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Adolescence and the Regulation of Youth Crime

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KEYNOTE ADDRESS: ADOLESCENCE AND THE REGULATION OF YOUTH CRIME

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I am delighted to be a part of this Symposium on Law and Adolescence. My talk today is about adolescent development and juvenile justice policy. Specifically, I will focus on why a legal regime that is grounded in scientific knowledge about adolescence and the role of criminal activity during this developmental period is better for young offenders and for society than the contemporary policy, which often pays little attention to differences between adolescents and adults.

My talk is based on a book on juvenile justice policy I am currently writing with Larry Steinberg, a developmental psychologist who is a leading expert on adolescence. For about ten years, Larry and I have worked together on an interdisciplinary research network sponsored by the MacArthur Foundation—the Research Network on Adolescent Development and Juvenile Justice.[1] The purpose of the Network has been to examine how scientific knowledge about adolescence and juvenile crime can usefully inform policy and practice, to determine where there are gaps in that knowledge, and to develop and conduct research studies that can fill those gaps and inform policymaking in this area. The book offers a framework for youth crime policy that we have developed through our work in the Network. Our thesis is that scientific knowledge about adolescence and youth crime is critically important as a foundation for satisfactory juvenile justice policy and that (for the most part) this premise translates into a legal regime that deals with young offenders as an intermediate legal category of persons—neither children nor adults.

The idea that developmental knowledge about adolescence is relevant to the regulation of youth crime has been largely ignored in the punitive law reforms of the past generation, but lately this perspective has been getting attention. Last year, the United States Supreme Court in *Roper v. Simmons*[2] held that imposing the death penalty on offenders for crimes committed as juveniles is unconstitutional under the Eighth Amendment prohibition of cruel

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* The author presented this essay as a keynote address at the Symposium on Law and Adolescence at Temple University James E. Beasley School of Law on March 18, 2006. As noted, the lecture draws on many years of collaborative work with Laurence Steinberg as members of the Research Network on Adolescent Development and Juvenile Justice and is based on a forthcoming coauthored book on juvenile justice policy. The John D. & Catherine T. MacArthur Foundation sponsors the Network and has supported our work during this period. Thanks to Brenna Clark for research assistance and to Bob Schwartz for helpful comments.

1. Larry Steinberg is the director of the Network and is the Laura Carneal Distinguished Professor of Psychology at Temple University.

2. 543 U.S. 551 (2005).

and unusual punishment.[3] The Court offered several bases for this conclusion, but the heart of Justice Kennedy's opinion is a proportionality analysis that draws on an article Larry Steinberg and I wrote in the *American Psychologist* in 2004.[4] In the article, we argued that the scientific knowledge about adolescence supports the position that the criminal choices of young offenders—even seventeen-year-olds—are less blameworthy than those of adults. This afternoon, I will talk about *Roper* and the developmental argument for mitigation that the Court adopted—fleshing out some parts that Justice Kennedy did not include—and then apply the mitigation framework more broadly to juvenile crime policy. I also hope to show that the case for a justice regime based on developmental knowledge is grounded not only in fairness to young offenders—which ultimately may not carry the day in the political arena—but in a pragmatic calculation of the interests of the rest of society. And finally, I will suggest that this is a good time to begin a new era of law reform in the area of juvenile justice.

I. THE CULPABILITY OF ADOLESCENT CRIMINAL CHOICES: THE ARGUMENT FOR MITIGATION

The story of *Roper v. Simmons* is familiar—at least to this audience. The Supreme Court granted certiorari two years after it held in *Atkins v. Virginia* that imposing the death penalty on mentally retarded persons is unconstitutional under the Eighth Amendment.[5] *Roper* came to the Court after the Missouri Supreme Court found the state's juvenile death penalty statute unconstitutional under *Atkins*. Chris Simmons was probably not the juvenile that child advocates would have chosen to challenge the death penalty. He was seventeen years old when he and a friend broke into a woman's home and then brutally murdered her by taping her up and throwing her in a nearby river. There were different accounts of why the youths killed their victim. Some testimony suggested that Chris panicked when the victim recognized him, but there was also a report that, weeks before the killing, he had said he wanted to kill someone.[6] In general, to

3. *Roper*, 543 U.S. at 578.

4. *Id.* at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) [hereinafter *Less Guilty*]). Justice Kennedy points out that juveniles are more immature, irresponsible, and subject to peer pressure than adults. *Id.* Drawing on the framework developed in the Steinberg and Scott article, he describes three key attributes of adolescence: immature decision-making skills, vulnerability to peer pressure, and an undeveloped character. *Id.* at 569-70 (citations omitted). *See also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2003) [hereinafter *Blaming Youth*] (describing the developmental aspects of adolescence that should serve to mitigate criminal responsibility and arguing that these characteristics correspond to standard bases of mitigation in criminal law).

5. 536 U.S. 304, 319-21 (2002) (holding that mentally retarded persons have reduced culpability, and thus executing them would be a violation of the Eighth Amendment prohibition of cruel and unusual punishment).

6. Elizabeth Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 55 n.10, 56 (2005).

be honest, Chris was not a person likely to arouse much sympathy. So, in a state like Missouri with a death penalty, why should *he* not be eligible?

The answer to this question, according to the Court, lies in the bedrock principle of proportionality, which holds, as many of you may remember from your first year Criminal Law class, that criminal punishment should be based not only on the harm caused, but also on the blameworthiness of the offender. In capital cases, the harm is as bad as it gets—a nasty murder. The Court in *Roper* found, however, that executing Chris Simmons and other juveniles would violate the Eighth Amendment because adolescents under the age of eighteen—due to their immaturity—are not among the "worst offenders" for whom the punishment of death is reserved.

Drawing on research in developmental psychology, the Court pointed to several dimensions of adolescence that distinguish young offenders from adults in ways that mitigate culpability. These include deficiencies in decision-making ability, greater vulnerability to external coercion, and the relatively unformed nature of adolescent character.[7] Although the Court did not elaborate, each of these attributes of adolescence corresponds to a conventional source of mitigation in criminal law—and together they offer strong evidence that young offenders are not as culpable as adults.[8] Let us look at each.

First, consider diminished capacity. Under standard criminal law doctrine, actors whose decision-making capacities are impaired, by mental illness or retardation for example, are deemed less blameworthy than typical offenders.[9] If the impairment is severe, their crimes are excused.[10] There is considerable evidence that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.[11]

Although few would question this claim as applied to children, the picture is more complicated for offenders such as Chris Simmons who are sixteen or seventeen years old. The capacities for reasoning and understanding improve significantly from late childhood into adolescence, and by mid-adolescence, most teens are close to adults in their ability to reason and to understand information—what you might call "pure" cognitive capacities—at least in the abstract. The reality, however, is that they are likely less capable than are adults in *using* these capacities in making real-world choices, partly because of lack of experience and partly because teens are less efficient than adults in processing information.[12] In life, and particularly on the street, the ability to quickly marshal information may be essential to competent decision making.

