that distinguish them from adult criminals and makes their choices less culpable. Adolescent decisionmaking is not as impaired as is that of children or persons who with severe mental disabilities, whose crimes may be excused due to their impairments. But the deficiencies that contribute to immature judgment in teens are developmental in nature and are characteristic of adolescents as a group. They are also organic,

for adolescents than for adults. L. Mann, *Stress, Affect, and Risk-Taking*, 201 at 214-14; in *RISK-TAKING BEHAVIOR*, J. F. Yates, ed. (1992)..

¹⁴⁶Susceptibility to peer pressure declines throughout the high-school years. See Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *CHILD DEVELOPMENT* 841 (1986); Elizabeth Scott, N.D. Reppucci, & Jennifer Woolard, *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 *Law and Human Behavior* 221 at 229-30 (1995); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 *DEVELOPMENTAL PSYCHOLOGY* 1531 (2007).

¹⁴⁷A. Greene, *Future-time Perspective in Adolescence: The Present of Things Future Revisted*, 15 *JOURNAL OF YOUTH AND ADOLESCENCE* 15 99 (1986); Jari Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 *DEVELOPMENTAL REVIEW* 1 (1991). Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Marie Branich, *Age Differences in Future Orientation and Delay Discounting*, 80 *CHILD DEVELOPMENT* 28 (2009).

¹⁴⁸Laurence Steinberg, *Risk-Taking in Adolescence. What Changes, and Why?* 1021 *ANNALS OF THE NEW YORK ACADEMY OF SCIENCES* 51 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study*, 41 *DEVELOPMENTAL PSYCHOLOGY* 625 (2005); Susan Millstein & Bonnie Halpern-Felsher, "Perceptions of Risk and Vulnerability," 31 *S JOURNAL OF ADOLESCENT HEALTH* 10 (2002). Elizabeth Cauffman, Elizabeth Shulman, Laurence Steinberg, Eric Claus Marie Branich, Sandra Graham & Jennifer Woolard, *Age Differences in Affective Decision-making as Indexed by Performance on the Iowa Gambling Task*, 46 *DEVELOPMENTAL PSYCHOLOGY*, 193 (2010); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 *DEVELOPMENTAL REVIEW* 78 (2008).

¹⁴⁹Ellen Greenberger, *Education and the Acquisition of Psychosocial Maturity* 155 in *THE DEVELOPMENT OF SOCIAL MATURITY*, DAVID MCCLELLAND, ED. (1982); Reed Larson, Mihaly Csikszentmihalyi, & Ronald Graef, *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 *Journal of Youth and Adolescence* 469 (1980); Laurence Steinberg, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-report: Evidence for a Dual Systems Model*, 44 *DEVELOPMENTAL PSYCHOBIOLOGY* 1764 (2010).

and are no more subject to individual control than are the impairments that affect the decisionmaking of mentally ill and retarded adults.

2. *Unformed Character and Culpability.* A related mitigation condition that is also important in assessing the culpability of typical young offenders involves to the relatively unformed nature of their characters. The criminal law implicitly assumes that harmful conduct reflects the actor's bad character, and evidence that this is not so can be offered in mitigation of culpability.¹⁵⁰ The criminal conduct of most teens is grounded in developmental processes that are constitutive of adolescence—immature judgment and normative experimentation with risky behaviors. It does not stem from stable moral deficiencies predictive of bad character. The character of the typical adolescent has not yet stabilized and his personal identity is in flux,¹⁵¹ and precisely for this reason, his criminal act, like that of the adult who establishes mitigation on this ground, does not express his bad character.

2. *Situational Coercion.* A somewhat different source of mitigation in criminal law may apply to some adolescents who, because of their social context, are subject to extraordinary coercive pressures to become involved in criminal activity. The criminal law does not require unusual fortitude or bravery, and mitigation may apply to crimes committed in response to extreme external pressures that an ordinary (or “reasonable”) person would not be able to resist.¹⁵² Ordinary adolescents who live in high-crime neighborhoods are subject to intense social pressures and often tangible threats that induce them to join in criminal activity. In some contexts, coercion is so intense that only unusual teens resist the pressure. Moreover, unlike adults, adolescents as minors whose liberties are constricted due to their dependency; thus, they are not in a position to extricate themselves from their schools or their neighborhoods.

