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Not so Hard (and Not so Special), After All: Comments on Zimring's "The Hardest of the Hard Cases"

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NOT SO HARD (AND NOT SO SPECIAL), AFTER ALL: 
COMMENTS ON ZIMRING’S “THE HARDEST OF THE 
HARD CASES”

Stephen J. Morse

The main theme of Frank Zimring’s interesting and provocative essay is that analysis of the culpability and appropriate punishment of adolescent killers requires a “series of factual and legal inquiries as subtle, as problematic, and as controversial as can be found in the modern criminal law of personal violence.” He asserts correctly that the justice system has failed utterly to confront adolescent culpability systematically and that transfer of an adolescent killer to criminal court does not resolve the issues. He accurately claims that we lack the principles that should govern an appropriate response to an adolescent killing, whether the adjudication occurs in juvenile or criminal court. Professor Zimring proposes that retributive punishment may be an appropriate component of the law’s response when mid to late adolescents commit crimes as serious as homicide, but he believes that consideration of immaturity and diminished responsibility provides the best means to treat adolescent killers justly.

This Comment begins with the assertion that it is impossible to think sensibly about adolescent or adult culpability without a general and robust theory of responsibility to identify and to analyze the normative and factual issues. Then, the Comment addresses

* Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry, University of Pennsylvania. This Comment was written while the author was William Minor Lile Visiting Professor of Law at the University of Virginia School of Law. John Monahan, Elizabeth Scott, and Amy Wax deserve my grateful thanks for providing very helpful comments. I would also like to thank my personal attorney, Jean Avnet Morse, for her input.

whether Professor Zimring’s motivating case studies do the work that he intends. Next, the Comment turns to an analysis of Professor Zimring’s arguments concerning diminished responsibility. My theses are first, that with a theory of responsibility in place, determination of the culpability of adolescent killers is complicated, but not as particularly complicated as Professor Zimring believes, and second, that most of the wise recommendations he urges imply reforms that extend to adolescents who commit other crimes and to adult offenders. In a few words, I do not think that adolescent homicide is the “hardest of the hard cases.” Adjudicating the culpability of adolescents who kill is just one of many hard cases that can be resolved by the same general principles, properly understood, that should guide all culpability and disposition analysis, for adults and adolescents alike. The Comment concludes with my own recommendations for adolescent offenders who commit serious crimes.

I. RESPONSIBILITY AND EXCUSE

Adolescents as a class are surely different from adults—they are less mature, for example—but do the undoubted differences make a moral difference? Are adolescents less responsible and why? Answering this question depends on whether a moral theory we accept dictates differential treatment. Although we tend to be sympathetic to “children,” difference does not necessarily entail diminished responsibility. Assuming otherwise begs the question. Thus, any sensible analysis of adolescent moral responsibility must begin with a theory of moral responsibility generally. There is no reason to believe that different theories of responsibility govern different age groups. Rather, a unified theory of responsibility might very well require different outcomes for different types of offenders, such as for people with and without severe mental disorder or for adolescents and adults. A potentially compelling case for diminished responsibility arises only if the distinguishing characteristics of adolescents raise mitigating or excusing conditions. Let us therefore turn briefly to the theory of responsibility and excuse that informs criminal law.

Analysis of responsibility and excuse usually proceeds in two steps. First, we ask whether an agent has done anything wrong, whether the person has violated a moral or legal rule. Second, we
inquire whether the offender should be excused from the usually deserved response to the violation. In criminal justice terms, the steps correspond to the sequential consideration of prima facie criminal liability and then of excusing or mitigating affirmative defenses. The offender’s subjectivity is considered at both stages. Crimes are in part defined by their mental state requirements, such as intent or recklessness. Moreover, the seriousness of an offense and the consequent punishment in large part depend on the mental state with which it is committed because the offender’s mental state indicates his or her attitude towards the rights and interests of others. Killing purposely, for example, in general demonstrates less concern for life than killing recklessly. Mental states such as purpose, knowledge, and awareness of risk have ordinary language, common sense meanings and do not require the capacity for moral reflection or the like. There is thus limited scope for individualization of culpability based on the mental state with which a crime is committed.

Even if an offender’s conduct meets the definition of the offense, including its subjective mental state elements, the offender might nonetheless deserve mitigation or full excuse if a partial or complete excusing condition, such as infancy or legal insanity, obtains. Virtually all moral and legal excusing conditions depend on some defect in the offender’s general capacity to grasp and be guided by good reason, in the offender’s “normative competence.” The law typically adopts bright line rules for the excuses, but in principle, normative capacity is distributed along a continuum, and consequently, responding to this capacity would permit substantial individualization of culpability attributions and punishment. Indeed, such individualization occurs largely at sentencing and in particular at capital sentencing proceedings.

Virtually all adolescent killers clearly have the capacity to form and do form the mental states required by the definitions of homicide and other offenses. They kill on purpose, or they are aware that they are creating a great and unjustifiable risk of death.

2 I borrow this felicitous phrase from Jay Wallace, R. Jay Wallace, Responsibility and the Moral Sentiments 16, 86-87 (1994). Duress is the clearest counterexample, but no one would claim that adolescents or any other identifiable class of people, such as those with mental disorder, have diminished responsibility generally because they act under duress.
or serious bodily injury, or they kill inadvertently in circumstances in which they should know and are capable of knowing that they are creating a great and unjustifiable risk of death. In an individual case there may be a factual dispute about which of these mental states was formed, but such questions arise with equal frequency both in cases of nonhomicide crimes adolescents commit and in cases of homicide by adults. All offenders who kill on purpose, whether they are young or old, are committing the same offense. An excusing or mitigating condition must be present if the offender wishes to avoid full responsibility for the offense.

