Juvenile Justice

Barry C. Feld[*]

*During the Get Tough Era (1980s–1990s), state lawmakers shifted juvenile justice policies from a nominally offender-oriented rehabilitative system toward a more punitive and criminalized justice system. Punitive pretrial detention and delinquency dispositions had a disproportionate impact on minority youths. Despite a two-decade drop in serious crime and violence, punitive laws and policies remain in effect. Notwithstanding juvenile courts' convergence with criminal courts, states provide delinquents with fewer and less adequate procedural safeguards than those afforded adults. Developmental psychologists and policy analysts contend that adolescents' compromised ability to exercise rights—*Miranda*, competence to stand trial, waiver of counsel, denial of jury—require greater procedural safeguards to offset their limitations in a more legalistic punitive system and to avoid risks of wrongful convictions. Get Tough Era transfer laws sent more and younger youths to criminal courts for prosecution as adults, emphasized offenses over offender characteristics, and shifted discretion from judges conducting waiver hearing to prosecutors making charging decisions. Although youth crimes have declined substantially, those harsh laws remain in effect. Judges sentence transferred youths in criminal courts similarly to other adult offenders. The Supreme Court in* Roper v. Simmons, Graham v. Florida, *and* Miller v. Alabama *limited the harshest sentences imposed on youths, relied on developmental psychology and neuroscience research to bolster its conclusions, and emphasized adolescents' diminished responsibility. However, the Court's decisions provided affected youths limited relief and states with limited guidance to implement their rationale. States' judicial and legislative responses inadequately acknowledge that "children are different," and require a more consistent strategy to recognize youthfulness as a mitigating factor—a Youth Discount. The chapter concludes with policy reforms to address juvenile and criminal courts' failure to provide justice for children.*

* Centennial Professor of Law Emeritus, University of Minnesota Law School. A version of this chapter will be published as *Competence and Culpability: Delinquents in Juvenile Court, Youth in Criminal Court*, 102 Minn. L. Rev. (forthcoming 2017).

INTRODUCTION

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

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

Contemporary juvenile justice policies reflect the legacy of the Get Tough Era of the 1980s and 1990s: extensive pretrial detention, punitive delinquency sanctions, increased transfer to criminal courts, and severe sentences as adults, all of which are rife with racial disparities. Although serious youth crime and violence peaked around 1993 and dropped precipitously over the subsequent two decades, those harsh laws remain on the books in most states. The recent Supreme Court trilogy of Eighth Amendment decisions—*Roper*, *Graham*, and *Miller*—reaffirmed that "children are different," relied on developmental psychology and neuroscience research to support its conclusions about youths' diminished criminal responsibility, and limited the most draconian sentences. However, they provided affected youths with limited relief and provided state courts and legislatures with minimal guidance how to implement their jurisprudence of youths.

1. Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999) [hereinafter Feld, Bad Kids]; Barry C. Feld, The Evolution of the Juvenile Court: Race, Politics, and the Criminalizing of Juvenile Justice (2017) [hereinafter Feld, Evolution of Juvenile Court]; Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice (2008) [hereinafter Scott & Steinberg, Rethinking Juvenile Justice]; Nat'l Research Council, Reforming Juvenile Justice: A Developmental Approach (2013) [hereinafter Nat'l Research Council, Reforming Juvenile Justice].

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

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

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

A. PRETRIAL AND POST-CONVICTION CUSTODY STATUS

1. Preventive detention of delinquents

Pretrial detention involves a youth's custody status pending trial.[2] States hold about 20% of youths referred to juvenile courts in pretrial detention facilities—

2. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 Minn. L. Rev. 141 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*]; Barry C. Feld, Cases and Materials on Juvenile Justice Administration 441–43 (4th ed. 2013) [hereinafter Feld, Cases and Materials]. For a discussion of pretrial detention, see Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in Volume 3 of the present Report.

between one-quarter and one-third of a million juveniles annually. In 2011, judges detained a larger proportion of youths arrested for person offenses (25.6%) than for property crimes (16.8%), but because police arrested so many more youths for property crimes, they confined roughly equal numbers. 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, proportionally more boys than girls, and more children of color than white youths. [3]

In 1984, the Supreme Court in *Schall v. Martin* upheld a statute that authorized preventive detention if a judge found there was a "serious risk" that the child "may … commit an act which if committed by an adult would constitute a crime."[4] The law did not specify the type of present offense, the likelihood or seriousness of any future crime, burden of proof, criteria, or evidence a judge should consider to make the prediction. Despite these flaws, *Schall* held that preventive detention "serves a legitimate state objective, and that the procedural protections afforded pre-trial detainees" satisfy constitutional requirements.[5]

Social scientists question *Schall*'s confidence in judges' clinical prognostication ability. Research comparing statistical versus clinical prediction strongly supports the superiority of actuarial risk-assessment instruments over professional judgments.[6] The fallibility of prediction is compounded because judges at an initial appearance often lack the information—psychometric tests, professional evaluations, and social histories—on which clinicians would rely.

Inadequate and dangerous conditions have characterized detention facilities for decades. Get Tough Era policies exacerbated overcrowding as states detained more youths to impose short-term punishment or to house those awaiting post-adjudication placement. Studies of conditions of confinement report inadequate physical and mental health care, poor education, lack of treatment services, and excessive use of solitary confinement and physical

3. Howard Snyder & Melissa Sickmund, Juvenile Offenders and Victims: A National Report 168–70 (2006); Melissa Sickmund, T.J. Sladky & Wei Kang, *Easy Access to Juvenile Court Statistics: 1985–2011*, Off. of Juv. Just. & Delinq. Prevention, www.ojjdp.gov (last visited Mar. 16, 2017) [hereinafter Sickmund, Sladky & Kang].

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

5. *Id.* at 256–57.

6. 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. *See* Barefoot v. Estelle, 463 U.S. 880, 899–02 (1983); Feld, Bad Kids, *supra* note 1, at 140–45.

restraints.[7] Pretrial detention disrupts youths' lives; weakens ties to family, school, and work; stigmatizes youths; and impairs legal defenses. Judges convict and institutionalize detained youths more often than they do similar youths released pending trial.[8]

States detain black youths more often than similarly situated white offenders.[9] Detention rates for drug crimes peaked during the Get Tough Era and exacerbated racial disparities. Between 1988 and 1991—the peak of the crack-cocaine panic—judges detained about half of all black youths charged with drug offenses, a rate twice that of white youths.[10] While race affects detention decisions, detention adversely affects youths' subsequent case processing and compounds disparities at disposition.[11]

Reform efforts: In the late 1980s, the Annie E. Casey Foundation launched the Juvenile Detention Alternatives Initiative (JDAI), which aimed to reduce use of detention, develop alternatives to institutions, reduce overcrowding, improve conditions of confinement, and lessen racial disparities.[12] JDAI reforms enlist justice-system stakeholders to develop consensus rationale for detention, to adopt objective intake and risk-assessment criteria, to use alternatives to secure detention—home detention, electronic monitoring, after-school or

7. Dale G. Parent et al., Conditions of Confinement: Juvenile Detention and Corrections Facilities (1994). *Cf.* Sharon Dolovich, "Prison Conditions," in Volume 4 of the present Report.

8. William Barton, *Detention*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice 636, 645 (Barry C. Feld & Donna M. Bishop eds., 2012).

9. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Process*, *in* Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice 23 (Darnell Hawkins & Kimberly Kempf-Leonard eds., 2005); Kimberly Kempf-Leonard, *Minority Youth and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 Youth Violence & Juv. Just. 71, 87 (2007); Alex R. Piquero, *Disproportionate Minority Contact*, 18 Future of Child. 59 (2008). Between 1985 and 2011, juvenile court judges detained about one-fifth of all youths referred to them. During that period, judges on average detained 18% of white youths compared with 26% of black youths. Judges detain youths charged with person offenses at higher rates than youths charged with other crimes. On average, judges detained 22.4% of white youths charged with person offenses compared with 28.4% of black youths. Sickmund, Sladky & Kang, *supra* note 3. The racial disparities for drug crimes are especially disturbing because since the 1970s; self-report research consistently reports that black youths use and sell drugs at *lower* rates than do white youths. Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 50 (2014).

10. Sickmund, Sladky & Kang, *supra* note 3.

11. Michael J. Leiber, *Race, Pre- and Post-Detention, and Juvenile Justice Decision Making*, 59 Crime & Delinq. 396 (2013); Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Pre-Adjudication Detention Matters*, 47 J. Res. Crime & Delinq. 391 (2010).

12. *Juvenile Detention Alternatives Initiative*, Annie E. Casey Found., http://www.aecf.org (last visited Apr. 26, 2017).

day reporting centers—and to expedite cases to reduce pretrial confinement.[13] Stakeholders develop criteria about which youths to detain based on present offense, prior record, and other factors. Although not all efforts have been equally successful, 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.[14]

Policy recommendations: Juvenile court judges in collaboration with other stakeholders and social scientists should develop validated risk-assessment instruments to better identify youths who pose a high risk of offending.[15] Statutes should presume release of all non-felony offenders and place a heavy burden—clear and convincing evidence—on the state to prove that a youth needs secure detention and that non-secure alternatives—house arrest, electronic monitoring, shelter care, day reporting—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—felonies, violence, or firearms—for whom, if convicted, commitment to a secure facility would likely result. States should bolster detention hearing procedures with a non-waivable right to counsel and an opportunity to meet with defense counsel prior to the hearing.

2. Punitive delinquency dispositions

In the 1980s and 1990s, lawmakers repudiated offender-based treatment and shifted delinquency sanctions toward offense-based punishments.[16] Supreme Court decisions identified factors with which to distinguish punishment and treatment: legislative purpose clause; indeterminate or determinate sentencing laws; judges' sentencing practices; institutional conditions of confinement; and intervention outcomes.[17] Changes in states' laws fostered a punitive convergence between juvenile and criminal courts' sentencing policies.

13. Annie E. Casey Found., *supra* note 12; Barton, *supra* note 8; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 5.

14. William H. Feyerherm, *Detention Reform and Overrepresentation: A Successful Synergy*, 4 Corr. Mgmt. Q. 44 (2000).

15. *Cf.* John Monahan, "Risk Assessment in Sentencing," in Volume 4 of the present Report.

16. Barry C. Feld, *Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821 (1988) [hereinafter Feld, *Punishment, Treatment*].

17. Allen v. Illinois, 478 U.S. 364 (1986); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Feld, *Punishment, Treatment, supra* note 16; Feld, Bad Kids, *supra* note 1, at 251–83; Francis A. Allen, *Legal Values and the Rehabilitative Ideal, in* The Borderland of the Criminal Law: Essays in Law and Criminology 25, 25–27 (1964); Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 2–3 (1981).

States repeatedly amended their juvenile codes' purpose clauses to endorse punishment.[18] The revisions focused on accountability, responsibility, punishment, and public safety rather than, or in addition to, a child's welfare or best interests.[19] Accountability became synonymous with retribution, deterrence, and incapacitation, and state courts affirmed punishment as a legitimate element of juvenile courts' treatment regimes.[20]

Originally, juvenile courts viewed delinquency as a symptom of a child's needs and imposed indeterminate non-proportional dispositions. The shift from an interventionist to a criminalized court culminates a trend *Gault* set in motion by providing modest procedural safeguards that legitimated harsher sanctions.[21] Beginning in the 1980s, states amended delinquency sentencing laws to emphasize individual responsibility and justice-system accountability, and adopted determinate or mandatory minimum sentences.[22] The National Research Council concluded:

> 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.[23]

18. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 Crime & Just. 189, 222–23 (1998) [hereinafter Feld, *Responses to Youth Violence*]; Feld, Bad Kids, *supra* note 1; Patricia Torbet, et al., State Responses to Serious and Violent Juvenile Crime: Research Report (1996).

19. Feld, *Punishment, Treatment*, *supra* note 16, at 833–47; Feld, *Responses to Youth Violence*, *supra* note 18, at 222–23.

20. Feld, *Punishment, Treatment, supra* note 16, at 844–47; Feld, Bad Kids, *supra* note 1, at 252–53; Ashley Nellis, A Return to Justice: Rethinking Our Approach to Juveniles in the System 47–48 (2016); Matter of Seven Minors, 664 P.2d 947, 950 (Nev. 1983); State v. Lawley, 591 P.2d 772, 773 (Wash. 1979).

21. Twentieth Century Fund Task Force on Sent'g Pol'y toward Young Offenders, Confronting Youth Crime 15–17 (1978); Feld, Evolution of Juvenile Court, *supra* note 1.

22. Feld, *Responses to Youth Violence*, *supra* note 18, at 220–28; Feld, *Punishment, Treatment*, *supra* note 16, at 850–79; Torbet et al., *supra* note 18, at 11–16. *See generally* Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report; Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

23. Nat'l Research Council, Juvenile Crime, Juvenile Justice 210 (2001).

Several factors influence juvenile court judges' sentencing decisions. States define juvenile courts' delinquency jurisdiction based on violations of criminal law. The same factors that influence criminal court sentences—present offense and prior record—influence juvenile court judges' sentences as well.[24] Another consistent finding is that juveniles' race affects the severity of dispositions.[25] Several factors account for racial disparities: differences in rates of offending; differential selection; and juvenile courts' context—the interaction of urban locale with minority residency.[26] As a result, juvenile courts' punitive sanctions fall disproportionately heavily on African-American youths.

Delinquency case-processing entails a succession of decisions by police, court personnel, prosecutors, and judges. Compounding effects of disparities produce larger cumulative differences between white youths and children of color.[27] Although the greatest disparities occur at earlier, less-visible stages of the process, differences compound, prior records accumulate, and blacks and other racial minorities constitute the largest plurality of youths in institutions.

Judges' focus on present offense and prior records contributes to racial differences. Black youths commit violent crimes at higher rates than white juveniles, a fact that accounts for some disparities.[28] By contrast, police arrest

24. Feld, Bad Kids, *supra* note 1, at 264–67; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 229–31.

25. Feld, Bad Kids, *supra* note 1, at 267–72; Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 228; Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8. *Cf.* Cassia Spohn, "Race and Sentencing Disparity," in Volume 4 of the present Report.

26. Bishop & Leiber, *supra* note 25, at 453–61

27. Black youths comprised about 16.6% of the population aged 10–17, 31.4% of juvenile arrests, 33.2% of delinquency referrals, 38.1% of juveniles detained, 40% of youths charged, and 40% of youths placed out of home. *Id.* at 446–53; Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 231; Eileen Poe-Yamagata & Michael A. Jones, And Justice for Some: Differential Treatment of Minority Youth in the Justice System 9 (2000). For discussions of the impact of race on criminal justice, see Jeffrey Fagan, "Race and the New Policing," in Volume 2 of the present Report; Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report; David A. Harris, "Racial Profiling," in Volume 2 of the present Report; Paul Butler, "Race and Adjudication," in Volume 3 of the present Report; and Spohn, *supra* note 25.

28. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 214–21; Piquero, *supra* note 9, at 64.

black youths at higher rates for drug crimes, although white youths use drugs more often.[29] Prior records reflect previous justice-system decisions and mask some racial disparities.[30]

Justice-system decisions amplify differences. Police stop and arrest youths of color more frequently than they do white youths.[31] Probation officers attribute white youths' offenses to external circumstances and black youths' crimes to internal fault or character failings which affect their referral, detention, and sentencing recommendations.[32] At each stage of the process, court referral, detention, petition, and sentencing decisions amplify disparities.[33]

Juvenile courts' context also contributes to disparities. Urban courts are more formal and sentence all delinquents more severely than do suburban or rural courts.[34] They have greater access to detention facilities; detain disproportionately more minority youths; and sentence all detained youths more severely.[35] Because more minority youths live in cities, judges detain them at higher rates, and sentence them in more formal, punitive courts.[36]

Punitive laws have exacerbated racial disparities in confinement. Over the past quarter-century, the proportion of white youths removed from home declined by about 10% while that of black youths increased by 10%.

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29. Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending, in* Our Children, Their Children, *supra* note 9, at 95–100 (2005); Nat'l Research Council, Reforming Juvenile Justice, *supra* note 23, at 219–20.

30. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 Crime & Just. 311, 363 (1997).

31. Heightened risks of arrest include: self-fulfilling deployment of police in neighborhoods, racial profiling, aggressive stop-and-frisk practices, and youths' attitude and demeanor during encounters. Bishop & Leiber, *supra* note 25, at 461; Bishop, *supra* note 9, at 23 (2005).

32. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554 (1998); Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 257.

33. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 257; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 77; Feld, Evolution of Juvenile Court, *supra* note 1.

34, Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. Crim. L. & Criminology 156, 185–90 (1991) [hereinafter Feld, *Justice by Geography*]; Barry C. Feld, Justice for Children: The Right to Counsel and the Juvenile Court 158–62 (1993) [hereinafter Feld, Justice for Children].

35. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185, 1337–39 (1989) [hereinafter Feld, *Right to Counsel*]; Rodriguez, *supra* note 11.

36. Feld, Bad Kids, *supra* note 1, at 271–72; Snyder & Sickmund, *supra* note 3; Timothy Bray et al., *Justice by Geography: Racial Disparity and Juvenile Courts, in* Our Children, Their Children, *supra* note 9.

In 1985, states removed 105,830 delinquents from their homes and placed them in residential facilities. The number of youths who received out-of-home placements increased steadily during the 1990s, peaking at 168,395 delinquents in 1997 (a 59% increase from 1985), and reflected Get Tough Era changes and judicial sensitivity to the punitive ethos. Since the peak in the late 1990s, the number of youths removed from home has declined dramatically. Although we do not know why residential placements have decreased, fiscal constraints may have driven confinement decisions.

Despite the recent decline, the racial composition of youths in confinement has changed substantially. In 1985, judges removed 68.5% of non-Hispanic and Hispanic white youths, 28.5% of black youths and 2.9% of youths of other races from their homes. By 2012, the proportion of youths removed from home who were white declined to 57.8%—a decrease of 10.7 percentage points—while the proportion of black youths increased to 39.3%—an offsetting increase of 10.8 percentage points. Despite dramatic overall reduction in youths in confinement, the racial composition of institutionalized inmates became ever darker. During the decade, the proportion of white inmates declined from 37.2% to 33.8% of all residents, the proportion of black inmates hovered around 40%, and that of other youths of color increased.[37]

Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1988 to require states receiving federal juvenile justice funds to examine minority overrepresentation in detention and institutions.[38] 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.[39] States responded to the 1988 JJDPA requirement, conducted evaluations, and reported disproportionate over-representation of minority youths in institutions.[40] Minority juveniles receive disproportionately more out-of-home placements, while whites receive more probationary dispositions.[41] Judges commit black youths to public institutions at rates three and four times that of white youths, and send larger proportions of white youths to private residential treatment programs. Black youths serve longer terms than do white youths committed for similar offenses.[42]

37. Feld, Evolution of Juvenile Court, *supra* note 1, at 141–44.

38. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 228–29; 42 U.S.C. § 5633(a)(16) (2000).

39. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 211–12.

40. Feld, Bad Kids, *supra* note 1, at 268; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 221.

41. Poe-Yamagata & Jones, *supra* note 27.

42. *Id.* at 18–21; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 221–22.

Researchers have evaluated programs in community and residential settings to determine what works, how well, and at what costs. The diversity of facilities and programs, the variability of populations they serve, and the lack of control groups make it difficult to attribute positive outcomes to intervention or to sample-selection bias. Correctional meta-analyses combine independent studies to measure effectiveness of different strategies to reduce recidivism or other outcomes. Evaluations have compared generic strategies—counseling, behavior modification, and group therapy—more sophisticated interventions and replications of brand-name programs—Functional Family Therapy and Multisystemic Therapy—and cost/benefit appraisals of different treatments.[43] A substantial literature exists on effectiveness of probation and other forms of non-institutional treatment.[44] 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.[45]

Delbert Elliot developed the Blueprints for Prevention program that certifies programs as proven or promising. Proven programs demonstrate reductions in problem behaviors with rigorous experimental design, continuing effects after youths leave the program, and successful replication by independent providers.[46] Although some proven programs treat delinquents, most programs aim to prevent school-aged youths' involvement with the juvenile justice system.[47] Mark Lipsey's ongoing meta-analyses report that treatment strategies such as counseling and skill-building are more effective than those adopted during the Get Tough Era that emphasize surveillance, control, and discipline.[48] 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

43. Peter W. Greenwood & Susan Turner, *Probation and Other Noninstitutional Treatment: The Evidence Is In*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 726–28; Doris Layton MacKenzie & Rachel Freeland, *Examining the Effectiveness of Juvenile Residential Programs*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 771, 790. For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in Volume 4 of the present Report.

44. *See, e.g.*, Greenwood & Turner, *supra* note 43; MacKenzie & Freeland, *supra* note 43. *Cf.* Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

45. Greenwood & Turner, *supra* note 43, at 725; Peter Greenwood, Changing Lives: Delinquency Prevention as Crime-Control Policy (2006).

46. MacKenzie & Freeland, *supra* note 43, at 790–91; Nellis, *supra* note 20, at 83–86.

47. Greenwood & Turner, *supra* note 43, at 728.

48. Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 Victims & Offenders 124 (2009).

and serious recidivism.[49] Cost-benefit studies use meta-analytic methods to evaluate program costs and benefits to the individual and community—recidivism reduction, costs to taxpayers, and losses for potential victims.[50] While there is a paucity of high-quality evaluations, research suggests that prevention programs—pre-school enrichment and family-based interventions outside of the juvenile justice system—provide benefits that exceed their costs and improvements in education, employment, income, mental health, and other outcomes.[51]

Cumulatively, evaluations conclude that states can handle most delinquents safely in community settings with cognitive-behavioral models of change. The most successful Blueprints programs—Functional Family Therapy and Multisystemic Therapy—focus on altering family interactions, improving family problem-solving skills, and strengthening parents' ability to deal with their children's behaviors.[52] But effective programs require extensive and expensive staff training, for which most state and local agencies are unwilling to pay. Despite decades of research, "only about 5% of the youths who could benefit from these improved programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision."[53]

Gault mandated procedural safeguards, in part, because of conditions in training schools.[54] Cases contemporaneous with *Gault* described inmates beaten by guards, hog-tied, or becoming psychotic through prolonged isolation.[55] Recent lawsuits challenging institutional conditions reveal gang conflict, inadequate education, mental-health and health-care services, suicide, heavy reliance on solitary confinement, and inmates' sexual abuse and deaths at the hands of staff.[56]

49. Vincente Garrido & Luz Anyela Morales, *Serious (Violent and Chronic) Juvenile Offenders: A Systematic Review of Treatment Effectiveness in Secure Corrections, in* Campbell Collaboration Reviews of Intervention and Policy Evaluations (2007); MacKenzie & Freeland, *supra* note 43, at 771.
50. Brandon C. Welsh et al., *Promoting Change, Changing Lives: Effective Prevention and Intervention to Reduce Serious Offending, in* From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention 262–68 (Rolf Loeber & David P. Farrington eds., 2012).
51. *Id.* at 267–70.
52. Greenwood & Turner, *supra* note 43, at 738–40; Nellis, *supra* note 20, at 84.
53. Greenwood & Turner, *supra* note 43, at 744.
54. *In re* Gault, 387 U.S. 1, 27 (1967).
55. Barry Krisberg, *Juvenile Corrections: An Overview*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 751–52 (2012).
56. *Id.* at 754–57.

Analysts criticize training schools as sterile and unimaginative, as inappropriate venues in which to treat juveniles, as schools for crime where children learn from more delinquent peers, and as settings in which staff and residents abuse and mistreat inmates.[57] During the 1960s and 1970s, investigators conducted in-depth ethnographic research in correctional facilities.[58] Studies in different states reported similar findings—violent environments, minimal treatment or educational programs, physical abuse by staff and inmates, make-work tasks, extensive use of solitary confinement, and the like. In the ensuing decades, little has 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 to 1,000 inmates.[59]

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.[60] Eighth Amendment litigation is proscriptive, defines constitutionally impermissible practices, and delineates the minimum floor below which institutional conditions may not fall. Judicial opinions from around the country describe youths housed in dungeon-like facilities, beaten with paddles, drugged for social control, locked in solitary confinement, housed in overcrowded and dangerous conditions, and other punitive practices.[61] 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.[62]

Do institutional treatment programs reduce recidivism, enhance psychological well-being, improve educational attainments, provide vocational skills, or boost community readjustment? There are no standard measures of recidivism—rearrest, reconviction, or recommitment—and most states do not collect data on programs' effectiveness or recidivism, which complicates judges' ability to distinguish treatment from punishment.[63] Despite these limitations,

57. MacKenzie & Freeland, *supra* note 43, at 775.

58. *See e.g.*, Clemens Bartollas, Stuart J. Miller & Simon Dinitz, Juvenile Victimization: The Institutional Paradox (1976); Barry C. Feld, Neutralizing Inmate Violence: Juvenile Offenders in Institutions (1977) [hereinafter Feld, Neutralizing Inmate Violence].

59. Snyder & Sickmund, *supra* note 3; MacKenzie & Freeland, *supra* note 43, at 774; Parent et al., *supra* note 7.

60. Feld, Bad Kids, *supra* note 1, at 274–77; Krisberg, *supra* note 55, at 753–54; Nellis, *supra* note 20, at 113–15.

61. Feld, Bad Kids, *supra* note 1, at 275–76; Krisberg, *supra* note 55, at 754–55.

62. Feld, Cases and Materials, *supra* note 2, at 969–81.

63. Greenwood & Turner, *supra* note 43, at 743–44; Krisberg, *supra* note 55, at 761–62.

evaluations of training schools provide scant evidence of effective treatment.[64] Programs that emphasize deterrence or punishment—institutions and boot camps—may lead to increased criminal activity following release.[65] Correctional boot camps reflect punitive policies and emphasize physical training, drill, and discipline. Despite their popularity, they do not reduce recidivism and some studies reported increases.[66] Evaluations of training schools report that police rearrest half or more juveniles for a new offense within one year of release.[67] More than half of incarcerated youths have not completed the eighth grade and more than two-thirds do not return to school following release.

Juvenile corrections policy: What should a responsible legislature do? Justice-system involvement impedes youths' transition to adulthood and aggravates minority youths' social disadvantage.[68] 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.[69] Adolescence is a developmentally fraught period of rapid growth and personality change. Most delinquents will outgrow adolescent crimes without extensive treatment, and interventions should be short-term, community-based, and as minimally disruptive as possible. "The best-known cure for youth crime is growing up. And the strategic logic of diversion and minimal sanctions is waiting for maturation to transition a young man from male groups to intimate pairs and from street corners to houses and workplaces."[70]

More than four decades ago, Massachusetts' Department of Youth Services (DYS) closed its training schools and replaced them with community-based alternatives—group homes, mental-health facilities, and contracts for services for education, counseling, and job training.[71] 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

64. Feld, Bad Kids, *supra* note 1, at 279–83; Krisberg, *supra* note 55, at 762–64.
65. MacKenzie & Freeland, *supra* note 43, at 794.
66. *Id.* at 784; Nellis, *supra* note 20, at 57–58, 84–85.
67. Snyder & Sickmund, *supra* note 3; Krisberg, *supra* note 55, at 763; McKenzie & Freeland, *supra* note 42, at 729.
68. Franklin E. Zimring, *Minority Overrepresentation: On Causes and Partial Cures*, *in* Choosing the Future for American Juvenile Justice 169 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).
69. *Id.* at 174.
70. Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, *in* Choosing the Future for American Juvenile Justice, *supra* note 68, at 228.
71. Feld, Neutralizing Inmate Violence, *supra* note 58; Jerome Miller, Last One Over the Wall 177–90 (1991). *See generally* Tonry, *supra* note 44.

graduated from juvenile institutions declined.[72] More recently, Missouri has replicated and expanded on the Massachusetts experiment and used continuous case management, decentralized residential units, and staff-facilitated positive peer culture to provide a rehabilitative environment.[73] Although proponents claim the Missouri strategy has led to a reduction in recidivism rates, no rigorous evaluations have demonstrated its effectiveness.[74] Other states have adopted de-institutionalization strategies. The California Youth Authority has closed five large institutions and reduced its incarcerated population from about 10,000 juveniles to around 1,600—changes driven in part by fiscal considerations.[75] New York's Office of Children and Family Services (OCFS) announced plans to close six youth correctional facilities after a study found that nearly 80% of young people released from its facilities were rearrested within three years.

Punishment or prevention: Delinquency prevention programs provide an alternative to control or suppression strategies and reflect the adage, "a stitch in time saves nine." Prevention intervenes with children and youths before they engage in delinquency. Risk-focused prevention identifies factors that contribute to offending and employs programs to counteract them. Some interventions apply to communities; others apply to individuals at risk to become offenders or to their families.[76]

Some prevention strategies identify individual risk factors—low intelligence or delayed school progress—and provide programs to improve cognitive skills, school readiness, and social skills. 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.[77] Cost-benefit analyses and evaluations report that larger proportions of experimental than control youths graduated from high school, received post-secondary education, had better employment records and higher income, paid taxes, had fewer arrests, and reduced public expenditures for crime and welfare.[78]

72. Barry Krisberg et al., Working Juvenile Corrections: Evaluating the Massachusetts Department of Youth Services (1989); Miller, *supra* note 71, at 218–26.

73. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 416.

74. *Id.* at 422–24; Nellis, *supra* note 20, at 86–87.

75. Krisberg, *supra* note 55, at 748.

76. David P. Farrington & Brandon C. Welsh, Saving Children from a Life of Crime: Early Risk Factors and Effective Interventions (2007); Greenwood, *supra* note 45; Brandon C. Welsh, *Delinquency Prevention, in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 395.

77. Welsh, *supra* note 76, at 398–99.

78. *Id.* at 398.

Other delinquency prevention programs address the families in which at-risk youths live. Family-based risk factors include poor child-rearing techniques, inadequate supervision, lack of clear norms, and inconsistent or harsh discipline. Home visitation, Nurse Home Visitation, and parent management training programs can produce positive outcomes in the lives of children.[79] Family interventions for adjudicated delinquents that operate outside of the juvenile justice system also produce positive outcomes—multi-systemic therapy (MST), functional family therapy (FFT), and multidimensional treatment foster care (MTFC).[80]

David Farrington and Brandon Welsh, in *Saving Children from a Life of Crime*, provide a comprehensive review of risk factors and effective interventions to prevent delinquency. They identify individual-, family-, and community-level factors and effective programs to reduce delinquency. At each level, they report proven or promising programs to improve youths' lives and recommend risk-focused, evidence-based prevention programs.[81]

Peter Greenwood, in *Changing Lives: Delinquency Prevention as Crime-Control Policy*, provides a comprehensive review of prevention programs. He focuses on interventions across the developmental trajectory from infancy and early childhood, through elementary school-aged children, and into adolescence. Some prevention programs have been adequately evaluated and clearly do *not* work—for example, Drug Abuse Resistance Education (DARE).[82] Many prevention programs have no evidentiary support—either they have not been evaluated or evaluations have used such flawed design that 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, politicians do not embrace prevention programs because they lack a punitive component and do not demonstrate immediate impact.[83] While highly visible crimes evoke fear and elicit a punitive response, delinquency prevention takes longer to realize and has a more diffuse impact. 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."[84]

79. Greenwood, *supra* note 45; Welsh et al., *supra* note 50, at 248–51.
80. Greenwood, *supra* note 45; Welsh et al., *supra* note 50, at 249–50.
81. Farrington & Welsh, *supra* note 76.
82. Greenwood, *supra* note 45, at 90–96.
83. *Id.* at 167.
84. Welsh, *supra* note 76, at 409.

3. Conclusion

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

Although juvenile courts served their diversionary function, lawmakers sharply shifted their interventions from rehabilitation toward offense-based punitive policies. During the last third of the 20th century, lawmakers forsook even nominal commitment to treatment in favor of punishment. They changed juvenile codes' purposes from care and treatment to accountability and punishment. They amended delinquency sentencing statutes to define length and location of confinement based on offense. In practice, judges focused primarily on present offense and prior record when making dispositions. All of these punitive changes had a disproportionate impact on black youths and other children of color. Although most delinquents received probation, between 1987 and 1997, institutional confinement rose by 54%. Training schools more closely resembled prisons than clinics and seldom improved delinquents' life trajectories. Training schools are the *least* effective way to respond to youths' needs. Meta-analyses and other evaluations identify effective programs and most of them are not administered by juvenile justice personnel.

