

# But He Knew It Was Wrong: Evaluating Adolescent Culpability

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Forensic psychiatric evaluators of adolescent defendants are often asked to address open-ended questions that affect what court an adolescent will be tried in and what sentence he might receive. Such questions often involve the extent to which the adolescent should be considered less culpable than an adult who has committed a similar offense. Assessing partial or diminished culpability in an adolescent is difficult because the concept of partial culpability is complex, assessment methods are inexact, and the implications for legal disposition are often not clear. This article suggests 10 factors a forensic evaluator may wish to consider in reaching opinions about an adolescent's culpability: appreciation of wrongfulness, ability to conform to law, developmental course of aggression and impulsivity, psychosocial immaturity (including time sense, susceptibility to peer pressure, risk-taking, and ability to empathize), environmental circumstances, peer group norms, out-of-character action, incomplete personality development, mental illness, and reactive attitudes toward the offense.

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Forensic evaluators of adult criminal defendants typically assess culpability in the context of a possible insanity defense where the outcome will be that the defendant is found either not responsible (insane) or fully culpable. Evaluations of diminished or partial responsibility are less common but may be addressed in pretrial evaluations of other defenses, such as diminished capacity, or in evaluations pertinent to sentencing. For forensic evaluators of adolescents, however, questions of partial responsibility are implicated by the defendant's status as a minor. Justice Stevens, writing for the majority in 1988 in *Thompson v. Oklahoma*,<sup>1</sup> the case in which the Supreme Court held that it was unconstitutional to impose the death penalty on defendants who were below the age of 16 when they committed their offenses, said:

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult [Ref. 1, p 835].

Culpability lies on a continuum, with children typically considered not responsible, and adults presumed fully responsible. Adolescents are somewhere in the middle, in a gray zone, so it is often not clear whether a particular adolescent is only somewhat less culpable than an adult charged with a comparable crime, or considerably less culpable. More than our adult counterparts, forensic evaluators of adolescent defendants are frequently asked open-ended referral questions by attorneys and judges that touch on issues of culpability. In addition to traditional questions of competency to stand trial and suitability for an insanity defense, evaluators are often asked to address any psychiatric aspect that might be relevant to the case, often framed as, "What's going on with this kid from a psychiatric perspective?" The results of

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these assessments may then be used in an array of decisions, including:

Negotiation between defense and prosecutor regarding appropriate charge or procedures (a key step, since the particulars of the charge often determine whether a youth will be tried in adult or juvenile court);

Waiving adolescents to adult criminal jurisdiction;

Guilt phase of a trial;

Disposition of adolescents found delinquent in juvenile court;

Sentencing of juvenile defendants found guilty in adult criminal court.

The decision-maker often has wide discretion and is much less bound by formal forensic tests or admissibility constraints than are present at a trial in adult court on the question of guilt. Such decisions turn in part on a judgment of how blameworthy, or morally culpable, the youth is for a criminal act. For determinations of reduced culpability that fall short of complete excuse, such as the insanity defense, there are few formal guidelines, in part because the concept of reduced culpability in adolescence is conceptually unclear, and in part because the implications for a finding of reduced culpability are also not clear. Put another way, while it is fairly clear that adolescents overall are less blameworthy than adults, once one asks how much less blameworthy a particular adolescent is for a particular act, one enters a thicket of confusion. Some have argued that the difficulty in making such individual determinations is a reason for replacing individual assessments of culpability with bright line presumptions through public policies that address sentencing of juveniles in adult court (such as the *Roper v. Simmons*<sup>2</sup> and *Graham v. Florida*<sup>3</sup> decisions) or policies that move most youth to juvenile court. While the public policy debate continues, forensic evaluators of adolescents struggle with criteria for partial culpability.

In this article, I will delineate several dimensions that are potentially relevant in evaluating an adolescent's culpability. My goal is to illuminate the concept of culpability when applied to adolescents, in the hope that this will provide a framework for forensic experts who are called on to evaluate adolescent culpability in individual cases. The analysis will focus on those factors that are especially relevant to

adolescents and not endeavor to cover in detail those factors that are commonly assessed in adults and would also be applicable to adolescents, such as findings substantiating an insanity defense. For simplicity, since youth aged 18 and 19 are typically handled as adults by the legal system, the term adolescent will refer to juveniles aged 13 to 17.

