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Rationalizing Juvenile Justice

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BOOK NOTICE

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AMERICAN YOUTH VIOLENCE. By *Franklin E. Zimring*. New York: Oxford University Press. 1998. Pp. xiii, 209. $29.95.

Few issues have occupied the public mind so much in recent years as the problem of youth violence. Due to sensational school shootings and public paranoia about the violence of youth gangs, America is concerned — *very* concerned — about the growing criminality of its children. In our concern, we find ourselves caught in the classic conundrum of criminal responsibility: reconciling the unavoidable knowledge that much of human behavior is determined with our strong instincts about free will. We blame violent television and video games, we blame single mothers, we blame low church attendance, but when all is said and done, we punish the child. The concrete response to our fears about increasing youth violence has been increased accountability for young offenders, and growing rhetoric about the genuine evil that exists even in seemingly innocent youth.

Franklin Zimring[1] confronts this trend of "getting tough" on young offenders in his most recent book, *American Youth Violence*. The basic aim of his project is to quell the storm of youth crime policy motivated by "fear and hostility" towards young offenders (p. xiii). Increased length of punishment, as well as abandonment of efforts at reform, have characterized the recent moves in juvenile justice. Zimring argues against these trends.

Zimring approaches the problem of youth criminality in a remarkably comprehensive manner. He comes at the issues from all angles — he is at the same time a social scientist, a policy specialist, and a legal philosopher. He uses empirical data to challenge (quite convincingly) the perception that American youth are increasingly violent (pp. 31-47). He uses his empirical findings to suggest reforms, such as changes in firearms policy, that would be likely to make a difference in the degree of violence among young people (pp. 89-106). Most im-

* Thanks to Thomas Green and Abigail Carter for careful reading of drafts and invaluable discussion.

1. William G. Simon Professor of Law and Director of the Earl Warren Legal Institute, University of California at Berkeley.

pressively, Zimring ties all of this together with deep legal and social debates about youth criminal responsibility. He not only tells us what the data say, but what they mean.

This impressive integration of views leads Zimring to a unified perspective on American youth violence that is rational and coherent. His main critique of existing means of dealing with youth violence is that they are illogical. He argues, for instance, that if a certain large percentage of youth who commit isolated violent acts never repeat them in adulthood, then violence is, by and large, "kid stuff" (p. 84). For Zimring it is silly and counterproductive to follow recent trends and put these kids in jail for some extended time, impeding their normal development, and it is wrongheaded to brand them as evil criminal predators (pp. 81-85). Zimring also seeks rational consistency between youth crime policy and other policies concerning youth. He suggests, for example, that our views of the risk of youth crime ought to be in some way informed by our views of the risks of youth driving. If society is willing to bear some risk to public safety in order to allow young people to develop into less risky adult drivers, perhaps it ought to be willing to tolerate the same degree of youth criminality as part of normal youth development (pp. 85-86). Similarly, he analogizes laws relating to alcohol to youth criminal responsibility — if the trend is to raise the age of legal possession of alcohol, he asks, how can this be consistent with lowering the age of criminal responsibility for commission of crimes (p. 81)?

Zimring's drive towards logic and coherence in social responses to youth violence is admirable and compelling (p. 127). But it raises the question whether approaches to criminality can ever be rational in the way that Zimring hopes. As this Notice will show, the criminal justice system serves an important role in affirming the reality of free will and personal responsibility in society, a role that often conflicts with enlightened viewpoints about acceptable risks and social scientific understandings. What appear to Zimring to be incoherencies are actually crucial strategies for holding the line on personal responsibility in the face of nagging awareness of the degrees to which human behavior is determined.[2] This tension between free will and determinism leads to a constant negotiation between holding responsibility and denying it, the ultimate settlement of which is anything but neatly consistent.[3]

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2. *See generally* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997); Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995) [hereinafter Green I].

3. Some deny the existence of any logical contradiction within the criminal law on the issue of criminal responsibility. For instance, Michael Moore has explained away the problem by taking a staunchly deterministic stance and describing most of the seemingly "free will"-based criminal law as based on practical (utilitarian) considerations about deterrability. *See* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985). But most

By placing free will and determinism at the center of debates about criminal justice, this Notice follows upon the conceptual frame set out by Thomas A. Green in his historical examinations of criminal justice at the beginning of this century.[4] Green has pointed to some of the ways in which the major structures of criminal law during this era can be explained by the tension between the two views of criminal responsibility. This Notice aims to show that this tension must also be addressed when suggesting criminal justice reforms today.[5] Zimring has failed to listen to the lessons of history — particularly the Progressive Era, when similar attempts to rationalize the criminal justice system failed.[6] Zimring must deal with the debates about criminal responsibility that caused this failure if he wishes his contemporary reforms to succeed.

I. THE "COMING STORM"

Zimring begins his book by highlighting the logical inconsistencies that can be caused by the debate between free will and determinism.[7] He notes the popularity of fears about a "coming storm" of "juvenile super-predators," hardened young criminals.[8] The fears are based on demographics — assumptions that certain social conditions uniformly produce these kinds of offenders. If we really believe this, Zimring argues, why should our response to the coming storm be an increasing call for treating juveniles harshly, as if they had free will? "[A]rguing that the later course of criminal careers can be predicted long in ad-

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people understand criminal responsibility to reflect genuine moral condemnation based on the reality of free will. The general perception of a tension between the two stances at the very least affects behavior and policy in these areas.

4. *See* Green I, *supra* note 2, at 2043-53. Green is in the process of bringing his investigations forward through the Progressive Era and into the present. *See* Thomas A. Green, Conventional Morality, Positivism, and the Rule of Law: Perspectives on Freedom and Criminal Responsibility in Mid-Twentieth Century America (1930-1960) (Feb. 1, 2000) (unpublished manuscript, on file with author) [hereinafter Green II]. In dealing with juvenile justice, this Notice addresses issues that Green has not fully investigated. Thus, my suggestions for how to proceed in this area are my own.

5. I have benefited from discussions with Green about criminal justice in the post-1960s period.

6. *See* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 61 (1980) (describing the "logical" thrust of Progressive reform).

