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Toward a Jurisprudence of Youth Violence

ABSTRACT

Most discussions of legal and social policies that justify different penal treatment for violent acts by adolescent offenders ignore basic substantive issues; youth crime policy has been preoccupied by procedural and jurisdictional matters. Justifications for separate treatment of juveniles can be found both in the principles of the penal law and in social policies that recognize adolescence as an important learning period. Three dimensions of adolescent diminished responsibility stand out—incomplete comprehension of moral duty, deficient capacity to manage impulses, and the vulnerability to peer pressure that is the hallmark of adolescent law violation. Social policy favoring youth development does not require a discounting of penal liability but suggests an effort to avoid using punishments that limit the opportunity of adolescent offenders to survive into normal adulthood. This implies qualitative limits on sanctions rather than quantitative discounts, and it conflicts with retributive minimums for very serious offenses. The challenge is to balance the many relevant dimensions of a youth crime policy in seeking appropriate solutions to key problems: distinguishing high seriousness violence cases for special penal priority in juvenile and criminal courts, constructing coherent firearms policies for youth, and finding just and appropriate outcomes in youth homicide cases.

The three key terms in the title of this essay are rather vague. The pretentious term "jurisprudence," for one, is hardly a model of precision. I use it here to advertise that my concerns are with the basic principles that should govern legal policy toward young offenders who in-

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0192-3234/98/0024-0010$02.00

tentionally injure others. The term "youth" is the second inexact usage. I speak of youth violence instead of juvenile violence because I hope to discuss violent behavior that occurs between the onset of adolescence and about age twenty-one. Some of these acts fall within the jurisdiction of juvenile courts. Different jurisdictions divide young offenders in different ways. But the transitional period of adolescence is characterized by very high rates of assaultive violence throughout.

The third ambiguous term is "violence." The problem here is the wide range of harms covered, from the conditional threat of an unarmed robbery through a bloody nose to a fatal injury. All these are violent acts but in very different ways and with widely varying consequences.

This essay thus aims to discuss the basic principles that should govern a wide range of differently dangerous harmful acts that occur in an age range from about twelve through twenty. That is a broad spectrum of policy and behavior. These remarks cannot hope for comprehensive coverage. Instead, what is offered here is usually called "notes toward," in the academic tradition where the author implies that a complete jurisprudence is his next project (but that, of course, never seems to get written).

My version of "notes toward" comes in five installments. Section I discusses the substitution in discussions of youth violence of debates about procedure and court jurisdiction for issues of substantive principle. Section II discusses policy toward youth violence as an extension of legal policy toward crime as well as an extension of legal policy toward youth development. The question is not which of these two perspectives should control thinking about youth violence but how they can jointly determine appropriate responses to particular circumstances. Section III is the heart of this essay, in which an attempt is made to identify two clusters of policies in more detail than previous efforts (Zimring 1979): diminished responsibility and room to reform. Section IV considers whether a good argument can be made that special dispensations toward youth of the types discussed in Section III should not extend to violent youth. The conclusion suggests three specific issues that must be decided in current conditions. The aim of the essay is to provide a framework that can inform the large number of specific questions that a useful youth violence policy must address one by one.

Without doubt, the world would be a simpler place if serious crimes were committed only by fully grown citizens of the republic. That is

not the world we inhabit. If there is merit to the notion that immaturity should mitigate the punishment deserved by middle adolescent offenders, this policy should apply in cases of serious violence as well as in cases of lesser seriousness. Further, the law should make substantial efforts to punish youth violence without eliminating an offender's chances to grow into adulthood in near-normal circumstances. This will not always be possible when very serious crime or manifest dangerousness are present.

This view of the goals of legal policy has implications for the procedures used in youth violence cases. If an offender's immaturity is to be taken into account in both juvenile and criminal tribunals, then the border between juvenile and criminal court processing becomes less important. The system can become less preoccupied with waiver to criminal courts and more concerned with identifying appropriate responses to specific problems.

The distinctive patterns of violence in adolescence require special attention in creating punishment policy. Sentencing policy toward young offenders must comprehend group involvement in most cases, and this will require more flexible penalty structures to account for the variety of accessorial responsibilities. Adolescent gun use is a special problem because all the features of youth that support findings of diminished responsibility also make gun possession and use more dangerous. Prohibitions of possession and use of guns seem justified even where adult ownership is not restricted. Homicide cases represent the worst case conflict between youth protection and the punishment of serious crimes. Even if the usual preferences for giving young offenders a chance to mature without interruption must give way in homicide, diminished responsibility should function as an important restraint on the level of punishment of adolescents who kill.

I. Substance versus Procedure

Juvenile violence raises issues for the justice system that involve both the substance and the procedures that the legal system uses to respond to particular acts. The substantive issues include whether punishment is appropriate for particular acts, the degree to which youth and the conditions associated with youth should affect the appropriate punishment in individual cases, and the purposes of punishment that should determine the justice system response to violent acts of varying degrees of seriousness. The procedural issues are whether a particular young

person should be referred to a juvenile or criminal court and what procedural provisions should govern in the hearing of particular cases.

To some extent, the choice of court—whether a case is heard in juvenile or criminal court—might determine both the procedures and the substantive principles that will govern a specific case, but this linkage is by no means a matter of logical necessity. In theory, the same principles about responsibility and mitigation could be invoked in both juvenile and criminal courts. In practice, it is widely assumed that these two different court systems employ very different philosophies and standards.

One troublesome feature of the current debate about responding to youth violence is the dominance of jurisdictional concerns. Almost all the policy discussion about the treatment of young violent offenders in the legal system is about which court system—juvenile or criminal—should handle particular types of cases. Political debates and academic discourse are both jurisdictionally focused and most concerned with the procedures that will be used to assign particular cases. Substantive principles are rarely considered as policies that might apply within either juvenile or criminal courts for different kinds of cases or as policies that might be changed to accommodate different circumstances. Instead, the implicit assumption seems to be that each of the court systems has a single stereotyped set of priorities for dealing with all the young offenders before it and, further, that nothing can or should be done to alter this set of mutually antagonistic institutional biases.

