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Blaming Youth

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Essay

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In March of 2001, a fourteen-year-old Florida boy named Lionel Tate was sentenced to life in prison without parole for killing six-year-old Tiffany Eunick during a wrestling match that took place when Lionel was twelve years old. Lionel was convicted of first degree murder on the ground that the killing was the result of aggravated child abuse, a crime that contemplates injury of a child by an adult caretaker.[1] His conviction and sentence have prompted much debate and discussion—about his case and, more generally, about the criminal punishment of young offenders.[2] Although the verdict and Lionel's sentence received considerable public support, many people are troubled by a justice system that sends a fourteen-year-old offender to prison for life. The debate is not about whether Lionel killed Tiffany, or even whether he represents a threat to public safety. Rather, the contested issue is whether adolescents who commit crimes should be subject to the same punishment as their adult counterparts.

This Essay addresses the question of how lawmakers should think about immaturity in assigning criminal punishment to young offenders. For reasons that have much to do with the peculiar history of juvenile justice policy, basic questions about the culpability of young law violators and the extent to which they can fairly be held responsible for their crimes have received

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1. Michael Browning et al., *Boy, 14, Gets Life in TV Wrestling Death: Killing of 6-Yr.-Old Playmate Wasn't Just Horseplay, Florida Judge Says*, CHI. SUN-TIMES, Mar. 10, 2001, at 1 (noting that the death occurred while Tate was "allegedly demonstrating wrestling techniques on her"); Dana Canedy, *At 14, a Life Sentence: Boy Killed Girl in 'Wrestling' Murder*, DALLAS MORNING NEWS, Mar. 10, 2001, at 1. *See* FLA. STAT. ANN. § 782.04(1)(a)(2)(h) (West 2002) (stating that the unlawful killing of a human being when committed by a person perpetrating, or attempting to perpetrate, aggravated child abuse is murder in the first degree and punishable by either life imprisonment or death).

2. *See, e.g.*, Dana Canedy, *As Florida Boy Serves Life Term, Even Prosecution Wonders Why*, N.Y. TIMES, Jan. 5, 2003, at A1; William Claiborne, *13-Year-Old Convicted in Shooting; Decision to Try Youth As an Adult Sparked Juvenile Justice Debate*, WASH. POST, Nov. 17, 1999, at A3; Mike Clary, *Teen's Life Sentence Sparks Juvenile Punishment Debate*, CHI. TRIB., Mar. 21, 2001, at A11.

surprisingly little attention in policy debates or in the academic literature.[3] During most of the 20th century, young offenders were dealt with in a separate system that held to the view that the disposition of its charges was not governed by the criminal law. In the rhetoric of the traditional juvenile court, youths who committed crimes were blameless children in need of treatment; responsibility and punishment were not part of the vocabulary of juvenile justice. This model has become largely obsolete in the last generation. Since the late 1980s, a wave of punitive legal reform has brought many young offenders into the adult criminal justice system. These reforms are worrisome; they have been carried out in a highly politicized climate, driven by exaggerated public fears that seem to be reinforced by illegitimate racial attitudes.[4] In the conceptual void created by traditional juvenile justice policy, important changes in the processing and punishment of this unique class of offenders have proceeded with little attention to the conventional constraints that limit punishment under criminal law doctrine and theory.

Our goal in this Essay is to begin to fill this void by analyzing the culpability of young offenders within a broader framework of criminal law doctrine and theory. The starting point is the principle of penal proportionality, which is the foundation of any legitimate system of state punishment. Proportionality holds that fair criminal punishment is measured not only by the amount of harm caused or threatened by the actor, but also by his blameworthiness.[5] Thus, the question we address is whether, and in what ways, the immaturity of adolescent offenders is relevant to their blameworthiness and to appropriate punishment for their criminal acts. The answer requires a careful examination of the developmental capacities and processes that are relevant to adolescent criminal choices, and also of the sources of excuse and mitigation in criminal law. Our analysis leads us to reject both the traditional excuse-based model of juvenile justice and the contemporary full-responsibility approach. Instead, we argue that a model under which immaturity mitigates responsibility—but does not excuse the criminal acts of youths who are beyond childhood—is more compatible with conventional theories of criminal responsibility and the standard doctrines and practices of the criminal law.

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3. There are notable exceptions. *See* Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that under principles of penal proportionality, immaturity mitigates the blameworthiness of juvenile offenders); Stephen J. Morse, *Immaturity and Responsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15 (1998) (applying a general theory of criminal responsibility to juveniles).

4. *See infra* subpart I(B).

5. Because offenders are overwhelmingly male, we tend to use the male pronoun. For a discussion of proportionality, see RICHARD J. BONNIE ET AL., CRIMINAL LAW 9–10 (1997). *See also* Zimring, *supra* note 3, at 272 (noting that "[a] host of subjective elements affect judgments of deserved punishment even though the victim is just as dead in each different case").

Using the tools of developmental psychology, we examine two important dimensions of adolescence that distinguish this group from adults in ways that are important to criminal culpability. First, the scientific evidence indicates that teens are simply less competent decisionmakers than adults, largely because typical features of adolescent psycho-social development contribute to immature judgment. Adolescent capacities for autonomous choice, self-management, risk perception and calculation of future consequences are deficient as compared to those of adults, and these traits influence decisionmaking in ways that can lead to risky conduct.[6] Second, adolescence is a developmental period in which personal identity and character are in flux, and begin to take shape through a process of exploration and experimentation. Youthful involvement in crime is often a part of this process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity. Most young law violators do not become adult criminals, because their youthful choices are shaped by factors and processes that are peculiar to (and characteristic of) adolescence.

Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation. Contemporary theorists debate whether the ultimate source of criminal responsibility is the actor's choice or his character.[7] Choice theorists measure criminal blameworthiness by focusing on the actor's capacity for rational choice and opportunity to conform to the law.[8] Character theorists argue instead that culpability is reduced when the actor can negate the inference that his act derived from bad character.[9] Although neither character nor choice theorists focus seriously on

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6. *See infra* notes 57–74 and accompanying text; *see also* Elizabeth S. Scott et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229–35 (1995) (describing developmental factors that contribute to immature judgment); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 LAW & HUM. BEHAV. 249 (1996) (providing evidence that age-linked differences in maturity of judgment account for differences in decisionmaking).

7. *See infra* subpart III(A). This characterization of the two dominant perspectives seems to be well recognized. For an excellent description of the debate, see R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 367–68 (1993). Michael Moore, a choice theorist, has described the choice and character perspectives elegantly, although perhaps not in a way that would be fully endorsed by a character theorist. *See* Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 49–58 (1990).

8. For an early expression of these views by the acknowledged founder of modern choice theory, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968). *See also* Moore, *supra* note 7; SANFORD H. KADISH, *The Decline of Innocence*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65 (1987); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701–02 (1988); Stephen J. Morse, *Culpability and Control*, 142 PENN. L. REV. 1587 (1994); Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251 (2000).

9. *See, e.g.*, NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 65–68 (1988); Michael D. Bayles, *Character, Purpose and Criminal Responsibility*, 1 LAW

how immaturity affects blameworthiness, our analysis demonstrates that a model of juvenile justice that acknowledges the immature judgment and unformed character of young actors fits comfortably within both of these frameworks.

The mitigation-based model that we advance is also consistent with criminal law doctrine and practice. Excuse and mitigation are available to two kinds of wrongdoers: those who are very different from ordinary people (because of endogenous incapacity such as mental disorder), and those who *are* ordinary people whose acts were responses to extraordinary circumstances or were aberrant in light of their past reputations and conduct.[10] Young offenders in a real sense belong in both groups. Adolescent decisionmaking capacity is diminished as compared to adults due to psychosocial immaturity. At the same time, the scientific evidence suggests that most young lawbreakers are "ordinary" persons (and quite different from typical adult criminals) in that normal developmental forces drive their criminal conduct.[11] This is important in two ways. First, ordinary adolescents are more vulnerable than are adults to exogenous pressures that can lead to criminal conduct. Further, an important source of mitigation in criminal law—evidence that the criminal act did not derive from bad moral character—is as applicable to youths as to upstanding adults who act aberrantly.[12]

The Essay proceeds as follows. In Part I, a brief historical account of the legal response to youth crime reveals how lawmakers have rejected the traditional juvenile justice model based on non-responsibility in favor of a regime of full responsibility. In both cases, scant attention has been paid to the conceptual links between criminal responsibility and the capacities and circumstances of adolescence. In the contemporary context, the lack of a theoretical or doctrinal framework has contributed to highly politicized legal reform. In Part II, we examine the dimensions of adolescent development that are important to youthful criminal involvement and that distinguish adolescent choices from those of their adult counterparts. Part III turns to the role of excuse and mitigation in criminal law. We sketch the contours of

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& PHIL. 5, 8–11 (1982); R.B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, *in* 27 CRIMINAL JUSTICE, NOMOS 165 (J. Roland Pennock & John W. Chapman eds., 1985); George Vuoso, *Background, Responsibility and Excuse*, 96 YALE L.J. 1661, 1662 (1986).

10. This characterization is based loosely on an observation by Sanford Kadish. *See* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 265 (1987) (drawing the distinction between crimes excused because circumstances were so constraining that most people would have acted similarly, and crimes excused because of the actors' deficiency of mind). In our analysis we describe three categories of mitigation: diminished capacity, extraordinary circumstances, and good character. *See infra* subpart III(B).

11. A small proportion of young offenders mature into adult criminals, and are distinguishable from typical young offenders whose crimes reflect transitory developmental influences. *See infra* notes 92–93 and accompanying text.

12. *See infra* notes 100–05 and accompanying text.

choice and character theories and examine the conditions and attributes that can reduce culpability under criminal law doctrine. In the last Part, we draw on this analysis to offer a mitigation model of juvenile justice that can form the basis of a separate system of justice, dealing fairly with young offenders without unduly compromising public protection.

I. Youth Crime Regulation: A Cautionary Tale of Policy Without Theory

Policy-makers have seldom paid much attention to the link between developmental immaturity and criminal responsibility or sought to tailor the law's response to the blameworthiness of young offenders. The Progressive social reformers who established the juvenile court in the late 19th century classified young offenders as blameless children and sought to remove them altogether from the reach of the criminal law.[13] Contemporary law-makers have forcefully rejected this paternalism, reclassifying many young offenders as adults.[14] Modern regulation, however, exhibits a similar lack of concern about whether the treatment of young offenders comports with criminal law policies and principles. The recent reforms provide a cautionary tale about the perils of developing criminal justice regulation without these constraints.

A. Juvenile Justice Policy: A History of Binary Categories

The binary classification of young law violators as either blameless children or culpable adults represents an application of a more general regulatory approach toward minors. Although the age boundary between childhood and adulthood varies in different legal contexts, lawmakers generally treat each status as a binary category.[15] Thus, in the construction of legal childhood, developmental differences between infants and adolescents get little attention. In most regulatory contexts, this simple classification scheme works quite well, even though it distorts developmental reality.[16] As the following historical account suggests, however, the use of binary categories has not worked well as a framework for juvenile justice policy, whether young offenders are treated as children, as they were in the traditional juvenile justice system, or as adults, as they increasingly are today. Binary classification has reinforced simplistic understandings of young offenders' criminal responsibility. Moreover, this taxonomy has shaped contemporary discourse about juvenile justice in undesirable ways. Because the debate proceeds as though the policy options were limited to the

13. *See infra* notes 20–23 and accompanying text.

14. *See infra* notes 30–36 and accompanying text.

15. *See generally* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 558–62 (2000) [hereinafter Scott, *Legal Construction*].

16. *Id.* at 558–62 (arguing that, in most contexts, this approach is administratively simple, relatively efficient, and creates a clear signal for those who deal with young persons).

choice between adult and child status, questions about the mitigating effects of immaturity in assessing criminal responsibility are seldom addressed.

At common law, the infancy defense excused young children from all criminal responsibility on the ground that they lacked the capacity to understand the wrongfulness of their conduct.[17] The defense was narrowly drawn, however. The presumption that children lacked criminal responsibility could be rebutted for youths between the ages of 7 and 14, and at age 14, offenders were conclusively presumed to have the moral capacity of adults.[18] Thus, common law courts constructed two dichotomous groups—innocent children and fully responsible adults. Young lawbreakers who were not excused were subject to the same punishment as adult criminals.[19]

The Progressive reformers who established the juvenile court envisioned a regime for the adjudication and disposition of young criminals in which the criminal law and its procedures would play little part.[20] The new court was part of an ambitious program to expand the boundaries of childhood, and it offered the law's protection to older youths as well as young children.[21] All delinquents were described as wayward but innocent children whose parents had failed them, but who could be redirected with the court's firm guidance.[22] The reformers thus created a new vocabulary of juvenile justice, one from which words like punishment, blame, and responsibility were expunged.[23]

Two related claims were at the heart of the rehabilitative model of juvenile justice: that young offenders were misguided children rather than

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17. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–12 (1984) (citing 1 M. HALE, PLEAS OF THE CROWN 22–26 (1778) and 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23–24 (1769)). A child between the ages of 7 and 14 could be convicted of a crime and subject to adult punishment if the prosecutor demonstrated that he understood the wrongfulness of his conduct. *Id.* at 511. The test was similar to that of the M'Naghten version of the insanity defense. *Id.* at 550.

