

Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court

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*Today, no population poses a larger threat to public safety than young adult criminals. . . . [B]race yourself for the coming generation of "super-predators."*¹

*In sum, this legislation would send a clear, cogent, and convincing message to violent juveniles: "Serious acts have serious consequences."*²

Introduction

Public fear, political capitalism, and a handful of well-publicized incidents involving violence by juvenile actors combined to form the legacy of juvenile criminal justice policy in the 1990s. "Adult crime, adult time" rhetoric in the

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¹ *Juvenile Justice and Delinquency: Hearings on Reauthorization of the Juvenile Justice and Delinquency Prevention Act of 1974 Before the House Subcomm. on Early Childhood, Youth & Families, House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 90 (1996) (statement of U.S. Rep. Bill McCullom, Chairman, House Subcomm. on Crime).

² 143 CONG. REC. S145 (daily ed. Jan. 21, 1997) (statement of Sen. Ashcroft).

early part of the decade has led to policies that are sending increasing numbers of youthful offenders to the adult criminal system, even as juvenile crime has declined.³ In keeping with the rhetoric, these new policies focus primarily on punishment, but have also been hailed because of the strong message they will send to juveniles about consequences. This recent movement gained momentum at the same time that juvenile violent crime rates, which peaked in 1993, continued to drop and while the percentage of juveniles who are serious repeat offenders remains a small percentage of the overall crime problem.⁴ While the transfer of juveniles to the adult system raises serious ethical and moral questions, this article focuses on the utilitarian question: Can the transfer of juveniles to adult court be justified on deterrence grounds?

Most criminal legal theories and the data offered in support of their application are based on adult actors.⁵ This limited theoretical and factual predicate makes the application of current deterrence theories somewhat problematic and incomplete with respect to juvenile actors. The economic theory of deterrence assumes rational adult actors making decisions that maximize adult notions of self-interest⁶ and applies a societal cost-benefit analysis in assessing the value of punishments in influencing these decisions to reduce criminal behavior.⁷ Sociological theory examines external factors and provides important behavioral insights that enhance and supplement this basic economic calculation.

In order to assess the impact of deterrence strategies within a juvenile population, the mere incorporation of

³ See JEFFREY BUTTS & JEREMY TRAVIS, URB. INST. JUST. POL'Y CTR., *THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000*, at 767-75 (2002).

⁴ See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 62, 81 (1999).

⁵ See Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 510 (1999).

⁶ See WALTER NICHOLSON, *INTERMEDIATE MICROECONOMICS AND ITS APPLICATION* 49-62 (1987).

⁷ See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191-93 (1968).

insights from these two disciplines, both premised on the adult model, is not enough. It is important to add a third dimension to the equation for juvenile offenders, one that appropriately acknowledges the differences between the adult and the adolescent. This article attempts to do that by considering the literature from adolescent developmental psychology. Insights from this field of research, supported by recent studies on adolescent brain development, permit a refinement of the factors most relevant to understanding and perhaps addressing negative adolescent behavior.

An examination of contemporary writings on deterrence theory help to illustrate that formulating workable deterrence strategies—an already daunting undertaking as applied to adults—is further complicated by the unique developmental and biological characteristics of youth. Studies indicate that sociological factors, such as perceived credibility of the law, understanding the law, and the influence of peers, play a role in the cost-benefit calculation one makes in deciding whether to commit a crime. Those studies, however, neglect to take into account that the importance an individual gives to these distinct factors depends on whether the individual is an adult or an adolescent. For example, a factor like social influence is likely to be more important than moral credibility to teenagers, due to their developmental psychology. The emerging research in the area of adolescent development provides useful insights not only in assessing the likely success of sentencing policies aimed at either juvenile or adult offenders in reducing crime, but also in helping to assess whether or when such policies are just.

Through the lens of recent advances in the study of adolescent development, this article examines whether transfer policies that place adolescents in the adult criminal justice system can be expected to deter. Part I provides brief background on the history of and rationale behind America's treatment of juvenile offenders. Part II reviews the evidence on the effectiveness of juvenile transfer in deterring criminal behavior. Part III looks at the deterrence effect on juvenile crime from the perspective of economic and sociological theory. Part IV articulates the importance of the missing

piece, adolescent developmental psychology, with respect to juvenile actors. Part V briefly touches upon what is working to prevent and reduce juvenile crime.

I. Background on the Treatment of Juvenile Offenders

One of the primary and most elusive goals of the criminal justice system is deterrence. How can the law be best constructed and implemented in order to prevent criminal conduct? What are the factors that must be considered in structuring a set of legal rules that will be both cost-efficient and effective? Finding an answer to these questions is made more complicated by the fact that deterrence is not the only, or even most visible, aim of the criminal justice system.

Lawmakers, practitioners, and the public want a criminal justice policy that deters individuals from criminal behavior, but they also want a system that punishes wrong doers and exacts retribution. This desire to see a criminal “pay” for harms caused may not always be compatible with the establishment of a punishment scheme that will result in maximum deterrence. Any deterrence model will be influenced by the on-going tension between the utilitarian justification of punishment for future societal benefit and the retributionist justification of “just desserts” for specific harm caused. The law is more often reactive than directive, responding to immediate public concerns and fears rather than focusing on any long-term calculus of public benefit. As a result, retributive policies that merely hold out the promise of deterrence can easily turn into political action, at the expense of policies that actually focus on the identification and elimination of incentives for criminal behavior.

Deterrence purists contend that prevention should be the primary goal of criminal law and the sole justification of exacting punishments.⁸ Grounded in an economic model of

⁸ See generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in FOUNDATIONS OF CRIMINAL LAW 65 (Leo Katz et al. eds., 1999). Bentham asserts that all laws ought to “augment the total happiness of the community,” and that “mischief” as well as punishments

utility maximization,⁹ traditional deterrence holds that punishment should be handed out only to the degree necessary to prevent future criminal action. In order for deterrence to work, it must be understood that punishment will be swift, certain and severe.¹⁰ However, American criminal justice has increasingly embraced punishment for its retributive value as much as, if not more than, for its deterrent value. Punishment becomes legitimate in and of itself. The question becomes how much do policy-makers, and by extension, the public, care whether policies have a deterrent effect? And, if deterrence is a desired goal, how can policies best be constructed and implemented to respect the public cry for retribution, while contributing to the long-term betterment of society?

To further complicate the question, can theories designed around the deterrence of adult criminal behavior be applied to juvenile offenders? Historically, the answer has been, No. Embracing the recognition that children are different from adults, the first separate court for juveniles was established in the United States in 1899. The court's key principles espoused the following four ideas: (1) children have different needs than adults and need adult protection and guidance; (2) children have constitutional human rights and need adult involvement to ensure those rights; (3) almost all children can be rehabilitated; and (4) children are everyone's responsibility.¹¹ This rehabilitative approach to the juvenile court grew rapidly, and by 1925, forty-six states, three territories and the District of Columbia had created separate juvenile courts.¹²

for mischief detract from this happiness and must be kept to a minimum. *Id.* Therefore, punishments have value to the degree that they prevent or "exclude" crime. *Id.*

⁹ See NICHOLSON, *supra* note 6, at 49.