¹⁵⁰The provocation defense has been explained in these terms. Thus, sufficient provocation is evidence that the killing was not the product of bad character, warranting a reduction of the crime from murder to manslaughter. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUMBIA LAW REVIEW 1281 (1937)([T]he greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor's passions and his lack of self-control.. to the extraordinary character of the situation ... rather than to any extraordinary deficiency in his own character.”) Also, a defendant can introduce evidence of his previously established good character in mitigation at sentencing

¹⁵¹ Identity formation takes place in two stages: individuation in early adolescence and identity development in late adolescence and early adulthood. See W. Andrew Collins & Laurence Steinberg, *Adolescent Development in Interpersonal Context*,” in SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT, HANDBOOK OF CHILD PSYCHOLOGY 1003 (WILLIAM DAMON & RICHARD LERNER, EDS (2006)).

¹⁵²The defenses of duress and necessity involve extreme exogenous circumstances. Circumstances not extreme enough to excuse the defendant from responsibility may be introduced in mitigation at sentencing.

These circumstances are similar in kind to those that are involved in claims of duress, provocation, necessity, or domination by co-defendants. The source of mitigation on the basis of exogenous conditions is not purely developmental in nature, but they are a product of a dependency, which itself is grounded in immaturity. When adolescents cross the line to legal adulthood, the formal legal disabilities of youth are lifted. Young adults can avoid the situational pressures they face by removing themselves from criminogenic settings. Moreover, pressure to get involved in crime eases as normal maturation influences most individuals to move beyond the risky activities of youth. 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.¹⁵³

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The adolescent who commits a crime typically is not so deficient in her decisionmaking capacity that she cannot understand the harmful consequences of her conduct or appreciate its wrongfulness, as might be true of a mentally disordered person or a child. Nor are the circumstances of her social context as coercive as those that excuse defendants from criminal liability.¹⁵⁴ But the developmental and social factors that drive decisionmaking predictably contribute to choices that reflect immature judgment and unformed character and are made under social pressure. Thus youthful criminal choices have much in common with those of adults whose criminal conduct is out of character, whose decisionmaking capacities are impaired by emotional distress or mental illness or disability, or whose choices are were influenced by extremely coercive circumstances. As the Supreme Court recognized in striking down the juvenile death penalty in *Roper v. Simmons* in 2005, the criminal choices of adolescents deserve less punishment than do those of adults because they are shaped by developmental immaturity

¹⁵³The 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." Some commentators have argued that such a defense be recognized and available to adult lawbreakers who grew up in crime-inducing settings without inculcation in pro-social norms or opportunities to succeed in socially acceptable ways, on the ground that these social forces combine to constrain their freedom to avoid crime. Richard Delgado, "*Rotten Social Background*": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQUALITY. 9 (1985). at 63-65, 64 n.363. This defense generally has been rejected by lawmakers (rightly, we think), 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 importantly, perhaps, the defense threatens to dissolve the important but delicate line between free will and determinism, the boundary of criminal responsibility. Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1251-53 (1976). In contrast, recognition of social context as situational mitigation that is limited to juveniles as a class does not carry the same threat of unraveling the core of criminal responsibility.

¹⁵⁴Under duress doctrine, the defendant must show that he faced an immediate threat of death or serious bodily harm from which he could not reasonably escape. SEE BONNIE, ET. AL., CRIMINAL LAW at 488-89 .

and coercive social contexts.¹⁵⁵ A justice system that is committed to fairness, as embodied in the principle of proportionality, will punish adolescents less severely than adult offenders.

