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Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts

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Article

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INTRODUCTION

The juvenile court lies at the intersection of youth policy and crime policy. How should the legal system respond when the kid is a criminal and the criminal is a kid? Since juvenile courts' creation more than a century ago, they have evolved through four periods: the Progressive Era (1899–1960s), the Due Process Era (1960s–'70s), the Get Tough Era (1980s–'90s), and the contemporary Children Are Different Era (2005–Present).[1] In each period, juvenile justice policies have reflected different views about children and crime control and appropriate ways to address youths' misconduct. With the U.S. Supreme Court recognizing again that children are not miniature adults, we have an opportunity to enact policies for a more just and effective justice system for youth.[2]

Competing conceptions of adolescents—immaturity and incompetence versus maturity and competence—and differing strategies of crime control—treatment or diversion versus punishment—affect the substantive goals and procedural means that juvenile courts use. Substantively, conceptions of youths' culpability or criminal responsibility affect juvenile courts' decisions to detain and sentence delinquents, transfer youths to criminal court, and sentence children as adults. Competence focuses on youths' capacity to employ rights, ability to understand and participate in the legal process, ability to exercise *Miranda* rights, competence to stand trial, and ability to exercise right to

1. *See generally* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) [hereinafter FELD, BAD KIDS]; BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE (2017) [hereinafter FELD, EVOLUTION OF JUVENILE COURT]; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 32–48 (2013) (outlining the historical context of juvenile courts in the United States); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008).

2. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) (holding that children are constitutionally different from adults).

counsel and right to a jury trial. The historical epochs of the juvenile court reflect the differing views of youths' culpability and competence.

At the end of the nineteenth century, the transition from a rural agrarian to a manufacturing economy increased immigration, fostered rapid urbanization, and posed problems of assimilation and integration.[3] During the Progressive Era, upper and middle class child-savers promoted a social construction of children as vulnerable, immature, and dependent, requiring protection and supervision.[4] Positivist criminology attributed criminal behavior to external antecedent forces and Progressive reformers adopted discretionary policies to rehabilitate offenders: probation, parole, indeterminate sentences, and juvenile courts.[5] They created a separate justice system to shield children from criminal courts, jails, and prisons. Two goals animated juvenile courts' creators: an interventionist rationale and a diversionary one.[6] The more-expansive interventionist vision expected juvenile courts to identify causes of youths' misbehavior, to intervene, and to promote their development into responsible adults.[7] Juvenile courts' less-articulated diversionary purpose was to minimize the harms the criminal justice system inflicted on young people. They could accomplish their diversionary goal simply by providing an alternative to criminal courts, even if their rehabilitative goal proved more elusive. Juvenile courts melded the new ideology of childhood with the new theory of crime control, introduced a judicial-welfare alternative to remove children from the criminal justice system, and promised individualized treatment in a nonpunitive child welfare system.

Juvenile courts' rehabilitative mission envisioned a specialized judge trained in social work and child development whose empathy and insight would enable him to make dispositions in

3. *See generally* FELD, BAD KIDS, *supra* note 1, at 17–45; DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004).

4. *See generally* FELD, BAD KIDS, *supra* note 1, at 46–78; ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977).

5. *See generally* Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, *in* THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25 (1964); ROTHMAN, *supra* note 3.

6. *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2481–84 (2000).

7. *See* Zimring, *supra* note 6, at 2480.

the child's best interests.[8] Progressives defined the court's jurisdiction broadly to include youths accused of crimes, noncriminal-status offenders at risk to become delinquents, and abused and neglected children.[9] Juvenile courts' rehabilitative dispositions focused on youths' future welfare rather than their past offenses and imposed indeterminate sentences that could continue for the duration of minority. The courts' founders conceived of children as immature and irresponsible and opposed procedural safeguards which could impede open communication between judge and child.[10] Progressive reformers intended juvenile courts to discriminate: to control poor and immigrant children, to assimilate and Americanize them, and to distinguish between their own children and other people's children.[11] While probation was the disposition of first resort, the institutions to which judges disproportionately committed poor and immigrant children more closely resembled youth prisons than clinics.

Despite the Progressives' rehabilitative aspirations, the 1967 President's Commission on Law Enforcement issued a task force report on juvenile delinquency and youth crime revealing juvenile courts' procedural deficiencies, inadequate correctional institutions, and racial disparities.[12] Drawing on its critique, the Supreme Court in *In re Gault* highlighted the disjunction between juvenile courts' rehabilitative rhetoric—long used to justify the dearth of procedural safeguards—and the reality of court and correctional practices.[13] Mandating procedural safeguards, the Court envisioned youths as competent to exercise legal rights and to participate in an adversarial system.[14] Subsequent decisions further criminalized delinquency proceedings. *In re Winship* required states to prove delinquents' guilt by the criminal law standard of proof beyond a reasonable doubt.[15] *Breed v. Jones* applied the ban on double jeopardy based on the functional

8. *See generally* TANENHAUS, *supra* note 3; Allen, *supra* note 5.

9. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 32.

10. *See e.g.*, FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 33–38. *See generally* FELD, BAD KIDS, *supra* note 1.

11. *See generally* FELD, BAD KIDS, *supra* note 1; ROTHMAN, *supra* note 3.

12. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 77–84, 91–107 (1967) [hereinafter PRESIDENT'S COMM'N]; *see also* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 10.

13. 387 U.S. 1, 13–57 (1967). *See infra* notes 90, 144, 148–50, 248–33, 299 and accompanying text.

14. *Gault*, 387 U.S. at 56.

15. 397 U.S. 358, 367 (1970). *See infra* notes 133, 315 and accompanying text.

equivalence of criminal trials and delinquency proceedings.[16] However, *McKeiver v. Pennsylvania* denied delinquents the constitutional right to a jury trial available to criminal defendants because it might adversely affect juvenile courts' informality, flexibility, and confidentiality.[17] Although granting delinquents some procedural rights might impair juvenile courts' ability to intervene in children's lives, safeguards would not impede their ability to divert youths and avoid the harms of the criminal justice system. But granting delinquents some procedural safeguards legitimated increasingly punitive penalties that fell most heavily on minority offenders.[18] The Court's due process revolution coincided with a synergy of campus disorders, escalating crime rates, urban racial rebellions, dissatisfaction with the treatment model, and emerging politics of crime that prompted calls for a return to classical criminal law and paved the way for get-tough policies.[19]

Structural, economic, and racial demographic changes in American cities during the 1970s and 1980s contributed to escalating black youth homicide rates at the end of the 1980s and provided the context within which states adopted get-tough policies.[20] The Great Migration increased the concentration of impoverished African Americans consigned to inner-city ghettoes. Federal housing, highway, and mortgage policies combined with bank redlining, real estate block-busting, and sales practices to create increasingly poor minority urban cores surrounded by

16. 421 U.S. 519, 528–33, 541 (1975). *See infra* notes 134, 381 and accompanying text.

17. 403 U.S. 528, 545–51 (1971). *See infra* notes 46, 135, 305–06, 308–09, 316, 338 and accompanying text. *See generally* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1143–69 (2003) [hereinafter Feld, *Constitutional Tension*].

18. *See* Feld, *Constitutional Tension*, *supra* note 17, at 1145.

19. Youth crime increased in the 1960s as baby-boomer children reached adolescence. The increased urbanization of blacks led to higher crime rates in minority areas. Race riots rocked many American cities between 1964 and 1968. These broader structural and demographic changes provided the backdrop for the Warren Court's civil rights decisions, criminal procedure rulings, and juvenile court opinions. *See generally* FELD, BAD KIDS, *supra* note 1; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash*," 87 MINN. L. REV. 1447 (2003) [hereinafter Feld, *Race, Politics*].

20. *See generally* FELD, BAD KIDS, *supra* note 1; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

predominantly white affluent suburbs. Beginning in the early 1970s, the globalization of manufacturing and technological innovations eliminated many jobs of less-skilled workers and produced a bifurcation of economic opportunities based on education and technical skills. The economic changes adversely affected blacks more deeply than other groups because of their more recent entry into the manufacturing economy, their vulnerability in the social stratification system, their lower educational attainments, and their spatial isolation from sectors of job growth.[21] By the 1980s, deindustrialization and white flight left an impoverished black underclass trapped in urban ghettos.[22] The introduction of crack cocaine and proliferation of guns sparked turf wars over control of drug markets.[23] Black youth homicide rates sharply escalated and gun violence provided political impetus to transform juvenile-justice policies.[24]

Beginning in the 1960s, the rise in youth crime and urban racial disorders evoked fear of crime in the streets. National Republican politicians decried a crisis of law and order, pursued a southern strategy to appeal to white southern voters' racial antipathy and resistance to school integration, and engineered a conservative backlash to foster a political realignment around race and public-policy issues.[25] Political divisions about race and social policy enabled conservative politicians to advocate punitive crime and welfare policies for electoral advantage. In the 1980s and 1990s, those policies produced longer sentences and mass incarceration for adult offenders and punitive changes in juvenile courts' transfer and sentencing laws.

Contemporary juvenile justice policies reflect the harsh legacy of the 1980s' and 1990s' get-tough policies—extensive pre-

21. Feld, *Race, Politics*, *supra* note 19. *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

22. *See generally* WILLIAM J. WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY (2009) [hereinafter WILSON, MORE THAN JUST RACE]; WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) [hereinafter WILSON, THE TRULY DISADVANTAGED].

23. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 26–29 (1995). *See generally* FELD, BAD KIDS, *supra* note 1; FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998).

24. Blumstein, *supra* note 23, at 32–36. *See generally* FELD, BAD KIDS, *supra* note 1; ZIMRING, *supra* note 23.

25. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 7–14 (1992). *See generally* KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969).

trial detention, punitive delinquency sanctions, increased transfer to criminal courts, and severe sentences as adults—all of which are rife with racial disparities. Although serious youth crime and violence peaked around 1993 and has dropped precipitously over the subsequent two decades, those harsh laws remain on the books in most states.[26] The recent Supreme Court trilogy of Eighth Amendment decisions—*Roper*, *Graham*, and *Miller*—reaffirmed that children are different, relied on developmental psychology and neuroscience research to support its conclusions about youths' diminished criminal responsibility, and limited the most draconian sentences. However, they provided affected youths with limited relief and gave state courts and legislatures minimal guidance to implement their jurisprudence of youth.

I divide this Article into two parts: delinquents in juvenile courts and youths tried in criminal courts. I analyze the contexts within which questions of adolescents' competence and culpability arise. Part I.A examines substantive decisions that affect delinquents' custody status: (1) pretrial detention; and (2) delinquency sanctions—and the increased punitiveness and racial disparities associated with each decision. Part I.B examines procedural issues associated with delinquency adjudications: (1) youths' ability to exercise *Miranda* rights; (2) competence to stand trial; (3) waivers of counsel; and (4) right to a jury trial. Juvenile courts' increased punitiveness, procedural deficiencies, and assembly-line process compound youths' developmental limitations, heighten risks of excessive and discriminatory interventions, and raise the specter of wrongful convictions. Part II examines transfer of youths to criminal court, and their sentencing as adults. Part II.A describes: (1) state laws' shift from a focus on offenders to offenses; (2) the increased role of prosecutors to make adulthood determinations; (3) transfer laws' failure to achieve their legislative intent; and (4) their racially disparate impacts. Part II.B examines Supreme Court decisions—*Roper*, *Graham*, and *Miller*—that: (1) somewhat mitigated the harshest sentencing policies; (2) reaffirmed that children are different; and (3) used developmental psychology and neuroscience research to bolster its conclusions about youths' diminished responsibility. The Article concludes with proposals for substantive and procedural reforms to address juvenile and criminal courts' failure to provide developmentally appropriate justice for children.

26. *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

I. DELINQUENTS IN JUVENILE COURT: CUSTODY, RACIAL DISPARITY, AND COMPETENCE

Social welfare and social control operate in fundamental tension. How do we balance young offenders' best interests with punishment for their offenses? How do we safeguard children and protect communities? The Progressives' interventionist juvenile court asserted a social welfare mission in which children's and society's interests were congruent, but get-tough politicians subordinated welfare to crime control. This imbalance inevitably occurs because states define delinquency jurisdiction based on criminal behavior rather than children's welfare needs, which diverts attention from the criminogenic conditions in which many youths live.

By the 1990s, punitive policies supplanted juvenile courts' earlier emphases on offenders' rehabilitation and had a disproportionate impact on children of color. This section focuses on juvenile court decisions that reflect judgments about delinquents' culpability and affect their custody status: (1) pretrial detention—the delinquency equivalent of jail; and (2) changes in delinquency sanctions that emphasized offense-based punishment rather than offender rehabilitation.

A. PRETRIAL AND POST-CONVICTION CUSTODY STATUS

Questions about effectiveness of rehabilitation emerged in the 1960s, eroded juvenile courts' interventionist rationale, and evoked a sense of failure among practitioners and the public. In 1974, Robert Martinson's essay, *What Works*?, concluded that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[27] "Nothing works" became the conventional wisdom for several decades thereafter, undercut efforts to treat offenders, and reinforced conservatives' distrust of government efforts to reduce crime or ameliorate social problems.

Violence and homicide in the late 1980s and early 1990s enabled conservative politicians to promote a stereotype of dangerous superpredators—cold-eyed young killers suffering from moral poverty—rather than traditional images of disadvantaged youths who needed help. Based on erroneous demographic pro-

27. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

jections, they predicted a bloodbath of youth crime, even as juvenile violence declined precipitously.[28] Relying on those flawed predictions, legislators preemptively enacted laws that emphasized suppression of crime—punishment, deterrence, and incapacitation—rather than efforts to rehabilitate children. Juvenile justice shifted from a welfare to a penal orientation and assumed responsibility to manage and control delinquents rather than to treat them. Beginning in the 1970s, just deserts and retribution displaced rehabilitation as rationales for adult and juvenile sentencing policy. Judges focused primarily on offenders' present offense and criminal history.

1. Preventive Detention of Delinquents

Conservatives claimed that juvenile courts' lenient sanctions failed to protect the public and emphasized punishment. Detention laws give judges broad discretion to confine youths prior to trial. Judges overuse and abuse detention facilities and disproportionally detain children of color. Reform efforts can reduce unnecessary and inappropriate use of pretrial confinement.

Pretrial detention involves a youth's interim custody status pending trial.[29] In 1984, the Supreme Court in *Schall v. Martin* upheld a statute that authorized preventive detention if a judge found there was a "serious risk" that the child "may . . . commit an act which if committed by an adult would constitute a crime."[30] The law did not specify the type of present offense, the likelihood or seriousness of any future crime, burden of proof, criteria, or evidence a judge should consider to make the prediction. Despite these flaws, *Schall* held that preventive detention "serves a legitimate state objective, and that the procedural protections afforded pre-trial detainees" satisfy constitutional requirements.[31]

Social scientists question *Schall*'s confidence in judges' clinical prognostication abilities. Research comparing statistical-versus-clinical prediction strongly supports the superiority of ac-

28. *See generally* Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, 42 CRIME & JUST. 265 (2013).

29. BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 441–43 (4th ed. 2013) [hereinafter FELD, CASES AND MATERIALS]; Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 191–209 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*].

30. Schall v. Martin, 467 U.S. 253, 255 (1984).

31. *Id.* at 256–57.

tuarial risk-assessment instruments over professional judgments.[32] The fallibility of prediction is compounded because judges at an initial appearance often lack the types of information—psychometric tests, professional evaluations, and social histories—on which clinicians would rely.

States hold about twenty percent of youths referred to juvenile courts in pretrial detention facilities—between one-quarter and one-third of a million juveniles annually.[33] In 2011, judges detained a larger proportion of youths arrested for person offenses (25.4%) than for property crimes (16.5%), but because police arrested so many more youths for property crimes, they confined roughly equal numbers.[34] Rates of detention rose and peaked between 1998 and 2007, even as the absolute numbers of youths referred to juvenile courts declined.[35] Courts detained older youths at higher rates than younger juveniles, proportionally more boys than girls, and more children of color than white youths.[36]

Inadequate and dangerous conditions have characterized detention facilities for decades. Get Tough Era policies exacerbated overcrowding as states detained more youths to impose short-term punishment or to house those awaiting postadjudica-

32. The American Psychiatric Association (APA) has long disclaimed psychiatrists' competence to predict future dangerousness because they tend to not use information reliably, to disregard base rate variability, to consider factors that are not predictive, and to assign inappropriate weights to relevant factors. Barefoot v. Estelle, 463 U.S. 880, 899–902 (1983) (discussing APA misgivings regarding expert testimony, but nonetheless declining to bar psychiatric expert testimony with respect to future dangerousness); FELD, BAD KIDS, *supra* note 1, at 140–45.

33. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 168–70 (2006); Melissa Sickmund et al., *Easy Access to Juvenile Court Statistics: 1985–2014*, OJJDP, https://www.ojjdp.gov/ojstatbb/ezajcs (last visited Nov. 15, 2017). *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

34. Sickmund et al., *supra* note 33 (reporting that 80,472 youths were detained in connection with 316,602 person crimes, and 73,474 youths were detained in connection with 444,070 property crimes in 2011).

35. *Id.* (reporting that detention numbers began to decline after their peak in 2007, a year in which 349,274 juveniles were detained).

36. SNYDER & SICKMUND, *supra* note 33, at 169–70; Sickmund et al., *supra* note 33 (reporting that between 2005 and 2012, youths under the age of twelve were detained in 7.3% of cases, while seventeen-year-olds were detained in 23.5% of cases; males were detained in 23.1% of cases, while females were detained 16.3% of the time; whites were detained at a lower rate than any other reported race, at 17.1%, compared to 24.5% for black youths and 23.3% of Hispanic youths).

tion placement. Conditions of confinement studies report inadequate physical and mental health care, poor education, lack of treatment services, and excessive use of solitary confinement and physical restraints.[37] Pretrial detention disrupts youths' lives, weakens ties to family, school, and work, stigmatizes them, and impairs legal defenses. Judges convict and institutionalize detained youths more often than similar youths released pending trial.[38]

There are substantial racial disparities in rates of detention. States detain black youths more often than similarly situated white offenders.[39] Detention rates for drug crimes exacerbated racial disparities. Between 1988 and 1991—the peak of the crack cocaine panic and the Get Tough Era—judges detained about half of all black youths charged with drug offenses, a rate twice

37. *See* DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES 7 (1994) (finding "substantial deficiencies" in detention facilities in areas including living space, security, controlling suicidal behavior, and healthcare).

38. William H. Barton, *Detention*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 636, 645, 648 (Barry C. Feld & Donna M. Bishop eds., 2012) (finding that detention "may foster further delinquency rather than suppress it," and that youths are "more likely to receive formal and punitive treatment by the juvenile justice system simply as a result of having been detained").

39. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 31–32 (Darnell Hawkins & Kimberly Kempf-Leonard eds., 2005) [hereinafter OUR CHILDREN, THEIR CHILDREN]; Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 YOUTH VIOLENCE & JUV. JUST. 71, 73 (2007); Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 62 (2008) (reporting racial disparity at "each decision point" in the juvenile justice system, from arrest to detention to post-adjudication placement). Between 1985 and 2014, juvenile court judges detained about one-fifth of all youths referred to them. Sickmund et al., *supra* note 33 (reporting 21.1% detention rate among all juvenile defendants between 1985 and 2011). During that period, judges on average detained 18% of white youths compared to 24.5% of black youths. *Id.* Judges detain youths charged with person offenses at higher rates than youths charged with other crimes. *Id.* (finding that 26.4% of youths charged for person crimes are detained, while only 16.8% and 16.9% of youths charged with property and drug crimes, respectively, are subject to detention). On average, judges detained 23.1% of white youths charged with person offenses compared with 28.3% of black youths. *Id.* The racial disparities for drug crimes are especially disturbing because, since the 1970s, self-report research consistently reports that black youths use and sell drugs at *lower* rates than do white youths. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 50 (2014) (finding higher drug use among whites than blacks in both high school and adult self-report surveys).

that of white youths.[40] While race affects detention decisions, detention adversely affects youths' subsequent case processing and compounds disparities at disposition.[41]

a. Reform Efforts

In the late 1980s, the Annie E. Casey Foundation launched the Juvenile Detention Alternatives Initiative (JDAI) which aimed to reduce use of detention, develop alternatives to institutions, reduce overcrowding, improve conditions of confinement, and lessen racial disparities.[42] JDAI reforms enlist justice system stakeholders to develop consensus rationale for detention, to adopt objective intake and risk assessment criteria, to use alternatives to secure detention—home detention, electronic monitoring, after school or day reporting centers—and to expedite cases to reduce pretrial confinement.[43] Stakeholders develop criteria to determine which youths to detain based on present offense, prior record, and other factors. Although not all efforts

40. Sickmund et al., *supra* note 33 (reporting 9600 detentions out of 49,200 total white youths processed for drug crimes in 1988 (19.5%), and 15,500 detentions out of 31,200 black youths processed for drug crimes in the same year (49.7%)). In 1989, 9900 of the 45,300 white youths processed for drug crimes were detained (21.9%), while 16,900 of the 33,600 black youths processed for drug crimes were detained (50.3%). *Id.* This trend continued through 1990, when 48% of black youths processed for drug offenses were detained, compared to 19.7% detention rate among white youth processed for drug offenses. *Id.*

41. Michael J. Leiber, *Race, Pre- and Post-detention, and Juvenile Justice Decision Making*, 59 CRIME & DELINQUENCY 396, 399 (2013) ("Race has . . . indirect effects on decision making through detention . . . [B]eing detained strongly predicts more severe treatment at judicial disposition."); Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Pre-Adjudication Detention Matters*, 47 J. RES. CRIME & DELINQ. 391, 391 (2010) (reporting that youths who are detained preadjudication are more likely to have a petition filed, less likely to have a petition dismissed, and more likely to be removed from the home at disposition).

42. *Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., http://www.aecf.org/work/juvenile-justice/jdai (last visited Nov. 15, 2017) (explaining the project's mission to "reduce reliance on local confinement of court-involved youth").

43. *See id.* (outlining strategies including implementation of "new or expanded alternatives to detention programs" and combatting racial disparities in youth detention through data analysis and policy reform). *See also* NAT'L RESEARCH COUNCIL, *supra* note 1, at 5 (outlining the advantages of community service over "unduly harsh interventions" in reducing the likelihood of re-offense, and discussing specific procedural and assessment reforms necessary to improving the juvenile system); Barton, *supra* note 38, at 660–68 (discussing the systematic improvements in confinement conditions and successful reform of youth detention policies achieved by JDAI).

have been equally successful, many sites have reduced the numbers of youths detained with no increases in crime or failures to appear.[44] JDAI efforts to reduce racial disparities among detained youths have been less successful.[45]

b. Policy Recommendations

Juvenile court judges, in collaboration with other stakeholders and social scientists, should develop validated risk-assessment instruments to better identify youths who pose a high risk of offending. Statutes should presume release of all nonfelony offenders and place a heavy burden (clear and convincing evidence) on the state to prove that a youth needs secure detention and that nonsecure alternatives—house arrest, electronic monitoring, shelter-care, and day-reporting—have been exhausted or would fail. Other than youths who pose a risk of flight or who have previously absconded from an institution, states should reserve detention for youths charged with serious crimes—felonies, violence, or firearms—for whom, if convicted, commitment to a secure facility would likely result. States should bolster detention hearing procedures with a non-waivable right to counsel and an opportunity to meet with defense counsel prior to the hearing.

2. Punitive Delinquency Dispositions

Supreme Court decisions identify factors distinguishing punishment from treatment: (1) legislative purpose clauses; (2) indeterminate or determinate sentencing laws; (3) judges' sentencing practices; (4) institutional conditions of confinement; and (5) intervention outcomes.[46] In the 1980s and 1990s, law-

44. Barton, *supra* note 38, at 666.

45. William H. Feyerherm, *Detention Reform and Overrepresentation: A Successful Synergy*, 4 CORRECTIONS MGMT. Q. 44 (2000).

46. Allen v. Illinois, 478 U.S. 364, 371–74 (1986) (analyzing the differences in conditions and procedures applied to inmates held under criminal sentences, versus the conditions and procedures applied to persons held for sex offender treatment, and finding the State act in question was non-punitive based on these differences); McKeiver v. Pennsylvania, 403 U.S. 528, 540, 550 (1971) (pointing to "various diagnostic and rehabilitative services" in the juvenile system as evidence that the intent of the system is to provide treatment rather than punishment, and rejecting arguments that the juvenile system is punitive based on procedural similarities between juvenile court and criminal proceedings); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (identifying "tests traditionally applied to determine whether an Act . . . is penal or regula-

makers repudiated offender-based treatment, shifted delinquency sanctions toward offense-based punishments, and fostered a punitive convergence between juvenile and criminal courts' sentencing policies.[47]

States repeatedly amended their juvenile codes' purpose clauses to endorse punishment.[48] The revisions focused on accountability, responsibility, punishment, and public safety rather than, or in addition to, a child's welfare or best interests.[49]

tory in character" including "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment," whether it requires scienter, and whether it promotes "the traditional aims of punishment—retribution and deterrence," among other factors); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 2–3 (1981); FELD, BAD KIDS, *supra* note 1, at 251–83; Allen, *supra* note 5, at 25–27; Barry C. Feld, *The Juvenile Court Meets the Principle Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 822 (1988) (highlighting the shift in the juvenile system "from treatment to punishment" and the "procedural criminalization of the juvenile court") [hereinafter Feld, *Punishment, Treatment*]; Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 791–92 (1982); Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1 (2012) [hereinafter Gardner, *Punitive Juvenile Justice*] (discussing the original conception of the juvenile system as a "therapeutic tradition" designed to "cure undesirable or unhealthy states of being . . . treating [children] for what they are rather than punishing them for what they have done" and outlining the disjunction between this conceptual ideal and the reality of juvenile court in practice).

47. Feld, *Punishment, Treatment*, *supra* note 46, at 850–57 (discussing the shift to determinate sentencing, legislative guidelines emphasizing uniformity, and proportionality over rehabilitation as the predominant sentencing justification in juvenile court); Gardner, *Punitive Juvenile Justice*, *supra* note 46, at 22–25 (discussing the emergence of punishment rather than the original rehabilitative goals of the juvenile system).

48. PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 11 (1996) (noting evolution from "traditional emphasis on . . . future welfare of the juvenile" to punishment, incapacitation, public safety, and accountability); Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 222–23 (1998) [hereinafter Feld, *Responses to Youth Violence*] ("[M]ore than one-quarter of the states have revisited their juvenile codes' statement of legislative purpose, deemphasized rehabilitation and the child's best interest, and asserted the importance of . . . punishment."); *See generally* FELD, BAD KIDS, *supra* note 1.

49. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 31–32 (noting that the 1980s saw the advent of a "harsher attitude toward juvenile crime," leading to policy reform which lasted through the 1990s as lawmakers "reformed juvenile crime policy to facilitate the adult prosecution and punishment of young offenders"); Feld, *Punishment, Treatment*, *supra* note 46, at 833–47 (contrasting purposes of treatment and punishment in juvenile systems and noting states' movement to include concepts of public safety and punishment in legislative purpose

Accountability became synonymous with retribution, deterrence, and incapacitation, and state courts affirmed punishment as a legitimate element of juvenile courts' treatment regimes.[50]

Originally, juvenile courts viewed delinquency as a symptom of a child's needs and imposed indeterminate nonproportional dispositions. The shift from an interventionist to a criminalized court culminates a trend *Gault* set in motion by providing modest procedural safeguards that legitimated harsher sanctions.[51] In subsequent decades, states amended delinquency sentencing laws to emphasize individual responsibility and justice-system accountability, and adopted determinate or mandatory minimum sentences.[52] The National Research Council concluded that:

> State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability. Laws have made some dispositions offense-based rather than of-

statements); Feld, *Responses to Youth Violence*, *supra* note 48 at 222–23; Gardner, *Punitive Juvenile Justice*, *supra* note 46, at 22–25 (discussing concepts of just deserts, accountability, and offense-oriented sentencing replacing rehabilitative aims in the juvenile system).

50. *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983) (discussing the juvenile court's original conception of a "child-centered" institution, and praising the court's evolution to a harsher ethic, stating that the early court lacked the "moralizing and socializing influence associated with the operation of criminal courts"); State v. Lawley, 591 P.2d 772, 773 (Wash. 1979) (finding that the state legislature may have rationally determined that "accountability for criminal behavior . . . does as much to rehabilitate, correct, and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile" in enacting punitive legislation); FELD, BAD KIDS, *supra* note 1, at 252–53; ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 47–48 (2016); Feld, *Punishment, Treatment*, *supra* note 46, at 844–47 (explaining that punishment came to be viewed as an "acceptable purpose" of juvenile court proceedings and cataloging judicial decisions highlighting accountability and punishment as legislative purposes of the juvenile justice system).

51. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 57–68 (outlining Supreme Court decisions regarding process in juvenile court, ultimately leading to a procedural and substantive convergence with criminal courts, and noting that the provision of "meager" procedural safeguards "legitimated the escalation of penalties" imposed by juvenile courts); TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 15–17 (1978).

52. TORBET ET AL., *supra* note 48, at 11–16 (discussing the juvenile court's emphasis on punishment and accountability); Feld, *Punishment, Treatment*, *supra* note 46, at 850–79 (addressing determinate sentencing in juvenile court, and providing state-specific analysis of legislative changes to juvenile codes); Feld, *Responses to Youth Violence*, *supra* note 48, at 220–28 (discussing the effects of reframing the juvenile system's purpose in terms of punishment and accountability and states' adoption of determinate and mandatory sentences).

> fender-based. Offense-based sanctions are to be proportional to the offense and have retribution or deterrence as their goals. Strategies for imposing offense-based sentences in juvenile court include blended sentences, mandatory minimum sentences, and extended jurisdiction.[53]

Several factors influence juvenile court judges' sentencing decisions. States define juvenile courts' delinquency jurisdiction based on criminal violations. The same factors that influence criminal court judges' sentences—present offense and prior record—influence juvenile court judges' sentences as well.[54] Another consistent finding is that juveniles' race affects the severity of dispositions.[55] Several factors account for racial disparities: differences in rates of offending, differential selection, and juvenile courts' context—the interaction of urban locale with minority residency.[56] As a result, juvenile courts' punitive sanctions fall disproportionately heavily on African American youths.

Delinquency case processing entails a succession of decisions by police, court personnel, prosecutors, and judges. Compounding effects of disparities produce larger cumulative differences between white youths and children of color.[57] Although the greatest disparities occur at earlier less visible stages of the process, differences compound, prior records accumulate, and blacks and other racial minorities comprise the largest plurality of youth in institutions.

53. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 210 (Joan McCord et al. eds., 2001).

54. FELD, BAD KIDS, *supra* note 1, at 264–67 (discussing the sentencing of juveniles, particularly in the context of racial disparities in sentencing); SCOTT & STEINBERG, *supra* note 1, at 229–31 (exploring sentencing factors in juvenile courts including a youth's prior criminal record).

55. FELD, BAD KIDS, *supra* note 1, at 267–72 (citing studies finding that juvenile courts detain black youths at higher rates than white youths, even when controlling for relevant variables); NAT'L RESEARCH COUNCIL, *supra* note 53, at 228 (noting "major disparities" in the involvement of minority and white youth in the juvenile justice system). *See generally* Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 445.

56. *See* Bishop & Leiber, *supra* note 55, at 453–61.

57. In 2005, Black youths comprised about 16.6% of the population aged 10–17, 31.4% of juvenile arrests, 33.2% of delinquency referrals, 38.1% of juveniles detained, 40% of youths charged, and 40% of youths placed out of home. Bishop and Leiber, *supra* note 55, at 446–53. *See also* NAT'L RESEARCH COUNCIL, *supra* note 53, at 231–34 (providing similar statistics for 1997); EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 7–10 (2000) (providing statistics for 1997–1999).

Justice system decisions amplify racial differences in processing youths. At each stage of the process, arrest, court referral, detention, petition, and sentencing decisions amplify disparities.[58] Police stop and arrest youths of color more frequently than white youths.[59] Probation officers attribute white youths' offenses to external circumstances and black youths' crimes to internal fault or character failings, which affects their referral, detention, and sentencing recommendations.[60]

Judges' focus on present offense and prior records further contribute to racial differences. Black youths commit violent crimes at higher rates than white juveniles, which account for some disparities.[61] By contrast, police arrest black youths at

58. NAT'L RESEARCH COUNCIL, *supra* note 53, at 254–57; NAT'L RESEARCH COUNCIL, *supra* note 1, at 77. *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 139; Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 363–64 (1997).

59. Factors contributing to heightened risk of arrest include: self-fulfilling deployment of police in neighborhoods, racial profiling, aggressive stop-and-frisk practices, and youths' attitude and demeanor during encounters. Bishop & Leiber, *supra* note 55, at 461 (explaining that minority youths have more exposure than white youths to "contexts of risk," including socioeconomic, geographic, and family conditions). *See generally* Bishop, *supra* note 39.

60. *See* NAT'L RESEARCH COUNCIL, *supra* note 53, at 257 (reporting that black adolescents are "being channeled to correctional facilities" while their "equally aggressive white counterparts are directed toward psychiatric treatment facilities"). *See generally* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juveniles Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

61. NAT'L RESEARCH COUNCIL, *supra* note 1, at 214–21; Piquero, *supra* note 39, at 64. The higher rates of violent offending by black youth reflect their greater exposure to risk factors associated with criminal involvement, many of which are corollaries of living in dire poverty. *See* Bryanna Hahn Fox et al., *Serious, Chronic, and Violent Offenders*, *in* JUVENILE JUSTICE SOURCEBOOK 553, 559–60 (Wesley T. Church II et al. eds., 2014); J. David Hawkins et al., *A Review of Predictors of Youth Violence*, *in* SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 106, 140–46 (Rolf Loeber & David P. Farrington eds., 1998). Concentrated poverty, limited employment opportunities, broken or unstable families, poor parental supervision, harsh discipline, abuse or maltreatment, failing schools, gang-infested neighborhoods, and community disorder contribute to higher rates of crime and violence in segregated urban areas. *See generally* NAT'L RESEARCH COUNCIL, *supra* note 39, at 96–97; MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 30 (2011); WILSON, MORE THAN JUST RACE, *supra* note 22, at 143–55 (2009) (advocating for a framework for understanding the formation and maintenance of racial inequality that integrates both cultural and structural forces); WILSON, THE TRULY DISADVANTAGED, *supra* note 22 (discussing how increasing rates of social dislocation are the product of a complex web of factors). Some inner-city black youths may be socialized in a code of the street that em-

higher rates for drug crimes, although white youths use drugs more often.[62]

Juvenile courts' context also contribute to disparities. Urban courts are more formal and sentence all delinquents more severely than do suburban or rural courts.[63] They have greater access to detention facilities, detain more minority youths, and sentence all detained youths more severely.[64] Because more minority youths live in cities, judges detain them at higher rates, and sentence them in more formal, punitive courts.[65]

Punitive sentencing laws have exacerbated racial disparities in confinement. Over the past quarter-century, the proportion of white youths removed from home declined by about ten percent, while that of black youths increased by ten percent.[66] In 1985, states removed 105,830 delinquents from their homes and placed them in residential facilities.[67] The number of youths who received out-of-home placements increased steadily during the

phasizes masculinity, risk taking, autonomy, and violent responses to challenges or disrespect. *See generally* ELIJAH ANDERSON, THE CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY (1999) (explaining that street culture has evolved a "code of the street" as a set of informal rules which govern interpersonal public behavior, particularly violence); Jeffrey A. Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371, 382 (Thomas Grisso & Robert Schwartz eds., 2000). The presence of gangs can lead to intragang violence over status and intergang violence to settle territorial disputes or perceived disrespect. *Id.* at 377–78.

62. Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending*, *in* OUR CHILDREN, THEIR CHILDREN, *supra* note 39, at 83, 95–100; NAT'L RESEARCH COUNCIL, *supra* note 1, at 219–20.

63. BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 158–62 (1993) [hereinafter FELD, JUSTICE FOR CHILDREN]; Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 185–90 (1991) [hereinafter Feld, *Justice by Geography*].

64. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1337–39 (1989) [hereinafter Feld, *Right to Counsel*]; Rodriguez, *supra* note 41 (finding that minority juveniles were treated more severely in juvenile court outcomes than their white counterparts).

65. FELD, BAD KIDS, *supra* note 1, at 271–72; SNYDER & SICKMUND, *supra* note 33; Timothy M. Bray et al., *Justice by Geography: Racial Disparity and Juvenile Courts*, *in* OUR CHILDREN, THEIR CHILDREN, *supra* note 39, at 270, 292–94 (finding that a court's rural or urban location was a significant predictor of placement decisions in juvenile cases).

66. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 141; *see generally* NELLIS, *supra* note 50 (explaining how the juvenile justice system changed focus from rehabilitation to retribution during the 1990s).

67. *See* sources cited *supra* note 66.

1990s and peaked at 168,395 delinquents in 1997—a 59% increase that reflects Get Tough Era changes and judicial sensitivity to the punitive ethos. Since the peak in the late 1990s, the number of youth removed from home has declined dramatically.[68] Although we do not know why residential placements have decreased, fiscal considerations may have driven confinement decisions.

Despite the recent decline, the racial composition of youths in confinement changed substantially. In 1985, judges removed 68.5% of non-Hispanic and Hispanic white youths, 28.5% of black youths and 2.9% of youths of other races from their homes.[69] By 2012, the proportion of white youths removed from home declined to 57.8% of all youths—a 10.7% decrease—while the proportion of black youths increased to 39.3%—an offsetting 10.8% increase.[70] Despite dramatic overall reduction of youths in confinement, the racial composition of institutionalized inmates became ever darker. During the decade, the proportion of white inmates declined from 37.2% to 33.8% of all residents, the proportion of black inmates hovered around 40%, and that of other youths of color increased.[71]

Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1988 to require states receiving federal juvenile-justice funds to examine sources of minority over-representation in detention and institutions.[72] It amended the JJDPA in 1992 to make reporting disproportionate minority confinement a core requirement and again in 2002 to require states to reduce disproportionate minority contact.[73] States responded to the 1988 JJDPA requirement by conducting evaluations and reporting disproportionate overrepresentation of minority youths in institutions.[74]

68. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 141–42; *see generally* NELLIS, *supra* note 50 (explaining how the juvenile justice system changed focus from rehabilitation to retribution during the 1990s).

69. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 143; *see generally* NELLIS, *supra* note 50 (explaining how the juvenile justice system changed focus from rehabilitation to retribution during the 1990s).

70. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 143.

71. *Id.* at 144; *see generally* NELLIS, *supra* note 50 (explaining how the juvenile justice system changed focus from rehabilitation to retribution during the 1990s).

72. 42 U.S.C. § 5633(a)(16) (2000); NAT'L RESEARCH COUNCIL, *supra* note 53, at 228–29.

73. NAT'L RESEARCH COUNCIL, *supra* note 1, at 211–12.

74. FELD, BAD KIDS, *supra* note 1, at 268; NAT'L RESEARCH COUNCIL, *supra* note 1, at 212.

Minority juveniles receive disproportionately more out-of-home placements, while white youths receive more probationary dispositions.[75] Judges commit black youths to public institutions at rates three and four times that of white youths, and send larger proportions of white youths to private residential treatment programs. Black youths serve longer terms than do white youths committed for similar offenses.[76]

Researchers have evaluated programs in community and residential settings to determine what works, how well, and at what costs. The diversity of facilities and programs, the variability of populations they serve, and the lack of control groups make it difficult to attribute positive outcomes to intervention or to sample selection bias of youths committed to them.[77] Correctional meta-analyses combine independent studies to measure effectiveness of different strategies to reduce recidivism or other outcomes. Evaluations have compared generic strategies (counseling, behavior modification, and group therapy), more sophisticated interventions and replications of brand-name programs (Functional Family Therapy (FFT) and Multisystemic Therapy (MST)), and cost-benefit appraisals of different treatments.[78] Substantial literature exists on effectiveness of probation and other forms of noninstitutional treatment.[79] Community-based programs are more likely to be run by private (usually nonprofit) service providers, to be smaller and less overcrowded, and to offer more treatment services than do publicly run institutions.[80]

Delbert Elliot developed the Blueprints for Prevention program that certifies programs as proven or promising. Proven pro-

75. POE-YAMAGATA & JONES, *supra* note 57, at 2.

76. NAT'L RESEARCH COUNCIL, *supra* note 1, at 221–22; POE-YAMAGATA & JONES, *supra* note 57, at 18–21.

77. Peter W. Greenwood & Susan Turner, *Probation and Other Noninstitutional Treatment: The Evidence Is In*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 723, 725–26.

78. *Id.* at 726–28; Doris Layton MacKenzie & Rachel Freeland, *Examining the Effectiveness of Juvenile Residential Programs*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 771, 790.

79. *See, e.g.*, Greenwood & Turner, *supra* note 77; MacKenzie & Freeland, *supra* note 78.

80. Greenwood & Turner, *supra* note 77, at 725; *see* PETER GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY 183–94 (2005) [hereinafter GREENWOOD, CHANGING LIVES] (explaining that providing programmatic support to the juvenile courts' high-risk offenders is a critical part of the government's approach to providing services for the young).

grams demonstrate reductions in problem behaviors with rigorous experimental design, continuing effects after youths leave the program, and successful replication by independent providers.[81] Although some proven programs treat delinquents, most programs aim to prevent school-aged youths' involvement with the juvenile justice system.[82] Mark Lipsey's ongoing meta-analyses report that treatment strategies such as counseling and skill-building are more effective than those adopted during the Get Tough Era that emphasize surveillance, control, and discipline.[83] The Campbell Collaboration conducted meta-analyses of rigorous empirical evaluations of treatment programs for serious delinquents in secure institutions and concluded that cognitive-behavioral treatment reduced overall and serious recidivism.[84] Cost-benefit studies use meta-analytic methods to evaluate program costs and benefits to the individual and community—recidivism reduction, costs to taxpayers, and losses for potential victims.[85] While there is a paucity of high-quality evaluations, research suggests that prevention programs—preschool enrichment and family-based interventions outside of the juvenile justice system—provide benefits that exceed their costs and improvements in education, employment, income, mental health, and other outcomes.[86]

Cumulatively, evaluations conclude that states can handle most delinquents safely in community settings with cognitive-behavioral models of change.[87] The most successful Blueprints programs—FFT and MST—focus on altering family interac-

81. NELLIS, *supra* note 50, at 83–86; MacKenzie & Freeland, *supra* note 78, at 790–91.

82. Greenwood & Turner, *supra* note 77, at 728.

83. Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124, 143–45 (2009).

84. Vicente Garrido & Luz Anyela Morales, *Serious (Violent and Chronic) Juvenile Offenders: A Systematic Review of Treatment Effectiveness in Secure Corrections*, 3 CAMPBELL SYSTEMATIC REVIEWS 1, 26 (2007), https://www.campbellcollaboration.org/media/k2/attachments/1029_Rv.2.pdf; MacKenzie & Freeland, *supra* note 78, at 793–95.

85. Brandon C. Welsh et al., *Promoting Change, Changing Lives: Effective Prevention and Intervention to Reduce Serious Offending*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 245, 262–68 (Rolf Loeber & David P. Farrington eds., 2012).

86. *Id.* at 267–70.

87. MacKenzie & Freeland, *supra* note 78, at 793–95.

tions, improving family problem-solving skills, and strengthening parents' ability to deal with their children's behaviors.[88] But effective programs require extensive and expensive staff training, for which most state and local agencies are unwilling to pay. Despite decades of research, "only about 5% of the youths who could benefit from these improved programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision."[89]

Gault mandated procedural safeguards, in part, because of conditions in training schools.[90] Cases contemporaneous with *Gault* described inmates beaten by guards, hog-tied, or becoming psychotic through prolonged isolation.[91] Recent lawsuits challenging institutional conditions reveal gang-conflict, inadequate education programs, deficient mental health and health care services, suicide, heavy reliance on solitary confinement, and inmates' sexual abuse and deaths at the hands of staff.[92]

Analysts criticize training schools as sterile and unimaginative, as inappropriate venues in which to treat juveniles, as schools for crime where children learn from more delinquent peers, and as settings in which staff and residents abuse and mistreat inmates.[93] During the 1960s and 1970s, investigators conducted in-depth ethnographic research in correctional facilities.[94] Studies in different states reported similar findings—violent environments, minimal treatment or educational programs, physical abuse by staff and inmates, make-work tasks, extensive use of solitary confinement, and the like.[95] In the ensuing decades, little has changed. States continue to confine half of all

88. NELLIS, *supra* note 50, at 84; Greenwood & Turner, *supra* note 77, at 738–40.

89. Greenwood & Turner, *supra* note 77, at 744.

90. *In re* Gault, 387 U.S. 1, 27–28 (1967).

91. Barry Krisberg, *Juvenile Corrections: An Overview*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 748, 751–52.

92. *Id.* at 754–57.

93. MacKenzie & Freeland, *supra* note 78, at 775.

94. *See generally* CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX (1976) (conducting ethno-graphic research on correctional facilities); BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS (1977) [hereinafter FELD, NEUTRALIZING INMATE VIOLENCE] (examining juvenile inmate subculture as influenced by organizational structure of correctional institutions).

95. *See generally* BARTOLLAS ET AL., *supra* note 94 (reporting on juvenile victimization in correctional settings); FELD, NEUTRALIZING INMATE VIOLENCE,

youths in overcrowded facilities, more than three-quarters in large facilities, and more than one-quarter in institutions with 200 to 1000 inmates.[96]

Over the past four decades, juvenile inmates have filed nearly sixty lawsuits that challenge conditions of confinement, asserting that they violate the Eighth Amendment's prohibition on cruel and unusual punishment, and deny their Fourteenth Amendment right to treatment.[97] Eighth Amendment litigation is proscriptive, defines constitutionally impermissible practices, and delineates the minimum floor below which institutional conditions may not fall. Judicial opinions from around the country describe youths housed in dungeon-like facilities, beaten with paddles, drugged for social control, locked in solitary confinement, housed in overcrowded and dangerous conditions, and other punitive practices.[98] The Fourteenth Amendment litigation is prescriptive and asserts that the denial of criminal procedural protections imposes a substantive right to treatment and creates a duty to provide beneficial programs.[99]

Do institutional treatment programs reduce recidivism, enhance psychological well-being, improve educational attainments, provide vocational skills, or boost community readjustment? There are no standard measures of recidivism—rearrest, reconviction, or recommitment—and most states do not collect data on programs' effectiveness or recidivism, which complicates judges' ability to distinguish treatment from punishment.[100] Despite these limitations, evaluations of training schools provide scant evidence of effective treatment.[101] Programs that emphasize deterrence or punishment—institutions and boot camps—

supra note 94 (explaining how organizational features contribute to inmates' incentive to use violence and provide a conducive environment in which to carry out violent activities); Krisberg, *supra* note 91 (describing the history of juvenile corrections as plagued with abuse, tragedy, and limited positive results).

96. PARENT ET AL., *supra* note 37, at 7–8; SNYDER & SICKMUND, *supra* note 33; MacKenzie & Freeland, *supra* note 78, at 774.

97. FELD, BAD KIDS, *supra* note 1, at 274–77; NELLIS, *supra* note 50, at 113–15; Krisberg, *supra* note 91, at 753–54.

98. FELD, BAD KIDS, *supra* note 1, at 275–76; Krisberg, *supra* note 91, at 754–55.

99. FELD, CASES AND MATERIALS, *supra* note 29, at 969–81.

100. Greenwood & Turner, *supra* note 77, at 743–44; Krisberg, *supra* note 91, at 761–62.

101. FELD, BAD KIDS, *supra* note 1, at 279–83; Krisberg, *supra* note 91, at 762–64.

may lead to increased criminal activity following release.[102] Correctional boot camps reflect punitive policies and emphasize physical training, drill, and discipline. Despite their popularity, they do not reduce recidivism and some studies report increases.[103] Evaluations of training schools report that police rearrest half or more juveniles for a new offense within one year of release.[104] More than half of incarcerated youth have not completed the eighth grade and more than two-thirds do not return to school following release.[105]

a. Juvenile Corrections Policy: What Should a Responsible Legislature Do?

Justice system involvement impedes youths' transition to adulthood and aggravates minority youths' social disadvantage.[106] Like the Hippocratic Oath, the first priority of juvenile court intercession should be harm reduction: to avoid or minimize practices that leave a youth worse off.[107] Adolescence is a developmentally fraught period of rapid growth and personality change. Most delinquents will outgrow adolescent crimes without extensive treatment and interventions should be short-term, community-based, and as minimally disruptive as possible. "The best-known cure for youth crime is growing up. And the strategic logic of diversion and minimal sanctions is waiting for maturation to transition a young man from male groups to intimate pairs and from street corners to houses and workplaces."[108]

More than four decades ago, the Massachusetts Department of Youth Services (DYS) closed its training schools and replaced them with community-based alternatives—group homes, mental

102. MacKenzie & Freeland, *supra* note 78, at 794.

103. NELLIS, *supra* note 50, at 57–58, 84–85; MacKenzie & Freeland, *supra* note 78, at 784.

104. SNYDER & SICKMUND, *supra* note 33; Krisberg, *supra* note 91, at 763; McKenzie & Freeland, *supra* note 78, at 729.

105. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 149; NELLIS, *supra* note 50, at 65–67.

106. Franklin E. Zimring, *Minority Overrepresentation: On Causes and Partial Cures*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 169, 169 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

107. *Id.* at 174.

108. Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 106, at 216, 228.

health facilities, and contracts for services for education, counseling, and job training.[109] Evaluations reported that more than three-quarters of DYS youths were not subsequently incarcerated, juvenile arrest rates decreased, and the proportion of adult prison inmates who had graduated from juvenile institutions declined.[110] More recently, Missouri has replicated and expanded on the Massachusetts experiment and used continuous case management, decentralized residential units, and staff-facilitated positive peer culture to provide a rehabilitative environment.[111] Although proponents claim reduction in recidivism rates, no rigorous evaluations demonstrate its effectiveness.[112] Other states have adopted deinstitutionalization strategies. The California Youth Authority has closed five large institutions and reduced its incarcerated population from about 10,000 juveniles to around 1600—changes driven in part by fiscal considerations.[113] New York's Office of Children and Family Services (OCFS) announced plans to close six youth correctional facilities after a study found that nearly eighty percent of young people released from its facilities were rearrested within three years.[114]

b. Punishment or Prevention

Delinquency prevention programs provide an alternative to control or suppression strategies and reflect the adage, a stitch in time saves nine. Prevention programs intervene with children and youths before they engage in delinquency. Risk-focused prevention identifies factors that contribute to offending and em-

109. JEROME MILLER, LAST ONE OVER THE WALL 177–90 (1991); *see generally* FELD, NEUTRALIZING INMATE VIOLENCE, *supra* note 94 (describing how the Department of Youth Services in Massachusetts became a highly visible symbol of a new approach to juvenile corrections by repudiating training schools and advocating for community-based services).

110. BARRY KRISBERG ET AL., WORKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES (1989); MILLER, *supra* note 109, at 218–26.

111. NAT'L RESEARCH COUNCIL, *supra* note 1, at 416.

112. *Id.* at 422–24; NELLIS, *supra* note 50, at 86–87.

113. Krisberg, *supra* note 91, at 748.

114. Press Release, N.Y. State Office of Children & Family Servs., New York Office of Children & Family Services Accelerating Transformation of State Juvenile Justice System (Jan. 11, 2008), https://ocfs.ny.gov/main/documents/press/NYS_OCFS_PRESS_011108_Accelerating_juvenile_justice_transformation.pdf.

ploys programs to ameliorate or counteract them. Some interventions apply to communities and others to individuals, and their families, at risk of becoming offenders.[115]

Some prevention strategies identify individual risk factors—low intelligence or delayed school progress—and provide programs to improve cognitive skills, school readiness, and social skills.[116] The Perry Preschool project—an enhanced Head Start program for disadvantaged black children—aims to provide intellectual stimulation, improve critical-thinking skills, and enhance later school performance.[117] Cost-benefit analyses and evaluations report that larger proportions of experimental youths graduated from high school, received postsecondary education, had better employment records (higher income and paid taxes), had fewer arrests, and reduced public expenditures for crime and welfare.[118]

Other delinquency prevention programs address the families in which at-risk youths live. Family-based risk factors include poor child-rearing techniques, inadequate supervision, lack of clear norms, and inconsistent or harsh discipline.[119] Home visitation, nurse home visitation, and parent management training can produce positive outcomes in the lives of children.[120] Family interventions for adjudicated delinquents that operate outside of the juvenile justice system—MST, FFT, and multidimensional treatment foster care (MTFC)—also produce positive outcomes.[121]

David Farrington and Brandon Welsh, in *Saving Children From a Life of Crime*, provide a comprehensive review of risk factors and effective interventions to prevent delinquency.[122] They identify individual-, family-, and community-level factors and effective programs to ameliorate delinquency. At each level,

115. DAVID P. FARRINGTON & BRANDON C. WELSH, SAVING CHILDREN FROM A LIFE OF CRIME: EARLY RISK FACTORS AND EFFECTIVE INTERVENTIONS 93–97 (2007); GREENWOOD, CHANGING LIVES, *supra* note 80, at 5–6; Brandon C. Welsh, *Delinquency Prevention*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 395, 395 [hereinafter Welsh, *Delinquency Prevention*]; GREENWOOD, *supra* note 80, at 5–6.

116. Welsh, *Delinquency Prevention*, *supra* note 115, at 397–98.

117. *Id.* at 398–99.

118. *Id.* at 398.