¹⁰ See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 42-64 (1764); see also ANNE L. SCHNEIDER, DETERRENCE AND JUVENILE CRIME 2 (1990).

¹¹ See Carol Stevenson et al., *The Juvenile Court: Analysis and Recommendations*, 6 FUTURE OF CHILD., JUV. CT. No. 3, at 4-28 (1996).

¹² See SNYDER & SICKMUND, *supra* note 4, at 86.

In the 1960s, two landmark Supreme Court decisions *Kent v. United States*¹³ and *In re Gault*¹⁴ imposed certain due process safeguards on the juvenile court, such as the right to a hearing, the right to counsel and the right against self-incrimination. However, the Supreme Court stopped short of requiring a jury in juvenile court proceedings, holding that a jury trial is more adversarial and most likely to “destroy the traditional character of the juvenile proceedings.”¹⁵ Despite the due process revolution brought about by the *Kent* and *Gault* decisions, concerns about the juvenile justice system remained. Fueled by evidence that delinquent children were routinely housed in adult jails,¹⁶ Congress enacted federal legislation providing financial incentives to states to stop incarcerating status offenders, to remove children from adult jails, and to separate children from adults in all facilities.¹⁷ The tension between affording minors greater individual due process protections under the law and preserving the less adversarial, more protective, rehabilitative practice of the juvenile system continued to grow.

More recently, state legislatures have responded to unexpected, but short-lived, increases in juvenile crime during

¹³ See *Kent v. United States*, 383 U.S. 541, 556-62 (1966) (finding grounds for the concern that “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children,” and holding that the juvenile court’s waiver of jurisdiction over a juvenile offender to adult court jurisdiction without a hearing was a violation of the juvenile’s due process rights). While the hearing does not have to meet all the requirements of a criminal trial or an administrative hearing, it must “measure up to the essentials of due process and fair treatment.” *Id.*

¹⁴ See *In re Gault*, 387 U.S. 1, 28, 33, 42, 55 (1967) (holding that whatever the advantages of an informal process, “the condition of being a boy does not justify a kangaroo court,” and juveniles were entitled to notice and an opportunity to be heard, the right to counsel in proceedings that might lead to commitment to an institution, and the right against self-incrimination).

¹⁵ *McKeiver v Pennsylvania*, 403 U.S. 528, 540 (1971).

¹⁶ See generally CHILDREN’S DEF. FUND, WASHINGTON RESEARCH PROJECT, INC., CHILDREN IN ADULT JAILS (1976) (documenting individual stories of children in adult jails).

¹⁷ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 42 U.S.C.).

the late 1980s and early 1990s, by moving away from a rehabilitative approach for youthful offenders to more punitive remedies. The trend marks a return to the days before the juvenile justice system where children as young as seven were tried as "miniature adults" and if found guilty, could be sentenced to life in prison or death.¹⁸ Highly publicized, violent events involving teens and reports of the never-realized youth "super-predator" theory¹⁹ in the early 1990s, continue to be used by lawmakers to justify more punitive remedies for juveniles. Since 1992, forty-seven states and the District of Columbia have made their juvenile systems more punitive through statutory exclusion, judicial waiver, or prosecutorial discretion.²⁰ Although the use of adult criminal

¹⁸ Currently, the United States is one of only six countries known to have executed child offenders since 1990 and holds the distinction of having killed ten child offenders in that time frame, more than the other five countries combined. See LYNN COTHERN, U.S. DEP'T OF JUST., JUVENILES AND THE DEATH PENALTY (2000). Additionally, the recent trial of a teenager in Broward County, Florida, for beating his six-year-old cousin to death while imitating wrestlers illustrates the way crimes modeled on adult behavior are being used to try and sentence juvenile actors. See *State v. Tate*, No. 99-14401CF10A (Fla. Super. Ct. Mar. 9, 2001). In order to avoid the need to prove all the elements of premeditation, the state charged fourteen-year-old Lionel Tate with felony murder. CNN Transcripts, Special Event, *Wrestling Death: Judge Sentences Lionel Tate, 14, to Life in Prison*, at <http://www.cnn.com/TRANSCRIPTS/0103/09/se.04.html> (Mar. 9, 2001). The "felony" was aggravated child abuse under the Florida Statutes. *Id.*; Fla. Stat. Ann. § 827.03 (West 1999). Although the sentencing judge observed that the Florida legislature should "revisit the issue" of whether a child should be deemed capable of "child abuse," he declined to find the felony charge inapplicable to Lionel Tate (twelve years old at the time of the incident) "[i]n the absence of case law to the contrary." CNN Transcripts, *supra*.

¹⁹ John J. DiIulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, reprinted in John DiIulio Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us into Wanting to Get to the Root Causes a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31 (commentary). But see Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

²⁰ Statutory exclusion is when the state legislature predetermines the question of criminal prosecution; judicial waiver leaves the decision about whether to transfer a juvenile out of juvenile court up to the judge; and

court for juveniles is commonly believed to be a response to serious violent crime, twenty-one states either require or allow adult prosecution of juveniles for certain property offenses, and nineteen states authorize or mandate prosecution in criminal court of juveniles who are charged with drug offenses.²¹ As a result more juvenile offenders are being subject to adult sentences and adult prison for an increasing number of less serious offenses.

II. The Evidence: How Effective Are Juvenile Transfers in Deterring Criminal Behavior?

Implicit in the “get tough” rhetoric around youth violence is the idea that the threat and experience of harsh sentences in the adult criminal system, especially for youths charged with serious, violent crime, will deter future acts of violence while satisfying the public’s desire for retribution and public safety.²² In general, discussions about crime prevention distinguish between general and specific deterrence.²³ General deterrence is crime prevention for the masses. It focuses on the public as an audience of potential offenders and attempts to construct punishment schemes that are severe enough to compel law-abiding behavior. Specific deterrence is recidivism control. It focuses on the individual who has already broken the law and sets penalties designed to dissuade future criminal acts based on the negative experience of punishment. Therefore, the deterrent effect of transfer must be

prosecutorial discretion gives the prosecutor the power over where to try a juvenile offender. SYNDER & SICKMUND, *supra* note 4, at 89.

²¹ PATRICK GRIFFIN ET AL., U.S. DEP’T OF JUST., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 13 (1998).

²² See generally FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998) (examining the recent history of violent adolescent offenses and the legal response to them).

²³ See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 92-245 (1973). But see Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, in READINGS IN CONTEMPORARY CRIMINOLOGICAL THEORY 26-32 (Peter Cordella & Larry Siegel eds., 1996).

examined both from the perspective of the potential offender and the punished offender.

