Juvenile Crime Regulation and the Moral Panic Problem

Elizabeth S Scott, Columbia Law School

Available at: https://works.bepress.com/elizabeth_scott/1/
American lawmakers hold complex and somewhat inconsistent attitudes about the appropriate response to juvenile crime. The dominant contemporary view is exemplified by recent Supreme Court opinions rejecting harsh sentences for juveniles as unconstitutional; on this view, young offenders are fundamentally different from adults and their crimes are seen as the product of immaturity. But sometimes a very different view prevails—as it did in the 1990s—of juvenile offenders as dangerous criminals whose age and immaturity are irrelevant to criminal punishment. This Essay argues that the tough sentences and punitive law reforms of that period were the products of moral panics in which perceptions of the threat posed by young criminals became exaggerated through a dynamic interaction among politicians, the public and the media. In this climate, lawmaking was dominated by immediate public safety concerns that trumped society’s long term interests in effective crime reduction, efficient use of public resources, and fairness. In calmer times, deliberation is possible and these long term interests are weighed in the calculus, resulting in better decisions and policies. The challenge, then, becomes how to limit the cost of inevitable future moral panics. The Essay argues that research and theory from psychology and behavioral economics can help us in this regard, offering new insights on how perceptions of threat become exaggerated and how individuals— and governments— can adopt strategies to assist them in adhering to long term goals and avoiding improvident decisions. Legislatures can put in place a precommitment framework that includes substantive guidelines, procedural requirements and monitoring mechanisms, as well as restrictions that insulate prosecutors and judges from public pressure; together these reforms can promote better decisionmaking and more deliberative lawmaking, mitigating the cost of moral panics.

American lawmakers hold complex and somewhat inconsistent attitudes about the appropriate response to juvenile crime. Two conflicting views have been pervasive. On one account (which can be traced to the early years of the juvenile court), young offenders are unformed youths who are different from their adult counterparts and should be dealt with differently by the justice system. This view is exemplified by several recent Supreme Court opinions (including Miller v. Alabama, decided last term1) rejecting the constitutionality of laws imposing harsh criminal sentences on juveniles on Eighth Amendment grounds.2 In these opinions, the Court points to developmental science to explain that the immaturity of young

---

1 567 U.S._ (2012). Miller held that a statute creating a mandatory sentence of life without parole for homicide was Cruel and Unusual Punishment as applied to juvenile offenders.
offenders distinguishes them from adult criminals in ways that mitigate criminal culpability. But, sometimes, a very different view seems to prevail-- of juvenile offenders as dangerous criminals who pose a serious threat to public safety. This account emphasizes harmful criminal conduct and discounts the importance of youthful immaturity in assigning punishment. These themes co-exist, but at various times one or the other has dominated policy debate and public discourse and shaped courtroom narratives when juveniles face adjudication for their crimes.

These competing themes can be observed in the recent history of youth crime regulation. Juvenile crime was a highly salient political issue in the 1990s. Rates of violent crime increased in the late 1980s, and the public reacted with alarm to vivid media reports of school shootings, gang killings and other crimes. Politicians, in turn, responded with calls for tough law reforms to protect society from a new generation of “superpredators” who threatened the social order. Across the country, law makers rejected the relevance to criminal punishment of differences between juveniles and adults and undertook sweeping legal reforms expanding criminal court jurisdiction over juveniles for a wide range of crimes. In the juvenile system, which was targeted for dealing too leniently with young offenders, incarceration increased dramatically.

In the past decade, both the tone and the content of political discourse about juvenile crime have changed—and it appears that a new wave of legal reforms is underway. The recent Supreme Court opinions are the most powerful signal of these changes, but the evidence is far broader. In many states, regulators have retreated from the trend toward criminalization. Politicians, judges and the media have emphasized the immaturity of young offenders and pointed to adolescent brain research in explaining how youthful criminal conduct differs from that of adults. It would appear that the traditional paternalism toward young offenders has reemerged in an updated form in the early 21st century.

What explains the shifting perceptions about juvenile offenders and responses to their criminal conduct? The simplest explanation is that lawmakers responded rationally to an increase and then a decline in violent crime rates. (Juvenile crime rates began to fall in the mid-1990s). But, although changing crime rates were a factor, the political dynamics that have

---

3 See discussion t.a.n 90 to 101 infra
4 See note 23 infra.
5 John Dilulio. The Coming of the Superpredators, WEEKLY STANDARD, Nov. 27, 1995. See note 55 and accompanying text infra for a discussion of how this term came to represent the threat of juvenile crime.
6 See t.a.n 31 infra. Virginia Governor George Allen, in advocating for a package of tough legislative reforms, stated: “A violent criminal is a violent criminal. Whether he is 13 or 30, he must be stopped from harming people.” Tony White, Juveniles Sacrificed for the Good of Society, RICHMOND AFRO-AMERICAN, May 17, 1995 (quoting Allen).
7 See t.a.n 26 to 31 infra. For general discussion, see ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 96-99 (2008).
8 See t.a.n 84 to 89 infra.
9 Violent juvenile crime rates began a steady decade-long decline in 1994; rates declined for other crimes shortly thereafter. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK,
shaped these movements cannot be fully explained on this basis— and sometimes decisionmaking was less than fully rational.

Indeed, the legal response to juvenile crime in the 1990s had the hallmarks of a moral panic, a form of collective response that has long interested sociologists in which the public, politicians and the media interact in a pattern of escalating alarm at a perceived social threat. Sometimes a high profile incident—a violent crime by juvenile offenders, for example—is the trigger; the public reacts with outrage and calls for severe punishment. In a moral panic, perceptions of the magnitude of the danger become exaggerated and the incident at hand is taken to represent a larger threat. This in turn generates urgent calls for the government to “do something” to secure public safety. In response, politicians call for reform, and legislatures enact tough laws. Not surprisingly, during these periods, the goals of punishing wrongdoers and protecting victims and the public drive legal responses. This is an apt description of decisionmaking about juvenile crime in the 1990s. Elevated fears about the threat posed by young criminals contributed to a climate in which the goals of public protection and punishment dominated policymaking and decisions by judges and prosecutors, often to the exclusion of other considerations.

Moral panics do not necessarily produce harmful consequences. Sometimes, an emotionally salient incident functions as a catalyst, focusing public attention on a social problem that has not been adequately addressed, and mobilizing government actors to respond in productive ways. Benefits may be realized even if the perception of the threat becomes

---

10 Stanley Cohen coined the term “moral panic,” and was probably the first sociologist to study and analyze moral panics in a study of British “mods” and “rockers” published in 1972. STANLEY COHEN, FOLK DEVILS AND MORAL PANICS (3RD ED. 2002). See also ERICH GOODE AND NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (2ND ED. 2009) (offering comprehensive theoretical and empirical treatment).


12 See t.a.n 25 to 31.

13 My colleague Ed Morrison suggests that moral panics may sometimes be an antidote to “moral lethargy,” focusing attention on a problem where public interest or political will were previously lacking. Two disparate examples may be the recent response to Wall Street excesses contributing to the economic recession and the public concern about bullying in schools, in the wake of the suicide of a South Hadley, MA teenager. Stacy Khadaroo, Phoebe Prince Bullies Sentenced, but How Do They Make Things Right?, CHRIST. SCI. MONITOR, May 5, 2011 at http://www.csmonitor.com/USA/Justice/2011/0505/Phoebe-Prince-bullies-sentenced-but-how-do-they-make-things-right.
exaggerated. But often, decisions made in the midst of a moral panic represent costly overreactions and are viewed with regret when the storm has passed. This seems to have happened over the past decade as the moral panics surrounding juvenile crime have subsided.\footnote{The passage of California’s Proposition 21 in 2000 was the last major punitive law reform initiative. \textit{Id.} at 102 to 115 (describing the campaign to adopt Proposition 21). \textsc{Scott and Steinberg, Rethinking Juvenile Justice}, \textit{supra} note 7 at 102 -115.} Lawmakers increasingly have been inclined to consider a broader range of factors in responding to youth crime, factors that were either ignored or trumped by more pressing concerns in the 1990s. These longer-term considerations include the effect of various policies and sanctions on recidivism rates and on the trajectory of young offenders’ future lives, the cost of alternative policies and the efficient use of financial resources, racial and ethnic disparities in punishment and the fairness of imposing adult sentences on young offenders. In this less hostile climate, the assumption that developmental differences between youths and adults are important to juvenile crime regulation once again plays a key role in public and policy discourse.

This essay confirms the wisdom of this assumption, and concludes that the contemporary approach is more likely to reduce the social cost of juvenile crime than the approach of the 1990s. In this context, decisions made during periods of moral panic are often improvident because, in focusing on an immediate threat, they tend to ignore the key long term societal interests described above. And even though government actors, in calmer times, are more likely to incorporate these interests in their decisions, moral panics have a lasting negative impact when they are institutionalized through punitive legislation, which tends to operate as a one-way ratchet.\footnote{William Stuntz describes the steady expansion of the criminal law as a one way process. \textit{The Pathological Politics of Criminal Law}, 100 Mich. L. Rev 505 (2001). I will suggest in Part IV that residual paternalism toward youth may sometimes exert a counter-veiling influence.} Thus the question is whether lawmakers can be encouraged to consider both short- and long-term interests during periods when the temptation to focus only on immediate concerns is intense and, more generally, whether the cost of moral panics in response to juvenile crime can be contained.

Recent psychology and behavioral economics research on decisionmaking shows that the pattern described above is problematic, but also predictable. In many domains, individuals are sometimes inclined to make decisions on the basis of compelling but transitory concerns and preferences that are inconsistent with their stable long term interests and goals.\footnote{For example, an individual may choose to eat a piece of chocolate cake, despite a stable long term goal of losing ten pounds.} One variation of this problem of inconsistent choice over time\footnote{See Part III \textit{infra}. The problem of inconsistent choice over time was first identified by R.H. Strotz, “\textit{Myopia and Inconsistency in Dynamic Utility Maximization}, 23 \textsc{Rev. Econ. Stud.} 165 (1955-56). The problem is analyzed from multiple perspectives in \textsc{George Lowenstein and Jon Elster, Eds., Choice Over Time} (1992).} occurs when emotions distort perceptions of risk, leading to suboptimal decisions.\footnote{See t.a.n. 172 to181 \textit{infra}. Paul Slovic and his colleagues provide a comprehensive analysis of the impact of emotions such as fear and anger on perceptions of risk. For general discussion, see \textsc{Paul Slovic, The Perception of Risk} (2000).} I argue that fear and anger directed at young offenders during
periods of moral panic result in exaggerated perceptions of the severity of the threat to public safety; lawmakers and justice system actors respond to these distorted perceptions by enacting more restrictive regulations and by sanctioning young offenders harshly. These decisions ignore long-term objectives that often are not furthered by punitive sanctions or incarceration-based policies.

This problem poses a challenge for the establishment of effective and fair juvenile crime policies, but decision theory and research suggest that lawmakers can employ corrective strategies to promote choices that are more compatible with society’s long term policy goals. Regulatory precommitments can deter future decisionmakers from acting improvidently when public fear of juvenile crime inevitably intensifies again. In general, precommitment mechanisms function to deter choices that reflect intense but transitory preferences by making those decisions more costly or less available. Homer offers a famous example in the tale of Ulysses, who directed his crew to bind him to the mast of his ship to restrain him from responding to the temptation of the sirens’ call. Although Greek myth may seem remote from contemporary policy concerns, this story contains lessons that can be applied to youth crime regulation. Lawmakers can put in place substantive and procedural constraints on later decisionmakers who may be tempted to act precipitously on the basis of a narrow range of short term costs and benefits. First, legislatures can guide judges and restrict prosecutorial discretion, limiting the ability of these front line justice system actors to make punitive charging and sentencing decisions that discount long term policy objectives. Further, mechanisms that promote deliberation in the lawmaking processes and encourage consideration of long term costs and benefits can mitigate the problem of inconsistent choices and reduce the extent to which moral panics become institutionalized through legislative and regulatory action.


19 Political economist Thomas Schelling has explored numerous situations from everyday life in which individuals use precommitment strategies to adhere to their long term goals. See THOMAS SCHELLING, CHOICE AND CONSEQUENCE 83-95 (1984); Thomas Schelling, Self Command in Practice, in Policy and in a Theory of Rational Choice, 74 AM. ECON REV. 1 (1984) [hereinafter Self Command]; Thomas Schelling, Self-Command: A New Discipline in CHOICE OVER TIME, supra note 18 at 167-75. See also Strotz, id. (introducing precommitment as a response to problem of inconsistent choice); George Ainslie & Nick Haslam, Self-Control, CHOICE OVER TIME, id. at 177-85 (discussing types of precommitments). See discussion and other sources at See t.a.n 203 to 209 infra. Jon Elster, a political theorist, has applied the precommitment framework to government action. See notes 203; 210 infra.


21 See Part IV C1 infra.

22 See Part IV C2 infra.
The essay proceeds as follows. Part I describes the tumultuous history of change in juvenile justice regulation over the past generation. This account shows that the punitive reforms of the 1990s that criminalized juvenile justice regulation often were undertaken in an atmosphere of moral panic. As the panic subsided in the past decade, lawmakers have adopted a more pragmatic and scientifically-based approach. Part II then argues that juvenile justice policy grounded in knowledge of adolescent development advances overall social welfare and fairness more effectively than policies that ignore the differences between youths and adults; thus moral panic decisionmaking in this realm tends to result in inferior outcomes. Part III explores the psychology of moral panics and the problem of inconsistent choices, drawing on recent research on risk perception to identify the source of the problem in the distorted perceptions of the threat of youth crime during periods of moral panic. In Part IV, I show how lawmakers can mitigate the problem by adopting regulatory precommitment mechanisms that assist them to resist and contain the costs of political passions aroused during moral panics. I examine the role of public opinion and argue that it may not be a major obstacle to reform.

I. PUNITIVE AND PRAGMATIC REFORM IN JUVENILE CRIME REGULATION

This Part offers an account of juvenile crime regulation over the past generation that focuses on the politics and processes of recent reforms and not on their deficiencies or merits. It begins with a brief review of the legal changes in the 1980s and 1990s that transformed a justice system that viewed most juvenile offenders as youngsters whose crimes were a product of immaturity into one that largely discounted the relevance to criminal punishment of differences between youths and adults. It then explains why these legal changes can aptly be characterized as the product of a series of moral panics, propelled by exaggerated fears of juvenile crime. The next section turns to the first decade of the 21st century, in which a quite different regulatory approach has taken hold. During this period, lawmakers—from the Supreme Court to state legislatures, and agencies to big city mayors—have made decisions about regulating juvenile crime aimed at long term crime reduction, fairness and efficient resource allocation, as well as immediate safety concerns.

A. Juvenile Justice Law Reform as Moral Panic

1. The Context and Content of the Punitive Reforms

The legal and policy changes that transformed youth crime regulation in the 1990s began as a response to a threat that warranted attention. Violent juvenile crime, particularly homicide, increased substantially beginning in the late 1980s. The public reacted with alarm, which was

23 For general discussion of the legal changes, see SCOTT & STEINBERG, supra note 7 at 96 to 99; FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE (1998).
24 Arrests for homicides by juveniles increased by 300% percent between 1985 and 1993 and then began to decline. U.S. Dep’t of Justice F.B.I., cited in ZIMRING, id. at 36. See also Puzzanchera, Juvenile Arrests 2008, supra note 9.
reinforced by a widespread perception that the juvenile justice system, with its traditional emphasis on rehabilitation, was excessively lenient and ineffectual in dealing with violent youths. 25 Not surprisingly, politicians responded to this public concern, even in states that already had relatively tough laws. 26

In a relatively brief period, sweeping reforms fundamentally altered the regulation of juvenile crime in almost every state. First, legislatures across the country greatly expanded criminal court jurisdiction over young offenders in several ways. Judicial transfer laws were amended to allow adult prosecution of youths barely in their teens for a broad range of crimes, including property and drug offenses. 27 But of greater impact was the enactment of legislative waiver statutes that excluded from juvenile court jurisdiction teenagers in mid-adolescence, either categorically or when charged with designated felonies. 28 It is estimated that 250,000 youths are prosecuted and punished as adults under these statutes, half for non-violent crimes. 29 Further, dissatisfaction with the juvenile court led to laws in many states shifting authority from judges to prosecutors to decide whether a youth charged with a serious crime should be dealt with as an adult or as a juvenile. 30 Second, in the juvenile system, dispositions became much harsher during this period, as incarceration became the norm for many youths who once would

at 6 (depicting rise in juvenile homicide rate from 1983-1993 and steep decline from 1993 to 2000). Some observers attributed this spike to the expanded availability of guns. ZIMRING, id. at 35-37.

