

IMMATURITY, NORMATIVE COMPETENCE, AND JUVENILE TRANSFER: HOW (NOT)
TO PUNISH MINORS FOR MAJOR CRIMES¹

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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 serious 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 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.³

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³Proposition 21 also enhanced penalties for various gang-related felonies. For the text of

Emblematic of the transfer trend is the notorious case of Lionel Tate. In Florida in 1999, when he was 12 years old, Lionel Tate brutally killed 6 year old family friend Tiffany Eunick in his home. Lionel alleged 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 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. 12 year-olds are immature cognitively and emotionally in ways that render them not fully responsible, and to be sentenced to life imprisonment without the possibility of parole at that age is to give up on someone as incorrigible before his character

Proposition 21, see <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm>. Since the passage of Proposition 21, the provisions for transferring juveniles to adult criminal court are contained in California Welfare and Institutions Code §602. 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 13 others at Santana High School, outside San Diego.

⁴ The initial plea bargain would have carried only a three year sentence in a juvenile correctional facility, followed by ten years of probation.

⁵ Florida v. Tate, L.T. Case No. 99-14401 CF10A (Broward County).

⁶ Tate v. Florida, 2003 Fla. App. LEXIS 18750 (Dec. 10, 2003). The legal basis for the retrial was that Lionel's competency had not been properly evaluated at the time of the first trial. Lionel's mother was still reluctant to accept a second-degree murder plea, rather than a manslaughter plea, on the ground that Lionel had not intended to cause Tiffany's death, but she eventually acquiesced on obvious pragmatic grounds.

has even been formed. 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.

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 deeply mistaken and terribly unjust.

One reason the trend is mistaken depends on a retributive conception of punishment, according to which wrongdoers deserve punishment and should be punished in proportion to the severity of their wrongdoing. But wrongdoing is a function not just of the harm one causes but also of the culpability or responsibility one bears for the 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 wrongs juveniles have done and the punishment they deserve by the harm they have done, ignoring their diminished responsibility for this 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 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 corrigible 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 juvenile 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 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 both empirical and conceptual issues, but it is possible to mix these dimensions in different ratios. Though I will have to say something about the empirical background to and aspects of this trend, my focus will be on conceptual issues of a jurisprudential sort. These are the issues that interest me most and that I am best qualified to address.

1. JUVENILE JUSTICE BACKGROUND

The concept of a special system of juvenile justice is largely a twentieth century development.⁷ 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

⁷My sketch of some aspects of the juvenile justice background owes much to John Whitehead and Steven Lab, Juvenile Justice, 3rd ed. (Cincinnati: Anderson Publishing, 1999) and Howard Snyder and Melissa Sickmund, Juvenile Offenders and Victims: 1999 National Report (Washington D.C.: Department of Justice, Office of Juvenile Justice and Delinquency Programs, 1999), ch. 4.

as the property of their parents, to be treated, like other property, at the discretion of the owner. 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.

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.

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 parens patriae (common guardianship), juvenile courts adopted a more paternalistic attitude toward juvenile offenders.⁸ 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.

For some time, the paternalistic focus of juvenile courts lent itself to procedural

⁸A classic statement of the parens patriae doctrine is Julian Mack, "The Juvenile Court" Harvard Law Review 22 (1909), pp. 104-22.

informalities in which juvenile offenders were not accorded the same procedural safeguards before and during trial as their adult counterparts. 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 Kent 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 transfer.⁹ 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.¹⁰ 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 evidential requirement to juvenile proceedings in which incarceration is a possible outcome.¹¹

Contemporary juvenile jurisprudence distinguishes juveniles from adults and recognizes distinct forms of juvenile offense. For instance, the Model Penal Code identifies juveniles as those under 18. Though it requires juveniles under 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.¹² A substantial majority of states have followed the Model Penal Code in identifying juveniles as those under 18.¹³ Juvenile courts recognize two main kinds of juvenile offense.