18. *Id.* at 510–12.

19. Toward the end of the 19th century, however, courts began to confine young offenders in separate facilities called "houses of refuge." *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 207–09 (rev. ed. 1990).

20. *See, e.g.*, MURRAY LEVINE & ADELINE LEVINE, A SOCIAL HISTORY OF HELPING SERVICES: CLINIC, COURT, SCHOOL, AND COMMUNITY 155–58 (1970) (noting that the first true juvenile court was established in Chicago in 1899 as a result of the efforts of the Chicago Womens' Club and Jane Addams's Hull House).

21. The Progressive reform program aimed to establish broad-based paternalistic policies. Other reforms included restrictions on child labor, school attendance laws, and the creation of a child welfare system. For a discussion of Progressive-era reforms directed at children, see generally LEVINE & LEVINE, *supra* note 20, at 23–24 (characterizing the 20th century as the "Century of the Child" and describing the child welfare and service agencies created during the *fin de siecle*); JOSEPH KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 221–27 (1977).

22. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

23. *See* LEVINE & LEVINE, *supra* note 20, at 185–87; Mack, *supra* note 22, at 107 (describing the purposes and procedures of the new court). For a narrative account of a court that embodied the ideal, see BEN B. LINDSEY & HARVEY J. O'HIGGINS, THE BEAST (photo. reprint 1970) (1910).

culpable wrongdoers, and that the sole purpose of state intervention was to promote their welfare through rehabilitation.[24] The first claim was supported only by rhetoric: the conceptual architects of the court were not seriously interested in the link between criminal responsibility and immaturity.[25] This idealized description of young lawbreakers may have made sense in light of the reformers' political goals, but it came to seem naive and implausible—at least as applied to older adolescents charged with serious crimes. As for the second claim, the acceptance of the "wayward child" ideal likely was always predicated on the promised effectiveness of rehabilitation in reducing youth crime and protecting society.[26] As the 20th century progressed, both the rehabilitative model and the image of the adolescent offender as a blameless child were discredited.[27]

The collapse of the rehabilitative model of juvenile justice left something of a conceptual vacuum. For a period in the 1970s and 1980s, it seemed that a new model might emerge, one that avoided the traditional rhetoric and grounded criminal responsibility in a more accurate account of adolescence. During this period, reform groups designed regulatory frameworks that combined proportionate juvenile justice dispositions with interventions aimed at preparing young offenders for conventional adult roles.[28] State legislatures revised their juvenile justice codes to incorporate

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24. A core tenet of the new court's philosophy (and key to the reformers' political strategy) was that delinquent and neglected children were very similar and warranted similar treatment. Judge Mack's famous challenge is representative: "Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?" *See* Mack, *supra* note 22, at 107.

25. In practice the image likely was always more rhetoric than substance. From the early years of the juvenile court, youths who committed serious crimes were sent to correctional facilities. *See* LINDSEY & O'HIGGINS, *supra* note 23.

26. As the Supremc Court noted, "the high crime rates among juveniles . . . could not lead us to conclude that . . . the juvenile justice system, functioning free of constitutional inhibitions as it had largely done, is effective to reduce crime or rehabilitate offenders." *In re Gault*, 387 U.S. 1, 22 (1967).

27. The rehabilitative model suffered both because little evidence suggested that it worked to reduce crime and because it harmed the interests of young offenders. *Gault* made clear that the rehabilitative model's failure to recognize adequately the state's interest in punishment and public protection was the source of procedures and practices that deprived youngsters of the core protections that adult defendants enjoyed, and that this ultimately harmed their interests. *Id.* at 25–27. For a discussion of how juvenile court procedures and dispositional structure were grounded in the rehabilitative model, see W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 15–21 (1972) (describing the theory of rehabilitation's reflection in the procedural scheme of the court). For a scathing critique of the procedural strueture of the juvenile court, see FRANCIS ALLEN, *The Juvenile Court and the Limits of Juvenile Justice*, *in* THE BORDERLAND OF CRIMINAL JUSTICE 43–61 (1964). *See also* LEVINE & LEVINE, *supra* note 20, at 11–21 (decrying the state of American mental health treatment in general, and noting that although juvenile courts "were among the first institutions to use psychiatric services," it eventually became rare for them to have treatment facilities).

28. FRANKLIN E. ZIMRING, CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS (1978)

accountability and public protection as policy objectives.[29] Before these initiatives were effectively translated into a comprehensive modern youth crime policy, however, they were overwhelmed by a new wave of reforms under which young criminals increasingly were classified as adults.

The contemporary reforms were partly responsive to periods of increased violent juvenile crime in the 1980s and early 1990s, a trend that understandably generated intensified concern about public safety.[30] This period was also marked by criticism of the juvenile court and a loss of confidence in its capacity to serve young offenders and also effectively protect the public.[31] Advocates for reform ridiculed the paternalistic rhetoric of the traditional court; young offenders now were described as hardened criminals and "superpredators."[32] Although this characterization has been challenged, most participants in the debate seem to assume that young offenders either will be treated as children in juvenile court or sent to prison to serve "adult time for adult crime."[33] Given this choice, lawmakers and the public have opted for public protection over leniency.[34] Legislatures across the country have enacted statutes that lower the age at which youths can be tried and punished as adults for an ever-broader range of crimes.[35] Underlying these

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(describing a theory of juvenile sentencing based on diminished responsibility, combined with policies that provided room to reform for young offenders); IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS ET AL., JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO DISPOSITIONS, STANDARD 4.1 (1980) (giving adjudicated delinquents a right to services).

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

30. The most alarming increase was in the rate of youth homicide, which doubled during this period. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 35–38 (1998). Many observers argue that the increased availability of guns played a large role. *Id.* at 35.

31. In one study in 1989, 70% of those questioned said that violent youth crime was *caused* by lenient treatment in juvenile courts. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 157 (Timothy J. Flanagan & Kathleen Maguire, eds. 1990) [hereinafter SOURCEBOOK].

32. WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 26–27 (1996).

33. *See* Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743, 744 (2002) (observing that prosecutors who fail to abide by this political mantra may suffer on election day).

34. *See* Jane B. Sprott, *Understanding Public Opposition to a Separate Youth Justice System*, 44 CRIME & DELINQ. 399 (1998) (presenting a study that shows that the public supports prison for juveniles because the juvenile system is too lenient). In a Gallup poll, 50% responded that juveniles should get the same punishment as adults for their first offense. David W. Moore, *Majority Advocate Death Penalty for Teenage Killers*, GALLUP POLL MONTHLY, Sept. 1994, at 2, 2–3.

35. During this period, most states lowered the age at which youths can be tried as adults, and legislative waiver (mandating automatic adjudication in criminal court above the jurisdictional age for some offenses) became more common. *See* Scott, *Legal Construction*, *supra* note 15, at 584–85 (noting a state legislative trend of lowering ages for transfer to adult court and increasing the types of felonies which trigger transfer hearings, waiver statutes, and blended hearings); Thomas Grisso, *Juvenile Competency to Stand Trial*, 12 CRIM. JUST. 4, 5–6 (1997) (stating that 90% of states have revised juvenile codes). Some states adopted blended sentencing for serious offenses, under which

initiatives is an implicit assumption that young offenders—at least those convicted of serious crimes—are fully responsible and can fairly be punished as adults.[36]

B. Contemporary Justice Policy as Moral Panic

At one level, the story of the recent policy reforms is a simple one: the rehabilitative model failed, violent juvenile crime increased, and rational lawmakers responded by narrowing the domain of childhood in order to protect public safety in the face of a growing threat. Closer scrutiny, however, suggests that the recent trend is not simply a coherent response to changing exigencies. Rather, it has features of what sociologists describe as a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat.[37] The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community.[38] Although the fervor typically fades in a relatively short time, panics can effectively become institutionalized if legal and policy changes result.[39]

The response to juvenile crime over the past decade fits this pattern well. The evidence suggests that public perceptions about the magnitude of the threat are greatly exaggerated, and that the fears apparently have not been allayed by a steady decrease in the rate of juvenile crime (including violent

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youths would complete sentences in adult prison. *Scott*, *supra* note 15, at 584–85. In Texas, for example, about two dozen felonies carry up to 40-year blended sentences. For a discussion of the Texas reforms initiated in 1995 by Governor George Bush, see Paul Duggan, *George Bush: The Texas Record*, WASH. POST, Nov. 9, 1999, at A1.

36. *See* Brian Doherty, *When Kids Kill: Blame Those Who Pull Trigger*, MILWAUKEE J. & SENTINEL, May 31, 1998, at 1 (advocating that children who commit crimes are to blame, not others).

37. *See generally* ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994).

38. *Id.* at 31.

39. *Id.* at 31–45. Moral panics are not exclusively a modern phenomenon. Examples include the Salem witch trials, prohibition, the public response to child sexual abuse in day care, and the response to claims of satanic ritual abuse. *Id.* at 57–61. A good example of law reform as a response to moral panic is the recent enactment of "Megan's Laws," under which many states now require a wide range of convicted sex offenders to make their criminal history known to neighbors. The first of such laws followed the killing of a New Jersey girl by a neighbor who was a sex offender. *See* John Goldman, *Sex Offender Guilty of Killing Megan Kanka*, L.A. TIMES, May 31, 1997, at A1. *See also* N.J. STAT. ANN. § 2C:7-6 (West 1995); Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 317–18 (2001) ("Recently, some commentators have suggested that Megan's Law reflects a recurring type of 'moral panic,' a widespread, if overblown fear that the nation's children are at extreme risk." (citing PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6–7, 196–206 (1998))).

crime) since the mid-1990s.[40] Indeed, much of the "get tough" legislation reclassifying juveniles charged with serious crimes has been enacted since 1995, after the crime rate began to decline.[41] As in other moral panics, politicians and the media have played key roles in stimulating public fears, and the public has reacted by demanding greater protection through tougher legislation. The process often seems to be triggered by high profile juvenile crimes, such as school shootings or other violent crimes with child victims.[42] Although such incidents are uncommon, they are publicized vividly and repeatedly by the media and become highly salient reminders of the terrible costs of youth crime. Through processes familiar to cognitive psychologists, collective perceptions of the threat become distorted, as alarmed public discourse is reinforced by vivid images of the crime and the victims.[43]

This account, although it sheds light on the recent changes in public and political opinion and the resulting law reforms, does not fully explain the

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40. Surveys reveal that Americans believe that juveniles are responsible for a far greater portion of crime than is in fact the case. *See* Moore, *supra* note 34, at 2 (presenting a poll which found that, on average, participants believed that juveniles are responsible for 43% of violent crime, three times the actual percent). The high rates of juvenile homicide, which fueled the punitive trend, declined steeply beginning in the mid-1990s. *See* ZIMRING, *supra* note 30, at 36 (presenting graphic evidence of the drop); Robert E. Shepherd, Jr., *Recapturing the Child in Adult Court*, 16 CRIM. JUST. 58, 58 (2002) (describing the continuing public misperception that an "epidemic" of juvenile crime exists, despite the actual decline in juvenile crime rates).

41. For example, in 2000, when the rate of violent juvenile crime in California was lower than it had been in years, a large majority of California voters passed Proposition 21, mandating adult criminal prosecutions of 14-year-olds for a wide variety of offenses. *See* Jim McLain, *System Bracing for Kids in Adult Courts*, VENTURA COUNTY STAR, Mar. 16, 2000, at A1 (discussing the predicted impact of broader prosecutorial authority under Proposition 21 to charge juveniles as adults); *see also* George Mgdesyan, *Gang Violence and Crime Prevention Act of 1998*, 3 J. LEGAL ADVOC. & PRAC. 128, 136–37 (citing statistics showing a 30% drop in California's juvenile felony arrest rate and a 50% drop in arrests for homicide between 1990 and 2000).

42. Fears that children are at risk often trigger moral panics. *See supra* note 39. In response to the killings of several students and a middle school teacher by 11- and 13-year-old boys, the Arkansas legislature lowered the age at which youths can be tried as adults. Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 806–10 (2002).