119. Welsh et al., *supra* note 85, at 248.

120. GREENWOOD, CHANGING LIVES, *supra* note 80, at 51; Welsh et al., *supra* note 85, at 248–51.

121. GREENWOOD, CHANGING LIVES, *supra* note 80, at 70–73; Welsh et al., *supra* note 85, at 249–50.

122. FARRINGTON & WELSH, *supra* note 115, at 395.

they report proven or promising programs to improve youths' lives and recommend risk-focused evidence-based prevention programs.[123]

Peter Greenwood, in *Changing Lives: Delinquency Prevention as Crime-Control Policy*, provides a comprehensive review of prevention programs. He focuses on interventions across the developmental spectrum, from infancy and early childhood through elementary-school-aged children, and into adolescence. Some prevention programs have been adequately evaluated and clearly do *not* work—for example, Drug Abuse Resistance Education (DARE).[124] Many prevention programs have no evidentiary support; they either have not been evaluated or used such flawed design that researchers could draw no conclusions.[125] Greenwood uses cost-benefit analyses to evaluate various delinquency and prevention programs. While cost-benefit analyses could rationalize delinquency policy and resource-allocation decisions, politicians do not embrace prevention programs because they lack a punitive component and do not demonstrate immediate impact.[126] While highly visible crimes evoke fear and elicit a punitive response, delinquency prevention takes longer to realize and has a more diffuse impact.[127] Despite effective programs, delinquency prevention "holds a small place in the nation's response to juvenile crime. Delinquency control strategies operated by the juvenile justice system dominate."[128]

3. Conclusion

Progressive reformers created juvenile courts to divert youths from the criminal justice system and rehabilitate them in a separate system. Politicians in the Get Tough Era assaulted the idea that children are different, repudiated the court's welfare role, and rejected its premise to keep youths out of prisons. Despite their punitive turn, changes in juvenile justice were less extreme than the mass incarceration that overtook the adult criminal justice system.

While juvenile courts served their diversionary function, lawmakers sharply shifted their interventions from rehabilitation toward offense-based punitive policies. During the last third

123. *Id.*
124. GREENWOOD, CHANGING LIVES, *supra* note 80, at 90–96.
125. *Id.* at 84.
126. *Id.* at 167.
127. *Id.* at 168.
128. Welsh, *Delinquency Prevention*, *supra* note 115, at 409.

of the twentieth century, lawmakers abandoned even nominal commitment to treatment in favor of punishment. They changed juvenile codes' purpose from care and treatment to accountability and punishment. They amended delinquency sentencing statutes to define length and location of confinement based on offense. In practice, judges focused primarily on present offense and prior record when making dispositions. All of these punitive changes had a disproportionate impact on black youths and other children of color. Although most delinquents received probation, between 1987 and 1997, institutional confinement rose by fifty-four percent. Training schools more closely resembled prisons than clinics and seldom improved delinquents' life trajectories. Training schools are the least effective way to respond to youths' needs. Meta-analyses and other evaluations identify effective programs and most of them are not administered by juvenile justice personnel.

I emphasize juvenile courts' explicitly punitive turn because it implicates their procedural safeguards. The Court in *McKeiver v. Pennsylvania* denied delinquents a right to a jury and *In re Gault* granted only watered-down safeguards because it assumed that delinquents received treatment. But as juvenile courts punish youths, their justification for reduced safeguards evaporates. Finally, the turn toward punishment falls most heavily on black youths. At every critical decision, black youths receive more punitive sanctions than white youths. Differences in rates of violence by race contribute to some disparity in justice administration. But many black youths experience very different childhoods than do most white youths.[129] Public policies and private decisions created segregated urban areas and consigned children of color to live in concentrated poverty with criminogenic consequences. Race affects decision-makers' responses to children of color: the way they see them, evaluate them, and dispose of them. It is not coincidental that the turn from welfare to punishment and from rehabilitation to retribution occurred as African Americans gained civil rights and the United States

129. *See generally* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 87–88 (examining the causes of overrepresentation of minority youths in the juvenile justice system); ROBERT PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS (2015) (describing the growing inequality gap between children of high school and college educated parents in their ability to achieve the American Dream).

briefly flirted with integration and inclusionary, rather than exclusionary, racial policies.[130]

B. JUVENILE COURT PROCEDURES: ADOLESCENTS' COMPETENCE TO EXERCISE RIGHTS

Progressive reformers created juvenile courts to divert children from criminal courts and to treat rather than punish them. Envisioned as a welfare agency, juvenile courts rejected criminal procedural safeguards and dispensed with formalities like lawyers, juries, and rules of evidence.[131] In 1967, *In re Gault* began to transform the juvenile court from a social welfare agency into a more formal legal institution.[132] The Court emphasized juvenile courts' criminal elements—youths charged with crimes facing institutional confinement, stigma of delinquency labels and records, judicial arbitrariness, and high rates of recidivism—and required proof of guilt using fair procedures. Although *Gault* did not adopt adult criminal procedural protections, it precipitated an operational convergence between juvenile and criminal courts. Subsequent decisions further emphasized delinquency proceedings' criminal character. *In re Winship* required states to prove delinquency by the criminal standard—proof beyond a reasonable doubt—rather than by the lower civil standard of proof.[133] *Breed v. Jones* posited a functional equivalency between juvenile and criminal trials and applied the Fifth Amendment's Double Jeopardy Clause to delinquency prosecutions.[134] However, *McKeiver v. Pennsylvania* posited a benevolent juvenile court, denied delinquents a constitutional right to a jury trial, and rejected procedural parity between delinquency and criminal proceedings.[135] Punitive changes have eroded *McKeiver*'s rationale and the absence of a jury adversely affects accurate fact-finding, the presence and performance of counsel, and increases the likelihood of wrongful convictions.[136]

130. FELD, BAD KIDS, *supra* note 1, at 79; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 155.

131. FELD, BAD KIDS, *supra* note 1 at 80; *see generally* TANENHAUS, *supra* note 3 (explaining how child advocates built up a separate court system for juveniles).

132. Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 141–42; FELD, BAD KIDS, *supra* note 1, at 80–81; SCOTT & STEINBERG, *supra* note 1, at 89.

133. *In re* Winship, 397 U.S. 358 (1970).

134. Breed v. Jones, 421 U.S. 519 (1975).

135. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

136. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground*

Juvenile courts handle about half the youths referred to them informally without filing a formal petition or proceeding to trial.[137] Court intake workers or prosecutors perform a triage function and conduct a rapid assessment to determine whether a youth's crime or welfare requires juvenile court attention or can be discharged or referred to others for care. Diversion minimizes formal adjudication and provides supervision or services in the community. Proponents of diversion contend that it is an efficient gatekeeping mechanism, avoids labeling minor offenders, and provides flexible access to community resources that referral after a formal process might delay.[138] Most youths desist after one or two contacts and diversion conserves judicial resources for those youths who distinguish themselves by recidivism.[139]

Critics of diversion contend that it widens the net of social control and exposes to informal supervision youths that juvenile courts otherwise might have ignored.[140] Probation officers or prosecutors who do preliminary screening of cases make low-visibility decisions which are not subject to judicial or appellate review.[141] Many states do not use formal screening or assessment tools and discretion at intake constitutes the most significant source of racial disparities in case processing.[142] Although the criteria and administration of diversion raise many significant policy concerns, cases handled informally do not raise the procedural issues of formal adjudication.

During the Get Tough Era, juvenile courts increasingly punished delinquents and increased their need for protection from the state. *Gault* made delinquency hearings more formal, complex, and legalistic, and required youths to participate in making

for Wrongful Convictions?, 34 NORTHERN KY. L. REV. 257, 260 (2007); Feld, *Constitutional Tension*, *supra* note 17, at 1222–24. *See generally* Gardner, *Punitive Juvenile Justice*, *supra* note 46 (arguing that "the continued homage to *McKeiver* in an era of punitive juvenile justice is the misguided result of judicial inattention to the distinction between punitive and rehabilitative dispositions").

137. SNYDER & SICKMUND, *supra* note 33; Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Versus Formal Processing*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 55, at 573, 586.

138. Mears, *supra* note 137, at 585.

139. *Id.* at 594.

140. *Id.* at 596.

141. *Id.* at 596–97.

142. NAT'L RESEARCH COUNCIL, *supra* note 53, at 6; NAT'L RESEARCH COUNCIL, *supra* note 1, at 221; Bishop, *supra* note 39, at 39–40; Mears, *supra* note 137, at 587.

difficult decisions. Developmental psychologists question whether younger juveniles possess competence to stand trial and whether adolescents have the ability to exercise *Miranda* rights or to waive counsel.[143] Despite clear developmental differences between youths and adults in understanding, maturity of judgment, and competence, the Court and most states do not provide either additional safeguards to protect them from their immaturity *or* procedural parity with criminal defendants, thus increasing the likelihood of excessive interventions and erroneous outcomes.

This section examines juvenile court practices and youths' competence to exercise procedural rights: *Miranda* rights, competence to stand trial, access to counsel, and jury trial. Subsection 1 analyzes juveniles' ability to exercise *Miranda* rights. It contrasts states' use of adult legal standards with psychological research that describes juveniles' questionable competence, heightened vulnerability during interrogation, and increased likelihood to make false confessions. Subsection 2 reviews legal standards and developmental research on adolescents' competence to stand trial. Subsection 3 examines juveniles' competence to waive counsel, the impact of waivers on delivery of legal services, and appellate courts' inability to oversee juvenile justice administration. Subsection 4 examines juveniles' right to a jury trial. *McKeiver*'s denial of a jury undermines accurate fact-finding, makes it easier to convict delinquents than criminal defendants, and heightens risks of wrongful convictions. States use these flawed convictions to punish delinquents, to enhance criminal sentences, and to impose collateral consequences.

1. Police Interrogation of Juveniles

The Supreme Court has decided more cases about interrogating youths than any other issue of juvenile justice.[144] Although it repeatedly has questioned juveniles' ability to exercise

143. THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 161 (2004) [hereinafter GRISSO, DOUBLE JEOPARDY]; Thomas Grisso, *What We Know About Youths' Capacities As Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 139 [hereinafter Grisso, *What We Know*]; Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities As Trial Defendants*, 27 L. & HUM. BEHAV. 333, 335 (2003) [hereinafter Grisso et al., *Juveniles' Competence to Stand Trial*].

144. J.D.B. v. North Carolina, 564 U.S. 261 (2011); Yarborough v. Alvarado, 541 U.S. 652 (2004); Fare v. Michael C., 442 U.S. 707 (1979); *In re* Gault, 387 U.S. 1 (1967); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S.

Miranda rights or make voluntary statements, it does not require special procedures to protect them. Rather, *Fare v. Michael C.* endorsed the adult standard—knowing, intelligent, and voluntary under the totality of circumstances—to gauge juveniles' *Miranda* waivers.[145]

Most states' laws equate juveniles with adults even though formal equality results in practical inequality. By contrast, developmental psychological research on juveniles' competence to exercise *Miranda* rights questions adolescents' ability to understand warnings or exercise them effectively.[146] Empirical research on how youths respond to interrogation practices designed for adults highlights how developmental immaturity and susceptibility to manipulation increase juveniles' likelihood to confess falsely.

a. The Law on the Books

In the decades prior to *Miranda*, the Court cautioned trial judges to examine closely how youthfulness affected voluntariness of confessions and found lengthy questioning of youth and the absence of a lawyer or parent could render confessions involuntary.[147] *Gault* reiterated concern that youthfulness adversely

596 (1948). *See generally*, BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013) [hereinafter FELD, KIDS, COPS, AND CONFESSIONS] (discussing how youths' prior record and responses influence interrogations and how waivers of *Miranda* rights affect case processing); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395 (2013) [hereinafter Feld, *Behind Closed Doors*] (examining how police interrogation raises difficult legal, normative, and policy questions, especially with regards to interrogation of juveniles).

145. *Michael C.*, 422 U.S. at 725.

146. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 7–8; Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) [hereinafter Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*].

147. *Haley*, 332 U.S. at 599–601 ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens . . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic . . . . The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction."); *Gallegos*, 370 U.S. at 54 ("[A] 14-year-old boy, no matter how sophisticated . . . is not equal to the police in knowledge and understanding . . . and . . . is unable to know how to protect his own interests or how to get the benefits of his constitutional rights . . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.").

affected the reliability of juveniles' statements.[148] It ruled that delinquency proceedings based on criminal allegations that could lead to institutional confinement "must be regarded as 'criminal' for purposes of the privilege against self-incrimination."[149] It recognized that the Fifth Amendment contributes to accurate factfinding *and* maintains the adversarial balance between (and protects the individual from) the State.[150] *Gault* assumed that youths could exercise rights and participate in the legal process.

Fare v. Michael C. departed from the Court's earlier concerns about youths' vulnerability and held that the legal standard used to evaluate adults' waivers—knowing, intelligent, and voluntary under the totality of the circumstances—governed juveniles' waivers as well.[151] *Michael C.* reasoned that *Miranda* provided an objective basis to evaluate waivers, denied that children's developmental differences demanded special protections, and required them to assert rights clearly.[152]

Miranda provided that if police question a suspect who is in custody—arrested or "deprived of his freedom of action in any significant way"—they must administer a warning.[153] The Court in *J.D.B. v. North Carolina* considered whether a thirteen-year-

148. *Gault*, 387 U.S. at 52 ("[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."); *see also* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 146, at 1137 ("*Gault* recognized that even greater protection might be required where juveniles are involved, since their immaturity and greater vulnerability place them at a greater disadvantage in their dealings with the police.").

149. *Gault*, 387 U.S. at 49–50.

150. *Id.* at 47. The Court recognized a number of significant benefits of the Fifth Amendment privilege against self-incrimination:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

Id.

151. Fare v. Michael C., 442 U.S. 707, 724–25 (1979); FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 35. The Court decided *Michael C.* as a *Miranda* case rather than as a juvenile interrogation case. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 449 (2006).

152. *Michael C.*, 442 U.S. at 724–25; FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 35; Feld, *Behind Closed Doors*, *supra* note 144.

153. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

old juvenile's age affected the *Miranda* custody analysis.[154] The Court concluded that age was an objective factor that would affect how a young person might experience restraint.[155] *J.D.B.* recognized that juveniles could feel restrained under circumstances in which an adult might not, and drew on *Roper* and *Graham*'s diminished responsibility rationale to emphasize youths' immaturity, inexperience, and heightened vulnerability during interrogation.[156]

Despite *J.D.B.*'s renewed concern about youths' vulnerability, the vast majority of states use the same *Miranda* framework for juveniles and adults.[157] *Miranda* only requires that suspects understand the words of the warning and not collateral consequences of a waiver. Most states do not require a parent or lawyer to assist juveniles.[158] When trial judges evaluate *Miranda* waivers, they consider characteristics of the offender (age, education, IQ, and prior police contacts) and the context of interrogation (location, methods, and length of interrogation).[159] The leading cases provide long lists of factors for trial judges to consider.[160] Appellate courts identify many relevant elements, do not assign controlling weight to any one variable, and defer to trial judges' decisions whether a juvenile made a valid waiver.[161]

Without decisive factors, *Michael C.* provides no meaningful check on judges' discretion to find that youths waived their rights. Judges regularly find valid waivers made by children as young as ten or eleven years of age, with limited intelligence or significant mental disorders, with no prior police contacts, and without parental assistance.[162]

154. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

155. *Id.* at 272 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality.").

156. *Id.*

157. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 41.

158. *Id.* at 42; Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 105, 105–06 [hereinafter Feld, *Juveniles' Waiver of Legal Rights*].

159. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 42–43; Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 158.

160. Fare v. Michael C., 441 U.S. 707 (1979); FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 42–43.

161. Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 183; FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 43.

162. *See In re* Joseph H., No. E059942, 188 Cal.Rptr.3d 171, at *176, *186–87 (Cal. Ct. App. 2015) (holding that Joseph H., a ten-year-old with low intelli-

About ten states presume that most juveniles lack capacity to waive *Miranda* and require a parent or other adult to assist them.[163] Some states require a parent for juveniles younger than fourteen years, presume that those fourteen or sixteen years or older are incompetent to waive, or oblige police to offer older youths an opportunity to consult.[164] Most commentators endorse parental presence, even though many question the value of their participation.[165] Parents' and children's interests may conflict,

gence and Attention Deficit Hyperactivity Disorder, voluntarily waived his Miranda rights and such a waiver did not violate due process); FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 43; Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 158, at 105.

163. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 43; Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1287 n.65 (2004) (listing Colorado, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Montana, North Carolina, Oklahoma, and West Virginia as among the states with parental presence requirements); Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 158, at 116–18 (discussing various states' per se rules for "assur[ing] the validity of a juvenile's waiver of rights or confession"); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 36–37 (2006); King, *supra* note 151, at 451–52.

164. *See, e.g.*, *In re* BMB, 955 P.2d 1302, 1312–13 (Kan. 1998) (holding that "a juvenile under 14 years of age must be given an opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination"); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (holding that for juveniles under the age of fourteen, a parent or interested adult must be present and have "had the opportunity to explain [the juvenile's] rights to [him or her] so that [he or she] understands the significance of waiver of these rights"); State v. Presha, 748 A.2d 1108, 1114 (N.J. 2000) (holding that "when a parent or guardian is absent from an interrogation involving a juvenile [under the age of fourteen], any confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable").

165. States assume that a parent will understand rights, provide legal advice, mitigate coercive influences, prevent unreliable statements, and reduce feelings of isolation. Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 158, at 117–18; *see* Lisa M. Krzewinski, *But I Didn't Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 374–77 (2002) (outlining several states' approaches to safeguarding juveniles' Miranda rights and expressing the view that those approaches which "render inadmissible any statement by a juvenile made during the interrogation outside the presence of an interested adult, such as a parent or attorney" are the "best way to provide protection for a juvenile"). *See generally* Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 153–55 (G. Daniel Lassiter ed., 2004) (endorsing a parental presence requirement even though interrogators reduce parents' role to passive observer). Parents may pressure their children to tell the truth and confess. *See, e.g.*, FELD, KIDS, COPS,

for example, if the juvenile assaulted or stole from a parent, victimized another sibling, or if the parent is a suspect. Parents may have a financial conflict of interest if they have to pay for their child's attorney; they may have an emotional reaction to their child's current arrest or chronic trouble; they may expect their child to tell the truth, urge her to stop lying, or physically threaten her to confess. Additionally, parents may not understand legal rights or consequences of waiver any better than their child.

If youths differ from adults in understanding *Miranda*, conceiving of or exercising rights, or susceptibility to pressure, then the law establishes a standard that few can meet and enables states to take advantage of their limitations. *Miranda* requires police to advise suspects of their rights, but some juveniles do not understand the words or concepts. Psychologists studied the vocabulary, concepts, and reading levels required to understand warnings and concluded that they exceed many adolescents' abilities.[166] Key words require an eighth-grade level of education and most juveniles thirteen years or younger cannot grasp their meaning.[167] Some concepts—the meaning of a *right*, the term *appointed* to secure counsel, and *waiver*—require a high school education and render *Miranda* incomprehensible.[168] Many juveniles cannot define critical words in the warning.[169] Special dumbed-down juvenile warnings are often longer and more difficult to understand.[170] If demanding reading level or verbal complexity makes a warning unintelligible, then it cannot serve its protective function.

Psychologist Thomas Grisso has studied juveniles' exercise of *Miranda* for more than four decades. He reports that many, if not most, do not understand the warning well enough to make a

AND CONFESSIONS, *supra* note 144, at 44, 200–06; THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 180–81 (1981) [hereinafter GRISSO, JUVENILES' WAIVER OF RIGHTS].

166. *See* Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCHOL., PUB. POL'Y & L. 63, 72–85 (2008) [hereinafter Rogers, *Comprehensibility and Content*]; Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 135 (2008) [hereinafter Rogers, *Language of* Miranda *Warnings*].

167. Rogers, *Comprehensibility and Content*, *supra* note 166, at 78; Rogers, *Language of* Miranda *Warnings*, *supra* note 166.

168. *See* Rogers, *Comprehensibility and Content*, *supra* note 166, at 78.

169. *See id.*

170. *See id.*

valid waiver.[171] Although age, intelligence, and prior arrests correlated with *Miranda* comprehension, more than half of juveniles, as contrasted with less than one-quarter of adults, did not understand at least one of the four warnings and only one-fifth of juveniles, as compared with twice as many adults, grasped all four warnings.[172] Juveniles fifteen years of age or younger exhibited significantly poorer comprehension of *Miranda* rights, waived more readily, and confessed more frequently than did older youths.[173] Other research reports that older youths understand *Miranda* about as well as adults, but many younger juveniles do not understand the words or concepts.[174] Adolescents with low IQs perform more poorly than adults with low IQs, and delinquent youths typically have lower IQs than do those in the general population.[175] The higher prevalence of mental disorders compounds juveniles' cognitive limitations, although police seldom are able to assess youths' impairments when they question them.[176]

Even youths who understand *Miranda*'s words may be unable to exercise its rights. Juveniles do not appreciate the function or importance of rights as well as adults and they are less competent defendants.[177] They have greater difficulty conceiving of a right as an absolute entitlement that they can exercise without adverse consequences.[178] Juveniles view rights as something

171. GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 128–30; Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 146, at 1152–54; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 335; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 11 (1997) [hereinafter Grisso, *Trial Defendants*].

172. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 51–52; *see* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 146, at 1151–54.

173. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 52–53; *see* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 146, at 1151–54.

174. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 50–57 (reviewing research literature).

175. *Id.* at 53.

176. *Id.* at 52–53.

177. *See* GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 128–30; Grisso, *Trial Defendants*, *supra* note 171 (distinguishing between understanding words of warning and appreciating the functions of rights); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 Vill. L. Rev. 629, 649–53 (2003) (reviewing social psychological research and juveniles' limited understanding of the concept of "rights" as entitlements to be exercised).

178. *See, e.g.*, Thomas Grisso, *Juveniles' Competence to Stand Trial: New Questions for an Era of Punitive Juvenile Justice Reform*, *in* MORE THAN MEETS

that authorities allow them to do, but which they may unilaterally retract or withhold.[179] They misconceive the lawyer's role and attorney-client privilege.[180] Generally, youths with poorer understanding of rights waive them at higher rates than those with better comprehension.[181]

Miranda characterized custodial interrogation as inherently compelling because police dominate the setting and create psychological pressures to comply.[182] The differing legal and social status of youths and adults render children questioned by authority figures more suggestible. We expect youths to answer questions posed by police, teachers, parents, and other adults; social expectations and children's lower status increase their vulnerability during interrogation.

Juveniles may waive rights and admit responsibility because they believe they should obey authority, acquiesce more readily to negative pressure or critical feedback, and accede more willingly to suggestions.[183] They impulsively confess to end

THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 23, 29–30 (Patricia Puritz et al. eds., 2002) [hereinafter Grisso, *Juveniles' Competence to Stand Trial*]; GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 130; Grisso, *What We Know*, *supra* note 143, at 148–49; Grisso, *Trial Defendants*, *supra* note 171 ("[A] larger proportion of delinquent youths bring to the defendant role an incomplete comprehension of the concept and meaning of a right as it applies to adversarial legal proceedings.").

179. *See, e.g.*, GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 130.

180. *See id.* at 128.

181. *See generally* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144 (discussing the correlation of juvenile waiver rates with comprehension of legal rights).

182. *See* Miranda v. Arizona, 384 U.S. 436, 455–58 (1966). *See generally* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 345 (2003) ("[I]nterrogative suggestibility [is defined] as '[t]he extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected.'" (quoting Gisli H. Gudjonsson & Noel K. Clark, *Suggestibility in Police Interrogation: A Social Psychological Model*, 1 SOCIAL BEHAVIOUR 83, 84 (1986))).

183. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1005 (2004) (finding that juveniles' "eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making," puts them at greater risk to confess falsely); Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8 (2010) ("[Y]outh under age 15 . . . are more likely to believe that they should waive their rights and tell what they have done, partly because they are still young enough to believe that they should never disobey authority."). Juveniles

an interrogation, rather than consider long-term consequences.[184]

The Court requires suspects to invoke *Miranda* rights clearly and unambiguously.[185] However, some groups of people—juveniles, females, or racial minorities—may speak indirectly or tentatively to avoid conflict with those in power.[186] *Davis v. United States* recognized that to require suspects to invoke rights clearly and unambiguously could prove problematic for some.[187] If a suspect thinks she has invoked her rights, but police disregard it as an ambiguous request, then she may feel overwhelmed by their indifference and succumb to further questioning.

b. The Law in Action

Research on police interrogation reports that about eighty percent of adults and ninety percent of juveniles waive their *Miranda* rights.[188] The largest empirical study of juvenile interrogations reported that 92.8% waived.[189] Juveniles' higher waiver rates may reflect lack of understanding or inability to invoke *Miranda* effectively.[190] As with adults, youths with prior felony arrests invoked their rights more often than those with fewer or less serious police contacts.[191] Youths who waived at prior arrests may have learned that they derived no benefit from cooperating, spent more time with lawyers, and gained greater understanding.

are more vulnerable to suggestion during questioning than adults. *See* GUDJONSSON, *supra* note 182, at 381.

184. *See* GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 158–59; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 357.

185. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Davis v. United States, 512 U.S. 452, 459 (1994).

186. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 318 (1993).

187. *Davis*, 512 U.S. at 460 ("[R]equiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.").

188. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 94; RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 280 (2008).

189. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 94; Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1, 12 (2013).

190. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 95–96.

191. *Id.* at 98–101; Feld, *Behind Closed Doors*, *supra* note 144, at 431.

Once officers secure a juvenile's waiver, they question him just like an adult. They employ the same maximization and minimization strategies used with adults to overcome young suspects' resistance and to enable them to admit responsibility.[192] Maximization techniques intimidate suspects and impress on them the futility of denial; minimization techniques provide moral justifications or face-saving alternatives to enable them to confess.[193] Despite youths' greater susceptibility, police do not incorporate developmental differences into the tactics they employ.[194] They do not receive special training to question juveniles and use the same tactics as with adults.[195] Techniques designed to manipulate adults—aggressive questioning, presenting false evidence, and using leading questions—create unique dangers when employed with youths.[196]

Some states require a parent to assist juveniles in the interrogation room although analysts question their protective role.[197] Parents—as adults—may have marginally greater un-

192. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 110; Kassin et al., *supra* note 183, at 12.

193. *See, e.g.*, FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 110, 126; Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 223 (2005) (discussing various interrogation techniques); Kassin et al., *supra* note 183, at 12 (explaining that maximization tactics "convey the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless."). Minimization techniques "provide the suspect with moral justification and face-saving excuses for having committed the crime in question. Using this approach, the interrogator offers sympathy and understanding; normalizes and minimizes the crime." Kassin et al., *supra* note 183, at 14.

194. Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 291 (2006). *See generally* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144 (discussing police's use of routine interrogation tactics with all suspects).

195. Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 243–46 (2006). *See generally* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144 (discussing lack of special training for juvenile interrogation).

