

CONTINUING LEGAL EDUCATION

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REPRESENTING ADOLESCENTS IN ADULT CRIMINAL COURT

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CHAPTER 2

The Nature of Adolescence

*All I need is someone in the world
to lean on their shoulder and cry
someone to tell my secrets to without having to lie
someone that will make me feel good deep down inside
someone who would understand me and look in my soul
and see that I am more than just a fourteen-year-old.*

—A JUVENILE OFFENDER

Remembrance

HOW MANY OF YOU have ever been fourteen? Let me see a show of hands." That is how I often facetiously begin a discussion with mature audiences on the relationship of adolescence to juvenile crime. The serious point of the question is to emphasize that offending and nonoffending teenagers, as well as adults, share at least one thing in common: the adolescent experience. Evoking the memory of our own adolescence is crucial to understanding the issues involved in judging the culpability of juveniles who commit crimes and determining the appropriate societal response to their behavior. The first step in capturing the nature of adolescence is to remember it. Not just the sweet memories made sweeter by the passage of time or the reminiscence of a time "free of responsibility" but also the feelings generated as much by failure as by success, by disappointment as well as gratification.

In order to make the journey from childhood to maturity, we all had to traverse the transitional adolescent period; a time when we saw ourselves evolving in size, strength, knowledge, and appreciation for

what was right and what was wrong. For some, the journey has been much more difficult than for others.

Several years ago on network television, there was a popular series called *The Wonder Years*. It chronicled the boyhood adventures of "Kevin," its main character, growing up during the 1960s in America. The series format involved the voice-over of the adult Kevin who shared his reflections on his childhood exploits. At the end of each program, the adult Kevin would provide a moral. One evening I watched an episode in which Kevin, who had a secret crush on his neighbor and classmate "Winnie," was lamenting the fact he never asked Winnie for a date because he was afraid that his friends would ridicule him. The boys did not consider Winnie "attractive." (Of course, she grew up to be a beautiful and powerful business executive.) At the end of the episode, the adult Kevin posed the question:

But who are you at 14? Who are you at 14? You are what your friends think you are.

The idea that one's perception of self-worth as a teenager often does not come from within but from without, is an important observation on the nature of adolescence. It explains one of the major causes of juvenile criminal behavior—peer pressure. Key to resisting peer pressure is the capacity to believe in one's self, one's destiny. The strength of belief in the ability to realize one's dreams is directly related to a child's capacity to rely on that dream in order to resist choices that would compromise it.

Reflecting on our own adolescence provides us with examples of how adolescence affected our own behavior. Reflection is a useful exercise from which we can sort out the implications of judging juvenile behavior and assessing culpability. If we could, cognizant of our own adolescence, develop a method of measuring whether a child's conduct was reasonable, excusable or punishable, would we settle for a standard that relies simply on arbitrary age limits beyond which "childhood" is no longer legally recognized? Wouldn't we prefer a system of determining culpability that is based on a flexible

assessment of an individual teenager's culpability rather than a standard of behavior designed for adults? Wouldn't we prefer a process of determining culpability that more clearly reflects the true nature of children rather than one based solely on arbitrary age parameters? Maturity is a process that develops over time rather than a precise, timed event. As such, at any given moment during a child's adolescence, we are witnessing an "evolving" appreciation of right and wrong, an "evolving" capacity to control one's impulses and resist peer pressure.

The argument for trying children as adults has formidable political appeal—but it does not have a sound basis in human nature or psychology. As Thomas Grisso and Laurence Steinberg point out in their groundbreaking research on the subject of competency of youth as trial defendants: "Adolescence—roughly the years between 10 and 17—is a time of rapid and dramatic change. These changes are highly variable, not only among different individuals, but along different dimensions within any given individual. One 15-year-old, for example, might be quite mature in appearance but emotionally still a child. Another may be intellectually ahead of his peers, but lag far behind in social skills. A teenager may act like an adult one day and be very impulsive the next, or be mature in one social setting and impulsive in another... It doesn't generally make sense to ask an adolescent to think or act like an adult, because he can't—any more than a six-year-old child can learn calculus."¹

A Modern Psychological View of Youth

Adolescence was first recognized as a distinct developmental phase in modern psychology at the turn of the 20th century. It was classified as a transitional stage between childhood and adulthood brought on by the onset of puberty.²

Many scholars have researched the psychological effects of adolescence on criminal behavior. They have concluded that children, particularly those under 16 years of age, are developmentally different from adults—physically, intellectually, and emotionally. Notably,

these differences result in an adolescent's diminished capacity to reason, that is, to know or appreciate the consequences of behavior or the wrongfulness of acts, a diminished capacity to control impulses and to resist peer pressure. Although these deficits do not make adolescents any less dangerous, experts have argued that they require a specifically defined manner of adjudication and scope of punishment.³

When teenagers commit criminal acts, gauging the level of their maturity is crucial in determining their culpability. I am proposing a system and method that will permit treatment of young offenders based on an individualized judicial assessment of their level of maturity and amenability to social service-oriented dispositions—a juvenile justice policy that treats adolescence as a distinct legal category.⁴ Modern legal principles reflect the significance of the presence or absence of maturity. For example, in criminal law the presumptive absence of maturity, reflected in a chronological age, serves as a dividing line, separating criminal behavior from noncriminal behavior and as a factor mitigating the severity of punishment.

In various areas of the law, we have developed mechanisms to gauge the level of a child's maturity, that is, the ability to make reasoned judgments. For instance, in the area of abortion rights, judges in many states are required to conduct a "judicial by-pass" hearing to determine a teenager's capacity to knowingly and intelligently make a decision whether to have an abortion, independent of a parent's advice or consent. This proceeding is required in many states as a predicate to assigning adult status to a minor for the purpose of permitting the minor to make such a decision absent parental advice or consent. Under this approach, the boundary between childhood and adulthood is not a "legislatively mandated bright line; rather it is set by an individualized evaluation of the minor's maturity."⁵ Closer to our context, the traditional juvenile court transfer or waiver hearing is another example of a mechanism that can be used to determine an individual child's level of maturity and amenability to social service dispositions.

Assessing a child's mental condition at the time of a crime presents a greater challenge than simply recreating the circumstances of the event. However, it is not a subject foreign to criminal jurisprudence. A judicial assessment of the level of a youth's maturity is

required in other contexts. These include evaluating whether a child can knowingly and intelligently waive his constitutional right to a jury trial in order to plead guilty and whether a child validly waived his right to remain silent on the issue of the admissibility of confessions or statements. "In all these instances, the Court must assess a child's intellectual capacity and his level of understanding to determine: (1) whether the child processed and understood the information received about the rights involved; (2), whether the child engaged in rational decision-making and (3) whether the child waived his rights volitionally."⁶

In proposing a model juvenile justice system based on rational principles, unalloyed by political considerations, I am not unmindful that criminal justice and juvenile justice in particular is invariably an emotionally charged subject. Indeed, it is often difficult to convince an audience to suspend judgment until I have had an opportunity to state my case. Overcoming a natural resentment toward children who participate in serious or violent crimes, however, is an important step in objectively evaluating the efficacy of proposals to deal more effectively with such children. I am not suggesting that we should or could stifle our indignation at the behavior of these children or that we should be "lenient" in dealing with them. On the contrary, their criminal behavior requires a firm response—a firmness, however, which is intended to promote respect for society rather than resentment. The response must embody an appreciation of the turbulence of adolescence, exacerbated in many cases by dysfunctional social circumstances. Such an approach does not ignore the dangerousness of certain children nor does it excuse criminal behavior. Rather, it can lead to solutions that assist a child to avoid reoffending. It recognizes that childhood mistakes are to be expected and, if their nature permits, we should view these mistakes as an opportunity to teach and help children grow—to move forward rather than backward in the process of adolescent development. The challenges of adolescence can provide an opportunity to gain confidence, to develop character, and to understand one's limitations not as failures but as lessons. The gravamen of my quarrel with laws equating children with adults is that they are *overtly* inclusive. They sweep into the adult system many children who could be better served in the juvenile or family courts. I suggest

an appropriate balance in our effort to devise a model juvenile justice system—a balance that recognizes the harm of which children are capable, and the need of victims to receive justice in our courts, yet which recognizes that fairness requires us to treat children as children, adolescents as adolescents and adults as adults. I propose a system in which punishment for criminal acts would be measured to fit an offender's level of maturity and understanding and, in the case of minors, a system designed ultimately to discipline rather than punish, to socialize rather than to exact retribution.

