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ABOLISH THE JUVENILE COURT: YOUTHFULNESS, CRIMINAL RESPONSIBILITY, AND SENTENCING POLICY

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I. INTRODUCTION

Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young people.[1] These reforms have converted the historical ideal of the juvenile court as a social welfare institution into a penal system that provides young offenders with neither therapy nor justice. The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the con-

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[1] *See* Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197 (1993) (analyzing changes in procedure, jurisdiction, and jurisprudence of juvenile courts) [hereinafter Feld, *Criminalizing the American Juvenile Court*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991) (summary of procedural and substantive convergence between juvenile and criminal courts) [hereinafter Feld, *Transformation of Juvenile Court*]; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988) (punitive juvenile court sentencing practices) [hereinafter Feld, *Punishment, Treatment*]; Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) (punitive policies in waiver statutes) [hereinafter Feld, *Juvenile Waiver Statutes*]; Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141 (1984) (procedural convergence between juvenile and criminal courts) [hereinafter Feld, *Criminalizing Juvenile Justice*].

ceptual and operational differences in strategies of criminal social control for youths and adults. No compelling reasons exist to maintain separate from an adult criminal court, a punitive juvenile court whose only remaining distinctions are its persisting procedural deficiencies. Rather, states should abolish juvenile courts' delinquency jurisdiction and formally recognize youthfulness as a mitigating factor in the sentencing of younger criminal offenders. Such a policy would provide younger offenders with substantive protections comparable to those afforded by juvenile courts, assure greater procedural regularity in the determination of guilt, and avoid the disjunctions in social control caused by maintaining two duplicative and inconsistent criminal justice systems.

My proposal focuses only on the criminal delinquency jurisdiction of juvenile courts because youth crime and violence provide the impetus for most of the current public anxiety and political responses.[2] First, this article will describe briefly the transformation of the juvenile court from a social welfare agency into a deficient criminal court. Second, it will analyze the inherent and irreconcilable contradictions between attempting to combine social welfare and penal social control in the juvenile court. Finally, once a state separates social welfare from criminal social control, no role remains for a separate juvenile court for delinquency matters. Rather, a state could try all offenders in one integrated criminal court, albeit with modifications to respond to the youthfulness of younger defendants. Adolescent developmental psychology, criminal law jurisprudence, and sentencing policy provide rationale to formally recognize youthfulness as a mitigating factor when sentencing younger offenders. Moreover, the uncoupling of social welfare from criminal social control also suggests a social policy agenda more responsive to the needs of youth than the current version of the juvenile court.

In Part II, I briefly analyze the social history of the juvenile court and its subsequent constitutional domestication. I argue that in the three decades since *Gault*, legal changes have altered

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[2] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995) (analyzing effect of increase in youth violence of late 1980s on juvenile justice reforms) [hereinafter Feld, *Violent Youth*]; *see also* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT (1995).

juvenile courts' procedures, jurisdiction, and jurisprudence, and increasingly render juvenile courts indistinguishable from criminal courts. The convergence is reflected in the decriminalization of status offenders, the criminalization of serious offenders via waiver to the criminal courts, and the increased punitiveness in sentencing of ordinary delinquents. Despite juvenile courts' increasing and explicit punitiveness, however, they still provide delinquents with fewer and less adequate procedural safeguards than those available to criminal defendants. In Part III, I argue that the juvenile court's deficiencies reflect a fundamental flaw in its conception rather than *simply* a century-long failure of implementation. The juvenile court attempts to combine social welfare and criminal social control in one institution, but inevitably subordinates the former to the latter because of its inherent penal orientation.

In Part IV, I propose to abolish the juvenile court and to formally recognize youthfulness as a mitigating factor in criminal sentencing, thereby accommodating the lesser culpability of younger offenders. Young offenders differ from adults in their breadth of experience, temporal perspective, willingness to take risks, maturity of judgment, and susceptibility to peer influences. These generic and developmental characteristics of adolescence affect their opportunity to learn to be responsible and to develop fully a capacity for self-control and provide a compelling rationale for mitigation of sentences. I propose an explicit, age-based "youth discount," a sliding scale of developmental and criminal responsibility, as the appropriate sentencing policy mechanism to implement the lesser culpability of younger offenders.

Finally, I suggest a number of benefits that may accrue from a formal recognition of youthfulness as a mitigating factor in an integrated criminal justice system—enhanced protection of the many younger offenders already being sentenced as adults, an affirmation of responsibility, integration of records, and a more consistent sentencing policy toward chronic younger offenders, and, ultimately, honesty about the reality of criminal social control in the juvenile court.

II. TRANSFORMED BUT UNREFORMED: THE RECENT HISTORY OF THE JUVENILE COURT

A. THE JUVENILE COURT

Many analysts have examined the social history of the juvenile court.[3] Ideological changes in cultural conceptions of children and in strategies of social control during the nineteenth century led to the creation of the juvenile court in 1899.[4] The juvenile court reform movement removed children from the adult criminal justice and corrections systems, provided them with individualized treatment in a separate system, and substituted a scientific and preventative alternative to the criminal law's punitive policies. By separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected both the criminal law's jurisprudence and its procedural safeguards such as juries and lawyers. Judges conducted confidential and private hearings, limited public access to court proceedings and court records, employed a euphemistic vocabulary to minimize stigma, and adjudicated youths to be delinquent rather than convicted them of crimes. Under the guise of *parens patriae*, the juvenile court emphasized treatment, supervision, and control rather than punishment. The juvenile court's "rehabilitative ideal" envisioned a specialized judge trained in social science and child development whose empathic qualities and insight would enable her to make individualized therapeutic dispositions in the "best interests" of the child. Reformers pursued benevolent goals, individualized their solicitude, and maximized discretion to provide flexibility in

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[3] *See, e.g.*, DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980) (discussing the social structural context of Progressives' building of social welfare and social control institutions); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978) (impact of social sciences on juvenile courts "rehabilitative" ideology); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977) (discussing the social history of origins of Cook County Juvenile Court); Francis A. Allen, *Legal Values and the Rehabilitative Ideal, in* THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25 (Francis A. Allen ed., 1964).

[4] JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981 (1988) (discussing the impact of changing social construction of childhood on juvenile justice policies); Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (noting the social construction of childhood and its impact on juvenile justice treatment ideology).

diagnosis and treatment of the "whole child." They regarded a child's crimes primarily as a symptom of her "real needs," and consequently the nature of the offense affected neither the degree nor the duration of intervention. Rather, juvenile court judges imposed indeterminate and non-proportional sentences that potentially continued for the duration of minority. Progressives used a variety of state agencies to "Americanize" immigrants and the poor; from its inception, juvenile courts provided a coercive mechanism to discriminate between "our" children and "other peoples' children"—those from other ethnic backgrounds, cultures, and classes.[5]

Progressives situated the juvenile court on a number of cultural and criminological fault-lines and institutionalized several binary conceptions for the respective justice systems: either child or adult, either determinism or free will, either treatment or punishment, either procedural informality or formality, either discretion or the rule of law. Serious youth crime challenges these dichotomous constructs. The recent procedural and substantive convergence between juvenile and criminal courts represent efforts to modify the Progressives' bifurcation between these competing conceptions of children and crime control.

B. THE CONSTITUTIONAL DOMESTICATION OF THE JUVENILE COURT

In *In re Gault*,[6] the Supreme Court began to transform the juvenile court into a very different institution than the Progressives contemplated. In *Gault*, the Supreme Court engrafted some formal procedures at trial onto the juvenile court's individualized treatment sentencing schema.[7] Although the Court did not intend its decisions to alter juvenile courts' therapeutic

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[5] *See* W. NORTON GRUBB & MARVIN LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 68-70 (1982) (discussing the selective application of *parens patriae* ideology in a class-based society); ROTHMAN, *supra* note 3, at 222; PLATT, *supra* note 3, at 36.

[6] 387 U.S. 1 (1967). For analyses of the Supreme Court's juvenile "due process" decisions, see, e.g., Feld, *Criminalizing Juvenile Justice*, *supra* note 1; Francis B. McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459 (1981); Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposals for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980).

[7] *Gault*, 387 U.S. at 31-57.

mission, in the aftermath of *Gault*, judicial, legislative, and administrative changes have fostered a procedural and substantive convergence with adult criminal courts. Several subsequent Supreme Court decisions furthered the "criminalizing" of the juvenile court. In *In re Winship*,[8] the Court required states to prove juvenile delinquency by the criminal law's standard of proof "beyond a reasonable doubt." In *Breed v. Jones*,[9] the Court applied the constitutional ban on double jeopardy and posited a functional equivalence between criminal trials and delinquency proceedings.

Gault and *Winship* unintentionally, but inevitably, transformed the juvenile court system from its original Progressive conception as a social welfare agency into a wholly-owned subsidiary of the criminal justice system. By emphasizing criminal procedural regularity in the determination of delinquency, the Court shifted the focus of juvenile courts from paternalistic assessments of a youth's "real needs" to proof of commission of a crime. By formalizing the connection between criminal conduct and coercive intervention, the Court made explicit a relationship previously implicit, unacknowledged, and deliberately obscured. And, ironically, *Gault* and *Winship*'s insistence on greater criminal procedural safeguards in juvenile courts may have legitimated more punitive dispositions for young offenders.

In *McKeiver v. Pennsylvania*,[10] however, the Court denied to juveniles the constitutional right to jury trials in delinquency proceedings and halted the extension of full procedural parity with adult criminal prosecutions. Without elaborating upon or analyzing the distinctions, *McKeiver* relied upon the rhetorical differences between juvenile courts' *treatment* rationale and criminal courts' *punitive* purposes to justify the procedural disparities between the two settings.[11] Because *McKeiver* endorsed a *treatment* justification for its decision, the right to a jury trial provides the crucial legal condition precedent to *punish* youths explicitly in juvenile courts. Several recent juvenile justice legislative reforms provide some youths with a statutory right to

[8] 397 U.S. 358 (1970).
[9] 421 U.S. 519 (1975).
[10] 403 U.S. 528, 541 (1971).
[11] *Id.* at 552.

a jury in order to expand the punitive sentencing options available to juvenile court judges.[12]

C. THE TRANSFORMATION OF THE JUVENILE COURT

In the decades since *Gault*, legislative, judicial, and administrative changes have modified juvenile courts' jurisdiction, purpose, and procedures and fostered their convergence with criminal courts. These inter-related developments—increased procedural formality, removal of status offenders from juvenile court jurisdiction, waiver of serious offenders to the adult system, and an increased emphasis on punishment in sentencing delinquents—constitute a form of criminological "triage," crucial components of the criminalizing of the juvenile court, and elements of the erosion of the theoretical and practical differences between the two systems.[13] This "triage" strategy removes many middle-class, white, and female non-criminal status offenders from the juvenile court, simultaneously transfers persistent, violent, and disproportionally minority youths to criminal court for prosecution as adults, and imposes increasingly punitive sanctions on those middle-range delinquent criminal offenders who remain under the jurisdiction of the juvenile court. As a result of these implicit triage policies, juvenile courts increasingly function similarly to adult criminal courts.

1. Status Offenses

Legislative recognition that juvenile courts often failed to realize their benevolent purposes has led to a strategic retrenchment of juvenile courts' jurisdiction over non-criminal misconduct such as truancy or incorrigibility, behavior that would not be a crime if committed by an adult. In the 1970s, critics objected that juvenile courts' status jurisdiction treated non-criminal offenders indiscriminately like criminal delinquents, disabled families and other sources of referral through one-sided intervention, and posed insuperable legal issues for

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[12] *See, e.g.*, Feld, *Violent Youth*, *supra* note 2, at 1039 (analyzing states' providing juveniles with right to jury trial in order to enhance the punishment capacities of juvenile courts).

[13] *See* Feld, *Transformation of Juvenile Court*, *supra* note 1, at 696-722 (analyzing procedural and substantive transformation of the juvenile court); Feld, *Criminalizing the American Juvenile Court*, *supra* note 1, at 227-54 (analyzing transformation of juvenile court from informal welfare agency into a scaled-down criminal court).

the court.[14] Judicial and legislative disillusionment with juvenile courts' responses to noncriminal youths led to diversion, deinstitutionalization, and decriminalization reforms that have removed much of the "soft" end of juvenile court clientele.[15] These legislative and judicial reforms represent a strategic withdrawal from "child saving," an acknowledgment of the limited utility of coercive intervention to provide for child welfare, a reduced role in enforcing normative concepts of childhood, and a diminished prevention mission.

2. Waiver of Juvenile Offenders to Adult Criminal Court

A second jurisdictional change entails the criminalizing of serious juvenile offenders as courts and legislatures increasingly transfer chronic and violent youths from juvenile to criminal courts for prosecution as adults.[16] Transfer laws simultaneously

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[14] *See* H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW (2d ed. 1985) (states traditionally treated status offenses as a form of delinquency, detained and confined status delinquents in the same institutions as criminal delinquents); JOEL F. HANDLER & JULIE ZATZ, NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONILIATION OF STATUS OFFENDERS (1982) (observing that intractable family disputes diverted scarce judicial resources from other tasks, and exacerbated rather than ameliorated family conflict); Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 CRIME & DELINQ. 121 (1977); Al Katz & Lee E. Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1978) (concluding that judges exercise of standardless discretion to regulate noncriminal misconduct had a disproportionate impact on female juveniles); Meda Chesney-Lind, *Girls and Status Offenses: Is Juvenile Justice Still Sexist?*, 20 CRIM. JUST. ABSTRACT 144 (1988); R. Hale Andrews, Jr., & Andrew H. Cohn, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974) (discussing legal issues of void for vagueness, equal protection and procedural justice).

[15] Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST. 145 (1979) (implementation of diversion reforms and their possible "net-widening" effects). Federal prohibitions on secure confinement of noncriminal youths provided the impetus to deinstitutionalize status offenders. *See* 42 U.S.C. § 5633(a)(12)(A) (1995). Deinstitutionalization also provided the impetus to transfer many middle-class, white, and female youths whom the juvenile justice system formerly handled as status offenders into the private sector system of mental health and chemical dependency treatment and confinement. *See, e.g.*, IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES (1989); Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988).

[16] Although the technical and administrative details of states' transfer legislation vary considerably, judicial waiver, legislative offense exclusion, and prosecutorial choice of forum represent the three general types of waiver statutes that jurisdictions employ both singly and in combination. *See, e.g.*, SNYDER & SICKMUND, *supra* note 2, at 85-89; PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 6 (1996); GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS (1995) [hereinafter JUVENILE JUSTICE]; Feld, *Juvenile Waiver Statutes*, *supra* note 1, at 503-19; Francis B. McCarthy, *The Serious*

attempt to resolve both fundamental crime control issues and the ambivalence embedded in our cultural construction of youth. The jurisprudential conflicts reflect many of the current sentencing policy debates: the tensions between rehabilitation or incapacitation and retribution, between basing decisions on characteristics of the individual offender or the seriousness of the offense, between discretion and rules, and between indeterminacy and determinacy. Waiver laws attempt to reconcile the contradictions posed when the child is a criminal and the criminal is a child. What legal processes, crime control policies, and substantive criteria best enable decision-makers to select from among the competing cultural images of youths as responsible and culpable offenders and as immature and salvageable children?

In most states, judges decide whether a youth is a criminal or a delinquent in a waiver hearing and base their discretionary assessments on a juvenile's "amenability to treatment" or "dangerousness."[17] The inherent subjectivity of waiver criteria permits a variety of racial inequalities and geographic disparities

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Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction, 38 ST. LOUIS U. L.J. 629 (1994) (juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses, typically older youths and serious crimes and prosecutors exercise their discretion to select the juvenile or adult status for youths); Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267 (1991); Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985); Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, JUV. & FAM. CT. J., Summer 1995, at 17.

[17] In *Kent v. United States*, the United States Supreme Court formalized the waiver process, and required juvenile courts to provide youths with some procedural due process protections, such as a fair hearing, assistance of counsel, access to social investigations and records, and written findings and conclusions. 383 U.S. 541, 554-57 (1966). Although the Supreme Court decided *Kent* on procedural "due process" grounds, it appended to its opinion a list of substantive criteria that juvenile court judges might consider. *Id.* at 566-67. Legislatures specify "amenability" waiver criteria with varying degrees of precision, and frequently adopt the general and contradictory list of factors appended to the *Kent* opinion.

Proponents of judicial waiver emphasize its consistency with juvenile courts' rehabilitative sentencing philosophy and contend that individualized judgments provide an appropriate balance of flexibility and severity. *See, e.g.*, Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93 (1990). Critics object that juvenile court judges lack valid or reliable clinical tools with which to assess youths' amenability to treatment or to predict dangerousness. *See, e.g.*, Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978).

to occur when judges attempt to interpret and apply these vague laws.[18] Judicial discretion also frustrates rational social control and confounds criminal courts' response to young career criminals.[19] A "lack of fit" between judicial waiver decisions and

[18] The subjective nature of waiver decisions and the lack of objective indicators or scientific tools with which to classify youths allows judges to make unequal and disparate rulings without any effective procedural or appellate checks. DONNA HAMPARIAN ET AL., YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 102-07 (1982) (nationwide state-by-state and intra-state analyses reported enormous variations in both the rates of waiver and the types of cases transferred); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990) (analyzing waiver decisions involving a sample of violent youths in four different jurisdictions, controlling for both offense and offender variables, and concluding that no uniform criteria guided transfer decisions). Within a single jurisdiction, judges cannot administer, interpret, or apply discretionary waiver statutes consistently from county to county or from court to court. *See* Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 J.L. & INEQUALITY 1, 41-46 (1989) (rural judges waive jurisdiction over youths more readily than urban judges transfer similarly-situated offenders); Tammy Meredith Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 CRIME & DELINQ. 3, 14 (1994).

Marcy Podkopacz and I analyzed waiver decisions by several judges in a single judicial locale and reported that "the various judges within the same urban county and court applied the same law and decided cases of similarly-situated offenders significantly differently." Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 J.L. & INEQUALITY 73, 172 (1995) [hereinafter Podkopacz & Feld, *Judicial Waiver Policy*]. These judicial differences influenced both the characteristics of youths waived or retained and the subsequent sentences imposed upon them as juveniles or adults. *See also* Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996) [hereinafter Podkopacz & Feld, *End of the Line*].