25 In one study, 70% of those questioned believed that leniency in the juvenile justice system contributed to violent youth crime. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Timothy Flanagan & Kathleen Maguire eds., 1990). See also Jane B. Sprott, Understanding Public Opposition to a Separate Juvenile System, 44 CRIME & DELINQUENCY 399 (2001) (survey finding support for view that juvenile system’s laxness encouraged youth crime). Governor John Engler of Michigan suggested that the juvenile justice system was designed for youths stealing in an earlier era—and was inadequate to deal with violent modern youths. See New Juvenile Code would Come Down Hard on Teens, Luddington Daily News, January 15, 1996, available at http://news.google.com/newspapers?nid=110&dat=19950113&id=ODRQAAAAIBAJ&sjid=UFUDAAAAIBAJ&page=5523,814670. See also Fox Butterfield, Republicans Challenge Notion of Separate Jails for Juveniles, N.Y. TIMES, Jun. 24, 1996 (quoting Senator Orrin Hatch, “We’ve got to quit coddling these kids...we’d all like to rehabilitate [them], but, by gosh, we’re in a different age.”).

26 In California, Governor Pete Wilson initiated Proposition 21, adopted by voters adopted in 2000, despite the state’s tough anti-gang statute, enacted in 1988. See SCOTT & STEINBERG, supra note 7, at 104.

27 Under traditional law, transfer was rare and, in most states was reserved for teens age 16 and older charged with serious violent crimes (e.g. murder, rape, kidnapping, aggravated assault). Statistics suggest that half of transferred youths today are charged with property or drug offenses. Id. at 98. In California youths age 14 and older can be transferred for 30 offenses, including minor drug selling. CAL. WELF. AND INSTIT. CODE SECT. 707 (West 2011).


have received community sanctions.\textsuperscript{31} In general, the reforms blurred the jurisdictional lines between the juvenile and adult justice systems and substantially undermined the core assumption of the traditional model of juvenile justice—that young offenders were different from their adult counterparts and should receive different treatment. \textsuperscript{32}

2. The elements and dynamic of a moral panic.

On the view of their supporters, these legal and policy changes were simply a coherent response to a new generation of dangerous young criminals—a recognition that the traditional regime was outmoded and unable to protect the public.\textsuperscript{33} But close inspection reveals that even when reforms were motivated by legitimate policy concerns, they were often adopted in a climate of fear and anger—sometimes near hysteria. Putting aside for now the merits of the punitive approach to juvenile crime, the process often had the hallmarks of a moral panic, a phenomenon in which politicians, the media and the public reinforce one another in a pattern of escalating alarm in response to a perceived social threat.\textsuperscript{34}

Moral panics have occurred in response to a wide range of perceived threats—from witches in 17\textsuperscript{th} century Salem, Massachusetts, to child sexual abusers in the 1980s and 1990s, and, more recently, Islamic terrorists.\textsuperscript{35} Sometimes a panic is triggered by a dramatic incident in which the public is made aware of a danger; \textsuperscript{36} the September 11\textsuperscript{th} terrorist attacks are a good example. As in that case, the danger is often real and the incident potentially can generate the political will to deal with a problem that previously received inadequate attention.\textsuperscript{37} But as the moral panic unfolds, perceptions of the threat tend to become exaggerated well beyond the actual


\textsuperscript{32} An early advocate of tough reforms, Alfred Regnery, head of the Office of Juvenile Justice and Delinquency Prevention under President Reagan, noted, “[T]here is no reason for punishing an offender less simply because he is sixteen.” Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul, 34 POLICY REV. 65, 68 (1987). See also supra note 6 (quoting Virginia’s Governor Allen expressing similar view). For a general overview of the trends toward more punitive policies toward juveniles charged with violent crimes in the early 1990s, see Torbet, State Responses, supra note 30 at 4.

\textsuperscript{33} Supra, note 25. (quoting Governor Engler’s deriding the outmoded juvenile system ‘s inability to deal with violent youths of the 1990s).

\textsuperscript{34} See, e.g., GOODE & BEN-YEHUDA, supra note 10.

\textsuperscript{35} Id. at 56 (describing Salem witch trials as examples of moral panics).

\textsuperscript{36} For example, the Three Mile Island accident triggered a panic about nuclear energy. Id. at 58 to 62. The molesting and killing of a 7 year old New Jersey child, Megan Kanka, by a neighbor led states across the country to pass “Megan’s laws,” mandating registration of sex offenders. Kimberley McLarin, Trenton Races to Pass Bills on Sex Abuse, N.Y. TIMES, Aug. 20, 1994 (law passed 30 days after Megan’s death). Earlier, charges of satanic sexual abuse against employees and the owner of day care center generated alarm across the country. See Margaret Talbot, The Devil in the Nursery, N.Y. TIMES MAG., Jan. 7, 2001 available at http://www.newamerica.net/publications/articles/2001/the_devil_in_the_nursery (obituary for accused worker describing hysteria).

\textsuperscript{37} The September 11 attacks showed that Islamic terrorists posed an actual threat. However, little evidence indicates that day care employees (id. ) or Salem witches (supra note 35) posed any real threat.
risk. Indeed, what distinguishes a moral panic from a straightforward recognition of a pressing social problem is the gap between the perception of the severity of the problem and the reality.

Moral panics responding to juvenile crime have followed this pattern. Often fears were triggered by high profile violent crimes by juveniles—school shootings, gang attacks, or killings of innocent persons (especially children). For example, the highly publicized shootings at Columbine High School in Colorado in 1999 generated widespread public alarm and were seen as evidence of “an epidemic” of school violence—despite the fact that, statistically, school shootings had declined and were, in any event, very rare events. Substantial evidence indicates that perceptions about the threat of youth violence were generally distorted in the 1990s. Surveys showed that public estimates of the percentage of violent crimes committed by juveniles (rather than adults) was greatly exaggerated. Moreover, the threat was often assumed to be growing in severity, even when it had been declining for several years. Not surprisingly, perhaps, tough new laws in many states were enacted long after crime rates had declined from their peak in the early 1990s.

The media played an important role in generating and amplifying public alarm. In general, media attention directed at a social problem increases its salience and may result in inflated assessments of its severity. Vivid television and other media crime stories arouse public fear and anger, often by focusing on particular sensational crimes that are taken to

---

38 The fearful reaction to the World Trade Center bombing seemed more intense in the Midwest than in New York City, and likely contributed to support for the questionable decision to intervene in Iraq. See Goode & Ben-Yehuda, supra note 10, at 35-37 (describing exaggeration of threat as element of moral panic).
39 School shootings are very rare events but generate alarm. Infra note 44. Newsweek in 1992 published a series labeled “Kids and Guns: A Report from America’s Classroom Killing Grounds.” See Rob Nordland, Deadly Lessons Newsweek, Mar. 9, 1992; Eloise Salholz, How to Keep Kids Safe, Newsweek, Mar. 9, 1992. The 1995 killing by two Jonesboro, Arkansas, boys of several class mates and a teacher at their school attracted national media attention and led to tough law reforms in the state. See Scott and Steinberg, supra note 7, at 111 and n 76.
40 The killing of 2 year-old James Bulger by two 10 year old boys near Liverpool England in 1993 generated public alarm, fueled by the media, and discussions its meaning and appropriate political responses. David A. Green, When Children Kill Children: Penal Populism and Political Culture, 190-218 (2008).
42 A 1996 survey of 1,000 likely California voters found that 60 percent of respondents believed that juveniles were responsible for most violent crime- in reality, only 14% of arrests for violent crimes involved juveniles. See Lori Dorfman & Vincent Schiraldi, Off Balance: Youth, Race, and Crime in the News, Building Blocks for Youth, 2001, 3-4, 40 n 10, available at www.cclp.org/documents/BBY/offbalance.pdf (describing results of study).
43 In a 1998 study of 2,000 adults, 62% of respondents believed youth crime was on the rise, while the National Crime Victimization Survey for that year revealed youth crime to be at its lowest rate in the 25 year history of the survey. See Justice Policy Institute, Schools and Suspensions: Self-Reported Crime and the Growing use of Suspensions, Sep. 1, 2001, available at www.prisonpolicy.org/scans/jpi/sss.pdf. A 2000 California poll found that a majority of voters thought youth crime was increasing- although the crime rate had decreased steadily for at least five years. Dorfman & Schiraldi, note 42. at 3.
44 Dorfman & Schiraldi, id.
45 Vivid media coverage of crime can increase salience resulting in exaggerated perceptions of risk. This issue is addressed in Part III, infra.
represent a broader threat.\textsuperscript{46} In the 1990s, the media focused increasingly on violent crime, particularly by juveniles. Both national and local television news outlets expanded their coverage of gang activity and other violent youth crime; national magazines and newspapers published cover stories and other reports examining the threat.\textsuperscript{47} One study reported that network news coverage of homicide stories increased by almost 500\%—in a period in which homicides were declining.\textsuperscript{48} This media climate contributed to the perception that violent juveniles were a serious threat to public welfare.

Political actors are also key players in moral panics—generally and in the juvenile crime context.\textsuperscript{49} Eager to demonstrate their concern for public safety and welfare, they seek opportunities, often through media appearances, to confirm the seriousness of the threat and to promise more effective government responses.\textsuperscript{50} Governors often led campaigns to reform youth crime regulation;\textsuperscript{51} as chief executives of state government, they were well positioned to sound the alarm and to advocate for tougher legislation. Immediately after the elementary school shootings in Jonesboro, Arkansas, for example, Governor Mike Huckabee began to call for legislative reform to allow younger juveniles to be prosecuted as adults.\textsuperscript{52} Law enforcement agents and legislators also play a role in fueling moral panics. Prosecutors were heavily involved in efforts to enact tougher juvenile crime regulation in the 1990s.\textsuperscript{53}

\textsuperscript{46} \textit{Id.} The James Bulger killing in England generated alarm about the moral decay of British society among the public and politicians, including Tony Blair, then shadow Home Secretary, although killing by 10 year olds is extraordinarily rare. \textit{GREEN, supra} note 40, at 190-93.

\textsuperscript{47} In the 1990s, local news reported crimes more than any other stories; network news programs increased stories reporting homicides by 473\%, although homicides declined by 33\% during this period. \textit{Dorfman & Schiraldi, supra} note 45, at 11. A California study found that two-thirds of television crime stories in the state featured violent crimes involving juveniles, although most violent crimes are committed by adults. Franklin Gilliam & Shanto Iyengar, \textit{Prime Suspects: The Influence of Local Television News on the Viewing Public, 44 Am. J. POL. SCI 560} (2000). Moreover, studies also showed that members of minority groups were overrepresented in the media as perpetrators of violent crimes. \textit{See also} note 39 \textit{infra} (Newsweek stories on school shootings); \textit{Dorfman & Schiraldi, supra} note 42, at 13

\textsuperscript{48} \textit{Dorfman & Schiraldi, id.} at 11.

\textsuperscript{49} \textit{See GOODE &BEN-YEHUDA, supra} note 10, at 35-37, 125-27.

\textsuperscript{50} \textit{See note 40 supra} (describing Tony Blair’s response to James Bulger killing); \textit{note 53 infra} (California D.A.s statement about gang threat).

\textsuperscript{51} Governor George Allen led the charge to reform Virginia law in the mid-1990s. \textit{See White, supra} note 6 (quoting Allen). Allen argued for a crackdown on “young thugs” and “predators.” \textit{Polls at Odds with Allen’s Panel’s Stance on ‘Young Thugs,’ ROANOKE TIMES & WORLD NEWS, Oct. 14, 1995}, at C1. In 1996, the Virginia legislature, following the recommendation of a Governor’s commission, passed a tough legislative waiver statute under which 14 year old youths charged with violent crimes were excluded from juvenile court jurisdiction. \textit{VA. CODE ANN. § 16.1.269.2}. Governor Engler led efforts to enact tougher laws in Michigan. \textit{See note 25 supra}.

\textsuperscript{52} The perpetrators, aged 11 and 13, killed four children and a teacher, and could not be prosecuted as adults under Arkansas law. \textit{See Brian Knowlton, 2 Jailed Boys Meet With Juvenile Judge, N.Y. TIMES, Mar. 27, 1998, available at http://www.nytimes.com/1998/03/27/news/27ht-slay_t_1.html?scp=20&sq=Jonesboro&st=cse; MIKE HUCKABEE, KIDS WHO KILL} (1998)(describing his role advocating for reform but also for return to Christian family values). Some governors have precipitated moral panics. California Governor Pete Wilson, for example, launched the campaign for passage of Proposition 21, a punitive referendum, in a period of relatively low crime rates, reportedly in service of his presidential aspirations. \textit{SCOTT &STEINBERG, supra} note 7 at 102-03.

\textsuperscript{53} The California District Attorneys Association played a key role in the campaign for Proposition 21 in the late 1990s. Michael Bradbury, district attorney for Ventura county wrote in an op-ed in support a few weeks before the
Another characteristic of a moral panic is a tendency to demonize the individuals or group creating the threat—to label members as deviant and deserving of enmity. Some groups, of course, are easier to demonize than others. Thus the targets of moral panics tend to be groups that have little power themselves and lack powerful advocates to defend them in the media or the political arena. The ubiquitous labeling of teenage criminals as “superpredators” in the 1990s captured aptly the rhetoric of demonization. Young offenders were depicted as remorseless creatures who maimed and killed without moral compunctions, and who considered no consequences other than their own evil gratification. Moreover, since teenagers tend to engage in criminal activity with peers, they were assumed to operate in marauding gangs. Most young offenders were also assumed to be members of racial and ethnic minority groups, partly because membership in street gangs, the frequent focus of media attention, was often limited by race or ethnicity. This assumption perhaps made juveniles easier to target as evil predators, both because poor minority youths tend to lack power and allies in the political arena to challenge the harsh characterization and because many non-minority Americans may have been ready to see them as threatening outsiders. The superpredator stereotype contrasted sharply

vote in 2000, “Gang violence is the most alarming of all crime trends…[C]urrent outmoded laws fail to address this growing problem.” At the time, juvenile crime rates had declined steadily for several years. SCOTT & STEINBERG, supra note 7, at 107 n 69.  

54 As one expert put it, “All moral panics, by their very nature, identify, denounce, and attempt to route out folk devils.” GOODE & BEN-YEHUDA, supra note 10, at 28.  

55 Consider the public image and social status of child sexual molesters and Islamic terrorists. Stanley Cohen points out that the group must be one that lends itself to demonization. COHEN supra note 10, at x-xi(pointing out that even intense and publicized public anger at police seldom leads to moral panics because police have many defenders). The term “super predator” was coined by John Dilulio, supra note 5, who sounded the alarm about a coming wave of violent dangerous youths growing up in moral poverty. Id. The term took hold with the media and politicians. See ZIMRING, supra note 23, at 4-5 (citing Congressman Bill McCollum, Chair of the House Subcommittee on Crime, “Brace yourself for the coming generation of superpredators.”). Peter Annin, “Superpredators Arrive: Should we Cage the New Breed of Vicious Kids, NEWSWEEK, Jan. 22, 1997, at 57; Jim Atkinson, Thrill Killers, TEXAS MONTHLY 126, 126-33 (“The culprits…are..a new breed of street criminals known as superpredators.[their crimes are as savage as they are pointless.]. Lynne Abraham, Philadelphia District Attorney opined “We’re talking about kids who have absolutely no respect for human life.” Richard Zoglin, Now for the Bad News: A Teenage Time Bomb at 52, TIME, Jan. 15, 1996.  

57 See Dilulio, supra note 5 (describing superpredators).  

58 Public fear of juvenile street gangs was successfully exploited by advocates for California’s Proposition 21in 2000; surveys showed it was a key factor in the success of the harsh initiative. SCOTT & STEINBERG, supra note 7, 107-08 n 70. In the early 1990s, California gangs were responsible for a juvenile homicide rate that was at an all time high (although it had declined substantially by 2000).  

59 Most gangs were ethnically based and non-white. Two African American gangs in Los Angeles, the Crips and the Bloods, gained notoriety in the 1980s, giving the city the dubious distinction of being known as the “gang capital of the nation.” Robert Conot, L.A. Gangs: Our City, Their Turf, L.A. TIMES, Mar. 22 1987, at 1. One commentator described gangs as “a breakdown of the moral order, an evil in which racial or ethnic ties have been perverted for criminal gain.” Jeffrey Mayer, Individual Moral Responsibility and the Criminalization of Youth Gangs, 28 WAKE FOREST L. REV. 943, 945 (1993).  

with the traditional depiction of juvenile offenders as immature youths who had gone astray.\textsuperscript{61} In the 1990s, young offenders became dangerous criminals and not children in the public imagination.

