

# MINORITY RULE: REDEFINING THE AGE OF CRIMINALITY

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## I.

## INTRODUCTION

*In the childhood years leading to Cristian Fernandez's arrest and indictment, violence and tragedy pursued him relentlessly and left indelible scars. When he was only twelve, his two-and-one-half-year-old half-brother, David Galarraga, died in his care, triggering both understandable outrage and unprecedented treatment in the criminal justice system. The Florida State Attorney General elected to prosecute Cristian as an adult, charging him with first-degree murder in the death of his brother.<sup>1</sup> At twelve, Cristian became the youngest person to be charged as an adult in the history of Jacksonville.<sup>2</sup> No one who looked at Cristian would consider him old enough to buy liquor, drive a car, or even enter an "R" rated movie unescorted. But the state of Florida deemed him an adult in criminal court. That decision—that the juvenile court lacked the ability to handle Cristian's case—would ultimately grab headlines and catapult Cristian onto the national and global stage.*

*What had escaped notice until that point was the family dysfunction and abuse that punctuated and misshaped Cristian's life. He was conceived when his then eleven-year-old mother was raped by an acquaintance. A child herself, Cristian's mother lacked the maturity and capacity to provide the kind of stable, secure home that her baby needed. She could barely care for herself. At fifteen months old, Cristian became ill and needed treatment for pneumonia. Hospital records indicate that he had not seen a pediatrician since he was two months old. That hospitalization marked the first of many times that he would be referred to the Department of Child and Family Services with little positive result. At age three, Cristian's circumstances prompted authorities to place him in foster care along with his mother. Foster care should have provided the stability he needed, but instead it brought a host of new traumas. Misfortune struck suddenly and forcefully. While there, Cristian was inappropriately exposed to sexual behavior, and then, when he was just four, Cristian's foster mother died of a heart attack in the home while Cristian was present.*

*The pattern of victimization, abandonment, and loss recurred throughout his young life and offered him the only constancy he knew. At six years old, Cristian*

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1. Camille Mann, *12-Year-Old Cristian Fernandez Charged as Adult in 2-Year-Old Brother's Murder*, CBS NEWS CRIMESIDER (June 3, 2011), [http://www.cbsnews.com/8301-504083\\_162-20068613-504083.html](http://www.cbsnews.com/8301-504083_162-20068613-504083.html).

2. David Hunt, *Boy, 12, Charged with Murder*, FLA. TIMES UNION, June 3, 2011, at A1.

likely thought that having the chance to live with his mother and her new husband would bring him the home life that he craved. But once again, safety and security eluded him. Over a two-year period, Cristian's twelve-year-old cousin sexually molested him. Cristian's new stepfather taunted him for being gay and, ultimately, sent Cristian away from the family for a year to the Dominican Republic to be "cured."<sup>3</sup> When Cristian's mother and stepfather finally permitted him to return home, Cristian endured repeated physical and emotional abuse by his stepfather. A black eye and broken rib finally attracted the attention of doctors who referred the case to the police for further investigation. By the time the police arrived, Cristian's stepfather had shot himself fatally in the head in front of Cristian's then two-year-old and four-year-old half-brothers. Following the suicide, Cristian's mother decided to relocate the family to Jacksonville, Florida.

There, Cristian's mother began to rely on Cristian—perhaps too much—to care for his younger siblings. Having grown up lacking genuine adult supervision himself, he had few tools. Managing three children under the age of six was more than he could handle. While in his care, Cristian's half-brother David suffered fatal injuries (reportedly as a result of Cristian pushing him).<sup>4</sup> Despite psychologists' determination that Cristian was amenable to treatment and should remain in the juvenile system, the State Attorney General made the decision to charge Cristian as an adult. That decision grew out of the all too common but flawed perception that a child's involvement in a death somehow conferred adulthood on that child. Although the State's Attorney announced that she was not seeking a life sentence,<sup>5</sup> Cristian still faced a potential sentence of more than twenty years if convicted.<sup>6</sup>

When a child dies—especially one as young as David—the public almost reflexively wants vengeance, regardless of the age of the accused. However, that retributive impulse stems from a faulty premise: that the homicide committed by a young offender is the same as one committed by an adult. What we know, from both science and common sense, is that an adolescent's act differs significantly from that of a mature adult. Adolescents are works in progress. The regions of

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3. Marty Beyer, *Developmental Assessment: Cristian Fernandez* 7 (May 2012), available at <http://www.scribd.com/doc/98808948/Dr-Marty-Beyer-s-assessment-of-Cristian-Fernandez>.

4. Phil Keating, *Florida Boy, 12, Charged as an Adult in Brother's Murder*, FOX NEWS (October 19, 2011), <http://www.foxnews.com/us/2011/10/19/boy-12-charged-with-murder-as-adult-in-florida/>.

5. Bridget Murphy, *Prosecutor Not Seeking Life for Boy but Corey Says 12-Year-Old Murder Defendant Must Be Held Accountable*, FLA .TIMES UNION, Oct. 7, 2011, at B-1, available at <http://jacksonville.com/news/crime/2011-10-07/story/prosecutor-not-seeking-life-in-prison-for-Cristian-Fernandez>.

6. Cristian ultimately received a sentence of seven years following a guilty plea to manslaughter. See Morris News Service, *Cristian Fernandez, Now 13, Pleads Guilty, Sentenced to Prison Until He's 19*, ST. AUGUSTINE RECORD (Feb. 8, 2013), <http://staugustine.com/news/police/2013-02-08/cristian-fernandez-now-13-pleads-guilty-sentenced-prison-until-hes-19>.

their brains governing impulse control and risk avoidance have not yet fully formed. They are uniquely susceptible to the hormonal spikes of puberty. They succumb more readily to negative external influences such as peer pressure and the influence of unstable environments. Fortunately, the biological and behavioral evidence explains that the volatility and impetuosity that have emerged as signature traits of adolescents are *transitory*. The ability to resist emotional impulses and regulate behavior gradually develops throughout adolescence, corresponding to the development of brain structures and systems involved in executive function and impulse control. In sum, most adolescents will age out of offending and will not persist in a life of crime.<sup>7</sup>

The Supreme Court has recognized that adolescents are unfinished products, developmentally and morally, and has determined that these factors hold constitutional significance. In assessing culpability and moral responsibility, the Court has stated emphatically that youth matters. Indeed, the Court recently noted that a sentencer “misses too much if he treats every child as an adult.”<sup>8</sup> Children have reduced culpability and a greater capacity for change than their adult counterparts. Even when convicted of the most aggravated murder, a child, according to the Court, cannot be deemed among the worst offenders, given “a lack of maturity and an underdeveloped sense of responsibility.”<sup>9</sup> Frankly, the “immaturity and plasticity that create an increased propensity for wrongdoing in adolescents also provide an enormous capacity for learning, development and growth.”<sup>10</sup> So, in the face of children being exposed to draconian sentences upon conviction, the Court has responded by addressing the constitutionality of that choice. But the Court has stopped short of taking action that would profoundly affect the lives of countless adolescents: a categorical ban against prosecuting an adolescent as an adult.

The Court’s failure to act decisively leaves in place a disturbing montage of state laws. Twenty-three states currently have no minimum age for trying a child as an adult.<sup>11</sup> Among states that set a minimum age for adult prosecution through transfer provisions, fourteen is the most common age.<sup>12</sup> Not only have these statutes shamefully ushered young children into the adult criminal justice system,

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7. See Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014–15 (2003).

8. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

9. *Id.* at 2464.