In addition to justice by geography and by judicial idiosyncrasy, a youth's race also may affect waiver decisions. *See, e.g.*, Feld, *Violent Youth*, *supra* note 2, at 1009-10; Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 263 (1987) (study of violent youths finding substantial disparities in the rates of transfers of minority and white offenders); Joel P. Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, *in* READINGS IN PUBLIC POLICY (John C. Hall et al. eds., 1981); Joel P. Eigen, *Punishing Youth Homicide Offenders in Philadelphia*, 72 J. CRIM. L. & CRIMINOLOGY 1072 (1981) (inter-racial effect in transfer decisions in Philadelphia, judges waived more readily black youths with white victims than other offender-victim patterns). A four state analysis in which the effects of race on judicial waiver decisions would be controlled found that "blacks were more likely than whites to have their cases waived for violent, property, and drug offenses." JUVENILE JUSTICE, *supra* note 16, at 59.

[19] Juvenile and criminal courts' sentencing policies may often work at cross-purposes and frustrate rather than harmonize responses to serious young offenders who move between the two systems. The correlation between age and criminal activity makes the current jurisdictional bifurcation especially problematic because youths' rates of offending peak in mid- to late-adolescence exactly at the juncture between the juvenile and criminal justice systems. Moreover, criminal career research indicates that young offenders do not "specialize" in particular types of crime, that serious

criminal court sentencing practices often produces a "punishment gap" that allows many chronic and active young criminals to fall between the cracks of the two systems.[20] By contrast, when judicial waiver decisions, legislatively excluded offenses, or prosecutorial charging decisions focus on violent young offenders, these youths often receive substantially longer sentences as

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crime occurs within an essentially random pattern of persistent delinquent behavior, and that a small number of chronic delinquents commit many of the offenses and most of the violent offenses perpetrated by juveniles. *See generally* CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumstein et al. eds., 1986) [hereinafter CRIMINAL CAREERS]; David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189 (1986); Peter W. Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, 7 CRIME & JUST. 151 (1986); Joan Petersilia, *Criminal Career Research: A Review of Recent Evidence*, 2 CRIME & JUST. 321 (1980).

[20] Juvenile court waiver criteria and criminal court sentencing practices often lack congruence. Criminal courts impose relatively lenient adult dispositions because juvenile court judges waived only about one-third of youths for offenses against the person and transferred the largest proportion of juveniles for property offenses such as burglary. ELLEN NIMICK ET AL., JUVENILE COURT WAIVER: A STUDY OF JUVENILE COURT CASES TRANSFERRED TO CRIMINAL COURT 2-3 (1986) (in 1982, prosecutors charged only a third (34.3%) of all youth waived to criminal court with an index violent offense, a greater percentage with an index property offense (40.3%), and one-quarter (25.4%) with less serious non-index offenses).

Despite the dramatic rise in violent youth crime in the late 1980s and early 1990s, between 1988 and 1992 juvenile court judges continued to transfer the largest plurality of youths for property offenses (45%), and only about one-third (34%) of juveniles for violent crimes against the person. SNYDER & SICKMUND, *supra* note 2, at 154. Only in 1993, for the first time, did the proportion of judicially waived violent offenders (42%) exceed that of property offenders (38%). *Id.* at 29.

The nature of the offenses transferred and the youthfulness of the offenders affected their criminal court sentences. *See* PETER W. GREENWOOD ET AL., FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS 12-14 (1984) (youths benefited from informal lenient sentencing policies in adult courts); HAMPARIAN ET AL., *supra* note 18, at 112 (criminal courts subsequently fined or placed on probation the majority (54%) of juveniles judicially transferred); JAMES P. HEUSER, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY (1985) (Oregon judges transferred majority of youths for property offenses rather than violent offenses; criminal courts incarcerated only 55% of the convicted youths; nearly two-thirds of the waived youths received about the same sentences that juvenile courts would impose on juveniles with prior records or convicted of felonies); L. Kay Gillespie & Michael D. Norman, *Does Certification Mean Prison: Some Preliminary Findings from Utah*, JUV. & FAM. CT. J., Fall 1984, at 23 (Utah prosecutors did not charge the majority of juveniles transferred with violent offenses; courts did not imprison a majority of those convicted as adults); M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53 (1986) (adult criminal courts sentenced to prison less than one-third (30.8%) of 214 transferred juveniles convicted in adult proceedings); Podkopacz & Feld, *Judicial Waiver Policy*, *supra* note 18, at 164 ("the juvenile court sentenced youths found delinquent for non-presumptive, property offenses for terms longer than their adult counterparts").

criminals than do their delinquent counterparts who remain in juvenile court simply because of their new-found "adult" status.[21]

In response to the rise in youth homicide and gun violence in the late-1980s, almost every state has amended its waiver statutes and other provisions of their juvenile codes in a frantic effort to "get tough" and to stem the tide.[22] These recent changes signal a fundamental inversion in juvenile court jurisprudence from treatment to punishment, from rehabilitation to retribution, from immature child to responsible criminal. Legislatures increasingly use age and offense criteria to redefine the boundaries of adulthood, coordinate juvenile transfer and adult sentencing practices, and reduce the "punishment gap." The common over-arching legislative strategy reflects a jurisprudential shift from the *principle of individualized justice* to the *principle of offense*, from rehabilitation to retribution, and an emphasis on the seriousness of the offense rather than judges' clinical assessments of offenders' "amenability to treatment." State legislative amendments use offense criteria either as dispositional guidelines to structure and limit judicial discretion, to guide

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[21] Waiver statutes that use offense criteria to target violent offenders, that grant prosecutors discretion to choose the forum, or that exclude serious and violent offenses from juvenile court jurisdiction, increase the likelihood that young offenders will receive significant sentences as adults. GREENWOOD ET AL., *supra* note 20, at 12-14 (when criminal court judges in Los Angeles sentenced juveniles tried as adults, gravity or violence of the crime rather than the age or record of the offender determined the sentence); Carole Wolff Barnes & Randal S. Franz, *Questionably Adult: Determinants and Effects of the Juvenile Waiver Decision*, 6 JUST. Q. 117 (1989) (youths transferred and convicted for violent crimes received substantially greater punishment based solely on the seriousness of the present offense than did youths retained in juvenile court or transferred as chronic property offenders); Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 2 CRIME & DELINQ. 75, 88-89 (1986) (criminal courts incarcerated over 90% of waived violent youths and imposed sentences five-times longer than those given to youths with similar offense characteristics but over whom the juvenile courts retained jurisdiction); Podkopacz & Feld, *Judicial Waiver Policy*, *supra* note 18, at 159-66; Podkopacz & Feld, *End of the Line*, *supra* note 18, at 485-89 (criminal courts sentenced the violent young "adults" to terms about five-times longer than those received by violent juveniles sentenced as delinquents).

[22] On the escalation of youth homicide rates in the 1980s, see generally Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 5 (1996); Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25 (1996); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995). In reaction to this increase, since 1992, 48 of the 51 states and the District of Columbia have amended various aspects of their juvenile codes, sentencing statutes, and transfer laws to "get tough" on youths who commit serious or violent crimes. TORBET ET AL., *supra* note 16, at 3-4.

prosecutorial charging decisions, or automatically to exclude certain youths from juvenile court jurisdiction.[23]

Regardless of the details of these legislative strategies, the efforts to "crack down" and to "get tough" repudiate rehabilitation and judicial discretion, narrow juvenile courts' jurisdiction, base youths' "adult" status increasingly on the offense charged, and reflect a shift toward more retributive sentencing policies. Whether the legislature makes the forum decision by excluding offenses, or the prosecutor does so on a discretionary basis via concurrent jurisdiction, these laws reduce or remove both discretionary judicial authority and juvenile courts' clientele. Offense exclusion rejects juvenile courts' philosophical premise that they can aid youth and denies them the opportunity to try without regard to the "real needs" of the offending youth. Finally, the legal shift to punish more young offenders as adults exposes at least some youths to the possibility of capital punishment for the crimes they committed as juveniles.[24]

Although legislatures and courts transfer youths to criminal court so that they may receive longer sentences as adults than they could in the juvenile system, chronic property offenders constitute the bulk of juveniles judicially waived in most states, and they often receive shorter sentences as adults than do prop-

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[23] About three dozen states recently have amended their judicial waiver statutes to reduce their inconsistent application, to lessen intra-jurisdiction disparities, and to improve the fit between judicial waiver. TORBET ET AL., *supra* note 16, at 3-8. Legislatures use offense criteria as a type of sentencing guidelines to control judicial discretion, to focus on serious offenders, and to increase the numbers of youths waived. Under concurrent-jurisdiction statutes, legislatures grant prosecutors more authority to charge youths directly in criminal courts. Within the past decade, the use of this waiver strategy has more than doubled to about a dozen states. Nearly two-thirds of the states now exclude at least some serious offenses from juvenile court jurisdiction. *See* SNYDER & SICKMUND, *supra* note 2, at 89; JUVENILE JUSTICE, *supra* note 16, at 8-9, 64-93; Fritsch & Hemmens, *supra* note 16, at 29-32. Because most excluded offense legislation targets serious violent offenses—murder, rape, kidnapping, or armed robbery—youths identified by such provisions face the prospect of serious adult consequences if convicted. As states continue to lower the ages of eligibility for transfer of young offenders from 16 to 14 or 13, expand the lists of excluded offenses, and grant to prosecutors authority to "direct file" more cases in criminal court, increasing numbers of younger offenders appear in criminal court charged with serious crimes.

[24] *See* Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding imposition of death penalty on offenders aged 16 or 17 at the time of their crimes); VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987); Victor L. Streib, The Juvenile Death Penalty Today: Present Death Row Inmates Under Juvenile Death Sentences and Death Sentences and Executions for Juvenile Crimes, Jan. 1, 1973 to June 30, 1995 (1995) (unpublished manuscript, on file with author).

erty offenders retained in juvenile court.[25] By contrast, youths convicted of violent offenses in criminal courts appear to receive substantially longer sentences than do their retained juvenile counterparts.[26] For youths and adults convicted of comparable crimes, both types of disparities—shorter sentences for waived youths than for retained juveniles adjudicated for property offenses, and dramatically longer sentences for waived youths than for retained juveniles convicted for violent crimes—raise issues of sentencing policy fairness and justice. No coherent policy rationales justify either type of disparities. Rather, some youths experience dramatically different consequences than do other offenders simply because of the disjunction between two separate criminal justice systems. The transition to adulthood also occurs during the peak of youths' criminal careers. Thus, jurisdictional bifurcation undermines the ability of the adult justice system to respond adequately to either persistent or violent young offenders. Without an integrated record system that merges juvenile with adult criminal histories, some chronic offenders may "slip through the cracks" and receive inappropriately lenient sentences as adults.[27]

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[25] Podkopacz & Feld, *Judicial Waiver Policy*, *supra* note 18, at 159-66; Podkopacz & Feld, *End of the Line*, *supra* note 18, at 485-89.

[26] Podkopacz & Feld, *Judicial Waiver Policy*, *supra* note 18, at 159-66; Podkopacz & Feld, *End of the Line*, *supra* note 18, at 485-89. *See also* Feld, *Violent Youth*, *supra* note 2, at 1010-12.

[27] Juvenile and adult criminal courts' failure to maintain centralized repositories of offenders' prior records of arrests and convictions or to integrate them across both justice systems may frustrate sentencing of "persistent" career offenders when they make the transition between the two systems. *See* DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 126 (1986) (confidentiality of juvenile records and failure to combine criminal histories across both systems creates a disjunction that "serious offenders can exploit to escape the control and punishment their chronic or violent offenses properly deserve"). In many jurisdictions, criminal court judges often lack access to the juvenile component of offenders' criminal histories because of the confidentiality of juvenile court records, the functional and physical separation of juvenile and criminal court staff who must collate and combine these records, sheer bureaucratic ineptitude, and the difficulty of maintaining an integrated system to track offenders and compile complete criminal histories across both systems. *See* Greenwood, *supra* note 19; Joan Petersilia, *Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 1746 (1981); CRIMINAL CAREERS, *supra* note 19, at 193 (sealing and purging juvenile court records impedes criminal courts' ability to identify career offenders and to enhance their subsequent sentences).

Despite the traditional confidentially of and restricted access to juvenile courts records, many states increasingly use prior juvenile convictions to enhance adult sentences. NEAL MILLER, STATE LAWS ON PROSECUTORS' AND JUDGES' USE OF JUVENILE

3. Sentencing Delinquent Offenders

The same jurisprudential shifts from offender to the offense and from treatment to punishment that inspire changes in waiver policies increasingly affect the sentences that juvenile court judges impose on serious delinquent offenders as well. Progressive reformers envisioned a broader and more encompassing social welfare system for youths and did not circumscribe state power narrowly. Juvenile courts' *parens patriae* ideology combined social welfare with penal social control in one institution, minimized procedural safeguards, and maximized discretion to provide flexibility in diagnosis and treatment. They focused primary attention on youths' social circumstances and accorded secondary significance either to procedural safeguards or to proof of guilt or the specific offense.[28]

RECORDS 1 (1995) (about half of states consider juvenile records in setting adult sentences); TORBET ET AL., *supra* note 16, at 35-43. Several states' sentencing guidelines and the federal sentencing guidelines include some juvenile prior convictions in an adult defendant's criminal history score. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (1995); Feld, *Violent Youth, supra* note 2, at 1058. Under California's "three strikes" sentencing law, "a prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancements;" criminal courts may use some juvenile convictions to increase adult sentences. CAL. PENAL CODE § 667(d)(3) (West 1997); *see also* People v. Peterson, 40 Cal. App. 4th 1479 (1995) (using a juvenile felony adjudication to double a young adult's sentence from 7 to 14 years). Most states' sentencing guidelines weigh juvenile prior offenses less heavily than comparable adult convictions and include, for example, only juvenile felonies committed after age 16. *See generally* Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the Rehabilitative Ideal*, 69 MINN. L. REV. 141 (1981); Feld, *Violent Youth, supra* note 2. Some states, however, do not distinguish qualitatively between juvenile and adult prior convictions and include both equally in an offender's criminal history score. *See, e.g.*, KAN. STAT. ANN. § 22-4701 (1995).

The use of juvenile prior convictions to enhance adult sentences fosters greater procedural convergence between the two justice systems. States' use of juveniles' prior records implicates the "quality" of procedural justice by which juvenile courts obtained those original convictions, because juvenile courts adjudicate many youths delinquent without the assistance of counsel and most states deny youths access to a jury trial. *See* BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 54-56 (1993); Feld, *Criminalizing Juvenile Justice, supra* note 1, at 189-90; Feld, *Violent Youth, supra* note 2, at 1108-15; Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1217 (1989) [hereinafter Feld, *The Right to Counsel in Juvenile Court*]; Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 400-03 (1988) [hereinafter Feld, In re Gault *Revisited*].

[28] *See supra* note 3 and accompanying text.

The same public impetus and political pressures to waive the most serious young offenders to criminal courts also impel juvenile courts to "get tough" and punish more severely the remaining criminal delinquents, the residual "less bad of the worst." Several indicators reveal whether a juvenile court judge's disposition punishes a youth for his past offense or treats him for his future welfare. Increasingly, juvenile court legislative purpose clauses and court opinions explicitly endorse punishment as an appropriate component of juvenile sanctions.[29] Currently, nearly half of the states use determinate or mandatory minimum sentencing provisions that base a youth's disposition on the offense she committed rather than her "real needs" to regulate at least some aspects of sentence duration, institutional commitment, or release.[30] Empirical evaluations of

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[29] In the decades since *Gault* and *McKeiver*, more than 25% of the states have revised the statement of legislative purpose in their juvenile codes to de-emphasize rehabilitation and intervention in the child's "best interest" and to assert the importance of public safety, punishment and accountability in the juvenile justice system. Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 239-42 (1996) (detailed analysis of juvenile justice policy embodied in juvenile code statutory preambles); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523 (1984); Martin Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 809-15 (1982).

For example, states have redefined their juvenile courts' purposes to: "provide for the protection and safety of the public," CAL. WELF. & INST. CODE § 202 (West Supp. 1988); "protect society. . . [while] recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases," FLA. STAT. ANN. § 39.001(2)(a) (West 1988); "render appropriate punishment to offenders," HAW. REV. STAT. § 571-1 (1993); "protect[] the public by enforcing the legal obligations children have to society," IND. CODE ANN. § 31-6-1-1 (Michie 1979); "promote public safety [and] hold juvenile offenders accountable for such juvenile's behavior," KAN. STAT. ANN. § 38-1601 (1997); and provide similar social defense objectives. Some courts recognize that these changes signal basic changes in philosophical directions. *See, e.g., In re* Javier A., 206 Cal. Rptr. 386 (Cal. Ct. App. 1984); *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983); State v. Lawley, 591 P.2d 772, 773 (Wash. 1979); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401 (W. Va. 1980).

[30] *See* TORBET ET AL., *supra* note 16, at 14-15; Feld, *Punishment, Treatment, supra* note 1, at 850-90; Jullianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the Juvenile Justice System*, 48 VAND. L. REV. 479, 500-06 (1995); Thomas C. Castellano, *The Justice Model in the Juvenile Justice System: Washington State's Experience*, 8 LAW & POL'Y 397, 405 (1986).