### Culpability

Culpability, the moral blame attributed for a wrongful act, is one of the central concepts in criminal law. Adults are presumed culpable for their criminal acts, a presumption that can be rebutted in some circumstances, such as with a successful insanity defense, and may be mitigated in cases where diminished responsibility is found. Young children, on the other hand, are generally not found legally responsible for their wrongful acts. Adolescents fall on a continuum between these two poles. Partial culpability mitigates, but does not fully excuse.

Insanity tests provide a framework for thinking about culpability. The most common test for insanity is the cognitive prong derived from the M'Naughton test, that the defendant did not know or appreciate that the crime was wrong.<sup>4</sup> Few adolescents meet this test because the incidence of psychosis is so much lower in adolescents than in adults. Although there are some cases in which knowledge of wrongfulness plays a role (such as intellectually disabled adolescent sex offenders who may have insufficient social judgment to know that sexual relationships with children are wrong), in most cases, the defendant knew it was wrong. Appreciation of wrongfulness is seldom at issue.

The second most common test for insanity is the inability to refrain from wrongful action.<sup>4</sup> This is the category most often implicated in theories of reduced culpability for adolescents and will be discussed further below.

The third category is derived from the product test, that the crime was the product of a mental illness. The interaction between delinquency and mental illness is complex. Psychotic thinking is less common in adolescence than in adulthood, so the product test seldom applies in its full force, and mental illness more commonly is relevant through its effects on the youth's ability to refrain from committing a crime.

It is important to remember that culpability is only one factor relevant to punishment. Punishment

is generally taken to have several purposes, including retribution, deterrence, protection of society through incapacitation, and rehabilitation. Of these, only retribution, or giving the offender his just deserts, is relevant to culpability. Two adolescents may be found equally blameworthy of a crime but receive different interventions, if one youth was thought to be more treatable than the other.

Once one concludes that adolescent culpability is on a continuum, several problems in evaluating it become evident. First, ethics theorists have done very little in examining how developmental issues enter into an ethics theory of culpability. A search of the Philosopher's Index, an online database of philosophy articles, utilizing terms associated with adolescence and culpability or responsibility yielded only two relevant hits.<sup>5,6</sup> Second, legal theorists and court cases have addressed culpability primarily in the context of the most severe penalties but are only beginning to apply the supporting rationales in less serious crimes.<sup>6-10</sup> Third, there are no accepted reliable metrics with which to measure the various dimensions that have been identified, such as immaturity and others discussed below. And fourth, assuming one could accurately measure the degree of an adolescent's culpability, the question of how much mitigation it takes to be legally meaningful is unclear. For example, even if a youth is quite impulsive, he almost certainly knows that brutal murder is both legally and morally unacceptable. While his youth precludes the death penalty, it is much less clear how much reduction in blameworthiness would militate against life imprisonment.

### Changing Views of Culpability

Infancy has long been a defense to criminal responsibility for criminal acts, but prior to the establishment of the first juvenile court in Illinois in 1899, persons 14 years of age and older were tried in adult courts and held to be fully culpable as adults. The Illinois Act in 1899 gave the juvenile court jurisdiction of youth under 16, mainly to handle minor offenses.<sup>11</sup> The purpose was to rehabilitate, not to punish. Under a rehabilitation model, culpability is largely irrelevant, since disposition focuses solely on treating the delinquent. Other states rapidly followed suit, and by the late 1920s, most states had raised the age of majority to 18, and most juveniles up to that age, regardless of offense, were dealt with in juvenile proceedings.<sup>11</sup>

Over time, the practice of juvenile courts became increasingly punitive. Justice Fortas recognized this in 1966 when he wrote in *Kent v. United States* that "the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>12</sup> The following year, the Supreme Court's decision *In re Gault*<sup>13</sup> took notice of the fact that many juvenile courts were acting punitively, and the Court, in a series of cases, began requiring most adult criminal due process protections for defendants in juvenile court. The specifics of punishments meted out in juvenile court were left largely to judicial discretion and juvenile departments of correction, who typically had no clear criteria for length of sentence, so a systematic account of what punishment might be deserved on the basis of an adolescent's culpability remained unexamined. The rehabilitation model had additional problems, most strikingly that rehabilitation efforts did not seem to be succeeding, and by the mid-1970s there was a pessimism among those who tried to rehabilitate delinquents that "nothing works."<sup>14,15</sup>

The rapid rise in adolescent crime in the late 1980s and early 1990s led to increased fears for public safety, and since 1992, many states have adopted additional procedures for transferring adolescents to adult criminal court<sup>16</sup> where they are held to adult standards of culpability and punished under the "adult crime, adult time" mantra.