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

welfare to punishment and from rehabilitation to retribution occurred as blacks gained civil rights and the United States briefly flirted with integration and inclusionary rather than exclusionary racial policies.[85]

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

Progressive reformers created juvenile courts to divert children from criminal courts and to treat rather than punish them. Envisioned as a welfare agency, juvenile courts rejected criminal procedural safeguards and dispensed with formalities like lawyers, juries, and rules of evidence.[86] In 1967, *In re Gault* began to transform the juvenile court from social welfare agency into a more formal legal institution.[87] In that case, the Court emphasized juvenile courts' criminal elements—youths charged with crimes facing institutional confinement, stigma of delinquency labels and records, judicial arbitrariness, and high rates of recidivism—and required proof of guilt using fair procedures. Although *Gault* did not adopt adult criminal procedural protections, it precipitated an operational convergence between juvenile and criminal courts. Subsequent decisions further emphasized delinquency proceedings' criminal character. *In re Winship* required states to prove delinquency by the criminal standard—proof beyond a reasonable doubt—rather than by the lower civil standard of proof.[88] *Breed v. Jones* posited a functional equivalency between juvenile and criminal trials and applied the Fifth Amendment's Double Jeopardy Clause to delinquency prosecutions.[89] However, *McKeiver v. Pennsylvania* posited a benevolent juvenile court, denied delinquents a constitutional right to a jury trial, and rejected procedural parity between delinquency and criminal proceedings.[90] Punitive changes have eroded *McKeiver*'s rationale. The absence of a jury adversely affects accurate fact-finding and the presence and performance of counsel, and increases the likelihood of wrongful convictions.[91]

85. Feld, Bad Kids, *supra* note 1; Feld, Evolution of Juvenile Court, *supra* note 1.

86. Feld, Bad Kids, *supra* note 1; David S. Tanenhaus, Juvenile Justice in the Making (2004).

87. Feld, Bad Kids, *supra* note 1; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; Barry C. Feld, *Criminalizing Juvenile Justice, supra* note 2.

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

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

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

91. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 275 (2007); Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003) [hereinafter Feld, *Constitutional Tension*]. For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in Volume 3 of the present Report.

Juvenile courts handle about half of the youths referred to them informally without filing a formal petition or proceeding to trial.[92] Court intake workers or prosecutors perform a triage function and conduct a rapid assessment to determine whether a youth's crime or welfare requires juvenile court attention or can be discharged or referred to others for care. Diversion minimizes formal adjudication and provides supervision or services in the community. Proponents of diversion contend that it is an efficient gate-keeping mechanism, avoids labeling minor offenders, and provides flexible access to community resources that referral after a formal process might delay. Most youths desist after one or two contacts, and diversion conserves judicial resources for those youths who distinguish themselves by recidivism.

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 of cases make low-visibility decisions, which are not subject to judicial or appellate review. Many states do not use formal screening or assessment tools, and discretion at intake constitutes the most significant source of racial disparities in case processing.[93] Although the criteria and administration of diversion raise many significant policy concerns, cases handled informally do not raise the procedural issues of formal adjudication.

During the Get Tough Era, juvenile courts increasingly punished delinquents and amplified their need for protection from the state. *Gault* made delinquency hearings more formal, complex, and legalistic and required youths to participate in and make difficult decisions. Developmental psychologists question whether younger juveniles possess competence to stand trial and whether adolescents have the ability to exercise *Miranda* rights or to waive counsel. Despite clear developmental differences between youths and adults in understanding, maturity of judgment, and competence, the Court and most states do not provide additional safeguards to protect youths from their immaturity *or* procedural parity with criminal defendants, increasing the likelihood of erroneous outcomes.

92. Snyder & Sickmund, *supra* note 3; Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Versus Formal Processing*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8.

93. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1; Bishop, *supra* note 9, at 39–40; Mears, *supra* note 92, at 587.

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

1. Police interrogation of juveniles

The Supreme Court has decided more cases about interrogating youths than any other issue of juvenile justice.[94] Although it repeatedly has questioned juveniles' ability to exercise *Miranda* rights or make voluntary statements, it does not require special procedures to protect them. Rather, *Fare v. Michael C.* endorsed the adult standard—"knowing, intelligent, and voluntary under the totality of circumstances"—to gauge juveniles' *Miranda* waivers.[95]

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

Questioning juveniles—the law on the books: In the decades prior to *Miranda*, the Court cautioned trial judges to examine closely how youthfulness affected voluntariness of confessions and found that youth, lengthy questioning, and absence of a lawyer or parent rendered confessions involuntary.[96] *Gault*

94. J.D.B. v. North Carolina, 564 U.S. 261 (2011); Yarborough v. Alvarado, 541 U.S. 652 (2004); Fare v. Michael C., 442 U.S. 707 (1979); *In re* Gault, 387 U.S. 1 (1967); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948). *See generally* Barry C. Feld, Kids, Cops, and Confessions: Inside the Interrogation Room (2013) [hereinafter Feld, Kids, Cops, and Confessions].

95. *Michael C.*, 442 U.S. at 725.

96. *Gallegos*, 370 U.S. at 54; *Haley*, 332 U.S. at 599–601.

reiterated concern that youthfulness adversely affected reliability of juveniles' statements.[97] It ruled that delinquency proceedings based on criminal allegations that could lead to institutional confinement "must be regarded as 'criminal' for purposes of the privilege against self-incrimination."[98] It recognized that the Fifth Amendment contributes to accurate fact-finding *and* maintains the adversarial balance with, and protects the individual from, the state.[99] *Gault* assumed that youths could exercise rights and participate in the legal process.

Fare v. Michael C. departed from the Court's earlier concerns about youths' vulnerability and held that the legal standard used to evaluate adults' waivers—"knowing, intelligent, and voluntary under the totality of the circumstances"—governed juveniles' waivers as well.[100] *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 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.[101] The Court in *J.D.B. v. North Carolina* considered whether a 13-year-old juvenile's age affected the *Miranda* custody analysis.[102] The Court concluded that age was an objective factor that would affect how a young person might experience restraint. *J.D.B.* recognized that juveniles could feel restrained under circumstances in which an adult might not and drew on *Roper* and *Graham*'s diminished responsibility rationale to emphasize their immaturity, inexperience, and heightened vulnerability during interrogation.

Despite *J.D.B.*'s renewed concern about youths' vulnerability, the vast majority of states use the same *Miranda* framework for juveniles and adults.[103] *Miranda* requires only that suspects understand the words of the warning and not collateral consequences of a waiver. Most states do not require a parent or lawyer to assist juveniles. When trial judges evaluate *Miranda* waivers, they consider characteristics of the offender (age, education, IQ, and prior police contacts) and the context of interrogation (location, methods, and length of interrogation). The leading cases provide long lists of factors for trial judges to consider.[104] Appellate courts identify many relevant elements, but do not assign controlling weight to any one variable, and defer to trial judges' decisions

97. *Gault*, 387 U.S. at 45, 55.
98. *Id.* at 49–50.
99. *Id.* at 47 (emphasis supplied)
100. *Michael C.*, 442 U.S. at 725; Feld, Kids, Cops, and Confessions, *supra* note 94.
101. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
102. *J.D.B.*, 564 U.S. at 264.
103. Feld, Kids, Cops, and Confessions, *supra* note 94.
104. *Michael C.*, 442 U.S. at 726–27; Feld, Kids, Cops, and Confessions, *supra* note 94.

whether a juvenile made a valid waiver.[105] Without decisive factors, *Michael C.* provides no meaningful check on judges' discretion to find that youths waived their rights. Judges regularly find valid waivers made by children as young as 10 or 11 years of age, with limited intelligence or significant mental disorders, with no prior police contacts, and without parental assistance.[106]

About 10 states presume that most juveniles lack capacity to waive *Miranda* and require a parent or other adult to assist them.[107] Some states require a parent for juveniles younger than 14 years, presume that those 14 or 16 years or older are incompetent to waive, or oblige police to offer older youths an opportunity to consult.[108] 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, victimized another sibling, or the parent is a suspect. Parents may have a financial conflict of interest if they have to pay for their child's attorney. They may have an emotional reaction to their child's current arrest or chronic trouble. They may expect their children to tell the truth, urge them to stop lying, or physically threaten them to make them confess. But many parents may not understand legal rights or consequences of waiver any better than their children.

If youths differ from adults in understanding *Miranda*, conceiving of or exercising rights, or susceptibility to pressure, then the law establishes a standard that few can meet and enables states to take advantage of their limitations. *Miranda* requires police to advise suspects of their rights, but some juveniles do not understand the words or concepts. Psychologists studied the vocabulary, concepts, and reading levels required to understand warnings and concluded that they exceed many adolescents' abilities. Key words require an eighth-grade level of education and most juveniles 13 years or younger cannot grasp their meaning.[109] Some concepts—the meaning of a *right*, the term

105. Feld, *Criminalizing Juvenile Justice*, *supra* note 2; Feld, Kids, Cops, and Confessions, *supra* note 94.

106. Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* Youth on Trial: A Developmental Perspective on Juvenile Justice 105 (Thomas Grisso & Robert Schwartz eds., 2000); Feld, Kids, Cops, and Confessions, *supra* note 94.

107. Feld, Kids, Cops, and Confessions, *supra* note 94; Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26 (2006).

108. Matter of B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983); State v. Presha, 748 A.2d 1108, 1114 (N.J. 2000).

109. Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124, 135 (2008); Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 Psychol. Pub. Pol'y & L. 63, 72–85 (2008).

appointed to secure counsel, and *waive*—require a high-school education and render *Miranda* incomprehensible. Many juveniles cannot define critical words in the warning. Special dumbed-down juvenile warnings are often longer and more difficult to understand. If demanding reading level or verbal complexity makes a warning unintelligible, then it cannot serve its protective function.

Psychologist Thomas Grisso has studied juveniles' exercise of *Miranda* for more than four decades. He reports that many, if not most, do not understand the warning well enough to make a valid waiver.[110] Although age, intelligence, and prior arrests correlated with *Miranda* comprehension, more than half of juveniles, as contrasted with less than one-quarter of adults, did not understand at least one of the four warnings, and only one-fifth of juveniles, as compared with twice as many adults, grasped all four warnings.[111] Juveniles 15 years of age or younger exhibited significantly poorer comprehension of *Miranda* rights, 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.[112] Adolescents with low IQs perform more poorly than adults with low IQs, and delinquent youths typically have lower IQs than do those in the general population.[113] The higher prevalence of mental disorders compounds juveniles' cognitive limitations, although police seldom will be able to assess youths' impairments when they question them.

Even youths who understand *Miranda*'s words may be unable to exercise rights. Juveniles do not appreciate the function or importance of rights as well as adults and they are less competent defendants.[114] They have greater difficulty conceiving of a right as an absolute entitlement that they can exercise without adverse consequences.[115] Juveniles view rights as something that authorities allow them to do, but which they may unilaterally retract or withhold. They misconceive the lawyer's role and attorney-client confidentiality. Youths with

110. Thomas Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence (1981) [hereinafter Grisso, Juveniles' Waivers]; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 11 (1997) [hereinafter Grisso, *Trial Defendants*]; Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1152–54 (1980) [hereinafter Grisso, *Juveniles' Capacity*]; Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 335 (2003) [hereinafter Grisso, *Juveniles' Competence*].

111. Grisso, *Juveniles' Capacity*, *supra* note 110, at 1152–54.

112. Feld, Kids, Cops, and Confessions, *supra* note 94 (reviewing research literature).

113. Thomas Grisso, Double Jeopardy: Adolescent Offenders with Mental Disorders 164–67 (2004) [hereinafter Grisso, Double Jeopardy].

114. Grisso, Juveniles' Waivers, *supra* note 110, at 130.

115. Grisso, *Trial Defendants*, *supra* note 110, at 10–11.

poorer understanding of rights waived them at higher rates than 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 render children questioned by authority figures more suggestible. We expect youths to answer questions posed by police, teachers, parents, and other adults; social expectations and children's lower status increase their vulnerability during interrogation. Juveniles may waive rights and admit responsibility because they believe they should obey authority, acquiesce more readily to negative pressure or critical feedback, and accede more willingly to suggestions.[116] They impulsively confess to end an interrogation, rather than to consider long-term consequences.[117]

The Court requires suspects to invoke *Miranda* rights clearly and unambiguously.[118] However, some groups of people—juveniles, females, or racial minorities—may speak indirectly or tentatively to avoid conflict with those in power.[119] *Davis v. United States* recognized that to require suspects to invoke rights clearly and unambiguously could prove problematic for some.[120] If a suspect thinks she has invoked her rights, but police disregard it as an ambiguous request, then she may feel overwhelmed by their indifference and succumb to further questioning.

Police interrogation of juveniles—the law in action: Research on police interrogation reports that about 80% of adults and 90% of juveniles waive their *Miranda* rights.[121] The largest empirical study of juvenile interrogation reported that 92.8% waived.[122] Juveniles' higher waiver rates may reflect lack of understanding or inability to invoke *Miranda* effectively.[123] As with adults, youths with prior felony arrests invoked their rights more often than those

116. Saul Kassin et al., *Police-Induced Confessions, Risk Factors, and Recommendations*, 34 Law & Hum. Behav. 49 (2010) [hereinafter Kassin et al., *Police Induced Confessions*].

117. Grisso, Juveniles' Waivers, *supra* note 110, at 158–59; Grisso, *Juveniles' Competence*, *supra* note 110, at 357.

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

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

120. *Davis*, 512 U.S. at 460.

121. Feld, Kids, Cops, and Confessions, *supra* note 94, at 93–98; Richard A. Leo, Police Interrogation and American Justice (2008).

122. Feld, Kids, Cops, and Confessions, *supra* note 94, at 93–98; Barry C. Feld, *Real Interrogation: What Happens When Cops Question Kids*, 47 Law & Soc'y Rev. 1 (2013).

123. Feld, Kids, Cops, and Confessions, *supra* note 94, at 93–98.

with fewer or less serious police contacts. Youths who waived at prior arrests may have learned that they derived no benefit from cooperating, spent more time with lawyers, and gained greater understanding.

Once officers secure a juvenile's waiver, they question him just like adults. They employ the same maximization and minimization strategies used with adults to overcome young suspects' resistance and to enable them to admit responsibility.[124] 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.[125] Despite youths' greater susceptibility, police do not incorporate developmental differences into the tactics they employ.[126] They do not receive special training to question juveniles and use the same tactics as with adults.[127] Techniques designed to manipulate adults—aggressive questioning, presenting false evidence, and using leading questions—create unique dangers when employed with youths.[128]

Some states require a parent to assist juveniles in the interrogation room although analysts question their protective role.[129] Parents—as adults—may have marginally greater understanding of *Miranda* than their children, but both share misconceptions about police practices.[130] Parents did not provide useful legal advice, increased pressure to waive rights, and many urged their children to tell the truth. Parents may be emotionally upset or angry at their child's arrest, believe that confessing will produce a better outcome, or think they should respect authority or assume responsibility. If a parent is present, police either enlist them as allies in the interrogation or neutralize their presence and render them as passive observers.[131] In the vast majority of interrogations that parents attended, they did not participate after police gave their child a *Miranda*

124. *Id.* at 110; Kassin et al., *Police Induced Confessions*, *supra* note 116, at 12.

125. Feld, Kids, Cops, and Confessions, *supra* note 94, at 110; Leo, *supra* note 121; Saul Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 Am. Psychologist 215, 223 (2005).

126. Feld, Kids, Cops, and Confessions, *supra* note 94; Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 Am. Psychologist 286, 291 (2006).

127. Feld, Kids, Cops, and Confessions, *supra* note 94; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219 (2006).

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

129. Feld, Kids, Cops, and Confessions, *supra* note 94; Grisso, Juveniles' Waivers, *supra* note 110; Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. Youth Adolescence 685 (2008).

130. Woolard et al., *supra* note 129.

131. Feld, Kids, Cops, and Confessions, *supra* note 94, at 200–03.

warning, sometimes switched sides to become active allies of the police, and rarely played a protective role.[132]

Juveniles' vulnerability and false confessions: Research on false confessions underscores juveniles' unique vulnerability.[133] Younger adolescents are at greater risk to confess falsely than older ones. In one study, police obtained more than one-third (35%) of proven false confessions from suspects younger than 18.[134] In another study, false confessions occurred in 15% of cases, but juveniles accounted for 42% of all false confessors, and two-thirds (69%) of those ages 12 to 15 confessed to crimes they did not commit.[135] Significantly, research on exonerated juveniles who confess falsely involves only the small group of youths prosecuted as adults. This reflects the seriousness of their crimes, the greater pressure on police to solve them, and the longer period available to youths and their attorneys to correct the errors.

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

Policy recommendations: Research on false confessions underscores the unique vulnerability of younger juveniles.[136] *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-olds possess. By contrast,

132. *Id.* at 203–06.

133. Richard A. Leo, "Interrogation and Confessions," in Volume 2 of the present Report; Garrett, *supra* note 91; Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010).

