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I. INTRODUCTION

While one hesitates to speak of "revolution" in connection with law, that term has been applied to developments in the modern legal treatment of relations and conduct within the family. The term could as well be applied to current trends in the treatment of what was once the special domain of the juvenile court: misconduct by children. Here, however, it would be more apt to talk of a "counterrevolution."

Over the last decade or so, a number of states have adopted new rules facilitating the transfer of proceedings against minors who commit crimes from juvenile court to criminal court for prosecution and punishment as adults.[1] Within the juvenile court itself, statements of purpose which once spoke only in terms of rehabilitation of young people and strengthening of families now adopt deterrence and/or retribution as justifying goals.[2] Sentencing ("dispositional") alternatives for delinquents

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* Dean and Professor of Law, University of Utah, College of Law. I would like to acknowledge, with gratitude, the thoughtful comments of Professors Carl Schneider, Ronald Boyce, and Lionel Frankel on drafts of this article, none of whom would entirely agree with the arguments it sets out. I would also like to thank Ms. Maureen Mundt Larsh, a third year student at the College of Law, for her research assistance. Responsibility for error and infelicity is, of course, entirely mine.

1. *See, e.g.*, Note, *The Transfer of Juvenile Offenders to Adult Courts in Massachusetts: Reevaluating the Rehabilitative Ideal*, 20 SUFFOLK U.L. REV. 989 (1986); New York Family Court Act, art. 3 N.Y. JUD. LAW §§ 301-15 (McKinney 1983 & Supp. 1990) (removing virtually all juvenile court jurisdiction for minors over the age of thirteen, except as the criminal court refers the matter for family court consideration). *See* Sobie, *Practice Commentary*, 29A MCKINNEY'S CONSOLIDATED LAWS OF N.Y. ANNOTATED 273 (1983).

2. *E.g.*, New York Family Court Act, N.Y. JUD. LAW § 301.1 (McKinney 1983 & Supp. 1990) ("In any proceeding under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community"). *See also*, Sobie, *supra* note 1, at 263-67. Within the last ten years, ten states have amended their juvenile codes to emphasize goals of public protection and individual accountability. Feld, *The Juvenile Court Meets the Principle of Offense*, 68 B.U.L. REV. 821, 842 & n.84 (1988).

increasingly reflect these goals as well. While traditional juvenile justice theory held that dispositional orders should respond to the child's circumstances and needs rather than to his or her offense, statutes and model rules increasingly employ determinate orders of confinement or probation tied to the conduct and harm done.[3] Indeed, the complete elimination of juvenile court jurisdiction for misconduct by minors has been urged for some time.[4]

There is, however, reason for caution in embracing "the language of blame and the machinery of criminal justice"[5] with respect to wrongs by children. We find, after all, little favorable to say about the criminal justice system in any other context. The limits of that system generally, and particularly in connection with youth crime, provide a central theme of this article.

Because of the historical relation of juvenile and criminal court jurisdiction and the differing approaches adopted by each of these systems, an examination of this kind will inevitably address the tension between decisions based on rules and decisions based on standards. The juvenile court arose as a critique, indeed a rejection, of the criminal law's characteristic rigidity in dealing with conduct by children and its inability to take account of the implications of childhood in assessing culpability and imposing punishment. The current movement to impose criminal court-like sanctions within the juvenile court and to curtail its jurisdiction in favor of adult prosecution is itself a critique of the juvenile court's reliance on individualized application of standards to deviance by young people.

The following discussion is not an argument in favor of resurrecting the traditional juvenile court, whose informality in

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3. That was the position taken by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association in *Institute of Judicial Administration-American Bar Association Juvenile Justice Standards: Standards relating to Juvenile Delinquency* § 5.2 (1980). This approach has been adopted in a number of states. A comprehensive review and thoughtful analysis of developments in juvenile court dispositions appears in Feld, *supra* note 2. *See also*, Castellano, *The Justice Model in the Juvenile Justice System: Washington State's Experience*, 8 LAW & POL'Y 479 (1986).

4. *E.g.*, FOX, *Abolishing the Juvenile Court*, 28 HARV. L. SCH. BULL. 22 (1977); McCarthy, *Should Juvenile Delinquency Be Abolished?*, 23 CRIME & DELINQ. 196, 203 (1977); Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

5. This phrase is taken from Zimring, *Towards a Jurisprudence of Family Violence*, in FAMILY VIOLENCE 47, 565 (L. Ohlin & M. Tonry eds. 1989), where it was used in connection with the criminalization of child abuse.

procedure has been rightly abandoned nor is it an argument that criminal prosecution is never appropriate for youth crime. The concern of this paper is to identify the formal and operational characteristics of the criminal and justice system as a means of evaluating the appropriateness of returning to a system of categorical rules for determining culpability and punishment for the populations and patterns of conduct characteristic of prosecutions for youth crime. Whether favorably or not, the approaches may be called pragmatic.

II. Regimes of Rules and Standards: The Criminal and Juvenile Courts

A. Rules, Standards, and Discretion

It is important early in this discussion to assign meanings to several recurring terms: "rules," "standards," and "discretion." The distinction between rules and standards is between an approach to legal decision-making which employs apparently mechanical formulae ("rules") and one which proceeds by individualized application of generally stated social policies ("standards"). One way of understanding this distinction, and the approaches of criminal and juvenile courts, has been provided by Roberto Unger, who compares regimes of "legal" and "substantive" justice.[6] In a system of legal justice, functions of law-making and law-application are sharply separated. Rules must be established and announced in advance of their application, and those rules must be clear enough to bind both individuals and law-applying agencies. Accordingly, a court may employ public force only when some person's conduct falls within established prescriptive or proscriptive categories of behavior. It does not matter whether reliance on those categories will under immediate circumstances best serve the social policy which the rule seeks to implement. By the same token, the law-applier must employ public force under these conditions or fail to respect the antecedent law-making function.

In contrast, commands taking the form of standards, or substantive justice, do not employ specific behavioral categories which preexist the time of application. The rule applied in each case is instrumental in character; each decision is justified be-

6. R. Unger, Knowledge and Politics 88-91 (1975).

cause it is best calculated to advance some accepted public objective, such as prevention of future harm.

The difference between law ordered by prescriptive rules and law ordered by instrumental commands is sometimes explained as a contrast between the value of individual freedom and the value of accuracy in achieving social goals. An inquiry directly addressing whether a person is dangerous, or requires assistance, rather than whether he or she acted in a certain way, may identify those persons who do and those who do not require intervention better than a rule which defines dangerousness solely in terms of a limited set of behaviors. However, the nonspecificity of standards, and the discretion they entail, appear to deny citizens foreknowledge of the behaviors in which they may lawfully engage and, perhaps, to deny that any such behaviors exist.

There are, of course, other ways of conceptualizing the difference between regimes of rules and standards. An emphasis upon rules can be regarded as the characteristic expression of modern legal development. Both Maine's theory of the movement of law from status to contract[7] and Weber's theory of the formal rationalization of society[8] emphasize the divergence of legal norms from other social structures. Legal relations and legal responsibility in modern society depend on the personhood of legal actors and not on their social positions or, indeed, on their individual capacities. In contrast, standards, with their goal of substantive justice through individualized decision-making, do not employ this stringent insistence on the anonymity of actors. They permit inquiry into the effects of decisions on, and the individual capacities and understandings of, those upon whom judgment is passed.

Accordingly, the difference between rules and standards is best understood as a choice between forms of rules. The former aspires to the following kind of proposition: "If and only if a will is witnessed by two persons, then it shall be given effect." Standards employ a different sort of statement, such as, "If doing so will effectuate the intent of the testator and satisfy the demands

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7. H. MAINE, ANCIENT LAW (1864) (Maine's theory of social and legal evolution supposes that "progress" in social development from a focus on groups or relations to individuals is reflected in the shift from legal analysis from status to contract.).

8. M. WEBER, ON LAW IN ECONOMY AND SOCIETY (E. Shils & M. Rheinstein trans. 1954).

of equity and good faith, then the testator's will shall be given effect."

A command taking the second form is sometimes described as "discretionary."[9] This is an entirely sensible usage. Within a system of standards, discretion means the permitted (and indeed expected) use of judgment in implementing the standard. Any legal command which anticipates individualized application is in this sense discretionary.[10] That usage does not, however, reflect the most common context for discussions of discretion.

More commonly, talk of discretion occurs within a context of legal propositions taking the form of rules. Here, discretion may or may not involve individualization of decisions. It would do so where an official elects not to punish a person whose conduct and cognitive state satisfied the conditions of a rule but seemed nonetheless to lack the responsibility that justifies punishment. By contrast, discretion would not involve individualization where the official decides, as a matter of practice, not to enforce a rule because of general concerns for efficiency or fairness.

In either case, discretion is formally considered deviant within a system of "rules." American sociology of law, which has largely devoted itself to discovering the operation of discretion at all levels of the justice system, typically draws a distinction between legal norms ("legal ideals") and the conduct of individuals and groups whose behavior should be governed by these norms ("legal reality"). Where a "gap" between theoretical expectations regarding the operation of legal norms and observed behavior is identified, it is ordinarily interpreted from the perspective of a regime of rules as either a failure in statutory formulation or a failure to comply with the legal norm. For example, the significance of observed police behavior is often said to lie in its nonconformity with what we suppose legal rules to require of policemen, which should be remedied either by clarifying the law or by reforming police behavior. Similarly, case load

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9. *See, e.g.*, Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 792 (1967), from which the foregoing example was adapted.

10. It does not follow, of course, that any interpretation will be valid, because the decision is "individualized" or "discretionary." The command itself refers to criteria of testamentary intent, equity, and good faith; an application which on the evidence plainly frustrated the decedent's wishes or preferred one claimant to another because of illegitimate considerations (such as race or religion) could be challenged and declared inappropriate. However, proving the existence of such errors is relatively more difficult when the grounds for decision are framed broadly than when they are framed specifically.

and collegial restraints on the performance of prosecutors and defense attorneys appear as deviations from a model of client-centered advocacy, which we take to embody the ideal of effective representation.[11]

B. *Criminal and Juvenile Justice as Systems of Rules and Standards*

The following discussion concerns itself with discretion both as a feature of commands expressed as standards and as an aspect of the implementation of a system of rules. Initially, however, our focus will be on rules and standards as alternate methods of decision-making. The controversy over responses to youth crime is precisely an argument about the kind of legal rules that should be employed. Conversely, this controversy provides an especially good vehicle for examining the tension between regimes of rules and standards. The competing approaches reflect what may, with some license, be called the paradigmatic case for each system of decision-making—the domain in which each system claims the greatest legitimacy and is employed with relative consistency. American criminal law is usually considered to be the context in which a regime of rules is most consistently and appropriately applied. The juvenile court's treatment of youth crime, for its part, is the domain most strongly identified with governance by standards and individualized justice; indeed, there may be no close second. A comparison of the criminal and juvenile court regimes offers, therefore, a set of case studies in these approaches to deviance and an opportunity to consider the bases for choice between them.

1. *Criminal justice and the regime of rules*

The rule orientation of the criminal law is reflected in its reliance on categorical rules to establish the occasion for, and the amount of, punishment and in its concomitant hostility to ambiguity and discretion.

It is black letter law that criminal culpability is founded on the concurrence of two elements: conduct and mental state. An evil intent does not provide an appropriate occasion for punishment nor, in most instances, does an act unaccompanied by a

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11. Ross & Teitelbaum, *Sociology of Law*, in THE FUTURE OF SOCIOLOGY 274, 280-82 (E. Borgatta & K. Cook eds. 1988).

culpable mental state. The treatment of both elements in Anglo-American law reflects its rule orientation.

The requirement of an act is explained in various ways, but there is general agreement that it is an essential aspect of culpability.[12] Blackstone explained the act element as a condition to inferring the bad character of the accused. Without some external or "objective" manifestation, a judgment of the accused's intent could not safely be drawn.[13] Glanville Williams founds the act requirement on the necessity of distinguishing between daydreaming and genuine intent to do wrong in order to avoid punishing mental states that may not translate into action.[14]

Insistence that the inference of culpability rest at least in part on objective sources—conduct—is one aspect of the criminal law's commitment to rules. In turn, that function establishes the paradigmatic instance of criminality: conduct which plainly supports the necessary character inference. Concomitantly, the penal scheme is most problematic when dealing with conduct from which character inferences seem more complex, as is notoriously the case with omissions—failures to act—and rape.[15]

Viewed this way, the rule orientation of the criminal law is understood as preserving values of individual liberty. Rule orientation has, however, another aspect. While the rules seek to articulate conduct from which bad character can safely be inferred, they also imply that such conduct, once committed, will ordinarily suffice to establish culpability as long as it is "intended"—a conclusion which ordinarily can be drawn from the act itself.