During moral panics, a sense of urgency often develops, fueled by dire predictions of future consequences even more awful than the events that brought the threat to public attention.\textsuperscript{62} Public fears of youth crime in the 1990s were exacerbated by oft-repeated predictions of an impending crisis in the early years of the 21\textsuperscript{st} century. Pointing to the increased birth rate in the early 1990s, a few criminologists warned that when this cohort reached adolescence, vast hordes of young superpredators would roam the streets.\textsuperscript{63} These predictions were amplified by politicians and repeated in the media,\textsuperscript{64} affecting perceptions of the magnitude of the threat and contributing to a sense that steps to avert an even greater crisis were urgently needed.\textsuperscript{65} This urgency mobilized lawmakers to act quickly to undertake reforms. In the wake of the Columbine High School shootings, for example, states across the country rushed to pass “zero tolerance” laws strictly mandating that children be punished and excluded from school for carrying weapons or engaging in threatening behavior.\textsuperscript{66}

Moral panics are volatile phenomena. Public fear and anger dissipates and the media’s attention is diverted to other concerns.\textsuperscript{67} Panics that focus on crime tend to recur periodically in response to new incidents or escalating offense rates; politicians and the media are generally ready to exploit evidence of a threat. But several years after juvenile crime steadily declined, the moral panics of the 1990s subsided and, for the time being, youth crime faded as the hot political issue. These episodes have a lasting impact, however, when they become institutionalized through legislative reform. Long after public fears of juvenile crime subsided, punitive policies

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} For an example, see \textsc{Ben Lindsay and Rube Borough, The Dangerous Life} (1931). Lindsay opined that there were “no bad kids”—only bad conditions that led to delinquent conduct. \textit{Id} at 102.
\item \textsuperscript{62} Thus an accident at a nuclear power plant becomes the basis for fears of world-wide nuclear devastation should the use of nuclear power proliferate. See \textsc{Goode & Ben-Yehuda, supra} note 10, at 58-59 (describing response to Three Mile Island accident).
\item \textsuperscript{63} DiLullio, \textit{supra} note 5, (predicting tens of thousands of young super-predators in early 21\textsuperscript{st} century). Criminologist James Alan Fox predicted “a bloodbath of teen violence by the year 2005.” \textsc{Michael Welch, Ironies of Imprisonment} 167 (2005).
\item \textsuperscript{64} See e.g. Zoglin, \textit{supra} note 56 (quoting Dilulio, Fox as well as law enforcement agents predicting wave of juvenile superpredators, under headline “…A Teenage Time Bomb” ); Editorial, \textit{Heading Off the Superpredators}, \textsc{Tampa Trib.} May 21 1996, at 8 (“They are called suprepredators. They are not here yet but they are predicted to be a plague upon the United States in the next decade.”). Peter Reinholz, head of the Family Court Division of the New York City Law Department put it less dramatically, “It’s time—we must prepare for the onslaught of juvenile violence.” in \textsc{Joyce Pumick, Youth Crime: Should Laws Be Tougher? N.Y. Times}, May 9, 1996, at B1.
\item \textsuperscript{65} These predictions also made it easy to discount statistics showing that juvenile crime had declined by the mid-1990s. See statement by Congressman McCollum in \textsc{Zimring, supra} note 23 at 8 (“Today’s drop in crime is only the calm before the coming storm.”).
\item \textsuperscript{66} See \textsc{Joan Wasser, Zeroing in on Zero Tolerance, 15 J.L. & Politics 747}, 747-59 (1999).
\item \textsuperscript{67} The volatility of moral panics can also be seen in the California experience. Soon after Proposition 21 was adopted, an energy crisis captured public attention and gang activity became yesterday’s news. Governor Gray Davis, who attributed his popularity to his zealous advocacy of Proposition 21, was rejected by the voters in a recall election a few years later. \textsc{Scott & Steinberg, supra} note 7, at 112.
\end{itemize}
\end{footnotesize}
that were enacted into law have continued to influence the justice system’s response to youths charged with crimes. To be sure, the political process operates more deliberately in calmer times, and as we will see, some legislatures have moderated and repealed punitive laws in the past decade. But the process of reshaping policies that are embodied in legislation is slow and difficult and many legal changes undertaken in the 1990s remain in place.

3. Justice System Decisionmakers and Moral Panics
The climate of moral panic in the 1980s and 1990s not only led to the enactment of tough juvenile crime regulation, but also influenced prosecutors, judges, and other justice system officials charged with making decisions about individual youths. These government actors may be even more vulnerable to public pressure than legislators. Even when legislative priorities are urgent, the law making process is relatively cumbersome, sometimes allowing time for the panic to dissipate. Prosecutors, in contrast, must make decisions quickly. Moreover, whereas legislatures are charged broadly with lawmaking authority to promote general social welfare, the primary responsibility of prosecutors is to protect the public from crime and assure that perpetrators are punished. Thus a dutiful prosecutor is likely to be very responsive to public anger at an accused youth and sensitive to the distress of victims. In a climate of moral panic, these immediate concerns understandably may lead prosecutors to seek criminal court adjudication and punishment of youths deemed to be a danger to society. Long term concerns such as the impact of dispositions on the future criminality and life prospects of offenders, their financial cost, and racial or ethnic disparities in punishment are likely less important to their decisionmaking calculus.

In the 1990s, prosecutors actively sought greater legislative authority to make jurisdictional decisions themselves and to narrow the authority of juvenile court judges to determine whether a youth would be tried in juvenile versus criminal court. As noted above, many states responded by enacting direct-file statutes expanding prosecutorial authority over these decisions. If the crime was serious, the charging decision often was made in the glare of media publicity directed at the alleged perpetrator and victims. Moreover, under automatic transfer statutes, prosecutors have discretionary authority to charge the youth with a transferrable

68 Note 250 infra (describing moderating influence on legislation created because Arkansas legislature was not in session at time of Jonesboro school shootings).
69 It is unlikely that a prosecutor making charging and jurisdictional decisions about a particular minority youth are unlikely to consider whether he was more likely to be apprehended by police than a non-minority counterpart. But in fact, substantial racial disparities in police contact exist. See, e.g., David Huizinga, Terence Thornberry, Kelly Knight, Peter Lovegrove, Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities, A Report to the Office of Juvenile Justice and Delinquency Prevention, July 28, 2007, available at http://www.ojjdp.gov/dmc/ (finding “clear evidence” of disproportionate minority contact with police). Further, the costs of incarceration are borne by correctional departments, and not by prosecutors or courts. In some systems, localities avoid the costs of dispositions when judges sentence youths to state institutions. See note 119 infra.
70 See SCOTT & STEINBERG, supra note 7, at 102-103 (describing district attorney role in advocating for limiting judicial discretion and expanding prosecutors’ direct file authority).
offense or with a less serious crime in juvenile court. In a climate of moral panic, this discretion may often be exercised in favor of the more serious charge.

Judges also are responsive to public fears, the outrage of victims and sympathizers and media scrutiny of high profile juvenile crimes. Youths adjudicated delinquent in the 1990s were far more likely to be incarcerated (and for longer periods) than were juveniles a decade earlier. But judges are often appointed (not elected) and the adjudicative process is more deliberative than the exercise of prosecutorial discretion; further, the role of the juvenile court judge encourages a broader perspective on the stakes of the transfer or adjudication decision and its implications for the accused youth. Probably for this reason, legal reforms of the 1990s limited juvenile court judges’ discretion in ways that promoted transfer to criminal court. Along with direct file and legislative waiver statutes, many states revised transfer laws to create presumptions favoring transfer or directing judges to focus primarily on the seriousness of the charged offense and the youth’s prior record, restricting consideration of his amenability to treatment or immaturity.

* 

The aim of the punitive law reforms of the 1990s was to protect citizens from young superpredators, who were thought to represent a pressing threat to public safety. In this hostile emotional climate, the reforms took on a life of their own: Initiatives that originated in alarm about youth violence expanded to encompass less serious and non-violent offenses, sweeping many juveniles into the net of criminal court jurisdiction. Moreover, criminalization extended to the juvenile system with the greatly expanded use of incarceration. These changes were transformative, but often they were undertaken with little deliberation or consideration of their long term consequences.

**B. Dissipation of the Moral Panic: Juvenile Crime Regulation in Calmer Times**

In the past decade, the moral panic over juvenile crime has subsided, as moral panics tend to do. Today, although public safety concerns continue to be vitally important, a less urgent attitude prevails. The specific factors contributing to this change are varied. Certainly it is important that after several years of declining juvenile crime, lawmakers and the public appeared to recognize that the threat posed by young offenders was not as great as it had seemed to be in the

---

71 See Aos, supra note 31, at 2 (describing 40% increased rate of incarceration in Washington state juvenile system).
72 See CAL. WELF. & INST. CODE SECT. 707 (B)(presumption favoring transfer for 30 felonies for youths age 14 and older). The age at which the presumption applies was lowered from 16 to 14 in 2000. See SCOTT & STEINBERG, supra note 2 at 103. See also Torbet, supra note 30. A youth’s amenability to treatment was a key factor under traditional statutes. See Barry Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform, 79 MINN. L. REV. 965, 1006-09.
1990s—and the prediction of a new wave of superpredators did not materialize in the early 21st century. One might also speculate that another threat—Islamic terrorists—supplanted teenage criminals as the most feared enemies of society. Further, critics have effectively challenged the fundamental fairness of subjecting young offenders to adult punishment. The success of this argument, and a generally more benign view of young offenders, may be linked to growing public interest in new studies on adolescent brain development suggesting that immaturity in the brain’s executive functions may affect teenagers’ decisions about involvement in criminal activity.

In this less hostile climate, lawmakers have been inclined to consider long term societal interests that got little attention in the 1990s. First, state governments in recent years began to recognize the high cost of incarceration-based policies. Moreover, policymakers increasingly have come to realize that the recidivism rate of youths coming out of institutional facilities is extremely high, while a growing body of evidence indicates that some community-based delinquency programs are effective at reducing recidivism. In combination, these factors have led to a new wave of policy reforms, premised on the assumption that juvenile offenders should receive special treatment based on their developmental immaturity.

1. Characterizing the Contemporary Young Offender: Superpredators No More

The striking change in attitudes in the past decade perhaps is most evident in the way juvenile offenders are characterized in legal and policy settings and by the media. Seldom heard in recent years are descriptions of vicious young superpredators, and few observers today dismiss as irrelevant differences between juvenile and adult offenders. Instead, from the Supreme Court to the local newspaper, juvenile offenders are described as youths whose crimes are the product of developmental immaturity. Recent opinion surveys indicate public support for a rehabilitative

---

74 See Dilullo, supra note 5 (predicting wave of superdators in first decade of 21st century). Get Apology
75 See generally Laurence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy? 64 AM. PSYCHOLOGIST 739 (2009)[hereinafter Adolescent Brain Development] (describing dimensions of brain development relevant to criminal offending. See discussion t.a.n 84 to 89 infra.
76 Expenditures on juvenile corrections increased dramatically in the 1990s. See Aos, supra note 33, at 2 (finding 43% increase). C.f. Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 COLUMBIA L. REV. 1276, 1290 (2005)(finding that budgetary impact of sentencing in adult system led states to change policies).
77 In 2009, a New York, Task Force appointed by Governor Patterson, issued a scathing critique of that state’s juvenile justice system, pointing to the high recidivism rate among youths sent to institutional facilities. The report urged the use of evidence based community programs. CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (2009) [hereinafter CHARTING A NEW COURSE]. See notes 117 infra.
78 See remarks by Gov. George Allen, supra notes 5 and 51.
79 See discussion of Supreme Court opinions, t.a.n. 91 to 101 infra. See also CHARTING A NEW COURSE, supra note 77 at 19 (“Youths have developing brains that lead them to behave differently than adults. Recent research shows that most adolescents have diminished decision-making capacity and are more susceptible to peer influence compared to adults. This research also suggests that many youth will cease lawbreaking as part of the normal maturation process.”).
approach with young offenders, a view endorsed by many lawmakers who support juvenile dispositions that attend to the developmental needs of adolescents. In contrast to the reformers of the 1990s, who seemed to believe that many young offenders were destined to be career criminals, lawmakers, and even conservative advocates, today increasingly embrace the goal of reducing recidivism through appropriate dispositions.

To some extent, this change in the public image of young offenders is not surprising. Paternalistic attitudes toward children and youth that are embedded in our culture were obscured in the 1990s and have re-emerged in recent years with the decline in juvenile crime and reduced focus on this threat. But juvenile offenders today are not depicted as innocent children—as they were a few generations ago. Instead, a more sophisticated account of teenage offenders has taken hold, one that is informed by scientific knowledge about adolescence, particularly developmental brain research.

a. Developmental Research and Youth Crime Regulation

By the 1990s, a body of behavioral research was available on psychological dimensions of adolescence that are likely relevant to juveniles’ involvement in criminal activity. During this period, a few scholars and researchers argued that developmental influences on decisionmaking likely contribute to youthful criminal choices, pointing to teenagers’ susceptibility to peer influence, tendency to focus on the immediate rather than future consequences of choices, deficiencies in impulse control and greater preference for risk-taking than adults. But it is fair to say that this argument gained little traction in the political arena.

80 Daniel Nagin, Alex Piquero, Elizabeth Scott & Laurence Steinberg, Public Preferences for Rehabilitation versus Incarceration of Young Offenders: Evidence from a Contingent Valuation Study, 5 J. CRIMINOLOGY AND PUB. POLICY 627 (2006) (study showing greater willingness to pay for rehabilitation than incarceration where both were described as equally effective at reducing crime); Julian Roberts, Public Opinion and Youth Justice, 31 CRIME AND JUSTICE 495 (2004).

81 An important part of this trend is the shifting of resources from institutions to community-based programs that have shown effectiveness in crime reduction. See discussion t.a.n 119 to123 infra.


83 The work of an interdisciplinary research network sponsored by the John D. and Catherine T. MacArthur Foundation, the Research Network on Adolescent Development and Juvenile Justice, brought attention to this issue. The Network, in collaboration with other funders, sponsored empirical research on dimensions of adolescent development relevant to criminal activity and to the adjudication of youths for their offenses. For general information, see www.adjj.org. For an early treatment, see FRANKLIN E. ZIMRING, CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUTH OFFENDERS (1978).

84 See, e.g., Elizabeth Scott, N. Dickon Reppucci and Jennifer Woolard, L. & HUMAN BEHAVIOR (1995); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 BEHAV. SCI. LAW 741 (2000); Laurence Steinberg and Elizabeth Scott, Less Guilty by Reason of Adolescence, 58 AMER. PSYCHOLOGIST 1009 (2003); SCOTT & STEINBERG, supra note 7, at 37-44; 130-39.
In the past decade, this has changed, partly in response to neuroscience studies of adolescent brain development that have supplemented the behavioral research.\(^{85}\) This new research shows that differences in the decisionmaking capacity of adults and adolescents can be linked to predictable changes in brain structure and function. Of particular importance are large-scale structural changes during adolescence and into early adulthood in the frontal lobes, particularly the prefrontal cortex, which controls what psychologists call “executive functions.” These are advanced thinking processes employed in planning, controlling impulses and weighing the costs and benefits of decisions before acting.\(^{86}\) Maturation in the connections between the prefrontal cortex and other parts of the brain is also important, resulting in improvements in impulse control, the calibration of risk and reward and emotional regulation.\(^{87}\)

Policy makers, the media, and the public have shown considerable interest in developmental neuroscience research in recent years, appearing to accept that immature brain functioning contributes to teenagers’ choices to become involved in criminal activity. News stories frequently have pointed to adolescent brain studies in suggesting that teenage criminals differ from adults,\(^{88}\) and neuroscience research has been invoked in support of a broad range of policies dealing more leniently with juveniles. Task Force reports advocating justice system reforms point to differences in adolescent and adult brain functioning, as do legislative policy statements justifying the abolition of punitive sanctions.\(^{89}\) For reasons that are unclear, many

---

\(^{85}\) Most researchers view the developments in neuroscience as simply confirming the earlier behavioral studies. See Steinberg, Adolescent Brain Development, supra note 72.


\(^{87}\) Scientists postulate that timing asymmetries in the development of different brain regions contribute to risk taking and immature judgment in adolescence. In early adolescence, changes in the limbic system at puberty contribute to sensation seeking behavior particularly with peers. But the regions of the prefrontal cortex that involve the executive functions of planning regulating emotions and controlling impulses develop over the course of adolescence into early adulthood. This gap between increased sensation seeking and later development of control has been compared by one scientist to “starting the engines without a skilled driver.” Ronald Dahl, supra note __, Affect Regulation, Brain Development and Behavioral Emotional Health in Adolescence, 6 CNS Spectrums 1, 8 (2001). See also Steinberg, Adolescent Brain Development, supra note 72.


