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Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, RETHINKING JUVENILE JUSTICE, ELIZABETH S. SCOTT & LAURENCE STEINBERG, HARVARD UNIVERSITY PRESS, 2008; COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 09-194 (2008).

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Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 09-194

RETHINKING JUVENILE JUSTICE

(version of Dec. 11, 2008)

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RETHINKING JUVENILE JUSTICE

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Harvard University Press
Cambridge, Massachusetts
London, England
2008

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CHAPTER 1

Introduction: The Challenge of Lionel Tate

In 1999 a twelve-year-old Florida boy named Lionel Tate killed Tiffany Eunick, a six-year-old neighbor girl half his size. According to initial press reports, Lionel, an avowed fan of professional wrestling, had executed a knee drop on Tiffany's chest during a wrestling match with her. Lionel later changed his account and admitted that he jumped down from a staircase onto his younger playmate. In any event, he broke the girl's ribs, fractured her skull, and lacerated several internal organs; the consequent hemorrhaging caused her death.¹

Two years later, Lionel was tried as an adult on charges of first-degree murder. The prosecution offered him a plea bargain of a relatively short sentence in a juvenile facility followed by probation. On the advice of his mother, Lionel turned down the plea offer and opted to go to trial. He was convicted and sentenced to life in prison without parole—reportedly the youngest person to receive such a sentence in modern American history. According to news stories, the prosecutor said that he had no choice but to seek this sentence, given Florida law and the extent of Tiffany's injuries, which some took as evidence that her death was not accidental.²

Public outcry was immediate and strong at the severity of the sentence for a crime committed by a twelve-year-old.³ Advocates for the boy insisted that the killing was accidental and that Lionel

did not pose a threat to society. In addition, many questioned whether Lionel was competent to stand trial, raising concerns about the fairness of adult criminal adjudication for a (by then) fourteen-year-old. Grassroots groups appealed to Florida Governor Jeb Bush, the Pope, and the United Nations to intervene on Lionel's behalf. Although many speculated that the governor would intervene and commute Lionel's sentence, this did not happen, and at age fourteen Lionel entered prison to begin serving his life sentence.

Lionel appealed, challenging the verdict on several grounds, and in December 2003 an appellate court reversed his conviction on the ground that the trial court should have ordered an assessment of Lionel's competence to stand trial before proceeding.⁴ This result pleased advocates who had opposed the verdict, but some were troubled. Tiffany's family and the prosecutor appeared on television talk shows, expressing disappointment at the court's decision. The following month, Lionel was released from prison under an agreement not unlike the one he had originally declined; he pled guilty to second-degree murder and received credit for the time he had already served—three years in prison. Under the new agreement, Lionel, by then seventeen, was sentenced to a year of house arrest and ten years' probation. He was released in January 2004.

Unfortunately, Lionel's contact with the justice system did not end with his victory in the appellate court. In September 2004, just nine months after his successful appeal, sheriffs' deputies discovered the boy, still under house arrest, outside his home with a knife in his possession, a clear violation of his parole. A judge extended his probation to fifteen years. Then, in May 2005, Lionel was arrested for holding up a pizza delivery-person at gunpoint. He was charged with armed robbery and violation of probation. In May 2006, Lionel was sentenced to thirty years in prison for having violated his probation; according to news reports, the judge told Lionel, "In plain English, Lionel Tate, you've run out of chances. You do not get any more."⁵

The Lionel Tate story is a good place to begin a discussion of contemporary juvenile justice policy. What one should make of the story, however, is not immediately clear. Lionel was an immature youth when he killed Tiffany, but one who caused the gravest of harms. Was he as culpable as a twenty-year-old killer would have been? Should he have received the same punishment as an adult, or was the sentence that the prosecutor proposed at the outset fairer and more appropriate for a twelve-year-old? And does Lionel's post-release behavior shed any light on the right answers to these questions? On the one hand, his subsequent behavior could be interpreted as evidence that Lionel was a dangerous criminal who *should* have been locked up for life, and that the benign view that he was an immature youth who killed Tiffany accidentally was simply wrong. On the other hand, Lionel's conduct at age seventeen does not resolve the question of whether a twelve-year-old deserves the same punishment as an adult. Moreover, the three years Lionel spent in prison may have affected him in adverse ways, molding a wayward adolescent into a criminal; Lionel might have been a different person at age seventeen had the disposition for his crime been different. Either way, the case suggests just how difficult it is to construct a juvenile justice policy that responds satisfactorily to the multiple challenges that society faces in dealing with youth crime. An optimal (or even adequate) juvenile crime policy must pursue and balance several goals. These include fair punishment of young offenders, which means recognizing their immaturity and yet also holding them accountable for their crimes. The goals also include fair hearings, as well as dispositions that will enhance rather than harm the future prospects of youths in the justice system and reduce rather than increase the likelihood that they continue their criminal activities. Last, but certainly not least, juvenile justice policy will fail unless it satisfies the community's need for retribution and assures adequate protection of public safety. Accommodating the tensions among these diverse policy goals is a daunting challenge.

