Essay

Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes

David O. Brink*

1. Introduction

In response to perceived increases in violent youth crime, the last two decades have witnessed a national trend toward getting tough on youth crime and holding youthful offenders more accountable. A central element in this national trend is the transfer of juveniles to adult criminal court, where the consequences of conviction are in various ways much more severe than they are in juvenile court. Prosecutors have long had discretion to prosecute older, mature juveniles who are repeat offenders as adults, and judges in juvenile court have long had the power to issue waivers or transfers that reassign these kinds of juveniles to adult court after a hearing in juvenile court. But in the attempt to get tough on violent juvenile crime, both the judicial waiver and prosecutorial discretion have expanded with the result that more juveniles are being transferred to adult court at younger ages for a broader variety of crimes. Many states have gone so far as enacting

* Professor of Philosophy, University of California, San Diego and Co-Director of the Institute for Law and Philosophy at the University of San Diego Law School. An earlier version of this material was presented at Ohio University; I would like to thank my audience on that occasion for helpful discussion. I am grateful to the Academic Senate of the University of California, San Diego for a grant that supported research assistance on this topic and to Nellie Wieland for providing extremely helpful research on various background issues concerning juvenile justice and recent state trends to get tough on juvenile crime. Pat Churchland provided suggestions about research in neurosciences relevant to the issues in developmental psychology that concern me. Stephen Morse provided useful orientation in the area of criminal and, especially, juvenile justice. Larry Alexander, Richard Arneson, Barry Feld, Stephen Morse, Dana Nelkin, Sam Rickless, and Nellie Wieland also provided valuable comments on an earlier version of this material.

legislation requiring mandatory transfer of juveniles to adult criminal court based on age, offense, or both. For example, California (the state in which I reside) recently enacted Proposition 21, which requires the transfer to adult criminal court of all juveniles over the age of 14 charged with certain serious criminal offenses, including murder and various sexual offenses. 2

Emblematic of the transfer trend is the notorious case of Lionel Tate. 3 In Florida in 1999, when he was twelve years old, Lionel Tate brutally killed six-year-old family friend Tiffany Eunick in his home. Lionel alleged that they were wrestling and that he was imitating body slams and other tactics employed by professional wrestlers that he watched on television. Tiffany suffered a fractured skull, a lacerated liver, and many other injuries from being kicked, punched, and thrown about the room—injuries that proved fatal. The prosecutor decided to try Lionel as an adult, apparently in response to the sensational nature of his crime. Lionel was offered a chance to plead to second-degree murder and a reduced sentence, but his mother refused the plea bargain on the ground that Lionel had not intended to kill Tiffany. 4 Lionel was convicted of first-degree murder, which in Florida carries a mandatory sentence of life in prison without the possibility of parole. 5 In response to public outcry over Lionel’s sentence, he was recently

2. In California, Proposition 21 also enhanced penalties for various gang-related felonies. See 2000 Cal. Legis. Serv. Prop. 21. For the text of Proposition 21, see http://primary/2000.ss.ca.gov/ VoterGuide/Propositions/21text.htm (last visited Feb. 29, 2004). Since its passage by popular referendum, Proposition 21 has been codified in the California Welfare and Institutions Code. See CAL. WELF. & INST. CODE § 602 (West 2004). California’s mandatory transfer of juveniles to adult court was recently upheld in the case of Charles “Andy” Williams, the 15-year-old boy charged with killing two fellow students and wounding thirteen others at Santana High School, outside San Diego. See People v. Williams, No. D040917, 2004 WL 179207, slip op. at *1–*2 (Cal. Super. Ct. Jan. 30, 2004). Examples of other states’ mandatory transfer statutes include ARIZ. CONST. art. 4 pt. 2 § 22(1) (mandatory transfer for offenders 15 years of age or older accused of murder, forcible sexual assault, armed robbery, and other violent felony offenses); CONN. GEN. STAT. § 46b-127(a) (2004) (mandatory transfer for offenders 14 years of age or older accused of capital felonies, class A or class B felonies, or arson-murder); 705 ILL. COMP. STAT. 405/5-805(1) (1999) (mandatory transfer for juveniles 15 years of age or older accused of felonies and having various types of previous felony adjudications); IND. CODE 31-30-1-4 (2003) (mandatory transfer for juveniles 16 years of age or older accused of murder, kidnapping, rape, armed robbery, robbery resulting in bodily injury, and carjacking, among other things).

3. For the factual background of Lionel Tate’s case, see Tate v. Florida, 864 So. 2d 44, 45–47 (Fla. Dist. Ct. App. 2003). See also Mike Clary, Teen’s Life Sentence Sparks Juvenile Punishment Debate, CHI. TRIB., Mar. 21, 2001, at 11.

4. See Mary A. Mitchell, Parenting, Not Society, to Blame When Son Kills, CHI. SUN-TIMES, Mar. 13, 2001, at 16 (quoting Tate’s mother: “People say I am a fool not to accept the plea from the State, but how do you accept a plea for second-degree murder when your child was just playing?”). The initial plea bargain would have carried only a three year sentence in a juvenile correctional facility, followed by ten years of probation. See Michael Browning et al., Clemency Possible for Teen, CHI. SUN-TIMES, Mar. 11, 2001, at 26.

5. Tate, 864 So. 2d at 46–47; see also FLA. STAT. ANN. § 775.082(1) (West 2004) (mandating that first-degree murder, a capital felony, be punished by either death or a sentence of life without the possibility of parole).
granted a retrial and subsequently accepted substantially the same plea bargain that he had earlier refused.6

Lionel’s brutal crime was shocking and tragic. But even more shocking was his prosecution and sentencing as an adult. Twelve-year-olds are immature cognitively and emotionally in ways that render them not fully responsible, and to sentence someone to life imprisonment without the possibility of parole at that age is to give up on someone as incorrigible before his character has even been formed.7 Permanent injustice was averted in Lionel’s case by virtue of his retrial and subsequent plea agreement. This might be reassuring if Lionel’s first trial was aberrational. Sadly, it is not. The national trend to try juveniles accused of serious crimes as adults is unmistakable.8

The transfer trend is deeply flawed. Juvenile crime deserves punishment, and serious juvenile crime deserves serious punishment. Moreover, some juveniles—especially older, more mature juveniles who are repeat offenders—may deserve to be tried and punished in adult criminal court. But the trend to try ever younger juveniles as adults based solely on the gravity of their crimes is mistaken and unjust.

One reason the trend is mistaken depends on a retributive conception of punishment, according to which the guilty deserve punishment and should be punished in proportion to the magnitude of their guilt, where guilt is a function not only of the wrong one commits or the harm one causes but also of the culpability or responsibility one bears for the wrong or harm. For a variety of reasons, juveniles tend to be less competent in discriminating right from wrong and in being able to regulate successfully their actions in accord with these discriminations. If they are less competent, then they are less responsible. But then the trend to try juveniles as adults mistakenly assesses the punishment juveniles deserve by the wrong or harm they have done, ignoring their diminished responsibility for this wrong or harm.

In ignoring the diminished responsibility that juveniles have for their crimes, the trend to try juveniles as adults ignores a principal reason for having separate systems of juvenile and adult criminal justice in the first place. It is in part because the normative competence of juveniles is diminished that we think that juvenile crime should be conceived and

6. Tate, 864 So. 2d at 47–48 (granting Tate a new trial and reporting an extreme public reaction to Tate’s conviction and sentence, “reflected in the multiple amicus briefs filed in this appeal”); see also Clary, supra note 3; Browning et al., supra note 4. The legal basis for the retrial was that Lionel’s competency had not been properly evaluated at the time of the first trial. See Tate, 864 So. 2d at 47–48. Lionel’s mother was still reluctant to accept a second-degree murder plea rather than a manslaughter plea, as she maintained that Lionel had not intended to cause Tiffany’s death, but she eventually acquiesced on obvious pragmatic grounds. See Natalie P. McNeal, Tate’s Mother Assents, MIAMI HERALD, Jan. 5, 2004, at 1B.

7. See discussion infra Part V.

8. See discussion infra Part III.
punished differently than adult crime and that juveniles should be tried and sentenced differently. This rationale for juvenile justice is retributive.

Another rationale appeals to possibilities for rehabilitation or correction. For obvious reasons, juveniles are more corrige and educable than adults. But then the corrective functions of punishment are better served by making different penal provisions for juveniles. Probation and community service tend to be more effective alternatives with juveniles than with adults. Furthermore, there is a special case to be made in the case of many juveniles, where prison sentences are necessary, that prison sentences should be shorter; that prison conditions should be more humane; and that prison life should contain more opportunities for education and vocational training. By mainstreaming juveniles with adult offenders and placing convicted juveniles in adult prison facilities, the trend to try juveniles as adults ignores the corrective rationale for a system of juvenile justice.

There are several dimensions to understanding and assessing the trend to try juveniles as adults. Some are doctrinal and empirical—involving the social and legal history of juvenile justice, the social determinants and consequences of the trend to try juveniles as adults, and various aspects of developmental psychology. Other aspects of the problem are conceptual and jurisprudential—involving the justification for punishment, the rationale for a separate system of juvenile justice, and the bearing of these jurisprudential ideas on the proper response to juvenile crime. Any sensible discussion of these issues must say something about doctrinal, empirical, and conceptual issues, but it is possible to mix these dimensions in different ratios. Though I will have to say something about the doctrinal and empirical background of this trend, my focus will be on jurisprudential issues. The jurisprudential aspects of the juvenile transfer trend are surprisingly underexplored, and these are the issues that interest me most and that I am best qualified to address.