\(^{89}\) CHARTING A NEW COURSE, supra note 77 at 19 (pointing to brain development in arguing for deinstitutionalization). In Washington, the state legislature pointed to differences between adolescent and adult brains in abolishing mandatory minimum sentences for youths tried as adults, stating “Emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults.” Chapter 437, Laws of 2005, 59th Legislature, 2005 Regular Session (Effective August, 2005). When Colorado abolished the sentence of life without parole for juveniles in 2006, politicians (including the Governor) pointed to differences in brain development as justification. Miles Moffeit and Kevin
observers seem to find the emerging neuroscience evidence on brain development more compelling and relevant to justice policy than the large body of behavioral research that is largely simply confirmed by the neuroscience studies.\footnote{Steinberg, supra note 75.}

**b. Young Offenders and the Supreme Court**

In three recent opinions, the Supreme Court has evaluated the constitutionality under the Eighth Amendment of imposing harsh criminal sentences on juveniles; in each case, the Court has strongly endorsed the view that the immaturity of young offenders mitigates the culpability of their criminal choices. *Roper v. Simmons*, in 2005, held that imposing the death penalty for a crime committed by a juvenile violated the Constitution’s prohibition of cruel and unusual punishment.\footnote{543 U.S. 551 (2005).} Five years later, in *Graham v. Florida*, the Court struck down a Florida law allowing the sentence of Life without Parole to be imposed on juveniles for non-homicide offenses.\footnote{The extension of *Roper* to non-capital offenses negated the assumption that the Court’s proportionality analysis only applied to the death penalty. 560 U.S._ (2010); 130 S.Ct 2011 (2010).} Most recently, in *Miller v. Alabama*, the Court rejected the mandatory imposition of this sentence even for youths convicted of homicide.\footnote{Relying on scientific research, the Court in these opinions described the developmental influences that make teenagers’ criminal acts less blameworthy than those of adults, pointing to the diminished decisionmaking capacity of youths as compared to adults, their greater vulnerability to external coercion (including peer pressure), and the unformed nature of personal identity in adolescence. As the Court suggested in *Roper*, the criminal conduct of most adolescents reflects “unfortunate yet transient immaturity.” While *Roper* drew on developmental psychology research in reaching these conclusions, *Graham* and *Miller* also pointed to developments in brain science that “show fundamental differences between juvenile and adult minds.” Even Justice Roberts, concurring in the *Graham* judgment but opting for a case-by-case approach, did not question that juvenile offenders are generally less culpable than adults. See also *Miller*, 567 U.S. at n. 5 (slip opinion)(describing general reduced culpabilities of youth).}

*Graham, 560 U.S. at 4-6; 130 S.Ct. at 2026-27 (citing brain research). The Court noted that brain development involved in behavioral control continues to mature through late adolescence. Id. See also *Miller*, 567 U.S. at n. 5 (slip opinion)(describing further brain research). The majority in both *Roper* and *Graham* rejected a case-by-case approach on the ground that it was too difficult to differentiate teenagers whose crimes reflect developmental immaturity from those few who might deserve the severest punishment. *Miller* did not impose a categorical ban on LWOP for juveniles, but struck down mandatory LWOP sentences; the sentence can be imposed if the youth is allowed to introduce age and immaturity in mitigation. 560 U.S. 2036 at __; 130 S.Ct. at 2038-39 (Roberts concurring)(describing general reduced culpabilities of youth).
The importance of these opinions can hardly be exaggerated. To be sure, they affect a relatively small number of young offenders convicted of the most serious crimes. And the Court may not extend the principle announced in these cases to further restrict state authority to punish juveniles as adults. But following a long period in which the relevance to criminal punishment of differences between juvenile and adult offenders was either ignored or denied, the opinions represent a forceful statement that young offenders are different from and less culpable than adults— a statement that is bound to influence other lawmakers. The Court bases this conclusion not on conventional wisdom, but on developmental psychology and neuroscience research. In the early 21st century, our preeminent legal institution effectively has rejected the negative stereotype of young criminals as predators that dominated in the 1990s.

2. Juvenile Crime Regulation in the Early 21st Century

Changing attitudes toward young offenders in the past decade have influenced policymakers at all levels of government, resulting in a trend away from the punitive law reforms of the 1990s. Many states have restricted the adult prosecution and punishment of juveniles, and youths in the adult system are now more likely to receive special treatment. Moreover, pro-incarceration policies in the juvenile system have come under scrutiny; states across the country have undertaken reforms that focus on developmentally appropriate interventions as the most effective means of reducing recidivism.

Several considerations have shaped this new wave of reforms. First, states have become cost-conscious, particularly in response to the great recession. Legislatures and government agencies have recognized that policies based on incarceration are expensive, and often less effective at reducing crime than some cheaper community programs. Increasingly, states are turning to evidence-based programs for juveniles as a better use of government resources than confinement in institutional facilities. Fairness concerns have also become more salient, as the implications

---

101 In evaluating whether the challenged punishment at issue violates the 8th Amendment, the Court considers how widely it is used. One basis for finding a constitutional violation in Roper and Graham was that few states imposed the challenged sentences on juveniles. See Roper, 543 U.S at 652 (finding only 3 states executed prisoners for crimes committed as juveniles between 1995-2005); Graham, 560 U.S. at 2023 (reviewing actual sentencing practices, and finding 109 youths serving Life without Parole for non-homicide offenses). In Miller, the mandatory nature of the LWOP sentence for homicide conviction meant that it was imposed on all juveniles convicted as adults.

102 The Court could abolish LWOP altogether for juveniles. Supra note 99 (describing Miller’s prohibition of mandatory LWOP).

103 Evidence of the trend toward less punitive regulation of juvenile crime, including restrictions on transfer to adult court and abolition of punitive sentences, is provided by reports of the National Juvenile Defender Center, which records all legislative changes in a year-by-year overview. See, e.g., 2008 Juvenile Justice Legislation at http://www.njdc.info.publications.php.

104 See t.a.n. 153 to156 infra.

105 Id. (describing policy shift).
of punishing juveniles as adults have become more apparent.\textsuperscript{106} The pervasive theme in these reforms is that both society and young offenders will gain from policies and practices that recognize that delinquent youths are different from adult criminals.

\textbf{a. Restrictions on Criminalization}

Legislatures in some states have retreated from laws facilitating the adjudication of juveniles in criminal court. For example, in 2009, the state of Washington, as part of a broad reform moderating its approach to juvenile crime, repealed an automatic transfer statute enacted in 1994,\textsuperscript{107} and also prohibited transfer of youths under the age of 15 except for murder or aggravated assault.\textsuperscript{108} Other states have adopted similar reforms.\textsuperscript{109} Also, Connecticut raised the minimum age of general criminal court jurisdiction from 16 to 18, following a campaign in which supporters emphasized the developmental immaturity of young offenders and the ineffectiveness of adult sanctions at reducing recidivism.\textsuperscript{110} Similar efforts are underway in other states.\textsuperscript{111}

Even juveniles who are tried and punished as adults increasingly receive differential treatment. Some states recently have restricted the imposition of harsh sentences on juveniles beyond limits mandated the Supreme Court.\textsuperscript{112} For example, pointing to developmental brain research, lawmakers in several states have abolished the sentence of life without parole for juveniles altogether.\textsuperscript{114} Some state legislatures have also addressed concerns that some juveniles may be unable to function adequately as defendants in criminal trials, enacting statutes requiring an

\textsuperscript{106} See note 114 infra (describing newspaper series about youths serving life without parole for felony murder). Concern about disproportionate impact on minority offenders has also increased. \textit{Supra} note 69; \textit{infra} note 123.


\textsuperscript{108} E.S.S.B. 5746, page 3, lines 27-30.


\textsuperscript{112} A Washington statute abolishing mandatory minimum sentences for juvenile offenders tried as adults also cited research on brain development. \textit{Supra} note 85.

\textsuperscript{113} Colorado abolished the sentence after a series of sympathetic news stories about youths serving the sentence, often for felony murder. \textit{Supra} note 89. \textit{See also} Gwen Florio, Sue Lindsey, & Sarah Langbein, \textit{Life for Death: Should Teen Murderers get a Second Chance at Freedom?}, ROCKY MTN NEWS, Sept. 17 2005, at 1A. Governor Bill Owen pointed to brain research in explaining his support. Moffèit, \textit{supra} note 85.

\textsuperscript{114} \textit{Miller} only applied to mandatory LWOP.
assessment of competence to stand trial to determine if immaturity impedes a youth’s ability to understand the proceedings against him or to assist his attorney.115 As the differences between youths and adults have become more salient, lawmakers increasingly weigh the values of procedural and substantive fairness.

b. Reforming the Juvenile System

Just as important as restrictions on criminal prosecution and punishment of juveniles are comprehensive reforms undertaken by many states of their juvenile justice systems. Several jurisdictions, including California116 and New York,117 (states with large institutional systems), have dramatically reduced the number of youths confined to institutions, shifting resources to community-based programs.118 Many states have also reformed residential placement itself, rejecting prison-like institutions in favor of small facilities that offer educational and therapeutic services and are located near residents’ communities.119

These reforms were motivated by a mix of factors, including a goal of cutting costs and using state revenues efficiently.120 Moreover, a growing body of evidence indicates that

116California has been a leader in this movement. Pursuant largely to a 2007 statutory directive (SB 81 and AB 191), the state dismantled the California Youth Authority (renamed the Division of Juvenile Justice (DYJ)) and closed most facilities, directing that most convicted youths remain in their communities. http://www.cdcr.ca.gov/Juvenile_Justice/DJJ_History/index.html, The DYJ census dropped by more than 80%. Id.
117In New York, a scathing 2009 Governor’s Task Force report was a major catalyst for reform. The report emphasized the high cost of institutionalization of youths ($210,000 per year per youth), the majority of whom were misdemeanants, and their very high recidivism rates. The system’s punitive approach, it stated, “damaged the future prospects of these young people, wasted millions of taxpayers’ dollars and violated the fundamental principles of positive youth development.” CHARTING A NEW COURSE, supra note 77 at 8. New York City officials responded by announcing a drastic reduction in the number of city youths sent to state institutions. Most youths would remain in their homes and receive therapeutic services that had been shown to reduce crime more effectively than institutionalization at a fraction of the cost. Julie Bosman, City Signals Intent to Put Fewer Teenagers in Jail, N.Y.TIMES, Jan. 21, 2010, available at http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html?ref=nyregion&pagewanted=print (describing a cost of $17,000 per youth).
118For a comprehensive analysis of the trend toward deinstitutionalization in juvenile justice, see NATIONAL JUVENILE JUSTICE NETWORK, BRINGING YOUTH HOME: A NATIONAL MOVEMENT TO INCREASE PUBLIC SAFETY, REHABILITATE YOUTH AND SAVE MONEY (2011) [hereinafter BRINGING YOUTH HOME], available at http://www.njjn.org/library/search-results?subject=8 (describing the move to community based sanctions in various states).
119The approach was developed in Missouri and has been adopted by many states. MO. DEP’T OF SOC. SERVICES, DIV. OF YOUTH SERVICES, ANNUAL REPORT FOR THE FISCAL YEAR 2006, available at www.dss.mo.gov/re/pdf/dys/dysfy06.pdf. Recidivism rates are reported to be far lower than the rates of youths coming out of institutional placement. Id. (reporting recidivism rates of 8.7%). See Marian Wright Edelman, Juvenile Justice Reform: Making the “Missouri Model” an American Model, HUFFINGTON POST, Mar. 21, 2010, available at http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html (advocating a nationwide shift to the Missouri Model).
120The high cost of incarceration was important. The American Correctional Association estimated the average yearly cost of keeping a youth in a residential facility at almost $88,000 per year. In some states, the cost is over $250,000 per year. AMER. CORRECTIONAL ASS’N, 2008 DIRECTORY OF ADULT AND JUVENILE CORRECTIONAL
institutionalized juveniles recidivate at high rates, while some less expensive community-based programs show promising reduction in rates of reoffending.\textsuperscript{121} States increasingly have embraced the view that public safety is best promoted by addressing the needs of young offenders through scientifically based rehabilitative services near offenders’ homes,\textsuperscript{122} and that the justice system should aim to maximize the opportunities for delinquent youths to become productive adults.\textsuperscript{123} Evidence that minority youths are disproportionately subject to institutional confinement has also become a matter of growing policy concern.\textsuperscript{124}

\*

A pragmatic approach to youth crime regulation appears to be supplanting the punitive policies of the 1990s. In part, this is because juvenile crime has not been a pressing social concern,\textsuperscript{125} and other concerns have become more urgent.\textsuperscript{126} Under these conditions, policymakers have been more inclined to deliberate on the long term costs and benefits of various policies and to focus on values such as fairness and youth welfare—considerations that got little attention in the late 20\textsuperscript{th} century.\textsuperscript{127} Together, the promise of cost savings, crime reduction and better long term outcomes for youths have led many states to substantially revise their juvenile justice policies to reflect a view that young offenders are different from their adult counterparts.\textsuperscript{128}

\textsuperscript{121}See Center for the Study and Prevention of Violence (U. Colorado), Blueprints for Violence Prevention, available at www.colorado.edu/cspv/blueprints/ (describing and endorsing particular evidence based programs). See also Scott & Steinberg, supra note 7 at 215-21. In New York, youths in state custody (50% of whom were misdemeanants), 75% were rearrested within 3 years of release. Supra note 77 at 10.


\textsuperscript{123}See e.g. Md. Dep’t of Juv. Services, DJS Comprehensive Three Year Strategic Plan FY 2009-2010 (2009) (adopting this goal).

\textsuperscript{124}See Charting a New Course, supra note 82.


\textsuperscript{126}See t.a.n. note 30 supra (describing increased salience of Islamic terrorism). The recent economic recession may also threaten social welfare more tangibly, and created budgetary strains. .

\textsuperscript{127}One noteworthy change that suggests deliberation is that policy reform today often involves strategic plans and task force reports. Supra note 131 (citing Md’s strategic plan); t.a.n. 82, 125 supra (discussing New York Task Force report).

\textsuperscript{128}In Washington, a study conducted on behalf of the state legislature by a research institute indicated that the state could reduce crime and save billions of dollars (in reduced prison costs) by investing aggressively in evidence-based programs, mostly in the juvenile system. Steve Aos, Marna Miller, & Elizabeth Drake, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates (2006) available at http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.
II. DEVELOPMENTAL KNOWLEDGE AND OPTIMAL YOUTH CRIME POLICIES

The story of juvenile crime regulation over the past 25 years is one in which lawmakers and justice system actors have tended to focus on compelling short term concerns in periods of moral panic and to consider a range of long term consequences in calmer times. Implicit in this account is the assumption that better decisions are made when decisionmakers weigh a range of relevant considerations and consider the future impact of alternative choices—acting on the basis of informed reason rather than emotion. But the legal changes of the past decade plausibly might be based largely on financial expediency, rather than a better appreciation of optimal social policy. And, as suggested earlier, moral panics may sometimes function to create the political will to undertake needed policy changes--such as (perhaps) reforming an overly permissive juvenile justice system.129 I have provided some evidence to refute this upbeat account of the punitive reforms, but further explanation may be required to demonstrates why moral panic decisionmaking about juvenile crime sub-optimal.

Developmental science offers three lessons that support policies that treat juvenile offenders differently from their adult counterparts on the basis of their psychological immaturity.130 First, the choices of many juvenile offenders to get involved in criminal activity are shaped by developmental influences, and therefore are less culpable than those of adults. Thus a regime committed to fairness will be reluctant to punish juveniles as adults. Second, because developmental factors play a key role in youthful criminal activity, most youths will outgrow their antisocial tendencies as they mature into adulthood—unless their experiences in the justice system push them toward lives in crime. Related to this is the third developmental lesson that should inform juvenile crime policy. Adolescence is a critical developmental stage in which individuals begin to acquire the social skills necessary for productive adult lives. Success or failure in this process depends importantly on social context, and for young offenders, the correctional setting provides that social context and may determine whether they make the transition to productive adulthood.

A. Fairness, Developmental Immaturity and Youth Crime Policy

129 See note 13 supra. As suggested, moral panics sometimes (perhaps often) direct attention to social problems that had been inadequately addressed. But by definition, the perception of the social threat is exaggerated in a moral panic, and thus the response is likely to be excessive. Net social benefits will accrue only if the costs of inertia (or “moral lethargy”) in response to the problem exceeded the costs of overreaction. The attention to bullying in recent years may be such a case. Id. Further, it is important to note that moral panics constitute a subcategory of a broader phenomenon; often emotionally salient events arouse public concern about an issue and function as a catalyst for reform- without the hysteria, targeted hostility and exaggerated perception of the threat that characterize moral panics. Consider, for example, the impact on the Civil Rights movement in the 1960s of media coverage of the violence directed at Freedom Riders and marchers from Selma to Montgomery, Alabama.

130 The three developmental lessons are developed in detail in SCOTT & STEINBERG, supra note 7..
As the Supreme Court has recognized in its recent Eighth Amendment opinions, adolescents can be distinguished from adults in three ways reduce the criminal culpability of young offenders: deficiencies in their decisionmaking capacities due to immaturity, vulnerability to external coercion from which extrication is difficult because of youthful dependency and lack of autonomy, and the unformed quality of adolescent character, which weakens the inference that the criminal conduct derives from the actor’s bad character. These developmental influences on teenage criminal activity do not result in such severe impairment that young offenders should be excused from criminal responsibility, but they distinguish juvenile offenders from adults in ways that mitigate criminal blameworthiness. The mitigation principle announced by the Court should guide juvenile crime regulation generally. A justice system committed to fairness will systematically impose more lenient punishment on young offenders than would be appropriate for adult offenders committing similar crimes.

B. Normative Adolescents and Criminal Activity

The research points to a second important lesson. Many normal teenagers engage in criminal activity but a relatively small percentage of young offenders become career criminals. The psychosocial influences on decisionmaking that contribute to adolescents’ immature judgment and reduced culpability (susceptibility to peer influence, poor impulse control and a tendency to discount future consequences, for example) also contribute to an inclination to get involved in criminal activity. Further, developmentalists explain that, for many teens, risky experimentation is a part of identity formation. In late adolescence or early adulthood, the psychosocial influences on decisionmaking naturally attenuate and identity becomes stabilized for most individuals. Adult plans and investment in work and intimate partners assume priority and activities that threaten these endeavors become costly and less attractive. Thus,

132 Each of these contributors of youthful criminal activity can be linked to conventional sources of mitigation in criminal law. Id. at 830-35 (describing mitigation based on diminished capacity, exogenous pressures and lack of bad character).
133 Id. at 829-30.
134 Scott & Steinberg, Blaming Youth, id.; SCOTT & STEINBERG, supra note 7 at 123-42 (arguing based on developmental immaturity that criminal choices of adolescents are less culpable than those of adults).
135 Of course, the mitigation principle does not require a separate system that offers correctional interventions based on developmental needs; a youth discount in a unitary system could satisfy the demands of fairness.
136 The research consistently shows that a very small percentage of juvenile offenders become adult criminals. See Alex Piquero, David Farrington & Alfred Blumstein, The Criminal Career Paradigm: Background and Recent Developments, CRIME AND JUSTICE: A REVIEW OF RESEARCH VOL. 30, 359 (Michael Tonry, ed., 2003) (5-10% become adult career criminals).
137 SCOTT & STEINBERG, supra note 7 at 136-38 (describing role of experimentation in identity formation).
predictably, most adolescents will outgrow their inclination to get involved in criminal activity as they mature.