I suggested above that lack of the general capacity to grasp and be guided by reason is the most general excusing condition. It explains, for example, why very young children and some people with severe mental disorder are excused if they do wrong. Age and mental disorder alone are not excusing conditions, but they can interfere with general normative competence. Normative incapacity as the most general excusing condition also explains a standard mitigating circumstance such as the common law’s provocation/passion doctrine that reduces an intentional homicide from murder to voluntary manslaughter or the Model Penal Code’s expanded formulation, “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” Intentional killers whose rationality is diminished in part for non-culpable reasons deserve a lesser degree of blame and punishment than equally intentional killers whose normative competence is intact.

The question is whether adolescent homicide offenders, and adolescent offenders in general, are sufficiently less normatively competent to warrant mitigation or excuse when they kill intentionally, recklessly, or negligently. Professor Zimring concludes that they are and that they must be treated differently from adults. Let us now turn to Professor Zimring’s reasons.

II. THE CASE STUDIES

Professor Zimring uses a series of case studies to motivate the widely-shared intuition that adolescents are different, that there is

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4 See Paul H. Robinson & John M. Darley, Justice, Liability & Blame: Community Views and the Criminal Law 139-147 (1995) (reporting that lay respondents believe that
no typical adolescent homicide case, and that adolescent homicide thus requires unusually difficult assessment. My conclusion from the cases, however, is that they do not support the claim that adolescent homicide is somehow special or that it requires particularly complicated legal analysis to determine the killer’s culpability. Most of the cases are either atypical adolescent killers or are not distinguishable from adult killers.

Professor Zimring’s iconic case is the tragedy of Malcolm Shabazz, the twelve-year-old grandson of Malcolm X, who used gasoline to set fire to his grandmother’s apartment, knowing that she was home, and as a result, his grandmother burned to death. Malcolm is described as “extremely troubled,” a chronic firesetter, and with clinical manifestations of schizophrenia, including the possibility that his deeds were motivated by the fantasy that there was an “imaginary companion called Sinister Torch.”5 A clinical psychologist who examined Malcolm concluded that he did not consciously intend to harm his grandmother; instead his deed was an “unconscious act to scare her, make her change, get her to do what he wanted.”6

Professor Zimring recognizes that Malcolm is not a typical adolescent killer—he was younger than most, acted alone, and there was evidence of substantial mental disorder. Professor Zimring concludes that in this case youth and maturity are not just factors to be added on to modify an otherwise deserved penalty. Rather, immaturity allegedly “has a pervasive influence on a large number of subjective elements of the offense, including cognition, volition, and appreciation that behavior such as setting a fire can produce results like the death of a person.”7 Immaturity is never specifically defined. And, I do not precisely understand either the difference between cognition and the appreciation of the consequences of action—the latter is seemingly an instance of the former—or how volition bears on the mental state elements of an offense, although it may bear on affirmative defenses. Let us

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rational capacities increase from ages ten through eighteen and that in general younger offenders should not be processed in the adult criminal justice system.

5 Zimring, supra note 1, at 441.
6 Id. (quoting Jane Gross, Experts Testify Shabazz Boy is Psychotic, N.Y. Times, July 30, 1997, at B1).
7 Id.
examine in detail, however, whether Malcolm’s case demonstrates a generalizable, pervasive influence of immaturity on culpability for homicide by adolescents.

The case clearly calls for vast mitigation or excuse, but not primarily because of the pervasive influence of Malcolm’s immaturity in Professor Zimring’s sense. Consider first the analysis of mens rea. There is no question that Malcolm intentionally set the fire, even if setting the fire was a “compulsive” act, even if it was directed by an imaginary companion, and even if we fully accept the evaluation of the clinical psychologist quoted above. Then, in principle, determining whether Malcolm killed his grandmother purposely, knowingly, recklessly, or negligently is no different from making the same determination in the case of an adult offender. Assuming that Malcolm killed neither purposely nor knowingly, his inexperience, unconscious psychodynamics, and mental abnormalities might indeed cast light on whether he was consciously aware of the risk of death. For example, if we credit the clinical psychologist’s evaluation, Malcolm might not have been aware of the risk of death, but he would be guilty of negligent homicide. Malcolm’s case lends itself to precisely the same type of mens rea analysis applicable to an adult killer, for whom mental abnormalities, unconscious dynamics and life experience might also be relevant to a proper mens rea determination. In any case, viewing the evidence most favorably to Malcolm, even standard mens rea analysis would hold him guilty of only the lowest degree of culpable homicide.

Professor Zimring writes that immaturity has a pervasive influence on the “subjective elements” of the offense, but even twelve-year-olds can kill purposely, knowingly and recklessly. Moreover, volition has little to do with mens rea. Volition is a poorly understood concept, but either it bears on whether the

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8 The evaluation is largely incoherent because it denies that he consciously meant to harm his grandmother, but never discloses what his conscious intention was. We are told that he was unconsciously motivated to scare and manipulate her, but such unconscious desires do not necessarily negate mens rea, and again, we do not know what he did intend to do. I suggest in the text, infra, that if we credit the evaluation, it suggests that Malcolm wanted his grandmother to live and thus was not consciously aware that the fire might kill her. Thus, he would be guilty of negligent homicide.

9 For the most thorough, recent analysis in the legal literature, see generally Michael S.
agent acted at all, which is not an issue in Malcolm’s case because he clearly acted, or on excuse. Again, lack of experience might cast doubt on whether Malcolm subjectively appreciated the risk, but this is the only immaturity-related consideration the case raises, and surely Malcolm’s mental abnormalities were vastly more important in explaining why he might not have been aware of the risk of death he created. To see this, imagine that none of the evidence of mental abnormality was present. What moral reaction would we have to Malcolm’s deeds? Surely it would be harsher, and deservedly so, than the reaction the actual case produces.

