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## Social Welfare and Fairness in Juvenile Crime Regulation

*Elizabeth S. Scott\**

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

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1. Matthew Thomas Wagman, Note, *Innocence Lost: In the Wake of Green, The Trend Is Clear—If You Are Old Enough to Do the Crime, You Are Old Enough to Do the Time*, 49 CATH. U. L. REV. 643 (2000).

2. See ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 118–48 (2008). The Supreme Court in *Roper v. Simmons* announced that to impose the death penalty on a juvenile was cruel and unusual punishment in violation of the Eighth Amendment of the Constitution; although the Court offered several rationales for its conclusion, the heart of the opinion was a proportionality analysis that emphasized the developmental immaturity of adolescents. 543 U.S. 551, 568–76 (2005) (basing this analysis on Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003)). In 2010 the Court followed *Roper* in holding that sentencing a juvenile to life without parole for a non-homicide offense violates the Eighth Amendment. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

public safety and reduce the social cost of juvenile crime.<sup>3</sup> And there is evidence that lawmakers are listening.<sup>4</sup>

In this Article, we argue that a developmental model of juvenile crime regulation grounded in scientific knowledge about adolescence is *both* fairer to young offenders *and* more likely to promote social welfare than a regime that fails to attend to developmental research. We challenge the punitive reformers who have presumed that public safety is enhanced and social welfare promoted if serious juvenile offenders are punished as adults, and who have been unconcerned about whether their approach is compatible with principles of fair punishment. We focus here primarily on the social welfare argument for a separate and more lenient juvenile justice system grounded in a developmental framework. First, the argument for mitigation on the grounds of developmental immaturity is more familiar, and although it supports less punishment, it provides no strong basis for a separate justice system.<sup>5</sup> Moreover, lawmakers and the public care about accountability, but they may care even more about public safety; fears about the threat of young “superpredators” propelled the transformation of juvenile crime policy that took place in the late twentieth century.<sup>6</sup> Thus, a regime that deals with juveniles more leniently than adults (because they deserve less punishment) is likely to fail in the political arena if public safety is imperiled. In short, the viability of the developmental model depends on evidence that the punitive response of the past generation is not

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3. See SCOTT & STEINBERG, *supra* note 2, at 181–222. A few scholars have gone a step further, arguing that public safety should be the *only* goal of juvenile crime regulation. See Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1 (2009).

4. In the past few years, policymakers have retreated somewhat from the punitive reforms of the 1990s, often pointing to research on juveniles’ developmental immaturity. See, e.g., Editorial, *Two Words: Wasteful and Ineffective*, N.Y. TIMES, Oct. 10, 2010, at A22 (describing New York’s closure of institutional juvenile justice facilities that contribute to reoffending, and arguing for expedition of more closings).

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

6. This term was coined by University of Pennsylvania criminologist John DiIulio, who in 1995 predicted that the new century would bring a juvenile crime wave far worse than the 1990s. John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23. DiIulio later expressed regret for the hyperbole and acknowledged that the prediction had not come to pass. Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

only inconsistent with basic principles of fairness, but also that it has failed to minimize the social cost of juvenile crime, and that regulation based on social science research is more likely to attain this goal.

The recent punitive reforms embodied a view that society's interests are promoted by tough incarceration policies under which more youths are dealt with in the adult system and offenders in the juvenile system are incarcerated for longer periods of time.<sup>7</sup> The claim that these measures will reduce juvenile crime is critical to the social welfare justification for more punitive sanctions, but it turns out to be hard to evaluate. Juvenile crime indeed has declined since its peak in the early 1990s, but the causes of the decline are complex.<sup>8</sup> As we will see, studies that have examined the impact of the adoption of punitive policies on youth crime rates yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws.<sup>9</sup>

Evaluating the impact of the punitive reforms also requires consideration of factors other than crime rates. First, the economic costs of tough laws are substantial, as legislatures and government agencies are beginning to recognize.<sup>10</sup> Resources spent on building and staffing correctional facilities needed to incarcerate more juveniles for longer periods are not available for other social uses. Even assuming that tough sanctions can reduce juvenile crime, at some point the additional dollars expended may not offer enough

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7. The views of Alfred Regnery, head of the Office of Juvenile Justice and Delinquency Prevention under President Reagan, are typical of critics of the traditional juvenile court who endorsed tough sanctions for young offenders. "[T]here is no reason that society should be more lenient with a 16-year-old offender than with a 30-year-old offender." Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65, 68 (1985).

8. See *infra* Part II.B. For example, many states enacted punitive reforms after crime rates began to fall, suggesting that other factors have played a role. The adoption of Proposition 21 in California is a good example. In 2000, when the referendum making transfer easier passed, juvenile crime rates had been declining for five or six years. See SCOTT & STEINBERG, *supra* note 2, at 102–17.

9. See *infra* Part II.C–D.

10. This has become a key issue in adult sentencing as well. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005). Barkow argues that cost considerations can function as an important constraint on punitive sentencing policies and points to state legislatures that have retreated from harsh sentencing reforms in the face of rising costs. She points out that in the 1990s, state governments doubled the amount spent on corrections due to get-tough policies. *Id.* at 1287. For a discussion of the rising costs of juvenile crime, see *infra* Part I.B.

benefit to be justified.<sup>11</sup> Also, if less costly correctional dispositions are effective at reducing recidivism in some young offenders, then incarcerating those youths may not be justified on utilitarian grounds. Finally, included in the calculus are the intangible and sometimes iatrogenic effects of correctional programs on the future welfare of young offenders. Correctional policies and programs that either reduce or enhance the prospect that young offenders will lead satisfying lives affect social welfare.

In this Article, we examine empirical evidence that can inform our thinking about optimal justice policies and how various approaches will likely affect social welfare. This evidence is varied; it includes studies of the economic costs of various sanctions, the deterrent impact of statutory changes, recidivism rates of different groups of offenders, and the effectiveness of different kinds of programs. No single body of research provides a clear answer to our normative question, but the complex empirical account that emerges indicates that the use of adult sanctions usually does not promote social welfare and that differential treatment of juvenile offenders is justified on consequentialist as well as retributive grounds. In our view, the research supports the conclusion that adult punishment and longer incarceration in the juvenile system have contributed somewhat to a reduction in juvenile crime, largely through incapacitation. But the costs have been high, and the societal benefits likely are limited to a far smaller group of young offenders than are subject to harsh penalties under current law.<sup>12</sup> Moreover, extensive research indicates that less costly sanctions in the juvenile system, including

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11. Economists find that increasing incarceration rates has diminishing marginal returns. Some amount of incarceration yields substantial benefits in terms of decreased crime, but those benefits decrease (i.e., fewer crimes are avoided) for each unit of increased incarceration. See Steve Aos, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates and Prison Economics*, WASH. ST. INST. FOR PUB. POL'Y (Jan. 2003), <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf>.

12. Social welfare may well be promoted by imposing tough sanctions on youths who are chronic serious offenders. These youths are classified by Terrie Moffitt as "life-course-persistent" offenders. Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993). Many criminologists have found that a small percentage of juvenile offenders commit a high percentage of juvenile crimes. MARVIN E. WOLFGANG, ROBERT M. FIGLIO & THORSTEN SELLIN, *DELINQUENCY IN A BIRTH COHORT* 88 (1972); see also DAVID P. FARRINGTON, LLOYD E. OHLIN & JAMES Q. WILSON, *UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY* 50 (1986) (approximately 5% commit 50% of crimes).

community-based programs, may be effective at reducing recidivism.<sup>13</sup>

Our social welfare analysis is informed by scientific knowledge of adolescence and youth crime, which reinforces the conclusion that policies based on broad use of incarceration are unlikely to minimize the social cost of juvenile crime. An important lesson of the developmental research is that most young law-breakers are normative adolescent offenders whose criminal activities are linked to developmental forces and who can be expected to “mature out” of their antisocial tendencies.<sup>14</sup> Therefore, there is no reason to assume that these youths are headed for careers in crime unless correctional interventions push them in that direction. The research also shows that social context is critically important to the successful completion of developmental tasks that are essential to the transition to conventional adult roles associated with desistance from crime. For young offenders, correctional programs shape that social context and can enhance or inhibit this process. Today, many teens without prior records are swept into the adult criminal justice system, by any account a harsh developmental environment. Even in the juvenile systems in many states, young offenders are incarcerated for long periods in prison-like facilities.<sup>15</sup> Developmental research supports other evidence indicating that enthusiasm for imposing harsh sanctions on young offenders is misguided and that policies grounded in scientific knowledge are far more likely to reduce the social cost of juvenile crime.

This research not only informs policies that promote social welfare; it also provides the foundation for a regime committed to fair and proportionate punishment of young offenders. Recently, some scholars have advocated an approach to juvenile justice dedicated solely to crime reduction,<sup>16</sup> but we are persuaded that both social welfare and fairness are essential components of a viable and stable regime. Although society’s primary goal in responding to juvenile crime may well be preventive in nature, the principle of retribution is a necessary check on government power in this context. The retributive principle of proportionality functions importantly as a side constraint, limiting the duration of correctional interventions to what is deserved on the basis of the

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13. *See infra* Part III.E.

14. Moffitt calls this group “adolescence-limited” offenders. *See supra* note 12; *see also infra* note 178.

15. TASK FORCE ON TRANSFORMING JUVENILE JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (2009), *available at* <http://www.vera.org/paterson-task-force-juvenile-justice-report> (criticizing the incarceration of juveniles in youth prisons).

16. *See* Slobogin & Fondacaro, *supra* note 3.

seriousness of the offense and the offender's culpability. In contrast, under a pure prevention approach, the government is free to intervene in the lives of individual offenders to the extent deemed necessary to prevent crime.<sup>17</sup> The potential for unfairness under that approach is substantial—both in the form of excessive punishment and in the likelihood of variations in responses to offenders based on considerations related to risk but not linked to the crime itself.<sup>18</sup> This possible unfairness may undermine the legitimacy of the justice system, and it can be avoided by incorporating proportionality as well as prevention into the developmental framework.

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

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17. The boundary for intervention under Slobogin and Fondacaro's argument is the maximum age of juvenile court jurisdiction. They reject transfer to adult court. *Id.* at 15–16.

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

## I. YOUTHS BEHIND BARS: THE EXPANDING NET AND ITS FINANCIAL COST

We begin by taking a closer look at the implementation of the punitive law reforms in juvenile justice and its financial impact on state budgets, the most concrete costs of the legal changes. How have the new laws changed the way juveniles are actually being processed and punished? As a result of the reforms, a large number of youths who previously would have been under exclusive juvenile court jurisdiction are potentially subject to processing and punishment as adults. This does not mean, however, that all or even most youths who *could* be subject to criminal prosecution today are actually tried and punished as adults. Indeed, the impact of statutes expanding the discretionary authority of judges to transfer youths has been modest.<sup>19</sup> But the widespread enactment of legislative waiver statutes that categorically redefine juveniles as adults has resulted in adult prosecution and punishment of many youths who previously would have been kept in the juvenile system. This change, together with longer sentences in the juvenile system, has greatly increased the number of incarcerated youths in this country. This in turn has resulted in legislatures devoting a greater portion of their budgets to juvenile corrections than was true a generation ago.

### A. *The Trend Toward Incarceration*

In some states, the tough reforms seem to have had little effect on the adjudication and disposition of young criminals. For example, emerging evidence suggests that California's Proposition 21, which greatly expanded the categories of youths susceptible to criminal court adjudication, has had a more modest impact on prosecutorial and judicial practices than was predicted by either supporters or opponents.<sup>20</sup> In other states, however, the impact of tougher laws has been substantial. During the 1980s and 1990s, many states categorically lowered the age of criminal court jurisdiction for a broad range of serious crimes, and a few states lowered the general jurisdictional age from 18 to either 17 or 16. In

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19. See *infra* Part I.A.

20. For a discussion of Proposition 21, see SCOTT & STEINBERG, *supra* note 2, at 102–17; see also Anna Gorman, *Few D.A.s Use New Power to Try Juveniles as Adults*, L.A. TIMES, Aug. 8, 2004, at B1.



this way, groups of juveniles have been reclassified categorically as adults for purposes of criminal prosecution.<sup>21</sup>

More information is available about youths who are tried as adults as a result of discretionary judicial transfer than those who are subject to criminal prosecution under legislative waiver or automatic transfer statutes. The number of youths transferred by judges fell from a high of about 13,000 in 1994 to about 7,000 in 2002.<sup>22</sup> The percentage of transfer cases that involved violent offenses against persons was slightly higher than property and drug offenses.<sup>23</sup> A large proportion of transferred teens are 16 or 17 years old; judges are less likely to transfer youths aged 15 or younger, although the number of youths under age 15 who were transferred doubled between 1985 and 2002.<sup>24</sup> African American juveniles are far more likely to be transferred than their white counterparts. Statistics from the 1990s indicated that more than 60% of transferred youths were convicted of their offenses and, of those convicted, about 70% were incarcerated in prison or jail.<sup>25</sup>

A far larger number of youths under the age of 18 are subject to criminal prosecution under legislative waiver statutes than are subject to judicial transfer, but we lack good statistics on how many youths are subject to adult punishment under these statutes.<sup>26</sup> Thirty-eight states mandate adult criminal prosecution for some

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21. Wisconsin, New Hampshire, and Wyoming have lowered the general jurisdictional age in the past generation. Altogether, 14 states set the upper boundary of the juvenile court jurisdictional age below age 18. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), *available at* <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. As of 2004, 29 states categorically exclude certain juveniles from juvenile court jurisdiction. These include states that set the jurisdictional age below eighteen, generally or for felonies, as well as states that mandate that youths charged with specific serious crimes be tried as adults. Fifteen states make judicial waiver mandatory for certain offenses, if certain criteria are met. *See State Juvenile Justice Profiles: National Overviews*, NAT'L CENTER FOR JUV. JUST., [http://70.89.227.250:8080/stateprofiles/overviews/transfer\\_state\\_overview.asp](http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp) (last visited Sept. 14, 2010). Rhode Island lowered the jurisdictional age from 18 to 16 and then raised it again six months later. *See Ray Henry, Rhode Island Lawmakers Repeal Law Imprisoning Teens*, ASSOCIATED PRESS (Oct. 31, 2007).

22. *See* SNYDER & SICKMUND, *supra* note 21, at 186.

23. *Id.* Transfer for drug offenses has increased substantially since the mid-1980s.

24. *Id.* Twenty-three states have no minimum age for transfer to criminal court; the rest have minimum ages ranging from 10 to 15 years of age. *Id.* at 114.