Juvenile court is where it is assumed that young offenders are sent to be coddled, reformed, and protected. Criminal courts are assumed to be institutions where the youth of a defendant will be ignored and only considerations relating to the seriousness of the offense and the need for deterrence and incapacitation will control the outcome. If the orientation and outcome in each court is uniform and unvaried, then the only important question to be considered is which court should get jurisdiction.

Such a preoccupation with the issue of which court should try a young person would only make sense if the current legal system for processing young offenders was itself both monstrous and arbitrary—with a single dividing line separating systems with totally inconsistent principles and no capacity to compromise either youth protection or crime control considerations. The juvenile court would pursue one unvarying policy, no matter what the offense, while the criminal court

would also be limited to a single policy mode, which would contradict the assumptions and priorities of the juvenile justice system.

Of course, the criminal courts and juvenile courts of the real world are much more complicated and much more subject to variation than the single-sentiment stereotypes of the previous discussion. Punishment and responsibility are not foreign concepts in the modern juvenile court, and diminished capacity as a consequence of immaturity is important in the decisions reached in criminal courts. So there is no sense in which the proper principles for deciding any particular case can be derived from just knowing which court will hear the case. The substantive principles that come into play when considering the appropriate responses are more important than the court that will have jurisdiction, and the discussion of proper substantive principles should also precede any consideration of appropriate form. Rightly considered, the institutions of justice should be servants of substantive principle. That perspective demands prior attention to substance.

The current debate, by stressing only the issue of which court prevails, is not, strictly speaking, putting the cart before the horse. It is instead all cart and no horse. The problem with imagining that the only important issue about youth crime is which court gets jurisdiction is that debate about responding to youth crime can proceed as if the substantive principles are not important in their own right. One reason basic principles get ignored in the current debate is that they are not evident on the agenda. A debate centered on jurisdiction is one important reason principles get ignored. So the current debate is not merely silly, it carries costs. This essay attempts to restore the primacy of substantive issues by first discussing the principles in competition when very young persons inflict serious harm on their victims.

II. Two Standards of Comparison

Sentencing policy toward young offenders is located at the crossroads between legal policy toward youth development and legal policy toward criminal offenders. A sixteen-year-old boy shoots and wounds another youth. The question of the appropriate legal response to this act by this actor is a matter of both crime control policy and youth policy. From the perspective of crime control policy, the question is one of determining the extent to which sixteen-year-olds who shoot and wound should be treated in the same way or differently from older persons who commit the same offense. From the perspective of youth pol-

icy, the issue is one of determining whether sixteen-year-olds who shoot and wound should be treated similarly to or differently from other sixteen-year-olds. If policy toward young offenders is properly classified as both youth policy and crime policy, then these two standards should not be thought of as competing to determine which should dominate decision making. Instead, the two perspectives should jointly inform a calculus of policy determination that must take both into account.

From a youth development policy perspective, what separates the sixteen-year-old who shoots and wounds from others his age is the harm of his act and the moral culpability of intention to do an act that causes great harm. Even if youth policy were the only set of principles used to decide legal policy in this case, the harm and culpability associated with the act would justify close to the maximum exertion of social control available to youth policy. One does not need a separate criminal law system to tell the difference between sixteen-year-olds who wound with deadly weapons and other kids. Any youth-serving institution will treat these kids and these acts separately.

From a criminal law perspective, what separates sixteen-year-olds from older persons who shoot is diminished culpability even for intended harms because of immaturity and because of a youth's lessened capacity and experience with self-control. Even if a criminal law perspective were the only tool available for making legal policy in this case, the youth and immaturity of a criminal actor would be relevant to the proper determination of punishment.

So the factors of importance to penal considerations and those that influence youth policy are not mutually exclusive. But there are also policy perspectives that are not shared by these two systems but that should influence policy when they overlap. Youth development policy takes risks with the general public welfare to allow young persons to try out adult privileges like driving even though adolescents are especially dangerous before they become experienced drivers. We take the special risks of this learning period because there is no way to avoid them when the only effective way to learn an activity is by doing it (Zimring 1982, chap. 7). For similar reasons, the system may wish to avoid punishments that inflict substantial permanent harm when dealing with young offenders so that a healthy transition to adulthood is still possible even when harmful mistakes are made.

But the larger dangers of adolescent actions also produce restrictions on the way young persons can behave that are not present for adults.

Activities like drinking, smoking, and purchasing handguns are not available to seventeen-year-olds because of a sense of their larger risk if not restrained. These special limitations of adolescent liberty are based on the same notions of immaturity that reduce the culpability of young persons for criminal acts. I show in the next section that status offenses and diminished penal responsibility are two sides of the same coin.

There is at least some evident tension between the punitive tug of crime control policy and the protective tug of youth development policy when young persons commit serious crimes. Debates about youth crime policy have produced many rhetorical gambits that seek to avoid this tension. The crudest method of seeking to remove young offenders from the coverage of youth protective policy is to rename them. When terms like "juvenile superpredator" and "feral presocial being" are used in debates about youth crime, they have a special rhetorical purpose to set the object of the description apart from other young persons and from the protection of youth development policy. A "superpredator" is posited as something very different from a youth, and the proponent of renaming suggests that thus no special provisions of a youth policy need apply to any person that can be so classified (Bennett, DiIulio, and Waters 1996).

A more reasoned effort to produce the same result can be found in the argument that those young persons who commit very serious crimes should forfeit the protected status of youth. In this view, committing a homicide, for example, is viewed as sufficiently depraved or dangerous behavior so that we would wish to deprive the guilty young person of any special protections extended because of his youth. Loss of the protected status of youth becomes in effect one penal consequence of the forbidden act.