⁹Kent v. United States, 383 U.S. 541 (1966).

¹⁰In re Gault, 387 U.S. 1 (1967).

¹¹In re Winship, 397 U.S. 358 (1970).

¹²Model Penal Code §4.10 [Immaturity Excluding Criminal Conviction; Transfer of Proceedings to Juvenile Court] and Commentary.

¹³Ten states (GA, IL, LA, MA, MI, MO, NH, SC, TX, 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.

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.

2. 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 punishment. For instance, Paul McNulty, president of an anti-crime 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 children will be held accountable. To do that will require a complete overhaul of the juvenile justice system.¹⁴

¹⁴Paul McNulty, “Natural Born Killers? Preventing the Coming Explosion of Teenage Crime” Policy Review 71 (1995), p. 85.

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 Juvenile Justice John Whitehead and Steven Lab chart a pattern of generally increasing juvenile offense rates during the period 1960–1995, as measured by arrest rates.¹⁵ Except for decreases in the early 1980s, the pattern they chart is one of increasing juvenile offense. But when they turn to genuinely violent crime – murder and aggravated assault – they note significant decreases in the incidence of arrest after the 1980s.¹⁶ A different picture of trends in juvenile crime is presented by The Sentencing Project, a non-profit criminal justice policy organization. In an analysis that tracked patterns in juvenile crime from 1970 through 1998, they report that

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.¹⁷

The exception to these patterns, they note, is murder. While juvenile murder rates remained relatively constant from 1970 through 1985 at around 2000 per year, they underwent a steep increase after that, peaking in 1993 at almost 4500, and then dropping by 48% 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.¹⁸ These two

¹⁵Juvenile Justice, pp. 13-15.

¹⁶Ibid., p. 25.

¹⁷The Sentencing Project, Briefing/Fact Sheet on Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences(<http://www.sentencingproject.org/brief/juveniles.html>).

¹⁸See, e.g., Alfred Blumstein and Richard Rosenfeld, Assessing Recent Ups and Downs in U.S. Homicide Rates, National Consortium on Violence Research, 1998.

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 don't agree about when the rates peaked, though they agree that the rates are now on the decrease.¹⁹

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.²⁰ 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.²¹ 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

¹⁹For further discussion and interpretation of the trends in juvenile justice, see Jeffrey Butts and Howard Snyder, "The Youngest Delinquents: Offenders Under the Age of 15" Juvenile Justice Bulletin (Sept. 1997), pp. 1-11; Mark Moore and Michael Tonry, "Youth Violence in America" and Philip Cook and John Laub, "The Unprecedented Epidemic in Youth Violence" in Youth Violence, ed. M. Tonry and M. Moore (Chicago: University of Chicago Press, 1998); Franklin Zimring, American Youth Violence (New York: Oxford University Press, 1998), chs. 1-4; Snyder and Sickmund, Juvenile Offenders and Victims, chs. 3 and 5.

²⁰Juvenile Justice, p. 231.

²¹Ibid.

punitive insofar as it allows juvenile offenders to be sentenced as adults to adult facilities or it combines juvenile correction while the offender is a juvenile with additional adult correction once the offender reaches majority.

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 to 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 judicial waiver or 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 §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. 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. 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. In effect, the judicial waiver, as traditionally conceived, creates 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. 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. Partly as the result of such statutory

changes the scope of the judicial waiver has expanded considerably in recent years.²²

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. 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 for 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.

However, even with the legislative changes in these two transfer mechanisms, they do not mandate transfer. Even when there is a presumption in favor of transfer, it can be rebutted in individual cases. Perhaps the most significant and disturbing aspect of the transfer trend is the legislative adoption in many states of mandatory transfer statutes that exclude certain cases that would otherwise go to juvenile court from going there and require such cases 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. The majority of states have now adopted some kind of mandatory transfer legislation.²³ For instance, adoption of Proposition 21 in 2000 added a mandatory transfer to the California Penal 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.