Professor Zimring also claims that a twenty-five-year-old arsonist with no developmental difficulties is committing a different crime from Malcolm’s because the two have different characteristics and perceptions. With respect, however, this hypothetical loads the deck. Different characteristics and perceptions produce different crimes only if they produce different mens rea. Consequently, we must ask what, precisely, did the arsonist do? If he is a professional and was extremely cautious about human life but killed nonetheless, he is a negligent killer. As such, he has committed precisely the same crime as Malcolm, assuming that Malcolm killed negligently. The arsonist should be treated differently, of course, but not because he committed a different crime. He should be treated more harshly because, unlike Malcolm, the hypothetical arsonist has no plausible claim for excuse or mitigation.

Even if Malcolm intended to kill his grandmother, excuse or mitigation is warranted first because he was too young to have achieved full moral rationality. I agree with Professor Zimring that twelve-year-olds should not be treated like older adolescents or adults because they do not have the formal moral reasoning powers that are usually obtained by mid-adolescence. But, few twelve-year-olds kill in any case, so Malcolm is an atypically young kil-


10 Malcolm might of course be guilty for felony murder, based on the predicate felony of arson, unless he is also not responsible for the arson. The adult arsonist is similarly situated. But let us bracket the felony murder issue. I discuss felony murder in Part III.E. infra.
lder, and he is not a typical twelve-year-old because he suffers from such serious mental abnormalities. Thus, we cannot generalize from his case about the effects of immaturity on most adolescent killers. As Professor Zimring notes, the vast majority of adolescent killers are mid to late adolescents and have reached the age of moral rationality. Malcolm’s immaturity does require an excuse because it lacks moral rationality, but it leads to no general approach to adolescent killers, most of whom are distinguishable.

Even if Malcolm had reached mid-adolescence, he would still warrant an excuse or mitigation because he suffered from substantial mental abnormalities. We do not have sufficient facts to perform a complete analysis, but it is clear that Malcolm’s capacity to grasp and be guided by reason was seriously deficient, and not primarily because of immaturity. Even the intentional firesetting per se should be excused if Malcolm was genuinely compelled to set it. Again, in principle the analysis is the same as would be performed for an adult. Imagine a jilted twenty-five-year-old with firesetting problems—adults, too, suffer from “pyromania”11—and evidence of delusions and hallucinations who sets fire to the apartment of the woman who jilted him, causing her death. I contend that this case calls for the same considerations based on mental abnormality as Malcolm’s, even though Malcolm is an early adolescent.

The further cases Professor Zimring adduces, none of which includes sufficient factual detail to enable a textured analysis, do not suggest that homicide by adolescents is morally and subjectively distinctive. The second case concerns a seventeen-year-old “hit man” who dropped a crime boss. The third involves a “senseless” killing by a thirteen-year-old who got into a shoving match

11 American Psychiatric Ass’ ’n. Diagnostic and Statistical Manual of Mental Disorders 614-15 (4th ed. 1994) [hereinafter DSM-IV]; Vernon L. Quinsey et al., Violent Offenders: Appraising and Managing Risk 103-117 (1998) (describing and analyzing the empirical literature). Indeed, in DSM-IV “compulsive” firesetting is primarily a feature of adult psychopathology, whereas repetitive, persistent firesetting, without any necessary indication of compulsion, is only one criterion for the more general childhood diagnosis of Conduct Disorder. Other criteria must also be present to make the childhood diagnosis, and the firesetting criterion requires that the child set fires deliberately with the intention of causing damage. DSM-IV at 90-91.
and argument with a girl and then shot her when she dared him to use the gun he carried. The fourth is a fourteen-year-old who with two accomplices shot a British tourist in Florida. The final case is a fourteen-year-old who broke up a school prayer meeting by shooting at attending students, killing two and injuring six. I am not sure what these cases are supposed to suggest about adolescent homicide generally. Two involve unusually young killers, and the range of circumstances does not seem distinguishable from those in adult cases. None would be surprising if the killer’s age were eighteen or older.

After presenting these cases, Professor Zimring argues that the atypicality of adolescent killings is a “jurisprudential argument rather than a criminological assertion.” He recognizes that there are typical patterns to adolescent homicides, but suggests that blameworthiness for adolescent killers comes in “many different sizes” and that “the number of significant variables and the distribution of factors influencing culpability is great.” Sure this assertion is equally true for adult killers. Consider the factors cited to support the assertion: age-related judgment and experience; the precipitating circumstances and whether they were the fault of the accused; and the offender’s degree of involvement if the killing was committed by a group. Although one might argue that the judgment skills of adolescents are substantially weaker than those of adults, judgment skills and the gains from experience do not stop developing at age eighteen, and the distribution of such skills among adults is broad. Precipitating circumstances are already a crucial factor for adults, both in terms of prima facie liability and at sentencing. The degree of involvement in group criminality is less important for liability than it should be for adults, but it is considered by some states, it is considered at sentencing, and there is little reason to believe that “involvement” is more important to adolescent than to adult culpability.

In sum, the cases do not demonstrate that adolescent homicide is atypical or that adolescent killers raise particularly difficult or

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12 Zimring, supra note 1, at 443.
13 Id. at 443-44.
14 Susceptibility to peer pressure, another factor that concerns Professor Zimring, is independent of involvement and will be considered in the next section.
distinguishable issues concerning their culpability for homicide. Like adult cases, some adolescent cases are easy and some are hard.