In the judicial system, culpability of juveniles has been most prominent in litigation over the juvenile death penalty. In 1988 the Supreme Court found that execution of juveniles below the age of 16 was cruel and unusual punishment.<sup>1</sup> The following year the Court held that executing 16- and 17- year-olds was constitutionally permissible,<sup>17</sup> reasoning that some youth over 15 could be responsible, and that grounds other than culpability were also relevant in determining whether the death penalty for minors represented cruel and unusual punishment. More recently, in the 2005 case *Roper v. Simmons*,<sup>2</sup> the Supreme Court found the execution of minors unconstitutional, basing its argument in part on a finding that adolescents as a class were less responsible than adults. The *Roper* court based its reduced culpability analysis on three aspects of adolescents: immaturity with impulsivity, vulnerability to adverse environmental factors, and the fact that an adolescent's character is not well formed (Ref. 2, pp 569-70). In

2010, using much of the reasoning of *Roper*, the Court found it unconstitutional to sentence adolescents to life without parole for crimes less than murder.<sup>3</sup>

### Aggression in Adolescent Development

Inability to resist performing an act, the volitional prong of many insanity tests, serves to negate culpability, and factors that reduce voluntary action serve to mitigate responsibility. To what extent is an adolescent in a developmental state of heightened aggression and impulsivity? While there is not space for a full review of this topic, there are some facts about adolescent violence that are particularly relevant. First, serious violent offending (defined as aggravated assault, robbery, gang fights, or rape) is very common in adolescence: the Surgeon General's report on youth violence noted that 30 to 40 percent of boys and 16 to 32 percent of girls had committed a serious violent offense by age 17.<sup>18</sup> This suggests that not overcoming aggressive impulses is very common. Further, only about 20 percent of these adolescent offenders continue offending into adulthood,<sup>19</sup> and less than half of those continue an adult violent career longer than two years. This suggests that higher aggression/lower self-control is, for most youth, a developmental, time-limited phenomenon. Some data suggest that delinquents who continue their criminal behavior into adulthood have different developmental patterns, and that for those who persist in criminal activity, impulsiveness and ability to suppress their aggression worsens through adolescence.<sup>20</sup> Second, the onset of serious violence is largely an adolescent phenomenon. The peak age for the onset of violent offending is around 15 to 16 years, and only a small number begin a violent career in adulthood.<sup>19</sup> Third, there are striking differences in the patterns of adolescent offending when compared with those in adulthood. For example, adolescents typically offend in groups, while adults typically offend alone; and adolescents tend to commit more impulsive criminal acts than do adults.<sup>21</sup> Groups tend to make riskier decisions and peer pressure reduces self-control in adolescents.<sup>22</sup> Taken together, these data strongly suggest that adolescents are in a developmental state of either higher aggression or weakened self-control. They have a developmentally imposed limitation on voluntary action.

The above argument applies to the class of adolescents. At an individual level, an evaluator would want

to assess the defendant's development of overall aggressiveness and the developmental course of his or her offending.

### Immaturity

The most important thread of scientific data cited in the argument that immaturity is relevant to responsibility has to do with research on adolescent decision-making. The first wave of this research was not in the area of criminal responsibility, but in the area of legal decision-making competence. Adolescents have traditionally been held to lack most civil competencies, such as competence to consent to most medical care (there have been some exceptions, such as treatment for substance abuse and sexually transmitted diseases). In the late 1980s and early 1990s, several studies examined adolescent decision-making in the context of waiving *Miranda* rights following arrest,<sup>23</sup> decisions about consenting to health care,<sup>24,25</sup> preferences about custody in hypothetical divorce situations,<sup>26</sup> and decisions about psychoeducational interventions.<sup>27</sup> More recent studies have examined adolescents' competency to stand trial.<sup>28-31</sup>