Youth Crime Policy in the Late Twentieth Century: A Period of Transformation

Lionel Tate's case unfolded during a period in which American juvenile justice policy was undergoing dramatic changes. In less than a generation, a justice system that viewed most juvenile lawbreakers as youngsters whose crimes were the product of immaturity has been transformed into one that often holds young offenders to the same standard of criminal accountability it imposes on adults. Under the traditional legal regime, the transfer to criminal court of a minor charged with a crime was a rare occurrence. That is no longer the case. Through legal reforms in almost every state, youths barely in their teenage years can be tried and punished as adults for a broad range of crimes. Florida law is not unusual in providing that twelve-year-olds accused of murder can be tried and punished as adults. Although such cases are rare, a youth of Lionel's age who is charged with murder could be subject to trial in criminal court and sentenced to prison in most states.⁶ Other reforms have broader impact. In some states, teenagers in mid-adolescence are categorically excluded from juvenile court—either in general or when charged with designated felonies. Moreover, sentences imposed by juvenile courts have become longer—closer to those received by adult criminals.

Politicians and the media tend to focus on juveniles like Lionel who are accused of murder. In general, public alarm about violent youth crime has been an important catalyst for legal reforms. But such reforms extend also to youths charged with less serious crimes. Of the more than 250,000 individuals under eighteen years of age who are tried as adults each year in the United States, only about half are accused of violent crimes—and a *very* small percentage are charged with murder.⁷ In many states, youths charged with selling drugs or stealing property fall under the jurisdiction of crim-

inal court. Until 2005, Illinois had a particularly strict law under which any person age fifteen or over who was apprehended for selling drugs near a school or public housing project was automatically transferred to criminal court, regardless of his or her prior record.⁸ The eroding distinction between the justice system's treatment of juveniles and of adults represents a pervasive and far-reaching policy shift that has touched the lives of many young people. The shift marks a dramatic departure from nearly a century of American juvenile justice policy.

The policy changes are not limited to an expansion of criminal court jurisdiction over juveniles. During the past twenty-five years, the juvenile justice system itself has come to treat young offenders with increasing severity. Incarceration has replaced community probation as a standard disposition in many cases, and youths who are adjudicated in juvenile court can receive long sentences that are completed well into their adult years, often in prison. Juvenile convictions also increasingly have repercussions in adulthood, in the form of criminal records or enhanced sentencing. Moreover, the system's reach is now appreciably broader, such that more juveniles are being referred to the justice system for less serious crimes. In response to fears about school violence, for example, police are routinely called into schools to respond to student misconduct.⁹ Under "zero-tolerance" policies, students who might have received a short school suspension a few years ago are sent to juvenile court today.¹⁰ Many cities have enacted curfew ordinances as a crime control tool; youths out late at night are charged with violations, and chronic violators can receive real penalties.¹¹ In other words, the normative misbehavior of adolescence—such as fighting in school or staying out too late at night—are increasingly being handled in court rather than at the kitchen table or in the principal's office.

The Traditional Court under Fire:
The Collapse of the Rehabilitative Ideal

What explains the growing trend for young offenders to be processed and punished as adults? Why has the boundary between the juvenile and the adult justice systems, intact for almost a century, eroded in less than a generation? In part, it is important to recognize that the reforms of juvenile crime regulation were part of a larger trend toward more punitive justice policies. A backlash against the liberal policies of the 1960s (the era of the Warren court and of sparse use of imprisonment) began in the 1970s. By the 1980s, prison rates were skyrocketing. As national crime rates rose in the late 1980s and early 1990s, politicians competed to demonstrate that they aimed to get tough on crime, whether the criminals were adults or juveniles.

Supporters of the juvenile system reforms suggest that they simply provided a straightforward response to the sharp increase in violent youth crime that began in the late 1980s—an increase that made it glaringly evident that the juvenile justice system was inadequate to the task of protecting the public from the threat of young “super-predators.”¹² According to this view, modern juvenile offenders are very different from young troublemakers of one hundred or even fifty years ago. The juvenile court, established at the turn of the last century as a key part of the Progressive Era’s social reforms, may have met the needs of a simpler time when kids got into schoolyard fistfights, but the system has failed to deal with today’s savvy young criminals who use guns to commit serious crimes.¹³ Even seemingly innocuous behaviors (schoolyard fistfights, for example) warrant serious attention because they are precursors to violence. On this view, the recent law reforms simply recognize that the juvenile court is an outmoded institution that cannot meet the needs of contemporary criminal justice.

There is some truth to this account. The crimes of contemporary juvenile offenders *are* different from those perpetrated by young delinquents in earlier times, in part because of the widespread availability of firearms beginning in the 1980s.¹⁴ Although there is little evidence that young criminals today are more prone to violence than were their predecessors owing to the “moral poverty” of modern culture,¹⁵ the injuries that modern youths inflict on their victims are more likely to be fatal. Predictions of a coming wave of super-predators and “fledgling psychopaths” have proved to be exaggerated, but there is no question that lethal violence committed by juveniles increased markedly during the 1980s and early 1990s.¹⁶

Critics of the traditional juvenile court pointed to the increase in violent crime as justification for less forgiving justice policies. Indeed, many argued that the lenient policies and practices of the juvenile court were the *cause* of the youth crime problem, because young criminals assumed that their punishment would not be severe.¹⁷ Although youth advocates strongly challenged this proposition, the criticism was generally well received by a public already disillusioned with the juvenile court and the rehabilitative model on which it was based.