As a result, the American approach to criminal law is generally reluctant to distinguish between rule violation and individual culpability: that is, between condemnation of the act and

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12. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73-79 (1968).

13. 4 W. BLACKSTONE, COMMENTARIES *21.

14. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 2 (2d ed. 1961). Abraham Goldstein likewise understands this element partly on the difficulty of drawing inferences about a person's character and its fixity absent conduct related to that intent. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405-06 (1959).

15. For the problem of liability for omissions, see Kleinig, *Criminal Liability for Failures to Act*, 49 LAW & CONT. PROB. 161 (1986); Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, 49 LAW & CONT. PROB. 181 (1986); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151, 189-204 (1973). On the notoriously difficult problems with rape, see MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 652-54 (1983) (addressing rape as assault); S. ESTRICH, REAL RAPE 60-70 (1987) (defining the meaning of "force").

condemnation of the actor.[16] Professor Fletcher summarizes the common law view in this way:

> [T]he common law, in the mind of its practitioners, consists of rules and nothing but rules. . . . What common law judges find to be extra-legal are questions about the particular accused: What could we fairly expect *him* to do under the circumstances? Is he personally to blame for having succumbed to pressure? These questions are not about what the rule ought to be, but about whether a violation of the rule is fairly attributable to a particular individual. As questions about individuals in unique circumstances, they fall outside the dominant Anglo-American conception of law.[17]

A further reflection of the importance of rules to the criminal justice system is that system's hostility to ambiguity and discretion. Ambiguity is ordinarily treated as a failure of intellect or drafting skill and discretion is viewed as a form of deviance.

In the criminal context, this principle—the "rule of law"—forbids crimes by analogy[18] while equally condemning acquittal when all elements of the crime exist even when conviction does not seem just.[19] Imprecision in penal statutes particu-

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16. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974). Defenses of necessity (including self-defense) and, to a considerable extent, duress are typically treated by courts as exceptions to a general rule (but still as rules themselves), and therefore will be recognized only when they have a rule-like character. A defense of necessity is said to be recognized because the conduct under these circumstances is necessary and commendable. "Duress" is sometimes framed in terms of coercion or involuntariness, suggesting a focus on individual responsibility. However, the restriction of this defense to situations where the actor's life is in danger and where a person of "reasonable firmness" would have been unable to resist is a movement away from individualization of the sanction in the direction of a further rule.

17. *Id.* at 1299-1300.

18. Until 1958, the Soviet Code provided that "if the Code has not made provision for any act which is socially dangerous, it is to be dealt with on the basis, and as carrying the same degree of responsibility, as the offenses which it most nearly resembles." The 1958 revision limits punishment to crimes specifically proscribed by law. *See* H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 47 (1966). Although the common law recognized something like this principle in the doctrine of common law crimes, *see* Shaw v. Director of Public Prosecutions, [1962] App. Cas. 220, that exception only applied to petty offenses and has, moreover, generally been criticized as violative of the principle, *nullum crimen nulla poena sine leqe*. *See* W. FRIEDMANN, LAW IN A CHANGING SOCIETY 54-62 (1964); H. HART, LAW, LIBERTY AND MORALITY 7-12 (1963). The constitutional doctrine treating vague statutes as violative of due process expresses the same principle. *See* Katz & Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1977-78).

19. Although prosecutorial discretion may undermine this general principle, its formal expression may be found in prohibitions against appeals to a jury to disregard the law (that is, for "jury nullification" of the law). *See, e.g.*, United States v. Dougherty, 473

larly offends expectations that legal norms be formulated and stated both generally and prior to their implementation in a particular case. As the United States Supreme Court observed many years ago when it struck down a civil regulation granting city officials unlimited power to deny or grant occupational licenses, "[T]he very idea that one may be compelled to hold his life, or the means of living, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[20]

As this statement makes clear, the assumption that statutory clarity is both possible and desirable implies disfavor of discretion. Indeed, definiteness is valued precisely because it controls official discretion.[21] It is not surprising, therefore, that discretion in the application of criminal laws is generally considered deviant.

Finally, the rule-boundedness of the criminal justice scheme is reflected in its approach to sentencing, which is closely tied to categories of offense. General deterrence is governed by notions of offense and not by offender characteristics. Punishments under this principle are Janus-like; they are backward looking because the extent of punishment is defined by the pleasure associated with this particular offense, but are forward looking in their concern to prevent future crimes. In neither aspect, however, do the individual circumstances of an offender play an important role.

Penalties justified by retribution or, more recently, deserts are likewise specifically related to the offense committed. Kant was quite clear about the direct relationship of offense to penalty. He and his successors explain the notion of deserved punishment in terms of a reciprocal social obligation to behave so as not to interfere with the freedom of others or to gain an unfair

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F.2d 1113 (D.C. Cir. 1972).

20. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

21. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972), striking down a municipal vagrancy ordinance: "Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. . . . It results in a regime in which the poor and unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'" *Id.* at 170 (quoting Shuttlesworth v. Burmingham, 382 U.S. 87, 90 (1965)).

advantage over others who behave correctly. In this view, punishment restores equilibrium by removing the advantage otherwise associated with wrongful conduct. The amount of punishment must, therefore, be directly related to the wrong committed.[22]

The emphasis on rule-based sentencing of current penal theory is, perhaps, especially evident in the recent work of the United States Sentencing Commission. The Commission was created by the federal Crime Control Act of 1984 and charged with responsibility for developing new sentencing guidelines and categories for use by federal judges.[23] The Commission ultimately could not resolve the debate between utilitarian and just deserts theorists and, accordingly, accepted neither justification for punishment.[24] Instead, it chose to base its approach on policies of "honesty, uniformity, and proportionality in sentencing,"[25] the meaning of which was derived from a broad empirical study of what American courts have actually done. The resulting scheme assigns penalty points according to the offense charged and certain specific offense characteristics. That score may be further adjusted by points attributable to the offender's prior criminal history, degree of participation in the offense, and lack of acceptance of responsibility for his acts. These calculations are reflected in sentencing tables from which, under the enabling legislation, the punishment must be drawn, unless the court identifies some factor not adequately considered by the sentencing guidelines.[26]

2. *The juvenile court and individualized justice*

The founders of the American juvenile court rightly considered it a novel experiment, embracing discretion and individualization as consistently as the criminal system now rejects it.

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22. "What kind and what degree of punishment does public legal justice adopt as its principle or standard? None other than the principle of equality . . . that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. . . . On the Law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment." I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (J. Ladd trans. 1965).

23. 28 U.S.C. §§ 991-98 (1988).

24. FEDERAL SENTENCING GUIDELINES MANUAL 3-4 (West 1987).

25. *Id.* at 2.

26. 18 U.S.C. § 3553(b) (1988).

"Child-savers," to use Anthony Platt's term,[27] spoke of the juvenile court system in terms of "socialized justice,"[28] a phrase that sharply distinguishes its operation from the contest of conflicting interests that characterizes the criminal justice system. These reformers also spoke routinely of "individualized justice," an approach which was explicitly contrasted to law founded on categorical rules: "With the dawn of the twentieth century, the juvenile court idea moves forward on the principle that man may dare to remove the blindfold of justice so that the parties may be seen as human beings with their individualized strengths and frailties, personalizing justice."[29]

In part, the juvenile court's readiness to reject the purpose and method of the criminal law flowed from its abandonment of the principles of deterrence and retribution. As we have seen, action founded on these justifications must be categorical, at least to some extent. Minors, however, were said to lack the degree of maturity necessary to support firm judgments about their own culpability. Moreover, their wrongful acts were often attributable to parental failure as well as their own. Nor could general deterrence be effective for young people who lacked a fully developed capacity for reasoning about costs and benefits supposed by that justification for punishment. Accordingly, the juvenile court took the rehabilitation of minors and the education of parents as its justifying purposes, and examination of the character and circumstances of persons before the court rather than the acts they had done as its methodology.[30]

In form, juvenile court statutes may not seem to express a system of standards to the exclusion of rules. Definitions of de-

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27. A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969).

28. *E.g.*, Van Waters, *The Socialization of Juvenile Court Procedure*, 13 J. AM. INST. CRIM. L. & CRIMINOLOGY 61 (1922).

29. Schramm, *The Juvenile Court Idea*, 13 FED. PROB. 19-20 (1949). *See also*, H. LOU, JUVENILE COURTS IN THE UNITED STATES 1 (1972).

30. This is not to say that the juvenile court regarded itself as "lenient" or libertarian. On the contrary, rehabilitation or moral reeducation was considered more demanding of offenders than simple incarceration. Moreover, proponents of the juvenile court believed that its ambit would be wider than had been true of the criminal court. They frequently observed that criminal court judges refused to make findings with respect to young people just because they could not bring themselves to commit those people to institutions which housed adult offenders, a result that would not occur under the new form of jurisdiction. Moreover, many of the proponents of juvenile justice believed that neither deterrence nor retribution provided an adequate basis for eliminating crime. *See* H. LOU, *supra* note 29, at 1-2. An interdisciplinary approach, in which law combined with other social institutions and disciplines, seemed an answer to the failure attributed to the administration of the criminal law in its traditional form upon adults.

linquency refer to commission of an act that would be criminal if done by an adult, thereby seemingly incorporating the criminal code by reference. Nonetheless, the premises of the child-savers were carried out consistently in the theory and practice of the juvenile court. A focus on the children and their circumstances carried implications for the substantive jurisdiction of the juvenile court, for its procedure, and for its dispositional scheme. The reach of the court had to be, and was, extraordinarily broad so as to reach every child who might require assistance.[31]

The special nature of juvenile court jurisdiction is revealed not only by the breadth of its authority but by its discretion to decline to intervene. According to some views, proof of a specific wrongful act by the youth was not necessary to assumption of jurisdiction. Conversely, proof of a wrongful act was not a sufficient basis for jurisdiction under many juvenile codes. In order to be adjudicated a "delinquent child" and thus fall within the juvenile court's jurisdiction, it was necessary to establish both that the child had committed a delinquent act and that he or she was currently in need of care, supervision, or treatment. This "dual condition" has often been invoked in traditional juvenile courts to justify dismissal of charges even when the respondent's misconduct has been conceded or clearly established.[32]

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31. Definitions of juvenile delinquency included behavior that would be criminal if done by an adult and that would not be criminal by an adult (such as truancy, running away, or disobedience to parental commands); misconduct directed at strangers and intrafamily conflict (including disobedience to parental commands); acts that are listed with great particularity (such as patronizing a saloon, poolroom or bucket shop) and, in the event the list was not quite exhaustive, conditions (such as "growing up in idleness or crime") which were designedly vague and comprehensive. *See, e.g.*, IND. CODE ANN. § 31-5-4-1 (Burns 1973), not repealed until 1975, which was virtually identical with the original 1905 Indiana juvenile court statute, 1905 Acts ch. 145, § 1. That statute included the parenthetical elements listed above, and many more, in the definition of juvenile delinquency.

Neglect jurisdiction was equally broadly defined, and reflected the same legislative strategies. The original Indiana law, which could stand for many others, defined as neglected any child of appropriate age "who has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or with any vicious or disreputable persons; or who is employed in any saloon; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardians or other persons in whose care it may be, is an unfit place for such child; or whose environment is such as to warrant the state, in the interest of the children, in assuming its guardianship." IND. CODE ANN. § 31-5-5-2 (Burns 1973), drawn from 1907 Acts ch. 41, § 2, at 59. Section 31-5-51 reached "dependent" children who are defined as youths "dependent upon public support, or . . . destitute, homeless, or abandoned."

32. *See, e.g., In re* Edwin R., 67 Misc. 2d 452, 323 N.Y.S.2d 909 (Fam. Ct. 1971); *In*

The procedure of the juvenile court further reflected its distinctive ideology. Formality in general, and criminal procedure particularly, were abandoned. Notice of charges was often oral rather than written, and framed in terms of delinquency rather than the particular acts with which the respondent was charged. Neglect allegations had much the same character. Counsel rarely appeared in juvenile court matters.[33] The privilege against self-incrimination was considered inappropriate in principle and effect for it had no place in non-criminal proceedings which did not seek to punish. In addition, the privilege interfered with the direct judge-juvenile communication which was a central aspect of the court's rehabilitative strategy.[34] And, although practices diverged in this respect, many juvenile courts regularly received hearsay evidence and information about the child's record at adjudication in order to assist their determinations of both misconduct and the need for juvenile court intervention.[35]

Finally, the theory of the juvenile court called for a radically different dispositional scheme than that employed by criminal courts. Far from being offense-based, juvenile court dispositions were expressly dissociated from the behavior bringing the respondent to court. Once an adjudication of delinquency was entered, the court could enter any statutorily authorized order the circumstances suggested. While the nature of the delinquent act or neglect might influence the judge's decision, the formal charge did not.[36]

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re Johnson, 30 Ill. App. 2d 439, 174 N.E.2d 907 (1961). Dismissals may be ordered immediately upon conclusion of the hearing, or after a continuance for some time to assure that the minor does not repeat his or her misconduct. For an empirical study which reports the incidence of these dismissals (which made up one-third of all outcomes in one jurisdiction), see W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 66-67 (1972).