II. Juvenile Justice Background

The concept of a special system of juvenile justice is largely a twentieth century development. Until the very late nineteenth century, Anglo-American law tended to treat children either as property or as little adults. Under the age of five or six, children were regarded as the property of their parents, to be treated, like other property, at the discretion of the owner.

9. One recent exception is Elizabeth S. Scott & Lawrence Steinberg, Blaming Youth, 81 Texas L. Rev. 799 (2003). Though their focus is not on the transfer trend per se, they defend several claims parallel to mine, appealing to findings in developmental psychology to mitigate the blameworthiness and punishment of juvenile offenders. Id. at 829–32.

Once the child reached the age of five or six, the law generally regarded him as a legal person, holding most of the responsibilities (and some of the rights) of adults.\footnote{11}

Industrialization and urbanization in the nineteenth century and the emergence of charitable organizations contributed to new ideas about the education and socialization of children, in general, and wayward children, in particular. This led to the development of houses of refuge and cottage reformatories that dealt with wayward children with a mix of discipline, education, and vocational training. In the late nineteenth century jurisdictions in several states experimented with separate procedures of some kind in the criminal trials of juveniles. The first juvenile court was established in Cook County, Illinois in 1899. By the 1920s separate juvenile justice systems were established in nearly every state.\footnote{12}

These juvenile courts differed from their adult counterparts in several ways. These differences reflected the assumptions that juveniles were not as mature as adults and that they were therefore both less responsible for their offenses and more corrigible than their adult counterparts. Procedurally, the juvenile courts were more informal and less adversarial. Substantively, they focused less on punishment and more on rehabilitation and socialization. Pursuing a doctrine of \textit{parens patriae} (common guardianship), juvenile courts adopted a more paternalistic attitude toward juvenile offenders.\footnote{13} Consequently, the disposition of juvenile offenders was different. Separate juvenile correctional facilities were created that stressed educational and vocational training, sentences were often shorter, courts made greater use of probationary and other diversionary alternatives to incarceration, and the criminal records of juvenile offenders were not made a matter of public record in order to prevent stigmatization that might interfere with successful rehabilitation.\footnote{14}

For some time, the paternalistic focus of juvenile courts lent itself to procedural informalities in which juvenile offenders were not accorded the same procedural safeguards before and during trial as their adult counterparts.\footnote{15} This practice eventually led to due process concerns, and by the 1960s the Supreme Court was willing to recognize due process rights in juvenile proceedings. In \textit{Kend v. United States} the Court insisted that in any judicial transfer from juvenile to adult criminal court the accused is entitled to a hearing, the assistance of counsel, and a statement of the reasons for the

\footnotesize{11. WHITEHEAD & LAB, supra note 10, at 29–30.}
\footnotesize{12. See id. at 37–38 (reporting that, by 1920, all but three states had some form of juvenile court); SNYDER & SICKMUND, supra note 1, at 86.}
\footnotesize{13. A classic statement of the \textit{parens patriae} doctrine can be found in Julian W. Mack, \textit{The Juvenile Court}, 23 HARV. L. REV. 104 (1909).}
\footnotesize{14. See SNYDER & SICKMUND, supra note 1, at 86–87 (detailing the procedural impact of the \textit{parens patriae} doctrine on the development of juvenile justice systems); WHITEHEAD & LAB, supra note 10, at 38–39, 42–43, 231–32.}
\footnotesize{15. See SNYDER & SICKMUND, supra note 1, at 87.}
transfer. In the case of *In re Gault*, the Court held that juveniles enjoy the Fifth Amendment right against self-incrimination and the Sixth Amendment rights to notice of charges, to confront and cross-examine accusers, and to the assistance of counsel. And in *In re Winship*, the Court not only affirmed the requirement that adult criminals be convicted only by the standard of guilt beyond a reasonable doubt but also extended this evidentiary requirement to juvenile proceedings in which incarceration is a possible outcome.

Contemporary juvenile justice distinguishes juveniles from adults and recognizes distinct forms of juvenile offense. For instance, the Model Penal Code identifies juveniles as those under the age of 18. Though it requires juveniles under the age of 16 to be tried in juvenile court, it provides for the possibility of judicial waiver of juveniles between the ages of 16 and 18 to adult criminal court on a case-by-case basis, in which the prosecution bears the burden of proof in justifying the waiver. A substantial majority of states have followed the Model Penal Code in identifying juveniles as those under 18 years of age. Juvenile courts recognize two main kinds of juvenile offense. *Juvenile crime* is simply criminal activity committed by a juvenile. The rules for adult and juvenile crime are the same; the only difference is the age of the offender. By contrast, *status offenses* comprise acts whose legality depends upon the status of the actor. Juvenile status offenses involve acts that would be legal if performed by an adult but are illegal for juveniles, such as truancy, running away from home, curfew violations, smoking, drinking, and swearing. Of necessity, the trend of trying juveniles as adults applies only to juvenile criminal conduct, not juvenile status offenses.

III. The Transfer Trend

Most commentators view the trend to try juveniles as adults as part of a more general attempt to "get tough" on crime and criminals over the last two decades. This crackdown on violent crime is a response to perceived increases in violent crime, in general, and juvenile violence, in particular. Juvenile crime is perceived by many as more violent and serious than before, and more serious crime has seemed to many to call for more serious

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17. 387 U.S. 1, 33, 41, 55–56 (1967).
20. See id. cmts. 1, 3.
21. Ten states (GA, IL, LA, MA, MI, MO, NH, SC, TX, and WI) identify juveniles as those under 17 years of age, and three states (CT, NY, and NC) identify juveniles as those under 16 years of age. WHITEHEAD & LAB, supra note 10, at 6–9.
punishment.\textsuperscript{23} For instance, Paul McNulty, president of an anticrime advocacy group and former official in the U.S. Department of Justice during the Bush administration, warns of a coming epidemic of violent juvenile crime, calls for an end to paternalistic attitudes toward juvenile offenders, and demands that juveniles be held more accountable for their crimes.

The challenge . . . lies in suppressing juvenile crime at the first sign of trouble, often with young teenagers or even pre-teens, before these criminals become violent young men. Government’s role is to enforce the law, and it should be vigorous and purposeful in the acceptance of that duty. When families fail to instill virtue in their children, government must be prepared immediately to send a clear message to those children, and their parents, that law-breaking will not be tolerated, and that the children will be held accountable. To do that will require a complete overhaul of the juvenile justice system.\textsuperscript{24}

On this view, responding to the epidemic of juvenile crime requires changing the juvenile justice system so that it stresses accountability and is more punitive.

As is often true, the data appear to be less clear than the public perception. For instance, in \textit{Juvenile Justice}, John Whitehead and Steven Lab chart a pattern of generally increasing juvenile offense rates during the period from 1960 to 1995, as measured by arrest rates.\textsuperscript{25} Except for decreases in the early 1980s, the pattern they chart is one of increasing juvenile offense.\textsuperscript{26} But when they turn to genuinely violent crime—murder and aggravated assault—they note significant decreases in the incidence of arrest after the 1980s.\textsuperscript{27} A different picture of trends in juvenile crime is presented by The Sentencing Project, a nonprofit criminal justice policy organization. In an analysis that tracked patterns in juvenile crime from 1970 through 1998, they report: “The juvenile proportion of all arrests for serious violent crime in 1998 was about average for the preceding twenty-five years, while the percentage of property crime arrests involving juveniles has actually declined throughout most of this period.”\textsuperscript{28}

The exception to these patterns, they note, is murder. While juvenile murder rates remained relatively constant from 1970 through 1985 at around 2,000 per year, they underwent a steep increase after that, peaking in 1994 at

\textsuperscript{23} See, e.g., Paul J. McNulty, \textit{Natural Born Killers? Preventing the Coming Explosion of Teenage Crime}, POL’Y REV., Winter 1995, at 84, 84 (claiming that a “breathtaking rise in juvenile crime is occurring even as the national rate of violent crime has leveled off”).

\textsuperscript{24} \textit{Id} at 85.

\textsuperscript{25} \textit{WHITEHEAD & LAB, supra} note 10, at 13–15.

\textsuperscript{26} \textit{Id}.

\textsuperscript{27} See \textit{id} at 14 (presenting a table of juvenile arrest-rate statistics).

almost 4,500, and then dropping by 52% by 1998. The prime determinant of these murder rates was the number of murders with guns (the rate of non-gun murders during this period was constant). A common explanation of this spike in the juvenile murder rate during the late 1980s and early 1990s appeals to the explosion of crack markets and the greater availability of guns in urban areas during this period. These two studies disagree in their assessments of general trends in juvenile crime and even violent juvenile crime. They agree only in the patterns they find in juvenile murder rates, and, even here, they do not agree about when the rates peaked, though they agree that the rates are now on the decrease.

