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Punishing Kids in Juvenile and Criminal Court

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ABSTRACT

During the 1980s and 1990s, state lawmakers shifted juvenile justice policies from a nominally offender-oriented rehabilitative approach toward a more punitive and criminalized one. Pretrial detention and delinquency dispositions had disproportionate adverse effects on minority youths. Despite juvenile courts' convergence with criminal courts, states provided fewer and less adequate procedural safeguards to delinquents than to adults. Developmental psychologists and policy analysts contend that adolescents' compromised ability to exercise rights requires greater procedural safeguards. States' transfer laws sent more and younger youths to criminal courts for prosecution as adults, emphasized offense seriousness over offender characteristics, and shifted discretion from judges conducting waiver hearings to prosecutors making charging decisions. Judges in criminal courts sentence youths similarly to adult offenders. The Supreme Court, relying on developmental psychology and neuroscience research, in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, emphasized adolescents' diminished responsibility and limited the harshest sentences. However, the court provided states limited guidance on how to implement its decisions. Judicial and legislative responses inadequately acknowledge that "children are different."

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? During the 1970s and 1980s, structural, economic, and demographic changes in American cities contributed to escalating

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black youth homicide rates. The Great Migration increased the concentration of impoverished African Americans living in inner-city ghettoes. Federal housing, highway, and mortgage policies combined with bank redlining and real estate blockbusting to create poor minority urban cores surrounded by predominantly white affluent suburbs. Beginning in the early 1970s, the United States began to shift from a manufacturing to an information and service economy. 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 average educational attainment, and their spatial isolation from sectors of job growth. By the 1980s, deindustrialization and white flight left an impoverished black underclass trapped in urban ghettos. The introduction of crack cocaine and the proliferation of guns sparked turf wars over control of drug markets. Black youth homicide rates sharply escalated, and gun violence provided political impetus to transform juvenile and criminal justice policies. By the late 1980s and early 1990s, states adopted get-tough policies to reduce youth crime, punish delinquents more severely, and prosecute more youths in criminal courts.[1]

Competing conceptions of children, as immature and incompetent versus mature and competent, and differing strategies of crime control, treatment, or diversion versus punishment affect courts' substantive goals and procedural means. Ideas about youths' culpability and responsibility affect juvenile courts' decisions to detain and sentence delinquents, transfer youths to criminal court, and sentence children as adults. Views about youths' competence to participate in the legal process influence policies about waiver of *Miranda* rights and the right to counsel, competence to stand trial, and access to a jury trial.

Contemporary juvenile justice policies reflect the harsh legacy of the 1980s and 1990s when lawmakers equated some youths' culpability with that of adults—"adult crime, adult time." Get-tough policies include ex-

[1] Criminal laws of historically unprecedented severity, particularly concerning sentencing of adult offenders and transfer of young offenders from juvenile to adult courts, were enacted in the period 1984–96 (National Research Council 2014; Tonry 2016).

tensive pretrial detention, punitive delinquency sanctions, increased transfer to criminal courts, and severe sentences as adults, all rife with racial disparities. The Supreme Court's trilogy of Eighth Amendment decisions about sentences to death or life without parole, *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), reaffirmed that "children are different," emphasized youths' diminished criminal responsibility, and limited the most severe sentences. However, they provided affected youths with limited relief and provided state courts and legislatures with minimal guidance.

States' get-tough policies affected both delinquents in juvenile courts and youths in criminal courts. In juvenile courts, states held more youths in pretrial detention, especially those charged with drug and violent crimes. Delinquency interventions shifted from emphasizing rehabilitation of young offenders to punishment of them for their crimes. Punitive pretrial detention and post-adjudications dispositions had disproportionate effects on black youths. Despite juvenile courts' increased punitiveness, their procedural deficiencies and youths' developmental limitations heightened risks of excessive, erroneous, and discriminatory interventions. As juvenile courts became more punitive, developmental psychologists questioned whether many juveniles have the ability to exercise their rights under the *Miranda* decision, 384 U.S. 436 (1966), concerning police interrogation and whether some are even competent to stand trial. They doubt whether delinquents have the capacity to waive counsel unaided. And most states deny delinquents the right to a jury trial, which increases the risk of error in guilt determinations.

States' increased punitiveness is also reflected in policy changes to transfer more youths to criminal courts and sentence them as adults. Transfer laws shifted focus from offenders to offenses and increased prosecutors' roles in making adulthood determinations. Despite efforts to get tough, transfer laws failed to achieve their legislative goals and exacerbated racial disparities. The US Supreme Court's decisions in *Roper*, *Graham*, and *Miller* somewhat mitigated the harshest sentences states inflicted on youths, reaffirmed that "children are different," and used developmental psychology and neuroscience to justify its conclusions. However, neither juvenile nor criminal courts provide developmentally appropriate justice for children. Sections I and II discuss juveniles' experiences in juvenile and adult courts. Section III offers reform proposals to enhance fairness and legitimacy.

I. Delinquents in Juvenile Courts

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 traditional juvenile court asserted a social welfare mission in which children's and society's interests were congruent, but get-tough politicians more recently subordinated welfare to crime control. This imbalance inevitably occurs because states define delinquency jurisdiction on the basis of criminal behavior rather than children's welfare needs, which diverts attention from the criminogenic conditions in which many youths live.

A. Pretrial and Postconviction 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 now-famous essay "What Works? Questions and Answers about Prison Reform" concluded that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism" (p. 25). "Nothing works" became the conventional wisdom for several decades, undercut efforts to treat offenders, and reinforced conservatives' distrust of government efforts to reduce crime or ameliorate social problems.

Increased rates of violence and homicide in the late 1980s and early 1990s enabled conservative politicians to promote a stereotype of dangerous young super-predators—cold-eyed young killers suffering from moral poverty—rather than traditional images of disadvantaged youths who needed help. On the basis of erroneous demographic projections, they predicted a bloodbath of youth crime, even as juvenile violence declined precipitously after 1991 (Zimring 2013). Relying on those flawed predictions, legislators enacted laws that emphasized suppression of crime through punishment, deterrence, and incapacitation rather than through efforts to rehabilitate children. Juvenile justice shifted from a welfare to a penal orientation and accepted 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, focused on offenders' past behavior rather than on preventive considerations, and imposed penalties based on offense or criminal history with little regard for offenders' situations, characteristics, or circumstances.

1. *Preventive Detention of Delinquents.* Conservatives claimed that ostensibly lenient dispositions in juvenile courts failed to protect the public and emphasized harsher 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, the delinquency equivalent of jail. States hold about 20 percent of youths referred to juvenile courts in pretrial detention facilities. This affects between one-quarter and one-third of a million juveniles annually. In 2011, judges detained a larger proportion of youths arrested for violent offenses (25.6 percent) than for property crimes (16.8 percent); but because police arrested so many more youths for property crimes, they confined roughly equal numbers of both. Rates of detention rose and peaked between 1998 and 2007, even as the absolute numbers of youths referred to juvenile courts declined. Courts detained older youths at higher rates than younger juveniles, proportionately more boys than girls, and far more children of color than white youths (Snyder and Sickmund 2006; Sickmund, Sladky, and Wang 2014).

Schall v. Martin, 467 U.S. 253, 255–57 (1984), upheld a New York 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." The law did not specify the type of current offense, the likelihood or seriousness of any future crime, the burden of proof, or the criteria or evidence a judge should consider to make the prediction. *Schall* held that preventive detention "serves a legitimate state objective, and that the procedural protections afforded pre-trial detainees" satisfy constitutional requirements.

Social scientists question *Schall*'s confidence in judges' prognostication ability. Research comparing statistical versus clinical prediction strongly indicates the superiority of actuarial risk assessment instruments over professional judgments.[2] Judges at an initial appearance often lack information—psychometric tests, professional evaluations, and social histories—

[2] The American Psychiatric Association long has 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]).

on which clinicians would rely. This compounds the fallibility of clinical predictions.

Inadequate and dangerous conditions have characterized detention facilities for decades. Get-tough era policies exacerbated overcrowding as states detained youths to impose short-term punishment or to house those awaiting post-adjudication placement. Studies of conditions of confinement document inadequate physical and mental health care, poor educational programs, lack of treatment services, and excessive use of solitary confinement and physical restraints (Parent et al. 1994). 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 (Barton 2012).

There are racial disparities in rates of detention. States detain black youths more often than similarly situated white offenders (Bishop 2005; Kempf-Leonard 2007; Piquero 2008).[3] Between 1988 and 1991, the peak of the crack cocaine panic, judges detained about half of all black youths charged with drug offenses, twice the rate of white youths (Sickmund, Sladky, and Kang 2014). Race affects detention decisions, and detention adversely affects youths' subsequent case processing and compounds disparities at disposition (Rodriguez 2010; Lieber 2013).

a. Reform Efforts. In the late 1980s, the Annie E. Casey Foundation launched the Juvenile Detention Alternatives Initiative (JDAI; http://www.aecf.org), which aimed to reduce use of detention, reduce overcrowding, improve conditions of confinement, and lessen racial disparities. JDAI reforms enlist justice system stakeholders to develop consensus rationales for detention; to adopt risk assessment criteria; to use alternatives to secure detention such as home detention, electronic monitoring, shelter care, after-school, or day reporting centers; and to expedite cases to reduce pretrial confinement (Barton 2012). Stakeholders develop detention criteria based on the current offense, prior record, and other factors. Not all efforts

[3] Between 1985 and 2011, juvenile court judges detained about one-fifth of all youths referred to them, including 18 percent of white youths and 26 percent of black youths. Judges detain youths charged with violent offenses at higher rates than youths charged with other crimes. On average, judges detained 22.4 percent of white youths charged with violent offenses compared with 28.4 percent of black youths (Sickmund, Sladky, and Kang 2014). The racial disparities for drug crimes are especially disturbing because, since the 1970s, self-report research has consistently reported that black youths use and sell drugs at lower rates than do white youths (National Research Council 2014).

have been equally successful, but many sites have reduced the numbers of youths detained with no increases in crime or failures to appear. JDAI efforts to reduce racial disparities among detained youths have been less successful, in part because risk assessment instruments include racially biased factors, such as prior record, that make them seem objective and unbiased (Feyerherm 2000; Frase 2009). Some racial disparities may also reflect differences in parental supervision by socioeconomic class: the perceived ability of parents to control their children, to pick them up at a detention center in the middle of the night, or to attend detention hearings (Bishop 2005).

b. Policy Recommendations. Juvenile court judges, other justice system 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 require use of a higher burden of proof—"clear and convincing evidence"—to prove that a youth needs secure detention and that nonsecure alternatives would fail. Other than youths who pose a risk of flight or who have absconded from an institution, states should reserve detention for youths charged with serious crimes such as felonies, violence, or firearms offenses for which commitment to a secure facility would likely follow a conviction. States should bolster detention hearing procedures with a nonwaivable right to counsel and an opportunity to meet with defense counsel prior to the hearing.