B. Why Retribution is Important

At one level, the conclusion that mitigation applies to the crimes of young offenders has modest implications for justice policy. As we have indicated, a regime dedicated to fairness could deal with juvenile and adult offenders in a unitary system and simply apply a “youth discount” to the sentences of juvenile offenders in recognition of their reduced culpability.¹⁵⁶ The argument for a separate juvenile justice system that implements developmentally-based policies aimed at reducing crime is not based on fairness and is unconcerned about the proportionality of sanctions. Therefore, given our emphasis on the social welfare value of evidence-based policies aimed at prevention, why is retribution or fair punishment important to the construction of optimal juvenile justice policies?

Before we explain the essential role of proportionality in a well-functioning model of juvenile justice, we should review briefly the difference between the law’s preventive and retributive purposes. Retribution focuses on the past criminal act which determines the amount of deserved punishment. The goal of crime prevention, in contrast, is future-oriented. Deterrence (specific and general), rehabilitation, and incapacitation all focus on the impact of correctional interventions on future criminal conduct and are not concerned with calibrating that response to the seriousness of the past criminal act or the culpability of the offender.¹⁵⁷ Thus, an offender who is judged to present a serious risk of re-offending may receive a longer sentence than another whose crime is more serious, but who is deemed less dangerous. Thus, taking proportionality seriously means not only that juveniles, due to their immaturity will be punished more leniently than their adult counterparts; it also means that young offenders who commit similar crimes should receive similar treatment on the basis of their crimes and culpability. Proportionality prohibits serious disparities in the treatment of young offenders on the basis of factors other than their criminal conduct.

Over the past century, retribution has been in and out of favor among lawmakers,

¹⁵⁵Justice Kennedy, drawing on our previously published work, described three features of adolescence that distinguish adolescents from their adult counterparts– diminished decisionmaking ability, vulnerability to external coercion from which they can not escape, and and because of the unformed nature of adolescent identity. *Roper v. Simmons*, 543 U.S. 551 at 567-70.

¹⁵⁶ See note 139 & 140 *supra*.

¹⁵⁷See generally *BONNIE, ET. AL.*, *supra* note 47 at 23-33.

reformers and scholars. The Progressive reformers who created the traditional juvenile court insisted that its purpose was solely to rehabilitate young offenders and that criminal responsibility and punishment played no role in delinquency dispositions.¹⁵⁸ For this reason, juvenile court dispositions were indeterminate—based on the individual offender’s treatment needs-- and, in theory, unrelated to the seriousness of the offense. In the 1970s and 1980s, reformers on both the left and right rejected the rehabilitative model as both ineffective and unfair. First, youth advocates favored proportionate sentences in the juvenile system that were shorter in duration than those imposed on adult criminals.¹⁵⁹ This approach emphasized accountability and fairness and rejected crime prevention as a dispositional goal.¹⁶⁰ More recently, alarm about public safety has resulted in a shift in emphasis toward prevention—particularly incapacitation, although punitive reformers also emphasized full accountability.¹⁶¹ Juvenile advocates have also focused on crime reduction in support of evidence-based community programs for young offenders. Recently, Professors Slobogin and Fondacaro have highlighted the importance of these programs in arguing for a regime dedicated solely to reducing crime and protecting the public.¹⁶²

Slobogin and Fondacaro reject retribution altogether as a legitimate purpose of juvenile justice policy; under their model, proportionality plays no role in determining correctional dispositions. Instead, their regime aims solely at specific deterrence; dispositions are determined on the basis of risk assessment, which they assert can be performed with substantial accuracy.¹⁶³ Slobogin and Fondacaro argue that evidence-based community programs are the most effective means of reducing juvenile crime, and apparently assume that most delinquency dispositions will

¹⁵⁸BEN LINDSEY & HARVEY O’HIGGINS, *THE BEAST* 144, 149 (reprint 1970).

¹⁵⁹FRANCIS ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN CRIMINOLOGY* (1964); Monrad Paulsen, *Fairness to the Juvenile Offender*, 41 *Minn.Law Review* 5(1957); Joel Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 *Wisconsin Law Review* 7.

