Pursuing Juvenile Justice: Comments on Some Recent Reform Proposals*

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INTRODUCTION

The establishment of the juvenile court in 1899 was a dramatic innovation in social policy toward youth crime. The purpose of this new court was not to dispense justice to criminals, but to identify and meet the needs of "delinquents." Because the juvenile court would exercise state power only benignly, the judge was given discretion to sentence any delinquent to anything from probation through institutional confinement—until his or her majority. And because the label of delinquency was to carry no stigma, almost any troubled youth could be found delinquent. This set of assumptions, what I shall call the "omnibus theory of delinquency", has dominated legal policy toward young offenders for most of this century. Over the last decade, however, social confidence in the propriety and effectiveness of this approach has declined sharply in the face of rising crime rates and growing distrust of the beneficence of state power exercised in the name of "curing" delinquency. There is widespread agreement that the basic principles underlying legal policy toward youth crime are ripe for reform, but there is also uncertainty and disagreement on how far and in what direction reform efforts should proceed. This note briefly summarizes some major themes in the large collection of recent "juvenile justice reform" literature and suggests two principles that justify a special policy for sentencing young offenders in juvenile and criminal courts.

A student of American culture might well be puzzled by the tone of most contemporary criticism of social policy toward young offenders. Crime is on the rise, and law-and-order rhetoric dominates public debate on criminal justice, but most reform proposals concerning juvenile justice favor lessening social control. Publicity about serious crimes committed by the young has produced several get-tough legislative proposals, but the recommendations of schol-

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ars and commissions are for "radical nonintervention,"¹ "locking them [juvenile offenders] out,"² and "the least restrictive alternative"³ for disposing of youthful offenders.

Perhaps reformers and reform commissions are more soft-hearted than the general public. But the tenor of the rhetoric of reform in juvenile and criminal justice also may be related to a decline in emphasis on rehabilitation as a goal of sentencing. In the criminal justice system, the decline of rehabilitation has redirected attention to the other proclaimed motives of criminal law—retribution, deterrence, and incapacitation. In the juvenile court, loss of faith in rehabilitation has undermined the only announced purpose of the omnibus theory of delinquency, leaving the court without any formal rationale for intervention in the lives of its subjects.

GENERAL CONSENSUS AND SPECIFIC DISAGREEMENT

Apparent differences in contemporary reform proposals often shrink upon closer examination. For example, Radical Nonintervention is the title of a celebrated book by Edwin Schur. Much of Schur’s analysis is indeed radical, but his prescription for dealing with serious youthful offenders is not:

Individualized justice must necessarily give way to a return to the rule of law. This means that while fewer types of youthful behavior will be considered legal offenses, in cases of really serious misconduct such traditional guidelines as specificity, uniformity and nonretroactivity ought to apply. Juvenile statutes should spell out very clearly just what kinds of behavior are legally prescribed, and should set explicit penalties for such violations (with perhaps a limited range of alternatives available to sentencing judges.)⁴

On this subject, Schur sounds as staid as a presidential commission. His proposal expresses a desire to return to principles of culpability from which young offenders have for the most part been exempted under the omnibus theory of delinquency.

⁴. Schur, supra, note 1, 169.
Similarly, Jerome Miller, the architect of the first state program "to adopt and quickly implement a policy of closing down the traditional training schools," included as point seven in his deinstitutionalization policy "Acquisition of the new small intensive care security unit." The inclusion of this facility was felt necessary because the traditional training schools had served as symbols of general deterrence, community protection and retribution. Even successful treatment on a community based program would not achieve this symbolic objective. . . . Most professionals agree that cases requiring security represent a small number, but they are the most troublesome for the local juvenile justice system to manage. There is, of course, wide disagreement about just which offenders merit this type of treatment.  