²²Nationally, there was a 33% increase in the incidence of judicial waiver between 1986 and 1995 (Juvenile Justice, p, 221).

²³Whitehead and Lab note that as of 1995 36 states and the District of Columbia had mandatory transfer provisions of some kind (Juvenile Justice, p. 231).

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 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.²⁴

3. 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 with 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 this view is plausible.

²⁴The trend is well documented in P. Griffin, P. Torbert, and L. Szymanski, Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 1998); Snyder and Sickmund, Juvenile Offenders and Victims, ch. 4; and Whitehead and Lab, Juvenile Justice, ch. 8.

The rehabilitative or corrective view of punishment sees crime as the expression of anti-social 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 anti-social 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 similar crimes. It also has value as a specific deterrent insofar as it deters A from repeat offense.²⁵ 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.²⁶

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

²⁵Punishment 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, deterrence would be the view that this is the only relevant consequence for justifying punishment.

²⁶Jeremy Bentham, An Introduction to the Principles of Morals and Legislation [originally published in 1789] (London: Athlone Press, 1970), chs. xiii-xiv.

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.²⁷

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 can make us rethink the adequacy of the rationale.

Moreover, we may doubt whether rehabilitation is a good guide about 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 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?

²⁷It 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.

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.²⁸ 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 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 much. 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 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

²⁸The anti-consequentialist 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. (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 anti-consequentialist sees rejecting (1) as the most plausible response. In a fuller discussion of punishment, one would want to consider and assess 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 consequentialism will remain an attractive alternative.

the retributivist as saying that punishment (P) should be proportional to desert (D), where D should itself be understood as the product of the magnitude of the wrong committed (W) and the person's degree of responsibility (R) for act in question.²⁹ In other words,

$$P = D = W \times R.$$

Any conception of retributivism must then interpret these two independent variables – wrongdoing and responsibility. Formally, responsibility is straightforward. Degree of responsibility should be measured on a 0-1 scale in which 0 indicates no responsibility and 1 indicates 100% responsibility. Who is responsible for what and to what degree will obviously depend on the substantive details of the correct theory of 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 harm he causes, but there may be other determinants as well.³⁰

The retributive formula is not without potential problems, but it provides a useful and intuitive first approximation to 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

²⁹Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press, 1981), p. 363. This formulation assumes that there could, in principle, be blameless wrongdoing (wrongdoing for which the agent bears no responsibility). Anyone who thinks that this possibility is problematic must deny that wrongdoing and responsibility could be independent variables. They should reformulate the retributivist formula so that punishment is proportional to wrongdoing which is itself the product of some morally neutral notion, such as harm, and responsibility ($P = W = H \times R$).

³⁰An exclusive focus on harm is problematic, because it would not allow us to justify punishment of actions that do not result in actual harms. In some cases – for instance, in cases involving failed criminal attempts (e.g. attempted murder), token crimes that do not harm the victim even if the general type of crime normally does harm its victims (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 – this result may seem strongly counterintuitive. Victimless crimes raise special issues and puzzles. We could perhaps deal with the first two sorts of cases by making wrongdoing track the harm risked, intended, or normally resulting from the type of action in question. Interesting as these issues are, I won't pursue them further here.

have a role to play. Provided that we punish all and only the guilty and that our punishments are proportional to the wrongness of the crime, 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 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.

4. IMMATURITY, NORMATIVE COMPETENCE, 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 on account of 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 wrongness 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.³¹ Part of what Locke means is that only persons are accountable in law and morality, because only persons are responsible for their actions. Non-responsible agents act on their strongest desires; if they deliberate, it is only about the instrumental means to the satisfaction of their desires. By contrast, responsible agents must be able to distinguish between the intensity and authority of their desires, deliberate about the value or authority of their desires, and regulate their actions in accordance with their deliberations. One must possess this sort of normative competence to qualify in law and morals as a responsible agent or person. Agents who possess this normative competence but do not exercise it 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.³² One central ingredient in normative

³¹John Locke, An Essay Concerning Human Understanding [first published 1690], ed. P.H. Nidditch (Oxford: Clarendon Press, 1979), book II, chapter xxvii, §§8, 15, 17-21, 23, 26.