Only two studies have evaluated the general deterrent effect of transfer. The first, conducted in 1978 by Simon Singer and David McDowell, looked at the New York Juvenile Offender Law of 1978, which lowered the age of criminal court jurisdiction for murder from age sixteen to age thirteen, and for rape, robbery, assault and violent burglaries from age sixteen to age fourteen.²⁴ The study compared juvenile arrest rates for the four-year period prior to enactment of the law with arrest rates for the six-year period after enactment.²⁵ Despite the fact that the law was well-publicized and effectively implemented, the threat of the harsher consequences of the adult system appeared to have little effect on the criminal behavior of New York adolescents.²⁶ A further comparison of juveniles affected by the law with older juveniles and juveniles in a neighboring jurisdiction without a similar transfer law found no measurable impact.²⁷ A second study of the general deterrent effect of transfer, conducted in 1981 by Eric Jensen and Linda Metsger, examined the impact of Idaho's mandatory transfer statute which required that juveniles as young as fourteen be tried in adult court for murder, attempted murder, robbery, forcible rape and mayhem.²⁸ Researchers tracked arrest data for five years before and five years after implementation of the law and compared arrest rates with the neighboring states of Montana

²⁴ See Simon I. Singer & David McDowell, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & SOC'Y REV. 521 (1988).

²⁵ *Id.* at 526.

²⁶ *Id.* at 532.

²⁷ The study looked at juvenile offenders ages sixteen to nineteen in New York City and ages thirteen to fifteen in Philadelphia as its control series. *Id.* at 529-30. Comparing crimes of the New York City youth ages thirteen to fifteen who were affected by the new law to these control groups, the study found that the new law had no impact on homicides and assaults, minimal impact on rape and arson, and at best a stabilizing effect on robberies. *Id.*

²⁸ See Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96 (1994).

and Wyoming over the same period. Montana and Wyoming were economically and demographically similar and used discretionary waiver to determine proper court jurisdiction for juvenile offenders as Idaho had prior to 1981.²⁹ As with the New York study, no notable evidence of general deterrent effects was found. In fact, the juvenile crime rate for offenses targeted by the Idaho law was actually lower in Montana and Wyoming, suggesting that juveniles in Idaho were not discouraged by the rigid new law.³⁰

To assess the specific deterrent effect of transfer, two studies examined the juvenile offenders' subsequent behavior, comparing the post-release recidivism rate for youth adjudicated in adult criminal court with youth retained in the juvenile system. The first study, conducted by Jeffrey Fagan, focused on neighboring counties in New York and New Jersey with like socioeconomic, demographic and crime indicators.³¹ New York and New Jersey also had similar burglary and robbery statutes. The major difference between the two laws was that New York had a statutory waiver law that placed fifteen and sixteen-year olds under the jurisdiction of the criminal court, while in New Jersey, these teens remained under juvenile court jurisdiction. Across both jurisdictions, Fagan randomly selected four hundred robbery offenders and four hundred burglary offenders and tracked their post-release recidivism rates. Results found that juveniles in New York who were transferred into the adult system were more likely to re-offend, re-offended more often and for a longer period of time than youths in New Jersey who were processed in the

²⁹ *Id.* at 99.

³⁰ A comparison of the mean arrest rates pre- and post enactment of Idaho's transfer law found a fourteen percent decrease in mean arrest rates for violent crime in Wyoming, a forty-five percent decrease in Montana, and an eighteen percent increase in Idaho. *Id.* at 101-02.

³¹ Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions of Recidivism Among Adolescent Felony Offenders*, in *SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK* 238-74 (Barry A. Krisberg et al. eds., 1995).

juvenile system.³² These results held true regardless of the type of sanction or sentence length.³³

Subsequent research conducted in Florida found similar results. Led by Donna Bishop, the Florida study looked at the impact of the state's use of prosecutorial waiver.³⁴ Juveniles who were waived into adult court were matched with like juveniles who remained in juvenile court. The study paired each case transferred into adult court with a like case retained in juvenile court based on "most serious offense charged, the number of counts charged, the number of prior delinquency referrals, the most serious prior offense, age, gender, and race."³⁵ The study found that juveniles in the adult system were rearrested more often and those arrests occurred sooner after release.³⁶ Subjects in the adult system also sustained criminal behavior over a longer period of time than the youths adjudicated in juvenile court.³⁷ Although lack of controls for individual and community risk factors leave some room for criticism, the finding that juveniles transferred into the adult system fared worse over both the short- and long-term than their counterparts in the juvenile system adds significantly to Fagan's research.

³² *See id.*

³³ Ninety-one percent of juveniles incarcerated in criminal court were subsequently rearrested, compared to seventy-three percent of juveniles incarcerated under the juvenile system. *See id.* at 250-51. Eighty-one percent of juveniles sentenced to adult probation were subsequently rearrested, compared to sixty-four percent of those sentenced to juvenile probation. *Id.*

³⁴ *See* Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 *CRIME & JUST.* 81 (2000).

³⁵ *Id.* at 132.

³⁶ *Id.*

³⁷ *Id.* at 133.

III. A Look at Traditional Theoretical Approaches to Deterrence

A. Economic and Sociological Theory: *The Vince and Larry Syndrome*

Since the 1950s the government and the automobile industry have relied on crash test dummies to assess the impact of automobile accidents on passengers. In the 1980s the National Highway Safety Administration brought two crash test dummies to life as part of its public safety awareness campaign and Americans listened as Vince and Larry encouraged us all to “Buckle Up!”³⁸ By the early 1990s, a controversy arose over the use of these dummies whose design, based upon the “average man,” had remained virtually unchanged for more than forty years.³⁹ The argument was that the use of the “average man” standard failed to account for the safety needs of women, children, and the un-average man. In much the same way, traditional deterrence models grounded in economic and, more recently, sociological theory have been tested out primarily on adult actors, failing to consider the unique characteristics of the juvenile.

Most criminal legal theory assumes a rational adult actor.⁴⁰ The traditional economic approach, articulated by Becker and others, assumes a rational actor balancing the costs and benefits of a given activity before deciding whether to act.⁴¹ Under this premise, the way to deter crime is to constrain opportunity to ensure that the benefit of undesirable activity to an individual actor is outweighed by its cost. Sociology attempts to explain individual criminal conduct by examining the influence of community in encouraging or discouraging certain behavior. Finding its roots in work by Emile Durkheim, sociologists examine the “problem of order,” concerned primarily with how non-economic factors

³⁸ Irene Wassell, *Seat Belt Exhibit Sponsored by FHA*, ARK. DEMOCRAT-GAZETTE, Feb. 5, 1987.

³⁹ Amy Harmon, *The Head-On Debate Over Crash Safety*, L.A. TIMES, Jan. 5, 1992, at D1.

⁴⁰ See *supra* note 5 and accompanying text.

⁴¹ See *supra* note 7 and accompanying text.

contribute to the maintenance of social order.⁴² In the criminal context, this approach examines how external reactions by individuals and institutions create social norms that help regulate or constrain criminal impulses.