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7. *Id.* at 569-70 (citing *Less Guilty*, *supra* note 4, at 1010).

8. *See Blaming Youth*, *supra* note 4, at 822; *Less Guilty*, *supra* note 4, at 1014.

9. RICHARD BONNIE ET AL., CRIMINAL LAW 531-647 (2d ed. 2004) (examining doctrinal treatment of mental abnormality as limit on criminal responsibility and punishment).

10. An offender may be excused from all criminal responsibility under the insanity defense if he suffers from severe mental illness or disability. *Id.* at 531. The standard formulation of the insanity test is the M'Naughten rule, which requires proof that the actor, at the time he committed the offense, did not appreciate the nature or quality of his act or did not know that it was wrong. *Id.* at 531-540.

11. *See Blaming Youth* and *Less Guilty*, *supra* note 4.

12. Adolescent brains are not fully developed in areas that govern impulse control, foresight, and

Also, other aspects of psychological development that affect decision making lag behind cognitive development and undermine adolescent competence. The research documents what most parents of adolescents already know—the decisions of teenagers are subject to psychosocial and emotional influences that contribute to immature judgment, which can lead them to make bad choices.[13]

It is probably not surprising that I first became interested in these issues when my daughter Christy was about fourteen years old. An orthopedist suggested that if Christy's mild scoliosis got worse she might need to wear a body brace. Her response basically was that she would rather spend her life as a pretzel than wear a body brace.

Christy understood as well as any adult what the surgeon was telling us about her condition, the medical options, and the consequences of choosing—or not choosing—the recommended procedure. But, as her response suggests, teens tend to lack what developmentalists call "future orientation." That is, as compared to adults, adolescents are more likely to focus on the here and now and less likely to think about the long-term consequences of their choices or actions, and when they do, they are inclined to assign less *weight* to future consequences than to immediate risks and benefits.[14] Over a period of years

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planning, and do not process information as efficiently as adult brains. This likely contributes to increased risk taking among adolescents in real-world situations, despite the fact that pure cognitive reasoning tests reveal little differences in decision-making capabilities between adolescents and adults. For example, although adolescents may be as capable as adults of detecting risk, they may be more likely to engage in risky activity due to deficits in self-regulation and other psychosocial influences. *See* Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51, 52-55 (2004) [hereinafter Steinberg, *Risk Taking in Adolescence*].

13. Social science research confirms that adolescents differ from adults in several ways that contribute to immature judgment—in their attitudes toward risk, the weight attached to short-term versus long-term consequences, and in peer conformity and susceptibility to peer influence. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229 (1995); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1643-60 (1992); *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251-67 (1996) (providing evidence that age-linked differences in maturity of judgment account for differences in decision making).

14. William Gardner and Jana Herman found that adolescents tend to discount the future and focus more on short-term consequences of their actions, hypothesizing that this tendency relates to the greater uncertainty young people have about their futures. William Gardner & Jana Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, NEW DIRECTIONS FOR CHILD DEV.: ADOLESCENTS IN THE AIDS EPIDEMIC, Winter 1990, at 17, 25-26. This results in an increase in risk-taking behavior because only immediate negative consequences will be taken into account and future harmful consequences will be ignored. *Id.*; *see also* Thomas Cottle et al., *Adolescent Perception of Time: The Effect of Age, Sex, and Social Class*, 37 PERSONALITY 636, 646-50 (1969) (noting that young adolescents are preoccupied with the present and that a sense of extended future has not yet formed); Anita Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 100 (1986) (discussing how changes in temporal perspective continue to occur through late adolescence); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 29 (1991) (finding that youths make gains in their capacity to understand and predict events in the future over an extended period between the ages of eleven and eighteen).

between mid-adolescence and early adulthood, individuals become more future oriented. There is every reason to believe that by age twenty-one, Christy might have made a different decision in the interest of her future health.

Substantial research evidence also supports the conventional wisdom that teens are more oriented toward peers and more responsive to peer influence than are adults. Several studies show that susceptibility to peer influence, especially in situations involving pressure to engage in antisocial behavior, increases between childhood and mid-adolescence, peaks around age fourteen, and declines slowly during the late adolescent years.[15] Increased susceptibility to peer pressure in early adolescence may reflect changes in individuals' capacity for self-direction (as parental influence declines), as well as changes in the intensity of pressure that teens exert on each other. Some studies suggest that adolescents who engage in certain types of antisocial behavior may enjoy higher status among their peers as a consequence—perhaps because they appear to be independent of adult authority.[16] The net result is that adolescents are more likely than *either* children or adults to change their decisions and alter their behavior in response to peer pressure.

Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, desire for peer approval (and fear of rejection) affects adolescent choices, even without direct coercion. Teens appear to seek peer approval, especially in group situations. Thus, perhaps it is not surprising that young offenders are far more likely than adults to commit crimes in groups.[17]

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

15. *See, e.g.*, NORMAN SPRINTHALL & W. ANDREW COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW 310-11 (3d ed. 1995) (finding that social conformity peaks in ninth grade in situations involving antisocial behavior); Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967, 972-74 (1966); Scott et al., *supra* note 13, at 229-30 (discussing studies that found social conformity peeks at age fifteen); Steinberg & Cauffman, *supra* note 13, at 254 (stating that susceptibility to peer influence peeks around age fourteen); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986) (presenting research demonstrating age differences in susceptibility to peer pressure).

16. *See* Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 687-88 (1993) (indicating that normal adolescents model antisocial peers, who are admired for "maturity" and autonomy).

17. *See* 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) (finding that it is uncommon for those older than twenty to commit offenses with others).

law, Timothy explained that he went along because he did not want to stay behind alone, and he did not want to be called a "scaredy-cat."[18] I would argue that Timothy's fatal decision to get involved in the break-in was, more than anything else, the choice of a fourteen-year-old worried about peer approval.

Justice Kennedy in *Roper* noted another psychosocial factor that contributes to immature judgment—adolescents are both less likely to perceive risks and less risk-averse than adults.[19] Thus, it is not surprising, perhaps, that they enjoy engaging in activities like speeding, unsafe sex, excessive drinking, and committing crimes more than adults. The story is actually a bit more complicated. In the abstract—on paper and pencil tests—adolescents are capable of perceiving risks almost as well as adults.[20] In the real world, however, risk preference and other dimensions of psychosocial immaturity interact to encourage risky choices.