10. Brief of J. Lawrence Aber, Marc S. Atkins, Camilla P. Benbow, Mary M. Brabeck, Jane C. Conoley, Kenneth A. Dodge, Michelle Fine, Adriana Galván, Margo Gardner, Charles F. Geier, Frances E. Jensen, Jacquesline Mattis, Pedro Noguera, Bruce D. Perry & Vincent Schmithorst as Amicus Curiae Supporting Petitioners at 10–11, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

11. See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUST., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 114 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/chapter4.pdf>.

12. *Id.* at 114.

they have done so disproportionately for youth of color.<sup>13</sup> The prosecution of very young children as adults cannot sensibly be reconciled with the constitutional obligation to consider child status. Without question, homicide is the most serious offense. But developmental issues of judgment exist when a child engages in any crime, including homicide. Age is directly related to consistent judgment. Given what we know about the psychosocial and biological development of adolescents, children under age seventeen should not be charged in the adult criminal justice system, either automatically or by transfer. State legislatures need to establish a bright-line rule of minority.

Child status matters. The time has arrived for criminal justice policy to reflect that reality. Part Two of this article will explore three distinct shifts in the justice system's approach to defining the age of criminality. This Part will examine the oscillating political currents that led to distinctive treatment for juveniles, shifted to treat youths as adults, and, finally, recognized a more detailed understanding of adolescent development and offender characteristics. Part Three explores the ways that the blurred distinction between child and adult has perpetuated and embodied unacceptable racial disparities. It then addresses the rationales behind punitive policies toward young offenders and demonstrates their faulty premises, given developments in social science and neuroscience. Part Four proposes that state legislatures issue a bright line mandate—a minority rule—preventing any child under the age of seventeen from being prosecuted in the adult system.

## II.

### SHIFTING CURRENTS IN HOW WE PERCEIVE AND TREAT YOUTHFUL OFFENDERS

Societal perceptions of, and attitudes toward, adolescents have oscillated dramatically over the past century. Shifts in treatment of youthful offenders have occurred less as a result of an improved understanding of adolescent behavior and more as a consequence of the frenetic pull of politics and perceived imperatives. A close examination of the policy choices surrounding the treatment of juvenile offenders and our assessments of criminality from the start of the twentieth century until the present day reveal three<sup>14</sup> distinct directional moves: (1) at the turn of the twentieth century, the Progressive reform movement articulated and endorsed the concept of juvenile offenders as wayward children

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13. *See infra* Part III.

14. In previous works I have described two distinct phases of how the U.S. justice system conceived of adolescence and how those conceptions reflected and drove justice policy. *See* Kim Taylor-Thompson, *States of Mind/States of Development*, 14 *STAN. L. & POL'Y REV.* 143 (2003). There, I advocated for the need to adjust our perceptions and treatment of adolescent offenders given emerging social science data about adolescent development. Since then, the Supreme Court has addressed the developmental differences between adolescent and adult offenders, leading to the conclusion that a third shift may be in its nascent stages. *See* *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48, 81 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

in need of care and therapeutic intervention; (2) at the end of the twentieth century, politicians, academics, and the media imbued youthful offending with a more sinister, adult-like character and adolescent offenders lost much of their protected status; and (3) in the last eight years, the Supreme Court has taken initial steps toward acknowledging that adolescents are developmentally distinct from adults and that this difference affects assessments of criminal responsibility and punishment.

What follows is a brief review of the vying forces underlying these radical swings.

*A. Setting the Course: Early Efforts to Identify and Institutionalize the Need for Distinctive Treatment of Juvenile Offenders*

For much of U.S. history, the justice system failed to act on—or even recognize—any differences between the youthful offender and her adult counterpart.<sup>15</sup> Children who violated the law faced criminal prosecutions with procedures identical to those for adults.<sup>16</sup> Throughout the late eighteenth century, courts considered children over the age of six sufficiently capable of forming the requisite criminal intent to be held responsible for their unlawful conduct.<sup>17</sup> Courts did, on occasion, advert to the fact that some children might be too young for criminal prosecution. Consequently, a defense of infancy existed that would enable a young offender to petition the court to excuse her from prosecution because, by virtue of her age, she lacked the capacity to distinguish right from wrong.<sup>18</sup> In practice, courts typically presumed that an offender younger than seven years old—and sometimes as old as fourteen—was incapable of committing a criminal offense. But the government could effectively rebut that presumption upon a showing that a particular child was capable of discerning right from wrong.<sup>19</sup> Upon conviction, young offenders faced the full range of penalties, including capital punishment. While officials rarely carried out death sentences against children, states in early America did execute some children as young as twelve.<sup>20</sup>

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15. See, e.g., JUVENILE OFFENDERS FOR A THOUSAND YEARS: SELECTED READINGS FROM ANGLO-SAXON TIMES TO 1900 326–28 (Wiley B. Sanders ed., 1970) (reproducing historical court records involving children charged with crimes).

16. See, e.g., NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86, available at <https://www.ncjrs.gov/html/ojdp/nationalreport99/chapter4.pdf>; *In re Gault*, 387 U.S. 1, 15 (1967) (noting that the reformers who led to the development of a separate juvenile court were “appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals”).

17. NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, *supra* note 16, at 86.

18. See generally Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168–170 (2005).

19. *Id.* at 169.

20. See Victor L. Streib, *Emerging Issues in Juvenile Death Penalty Law*, 26 OHIO N.U. L. REV. 725, 728 (2000).

The treatment of children in the justice system emerged in the late nineteenth century as one of the core problems Progressive activists sought to address. Progressives had set their sights on a broad swath of legal, economic, and social problems that accompanied the country's shift to industrialization.<sup>21</sup> The transformation from a rural agrarian economy to an industrialized state had dramatically altered the social and economic landscape of the country.<sup>22</sup> Between 1890 and 1920, immigrants, largely from southern and eastern Europe, streamed into urban ghettos located just outside manufacturing centers.<sup>23</sup> Overcrowded cities with dense concentrations of poor families living in tenements and row houses contrasted sharply with the wealth of urban capitalists.

While the economic divide became more visible, the dividing line between child and adult all but disappeared. In this new industrialized environment, children were regarded as a necessary part of the labor market, which exposed them to perilous working conditions and abusive labor practices. And, if young people violated the law, they faced adult trials, adult convictions, and prison terms where they were often housed with and abused by more hardened offenders.<sup>24</sup> Progressives were committed to developing legislation to reduce the myriad threats to child development and safety and to reform a justice system intent on ignoring differences between children and adults.<sup>25</sup>

The prevailing perception of children posed a real obstacle. Progressive reformers needed to take on and alter the popular image of youthful offenders if they hoped to effect genuine change. So, these reformers purposely and persuasively invoked images of young offenders that highlighted and amplified their child-like qualities.<sup>26</sup> Adolescents were not fully formed individuals, they insisted.<sup>27</sup> Given their youth, adolescents were less responsible than adults and more likely to gain from treatment and intervention.<sup>28</sup> Progressive reformers

21. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 333–35 (1999) [hereinafter *The Transformation of the Juvenile Court*].

22. *Id.* at 332.

23. W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 19–20* (1988); Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189, 191–92 (2007).

24. See RICHARD S. TUTHILL, *HISTORY OF THE CHILDREN’S COURT IN CHICAGO*, H.R. DOC. NO. 58-701, at 1 (1904).

25. *The Transformation of the Juvenile Court*, *supra* note 21, at 334–35.

26. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 291, 294 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *Criminal Responsibility*]; *The Transformation of the Juvenile Court*, *supra* note 21, at 333 (noting that the upper and middle classes promoted a new ideology of children as “vulnerable, fragile and dependent innocents”).