25. *See State Juvenile Justice Profiles*, NAT'L CENTER FOR JUV. JUSTICE, <http://70.89.227.250:8080/stateprofiles/> (last visited Sept. 14, 2010).

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

categories of young defendants under the age of 18 (based on the offense charged), and about a dozen set the age of general jurisdiction for adult criminal prosecution at age 16 or 17 when youths are legal minors for most other purposes.<sup>27</sup> According to recent estimates, about 220,000 teens, mostly 16 and 17 year olds, are automatically subject to criminal prosecution and punishment annually under legislative jurisdictional and waiver statutes.<sup>28</sup>

Youths who are convicted in criminal court are more likely to be incarcerated for their offenses and, according to recent studies, are confined for substantially longer periods on average than those who are sentenced in juvenile court.<sup>29</sup> The Washington State Institute for Public Policy produces much of the best empirical data on these issues (and generally on the impact of juvenile justice policies and practices).<sup>30</sup> In one study, Institute researchers compared average minimum sentence lengths before and after the 1994 enactment of a statute automatically transferring to adult court 16- and 17-year-old youths charged with certain violent crimes that previously had been subject to discretionary judicial

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27. See *State Juvenile Justice Profiles: National Overviews*, *supra* note 21. In New York, for example, general juvenile court jurisdiction ends at age sixteen, and jurisdiction for murder ends at age 13. *Id.* (under "State Profiles," select "New York").

28. CAMPAIGN FOR YOUTH JUSTICE, *THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM* (2007), available at [http://www.campaignforyouthjustice.org/documents/CFYJNR\\_ConsequencesMinor.pdf](http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf).

29. The Washington Institute of Public Policy has found that youths tried as adults receive substantially longer sentences. See Robert Barnoski, *Changes in Washington State's Jurisdiction of Juvenile Offenders: Examining the Impact*, WASH. ST. INST. FOR PUB. POL'Y 16-20 (Jan. 2003), <http://www.wsipp.wa.gov/rptfiles/JuvJurisChange.pdf>. Barnoski found that under Washington's discretionary transfer law, youths who were transferred received an average sentence of almost six years as compared to those retained in juvenile court who received less than a year. The combined average was 1.78 years. After the enactment of the state's automatic transfer law (under which all youths were tried as adults), the average was 2.8 years. *Id.*; see also Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996). In a comparative study, Fagan found that 46% of youths convicted of robbery were sentenced to prison or jail for first offenses in New York, while in New Jersey, 18% of those processed as juveniles were incarcerated. For a discussion of Fagan's study, see *infra* Part II.D.

30. This research institute was created by the state legislature to study the cost effectiveness of justice system (and other social) legislation and policies, primarily in Washington, but nationally as well. The institute conducts sophisticated and comprehensive research that is an important source of information in evaluating the costs and benefits of legal regulation. WASH. ST. INST. FOR PUB. POL'Y, <http://www.wsipp.wa.gov> (last updated Sept. 1, 2010).

transfer.<sup>31</sup> The researchers found sentences to be 50% longer for crimes that met the automatic transfer criteria than under the judicial waiver regime, when fewer than 25% of youths charged with these crimes were tried as adults.<sup>32</sup> Fifteen percent of youths automatically transferred to adult court received sentences of five years or more, whereas no youths retained in juvenile court before 1994 received such lengthy sentences.<sup>33</sup> Because jurisdiction in the juvenile correctional system in most states ends by age 21 or earlier, some youths who are prosecuted as adults receive sentences many times as long as the maximum period of confinement in a juvenile facility.

That is not to say that young offenders today are subject to lenient treatment in the juvenile system; delinquency dispositions have also become harsher under the recent policy reforms. Youths are more likely to be confined in secure juvenile facilities for longer periods than a generation ago. According to another Washington study, confinement rates in that state's juvenile system increased by 40% in the 1990s, a period when serious crime rates fell by 50%.<sup>34</sup> In the late 1980s, 2.5 out of 1,000 Washington youths were confined in juvenile facilities; a decade later the confinement rate increased to 3.5 youths per 1,000.<sup>35</sup>

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

### *B. The Economic Costs of the Punitive Reforms*

The debate about the merits of the punitive reforms has focused primarily on whether the increased use of incarceration has

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31. Barnoski, *supra* note 29, at 17–19.

32. *Id.* The study examined cases over a two and one half year period before the enactment of the statute (January 1, 1992 to July 1, 1994) and a similar period after enactment (January 1, 1998 to July 1, 2001). In the “before” group, 738 youths were retained in juvenile court and 175 transferred. In the “after” group, 690 youths were tried as adults. *Id.* at 4.

33. *Id.* at 19. Under discretionary transfer, 35% of transferred youths received a sentence of five years or more, but less than 25% of youths were transferred.

34. Steven Aos, *The Juvenile Justice System in Washington State: Recommendations to Improve Cost-Effectiveness*, WASH. ST. INST. FOR PUB. POL’Y, 2 (Oct. 2002), <http://www.wsipp.wa.gov/rptfiles/WhatWorksJuv.pdf>.

35. *Id.*

reduced juvenile crime and, to a lesser extent, on their impact on young offenders. Interestingly, until recently, the economic costs associated with the increased use of incarceration of juveniles received relatively little attention in the policy debates.<sup>36</sup> Economic expenditures are the most concrete costs of the policies we are examining, and evaluating the benefit of any crime reduction impact requires that we know the financial cost incurred. The headline is that the impact on state budgets of the recent justice reforms has been substantial. Moreover, although juvenile crime has declined significantly since the early 1990s, the costs of responding to youthful criminal activity have risen substantially. According to a careful analysis of the costs and benefits associated with one state's policies responding to juvenile crime, serious juvenile crime declined by 50% between 1994 and 2001, while expenditures in the juvenile justice system increased by 43%.<sup>37</sup>

Not surprisingly, this increase in spending is due largely to the expanded use of incarceration as the preferred (or required) sanction for young offenders. Longer sentences in both the juvenile and criminal systems, and the use of incarceration in place of community sanctions, add up to higher justice system costs. The cost of incarcerating a youth for a year in the juvenile system varies in different states, depending on labor costs and the quality and kinds of programs provided. Costs range from \$215,000 in New York youth prisons, \$100,000 in California, almost \$90,000 in Virginia, \$58,000 in Florida, and \$45,000 in Washington.<sup>38</sup> A year of imprisonment in the adult system is less expensive than a year of incarceration in the juvenile system, in part because prisons

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36. In the past few years, legislatures have begun to examine the budgetary burden of harsh sanctions. This issue has become quite prominent in deliberations about adult sentencing policy as legislatures across the country have revised and moderated harsh sentencing regimes in response to evidence that criminal justice system costs had doubled in the 1990s. *See* Barkow, *supra* note 10; *see also* Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, ISSUES BRIEF (Vera Inst. of Justice, New York, N.Y.), June 2002.

37. *See* Aos, *supra* note 34.

38. In Virginia, a 2009 report by the Department of Juvenile Justice reported that the per capita cost of holding one juvenile for a year was \$120,167. VA. DEP'T OF JUVENILE JUSTICE, DATA RESOURCE GUIDE: FISCAL YEAR 2009, at 192 (2009), available at [http://www.djj.virginia.gov/About\\_Us/Administrative\\_Units/Research\\_and\\_Evaluation\\_Unit/pdf/Appendices\\_2009.pdf](http://www.djj.virginia.gov/About_Us/Administrative_Units/Research_and_Evaluation_Unit/pdf/Appendices_2009.pdf); *see also* Barnoski, *supra* note 29, at 19 (describing yearly per youth cost of a juvenile facility as almost \$45,000). Mayor Michael Bloomberg recently announced that New York City would greatly reduce the number of youths incarcerated in youth prisons, citing a cost of \$215,000 per year per youth. Julie Bosman, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. TIMES, Jan. 21, 2010, at A31, available at <http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html>.

are less likely to provide educational and counseling services and have a higher ratio of inmates to staff. Cost estimates per prisoner range from \$25,000 to \$40,000 per year.<sup>39</sup> But, as we have suggested, criminal sentences generally are longer than juvenile dispositions and therefore are often costlier.<sup>40</sup>

The recent reforms have also generated increased procedural costs. In the juvenile system, many cases that would have been dealt with informally 20 years ago are subject to formal adjudication today.<sup>41</sup> Increased costs are also associated with prosecution and adjudication in criminal court. The procedural protections afforded defendants and the time expended by judges, attorneys, jurors, and law enforcement agents combine to make criminal trials very expensive. Even when convictions are based on plea agreements, the costs are far greater than are those of delinquency proceedings, which, even in the post-*Gault* era, tend to be more informal, briefer, and simpler.

State governments today spend more money prosecuting and punishing juveniles than they did in the early 1990s, when juvenile crime rates were far higher. These expenditures are funded either by higher taxes or by shifting funds from other programs. Governors and legislatures are usually reluctant to raise taxes, and thus they may cut allocations for public schools or social programs so that adequate funds are available for incarcerating juveniles.<sup>42</sup> Are these expenditures justified? From the perspective of social welfare, the answer depends on whether two conditions are met—first, that the economic costs of incarceration policies (together with other indirect costs that we will explore shortly) are offset by greater public benefits in terms of reduced crime, and second, that these policies are more effective at accomplishing their purposes

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39. Costs in Washington were estimated at about \$36,000. See Barnoski, *supra* note 29, at 19. Prisons have lower costs per prisoner than juvenile facilities for several reasons. First, prisons are larger than juvenile facilities and thus can reduce costs from economies of scale. The ratio of staff to inmates is usually much lower in juvenile facilities, in part because inmates are not confined as restrictively. Moreover, juvenile facilities generally have more counselors and teachers and generally offer more programming to inmates.

40. In Washington, the average cost of confinement per youth increased from \$65,000 under the discretionary transfer regime to \$75,000 under the automatic transfer law. *Id.* at 20.

41. See SNYDER & SICKMUND, *supra* note 21.

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

than other, less costly, policies.<sup>43</sup> In the pages that follow we explore these conditions and conclude that the evidence does not justify the incarceration policies adopted in the recent period of punitive reform.

## II. THE EFFECTIVENESS OF PUNITIVE POLICIES: DO HARSH SANCTIONS REDUCE CRIME?

We turn now to the question of whether youth crime policies based on expansive use of incarceration are effective in accomplishing the goal of reducing youth crime. If so, several kinds of benefits follow that may justify the increase in government spending. In cost-benefit evaluations of crime policies, economists include the benefit to potential victims of crimes that are not committed: Less crime will reduce costs that can include (depending on the crime) lost possessions, physical pain and psychological distress, lost productivity, medical expenses, and lost lives. Less crime also enhances the well-being of citizens generally. The residential real estate market illustrates the fact that people attach a monetary value to feeling safe as they go about their lives—comparable housing is cheaper in high-crime neighborhoods than in those where crime rates are low. Desistance from a life of crime (or avoidance of criminal activity altogether) also offers intangible value to youths in terms of their future well-being and productivity. Youths who are deterred from involvement in crime (or from reoffending) are likely to experience benefits from lives that are more likely than those of young criminals to include educational achievement, stable employment, and rewarding intimate relationships.<sup>44</sup> Finally, state expenditures on the operation of the justice system should decline if crime is reduced, including not only the costs of operating correctional facilities and programs, but also the costs of law enforcement and criminal proceedings.

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

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

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

### *A. The Traditional Regime and the Failure to Prevent Crime*

To the punitive reformers of the late 1980s and 1990s, violent juvenile crime was a critical threat to social welfare, one that was caused largely by the lax response to crime of traditional juvenile courts.<sup>45</sup> On the view of critics, the juvenile court was a “revolving door”; the typical young offender received a slap on the wrist from the judge and was soon out on the street again engaging in criminal activity—until he got caught and returned to court. Youths were virtually invited to engage in criminal activities by a regime that used community probation as the standard sanction. A delinquency charge carried no deterrent threat because youths knew that no serious consequences would follow the adjudication.<sup>46</sup>

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

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45. See SCOTT & STEINBERG, *supra* note 2, at 94–96.

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

this meant they had a free pass to engage in criminal activity. According to conventional wisdom, “adult” members of criminal gangs frequently assigned tasks that might result in arrest to juveniles. Even Chris Simmons, whose death sentence the Supreme Court overturned in 2005, was reported to believe that as a juvenile he would be treated leniently.<sup>47</sup> Thus, it is hard to deny that the traditional juvenile system not only failed in its rehabilitative mission but also was unsuccessful in deterring crime and incapacitating young offenders.

There was another dimension to the claim that legal reforms were necessary to protect the public from young criminals. In the 1990s, some observers predicted that, unless tough policies were enacted, the country would face an even larger wave of violent youth crime in the first decade of the twenty-first century as a large cohort of children born in the early 1990s became teenagers. Several criminologists promoted this view, including John DiIulio, who warned politicians and the public of a coming generation of “superpredators,” youths without moral sensibilities who would roam the streets in gangs, terrorizing the public with their violent and senseless rampages.<sup>48</sup> Thus, the policy goal of crime prevention took on an unprecedented urgency in the face of this overwhelming threat, and politicians embraced tough incarceration policies as the means of protecting the public.

How did the punitive reformers think harsh sanctions would reduce crime? As first year law students learn in their Criminal Law classes, several preventive rationales justify criminal punishment and may be offered in support of harsh juvenile crime policies.<sup>49</sup> First, the threat of punishment can generally deter future

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47. For an insightful analysis of *Roper*, see Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUP. CT. REV. 51.

48. DiIulio, *supra* note 6. DiIulio describes superpredators as youths who grow up in extreme “moral poverty,” without the care and love of responsible parents who teach their children right from wrong. This leads them to be radically present-oriented, such that they perceive no connection between crime and later punishment, and radically self-regarding, with no feeling for their victims. He predicted tens of thousands of young superpredators would roam the streets in the next decade, committing heinous violent acts for trivial reasons: “They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.” *Id.* Although DiIulio’s prescription for dealing with the crisis was to bring religion into these youths’ lives, others who adopted the image and repeated the frightening predictions argued for harsh justice policies. See FRANKLIN ZIMRING, *AMERICAN YOUTH VIOLENCE* 4–5 (1998) (statement by Bill McCollum before the House Committee on Early Childhood, Youth, and Families in 1996).