Another story—this one about a colleague's son—makes this point aptly. At 2:00 a.m. one Sunday morning, fourteen-year-old Ben and several friends secretly left the house where they were spending the night to visit one of the boy's girlfriends, who lived nearby. When they arrived at the girl's home, they threw pebbles at her window to wake her. Unfortunately, this set off a burglar alarm, which sounded a siren and sent a silent dispatch to the local police station. Upon hearing the siren, the boys ran—right into a patrol car that was racing toward the house. Instead of stopping and explaining their situation to the police, Ben and his friends panicked and scattered. The police apprehended one of the boys and took him home. The others returned to the house where they were spending the night.

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

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18. Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005 at A1.

19. *See* Roper v. Simmons, 543 U.S. 551, 569-72 (2005) (stating that due to adolescent immaturity, it is unlikely an adolescent engages in any kind of cost-benefit analysis).

20. Under Jean Piaget's theory of cognitive development, mid-adolescents' abilities to think about problems hypothetically and weigh and compare consequences were similar to adults. *See generally* JOHN H. FLAVELL, COGNITIVE DEVELOPMENT 92-101 (2d ed. 1985) (describing generalizations drawn from Piaget's theories); BÄRBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (Anne Parsons & Stanley Milgram trans., Basic Books 1958) (1955) (describing cognitive development in children between eleven and fifteen years of age); ROBERT S. SIEGLER, CHILDREN'S THINKING 20-21, 26-38 (2d ed. 1991) (describing different developmental stages outlined by Piaget). Piaget focused on "pure" cognitive development, however, and modern researchers contend that adolescents' perceptions of risks are more complicated because psychosocial development proceeds more slowly than cognitive development. *See* Steinberg, *Risk Taking in Adolescence*, *supra* note 12, at 52, 54-57 (noting that although after age thirteen there are no age differences in risk perception, adolescents are far more likely to take risks than adults due to a desire for novel experiences and a slower development of self-regulatory capabilities, which are attributes that continue to develop into late adolescence and adulthood).

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

Another (compatible) account of why adolescents take more risks than adults is that they may evaluate both the risks and benefits of risky activity differently. Psychologists refer to the outcome of weighing risks and benefits as the "risk-reward ratio"; the higher the ratio, the less likely an individual is to engage in the behavior in question. Studies suggest that, in calculating the risk-reward ratio that guides decision making, adolescents may discount risks and assign greater weight to the rewards of a choice than do adults.[21] (In studies involving gambling games, teens tend to focus more on potential gains relative to losses than do adults.[22]) Thus, for example, in deciding whether to speed while driving a car, adolescents may weigh the potential rewards of the behavior (e.g., the thrill of driving fast, peer approval, getting to one's destination quickly) more heavily than adults and discount the risks (e.g., having an accident, getting a ticket). What distinguishes adolescents from adults in this regard, then, is not the fact that teens are less knowledgeable about risks, but, rather, that they attach different value to the rewards that risk taking provides.

Emerging evidence suggests that the special salience of rewards to adolescents may be driven by the hormonal changes of puberty. In particular, the tendency of adolescents to seek more novelty and to require higher levels of stimulation to achieve pleasure than do adults may have a hormonal basis. Although most of the relevant brain research on this question comes from animal studies, there is some support for the notion that developments in the limbic system of the brain around puberty may account for at least part of this change in reward seeking that occurs in adolescence.[23]

In addition to age differences in susceptibility to peer influence, future orientation, and risk preference and assessment, adolescents and adults also differ with respect to their ability to control impulsive behavior and choices.[24]

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21. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 1-2 (1992) (describing decision making about risky behavior in a rational decision-making model); Gardner & Herman, *supra* note 14, at 24 (noting that adolescents focus less on protection against losses and more on opportunities for gains in making choices, which is why they are more likely to engage in risky behavior such as unprotected sex).

22. Maya Tester et al., *Experimental Studies in the Development of Decisionmaking Competence*, *in* CHILDREN, RISKS & DECISIONS: PSYCHOLOGICAL AND LEGAL IMPLICATIONS (American Psychological Association ed., 1987).

23. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 420-21 (2000) (reviewing animal and human research on brain maturation indicating that a type of "remodeling" of the brain occurs during adolescence among species).

24. Studies tend to show a gradual increase in an individual's self-direction and ability to control impulsivity. Ellen Greenberger, *Education and the Acquisition of Psychosocial Maturity*, *in* THE DEVELOPMENT OF SOCIAL MATURITY 155, 169-72 (David C. McClelland ed., 1982). The gains occur

Thus, the conventional wisdom that teens are more reckless than adults is supported by research on developmental changes in impulsivity and self-management. In general, studies show gradual but steady increases in the capacity for self-direction through adolescence, with gains continuing through the high school years. Research also indicates that adolescents are subject to more rapid and extreme mood swings (both positive and negative) than are adults.[25] (Not surprising to many parents.) Although the connection between moodiness and impulsivity is not clear, it is likely that extreme levels of emotional arousal (either anger or elation) are associated with difficulties in self-control. Although more research is needed, the available evidence indicates that adolescents may have more difficulty regulating their moods, impulses, and behaviors than do adults.

These psychosocial and emotional factors contribute to immature judgment in adolescence and likely play a role in decisions by teens to engage in criminal activity. It is easy to imagine how individuals whose choices are subject to these developmental influences—susceptibility to peer influence, poor (real-world) risk assessment, sensation seeking, a tendency to discount future consequences of choices and focus on immediate consequences, and poor impulse control—might decide to engage in criminal conduct.

Consider the following scenario. A teen hangs out with his buddies on the street, when, on the spur of the moment, someone suggests holding up a nearby convenience store. The youth does not really go through a formal decision-making process, but he "chooses" to go along, even though he has mixed feelings. Why? First and most important, like Tim Kane, he may assume that his friends will reject him if he declines to participate—a negative consequence to which he attaches substantial weight in considering alternatives. He does not think of options to extricate himself—although a more mature person might do so. This may be because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the "adventure" of the holdup and the possibility of getting some money are exciting. These immediate rewards (together with peer approval) weigh more heavily in his decision than the (remote) possibility of apprehension by the police. He never considers the long-term costs of conviction of a serious crime.[26]

This account is consistent with the general developmental research and it suggests how factors that are known to affect adolescent decision making in general are likely to operate in this setting. As a general proposition, it is uncontroversial that teens are inclined to engage in risky behaviors that reflect

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gradually over the course of adolescence and continue through the final years of high school. *See id.* at 170-71 (noting that "Social Adequacy" scores increase over the school years).