Some of the criticism of the traditional system was quite justified. By the late 1980s, two key premises of the rehabilitative model had been largely discredited. The first was that young offenders were blameless but misguided children who were simply in need of redirection with the guidance of the court. Although this sympathetic image of delinquent youths probably served a useful political purpose in the early twentieth century when social reformers were promoting their new court to legislatures and the public, it later appeared naive when applied to older youths committing violent crimes. The second premise, related to the first, was that the sole purpose of state intervention in delinquency cases was to promote the welfare of delinquent youths through rehabilitative interventions. Though ardently defended by the architects of the juvenile

court, this premise also turned out to be deeply flawed. It rested implicitly on an optimistic prediction that rehabilitation would “cure” young offenders of their criminal propensities, a prediction that allowed the Progressive reformers to avoid confronting the public’s interest in protection from youth crime. When it became clear that juvenile correctional programs were failing to reduce recidivism, the conflicting interests of the state and of youths involved in crime became apparent. The rise in juvenile crime was seen as evidence not only that the juvenile justice system was too soft on young criminals, but also that the system’s well-intentioned rehabilitative interventions were completely ineffective.

Even before the dramatic reforms of juvenile crime policy in the 1990s, the juvenile court had already undergone substantial changes from the model envisioned by the Progressive reformers. In the 1960s, it was disillusioned youth advocates (not politicians concerned about public safety) who launched a far-reaching reform initiative. These critics argued that the problem with the juvenile justice regime was not the failure of the rehabilitation model, but the failure of the system to deliver the treatment it promised while at the same time denying juveniles the procedural rights provided to adult criminal defendants.¹⁸ In 1967, the Supreme Court responded to this challenge in *In re Gault*, a landmark opinion that extended to juveniles in delinquency proceedings some of the same constitutional rights that defendants in criminal proceedings enjoy under the Due Process Clause of the Fourteenth Amendment—most important, the right to an attorney.¹⁹

In the view of many observers, *Gault* marked the beginning of the end of the traditional juvenile court. To be sure, at least two decades would pass before there were serious challenges to the idea that juvenile offenders should be subject to more lenient treatment in the juvenile system. *Gault* nonetheless dealt a severe blow to the already faltering rehabilitative model. Moreover, in the 1970s and 1980s no coherent contemporary rationale for maintaining a sepa-

rate juvenile justice system emerged to replace the traditional framework.²⁰ Although youths continued to be processed in the juvenile system, it was not clear what its purposes should be or how it should differ from the adult system. In short, the American juvenile justice system was floundering and in search of a rationale for its existence. In this environment, when violent juvenile crime became a hot issue in the late 1980s, the public and lawmakers were ready for radical reform.

Youth Violence and Law Reform as Moral Panic

Advocates for tougher laws governing youth violence focused on three themes: first, that young offenders were not children but dangerous criminals; second, that violent juvenile crime was epidemic, partly due to the laxity of juvenile court dispositions; and third, that rehabilitation was a dismal failure, at least when it came to reforming serious juvenile offenders.²¹ A growing chorus of angry critics argued that youth crime policy should focus primarily (or even exclusively) on the goal of protecting the public. These critics ridiculed the juvenile system for coddling youths, whom they depicted as hardened criminals who deserved “adult time for adult crime.” Albert Regnery, head of the Office of Juvenile Justice and Delinquency Prevention during the second Reagan administration, offered a typical comment: “Although there may be a good reason to give a more lenient sentence to a first offender, there is no justification for punishing an offender less simply because he is sixteen.”²²

Youth advocates who challenged the punitive reforms did not deny that public safety was an important consideration in responding to juvenile crime. Many of these advocates, however, tended to invoke the paternalistic rhetoric of the traditional juvenile court and characterized delinquents as children who were victims of poverty and racism.²³ In the polarized debate that unfolded during

the 1990s, participants on both sides seemed to assume that youths charged with crimes would either be treated as children in juvenile court or be tried and punished as adults. Given this choice, lawmakers responded by opting for public protection over leniency and by redefining many adolescent offenders as adults.²⁴

Although supporters saw the punitive law reforms as a coherent policy response to a new generation of dangerous young criminals, closer inspection reveals that these policy changes, even when driven by legitimate concerns, have often been adopted in a climate of fear and, sometimes, near hysteria. Indeed, juvenile crime policy has been transformed by a process that has the hallmarks of what sociologists describe as a “moral panic,” in which politicians, the media, and the public reinforce each other in an escalating pattern of alarmed response to a perceived social threat.²⁵ Other features of a moral panic are evident in the response to juvenile crime that has led to the reforms, such as intense public hostility toward young offenders, exaggerated perceptions about the magnitude of the threat, and the conviction that drastic measures are urgently needed. For example, rigid “zero-tolerance” policies were implemented on a widespread basis to protect American schoolchildren in response to the school shootings of the 1990s, although the probability of an American student being murdered while in school is lower than that of being struck by lightning.²⁶ Moral panics are often triggered by highly publicized events; in the context of juvenile justice reform, the events are usually horrendous crimes committed by young perpetrators. In California, for example, reports of drive-by shootings by gang members that killed innocent bystanders generated enthusiasm for a punitive referendum expanding criminal court jurisdiction over juveniles.²⁷

Although moral panics subside in time as the perception of the threat recedes, the impact can be enduring when lawmakers rush to protect the public through legislation and policy change. Moreover, once the legislative reform process is initiated, it seems to take

on a life of its own. In many states, reform initiatives triggered by fears of violent youth crime have led to wholesale changes in juvenile justice policy, resulting in criminal court jurisdiction over youths charged with a broad range of nonviolent crimes, as well as the violent offenses that were initially targeted.²⁸ What has been missing, for the most part, is the kind of thoughtful deliberation and consideration of consequences that one would expect to inform legal and institutional changes of such sweeping importance.