¹⁶⁰The American Bar Association-Institute for Judicial Administration sponsored the most ambitious law reform project the Juvenile Justice Standards, which embodied this proportionate sentencing approach. Volumes included *Transfer between Courts, Adjudication, Dispositions, Delinquency, Sanctions, etc.* ABA-AJA JUVENILE JUSTICE STANDARDS (1980). See also FRANKLIN ZIMRING, *TWENTIETH-CENTURY FUND TASKFORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS: CONFRONTING YOUTH CRIME* (1978).

¹⁶¹The mantra, “adult time for adult crime” suggests a focus on full responsibility for juveniles, based on the seriousness of the offense.

¹⁶² Slobogin and Fondacaro, *supra* note 3 at 101, 113, 131. (Cites to ssrn version)

¹⁶³*Id.* at 125-26.

take this form.¹⁶⁴ But they concede that some youths who pose a risk to public safety must be incarcerated, and implicitly accept that, under their approach, incarceration might extend for the duration of juvenile court jurisdiction for youths deemed too dangerous to be in the community.¹⁶⁵ The judgment about the need for incarceration and its duration is independent of the seriousness of the crime and the culpability of the offender.¹⁶⁶ Thus a 10 year old could be picked up for shoplifting and, based on a risk assessment, confined for many years.¹⁶⁷ In short, not only are sanctions not reduced for juveniles on the basis of immaturity, but dispositional duration for less serious crimes is not limited by what would be proportionate punishment for adults¹⁶⁸.

There is much to admire in this provocative reform proposal. Slobogin and Fondacaro employ social science research in a sophisticated way, emphasizing the merits of evidence-based programs and locating these programs at the core of their regime. Moreover, they reject the transfer of youths to adult court,¹⁶⁹ although it is unclear how this could be avoided for youths who threaten public safety in ways that can not be dealt with in the juvenile system. But, although their aims are benign, the policy model offered by these scholars is defective in ways that are not so different from the flaws that led to the collapse of the traditional rehabilitative model. Open ended indeterminacy, whether based on risk assessment or diagnosis, is unsatisfactory because it poses a substantial risk of unfairness that inevitably threatens the legitimacy of any regime aimed solely at prevention.

Under a pure prevention model, the youth's criminal act functions as a threshold condition for state intervention,¹⁷⁰ but does not otherwise determine the form or duration of the

¹⁶⁴Id. at 116.

¹⁶⁵Id. Slobogin and Fondacaro assert, optimistically we think, that only youths who pose an imminent risk of serious harm would be confined under their model. Confinement is subject to frequent review for continuing risk, terminating of necessity at the age that juvenile court jurisdiction ends.

¹⁶⁶ The authors require a crime as a predicate for intervention, on the basis of the legality principle; thereafter the nature and duration of intervention are based on risk assessment. Id. at 153.

¹⁶⁷ This possibility is less apocryphal than it seems, as very young offenders are more likely to persist in criminal activity than older teens. See Scott & Steinberg, *supra* note 2 at 252-257.

¹⁶⁸For serious crimes, the proportionate adult sentence would likely extend beyond the end of juvenile court jurisdiction, which is the durational limit under Slobogin & Fondacaro's model. See id at 107.

¹⁶⁹ Id. At 114.

¹⁷⁰Note 166 *supra*.

correctional disposition. Although the crime itself provides important information in the risk assessment, many other factors unrelated to culpability and outside the control of the youth may also be relevant. An accurate risk assessment may conclude that one youth is more promising candidate for a community-based program than another whose crime was identical because the former has more competent or invested parents, lives in a lower-crime neighborhood, has fewer learning deficits, is involved in a sport, or has no antisocial siblings. Such factors (particularly parental capacities) may indeed be predictive of the success or failure of evidence-based programs, but to base the decision of whether the youth should stay in the community or be confined in a correctional facility on considerations completely unrelated to the underlying crime is problematic on grounds of unfairness.