Of course, we all want quick, easy, and complete solutions to the problem of juvenile crime. Public frustration is understandable, especially when influential government officials have taken the position that such children should be treated no differently than adults.⁷ This position, however, ignores the real issue concerning the culpability of children. The approach that I recommend comes from a recognition that the stage of adolescence itself plays a pivotal role in the nature of juvenile crime and largely dictates the level of culpability that we can fairly impose on children. Although fundamental differences in our adolescent experiences and our moral and political outlook may lead to different conclusions regarding which characteristics are to be taken into account and the weight such factors should be accorded in determining how to treat delinquent children, I submit that the phase of adolescence is not a waivable aspect of a child's culpability.

A Classical View of Youth

Conceptions about children and their relationship to society have ancient roots. Aristotle described the youth of his day in terms that reveal the essence of adolescence:

In terms of their character, the young are prone to desires and inclined to do whatever they desire.... And they are impulsive and quick-tempered and inclined to follow up their anger [by action]. And they are unable to resist their impulses; for through love of honor they cannot put up with being belittled

but become indignant if they think they are done a wrong. And though they love honor, they love victory more; for youth longs for superiority, and victory is a kind of superiority... And [they are] filled with good hopes; for like those drinking wine, the young are heated by their nature, and at the same time [they are filled with hopes] because of not yet having experienced much failure. And they live for the most part in hope; for hope is for the future, and memory is of what has gone by, but for the young the future is long and the past short; for in the dawn of life nothing can be remembered, and everything [can be] hoped for. And they are easily deceived for the reason given; for they easily hope for the best. And they are more courageous [than the other age groups]; for they are impulsive and filled with good hopes, of which the former quality makes them lack fear, and the latter makes them brave; for no one feels fear when angry, and to expect something good is a source of confidence. And they are sensitive to shame; for they have been educated only by convention and do not yet understand other fine things. And they are magnanimous; for they have not yet been worn down by life but are inexperienced with constraints, and to think oneself worthy of great things is magnanimity; and this is characteristic of a person of good hopes... For they live more by natural character than by calculation, and calculation concerns the advantageous, virtue the honorable. And more than other ages of life they are fond of friends and eager for companions, because they enjoy living with others and do not yet judge anything on the basis of advantage; thus, they do not judge friends that way. And all the mistakes they make are in the direction of excess and vehemence...; for they do "everything too much": they love too much and hate too much and all other things similarly. And they think they know everything and strongly insist on it; for this is the cause of their doing everything too much. And the wrongs they commit come from insolence, not maliciousness. And they are inclined to pity, because of supposing [that] everybody is good or better than average... and they are fond of laughter and, as a result,

witty; for wit is cultured insolence. Such, then, is the character of the young."⁸

Twenty-five-hundred years later, Aristotle's observations are still valid and valuable in understanding adolescence. An accurate understanding of the nature of adolescence is important in order to contextualize our work in the Youth Part and our recommendations to improve the juvenile justice system. In the treatise "American Youth Violence,"⁹ Frank Zimring emphasizes a characteristic of adolescence that I often see in my courtroom. It is that at no other point in life is violence so common. It is, for most, the only time when one acts violently toward another. As Aristotle noted, the young are "quick tempered, and inclined to follow up their anger by action." The inclination to violence, therefore, should be understood as one aspect of the nature of adolescence. Of course, this does not mean that all adolescents are preordained to be violent, or that violence should ever be excused or go uncorrected and unpunished. However, the interplay between adolescence and violence does require a juvenile sentencing policy that is flexible enough to respond effectively to the context of its occurrence. Adolescence is also a time when peer pressure and "group standing" are significant factors underlying motivation for behavior. These aspects of adolescent behavior make the case for the exercise of discernment in determining the nature of an individual child's fault.

The Juvenile Nature of Juvenile Crime

I have found that there are three traits of teenagers that create fertile ground for juvenile offending that are consistent with Aristotle's observations: impulsivity, volatility, and collective adolescent behavior. I frequently see the consequences of these traits in the nature of juvenile crime. For instance, in one case, a 65-year-old widow who lived alone ordered several items from a local supermarket. Unable to carry the items home, the supermarket manager sent Robert, a 14-year-old who worked part-time as a delivery boy, to her apartment

with her order. When the woman opened the door, she invited Robert in and told him to place the packages on her kitchen table. She then opened her purse to give him a tip. When Robert saw the number of bills in her wallet, he picked up a frying pan that was lying in her kitchen sink and hit her with it, grabbing her purse and running from the apartment. The widow, bruised and dazed, managed to call the police. Robert was quickly apprehended. His identity and home address were on file with his employer.

Shortly after Robert's first appearance before me, he pleaded guilty to robbery. During his plea allocution, I asked him, "Why did you do this? Didn't you realize you would be caught quickly?" He responded by telling me that he didn't know what came over him, but when he saw the money in the purse it was like he had an angel on one shoulder telling him to be good and a devil on the other. He listened to the devil.

In another case, Andrew, a 14-year-old boy, was arrested for attempting to smuggle a .38 caliber pistol into his school apparently to settle a score with another young man who insulted him in front of his girlfriend. When he was arraigned before me, his mother and a young boy who resembled the defendant were seated in the audience. The boy was Andrew's 11-year-old brother. When Andrew's case was called, I asked his mother to step up to the railing that separated the audience from the courtroom well. When she did so, the younger boy accompanied her. Her son Andrew was facing a mandatory sentence of imprisonment. The legislature had recently expanded the scope of the Juvenile Offender Law to encompass the crime of gun possession on school grounds. The amendment required mandatory imprisonment for that offense and imposed restrictions on granting Youthful Offender Treatment. I wanted his mother to understand that my options under the circumstances were very limited. She told me that she had five sons and that her two oldest sons also were in jail. The boy with her was her second youngest. I asked the boy what he thought of his brother and the situation. He said, "I look up to my brother as a role model, but he has to think before he acts." This young boy was apparently mature beyond his years and certainly more insightful than his brother. The mother was trying to raise these boys without a father.

I suggested that the mother call New York's Big Brothers Big Sisters for help. Perhaps, I thought, if this boy had a positive role model, a mentor, he could escape the destiny of his older siblings.

Impulsive behavior such as that described here results in rash decisions and reckless disregard of consequences. Aristotle observed that not only are the young impulsive, but also that they appear to be unable to control their impulses. He imparts a degree of involuntariness to their behavior. This assertion may actually reflect the powerful forces at work on the psyche of a youth. Nevertheless, it is not a view that society can or is willing to adopt as a matter of public policy. The occasion of the impulsive act, however, should be viewed as an opportunity to teach a child the value of self-control, a characteristic that can evolve.

"Self-control," as Professor Frank Zimring observes, "is the habit of behavior which can be developed over a period of time, a habit dependent on the experience of successfully exercising it. This particular type of maturity, like so many others, takes practice."¹⁰

Children and adolescents have had obviously less opportunity than adults to practice this habit of behavior. Therefore, it follows they have a diminished capacity to control their behavior. This does not excuse their impulsive acts but it does explain the foolish behavior of a Robert and the reckless behavior of an Andrew.

Volatility or quick temperedness as discussed earlier is also a form of impulsive behavior that often leads to violence. It results from a lack of mature coping skills, and an undeveloped self-image. When, for example, was the last time you were involved in a fistfight? For most, it was during our teenage years.