A Window of Opportunity

After more than a decade of steadily declining juvenile crime rates, the moral panic finally seems to have subsided, leaving many people feeling uneasy about the dramatic policy changes that occurred and uncertain about the soundness of the reforms. As we discuss in a later chapter, recent polls indicate that the public opposes adult prison for most juveniles and favors rehabilitative interventions even for serious first-time juvenile offenders so long as they are held accountable for their crimes.²⁹ Even some enthusiasts for getting tough on kids seem a bit embarrassed at the punitive way the law has dealt with some young offenders. For example, John DiIulio, who coined the term “super-predators” in the mid-1990s, recently expressed regret at this characterization of young offenders and acknowledged that his predictions about the growing threat had not come to pass.³⁰ Legal commentators increasingly have challenged the punitive reforms, pointing out that juvenile justice policy stands out as a glaring anomaly in the legal regulation of minors: In virtually every other area of legal regulation, adolescents (and especially younger teenagers) are *not* treated like adults.³¹

There is also evidence that lawmakers are having second thoughts about policies that treat youths like adults, particularly as they begin to internalize the budgetary impact of tough sanctions. Recent legislative and policy reforms in states as diverse as Illinois, New

Hampshire, Connecticut, and California indicate that the pendulum may be swinging back toward a more moderate approach. In 2005, for example, Illinois abolished the statute under which youths charged with selling drugs near a school were automatically tried as adults, partly in response to evidence that the statute was enforced almost exclusively against African American youths.³² The recent Supreme Court decision in *Roper v. Simmons*, abolishing the juvenile death penalty, is further evidence of this trend.³³

This period of relative calm provides an opportunity to step back and evaluate the recent punitive reforms and, if they are unsatisfactory (as we shall argue), to devise a model of juvenile justice that can better serve the needs of society in the twenty-first century. Doing so seems particularly important at this time; juvenile crime rates have begun to climb slightly in the past year or two, and, if we are to avoid a new wave of reforms based on moral panic, policy makers must have a framework on which to build policies that are both sensible and fair. We undertake this challenge.

At the outset, we emphasize that we think the question of how society should respond to juvenile crime is much harder than either zealous youth advocates or defenders of punitive policies acknowledge—and we admit that we have no easy solutions to offer. Although we argue that most adolescents should not be subject to the same procedures and punishment as adults, we recognize the legitimacy of the concerns about violent youth crime that drove the reforms. Social scientists continue to debate what caused the escalation of serious juvenile crime that led to the punitive reforms, but the fact remains that violent crime *did* increase during the 1980s and early 1990s, and the availability of inexpensive handguns made the crimes more lethal and the young offenders more dangerous. In the early 1990s, homicides by juveniles were at an all-time high, several times the number in 1970.³⁴

Furthermore, in light of research indicating high recidivism rates among serious juvenile offenders, the argument that the juvenile

justice system was doing a poor job of rehabilitating violent young criminals is hard to refute; in truth, the lack of confidence in the system and in the rehabilitative model of juvenile justice was warranted. The response of some youth advocates to public concerns about youth crime—minimizing the threat, charging racism, and clinging to an outmoded image of young offenders as children—has not been helpful. Protecting the public from violent youth crime must be a core concern of a viable juvenile justice policy. At the same time, we aim to persuade the reader that a justice regime that focuses narrowly on public safety and that fails to attend to the differences between juveniles and adults ultimately will be unsatisfactory.

The Psychology of Adolescence and the Regulation of Crime

Adolescents are different from adults—and juvenile offenders are different from adult criminals—in ways that are important to the regulation of youth crime. In the chapters that follow, we propose an evidence-based developmental model of juvenile justice. Our model is grounded in wide-ranging scientific knowledge about psychological maturation in adolescence, patterns of involvement in crime during this developmental stage, and the impact of various dispositions on youth development and the transition to adulthood. A vast body of recent research that was not available a generation ago offers insights about both adolescence and youth crime from which we can draw important lessons for the design of juvenile justice policy. The research demonstrates convincingly that this developmental stage is distinctive in ways that are relevant both to the involvement of adolescents in crime and to effective legal responses. Developmental knowledge provides the material needed to construct a satisfactory framework for regulating juvenile crime in the twenty-first century.

First, available scientific knowledge confirms what parents of adolescents surely know—that although teenagers are not childlike, they are less competent decision makers than are adults. Although adolescents' capacities for reasoning and understanding (what might be called “pure” cognitive abilities) approach adult levels by about age sixteen, the evidence suggests they may be less capable than are adults of *using* these capacities in making real-world choices.³⁵ More important perhaps is that emotional and psychosocial development lags behind cognitive maturation. For example, teenagers are considerably more susceptible to peer influence than are adults, more likely to focus on immediate rather than long-term consequences, and more impulsive and subject to mood fluctuations. They are also more likely to take risks and probably less skilled in balancing risks and rewards. Finally, personal identity is fluid and unformed in adolescence.³⁶ This is a period when individuals separate from their parents, experiment (often in risky endeavors), and struggle to figure out who they are.