Schur and Miller are associated with extreme reformist positions in juvenile justice. Yet their ideas closely parallel the proposals in the mainstream juvenile justice standards project, which its chairman has labeled the "new pragmatism," and the earlier efforts of the President's Commission on Crime. In advocating "radical nonintervention" and "least restrictive alternative," respectively, Schur and Miller are not arguing that serious youth crime should be ignored but rejecting the omnibus theory of delinquency, which invokes the coercive power of the state in proportion to what a child needs rather than to what he has done.

The omnibus theory of delinquency and the broad reach of delinquency jurisdiction still have their defenders, but a consensus is forming among commissions and commentators in support of four basic juvenile justice reforms:

- narrowing the delinquency jurisdiction of the juvenile court
- reducing the number of youths placed under formal social control
- cutting back on state power to intervene coercively in the lives of young persons who have not violated the criminal law
- making the maximum amount of social control that can

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5. Miller & Ohlin, supra note 2, at 154.
6. Id. 163-64.
be imposed on young offenders proportional to the seriousness of their offenses.

Stated in such general terms, this reform agenda enjoys the support of the President's Commission on Crime, the Commission on Standards and Goals, the Juvenile Justice Standards volumes, and a majority of academic commentators. But this consensus is qualified by two important facets of modern discussion of social policy toward youth crime. First, most commentators are preoccupied by the omnibus theory of delinquency, and have devoted little time and thought to the "serious offender." More extensive study of young people who have committed serious offenses and the treatment they receive in juvenile and criminal courts might lead to heated debate over what constitutes "seriousness" and what proportionality means in assessing the culpability of young offenders. Second, to the extent that they have considered the details of policy toward young offenders, commentators differ substantially as to both the extent to which jurisdiction and power should be curtailed and the means they favor to achieve the four reforms on which they agree.

For example, almost all favor reducing state regulation of noncriminal misbehavior on the part of the young. But the measures proposed for this purpose range from total abandonment of coercive power over noncriminal behavior to simply keeping this noncriminal group out of secure institutions after adjudication. Similarly, the consensus in favor of making the exercise of coercive state power more proportional to the seriousness of the youth offense coexists with a wide range of opinion on what constitutes proportional punishment. Thus, depending on which of many reform proposals is adopted, a sixteen-year-old convicted of murder may receive any-

10. The National Advisory Committee on Juvenile Justice and Delinquency Prevention favors immediate elimination of jurisdiction over noncriminal misbehavior. The Advisory Committee on Standards would retain jurisdiction over noncriminal misbehavior while providing that juveniles not guilty of criminal misbehavior should not be held in secure custody. U.S. Dep't of Justice, LEAA, Nat'l Juvenile Inst. for Justice and Delinquency Prevention, Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice 11-16 [hereinafter cited as Report of the Advisory Committee].
thing from a maximum of twenty-four months in secure custody to the death penalty.\textsuperscript{11}

The different approaches to reform vary in both style and substance. For status offenses and undesirable, but noncriminal behavior, some reformers, apparently including Schur,\textsuperscript{12} would limit the state to supplying only voluntary social services. The Juvenile Justice Standards scheme would provide the state with some "crisis intervention" authority in the short term, but would rely on the child's consent to accept treatment following "noncriminal misbehavior" and does not suggest any official response to those young people presently classified as status offenders because they abuse substances, such as alcohol or tobacco, that are forbidden to minors.\textsuperscript{13} Other proposals to de-emphasize the role of the juvenile court in "status offenses" involve the creation of entire new networks of "community-based" programs for status offenders, "predelinquents," and other children considered to be in need of state supervision.\textsuperscript{14} The federal Juvenile Justice and Delinquency Prevention Act of 1974\textsuperscript{15} seems to provide for some degree of coercive state power to channel status offenders into such community-based programs. Proposals to remove coercive state power probably would bring fewer adolescents under state supervision. Proposals involving the use of the juvenile court's coercive power as a backup to a new network of treatment would probably increase the number of agencies exercising social control over young persons and the number of young persons involved in the totality of the youth control system. Yet the proponents of both approaches maintain that their primary purpose is to reduce the use of the juvenile justice system to deal with status offenders.