III. DIMINISHED RESPONSIBILITY AND LAW REFORM

Diminished responsibility is Professor Zimring’s suggested doctrinal path to justice for adolescent killers, although he is sometimes unclear whether the concept should be incorporated into the elements of the prima facie case, whether it should be treated as a mitigating affirmative defense, or whether it should be a variable considered at sentencing. In either case, however, a concept that must do as much work as Professor Zimring asks of diminished responsibility should be defined sufficiently precisely to permit the work to go on, but no such definition is forthcoming. I do not think that this is a quibble or that this concern derives from an unrealistic desire for unnecessarily precise or operationalized definitions. Real criteria are necessary to permit sensible analysis. Nevertheless, the only criteria provided are that adolescents in general are less mature, more susceptible to peer pressure, and less skilled at dealing with provocation than adults. Maturity and immaturity are too vague to be useful, but their morally relevant components are never specified. No argument is provided for why susceptibility to peer pressure is a responsibility diminishing variable. Finally, no evidence that I know of suggests that adolescents in fact are less skilled than adults in dealing with provocation, although there is evidence that adolescents in general may be more impulsive than adults.15 In a word, I fear that Professor Zimring has begged the question of diminished responsibility, assuming without demonstrating that it applies to adolescents generally. Having said this, I must confess that I share his conclusion. After considering Professor Zimring’s arguments for diminished respon-

15 Jorge H. Daruna & Patricia A. Barnes, A Neurodevelopmental View of Impulsivity, in The Impulsive Client: Theory, Research, and Treatment 23 (William G. McCown et al. eds., 1993); see also Judy Zaparniuk & Steven Taylor, Impulsivity in Children and Adolescents, in Impulsivity: Theory, Assessment, and Treatment 158-179 (Christopher D. Webster & Margaret A. Jackson eds., 1997) (reviewing the conceptual and research literature, but also noting that impulsivity is not a unitary or well-conceptualized variable and that it is a feature of adult behavior as well). Moreover, we do not know the comparative distribution of adolescent and adult provoked killings, so it is not clear that this variable would have much practical bite. I suspect that it does, however.
sibility. I shall offer my own.

A. Four Observations About Diminished Responsibility and Desert

Professor Zimring's argument begins by suggesting that diminished responsibility should be part of the "elements of the offense" that define the appropriate range of deserved punishment. I do not understand, however, how diminished responsibility—a doctrine typically of affirmative defense—can be part of the elements of the offense. The factors Professor Zimring adduces—immaturity, psychological handicaps, and inability to appreciate risked consequences—might all bear on the offender's mens rea, but this raises a separate question, a standard mens rea analysis. I fail to see, however, how these undeniably relevant factors could be incorporated into the doctrinal mens rea elements of homicide. After all, for example, immature and handicapped people can kill intentionally.

Diminished responsibility suggests, in contrast, that an agent who killed with a particular mens rea is not as fully culpable as other agents who killed with the same mens rea. The primary reason, I have suggested, is that the agent acted with non-culpably diminished capacity to grasp and be guided by reason. It is easy to comprehend how Professor Zimring's factors could be incorporated into a rich theory of mitigation and excuse that might play a role at sentencing in setting the appropriate penalty within a deserved range. Mens rea and the other elements defining crimes would set the range; considerations of diminished responsibility would inform the condign sentence within the range. Finally, once again, I see no reason why such factors should not be considered in adult cases as well, and Professor Zimring provides no reason to insist on the distinction between adolescents and adults.

Next, Professor Zimring makes four general observations concerning diminished capacity on account of youth and just punishment for youths. I agree with most of what he says, but the observations apply with equal force to adolescents who commit crimes other than homicide and to adult offenders as well. The first observation is that doctrines of diminished responsibility should be

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16 Zimring, supra note 1, at 447.
applicable throughout the full spectrum of offense severity and that the moral consistency of the criminal law requires that such doctrines should stand or fall as issues of general applicability. To begin, I do not understand what is meant by the plural, "doctrines" of diminished responsibility.\footnote{Id.} Is Professor Zimring referring to a congeries of distinct, potentially mitigating factors like those quoted above, or is diminished responsibility a unitary mitigating condition that can be supported by evidence of any number of relevant variables? It would be helpful to know the content of the doctrine or doctrines we are considering. In either case, if an offender might be nonculpably less responsible for various reasons, why shouldn't the doctrine that instantiates such claims apply to all crimes and to all offenders? An angry adolescent or an angry adult might kill, burn, or assault in response to anger. Adolescents and adults alike, although perhaps for different reasons, might suffer diminished rationality. Why not apply diminished responsibility across the board?

The second observation is that the impact of diminished responsibility produced by immaturity or personal handicaps (never defined) will be greater when subjective elements are more important in setting the range of appropriate punishment. Once again, it is unclear whether the observation extends to the definitional elements of the crime or to a mitigating condition or affirmative defense. Professor Zimring’s discussion suggests the former, but immaturity and other personal handicaps are unlikely to negate mens rea, especially among the substantial majority of adolescent killers, who are fifteen or older. Professor Zimring also notes the role of motivation, but motivation rarely plays a role in mens rea; motivation issues are raised largely by affirmative defenses and at sentencing. In any case, the same arguments apply with equal force to adult crimes that require greater subjectivity.

The third observation is that some forms of liability, such as accomplice liability and conspiracy, depend almost entirely on mental state and not on objective conduct elements. In such cases, Professor Zimring argues, diminished responsibility caused by immaturity has greater potential for mitigation than in crimes for
which conduct is a more crucial element. Once again, however, the discussion suffers from a hazy distinction between mens rea analysis and affirmative defense. Adolescents may be more subject to peer influence and more likely to commit crimes in groups than adults. As a result, one might wish to claim that they are less responsible when they act under peer influence and in groups—although this requires an argument. But, there is no reason to believe that an adolescent accomplice or conspirator does not have the purpose to promote or facilitate the object crime. Moreover, even on the affirmative defense interpretation of Professor Zimring’s observation, no evidence is offered to suggest that peer influence plays more of a role in homicide than in other adolescent crimes, and no argument is provided to support the implication that adult accomplices and conspirators should be denied the benefit of diminished responsibility in appropriate cases.