The upshot is that much adolescent criminal activity is “normative” behavior, as psychologists use this term,\textsuperscript{139} and not indicative of bad character or criminal predisposition. Of course, not all adolescents get involved in crime; social context and individual vulnerabilities play important roles.\textsuperscript{140} But the involvement in criminal activity of the overwhelming majority of young criminals begins and ends in adolescence. Criminologists observe an age-crime trajectory, a pattern of criminal activity that increases steadily beginning at age 13, peaks at age 17 and then drops off sharply.\textsuperscript{141} Only a small percentage of youths become career criminals.\textsuperscript{142} This developmental pattern has important policy implications; if most youths will tend to mature out of their tendency to get involved in criminal activity, society has an interest in facilitating desistence and minimizing the negative impact of sanctions on their future lives. Yet, although much relevant research on the age-crime trajectory was available in the 1990s,\textsuperscript{143} lawmakers seemed to have little interest in the long-term social costs of incarceration-based policies.

C. Social Context and Healthy Adolescent Development

Developmental science offers a third key lesson, explaining why and how correctional interventions can influence whether teenagers make a successful transition to adult life. Mid- and late adolescence is a period in which individuals normally make substantial progress toward acquiring and coordinating skills that are essential to functioning in the conventional work and relationship roles that are part of self-sufficient adulthood.\textsuperscript{144} This process toward psychosocial maturity is one of reciprocal interaction between the individual and her social context. Healthy social contexts provide "opportunity structures" that facilitate normative development, but social contexts can also hamper this process.\textsuperscript{145} Several environmental conditions are important— the

\textsuperscript{139} In this context, normative means developmental in nature and normal for a particular stage.
\textsuperscript{141} Piquero, et al., \textit{supra} note 137 at 370 (describing the age-crime curve which peaks at age 17).
\textsuperscript{142} \textit{Id.} (describing studies finding between 5-10\% of juvenile offenders become adult criminals). \textit{See also} Moffitt, \textit{supra} note 139 (describing a small group of “life-course-persistent” offenders).
\textsuperscript{143} \textit{See e.g.} Marvin Wolfgang, Robert Figlio, & Thornstein Sellin, \textit{Delinquency in a Birth Cohort} (1972)(classic 1970s study finding 5\% of young criminals committed majority of crimes and persisted).
\textsuperscript{144} These include basic educational and vocational skills necessary to function in the workplace, social skills necessary to establish stable intimate relationships and cooperate in groups, and the ability to behave responsibly without external supervision and set meaningful personal goals. See He Len Chung, Michelle Little, & Laurence Steinberg, \textit{The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective}, in \textit{On Your Own Without a Net: The Transitions to Adulthood for Vulnerable Populations} (Wayne Osgood, Michael Foster, Constance Flanagan, & Gretchen Ruth eds., 2005).
\textsuperscript{145} \textit{Id.} at \textit{\_}. Urie Bronfenbrenner & Morris, \textit{The Ecology of Environmental Process in Handbook of Child Psychology} (1998); Laurence Steinberg, \textit{Handbook of Adolescence Psychology}. 

presence or absence of an authoritative adult parent figure; association with pro-social or antisocial peers; and participation (or not) in educational and other activities that facilitate the development of autonomous decision-making and critical thinking skills. For young offenders, the justice system becomes the environment for social development and it may support or undermine healthy maturation.\textsuperscript{146} Whether youths desist from criminal activity and become mature adults who are able to function adequately in society depends in part on whether the correctional setting provides opportunity structures for successful development.\textsuperscript{147}

This developmental knowledge challenges the incarceration-based policies of the 1990s and supports the contemporary approach. Considerable evidence indicates that adult prisons and institutional juvenile facilities are harmful developmental settings. Their large size is associated with impersonal relationships between inmates and adult staff,\textsuperscript{148} unstructured interactions with fellow inmates,\textsuperscript{149} and inadequate educational, mental health and occupational services.\textsuperscript{150} These facilities do little to prepare youths to function in the workplace or to develop the interpersonal skills necessary to establish stable relationships.\textsuperscript{151} Against the backdrop of developmental knowledge, the high recidivism rates of youths released from these facilities is not surprising.

In contrast, scientifically-based correctional programs create social context that provide delinquent youths with opportunity structures essential to healthy maturation in adolescence—by seeking to build their relationships with authoritative parents or other adults,\textsuperscript{152} minimize the

---

\textsuperscript{146} Chung et al., supra note 145.

\textsuperscript{147} Laurence Steinberg, He Chung, & Michelle Little, \textit{Reentry of Young Offenders from the Justice System: A Developmental Perspective}, 1 \textit{YOUTH VIOLENCE AND JUVENILE JUSTICE} 21 (2004). The research shows that desistance is often linked to achieving stable employment or a satisfying marriage. See note 139 \textit{supra}. Sampson and Laub (id.) treat marriage and employment as fortuitous exogenous events. More likely, some youths can succeed in these adult roles because they have attained psychosocial maturity, while others who fail to successfully complete developmental tasks do not make this transition.

\textsuperscript{148} Staff in prisons and institutional facilities are unlikely to function as positive adult role model; they typically perform custodial functions, maintaining distant, authoritarian, and generally hostile relationships with inmates. Martin Forst, Jeffrey Fagan & Scott Vivona, \textit{Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy}, 40 JUV AND FAM. CT. J 1 (1989); Donna Bishop & Charles Frazier, \textit{Consequences of Transfer, in The Changing Borders of Juvenile Justice}, 227 (Jeffrey Fagan & Frank Zimring EDS., 2000) (describing staff-inmate relationships in prisons).

\textsuperscript{149} In most adult facilities, youths have frequent contact with older prisoners, who may teach them criminal strategies or victimize them. James Austin, Kelly Johnson & Maria Gregorious, \textit{Juveniles in Adult Prisons and Jails: A NATIONAL ASSESSMENT}, U.S. DEP’T OF JUSTICE (2000) (juvenile and adult prisoners separated in 13% of facilities); Marilyn McShane and Frank Williams, \textit{The Prison Adjustment of Juvenile Offenders}, 35 CRIME AND DELINQUENCY 254 (1989) (describing victimization). In some youth prisons, juveniles confined for minor crimes mix freely with serious chronic offenders. Charting a New Course, \textit{supra} note 77 at 19, 47 (describing misdemeanants and violent youths mixed in institutional facilities).

\textsuperscript{150} Charting a New Course, \textit{id.} at 57-62.

\textsuperscript{151} Institutional incarceration may be more aversive for adolescents than for older prisoners because teenagers are in a formative developmental stage.

\textsuperscript{152} Most successful programs seek to involve delinquents’ parents and to guide them in performing their role effectively. If this is not possible, program staff, teachers, or foster parents, can function as adult role models. are unlikely to function as positive adult role model. Scott & Steinberg, \textit{supra} note 7, at 215-21 (describing effective programs using this approach).
influence of antisocial peers, and provide appropriate training and educational services. The most effective correctional programs adopting this approach have been evaluated repeatedly over a twenty year period; when faithfully implemented, they have been shown to be substantially more effective at reducing recidivism than incarceration—and at a far lower cost. For youths who cannot safely remain in their communities, the approach adopted by Missouri—placement in small homelike facilities with close adult supervision —has been far more effective in reducing recidivism than placement in large impersonal facilities.

* * *

Developmental science clarifies that the approach to juvenile crime regulation that has emerged in this decade is both fairer and more likely to reduce the social cost of juvenile crime than 1990s’ policies that emphasized punishment and favored incarceration. Policymakers increasingly assume that delinquent youths can become productive adults and favor correctional programs that aim to achieve that goal. Thus deinstitutionalization and the shifting of resources to small facilities and evidence-based community programs are justified not only as cost-saving measures, but as more effective means of reducing recidivism and promoting healthy development in young offenders. The upshot is that juvenile justice decisions that consider both short-term and long-term consequences are more likely to serve the public interest than those that focus primarily on the immediate public safety threat.

III. MORAL PANIC IN A DECISIONMAKING FRAMEWORK: THE PROBLEM OF INCONSISTENT CHOICES

The pattern that characterizes juvenile justice decisionmaking is not unique to this context. Not only do moral panics occur in other policy settings, but variations of this pattern can also be observed in decisionmaking by individuals. Ideally, individuals (like government actors) make rational decisions on the basis of a calculus that weighs accurately their

---

153 For example, the Missouri model of programs in small residential facilities allows very limited unstructured interaction among residents, emphasizing adult presence and transparency. Supra note 119. Multi-systemic Therapy (infra note 155) also provides youths with tools to avoid the influences of antisocial peers. SCOTT & STEINBERG, id.

154 Among the most successful programs are Multi-systemic Therapy, Functional Family Therapy, and Therapeutic Foster Care. See discussion of these programs, how they function to provide healthy social contexts and their effectiveness in SCOTT & STEINBERG, id. See also Aos, et.al., Comparative Costs and Benefits, supra note 129 (showing cost effectiveness of these programs); SCOTT & STEINBERG, supra note 7 at 219-20 (comparative costs of incarceration and effective community based programs). See also note 126 supra (describing average yearly cost of incarceration per youth in the juvenile system).

155 See discussion of Missouri model, supra notes 119 and 154.

156 A good rule of thumb is that any criminal statute that has a person’s name attached probably was enacted in the midst of a moral panic. In New Jersey, for example, the legislature enacted “Megan’s law,” requiring the registration of child sex offenders, weeks after a sex offender killed a child living in his neighborhood. Kimberley McLarin, Trenton Races to Pass Bills on Sex Abuse, N.Y. TIMES, Aug. 20, 1994 available at http://www.nytimes.com/1994/08/30/nyregion/trenton-races-to-pass-bills-on-sex-abuse.html.
subjectively defined short and long-term interests. In reality, however, almost everyone sometimes makes choices based on compelling short-term preferences that momentarily overpower their self-identified long term goals. The teenager who engages in unprotected sex and the dieter who eats a piece of cake are making choices on the basis of compelling immediate preferences that overwhelm conflicting long-term goals that they normally would deem to be more important. These departures from rational choice may be driven by impulsivity and weakness of will. But a large body of recent psychological research demonstrates that cognitive error, compounded by emotional influences that temporarily distort risk perception, can also lead to suboptimal choices based on immediate preferences. These are the factors that shape decisionmaking in the midst of a moral panic. The anger and fear directed at young criminals during these periods lead to decisions by legislatures, courts and prosecutors that are based on exaggerated perceptions of the threat—decisions that weigh immediate public safety concerns excessively while unduly discounting society’s long term goals and values.

A. The Problem of Inconsistent Choices

For decades, psychologists and behavioral economists have been interested in the problem of inconsistent choices—the tendency of individuals to sometimes make choices that conflict with their stable long term interests and preferences. The dieter who reaches for a piece of cake has not altered her goal of losing weight, but her immediate desire for the dessert determines her

158 George Akerloff and Thomas Schelling have offered many examples of the problem of individuals acting on the basis of choices inconsistent with their self-defined interest. See, e.g., George Akerloff, Procrastination and Obedience 81 AMER. ECON. Rev. 1 (1991)(substance abuse, failure to save money, procrastination); Thomas Schelling, Self Command, supra note 13 (overeating, shopping binges, drugs, gambling, procrastination). Dan Ariely and Klaus Wertenbrauch have studied the problem of procrastination. Dan Ariely & Klaus Wertenbrauch, Procrastination, Deadlines and Performance: Self Control by Precommitment, 13 PSYCHOLOGICAL SCIENCE 219 (2002)(studying the effectiveness of self imposed deadlines to combat procrastination).


160 The work of Paul Slovic and his colleagues is particularly prominent, as is that of George Loewenstein and his colleagues. See sources cited, supra note 18. See also Yuval Rottenstreich & Christopher K. Hsee, Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk, 12 PSYCHOL. SCI. 185, 188 (2001)(evaluating the impact of emotion on probability assessment). Cass Sunstein has applied this research to legal issues. See Cass Sunstein, Probability Neglect: Emotions, Worst Cases and the Law, 112 Yale L. J. 61 (2002); Cass Sunstein & Richard Zeckhauser, Overreaction to Fearsome Risks, in THE RATIONAL ECONOMIST: FUTURE DIRECTIONS IN BEHAVIORAL ECONOMICS AND RISK MANAGEMENT (Erwann Michel-Kerjan & Paul Slovic eds., 2009).

Emotions do not always hinder decisionmaking. One important distinction drawn by researchers is between current emotional states, that often lead to ignoring important information, particularly probabilities, leading to bad decisions, and anticipated emotional outcomes that can help individuals set priorities and make good decisions. Roy Baumeister, C. Nathan DeWall, & Liqing Zhang, Do Emotions Improve or Hinder the Decision Making Process?, in DO EMOTIONS HELP OR HURT DECISION MAKING: A HEDGEFOXIAN PERSPECTIVE, 11 (Kathleen Vohs, Roy Baumeister, & George Loewenstein eds., 2007).
choice. This tendency appears to contradict the assumption that individuals are rational decisionmakers who make choices that maximize their expected utilities at any point in time. R.H. Strotz first identified the problem of inconsistent choices in the 1950s, demonstrating that individuals will make decisions inconsistent with optimal plans, assuming a tendency to discount the future, despite the fact that goals remain constant.161 Other economists and psychologists have built on this work, focusing on hyperbolic discounting—the steep discounting of future as compared to immediate rewards— as a key element of inconsistent choices.162 George Ainslie, a psychologist, analyzed the problem of impulsive behavior, probing how individuals could avoid choosing tempting immediate rewards that were inconsistent with larger long-term rewards.163

The problem of inconsistent choices is often attributed to weakness of will or poor impulse control that leads individuals to succumb to tempting choices they will later regret.164 But recent research indicates that individuals also make decisions that conflict with their long-term interests because of systematic tendencies to evaluate risk inaccurately, a tendency that is powerfully affected by emotion. In the following section, I focus on risk perception and explain its important role in decisionmaking during moral panics.

**B. Cognitive Bias, Emotion and Perceptions of Threat**

A large body of research on risk perception offers insights about how individuals’ assessments of particular harms can become exaggerated and also how distorted perceptions can spread contagiously in society. Both cognitive and affective biases can distort perceptions of risk, leading to erroneous judgments, that either over- or under-estimate the probability of harmful outcomes.165 These distortions are amplified as they spread from person to person, reinforcing and intensifying individual perceptions.166 This literature can enrich our understanding of how fearful attitudes toward young offenders influenced juvenile justice

---

161 See Strotz, supra note 17.

162 George Ainslie & Nick Haslam, Hyperbolic Discounting, in CHOICE OVER TIME, supra note 18, at 57 (analyzing hyperbolic discounting as source of self defeating behavior).

163 Supra note 160.

164 Id. Jon Elster has described the impact of weak will on the capacity for rational behavior, which would take future preferences into account. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY, 65-77 (1979).

165 Most early work focused on cognitive biases. Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIAS (Amos Tversky, Paul Slovic, & Daniel Kahneman eds., 1982) (describing various heuristics used as information-processing tools, and biases). More recently researchers have focused on the distorting impact of emotion on risk perception. See sources cited in note 18 supra and discussion t.a.n. notes 172 to 181infra. See also Rottenstreich & Hsee, supra note 161 (affect-laden material distorts judgments about risk).

166 The process of amplification was identified and explained by Timur Kuran and Cass Sunstein, who call it an availability cascade. See Timur Kuran & Cass Sunstein, Availability Cascades and Risk Regulation, 51 STAN. L. REV. 683 (1999)(describing how perceptions of risk spread through process of social contagion). See discussion infra t.a.n. notes 193 to 196.
decisionmaking in the 1980s and 1990s, and how dissipation of the moral panic has facilitated more rational policy choices.