33. H. LOU, *supra* note 29, at 137-38.

34. *See In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied* 348 U.S. 973 (1955); *In re* Lewis, 51 Wash. 2d 193, 316 P.2d 907 (1957); Driscoll, *The Privilege Against Self-Incrimination in Juvenile Proceedings*, 15 JUV. CT. JUDGES J. 17 (1964).

35. *See* Teitelbaum, *The Use of Social Reports in Juvenile Court Adjudications*, 7 J. FAM. L. 425 (1967).

36. R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT 22 (1969). There are celebrated or notorious instances in which that dissociation is plain. On the one hand, there is the commitment of Gerald Gault to an industrial school for a misdemeanor that involved offensive but not harmful behavior. *In re* Gault, 387 U.S. 1 (1967). On the other, there is at least one instance where homicide charges against juveniles were dismissed because they did not appear to require court supervision by the time proceedings against them were concluded. *In re* Edwin R., 67 Misc. 2d 452, 323 N.Y.S.2d 909 (N.Y. Fam. Ct. 1971) (murder charges dismissed after lapse of time where respondents either were engaged in some appropriate program or had been committed on

Despite the rule-like appearance of juvenile codes, therefore, the central feature of the juvenile court is the emphasis on a capacity for individualized rather than categorical judgments. Leaving aside the procedural informality that has now generally been abandoned, this central feature is expressed in two substantive ways. At the point of adjudication, the juvenile court judge is typically asked to make decisions about *both* the child's conduct and the necessity for care, supervision, or treatment. At the point of disposition, the dissociation of sanction and offense also invites decision-makers to look directly at the actor whose conduct is involved rather than to infer character for purposes of adjudication and treatment from more generalized propositions about conduct and awareness. Individualized assessment of culpability and dangerousness are regarded as a characteristic of rather than a departure from the rule for decision in juvenile cases.

C. The Relevance of Discretion

Systems of rules and standards embody formally different approaches to decision-making. Our concern to this point has been with the formal features of two paradigmatic instances of justice employing these different approaches. The criminal court's method bases its judgments on categorical statements of wrong behavior, from which inferences about character are drawn. Rules within this system aspire to universality in the following form: "If and only if a person does one of a set of acts [A_1, A_2 . . . A_n], he or she is guilty of crime X." In contrast, the juvenile court's method incorporates a capacity for individualized inquiry as its central characteristic.

These are the formal features of justice within the criminal and juvenile justice systems. Although these features have great symbolic and substantial functional significance, it must now be said that the regimes of rules and standards are best understood in a modern society as ideal types. At the theoretical level, it is commonly observed that a tension exists between these approaches to justice which cannot be resolved within the ideology

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the basis of other charges). *See also*, D. MATZA, DELINQUENCY AND DRIFT 124-129 (1964) (both for the theory of juvenile court decisions and the point that, theory notwithstanding, many courts had effectively reinstitutionalized the principle of offense in the great run of cases). Some reasons for this tendency are considered in the immediately following discussion.

of the current legal system.[37] On the one hand, a scheme of established and known rules for behavior supplies the only basis for saying that an application of law is founded on legitimate grounds rather than from bias or whim. On the other hand, such a scheme necessarily undermines the norms it is supposed to express because it cannot accurately reflect them within the limits of categorical rules.

This discussion does not seek to deny or resolve this contradiction. Indeed, just this sense of contradiction may explain why neither theory of justice exists in pure form in modern society. Decisions based on standards—at least in the juvenile court setting—are hardly unconstrained. For one thing, juvenile court statutes are not formulated as pure examples of standards. As observed above, such statutes typically take a rule-like form (partly because they were drafted by lawyers accustomed to a regime of rules), although they also allow for individualized application of those rules. Moreover, the application of juvenile court statutes is carried out by judges, lawyers, and probation officers who are members of the culture from which the rules emerged. Their decisions will be guided by more or less generally agreed understandings of behavior and the culpability of persons who engage in that behavior.

It is equally true that no set of rules can entirely spare those who apply them from the need to refer back to the cultural norms which the rules seek to institutionalize. And, under modern social conditions, it is inevitable that discretion in some form must moderate the regime of rules. These limits apply at every level of decision even within the criminal justice system itself.

Although criminal codes seek to specify the mental element narrowly, interpretation—that is, individualized application of norms—cannot be eliminated. Take, for example, the notion of premeditation, on which the distinction between first and second degree murder often hangs. Premeditation supposes forethought, but how much and of what quality is unclear. What is important about this ambiguity is not that it produces doctrinal inconsistency among jurisdictions, although such inconsistency exists.[38] Its greatest significance lies in the capacity of even ap-

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37. *E.g.*, R. UNGER, *supra* note 6, at 88-91; M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Kennedy, *Form and Substance in Private Law Adjudications*, 89 HARV. L. REV. 1685 (1976); Katz & Teitelbaum, *supra* note 18, at 10.

38. *Compare* Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963) (almost

parently clear terms for substantially different interpretations by judges and juries called on to apply them in particular cases. Moreover, these judgments will, in the ordinary course, never be public or subject to review. The internal deliberations of a jury are insulated from appellate review and, consequently, its determinations about the existence of premeditation will be sustained as long as the evidence in the case *could* meet the standard formally required by appellate courts.[39]

What is true about the meaning of rules at adjudication is also true at other points in the criminal and juvenile justice systems. The activities of police have much to do with determining whether what occurs on the street will be treated officially as "crime."[40] Other communities likewise must make judgments about whether, for example, an injury is the result of criminal, accidental, or justified behavior. These communities' interpretations also vary from place to place and time to time and yet reflect good faith efforts to comply with law.[41]

Of course, not all discretionary decisions are of this sort. There are instances in which courts, police, or others do not punish or report conduct that everyone would agree to be deviant. From a perspective of rules, these failures are themselves deviant. In many instances, the same would be true under a system of standards.[42] Even here, however, it may be wrong simply to dismiss these instances from consideration, at least if they are common. In some cases, they may reflect judgments about the norm itself—perhaps that it is too stringent either generally or in the particular instance. While that may not establish the lack of clarity of the rule, it may say something about the clarity of cultural consensus about the norm reflected in the rule and, in that sense, about the rule itself.

It may, perhaps, be said that such an ap-

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any forethought satisfies requirement of premeditation and deliberation) *with* People v. Anderson, 70 Cal.2d 15, 447 P.2d 942, 93 Cal. Rptr. 550 (1968) (requiring combination of proof regarding motive, planning, and method of killing).

39. Indeed, the use of special verdicts has been disapproved for criminal prosecutions because of its tendency to influence the jury's reasoning. *See* United States v. Spock, 416 F.2d 165 (lst Cir. 1969).

40. *See, e.g.*, Davis, *Discretionary Justice*, 23 J. LEGAL EDUC. 56, 61 (1971) ("The police are among the most important policy makers in our society. . . . They make more discretionary determinations in individual cases than any other class of administrators; I know of no close second.").

41. *See infra* text accompanying notes 75-82.

42. *See supra* note 10.

proach—particularly at the subjudicial level—extends the notion of law beyond its bounds: that a system of rules and even a system of standards is concerned with the form of commands given by a sovereign. However, it can also be argued, as European commentators regularly do,[43] that law can be given a broader meaning. Sovereign force is one source of law, but other social groups—police, neighborhoods, and families—have their laws (or norms, or mores) as well. The discussion to this point suggests that various sources of law are, at some points, reciprocally related. Just as sovereign law influences conduct and its meaning in other social contexts, so conduct and its meaning in various communities may be considered part of the meaning of sovereign law. To the extent that official legal communities can and must take account of, or are influenced by, norms generated by other social groups, the latter can be regarded as participating in the definition of official norms. Even short of that, their interpretations of conduct can also be considered as evidence of agreement regarding the norms themselves.

Our inquiry is not, therefore, into whether responses to juvenile crime and child maltreatment should follow a pure theory of justice or rely entirely on standards. It does, however, address the relative possibility and normative desirability of these approaches. Without such an inquiry, it is impossible to address the central issue presented by the current controversy regarding social response to youth crime: the bases for preferring one or another approach to legal decision-making in these domains. In the course of this examination, we will take account of the operational as well as the formal features of each system by examining the significance of some forms and applications of discretion as an aspect of the meaning of both rules and standards.

III. The Grounds for Choosing Between Regimes

An examination of the grounds for preferring one or another regime of justice in connection with youth crime should begin with the claims of those who seek to replace a system that emphasizes individualized justice with one that emphasizes a regime of rules.

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43. *See* Ross & Teitelbaum, *supra* note 11, at 285-87; G. Gurvitch, Sociology of Law (1942); Van Houtte, *Les Fondements Scientifiques de la Sociologie du Droit* (paper presented at the Congres Mondiale de law Sociologie du Droit, Aix-en-Provence, France (1985)).

A. Grounds for Preferring a Regime of Rules

1. The argument from the point of view of deterrence

Particularly in political discussion, the argument for change invokes the perception that juvenile court intervention has been ineffective. It is widely said that the court has not deterred youth crime, which is thought to have increased steadily in frequency and severity.[44] While liberals are often disinclined to endorse deterrent strategies, they also increasingly agree that rehabilitative justifications for intervention—whether in the juvenile court or elsewhere—cannot be sustained in principle or experience. They join, therefore, in rejecting rehabilitation as the principal foundation of intervention under juvenile court theory.[45]

2. The argument from the point of view of equality

A principal concern of current criminal law sentencing reform has been in the direction of assuring "uniformity" or "equality" in punishment.[46] To a considerable extent, this concern has also influenced the movement to reduce discretion and individualized treatment of youthful offenders. More particularly, individualized decision-making is said to produce disparities among youths who are similarly culpable and have similar records, and to result in racially discriminatory sentencing patterns.[47]

3. The argument from the point of view of deserts

A third set of justifications for reform reflects current assessments of the degree of responsibility that can be assigned to

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44. *See, e.g., National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice, Major Issues in Juvenile Justice Information and Training: Youth in Adult Courts: Between Two Worlds*, 3-5 (1982).

45. For this view apart from the juvenile court setting, see A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). *See also*, E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 188-91 (1975).

46. *E.g.*, A. VON HIRSCH, *supra* note 45, at 29; FEDERAL SENTENCING GUIDELINE MANUAL 2 (West 1987).

47. *See, e.g.*, Feld, *supra* note, 2 at 87 (dispositional patterns); Fagan, Slaughter & Hartstone, *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224 (1987) (dispositional patterns); Krisberg, Schwartz, Fishman, Eisikovits, Guttman, & Joe, *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173 (1987) (dispositional patterns); Feld, *Bad Law Makes Hard Cases: Reflections on Teenaged Axe Murderers, Judicial Activism, and Legislative Default* 8 LAW & INEQUALITY 1, 9-17 (1989) (transfer decisions).

minors for their acts. The argument in favor of recognizing the responsibility and culpability of juveniles is to some extent based on the incorporation of due process or "adversarial" procedures in the juvenile court. Traditional juvenile court theory, the argument runs, was coherent only on its non-adversarial assumptions. It is not, however, sensible to deny the child's responsibility and to maintain non-punitive assumptions while recognizing a panoply of rights founded on the theory that the child is entitled to autonomy and choice regarding the proceeding.[48] In short, if minors are competent to decide whether to assert the privilege against self-incrimination or freedom from search and seizure of their possessions, they are also capable of responsibility for their acts outside of court.

Convinced supporters of "children's rights," both within and without the juvenile court context, may well adopt much the same position. Within the juvenile court, recognition of a privilege against self-incrimination—to decide whether to cooperate with the state in proceedings affecting liberty—entails an assumption about the capacity of minors to define their own interests in delinquency matters. Outside of the juvenile court arena, arguments in favor of recognizing rights of minors in connection with contraception, abortion and expression likewise apparently assume a minor's capacity for intelligent and rational decision-making.[49]

Moreover, an empirical foundation has recently been added to this body of doctrinal implications regarding responsibility of minors. Psychological research, largely in the field of learning, seems to suggest that children—even quite young children—reason in much the same fashion as adults. Professor Melton, for example, argues that the most cogent review of the literature on children's problem solving abilities and vulnerability to social influence indicates that "there were not grounds on the basis of competence alone to deprive minors aged fifteen and older of rights to self-determination, at least in the area of treatment decisions."[50] Consequently, he suggests, even young chil-

48. *See, e.g.*, Melton, *Taking* Gault *Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 149 (1989).