Similarly, in dealing with the young offender, many proposals for proportionality in sentencing policy retain both the juvenile court and the status of delinquency. These proposals approach proportionality by defining different grades of delinquency and assigning different maximum sentences to these separate grades.\textsuperscript{16} These

\textsuperscript{11} Twenty-four months is the maximum sentence under the Juvenile Justice Standards. Juveniles waived to criminal court may face the death penalty under the standards set forth by the Advisory Committee on Standards. IJA/ABA JUVENTILE JUSTICE STANDARDS, \textit{supra note 7}, at 5.1-5.2; REPORT OF THE ADVISORY COMMITTEE, \textit{supra note 10}, at 3.116.

\textsuperscript{12} SCHUR, \textit{supra note 1}, at 145-46.

\textsuperscript{13} IJA/ABA JUVENTILE JUSTICE STANDARDS, \textit{supra note 7}, at 4.2.

\textsuperscript{14} ADVISORY COMMITTEE, \textit{supra note 10}, at 3.112, 3.183.


\textsuperscript{16} IJA/ABA JUVENTILE JUSTICE STANDARDS, \textit{supra note 7}, at 5.1-5.2; TASK FORCE, \textit{supra note 7}, at 14.13-14.14.
proposals retain the existing vocabulary and legislative framework of the juvenile court as a mechanism for reform. At the other extreme, proposed Canadian legislation would abolish both the concept of delinquency and the title of juvenile court in favor of a "court for young offenders." Substantial arguments can be made for both of these approaches. The case for renaming the institutions that deal with young offenders now within the jurisdiction of the juvenile court is, of course, that if we reject the omnibus theory of delinquency the child-centered court that was organized around that theory should be abolished. The case for retaining the old labels but reforming the consequences of labeling rests more on political than on jurisprudential considerations. The juvenile court is an existing, powerful, and resilient institution that currently achieves some protection for some young offenders. Working within present jurisdictional rubrics and terms would probably generate less political opposition than discarding the labels as well as the content of the omnibus theory of delinquency.

**SOME PERSPECTIVES ON REFORM PROPOSALS**

Although recent efforts to reform juvenile justice have been thoughtful and constructive, much of the recent literature on the subject is deficient in three important respects. First, many youth crime proposals come to different conclusions, not because they focus on different archetypical cases. Second, some proposals intended to achieve greater uniformity in the juvenile court might achieve that objective but create greater disparity between the adolescent in juvenile court and the adolescent in criminal court because they do not deal with the latter. Third, proposals for alternatives to the omnibus theory of delinquency fail to provide a principled basis for differentiation among the various forms of youth criminality.

*Paradigm Cases: Different Theories for Different Problems.*

Proposals for juvenile court reform differ in part because different commentators have had different typical cases in mind. Most runaways with whom the juvenile court deals, for example, are in

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early or middle adolescence.\textsuperscript{18} Perhaps for that reason, the Juvenile Justice Standards volume on “noncriminal misbehavior” asserts that “the juvenile’s acts of misbehavior, ungovernability, or unruliness which do not violate the criminal law should not constitute a ground for asserting juvenile court jurisdiction.”\textsuperscript{19} The Standards volume requires the consent of the child to his return to parent or guardian. Such policies may or may not make sense when applied to a fifteen-year-old child in conflict with his family who has run away from home. But as written, they appear to apply with equal force to seven-year-old children.\textsuperscript{20} Such a curtailment of parental power over seven-year-olds is a sharp departure from common law and constitutional standards of parental control and appears to be quite a different issue from the same policy applied to children eight years older. Was this delegation of power to seven-year-olds intended? Or is it an example of an analysis that began with a single paradigm case and proceeded to the formulation of standards without regard to all the other instances of the problem?

The problem of stereotyping issues in terms of particular age groups is pervasive in juvenile justice and juvenile justice reform. For example, the merits of radical nonintervention would appear to depend heavily on the age of the child being discussed. Any balanced agenda of reform must be prepared to recognize the great differences among children in different developmental phases both before and within adolescence and to respond with something other than a single standard to the great variety of problems that different forms of deviance by the young represent.