49. See RICHARD J. BONNIE ET AL., *CRIMINAL LAW* 14–33 (2d ed. 2004).



crime by discouraging youths from ever getting involved in criminal activity.<sup>50</sup> Policies that emphasize incarceration may also serve a specific deterrent function, influencing youths who fear future punishment not to reoffend after they are released. Here the idea is that the experience of being in prison is sufficiently unpleasant that young offenders will be motivated to stay out of trouble in the future. Moreover, imprisonment prevents crime by incapacitating offenders; young criminals who are locked up cannot be out on the streets committing crimes. Finally, in theory at least, imprisonment could reduce future crime by rehabilitating young offenders so that they will mend their criminal ways, although proponents of tough policies have not emphasized rehabilitation.<sup>51</sup>

Preventive rationales for criminal punishment need not be excessively punitive, of course. Modern theorists who accept that deterrence is the primary justification for punishing criminals may disagree about what *level* of punishment is appropriate. As we discuss in Part IV, some legal theorists support that prevention of crime is a legitimate justification for criminal punishment but argue that the appropriate amount of punishment is limited by the retributive principle of proportionality.<sup>52</sup> But politicians in the 1980s and 1990s often seemed unconcerned with fairness constraints, arguing that harsh punishment of juveniles was necessary to contain the epidemic of youth crime.

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

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

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

*B. Changing Crime Rates and the Effectiveness of Punitive Policies*

Supporters of the recent reforms may point to the fact that juvenile crime has declined substantially since the early 1990s as evidence that they have succeeded in achieving their crime-reduction goal. On this account, youths who might be inclined to engage in criminal activity are deterred because they now realize that real consequences will follow. Bad kids who did not get the message are locked up (and will learn from the experience to stay out of trouble in the future). So, to what extent does the decline in criminal activity indicate that the reform policies are working?

Although crime rates should fall if tough sanctions in fact deter crime, criminologists who study both adult and juvenile crime emphasize that we cannot assume that changes in crime rates are caused by changes in penal policy affecting the harshness of punishment. Historical reviews indicate that crime rates fluctuate over time and that many factors contribute to the variations. Criminologists agree that crime rates fell (from extraordinarily high rates) for much of the nineteenth century and began to rise again in the mid-twentieth century. There is no agreement, however, about what explains this trend.<sup>53</sup> Demographics may be an important factor; some experts have suggested that crime rates are correlated with the percentage of teens and young men in the population at a given time.<sup>54</sup> Others point to cultural and religious influences. James Q. Wilson and Richard Herrnstein, for example, have argued that declining crime rates in the nineteenth century were a product of a period of religious revivalism and moral awakening that affected the socialization of children in families, schools, and communities.<sup>55</sup> Some criminologists attribute the sharp rise in juvenile homicide in the late 1980s to the easy availability of cheap guns.<sup>56</sup> Why were teens able to get firearms

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53. Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, in 26 *CRIME AND JUSTICE* 3 (Michael Tonry & Joan Petersilia eds., 1999).

54. James Alan Fox & Alex R. Piquero, *Deadly Demographics: Population Characteristics and Forecasting Homicide Trends*, 49 *CRIME & DELINQ.* 339 (2003).

55. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985). The argument that today's young criminals are "superpredators," in part, is the mirror image of this argument. According to adherents, these youths lack any sense of moral responsibility because none was instilled by their parents. See *supra* note 48.

56. See ZIMRING, *supra* note 48. According to FBI statistics, homicides by juveniles involving guns increased dramatically in the late 1980s and early 1990s, but other homicides did not—the rate of homicides not involving guns continued at a steady, relatively low rate. *Uniform Crime Reporting Program*

so easily? The explanation may lie partly in developments in technology and marketing, and partly in the successful lobbying efforts of the National Rifle Association.

Crime rates are statistically complex, and during any period, many factors can influence individual decisions about getting involved in criminal activity that in the aggregate constitute crime rates. Changes in justice policies might be important, but assertions that declining juvenile crime rates demonstrate that punitive policies have been effective are naïve, particularly in light of the fact that crime rates began to decline in many states before legal reforms were enacted.<sup>57</sup>

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

Although broad claims about the causes of fluctuations in crime rates are speculative, social scientists have produced a large body of research (mostly focusing on adults) that probes the deterrent effects of criminal sanctions. Perceptual deterrence studies (based on self-reports) provide the most direct evidence of the impact of anticipated punishment on individuals' decisions not to engage in criminal activity, but their reliability is uncertain, and their findings are mixed. Moreover, the extent to which even sincere expressed intentions predict behavior is unclear.<sup>58</sup> Other researchers have focused on more indirect evidence, seeking to link changes in crime rates to particular statutory enactments or changes in law enforcement practices, while controlling, to the extent possible, for other factors that influence crime rates.<sup>59</sup> These

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*Resource Guide*, NAT'L ARCHIVE CRIM. JUST. DATA, <http://www.icpsr.umich.edu/NACJD/ucr.html> (click on "Supplementary Homicide Reports" for each of the years 1976–1992) (last visited Sept. 18, 2010).

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

58. Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in 23 CRIME AND JUSTICE 1, 12–23 (Michael Tonry ed., 1998); Raymond Paternoster & Alex R. Piquero, *Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences*, 32 J. RES. CRIME & DELINQ. 251 (1995). Perceptual deterrence studies are useful as a means to understand how perceptions about the risk and severity of criminal punishment affect expressed intentions about offending. The limitation of this type of research is that the relationship between responses to questions in a study and criminal behavior is uncertain, either because study subjects are not candid or because the actual choice about criminal activity is driven by other factors.

59. For example, in the 1990s, researchers studied patterns of criminal activity responding to recently enacted "three strikes" laws, which mandate a

studies either examine crime rates immediately before and after a policy reform or compare crime rates in states that have adopted enhanced penalties with others that have not.

Experts on deterrence agree that simply having a system of law enforcement and criminal punishment has a general deterrent effect on crime—there would be a lot more crime if there were no criminal justice system.<sup>60</sup> However, as Daniel Nagin, a leading expert on deterrence research, has emphasized, getting useful information about the marginal deterrent impact of particular policy changes is an uncertain business.<sup>61</sup> Studies of the effectiveness of specific policies on criminal behavior have mixed findings. For example, various studies of three-strike laws have found a crime-reduction effect in some states but not in others, and some studies have found that criminal activity actually increased following the enactment of the enhanced penalties.<sup>62</sup> Some studies find an initial deterrent effect of new policies (such as drunk driving laws) that erodes over time.<sup>63</sup>

One explanation for the varied and inconsistent research findings is that many factors contribute to effective deterrence besides the severity of sanctions. Certainty of apprehension and punishment appears to be far more important to deterrence than severity of sanction; potential offenders who fear they will get caught are more likely to be deterred than those who think they will not.<sup>64</sup> If law enforcement is ineffective, or if harsh sentences under the new laws are infrequently imposed or unpredictable, potential offenders may view the risk of arrest and punishment as low, and enhanced penalties will have little deterrent impact. Of course, would-be criminals must also be aware of the increased sanctions in some general way for deterrence to work. Further, the punishment must represent a substantial threat to the individual, in terms of both loss of liberty and social stigma. If many associates

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life sentence on conviction of a third felony. Several types of deterrence research are described by Nagin. *See* Nagin, *supra* note 58, at 2.

60. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS*, 37–44 (1976); Nagin, *supra* note 58.

61. Nagin, *supra* note 58, at 4–8 (describing impediments to evaluating effectiveness of policies).

62. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 *CRIME & JUST.* 143 (2003).

63. H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (1982).

64. Nagin, *supra* note 58, at 12–19.

are subject to the sanctions, their deterrent effect may be diluted.<sup>65</sup> Finally, the added cost to the actor represented by the threat of punishment (along with other costs) must outweigh the anticipated gains of the crime. Ultimately, deterrence theory presumes a rational decision-maker who weighs the expected benefits of criminal activity against the risk and perceived consequences of apprehension and punishment. Conditions affecting this calculus may vary in different localities and among different groups of offenders, contributing to variability in the deterrent effect of new sentencing policies. The upshot is that we have no clear picture of how enhanced criminal sanctions, standing alone, impact criminal activity.<sup>66</sup>

Even assuming that harsh criminal penalties generally have a deterrent effect on criminal activity, it is uncertain whether juveniles will respond in the same way as adults. Two factors that might differentially affect the responses of youths appear to be in tension with one another. First, because of their psychosocial immaturity, youths may be less responsive to the impact of criminal penalties than adults. Developmental influences on decision-making that are likely implicated in youthful decisions to get involved in crime—an inclination to take risks, a tendency to focus on immediate rather than future consequences, susceptibility to peer influence, and impulsivity<sup>67</sup>—in combination may also lead youths to discount or ignore the prospect of harsh punishment. Approval by antisocial peers may be a particularly important influence that undercuts the deterrent effect of severe sanctions. A self-report study of inner-city youths by Wanda Foglia found that the threat of legal sanctions had little impact on delinquent behavior but that peer behavior had a powerful impact, both through concern about social sanctions and through internalized norms.<sup>68</sup>

Although the psychosocial immaturity of adolescents may undercut the deterrent impact of severe sanctions, a second factor

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65. Thus, if criminal arrests and convictions are common in a neighborhood or peer group, the associated stigma may be diluted. *See* Nagin, *supra* note 58.

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

67. *See infra* notes 152–55 and accompanying text. These developmental psychosocial factors contribute to immature judgment in adolescents and likely play a role in the criminal choices of juvenile offenders. *See* SCOTT & STEINBERG, *supra* note 2, at 130–34; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

68. Wanda D. Foglia, *Perceptual Deterrence and the Mediating Effect of Internalized Norms Among Inner-City Teenagers*, 34 J. RES. CRIME & DELINQ. 414 (1997).

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

A small number of studies have sought to gauge the deterrent effect of legislative waiver statutes lowering the age of criminal court jurisdiction in different states, with mixed results.<sup>69</sup> Simon Singer and his colleagues studied the impact of New York's statute categorically lowering the age of criminal court jurisdiction and found no effect on juvenile crime rates over a ten-year period.<sup>70</sup> A study that compared Idaho, a state that adopted a legislative waiver statute, with Montana and Wyoming, states that did not, found that crime rates rose in Idaho and declined in the neighboring states.<sup>71</sup> However, Stephen Levitt examined juvenile crime rates over a 15-year period from 1978 to 1992, analyzing crime rate changes when juveniles reach the age at which they become subject to criminal court jurisdiction. Levitt found that in states with lenient juvenile systems, rates for violent crime declined sharply at the jurisdictional age when youths faced adult sanctions, while crime rates rose when youths attained adult legal status in states with strict juvenile systems and more lenient adult regimes. Levitt concluded that the threat of harsh punishment has a substantial deterrent effect and that much of the increase in juvenile crime in

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69. Richard Redding provides a comprehensive review of the research on the impact of adult punishment on deterrence and recidivism by juvenile offenders. Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128 (2003).

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

71. Eric L. Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96 (1994).

the late 1980s and early 1990s can be attributed to lenient juvenile sanctions.<sup>72</sup>

Levitt's study is the most comprehensive effort to link changes in juvenile crime rates with severity of sanctions in several jurisdictions. His finding that crime rates decline when youths move from a very lenient juvenile justice system into the adult system is not surprising. As we have suggested, youths who perceive that they are insulated from criminal liability in the juvenile system may be deterred when they confront the possibility of tough sanctions in the adult system. The finding that crime rates increase rather dramatically when youths move from a tough juvenile system to a lenient adult system is far more puzzling. We are unfamiliar with states in which criminal court sanctions systematically are more lenient than juvenile court dispositions, and Levitt does not identify which states he classifies in this way.<sup>73</sup>

In sum, the research on the general deterrent effect of legal regulation on juvenile crime is sparse and gives no clear answer to the question of whether legislative waiver laws and other punitive measures reduce juvenile crime. The evidence that the reforms have contributed to the decline in crime rates is weak. Although Levitt offers some indirect support for the idea that the transformation of youth crime policy has had a deterrent impact, most other researchers have not found support for the conclusion that particular punitive laws deter youths from engaging in criminal conduct.

#### *D. Specific Deterrence—Do Punitive Laws Reduce Recidivism?*

Some researchers have sought to measure the specific deterrent effect on juvenile crime of the punitive reforms by examining whether criminal prosecution and punishment reduce recidivism. Given that the recent legal changes have altered dramatically the risks facing youths who get involved in crime, it would be useful

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72. Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECONOMY 1156 (1998).

73. Levitt calculated the relative punitiveness of each state's adult and juvenile system and then examined the time path of criminal involvement before and after the age of majority. His measure of the relative punitiveness of a state's adult and juvenile system involved comparing the ratio of adult prisoners to adult violent crime in a state with the number of juvenile delinquents to juvenile violent crimes. This measure has been criticized by Doob and Webster, who question it in part on the basis that the statistics on which the calculus is based are unreliable. Doob & Webster, *supra* note 62. Further, the 22% jump in violent crime from age 17 to 18 in states where the transition is to a more lenient adult system is puzzling, given that the criminal system is universally harsher than the juvenile system.

to know whether youths who experience harsh punishment then alter their future behavior. These offenders know about the risk of punitive sanctions, and they know that they may be caught and punished. Are they more likely to desist from criminal activity than those who are dealt with more leniently? The answer should be “yes” according to deterrence theory and advocates for adult punishment.

Research based on interviews of young offenders indicates that being tried in criminal court causes some youths to understand for the first time that their criminal conduct had serious consequences.<sup>74</sup> As a youth in one study explained, “When you are a boy, you can be put into a detention home. But you can go to jail now. Jail ain’t no place to go.”<sup>75</sup> However, it is not clear whether or to what extent actual involvement in crime is affected by this awareness. Another study found that youths interviewed upon release from prison reported intentions not to get involved in crime again, but that follow-up analysis of recidivism rates suggested that they had not adhered to their plans.<sup>76</sup> Moreover, some researchers have found that youths in prison are less likely to forswear future criminal activity than their counterparts in juvenile facilities.<sup>77</sup> Lawrence Sherman and others have argued that juveniles who are punished as adults become defiant at the perceived injustice of the severe sanctions they receive and reject the system as illegitimate.<sup>78</sup> In short, it is not clear whether youths who are tried and punished as adults learn the lessons that policy makers aim to teach in a way that deters their antisocial conduct.

Another method of evaluating the specific deterrent effect of adult sanctions is to compare recidivism rates of youths prosecuted and punished in the adult system with those who are sanctioned as

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74. Richard E. Redding & Elizabeth J. Fuller, *What Do Juvenile Offenders Know About Being Tried as Adults? Implications for Deterrence*, 55 JUV. & FAM. CT. J. 35 (2004). They quote one youth: “Before, I thought that since I’m a juvenile I could do just about anything and just get six months if I got caught.” *Id.* at 39.