About half (22) the states use some type of offense-based criteria to guide judicial sentencing discretion. Washington State adopted sentencing guidelines to impose presumptive, determinate and proportional sentences based on a juvenile's age, seriousness of the offense, and prior record. WASH. REV. CODE ANN. § 13.40.010(2) (West Supp. 1988). Mandatory minimum sentencing provisions in other states typically use age and offense criteria to define serious offenders and to prescribe lengths of sen-

juvenile courts' sentencing practices indicate that the present offense and prior record account for most of the explained variance in judges' dispositions of delinquents, and reinforce the criminal orientation of juvenile courts.[31] Despite their penal focus, however, the individualized discretion inherent in juvenile courts' treatment ideology is often synonymous with racial discrimination.[32] Finally, evaluations of conditions of confine-

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tences or youths levels of security. TORBET ET AL., *supra* note 16, at 14-15; Sheffer, *supra*, at 489-92. While nomenclatures differ among the states, these "therapeutic" mandatory minimum sentencing laws typically apply to "violent and repeat offenders," "mandatory sentence offenders," "aggravated juvenile offenders," "habitual offenders," "serious juvenile offenders," or "designated felons." *Compare* ALA. CODE § 12-15-71.1 (1990), *with* COLO. REV. STAT. § 19-1-103 (1993). These laws identify violent and persistent offenders over whom juvenile courts do not waive jurisdiction either because of their youthfulness or lesser culpability or complicity. More recent legislative amendments add youths whom prosecutors charge with crimes involving firearms or those who commit violent or drug crimes on school grounds to those eligible for "special" sentences. *See, e.g.*, ARK. CODE ANN. § 9-27-330(c) (Michie 1989). The rate at which states amend their juvenile sentencing laws appears to have accelerated. "Since 1992, 15 States and the District of Columbia have added or modified statutes that provide for a mandatory minimum period of incarceration of juveniles committing certain violent or other serious crimes." TORBET ET AL., *supra* note 16, at 14. Similarly, the departments of corrections of many states have administratively adopted security classification and release guidelines that use offense criteria to specify proportional or mandatory minimum terms of confinement. *See* SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 139-43 (1996); Martin Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 340 (1991).

[31] The Principle of Offense (present offense and prior record) accounts for most of the variance in juveniles' sentences. Every methodologically rigorous study reports that juvenile court judges, like criminal court judges, focus primarily on the seriousness of the present offense and prior record when they sentence delinquents. *See, e.g.*, Donna M. Bishop & Charles S. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392 (1996); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987); Belinda McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41 (1986); Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263 (1980).

[32] After controlling for the seriousness of the present offense and prior record, individualized sentencing discretion often results in racial disparities. *See* KIMBERLY KEMPF-LEONARD ET AL., MINORITIES IN JUVENILE JUSTICE 73 (1995); CARL POPE & WILLIAM FEYERHERM, MINORITIES AND THE JUVENILE JUSTICE SYSTEM 39-41 (1992); Donna M. Bishop & Charles S. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242, 250 (1988); Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 185 (1987); McCarthy & Smith, *supra* note 31, at 49; Fagan et al., *supra* note 31. In 1988, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDPA) to require states receiving federal funds to assure equitable treatment on the basis, *inter alia*, of race and to assess the sources of over-representation of minorities in juvenile detention facilities and institutions. 42

ment[33] and treatment effectiveness[34] belie any therapeutic "alternative purpose" to juvenile incarceration. In short, all of

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U.S.C. § 5633(a)(16) (1993). In response to the JJDPA mandate, a number of states examined and found racial disparities in their juvenile justice systems. BARRY KRISBERG & JAMES AUSTIN, REINVENTING JUVENILE JUSTICE 122-34 (1993); Carl E. Pope, *Racial Disparities in Juvenile Justice System*, 5 OVERCROWDED TIMES 1, 5 (1994) (after controlling for legal variables, 41 of 42 states found minority youths over-represented in secure detention facilities; 13 of 13 states that analyzed other phases of juvenile justice decision-making found evidence of minority overrepresentation).

[33] *Gault's* decision to grant procedural protections recognized that incarceration of delinquents and deprivation of their autonomy constituted elements of punishment. *In re* Gault, 387 U.S. 1, 26-27 (1967). Evaluations of juvenile correctional facilities in the decades since *Gault* reveal a continuing gap between rehabilitative rhetoric and punitive reality. *See, e.g.*, HUMAN RIGHTS WATCH, CHILDREN IN CONFINEMENT IN LOUISIANA 1 (1995) (juvenile training schools confined predominantly black juveniles in "punitive" facilities surrounded by high chain-link and razor wire fences; guards physically abused inmates and locked them in isolation for long periods of time); DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (1994) (endemic institutional overcrowding in juvenile correctional facilities); STEVE LERNER, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY (1986) (staff cannot protect inmates from being beaten or intimidated by other prisoners); BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977) (violent and punitive facilities in which staff physically punished inmates, and frequently failed to prevent inmates' physical abuse and homosexual rape of other inmates); CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX (1976) (violent and oppressive institutional environment for the "rehabilitation" of young delinquents); KENNETH WOODEN, WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN (1976).

[34] Martinson's generally negative observation that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable affect on recidivism," challenged the fundamental premise of therapeutic dispositions and the juvenile court. Robert Martinson, *What Works?: Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 25. Evaluation studies provide minimal evidence that confining juveniles in institutions effectively treats rather than punishes them or reduces recidivism rates. *See generally* THE REHABILITATION OF CRIMINAL OFFENDERS (Lee B. Sechrest et al. eds., 1979); Steven P. Lab & John T. Whitehead, *From "Nothing Works" to "The Appropriate Works": The Latest Stop on the Search for the Secular Grail*, 28 CRIMINOLOGY 405 (1990); John T. Whitehead & Steven P. Lab, *A Meta-Analysis of Juvenile Correctional Treatment*, 26 J. RES. CRIME & DELINQ. 276 (1989); Steven P. Lab & John T. Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60 (1988).

Evaluations of training schools, the most common form of institutional "treatment" for the largest numbers of delinquents, report consistently negative findings. *See, e.g.*, MINNESOTA LEGISLATIVE AUDITOR, RESIDENTIAL FACILITIES FOR JUVENILE OFFENDERS 71-73 (1995) (analysis of recidivism rates of youths released from state correctional and private facilities in 1985 and 1991 found that between 53% and 77% continued their criminal careers into adulthood); JOHN C. STEIGER & CARY DIZON, REHABILITATION, RELEASE, AND REOFFENDING: A REPORT ON THE CRIMINAL CAREERS OF THE DIVISION OF JUVENILE REHABILITATION "CLASS OF 1982" 8 (1991) (over half of males (58.8%) released from Washington State's residential facilities in 1982 reoffended within one year, and more than two-thirds (67.9%) reoffended within two years); LYNN GOODSTEIN & HENRY SONTHEIMER, A STUDY OF THE IMPACT OF 10 PENNSLYVANIA

these indicators consistently reveal that *treating* juveniles closely resembles *punishing* adults. A strong, nationwide policy shift both in theory and in practice away from therapeutic dispositions toward punishment or incapacitation of young offenders characterizes sentencing practice in the contemporary juvenile court.

4. *Procedural Justice in Juvenile Courts*

Procedure and substance intertwine inextricably in juvenile courts. The increased procedural formality since *Gault* coincides with the changes in legal theory and administrative prac-

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RESIDENTIAL PLACEMENTS ON JUVENILE RECIDIVISM (1987) (police rearrested more than half of males (57%) released from 10 residential facilities in Pennsylvania in 1984 and courts recommitted to residential facilities or prisons about one-quarter (23%) within two years); PETER GREENWOOD & FRANKLIN ZIMRING, ONE MORE CHANCE: THE PURSUIT OF PROMISING INTERVENTION STRATEGIES FOR CHRONIC JUVENILE OFFENDERS 40 (1985) (most state training schools "fail to reform . . . [and] make no appreciable reductions in the very high recidivism rates, on the order to 70 to 80 percent, that are expected for chronic offenders").

Proponents of juvenile rehabilitation strenuously resist the general conclusion that "nothing works" in juvenile or adult corrections. *See* Gary B. Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989). Advocates of "treatment" offer literature reviews, meta-analyses, or program descriptions that stress that some types of intervention may have positive effects on selected clients under certain conditions. *See* GREENWOOD & ZIMRING, *supra*, at 70, ("we consider the 'nothing works' conclusion to be simplistic overreaction to the empirical evidence"); Mark W. Lipsey, *Juvenile Delinquent Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION: A CASEBOOK 97-98 (Thomas A. Cook et al. eds., 1992) (positive treatment effects typically occur in small, experimental programs that provide an intensive and integrated response to the multiplicity of problems that delinquent youths present); Albert R. Roberts & Michael J. Camasso, *The Effects of Juvenile Offender Treatment Programs on Recidivism: A Meta-Analysis of 46 Studies*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 437 (1991) (family therapy produced positive effects); D.A. Andrews et al., *Does Correctional Treatment Work?: A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 384 (1990) (meta-analysis reported positive effects when offenders received clinically appropriate psychological treatments "according to the principles of risk, need, and responsivity"); Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 CRIM. JUST. & BEHAV. 93 (1990) ("the conclusion that 'nothing works' may be based more on the absence of empirical evidence that treatment is effective than on conclusive evidence that treatment does not work"); Rhena L. Izzo & Robert R. Ross, *Meta-Analysis of Rehabilitation Programs for Juvenile Delinquents*, 17 CRIM. JUST. & BEHAV. 134, 141 (1990) (treatment strategies that developed juvenile offenders' cognitive skills appeared to show positive effects); Paul Gendreau & Bob Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349, 395 (1987) ("it is downright ridiculous to say '[n]othing works'"); Carol J. Garrett, *Effects of Residential Treatment on Adjudicated Delinquents: A Meta-Analysis*, 22 J. RES. CRIME & DELINQ. 287, 306 (1985) (meta-analysis of delinquency in residential treatment concluded that some programs produce positive results).

tice from therapeutic, individualized dispositions toward more punitive, offense-based sentences. Indeed, *Gault*'s procedural reforms may have encouraged these changes by legitimating punishment. These changes contradict *McKeiver*'s premise that therapeutic juvenile dispositions require fewer procedural safeguards than do adult criminal prosecutions and raise questions about the quality of procedural justice in juvenile courts.[35]

Although the formal procedures of juvenile and criminal courts have converged under *Gault*'s impetus, a substantial gulf remains between theory and reality, between the "law on the books" and the "law in action." Theoretically, the Constitution and state juvenile statutes entitle delinquents to formal trials and assistance of counsel. But, the actual quality of procedural justice differs considerably from theory; a gap persists between "rhetoric" and "reality." Despite the criminalizing of juvenile courts, most states provide neither special procedures to protect youths from their own immaturity nor the full panoply of adult procedural safeguards. Instead, states treat juveniles just like adult criminal defendants when treating them equally places youths at a practical disadvantage, and use less effective juvenile court safeguards when those deficient procedures provide an advantage to the state.

a. Jury

Although the right to a jury trial is a crucial procedural safeguard when states punish offenders, the vast majority of jurisdictions uncritically follow *McKeiver*'s lead and deny juveniles access to juries.[36] Because judges and juries decide cases and apply *Winship*'s "reasonable doubt" standard differently, it is easier to convict youths in juvenile court than in criminal court with comparable evidence.[37] Moreover, *McKeiver* simply ignored

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[35] FELD, *supra* note 27, at 54-56; Feld, In re Gault *Revisited*, *supra* note 27, at 400-03; Feld, *The Right to Counsel in Juvenile Court*, *supra* note 27, at 1217. *See also* AMERICAN BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (Patricia Puritz ed., 1995) [hereinafter A CALL FOR JUSTICE].

[36] Feld, *Punishment, Treatment*, *supra* note 1, at 903-07; Feld, *Violent Youth*, *supra* note 2, at 1099-1108.

[37] Ainsworth, *supra* note 4, at 1124-25. *See also* PETER W. GREENWOOD ET AL., YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA 30-31 (1983) ("it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases").

the reality that juries protect against a weak or biased judge, inject the community's values into the law, and increase the visibility and accountability of justice administration.[38] These protective functions acquire even greater importance in juvenile courts, which typically labor behind closed doors immune from public scrutiny.

On the other hand, several states have recently enacted legislation to increase the sentencing authority and punishment capacities of juvenile courts. These "blended" sentences begin with a youth's trial in juvenile court and then authorize the judge to impose enhanced sentences beyond those used for ordinary delinquents. New Mexico,[39] Minnesota,[40] and Texas[41]

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[38] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (noting the protective functions of jury trial in criminal proceedings).

[39] New Mexico created a three-tiered classification based on age and offense. N.M. STAT. ANN. §§ 32A-2-3(C), (H), (I) (Michie 1995). Youths 16 or 17-years-old and charged with first degree murder constitute "serious youthful offenders" whom courts must sentence as adults. "Youthful offenders" consist of juveniles aged 15 to 18-years-of-age charged with legislatively designated aggravated, violent or repeated crimes. All "delinquents" and "youthful offenders" in New Mexico enjoy a statutory right to a jury trial in a juvenile court proceeding. Following a conviction as a "youthful offender," the juvenile court conducts a quasi-waiver sentencing hearing to decide a youth's "amenability to treatment or rehabilitation" and whether to sentence the juvenile as an adult or as a youthful offender. *Id.* § 32A-2-20(B)(1). The court may impose either an adult criminal sentence or a juvenile disposition which extend until age 21. *Id.* § 32A-2-20.

[40] Minnesota created an intermediate category for serious young offenders called Extended Jurisdiction Juvenile (EJJ) prosecutions. MINN. STAT. ANN. § 260.126 (West 1997); *see also* Feld, *Violent Youth*, *supra* note 2, at 1038-51. The statute restricts eligibility for EJJ prosecutions to youths 16-years-of-age or older and charged with presumptive commitment to prison violent offenses, to youths whom judges decline to waive to criminal courts and sentence instead as EJJs, and to younger juveniles whom judges determine in an EJJ hearing meet offense-based "public safety" criteria. Juvenile courts try and sentence these EJJ youths as juveniles but provide them with all adult criminal procedural safeguards, including the right to a jury trial, because judges impose both a juvenile delinquency disposition and an adult criminal sentence, which the court stays pending compliance with the juvenile sentence. MINN. STAT. ANN. § 260.126 (West 1997). Juvenile court jurisdiction continues until age 21 for EJJ youths, rather than terminating at age 19 as it does for ordinary delinquents. If the EJJ youth violates the conditions of the juvenile sentence, then the court may revoke the probation and execute the adult criminal sentence.

[41] In 1987, Texas enacted determinate sentences for youths convicted of certain violent crimes or as habitual offenders in lieu of sentencing them either as ordinary delinquents or seeking their transfer for adult prosecution. TEX. FAM. CODE ANN. §§ 53.045, 54.04(d)(3) (West 1996); Robert O. Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 TEX. TECH L. REV. 1897 (1990); Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988). Juveniles receive the same procedural

provide examples of three different versions of these enhanced juvenile sentences for youths whom judges have not transferred to criminal court for prosecution as adults. Although these statutes differ in many details, all of the variants of "blended jurisdiction" provide these "intermediate" youths with adult criminal procedural safeguards, including the right to a jury trial. Once a state provides a youth with the right to a jury trial and other criminal procedural safeguards, it preserves the option to punish explicitly, as well as to extend jurisdiction for a period of several years or more beyond that available for ordinary delinquents. Thereby the state also gains greater flexibility to treat a youth. Moreover, these various enhanced sentencing strategies recognize that age jurisdictional limitations of juvenile courts create an undesirable binary forced-choice, either juvenile or adult, either treatment or punishment. Finally, these statutes recognize the futility of trying to rationalize social control in two separate systems. These "blended" jurisdictional provisions represent a significant procedural and substantive convergence with an erosion of the differences between juvenile and criminal courts. They provide a conceptual alternative to binary waiver statutes by recognizing that adolescence comprises a developmental continuum that requires an increasing array of graduated sanctions for youths and procedural equality with adults to reflect the reality of punishment.

b. Counsel

Procedural justice hinges on access to and the assistance of counsel. Despite *Gault*'s formal legal changes, the promise of quality legal representation remains unrealized for many juveniles. In several states, half or less of all juveniles receive the assistance of counsel to which the Constitution and state statutes

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guarantees as do adult criminal defendants, including the right to a jury trial. Juveniles begin their determinate sentences in Texas Youth Commission facilities, and at age 18, a court conducts a sentencing review hearing using *Kent*-like statutory criteria to decide whether they will be retained within the juvenile correctional system for the duration of their minority or complete their sentence as adults in the Texas Department of Criminal Justice. TEX. FAM. CODE ANN. § 54.11(k) (West 1996). In 1995, the Texas legislature expanded from the original list of 6 crimes to 13 offenses for which youths could receive determinate sentences, and increased the maximum length of determinate sentences from 30 to 40 years. *Id.* §§ 53.045, 54.04(d)(3).

entitle them.[42] Moreover, rates of representation vary substantially within states and suggest that differences in rates of appointment of counsel reflect judicial policies to discourage representation. The most common explanation for why so many juveniles are unrepresented is that judges find that they waived their right to counsel.[43] Courts typically use the adult legal standard of "knowing, intelligent, and voluntary" under the "totality of the circumstances" to gauge the validity of juveniles' waivers of rights.[44] Because juveniles possess less ability than adults to deal effectively with the legal system,[45] formal equality results in practical procedural inequality.

III. THE INHERENT CONTRADICTION OF THE JUVENILE COURT

The foregoing jurisdictional, jurisprudential, and procedural changes have transformed the juvenile court from its original model as a social service agency into a deficient second-rate criminal court that provides young people with neither positive treatment nor criminal procedural justice. It effectively punishes young offenders, but uses procedures under which no adult would consent to be tried if she faced the prospect of confinement in a secure facility. The changes in procedures, jurisdiction, and sentencing policies reflect the contradictory roles of juvenile courts and ambivalence about the social control of young offenders. The Progressives sited the juvenile court on a number of unstable cultural and criminological fault lines that exacerbate the conflicted impulses engendered when a child is a criminal and a criminal is a child. In this section, I contend that juvenile courts' social welfare mission cannot and should not be rehabilitated. In the next section, I advocate abolishing

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[42] *See* FELD, *supra* note 27, at 54-56; Feld, In re Gault *Revisited*, *supra* note 27, at 400-03; A CALL FOR JUSTICE, *supra* note 35, at 19-27; *see also* GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 11-13 (1995) [hereinafter JUVENILE JUSTICE].

[43] A CALL FOR JUSTICE, *supra* note 35, at 25-27; Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 169-90; Feld, *The Right to Counsel in Juvenile Courts*, *supra* note 27, at 1201-03.

[44] *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) ("knowing[]," "intelligent[]," and "voluntar[y]" waiver of *Miranda* right to counsel under the "totality-of-the-circumstances"); Feld, *The Right to Counsel in Juvenile Courts*, *supra* note 27, at 1201-03.