Most of these studies focused on the cognitive factors involved in giving informed consent: did the adolescent understand the relevant information, and could he or she weigh the possible consequences appropriately in reaching a decision. The results suggest that the decision-making of normal 15-year-olds is not significantly different from the capacities of adults. For younger adolescents, capacity falls off fairly quickly: about half of 13- to 14-year-olds demonstrate decision-making that is significantly worse than that of adults. While most studies focused on cognitive factors, some took into account noncognitive factors, such as deference to authority when given a *Miranda* warning,<sup>23</sup> but found similar results. These findings were utilized to argue for increased legal recognition for autonomous rights for minors over age 14, most especially in court cases regarding whether an adolescent girl should be able to provide legal consent to obtain an abortion without parental notification or consent.<sup>32</sup>

The late 1980s to early 1990s witnessed a rapid increase in juvenile homicide rates. From 1984 to 1993, firearm homicides among juveniles increased over 200 percent, a much greater increase than that seen in other age groups.<sup>33</sup> This wave of juvenile violence received great public attention, generated

considerable fear among the public, and led many state legislatures to pass waiver statutes that had the effect of moving many more juveniles charged with violent crimes to adult criminal jurisdiction, where they were subject to adult penalties. For those who opposed such a punitive trend, the research on adolescent decision-making raised a problem: if adolescents aged 15 years and older use decision-making processes similar to adults, then the decision made by a 15-year-old to commit a crime may not reflect immaturity to a sufficient degree that would mitigate criminal responsibility, and, by implication, the imposition of adult punishment.

### **Adolescent Judgment**

The problem, in the face of research on cognitive decision-making, was to identify those aspects of judgment that differentiated adolescents from adults. The argument from immaturity as commonly utilized holds that if the decision to commit a crime can be shown to derive from judgments that can be meaningfully distinguished from adult judgments, then adolescent culpability is reduced. The reverse may also be argued: if adolescent capacity cannot be meaningfully distinguished from that of an adult, then differential treatment is not warranted.

In a classic study published in 2000 by Cauffman and Steinberg,<sup>34</sup> adolescents were given paper-and-pencil questionnaires that measured hypothesized components of psychosocial maturity: responsibility (tapping self-perceptions of self-reliance, identity, and work orientation), time perspective (ability to see short- and long-term consequences), social perspective (the ability to take another person's point of view into account), and temperance (impulse control and suppression of aggression). A questionnaire designed to measure antisocial decision-making asked questions such as "You're out shopping with some of your close friends and they decide to take some clothing without paying for it. You don't think it's a good idea, but they say you should take something, too." Subjects then rated how likely they would be to perform the antisocial act. A key finding was that lower levels of psychosocial maturity correlated with more decisions to commit antisocial acts. After the contribution of psychosocial maturity was factored in, age was no longer a significant predictor. Over the past 10 years, there has been considerable research that further refined our views of adolescent psychosocial

immaturity, and that research has been used to argue for mitigation of adolescent culpability.<sup>35-37</sup>

One facet of immaturity is adolescents' attitude toward risk and susceptibility to peer pressure. This is especially salient in view of the fact that unlike most adult offending, most adolescent offending occurs in groups.<sup>38</sup> Adolescents tend to make riskier decisions than adults, and this tendency is increased in the presence of peers.<sup>22</sup> Both the tendency to take risks and susceptibility to peer pressure decrease through adolescence and into early adulthood.<sup>22</sup>

Another line of scientific data frequently cited in support of distinguishing adolescent thinking from that of adults flows from the relatively new data on adolescent brain development. Although it had been thought that brain development was essentially complete by puberty, new techniques have convincingly demonstrated that brain development continues through adolescence and into early adulthood, and that some of the areas of the brain which are still changing are those thought to be involved in social information processing, impulsivity, risk-taking, and decision-making.<sup>39-42</sup> Such findings provide a biological substrate to the argument that adolescents are less mature than adults.

There is limited data on the psychosocial immaturity of delinquents and how such factors affect behavior on the street. Despite potential criticisms regarding ecological validity in delinquent populations and relevance to violent crimes as opposed to property crimes, the research on psychosocial maturity does point to matters that an evaluator would want to investigate. While self-reliance, work orientation, and ability to see long-term consequences, take the other's point of view, control impulses, take risks, and be susceptible to peer pressure are difficult to measure, they can be addressed both in interviews with the defendant and in interviews with others who know the defendant well. Paper-and-pencil measures of these constructs, such as those used in research, may prove to have a useful role as well.