Familiar psychological research indicates that individuals use heuristics, or rules of thumb, to process the vast amounts of information they receive and to assess the importance of particular data.\textsuperscript{167} Although heuristics can be very useful, they also may lead to systematic cognitive biases.\textsuperscript{168} One such bias, the availability heuristic, leads individuals to overvalue vivid and experiential data that can be readily brought to mind and to discount the importance of abstract information.\textsuperscript{169} Based on availability, individuals may judge the risk of an event that is readily imaginable to be more probable than one that is remote and not easily contemplated.\textsuperscript{170} Thus television news stories depicting violent crimes likely assume disproportionate salience to a viewer evaluating the threat—as compared to abstract crime statistics.\textsuperscript{171} Much research on probability assessment has focused on cognitive biases, but recently decision researchers have found that emotion plays a critically important role in evaluating risk, often overwhelming cognitive processes. Paul Slovic and his colleagues have identified what they call the \textit{affect heuristic}, which their research indicates is used by individuals to evaluate particular risks that are linked to images carrying strong emotional content.\textsuperscript{172} The affect heuristic functions as a shortcut; it leads to risk judgments, either positive or negative, based on an overall emotional impression, rather than on a quantitative weighing of risks and benefits.\textsuperscript{173} This may lead individuals to lose sight of the complexity of risks, as well as the costs and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{167} See Tversky & Kahneman, \textit{supra} note 166.
\item \textsuperscript{168} Psychologists debate the extent to which heuristics distort decisionmaking. Legal scholars, influenced by Kahneman and Tversky, \textsc{id.}, have often focused on the biasing effect. But see, Gerd Gigerenzer & Wolfgang Gaissmaier, \textit{Heuristic Decision Making}, 62 ANN. REV. OF PSYCHOL. 451 (2011) (concluding that “heuristics can often be more accurate than complex ‘rational’ strategies”).
\item \textsuperscript{169} Tversky & Kahneman, \textit{supra} note 166. In part, availability is a function of the readiness with which information can be retrieved. Abstract statistical information is less readily retrievable than experiential familiar information. Eugene Borgida & Richard Nisbett, \textit{The Differential Impact of Abstract vs. Concrete Information on Decisions}, 7 J. APPLIED SOC. PSYCHOL. 258 (1977). The vividness of information plays an important role in its retrievability and impact on decisions. Hazel Markus & Robert Zajonc, \textit{The Cognitive Perspective in Social Psychology}, in \textsc{The HANDBOOK OF SOCIAL PSYCHOLOGY}, 137, 181-82 (Gardner Lindzey & Elliot Aronson eds.,3\textsuperscript{rd} ed. 1985)(describing vividness as element in retrievability of information). Imaginability is a related dimension of availability. Risks that are dramatically portrayed (and thus are readily imagined) are likely to be exaggerated. Tversky & Kahnemann, \textit{supra} note 166, at 12-13.
\item \textsuperscript{170} For example, a person whose car crashes because of a brake malfunction may give this experience more weight than statistics about the excellent safety record of that make of car. Tversky & Kahnemann, \textsc{id.} at 12-13.
\item \textsuperscript{171} See discussion of media coverage of juvenile crime in the 1990s, \textsc{t.a.n} 42 to 46 \textit{supra}. Vivid depictions of crimes, particularly in television news stories likely contribute to exaggerated perceptions of the threat. \textsc{t.a.n.170} \textit{supra}.
\item \textsuperscript{172} Finucane, et. al., \textit{supra} note 18. The affect heuristic is similar to the model of risk as feeling proposed by Loewenstein and his colleagues. Loewenstein et al., \textsc{id.} (examining divergence between emotional and cognitive reactions to risk and showing that emotions can drive behavior).
\item \textsuperscript{173} Slovic and his colleagues explain the affect heuristic as follows: “Representations of objects and events in people’s minds are tagged to varying degrees with affect…” They posit that individuals consult or refer to these positively and negatively tagged representations in making judgments on the basis of an emotional impression, rather than calculating risk and benefit. Finicane et al., \textit{supra} note 18, at 415.
\end{itemize}
\end{footnotesize}
benefits of desirable responses. For example, in the wake of a nuclear accident, the public may fail to consider the benefits of nuclear power or to calculate the costs of using alternative sources of energy.

Distortions in risk assessment (and decisionmaking) associated with emotion-laden outcomes occur largely because individuals tend to ignore probabilities—and particularly, to give excessive weight to outcomes with a small probability of being realized. This response has been observed in association with positive emotions (winning the lottery, for example) but more importantly, for our purposes, with fear, anxiety and outrage. The causal mechanism is not clear but it is likely that visualization of the harm plays a key role in emotional reactions to risks. Emotional judgments are shaped by accessible vivid images of a harm that are taken to be representative of the risk generally. In short, concern about a risk increases if the harmful outcome can be readily imagined, regardless of the probability that it will occur. George Lowenstein has postulated that strong emotions such as fear “crowd out” other thoughts, including the recognition that the probability of the outcome is small. Indeed, the fear of a

---

174 An activity perceived to have high risk will be deemed to have low benefit- and vice versa. Id at 415-17. Alkahami and Slovic found that when individuals ‘liked’ an activity, they found risks low and benefits high, and they judged activities they disliked to have high risks and low benefits. Further, when greater risks were pointed out, perceived benefits declined. Ali Alkahami & Paul Slovic, A Psychological Study of the Inverse Relationship between Perceived Risk and Perceived Benefit, 14 RISK ANALYSIS 1085 (1994). Time pressure increased the tendency to make judgments on the basis of affective impressions. Paul Slovic, Ellen Peters, Melissa Finucane, & Donald McGregor, Affect, Risk and Decisionmaking, 24 HEALTH PSYCHOL. S35 (2005)(finding inverse correlation between perceived risks and benefits increased under time pressure); Finucane et al., supra note 18 at 415-21.

175 Many studies have found that individuals making judgments about outcomes associated with strong emotion tend to ignore probabilities. Slovic et al., Risk, Affect and Decisionmaking, id.; Loewenstein et al., supra note 18 at 271(describing how cognitive judgments focus on probabilities while emotional judgments focus on vividness of outcomes); Rottenstreich and Hsee, supra note 161 (probability of electric shock occurring was irrelevant to willingness to pay to avoid it); Drazen Prelec, The Probability Weighting Function, 66 ECONOMETRICA 497 (1998) (small probabilities are overweighted in judgments about risk when attached to extreme outcomes). Peter Sandman and his colleagues have studied how outrage increases the perception of the threat of nuclear waste as compared to that of radon, though the risk is identical. Peter Sandman, Neil Weinstein & William Hallman, Communications to Reduce Risk: Underestimation and Overestimation, 3 RISK DECISION AND POL’Y 93 (1998); Peter Sandman, Paul Miller, Branden Johnson & Neil Weinstein, Agency Communication, Community Outrage, and Perception of Risk: Three Simulation Experiments, 13 RISK ANALYSIS 585 (1993) [hereinafter Community Outrage].

176 Loewenstein et al., supra note 18 at 275 (vividness with which outcomes are described affects affects emotional reaction and risk perception). Emotional responses may also explain the “alarmist bias,” the tendency when presented with alternative accounts to focus on the worst case scenario. See Kip Viscusi, Alarmist Decisions with Divergent Risk Information, 107 ECON J. 1657, 1657-59 (1997).

177 For example, studies indicate a greater willing to pay for flight insurance compensating for losses from terrorism than from all risks. E.J. Johnson, John Hersey, Jacqueline Meszaros & Howard Kunreuther, Framing, Probability, Distortions and Insurance Decisions, 7 J. RISK AND UNCERTAINTY 35 (1993).

178 Lowenstein describes what he calls “visceral factors,” such as the experience of fear and pain, which he argues, tend to crowd out all other goals except mitigating the visceral factor itself. George Lowenstein, Out of Control: Visceral Influences on Behavior, 65 ORG.’L BEHAV. & HUM. DECISION PROCESSES 272 (1996). See also Cass Sunstein, Probability Neglect, supra note 159 at 82 (describing how vivid images may crowd out other thoughts).
horrendous outcome (and willingness to take steps to avoid it) may vary little on the basis of whether the probability that it will actually occur is low or high.\footnote{In several studies, subjects’ willingness to pay to avoid an electric shock varied little whether the risk was described as 1% or 99%. Rottenstreich and Hsee, supra note 161 at 188; Loewenstein, \textit{id.} at 276 (describing other studies).}

Research by Slovic and others suggests a connection between the distorting impact of emotion on risk perception and the availability heuristic, which has previously been understood purely as a source of \textit{cognitive} bias under conditions of uncertainty.\footnote{Tversky & Kahneman, \textit{supra} note 166.} This connection seems probable, since the bias associated with availability is linked to the vividness of information and the extent to which it can be readily imagined, traits that may be associated with affect-laden content. Research on the interaction of emotion and cognition is at an early stage, but it is clear that emotion increases inaccuracy in the evaluation of risk.\footnote{Research indicates that negative emotions increase pessimistic risk predictions. \textit{See} Eric Johnson & Amos Tversky, \textit{Representations of Perceptions of Risk}, 113 J. OF EXPERIMENTAL PSYCHOL. 55 (1984) (people who read sad news articles give higher risk estimates for various causes of death).}

This research sheds important light on how public perceptions of the threat of juvenile crime became exaggerated in the 1990s.\footnote{See t.a.n 41 to 43 (studies showing public’s perception of threat of juvenile crime was exaggerated).} During this period, the image of young offenders as violent superpredators\footnote{See note 56 supra (discussing superpredator image in the media).} was reinforced by alarming stories of sensational crimes such as school shootings and gang killings of innocent bystanders, prominently featured in newspaper and television news stories, and in national news magazines.\footnote{See t.a.n 44 to 47 \textit{supra} (discussing sensational media coverage of juvenile crime).} Vivid media depiction of such crimes predictably would lead those evaluating the threat of juvenile crime to readily visualize “worst case scenarios.” As discussed earlier, these crimes, in fact, were rare occurrences,\footnote{See t.a.n 42 and 43 \textit{supra} (discussing impact of school shootings and other rare crimes).} but, as the research indicates, powerful negative images influence individuals to focus on outcomes and not probabilities in evaluating risks.\footnote{The importance of salient images in evaluating threat is suggested by a Field survey finding far higher levels of support for a pending referendum on a punitive law reform proposal when it was described as a response to violent gangs (55% support) than when described as creating “changes for juvenile felonies-increasing penalties…,” (30% support; 47 % oppose) Mark DiCamillo & Mervin Field, Release # 1956: \textit{Prop. 21 Running Ahead in Counties with Long Ballot Label Wording}, \textit{The FIELD POLL}, Feb. 29, 2000, at 5 (describing these outcomes).} In this way, horrendous cases came to represent a much larger social threat.\footnote{The murder of two year old Jamie Bulger by two 10 year old children in England is a good example of an extraordinarily rare event that was taken to represent a much larger threat to British society. \textit{See} GREEN, \textit{supra} note 40 at 190-218.} Moreover, the tendency to evaluate risk affectively on the basis of an overall judgment likely reduced any inclination to view the problem— or appropriate responses—in terms of complex costs and benefits. Hostility toward young offenders and fear of
what appeared to be an urgent threat evoked strong calls for punishment and public protection, and politicians responded enthusiastically. 188

The research informs our understanding of another factor that increased concern about the threat of juvenile crime. Slovic points out that trust or distrust in the institution responsible for dealing with a particular risk strongly influences assessments of the danger itself; a lack of confidence in the agency managing the risk increases the perceived threat. 189 As mentioned earlier, lack of confidence in the traditional juvenile court and dissatisfaction with its effectiveness in responding to young offenders was a pervasive theme among advocates for tougher laws in the 1980s and 1990s. 190 Both politicians and the public thought juvenile court judges were too lenient with young offenders and that this leniency was an important contributor to the increase in violent youth crime. 191 In short, the institution with responsibility for protecting the public from what was perceived to be a serious threat was thought to be failing in its mission.

Distorted perceptions of risk in a moral panic are not simply a matter of individual misperception, of course. The fear and anger become contagious and are magnified as claims about the threat are repeated and reinforced in public discourse. 192 Individuals talk to their neighbors, friends and colleagues (around the proverbial water cooler) about a publicized threat (a news story about a school shooting, for example), and the perception that the story represents a real danger is reinforced and gains momentum, as each retelling makes the threat more salient. Scholars have called this dynamic process of social contagion an availability cascade. 193 Moreover, as public opinion intensifies, individuals who are neutral or even skeptical about the threat may endorse its seriousness or be silent, in order to avoid the reputational costs of dissent. 194 The media, both generating and responding to the public’s concern, amplify the threat through attention to the peril. 195 In this way, the collective perception of the seriousness of the

188 Sandeman and his colleagues found that the intention to respond to risks is stronger when the threat is associated with outrage. See Sandeman et al., Community Outrage, supra note 176. And for politicians, the political cost of a mistaken decision not to incarcerate likely loom far larger than those of an erroneous decision to incarcerate. See discussion in Paul Slovic, Perceived Risk, Trust and Democracy, 13 RISK ANALYSIS 675 (2006).

189 See supra note 25. To some extent, the misperceptions about the juvenile court were fueled by the rhetoric that surrounded it. For example, the view that young offenders were “children” was at the heart of the traditional model of juvenile justice. See Justine Wise Polier, Dissenting View, in JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR (1982).

190 See Sprott, supra note 25 and other sources (describing surveys showing negative public attitudes toward juvenile system and politicians’ statements).

191 See Part IA2 supra (describing the dynamic of moral panics and the role of the public, the media and politicians).

192 Cass Sunstein and Timur Kuran coined this term and analyzed the process through which a perception gains plausibility on the basis of its availability in public discourse. Kuran &Sunstein, supra note 167. They describe the forming of risk judgments as a “circular social process” in which the availability of information (mediated by the availability heuristic) contributes to individual perceptions of the magnitude and acceptability of risks and, simultaneously, individuals’ reactions and expressions contribute to the availability of information. Id at 712.

193 Kuran and Sunstein argue that social pressures influence individuals to conform their expressions to social expectations in the midst of an availability cascade. Id. at 714-15; 723-28.

194 Sometimes the sources of media stories are interest groups seeking to focus attention on an issue, biasing media coverage. Id.at 735-36. Crime stories likely often come from law enforcement sources.
threat grows, and politicians, the public and the media agree that “something must be done” to stop the deviants. The moral panics surrounding juvenile crime in the 1980s and 1990s appear to have followed this pattern. In this environment, immediate public safety concerns overwhelmed other societal interests as courts and policymakers responded to public alarm.

C. Politicians, Prosecutors, and Risk Perception

The body of research on risk perception goes a long way toward explaining the formation of public opinion on juvenile crime during moral panics, and clarifies how individual perceptions of the threat became distorted and spread contagiously through society. But individual members of the public did not make policy, prosecution, or sentencing decisions. Are regulators, prosecutors and courts similarly influenced by distorted perceptions of the threat to public safety? To some extent, the answer is likely “yes.” Politicians are as susceptible to cognitive and affective biases as are ordinary citizens and many policymakers in the 1990s likely viewed the need for reform of juvenile justice policy as an urgent priority.196 But these professionals have broader experience than the public with the issues and (hopefully) a deeper understanding of the range of regulatory tradeoffs and other interests implicated in decisions about youth crime. We might expect them to deliberate about the threat and appropriate responses to a greater extent than individual citizens.

There is little evidence that much deliberation preceded the punitive reforms of the 1990s. Juvenile court judges may have been concerned about the impact of dispositions on young offenders’ future lives—which in part was why legislatures restricted their sentencing discretion.197 But, in general, few government decisionmakers expressed awareness that important societal interests were being sacrificed in the rush to punish young offenders.198 Perhaps this is not surprising. As public servants, politicians, prosecutors and judges are expected to be responsive to public concerns, and public safety was an urgent concern. Even if they understood that perceptions of the threat were likely to become exaggerated when a horrendous crime aroused fears, the political climate strongly favored an aggressive stance: Politicians likely anticipated public approval of punitive policies, and young offenders and their supporters were a relatively powerless interest group.199 Even lawmakers or judges who recognized the long-term social costs of moral panic decisionmaking were likely to see short-

196 Certainly many politicians’ statements suggested that their perceptions of the threat of juvenile crime were distorted. See SCOTT & STEINBERG, supra note 7, at 107 (op-ed column by California D.A. arguing that gang violence, “the most alarming of all crime trends,” and was increasing, when it had decreased steadily for years).
197 Michael Corriero
198 There was occasionally an exception. See James Rainey, Probation Chief’s Views Clash with Trend toward Tough Juvenile Justice Policy, L.A. TIMES, Nov. 20, 2000, at A1 (chief county probation officer speaking out against Proposition 21).
199 See note 60 supra.
term political gains of appearing to be “tough on crime.” In short, whatever their personal views, politicians and other government agents predictably made suboptimal decisions in response to intense public preferences that were based on distorted and exaggerated perceptions of the threat of juvenile crime.

*  

As reported earlier, distorted perceptions of the threat of juvenile crime gradually dissipated, paving the way for more deliberative policymaking. There is little evidence that young offenders are feared as violent superpredators today, and hostile rhetoric and vivid negative images do not dominate media coverage or political discourse. But the forces that triggered public fears in the 1990s are likely to be activated again at some point, potentially triggering a new wave of moral panics. The question then becomes whether lawmakers can take steps to reinforce the more deliberative approach that currently prevails through mechanisms that deter moral panic decisionmaking or at least reduce its harmful impact.

**IV. A PRECOMMITMENT FRAMEWORK FOR JUVENILE JUSTICE DECISIONMAKING**

I have shown how individuals, including government actors, can undermine their self defined interests by making choices on the basis transitory short-term preferences fueled by emotion. But economists, psychologists and political scientists have also shown that decisionmakers can adopt self management strategies to assist them in avoiding choices incompatible with their self defined long-term interests and plans. Through *ex ante* precommitment devices, individuals can mitigate the problem of inconsistent choices and reinforce their long-term goals.