43. The public response can be understood as involving a familiar cognitive bias described by psychologists as the availability heuristic. Availability can lead individuals to exaggerate the likelihood of salient events that can be readily brought to mind. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11 (Daniel Kahneman et al. eds., 1982). Timur Kuran and Cass Sunstein argue that this bias is key to understanding how public perceptions of risk become exaggerated, and they offer many examples of the phenomenon. *See generally* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (describing the public responses to the Love Canal incident and the pesticide alar as examples of exaggerated perceptions of risk). In the context of youth crime, the text suggests how public perceptions of the threat are amplified by extensive coverage in the media, and attention by politicians, experts, and the public. Under the Kuran-Sunstein model, a cascade of collective opinion is triggered as individuals are persuaded of the seriousness of the threat, and then they too join in the outcry. Those who are skeptical may remain silent rather than voicing unpopular opinions and risking social disapproval. In this view, public opinion based on distorted perceptions gains momentum and contributes to public pressure on politicians and policy-makers to institutionalize the public's concerns by enacting legislation that responds to the threat.

current hostility toward young offenders and readiness to punish them as adults. The recent trend represents a shift in attitude in a relatively short period of time,[44] and it stands in sharp contrast to paternalistic social attitudes and legal policies toward children and adolescents in virtually every other context.[45] The pervasive assumption that adolescents are incapable of making competent decisions and should be protected from their own immature judgment is readily set aside when the question is whether young lawbreakers should be held fully responsible for their crimes. It is ironic, for example, that while Lionel Tate can be sentenced to life in prison, he cannot work, execute a binding contract, or make other important decisions on his own behalf.[46]

A troubling explanation for the puzzling hostility toward young law violators is that attitudes are driven by racial and ethnic bias. Minority youths are disproportionately represented in the justice system,[47] and it is likely that many people envision young criminals as members of minority groups. If so, racial stereotypes may override conventional paternalistic attitudes about minors. If people do not identify young offenders as "kids," because they are not *their* kids, they may react with an unsympathetic

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44. For example, Gallup polls in the 1950s showed strong opposition to imposing the death penalty on juveniles—in contrast to more recent polls. *See* Moore, *supra* note 34, at 2, 4 (presenting a 1994 poll showing that 60% favor the death penalty for teenage murderers, in contrast to 11% in 1957). More lenient attitudes toward young offenders began to harden in the 1980s, and today there is substantial public support for punishing young offenders as adults. *See, e.g.*, SOURCEBOOK, *supra* note 31 (examining a national study in which 65% of respondents favored treating juveniles accused of violent crimes the same as adults); Moore, *supra* note 34, at 3 (presenting a Gallup poll that shows 50% support for treating juveniles as adults for a first offense; 83% for second or third offense); Jane B. Sprott, *Understanding Public Views of Youth Crime and the Youth Justice System*, 38 CAN. J. CRIMINOLOGY 271, 281–85 (1996) (describing a Canadian study in which 88% of respondents believed juvenile court sentences were "too lenient" and 57% of this subset of respondents also opposed having a separate juvenile justice system).

45. *See* Scott, *Legal Construction*, *supra* note 15, at 550–57 (describing entrenched paternalism in legal regulation of minors).

46. *Cf.* Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 207 (2000) (noting that a primary argument for the adoption of the 26th Amendment was that if 18 was old enough to fight and die in Vietnam, it was also old enough to vote).

47. *See* TERRENCE P. THORNBERRY ET AL., OFFICE OF JUVENILE JUSTICE PREVENTION, CHILDREN IN CUSTODY 7 (1991) (reporting that minorities represented the majority of children detained in public facilities in 1987); OFFICE OF JUVENILE JUSTICE & DELINQ. PREVENTION, JUSTICE REFORM INITIATIVES IN THE STATES: 1994–1996 PROGRAM REPORT 4 (1997) (reporting that black juveniles made up 12.5% of the population in 1994, but accounted for nearly 29% of juvenile arrests, and more than half of the arrests for violent crime, including 59% of juvenile homicide arrests). Evaluating disproportionate representation of minority youths in the justice system is a tricky business. Most analysts believe that the phenomenon reflects both higher offending rates and differential responses to minority and white youths by system participants, including police, prosecutors, judges, and corrections officers. *See* Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242, 242–58 (1998) (indicating that African-American youths "are more likely to be recommended for formal processing, referred to court, adjudicated delinquent, and given harsher dispositions than comparable" whites).

detachment that is not usually directed toward youth. Through this lens, young law violators are simply criminals, and harsh punishment is the right response to their crimes.

Many observers argue that racial and ethnic bias plays a pervasive, if largely invisible, role in shaping public attitudes toward young offenders, and that it also influences the responses of the media, politicians, and actors in the justice system. Although the extent to which prejudice shapes opinion and practice is quite uncertain, the research evidence supports the view that it plays a pernicious role.[48] African-American youths are perceived as being more mature, more dangerous, and more deserving of punishment than are comparable white youths.[49] Indifference to immaturity as a factor in criminal punishment becomes less of a puzzle in a social context in which the justice system disproportionately deals with minority youths, and those youths are deemed to represent a substantial threat to society.

This account of the formulation of modern juvenile justice policy suggests that it is a politicized process, driven by distorted perceptions of the threat and possibly by illegitimate social attitudes. These deficiencies are troubling in themselves and warrant remedial attention. They are also symptomatic of a deeper deficiency, which is that contemporary youth crime policy lacks a theory and a conceptual framework in which regulation can be formulated and evaluated. Ironically, this void was created in large part by the dominance during the 20th century of a model of juvenile justice that rejected the relevance of criminal law doctrine and principles to delinquency dispositions. With the discrediting of the rehabilitative model, contemporary lawmakers have created a regime for punishing immature lawbreakers that is driven by political forces, unconstrained by the conventional limits on pun-

48. *See* Bishop & Frazier, *supra* note 47, at 258. A 2000 Michigan State University study comparing white to Latino youths found sentencing disparities for similar drug crimes. *See* FRANCISCO A. VILLARRUEL ET AL., DÓNDE ESTÁ LA JUSTICIA? A CALL TO ACTION ON BEHALF OF LATINO AND LATINA YOUTH IN THE U.S. JUSTICE SYSTEM 27–28, *available at* http://www.buildingblocksforyouth.org/Full%20Report%20English.pdf (last visited Oct. 5, 2002). The research suggests that the media plays a role in reinforcing racial bias. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000) (presenting a study that shows that "crime script" of local television news, in which race and violence are prominent, increases hostility among white viewers toward African-Americans). *See generally* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 134–48 (1995) (describing the vastly higher crime rates among poor minorities).

49. Some of the evidence of racial bias is indirect. *See supra* note 47. Other evidenee is more direct. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIOLOGICAL REV. 554, 561–64 (1998) (presenting a study which shows that probation officers were more likely to make internal (character-related) attributions for the offenses of black juveniles, and external (environmental) attributions for the crimes of white juveniles); Sandra Graham, Racial Stereotypes in the Juvenile Justice System, Presentation at Conference of American Psychology-Law Society (Mar. 9, 2002) (transcript on file with authors) (showing that law enforcement subjeets who were unconsciously primed to expect that a perpetrator in a crime vignette was African-American were harsher in their judgments of the perpetrator's culpability and deserved punishment).

ishment embedded in the criminal law. In sharp contrast to the complex elaboration of excuse and mitigation generally found in the criminal law, little is offered when it comes to how the condition of immaturity should affect punishment,[50] and no contemporary framework has replaced the traditional rehabilitative model.

II. Adolescent Development and Involvement in Crime

In order to construct a modern juvenile justice framework, we first examine the attributes of childhood and adolescence that distinguish young offenders from their adult counterparts in ways that are relevant to their criminal choices. Scientists who study adolescence view this stage as a bridge between childhood and adulthood—a period during which various decisionmaking capacities develop, although not at a uniform rate. By mid-adolescence, cognitive capacities for reasoning and understanding are probably close to those of adults, although teens are likely less skilled in using these capacities to make real-life decisions.[51] In psycho-social development, however, teens mature more slowly. This contributes to what in common parlance would be called immature judgment—the tendency of adolescents to make choices that may be harmful to themselves or others.[52] The ways in which psycho-social factors influence decisionmaking and the kinds of

50. Consider, for example, the relationship between mental disorder and criminal responsibility. Several versions of the insanity defense have been offered over the past 150 years, and courts and commentators have explored the extent to which mental illness can mitigate blameworthiness under doctrines such as diminished capacity. *See generally* BONNIE ET AL., *supra* note 5, at 445–56, 477–502 (discussing the ways the law has defined the relationship between mental abnormality and criminal responsibility). Mental disorder as an excuse from criminal responsibility has been a topic of great interest to criminal law scholars. *See generally* JOEL FEINBERG, DOING AND DESERVING: ESSAYS ON THE THEORY OF RESPONSIBILITY 272–92 (1970) (arguing that "mental illness has an independent significance for questions of responsibility not fully accounted for by reference to its power to deprive one of the capacity to be law-abiding"); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 217–24 (1984) (discussing madness as an excuse for criminal activity); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982) (exploring madness and the law through numerous fictional scenarios). Although mental disorder and immaturity (insanity and infancy) are often classified together as excuses based on endogenous incapacity, immaturity is ignored in the literature of criminal responsibility. Criminal law theorists assume without inquiry that the immaturity of youth functions to mitigate or excuse young actors from responsibility for their crimes, but they also appear to assume that this conclusion has little contemporary importance in criminal law, perhaps because they believe that youths continue to be dealt with in a separate justice system in which their reduced blameworthiness is recognized (as was historically true). *See* Duff, *supra* note 7, at 351–55 (focusing on insanity as an excuse with no mention of immaturity); Kadish, *supra* note 10, at 262, 278–81 (mentioning infancy as a non-responsibility excuse and analyzing the non-responsibility excuse with a focus on insanity); Moore, *supra* note 7, at 31 (mentioning infancy as a status excuse).

51. In part, adolescents laek skills in decisionmaking because they lack the experience of adults. Individuals are better able to use complex reasoning abilities in familiar situations. *See* Shawn C. Ward & Willis F. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 DEVELOPMENTAL PSYCHOL. 488, 492 (1990).

52. Scott et al., *supra* note 6, at 223; Steinberg & Cauffman, *supra* note 6, at 267–68.

choices adolescents make depend, in part, on the social context in which they find themselves. Adolescence is also a stage of individuation and identity formation, processes closely linked to psycho-social development. Individuals do not develop a coherent sense of identity until young adulthood, and adolescence is characterized by exploration, experimentation, and fluctuations in self-image. This movement from a fluid and embryonic sense of identity to one that is more stable and well-developed includes developments in the realms of morality, values, and beliefs.[53]

In this Part, we examine the dimensions of psychological and social development that provide the basis of our claim that adolescent involvement in crime differs from that of adults in ways that are important to assessments of culpability. First, several features of cognitive and psycho-social development in adolescence undermine competent decisionmaking and distinguish youths from adults. Second, the relationship between psycho-social development and the forming of personal identity in adolescence is important to understanding unique features of youthful criminal activity. Our analysis explains that typical adolescent criminal conduct is qualitatively different from that of adults *because* it is driven by developmental forces that are constitutive of this developmental stage.

A. Cognitive and Psycho-Social Development

Understanding and Reasoning.—The most familiar factors related to decisionmaking capacity are reasoning and understanding, basic elements of cognitive development. These capacities increase through childhood into adolescence; thus, pre-adolescents and younger teens differ substantially from adults in their cognitive abilities (although there is great variability among individuals). These developments, described in rich detail by Jean Piaget and subsequent researchers in cognitive development, are undergirded by increases in specific and general knowledge gained through education and experience, and by improvements in basic information-processing skills, including attention, short- and long-term memory, and organization.[54]

By mid-adolescence, tentative scientific evidence supports the claim that adolescents' capacities for understanding and reasoning in making decisions roughly approximate those of adults.[55] These findings from lab-

53. LAURENCE STEINBERG, ADOLESCENCE 263–65 (5th ed. 1999) (summarizing research on the development of moral reasoning, religious beliefs, and political views, and indicating a consolidation of values during the middle and late adolescent years).

54. The key advances during this period are gains in deductive reasoning, the ability to think about hypothetical situations, the ability to think simultaneously in multiple dimensions, the ability to think abstractly, and the ability to think about the process of thinking ("metacognition"). *See* JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT (3d ed. 1993) (outlining Piaget's theory and updating it based on new data); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); JEAN PIAGET, GENETIC EPISTEMOLOGY (1970); ROBERT S. SIEGLER, CHILDREN'S THINKING 55 (2d ed. 1991).

55. The evidence is tentative for two reasons. First, it is based in part on Piaget's stage theory of cognitive development, which has been challenged by modern cognitive scientists. Cognitive

oratory studies are only modestly useful, however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the strcet) in which decisionmakers must rely on personal experience and knowledge.[56] For these reasons, it remains uncertain whether adolescent cognitive capacity—as it affects choices relevant to criminal conduct—is comparable to that of adults.

Judgment Factors in Decisionmaking.—Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management.[57] While cognitive capacities shape the process of decisionmaking, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.

Substantial research evidence supports the conventional wisdom that teens are more responsive to peer influence than are adults. Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control. This susceptibility peaks around age fourteen and declines slowly during the high-school years.[58] Peer

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psychologists now accept that skills develop at different rates in different domains, and competence to make one kind of decision cannot be generalized. *See* FLAVELL, *supra* note 54; SIEGLER, *supra* note 54, at 51 (arguing that subsequent data fails to support the stage theory assumption of concurrent development in reasoning). Second, as the text suggests, the claim is tentative because it is supported by a group of small research studies conducted in laboratory scttings that for the most part involved white middle class subjects and no adult control groups. These studies are discussed and critiqued in Scott et al., *supra* note 6, at 224–26. For a thoughtful scientific critique of claims that youths' decisionmaking capacities are adultlike, see William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 900–01 (1989).