Professor Zimring’s final observation concerns standard presumptions, such as that people intend the natural and probable consequences of their acts. Professor Zimring wonders whether such presumptions apply to twelve-, fourteen-, and sixteen-year-olds. In the first place, of course, these presumptions are not mandatory, and if they shift the burden of persuasion, they are unconstitutional. They are simply commonsense “rules of thumb” to help the factfinder decide whether a requisite mens rea was present. Professor Zimring is right that such a presumption may be prejudicial when used in the case of a twelve-year-old, but it may be equally prejudicial, for example, if used in the prosecution of a normal but extremely mentally slow adult. Furthermore, most adolescent killers are fifteen or older, and the standard presumptions most assuredly apply to them as well as they do to most adults.

Professor Zimring concludes this section by suggesting that case by case determinations of culpability are as important in juvenile homicide cases as in any other type of case. I agree, but not because the offender is a juvenile. Homicide is in general the most serious crime and carries significant punishment, even for its lowest degrees. Case by case culpability determinations should always be required before our society imposes blame, punishment, and stigma on any criminal, and especially so in homicide cases,
whether involving adolescents or adults, in which these potential impositions are heaviest. Of course, when immaturity, like many other potentially responsibility diminishing variables, is in issue, the law should consider it for the general reason just given.

B. Sentencing and Youth Policy

Professor Zimring correctly argues that the justice system should adjudicate young offenders without compromising youth policies generally, and where possible, should provide young people with “room to reform,” that is, it should avoid damaging a young person’s potential for mature, responsible citizenship. He admits, however, that desert and youth policy concerns can conflict. Indeed, room to reform considerations are exterior to desert. Some offenders therefore may deserve and should receive punishment that will damage their developmental potential. When this occurs, youth policy must defer to desert, which will not be unfair as long as an offender’s diminished responsibility has been considered in setting the range of punishment that is appropriate to the offender’s culpability. Then, promoting reform can help set the proper penalty within the deserved range, including influencing the form of criminal punishment.

I agree entirely with these worthy goals, but wonder again why they apply just to adolescent homicide offenders and why they should not apply equally to other adolescent and adult offenders. The justice system should fully adjudicate the culpability of any mid to late adolescent who commits crimes serious enough to deserve punishment, and then room to reform should be a prime consideration in setting the right punishment within the deserved range. If anything, adolescent killers perhaps should receive less consideration of reform potential than adolescents who commit less serious crimes because the killers are especially deserving of punishment. What is more, the potential for development and reform does not cease at age eighteen. Many adult offenders suffer from developmental handicaps, broadly conceived, ranging from illiteracy to dispositional impulsivity. A humane system of punishment would try to maximize all prisoners’ potential within the constraints of just punishment. Adolescents as a class may be more developmentally malleable or amenable to treatment than
adults, but then amenability or malleability, not age, is the operative variable. A better system would be to ignore malleability for “hardened” youths and for adults who cannot be reformed and to apply the room to reform concept to malleable adolescents and to adults who can change. But, such a system would require reasonably clear, operationalizable criteria for amenability and malleability, which I believe do not now exist.

An argument for “room to reform” that applies specially to adolescents, with which I know Professor Zimring fully agrees, is not presented in this paper, but it strengthens his argument and deserves mention. We know that almost half of adolescents commit only one offense and a large majority commit no more than two. Thus, most adolescents are not at significant risk for career criminality. It appears that many adolescent single offenders commit their crimes in large part solely as a result of the developmental attributes of adolescence, which, when outgrown through normal maturation, will decrease markedly the risk for further offending for these offenders. Although there are data that enable us to predict with some success who these adolescents are, it is not optimally accurate. The alternative explanation for these data, of course, is that unusual and specific circumstances, rather than immaturity, explain the single-offending adolescent’s crime. After all, if immaturity were really the primary explanatory variable, then we would expect many more adolescents to make repeated “mistakes.” Still, let us make the plausible assumption that normally outgrowable immaturity plays a large role.

The claim that maturation “cures” criminality must be distinguished from the amenability to treatment rationale for room to reform. If normal developmental immaturity is the relevant variable, then there is nothing “wrong” with the adolescent that requires “treatment.” The justice system should simply ensure that its response does as little as possible to inhibit normal maturation. Malleability or amenability to treatment, however, suggests that additional, undesirable variables are responsible for adolescent criminality and that these variables can be ameliorated by specific

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18 Marvin E. Wolfgang et al., Delinquency in a Birth Cohort 254 (1972) (forty-six percent of delinquents commit only one offense; an additional thirty-five percent commit only a second offense).
interventions, not simply through maturation. Again, a rational system would need the means to distinguish the two classes and to respond appropriately to each.

If it is true that many adolescents will simply outgrow re-offending, then there is special reason to try to minimize for them the inevitably deleterious effects of criminal punishment. Here again, however, the conflict with desert arises. Many adolescent single offenders may outgrow the normal, age-appropriate predisposition that increases the risk of criminality. But, if they are nevertheless responsible for their deeds, especially for serious offenses such as homicide, then there is no easy resolution of the conflict between desert and facilitating growth. And, as a practical matter, victims, families, and perhaps a majority of society at large will understandably reject mild responses for responsible adolescents who commit serious crimes. Moreover, the comparison to some adult offenders is once again instructive. Adult criminality, too, drops off with age, although not nearly as steeply as in late adolescence and early adulthood. So, many young adults will "mature out of" criminality. Furthermore, many adults with unblemished juvenile and adult records commit single, serious offenses as a result of predisposing traits that interact with particularly unfortunate circumstances, but to the best of our knowledge, they are at little or no risk of re-offending. If they are responsible, however, our society rightly feels no hesitation in imposing serious blame and punishment.