196. David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 671–77 (2002).

197. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 43–44; GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 165, at 18; Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685, 687 (2008).

derstanding of *Miranda* than their children, but both share misconceptions about police practices.[198] Often parents do not provide useful legal advice, they increase pressure to waive rights, and many urge their children to tell the truth.[199] Parents may be emotionally upset or angry at their child's arrest, believe that confessing will produce a better outcome, or may think their child should respect authority or assume responsibility. If a parent is present, police either enlist them as allies in the interrogation or neutralize their presence and render them as passive observers.[200] In the vast majority of interrogations that parents attended in a pertinent study, parents did not participate after police gave their child a *Miranda* warning, sometimes switched sides to become active allies of the police, and rarely played a protective role.[201]

c. Vulnerability and False Confessions

Research on false confessions underscores juveniles' unique vulnerability.[202] Younger adolescents are at greater risk to confess falsely than older ones; in one study, police obtained more than one-third (thirty-five percent) of proven false confessions from suspects younger than eighteen.[203] In another study, false confessions occurred in fifteen percent of cases, but juveniles accounted for forty-two percent of all false confessors and two-thirds (sixty-nine percent) of those aged twelve to fifteen confessed to crimes they did not commit.[204] Significantly, research on exonerated juveniles who confess falsely involves only the small group of youths prosecuted as adults. This reflects the seriousness of their crimes, the greater pressure on police to solve them, and the longer period available to youths and their attorneys to correct the errors.

198. Woolard et al., *supra* note 197, at 688.

199. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 44–45; Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 181.

200. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 200–03.

201. *Id.* at 203–06.

202. Drizin & Leo, *supra* note 183, at 945; Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010). *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (discussing the unique vulnerability of juveniles in police interrogations and resulting false confessions).

203. *See* Drizin & Leo, *supra* note 183, at 945.

204. *See* Gross et al., *supra* note 202, at 545.

Developmental psychologists attribute juveniles' overrepresentation among false confessors to reduced cognitive ability, developmental immaturity, and increased susceptibility to manipulation.[205] They have fewer life experiences or psychological resources with which to resist the pressures of interrogation. They are more likely to comply with authority figures, tell police what they think they want to hear, and respond to negative feedback.[206] Their impulsive decision-making and tendency to obey authority heightens those risks, especially for younger juveniles with limited understanding. The stress and anxiety of interrogation intensifies their desire to extricate themselves in the short-run by waiving and confessing. The vulnerabilities of youth multiply when coupled with mental illness, mental retardation, or compliant personalities.

d. Policy Recommendations

Research on false confessions underscores the unique vulnerability of younger juveniles.[207] *Miranda* is especially problematic for younger juveniles who may not understand its words or concepts. *Miranda* requires only shallow understanding of the

205. *See* Bonnie & Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 73, 87 ("[Y]ouths[] . . . may have significant deficits in competence-related abilities due . . . to developmental immaturity."); Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 165, at 107, 114 (examining research showing an inverse relationship between age and suggestibility); Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 225, 231–34 (discussing how juveniles are difficult clients for attorneys because they have difficulty remembering information, maintaining attention, and making decisions appropriately); Drizin & Luloff, *supra* note 136, at 260.

206. *See* GUDJONSSON, *supra* note 182, at 381 (summarizing research which showed that juveniles are "markedly more suggestible than adults" when subjected to interrogative pressure); LEO, *supra* note 188, at 233 ("Many juveniles . . . are highly compliant. They tend to be . . . acquiescent[] and eager to please . . . when questioned by police.").

207. *See generally* GARRETT, *supra* note 202 (discussing false confessions and the unique vulnerability of adolescents compared to older juveniles and adults); Drizin & Leo, *supra* note 183 (analyzing 125 interrogation-induced false confession cases using a variety of demographic criteria and finding that juveniles are uniquely vulnerable); Gross et al., *supra* note 202 (finding that false confessions were heavily concentrated among the most vulnerable groups of innocent defendants, including juveniles and individuals with mental disabilities); Tepfer et al., *supra* note 202 (finding that younger exonerees falsely confessed to crimes at nearly twice the rate of adult exonerees).

words which developmental psychologists conclude most sixteen- and seventeen-year-old youths possess. By contrast, psychologists report that many, if not most, children fifteen or younger do not understand *Miranda* or possess competence to make legal decisions.[208]

i. Mandatory Counsel for Younger Juveniles

Younger juveniles' limited understanding and heightened vulnerability warrant greater procedural protections: a nonwaivable right to counsel. The Supreme Court's juvenile interrogation cases—*Haley*, *Gallegos*, *Gault*, *Fare*, *Alvarado*, and *J.D.B.*—excluded statements taken from youths fifteen years of age or younger and admitted those obtained from sixteen- and seventeen-year-olds. The Court's de facto functional line—fifteen and younger versus sixteen and older—closely tracks what psychologists report about youths' ability to understand the warning. Courts and legislatures should adopt that functional line and provide greater protections for younger juveniles.

Psychologists advocate that juveniles younger than sixteen years of age "should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role."[209] More than three decades ago, the American Bar Association (ABA) endorsed mandatory, nonwaivable counsel because it recognized that "[f]ew juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful."[210] Juveniles should consult with an attorney, rather than rely on parents, before they exercise or waive rights.[211] Requiring consultation with an attorney assures a functioning legal services delivery system and an informed and voluntary waiver. If youths fifteen years of age or younger consult with counsel, it will somewhat limit police's ability to secure confessions. However, if younger juveniles cannot understand or

208. Grisso, *Juveniles' Capacity to Waive* Miranda *Rights*, *supra* note 146, at 1160; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 356.

209. Kassin et al., *supra* note 183, at 30.

210. AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 92 (1980).

211. *Id.* at 89–94 (discussing the "[s]cope of the juvenile's right to counsel"); Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 167 (2007) (summarizing the findings of a variety of studies and concluding that "fairness requires that juveniles have the benefit of a nonwaivable right to counsel at every step in delinquency proceedings in order to fulfill the promise of *Gault*").

exercise rights without assistance, then to treat them as if they do enables the state to exploit their vulnerability. Constitutional rights exist to assure factual accuracy, promote equality, and protect individuals from governmental overreaching. *Michael C.* emphasized lawyers' unique role in the justice system, and *Haley*, *Gallegos*, and *Gault* recognized younger juveniles' exceptional need for their assistance.

ii. Limiting the Length of Interrogation

The vast majority of interrogations are very brief. In previous studies, police completed nearly all interviews in less than an hour and few took longer than two hours.[212] By contrast, interrogations that elicit false confessions are usually long inquiries that wear down an innocent person's resistance—eighty-four percent took at least six hours—and youthfulness exacerbates those dangers.[213] The Supreme Court has recognized that questioning juveniles for five or six hours renders their statement involuntary.[214] Thus, states should create a sliding-scale presumption that a confession is involuntary and unreliable based on length of interrogation.

iii. Mandatory Recording of Interrogation

Within the past decade, legal scholars, psychologists, law enforcement, and justice system personnel have reached consensus that recording interrogations reduces coercion, diminishes dangers of false confessions, and increases reliability.[215] More than a dozen states require police to record interrogations, albeit some under limited circumstances, such as with homicide or very young suspects.[216] Recording creates an objective record and provides an independent basis to resolve credibility disputes about

212. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 155–66; Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 279 (1996).

213. Drizin & Leo, *supra* note 183, at 948–49.

214. *See* Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

215. *See generally* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144 (discussing the benefits of recording interrogations); GARRETT, *supra* note 202 (relaying the positive experiences of police and judges regarding the electronic recording of interrogations); LEO, *supra* note 188 (discussing how the recording of police interrogations benefits all parties who value accurate factfinding and more informed decision-making).

216. *See* GARRETT, *supra* note 202, at 248 ("Eleven states and the District of Columbia now require or encourage electronic recording of at least some interrogations by statute, and seven more state supreme courts wrote opinions either

Miranda warnings, waivers, or statements. It enables a judge to decide whether a statement contains facts known to a guilty perpetrator or whether police supplied them to an innocent suspect. Recording protects police from false claims of abuse, enhances professionalism, and reduces coercion. It enables police to focus on suspects' responses, to review details of an interview not captured in written notes, and to test them against subsequently discovered facts. Recording avoids distortions that occur when interviewers rely on memory or notes to summarize a statement.

Police must record all interactions with suspects (preliminary interviews and interrogations) rather than just a final statement (a post-admission narrative). Otherwise, police may conduct a preinterrogation interview, elicit incriminating information, and then construct a final confession after the cat is out of the bag. Only a complete record of every interaction can protect against a final statement that ratifies an earlier coerced one or against a false confession contaminated by nonpublic facts that police supplied a suspect.

2. Competence to Stand Trial

Gault's procedural rights are of no value to youths unable to exercise them. The Supreme Court long has required that defendants be competent to preserve the integrity of trials, to promote factual accuracy, to reduce risk of error, and to enable them to play a part in proceedings.[217] *Dusky v. United States* held that a defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and have] a rational as well as factual understanding of the proceedings against him."[218] *Drope v. Missouri* held that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[219] The standard is functional and binary: a defendant either is or is not competent to stand trial.

requiring or encouraging the recording of interrogations."); LEO, *supra* note 188, at 295 ("At the time of this writing, eight states . . . and the District of Columbia have laws requiring police to record interrogations in their entirety in some or all criminal cases.").

217. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 800 (2005).

218. Dusky v. United States, 362 U.S. 402, 402 (1960).

219. Drope v. Missouri, 420 U.S. 162, 171 (1975).

The standard for competency is not onerous because the more capability it requires of moderately impaired defendants, the fewer who will meet it.[220] Juveniles must understand the trial process, have the ability to reason and work with counsel, and rationally appreciate their situation. If a person understands that he is on trial for committing crimes, knows he can be sentenced if convicted, and can communicate with his attorney, a court likely would find him competent. Significant mental illness—psychotic disorders such as schizophrenia—or severe mental retardation typically render adult defendants incompetent. However, psychotic disorders typically do not emerge until late adolescence or early adulthood and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* cautions against diagnosing profound illnesses in younger populations.[221] Despite that reservation, researchers report that the prevalence of mental disorders among delinquent youths is substantially higher than in the general population—half to three-quarters exhibit one or more mental illnesses.[222]

Developmental psychologists contend that immaturity per se—especially for younger juveniles—produces the same deficits of understanding and inability to assist counsel that mental illness or retardation engender in incompetent adults.[223] Youths' developmental limitations adversely affect their ability to pay attention, absorb and apply information, understand proceedings, make rational decisions, and work with counsel.[224]

Significant age-related differences appear between adolescents' and young adults' competence, judgment, and legal decision-making.[225] Developmental psychologists report that many juveniles younger than fourteen years of age were as severely impaired as adults found incompetent to stand trial.[226] Some

220. Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 137 (2009).

221. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 88–89 (5th ed. 2013).

222. GRISSO, DOUBLE JEOPARDY, *supra* note 143, at 10–11.

223. *See* SCOTT & STEINBERG, *supra* note 1, at 151–52; Scott & Grisso, *supra* note 217, at 796.

224. *See* SCOTT & STEINBERG, *supra* note 1, at 158–60; Scott & Grisso, *supra* note 217, at 795–96.

225. *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 343–46.

226. *See* SCOTT & STEINBERG, *supra* note 1, at 162–65; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 356.

older youths also exhibited substantial impairments.[227] Age and intelligence produced higher levels of incompetence among adolescents with low IQs than adults with low IQs.[228] The MacArthur study reported that about one-fifth of fourteen- to fifteen-year-olds were as impaired as mentally ill adults found incompetent; those with below-average intelligence were more likely than juveniles with average intelligence to be incompetent.[229] Even nominally competent adolescents may suffer from cognitive deficits—borderline intelligence, limited verbal ability, short attention span, or imperfect memory—that adversely affect understanding and decision-making.

While incompetence in adults stems from mental disorders, which may be transient or treatable with medication, it is less clear how to accelerate legal capacities in adolescents whose deficits result from developmental immaturity.[230] Competency restoration may be especially problematic for younger juveniles who never possessed relevant knowledge or understanding to begin with.[231] Moreover, adolescents deemed incompetent due to mental retardation may be especially difficult to remediate or restore to competence.[232]

The prevalence of mental illness among delinquents compounds their developmental incompetence. In many jurisdictions, the juvenile justice system has become the de facto mental health system as a result of inadequate mental health services for children.[233] Analysts estimate that half or more of male delinquents and a larger proportion of female delinquents suffer

227. *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 344 (reporting that seven percent of sixteen to seventeen-year-olds showed "significantly impaired [u]nderstanding," compared with twenty percent of eleven to thirteen-year-olds and thirteen percent of fourteen to fifteen-year-olds).

228. *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 356; Sanborn, *supra* note 220, at 171–72.

229. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 143, at 356.

230. Jodi Viljoen et al., *Competence and Criminal Responsibility in Adolescent Defendants: The Roles of Mental Illness and Adolescent Development*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 526, 535 [hereinafter Viljoen et al., *Competence and Criminal Responsibility*]; Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCHOL. PUB. POL'Y & L. 87, 107–08 (2007).

231. Scott & Grisso, *supra* note 217, at 797.

232. *See* Viljoen et al., *Competence and Criminal Responsibility*, *supra* note 230, at 530; Sanborn, *supra* note 220, at 145–47.

233. GRISSO, DOUBLE JEOPARDY, *supra* note 143, at 5 (discussing the lack of

from one or more mental disorders.[234] Youths suffering from Attention-Deficit Hyperactivity Disorder (ADHD) may have difficulty concentrating or communicating with their attorney and those suffering from depression may lack the motivation to do so.

The issue of competence to stand trial arises both for youth transferred to and tried in criminal court and for those prosecuted in juvenile court. For youths tried as adults, criminal courts apply the *Dusky/Drope* standard, but focus on mental illness rather than developmental immaturity.[235] For youths tried in juvenile courts, about half the states have addressed competency in statutes, court rules, or case law.[236] However, most statutes consider only mental illness or retardation as sources of incompetence rather than developmental immaturity per se.[237]

Even after states recognize juveniles' right to a competency determination in delinquency proceedings, they differ over whether to apply the *Dusky/Drope* adult standard or a juvenile-normed standard. Some courts apply the adult standard in delinquency as well as criminal prosecutions because both may result in a child's loss of liberty and punitive consequences.[238] Other jurisdictions opt for a relaxed competency standard on the theory that delinquency hearings are less complex and penalties less severe.[239]

Advocates for a watered-down standard of competence in delinquency proceedings contend that a youth who might be found incompetent to stand trial as an adult or if evaluated under an

public mental health services for children and adolescents in many states and the subsequent referral of youths with mental disorders to the juvenile justice system).

234. *Id.* at 6–13; Viljoen et al., *Competence and Criminal Responsibility*, *supra* note 230, at 529 (reporting that "approximately 60% of detained male adolescents and 70% of detained female adolescents met criteria for a current mental disorder").

235. *See* Sanborn, *supra* note 220, at 147–49; Scott & Grisso, *supra* note 217, at 804–05.

236. *See* Sanborn, *supra* note 220, at 140–42. *See generally* FELD, CASES AND MATERIALS, *supra* note 29, at 117–33 (discussing various states' frameworks for addressing competency); Scott & Grisso, *supra* note 217 (discussing juvenile competency schemes in a variety of jurisdictions).

237. Viljoen et al., *Competence and Criminal Responsibility*, *supra* note 230, at 532; Sanborn, *supra* note 220, at 141–42.

238. *See, e.g.*, *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. App. 1990); *In re* D.D.N., 582 N.W.2d 278, 280–82 (Minn. Ct. Ap. 1998).

239. *See, e.g.*, *In re* K.G., 808 N.E.2d 631, 632 (Ind. 2004); *In re* Bailey, 782 N.E.2d 1177, 1177 (Ohio Ct. App. 2002); Sanborn, *supra* note 220, at 141–42; Scott & Grisso, *supra* note 217, at 803–04.

adult standard in juvenile court should still be found competent under a relaxed standard.[240] They insist that if delinquency sanctions are less punitive than criminal sentences and geared to promote youths' welfare, then they require fewer procedural safeguards.[241] However, the constitutional requirement of competence hinges on defendants' ability to participate in proceedings and the legitimacy of the trial process, and not the punishment that may ensue. Although delinquency dispositions, especially for serious crimes, may be shorter than criminal sentences, as I argued above, it is disingenuous to claim they are not punitive. *Baldwin v. New York* held that no crime that carried an *authorized* sentence of six months or longer could be deemed a petty offense.[242] While proponents of a watered-down standard argue that a rule that immunizes some incompetent youths from adjudication could undermine juvenile courts' legitimacy,[243] adjudicating immature youths under a relaxed standard enables the state to take advantage of their incompetence and undermines the legitimacy of the process. A finding of delinquency requires proof of guilt. Either defendants understand the proceedings and can assist counsel or they cannot; if they cannot perform those minimal tasks, then they should not be prosecuted in any court.

Juvenile courts do not routinely initiate competency evaluations, even for young offenders, and many delinquents may face charges without understanding the process or the ability to work with counsel. Defense attorneys may be best positioned to detect whether a competency evaluation is warranted, but often fail to do so because of heavy caseloads, limited time spent with a client, and an inability to distinguish between immaturity and disabling incompetence.[244] Defense counsel tactically may not raise a juvenile's incompetence because of the delays for competency evaluation and restoration.[245] And justice system personnel may lack evaluation instruments or clinical personnel who can administer them.[246]

240. *See* SCOTT & STEINBERG, *supra* note 1, at 168–77; Scott & Grisso, *supra* note 217, at 831–39.

241. *See* Scott & Grisso, *supra* note 217, at 840–43.

242. Baldwin v. New York, 399 U.S. 66 (1970).

243. SCOTT & STEINBERG, *supra* note 1, at 173.

244. Viljoen et al., *Competence and Responsibility*, *supra* note 230, at 533–34.

245. GRISSO, DOUBLE JEOPARDY, *supra* note 143, at 168–70.

246. *Id.* at 77–80.

3. Access to Counsel

Gideon v. Wainwright applied the Sixth Amendment to the states to guarantee criminal defendants' right to counsel.[247] *Gault* relied on *Gideon*, compared a delinquency proceeding to a felony prosecution, and granted delinquents the right to counsel.[248] However, *Gault* used the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment and did not mandate automatic appointment of counsel.[249] *Gault*, like *Gideon*, left to state and local governments the task to fund legal services. Over the past half-century, penurious politicians who want to get tough on crime and avoid coddling criminals have shirked their responsibility to adequately fund public defenders' offices and have severely undermined the quality of justice.

Gault required a judge to advise the child and parent of the right to have a lawyer appointed if indigent, but ruled that juveniles could waive counsel.[250] Most states do not use special procedural safeguards—mandatory nonwaivable appointment or prewaiver consultation with a lawyer—to protect delinquents from improvident decisions.[251] Instead, they use the adult standard—knowing, intelligent, and voluntary—to gauge juveniles' relinquishment of counsel. As with *Miranda* waivers, formal equality results in practical inequality—lawyers represent delinquents at much lower rates than they do criminal defendants.[252]

Despite statutes and court rules of procedure that apply equally throughout a state, juvenile justice administration varies with urban, suburban, and rural context and produces justice by geography.[253] Lawyers appear more frequently in urban

247. Gideon v. Wainwright, 372 U.S. 335 (1963).

248. *In re* Gault, 387 U.S. 1, 36 (1967).

249. *Gault*, 387 U.S. at 27–31; *Gideon*, 372 U.S. at 344–45.

250. *Gault*, 387 U.S. at 41–42.

251. *Gault*, 387 U.S. at 42; Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 183–90. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (discussing a lack of procedural safeguards in most jurisdictions).

252. FELD, JUSTICE FOR CHILDREN, *supra* note 63, at 4; CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES (U.S. DOJ 2000); JUDITH B. JONES, ACCESS TO COUNSEL (OJJDP 2004); George W. Burruss, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37, 37–39 (2002); Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 399–402 (1988) [hereinafter Feld, In re Gault *Revisited*]; Feld, *Right to Counsel*, *supra* note 64, at 1217–23.

253. Burruss & Kempf-Leonard, *supra* note 252, at 60–65; Feld, *Justice by Geography*, *supra* note 63, at 157–58; Barry C. Feld & Shelly Schaefer, *The*

courts than in more informal rural courts.[254] In turn, more formal urban courts hold more youths in pretrial detention and sentence them more severely.[255] Finally, a lawyer's presence is an aggravating factor at disposition; judges sentence youths who appear with counsel more severely than they do those who appear without an attorney.[256] Several factors contribute to this finding: (1) lawyers who appear in juvenile court may be incompetent and prejudice their clients' cases; (2) judges may predetermine sentences and appoint counsel when they anticipate out-of-home placements; or (3) judges may punish delinquents for exercising procedural rights.[257]

a. Presence of Counsel

When the Court decided *Gault*, lawyers appeared in fewer than five percent of delinquency cases, in part because juvenile court judges actively discouraged juveniles from retaining counsel and the courts' informality prevented lawyers from playing an advocate's role.[258] Although states amended their juvenile codes to comply with *Gault*, evaluations of initial compliance found that most judges did not advise juveniles of their rights

Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography, 9 CRIMINOLOGY & PUB. POL'Y 327, 328 (2010) [hereinafter Feld & Schaefer, *Law Reform*]; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor at Disposition*, 27 JUST. Q. 713 (2010) [hereinafter Feld & Schaefer, *Right to Counsel*]. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (discussing and analyzing the juvenile justice system and the right counsel).

254. Burruss & Kempf-Leonard, *supra* note 252, at 53, 60–65; Feld, *Justice by Geography*, *supra* note 63, at 185. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (discussing and analyzing the juvenile justice system and the right to counsel).

255. Burruss & Kempf-Leonard, *supra* note 252, at 60–65; Feld, *Justice by Geography*, *supra* note 63, at 194–97. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (discussing and analyzing the juvenile justice system and the right counsel).

256. Burruss & Kempf-Leonard, *supra* note 252, at 60–65; Feld, *Justice by Geography*, *supra* note 63, at 190; Feld, *Right to Counsel*, *supra* note 64, at 1236–44; Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 714.

257. Burruss & Kempf-Leonard, *supra* note 252, at 43–44; Feld & Schaefer, *Right to Counsel*, *supra* note 253.

258. *In re* Gault, 387 U.S. 1 (1967); *see* Feld, *Right to Counsel*, *supra* note 64, at 1192. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (reviewing research on delivery of legal services).

and the vast majority did not appoint counsel.[259] Studies in the 1970s and 1980s reported that many judges did not advise juveniles of their right to a lawyer and most did not appoint counsel.[260] Research in Minnesota in the mid-1980s reported that most youths appeared without counsel, that rates of representation varied widely in urban, suburban, and rural counties, and that one-third of youths whom judges removed from home and one-quarter of those in institutions were unrepresented.[261] A decade later, about one-quarter of juveniles removed from home were unrepresented despite legal reforms to eliminate the practice.[262] A study of delivery of legal services in six states reported that only three of them appointed counsel for a substantial majority of juveniles.[263] Studies in the 1990s described juvenile court judges' continuing failure to appoint lawyers.[264] In 1995, the General Accounting Office confirmed that rates of representation varied widely among and within states and that judges tried and sentenced many unrepresented youths.[265]

In the mid-1990s the ABA published two reports on juveniles' legal needs. *America's Children at Risk* reported that many children appeared without counsel and that lawyers who represented youth lacked adequate training and often failed to provide effective assistance.[266] *A Call for Justice*, which focused on the quality of defense lawyers, again reported that many youths

259. *In re* Gault, 387 U.S. 1 (1967); Feld, *Right to Counsel*, *supra* note 64, at 1199–1200. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (reviewing research on delivery of legal services).

260. *See* Feld, *Right to Counsel*, *supra* note 64, at 1199–1200. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (reviewing research on delivery of legal services).

261. Feld, In re Gault *Revisited*, *supra* note 252, at 394–95; Feld, *Justice by Geography*, *supra* note 63; *see* Feld, *Right to Counsel*, *supra* note 64, at 1199–1200, 1213–44.

262. Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 730; *see* Feld & Schaefer, *Law Reform*, *supra* note 253, at 333–35 (discussing Minnesota's reform laws to improve legal representation of juvenile delinquents).

263. Feld, In re Gault *Revisited*, *supra* note 252, at 396, 416.

264. *See* GAO, GAO/GGD-95-139, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES (1995) (reporting on variations of representation rates in California, Pennsylvania, and Nebraska); *see also* NAT'L JUVENILE DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 4, 25–27 (2017), https://www.njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.

265. GAO, *supra* note 264, at 13.

266. AM. BAR ASS'N PRESIDENTIAL WORKING GRP. ON THE UNMET LEGAL NEEDS OF CHILDREN & THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 60 (1993).

appeared without counsel and that many attorneys failed to appreciate the challenges of representing young clients.[267] Since the late 1990s, the ABA and the National Juvenile Defender Center have conducted more than twenty state-by-state assessments, reporting that many, if not most, juveniles appeared without counsel and that lawyers who represented youth often encountered structural impediments to effective advocacy—heavy caseloads, inadequate resources, lack of training, and the like.[268]

b. Waivers of Counsel

Several factors account for why so many youths appear in juvenile courts without counsel. Public defender services may be less available or nonexistent in nonurban areas.[269] Judges may give cursory advisories of the right to counsel, imply that waivers are just legal technicalities, and readily find waivers to ease their administrative burdens.[270] If judges expect to impose noncustodial sentences, then they may dispense with counsel. Some jurisdictions charge fees to determine a youth's eligibility for a public defender and others base youths' eligibility on their parents' income.[271] Parents may be reluctant to retain or accept an attorney if, as in many states, they may have to reimburse attorney fees if they can afford them.[272]

The most common explanation for why fifty to ninety percent of juveniles in many states are unrepresented is that they

267. AM. BAR ASS'N JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 52–56 (1995).

268. Drizin & Luloff, *supra* note 136, at 220; *see* NAT'L RESEARCH COUNCIL, *supra* note 1, at 200–01; NAT'L JUVENILE DEF. CTR., *supra* note 264, at 34. For more detail and access to the state assessments from the National Juvenile Defender Center, see *State Assessments*, NAT'L JUVENILE DEF. CTR., http://www.njdc.info/our-work/juvenile-indigent-defense-assessments (last visited Nov. 15, 2017) (providing state assessments through "comprehensive examinations of the systemic and institutional barriers that prevent children from receiving high-quality legal representation").

269. FELD, BAD KIDS, *supra* note 1, at 127.

270. AM. BAR ASS'N JUVENILE JUSTICE CTR., *supra* note 267, at 44–45; NAT'L RESEARCH COUNCIL, *supra* note 1, at 199; Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002).

271. NAT'L RESEARCH COUNCIL, *supra* note 1, at 199.

272. FELD, BAD KIDS, *supra* note 1, at 127–28; NAT'L RESEARCH COUNCIL, *supra* note 1, at 199.

waive counsel.[273] Judges in most states use the adult standard to gauge juveniles' waivers of counsel and consider the same factors—age, education, IQ, prior police contacts, or court experience—as those in *Miranda* waivers.[274] Many juveniles do not understand their rights or the role of lawyers and waive counsel without consulting with either a parent or an attorney.[275] Although judges are supposed to conduct a dialogue to determine whether a child can understand rights and represent herself, they frequently fail to give any waiver of counsel advisory, often neglect to create a record, and readily accept waivers from manifestly incompetent children.[276] Many juveniles' marginal competence to stand trial exacerbates the dangers of improvident waivers. Judges who give waiver of counsel advisories often seek waivers to ease their administrative burdens, which affects how they inform juveniles of their rights and interpret their responses.[277] As long as the law allows juveniles to waive counsel, judges can find valid waivers regardless of youths' incompetence. Juveniles' diminished competence, inability to understand proceedings, and judicial incentives and encouragement to waive counsel results in larger proportions of delinquents adjudicated without lawyers than criminal defendants.[278]

c. Pleas Without Bargains

Like adult criminal defendants, nearly all delinquents plead guilty and proceed to sentencing.[279] Even though pleading guilty is the most critical decision a delinquent makes, states use adult waiver standards to evaluate their pleas.[280] Judges and lawyers

273. FELD, BAD KIDS, *supra* note 1, at 128; Berkheiser, *supra* note 270, at 649–50; *see* FELD, JUSTICE FOR CHILDREN, *supra* note 63, at 4; NAT'L RESEARCH COUNCIL, *supra* note 1, at 199–200.