Whether or not the perception of increases in violent juvenile crime over the last two decades is entirely accurate, it does seem that in response to this perception states have begun to take an increasingly punitive attitude toward juvenile crime. A symbolic indication of this punitive attitude is the change many states have made in the purpose clauses of their juvenile codes. Forty-two states have such clauses, and virtually all had focused, as the parens patriae doctrine would suggest, on the best interests of the offender. Since the 1980s, approximately one-third of the states have amended their purpose clauses to include the goals of punishment, protection of the innocent, and accountability. More significantly, during this period several states have passed legislation requiring mandatory minimum sentencing guidelines for a variety of juvenile offenses, apparently reflecting a public, or at least legislative, sense that juvenile offenses were being punished too leniently. Another aspect of the trend toward greater punitiveness of juvenile crime is the use of so-called blended sentencing in which courts have the authority to sentence juvenile offenders to either juvenile or adult correctional facilities or both. By contrast with the traditional juvenile system in which sentences are served in juvenile correctional facilities and terminate no later than the age of majority, blended sentencing is more punitive insofar as it allows juvenile offenders to be sentenced as adults to

29. Id.
30. Id.
34. See id.
35. Id. at 230–32.
adult facilities or it combines juvenile correction while the offender is a juvenile with additional adult correction once the offender reaches majority.\footnote{36}{Id. at 231.}

But the most significant element in the punitive attitude is the trend to treat juveniles as adults. This is a more punitive trend because, in comparison with the juvenile forum, the adult forum makes juveniles liable for longer sentences in harsher environments and makes their convictions a matter of permanent public record.

The most traditional mechanism for trying juveniles as adults is the \textit{judicial waiver} or \textit{transfer} of the juvenile to adult criminal court. The judicial waiver occurs in a juvenile court hearing, decided on a case-by-case basis. Model Penal Code section 4.10 contemplates that the waiver will occur only in cases in which the juvenile is at least 16 years old. It does not specify the conditions in which such a waiver is appropriate.\footnote{37}{See MODEL PENAL CODE § 4.10 cmt. 3 & n.16 (Official Draft, 2nd Revised Comments 1980) (describing the procedure for using the judicial waiver and listing states that allow juvenile courts to waive their jurisdiction in cases involving defendants under 16 years old); see also Gordon, supra note 1, at 204–05 (characterizing judicial waiver as the “most prevalent practice in United States jurisdictions”).} Traditionally, juvenile court judges have taken into consideration the age and maturity of the accused, the prior record of the accused (e.g., whether he is a repeat offender), and the severity or seriousness of the offense.\footnote{38}{See Gordon, supra note 1, at 205 (explaining that most judges utilize the factors outlined by the Court in \textit{Kem}t). In an appendix to its opinion, the \textit{Kem}t Court listed eight “determinative factors,” including the seriousness of the offense, whether the offense was against persons or property, the maturity of the offender, the likelihood of rehabilitation, and the offender's prior record. Kent v. United States, 383 U.S. 541, 566–67 (1966).} Several states have passed legislation that affects the judicial waiver, effectively expanding its scope. For instance, several states have lowered the age at which the judicial waiver can be issued either as a general matter or for certain categories of offense. For example, in 1978 New York passed a juvenile offender law that made 13-year-olds eligible for trial for murder in criminal court and made 14-year-olds eligible for such trial in cases involving lesser violent offenses.\footnote{39}{1978 N.Y. Laws ch. 478 § 2(h) (codified as amended at N.Y. PENAL LAW § 30.00 (McKinney 1998)).} In effect, the judicial waiver as traditionally conceived created a presumption in favor of trying the accused juvenile as a juvenile, a presumption which could only be rebutted on a case-by-case basis when it was shown that the juvenile was sufficiently mature and had already shown signs of sufficient incorrigibility as to justify treating him as an adult.\footnote{40}{See \textit{Patrick Griffin} et al., U.S. DEP'T. OF JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS, 3–4 (1998).} Recently, several states have also expanded the scope of the judicial waiver by shifting the presumption from juvenile jurisdiction to adult jurisdiction for
certain ages and categories of offense.\footnote{Whitehead & Lab, supra note 10, at 231.} Partly as the result of such statutory changes the scope of the judicial waiver has expanded considerably in recent years.\footnote{Id.}

Another mechanism of transfer to adult court involves prosecutorial discretion. Recent legislation in several states gives prosecutors the authority, either as a general rule or in special circumstances relating to the age of the accused and the category of offense, to determine whether to bring the case in adult court. This mechanism allows the prosecutor to bypass the need for a judicial hearing and waiver.\footnote{Id. at 218–19.} Recent legislation has simultaneously expanded prosecutorial discretion—expanding the pool of cases in which prosecutors can exercise their discretion to try juveniles as adults—and restricted it by creating presumptions in favor of transfer for certain ages and categories of offense. Both kinds of change in prosecutorial discretion have had the effect of increasing the number of transfers.\footnote{Id. at 231.}

However, even with the legislative changes in these two transfer mechanisms, they do not absolutely mandate transfer. Even when there is a presumption in favor of transfer, it can be rebutted in individual cases.\footnote{See Gordon, supra note 1, at 205–07 (describing these trends of change in prosecutorial discretion and their results).} Perhaps the most significant and disturbing aspect of the transfer trend is the legislative adoption in many states of mandatory transfer statutes that require certain cases that would otherwise go to juvenile court to go to adult criminal court, bypassing both judicial and prosecutorial scrutiny over the appropriate forum for the accused. Typically, mandatory transfers lower the age at which juvenile cases go to adult court either as a general rule or for special categories of violent offense, such as murder, rape, and aggravated assault.\footnote{Whitehead & Lab, supra note 10, at 218.}

The majority of states have now adopted some kind of mandatory transfer legislation.\footnote{Whitehead and Lab note that, as of 1999, 29 states had mandatory transfer statutes of some kind. Id.} For instance, adoption in 2000 of Proposition 21 added a mandatory transfer to the California Welfare and Institutions Code requiring that juveniles 14 years of age or older be tried as adults in cases where they are accused of murder or various sexual offenses, including rape, forcible sodomy, and lewd and lascivious acts with a child under the age of 14.\footnote{See Cal. Welf. & Inst. Code § 602 (West 2004).}

The net result of such departures from the Model Penal Code provisions for juvenile transfer is that more juveniles are being transferred to adult court at younger ages for a broader variety of crimes. Indeed, Nebraska is the only

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41. Whitehead & Lab, supra note 10, at 231.
42. Id.
43. Id. at 218–19.
44. Id. at 231.
45. See Gordon, supra note 1, at 205–07 (describing these trends of change in prosecutorial discretion and their results).
46. Whitehead & Lab, supra note 10, at 218.
47. Whitehead and Lab note that, as of 1999, 29 states had mandatory transfer statutes of some kind. Id.
state that has not altered its provisions for juvenile transfer in some way to make it easier to try juveniles as adults. It is this broad trend to try juveniles as adults and, in particular, the trend to try ever younger juveniles as adults on account of the seriousness of their offenses that ought to raise serious jurisprudential concerns.49

IV. The Focus on Punishment

It is worth noting that there is nothing objectionable per se about the change in the purpose clauses of state penal codes to emphasize a concern for punishment rather than the best interests of the offender. Though some forms of juvenile punishment may be questionable, there should be nothing controversial about punishing juvenile crime. Nor should punishment be contrasted with concern for the offender, protection of the innocent, or the demand for accountability, because these are all legitimate aspects of punishment. Specifically, these three values correspond to the three main jurisprudential rationales for punishment—rehabilitation or correction, deterrence, and retribution.

Any assessment of the trend to try juveniles as adults must engage our assumptions about the justification for punishment and the justification for a separate system of juvenile criminal justice. Adequate theories of punishment should address not only whom we should punish but also how and how much we should punish. I cannot justify a comprehensive conception of punishment here. What I can do is briefly explain the assumptions about the justification of punishment that will inform my discussion and at least sketch some reasons for thinking that such assumptions are plausible.

The rehabilitative or corrective view of punishment sees crime as the expression of antisocial behavior, perhaps itself the product of social dysfunction, and sees the goal of punishment as the rehabilitation and resocialization of the individual into constructive and socially acceptable behavior. It tells us that we should punish antisocial behavior and that we should do so in a manner and to the extent necessary to resocialize the offender. This corrective view is one traditional conception of punishment and certainly underlies much of the parens patriae doctrine that has been influential in juvenile justice.

A consequentialist justifies punishment by appeal to its good consequences. Though consequentialists could appeal to the value of rehabilitation, historically they have appealed to punishment's contribution to reducing crime and promoting peace and security. This deterrent value has two main components. Punishment has value as a general deterrent insofar as punishing A for his crime tends to deter others (B–Z) from committing

49. The trend is well documented. See generally GRIFFIN ET AL., supra note 40; SNYDER & SICKMUND, supra note 1, at 85–108; WHITEHEAD & LAB, supra note 10, at 218–22, 230–32.
similar crimes. It also has value as a specific deterrent insofar as it deters A from repeat offense. Consequentialism of this sort tells us that we should punish those whose punishment would deter crime and that we should punish in a manner and to the extent necessary to secure this deterrent effect. For instance, Jeremy Bentham, perhaps the most famous proponent of the consequentialist conception of punishment, claims that we should punish in ways calculated to deter crime and that the severity of punishment should be such that it is greater than the expected profit of each offense discounted (divided) by the perceived probability that the infraction will be punished.