7. Precise definitions for "free will" and "determinism" are hard to come by, and have occupied libraries of philosophical literature. For the purposes of this Notice, the reader should rely on her instincts, however vague and unsatisfying, about this conceptual distinction.

8. Pp. 4-5 (quoting Bill McCollum, April 30, 1996. Testimony Before the House Subcommittee on Early Childhood, Youth, and Families. Washington, D.C. U.S. Government Printing Office).

vance seems inconsistent with doctrines of free will and moral accountability, which are important to the case for adult punishment and responsibility" (p. 11). To Zimring, whatever degrees of determination are reflected in statistics should be compatible with the degree of responsibility assigned to criminals at trial.

Zimring's logical move assumes that the role social scientists play in society is identical to that of criminal courts. If deterministic insights are accepted within social science, they should also be accepted in the criminal justice system. But there is a difference. Society has strong reasons for wishing to maintain a criminal justice system whose primary philosophy is that of free will, a need that does not extend to social science. It is because of their special role as fora for social affirmation of personal responsibility that courts are required to reflect a belief in free will not necessarily borne out by the social scientific data.

This need became apparent during the Progressive Era. Positivistic social scientists and jurists attempted to model all of criminal justice to reflect a deterministic vision.[9] Despite relatively widespread belief in the scientific truth of these thinkers' viewpoint, Progressive society found itself reluctant to incorporate those insights into the functioning of criminal courts. This positivist agenda was instead met by fear that bringing such a deterministic perspective into the court system would lead to a wide-scale loss of personal responsibility accompanied by an increase in criminality,[10] as well as a lessening of the psychic[11] and spiritual[12] health of individual citizens. It was not healthy for a society to focus on the excuses that everyone undoubtedly has for wrongdoing. If society did not retain a focus on free will, it was thought, citizens would not feel an obligation to escape the bounds of

9. During the Progressive Era, the early part of the 20th century, there were significant changes in the way criminality was conceptualized. Reformers influenced by largely deterministic social science and psychology (here referred to as "positivists") "were convinced that they understood the complex causes of crime and were capable of designing a program to eradicate it." ROTHMAN, *supra* note 6, at 45. These reformers reconceptualized the purposes of the criminal system to be treatment rather than punishment, and attempted (with only limited degrees of success) to shape the law and criminal justice institutions to reflect this view. *See generally id.* As a strategy for succeeding in the midst of strong popular support for free will-based views of criminality, Progressive jurists tended to focus on reforming the institutions of penology, while conceding much of guilt assessment to the traditional view. *See* Green I, *supra* note 2, at 1918, 1925-26.

10. *See* Green II, *supra* note 4, at 145, 150.

11. *See* Robert P. Knight, *Determinism, "Freedom," and Psychotherapy*, 9 PSYCHIATRY 251, 259 (1946), *discussed in* Green II, *supra* note 4, at 142-45.

12. *See* Green II, *supra* note 4, at 145-50 (discussing SIR WALTER MOBERLY, RESPONSIBILITY (1951)).

their own circumstances. Treating people who did not have real choice "as if" they did was good for them and good for everyone else.[13]

This fear of encroaching determinism in the criminal justice system persists (in fact thrives) today. The popularity of books such as James Q. Wilson's *Moral Judgment* (subtitled, appropriately, *Does the Abuse Excuse Threaten Our Legal System?*) is testimony. Many believe that "a sense of personal responsibility . . . has withered" in the presence of legal excuses that recognize the possibly determined nature of some adult criminal behavior.[14] Allow evidence of battered women's syndrome and temporary insanity, and what you end up with is the "Twinkie defense."[15] No one could put the response to the Progressive positivists in better modern language than Wilson:

> We are all exposed to temptations, we all on occasion lack self-control; some of us face acute temptations or are remarkably deficient in self-control. It is the task of the law to raise, not lower, the ante in these circumstances. . . . [I]t is the task of the law not only to remind us of what is wrong . . . but also to remind us that we must work hard to conform to the law.[16]

Fears of what might happen if the law abandons its commitment to free will in the criminal justice system, remain compelling in the modern context.

Thus, the justice system must, in some way, preserve the free will-based viewpoint that allows certain offenders to be labeled "juvenile super-predators." While the criminal justice system is there to fulfill the social function of affirming free will, Zimring and other social scientists are free to probe the truth of determinism. When social scientists are carrying out empirical work on potential criminality, their findings are intellectual, largely reserved for specialists in the field. The social need to affirm free will through such findings is not particularly strong. It is primarily the court that speaks to the public.[17]

The phenomenon is not limited to scientific predictions about juvenile criminality. Lots of research is done every year predicting the

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13. *See generally* Wilber G. Katz, *Responsibility and Freedom*, 5 J. LEGAL EDUC. 269 (1953).

14. JAMES Q. WILSON, MORAL JUDGMENT 1 (1997).

15. The public obsession with this defense arose from a case where the defendant's expert witness, attempting to make the case for diminished responsibility, included his consumption of junk food as an element of his psychological state. *See id.* at 2, 22-23, 48-58.

16. *Id.* at 27-28.

17. For instance, by participating in juries, lay people are invited to listen to the message sent by the criminal justice system, as well as to communicate with the broader public. This discussion is frequently about personal responsibility. *See generally* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999).

criminality of adults based on poverty or other social circumstances.[18] Yet these studies have not formed the basis for changing the adult courts to reflect a lessor degree of criminal responsibility. A distinction between the sorts of conclusions that are allowed in scientific journals and in the courtroom reflects the unique role courts play in affirming free will in the face of scientific skepticism.

A similar response applies to Zimring's attempts to make youth criminal justice consistent with other areas of youth policy, such as driving policy, and access to alcohol.[19] In a sense, Zimring is right. Society tolerates a certain amount of risk in order to enable young people to grow into responsible drivers, no doubt more risk than it tolerates in order to allow young people to pass through stages of criminality. He is also right about alcohol policy. Raising the age for legal consumption of alcohol does in some way reflect a vision of youth irresponsibility that is in tension with the trend towards lowering the age of criminal responsibility. The answer to these incoherencies, however, is an easy one. Driving policy and alcohol policy have not taken on so central a role in the social fight to maintain a sense of individual responsibility as has the criminal justice system.[20] Few have fears like Wilson's about the effect the message sent by raising the driving age will have on the social fabric. Criminal justice policy, by contrast, is where free will is affirmed. Its message on the matter of responsibility is broadcast loudly throughout the culture. The risk posed by youth criminality is different in kind from the risk posed by youth driving. It poses a challenge to basic social understandings of individual responsibility that cannot be ignored.