75. Barry Glassner et al., *A Note on the Deterrent Effect of Juvenile vs. Adult Jurisdiction*, 31 SOC. PROBS. 219 (1983).

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

77. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 227, 250 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); see also Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1 (1989).

78. Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445 (1993).



juveniles. Most studies undertaking this comparison have found higher recidivism rates among juveniles tried and punished as adults. However, these studies often are seriously flawed by selection bias in that the two groups of youths differed in *other* ways that may have affected recidivism. For example, transferred youths may have been involved in more serious criminal activity or had more serious criminal records and thus have been more likely to recidivate *ex ante*.<sup>79</sup> In other studies, differences in the length of the incarceration period make comparison difficult.<sup>80</sup> But two studies in the 1990s tried with more success to control for these differences. One group of researchers led by Donna Bishop and Charles Frazier compared a group of 2,700 Florida youths transferred to criminal court, mostly based on prosecutors' discretionary authority under Florida's direct-file statute, with a carefully matched group of youths retained in the juvenile system.<sup>81</sup> In another study, Jeffrey Fagan and his colleagues compared 15- and 16-year-old youths charged with robbery and burglary in several counties in metropolitan New York and in demographically similar counties in New Jersey.<sup>82</sup> The legal settings differed in that New York juveniles who are charged with robbery and burglary are automatically dealt with in the adult system at age 15 under that state's legislative waiver statute, while

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

80. One example is a study by Robert Barnoski examining the effect on recidivism of adult sentencing under Washington's statute mandating adult processing of youths charged with certain crimes. The study found that adult sanctions had no short-term effect on reoffending. See Barnoski, *supra* note 29, at 21–23. The study is of limited value because, at the time of the study, only 23% of the youths sentenced under the automatic transfer statute had been released. Further, because the statutory change was relatively recent (and because many youths in the study were still incarcerated), it was not possible to compare long-term effects on recidivism.

81. Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996); Bishop & Frazier, *supra* note 77.

82. Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, 18 LAW & POL'Y REV. 77 (1996); Jeffrey Fagan, Aaron Kupchik & Akiva Liberman, *Be Careful What You Wish for: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court* (Columbia Law Sch., Pub. Law Research Paper No. 03-61, 2007), available at <http://ssrn.com/abstract=491202>.

in New Jersey, transfer is rarely used and the juvenile court retains jurisdiction over almost all youths charged with these crimes.

Fagan found that youths convicted of robbery in criminal court were rearrested and incarcerated at a higher rate than those who were dealt with in the juvenile system, but that rates were comparable for burglary, a less serious crime. The risk of re-arrest within three years of "street time" was 29% lower for the New Jersey youths convicted of robbery in juvenile court than for the New York juveniles who were sanctioned in the criminal system. The study also examined the number of days until rearrest and found a similar pattern; the youths sentenced for robbery in criminal court reoffended sooner than their juvenile court counterparts (457 days after first release for the criminal court offenders versus 553 days for juvenile court offenders.) There was no difference between the two groups convicted of burglary. Recidivism was not affected by sentence length; longer sentences were not more effective at deterring recidivism than shorter sentences. The upshot is that youths convicted of robbery who were punished as adults were more likely to recidivate than youths who were dealt with in the juvenile system.<sup>83</sup>

The findings of the Florida study also suggest that juvenile sanctions may reduce recidivism more effectively than criminal punishment. This study measured only rearrest rates and found lower rates for youths who were retained in juvenile court than youths who were transferred. The follow-up period in this study was relatively brief—less than two years.<sup>84</sup> During this period, 29% of the transferred youths were rearrested as compared to 19% of the youths in the juvenile system. The researchers also calculated yearly rearrest rates, which was .54 offenses per year for the transferred group versus .32 for the retained youths. Transferred youths who were rearrested were apprehended sooner after their release than juvenile system youths—135 days after release versus 227 days. Youths who were incarcerated in the adult system received longer sentences; the mean number of days served was 245 versus 90 days served by those who were incarcerated in the juvenile system. As in the New York–New Jersey study, longer sentences did not have a deterrent effect.

The studies finding that adult punishment may contribute to recidivism in young offenders charged with violent crimes seem to

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83. Fagan, Kupchik & Liberman, *supra* note 82. Robbery is classified as serious violent crime because it involves a threat of the use of force. Burglary does not and for this reason is a less serious crime.

84. Bishop et al., *supra* note 81. The period for measuring recidivism was from the date of case closing in 1987 until December 31, 1988.

undercut the claimed crime-reduction benefits of the recent reforms. The findings should be viewed with caution, however. In both studies, the two groups of offenders (or the two settings in Fagan's study) may differ from one another in subtle ways other than in the sanction the youths received. These researchers have mitigated this problem far better than earlier studies: Fagan by comparing two jurisdictions that dealt with the same offenses differently and Bishop and Frazier by matching each youth with a counterpart on several variables, including criminal charges, number of prior referrals, and most serious prior offense. Nonetheless, it is possible that, in Florida, prosecutors used other, more subtle distinctions as a basis of filing charges in criminal court such that more antisocial youths were dealt with in the adult system. Moreover, as the researchers concede, the police may have monitored youths who had been in the criminal system more closely than others, resulting in a higher rearrest rate. In Fagan's study, New York prosecutors had charging discretion that may have affected the composition of the study cohort. For example, 15-year-old youths who seemed less culpable may have been charged with lesser crimes than robbery, so that they would not be prosecuted as adults. Thus, the cohort of young robbers in that state may be more serious offenders than in New Jersey, where almost all youths are retained in the juvenile system, giving prosecutors little reason to discriminate in their charging decisions.<sup>85</sup> Moreover, law enforcement may be more aggressive and effective in New York than in New Jersey, leading to higher rearrest rates in the former jurisdiction.

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

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

*E. Lowering Juvenile Crime Rates Through Incapacitation*

Youths who are inclined to commit crimes are constrained from doing so if they are incarcerated. Thus, although it is unclear whether harsh sanctions generally deter youths from criminal activity or reduce recidivism, imprisonment certainly can reduce crime through incapacitation.<sup>86</sup> Supporters of the recent reforms may point to this reality as powerful evidence that tough sanctions indeed can lower crime rates, despite the lack of evidence that young criminals are deterred. The unassailable logic is that the more time young criminals spend in prison, the less time they are on the street getting in trouble.

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

There is another important consideration to be weighed. Almost all incarcerated youths *will* be released at some point to rejoin society; thus, the impact of incarceration on reoffending and generally on offenders' future lives must be considered in calculating its costs and benefits. For some youths, the risk of recidivism is high at the outset (based on their prior record, for example), and if they caused serious harm through their criminal activity, the costs of extensive incapacitation may be justified on social welfare grounds. But many youths are not in this category, and as lawmakers have expanded the category of young offenders

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86. It is sometimes difficult to distinguish whether fluctuations in crime rates in response to changes in criminal sanctions are a result of incapacitation or deterrence, and deterrence studies have sometimes been critiqued on this ground. For example, Steven Levitt, in a study of the impact of a federal court mandate that Alabama reduce its prison population to prevent overcrowding, concluded that an increase in crime that followed the judicial order was largely the result of weakened deterrence. Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996). Anthony Doob and Cheryl Webster challenge this conclusion, arguing that, because many prisoners were released and prison was used more sparingly in response to the court order, many criminals were on the street where they were free to commit crimes. Doob & Webster, *supra* note 62.

who are subject to harsh sanctions to include moderate-risk offenders, the marginal benefits of incapacitation have declined. At some point, the cost of sanctions involving long periods of incarceration will exceed the benefits, particularly if these costs include increasing the risk of reoffending in the future.

#### *F. Summary*

The research that we reviewed provides no clear answer to the question of how much the criminalization of juvenile justice policy contributed to the declining crime rate of the past decade. Our review leads us to conclude that the punitive reforms likely *have* had some effect, at least in the short term, through increased incapacitation—both in the adult and juvenile systems—and possibly through general deterrence as well. Theory and research on adults support the view that a justice regime that signals to youths that they will be held accountable for their misdeeds may deter crime more effectively than one in which they think their status as juveniles shields them from punishment.<sup>87</sup> It is not at all clear, however, whether the legal changes of the past generation are optimal or excessive as the means of bringing about changed perceptions. It is plausible that more lenient juvenile crime policy grounded in accountability and certainty of sanction may shape perceptions in ways that influence behavior as effectively as the current regime with a more modest budgetary impact and fewer collateral costs.

Beyond this, the evidence does not support the claims by supporters of the punitive reforms that juveniles will be deterred by tough sanctions or that the reforms are responsible for the decline in juvenile crime rates that began in the mid-1990s. In many states, such as California, juvenile crime rates had been steadily declining for several years *before* legislatures enacted tough reforms.<sup>88</sup> Moreover, although the research findings are mixed, most studies find no evidence that the enactment of automatic transfer laws has discouraged youths generally from getting involved in crime. Somewhat more surprisingly, perhaps, the research does not indicate that those young offenders who are sentenced to prison for violent offenses are less likely to offend upon release by virtue of that experience; indeed, the existing studies suggest that they have

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87. This would be compatible with the uncontroversial view among criminologists that having a criminal justice system has a general deterrent effect as compared to a world without criminal sanctions. See Redding & Fuller, *supra* note 74, at 39; *supra* note 58.

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

higher recidivism rates than their counterparts in the juvenile system and that sentence severity does not appear to affect recidivism. In short, the argument that public safety will be promoted if youths get “adult time for adult crime” has little empirical support. Given that this claim is at the heart of the preventive argument for harsh sanctions, the case for get-tough policies is far weaker than its supporters acknowledge.

### III. ADOLESCENT DEVELOPMENT AND OPTIMAL JUSTICE SYSTEM INTERVENTIONS

The dearth of evidence supporting the effectiveness of tough sanctions in deterring youthful criminal activity becomes less puzzling when we consider the responses of young offenders in light of the scientific knowledge about adolescence. First, as we have suggested, due to their psychosocial immaturity, teens on the street deciding whether to hold up a convenience store may simply be less capable than adults of considering the sanctions they will face. Thus, the developmental influences on decision-making that likely shape their decisions to get involved in criminal activity may also make adolescents less responsive to the threat of criminal sanctions.<sup>89</sup> Beyond this, however, sanctions themselves may vary in their impact on the future developmental trajectories of adolescents in ways that are important to recidivism. The research supports the conclusion that prison provides an aversive social context that inhibits youths from accomplishing developmental tasks of adolescence that are essential to the transition to non-criminal adulthood. In contrast, the juvenile system potentially can do a better job of responding to developmental needs. Although long incarceration in any institutional setting, whether adult or juvenile, is unlikely to have a beneficial impact on development, many juvenile facilities and community programs offer youths developmental settings that can facilitate healthy maturation. In general, scientific knowledge about adolescence reinforces the lesson that a legal regime that aims to reduce recidivism will deal with most young offenders in the juvenile system.

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

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

### *A. Lessons from Developmental Research*

Developmental research offers two lessons that together underscore the importance of correctional interventions in shaping the trajectories of young offenders’ lives. First, many adolescents engage in criminal activity, but are likely to desist as they mature into adulthood. Developmentalists explain that risky experimentation is a part of identity formation for many teens. Thus, psychologist Terrie Moffitt has observed that, for adolescent boys, getting involved in criminal activity is “a normal part of teenage life.”<sup>90</sup> But most youths mature out of their criminal tendencies; only about 5% are incipient career criminals.<sup>91</sup> Criminologists find that the crime rate peaks at age 17 and then declines steeply.<sup>92</sup> The upshot is that much adolescent criminal activity is “normative” behavior, as psychologists use this term, and not indicative of bad character or criminal predisposition. In responding to the criminal conduct of juveniles, society has an important interest in facilitating their transition to non-criminal adulthood.

The second lesson of developmental science is just as important to achieving the goal of reducing the social cost of juvenile crime. Mid- and late-adolescence are periods in which individuals normally make substantial progress in acquiring and coordinating skills that are essential to self-sufficient adulthood. First, individuals begin to acquire basic educational and vocational skills to enable them to function in the workplace as productive members of society. They also acquire the social skills necessary to establish stable intimate relationships and to cooperate in

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90. See Moffitt, *supra* note 12.

91. See *supra* note 12 (describing studies finding that a small percent of youths commit most crimes). Moffitt labeled this group “life-course-persistent” offenders. Moffitt, *supra* note 12.

92. Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, in 30 CRIME AND JUSTICE 359 (Michael Tonry ed., 2003).

groups. Finally, they must begin to learn to behave responsibly without external supervision and to set meaningful personal goals for themselves. For most individuals, the process of completing these developmental tasks extends into early adulthood, but making substantial progress in adolescence is important.

This process of development toward psychosocial maturity is one of reciprocal interaction between the individual and her social context. Healthy social contexts provide “opportunity structures” that facilitate normative development, but social contexts can also undermine this process.<sup>93</sup> Several environmental conditions are particularly important—the presence or absence of an authoritative adult parent figure; association with prosocial or antisocial peers; and participation or non-participation in educational, extracurricular, or employment activities that facilitate the development of autonomous decision-making and critical-thinking skills. For the youth in the justice system, the correctional setting becomes the environment for social development and may affect whether he makes the transition to conventional adult roles successfully.<sup>94</sup>

Normative teens who get involved in crime do so, in part, because their choices are driven by developmental influences typical of adolescence. In theory, they should desist from criminal behavior and mature into reasonably responsible adults as they attain psychosocial maturity. We have indirect evidence that many young offenders follow this process as predicted; the crime rate drops off sharply in late adolescence, and the research shows that desistance is often linked to achieving stable employment or a satisfying marriage.<sup>95</sup> Whether youths successfully make the transition to conventional adult roles, however, depends in part on whether their social context provides opportunity structures for

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93. Urie Bronfenbrenner & P.A. Morris, *The Ecology of Developmental Processes*, in HANDBOOK OF CHILD PSYCHOLOGY 993 (5th ed. 1998); He Len Chung, Michelle Little & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET 68 (D. Wayne Osgood et al. eds., 2005).

94. Chung, Little & Steinberg, *supra* note 93.

95. JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003) [hereinafter *SHARED BEGINNINGS*]; ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 *CRIME & JUST.* 1 (2001). Sampson and Laub treat marriage and employment as fortuitous exogenous events that facilitate desistance. It seems more likely that some youths are able to succeed in these adult roles because they have attained psychosocial maturity, while others who fail to successfully complete developmental tasks do not make this transition.



successfully completing the developmental tasks described above.<sup>96</sup>

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

### *B. Prisons as Developmental Settings*

In most states, youths in prison are treated like other inmates, receiving few or no special accommodations or programs in recognition of their developmental needs. Many features of the typical prison make it a harmful environment for adolescent offenders.<sup>97</sup> First, prisons are generally much larger institutions than juvenile facilities. According to one estimate, more than 40% of prisons house more than 500 prisoners; many have an inmate population of more than 1,000.<sup>98</sup> Even the largest training schools house on average about 125 youths, and other residential programs are far smaller.<sup>99</sup> Institutional size affects the experience of inmates

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96. Laurence Steinberg, He Len Chung & Michelle Little, *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21 (2004).