Both the corrective and consequentialist conceptions of punishment are forward-looking; they justify punishment by its good effects, whether these are therapeutic effects for the offender or special and general deterrent effects. By contrast, the retributive view of punishment is backward-looking; it appeals to desert. Retributive theories answer the questions about whom we should punish and why by insisting that punishment be reserved for those who deserve sanctions on the basis of prior wrongdoing. They answer the question of how and how much to punish by appeal to the idea of proportionality; the magnitude of punishment for a crime should be commensurate with the magnitude of the wrong done.

While there are no doubt important roles for considerations of rehabilitation and deterrence to play in an adequate theory of punishment, it is hard to believe that any purely forward-looking theory could represent an adequate conception of punishment. The purely forward-looking theories do not give plausible answers to the questions whom to punish and how much to punish.

Consider the corrective view. If rehabilitation is the exclusive or main goal of punishment, then it looks as if our penal practices are often unjustified. Over-crowded and brutal prisons in which insufficient resources are devoted to education and job training are schools for social pathology, not schools for the social sentiments. No doubt there is need for penal reform, but a huge mismatch between penal rationale and penal practice may give us reason to rethink the adequacy of the rationale.

Moreover, we may doubt whether rehabilitation is a good guide as to whom to punish. Many people, including those who have not broken the law, may be in need of social adjustment. Is the state permitted to require

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50. Punishment might reduce crime via rehabilitation or correction. Punishment might also have benefits other than those of reducing crime, such as the satisfaction that victims and others might experience at seeing the guilty suffer. However, deterrence seems to be the good on which consequentialists often focus. Indeed, a deterrence theory would be the view that deterrent effects (general and specific) are the only relevant consequences for justifying punishment.


52. It is worth noting that the notion of proportionality, central to retributivism, does not presuppose the implausible notion of “an eye for an eye.” We can punish rapists proportional to the seriousness of the wrong they do without raping rapists.
compulsory therapy for those who have not committed crimes? Nor is it clear that rehabilitation is a good guide as to how much to punish. Suppose we have two people who have committed equally serious crimes for which they are equally responsible. Should their sentences differ just because one is easier to resocialize than the other? And what about those who cannot be rehabilitated? Do they deserve no punishment at all?

Similar worries plague the pure consequentialist theory of punishment. The most notorious worry is that it too provides an inadequate account of whom to punish because it would condone and indeed require punishing the innocent if this had sufficient deterrent value. The stock example is that in response to a recent crime spree, a sheriff may be able to prevent a security crisis and general unrest if he frames an innocent person for the crimes. The consequentialist might doubt that framing an innocent person is likely to achieve either specific or general deterrence if the deceit is discovered, or might instead appeal to the (moral) disvalue of punishing innocent people. But this just requires more careful thought in constructing the counterexample. For—whatever we take to be valuable—it seems there are possible circumstances in which we would maximize good consequences by punishing the innocent (if only because this is required to minimize the number of innocents being punished). We might also wonder about the consequentialist account of how much to punish. If the crime arose from unique temptations in circumstances very unlikely to repeat themselves, or if the offender happened to undergo a character change after the commission of his crime, then there might be no special deterrent value to punishing him very severely. And if the public were to understand this, there might be little general deterrent value to punishing him. Or there might be other ways of securing the general deterrent value if the state could reliably produce the appearance of punishing the offender without actually punishing him. In such circumstances, there would be little consequentialist reason to punish him or to punish him very much. But many of us would think that he still deserves punishment and that he deserves significant punishment if he is blameworthy for a serious crime.

To explain whom we should punish, I think we need to appeal to retributive ideas. We should punish those who deserve punishment because they are blameworthy for wrongdoing. In this way, notions of desert and

53. The anticonsequentialist notices a tension in the following triad: (1) the state ought always to maximize value; (2) it is never permissible for the state to punish an innocent person; and (3) sometimes it would maximize value to punish an innocent person. Something has to go. Consequentialists aim at accommodation, disputing (3), or reform, inviting us to reject (2). The anticonsequentialist sees rejecting (1) as the most plausible response. In a fuller discussion, one would want to consider various consequentialist strategies of accommodation and reform. However, I suspect that for any attempt at consequentialist accommodation, we can reconfigure the example so that the consequentialist is forced to support reformist conclusions. These will be worth taking seriously, but rejecting a pure consequentialism will remain an attractive alternative.
accountability place a limiting condition on whom we may punish. Moreover, the retributive ideal of proportionality provides a reasonably plausible account of how much to punish. Adapting a formula from Robert Nozick, we could understand the retributivist as saying that punishment (P) should be proportional to desert (D), where D itself should be understood as the product of the magnitude of the wrong committed (W) and the person’s degree of responsibility (R) for the act in question.54 In other words,

\[ P \propto D = W \times R \]

Any conception of retributivism must then interpret these two independent variables: wrongdoing and responsibility. Formally, responsibility is straightforward. The degree of responsibility should be measured on a 0–1 scale in which 0 indicates no responsibility and 1 indicates 100% responsibility. The retributivist also needs a conception of the magnitude of wrongdoing. It is natural to think that the magnitude of an agent’s wrongdoing will be determined in significant part by the magnitude of the harm he causes, but there may be other determinants as well.55

The retributive formula is not without potential problems, but it provides a useful and intuitive first approximation of a retributive conception of punishment and proportionality. Whereas this formula determines the length or severity of punishment, it does not otherwise tell us how to punish. It is here, I am inclined to think, that corrective and deterrent considerations have a role to play. Provided that we punish all and only the guilty and that our punishments are proportional to their desert, we should punish in ways designed to rehabilitate the offender and deter crime.

This is a sketch of one way of trying to recognize and integrate the apparently disparate demands of correction, deterrence, and retribution within a conception of punishment that recognizes blameworthiness and

54. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363 (1981). This formulation assumes that there could be, in principle, blameless wrongdoing (wrongdoing for which the agent bears no responsibility). What one makes of the possibility of blameless wrongdoing will depend, in part, upon whether one conceives of wrongdoing as a moral or legal category. Blameless legal wrongdoing is easier to conceive than blameless moral wrongdoing, but there are reasons to recognize both kinds of blameless wrongdoing. Anyone who finds the possibility of blameless wrongdoing problematic must deny that wrongdoing and responsibility could be independent variables. They should reformulate the retributivist idea so that punishment is proportional to wrongdoing—which is itself the product of some notion that does not presuppose blame, such as contra-legal behavior or harm—and responsibility.

55. An exclusive focus on harm is problematic insofar as it would not allow us to justify punishment of actions that do not result in actual harms. In some cases, this result may seem strongly counterintuitive. Examples of such cases include failed criminal attempts (e.g., attempted murder), token crimes that do not harm the victim even if the general type of crime normally does harms its victim (e.g., a murder that inadvertently ends a life not worth living or that inadvertently prevents a much more painful murder seconds later), and victimless crimes. Victimless crimes raise special issues and puzzles. We could perhaps deal with the first two sorts of cases by modifying the formula to focus on the harm risked, intended, or normally resulting from the type of action in question. Interesting as these issues are, I will not pursue them further here.
desert as limiting conditions on whom we may punish. In the discussion that follows, it will be useful to have some such conception of punishment in place, though I will try, so far as possible, to be agnostic between rival ways of spelling out the details of such a conception.

V. Immaturity and the Retributive Perspective

Proponents of transferring juveniles to adult criminal court appear to be moved by a level of violence in juvenile crime normally associated with adult crime. The motto seems to be that adult crime calls for adult penalties. But insofar as we are retributivists about whom to punish and how much to punish, we should see a problem with the trend to try juveniles as adults based on the seriousness of their crimes. It is true that the retributive formula implies that all else being equal the more pernicious the crime the greater should be the punishment. But all else is not equal when we are comparing juvenile and adult crime. Harm done and responsibility or culpability for harm done are independent factors in determining the blameworthiness of someone’s actions. Juveniles can cause harm as severe as adults can, but typically they bear less responsibility for the harm they cause. This is because they tend to lack, or possess to a reduced degree, the normative competence required for responsibility.

Responsibility is tied to notions of agency and personhood. In An Essay Concerning Human Understanding, John Locke distinguishes between persons and men (or, as we might prefer to say, human beings) and claims that the concept of a person and that of the same person over time are “forensic” concepts. Part of what Locke means is that only persons are accountable in law and morality because only persons are responsible for their actions. Nonresponsible agents act on their strongest desires; if they deliberate, it is only about the instrumental means to the satisfaction of their desires. Responsibility requires that agents possess normative competence and capacities for normative control—they must be able to recognize reasons for and against action and be able to regulate their actions in accordance with this normative knowledge. On this Lockean view, personhood is a normative category to be understood in terms of agency and responsibility, which are themselves to be understood in terms of capacities for normative competence and control. One must possess these capacities to qualify in law and morals as a responsible agent or person. Agents who possess these capacities but do not exercise them properly are responsible for their wrongdoing.