Professor Zimring argues that needs for protection, education, mental health services, and skill development should be accommodated for young offenders if this can be achieved without compromising security. I agree entirely that these needs should not be ignored simply because an adolescent deserves punishment for a serious crime or because commission of a serious crime inevitably betokens adult maturity. But, I also suggest that the same can be said for adolescent offenders who commit crimes other than homicide and for adults. Many adult offenders suffer from mental disorders, need educational skills, and are in great danger of predation in a general prison population. Adult offenders should not automatically lose their humanity or claims to assistance simply because they offend. Locking people up because they deserve it,
whether they are adults or adolescents, is one thing; depriving them unnecessarily of life chances and subjecting them unreasonably to the horrors of prison life is another.

C. The Age Span of Diminished Responsibility

Professor Zimring asks how long considerations of diminished responsibility should play a role in determining deserved punishment after the age of minimum culpability is reached, say, between twelve and fourteen. The answer depends, he claims, on what "capacities" are relevant to culpability and at what age they are attained. At this stage, a full explanation of the theory of diminished responsibility in play is necessary. Professor Zimring offers only that mid to late adolescents suffer from "far from trivial deficits" in the ability to deflect peer pressure and to respond to provocation. As noted above, there are good data to suggest that adolescents are particularly susceptible to peer pressure, although the data are not derived from studies of criminal conduct, but none that I know of support the claim about provocation. Indeed, if adolescents are so unable to restrain themselves when provoked, why do so few kill? After all, provoking peers is a standard form of adolescent interaction. Let us assume, however, that both deficits are true for adolescents generally. Still, we are not told why these variables diminish responsibility, why they diminish it especially in cases of homicide, and why they should not also diminish the responsibility of adult offenders who suffer from similar deficits. For the purpose of tracing the implications of the argument, however, let us assume further that they are relevant to responsibility.

If capacities relevant to responsibility develop with age and experience, as they surely do, then in general as people age and gain experience, they will tend, again in general, to attain increasingly full responsibility. But, the curves for adolescents and adults overlap: There are adolescents who have attained the full capacities of adults and chronological adults who have not. Moreover,

given what we know of the lives of most serious offenders, it would be
boots0less to claim that adult offenders with deficits are
tully responsible for their deficits.

I understand the efficiencies of bright line rules. There are
bright line ages for permitting voting, drinking, and driving, for
example. Although many younger people are fully capable of re
sponsibly engaging in these activities and many adults are not, we
are willing to ignore individualized claims, even though some of
these activities, say, voting, are important benefits, and others,
such as driving, involve serious risk of harm. But, none of these
activities that we regulate with bright line rules is as important to
the total life chances of a person as criminal conviction and puni
ishment. When criminal culpability is being adjudicated for seri
ous crime, and punishment and stigma are at stake, justice requires
individualization for potentially responsible agents. Evidentiary
rules, such as a rebuttable presumption of diminished responsibil
ity for adolescents, would promote efficiency, but they cannot
substitute for individualized determinations of culpability.

Professor Zimring claims repeatedly that sentencing of homi
cidal adolescents does not lend itself to determinate sentences that
can be read off a grid of relevant factors. He argues that there is
no alternative to wide sentencing frames and individual judicial
judgments with reasons. But, he does not give convincing reasons
to believe that this is true only for adolescent killers and is not
equally true for other adolescent and adult offenders. Professor
Zimring’s first reason for suggesting that relatively determinate
punishment of adolescent killers is particularly inappropriate is
that punishment for homicide is already differentiated into many
degrees based on mens rea. This is correct, but relatively determi
nate sentencing could be imposed within each distinct degree of
homicide. Moreover, it is equally true of adult killers. He then
adds that diminished responsibility complicates matters further.

See Stephen J. Morse, Immaturity and Irresponsibility, 88 J. Crim. L. & Criminol
ogy 15, 63-64 (1997).

I assume for the purpose of discussion that we are holding constant the degree of
determinate sentencing that might be appropriate in general. As we have seen, Professor
Zimring adopts a mixed theory of punishment in which desert is a necessary but not suffi
cient justification that sets a range of deserved punishment within which consequential
justifications dictate the proper sentence.
This is also true, but diminished responsibility complicates all sentencing, including other crimes by adolescents and crimes committed by adults.

The second reason Professor Zimring rejects determinate sentences for adolescent killers is the assertion that such sentencing works best when the major influence on sentencing is the type of harm inflicted rather than variations in the offender's subjective state, including the capacity to control behavior. With respect, I do not see why this should be so. Why should sentencing for burglary, which is his example, be more determinate than the sentence for purposeful homicide? Although both have objective harms, burglary is not divided into degrees, but why should this matter? For example, in a prosecution for purposeful homicide, the state must prove beyond a reasonable doubt both killing conduct and the purpose to kill; in a burglary prosecution, the state must prove intentional breaking and entering with the intent to commit a felony therein. In both cases of successful prosecution, the elements are established and the degree of prima facie guilt is determinate. Why shouldn't the sentence for both be equally determinate? If the implicit answer is that diminished responsibility affects homicide culpability, the simple response is that it might equally affect burglary culpability. Finally, if Professor Zimring is right that crimes divided into degrees based on variation in mens rea are particularly unsuited to determinate sentencing, this would be true for adult killers as well.

D. The Calculus of Juvenile Desert

Professor Zimring rejects a straight discount from adult sentences as a response to the assumed diminished responsibility of adolescents—so-called "youth discounts"—and proposes instead an independent determination of the adolescent offender's appropriate sentence. The thrust of the argument is once again not directed at adolescents, however. Professor Zimring correctly notes that criminal sentences are "inexact, even crude measures of blameworthiness and variations in terms of confinement are only roughly correlated with levels of culpability...." Thus, he

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22 Zimring, supra note 1, at 461.
claims, using these penalties as base rates for discounting treats an already crude system "as if it were a much more sensitive and accurate measure of the community's sense of deserved punishment." The problem, of course, is the initial crudeness of the penalty structure. Discounting does not treat the crude system as more refined and sensitive than it is, and it would not exacerbate the problem; it would simply incorporate it. The proper reform is not special treatment for adolescents, but change in the method of all culpability determinations and sentencing.