A similar problem of stereotyping exists in much of the public debate over what to do with “the violent young offender.” Public and legislative concern about violent crimes committed by young people tends to crystalize around well-publicized and unrepresentative episodes of violent crime committed by young offenders. On occasion, these well-publicized stereotypical cases become a basis for policy recommendations. Yet a case on the front page of The New York Times may mislead readers, causing them to form an

\textsuperscript{18} The average age of a runaway child in the United States is 14.5 years. Two-thirds of the runaway children arrested in the United States in 1976 were under age sixteen. \textsc{Behavioral Research and Evaluation Corporation, Final Report: The Incidence and Nature of Runaway Behavior} (1975).

\textsuperscript{19} \textsc{IJA/ABA Juvenile Justice Standards, supra note 7, at 1.1.}

\textsuperscript{20} \textit{Id.} The volume contains no discussion of differential treatment for even the youngest children. The standards relating to juvenile delinquency and sanctions provide for a minimum-age jurisdiction of ten.
image of "the violent offender" and apply it to the arrest and court processing statistics on "violent crime." The four offenses that are generally aggregated and reported by the FBI as violent crimes are homicide, rape, robbery, and aggravated assault. Homicide and rape are candidates for the front page, particularly when the offender is young and the victim is old, vulnerable, or well known. Yet 90 percent of all youth arrests for violent crime are for robbery and aggravated assault. Moreover, the 133,000 arrests made in 1975 for robbery and aggravated assault varied dramatically in seriousness and extent of offender involvement. Most of the victims of aggravated assaults by young offenders also are young, and the crime itself encompasses a range of acts from fistfights through shootings. Most offenders under twenty who engage in robbery are unarmed rather than armed, and arrests for both robbery and assault often involve a large number of accessories as well as principal offenders. To think of a single category of "the violent offender" under such circumstances is to be mislead in a profoundly dangerous way.

The Problem of Systemic Impact.

A second pervasive problem in the literature on juvenile justice reform is a failure to recognize the broader implications of decisional principles applied to the juvenile court. For example, according to the waiver provisions of the Juvenile Justice Standard Act, a juvenile never before convicted of offenses involving violence cannot be waived out of the juvenile court, and even if he is currently charged with murder, the maximum sentence he may receive is twenty-four

21. See Chapter I, Table I-1.
23. Of the 152,000 arrests for violent crime of young offenders (under twenty-one) in 1975, 133,000 were crimes of robbery or aggravated assault. Dep't of Justice, Federal Bureau of Investigation, Uniform Crime Reports for the United States, 1975, Table 37 (1976).
24. Sixty-four percent of the twelve- to nineteen-year-old victims of aggravated assault by a lone offender perceived their assailants to be between twelve and nineteen years old. Seventy percent of the twelve- to nineteen-year-old victims of aggravated assault by multiple offenders perceived their assailants to be between twelve and nineteen years old. U.S. Dep't of Justice, LEAA, National Criminal Justice Information and Statistics Service, Criminal Victimization in the United States, 1973, 85-87 (1976).
months in a secure facility. Within the juvenile court, there may be much to recommend such an approach. From the broader perspective of a social policy toward youth crime, such a standard seems arbitrary. In a jurisdiction that defines the eighteenth birthday as the age limit for juvenile court processing, a seventeen-year-old willful killer will face a maximum penalty of twenty-four months confinement; an eighteen-year-old may face the death penalty for the same offense. The requirement of a prior adjudication for a violent offense before any juvenile misconduct is waivable has two paradoxical effects: First, it may subject two juvenile killers to grossly different punishments if one has a prior record of violence within the juvenile court and the other does not. If waiver to the criminal court depends on the existence of a prior juvenile record, the killer who is waived to the criminal court because of his previous history of adjudication for a violent offense can rightly claim that it is his prior juvenile offense rather than the crime of which he is accused that has resulted in his unfavorable treatment. Second, a tight waiver standard increases the importance of the arbitrary jurisdictional age boundary between juvenile and criminal courts.