Each approach brings with it legitimate variables to the equation of human behavior, but standing alone neither approach offers a complete explanation. Economic theory fails to incorporate the very real sociological and psychological components of human behavior that defy the rational actor thesis. Conversely, these behavioral components cannot always be adequately quantified and transferred into a cost-benefit formula. Rather, it is the elasticity of social norms that often defy attempts to apply the strict constructionism espoused by the economic theorists. Because social norms and socio-economic factors, such as poverty, vary from community to community, it is difficult to construct a deterrence model that is flexible enough to recognize and accommodate all the dynamics that can and often do shape behavior. Economic approaches are incomplete, while sociological approaches are logistically unwieldy, making application of these important principles complex. However, both provide valuable insights when examining and designing criminal justice policies that seek to deter crime.⁴³

Dan Kahan advocates a “third way” of thinking about deterrence that focuses on the strengths and downplays the weaknesses of economics and sociology.⁴⁴ According to Kahan, this new path can be used to “identify morally acceptable and politically feasible alternatives to the severe

⁴² See PETER CORDELLA & LARRY SIEGEL, READINGS IN CONTEMPORARY CRIMINOLOGICAL THEORY 123-27 (1996).

⁴³ See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (incorporating economic, sociological, and psychological theories to illustrate the complexity in formulating workable deterrence strategies).

⁴⁴ Dan Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); see also Stephan M. Panther, *The Economics of Crime and Criminal Law: An Antithesis to Sociological Theories?*, 2 EUR. J.L. & ECON. 365 (1988).

punishments that dominate contemporary law.”⁴⁵ Kahan seeks to create a politically feasible framework for deterrence that addresses some of the unintended consequences of the application of traditional theories in certain criminal situations. Kahan identifies four social phenomena that influence individual behavior and may be amenable to regulation: social organization, moral credibility, social meaning, and social influence.⁴⁶ “Social organization” focuses on the importance of strong social and civic associations in swaying individuals from criminal behavior. “Moral credibility” posits that individuals are more likely to obey laws that are reflective of their own values. “Social meaning” refers to the idea that actions (when acted out) have meanings as well as consequences; and “social influence” describes the propensity of individuals to act in accordance with the behavior and expectations of others.

Having identified several key social phenomena, Kahan then seeks to apply several of Neal Katyal’s observations about substitution, income effects, and extremeness aversion to legal deterrence schemes that weigh both economic and societal factors in a realistic fashion.⁴⁷ Kahan uses several examples to both validate Katyal’s assertions about the pitfalls in successful application of these phenomena and to suggest that Katyal did not go far enough by failing to illustrate how these pitfalls can still serve to inform effective deterrence policy. In other words, Kahan seeks to illustrate how Katyal’s observations about the unintended consequences of some strategies based on economic and social theory can tell us more than just what not to do, but more importantly what can be done to generate feasible policy to deter crime.⁴⁸ The analysis undertaken by both authors is helpful in providing insight about factors to be considered in formulating criminal justice policies that deter. However, in the case of juvenile actors, the formulation is still incomplete. Although both Katyal and Kahan include some

⁴⁵ Kahan, *supra* note 44, at 2478.

⁴⁶ *See id.*

⁴⁷ *Id.* at 2489-96.

⁴⁸ *Id.* at 2479.

discussion of criminal situations that involve juvenile actors, basic distinctions between youths and adults are not explored. In order for theory to keep pace with policy and provide “usable policy guidance,” this distinction cannot be overlooked. As more states move to try and sentence juveniles as adults, placing them squarely within an adult system that carries with it assumptions of adult knowledge and behavior, it becomes necessary that theories purporting to provide insight into policy-making take account of this reality.

B. Adolescent Developmental Psychology: The Missing Piece

Given the blending of juvenile and adult criminal justice policy, in order to build on the deterrence work of Katyal and Kahan in a meaningful way, a discussion of adolescent development must take place. Most legal and social norms reflect that children and youth are at a fundamentally different developmental stage than adults. Indeed, as noted earlier, the creation of a separate juvenile justice system was based on this very premise.⁴⁹ Youth are not permitted to vote or make most medical decisions for themselves until age eighteen, drive in most states until age sixteen, or purchase alcohol until age twenty-one. These arguably arbitrary legal limitations on individual action are respected and upheld by society under the belief that youths’ decision-making and cognitive abilities are not yet fully formed. They are not yet adults, and therefore should not be given the privileges of adults, nor burdened with what are identified as adult responsibilities. The legal and societal standard for determining what is rational for the juvenile actor is, and has historically been, different from the adult standard.

Developmental psychology concerns the scientific study of changes in “physical, intellectual, emotional, and social development over the life cycle.”⁵⁰ The idea is that a variety of forces—both environmental and biological—come together to improve competencies and capabilities over time.

⁴⁹ See discussion *supra* Part I.

⁵⁰ See Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL* 21 (Thomas Grisso & Robert G. Schwartz eds., 2000).

Much of this development occurs during adolescence⁵¹ and understanding its unique characteristics can provide additional clues about why transfer policies that attribute a set of adult assumptions about behavior may not have the same deterrent effect on juveniles. Adolescent development provides analytical tools for assessing how a juvenile fits, or does not fit, the adult rational actor model. Examination of this development process may also help provide additional insight into which social phenomena have the strongest influence on juveniles and would therefore be the most logical focus of deterrence strategies for juveniles.

IV. Framework for Discussion

A. The Policies That Inform Culpability Are Relevant Under Deterrence Theory

Why does the practice of transferring juveniles to adult court appear to fail as a matter of deterrence policy? In order to answer this question, it is useful to provide some framework for examining the treatment of youthful offenders in criminal law. Franklin Zimring articulates two policy clusters at work in any analysis of systems dealing with youth crime: (1) diminished responsibility because of immaturity; and (2) the desire to afford youthful offenders the opportunity to reform.⁵² The first cluster, Zimring explains, refers to factors that might weigh in a criminal lawyer's assessment of a juvenile offender's culpability, while the second cluster focuses on the way in which the law responds to young people in the process

⁵¹ *See id.* at 23-34 (“Today, most experts in developmental psychology agree that the period between twelve and seventeen occupies a crucial place in contemporary development for four interrelated reasons.”). Steinberg and Schwartz list: (1) rapid and dramatic changes in physical, mental, emotional and social capabilities; (2) greater susceptibility to external influences from family and peer groups; (3) formation of developmental trajectories despite characteristic malleability; and (4) tremendous variability both within and between individual adolescents as descriptive of this critical period of growth. *Id.*

⁵² ZIMRING, *supra* note 22, at 75.

of growing up.⁵³ For Zimring, these two policy clusters speak to the issues of juvenile culpability and rehabilitation, not deterrence.⁵⁴ Any systematic decision to transfer juveniles into the adult system rejects the notion that the law respond differently to juveniles, at least with certain offenses. However, those considerations that make immaturity relevant in assessing culpability might also prove to be useful when applied to a deterrence analysis of transfer. If immaturity is indeed helpful in analyzing deterrence as well as assessing culpability, then trying juveniles as adults becomes harder to reconcile with the maintenance of two distinct levels of culpability.