This forfeiture theory is an improvement over the mere relabeling of offenders by using different terms, but it raises serious questions about the appropriateness of the linkage. Is the status of youth just a privilege provided to nice kids, or is it a socially and legally separate stage of development where nice kids and bad kids should alike be governed by distinct rules? Certainly, the law does not prohibit only nice kids from buying liquor under age twenty-one; that is, rather, a prohibition we seek to extend to all kids. Why should some of the protective aspects of a youth policy be less general? There is certainly no logically necessary reason that protective features of youth policy are only for nice kids.

A third device used to restrict the coverage of youth policy attempts to link the intention to commit serious criminal harms with a maturity and commitment to criminal activities that is inconsistent with legal treatment as a youth. In standards providing for waiver to criminal courts, juvenile court judges are asked to decide whether a particular accused is mature. If he is, then he can be punished as an adult (see, e.g., *Kent v. United States*, 383 U.S. 541 [1966]).

The transfer of young persons below the maximum age of juvenile court jurisdiction to criminal court if they are found to be too mature or too sophisticated for juvenile court processing has a history just as long as that of the juvenile court. One year before Judge Julian Mack published his classic polemic in support of a help-oriented juvenile court system, the chief probation officer of the Cook County juvenile court (that was Exhibit A for Judge Mack's optimism) was already suggesting that some delinquents were too far developed for juvenile court treatment (compare Mack [1909] with Circuit Court of Cook County [1907], p. 123).

And saying that the kids who were too much trouble for juvenile justice were mature and sophisticated provided a good jurisprudential rationale for not extending the protection of a youth-oriented policy. If the offenders in the worst cases for a young people's court were significantly more adult in their cognition and behavior than other young offenders and significantly more adult than most youths of the same chronological age, then the reasons justifying special treatment of youth might not apply.

The problem with withdrawing the protections of juvenile justice only when the subject is mature and sophisticated is that the most serious cases are not the most mature offenders. The empirical pattern is, if anything, to the contrary. The most serious acts of violence are probably committed by youth operating with lower levels of educational attainment, less capacity for mature judgment, and less understanding of the world around them than other kids of the same chronological age. The limited number of studies conducted of waiver to adult court suggest that serious violence was always an important prediction of waiver (see Eigen 1981; Dawson 1992; Howell 1996). And the statutes that provide automatic transfer for listed serious crimes of violence for offenders above a particular age further contradict theories that maturity was the animating principle behind transfers to criminal court. This recent tendency to reduce the age for transfer if the offense was sufficiently serious clarifies the priorities that operate generally to

withhold juvenile court protections in waiver processes. While some youths who are near the age boundary of juvenile and criminal court may be pushed up because of age, in most cases it is offense severity that is a major influence (Dawson 1992; Howell 1996). Kids who are immature are no less dangerous for that reason. Kids who are dangerous are no older. The traditional language about maturity and sophistication was always largely a cover for pushing the worst-case juvenile offenders into criminal courts. The recent emphasis on serious violence has simply removed the cover.

So there is no persuasive reason available to assume that legal policy toward youth is irrelevant to policy toward violent young offenders. That does not mean that violent youths should be treated no differently from nonviolent youths. It does mean that the reasons the legal system wishes to treat some young people who violate the law differently than older law violators must be surveyed and discussed before proper legal responses to youth violence can be framed.

III. Rationales for Distinctive Penal Policies for Youth

Little has been written about the substantive reasons that support a separate policy toward crimes committed by young offenders for a variety of reasons. As described in Section I, part of the problem is that debate about procedures and jurisdiction crowded out any issues of the substantive content of a youth crime policy. Part of the problem is that juvenile and criminal court issues were usually considered separately, so that there was little pressure exerted to examine the same questions across different procedural settings. A third deterrent to substantive analysis is that separate treatment of children seemed intuitively right in a way that did not invite further scrutiny from its advocates. Of course, kids who violate laws should be differently treated; should we imprison six-year-olds? Legal nuance and complexity might seem beside the point in this context. For all these reasons, no sustained analysis of the factors that justify separate treatment of adolescent offenders is in the literature to measure against the known facts on serious youth violence.

Some years ago, I suggested two general policy clusters that were at work in youth crime policy: diminished capacity due to immaturity, and special efforts designed to give young offenders room to reform in the course of adolescent years (Twentieth Century Fund 1978, pp. 78–81). The issues grouped under the "diminished capacity" heading relate to the traditional concerns of the criminal law, so that these mat-

ters tell us why a criminal lawyer might regard a younger offender as less culpable than an older offender. The cluster of policies under the heading of "room to reform" are derived from legal policies toward young persons in the process of growing up. They are the same policies we apply to young drivers, teen pregnancy, and school dropouts.

A. Dimensions of Diminished Responsibility

To consider immaturity as a species of diminished responsibility has some historic precedent but little analytic pedigree. Children below seven were at common law not responsible for criminal acts by reason of incapacity, while those between seven and fourteen were the subject of special inquiries with respect to capacity. But capacity in this sense was an all-or-nothing matter like legal insanity rather than a question of degree. Yet diminished-capacity logic argues that, even after a youth passes the minimum threshold of competence that leads to finding capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender. Just as psychiatric disorder or cognitive impairment that does not render a subject exempt from the criminal law might still mitigate the punishment justly to be imposed, so a minimally competent adolescent should not be responsible for the whole of an adult's desert for the same act.

Despite the universal acceptance of immaturity in doctrines of infancy and the widespread acceptance of reduced levels of responsibility in early teen years, there has been little analysis of what aspects of immaturity should be relevant to mitigation of punishment. Again, the intuitive appeal of the result may have deferred the analysis of its rationale. Yet the specific attributes of legal immaturity must be discovered before judgments can be made about what ages and conditions are relevant to reducing punishment on this ground. Here is an important collaboration for law and the behavioral sciences.