### **How Immature Is Immature Enough?**

Consider a 15-year-old whose psychosocial maturity is equal to that of the average incarcerated adult. The studies discussed above compared adolescents to average adults. But why should an average adult be the standard? We hold adults responsible when they have considerably worse judgment than average. While I am not aware of any studies that actually

measure the decision-making maturity of incarcerated adults compared with incarcerated adolescents, clinical experience strongly suggests that most adult offenders display judgment that falls well below that of an average adult. (Of course, incarcerated adolescents are likely to have below average decision-making maturity for their age group, as well.) Since we hold imprisoned adults culpable for their acts, if decision-making capacity is all there is to blameworthiness, once a person reaches a certain level of maturity, and that level is well below that of the average adult, he should be held fully culpable (although one might decide to punish differently for other reasons). Morse,<sup>43</sup> in his analysis of adolescent responsibility, does not find a reason to differentiate offenders of similar capacity but different developmental stages. Incomplete development, once it gets within range of some defined level of adult variation, is not enough.

### Environmental Circumstances

Environmental circumstances such as lower socioeconomic level, living in an abusive family, or living in a high-crime neighborhood have long been linked to higher crime rates. Yet, such circumstances (sometimes referred to in legal literature as “rotten social background”) have not generally been useful in establishing a diminished-capacity defense or mitigation for an adult (except in death penalty sentencing). Many adults in such circumstances do not engage in criminal behavior, and adults are presumed to be able to make autonomous choices. From a practical perspective, such deprivation is so common and applies to so many defendants that utilizing it would undercut the presumption of autonomy. Key to this is the idea that an adult can distance himself from such circumstances. In cases where an adult could in principle move away from abusive circumstances but does not, a showing that the defendant was psychologically unable to leave, such as in a battered-spouse defense, may succeed in reducing culpability.

Many aspects of the environment of an adolescent, however, are outside the adolescent’s control. As a general rule, he has no choice or control as to what neighborhood to live in, what school to attend, whom to live with, the economic circumstances of his family, or whether to continue to live in abusive, neglectful, or dangerous circumstances. Unlike an

adult, who may have practical, but not legal, constraints on changing some of these circumstances, a minor has no legal means of doing so. Such conditions are imposed. The Supreme Court has recognized this as a basis for a distinction: “[Adolescents’] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment” (Ref. 2, p 553). When circumstances are imposed, one is not responsible for the effects of those circumstances (although one may have an obligation to rise above them). If one accepts that mitigation should be afforded adolescents when adverse circumstances are relevant, there is a relatively bright line: since the legal system generally denies a youth autonomy until age 18 years, that age becomes the bright line for disallowing diminished culpability on the basis of environmental circumstances.

Many of these environmental conditions have a direct bearing on the threshold for committing a crime.<sup>44</sup> There is strong statistical support linking adolescent crime rates to conditions of socioeconomic deprivation. In addition, there are specific conditions that appear to have a causal connection to adolescent offending in particular. For example, the increase in youth homicide in the early 90s is generally considered to be due to the increased use of handguns by adolescents.<sup>45,46</sup> It is also clear that most gun-carrying by youths is justified by them as needed for safety.<sup>47-49</sup> Very few youths, even among samples of delinquents, carry a gun for the purpose of using it in a crime. The increased gun-carrying drove a vicious cycle: as more youth carried guns, the more guns were used, the more dangerous the streets became, and the more youths carried guns for protection. In the event of an angry dispute, the presence of guns markedly increased the risk that someone would be shot. As D. S. Elliott<sup>50</sup> once put it, the incidence of adolescent aggression did not increase, the lethality of the aggression did.

For an evaluator, assessing the nature of environmental circumstances is fairly straightforward. Assessing the effect of adverse circumstances on an individual defendant is more complex, but there is nevertheless considerable social science data on the effects of factors such as abuse, neglect, and family disruption that the expert may draw upon to help justify his or her conclusions.