274. *See* Feld, *Behind Closed Doors*, *supra* note 144, at 402; *see also* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 41–45.

275. Berkheiser, *supra* note 270, at 629–31.

276. *See In re* Manuel R., 543 A.2d 719, 722 (Conn. 1988) (concluding the juvenile did not "knowingly and voluntarily" waive the right to an attorney, notwithstanding court records indicating an affirmative response to the judge's question about waiving counsel); Berkheiser, *supra* note 270, at 633–34; Drizin & Luloff, *supra* note 136, at 285–86.

277. FELD, BAD KIDS, *supra* note 1, at 128.

278. *See generally* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144 (discussing law and policy concerning juveniles' encounters with the law).

279. NAT'L RESEARCH COUNCIL, *supra* note 1, at 201–02. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (discussing and analyzing the juvenile justice system and the right to counsel).

280. *See* Joseph B. Sanborn Jr., *Pleading Guilty in Juvenile Court: Minimal Ado About Something Very Important to Young Defendants*, 9 JUST. Q. 127, 127

often speak with juveniles in complicated legal language and fail to explain long-term consequences of pleading guilty.[281] A valid guilty plea requires a judge to conduct a colloquy on the record, in which an offender admits the facts of the offense, acknowledges the rights being relinquished, and demonstrates that she understands the charges and potential consequences. Because appellate courts seldom review juveniles' waivers of counsel, pleas made without counsel receive even less judicial scrutiny.[282] Guilty pleas by factually innocent youths occur because attorneys fail to investigate cases, assume their clients' guilt—especially if they have already confessed—and avoid adversarial litigation, discovery requests, and pretrial motions that conflict with juvenile courts' cooperative ideology. Juveniles' emphasis on short-term over long-term consequences and dependence on adult authority figures increases their likelihood to enter false guilty pleas.[283]

d. Counsel as an Aggravating Factor in Sentencing

Historically, juvenile court judges discouraged adversarial litigants and impeded effective advocacy. Today, lawyers in juvenile courts may put their clients at a disadvantage when judges sentence them.[284] Research that controls for legal variables—present offense, prior record, pretrial detention, and the like—consistently reports that judges remove from home and incarcerate delinquents who appeared with counsel more frequently than unrepresented youths.[285] Legal reforms to improve

(1992); *see also* Lacey Cole Singleton, Study Note, *Say "Pleas": Juveniles' Competence to Enter Plea Agreements*, 9 J.L. & FAM. STUD. 439, 446 (2007).

281. NAT'L RESEARCH COUNCIL, *supra* note 1, at 201–02.

282. *See* Berkheiser, *supra* note 270, at 633. *See generally* Sanborn, *supra* note 280 (examining the juvenile guilty plea process through statutes, court rules, and case law from all fifty states).

283. *See* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 48–49.

284. Burruss & Kempf-Leonard, *supra* note 252, at 41–45; Feld, In re Gault *Revisited*, *supra* note 252, at 418–19; Feld, *Right to Counsel*, *supra* note 64, at 1330–31. *See generally* Feld & Schaefer, *Right to Counsel*, *supra* note 253 (discussing attorneys as an aggravating factor in juvenile dispositions).

285. Burruss & Kempf-Leonard, *supra* note 252. *See generally* FELD, JUSTICE FOR CHILDREN, *supra* note 63 (reviewing research on aggravating impact of representation); Feld, *Right to Counsel*, *supra* note 64 (analyzing variations in rates of representation and the effects of attorneys in juvenile delinquency and status proceedings in Minnesota in 1986); Feld & Schaefer, *Law Reform*, *supra* note 253 (reporting on inconsistent judicial compliance with the *Gault* requirement for appointment of counsel in juvenile courts); Feld & Schaefer,

delivery of legal services actually increase the aggravating effect of representation on dispositions.[286]

Several factors contribute to lawyers' negative impact at disposition. First, juveniles may not believe lawyers' explanations of confidential communications and withhold important information to their detriment.[287] Second, lawyers assigned to juvenile court may be incompetent and prejudice their clients' cases; public defender offices often send their least capable or newest attorneys to juvenile court to gain trial experience.[288] Third, lack of adequate funding for defender services may preclude investigations, which increases the risk of wrongful convictions;[289] defense attorneys seldom investigate cases or interview their clients prior to trial because of heavy caseloads and limited organizational support.[290] Fourth, court-appointed lawyers may place a greater premium on maintaining good relations with judges who assign their cases than vigorously defending their revolving clients.[291] Juvenile courts' parens patriae ideology discourages zealous advocacy and engenders adverse consequences for attorneys who rock the boat or for their clients.[292] Fifth, and most significantly, many defense attorneys work under conditions that create structural impediments to quality representation.[293] Assessments in dozens of states report derisory working conditions—crushing caseloads, penurious compensation, scant support services, inexperienced attorneys, and inadequate supervision—that detract from or preclude effective representation.[294] Ineffective assistance of counsel, for whatever reason, is a significant factor in one-quarter of wrongful convictions.[295]

Right to Counsel, *supra* note 253 (comparing how Minnesota juvenile courts processed youths in 1994, prior to reform laws enacted in 1995, with how state juvenile courts processed youths in 1999).

286. *See* Feld & Schaefer, *Law Reform*, *supra* note 253; *see also* Feld & Schaefer, *Right to Counsel*, *supra* note 253 (comparing pre- and post-reform rates of representation in Minnesota).

287. *See* FELD, BAD KIDS, *supra* note 1, at 129.

288. Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 717.

289. Drizin & Luloff, *supra* note 136, at 284.

290. NAT'L RESEARCH COUNCIL, *supra* note 1, at 200.

291. Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 717.

292. NAT'L RESEARCH COUNCIL, *supra* note 1, at 201; Drizin & Luloff, *supra* note 136, at 291.

293. AM. BAR ASS'N JUVENILE JUSTICE CTR., *supra* note 267, at 6.

294. NAT'L RESEARCH COUNCIL, *supra* note 1, at 58; *State Assessments*, *supra* note 268.

295. *See generally* GARRETT, *supra* note 202 (examining the factors contributing to 250 cases of wrongful criminal convictions ultimately exonerated by DNA evidence).

Another explanation of lawyers' negative impact on dispositions is that judges may appoint them when they anticipate more severe sentences. The Court in *Scott v. Illinois* prohibited "incarceration without representation" and limited an indigent adult misdemeanant's right to appointed counsel to cases in which judges ordered defendants' actual confinement.[296] In most states, the same judge presides at a youth's arraignment, detention hearing, adjudication, and disposition and may appoint counsel if she anticipates a more severe sentence.[297] Judges typically appoint counsel, if at all, at the arraignment, detention hearing, or on the day of trial.[298] Court practices that appoint lawyers who meet their clients for the first time on the day of trial create a system conducive to inadequate representation and wrongful convictions.

Finally, judges may sentence delinquents who appear with counsel more severely than those who waive because the lawyer's presence insulates them from appellate reversal. Juvenile court judges may sanction youths whose lawyers invoke formal procedures, disrupt routine procedures, or question their discretion in ways similar to an adult defendant's trial penalty—the harsher sentences imposed on those who demand a jury trial rather than plead guilty.

e. Appellate Review

Gault rejected the juvenile's request for a constitutional right to appellate review because it had not found that criminal defendants enjoyed such a right.[299] However, states invariably provided adult defendants with a statutory right to appellate review. By avoiding the constitutional issue, the Court undermined the other rights that it granted delinquents because the only way to enforce its rules would have been through rigorous appellate review of juvenile court judges' decisions.[300] Regardless of how poorly lawyers perform, appellate courts seldom can correct juvenile courts' errors. Juvenile defenders appeal adverse decisions far less frequently than lawyers representing adult criminal defendants and often lack a record with which to

296. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 730.

297. Feld & Schaefer, *Right to Counsel*, *supra* note 253, at 718.

298. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 198–99.

299. *In re* Gault, 387 U.S. 1, 58 (1967).

300. CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 158 (1998).

challenge an invalid waiver of counsel or trial errors.[301] Juvenile court culture may discourage appeals as an impediment to a youth assuming responsibility. The vast majority of delinquents enter guilty pleas, which waive the right to appeal and further precludes review.[302] Moreover, juveniles who waive counsel at trial will be less aware of or able to pursue an appeal.

f. Conclusion

The formal procedures of juvenile and criminal courts have converged in the decades since *Gault*. Differences in age and competence would suggest that youths should receive more safeguards than adults to protect them from punitive delinquency adjudications and their own limitations. However, states do not provide juveniles with additional safeguards—mandatory nonwaivable appointment of counsel or prewaiver consultation with a lawyer—to protect them from their own immaturity. Instead, they use adult legal standards that most youths are unlikely to meet.

High rates of waiver undermine the legitimacy of the juvenile justice system because assistance of counsel is the prerequisite to the exercise of other rights.[303] Youths require safeguards which only lawyers can provide to protect against erroneous and punitive state intervention. The direct consequence of delinquency convictions—institutional confinement—and use of prior convictions to sentence recidivists more harshly, to waive youths to criminal court, and to enhance criminal sentences makes assistance of counsel imperative. A justice system that recognizes youths' developmental limitations would provide, at a minimum, no pretrial waivers of *Miranda* rights or counsel without prior consultation with counsel. Only mandatory nonwaivable counsel can prevent erroneous convictions and collateral use of adjudications that compound injustice. Lawyers can only represent delinquents effectively if they have adequate support, resources, and specialized training to represent children.

301. *See* Berkheiser, *supra* note 270, at 619, 650; Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 218–22 (1994).

302. *See* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 144, at 20.

303. *See* Drizin & Luloff, *supra* note 136, at 287–88. *See generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998) (examining systematic issues with juvenile court in the wake of *McKeiver*).

As *Michael C.* repeatedly emphasized, lawyers play a unique role in the legal process and only they can effectively invoke the procedural safeguards that are every citizens' right. A rule that requires mandatory nonwaivable appointment of counsel would impose substantial costs and burdens on legal services delivery in most states. But after *Gault*, all juveniles are entitled to appointed counsel. Waiver doctrines to relieve states' fiscal or administrative burdens are scant justifications to deny fundamental rights.

4. Jury Trial: Factfinding, Governmental Oppression, and Collateral Consequences

States' laws treat juveniles just like adults when formal equality produces practical inequality. Conversely, they use juvenile court procedures that provide *less* effective protection when called upon to provide delinquents with adult safeguards. *Duncan v. Louisiana* gave adult defendants the right to a jury trial to assure accurate factfinding *and* to prevent governmental oppression.[304] By contrast, *McKeiver v. Pennsylvania* denied delinquents protections the Court deemed fundamental to criminal trials.[305] The presence of lay citizens functions as a check on the State, provides protection against vindictive prosecutors or biased judges, upholds the criminal standard of proof beyond a reasonable doubt, and enhances the transparency and accountability of the justice system. Despite those salutary functions, *McKeiver* insisted that delinquency proceedings were not yet criminal prosecutions despite their manifold criminal aspects.[306]

The *McKeiver* plurality reasoned that a judge could find facts as accurately as a jury, rejected concerns that informality could compromise factfinding, invoked the imagery of a paternalistic judge, and disregarded delinquents' need for protection from punitive state overreaching.[307] The Court feared that jury trials would interfere with juvenile courts' informality, flexibility, and confidentiality, make juvenile and criminal courts procedurally indistinguishable, and lead to abandonment of the juvenile court.[308]

304. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

305. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

306. *Id.* at 541.

307. *Id.*; Feld, *Constitutional Tension*, *supra* note 17, at 1143–45; *see also* NAT'L RESEARCH COUNCIL, *supra* note 53, at 160 (questioning *McKeiver*'s reasoning based on evidence suggesting that judges convict defendants at higher rates than juries).

308. *McKeiver*, 403 U.S. at 550–51.

The *McKeiver* dissenters insisted that when the State charged a delinquent with a crime for which it could incarcerate her, she should enjoy the same jury right as an adult.[309] For them, *Gault*'s rationale—criminal charges and the possibility of confinement—required comparable procedural safeguards.[310] The dissenters feared that juvenile courts' informality would contaminate factfinding.[311] Although the vast majority of delinquents, like criminal defendants, plead guilty, the possibility of a jury trial provides an important check on prosecutorial overcharging, on judges' evidentiary rulings, and the standard of proof beyond a reasonable doubt. Despite the prevalence of guilty pleas, lawyers are supposed to evaluate cases as if they were to go to trial and practice in the shadow of the jury. The possibility of a jury trial increases the visibility and accountability of justice administration and the performance of lawyers and judges. The jury's checking function may be even more important in highly discretionary, low visibility juvenile courts that deal with dependent youths who cannot effectively protect themselves.

A few states give juveniles a right to a jury trial as a matter of state law, but the vast majority do not.[312] During the Get Tough Era, states revised their juvenile codes' purpose, opened delinquency trials to the public, adopted determinate or mandatory sentencing laws, fostered a punitive convergence with criminal courts, imposed collateral consequences for delinquency convictions, and eroded the rationale for fewer procedural safeguards.[313] Despite the explicit shift from treatment to punishment, most state courts continue to deny juveniles a jury.[314]

Constitutional procedural protections serve dual functions: assure accurate factfinding *and* protect against governmental oppression. *McKeiver*'s denial of a jury fails on both counts. First, judges and juries find facts differently and when they differ, judges are more likely to convict than a panel of laypeople.

309. *Id.* at 559 (Douglas, J., dissenting); Feld, *Constitutional Tension*, *supra* note 17, at 1145–46.

310. *McKeiver*, 403 U.S. at 559 (Douglas, J., dissenting).

311. *Id.* at 564 (Douglas, J., dissenting).

312. Feld, *Constitutional Tension*, *supra* note 17, at 1155.

313. *See generally*, TORBET ET AL., *supra* note 48 (reporting states' punitive legislative actions from 1992 to 1995 in response to an increase in juvenile arrests and public perception of crime).

314. *See* State *ex rel.* D.J., 817 So. 2d 26, 34 (La. 2002); *In re* J.F., 714 A.2d 467, 475 (Pa. Super. Ct. 1998); State v. Hezzie R. (*In re Hezzie R.*), 580 N.W.2d 660, 678 (Wis. 1998); Feld, *Constitutional Tension*, *supra* note 17, at 1155–59, 1190–91.

Second, punitive sanctions increase the need to protect delinquents from direct and collateral consequences of convictions. Providing delinquents with a second-rate criminal court denies them fundamental fairness, undermines the legitimacy of the process, and increases the likelihood of wrongful convictions.

a. Accurate Factfinding

Winship reasoned that the seriousness of proceedings and the consequences for a defendant—juvenile or adult—required proof beyond a reasonable doubt.[315] *McKeiver* assumed that judges could find facts as accurately as juries.[316] Its rejection of jury trials undermines factual accuracy and increases the likelihood that outcomes will differ in delinquency and criminal trials. Although juries and judges agree about defendants' guilt or innocence in about four-fifths of criminal cases, when they differ, juries acquit more often than do judges.[317]

Factfinding by judges and juries differs because juvenile court judges may preside over hundreds of cases a year, while a juror may only participate in one or two cases in a lifetime.[318] Several factors contribute to jurors' greater propensity to acquit than judges. The presence of jurors affects the ways in which lawyers present their cases.[319] As judges hear many cases, they may become less meticulous when they weigh evidence and apply less stringently the reasonable doubt standard than do jurors.[320] Judges hear testimony from police and probation officers on a recurring basis and form settled opinions about their credibility.[321] Similarly, judges may have formed an opinion about a youth's credibility, character, or the case from hearing earlier charges against her or presiding at a detention hearing.

315. *See In re* Winship, 397 U.S. 358, 365–68 (1970).

316. *See McKeiver*, 403 U.S. at 541.

317. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 185–90, 209–13 (1966).

318. Janet E. Ainsworth, *Re-imagining Childhood and Re-constructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1124 (1991).

319. *See* Guggenheim & Hertz, *supra* note 303, at 579–80 (discussing differences in attorneys' use of opening statements between a jury trial and a bench trial).

320. *See id.* at 564 (describing examples of convictions by judges that were based on scant evidence).

321. Ainsworth, *supra* note 318.

Delinquency proceedings' informality compounds differences between judge and jury factfinding and further disadvantages delinquents. Judges in criminal cases instruct jurors about the applicable law. By contrast, a judge in a bench trial does not discuss either the law or the evidence before reaching a conclusion, which makes it more difficult for an appellate court to determine whether the law was correctly understood and applied. Further, a lack of diverse opinions increases the variability of outcomes. *Ballew v. Georgia* recognized the superiority of group decision-making over individual judgments. In jury trials, some group members remember facts that others forget, and deliberations air competing views and promote more accurate decisions.[322] By contrast, in bench trials, judges administer the courtroom, make evidentiary rulings, take notes, and conduct sidebars with lawyers, which divert their attention during proceedings.[323]

The greater flexibility and informality of closed juvenile proceedings compounds the differences between judge and jury reasonable doubt. When a judge presides at a youth's detention hearing, she receives information about the offense, criminal history, and social background, which may contaminate impartial factfinding.[324] Exposure to nonguilt related evidence increases the likelihood that a judge subsequently will convict and institutionalize her.[325] Some differences between judges and juries reflect the latter's use of a higher threshold of proof beyond a reasonable doubt.[326]

The youthfulness of a defendant is a factor that elicits jury sympathy and accounts for some differences between judge and jury decisions.[327] By contrast, juvenile court judges may be more predisposed to find jurisdiction to help a troubled youth.[328] Finally, without a jury, judges adjudicate many delinquents without an attorney, which prejudices factfinding and increases the likelihood of erroneous convictions.

322. Ballew v. Georgia, 435 U.S. 223, 232–39 (1978); *see* Guggenheim & Hertz, *supra* note 303, at 578.

323. Guggenheim & Hertz, *supra* note 303, at 578.

324. Feld, *Constitutional Tension*, *supra* note 17, at 1167.

325. *Id.*

326. *See* KALVEN & ZEISEL, *supra* note 317, at 185–90.

327. *Id.* at 209–10.

328. Feld, *Constitutional Tension*, *supra* note 17, at 1166.

i. Suppression Hearings and Evidentiary Contamination

In bench trials, judges typically conduct suppression hearings immediately before or during trial, a practice that exposes them to inadmissible evidence and prejudicial information.[329] A judge may know about a youth's prior delinquency from presiding at a detention hearing, prior adjudication, or trial of co-offenders. Similarly, a judge who suppresses an inadmissible confession or illegally seized evidence may still be influenced by it. The presumption that exposure to inadmissible evidence will not affect a judge is especially problematic where the same judge typically handles a youth's case at several different stages. An adult defendant can avoid these risks by opting for a jury trial, but delinquents have no way to avoid the cumulative risks of prejudice in a bench trial. Critics of juvenile courts' factfinding conclude that "judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt."[330] As a result, states adjudicate delinquents in cases in which they could not have obtained convictions with adequate procedural safeguards.[331] The differences between the factual reliability of delinquency adjudications and criminal convictions raise questions about the use of juveniles' records to enhance criminal sentences.

b. Preventing Governmental Oppression and Get Tough Policies

McKeiver uncritically assumed that juvenile courts treated delinquents rather than punished them, but it did not review any record to support that assumption. The Court did not analyze the indicia of treatment or punishment—juvenile code purpose clauses, sentencing statutes, judges' sentencing practices, conditions of confinement, or intervention outcomes—when it denied delinquents a jury.

The Court long has recognized that juries serve a special role to prevent governmental oppression and protect citizens facing punishment.[332] In our system of checks and balances, lay cit-

329. *See* Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 231–41; Guggenheim & Hertz, *supra* note 303, at 571.

330. Guggenheim & Hertz, *supra* note 303, at 564–65.

331. *See* Feld, *Criminalizing Juvenile Justice*, *supra* note 29, at 231–41; Guggenheim & Hertz, *supra* note 303, at 564–65, 571.

332. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 543, 554 (1971).

izen jurors represent the ultimate restraint on abuses of governmental power, which is why it is the only procedural safeguard listed in three different places in the constitution.[333] *Duncan v. Louisiana*, decided three years before *McKeiver*, held that the Sixth Amendment guaranteed a jury right in state criminal proceedings to assure accurate factfinding *and* to prevent governmental oppression.[334] *Duncan* emphasized that juries inject community values into the law, increase visibility of justice administration, and check abuses by prosecutors and judges.[335] The year after *Duncan*, *Baldwin v. New York* again emphasized the jury's role to prevent government oppression by interposing lay citizens between the State and the defendant.[336] *Baldwin* is especially critical for juvenile justice because an adult charged with any offense that carries a *potential* sentence of confinement of six months or longer enjoys a right to a jury trial.[337]

McKeiver feared that granting delinquents jury trials would also lead to public trials.[338] However, as a result of Get Tough Era reforms to increase the visibility, accountability, and punishment powers of juvenile courts, about half the states authorized public access to all delinquency proceedings or to felony prosecutions.[339] States limited confidentiality protections to hold youths accountable and put the public on notice of those who pose risks to the community.[340]

i. Punitive Juvenile Justice

The vast majority of states deny delinquents the right to a jury[341] and youths have challenged *McKeiver*'s half-century old

333. *See* U.S. CONST. art. 3, § 2, cl. 2.; *id.* amends. VI, VII.

334. *McKeiver*, 403 U.S. at 545; Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

335. *Duncan*, 391 U.S. at 156.

336. Baldwin v. New York, 399 U.S. 66, 72 (1969) ("[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him."); *Duncan*, 391 U.S. 145.

337. *See Baldwin*, 399 U.S. at 73–74.

338. *McKeiver*, 403 U.S. at 550.

339. TORBET ET AL., *supra* note 48, at 36.

340. NAT'L RESEARCH COUNCIL, *supra* note 1, at 81.

341. Feld, *Constitutional Tension*, *supra* note 17, at 1190; Gardner, *Punitive Juvenile Justice*, *supra* note 46, at 49 n.252.

rationale in light of Get Tough Era changes.[342] Most state appellate courts have rejected their claims with deeply flawed, uncritical analyses, which often conflate treatment with punishment.[343] Few courts engage in the careful analysis of purpose clauses, sentencing statutes, judicial practices, and conditions of confinement required to distinguish treatment from punishment.[344] States rejected juveniles' challenges to Get Tough Era changes—open hearings, mandatory sentences, and the use of delinquency convictions to enhance criminal sentences—by emphasizing differences in the severity of penalties imposed on delinquents and criminal defendants convicted of the same crime.[345] However, once a penalty crosses *Baldwin*'s six-month *authorized sentence* threshold, further severity is irrelevant. By contrast, the Kansas Supreme Court in *In re L.M.* concluded that legislative changes eroded the benevolent parens patriae character of juvenile courts and transformed it into a system for prosecuting juveniles charged with committing crimes.[346]

c. Delinquency Convictions to Enhance Criminal Sentences

Apprendi v. New Jersey ruled that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," *other than the fact of a prior conviction*, "must be submitted to a jury, and proved beyond a reasonable doubt."[347] The Court exempted the "fact of a prior conviction" because criminal defendants enjoyed the right to a jury trial and proof beyond a

342. *McKeiver*, 403 U.S. 528; *see In re* D.J., 817 So. 2d 26, 30–35 (La. 2002) (rejecting the juveniles' argument that the policy-based analysis in *McKeiver* is outdated, specifically in light of recent changes in state law and ongoing national critique of the juvenile justice system); *In re* J.F., 714 A.2d 467, 471 (Pa. Super. Ct. 1998) ("As appellants correctly point out, the juvenile justice system has undergone a transformation over the past two decades in which there has been a move away from the rehabilitation and protection of juvenile offenders toward more punishment and correctional oriented policies. Nonetheless, we cannot conclude that a juvenile adjudication has, in essence, become the equivalent of an adult criminal proceeding."); State v. Hezzie R. (*In re Hezzie R.*), 580 N.W.2d 660, 667–68 (Wis. 1998) (rejecting the juveniles' argument that Wisconsin's Juvenile Justice Code is criminal in nature and thus *McKeiver*'s rationale is inapposite).

343. Gardner, *Punitive Juvenile Justice*, *supra* note 46, at 50–51.

344. *See In re J.F.*, 714 A.2d 467; *In re Hezzie R.*, 580 N.W.2d 660.

345. *See In re D.J.*, 817 So. 2d at 33 (arguing that the juvenile would face a maximum of eight years of detention if found delinquent while an adult convicted of the same charge could receive a maximum of fifty-five years imprisonment at hard labor).

346. *See In re* L.M., 186 P.3d 164, 170 (Kan. 2008).

347. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

reasonable doubt, which assured reliability of prior convictions.[348] *Apprendi* emphasized the jury's role to uphold *Winship*'s standard of proof beyond a reasonable doubt.[349] While *McKeiver* approved jury-free delinquency proceedings to impose rehabilitative dispositions, they would *not* be adequate to punish a youth.

Juvenile courts historically restricted access to records to avoid stigmatizing youths.[350] Criminal courts lacked access to delinquency records because of juvenile courts' confidentiality, practice of sealing or expunging delinquency records, physical separation of juvenile and criminal court staff and records, and the difficulty of maintaining systems to track offenders and compile histories across both systems.[351] But criminal courts need to know which juveniles' delinquent careers continue into adulthood to incapacitate them, punish them, or protect public safety.[352] Therefore, despite a tradition of confidentiality, states have long used some delinquency convictions. Some states use juvenile records on a discretionary basis.[353] Many state and federal sentencing guidelines include some delinquency convictions in defendants' criminal history score,[354] although some vary in how they weigh delinquency convictions.[355]

As a matter of policy, however, states should not equate delinquency and criminal convictions for sentence enhancements. Despite causing the same physical injury or property loss as older actors, juveniles' reduced culpability makes their choices less blameworthy and should diminish their weight.[356] Moreover, their use to enhance criminal sentences raises questions about the procedures used to obtain those convictions. Juvenile courts in many states adjudicate half or more delinquents without counsel.[357] The vast majority of states deny juveniles the

348. *Id.*; *see* Feld, *Constitutional Tension*, *supra* note 17, at 1120–24.

349. *Appredni*, 530 U.S. at 483–84.

350. FELD, BAD KIDS, *supra* note 1, at 233–35.

351. *Id.*

352. *Id.*; James B. Jacobs, *Juvenile Criminal Record Confidentiality*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 106, at 149, 155.

353. *See* Feld, *Constitutional Tension*, *supra* note 17, at 1184–88.