In his discussion of the first policy cluster, Zimring outlines three characteristics of adolescent immaturity that explain why juveniles may be less culpable than adults for the same behavior.⁵⁵ First, juveniles “may lack fully developed cognitive abilities to comprehend the moral content of commands and to apply legal and moral rules to social situations.”⁵⁶ Second, the capacity of juvenile actors to control impulsiveness is limited.⁵⁷ And third, the ability to resist peer pressure is not fully developed in many adolescents.⁵⁸ Underlying each of these characteristics is the developmental norm that dictates that most delinquent conduct is “adolescent limited.”⁵⁹ Research has shown that criminal behavior is rare in early adolescence, peaks in mid- to late adolescence and declines sharply after age seventeen.⁶⁰ In the rush to try more youthful offenders as adults, these characteristics, unique to nearly a quarter of the juvenile population are entirely discounted. These distinct characteristics articulated by Zimring not only illuminate questions of culpability, but, when viewed through the lens of

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 76-80.

⁵⁶ *Id.* at 77.

⁵⁷ *See id.*

⁵⁸ *See id.* at 78.

⁵⁹ Elizabeth S. Scott, *Criminal Responsibility*, in *YOUTH ON TRIAL*, *supra* note 50, at 311.

⁶⁰ *Id.* at 300.

developmental psychology, demonstrate why a policy of transfer is not an effective deterrent on juvenile actors.

B. Decision-Making and Understanding of the Law

Under the economic theory, in order for general deterrence to be effective, the individual must have some understanding of the law, its sanctions, and the probability of getting caught.⁶¹ Otherwise, there could be no way of figuring out whether it is ultimately beneficial to break the law.⁶² An individual must know an act is “wrong” and must also have some understanding of the probability and severity of potential sanctions. These assumptions are critical in establishing penalties and allocating resources in a way that effectively and efficiently deters crime. According to this approach, substantially increasing the certainty and severity of punishment should make the cost of committing the crime undesirable, resulting in the sought after deterrent effect. In the case of juvenile transfer, the threat of adult court with its potential for harsher treatment and longer sentences is intended to have a “scared straight” effect on teens. However, as previously discussed, early evidence suggests that providing this information to juveniles has limited impact on their decision-making.⁶³

While it is widely accepted that by age nine, children understand right from wrong, it is less clear when and how that understanding is used in decision-making through adolescence.⁶⁴ As children grow into adulthood, the ability to process information and experiences and to think hypothetically grows, allowing for more reasoned decision-making about certain types of conduct. Evidence suggests that adolescents use information differently from adults, they may consider fewer options than adults, they are less likely to behave consistently across different problem-solving situations especially when subject to stress or ambiguity, and

⁶¹ See BECCARIA, *supra* note 10, at 55-58.

⁶² Katyal, *supra* note 43, at 2447-48.

⁶³ See discussion *supra* Part II.

⁶⁴ Scott, *supra* note 59, at 303, 305.

they differ from adults in how they value perceived consequences in the decision-making process.⁶⁵

Culpability analysis points to this lower level of maturity to help mitigate blameworthiness or accountability for a juvenile already charged with a crime.⁶⁶ Applying this same analysis to the front end of juvenile behavior may serve to illustrate the inappropriateness of relying on assumptions about decision-making that are grounded in adult models. The very message that adult court is intended to convey in order to deter requires the ability to understand and correctly assess the complexity of the adversarial system. In a traditional economic deterrence scheme, the effect of increasing the sanction prong of the equation is significantly weakened if the actor cannot fully appreciate the elements that make the sanction a greater threat.

The same considerations that suggest a lesser standard of culpability can help explain how adult-centered assumptions about what motivates a juvenile to act or refrain from acting may be misplaced. For example, in response to state legal reforms pushing more juveniles into the adult system, developmental psychologists and criminal legal theorists began to question whether juveniles met the constitutional requirement that criminal defendants be competent to participate in their defense.⁶⁷ Assessing juvenile competency in adult court involves determining whether juveniles have the capacity to assist counsel and whether they possess sufficient reasoning skills and judgment to make decisions in the process, including the waiver of important rights.⁶⁸ Research suggests that delinquent adolescents are at

⁶⁵ See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 154-67 (1997).

⁶⁶ Historically, children under age seven are not held criminally liable for their actions. From age seven through fourteen, a lesser level of culpability based on immaturity was applied and by age fourteen capacity was presumed in common law. See ZIMRING, *supra* note 22, at 146.

⁶⁷ See Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL, *supra* note 50, at 73.

⁶⁸ See *id.* at 75-76.

risk of being less competent participants in their defense, a risk that notably increases for youth under age fourteen.⁶⁹

While most studies of cognitive development suggest that juveniles over age fifteen and adults employ similar decision-making processes, adolescents are still likely to use information and weigh priorities differently from adults.⁷⁰ Therefore, it is unclear at what age individuals begin to appreciate the risks and conflicts that mark the adult adversarial criminal process.⁷¹ To the extent that juveniles do not fully understand this process, they are not likely to calculate their “treatment as adults” heavily, if at all, in deciding whether to engage in criminal activity. This immature perspective on the criminal process makes the distinction between the adult criminal justice system and the juvenile justice system punishments insignificant for the typical adolescent. In fact, some evidence has suggested that perceptions of severity of punishment are essentially irrelevant.⁷² Additionally, most youth caught breaking the law expect to be subject to punishment in the juvenile system. Therefore, given adolescents’ diminished capacity to weigh risks, it is even more unrealistic to believe that these young offenders will weigh the marginal increase in risk between adult and juvenile court sanctions.

⁶⁹ See Scott & Grisso, *supra* note 65, at 169.

⁷⁰ See Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated As Adults?*, 63 FED. PROBATION, Dec. 1999, at 52.

⁷¹ See also Int’l Justice Project, *Brain Development, Culpability and the Death Penalty* (citing recent research that shows the adolescent brain undergoes “rapid change and does not fully develop adult capacity until the early twenties”), at <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf> (last visited Mar. 1, 2003). More specifically, research conducted by neuro-scientists at the National Institute of Mental Health found the most significant changes to be in the frontal lobes, areas of the brain that “control impulses, calm emotions, provide an understanding of the consequence of behavior and allow reasoned, logical and rational decision-making processes.” *Id.* at 1.

⁷² See SCHNEIDER, *supra* note 10, at 67-68 (citing research on juvenile offenders that, when controlling for other variables, found no evidence that “offenders who are more certain they will be caught or believe they will be punished more severely are less likely to commit crimes”).