Collective adolescent behavior is the hallmark of juvenile crime. The desire for friendship, to belong, to be part of a group, to be accepted, is a powerful, if not dominant, adolescent trait. It heightens a child's vulnerability to peer pressure. The overwhelming majority of juveniles appearing before me are involved in group crimes. The group context of this behavior suggests that the motivation for criminal conduct often has less to do with, "I wanted the money" or "I wanted the jacket" and more to do with "what will my friends think of me if I'm not 'down' with the crime?"

The power of peer pressure on a child's decision to engage in criminal behavior is directly related to an adolescent's need to belong and be accepted by his peers. The consequence of "saying 'no' to negative peer pressure is not just withstanding the 'heat' of the moment," but it is also "coping with a sense of exclusion as others engage in the behavior and leave the adolescent increasingly alone.... Further, the sense of exclusion remains whenever the group later recounts what happened. This feeling of loneliness then becomes persuasive and carries an easy solution. Go along with the crowd."¹¹ Consequently, a teenager may know right from wrong and, according to Professor Zimmerman, "... may even have developed a capacity to control his or her impulsiveness, if left alone to do so, but resisting temptation while alone is a different task from resisting the pressures to commit an offense when among adolescent peers who wish to misbehave..."¹² The ability to deflect or resist peer pressure is a useful tool that can help an adolescent avoid criminal behavior. Many youth lack the crucial skills to do so until maturity.

As a result of their propensity to socialize in groups and to act in groups, children rarely commit crimes alone. Because of the group nature of their behavior, involvement and culpability differ from participant to participant. This characteristic of juvenile crime, that is, its group context, requires a careful evaluation of a child's individual state of mind and extent of involvement in an underlying charge. Adolescents often seem to have their own conception of criminal responsibility when they act in groups. "Being there" for example, is often perceived as a circumstance that is sufficient for criminal liability. When a child offers to plead guilty, I often phrase an inquiry into the child's perception of culpability with the seemingly straightforward question: "What did you do to be guilty of this crime?" "I was there" is a common response. Of course, there is no crime of simply "being there." Mere presence at the scene of a crime does not in and of itself render one guilty of a crime. Action or acts, however slight, with the intent to further the crime, is necessary. Children or adolescents, because of their intellectual immaturity, often lack sufficient capacity to grasp the legal concept of accomplice liability, a principle central to understanding the group nature of juvenile crime.¹³

These characteristics—intellectual immaturity, impulsivity, volatility, and collective behavior—often result in what I call the juvenile nature of juvenile crime. The foolishness of their criminal acts sets young offenders apart from others and is apparent by the lack of sophistication in planning, executing, and covering up their criminal behavior. For example, one may justifiably believe, in light of the numerous cases involving food deliverymen, that these employees have one of the most dangerous occupations in New York City. A common scenario that we often encounter in the Youth Part is the crime of robbery, which typically involves a teenager calling a restaurant from his home, ordering food, and instructing the person to deliver the food to a particular address. When the delivery person enters the vestibule of the building to deliver the food, the youth who made the call as well as two or three of his friends are there, waiting for their victim. One of them threatens the delivery person with a knife, stick, or gun, another boy tells him to empty his pockets, another takes the food. The juveniles then run from the building and divide up the proceeds of their crime. The youth who made the call did not realize that the restaurant had caller-ID. In short order, the police arrive at the scene only to find the teens sitting on a park bench eating the stolen food. These youth now face as much as 10 years' imprisonment under New York's Juvenile Offender Law for their conduct.

Although the potentially negative traits of impulsivity, volatility, and collective adolescent behavior are potent traits in adolescence, we know by our own experience that our characters are not frozen forever by what we have done at 14 or 15 years of age. Naturally, we presume that children have the capacity to learn from their experiences, to move beyond the worst things that they have done. Isn't that precisely what growing up is all about?

In terms of constructing an effective sentencing policy for adolescents who commit crime, a quality of youth that must be considered is their "malleability" the recognition that because of their youth, adolescents are not wedded to their pasts. They are less committed to their misconduct and more adaptable to positive influence than most adults who commit crime. The adaptability of adolescents is also an aspect of youth that has support in recent research, which

suggests that most criminal adolescent behavior is stage-related and disappears as a person grows older.¹⁴ Recognition, therefore, that children are malleable, at least more malleable than adults, is a crucial element that must be integrated into a juvenile justice policy, in order that such a policy conform to human nature.

Finally, Aristotle gives us an illuminating glimpse into a salutary and encouraging aspect of youthfulness that can work in tandem with a child's malleability and that provides a strong basis for optimism in the ability to improve children's conduct. As Aristotle observed "[youth] live for the most part in hope; for hope is for the future and memory is of what has gone by, but for the young the future is long and the past short, for in the dawn of life nothing can be remembered and everything can be hoped for."¹⁵

Aristotle's eloquent description of the resiliency of youth, that is, their ability to positively adjust and be optimistic even in the face of significant trauma, both physical and emotional, is also a trait that I have observed in many of the young people who appear before me. Ancient Stoic philosophers asserted that we cannot help what happens to us but we can decide what our reaction to what happens to us will be. I saw this attribute in Alice. She was a 15-year-old Asian-American girl who was involved in a gang that kidnaped the son of a wealthy Chinese restaurant owner and attempted to extort a ransom. The owner of the restaurant contacted the police, who set a trap for the gang members and managed to free the storeowner's son unharmed. I learned that Alice was physically and emotionally abused as a child and ran away from her Chinese immigrant mother at 13 to live with the 19-year-old leader of the gang. Alice was ultimately conditionally released from detention to reside in a private residential psychiatric community and was periodically required to return to court so that her progress could be monitored. She was extremely intelligent and eager to display her progress in the community's school. Each time she appeared in court, she would bring her examination papers with her and I would review them. They were all excellent. She had straight As in all her courses. One day she showed me an exam that she had taken in Greek mythology. She had answered all but one question correctly. She had to consider whether the

following statement was true or false: "Zeus created mankind, human beings, for the entertainment of the Gods, to be used as pawns or toys for their amusement." She answered "false". The correct answer is "true". According to Greek mythology Zeus and the other Gods did create human beings for their amusement. I believe she knew the answer was "true," and that her answer revealed more about her innate sense of optimism than her knowledge of Greek mythology; that she simply couldn't bring herself to believe, despite all that had happened to her, that beings in authority could be so cruel and uncaring.

The concept of children and adolescents as developing human beings draws both conceptually and historically from ancient ideas about the nature of youthful behavior as distinguished from adult behavior. Although children were not given special treatment for their bad acts in ancient courts, as society became more sophisticated and knowledgeable about human behavior and appropriate forms of punishment, it was gradually understood that distinctions were required based upon an individual's capacity to understand and to appreciate the harms caused by certain actions. Thus, as the common law of England, the source for many of our legal concepts, evolved, rules were developed to help determine the level of maturity sufficient to hold children accountable. This discernment with respect to an individual's culpability based on a concept of psychological maturity was ultimately formalized in the legal principles of "infancy," "diminished capacity" and "proportionality."¹⁶

Because of the acknowledged developmental differences of children from adults, justice demands that they be treated in a manner consistent with those differences. A concept of justice based on fairness and "giving each person his due" cannot encompass a system that denies children full participation in civil society based on their immaturity and yet, at the same time, punishes them criminally despite their immaturity. Can we truly be a society committed to the idea of each person possessing inalienable rights if we fail to fully recognize the potential of each and every child in our society, especially those most vulnerable?

In creating a more just response to juvenile crime, we can start by considering a definition of adolescence proffered by Professor

Robert E. Shepherd Jr. of Virginia's T.C. Williams School of Law that succinctly acknowledges the interplay between adolescence and criminal behavior. He defines adolescence as "the psychosocial response to the profound biological changes of puberty within a social context."¹⁷ This is the key to our approach in constructing an effective youth policy—the recognition that the experience of adolescence has a bearing on culpability, influencing behavioral choices, and that although the nonoffending teenager and the delinquent share the experience of adolescence, they often do so in vastly different social contexts.