27. See JOSEPH F. KETT, *rites of passage: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT* 5–6 (1977).

28. See ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA’S JUVENILE COURT EXPERIENCE* 37 (1978).

openly criticized the prosecution of all adolescents as an “outrage against childhood.”<sup>29</sup> What these wayward children arguably lacked was adequate parental supervision and care.<sup>30</sup> Progressives maintained that the state could better address the inappropriate conduct engaged in by children through remedial measures taken in the best interest of the child.<sup>31</sup> Playing the politics of shame quite skillfully, the Progressives sought to stir the protective interests of policymakers and the public as a means of persuading them to do what was best for these youthful delinquents.<sup>32</sup>

Their efforts worked. By 1899, Progressives secured legislation that enabled the establishment of the first juvenile court in Chicago.<sup>33</sup> Other states soon followed Illinois’s lead. All but two states developed juvenile courts of their own by 1928.<sup>34</sup> The driving force behind the juvenile court was to intervene in a child’s life when that child was still amenable to change and to “save him from a downward career.”<sup>35</sup> To do this, the juvenile court did not focus solely on the commission of crimes. The court exercised jurisdiction over children under eighteen in three general areas: status offenses (actions deemed unlawful only because they are committed by a minor), incidents related to neglect or abuse, and the commission of actual crimes.<sup>36</sup>

In its first year of existence, more than ninety percent of the cases handled by the Chicago juvenile court involved minor offenses.<sup>37</sup> The juvenile court act was construed liberally, giving courts wide latitude to bring children within their

29. Ben B. Lindsey, *Colorado’s Contribution to the Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 274 (Jane Addams ed., 1925).

30. See *The Transformation of the Juvenile Court*, *supra* note 21, at 333 n.15; *Criminal Responsibility*, *supra* note 26, at 294 (noting that Progressive reformers insisted that youthful offenders should not face criminal punishment because they lacked moral or criminal responsibility for the harm they caused; their conduct reflected youthful immaturity and poor parental guidance).

31. See *Criminal Responsibility*, *supra* note 26, at 294–95.

32. For example, William Stead, a major public activist, referred to a police station in which “urchins of ten and twelve who have been run in for juvenile delinquency have found the police cell the nursery cradle of the jail.” Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2482 (2000) (citing WILLIAM T. STEAD, *IF CHRIST CAME TO CHICAGO!* 20 (Chicago Historical Bookworks ed., 1990) (1894)). Similarly, Judge Timothy Hurley, who drafted the Illinois Juvenile Court law, called upon “society . . . to answer for millions upon millions of law-made criminals.” Timothy D. Hurley, *Origin of the Illinois Juvenile Court Law*, in *THE CHILD, THE CLINIC AND THE COURT* 320, 321 (Jane Addams ed., 1925).

33. See Taylor-Thompson, *supra* note 14, at 147; *Criminal Responsibility*, *supra* note 26, at 291.

34. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (1969).

35. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909).

36. See generally *The Transformation of the Juvenile Court*, *supra* note 21, at 337–38; Robert E. Shepherd, Jr., *The Juvenile Court at 100 Years: A Look Back*, 6 JUVENILE JUSTICE 13, 15 (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice) (Dec. 1999), available at <https://www.ncjrs.gov/pdffiles1/ojdp/178255.pdf>.

37. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1221 (1970).

jurisdiction.<sup>38</sup> The court's mission involved assessing the child's family circumstances as well as the child's psychological makeup to devise specific remedial plans in the child's best interest. As Chicago's second juvenile court judge observed:

The problem for determination by the judge is not, Has this, boy or girl committed a specific wrong but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding.<sup>39</sup>

Much of the terminology used in juvenile proceedings had a therapeutic veneer. The court did not refer to the child brought under its control as a "defendant" or "the accused."<sup>40</sup> Instead, the child was called the "respondent." She did not face conviction, but would be adjudicated "delinquent."<sup>41</sup> And upon a finding of delinquency, the child would not proceed to a sentencing hearing, but would have her future determined by a judge at a "dispositional" hearing.<sup>42</sup> More importantly, in theory, the adjudicated delinquent would not face punishment. She could look forward to care and rehabilitation at the hands of the state.<sup>43</sup>

But the system's informality attracted criticism.<sup>44</sup> Given the wide latitude juvenile court judges enjoyed, children could face variations in treatment that were driven largely by the unguided discretionary choices of the judge.<sup>45</sup> So, in 1967, the Supreme Court entered the discussion to regulate the procedures under which the juvenile court operated. The Court's decision in *In re Gault*<sup>46</sup> created new procedural rights in juvenile delinquency proceedings. The juvenile

38. See *Criminal Responsibility*, *supra* note 26, at 295; Robert G. Caldwell, *Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 493, 495–96 (1961); Zimring, *supra* note 32, at 2480.

39. See Mack, *supra* note 35.

40. Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 110 (2011).

41. *Id.*

42. *Id.*

43. See *Criminal Responsibility*, *supra* note 26, at 294.

44. Some questioned the rehabilitative premise of the court. See Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226, 229 (1959) (criticizing the operation of the juvenile court where the court intervenes punitively, uses indeterminate sentences resulting in lengthened periods of imprisonment, and utilizes the "civil" label to impose criminal sanctions with reduced protections); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 145 (1997).

45. See *The Transformation of the Juvenile Court*, *supra* note 21 at 338–39; Neitz, *supra* note 40, at 102.

46. *In re Gault*, 87 U.S. 1 (1967).

respondent, like an adult accused of a crime, was now entitled to counsel,<sup>47</sup> who could confront and cross-examine the government's witnesses,<sup>48</sup> and enjoyed a right against self-incrimination.<sup>49</sup> The Court maintained the therapeutic orientation of the juvenile proceedings<sup>50</sup> and considered the extension of some procedural rights to be an additional measure of protection for the child.<sup>51</sup>

Interestingly, the extension of adult-like process seems to have had unintended consequences. That choice may actually have eased the way for policymakers to close the gap between child and adult offenders. The more that juvenile court procedures began to mirror those of the adult court, the more complicated it has become to justify a separate system of adjudication for the young offender. The Court may have unwittingly encouraged the notion that courts *could* again treat children as adults in the justice system. The extension of procedural rights previously reserved for adults led to a misstep: that children and adults were substantively the same.<sup>52</sup> Once that leap had occurred, the normative assumption that courts *should* treat the child as an adult seemed, deceptively, to only be a small step.

Still, the requirement of differential and rehabilitative treatment for children held fast. Policies still allowed states to treat children as adults under certain circumstances.<sup>53</sup> But throughout most of the twentieth century, those in policymaking positions who insisted that the judicial system should support separate and distinctive treatment based on the offender's immaturity controlled the debate. Violence at the end of the twentieth century would upend this century-long tradition and ultimately force those policymakers interested in differential and rehabilitative treatment for youthful offenders to acquiesce to those demanding harsher treatment.

### *B. Veering Off Course: Political Dynamics Encourage Blurring of the Distinction Between Adolescents and Adults*

The Progressive Era's politics of shame gave way to the twentieth century's politics of fear. The concept of the adolescent offender underwent a tectonic shift

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47. *Id.* at 36–37, 41.

48. *Id.* at 56.

49. *Id.* at 55.

50. *Id.* at 27 (“While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly judge be replaced by its opposite . . .”).

51. The Court in *Gault* noted that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” *Id.* at 18.

52. See Taylor-Thompson, *supra* note 14, at 147–48; *The Transformation of the Juvenile Court*, *supra* note 21, at 350 (“Providing a modicum of procedural justice also legitimated greater punitiveness in juvenile courts.”).