Normative competence can be compromised in various ways that the law recognizes. The insane and the severely mentally retarded lack normative competence and, as a result, are not responsible. But normative competence is not an all or nothing matter, and there is good reason to suppose that immaturity involves a form of reduced or diminished normative competence. Normative competence involves the cognitive ability to discriminate right from wrong but also the affective and conative abilities to regulate one’s emotions, appetites, and actions in accordance with this normative knowledge.\(^{58}\) One central ingredient in normative competence is impulse control—the ability to refrain from acting on one’s good-independent desires that is necessary to being guided by one’s good-dependent desires.\(^{59}\) All of these capacities appear to be scalar insofar as they can be possessed to different degrees. The gradual development of this competence is what marks normal normative progress through childhood and adolescence to maturity. Though not all individuals mature at the same rate, and some individuals never mature, this sort of normative maturation is strongly correlated with age.\(^{60}\) The reduced normative competence of juveniles provides a retributive justification for reduced punishment for juveniles.

Of course, it is not always easy to distinguish between a failure to exercise normative competence and a lack of such competence or a reduced capacity. This is part of what makes the insanity defense controversial and the notion of temporary insanity even more troublesome.\(^{61}\) But the sort of

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58. For this reason, I am inclined to resist conceptions of responsibility within the criminal law that analyze responsibility solely in terms of cognitive or rational capacities and to insist that responsibility requires independent affective and conative capacities. For good statements of the cognitive conception, see generally HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979) and MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 9–112 (1984). See also Stephen J. Morse, Uncontrollable Urges and Irrational People, 88 VA. L. REV. 1025, 1036–42 (2002). For good statements of the comprehensive conception, see generally Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. REV. 1511 (1992). However, the differences between the two conceptions are harder to make out if the cognitive conception includes various affective and conative capacities as prerequisites or ingredients of rationality.

59. See Arenella, supra note 58, at 1614 (arguing that one “threshold capacity” needed to qualify as a morally accountable actor is the capacity to subject ends to moral evaluation).

60. For more discussion of the generally scalar nature of these capacities and the correlation of their development with age, see id. at 1613–14.

61. This is really a problem with applying the insanity defense. A prior problem is with its interpretation. There has been significant vacillation between purely cognitive and cognitive and volitional conceptions of the sort of normative incompetence required for insanity. Initially, courts relied on the M’Naghten rule, which construes the relevant sort of normative incompetence in purely cognitive terms, and by which the accused counts as legally insane if and only if she lacks the capacity to know or appreciate the moral quality of her actions. See M’Naghten’s Case, 8 Eng. Rep. 718, 719 (1843). Subsequently, the Model Penal Code recognized an independent volitional component to normative competence, treating someone as not responsible by reason of mental illness if, as the result of such illness, she lacks substantial capacity to appreciate the moral quality of her conduct or to regulate her conduct in accordance with her understanding of the moral quality
reduced or diminished capacity that is due to immaturity is in some ways less troublesome. Insanity is an anomalous condition, afflicts a minority of people, and often lacks obvious markers. By contrast, immaturity is a normal condition that all adults passed through. Though there is some individual variation, immaturity is strongly correlated with age.

There is widespread agreement among developmental psychologists that the period between twelve and eighteen years of age is a time of very significant physical, cognitive, and emotional development. Older adolescents may have many of the cognitive abilities that adults have, but they lack the wealth of experience and factual information that adults typically possess. And even when older adolescents share cognitive abilities with adults, they typically lack familiar forms of emotional and social maturity and control—they are less able to represent the future adequately, with the result that they are more impulsive and less risk-averse. Moreover, adolescents are also less able to represent the interests of others adequately, with the result that their sense of empathy, which is crucial in inhibiting harmful behavior, is less strong. They also tend to be more susceptible to the influence of peers, with the result that they lack autonomy, which is a key ingredient in normative competence and control. Finally, there is emerging

of her conduct. See Model Penal Code § 4.01 (1962). However, in the post-Hinckley era, state courts and legislatures have increasingly returned to a narrower, purely cognitive construal, similar to the M'Naghten rule. See Robert F. Schopp, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 31–32 (1991) (noting that, after the Hinckley verdict, seven jurisdictions restricted the insanity defense to the less-inclusive cognitive standard, while only two expanded the defense). For a good discussion of the cognitive aspects of insanity, see generally MOORE supra note 58, at 217–45; Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. Cal. L. Rev. 777, 780–88 (1985); and SCHOPP, supra, at 27–70, 160–76. But while such a cognitive incompetence should be a sufficient condition of insanity, I am skeptical of accounts that treat it as a necessary condition. A purely cognitive interpretation of insanity ignores affective and conative aspects of normative competence, which I distinguished above. However, this is a topic for another occasion.


63. See, e.g., P. Finn & J. Bragg, Perception of the Risk of an Accident by Young and Older Drivers, 18 Accident Analysis & Prevention 289, 289–98 (1986) (reporting empirical findings supporting the conclusion that young male drivers "perceive less risk in driving situations than older male drivers"); William Gardner & Janna Herman, Adolescents' AIDS Risk Taking: A Rational Choice Perspective, in ADOLESCENTS IN THE AIDS EPIDEMIC 17, 17–19 (William Gardner et al. eds., 1990) (explaining that "[t]here is abundant evidence that adolescents take serious risks with their health, as compared with both adults and younger children"); Scott et al., supra note 62, at 229–35 (observing that adolescents lack both emotional and social maturity).

64. See generally Martin Hoffman, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE chs. 5–6 (2000).

evidence that the neurological correlates of these cognitive, emotional, and social capacities are undergoing crucial development throughout adolescence and well into late adolescence. 66

If normative competence is a condition of responsibility, then the reduced or diminished normative competence of juveniles calls into question most of the punitive reforms to juvenile justice. I say most, because there is a retributive rationale for the selective use of blended sentencing. Older mature adolescents will often be significantly, if not fully, normatively competent. So they can be largely, if not fully, responsible for committing heinous crimes. Under the traditional juvenile sentencing rules that require juvenile sentences to expire by the age of majority, such offenders are unlikely to receive sentences commensurate with their wrongdoing. Indeed, there is a puzzle for the traditional juvenile sentencing system, in that the older and more responsible the offender, the less time he is eligible to serve for his crimes. Blended sentencing provides a solution to this puzzle insofar as it allows mature adolescents who are substantially culpable for serious harms to serve adult sentences in addition to limited juvenile sentences. I am not claiming that the actual use of blended sentencing has typically conformed to the retributive formula of proportionality, only that the retributive conception of proportionality endorses in principle the selective use of blended sentencing.

However, even if the retributive conception of punishment may find room for selective use of blended sentencing, it condemns the trend to transfer juveniles to adult criminal court. The fact that juveniles tend to be less normatively competent than their adult counterparts implies that, all else being equal, a juvenile is less responsible for her crime than her adult counterpart is for the same crime and that, all else being equal, the younger the juvenile the less responsible she is for her crime. 67 Insofar as punishment

Adolescence, 57 CHILD DEVEL. 841, 848–51 (1986) (connecting peer conformity to various types of autonomy and concluding that “[f]or most boys and girls, the transition from childhood into adolescence is marked more by a trading of dependency on parent for dependency on peers rather than straight-forward and undimensional growth in autonomy”); Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in YOUTH ON TRIAL, supra note 62, at 9, 27 (“Whatever importance the peer group has for the individual adolescent as a source of identity and companionship is exacerbated by an increase in susceptibility to peer pressure that occurs during the early adolescent years.”).

66. See, e.g., Steven W. Anderson et al., Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex, 2 NATURE NEUROSCIENCE 1032, 1034–36 (1999) (concluding that pre-adolescent “dysfunction in certain sectors of the prefrontal cortex seems to cause abnormal development of social and moral behavior”); Francine M. Benes, The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and Their Interactions, in HANDBOOK OF COGNITIVE NEUROSCIENCE 79, 79–89 (Charles A. Nelson & Monica Luciana eds., 2001) (concluding that the development of the prefrontal cortex “includes the early adult period and possibly even beyond”).

67. In cases in which juvenile crime is the product of various mental disorders that impair normative competence, there will be further reason for reducing or (in extreme cases) eliminating punishment. See, e.g., Alan E. Kazdin, Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in YOUTH ON TRIAL, supra note 62, at 33, 48–55 (explaining the way
should be proportional to desert and desert is itself the product of the wrongfulness or harm of an agent's act and the agent's responsibility for the act, the diminished competence of juveniles provides a retributive rationale for reduced punishment for juveniles. But this means that the appeal to accountability that is often made to support the trend to try juveniles as adults, far from supporting that trend, actually undermines it.

VI. Immaturity, Rehabilitation, and Deterrence

We have seen that immaturity is directly relevant to the retributivist's backward-looking rationale for punishment. It is also directly relevant to the forward-looking rationales involving rehabilitation and deterrence.

Rehabilitative goals have a legitimate role in adult criminal justice, in which offenders are fully responsible for their crimes. They have an even more important role in juvenile criminal justice, in which the immaturity of offenders renders them simultaneously less responsible and more corrigeable. Adolescence is a pivotal period because it is a time of enormous cognitive growth, emotional growth, and maturation. Adolescence is also a time when enduring intellectual, emotional, and social habits are being established. This means that adoption of the rehabilitative stance toward juvenile offenders is not only especially appropriate but also especially consequential. This makes it imperative that juvenile offenders be sentenced to special juvenile facilities that avoid the brutality of adult prisons; that provide significant educational, vocational, and avocational training; and that make provisions for the special nutritional and developmental needs of adolescents. Adult correctional facilities rarely address rehabilitative goals with adult offenders. They are even more poorly suited to address the special rehabilitative needs and opportunities posed by juvenile offenders. But then the trend to try juveniles as adults and incarcerate them in adult correctional facilities runs afoot of rehabilitative rationales for punishment.