2. *Punitive Delinquency Dispositions.* Several Supreme Court decisions, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), and *Allen v. Illinois*, 478 U.S. 364 (1986), have identified factors with which to distinguish punishment from treatment. Courts examine legislative purpose clauses, use of indeterminate or determinate sanctions, judges' dispositional practices, institutional conditions of confinement, and intervention outcomes to differentiate treatment from punishment (Feld 1988*b*, 1998, 1999). During the get-tough era, lawmakers repudiated juvenile courts' offender-based treatment philosophy, shifted delinquency sanctions toward offense-based punishments, and fostered a punitive convergence between juvenile and criminal courts (Gardner 2012; Feld 2017).

States repeatedly amended their juvenile codes' purpose clauses to endorse punishment (Torbet et al. 1996; Feld 1999). The revisions focused on accountability, responsibility, punishment, and public safety rather than on, or in addition to, a child's welfare or best interests. Accountability be-

came synonymous with retribution, deterrence, and incapacitation, and state courts affirmed punishment as a legitimate element of juvenile courts' treatment regimes (Nellis 2016).

Originally, juvenile courts viewed delinquency as a symptom of a child's needs and imposed indeterminate nonproportional dispositions. *In re Gault*, 387 U.S. 1 (1967), set in motion a shift toward a more criminalized court by providing modest procedural safeguards that legitimated harsher sanctions (Twentieth Century Task Force 1978). During the get-tough era, states amended delinquency sentencing laws to emphasize individual responsibility and justice system accountability and adopted determinate or mandatory minimum sentences. The National Research Council and Institute of Medicine (2001, p. 210) observed 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 offender-based and imposed proportional sanctions to achieve retributive or deterrent goals. Strategies for imposing offense-based sentences in juvenile court include blended sentences, mandatory minimum sentences, and extended jurisdiction."

a. Case Processing. Several factors influence juvenile court judges' sentencing decisions. States define delinquency jurisdiction on the basis of criminal violations. The same factors that influence criminal court sentences, the current offense and any prior record, also influence juvenile court judges' dispositions (Scott and Steinberg 2008). Another consistent finding is that juveniles' race affects the severity of dispositions (Bishop and Leiber 2012). Several factors account for racial disparities: differences in rates of offending, differential selection, and juvenile courts' contexts—the interaction of urban locale with minority residency. As a result, juvenile courts' punitive sanctions fall disproportionately heavily on African American youths.

Delinquency case processing includes 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.[4] Although the greatest disparities occur at early, less visible stages of the process, differences compound, prior records ac-

[4] In 2005, black youths constituted about 17 percent of the population aged 10–17, 30 percent of juvenile arrests, 33 percent of delinquency referrals, 42 percent of juveniles detained, 37 percent of youths charged, and 39 percent of youths placed out of home (Bishop and Leiber 2012, pp. 448–49).

cumulate, and African Americans and other racial minorities make up the largest numbers of youths in institutions.

Judges' focus on the current offense and prior records contributes to racial differences. Black youths commit violent crimes at higher rates than do whites; this accounts for some disparities (Piquero 2008; National Research Council 2013).[5] By contrast, police arrest black youths at higher rates for drug crimes, although white youths use drugs more often (Lauritsen 2005; National Research Council 2013). Prior records reflect previous justice system decisions and mask some racial disparities (Sampson and Lauritsen 1997; Frase 2009).

Justice system decisions amplify racial disparities. Police stop and arrest youths of color more frequently than white youths.[6] Probation officers often attribute white youths' offenses to external circumstances and black youths' crimes to character failings, which affect their referral, detention, and sentencing recommendations (Bridges and Steen 1998; National Research Council and Institute of Medicine 2001). Each stage of the process—court referral, detention, petition, and sentencing decisions—magnifies disparities (National Research Council 2013).

Juvenile courts' contexts also contribute to racial disparities. Urban courts are more formal and sentence all delinquents more severely than do suburban or rural courts (Feld 1991, 1993). They have greater access to detention facilities, detain more minority youths, and sentence all detained youths more severely (Rodriguez 2010). Because more minority youths live in cities, judges detain them at higher rates and sentence them in more formal, more punitive courts (Bray, Sample, and Kempf-Leonard 2005; Snyder and Sickmund 2006).

[5] The higher rates of violent offending by black youths reflect their greater exposure to risk factors associated with criminal involvement, many of which are corollaries of living in dire poverty (Loeber and Farrington 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 (Wilson 2009; National Research Council 2014). Some inner-city black youths may be socialized into a code of the street that emphasizes masculinity, risk taking, autonomy, and violent responses to challenges or disrespect (Anderson 1999; Fagan 2000). The presence of gangs can lead to intragang violence over status and intergang violence to settle territorial disputes or perceived disrespect, which further contributes to youth violence (Fagan 2000).

[6] Causes of heightened risks of arrest include deployment of police in minority neighborhoods, racial profiling, aggressive stop-and-frisk practices, and youths' attitudes and demeanor during encounters (Bishop and Leiber 2012).

Get-tough laws have exacerbated racial disparities in confinement. Over the past quarter century, the proportion of white youths removed from home declined by about 10 percent while the black proportion increased by 10 percent. In 1985, states removed 105,830 delinquents from their homes and placed them in residential facilities. The number of youths receiving out-of-home placements increased steadily during the 1990s and peaked at 168,395 delinquents in 1997, a 59 percent increase. Since the late 1990s peak, the number of youths removed from home has declined dramatically. Although we do not know why residential placements have decreased, fiscal considerations may have driven the decline.

Despite the recent drop, the racial composition of youths in confinement changed substantially. By 2012, the proportion of white youths removed from home declined to 57.8 percent of the total—a 10.7 percent decrease—while the proportion of black youths increased to 39.3 percent—a 10.8 percent increase. Notwithstanding overall reduction in youths in confinement, a 1-day count of youths reveals that the racial composition of institutionalized inmates became ever darker. During the past decade, the proportion of white inmates declined from 37.2 percent to 33.8 percent of all institutional residents, the proportion of black inmates hovered around 40 percent, and the proportion of other youths of color increased (Feld 2017).

Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1988 to require states to examine minority overrepresentation in detention and institutions. It amended the JJDPA in 1992 to make disproportionate minority confinement a core requirement and again in 2002 to require states to reduce disproportionate minority contact. States conducted evaluations and confirmed disproportionate minority confinement. Minority juveniles receive disproportionately more out-of-home placements, while whites receive more probationary dispositions. 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 white youths committed for similar offenses (Poe-Yamagata and Jones 2000; National Research Council 2013).

b. Treatment Programs. Researchers have evaluated programs in community and residential settings to determine what works, how well, and at what costs (Greenwood and Turner 2012; MacKenzie and Freeland 2012). Correctional meta-analyses combine independent studies

to measure effectiveness of different strategies to reduce recidivism or other outcomes. Evaluations have compared generic strategies such as counseling, behavior modification, and group therapy; more sophisticated interventions and replications of brand-name programs such as Functional Family Therapy and Multisystemic Therapy; and cost/benefit appraisals of different treatments. A substantial literature exists on effectiveness of probation and other forms of noninstitutional treatment. Community-based programs are more likely to be run by private (usually nonprofit) service providers, to be smaller and less crowded, and to offer more treatment services than do publicly run institutions.

The Blueprints for Prevention program certifies programs as proven or promising. Proven programs demonstrate reductions in problem behaviors in evaluations with rigorous experimental design, continuing effects after youths leave the program, and successful replication by independent providers (MacKenzie and Freeland 2012; Nellis 2016). Although some proven programs treat delinquents, most aim to prevent school-aged youths' involvement with the juvenile justice system. Mark Lipsey's (2009) ongoing meta-analyses report that treatment strategies such as counseling and skill building are more effective than those that emphasize surveillance, control, and discipline. 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 (Garrido and Morales 2007; MacKenzie and Freeland 2012). Cost-benefit studies use meta-analytic methods to evaluate program costs and benefits to the individual and community—recidivism reduction, taxpayers, and potential victims. While there is a paucity of high-quality evaluations, research suggests that preschool enrichment and family-based interventions outside of the juvenile justice system provide preventive benefits that exceed their costs and produce improvements in education, employment, income, mental health, and other outcomes (Welsh et al. 2012).

Cumulatively, evaluations conclude that states can handle most delinquents safely in community settings with cognitive-behavioral models of change (MacKenzie and Freeland 2012). The most successful Blueprints programs—Functional Family Therapy and Multisystemic Therapy—focus on improving family problem-solving skills and strengthening parents' ability to deal with their children's behaviors. 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 percent 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" (Greenwood and Turner 2012, p. 744).

In re Gault, 387 U.S. 1 (1967), mandated procedural safeguards in juvenile courts, in part, because of inhumane conditions in some training schools—including inmates beaten by guards, hog-tied, or subjected to prolonged isolation (Krisberg 2012). During the 1960s and 1970s, investigators conducted in-depth ethnographic research in correctional facilities (e.g., Bartollas, Miller, and Dinitz 1976; Feld 1976). They reported violent environments, minimal treatment or educational programs, physical abuse by staff and inmates, make-work tasks, and extensive use of solitary confinement. In the ensuing decades, little changed. States continue to confine half of all youths in overcrowded facilities, more than three-quarters in large facilities, and more than one-quarter in institutions with 200–1,000 inmates (Snyder and Sickmund 2006; MacKenzie and Freeland 2012).

Over the past four decades, juvenile inmates have filed nearly 60 lawsuits that challenge conditions of confinement, assert that they violate the Eighth Amendment's prohibition on cruel and unusual punishment, and deny their Fourteenth Amendment right to treatment (Krisberg 2012; Nellis 2016). 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 subjected to other punitive practices. 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 (Feld 1999, 2013*b*).

Do institutional treatment programs reduce recidivism, enhance psychological well-being, improve educational attainments, provide vocational skills, or boost community readjustment? Most states do not collect data on programs' effectiveness or recidivism. This complicates judges' ability to distinguish treatment from punishment. Despite these limitations, evaluations of training schools provide scant evidence of ef-

fective treatment (Krisberg 2012). Programs that emphasize deterrence or punishment—training schools and boot camps—may increase criminal activity following release (MacKenzie and Freeland 2012). Correctional boot camps, reflecting punitive policies and emphasizing physical training, drill, and discipline, despite their popularity did not reduce recidivism; some studies reported increases (MacKenzie and Freeland 2012). Evaluations of training schools report that police rearrest half or more juveniles for a new offense within 1 year of release (Snyder and Sickmund 2006; Krisberg 2012).