134. Drizin & Leo, *supra* note 133, at 945.

135. Gross et al., *supra* note 133, at 545.

136. Garrett, *supra* note 133; Drizin & Leo, *supra* note 133; Gross et al., *supra* note 133; Tepfer et al., *supra* note 133.

psychologists report that many, if not most, children 15 or younger do not understand *Miranda* or possess competence to make legal decisions.[137]

Mandatory counsel for younger juveniles: Younger juveniles' limited understanding and heightened vulnerability warrant greater procedural protections—a non-waivable right to counsel. The Supreme Court's juvenile interrogation cases—*Haley*, *Gallegos*, *Gault*, *Fare*, *Alvarado*, and *J.D.B.*—excluded statements taken from youths 15 years of age or younger and admitted those obtained from 16- and 17-year-olds. The Court's *de facto* functional line—15 and younger versus 16 and older—closely tracks what psychologists report about youths' ability to understand the warning. Courts and legislatures should adopt that functional line and provide greater protections for younger juveniles.

Psychologists advocate that juveniles younger than 16 "should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role."[138] More than three decades ago, the American Bar Association endorsed mandatory, non-waivable counsel because it recognized that "[f]ew juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful."[139] Juveniles should consult with an attorney, rather than to rely on parents, before they exercise or waive rights.[140] Requiring consultation with an attorney assures a functioning legal services delivery system and an informed and voluntary waiver. If youths 15 or younger consult with counsel, it will limit somewhat 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. Constitutional rights exist to assure factual accuracy, promote equality, and protect individuals from governmental over-reaching. *Michael C.* emphasized lawyers' unique role in the justice system, and *Haley*, *Gallegos*, and *Gault* recognized younger juveniles' exceptional need for their assistance.

Limiting the length of interrogation: The vast majority of interrogations are very brief; police completed nearly all interviews in less than an hour and few take longer than two hours.[141] By contrast, interrogations that elicit false confessions are usually long inquiries that wear down an innocent person's

137. Grisso, *Juveniles' Capacity*, *supra* note 110; Grisso, *Juveniles' Competence*, *supra* note 110.

138. Kassin et al., *Police Induced Confessions*, *supra* note 116, at 28.

139. Am. Bar Ass'n & Inst. of Jud. Admin., Juvenile Justice Standards Relating to Pretrial Court Proceedings 92 (1980) [hereinafter Am. Bar Ass'n].

140. Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 Rutgers L. Rev. 125 (2007); Am. Bar Ass'n , *supra* note 139.

141. Feld, Kids, Cops, and Confessions, *supra* note 94.

resistance—85% took at least six hours—and youthfulness exacerbates those dangers.[142] The Court has recognized that questioning juveniles for five or six hours rendered their statement involuntary. States should create a sliding-scale presumption that a confession is involuntary and unreliable based on length of interrogation.

Mandatory recording of interrogation: Within the past decade, legal scholars, psychologists, law enforcement, and justice-system personnel have reached consensus that recording interrogations reduces coercion, diminishes dangers of false confessions, and increases reliability.[143] About a dozen states require police to record interrogations, albeit some under limited circumstances—homicide or very young suspects.[144] 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 whether police supplied them to an innocent suspect. Recording protects police from false claims of abuse, enhances professionalism, and reduces coercion. It enables police to focus on suspects' responses, to review details of an interview not captured in written notes, and to test them against subsequently discovered facts. Recording avoids distortions that occur when interviewers rely on memory or notes to summarize a statement.

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

2. Competence to stand trial

Gault's procedural rights would be of no value to youths unable to exercise them. The Court long has required that a defendant must be competent to preserve the integrity of trials, to promote factual accuracy, to reduce risk of error, and to enable defendants to play a part in proceedings.[145] *Dusky v. United*

142. Drizin & Leo, *supra* note 133.

143. Feld, Kids, Cops, and Confessions, *supra* note 94; Garrett, *supra* note 133; Leo, *supra* note 121.

144. Garrett, *supra* note 133; Leo, *supra* note 121.

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

States held that a defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and have] a rational as well as factual understanding of proceedings against him."[146] *Drope v. Missouri* held that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[147] 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.[148] Juveniles must understand the trial process, have the ability to reason and work with counsel, and to rationally appreciate their situation. If a person understands that he is on trial for committing crimes, knows he can be sentenced if convicted, and can communicate with his attorney, a court likely would find him competent. Significant mental illness—psychotic disorders such as schizophrenia—or severe mental retardation typically render adult defendants incompetent. However, psychotic disorders typically do not emerge until late adolescence or early adulthood and the American Psychiatric Association's *Diagnostic and Statistical Manual* cautions against diagnosing profound illnesses in younger populations.[149] Despite that reservation, researchers report that the prevalence of mental disorders among delinquent youths is substantially higher than in the general population—half to three-quarters exhibit one or more mental illnesses.[150]

Developmental psychologists contend that immaturity per se—especially for younger juveniles—produces the same deficits of understanding and inability to assist counsel that mental illness or retardation engender in incompetent adults.[151] Youths' developmental limitations adversely affect their ability to pay attention, absorb and apply information, understand proceedings, make rational decisions, and work with counsel.[152]

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

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

148. Joseph B. Sanborn, *Juveniles' Competency to Stand Trial: Wading through the Rhetoric and the Evidence*, 99 J. Crim. L. & Criminology 135, 137 (2009).

149. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

150. Grisso, Double Jeopardy, *supra* note 113. For a discussion of mental illness, see Stephen J. Morse, "Mental Disorder and Criminal Justice," in the present Volume.

151. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 151–52; Scott & Grisso, *supra* note 145, at 796.

152. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 158–60; Scott & Grisso, *supra* note 145.

Significant age-related differences appear between adolescents' and young adults' competence, judgment, and legal decision-making.[153] Developmental psychologists report that many juveniles younger than 14 were as severely impaired as adults found incompetent to stand trial.[154] Some older youths also exhibited substantial impairments.[155] Age and intelligence interacted and produced higher levels of incompetence among adolescents with low IQs than adults with low IQs.[156] The MacArthur study reported that about one-fifth of 14- to 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.[157] Even nominally competent adolescents may suffer from cognitive deficits—borderline intelligence, limited verbal ability, short attention span, or imperfect memory—that adversely affect understanding and decisions.

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 developmental immaturity.[158] Competency restoration may be especially problematic for younger juveniles who never possessed relevant knowledge or understanding to begin with.[159] Moreover, adolescents deemed incompetent due to mental retardation may be especially difficult to remediate or restore to competence.[160]

The prevalence of mental illness among delinquents compounds their developmental incompetence. In many jurisdictions, the juvenile justice system has become the de facto mental health system as a result of inadequate mental health services for children.[161] Analysts estimate that half or more of male delinquents and a larger proportion of female delinquents suffer from one or more mental

153. Grisso, *Juveniles' Competence*, supra note 110, at 344.

154. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 162–65; Grisso, *Juveniles' Competence*, *supra* note 110, at 356.

155. Grisso, *Juveniles' Competence*, *supra* note 110, at 344.

156. *Id.* at 356; Sanborn, *supra* note 148, at 171.

157. Grisso, *Juveniles' Competence*, supra note 110, at 356.

158. Jodi L. Viljoen et al., *Competence and Criminal Responsibility in Adolescent Defendants: The Roles of Mental Illness and Adolescent Development*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8; Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 Psych., Pub. Pol'y & Law 87 (2007).

159. Scott & Grisso, *supra* note 145, at 797.

160. Sanborn, *supra* note 148, at 145–47; Viljoen et al., *supra* note 158, at 530.

161. Grisso, Double Jeopardy, *supra* note 113, at 5.

disorders.[162] Youths suffering from Attention-Deficit Hyperactivity Disorder (ADHD) may have difficulty concentrating or communicating with their attorney and those suffering from depression may lack the motivation to do so.

The issue of competence to stand trial arises both for youths transferred to and tried in criminal court and for those prosecuted in juvenile court. For youths tried as adults, criminal courts apply the *Dusky/Drope* standard, but focus on mental illness rather than developmental immaturity.[163] For youths tried in juvenile courts, about half the states have addressed competency in statutes, court rules, or case law.[164] However, most statutes consider only mental illness or retardation as sources of incompetence rather than developmental immaturity per se.[165]

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.[166] Other jurisdictions opt for a relaxed competency standard on the theory that delinquency hearings are less complex and consequences less severe.[167]

Advocates for a lower, watered-down standard of competence in delinquency proceedings contend that a youth who might be found incompetent to stand trial as an adult or if evaluated under an adult standard in juvenile court should still be found competent under a relaxed standard.[168] They insist that if delinquency sanctions are less punitive than criminal sentences and geared to promote youths' welfare, then they require fewer procedural safeguards.[169] 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

162. *Id.* at 6–13; Viljoen et al., *supra* note 158, at 529.
163. Sanborn, *supra* note 148, at 147–49; Scott & Grisso, *supra* note 145, at 804–05.
164. Feld, Cases and Materials, *supra* note 3; Sanborn, *supra* note 148, at 140–42; Scott & Grisso, *supra* note 145.
165. Sanborn, *supra* note 148, at 141–42; Viljoen et al., supra note 158, at 532.
166. *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990); *In re* D.D.N., 582 N.W.2d 278 (Minn. Ct. App. 1998).
167. *In re* K.G., 808 N.E.2d 631, 639 (Ind. 2004); *In re* Bailey, 782 N.E.2d 1177, 1180 (Ohio 2002); Scott & Grisso, *supra* note 145; Sanborn, *supra* note 148, at 141–42.
168. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 168–77; Scott & Grisso, *supra* note 145, at 831–38.
169. Scott & Grisso, *supra* note 145, at 840–43.

disingenuous to claim they are not punitive. *Baldwin v. New York* held that no crime that carried an *authorized* sentence of six months or longer could be deemed a petty offense for which a defendant would not be entitled to a jury.[170] While proponents of a watered-down standard argue that a rule that immunizes some incompetent youths from adjudication could undermine juvenile courts' legitimacy,[171] trying immature youths under a relaxed standard enables the state to take advantage of their incompetence and undermines the legitimacy of the process. A finding of delinquency requires proof of guilt. Either defendants understand the proceedings and can assist counsel or they cannot; if they cannot perform those minimal tasks, then they should not be prosecuted in any court.

Juvenile courts do not routinely initiate competency evaluations even for young offenders, and many delinquents may face charges without understanding the process or the ability to work with counsel. Defense attorneys may be best positioned to detect whether a competency evaluation is warranted, but often fail to do so because of heavy caseloads, limited time spent with a client, and an inability to distinguish between immaturity and disabling incompetence.[172] Defense counsel tactically may not raise a juvenile's incompetence because of the delays for competency evaluation and restoration.[173] Justice-system personnel may lack evaluation instruments or clinical personnel who can administer them in a consistent and valid manner.[174]

3. Access to counsel

Gideon v. Wainwright applied the Sixth Amendment to the states to guarantee criminal defendants' right to counsel.[175] *Gault* relied on *Gideon*, compared a delinquency proceeding to a felony prosecution, and granted delinquents the right to counsel.[176] However, *Gault* used the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment and did not mandate automatic appointment of counsel.[177] *Gault*, like *Gideon*, left to state and local governments the task to fund legal services. Over the past half-century, politicians who want to get tough on crime and avoid coddling criminals have

170. Baldwin v. New York, 399 U.S. 66, 73–74 (1970).
171. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 173.
172. Viljoen et al., *supra* note 158, at 533–34.
173. Grisso, Double Jeopardy, *supra* note 113, at 168–70.
174. *Id.* at 77–80.
175. Gideon v. Wainwright, 372 U.S. 335, 342 (1963). *See generally* Eve Brensike Primus, "Defense Counsel and Public Defense," in Volume 3 of the present Report.
176. *In re* Gault, 387 U.S. 1, 36 (1967).
177. *Id.* at 27–30; *Gideon*, 372 U.S. at 344.

shirked their responsibility to adequately fund public defenders' offices and severely undermined the quality of justice.

Gault required a judge to advise the child and parent of the right to have a lawyer appointed if indigent, but ruled that juveniles could waive counsel. Most states do not use special procedural safeguards—mandatory non-waivable appointment or pre-waiver consultation with a lawyer—to protect delinquents from improvident decisions.[178] Instead, they use the adult standard—knowing, intelligent, and voluntary—to gauge juveniles' relinquishment of counsel. As with *Miranda* waivers, formal equality results in practical inequality—lawyers represent delinquents at much lower rates than they do criminal defendants.[179]

Despite statutes and court rules of procedure that apply equally throughout a state, juvenile justice administration varies with urban, suburban, and rural context and produces justice by geography.[180] Lawyers appear more frequently in urban courts than in more informal rural courts.[181] In turn, more formal urban courts hold more youths in pretrial detention and sentence delinquents more severely. Finally, a lawyer's presence is an aggravating factor at disposition; judges sentence youths who appear with counsel more severely than they do those who appear without an attorney.[182] Several factors contribute to this finding: lawyers who appear in juvenile court may be incompetent and prejudice their clients' cases; judges may pre-determine sentences and appoint counsel when they anticipate out-of-home placements; or judges may punish delinquents for exercising procedural rights.

178. *Gault*, 387 U.S. at 42; Feld, Justice for Children, *supra* note 34; Feld, *Criminalizing Juvenile Justice*, *supra* note 2.

179. Judith B. Jones, Off. of Juv. Just. & Delinq. Prevention, Access to Counsel (2004); Caroline Wolf Harlow, U.S. Dep't of Justice, Defense Counsel in Criminal Cases (2000); Feld, Justice for Children, *supra* note 34; George W. Burruss & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 Just. Q. 37 (2002); Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 Crime & Delinq. 393 (1988) [hereinafter Feld, In re Gault *Revisited*]; Feld, *Right to Counsel*, *supra* note 35.

180. Feld, Justice for Children, *supra* note 34; Burrus & Kempf-Leonard, *supra* note 179; Feld, *Justice by Geography*, *supra* note 34, at 157–58; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor in Dispositions*, 27 Just. Q. 713 (2010) [hereinafter Feld & Schaefer, *Right to Counsel*]; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography*, 9 Criminology & Pub. Pol'y 327 (2010) [hereinafter Feld & Schaefer, *Law Reform*].

181. Feld, Justice for Children, *supra* note 34; Burrus & Leonard, *supra* note 179; Feld, *Justice by Geography*, *supra* note 34.

182. Burrus & Kempf-Leonard, *supra* note 179; Feld, *Right to Counsel*, *supra* note 35; Feld, *Justice by Geography*, *supra* note 34; Feld & Schaefer, *Right to Counsel*, *supra* note 180.

Presence of counsel in juvenile courts: When the Court decided *Gault*, lawyers appeared in fewer than 5% of delinquency cases, in part because juvenile court judges actively discouraged juveniles from retaining counsel and the courts' informality prevented lawyers from playing an advocate's role. Although states amended their juvenile codes to comply with *Gault*, evaluations of initial compliance found that most judges did not advise juveniles of their rights and the vast majority did not appoint counsel. Studies in the 1970s and 1980s reported that many judges did not advise juveniles and most did not appoint counsel.[183] Research in Minnesota in the mid-1980s reported that most youths appeared without counsel, that rates of representation varied widely in urban, suburban and rural counties, and that one-third of youths whom judges removed from home and one-quarter of those in institutions were unrepresented.[184] A decade later, about one-quarter of juveniles removed from home were unrepresented despite law reforms to eliminate the practice.[185] A study of delivery of legal services in six states reported that only three of them appointed counsel for a substantial majority of juveniles.[186] Studies in the 1990s described juvenile court judges' continuing failure to appoint lawyers. In 1995, the General Accounting Office confirmed that rates of representation varied widely among and within states and that judges tried and sentenced many unrepresented youths.[187]

In the mid-1990s the American Bar Association published two reports on juveniles' legal needs. *America's Children at Risk* reported that many children appeared without counsel and that lawyers who represented youths lacked adequate training and often failed to provide effective assistance.[188] *A Call for Justice*, focusing on the quality of defense lawyers, again reported that many youths appeared without counsel and that many attorneys failed to appreciate the challenges of representing young clients.[189] Since the late 1990s, the ABA and the National Juvenile Defender Center have conducted more than 20 state-by-state assessments, reporting that many, if not most, juveniles appeared

183. Feld, Justice for Children, *supra* note 34 (reviewing research on delivery of legal services); Feld, *Right to Counsel*, *supra* note 35.

184. Feld, In re Gault *Revisited*, *supra* note 179; Feld, *Right to Counsel*, *supra* note 35; Feld, *Justice by Geography*, *supra* note 34.

185. Feld & Schaefer, *Right to Counsel*, *supra* note 180; Feld & Schaefer, *Law Reform*, *supra* note 180.

186. Feld, In re Gault *Revisited*, *supra* note 179.

187. U.S. Gen. Acct. Off., Juvenile Justice: Representation Rates Varied as Did Counsel's Impact on Court Outcomes (1995).