## Peer Group Norms

Fagan and Wilkerson<sup>51</sup> have described how upholding one's honor when "dissed" [disrespected] justifies, for many youth, an assault on the diss-er. To endure being publicly disrespected without responding violently runs an actual risk that one would be seen as weak and so more prone to being selected as a future target, which would in turn increase the likelihood of future victimization. Garbarino<sup>52</sup> has described how deprived boys rationalize their violence. Environmental effects have the most import in diminishing responsibility when the activity, while considered wrong by society, is considered right in the environment where a youth lives. In the code of the streets, being dissed calls for a violent response. This factor is different from a heightened susceptibility to peer pressure which was considered in the section on immaturity. It is a factor that emphasizes the values of the subculture in which the youth lives.

The philosophical argument that underlies a theory that a different subculture's morality diminishes culpability derives from the idea that morality is associated with deviance from group values. In a subculture where violence is accepted, justified, and possibly even adaptive, the badness of resorting to violence is reduced. This tendency is amplified in adolescence, where it is developmentally expected that a youth wishes to conform to his peer group.

## Unfinished Character Development

Some legal theorists subscribe to character theory, which holds that when a person is blamed, it is his character that is found deficient. In situations in which the act does not reflect bad character traits, culpability is diminished. The idea is that in blaming, what is condemned is not merely the present action, but the defendant as the author of that action.<sup>53</sup> Character is taken to comprise settled and enduring traits.

Character theory is controversial among legal scholars. For adults, such character defenses do not fully excuse the act, but are relevant in mitigation. The most common instance of this is when a defendant acts out of character in committing the offense. Federal sentencing guidelines allow mitigation for behavior that "represents a marked deviation by the defendant from an otherwise law-abiding life,"<sup>54</sup> although the guidelines specifically exclude violent offenses from mitigation on this ground.

There are two different senses of what it means for an act not to reflect a character that is settled and enduring. The first sense is that an act may be out of character, that it does not fit with how we expect a particular person to behave. Typically such instances lead to a search for an explanation for the out-of-character behavior, such as the person was drunk, under acute stress, terrorized, or suffering from time-limited mental illness. The explanation functions as a partial excuse for otherwise culpable behavior. This is the sense used in federal sentencing guidelines.

For most juvenile offending, the acting-out-of-character sense does not apply. The average adolescent at first arrest has committed numerous prior offenses for which he has not been caught, and arrest records depict only the tip of the iceberg of misbehavior.<sup>18</sup> Few adolescents begin their delinquent career with a violent offense: rape and armed robbery are almost always the endpoints of a developmental progression of offenses that begins with minor offenses, such as shoplifting and vandalism; progresses to theft without confrontation and then to illegal substance use; moves through aggravated assault; and culminates with armed robbery and rape.<sup>19</sup> Although there are exceptions (intrafamilial homicide, mass school shootings, and assaults clearly attributable to psychosis, for example), with most arrests, the delinquent's behavior is disturbingly in character.

## Personality Development

The second sense in which an adolescent's character is linked to culpability is the argument that since an adolescent's character is still developing and will not be established until adulthood, current bad acts are not reflective of his (future adult) character at all. Forming an identity is one of the main developmental tasks of adolescence. One essential difference between a 15-year-old and an adult with comparable psychosocial maturity is that we expect that the 15-year-old's personality will change over the next six years, whereas we expect an adult's personality to remain more stable. Symptoms of personality disorder tend to decrease over the course of adolescence.<sup>55</sup> Psychopathy assessed in adolescence has a significant correlation with psychopathic traits in adulthood, but the reported correlation ( $r = .31$ )<sup>56</sup> is not strong enough to account for enough of the variance to be useful in sentencing an individual delinquent. Longitudinal data strongly support the finding that most

adolescent offenders will not continue their offending into adulthood.<sup>18</sup>

Blustein argues that “the notion of responsibility is conceptually linked to the having of an ego identity . . .” (Ref. 5, p 11), and that adolescents are less culpable because their identity is not fully formed. Scott and Steinberg suggest:

. . . [the adolescent offender’s] wrongful act does not derive from attitudes and values that are part of his continuing identity as a person; in other words, his crime is not an expression of bad character. . . the adolescent’s harmful act does not express his bad character; indeed it does not manifest “character” at all, but something else—in this case developmental immaturity [Ref. 8, pp 833–4].

The Supreme Court appeared to endorse this view in *Roper v. Simmons*:

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed [Ref. 2, p 570].