97. Donna Bishop and Charles Frazier have provided an excellent comparison of youths' experiences in prison and juvenile facilities based on their research and other studies. Our discussion of these issues draws on their account. See Bishop and Frazier, *supra* note 77, at 251–61. Another useful study by Forst, Fagan, and Vivona compared reports of their incarceration experience by youths on release from prison with that of youths on release from training schools. See Forst, Fagan & Vivona, *supra* note 77. The authors of one national survey summarized their findings by reporting that they found “little evidence of efforts to customize programs for youthful offenders.” JAMES AUSTIN, KELLY DEDEL JOHNSON & MARIA GREGORIOU, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, at xi (2000).

98. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 1995, at v (1997).

99. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONAL FACILITIES 24 (1994).

in several ways. In large institutions, violence levels are higher, staff–inmate relationships are more impersonal, and the organizational structure is more rigid.<sup>100</sup> Researchers have found that recidivism rates among juvenile offenders increase with the size of the institution.<sup>101</sup>

The function of prison is to punish and confine criminals and in the organization and staffing reflect that purpose. More than two-thirds of prison employees are uniformed guards and other security staff whose job is to maintain order and security by monitoring inmates.<sup>102</sup> Although some educational and counseling programs may be provided, these services are not readily available and are often add-ons provided by adjunct staff and not integrated into prison life. Some states provide special instructional programs in prisons for minors, but this is by no means the norm, and young prisoners have no right to educational services comparable to those offered to non-institutionalized youths.<sup>103</sup> One study reported that the teacher-to-student ratio in prisons was 1:100, and that fewer than 40% of inmates received any academic instruction.<sup>104</sup> Counseling, therapeutic, and occupational training staffs generally are scarce in prisons; fewer than 10% of prisoners in one study were involved in any kind of counseling program.<sup>105</sup>

These dimensions of prison organization shape the experience of youths incarcerated in the adult system in ways that are likely to undermine healthy psychosocial development. First, adult authority figures are unlikely to have a positive influence. Researchers report that correctional officers, whose job is to maintain security, have impersonal, authoritarian, and often hostile relationships with inmates. Not surprisingly, young prisoners, in turn, express hostility toward staff, who are perceived as being unconcerned about inmates' welfare and uninterested in helping young inmates to

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100. Kenneth Adams, *Adjusting to Prison Life*, 16 CRIME & JUST. 275 (1992).

101. RICHARD A. MENDEL, AM. YOUTH POLICY FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T (2000).

102. See AUSTIN, JOHNSON & GREGORIOU, *supra* note 97; Bishop et al., *supra* note 81.

103. See AUSTIN, JOHNSON & GREGORIOU, *supra* note 97. In *Tunstall ex rel. Tunstall v. Bergeson*, 5 P.3d 691 (Wash. 2000), the Washington Supreme Court found that juveniles held in adult facilities had no right to general elementary or secondary educational services at the same level of quality as their non-institutionalized peers. See also *Handberry v. Thompson*, 436 F.3d 52, 71 (2d Cir. 2006).

104. ALLEN BECK ET AL., BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991 (1993).

105. Bishop & Frazier, *supra* note 77, at 256. Bishop & Frazier suggest that the custodial staff tend to view treatment professionals with suspicion and hostility. Their role is not integral to the operation of the prison.

develop social skills, improve relationships, or deal with problems.<sup>106</sup> Further, with little in the way of education, occupational training, or rehabilitation, many prisons provide minimal positive structure for inmates' daily lives. In these facilities, much time is spent in cells or in the prison yard with other prisoners under the surveillance of guards on the perimeter.<sup>107</sup>

Frequent opportunities for interaction among prisoners together with distant relationships with staff combine to create an aversive developmental context. Although youths are separated from adults in some prisons, this is not the case in most facilities.<sup>108</sup> According to reports by young prisoners, experienced criminals teach them strategies and methods for engaging in criminal activity and avoiding detection.<sup>109</sup> Young inmates are also more likely to be victimized than older prisoners or their counterparts in juvenile facilities; ten times as many youths in prison report sexual assaults as youths in juvenile facilities.<sup>110</sup> In some facilities, young prisoners who are targets of older predators are isolated for their own protection, apparently because isolating victims is easier than restraining attackers.<sup>111</sup> Most prisoners decline to report victimization to prison officials; to do so is a serious violation of prison norms against snitching and may only increase vulnerability to attack. Young prisoners often attempt to protect themselves from victimization by responding aggressively to threats, which can result in disciplinary sanctions.<sup>112</sup>

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

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106. *Id.*

107. *Id.*

108. AUSTIN, JOHNSON & GREGORIOU, *supra* note 97. States with Youthful Offender statutes, like New York, separate youths in adult prisons from adults. Austin and colleagues found that juvenile and adult prisoners were separated in 13% of facilities. For a guide to developmentally-based treatment of juveniles in adult prisons (emphasizing separation from adult prisoners), see AM. BAR ASS'N, YOUTH IN THE CRIMINAL JUSTICE SYSTEM (2001).

109. Bishop & Frazier, *supra* note 77, at 257.

110. Forst, Fagan & Vivona, *supra* note 77.

111. *Id.*

112. Bishop & Frazier, *supra* note 77; see also Richard McCorkle, *Personal Precautions to Violence in Prison*, 19 CRIM. JUST. & BEHAV. 160 (1992).

engage in aggressive conduct to prove their toughness and masculinity and thereby attain higher peer status.<sup>113</sup>

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

Moreover, the harmful effects of imprisonment follow young offenders after they are released in ways that amplify its negative impact on psychosocial development. A felony conviction is a stigmatic signal that carries legal disabilities such as disenfranchisement and exclusion from military service (which has been found to be another pathway to desistance for young offenders).<sup>114</sup> Just as important are the informal handicaps that undermine the ability of young felons to move into conventional adult roles. Disclosure of a criminal record is mandatory in many settings and often the criminal conviction will bar educational and employment opportunities. Further, a youth who has been in prison may find it much harder to develop social relationships with peers who are not involved in crime. Thus, youths who serve time in prison are severely handicapped in their efforts to find meaningful legal employment or to establish stable intimate relationships or marriages, the two most important factors associated with desistance from involvement in crime.

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113. Bishop and Frazier offer this hypothesis. Bishop & Frazier, *supra* note 77, at 257–58; see also Marilyn McShane & Frank Williams, *The Prison Adjustment of Juvenile Offenders*, 35 CRIME & DELINQ. 254 (1989). These researchers found that serious and violent juvenile offenders in prison engaged in misconduct at a rate twice that of similar offenders age 17 to 21.

114. Sampson and Laub found that military service, along with marriage and stable employment, was another pathway to desistance for many young offenders. LAUB & SAMPSON, *SHARED BEGINNINGS*, *supra* note 95, at 41–51.

*C. Juvenile Facilities as Developmental Settings*

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

Although the regulation of youth crime has become harsher over the past generation, juvenile facilities and programs in many states continue to recognize that convicted youths are adolescents with developmental needs. Thus, juvenile facilities tend to offer environments that are less purely custodial than typical prisons. In many juvenile facilities, a relatively large number of line staff perform educational and counseling duties. Ninety-five percent of training schools have a ratio of at least one teacher per 15 youths, and two-thirds have one counselor for every ten youths.<sup>115</sup> Even in states that have enthusiastically embraced punitive reforms, the programs in and organization of juvenile facilities often are based on a developmental therapeutic model. For example, in Florida, which transfers many youths and imposes harsh adult sentences on juveniles,<sup>116</sup> the juvenile system's correctional programs are based on empirically-validated cognitive behavioral principles that guide staff behavior and staff-resident interaction.<sup>117</sup> Residents' daily

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115. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 99.

116. In 2010, the United States Supreme Court reviewed two cases in which Florida youths received sentences of life without parole for non-homicide offenses and found this sentence to be unconstitutional for juveniles under the Eighth Amendment. Most of the cases in which this sentence was imposed were Florida cases. See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

117. Cognitive behavior therapy is the basis for many successful delinquency programs. See J.J. Platt & M.F. Prout, *Cognitive-Behavioral Theory and Interventions for Crime and Delinquency*, in BEHAVIORAL APPROACHES TO CRIME AND DELINQUENCY 477 (Edward Morris & Curtis Braukmann eds., 1987).

schedules include academic classes, skills training, counseling, and recreational activities.<sup>118</sup>

There is some evidence that these distinctive programmatic aspects of the juvenile system affect the social environment of youths in ways that contribute positively to psychological development. Self-report studies find that youths in juvenile facilities have far more positive attitudes toward staff than do young prisoners in the adult system. In general, the former group report that staff are concerned about their welfare, encourage them to participate in programs, and attempt to help them develop social skills and solve problems.<sup>119</sup> Offenders in juvenile facilities are also more likely than youths in prison to say that they intend to avoid criminal activity in the future. When asked to evaluate programs, youths reported benefitting the most from long-term intensive programs in which they developed relationships with caring counselors, particularly programs that were directed at improving social skills and self control.<sup>120</sup> In effect, these youths reported that staff in their facilities provided the social conditions and experiences that research indicates facilitate the attainment of psychosocial competence. As we will see shortly, the characteristics of programs that youths found most helpful are those that researchers have correlated with reduced recidivism.<sup>121</sup>

#### *D. Youths in Community-Based Programs*

Even under contemporary law, a large percentage of youths serve all or part of their delinquency dispositions in their communities rather than in correctional facilities.<sup>122</sup> For many offenders, community sanctions may be optimal—they are lower in cost than confinement in a correctional facility and offer a better context for navigating the transition to productive adulthood. Many

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118. See Bishop & Frazier, *supra* note 77.

119. See *id.*; Forst, Fagan & Vivona, *supra* note 77.

120. Bishop & Frazier, *supra* note 77.

121. See *infra* notes 130–43 and accompanying text.

122. See SNYDER & SICKMUND, *supra* note 21 (citing Office of Juvenile Justice and Delinquency Prevention statistics showing that 54% of youths receive some form of probation). Community sanctions today extend to many youths who a generation ago were processed informally and diverted from the justice system. In Boston, for example, probation officers visit their charges' homes unannounced in the evening hours to check on compliance with curfews. See *Operation Night Light—Boston, MA*, OFF. JUV. JUST. & DELINQ. PREVENTION, [http://www.ojjdp.ncjrs.gov/pubs/gun\\_violence/profile33.html](http://www.ojjdp.ncjrs.gov/pubs/gun_violence/profile33.html) (last visited Aug. 22, 2010). Some research suggests, however, that closely supervised probation is not associated with lower recidivism rates. See AOS, *supra* note 34.

normative adolescents will be better off if they are not removed from their families, schools, and communities. For non-delinquent youths, these social environments provide the opportunity structures for completing the developmental tasks that are the basis of psychosocial maturity. Residential facilities, even those that are organized to respond to adolescents' developmental needs, are generally not ideal settings for acquiring the skills necessary to make a successful transition to adulthood, particularly if youths are confined for long periods. Delinquent youths will ultimately return to their communities and must be able to function in the social contexts that constitute their world.

An obvious problem with community sanctions for some delinquent youths is that their families, peer groups, neighborhoods, and schools may undermine rather than support healthy psychosocial development. Criminologists explain that toxic social contexts contribute to youthful offending.<sup>123</sup> Young offenders are likely to continue their involvement in criminal activity unless something changes in the setting or in their ability to avoid negative influences. Youths whose friends are involved in crime, whose parents are deficient, and whose schools are dangerous settings that lack resources may find it hard to stay in the community and *not* get into trouble again. Thus, an important goal of any community-based disposition is to minimize the impact of negative social contexts by providing delinquent youths with tools to deal in self-protective ways with their social environment and also to facilitate and reinforce settings that promote healthy development.<sup>124</sup> As we will see shortly, these strategies characterize programs that are successful at reducing recidivism.

The goal of changing the interaction between the youth and his social environment is also important for the offender who returns to his community after a period of incarceration. A "reentry" period of structured supervision and support can enhance the youth's ability to function in his community in ways that minimize the likelihood that he will simply reconnect with antisocial peers and resume his involvement in criminal activity. The developmental benefits of programs in correctional facilities can be lost when youths return to their communities and neighborhoods unless they receive support during the transition. Recent research

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123. Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 535-38 (1999); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in YOUTH ON TRIAL 371 (Thomas Grisso & Robert Schwartz eds., 2000).

124. One of the most successful community-based programs, Multi-Systemic Therapy, uses an ecological approach. See *infra* notes 133-36 and accompanying text.

indicates that youths who have been released from institutional placement are more likely to reoffend when they return to environments characterized by bad parenting and, especially, the presence of antisocial peers.<sup>125</sup> Increasingly, effective correctional programs include intensive community probation to assure that interventions have a lasting impact.

Community sanctions grounded in developmental knowledge are quite different from those employed by the traditional juvenile court, where loosely supervised probation was a standard disposition for less serious and first-time offenders. If offenders who are subject to community sanctions are not carefully supervised, and if the criminogenic influences in their social environment are not addressed, many will not desist from criminal activity. Moreover, an important lesson of the deterrence research is that young offenders must understand that they will be punished for the harms they cause. The traditional courts, in meting out community probation (and little else) to many young offenders, failed to communicate this message and apparently achieved little deterrence. Some localities have found that sanctions that include not only therapeutic and skill-building programs, but also compensation to victims, community service, close supervision, and the enforcement of probation conditions such as curfews and orders to avoid antisocial peers, are more effective in promoting accountability and reducing recidivism.<sup>126</sup> Supporters of harsh sanctions are suspicious of community-based programs, in part because they assume that public protection requires incarceration of many young offenders. Whether this is true depends in part on the effectiveness of community-based programs in reducing recidivism. Although traditional probation has not been successful at achieving this goal, developmental knowledge suggests that interventions that alter criminogenic social contexts and provide youths with tools that can assist them to attain psychosocial maturity may be more effective. If community interventions are effective in reducing reoffending by youths who otherwise would be confined, they may be superior on public welfare grounds, given that they are less costly financially and less disruptive to young offenders' lives. We turn next to the empirical evidence, which indicates that some community-based programs indeed are effective at reducing crime.