The culpability analysis, which highlights some of the decision-making limitations of adolescents, along with Katyal's observation that precise knowledge is not required for deterrence makes it hard to avoid the conclusion that transfer does not deter. Drawing from sociological perspectives, Katyal refutes the notion that precise knowledge of the law is necessary in order to produce a deterrence effect. Instead, he suggests it is enough that individuals understand certain crimes come with severe penalties.⁷³ According to Katyal, criminal law deters through what he calls "information vanguards" who pass along general messages tied to criminal legal penalties and through this process these messages are integrated as social norms.⁷⁴ Under this theory, actors only need know that an activity is illegal or "bad" to refrain from doing it. However, culpability analysis suggests that the not fully developed decision-making skills of an adolescent prohibit full appreciation of the severity of transfer into the adult system as a heightened sanction for criminal behavior by youth. Therefore, even the general messages about the law and degree of sanction involved in violations fall on immature ears and may have little practical value.

However, given the influence of peers in young peoples' lives, can Katyal's notion of "information vanguards" be exploited to compensate for this decision-making deficiency? The primary question then becomes who are the "information vanguards" for juveniles? If, as one would suspect, they are peers, other adolescents and young adults, the same developmental factors that shape young people's use and valuation of information in deciding to commit crime will also influence, and ultimately limit, the level of sophistication used in communicating the risks and sanctions of criminal behavior.

One response to this would be to change the vanguards, to provide adolescents with messengers who can convey exactly why adjudication in the adult system is a greater risk and potentially more harmful consequence.

⁷³ Katyal, *supra* note 43, at 2449.

⁷⁴ *Id.*

However, more effective messengers may not matter. Again, the difficulty is not with the provision of the information, but rather with the juvenile's ability to use and apply that information in their decision-making process. It is the very status of being an adolescent that limits their capacity to use this information in a way that would have a general deterrent effect. The appreciation and understanding of the penalty of adult criminal sanctions develops through a process that cannot be directly taught but that forms through experience over time.

Furthermore, the evidence suggests that the experience of adult court and adult jail may be insufficient to achieve specific deterrence of repeat criminal behavior. In fact, as previously discussed, evidence suggests that transfer increases the likelihood that the transferred offenders will become repeat offenders without affecting the decision of other youthful actors who may be moved to engage in criminal behavior for the first time.⁷⁵ One possibility is that the negative social lessons reinforced through the experience of the adult system serve to institutionalize, rather than dissuade, future criminal behavior.

C. *Impulse Control and Risk Assessment*

A central component of adolescence, intimately connected to decision-making capacity, is the proclivity of young people to engage in risky behaviors. It is well established that adolescents generally take more risks with their health and safety than adults.⁷⁶ Adolescents more frequently engage in unprotected sex, drunk driving, and substance abuse.⁷⁷ Part of the explanation for this behavior is related to the decision-making traits of adolescents discussed previously. Generally, adolescents calculate the probability of risks differently, and value them differently.⁷⁸ For example,

⁷⁵ See Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 227 (Jeffery Fagan & Franklin E. Zimring eds., 2000).

⁷⁶ See Scott & Grisso, *supra* note 65, at 163-64.

⁷⁷ *Id.*

⁷⁸ See Scott, *supra* note 59, at 304-05.

adolescents tend to calculate short-term risks and benefits more heavily than long-term consequences. This tendency may be linked to “the greater uncertainty that young people have about their future,” or the observation that adolescents focus less on protection against losses and more on the potential benefits of their choices.⁷⁹ Additionally, adolescent development involves a fluid notion of time. Adolescents rarely formulate long-term plans and when they do, are easily distracted by unanticipated events.⁸⁰ Juveniles will often view these unexpected events as “accidents” while adults, largely through a recognition of commonality of experience and emotion, are more likely to be able to predict and adjust to unintended outcomes.⁸¹

A related trait that contributes to adolescent risk-taking behavior is an adolescent's tendency to be extremely self-absorbed. Known as the “personal fable” syndrome, many youth believe that their experience is completely unique, and this perception fosters the belief that things that happen to others could not possibly happen to them.⁸² Adolescents think they are immune to the harms that may have befallen their peers. Such an intensely individualized perspective may also help explain why the threat of transfer to adult court for criminal behavior appears to have little deterrent impact on young offenders. Evidence suggests that steep penalties are unlikely to deter individuals who do not believe they will be caught.⁸³ Juveniles are less likely to think they will get caught in the first place, and when they do, they are not capable of

⁷⁹ Scott & Grisso, *supra* note 65, at 164.

⁸⁰ See Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J., Summer 1999, at 16.

⁸¹ See *id.* at 17.

⁸² CYNTHIA LIGHTFOOT, *THE CULTURE OF ADOLESCENT RISK-TAKING* 34 (1997).

⁸³ See Floyd Feeney, *Robbers As Decision-Makers*, in *THE REASONING CRIMINAL* 69 (Derek B. Cornish ed., 1986) (citing evidence that steep penalties were unlikely to deter individuals who did not believe they would be caught). *But see* Claude Montmarquette & Marc Nerlove, *Deterrence and Delinquency: An Analysis of Individual Data*, 1 J. QUANTITATIVE CRIMINOLOGY 37, 52 (1985) (citing evidence that when juveniles perceive arrest is likely for one crime, the general deterrent effect for other crimes appears to be enhanced).

fully comprehending the implications of risking adjudication in adult court or incarceration in adult jail or prison.

Embodied in juveniles' predisposition to risk-taking is the diminished ability to control impulsive behaviors. The ability to control impulsiveness and refrain from risky actions is a capacity that develops over time as a result of acting rashly or hastily and learning from those actions.⁸⁴ Research also suggests that it is unclear how large a role context plays in an adolescent's ability to control impulses. For example, juveniles may be more likely to act impulsively out of fear than out of temptation or vice versa. As Zimring points out, "impulse control is a social skill not easily measured in a laboratory."⁸⁵

The culpability analysis of juvenile impulsiveness and risk-taking implicitly embraces the developmental notion that some forms of adolescent behavior are the result of a not yet fully formed ability to control impulses. In effect, young people do not have the same capacity for self-control as adults and this should be considered a mitigating factor when assessing culpability.⁸⁶ Similarly, the proclivity of adolescents to take risks and act on a whim skews the traditional deterrence calculus for the adolescent actor. Adolescents are not likely to recognize all possible options and therefore, their preference prioritization may be completely tilted toward outcomes that they expect will provide immediate gratification but that do not actually maximize their utility.

Sociological approaches that seek to deter are also problematic as applied to this aspect of adolescent behavior. Several criminal justice theorists have suggested that the law should not only attempt to constrain opportunity, as proposed by the traditional economic approach, but should also seek to shape individual preferences in a way that promotes law-abiding behavior.⁸⁷ However, the impulsive and erratic nature

⁸⁴ See Scott, *supra* note 59, at 297.

⁸⁵ ZIMRING, *supra* note 22, at 77.

⁸⁶ See Steinberg & Cauffman, *supra* note 70, at 55-56.

⁸⁷ See generally Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

of adolescent decision-making is precisely what makes general characterizations of adolescent preferences difficult. For example, Katyal cites research that shows how individual preferences can be influenced by “technically irrelevant influences.”⁸⁸ Specifically, Katyal describes the phenomenon that if an individual is presented with too many alternatives, they will stick to the status quo—even if all the alternatives presented are more attractive choices.⁸⁹ Because adolescents are generally less aware of the range of possible alternatives and are more likely to take risks or behave impulsively, this normative assumption about preferences would be flawed as applied to young people.