³²For 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. Good statements of the cognitive conception are Herbert Fingarette and Ann Fingarette Hasse, Mental Disabilities and Criminal Responsibility (Berkeley: University of California Press, 1979); Michael Moore, Law and Psychiatry: Rethinking the Relationship (New York: Cambridge University Press, 1984) and Placing Blame (Oxford: Clarendon Press, 1997); and Stephen Morse, “Uncontrollable Urges and Irrational People” Virginia Law Review 88 (2002), pp. 1025-78. A good statement of the comprehensive conception is Peter Arenella, “Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability” UCLA Law Review 39 (1992), pp. 1511-1622. 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.

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. 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. 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.³³ But the sort of reduced or diminished capacity due to immaturity is in some ways less troublesome. Insanity is an anomalous condition, afflicting a minority of people, often lacking obvious markers. By contrast, immaturity is a normal condition, which all adults passed through. Though there is some individual variation, it 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.³⁴ Older adolescents may have many of the cognitive abilities that adults

³³This is really a problem with applying the insanity defense. A prior problem is with its interpretation. In the post Hinckley era, state courts and legislatures have increasingly construed the relevant sort of normative incompetence in purely cognitive terms in which the accused counts as legally insane if and only if she lacks knowledge of right and wrong. But while such a cognitive incompetence should be a sufficient condition of insanity, it should not be a necessary condition. The purely cognitive interpretation of insanity ignores affective and conative aspects of normative competence, which I distinguished above. However, this is a topic for another paper.

³⁴See, generally, E. Scott, N. Reppucci, and J. Woolard, “Evaluating Adolescent Decision Making in Legal Contexts” Law and Human Behavior 19 (1995), pp. 221-44, and Thomas Grisso and Robert Schwartz (eds), Youth on Trial: A Developmental Perspective on Juvenile Justice (Chicago: University of Chicago Press, 2000).

have, but they lack the wealth of experience and factual information that adults typically possess. 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.³⁵ Moreover, adolescents are also less able to represent the interests of other adequately, with the result that their sense of empathy, which is crucial in inhibiting harmful behavior, is less strong.³⁶ They also tend to be more susceptible to the influence of peers, with the result that they lack a key ingredient in autonomy.³⁷ Finally, there is emerging evidence that the neurological correlates of these cognitive, emotional, and social capacities are undergoing crucial development throughout adolescence and well into late adolescence.³⁸

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

³⁵See, e.g., P. Finn and B. Bragg, "Perception of the Risk of an Accident by Young and Older Drivers" Accident Analysis and Prevention 18 (1986), pp. 289-98; M. Tester, W. Gardiner, and E. Wilfong, "Experimental Studies of the Development of Decision-making Competence" in Children, Risks, and Decisions: Psychological and Legal Implications (New York: American Psychological Association, 1987); W. Gardner and J. Herman, "Adolescents' AIDS Risk Taking: A Rational Choice Perspective" in Adolescents in the AIDS Epidemic, ed. Gardiner (et. al.) (San Francisco: Jossey-Bass, 1991); and Scott, et. al., "Evaluating Adolescent Decision Making in Legal Contexts".

³⁶See, e.g. Martin Hoffman, Empathy and Moral Development (New York: Cambridge University Press, 2000).

³⁷See, e.g., T. Berndt, "Developmental Changes in Conformity to Peers and Parents" Developmental Psychology 15 (1979), pp. 608-16; S. Steinberg and S. Silverberg, "The Vicissitudes of Autonomy in Early Adolescence" Child Development 57 (1986), pp. 841-51; Scott et. al., "Evaluating Adolescent Decision Making in Legal Contexts"; and Youth on Trial: A Developmental Perspective on Juvenile Justice, ed. Grisso and Schwartz.