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125. Edward Mulvey, Maryfrances Porter & He Len Chung, *Building Pathways out of Crime and Delinquency for Serious and Violent Juvenile Offenders 16–20* (2002) (unpublished manuscript).

126. SNYDER & SICKMUND, *supra* note 21. Figures show increases in formal versus informal processing since the mid-1980s.



*E. What Works with Young Offenders?*

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

Until the 1990s, most researchers who studied juvenile delinquency programs might well have answered that the system had little to offer in the way of effective therapeutic interventions; the dominant view of social scientists in the 1970s and 1980s was that “nothing works” to reduce recidivism with young offenders.<sup>127</sup> Today the picture is considerably brighter, in large part due to a substantial body of research produced over the past 15 years showing that many juvenile programs, both in the community and in institutional settings, have a substantial crime-reduction effect; for the most promising programs that effect is in the range of 20 to 30%.<sup>128</sup> Moreover, by applying meta-analysis, a relatively new quantitative method for coding, analyzing, and accurately comparing the findings of many related studies, researchers are able to sort the types of interventions that are promising from those that are ineffective and clarify the attributes of effective programs.<sup>129</sup> An increased focus on research-based programs

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127. DOUGLAS LIPTON, ROBERT MARTINSON & MELANIE WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* (Susan Martin, Lee Sechrest & Robin Redner eds., 1981); Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 *PUB. INT.* 22 (1975).

128. PETER GREENWOOD, *CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY* (2006); Steve Aos et al., *The Comparative Costs and Benefits of Programs to Reduce Crime*, WASH. ST. INST. FOR PUB. POL’Y (May 2001), <http://www.wsipp.wa.gov/rptfiles/costbenefit.pdf>.

129. See Mark Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Young Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 *VA. J. SOC. POL’Y & L.* 611 (1999). Researchers began to use meta-analysis to evaluate the effectiveness of juvenile programs in about 1990, and numerous meta-analyses have been undertaken. See *id.* at 613 n.6. Lipsey’s analyses of juvenile programs are very comprehensive, and he is prominent among researchers using this now widely-used methodology. See also Aos et al., *supra* note 128.

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

In general, successful programs are those that attend to the lessons of developmental psychology, seeking to provide young offenders with supportive social contexts and assist them in acquiring the skills necessary to change problem behavior and attain psychosocial maturity. In his comprehensive meta-analysis of 400 juvenile programs, Mark Lipsey found that among the most effective programs in both community and institutional settings were those that focused on improving social development skills in the areas of interpersonal relations, self control, academic performance, and job skills.<sup>130</sup> Some effective programs focus directly on developing skills to avoid antisocial behavior, often through cognitive behavioral therapy, a therapeutic approach with substantial empirical support.<sup>131</sup> For example, Aggression Replacement Training is a cognitive-behavioral intervention that focuses on anger control, prosocial skill development, and moral reasoning. Other interventions that have been shown to have a positive effect on crime reduction focus on strengthening family support. In Functional Family Therapy, for example, therapists work in youths' homes to improve emotional connections between parents and children and strengthen parents' abilities to provide structure and limits for their children. This approach explicitly recognizes the importance of authoritative parenting for healthy

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130. Mark Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, in *WHAT WORKS: REDUCING REOFFENDING* 63 (James McGuire ed., 1995). Lipsey found a broad range of programs to have some effectiveness at reducing recidivism (although results are not always consistent) from formal restitution, to therapeutic wilderness interventions, to "wraparound" programs that combine intensive supervision with individualized treatment provided by collaborative interagency teams.

131. Cognitive behavioral therapy is employed in many juvenile correctional programs, both in residential facilities and community settings. It is a problem-focused approach that is designed to help individuals identify beliefs, thoughts, and behaviors that contribute to their problems—in the case of delinquent youths, to alter contributors to criminal conduct. It has been used extensively with youths with substance abuse problems that are linked to their criminal conduct. See Platt & Prout, *supra* note 117; see also AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY AND VIOLENCE* (1999); JUDITH S. BECK, *COGNITIVE THERAPY: BASICS AND BEYOND* (1995); Mark W. Lipsey, Gabrielle L. Chapman & Nana A. Landenberger, *Cognitive-Behavioral Programs for Offenders*, 578 *ANNALS AM. ACAD. POL. & SOC. SCI.* 144 (2001).

development, as does Multidimensional Treatment Foster Care, an intervention that has been found to be quite effective with high-risk and chronic offenders. This program places youths with trained and supervised foster parents for 6 to 12 months, while they also engage in family therapy with their own parents. This program involves close supervision and treatment in the home, school, and community; adult mentoring; and separation from delinquent peers.<sup>132</sup>

One of the most successful interventions with violent and aggressive youths is Multi-Systemic Therapy (MST), a community-based program that has been replicated and evaluated repeatedly for almost 20 years with many groups of juvenile offenders. MST is thoroughly grounded in developmental knowledge; it combines cognitive behavioral therapy with an ecological approach that deals with individual youths in the multiple social contexts in which they live—their families, peer groups, schools, and communities—and addresses the factors that contribute to criminal conduct across these settings. MST therapists work in teams with small caseloads of four to six families, providing intensive in-home services. The focus of treatment is to empower parents with skills and resources to support their children in avoiding problem behaviors and give youths the tools to cope with family, peer, and school problems that can contribute to reinvolvement in criminal activity.<sup>133</sup> Controlled studies of MST have shown it to be among the most effective justice system treatments.<sup>134</sup> One study compared chronic and violent offenders receiving MST with a randomly assigned group who received the standard treatment of supervised probation and found that MST reduced rates of both reoffending and incarceration in this group of very high risk offenders. The MST youths had significantly lower recidivism rates over a 59 week period despite the fact that they remained in the community an

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132. See GREENWOOD, *supra* note 128; Robert Barnoski, *Outcome Evaluation of Washington State's Research-Based Programs for Juvenile Offenders*, WASH. ST. INST. FOR PUB. POL'Y (Jan. 2004), <http://www.wsipp.wa.gov/rptfiles/04-01-1201.pdf>.

133. Scott W. Henggeler, Gary B. Melton & Linda A. Smith, *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. CONSULTING & CLINICAL PSYCHOL. 953 (1992). One role of MST therapists is to expand natural social support systems for the family (extended family, neighbors, church members, etc.) and to remove impediments to effective functioning (parents, substance abuse, stress). See *OJJDP Model Programs Guide: Multisystemic Therapy*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.ncjrs.gov/mpg/mpgProgramDetails.aspx?ID=363> (last visited Aug. 22, 2010).

134. Aos et al., *supra* note 128.

average of 73 days more than youths in the control group during that period.<sup>135</sup> Moreover, a two-year follow-up study showed that youths who received MST continued to reoffend at a substantially lower rate than those who got standard dispositional treatment (although the rates for both groups were relatively high).<sup>136</sup>

Not all juvenile programs are effective at reducing crime. Two popular programs—military boot camps and “scared straight” programs, in which youths are taken to adult prisons and lectured on the perils they face if they persist in their criminal ways—actually increase recidivism; young offenders who participate in these programs commit more crimes than other youths.<sup>137</sup> Moreover, even effective programs can fail if they are not well implemented. Some studies have found substantial variations in recidivism rates due to differences in the quality of staff and compliance with program protocols.<sup>138</sup> This suggests that general replication in the justice system of effective “model programs” may sometimes not produce the positive results that program developers achieve. Beyond this, duration of the treatment and amount of contact time are often positively correlated with effectiveness. Lipsey’s meta-analysis found that those programs that exceeded the mean in these dimensions were more effective at reducing recidivism than briefer programs that involved less contact.<sup>139</sup>

Many treatment programs in the justice system are more expensive than standard probation or parole, the alternative to which they often are compared. MST, for example, costs approximately \$5,000 per youth.<sup>140</sup> How can policymakers decide whether the benefits of particular programs justify their cost to taxpayers? Recently state governments have begun to focus on the cost effectiveness of criminal and juvenile sanctions and have

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135. Henggeler, Melton & Smith, *supra* note 133.

136. Scott W. Henggeler et al., *Family Preservation Using Multisystemic Treatment: Long-Term Follow-up to a Clinical Trial with Serious Juvenile Offenders*, 2 J. CHILD & FAM. STUD. 283 (1993). Eighty percent of the control group had re-offended, compared with 60% of the group receiving Multisystemic Therapy.

137. Aos et al., *supra* note 128.

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

139. Lipsey, Chapman & Landenberger, *supra* note 131. Multisystemic therapy averages 60 hours of contact over a four-month period, and therapists are always on call. *OJJDP Model Programs Guide: Multisystemic Therapy*, *supra* note 133.

140. Aos et al., *supra* note 128.

enlisted economists to calculate whether the benefits of various programs, as measured by the value to taxpayers and crime victims of the programs' expected effect on crime, are greater than their costs. A comprehensive cost-benefit analysis of 400 programs aimed at crime reduction found that several of the juvenile justice programs we have described offered taxpayers the best return for dollars invested—better than programs aimed at adult criminals and better than early childhood and school prevention programs (although the latter have other goals besides crime prevention).<sup>141</sup> For example, based on research showing that MST reduces recidivism by about 30%, taxpayers gain about \$31,000 in subsequent criminal justice system savings for each program participant, or more than six dollars for each dollar spent. When the value to potential crime victims is included, the benefit rises to \$131,918, or \$28 for each dollar spent.<sup>142</sup> The cost-benefit ratio for Functional Family Therapy, Aggression Replacement Training, and Multidimensional Treatment Foster Care were also very favorable.<sup>143</sup> The upshot is that a range of intensive programs in the juvenile system have proved effective if they are faithfully and competently implemented with appropriately targeted youths. These programs offer good value for taxpayers' dollars spent, and the benefits in terms of crime reduction far exceed the costs.

This promising research on juvenile justice programs challenges the claim that punitive policies promote social welfare by reducing youth crime. Cost-conscious policymakers who care about reducing crime would be well advised to invest in these research-based programs as a key element in the legal response to juvenile crime. The fact that some of the most cost-effective interventions are community-based programs suggests that community sanctions can play an important role in a contemporary regime that is quite different from that of probation and parole in the traditional system. This not to say, however, that all young offenders should remain in the community. Even though some programs such as MST have been shown to reduce recidivism even in serious and chronic offenders, there may be good reasons to place in residential facilities some youths who commit serious violent crimes or who are repeat offenders. Very few studies of

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141. *Id.*

142. *Id.*

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

justice system programs to date have compared community-based sanctions with incarceration, and thus the impact of incapacitation periods on crime rates has rarely been included in the calculus. Some youths simply present too much of a risk to public safety to stay in the community. Moreover, the threat of incarceration may have an impact on general deterrence that would be diluted in a regime that seldom uses confinement as a sanction. However, community sanctions are appropriate for many youths, and others can benefit from community-based interventions as part of the transition from residential programs. Extensive use of programs that have demonstrated effectiveness is a good investment for a state aiming to advance social welfare through its juvenile justice policies.

The developmental and programmatic research we have described provides a key rationale for maintaining a system of juvenile justice separate from the adult system. The question of whether maintaining a separate system for juveniles is important or desirable has been the subject of policy debate in recent years, with conservatives and even some progressive academics arguing for dismantling the juvenile system. For example, Barry Feld has argued for a unitary system in which juveniles would serve shorter sentences for their crimes in recognition of their reduced culpability.<sup>144</sup> Such an approach would satisfy the requirements of fair punishment. But a key lesson of the research we have reviewed is that a regime that aims to reduce crime will treat most juvenile offenders differently from their adult counterparts; even youths who must be incarcerated for public safety reasons should be confined in facilities that provide a social context, programs, and services very different from adult prisons. A separate juvenile system is far more likely than a unitary system to create a developmentally appropriate social environment, provide research-based interventions, and generally to recognize that differential treatment of adolescent offenders is the key to crime reduction.

To this point, we have examined youth crime policy through a consequentialist lens, a perspective from which the primary policy goal is to promote social welfare and prevent future crime. Many supporters of punitive policies argue that achieving this goal requires the extensive use of incarceration of young offenders in both the adult and juvenile systems. We have found little support for this claim. Indeed, most of the evidence points to the conclusion that the social costs of criminalization outweigh the benefits. Extensive use of incarceration is expensive; juvenile

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144. FELD, *supra* note 5. Feld also favors housing juveniles separately from adult inmates.

justice expenditures have risen steeply in response to policy shifts in this direction. This cost is justified only if these policies are more effective at public protection than less costly alternatives. But the existing research data provides little support for the notion that tough sanctions function effectively to deter crime either generally or in their impact on young offenders.

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

#### IV. RETRIBUTION AS A LIMITING PRINCIPLE IN REGULATING JUVENILE CRIME

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

Both crime reduction and fair punishment are important purposes of crime regulation, and both are essential to a stable and satisfactory system of youth crime regulation.<sup>145</sup> Fairness alone is an inadequate basis for formulating policy because, as we have suggested, fairness can be accommodated within a unitary criminal

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

justice system by giving youths discounted sentences.<sup>146</sup> Only if lawmakers also aim to reduce crime and promote social welfare is it important to have a separate system that responds to the developmental needs of young offenders. But crime prevention alone is also inadequate as a regulatory purpose. Under the developmental model, retribution functions importantly as a limiting principle and source of legitimacy. Commitment to fair retribution constrains the authority of the government to intervene in the lives of young offenders as it pursues its preventive purposes by mandating that the duration and harshness of sanctions be limited to what the offender deserves on the basis of the offense itself.<sup>147</sup> This constraint is necessary to prevent excessive punishment and to avoid exacerbating sentencing disparities that already threaten the legitimacy and political stability of the justice system. It also promotes confidence in the legal system as well as public acceptance of criminal sanctions.<sup>148</sup>

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

#### *A. Developmental Research and the Culpability of Young Offenders*

In general, factors that reduce culpability under the criminal law can be grouped in three rough categories. The first category includes endogenous impairments and deficiencies in the actor's decision-making capacity that affect his choice to get involved in criminal activity. Mental illness and retardation are in this category, as is developmental immaturity. Under the second

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146. FELD, *supra* note 5; SCOTT & STEINBERG, *supra* note 2, at 147.

147. See *supra* note 52 (discussing criminal law scholars who have argued that retribution should function as a limiting principle both to constrain state authority and to promote public acceptance of criminal sanctions); see also Albert W. Alschuler, *The Changing Purposes of Criminal Punishment*, 70 U. CHI. L. REV. 1, 7–8 (2003).