There are difficulties with the theory that adolescents have reduced culpability because they do not have a settled personality. First, it equates character used in a lay sense with personality as used as a technical term in psychiatry. I do not think most speakers of the English language would agree that an adolescent has no character. Second, having culpability for a present act turn on how much more morally mature the person is likely to be at some future time is problematic. Would this mean that an adult with dissociative identity disorder is less culpable because in the future he is likely to be acting as a different person? A person is not less culpable for an offense committed yesterday because he has learned his lesson and is less likely to repeat an offense in the future. When comparing two mentally ill adults, one with a treatable illness is not less culpable than one whose illness is treatment-resistant on the basis that the treatable person is more likely to be different in the future. Moral responsibility is typically taken to reflect a person’s actions, beliefs, and general state at the time of the act, and is not contingent on possible later events. That an adolescent may be morally handicapped when compared with an adult by not having had as many life experiences to

learn from is a form of the immaturity argument discussed above, rather than a matter of character. That someone may be different in the future may nevertheless affect how one responds to a present transgression. When the Court says that “a greater possibility exists that a minor’s character deficiencies will be reformed,” I suggest that the Court is justifying the importance of possible rehabilitation in considering punishment, rather than lessening the case for retribution. In the 2010 case of *Graham v. Florida*,<sup>3</sup> in which the Supreme Court found a sentence of life without parole unconstitutional for minors who commit nonhomicide offenses, the Court reiterated the culpability analysis of *Roper* but more explicitly strengthened a right to rehabilitation when it said that “What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” (Ref. 3, p 2030).

In assessing an individual defendant, there may be some cases in which the criminal act fits the out-of-character sense, and an account of why that occurred may be applicable. The argument that adolescents should be seen as less culpable because of their unfinished character development is one that applies to all adolescents, although it might be stronger when applied to younger adolescents, because they have more development to undergo. While I have argued that the likelihood of character change and amenability to rehabilitation are not, strictly speaking, part of a culpability analysis, there is clear legal precedent for including it.

### Mental Illness

The interaction between mental illness and delinquent behavior is complex and not well understood. Many delinquents have histories consistent with a diagnosis of conduct disorder, but since theft, lying, and serious violations of rules are considered symptoms of that disorder,<sup>57</sup> such a diagnosis is of little explanatory value. It is clear that delinquent youth have high rates of mental disorders across the entire range of diagnoses.<sup>58,59</sup> Excluding conduct disorders, over 60 percent of incarcerated juveniles evidence at least one disorder, about triple the rate in the general population, and over 40 percent have more than one disorder.

Serious mental illness has long been considered a relevant mitigating factor. Mental disorder most



likely magnifies the effects of other factors relevant to reducing culpability noted above, through such pathways as further impairing judgment, increasing aggressivity and impulsivity, and slowing consolidation of a healthy identity. There are some cases in which the offense appears to meet the product of a mental illness test. Although such a test is now only exculpatory in New Hampshire, it can nevertheless serve as a means of justifying a finding of reduced culpability on the theory that mental illness reduces the ability to act freely and voluntarily. The presence of mental illness also has implications for rehabilitation.

### **Engendered Resentment and Attitudes Toward Adolescence**

The above factors are potentially mitigating because they derive from well-established ethics theory or law. However, a comprehensive ethics theory of responsibility in adolescence has yet to be worked out. We have attitudes and emotional reactions toward adolescents that seem relevant to culpability, but do not fit neatly into any of the above categories. They flow in part from attitudes we have as parents and practices of holding our children responsible, cutting them a certain slack and trying to foster their development. Strawson<sup>60</sup> proposed that our reactive attitudes toward an act precede our judgments about responsibility, not follow from them. For example, if someone steps on my foot and I feel resentment, I am attributing some intentionality to the other person. If I learn that he didn't see me, my resentment is likely to diminish, but I may still think, "He should have looked." If I know the other person was pushed and was not at fault for tripping on my foot, I am likely to feel no resentment at all. In these situations, my reactions are affected by my assessment of the other's intent. Strawson distinguishes these examples from the example of a child who steps on my foot, even if I attribute intentionality to the child, my reactive attitude will be different because the action was done by a child. We have different reactive attitudes toward children than we do toward adults. Consistent with Strawson's theory, if the hurtful action is done by an adolescent, our reactive attitude will be different if we see the adolescent as a child when compared with our reactive attitude that goes with seeing the adolescent as an adult. In short, if we react to adolescents as though they are adults, we have a ready set of attitudes that we apply to adult

offenders. If we see them as different from adults, then we will use, or have to find, a different set of attitudes.