II. THE JUVENILE COURT

For most of the rest of the book, Zimring turns his logical eye to examining the way criminal responsibility is attributed to young offenders. Section II.A sets out Zimring's plan for reform of this system. One of its most remarkable features is Zimring's rejection of the juvenile court as a conceptually separate criminal justice system that allows a more deterministic view of the offenders within it. Instead, Zimring proposes a unified adult/juvenile court philosophy that somehow manages to retain a focus on free will while accommodating the deterministic insights of social science. Section II.B issues a caution to

18. *See generally* Irene Merker Rosenberg et al., *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511 (1998).

19. *See supra* pp. 1975-77.

20. For a discussion of criminal responsibility as the stage upon which basic issues of free will and determinism are perpetually played out, see Green I, *supra* note 2, at 1915-17, 1925.

Zimring's project. It suggests that because of the need to preserve a safe space for free will condemnation of criminal behavior, the main adult criminal justice system cannot accommodate as much determinism as Zimring recommends. Section II.C provides historical perspective by identifying attempts to incorporate determinism into adult criminal justice in the Progressive Era and beyond that have failed for precisely this reason. Section II.D demonstrates that the present allocation of offenders into the juvenile and adult systems is actually logical when viewed in relation to these features of criminal justice.

A. *Rational Reform*

Zimring's recommendations for dealing with young offenders suggest a view of youth criminality that is primarily deterministic. Zimring focuses on the way particular features of youth lessen juvenile offenders' blameworthiness for crimes they commit (pp. 76-81). Linked to his skepticism about the responsibility of young offenders for their crimes are his recommendations about proper punishment. Young offenders, influenced as they are by their immaturity and by particular social circumstances, have "room to reform." Thus, they also have strong claims to reform-based rather than purely retributive punishment (pp. 142-43). According to Zimring, "the response of the criminal justice system to adolescent violence can only be coherent" if it reflects the lessened blameworthiness and the strong claims to reform of young offenders (p. 127).

To make the system coherent, Zimring recommends individualizing judgments of guilt and sentencing (p. 136). This theme runs throughout his book, forming the basis for most of his arguments about the proper approach to youth violence. There is no such thing as a typical adolescent homicide, Zimring argues (pp. 134-37). Each one is different, and courts must take individual circumstances into account if they want to be "coherent in making retributive judgments" (p. 132). Generalizing about any sort of violent youth offenders, he claims, is unwise given the wide distribution of characteristics (p. 163). Looking at each young offender's individual circumstances, and tailoring the response to match her degree of responsibility and her possibilities for reform, is the rational response to such divergence.

Adopting such an individualized system, according to Zimring, should not be too difficult for our criminal justice system. It flows naturally from the principle of penal proportionality, he claims, that the punishment should fit the degree of responsibility of the individual offender. Zimring claims that this principle is already inherent as one of the central ideals of the entire criminal justice system, including the adult system (pp. 75-76). Adults should be held more or less culpable for the crimes they commit, in accordance with the degree of freedom they individually possess, and be punished accordingly. He does not

discuss the extent to which that ideal has been realized in the present system,[21] but he is certain that this principle is, at the very least, a recognized ideal to which the criminal justice system could (and should) be held. For Zimring, all decisions of the criminal justice system, affecting juveniles and adults alike, should involve a sensitive individual inquiry.

It is Zimring's belief that his ideal juvenile justice philosophy is already implicit as the ideal for the adult system that causes him to give up on keeping young offenders in the juvenile court, thus conceding one of the main strategies for preserving a less punitive agenda for juveniles.[22] For Zimring, preserving the jurisdiction of the juvenile court is unnecessary. All that is necessary is making the adult court live up to its own ideals. Even in adult court, Zimring claims, the special disadvantages of the offenders' youth should be taken into account. Adult court justice, like juvenile justice, ought to be sensitive to degrees of individual culpability and the possibilities of reform through sentencing.[23] Thus, according to Zimring, it makes no difference which court ends up with the young offender, so long as that court acts in accordance with Zimring's general principles (pp. 127-28).

For Zimring, the ideal jurisdictional division between the juvenile and adult courts depends on whether the court is empowered to provide the particular length of punishment that the individual young offender requires. A young offender ought to end up in adult court when he should have a sentence that is greater than that which can be levied by the juvenile court (p. 169). For Zimring, that decision is again ultimately based on the rule of penal proportionality (and, by extension, on the individual maturity and culpability of the offender) (pp. 109, 127-28). Zimring thus envisions a seamless transition between the offenders sent to juvenile court and those that end up in adult court. In either court, an offender gets exactly what he deserves, perfectly tailored to his individual responsibility. The decision to waive a young offender into adult court becomes, in a way, no big deal, nothing that needs to be probed in any more depth than the determination of the precise gradation of punishment deserved by an individual offender.

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21. For this Notice's discussion of this issue, see *infra* text accompanying notes 29-31.

22. Zimring is not the only scholar to adopt such a view. Many "progressive abolitionists" recommend eliminating the juvenile court altogether and attempting to achieve the goals of juvenile justice in adult court. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

23. *See, e.g.*, p. 122 ("[A]n increased volume of juvenile homicides processed in adult courts should reduce somewhat the average severity of the sanctions because more cases of lesser seriousness would be in the adult court for sentencing.").