Kahan points out a similar problem with extremeness aversion in preference shaping as applied to juveniles.⁹⁰ Extremeness aversion is the idea that within a set of options or preferences, those that appear the most extreme are less valued. Katyal proposes that the law should exploit this phenomenon by constructing moderate third options that are viewed as improvements over undesirable extremes.⁹¹ Kahan uses the example of weapon carrying in schools to illustrate the problematic application of the theory in a real-world setting. Kahan is skeptical about a policy that induces students to carry less lethal knives over guns.⁹² Not only is the desirability of such an approach suspect from a moral perspective, but it presents significant practical problems. Although Kahan does not articulate why such a policy is difficult to conceptualize, his reaction involves an intuitive but very real acknowledgement of adolescent developmental characteristics of risk-taking, invulnerability, and impulsiveness that defy general classification.

⁸⁸ Katyal, *supra* note 43, at 2462-63.

⁸⁹ *Id.*

⁹⁰ Kahan, *supra* note 44, at 2493-95.

⁹¹ Katyal, *supra* note 43, at 2464.

⁹² Kahan, *supra* note 44, at 2494.

D. Peer Pressure, Social Identity, and Context

Peer influence plays a substantial role in adolescent behavior and in decisions to commit crime.⁹³ Decisions made and actions taken by adolescents represent an ever-changing expression of who they are and where they fit in. Young people are continuously assessing themselves against others who are doing the same thing. This on-going interplay of assessment, reaction, and expectation shapes a young person's view of him or herself and of others.⁹⁴ Despite the highly individualized concept of self, most adolescents decide to break the law on a definitively social stage.⁹⁵ Statistics show that most juvenile crime occurs in groups.⁹⁶ In fact, when it comes to serious violent crime, juveniles are twice as likely as adults to commit a serious violent crime with other offenders.⁹⁷

Research suggests two ways in which peers influence adolescent behavior: social comparison and conformity.⁹⁸ Social comparison dictates that adolescents will measure their own behavior by comparing it to others, while social conformity describes the desire of adolescents to "adapt their behavior and attitudes to that of their peers."⁹⁹ Identifying with and achieving social status among peers is an important part of self-definition. Therefore, individuals will behave to maintain that group status to the detriment of other groups.¹⁰⁰ It is this powerful desire for inclusion and group validation that weakens an adolescent's ability to make decisions based on self-interest outside this context. In fact, adolescents will often feel that decisions sanctioned by peers are in their own

⁹³ See Scott & Grisso, *supra* note 65, at 162; see also Feeney, *supra* note 83, at 58 (reporting evidence from interviews with juvenile offenders that they often cited the influence of friends for involvement in robbery).

⁹⁴ See LIGHTFOOT, *supra* note 82, at 25-37; see also Fagan, *supra* note 5.

⁹⁵ See ZIMRING, *supra* note 22, at 79.

⁹⁶ See SNYDER & SICKMUND, *supra* note 4, at 63.

⁹⁷ *Id.* at 26, 29.

⁹⁸ See Scott & Grisso, *supra* note 65, at 162.

⁹⁹ *Id.*

¹⁰⁰ See Fagan, *supra* note 5, at 524.

best interest even though it is clear to the outside observer that they are not.

Context is an additional factor that shapes and defines the power of peer pressure during adolescence. Put simply, context is the social setting in which events take place. Jeffery Fagan articulates the importance of context with respect to juvenile actors in determining appropriate levels of culpability.¹⁰¹ Combining context with adolescent development, Fagan suggests that it is critical to look beyond the actor to the context for an appropriate assessment of culpability for youthful offenders.¹⁰² According to Fagan, adolescents may situationally engage in antisocial behavior to establish or maintain status among peers.¹⁰³ Additionally, this type of behavior may be essential from the juvenile's perspective in creating an image that helps ensure personal safety, social acceptance, and self-esteem.¹⁰⁴ The ability to resist peer pressure in these contexts is at once central to law-abiding behavior but a capacity not fully developed in adolescents. This tension is what drives the notion that while juveniles should be held accountable for their actions, the not fully formed capacity to resist peer pressure should serve to distinguish juvenile from adult culpability.

Understanding the significance of these external factors to the adolescent has implications for deterrence strategies as well. As discussed previously, Kahan articulates four social phenomena that may be amenable to manipulation in ways that would steer individuals away from criminal acts.¹⁰⁵ However, to have relevance to deterrence of juvenile crime, the importance of peer interaction must be incorporated in the calculation. Kahan uses the example of gang crime to illustrate the prominence of peer pressure in adolescent behavior suggesting that effective deterrence strategies for juveniles should focus most heavily on the phenomenon of

¹⁰¹ *Id.* at 515.

¹⁰² *Id.* at 524.

¹⁰³ *Id.* at 533.

¹⁰⁴ *Id.* at 524.

¹⁰⁵ *See supra* note 44 and accompanying text.

social influence.¹⁰⁶ Kahan references the success some communities have had in adopting policies that suppress open gang activity to diminish the value of gang membership among young people in the community.¹⁰⁷ Curfews, anti-loitering ordinances, and even school uniform policies can work to break down the visibility of gangs and help to diminish their influence among young people in the community. Link this, in turn, to the pack-mentality that often underlies juvenile crime and it becomes clearer how approaches that recognize the power of peer pressure in a young person's life can reduce gang-related crime without the threat of severe penalties.

The strength of social influence among adolescents is also helpful in illustrating why transfer fails to deter once juveniles come to understand the consequences of transfer through experience. Youth who experience the adult system have had an adult jail or prison for a classroom and adult inmates for peers. The desire to achieve some level of social status remains, and the juvenile offender's social identity is shaped by the adult criminal justice experience.¹⁰⁸ Criminal behavior is reinforced and juveniles learn to be better criminals. Although still school age, juveniles in the adult system generally do not receive the education, counseling, and recreation services often provided through the juvenile system—services that may work to counteract the effects of being labeled a criminal. Additionally, juveniles leave the system with a felony conviction record, making employment subsequent to incarceration difficult.¹⁰⁹

The policy of transfer also attempts to ratchet up the social meaning of a crime by increasing its consequences for a juvenile actor. However, in order to deter that meaning has to be successfully communicated to and valued by the audience

¹⁰⁶ Kahan, *supra* note 44, at 2488.

¹⁰⁷ *Id.*

¹⁰⁸ See Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, in CRIMINAL LAW AND URBAN PROBLEMS 1999, at 395 (PLI Litig. & Admin. Practice Course, Handbook Series No. 183, 1999).