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

26. This account 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, 166 (1997).

their immaturity of judgment. (If none of this sounds familiar in regard to the teens in your life, then you are very fortunate.) Overall, it seems very likely that the psychosocial influences that shape adolescents' decision making in other settings contribute to their choices about criminal activity as well—although, for obvious reasons, getting direct evidence about decision making on the street may be impossible. Of course, not every teen gets involved in crime—that depends on a lot of things, including social context. But the important point is that these psychosocial and emotional influences on decision making are *normative*—as psychologists use this term—that is, typical of adolescents as a group and developmental in nature.[27]

As I have suggested, research in the last few years indicates that some of these psychological factors may have biological underpinnings. Recent studies of brain development show that important structural changes take place during adolescence in the frontal lobes, most importantly in the prefrontal cortex.[28] This region of the brain is central to what psychologists call "executive functions"—advanced thinking processes that are employed in planning ahead, regulating emotions, controlling impulses, and weighing the costs and benefits of decisions before acting.[29] Thus, the immature judgment of teens to some extent may be a function of hard wiring.

That immaturity is mitigating of culpability as a form of diminished decision-making capacity is not controversial, at least as a general proposition—even the *Roper* dissenters accept this point.[30] What is not so obvious is that two other sources of mitigation in criminal law also apply to adolescents—and reinforce the conclusion that young offenders are less blameworthy than their adult counterparts.

The second source of mitigation involves situations in which a person offends in response to extreme external pressures. (Think about the defenses of provocation and duress.) The criminal law does not require exceptional

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27. A very high percent of teenage boys report having engaged in criminal activity for which they could be incarcerated. Moffitt, *supra* note 16, at 675, 685-86.

28. Spear, *supra* note 23, at 423 (showing that the ability to perform complicated planning and decision making may be immature well into middle or late adolescence). Research suggests that changes in the prefrontal cortex occur into late adolescence and play a role in the maturation of the adolescent's ability to self-regulate. Steinberg, *Risk Taking in Adolescence*, *supra* note 12, at 57; *see also* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 35 (2001) (explaining that the prefrontal cortex, which regulates planning, organizing, and understanding consequences, is one of the last parts of the brain to develop).

29. GOLDBERG, *supra* note 28, at 35-36.

30. *See* Roper v. Simmons, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting). O'Connor argued that rather than establishing a categorical rule, juries should give "appropriate mitigating weight to the defendant's immaturity." *Id.* at 602-03. General sentencing guidelines often consider youth and immaturity to be mitigating factors as a form of endogenous diminished capacity. *See* FLA. STAT. ANN. § 921.0026 (West 2006) (including impaired cognitive capacity, mental disorder, domination by another, and youth); KAN. CRIM. CODE. ANN. § 21-4637(b), (e)-(g) (West Supp. 2006) (including extreme mental disturbance, domination by another, impaired cognitive or volitional capacity, and age); NEB. REV. STAT. § 29-2523(2)(b)-(d), (g) (Supp. 2004) (including extreme emotional disturbance, domination by another, impaired cognitive or volitional capacity, and age).

forbearance or bravery; a defense (or a reduced sentence) may be available if an ordinary (i.e., "reasonable") person might have responded to the situation in the same way the defendant did.[31] Because of the coercive circumstances, the actor is deemed less blameworthy than other offenders.

In *Roper*, the Court recognized that "ordinary" adolescents are subject to peer pressure to a far greater extent than adults, including pressure to commit crimes. As I have suggested, most juvenile crimes, including the murder committed by Chris Simmons, are committed in groups, while most adult criminals act alone. In some high-crime neighborhoods, peer pressure to commit crimes is so powerful that only exceptional kids escape. As Jeffrey Fagan and others have found, in these settings, resisting this pressure can result in loss of status, ostracism, and vulnerability to physical assault.[32] The circumstances many teens face in these social contexts are similar to those involved in claims of duress, provocation, necessity, or domination by codefendants and are appropriately deemed mitigating of culpability. As the *Roper* Court also noted, the case for mitigation on this ground seems all the more compelling because, unlike adults, adolescents as legal minors are not free to leave their schools, homes, and neighborhoods.[33] When teens cross the line to legal adulthood, of course, the formal disabilities of youth are lifted. Young adults can avoid the pressure by removing themselves from the social setting in which avoiding involvement in crime is difficult. Thus, it is reasonable that adults can not claim this kind of situational mitigation.

A third source of mitigation in criminal law is evidence that a criminal act was out of character. At sentencing, offenders can often introduce evidence of their general good character to demonstrate that the offense was an aberrant act.[34] Here mitigation applies to the crimes of young offenders as well—not

31. The defense of duress is available to a defendant who commits a crime when faced with a threat of death or bodily harm and the defendant had no reasonable opportunity to avert the harm. BONNIE ET AL., *supra* note 9, at 478-92 (discussing duress as a situational defense available where external circumstances are extremely coercive).

32. *See* Jeffrey Fagan & Deanna Wilkinson, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 64 (1996). Conformity in these situations is enforced with the threat of severe sanctions such as violence and loss of social status. *See id.* at 63-64; Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371, 376 (Thomas Grisso & Robert Schwartz, eds., 2000) (arguing that social context predicts violent adolescent behavior); Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 535-38 (1999) (describing how coercive social contexts influence the criminal choices of adolescents).

33. Roper, 543 U.S. at 569 ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting." (citing *Less Guilty*, *supra* note 4, at 1014)).

34. The criminal behavior must "represent a marked deviation by the defendant from an otherwise law-abiding life." U.S. SENTENCING GUIDELINES MANUAL § 5K2.20(b)(3) (2005). State sentencing guidelines also allow mitigation based on past reputation and character. *See, e.g.*, FLA. STAT. ANN. § 921.0026 (2)(j) (West 2006) (allowing mitigation if the crime was an isolated incident and the defendant has shown remorse); MASS. GEN. LAWS ANN. ch. 211E, § 3(d)(13)-(14), (16) (West 2005) (allowing mitigation based on character, family responsibilities, and personal history); N.C. GEN. STAT. § 15A-1340.16(e)(12) (2005) (allowing mitigation for community reputation).

because of their good character per se—but because their characters are unformed.

Beginning with Erik Erikson, psychologists have explained that an important developmental task of adolescence is the formation of personal identity, a process linked to psychosocial development that for most teens extends over several years until a coherent "self" emerges in late adolescence or early adulthood.[35] During adolescence, identity is fluid—values, plans, attitudes, and beliefs are likely to be tentative as teens struggle to separate from their parents and figure out who they are. This process involves a lot of experimentation, which for many kids means engaging in the risky activities I have described, including involvement in crime. Self-report studies have found that a very high percent of teenage boys admit to committing crimes for which they could be incarcerated, leading one psychologist to describe involvement in criminal activity as "a normal part of teen life."[36]

But, the typical teenage delinquent does not grow up to be an adult criminal. The statistics consistently show that seventeen-year-olds commit more crimes than any other age group. After that age, the crime rate declines steeply.[37] Most adolescents literally grow out of their antisocial tendencies as they attain psychosocial maturity and individual identity becomes settled. How many adults look back on their risky adventures or mishaps as teenagers with chagrin and amazement? (Maybe some of us?) Almost every time I teach my Children in the Legal System course, I hear confessions from upstanding law students about their delinquent exploits as adolescents—often with expressions of gratitude at their good fortune in emerging relatively unscathed.