354. *Id.* at 1184–85; *see* United States v. Davis, 48 F.3d 277, 280 (7th Cir. 1995); United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993).

355. For example, under California's three strikes law, some juvenile felony convictions count as strikes for sentence enhancements. Feld, *Constitutional Tension*, *supra* note 17 at 1187–88.

356. *See infra* Part II.B.

357. FELD, BAD KIDS, *supra* note 1, at 128.

right to a jury trial.[358] Because some judges in bench trials may apply *Winship*'s reasonable doubt standard less stringently, more youths are convicted than would be with adequate safeguards.

Federal circuits are divided whether *Apprendi* allows judges to use delinquency convictions to enhance criminal sentences.[359] State appellate court rulings reflect the federal split of opinion

358. *Id.* at 158.

359. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Ninth Circuit in *United States v. Tighe* reasoned that delinquency adjudication does not fall within the prior conviction exception. 266 F.3d 1187, 1194 (9th Cir. 2001). *Tighe* explains:

> [T]he "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi*'s 'prior conviction' exception.

Id.

By contrast, the Eighth Circuit in *United States v. Smalley* reasoned that *Apprendi* excepted prior convictions from its general rule because the procedural safeguards of trial by jury and proof beyond a reasonable doubt assured their reliability. 294 F.3d 1030, 1032 (8th Cir. 2002). While *Apprendi* identified those procedural safeguards that clearly established the reliability of prior convictions—notice, right to a jury trial, and proof beyond a reasonable doubt—it did not hold that they were essential prerequisites to a valid conviction. 530 U.S. at 476–78. The court in *Smalley* reasoned:

> We think that while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser [preponderance] standard of proof), the Court did not take a position on possibilities that lie in between these two poles. In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the "fundamental triumvirate of procedural protections" . . . underly [sic] an adjudication before it can qualify for the *Apprendi* exemption.

Smalley, 294 F.3d. at 1032.

Rather than focusing on the specific procedural safeguards of a criminal prosecution, *Smalley* focused on "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Id.* at 1033. The court reviewed the procedural safeguards available to juveniles as a result of *Gault* and *Winship* and concluded that "these safeguards are more than sufficient to ensure the reliability that *Apprendi* requires." *Id.* at 1033. The court reiterated *McKeiver*'s assertion that the absence of a jury would not detract from the accuracy of factfinding in delinquency adjudications. *Id.* However, *Smalley* did not examine *McKeiver*'s "treatment" rationale for less stringent procedural safeguards or the inconsistency of using convictions obtained for a benign purpose subsequently to be used for a more punitive one. Feld, *Constitutional Tension*, *supra* note 17, at 1196–1222.

about the reliability of delinquency convictions and the requirement for a jury right.[360] Until the Court clarifies *Apprendi*, defendants in some states or federal circuits will serve longer sentences than those in other jurisdictions based on flawed delinquency convictions.

Finally, the use of delinquency convictions to enhance criminal sentences further aggravates endemic racial disparities in justice administration. At each stage of the juvenile justice system, racial disparities compound, cumulate, create more extensive delinquency records, and contribute to disproportionate minority confinement. Richard Frase's magisterial analysis of racial disparities in criminal sentencing in Minnesota concludes that "seemingly legitimate sentencing factors such as criminal history scoring can have strongly disparate impacts on nonwhite defendants."[361]

i. Collateral Consequences of Delinquency Convictions

In addition to direct penalties—confinement and enhanced sentences as juveniles or as adults—extensive collateral consequences follow from delinquency convictions. Although state policies vary, collateral consequences may follow youths for decades and affect future housing, education, and employment opportunities.[362] States may enter juveniles' fingerprints, photographs, and DNA into databases accessible to law enforcement and other agencies.[363] Some get-tough reforms opened delinquency trials and records to the public, and media reports on the internet create a permanent and easily accessed record.[364] Criminal justice agencies, schools, child care providers, the military, and others may have access to juvenile court records automatically or by petition.[365] Expungement of delinquency records is not automatic and requires a petition and court hearing.[366] Delinquency convictions may affect youths' ability to obtain professional licensure, to receive government aid, to join the military, to obtain

360. *See* State v. Hitt, 42 P.3d 732 (Kan. 2002); State v. Brown, 879 So. 2d 1276 (La. 2004); Feld, *Constitutional Tension*, *supra* note 17, at 1203–14.

361. Richard Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 265 (2009).

362. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 3; NELLIS, *supra* note 50, at 61.

363. *See* FELD, CASES AND MATERIALS, *supra* note 29, at 369–76.

364. *See* NELLIS, *supra* note 50, at 69–73.

365. *See id.* at 63–65; Jacobs, *supra* note 352, at 161.

366. *See* NELLIS, *supra* note 50, at 63–65 (discussing the complex process for juvenile record expungement).

or keep legal immigration status, to live in public housing, and more.[367]

The response to juvenile sex offenders is among the most onerous collateral consequence of delinquency adjudication.[368] The federal Adam Walsh Child Protection and Safety Act—Sex Offender Registration and Notification Act (SORNA)—requires states to implement registration and notification standards for individuals convicted as adults or juveniles for certain sex offenses.[369] Some states require lifetime registration, limit where registered offenders can live, work, or attend school, and require neighborhood notification.[370]

d. Conclusion

The procedural as well as substantive convergence between juvenile and criminal courts since *Gault* has placed greater demands on juveniles' competence to exercise rights. Despite greater punitiveness and increased formality, most states do not provide delinquents the formal or functional procedural protections afforded adults. Juveniles waive *Miranda* rights and counsel under an adult legal standard that many do not understand and cannot meet. The denial of juries undermines the reliability of delinquency convictions and their subsequent use for long-term collateral consequences.

State legislatures that define juvenile courts should recognize that "children are different," and provide greater assistance. Lawmakers passed punitive laws and simultaneously eroded juvenile courts' meager protections—closed and confidential proceedings, limited collateral use of delinquency convictions, and the like. Legislators failed to appropriate adequate funds for legal services and fostered crippled public defenders incapable of providing effective assistance of counsel. A half-century after

367. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 127; *see also* NELLIS, *supra* note 50, at 61.

368. *See* NELLIS, *supra* note 50, at 69–73. *See generally* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) (discussing the societal and legal response to the juvenile sex offender).

369. 42 U.S.C. §§ 16901–16962 (2012); NELLIS, *supra* note 50, at 70–71.

370. *See* ZIMRING, *supra* note 368, at 147–50; *see also* Michael F. Caldwell, *Juvenile Sexual Offenders*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 106, at 55, 80 (discussing studies of registration laws, concluding that these laws impede "community reintegration of less resilient offenders, who are then rearrested more rapidly").

Gault, many juveniles in many states are still waiting for a lawyer to advocate on their behalf.[371]

II. YOUTHS IN CRIMINAL COURT

A. TRANSFER TO CRIMINAL COURT

During the Get Tough Era, lawmakers changed the theory and practice of transfer and increased the numbers of youths tried as adults. States use one or more often-overlapping transfer strategies: (1) judicial waiver; (2) legislative offense exclusion; and (3) prosecutorial direct-file.[372] For around 200,000 youths, states' juvenile court jurisdiction ends at fifteen or sixteen, rather than seventeen years of age.[373] States transfer another 50,000 youths via judicial waiver (7500), prosecutorial direct-file (27,000), and the remainder with prosecutor-determined excluded offenses.[374] We lack precise numbers because states only collect data on judicial transfers, which account for the fewest number of youths waived.[375]

During the Get Tough Era, legislators shifted control of transfer decisions from judges to prosecutors to avoid the former's relative autonomy from political pressures.[376] Legal changes lowered the age for transfer, increased the numbers of excluded offenses, and strengthened prosecutors' charging powers.[377] Despite the prevalence of judicial waiver statutes, prosecutors' excluded offenses or direct-file charging decisions determine the adult status of eighty-five percent of youths.[378]

371. *See generally* NAT'L JUVENILE DEF. CTR., *supra* note 264 and accompanying text.

372. SNYDER & SICKMUND, *supra* note 33, at 110; Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 801, 802.

373. Feld & Bishop, *supra* note 372, at 815.

374. *Id.*

375. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 110.

376. *See* NAT'L RESEARCH COUNCIL, *supra* note 53, at 207, 214–18; NAT'L RESEARCH COUNCIL, *supra* note 1, at 38–39.

377. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 126 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*].

378. Jolanta Juszkiewicz & Mark Schindler, *Youth Crime/Adult Time: Is Justice Served?*, CORRECTIONS TODAY, Feb. 2001, at 102; *see also* AMNESTY INTERNATIONAL & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 19 (2005) [hereinafter AMNESTY INTERNATIONAL] ("[T]he proportion of children who have had a

The vast majority of states have judicial waiver laws that specify the ages and offenses for which a judge may conduct a transfer hearing.[379] *Kent v. United States* required judges to conduct a procedurally fair hearing (counsel, access to probation reports, and written findings for appellate review) because the loss of juvenile courts' benefits (access to treatment, confidentiality, limited collateral consequences, and the like) was a critical action.[380] *Breed v. Jones* applied the Fifth Amendment double jeopardy prohibition to delinquency adjudications and required states to decide whether to prosecute a youth in juvenile or criminal court before proceeding to trial.[381] *Kent* appended a list of factors for judges to consider and state courts and statutes incorporated those criteria.[382] Judges have broad discretion to interpret those factors and studies of judicial waiver document inconsistent rulings, justice by geography, and over-representation of racial minorities.[383] For decades, studies reported racial disparities in judicial transfer decisions.[384] Judges transfer minority youths more often than white youths especially for violent and drug crimes.[385] In the seventy-five largest counties in the United States, racial minorities comprised more than two-thirds of juveniles tried in criminal court and the vast majority of those sentenced to adult prison.[386]

A dozen states set their juvenile courts' age jurisdiction at fifteen or sixteen years—rather than seventeen—for certain felonies, which results in the largest numbers of youths tried as adults.[387] In addition, some states' laws exclude youths sixteen

transfer hearing before being tried in criminal court has been steadily declining.").

379. Feld & Bishop, *supra* note 372, at 802–05.

380. Kent v. United States, 383 U.S. 541 (1966).

381. Breed v. Jones, 421 U.S. 519 (1975).

382. *Kent*, 383 U.S. at 566–67.

383. *See generally* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73 (1995); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996).

384. *See, e.g.*, GAO, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 59 (1995); *see also* AMNESTY INTERNATIONAL, *supra* note 378, at 39 ("[M]inority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system.").

385. NAT'L RESEARCH COUNCIL, *supra* note 53, at 216; POE-YAMAGATA & JONES, *supra* note 57, at 12–14.

386. NAT'L RESEARCH COUNCIL, *supra* note 53, at 220.

387. Feld & Bishop, *supra* note 372, at 806, 809–10.

or older charged with murder, while others exclude more extensive lists of offenses.[388] During the Get Tough Era, many states excluded more offenses—crimes against the person, property, drugs, or weapons offenses—to evade *Kent*'s hearing requirement.[389] Appellate courts uniformly reject youths' claims that prosecuting them for an excluded offense denies *Kent*'s procedural safeguards.[390]

In more than a dozen states, juvenile and criminal courts share concurrent jurisdiction over some ages and offenses—older youths and serious crimes—and prosecutors decide through direct file in which forum to charge a youth.[391] Under offense exclusion, the crime charged determines the venue; direct-file laws allow prosecutors to select either system to try the crime.[392] Direct file elevates prosecutors' power at judges' expense and creates a model more typical of criminal courts. Most direct-file laws provide no criteria to guide prosecutors' choice of forum.[393] Prosecutors lack access to personal, social, or clinical information about a youth that a judge would consider and base their decisions primarily on police reports.[394] Locally elected prosecutors exploit crime issues just as get-tough legislators do, introduce justice by geography and racial disparities, and exercise their discretion as subjectively as do judges, but without appellate review. Nationally, prosecutors have determined the criminal status of eighty-five percent of youths tried as adults[395] and have acted as gatekeepers to the juvenile justice system, a role previously reserved for judges—who have more experience, information, and less political motivations.

Another Get Tough Era innovation was blended sentences, which provide judges with mixed juvenile-criminal sentencing options.[396] Because juvenile courts lose jurisdiction when youths reach the age of majority or other dispositional age limit, judges

388. *Id.* at 809–10.

389. *See id.* at 806.

390. *See, e.g.*, United States v. Bland, 472 F.2d 1329, 1337 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1972).

391. *See* Feld, *Legislative Exclusion*, *supra* note 377 at 98–101; Feld & Bishop, *supra* note 372, at 819.

392. *See* Feld & Bishop, *supra* note 372, at 819.

393. *Id.* at 820.

394. *Id.*

395. *Id.* at 821.

396. *Id.* at 806. *See generally* Marcy Rasmussen Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997 (2001) (examining the net-widening impact of blended sentencing policies).

may be unable to sentence appropriately older offenders convicted of serious crimes. States increase judges' sentencing powers by allowing juvenile courts to impose extended delinquency sentences with a stayed criminal sentence, or by giving criminal courts authority to use a delinquency disposition in lieu of imprisonment.[397] Regardless of approach, blended sentencing laws require criminal procedural safeguards, including the right to a jury trial, to enable a judge to punish and thereby gain greater flexibility to treat.[398] Although states adopted blended sentences as an alternative to transfer, they had a net-widening effect, and juvenile court judges frequently impose them on less-serious offenders whom they previously handled as delinquents.[399] Judges have imposed blended sentences on younger, less-serious offenders, have subsequently revoked their probation—primarily for technical violations—and have doubled the number of youths sent to prison.[400] Prosecutors have used the threat of transfer to coerce youths to plead to blended sentences, to waive procedural rights, to increase punishment imposed in juvenile courts, and to risk exposure to criminal sanctions.[401]

1. Juveniles in Prison

Criminal court judges sentence transferred youths like adults, which increases their likelihood of subsequent offending.[402] While all inmates potentially face abuse, adolescents' size, physical strength, lesser social skills, and lack of sophistication increase their risk for physical, sexual, and psychological victimization.[403] To prevent victimization, some states place vulnerable youths in solitary confinement for twenty-two hours a day.[404] Prisons are developmentally inappropriate places for youths to form an identity, acquire social skills, or make a suc-

397. *See* Podkopacz & Feld, *supra* note 396, at 999.

398. *Id.* at 1009.

399. *Id.* at 1028, 1071.

400. *See id.* at 1063, 1070.

401. *See id.* at 1003, 1029–30.

402. *See* Feld & Bishop, *supra* note 372, at 828.

403. *See* Michele Deitch & Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, *in* JUVENILE JUSTICE SOURCEBOOK 241, 252 (Wesley T. Church II et al. eds., 2d ed. 2014); Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 843, 846–48.

404. Deitch & Arya, *supra* note 403, at 252–53.

cessful transition to adulthood. Imprisoning them exacts different and greater developmental opportunity costs than those experienced by adults.[405] It disrupts normal development—completing education, finding a job, forming relationships and creating social bonds that promote desistance—and ground lost may never be regained.

2. Policy Justifications for Waiver: Unarticulated and Unrealized

States will prosecute some youths in criminal court as a matter of public safety and political reality. Legislative changes that targeted violent and drug crimes increased the likelihood and severity of criminal sentences; judges incarcerate transferred youths more often and for longer sentences than youths retained in juvenile courts.[406] Although approximately three-quarters of youths convicted of violent felonies in criminal court go to prison, overall nearly half of all transferred youths are not convicted or placed on probation, fewer than twenty-five percent are sentenced to prison, and ninety-five percent are released from custody by their twenty-fifth birthday.[407]

Although legislators assumed that threat of transfer and criminal punishment would deter youths, studies of juvenile crime rates before and after passage of get tough laws found no general deterrent effect.[408] Studies of specific deterrence report that transferred youths had higher recidivism rates than did those sentenced as delinquents.[409] Studies compared outcomes

405. NAT'L RESEARCH COUNCIL, *supra* note 1, at 135.

406. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf; MALCOLM C. YOUNG & JENNI GAINSBOROUGH, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 9 (2000), https://www.prisonpolicy.org/scans/sp/juvenile.pdf.

407. Deitch & Arya, *supra* note 403, at 251; Carol A. Schubert et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 L. & HUM. BEHAV. 460, 468 (2010).

408. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 122. *See generally* Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451 (2006) (concluding that direct file laws do not deter juvenile crime); Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUST. Q. 34 (2006) (finding that excluded offense laws do not deter young offenders).

409. *See generally* Redding, *supra* note 406 (exploring the effects of juvenile transfer mechanisms); Jeffrey Fagan et al., *Be Careful What You Wish For: Legal Sanctions and Public Safety Among Adolescent Felony Offenders in Juvenile and Criminal Court* (Columbia Law Sch., Pub. Law Research Paper No. 03-61,

of youths transferred to criminal courts with those who remained in juvenile courts and concluded that youths tried as adults had higher and faster recidivism rates, especially for violent crimes, than their delinquent counterparts.[410]

Although judges do not imprison all transferred youths, they sometimes treat youthfulness as an aggravating rather than a mitigating factor when they do. Prior to *Miller v. Alabama*, more youths convicted of murder received life without parole (LWOP) sentences than did adults sentenced for murder.[411] Compared with young adult offenders, transferred juveniles convicted of the same crimes often received longer sentences.[412]

Punitive transfer laws have targeted violent crimes, which black youths commit more often.[413] Even prior to the Get Tough Era, studies reported racial disparities in judicial transfer decisions.[414] Subsequently, judges transferred youths of color more often than white youths charged with similar violent and drug crimes.[415] The vast majority of juveniles transferred to criminal court and sentenced to prison are youths of color, primarily black youths.[416]

3. Waiver Policy: What Should a Rational Legislature Do?

Expansive transfer policies further no legitimate penal goals. Equating younger and older offenders ignores developmental differences and disproportionately punishes less blameworthy adolescents. Transfer does not deter youths because their

2007), https://ssrn.com/abstract=491202.

410. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM 7 (2007), https://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf; NAT'L RESEARCH COUNCIL, *supra* note 1, at 175.

411. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 121.

412. Megan Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485, 500–02 (2004). *See generally* Megan Kurlychek & Brian D. Johnson, *Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court*, 48 CRIMINOLOGY 725 (2010) [hereinafter Kurlychek & Johnson, *Juvenility and Punishment*].

413. *See* NAT'L RESEARCH COUNCIL, *supra* note 53, at 216; POE-YAMAGATA & JONES, *supra* note 57, at 12–14.

414. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 122.

415. *See* Feld, *Responses to Youth Violence*, *supra* note 48, at 194–95; NAT'L RESEARCH COUNCIL, *supra* note 53, at 216, 250; POE-YAMAGATA & JONES, *supra* note 57, at 17.

416. NAT'L RESEARCH COUNCIL, *supra* note 53, at 220.

immature judgment, short-term time perspective, and preference for immediate gains lessen the threat of sanctions. Youths tried as adults reoffend more quickly and more seriously, thereby increasing the risk to public safety and negating any short-term crime reduction by incapacitation.[417]

The vast majority of juvenile justice scholars agree that *if some youths must be transferred*, then it should occur in a judicial waiver process and be used rarely.[418] A state should waive only those youths whose serious *and* persistent offenses require minimum lengths of confinement that greatly exceed the maximum sanctions available in juvenile court. A retributive policy would limit severe sanctions to youths charged with homicide, rape, robbery or assault with a firearm or substantial injury. However, severely punishing *all* youths who commit serious crimes would be counterproductive because youths arrested for an initial violent offense desist at similar rates to other delinquents.[419] Chronic offenders may require sentences longer than those available in juvenile court because of persistent criminality and exhaustion of juvenile court resources.[420]

A legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise procedural rights for youths fifteen years of age or younger.[421] The minimum age for transfer should be sixteen years of age.

A juvenile court hearing (1) guided by offense criteria and clinical considerations; and (2) subject to rigorous appellate review is the only sensible way to make transfer decisions.[422] Cri-

417. *See* FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 122.

418. *See id.* at 122–23; SCOTT & STEINBERG, *supra* note 1, at 242–43; ZIMRING, *supra* note 23, at 125–27; Donna Bishop, *Injustice and Irrationality in Contemporary Youth Policy*, 3 CRIMINOLOGY & PUB. POL'Y 633, 640 (2004); Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE OF CHILD., Fall 2008, at 108.

419. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 23–25; MARVIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 251, 254 (1972); Alex R. Piquero et al., *Criminal Career Patterns*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION, *supra* note 85, at 14, 24.

420. Feld, EVOLUTION OF JUVENILE COURT, *supra* note 1, at 123.

421. See *supra* notes 166–81, 223–29, 273–76; *infra* notes 457–87 and accompanying text.

422. *See* FELD, BAD KIDS, *supra* note 1, at 210; SCOTT & STEINBERG, *supra*

teria should focus on violent offenses, prior record, offender culpability, criminal participation, clinical evaluations, and aggravating and mitigating factors which, taken together, distinguish youths who deserve sentences substantially longer than those juvenile courts can impose. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. Although waiver hearings are less efficient than prosecutors' charging decisions, it should be difficult to transfer youths—juvenile courts exist to keep them out of the criminal justice system. An adversarial hearing at which prosecution and defense present evidence about offense, culpability, and treatment prognoses will produce better decisions than will politically-motivated prosecutors acting without clinical information.

B. SENTENCING YOUTHS AS ADULTS: CHILDREN ARE DIFFERENT

The Supreme Court developed its jurisprudence of youth—children are different—in response to punitive laws that ignored adolescents' reduced culpability. It was a judicial assertion that enough is enough. In a trilogy of cases beginning in 2005, the Court applied the Eighth Amendment prohibition on cruel and unusual punishment to juveniles.[423] *Roper v. Simmons* prohibited states from executing offenders for murder committed before they were eighteen years of age.[424] The Justices concluded that youths' immature judgment and lack of self-control, susceptibility to negative peers, and transitory personalities reduced their culpability and precluded the most severe sentence.[425] *Graham v. Florida* extended *Roper*'s diminished-responsibility rationale and prohibited states from imposing LWOP sentences on juveniles convicted of nonhomicide offenses.[426] It repudiated the Court's Eighth Amendment doctrine that "death is different."[427]

note 1, at 244–45; Bishop, *supra* note 418; Feld, *Responses to Youth Violence*, *supra* note 48, at 205–06; *cf.* ZIMRING, *supra* note 23, at 125–27 (arguing that transfer decisions should be made by judges rather than prosecutors).

423. *See, e.g.*, Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*] (explaining these cases' impact on juvenile criminal law); Barry C. Feld, *The Youth Discount: Old Enough To Do the Crime, Too Young To Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013) [hereinafter Feld, *Youth Discount*] (tracing the effects of these three cases).

424. Roper v. Simmons, 543 U.S. 551 (2005).

425. *Id.* at 569–70.

426. Graham v. Florida, 560 U.S. 48, 70–73, (2015).

427. *Id.* at 74 (majority opinion); *id.* at 103 (Thomas, J., dissenting).

Miller v. Alabama extended *Roper* and *Graham*'s diminished-responsibility rationale and barred *mandatory* LWOP sentences for youths convicted of murder.[428] *Miller* required judges to make individualized culpability assessments and to weigh youthfulness as a mitigating factor.[429]

Despite the Court's repeated assertions that children are different, *Graham* provided nonhomicide juvenile offenders very limited relief—"some meaningful opportunity to obtain release"[430]—without requiring either rehabilitative services or eventual freedom. *Miller* required a judge to make an individualized assessment of a juvenile murderer's culpability, but did not preclude a LWOP sentence.[431] State courts and legislatures have struggled to implement juveniles' diminished responsibility when sentencing them as adults.[432]

The increased numbers and immaturity of many juveniles sentenced as adults impelled the Court to review states' criminal sentencing laws as applied to children. *Roper* held that youths are categorically less criminally responsible than adults.[433] *Graham* rejected the Court's death is different jurisprudence and reformulated the Court's proportionality analyses to account for the doubly diminished responsibility of juveniles who did not kill.[434] *Miller* barred *mandatory* LWOP sentences for juveniles who murder and relied on death-penalty precedents to require individualized assessments and to weigh youths' diminished responsibility.[435] State courts and legislatures have struggled unsuccessfully to implement the Court's children are different jurisprudence because the opinions' broad language provides scant guidance on several critical questions. This Section concludes by proposing a youth discount—shorter sentences for younger offenders—to formally recognize youthfulness as a mitigating factor.

As noted above, states annually try upwards of 200,000

428. Miller v. Alabama, 567 U.S. 460, 479 (2012).

429. *Id.* at 481, 489.

430. *Graham*, 560 U.S. at 75.

431. *Miller*, 567 U.S. at 479.

432. See *infra* notes 515–24 and accompanying text. *See generally* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1816–18 (2016) (reviewing state responses to *Miller*); Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 975–76 (2015) (describing how states have reformulated sentencing schemes after *Miller*).

433. Roper v. Simmons, 543 U.S. 551, 570 (2005).

434. *Graham*, 560 U.S. at 72.

435. *Miller*, 567 U.S. at 474–79.

chronological juveniles as adults.[436] The fallacious predictions during the Get Tough Era of an impending bloodbath by superpredators propelled punitive policies.[437] States lowered the age for transfer, increased the number of excluded offenses, and shifted discretion from judges to prosecutors, all of which exacerbated racial disparities.[438] Racial stereotypes taint culpability assessments and reduce youthfulness' mitigating role.[439] Children of color comprise the majority of juveniles tried in criminal court and three-quarters of those who enter prison.[440] For adults, states' Get Tough Era criminal laws lengthened sentences, adopted mandatory minimums, and imposed mandatory LWOP sentences for homicide and other crimes.[441] The laws applied equally to juveniles as to adults; judges sentenced them as if they were adults and sent them to the same prisons.

1. *Roper v. Simmons*: Banning the Death Penalty for Juveniles

The Eighth Amendment prohibits states from inflicting cruel and unusual punishments.[442] Prior to *Roper v. Simmons*, the Court thrice considered whether it prohibited states from executing juveniles convicted of murder.[443] Before *Roper* in 1989,

436. POE-YAMAGATA & JONES, *supra* note 57, at 13.

437. *See* WILLIAM BENNETT ET AL., BODY COUNT: MORAL POVERTY. . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 21–34 (1996) (warning of ominous impending crime wave by young people); ZIMRING, *supra* note 23, at 11–16; Zimring, *supra* note 28, at 265.

438. *C.f.* NAT'L RESEARCH COUNCIL, *supra* note 1, at 42 (explaining that these reforms made minority youth "[receive] disproportionately harsh treatment in many states").

439. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561 (1998); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 494 (2004); Perry L. Moriearty, *Framing Justice, Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 853–54 (2010).

440. POE-YAMAGATA & JONES, *supra* note 57, at 2, 25; *see also* AMNESTY INTERNATIONAL, *supra* note 378, at 39–43.

441. *See* TONRY, *supra* note 61, at 170; MICHAEL TONRY, SENTENCING MATTERS, 146–47 (1996).

442. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

443. Earlier decisions adverted to the importance of considering youthfulness as a mitigating factor in capital sentencing. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 822–23 (1988) (plurality opinion) (concluding that fifteen-year-old offenders lacked culpability to warrant execution); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (remanding a sixteen-year-old defendant for resentencing after the trial court's failure to properly consider youthfulness as

Stanford v. Kentucky upheld the death penalty for sixteen- or seventeen-year-olds convicted of murder and allowed juries to assess their personal culpability on a case-by-case basis.[444] Finally, in 2005, *Roper* overruled *Stanford* and prohibited states from executing youths for crimes committed prior to age eighteen.[445]

Roper gave three reasons why states could not punish juveniles as severely as adults. First, their immature judgment and limited self-control causes them to act impulsively and without adequate appreciation of consequences.[446] Second, their susceptibility to negative peers and inability to escape criminogenic environments reduce their responsibility.[447] Third, their transitory personality provides less reliable evidence of enduring blameworthiness.[448] Because juveniles' character is transitional, the

a mitigating factor and noting that "youth is more than a chronological fact" and "minors, especially in their earlier years, generally are less mature and responsible than adults"). *Thompson*'s proportionality analysis considered both objective factors—state statutes, jury practices, and the views of organizations and the international community—and the Justices' own subjective sense of "civilized standards of decency." *Thompson*, 487 U.S. at 823, 830–31. *Thompson* emphasized that deserved punishment must reflect individual culpability and concluded that "[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Id.* at 834.

444. Stanford v. Kentucky, 492 U.S. 361, 374–77 (1989) (acknowledging that most juveniles were less criminally responsible than adults, but rejecting a categorical ban and allowing juries to decide whether a youth's culpability warranted execution).

445. Roper v. Simmons, 543 U.S. 551, 578 (2005). *Roper* relied on the analytic methodology the Court used earlier in *Atkins v. Virginia* to bar execution of defendants with mental retardation. *See id.* at 563–67; Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring states from executing defendants with mental retardation). *Atkins* found a national consensus existed because many states barred the practice and few states actually executed offenders with mental retardation. *Atkins*, 536 U.S. at 314–16 (counting state statutes and emphasizing that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change" that enabled the Court to find the existence of a national consensus). The *Atkins* Justices' independent proportionality analysis concluded that mentally impaired defendants lacked the culpability to warrant execution. *Id.* at 315–19.

446. *Roper*, 543 U.S. at 569. ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often that in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.") (internal citation omitted).

447. *Id.* at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."). The Court explained, "Their 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." *Id.* at 570.

448. *Id.* ("[T]he character of a juvenile is not as well formed as that of an

Court concluded that there is a great likelihood that they can be reformed.[449] For *Roper*, youths' diminished responsibility undermined retributive justifications for the death penalty.[450] Similarly, the Court concluded that impulsiveness and limited self-control weakened any deterrent effect.[451] *Roper* imposed a categorical ban rather than allowing juries to evaluate youths' culpability individually because the "*unacceptable likelihood* exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[452] Because a brutal murder could overwhelm the mitigating role of youthfulness, *Roper* used age as a categorical proxy for reduced culpability.

Roper reasoned that immature judgment, susceptibility to

adult."). Because juveniles' character is transitional, "[f]rom 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." *Id.*

449. *Id.*

450. *Id.* at 571. *Roper* noted the two penal functions served by the death penalty—retribution and deterrence—and concluded that:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Id.

451. *Id.* The Court concluded that juveniles' immature judgment decreased the likelihood that the threat of execution would deter them, explaining that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.*

452. *Id.* at 572–73 (emphasis added). Clinicians do not diagnose people younger than eighteen with antisocial personality disorder, and *Roper* declined to allow jurors to make culpability assessments that clinicians eschew. *Id.* at 573 (noting that psychologists cannot differentiate between a transiently immature juvenile and the "rare juvenile offender whose crime reflects irreparable corruption"). The Court feared that a brutal murder could overwhelm the mitigating role of youthfulness. *Id.*; *see also* Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 83 (2005) (arguing that "to the extent we see or want to see childhood as a time of innocence, cognitive dissonance may prompt us to reconceive a child who does terrible things as an adult"). *See generally*, Feld, *Adolescent Criminal Responsibility*, *supra* note 423 (tracing the Court's jurisprudence on youth as a mitigating factor); Feld, *Youth Discount*, *supra* note 423 (advocating a categorical rule of mitigation based on offenders' youth).

peer and environmental influences, and transitional personalities reduced adolescents' criminal responsibility.[453] *Roper*—and subsequently *Graham* and *Miller*—analyzed youths' reduced culpability within a retributive sentencing framework: proportionality and deserved punishment. Retributive sentencing proportions punishment to a crime's seriousness.[454] A crime's seriousness is defined by two elements, harm and culpability, which determine how much punishment an actor deserves. An offender's age has no bearing on the harm caused—children and adults can cause the same injuries. But proportionality requires consideration of an offender's culpability, and immaturity reduces youths' blameworthiness.[455] Youths' inability to fully appreciate wrongfulness or to control themselves lessens, but does

453. *Roper*, 543 U.S. at 569–70.

454. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 161 (2009) (arguing that "the offender's blameworthiness for an offense is generally assessed according to two elements: the nature and seriousness of the harm foreseeably caused or threatened by the crime and the offender's culpability in committing the crime (in particular, the offender's degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity"); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 48 (1976) ("[P]unishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it."). According to Professor Frase:

> [T]he degree of blameworthiness of an offense is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his or her degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity.

Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 590 (2005).

455. Offender culpability is central to proportional sentencing. *See* Tison v. Arizona, 481 U.S. 137, 156 (1987) (reasoning that "[d]eeply engrained in our legal tradition is the idea that the more purposeful is [sic] the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished"); *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) [hereinafter Scott & Grisso, *Evolution of Adolescence*] ("[Adolescents'] criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility."); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 407–09 (1999) (explaining that youths lack "ability to control

not excuse, responsibility for causing harms. They may have the minimum capacity to be criminally liable, that is, the ability to distinguish right from wrong, but still deserve less punishment.[456]

a. Developmental Psychology, Neuroscience, and Diminished Responsibility

Developmental psychology focuses on how children and adolescents' thinking and behavior change with age.[457] By mid-adolescence, most youths reason similarly to adults, such as when, for example, they make informed-consent medical decisions.[458] But the ability to make reasonable decisions with complete information under laboratory conditions differs from the ability to act responsibly under stress with incomplete information. Emotions influence youths' judgment to a greater extent than adults

[their] impulses, to manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation," and that these deficiencies render them less blameworthy). Franklin Zimring uses the term "diminished responsibility" to refer to adolescents who possess "the minimum abilities for blameworthiness and thus for punishment . . . [whose] immaturity . . . still suggests that less punishment is justified." Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 271, 273 [hereinafter Zimring, *Penal Proportionality*]; *see also* SCOTT & STEINBERG, *supra* note 1 at 123–24; ZIMRING, *supra* note 23, at 75 (arguing that "even after a youth passes the minimum threshold of competence, this barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender"); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 830 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*] (arguing that compared with adults, youths act more impulsively, weigh consequences differently from adults, and discount risks because of normal developmental processes that "undermine [their] decision-making capacity in ways that are accepted as mitigating culpability").

456. Zimring, *Penal Proportionality*, *supra* note 455, at 278; SCOTT & STEINBERG, *supra* note 1, at 122 ("[C]riminal law calculates culpability and punishment on a continuum and is not limited to the options of full responsibility (the presumption for typical adult offenders) or excuse (the disposition of children).").

457. *See* INST. OF MED. & NAT'L RESEARCH COUNCIL, THE SCIENCE OF ADOLESCENT RISK-TAKING: WORKSHOP REPORT 48–49 (2011).

458. *Cf.* NAT'L RESEARCH COUNCIL, *supra* note 1, at 95 ("Adolescents are similar to adults in their reasoning and abstract thinking abilities."); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 52–53 (1997) (concluding that the cognitive capacity and formal reasoning ability of mid-adolescents does not differ significantly from that of adults).

and compromise adolescents' decision-making and self-control.[459] Youths are more heavily influenced by the reward centers of the brain, which contributes to riskier decisions.[460]

In response to states' adoption of punitive laws, in 1997 the John D. and Catherine T. MacArthur Foundation sponsored the Research Network on Adolescent Development and Juvenile Justice (ADJJ). Over the next decade, the ADJJ network conducted research on adolescent decision-making, judgment, and adjudicative competence.[461] The research distinguishes between cognitive abilities, judgment, and self-control: controlled thinking versus impulsive behaving.[462] Cognitive capacities involve understanding, the ability to comprehend information, and reasoning, the ability to use information logically.[463] Self-control requires the ability to think before acting, to choose between alternatives, and to interrupt a course in motion.[464] Although sixteen-year-olds' understanding and reasoning approximate adults, their ability to exercise mature judgment and control impulses takes several more years to emerge.[465]

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation-seeking, and compliance with peers.[466] The regions of the brain that control reward-seeking and emotional arousal develop earlier than

459. *See* INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 39; NAT'L RESEARCH COUNCIL, *supra* note 1, at 91; LINDA PATIA SPEAR, THE BEHAVIORAL NEUROSCIENCE OF ADOLESCENCE 139–40 (2010); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001).

460. *See* INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 40; Dahl, *supra* note 459, at 62.

461. *See, e.g.*, NELLIS, *supra* note 50, at 79–82; MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, *Development and Criminal Blameworthiness* (2006), https://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf.

462. *See* SCOTT & STEINBERG, *supra* note 1, at 131–33, 136–38; Jennifer L. Woolard, *Adolescent Development, Delinquency, and Juvenile Justice*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 38, at 107, 107–08.

463. *See* Woolard, *supra* note 462, at 107–10.

464. *Id.* at 108.

465. SCOTT & STEINBERG, *supra* note 1, at 36–37; LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 69 (2014); Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 813.

466. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 2; SCOTT & STEINBERG, *supra* note 1, at 37–44; Feld, *Youth Discount*, *supra* note 423, at 115–17.

do those that regulate executive functions and impulse control.[467] Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, focus on anticipated gains rather than possible losses to a greater extent than adults, and consider fewer options.[468] They weigh costs and benefits differently, apply dissimilar subjective values to outcomes, and more heavily discount negative future consequences than more immediate rewards.[469] They have less experience and knowledge to inform decisions about consequences. They prefer an immediate, albeit smaller, reward than do adults, who can better delay gratification.[470] In a risk-benefit calculus, youths may view *not* engaging in risky behaviors differently than adults.[471] Researchers attribute youths' impetuous decisions to a heightened appetite for emotional arousal and intense experiences, which peaks around sixteen or seventeen years of age.[472]

Neuroscience research reports that the human brain continues to mature until the early to mid-twenties. Adolescents on average do not have adults' neurobiological capacity to exercise mature judgment or control impulses.[473] The relationship between

467. SCOTT & STEINBERG, *supra* note 1, at 48.

468. *See* SPEAR, *supra* note 459, at 137–39; Woolard, *supra* note 462, at 109–10.

469. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 54–56; Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE OF CHILD., (Fall 2008), at 15, 20 (suggesting that because youths assess and weigh risks differently than adults, they are less likely to anticipate that someone might get hurt or killed in the commission of a felony); Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 61, at 291, 304–05 ("Adolescents, perhaps because they have less knowledge and experience, are less aware of risks than are adults. . . . [T]he fact that adolescents have less experience and knowledge than adults seems likely to affect their decision making in tangible and intangible ways.").

470. NAT'L RESEARCH COUNCIL, *supra* note 1, at 91, 93.

471. Barry C. Feld et al., *Adolescent Competence and Culpability: Implications of Neuroscience for Juvenile Justice Administration*, *in* A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE 179, 188 (Stephen J. Morse & Adina L. Roskies eds., 2013); *see also* SCOTT & STEINBERG, *supra* note 1, at 42; INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 50; Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 814–15.

472. *See* Feld et al., *supra* note 471, at 186–88; INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 42; NAT'L RESEARCH COUNCIL, *supra* note 1, at 91–93; SPEAR, *supra* note 459, at 140–41.

473. *See* NAT'L RESEARCH COUNCIL, *supra* note 1, at 96–100 (citing studies showing the difference in adolescent brain function relative to adults, including

two brain regions—the prefrontal cortex (PFC) and the limbic system—underlie youths' propensity for risky behavior.[474] The PFC is responsible for judgment and impulse control.[475] The amygdala and limbic system regulate emotional arousal and reward-seeking behavior.[476] The PFC performs executive functions: reasoning, planning, and impulse control.[477] These top-

the ability to exercise self-control). *See generally* SPEAR, *supra* note 459 (explaining how neurobiological developments in the brain affect how adolescents think and behave).

474. Dahl, *supra* note 459, at 69 ("Regions in the PFC that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood."). While summarizing research on brain development and its implications for adolescent self-control, Scott & Steinberg note:

> [R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision-making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.

Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 816. *See also* Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010) [hereinafter Steinberg, *Dual Systems*] (reviewing the "neurobiological evidence for changes in brain structure and function during adolescence and early adulthood that facilitate improvements in self-regulation"). *See generally* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78 (2008) [hereinafter Steinberg, *Social Neuroscience*] (analyzing how changes in the brain during adolescence are related to a decline in risk-taking behavior).

475. Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 816.

476. Feld et al., *supra* note 471, at 191 (identifying the amygdala and limbic system as the parts of the brain that govern desire and emotion); Steinberg, *Social Neuroscience*, *supra* note 474, at 95 (linking maturity in the prefrontal cortex to improved emotional regulation and cognitive control).

477. The prefrontal cortex operates as the CEO of the brain and controls planning, goal-directed responses, risk assessment, and impulse control. ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 144 (2001); *see also* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000) [hereinafter Casey et al., *Structural and Functional*] (associating the PFC with a variety of cognitive abilities and behavior control); B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. OF SCI., March 2008 at 111, 112 (reporting that the brain's ability to control behavior continues to mature through late adolescence); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 323 (2006) ("The frontal cortex has been shown to play a major

down capabilities develop gradually and enable individuals to exercise greater self-control.[478]

During adolescence, two neurobiological processes—myelination and synaptic pruning—enhance the PFC's functions.[479] Myelin is a white fatty substance that forms a sheath around neural axons, facilitates more efficient neurotransmission, and makes communication between different brain regions faster.[480] Synaptic pruning involves selective elimination of unused neural connections, promotes greater efficiency, speeds neural signals, and strengthens the brain's ability to process information.[481]

role in the performance of executive functions including short term or working memory, motor set and planning, attention, inhibitory control and decision making."); Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION NEUROBIOLOGY, April 2007 at 251, 253 (detailing the correlation between levels of intellectual ability and "brain alterations" during adolescence). *See generally* SPEAR, *supra* note 459, at 102–09 (describing changes in cognitive functioning with age).

478. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 37 ("The development of the prefrontal cortex is gradual and is not complete until well into adulthood."); NAT'L RESEARCH COUNCIL, *supra* note 1, at 97 ("[P]refrontal circuitry implicated in self-regulation and planning behavior continues to develop into young adulthood. . . . This development is slow and linear in nature.").

479. STEINBERG, *supra* note 465, at 31–33 (detailing how brain circuitry develops throughout an individual's life); Steinberg, *Dual Systems*, *supra* note 474, at 217 ("As a consequence of synaptic pruning and late continued myelination of prefrontal brain regions, there are improvements over the course of adolescence in many aspects of executive function, such as response inhibition . . . [and] weighing risks and rewards . . . .").

480. Myelination and brain growth in the frontal cortex during adolescence improve brain function by acting like the insulation of a wire to increase the speed of neural electro-conductivity. *See* GOLDBERG, *supra* note 477, at 144 (explaining that "[t]he presence of myelin makes communication between different parts of the brain faster and more reliable"); SPEAR, *supra* note 459, at 64 ("[Myelin] allows the electrical impulse to jump from gap to gap, considerably speeding information flow along the axon . . . ."); Zoltan Nagy et al., *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16 J. COGNITIVE NEUROSCIENCE 1227, 1231 (2004) ("[T]he physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed.").

481. The pruning and elimination of unused connections promotes greater efficiency and strengthens the brain's ability to process complex information. *See* INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 37 ("The pruning that occurs during adolescence contributes to the fine-tuning of brain connections necessary for adult cognition."); STEINBERG, *supra* note 465, at 26 ("Pruning makes the brain function more effectively, the way that thinning a tree allows the remaining branches to grow stronger."); Casey et al., *Structural and Functional*, *supra* note 477, at 246 (reporting that "increasing cognitive capacity during childhood may coincide with a gradual loss [of grey matter] rather than formation of new synapses"); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8175 (2004) (detailing how scans of grey matter

The limbic system controls emotions, reward-seeking, and instinctual behavior—the fight-or-flight response.[482] The PFC and limbic systems mature at different rates and adolescents rely more heavily on the limbic system—bottom-up emotional processing—rather than the top-down cognitive regulatory system.[483] The developmental lag between the PFC regulatory system and the reward- and pleasure-seeking limbic system contributes to impetuous behavior driven more by emotions rather than reason.[484] The imbalance between the impulse-control and reward-seeking systems contributes to youths' poor judgment, impetuous behavior, and criminal involvement.[485]

Roper attributed juveniles' diminished responsibility to greater susceptibility to peer influences. As their orientation shifts toward peers, youths' quest for acceptance and affiliation

in the adolescent brain show that the prefrontal cortex does not mature until the end of adolescence). *See generally* SPEAR, *supra* note 459, at 75–76 (describing how synaptic pruning occurs in the brain); Feld et al., *supra* note 471 at 189–91 (citing to studies that use brain imaging to measure changes in brain circuitry).

482. SPEAR, *supra* note 459, at 68–69 (identifying the components of the limbic system that control learning and emotional response); STEINBERG, *supra* note 465, at 72–74 (explaining the function of the limbic system).

483. Feld et al., *supra* note 471, at 191–93; SPEAR, *supra* note 459, at 180.

484. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 38 ("The limbic system develops on a steeper curve than the prefrontal cortex . . . . The result can be an imbalance that may favor behaviors driven by emotion and response to incentives over rational decision making."); STEINBERG, *supra* note 465, at 74 ("[S]ensation seeking . . . rises and falls during adolescence, peaking around age sixteen."); Dahl, *supra* note 459, at 64 ("When the control of emotional behavior includes a cognitive process that is abstract in the temporal domain (such as weighing the possibility of a future consequence), these processes are also likely to engage systems in the dorsolateral prefrontal cortex."); Steinberg, *Dual Systems*, *supra* note 474, at 221 (noting that "heightened reward-seeking is most clearly and consistently seen during mid-adolescence"); Steinberg, *Social Neuroscience*, *supra* note 474, at 96–97 (proposing that maturation of the prefrontal cortex and the limbic system at different points in adolescence explains impulsive behavior among adolescents).

485. Feld et al., *supra* note 471, at 193–94; *see also* SCOTT & STEINBERG, *supra* note 1, at 48–49 ("This gap in time, between the increase in sensation seeking around puberty and the later development of 'regulatory competence,' may combine to make adolescence a time of inherently immature judgment."); Steinberg, *Dual Systems*, *supra* note 474, at 222 ("Middle adolescence appears to be a time of growing vulnerability to risky behavior . . . heightened reward-seeking impels adolescent[s] toward risky activity, and immature self-regulatory capabilities do not restrain this impulse."); Steinberg, *Social Neuroscience*, *supra* note 474, at 89 (observing that scores on measures of impulse control and resistance to peer influence improve with age).

makes them more susceptible to influences than adults.[486] Peers increase youths' propensity to take risks because their presence stimulates the brain's reward centers.[487]

Neuroscience research about brain development bolsters social scientists' observations about adolescents' impulsive behavior and impaired self-control. Despite impressive advances, neuroscientists have not established a direct link between brain maturation and behavior, nor have they found ways to individualize assessments of developmental differences.[488]

486. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 457, at 50 ("The drive for affiliation and acceptance at this stage makes adolescents more open to peer influence . . . ."); SCOTT & STEINBERG, *supra* note 1, at 51 ("[A]s part of normal emotional development, youths individuate from parents, a process that sometimes involves engaging in risky behavior that reflects both challenges to parental control and a shift in orientation from parents to peers."); SPEAR, *supra* note 459, at 155–57 (summarizing research on the social behavior of adolescents); Feld, *Youth Discount*, *supra* note 423, at 120–21 (citing to studies of the impact of peer influences on juveniles' behavior).

487. STEINBERG, *supra* note 465, at 98 ("Just by being around their friends, adolescents' heightened sensitivity to social rewards makes them more sensitive to *all* kinds of rewards, including the potential rewards of a risky activity."); Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 815–17 (discussing empirical research on brain development, peer-influence, and risk-taking behavior).

488. *See* SCOTT & STEINBERG, *supra* note 1, at 46 ("Research directly linking anatomical brain development with actual behavioral change is still very sparse . . . ."); STEINBERG, *supra* note 465, at 4 ("[N]euroscience frequently doesn't add to the explanation of human behavior beyond what we already know from psychology and other social sciences . . . ."); Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 769 (2011) (reporting that an analysis of claims based on adolescent brain science suggests that the "persuasive power" of such science "fall[s] far short of expectations"); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO STATE J. CRIM. L. 397, 403–06 (2006) (explaining why brain science should not be the basis for determining responsibility in criminal cases). *See generally* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 176 (2009) (arguing that most attempts to introduce developmental neuroscience evidence in the courts have failed); Stephen J. Morse, *New Neuroscience, Old Problems*, *in* NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE 157, 168–70 (Brent Garland ed., 2004) (questioning the ability of neuroscience to show that individuals can act without forming intent).

2. *Graham v. Florida*: Banning LWOP for Nonhomicide Juvenile Offenders

Prior to *Graham v. Florida*, the Court asserted that "death is different."[489] *Graham* extended *Roper*'s diminished responsibility rationale to nonhomicide juvenile offenders who received LWOP sentences. *Graham* raised "a categorical challenge to a term of years sentence"—a life without parole sentence applied to the category of juvenile offenders.[490] *Graham* repudiated the Court's "death is different" distinction, extended *Roper*'s reduced culpability rationale to term-of-year sentences, and "declare[d] an entire class of offenders immune from a noncapital sentence."[491] *Graham* rested on three features: offender, offense, and sentence. It reiterated *Roper*'s rationale that juveniles' re-

489. Rummel v. Estelle, 445 U.S. 263, 272 (1980) (reviewing Eighth Amendment case law with respect to the death penalty). *See generally* Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS, & PUBLIC POL'Y 9 (2008) [hereinafter Feld, *Slower Form of Death*] (analyzing the Supreme Court's decisions in juvenile death penalty and life without parole cases); Feld, *Adolescent Criminal Responsibility*, *supra* note 423 (examining the Supreme Court's non-death penalty proportionality framework).

490. Graham v. Florida, 560 U.S. 48, 61 (2010). *Graham* arose at the intersection of two lines of Eighth Amendment proportionality cases. One line of cases raised "gross disproportionality" claims and challenged term-of-years sentences that greatly exceeded the seriousness of the crime. *See* Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment) (elaborating upon principles of "narrow proportionality" review in noncapital cases); Solem v. Helms, 463 U.S. 277, 284, 286 (1983) (emphasizing that the Eighth Amendment's ban on cruel and unusual punishments "prohibits . . . sentences that are disproportionate to the crime committed" and that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century"); *Rummel*, 445 U.S. at 284–85 (approving a mandatory life sentence for a recidivist following his third conviction for minor property crimes).

The other line of cases made "categorical disproportionality" claims and challenged imposition of the death penalty on categories of offenders or offenses. *E.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2007) (prohibiting execution for raping a child); Roper v. Simmons, 543 U.S. 551 (2005) (barring the execution of juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (barring the execution of defendants with mental retardation); Enmund v. Florida, 458 U.S. 782 (1982) (barring execution for a felony murderer who did not kill or intend to kill the victim); Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the sentencer in a capital case should not be precluded from considering as mitigating factors the defendant's character or the circumstances of the crime); Coker v. Georgia, 433 U.S. 584 (1977) (barring the execution for rape of an adult woman).

491. *Graham*, 560 U.S. at 102.

duced culpability warrants less severe penalties than those imposed on adults convicted of the same crime.[492] Unlike *Roper*, *Graham* explicitly based young offenders' diminished responsibility on developmental and neuroscience research.[493]

Focusing on the offense, *Graham* invoked the Court's felony murder death-penalty decisions and concluded that even the most serious non-homicide crimes "cannot be compared to murder in their 'severity and irrevocability.'"[494] The combination of diminished responsibility and a nonhomicide crime made a LWOP sentence grossly disproportional.[495]

Finally, the Court equated a LWOP sentence for a juvenile with the death penalty.[496] *Graham* found no penal rationale—retribution, deterrence, incapacitation, or rehabilitation—justified the penultimate sanction for nonhomicide juvenile offenders.[497] While incapacitation might reduce future offending, judges cannot reliably predict at sentencing whether a juvenile will pose a future danger to society. Nevertheless, most states deny vocational training or rehabilitative services to youths

492. *Id.* at 67 (citing *Roper*, 543 U.S. at 568) ("The juridical exercise of independent judgment requires consideration of the culpability of offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.").

493. *Id.* at 68 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence").

494. *Id.* at 69 (quoting *Kennedy*, 554 U.S. at 438); *see also Coker*, 433 U.S. at 598.

495. *Graham*, 560 U.S. at 69 ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis").

496. *Id.* at 79 (noting that "life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope"); Eva S. Nilsen, *From* Harmelin *to* Graham*—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FED. SENT'G REP. 67, 69 (2010) (quoting Graham, 560 U.S. at 74) (noting the inconsistency between rehabilitation and an LWOP sentence that "'forswears altogether' the idea that the defendant can change"); Leslie Patrice Wallace, *"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 58 (2010) (arguing that the rationale of *Graham* should also preclude lengthy term-of-years sentences that deny juveniles hope of release as well).

497. *Graham*, 560 U.S. at 71–74.

serving LWOP sentences in favor of those who might return to the community.[498]

Although *Graham* adopted a categorical rule, it only required states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[499] It did not prescribe states' responsibility to provide resources with which to change or specify when youths might become eligible for parole. Parole consideration would not guarantee young offenders' release and some might remain confined for life.[500]

Although *Graham* barred LWOP for juveniles convicted of a nonhomicide crime, many more youths are serving de facto life sentences—aggregated mandatory minima or consecutive terms totaling fifty to one hundred years or more—than those formally sentenced to LWOP.[501] Some state courts have found that very long sentences imposed on a juvenile convicted of several nonhomicide offenses do not provide a meaningful opportunity to obtain release.[502] By contrast, other courts have read *Graham* narrowly, limiting its holding to formal LWOP sentences, and upholding consecutive terms that exceed youths' life expectancy.[503]

498. *Id.* at 79 (noting that "it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration"); Feld, *Adolescent Criminal Responsibility*, *supra* note 423, at 298–99; ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 4 (2012), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf (providing statistics on the number of juvenile lifers who receive rehabilitative programming in prison).

499. *Graham*, 560 U.S. at 74.

500. *Id.* at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.").

501. *See* Feld, *Adolescent Criminal Responsibility*, *supra* note 423, at 306 (observing that judges can create "virtual life sentences" by imposing stacked consecutive terms in lieu of formal LWOP sentences).