3. *What Should a Responsible Legislature Do?* Justice system involvement impedes youths' transition to adulthood and aggravates minority youths' social disadvantage. 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. Most delinquents will outgrow adolescent crimes without extensive treatment. 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" (Zimring and Tanenhaus 2014, p. 228).

More than four decades ago, Massachusetts's Department of Youth Services (DYS) closed its training schools and replaced them with group homes, mental health facilities, and contracts for services for education, counseling, and job training. 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 (Krisberg, Austin, and Steele 1989; Miller 1991). More recently, Missouri replicated and expanded the Massachusetts experiment and used continuous case management, decentralized residential units, and staff-facilitated positive peer culture to provide a rehabilitative environment. Although proponents claim reduction in recidivism rates, no rigorous evaluations demonstrate the initiative's effectiveness (National Research Council 2013). Other states have adopted deinstitutionalization strategies. In one hopeful sign, the California Youth Authority has closed five large institutions and reduced its incarcerated population from about 10,000 juveniles to around 1,600 (Krisberg 2012).

Delinquency prevention programs provide an alternative to control or suppression strategies. Prevention intervenes with children and youths

before they engage in delinquency, identifies factors that contribute to offending, and employs programs to ameliorate or counteract them. Interventions apply to individuals at risk of becoming offenders, their families, or communities. Prevention strategies that identify individual risk factors—such as low intelligence or delayed school progress—provide programs to improve cognitive skills, school readiness, and social skills. The Perry Preschool project—an enhanced Head Start Program for disadvantaged black children—aimed to provide intellectual stimulation, improve critical thinking skills, and enhance later school performance. Larger proportions of experimental than control youths graduated from high school; received postsecondary education; had better employment records, earned higher income, and paid taxes; had fewer arrests; and reduced public expenditures for crime and welfare. Other prevention programs address family risk factors such as poor child-rearing techniques, inadequate supervision, lack of clear norms, and inconsistent or harsh discipline. Home visitation, nurse home visitation, and parent management training can produce positive outcomes in the lives of children (Greenwood 2006; Welsh et al. 2012).

David Farrington and Brandon Welsh (2007) provide a comprehensive review of risk factors and effective interventions to prevent delinquency. They identify individual, family, and community-level factors and effective programs to ameliorate delinquency. At each level, they report proven or promising programs to improve youths' lives and recommend risk-focused evidence-based prevention programs.

Peter Greenwood (2006) provides a comprehensive review of prevention programs. He focuses on interventions along the developmental trajectory from infancy and early childhood, through elementary school ages, and into adolescence. Some prevention programs have been adequately evaluated and clearly do not work—for example, Drug Abuse Resistance Education. Many prevention programs have no evidentiary support: they either have not been evaluated or used flawed designs from which researchers could draw no conclusions. Greenwood uses cost-benefit analyses to evaluate various delinquency and prevention programs. While cost-benefit analyses could rationalize delinquency policy and resource allocation decisions, many politicians do not embrace prevention programs because they lack a punitive component and do not demonstrate immediate effects. While highly visible crimes evoke fear and elicit a punitive response, delinquency prevention takes longer to realize and has more diffuse effects. 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" (Welsh 2012, p. 409).

During the 1980s and 1990s, lawmakers sharply shifted juvenile courts' emphases from rehabilitative toward punitive policies. They changed juvenile codes' purposes from care and treatment to accountability and punishment. They amended delinquency sentencing statutes to specify length and location of confinement based on the offense. Judges focused primarily on the current offense and prior record when making dispositions. Training schools more closely resembled prisons than clinics and seldom improved delinquents' life chances. Meta-analyses and other evaluations identify effective programs, most of which juvenile justice personnel do not administer.

Tougher handling has fallen 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 and grow up under much worse conditions than do most white youths. Public policies and private decisions created segregated urban areas and consigned children of color to live in concentrated poverty. 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 rehabilitation to retribution occurred as blacks gained civil rights and the United States briefly flirted with integration and inclusionary rather than exclusionary racial policies (Feld 1999, 2017).

B. Juvenile Court Procedures

I emphasize juvenile courts' explicitly punitive turn because it has implications concerning the procedural safeguards they accord children. *McKeiver v. Pennsylvania* denied delinquents a right to a jury and *In re Gault* granted only watered-down safeguards. But punishing delinquents erodes the justifications for fewer safeguards. Progressive Era reformers envisioned the juvenile court as a welfare agency and rejected criminal procedural safeguards—lawyers, juries, and rules of evidence. In 1967, *In re Gault* began to transform the juvenile court from a social welfare agency into a legal institution. *Gault* emphasized juvenile courts' criminal elements—youths charged with crimes facing institutional confinement, the stigma of delinquency, judicial arbitrariness, and high rates of recidi-

vism—and required fundamentally fair procedures. Although *Gault* did not adopt all adult criminal procedural protections, it precipitated a convergence between juvenile and criminal courts. *In re Winship*, 397 U.S. 358 (1970), required states to prove delinquency by the criminal standard of proof—beyond a reasonable doubt—rather than by the lower civil standard of proof of "more probably than not." *Breed v. Jones*, 421 U.S. 519 (1975), described a functional equivalence between juvenile and criminal trials and applied the Fifth Amendment's double jeopardy clause to delinquency prosecutions. However, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), posited a benevolent juvenile court that treated delinquents and denied them a constitutional right to a jury trial. Subsequent punitive changes have eroded *McKeiver*'s unsupported rationale. The absence of a jury adversely affects accurate fact-finding, the presence and performance of counsel, and chances of wrongful convictions.

Juvenile courts handle about half of the youths referred to them informally without a formal petition or a trial (Snyder and Sickmund 2006; Mears 2012). Court intake workers or prosecutors perform a rapid assessment to determine whether a youth's crime or welfare requires juvenile court attention or whether he or she 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 gate-keeping mechanism, avoids labeling minor offenders, and provides flexible access to community resources (Mears 2012). Most youths desist after one or two contacts, and diversion conserves judicial resources for those youths whose crimes or chronic recidivism requires formal intervention.

Critics of diversion contend that it widens the net of social control and exposes youths to informal supervision whom juvenile courts otherwise might have ignored. Probation officers or prosecutors who do preliminary screening make low-visibility decisions that are not subject to judicial review. Many states do not use formal screening or assessment tools; intake constitutes the most significant source of racial disparities in case processing. Although the criteria and administration of diversion raise many significant policy concerns, cases handled informally do not raise the procedural issues of formal adjudication (National Research Council and Institute of Medicine 2001; Mears 2012).

As juvenile courts increasingly punished delinquents, their need for protection from the state increased. *Gault* made delinquency hearings more complex and legalistic. 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. Despite clear developmental differences between youths and adults in understanding, maturity of judgment, and competence, the US Supreme Court and most states do not provide additional safeguards to protect them from their immaturity or provide procedural parity with criminal defendants. States treat juveniles just like adults when formal equality results in practical inequality and use special juvenile court procedures when they provide an advantage to the state.

1. *Police Interrogation.* The Supreme Court has decided more cases about interrogating youths than any other issue of juvenile justice.[7] It repeatedly has questioned juveniles' ability to exercise *Miranda* rights or make voluntary statements but does not require special procedures to protect them. Rather, *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), endorsed the adult standard—"knowing, intelligent, and voluntary under the totality of circumstances"—to gauge juveniles' *Miranda* waivers. While most states' laws equate juveniles' maturity with that of adults, developmental psychologists question adolescents' ability to understand *Miranda* warnings or exercise them effectively. Research on youths' responses to interrogation practices designed for adults highlights how developmental immaturity and susceptibility to manipulation increase the likelihood they will confess falsely.

Before *Miranda* was decided, the Court in *Haley v. Ohio*, 332 U.S. 596 (1948), and *Gallegos v. Colorado*, 370 U.S. 49 (1962), cautioned trial judges to examine closely how youthfulness affected voluntariness of confessions and held that youth, lengthy questioning, and the absence of a lawyer or parent could render confessions involuntary. *Gault* reiterated that youthfulness adversely affects the reliability of juveniles' statements. It ruled that delinquency proceedings "must be regarded as 'criminal' for purposes of the privilege against self-incrimination" (*Gault*, pp. 49–50). It recognized that the Fifth Amendment contributes to accurate fact-finding and maintains the adversarial balance between the individual and the state.

Fare v. Michael C. departed from the court's earlier concerns about youths' vulnerability and held that the legal standard used to evaluate

[7] *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *In re Gault*, 387 U.S. 1 (1967); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

adults' waivers governed juvenile waivers as well. *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. *Miranda*, 384 U.S. 436, 444 (1966), 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. The court in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), considered whether a 13-year-old juvenile's age affected the *Miranda* custody analysis. The court concluded that age was an objective factor that would affect how a young person might experience restraint.

Despite *J.D.B.*'s recognition of youths' vulnerability, the vast majority of states use the same *Miranda* framework for juveniles and adults. When trial judges evaluate *Miranda* waivers, they consider offender characteristics such as age, education, IQ, and prior police contacts, and the context of interrogation including location, methods, and length of interrogation. The leading cases provide long lists of factors for trial judges to consider. Appellate courts identify many relevant elements, do not assign controlling weight to any one variable, and provide no meaningful check on judges' discretion. Judges regularly find valid waivers by children as young as age 10, with limited intelligence, with no prior police contacts, and without parental assistance (Feld 2000*a*, 2006*a*, 2006*b*, 2013*c*).

About 10 states presume that most juveniles lack capacity to waive *Miranda* and require a parent or other adult to assist them. Some states require a parent to be present for juveniles younger than 14, presume that those 14 or 16 or older are incompetent to waive, or oblige police to offer older youths an opportunity to consult counsel or parents. Most commentators endorse parental presence, even though many question the value of their participation. Parents' and children's interests may conflict, for example, if the juvenile assaulted or stole from a parent or victimized another sibling, or if the parent is a suspect or has to pay for the child's attorney. Parents may not understand legal rights any better than their children do.