What characteristics of children and adolescents might lead us to lessen punishment in the name of immaturity? An initial distinction needs to be drawn between diminished capacities and the poor decisions such impairments encourage. Most teenaged law violators make bad decisions, but so do most adults who commit major infractions of the criminal law. The Anglo-American criminal law is designed to punish bad decisions full measure. But persons who for reasons not their own fault lack the capacity observed in the common citizen to appreciate the difference between wrong and allowable conduct or to

conform their conduct to the law's requirements may be blameless because of the incapacity. Even when sufficient cognitive capacity and emotional control is present to pass the threshold of criminal capacity, a significant deficit in the capacity to appreciate or control behavior would mean the forbidden conduct is not *as much* the offender's fault, and the quantum of appropriate punishment is less.

How might fourteen- and fifteen-year-olds who commit crimes be said to exhibit diminished capacity in moral and legal terms? There are three different types of personal attributes that influence decisions to commit crimes where adolescents may lack full adult skills and therefore also full adult moral responsibilities when the law is violated.

1. *Cognitive Abilities.* First, older children and younger adolescents may lack fully developed cognitive abilities to comprehend the moral content of commands and to apply legal and moral rules to social situations. The lack of this kind of capacity is at the heart of infancy as an absolute defense to criminal liability. This ability to comprehend and apply rules in the abstract requires a mix of cognitive ability and information. A young person who lacks these skills will not do well on a paper-and-pencil test to assess knowledge about what is lawful and unlawful behavior and why. Very young children have obvious gaps in both information and the cognitive skills to use it. Older children have more subtle but still significant deficits in moral reasoning abilities.

2. *Self-Control.* The capacity to pass paper-and-pencil tests in moral reasoning may be one necessary condition for adult capacity of self-control, but it is by no means a sufficient condition. A second skill that helps transform cognitive understanding into the capacity to obey the law is the ability to control impulses. This is not the type of capacity that can be tested well on abstract written or oral surveys. Long after a child knows that taking candy is wrong, the capacity to resist temptation when a taking is the only available route to the candy may not be fully operational.

To an important extent, self-control is a habit of behavior developed over a period of time, a habit dependent on the experience of successfully exercising self-control. This particular type of maturity, like so many others, takes practice. While children must start learning to control impulses at a very early age, the question of how long the process continues until adult levels of control are achieved is an open one. Impulse control is a social skill not easily measured in a laboratory. We also do not know the extent to which lessons to control impulses are generalized or how context-specific are habits of self-control. Kids

must learn not to dash in front of cars at an early age. How much of that capacity to self-control carries over when other impulses—say, the temptation to cheat on a test—occur in new situations? The empirical psychology of self-control is not a thick chapter in current psychological knowledge. The developmental psychology of self-control is practically nonexistent. There may also be an important distinction between impulse control in the context of frustration and impulse control in temptation settings. If so, the frustration context may be the more important one for study of the determinants of youth violence.

To the extent that new situations and opportunities require new habits of self-control, the teen years are periods when self-control issues are confronted on a series of distinctive new battlefields. The physical controls of earlier years are supplanted by physical freedoms. New domains—including secondary education, sex, and driving—require not only the cognitive appreciation of the need for self-control in a new situation but also its practice. If this normally takes a while to develop, the bad decisions made along the way should not be punished as severely as the bad decisions of adults who have passed through the period when the opportunity to develop habits of self-control in a variety of domains relevant to the criminal law has occurred. To the extent that inexperience is a condition of reduced capacity, this inexperience is partially excusable in the teen years, whereas it is not usually understandable in later life.

3. *Peer Pressure.* The ability to resist peer pressure is yet another social skill that is a necessary part of legal obedience and is not fully developed in many adolescents. A teen may know right from wrong and even may have developed the capacity to control his or her impulses if left alone to do so, but resisting temptation while alone is a different task than resisting the pressure to commit an offense when adolescent peers are pushing for the adolescent to misbehave and witnessing whether or not the outcome they desire will occur. Most adolescent decisions to break the law or not take place on a social stage where the immediate pressure of peers urging the adolescent on is often the real motive for most teenage crime. A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure. Many kids lack this crucial social skill for a long time.

Figure 1 shows the percentage of juvenile defendants who were accused of committing a crime with at least one confederate in the New York City Family Courts in 1978. These offenders were all under sixteen at the time the act was committed. The percentage of total defen-

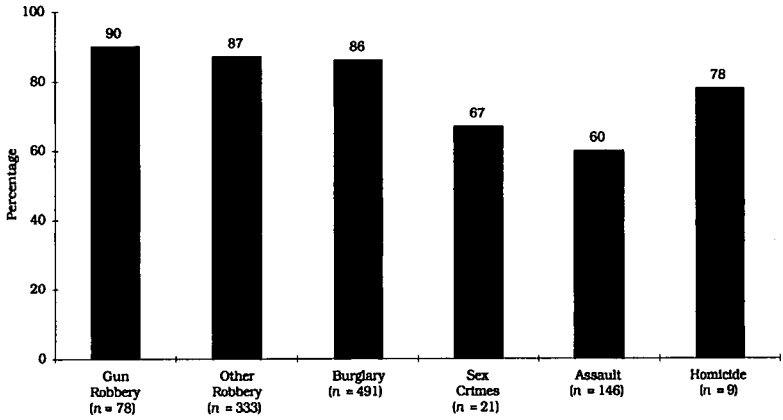

FIG. 1.—Multiple offender cases as a percent of total juveniles charged, by crime, New York City. Source: Zimring (1981).

dants who acted with a confederate ranged from 60 percent for assault to 90 percent for robbery.

The cold criminological facts are these: the teen years are characterized by what has long been called "group offending." No matter the crime, if a teenager is the offender, he is usually not committing the offense alone. When adults commit theft, they usually are acting alone. When kids commit theft, they usually steal in groups. When adults commit rape, robbery, homicide, burglary, or assault, they usually are acting alone. When adolescents commit rape, robbery, homicide, burglary, or assault, they usually commit the offense accompanied by other kids (Zimring 1981). The setting for the offenses of adolescents is the presence of delinquent peers as witnesses and collaborators.

No fact of adolescent criminality is more important than what sociologists call its "group context" (Reiss 1988). And this fact is important to a balanced and worldly theory of adolescent moral and legal responsibility for criminal acts.