In combination, these developmental factors undermine adolescent decision making and contribute to immature judgment—as this term is used in common parlance.³⁷ Again, as most parents of teenagers can attest, immature judgment can lead adolescents to make “bad” decisions—that is, choices that threaten the welfare of the teenager or others—to a greater extent than do adults. Although not every teenager displays poor judgment, the effects of immature judgment on decision making are *normative*, as psychologists use this term: that is, typical of adolescents as a group and developmental in nature. Moreover, recent research has elucidated the biological underpinnings of many of these psychological attributes. Studies of brain development show that during adolescence, significant maturation occurs in brain systems and regions involved in long-term planning, impulse control, regulation of emotion, and evaluation of risk and reward.³⁸ Thus, the immature judgment of teenagers to some extent may be a function of hard wiring.

The psychological immaturity of adolescents affects their decision making in contexts that are relevant to justice policy. First, immature judgment likely plays a role in decisions by teenagers to engage in criminal activity, and the developmental influences sketched above (and described more fully in Chapter 2) combine to distinguish the criminal choices of adolescents from those of adults. The differences between teenagers and adults are more subtle than those that distinguish young children and severely impaired persons from ordinary criminals, but they are substantial and, we will argue, justify the conclusion that the punishment imposed on young offenders should be less severe than that which adult criminals receive. Further, due to their immaturity, adolescents may be less capable than adult defendants of participating effectively in criminal proceedings. This is important because of constitutional restrictions on adjudicating defendants who fail to meet basic standards of trial competence.³⁹

Developmental psychologists view adolescence as a critical stage in an individual's development, not only because it is a period in which decision-making capacities mature, but also because during adolescence individuals begin to learn many essential skills required for optimal functioning in adulthood.⁴⁰ The basic capacities needed to fulfill the conventional adult roles of spouse (or intimate partner), employee, and citizen are acquired through the ordinary experiences of adolescence. Severe disruption of this process may impede, or completely sidetrack, the transition to productive adulthood. The successful completion of these developmental tasks involves reciprocal interactions between the adolescent and his or her social environment, an important consideration for the structuring of correctional programs.

Scientific knowledge about patterns of criminal behavior in adolescence and early adulthood also plays an important role in our developmental model. Ironically, many of the developmental factors that make the criminal conduct of adolescents less culpable

than that of adults also contribute to the tendency of many teenagers (especially males) to get involved in criminal activity. This tendency is so pervasive that psychologist Terrie Moffitt, one of the world's leading experts on the development of antisocial behavior, has described delinquent behavior as "a normal part of teenage life."⁴¹ It is not surprising, then, that seventeen-year-olds commit more crimes than any other age group; after that age, the crime rate declines dramatically. Predictably, as normative adolescents move into adulthood, they mature in all areas of psychological development, and, of particular importance for our purposes, most of them also desist from criminal activity. A much smaller group of more intractable youths, who are described as "life-course-persistent" offenders by Moffitt,⁴² continue to engage in criminal activity beyond early adulthood. Policy makers are well advised to pay attention to these diverse patterns and to consider the impact of sanctions on a young offender's transition to adulthood.

The Developmental Model: Adolescence as an Intermediate Legal Category

Our developmental model of juvenile justice treats (most) adolescent offenders as a separate legal category, neither children whose crimes are excused nor adults who are fully responsible for their crimes. This approach, we argue, is the key to a fair and effective juvenile justice system, although it is not typical in the legal regulation of minors generally. On most issues, childhood and adulthood are binary legal categories; young citizens are treated as children until they cross the legal threshold and become adults. The boundary between childhood and adulthood is age eighteen, the age of majority, for most purposes, although occasionally it is set at a different age.⁴³ In this classification scheme, adults are presumed to be competent, autonomous persons who are responsible for their

choices, while minors, whether they are toddlers or teenagers, are presumed to be incompetent, dependent, and not responsible. There is no middle ground where most issues are concerned.⁴⁴

For the most part, as we explain in Chapter 3, this binary approach works quite well, although it often distorts the developmental reality of adolescence. It has not worked well, however, in juvenile justice policy. As we have noted, the rehabilitative model of juvenile justice collapsed, in part, due to its naive characterization of delinquent youths as innocent children who were not responsible for their crimes. The contemporary model errs in the other direction, depicting youths who are legal minors for all other purpose as adults when it comes to criminal adjudication and punishment.

The contemporary approach is deficient on both theoretical and practical grounds. First, it offends the core principles of proportionality and due process that are deeply embedded in our criminal justice system—and are essential to its fairness. Proportionality holds that criminal punishment should be based not only on the harm of the offense but also on the actor's blameworthiness. A justice system that is ready to hold adolescent offenders fully responsible for their crimes violates proportionality because young lawbreakers are less blameworthy than are their adult counterparts due to developmental immaturity. Beyond this, criminal adjudication of younger teenagers threatens the justice system's commitment to procedural fairness, because cognitive and psychosocial immaturity can undermine the ability of youths to function as criminal defendants. Second, although advocates argue that tough policies will protect the public and promote social welfare, in reality, adult punishment of delinquent youths, for the most part, is likely to be ineffective in achieving these practical goals. Punitive reformers have never confronted hard questions about the impact of adult punishment on adolescents, in terms of both their future criminal conduct and their development into adult members of society.