We can also see how immaturity affects the operation of deterrence within juvenile criminal justice. Rehabilitation itself can have deterrent value because successful rehabilitation results in specific deterrence. But, of course, deterrence is usually understood in terms of sanctions. By attaching sanctions to criminal activity, we make it less attractive; the greater the sanctions we attach to it, the more unattractive we make such activity. But the deterrent effect of sanctions crucially depends on potential criminals being rational calculators of expected utility. Immaturity compromises this assumption. Adolescents are not rational calculators of utility. Not only do they lack the cognitive capacities of adults, but also, and more importantly,
they lack the ability to represent vividly the future and are prone to discount
the significance of future benefits and harms in comparison to their actual
magnitudes. 68 But this means that sanctions that might, in principle, work for
adults simply will not have the same deterrent value for juveniles. 69 In fact,
there is evidence from Florida and other states that use of harsher, adult
criminal sanctions for minors actually increases recidivism rates. 70 If so,
considerations of specific deterrence actually speak against the transfer trend.
In the juvenile context, deterrence is more likely to be served by establishing
better schools for the social sentiments both inside and outside of
correctional facilities, than by ratcheting up the severity of the sanctions for
violating the law.

VII. Two Tracks in Juvenile Crime

A further consideration potentially relevant to both forward-looking
rationales for punishment, namely, rehabilitation and deterrence, is that there
is growing evidence that for many juveniles adolescence involves a period of
increased risk-taking and antisocial impulses that is normally outgrown. The
historically robust fact that juvenile crime constitutes a disproportionate
amount of all crime committed means that a significant portion of juvenile
crime is adolescent-specific. 71 Most deviant adolescents do not become
deviant adults. Whereas most teenage offenders do not become career
criminals, younger preteen arrest is the best predictor of career criminality. 72
This suggests that the class of juvenile offenders divides roughly into two
subclasses—a small number of juveniles whose antisocial tendencies begin
before puberty who are strongly disposed to become career offenders and a
much larger number of juveniles whose deviance is confined to adolescence
and who, under normal circumstances, would outgrow these deviant
tendencies. Whereas specifically adolescent deviance is more common and
represents a temporary phase, preteen deviance is strongly correlated with
cognitive and emotional disabilities and the presence of domestic dysfunction
and other environmental stress for which it is very difficult to correct. 73 This
two-track model of juvenile deviance suggests that a two-track approach to
juvenile crime is worth exploring. This alternative approach stresses

68. See supra note 63 and accompanying text.
69. Of course, adults will also fail to be rational utility maximizers insofar as they are temporal
discounters. My present point is simply that adolescents tend to be more subject to temporal bias
than adults. I am not even factoring in the live possibility that flouting social norms and sanctions
might actually be an incentive for many adolescents.
70. See Donna Bishop et al., The Transfer of Juveniles to Criminal Court: Does it Make a
71. See FELD, supra note 22, at 221–22.
72. See id.
73. See generally Terrie Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial
Behavior: A Developmental Taxonomy, 100 PSYCHOL. REV. 674 (1993).
intervention, which can sometimes be punitive, but it does not endorse the trend toward greater punitiveness or the trend toward trying juveniles as adults.

Specifically adolescent offenders with no prior history of preteen deviance should be held accountable for their offenses, and indeed being held accountable for their actions is an essential ingredient in the normal process of normative maturation. But their diminished normative competence means that all else being equal they are less accountable for the harm they cause than their adult counterparts and that, as a result, they deserve to be punished proportionately less severely. Their immaturity and corrigibility suggest both that deterrence will not be served by a more punitive response and that there are greater opportunities for rehabilitation with juvenile offenders than with their adult counterparts. The fact that specifically adolescent offenders tend to outgrow their deviance provides further reason to think that neither rehabilitative nor deterrent goals will be served by adopting a more punitive attitude toward these offenders.

The two-track model of juvenile deviance suggests that preteen offenses should be handled quite differently. There is little retributive rationale for punishment. Few think that normal preteens—those that suffer from no special cognitive, affective, or conative deficits—are fully responsible, and the trend to try juveniles as adults only rarely extends to preteens. If preteen crime is mostly committed by children that do suffer from such deficits, then there is even less reason to treat them as normatively competent and even less reason to treat them as responsible for the harm they cause. The absence of responsibility for their offenses means that they do not meet the retributive condition for punishment. But other forms of intervention and civil commitment may be appropriate. If preteen offenders, especially those who are near adolescence, suffer deficits in their normative competence that strongly dispose them to careers of social deviance, then considerations of specific deterrence give us special reason to be concerned about them. Insofar as they remain corrigible, there is special reason to try to achieve specific deterrence through rehabilitation. Insofar as the normative deficits are incorrigible, specific deterrence may only be achievable through various forms of detention or monitoring.

A two-track approach to juvenile justice raises a host of interesting and important moral questions that cannot be pursued here. Moreover, we will not be able to get very far in addressing them without better empirical models of the causes and corrigibility of preteen deviance. Whatever the ultimate merits of such a two-track approach to juvenile justice, this approach does not support a more punitive attitude toward juvenile crime or, specifically, the transfer trend.
VIII. Immaturity and Transfer

When we consider various familiar and empirically well-documented facts about the normative immaturity of adolescents in light of the retributive, corrective, and deterrent values underlying criminal jurisprudence, we can see a clear rationale for a separate system of juvenile justice. Immaturity may also raise special problems for the competence of juveniles to stand trial; in particular, to understand the charges, to assist counsel in preparing a defense, and to make plea decisions. A different set of procedural rules that creates a less adversarial culture may be necessary in order to ensure that due process requirements are satisfied in juvenile cases. But our focus has been on the way that immaturity affects responsibility and considerations about punishment. In these matters, immaturity provides a rationale for something like traditional arrangements that provide for less punitive responses to juvenile crime than for comparable adult crime. Their comparative immaturity makes juveniles less responsible for their crimes than their adult counterparts, it makes them more amenable to rehabilitation, and renders sanctions a less effective deterrent. These are strong presumptive reasons to treat juvenile crime within juvenile court and to regard the transfer trend, especially the trend toward mandatory transfer, as jurisprudentially troubling. The Model Penal Code's provisions for immaturity and limited judicial waiver are consistent with this rationale. The trend to make the transfer of juveniles to adult criminal court easier and to make it applicable to ever younger juveniles for an ever wider range of offenses is not consistent with this rationale.

Does this appeal to immaturity overlook resources for defending the transfer trend? We will consider three strategies.

The transfer trend typically focuses on violent crime. We considered the rationale for transfer that claims that adult crimes require adult penalties. We faulted that rationale for failing to distinguish between wrongdoing or harm and culpability as two independent factors contributing to the blameworthiness of a crime. We argued that even if juveniles cause the same harm as their adult counterparts, they are less culpable, because less responsible, because less normatively competent. But the proponent of the transfer trend might protest that it is a mistake to insist that wrongdoing and culpability are always independent factors. In the case of violent crime, it might be claimed, the seriousness of the harm makes it harder for the offender to plead normative incompetence. The idea is that the more harmful the crime, the easier it is to recognize that it is wrong. Adolescents may experience difficulties appreciating the difference between simple and gross

74. See, e.g., Richard J. Bonnie & Thomas Grisso, Adjudicative Competence and Youthful Offenders, in YOUTH ON TRIAL, supra note 62, at 73, 87–92 (discussing unresolved issues of youth competency and the importance of procedural protections).

75. See supra notes 19–22, 37–42 and accompanying text.
negligence, but they should have no difficulty determining that murder is wrong. If so, the immaturity excuse, while otherwise applicable, may not apply to violent juvenile crime.

In response to this defense, we might wonder whether the wrongfulness of causing harm is always directly proportional to the magnitude of the harm. Some forms of cheating and lying are obviously wrong, even when they cause little or no harm, and some actions that cause real suffering, even death, are not obviously wrong. But there is a further worry about this defense of the transfer trend. For even if more violent crimes were more obviously wrong, that would not show that immaturity did not threaten responsibility. For normative competence is not a simple cognitive ability. The normatively competent person not only has to be able to tell right from wrong but also has to be able to regulate her emotions, appetites, and actions in accord with her normative knowledge. But this, we noted, requires significant imaginative, affective, and conative capacities, including a capacity for impulse control, a capacity to project oneself into the future, a capacity to empathize with others, and a capacity for independent judgment and action. So even if adolescents had the requisite moral knowledge, it would not follow that they had the requisite strengths of will required for normative competence.

The first defense of the transfer trend focuses on crimes whose turpitude seems especially salient. A different defense focuses on crimes the commission of which seems to require maturity. Among the most serious crimes that the transfer trend targets are those involving premeditation. But premeditated crime seems to be the antithesis of impulsive behavior. Elaborate and temporally extended planning of a crime suggests that the offender has control of her actions. This would suggest that those guilty of premeditated crimes would be more responsible for their crimes, and this might suggest that the defense of immaturity, which might be appropriate for crimes of impulse or passion, has less application for crimes of premeditation.