If youths differ from adults in understanding *Miranda*, exercising rights, or being susceptible to pressure, then the law establishes a standard that few can meet. *Miranda* requires police to advise suspects of their rights, but some juveniles do not understand the words or concepts that are used. Psychologists have studied the vocabulary, concepts and reading levels required to understand warnings and concluded that they

exceed many adolescents' abilities (Rogers et al. 2008*a*, 2008*b*). Some concepts, such as the meaning of a *right*, the term *appointed* to secure counsel, and *waive*, require a high school education and render *Miranda* incomprehensible to many who lack one. If the youth's 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* rights for more than four decades. He reports that many, if not most, do not understand the warning well enough to make a valid waiver. Although age, intelligence, and prior arrests correlate 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 warnings, and only one-fifth of juveniles, as compared with twice as many adults, grasped all four warnings (Grisso 1980). Juveniles 15 or younger exhibited poorer comprehension, waived more readily, and confessed more frequently than did older youths. Other research reports that older youths understand *Miranda* as well as adults, but many younger juveniles do not understand the words or concepts (Feld 2013*c*). Adolescents with low IQs perform worse than adults with low IQs, and delinquent youths typically have lower IQs than do those in the general population.

Even youths who understand *Miranda*'s words may not appreciate the function or importance of rights as well as adults do (Grisso 1981). They have greater difficulty conceiving of a right as an absolute entitlement that they can exercise without adverse consequences. Juveniles view rights as something that authorities allow them but that may be retracted or withheld. They misconceive the lawyer's role and attorney-client confidentiality and waive rights at higher rates than do those with better comprehension.

Miranda characterized custodial interrogation as inherently compelling because police dominate the setting and create psychological pressures to comply. The differing legal and social statuses of youths and adults make children questioned by authority figures more suggestible and increase their vulnerability. 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 (Kassin et al. 2010). They impulsively confess to end an interrogation rather than consider long-term consequences (Grisso 1981; Grisso et al. 2003).

The US Supreme Court requires suspects to invoke *Miranda* rights clearly and unambiguously. However, some groups of people—juveniles,

females, or members of racial minorities—may speak tentatively to avoid conflict with those in power (Ainsworth 1993). *Davis v. United States*, 512 U.S. 452 (1994), recognized that to require suspects to invoke rights clearly and unambiguously could prove difficult for some. A suspect who thinks he or she has invoked his or her rights but the police disregard this may feel overwhelmed and succumb to further questioning.

About 80 percent of adults and 90 percent of juveniles waive *Miranda* rights. The largest empirical study of juvenile interrogation reported that 92.8 percent waived. Juveniles' higher waiver rates may reflect their lack of understanding or inability to invoke *Miranda* effectively. As with adults, youths with prior felony arrests invoked their rights more often than did those with fewer or less serious police contacts. Youths who waived rights when previously arrested may have learned that they derived no benefit from cooperating, spent more time with lawyers, and gained greater understanding (Leo 2008; Feld 2013*c*, 2013*d*).

Once officers secure juveniles' waivers, they question them just like adults (Kassin 2005; Feld 2006*a*, 2006*b*, 2013*c*). Police employ the same maximization and minimization strategies used with adults. 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. Despite youths' greater susceptibility, police do not receive special training to question juveniles and do not incorporate developmental differences into the tactics they employ (Owen-Kostelnik, Reppucci, and Meyer 2006). Techniques designed to manipulate adults, such as aggressive questioning, presenting false evidence, and using leading questions, create heightened dangers when employed with youths (Tanenhaus and Drizin 2003).

Some states require a parent to assist juveniles in the interrogation room, although analysts question their protective role (Grisso 1981; Woolard et al. 2008; Feld 2013*c*). Parents may have marginally greater understanding of *Miranda* than do their children, but both share misconceptions about police practices. Parents did not provide useful legal advice and increased pressure to waive rights, and many urged their children to tell the truth. Parents may be emotionally upset, believe that confessing will produce a better outcome, or think children should respect authority or assume responsibility. If parents are present, police either enlist them as allies in the interrogation or treat them as passive observers. In the vast majority of interrogations that parents attended, they did not participate after police gave their child a *Miranda* warning, some-

times switched sides to become active allies of the police, and rarely played a protective role (Feld 2013*c*).

a. Juvenile Vulnerability and False Confessions. Research on false confessions underscores juveniles' unique vulnerability (Tepfer, Nirider, and Tricarico 2010; Garrett 2011). Younger adolescents are at greater risk of confessing falsely than older ones. In one study, police obtained more than one-third (35 percent) of proven false confessions from suspects younger than 18 (Drizin and Leo 2004). In another, false confessions occurred in 15 percent of cases, but juveniles accounted for 42 percent of all false confessors; two-thirds (69 percent) of those aged 12–15 confessed to crimes they did not commit (Gross et al. 2005). Significantly, research on 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.

Developmental psychologists attribute juveniles' overrepresentation among false confessors to reduced cognitive ability, developmental immaturity, and increased susceptibility to manipulation. They are more likely to comply with authority figures, tell police what they think police want to hear, and respond to negative feedback. The stress and anxiety of interrogation intensify their desire to extricate themselves in the short run by waiving and confessing. The vulnerabilities of youths multiply when coupled with mental illness, mental retardation, or compliant personalities.

b. Policy Recommendations. Research on false confessions underscores the unique vulnerability of juveniles. *Miranda* is especially problematic for younger juveniles who may not understand its words or concepts. *Miranda* requires only shallow understanding of the words that developmental psychologists conclude most 16- and 17-year-old youths possess. By contrast, psychologists report that many, if not most, children 15 or younger do not understand *Miranda* or possess competence to make legal decisions.

1. *Mandatory Counsel for Younger Juveniles.* Younger juveniles' limited understanding and heightened vulnerability warrant a nonwaivable right to counsel. The US Supreme Court's juvenile interrogation cases—*Haley*, *Gallegos*, *Gault*, *Fare*, *Alvarado*, and *J.D.B.*—excluded statements taken from youths 15 or younger and admitted those obtained from 16- and 17-year-olds. The Court's de facto functional line 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 16 "should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role" (Kassin et al. 2010, p. 28). More than three decades ago, the American Bar Association endorsed mandatory, nonwaivable counsel for juveniles because it recognized that "few juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful" (American Bar Association and Institute of Judicial Administration 1980, p. 92). Juveniles should consult with an attorney, rather than rely on parents, before they exercise or waive rights. If youths 15 or younger consult with counsel, it will somewhat limit police's ability to secure confessions. However, if younger juveniles cannot understand or exercise rights without assistance, then to treat them as if they do enables the state to exploit their vulnerability.

2. *Limiting the Length of Interrogation*. The vast majority of interrogations are very brief; nearly all last less than an hour, and few take longer than 2 hours (Feld 2013*c*). By contrast, interrogations that elicit false confessions are usually long inquiries that wear down an innocent person's resistance—85 percent took at least 6 hours—and youthfulness exacerbates those dangers (Drizin and Leo 2004). *Haley* and *Gallegos* recognized that questioning juveniles for 5 or 6 hours rendered their statement involuntary. States should create a sliding-scale presumption that a confession is involuntary and unreliable based on length of interrogation.

3. *Mandatory Recording*. 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 (Leo 2008; Garrett 2011; Feld 2013*c*). More than a dozen states require police to record interrogations, albeit some under limited circumstances, for example, cases involving homicides or very young suspects. Recording creates an objective record and provides an independent basis to resolve credibility disputes about *Miranda* warnings, waivers, or statements. It enables a judge to decide whether a statement contained facts known to a guilty perpetrator or 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

details 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 postadmission narrative. 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 to a suspect.

2. *Competence to Stand Trial.* *Gault*'s procedural rights are of no value to youths unable to exercise them. The US Supreme Court long has required that a defendant must be competent to preserve the integrity of trials, promote factual accuracy, reduce risks of error, and participate in proceedings. *Dusky v. United States*, 362 U.S. 402 (1960), 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 proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 171 (1975), 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." The standard is functional and binary: a defendant either is or is not competent to stand trial.

The standard for competency is not onerous because the more capability it requires of moderately impaired defendants, the fewer who will meet it (Sanborn 2009). Juveniles must understand the trial process, have the ability to reason and work with counsel, and appreciate their situation. If a person understands that he or she is on trial for committing crimes, knows he or she can be sentenced if convicted, and can communicate with his or her attorney, a court likely will find him or her competent. Significant mental illness, for example, psychotic disorders such as schizophrenia, or severe mental retardation typically renders adult defendants incompetent. However, psychotic disorders usually do not emerge until late adolescence or early adulthood, and the American Psychiatric Association's *Diagnostic and Statistical Manual-V* (2013) cautions against diagnosing profound illnesses in younger populations. Despite that reservation, 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 (Grisso 2004).

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 engenders in incompetent adults. Youths' developmental limitations adversely affect their ability to pay attention, absorb and apply information, understand proceedings, make rational decisions, and work with counsel (Scott and Grisso 2005; Scott and Steinberg 2008).

Significant age-related differences appear between adolescents' and young adults' competence, judgment, and legal decision making. Many juveniles younger than 14 were as severely impaired as adults found incompetent to stand trial. Age and intelligence interacted and produced higher levels of incompetence among adolescents with low IQs than adults with low IQs (Sanborn 2009). A MacArthur Foundation study (2006) reported that about one-fifth of 14–15-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. Some older youths also exhibited substantial impairments (Grisso et al. 2003; Scott and Steinberg 2008).

While incompetence in adults stems from mental disorders that may be transient or treatable with medication, it is less clear how to accelerate legal capacities in adolescents whose deficits result from immaturity and who never possessed relevant knowledge or understanding to begin with. Adolescents deemed incompetent because of mental retardation may be especially difficult to remediate or restore to competence. The prevalence of mental illness among delinquents compounds their developmental incompetence. Analysts estimate that half or more of male delinquents and a larger proportion of female delinquents suffer from one or more mental disorders. Youths suffering from attention-deficit hyperactivity disorder may have difficulty concentrating or communicating with their attorney, and those suffering from depression may lack the motivation to do so (Grisso 2004; Sanborn 2009; Viljoen, Penner, and Roesch 2012).

The issue of competence to stand trial arises both for youths waived to 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. For youths tried in juvenile courts, about half the states have addressed competency in statutes, court rules, or case law. However, most statutes consider only mental illness or retardation as a source of incompetence rather than de-

velopmental immaturity per se (Sanborn 2009; Viljoen, Penner, and Roesch 2012; Feld 2013*b*).

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. Other jurisdictions opt for a relaxed competency standard on the theory that delinquency hearings are less complex and consequences less severe (Scott and Grisso 2005).