[45] *See generally* FELD, *supra* note 27; THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

the juvenile court and trying all offenders in one integrated criminal court with modifications for the youthfulness of some defendants.

A. SOCIAL WELFARE VERSUS PENAL SOCIAL CONTROL

The juvenile court treatment model constitutes an inappropriate policy response to young offenders. If we formulated a child welfare policy *ab initio*, would we choose a juvenile court as the most appropriate agency through which to deliver social services, and make criminality a condition precedent to the receipt of services? If we would not create a court to deliver social services, then does the fact of a youth's criminality confer upon a court any special competency as a welfare agency? Many young people who do not commit crimes desperately need social services and many youths who commit crimes do not require or will not respond to social services. In short, criminality represents an inaccurate and haphazard criterion upon which to allocate social services. Because our society denies adequate help and assistance to meet the social welfare needs of all young people, the juvenile court's treatment ideology serves primarily to legitimate the exercise of judicial coercion of some *because of their criminality.*

Quite apart from its unsuitability as a social welfare agency, the individualized justice of a rehabilitative juvenile court fosters lawlessness and thus detracts from its utility as a court of law as well. Despite statutes and rules, juvenile court judges make discretionary decisions effectively unconstrained by the rule of law. If judges intervene to meet each child's "real needs," then every case is unique and decisional rules or objective criteria cannot constrain clinical intuitions. The *idea* of treatment necessarily entails individual differentiation, indeterminacy, a rejection of proportionality, and a disregard of normative valuations of the seriousness of behavior. But, if judges possess neither practical scientific bases by which to classify youths for treatment nor demonstrably effective programs to prescribe for them, then the exercise of "sound discretion" simply constitutes a euphemism for idiosyncratic judicial subjectivity. Racial, gender, geographic, and socio-economic disparities constitute almost inevitable corollaries of a treatment ideology that lacks a scientific foundation. At the least, judges will sentence youths differently based on extraneous personal characteristics for which they

bear no responsibility. At the worst, judges will impose haphazard, unequal, and discriminatory punishment on similarly situated offenders without effective procedural or appellate checks.

Is the discretion that judges exercise to classify for treatment warranted? Do the successes of rehabilitation justify its concomitant lawlessness? Do the incremental benefits of juvenile court intervention outweigh the inevitable inequalities and racial disparities that result from the exercise of individualized discretion? These questions require more sophisticated cost-benefit policy analyses than Progressives' claims that "if we save even one child, then it is worth it." Evaluations of the effectiveness of juvenile court intervention on recidivism rates counsel skepticism about the availability of programs that consistently or systematically rehabilitate juvenile offenders. The inability to demonstrate significant treatment effects may reflect either methodological flaws, poorly implemented programs, or, in fact, the absence of effective methods of treatment. Moreover, even if some model programs do "work" for some offenders under some conditions, fiscal constraints, budget deficits, and competition from other interest groups make it unlikely that states will provide universally such treatment services for ordinary delinquents. In the face of unproven efficacy and inadequate resources, the possibility of an effective rehabilitation program constitutes an insufficient justification to confine young offenders "for their own good" while providing them with fewer procedural safeguards than those afforded adults charged, convicted, and confined for crimes.

The juvenile court predicates its procedural informality on the assumptions that it provides benign and effective treatment. The continuing absence or co-optation of defense counsel in many jurisdictions reduces the likelihood that juvenile courts will adhere to existing legal mandates. The closed, informal, and confidential nature of delinquency proceedings reduces the visibility and accountability of the justice process and precludes external checks on coercive interventions. So long as the mythology prevails that juvenile court intervention constitutes only benign coercion and that, in any event, children should not expect more, youths will continue to receive the "worst of both worlds."

B. FAILURE OF IMPLEMENTATION VERSUS CONCEPTION

The fundamental shortcoming of the juvenile court's welfare *idea* reflects a failure of conception rather than *simply* a failure of implementation. The juvenile court's creators envisioned a social service agency in a judicial setting, and attempted to fuse its welfare mission with the power of state coercion. The juvenile court *idea* that judicial-clinicians successfully can combine social welfare and penal social control in one agency represents an inherent conceptual flaw and an innate contradiction. Combining social welfare and penal social control functions in one agency assures that the court does both badly. Providing for child welfare is a societal responsibility rather than a judicial one. Juvenile courts lack control over the resources necessary to meet child welfare needs exactly because of the social class and racial characteristics of their clients. In practice, juvenile courts subordinate welfare concerns to crime control considerations.

The conflicted impulses engendered between concern for child welfare and punitive responses to criminal violations form the root of the ambivalence embedded in the juvenile court. The hostile reactions that people experience toward other peoples' children, whom they regard as a threat to themselves and their own children, undermine benevolent aspirations and elevate concerns for their control. Juvenile justice personnel simultaneously profess child-saving aspirations but more often function as agents of criminal social control.

The juvenile court inevitably subordinates social welfare to criminal social control because of its built-in penal focus. Legislatures do not define juvenile courts' social welfare jurisdiction on the basis of characteristics of children for which they are not responsible and for which effective intervention could improve their lives. For example, juvenile court law does not define eligibility for services or create an enforceable right or entitlement based upon young peoples' lack of access to decent education, lack of adequate housing or nutrition, unmet health needs, or impoverished families—*none of which are their fault.* In all of these instances, children bear the social burdens of their par-

ents' circumstances literally as innocent bystanders.[46] If states defined juvenile courts' jurisdiction on the basis of young people's needs for social welfare, then they would declare a broad category of at-risk children who are eligible for public assistance. Such a policy would require a substantial commitment of social resources and public will to children's welfare.[47]

Instead, states' juvenile codes define juvenile courts' jurisdiction based on a youth committing a crime, a prerequisite that detracts from a compassionate response. Unlike disadvantaged social conditions that are not their fault, criminal behavior represents the one characteristic for which adolescent offenders do bear at least partial responsibility. As long as juvenile courts define eligibility for "services" on the basis of criminality, they highlight that aspect of youths which rationally elicits the least sympathy, and ignore personal circumstances or social conditions that evoke a desire to help. Thus, the juvenile courts' defining characteristic simply reinforces the public's antipathy to young people by emphasizing that they are law violators.[48] Recent changes in juvenile court waiver and sentencing policies to emphasize punishment, "accountability," and personal responsibility further re-enforce juvenile courts' penal foundations and reduce the legitimacy of youths' claims to compassion or humanitarian assistance.

A century ago Progressive reformers had to choose between initiating structural social reforms that would ameliorate inequality and criminogenic forces, or ministering to the individuals damaged by those adverse social conditions. Driven by class and ethnic antagonisms, they ignored the social-structural and political-economic implications of their own structural theories of delinquency. Instead they chose to "save children" and, inci-

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[46] GRUBB & LAZERSON, *supra* note 5, at 298-300; NATIONAL RESEARCH COUNCIL, LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 48-56 (1993) [hereinafter LOSING GENERATIONS].

[47] DUNCAN LINDSEY, THE WELFARE OF CHILDREN 321-35 (1994); NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 369-90 (1991) [hereinafter BEYOND RHETORIC]; LOSING GENERATIONS, *supra* note 46, at 235-56.

[48] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 236-37 (1990) ("Of all the groups which make a claim upon public sympathy and fellow feeling, criminal offenders often seem to have the weakest claim and this is particularly the case if they are represented as a willful danger to the public, rather than as inadequate, or maladjusted, or as themselves victims of social injustice.").

dentally, to preserve their own power and privilege.[49] "Child-saving" satisfied humanitarian impulses without engendering more fundamental social change. As a result, the juvenile court welfare *idea* espoused social structural or deterministic explanations of delinquent behavior and then individualized its sanctions. On the one hand, to punish people for behavior that society "caused" may lead to charges of hypocrisy. On the other hand, to subscribe to deterministic explanations of behavior undermines individual responsibility and erodes the expressive, condemnatory function of criminal law.

A century later, we face similar choices between rehabilitating "damaged" individuals in a criminal justice system and initiating more fundamental social structural change. In making these choices, the juvenile court welfare *idea* may constitute an obstacle to child welfare reform. The *existence* of a juvenile court provides an alibi to avoid fundamental improvement. Conservatives may deprecate the juvenile court as a welfare system that fails to "crack down" or "get tough" and thereby "coddles" young criminals. Liberals may bemoan its lack of resources and inadequate options, none of which address the underlying structural causes of crime or children's poverty. But either stance is akin to sticking fingers in the dike while the flood of adverse social indicators of youth pour over the top in a torrent.[50] Society collectively bears responsibility to provide for the welfare of its children, and does so by supporting families, communities, schools, and social institutions that nurture all young people—not by cynically incarcerating its most disadvantaged children "for their own good." Neither juvenile court judges nor any other criminal justice agencies realistically can ameliorate the social ills that afflict young people or significantly reduce youth crime.[51]

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[49] *See* ROTHMAN, *supra* note 3, at 288-89; PLATT, *supra* note 3, at 137-45.

[50] LOSING GENERATIONS, *supra* note 46, at 13-20; UNITED STATES DEP'T OF HEALTH AND HUMAN SERVICES, TRENDS IN THE WELL-BEING OF AMERICA'S CHILDREN AND YOUTH: 1996, 12-35 (1996).

[51] Michael Tonry notes that:

> [t]he resources of the criminal [and juvenile] justice system are few. The answers to poverty, underemployment, and racial bias must be sought elsewhere, in schools and social welfare programs and broad-based social policies. To look to the criminal [and juvenile] justice system to solve fundamental social problems would be foolish and doomed to fail.

MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 163 (1995).

IV. YOUTHFULNESS, CRIMINAL RESPONSIBILITY, AND SENTENCING POLICY: YOUNG OFFENDERS IN CRIMINAL COURTS

Once we uncouple social welfare from penal social control, then no need remains for a separate juvenile court for young offenders. We can try all offenders in criminal court with certain modifications of substantive and procedural criminal law to accommodate younger defendants. Some proponents of juvenile courts properly object that criminal courts suffer from profound deficiencies: crushing caseloads; ineffective attorneys; insufficient sentencing alternatives; coercive plea bargains; and assembly-line justice.[52] Unfortunately, these shortcomings equally characterize juvenile courts as well.[53] Others argue that because no social or political will exists to reform or provide resources for criminal courts, then juvenile court abolitionists must demonstrate conclusively their irremediable bankruptcy before remitting youths to the criminal courts that inspired their creation.[54] In short, few juvenile court proponents even attempt any longer to defend the institution on its own merits, but only to justify it by comparison with criminal courts, which they contend are worse. In this article, I do not propose simultaneously to completely reform the criminal justice system, but rather only to identify the sentencing policy issues raised when the criminal is a child. Because legislatures, prosecutors, and juvenile court judges already transfer increasing numbers and younger offenders to criminal courts for prosecution as adults, formulating a youth sentencing policy has considerable contemporary salience whether or not states abolish juvenile courts in their entirety.

If the child is a criminal and the "real" reason for formal intervention is criminal social control, then states should abolish juvenile courts' delinquency jurisdiction and try young offenders in criminal courts alongside their adult counterparts. But, if the criminal is a child, then states must modify their criminal

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[52] Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Abolitionists*, 1993 WIS. L. REV. 163, 173; H. Ted Rubin, *Retain the Juvenile Court?: Legislative Developments, Reform Directions and the Call for Abolition*, 25 CRIME & DELINQ. 281, 289 (1979).

[53] FELD, *supra* note 27, at 283; Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 140 (1990); Feld, *Criminalizing the American Juvenile Court*, *supra* note 1, at 259.

[54] Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 19 (1992).

justice system to accommodate the youthfulness of some defendants. Before prosecuting a child as a criminal in an integrated court, a legislature must address issues of substance and procedure. Substantive justice requires a rationale to sentence younger offenders differently, and more *leniently*, than older defendants, a formal recognition of *youthfulness as a mitigating factor in sentencing*. Procedural justice requires providing youths with full procedural parity with adult defendants and additional safeguards to account for the disadvantages of youth in the justice system. Taken in combination, these substantive and procedural modifications can avoid the "worst of both worlds," provide youths with protections functionally equivalent to those accorded adults, and do justice in sentencing.

Politically popular "sound-bites"—"old enough to do the crime, old enough to do the time" or "adult crime, adult time"—do not analyze adequately the complexities of a youth sentencing policy. My proposal to abolish the juvenile court constitutes neither a unqualified endorsement of punishment nor a primitive throw-back to earlier centuries' views of young people as miniature adults. Rather, it honestly acknowledges that juvenile courts currently engage in criminal social control, asserts that younger offenders in a criminal justice system *deserve* less severe consequences for their misdeeds than do more mature offenders *simply* because they are young, and addresses many problems created by trying to maintain binary, dichotomous, and contradictory criminal justice systems based on an arbitrary age classification of a youth as a child or as an adult.

Formulating a youth sentencing policy entails two tasks. First, I will develop a rationale to sentence younger offenders differently, and *more leniently*, than older defendants. Explicitly punishing young offenders rests on the premise that adolescents possess sufficient moral reasoning, cognitive capacity, and volitional controls to hold them responsible and accountable for their behavior, albeit not necessarily to the same degree as adults. Developmental psychological research, jurisprudence and criminal sentencing policy provide a rationale to explain why young offenders deserve less severe consequences for their misdeeds than do older offenders and justify formal recognition of youthfulness as a mitigating factor. Secondly, I will propose a "youth discount" as a practical administrative mechanism to implement youthfulness in sentencing.

A. SUBSTANTIVE JUSTICE—JUVENILES' CRIMINAL RESPONSIBILITY

Questions about youths' accountability or criminal responsibility arise at two different stages in the justice system, either when deciding guilt or when imposing a sentence. In the former instance, questions of responsibility focus on the minimum age at which the state may find a person guilty of an offense. In making judgments about criminal responsibility, the criminal law's *mens rea* construct focuses narrowly on cognitive ability and capacity to make choices and excludes from consideration the goals, values, emotions or psychological development that motivate a person's choices.[55] In the absence of insanity, compulsion, or some cognizable legal excuse, any actor who has the capacity to choose to act otherwise than the way she did possesses criminal responsibility. For questions of criminal responsibility and guilt, the common law's insanity and infancy *mens rea* defenses provide most of the answers. These doctrines excuse from criminal liability only those who lack the requisite criminal intent, the *mens rea,* because of mental illness[56] or immaturity. Because these *mens rea* defenses effectively excuse an offender when the state cannot prove a crucial element of the offense, i.e., criminal intent, the common law employs a very low cognitive threshold—knowledge of "right from wrong"—to establish criminal guilt. Knowledge of "right from wrong" entails only minimally rational understanding, and infancy *mens rea* does not provide an especially useful analytical prism through which to view youthfulness as a "special circumstance."[57] Even very young

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[55] JAMES Q. WILSON, MORAL JUDGMENT (1997); Sanford H. Kadish, *The Decline of Innocence,* 26 CAMBRIDGE L.J. 273 (1968).

[56] Joseph Goldstein and Jay Katz argue that the "insanity defense" functions to subject to social control those whom traditional criminal law principles of *mens rea* might otherwise excuse from liability. Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?,* 72 YALE L.J. 853, 864 (1963) ("[T]he defense is not to absolve of criminal responsibility 'sick' persons who would otherwise be subject to criminal sanction. Rather, its real function is to authorize the state to hold those who might be found not to possess the guilty mind *mens rea,* even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged.").

[57] In the narrow *mens rea*-as-capacity formulation, any criminally responsible actor who makes a blameworthy choice deserves the same punishment as any other person who makes a comparable choice. *Mens rea* for guilt or as a criminal law grading principle operates in a binary fashion either present or absent. In the *mens rea*-as-capacity formula, virtually all youths over whom juvenile courts exercise jurisdiction possess the cognitive capacity to distinguish between "right and wrong." If they do not, then an insanity defense provides the appropriate context in which to litigate the issues of

children may act purposefully and with knowledge of the wrongfulness of their conduct.

Quite apart from decisions about guilt or innocence, individual accountability and criminal responsibility also relate to questions of disposition or sentence. Even if a court finds a youth criminally responsible for causing a particular harm, should the criminal law treat a fourteen-year-old as the moral equivalent of a twenty-four-year-old and impose an identical sentence, or should youthfulness mitigate the severity of the consequences? "Old enough to do the crime, old enough to do the time" provides an overly simple answer to a complex, normative, moral, and legal question. If political "soundbites" do not capture adequately the complexity of a youth sentencing policy, then on what principled bases should we distinguish between the two in sentencing?

Contemporary juvenile courts typically impose shorter sentences on serious young offenders than adult offenders convicted of comparable crimes receive.[58] These shorter sentences enable young offenders to survive the mistakes of adolescence with a semblance of life chances intact.[59] The juvenile court reifies the idea that young people bear less criminal responsibility and deserve less punishment than adults. Shorter sentences recognize that young people *do differ somewhat* from adults. These differences stem from physical, psychological, or developmental characteristics of young people, and as by-products of the legal and social construction of youth. Adolescents differ from adults physically and psychologically, and their immaturity affects their judgment. A formal mitigation of punishment based on youthfulness comprises a necessary component of a criminal justice system in order to avoid the equally undesirable alternatives of excessively harsh penalties disproportionate to culpability on the one hand, or nullification and excessive leniency on the other. Youthfulness provides a rationale to mitigate

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criminal responsibility. In theory, common law *mens rea* provides no special doctrinal protections for youths older than 14 absent some "diminished responsibility" doctrine which ameliorates punishment on the grounds of reduced culpability.

[58] *See, e.g.*, Podkopacz & Feld, *Judicial Waiver Policy*, *supra* note 18; Podkopacz & Feld, *End of the Line*, *supra* note 18.

[59] FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89-96 (1982); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 66-69 (1978) [hereinafter CONFRONTING YOUTH CRIME].

sentences to some degree without excusing criminal conduct. But, shorter sentences for young people do not require a separate justice system in which to try them. Both juvenile and adult courts separate adjudication of guilt or innocence from sentencing, confine consideration of individual circumstances largely to the latter phase, and criminal courts may impose lenient sentences on young offenders when appropriate.