53. See Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 319 (1990).

in the late 1980s and 1990s. Incidents of children killing other children<sup>54</sup> and allegedly engaging in random violence<sup>55</sup> stunned the nation and ignited debate<sup>56</sup> about the most effective ways to address adolescent criminal behavior. Pundits, academics, and the media stoked the image of children engaged in often-lethal violence, and this image fundamentally shook the public's notion of the innocence and vulnerability of children. With each new violent incident, the public's fear and confusion escalated. Particularly, when violence erupted in schools<sup>57</sup>—seemingly safe havens—harsh policy measures seemed to provide the only safeguard against youth crime that threatened to spiral dangerously out of control.<sup>58</sup> The acts of youthful offenders no longer appeared delinquent—they now seemed criminal.<sup>59</sup>

Academics soon gave voice to a sense of impending doom.<sup>60</sup> They predicted the coming of a generation of “temporary sociopaths—impulsive and

54. See, e.g., Mike Clary, *Boy, 14, Gets Life Term in Wrestling Killing*, L.A. TIMES, Mar. 10, 2001, at A1 (discussing sentencing of Lionel Tate who, at age twelve, killed his playmate, six-year-old Tiffany Eunick); Sam Howe Verhovek, *Sounds from a Massacre: 'Oh God, Kids, Stay Down'*, N.Y. TIMES, Apr. 24, 1999, at A1.

55. One particularly notorious case in 1989 involved the brutal attack of a young woman jogging in New York's Central Park. See Craig Wolff, *Youths Rape & Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1; David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, Apr. 22, 1989, at 1; *Madness in the Heart of the City*, PEOPLE, May 22, 1989. Coverage of this case introduced the term “wilding” as the pastime of a “new breed” of adolescents who gained pleasure from random acts of violence. *Id.* The term “wilding” would appear 156 times in articles in New York City newspapers over the next eight years. See Perry L. Moriearty, *Framing Justice: Bias and Legal Decisionmaking*, 69 MD. L. REV. 849, 863 (2011).

56. See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 208 (1999). For an example of the debate, compare Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727, 728 (1998) [hereinafter Zimring, *Youth Violence Epidemic*] (challenging predictions of a coming storm of adolescent super-predators as “fundamentally unscientific” guesswork), with Judy Briscoe, *Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth*, 61 FED. PROBATION 3, 3 (1997) (claiming that those who ignore the super-predator “reality” are ignoring the 150,000 juveniles under age seventeen who are arrested annually for violent offenses).

57. There were at least ten such incidents in the 1990s. See Katherine Ramsland, *School Killers*, CRIMELIBRARY.COM, [http://www.trutv.com/library/crime/serial\\_killers/weird/kids1/index\\_1.html](http://www.trutv.com/library/crime/serial_killers/weird/kids1/index_1.html) (last visited Jan. 9, 2013).

58. See Eric C. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 374 (1997–1998) (noting that a 1993 poll found that seventy-three percent of respondents were in favor of trying violent juveniles as adults rather than in the “lenient juvenile courts”); Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 37 (citing a 1989 Time/CNN poll, which found that eighty-eight percent of respondents believed that teen violence was a more serious problem than in the past; seventy percent thought that “lenient treatment of juvenile offenders by the courts” was partly to blame for the situation).

59. For example, in his 1996 presidential campaign, Bob Dole gave voice to this changed perspective, noting that “[a] violent teenager who commits an adult crime should be treated as an adult in court and should receive adult punishment.” *Dole Seeks to Get Tough on Young Criminals*, L.A. TIMES, July 7, 1996, at A16.

60. John J. DiIulio, Jr. began the movement with articles in the *Weekly Standard*. See John J. DiIulio Jr., *The Coming of the Super -- Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23

immature”<sup>61</sup> who were born of “abject moral poverty.”<sup>62</sup> This prediction was astounding for its audacity, given that the professors based their warnings only on projected increases in population numbers of the nation’s youth.<sup>63</sup> Still, their threat of a hardened and remorseless breed of “superpredators”<sup>64</sup> looming dangerously on the horizon wore the veneer of scholarly research and garnered considerable media and political attention.<sup>65</sup> These explosive labels, more often reserved for children of color who committed crimes,<sup>66</sup> pushed the public to fear a coming tide of “elementary school youngsters who pack guns instead of lunches.”<sup>67</sup> These portrayals at once stigmatized the offender and impressed upon the listener the notion that these sorts of offenders were decidedly more dangerous than the paradigmatic wayward child. In the public view, these youthful offenders no longer needed or deserved the protective environs of a juvenile system that emphasized the twin goals of care and rehabilitation. Those approaches now seemed dangerously outdated.<sup>68</sup> Many politicians argued that the conduct of these new young offenders cried out for models that emphasize punishment and control.<sup>69</sup>

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[hereinafter DiIulio, *The Coming*], available at <http://cooley.libarts.wsu.edu/schwartzj/criminology/diIulio.pdf>; John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY JOURNAL, Spring 1996, available at [http://www.city-journal.org/html/6\\_2\\_my\\_black](http://www.city-journal.org/html/6_2_my_black). Later DiIulio, William J. Bennett, and John P. Walters perpetuated this idea in their book, WILLIAM J. BENNETT, JOHN J. DI IULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996). DiIulio was then a professor at Princeton University and coined the term of a juvenile “superpredator”; he later regretted his deep involvement in creating and perpetuating the hysteria. See Elizabeth Becker, *As Ex-Theorist on ‘Young Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

61. See Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52 (quoting Professor James Alan Fox, Northeastern University Criminologist).

62. John J. DiIulio Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us Into Wanting to Get to the Root Cause of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31.

63. See generally FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* (1998); Zimring, *Youth Violence Epidemic*, *supra* note 56, at 728 (disputing predictions of the “coming storm” of adolescent “superpredators”).

64. See Judy Briscoe, *Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth*, 61 FED. PROBATION 3, 3 (1997) (citing predictions that “the number of juveniles arrested for murder, rape, robbery, and aggravated assault will more than double by 2010”); John J. DiIulio, Jr., Op-Ed., *Stop Crime Where It Starts*, N.Y. TIMES, July 31, 1996, at A15. *But see* Zimring, *Youth Violence Epidemic*, *supra* note 56, at 728 (disputing predictions of the “coming storm” of adolescent “superpredators”).

65. See Moriearty, *supra* note 55, at 860–71.

66. *Id.* at 851–52.

67. DiIulio, *The Coming*, *supra* note 60, at 23.

68. See, e.g., Alfred S. Regnery, *Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL’Y REV. 65 (1985) (Regnery, the administrator of the Office of Juvenile Justice and Delinquency Prevention under President Ronald Reagan contended that the current policies used to address juvenile crime “fail to hold offenders accountable and do not deter crime. At best they are outdated; at worst, they are a total failure, and may even abet the crimes they are supposed to prevent.”).

69. See generally Scott & Grisso, *supra* note 44, at 148–50.

A peculiar madness seized the country. The media capitalized on the sensationalism of each violent event involving children to push to the foreground questions about juvenile crime.<sup>70</sup> Rather than serving as a voice of reason and restraint by demonstrating that school shootings and other forms of adolescent lethal violence were exceptional situations rather than the norm, the media used its voice to feed public fear.<sup>71</sup> The barrage of media stories about juvenile crime seemed to signal that greater and more lethal forms of violence would erupt with increasing frequency and without advance warning.<sup>72</sup> Predictably, what followed was a negative shift in public attitudes toward young offenders,<sup>73</sup> coupled with more insistent demands that political leaders provide an effective solution.<sup>74</sup>

Policymakers did not understand this phenomenon.<sup>75</sup> Like most complex social issues, the juvenile crime problem attracted more than its share of pundits and policymakers who, though barely informed, were willing to promise quick-fix solutions to an anxious public.<sup>76</sup> So, without pausing to test or question their operative assumptions, policymakers charged forward, advocating and enacting policy initiatives that were, at best, probably motivated by a blend of vengeance and fear. Unless they acted, the pundits and lawmakers warned, the public would soon be overrun by violent juvenile offenders.<sup>77</sup>

Too quickly, politicians resorted to the same answer that had appeased the electorate in the face of escalating adult crime: more retributive forms of control. They looked to scale the severity of punishment to the severity of the crime without regard to the age of the offender.<sup>78</sup> Demands that youthful offenders who committed “adult crimes” should serve “adult time” became the rallying cry of some policymakers across the nation.<sup>79</sup> Such slogans not only boasted

70. See Moriearty, *supra* note 55, at 860–871.

71. *Id.* at 865 (noting three studies conducted between 1993 and 1997 concluding that homicides made up more than a quarter of all crimes reported on the evening news which was a rate of 100 to 300 times their actual occurrences).