Zimring glosses over what is typically considered the main difference between the juvenile and the adult court systems — the former's focus on reform and the latter's on retribution — by denying the existence of serious conflict between the two priorities. In most cases, Zimring claims, the two goals can be met simultaneously. According to Zimring, the range of retributively appropriate sentences includes the sentence that would best facilitate reform. The needs of reform can be met, he suggests, by allowing judges to determine where, within the morally mandated range, the sentence will fall (pp. 142-45). In instances when a young person deserves more punishment than his reform requires, Zimring concedes that the minimum sentence necessary to address the offender's blameworthiness must (regrettably) "carry the day" (p. 143). But in an adult system where desert is tailored to take account of every individual's special disabilities (including those of youth), these unfortunate moments should be rare (p. 143).

For Zimring, the adult penal system can also provide the reform efforts that young people need. Zimring argues that "whenever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so" (p. 144). Who could complain, Zimring suggests, if during the time they are paying their moral debt, we give them treatment and reform rather than brutal hopeless imprisonment (p. 145)?

Thus, Zimring's reform efforts rely on the melding of the adult and juvenile systems to reflect the same priorities. The adult system can recognize the lessened responsibility of young offenders through the principle of penal proportionality, and it can accommodate their special claims to reform without sacrificing its focus on retribution.

B. *Two Systems*

Zimring would not be so sanguine about suggesting that juvenile and adult courts could share the philosophy of individualized responsibility and the focus on reform if he took a hard look at the differences between the two systems that have existed since the juvenile court's inception, and persist today. Zimring neglects to consider the forces that have made the adult system considerably less flexible and reform-minded than the juvenile court. These differences exist for a reason: society demands that the adult court, in order to fulfill its task of reaffirming free will, keep a safe space for the holding of responsibility, free of the corrupting and encroaching influences of deterministic thinking. Insofar as Zimring's reform efforts require introducing determinism into the mainstream adult system, their failure seems inevitable.

Despite Zimring's attempts to create a seamless transition between the two systems, major differences in philosophy remain. The juvenile

court system recognizes individual lack of responsibility much more readily than the adult court. By initial design, the juvenile court was less of a criminal court and more of a social service agency. Because those coming before it were not viewed as wholly responsible, reform was its central goal, not retribution.[24] This philosophy is still part of the juvenile court, as evidenced by the fact that offenders in the juvenile court system still lack some protections that are constitutionally required in the adult system. The notion is that these protections are not required when young offenders are not being condemned for their acts, but rather helped to overcome the influence of external responsibility-compromising forces.[25] Particularly in light of the movements to "get tough" on juvenile offenders that Zimring identifies, the juvenile court is moving further and further from that philosophy (pp. 13-16). Correspondingly, an increasing number of constitutional protections have been added to the juvenile court system.[26] Some have even suggested that the juvenile court has gone so far afield from its noncriminal nature that young offenders would be better served if it were abolished. If they are not going to be treated from a reform perspective, the argument goes, they might at least get the procedural protections the adult court has to offer.[27] The very idea of the drift, however, confirms that there is something basically different about the missions of the juvenile and adult court systems. By and large, the idea that youth are not fully responsible for their crimes still resonates with society.[28] With all of its imperfections, the juvenile justice system does retain a fair portion of the deterministic perspective with which it began.

By contrast, the extent to which the free will philosophy reigns in the adult court is underscored by the fate of Zimring's beloved "core value" of individual penal proportionality there. If, as Zimring suggests, individualization is the ideal of the adult as well as the juvenile court, the adult court is *far* from accepting it. Consider the defense of diminished responsibility. When courts are asked to lessen the guilt of individual sane adults on the grounds that they are (by degrees) less

24. *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977) (1969).

25. P. 169. For instance, juveniles do not have a right to a jury trial because the juvenile court's mission is "reformative." *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

26. For instance, the prohibition on double jeopardy and the requirement of proof "beyond a reasonable doubt" now apply to juvenile proceedings. *See* Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

27. *See* Feld, *supra* note 2, at 68-69.

28. *See, e.g.*, David Yellen, *The Enduring Difference of Youth*, 47 U. KAN. L. REV. 995, 997 (1999).

responsible than others, they overwhelmingly refuse.[29] The trend in adult courts, if anything, is to further lessen the degree to which differences in individual responsibility can affect punishment.[30] This was further fueled by the retributivist turn in American criminal justice, which began in the late 1960s.[31] Exemplifying the trend, the federal sentencing guidelines even more greatly reduce the possibility that individual lack of responsibility will be taken into account when determining punishment.[32] Even though the sentencing guidelines allow for some departures, in general the very personal characteristics that constitute individual responsibility are not (and perhaps cannot easily be) taken into account in such a rigid system.[33]

Zimring acknowledges that the adult court, despite the principle of penal proportionality, has not been living up to its obligation to take

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29. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 956, 961-962. (1999); *see also, e.g.*, Bethea v. United States, 365 A.2d 64, 87-88 (D.C. 1976) ("The concept of insanity is simply a device the law employs to define the outer limits of that segment of the general population to whom these presumptions concerning the capacity for criminal intent shall not be applied. The line between the sane and the insane for the purposes of criminal adjudication is not drawn because for one group the actual existence of the necessary mental state (or lack thereof) can be determined with any greater certainty, but rather because those whom the law declares insane are demonstrably so aberrational in their psychiatric characteristics that we choose to make the assumption that they are incapable of possessing the specified state of mind. Within the range of individuals who are not 'insane', the law does not recognize the readily demonstrable fact that as between individual criminal defendants the nature and development of their mental capabilities may vary greatly") (footnote omitted); Commonwealth v. Mazza, 313 N.E.2d 875, 878 (Mass. 1974) ("[T]here is no intermediate stage of partial criminal responsibility between insanity and ordinary responsibility as defined by statute."). *But see* People v. Wolff, 394 P.2d 959 (Cal. 1964) (recognizing diminished responsibility); Henry Weihofen, *Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505, 508 (1930) (arguing that there is no clear divide between the sane and insane).

30. *See* Kadish, *supra* note 29, at 979-81.

31. For a critique of this movement, see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992).

32. *See generally* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992). For some strained arguments to the contrary, see S. REP. NO. 98-225, at 52-53 (1983) ("The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law."). *But see* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 257, 272-73 (1993) (characterizing these statements as "soothing assurances"); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 700-701.