The research evidence suggests that their approach is shortsighted at best.

The developmental model is superior to both of the alternative frameworks that have shaped juvenile justice policy for more than a century. First, the research on adolescence has important implications for creating a justice system that is compatible with the theoretical commitments of the criminal law to fair punishment and fair process. Second, under the developmental model, scientific knowledge guides the formulation of policies that maximize social welfare at the least cost.

The Developmental Model and Principles of Criminal Law Fairness

Consider proportionality, a bedrock principle of the criminal law. Proportionality seems a rather abstract concern, but it is crucial to the legitimacy of state-sponsored punishment and an important dimension of a fair and stable juvenile justice system. Indeed, some of the ridicule directed at the traditional juvenile court and the uneasy response to recent punitive reforms may reflect public concerns about accountability and fairness. Scientific research and theory support the conclusion that adolescents, even sixteen-year-olds and seventeen-year-olds, make decisions to get involved in criminal activity that are less culpable than those of adults, largely because their choices are driven by developmental factors that contribute to immature judgment. But adolescents are also not children whose crimes should be excused. Thus, *mitigation* should apply to their criminal conduct. The distinction between mitigation and excuse is an important one that is often lost in the public debate, where the alternative options are often cast as either adult punishment or “a slap on the wrist,” suggesting that if teenagers are not held fully responsible for their crimes, they bear no criminal responsibility at all. The developmental model holds that adolescents are responsible for

their criminal conduct and should be sanctioned for their misdeeds but deserve less punishment than do typical adult offenders.

The principle of proportionality is at the heart of the substantive criminal law, but procedural fairness is also an important element of a satisfactory system for regulating youth crime. The U.S. Constitution requires that defendants in criminal proceedings be competent to stand trial, but substantial research indicates that the capacity of younger adolescents to function adequately in the trial context is highly uncertain.⁴⁵ This evidence has important implications both for the adjudication of youths in criminal court and for formulating a competence standard in juvenile delinquency proceedings. It should be underscored—because it often seems to be the source of confusion—that the issues of culpability and competence are quite distinct; the former involves the quality of the actor's decision to engage in criminal conduct, while the latter pertains to the actor's capacity for trial participation. Juvenile justice policy that is grounded in developmental knowledge attends to the impact of immaturity in both contexts.

The Developmental Model and Social Welfare

The theoretical mandates of proportionality and due process are important constraints on the design of juvenile justice regulation, but they are unlikely to carry the day in the political arena. Ultimately, the most compelling arguments for our proposed developmental framework are consequentialist. From society's perspective, crime policies are evaluated largely on the basis of their effectiveness at reducing crime at the least cost. At the heart of our model is the claim that social welfare will be enhanced and the cost of juvenile crime minimized if society adheres to the lessons of scientific research in responding to youth crime.

Supporters of the recent reforms claim, of course, that punitive policies promote public safety and therefore serve society's interests.

Their calculus is distorted, however, exaggerating the threat (and thus the social costs) of youth crime and the societal benefits of adult punishment, while miscalculating or discounting an array of potential costs of punitive policies, including recidivism costs and economic costs that have strained budgets in many states. Unnecessary costs have been generated because legislative enthusiasm for cracking down on youth crime has swept into the adult system many nonviolent offenders who represent little threat to public safety.⁴⁶ To be sure, at one level, tough sanctions can reduce juvenile crime. Youths who are locked up for long periods are not on the street committing crimes. But there is little evidence that long incarceration is effective at deterring crime or at reducing recidivism—indeed, most evidence indicates that adult imprisonment increases juvenile re-offending.⁴⁷

The developmental research provides essential lessons for the construction of justice policies that promote social welfare. The first lesson is that most adolescent offenders are not headed for careers in crime—unless correctional interventions push them in that direction. Legal sanctions can have a profound impact on the trajectory of young offenders' lives and affect the likelihood that they will become productive (or at least not criminal) adults. Because adolescence is a critical developmental stage during which teenagers acquire essential competencies and skills, correctional dispositions have the potential either to disrupt or to enhance social and educational development, and thus either undermine or promote prospects for gainful employment, successful family formation, engaged citizenship—and criminal involvement. Twenty years ago, most social scientists were pessimistic about the effectiveness of delinquency programs in reducing recidivism.⁴⁸ That view has changed dramatically. A growing body of research indicates that interventions that invest in the social development of young offenders diminish the risk of re-offending, thus benefiting society, potential future victims, and youths themselves.⁴⁹

Our consequentialist analysis explicitly recognizes that the promotion of social welfare is an essential criterion for evaluating juvenile justice policy. A key lesson we can take from the disillusionment with the traditional juvenile court is that youth crime policy will fail if it is not perceived as achieving this goal. Harms caused by young offenders must be minimized; occasionally tough measures (including adult imprisonment) may be required to achieve public protection against youths who persist in committing serious violent crimes. But most young criminals do not pose the kind of risk that justifies long incarceration in either the adult or the juvenile system. Policies that invest in their future lives will benefit young offenders and, ultimately, the rest of society. This conclusion is not based on paternalism, but rather on the conventional policy goal of maximizing public welfare at the least cost. In short, like the punitive reformers, we are utilitarian; we simply argue for a more comprehensive and accurate utility calculus.