72. See *id.* at 871–73.

73. See *id.* at 871 (noting that even as national crime rates declined, public opinion polls in the late 1990s revealed the American public’s fear of violent juvenile crime).

74. *Id.* at 877–78.

75. See *The Transformation of the Juvenile Court*, *supra* note 21, at 367–68.

76. See Moriearty, *supra* note 55, at 877–78.

77. See BARRY KRISBERG, *JUVENILE JUSTICE: REDEEMING OUR CHILDREN 2* (2005) (noting that in 1995 criminologist James Q. Wilson claimed that by 2010 there would be 30,000 more juvenile “muggers, killers, and thieves” and Professor John DiIulio built on that, predicting that the new wave of youth criminals would be upon us by 2000).

78. See Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 408 (2006); PATRICIA TORBET, RICHARD GABLE, HUNTER HURST IV, IMOGENE MONTGOMERY, LINDA SZYMANSKI & DOUGLAS THOMAS, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* xi (1996).

79. See Mark Dowie, *Tough Justice: When Kids Commit Adult Crime, Some Say They Should Do Adult Time*, 13 CALIF. L. REV. 54 (1993); Matthew Daly, *House Toughens Juvenile Justice: Lawmakers Back Bill to Try Youths as Adults in Some Violent Crimes*, HARTFORD COURANT, June 4, 1995, at A1; Scott & Grisso, *supra* note 44, at 148; Laura Sessions Stepp, *The Crackdown on*

simplistic rhymes, but reflected simplistic reasoning. The country witnessed legislators do sound-bite policymaking rather than informed policymaking.<sup>80</sup> Anxious to establish their crime control credentials, politicians across the country turned untested ideas into guiding principles and promulgated criminal and juvenile justice policies without any attention to whether the promised outcomes would ever occur.

They rushed to send young offenders into the adult system in record numbers, propelled by the misconception that violence, not the offender's age, justifies adult court treatment.<sup>81</sup> Despite a decline in the incidence of juvenile crime in the 1990s,<sup>82</sup> forty jurisdictions moved to extend adult court jurisdiction over juvenile offenders by reducing the minimum age for prosecution in criminal court.<sup>83</sup> Twelve states entirely abandoned any age floor for transfers to the adult court system.<sup>84</sup> Forty-seven states modified or removed confidentiality provisions in juvenile court or criminal court.<sup>85</sup> At the federal level, Congress not only expanded the quantity of federal crimes with which a juvenile offender may be charged, but it also considered strikingly punitive juvenile crime legislation as part of a general trend.<sup>86</sup>

The justice landscape had altered profoundly. A number of procedural shifts accompanied and facilitated the expansion of criminal court jurisdiction. With the stroke of a pen, legislators eased transfers to adult court by usurping the

*Juvenile Crime: Do Stricter Laws Deter Youth?*, WASH. POST, Oct. 15, 1994, at A1 (quoting a Maryland legislator who said, “[i]f they want to do adult-type crimes, we’re going to treat them like adults”).

80. See FELD, *supra* note 56, at 90; *The Transformation of the Juvenile Court*, *supra* note 21 at 367; KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); Barry C. Feld, *The Politics of Race and Juvenile Justice: The “Due Process Revolution” and the Conservative Reaction*, 20 JUST. Q. 765, 790 (2003).

81. See Scott & Grisso, *supra* note 44, at 150–51; *The Transformation of the Juvenile Court*, *supra* note 21, at 357–58 (noting that the “rate of judicial waiver increased sixty-eight percent between 1988 and 1992).

82. Barbara Fedders, Randy Hertz & Stephen J. Weymouth, *The Defense Attorney’s Perspective on Youth Violence*, in SECURING OUR CHILDREN’S FUTURE 89 (Gary S. Katzmann ed., 2002); AM. BAR ASS’N, AMERICA’S CHILDREN STILL AT RISK 253–54 (2001); AM. BAR ASS’N, STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN (2001); HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, 1999 NATIONAL REPORT SERIES: JUVENILE JUSTICE BULLETIN 1 (2000). The annual number of crimes reported by law enforcement authorities nationwide from 1992 through 1996 declined by 6.7%. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1996: UNIFORM CRIME REPORTS 7 (1997), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/1996>.

83. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 688–89 (1998).

84. *Id.* at 689.

85. SNYDER & SICKMUND, *supra* note 11, at 97.

86. Violent and Repeat Juvenile Offender Accountability & Rehabilitation Act of 1999, H.R. 1501, 106th Cong. (1999). The federal government has also conditioned the distribution of federal grants on a state’s willingness to try violent crimes committed by juveniles in adult court. See Stephen J. Schulhofer, *Youth Crime—and What Not to Do About It*, 31 VAL. U. L. REV. 435, 438–39 (1997).

power of the judge. Previously, judges performed the role of neutral arbiter, at least in theory, in determining whether the child warranted adult court prosecution. New statutes narrowed judicial discretion.<sup>87</sup> The offense became the principal determinant of transfers into adult court,<sup>88</sup> children of color were more likely to face transfer,<sup>89</sup> and the frequency of such removals increased dramatically.<sup>90</sup> In many jurisdictions, transfer is automatic based on offense or at the discretion of the prosecutor.<sup>91</sup> In the rush to gain a sense of control—no matter how illusory—over juvenile crime, many states adopted provisions that allowed for juveniles to be waived automatically into the adult system, obviating the requirement for a hearing before a judge. As a result, eighty-five percent of the determinations to send juveniles into the adult criminal justice system are not made by judges, but instead by prosecutors or legislatures.<sup>92</sup>

Society embarked on a retributive path in the 1990s, and the public eagerly embraced the transfer of children to the adult system. The idea that adolescents who committed violent offenses differed from other children animated juvenile justice policy. This “forfeiture theory”<sup>93</sup> gained traction as a mechanism for convincing the public to treat juveniles differently when children engaged in violent acts. The theory did not require that the public wholly abandon its views that children needed protection and guidance. Under the theory, society could continue to protect some children: nonviolent offenders. But the theory made it clear that the public could—and should—withdraw special protection from violent adolescent offenders. Advocates of this theory insisted that the violent nature of these offenders’ acts exhibited a depravity that led inexorably to the dual consequences of a forfeiture of the protected status of youth and expulsion

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87. See Alexes Harris, *Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice*, 41 L. & SOC’Y REV. 387, 388 (2007).

88. See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 487 (1987) (noting a discernible trend to make transfer decisions based on offense seriousness even before the late 1980s).

89. See Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1024 (2001) (noting that judges decide to transfer juveniles to adult court by considering their race); Jeffrey Fagan, Martin Forst & T. Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259 (1987) (finding that race influenced transfer decisions in homicide cases).

90. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 358–59 (1999) (noting that the “rate of judicial waiver increased sixty-eight percent between 1988 and 1992”).

91. See generally Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice) Dec. 2012, at 2, available at <http://www.ojjdp.gov/pubs/232932.pdf>.