33. *See* David Yellen, *What Juvenile Court Abolitionists Can Learn From the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 586. Green suggests that the due process and equal protection arguments for the guidelines also "reflect a desire to strain out . . . causal factors." *See* Green I, *supra* note 2, at 2044-45.

into account the diminished responsibility of young offenders. But his analysis and recommendations suggest that all this can be disposed of quite simply. In response to the argument that leaving the matter in the juvenile court preserves a distinctive (more deterministic) mission, Zimring protests that there is no "logical reason" why this should be so. Adult courts can have this focus just as well (p. 174). All that it takes is for adult criminal courts to realize their true functions — to calibrate the punishment to fit the individual culpability of the offender.

It is hard to fault Zimring for viewing this bifurcated system of criminal responsibility as creating irrationally strong divides between what are more slippery concepts. By degree, there are good reasons to treat young people differently with respect to their criminal culpability and "room to reform" (p. 142). Adults are more capable of casting off the disadvantages of circumstance and making their own decisions responsibly. But these are differences of degree rather than kind. The trick of separating the juvenile court system from the adult system is to essentialize these gradated differences into paradigms of the consummately responsible adult and the inevitably irresponsible youth.[34] It is this essentialization to which Zimring objects.

Juvenile justice is not the only example of this essentialization. It is also the chosen path for dealing with insanity. Rather than recognizing that every person experiences differing degrees of mental health, the insanity defense draws another bright line between the completely responsible and the wholly irresponsible. It is a line that even Judge Bazelon, who authored a relatively expansive test for legal insanity, was willing to concede. His *Durham* test may have expanded the class of criminals who could be exonerated for their mental states, but there continued to be something that looked at least from the outside like a *category* of insanity that had conceptual limits. Those who fit themselves in the category successfully were completely exonerated, and those that should have been marginal cases were treated as wholly culpable.[35]

Maybe, as a matter of logic, the structure of the criminal law ought not to have taken such a categorical approach. But there is a reason for such an approach that must at least be addressed: a free will-based

34. Zimring notes this phenomenon, with complaint, in the context of absolute age bars to any ascription of criminal capacity, by any court. The problem with these rules, he notes, is that they treat the matter of capacity as if it were absolute, rather than a matter of degree. P.75.

35. The *Durham* test freed the jury to determine if behavior was the product of mental illness, rather than focusing on the rigid *M'Naghten* framework. *See generally* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Symposium, *Insanity and the Criminal Law — A Critique of* Durham v. United States, 22 U. CHI. L. REV. 317 (1955). Judge Bazelon was concerned to keep a line of defense against the insights of deterministic science and to preserve social understandings of responsibility. *See* Green II, *supra* note 4, at 170-171.

system, if it is to serve the responsibility-enhancing mission set out for it, needs to remain somewhat free of corrupting deterministic influences.[36] Attempts to give a deterministic view too big a place in adult systems have typically collapsed, no doubt because of the fear that giving an inch to those who wish to deny personal responsibility will so quickly give way to a very troubling mile.[37] The Progressive Era jurist John Wigmore, concerned about the effect of encroaching deterministic criminal justice on human responsibility, suggested that such a view be locked away, "confined to the very limited and feasible field of, say, juvenile offenses, until it can demonstrate its right to a safe and gradual enlargement."[38] Insofar as society wishes to recognize the truth of determinism, it can only do it by placing it in a safe space, far away from the main criminal justice system.

Similarly, Zimring's suggestion that the goals of retribution and reform in sentencing can be met within a single sentence, in addition to being highly implausible,[39] fails to appreciate the adult court's need to send a clear and consistent message about the reality of criminal responsibility. The need to preserve a free will focus in adult criminal justice is not simply a need to preserve a numerical identity between the length of sentences actually ordered and the length of sentences deserved. Rather, the fear that deterministic criminal justice will erode a sense of personal responsibility is linked to what is perceived to be the conceptual underpinning behind the criminal law.[40] That desert and reform can numerically coincide does not entail that they can coincide ideologically. The message of the criminal law is sent by

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36. *See supra* text accompanying notes 10-12.

37. *See supra* text accompanying notes 9-16.

38. *See* John H. Wigmore, *Comments on Dr. Gosline's Comments*, 15 J. CRIM. L. & CRIMINOLOGY 505, 508 (1924-25), *discussed in* Green I, *supra* note 2, at 2028.

39. In light of the lessening of sentencing discretion, the "range" of sentencing that Zimring relies on to provide the framework for reform-based punishment is ever decreasing. The trend of criminal justice, following the retributivist turn, is to more closely match punishment with desert and lessen the ability of judges to deviate for other kinds of reasons. *See supra* text accompanying notes 32-33. Further, it is not at all clear that desert-minded people would be indifferent to where, within the range of allowable punishment, different offenders would fall. To the extent that there is a range available, the public pays attention to who gets what within that range. Not all people who commit murder in the first degree *must* receive the death penalty, but it is a matter of public notice when someone who is seen to deserve the death penalty does not receive it. *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (chronicling public pressures on judges to impose the death penalty in high-profile cases). Even outside of death penalty issues, the notion that the public is indifferent to whether certain criminals receive relatively harsh or light sentences is highly implausible. The contours of "deserved" crime are not as flexible as Zimring hopes, and the extent that reform can be imposed within them is accordingly attenuated.

40. *See* Green I, *supra* note 2, at 2025-27 (discussing the views of John Wigmore on the centrality of the principle of deterrence in criminal law).

more than simply the number of years the criminal is incarcerated. Zimring cannot hope that a compromise about the number of years in prison can wash away the true difference between the reform-based sentence and the retributive sentence.[41]

Thus, the categories of juvenile and adult justice are considerably more rigid than Zimring recognizes. The implication of this categorical approach for Zimring is that in formulating his recommendations, he must recognize, in a way his approach fails to, the ultimate centrality of the battle over the jurisdiction of the juvenile court over certain young offenders. What is at stake is in the outer definition of a very crucial category. Those who end up in the juvenile justice system will inevitably be seen and treated as having less personal responsibility than those who end up in the adult system. Zimring's collapsing of the two systems neglects this central truth.