A variety of doctrinal and policy reasons justify sentencing young people less severely than their adult counterparts. The common law's infancy *mens rea* defense antedated positive criminology's deterministic assumptions, and recognized that young people may lack criminal capacity. The classical criminal law assumed that rational actors make blameworthy choices and deserve to suffer the consequences of their freely chosen acts.[60] The common law recognized and exempted from punishment categories of persons who lacked the requisite moral and criminal responsibility, for example, the insane and the young.[61] It conclusively presumed that children less than seven-years-old lacked criminal capacity, and treated those fourteen-years-of-age and older as fully responsible.[62] Between the ages of seven and fourteen years, the law rebuttably presumed criminal incapacity.[63] The common law infancy gradations reflect developmental differences that render youths less *culpable* or criminally responsible than their adult counterparts and provide a first approximation of a rationale for shorter sentences for youths than for adults. Juvenile court legislation simply extended upward by a few years the general presumption of youthful criminal irresponsibility and incapacity.

The extent to which young offenders, like adults, *deserve* punishment hinges on the meaning of *culpability.* Respect for the integrity of the individual provides the underlying rationale of *deserved punishment.* Just deserts theory treats a free-will actor as an "end," a sovereign person, rather than as a "means" to be

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[60] *See* ANDREW VON HIRSCH, DOING JUSTICE (1976); Kadish, *supra* note 55.

[61] Goldstein & Katz, *supra* note 56.

[62] *See infra* note 63 and accompanying text.

[63] James C. Weissman, *Toward an Integrated Theory of Delinquency Responsibility,* 60 DENV. L.J. 485, 490 (1983); Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings,* 10 U. MICH. J.L. REFORM 181, 184-85 (1977); Walkover, *supra* note 29, at 514; Sanford J. Fox, *Responsibility in the Juvenile Court,* 11 WM. & MARY L. REV. 659, 660 (1970).

manipulated by the state to achieve some ulterior utilitarian social objective, including her own well-being.[64] Blaming a culpable actor for her voluntary choice to do wrong and giving her the consequences that her choice deserves respects her integrity as a morally responsible individual. Deserved punishment emphasizes censure and condemnation for blameworthy choices.[65] As long as the criminal law rests on a moral foundation, the idea of blameworthiness remains central to ascribing guilt and allocating punishment.[66] Penalties proportionate to the seriousness of the crime reflect the connection between conduct, choice, and blameworthiness.

Because commensurate punishment proportions sanctions to the seriousness of the offense, it shifts the analytical focus to the meaning of *seriousness.* Two elements—*harm* and *culpability*—define the seriousness of an offense. Evaluations of harm focus on the nature and degree of injury inflicted, risk created, or value taken. A perpetrator's age has little bearing on assessments of harmfulness.[67] But evaluations of *seriousness* also include the quality of the actor's *choice* to engage in the criminal conduct that produced the harm. Just deserts theory and criminal law grading principles base the degree of deserved punishment on an actor's culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, "in the heat of passion," recklessly, negligently, or accidentally.[68] The criminal law treats the same objective consequence or harm, the death of another per-

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[64] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 210-37 (1968); VON HIRSCH, *supra* note 60, at 49-55.

[65] "[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it." VON HIRSCH, *supra* note 60, at 48. *See also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985).

[66] NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73-80 (1974); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered,* 58 S. CAL. L. REV. 779, 793 (1985).

[67] Ernest van den Haag contends that:

> There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old muggers [sic] is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is just as dead or as raped as the victim of an older one. The need for social defense or protection is the same.

ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 174 (1975).

[68] JEROME HALL, GENERAL PRINCIPLES OF COMMON LAW 105-45 (1960).

son, very differently depending upon the nature of the choice made.

Youthfulness acquires special salience when gauging the culpability of *choices*—the blameworthiness of acting in a particular harm-producing way. In a framework of deserved punishment, it would be fundamentally unjust to impose the same penalty upon offenders who do not share equal culpability. If young people are neither fully responsible nor the moral equals of adults, then they do not *deserve* the same legal consequences even for their blameworthy misconduct.

Responsibility for choices hinges on cognitive and volitional competence. Do young offenders make criminal choices that constitute the moral equivalents of those made by more mature actors? If one focuses narrowly only on the capacity to make instrumental choices to do wrong, then we could view even very young actors as criminally responsible. For example, a six-year-old child can act purposively to "steal" the toy of a friend even though she "knows" and can articulate that such conduct is "wrong." When young children make voluntary and instrumental choices to engage in prohibited conduct, they possess some moral ability to understand its wrongfulness and require discipline to hold them accountable and to teach them the consequences of violating rules. However, despite their ability to make reasoned choices and engage in goal-oriented behavior, we do not regard them as full moral agents. The criminal law regards young actors differently exactly because they have not yet fully internalized moral norms, developed sufficient empathic identification with others, acquired adequate moral comprehension, or had sufficient opportunity to develop the ability to restrain their actions. They possess neither the rationality—cognitive capacity—nor the self-control—volitional capacity—to equate their criminal responsibility with that of adults.

1. Developmental Psychology

Developmental psychology posits that young people move through a sequence of psychological stages and their operational processes, legal reasoning, internalization of social and legal expectations, and ethical decision making change as they

pass through these stages.[69] Children's moral reasoning at different developmental stages differs from that which they use at other stages, and differs qualitatively from that which adults use. The descriptions of the developmental sequence and changes in cognitive processes parallel strikingly the imputations of responsibility associated with the common law infancy defense,[70] and suggest that by mid-adolescence youths acquire most of the cognitive and moral reasoning capacity that will guide their behavior through later life.[71] Somewhere between about eleven and fourteen-years-of-age, children achieve the highest stage of cognitive development, the "formal operational" stage, in which they can think abstractly and hypothetically, weigh and compare consequences, and consider alternative solutions to problems.[72]

Developmental psychological research on adolescents' cognitive decision-making ability suggests that "for most purposes, adolescents cannot be distinguished from adults on the grounds of competence . . . ."[73] When youths solve problems or make informed consent decisions for psychotherapy or medical treatment, social psychologists find few bases on which to distinguish the quality of judgments made by adolescents fifteen-years-of-age or older from those made by adults in terms of either the reasoning processes, the information used, or qualitative out-

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[69] *See* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 26-28 (1965); June L. Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice, in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 89, 90 (June L. Tapp & Felice Levine eds., 1974); Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization, in* HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 325, 347 (David Goslin ed., 1969); Lawrence Kohlberg, *Development of Moral Character and Moral Ideology, in* REVIEW OF CHILD DEVELOPMENT RESEARCH 383, 386 (M. Hoffman ed., 1964); June L. Tapp & Felice Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974); Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11 (1963) [hereinafter Kohlberg, *Orientations Toward a Moral Order*].

[70] *See supra* authorities cited in note 63.

[71] PIAGET, *supra* note 69, at 314-25; Kohlberg, *Orientations Toward a Moral Order, supra* note 69, at 11; June L. Tapp, *Psychology and the Law: An Overture*, 27 ANN. REV. PSYCHOL. 359, 374 (1976).

[72] ROBERT S. SIEGLER, CHILDREN'S THINKING 41-42 (1986). Justice Douglas' dissent in *Wisconsin v. Yoder*, which exempted Amish children from compulsory school attendance laws at age 14, cited the work of Piaget and Kohlberg for the proposition that "there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14 year-old approaches that of the adult." 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting).

[73] Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOL. 99, 100 (1983).

comes.[74] Research on young peoples' ability to make informed consent medical decisions generally supports the equation between adolescents' and adults' cognitive abilities.[75] A review of several psychological studies of adolescents' reasoning processes and understanding and use of medical information about their conditions and treatment options found that adolescents and adults generally made qualitatively comparable decisions.[76]

The empirical support for adolescents' cognitive equality with adults derives primarily from research on informed medical consent that emphasizes subjective preferences rather than qualitative outcomes. Because informed consent policies promote patients' autonomy to make medical decisions, cognitive psychological research focuses narrowly on youths' ability to understand and appreciate information about risks and alternatives, and to use that information in a rational process. Moreover, most of these decision-making studies occured in a laboratory setting in which researchers posed hypothetical treatment scenarios and provided respondents with complete information. It remains unproven, however, whether the ability to make hypothetical medical decisions under structured conditions constitutes adult-equivalent competence, judgment, and responsibility in other contexts which focus on objective outcomes rather than subjective preferences or in real-life situations with actual consequences.[77] For purposes of formulating a

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[74] *Id.* at 100-01; Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science, in* CHILDREN'S COMPETENCE TO CONSENT 15 (Gary B. Melton et al. eds., 1983).

[75] *See* Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions,* 53 CHILD DEV. 1589, 1595 (1982) (fourteen-year-olds' choices did not differ significantly from those of adults in terms of comprehension, understanding of alternatives, rational reasoning, and decision making processes when responding to medical and psychological treatment hypotheticals); Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective,* 9 PROF. PSYCHOL. 412, 423 (1978) (little research evidence exists that adolescents aged 15 or older possess less competence than adults to provide knowing, intelligent, and voluntary informed consent).

[76] *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking,* 37 VILL. L. REV. 1607, 1627-30 (1992).

[77] *Id.* at 1626; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making,* 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*] ("the informed consent model is too narrow in scope to adequately illuminate differences between adolescents' and adults' decision-making, because it overemphasizes cognitive functioning (e.g., capacity for thinking, reasoning, understanding) and minimizes the importance of noncognitive, psychosocial, variables that influence the decision-

youth sentencing policy, the claims of some developmental psychologists that adolescents' cognitive competency approximates that of adults proves too much. "Get tough" proponents then could argue that they should be punished for crimes just like adults.

Many developmental psychologists question the appropriateness of advocating for presumptive legal equality based on adolescents' cognitive parity with adults to make informed medical decisions.[78] Cognitive capacity alone does not comprise the only relevant dimension on which policymakers can distinguish between young people and adults. More recent research indicates that child development occurs more continuously and gradually, rather than as an all-or-nothing invariant stage and sequence, and that young people use different reasoning processes simultaneously in different task domains.[79] Youths' developmental skills and knowledge may accrue unevenly in different task areas rather than as a uniform increase in overall capacity. Moreover, differences in language ability, knowledge, experience, and culture affect the ages at which different individuals' various competencies emerge.[80] A comprehensive analytical review of developmental psychological research concludes that while those findings undermine support for the treatment of adolescents as incompetent and categorically different from adults, they do not support the converse proposition that young people and adults therefore function equally and that no legally significant differences exist between them.[81]

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making process"). *See also* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influence on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763 (1995) [hereinafter Cauffman & Steinberg, *Adolescent Decision-Making*].

[78] *See* William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOL. 895, 897-98 (1989); Scott, *supra* note 76, at 1631; Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224 (1995).

[79] *See* SIEGLER, *supra* note 72, at 344-81; Gardner et al., *supra* note 78, at 898; Scott, *supra* note 76, at 1632.

[80] Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 233 (1996) ("Progress toward completion of cognitive and moral developmental stages can be detoured or delayed by cultural, intellectual, and social disadvantages.").

[81] Scott, *supra* note 76, at 1633. Current research "certainly casts doubt on the presumption that adolescent reasoning and understanding are inferior. Our current state of knowledge is far too inconclusive, however, to support a positive claim that no differences distinguish adolescent and adult decisionmaking, and that the research findings themselves dictate a direction for legal policy." *Id.* at 1635-36.

Even a youth fourteen-years-of-age or older who abstractly knows "right from wrong," who understands intentionality, and who possesses the requisite criminal *mens rea* for a finding of guilt still deserves neither the blame nor the comparable punishment of an adult offender. Juveniles possess less ability than adults to make sound judgments or moral distinctions, or to act with the same culpability as adults. Because youths possess less ability than adults to control their impulses or to appreciate the consequences of their acts, they *deserve* less punishment even when they commit the same criminal harm.[82]

Certain characteristic developmental differences distinguish the quality of judgments that young people make from those of adults and justify a somewhat more protective stance toward younger decision-makers.[83] Attributions of responsibility involve volitional controls—the ability to exercise self-control—as well as cognitive capacity—knowledge of right from wrong. Concepts like psychosocial "maturity" or "temperance" provide bases for assessing the qualities of judgment or the decision-making competencies of adolescents compared with adults.[84] Mature judgments result from the interaction of cognitive and psychosocial factors and deficiencies in either domain may undermine competent decisions. Crucially, for purposes of comparing the qualities of judgment and self-control, adolescents and adults may differ in their breadth of experience, short-term versus long-term temporal perspective, attitude toward risk, impulsivity, and the importance they attach to peer influence.[85] Three developmentally unique attributes of youth—temporal perspective, attitudes toward and acceptance of risk, and susceptibility

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[82] CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 355 (1978); CONFRONTING YOUTH CRIME, *supra* note 59, at 7 (adolescents are more vulnerable and more impulsive, and have less self-discipline or capacity to control their conduct than adults).

[83] Scott, *supra* note 76, at 1610; Steinberg & Cauffman, *Maturity in Judgment*, *supra* note 77, at 251. "[T]he intuition behind paternalistic policies is that developmentally linked traits and responses systematically affect the decisionmaking of adolescents in a way that may incline them to make choices that threaten harm to their own and others' health, life, or welfare, to a greater extent than do adults." Scott et al., *supra* note 78, at 227.

[84] Steinberg & Cauffman, *Maturity in Judgment*, *supra* note 77, at 252; Cauffman & Steinberg, *Adolescent Decision-Making*, *supra* note 77, at 1765; Scott et al., *supra* note 78, at 227.

[85] Scott, *supra* note 76, at 1610; Steinberg & Cauffman, *Maturity in Judgment*, *supra* note 77, at 258-62.

to peer influences—may affect young peoples' qualities of judgment in ways that distinguish them from adults and bear on their criminal responsibility.

A developmentally informed youth sentencing policy would emphasize qualities of "judgment" rather than narrow cognitive capacity, ask whether young people characteristically make poorer quality choices than they would when they are somewhat older (because of adolescent-specific emotional, psychosocial, or developmental differences) and reflect young people's lesser developmental capacities. If adolescents likely will make better, adult-quality decisions with maturity, "then the case for protecting the opportunities and prospects of that future adult from the costs of her immature youthful judgment and choices seems powerful."[86]

2. Risk-Taking

Risk entails a chance of loss; risk-taking behavior entails conduct that exposes the actor to those potential adverse consequences.[87] Young people are more impulsive, exercise less self-control, fail adequately to calculate long-term consequences and engage in more risky behavior than do adults. Adolescents may estimate the magnitude or probability of risks, may use a shorter time-frame, or focus on opportunities for gains rather than possibilities of losses differently than adults.[88] The greater prevalence of accidents, suicides and homicides as the primary causes of death of the young reflect greater "risk-taking" behavior.[89] Teenager's greater proclivity to engage in unprotected sex, to speed and drive recklessly, and to engage in criminal behavior reflect their taking risks with respect to health and safety.[90]

Criminal behavior constitutes a specific form of highly risky behavior, and every theory of crime attempts to account for the

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[86] Scott et al., *supra* note 78, at 228.

[87] Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 3 (1992).

[88] *Id.*

[89] William Gardner, *A Life-Span Rational Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 67 (Nancy J. Bell & Robert W. Bell eds., 1993).

[90] Scott et al., *supra* note 78, at 230.

age-specific nature of offending.[91] The differences between adolescent and adult decision-making with regard to risk are relevant in assessing criminal responsibility for the quality of their choices.[92] A decision-making calculus requires the actor to identify possible outcomes, identify possible consequences that may follow from each option, evaluate the positive or negative desirability of those consequences, estimate the likelihood of those various consequences occurring, and develop a decisional rule to optimize outcomes.[93] Experimental and developmental psychological literatures suggest that adolescents may approach these various decision-making steps differently from adults. Youths may engage in riskier behavior than adults because they differ both in the extent of knowledge they possess and the amount of information they actually use when they make decisions. Unlike informed consent cognitive tests conducted under laboratory conditions with all relevant information, in less-structured, real-life circumstances, adolescents may simply possess or use less information about risks than adults.

Even when adolescents possess and use comparable information, they may assign different subjective values to the alternative consequences. Youths' developmentally influenced cost-benefit calculus may cause them to weigh benefits and consequences differently and to discount negative future consequences in ways that may systematically skew the quality of their choices. In some instances, youths simply may perceive risky behavior as posing lower probabilities of eventuating than do adults.[94] In others cases, youths' subjective valuations of risks and consequences may cause them to make different choices than do adults.[95] Adolescents may weigh the negative conse-

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[91] *See, e.g.*, MICHAEL R. GOTTFEDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 124-44 (1990).

[92] An extensive review of the empirical literature on risk-taking and cognitive development reports "mixed results regarding the degree to which adolescents may be taking more risks than other age level[s]," and cautions that "we know very little about either overall decision-making competence among adolescence or the development of specific skills that are necessary for or that facilitate effective decision-making." Furby & Beyth-Marom, *supra* note 87, at 38. *See also* Grisso, *supra* note 80, at 232-35.

[93] *See also* Grisso, *supra* note 80, at 232-35.

[94] Furby and Beyth-Marom speculate that "adolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do." Furby & Beyth-Marom, *supra* note 87, at 19.

[95] *Id.*

quences of *not* engaging in risky behaviors differently than adults. For example, saying "no" to drugs may not mean the same thing to a teen-ager seeking peer acceptance and good feelings as it does to an adult with greater appreciation of the risks of drugs and more to lose from involvement in the justice system. Similarly, an adolescent's decision to participate with friends in a robbery may reflect a different risk-calculus than an adult's in terms of a greater emphasis on short-term benefits versus long-term negative legal consequences.[96] Youths' impulsitivity, unrealistic optimism, or feelings of "invulnerability" and "immortality" also may contribute to risk-taking behavior.[97]

Rational choice theory also helps to account for adolescents' greater propensity for risk-taking.[98] People make utility-maximizing choices within a context of constraints, and people at different stages of their lives will make different valuations of uncertain future events. Knowledge about one's self, social environment, and life-course trajectory increase with age and affect a person's short-term versus long-term calculus. Because young people have much less clarity about their futures than do adults, "a focus on the immediate rather than the long-term consequences of a decision is a rational response to uncertainty about the future."[99] As a result, young people may discount the negative value of future consequences because they have more difficulty than adults in integrating a future consequence into their more limited experiential baseline. Thus, adolescents may discount the cost of longer-term future consequences and weigh shorter-term benefits more heavily than adults.[100]

Another developmental perspective for assessing adolescent risk-taking emphasizes *temperance* or the ability to limit impulsivity and evaluate a situation thoroughly.[101] Developmental psy-

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[96] Scott et al., *supra* note 78, at 234.