The fairness problem is magnified by the likelihood that factors influencing risk assessment are linked to race, socio-economic status and age. Thus, minority youths, youths from single-parent homes, or those who live in poverty may be less likely to have supportive families or other resources or attributes that are associated with lower risk of re-offending or positive program outcome.¹⁷¹ If so, they may be less likely than their more fortunate peers to qualify for community programs and more likely to be incarcerated. Moreover, substantial evidence indicates that youths who are arrested at a very young age are at significantly higher risk of persisting in criminal activity than those who first become involved in crime in mid-adolescence.¹⁷² Under a pure prevention regime, a 10 year old arrested for theft who has a history of family, behavioral and academic problems might be a candidate for correctional interventions that extend for as long as he is under juvenile court jurisdictions--into his twenties. Thus, the least culpable juveniles under conventional criminal law principles would be subject to the most intensive interventions in response to their crimes. While proponents may insist that these discrepancies are acceptable because the dispositional purpose is not punishment but crime reduction, this will likely offer little comfort to youths subject to more restrictive treatment than their peers.

¹⁷¹Slobogin and Fondacaro recognize that delinquency is linked to living in poor high-crime neighborhoods and that schools and families are important contextual factors affecting criminal behavior. *Id.* at 121-123. Thus, youths in lower socio-economic neighborhoods (who often will belong to racial and ethnic minorities) who have weak family support and go to inferior schools are likely to warrant more intensive interventions *ex ante* under a pure prevention approach than middle class youths, and risk reduction may pose more of a challenge. The effectiveness of many programs such as Functional Family Therapy and MST depends on parental engagement.

¹⁷²Age of first arrest is a key prognostic indicator of re-offending; the small number of youths who are arrested before age 12 are far more likely to become career criminals than those whose first arrest is in mid-adolescence, particularly very young offenders who have a history of problem behaviors beginning early in childhood. Terrie Moffitt describes this group as “life-course persistent” offenders.” See Moffitt, *supra* note 11. Under a pure prevention model, risk reduction interventions for these offenders are likely to be intensive and of extended duration.

To this point, we have focused on dispositional disparities that are likely to result from accurate and unbiased risk assessment. But risk assessment is far from an exact science and will always rely on the subjective judgments of justice system decisionmakers.¹⁷³ The possibility that decisionmakers may exaggerate the risk of re-offending by youths who belong to racial and ethnic minority groups is substantial. Much has been written about racial and ethnic bias in the justice system; disproportionate minority contact and confinement are broadly recognized as a serious threat to the legitimacy of the system.¹⁷⁴ Honest judges, probation officers and other agents may engage in unconscious racial and ethnic stereotyping in assessing the risk of offending by minority youths, with the result that these juveniles are subject to more restrictive sanctions than accurate risk assessment would dictate.¹⁷⁵ Some research evidence indicates that a higher percentage of minority youths are transferred by judges than would be subject to adult court jurisdiction on the basis of the crime alone.¹⁷⁶ A regime that bases dispositions solely on risk prediction may well result in greater disparities in the treatment of white and minority youths.

This problem can be substantially mitigated by incorporating retribution as a limiting principle in juvenile crime regulation. Some scholars have embraced retribution, not as the sole (or even primary) purpose of state intervention in responding to criminal conduct, but as an important check or side constraint on the power of the government to deprive individuals of liberty.¹⁷⁷ Some criminal law theorists endorse strong retributivism, under which sentences *must* be proportionate to the seriousness of the offense and the culpability of the offender—no more, no less.¹⁷⁸ Under a weaker retributivist approach, proportionality is important in limiting the maximum severity and duration of criminal sentences and in grading offenses on the basis of

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¹⁷⁴Differences in arrest rates, processing and incarceration between minority youths and others is well established. See generally OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE, DARNELL HAWKINS & KIMBERLEY KEMPF-LEONARD, EDS. (2005)) (edited volume examining racial disparities in the processing and punishment of juveniles).

¹⁷⁵George Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AMERICAN SOCIOLOGICAL REVIEW 554(1998); Sandra Graham & Brian Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, LAW AND HUMAN BEHAVIOR 28 (2004): 483–504, 487–501.

¹⁷⁶See Barnoski, *Changes in Washington State's Jurisdiction of Young Offenders*, supra note 26.