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

35. Research suggests that most identity development occurs late in the adolescent period. LAURENCE STEINBERG, ADOLESCENCE 273-79 (7th ed. 2004). A coherent sense of identity in the areas of ideological values and beliefs, occupation, and interpersonal relations typically does not solidify before age eighteen. *Id.* at 263-64.

36. Moffitt, *supra* note 16, at 675, 685-86.

37. *See* RICHARD JESSOR & SHIRLEY L. JESSOR, PROBLEM BEHAVIOR AND PSYCHOSOCIAL DEVELOPMENT: A LONGITUDINAL STUDY OF YOUTH 145-63 (1977); David P. Farrington, *Age and Crime*, *in* CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189, 189 (Michael Tonry & Norval Morris eds., 1986) (describing a declining crime rate late in adolescence); David P. Farrington, *Offending From 10 to 25 Years of Age*, *in* PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY 17, 22 (Katherine Teilman Van Dusen & Sarnoff A. Mednick eds., 1983) (describing data demonstrating that adolescents in their late teenage years commit the most crimes); Moffitt, *supra* note 16, at 675 (showing arrests peak around seventeen).

said of the crimes of typical juvenile offenders, whose choices, while unfortunate, are shaped by developmental factors that are constitutive of adolescence. Like the adult who offers evidence of good character, most adolescent offenders lack a key component of culpability—the connection between the bad act and the offender's bad character. The Court in *Roper* recognized this, rejecting the notion that we can be confident that "even a heinous crime by an adolescent is the product of an irretrievably depraved character."[38]

The reality, of course, is that not all young offenders grow up to be persons of good character—some grow up to be criminals. Psychologist Terrie Moffitt, in a major longitudinal study, has placed adolescent offenders in two rough categories: (1) a large group of what she calls "adolescent-limited" offenders—typical delinquents whose involvement in crime begins and ends in adolescence, and (2) a much smaller group that she labels "life-course-persistent offenders."[39] The latter are youths whose antisocial conduct often begins in childhood and continues through adolescence into adulthood; many are in the early stages of criminal careers. In adolescence, the criminal conduct of kids in these two groups looks pretty similar, but the underlying causes and the prognosis are different.

This raises an important issue: Even if adolescents (including seventeen-year-olds) generally are less mature than adults, why should immaturity not be considered on an individualized basis as is typical of most mitigating conditions? Not all adolescent offenders are unformed youths whose crimes are driven by developmental forces—some may not deserve lenient treatment on the basis of immaturity. This question was critical in the context of the juvenile death penalty, but it is also important in the broader arena of juvenile justice policy. In his *Roper* dissent, Justice Scalia argued that there was no reason to abandon the practice of allowing capital juries to evaluate the immaturity of juveniles on a case-by-case basis.[40]

Without question, individual adolescents vary in the pace of psychological development and character formation. The problem with individualized assessment is that we currently lack the diagnostic tools to evaluate psychosocial maturity and identity formation on an individualized basis so as to separate savvy young career criminals from ordinary adolescents. Justice Kennedy noted the potential for error in distinguishing incipient psychopaths from youths whose crimes reflect, as he described it, "transient immaturity," and he expressed concern that the brutality of the offense might often overwhelm consideration of

38. Roper v. Simmons, 553 U.S. 551, 570 (2005).

39. "Life-course-persistent offenders," in Moffitt's taxonomy, are youths who develop a pattern of behavioral problems and other difficulties during childhood and whose antisocial behavior continues through adulthood. These youths often suffer from neurological deficiencies or disabilities and may be subject to parental neglect or abuse. Also common in childhood are motor and language delays, aggressive behavior, irritability, and mild cognitive deficits. Behavioral problems in childhood may be followed by involvement in crime in late childhood or early adolescence. *See* Moffitt, *supra* note 16, at 680-83 (describing developmental characteristics of persons whose antisocial behavior persists beyond adolescence).

40. *Roper*, 543 U.S. at 620-21 (Scalia, J., dissenting) (arguing that individual determination by jury is at foundation of America's justice system).

youth and immaturity.[41] Indeed, the prosecutor had argued to the jury that Chris Simmons's youth was not mitigating, but *aggravating*—a point that Elizabeth Emens explores in her wonderful *Supreme Court Review* article on *Roper*.[42]

There is an important lesson here that extends beyond the death penalty. Courts in some areas have begun to use a psychopathy checklist (a variation of an instrument developed for adults) in an effort to identify adolescent psychopaths for transfer or sentencing purposes. This practice is fraught with the potential for error, because normal adolescent traits may resemble adult psychopathy.[43] For this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals age eighteen and older—evaluating antisocial traits and conduct in adolescence is just too uncertain.[44]

There is something else to worry about if maturity is litigated on a case-by-case basis. Research evidence suggests that racial and ethnic biases influence attitudes about the punishment of young offenders; thus, decision makers may be inclined to discount the mitigating impact of immaturity in minority youths.[45] The integrity of any individualized decision-making process is vulnerable to contamination from racist attitudes or from unconscious racial stereotyping that operates even among those who may lack overt prejudice.[46] There is evidence that African American youths are viewed as more mature than same-aged white kids, and *all* offenders will look more like adults at the time of sentencing than at the time of the crime.

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41. *Id.* at 573 (majority) (citing *Less Guilty*, *supra* note 4, at 1014-18).

42. *See* Emens, *supra* note 6, at 75-81 (suggesting that prosecutors may persuade jurors that youth and immaturity are aggravating factors that *increase* culpability).

43. *See* Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 LAW & HUM. BEHAV. 219, 224 (2002) (noting that traits which may resemble adult psychopathy may be the result of normal adolescent development, resulting in a misdiagnosis); Jennifer Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 BEHAV. SCI. & L. 737, 738-39 (2003) (questioning the validity of methods used to identify adolescent psychopaths).

44. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 702 (4th ed. text rev. 2000) (listing age eighteen as minimum age requirement to diagnose a patient with antisocial personality disorder or psychopathy).

45. M.A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 277, 280 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (explaining that minority youths are most often transferred and punished as adults because they are seen as the worst offenders); *see also* Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Processing*, 25 J. RES. CRIME & DELINQ. 242, 258 (1998) (noting that African Americans are more likely to be recommended for formal processing, referred to court, adjudicated as delinquent, and given harsher punishments than comparable whites).

46. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 487-501 (2004) (showing that law enforcement subjects who were unconsciously primed to expect that a perpetrator in a crime vignette was African American were harsher in their judgments about the perpetrator's culpability and deserved punishment); *see also* Bishop & Frazier, *supra* note 45, at 248 (suggesting that disproportionate representation of black juveniles in justice system may be because of discrimination).

II. APPLYING THE MITIGATION PRINCIPLE TO JUVENILE JUSTICE POLICY

The juvenile death penalty is an interesting issue that has captured public attention in the wake of *Roper v. Simmons*,[47] but in practical terms, it is not the most important context in which to ask the question of whether juveniles should face the same procedures and punishment as adults. According to *Roper*, 123 juveniles had been sentenced to death since 1990,[48] but many thousands have been tried and punished as adults. The developmental evidence that I have described indicates that adolescent offenders, because of their developmental immaturity, differ from their adult counterparts in ways that mitigate culpability *and* there is good reason to recognize this difference through categorical classification of young offenders. I would like to turn now to the implications of these conclusions for juvenile crime policy generally.

At the outset, I should say something about why this issue has become so salient in recent years. Beginning in the late 1980s, major reforms in youth crime policy have transformed a justice system that viewed most teens as youngsters whose crimes were the product of immaturity into one that often holds young offenders to the same standards of criminal accountability it imposes on adults. This movement is based on an unexamined assumption that whatever differences exist between adults and adolescents are immaterial in devising legal responses to youth crime. In fact, some advocates for tough policies (like the *Roper* prosecutor) seem to view young offenders as *more* culpable—and certainly more dangerous—than adult criminals. John Dilulio's famous description of "super-predators" in the mid-1990s captured the image of teenage criminals as a major threat to society.[49] Legislatures across the country have rushed to enact tough laws lowering the age at which juveniles can be tried and punished as adults for a broad range of crimes and broadening prosecutorial discretion to charge youths in adult court.[50] Perhaps the most important changes have come in the form of legislative waiver statutes, under which many youths who are legal minors for most other purposes are categorically treated as adults when they are charged with certain crimes. This has resulted in the wholesale transfer of youths into the adult criminal system—over 200,000 a year by most estimates.[51] At the same

47. 543 U.S. 551 (2005).

48. *Roper*, 543 U.S. at 614 (Scalia, J., dissenting).

49. Dilulio, a criminologist, coined this term in an article predicting that the new century would bring a wave of juvenile crime far worse than the 1990s. John Dilulio, *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

50. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 584-85 (2000) [hereinafter *Legal Construction of Adolescence*] (describing legislative trend of lowering age at which adult prosecution can occur, either through judicial transfer or legislative waiver); *see also* PATRICIA TORBET ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS & VIOLENT JUVENILE CRIME 3-5 (1996) (describing trend in expanding prosecutorial authority to directly file charges in criminal court).

51. Legislative waivers mandate an automatic adjudication in adult criminal court at a jurisdictional age below the age of majority for specific offenses or in general. *Legal Construction of Adolescence*, *supra* note 50, 584-85. In the 1980s and 1990s, these laws became much more common. *Id.* at 585. In California, for example, after age fourteen juveniles are automatically tried as adults for

time, juvenile court dispositions have become more like prison sentences, often extending well into adulthood. Questions about whether juveniles should be subject to the same punishment as adults get a lot of attention in high-profile murder cases, such as that of Lionel Tate, the twelve-year-old Florida boy who was given a life sentence (later reversed) for killing a six-year-old neighbor girl[52]—but the issue also arises in many more mundane cases involving drug sales and property crimes.

These reforms were fueled by rising juvenile crime rates, and particularly homicide rates in the late 1980s and early 1990s, a legitimate source of concern. In part, the legal changes reflected disillusionment with the traditional juvenile court and the view that, while the juvenile system may have met the needs of a simpler time when kids got into schoolyard fistfights, it was not up to the task of dealing with today's young criminals who use guns to commit serious crimes.[53] Politicians ridiculed the system and pointed to high recidivism rates as evidence that rehabilitation was a failure. Supporters of the court sometimes seemed to invite criticism. As youth crime rates rose, paternalistic descriptions of young criminals as wayward children who would respond to the caring treatment of the juvenile court began to sound naive.

Proponents of more punitive policies for juveniles cast the available options as being either adult punishment or a "slap on the wrist," suggesting that if teens are not held fully responsible for their crimes, they would bear no criminal responsibility at all.[54] Child advocates often seem to accept these constrained choices. Thus, in the policy debate, both sides appeared to agree that youths charged with crimes would either be treated as children in juvenile court or tried and punished as adults. Across the country, lawmakers opted for public protection by redefining adolescent offenders (or many of them) as adults.

Supporters may present these reforms as a coherent policy response to a new generation of dangerous young criminals. But close inspection reveals that often the process has had the hallmarks of a moral panic, in which politicians, the

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murder, rape, and several other sexual offenses. CAL. WELF. & INST. CODE § 707(b), (e) (West 2003).

52. State v. Tate, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003); *see also* Michael Browning et al., *Boy, Age 14, Gets Life in T.V. Wrestling Death: Killing of 6-Year-Old Playmate Wasn't Just Horseplay Florida Judge Says*, CHI. SUN-TIMES, Mar. 19, 2001, at 1. Lionel Tate's conviction was overturned in 2004, and he was released. Terry Aguayo, *Youth Who Killed at 12 Gets 30 Years for Violating Probation*, N.Y. TIMES, Mar. 19, 2006, at A21. In 2005, he violated his parole when he held up a pizza delivery boy, and in 2006, a judge sentenced him to thirty years in prison. *Id.*

53. In a 1989 study, seventy percent of those questioned stated that the leniency of the juvenile system was a cause of violent youth crime. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 157 (1990).

54. *See, e.g.*, Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65, 68 (1985) (arguing that "there is no reason that society should be more lenient with a 16 year old first offender than a 30 year old first offender"); Virginia Ellis, *Lungren to Seek Lower Age for Trial as Adult*, L.A. TIMES, Jan. 15, 1993, at A3 (stating that "if you commit an adult crime, you'd better be prepared to do adult time" (quoting California Attorney General Dan Lungren)); Jon R. Sorensen, *Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails*, BUFFALO NEWS, Dec. 10, 1995, at A16 (stating "[a]dult crime should mean adult time" (quoting New York Governor George Pataki)).

media, and the public have reinforced each other in a pattern of escalating alarm about the seriousness of the threat of youth violence and the urgent need to respond.[55] Sometimes the process is triggered by a high-profile crime that stirs public fears. In Arkansas, for example, legislative reforms lowering the minimum age of criminal adjudication for juveniles followed the Jonesboro school shootings in which two youths, ages eleven and thirteen, killed four schoolmates and a teacher.[56] Seldom is reform undertaken with the kind of thoughtful deliberation one might expect to inform legal and institutional changes of such importance.