¹⁰⁹ *See id.* at 413.

whose behavior the law seeks to change. Transfer policies, even when well-publicized, do not resonate with juvenile actors in part because they are influenced more by their peers than the law. Further complicating the efficacy of transfer policies is the previously discussed suggestion that the “information vanguards” charged with conveying the intended social meaning behind harsher sentences are themselves immature carriers.¹¹⁰

V. Promising Practices to Prevent and Reduce Youth Violence

What does all this mean in practical terms for policy makers and practitioners who hold out the goal of deterrence as a cornerstone of meaningful social policy? Katyal convincingly articulates how crime reduction strategies that rely primarily on severe punishments as a deterrent can backfire when certain economic or sociological considerations trigger behaviors that are more, rather than less, harmful. An examination of the unique characteristics of adolescent development, which argues for an alternative to the traditional culpability framework in holding juveniles accountable for crime, also provides clues as to why the specific punishment of transfer to the adult system does not meet deterrence goals. But, can these observations work together, as Kahan suggests they must, to inform practical approaches to deterrence and crime reduction that work?

In many important ways, the strategies that appear to be most effective in deterring juvenile crime do recognize the complex array of economic, social, and developmental factors involved in adolescent behavior. According to a comprehensive report on youth violence issued by the U.S. Surgeon General in 2001, the key to reducing juvenile crime is to minimize the risk factors that contribute to aggressive and violent behavior and maximize those protective factors that

¹¹⁰ See *supra* note 73 and accompanying text.

diminish the likelihood of violent activity by youth.¹¹¹ Most juvenile offenders have multiple problems and often struggle with social, educational, or economic hardships beyond their control.¹¹² Research has identified factors that make children and adolescents more likely to behave violently which can be grouped into three general areas: individual, family, and community.¹¹³ Individual risk factors include social or cognitive problems, a history of aggressive behavior, beliefs that support use of violence, and drug or alcohol abuse.¹¹⁴ Family factors include lack of parental supervision; spousal or child abuse; access to firearms; a parent's use of drugs or alcohol; and divorce, relocation, or other family disruption.¹¹⁵ External or community risk factors include problems at school, isolation from peers or association with peers who are violent, and lack of positive interaction with non-familial adults.¹¹⁶

Prevention strategies that address these risks before they translate into criminal behavior have had some success in reducing delinquency. The Centers for Disease Control and Prevention and the Center for the Study and Prevention of Violence at the University of Colorado have released reports outlining successful youth violence prevention models, including Multisystemic Therapy (MST); the Bullying Prevention Program; and Life Skills Training.¹¹⁷ Kahan

¹¹¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001) [hereinafter SURGEON GENERAL].

¹¹² ROLF LOEBER & DAVID P. FARRINGTON, SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 356-66 (Rolf Loeber & David P. Farrington, eds., 1998); *see also* MICHAEL SHADER, U.S. DEP'T OF JUST., RISK FACTORS FOR DELINQUENCY: AN OVERVIEW (2003), *available at* <http://www.ncjrs.org/pdffiles1/ojjdp/frd030127.pdf>.

¹¹³ SURGEON GENERAL, *supra* note 111, at 57-77.

¹¹⁴ *Id.* at 64-66, 68-69.

¹¹⁵ *Id.* at 66-67, 69.

¹¹⁶ *Id.* at 67, 69.

¹¹⁷ *See* TIMOTHY N. THORNTON, ET AL., DIVISION OF VIOLENCE PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, BEST PRACTICES OF YOUTH VIOLENCE PREVENTION: A SOURCEBOOK FOR COMMUNITY ACTION (2002), *available at* <http://www.cdc.gov/ncipc/dvp/>

concludes that because crime threatens the welfare of whole communities, "detering crime should therefore be regarded as a primary aim of social welfare policy."¹¹⁸ The approaches that have shown some measure of success rightly view deterrence and crime reduction as a component of an overall strategy to promote a healthy, more stable society, while at the same time recognize the unique developmental considerations of juveniles.

Conclusion

Over the last decade, the rush to find politically popular solutions to seriously flawed predictions about the coming of teenage "super-predators" has served to limit thoughtful consideration of juvenile crime policy. The quick political benefit from advocating get-tough, retributionist policies has left us lacking a more thorough examination of policy solutions that are designed to deter crime by both juveniles and adults. Fortunately, the significant decline in juvenile crime has allowed for a more informed discussion about the appropriateness of transferring juveniles into the adult system as well as inquiries into whether the policy has any deterrence value. The rationale behind a lesser culpability standard for youthful offenders provides a useful analogy for assessing the deterrence value of policies that attempt to treat juveniles as adult actors. Early evidence finds little deterrent effect either in dissuading adolescents from first time offenses or from re-offending after being adjudicated in adult court. Research on adolescent development, now supported by recent studies on the biology of brain development, suggest that incomplete decision-making capacities, low impulse control,

bestpractices.htm; *see also* RICHARD MENDEL, AM. YOUTH POL'Y FORUM, LESS COST, MORE SAFETY: GUIDING LIGHTS FOR REFORM IN JUVENILE JUSTICE (2001), *available at* <http://www.aypf.org/lesscost/pages/full.pdf>; SHARON MIHALIC, ET AL., U.S. DE P'T OF JUST., BLUEPRINTS FOR VIOLENCE PREVENTION 2 (2001), *available at* <http://www.ncjrs.org/pdf/files1/ojjdp/187079.pdf>.

¹¹⁸ Kahan, *supra* note 44, at 2496.

and the power of peer influence help explain why the threat and experience of adult court do little to deter juvenile actors.

As deterrence theorists look to the law to help exploit economic, social, and psychological factors to promote law-abiding behavior, careful attention must be paid to the characteristics that distinguish youth from adults. Developmental psychology suggests that adolescents must be allowed to make mistakes in order to learn and grow into adulthood and, increasingly, the relevance of this developmental perspective is being recognized in the law.¹¹⁹ Ironically, after spawning much of the get-tough approach that resulted in harsher state juvenile justice laws in the 1990s, Congress recently acted to reauthorize federal juvenile justice legislation, which reinforces the legitimacy of a separate justice system for children by essentially retaining the rehabilitative principles of the juvenile system and focusing resources squarely on prevention.¹²⁰

Policies that automatically transfer juvenile offenders to the adult system fail to acknowledge the importance of adolescent development and are, therefore, misplaced and thus far ineffective. If deterrence is to remain a central goal of criminal legal theory with respect to all potential criminal actors, adolescent developmental principles must be a part of any comprehensive youth violence prevention and crime reduction policy.

¹¹⁹ In 1997, the ABA Criminal Justice Section Standards and Juvenile Justice Committees jointly authorized the creation of a Task Force to “address the overall implications of the increasing number of juveniles being transferred to the adult criminal justice system for trial and incarceration there.” ABA, Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001). The Task Force’s White Paper is designed to provide guidance to those involved with youth in the criminal justice system by providing a framework, rooted in current knowledge of child and adolescent development, for dealing with youth from the time of arrest through incarceration. *Id.*

¹²⁰ Juvenile Justice and Delinquency Prevention Act of 2002, Pub. L. No. 107-273, 12201-12223, 116 Stat. 1758 (to be codified as amended in scattered sections of 42 U.S.C.).