³⁸See, e.g., S. Anderson, A. Bechara, H. Damasio, D. Tranel, and A. Damasio, "Impairment of Social and Moral Behavior Related to Damage in Human Prefrontal Cortex" Nature Neuroscience 2 (1999), pp. 1032-37; F. Benes, "The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and their Interactions" in Fundamentals of Developmental Neurobiology [get publication details].

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 that the older and more responsible the offender the less time is he 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.³⁹ Insofar as punishment should be proportional to the wrongness of a criminal act and wrongness is itself the product of the act's harm 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

³⁹Insofar as juvenile crime is the product of various mental disorders that impair normative competence, this is further reason for reducing or (in extreme cases) eliminating punishment. See, e.g., Alan Kazadin, "Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths" in Youth on Trial: A Developmental Perspective on Juvenile Justice, ed. Grisso and Schwartz. But this is really a separate issue. Similar claims might be made about the role of mental disorders in adult criminal activity. I'm here interested in the question whether adolescence, as such, justifies diminished responsibility.

often made to support the trend to try juveniles as adults, so far from supporting that trend, actually undermines it.

5. 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 but more corrigible. Adolescence is a pivotal period both because it is a time of enormous cognitive and emotional growth and maturation and because it is 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 afoul of rehabilitative ideals of punishment.

We can also see how immaturity changes the operation of deterrent values 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. But 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 vividly represent the future and are prone to discount the significance of future benefits and harms out of proportion to their actual magnitude. But this means that sanctions that might, in principle, work for adults just won't have the same deterrent value for juveniles.⁴⁰ In fact, there is evidence from Florida and other states that use of harsher, adult criminal sanctions for minors actually increases recidivism rates.⁴¹ 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.

6. TWO TRACKS IN JUVENILE CRIME

A further consideration potentially relevant to both forward-looking rationales for punishment, viz. rehabilitation and deterrence, is that there is growing evidence that for many children adolescence involves a period of increased risk-taking and anti-social impulses that is normally outgrown. The historically robust fact that juvenile crime constitutes a disproportionate amount of all crime committed means that most deviance is limited to adolescence. Most deviant adolescents do not become deviant adults. Whereas most teenage offenders do not become career criminals, younger pre-teen arrest is the best predictor of career

⁴⁰(a) 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. (b) I am not even factoring in the live possibility that flouting social norms and sanctions might actually be an incentive for many adolescents.

⁴¹Donna Bishop et. al., "The Transfer of Juveniles to Criminal Court: Does it Make a Difference?" Crime and Delinquency 42 (1996), pp. 171-91.

criminality. This suggests that the class of juvenile offenders divides roughly into two subclasses – a small number of juveniles whose anti-social 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.⁴² This two-track model of juvenile deviance suggests that a two track approach to juvenile crime is worth exploring. The alternative approach stresses 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 suggests 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

⁴²See, e.g., Terrie Moffitt, “Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy” Psychological Review 100 (1993), pp. 674-701 and Thomas Grisso, “Society’s Retributive Response to Juvenile Violence: A Developmental Perspective” Law and Human Behavior 20 (1996), pp. 229-47.

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 won't be able to get very far in addressing them without better empirical models of the causes and corrigibility of preteen deviance. For present purposes, the important point is that whether such a two-track approach to juvenile justice is appropriate and, if so, how it is best developed, it does not support a more punitive attitude toward juvenile crime or, specifically, the transfer trend.

7. 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 juvenile competence 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 due process requirements for juveniles.⁴³ 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 it 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 (§4.10) 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? I 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 harm and culpability as two independent factors contributing to the wrongness 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 harm 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 is the easier it is to recognize that it is wrong. Adolescents may experience difficulties appreciating the difference between simple and gross 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

⁴³See, e.g., the discussion in Youth on Trial, ed. Grisso and Schwartz, part II.

juvenile crime.

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 wouldn't show that immaturity didn't 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 that may seem to have maturity built into them. 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.