188. Am. Bar Ass'n, America's Children at Risk: A National Agenda for Legal Action 60 (1993).

189. Am. Bar Ass'n, A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 52–56 (1995) [hereinafter ABA, Call for Justice].

without counsel, and that lawyers who represented youths often encountered structural impediments to effective advocacy—heavy caseloads, inadequate resources, lack of training, and the like.[190]

Waivers of counsel and guilty pleas in juvenile court: Several factors account for why so many youths appear in juvenile courts without counsel. Public-defender services may be less available or nonexistent in non-urban areas. Judges may give cursory advisories of the right to counsel, imply that waivers are just legal technicalities, and readily find waivers to ease their administrative burdens.[191] If judges expect to impose non-custodial sentences, then they may dispense with counsel. Some jurisdictions charge fees to determine a youth's eligibility for a public defender and others base youths' eligibility on their parents' income. 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.[192]

The most common explanation for why 50% to 90% of juveniles in many states are unrepresented is that they waive counsel.[193] Judges in most states use the adult standard to gauge juveniles' waivers of counsel and consider the same factors—age, education, IQ, prior police contacts, or court experience—as those in *Miranda* waivers. Many juveniles do not understand their rights or the role of lawyers and waive counsel without consulting with either a parent or an attorney.[194] Although judges are supposed to conduct a dialogue to determine whether a child can understand rights and represent herself, they frequently failed to give any counsel advisory, often neglected to create a record, and readily accepted waivers from manifestly incompetent children.[195] Judges who give counsel advisories often seek waivers to ease their administrative burdens, which affects how they inform juveniles of their rights and interpret their responses. As long as the law allows juveniles to waive counsel, judges can find valid waivers regardless of youths' incompetence. Juveniles' diminished

190. *State Assessments*, Nat'l Juv. Defender Ctr., http://njdc.info/our-work/juvenile-indigent-defense-assessments/ (last visited Apr. 27, 2017).

191. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 199; ABA, Call for Justice, *supra* note 189, at 44–45; Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002).

192. Feld, Bad Kids, *supra* note 1, at 127–28; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 199.

193. Feld, Justice for Children, *supra* note 34, Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 199-200; Berkheiser, *supra* note 191, at 649–50.

194. Berkheiser, *supra* note 191.

195. *In re* Manuel R., 543 A.2d 719 (Conn. 1988); Berkheiser, *supra* note 191; Drizin & Luloff, *supra* note 91.

competence, inability to understand proceedings, and judicial incentives and encouragement to waive counsel results in larger proportions of delinquents adjudicated without lawyers than criminal defendants.

Pleas without bargains: Like adult criminal defendants, nearly all delinquents plead guilty and proceed to sentencing.[196] Even though pleading guilty is the most critical decision a delinquent makes, states use adult waiver standards to evaluate their pleas.[197] Judges and lawyers often speak with juveniles in complicated legal language and fail to explain long-term consequences of pleading guilty.[198] A valid guilty plea requires a judge to conduct a colloquy on the record in which an offender admits the facts of the offense, acknowledges the rights being relinquished, and demonstrates that she understands the charges and potential consequences. Because appellate courts seldom review juveniles' waivers of counsel, pleas made without counsel receive even less judicial scrutiny.[199] Guilty pleas by factually innocent youths occur because attorneys fail to investigate cases, assume their clients' guilt especially if they have already confessed, and avoid adversarial litigation, discovery requests, and pretrial motions that conflict with juvenile courts' cooperative ideology. Juveniles' emphasis on short-term over long-term consequences and dependence on adult authority figures increases their likelihood to enter false guilty pleas.

Counsel as an aggravating factor in sentencing: 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.[200] Research that controls for legal variables—present offense, prior record, pretrial detention, and the like—consistently reports that judges removed from home and incarcerated delinquents who appeared with counsel more frequently than unrepresented youths. Law reforms to improve delivery of legal services actually increased the aggravating effect of representation on dispositions.[201]

196. Feld, Justice for Children, *supra* note 34; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 201–02. *See generally* Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

197. Joseph B. Sanborn, *Pleading Guilty in Juvenile Court: Minimal Ado about Something Very Important to Young Defendants*, 9 Just. Q. 127 (1992) [hereinafter Sanborn, *Pleading Guilty*]; Lacey Cole Singleton, *Say 'Pleas': Juveniles' Competence to Enter Plea Agreements*, 9 J.L. & Fam. Stud. 439 (2007).

198. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 201–02.

199. Berkheiser, *supra* note 191; Sanborn, *Pleading Guilty*, *supra* note 197.

200. Burrus & Kempf-Leonard, *supra* note 179; Feld, In re Gault *Revisited*, *supra* note 179, at 418–19; Feld, *Right to Counsel*, *supra* note 35, at 1330; Feld & Schaefer, *Right to Counsel*, *supra* note 180.

201. Feld & Schaefer, *Right to Counsel*, *supra* note 180; Feld & Schaefer, *Law Reform*, *supra* note 180.

Several factors contribute to lawyers' negative impact at disposition. Juveniles may not believe lawyers' explanations of confidential communications and withhold important information to their detriment. In addition, the lawyers assigned to juvenile court may be incompetent and prejudice their clients' cases. Public defenders' offices often send their least capable or newest attorneys to juvenile court to gain trial experience. Lack of adequate funding for defender services may preclude investigations, increasing the risk of wrongful convictions.[202] Defense attorneys seldom investigate cases or interview their clients prior to trial because of heavy caseloads and limited organizational support.[203] Court-appointed lawyers may place a greater premium on maintaining good relations with judges who assign their cases than vigorously defending their revolving clients. Juvenile courts' *parens patriae* ideology—a legal doctrine that grants the state the right to exercise control over children whose parents fail to meet their responsibilities—discourages zealous advocacy and engenders adverse consequences for attorneys who "rock the boat," or their clients.[204] Most significantly, many defense attorneys work under conditions that create structural impediments to quality representation.[205] Assessments in dozens of states report derisory working conditions—crushing caseloads, low compensation, scant support services, inexperienced attorneys, and inadequate supervision—that detract from or preclude effective representation.[206] Ineffective assistance of counsel, for whatever reasons, is a significant factor in one-quarter of wrongful convictions.

Another explanation of lawyers' negative impact on dispositions is that judges may appoint them when they anticipate more-severe sentences. The Court in *Scott v. Illinois* prohibited "incarceration without representation" and limited indigent adult misdemeanant's right to appointed counsel to cases in which judges ordered defendants' actual confinement.[207] 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. Judges typically appoint counsel, if at all, at the arraignment, detention

202. Drizin & Luloff, *supra* note 91.
203. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 200.
204. *Id.* at 201; Drizin & Luloff, *supra* note 195.
205. ABA, Call for Justice, *supra* note 189; Poe-Yamagata & Jones, *supra* note 27.
206. Nat'l Juvenile Defender Ctr., *supra* note 190; Poe-Yamagata & Jones, *supra* note 27; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 58.
207. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Feld & Schaefer, *Right to Counsel*, *supra* note 180.

hearing, or on the day of trial. Court practices that appoint lawyers who meet their clients for the first time on the day of trial create a system conducive to inadequate representation and wrongful convictions.

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

Appellate review: Gault rejected the juvenile defendant's request for a constitutional right to appellate review because it had not found that criminal defendants enjoyed such a right. However, states invariably provided adult defendants with a statutory right to appellate review.[208] By avoiding the constitutional issue, the Court undermined the other rights that it granted delinquents because the only way to enforce its rules would have been through rigorous appellate review of juvenile court judges' decisions.[209] Regardless of how poorly lawyers perform, appellate courts seldom can correct juvenile courts' errors. Juvenile defenders appeal adverse decisions far less frequently than lawyers representing adult criminal defendants and often lack a record with which to challenge an invalid waiver of counsel or trial errors.[210] Juvenile court culture may discourage appeals as an impediment to a youth assuming responsibility. The vast majority of delinquents enter guilty pleas, which waive the right to appeal, further precluding review. Moreover, juveniles who waived counsel at trial will be less aware of or able to pursue an appeal.

Conclusion: The formal procedures of juvenile and criminal courts have converged in the decades since *Gault*. Differences in age and competence would suggest that youths should receive more safeguards than adults to protect them from punitive delinquency adjudications and their own limitations. States do not provide juveniles with additional safeguards to protect them from their own immaturity—mandatory non-waivable appointment of counsel or pre-waiver consultation with a lawyer. 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 pretrial waivers of *Miranda* rights or counsel without prior consultation with counsel. As *Michael*

208. *See generally* Nancy J. King, "Criminal Appeals," in Volume 3 of the present Report.

209. Christopher P. Manfredi, The Supreme Court and Juvenile Justice 158 (1998).

210. Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 Dickinson L. Rev. 209 (1998); Berkheiser, *supra* note 191.

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

States use the adult standard to gauge juveniles' waivers of counsel, even though many youths cannot meet it. High rates of waiver undermine the legitimacy of the juvenile justice system because assistance of counsel is the prerequisite to exercise of other rights.[211] Youths require safeguards that only lawyers can provide to protect against erroneous and punitive state intervention. The direct consequence of delinquency convictions—institutional confinement—and use of prior convictions to sentence recidivists more harshly, to waive youths to criminal court, and to enhance criminal sentences make assistance of counsel imperative. Only mandatory non-waivable counsel can prevent erroneous convictions and collateral use of adjudications that compound injustice. Lawyers can only represent delinquents effectively if they have adequate support and resources and specialized training to represent children.

4. Jury trial: fact-finding, government oppression, and collateral consequences

States treat juveniles just like adults when formal equality produces practical inequality. Conversely, they use juvenile court procedures that provide *less* effective protection when called upon to provide delinquents with adult safeguards. *Duncan v. Louisiana* gave adult defendants the right to a jury trial to assure accurate fact-finding *and* to prevent governmental oppression.[212] By contrast, *McKeiver v. Pennsylvania* denied delinquents protections the Court deemed fundamental to criminal trials.[213] The presence of lay citizens functions as a check on the state, provides protection against vindictive prosecutors or biased judges, upholds the criminal standard of proof, and enhances the transparency and accountability of the justice system. Despite those salutary functions, *McKeiver* insisted that delinquency proceedings were not yet criminal prosecutions despite their manifold criminal aspects.[214]

211. Drizin & Luloff, *supra* note 91; Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L. Rev. 553 (1998).

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

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

214. *Id.* at 541.

The *McKeiver* plurality reasoned that a judge could find facts as accurately as a jury, rejected concerns that informality could compromise fact-finding, invoked the imagery of a paternalistic judge, and disregarded delinquents' need for protection from punitive state over-reaching.[215] The Court feared that jury trials would interfere with juvenile courts' informality, flexibility, and confidentiality, make juvenile and criminal courts procedurally indistinguishable, and lead to abandonment of the juvenile court.

The *McKeiver* dissenters insisted that when the state charged a delinquent with a crime for which it could incarcerate her, she should enjoy the same jury right as an adult.[216] For them, *Gault*'s rationale—criminal charges and the possibility of confinement—required comparable procedural safeguards. The dissenters feared that juvenile courts' informality would contaminate fact-finding. Although the vast majority of delinquents, like criminal defendants, plead guilty, the possibility of a jury trial provides an important check on prosecutorial over-charging, on judges' evidentiary rulings, and the standard of proof beyond a reasonable doubt. Despite the prevalence of guilty pleas, lawyers are supposed to evaluate cases as if they were to go to trial and practice in the shadow of the jury. The possibility of a jury trial increases the visibility and accountability of justice administration and the performance of lawyers and judges. The jury's checking function may be even more important in highly discretionary, low-visibility juvenile courts that deal with dependent youths who cannot effectively protect themselves.

A few states give juveniles a right to a jury trial as a matter of state law, but the vast majority do not.[217] During the Get Tough Era, states revised their juvenile codes' purpose, opened delinquency trials to the public, fostered a punitive convergence with criminal courts, imposed collateral consequences for delinquency convictions, and eroded the rationale for fewer procedural safeguards. Despite the explicit shift from treatment to punishment, most state courts continue to deny juveniles a jury.[218]

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

215. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23; Feld, *Constitutional Tension*, *supra* note 91.

216. *McKeiver*, 403 U.S. at 559; Feld, *Constitutional Tension*, *supra* note 91, at 1145.

217. Feld, *Constitutional Tension*, *supra* note 91.

218. State *ex rel.* D.J., 817 So. 2d 26 (La. 2002); In Interest of J.F., 714 A.2d 467 (Pa. Super. Ct. 1998); In Interest of Hezzie R., 580 N.W.2d 660 (Wis. 1998).

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

Accurate fact-finding: Winship reasoned that the seriousness of proceedings and the consequences for a defendant—juvenile or adult—required proof beyond a reasonable doubt. *McKeiver* assumed that judges could find facts as accurately as juries. Its rejection of jury trials undermines factual accuracy and increases the likelihood that outcomes will differ in delinquency and criminal trials. Although juries and judges agree about defendants' guilt or innocence in about four-fifths of criminal cases, when they differ, juries acquit more often than do judges.[219]

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.[220] Several factors contribute to jurors' greater propensity to acquit than judges. The presence of jurors affects the ways in which lawyers present their cases. As judges hear many cases, they may become less meticulous when they weigh evidence and apply less stringently the reasonable doubt standard than do jurors.[221] Judges hear testimony from police and probation officers on a recurring basis and form settled opinions about their credibility.[222] Similarly, judges may have formed an opinion about a youth's credibility, character, or the case from hearing earlier charges against her or presiding at a detention hearing.

Delinquency proceedings' informality compounds differences between judge and jury fact-finding and further disadvantages delinquents. A judge does not discuss either the law or the evidence before reaching a conclusion, and lack of diverse opinions increases the variability of outcomes. Judges in criminal cases instruct jurors about the applicable law. By contrast, a judge in a bench trial does not state the law, which makes it more difficult for an appellate court to determine whether she correctly understood or applied it. *Ballew v. Georgia* recognized the superiority of group decision-making over individual judgments—some group members remember facts that others forget, and

219. Peter W. Greenwood et al., Youth Crime and Juvenile Justice in California 30–31 (1983); Harry Kalven & Hans Zeisel, The American Jury 185–90, 209–13 (1966).

220. Kalven & Zeisel, *supra* note 219, at 58–59; Janet E. Ainsworth, *Re-imagining Childhood and Re-constructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1123 (1991).

221. Guggenheim & Hertz, *supra* note 211, at 564.

222. *Id.* at 568–74.

deliberations air competing views and promote more accurate decisions.[223] By contrast, judges administer the courtroom, make evidentiary rulings, take notes, and conduct sidebars with lawyers, all of which divert their attention during proceedings.

The greater flexibility and informality of closed juvenile proceedings compound the differences between judge and jury when it comes to reasonable doubt. When a judge presides at a youth's detention hearing, she receives information about the offense, criminal history, and social background, which may contaminate impartial fact-finding. Exposure to non-guilt-related evidence increases the likelihood that a judge subsequently will convict and institutionalize the defendant. Some differences between judges and juries reflect the latter's use of a higher threshold of proof beyond a reasonable doubt.[224]

The youthfulness of a defendant is a factor that elicits jury sympathy and accounts for some differences between judge and jury decisions.[225] By contrast, juvenile court judges may be more predisposed to find jurisdiction to help a troubled youth. Finally, without a jury, judges adjudicate many delinquents without an attorney, which prejudices fact-finding and increases the likelihood of erroneous convictions.

Suppression hearing and evidentiary contamination: In bench trials, judges typically conduct suppression hearings immediately before or during trial, a practice that exposes them to inadmissible evidence and prejudicial information.[226] A judge may know about a youth's prior delinquency from presiding at a detention hearing, prior adjudication, or trial of co-offenders. Similarly, a judge who suppresses an inadmissible confession or illegally seized evidence may still be influenced by it. The presumption that exposure to inadmissible evidence will not affect a judge is especially problematic where the same judge typically handles a youth's case at several different stages. An adult defendant can avoid these risks by opting for a jury trial, but delinquents have no way to avoid the cumulative risks of prejudice in a bench trial. Critics of juvenile courts' 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."[227] As

223. Ballew v. Georgia, 435 U.S. 223, 232–39 (1978); Guggenheim & Hertz, *supra* note 211, at 578.

224. Kalven & Zeisel, *supra* note 219, at 185–90.

225. *Id.* at 210.

226. Feld, *Criminalizing Juvenile Justice*, *supra* note 2, at 231–41; Guggenheim & Hertz, *supra* note 211, at 571.

227. Guggenheim & Hertz, *supra* note 211, at 564.

a result, states adjudicate delinquents in cases in which they could not have obtained convictions with adequate procedural safeguards. The differences between the factual reliability of delinquency adjudications and criminal convictions raise questions about the use of juveniles' records to enhance criminal sentences.