It is therefore important whether we view adolescents as like adults, or as different. Why are attorneys so interested in the research on adolescent brain development? As Mayberg<sup>61</sup> and Morse<sup>62</sup> have pointed out, despite provocative findings, there is no clear logical inference to be made from the current brain data to a conclusion that adolescents are less culpable than adults. The data that adolescents are more impulsive comes from behavioral studies, not imaging studies. Part of the force of a neurocircuitry argument is that brain circuitry connotes determinism, and determinism undercuts the free will that is necessary for moral responsibility. I suggest that much of the power in the still-developing adolescent brain argument is that the data do say that the adolescent brain is different, and by emphasizing difference, it is implicitly saying that our reactive attitudes that we have toward adults should not apply. Parents often say something to their children along the lines of "You did a bad act but are not a bad person." Once we take the step of feeling that our reactive attitudes toward adults do not apply to adolescents, we are left with the problem of deciding what reactive attitudes do apply.

If two offenders committed the same act with the same intent and were equally impulsive and had the same neurocircuitry, the only difference being one was 15 and one was 24, is there a basis on which to argue that one is as morally blameworthy as the other? Some recent research on public attitudes suggests that attitudes are changing in the direction of differential treatment.<sup>63</sup>

### **Synthesizing the Findings**

A forensic evaluator assessing adolescent culpability faces a complex task. Multiple factors that may be relevant are shown in Table 1.

These factors overlap and interact, and the evaluator must illustrate the connections in any particular case. Because there is no clearly specified forensic test to address for partial responsibility, the evaluator has considerable latitude in how to present his assessment. For example, in a state that does not have a volitional component to its insanity test, an evaluator might nevertheless utilize the concept of limited ability of the defendant to conform his behavior to the requirements of law, based on developmental consid-

**Table 1** Factors to Consider in Assessing Adolescent Culpability

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Appreciation of wrongfulness
Ability to conform to law
Developmental course of aggression and impulsivity
Immaturity: IQ, psychosocial maturity, including time sense, susceptibility to peer pressure, risk taking, ability to empathize
Out-of-character action
Environmental circumstances
Peer group norms
Incomplete personality development
Mental illness
Reactive attitudes toward the offense

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erations, as a way of organizing a section of the report. For other factors, the evaluator might want to show how the defendant's actions were a product of mental illness. Depending on who is the audience for the report and what decision the report is aimed at influencing, different formats would be appropriate.

### The Shift to Rehabilitation as a Purpose of Punishment

Most of the above factors, often cited as affecting culpability, also affect amenability for rehabilitation. I suggest that courts have been reluctant to address rehabilitation because it has fallen out of favor in correctional systems. The federal Sentencing Reform Act of 1984 abolished federal parole and instructed sentencing courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.”<sup>64</sup> The pessimism about rehabilitation in the 1970s, coupled with *Gault* and its progeny, also moved the focus of the juvenile court from rehabilitation to retribution and incapacitation. To the extent that rehabilitation is a purpose of punishment, it is justified only if it works. With a better understanding of the development of juvenile offending and its course, rehabilitation now appears a more viable option<sup>18</sup> and so is playing a larger role in sentencing in adolescent cases. The *Graham* court still emphasized limited culpability as justifying a different punishment strategy, but explicitly intertwined a connection to rehabilitation when it said, “What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” (Ref. 3, p 2030). It remains to be seen whether this means correctional systems must foster rehabilitation or simply assess whether the individual has achieved maturity and rehabilitation through

maturity. However, I suggest that this movement toward considering rehabilitation reflects our changing reactive attitudes toward adolescent crime, as we come to appreciate how adolescents are different from adults.

### Conclusions

There is currently a strong movement in the mental health fields to advocate for a decrease in the utilization of adult courts for adjudicating minors. This shift is being justified by the argument that adolescents as a class are less culpable than adults. At the level of the individual adolescent defendant, assessments of partial culpability are difficult. Delineation of component factors related to adolescent culpability may assist forensic evaluators in providing useful information and opinions to decision-makers involved in the disposition of a case.

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