56. Research generally indicates that there is often a gap between intellectual competence and performance; performance is affected by a host of factors, including familiarity with the content area of the task. For example, if the task used to measure intellectual competence involves the reading of text about airplanes, then familiarity with airplanes may affect the performance of the person being tested. *See generally* Ward & Overton, *supra* note 51.

57. *See generally* Scott et al., *supra* note 6, 232–35 (exploring the effects of temporal perspective, attitude toward risk, and peer and parental influence on decisionmaking); Steinberg & Cauffman, *supra* note 6, 267–68 (examining research and theory regarding responsibility, temperance, and perspective as characteristics of mature judgment).

58. *See* Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986) (presenting research showing age differences in susceptibility to peer pressure); Scott et al., *supra* note 6, at 229–30; Steinberg & Cauffman, *supra* note 6, at 257–59. Changes in susceptibility to peer pressure may reflect changes in individuals' capacity for self-direction or, as some theorists have suggested, changes in the intensity of pressure that adolescents exert on each other. B. Bradford Brown, *Peer Groups and Peer Cultures*, *in* AT

influence affects adolescent judgment both directly and indirectly.[59] In some contexts, adolescents might make choices in response to direct peer pressure. More indirectly, adolescents' desire for peer approval (and fear of rejection) affects their choices, even without direct coercion. Finally, peers may provide models for behavior that adolescents believe will assist them to accomplish their own ends.

Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since it will affect the extent to which individuals consider the long-term consequences of their actions in making choices. Over an extended period between childhood and young adulthood, individuals become more future-oriented.[60] Adolescents tend to discount the future more than adults do, and to weigh more heavily short-term consequences of decisions—both risks and benefits—in making choices.[61] There are several plausible explanations for this age gap in future orientation. First, owing to cognitive limitations in their ability to think hypothetically, adolescents simply may be less able than adults to think about events that have not yet occurred (i.e., events that may occur sometime in the future). Second, adolescents' weaker future orientation may reflect their more limited life experience. For adolescents, a consequence five years in the future may seem very remote, while a short-term consequence may be valued disproportionately due to its immediacy.[62]

Research evidence also suggests that adolescents differ from adults in their perception of, and attitude toward, risk.[63] It is well established that

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THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliott eds., 1990).

59. Suseeptibility to peer influence involves two proccsses: social comparison and conformity. N. SPRINTHALL & W.A. COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW 269 (1988). Through social comparison, adolescents measure their own behavior by comparing it to others. *Id.* Conformity influcnces adolescents to adapt their behavior and attitudes to that of their peers. *Id.* at 272. Substantial research supports these influences. *See also* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608 (1979) (discussing studies which measure the effects of age on peer and parental conformity); Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967 (1966) (confirming hypothesis that conformity increases up to adolescence and declines afterwards).

60. *See* Anita Greene, *Future Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99 (1986) (presenting a study showing improvement over the course of adolescence in the ability to project events into the future); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1 (1991) (reviewing literature on future orientation and finding capacity increases over the course of adolescence). Gains take place over an extended period between the ages of 11 and 18 in individuals' capacities to project various events into the future. *Id.* at 29.

61. *See* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS IN THE AIDS EPIDEMIC 24 (William Gardner et al. eds., 1990) (arguing that adolescents may be more likely to engage in unprotected sex because they discount long-term consequences).

62. William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 78–79 (Nancy J. Bell & Robert W. Bell eds., 1993).

63. Gardner & Herman, *supra* note 61, at 25–26; Michael L. Matthews & Andrew R. Moran, *Age Differences in Male Drivers' Perception of Accident Risk: The Role of Perceived Driving*

adolescents and young adults generally take more health and safety risks than do older adults by engaging more frequently in behaviors such as unprotected sex, drunk driving, and criminal conduct.[64] Moreover, a synergy likely exists between adolescent peer orientation and risk-taking; considerable evidence indicates that people generally make riskier decisions in groups than they do alone.[65] In general, adolescents are less risk-averse than adults, generally weighing rewards more heavily than risks in making choices.[66] In part, this may be due to limits on youthful time perspective; taking risks is more costly for those who focus on the future. Finally, adolescents may have different values and goals than do adults, leading them to calculate risks and rewards differently. For example, the danger of risk-taking could constitute a reward for an adolescent but a cost to an adult.[67]

The widely held stereotype that adolescents are more impulsive than adults is supported by the relatively sparse research on developmental changes in impulsivity and self-management over the course of adolescence. In general, studies show gradual but steady increases in individuals' capacity for self-direction throughout the adolescent years, with gains continuing through the final years of high school.[68] Impulsivity, as a general trait, increases between middle adolescence and early adulthood and declines thereafter, as does sensation-seeking.[69] Research also indicates that adolescents have more rapid and more extreme mood swings (both positive and negative) than adults,[70] although the connection between moodiness and impulsivity is not clear. While more research is needed, the available evidence supports the notion that adolescents may have more difficulty regulating their moods, impulses, and behaviors than do adults.

Ability, 18 ACCIDENT ANALYSIS & PREVENTION 299, 309–11 (1986); Maya Tester et al., *Experimental Studies of the Development of Decision-making Competence, in* CHILDREN, RISKS, AND DECISIONS: PSYCHOLOGICAL AND LEGAL IMPLICATIONS (Symposium materials, Annual Convention of the Am. Psychological Ass'n, New York, Aug. 1987); Scott et al., *supra* note 6, at 230.

64. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 1–2 (1992) (presenting a rational-decisionmaking model of adolescent risky behavior).

65. This phenomenon is known as the "risky-shift" and has been observed in adults (who are less subject to peer influence and less likely to make decisions in groups). Jerald M. Jellison & John Riskind, *Attribution of Risk to Others as a Function of Their Ability*, 20 J. PERSONALITY & SOC. PSYCHOL. 413 (1971).

66. Gardner & Herman, *supra* note 61, at 25–26.

67. Moreover, peer rejection (for not taking risks) is likely to be weighed more heavily by teens than adults.

68. Ellen Greenberger, *Education and the Acquisition of Psycho-social Maturity, in* THE DEVELOPMENT OF SOCIAL MATURITY (David C. McClelland ed., 1982) (showing gradual gains in self-reliance over the course of adolescence).

69. Steinberg & Cauffman, *supra* note 6, at 260.

70. Reed Larson et al., *Mood Variability and the Psycho-Social Adjustment of Adolescents*, 9 J. YOUTH & ADOLESCENCE 469, 488 (1980) (presenting a study finding wider mood fluctuations among adolescents than adults).

Although most of the developmental research on cognitive and psychosocial functioning involves psychological studies, mounting evidence suggests that some of the differences between adults and adolescents have an organic dimension. Research on brain development, although in its early stages, indicates that regions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood.[71] At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes may also contribute to increased emotionality and vulnerability to stress.[72] At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decisionmaking, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.[73] One scientist has likened the psychological consequences of brain development in adolescence to "starting the engines without a skilled driver."[74]

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

1. Developmental Factors and Criminal Decisionmaking.—How might developmental factors that contribute to immature judgment influence young actors to participate in criminal activity?[75] Consider the following scenario.[76] A teen hangs out with his buddies on the street, when, on the spur of the

71. Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417 (2000) (reviewing animal and human research on brain maturation during puberty and indicating that "remodelling of the brain" during adolescence occurs among different species).

72. *Id.* at 421.

73. *Id.* at 423.

74. Ronald Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60 (2001).

75. For an analysis of the impact of cognitive and psycho-social immaturity on adolescent decisionmaking generally, see Elizabeth S. Scott, *Reasoning and Judgment in Adolescent Decisionmaking*, 37 VILLANOVA L. REV. 1607, 1647–57 (1992).

76. The scenario in the text is adapted from Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 165–66 (1997).

moment, someone suggests holding up a nearby convenience store. The youth doesn't really go through a formal decisionmaking process, but he "chooses" to go along, even if he has mixed feelings. Why? First and most important, he may assume that his friends will reject him if he declines to participate—a negative consequence to which he attaches considerable weight in considering alternatives. He does not think of options to extricate himself—although a more mature person might do so. This may be because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the "adventure" of the hold-up and the possibility of getting some money are exciting. These immediate rewards (together with peer approval) weigh more heavily in his decision than the remote possibility of apprehension by the police. He never considers the long-term costs of committing a serious crime.

Research on youthful criminal activity offers some empirical support for this scenario. For example, unlike adult criminals, adolescents usually commit crimes with peers,[77] although the precise mechanisms by which peer orientation shapes criminal behavior are not well understood. Researchers have also linked desistance from crime in late adolescence to improved future orientation and to changing patterns of peer relationships.[78] The scenario is also consistent with the general developmental research on peer influence, risk preference, impulsivity, and future orientation, and it suggests how factors that are known to affect adolescent decisionmaking in general are likely to operate in this setting. As a general proposition, teens are inclined to engage in risky behaviors that reflect their immaturity of judgment. It seems very likely that the psycho-social influences shaping adolescents' decisionmaking in other settings contribute to their choices about criminal activity as well.

2. *Psycho-Social Development in Social Context.*—The psycho-social factors that influence decisionmaking are an important component of youthful criminal choices. Whether teens become involved in crime, and what crimes they commit depend on other ingredients as well, including

77. Albert Reiss, Jr. & David Farrington, *Advancing Knowledge About Co-Offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360, 361–62 (1991). Even adults, however, can make riskier choices in groups. Consider mob behavior, for example.

78. *See* Edward Mulvey & John F. LaRosa, *Delinquency Cessation and Adolescent Development*, 56 AM. J. ORTHOPSYCHIATRY 212, 222 (1986) (contending that cognitive changes and increased awareness of consequences account for improved decisionmaking by troubled youths, rather than drastic life-changing events). Terrie Moffitt postulates that young adults may cease to commit crimes because they come to understand that the decision to offend carries the risk of lost future opportunities. Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 690 (1993).

opportunity and social context.[79] Adolescent peer orientation makes youths who live in high-crime neighborhoods susceptible to powerful pressures to join in criminal activity, and compliance may be more typical than resistance. Jeffrey Fagan and others have described how strong social norms within urban adolescent male subcultures prescribe a set of attitudes and behaviors that often lead to violent crime.[80] Moreover, avoiding confrontation when challenged by a rival results in a loss of social status and ostracism by peer affiliates, which in itself can create vulnerability to physical attack.[81] The research by Fagan and his colleagues suggests that ordinary youths in poor urban neighborhoods face coercive peer pressure and sometimes tangible threats that propel them to get involved in crime while making extrication difficult.[82]

The coercive impact of social context is exacerbated because adolescents are subject to legal and practical restrictions on their ability to escape these criminogenic settings. Financially dependent on their parents or guardians and subject to their legal authority, adolescents cannot escape their homes, schools, and neighborhoods. At least until age sixteen, a web of legal restrictions on their liberty prevents adolescents from doing what we might expect of an adult in the same context—move to another location in which the pressures to offend are lessened. Because adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy and are more restricted in their capacity to avoid coercive criminogenic influences than are adults.[83]

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79. Jens Ludwig et al., *Urban Poverty and Juvenile Crime*, 116 Q. J. ECON. 655, 676 (2001) (concluding that giving families the opportunity to move from high-poverty to low-poverty areas reduces juvenile involvement in violent crime).

80. Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 535–38 (1999) (noting that coercive social context influences criminal choices); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL, *supra* note 3, at 376 (arguing that social context predicts violent adolescent behavior); Deanna Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 64–66 (1996). Wilkinson and Fagan describe the way in which the peer social context coerces youths to follow set "scripts" that can lead to violent confrontation. *Id.* Conformity to these social norms is then enforced with the threat of severe sanctions. *Id.* at 63–64.

81. *Id.*

82. *Id.*

83. At some level, many adult criminals can point to the impact of social context on their involvement in crime. Arguments that the actor's "rotten social background" is exculpatory also focus on such constraints. *See generally* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985). However, the formal legal and structural restrictions on minors (which are removed when the minor reaches adulthood) distinguish them from adults who are also from impoverished backgrounds.

B. The Formation of Personal Identity and Experimentation in Crime

The emergence of personal identity is an important developmental function of adolescence, and one in which the aspects of psycho-social development discussed earlier play a key role. During this period, youths begin to separate from their parents and take steps toward an autonomous personhood. Developmental psychologists describe two interrelated processes: individuation (the process of establishing autonomy from one's parents), and identity development(the process of creating a coherent and integrated sense of self).[84] A predictable developmental sequence can be described. Most pre-adolescents strive to please their parents and other adults by complying with their wishes and parroting adult beliefs and values. During early and middle adolescence, youths individuate from parents, a process that can involve a certain amount of risky behavior reflecting rebellion and a shift in orientation from parents to peers. By late adolescence, individuation is complete, autonomy from both parental and peer influence is achieved, and the individual is well on the way toward the establishment of personal identity.[85]

Adolescence has often been described as a period of "identity crisis"—an ongoing struggle to achieve sclf-definition.[86] According to developmental theory, the process of identity development is a lengthy one that involves considerable exploration and experimentation with different behaviors and identity "elements." These elements include both superficial characteristics, such as style of dress, appearance, or manner of speaking, and deeper phenomena, such as personality traits, attitudes, values, and beliefs. As the individual experiments, she gauges the reactions of others as well as her own satisfaction, and through a process of trial and error, over time selects and integrates the identity elements of a realized self. Not surprisingly, given adolescent risk preferences (perhaps combined with rebellion against parental values in the course of individuation), identity experimentation often involves risky, illegal, or dangerous activities—alcohol use, drug use, unsafe sex, delinquent conduct, and the like. For most teens, this experimentation is fleeting; it ceases with maturity as identity becomes settled. Only a relatively

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84. *See* Peter Blos, *The Second Individuation Process of Adolescence*, 22 THE PSYCHOANALYTIC STUDY OF THE CHILD 162–68 (1967) (describing individuation in early adolescence). The most influential writing on the development of identity in adolescence is ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968).