C. *Lessons*

The need to keep the adult system pure of the corrupting influences of determinism can be seen by looking to the sorry fate of attempts to implement such reforms in the Progressive Era and more recently. The reasons for their failure should reinforce skepticism that Zimring's approach can be successful.

First, consider the central case of the failure of the Progressive-Era positivists to take control of the adult court. Zimring's individualized approach to criminal justice resonates with their reform efforts. Much like Zimring, the Progressive positivists recognized offenders' incomplete responsibility for their actions and the corresponding need for reform-based punishment. Like Zimring, Progressive reformers linked lack of responsibility with the need to provide reform-based punishment. The factors that made individual criminals less than completely responsible for their crimes also counseled against punishment with a retributive purpose. Justifying the criminal justice system in terms of reform was a much more appropriate response to criminal behavior caused by social or individual sicknesses rather than purely the free choice of the offender. As with Zimring, individualization was the central characterizing feature of the Progressive agenda, as it allowed sensitivity to the particular determining social factors that had led to the offender's commission of the crime as well as the best strategy for reform.[42]

41. Of course, this opens the possibility that the criminal justice system could publicly operate as a retributive system, while the specialists within it would secretly make decisions with reform in mind. Duplicitous though it may seem, this idea has a relatively long lineage. Green refers to it as "disjunction." *See* Green II, *supra* note 4, at 127-29.

42. *See* ROTHMAN, *supra* note 6, at 50, 59-60; Green II, *supra* note 4, at 70-71.

Zimring may appear to be different from the Progressive reformers in that much of his argument presupposes some amount of deserved punishment (pp. 143-44). This does differentiate him from the most deterministic of the group.[43] Most Progressive jurists, though, did concede that some notion of desert would continue to play a role, at least in the guilt-assessment phase of trial, even if they may have wished ultimately to annihilate all notions of desert from criminal justice.[44] They concentrated primarily on the more limited ambitions of bolstering the availability of excuses at the guilt assessment phase to reflect an attenuated deterministic vision, and shaping the punishment phase to completely eliminate free will-based punitiveness.[45] Zimring's concession — most likely, for practical reasons — of some degree of deserved punishment is consistent with the pragmatic approach of most Progressive reformers.

Even Zimring's attempts to press single sentences into the double duty of satisfying the demands of reform and retribution are not new. Many positivist thinkers in the Progressive Era attempted to "sell" their deterministic systems by touting the ways in which the features of these systems were compatible with what a free will-based system would require. Reforming criminals, they claimed, could also meet the social need for retribution. These thinkers asserted that somehow, in some way (and here they were short on explanation), the threat of individualized reform could deter future criminality in the same way as punishment and satisfy a public hungry for vengeance.[46]

The lesson that Zimring should take from the Progressive-Era reformers is that, despite their attempts, their ideals never really took hold in the adult system — it was only in the juvenile system that they met with any significant degree of success.[47] Ideally, for many positivists, the transition between youth and adult criminal justice would have been as seamless as it is for Zimring.[48] Instead, they gained only a "pocket" of control over the juvenile justice system.

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43. Many progressive reformers denied the possibility of *any* degree of free will-based responsibility for criminal conduct. *See* Green II, *supra* note 4, at 32-42 (discussing, among others, the psychoanalyst William A. White).

44. *See* Green II, *supra* note 4, at 81-102 (discussing John Waite and Alfred Gausewitz).

45. *See* Green I, *supra* note 2, at 1918, 1922-29; Green II, *supra* note 4, at 28.

46. *See* Green I, *supra* note 2, at 2030-31 (discussing William A. White's belief that "his preferred reform program would meet the requirements of retribution and general deterrance" and ultimately satisfy society's feelings of "vengeance"); Green II, *supra* note 4, at 26 ("The very unpleasantness of "treatment" would have both specific and general deterrence effects.").

47. *See* Green II, *supra* note 4, at 27, 70-71, 87-88, 93-95.

48. Many Progressive-Era positivists recommended that the adult system be modeled on the juvenile court. *See* William A. White, M.D., 13 A.B.A. J. 551, 553 (1927).

Even their success with juvenile justice was by no means complete. Many juvenile criminals still ended up in "reformatories" whose reformative purpose was not always readily apparent.[49] On the whole, however, the juvenile justice system was different. It did not function as a criminal court because its subjects were not seen to possess the requisite free will.[50] Americans were much more comfortable with determinism where children were concerned; when it came to adults, free will still ruled.

Progressive-Era positivists did manage to attain some limited success in the adult system, but even that has not survived. The Progressive's success with adults was somewhat contradictory, involving a split between the theories behind the guilt-assessment and the sentencing phases of trial.[51] The guilt-assessment phase of the trial has always presupposed the complete free will of the offender. The "main defenses of unfreedom," duress and legal insanity, were (and continue to be) very narrowly defined.[52] Criminals were presumed to have intended the natural consequences of their acts, and to have freely willed those intentions. Progressive-Era sentencing, by contrast, more fully incorporated positivist ideas — sentences were individualized to reflect the particular treatment required for rehabilitation. Through devices like indeterminate sentencing, parole, and probation, Progressive reformers attempted to transform criminal punishment into treatment that could genuinely reform the offender.[53]

In the adult context, the bulk of these Progressive-Era sentencing reforms have been effectively reversed. Sentences are anything but indeterminate and individualized. Some small pockets of reform-mindedness remain, but all in all, retributive sentencing pervades the modern system.[54] The tension embodied by treating adults as free in the guilt-assessment phase and determined in the sentencing phase was not able to withstand the passage of time. Especially in light of the particularly strong social trend towards the taking of greater individual responsibility, free will won out.

That the failure of the adult court to adopt the Progressive-Era reforms was due to fears of the influence of deterministic thinking can be see in the Progressive-Era Chicago Boys' Court, chronicled by

49. *See* ROTHMAN, *supra* note 6, at 43-81.

50. *See* Michael Willrich, City of Courts: Crime, Law and Social Governance in Chicago, 1880-1930, at 411-63 (Apr. 10, 1999) (unpublished manuscript, on file with author).

51. *See* Green I, *supra* note 2, at 1925-26.

52. *See id.* at 1924.