Advocates for a lower 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 adult standard in juvenile court should still be found competent under a relaxed standard. They insist that if delinquency sanctions are less punitive than criminal sentences and are geared to promote youths' welfare, then they require fewer procedural safeguards. 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, it is disingenuous to claim they are not punitive. *Baldwin v. New York*, 399 U.S. 66 (1969), held that no crime that carried an authorized sentence of 6 months or longer could be deemed a petty offense. While proponents of a watered-down standard argue that a rule that immunizes some incompetent youths from adjudication could undermine juvenile courts' legitimacy (Scott and Grisso 2005; Scott and Steinberg 2008), adjudicating immature youths under a relaxed standard enables the state to take advantage of their incompetence and undermines the legitimacy of the process. 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.

3. *Access to Counsel.* *Gideon v. Wainwright*, 372 U.S. 335 (1963), applied the Sixth Amendment to the states to guarantee criminal defendants' right to counsel. *Gault* relied on *Gideon*, compared a delinquency proceeding to a felony prosecution, and granted delinquents the right to counsel. However, *Gault* used the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment and did not mandate automatic appointment. *Gault*, like *Gideon*, left responsibility to fund legal services to state and local governments. Over the past half century,

politicians who want to show they are tough on crime and to avoid "coddling" criminals have failed to fund public defenders adequately.

Gault required judges to advise the child and parent of the right to have a lawyer appointed if indigent but observed that juveniles could waive counsel. Most states do not use special procedural safeguards—mandatory nonwaivable appointment or prewaiver consultation with a lawyer—to protect delinquents from improvident decisions (Feld 1984, 1993). Instead, they use the adult standard 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 (Burruss and Kempf-Leonard 2002; Jones 2004).

Despite statutes and procedural rules that apply equally throughout a state, juvenile justice administration varies with urban, suburban, and rural context and produces justice by geography. Lawyers appear more frequently in urban courts than in more informal rural courts. In turn, more formal urban courts hold more youths in pretrial detention and sentence them more severely. Finally, a lawyer's presence is an aggravating factor at disposition; judges sentence youths more severely when they are represented than when they are not (Feld 1991; Burruss and Kempf-Leonard 2002; Feld and Schaefer 2010*a*).

a. Counsel in Juvenile Courts. When the US Supreme Court decided *Gault*, lawyers appeared in fewer than 5 percent of delinquency cases, in part because judges actively discouraged juveniles from retaining counsel and because courts' informality prevented lawyers from playing an advocate's role. Studies in the 1970s and 1980s reported that many judges did not advise juveniles and most did not appoint counsel (Feld 1989, 1993). Research in Minnesota in the mid-1980s showed that most youths appeared without counsel; rates of representation varied widely among urban, suburban, and rural counties; and one-third of youths whom judges removed from home and one-quarter of those in institutions were unrepresented (Feld 1991). A decade later, about one-quarter of juveniles removed from home remained unrepresented despite law reforms meant to eliminate the practice (Feld and Schaefer 2010*a*, 2010*b*). A study of legal representation in six states reported that only three appointed counsel for a substantial majority of juveniles (Feld 1988*a*). Studies in the 1990s described juvenile court judges' continuing failure to appoint lawyers. In 1995, the US General Accounting Office confirmed that rates of representation varied widely among and within states and that judges tried

and sentenced many unrepresented youths. Since the late 1990s, the American Bar Association and the National Juvenile Defender Center (2017) have conducted more than 20 state-by-state assessments; they report that many, if not most, juveniles appear without counsel and that lawyers who represent youths encounter structural impediments to effective advocacy, including heavy caseloads, inadequate resources, and lack of training.

b. Waivers. 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. Judges may give cursory notice of the right to counsel, imply that waivers are just legal technicalities, and be quick to conclude a waiver has been made. If judges expect to impose noncustodial sentences, 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. 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 (Feld 1999; National Research Council 2013).

The most common explanation for why 50–90 percent of juveniles in many states are unrepresented is that they waive counsel. Judges in most states use the adult standard to gauge juveniles' waivers of counsel and consider the same factors as those for *Miranda* waivers. Many juveniles do not understand their rights or the role of lawyers and waive counsel without consulting a parent or an attorney. Although judges are supposed to conduct a dialogue to determine whether a child can understand rights and represent her- or himself, they frequently fail to give any counsel advisory, often neglect to create a record, and readily accept waivers from manifestly incompetent children. Judges who provide notice often seek waivers to ease their administrative burdens (Feld 1993; Berkheiser 2002; Drizin and Luloff 2007).

c. Pleas without Bargains. Like adult criminal defendants, nearly all delinquents plead guilty. Even though that is the most critical decision a delinquent makes, states use adult standards to evaluate their pleas. Judges and lawyers often speak with juveniles in complicated legal language and fail to explain long-term consequences. A valid guilty plea requires a judge to conduct a colloquy on the record in which an offender admits the facts, acknowledges the rights being relinquished, and demonstrates that she or he understands the charges and potential consequences. Because appellate courts seldom review juveniles' waivers of

counsel, pleas made without counsel receive even less judicial scrutiny. Guilty pleas by factually innocent youths occur because attorneys often fail to investigate cases, assume their clients' guilt especially if they have confessed, and avoid adversarial litigation, discovery requests, and pretrial motions that conflict with juvenile courts' ideology of cooperation. Juveniles' emphasis on short-term over long-term consequences and dependence on adult authority figures increase their likelihood of entering false guilty pleas (Singleton 2007; National Research Council 2013).

d. Counsel as an Aggravating Factor. Historically, juvenile court judges discouraged adversarial litigants and impeded effective advocacy. Lawyers in juvenile courts may put their clients at a disadvantage when judges sentence them. Research that controls for legal variables—the current offense, prior record, pretrial detention, and the like—consistently reports that represented youths were more likely to be removed from home and incarcerated than unrepresented youths. Law reforms to improve delivery of legal services increased the aggravating effects of representation on dispositions (Feld 1989; Feld and Schaefer 2010*a*, 2010*b*).

Several factors contribute to lawyers' negative effects at disposition. Juveniles may not believe lawyers' assurances about confidential communications and withhold important information. Lawyers assigned to juvenile court may be incompetent or make insufficient effort. Public defender offices often send their least capable or newest attorneys to juvenile court to gain trial experience. Lack of adequate funding may preclude investigations that increase the risk of wrongful convictions. Defense attorneys seldom investigate cases or interview their clients prior to trial because of heavy caseloads and limited organizational support. Court-appointed lawyers may place a greater premium on maintaining good relations with judges than on vigorously defending their ever-changing clients. Most significantly, many defense attorneys work under conditions that create structural impediments to quality representation: crushing caseloads, meager compensation, scant support services, inexperienced attorneys, and inadequate supervision (Drizin and Luloff 2007; National Research Council 2013; National Juvenile Defender Center 2017).

Another explanation is that, 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. The US Supreme Court in *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979),

prohibited "incarceration without representation" and limited indigent adult misdemeanants' right to appointed counsel to cases in which judges ordered defendants' actual confinement. Finally, judges may sentence delinquents with counsel more severely because the lawyer's presence insulates them from appellate reversal. Juvenile court judges may also effectively penalize youths whose lawyers invoke formal procedures, disrupt routine procedures, or question their discretion in parallel to the adult defendant's trial penalty: those who demand a jury trial receive harsher sentences.

e. Appellate Review. *Gault* rejected an argument calling for juveniles' constitutional right to appellate review because it did not find that such a right existed for criminal defendants. However, states invariably provide 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 them is to use rigorous appellate review (Manfredi 1998). Regardless of how poorly lawyers perform, appellate courts seldom can correct juvenile courts' errors. Juvenile defenders appeal adverse decisions far less frequently than do adults' lawyers and often lack a record on which to base challenges (Harris 1994; Berkheiser 2002). Juvenile court culture may also discourage appeals as an impediment to a youth assuming responsibility.

Despite the procedural and punitive convergence of juvenile and criminal courts, states do not provide juveniles with additional safeguards, such as 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. A justice system that recognizes youths' developmental limitations would provide, at a minimum, no waivers of counsel without prior consultation with counsel. A rule that requires mandatory appointment of or consultation with counsel would impose substantial costs 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 for denial of fundamental rights. High rates of waiver undermine the legitimacy of juvenile justice because assistance of counsel is the prerequisite to exercise of other rights (Guggenheim and Hertz 1998; Drizin and Luloff 2007). The direct consequences 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 make assistance of counsel imperative. Lawyers can represent

delinquents effectively only if they have adequate support and resources and specialized training to represent children.

4. *Jury Trial.* States treat juveniles like adults when formal equality produces practical inequality. Conversely, they use juvenile court procedures that provide less effective protection when called on to provide delinquents with adult safeguards. *Duncan v. Louisiana*, 391 U.S. 145 (1968), gave adult defendants the right to a jury trial to assure accurate fact-finding and to prevent governmental oppression. By contrast, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), denied delinquents protections deemed fundamental to criminal trials. The presence of lay jurors functions as a check on the state, provides protection against vindictive prosecutors or biased judges, upholds the criminal law standard of proof, and enhances transparency and accountability. *McKeiver* insisted, however, that delinquency proceedings were not criminal prosecutions despite their manifold criminal aspects.

A few states give juveniles a right to a jury trial as a matter of state law, but the vast majority do not (Feld 2003). During the get-tough era states revised their juvenile codes' purposes clauses, opened delinquency trials to the public, imposed collateral consequences for delinquency convictions, and eroded the rationale for fewer procedural safeguards in juvenile proceedings (Feld 1988*b*, 1998). Despite the explicit shift from treatment to punishment, most state courts continue to deny juveniles a jury.

Constitutional procedural protections serve dual functions: they assure accurate fact-finding and protect against governmental oppression. *McKeiver*'s denial of a jury to juveniles fails on both counts. First, judges and juries find facts differently, and when they differ, judges are more likely to convict than are lay people. Second, punitive changes increase the need to protect delinquents from direct and collateral consequences of convictions.

a. Accurate Fact-Finding. *In re Winship*, 397 U.S. 358 (1970), held that the seriousness of proceedings and the consequences for a defendant, whether juvenile or adult, required proof beyond a reasonable doubt. *McKeiver*'s rejection of jury trials undermines factual accuracy and increases the likelihood that outcomes will differ in delinquency and criminal trials. Juries and judges agree about defendants' guilt or innocence in about four-fifths of criminal cases, but when they differ, juries acquit more often than judges do (Kalven and Zeisel 1966; Greenwood et al. 1983).