[97] Lawrence D. Cohn et al., *Risk-Perception: Differences Between Adolescents and Adults*, 14 HEALTH PSYCHOL. 217, 221 (1995) (adolescents engage in health-threatening activities because they do not regard such behavior as extremely risk or unsafe, rather than because of unique feelings of invulnerability); Furby & Beyth-Marom, *supra* note 87, at 19-21.

[98] Gardner, *supra* note 89, at 70.

[99] *Id.* at 77.

[100] William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS AND THE AIDS EPIDEMIC 18-19 (W. Gardner et al. eds., 1991).

[101] Steinberg & Cauffman, *Maturity in Judgment*, *supra* note 77, at 258-62.

chological studies examine ways in which adolescents' judgments may differ from adults because of their disposition toward sensation-seeking, impulsivity related to hormonal or physiological changes and mood volatility.[102] For example, hormonal and physiological changes, mood volatility, and predisposition toward sensation-seeking affect the quality of decision-making and maturity of judgements, and cause adolescents to experience more difficulty controlling their impulses than adults.[103] Because adolescents' predisposition to risk-taking reflects generic developmental processes rather than malevolent personal choices, it provides one sentencing policy rationale to protect the adult that the youth eventually will become from the detrimental consequences of immature decisions.

3. Peer Group Influences

Adolescents respond to peer group influences more readily than adults because of the crucial role peer relationships play in identity formation.[104] Youth's greater desire for acceptance and approval renders them more susceptible to peer influences as they adjust their behavior and attitudes to conform to those of their contemporaries.[105] Significantly, young people "commit crimes, as they live their lives, in groups."[106] Police arrest a larger proportion of two or more juveniles for involvement in a single criminal event than they do adults.[107] Young peoples' developmentally greater susceptibility to peer group influences and group process dynamics than their older counterparts lessens, but does not excuse, their criminal responsibility. It takes time, experience, and opportunities for young people to develop the capacity for autonomous judgments and resistance to the influences of peers. Because the group-nature of youth crime renders all equally as a criminally liable, it poses a chal-

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[102] *See generally* Steinberg & Cauffman, *Maturity in Judgment, supra* note 77; Cauffman & Steinberg, *Adolescent Decision-Making, supra* note 77.

[103] Steinberg & Cauffman, *Maturity in Judgment, supra* note 77; Cauffman & Steinberg, *Adolescent Decision-Making, supra* note 77, at 1780.

[104] *See* ERIK ERIKSON, IDENTITY: YOUTH AND CRISIS (1968); Steinberg & Cauffman, *Maturity in Judgment, supra* note 77, at 254-56.

[105] Scott et al., *supra* note 78, at 230. *See also infra* notes 144-47 and accompanying text.

[106] Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981).

[107] *Id. See also* SNYDER & SICKMUND, *supra* note 2, at 47.

lenge to formulate a youth sentencing policy that recognizes differential participation and culpability of different adolescent members of a group.

4. Reduced Culpability

In *Thompson v. Oklahoma*,[108] the Supreme Court analyzed the criminal responsibility of young offenders and provided additional support for shorter sentences for reduced culpability even for youths older than the common law infancy threshold of age fourteen. *Thompson* presented the issue whether executing an offender for a heinous murder committed when he was fifteen-years-old violated the Eighth Amendment prohibition on "cruel and unusual punishments." In vacating Thompson's capital sentence, the plurality concluded that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[109]

Although the Court provided several rationales for its decision, it explicitly concluded that juveniles are less culpable for their crimes than are their adult counterparts.[110] Significantly, even though the Court found Thompson responsible for his crime, it concluded that he could not be punished as severely as an adult, simply because of his age.[111]

The *Thompson* Court emphasized that even though youths may inflict blameworthy harms, the culpability of their choice is

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[108] 487 U.S. 815 (1988).

[109] *Id.* at 822-23.

[110] *Id.* at 833-34. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834. Earlier juvenile death penalty decisions also emphasized the youthfulness of an offender as a mitigating factor at sentencing. In *Eddings v. Oklahoma*, the Court noted that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." 455 U.S. 104, 116 (1982).

[111] *Thompson*, 487 U.S. at 834. The Court stated:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgement expected of adults . . . . The Court has already endorsed the proposition that *less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.*

Id. at 834-35 (internal citations omitted) (emphasis added).

less than that of adults.[112] The Court cited numerous other areas of life (e.g., serving on a jury, voting, marrying, driving, and drinking), as instances in which the legal system treated adolescents differently from adults because of juveniles' lack of experience and judgment.[113] In all of those cases, the Court noted, the state acts paternalistically and imposes legal disabilities because of youths' presumptive incapacity to "exercise choice freely and rationally."[114] The Court emphasized that it would be both inconsistent and ironic suddenly to find juveniles the equals of adult for purposes of capital punishment.[115]

Subsequently, in *Stanford v. Kentucky*, a different plurality of the Supreme Court upheld the death penalty for youths who were sixteen or seventeen at the time of their offenses, although a majority of all states bar the practice.[116] While recognizing that juveniles as a class possess less culpability than adults, the Court decided *Stanford* on the narrow grounds that no clear national consensus exists that such executions violated "evolving standards of decency" in the Eighth Amendment's prohibition against "cruel and unusual" punishment.[117]

5. Subjective Time

Quite apart from differences in culpability, because of differences in their "time perspective," juveniles deserve less severe punishment than do adults for comparable criminal harms. Although we measure penalties in units of time—days, months, or years—youths and adults subjectively and objectively conceive of

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[112] *Id.* at 835. The Court noted:

> 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 much 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.

Id.

[113] *Id.*

[114] *Id.* at 823-25.

[115] *Id.* The Court noted that "the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent." *Id.*

[116] 492 U.S. 361, 371 (1989).

[117] *Id.* at 380.

and experience similar lengths of time differently.[118] The developmental progression in thinking about and experiencing time—future time perspective and present duration—follows a developmental sequence that affects the evolution of judgment and criminal responsibility. The ability to project events and consequences into the future evolves gradually during adolescence into early adulthood.[119] Without a mature appreciation of future time, juveniles less fully understand or appreciate the consequences of their acts, may give excess weight to immediate goals, and, as a result, engage in riskier behavior. Because youths do not perceive present time duration equivalently with adults, a policy of "adult crime, adult time," which imposes equal sentences on adults and juveniles, would be disproportionately more severe for the latter. Because of developmental differences, time seems to pass more slowly when we are younger. Consequently, youths experience objectively equal punishment subjectively as more severe. While a three-month sentence may seem lenient for an adult offender, for a child it represents the equivalent of an entire summer vacation—a long period of time. Because young people depend upon their families, sentences of home removal or confinement are more developmentally disruptive than they would be for more formed and independent adults.[120]

6. Toward a Youth Sentencing Policy Rationale

Certain characteristic developmental differences between adolescents and adults distinguish their quality of judgment, psychosocial maturity, and self-control, and justify a different criminal sentencing policy for younger offenders. Youths differ from adults on several dimensions that directly affect their degree of criminal responsibility and deserved punishment: breadth of experience; short-term versus long-term temporal perspective; attitude toward and acceptance of risk; and suscep-

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[118] *See* W. FRIEDMAN, THE DEVELOPMENTAL PSYCHOLOGY OF TIME (1982); THOMAS COTTLE, PERCEIVING TIME: A PSYCHOLOGICAL INVESTIGATION WITH MEN AND WOMEN (1976); JEAN PIAGET, THE CHILD'S CONCEPTION OF TIME (1969).

[119] Steinberg & Cauffman, *Maturity in Judgment*, *supra* note 77, at 266; Scott et al., *supra* note 78, at 231.

[120] ROBERT SAMPSON & JOHN LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 95-98 (1993) (noting that positive ties to the family, the school, and the workplace alter criminal career and life-course trajectories).

tibility to peer influences. These developmentally unique attributes affect young peoples' capacity to comprehend fully the consequences of their actions and their empathic identification with others. Moreover, it takes time and experience to develop the capacity to exercise self-control. While young offenders possess sufficient understanding and culpability to hold them accountable for their acts, their choices are less blameworthy than those of adults because of truncated self-control. Their crimes are less blameworthy not simply because of reduced culpability and limited appreciation of consequences but because their life-situations have understandably limited their capacity to learn to make fully responsible choices.

When youths offend, the families, schools, and communities that socialize them bear some responsibility for the failures of socializing institutions.[121] Human beings depend upon others for nurture; this includes the ability to develop and exercise the moral capacity for constructive behavior. The capacity for self-control and self-direction is not a matter of moral luck or good fortune, but a socially constructed developmental process that provides young people with the opportunity to develop a moral character. Zimring describes the "semi-autonomy" of adolescence as a "learner's permit" that gives youths the opportunity to make choices and to learn to be responsible but without suffering fully the long-term consequences of their mistakes.[122] The ability to make responsible choices is learned behavior, and the dependent status of youth systematically deprives them of chances to learn to be responsible. Inevitably, when we grant young people autonomy in order to learn to make mature judgments, they will abuse that trust. Young peoples' socially constructed life situation understandably limits their capacity to develop self-control, restricts their opportunities to learn and exercise responsibility, and supports a partial reduction of criminal responsibility. Adolescence itself limits opportunities fully to develop and internalize responsible adult-quality deci-

[121] The Twentieth Century Fund, in CONFRONTING YOUTH CRIME, noted that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system which share responsibility for the development of youth." CONFRONTING YOUTH CRIME, *supra* note 59, at 7.

[122] ZIMRING, *supra* note 59, at 90-99 (stating that youth sentencing policy minimizes the harm young persons do themselves, reduces to a minimum the harm sanctions inflict on them when they harm the community, and "*preserves the life chances for those who make serious mistakes*") (emphasis added).

sion-making. Their susceptibility to peer group influences reflects truncated development of their own capacity for autonomous and independent judgment. Thus, a youth sentencing policy must recognize youths' reduced opportunities and abilities to make responsible choices. Such a policy would entail both shorter sentence durations and a higher offense-seriousness threshold before a state incarcerates youths than for older offenders.

B. ADMINISTERING YOUTHFULNESS AS A MITIGATING FACTOR AT SENTENCING: THE "YOUTH DISCOUNT"

Implementing a youth sentencing policy entails legal, moral, and social judgments. Because of developmental differences and the social construction of adolescence, younger offenders are less criminally responsible than more mature violators. But, they are not so essentially different and inherently incompetent as the current legal dichotomy between juvenile and criminal court suggests. The binary distinction between infant and adult that provides the bases for states' legal age of majority and the jurisprudential foundation of the juvenile court ignores the reality that adolescents develop along a continuum and creates an unfortunate either-or choice in sentencing. In view of the developmental psychological research that suggests several ways in which youths systematically differ from adults, should the criminal law adopt a "youth-blind" stance and treat fourteen-year-olds as the moral equivalent of adults for purposes of sentencing, or should it devise a youth sentencing policy that reflects more appropriately the developmental continuum?

Shorter sentences for reduced responsibility represents a more modest and attainable reason to treat young offenders differently than adults than the rehabilitative justifications advanced by Progressive childsavers. In this context, adolescent criminal responsibility represents a global judgement about the degree of youths' deserved punishment, rather than a technical legal judgment about whether or not a particular youth possessed the requisite *mens rea* or mental state defined in the criminal statute. If adolescents as a class characteristically exercise poorer judgment than do adults, then sentencing policies

can reduce the long-term harm that they cause to themselves.[123] Protecting young people from the full penal consequences of their poor decisions reflects a policy to preserve their life chances for the future when they presumably will make more mature and responsible choices. Such a policy simultaneously holds young offenders accountable for their acts because they possess sufficient culpability, and yet mitigates the severity of consequences because their choices entail less blameworthiness than those of adults.

Criminal courts in some jurisdictions already consider "youthfulness" in the context of aggravating and mitigating factors, and may impose shorter sentences on a discretionary basis.[124] Although the federal sentencing guidelines explicitly reject "youthfulness" as a justification to sentence outside of the guidelines range,[125] sentencing statutes in some states recognize "youthfulness" as a mitigating factor at sentencing.[126] Under these aggravating-mitigating sentencing laws, trial court judges regularly consider youthfulness both *de jure* and *de facto*; appellate courts may remand them for resentencing if they do not.[127]

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[123] Scott, *supra* note 76, at 1656 ("[I]f the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decision-maker . . . from his or her bad judgment."). *See also* ZIMRING, *supra* note 59, at 90-99.

[124] Apart from capital punishment, the United States Supreme Court gives great constitutional deference and virtually unreviewable authority to states to formulate their sentencing policy. *See* Harmelin v. Michigan, 501 U.S. 957, 1008 (1991) (stating that a *mandatory* sentence of life imprisonment without the possibility of parole for possession of cocaine did not require any "individualized" consideration of any personal mitigating circumstances). *Harmelin* overruled the Court's earlier decision in *Solem v. Helms*, 463 U.S. 277 (1983). The Court in *Solem* held that the Eighth Amendment's prohibition on "cruel and unusual punishment" entitled a non-capital defendant to proportionality analysis focusing on: severity of the penalty in relation to the gravity of the offense; comparison with sentences imposed for other types of crimes within the same jurisdiction; and comparison with the sentences imposed in other states for the same type of crime. *Harmelin*, 501 U.S. at 965.

[125] U.S. SENTENCING GUIDELINES MANUAL § 5H.1 (1995).

[126] *See, e.g.*, ARIZ. REV. STAT. § 13-702(D)(1) (1996); FLA. STAT. ch. 921.0016(4)(k) (1996) ("the defendant was too young to appreciate the consequences of the offense"); LA. REV. STAT. ANN. § 905.5(f) (West 1997) ("the youth of the offender at the time of the offense"); N.C. GEN. STAT. § 15A-134.D.16 (e)(4) (1996) ("The defendant's age, immaturity, or limited mental capacity").

[127] *See, e.g.*, State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993) ("[C]ourts should consider the concept of youth in context, i.e., the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct."); State v. Strunk, 846 P.2d 1297, 1300-02 (Utah 1993) (noting that trial

However, states that consider youthfulness as a mitigating factor simply treat it as one element to be weighed with other aggravating and mitigating factors in deciding what sentence to impose on an individual.

In most jurisdictions, however, whether a trial judge treats "youthfulness" as a mitigating factor rests within her "sound discretion." Failure to exercise leniency does not constitute reversible error or an abuse of discretion, and courts impose sentences of "life without parole" even on very young offenders.[128]

Uniquely among the states, the Nevada Supreme Court in *Naovarath v. State* considered whether a mandatory term of "life without parole" imposed on a fourteen-year-old convicted of murder constituted "cruel and unusual punishment," and included "youthfulness" as a consideration in its proportionality analysis.[129] Because Nevada excluded young murderers from juvenile court jurisdiction without any minimum age restriction,[130] the court asserted that there must be some young age at which a criminal sentence of life without parole would constitute a "cruel and unusual" punishment.[131] The court asserted that the state's constitutional prohibition on "cruel and unusual punishments" required the judiciary to articulate "evolving stan-

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court's failure to consider defendant's youthful age as a mitigating factor warranted remand for resentencing).

[128] For example, in *State v. Furman*, the Washington Supreme Court ruled that the state constitution prohibited the execution of youths for crimes committed under the age of 18, but upheld its authority to imprison them for mandatory terms of life without parole. 858 P.2d 1092, 1102 (Wash. 1993). In *State v. Massey*, the Washington Court of Appeals upheld a sentence of life without parole for a 13-year-old juvenile convicted as an adult and rejected any special consideration of the youth's age. 803 P.2d 340, 348 (Wash. Ct. App. 1990). The court held that the test to measure "cruel and unusual punishment" or proportionality "does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are [sic] sentenced to life without parole for first degree aggravated murder." *Id.*

[129] Naovarath v. State, 779 P.2d 944, 948-49 (Nev. 1989).

[130] NEV. REV. STAT. § 62.040 (1979).

[131] *Naovarath*, 779 P.2d at 946. The court commented:

> Most agree that it would be excessive to sentence a nine or ten year old to life imprisonment without possibility of parole. Children of this age simply cannot be said to deserve this kind of severe punishment, nor can it be said that a child of such tender years is so unalterably bad that no parole release should ever be considered.

Id.

dards of decency."[132] The court concluded that even for the most serious crimes, a sentence of life without parole constituted a disproportionately "cruel and unusual" penalty because of "the undeniably lesser culpability of children for their bad actions, their capacity for growth and society's special obligation to children."[133] Although the Nevada Supreme Court affirmed the state constitutional proportionality analyses and juveniles' reduced culpability, it provides virtually no practical protections or limitations on the legislature's power to prescribe severe penalties for youths. By a 3-2 vote, the court held only that a youth must receive a parole hearing at some time in the distant future in order for a mandatory life sentence to pass state constitutional muster.

A statutory sentencing policy that integrates youthfulness, reduced culpability, and restricted opportunities to learn self control with principles of proportionality would provide younger offenders with categorical fractional reductions of adult sentences. Because "youthfulness" constitutes a universal form of "reduced responsibility," states should treat it unequivocally as a mitigating factor without regard to nuances of individual developmental differences. Treating youthfulness as a formal mitigating sentencing factor represents a social, moral, and criminal policy judgment rather than a clinical or psychiatric evaluation. Such an approach avoids the risks of discretionary clinical subjectivity inherent in individualized adolescent culpability determinations.

This categorical approach would take the form of an explicit "youth discount" at sentencing. A fourteen-year-old offender might receive, for example, 25-33% of the adult penalty, a sixteen-year-old defendant, 50-60%, and an eighteen-year-old adult the full penalty, as presently occurs. The "deeper discounts" for younger offenders correspond to the developmental continuum and their more limited opportunities to learn and

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[132] *Id.* at 947. The court said:

> What constitutes cruel and unusual punishment for a child presents an especially difficult question . . . . If putting this child away until his death is not cruel, it is certainly unusual. To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder.