The Criminal Responsibility of Juveniles

When I was a child, I spoke as a child, I understood as a child, I thought as a child, but when I became a man, I put away childish things.

—1 CORINTHIANS 13.11

BEFORE WE DISCUSS a juvenile sentencing policy that reflects the impact of adolescence on the prevalent social contexts within which juvenile offending frequently occurs, we must first consider the rationale for holding adolescents criminally responsible. In most states, in order to be criminally responsible, a juvenile/adolescent must reach a threshold age. The age of criminal responsibility varies from state to state. In New York it is as low as 13 for murder, 14 for other serious crimes. In Oklahoma, a child of 7 can be held criminally responsible provided the state can prove that, at the time of the act, the youth knew it was wrong. In Nevada the age of criminal responsibility is 8, Colorado 10, Oregon 12.¹ ²³ states and the District of Columbia now have no minimum age at which children can be tried as adults for the most serious offenses. In the remaining 27 states, the minimum age ranges from 10 to 15. Today, an estimated 200,000 American youth under the age of 18 are tried as adults each year; about 12 percent of these are younger than 16.²² The ability or capacity of a child to form a criminal intent, that is, to knowingly recognize and appreciate that what one was doing was wrong is the critical issue that must be determined in imposing

criminal responsibility on a juvenile or minor. Criminal responsibility is based on the theory that an individual is responsible for his actions and if he violates the law he should expect to be punished. The common law of England, from which we derive many of our legal concepts, is based on doctrines implicit in court decisions, customs, and usages rather than on codified written laws. Initially, the English courts drew no distinctions based on age with respect to criminal responsibility. Child and adult alike were subject to identical penalties. Gradually, the common law evolved to reflect a view of human nature that corresponded with ecclesiastical concepts, especially in the context of the capacity of an individual to commit sin.³ Such moral responsibility was based on the knowledge of right and wrong and the ability to choose either course. The standard for criminal responsibility became not solely the act but the state of mind of the actor at the time of the conduct. Criminal responsibility was thus rooted in a view of human nature that holds that man is naturally endowed with a free will and the capacity to make reasoned choices. These two faculties gave man his autonomy and independence. The exercise of the will in a reasoned manner, therefore, renders human actions appropriate or culpable.

Holding youth criminally accountable for their behavior is ultimately a matter of degree. Aristotle, in discussing the nature of man, asserted that "For what each thing is when fully developed we call its nature."⁴ Until a child becomes an adult he does not assume his true nature. His faculties of reason and liberty of choice are not yet fully developed. Therefore, we do not hold children of a certain age responsible for their acts because we believe they are not yet mature enough to make knowing decisions or to control their behavior. Every civilized society recognizes that without a level of maturity there can be no criminal responsibility. There are differences of opinion, however, as to what degree of immaturity precludes criminal guilt.

Historically, the relationship between immaturity and criminal responsibility was captured in the common law concept of infancy. By the Middle Ages, the courts had established seven years of age as the age of reason, following the lead of the ecclesiastical courts. The latter were cued by the Roman civil law, which established seven as the

age of responsibility. For the church, it was the age of loss of innocence when a child could be guilty of sin. For the courts, it was the age of punishment when a child could be criminally liable for his behavior.

The infancy defense was adopted because judges concluded that criminal culpability necessitated sufficient maturity to act knowingly and intelligently. Where a youth's immaturity renders him unable to appreciate the likely consequences of his act or its wrongful nature, his conduct is not a product of meaningful choice and such an actor cannot be held criminally liable. Because of the difficulty in pinpointing the time at which an individual reached the age of reason—the threshold of criminal liability—the common law presumed that children between 7 and 14 years of age (14 being the age at which a male child was presumed to have attained puberty) did not possess sufficient intellectual capacity to engage in a process of right reasoning. This presumption could be rebutted by proof that a particular child under 14 in fact understood the nature and consequences of his acts.

The rebuttable presumption was explained on the ground that some children matured more quickly than others. It also served an important public policy interest since it was believed that failure to punish particularly atrocious acts committed by children between the ages of 7 and 14 would encourage other children to commit similar acts with impunity. Consequently, the common law maxim developed that malice supplies the want of mature years. The more horrendous the crime, the more likely the child would be treated as an adult, recognizing that it does not necessarily follow that the more vicious or violent the conduct the more maturity the child possessed. In the final analysis, a child's infancy or immaturity, at times, yielded to the savagery of the act.

The process of determining maturity under the common law required judicial "consideration" of the level of a child's development, to determine whether a child under 14 possessed sufficient maturity to warrant punishment. In order to do this, the court delved into the state of mind of the offender. Did he possess a culpable state of mind when he acted? Factors evincing a child's awareness of the evil nature of his act were considered, such as a child's lying to cover up the deed, or hiding the fruits of the crime.

Before the founding of the juvenile court, the status of children in American courts was not so different from that of an adult. Children were tried in the same courts as adults. Although the common-law defense of infancy was available to children under 14 years of age, after conviction the treatment of children did not differ substantially from that of adults. Few sentencing options were available to judges other than hanging or imprisonment. Child murderers were hanged and child robbers imprisoned in proportion to the gravity of their crime and number of their offenses.⁵ Little attention was paid to the individual characteristics of the young offender and little more was required of a judge other than impartiality and knowledge of the law. The process of law as it existed at the time, as well as the state of scientific and psychological knowledge concerning moral and intellectual development, did not support the proposition that children should be treated substantially different from adults. As society progressed and advances were achieved in understanding the psychology of human behavior, American courts began to integrate social and scientific developments. Courts began to focus on reform of the offender as well as avenging the offense. The founders and promoters of the juvenile court sought to incorporate this progress into a special tribunal for delinquent children.

The commonlaw rules were embraced by American judges because they were considered "consistent with the nature of man and the natural use of the faculties of intellect, will and his freedom to acquire the necessary knowledge to make the distinction between right and wrong. They were rules used to determine the ultimate fact of the ability of an individual to distinguish between right and wrong. The point in life when a person is capable of making the distinction may vary but once it is reached that person, whether he be an adult or a child, is capable of criminal intent."⁶ The point at which the line between infancy and criminal responsibility, between the age of innocence and the age of reason should be drawn has long been debated. In the final analysis, it is resolved by public policy.⁷ In explaining the concept of public policy and its seeming indifference to the plight of the individual, Oliver Wendell Holmes stated: "The explanation of the rule is the same as that which accounts for the law's

indifference to a man's particular temperament, faculties and so forth. Public policy sacrifices the individual to the general good. It is more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey. And justice to the individual is rightly outweighed by the larger interests on the other side of the scales."⁸ Thus, the issue of when and how to hold children accountable, in the final analysis, is a question of public policy.

Laws that require the automatic prosecution of juveniles in adult court do not permit an individualized assessment of maturity before prosecution. Criminal responsibility is presumed as a matter of public policy. Even though current public policy has defined children as young as 13 as adults for prosecution purposes, a child does not become an adult simply on the basis of legislative fiat. The question remains: When do we cease thinking and understanding as a child? Does it happen all at once? If we travel from the state of New Jersey where the age of criminal responsibility is 18,⁹ and cross the Hudson River to New York where the age of criminal responsibility is 13¹⁰ for the crime of murder, do we suddenly acquire by that voyage the presumptive wisdom and judgment of an adult? Also, consider the anomaly that in New York a child of 13 can be considered criminally responsible for murder but not for robbery.¹¹

The use of chronological age as the exclusive measure of criminal responsibility is in many ways arbitrary because children under the age of majority, 18 in most states, are deemed not to possess sufficient capacity to reason to the extent that they are not considered mature enough to enter into binding contracts; they are not considered sophisticated enough to vote or responsible enough to drive until 16, 17, or 18. Yet, today legislators and policy makers have determined that children as young as 13, 14, and 15 (and younger in some states), although not civilly liable for their choices or behavior, are criminally liable for certain conduct. A mere 25 years ago, most states treated children under 16 years of age as juvenile delinquents and not subject to the jurisdiction of adult criminal courts.