The more we reform the juvenile system without regard for the treatment of young offenders in criminal court, the farther we stray from continuity and consistency in overall sentencing policy. The difficulty of fashioning standards for waiver is, in my judgment, a symptom of failure to approach reforming youth crime policy as an inter- rather than an intrainstitutional problem. Certainly, immaturity may be considered to carry with it diminished responsibility, but reforming only one part of the dual system that deals with youthful offenders may create more disparity in treatment of essentially similar conduct than it alleviates.

Treating Different Cases Differently.

The reform literature suggests that, unless one is prepared to swallow the omnibus theory of delinquency whole, it is not the age of the offender so much as his particular circumstances that should determine social policy toward his conduct. To consider the bank robber and the bicycle thief under the same jurisdictional rubric with the same dispositional alternatives is to endorse a theory of juvenile delinquency that is either obsolete or fading quickly. To proceed in any other manner toward reform is to consider the differ-

27. Id. 2.2(c)(2).
ent types of youth deviance as representing different bases for the imposition of coercive state controls.

If runaway and robber are different social problems, and if the concept of proportionality in sanctions for youthful offenders is carried to the logical conclusion of different sanction alternatives, we must cease to consider delinquent minors as a categorical grouping independent of the acts they commit. We must instead consider different classes of criminal offenses and offenders as special cases.

This relatively simple shift in focus has two consequences for the analysis of juvenile court processes. First, within the juvenile court, an emphasis on proportionality leads necessarily to a jurisprudence closer to that of criminal courts than of traditional juvenile justice jurisdiction. That is, move closer to making the punishment fit the crime and farther away from the treatment ideology and omnibus theory that have characterized juvenile delinquency jurisdiction in years gone by.

Second, the emphasis on the degree of seriousness or dangerousness of juvenile behavior also calls into question the appropriateness of the border between juvenile and criminal jurisdiction. The more closely the dispositional principles of the juvenile court resemble those of the criminal court, the more apparent become those differences in consequence that attach to juvenile as opposed to criminal court jurisdiction. Once the all-encompassing theory of delinquency is abandoned, the similarity between older juveniles and younger nonjuveniles also becomes more apparent; any disparity in the treatment of these two groups becomes, more clearly, an occasion for questioning the present dual system.

The Search for Principles

The conflicts inherent in sentencing young offenders do not disappear with the invocation of a magic word, such as "proportionality." Balancing the many conflicting interests involved in protecting the young while suppressing youth crime remains a necessary part of setting punishments for young offenders.

All of the detailed commentaries on policy toward youth crime that invoke principles of proportionality also call for substantially shorter maximum periods of incarceration for convicted youthful offenders. For example, the Juvenile Justice Standards volume on sanctions sets forth a concept of proportional sentencing in which the maximum penalty available for a juvenile offender is totally determined by the maximum punishment provided by a particular
state legislature for an adult who commits the same crime. But the differences in the quantities of punishment available are substantial, as Table 1 demonstrates.

<table>
<thead>
<tr>
<th>Class</th>
<th>Ages 18 and older</th>
<th>Ages 10-17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class 1</td>
<td>Life/Death or over 20 Years</td>
<td>2 Years</td>
</tr>
<tr>
<td>Class 2</td>
<td>Over 5-20 Years</td>
<td>1 Year</td>
</tr>
<tr>
<td>Class 3</td>
<td>Over 1-5 Years</td>
<td>6 Months</td>
</tr>
<tr>
<td>Class 4</td>
<td>1 year or less</td>
<td>3 Months</td>
</tr>
</tbody>
</table>

*a Secure facility only if prior record.