But even if premeditation implied normative competence, this would not provide a defense of the transfer trend—if only because the transfer trend is much broader, applying to various serious harms that do not involve significant premeditation. The transfer trend targets crimes of passion and impulse, as well as crimes of premeditation. Indeed, as Lionel Tate’s case suggests, even first-degree murder need not involve elaborate and extended planning. So there is much juvenile crime that is treated, under the transfer trend, as adult crime, but that does not involve the sort of significant premeditation that might seem incompatible with immaturity. Even more importantly, it is a mistake to think that premeditation is a reliable sign of normative competence. Impulse resistibility may be a necessary condition of normative competence, and premeditation may demonstrate one form of
impulse resistibility, but that does not make premeditation a sufficient condition of normative competence. In particular, it is possible to engage in means-ends reasoning in the formation of plans and to display resoluteness in the execution of such plans without being suitably competent to deliberate about one's ends and to put one's emotions and desires in proper perspective. Children often engage in elaborate planning in the service of whims or other ends for which they are not accountable. The phenomenon of planning without full accountability can be found among adolescents as well. They may commit crimes that reflect elaborate and temporally extended planning, but they may nonetheless be unable to appreciate fully the normative significance of the ends for the sake of which they have planned. Their ends may reflect steep temporal discounting of long-term benefits and harms, an inadequate ability to empathize with the interests of others whom their actions affect, or an exaggerated concern with approval of their peers expressed in the inflation of petty jealousies, resentments, and rivalries. Such failings correspond to different dimensions of normative competence—capacities for temporal neutrality, empathy, and autonomy. Because premeditation does not necessarily guarantee the presence of these other aspects of normative competence, and because these aspects of normative competence tend to be immature and developing in juveniles, premeditation does not rebut the case for reduced juvenile culpability.

The proponent of the transfer trend might appeal instead to the scalar nature of normative competence and individual variability in normative maturation. She could then argue that some individuals are normatively more mature than their chronological peers and that some juveniles are as mature or even more mature than some adults. This would justify punishing them as adults, as the transfer trend requires.

The premises of this argument are plausible, but the conclusion does not follow. First of all, the law often draws lines in ways that generally, but nonetheless imperfectly, track the facts that matter. Setting the boundary between juveniles and adults at 18 years of age, as the Model Penal Code does, is probably a case in point. Even if the boundary is supposed to track normative maturation, some 17-year-olds may be more normatively mature than some 19-year-olds. That does not make the 18-year-old boundary arbitrary. We can try to achieve individualized justice, consistent with the use of a generally but imperfectly reliable boundary marker, if we allow the marker to establish a rebuttable presumption. Here, the relevant court would consider and assess rebuttals on a case-by-case basis. Normatively immature young adult defendants could try to establish their immaturity in adult court, and prosecutors could try to establish normative precocity in mature juvenile

defendants in juvenile court. This second possibility is what section 4.10 of
the Model Penal Code already recognizes: 16- and 17-year-olds can be
transferred to adult court after a judicial hearing in juvenile court in which
the judge determines that the juvenile in question is sufficiently mature and
incorrigible.77 But the transfer trend outstrips these Model Penal Code
provisions. That trend pushes the age at which normative competence might
be established much further back, to ages where it strains credulity to think
that the case for normative immaturity could be successfully rebutted. This
is bad enough, but an important strand in the transfer trend actually inverts
the presumption so that many juveniles accused of certain crimes now bear
the presumption of showing that they should be tried in juvenile court.
Worse still are the mandatory transfer laws, such as California’s Proposition
21, that automatically transfer comparatively young juveniles accused of
certain crimes to adult court. It is hard to see how such transfer policies
could be defended by appeal to the scalar nature of normative competence
and individual variability in normative maturation. An unrebuttable 18-year-
old cut-off, which few endorse, would be bad, but at least it would generally,
if imperfectly, track the facts about normative competence that matter. To
replace an unrebuttable 18-year-old cut-off with an unrebuttable 14-year-old
cut-off is ludicrous. It too fails to achieve individualized justice, but it also
greatly multiplies the number of individual injustices. For while an 18-year-
old test for adulthood will be both under-inclusive and over-inclusive at the
margins, a 14-year-old test will be massively over-inclusive. This is bad
enough. If we assume, as most do, that it is better to weight the criminal
justice system so that errors of over-punishment are seen as worse than errors
of under-punishment, then the transfer trend must seem especially unjust.78

IX. Separate or Unified Treatment for Juvenile Justice?

The transfer trend is a modification to or adjustment within a dual
system of criminal justice that makes parallel but different provisions for
adult and juvenile offenders. So the trend’s reform of juvenile justice is
selective. The transfer trend retains this dual system but seeks to reduce the
number of individuals processed in the juvenile system and increase the
number of individuals processed in the adult system. The trend is to treat
some significant number of offenders that would have been processed as
juveniles exactly as if they were adults. I have argued that this is a reform in
the dual system that we should resist. But it is worth considering a proposal
for what appears to be more radical reform in our system of criminal justice.

77. See supra text accompanying notes 37–38.
78. This weighting is reflected in the fact that the criminal law employs the standard of proof
beyond a reasonable doubt, rather than the standard of proof based on the preponderance
of evidence, which reflects the attitude that it is worse to convict the innocent than to let the guilty go
free.
This more radical reform seeks to abolish the separate system for juvenile justice altogether. This proposal will be unjust if it treats juveniles exactly as it treats adults. But it need not. For instance, in his book *Bad Kids*, Barry Feld acknowledges the rationale for punishing juveniles less severely than their adult counterparts that appeals to diminished normative competence and reduced responsibility, but he questions why we need to accommodate this fact within dual systems of criminal justice.\(^79\) Instead, he advocates a unified system of criminal justice, modeled on our current (adult) criminal justice system, which processes juveniles as well as adults and which allows immaturity to function as a mitigating factor at sentencing.\(^80\)

While this proposal would address the retributive reasons for punishing juveniles less, it would not yet address the deterrence reasons for punishing adolescence-specific offenses less (on the ground that deviance is a condition that most such offenders will naturally outgrow) or the rehabilitation reasons for punishing juvenile offenses differently (on the ground that juvenile offenders are more corrigeble than their adult counterparts). But Feld is prepared to accommodate these considerations as well. He seems to think that, where the offense is part of adolescence-specific deviance, youth can play a further mitigating role.\(^81\) Also, he proposes that criminal courts distinguish between the appropriate degree and manner of criminal sanction.\(^82\) On his proposal, criminal courts would determine what sort of correctional facilities offenders attend and what sort of services and opportunities should be open to them.\(^83\) Juveniles could and should be assigned to juvenile-specific correctional facilities that provided different nutritional and educational services than adult facilities.\(^84\)

Though this proposal to abolish the juvenile court is in one way more radical than the transfer trend, which accepts the juvenile court but seeks to limit its role, its reforms are very different from those of the transfer trend. For the abolitionist, reform preserves the traditionalist’s insistence that, all else being equal, juveniles are less culpable for the harm they cause than their adult counterparts, and so are deserving of less punishment; whereas, the transfer trend rejects this commitment to differential desert and punishment. From this perspective, the transfer trend’s reforms are much more radical than the abolitionist reforms. Because the abolitionist reforms do not threaten differential desert and punishment, they are less threatening to the traditional rationale for a separate juvenile court. Whether a unified

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80. Id. at 302.
81. Id. at 325.
82. Id. at 325–27.
83. Id. at 326.
84. Id. at 326–27.
system would be preferable to a separate juvenile court raises many issues worth discussing, but that are beyond the scope of this Essay. I will briefly mention just a few.

Perhaps unitary systems of criminal justice enjoy both theoretical and administrative simplicity. But we have just seen that Feld is sensitive to the need for establishing separate correctional facilities for juvenile and adult offenders. 85 Separate correctional facilities are compatible with unified courts, but once we allow dual or parallel institutions into the criminal justice process at one point, we must give up on the goal of complete integration or unification, and it is less clear what the appeal of partial integration or unification is.

More importantly, separate juvenile courts may function as useful institutional antidotes to the problems that beset case-by-case assessments of the desert of both youthful and adult offenders in a single criminal court. For there is some reason to think that many people do not distinguish adequately between committing wrong or causing harm, on the one hand, and being morally responsible for harm, on the other hand, and that they do not attach sufficient weight to factors such as diminished competence and responsibility. Indeed, if my arguments are right, this sort of moral blindspot is precisely what underlies the transfer trend. Further evidence for such a blindspot is found in a study that gauges societal consensus on capital punishment for juveniles. A survey of recent jurors found that the heinousness of the crime was the main determinant of jurors’ willingness to impose the death penalty and that willingness to do so was not terribly sensitive to the age or maturity of the defendant. 86 A natural worry is that this blindspot about the effect of immaturity on culpability and of culpability on desert will have full range to operate in case-by-case treatment of juvenile

85. Id. at 326.
86. See generally C. Crosby et al., The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Social Consensus and Proportionality, 19 LAW & HUM. BEHAV. 245 (1995). The questionnaire contained descriptions of cases with defendants on trial for murder whose ages ranged from 10 to 19 years old. The details of the cases included a description of the crime, probable culpability of all juveniles, level of remorse, and age of the defendant. Id. at 250–51. The number of respondents willing to impose the death penalty for defendants were as follows: 96.3% of male respondents and 95.7% of female respondents were willing to impose the death penalty on the 19-year-old defendant; 92% of male respondents and 87% of female respondents were willing to impose the death penalty on the 16-year-old defendant; 87.5% of male respondents and 52.9% of female respondents were willing to impose the death penalty on the 15-year-old defendant; and 71% of male respondents and 52.4% of female respondents were willing to impose the death penalty on the 10-year-old defendant. Id. at 259. Though the willingness among male respondents to impose the death penalty was not completely insensitive to immaturity, and the willingness among female respondents was more sensitive, the level of insensitivity in both men and women was striking. For a similar finding about the comparative insensitivity of views about the severity of sentencing to degree of maturity and normative competence, see S. Ghetti & A. Reddish, Reactions to Youth Crime: Perceptions of Accountability and Competency, 19 BEHAV. SCI. & L. 33, 45–47 (2001).
offenders within a unified criminal court, with the predictable result that juveniles will be treated like their adult counterparts more often than they deserve. Use of a separate juvenile court might be defended as a sort of institutional precommitment strategy to block the bias in assignment of just deserts that would result from the operation of the blindspot in a unified system.