Id.

[133] *Id.* at 948.

exercise responsibility. A youth discount based on reduced culpability functions as a sliding scale of diminished responsibility. Just as adolescents posses less criminally responsibility than do adults, fourteen-year-old youths should enjoy a greater mitigation of blameworthiness than would seventeen-year-olds. Because the rationale for youthful mitigation rests upon reduced culpability and limited opportunities to learn to make responsible choices, younger adolescents bear less responsibility and deserve proportionally shorter sentences than older youths. The capacity to learn to be responsible improves with time and experience. With the passage of time, age, and opportunities to develop the capacity for self-control, social tolerance of criminal deviance and claims for mitigation decline. Several youth sentencing policy groups and scholars implicitly endorse the concept of a "youth discount" or a sliding scale of criminal responsibility for younger offenders.[134]

Discounted sentences that preserve younger offenders' life chances require that the maximum sentences they receive remain substantially below those imposed on adults.[135] For youths

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[134] AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS 35 (1980), emphasized the relationship between age and sanctions: "The age of the juvenile is also relevant to the determination of the seriousness of his or her behavior. In most cases, the older the juvenile, the greater is his or her responsibility for breaking the law." CONFRONTING YOUTH CRIME, *supra* note 59, at 6-7, also concluded that the law should hold young offenders accountable by age 13 or 14, at least to some degree because youths of that age "are aware of the severity of the criminal harms they inflict and that, much as they fall short of maturity or self-control, they are morally and should be legally responsible for intentionally destructive behavior. The older the adolescent, the greater the degree of responsibility the law should presume."

The sentencing principles of frugality or parsimony of punishment, or the "least restrictive alternative" also provide support for a "youth discount." *See, e.g.*, MORRIS, *supra* note 66, at 59-60; JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS, *supra*, at 34 ("the court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability indicated by the circumstances of the particular case, and by the *age* and prior record of the juvenile."); NATIONAL ADVISORY COMM., JUVENILE JUSTICE AND DELINQUENCY PREVENTION 440 (1980) ("In choosing among statutorily permissible dispositions, the court should employ the least coercive category and duration of disposition that are appropriate to the seriousness of the delinquent act, as modified by the degree of culpability indicated by the circumstances of the particular case, age and prior record.").

[135] AMERICAN BAR ASS'N, JUVENILE JUSTICE STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 39-41 (1980), provides one example of "discounted" sentences for young offenders parallel to those for adults. The Standards used adult sentence lengths to establish substantive proportionality, classified all crimes into five categories based on the level of punishment attached to them, and then provided for substantially shorter equivalent juvenile sanctions. Other groups endorse similar dis-

below the age of fourteen, the common law infancy *mens rea* defense would acquire new vitality for proportionally shorter "discounted" sentences or even non-criminal dispositions.

The rationale for a "youth discount" also supports requiring a higher in/out threshold of offense seriousness as a prerequisite for imprisonment. Because juveniles depend upon their families more than do adults, removal from home constitutes a more severe punishment. Because of differences in "subjective time," youths experience the duration of imprisonment more acutely than do adults. Because of the rapidity of developmental change, sentences of incarceration are more disruptive for youths than for adults. Thus, states should require a higher threshold of offense seriousness and a greater need for social defense before confining a youth than might be warranted for an older offender.

The specific discount value—the amount of fractional reduction and the in/out threshold—reflects several empirical and normative considerations. It requires an empirically-informed sentencing policy judgment about adolescent development and criminal responsibility. To what extent do specific physical, social, and psychological characteristics of youth—depreciation of future consequences, risk-taking, peer influences, lack of self-control, hormonal changes, and lack of opportunities to learn to make responsible choices—induce them to engage in behavior simply because they are young? How much developmental difference should a state require to produce what degree of moral and legal mitigation in its sentencing policy? To what extent will severe, unmitigated adult penalties so alter youths' life course that they will be unable to survive the mistakes of adolescence with any semblance of life chances intact? Developmental psychological research provides only suggestive directions rather than definitive answers to these sentencing policy questions.

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counted penalties. *See, e.g.*, CONFRONTING YOUTH CRIME, *supra* note 59, at 17 ("The principle of diminished responsibility makes life imprisonment and death penalties inappropriate," for example, even in cases of intentional murders by youths.); MODEL PENAL CODE § 6.05 commentary at 25 (Tentative Draft No. 7, 1957) (recommending special provisions for "young adult offenders," ages 16 to 22, with a *maximum sentence* length of four years. The "special sentence should relate to the *duration* of commitment . . . adapted to the age of the offender.") (emphasis added).

Only the states whose criminal sentencing laws provide realistic, humane, and determinate sentences that enable a judge actually to determine "real-time" sentences can readily implement a proposal for explicit fractional reductions of youths' sentences.[136] One can only know the value of a "youth discounted" sentence in a sentencing system in which courts know in advance the standard or "going rate" for adults. In many jurisdictions, implementing a "youth discount" would require significant modification of the current criminal sentencing statutes including presumptive sentencing guidelines with strong upper limits on punishment severity, elimination of all mandatory minimum sentences, and some structured judicial discretion to mitigate penalties based on individual circumstances. In short, a criminal sentencing system itself must be defensible in terms of equality, equity, desert, and proportionality. Attempts to apply idiosyncratically "youth discounts" within the flawed indeterminate or draconian mandatory-minimum sentencing regimes that currently prevail in many jurisdictions runs the risk simply of reproducing all of their existing inequalities and injustices.

1. Individualization vs. Categorization

Youthful development is highly variable. Young people of the same age may differ dramatically in their criminal sophistication, appreciation of risk, or learned responsibility. Chronological age provides, at best, a crude and imprecise indicator of maturity and the opportunity to develop a capacity for self-control. However, a categorical "youth discount" that uses age as a conclusive proxy for reduced culpability and a shorter sentence remains preferable to an "individualized" inquiry into the criminal responsibility of each young offender. The criminal law represents an objective standard. Attempts to integrate subjective psychological explanations of adolescent behavior and personal responsibility into a youth sentencing policy cannot be done in a way that can be administered fairly without undermining the objectivity of the law. Developmental psychology does not possess reliable clinical indicators of moral development or

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[136] *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 159-64 (1996); TONRY, *supra* note 51, at 190-209; Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After*, 75 MINN. L. REV. 727, 729 (1991); Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367 (1987).

criminal sophistication that equate readily with criminal responsibility or accountability.[137] For young criminal actors who possess at least some degree of criminal responsibility, relying upon inherently inconclusive or contradictory psychiatric or clinical testimony to precisely tailor sanctions hardly seems worth the judicial burden and diversion of resources that the effort would entail.[138] Thus, for ease of administration, age alone provides the most useful criterion upon which to allocate mitigation.

Youthful mitigation of criminal responsibility represents a legal concept and social policy judgment that does not correspond with any psychiatric diagnostic category or developmental psychological analogue about which an expert could testify. Unlike the insanity defense,[139] a "youth discount" does not attempt to assess whether antecedent forces, such as a mental illness, caused or determined a young offender's behavior. Rather, it conclusively presumes that young people's criminal choices differ qualitatively *per se*, from those of adults. "Youthfulness" constitutes a form of legal "partial responsibility" without need for any specific clinical indicators other than a birth certificate. A "youth discount" that bases fractional reductions of sentences on age-as-a-proxy-for culpability also avoids the conceptual and administrative difficulties of a more encompassing subjective inquiry into diminished responsibility,[140] a "rotten

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[137] *See, e.g.*, Grisso, *supra* note 80, at 235; Scott et al., *supra* note 76, at 1630.

[138] The administrative experiences with the insanity and diminished responsibility defenses in the criminal law, and with "amenability to treatment" in judicial waiver proceedings teach that efforts to individualize culpability assessments necessarily founder on clinical subjectivity, differences among experts about symptomology and their effects on choices, the inability of juries or judges rationally and consistently to assess culpability, and uncertainty about the penal purposes being advanced by the inquiry. *See, e.g.*, Goldstein & Katz, *supra* note 56, at 865; Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984); Feld, *Violent Youth*, *supra* note 2, at 1006-10.

[139] *See supra* note 56 and accompanying text (discussing the insanity defense).

[140] Arenella, *supra* note 138, at 835-36. Although "diminished responsibility" doctrines attempt to link a sane defendant's mental abnormality with some reduced degree of criminal responsibility, efforts to evaluate subjective culpability result in inconsistent, confusing, and arbitrary applications. Diminished responsibility allows the defendant to introduce psychological evidence about why he was less responsible than an ordinary person as a formal mitigation of punishment, although it is unclear to what legal formula that evidence corresponds. *Id.* at 835-36. *See also* Morse, *supra* note 138, at 9-13.

social background,"[141] or "social adversity."[142] Defenses that recognize deficiencies of character as excuses to criminal liability undermine the value of responsibility and encourage deterministic claims of lack of culpability. The juvenile courts' treatment ideology mistakenly denies that young people are morally responsible actors whom the law may hold accountable for their behavior.

A youth sentencing policy requires formal mitigation to avoid the undesirable forced choice between either inflicting undeservedly harsh punishments on less culpable actors or "doing nothing" about the manifestly guilty. Mitigation avoids the pressures judges and juries historically experienced to nullify and acquit the "somewhat guilty" or to punish excessively the "partially" responsible. A formal policy of youthful mitigation provides a buffer against the inevitable political pressure to ratchet-up sanctions every time youths sentenced leniently subsequently commit serious offenses. The *idea* of deserved punishment also limits the imposition of *too little* punishment as well as too much. Although the overall cardinal scale of penalties for juveniles should be considerably less than that for adults, a failure to sanction when appropriate, as juvenile court treatment ideology may dictate in some instances, can deprecate the moral seriousness of offending.[143] Indeed juvenile court judges *de facto* reinstate the principle of offense and punish young offenders exactly because a treatment ideology cannot justify either "clinically" lenient or disparate, individualized sentences.

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[141] Richard Delgado, *"Rotten Social Background": Should Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 J.L. & INEQUALITY 9, 15 (1982). A "rotten social background" defense posits that a person raised in a manifestly criminogenic environment—grinding deprivation and poverty, minimal parental or familial support, exposure to violence and abuse, tutelage in crime by older youths "on the street"—cannot make the same moral choices as those born in more advantageous circumstances and should not be held to the same degree of criminal responsibility. *Id.*

[142] TONRY, *supra* note 51, at 141. Tonry notes that recognizing a "social adversity" defense denigrates those offenders by implying that "those people are not responsible adults whose moral choices matter." *Id.* at 141-42. Since recognition of moral autonomy entails acknowledgment of people's responsibility for their willed actions, a social adversity defense cutting that link would deny the actor's autonomy. *Id.* at 142-43. Tonry also argues that formal recognition of "social adversity" as an excuse would stigmatize all members of the disadvantaged class to whom the defense might be available, remove disincentives to engage in crime, and undermine the objectivity and deterrent functions of criminal law. *Id.* at 146-47.

[143] Feld, *Juvenile Waiver Statutes*, *supra* note 1, at 527-28.

2. *Youth and Group Crime*

Young offenders commit crimes in groups to a much greater extent than do adults.[144] While the law treats all participants in a crime as equally responsible and may sentence them alike, young people's susceptibility to peer group influences requires a more nuanced assessment of their degree of participation, personal responsibility, and culpability.[145] The group nature of youth crime affects sentencing policy in several ways. The presence of a social audience of peers may induce youths to participate in criminal behavior that they would not engage in if alone.[146] Even though the criminal law treats all accomplices as equally guilty as a matter of law, they may not all bear equal responsibility for the actual harm inflicted and may *deserve* different sentences.[147] To some extent, state criminal sentencing laws already recognize an offender's differential participation in a crime as a "mitigating" factor.[148] Similarly, some states' juvenile court waiver laws and juvenile sentencing provisions also focus on "the *culpability* of the child in committing the alleged offense, including the level of the child's participating in planning and carrying out the offense . . . ."[149] Thus, the group nature of adolescent criminality requires some formal mechanism to dis-

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[144] Zimring, *supra* note 106, at 880; SNYDER & SICKMUND, *supra* note 2, at 49.

[145] Zimring, *supra* note 106, at 883 ("The pervasive problem of the adolescent accessory aggravates the difficulty of determining appropriate sanctions for youth crime."). Zimring contends that currently, prosecutors' charging decisions and juvenile court judges' sentencing decisions attempt to distinguish between a "reluctant but voluntary" aider and abettor and youths who bear primary responsibility. *Id.* at 883-84.

[146] *See generally* DAVID MATZA, BECOMING DEVIANT (1969) (as a result of "pluralistic ignorance" or "shared misunderstanding," youths attribute to other members of their group a greater propensity to deviance and participate in delinquency in order to avoid "losing face."); JAMES SHORT & FRED STRODBECK, GROUP PROCESS AND GANG DELINQUENCY (1965) (group nature of youth crime and encouragement each provides the other).

[147] *See, e.g.*, MINN. STAT. § 609.05 (1992) (aiding and abetting liability of accomplices). State criminal laws and court opinions do not require juvenile courts to distinguish between active and "passive" accomplices either to transfer youths to criminal courts, *see, e.g.*, *In re* K.C., 513 N.W.2d 18, 21 (Minn. Ct. App. 1994); *In re* T.L.C., 435 N.W.2d 581, 583 (Minn. Ct. App. 1989), or to sentence them as juveniles, *In re* D.K.K., 410 N.W. 2d 76, 77 (Minn. Ct. App. 1987).

[148] *See, e.g.*, MINN. SENTENCING GUIDELINES § II.D.2.a.(2) (1996) (mitigating factor that "offender played a minor or passive role" in crime).

[149] MINN. STAT. § 260.125(2b) (1992). *See generally* Feld, *Violent Youth*, *supra* note 2, at 1031-34.

tinguish between active participants and passive accomplices with even greater "discounts" for the latter.

3. Virtue of Affirming Partial Responsibility for Youth

In the Broadway musical, *West Side Story*, The Jets sing the song, "Gee Officer Krupke," in which they invoke many of the popular deterministic explanations of delinquency. One boy complains that "Our mothers all are junkies, Our fathers all are drunks," and the chorus responds that "We never had the love that every child ought a get." Another youth observes that he's "depraved on account I'm deprived," and others' self-diagnoses conclude that "We are sick, sick, sick, Like we're sociologically sick." One boy prescribes "a analyst's care! It just his neurosis that ought a be curbed—He's psychologically disturbed."[150] In short, the delinquents readily understood cultural explanations of criminality, invoked exculpatory appeals to determinism, and employed "techniques of neutralization" to relieve themselves of responsibility for their behavior.[151]

One of the principal virtues, Goldstein argues in his seminal defense of *The Insanity Defense*, is that it dramatically affirms the idea of individual responsibility.[152] Because the criminal law emphasizes blame, the insanity defense attempts to distinguish between the "mad" and the "bad," between the "sick" and the "evil," in order to reinforce the concept of personal responsibility.[153] The *idea* of personal responsibility and holding people accountable for their behavior provides an important counterweight to a popular culture that endorses the idea that everyone is a victim, that all behavior is determined and no one is responsible, and that therefore the state cannot blame wrong-doers.[154]

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[150] STEVEN SONDHEIM, WEST SIDE STORY 114-16 (1956).

[151] *See, e.g.*, Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957); DAVID MATZA, DELINQUENCY AND DRIFT 69-98 (1964).

[152] ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 224-25 (1967).

[153] *Id.*

[154] Packer argues that regardless of how psychologists or philosophers ultimately resolve the "free will versus determinism" debate, it is desirable to act "as if" responsible people make choices:

> The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will . . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints . . .

The juvenile court's "rehabilitative ideal" elevated determinism over free will, characterized delinquent offenders as victims rather than perpetrators, and envisioned a therapeutic institution that resembled more closely a preventive, forward-looking civil commitment process rather than a criminal court. By denying youths' personal responsibility, juvenile courts' treatment ideology reduces offenders' duty to exercise self-control, erodes their obligation to change, and sustains a self-fulfilling prophecy that delinquency occurs inevitably for youths from certain backgrounds.

Affirming responsibility encourages people to learn the virtues of moderation, self-discipline, and personal accountability. Acknowledging that we *punish* young offenders for their misconduct

> becomes part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society. In short, even if we have misgiving about blaming a particular individual, because he has been shaped long ago by forces he may no longer be able to resist, the concept of "blame" may be necessary.[155]

Because a criminal conviction represents an official condemnation, the idea of "blame" reinforces for the public and provides for the individual the incentive to develop responsibility. A culture that values autonomous individuals must emphasize both freedom and responsibility.

While the paternalistic stance of the traditional juvenile courts rests on the humane desire to protect young people from the adverse consequences of their bad decisions, protectionism simultaneously disables young people from the opportunity to make choices and to learn responsibility for their natural consequences. Even marginally competent adolescents can only learn self-control by exercising their capacity for autonomy. Accountability for criminal behavior may facilitate legal socialization and moral development in ways that juvenile courts' rejection of criminal responsibility cannot.

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would be fatally impaired unless the law provided a *locus poenitentiae*, a point of no return beyond which external constraints may be imposed but before which the individual is free–not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law.

HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74-75 (1968).

[155] GOLDSTEIN, *supra* note 152, at 224.

4. Integrated Criminal Justice System

A graduated age-culpability sentencing scheme in an integrated criminal justice system avoids the inconsistencies and injustices associated with the binary either-juvenile-or-adult drama currently played out in judicial waiver proceedings and in prosecutorial charging decisions. It also avoids the "punishment gap" when youths make the transition from the one justice system to the other. Depending upon whether or not a judge or prosecutor transfers a case, the sentences that violent youths receive may differ by orders of magnitude. Moreover, appellate courts eschew proportionality analyses and allow criminal court judges to sentence waived youths to the same terms applied to adults without requiring them to consider or recognize any differences in their degree of criminal responsibility. By contrast, waived chronic property offenders typically receive less severe sanctions as adults than they would have received as persistent offenders in the juvenile system. As the sentencing principles of juvenile courts increasingly resemble more closely those of criminal courts, the sentence disparities that follow from waiver decisions become even less defensible. Because of the "life and death" consequences at stake, transfer hearings consume a disproportionate amount of juvenile court time and energy.