When an adult offender commits rape, his motive may be rage or lust or any number of other things. When a teen offender in a group setting commits rape, the motive may well be "I dare you" or its functional equivalent "Don't be a chicken." When an adolescent robs, steals, breaks into a house, or shoots another youth in the company of co-offenders, the real motive for his acts may be the explicit or implicit "I dare you" that leads kids to show off and that deters kids from with-

drawing from criminal acts. Fear of being called chicken is almost certainly the leading cause of death and injury from youth violence in the United States.

"I dare you" is the core reason young persons who would not commit crimes alone do so in groups. "I dare you" is the reason that "having delinquent friends" both precedes an adolescent's own involvement in violence and is a strong predictor of future violence (Elliott and Menard 1996; Howell and Hawkins, in this volume).

That social settings account for the majority of all youth crime suggests that the capacity to deflect or resist peer pressure is a crucially necessary dimension of being law-abiding in adolescence. Dealing with peer pressure is another dimension of capacity that requires social experience. Kids who do not know how to deal with such pressure lack effective control of the situations that place them most at risk of crime in their teens. This surely does not excuse criminal conduct. But any moral scheme that gives mitigational recognition to other forms of inexperience must also do so for a lack of peer-management skills that an accused has not had a fair opportunity to develop. This is a matter of huge importance given the reality of contemporary youth crime as group behavior.

I do not want to suggest that current knowledge is sufficient for us to measure the extent of diminished capacity in young offenders or to express in detail the types of understanding and control that are important parts of a normative developmental psychology. We have an awful lot of social psychology homework ahead of us before achieving understanding of the key terms in adolescent behavioral controls relevant to criminal offending.

But it is important to recognize that a substantive criminal law with a broad-spectrum doctrine of diminished responsibility would generate many of the same issues we now confront in juvenile justice. Even if there were no separate youth policy to consult in making decisions about younger offenders, and even if there were no juvenile court, the punishment of young offenders would be a separate problem of complexity for the criminal courts.

B. Room to Reform in Youth Development Policy

The notion that children and adolescents should be the subject of special legal rules pervades the civil as well as the criminal laws of most developed societies. There are a multiplicity of different policies reflected in different legal areas and also important differences through-

out law in the treatment of younger and older children. Under these circumstances, to refer to "youth policy" generally risks misunderstandings about both the subjects of the policies and the policy objects of the rules.

The policies I refer to in this section concern adolescence, a period that spans roughly from ages eleven or twelve to about age twenty. This is also the only segment of childhood associated with high rates of serious crime. This span has been described as a period of increasing semiautonomy when kids acquire adult liberties in stages and learn their way toward adult freedoms (Zimring 1982).

At the heart of this process is a notion of adolescence as a period of "learning by doing" when the only way competence in decision making can be achieved is by making decisions and making mistakes. For this reason, adolescence is a period that is mistake-prone by design. The special challenge here is to create safeguards in the policies and environments of adolescents that reduce the permanent costs of adolescent mistakes. Two goals of legal policy are to facilitate "learning by doing" and to reduce the hazards associated with expectable errors. One important hallmark of a successful adolescence is survival to adulthood, preferably with the individual's life chances intact.

There is a currently fashionable theory of the classification of youth crime in legal policy that provides a rationale for a room-to-reform policy. The theory is that the high prevalence of offense behavior in the teen years and the rather high rates of incidence for those who offend are often transitory phenomena associated with a transitional status and life period. Even absent heroic interventions, the conduct that occurs at peak rates in adolescence will level off substantially if and when adolescents achieve adult roles and status. With regard to youth violence, the distinction is drawn between "adolescence-limited" and "life-course-persistent" adolescent violent offenders (Moffitt 1993).

The adolescence-limited assumption may carry three implications. First, it regards criminal offenses as a more or less normal adolescent phenomenon, a by-product of the same transitional status that increases accident risks, rates of accidental pregnancy, and suicidal gestures. This view of youth crime tells us, therefore, that policy toward those offenses that are a by-product of adolescence should be a part of larger policies toward youth.

A second implication of the notion that high rates of adolescent crimes can be outgrown is that major interventions may not be neces-

sary to reorient offenders. The central notion of what has been called "adolescence-limited" offending is that one cure for youth violence is growing up (Moffitt 1993; Howell and Hawkins, in this volume).

Related to the hope for natural processes of remission over time is the tendency for persons who view youth crime policy as a branch of youth development policy to worry that drastic countermeasures that inhibit the natural transition to adulthood may cause more harm than they are worth. If a particular treatment risks severe side effects, it usually should only be elected if failure to use would risk more cost. Those who regard youth crime as a transitional phenomenon see problems of deviance resolving themselves without drastic interventions and thus doubt the efficacy of high-risk interventions on utilitarian grounds. So juvenile justice theories with labels like "radical nonintervention" and "diversion" are a natural outgrowth of the belief that long-term prospects for most young offenders are favorable.

But what about the short term? The current costs of youth crime to the general community, to other adolescents, and to the offending kids are quite large. How would enthusiasts for juvenile court nonintervention seek to protect the community? Is a room-to-reform policy inconsistent with *any* punitive responses to adolescent law violation?

The emphasis in youth development policy is on risk management over a period of transitional high danger. As we have seen, the theory that adolescents are not fully mature allows a larger variety of risk-management tactics than is available for dealing with adults. Minors cannot purchase liquor, acquire handguns, buy cigarettes, or pilot planes. Younger adolescents are constrained by curfews and compulsory education laws. There are special age-graded rules for driving motor vehicles, entering contracts, and establishing employment relationships. Many of these rules are to protect the young person from the predation of others. Many are to protect the young person from herself. Many are to protect the community from harmful acts by the young. So there is a rich mixture of risk-management strategies available to reduce the level of harmful consequences from youth crime.