¹⁷⁷See discussion in note _ supra.

¹⁷⁸Michael Moore is in the group. He argues that it is respectful of the moral worth of the criminal actor to hold him to the same standard that we would apply to ourselves. Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS, (FERDINAND SCHOEMAN, ED.,(1987)).

harm. On our view, the latter approach is compatible with a model of juvenile crime regulation that incorporates retribution as a limiting principle, but only if it avoids excessive disparities among similarly situated young offenders. Thus under the developmental model, dispositions may vary somewhat on the basis of preventive factors, but the range should be limited to avoid unfairness.

This dual approach is superior to a pure prevention model in several ways. First, it acknowledges that a part of society's purpose in sanctioning criminals is punishment—holding youths accountable for the harms they cause. Accountability is important to public acceptance of any regime of crime regulation.¹⁷⁹ The traditional model of juvenile justice collapsed in part because proponents insisted that youths were children who were not responsible for their crimes, a claim that ultimately had little public support. Second, young offenders themselves are likely to benefit from the regime's emphasis on accountability. An important developmental lesson of adolescence is learning to accept personal responsibility for one's choices; this lesson is particularly important when choices cause harm to others.¹⁸⁰ This lesson is lost under the pure prevention approach which purposely obscures the connection between the disposition and the underlying crime. Finally, there is evidence that offenders are more likely to comply with court-ordered sanctions and less likely to re-offend when they believe that they have been subject to fair proceedings. Thus, a regime that permitted unfair sanctioning in the service of prevention has the potential to undermine some juveniles' sense of "procedural justice," thereby elevating the risk of future criminal behavior.¹⁸¹

¹⁷⁹ H.L.A. Hart argued that the criminal law should incorporate retribution because the norm of imposing responsibility for causing harm is well established and accepted in our society. "The law should ... reflect in its judgments on human conduct distinctions that not only underly morality, but pervade the whole of our social life. H.L.A. Hart, *supra* note 47 at 180-183. See also Paul Robinson and John Darley, *The Utility of Desert*, 91 NORTHWESTERN L. REV. 453 (1997) (arguing that a utilitarian system of criminal justice should be based on principles of desert, as these define and reinforce norms against offending and promote compliance).

¹⁸⁰ As individuals mature into and through adolescence, their conceptions of morality change. At around age 13, there is a normative shift in moral reasoning from an orientation in which individualism and instrumentalism predominate to one in which moral behavior involves "living up to what is expected by people close to you or what others generally expect of people in your role. "Being good" is reflected in having good motives [and] showing concern for others, and in maintaining mutual relationships through trust, loyalty, respect, and gratitude. At this stage, the focus in moral reasoning shifts from self-interest to fulfilling others' expectations and concern with one's position in others' eyes, as well as maintaining positive interpersonal relationships with others" See N. Eisenberg, A. Morris, B. McDaniel, and T. Spinrad, *Moral Cognitions and Prosocial Responding in Adolescence* 231 *Handbook of Adolescent Psychology* (3rd ed.) (R. Lerner and L. Steinberg (eds.)) (2009).

¹⁸¹ Alex Piquero, Jeffrey Fagan, Edmund Mulvey, Laurence Steinberg & Candice Odgers, *Developmental Trajectories of Legal Socialization among Serious Adolescent Offenders*, 96 J. CRIM L & CRIMINOLOGY 101 (2006).

Third, in a regime that adopts retribution as well as prevention, dispositions will be predictable and transparently based on the youth's criminal conduct. Within a limited range, youths who commit similar crimes will receive sanctions of similar duration, and none will be subject to dispositions that exceed what is fairly deserved on the basis of the youth's culpability and the seriousness of the offense. This is important as a matter of individual justice, but, as we have suggested, it is also important as a means of avoiding disparate treatment of offenders on the basis of race and ethnicity. The indeterminacy of dispositions in the traditional juvenile court became a target of criticism not only from conservatives, who thought the system was too lenient, but also from youth advocates, who objected to the lack of fair procedures and also to disparities and excessive sanctions justified by the avowed rehabilitative purpose.¹⁸² Under a regime that insists that its purpose is not punishment, but crime prevention, the government is free to deprive offenders of liberty for so long as is needed to protect public safety. This will vary widely among offenders; for some it may result in no intervention; for others the deprivation of liberty may be far greater than is warranted on the basis of their criminal conduct.¹⁸³ This problem is reduced through the adoption of retribution as a limiting principle.