As my earlier analysis demonstrates, this legal trend offends proportionality—a core principle of criminal law. The developmental psychology evidence does not support a justice system that treats young offenders as *children* whose crimes are excused, but it does support a mitigation-based model that treats adolescents as a separate legal category of offenders who are less blameworthy and deserve less punishment than typical adult offenders. The distinction between excuse and mitigation seems straightforward, but it is often misunderstood. Even Justice Scalia, who should know better, makes this error in his *Roper* dissent. In criticizing the majority for (in his view) finding juveniles to lack responsibility, Scalia seemed to forget that, having escaped the death penalty, Simmons would spend the rest of his life in prison.[57]

III. THE UTILITARIAN CASE FOR DEVELOPMENTALLY BASED POLICIES

In reality, although the scientific evidence of adolescent immaturity is compelling, it is unlikely that principle alone will dictate youth crime policy. Ultimately, the most compelling argument for a separate, less punitive system for dealing with young criminals rests on utilitarian grounds. An important lesson of the research on juvenile crime by Moffitt and others is that most delinquent youths, even those who commit serious crimes, are "adolescent-limited" offenders who are likely to mature out of their antisocial tendencies. These youths are not headed for careers in crime—unless correctional interventions

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

56. In Jonesboro, Andrew Golden and Mitchell Johnson, ages eleven and thirteen, brought guns to school and killed a teacher and four young girls and wounded ten others outside of a middle school. Rick Bragg, *Judge Punishes Arkansas Boys Who Kill 5*, N.Y. TIMES, Aug. 12, 1998, at A1. After the incident, Arkansas passed the Extended Juvenile Jurisdiction Act, which enabled prosecutors to charge any child with murder, as long as he appeared to possess the requisite mental state and understood the criminal consequences of his conduct. *See* ARK. CODE ANN. § 9-27-501(a)(1) (2002) (stating that a prosecutor may charge a child under thirteen with murder if "the state has overcome presumptions of lack of fitness to proceed and lack of capacity").

57. *See* Roper v. Simmons, 543 U.S. 551, 614-17 (2005) (Scalia, J., dissenting).

push them in that direction. Thus, it is critical that youth crime policy not lose sight of the impact of sanctions on the future life prospects of young offenders. Effective sanctions that invest in the human capital of young offenders are likely to promote the interests of society as well as those of the youths themselves, as long as public safety is not unduly compromised.

Supporters of the recent reforms argue that tough policies promote social welfare by protecting the public from the harm of youth crime. Their calculus is distorted, however, because it exaggerates the threat (in part by not acknowledging the steady decline in juvenile crime rates for more than a decade)[58] and because it discounts (or fails to include) the potential costs of harsh punishment. For starters, the concrete economic costs of incarcerating youths are substantial; dollars spent on prisons are not available for education or other social programs, a fact that some state legislatures are beginning to recognize, particularly in the context of adult sentencing policy.[59] But just as important are the human costs. Although research on the impact of adult incarceration on normative adolescent offenders is not yet extensive, the available evidence suggests that imprisonment undermines social maturation and educational progress and likely contributes to recidivism. Psychologists view adolescence as a critical developmental stage during which youths acquire competencies, skills, and experiences essential to the successful transition to conventional adult roles. If the experience of youths in the correctional system disrupts educational and social development severely, it may irreversibly undermine prospects for gainful employment, successful family formation, and engaged citizenship.[60] My point is that under a valid utilitarian calculus, policies and programs will be measured by asking not only whether the public will be safer in the short run, but also whether youths *after* their involvement in the justice system will be more or less likely to desist from criminal activity, to stay in

58. California legislators passed Proposition 21 in 2000, significantly expanding the category of youths who could be subject to adult prosecution and punishment; at the time, youth crime rates in California had been steadily declining for years. FRANK E. ZIMRING, AMERICAN YOUTH VIOLENCE 36 (1998). In San Diego County, for example, juvenile felony charges dropped by forty-three percent during the period between 1990 and 2000. James R. Milliken & Edwin Kofler, *A Better Way to Combat Juvenile Crime*, SAN DIEGO UNION-TRIBUNE, Feb. 27, 2000, at G3; George Mgdesyan, *Gang Violence and Crime Prevention Act of 1998*, 3 J. LEGAL ADVOC. & PRAC. 128, 136-37 (2001) (citing statistics showing thirty percent drop in California's juvenile felony arrest rate and fifty percent drop in juvenile arrests for homicide between 1990 and 2000); Robert E. Shepherd, Jr., *Recapturing the Child in Adult Court*, 16 CRIM. JUST., Winter 2002, at 58, 58 (describing public's misperception that an "epidemic" of juvenile crime exists, despite decline in juvenile crime rates).

59. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285-88 (2005) (describing the repeal and scaling back of tough sentencing laws in some states in response to high costs; also describing legislative initiatives requiring analysis of the fiscal implications of correction programs and reforms).

60. Hen Le Chung et al., *Juvenile Justice and the Transition to Adulthood: A Developmental Perspective*, *in* ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68, 68-91 (William Osgood et al. eds., 2005) (describing adolescence as a critical developmental stage and examining the potential harmful impact of adult correctional programs on young offenders' successful transition to adult roles).

school, to get steady employment as adults, and to develop long-term relationships that bring stability to their lives.

The effectiveness of juvenile correctional programs has been the subject of debate for decades and, until recently, most researchers were quite pessimistic about the ability of such programs to have a positive influence on young offenders. The findings of a much cited study by Lipton, Martinson, and Wilks in the mid-1970s can be (and often has been) summarized in two words—"Nothing works."[61] In the past decade or so, however, new programs, such as Scott Henggeler's multisystemic therapy, and more sophisticated methods of statistical analysis have contributed to a brighter picture.[62] A growing body of programmatic outcome research indicates that interventions that invest in the human capital of young offenders can enhance their prospects for becoming productive adults and diminish the risk of recidivism.[63]

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61. DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 267 (1975).