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Such a scheme is proportional only in the sense that the maximum criminal court penalty determines the maximum juvenile court sanction. But without considering the proportionality of sentences for adult offenders, the authors of the Standards volume arrived at arbitrarily varying ratios between adult and juvenile sentences. The maximum penalties for juvenile offenders are only fractions of those for adult offenders—one year instead of twenty for “class 2” offenses. A seventeen-year-old convicted of murder will serve far less time than is authorized for an eighteen-year-old, the distinction between a “class 2” and “class 3” offense can mean a difference of almost nineteen years’ imprisonment; for a seventeen-year-old, the difference in maximum penalties for the two offenses is six months.

Discontinuities of this kind would be troublesome under any system. When they occur in a system that espouses proportionality as its aim and uses adult sentences rather than theories of delinquency as the point of reference for juvenile sanctions, the contrasts are all the more noticeable and disturbing.

Where, then, does one look to find principles for constructing a unified approach to sentencing young offenders?

The criminal codes and case law in most states are silent on the sentencing of young offenders. They hide whatever special policies might exist behind the judicial and prosecutorial discretion in crim-
inal sentencing. Those few jurisdictions that have special youth corrections acts are not promising models: these acts generally provide for indeterminate sentences and represent an extension of the same rehabilitative logic that generated the omnibus theory of delinquency.29

The general argument for proportionality in criminal sentences means either a return to the discretion that governs the criminal court or a search for new principles. It is a singular tribute to the unpopularity of the omnibus theory of delinquency that its critics are willing to fall back on the uncertainties of adult criminal sentences in their pursuit of reform.30 In the current state of American criminal law, an appeal to proportionality is not a solution to the issue of policy for young offenders; it is a method of starting from scratch.

As a starting point, reform requires principles to explain legal response to youth crime. The two most plausible justifications for separate treatment of adolescent offenders are the social value of giving young offenders the chance to mature and the theory that offenses committed by adolescents are less blameworthy than those committed by adults because the offender is not fully mature. Both of these principles justify lenient treatment of young offenders, but they differ in a number of other respects.

Room to Reform.

One function of social policy toward young offenders is to provide the opportunity for them to outgrow a developmental stage that is peculiarly vulnerable to pressures toward criminality. The intense concentration of some property offenses among adolescents suggests that most people who commit such offenses during adolescence cease to commit them upon attaining adulthood. One purpose of mitigating the harshness of punishment for young offenders is to enhance the opportunity to survive adolescence without a major sacrifice in life chances. In providing the opportunity, a community deliberately takes risks with the auto thief, just as it takes risks with the young driver.

Advocating “room to reform” for young offenders is not the equivalent of saying that criminal acts committed by the young should go unpunished. Punishment may be an appropriate response

29. For example, Youthful Offender Act, Wis. Stats., § 54.01 et seq. (1975).
30. IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS.
to youth crime. But a policy that facilitates growth is one that avoids permanent stigma, the isolation of young offenders from community settings, or any other form of exile from the larger society in which they are expected to grow.

A general policy of giving young offenders the opportunity to learn from and survive adolescent misdeeds represents an intelligent social policy option as a value decision independent of whatever empirical data we have that suggests it is "cost effective"; values may dictate policies designed to achieve these ends, even if a substantial minority of the young do not outgrow patterns of law violation.\footnote{The most careful study of the later careers of young offenders is being supervised by Marvin Wolfgang of the University of Pennsylvania. Preliminary results show that about half of all individuals arrested prior to age eighteen are arrested in the decade after their eighteenth birthday, but a far smaller proportion become chronic offenders.}

Perhaps American adolescents should not be age-segregated and dependent.\footnote{J. Coleman, Youth: Transition to Adulthood (1974).} But the social meaning of adolescence was not invented by adolescents. Our culture views the adolescent years as a transition—frequently a troublesome transition—to adulthood. Social policy toward the young offender should be designed, as much as is practical, not to diminish the individual's chances to make that transition successfully.