Under our developmental model of juvenile justice, the reduced culpability of most young offenders will be recognized through correctional interventions that are shorter in duration than those of similarly situated adult offenders. With the duration set, the disposition can and should aim to promote social welfare by rehabilitating the youth, if necessary, and enhancing his prospects for a non-criminal adulthood. Thus, determinate sanctions, based on both the young offender's reduced culpability and the seriousness of the crime, should be carried out in settings that promote healthy development and reduce the likelihood of future offending—in the community, if possible, or in a residential facility if necessary.

C. Are Retribution and Prevention Compatible?

The aims of fair and proportionate punishment and promotion of social welfare through crime prevention are very different and sometimes will be in tension with one another. Can both purposes actually be accommodated in a model of juvenile justice grounded in developmental knowledge? In most cases, we think the answer is “yes.” Presumptively, as we explain above,

¹⁸²See note 159 *supra*, citing criticisms of traditional court as harmful to youths. In *In re Gault*, the landmark opinion holding that youths in delinquency proceedings have a right to counsel and to other procedural protections, the defendant was adjudicated delinquent and sent to a secure facility for up to six years for a minor misdemeanor. *In re Gault*, 387 U.S.1 (1967).

¹⁸³Slobogin and Fondacaro point with approval to *Kansas v. Hendricks*, 521 U.S. 346 (1997), which upheld a law authorizing confinement of sex offenders for treatment after their sentences are completed for so long as they pose a threat of future sex offending. *Supra* note 4 at 141-144.

the *duration* of sanctions is based on the harm of the act and the immaturity of the youth, and the *content*— what happens to the youth during the period that he is in state custody— is determined by the crime prevention goals we have described. Put differently, retribution as a limiting principle simply restricts the amount of time allowed for the state to undertake its crime reduction efforts as well as the harshness of the intervention. Proportionality does not require precisely measured punishment; as we have suggested, it is compatible with a regime that authorizes a limited range of sanctions for a given offense.

Occasionally a tension can arise between the developmental model's two goals. For example, a youth may commit a very serious crime that warrants incarceration in a residential facility on proportionality grounds, but a community program is less costly and, in his case, may be more likely to minimize the likelihood of recidivism and promote his healthy development. In another case, removal of the youth from his family and neighborhood for an extended period may offer the best hope of avoiding continued involvement in criminal activity, but represents a more severe sanction than is appropriate for his crime. Moreover, as we suggested above, public safety considerations may warrant the secure placement of *some* individuals convicted of a particular serious crime—but not others. Should high-risk and low-risk youths receive the same sentences for their similar crimes? The pure prevention approach avoids these clashes between prevention and retribution by simply excluding retribution and proportionality as considerations.

Perhaps the most pronounced tension between preventive and retributive purposes arises in cases involving very young offenders— aged 12 and under, who have a history of behavioral problems. Based on their immaturity, these youths are the least culpable of juvenile offenders; thus, fairness dictates that they should receive the most lenient interventions. But their prognosis for reoffending is far bleaker than is that of older first offenders.¹⁸⁴ Thus, under a regime that cares about prevention, they should receive intensive interventions; indeed, without such intervention, they are likely to offend again. Reconciling retribution and prevention with this category of young offenders may be difficult, but we are not comfortable with grossly disproportionate dispositions, based on risk assessment. On our view, the tension can be ameliorated by combining proportionate correctional dispositions with social, educational and psychological services that are available to children not in the justice system.¹⁸⁵

¹⁸⁴See note 167 *supra*.