49. *See* Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 164-66 (1988).

50. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 1, 14-16 (G. Melton, G. Koocher & M. Saks eds. 1983).

dren should be treated as capable of rational choice.[51] This research has generally been used to support recognition of the capacity of minors to make, or at least participate in, important decisions concerning their lives. However, the inference that children can therefore also be held morally responsible for their decisions, and thus eligible for punishment in a criminal setting, has been difficult to resist.

These three arguments, in various ways, go to the heart of the choice between a regime of rules and one of discretion by individualized application. An argument for deterrence requires sanctions substantially related, and known to be related, to the actor's offense—sanctions that announce, "If you do X, you will suffer Y punishment." When judgments are individualized, that relationship is obscured to some extent in principle and practice. The argument for equality, as discussed in more detail below, is an argument for equality based on a particular criterion: the nature of the offense committed. Individualization of punishment plainly allows departure from that, or any generalizable, criterion. Finally, the argument for recognizing the competence of young persons provides a basis for equating the treatment of adults and minors.

B. Evaluating the Case for Rules

The first two bases for preferring the criminal law system--deterrence of deviance and equality of punishment—might be described as outcome measures. Ultimately, they present the problems that generally characterize the use of such measures. The criteria for success are themselves inevitably controversial and claims for success and failure are often tautological. Both problems exist in our setting as well.

1. The question of deterrence

The argument concerning deterrence rests heavily on perceptions of increased rates of serious juvenile crime and child abuse, which criminalization is said to ameliorate by resort to principles of general deterrence. Both the premise and the conclusion of this argument are highly doubtful.

There is little evidence to support the claim that violent behavior by or against children is greater now than in the past.

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51. *Id.*

With regard to crime by minors, the evidence indicates that the high rates of youth crime observed in the 1960s and 1970s were associated with the appearance of large numbers of older adolescents in the population as a result of the post World War II baby boom. Moreover, most data on juvenile crime are based on arrest rates, which are greatly affected by the tendency of youths to commit crimes in groups.[52]

If there is little evidence of a continuing increase in serious deviance of the sorts involved here, there is ample reason to doubt the efficacy of general deterrence in the criminal justice system. Proposals for criminal rather than juvenile court treatment of delinquency typically incorporate a crude formulation of general deterrence, in which increasing the severity of punishment is assumed to produce a reduction in crime. On current information, however, there is a weak but consistent negative association between criminality, measured by official and self-reported crime rates, and *certainty* of punishment, reflected by arrest rates, imprisonment rates, or subjective assessment of risks.[53] Severity, as opposed to certainty, of punishment seems to bear no consistent relationship to criminal conduct.[54] Indeed, there is even some doubt even about the relationship of certainty of punishment to crime rates. At the very least, the relationship between greater certainty and less crime is not a smooth linear function.[55]

Nor can it be assumed that an increase in severity will in some general way improve certainty of sanction. Indeed, pursuit of the former may be inconsistent with pursuit of the latter. Prison terms where none were used before, or longer prison terms than were employed previously, increase severity of punishment. However, these practices may make punishment less certain if prosecutors and judges, because of overcrowded prison conditions or discomfort with the degree of penalty, routinely accept pleas and impose sanctions that do not require incarcera-

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52. For a dramatic instance of the decline in youth crime, see Zimring, *Youth Homicide in New York: A Preliminary Analysis*, 13 J. LEGAL STUD. 81, 83 (1984). The inflationary effect of using arrest rates (rather than, for example, offense rates) results from the fact that minors are far more likely than adults to commit crimes in groups. *See id.* at 91 (homicide), 95 (robbery).

53. *See, e.g.*, Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support*, 16 LAW & SOC. REV. 513, 516 (1981-82) (and sources cited therein).

54. *See* Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROBS. 409 (1969).

55. *See* H.PONTELL, A CAPACITY TO PUNISH 20-21 (1984); Logan, *General Deterrent Effects of Punishment*, 51 SOC. FORCES 64-73 (1972).

tion. Moreover, heavier penalties seem to *increase* criminality in some circumstances.[56]

2. *The question of equality*

The equality argument is unavoidably circular, at least if it is assumed that "unequal" outcomes are for that reason unfair. Equality must be measured by some criterion. The claim that individualized outcomes are unequal usually reflects the premise that equality is properly measured by reference to offense (and, perhaps, former criminal record). Differing outcomes founded on such a premise are only unfair, however, if it is also true that offense (and prior record) provide the only fair basis for sanctions of youthful misconduct. Because this question inevitably forms the core of the discussion of deserts-based punishment in these contexts, it is premature to accept an argument which depends on its resolution. Accordingly, we will return to this question later in the discussion.[57]

3. *The question of deserts*

The crucial issue, accordingly, is the argument from deserts. This argument seems to provide the most powerful case for

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56. The Philadelphia cohort study of juvenile delinquency found that recidivism declined when the offense committed was serious but the offender received a *lenient* disposition, and that a greater proportion of those who received a serious disposition not only committed further offenses but their subsequent offenses were serious. M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 237 (1972). Studies of adult criminals also indicate that lower penalties are generally associated with lower rates of subsequent offenses, although this finding may reflect accurate selection of low-risk offenders for diversion or lighter punishment rather than a differential effect for all offenders. *Id.* at 243.

These observations are directed to theories of general, rather than individual, deterrence. These approaches differ in theory and, perhaps, in result. Punishment based on general deterrence operates through a *threat* which is addressed to the community generally. By contrast, punishment is individual deterrence for the person sanctioned, and for that person it is not a threat but an experience—that of being discovered, apprehended, convicted, and sanctioned. To the extent that individual offenders are affected by an experience that demonstrates the reality of the threat of punishment, they may be less likely to commit crime again. Indeed, it has been suggested that the experience of individual deterrence may account for any observed diminution in offense rates associated with punishment. *See* Lempert, *supra* note 53, at 514-15.

Professor Ronald Boyce has also pointed out that large scale studies may not adequately take account of localized conditions: that is, that there are *some* settings or communities (perhaps those characterized by strong attachments and peer relations) in which general deterrence might have an effect. Research focused on such conditions, however, appears not to have been conducted.

57. *See infra* text accompanying notes 125-30.

abandonment of the juvenile court's emphasis on individualization and discretion in favor of punishment based on offense, or rule violation.

In considering the operation of deserts-based punishment, it is important to remember its essential characteristics.[58] A system of justice based on categorical rules relies on the universality of the rule itself. That rule provides both a necessary and a sufficient basis for punishment. In the ordinary case, at least, the set of proscribed behaviors and states of mind not only explains but defines the accused's deserts and thereby the occasion for and extent of punishment.

Although not ordinarily articulated in discussions of deserts, it would seem that rules of this character, if they are not simply tyrannical, suppose a high degree of normative agreement within the culture that generates them. The assumption of clarity and agreement is essential to the legitimacy of judgments which do not inquire into actual circumstances with any specificity.

The clarity of those cultural propositions is, in turn, a function of consensus regarding both behavior and actor. Clarity with respect to conduct depends, at least partly, on the extent of agreement about the wrongfulness of the conduct and about the extension of the prohibition. Where there is almost uniform agreement that a form of behavior is wrong, it seems less important to examine closely individual cases of such conduct. A categorical form of condemnation—"Anybody who does X has committed a bad act"—is acceptable when we are confident that this statement will almost always be correct in application.

For its part, clarity with respect to the actor depends, at least partly, on the extent of consensus that an individual's conduct can be condemned on the basis of the norm. Where few excuses for misconduct are accepted in the culture, and they are relatively narrow in extension, categorical rules—"Anybody who does X has acted wrongly or culpably"—also seem justifiable. If these observations are accepted, the extent of consensus regarding the kinds of behavior and actors caught up in the criminalization dispute becomes a central question.

Much of the following discussion will focus on this issue. We

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58. In carrying out this examination, subtleties and variations in approach to deserts-based punishment will not be emphasized. All versions look to the offense committed as a principal basis for culpability. Many also rely on the offense to measure the extent of punishment and, as we have seen, the current preference for determinate and proportionate sentencing strongly tend in that direction.

will look primarily to the clarity of judgments at the official or adjudicative level by examining the universality and sufficiency of offense categories as they are formally expressed at the point of deciding guilt and sentence. For reasons indicated in Section I, we will consider another aspect of offense clarity: pre- or non-judicial evidence regarding recognition and enforcement of cultural norms which have been institutionalized by statute or doctrine. The closer the agreement concerning a norm, the more consistently we would expect citizens, neighbors, police and others who encounter behavior of a kind that might be regarded as deviant to so treat it. Accordingly, the following discussion seeks to examine the clarity of judgments regarding culpability in connection with the behaviors and persons involved in prosecutions for youth crime. That examination will provide a basis for assessing the extent to which these offenses and actors are amenable to rule-based or categorical treatment of the kind employed by the criminal law.

IV. Deserts and Juvenile Crime

As we saw in the previous section, the scheme of the criminal law relies on inferences of character drawn from rules describing an actor's conduct and mental state. The justifiability of a deserts approach depends on the capacity of those rules to capture accurately and consistently the characters and culpability of both the general population it addresses and the special population for whom it is now urged.

This section examines the clarity of criminal law categories both in its ordinary operation and in connection with youth crime. The clarity of the conduct or offense element is considered first, followed by discussion of the problems of rule-based judgments of mental state, particularly with respect to youthful offenders. Finally, this section examines a proposition that was deferred above—that rule-based judgments are necessary to assure fairness in adjudication and sentencing.

A. The Problem of Conduct

The rationality of sanctions founded on offense is largely at the mercy of the conduct category on which conviction is based. It is that conduct, after all, from which inferences of character are first drawn, and which measures the extent of eligibility for punishment. The difficulties with identifying offense seriousness

are, however, always considerable, and are particularly so in connection with offenses by and against minors.

B. Ambiguity in Judicial Proceedings

It would be convenient for measuring seriousness of offense if deviance could be considered a natural phenomenon, like earthquakes, which could be measured on something like a Richter scale. And, indeed, we sometimes talk that way. We speak with understandable concern about a sharp increase in crime as we talk about increasing heat and drought in the West, and about the failure of institutions to deal with that increase as we talk about the effects of nuclear testing or fluorocarbons.

The "natural" character of deviance has two aspects. One has to do with its universality. Every society has had crime and, in some interpretations at least, every society must have crime.[59] The second "natural" aspect concerns the character of that conduct. While some kinds of deviance are historically contingent,[60] many observers, including some who take otherwise radical views of the criminal law, argue that "real crime" is not so contingent. Offenses of the kinds listed in the Uniform Crime Reports, such as robbery and murder, have everywhere and always been considered grave wrongs calling for criminal punishment.[61] These are categories of natural and universal criminality, whose seriousness is also universally recognized.

As popular and even sensible as this conception of offense may be, it ultimately cannot be accepted. For one thing, categories of offense within the criminal law aggregate quite different forms of behavior according to crude approximations of culpability. An infinite variety of behaviors and states of mind are compressed into relatively few classes. The definition of murder in the first degree may include the actions of the professional contract killer, a frightened woman who believes, unreasonably, that she is about to be assaulted by a mugger and, with some forethought, kills him first, and the 17-year-old boy who keeps a

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59. The most famous formulation of the view that crime is not only a feature of normal sociology but is necessary to public health and social integration appears in E. DURKHEIM, DIVISION OF LABOR IN SOCIETY 52-64 (1964).

60. Government response to labor unrest, the treatment of alcohol and drug use, and laws concerning pornography, as well as the explosion of regulatory offenses during the late nineteenth and twentieth centuries, illustrate the historical contingency of law.