A road map of the book may help guide readers through our proposed model. Chapter 2 elaborates on the scientific evidence about adolescence that forms the building blocks of the developmental model. First, we focus on cognitive, emotional, social, and neurobiological maturation, as well as identity formation, key aspects of development that influence the decision-making capacities of adolescents in ways that distinguish them from adults. We then explore patterns of antisocial conduct in adolescence and explain how psychological factors contribute to criminal conduct during this developmental stage and to desistance from criminal activity in late adolescence or early adulthood. This pattern reinforces the point that most young offenders are normative adolescents, teenagers whose involvement in crime is largely the product of developmental influences and begins and ends during adolescence; only a small percentage of teenagers are likely to become career criminals.

Although the criminal conduct of these two categories of young offenders in adolescence may be similar, the underlying causes and prognoses are different. Finally, this chapter examines recent evidence that mid- to late adolescence is a critical period for the development of the skills and competencies necessary for success in work, family, and citizenship roles and the importance of social environment in the accomplishment of these developmental tasks.

In Chapter 3 we describe the key features of legal regulation of minors generally, as a backdrop for understanding and evaluating justice policy in the chapters that follow. Many aspects of contemporary regulation can be traced to the ambitious Progressive agenda to improve the lives of children at the turn of the past century. From these early reforms came the concept of the state as parent and protector of children and the assumption that the overriding purpose of regulation is to promote children's welfare and to facilitate their development to healthy adulthood, ideas that continue to shape legal regulation. This chapter describes the standard binary approach to legal regulation under which adolescents, for most legal purposes, are subject to the same restrictions and protections as are younger children, although occasionally they are classified as adults. In this classification scheme, the intermediate stage of adolescence is virtually invisible. The chapter analyzes how the boundary between childhood and adulthood is determined, first by examining the age of majority and then by exploring contexts in which the line is shifted either downward (for example, under statutes authorizing minors' consent to particular medical treatments) or upward (for example, through laws authorizing child support through college). Our analysis suggests that departures from the presumptive boundary occur when youth welfare and social welfare converge on a different age as superior to the presumptive age of majority.

Chapter 4 examines crime regulation as a type of legal regulation of minors. This perspective makes clear that the traditional juvenile justice regime fit comfortably within the general paternalistic

framework, treating young offenders as children whose welfare was of paramount concern in the legal response to their crimes. The chapter explains why the standard paternalistic approach failed in the context of crime regulation and examines the forces that led to a dramatic policy transformation in the last decades of the twentieth century. After briefly describing the various legal strategies through which the jurisdictional boundary between the juvenile system and the criminal system has shifted, we focus on one jurisdiction, California, that adopted tough juvenile justice reforms by referendum in 2000. Analysis of the campaign that led to the adoption of Proposition 21 provides an informative case study of the politics of juvenile justice reform under conditions that have the hallmarks of a moral panic—in this case, focusing on juvenile gang activity. This account suggests that an appeal to racial bias played a role in the campaign and that, generally, the process by which the reforms were undertaken was deeply flawed.

In Chapters 5 and 6, we locate juvenile justice policy within the broader framework of the criminal law and examine how two key elements of a fair justice system apply to the prosecution and punishment of juveniles. Chapter 5 undertakes a standard proportionality analysis that identifies three conventional sources of mitigation in criminal law—diminished capacity, external coercion, and the lack of bad character—as important to assessing the culpability of normative adolescent offenders. We also explain why mitigation based on immaturity generally should operate as a categorical constraint on punishment of teenagers rather than as a basis of individualized assessment of culpability. Implementation of this principle will reinforce the jurisdictional boundaries of the juvenile court and affect transfer and legislative waiver policies, as well as juvenile dispositions. We address the vexing question of whether “immature” adult offenders should qualify for mitigation—and explain important psychological differences between these actors and adolescents that disqualify the former

group. The chapter concludes with an examination of the juvenile death penalty, recently struck down by the Supreme Court in *Roper v. Simmons*. Adopting elements of our mitigation framework, the Court concluded that juveniles are not culpable enough to deserve the ultimate punishment of death, and that the prohibition should be categorical.⁵⁰

In Chapter 6, we turn to procedural fairness, examining the application to juveniles of the constitutional mandate that criminal defendants must be competent to stand trial. The due process requirement of adjudicative competence evolved as a protection for mentally impaired defendants, but it applies with equal force to youths who may be incapable of competent participation in a criminal proceeding due to developmental immaturity. The chapter examines how younger teenagers' immature decision-making capacities and limited experience may affect their abilities to assist their attorneys and otherwise to function as criminal defendants. We describe compelling research evidence, including findings of a major study conducted by the authors with colleagues, that a substantial percentage of younger teenagers are at risk for incompetence using standard measures applied to adults.⁵¹ These findings have important practice and policy implications for the criminal adjudication of youths; they present policy makers with important policy choices, one of which is whether to shift the jurisdictional boundary of criminal prosecution to exclude younger teenagers. The research evidence also has implications for delinquency proceedings. We argue that to avoid the exclusion of many younger teenagers from adjudication in *any* court, dual standards of competence should be applied in criminal and juvenile court, an approach that is constitutionally acceptable so long as the dispositional stakes faced by youths in juvenile court are lower than those faced by adults.