53. The advantage of these particular devices was that their flexibility allowed adequate response to the criminal's changing condition: "No one compelled a physician to prescribe in advance for the patient . . . ." ROTHMAN, *supra* note 6, at 43-44, 59-60.

54. *See* Kadish, *supra* note 29, at 978-81.

Michael Willrich.[55] The Boys' Court took young men who were old enough to be held responsible as adult criminals, and attempted to treat them with some of the deterministic tools characteristic of the juvenile court.[56] Although the Boys' Court was itself a separate court, in some way discrete from the juvenile and adult systems, the boys inside of it had reached an age where they were considered to be adults, and the same laws that governed the adult system governed them. Despite their technical adult status under the criminal law, they still seemed to many reformers less responsible and more pliable than those in the adult system.

The Boys' Court demonstrated the problems inherent in attempting to combine the philosophies of the juvenile and adult systems. As a reform-based system, it was far from ideal because it had to operate within the framework of the adult criminal law, with the required adult procedures and adult-length sentences.[57] It tried to account for the age of the young men by incorporating juvenile court techniques. The court employed psychiatric and sociological specialists,[58] and frequently used continuances as a means of replicating some of the benefits of the indeterminate sentence.[59] Even with the genuine desire by those involved in the movement to treat these boys as reformable juveniles,[60] the inflexibly free will-based adult law stood in the way. Rather than being able to calibrate appropriately the adult law to take account of the diminished responsibility of youth, Boys' Court judges were forced to resort to ordering that offenders be re-booked on lesser charges that carried lesser penalties.[61] The obstacle of a jury system, which would no doubt be less sensitive to the enlightened positivist agenda, had to be avoided through dubiously voluntary waivers on the part of defendants.[62] The adult law, then as now, was not suitable for the view that its subjects were less than fully responsible for their acts.

What ultimately doomed the Boys' Court was the threat that even this small amount of deterministic thinking about seemingly adult-like criminals seemed to pose. Even though the Boys' Court incorporated enough adult-type features to profoundly disappoint positivistic reformers,[63] the conservatives still accused it of leniency in dealing with

55. *See* Willrich, *supra* note 50, at 403.

56. *See id.* at 420.

57. *See id.* at 428.

58. *See id.* at 447-48.

59. *See id.* at 442-43.

60. *See id.* at 428-29.

61. *See id.* at 440-41.

62. *See id.* at 440.

63. *See id.* at 461-62.

serious offenders who, after all, were of age.[64] The "contradictions inherent in the idea of the 'juvenile adult' " were too much for society to swallow; adults were adults, and they had to be treated with the appropriate presumption of free will.[65]

The effects of deterministic threats to the free will-based system of adult punishment are also apparent in modern systems of blended jurisdiction, where young offenders acknowledged to have an adult-like culpability remain in juvenile court. These systems leave juvenile cases involving offenders who would otherwise be waived to the adult court in the juvenile courts, while giving those courts the power to impose adult-length sentences on young offenders (pp. 14-15). Zimring himself notes that the responses to blended jurisdiction have been less than supportive. Courts asked to enforce adult sentences within a juvenile framework suffer a "cognitive dissonance" between the competing visions of their defendants, the free adult and the determined child (p. 172). "Twenty year sentences may be socially unavoidable" as a response, presumably, to a vision of adult-type responsibility for crime, "but [they] could still be inappropriate for a court that must put great weight on the interests of juveniles." (p. 169). With blended jurisdiction, the court must also provide adult procedural protections, the sort that caused so much trouble for the positivist agenda of the Boys' Court (p. 170). Because of these rigid structures, it is difficult for blended jurisdiction to respond to the vision of offenders as juveniles. The law has decided to treat these offenders as adults, and adult treatment does not blend well with the philosophy of the juvenile court.

As with the Boys' Court, even though the blended juvenile court has largely failed to treat these young offenders under a more deterministic philosophy, it is not enough to counter the perceived threat these systems pose to the adult free will presumption. Blended jurisdiction is perceived as inadequate to address the social demand for punishment of those responsible enough to deserve it. The common sentencing strategy of blended jurisdiction is to provide for adult-length sentences in a youth-driven conditional framework. If the offender is not helped by her time in the juvenile system, she will serve the whole adult sentence; if she is reformed, she will go free at the end of her minority (pp. 170-71). Zimring recognizes that the degree of determinism inherent in this sort of sentence is precisely why legislatures have been reluctant to cede much authority to these kinds of systems. They are not sufficiently punitive or free will-based. Even when there is a system of blended jurisdiction, the worst youth offenders

64. *See id.* at 460.

65. *Id.* at 463.

end up in adult court anyway (pp. 170-71).[66] Society is not comfortable with the law allowing these adult-type juvenile offenders even a small degree of juvenile treatment.

These examples show that reform efforts that rely on introducing a deterministic threat to the adult criminal justice system have consistently failed. Thus, Zimring's efforts to reform juvenile justice by denying the philosophical divide between the juvenile and adult courts seem unlikely to succeed, barring some explanation (absent in this book) of why they should survive the difficulties with bringing the two approaches together.

D. *Reevaluating the Data*

Regardless of the merits of his reform proposals, Zimring's data about the nature of youth criminality and the court's treatment of it provide a valuable opportunity to consider precisely how the present dual juvenile/adult system deals with the conflicts between free will and determinism. In particular, the criteria for allocating offenders into each domain are a fruitful source for probing the issue. The present allocation of young offenders into adult and juvenile courts makes at least some sense when viewed in the light of the social need to affirm responsibility while recognizing some degree of determination.

Zimring describes our current situation: our bright line between juvenile and adult court is presently defined not absolutely by age, but instead by age plus some consideration of the type of criminality. Certain youth are categorized as adults for the purposes of responsibility on the basis of the seriousness or frequency of their crimes (p. 74). Those who end up in adult court are those who have committed very serious crimes, such as homicide, those with extensive criminal records, or those on the brink of chronological adulthood (p. 109).

These kids end up in adult court not simply because they happen to deserve a sentence marginally larger than what the juvenile court could dole out (Zimring's suggested test).[67] They are there because they are no longer seen as children. As Zimring correctly notes, the mere fact of committing serious or frequent crimes, endows the offender with automatic maturity in the eyes of many in the culture (pp.