92. See JOLANTA JUSZKIEWICZ, *BUILDING BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED?* 2, available at [http://www.njjn.org/uploads/digital-library/resource\\_127.pdf](http://www.njjn.org/uploads/digital-library/resource_127.pdf).

93. See Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 483 (1998) (labeling this school of thought as forfeiture theory).

from juvenile court.<sup>94</sup>

Over 200,000 youth under the age of eighteen face prosecution as adults in criminal court annually.<sup>95</sup> Despite their prevalence, transfer policies have not resulted from evidence showing the effectiveness of such transfers. In fact, the opposite appears to be true: transfer policies do not deter<sup>96</sup> and have instead led to significant increases in recidivism across several jurisdictions.<sup>97</sup> The dangerous truth is that the American criminal justice system has long been the place that turns untested ideas into guiding principles and embraces approaches without attention to whether the promised outcomes will ever occur.

*C. Correcting the Course: The Case for Revisiting Distinctive Treatment for Young Offenders*

The Supreme Court has recently planted the seed for a changed perception of youthful offenders. Recently, in a trio of decisions, the Court has examined questions of culpability and punishment for juveniles prosecuted in the adult system. The Court's decisions reveal its willingness to examine and recognize a body of developmental research that has emerged in the past fifteen years that questions assumptions about adolescent crime. Indeed, the Court's receptiveness to this data may signal the beginning of a third shift in how we perceive and treat youthful offenders.

The past few decades have witnessed a marked increase in the number of adolescents challenging their convictions and harsh punishments in the adult criminal justice system. In response to their arguments, the Supreme Court has determined that the most draconian sentences cannot withstand constitutional scrutiny as applied to juvenile offenders. The Court has invalidated the death penalty for all juvenile offenders under the age of eighteen,<sup>98</sup> the imposition of life without parole sentences for convictions of nonhomicide offenses,<sup>99</sup> and the mandatory imposition of such sentences for juvenile offenders in homicide cases.<sup>100</sup> These recent rulings track the Court's earlier conclusion in a case that

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94. *Id.*

95. Jennifer J. Woolard, Candice Odgers, Lonn Lanza-Kaduce & Hayley Daglis, *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 4 (2005).

96. AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 2 (2006); Jeffrey Fagan, Aaron Kupchik & Akiva Liberman, *Be Careful What You Wish For: Legal Sanctions and Public Safety Among Adolescent Felony Offenders in Juvenile and Criminal Court* (Columbia Law School, Pub. Law Research Paper No. 03-61, 2007).

97. 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, 1457-58 (2006); COALITION FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING & SENTENCING YOUTH IN ADULT CRIMINAL COURT 2 (2005); Fagan, Kupchik & Liberman, *supra* note 96, at 17, 70.

98. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

99. *Graham v. Florida*, 560 U.S. 48, 81 (2010).

100. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

came down more than thirty years ago, that “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”<sup>101</sup> Rather than perpetuating the fiction that the criminal conduct of youthful offenders renders them beyond rehabilitation or redemption, the Court acknowledged that recklessness and impulsivity—the “signature qualities” of youth—are all “transient.”<sup>102</sup> In so noting, the Court has found persuasive a growing scientific consensus:<sup>103</sup> basic differences between adolescents and adults not only exist but fundamentally affect the culpability of adolescents even when they engage in behavior where death results.

The Court’s holdings emphasize that children need greater attention and protection in the criminal justice system. The Court’s 2005 decision in *Roper v. Simmons*, struck down the death penalty for young offenders under the age of eighteen. The Court found that, even in serious murder cases, children are less deserving of severe punishment due to three significant developmental gaps between adolescents and adults: impulsivity linked to developmental factors, susceptibility to external pressures, and a still-developing identity.<sup>104</sup> Specifically, the Court noted that, as compared with adults, teenagers have a “lack of maturity and an underdeveloped sense of responsibility” that lead to impulsivity and thoughtless risk taking.<sup>105</sup> Second, children “are more vulnerable or susceptible to negative influences and outside pressures” including peer pressure and the influence of environments over which they exercise little control.<sup>106</sup> Third, a child’s identity is not as “well formed” as an adult’s character, and the traits that she may exhibit are “less fixed.”<sup>107</sup>

Central to the Court’s reasoning in *Roper* was the conclusion that children are not simply miniature adults. Even in a case in which a seventeen-year-old, along with friends, broke into a woman’s home, kidnapped her, and murdered her by tossing her into a river,<sup>108</sup> the Court found the death penalty inappropriate.<sup>109</sup> The Court noted that “juvenile offenders cannot with reliability be classified among the worst offenders.”<sup>110</sup> What the Court made clear was that the offense did not somehow magically transform *Roper* into an adult because

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101. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

102. *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

103. See *Miller*, 132 S. Ct. at 2464 n.5 (noting an “ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions” about the differences that adolescents exhibit) (citing Brief for Am. Psychological Ass’n, Am. Psychiatric Ass’n & Nat’l Ass’n of Soc. Workers, as Amici Curiae Supporting Petitioners, *Miller v. Alabama* 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647)).

104. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

105. *Id.* at 569 (quoting *Johnson*, 509 U.S. at 367).

106. *Id.* (citing *Eddings*, 455 U.S. at 115).

107. *Id.* at 570.

108. *Id.* at 556–57.

109. *Id.* at 568.

110. *Id.* at 569.

even the most heinous crimes, when committed by children, are not conclusive evidence of “irretrievably depraved character” justifying a death sentence.<sup>111</sup> In reaching that conclusion, the Court cited and relied on studies that showed “[o]nly a relatively small proportion of adolescents” who engage in risky or illegal activity actually “develop entrenched patterns of problem behavior.”<sup>112</sup>

The Court also acknowledged the toxic impact of negative environments. Rather than placing blame solely on the youthful offender, the Court attributed some responsibility to the influence of dangerous environments in which young offenders often find themselves. A troubled neighborhood or abusive household can be a risk factor for juvenile offending, and these settings prove difficult to escape—particularly for minors. Precisely because of their legal minority, children typically have no choice over the environment in which they are raised and lack the ability to leave a harmful environment. Furthermore, laws designed to protect children, such as restrictions on driving, working, and leaving school, limit their capacity to remove themselves from negative surroundings. Thus, the Court noted, teenagers’ “own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”<sup>113</sup>

Five years later, the Court built on the foundations of *Roper* and established a categorical ban against life without parole sentences for juvenile offenders convicted of a nonhomicide offense. In *Graham v. Florida*, the Court concluded that a sentence of life without the possibility of parole was excessive in a case involving a sixteen-year-old convicted of armed burglary.<sup>114</sup> The Court emphasized that the distinctive traits of juvenile offenders serve to diminish the power of penological justifications often cited to support imposition of harsh sentences. The Court observed that because “[t]he heart of the retribution rationale” relates to an offender’s blameworthiness, “the case for retribution is not as strong with a minor as with an adult.”<sup>115</sup> Indeed, deterrence rationales fell short as well because children’s impetuosity, recklessness and susceptibility to peer pressure make it less likely that they will weigh consequences such as severe punishment before acting.<sup>116</sup> Similarly, incapacitation justifications could not support a life without parole sentence in the case of juveniles committing nonhomicide offenses.<sup>117</sup> The Court asserted that making a decision to incapacitate a child for the rest of her life would mean that society was making

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111. *Id.* at 570.

112. *Id.* (quoting Steinberg & Scott, *supra* note 7, at 1014).

113. *Id.*

114. *Graham v. Florida*, 560 U.S. 48 (2010).

115. *Id.* at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

116. *See id.* at 2028–29 (quoting *Roper*, 543 U.S. at 571, *Johnson v. Texas*, 509 U.S. 350, 367 (1993), and *Kennedy v. Louisiana*, 554 U.S. 407, 441–42 (2008)).