85. ERIKSON, *supra* note 84, at 136. Although both processes are ongoing throughout this period, individuation is a more salient task in early and middle adolescence (when individuals struggle for independence from parental control), while identity development is more important in late adolescence and young adulthood. *See* Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEVELOPMENTAL PSYCHOL. 341, 345–48 (1982) (reviewing research on identity development); STEINBERG, *supra* note 53, at 256–64, 278–99 (describing the development of identity and autonomy).

86. *See generally* ERIKSON, *supra* note 84, 15–19.

small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.[87] Thus, predicting the development of relatively more permanent and enduring traits on the basis of risky behavior patterns observed in adolescence is an uncertain business.

While individuation, exploration, and experimentation are ongoing from early adolescence, coherent integration of the various retained elements of identity into a developed "self" does not occur until late adolescence or early adulthood.[88] Elements of adult personhood include social and political attitudes, moral values, occupational commitments, religious beliefs, and personal habits and lifestyle choices.[89] Until at least late adolescence, the values, attitudes, beliefs, and plans expressed by adolescents are likely to be tentative and exploratory expressions, rather than enduring representations of personhood.

This account of identity development in adolescence informs our understanding of patterns of criminal conduct among teens. Criminal behavior is rare in childhood and early adolescence. Onset typically occurs during a period in which adolescents separate from parents and parental influence, and become more focused on peers. The incidence of antisocial behavior increases through age sixteen and declines sharply from age seventeen onward.[90] Most teenage males engage in some criminal activity; indeed, psychologist Terrie Moffitt describes it as "a normal part of teen life."[91] However, only a small group of young offenders will persist in a life of crime.[92] Based on these patterns, Moffitt offers a taxonomy of adolescent

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87. *See infra* notes 91–93 and accompanying text.

88. *See* ERIKSON, *supra* note 84, at 70; Waterman, *supra* note 85, at 345–48. Early descriptions of the identity crisis of adolescence did not distinguish among early, middle, and late adolescence; Erikson described adolescence as a single period of development. ERIKSON, *supra* note 84, at 128–35. Empirical research suggests, however, that most identity development occurs late in the adolescent period. Compare generally ERIKSON, *supra* note 84, with research reviewed by STEINBERG, *supra* note 53, at 273–79.

89. *See* STEINBERG, *supra* note 53, at 263–64 (reviewing research indicating that the development of a coherent sense of identity in the areas of ideological values and beliefs, occupational commitments, and interpersonal relations does not typically occur before age 18).

90. RICHARD JESSOR & SHIRLEY L. JESSOR, PROBLEM BEHAVIOR AND PSYCHOSOCIAL DEVELOPMENT: A LONGITUDINAL STUDY OF YOUTH 145–63 (1977); David P. Farrington, *Offending from 10 to 25 Years of Age*, *in* PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY 17 (K. Teilman Van Deusen & S.A. Mednick eds., 1983); Moffitt, *supra* note 78, at 675.

91. Moffitt, *supra* note 78, at 675.

92. Much research supports this statement. *See* David P. Farrington, *Age and Crime*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189 (Michael Tonry & Norval Morris eds., 1986) (describing declining crime rate in late adolescence); Edward P. Mulvey & Mark Aber, *Growing Out of Delinquency: Development and Desistance*, *in* THE ABANDONMENT OF DELINQUENT BEHAVIOR: PROMOTING THE TURNAROUND 99, 100 (Richard L. Jenkins & Waln K. Brown eds., 1988) (describing a "natural onset and recovery process"); MARTIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 89 (1972) (reporting that a small fraction of the cohort persists in crime); Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 991 (1987) (pointing out that after age twenty, "participation levels continue to decline"); Travis

antisocial conduct, in which typical teenage lawbreakers are described as "adolescence-limited" offenders, while a much smaller group are described as "life-course-persistent" offenders.[93] Most youths in the first group have little notable history of antisocial conduct in childhood, and, predictably, in late adolescence or early adulthood, they will "mature out" of their inclination to get involved in criminal activity.

This pattern supports the conclusion that much youth crime represents the experimentation in risky behavior that is a part of identity development but desists naturally as individuals develop a stable sense of self and maturity of judgment. One reason the typical delinquent youth does not grow up to be an adult criminal is that the developmentally linked values and preferences that drive his criminal choices as a teenager change in predictable ways as he matures. Adolescents are not yet the persons they will become—persons whose choices reflect their *individual* values and preferences. As the typical adolescent offender matures, he becomes an adult with personally defined commitments and values and a stake in his own future plans. He is no longer inclined to get involved in crime because his adult values (components of his personal identity) no longer lead him in that direction. Indeed, there is no reason to believe that the young actor's adult self would endorse his youthful choices.

The upshot is that the criminal conduct of most young wrongdoers is quite different from that of typical adult criminals. It is fair to assume that most adults who engage in criminal conduct act upon subjectively defined preferences and values, and that their choices can fairly be charged to deficient moral character. This cannot fairly be said of the crimes of typical juvenile actors, whose choices, while unfortunate, are shaped by development factors that are constitutive of adolescence. To be sure, some adolescents may be in the early stages of developing a criminal identity and reprehensible moral character traits—Moffitt's "life-course-persistent" offenders—but most are not.[94] The criminal choices of typical young offenders differ from those of adults, not only because the choice, *qua* choice, is deficient as the product of immature judgment, but also because the adolescent's criminal act does not express the actor's bad character.

III. Excuse and Mitigation in Criminal Law

In contrast to the binary categorization used to define the criminal responsibility of juveniles, under general criminal law doctrine, blame-

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Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983) (stating that "[t]he empirical fact of a decline in the crime rate with age is beyond dispute").

93. Moffitt, *supra* note 78, at 682–85. Although some "life-course-persistent" offenders do not initiate antisocial behavior until early adolescence, Moffitt claims that many display a variety of problem behaviors early in life which persist through adolescence into adulthood. *Id.*

94. Moffitt, *supra* note 78, at 684–85.

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

A. Criminal Law Theories of Responsibility and Excuse

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

This leads to the question of what makes one actor's conduct more or less blameworthy than that of another. In response, criminal law scholars offer a variety of positive and normative theories of culpability and excuse.[95] Choice and character theorists often seek to explain criminal law treatment of excuse and mitigation, paying close attention to the doctrines of duress, defense against aggression, provocation, and insanity, as well as other factors that may affect deserved punishment.[96] This inquiry rests on the quite plausible intuition that understanding why actors are deemed not culpable (or less culpable than the typical actor) illuminates the meaning of culpability. Not surprisingly, choice and character theorists offer different positive

95. *See supra* note 10. For a general description of various theories, see Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193 (1993). Some theorists offer alternatives to choice and character-based theories. Jean Hampton, for example, argues that defiance is the source of culpability. *See* Jean Hampton, *Mens Rea*, 7 SOC. PHIL. & POL'Y 1 (1990).

96. Insanity and duress are often analyzed as representative (respectively) of incapacity and situational excuses. *See* Duff, *supra* note 7, at 351–55; Moore, *supra* note 7, at 31; Brandt, *supra* note 9, at 182–87. However, in analyzing culpability, some theorists group as "excuses" all exculpatory defenses, including voluntary act, self defense, and mistake, as well as those that fit in the doctrinal categories of justification and excuse. *See* Kadish, *supra* note 10, at 265. At a minimum, the boundary between justification and excuse is not as important for the purposes of this analysis as it is often assumed to be in criminal law, because the focus is on factors that reduce or eliminate culpability. *See generally* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

accounts of the role and purposes of these doctrines and draw different inferences about their optimal reach.

Choice theorists adopt a model of culpability based on rationality and volition, positing the responsible moral agent as one who has the capacity to make a rational choice and a "fair opportunity" to choose the law-abiding course.[97] Under this view, the legitimacy of criminal punishment is diminished if an actor's choice departs substantially from this autonomy model.[98] The actor whose decisionmaking capacity is extremely compromised or whose opportunity to make a different (non-criminal) choice is severely limited may not even meet the minimum threshold conditions of culpability; he will be excused from criminal responsibility altogether.[99] Thus, the insanity defense excuses the actor whose capacity to understand the wrongful nature of his act is so distorted as to negate moral agency, and an actor whose will is overborne by threats of physical harm may be excused on grounds of duress. Other actors, whose decisionmaking capacities are less severely impaired, or who are subject to compelling (but not overwhelming) pressures and constraints that limit their freedom of choice, may pass the minimum threshold of responsibility but be judged less culpable and deserving of less punishment than the typical criminal actor.

Character theory holds that criminal blameworthiness is premised on an implicit but powerful inference that the wrongful act is the product of the actor's bad character. This premise is evident, not in standard determinations of responsibility and punishment (which include no inquiry into character), but in the defenses that negate or reduce culpability and in the apportionment of blame at sentencing.[100] In our view, the most defensible version of character theory maintains the focus on criminal conduct as the object of punishment, but holds that the culpability of the criminal act varies depending not simply on the quality of the choice, but on its meaning as an expression of the actor's moral character.[101] Thus, a lawbreaker who is co-

97. *See* H.L.A. HART, *supra* note 8, at 152; Moore, *supra* note 7, at 31–35.

98. Stephen Morse has described the conditions for excuse as "non-culpable irrationality . . . and non-culpable hard choice." *See* Morse, *supra* note 3, at 24.

99. Similarly, the actor who did not choose to cause harm, instead acting under a mistake of fact, may be exculpated. *Id.*

100. Thus, for example, George Fletcher states, "The only way to work out a theory of excuses is to suggest that the excuses represent a limited, temporal distortion of the actor's character." GEORGE FLETCHER, RETHINKING CRIMINAL LAW 802 (1978).

101. Some character theorists argue that the ultimate purpose of criminal law is to punish bad character per se (rather than bad acts), a claim that has been the target of much legitimate criticism. Nicola Lacey and Michael Bayles adopt this view. *See* LACEY, *supra* note 9, at 65–68; Bayles, *supra* note 9, at 5–20; *see also* Moore, *supra* note 7, at 49–58 (offering a critique of character theory). Duff criticizes this extreme position and affirms that conduct is the focus of punishment, but he argues that criminal liability can only be explained in terms of a link between act and character. *See* Duff, *supra* note 7, at 359–62, 372; *see also* Horder, *supra* note 95, at 204–09 (arguing that under character theory, excuse is warranted if a person of good character would act as

erced to offend under a threat of injury does not act on the basis of bad character if the threat is such that a person of good character would likely succumb to the same pressure. The insane actor's choice is an expression of his mental illness and not of bad character. Under character theory, both exogenous and endogenous forces that subvert the inference that the criminal act reflects bad moral character have exculpatory or mitigating importance in assessing culpability.

Character theory is more controversial than choice theory, in part because it seems to invite an open-ended assessment of blame on the basis of criteria that are only indirectly linked to the wrongful act. By limiting the inquiry about culpability to the connection between the quality of the actor's decision and her conduct, choice theory requires a more bounded assessment. Yet, although its normative appeal may be contested, character theory has considerable explanatory power in some areas of doctrine and practice. First, evidence that the crime was aberrational in light of the actor's established character is explicitly a basis for mitigation of pnnishment.[102] Beyond this, excuse and mitigation often seem to require not only that the actor's reason and will were overborne, but that the reaction was not morally deficient: In other words, a person of good character would react similarly.[103] For example, provocation is a mitigating defense to a murder charge, but only if the angered response was reasonable under the circumstances and not simply because the actor was subjectively unable to control his rage.[104] Similarly,

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the accused did); Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 346–49 (1996) (arguing that the moral quality of emotions that undermine rationality and volition determines whether they are exculpatory).

102. For a discussion of mitigating character evidence at sentencing, sce *infra* note 119 and accompanying text.

103. R.A. Duff argues that focusing solely on choice as the source of criminal liability cannot explain excuses such as duress and insanity. In his view, what makes a criminal actor fully culpable is that the act flowed from an intelligible set of attitudes, concerns, and values, and the act displayed improper indifference to others' interests or the law's values—all aspects of character. What makes an action "out-of-character" (and less culpable) is that it does not reflect character at all. In other words, the action is not related to the actor's attitudes, structures of value, or motives, which are aspects of the individual's continuing identity as a person. *See* Duff, *supra* note 7, at 359–61, 378–79.