Age is merely a convenient approximation of maturity. Children at any given moment have actually three ages: a chronological age, the number of years the child has actually lived; an apparent biological age, the extent of the child's physical development; and an intellectual age, the level of intellectual maturity the child has attained. A child, therefore, can look 20 but actually be 14 and have the mental and emotional capacity of an 11-year-old. Whether a person has developed sufficient intelligence or maturity to understand the nature and consequences of his act is often extremely difficult to determine. Individuals who are emotionally and socially immature may be above the chronological cutoff age and, of course, there are young people below the chronological age who possess sufficient sophistication and understanding to appreciate the nature of their behavior.

Ascertaining maturity is often a matter of evaluating the nature of the crime, the manner in which it was committed, the degree of the offender's participation, prior delinquency record and the social history of the offender, including his school records and family relationships. How can we evaluate or measure a child's criminal culpability in determining criminal responsibility or appropriate sanctions? If we visualize a linear continuum of culpability corresponding to the intellectual growth of an infant, we would observe an initial point at which no liability exists because of infancy. This lack of responsibility continues through age seven. Further along the line there is a period of presumptive innocence that continues to the age of 14, corresponding to common law perceptions of responsibility; from 14 to 18, the age of majority, a period of diminished responsibility exists. Thus, as one progresses along the continuum the level of criminal responsibility increases until it fully vests in adulthood.

An assessment of maturity can best be accomplished through the mechanism of a judicial transfer hearing. In the model juvenile justice system I propose, no minor would be prosecuted in the adult court without a hearing, which includes a consideration of a youth's level of maturity. The advantage of such a strategy is that it provides an opportunity for exploration of the developmental differences of youth, it permits a suitable child to remain in the Family Court setting where more social services are available, and, at the same time,

it permits the adult court to focus on violent juveniles. It also allows the courts to effectively utilize the one institution in our community uniquely qualified to identify violent and dangerous juveniles—the juvenile court. The judges of the juvenile court have seen many of these children as infants in neglect and abuse proceedings; as persons in need of supervision as they grew older, and as respondents in delinquency petitions before they reach their teens. By using the juvenile court as a screening device, only the most dangerous, incorrigible and violent juveniles would be prosecuted in the adult court. If the decision to transfer is informed, sensitive to the developmental needs of adolescents, and if adequate flexibility is given to the decision maker, the principle of isolating the violent and incorrigible child from the child that can be safely channeled out of the adult court system can be advanced. By enacting laws that serve that general purpose, local jurisdictions will be able to implement the policy of prosecuting in the adult court only those juveniles who are deemed dangerous.

For those children who meet the threshold of criminal responsibility, prosecution in adult courts would then be justified. However, the nation's interest in the protection of minors is not nullified simply because they are prosecuted in adult courts. Protection of the community from violent juveniles does not require abandonment of the goal of socialization of children who violate the law. In enacting laws requiring the prosecution of certain children in adult courts, state legislatures did not intend nor could they obliterate all distinctions between child and adult by such prosecution. Such differences are clearly recognized in decisions of the Supreme Court that reflect the traditional judicial concern for children, a concern based on the recognition that childhood is a time of human development often punctuated by mistakes in judgment. In *Bellovi v. Baird*,¹² the Supreme Court in 1979 posited three reasons why children should be treated differently from adults: (1) their peculiar vulnerability; (2) their inability to make critical decisions in an informed, mature manner; and (3) the importance of a parent's role in child rearing.¹³ In *Edlings v. Oklahoma*,¹⁴ decided in 1982, the Supreme Court similarly stated: "Adolescents, particularly in the early, middle, and teen years, are more vulnerable, more impulsive, and less self-disciplined

than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.¹⁵ Viewed together, these cases reveal a judicial policy that recognizes that children are entitled to special care and protection because they are still developing physically, mentally, and emotionally; a policy that recognizes the diminished capacity and responsibility of children for their criminal behavior.

Even if a child has reached the age of statutory criminal responsibility and is thereby determined as a matter of law to have sufficient capacity to reason and to freely make choices, the overarching doctrine of proportionality requires punishment in just proportion to culpability. The basic premise of free will permits the criminal law to justify punishment as a deserved product, the just deserts of the individual's personal culpability. The same concept also permits the criminal law to vary the degree of punishment relative to the degree of blameworthiness of the offender in accordance with the principle of proportionality. Justinian's definition of justice, giving each person his due, requires the severity of criminal penalties to be proportional to the culpability of the offender and his offense. In the case of juveniles, behavioral scientists and child development specialists have argued that adolescents are developmentally different from adults in that they have a diminished capacity to resist the negative influence of their contemporaries, a diminished capacity to know right from wrong. Although they may meet the threshold for criminal liability, adolescence should be a mitigating factor in assessing punishment.

In determining the criminal responsibility of adolescents, therefore, we must recognize the peculiar traits of this stage of life that impact on a teenager's exercise of his free will. In the case of adolescents, this freedom is affected by several factors that diminish the adolescent's freedom of choice: peer pressure, poor impulse control, and lack of foresight. All affect the quality of choice and, therefore, although they do not excuse one from sanctions, they should mitigate punishment. Behavioral scientists who are conducting studies for the MacArthur Foundation's Research Network on Adolescent

Development and Juvenile Justice confirm that "the cognitive, emotional and social development of adolescents is incomplete and that, for instance, boys well into their teens have difficulty curbing their impulses, thinking through long-term consequences and... resisting the influence of others."¹⁶

Professor Elizabeth Scott summarized the findings of modern behavioral scientists with respect to the pertinent developmental factors affecting an adolescent's free will, that is, factors that contribute to immature judgment in ways that affect the manner in which an adolescent makes choices: "In general, youth are likely to have less knowledge and experience to draw on in making decisions than adults. Moreover, peer conformity is a powerful influence on adolescent behavior, and may lead teens to become involved in criminal activity to avoid social rejection... Adolescents also seem to perceive risks differently or less well than adults, and they are more inclined to engage in risky activities (smoking, drinking, unprotected sex, and delinquent behavior, for example). Finally, time perspective changes with maturity. As compared to adults, adolescents tend to focus more on immediate rather than long-term consequences" [footnotes omitted].¹⁷ These adolescent characteristics would not ordinarily excuse one from liability, but they should be considered in mitigation of blameworthiness.

The criminal law, therefore, assumes that offenders must be able to make rational autonomous choices in order to be held criminally responsible. "The legitimacy of punishment is undermined if the decision is coerced, irrational, or based on lack of understanding about the full meaning of the choice."¹⁸ I am not proposing that adolescent immaturity should excuse young offenders from all responsibility. Rather, it should support a standard of diminished responsibility once they are prosecuted in adult court. "A diminished responsibility standard recognizes that most young offenders are in a transitional developmental stage and calibrates criminal liability accordingly. Under such a regime, young offenders can be held accountable for the bad choices they make, without bearing the full cost of their mistakes."¹⁹

Professor Frank Zimring explains that "capacity in the common-law view of criminal responsibility was an all or nothing matter like

legal insanity rather than a question of degree, yet the logic of diminished culpability argues that even after a youth possesses the minimum threshold of competence, this barely competent youth is not as culpable, and, therefore, not as deserving of a full measure of punishment as a fully qualified adult offender. Just as a psychiatric disorder of cognitive impairment that does not render a subject exempt from criminal law may still justly mitigate the punishment to be imposed, so a minimally competent adolescent does not deserve all of an adult's punishment for the same act."²⁰