The lessons on self management derived from decisionmaking research and theory apply with equal force in the setting of juvenile crime regulation. If policies grounded in developmental knowledge optimally promote both fairness and social welfare, then society’s interests will be advanced by adhering to these policies. What are needed are precommitment

---

200 *Supra* note 26 (describing Governor Pete Wilson’s promotion of Proposition 21 reportedly hoping it would boost his bid for the Republican presidential nomination). *See* SCOTT & STEINBERG, *supra* note 7, at 102-03.

201 *See* Schelling and other sources, *supra* notes 19 and 173. Schelling has written extensively about the way in which precommitment strategies can assist individuals in everyday life to adhere to their long term goals—smoking clinics, Christmas Savings clinics. Jon Elster, a political theorist, has focused on these issues over a period of decades. For a recent treatment, *see* JON ELSTER, STUDIES IN RATIONALITY, PRECOMMITMENT AND RERAINTS 68-70 (2000); JON ELSTER, ULYSSES UNBOUND, 7-19 (2000)(analyzing precommitment as a response to passion). *See also* ELSTER, ULYSSES AND THE SIRENS, 65-77 (1979). Dan Ariely and Klaus Wertenbroch have studied and compared the effectiveness of different strategies to combat procrastination. *See* Ariely & Wertenbroch, *supra* note 159.
mechanisms, adopted in periods when deliberation is possible, that aim to restrain lawmakers and justice system decisionmakers in times of moral panic. In this Part, I show how a precommitment framework might be employed to limit the costly impact of future moral panics in this context. The focus is twofold: limitations on the discretion of front line decisionmakers and self-imposed constraints on legislatures to deter hasty regulatory action, promote deliberation and provide oversight, to reduce the cost of inevitable lapses. I conclude by addressing the political viability of regulatory precommitments, arguing that public outrage at juvenile crime tends to be short lived and that the political costs of adopting precommitment measures are manageable.

A. The Precommitment Framework

At least since Ulysses directed his crew to tie him to the mast so that he would not yield to the sirens’ calls,202 people have used precommitment mechanisms to resist intense transitory preferences that may lead them to make choices they will later regret. These strategies are useful in situations in which individuals have long-term interests or goals that they anticipate will sometimes conflict with temporarily dominant short-term desires.203 Precommitment devices represent conscious attempts to manipulate ex ante the costs and benefits of future options. Fines, rewards and bonds can function as precommitment mechanisms.204 More creatively, an individual might mandate that the costs of the undesired choice be confronted before acting.205 Or, because intense preferences are transitory and tend to fade with the passage of time, interposing obstacles that create delay might be effective.206 Each of these devices and strategies imposes costs on the undesired choice (making it unavailable or less attractive) or reinforces the desired outcome and may assist the individual to achieve her long-term goal. The purpose is not to deter “true” changing preferences,207 but to enable the individual to adhere to the original optimal plan.

B. Government Precommitments

202 HOMER, supra note 20.
203 As discussed earlier, examples of short-term preferences might include overeating, overspending, or procrastination. See t.a.n. 159 supra. Schelling offers a long list of precommitment strategies and tactics, including relinquishing authority to someone else, contracting, arranging delays, rewards and penalties, establishing enforceable rules. Schelling, Self Command, supra note 19 at 6-7. See discussion of precommitment strategies in Elizabeth Scott, Rational Decisionmaking about Marriage and Divorce, 76 VA. L. REV. 9 (1990)
204 See e.g. Michael Abramawicz & Ian Ayres, Compensating Commitments: The Law and Economics of Commitment Bonds That Compensate for the Possibility of Forfeiture,(2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612396 (suggesting a bond to be sold by committing party (including the government) to be redeemed by the purchaser if commitment is violated).
205 Thus a smoker who wants to quit might require the viewing of cancerous lungs as a condition of lighting up.
206 The aspiring non-smoker could throw out all the cigarettes in the house or mandate a three mile walk or two hour delay before smoking.
207 If true preferences actually change, precommitments can become harmful restraints. See gen. t.a.n. 247 to 250. infra.
Governments, like individuals, may put in place self-binding mechanisms to promote adherence to their long term interests, anticipating that the temptation may arise to make choices inconsistent with those interests. The Constitution provides a good example. The framers sought to create a constitutional order that was insulated to some extent from political forces that might occasionally challenge and seek to undermine it. The arduous set of requirements for amending the Constitution can be understood as a precommitment mechanism that aims to promote a stable regime and discourage precipitous change. More generally, checks and balances and separation of powers (judicial review and the presidential veto, for example) dilute and disperse political power, creating obstacles to hasty government action. Some constitutional regimes require votes in multiple legislative sessions as a part of the amendment process, creating a time delay that deters hasty action.

Legislative precommitment is more complicated, as it is not clear that a legislature can bind a future body in any way that cannot be reversed by majority vote. Nonetheless, legislatures can create constraints that later legislatures may not be inclined to casually override. For example, the occasional requirement of a supermajority is seldom ignored. Regulators also routinely follow requirements to undertake cost-benefit analyses or produce impact statements before a bill can be enacted or regulation adopted. These mandates direct lawmakers to consider (or at least be aware of) consequences beyond the law’s immediate impact, focusing attention on future

---


209 *Id.*

210 Substantive due process and equal protection doctrine serve a precommitment function of protecting core rights from infringement by legislatures, and “discrete and insular” minorities from discrimination by majorities.

211 The recent Massachusetts experience is instructive. Following a 2004 Massachusetts Supreme Judicial Court decision holding that the state constitution required that gay and lesbian couples be allowed to marry, the legislature initiated the process of amending the constitution to override the opinion. This required votes in 2 legislative sessions to put the issue on the ballot in 2008 for a voter referendum. Although the legislature’s first vote in 2006 favored the referendum, the measure failed to get sufficient votes in 2007, and the issue died. Frank Philips, *Legislators Vote to Defeat Same Sex Marriage Ban, BOSTON GLOBE, Jun. 14, 2007, available at* [http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html](http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html).


costs that may otherwise be heavily discounted. Other measures that function (with mixed success) as precommitments include Congressional efforts to impose fiscal discipline on the budget formulation process and reduce the deficit. More generally, standing law revision commissions encourage adherence to long term interests by providing oversight of the lawmaking process, reviewing legislation and proposing reforms. In short, governments have adopted a range of mechanisms to promote deliberation and deter future decisionmakers from acting in response to short term political pressures.

C. Applying the Precommitment Framework to Juvenile Crime Regulation

The current environment is conducive to rethinking our approach to juvenile crime regulation and offers the opportunity to apply a precommitment framework that potentially can improve lawmaking and limit the costs of moral panic decisionmaking in the future. Three broad strategies, adapted from other legal contexts, may be useful in this context. First, lawmakers can guide and restrict the authority of judges and prosecutors, front line decisionmakers who operate in settings in which public pressure is likely to be high. Second, legislative and regulatory structures can define substantive goals and mandate consideration of cost, effectiveness and fairness in future law reform deliberations, thus assuring that key long term interests cannot be readily ignored. Finally, recognizing that even well structured precommitments will sometimes fail to deter improvident action, lawmakers can minimize ex post the impact of moral panic decisionmaking, by establishing an oversight commission, tasked with the job of periodically reviewing juvenile crime regulation and proposing corrective reforms where needed.

1. Restricting the Authority of Front Line Decisionmakers

Judges and prosecutors, simply by virtue of their roles in the justice system, attend primarily to immediate concerns in making decisions about individual youths accused of crimes. Judges also may focus on the immaturity of particular accused youths and the impact of sanctions on their future lives, but punishment and public safety usually dominate the decisionmaking of prosecutors, and neither is likely to give substantial weight to the financial costs of dispositions or to broader issues of racial and ethnic disparities. Thus the reforms of the 1990s broadening

215 See discussion of cost benefit analysis and impact statements, t.a.n 235 to 277 infra.
216 The Gramm- Rudman-Hollings Act of 1985 (GRH) sought to reduce the deficit by setting yearly targets with the goal of achieving a balanced budget in 5 years, with automatic cuts if the targets were not met each year. Congress evaded the constraints through creative accounting, and Gramm-Rudman was eventually replaced by a more flexible deficit reduction statute in 1990. See note 250 supra. Although the effectiveness of constraints created by GRH and successive laws was mixed at best, analysts have found some budgetary impact. Alan Auerbach, Federal Budget Rules: The U.S. Experience, 15 SWEDISH ECON. POLICY REV. 15 (2008). See also Jackie Calmes, Idea Rebounds: Automatic Cuts to Curb Deficits, N.Y. TIMES, May 16, 2011, at A11 (GRH set the stage for budget compromises). The 2011 Congressional battle over raising the debt ceiling suggests the potential hazards of precommitments under some circumstances. See t.a.n. 247infra.
217 See discussion t.a.n 242 to 244 infra.
218 Judges may focus on the financial costs of dispositions under some conditions. Recently lawmakers in some states have restructured budgetary incentives that encouraged judges to commit youths to state institutional facilities,
the discretionary authority of prosecutors and directing judges to presume that many youths should be transferred to criminal court have promoted short-sighted decisionmaking in settings in which the pressures were already powerful.

Through legislation reversing this trend, the government can restrict its agents from acting in ways that conflict with our collective long-term interests. Reforms in service of this goal include the repeal of both legislative waiver statutes that categorically define youths under age 18 as adults (either generally or when charged with particular crimes) and direct file statutes that give prosecutors the authority to decide whether individual youths should be tried in juvenile or criminal court. Finally, limiting the range of judicially transferrable offenses to serious violent crimes, raising the minimum age for transfer eligibility, and abolishing presumptions favoring transfer would exclude from judicial consideration youths whose transfer to criminal court is very likely to carry more costs than benefits. These 21st century reforms (already underway in some states) would go a long way toward insulating prosecutors and judges from pressures to make decisions that discount the future costs of harsh punishment.

2. Legislative and Regulatory Precommitments

The lawmaking process is generally slower and more cumbersome than adjudication, but, as we have seen, it was legislatures that effectively institutionalized the moral panics of the 1990s. This section sketches a framework of regulatory precommitments that can promote deliberative lawmaking, enhancing social welfare and generally minimizing the impact of moral panic decisionmaking. The framework incorporates comprehensive juvenile crime legislation establishing substantive goals and policies, together with procedural requirements that slow the lawmaking process and mandate the acquisition of particular information that implicates long term interests: For example, cost-benefit analyses and impact statements focus attention on the

because the costs were borne by the state, whereas the locality itself paid for community-based dispositions. See note 118 and 120 supra.

219 At a minimum, judges should have the authority to “reverse waive” juveniles charged by prosecutors in criminal court. See PA. CONS STAT ANN. Tit. 42 § 6322 (WEST 2011). See discussion of direct file and legislative waiver statutes, t.a.n. 28 to 30 supra.

220 See t.a.n 27 supra (describing broadening of transfer eligibility in the 1990s to include younger youths and non-violent offenses).

221 Supra note 31.

222 See SCOTT & STEINBERG, supra note 7, at 236-37, 241-45 (arguing that age 15 should be the minimum age for transfer).

223 Expanding the discretionary authority of judges to retain youths in the juvenile system (by abolishing presumptions favoring transfer) would also be beneficial.

224 The commitment of resources to the construction of new institutional facilities contributed to policy entrenchment. Aos, Recommendations to Improve Cost-Effectiveness, supra note 33, at 3 (describing increased use of incarceration).

225 The passage of time itself can contribute to better decisionmaking: emotions can cool, reducing distorted risk perceptions. Supra note 212. The intuition that the passage of time allows individuals to avoid impetuous or impulsive decisions supports consumer protection laws allowing purchasers a “cooling off” period to cancel purchases from door-to-door salesmen. See 16 CFR Part 429 (Federal Trade Commission Cooling-Off Rule allowing 3 day cancellation period) discussed at http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro03.shtm
financial costs of policy changes, their crime reduction potential, and impact on offenders and communities. Finally, oversight by a standing law revision commission can serve a corrective function of minimizing the impact of inevitable lapses from deliberative lawmaking, and generally encourage adherence to welfare-enhancing policies.\textsuperscript{226}

Lawmakers face two critical challenges that may determine the effectiveness of precommitment mechanisms. First, precommitments obviously must be politically viable to be adopted in the first instance—and because legislative constraints can always be undone by later legislatures, it is important to enact regulations that are not likely to be repudiated during moral panics, when they are most needed. Second, precommitments that are unduly burdensome can undermine efficient lawmaking in unproductive ways. The goal is to adjust the legislative and regulatory process in ways that reduce precipitous action and promote deliberation but not to excessively interfere with legislation in normal times. I set aside discussion of these challenges until the next section, but they inform my recommendations and have led me to reject some strategies that seem politically implausible in this context or that are likely to restrict the legislative process excessively.

\textbf{a. Comprehensive Substantive Legislation}

The legislative enactment of a comprehensive “super-statute”\textsuperscript{227} can set in place substantive juvenile crime policies based on developmental knowledge, while also announcing the principles, goals and guidelines to direct lawmakers in the future. In other substantive areas, lawmakers have shaped the future direction of policy through such statutes. The National Environmental Policy Act (NEPA), for example, offers broad environmental goals and policies, and institutes procedures to promote adherence to these policies.\textsuperscript{228} Similarly, a comprehensive juvenile justice statute can establish scientifically-based policies that further the substantive goals of crime reduction, cost effectiveness and fairness, together with procedural requirements (discussed below) that maximize the likelihood that future regulation will conform to these goals and principles\textsuperscript{229}

\textsuperscript{226} See discussion, t.a.n 242 to 244 infra.
\textsuperscript{227} This term was introduced by William Eskridge and John Ferejohn to describe federal laws that create “a new normative or institutional framework for state policy.” They argue that super-statutes (such as the Sherman Anti-Trust Act and the Civil Rights Act of 1964) embody far-reaching and fundamental principles and have transformed an area of law. (On their view, superstatutes can only be identified ex post). William N. Eskridge, Jr. and John Ferejohn, \textit{Super-Statutes}, 50 DUKE L. J. 1215 (2001). The aspiration of comprehensive juvenile crime legislation would be similar.
\textsuperscript{228} The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-37, available at www.nepa.gov, establishes broad environmental policy goals and requires federal agencies to evaluate the environmental impact of proposed actions, regulations, programs and legislative proposals. 40 CFR § 1508.18. Its goal is to require that agency decisionmakers be informed of the environmental consequences of their decisions. The Environmental Protection Agency reviews and comments on other agencies’ analysis of environmental impact.
\textsuperscript{229} Many states recently have embraced developmental knowledge in piecemeal fashion, but few have comprehensively revised their laws to repeal the punitive legislation of the 1980s and 1990s. A statute that incorporates reform of existing law and practices can avoid the inefficiencies that will arise when procedural requirements (described in the next section) are applied piecemeal to legal changes.
b. **Procedural Reforms through Framework Legislation**

Procedural reforms will also be needed to encourage future lawmakers to adhere to long term juvenile justice goals. In other areas of law, legislatures have adopted “framework legislation,” internal rules that structure legislative deliberation, with the purpose of constraining the lawmaking process to promote conformity to particular legislative goals.\(^{230}\) An example, mentioned earlier, is the ongoing effort by Congress to control spending and reduce the deficit through various procedural statutes regulating the budget process.\(^{231}\) Framework laws can be stand-alone requirements or part of broad substantive reform legislation.\(^{232}\) In the realm of juvenile crime regulation, special procedural requirements can contribute to a more deliberate lawmaking process in which proposed regulatory changes are considered in light of long term policy interests and goals. Among the most promising are requirements for cost-benefit analysis and impact statements.\(^{233}\)

---

1. **Cost–benefit Analysis** Government agencies are sometimes required to undertake cost–benefit analyses to encourage consideration of the predicted financial costs over time of proposed regulatory changes (or of existing regulations).\(^{234}\) This practice could be beneficial in the realm of juvenile crime regulation. As we have seen, legislatures rushing to enact laws in the

\(^{230}\) Elizabeth Garrett has offered a thoughtful exposition of framework legislation. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005). Among the purposes framework legislation can serve, according to Garrett, are (a) providing neutral rules for considering future substantive decisions and (b) entrenching certain substantive policies. She and other scholars have described framework legislation as serving a precommitment function. Id. at 748-53. See also Rebecca Kysar, *Sunsets and the Tax Code*, 40 GA. L. REV. 341, 342-43 (2005).


\(^{232}\) NEPA, may be in this category; it includes broad substantive reforms and a statement of the goals of environmental regulation, as well as procedural mechanisms (such as impact statements) that aim to promote future regulation and activity that conforms to NEPA policies. See note 229 *supra* and 237 *infra*.

\(^{233}\) Other requirements might include mandated hearings, meetings with stakeholders and periods for public comment.


Some states also use cost-benefit analyses. The legislature in Washington state has created an independent institute to evaluate the costs and benefits of social and educational programs, including juvenile justice programs. See t.a.n 245 and 246 *infra*. 