The concept of "room to reform" differs from the concept of rehabilitation, which relies on coercive state power to socialize and mature young offenders. The advocates of rehabilitation envisioned a curing process in which treatment produced results in a relatively passive subject. Underlying the concept of providing room to reform are the notions that reform is a process in which time, the offenders' efforts, and the resources in the community at large play their parts; the use of coercive state power may sometimes unduly disrupt this process. This is not to say that the state plays or should play a neutral role in individual growth. Better educational and social services, and greater social and economic opportunities for the young probably facilitate growth in the lives of all young people, particularly those most at risk during adolescence. But these aspects of social policy toward youth are not crime-specific, nor do they amount to the compulsory moral rearmament favored by the most extreme advocates of rehabilitation.

\textit{Diminished Responsibility.}

Another rationale for separate treatment of young offenders is
diminished responsibility on account of immaturity. If proportionality was the sole consideration in sentencing, many young offenders would receive harsher punitive treatment than that meted out to most adult offenders. Sound sentencing policy also takes into account the forces that impinge on adolescent life, including the adolescent's shaky judgment and incapacity to resist peer pressure. The concept of diminished responsibility on account of immaturity means that young offenders should be treated more leniently than adult offenders not because their acts are less dangerous, but because they are less capable of controlling impulses, resisting peers, or thinking in the long-range terms that characterize mature decisionmaking. The implications of diminished responsibility are paradoxical: we punish those who are greater risks to the community more leniently precisely because of the conditions that make them greater risks.

Precedents for this type of policy appear in the criminal law of insanity, intoxication, and mental instability. Some of these conditions provide a complete defense against criminal liability. Adolescence clearly should not be in this category, unless one is prepared to argue that the condition of adolescence in American society totally deprives the affected individual of the capacity to know right from wrong or to resist any impulse. More instructive are the mitigations of punishment available for the mentally disturbed, who are held partially accountable for their acts. Their criminal behavior is considered blameworthy, but less so than that of a normal individual. Adolescents have had some experience in making moral decisions, but not so much experience as adults and far fewer opportunities than adults have had for exercising responsibility in making decisions.

A diminished responsibility policy, given the reasoning behind it, should operate on a sliding scale. Just as the adolescent is held less morally responsible than the adult, a fourteen-year-old is presumptively entitled to a greater degree of mitigation of blameworthiness than an eighteen-year-old. Similarly, chronological age cannot be the sole basis for determinations of maturity; the different capacities and life circumstances of two sixteen-year-olds may call for different gradations of the criminal sanction.

33. ALI, MODEL PENAL CODE, §§ 4.01 (mental disease or defect) and 2.08 (intoxication) (1962).
In theory, the notion of diminished responsibility due to immaturity applies to the full range of criminal offenses. Yet considerations of diminished responsibility have more pronounced effects on sentencing for the very serious offenses that normally mandate the most awesome of criminal punishments than on sentencing for more trivial offenses. The greater the otherwise available sanction, the greater the practical weight of diminished responsibility as a mitigation of that sanction. Moreover, the more bizarre the criminal behavior, the more likely are the circumstances of the offender to suggest diminished responsibility. Thus, diminished responsibility is one of the more dramatic doctrinal examples in the criminal law of the conflict between utilitarian and retributive theories of justice for young offenders. It is the retributive rather than the utilitarian branch of the justification for criminal punishments that provides a basis for diminished responsibility as a major force in determining punishments for young offenders.

As reform efforts move to a system of proportional punishments, the principles of diminished responsibility and of giving opportunity for growth emerge as coherent motives for differential leniency in the sentencing of young offenders. These theories do not correspond to any current jurisdictional borders between juvenile and criminal courts. Rather, they extend across the ill-defined frontiers of adolescence and challenge reform efforts to deal with a broader spectrum of young offenders.

The task of creating a coherent structure for young offenders is intellectually formidable and politically dangerous. Designing special penal policies for the young will be difficult in a legal system that has yet to devise a general jurisprudence of criminal sentencing. Casting aside the romantic omnibus theory of delinquency may produce harsh and arbitrary penal policies in a law-and-order atmosphere. Further, the theories outlined above may be too fragile to support a viable system of separate penal policy for youth crime. But the momentum already generated by critical reexamination of the omnibus theory of delinquency suggests that a new set of basic principles must be found for dealing with the young offender.