66. Even if they remain in juvenile court, they may do so at the cost of transforming the juvenile court into a exact copy of the free will-based adult system. Zimring notes this effect: while presently they may be designed for only serious offenses, once blended jurisdiction systems are installed, "the barrier between aggravated and standard delinquency can be lowered by increments on a never-ending basis." P. 172. After all, Zimring rightly notes, "[i]f armed robbers should be subject to the extended penalties and enhanced procedures, why not all robbers?" P. 172. A free will approach to criminality, once set free in the juvenile court, threatens to take over entirely.

67. *See supra* pp. 1989-90.

8-10, 73, 144). Zimring also understands the complex function these transfers serve in the division of criminal justice into separate spheres:

> The symbolic value of transfer to criminal courts is that it seems to completely resolve the conflict that many citizens feel when very young adolescents are charged with serious acts of violence. The conflict is between the impulse to punish criminals, on the one hand, and to protect children and youths, on the other. Transfer to adult court resolves this conflict by declaring the defendant to be no longer a child. [p. 14]

As a rational matter, Zimring is right to criticize this: if placement in juvenile court is supposed to reflect something about one's degree of responsibility, this allocation doesn't map on quite right. Immaturity can drive one to murder,[68] just as it can drive one to commit other less serious crimes. As Zimring notes, "[t]here are . . . no indications that violent juveniles are either more or less mature than other youths of the same age who are arrested" (p. 164). Drawing distinctions about responsibility based almost entirely on the severity of the crime committed is, for that reason, irrational.

When viewed in light of the rigidly dualistic system that presently exists, however, this allocation of offenders makes some sense. Making what appears to be a de facto categorical exception for homicides and a few equivalently serious crimes to be inherently adult retains the bright-line nature of the division between the courts.[69] If courts were to decide, as Zimring recommends, based on each individual's degree of responsibility and moral desert, the tidy dual system is challenged. Every offender is both determined, to a degree, and free, to a degree. The sensitive inquiry as to how much of each *this* offender is leaves us with data that makes us uncomfortable in either court. If he falls just below the responsibility line, he seems too much like an adult to fit into the juvenile court fiction. If he falls just above, the court knows the ways in which he is less than free, and finds it harder to justify the retribution that will be taken against him. But if his special circumstances are to be taken into account, why not the circumstances of the eighteen-year-old, or the twenty-year-old, or the forty-five-year-old with mild mental retardation? Fuzzy lines pose challenges we may not be prepared to meet. The de facto homicide line, or the repeat offender line, provides a workable strategy for avoiding this problem.

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68. Zimring gives the example of serious crimes committed by juveniles because of peer pressure. P. 151 (recounting the story of a juvenile who was taunted by his victim as being "too chicken" to pull the trigger).

69. Zimring's data show that when prosecutors request waiver in homicide cases, it is almost always granted. P. 114. In the sample he used, prosecutors only made such a request in 31% of cases. This shows that some individualized, rather than categorical, discretion remains for prosecutors to decide whether to file for waiver. Once in court, however, it seems apparent that there is a strong presumption that homicide waiver requests should be granted.

Seriousness and frequency of crime also map onto an important social phenomenon, that of identification. Zimring's data show us that a fair number of young people commit crimes (even violent ones) in their youth, and never offend again (p. 84). A fair number of citizens and legislators can remember (perhaps even fondly) the fights and minor shoplifting of their youth and know for a fact that their failure to be held fully responsible did not lead to a life of hardened criminality. Juveniles who stay in juvenile court seem to be more like everyday people. This reassures us that the threat of treating these youth as determined can be contained. By contrast, few of us remember our youthful homicides, or our years in criminal gangs.

Zimring notes that, in many ways, violent crime is "kid stuff" and should be treated as a normal phase of human development, rather than as a pathology (p. 84). Maybe this should be true of homicides as well as of other types of violent assaults (especially if Zimring is right that the rise in youth homicide is merely a rise in the availability of guns, rather than a rise in the brutality of the relevant youth (pp. 36-38)), but it is certainly hard to convince most people of this. Even if a youth murderer is no more responsible than the schoolyard brawler we tolerate, perhaps there are reasons to fear that the effect on the offender of having taken a human life makes it impossible to return to a normal life. Our ability to identify the young offender with things that normal citizens might have done in their youth is a strong determinant of the category of youth crime.

This phenomenon compares interestingly to the insanity defense, where identification cuts in the reverse direction. One of the determinants of the acceptable boundaries of the insanity category is that the offender be a person with whom we are *not* able to identify. If she is very far out of the bounds of normal human existence, there is less reason to worry that denying her responsibility will lead to a wholesale erosion of the idea of free will in everyone else.[70] This reversal of identification in the youth category and the insanity category makes perfect sense: youth is a common condition that most people have survived with free will intact. Insanity, by contrast, is pathology. The category of youth is chosen as reassurance that this condition of irresponsibility will go away. Identification here is an advantage. The category of insanity does quite the opposite. It represents a terrifying incursion on responsibility that may not be controllable.[71] The insanity

70. *See* Green II, *supra* note 4, at 186 (quoting Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374-75 (1955)).

71. *See id.* at 18 ("The entire paradigm of responsibility could not withstand the criticism of scientific positivists once the field of legal insanity was no longer restricted to special and assertedly rare conditions that were commonly understood to demonstrate a person's total lack of ability to control his behavior.").

category must distance these offenders so that their sickness will have nothing whatsoever to do with normal life.

The way in which offenders are presently allocated into the juvenile and adult courts supports the idea that the dual court system plays a role in navigating the tensions between free will and determinism. The precise contours of waiver decisions reflect a system that is attempting to give credit about individual causes of criminality within a general framework that affirms free will.

III. CONCLUSION

Zimring's attempts to rationalize our approach to youth criminal justice neglect the special role of the criminal justice system in affirming free will in the face of the nagging suspicion that much of human behavior is determined. Because of this important role, courts assigning personal responsibility can never be as neatly rational and consistent as Zimring recommends.