Fact-finding by judges and juries differs because juvenile court judges may preside over hundreds of cases a year while a juror may participate in only one or two cases in a lifetime. Several factors contribute to jurors' greater propensity to acquit. Judges hear many cases, and they may become less meticulous than jurors when they weigh evidence and apply the reasonable doubt standard less stringently. Judges hear testimony from police and probation officers on a recurring basis and form settled opinions about their credibility. Similarly, judges may have opinions about a youth's credibility, character, or the case based on prior contacts from hearing earlier charges or presiding at a detention hearing (Guggenheim and Hertz 1998).

Delinquency proceedings' informality compounds differences between judge and jury. Judges in criminal cases instruct jurors about the applicable law. By contrast, a judge in a bench trial does not state the law; this makes it more difficult for an appellate court to determine whether she correctly understood or applied it. *Ballew v. Georgia*, 435 U.S. 223 (1978), recognized the superiority of group decision making over individual judgments: some group members remember facts that others forget, and deliberations air competing views and promote more accurate decisions. By contrast, judges administer the courtroom, make evidentiary rulings, take notes, and conduct sidebars with lawyers, all of which may divert their attention during proceedings.

The informality of juvenile proceedings compounds the differences between judges' and juries' approaches toward reasonable doubt. When a judge presides at a detention hearing, he or she receives information about the youth's offense, criminal history, and social background that may contaminate impartial fact-finding. Earlier exposure to non-guilt-related evidence increases the likelihood that a judge subsequently will convict and institutionalize the defendant. In bench trials, judges typically conduct suppression hearings immediately before or during trial, a practice that exposes them to inadmissible evidence and prejudicial information (Feld 1984). A judge may know about a youth's prior delinquency from presiding at a detention hearing, prior adjudication, or trial of co-offenders. The presumption that exposure to inadmissible evidence will not affect a judge is especially problematic when the same judge 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' fact-finding 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" (Guggenheim and Hertz 1998, p. 564). As a result, states adjudicate delinquents in cases in which adequate procedural safeguards would preclude convictions. The questionable reliability of some delinquency convictions raises questions about their later use to enhance criminal sentences and impose collateral consequences.

b. Preventing Governmental Oppression. *McKeiver* uncritically assumed that juvenile courts treated delinquents rather than punished them. But the Court did not analyze distinctive indicia of treatment or punishment for juveniles when it denied delinquents a right to a jury trial.

The Court long has recognized that juries serve a special role to prevent governmental oppression and protect citizens. In our system of checks and balances, lay citizen jurors represent the ultimate restraint on abuses of governmental power. *Duncan v. Louisiana*, 391 U.S. 145 (1968), decided 3 years before *McKeiver*, emphasized that juries inject community values into the law, increase the visibility of justice administration, and check abuses by prosecutors and judges. The next year, *Baldwin v. New York*, 399 U.S. 66 (1969), again emphasized the jury's role to prevent government oppression by interposing lay citizens between the state and the defendant. *Baldwin* is especially critical for juvenile justice because an adult charged with any offense that carries a potential sentence of confinement of 6 months or longer has a right to a jury trial. Most delinquency dispositions can continue for the duration of minority or a term of years and greatly exceed *Baldwin*'s 6-month line.

The Court in *McKeiver* feared that granting delinquents jury trials would also lead to public trials. However, as a result of changes in the 1980s and 1990s 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 (Torbet et al. 1996). States limited confidentiality protections in order to hold youths accountable and put the public on notice of who poses risks to the community (National Research Council 2013, p. 81).

Youths have challenged *McKeiver*'s half-century-old rationale. Most state appellate courts have rejected their claims with deeply flawed, uncritical analyses that conflate treatment with punishment (Gardner 2012). Few courts analyze purpose clauses, sentencing statutes, judicial sentenc-

ing practices, and conditions of confinement to distinguish treatment from punishment. States rejected juveniles' challenges by emphasizing differences in the severity of penalties imposed on delinquents and adult criminal defendants. However, once a penalty crosses *Baldwin*'s 6-month authorized sentence threshold, further severity is irrelevant. By contrast, the Kansas Supreme Court in *In re L.M.*, 186 P.3d 164 (Kan. 2008), concluded that changes eroded the benevolent *parens patriae* character of juvenile courts and transformed it into a system for prosecuting juveniles charged with committing crimes.

c. Delinquency Adjudications to Enhance Criminal Sentences. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), ruled that "any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." The Court exempted the "fact of a prior conviction" because criminal defendants enjoyed the right to a jury trial and proof beyond a reasonable doubt, which assured reliability of prior convictions. *Apprendi* emphasized the jury's role to uphold *Winship*'s standard of proof beyond a reasonable doubt.

Juvenile courts historically restricted access to records to avoid stigmatizing youths. But criminal courts need to know which juveniles' delinquent careers continue into adulthood in order to incapacitate them, punish them, or protect public safety (Feld 1999; Jacobs 2014). Historically, criminal courts lacked access to delinquency records because of juvenile courts' confidentiality, sealing or expungement of records, and the difficulty of maintaining systems to track offenders and compile histories across both systems. Despite a tradition of confidentiality, states have long allowed use of some delinquency convictions on a discretionary basis. Most state and federal sentencing guidelines include some delinquency convictions in defendants' criminal history scores, although they vary in how they weight delinquency convictions.

As a matter of policy, states should not equate delinquency adjudications and criminal convictions for sentence enhancements. Juveniles may cause the same physical injuries or property losses as older actors, but their reduced culpability makes their crimes less blameworthy. Moreover, prior convictions' 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. The vast majority of states deny juveniles the right to a jury trial. Be-

cause some juvenile judges may apply *Winship*'s reasonable doubt standard less stringently, more youths are convicted than would be if there were adequate safeguards.

Federal circuits are divided about the question of whether *Apprendi* allows judges to use delinquency convictions to enhance criminal sentences (Feld 2003). State appellate court rulings reflect the federal split of opinion. Until the US Supreme Court clarifies *Apprendi*, defendants in some states or federal circuits will serve longer sentences than those in other jurisdictions on the basis of flawed delinquency adjudications.

The use of delinquency convictions to enhance criminal sentences further aggravates endemic racial disparities. 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 (2009, p. 265) analyzed racial disparities in criminal sentencing in Minnesota and concluded that "seemingly legitimate sentencing factors such as criminal history scoring can have strong disparate impacts on nonwhite defendants."

d. Collateral Consequences. 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. States may enter juveniles' fingerprints, photographs, and DNA into databases accessible to law enforcement and other agencies (Feld 2013*b*). Some get-tough reforms opened delinquency trials and records to the public. Media reports on the internet create a permanent and easily accessed record. Criminal justice agencies, schools, child care providers, the military, and others have access to juvenile records automatically or by petition (Jacobs 2014). Expungement of delinquency records is not automatic and requires court proceedings. Delinquency convictions may affect youths' ability to obtain professional licensure, receive government aid, join the military, obtain or keep legal immigration status, or live in public housing (National Research Council 2013; Nellis 2016).

e. Sex Offender Registration. Juvenile sex offenders face among the most onerous collateral consequences. Federal sex offender registration and notification laws require states to implement registration and notification standards for individuals convicted as adults or juveniles for certain sex offenses. Some states require lifetime registration; limit where registered offenders can live, work, or attend school; and require neighborhood notification (Zimring 2004; Caldwell 2014; Nellis 2016).

II. Youths in Criminal Court

During the 1980s and 1990s, lawmakers changed the theory and practice of transfer of youths to adult courts. Each state uses one or more, often overlapping, transfer strategies: judicial waiver, legislative offense exclusion, and prosecutorial direct file (Snyder and Sickmund 2006). Some states' juvenile court jurisdiction ends at age 15 or 16, rather than at 17, which results in about 200,000 chronological juveniles being tried annually in criminal courts. In addition, states transfer another 50,000 youths via judicial waiver (7,500), prosecutorial direct filing in adult courts (27,000), and the remainder with prosecutor-determined excluded offenses (Feld and Bishop 2012). We lack precise numbers because states collect data only on the small number of judicial transfers.

Criminal court judges sentence convicted youths similarly to other adult defendants. Prior to *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), states executed people who committed offenses as youths and sentenced youths to mandatory sentences of life without parole (LWOP). Although the US Supreme Court has rejected the most draconian sentences because of youths' diminished responsibility, states have made only minimal sentencing modifications to acknowledge or implement their reduced culpability and comply with the Court's decisions.

A. Transfer to Criminal Court

During the get-tough era, legislators shifted control of transfer decisions from judges to prosecutors in order to avoid judges' relative insulation from political pressures. Laws lowered the age for transfer, increased the numbers of "excluded offenses" triable only in adult courts, and strengthened prosecutors' charging powers. Despite the widespread prevalence of judicial waiver statutes, excluded offenses and prosecutors' charging decisions determine the adult status of 85 percent of youths (Juszkiewicz 2000; Amnesty International and Human Rights Watch 2005).

The vast majority of states have judicial waiver laws that specify the ages and offenses for which a judge may conduct a transfer hearing. *Kent v. United States*, 383 U.S. 541 (1966), required judges to hold a procedurally fair hearing including a right to counsel, access to probation reports, and written findings for appellate review, because the loss of juveniles' access to treatment, confidentiality, limited collateral consequences, and the like is a critical action. *Breed v. Jones*, 421 U.S. 519 (1975), 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. *Kent* appended a list of criteria for judges to consider, and state courts and statutes incorporated those criteria. Judges have broad discretion to interpret those factors. Studies of judicial waiver document inconsistent rulings, justice by geography, and racial disparities. Judges transfer minority youths more often than white youths especially for violent and drug crimes. In the 75 largest counties in the United States, members of racial minorities constituted more than two-thirds of juveniles tried in criminal courts and the vast majority of those who were sentenced to prison (Poe-Yamagata and Jones 2000; National Research Council and Institute of Medicine 2001).

Some states set their juvenile courts' upper age jurisdiction at 15 or 16 years rather than 17, which results in the largest numbers of youths being tried as adults. In addition, a number of states exclude youths 16 or older charged with murder from juvenile court jurisdiction, and others exclude more extensive lists of offenses. In the 1980s and 1990s, states expanded the lists of offenses excluded to include various crimes against the person, property, drugs, and weapons offenses, to evade *Kent*'s hearing requirement (Feld 2000*b*). Appellate courts uniformly reject youths' claims that prosecuting them for excluded offenses violates the Constitution (Feld and Bishop 2012).

In more than a dozen states, juvenile and criminal courts share concurrent jurisdiction over some ages and offenses, usually older youths and serious crimes, and prosecutors decide where to charge a youth. Appellate courts rely on the doctrine of "separation of powers" and decline to review prosecutors' exercises of executive discretion except under manifestly discriminatory circumstances.