61. *See, e.g.*, Kelman, *The Origins of Crime and Criminal Violence*, in THE POLITICS OF LAW 214, 221 (D. Kairys ed. 1982).

look-out for his older brother when the latter conducts a robbery in which a storekeeper is killed. Criminal damage to property includes the vandal who smashes school property for the fun of it, the teenager who sprays the name of his gang on the side of a building, and the youngster who puts a BB through a window. Grand theft reaches an embezzler who has for years stolen money from his employer, a youth who on the spur of the moment takes a Trans Am whose keys have been left in the ignition, and an elderly woman who steals $101 worth of food for her hungry family. To the extent that sentencing based on deserts is intended to serve goals of predictability and uniformity, it does so at the price of grave inaccuracy.[62]

Far more important than the clumsiness of offense categories, however, is the nature of the charge upon which the judgment of deserts is founded. One of the grave impediments to identification of "natural" wrongdoing is the circumstances that most criminal matters are resolved by pleas which do not describe the conduct actually committed. Indeed, cases not resolved by plea represent a small minority of convictions: perhaps five to ten percent of the total.[63] When sanctions are founded on deserts, the sentence should, in principle, reflect the actual conduct of the defendant (the "real offense"). Any other basis fails to redress the advantage actually gained by the defendant and, indeed, is inconsistent with the goal of social denunciation of his or her conduct.[64]

Nevertheless, punishment founded on actual conduct proba-

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62. Proponents of deserts claim that these differences can be taken into account in sentencing, if not at the point of conviction. But that is true only to a limited degree, even in the best of situations. The Committee's recognition of only five or six levels of culpability makes this plain. *See* A. VON HIRSCH, *supra* note 45, at 83. The Committee suggests that a presumptive penalty be established for each level of seriousness, which may be increased by the offender's prior history, and further modified by aggravating and mitigating factors such as degree of participation. However, variations based on the last grounds are limited in their extent and should not create overlap of punishments for offenses of different seriousness levels. *Id.* at 100.

63. *See* C. FOOTE & R. LEVY, CRIMINAL LAW: CASES AND MATERIALS 322 (1981).

64. The importance of sentencing on the basis of the real, as opposed to the charged, offense is less clear in sentencing based on general deterrence. On the one hand, it can be argued that what matters is that the community knows what punishments are associated with what crimes. That the defendant in fact committed some other crime does not matter for that purpose. On the other hand, this argument supposes that the community does not know that the accused committed a more serious crime, or generally about the effects of plea negotiations. If they are familiar with this practice, then they will take offense reduction into account as they calculate the risks associated with criminal conduct.

bly cannot be achieved within the modern American criminal justice system. The experience of the Sentencing Commission in this respect is instructive. The Commission initially sought to develop a sentencing system based on the real, rather than the charged, offense. It soon found this to be impossible, due to the need of the legal system for an efficient adjudicatory and sentencing process. The Committee also considered and ultimately proposed a "modified real offense system," which likewise foundered on the shoals of practicality. Finally, and apparently with regret, the Commission moved to a sentencing scheme which relies substantially on the offense charged, although seeking to take account of a limited number of "real offense" characteristics (such as possession of a gun).[65]

There is another impediment to confidence in the capacity of offense categories to consistently reflect conduct and culpability: the ineluctable ambiguity of the offense categories themselves, even for "real crime." As we have already seen, the criminal law relies on categorical rules to justify an inference about the character of the accused. With respect to the act requirement, the assumption is that the behaviors made criminal are such as to support that inference almost by themselves. Accordingly, the kinds of conduct that call for criminal punishment are (and must be) those which declare their own wrongfulness. Shooting another human being, or taking her property, or striking her, is wrong and known to be so because there are few acceptable instances of these forms of conduct. Therefore, the inference of character is seemingly easy to draw, as long as we can also infer that the actor at least intended to strike, shoot, or take property. Ordinarily, this inference is drawn simply from commission of the act.

However, this model grants more clarity to conduct than is justified. Even at the level we most directly associate with the definition of offense—the criminal trial or the juvenile court adjudication—the activities of judges, juries, and lawyers routinely involve judgments about conduct that require interpretation. In many instances, legal terms are plainly indeterminate and invite the trier of fact, and those who decide the charge against the defendant, to bring to bear their own standards of acceptable conduct and their own assessments of community standards. A claim of self-defense, for example, is based on the "reasonable-

65. FEDERAL SENTENCING GUIDELINES MANUAL 5-6 (West 1987).

ness" of the accused's fear of imminent death or serious bodily harm from the victim.[66] Judges and juries must evaluate the circumstances according to their own experience and perceptions of the victim's conduct, including the situation in which he or she was placed at the time. Judgments of these kinds may vary considerably among persons and communities. The same is true of judgments regarding the degree of dangerousness involved in an activity leading to death, injury, or loss of property when criminal liability may be founded on recklessness, or inappropriate risk taking.[67]

These indeterminancies in the understanding of conduct and the definition of offense always exist, despite the effort of the criminal law toward clarity and reduction of ambiguity. They are, however, especially acute in some instances. The scheme of the criminal law works best for the situation it implicitly supposes: conduct by adults that is typically, and almost uniformly, understood as seriously wrongful. Special problems arise, however, when these two conditions do not apply.

The character inference with adults is based on an assumption of a developed character. For such persons, we believe, wrongful acts are uncommon. This assumption is supported by data indicating that relatively few people commit almost all reported crimes. Young people, however, engage in at least minor acts of criminality with considerable frequency. Indeed, it is the rare minor who does not commit some act that would be criminal if done by an adult.[68] We also know, however, that most young people do not become adult criminals. These circumstances suggest that a great deal of juvenile deviance is transitional and explained by a variety of conditions associated distinctively with being young.[69]

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66. *See, e.g.*, United States v. Peterson, 483 F.2d 1222 (D.C. Cir.), *cert. denied.* 414 U.S. 1007 (1973); People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).

67. MODEL PENAL CODE § 2.02(2)(c) (1985) defines recklessness to mean the conscious disregard of

> a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id.

68. *See, e.g.*, Zimring, *Kids, Groups, and Crime: Some Implications of a Well-known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 879 (1981).

69. *See* Zimring, *supra* note 52, at 86.

Moreover, we know that the pattern of criminality for youths differs from that of adults. Adults tend to commit crimes alone. It is, therefore, relatively easier to draw an inference about their culpability from such an act. Youths, by contrast, tend to commit crimes in groups.[70] Most criminal codes do not distinguish between sole and group criminality; accessories typically are liable in the same degree as principals.[71] This treatment is explicable on the ground that each adult is seen as standing alone in making decisions about his or her conduct. The assumption seems to be that adults form a criminal intent independently, and then they act together. That assumption plainly operates less well for young people, who seem characteristically to group together and then engage, with varying degrees of active participation, in wrongful enterprises.[72]

Finally, the application of categories drawing on community judgments such as "reasonableness" is especially problematic with youthful actors. Often, criminal law judgments of these kinds do not take account of special characteristics such as the youth of the offender.[73] Where they do not, the trier of fact must hold minors to adult standards of perception of risk with respect to their own activities and the actions of others (as in cases of self-defense). Even under statutory formulations which do permit the trier of fact to take such characteristics into account, an adult decision-maker will not be asked to put itself in the place of this individual actor, about whom a considerable amount might be known. Rather, the trier of fact is told to adopt the position of an "ordinary" young person whose characteristics and judgments are not before the court and can only be imagined.[74]

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70. *See id.*; Zimring, *supra* note 68, at 867.

71. *E.g.*, CAL. PENAL CODE §§ 31, 971 (West 1988); 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

72. The literature on gang behavior, for example, indicates the varieties of membership and degree of participation, as well as the influence of core group members on those who are peripherally and episodically associated with the gang. *See* U.S. Department of Justice, U.S. Marshall's Service, Street Gangs: Bloods and Crips (1989).

73. *See, e.g.*, W. LAFAVE & A. W. SCOTT, JR., CRIMINAL LAW 659 (2d ed. 1986) (in connection with the requirement of "reasonable" provocation to reduce murder to voluntary manslaughter); Bedder v. Director of Public Prosecutions, 2 ALL E.R. 810 (1954).

74. *See, e.g.*, MODEL PENAL CODE § 202.3 and Comment 3 (1985).

C. *Ambiguity in Pre-Judicial Decisions*

There are, then, difficulties with the claim of deserts-based punishment to identify accurately and consistently the fact and extent of culpability from conduct—perhaps generally and certainly when the acts are committed by minors—even at the formal level of adjudication. This difficulty is especially severe because, as we have seen, the judgment of culpability is founded on the offense charged rather than on actual behavior. The importance of this circumstance lies in demonstrating that a conviction for crime does not simply reflect the official discovery and condemnation of an event occurring in the world, but the end product of a multi-stage, socially complex process which winnows, simplifies, and ultimately creates the definition of an offense upon which any court action is based. To the extent that punishment depends on the charge brought, it seems that we must regard all groups or communities which participate in the decision to prosecute and select the charge as legal communities, whether "official" or not.

Clearly there are a number of such communities, many of which affect both the criminal and juvenile justice systems. Offenses do not come to the attention of official agents of justice unless they have been discovered in the community, reported to the police as deviance, and processed by police agencies. The ambiguity that attends even official adjudications, and often also finds quasi-judicial expression in strategies such as plea negotiations prior to trial, is at least as salient in decisions to ignore, divert, or refer conduct or complaints for official treatment.

We know very little about how these communities make decisions generally, and particularly little about their decisions to ignore or to deal informally with conduct that might also be referred for official treatment.[75] We do know, however, that they do so and that how they do so is to some extent dependent on their organizations and to some extent on the behavior of other unofficial and official legal communities. Police departments have varying organizational characteristics and orientations, which are related in some degree to the characteristics of the communities they serve and affect the ways in which they define their roles and respond to behavior.[76]

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75. *Cf.* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

76. *See, e.g.*, J. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW

Moreover, the involvement of police initially depends heavily on actions by lay communities. Although police often decide whether a complaint will be filed, they rarely discover the offense or decide themselves how it will be pursued. An observation study of routine police patrolling in three large cities found that 72% of all police-juvenile encounters resulted from citizen complaints.[77] "Hence," the authors observe, "it would seem that the moral standards of the citizenry have more to do with the definition of juvenile deviance than do the standards of the policeman on patrol."[78]

Whether because of moral standards or other factors, neighborhood and community characteristics have much to do with the mobilization of justice agencies and, therefore, the definition of offense. For one thing, deviance is not equally distributed across communities.[79] Perhaps the most common explanation for

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AND ORDER IN EIGHT COMMUNITIES (1968); Smith, *The Organizational Context of Legal Control*, 22 CRIMINOLOGY 19 (1984).

77. Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970).

78. *Id.* at 66.

79. It has, for example, long been clear that some neighborhoods are more crime-prone than others, at least when official data are consulted. The Sourcebook of Criminal Justice Statistics for 1983, for example, reveals that while black citizens make up 12% of the current United States population, they account for 47% of all arrests for violent crimes and for 32.7% of all arrests for property crimes. *Bureau of Justice Statistics, United States Department of Justice, Sourcebook of Criminal Justice Statistics—1983*, at 483 (Bb.3.3(a)) (1984). The same pattern holds for arrests of persons under the age of 18. *Id.* at 484.

Even more aggravated distributions appear when we look at victims rather than offenders. Blacks were twice as often the victims of robbery and personal larceny with contact than were whites, although they make up only one-eighth of the population. Moreover, approximately equal number of blacks and whites were the victims of rape, assault, and larceny without contact. *Id.* at 295, fig. 3.12. Given the general pattern of housing concentrations, it follows that certain neighborhoods include higher rates of official victims and perpetrators of crime than others.

A number of studies, dating back to the 1940s, have found a higher rate of deviance in poorer, less stable communities. *E.g.*, C. R. SHAW & H. D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF ROLE OF DELINQUENCY IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (1942); Bordua, *Juvenile Delinquency and 'Anomie': An Attempt at Replication*, 6 SOC. PROB. 230 (1958); Hagan, Gillis & Chan, *Explaining Official Delinquency: A Spatial Study of Class, Conflict and Control*, 19 SOC. Q. 386 (1978); Sampson, Castellano & Laub, *Juvenile Criminal Behavior and its Relation to Neighborhood Characteristics*, 5 Analysis of National Crime Survey Data to Study Serious Delinquent Behavior, (1981); Messner, *Poverty Inequality and the Urban Homicide Rate*, 20 CRIMINOLOGY 103 (1982); Cohen & Land, *Discrepancies Between Crime Reports and Crime Surveys: Urban and Structural Determinants*, 22 CRIMINOLOGY 499 (1984); Simcha-Fagan & Schwartz, *Neighborhood and Delinquency: An Assessment of Contextual Effects*, 24 CRIMINOLOGY 667 (1986).