117. *See id.* at 2029.

the judgment that a “juvenile offender forever will be a danger to society.”<sup>118</sup> But, as the Court noted, “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>119</sup> A finding of incorrigibility makes little sense given what we know about children: they are works in progress.<sup>120</sup> Thus, the Court’s reasoning in *Graham* tracked and reaffirmed that of the *Roper* court.

The *Graham* Court relied on “developments in psychology and brain science” to buttress its conclusions that youth status matters.<sup>121</sup> Those findings offered both psychological and biological support for what parents know from experience: teenagers experience “[d]ifficulty in weighing long-term consequences” and exhibit “a corresponding impulsiveness.”<sup>122</sup> It noted that the “parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>123</sup> The Court concluded that the immaturity and vulnerabilities that characterize youth should bear directly on the justice system’s assessment of punishment and personal culpability.<sup>124</sup> What made these youthful traits salient in the justice context was that they at once lessened a child’s “moral culpability” and increased the probability that with time and attendant neurological development, the child’s “deficiencies will be reformed.”<sup>125</sup>

Finally, in 2012, the Court addressed the question left open by *Graham*. In the companion cases *Miller v. Alabama*<sup>126</sup> and *Jackson v. Hobbs*,<sup>127</sup> the Court held that mandatory life without parole sentences for all children under the age of eighteen are unconstitutional. The Court’s ruling struck down statutes in twenty-nine states that mandated the imposition of life without parole sentences for children upon conviction of homicide. The Court made clear that failing to consider the mitigating qualities of youth in the assessment of culpability “contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot

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118. *Id.* at 2029.

119. *See id.* at 2029 (quoting *Roper*, 543 U.S. at 572).

120. *See id.*

121. *Id.* at 2026.

122. *Id.* at 2032 (citing Brief for J. Lawrence Aber, Marc S. Atkins, Camilla P. Benbow, Mary M. Brabeck, Jerome Bruner, Hardin L.K. Coleman, Jane C. Conoley, Kenneth A. Dodge, Michelle Fine, Douglas Fuchs, Lynn S. Fuchs, Frances M. Jensen, Brinton Lykes, Jacqueline Mattis, Pedro Noguera, Isaac Prilleltensky & Niobe Way, as Amici Curiae Supporting Petitioners at 35, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412)).

123. *Id.* at 2026 (citing Brief for Am. Med. Ass’n & Am. Acad. Child and Adolescent Psychiatry as Amici Curiae Supporting Neither Party at 16–24, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412) and Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 22–27, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412)).

124. *See id.* at 2027.

125. *Id.* at 2026–27 (quoting *Roper*, 543 U.S. at 570).

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

127. *Id.*

proceed as though they were not children.”<sup>128</sup> Because the Court’s ban on mandatory life without parole sentences was sufficient to decide the cases of *Miller* and *Jackson*, the Court explained that it did not need to reach the question of whether the Eighth Amendment “requires a categorical bar on life without parole for juvenile, or at least for those 14 and younger.”<sup>129</sup> But Justice Kagan, writing for the majority, did insist that “appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.”<sup>130</sup>

The Court in *Miller* and *Jackson* was not announcing novel legal theories or principles. The decision flowed from the reasoning and data that the Court had already accepted in *Roper* and *Graham*: those meting out punishment must have the ability to consider a juvenile’s “lessened culpability” and greater “capacity for change.”<sup>131</sup> What seemed to move the Court was an ever-growing body of science and social science research that not only confirmed the conclusions in *Roper* and *Graham*, but strengthened them.<sup>132</sup> Both Evan Miller and Kuntrell Jackson were fourteen years old at the time of their offenses and both their age and the “wealth of characteristics and circumstances attendant to it”<sup>133</sup> were “relevant to the Eighth Amendment.”<sup>134</sup> The Court worried that without the discretion to take into account an offender’s age, every juvenile would receive “the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve”<sup>135</sup> even though the “two classes differ significantly in moral culpability and capacity for change.”<sup>136</sup>

When read as a whole, these three opinions craft a compelling argument. They insist that the justice system acknowledge that children differ from adults in ways that bear directly on the question of their culpability and their capacity for change. In so doing, it becomes clear that making a final, irreversible judgment that a teenager, whose character is far from fully formed, will never be suited for release later in life is, at once, unreliable and wrong. A teenager who acts irresponsibly in reaction to an impulse or peer pressure is not irretrievably depraved or permanently flawed. In fact, evidence suggests in the vast majority of cases, he will grow up to be a moral, law-abiding adult if given the chance.<sup>137</sup> As importantly, what is significant about these opinions is their reliance on scientific studies of adolescent brain structure and functioning and social science research of adolescent behavior that confirm what every parent knows: teenagers

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128. *Id.* at 2458 (emphasis added).

129. *Id.* at 2469.

130. *Id.*

131. *Id.* at 2460 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026–27, 2029–30 (2010)).

132. *Id.* at 2464 n.5.

133. *Id.* at 2460.

134. *Id.* at 2466.

135. *Id.* at 2468.

136. *Id.* at 2468 n.7.

137. See Steinberg & Scott, *supra* note 7, at 1014–15.

are not fully developed personalities;<sup>138</sup> they are driven by circumstances and impulses;<sup>139</sup> are vulnerable to the influences of their peers;<sup>140</sup> are less capable of considering alternative courses of action and avoiding unduly risky behavior;<sup>141</sup> and lack the self-control that almost all of them will gain later in life.<sup>142</sup>

A mounting body of biological and scientific research helps us understand and explain the reasons that teenagers behave as they do.<sup>143</sup> This research sits at the core of the Court's reasoning. It seems unlikely that the Court will have much more to say in this area unless, contrary to Justice Kagan's prediction, the imposition of life without parole sentences under a discretionary scheme become something other than rare occurrences.<sup>144</sup> At that point, the Court might be willing to consider a categorical ban on such sentences particularly for the youngest offenders. But state legislatures seem the more likely choice to pick up the strands of the developing story about adolescent development. Indeed, to ground the story, and to make sound policy decisions, legislators must begin where the Court did—with the data about adolescent development.

### III.

#### THE CONSEQUENCES OF BLURRING THE DISTINCTION

For too long, a different and disturbing story has unfolded with heartbreaking clarity. Animated by fear and limited understanding, policymakers have promulgated laws and policies that have blurred the distinction between adolescents and adults. That politically driven choice has exacted untold and unacceptable costs: youth of color have been disproportionately prosecuted and

138. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 52 (2008) (explaining that “coherent integration of [identity] does not occur until late adolescence or early adulthood”); Lawrence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 26–27 (Thomas Grisso & Robert G. Schwartz eds., 2000) (noting “most identity development takes place during the late teens and early twenties.”).

139. See Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 472 (2009).

140. See Laurence Steinberg & Kathryn Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007).

141. See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756–57 (2000) (finding that “maturity of judgment” is correlated to “antisocial decision-making,” but that responsibility, perspective, and temperance are more predictive than age alone).

142. See Laurence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1774–76 (2008).

143. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 n.5 (2012) (noting an “ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions” about the differences that adolescents exhibit) (citing Brief for Am. Psychological Ass'n, Am. Psychiatric Ass'n & Nat'l Ass'n of Soc. Workers, as Amici Curiae Supporting Petitioners, *Miller v. Alabama* 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647)).

144. *Miller*, 132 S. Ct. at 2469.

punished in the adult justice system. Indeed, the practice of criminalizing adolescent conduct has stoked unconscionable racial disparities in the justice system. But what has made the costs so troubling is that the harsh treatment young people have endured does not actually enhance safety or serve justice. Given these consequences, a course correction is long overdue.