In Chapter 7, we undertake a social welfare analysis of youth crime policy, shifting the focus from fairness to young offenders to the prevention of crime at the least cost to society. One aim of this

chapter is to probe the claim that tough policies are justified on the ground that they promote social welfare. We do this by the evaluating available evidence on the costs and benefits of alternative approaches—an analysis undertaken against the backdrop of scientific knowledge about adolescence and the pattern of youth offending. First, we examine economic costs, which have increased dramatically since 1990, a period in which juvenile crime has steadily declined. This increase in costs is due primarily to a substantially greater use of incarceration in both the adult and the juvenile systems for both violent and nonviolent young offenders. The chapter then examines whether severe sanctions themselves have reduced juvenile crime and concludes that the policy reforms in recent years may have had a modest effect through general deterrence and incapacitation, but have also resulted in the incarceration of many youths who do not present a great risk of re-offending. Moreover, the empirical evidence does not support that harsh sanctions reduce recidivism—indeed, youths sent to prison appear more likely to recidivate than do comparable youths in the juvenile system.

An examination of prisons and of juvenile facilities as social environments against the backdrop of developmental knowledge provides some insight into why this might be so. The developmental model clarifies that delinquency interventions should aim to avoid what may be irremediable disruption of developmental trajectories of adjudicated youths, and to facilitate, to the extent possible, preparation for conventional adult life. The chapter concludes with a description of programs in the juvenile system that incorporate developmental knowledge with considerable success. Several promising programs, some of which have been replicated and studied extensively, have been found to reduce recidivism substantially in young offenders at considerably less cost than incarceration.

Chapter 8 extracts lessons for juvenile justice policy from the fairness and social welfare analyses presented in earlier chapters. Although we offer no detailed blueprint for an ideal regime, our

model provides guidelines for a justice system that is fair to young offenders and at the same time minimizes the social cost of youth crime. First, our analysis indicates the importance of retaining a separate juvenile justice system with a clear boundary separating it from the adult system. Most youths should be retained in this system and subject to sentences that are proportionate in duration in correctional settings promoting healthy development through investments in the human capital of young offenders. We argue that the dispositional jurisdiction of the juvenile court should be extended into early adulthood, so that youths who commit serious crimes can be held accountable while remaining in the juvenile system. In a regime grounded in the developmental framework, only older youths are eligible for transfer to criminal court, under rules that are designed to separate normative offenders from career criminals and to limit judicial and prosecutorial discretion. Thus, only serious violent felonies are transferable offenses, and waiver to the criminal court is limited to juveniles with a record of serious violent crimes. These youths have the least claim to mitigation and pose the most severe threat to public safety. Finally, even in the adult system, fairness and social welfare dictate that juveniles should not be subject to toxic environments or receive the most severe sentences, such as life without parole.

Chapter 8 then deals with the “hard cases,” the small group of youths whose crimes do not appear to result from developmental influences and who are at substantial risk of becoming career criminals. For some, a pattern of antisocial behavior may begin in early childhood; they may come into the justice system in late childhood or early adolescence and by mid-adolescence have a long criminal record. Containing the substantial costs that these youths inflict on society is an essential condition of a viable juvenile justice policy. We examine the sources of persistent antisocial behavior and explore appropriate responses for the justice system. Older youths in this category are likely to be well represented among juveniles

transferred to the adult system. More challenging from a policy perspective is how to deal with pre-teenage or young adolescent offenders, youths who are at high risk for recidivism but also have the most compelling claims for mitigation due to immaturity. Intensive and comprehensive interventions offer the best hope for changing the developmental course of these very young offenders, but, on proportionality grounds, the disposition should be a mix of correctional programs and social, educational, and psychological interventions available to children not in the justice system. The costly investment in developing effective programs will be justified if it can be linked to enhanced public protection.

In Chapter 9, we return to an issue raised earlier—the politics of juvenile justice—and ask whether a stable justice regime grounded in our developmental model can be established and sustained. We are cautiously optimistic about the possibilities of reform in this direction. Recent evidence from several sources indicates that enthusiasm for punitive policies is waning and that the pendulum may be swinging back toward moderation. Several state legislatures have revised their juvenile justice laws, backing off from the punitive reforms enacted just a few years earlier. Moreover, policy makers appear to be focusing to a greater extent on the monetary costs of criminalizing juvenile justice—and perhaps on human costs as well. Research evidence also indicates that public attitudes toward young offenders are considerably less punitive and have more nuances than conventional wisdom would suggest.⁵² This evidence can reassure lawmakers that responding cautiously to public pressure in the wake of high-profile crimes may not carry the political risk some seem to fear. Deliberation and the passage of time can result in more rational policy formation. On our view, the time is ripe for a new period of juvenile justice reform. Translating the developmental framework into legal policy is the key to creating a stable regime that is fair to juvenile offenders and promotes social welfare.