---

41
midst of a moral panic tend to discount or ignore future costs. Lawmakers in the 1990s assumed (erroneously) that increasing the use of incarceration would result in substantial crime-reduction benefits, but seldom considered the long term budgetary impact of the punitive reforms, which often became a source of concern over time. This problem can be mitigated if a cost benefit analysis is built into the legislative and regulatory process; this requirement may also simply slow the lawmaking process, contributing to more deliberative decisionmaking.

2. Impact Statements. A related mechanism to promote deliberation in the lawmaking process is the requirement of an impact statement, familiar in environmental law. An environmental impact statement (EIS), comprehensively describing the negative and positive environmental effects of proposed government actions, is mandated in situations in which a federal government action is likely to have substantial environmental consequences. Closer to the juvenile justice context, several states have required legislatures and agencies to prepare racial impact statements when considering changes to sentencing policy or other criminal justice regulation.

A juvenile justice impact statement could evaluate the likely effect of the proposed change on incarceration rates and duration, recidivism, and on the trajectory of the future lives (the educational, social and employment opportunities) of the youths affected by the law. As in other legal contexts, the purpose of the juvenile justice impact statement would be to improve regulatory decisionmaking by promoting consideration of consequences that

235 See t.a.n, 246 infra, discussing Washington State’s use of cost-benefit analysis effectively to guide juvenile crime regulation. Cost benefit analyses of juvenile justice programs have shown that incarceration-based policies are expensive, and that alternative less costly programs may be more effective at reducing crime. Steve Aos et al., Comparative Costs and Benefits supra note 129 (cost benefit analysis of crime reduction outcomes of correctional and other programs); Aos, Recommendations to Improve Cost-Effectiveness, supra note 33 (analysis showing increased cost of correctional policies favoring incarceration) The impact on recidivism is part of the cost benefit analysis. A policy that increases recidivism generates costs incurred dealing with those future crimes.

236 See, 42 U.S.C. §§ 4321-37. See notes 229 and 235 supra. The NEPA process, which must be completed before action is taken, requires either an Environmental Assessment (where environmental impact is uncertain) or Environmental Impact Statement (a more comprehensive evaluation). NEPA requirements extend to the “environmental justice” impact of federal agency actions. For example, the Department of Transportation (DOT) requires recipients of federal transit system grants to submit an analysis of the health and environmental impact of their proposals on minority communities and how adverse impacts on minority communities can be mitigated. See Dep’t of Transp., Federal Highway Administration, FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Order 6640.23 (Dec. 2, 1998), available at http://www.fhwa.dot.gov/legsregs/directives/orders/6640_23.htm; Dep’t of Transp., Federal Highway Administration, Community Impact Assessments, A Quick Reference for Transit, available at http://www.ciatrans.net/CIA_Quick_Reference/Purpose.html. See Olatunde Johnson, Beyond the Private Attorney General: Equality Directives in American Law, N.Y.U. L. Rev. (describing DOT requirements of community impact statements by recipients of federal transit grants).


238 For example, consider a proposed statute mandating that youths aged 15 and older charged with burglary must be adjudicated as adults. Based on recent crime statistics and other data, the impact statement could estimate the number of youths likely to be affected by the law and assess the impact on their future lives in terms of incarceration time, recidivism, and educational and employment opportunities. Impact statements conceptually overlap with cost-benefit analyses and the two analyses could be integrated into a unitary process.
otherwise might be ignored.239 A juvenile justice statement finding a substantial negative impact should result, at a minimum, in a mandate to consider whether alternatives with greater effectiveness and/or a less harmful developmental impact might be possible.240

3. The Role of the Non-Partisan Research Institute. Implementation of the procedural requirements that are an essential part of the precommitment framework can be facilitated by creating a non-partisan independent research institute with the job of conducting analyses and reporting information required to improve legislative and agency deliberation. The Washington State Institute of Public Policy (WSIPP) provides a model. Created by the state legislature in 1983 to conduct policy-relevant research on its behalf, WSIPP provides cost-benefit analyses and other assessments that inform the legislative process and assist in cost effective planning and lawmaking.241 The legislature has sought input from WSIPP on the crime reduction impact and cost effectiveness of juvenile justice regulations and programs; WSIPP reports have had a major impact, resulting in legislation to restrict criminal court jurisdiction over juveniles and influencing resource allocation decisions.242 A research agency of this kind can contribute to more deliberative lawmaking in other jurisdictions as well.

c. Law Revision Commissions Despite legislative precommitments, public fears about juvenile crime are likely to sometimes result in the adoption of ill-considered laws inconsistent with the goals of crime reduction and fair treatment of young offenders. The cost of such lapses can be contained, however, through oversight by a standing law revision commission, tasked by the legislature with the job of reviewing juvenile justice laws periodically to evaluate conformity to established principles and goals. Legislatures can adapt to this setting a model based on long-standing commissions in the United Kingdom and in several American states.243 These

239 This is the purpose of the Environmental Impact Statement; NEPA, only requires that environmental concerns be evaluated and considered. COUNCIL ON ENVIRON. QUAL. EXEC. OFF. OF THE PRES., A CITIZEN’S GUIDE TO THE NEPA, at 1 (2007), available at http://ceq.hss.doe.gov/publications/citizens_guide_to_nepa.html. Note 235 supra.
240 A mandate to consider less harmful alternatives results when a community impact statement is required of recipients of federal transit grants finds a negative impact on minority communities. Johnson, supra note 237.
241 See http://www.wsipp.wa.gov, describing history and purpose of the Institute and scope of research areas, which include juvenile and criminal justice, education, child welfare and health and mental health. For example WSIPP reports, see Aos et al., Evidence-Based Policy Options, supra note 128 (describing how expanded use of community-based correctional programs could allow state to avoid constructing new prisons); Aos, et al., Comparative Costs and Benefits, note 129 supra.
242 In 2006, WSIPP published a comprehensive cost-benefit analysis evaluating the crime reduction effect of a broad range of social and correctional programs, which found several evidence-based juvenile correctional programs to be among the most cost-effective. Aos, et al., Comparative Costs and Benefits, supra note 129. This report influenced Washington and other states to divert funds from institutions to evidence-based community programs.
In 2009, the legislature repealed an automatic juvenile transfer statute largely on the basis of a WSIPP report indicating that the law had resulted in longer sentences for young offenders at a substantially increased cost to the state. Robert Barnoski, Changes in Washington State’s Jurisdiction of Juvenile Offenders: Examining the Impact, at 2 (2003), available at www://wsipp.wa.gov
243 The U.K. commission, created as an independent body by Parliament in 1965, consists of 5 members who serve full time; the chair must be an appellate judge. http://www.justice.gov.uk/lawcommission/about/who-we-are.htm. Statutorily created commissions have played important roles in proposing legislative reform in New York and California. See http://www.lawrevision.state.ny.us/ (describing purpose of N.Y. commission’s review and reform
legislatively-created independent bodies review different areas of law and propose legislative reform when laws are outdated, inconsistent with contemporary policies, inequitable or excessively complex; most reforms proposed by standing law commissions have been adopted. In the context of juvenile crime regulation, an independent legislatively-appointed commission can perform an important monitoring function, proposing reforms of ill-considered laws. This monitoring can serve as a safeguard when the social costs of laws enacted during periods of moral panic later become evident; during calmer periods, corrective action in response to law commission recommendations can be undertaken. More broadly the commission, drawing on its expertise, can serve as a law reform body, devising and advocating for laws that serve long term societal interests.

* 

The proposals described above can substantially improve the lawmaking process in the realm of juvenile crime regulation. Comprehensive legislation, cost-benefit analyses, impact statements and law revision commissions create a precommitment framework that can function to slow the lawmaking process, encourage consideration of consequences that otherwise may be ignored or discounted, and correct ex post ill considered decisions. By promoting deliberative decisionmaking and containing the cost of suboptimal choices, these mechanisms can mitigate the impact of moral panics by reducing the extent to which they are institutionalized through regulatory change.


As the 2011 fiscal crisis over raising the federal debt ceiling suggested, some precommitment mechanisms may create obstacles to optimal governmental action. In ordinary times, the lawmaking process is far from efficient, and sensible reforms may fall victim to partisan politics and interest group advocacy. The challenge is to deter the hasty enactment of suboptimal

purposes). See also [http://www.clrc.ca.gov/](http://www.clrc.ca.gov/)

244 The stated goal of the U.K. Commission is to ensure that the law is fair, modern, simple, and as cost-effective as possible. [http://www.justice.gov.uk/lawcommission/index.htm](http://www.justice.gov.uk/lawcommission/index.htm). Most law revision commissions focus broadly on reviewing the law. The U.K. commission at any one time may be reviewing as many as 20 areas of law. [http://www.justice.gov.uk/lawcommission/about/how-we-work.htm](http://www.justice.gov.uk/lawcommission/about/how-we-work.htm).

245 More than 2/3 of the U.K. commission’s proposed law reforms are enacted or accepted by the government. [http://www.justice.gov.uk/lawcommission/about/381.htm](http://www.justice.gov.uk/lawcommission/about/381.htm). Over 90% of California’s Law Revision Commission’s recommendations have been enacted into law, affecting more than 22,500 sections of the California statutory codes. [http://www.clrc.ca.gov/](http://www.clrc.ca.gov/).

246 The crisis was created because Federal law requires Congress to approve raising the debt ceiling to allow the government to borrow to pay for expenditures that exceed tax revenues. A political standoff between President Obama and congressional Republicans ended on the eve of the day that the United States would have been unable to meet its financial obligations without borrowing. See [Federal Debt Ceiling, N.Y. TIMES](http://topics.nytimes.com/topics/reference/timestopics/subjects/n/national_debt_us/index.html), Aug. 3, 2011, available at [http://topics.nytimes.com/topics/reference/timestopics/subjects/n/national_debt_us/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/n/national_debt_us/index.html). See note 217 supra.
regulations, without creating inefficiencies that unduly impede desirable legislative action.\textsuperscript{247} This is a salient concern, given that constraining mechanisms would apply to all relevant regulation, including ill-conceived laws in need of reform.

This concern argues for adopting a precommitment framework as part of comprehensive reform legislation—but it also argues for caution in the selection of strategies. For example, some mechanisms that may be appropriate for the amendment of constitutions are too onerous or costly to apply to ordinary legislation. Thus, a supermajority requirement or a rule conditioning routine legislation on approval in two successive legislative sessions creates costly impediments to lawmaking that may be regretted.\textsuperscript{248} The mechanisms I have proposed will slow the regulatory process and provide oversight, but in service of promoting decisions based on information that \textit{should} be considered in juvenile justice decisionmaking.

\section*{4. The Politics of Precommitment}

Whatever the merits of the precommitment framework as a means of minimizing the impact of moral panic decisionmaking, the proposed reforms will only be adopted (and effective) if they are politically viable. Even lawmakers who are inclined to accept the wisdom of careful deliberation over proposed policy changes may balk at the idea of restricting their future options, believing perhaps that when the public is alarmed about juvenile crime, dissatisfaction will escalate into outrage if the government is perceived to be insufficiently responsive. History indeed suggests that the public can react angrily when youths charged with terrible crimes are excluded from adult prosecution and punishment.\textsuperscript{249} Moreover, during moral panics, legislators may be tempted to demonstrate that they are “tough on crime” by repealing laws that hamper their ability to respond expeditiously to the urgent demands of their constituents. Even though the components of the precommitment framework have been implemented in other legal settings, perhaps it is unrealistic to propose legislative constraints in the realm of crime regulation.

\textsuperscript{247} Any regulatory or legislative precommitment might be used by opponents of proposed legal change to delay passage.

\textsuperscript{248} A requirement of multiple readings of a bill has some appeal because it postpones the decision, allowing moral panic to subside. In Arkansas, the legislature was not in session immediately after the Jonesboro school shootings. The legal changes enacted the following year to facilitate adult prosecution of younger juveniles included important protections (such as a requirement that the youth be competent to stand trial as an adult) that likely would not have been included in legislation enacted right after the shootings. David Firestone, \textit{Arkansas Tempers a Law on Violence by Children}, N.Y. TIMES, Apr. 11, 1999, \textit{available at http://www.nytimes.com/1999/04/11/us/arkansas-tempers-a-law-on-violence-by-children.html?pagewanted=all&src=pm} (describing protections). But a multi-session requirement is burdensome and, on my view, only justified when other evidence (such as an impact statement) signals that the legislation is problematic.

Concerns about public opinion are legitimate, but constitute a less formidable obstacle to reform than politicians might assume. Considerable evidence supports that public attitudes toward juvenile crime are far more nuanced than attitudes toward criminal activity by adults: Many surveys indicate that the public indeed cares about protection from violent crime, but also endorses policies that treat juvenile offenders differently from adults and sanctions that preserve their life options.\footnote{When public surveys offer a range of sanctioning options, attitudes tend to soften. Melissa Moon, Jody Sundt, Francis Cullen & John Wright, \textit{Is Child Saving Dead? Public Support for Rehabilitation,}\ 46 CRIME \& DELINQUENCY 38 (2000). Also, respondents are less punitive when they are provided with personal information about youths. \textit{See} Roberts, \textit{supra} note 80, at 523 ("[T]he public are sensitive to mitigating factors such as childhood abuse.").} Public opinion surveys find that most people do not support adult prosecution of younger juveniles even for violent crimes,\footnote{In a survey of 800 people, the preferred mean minimum age for violent offenses was 15; for non-violent crimes it was age 16. Elizabeth Scott, N.Dickon Reppucci, Jill Antionashak, \& Jennifer Gernnaro, \textit{Public Attitudes about the Culpability and Punishment of Young Offenders,}\ 24 BEHAVIORAL SCI. \& L. 815, 825 (2006).} or believe that sentencing youths to prison reduces recidivism.\footnote{\textit{SCOTT \& STEINBERG, supra} note 7, at 275.} Further, one study found that subjects were more willing to pay for effective juvenile rehabilitation programs than for incarceration.\footnote{\textit{See} Nagin, et. al., \textit{supra} note 80.} In short, the public at least intuitively seems to value the goals and interests that are likely to be furthered in a deliberative decisionmaking process.

These considerations often are forgotten in the midst of moral panics, of course, but the evidence suggests that public anger directed at young offenders tends to be short lived.\footnote{The punitive law reforms in the 1990s may seem to belie this claim. During this period, moral panics became self reinforcing, playing out against a backdrop of generally heightened concern about juvenile crime. But even then, the passage of time sometimes had the effect of reducing outrage, moderating regulatory outcomes. \textit{Supra} note 52 (discussing how delay of a year after Arkansas school shootings resulted in more moderate reforms). James Liebman and Peter Clarke note that prosecutors seldom seek to impose the death penalty after reversal. \textit{See also} note 60 at 50. (estimate again, original page # is 50 version I have) Recently, even a horrendous school shooting did not arouse the kind of outrage that was predictable in the 1990s. \textit{See} CITE NYT article.} Predictably, demands for harsh punishment and tough laws will fade and residual paternalistic attitudes toward young people reemerge, along with a pragmatic desire to deal effectively with the social problem of juvenile crime. Thus, we can anticipate public acceptance of corrective legislation enacted in response to law revision commission proposals after moral panics recede. Beyond this, as long as lawmakers take public concerns seriously, their political prospects are not likely to be harmed by adhering to the procedural requirements that encourage deliberation. Indeed, the requirements provide cover for politicians and regulators who understand that hasty lawmaking does not ultimately promote social welfare.\footnote{The political payoff for fueling public fears may be short-lived. California’s Governor Gray Davis in 1999 broke with the Democratic Party to vigorously promote Proposition 21, which expanded the category of youths prosecuted in criminal court. Two years later he was recalled by the voters. \textit{See} SCOTT \& STEINBERG, \textit{supra} note 7, at 103}
protect the public from young criminals. But that system has been dramatically altered over the past generation. The image of the traditional juvenile court, with its (ostensibly) single-minded goal of rehabilitating young offenders has virtually disappeared. Today, public protection and the accountability of young offenders are core elements of juvenile justice policy. But what has also changed over the past decade is our understanding of how best to achieve the goal of public safety at the least cost. Greater confidence in the effectiveness of the justice system’s response to juvenile crime is likely to reduce distortions in the public’s perception of the threat and calls for harsh legal responses.

CONCLUSION

In the future, occasional moral panics in response to the threat of juvenile crime may occur when public fears are aroused by a school shooting or other high profile crime. But this essay has shown that in calmer times, the public understands that young offenders are different from their adult counterparts and that policies that recognize these differences promote social welfare. The current period offers a window of opportunity in which lawmakers can put in place a precommitment framework to limit the costs of future moral panics. Decision research and theory indicate that the problem of inconsistent choices can be mitigated in this context through the adoption of prophylactic measures constraining the ability of government actors to respond precipitously to exaggerated fears. The precommitment framework incorporates two broad strategies. First, limiting the discretionary authority of prosecutors and judges to transfer juveniles to the adult system insulates the actors whose roles make them particularly vulnerable to public pressure based on fear and anger directed at particular youths. Second, legislative mechanisms can constrain and monitor lawmakers by creating a law reform process that promotes deliberation and enhances the likelihood that important long term interests—crime reduction, financial cost and fairness—will be weighed in the decisionmaking process.