In addition to evaluating the traditional factors relevant to sentencing, in the Youth Part we routinely ask the court psychiatric clinic to interview young offenders to give us a sense of their intellectual and emotional capacity. All of this information demonstrates whether the offender has exhibited mature behavior in his home, neighborhood, and school, which in turn gives us some indication of his mental health and potential. There is, however, an important distinction that must be borne in mind when considering psychiatric profiles of offenders. There is debate within the legal and medical communities concerning the issue of criminal responsibility: "The law tells us that if we commit illegal acts, we must be punished. In doing so, it assumes that we have freely chosen to perform the act. Psychiatry does not make any such assumption about free will or choice. Psychiatric theory is determinant and assumes that behavior is caused, shaped or determined by prior events—either immediate events or those in the distant past—or by physiological states... For example, to the psychiatrist, an abused child is likely to become an abusive adult. He has learned from his parents that violent behavior is acceptable—he does not choose to abuse others. Or the psychiatrist may believe that chemical imbalances or chemical deficiencies within the brain will precipitate certain violent behaviors when certain external stimuli are present. In neither case could one be said to be 'responsible' for the violent action in the sense that one chose it, for one does not (at least within the ordinary meaning of the word) choose either one's parents or one's brain chemistry."²¹ Despite the different perspective of psychiatry, as it relates to responsibility, psychiatric reports are relevant to decisions concerning treatability and suitability of the offender for

sanctions other than imprisonment. These issues are complicated and exacerbated by the legislative requirement of trying children in adult courts. In the adult court, the level of a youth's maturity is relevant primarily in determining the nature of the sanction instead of as a defense to prosecution. In some instances, however, lack of maturity may be relevant in establishing that the offender, because of his extreme immaturity, was not able to form the culpable mental state necessary for the commission of the crime. Once culpability of a youth has been established, however, a judge should have the authority to craft a sanction that conforms to the offender's level of maturity and that enhances such a youth's potential to make a positive contribution to society.²²

- Juvenile Offenders in Manhattan and Queens*. It compares and contrasts the Manhattan and Queens juvenile cases that entered the Supreme Court in those boroughs from 1997 through 2000. Rearrests were tracked through January 31, 2005. The research sample consisted of 304 Manhattan cases and 258 Queens cases.
24. *Id.* at p. 22.
 25. *Id.* at p. 21.
 26. See Responding to Juvenile Crime: Lessons Learned, Peter W. Greenwood, *The Future of Children*, The Juvenile Court, vol. 6, no. 3 (Winter 1996) (The David and Lucile Packard Foundation).
 27. Report of Correctional Association, City of New York, Rethinking Juvenile Detention in New York City, p. 9.
 28. *Id.*
 29. See Franklin E. Zimring, *American Youth Violence* (Oxford University Press, 1998) at p. XI. See also Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, *Journal of Law and Policy*, vol. V, no. 1; Juvenile Offenders and Victims, 1999 National Report Series, *Juvenile Justice Bulletin*, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Shay Bilchik, Administrator.
 30. See *supra* note 29.

CHAPTER 2: THE NATURE OF ADOLESCENCE

1. Laurence Steinberg, *Juveniles on Trial*, MacArthur Foundation Calls Juvenile Competency Into Question, *Juvenile Justice Update*, vol. 9, no. 4, Aug/Sept 2003, p. 3.
2. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *Fordham L. Rev.* 1873, note 12. See C. Stanley Hall, *Adolescence*, first published in 1905 (Lawrence A. Cremin ed., Arno Press and the New York Times, 1968).
3. The discussion of the psychological effects of adolescence on criminal behavior is based on my analysis of the material contained in the following sources: *Youth on Trial: A Developmental Perspective on Juvenile Justice*, edited by Thomas Grisso and Robert G. Schwartz (The University of Chicago Press, 2000); Laurence Steinberg and Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 *Va. J. Soc. Pol'y L.* (1999); Elizabeth S. Scott and Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, *The Journal of Criminal Law and Criminology*, vol. 88, no. 1, Fall 1997, p. 137; Wallace Mlyniec *supra* note 2, as well as Professor Scott's article cited hereafter in note 4, provide an excellent review of current research data in the field.
4. I am indebted to Professor Elizabeth S. Scott's article for the crystallization of my thoughts concerning the classification of adolescence as a distinct legal category carrying its own implications for criminal liability. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *Hofstra L. Rev.*, 547.
5. *Id.* at pp. 573-574.
6. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *Fordham L. Rev.* 1873, 1896.
7. *Supra* note 4 at n. 29 p. 554.
8. Aristotle, *On Rhetoric* (newly translated by George A. Kennedy, New York and Oxford [Oxford University Press 1991]), pp. 165-166.

9. Professor Franklin E. Zimring, *American Youth Violence* (Oxford University Press, 1998).
 10. *Id.* at p. 78.
 11. Michael Riera, *Uncommon Sense for Parents with Teenagers* (Celestial Arts, Berkeley, CA, 1995), p. 22.
 12. *Supra* note 9 at p. 78.
 13. For an excellent discussion on the competence of adolescents to understand legal proceedings and principles, see Laurence Steinberg, *Juveniles on Trial*, MacArthur Foundation Study Calls Juvenile Competency into Question, *ABA Criminal Justice Magazine*, Fall 2003, 21. The MacArthur juvenile competence study is a research project undertaken by the MacArthur Foundation Research Network on adolescent development and juvenile justice. The study focuses on two broad issues: the competence and culpability of adolescents, and the factors that influence their antisocial behavior. It should be noted that the author is a consultant to the MacArthur Project.
 14. See Terrie E. Moffitt, *Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychol. Rev.* 674.
 15. Aristotle, *supra* note 8, p. 166.
 16. The concept of diminished capacity has been relied on to mitigate culpability. In the context of a criminal proceeding it permits evidence establishing that a defendant was less mentally capable than a normal person of having the requisite mental state for the offense charged. See <<http://www.diminishedcapacity.com/sec2.htm>>.
 17. The concept of proportionality requires the sentencing authority to impose a sentence that does not exceed the discernable degree of culpability of the individual offender. See Zimring, *supra* note 9, pp. 75-81.
- Robert E. Shepherd Jr., *Developmental Psychology and the Juvenile Justice Process*, *Criminal Justice Magazine*, American Bar Association, Spring 1999, p. 43.

CHAPTER 3: THE CRIMINAL RESPONSIBILITY OF JUVENILES

1. Griffin, P., Torbet, P. M., and Szymanski, L. 1998, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, Report, Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, p. 16.
2. See Laurence Steinberg, *MacArthur Foundation Study Calls Competency into Question*, *Criminal Justice*, ABA Crim. Just. Section Magazine, Fall 2003, p. 21.
3. See generally, Introduction to the *Criminal Justice System*, Second Edition, Hazel B. Kerper (West Publishing Co., 1979), p. 112; *Criminal Law and Procedure*, Perkins and Boyce (The Foundation Press, Inc., 1977), Chapter 8—Responsibility, Limitations on Criminal Capacity—Section 1 Immaturity (Infancy), pp. 508-539.
4. Aristotle, *Politics*, in Hall, *Readings in Jurisprudence* (Bobbs-Merrill Co., 1938), p. 5.
5. See *Criminal Justice, Cases and Comments, Inbau and Soule* (The Foundation Press, Inc., 1964), pp. 383-384.
6. *State v. Monahan*, 15 N.J. 34, 104 A.2d 21, (Sup Ct. 1954), dissent of J. Oliphant, at 15 N.J. 65, A.2d 38.
7. All states have adopted the concept of a juvenile court with special authority over youths below a specified age. If a youth below a specified age committed an act that would otherwise be a crime, he would be subject to the jurisdiction of the

- juvenile court. If a youth above that age committed a criminal act, he was deemed criminally responsible and prosecuted in the adult courts and subject to greater punishment. Although the commonlaw rule originally was adopted throughout the United States, most states today have discarded the rule in favor of an absolute statutory minimum age for criminal responsibility. See 1999 National Report, Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention (December 1999).
8. Oliver Wendell Holmes, *The Common-Law* (Boston: Little Brown and Company, 1963), p. 42.
 9. New Jersey statutes annotated, N.J.S.A.2A: 4A-22(a).
 10. New York Penal Law Section 10.00 (18); Section 30.00 (2).
 11. See *supra* note 10.
 12. 443 U.S. 622 (1979).
 13. Id. at pp. 633-636.
 14. 455 U.S. 104 (1982).
 15. Id. at p. 115.
 16. Joan Jacobs Brunberg: Separate the Killers from the Boys, *New York Times*, December 18, 2000, p. A43. See generally *Youth on Trial*, Thomas Grisso and Robert G. Schwartz, eds. (2000), a volume of research sponsored by the John D. and Catherine T. MacArthur Foundation, Research Network on Adolescent Development and Juvenile Justice.
 17. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *Hostra L. Rev.* 547, 591-592.
 18. Id. at 590.
 19. Id. at 593.
 20. Franklin E. Zimring, *American Youth Violence* (Oxford University Press, 1998), p. 75.
 21. William J. Winslade and Judith Wilson Ross, *The Insanity Plea* (Charles Scribner & Sons, 1983), pp. 12-13.
 22. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *Fordham L. Rev.* 1873, 1896.