104. Reasonable provocation reduces murder to manslaughter. Jerome Michael and Herbert Wechsler describe the reasonableness requirement as a measure of character:

> Provocation . . . cannot be measured by the intensity of the passions aroused in the actor by the provocative circumstances. It must be cstimated by the probability that such circumstances would affect most men in like fashion. . . . [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*. . . . [T]he more difficulty [most men] would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.

Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) (emphasis added). Dan Kahan and Martha Nussbaum describe the extent to which the provocation doctrine incorporatcs a moral evaluation of the loss of control in response to

under conventional doctrine the coward will be unable to establish self-defense or duress, however genuine his fear.[105]

Our purpose in this Essay is not to take sides in this ongoing debate between competing theoretical perspectives on culpability. We tend to agree with the view that neither choice nor character theorists provide a comprehensive account of culpability and that both perspectives offer insights of varying persuasiveness in different doctrinal contexts.[106] The important point for our purposes is that an analysis of adolescent culpability within either of these theoretical frameworks points to the conclusion that young actors are less culpable than are typical adults. In a framework that focuses only on choice, young law violators are poorer decisionmakers with more restricted opportunities to avoid criminal choices than are adults. Under an approach in which bad moral character is the ultimate source of culpability, ordinary adolescents, whose identity is in flux and character unformed, are less culpable than typical adult criminals.[107]

B. Excuse and Mitigation in Criminal Law Doctrine

1. Categories of Excuse and Mitigation.—We suggested at the outset that excuse and mitigation are available to actors who are unlike "typical" criminals in two very different ways—those with deficient decisionmaking capacities, and those who are "ordinary persons" who offend in response to extraordinary circumstances. In the first group are actors whose culpability

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external circumstances. *See supra* note 101. *See* People v. Shields, 575 N.E.2d 538, 545–46 (Ill. 1991) (holding that a properly instructed jury could reasonably have found that the sexual assault of the defendant's child could constitute legally adequate provocation).

105. Compare the unsuccessful self-defense claim of Bernard Goetz (who claimed that he feared being maimed when he opened fire on four young black men who approached him on the subway) with that of a battered woman who kills a partner. People v. Goetz, 497 N.E.2d 41 (N.Y. 1986) (requiring objectively reasonable belief of threat). If these claims are treated differently, it is not simply because of subjective differences in the fear experienced by the actors but rather on the basis of an evaluation of the moral legitimacy of the claims. Kahan and Nussbaum point out that a woman who robs a bank in the face of a threatened beating may be exeused on grounds of duress, while one who allows her child to be harmed in the face of the same threat will likely fail. The will of both actors is subject to the same coercive force, but one is revealing deficient character, while the other is not. Kahan & Nussbaum, *supra* note 101, at 333–37. *Cf.* People v. Romero, 13 Cal. Rptr. 2d 332, 340 (Cal. Ct. App. 1992) (holding that expert testimony on Battered Woman Syndrome could have persuaded a reasonable jury to accept a duress defense to a robbery charge). A few states (and the Model Penal Code) apply a subjective test to self-defense claims and thus would give the coward a defense. *See* State v. Warlock, 609 A.2d 972, 976 (Vt. 1992) (stating that "[o]ur law does not hold a nervous coward and fearless bully to an identical reasonable person standard"); MODEL PENAL CODE § 3.04(1) (recognizing a subjective test).

106. As R.A. Duff put it, choice theory is too arid and character theory is too rich. Choice theorists err in denying the relevance of the link between the act and the actor's underlying personal identity, while (many) character theorists wrongly discount the importance of the criminal act. *See* Duff, *supra* note 7, at 367–68.

107. R.A. Duff's description of less culpable "out of character" acts as reflecting no character at all aptly describes adolescent actors. *See* Duff, *supra* note 7, at 368.

for wrongful acts is reduced or excused due to endogenous traits or conditions that undermine their decisionmaking capacity, impairing their ability to understand the nature and consequences of their wrongful acts. The primary focus here has been on mental disability and disorder, and the defenses of insanity, diminished capacity, and extreme emotional disturbance are doctrinal expressions of this type of culpability-reducing condition.[108] Two types of excuse or mitigation are available to actors in the second group. First, culpability is reduced or negated when, due to exogenous circumstances surrounding the offense, the actor faces a difficult choice that leads her to engage in harmful conduct, and her response is reasonable under the circumstances (as measured against expected responses of ordinary people).[109] On this account, the doctrines of duress, provocation, necessity, and self-defense are exculpatory or mitigating because the actor can explain the criminal act in terms of unusual exogenous pressures and not moral deficiency.[110] The link between bad act and bad character is negated more explicitly in the other category of culpability-reducing evidence invoked by ordinary persons. Where the conduct is aberrant or "out of character" in light of the actor's reputation and prior conduct, it is deemed less culpable and deserving of reduced punishment.[111] Thus, effectively, the criminal law recognizes three rough categories of culpability-reducing conditions: incapacity, coercive circumstances, and out-of-character behavior.

2. Proportionality and Mitigation.—The line between excuse and mitigation is significant because it defines the categorical boundary of criminal responsibility. In assessment of the culpability of behavior, however, most mitigating conditions are of the same kinds as those that excuse, and the differences are a matter of degree.[112] Not surprisingly,

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108. At common law, infaney was described as this type of excusing condition. *See* Walkover, *supra* note 17 and accompanying text.

109. The difficulty may be due to threats directed at the actor or others, or to other harms that can be avoided only by engaging in the harmful act.

110. *See* Michael & Wechsler, *supra* note 104, at 1279–82. Not all of these categories are doctrinally classified as excuses, but all result in reduced (or negated) eulpability because the actor's response was reasonable as a response to exogenous eircumstances. Defenses against aggression are classified as justification, but the actor's conduct is justified as a reasonable response to a threat by his victim. *See* BONNIE ET AL., *supra* note 5, at 325–57.

111. Good character alone (without evidence of sufficiently compelling extraordinary eircumstances) can mitigate culpability, but it is never the basis of outright excuse from criminal responsibility. One could argue that this third type of mitigation is not a distinct category, but rather functions as a weaker version of the other two, in cases in which the evidence (of incapacity or extraordinary circumstances) is ambiguous. A pronounced contrast between the actor's established character and the bad act suggests that either his mental state was temporarily impaired or unusual circumstances drove him to offend.

112. *See* HART, *supra* note 8, at 16 (describing indistinct boundaries among excuse, justification, and mitigation). All excusing conditions can be mitigating in their less extreme form, although some sources of mitigation, such as provocation and aberrant conduct, are not sufficiently exculpatory to serve as the basis of excuse.

defenses that excuse actors altogether from criminal liability are very narrowly drawn.[113] Culpability is mitigated when a harmful act is sufficiently blameworthy to meet the minimum threshold of criminal responsibility, but the actor's capacity or circumstances are compromised (or general good character is evident) sufficiently to warrant less punishment than the typical offender. For example, mental disorder that distorts the actor's decisionmaking but is not severe enough to support an insanity defense can reduce the grade of an offense or result in a less punitive disposition.[114] Under this approach, mitigation plays an important role in implementing the principle of penal proportionality in the criminal law without sacrificing the policy objectives of public protection and deterrence.

Calibrated measures of culpability are embedded in the substantive criminal law, particularly in mens rea doctrine and the law of homicide.[115] Mitigation also plays a key role at sentencing, where a broad range of factors can be considered in the judgment about deserved punishment.[116] Sentencing

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113. For example, the defense of duress is available only when the actor faces an imminent threat of death or serious physical injury that "a person of reasonable firmness" would be unable to resist. *See* United States v. Willis, 38 F.3d 170, 178–79 (5th Cir. 1994). An offense committed in response to a lesser threat (to property, for example) could constitute mitigation, but not excuse.

114. Some jurisdictions recognize homicide defenses of diminished capacity or partial responsibility that either negate a mens rea element or reduce murder to manslaughter. *See* BONNIE ET AL., *supra* note 5, at 538–40. Under the Model Penal Code, the actor's extreme mental or emotional disturbance reduces the homicide to manslaughter. MODEL PENAL CODE § 210.3(1)(B). This provision seems to combine diminished capacity or temporary insanity with provocation. Although the sufficiency of the emotional disturbance is to be evaluated on the basis of its reasonableness, reasonableness itself is assessed from the subjective viewpoint of the actor. Mental illness is also often a general mitigation factor at sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2001); KAN. STAT. ANN. § 21-4637(h) (1995); NEB. REV. STAT. § 29-2523(2)(g) (Supp. 2000). In the recent trial of Andrea Yates, the Texas mother who killed her 5 children, the jury rejected Yates's insanity plea but declined to impose the death penalty in light of her serious mental illness. Jim Yardley, *Mother Who Drowned Five Children in Tub Avoids a Death Sentence*, N.Y. TIMES, March 16, 2002, at A1.

115. Basic mens rea doctrine grades culpability on the basis of the actor's intentions and awareness of risk-creating circumstances. *See* MODEL PENAL CODE § 2.02. Moreover, under specific intent doctrine, an actor with a particular bad purpose is deemed more culpable (and deserves more punishment) than one who engages in the same conduct without that purpose. *See* BONNIE ET AL., *supra* note 5, at 133. The law of homicide operates through a grading scheme under which punishment for the most serious of harms varies dramatically depending upon the blameworthiness of the actor. Thus, the actor who kills intentionally is deemed less culpable when he does so without premeditation and deliberation. This is because his choice reveals less consideration of the consequences of his act and less commitment to the evil purpose. One who kills in response to provocation or under extreme emotional disturbance is guilty only of manslaughter. The actor who negligently caused the victim's death commits a less serious crime than she who intended to kill. *See* MODEL PENAL CODE § 210. *See generally* Michael & Wechsler, *supra* note 104, at 1274–90.

116. These factors may also be important to the law's preventive purposes. Often, mitigating factors are responsive to both retributive and preventive purposes. For example, the actor who offends in response to duress or the actor who demonstrates good character is less culpable and also less likely to offend again than the typical offender. However, retributive and preventive purposes may sometimes cut in opposite directions. Some factors—such as mental disorder—may be

guidelines routinely include mitigating factors relevant to culpability that can be grouped in the three categories described above. First, endogenous factors relating to the quality of the actor's decisionmaking capacity include impaired cognitive or volitional capacity due to mental illness or retardation, extreme emotional distress, youth, lack of sophistication, susceptibility to influence or domination, or evidence that the crime was unplanned and spontaneous.[117] Typical mitigating factors relating to external circumstances include duress, provocation, perceived threat, extreme need and domination that are not severe enough to constitute a defense.[118] The third category recognizes mitigation when the criminal act was out of character for the actor.[119] For example, a reduced sentence might result if the crime was a first offense or an isolated incident; if the actor expressed genuine remorse or tried to mitigate the harm; if he had a history of steady employment, fulfillment of family obligations, and good citizenship; or, more generally, if the criminal act was aberrant in light of the defendant's established character traits. Under this category, the actor's settled identity as a moral person is deemed relevant to the assessment of blame.

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mitigating of culpability but also suggest that the actor represents a threat to public safety. This claim is sometimes made concerning immaturity as a mitigating factor, usually as a way to justify adult punishment for young offenders.

117. For representative sentencing guidelines that include these mitigating factors, see FLA. STAT. ANN. § 921.0026 (West 2001) (including impaired cognitive/volitional capacity, mental disorder, domination by another, and youth); KAN. STAT. ANN. § 21-4637(b), (e), (g)–(h) (1995) (including extreme mental distress, mental disorder, domination by another, impaired cognitive/volitional capacity, and age); NEB. REV. STAT. § 29-2523(2)(b)–(d), (g) (1995 & Supp. 2001) (including extreme mental distress, domination by another, impaired cognitive/volitional capacity, and age). In *Atkins v. Virginia*, the Supreme Court held that the death penalty is disproportionate punishment for mentally retarded offenders. The Court described the diminished capacity of this group as the basis for a categorical reduction of culpability. 122 S.Ct. 2242, 2250–52 (2002).

118. *See* N.J. STAT. ANN. § 2C:44-1(b)(3) (1995 & Supp. 2002) (listing provocation as a "mitigating circumstance"), § 2C:44-1(b)(13) (listing undue influence by an older person as a "mitigating circumstance"); N.C. GEN. STAT. § 15A-1340.16(e)(1) (listing duress, coercion, threat insuffieient to constitute defense but reducing culpability), § 15A-1340.16(e)(8) (listing provocation as a mitigating factor) (2001); TENN. CODE ANN. § 40-35-113(2) (1997) (listing provocation as a mitigating factor), § 40-35-113(12) (listing duress or domination as mitigating factors even though neither is sufficient to constitute a defense); CAL. CT. R. 4.423(a)(8) (stating that one mitigating factor is that "[t]he defendant was motivated by a desire to provide neeessities for his or her family or self").