The characteristics most often measured in these studies include area income and stability, population density, ethnic homogeneity, and family structure. Some recent re-

the association between deviance and poorer, less stable communities is expressed in terms of social disorganization, or the extent to which a community structure articulates and realizes the common values of its residents.[80] Sometimes this view is expressed in terms of community "cohesiveness." In a cohesive community, friends, neighbors and others are more likely to intervene informally, rather than seek police intervention, when they see children "getting into trouble." In less cohesive communities, "taking care of one's own" is a less common response because the sense of "one's own" is less generally held or firmly established.[81] It has also been suggested that communities differ in their tolerance for deviance: that is, "how much 'trouble' the community will put up with before it acts, or in other words how much deviant behavior it will permit before either citizens or official agents take offense and respond in some systematic way."[82]

The point of importance is not that police and lay communities ignore some juvenile crime, although that may be true. What is important is that they also define that crime, at least with respect to the gravity of conduct and characteristics of actors for whom the criminal process is invoked. The fact that these communities resolve questions of adult deviance without

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search also emphasizes contextual variables such as community disorder, reflected in attachment to the community, the existence of organizational networks within the community, and the like.

80. Areas characterized by economic deprivation tend to have high rates of population shift and thus to be heterogeneous. These characteristics, in turn, result in weak systems of external controls on individual behavior and weakened commitment to agencies within the community. *See generally*, R. KORNHAUSER, SOCIAL SOURCES OF DELINQUENCY: AN APPRAISAL OF ANALYTIC MODELS (1978).

81. *See* Maccoby & Maccoby, *Community Integration and the Social Control of Juvenile Delinquency*, 14 J. SOC. ISSUES 38 (1958).

82. Wheeler, *Criminal Statistics: A Reformulation of the Problem*, in CRIME, LAW AND SOCIETY 131, 135 (A. Goldstein & J. Goldstein eds. 1971). It is quite clear that individual and community attitudes toward the behavior of youths on the one hand, and toward police and courts on the other, have much to do with the way an event is treated. While victims and witnesses do not have the formal right to prevent or to require police referral of a child for prosecution, their views often have considerable practical effect. The importance of victim and witness attitudes has been noted in most studies of police practices. The authors of the observation study of police practices mentioned earlier reported that

> the police show a quite dramatic pattern of compliance with the expressed preferences of complainants. In not one instance did the police arrest a juvenile when the complainant lobbied for leniency. When a complainant explicitly expressed a preference for an arrest, however, the tendency of the police to comply is quite strong.

Black & Reiss, *supra* note 77, at 71.

referral to court[83] does not impeach the suggestion that judgment at these levels is an important aspect of the normative scheme. What it does indicate is that for some proportion of instances, members of these communities and agencies—and the justice system itself—recognize that application of rules in the formal and public way expected by the criminal model will be unnecessary or produce inappropriate results and, therefore, should be avoided. The fact that this disjunction is understood and acted upon in connection with adults as well as children reveals the complexity of judgments of deviance in both the criminal and juvenile justice settings.

D. The Mental Aspect of Culpability

The rule-boundedness of the criminal law extends to the mental element on which it relies heavily to determine and grade blameworthiness and thus to justify the fact and extent of sanction. At least as it is expressed in modern criminal codes, that element takes a rigid analytical mode. The actor must do some act voluntarily. In addition, he or she must ordinarily desire that the act happen and, for some crimes, that certain consequences result from those acts. For other crimes, it will be enough that the actor appreciate the risk of those consequences. And for yet a third group, culpability exists when the actor does not personally appreciate the risk of harm but a person of ordinary thoughtfulness would have done so.[84]

Two characteristics of this formulation are evident. One is that it emphasizes cognition, perhaps almost exclusively. While the English common law, at least since the thirteenth century,[85] has emphasized blameworthiness in a general sense, modern American codifications tend to follow the Model Penal Code's

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83. Indeed, there is evidence that, in some jurisdictions, such resolutions are as common for adult as for juvenile misconduct. Hutzler & Snyder, *Legislation and Juvenile Court Procedure: Dealing with Serious, Repeat, Juvenile Offenders: An Empirical Review of Current Practices*, in NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, UNITED STATES DEPARTMENT OF JUSTICE, DEALING WITH SERIOUS, REPEAT JUVENILE OFFENDERS 23, 36 (1981).

84. *See* MODEL PENAL CODE § 2.02; H. PACKER, *supra* note 12, at 105-06.

85. There is some evidence that, at an earlier point, criminal responsibility rested almost wholly on the harm done. Intentions and motives were of little, if any, importance. *See* 2 F. POLLOCK & W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 470-71 (2d ed. 1968).

focus on specific states of mind, from which assessments of blameworthiness (and bad character) follow.

The other characteristic is that the criminal law scheme is categorical. Accused persons either did, or did not, wish to do an act and, perhaps, cause some consequence of that act. They did (or did not) perceive a risk of injury, or should or should not have done so. While these various kinds of mens rea are themselves graded (from purpose through negligence),[86] there are no gradations within them according to individual development or expertise.

To the narrow extent that excusing conditions are recognized, they are likewise categorical and tend to focus on cognitive capacity. In their classic forms, both insanity and infancy seemed largely concerned with lack of cognitive skills. Infancy, for example, is typically understood as the absence of capacity to intend wrong because of an incapacity to appreciate the causal relationship between act and result.

Competence is also categorical in the sense that it is conceived in terms of a largely unspecified adult measure, which the minor does or does not possess. Children below the age of seven have been conclusively presumed incapable of meeting that standard; those above fourteen have been treated as adults for this purpose. Between the ages of seven and fourteen, there has appeared to be an individualized inquiry. Children of these ages have rebuttably been presumed incapable of criminal intent, with the strength of the presumption waning as age increased.[87] Even this inquiry does not focus directly on the child's own understanding of his or her act, but seeks to determine whether this child's mental development approximates that of an adult.

The adequacy of this approach to assessments of culpability is, indeed, the heart of the issue concerning determinate and proportionate sentencing. It is quite plain that, given both legal authority and resources for the exercise of discretion, judges will inquire into the "culpability" of offenders beyond the charge actually presented.[88] A recent study of federal judges (conducted

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86. This scheme is most clearly revealed in connection with homicide. The act and consequence of homicide are constant; variations in degree of sanction are determined according to whether the conduct was purposed (commonly first degree murder), reckless (second degree murder or involuntary manslaughter), or negligent (involuntary manslaughter or negligent homicide).

87. *E.g.*, State v. Milholland, 89 Iowa 5, 56 N.W. 403 (1893).

88. S. WHEELER, K. MANN & A. SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 81 (1988). The question of authority depends on the sentenc-

prior to the advent of the Federal Sentencing Guidelines) reveals a profound interest in more information for sentencing purposes than a highly positivist notion of mens rea and excuse provides. This interest is especially acute for white collar offenders whom these judges regard as "atypical" criminals. They want to know such things as "Was this person really aware that he or she was committing a crime? Was there any real intent on the person's part?"[89] They also want to know the amount of scheming involved, the relative participation of various offenders, and even something about motive.[90] These are, in some instances, frankly extra-legal considerations, but at the same time appear to be part of a "common law" of sentencing.

Wheeler, Mann, and Sarat explain these concerns in terms of the institutionalization of common cultural norms.[91] These norms, which include the importance of offense in terms of harm done, the blameworthiness of the offender, and the consequence of punishment both for society and the offender, have already been institutionalized in one form by legislative (and appellate court) decisions. That form is, as we have seen, typically highly formalized. Judges are also products of the culture from which these norms derive (and which is itself continually educated through the public declaration of those norms). As they apply these formal rules, however, they reach back to the broader, more general understanding imbedded in the culture and only partly reflected in legislative rules.[92]

This explanation helps us understand how judges go behind the institutionalization of those norms found in statutes, but not why they do so. In part, they are compelled to do so when the statute provides them an explicit range of choices, as with indeterminate or partially determinate sentencing laws. However,

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ing scheme adopted by the legislature. Opportunity to inquire beyond the charge presented also depends on whether caseload constraints and administrative staff permit or discourage such an inquiry. State court judges typically have little time to conduct extensive sentencing inquiries, and considerations of blameworthiness in the specific case are usually resolved during plea negotiations between prosecution and defense counsel, who carry the principal practical responsibility for deciding upon the charge and, therefore, the sentence. On the routinized processing of state court criminal matters, see S. THOMAS-BUCKLE & L. BUCKLE, BARGAINING FOR JUSTICE (1977); L. MATHER, PLEA BARGAINING OR TRIAL?: THE PROCESS OF CRIMINAL CASE DISPOSITION (1979); M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

89. S. WHEELER, K. MANN & A. SARAT, *supra* note 88, at 93.

90. *Id.* at 94-112.

91. *Id.* at 21.

92. *Id.* at 23-24.

the approach taken by judges in this study indicates that they are also concerned that the formal charge and the positivist description of mens rea were incomplete at least for this criminal population. In a positivist scheme, questions such as "Was this person really aware that he or she was committing a crime?" and "Was there real intent?" make no sense. Both are fully answered by the finding of mens rea. Those questions only make sense on the belief that formal definitions of mens rea provide an inadequate guide to the existence, and particularly to the degree, of culpability.

Judicial efforts to moderate the rigidity of the mens rea element are, perhaps, what determinate sentencing seeks to avoid, whether because of concerns about inequality in the treatment of poor (ordinary) and middle-class (white-collar criminals), concern for proportionality in itself, or other factors. Rigidity is nonetheless present, and individualized examination of culpability may be highly appropriate when the offending population is atypical on some less troublesome basis than social class.

E. The Mental Element and the Culpability of Young Persons

For young people, the criminal law's association of mens rea (in the narrow sense) and culpability is especially unpersuasive. Culpability or blameworthiness has the sense of mature decision. It is, however, generally agreed that moral judgment and a number of its aspects—legal reasoning, internalization of social expectations, and acceptance of individual responsibility—are developmental.[93] The discovery of adolescence at the end of the nineteenth century influenced the juvenile court heavily and has remained a central aspect of psychological theory throughout this century.[94]

Despite its long pedigree, the theory of the relative irre-

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93. *See, e.g.*, Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp & F. Levine eds. 1977).

94. *See* Teitelbaum & Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, in BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURTS 1, 29-30 (L. Teitelbaum & A. Gough eds. 1977). G. Stanley Hall, often considered the "discoverer" of adolescence, described this stage as a time of " 'storm and stress' " during which the youth's " 'previous selfhood is broken up . . . and a new individual is in the process of being born.' " Demos & Demos, *Adolescence in Historical Perspective*, in 31 J. MARRIAGE & FAM. 632, 635 (1969) (quoting Hall, *The Moral and Religious Training of Children*, PRINCETON REV. 26-48 (January 1882)).

sponsibility of youth has been questioned on two rather different (but related) grounds. One is empirical, and suggests that minors do possess the kinds of capacity required for moral responsibility. The other is doctrinal. This argument asserts that the course of judicial decisions, and especially United States Supreme Court decisions, demonstrates that earlier notions of the incapacity of youth have been abandoned or been found not to be conclusive with respect to the responsibility of minors for their acts.

1. The empirical argument

There has long been a popular sense that adolescents, and especially older adolescents, who commit crimes know exactly what they are doing and that it is wrong. That belief has often found anecdotal support in the heinousness of some crimes[95] and/or the cynicism of some offenders. Recently, this view has been supplemented by evidence of a more systematic character, founded on a body of psychological research. The thrust of this research has been summarized in the following way:

> [A] large body of recent psycholegal scholarship [indicates that] juveniles, especially adolescents, commonly are more competent decisionmakers than the law historically has presumed. Piagetian theory implied that adolescents, at least by age fourteen, would not differ from adults on average in their ability to comprehend and weigh risks and benefits of personal decisions. That general proposition now has been supported by numerous laboratory and field studies of decisionmaking by youth in various legally relevant contexts.
>
> In fact, if research contradicts the Piagetian hypothesis at all, it generally is in the direction of competence of even younger minors to make personal decisions. . . . [R]esearch has indicated that children in the intermediate grades make adult-like decisions about routine therapeutic and educational matters, even if they are not as competent as adolescents and adults in comprehending and weighing the risks and benefits of the various alternatives. Stated somewhat differently, children can imitate adult models in making decisions for themselves, even when they are not prepared cognitively to explain the merits of those decisions.

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95. A recent illustration of drawing the inference from heinousness to culpability is found in Justice Scalia's dissenting opinion in *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988).

> "Adult-like" causal reasoning is well established by age four or five and sometimes observable even among two- and three-year-old children. Thus, concepts of agency and intentionality are within the repertoire even of young children.[96]

The author of this summary finds these studies compelling in one direction: the recognition of greater capacity for choice by young, indeed quite young, minors. He resists the extension of this research to justify an imputation of criminal responsibility, although he does not adequately explain why the connection is faulty.[97] Nonetheless, the conclusion that these studies do not compel a conclusion of criminal responsibility seems ultimately correct.