Professor Zimring suggests that individualized determinations are preferable for adolescents because age is an incomplete proxy for diminished responsibility and because vulnerabilities associated with early and middle adolescents—especially susceptibility to peer pressure—explain some patterns of homicide particularly well. Once again, the reach of the argument extends far past adolescent homicide. If diminished responsibility is a general mitigating condition, then some type of individualized determination will always be necessary to determine the degree of diminution in any individual case, whether it is homicide or another crime and whether it is committed by an adult or by an adolescent. After all, the particular vulnerabilities cited would apply to crimes other than homicide and would apply to some adults, too. To use Professor Zimring's example, imagine a passive adolescent who goes along with an armed robbery to make a positive impression and that the robbery does not turn lethal. The claim for diminished responsibility for armed robbery of the passive, vulnerable accomplice is as strong as it would be if the robbery causes death and results in a homicide prosecution. For another example, courts have recently been faced with claims of duress by battered women who were accomplices to the batterer's crime. In many of these cases, standard duress conditions do not obtain, but there is surely a claim for diminished responsibility based on the accomplice's vulnerability to pressure from and desire to accommodate the batterer. Indeed, dependent adults may in general be more likely to be pas-

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23 Id.
24 Professor Zimring uses the word "immaturity," but I assume that this is a proxy for his more general mitigating condition, diminished responsibility. Elsewhere he notes that the range of variation in responsibility among kids of the same age is "notoriously large." Id. at 458.
sive accomplices.

Professor Zimring concludes the discussion of the calculus of desert by observing that straight discounting has not been used in the United States and Germany. He suggests that failure to use this mechanism for sentencing to implement diminished responsibility "should inspire caution." I do not think, however, that Professor Zimring means to imply that present juvenile sentencing policies and practices in the United States are a success. Indeed, he opens his paper by saying that there is no adequate theory or practice in juvenile sentencing in general or in homicide cases in particular. I believe that we have no adequate model of either discounting or the individualized determinations urged. The argument for individualized determinations would be more persuasive if it included a richer theory of diminished responsibility and evidence that juries and judges would be able to apply it in a principled and even-handed fashion.

E. Constructive Doctrine and Adolescent Homicide Liability

Professor Zimring next addresses a series of doctrines, including felony murder, accessory liability and conspiracy, that he believes are especially relevant to adolescent homicide and in their traditional form are not appropriate for determining adolescent culpability. Group involvement is more common in teen violence than at any other age. Just over half of adolescent killers did not act alone, whereas only about a quarter of adult killers acted with others. He does not describe similar data for other serious crimes, although it appears that in general adolescents are more likely to commit most crimes in groups. One fifth of adolescent

25 Id. at 463.
26 Professor Zimring never directly addresses conspiratorial liability. I will assume, however, that the arguments he makes about accomplice liability for adolescents could be mounted equally against conspiratorial liability. Likewise, my response to his discussion of accomplice liability applies, with suitable modifications, to questions about conspiracy.
27 Zimring, supra note 1, at 464.
28 See Peter W. Greenwood, Differences in Criminal Behavior and Court Responses among Juvenile and Young Adult Offenders, in 7 Crime and Justice: An Annual Review of Research 151, 156-157 (Michael Tonry & Norval Morris eds., 1986) (reporting, inter alia, data from victim surveys indicating that juveniles commit robbery in groups twice as often as adults and from an arrest record study demonstrating that seventy-seven per-
homicides are felony murders, but we are not given the rate of adult felony murder.

Professor Zimring argues first that traditional doctrines of accomplice liability are particularly inappropriate for determining the culpability of adolescents because accomplice liability is largely based on subjective factors, because the range of culpability for adolescent accomplices to homicide is large, and because the culpability at the "low end of the seriousness distribution should be rather small." He suggests that adolescent accomplices to homicide are sufficiently culpable for transfer only if the defendant knew of and encouraged the use of lethal force. I agree with all of this, but it is true for adults and for less serious crimes by adolescents. American criminal law does not in general distinguish among accomplices in proportion to the importance of the role an accomplice played in the crime, but this is an objection to American law generally and it applies with equal force to adult prosecutions. The passive or "small fry" accomplice or conspirator should not be treated as severely as the active accomplice. Indeed, other legal systems do grade an accomplice's culpability and punishment according to the degree of the accomplice's participation.20

Finally, the degree of involvement that would distinguish the culpability of accomplices is not based primarily on subjective factors, as Professor Zimring suggests, but on the actual aid rendered. Accomplice liability requires that the defendant intended to promote or facilitate the crime, so all accomplices meet this subjective, mens rea requirement. The degree of the accomplice's enthusiasm is not an element of the crime. The primary way accomplices indicate their intensity of participation is in the aid they render. The accomplice who holds the victim of a savage beating is different from the accomplice who passively stands by, implicitly offering encouragement. It is possible, of course, that some who aid more actively might be less enthusiastic and vice versa, but surely these are less common possibilities.

Professor Zimring next makes the very interesting suggestion

1 cent of sixteen- and seventeen-year-olds and sixty-six percent of eighteen- and nineteen-year-olds robbed in groups.
29 Zimring, supra note 1, at 464.
30 George P. Fletcher, Rethinking Criminal Law 650 (1978).
that adolescents should not be guilty of felony murder, even if their behavior satisfies all the elements of an underlying forcible felony that is the predicate for strict liability for homicide. He speculates that strict liability for felony murder is justifiable only if the offender is fully culpable for the underlying offense.

I am very sympathetic to this claim, but it applies equally to adults. Many adults are not fully culpable because they, too, suffer from diminished responsibility. The reason adults may have diminished responsibility may differ from the ordinary reasons that apply to adolescents, but diminished responsibility for any reason still undermines culpability. If Professor Zimring's argument is sound, it clearly generalizes. It also proves, however, that his concept of diminished responsibility applies equally to crimes other than homicide. If strict liability felony murder should not apply to adolescents because they are not fully culpable for the underlying forcible felony, then they should not be held fully responsible for underlying forcible felonies that do not cause death.