148. H.L.A. Hart argued that retribution should be retained for this purpose. HART, *supra* note 52, at 180–83.



category, an actor may be less culpable if he engaged in the criminal conduct in response to extraordinary coercive circumstances that a reasonable person would be unable to resist. The third category of mitigation applies when the actor can show that the criminal act was not the product of bad character. Each of these sources of mitigation applies to the crimes of juvenile offenders, and together they support a regime that deals with most juveniles as an intermediate category of offenders—not as adults, but also not as children.<sup>149</sup>

### *1. Deficiencies in Decision-Making*

Developmental research indicates that adolescents differ from adults in their decision-making capacities in ways that affect their criminal choices due to both cognitive and psychosocial immaturity, but the deficiencies are more subtle than those that characterize younger children. By age 14 or 15, most adolescents have the capacities for reasoning and understanding comparable to those of adults when measured in laboratory studies.<sup>150</sup> But there is reason to believe that in unstructured real-world settings, such as those in which decisions about criminal activity are made, teenagers do not process information as efficiently as adults and may be more susceptible to stress and emotional arousal.<sup>151</sup>

More importantly, perhaps, several psychosocial developmental factors influence adolescents' decision-making in ways that contribute to immature judgment. First, teenagers are more susceptible to peer influence than are adults.<sup>152</sup> They also differ

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149. This section summarizes earlier work arguing that mitigation should be applied to the criminal conduct of young offenders. See SCOTT & STEINBERG, *supra* note 2; see also Scott & Steinberg, *supra* note 67.

150. Daniel P. Keating, *Cognitive and Brain Development*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 45 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004).

151. See Shawn L. Ward & Willis F. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 DEVELOPMENTAL PSYCHOL. 488 (1990). Adolescent decision-making under stress is often poorer than in hypothetical situations, and research suggests that the effects of stress on decision-making are more marked for adolescents than for adults. Leon Mann, *Stress, Affect, and Risk-Taking*, in RISK-TAKING BEHAVIOR 201, 214 (J. Frank Yates ed., 1992).

152. Susceptibility to peer pressure declines throughout the high school years. See Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229–30 (1995); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841 (1986).

from adults in future orientation, being less inclined to weigh future consequences and more likely to focus on the here and now.<sup>153</sup> Third, adolescents differ in their assessment of and attitude toward risk. Teens tend to value rewards more than risks and sometimes count as a reward what an adult would view as a risk.<sup>154</sup> And fourth, teenagers tend to be more impulsive than adults, having more difficulty regulating their moods, impulses, and behavior.<sup>155</sup>

In combination, these developmental factors are likely to influence juveniles' decisions to get involved in criminal activity in ways that distinguish them from adult criminals and make their choices less culpable. Adolescent decision-making is not as impaired as is that of children or persons with severe mental disabilities, whose crimes may be excused due to their impairments. But the deficiencies that contribute to immature judgment in teens are developmental in nature and are characteristic of adolescents as a group. They are also organic and no more subject to individual control than are the impairments that affect the decision-making of mentally ill and retarded adults.

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153. A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 15, 99 (1986); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1 (1991); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009).

154. Elizabeth Cauffman et al., *Age Differences in Affective Decision-making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625 (2005); Susan G. Millstein & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability*, 31 J. ADOLESCENT HEALTH 10 (2002); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78 (2008); Laurence Steinberg, *Risk-Taking in Adolescence: What Changes, and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51 (2004).

155. Ellen Greenberger, *Education and the Acquisition of Psychosocial Maturity, in THE DEVELOPMENT OF SOCIAL MATURITY* 155 (David McClelland ed., 1982); Reed Larson, Mihaly Csikszentmihalyi & Ronald Graef, *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. YOUTH & ADOLESCENCE 469 (1980); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2010).

## 2. *Unformed Character and Culpability*

A related mitigation condition that is also important in assessing the culpability of typical young offenders involves the relatively unformed nature of their characters. The criminal law implicitly assumes that harmful conduct reflects the actor's bad character, and evidence that this is not so can be offered in mitigation of culpability.<sup>156</sup> The criminal conduct of most teens is grounded in developmental processes that are constitutive of adolescence—immature judgment and normative experimentation with risky behaviors. It does not stem from stable moral deficiencies associated with bad character. The character of the typical adolescent has not yet stabilized, and his personal identity is in flux;<sup>157</sup> precisely for this reason, his criminal act, like that of the adult who establishes mitigation on this ground, does not express his bad character.

## 3. *Situational Coercion*

A somewhat different source of mitigation in criminal law may apply to some adolescents who, because of their social context, are subject to extraordinary coercive pressures to become involved in criminal activity. The criminal law does not require unusual fortitude or bravery, and mitigation may apply to crimes committed in response to extreme external pressures that an ordinary (or “reasonable”) person would not be able to resist.<sup>158</sup> Ordinary adolescents who live in high-crime neighborhoods are subject to intense social pressures and often tangible threats that

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156. The provocation defense has been explained in these terms. Thus, sufficient provocation is evidence that the killing was not the product of bad character, warranting a reduction of the crime from murder to manslaughter. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) (“[T]he greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor's passions and his lack of self-control . . . to the extraordinary character of the situation . . . rather than to any extraordinary deficiency in his own character.”). Also, a defendant can introduce evidence of his previously established good character in mitigation at sentencing.

157. Identity formation takes place in two stages: individuation in early adolescence, and identity development in late adolescence and early adulthood. See W. Andrew Collins & Laurence Steinberg, *Adolescent Development in Interpersonal Context*, in 3 HANDBOOK OF CHILD PSYCHOLOGY 1003 (Nancy Eisenberg, William Damon & Richard M. Lerner eds., 6th ed. 2006).

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

induce them to join in criminal activity. In some contexts, coercion is so intense that only unusual teens resist the pressure. Moreover, unlike adults, adolescents are minors whose liberties are constricted due to their dependency; thus, they are not in a position to extricate themselves from their neighborhoods, schools, or homes.

These circumstances are similar in kind to those that are involved in claims of duress, provocation, necessity, or domination by co-defendants. The source of mitigation on the basis of exogenous conditions is not purely developmental in nature, but it is a product of dependency, which itself is grounded in immaturity. When adolescents cross the line into legal adulthood, the formal legal disabilities of youth are lifted. Young adults can avoid the situational pressures they face by removing themselves from criminogenic settings. Moreover, pressure to get involved in crime eases as normal maturation influences most individuals to move beyond the risky activities of youth. Thus, adults have no claim of situational mitigation on the ground that they are restricted to a social setting in which avoiding crime is difficult.<sup>159</sup>

The adolescent who commits a crime typically is not so deficient in her decision-making capacity that she cannot understand the harmful consequences of her conduct or appreciate its wrongfulness, as might be true of a mentally disordered person or a child. Nor are the circumstances of her social context as coercive as those that excuse defendants from criminal liability.<sup>160</sup>

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159. The inability to escape distinguishes adolescents from adult offenders, who might argue that they are less culpable than other criminal actors because of their "rotten social background." Some commentators have argued that such a defense be recognized and available to adult lawbreakers who grew up in crime-inducing settings without inculcation in pro-social norms or opportunities to succeed in socially acceptable ways, on the ground that these social forces combine to constrain their freedom to avoid crime. Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 *LAW & INEQ.* 9, 63-65 & n.363 (1985). This defense generally has been rejected by lawmakers (rightly, we think), in part because of the high social cost incurred if a defense were available to a large open-ended category of adult offenders otherwise indistinguishable from the norm. More importantly, perhaps, the defense threatens to dissolve the important but delicate line between free will and determinism, the boundary of criminal responsibility. Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 *S. CAL. L. REV.* 1247, 1251-53 (1976). In contrast, recognition of social context as situational mitigation that is limited to juveniles as a class does not carry the same threat of unraveling the core of criminal responsibility.

160. Under the duress doctrine, the defendant must show that he faced an immediate threat of death or serious bodily harm from which he could not reasonably escape. See *BONNIE ET AL.*, *supra* note 49, at 488-89.

But the developmental and social factors that drive adolescent decision-making predictably contribute to choices that reflect immature judgment and unformed character and are made under social pressure. Thus youthful criminal conduct has much in common with that of adults whose criminal acts are out of character, whose decision-making capacities are impaired by emotional distress or mental illness or disability, or whose choices are influenced by extremely coercive circumstances. As the Supreme Court recognized in striking down the juvenile death penalty in *Roper v. Simmons* in 2005, the criminal choices of adolescents deserve less punishment than do those of adults because they are shaped by developmental immaturity and coercive social contexts.<sup>161</sup> A justice system that is committed to fairness, as embodied in the principle of proportionality, will punish adolescents less severely than adult offenders.

### *B. Why Retribution is Important*

At one level, the conclusion that mitigation applies to the crimes of young offenders has modest implications for justice policy. As we have indicated, a regime dedicated to fairness could deal with juvenile and adult offenders in a unitary system and simply apply a “youth discount” to the sentences of juvenile offenders in recognition of their reduced culpability.<sup>162</sup> The argument for a separate juvenile justice system that implements developmentally-based policies aimed at reducing crime is not based on fairness and is unconcerned with the proportionality of sanctions. Therefore, given our emphasis on the social welfare value of evidence-based policies aimed at prevention, why is retribution or fair punishment important to the construction of optimal juvenile justice policies?

Before we explain the essential role of proportionality in a well-functioning model of juvenile justice, we should review briefly the difference between the law’s preventive and retributive purposes. Retribution focuses on the past criminal act, which determines the amount of deserved punishment. The goal of crime prevention, in contrast, is future-oriented. Deterrence (specific and general), rehabilitation, and incapacitation all focus on the impact

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161. Justice Kennedy, drawing on our previously published work, described three features of adolescence that distinguish adolescents from their adult counterparts—diminished decision-making ability, vulnerability to external coercion from which adolescents cannot escape, and the unformed nature of adolescent identity. *Roper v. Simmons*, 543 U.S. 551, 567–70 (2005).

162. See *supra* notes 145–46 and accompanying text.

of correctional interventions on future criminal conduct, and they are not concerned with calibrating that response to the seriousness of the past criminal act or the culpability of the offender.<sup>163</sup> Thus, an offender who is judged to present a serious risk of reoffending may receive a longer sentence than another whose crime is more serious but who is deemed less dangerous. Thus, taking proportionality seriously means not only that juveniles, due to their immaturity, will be punished more leniently than their adult counterparts, but it also means that young offenders who commit similar crimes should receive sanctions of similar duration on the basis of their crimes and culpability. Proportionality prohibits serious disparities in the treatment of young offenders on the basis of factors other than their criminal conduct.

Over the past century, retribution has been in and out of favor among lawmakers, reformers, and scholars. The Progressive reformers who created the traditional juvenile court insisted that its purpose was solely to rehabilitate young offenders and that criminal responsibility and punishment played no role in delinquency dispositions.<sup>164</sup> For this reason, juvenile court dispositions were indeterminate—based on the individual offender's treatment needs—and, in theory, unrelated to the seriousness of the offense. In the 1970s and 1980s, reformers on both the left and right rejected the rehabilitative model as both ineffective and unfair. Youth advocates favored proportionate sentences in the juvenile system that were shorter in duration than those imposed on adult criminals.<sup>165</sup> This approach emphasized accountability and fairness and rejected crime prevention as a dispositional goal.<sup>166</sup> More recently, alarm about public safety has resulted in a shift in emphasis toward prevention, particularly incapacitation, although punitive reformers also emphasized full

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163. See generally BONNIE ET AL., *supra* note 49, at 23–33.

164. BEN B. LINDSEY & HARVEY J. O'HIGGINS, *THE BEAST* 144, 149 (Univ. of Wash. Press 1970) (1909).

165. FRANCIS ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN CRIMINOLOGY* (1964); Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

166. The American Bar Association's Institute for Judicial Administration sponsored an ambitious law reform project called the Juvenile Justice Standards, which embodied this proportionate sentencing approach. Volumes included *Transfer Between Courts*, *Adjudication*, *Dispositions*, *Delinquency*, and *Sanctions*, among others. INST. FOR JUVENILE JUSTICE, AM. BAR ASS'N, *JUVENILE JUSTICE STANDARDS* (1980); see also FRANKLIN E. ZIMRING, *CONFRONTING YOUTH CRIME: TWENTIETH-CENTURY FUND TASKFORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS* (1978).

accountability.<sup>167</sup> Recently, juvenile advocates also have focused on crime reduction in advocating for evidence-based community programs for young offenders. Professors Slobogin and Fondacaro have highlighted the importance of these programs in arguing for a regime dedicated solely to reducing crime and protecting the public.<sup>168</sup>

Slobogin and Fondacaro reject retribution altogether as a legitimate purpose of juvenile justice policy; under their model, proportionality plays no role in determining correctional dispositions. Instead, their regime aims solely at specific deterrence; dispositions are determined on the basis of risk assessment, which they assert can be performed with substantial accuracy.<sup>169</sup> Slobogin and Fondacaro argue that evidence-based community programs are the most effective means of reducing juvenile crime and suggest that most delinquency dispositions will take this form.<sup>170</sup> But they concede that some youths who pose a risk to public safety must be incarcerated and implicitly accept that, under their approach, incarceration might extend for the duration of juvenile court jurisdiction for youths deemed too dangerous to be in the community.<sup>171</sup> In their view, the judgment about the need for incarceration and its duration should be independent of the seriousness of the crime and the culpability of the offender.<sup>172</sup> Thus, in theory, a youth could be picked up for shoplifting and, based on a risk assessment, confined for many years.<sup>173</sup> In short, not only are sanctions not reduced for juveniles on the basis of immaturity, but dispositional duration for less serious crimes is not limited by what would be proportionate punishment for adults.<sup>174</sup>

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

168. Slobogin & Fondacaro, *supra* note 3, at 1, 13, 31.

169. *Id.* at 25–26.

170. *Id.* at 16.

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

172. The authors require a crime as a predicate for intervention, on the basis of the legality principle; thereafter, the nature and duration of intervention are based on risk assessment. *Id.* at 53.

173. This possibility is less apocryphal than it seems, as very young offenders are more likely to persist in criminal activity than older teens. See SCOTT & STEINBERG, *supra* note 2, at 252–57; see also *infra* note 178.

174. For serious crimes, the proportionate adult sentence would likely extend beyond the end of juvenile court jurisdiction, which is the durational limit under Slobogin and Fondacaro’s model. Slobogin & Fondacaro, *supra* note 3, at 7.