CHAPTER 4: SENTENCING CHILDREN TRIED IN ADULT COURTS

1. The Juvenile Offender Law provides as a maximum sentence for most serious "O" offenses, other than murder, an indeterminate sentence of a minimum of 3 years 4 months to a maximum term of 10 years. Fourteen- or 15-year olds convicted of manslaughter in the first degree or robbery in the first degree, and sentenced to a maximum term, can return to society as young as 18 years of age and generally no later than 21. Such an offender will "max" out of his sentence, after serving two-thirds of his term, assuming he does not lose good time credits (an offender earns good-time credit if he is well behaved in prison that usually amounts to one-third of the maximum sentence).
2. See Responding to Juvenile Crime: Lessons Learned Peter W. Greenwood, *The Future of Children*, The Juvenile Court, vol. 6, no. 3, Winter 1996 (The David and Lucille Packard Foundation). See also Report of Vera Institute of Justice by Rachel Kramer and Rachel Porter submitted to the New York City Office of the Criminal Justice Coordinator, June 2000, *Alternative-to-Incarceration Programs for*

- Felony Offenders: Progress Report and Preliminary Findings From a Recidivism Analysis, p. 23.
3. *The World Almanac and Book of Facts 2004* (St. Martin's Press, 2004), p. 14. For the United States, the average life span is 77.14 years; the average for men is 74.37, and for women 80.05.
 4. Fox Butterfield, *Ideas and Trends: Prison: Where the Money Is*, *New York Times*, *Week in Review*, June 2, 1996, sec. 4, p. 16, col. 1; but see Elliot Currie, *Crime and Punishment in America* (Owl Books, 1998), pp. 67-79, for a discussion of problems of analysis and interpretation raised by cost calculations of this nature.
 5. *Supra* note 2.
 6. See New York State Office of Justice Systems Analysis, Research Report 1989, *New York State Division of Criminal Justice Services—Factors Contributing to Recidivism Among Youth Placed with the New York State Division for Youth*, Bruce Fredrick, Ph.D. See also New York State Program Abstract—Family Court Residential Placement/Diversion Program, p. 1.
 7. Rollin M. Perle and Ronald N. Boyce, *Criminal Law and Procedure, Cases and Materials* (The Foundation Press, Inc., 1977), p. 538, quoting from the Introduction of the American Law Institute's Model Youth Correction Authority Act, John B. Waite, Reporter.
 8. See *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer and Meha Chesney-Lind, eds. (New York: New Press, 2002).
 9. Franklin E. Zimring, *American Youth Violence* (Oxford University Press 1998), p. 144.
 10. See Martin E. P. Seligman, Ph.D., *Building Human Strengths: Psychology's Forgotten Mission*, American Psychological Association, *APA Monitor* vol. 29, no. 1, 1998. See Dr. Susan Linn, *How Can I Raise a Moral Child?* <<http://www.familyeducation.com>>.
 11. See Section 340.1, N.Y. Family Court Act.
 12. See Section 30.30, N.Y. Crim. Proc. Law.
 13. Torbet P., Chffn, P., Hurst, Jr., H., MacKenzie, L. R. (2000) *Juveniles Facing Criminal Sanctions: Three States that Changed the Rules*. Report, Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (The Justice Department Report refers to New Mexico and Minnesota.) See also *Michigan v. Abraham*—File No. 9763787 FC—ham and referred to Michigan's blended sentencing statute.
 14. Michel Foucault, *Discipline and Punish*. (Vintage Books, 1979), p. 180.
 15. Id. at 178.
 16. Brent Staples, *Prison Class: What Ma Barker Knew and Congress Didn't*, editorial page, *New York Times*, Nov. 25, 2002, at A20.
 17. Andre Compté-Sponville, *A Small Treatise on the Great Virtues* (New York: Metropolitan Books, Henry Holt & Company, 1996).
 18. Id.
 19. Id.
 20. *Supra* note 9 at pp. 81-82.
 21. Lauren Chambliss et al., *Second Chances: 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* (1999), a joint project of The Justice Policy Institute, Washington, DC, and Children and Family Justice Center, Northwestern University School of Law, Legal Clinic, Chicago, IL.

NYCJJ
New York Center
for Juvenile Justice

*Key Principles in Representing
Adolescents In Adult Courts*

Three Laws

- 1. Age of Criminal Responsibility*
- 2. The Juvenile Offender Law*
- 3. Youthful Offender Law*

The Age of Criminal Responsibility

- Subdivision 1 of Section 30.00 of the Penal Law embodies the statutory defense of Infancy and establishes 16 as the general age of criminal responsibility in New York

Juvenile Offender Law

- Subdivision 2 of Penal Law Section 30.00 also permits the prosecution of children as young as 13 automatically as adults if they are charged with certain offenses defined as “Juvenile Offender Offenses.”

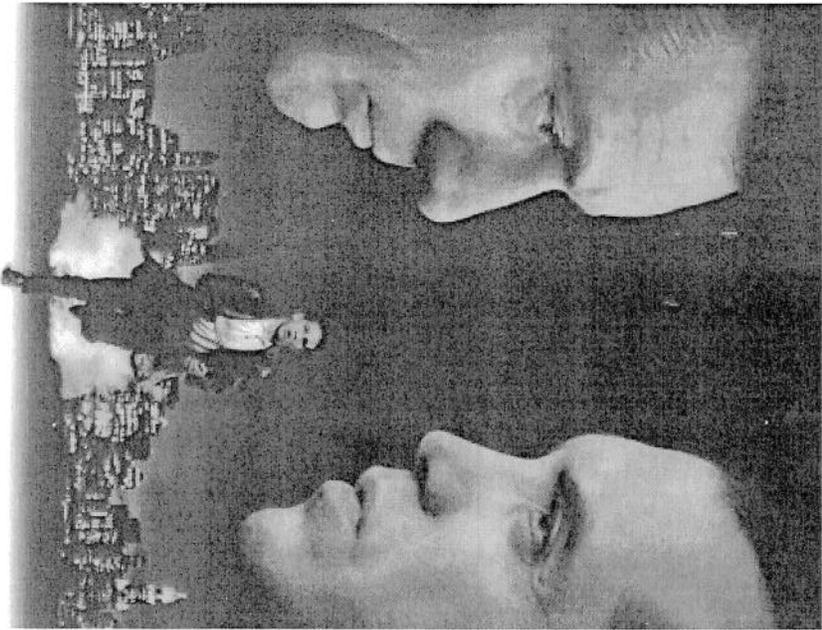
Youthful Offender Law

- New York's Youthful Offender procedure provides an avenue for the court to exercise discretion upon the conviction of youths 14 through 18, in order to avoid the lifetime stigma of a criminal conviction and the imposition of certain mandatory sentences of imprisonment.