Does this mix of strategies include the punishment of intentional harms? The answer to this question is yes from all but the most extreme radical noninterventionists, but attaching negative consequences to youthful offenders is good policy in this view only up to a point. Youth development proponents are suspicious of sacrificing the personal interests of a young person in order to serve as a deterrent example to other youth if the punished offender's interests are substantially

prejudiced. And punishing a young offender in ways that significantly diminish later life chances compromises the essential core of a youth protection policy. There may be circumstances where drastic punishment is required, but such punishments always violate important priorities in youth development policy and can be tolerated rarely and only in cases of proven need. In this view, punishment begins to be suspicious when it compromises the long-term interests of the targeted young offender.

IV. Categorical Exception for Violent Crime?

Having outlined the principal headings that justify special treatment of adolescent offenders, it becomes necessary to inquire whether any of the considerations in the previous section should be relevant to the legal treatment of youth violence. The argument against extending special youth-oriented policies to violent crime goes something like this: it is okay to allow soft treatment of young offenders when the crimes they commit are kid's stuff, but violent crime is not kid's stuff. There is no room for leniency. Because the harms are so serious, the young offenders who commit them should be treated as if they were adults.

The threshold question to be considered here is whether that reasoning amounts to a principled argument against special youth policies for all violent young offenders. While the rhetoric just summarized sounds much like the denials discussed in Section II, the task of this section is to measure that argument against the specific policies outlined in Section III. The current concern is whether violent acts should be properly excluded from the scope of the policies just discussed.

With respect to doctrines of diminished capacity, there is no logical basis for limiting the scope of a mitigation principle because the harm caused by the criminal act is great. Doctrines of diminished capacity have their greatest effect when large harms have been caused by actors not fully capable of understanding and control. The visible importance of diminished responsibility in these cases comes because the punishments provided are quite severe, and the reductive effect of mitigating punishment is correspondingly large. But if doctrines of diminished capacity mean anything in relation to the punishment of immature offenders, their effects cannot be limited to trivial cases. Diminished capacity is either generally applicable or generally unpersuasive.

The situation with the youth policies served by a room-to-reform perspective is more complicated. A young offender does not become any less young because he pulls the trigger that ends a human life, just

as the victim is just as dead as if shot by an adult. The seriousness of harms intended and done may push legal policy in the opposite direction to that which room-to-reform perspectives would usually suggest. But this countervailing force is not the same as suggesting that either violent acts or the young persons who commit them are not suitable candidates for a youth-oriented policy.

To begin with, violent crime is kid stuff as an empirical matter if American criminology is to be trusted. Just under half of all males report being responsible for an assault at some time during their teen years. So a very large proportion of a male youth population crosses the border into violence at least once in adolescence. Further, teenage boys are involved in assaults at annual rates ranging from 10 to 27 percent depending on how the term "assault" is defined and limited. African-American boys reported serious assault involvement rates of 36 percent per year (Farrington 1996, p. 5). At least half these assaults involve weapon use or injury (Elliott 1994).

The empirical literature reports that violence is kid stuff in one further respect importantly relevant to a room-to-reform youth crime policy and discussed in the previous section. Over 75 percent of those in Delbert Elliott's national youth survey who committed a violent offense during their teenaged years did not continue to do so thereafter (see Howell and Hawkins, in this volume). The majority of self-reported youth violence offenders are adolescence-limited. These are the transitional offenders who proponents of a room-to-reform strategy believe will outgrow criminal conduct without drastic intervention. On the evidence from self-report studies, there is no basis for a categorical exclusion of violent offenders.

Official police statistics tell a somewhat different story. A much smaller percentage of the youth population is identified as violent. But the mode in police statistics patterns is for no repeat offense of violence among the ever-arrested, and the desistance probabilities for violence offenders are no worse than for nonviolent offenders (Wolfgang, Figlio, and Sellin 1972, p. 303, table F.2.2). The characteristic patterns of youth crime discussed in this essay are found in most violent offenders. The only real basis for differentiating the violent offender is the seriousness of his crime. Further, using the offense labels that young offenders are arrested for to screen for seriousness of their owners does not work well. Assaults and robberies vary tremendously in seriousness. These two offenses account for 94 percent of all youth vio-

lence arrests. Categorical generalizations are therefore a poor basis for policy in a great majority of cases.

Instead, policy discussion should be organized around specific subcategories of violent offenders when measuring the justice and efficacy of particular policy responses. The last section of this essay identifies three of these specific subcategories that are of particular import in the late 1990s. That discussion should also be regarded as my attempt to demonstrate the value of shifting the focus from "juvenile violence" as a general category to smaller policy packages.

One final perspective on youth violence in the context of youth development policy concerns the kinds of harm involved in violence as a possible basis for distinguishing violent crime from other areas where youth protective policies apply. The kind of damage that youth violence sometimes causes means that the stakes are high when formulating policy to respond to it. Life and limb are the largest concerns in criminal justice generally, and life-threatening violence demands the priority concerns of criminal justice policy (Zimring and Hawkins 1997).

But violent crime is not the only dangerous behavior that challenges youth policy in current circumstances, nor is it even the most dangerous. Even though driving privileges are withheld until midadolescence, the "learning period" of unsupervised driving in the United States is associated with high risks of death and injury and large aggregate death and injury losses. From the standpoint of the community at large, the risks generated by drivers aged sixteen to twenty-one are of similar kind and similar magnitude to those associated with intentional injuries.

The analogies between traffic injuries and assaultive injuries in modern American life are instructive if incomplete. In each case, the instrumentalities and values of the larger society play an important role in defining the risk environment associated with youth. Kids must learn to drive to be adult in the United States, and this imperative generates a high transitional risk that cannot be avoided. Yet improvements in the risk environments of driving generally—the kinds of roads, kinds of cars, range of legally required safety precautions—can reduce the death toll produced by youth driving. The nature of American youth violence has similar links to larger social phenomena. Distinctively high rates of lethal violence throughout the age distribution are associated with our high rates of youth violence. Handgun availability in the

general society is importantly linked to handgun availability in the youth population, even when we attempt to prohibit acquisition by youths.