Professor Zimring concludes his discussion of felony murder by suggesting that if transfer to criminal court is restricted to cases that are morally equivalent to intentional homicide, then transfer should occur only if an accomplice to the felony actively supported and participated in the acts that caused death. This argument, too, generalizes, and in its broadest form, it generalizes to perpetrators as well as to accomplices. If felony murder is to be retained at all, it ought to be applied only to adolescent and adult accomplices who actively participated in the acts causing death or who knew that the perpetrator was carrying a lethal weapon or the like. Otherwise, strict liability is especially disproportionate. Indeed, some states have incorporated such fair rules into their penal code. More important and more generally, felony murder is a moral abomination that should be abolished. Strict liability for homicide is entirely unjustified; the prosecution should be forced to prove homicide liability directly for perpetrators and accomplices alike when a death occurs in the perpetration or attempt to

31 E.g., N.Y. Penal Law § 125.25.3(a)-(d) (McKinney 1997) creating an affirmative defense to felony murder if the agent did not commit or encourage the homicide, was not armed, had no reasonable ground to believe that another participant was armed, and had no reasonable ground to believe that another participant intended to engage in conduct likely to result in death or serious physical injury).
perpetrate a felony.

In sum, Professor Zimring’s complaints about the application of felony murder, accomplice liability, and conspiracy to adolescents is really a complaint about the unfair extent to which these doctrines impose liability generally.

F. Capital Punishment and the Adolescent Killer

We inhabit a nation in which over two-thirds of the states authorize capital punishment, and the Supreme Court has held that executing killers who killed when they were sixteen- and seventeen-years-old does not offend the Eighth Amendment.\(^\text{32}\) Professor Zimring argues that age cannot be the relevant variable for why we draw the line at sixteen; instead, the notion of diminished culpability for the crime is the touchstone. Moreover, he believes that only the most blameworthy killers should be eligible for execution. He is entirely right about all of this. Thus, justice requires that we establish the most thorough, convincing theory of responsibility and mitigation. Under many theories, young killers may in general be less blameworthy than adult killers, but these theories must be offered and supported.

IV. Partial Responsibility

I have elsewhere offered a full theory of responsibility and an analysis of its application to mid to late adolescent offenders.\(^\text{33}\) In brief, I proposed that the general capacity to grasp and be guided by good reason, normative competence, is the most general condition of responsibility. I included the capacities for empathy and guilt because they furnish the best reasons not to harm others. People who lack these capacities are not morally rational and are not members of the moral community. I then examined the psy-

\(^{32}\) Stanford v. Kentucky, 492 U.S. 361, 380 (1989). Age may be considered as a mitigating factor, however, Id. at 375; see also Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (barring the execution of murderers who were less than sixteen-years-old when they killed); see generally Norman J. Finkel, Common sense Justice: Jurors’ Notions of the Law 212-213 (1995) (reporting that age has an independent effect on the willingness of subjects to impose the death penalty and that age is inversely correlated with such imposition).

\(^{33}\) See Morse, supra note 18.
chosocial data comparing adolescents to adults, none of which was derived from studies of the criminal conduct of either group. I concluded that there are differences, but I also concluded that most of the variables that differentiate the groups are not fundamental conditions of responsibility and that the curves of the groups overlap. For example, impulsivity and susceptibility to peer influence do not seem to be excusing conditions generally and many adults demonstrate these traits. In terms of responsibility, most mid to late adolescents appear to be like adults. And, if a rich normative theory indicates that the variables that differentiate adolescents should be considered mitigating or excusing conditions, then adults with these conditions should also be considered for mitigation or excuse. Only efficiency would justify failure to make individualized culpability determinations for adults. Finally, I speculated that there might be sufficiently substantial differences between adolescents and adults in the capacity for empathy to warrant a presumption of partial responsibility for adolescents.

I agree with Professor Zimring that individualization of culpability for adolescent killers is very difficult, even when guided by a robust theory of responsibility and excuse. But, I believe that this is true for all criminals of any age. Indeed, as I have suggested throughout this Comment, many adult offenders suffer from the same deficits as adolescents and more. They, too, deserve individualization, although it will be as hard to achieve in adult as in adolescent cases.

As a result of the difficulties attending individualization, my preferred solution is adoption of a generic mitigating defense, partial responsibility, based on the impaired capacity for rationality, that would apply to offenders of any age and to all crimes and that would be determined by the trier of fact. Thus, adolescents and adults alike might use diminished capacity for empathy, susceptibility to peer pressure, or any other variable that our theory of responsibility suggested reduced culpability. Unlike Professor Zimring, I would use a straight discounting approach to sentencing, reducing sentences in inverse relation to the seriousness of the crime charged. The inverse relation would be a means to balance culpability and public safety concerns. One grade of mitigation for every crime would fail to reflect finer culpability gradations,
treat quite different offenders alike. But, given the epistemological and normative problems besetting more precise culpability determinations, justice can demand no more, and one grade of mitigation would avoid the inequality and arbitrariness that would inevitably result from allegedly more refined determinations.

CONCLUSION

Professor Zimring rightly asserts that no good theory and practice is available to respond to adolescent killers. He also thinks that these cases raise the most difficult issues for culpability analysis. I agree that they raise difficult issues, but I disagree that they are any harder than the culpability analysis required for other adolescent offenders and for adults. Adolescent killers are just one hard case among a system rife with hard cases. What is needed is a complete, systematic theory of responsibility and excuse to respond to all culpability determinations. Assessing culpability will still be hard for all criminals, but at least it will be subject to greater rational control than now obtains.