62. *See* SCOTT W. HENGGELER & CHARLES M. BORDWIN, FAMILY THERAPY AND BEYOND: A MULTISYSTEMIC APPROACH TO TREATING THE BEHAVIOR PROBLEMS OF CHILDREN AND ADOLESCENTS 1 (1990) [hereinafter: FAMILY THERAPY AND BEYOND] (describing the positive effects on youthful behavior of multisystemic therapy); Scott W. Henggeler et al., *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. CONSULTING & CLINICAL PSYCHOL. 953, 953, 958 (1992) (finding multisystemic therapy superior to usual services in reducing arrests, self-reported delinquency, and time incarcerated). Multisystemic therapy is a community-based program that targets delinquent and antisocial youths. *Id.* at 954. It focuses on the individual youth and her family as well as the school and community context. *Id.* Outcome research supports the effectiveness of multisystemic therapy in reducing recidivism. *Id.*

New methods of statistical analysis have allowed researchers to better evaluate program effectiveness and to discern different responses among youths, based on age, seriousness of offense, etc. Meta-analysis is a method of statistical analysis that allows researchers to examine variables across a large number of program outcome studies. Mark Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders: An Inquiry Into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 613 (1999). Meta-analysis can reveal factors contributing to program effectiveness more accurately than individual outcome studies. *Id.*; *see also* Mark Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Longitudinal Research*, *in* SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313, 314 (Rolf Loeber & David P. Farrington eds., 1998) (describing meta-analysis as "very direct way" to answer questions of whether evidence shows intervention programs reduce recidivism and which programs are most effective).

63. Some of the best research on these issues has been conducted by the Washington State Institute for Public Policy, a legislatively funded institute that (among other things) evaluates the effectiveness of correctional programs. *See* ROBERT BARONSKI, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON STATE'S COMMUNITY COMMITMENT PROGRAMS: RECIDIVISM FINDINGS 2 (Apr. 2003), *available at* http://www.wsipp.wa.gov/rptfiles/03-04-1201.pdf (finding that incarcerating youths, rather than placing them in rehabilitative programs, did not reduce recidivism); ROBERT BARONSKI & STEVE AOS, WASH. STATE INST. FOR PUB. POLICY, THE EFFECTS OF PAROLE ON RECIDIVISM: JUVENILE OFFENDERS RELEASED FROM WASHINGTON STATE INSTITUTIONS: PRELIMINARY FINDINGS 21 (Mar. 2001), *available at* http://www.wsipp.wa.gov/rptfiles/parolerecid.pdf (finding that because recidivism rates among young offenders are high, parole intervention programs would be cost effective); ROBERT BARONSKI, STEVE AOS & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, RECOMMENDED QUALITY CONTROL STANDARDS: WASHINGTON STATE RESEARCH BASED JUVENILE OFFENDER PROGRAMS 1 (Dec. 2003), *available at* http://www.wsipp.wa.gov/rptfiles/JuvQA.pdf (stressing the importance of intervention programs to reduce recidivism).

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

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

This is a good time to reflect on youth crime policy. The alarm that fueled the punitive reforms has subsided as juvenile crime rates have fallen for several years. Even supporters of tough policies have had second thoughts. John Dilulio, who coined the term "super-predators" in the mid-1990s, recently expressed regret about this characterization of young offenders and acknowledged that his predictions about the threat of juvenile crime had not been realized.[64]

Moreover, recent research suggests that the public may be less enthusiastic about punitive policies than politicians seem to believe. Last year my colleagues and I conducted what is called a "contingent valuation survey" in which we probed how much 1,500 Pennsylvania residents were willing to pay (through increased taxes) for either incarceration or rehabilitation programs for juveniles.[65] The alternatives were described—accurately, according to the research—as offering a similar prospect of crime reduction. We found that participants were willing to pay more for rehabilitation than for punishment—a mean of $98.00 for rehabilitation versus $81.00 for incarceration. Of course, this kind of survey is somewhat artificial since the willingness-to-pay question was hypothetical. Nonetheless, these findings should be interesting to policy makers, particularly in light of facts about the two options that we did not disclose to our participants—that a year of juvenile incarceration actually costs *five times* as much as a year-long rehabilitation program.[66]

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64. Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. During an interview in which he expressed regret for advocating teen prison sentences and condemning them as superpredators, John Dilulio stated, "If I knew then what I know now, I would have shouted for the prevention of crimes." *Id.*

65. The study is reported in Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Young Offenders: Evidence from a Contingent Valuation Survey*, 5(4) J. CRIMINOLOGY & PUB. POL'Y 627 (2006).

66. *Id.* at 640.

Our study and other recent survey evidence suggest that the public cares about safety but is quite open to programs in the juvenile system as a way of reducing juvenile crime.[67] Politicians claim that the public demands "get-tough" policies, but this may often be a transitory response to highly publicized crimes—the moral panic I described earlier. The evidence suggests that, in calmer times, public opinion is far less punitive. Thus, the political risk that policy makers face in responding cautiously to public pressure in the wake of these incidents may not be as great as they might surmise.

There is some evidence that legislatures also are having second thoughts about the punitive laws that they have enacted in the past generation. This may be partly in response to lower juvenile crime rates and partly in recognition of the reality that adult prosecution and punishment of juveniles carry high costs. In several states, punitive laws have been repealed or scaled back. In 2005, for example, Illinois repealed a statute mandating adult prosecution of fifteen-year-olds charged with selling drugs near schools.[68] Lawmakers may be ready today to approach juvenile justice policy more thoughtfully than they have in a generation. If so, a large body of recent research that was not available twenty years ago offers insight about adolescence and about young offenders. My hope is that this scientific knowledge can influence the direction of juvenile justice policy.

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67. Recent polls demonstrated strong public support for rehabilitation programs and the belief that young offenders are less culpable than adults. Julian Roberts, *Public Opinion and Youth Justice*, *in* YOUTH CRIME AND YOUTH JUSTICE: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 495, 512 (Michael Tonry & Anthony N. Doob eds., 2004). A 2002 nationwide poll revealed that eighty-five percent of respondents favored rehabilitative programs over prison sentences for juvenile offenders. Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1072 (2005). In a 2003 Louisiana poll, seventy-eight percent of respondents believed that juvenile justice should focus on rehabilitative programs, while seventy-six percent of those polled believed such programs would be less expensive than incarceration. *Id.* at 1073 (citing Editorial, TIMES (Shreveport, La.), May 24, 2003, at 9A). Surveys conducted in Georgia suggested similar public support for rehabilitative programs, where only fifteen percent of those polled expressed the belief that punishment should be the main goal of the juvenile justice system. *Id.* (citations omitted).

68. ILL. COMP. STAT. ANN. § 405/5-130(1)(a) (repealed 2005); *see also* Scott Ehlers, *State Legislative Affairs Update*, THE CHAMPION, Dec. 2005, at 48, 48 (noting that Illinois legislature recently enacted a bill that removed an automatic transfer provision that had transferred juveniles to adult court). In 2005, Delaware amended an automatic transfer statute requiring youths accused of robbery and burglary to be sent to criminal court. *Id.* at 50. The new law limited the conditions under which young offenders could automatically be transferred to criminal court. *Id.* The Connecticut legislature enacted a new law in 2005 affording juveniles a presumptive youthful offender status for lower level offenses, which would preserve the confidentiality of their offenses and set a maximum sentence of four years. *Id.*