Most direct-file laws provide no criteria to guide prosecutors' choice of forum. 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. Locally elected prosecutors exploit crime issues like get-tough legislators, introduce justice by geography and racial disparities, and exercise their discretion as subjectively as do judges but without being subject to appellate review. Through their charging decisions, prosecutors act as gatekeepers to the juvenile justice system, a role previously reserved for judges (Feld and Bishop 2012; National Research Council 2013).

"Blended sentences," another punitive innovation of the 1990s, provide judges with juvenile and criminal sentencing options. Because juve-

nile courts' jurisdiction ends when youths reach specific ages, judges may be unable to sentence older offenders convicted of serious crimes appropriately. 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. Regardless of approach, blended sentencing laws require criminal procedural safeguards, including the right to a jury trial, to preserve a judge's power to punish. Although states adopted blended sentences as an alternative to transfer, they had a net-widening effect. Judges imposed blended sentences on younger, less serious, offenders whom they previously handled as delinquents, subsequently revoked their probation primarily for technical violations, and doubled the number of youths sent to prison. Prosecutors used the threat of transfer to coerce youths to plead guilty to obtain a blended sentence, to waive procedural rights, to increase punishment in juvenile courts, and to risk exposure to criminal sanctions (Podkopacz and Feld 2001; Feld and Bishop 2012).

1. *Juveniles in Prison.* Criminal court judges sentence transferred youths like adults, which increases their likelihood of subsequent offending. While all inmates potentially face abuse, adolescents' size, physical strength, lesser social skills, and lack of sophistication increase their risks of physical, sexual, and psychological victimization. To prevent victimization, some states place vulnerable youths in solitary confinement for 23 hours a day. Prisons are developmentally inappropriate places for youths to form an identity, acquire social skills, or make a successful transition to adulthood. Imprisoning them exacts different and greater developmental opportunity costs than are experienced by adults. It disrupts normal development, including completing education, finding a job, forming relationships, and creating social bonds that promote desistance. That lost ground may never be regained (Mulvey and Schubert 2012; National Research Council 2013; Deitch and Arya 2014).

2. *Policy Justifications for Waiver.* States prosecute some youths in criminal courts as a matter of public safety and political reality. Laws enacted during the get-tough era targeted violent and drug crimes and increased the likelihood and severity of criminal sentences (Zimring 2013). Judges incarcerate transferred youths more often and for longer sentences than youths retained in juvenile courts. Although three-quarters of youths convicted of violent felonies are sent to prison, overall nearly half of all transferred youths are not convicted or placed on probation, fewer than

25 percent are sentenced to prison, and 95 percent are released from custody by their 25th birthday (Schubert et al. 2010; Deitch and Arya 2014).

Although legislators assumed that the threats of transfer and criminal punishment would deter youths, studies of juvenile crime rates before and after passage of legal changes have found no general deterrent effect (Steiner, Hemmens, and Bell 2006; Steiner and Wright 2006; National Research Council 2013). Studies of special deterrence report that transferred youths have higher recidivism rates than do those sentenced as delinquents (Fagan, Kupchik, and Lieberman 2003; Redding 2008). Comparisons of youths transferred to criminal courts with those who remained in juvenile courts conclude that youths tried as adults have higher and faster recidivism rates, especially for violent crimes, than do their delinquent counterparts (Centers for Disease Control 2007; National Research Council 2013).

Although judges do not imprison all transferred youths, they sometimes treat youthfulness as an aggravating rather than a mitigating factor. Comparatively more youths convicted of murder received LWOP sentences than did adults (Steiner 2009; Feld 2017). Compared with young adult offenders, judicially waived juveniles convicted of the same crimes received longer sentences (Kurlychek and Johnson 2004, 2010; Snyder and Sickmund 2006).

Punitive transfer laws targeted violent crimes that black youths commit more often. Even prior to enactment of the get-tough measures, studies reported racial disparities in judicial transfer decisions. Subsequently, judges transferred youths of color to adult courts more often than white youths charged with similar violent and drug crimes (Feld 1998; Poe-Yamagata and Jones 2000). The vast majority of juveniles transferred to criminal courts and sentenced to prison are youths of color, primarily blacks (National Research Council and Institute of Medicine 2001).

3. *What Should a Rational Legislature Do?* Expansive transfer policies generally fail to achieve their publicly stated goals. Equating younger and older offenders ignores developmental differences and disproportionately punishes less blameworthy adolescents. Transfer does not deter youths because their 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.

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 happen rarely (e.g., Zimring 1998; Fagan 2008; Scott and Steinberg 2008; Feld 2017). States 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 rates similar to those of other delinquents. Chronic offenders may require sentences longer than those available in juvenile court because of persistent criminality and exhaustion of juvenile court resources.

The legislature should prescribe a minimum age of eligibility for criminal prosecution. As the next section explains, the US Supreme Court relied on developmental psychological and neuroscience research that reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise procedural rights for youths 15 or younger. The minimum age for transfer should be 16.

A juvenile court hearing guided by offense criteria and clinical considerations and subject to rigorous appellate review is the only sensible way to make transfer decisions. Criteria should focus on offenses, prior record, criminal participation, clinical evaluations, and aggravating and mitigating factors that, taken together, distinguish the few youths who deserve sentences substantially longer than juvenile courts can impose from the vast majority of those who do not. 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 after all exist to keep youths 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 (Zimring 1998; Feld 1999; Bishop 2004; Scott and Steinberg 2008).

B. Sentencing Youths as Adults

The US Supreme Court developed its jurisprudence of youth—"children are different"—in response to get-tough era laws that ignored

adolescents' reduced culpability. In a trilogy of cases beginning in 2005, the Court applied the Eighth Amendment prohibition on cruel and unusual punishment to juveniles. *Roper v. Simmons*, 543 U.S. 551 (2005), prohibited states from executing offenders for murder committed prior to 18 years of age. *Graham v. Florida*, 130 S. Ct. 2011 (2010), extended *Roper*'s diminished responsibility rationale and prohibited states from imposing LWOP sentences for nonhomicide offenses and repudiated the Court's doctrine that "death is different." *Miller v. Alabama*, 132 S. Ct. 2455 (2012), extended *Roper* and *Graham*'s diminished responsibility rationale and barred mandatory LWOP sentences for youths convicted of murder and required judges to make individualized culpability assessments.

States annually try upward of 200,000 chronological juveniles as adults. Fallacious predictions of an impending bloodbath by super-predators propelled punitive policies (Bennett, DiIulio, and Walters 1996; Zimring 1998, 2013). States lowered the age for transfer, increased the number of excluded offenses, and shifted discretion from judges to prosecutors. Get-tough transfer laws exacerbated racial disparities. Racial stereotypes taint culpability assessments and reduce youthfulness's mitigating role (Bridges and Steen 1998; Graham and Lowery 2004; Moriearty 2011). Children of color make up the majority of juveniles tried in criminal court and three-quarters of those who enter prison. For adults, states lengthened criminal sentences, adopted mandatory minimums, and imposed mandatory life without parole for homicide and other crimes (Tonry 1996, 2011). Most states' criminal sentencing laws apply equally to juveniles tried as adults in criminal courts, and judges sentence youths to the same prisons.

1. *Capital Punishment for Juveniles.* The Eighth Amendment prohibits states from inflicting cruel and unusual punishments. Prior to *Roper v. Simmons*, the Supreme Court thrice considered whether it prohibited states from executing juveniles convicted of murder. In 1989, *Stanford v. Kentucky*, 492 U.S. 361 (1989), upheld the death penalty for people aged 16 and 17 convicted of murder and allowed juries to assess their personal culpability. In 2005, *Roper* overruled *Stanford* and prohibited states from executing youths for crimes committed prior to age 18.

Roper gave three reasons. First, juveniles' immature judgment and limited self-control sometimes cause them to act impulsively and without adequate appreciation of consequences. Second, their susceptibility to negative peer influences and inability to escape criminogenic environ-

ments reduce their responsibility. Third, their not fully developed personalities provide less reliable evidence of blameworthiness. Because juveniles' character is transitional, the Court concluded that a great likelihood exists that they can reform. Youths' diminished responsibility undermined retributive justifications for the death penalty. Similarly, the Court concluded that impulsiveness and limited self-control weakened any deterrent effect. *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" (pp. 572–73). Because the emotional effects of a brutal murder could overwhelm the mitigating role of youthfulness, *Roper* used age as a categorical proxy for reduced culpability.

Roper, and subsequently *Graham* and *Miller*, analyzed youths' reduced culpability within a retributive sentencing framework of proportionality and deserved punishment. Retributive sentencing apportions punishment to a crime's seriousness based on the harm and culpability involved and affects 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 blameworthiness. Youths' inability to fully appreciate wrongfulness or control themselves lessens, but does not excuse, responsibility for causing harms. They may have the minimum capacity to be criminally liable and the ability to distinguish right from wrong but deserve less punishment (Scott and Steinberg 2008).

In response to punitive changes affecting juveniles, in 1995, the John D. and Catherine T. MacArthur Foundation established the Adolescent Development and Juvenile Justice Research Network. Over the following decade, the network conducted research on adolescent decision making, judgment, and adjudicative competence. The research distinguishes between cognitive abilities and judgment and self-control, controlled thinking versus impulsive behaving (Steinberg 2008, 2010, 2014; Monahan, Steinberg, and Piquero 2015).

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation seeking, and compliance with peers. The regions of the brain that control reward seeking and

emotional arousal develop earlier than do those that regulate executive functions and impulse control. Adolescents underestimate the amount and likelihood of risks, focus on anticipated gains rather than possible losses, and consider fewer options. They weigh costs and benefits differently, apply dissimilar subjective values to outcomes, and more heavily discount negative future consequences than more immediate rewards. 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. In a risk-benefit calculus, youths may view not engaging in risky behaviors differently than adults. Researchers attribute youths' impetuous decisions to a heightened appetite for emotional arousal and intense experiences, which peaks around age 16 or 17 (National Research Council and Institute of Medicine 2011; National Research Council 2013).

2. *Neuroscience and Adolescent Brain Development.* Neuroscientists report that the human brain continues to mature until the early to mid-20s. Adolescents on average do not have adults' neurobiological capacity to exercise mature judgment or control impulses. The relationship between two brain regions, the prefrontal cortex (PFC) and the limbic system, underlies youths' propensity for risky behavior. The PFC is responsible for judgment and impulse control. The amygdala and limbic system regulate emotional arousal and reward-seeking behavior. The PFC performs executive functions such as reasoning, planning, and impulse control. These top-down capabilities develop gradually and enable individuals to exercise greater self-control (Casey, Giedd, and Thomas 2000; Spear 2010; National Research Council and Institute of Medicine 2011).