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

The Court long has recognized that juries serve a special role to prevent governmental oppression and protect citizens facing punishment. In our system of checks and balances, lay citizen jurors represent the ultimate restraint on abuses of governmental power, which is why it is the only procedural safeguard listed in three different places in the Constitution. *Duncan v. Louisiana*, decided three years before *McKeiver*, held that the Sixth Amendment guaranteed a jury right in state criminal proceedings to assure accurate fact-finding *and* to prevent governmental oppression. *Duncan* emphasized that juries inject community values into the law, increase visibility of justice administration, and check abuses by prosecutors and judges.[228] The year after *Duncan*, *Baldwin v. New York* again emphasized the jury's role to prevent government oppression by interposing lay citizens between the State and the defendant.[229] *Baldwin* is especially critical for juvenile justice because an adult charged with any offense that carries a *potential* sentence of confinement of six months or longer enjoys a right to a jury trial.

McKeiver feared that granting delinquents jury trials would also lead to public trials. However, as a result of Get Tough Era reforms to increase the visibility, accountability, and punishment powers of juvenile courts, about half the states authorized public access to all delinquency proceedings or to felony prosecutions.[230] States limited confidentiality protections to hold youths accountable and put the public on notice of who pose risks to the community.[231]

228. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
229. Baldwin v. New York, 399 U.S. 66, 72 (1970).
230. Torbet et al., *supra* note 18.
231. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 81.

Punitive juvenile justice: The vast majority of states deny delinquents the right to a jury and youths have challenged *McKeiver*'s half-century old rationale in light of punitive changes. Most state appellate courts have rejected their claims with deeply flawed, uncritical analyses, which often conflate treatment with punishment.[232] Few courts engage in the careful analysis—purpose clauses, sentencing statutes, judicial practices, conditions of confinement—required to distinguish treatment from punishment.[233] States rejected juveniles' challenges to punitive changes—open hearings, mandatory sentences, delinquency convictions to enhance criminal sentence—by emphasizing differences in the severity of penalties imposed on delinquents and criminal defendants convicted of the same crime.[234] However, once a penalty crosses *Baldwin*'s six-month *authorized sentence* threshold, further severity is irrelevant. By contrast, the Kansas Supreme Court in *In re L.M.* concluded that legislative changes eroded the benevolent *parens patriae* character of juvenile courts, transformed it into a system for prosecuting juveniles charged with committing crimes, and gave them a state constitutional right to a jury.[235]

Delinquency convictions to enhance criminal sentences: Apprendi v. New Jersey 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."[236] 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.[237] *Apprendi* emphasized the jury's role to uphold *Winship*'s standard of proof beyond a reasonable doubt. While *McKeiver* approved jury-free delinquency proceedings to impose rehabilitative dispositions, they would *not* be adequate to punish a youth.

Juvenile courts historically restricted access to records to avoid stigmatizing youths. But criminal courts need to know which juveniles' delinquent careers continue into adulthood to incapacitate them, punish them, or protect public safety.[238] Historically, criminal courts lacked access to delinquency records

232. Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 Neb. L. Rev. 1, 50–51 (2012).

233. In Interest of J.F., 714 A.2d 467 (Pa. Super. Ct. 1998); In Interest of Hezzie R., 580 N.W.2d 660 (Wis. 1998).

234. State *ex rel.* D.J., 817 So. 2d 26 (La. 2002).

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

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

237. Feld, *Constitutional Tension*, *supra* note 91, at 1132–34.

238. Feld, Bad Kids, *supra* note 1, at 233–35; James B. Jacobs, *Juvenile Criminal Record Confidentiality*, *in* Choosing the Future for American Juvenile Justice, *supra* note 68, at 149, 155.

because of juvenile courts' confidentiality, practice of sealing or expunging delinquency records, physical separation of juvenile and criminal court staff and records, and difficulty of maintaining systems to track offenders and compile histories across both systems. Despite a tradition of confidentiality, states have long used some delinquency convictions. Some states use juvenile records on a discretionary basis.[239] Many state and federal sentencing guidelines include some delinquency convictions in defendants' criminal history score, although they vary in how they weight delinquency convictions.[240]

As a matter of policy, states should not equate delinquency and criminal convictions for sentence enhancements. Despite causing the same physical injury or property loss as older actors, juveniles' reduced culpability makes their choices less blameworthy and should diminish their weight. Moreover, their use to enhance criminal sentences raises questions about the procedures used to obtain those convictions. Juvenile courts in many states adjudicate half or more delinquent without counsel. The vast majority of states deny juveniles the right to a jury trial. Because some judges in bench trials may apply *Winship*'s reasonable-doubt standard less stringently, more youths are convicted than would be with adequate safeguards.

Federal circuits are divided over whether *Apprendi* allows judges to use delinquency convictions to enhance criminal sentences.[241] State appellate court rulings reflect the federal split of opinion about the reliability of delinquency convictions and the requirement for a jury right.[242] Until the Court clarifies *Apprendi*, defendants in some states or federal circuits will serve longer sentences than those in other jurisdictions based on flawed delinquency convictions.

The use of delinquency convictions to enhance criminal sentences further aggravates endemic racial disparities in justice administration. At each stage of the juvenile justice system, racial disparities compound and cumulate, creating more extensive delinquency records, and contributing to disproportionate minority confinement. Richard Frase's magisterial analysis of racial disparities

239. United States v. Davis, 48 F.3d 277, 280 (7th Cir. 1995); United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993).

240. For example, California's three-strikes law counts juvenile felony convictions as strikes for sentence enhancements. Feld, *Constitutional Tension*, *supra* note 91, at 1187–88.

241. United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002); United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001); Feld, *Constitutional Tension*, *supra* note 91, at 1196–22.

242. State v. Hitt, 42 P.3d 732 (Kan. 2002); State v. Brown, 879 So. 2d 1276 (La. 2004); Feld, *Constitutional Tension*, *supra* note 91, at 1203–14.

in criminal sentencing in Minnesota concludes that "seemingly legitimate sentencing factors such as criminal-history scoring can have strong disparate impacts on non-white defendants."[243]

Collateral consequences of delinquency convictions: In addition to direct penalties—confinement and enhanced sentences as juveniles or as adults—extensive collateral consequences follow from delinquency convictions. Although state policies vary, they may follow youths for decades and affect future housing, education, and employment opportunities.[244] States may enter juveniles' fingerprints, photographs, and DNA into databases accessible to law enforcement and other agencies.[245] Some reforms opened delinquency trials and records to the public and media reports on the Internet create a permanent and easily accessed record. Criminal justice agencies, schools, child-care providers, the military, and others may have access to juvenile court records automatically or by petition.[246] Expungement of delinquency records is not automatic and requires court proceedings. Delinquency convictions may affect youths' ability to obtain professional licensure, to receive government aid, to join the military, to obtain or keep legal immigration status, or to live in public housing.[247]

Sex-offender registration: The response to juvenile sex offenders is among the most onerous collateral consequences of delinquency adjudication.[248] The federal Adam Walsh Child Protection and Safety Act—also known as the Sex Offender Registration and Notification Act (SORNA)—requires states to implement registration and notification standards for individuals convicted as adults or juveniles for certain sex offenses.[249] Some states require lifetime registration, neighborhood notification, and limit where registered offenders can live, work, or attend school.[250]

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

244. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 3; Nellis, *supra* note 20, at 61. *See generally* Gabriel J. Chin, "Collateral Consequences," in Volume 4 of the present Report.

245. Feld, Cases and Materials, *supra* note 3, at 369–76.

246. Jacobs, *supra* note 238, at 161; Nellis, *supra* note 20, at 63–65.

247. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 127; Nellis, *supra* note 20, at 61.

248. Franklin E. Zimring, An American Travesty: Legal Responses to Adolescent Sexual Offending (2004) [hereinafter Zimring, An American Travesty]; Nellis, *supra* note 20, at 69–73. *See generally* Wayne A. Logan, "Sex Offender Registration and Notification," in Volume 4 of the present Report.

249. 42 U.S.C. § 16901 et seq.; Nellis, *supra* note 20, at 70–71.

250. Zimring, An American Travesty, *supra* note 248; Michael F. Caldwell, *Juvenile Sexual Offenders, in* Choosing the Future for American Juvenile Justice, *supra* note 68, at 55–80.

Reforming court procedures to prevent wrongful convictions: The procedural as well as substantive convergence between juvenile and criminal courts since *Gault* has placed greater demands on juveniles' competence to exercise rights. Despite increased punitiveness and formality, most states do not provide delinquents equal or functional procedural protections. Juveniles waive *Miranda* rights and counsel under adult legal standards that many are not competent to understand or meet. Denial of juries affects the use of delinquency convictions both initially and for long-term collateral consequences.

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

II. JUVENILES IN CRIMINAL COURT

A. TRANSFER TO CRIMINAL COURT

During the Get Tough Era, lawmakers changed the theory and practice of transfer and increased the numbers of youths tried as adults. States use one or more often overlapping transfer strategies: judicial waiver, legislative offense exclusion, and prosecutorial direct-file.[251] In about a dozen states, juvenile courts' jurisdiction ends at 15 or 16, rather than 17 years of age, resulting in about 200,000 youths being tried in criminal court each year. In addition, states annually transfer another 50,000 youths via judicial waiver (7,500), prosecutorial direct-file (27,000), and the remainder with prosecutor-determined excluded offenses.[252] We lack precise numbers because states only collect data on judicial transfers which account for the fewest number of youths waived.

Legislators shifted control of transfer decisions from judges to prosecutors to avoid the former's relative autonomy from political pressures.[253] Laws lowered the age for transfer, increased the numbers of excluded offenses, and

251. Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 801–22 [hereinafter Feld & Bishop]; Snyder & Sickmund, *supra* note 3, at 85–89.

252. Feld & Bishop, *supra* note 251, at 815.

253. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 204–09, 214–18; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 38.

strengthened prosecutors' charging powers.[254] Despite the prevalence of judicial waiver statutes, prosecutors' excluded offenses or direct-file charging decisions determine the adult status of 85% of youths.[255]

The vast majority of states have judicial waiver laws that specify the ages and offenses for which a judge may conduct a transfer hearing.[256] *Kent v. United States* required judges to conduct a procedurally fair hearing (counsel, access to probation reports, and written findings for appellate review) because the loss of juvenile courts' benefits (access to treatment, confidentiality, limited collateral consequences, and the like) was a critical action.[257] *Breed v. Jones* applied the Fifth Amendment double-jeopardy prohibition to delinquency adjudications and required states to decide whether to prosecute a youth in juvenile or criminal court before proceeding to trial.[258] *Kent* appended a list of criteria for judges to consider and state courts and statutes incorporated those criteria.[259] Judges have broad discretion to interpret those factors and studies of judicial waiver document inconsistent rulings, justice by geography, and over-representation of racial minorities.[260] For decades, studies reported racial disparities in judicial transfer decisions.[261] Judges transfer minority youths more often than white youths, especially for violent and drug crimes.[262] In the 75 largest counties in the United States, racial minorities comprised more than two-thirds of juveniles tried in criminal court and the vast majority of those sentenced to prison.[263]

254. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *in* The Changing Borders of Juvenile Justice 93, 124–29 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*].

255. Jolanta Juszkiewicz, Youth Crime/Adult Time: Is Justice Served? 5 (2000); Amnesty Int'l & Hum. Rts. Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States 19 (2005) [hereinafter Amnesty Int'l].

256. Feld & Bishop, *supra* note 251, at 803–05.

257. Kent v. United States, 383 U.S. 541, 560–61 (1966).

258. Breed v. Jones, 421 U.S. 519, 541 (1975).

259. *Kent*, 383 U.S. at 566–67.

260. Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 J.L. & Inequality 73 (1995); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. Crim. L. & Criminology 449 (1996).

261. U.S. Gen. Acct. Off., Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 59 (1995); Amnesty Int'l, *supra* note 255.

262. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 216; Poe-Yamagata & Jones, *supra* note 27, at 12–14.

263. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 220.

A dozen states set their juvenile courts' age jurisdiction at 15 or 16 years, rather than 17, which results in the largest numbers of youths tried as adults. In addition, some states' laws exclude youths 16 or older charged with murder, while others exclude more extensive lists of offenses.[264] During the Get Tough Era, many states expanded offense exclusion—crimes against the person, property, drugs, or weapons offenses—to evade *Kent*'s hearing requirement.[265] Appellate courts uniformly reject youths' claims that prosecuting them for an excluded offense denies *Kent*'s procedural safeguards.[266]

In more than a dozen states, juvenile and criminal courts share concurrent jurisdiction over some ages and offenses (older youths and serious crimes) and prosecutors decide (direct file) in which forum to charge a youth.[267] Under offense exclusion, the crime charged determines the venue; direct-file laws allow prosecutors to select either system to try the crime. Direct file elevates prosecutors' power at judges' expense and creates a model more typical of criminal courts. Most direct-file laws provide no criteria to guide prosecutors' choice of forum. The 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 appellate review. Nationally, prosecutors determine the criminal status of 85% of youths tried as adults and act as gatekeepers to the juvenile justice system, a role previously reserved for judges who have more experience, information, and fewer political motivations.[268]

Another Get Tough Era innovation was blended sentences that provide judges with juvenile/criminal sentencing options.[269] Because juvenile courts lose jurisdiction when youths reach the age of majority or other dispositional age limit, judges may be unable to sentence appropriately older offenders convicted of serious crimes. States increase judges' sentencing powers by allowing juvenile courts to impose extended delinquency sentences with a stayed criminal sentence, or by giving criminal courts authority to use a

264. Feld & Bishop, *supra* note 251, at 809–10.
265. *Id.*
266. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).
267. Feld, *Legislative Exclusion*, *supra* note 254, at 98–101; Feld & Bishop, *supra* note 251, at 811–12.
268. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 135.
269. Feld & Bishop, *supra* note 251, at 806; Marcy Rasmussen Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, 'Blended Sentencing,' and the Law of Unintended Consequences*, 91 J. Crim. L. & Criminology 997 (2001).

delinquency disposition in lieu of imprisonment. Regardless of approach, blended sentencing laws require criminal procedural safeguards, including the right to a jury trial, to enable a judge to punish and thereby gain greater flexibility to treat. Although states adopted blended sentences as an alternative to transfer, they had a net-widening effect, and juvenile court judges frequently impose them on less serious offenders whom they previously handled as delinquents.[270] Judges imposed blended sentences on younger, less-serious offenders, 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 to blended sentences, to waive procedural rights, to increase punishment imposed in juvenile courts, and to risk exposure to criminal sanctions.[271]

Juveniles in prison: Criminal court judges sentence transferred youths like adults, which increases their likelihood of subsequent offending.[272] While all inmates potentially face abuse, adolescents' size, physical strength, lesser social skills, and lack of sophistication increase their risk for physical, sexual, and psychological victimization.[273] To prevent victimization, some states place vulnerable youths in solitary confinement for 23 hours a day.[274] 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 those experienced by adults.[275] It disrupts normal development—completing education, finding a job, forming relationships, and creating social bonds that promote desistance—and ground lost may never be regained.

Policy justifications for waiver—unarticulated and unrealized: States will prosecute some youths in criminal court as a matter of public safety and political reality. The Get Tough Era targeted violent and drug crimes, increasing the likelihood and severity of criminal sentences, and judges incarcerate transferred youths more often and for longer sentences than youths retained in juvenile courts. Although three-quarters of youths in criminal court convicted of violent felonies went to prison, overall nearly half of all youths are not

270. Podkopacz & Feld, *supra* note 269.

271. *Id.*

272. Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 843, 845–846.

273. *Id.* at 846–48; Michele Deitch & Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, *in* Juvenile Justice Sourcebook 241, 252 (Wesley T. Church, David W. Spring & Albert R. Roberts eds., 2014). *Cf.* Dolovich, *supra* note 7.