119. The Federal Sentencing Guidelines were amended to include "aberrant behavior" as a mitigating faetor. U.S. SENTENCING GUIDELINES MANUAL § 5K2.20, cmt. n.1(c) (1998). Such behavior must "represen[t] a marked deviation by the defendant from an otherwise law-abiding life." State guidelines also include mitigating factors based on past reputation and character. *See, e.g.*, FLA. STAT. ANN. § 921.0026 (2)(h)(j) (West 2001) (allowing mitigation for compensation of the victim and the isolated nature of the incident, for whieh defendant has shown remorse); MASS. GEN. LAWS ANN. ch. 211E § 3(d)(13)–(14), (16) (Supp. 2001) (allowing mitigation based on community ties, family responsibilities, character, and personal history); N.C. GEN. STAT. § 15A-1340.16(e)(12) (2001) (recognizing good character or good reputation in community as mitigating factors); CAL. CT. R. 4.423(b)(5) (allowing mitigation where the defendant made restitution to victim).

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

IV. A Mitigation Model Of Juvenile Justice

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

A. Locating Adolescence on the Excuse-Mitigation Continuum

As a preliminary matter, a culpability line should be drawn between children and adolescents. The very small group of offenders who are pre-adolescents should be excused from responsibility for their crimes, as they presumptively were at common law. Excusing children who commit crimes is compatible with the conventional drawing of the responsibility boundary in criminal law. Pre-adolescent children are appropriately grouped with actors suffering from severe disability because their cognitive decision-making capacity is so different from that of adults.[120]

The differences that distinguish adolescents from adults are more subtle—mitigating, but not exculpatory. Most obviously, cognitive and psycho-social immaturity undermines youthful decisionmaking in ways that reduce culpability. Moreover, due to their immaturity, adolescents may be more vulnerable to coercive pressures than are adults. Finally because their

120. In practice, this would mean that children would be subject only to purely rehabilitative interventions, and not subject to criminal punishment. Secure confinement would be appropriate on civil commitment grounds, but not in correctional facilities. Child welfare interventions could result in state custody in cases where parents are unable to supervise and control their children.

criminal acts are influenced by normal developmental processes, typical adolescent law breakers are different from fully responsible adults whose crimes are assumed to be the product of bad moral character. Thus, young offenders are less culpable than adults because of their diminished capacity; but they are also appropriately identified with actors who succumb to coercive pressures or who demonstrate that their criminal acts were out of character, and who are less culpable because their responses are those of ordinary persons.

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

To some extent, lawmakers, by including youth or immaturity as a mitigating factor under many sentencing statutes, implicitly acknowledge that immature judgment mitigates the culpability of young decisionmakers.[121] Only in the context of capital punishment, however, has the rationale for treating youthful immaturity as a mitigating condition been articulated.[122] Within the larger death penalty debate, the question of whether juveniles should ever be executed is hotly contested. In praetice, the execution of juv-

121. Many sentencing statutes list youth as a mitigating factor. *See, e.g.*, FLA. STAT. ANN. § 921.0026(2)(k) (West 2001); IND. CODE ANN. § 35-38-1-7.1(a)(4) (1998); MONT. CODE ANN. § 46-18-304 (1)(g)(2001); TENN. CODE ANN. § 40-35-113(6) (1997).

122. The Supreme Court has made clear that a broad range of mitigating evidence must be admitted in a capital sentencing proceeding. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 105 (1982) (holding that mitigating evidence of turbulent family history and emotional disturbance must be admitted). The Court has struck down statutes that limit discretion at sentencing by excluding most mitigating evidence. *Compare* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that a statute imposing a mandatory death sentence under certain conditions was unconstitutional) *with* Gregg v. Georgia, 428 U.S. 153, 163–64 (1976) (upholding a statute that allowed broad-ranging mitigating evidence at capital sentencing).

eniles is either formally prohibited or a rare occurrence, a pattern that acknowledges that young offenders are not fully responsible, at least not to the extent of deserving the ultimate punishment.[123] The Supreme Court has declined to hold that the death penalty is categorically disproportionate punishment for all juveniles,[124] but in *Thompson v. Oklahoma*, the Court prohibited the execution of youths whose offenses occurred before their sixteenth birthday.[125] In his plurality opinion, Justice Stevens focused on the immature judgment of adolescents in explaining why such punishment would violate the principle of proportionality—and thus, the Eighth Amendment prohibition of cruel and unusual punishment:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis of this conclusion is too obvious to require extended explanation. Inexperience, less education and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[126]

Although the judgment of blameworthiness that is at issue in the death penalty context occupies an extreme pole on the culpability continuum, Justice Stevens's analysis of the relationship between immature judgment and blameworthiness is applicable generally to the criminal punishment of young actors.[127] The youthful characteristics identified by Justice Stevens impede decisionmaking in crime settings in which the death penalty is not at issue. Moreover, under the logic of *Thompson*, contemporary reformers have it backwards when they argue that youths can be classified as adults for

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123. Of the 18 states with minimum age restrictions on the imposition of the death penalty, 12 states set the age at 18. Twenty states have no minimum age, but the execution of juveniles is extremely rare. For a discussion of state statutes regulating juvenile death penalty, see *Thompson v. Oklahoma*, 487 U.S. 815, 819 (1988) and *Stanford v. Kentucky*, 492 U.S. 361, 365–74 (1989). Proportionality analysis directs that the death penalty be reserved for only the most culpable criminals, and thus, opponents of imposing the death penalty on juveniles argue that it is never appropriate because immaturity is categorically mitigating. Only a handful of countries authorize the execution of juveniles. *See* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. (forthcoming 2002) (noting that only six nations worldwide (including the United States, Congo, Saudi Arabia, and Nigeria) allow execution of juveniles).

124. *Stanford*, 492 U.S. at 380 (rejecting a categorical ban for 16- and 17-year-olds).

125. *Thompson*, 487 U.S. at 830.

126. *Id.* at 835. *See also* Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (citing the trend toward prohibition and holding that, based on the reduced culpability of persons with mental disability, the execution of a mentally retarded person is a violation of the Eighth Amendment).

127. Psychologists might quibble with Justice Stevens's description of the source of immature judgment in that education does not seem to be at issue, and youths are not "less intelligent" than adults.

serious crimes but not for minor offenses.[128] *Thompson* supports the conclusion that the importance of recognizing the reduced culpability of young criminals grows as the stakes increase. *Thompson* also recognizes that immaturity can mitigate culpability *categorically*, and that individualized consideration of this factor may be inadequate protection. This point is important, as it suggests a difference between youth as a mitigator and other factors that reduce culpability, a point to which we will return shortly.[129]

2. Adolescent Offenders as "Ordinary Persons."—That immaturity is mitigating as a type of diminished capacity is, in Justice Stevens's words, "too obvious to require extended explanation."[130] What is less obvious is that the other sources of mitigation in criminal law also illuminate key differences between adolescents and typical criminals. Adolescent offenders indeed are different from the rest of us, but they (or most of them) are also ordinary persons—although not ordinary adults. This is not to say, of course, that all adolescents will commit crimes, or that those who do are without blame. It is to say, however, that those whom psychologists call normative adolescents may well succumb to the extraordinary pressures of a criminogenic social context. Beyond this, the typical adolescent can be distinguished from most criminals and aligned with ordinary persons whose crimes deserve less than full punishment, because his wrongful act does not derive from attitudes and values that are part of his continuing identity as a person; in other words, his crime is not an expression of bad character. Here again, immature youths are not like ordinary adults—fully realized selves who have internalized the law's values. Instead, adolescent crime is a costly manifestation of influences and processes that are characteristic of a discrete stage in human development. If we consider youthful culpability against the predicted responses of an "ordinary adolescent," the mitigating character of immaturity becomes clear.

a. Situational Mitigation and the Context of Adolescence.—As we have suggested, adolescents in high crime neighborhoods are subject both to unique social pressures that induce them to join in criminal activity and to restrictions on their freedom that tangibly limit their ability to escape. These restrictions are constitutive of a well-defined legal status resulting from youthful dependency that substantially limits autonomy. Beyond this, ordi-

128. The legislative trend has been to maintain exclusive juvenile court jurisdiction for less serious offenses but to assume without inquiry that public protection warrants adult punishment for more serious offenses. *See supra* note 35 and accompanying text.

129. In *Stanford v. Kentucky*, the Court declined to extend this categorieal approach to youths who are age 16 or older, emphasizing that individualized consideration of immaturity and youth would be part of every capital sentencing provision involving a minor. *Stanford*, 492 U.S. at 374–77, 377 n.7.

130. *Thompson*, 487 U.S. at 835.

nary adolescents lack the life skills and psycho-social capacities that would allow them to escape the extraordinary circumstances present in these social contexts. Indeed, ordinary adults might well succumb to the pressures. These circumstances are similar in kind to those involved in claims of duress, provocation, necessity, or domination by co-defendants, and appropriately are deemed mitigating of culpability. When adolescents cross the line to legal adulthood, the formal disabilities of youth are lifted; young adults can avoid the situational pressures they face by removing themselves from the criminogenic setting. Moreover, normal maturation enables individuals to cope with circumstances that are overwhelming in adolescence. Thus, adults have no claim of situational mitigation on the ground that they are restricted to a social setting in which avoiding crime is difficult.[131]

The framework we employ for analyzing the culpability of juveniles in response to extraordinary circumstances uses as a baseline the reactions of ordinary adolescents. Under the conventional standard, criminal conduct is less culpable if an ordinary ("reasonable") person, with a typical set of adult psychological and moral capacities, might be led to respond similarly when subjected to the same unusual pressures as the wrongdoer.[132] Yet, this baseline can be criticized for failing to accommodate responses to external pressures that are reasonable for adolescents.[133] The psychological attributes that normal adolescents bring to their experience increase the challenges they

131. The inability to escape distinguishes adolescents from adult offenders, who might argue that they are less culpable than other criminal actors because of their "rotten social background" or "toxic social context." Some commentators have argued for a defense, 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. Delgado, *supra* note 83, at 63–65, 64 n.363. Among the judiciary, Judge David Bazelon has argued that an impoverished background should be recognized as mitigating. *See* David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 395 (1976). This defense generally has been rejected by lawmakers or scholars, in part because of the high social cost incurred if a defense were available to a large open-ended category of adult offenders otherwise indistinguishable from the norm. More importantly, perhaps, the defense threatens to dissolve the important but delicate line between free will and determinism, the boundary of criminal responsibility. Stephen J. 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.

132. *See* Duff, *supra* note 7, at 358–59 (discussing the role of the "reasonable person").

133. Some courts have adopted the approach we suggest in evaluating adolescent conduct under a reasonable person standard. *E.g.*, *In re* William G., 963 P.2d 187, 293 (Ariz. App. Div. 1987) (holding that the determination of whether the defendant's conduct was a "gross deviation" from the conduct of a reasonable person should use the standard of a 15-year-old). The argument is similar to the feminist challenge to the "reasonable man" standard. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105–20 (1986) (challenging the definition of "reasonable resistance" in rape law as requiring male physical strength). *See also* Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178–79 (1990) (arguing that pluralist ideology wrongly reinforces an objective reasonableness standard in sexual harassment law).

face in responding to crime-inducing social contexts. The baseline adjustment clarifies that many adolescents responding to external circumstances, like ordinary adults who claim situational mitigation, can explain their criminal choices in terms of exogenous pressures rather than individual moral deficiency.

b. Development, Character, and Culpability.—The conclusion that blameworthiness decreases when actors can negate the inference that their bad acts reflect bad moral character has a broader importance in assessing the culpability of typical young offenders. In one sense, to be sure, young wrongdoers are not like ordinary adults whose acts are less culpable on this ground. The criminal choice of the typical adolescent cannot be evaluated by comparing it to his previously established good character, because his personal identity and his character have not yet stabilized. Yet, like the adult actor who establishes mitigation, it can be said that the adolescent's harmful act does not express his bad character; indeed, it does not manifest "character" at all,[134] but something else—in this case, developmental immaturity. Most youths will outgrow their inclination to get involved in crime and mature into persons who do not reject the law's values.

Explicit recognition of this critical difference between typical criminals and adolescent offenders illuminates the moral intuitions that inform our uneasy response when a young offender like Lionel Tate is sentenced as an adult. If Lionel serves a long prison term for his crime, the adult individual who will be incarcerated for Tiffany's death will be a different person, in a real sense, from the unformed earlier "person" who caused her death. Our intuition is that adult Lionel is less responsible for his youthful crime than would be true if he killed as an adult. To be sure, personal identity can evolve and change over the course of adult life, and accountability is seriously weakened if the potential for "reform" signifies that individuals cannot be held responsible for misdeeds.[135] But the transition from adolescence to adulthood is different from the idiosyncratic changes that may take place in

134. *See* Duff, *supra* note 7, 359–61, 378–79. The inference, of course, is that if the wrongful act *does* reflect "character," it is bad character—settled dispositions and values that lead the actor to engage in crime.