Two sets of limitations in matching research with criminal law norms must be recognized. One concerns the norms themselves. We have already seen that, although criminal codes seek to specify the mental element narrowly, scope for interpretation cannot be eliminated even for apparently clear terms such as "premeditation."[98] If significant ambiguity exists even for what seems a clear and familiar term, it can be assumed to exist for any formulation of mens rea, whether it be the "guilty knowledge" to which Nineteenth century law referred or "recklessness" under the Model Penal Code. Accordingly, the standard against which empirical findings will be measured cannot be articulated with a consistently high degree of reliability.

A second limitation on the effort to match research and legal norms concerns the limits of research into cognitive abilities and decision-making. This research is appropriately descriptive; it reports "adult-like" causal reasoning and imitation of adult models for decision-making. That is quite different from saying that children understand causation in the same way that adults do, or that their decisions occur under the same conditions as do those of adults. Indeed, the fact that very young children, perhaps of the age of four or five, can engage in causal reasoning

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96. Melton, *supra* note 48, at 153-55 (citations omitted).

97. Professor Melton does invoke Professor Zimring's notion of adolescence as a "learner's permit," arguing that it is inconsistent to, on the one hand, generally restrict the choices available to minors and therefore their experience in making decisions while, on the other hand, holding them fully responsible for their decisions to commit crime. However, the significance of experience is not satisfactorily explained, and the inference of moral agency has remained appealing. *Id.* at 158 (citing F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982)).

98. *See supra* text accompanying note 38.

plainly indicates that performance on tests of these kinds cannot be compared in a simple way with adult responsibility.

That is not to say that this research is without value for important legal purposes. It may be most helpful in deciding on the value of youthful testimony, or in establishing procedures for health care decisions if the utility of consulting a very young patient is in question. In the context of criminal responsibility, however, reliance on these empirical approximations may have the effect of supplying a spurious confirmation for the rigidity of the criminal law with its deserts-based reluctance to inquire directly into the understanding and the culpability of offenders.

The same point applies to the body of research concerning legal socialization which describes stages of development in ideas of law and justice[99] paralleling the common law scheme of infant responsibility. The connection between legal socialization and culpability for conduct is, however, indirect. Even if most older children (over fourteen years of age) and adults share a conventional, rule-based (law and order) approach to justice, this does not establish that the conditions under which they act are identical. Research on legal socialization also emphasizes the interactive quality of development, in which a variety of conditions affect the nature of that socialization.[100]

There is, finally, the body of research upon which judgments of relative incapacity have always relied, and has not been rejected. This research suggests that adolescence is often marked by identity confusion and preoccupation with appearances in the eyes of others,[101] and by a concern with the present rather than with long-term implications of conduct.[102] Adolescents often are, in short, more vulnerable to peer pressure, more impulsive, and less thoughtful of consequence than adults. Our awareness of these characteristics should make us even less ready to rely on the categorical inferences of culpability that the criminal law incorporates.

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99. *See* Tapp & Kohlberg, *supra* note 93.

100. *See* Levine & Tapp, *The Dialectic of Legal Socialization in Community and School* in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 163 (J. Tapp & F. Levine eds 1977).

101. *See, e.g.*, E. ERIKSON, IDENTITY, YOUTH AND CRISIS 128-35 (1968); Gordon, *The Tattered Cloak of Immortality*, in ADOLESCENCE AND DEATH 16 (C. Corr & J. McNeil eds. 1986) (emphasizing risktaking as an aspect of identity formation).

102. Kastenbaum, *Time and Death in Adolescence*, in THE MEANING OF DEATH 99 (H. Feifel ed. 1959).

2. The doctrinal argument

It can be argued that, even if the psychological literature concerning the reasoning ability and responsibility of young people is inconclusive, the Supreme Court has at least implicitly accepted their responsibility in a series of decisions recognizing the child's right to resist the state and to make important decisions regarding contraception, abortion, and speech. Within the juvenile court context itself, incorporation of due process or "adversarial" procedures seems to have eliminated the juvenile court's *raison d'etre*. The traditional juvenile court theory was, as we have seen, founded on assumptions about the dependence and incapacity of youth, the rehabilitative quality of juvenile court intervention, and the common interests of youth and society in assisting the child toward "good, adult citizenship."[103] On these assumptions, it was justifiable to seek to treat rather than punish the youthful offender.

It is not, the argument continues, sensible to retain a nonpunitive attitude when these assumptions have been rejected, as Supreme Court decisions have done since 1967. *In re Gault*[104] clearly rejected the notion that youthful offenders, because of their "dependent status," generally have no right to liberty. The case noted, but did not approve, the proposition that "a child, unlike an adult, has a right not to liberty but to custody" and repeatedly reemphasized the gravity of intervention from the child's perspective. Subsequent decisions have, with one exception,[105] reaffirmed these principles and established that rehabilitative goals, even if legitimate, do not change the nature of action taken by the juvenile court.[106] Moreover, the Court has recognized the appropriateness of a panoply of defenses which imply that minors possess a capacity for competent choice and autonomous decision-making, such as freedom from search and seizure of one's person or possessions[107] and, most especially, the privilege against self-incrimination. In *Gault*, the Court sustained the privilege in delinquency matters not solely out of concern for untrustworthy confessions, but because children, like adults, are entitled to decide whether and how they will partici-

103. Macc, *The Chancery Procedure in Juvenile Court*, in THE CHILD, THE CLINIC AND THE COURT 310, 311-12 (J. Addams, ed. 1927).

104. 387 U.S 1 (1967).

105. Schall v. Martin, 467 U.S. 253 (1984).

106. Breed v. Jones, 421 U.S. 519 (1975).

107. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

pate in proceedings affecting their liberty. As Mr. Justice Fortas observed in *Gault*:

> [T]he roots of the privilege [against self-incrimination] tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.[108]

If, the conclusion runs, minors are entitled to resist the state in seeking their welfare, and if they are regarded as holding the rights of adults in proceedings against them, the theory of the juvenile court is left incoherent. It is irrational to argue that minors must be treated as adults when they are tried but to deny such treatment when they are adjudicated and punished.

The premises of this argument may also be supported by reference to the body of constitutional doctrine that has emerged in connection with children's rights outside the juvenile court, particularly rights to free expression, contraception, and abortion. In the adult setting, these rights are often conceptualized in terms of the individual's interest in autonomy: to decide upon his or her expression and career without the control of others. Recognition of such autonomy claims supposes a capacity for moral responsibility on the part of the rights holders. In affirming the rights of minors to such claims, therefore, the Court has likewise affirmed their capacity for moral choice.

The moral choices involved in crime, and particularly serious crime, it is said, require no greater (and almost surely) less capacity than those minors may make under current constitutional doctrine.[109] Children know from an early age that *mala in se* are wrong—indeed that is one of the indicia of *mala in se*—and therefore, can appropriately be held responsible for their decision to engage in that conduct.

Despite the popularity of the doctrinal argument, it is far too simplistic, even in its interpretation of the doctrine upon which it relies. Within the juvenile court, recognition of procedural rights has been grounded in great part on their importance

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108. 387 U.S. at 47 (citation omitted).

109. *See, e.g.*, Melton, *supra* note 48, at 155-57.

to accuracy in fact finding. The right to counsel has likewise been regarded as essential because its alternative, reliance on the parent and the juvenile probation officer, presented such risks of conflict of interest and lack of legal skill that they could not be counted on to provide adequate assistance.[110] Confrontation and cross-examination have been considered necessary because no adequate reason appeared for treating juvenile cases differently from all other judicial matters, whether civil or criminal.[111] And, while Justice Fortas explained the privilege against self-incrimination in terms of distance from the state, the opinion does not emphasize, or even mention, any assumption about competence to make important decisions. Indeed, the opinion expressly recognizes that "special problems may arise with respect to waiver of the privilege by or on behalf of children, and . . . there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents."[112]

Indeed, there is very little discussion of the competence of children in cases extending procedural protections in delinquency cases.[113] It is even more surprising to find little such discussion in decisions outside of the delinquency area which establish privacy rights. The Court has, on the one hand, recognized that minors enjoy some degree of liberty interest in virtually all areas where such interests are recognized for adults.[114] On the other hand, these liberty interests have not usually been explained on grounds of competent choice. Rather, the line of analysis has begun with a recognition that minors generally possess constitutional rights, followed by an inquiry into whether the state has established a sufficient justification for restricting those rights. This inquiry does not assume that the extent of state power to regulate is the same for minors and adults. On the contrary, it has long recognized greater governmental au-

110. 387 U.S. at 35-37.

111. *Id.* at 56.

112. *Id.* at 55.

113. Neither *In re* Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt) nor Breed v. Jones, 421 U.S. 519 (1975)(holding that the prohibition against double jeopardy extended to delinquency adjudications) were framed in terms of the competence of children, focusing rather on the consequences of adjudication for them.

114. *E.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (termination of fetus); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (access to contraceptives); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (speech); Ingraham v. Wright, 430 U.S. 651 (1977) (physical integrity).

thority to regulate the activities of minors than would be allowable for adults.[115] States may restrict religiously motivated activities of children when some danger exists,[116] although adults probably could not be so controlled. They may require attendance at school by minors[117] and may limit their access to "objectionable" but not "obscene" material which could not constitutionally be kept from adults.[118]

The greater capacity of the state to regulate the decisions and conduct of minors reflects precisely a belief that their claims to rights do *not* entail assumptions about equal capacity. Mr. Justice Stewart, concurring in *Ginsberq v. New York*, justified protecting children from non-obscene publications in the following way:

> I think a State may permissibly determine that, at least in some relatively precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[119]

Mr. Justice Brennan's plurality opinion in *Carey v. Population Services International* sounded the same theme. The privacy interest implicated (access to contraceptives) was ultimately an "interest in . . . making certain kinds of important decisions, . . . and the law has generally regarded minors as having a lesser capability for making important decisions."[120] This assumption is reflected as well in the standard of review employed by Justice Brennan in connection with privacy rights of minors. The issue is whether state restrictions "serve 'any significant state interest . . . that is not present in the case of an adult,' " a test he characterizes as

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115. *See* Prince v. Massachusetts, 321 U. S. 158, 170 (1944) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults.").

116. *Id.* at 158.

117. This proposition has routinely been assumed. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925).

118. Ginsberg v. New York, 390 U.S. 629 (1968).

119. *Id.* at 629, 649-50 (citation omitted).

120. 431 U.S. 678, 693, n.15 (citation omitted) (quoting Wholen v. Roe, 429 U.S. 589, 599-600 (1977)).

> less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. . . . Such lesser scrutiny is appropriate [both] because of the States' greater latitude to regulate the conduct of children . . . and the law has generally regarded minors as having a lesser capability for making important decisions.[121]

It is not, therefore, true that constitutional doctrine incorporates a premise that children are as capable of mature choice as adults. While privacy rights may seem dichotomous propositions, in the sense that they exist or do not, they also exist subject to greater or lesser regulation, and the justifications for variation of regulation include the capacity of the holder. The Court has made abundantly clear that it does not automatically associate the *extension* of children's rights with that which their elders may claim.

Any doubt about the doctrinal assumption of equal culpability is removed by the only Supreme Court decision which directly addresses the question of children's responsibility for their crimes. The plurality opinion in *Thompson v. Oklahoma*,[122] which considered the constitutionality of the death penalty for persons who committed crimes during minority, explicitly declared that children younger than sixteen years of age could not be held to an adult standard of culpability, for reasons that were

> too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.[123]

Not only was this assumed generally to be the case, but so generally true that capital punishment of children below the age of sixteen was held a per se affront to contemporary standards of decency and, therefore, to the eighth amendment prohibition against cruel and unusual punishment. It might be added that, in reaching this conclusion, the plurality expressly referred to the body of traditional psychological literature describing differences in judgment between adolescents and adults.[124]

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121. *Id.* at 693 n.15 (citations omitted).
122. 487 U.S. 815 (1988).
123. *Id.* at 835 (citation omitted).
124. For examples of this literature, see *supra* notes 101-02.

F. Rules, Equality, and Fairness

This argument has addressed the limits of the criminal law scheme of culpability, both generally and in connection with youth crimes. It is fair to ask whether this critique ignores concerns for inequality of treatment and fairness in favor of an apology for individualization of judgments of culpability. The answer, inevitably, is no and yes.