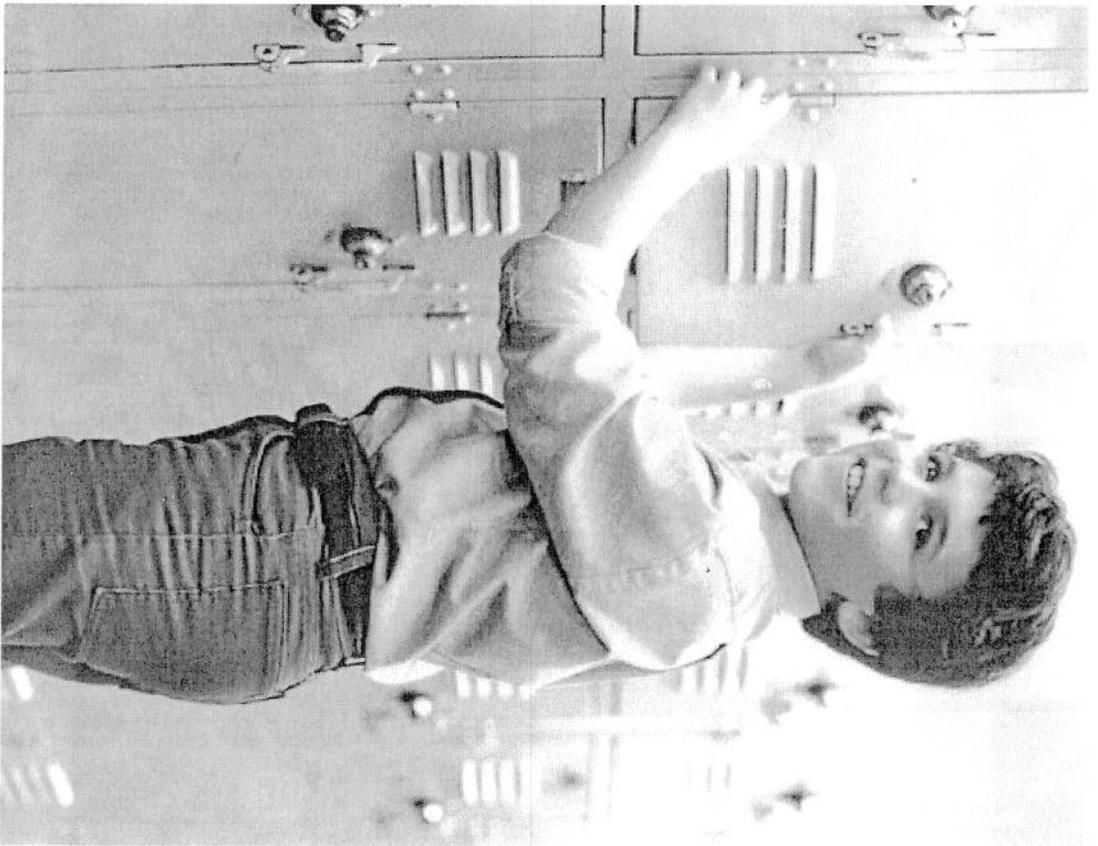
Adolescence

“The psychosocial response to the profound biological changes of puberty within a social context.”

Professor Robert E. Sheppard Jr.,
Virginia’s T.C. Williams School of Law



A BRONX TALE



Adolescent Traits

Three traits of teenagers that create fertile ground for juvenile offending:

- Impulsivity
- Short sightedness
- Peer pressure

“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

Ropers v. Simmons 543 U.S.
551 U.S. 551(2005)

Key Principles in The Representation of Adolescents

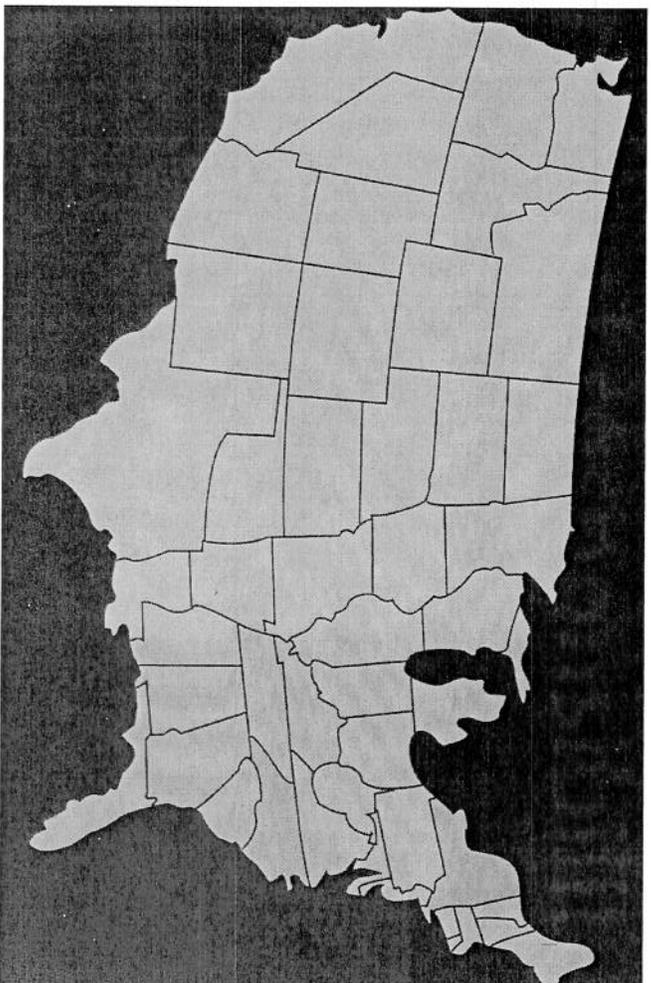
- Cultivate the ability to engage with young people
- Recognize and integrate the malleability and resiliency of adolescents in dispositional recommendations.
- Cultivate a reintegrative/restorative approach to dispositions
- Cultivate a recognition of the redemptive quality of children.
- Cultivate the right attitude

Representing Adolescents Tried in Adult Courts

“The principal objective of policy in the adjudication and sentencing of minors is to avoid damaging the young person’s development into an adulthood of full potential and free choice. Thus, the label for this type of policy is ‘room to reform.’”

Frank Zimring

Penal Law Section 30 establishes
sixteen as the general age of
criminal responsibility.



Youthful Offender Treatment

Criminal Procedure Law Section 720.20(1)(a):

“If in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible youth is a youthful offender.”

Youthful Offender Criteria

In People v. Cruickshank, 105 App.Div.2d 325, 333 (Third Dep’t. 1985), the court stated that the factors to be considered upon an application for youthful offender treatment include:

- “the gravity of the crime and manner in which it was committed”
- “mitigating circumstances”
- “defendant’s prior criminal record”
- “prior acts of violence”
- “recommendations in the presentence reports”
- “defendant’s reputation”
- “the level of cooperation with authorities”
- “defendant’s attitude toward society and respect for the law”
- “[defendant’s] prospects for rehabilitation and hope for a future constructive life”

The Process

- Gather as much information as is available about the youth.
- Assess the youth's background and involvement in the offense to determine level of culpability.
- Develop a plan/ a structured plea.

Essential Tools in the Process

- The postponement of sentence after plea.
- The conditional nature of the sentence.
- Validation/monitoring



Interactive Justice

“What we are engaged in here isn’t a chance
conversation but a dialogue about the way we
ought to live our lives”

-Socrates

The Interactive Technique

Establishing a level of communication

- Learn everything possible about your audience
- Build on:
 - Truth
 - Trust
 - conviction

Definition of Interactive Justice

Interactive justice is that dynamic, based on principles of rhetoric, that permits a judge to seize the opportunity to teach a child, or to inspire, or, when necessary, to impose appropriate constructive discipline.

“If due process values are to be preserved in the bureaucratic state of the late 20th century, it may be essential that officials possess passion, the passion that puts them in touch with the dreams and disappointments of those with whom they deal, the passion that understands the pulse of life beneath the official version of events.”

-Supreme Court Justice William J. Brennan Jr.