Why then are there no serious proposals radically to redefine youth traffic problems, to defer driver's licenses until age twenty-one, or to revoke them when youth drivers have accidents?

The transitional risks associated with young drivers may be regarded as part of the American system, a cost associated with a social process we approve. Youth violence, by contrast, is not believed to be a part of an American system that carries positive benefits. We do not think of high youth homicide rates as growing out of high rates of firearms availability to the general public or out of patterns of male aggression with positive payoffs. Traffic accidents are problems that happen to kids like ours. Youth violence is perceived as a cost imposed on American society from without.

The different social constructions of traffic fatalities and assault fatalities is only one of many differences between highway deaths and homicides. I do not mean to argue that the American public should regard the two problems as equivalent. But it is important to note that in both our history and current affairs, there are contexts other than violence where we are willing to pay the price of adolescent development into adulthood even when community safety is put at risk.

V. General Conclusions and Specific Questions

There are two clusters of reasons criminal acts by immature offenders are treated differently from the same acts committed by adults. Concerns about diminished responsibility come from a criminal law concern about punishment in just proportion to culpability. Concerns about preserving the future life chances of young offenders come from general policies that provide special support to adolescents in the transition to adulthood. Diminished-responsibility doctrines seek to reduce the amount of punishment that is appropriate. Room-to-reform policies address not so much the amount of punishment imposed but the kind of punishment and the kind of consequences that should be avoided. The orientation of these policies is qualitative rather than quantitative.

This essay's next-to-last contribution is a negative one. There is nothing in the known facts about adolescent violence or in other legal policies toward youth that would exclude violent injury categorically from either mitigation or youth protection. These policies will be bal-

anced against other important interests in making decisions on particular topics and in specific cases. The appropriate way to explore the balancing processes is to address specific issues that are raised by recent developments. Identifying some of these specific issues is the final task of this analysis.

The data reported in this volume on the nature of American youth violence and on recent trends in that violence are useful in establishing some important questions that recent developments suggest must be resolved in responding to the 1990s version of violence by the young. Three issues emerge as particularly important:

1. discriminating between serious and less serious forms of youth violence so that special priority programs can be appropriately focused;
2. formulating firearms policies for minors in juvenile and criminal courts;
3. providing punishment processes for young offenders who kill.

Let me briefly discuss why current conditions underscore the importance of these three questions.

1. *Horizontal and Vertical Discrimination.* The increase in youth gun use and youth homicide has produced a demand for making the control of serious violence a priority for young persons in both juvenile and criminal courts. The perceived value of a special focus on serious violence has been widely reflected in mandatory or automatic transfer statutes, mandatory minimum punishments, and special extensions of the punishment powers held by juvenile courts. All of these tactics require capacities to concentrate on serious violence and to define those elements of common offenses of violence that should call for special focus. There are five common youth crimes that involve injury or the threat of injury: homicide, rape, aggravated assault, robbery, and the Uniform Crime Reports "part II" offense of assault (Federal Bureau of Investigation 1996). Homicide and forcible rape are serious offenses by definition. Aggravated assault, robbery, and assault vary widely in seriousness and account for over 95 percent of all youth violence arrests.

Any strategy that brings specially stringent penal policy to serious violence must define in advance what aspects of a crime and what types of participation in a crime are the specially serious grades that deserve the higher sanctions. Raising the penal stakes for serious violence thus

also increases the need for coherent distinctions between gradations of seriousness in violent criminality.

A special focus on the most serious classes of violence will require two separate types of distinctions, what I call *vertical* and *horizontal* discriminations of serious individual acts of violence. Vertical distinctions involve deciding which types of attacks and robberies are the most serious and which do not deserve special high priority. Some vertical distinctions are between crime classifications. Homicides are more serious than nonfatal assaults and robbery. Most vertical distinctions will have to make divisions within crime categories, such as separating the most dangerous assaults and robberies from the rest.

Once there is a hierarchy of criminal acts, it is a further necessity to make judgments about the penal priority to be placed on the extent of a particular defendant's participation in a violent act. If a shooting on the street deserves a high penal priority, that decision implies serious consequences for the young offender who fired the gun. What of his (unarmed) friend who drove him to the scene of the assault? What of their mutual friend who, knowing of the pending assault, loaned the shooter gas money? The high level of group involvement reported for all crimes in figure 1 tells us that detailed judgments about the degree of guilt and punishment of accomplices will be a recurrent need for young offenders. Horizontal distinctions between shooters and supporters, as well as between dominant and passive accomplices, are as much a common need as distinctions between serious and less serious offenses.

My suspicion is that no statutory formula or sentencing commission grid can do an acceptable job of defining in advance which acts and actors should be singled out in special priority programs. Judicial waiver proceedings with a high standard of seriousness are the least wasteful way to provide for the occasional exceptionally serious assault or robbery case as a candidate for waiver or other special emphasis programs.

2. *Firearms Policy for Minors.* The entire increase in youth homicide over the period 1985–93 was in gun homicide (Cook and Laub, in this volume). This suggests that a special priority for reducing lethal violence by the young is removing guns from kids. There are several kinds of gun-related behavior that can be the subject of special treatment in juvenile and criminal courts. Acquisition and possession of handguns by minors are usually illegal acts, status offenses in the sense that having these weapons are illegal only because of the youth of a

subject. There are also laws against carrying concealed weapons and other high-risk uses that apply both to youths and adults. Finally, there are laws that escalate penal liability for some violent crimes if guns are used. All three types of regulation are available for minors, in both juvenile and criminal courts.