Feld’s abolitionist proposal contains its own precommitment strategy that might deal with this blindspot, even if it wasn’t designed for this purpose. Feld’s proposal gives up case-by-case evaluation of juvenile offenders. Though he recognizes that the morally relevant variable is maturity, he proposes to treat age as an objective and administratively feasible proxy for maturity and to use age as the basis for a discount rate that is to be applied to the sentencing of juvenile offenders.

This categorical approach would take the form of an explicit “youth discount” at sentencing. A fourteen-year-old offender might receive, for example, 25 to 33 percent of the adult penalty; a 16-year-old defendant, 50 to 60 percent; and an eighteen-year-old adult, the full penalty, as is presently the case. The “deeper discounts” for younger offenders correspond to the developmental continuum and their more limited opportunities to learn self-control and to exercise responsibility. A youth discount based on reduced culpability functions as a sliding scale of diminished responsibility.87

Because Feld’s youth discount rate is tied to age, it represents, as he notes, a categorical approach to juvenile sentencing that would precommit judges and prevent the operation of the blindspot in case-by-case evaluation within an integrated criminal justice system.

The youth discount rate might be an attractive precommitment strategy and it might enjoy other pragmatic advantages. However, it is problematic in two ways.

One unwelcome feature of the abolitionist proposal is its reliance on mitigation. The abolitionist takes account of the diminished normative competence associated with immaturity by adopting a youth discount as a mitigating factor at sentencing. Criminal jurisprudence tends to handle the concepts of excuse and mitigation differently. Excuse, like justification, is a true defense. A successful excuse exonerates the accused of culpability. As such, excuses are properly evaluated at the guilt phase of a criminal proceeding. Moreover, in assessing guilt, jurors are obligated to evaluate arguments that, if successful, would excuse. By contrast, mitigation is determined at the sentencing phase of a criminal proceeding, after the guilt phase, and it is often discretionary. The different procedural treatment of excuse and mitigation can seem puzzling insofar as the factors that typically

87. Feld, supra note 22, at 317.
mitigate look like partial excuses. If mitigators are partial excuses, then why should their recognition be discretionary? Why should they be relegated to the sentencing phase, rather than guilt phase, which would presumably be the natural forum for evaluating culpability? The differential procedural treatment of excuse and mitigation appears to be a consequence of the fact that Anglo-American criminal jurisprudence does not recognize a generic partial excuse of diminished capacity or responsibility. Whereas diminished capacity may be relevant to negating an element of criminal offense (actus reus or mens rea), it is not recognized as an independent excusing condition. Excuses must be all-or-nothing. Consequently, partial excuses, if they are to be recognized at all, must be treated as mitigating factors at sentencing. This treatment of partial excuses is conceptually unsatisfactory. But insofar as immaturity involves diminished normative competence, immaturity implies diminished responsibility and partial excuse. Because it relegates diminished capacity and partial excuse to the status of a mitigating factor at sentencing, the abolitionist proposal forces us to apply unsatisfactory conceptual tools to what is a central feature of juvenile offense. By contrast, the traditional juvenile court does not relegate assessments of normative competence exclusively to sentencing, but pushes it to the foreground as a consideration that determines whether accused juveniles should be tried in juvenile or criminal court and affects determinations made at the guilt phase. The abolitionist could avoid these worries by advocating a dual reform: abolish the juvenile court and recognize generic partial excuses such as immaturity and diminished normative competence. But without the second reform the first must remain conceptually unsatisfactory.

This issue concerns the adequacy of the abolitionist’s conceptualization of juvenile crime and punishment. It does not concern the substantive adequacy of the abolitionist account of how much to punish juveniles. But we might question the substantive adequacy of the abolitionist proposal as well on the ground that it sacrifices the ideal of individualized justice. For,

88. Not all mitigating factors are partial excuses. Some mitigators are partial justifications, rather than partial excuses, and some mitigators may not be defenses at all. If seasoning justice with mercy can be one form of mitigation, then some mitigators are not partial defenses.


90. See, e.g., Stephen J. Morse, Diminished Rationality, Diminished Responsibility, 1 Ohio St. J. Crim. L. 289, 298–99 (2003) (“Our criminal justice system has a preference for making crucial culpability determinations that affect punishment at trial. Partial responsibility is an explicitly normative judgment that should be made, therefore, by the community’s representatives at the guilt phase, and not by judges at sentencing.”).

91. One concern about treating partial excuses as mitigating factors at sentencing is that this often makes their relevance discretionary, and injustice is done insofar as the relevance of partial excuses is ignored. This concern does not apply to the abolitionist proposal, which treats immaturity as a nondiscretionary mitigating factor.
as we have noted, age is an imperfect proxy for maturity.\textsuperscript{92} Even if maturation is reasonably regular, so that there is a significant correlation between age and maturity, there will be individual variance. Some 16-year-olds will have as much normative competence as the normal 18-year-old, and some 16-year-olds will have as much normative competence as the normal 14-year-old. So adoption of a categorical age-based discount will be both under-punitive and over-punitive, relative to the demands of individualized justice.

Perhaps this is just the inevitable moral trade-off that has to be made between the demands of individualized justice and the need to correct for an over-punitive blindspot that operates in a case-by-case analysis. But some version of the traditional separate juvenile court promises to precommit in a way that avoids the blindspot. For, in contrast with the unified system, it takes juvenile crime out of direct comparison with adult crime and thus circumvents the operation of the blindspot for the effects of immaturity on culpability and of culpability on desert. In doing so, it does impose one category, namely, the distinction between minors and adults. But, as we have seen, it treats this categorical distinction as creating a defeasible presumption.\textsuperscript{93} The availability of the judicial waiver allows judges to transfer a mature juvenile to criminal court on a showing in the individual case that the defendant is sufficiently mature to stand trial as an adult. Moreover, within juvenile court, judges can and do take account of the maturity levels of juveniles of different ages as factors in both the guilt and sentencing phases.\textsuperscript{94}

Both the traditional juvenile court and the proposal to abolish the juvenile court in favor of a unified system employing a youth discount condemn the current punitive reforms embodied in the juvenile transfer trend. Though there is a surprising amount to be said in favor of the abolitionist proposal, the traditional separate juvenile court has the advantages of preserving immaturity’s relevance to a true defense and of making punishment sensitive to maturity in a way that does not sacrifice individualized justice.\textsuperscript{95}

\textsuperscript{92} See supra note 76 and accompanying text.
\textsuperscript{93} See supra notes 20–21, 77 and accompanying text.
\textsuperscript{94} See supra text accompanying note 14.
\textsuperscript{95} Perhaps the abolitionist who favors the age-based discount schedule could try to accommodate the demands of individualized justice by treating that schedule as establishing rebuttable presumptions about sentencing. It is an empirical question whether making the presumptions rebuttable in a unified system that allows direct comparison with adult offenders would give too much room for the blindspot to operate.
X. Concluding Remarks

Interestingly, the transfer trend appears to be out of step with popular opinion in one way. Recent surveys indicate that there is support for treating youthful offenders as juveniles and for sentencing that is rehabilitative in nature. But public attitudes are ambivalent, inasmuch as the transfer trend is part of the political rhetoric and policy about getting tough on crime that seems to find a responsive chord in the electorate, and insofar as there is also evidence suggesting that many people have a blindspot for the effects of maturity on culpability and of culpability on desert. Indeed, legislative attitudes themselves appear ambivalent insofar as the transfer trend, which effectively lowers the age of criminal responsibility, has evolved at approximately the same time as state legislatures have acted to raise the legal drinking age to 21. It is hard to believe that a 20-year-old is too immature to handle drinking alcohol responsibly while a 12-year-old is mature enough to stand trial for murder in criminal court and be sentenced to life imprisonment. We need to bring consistency to our views about adolescents. The trend to try juveniles as adults is inconsistent with retributive, rehabilitative, and deterrent rationales for punishment and with the related rationales for having a separate system of juvenile justice in the first place. A sound criminal jurisprudence requires that we stop treating juvenile offenders as little adults.

97. See supra note 86.
98. Actually, social and legislative ambivalence about where to draw the line between adolescence and adulthood is even more rampant. One can be tried as an adult for murder in some states at age 12; one can begin to drive at age 16 or younger in most states; one can attend R-rated movies without an adult chaperone at age 17; one can vote at age 18; and one can buy and consume alcohol at age 21.