Take, first, the concern for equality or uniformity of treatment. The term equality is not self-defining. Accordingly, an argument that individualization and discretion, produce unequal results and thus unfairness, standing alone, is tautological. There are few more complex notions than that of equality. In a distributive sense, it can mean equality according to deserts or according to needs. Equality with respect to deserts may refer to outcomes or to effort without regard to outcome. Equality with respect to needs may refer to any, or some subset of, circumstances and conditions.[125] Although we are concerned here with equality in the distribution of burdens or punishments rather than of goods or benefits, the same observation can fairly be made.[126]

A claim that individualization entails inequality and unfairness implicitly chooses one of the possible criteria of equal treatment—usually kind or gravity of offense. Moreover, gravity of offense is itself defined by the formal charge. On that premise, it certainly follows that different sanctions for similar offenses are unequal. If, however, some other criterion for sanction is adopted, the claim of inequality based on offense becomes incoherent. Take, for example, the principle that punishment should reflect individual culpability. As we have seen, neither the criminal law approach nor proportionate sentencing addresses culpability directly. They declare guilt only through the mediation of categorical rules which are taken as sufficient indications of culpability. The benefit of this approach lies in a capacity to articu-

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125. Aristotle observed that "everyone agrees that the just distribution is one in accordance with desert of some kind; but they do not call desert the same thing, but the democrats say it is being a free citizen, the oligarchs being rich, others good lineage, and the aristocrats virtue." PLATO, REPUBLIC 558c. It should also be remembered that Plato himself complained that democracy "bestows equality of a sort on equals and unequals alike," making plain that equality is not itself a self-defining basis for justice. *See* Hare, *Justice and Equality*, in JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES 105, 113 (J. Sterba ed. 1980).

126. *See* Hare, *supra* note 125, at 108-11.

late *how* sanctions are equal.[127] In doing so, however, the criminal law arguably accepts *less* equality in punishments measured by culpability because it relies on proxies for culpability.[128] A great part of the preceding discussion has sought to indicate just how wide the gap is between proxy and phenomenon in the kinds of cases under consideration. That gap also provides the measure of inequality in sanctions based on culpability.

By the same token, if it is appropriate to be concerned about the effects of punishment on the offender's family or on the victim, then sanctions based simply on offense would likewise be objectionable. And if it were believed that sanctions should reflect the possibility of rehabilitation, the principle of equal treatment would be violated by punishing identically two offenders who committed a given crime where one had repeatedly and seemingly unsuccessfully been treated by various juvenile corrections programs and the other had never been so treated.

If equality can mean various things, the real issue becomes one of justice or fairness. Equality and fairness are not synonyms. Distribution, whether of goods or punishments, may be equal by some criterion, but the fairness of the criterion is itself a matter for analysis. The claim that only the criminal law approach provides equality and fairness cannot stand, therefore, unless we reject the appropriateness of other criteria for fairness or establish that the principle of offense as it is articulated and carried out in the criminal justice system adequately reflects those other criteria. Neither proposition seems to be justified.

We have already seen, at considerable length, that criminal law theory relies heavily on judgments of culpability, yet its categories offer only relatively crude approximations of that phenomenon. This, by itself, would justify hesitation about the fairness of that approach. And the more we inquire into the appropriateness of concern about various elements of culpability which are only imperfectly measured by the principle of offense, the more hesitation is justified.

In connection with youth crime, we have seen that charges are only brought with the agreement of various legal communi-

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127. *See* Fletcher, *supra* note 16, at 1302.

128. *Cf.* Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847 (1987) ("[I]mplicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand.").

ties. On positivist assumptions, the lack of such agreement can seemingly be explained only in terms of deviance. That is not, however, an entirely adequate explanation. We look back to the discretion of police officers to employ informal sanctions, even for undeniable criminal conduct, not only with nostalgia but with approval. We also recognize that a considerable amount of such discretion is currently employed. Indeed, individualization of this kind has been formalized through diversion programs in both the juvenile and criminal justice systems because we value that capacity on the one hand and yet still wish to control it on the other.

In seeking justice or fairness, it is also difficult to devalue alternatives to the criminal (and juvenile) justice system on which communities and police have long relied. A high degree of community cohesion, which seems to explain the readiness of members of some communities to avoid seeking official response to deviance,[129] is not generally considered a bad thing. It is true that young people who commit felonious non-violent or minimally violent offenses in these communities will be handled for some time by churches and community centers and that young people who commit similar acts in more disorganized communities will likely be referred to court. However, few people would prefer the latter response to deviance to the former, although they may regret the absence of similar opportunities for youths in more transient and less cohesive neighborhoods.

These observations, if accepted, reveal the extent to which we not only recognize but normatively approve avoidance of official sanctions, even for acts that are relatively unambiguous in character. The reluctance of some individuals and communities to pursue criminal charges against an actor reflects one or more of several conditions. It may reflect a sense that invocation of criminal justice agencies is more harmful than helpful to the offender. Almost surely, it indicates a belief that not every youth who takes property or even injures another person is culpable, or sufficiently culpable to require official punishment. To the extent that these perceptions are not rejected as inappropriate, they plainly embody a set of norms that is not adequately captured by the processes of the criminal justice system.

Furthermore, individualization is normatively approved on more general grounds, as appealing to notions of individual dig-

129. *See supra* text accompanying notes 80-82.

nity and meaning. Categorical rules of criminal responsibility are, in a real sense, stereotypes. A great deal of modern legal and social culture is concerned precisely with loosening our reliance on stereotypes. This is surely true of a considerable body of constitutional doctrine, as well as other doctrine in family law.[130]

Criminalization of offenses by minors seems centrally inconsistent with our general rejection of simplifying assumptions. Stereotypes are, indeed, especially dangerous when applied to special populations such as those with which we are concerned. The rhetoric of reform certainly invokes a strong picture of the youthful criminal who murders because he is subject only to juvenile court jurisdiction. These terrible events do occur, and should be dealt with as they warrant. They do not, however, describe the general run of youth crime which is swept up in the image conveyed.

V. Conclusion

This discussion has examined a special instance of the controversy over rules and standards that pervades legal discourse generally, and criminal law particularly: the question of criminalization of offenses by young people. It has not sought to resolve the contradiction between these two regimes. Rather, it has sought to identify the formal and operational characteristics of these systems of justice in the belief that, even if neither can be maintained in principle, there is value to evaluating their relative desirability for purposes of dealing with youth crime. It is in this sense that the discussion is pragmatic.

Does it follow, then, that social response to youth crime is, and must be, standardless? On its face, a strong claim of this kind is implausible. Judges and juries are, after all, products of their culture. That culture is the origin of the notions of blameworthiness and harm reflected both in legislative rules and in judicial or lay attitudes towards deviance.[131] It is obvious, therefore, that formal decisions will and must incorporate standards that are recognizable within the common cultural context.

Consider, for example, judicial decisions to transfer a minor for prosecution in the criminal court. Legislative and judicial cri-

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130. State laws of ancient lineage that provided alimony for wives but not husbands, for example, have been struck down just because they rely on stereotypical assumptions about economic activity. Orr v. Orr, 440 U.S. 268 (1979).

131. *See supra* text accompanying notes 95-96.

teria for these decisions typically include seriousness of offense, the age and previous record of the accused, and sometimes his or her amenability to treatment by juvenile justice programs.[132] Because a variety of factors are involved, transfer decisions have been compared to death penalty statutes in their lack of standards.

Examination of data regarding these decisions yields, however, a somewhat more complex picture. First, transfers are uncommon in most states. The most complete study of judicial transfer, conducted in Minnesota, reported that only about six-tenths of one percent of all youth crime results in a petition for certification to the adult court.[133] Although transfer in some other jurisdictions is more frequent, it is never a common practice.[134]

Second, petitions for transfer seem to reflect the standards articulated by legislature. Nationally and in Minnesota, there is a direct correlation between the commission of serious offenses—particularly, those involving personal violence—and transfer.[135] Certified juveniles were also likely to have had a previous referral to the juvenile court. Two-thirds of the transferred minors had at least one prior referral, as compared with about one-quarter of the minors prosecuted in the juvenile court. Finally, older juveniles were also far more likely to be transferred.[136]

There is nothing surprising in these patterns, which we assume can be found across the country. Indeed, legislative rules limit the pattern that could exist, even without regard to customary notions of culpability. The pattern does indicate, however, that the sense of standardlessness does not arise from decisions to transfer for adult prosecution, but from decisions *not* to

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132. *See* Feld, *supra* note 47, at 9-17; D. Hamparian, L. Estep, S. Muntean, R. Priestino, R. Swisher, P. Wallance & J. White, YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 43-72 (1982).

133. Feld, *supra* note 47, at 26.

134. The most comprehensive national study, conducted in 1978, indicated that between one and two percent of all juvenile court findings resulted in referral to criminal court. Hamparian, *Juveniles in Adult Court*, in NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, UNITED STATES DEPARTMENT OF JUSTICE, DEALING WITH SERIOUS, REPEAT JUVENILE OFFENDERS 39, 41 (1981).

135. *See* Feld, *supra* note 47, at 30, Table 2. Seventy percent of the juveniles certified to the adult court were charged with a felony, and almost half of those with a felony against the person of another.

136. *Id.* at 30-34.

do so. Any claimed inequality and unfairness must lie in the retention of minors in the juvenile court system who appear to be indistinguishable from those who are transferred to the criminal court system.

Because we are dealing with a small number of youths who are in fact transferred, it is always possible that they present special circumstances relating to the child or the offense which do not emerge through statistical analyses. Even if we ignore that possibility, however, there are still two solutions to the problem of inequality. Uniformity of treatment would be enhanced by elimination of transfer quite as much as by adoption of the criminal justice approach. An appeal for uniformity thus does not ultimately require return to the theory and method of the criminal justice system.

There is, as well, a middle ground between retention of the capacity for individualization in its current, highly generalized form and its abandonment. That *via media* requires reconsideration of the substantive categories of culpability for juveniles, both in connection with delinquency proceedings and in proceedings for transfer for adult prosecutions.

As we saw early on, juvenile codes are generally content simply to incorporate by reference the generally prevailing rules for adjudicating adult criminality. Those rules, even applied to adults, have been criticized for their failure to consider the culpability of individuals before the court.[137] Whatever may be true in that domain, punishment justified by deserts and dependent on categories of offense supposes a normative clarity about conduct and mental state that cannot routinely be supposed for children. Accordingly, it seems sensible to consider adopting, for this special population, formulations that depart from the usual Anglo-American approach to adult wrongdoing.

One such strategy involves replacing the "objectivity" of the traditional approach to culpability with subjective grounds. We have already seen that most criminal codes recognize self-defense only when the actor actually feared imminent death or serious bodily harm and was "reasonable" in that judgment.[138] The same objective criterion can be found in the definition of offenses and the formulation of defenses. An accused charged with forcible rape is, in many jurisdictions, guilty even if he gen-

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137. *E.g.*, Fletcher, *supra* note 16.

138. *See supra* text accompanying note 67.

uinely believed that the victim consented to intercourse, unless the belief was reasonable under the circumstances.[139] Duress ordinarily provides an excuse only when a person of reasonable firmness would have been unable to resist the threat of unlawful force.[140]

We have already seen that an adult judge or jury faces great difficulty in deciding what a fifteen-year-old would consider "reasonable," and we also have reason to think that minors of this age undergo developments in perception that vary considerably from adolescent to adolescent. A body of respectable authority argues for a subjective test for adult proceedings, on the ground (among others) that a reasonableness standard inappropriately makes guilt of murder turn on negligence regarding the risk of harm.[141] Even if that standard is acceptable for adults on the ground that they can be held to some generally applicable standard of thoughtfulness, an especially persuasive case for subjectivization seems to exist for minors about whom such a standard is difficult to articulate or apply with confidence.

If the trier of fact decides that the child did honestly believe that he or she faced a threat of death or serious bodily harm, then he or she was at most negligent in assessing the circumstances—and even that is very hard to determine. If, on the other hand, it appears that the child did not so believe, and in fact killed with intention and without justification, adjudication or transfer may be ordered on a basis in which we can have relative confidence.

Subjectivization may not entirely satisfy the requirements of individualization. There still may be qualitative aspects of the child's "intent" to be considered. These aspects are best addressed by allowing the trier of fact or sentencing agency to inquire directly into a minor's understanding of his or her act. Although there are models for doing so, as we have seen, that further step presents an important but independent inquiry.

But this is not the place to attempt the elaboration of a criminal code for minors. It is enough to suggest that doing so is well worth considering. Certainly such a code would present risks of inaccuracy in adjudication, as the juvenile court's cur-

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139. *See, e.g.*, Commonwealth v. Sherry, 386 Mass. 682, 437 N.E.2d 224 (1982); People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975).

140. *E.g.* MODEL PENAL CODE § 2.09 (1985); State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977) (following Model Penal Code approach).

141. *E.g.*, G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 451-55 (1st ed. 1978).

rent method of individualization does. However, those risks might be reduced somewhat by the articulation of more acceptable guides to judges and juries. In any case, either the traditional approach or a revised inquiry seems preferable to an approach where the risks of inaccuracy and unfairness are masked by a formal uniformity that is unsuited to the conditions and context of its application.