There are two questions that should be answered about an emphasis on guns in relation to youth violence, one simple and one complex. The simple question concerns the priority that police, prosecutors, and courts should accord to gun cases. Since changes in gun use are the complete explanation of the troublesome increases in total youth homicide, it would seem that gun availability, carrying, and use by kids are all high-priority issues. The complicated question is which groups of prohibitions should be emphasized in framing a youth gun policy. The broad prohibitions of acquisition and use argue for attempts to prevent gun use before shots are fired. Additional penalties for gun use in crime are also available as policy options, but the upper limits on punishment for gun use are constrained by the system's recognition that immature judgment is to be expected from kids with access to loaded guns. That, after all, is the foundation for the status offense that makes guns unavailable to minors. To then punish misusing minors as if they were as responsible as adults is inconsistent with the central premise of the regulatory scheme. So gun robbery and assault may rightfully generate special penalties, but the lengthy mandatory minimums of several criminal codes contradict the theory of immaturity that is the centerpiece of current youth gun policy.

The status offenses that control youth access to firearms seem, all other things being equal, to be more suitably enforced in juvenile rather than criminal courts. After all, juvenile courts deal with a wide range of age-based prohibitions established because of the higher risks associated with immaturity. Possession of a handgun is near the top of the scale in risk severity for this category of offenses but shares many of the subtleties and peculiarities that are associated with the enforcement of other status offenses ranging from liquor offenses to breaking curfew. When the advanced age of the minor makes a juvenile court referral unavailable, the criminal courts will face difficult and unfamiliar problems. The last thing the system should encourage is the waiver of additional gun status offenses into criminal courts when the defendant is under the maximum age for juvenile court jurisdiction.

3. *The Challenge of Youth Homicide.* Homicide cases are the most serious offenses in Anglo-American criminal law, and the arena where

the retributive pressures generated by a terrible loss clash most powerfully with notions of youth protection and diminished responsibility. The problems associated with cases where young persons kill would be prominent in any environment. The substantial increases in the volume and rate of youth homicide arrests over the years since 1984 make dealing with these worst-case scenarios even more obviously a priority in the 1990s and beyond.

The unfortunate tendency for debates about jurisdiction to crowd out discussion of appropriate substantive principles is nowhere more apparent than for youth homicide. Almost all the discussion of juvenile killers has been in the context of deciding at what age juvenile homicide defendants may and must be transferred to criminal courts. Little attention has been paid to the appropriate principles for such cases in juvenile court and very little discussion has concerned what special rules or principles should influence case outcomes in criminal court once a transfer occurs. The implicit assumption has been that the transfer of a juvenile into a criminal court should end any special concerns relating to the immaturity of the defendant. Why this might be is not often addressed.

A jurisprudence of youth violence without coherent principles for youth homicide cases is as vulnerable as a house without a roof. But two thin layers of reasoning in death-penalty litigation and conclusory arguments as the background to state legislation are all that is currently available to address these issues. Both legislative debate and the consideration of diminished-responsibility questions by state appellate courts in individual cases must provoke the most sustained consideration of these important substantive questions. The proper disposition of homicide offenses by middle adolescents will probably require criminal court policies that permit mitigation of punishment on grounds of immaturity. Transfer to criminal court relocates these difficult problems; it does not resolve them.

REFERENCES

Bennett, William, John J. DiIulio, Jr., and John P. Waters. 1996. *Body Count.* New York: Simon & Schuster.

Circuit Court of Cook County. 1907. *Annual Report of the Circuit Court of Cook*

County, Juvenile Division. Chicago: Circuit Court of Cook County, Juvenile Division.

Cook, Philip J., and John H. Laub. In this volume. "The Unprecedented Epidemic in Youth Violence."

Dawson, Robert. 1992. "An Empirical Study of Kent Style Juvenile Transfers to Criminal Court." *St. Mary's Law Journal* 23:975–1054.

Eigen, Joel Peter. 1981. "Punishing Youth Homicide Offenders in Philadelphia." *Journal of Criminal Law and Criminology* 72:1072–93.

Elliott, Delbert S. 1994. "Serious Violent Offenders: Onset, Developmental Course, and Termination: The American Society of Criminology 1993 Presidential Address." *Criminology* 32:1–21.

Elliott, Delbert S., and Scott Menard. 1996. "Delinquent Friends and Delinquent Behavior: Temporal and Developmental Patterns." In *Delinquency and Crime: Current Theories,* edited by J. David Hawkins. Cambridge: Cambridge University Press.

Farrington, David P. 1996. "The Explanation and Prevention of Youthful Offending." In *Delinquency and Crime: Current Theories,* edited by J. David Hawkins. Cambridge: Cambridge University Press.

Federal Bureau of Investigation. 1996. *Crime in the United States: Uniform Crime Reports, 1995.* Washington, D.C.: U.S. Goverment Printing Office.

Howell, James C. 1996. "Transfers to the Criminal Justice System: State of the Art." *Law and Policy* 18:17–60.

Howell, James C., and J. David Hawkins. In this volume. "Prevention of Youth Violence."

Mack, Julian. 1909. "The Juvenile Court." *Harvard Law Review* 23:107–22.

Moffitt, Terrie E. 1993. "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy." *Psychological Review* 100:674–701.

Reiss, Albert J., Jr. 1988. "Co-offending and Criminal Careers." In *Crime and Justice: A Review of Research,* vol. 10, edited by Michael Tonry and Norval Morris. Chicago: University of Chicago Press.

Twentieth Century Fund. 1978. *Confronting Youth Crime.* Task Force on Sentencing Policy. New York: Holmes & Meier.

Wolfgang, Marvin, Robert Figlio, and Thorsten Sellin. 1972. *Delinquency in a Birth Cohort.* Chicago: University of Chicago Press.

Zimring, Franklin E. 1979. "American Youth Violence: Issues and Trends." In *Crime and Justice: An Annual Review of Research,* vol. 1, edited by Norval Morris and Michael Tonry. Chicago: University of Chicago Press.

———. 1981. "Kids, Groups, and Crime: Some Implications of a Well-Known Secret." *Journal of Criminal Law and Criminology* 72:867–85.

———. 1982. *The Changing Legal World of Adolescence.* New York: Free Press.

Zimring, Franklin E., and Gordon Hawkins. 1997. *Crime Is Not the Problem: Lethal Violence in America.* New York: Oxford University Press.