502. People v. Caballero, 282 P.3d 291 (Cal. 2012); State v. Null, 836 N.W.2d 41, 72 (Iowa 2013).

503. Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012) (identifying a split in opinion among courts as to "whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy").

3. *Miller v. Alabama*: Banning Mandatory LWOP for Juveniles Convicted of Murder

When the Court decided *Miller v. Alabama*, forty-seven states permitted judges to impose LWOP sentences on any offender—adult or juvenile—convicted of murder.[504] In twenty-seven states, LWOP sentences were mandatory for those convicted of murder, precluded consideration of actors' culpability or degree of participation, and equated juveniles' criminal responsibility with adults.[505] Courts regularly upheld mandatory LWOP and extremely long sentences imposed on children as young as twelve or thirteen years of age.[506] One in six juveniles

504. AMNESTY INTERNATIONAL, *supra* note 378, at 25 ("Only Kentucky, New York, Oregon, and the District of Columbia specifically exclude anyone under the age of eighteen who is tried as an adult from life without parole sentencing.").

505. *Id.*

506. *Id.* at 1 (specifying that children as young as ten years old are subject to prosecution as adults in forty-two states and under federal law); Feld, *Adolescent Criminal Responsibility*, *supra* note 423, at 269; Feld, *Youth Discount*, *supra* note 423, at 129 (citing AMNESTY INTERNATIONAL, *supra* note 378, at 25 n.44); *see, e.g.*, Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998) (affirming a mandatory LWOP sentence imposed on an illiterate, mildly retarded sixteen-year-old murderer, even though the statute excluded consideration of any mitigating factors, including youthfulness, and holding that "we cannot find any basis in decisions interpreting the Eighth Amendment, or in any other sources of guidance to the meaning of 'cruel and unusual punishments,' for concluding that the sentence in this case was unconstitutionally severe"); Harris v. Wright, 93 F.3d 581, 583–85 (9th Cir. 1996) (rejecting a fifteen-year-old juvenile's constitutional challenge to a mandatory LWOP sentence imposed for murder); Tate v. State, 864 So. 2d 44, 54 (Fla. Dist. Ct. App. 2003) (rejecting the argument that "a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child"); State v. Foley, 456 So. 2d 979, 984 (La. 1984) (affirming a LWOP sentence imposed on a fifteen-year-old juvenile convicted of rape); State v. Pilcher, 655 So. 2d 636, 644 (La. Ct. App. 1995) (upholding a LWOP sentence imposed on a fifteen-year-old); Swinford v. State, 653 So. 2d 912, 918 (Miss. 1995) (upholding a LWOP sentence imposed on fourteen-year-old convicted of murder); Edmonds v. State, 955 So. 2d 864, 895–97 (Miss. Ct. App. 2006) (approving a mandatory life sentence imposed on a youth convicted of murder committed at thirteen years of age), *rev'd*, 955 So. 2d 787 (Miss. 2007); State v. Green, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for a thirteen-year-old convicted of rape, recognizing that "the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime," but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent); State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) (upholding a "two-strike" LWOP sentence imposed on a fifteen-year-old convicted of burglary based on his prior juvenile conviction for a serious felony, a sentence presumably invalid after *Graham*); Paul G. Morrissey, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in*

who received a LWOP sentence was fifteen years or younger at the time of their crime; for more than half, it was their first ever conviction.[507] States may not execute a felony-murderer who did not kill or intend to kill, but one-quarter to one-half of juveniles who received LWOP sentences were convicted as accessories to a felony murder.[508] Although the Supreme Court viewed youthfulness as a mitigating factor, many trial judges treated it as an aggravating factor and sentenced young murderers more severely than adults convicted of murder.[509]

Miller v. Alabama extended *Roper* and *Graham* and banned *mandatory* LWOP for youths convicted of murder.[510] *Miller* invoked death penalty cases that barred *mandatory* capital sen-

State v. Green, 44 VILL. L. REV. 707, 738 (1999) (citing *Green*, 502 S.E.2d 819) (explaining that age was not a dispositive factor in the case of *State v. Green*).

507. AMNESTY INTERNATIONAL, *supra* note 378, at 1.

508. *Id.* at 27–28; HUMAN RIGHTS WATCH, "WHEN I DIE . . . THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE IN PRISON WITHOUT PAROLE IN CALIFORNIA, AN UPDATE 4 (2012), https://www.hrw.org/sites/default/files/reports/crd0112webwcover.pdf.

509. *See* Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* The CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 377, at 227, 236–37 (comparing the sentences imposed on youths transferred to criminal courts with those of adults and noting that "transferred youths are sentenced *more* harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity"); Kurlychek & Johnson, *Juvenility and Punishment*, *supra* note 412, at 747 (reporting that judges sentenced juveniles waived into adult court more harshly than similar young adult offenders in four states); Tanenhaus & Drizin, *supra* note 196, at 665 (citing the impact of "get tough" politics and arguing that "[b]y the mid-1990's [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability").

Youths convicted of murder are more likely to enter prison with LWOP sentences than are adults convicted of murder. AMNESTY INTERNATIONAL, *supra* note 378, at 33 (reporting that judges imposed LWOP sentences on juveniles convicted of murder more frequently than they did adults and concluding that "states have often been more punitive toward children who commit murder than adults . . . age has not been much of a mitigating factor in the sentencing of youth convicted of murder"); HUMAN RIGHTS WATCH, *supra* note 508, at 4 (reporting that "in more than half the cases where there was an adult co-defendant, the adult received a lower sentence than the young person who was sentenced to life without parole").

510. Miller v. Alabama, 567 U.S. 460, 489 (2012) ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles . . . . [M]andatory-sentencing schemes . . . violate [the] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

tences and required an individualized culpability assessment before a judge could impose LWOP on a juvenile murderer.[511] *Miller* emphasized that "children are constitutionally different from adults for purposes of sentencing" and "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[512] The Court asserted that once judges considered a youth's diminished responsibility individually, very few cases would warrant LWOP.[513]

The Court's recognition that children are different reflected a belated correction to states' punitive excesses, but its Eighth Amendment authority to regulate their sentencing policies is very limited. *Graham* and *Miller* raised as many questions as they answered. Several years after *Miller* held mandatory LWOP unconstitutional, the Court in *Montgomery v. Louisiana* resolved lower courts' conflicting decisions about *Miller*'s retroactive application to more than 2500 youths sentenced prior to the decision, and ruled that youths who received a mandatory LWOP sentence prior to *Miller* would be eligible for resentencing or parole consideration.[514]

511. *Id.* at 461 (citing cases within two strands of precedent that underpin the Court's decision); *see, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense"). *Woodson* condemned:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. See also Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (quoting Franklin v. Lynaugh, 487 U.S. 164, 184 (1988)) (requiring "reasoned moral response" that reflects an offender's individual culpability), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); Sumner v. Shuman, 483 U.S. 66, 74 (1987) (requiring the sentencing authority to consider mitigating circumstances relative to the offense and the defendant as an individual).

512. *Miller*, 567 U.S. at 471, 476.

513. *Id.* at 479 (noting that "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"); *see also id.* at 484 n.10 (observing that "when given the choice, sentencers impose life without parole on children relatively rarely").

514. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

Miller gave lawmakers and judges minimal guidance to make culpability assessments. The factors it described—age, immaturity, impetuosity, family and home environment, circumstances and degree of participation in the offense, youthful incompetence, and amenability to treatment—enable judges to make subjective decisions without meaningful controls.[515] As a result, state courts' interpretations and legislatures' responses to *Miller* vary substantially.[516]

Miller required twenty-eight states and the federal government to revise mandatory LWOP statutes to provide for individualized assessments.[517] Some states adopted *Miller* factors for a judge to consider;[518] a few states abolished juvenile LWOP sentences entirely; and others replaced them with minimum sentences ranging from twenty-five years to life with periodic reviews, or determinate sentences of forty years to life.[519] Other states provide age-tiered minimum sentences for parole consideration: twenty-five years for youths fourteen or younger convicted of murder; thirty-five years for those fifteen or older.[520] None of these changes approximate the American Law Institute's Model Penal Code recommendations that juveniles should be eligible for parole consideration after ten years.[521]

State courts are divided over whether *Miller* applies to mandatory sentences other than murder that preclude consideration

515. *See Miller*, 567 U.S. at 477–80 (identifying features of adolescence that judges should consider when sentencing juvenile offenders).

516. *See, e.g.*, People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014) (holding that *Miller* requires a trial court to consider how certain attributes of youth may affect the justification for LWOP sentences as punishment for juveniles); People v. Chavez, 175 Cal. Rptr. 3d 334, 346 (Cal. Ct. App. 2014) (reversing LWOP sentences and remanding for resentencing in the wake of *Miller*); People v. Carp, 852 N.W.2d 801, 849 (Mich. 2014) (holding that the rule from *Miller* does not apply retroactively); Commonwealth v. Knox, 50 A.3d 749, 769 (Pa. Super. Ct. 2012) (vacating the sentence of life in prison for the commission of second-degree murder and remanding the case for resentencing; Bear Cloud v. State, 334 P.3d 132, 147 (Wyo. 2014) (ordering the trial court to conduct a "*Miller* hearing" to resentence the defendant). *See generally* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1816–18 (2016) (reviewing state responses to *Miller*).

517. Drinan, *supra* note 516, at 1795.

518. *Id.* at 1816–17.

519. THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 2 (2014); Moriearty, *supra* note 432, at 975–76 (2015) (describing how states have reformulated sentencing schemes after *Miller*).

520. Drinan, *supra* note 516, at 1818.

521. MODEL PENAL CODE: SENTENCING § 6.11A(g) (AM. LAW INST., Tentative Draft No. 2, 2011).

of youthful mitigation.[522] Several post-*Miller* courts have approved twenty-five year mandatory minimum sentences without any individualized culpability assessments,[523] whereas others have found all mandatory minimum sentences violate the state constitution.[524]

Miller's prohibition of mandatory LWOP may affect transfer provisions—offense exclusion and prosecutorial direct file—that do not provide individualized assessments. Both result in automatic adulthood without any knowledge of a juvenile's circumstances, opportunity to present mitigating evidence, or appellate review.

C. YOUTH DISCOUNT

There is a straightforward alternative to the confusion and contradiction reviewed above. States should formally incorporate youthfulness as a mitigating factor in sentencing statutes. Youthful mitigation does not excuse criminality; it holds juveniles accountable for their crimes, but proportions punishment to their diminished responsibility.[525] *Roper* and *Graham* adopted a categorical prohibition because the Court feared that a judge or jury could not properly consider youthful mitigation when confronted with a heinous crime.[526]

There are two reasons to prefer a categorical rule over individualized discretion. First, judges and legislators cannot define or identify what constitutes adult-like culpability. Culpability is not an objectively measurable thing, but a subjective judgment

522. Drinan, *supra* note 516, at 1818.

523. *Id.*

524. *E.g.*, State v. Lyle, 854 N.W.2d 378, 404 (Iowa 2014) (holding that mandatory minimum sentences for juveniles violate the Iowa Constitution).

525. *See* AMNESTY INTERNATIONAL, *supra* note 378, at 113 ("In order to achieve [the] goal of proportionality, both the nature of the offense and the culpability of the offender must be taken into account."); FELD, BAD KIDS, *supra* note 1, at 315–16 (reasoning that youthfulness as a mitigating factor requires proportional punishment); ZIMRING, *supra* note 23, at 139 (arguing for the general applicability of the doctrine of diminished responsibility in sentencing); Feld, *Youth Discount*, *supra* note 423 (arguing that the use of age as a mitigating factor is consistent with the principle of proportionality in sentencing); Scott & Grisso, *Evolution of Adolescence*, *supra* note 455, at 172–76 (explaining how policy changes can support a presumption of diminished responsibility without providing a blanket excuse from responsibility); *see also Lyle*, 854 N.W.2d at 398 ("The Constitutional analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today."); State v. Null, 836 N.W.2d 41, 75 (Iowa 2013) ("[W]hile youth is a mitigating factor in sentencing, it is not an excuse.").

526. Roper v. Simmons, 543 U.S. 551, 573 (2005).

about criminal responsibility. Development is highly variable—a few youths may achieve competencies prior to eighteen years of age, while many others may not attain maturity even as adults. Despite individual developmental differences, clinicians lack tools with which to assess youths' impulsivity, foresight, and preference for risk, or a metric by which to relate maturity of judgment with criminal responsibility.[527] The inability to define, measure, or diagnose immaturity or validly to identify a few responsible youths introduces a systematic bias to over-punish less culpable juveniles.[528] The law uses age-based categorical lines to approximate the level of maturity required for particular activities—voting, driving, and consuming alcohol—and restricts youths without individualized assessments of maturity.

The second reason to adopt a categorical rule of youthful mitigation is judges' or juries' inability to fairly weigh the abstraction of diminished responsibility against the aggravating reality of a horrific crime. *Roper* rightly feared that jurors could not distinguish between a person's diminished responsibility for causing a harm and the harm itself, and that the heinousness of a crime would trump reduced culpability.[529] When courts sentence minority offenders, unconscious racial stereotypes compound the difficulties of assessing immaturity.[530] Treating youthfulness categorically is a more efficient way to address immaturity when every juvenile can claim some degree of diminished responsibility.

527. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; SCOTT & STEINBERG, *supra* note 1, at 140 ("[W]e currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation.").

528. James C. Howell et al., *Young Offenders and an Effective Justice System Response*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION, *supra* note 85, at 200, 229 ("Despite adolescents' developmental differences, clinicians lack the tools with which to assess youths' impulsivity, foresight, or preference for risks in ways that relate to maturity of judgment and criminal responsibility."); SCOTT & STEINBERG, *supra* note 1, at 154–57 (discussing how courts are trying to develop methods to assess competence); Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 836.

529. *Roper*, 543 U.S. at 553–54.

530. Feld, *Adolescent Criminal Responsibility*, *supra* note 423, at 270–71 ("Racial stereotypes taint culpability assessments, reduce the mitigating value of youthfulness for children of color, and contribute to disproportionate numbers of minority youths tried and sentenced as adults."); *see also* Moriearty, *supra* note 439, at 850–51 (citing studies of racial bias in the juvenile justice system).

The abstract meaning of culpability, the inability to measure or compare moral agency of youths, administrative complexity of individualization, and the tendency to overweigh harm requires a clear-cut alternative. A categorical youth discount would give all adolescents fractional reductions in sentence lengths based on age as a proxy for culpability.[531] While age may be an incomplete proxy for maturity or culpability, no better bases exist on which to distinguish among young offenders. *Miller* recognized that same-length sentences exact a greater penal bite from younger offenders than older ones.[532]

Imprisonment per se is more developmentally disruptive and onerous for adolescents than adults.[533] Thus, a statutory youth discount would require judges to give substantial reductions to youths based on a sliding scale of diminished responsibility with the largest reductions to the youngest offenders.[534] If tried as an adult, a fourteen-year-old would receive a sentence substantially shorter than that an adult would receive—perhaps

531. FELD, BAD KIDS, *supra* note 1, at 317 ("A statutory sentencing policy that integrates youthfulness . . . with principles of proportionality and reduced culpability would provide younger offenders with categorical fractional reductions of adult sentences."); SCOTT & STEINBERG, *supra* note 1, at 139 ("The uniqueness of immaturity as a mitigating condition argues for the adoption of . . . a categorical approach in the context of youth crime policy."); Feld, *Adolescent Criminal Responsibility*, *supra* note 423, at 322 ("A Youth Discount would require a judge to give a substantial reduction off of the sentence that she would impose on an adult convicted of the same crime."); Feld, *Slower Form of Death*, *supra* note 489, at 55–65 (urging legislators to enact changes in sentencing for juvenile offenders); Feld, *Youth Discount*, *supra* note 423, at 108 ("A Youth Discount provides a straightforward way for legislatures to recognize juveniles' categorically diminished responsibility and formally to incorporate youthfulness as a mitigating factor in sentencing."). *See generally* Howell et al., *supra* note 528, at 227–29 (providing policy recommendations for juvenile sentencing practices).

532. Miller v. Alabama, 567 U.S. 460, 475 (2012) ("[LWOP] is an 'especially harsh form of punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" (quoting Graham v. Florida, 560 U.S. 48, 50 (2010))).

533. Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different Than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001); *see also* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 81 (1997) [hereinafter Feld, *Abolish Juvenile Court*] (explaining how differences in adolescents' culpability "raise issues of sentencing policy and fairness").

534. Feld, *Abolish Juvenile Court*, *supra* note 533, at 115–21 (describing how a youth discount would operate in the courts); Scott & Steinberg, *Blaming Youth*, *supra* note 455, at 837 (proposing a systematic discount in sentencing for youthful offenders); *see also* SCOTT & STEINBERG, *supra* note 1, at 140 ("The use of an age category is justified because the presumption of immaturity can be applied confidently to most persons in the group.").

ten or twenty percent of the adult length. A sixteen-year-old would receive a maximum sentence no more than one-third or half the adult length. Deeper discounts for younger offenders correspond with their greater developmental differences in judgment and self-control. A judge can more easily apply a youth discount in states that use sentencing guidelines under which present offense and prior record dictate presumptive sentences. In less structured sentencing systems, a judge would have to determine the going rate or appropriate sentence for an adult convicted of that offense and then reduce it by the youth discount.

The youth discount's diminished responsibility rationale would preclude mandatory, LWOP, or de facto life sentences for young offenders.[535] Although some legislators may find it difficult to resist penal demagoguery, states can achieve all of their legitimate penal goals by sentencing youths to a maximum of no more than twenty or twenty-five years for even the most serious crimes, as recommended by the American Law Institute's Model Penal Code.[536] Several juvenile justice analysts and policy groups have endorsed the youth discount as a straightforward way to proportionally reduce sentences for younger offenders.[537]

535. Howell et al., *supra* note 528, at 367; SCOTT & STEINBERG, *supra* note 1, at 246–47; *see also* AMNESTY INTERNATIONAL, *supra* note 378, at 5–6 (outlining the types of sentences that juveniles receive and why culpability should be diminished by the youth of the offender).

536. MODEL PENAL CODE: SENTENCING § 6.11A(g) (AM. LAW INST., Tentative Draft No. 2, 2011).

537. Several academic analysts have explicitly endorsed my proposal for the youth discount. *See, e.g.*, SCOTT & STEINBERG, *supra* note 1, at 246 ("Proportionality supports imposing statutory limits on the maximum duration of adult sentences impose[d] on juveniles—a 'youth discount,' to use Feld's term."); Tanenhaus & Drizin, *supra* note 196, at 698 ("We endorse Feld's proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders."); von Hirsch, *supra* note 533, at 227 (arguing for categorical penalty reductions based on juveniles' reduced culpability).

> While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old's penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth's degree of moral development would be neither feasible nor desirable.

Id. at 226. *See also* MODEL PENAL CODE: SENTENCING § 6.11A(g) Reporter's Note (AM. LAW INST., Tentative Draft No. 2, 2011) (acknowledging that the framework of the MPC's recommendation for "specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much"

For example, a National Institute of Justice study group concluded that youths' diminished responsibility required mitigated sanctions for youths sentenced as adults.[538] Additionally, the ABA has condemned juvenile LWOP sentences, and has proposed that statutes formally recognize youthfulness as a mitigating factor, and provide for earlier parole release consideration.[539]

CONCLUSION

The time is right to reform juvenile courts' jurisdiction, jurisprudence, and procedures. Although most states' juvenile court jurisdiction extends to youths under eighteen years of age, North Carolina, for example, sets the boundary at sixteen, and ten other states set it at seventeen years of age.[540] Developmental psychology and neuroscience research strengthens the case to raise the age of jurisdiction to eighteen in every state. Indeed, it would be appropriate to extend to young adults aged eighteen to twenty-one some of the protections associated with juvenile courts: shorter sentences like a youth discount, rehabilitative treatment in separate facilities, protected records, and the like. Many European countries' criminal laws provide separate young adult sentencing provisions and institutions to afford greater leniency and use of rehabilitative measures.[541]

to Feld's proposal for a youth discount—"a sliding scale of developmental and criminal responsibility").

538. A study group funded by the National Institute of Justice determined that "[y]ouths' diminished responsibility requires mitigated sanctions to avoid permanently life-changing penalties and provide room to reform." Rolf Loeber et al., *Overview, Conclusions, and Key Recommendations*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION, *supra* note 85, at 315, 353. Following the rationale of *Roper* and *Graham*, the study group concluded that "[a] categorical rule of youthfulness as a mitigating factor in sentencing is preferable to individualized discretion." Howell et al., *supra* note 528, at 229; David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 743 (endorsing a "maturity discount" that provides a "decrease in the severity of penalties that take account of younger persons' lesser culpability and diminished responsibility").

539. Stephen Saltzburg, *ABA Policies on Youth in the Criminal Justice System*, 2008 A.B.A. CRIM. JUST. SEC. 1, 5–6.

540. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONFERENCE ST. LEGISLATURES (Apr. 17, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

541. Loeber et al., *supra* note 538, at 350–51.

Most youths involved with the juvenile justice system will outgrow their youthful indiscretion without significant interventions. We can facilitate desistance by reinforcing the two-track system—one informal, one formal—proposed by the President's Crime Commission a half-century ago.[542] For youths who require services, diversion to community resources provides a more efficient and flexible alternative to adjudication and disposition. If states explicitly forgo home removal, then juvenile courts can use summary processes to make noncustodial dispositions. *Scott v. Illinois* prohibits incarceration without representation.[543] *Alabama v. Shelton* prohibits revocation and confinement of an unrepresented defendant who violated probation.[544] *Baldwin v. New York* affords a jury right to any person facing the prospect of at least six months incarceration.[545] By clearly foregoing home removal or incarceration dispositions, states can administer a streamlined justice system for most youths. Diversion raises its own issues because low-visibility decisions contribute to racial disparities at the front end.[546] States can adopt formal criteria,

542. The President's Crime Commission suggested that the juvenile court ultimately might evolve into a two-track system with separate crime control and social welfare functions. In such a system, public officials would divert and handle informally most minor delinquents and status offenders. "In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles . . . . The range of conduct for which court intervention is authorized should be narrowed with greater emphasis upon consensual and informal means of meeting the problems of difficult children." PRESIDENT'S COMM'N, *supra* note 12, at 2. The Commission also acknowledged that juvenile courts intervened to control crime rather than simply to treat youths and recommended that public officials refer more serious offenders for formal adjudication:

> The cases that fall within the narrowed jurisdiction of the court and filter through the screen of prejudicial, informal disposition methods would largely involve offenders for whom more vigorous measures seem necessary. Court adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection. While rehabilitative efforts should be vigorously pursued in deference to the youth of the offenders and in keeping with a general commitment to individualized treatment of all offenders, the incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.

Id.

543. Scott v. Illinois, 440 U.S. 367 (1979).

544. Alabama v. Shelton, 535 U.S. 654 (2002).

545. Baldwin v. New York, 399 U.S. 66 (1970).

546. Mears, *supra* note 137, at 587 ("[C]onsiderable room exists for front-end decision-making, especially arrest and intake decisions, to contribute to racial disparities in the processing of young people.").

risk assessment instruments, data collection, and ongoing monitoring to rationalize diversion decisions and reduce disparities. Finally, an ounce of prevention is worth a pound of cure. Prevention programs that target at-risk youths, families, and communities, have demonstrated efficacy, provide cost-benefit returns, and would reduce the number of youths referred to juvenile courts in the first instance.

For delinquents facing custodial restraints—pretrial detention or postconviction confinement—juvenile courts *are* criminal courts and require criminal procedural safeguards including the right to a jury. Increasing protections and costs of formal adjudication provide financial and administrative incentives to divert more youths. Although delinquency sanctions are shorter than those imposed by criminal courts, it is disingenuous to claim that they do not pursue deterrent, incapacitative, and retributive goals. Apart from those who pose a risk of flight, states should reserve secure detention for youths whose offense and prior record indicate that they likely would be removed from home if convicted. Risk assessment instruments, other JDAI strategies, and effective assistance of counsel could reduce pretrial detention and disproportionate minority confinement. Juvenile court interventions should keep youths in their community and avoid out-of-home placements and secure confinement to the greatest extent possible and use evidence-based programs to rehabilitate and reintegrate them.

The procedural safeguards of juvenile courts should be greatly enhanced to compensate for adolescents' developmental immaturity: automatic competency assessment for children younger than fourteen years of age, mandatory presence of counsel during interrogation for those younger than sixteen, and mandatory nonwaivable counsel for youths in court proceedings. Any system of justice will fail without a robust public defender system to enable youths to exercise rights. Delinquents should enjoy the right to a jury trial to assure reliability of convictions and to increase the visibility and accountability of judges, prosecutors, and defense lawyers. States should strengthen appellate oversight of delinquency proceedings. Records of youths should be easily sealed or expunged to reduce impediments to education and employment. In keeping with juvenile courts' rationale to avoid stigmatizing youths, states should eschew collateral consequences of delinquency convictions.

For those few youths whom policymakers believe should be tried as adults, a judicial hearing guided by offense criteria and

clinical considerations and subject to rigorous appellate review is the only sensible way to make transfer decisions.[547] Criteria should focus on serious offenses and extensive prior records, criminal participation, clinical evaluations, and aggravating and mitigating factors which, taken together, distinguish the few youths who might deserve sentences substantially longer than the maximum sanctions that juvenile courts can impose. A judicial hearing will produce better decisions than will politically motivated prosecutors. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. A legislature should prescribe a minimum age of eligibility for criminal prosecution.

Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise rights for youths fifteen years of age or younger. The minimum age for transfer should be sixteen. Sentences of youths convicted as adults should be substantially reduced—through a youth discount—to reflect their diminished culpability. Once judges properly consider youths' generic developmental limitations and diminished responsibility, there will be very few youths or crimes for which prosecution as an adult would be appropriate.[548]

It will take political courage for legislators to enact laws that recognize the diminished responsibility of serious young offenders—and even greater political courage when they are charged with being soft on crime. However, the legislators of the Get Tough Era produced punitive delinquency sanctions as well as unjust and counterproductive waiver and criminal sentencing laws—all of which have had a disproportional impact on youths of color. The legislators who enacted these laws are obliged to undo the damage and adopt sensible policies that reflect our greater understanding of adolescent development—that children are different.

547. SCOTT & STEINBERG, *supra* note 1, at 178–79 (proposing a new standard for juvenile dispositions in delinquency proceedings); ZIMRING, *supra* note 23, at 107–29 (concluding that case-by-case determinations are preferable to categorical transfer rules). *See generally* FELD, BAD KIDS, *supra* note 1, at 208–44 (detailing juvenile transfer policies); Bishop, *supra* note 418 (discussing automatic and prosecutorial transfer to adult court); Feld, *Responses to Youth Violence*, *supra* note 48, at 195–220 (summarizing research on transfers of juvenile offenders to criminal courts and sentences to prisons).

548. Miller v. Alabama, 567 U.S. 460, 479 (noting that "we think appropriate occasions for sentencing juveniles . . . will be uncommon").