There is much to admire in this provocative reform proposal. Slobogin and Fondacaro employ social science research in a sophisticated way, emphasizing the merits of evidence-based programs and locating these programs at the core of their regime. Moreover, they reject the transfer of youths to adult court,<sup>175</sup> although it is unclear how this could be avoided for youths who threaten public safety in ways that cannot be dealt with in the juvenile system. But, although their aims are benign, the policy model offered by these scholars is defective in ways that are not so different from the flaws that led to the collapse of the traditional rehabilitative model. Open ended indeterminacy, whether based on risk assessment or diagnosis, is unsatisfactory because it poses a substantial risk of unfairness that inevitably threatens the legitimacy of any regime aimed solely at prevention.

Under a pure prevention model, the youth's criminal act functions as a threshold condition for state intervention<sup>176</sup> but does not otherwise determine the form or duration of the correctional disposition. Although the crime itself provides important information in the risk assessment, many other factors unrelated to culpability and outside the control of the youth may also be relevant. An accurate risk assessment may conclude that one youth is a more promising candidate for a community-based program than another whose crime was identical because the former has more competent or invested parents, lives in a lower-crime neighborhood, has fewer learning deficits, is involved in a sport with a caring coach, or has no antisocial siblings. Such factors (particularly parental capacities) may indeed be predictive of the success or failure of evidence-based programs, but to base the decision of whether the youth should stay in the community or be confined in a correctional facility on considerations completely unrelated to the underlying crime is problematic on fairness grounds.

The fairness problem is magnified by the likelihood that factors influencing risk assessment are linked to race, socioeconomic status, and age. Thus, minority youths, youths from single-parent homes, or youths who live in poverty may be less likely to have supportive families or other resources or attributes that are associated with a lower risk of reoffending or with positive program outcomes.<sup>177</sup> If so, under a pure prevention regime, they

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175. *Id.* at 14.

176. *See supra* note 172.

177. Slobogin and Fondacaro recognize that delinquency is linked to living in poor high-crime neighborhoods and that schools and families are important contextual factors affecting criminal behavior. Slobogin & Fondacaro, *supra*



may be less likely than their more fortunate peers to qualify for community programs and more likely to be incarcerated. Moreover, substantial evidence indicates that youths who are arrested at a very young age are at significantly higher risk of persisting in criminal activity than those who first become involved in crime in mid-adolescence.<sup>178</sup> Under a pure prevention regime, a ten year old arrested for theft who has a history of family, behavioral, and academic problems might be a candidate for correctional interventions that extend for as long as he is under juvenile court jurisdiction—in many states, into his twenties. Thus, the least culpable juveniles under conventional criminal law principles would be subject to the most intensive interventions in response to their crimes. Although proponents may insist that these discrepancies are acceptable because the dispositional purpose is not punishment but crime reduction, this will likely offer little comfort to youths subject to more restrictive treatment than their peers.

To this point, we have focused on dispositional disparities that are likely to result from accurate and unbiased risk assessment. But risk assessment is far from an exact science and will always rely on the subjective judgments of justice system decision-makers.<sup>179</sup> The possibility that they may exaggerate the risk of reoffending by youths who belong to racial and ethnic minority groups is substantial. Much has been written about racial and ethnic bias in the justice system; disproportionate minority contact and confinement are broadly recognized as a serious threat to the

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note 3, at 21–23. Thus, risk reduction may pose more of a challenge for youths in lower socioeconomic neighborhoods (who often will belong to racial and ethnic minorities) who have weak family support and go to inferior schools, and they are likely to warrant more intensive interventions *ex ante* under a pure prevention approach than middle class youths. The effectiveness of many programs such as Functional Family Therapy and MST depends on parental engagement.

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

179. Edward P. Mulvey & Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, FUTURE CHILD., Fall 2008, at 35, available at [http://futureofchildren.org/futureofchildren/publications/docs/18\\_02\\_03.pdf](http://futureofchildren.org/futureofchildren/publications/docs/18_02_03.pdf).

legitimacy of the system.<sup>180</sup> Honest judges, probation officers, and other agents may engage in unconscious racial and ethnic stereotyping in assessing the risk of offending by minority youths, with the result that these juveniles may be subject to more restrictive sanctions than accurate risk assessment would dictate.<sup>181</sup> Some research evidence indicates that a higher percentage of minority youths are transferred by judges than would be subject to adult court jurisdiction on the basis of the crime alone.<sup>182</sup> A regime that bases dispositions solely on risk prediction may well result in greater disparities in the treatment of white and minority youths.

This problem can be substantially mitigated by incorporating retribution as a limiting principle in juvenile crime regulation. Some scholars have embraced retribution, not as the sole (or even primary) purpose of state intervention in responding to criminal conduct, but as an important check or side constraint on the power of the government to deprive individuals of liberty.<sup>183</sup> Some criminal law theorists endorse strong retributivism, under which sentences *must* be proportionate to the seriousness of the offense and the culpability of the offender—no more, no less.<sup>184</sup> Under a weaker retributivist approach, proportionality is important in limiting the maximum severity and duration of criminal sentences and in grading offenses on the basis of harm. In our view, the latter approach is compatible with a model of juvenile crime regulation that incorporates retribution as a limiting principle, but only if it avoids excessive disparities among similarly situated young offenders. Thus, under the developmental model, dispositions may vary somewhat on the basis of preventive factors, but the range should be limited to avoid unfairness.

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180. Differences in arrest rates, processing, and incarceration between minority youths and others is well established. See generally OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE (Darnell F. Hawkins & Kimberley Kempf-Leonard eds., 2005) (examining racial disparities in the processing and punishment of juveniles).

181. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

182. See Barnoski, *supra* note 29.

183. See *supra* notes 52, 147.

184. Michael Moore is in this group. He argues that it is respectful of the moral worth of the criminal actor to hold him to the same standard that we would apply to ourselves. Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

This dual approach is superior to a pure prevention model in several ways. First, it acknowledges that a part of society's purpose in sanctioning criminals is punishment—holding youths accountable for the harms they cause. Accountability is important to public acceptance of any regime of crime regulation.<sup>185</sup> The traditional model of juvenile justice collapsed in part because proponents insisted that the only purpose of intervention was rehabilitation, a claim that ultimately had little public support. Second, young offenders themselves are likely to benefit from crime regulation that emphasizes accountability. An important developmental lesson of adolescence is learning to accept personal responsibility for one's choices; this lesson is particularly important when choices cause harm to others.<sup>186</sup> This lesson is lost under the pure prevention approach, which obscures the connection between the disposition and the underlying crime. Moreover, there is evidence that offenders are more likely to comply with court-ordered sanctions and less likely to reoffend when they believe that they have been subject to fair proceedings. Thus, a regime that permitted excessive sanctioning in the service of prevention has the potential to undermine some juveniles' sense

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185. H.L.A. Hart argued that the criminal law should incorporate retribution because the norm of imposing responsibility for causing harm is well established and accepted in our society. "The law should . . . reflect in its judgments on human conduct distinctions that not only underly morality, but pervade the whole of our social life." HART, *supra* note 52, at 180–83; see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (arguing that a utilitarian system of criminal justice should be based on principles of desert, as these define and reinforce norms against offending and promote compliance).

186. As individuals mature into and through adolescence, their conceptions of morality change. At around age 13, there is a normative shift in moral reasoning from an orientation in which individualism and instrumentalism predominate to one in which moral behavior involves

living up to what is expected by people close to you or what others generally expect of individuals in your role. . . . "Being good" is . . . reflected in having good motives, showing concern for others, and in maintaining mutual relationships through trust, loyalty, respect, and gratitude. At this stage, the focus in moral reasoning shifts from self-interest . . . to fulfilling others' expectations and concern with one's position in others' eyes, as well as maintaining positive interpersonal relationships with others.

Nancy Eisenberg & Amanda Sheffield Morris, *Moral Cognitions and Prosocial Responding in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 155, 157 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004) (citation omitted).

of “procedural justice,” thereby elevating the risk of future criminal behavior.<sup>187</sup>

Third, in a regime that is grounded in retribution as well as prevention, dispositions will be predictable and transparently based on the youth’s criminal conduct. Within a limited range, youths who commit similar crimes will receive sanctions of similar duration, and none will be subject to dispositions that exceed what is fairly deserved on the basis of the youth’s culpability and the seriousness of the offense. This is important as a matter of individual justice, but as we have suggested, it is also important as a means of avoiding disparate treatment of offenders on the basis of race and ethnicity. The indeterminacy of dispositions in the traditional juvenile court became a target of criticism not only from conservatives, who thought the system was too lenient, but also from youth advocates, who objected to the lack of fair procedures and to sentencing disparities and excessive sanctions justified by the avowed rehabilitative purpose.<sup>188</sup> Under a regime that insists that its purpose is not punishment but crime prevention, the government is free to deprive offenders of liberty for as long as is needed to protect public safety. This will vary widely among offenders; for some it may result in no intervention, although for others the deprivation of liberty may be far greater than is warranted on the basis of their criminal conduct.<sup>189</sup> This problem is reduced through the adoption of retribution as a limiting principle.

Under our developmental model of juvenile justice, the reduced culpability of most young offenders will be recognized through correctional interventions that are shorter in duration than those of similarly situated adult offenders. Within the duration that is deserved on the basis of the offense and the young offenders’ culpability, the disposition can and should aim to promote social welfare by rehabilitating the youth, if necessary, and enhancing his prospects for non-criminal adulthood. Thus, sanctions of determinate duration should be carried out in settings that promote

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187. Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267 (2005).

188. See *supra* note 165 (citing criticisms of traditional court as harmful to youths). In *In re Gault*, the landmark opinion holding that youths in delinquency proceedings have a right to counsel and to other procedural protections, the defendant was adjudicated delinquent and sent to a secure facility for up to six years for a minor misdemeanor. 387 U.S. 1 (1967).

189. Slobogin and Fondacaro point with approval to *Kansas v. Hendricks*, which upheld a law authorizing confinement of sex offenders for treatment after their sentences are completed for so long as they pose a threat of future sex offending. 521 U.S. 346 (1997); see Slobogin & Fondacaro, *supra* note 3, at 41–44.

healthy development and reduce the likelihood of future offending—in the community, if possible, or in a residential facility if necessary.

*C. Are Retribution and Prevention Compatible?*

The aims of fair punishment and promotion of social welfare through crime prevention are very different and sometimes will be in tension with one another. Can both purposes actually be accommodated in a model of juvenile justice grounded in developmental knowledge? In most cases, we think the answer is “yes.” Presumptively, as we explained above, the *duration* of sanctions is based on the harm of the act and the immaturity of the youth, and the *content*—what happens to the youth during the period that he is in state custody—is determined by the crime prevention goals we have described. Put differently, retribution as a limiting principle simply restricts the amount of time allowed for the state to undertake its crime reduction efforts, as well as the harshness of the intervention. Proportionality does not require precisely measured punishment; as we have suggested, it is compatible with a regime that authorizes a limited range of sanctions for a given offense.

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

Perhaps the most pronounced tension between preventive and retributive purposes arises in cases involving very young offenders—aged 12 and under—who have a history of behavioral problems. Based on their immaturity, these youths are the least culpable of juvenile offenders; thus, fairness dictates that they should receive the most lenient interventions. But their prognosis

for reoffending is far bleaker than is that of older first offenders.<sup>190</sup> Thus, under a regime that cares about prevention, they should receive intensive interventions; indeed, without such interventions, they are very likely to offend again. Reconciling retribution and prevention with this category of young offenders may be difficult, but we are not comfortable with grossly disproportionate dispositions based on risk assessment. In our view, the tension can be ameliorated by combining proportionate correctional dispositions with social, educational, and psychological services that are available to children not in the justice system.<sup>191</sup>

These hard questions are not unique to the juvenile system; they also arise in criminal sentencing.<sup>192</sup> In that context, courts struggle to impose fair punishment while attending to crime prevention concerns. Many (although not all) retributivists would agree that excessive punishment (more than is deserved on the basis of the offender's harm and culpability) is a greater affront to fairness than insufficient punishment.<sup>193</sup> On this view, punishing a youth less harshly than he deserves as a means of reducing the social cost of his crime may be more acceptable than imposing a harsher sentence than he deserves in the interest of reducing the likelihood that he will become involved in criminal activity in the future. However, as we have emphasized, an important element of fairness is that similar cases be treated similarly; thus, we are not sanguine about a regime in which one armed robber is sent to a correctional institution (the deserved punishment), while another receives a community sanction based on judicial judgments about their relative risk and potential for rehabilitation. This is particularly worrisome to the extent that racial and ethnic biases play a role in sentencing. These concerns lead us to conclude that a presumption favoring proportionate punishment is justified, and that in hard cases, fairness should trump social welfare.

We recognize that policymakers may reach a different conclusion—and that these are difficult choices. Fortunately, cases

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190. See *supra* note 173.

191. The state has the power to intervene to promote the welfare of children whose parents cannot provide adequate care and guidance. Thus, special educational services, counseling, and family support services, including foster care, can be provided to these youths and their families. See SCOTT & STEINBERG, *supra* note 2, at 250–60.

192. Criminal law casebooks pose this classic dilemma by presenting students with several cases in which actors commit the same crime with different levels of culpability. See, e.g., BONNIE ET. AL., *supra* note 45, at 3–6 (hypothesizing several cases involving the death of a child left in a car).

193. Michael Moore favors imposing proportionate punishment and opposes leniency. Moore, *supra* note 184.

involving normative adolescent offenders that truly present a conflict between fairness and social welfare are likely to be infrequent. In general, the research evidence supports the greater use of community sanctions in dispositions for juveniles than for adults, not only on grounds of social welfare but *also* on grounds of proportionality. Modest sentence variations based on social welfare concerns acknowledge the multiple goals that must be accommodated in a satisfactory and stable system and do not undermine fairness excessively. A regime that is committed to the recognition of adolescents as a distinct category, and to the presumptively more lenient punishment of juveniles than adults, embodies the principle of proportionality far better than the contemporary regime in which many youths are punished as adults. The interests of justice will be served generally by reforms that reinforce and maintain a sturdier boundary between the juvenile and adult systems, as long as sanctions are roughly calibrated on the basis of harm and culpability.

#### CONCLUSION

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

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

But a justice regime that promotes social welfare will not be adequate unless it also incorporates principles of fair punishment. Our analysis demonstrates that fairness will be served if juvenile sanctions are proportionate, based on the reduced blameworthiness of the young offender and the seriousness of the offense

committed. Retribution functions as a critically important limiting principle, serving both to protect young offenders from excessive punishment and to ensure that like cases are treated similarly. This parity guards against dispositional decisions that may disadvantage minority and low income youths due to bias or even accurate risk assessment. Ultimately, the legitimacy of juvenile crime policy depends on public perception that society is subjecting all young offenders to fair punishment.