274. Deitch & Arya, *supra* note 273, at 252–53.

275. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 135.

convicted or placed on probation, fewer than 25% are sentenced to prison, and 95% are released from custody by their 25th birthday.[276]

Although legislators assumed that threat of transfer and criminal punishment would deter youths, studies of juvenile crime rates before and after passage of punitive laws found no general deterrent effect.[277] Studies of special deterrence report that transferred youths had higher recidivism rates than did those sentenced as delinquents.[278] Studies compared outcomes of youths transferred to criminal courts with those who remained in juvenile courts and concluded that youths tried as adults had higher and faster recidivism rates, especially for violent crimes, than their delinquent counterparts.[279]

Although judges do not imprison all transferred youths, they sometimes treat youthfulness as an aggravating rather than a mitigating factor when they do. More youths convicted of murder received life-without-parole sentences than did adults sentenced for murder.[280] Compared with young adult offenders, juveniles convicted of the same crimes received longer sentences.[281]

Punitive transfer laws targeted violent crimes, which black youths commit more often.[282] Even prior to the Get Tough Era, studies reported racial disparities in judicial transfer decisions. Subsequently, judges transferred youths of color

276. Carol A. Schubert et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 Law & Hum. Behav. 460, 467–68 (2010); Deitch & Arya, *supra* note 273, at 251.

277. Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post 1979*, 23 Just. Q. 34 (2006); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. Crim. L. & Criminology 1451 (2006); Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 122.

278. Richard E. Redding, Juvenile Transfer Laws: An Effective Deterrent to Delinquency? (2008); Jeffrey Fagan, Aaron Kupchick & Akiva Liberman, Be Careful What You Wish For: The Comparative Impacts of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders (Columbia Law Sch. Working Paper No. 03–62, July 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=491202.

279. Ctr. for Disease Control, Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System 13 (2007); Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 175–76.

280. Feld, Evolution of Juvenile Court, *supra* note 1; Snyder & Sickmund, *supra* note 3; Benjamin Steiner, *The Effects of Juvenile Transfer to Criminal Court on Incarceration Decisions*, 26 Just. Q. 77 (2009)

281. Snyder & Sickmund, *supra* note 3; Megan Kurlychek & Brian D. Johnson, *Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court*, 48 Criminology 725 (2010); Megan Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 Criminology 485 (2004).

282. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 216; Poe-Yamagata & Jones, *supra* note 27, at 12–14.

more often than white youths charged with similar violent and drug crimes.[283] The vast majority of juveniles transferred to criminal court and sentenced to prison are youths of color, primarily blacks.[284]

Waiver policy: What should a rational legislature do? Expansive transfer policies further no legitimate penal goals. Equating younger and older offenders ignores developmental differences and disproportionately punishes less blameworthy adolescents. Transfer does not deter youths, because their immature judgment, short-term time perspective, and preference for immediate gains lessen the threat of sanctions.[285] Youths tried as adults reoffend more quickly and more seriously, thereby increasing the risk to public safety and negating any short-term crime reduction due to incapacitation.[286]

The vast majority of juvenile justice scholars agree that *if some youths must be transferred*, then it should occur via a judicial waiver hearing and be used rarely.[287] A state should waive only those youths whose serious *and* persistent offenses require minimum lengths of confinement that greatly exceed the maximum sanctions available in juvenile court. A retributive policy would limit severe sanctions to youths charged with homicide, rape, robbery, or assault with a firearm or substantial injury. However, severely punishing *all* youths who commit serious crimes would be counterproductive, because youths arrested for an initial violent offense desist at similar rates to other delinquents. Chronic offenders may require sentences longer than those available in juvenile court because of persistent criminality and exhaustion of juvenile court resources.

A legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise procedural rights for youths 15 or younger. The minimum age for transfer should be 16.

283. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 204–09, 214–18; Poe-Yamagata & Jones, *supra* note 27, at 17; Feld, *Responses to Youth Violence*, *supra* note 18, at 194.

284. Nat'l Research Council, Juvenile Crime, Juvenile Justice, *supra* note 23, at 220.

285. *Cf.* Daniel S. Nagin, "Deterrence," in Volume 4 of the present Report.

286. *Cf.* Shawn D. Bushway, "Incapacitation," in Volume 4 of the present Report.

287. Feld, Bad Kids, *supra* note 1; Feld, Evolution of Juvenile Court, *supra* note 1; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; Franklin E. Zimring, American Youth Violence (1998); Donna Bishop, *Injustice and Irrationality in Contemporary Youth Policy*, 3 Criminology & Pub. Pol'y 633 (2004) [hereinafter Bishop, *Injustice*]; Jeffrey A. Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81 (2008).

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.[288] Criteria should focus on offenses, prior record, offender culpability, criminal participation, clinical evaluations, and aggravating and mitigating factors, which, taken together, distinguish youths who deserve sentences substantially longer than juvenile courts can impose from 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 exist to keep them out of the criminal justice system. An adversarial hearing at which prosecution and defense present evidence about offense, culpability, and treatment prognoses will produce better decisions than will politically motivated prosecutors acting without clinical information.

B. SENTENCING YOUTHS AS ADULTS: "CHILDREN ARE DIFFERENT"

The Supreme Court developed its jurisprudence of youth—"children are different"—in response to punitive laws that ignored adolescents' reduced culpability. 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* prohibited states from executing offenders for murder committed prior to 18 years of age.[289] The Justices concluded that youths' immature judgment and lack of self-control, susceptibility to negative peers, and transitory personalities reduced their culpability and precluded the most severe sentence. *Graham v. Florida* extended *Roper*'s diminished responsibility rationale and prohibited states from imposing life without parole (LWOP) sentences for non-homicide offenses.[290] It repudiated the Court's Eighth Amendment doctrine that "death is different."[291] *Miller v. Alabama* extended *Roper* and *Graham*'s diminished responsibility rationale and barred *mandatory* LWOP sentences for youths convicted of murder.[292] *Miller* required judges to make individualized culpability assessments and to weigh youthfulness as a mitigating factor.

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288. Feld, *Responses to Youth Violence*, *supra* note 18; Feld, Bad Kids, *supra* note 1; Zimring, American Youth Violence, *supra* note 287; Bishop, *Injustice*, supra note 287; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1.

289. Roper v. Simmons, 543 U.S. 551 (2005). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in Volume 4 of the present Report.

290. Graham v. Florida, 560 U.S. 48, 67–68 (2010).

291. *Id.* at 74 (Kennedy, J., majority); 102–03 (Thomas, J., dissenting).

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

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

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

As noted above, states annually try upward of 200,000 chronological juveniles as adults. The fallacious predictions of an impending bloodbath by super-predators propelled punitive policies.[293] States lowered the age for transfer, increased the number of excluded offenses, and shifted discretion from judges to prosecutors. These changes in transfer laws exacerbated racial disparities. Racial stereotypes taint culpability assessments and reduce youthfulness's mitigating role.[294] Children of color constitute the majority of juveniles tried in criminal court and three-quarters of those who enter prison.[295] For adults, states' criminal laws lengthened sentences, adopted mandatory minimums, and imposed mandatory life without parole for homicide and other crimes.[296]

293. William Bennet & John DiIulio, Body Count: Moral Poverty and How to Win America's War against Crime and Drugs 21–34 (1996); Zimring, American Youth Violence, *supra* note 287.

294. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juveniles Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 561 (1998); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law & Hum. Behav. 483, 488–95 (2004); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849, 850–51 (2010).

295. Amnesty Int'l, *supra* note 255, at 6; Poe-Yamagata & Jones, *supra* note 27, at 34.

296. Michael Tonry, Punishing Race: A Continuing American Dilemma (2011); Michael Tonry, Sentencing Matters (1996); Luna, *supra* note 22.

They apply equally to juveniles as to adults; judges sentenced them as if they were adults and sent them to the same prisons.

1. *Roper v. Simmons*: Death penalty for juveniles

The Eighth Amendment prohibits states from inflicting cruel and unusual punishments.[297] Prior to *Roper v. Simmons*, the Court thrice considered whether it prohibited states from executing juveniles convicted of murder.[298] In 1989, *Stanford v. Kentucky* upheld the death penalty for 16- or 17-year-olds convicted of murder and allowed juries to assess their personal culpability.[299] In 2005, *Roper* overruled *Stanford* and prohibited states from executing youths for crimes committed prior to 18.[300]

Roper gave three reasons why states could not punish juveniles as severely as adults. First, their immature judgment and limited self-control causes them to act impulsively and without adequate appreciation of consequences.[301] Second, their susceptibility to negative peers and inability to escape crime-inducing environments reduces their responsibility.[302] Third, their transitory personality provides less reliable evidence of enduring blameworthiness.[303] Because juveniles' character is transitional, the Court concluded that there is a great likelihood that they can be reformed.[304] For *Roper*, youths' diminished responsibility undermined retributive justifications for the death penalty.[305] Similarly, the Court concluded that impulsiveness and limited self-control weakened any deterrent effect.[306] *Roper* imposed a categorical ban rather than to allow 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

297. U.S. Const. amend. VIII.
298. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988); Eddings v. Oklahoma, 455 U.S. 104 (1982).
299. Stanford v. Kentucky, 492 U.S. 361 (1989).
300. Roper v. Simmons, 543 U.S. 551 (2005).
301. *Id.* at 569.
302. *Id.* at 569–70.
303. *Id.* at 570.
304. *Id.*
305. *Id.* at 571.
306. *Id.*

than death."[307] Because a brutal murder could overwhelm the mitigating role of youthfulness, *Roper* used age as a categorical proxy for reduced culpability.

Roper reasoned that immature judgment, susceptibility to peer and environmental influences, and transitional personalities reduced adolescents' criminal responsibility. *Roper*—and subsequently *Graham* and *Miller*—analyzed youths' reduced culpability within a retributive sentencing framework—proportionality and deserved punishment. Retributive sentencing proportions punishment to a crime's seriousness.[308] A crime's seriousness is defined by two elements—harm and culpability—which determine how much punishment an actor deserves. An offender's age has no bearing on the harm caused—children and adults can cause the same injuries. But proportionality requires consideration of an offender's culpability, and immaturity reduces youths' blameworthiness.[309] 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—ability to distinguish right from wrong—but deserve less punishment.[310]

Developmental psychology focuses on how children and adolescents' thinking and behaving change with age.[311] By mid-adolescence, most youths reason similarly to adults, for example, when they make informed-consent medical decisions.[312] But the ability to make reasonable decisions with complete information under laboratory conditions differs from the ability to act responsibly under stress with incomplete information. Emotions influence

307. *Id.* at 572–73; Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 J.L. & Inequality 263 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*]; Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. L. 107 (2013) [hereinafter Feld, *Youth Discount*].

308. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 589–91 (2005); *see also* Jeffrie G. Murphy, "Retribution," in Volume 4 of the present Report.

309. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 822 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*]; Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* Youth on Trial: A Developmental Perspective on Juvenile Justice 271 (Thomas Grisso & Robert Schwartz eds., 2000) [hereinafter Zimring, *Penal Proportionality*]; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 123–24.

310. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 121–22; Zimring, *Penal Proportionality*, *supra* note 309, at 278.

311. Nat'l Research Council, The Science of Adolescent Risk-Taking: Workshop Report 48–49 (2011) [hereinafter Nat'l Research Council, Adolescent Risk-Taking].

312. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 95.

youths' judgment and compromise their decision-making and self-control.[313] Youths are more heavily influenced by the reward centers of the brain, contributing to riskier decisions.[314]

In response to states' adoption of punitive laws, in 1995 the John D. and Catherine T. MacArthur Foundation sponsored the Adolescent Development and Juvenile Justice (ADJJ) Research Network. Over the next decade, the ADJJ Network conducted research on adolescent decision-making, judgment, and adjudicative competence.[315] The research distinguishes between cognitive abilities and judgment and self-control—controlled thinking versus impulsive behaving.[316] Cognitive capacities involve understanding (the ability to comprehend information) and reasoning (the ability to use information logically). Self-control requires the ability to think before acting, to choose between alternatives, and to interrupt a course in motion.[317] Although 16-year-olds' understanding and reasoning approximate adults', their ability to exercise mature judgment and control impulses takes several more years to emerge.[318]

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation-seeking, and compliance with peers.[319] The regions of the brain that control reward-seeking and emotional arousal develop earlier than do those that regulate executive functions and impulse control.[320] Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, focus on anticipated gains rather than possible losses to a greater extent than adults, and consider fewer options.[321] They weigh costs and benefits differently, apply dissimilar subjective values to outcomes,

313. *Id.* at 91; Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 39; Linda P. Spear, The Behavioral Neuroscience of Adolescence 139–40 (2010); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS Spectrums 60, 61 (2001).

314. Dahl, *supra* note 313, at 62; Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 40.

315. MacArthur Found., Development and Criminal Blameworthiness (2006); Nellis, *supra* note 20, at 79–82.

316. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 131–39; Jennifer L. Woolard, *Adolescent Development, Delinquency, and Juvenile Justice*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 107–8 (2012).

317. Woolard, *supra* note 316, at 108.

318. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 36–37; Laurence Steinberg, Age of Opportunity: Lessons from the New Science of Adolescence 69 (2014); Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 813.

319. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 2; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 37–44.

320. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 48.

321. Spear, *supra* note 313, at 137–39; Woolard, *supra* note 316, at 109–10.

and more heavily discount negative future consequences than more immediate rewards.[322] 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.[323] In a risk-benefit calculus, youths may view *not* engaging in risky behaviors differently than adults.[324] Researchers attribute youths' impetuous decisions to a heightened appetite for emotional arousal and intense experiences, which peaks around 16 or 17.[325]

Neuroscience and adolescent brain development: Neuroscience research reports that the human brain continues to mature until the early to mid-20s. Adolescents on average do not have adults' neuro-biological capacity to exercise mature judgment or control impulses.[326] The relationship between two brain regions—the prefrontal cortex (PFC) and the limbic system—underlies youths' propensity for risky behavior.[327] The PFC is responsible for judgment and impulse control. The amygdala and limbic system regulate emotional arousal and reward-seeking behavior.[328] The PFC performs executive functions—reasoning, planning, and impulse control.[329] These top-down capabilities develop gradually and enable individuals to exercise greater self-control.[330]

322. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 54–56.

323. Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 91, 93.

324. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 50; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; Scott & Steinberg, *Blaming Youth*, *supra* note 309.

325. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 42; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 91–92; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 45; Spear, *supra* note 313, at 140–41; Barry C. Feld, B.J. Casey & Yasmin Hurd, *Adolescent Competence and Culpability: Implications of Neuroscience for Juvenile Justice Administration, in* A Primer on Criminal Law and Neuroscience 179 (Stephen J. Morse & Adina L. Roskies eds., 2013); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 163 (1997) [hereinafter Scott & Grisso, *Evolution of Adolescence*].

326. Spear, *supra* note 313; Nat'l Research Council, Reforming Juvenile Justice, *supra* note 1, at 96–100.

327. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 Developmental Psychobiology 216, 217 (2010) [hereinafter Steinberg, *Dual Systems*]; Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Rev. 78 (2008) [hereinafter Steinberg, *Social Neuroscience*].

328. Feld, Casey & Hurd, *supra* note 325; Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 816.

329. Spear, *supra* note 313, at 102–09; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychol. 241, 244 (2000).

330. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 37.

During adolescence, two processes—myelination and synaptic pruning—enhance the PFC's functions.[331] Myelin is a white fatty substance that forms a sheath around neural axons, facilitates more efficient neuro-transmission, and makes communication between different brain regions faster and more reliable.[332] Synaptic pruning involves selective elimination of unused neural connections, promotes greater efficiency, speeds neural signals, and strengthens the brain's ability to process information.[333]

The limbic system controls emotions, reward-seeking, and instinctual behavior—the fight-or-flight response.[334] The PFC and limbic systems mature at different rates and adolescents rely more heavily on the limbic system—bottom-up emotional processing rather than the top-down cognitive regulatory system.[335] The developmental lag between the PFC regulatory system and the reward- and pleasure-seeking limbic system contributes to impetuous behavior driven more by emotions rather than reason.[336] The imbalance between the impulse-control and reward-seeking systems contributes to youths' poor judgment, impetuous behavior, and criminal involvement.[337]

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 influences than they will be as adults.[338] Peers increase youths' propensity to take risks, because their presence stimulates the brain's reward centers.[339]

Neuroscience research about brain development bolsters social scientists' observations about adolescents' impulsive behavior and impaired self-control. Despite impressive advances, neuroscientists have not established a direct

331. Steinberg, Age of Opportunity, *supra* note 318, at 31–33.

332. Spear, *supra* note 313, at 64.

333. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 37; Spear, *supra* note 313, at 75–76; Steinberg, Age of Opportunity, *supra* note 318, at 26; Feld, Casey & Hurd, *supra* note 325, at 189–91.

334. Spear, *supra* note 313, at 68–69; Steinberg, Age of Opportunity, supra note 318, at 72–74.

335. Spear, *supra* note 313, at 180; Feld, Casey & Hurd, *supra* note 325, at 191–93.

336. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 38; Steinberg, Age of Opportunity, *supra* note 318, at 74; Dahl, *supra* note 313, at 64; Steinberg, *Social Neuroscience*, *supra* note 327; Steinberg, *Dual Systems*, *supra* note 327, at 161–62.

337. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 48; Feld, Casey & Hurd, *supra* note 325, at 193–94; Steinberg, *Social Neuroscience*, *supra* note 327; Steinberg, *Dual Systems*, *supra* note 327, at 162.

338. Nat'l Research Council, Adolescent Risk-Taking, *supra* note 311, at 50; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 35, 50–51; Spear, *supra* note 313, at 155–57.

339. Steinberg, Age of Opportunity, *supra* note 318, at 77, 98; Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 815.

link between brain maturation and behavior or found ways to individualize assessments of developmental differences.[340]

2. *Graham v. Florida*: LWOP for non-homicide juvenile offenders

Prior to *Graham v. Florida*, the Court long had asserted that "death is different."[341] *Graham* extended *Roper*'s diminished responsibility rationale to non-homicide offenders who received LWOP sentences. *Graham* raised "a categorical challenge to a term of years sentence"—a life-without-parole sentence applied to the category of juveniles.[342] *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."[343] *Graham* rested on three features—offender, offense, and sentence. 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.[344]

Focusing on the offense, *Graham* invoked the Court's felony-murder death-penalty decisions and concluded that even the most serious non-homicide crimes "cannot be compared to murder in their 'severity and irrevocability'."[345] The combination of diminished responsibility and a non-homicide crime made an LWOP sentence grossly disproportional.[346]

Finally, the Court equated an LWOP sentence for a juvenile with the death penalty.[347] *Graham* found no penal rationale—retribution, deterrence, incapacitation, or rehabilitation—justified the penultimate sanction for non-homicide juvenile offenders. While incapacitation might reduce future offending, judges could not reliably predict at sentencing whether a juvenile

340. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 46; Steinberg, Age of Opportunity, *supra* note 318, at 4; Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 Notre Dame L. Rev. 765, 769 (2011); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89 (2009); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 405–06 (2006); Stephen J. Morse, *New Neuroscience, Old Problems*, *in* Neuroscience and the Law: Brain, Mind, and the Scales of Justice 157 (Brent Garland ed., 2004).

341. Rummel v. Estelle, 445 U.S. 263, 272 (1980).

342. Graham v. Florida, 560 U.S. 48, 60–63 (2010).

343. *Id.* at 102.

344. *Id.* at 67–68.

345. *Id.* at 50; Kennedy v. Louisiana, 554 U.S. 407, 428 (2008); Coker v. Georgia, 433 U.S. 584, 598 (1977).

346. *Graham*, 560 U.S. at 48, 69.

347. *Id.* at 70.

would pose a future danger to society. Most states denied vocational training or rehabilitative services to youths sentenced to LWOP in favor of those who might return to the community.

Although *Graham* adopted a categorical rule, it only required states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[348] It did not prescribe states' responsibility to provide resources with which to change or specify when youths might become eligible for parole. Parole consideration would not guarantee young offenders' release, and some might remain confined for life.[349] Although *Graham* barred LWOP for juveniles convicted of non-homicide crimes, many more youths are serving de facto life sentences—aggregated mandatory minimums or consecutive terms totaling 50 to 100 years or more—than those formally sentenced to LWOP. Some state courts have found that very long sentences imposed on a juvenile convicted of several non-homicide offenses did not provide a meaningful opportunity to obtain release.[350] By contrast, other courts read *Graham* narrowly, limit its holding to formal LWOP sentences, and uphold consecutive terms that exceed youths' life expectancy.[351]

3. *Miller v. Alabama*: Mandatory LWOP for juveniles convicted of murder

When the Court decided *Miller v. Alabama*, 42 states permitted judges to impose LWOP sentences on any offender—adult or juvenile—convicted of murder.[352] 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 adults. Courts regularly upheld mandatory LWOP and extremely long sentences imposed on children as young as 12 or 13.[353] One in six juveniles who received an LWOP sentence was 15 or younger; for more than half, it was their first-ever conviction.[354] Although states may not execute a felony murderer who did not kill or intend to kill, one-quarter to one-half of juveniles who received LWOP sentences were convicted as accessories to a felony murder.[355] Although the Supreme Court

348. *Id.* at 75.
349. *Id.* at 82.
350. People v. Caballero, 282 P.3d 291, 296 (Cal. 2012); State v. Null, 836 N.W.2d 41, 72 (Iowa 2013).
351. Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012).
352. Amnesty Int'l, *supra* note 255, at 25 n.44.
353. *Id.* at 1; Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *Youth Discount*, *supra* note 307.
354. Amnesty Int'l, *supra* note 255, at 1–6.
355. *Id.* at 27–28; Hum. Rts. Watch, When I Die ... They'll Send Me Home: Youth Sentenced to Life in Prison without Parole in California—An Update 4 (2012).

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.[356]

Miller v. Alabama extended *Roper* and *Graham* and banned *mandatory* LWOP for youths convicted of murder.[357] *Graham* equated a non-homicide 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 LWOP on a juvenile murderer.[358] *Miller* emphasized that "children are constitutionally different from adults for purposes of sentencing" and "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[359] The Court asserted that once judges considered a youth's diminished responsibility individually, very few cases would warrant LWOP.[360]

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* 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.[361]

Miller gave lawmakers and judges minimal guidance to make culpability assessments. The factors it described—age, immaturity, impetuosity, family and home environment, circumstances of and degree of participation in the

356. Amnesty Int'l, *supra* note 255, at 33; Hum. Rts. Watch, *supra* note 355, at 4; Kurlychek & Johnson, *supra* note 281; Tanenhaus & Drizin, *supra* note 128, at 665; Kurlychek & Johnson, *Juvenility and Punishment*, *supra* note 281; Kurlychek & Johnson, *The Juvenile Penalty*, *supra* note 281.

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

358. Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976); Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *Youth Discount*, *supra* note 307.

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

360. *Id.* at 479.

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

offense, youthful incompetence, and amenability to treatment—give expression to judges' subjective discretion.[362] State courts' interpretations and legislatures' responses to *Miller* vary substantially.[363]

Miller required 29 states to revise mandatory LWOP statutes to provide for individualized assessments. Some states adopted *Miller* factors for judges to consider. A few states 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.[364] 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 recommendations that juveniles should be eligible for parole consideration after 10 years.

State courts are divided on whether *Miller* applies to mandatory sentences other than murder that preclude consideration of youthful mitigation. Several post-*Miller* courts have approved 25-year mandatory minimum sentences without any individualized culpability assessments, whereas others have found all mandatory minimum sentences violated the state constitution.[365]

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

Youth Discount: There is a straightforward alternative to the confusion and contradiction reviewed above. States should formally incorporate youthfulness as a mitigating factor in sentencing statutes. Youthful mitigation does not excuse criminality, and it holds juveniles accountable for their crimes—but it proportions punishment to their diminished responsibility.[366] *Roper* and

362. *Miller*, 567 U.S. at 477–80.

363. People v. Chavez, 228 Cal. App. 4th 18, 34 (2014); People v. Gutierrez, 324 P.3d 245 (Cal. 2014); People v. Carp, 852 N.W.2d 801 (Mich. 2014); Commonwealth v. Knox, 50 A.3d 749, 769 (Pa. Super. 2012); Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014); Cara H. Drinan, *The* Miller *Revolution*, 101 Iowa L. Rev. 1787 (2016).

364. Sent'g Project, Slow to Act: State Responses to 2012 Supreme Court Mandate on Life without Parole (2014); Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. Penn. J. Const. L. 929, 975–76 (2015).

365. State v. Lyle, 854 N.W.2d 378, 409–10 (Iowa 2014).

366. Amnesty Int'l, *supra* note 255, at 113; Feld, Bad Kids, *supra* note 1; Zimring, American Youth Violence, *supra* note 287; Feld, *Youth Discount*, *supra* note 307; Scott & Grisso, *Evolution of Adolescence*, *supra* note 325; *Lyle*, 854 N.W.2d at 398; State v. Null, 836 N.W.2d 41, 75 (Iowa 2013).

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.[367]

There are two reasons to prefer a categorical rule over individualized discretion. First, judges and legislators cannot define or identify what constitutes adult-like culpability. Culpability is not an objectively measurable thing, but a subjective judgment about criminal responsibility. Development is highly variable—a few youths may achieve competencies prior to 18 years of age, while many others may not attain maturity even as adults. Despite individual developmental differences, clinicians lack tools with which to assess youths' impulsivity, foresight, and preference for risk, or a metric by which to relate maturity of judgment with criminal responsibility.[368] The inability to define, measure, or diagnose immaturity or validly to identify a few responsible youths introduces a systematic bias to over-punish less-culpable juveniles.[369] The law uses age-based categorical lines to approximate the level of maturity required for particular activities—voting, driving, and consuming alcohol—and restricts youths without individualized assessments of maturity.

The second reason to adopt a categorical rule of youthful mitigation is judges' or juries' inability to fairly weigh the abstraction of diminished responsibility against the aggravating reality of a horrific crime. *Roper* rightly feared that jurors could not distinguish between a person's diminished responsibility for causing a harm and the harm itself, and that the heinousness of a crime would trump reduced culpability in jurors' minds.[370] When courts sentence minority offenders, unconscious racial stereotypes compound the difficulties of assessing immaturity. Treating youthfulness categorically is a more efficient way to address immaturity when every juvenile can claim some degree of diminished responsibility.

The abstract meaning of culpability, the inability to measure or compare moral agency of youths, administrative complexity of individualization, and the tendency to overweigh harm require a clear-cut alternative. A categorical Youth Discount would give all adolescents fractional reductions in sentence

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

368. Feld, Evolution of Juvenile Court, *supra* note 1; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 140.

369. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; James C. Howell, Barry C. Feld, & Daniel P. Mears, *Young Offenders and an Effective Justice System Response*, *in* From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention, *supra* note 50, at 200, 229; Scott & Steinberg, *Blaming Youth*, *supra* note 309.

370. *Roper*, 543 U.S. at 553–54.

lengths based on age as a proxy for reduced culpability.[371] While age may be an incomplete proxy for maturity or culpability, no better bases exist on which to distinguish among young offenders. *Miller* recognized that same-length sentences exact a greater penal bite from younger offenders than older ones.[372] Imprisonment per se is more developmentally disruptive and onerous for adolescents than adults.[373]

A statutory Youth Discount would require judges to give substantial reductions to youths based on a sliding scale of diminished responsibility, with the largest reductions to the youngest offenders.[374] If tried as an adult, a 14-year-old would receive a sentence substantially shorter than those an adult would receive—perhaps 10% or 20% of the adult length. A 16-year-old would receive a maximum sentence no more than one-third or half the adult length. Deeper discounts for younger offenders correspond with their greater developmental differences in judgment and self-control. A judge can more easily apply a Youth Discount in states that use sentencing guidelines under which present offense and prior record dictate presumptive sentences. In less structured sentencing systems, a judge would have to determine the going rate or appropriate sentence for an adult convicted of that offense and then reduce it by the Youth Discount.

The Youth Discount's diminished responsibility rationale would preclude mandatory, LWOP, or de facto life sentences for young offenders.[375] Although some legislators may find it difficult to resist penal demagoguery, states can achieve all of their legitimate penal goals by sentencing youths to a maximum of no more than 20 or 25 years for even the most serious crimes as recommended by the American Law Institute's *Model Penal Code*.[376] Several

371. Feld, Bad Kids, *supra* note 1; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 139; Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9 (2008); Feld, *Youth Discount*, *supra* note 307; Howell, Feld & Mears, *supra* note 369.

372. Miller v. Alabama, 132 S. Ct. 2455, 2455 (2012).

373. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. Crim. L. & Criminology 68 (1997) [hereinafter Feld, *Abolish Juvenile Court*]; Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 Punishment & Soc'y 221, 227 (2001).

374. Feld, *Abolish Juvenile Court*, *supra* note 373; Scott & Steinberg, *Blaming Youth*, *supra* note 309; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1.

375. Amnesty Int'l, *supra* note 255; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; Howell, Feld & Mears, *supra* note 369.

376. Model Penal Code: Sentencing § 6.11A(g) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

juvenile justice analysts and policy groups have endorsed the Youth Discount as a straightforward way to proportionally reduce sentences for younger offenders.[377] A National Institute of Justice study group concluded that youths' diminished responsibility required mitigated sanctions for youths sentenced as adults.[378] The American Bar Association condemned juvenile LWOP sentences, proposing that statutes formally recognize youthfulness as a mitigating factor, and provide for earlier parole release consideration.

RECOMMENDATIONS

The time is right to reform juvenile courts' jurisdiction, jurisprudence, and procedures.

1. **Higher age limits for juvenile court jurisdiction.** Although most states' juvenile court jurisdiction extends to youths under 18 years of age, 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 who are 18 to 21 years old some of the protections associated with juvenile courts—shorter sentences like a Youth Discount, rehabilitative treatment in separate facilities, protected records, and the like. Many European countries' criminal laws provide separate young-adult sentencing provisions and institutions to afford greater leniency and use of rehabilitative measures.[379]

2. **Greater use of diversion and prevention programs.** Most youths involved with the juvenile justice system will outgrow their youthful indiscretion without significant interventions. We can facilitate desistance by reinforcing the two-track system—one informal, one formal—proposed by the President's Crime Commission a half-century ago. For youths who require services, diversion to community resources provides a more efficient and flexible alternative to adjudication and disposition. If states explicitly forgo home removal, then juvenile courts can use summary processes to make non-custodial dispositions. *Scott v. Illinois* prohibits incarceration without representation. *Alabama v. Shelton* prohibits revocation and confinement of an unrepresented defendant who violated

377. Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1, at 246; Tanenhaus & Drizin, *supra* note 128, at 697–98.

378. Howell, Feld, & Mears, *supra* note 369, at 213.

379. Rolf Loeber et al., *Overview, Conclusions, and Key Recommendations*, *in* From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention, *supra* note 50, at 315, 350–51.

probation.[380] *Baldwin v. New York* affords a jury to any person facing the prospect of six months' incarceration. By foregoing home removal or incarceration, states can administer a streamlined justice system for most youths. Diversion raises its own issues because low-visibility decisions contribute to racial disparities at the front end.[381] States can adopt formal criteria, risk-assessment instruments, data collection, and ongoing monitoring to rationalize decisions and reduce disparities. Finally, an ounce of prevention is worth a pound of cure. Prevention programs that target at-risk youths, families, and communities have demonstrated effectiveness, provide cost/benefit returns, and would reduce the number of youths referred to juvenile courts in the first instance.

3. **Increase procedural safeguards, including the right to a jury.** 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 who pose a risk of flight, states should reserve secure detention for youths whose offense and prior record indicate that they likely would be removed from home if convicted. Risk-assessment instruments, other JDAI strategies, and effective assistance of counsel could reduce pretrial detention and disproportionate minority confinement. Juvenile court interventions should keep youths in their communities and avoid out-of-home placements and secure confinement to the greatest extent possible and use evidence-based programs to rehabilitate and reintegrate them.

   The procedural safeguards of juvenile courts should be greatly enhanced to compensate for adolescents' developmental immaturity: automatic competency assessment for children younger than 14, mandatory presence of counsel during interrogation for those younger than 16, and mandatory non-waivable counsel for youths in court proceedings. Any system of

380. Alabama v. Shelton, 535 U.S. 654, 657–58 (2002).

381. Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Versus Formal Processing*, *in* Oxford Handbook of Juvenile Crime and Juvenile Justice, *supra* note 8, at 573.

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.

4. **Require judicial waiver hearings, guided by specific criteria, to determine which youths should be tried as adults and a Youth Discount for those convicted and sentenced as adults.** For those few youths whom policymakers believe should be tried as adults, a judicial waiver hearing guided by offense criteria and clinical considerations and subject to rigorous appellate review is the only sensible way to make transfer decisions.[382] Criteria should focus on serious offenses and extensive prior records, criminal participation, clinical evaluations, and aggravating and mitigating factors, which, taken together, distinguish the few youths who might deserve sentences substantially longer than the maximum sanctions that juvenile courts can impose. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. A legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise rights for youths 15 or younger. The minimum age for transfer should be 16. Sentences of youths convicted as adults should be substantially reduced—a Youth Discount—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.[383]

382. Feld, Bad Kids, *supra* note 1; Scott & Steinberg, Rethinking Juvenile Justice, *supra* note 1; Zimring, American Youth Violence, *supra* note 287; Bishop, *Injustice*, *supra* note 287; Feld, *Responses to Youth Violence*, *supra* note 18.

383. *Cf.* Miller v. Alabama, 567 U.S. 460, 479 (2012).

CONCLUSION

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, and unjust and counterproductive waiver and criminal sentencing laws, all of which had a disproportional 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."