During adolescence, two processes, myelination and synaptic pruning, enhance the PFC's functions. 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 and more reliable. Synaptic pruning involves selective elimination of unused neural connections, promotes greater efficiency, speeds neural signals, and strengthens the brain's ability to process information (National Research Council and Institute of Medicine 2011; Steinberg 2014).

The limbic system controls emotions, reward seeking, and instinctual behavior, expressed in the fight-or-flight response. The PFC and limbic systems mature at different rates, and adolescents rely more heavily on the limbic system involving bottom-up emotional processing rather than on the top-down cognitive regulatory system (Feld, Casey, and Hurd

2013). The developmental lag between the PFC regulatory system and the reward- and pleasure-seeking limbic system contributes to impetuous behavior driven more by emotions than by reason. The imbalance between the impulse-control and reward-seeking systems contributes to youths' poor judgment, impetuous behavior, and criminal involvement (Spear 2010; National Research Council and Institute of Medicine 2011).

Roper attributed juveniles' diminished responsibility to greater susceptibility to peer influences. As their orientation shifts toward peers, youths' quest for acceptance and affiliation makes them more susceptible to influence than they will be as adults. Peers increase youths' propensity to take risks because their presence stimulates the brain's reward centers (Spear 2010; National Research Council and Institute of Medicine 2011).

Neuroscience research 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 or found ways to individualize assessments of developmental differences (Morse 2006; Maroney 2009, 2011; Steinberg 2014).

3. Graham v. Florida: *LWOP for Nonhomicide Juvenile Offenders.* Prior to *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court asserted that "death is different." *Graham* extended *Roper*'s diminished responsibility rationale to nonhomicide offenders who received LWOP sentences. *Graham* raised "a categorical challenge to a term of years sentence"—an LWOP sentence applied to the category of juveniles (pp. 2022–23). *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" (p. 2046). *Graham* rested on three features—offender characteristics, offenses, and sentences. It reiterated *Roper*'s rationale that juveniles' reduced culpability warranted less severe penalties than those imposed on adults convicted of the same crime. Unlike *Roper*, *Graham* explicitly based young offenders' diminished responsibility on developmental and neuroscience research (Monahan, Steinberg, and Piquero 2015).

Focusing on the offense, *Graham* invoked the court's felony-murder death-penalty decisions and concluded that even the most serious nonhomicide crimes "cannot be compared to murder in their 'severity and irrevocability'" (p. 2027). The combination of diminished responsibility

and a nonhomicide crime made an LWOP sentence grossly disproportionate.

Finally, the Court equated an LWOP sentence for a juvenile with the death penalty. *Graham* found that no penal rationale—retribution, deterrence, incapacitation, or rehabilitation—justified the penultimate sanction for nonhomicide juvenile offenders. While incapacitation might reduce future offending, judges could not reliably predict at sentencing whether a juvenile would pose a future danger to society.

Although *Graham* adopted a categorical rule, it required states only to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (p. 2030). It did not prescribe states' responsibilities 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. Although *Graham* barred LWOP for juveniles convicted of a nonhomicide crime, many more youths are serving de facto life sentences—aggregated mandatory minimums or consecutive terms totaling 50–100 years or more—than those formally sentenced to LWOPs. Some state courts have found that very long sentences imposed on a juvenile convicted of several nonhomicide offenses did not provide a meaningful opportunity to obtain release. Other courts read *Graham* narrowly, limit its holding to formal LWOP sentences, and uphold consecutive terms that exceed youths' life expectancy.

4. *Mandatory LWOP for Juveniles Convicted of Murder.* When the Court decided *Miller v. Alabama*, 42 states permitted judges to impose LWOP sentences on any adult or juvenile offender convicted of murder. In 29 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 that of adults. Courts regularly upheld mandatory LWOPs and extremely long sentences imposed on children as young as 12 or 13. One of six juveniles who received an LWOP sentence was 15 or younger; for more than half, it was their first conviction. 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. Although the US 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 (Amnesty International and Human Rights Watch 2005; Human Rights Watch 2012).

Miller v. Alabama, 132 S. Ct. 2455 (2012), extended *Roper* and *Graham* and banned mandatory LWOPs for youths convicted of murder. *Graham* equated a nonhomicide LWOP sentence with the death penalty. *Miller* invoked death penalty cases that barred mandatory capital sentences and required an individualized culpability assessment before a judge could impose an LWOP on a juvenile murderer (e.g., *Woodson v. North Carolina*, 428 U.S. 280 [1976]). *Miller* emphasized that "children are constitutionally different from adults for purposes of sentencing" and "mandatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it" (p. 2467). The Court asserted that once judges considered a youth's diminished responsibility individually, very few cases would warrant an LWOP.

The Court's recognition that children are different reflected a belated corrective 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*, 136 S. Ct. 718 (2016), resolved lower courts' conflicting decisions about *Miller*'s retroactive application to more than 2,500 youths sentenced prior to the decision and ruled that youths who received a mandatory LWOP prior to *Miller* would be eligible for resentencing or parole consideration.

Miller gave lawmakers and judges minimal guidance to make culpability assessments. The numerous pertinent factors it described—age, immaturity, impetuosity, family and home environment, circumstances of and degree of participation in the offense, youthful incompetence, and amenability to treatment—effectively enabled judges' subjective discretion. State courts' interpretations and legislatures' responses to *Miller* vary substantially (Moriearty 2015; Drinan 2016).

Miller required 29 states to revise their mandatory LWOP statutes to provide for individualized assessments for juveniles. Some states adopted factors identified in *Miller* for judges to consider. A few abolished juvenile LWOP sentences entirely; others replaced them with minimum sentences ranging from 25 years to life with periodic reviews or determinate sentences of 40 years to life (Sentencing Project 2014; Drinan 2016). Other states provide age-tiered minimum sentences for parole consideration: 25 years for youths 14 or younger convicted of murder, 35 years for those 15 or older. None of these changes approximate the American

Law Institute's Model Penal Code's (2017) provision that all juveniles should be eligible for parole consideration after 10 years.

State courts divide over whether *Miller* applies to mandatory sentences other than murder that also preclude consideration of youthful mitigation. Several post-*Miller* courts have approved 25-year mandatory minimum sentences without any individualized culpability assessments; others have found all mandatory sentences violated their state constitutions (Moriearty 2015; Drinan 2016).

III. Policy Prescriptions

The time is right to reform juvenile courts' jurisdiction, jurisprudence, and procedures. Although most states' juvenile court jurisdiction extends to youths under 18, North Carolina sets the boundary at 16 and 10 states set it at 17. Developmental psychology and neuroscience research strengthens the case to raise the age of jurisdiction to 18 in every state. Indeed, it would be appropriate to extend to young adults aged 18–21 some of the protections associated with juvenile courts: shorter sentences such as 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 moderation and use of rehabilitative measures (Loeber et al. 2012, pp. 350–51).

States should formally incorporate youthfulness as a mitigating factor in all sentencing statutes. *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. There are two reasons to prefer a categorical rule. First, judges and legislators cannot define or identify what constitutes adult-like culpability. Culpability is not an objectively measurable thing, but a subjective judgment about criminal responsibility. Development is highly variable; a few youths may be responsible prior to age 18, but many others may not attain maturity even as adults. 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. The inability to define, measure, or diagnose immaturity or to identify validly a few responsible youths introduces a systematic bias to overpunish less culpable juveniles. The second reason to adopt a categorical approach is judges' or juries' inability to weigh fairly 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, whose heinousness might trump consideration of reduced culpability. Treating youthfulness categorically is a more efficient way to address immaturity when every juvenile can claim some diminished responsibility.

The abstract meaning of culpability, the inability to measure or compare moral agency of youths, the administrative complexity of individualization, and the tendency to overweigh harm require 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 (Feld 1997, 2008, 2013*a*, 2013*e*). While age may be an incomplete proxy for maturity or culpability, no better bases exist on which to distinguish young offenders. A statutory youth discount would require judges to give substantial reductions to youths, affording a sliding scale of diminished responsibility with the largest reductions to the youngest offenders that correspond to their greater developmental differences in judgment and self-control. The youth discount's diminished responsibility rationale would preclude mandatory, LWOP, or de facto life sentences for young offenders. States can achieve their penal goals by sentencing youths to a maximum of no more than 20 or 25 years for even the most serious crimes.

Most youths involved with the juvenile justice system will outgrow their youthful indiscretions without significant interventions. We can facilitate desistance by reinforcing the two-track system—one informal, one formal—proposed by the President's Commission on Law Enforcement and Administration of Justice (1967) a half century ago. 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, they can administer a streamlined justice system using summary processes to make noncustodial dispositions. Diversion raises its own issues because low-visibility decisions contribute to racial disparities at the front end. States can adopt formal criteria, risk assessment instruments, data collection, and ongoing monitoring to rationalize decisions and reduce disparities. 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 youths facing detention and 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 youths who pose a risk of flight, states should reserve secure detention for those whose offense and prior record indicate that they likely would be removed from home if convicted. Risk assessment instruments, other strategies developed by the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, and effective assistance of counsel could reduce pretrial detention and disproportionate minority confinement (Zimring 2014). Juvenile court interventions should keep youths in their communities, 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 14 years of age, mandatory presence of counsel during interrogation for those younger than 16, 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. Collateral consequences of delinquency convictions should be eliminated.

For those few youths who 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. Criteria should focus on serious offenses and extensive prior records, criminal participation, clinical evaluations, and aggravating and mitigating factors that, taken together, distinguish the few youths who might deserve sentences substantially longer than the maximum sanctions that juvenile courts can impose. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. The legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuro-

science research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise rights for youths 15 or younger. The minimum age for transfer should be 16. Sentences of youths convicted as adults should be substantially reduced—to reflect their diminished culpability. Once judges properly consider youths' generic developmental limitations and diminished responsibility, there would be very few youths or crimes for which prosecution as an adult would be appropriate.

It will take political courage for legislators to enact laws that recognize the diminished responsibility of serious young offenders. It will take even greater political courage when an opponent may charge a lawmaker with being "soft on crime." The get-tough era produced punitive delinquency sanctions, unjust and counterproductive waiver policies, and unduly harsh sentencing laws, all of which had a disproportionate impact on black youths and other children of color. The legislators who enacted them are obliged to undo the damage and adopt sensible policies that reflect our greater understanding of adolescent development—"children are different."

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