An integrated criminal justice system eliminates the need for transfer hearings, saves the considerable resources that juvenile courts currently expend ultimately to no purpose, reduces the "punishment gap" that presently occurs when youths make the passage from the juvenile system, and assures similar consequences for similarly situated offenders. Adolescence and criminal careers develop along a continuum. But the radical bifurcation between the two justice systems confounds efforts to respond consistently and systematically to young career offenders.

A sliding-scale of criminal sentences based on an offender's age-as-a-proxy-for-culpability accomplishes much more directly what the various "blended jurisdiction" statutes attempt to achieve indirectly. The variants of "intermediate" sanctions attempt to reconcile the binary alternatives of either a sentence limited by juvenile court age jurisdiction or a dramatically longer criminal sentence imposed upon a youth as an adult. While those statutes attempt to smooth the juncture between

the two systems, the existence of two separate systems thwarts the fusion.

5. Integrated Record Keeping

The absence of an integrated record keeping system that enables criminal court judges to identify and respond to career offenders on the basis of their cumulative prior record constitutes one of the most pernicious consequences of jurisdictional bifurcation. Currently, persistent young offenders may "fall between the cracks" of the juvenile and criminal systems, often at the age at which career offenders approach their peak offending rates. A unified criminal court with a single record keeping system can maintain and retrieve more accurate criminal histories when a judge sentences an offender.[156] Although a "youth discount" provides appropriate leniency for younger offenders, integrated records would allow courts to escalate the discounted sanctions for chronic and career young offenders.

6. Decriminalize "Kids' Stuff"

Despite juvenile courts' overcrowded dockets and inadequate treatment resources, their procedural deficiencies and informality allow them to process delinquents too efficiently. Expedited procedures, fewer lawyers and legal challenges, and greater flexibility allows juvenile courts to handle a much larger number of cases per judge than do criminal courts and at lower unit cost.[157] Merging the two systems would introduce an enormous volume of cases into an already over-burdened criminal justice system that barely can cope with its current workload. Legislators and prosecutors forced to allocate scarce law en-

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[156] State laws can relieve young offenders from the collateral consequence of an isolated criminal conviction. Some research indicates that an arrest record and criminal justice system involvement adversely affects youths' employment prospects and further restricts their access to legitimate labor markets. LOOSING GENERATIONS, *supra* note 46, at 166; MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY 251-55 (1989); Richard B. Freeman, *Employment and Earnings of Disadvantaged Youth in a Labor Shortage Economy, in* THE URBAN UNDERCLASS 103 (Christopher Jencks & Paul Peterson eds., 1991). Although criminal sentencing authorities require access to records of prior convictions to identify chronic and career offenders, younger first offenders need not suffer all of the disabilities and losses of rights typically associated with criminal convictions. A legislature can nullify the effects of a felony conviction upon completion of sentence and supervision.

[157] SNYDER & SICKMUND, *supra* note 2, at 132-37; Feld, *Violent Youth, supra* note 2, at 1097-21.

forcement resources would use the seriousness of the offense to rationalize charging decisions and "divert" or "decriminalize" most of the "kids' stuff" that provides the grist of the juvenile court mill until it became chronic or escalated in severity.[158] Unlike a rehabilitative system inclined to extend its benevolent reach, an explicitly punitive process would opt to introduce fewer and more criminally "deserving" youths into the system.

7. *Sentencing Expertise*

Contemporary proponents of a specialized juvenile court contend that juvenile court judges require substantial time and commitment to become familiar with youth development, family dynamics, and community resources, and cite judges' dispositional expertise as a justification for a separate justice system.[159] Whether juvenile court judges actually acquire such expertise remains unclear. In many jurisdictions, non-specialist judges handle juvenile matters as part of their general trial docket or rotate through a juvenile court on short term assignments without developing any special expertise in sentencing juveniles.[160] Even in specialized juvenile courts, the court services personnel, rather than the judge herself, typically possess the information necessary to recommend appropriate sentences.

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[158] *Compare* Feld, *Violent Youth*, *supra* note 2, at 1108-21 (state statute extends nonwaivable right to counsel to juveniles), *with* Melissa M. Weldon, Note, *Fiscal Restraints Trump Due Process: Children's Diminishing Right to Counsel in Minnesota*, 14 LAW & INEQ. J. 647, 668 (1996) (after law guaranteed representation by counsel, legislature amended statute and "decriminalized" juvenile misdemeanors as a cost-saving strategy). The well-documented phenomenon of "desistance" suggests that most young offenders spontaneously abandon their tentative criminal involvements and accounts for most of the "success" of diversion and informal probation. *See* MARVIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972).

[159] *See, e.g.*, Edwards, *supra* note 54, at 36.

[160] Rubin, *supra* note 52, at 296; *see also* Edwards, *supra* note 54. An integrated criminal court that functions primarily as a court of law reduces the need for a specialized judiciary trained in principles of social work. Trying young people with full procedural safeguards would not especially diminish judges' expertise about appropriate dispositions for young people. Even if a court convicts a youth, probation staff may conduct a presentence investigation and advise the judge as to the appropriate sentence. Within the range of sentence lengths determined by the offense and reduced by the "youth discount," courts still could provide young offenders with whatever social or welfare services they deem appropriate.

8. Age-segregated Dispositional Facilities and "Room to Reform"

Questions about young offenders' criminal responsibility and length of sentence differ from issues about appropriate places of confinement or the services or resources the state should provide to them. Even explicitly punitive sentences do not require judges or correctional authorities to confine young people with adults in jails and prisons, as is the current practice for waived youths,[161] or to consign them to custodial warehouses or "punk prisons." States should maintain separate age-segregated youth correctional facilities to protect both younger offenders and older inmates. Even though youths may be somewhat responsible for their criminal conduct, they may not be the physical or psychological equals of adults in prison. While some youths may be vulnerable to victimization or exploitation by more physically developed adults, other youths may pose a threat to older inmates. Younger offenders have not learned to "do easy time," pose more management problems for correctional administrators, and commit more disciplinary infractions while they serve their sentences.[162] Existing juvenile detention facilities, training schools, and institutions provide the option to segregate inmates on the basis of age or other risk factors. Some research indicates that youths sentenced to juvenile correctional facilities may recidivate somewhat less often, seriously, or rapidly than comparable youths sentenced to adult facilities.[163] However, these findings provide modest support for

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[161] *See supra* notes 127-28 and accompanying text; TORBET ET AL., *supra* note 16, at 25-27.

[162] A study of prison rule violations reported that "[a]ge was the prisoner characteristic that related most directly to prison rule violation...[and] the younger the age category, the larger the percentage of inmates charged with rule violations." BUREAU OF JUSTICE STATISTICS, PRISON RULE VIOLATORS 2 (1989). *See also* LIS, INC., OFFENDERS UNDER AGE 18 IN STATE ADULT CORRECTIONAL SYSTEMS: A NATIONAL PICTURE 4 (1995). One study of prison adjustment compared a sample of waived youths sentenced to the Texas Department of Corrections for violent crimes committed before the age of 17 with a matched sample of incarcerated inmates aged 17 to 21 at the time of their offenses. By every measure, the waived violent youths adapted less well, accumulated more extensive disciplinary histories, earned less good time, experienced higher custody classification, committed more assaults, and required extra security measures. Marilyn D. McShane & Frank P. Williams, III, *The Prison Adjustment of Juvenile Offenders*, 35 CRIME & DELINQ. 254 (1989).

[163] *See* Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, *in* A SOURCEBOOK: SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 238 (James C. Howell et al. eds., 1995); Lawrence Winner et al., *The Transfer of Juveniles to Criminal*

a separate youth correctional system rather than for an entirely separate juvenile justice system.

Virtually all young offenders return to society, and the state should provide them with resources for self-improvement on a voluntary basis because of its basic responsibility to its citizens and its own self-interest. If a state fails to provide opportunities for growth and further debilitates already disadvantaged youths, it guarantees greater long-term human, criminal, and correctional costs. A sentencing and correctional policy that offers young offenders "room to reform," opportunities, and resources does not covertly reinstate a treatment ideology, but facilitates young offenders' constructive use of their time. With maturity, most young offenders develop a capacity for self-control and desist from criminality. Providing them with opportunities to reform requires more than custodial warehousing. Education, social services, and economic training may contribute to personal growth and perhaps improve the life chances of adolescents at risk even if they do not demonstrably reduce recidivism rates. Although the state bears an obligation to provide the means and incentives for personal change, the length of a youth's sentence should not depend fundamentally on either clinically perceived "real needs" or apparent responsiveness to "coerced treatment."[164]

V. SUMMARY AND CONCLUSIONS: LET'S BE HONEST ABOUT YOUTH CRIME CONTROL

Law reforms that tinker with the boundaries of childhood or modify judicial procedures do not appear to reduce appreciably offenders' probabilities of recidivism or increase public

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Court: Reexamining Recidivism Over the Longer Term, 43 CRIME & DELINQ. 548 (1997) (long-term recidivism survival analysis reported that police rearrested transferred juveniles more quickly and more often than retained juveniles); Donna Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996) (comparison of recidivism rates of waived youths with matched sample of retained juveniles reported more favorable outcomes for the latter); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Felony Offenders*, 18 LAW & POL'Y 77 (1996) (compared recidivism rates of 15 and 16-year-old robbery and burglary offenders sentenced as adults in New York with a comparable sample of youths sentenced as juveniles in contiguous counties in New Jersey).

[164] One can uncouple social welfare from criminal social control, and divorce treatment from punishment only by providing the opportunity for change on a voluntary basis. *See* AMERICAN FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE 171 (1997).

safety. Even far-reaching justice system changes can have only a marginal impact on social problems as complex as crime and violence. Rather, a proposal to abolish the juvenile court and to try all young offenders in an integrated justice system makes no utilitarian claims, but represents a commitment to honesty about state coercion. States bring young offenders who commit crimes to juvenile court for social control and to punish them. Juvenile courts' rehabilitative claims fly in the face of their penal reality, undermine their legitimacy, and impair their ability to function as judicial agencies. Because punishment is an unpleasant topic, juvenile courts attempt to evade those disagreeable qualities by obscuring their reality with rehabilitative euphemisms, psycho-babble, and judicial "double-speak" like "sometimes punishment is treatment."

The shortcomings of the "rehabilitative" juvenile court run far deeper than inadequate resources and rudimentary and unproven treatment techniques. Rather, the flaw lies in the very *idea* that the juvenile court can combine successfully criminal social control and social welfare in one system. Similarly, a separate "criminal" juvenile court cannot succeed or long survive because it lacks a coherent rationale to distinguish it from a "real" criminal court.[165] A scaled-down separate criminal court for youths simply represents a temporary way-station on the road to substantive and procedural convergence with the criminal court. Only an integrated criminal justice that formally recognizes adolescence as a developmental continuum may effectively address many of the problems created by our binary conceptions of youth and social control.

Enhanced procedural protections, a "youth discount" of sentences, and age-segregated dispositional facilities recognize and respond to the "real" developmental differences between young people and adult offenders in the justice system. Because these policy proposals require state legislators courageous enough to adopt them, several thoughtful commentators question whether elected public officials in a "get tough" political climate would make explicit the leniency implicit in the con-

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[165] *See, e.g.*, Rosenberg, *supra* note 52, at 182-85; Melton, *supra* note 34, at 177-80 (proposing a "criminal" juvenile court with adult procedural safeguards and shorter sentences in a separate justice system).

temporary juvenile court.[166] While the public unknowingly may tolerate nominal sanctions administered to young offenders in low visibility juvenile proceedings, politicians may balk at openly acknowledging a policy of moderation. Many elected officials prefer to demagogue about crime and posture politically to "crack down" on youth crime rather than to responsibly educate the public about the realistic limits of the justice system to control it. Some would rather fan the flames of fear for political advantage despite overwhelming evidence that escalating rates of imprisonment represent a failed policy that ultimately leads only to fiscal and moral bankruptcy.

I propose to abolish the juvenile court with trepidation. On the one hand, combining enhanced procedural safeguards with a "youth discount" in an integrated criminal court can provide young offenders with greater protections and justice than they currently receive in the juvenile system, and more proportional and humane consequences than judges presently inflict on them in the criminal justice system. Integration may foster a more consistent crime control response than the present dual systems permit to violent and chronic young offenders at various stages of the developmental and criminal career continuum. On the other hand, politicians may ignore the significance of youthfulness as a mitigating factor and use these proposals to escalate the punishment of young people. Although abolition of the juvenile court, enhanced procedural protections, and a "youth discount" constitute essential components of a youth sentencing policy package,[167] nothing can prevent legislators from selectively choosing only those elements that serve their "get tough" agenda, even though doing so unravels the threads that make coherent a proposal for an integrated court.

In either event, the ensuing debate about a youth sentencing policy would require them to consider whether to focus primarily on the fact that young offenders are *young* or *offenders*. A public policy debate about when the child is a criminal and

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[166] Rosenberg, for example, questions whether legislators who fail to provide juveniles even with procedural parity in the current "benevolent" juvenile justice system would provide youths with greater safeguards after they merged them into a unified criminal system. Rosenberg, *supra* note 52, at 175. Bernard argues that a policy of leniency as crime control would be difficult to sell to "law and order" politicians. THOMAS J. BERNARD, CYCLE OF JUVENILE JUSTICE 181-82 (1992).

[167] Feld, *Violent Youth*, *supra* note 2, at 1004.

the criminal is a child forces a long overdue and critical reassessment of the entire social construction of "childhood." To what extent do adolescents really differ from adults? To what extent do differences in competency and judgment result from physical or psychological developmental processes, or from social arrangements and institutions that systematically disable young people? If politicians ultimately insist upon treating young people primarily as offenders and the equals of adults, can they simultaneously maintain without contradiction other age-graded legal distinctions such as denial of the right to vote or to exercise self-determination?

The idea of the juvenile court is fundamentally flawed because it attempts to combine criminal social control and social welfare goals. My proposal to abolish the juvenile court does not entail an abandonment of its welfare ideal. Rather, uncoupling policies of social welfare from penal social control enables us to expand a societal commitment to the welfare of all children regardless of their criminality. If we frame child welfare policy reforms in terms of child welfare rather than crime control, then we may expand the possibilities for positive intervention for all young people. For example, a public health approach to youth crime that identified the social, environmental, community structural, and ecological correlates of youth violence, such as poverty, the proliferation of handguns, and the commercialization of violence, would suggest wholly different intervention strategies than simply incarcerating minority youths. Youth violence occurs as part of a social ecological structure; high rates of violent youth crime arise in areas of concentrated poverty, high teenage pregnancy, and AFDC dependency.[168] Such social indicators could identify census tracts or even zip-codes for community organizing, economic development, and preventive and remedial intervention.

Three aspects of youth crime and violence suggest future social welfare policy directions regardless of their immediate impact on recidivism. First, it is imperative to provide a *hopeful future for all young people.* As a result of structural and economic changes since the 1980s, the ability of families to raise children,

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[168] *See generally* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS (1996); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID (1993); LOSING GENERATIONS, *supra* note 46; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987).

to prepare them for the transition to adulthood, and to provide them with a more promising future has declined.[169] Many social indicators of the status of young people—poverty, homelessness, violent victimization, and crime—are negative and some of those adverse trends are accelerating. Without realistic hope for their future, young people fall into despair, nihilism, and violence.[170] Second, the disproportionate over-representation of minority youths in the juvenile justice system makes imperative the pursuit of *racial and social justice.* A generation ago, the Kerner Commission warned that the United States was "moving toward two societies, one black, one white—separate and unequal."[171] The Kerner Commission predicted that to continue present policies was "to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs."[172] Today, we reap the bitter harvest of racial segregation, concentrated poverty, urban social disintegration, and youth violence sown by social policies and public neglect a generation ago.[173] Third, youth violence has become increasingly lethal as the proliferation of handguns transforms adolescent altercations into homicidal encounters.[174] Only public policies that reduce and reverse the proliferation of guns in the youth population will stem the carnage.

While politicians may be unwilling to invest scarce social resources in young "criminals," particularly those of other colors or cultures, a demographic shift and an aging population give all of us a stake in young people and encourage us to invest in

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[169] *See generally* BEYOND RHETORIC, *supra* note 47; LOSING GENERATIONS, *supra* note 46.

[170] BEYOND RHETORIC, *supra* note 47; Grisso, *supra* note 80, at 234 (summarizing research on youth violence by noting that "[n]umerous studies describe the sense of 'futurelessness' and fatalism that is experienced by adolescents whose dependent status does not allow them to escape neighborhoods in which violent death is a daily occurrence, and they consider that many urban youths who murder believe that there is no future to consider.").

[171] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) (Kerner Commission Report).

[172] *Id.*

[173] WILSON, TRULY DISADVANTAGED, *supra* note 168; MASSEY & DENTON, *supra* note 168.

[174] Young people committed three-quarters of homicides with firearms, and only a policy of systematic disarmament will begin to stem the tide. *See generally* Blumstein, *supra* note 22; Blumstein & Cork, *supra* note 22; Zimring, *supra* note 22.

their human capital for their and our own future well-being and to maintain an inter-generational compact.[175] Social welfare and legal policies to provide all young people with a hopeful future, to reduce racial and social inequality, and to reduce access to and use of firearms require a public and political commitment to the welfare of children that extends far beyond the resources or competencies of any juvenile justice system.

[175] One generation ago, the elderly constituted the largest segment of the population in poverty, and public policies such as social security, SSI, and medicare dramatically improved their material conditions. Today, children constitute the largest segment of the population in poverty, and the youngest, minorities, and those living in single-parent families experience the greatest penury. *See* LOSING GENERATIONS, *supra* note 46, at 41-63. Social security-like public policies can provide for child health and welfare, lift young people out of poverty, and ease the transition from adolescence to productive adulthood for considerably less than the annual costs of "bailing out" the savings and loan industry. *See* LINDSEY, *supra* note 47, at 229-56.