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 harmings that don't 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 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 resistability may be a necessary condition of normative competence, and premeditation may demonstrate one form of impulse resistability, but that doesn't 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. A version of this 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 guarantee these other aspects of normative competence and 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 doesn't 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 is what §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. 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 un rebuttable 18 year-old cut-off, which no one endorses, would be bad, but at least it would generally if imperfectly track the facts about normative competence that matter. To replace an imaginary un rebuttable 18 year-old cut-off in favor of an un rebuttable 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.⁴⁴

8. 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 its 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 had 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 dual system of criminal justice.

This more radical reform seeks to abolish a separate system for juvenile justice altogether. This proposal will be unjust if it treats juveniles exactly as it treats as 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.⁴⁵ Instead, he advocates a unified system of juvenile justice, modeled on our current (adult) criminal justice system, that allows immaturity to function as a mitigating factor at sentencing.

⁴⁴This weighting is reflected in the fact that the criminal law employs the standard of proof beyond a reasonable doubt, which reflects the attitude that it worse to convict the innocent than to let the guilty go free.

⁴⁵Barry Feld, Bad Kids: Race and the Transformation of the Juvenile Court (New York: Oxford University Press, 1999), esp. ch. 8.

While this proposal would address the retributive reasons for punishing juveniles less, it would not yet address the deterrence reasons for punishing specifically adolescent 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 corrigible 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.⁴⁶ Also, he proposes that criminal courts distinguish between the appropriate degree and manner of criminal liability. 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.⁴⁷ Juveniles could and should be assigned to juvenile-specific correctional facilities that provided different nutritional and educational services than adult facilities.

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 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 reforms are much more radical than the abolitionist reforms. Because the abolitionist reforms do not threaten differential desert and punishment, I see them as much less threatening to the traditional rationale for a separate juvenile court. Whether a unified 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

⁴⁶Ibid., p. 325.

⁴⁷Id., 326.

simplicity. But we have just seen that Feld is sensitive to the need for establishing separate correctional facilities for youthful and adult offenders. 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 case-by case analysis 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 causing harm and being morally responsible for harm or that they do not attach sufficient weight to mitigating factors such as diminished competence and responsibility. Indeed, if my arguments are right, this sort 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.⁴⁸ A natural worry is that this

⁴⁸See C. Crosby, P. Britner, K Jodl, and S. Portwood, "The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality" Law and Human Behavior 19 (1995), pp.245-61. The questionnaire contained descriptions of cases with defendants on trial for murder whose ages ranged from 10-19 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. 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. 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. A similar finding about the comparative insensitivity of views about the severity of sentencing to degree of maturity and normative competence is made in S. Ghetti and A. Redlich, "Reactions to Youth Crime: Perceptions of Accountability and Competency" Behavioral Sciences and the Law 19 (2001), pp. 33-52.

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 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, 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.⁴⁹

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 sacrifices the ideal of individualized justice. For, as we have noted (§7), age is an imperfect proxy for maturity. Even if maturation is reasonably

⁴⁹Feld, Bad Kids, p. 317.

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 Feld's 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 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, viz. the distinction between minors and adults. But, as we have seen (§§2, 7), it treats this categorical distinction as creating a defeasible presumption. 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 mitigating factors at the sentencing phase.

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 the abolitionist proposal, the traditional separate juvenile court has the advantage of making punishment sensitive to maturity in a way that does not sacrifice individualized justice.⁵⁰

⁵⁰Perhaps 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.

9. 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.⁵¹ But public attitudes are ambivalent, inasmuch as the transfer trend is part 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.⁵² 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.

⁵¹Gail Appleson, "Americans Want Child Criminals Sentenced as Kids" Reuters, March 28, 2001 and F. Cullen et. al., "Public Support for Early Intervention Programs: Implications for a Progressive Policy Agenda" Crime and Delinquency 44 (1998), pp. 187-204.

⁵²Actually, 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.