135. Philosophers have examined the implications of change in personal identity over time. Derek Parfit argues that an individual's responsibility for conduct may attenuate over time as personal identity changes, and that at some point, the later self becomes a fundamentally different person whose responsibility for the earlier self's act is questionable. *See generally* Derek Parfit, *Later Selves and Moral Principles*, *in* PHILOSOPHY AND PERSONAL RELATIONS 137 (Alan Montefiore ed., 1973) (arguing that personal identity over time is not "all-or-nothing" but a matter of degree). The criminal law is ordinarily not interested in whether an individual's identity has changed since he committed the offense. However, occasionally, when many years elapse between the crime and the apprehension, and the actor has lived an exemplary life in the interim, reservations are expressed about whether full retribution is warranted. Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 445 (1990).

the lives of adults.[136] The identity of the young person on whom punishment is imposed is amorphous and undefined, and the coalescence of the self is a predictable, systematic, and developmental process that occurs over a relatively short period of time.

Our analysis also clarifies why the crime of the adult actor with "adolescent" traits warrants a different response than does that of the typical young offender. Although most impulsive youths who enjoy risky activities and focus on immediate consequences will mature into adults with different values, some adult criminals may have traits that are similar to their younger counterparts. In the case of the adult, however, the predispositions, values, and preferences that motivate him most likely are not developmental but characterological and are unlikely to change merely with the passage of time.[137] Adolescent traits that contribute to criminal conduct are not typical of adulthood. In an adult, they become part of the personal identity of an individual who is not respectful of the values of the criminal law and who deserves the full measure of punishment when he violates its prohibitions.

B. Categorical Mitigation—Juvenile Justice as a Separate System

If, in fact, adolescent offenders are generally less culpable than their adult counterparts, how should the legal system recognize their diminished responsibility? At a structural level, the first important policy choice is whether immaturity should be considered on an individualized basis,[138] as is typical of most other mitigating conditions, or as the basis for a separate category of young offenders. Traditional juvenile justice policy employed a categorical approach that continues in a diluted form in the contemporary juvenile court and correctional system. As the boundary between the juvenile and adult system breaks down, however, evaluation of immaturity as a

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136. The transition to adulthood is also quite different from the kind of "jailhouse conversion" transformation often seen in prisoners, which is often viewed (correctly, we think) with suspicion. *See* Pat Robertson, *Speech on Religious Role in the Administration of the Death Penalty*, 9 WM. & MARY BILL RTS. J. 215, 215 (2000) (discussing the frequency and dubious nature of jailhouse conversions).

137. Some young adults may simply be slow to mature; their crimes are less culpable on this account. As time passes, however, their adolescent traits can fairly be ascribed to personal identity. Whether the immaturity of young adults should count as mitigation may depend on our confidence in discerning whether the traits are developmental or characterological. As we argue below, there is much to recommend a categorical approach, as individualized assessment of immaturity may be error-prone.

138. An individualized assessment of the immaturity of the offender focusing on culpability could inform the charging decision (adult vs. juvenile court prosecution), the evaluation of a modern infancy defense, or the sentencing judgment. Under the common law infancy defense, judgments about whether immaturity was exculpating were made on an individualized basis for youths between the ages of 7 and 14 years. *See supra* notes 17–19 and accompanying text. Inquiry could also focus on whether a youth's competence to stand trial is compromised by immaturity. *See generally* Grisso, *supra* note 35, at 6 (noting that while mental defects may limit an adult's competence to stand trial, "undeveloped capacities" may limit juveniles).

mitigator increasingly takes place (if at all) on an individualized basis in a transfer hearing or at sentencing.[139]

The uniqueness of immaturity as a mitigating condition argues for the adoption of (or renewed commitment to) a categorical approach in this context. Other mitigators—emotional disturbance and coercive external circumstances, for example—affect criminal choices with endless variety and idiosyncratic impact on behavior. Thus, individualized consideration of mitigation is appropriate when these phenomena are involved.[140] In contrast, the capacities and processes associated with adolescence are characteristic of individuals in a relatively defined group, whose development follows a roughly prescribed course to maturity, and whose criminal choices are predictably affected in ways that mitigate culpability. Although individual variations exist within the age cohort of adolescence, coherent boundaries can delineate a minimum age for adult adjudication, as well as a period of years beyond this minimum when a strong presumption of reduced culpability operates to keep most youths in a separate system.[141] The age boundary is justified if the presumption of immaturity can be applied confidently to most individuals in the group. This approach offers substantial efficiencies over one in which immaturity is assessed on a case-by-case basis, particularly since mitigation claims likely would be a part of every criminal adjudication involving a juvenile.

Adopting a mitigation framework does not mean that all youths are less mature than adults in their decisionmaking capacity or that all juveniles are unformed in their identity development. Some individuals exhibit mature judgment at an early age—although most of these youths are not offenders. For others, antisocial tendencies that begin in childhood continue in a stable pattern of criminal conduct that defines their adult characters.[142] Adult punishment of mature youths might be fair if these individuals could be identified with some degree of certainty. But we currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation.[143] Litigating maturity

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139. *See supra* note 121.

140. Mental retardation, in contrast, may justify a more categorical approach, as the Supreme Court recognized in the death penalty context in *Atkins v. Virginia.*

141. We are reluctant to recommend specific age boundaries for juvenile court jurisdiction, because other considerations besides reduced culpability will go into this judgment (such as public safety and protection of the future prospects of young offenders). Our goal is to provide the theoretical framework for a separate mitigation category based on immaturity, not to define the precise boundaries of the juvenile justice system.

142. Moffitt labels this small group "life-course-persistent" offenders. *See* Moffitt, *supra* note 78 at 682–85.

143. For example, Moffitt identifies a pattern of dysfunction and antisocial tendencies beginning in the early childhoods of life-course-persistent offenders that distinguishes them from adolescent-limited offenders. *Id.* at 679–85. But some children who have serious behavior

on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.

A developmentally-informed boundary constraining decisionmakers represents a collective pre-commitment to recognizing the mitigating character of youth in assigning blame. Otherwise, immaturity often may be ignored when the exigencies of a particular case engender a punitive response; indeed, it is likely to count as mitigating only when the youth otherwise presents a sympathetic case. This concern is critical, given the evidence that illegitimate racial and ethnic biases influence attitudes about the punishment of young offenders and that decisionmakers appear to discount the mitigating impact of immaturity in minority youths.[144] The integrity and legitimacy of any individualized decisionmaking process is vulnerable to contamination from racist attitudes or from unconscious racial stereotyping that operates even among individuals who may lack overt prejudice.[145] In the death penalty context, the Supreme Court implicitly has recognized that categorical restrictions on individualized blaming judgments are sometimes necessary to safeguard against racism.[146] Similarly, a structural boundary that hinders adult adjudication of young offenders is justified as a counterweight to this pernicious influence.

Categorical recognition of the mitigating impact of immaturity provides the conceptual framework for a separate justice system for juveniles but does not itself dictate a particular set of institutional arrangements.[147] A variety of arrangements, including a systematic sentencing discount for young offenders in adult court, might satisfy the demands of proportionality.[148] Ultimately, the case for a separate system rests on utilitarian considerations as well as on proportionality concerns. Because most young lawbreakers are

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problems in childhood will defy this pattern and not become antisocial adults. *See* Rolf Loeber & Magna Stouthamer-Loeber, *Development of Juvenile Aggression and Violence*, 53 AM. PSYCHOLOGIST 242, 242–44 (1998) (arguing that research demonstrates that some violent children discontinue violence before reaching adulthood).

144. *See supra* notes 47–49 and accompanying text.

145. *See* Graham, *supra* note 49.

146. The best example of such a categorical restriction is the prohibition against imposing the death penalty for rape, which historically was available in many southern states, and probably most often imposed when black men raped white women. *See* Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 594–95 (1997) (diseussing the disparate treatment of black rapists, and noting that the overwhelming majority of men executed for rape between 1930 and 1967 were black (citing MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 75 (1973))). In *Coker v. Georgia*, the Supreme Court held that imposing the death penalty for rape was disproportionate punishment in violation of the 8th Amendment. 433 U.S. 584 (1977).

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

148. Barry Feld argues for a unified criminal justice system under which young offenders get a "youth discount" at sentencing. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 302–03 (1999).

"adolescent-limited" offenders, the social cost of youth crime will be minimized by policies that attend to the impact of punishment on the future lives and prospects of young offenders. The research suggests that a separate juvenile court and correctional system are more likely than the adult justice system to offer an environment in which youths can successfully "mature out" of their antisocial tendencies and to provide educational and job training programs to prepare young offenders for conventional adult roles.[149] Thus, to a considerable extent, social welfare and fairness converge to support a separate juvenile justice system grounded in mitigation.

Sometimes, however, youths should be subject to adult punishment. A policy that treats immaturity as a mitigating condition is viable only to the extent that public protection is not seriously compromised. Immature offenders can be a threat to public safety, and public tolerance of youthful misconduct, as we have seen, is tenuous at best. Moreover, both proportionate punishment and public protection are important purposes of the criminal law. At some point, public safety concerns dictate that young recidivists who inflict large amounts of social harm must be incapacitated as adults. This response may undermine proportionality to some extent, but, in practice, the sacrifice is likely to be modest. This is so because the small group of youths who are recidivist violent offenders are generally older teens, and they are more likely than other adolescent lawbreakers to be young career criminals of settled dispositions. That is not to say that we should "throw away the key" when we incapacitate these youths. Given the uncertainty of predicting adult character during adolescence, efforts should be made to protect against iatrogenic prison effects and to invest in the future post-incarceration lives of even serious chronic offenders. Nonetheless, a mechanism to protect society from harms caused by dangerous youths is a critically important safety valve for a well-functioning juvenile justice system based on mitigation.

Implementing a mitigation-based model of juvenile justice will require significant shifts in crime policy, but it will not require a radical overhaul of the juvenile justice system itself. Probably because of the scathing criticisms of its inadequacies, the juvenile system has undergone substantial change in

149. Research evidence indicates that adult punishment of adolescents may contribute to recidivism. Jeffrey Fagan has compared youths serving prison sentences in one jurisdiction with a sample matched for seriousness of offense incapacitated in juvenile correctional facilities in an adjacent state. He found higher recidivism rates among imprisoned youths. *See* Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996). Advocates for tougher sanctions duck this problem by assuming that most young offenders are criminal careerists. The evidence that we have described contradicts this assumption. *See supra* notes 90–93 and accompanying text. *See generally* Scott & Grisso, *supra* note 76 (arguing that a separate juvenile system is more likely to promote young offenders' maturation into productive adults); ZIMRING, *supra* note 30, at 81–83 (arguing that giving young offenders "room to reform" should be a goal of youth crime policies).

the past generation, evolving toward one that increasingly emphasizes accountability and public protection.[150] Although the public image of the modern juvenile court continues to be distorted by lingering echoes of the traditional rhetoric, delinquents under its jurisdiction are increasingly subject to proportionate punishment for their offenses.

Nonetheless, a large gap separates contemporary youth crime policy from one that is optimally grounded in mitigation, in part because the purposes and rationale of the contemporary juvenile system lack a coherent theory. First, rather than systematically seeking to reform the system pursuant to a goal of tailoring dispositions to the culpability of young offenders, lawmakers have incorporated accountability and public protection in a piecemeal fashion, mostly in response to political pressures. More importantly, in response to those same forces, the boundary between the juvenile and adult systems has become very porous under recent reforms. Youths can be subject to adult adjudication and punishment today for a broad range of crimes, including many, such as car theft and drug transactions, that appear to be quintessential adolescent behavior.[151] Young criminals can also be tried as adults for first offenses which may well be experimental behavior that would not be repeated. Neither fairness nor utility are well served by these responses.

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Our goal in this Essay has been to develop a theoretical framework for youth crime policy that is based on the empirical reality of adolescence and is also compatible with standard notions of culpability embodied in the criminal law. Both traditional and contemporary lawmakers have ignored the relationship between immaturity and criminal responsibility, with unfortunate results. Our analysis shows that scientific evidence supports the claim that most adolescents are less mature than adults in ways that distinguish their criminal choices, and that this immaturity mitigates culpability but does not excuse young law violators from criminal responsibility. Because it is solidly grounded in criminal law doctrine and theory, a mitigation-based model of juvenile justice offers a legitimacy that neither the traditional rehabilitative model nor the recent full-responsibility reforms can

150. Under few, if any, modern juvenile codes is rehabilitation described as the principal goal of delinquency interventions. Many include policy statements that include accountability and community protection as goals. *See, e.g.*, VA. CODE ANN. § 16.1-227 (4) (Michie 1950; Cum. & Supp. 2002) (stating that the purpose of the juvenile code is to protect the community against juveniles' harmful acts, to reduce incidence of juvenile crime, and to hold offenders accountable for their acts). For similar statutes, see *supra* note 29.

151. *See, e.g.*, ARK. CODE ANN. § 9-27-318 (b)(1)(6) (Michie 1987) (holding that a 14-year-old can be charged as an adult for soliciting a minor to join a criminal street gang); ILL. COMP. STATS. ANN. § 405/5-4(6)(a) (1993) (holding that a 15-year-old charged with selling drugs in school is not a minor).

claim. Moreover, our proposed approach can accommodate the seemingly conflicting goals of protecting public safety and responding to the attributes of this unique group of wrongdoers without abandoning basic criminal law principles.