¹⁸⁵The state has the power to intervene to promote the welfare of children whose parents can not provide adequate care and guidance. Thus special educational services, counseling, and family support services including foster care can be provided to these youths and their families. See SCOTT & STEINBERG, *supra* note 2 at 250 to 260.

These hard questions are not unique to the juvenile system; they also arise in criminal sentencing.¹⁸⁶ In that context, courts struggle to impose fair punishment while attending to crime prevention concerns. Many (although not all) retributivists would agree that excessive punishment (more than is deserved on the basis of the offender's harm and culpability) is a greater affront to fairness than insufficient punishment.¹⁸⁷ On this view, punishing a youth less harshly than he deserves as a means of promoting his welfare and reducing the social cost of his crime may be more acceptable than imposing a harsher sentence than is deserved in the interest of reducing the likelihood that a young offender will become involved in criminal activity in the future. However, as we have emphasized, an important element of fairness is that similar cases be treated similarly; thus we are not sanguine about a regime in which one armed robber is sent to a correctional institution (the deserved punishment), while another receives a community sanction – based on judicial judgments about risk and potential for rehabilitation. This is particularly worrisome to the extent that racial and ethnic biases play a role in sentencing. These concerns lead us to conclude that a presumption favoring proportionate punishment is justified, and that in hard cases, fairness should trump social welfare.

We recognize that policymakers may reach a different conclusion – and that these are difficult choices. Fortunately, cases involving normative adolescent offenders that truly present a conflict between fairness and social welfare are likely to be infrequent. In general, the research evidence supports the greater use of community sanctions in dispositions for juveniles than for adults, on grounds of social welfare, but *also* on grounds of proportionality. Modest sentence variations based on social welfare concerns acknowledge the multiple goals that must be accommodated in a satisfactory and stable system without undermining fairness excessively. A regime that is committed to the recognition of adolescents as a distinct category, and to the presumptively more lenient punishment of juveniles than adults, embodies the principle of proportionality far better than the contemporary regime. The interest of justice will be served generally by reforms that reinforce and maintain a sturdier boundary between juveniles and adults, as long as sanctions are roughly calibrated on the basis of harm and culpability.

Conclusion

¹⁸⁶ Criminal law casebooks pose this classic dilemma by presenting students with several cases in which actors commit the same crime with different levels of culpability. See e.g. BONNIE ET. AL., *supra* note 44 at 3 to 6 (several cases involving the death of a child left in a car).

¹⁸⁷ Michael Moore favors imposing proportionate punishment and opposes leniency. See Moore, *supra* note 177.

Crime prevention and fair punishment are the two important purposes of government response to criminal conduct; we have argued that a satisfactory system for regulating juvenile crime must satisfy both purposes. Scientific knowledge about adolescent development provides the basis for an approach to legal regulation that promotes social welfare by reducing crime at a reasonable cost and that also is fair to young offenders in recognizing that they are less culpable than their adult counterparts.

Our analysis challenges the assumption underlying the recent punitive reforms that the public interest is best served by a response to juvenile crime that emphasizes incarceration and deals with many young offenders as adults. To the contrary, policies that recognize that correctional settings are developmental contexts which can inhibit or facilitate healthy adolescent development in most young offenders are likely to be more effective at reducing the social cost of juvenile crime. Substantial evidence supports that research-based correctional programs in the juvenile system are likely to reduce recidivism and facilitate the transition to normative adulthood more effectively than incarceration and at lower financial cost to society.

But a justice regime that promotes social welfare will not be adequate unless it also incorporates principles of fair punishment. Our analysis demonstrates that fairness will be served if juvenile sanctions are proportionate, based on the reduced blameworthiness of the young offender and the seriousness of the offense committed. Retribution functions as a critically important limiting principle, serving both to protect young offenders from excessive punishment and to assure that like cases are treated similarly. This parity guards against dispositional decisions that may disadvantage minority and low income youths, due to bias or even accurate risk assessment. Ultimately, the legitimacy of juvenile crime policy depends on public perception that society is subjecting all young offenders to fair punishment.