*A. Adult Treatment Embodies and Perpetuates Unacceptable Racial Disparities*

Almost all adolescents participate in some sort of antisocial conduct, which may include conduct that breaks the law.<sup>145</sup> But not all adolescents will be exposed to the sanctions of arrest and processing in court. We invoke the power of the state selectively, in part, to get the best bang for the buck. Limited resources available to monitor delinquent behavior, to apprehend individuals who may have engaged in such conduct, and to engage the formal system of justice, mean that states cannot enforce the law against every offender for every offense. How we choose to deploy limited resources, though, reveals much about the normative choices that we make as a society. But if we examine who tends to feel the weight of the state's power and who does not, who becomes the example and who does not, an uneasy pattern emerges. As the following discussion shows, we make the choice to activate the formal system of justice more often against a select group of those children: children of color.<sup>146</sup>

Adolescents, at once, covet and flaunt adult independence and childish irresponsibility. But their fitful and uneasy vacillation between adulthood and childhood often, at a minimum, sparks enormous mutual incomprehension in the larger society. Of course, the entitlement—or, perhaps more pointedly, the irritation—of adolescents is to be emphatically different. When we add a racial dimension to this different behavior, we tend to perceive these adolescents' conduct with less sentimentality.<sup>147</sup> The acts of children of color, for some, seem more perplexing and, ultimately, more threatening.<sup>148</sup>

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145. See Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 685–686 (1993) (noting that numerous rigorous self-report studies show that it is “statistically aberrant” for adolescents to refrain from crime during adolescence).

146. See NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007).

147. See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice*, 98 *CORNELL L. REV.* 383, 403–04 (2013).

148. See Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 *DEPAUL L. REV.* 679, 704, 708 (2002); George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *AM. SOC. REV.* 554 (1998).

### 1. *Exercise of Discretion Brings Racial Dynamics into Play*

The fear-inspired policies that have dominated the justice system since the end of the last century took direct aim at young offenders of color.<sup>149</sup> Youth of color have faced, and continue to receive, harsh treatment in the justice system through disproportionate prosecution as adults. Both the decision to seek as well as to grant a transfer into the adult criminal justice system tends to be quite subjective. In making the discretionary call to expose an individual offender to adult prosecution, decision makers must weigh whether a child is amenable to treatment or instead poses a danger to society.<sup>150</sup> Even in those instances where the legislature has delineated those offenses that require adult prosecution, some degree of subjectivity remains: the prosecutor often still maintains the discretion to charge the young person with a particular designated offense that will force the charge into adult court.<sup>151</sup> And, in the exercise of that discretion, we see disproportionately more youth of color transferred to adult court.<sup>152</sup>

At least in theory—and perhaps at times in our history—discretion has redounded to the benefit of the accused. Discretion itself permits actors in the justice system to insert their own judgments to influence outcomes in the justice system. At times, participants in the criminal justice system and scholars have alternated between applauding discretion and encouraging its use,<sup>153</sup> or blaming it for a wide range of evils and limiting its exercise.<sup>154</sup> But, of late, as the social norms animating the justice system have swung towards increased punishments and greater retribution for acts, it should perhaps come as no surprise that the

149. See Moriearty, *supra* note 55, at 850–51.

150. See *The Transformation of Juvenile Court*, *supra* note 21, at 358, 361.

151. See Simon I. Singer, *The Automatic Waiver of Juveniles and Substantive Justice*, 39 CRIME & DELINQ. 253, 256 (1993).

152. See, e.g., MIKE MALES & DAN MACALLAIR, JUSTICE POLICY INSTITUTE, *THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA* (2000), available at <http://www.cclp.org/documents/BBY/coj.pdf>; Kenneth J. Cooper, *Black Juveniles Tried as Adults at Alarming Rate in Missouri*, BLACK VOICE NEWS (Feb. 14, 2011, 6:37 PM), <http://www.blackvoicenews.com/news/news-wire/45715-black-juveniles-tried-as-adults-at-alarming-rate-in-missouri.html> (noting the racial disparity in transfers and quoting one expert who notes that prosecutors have an incentive to take weak cases into adult court where young people feel pressured to accept a plea bargain or potentially face adult prison time); Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 60 (Fall 2008); CAMPAIGN FOR YOUTH JUSTICE, *THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 2* (2007).

153. See, e.g., Paul Butler, *Jury Nullification: Power to the People*, PRISON LEGAL NEWS, June 2009, at 15; PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 72–73 (2009) (advocating citizen education about jury nullification).

154. Liberal activists believed judicial discretion led to racially disparate sentencing, which led to adoption of sentencing guidelines. Later, conservative tough-on-crime activists similarly blamed exercise of discretion by judges as allowing them to be too soft on crime and advocated for mandatory sentencing schemes, such as “Three Strikes and You’re Out.” See, e.g., CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 226 (2d ed. 2009) (an example of a determinate sentencing guideline).

exercise of discretion has become one of “prosecutorial maximization”<sup>155</sup>—using discretionary power to intensify the effects of changes in the law. Discretion by both prosecutors and judges in the transfer system has maximized the severity of criminal justice decisions regarding juvenile defendants.

In the exercise of discretion, racial bias affects virtually every critical stage of a prosecution of youthful offenders in the system. Data reveal that racial disparities plague enforcement decisions, which begin with the decision to arrest. According to Human Rights Watch, every year from 1980 to 2007, blacks throughout the country were arrested for drug offenses at rates 2.8 to 5.5 times higher than whites relative to their representation in the population.<sup>156</sup> Contrary to popular perceptions, the higher rates of drug arrests do not reflect higher incidences of offending by blacks. Indeed, in its May 2008 report, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, Human Rights Watch detailed that blacks and whites engage in drug possession and drug sales at roughly comparable rates. But because law enforcement has principally waged the War on Drugs in communities of color, the burden of drug arrests and incarceration fall disproportionately on black men, women, and their families.<sup>157</sup>

Youth of color also disproportionately face arrest. Police practices that direct their efforts towards low-income urban communities and employ group arrest procedures can contribute to disproportionate arrests of young people of color.<sup>158</sup> For example, in the past five years, the New York City Police Department (NYPD) has been implementing a controversial program of stopping and frisking individuals whom they consider suspicious. In looking at this program, the New York Civil Liberties Union reviewed the NYPD’s data and found that in 2011, New Yorkers were stopped by the police 685,724 times; 53% were black, 34% were Latino, 9% were white and 51% were between the ages of fourteen and twenty-four.<sup>159</sup> In the first six months of 2012, the patterns continued to hold steady. New Yorkers were stopped by the police 337,434

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155. See DANIEL P. KESSLER & ANNE MORRISON PIEHL, THE ROLE OF DISCRETION IN THE CRIMINAL JUSTICE SYSTEM 4–5, 25–26 (Nat’l Bureau of Econ. Research, Working Paper No. 6261, 1997), available at <http://www.nber.org/papers/w6261.pdf>.

156. HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 7 tbl.2 (2009).

157. *Id.* at 1 (citing HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES (2008)).

158. JEFF ARMOUR & SARAH HAMMOND, NATIONAL CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 4 (2009).

159. *Stop and Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Sept. 27, 2013). See also *Floyd v. City of New York*, No. 08 Civ. 1034, 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. 2013), superseded by *Ligon v. City of New York*, 736 F.3d 119 (2d Cir. 2013), in which Judge Shira A. Scheindlin held that the City of New York violated plaintiffs’ Fourth and Fourteenth Amendment rights by acting with deliberate indifference toward NYPD’s practice of making unconstitutional stops and frisks. She further found that the NYPD targeted blacks for stops “based on a lesser degree of objectively founded suspicion than whites.”

times; of those stopped, 55% were black, 32% were Latino and only 10% were white.<sup>160</sup> It is important to note that decisions throughout the criminal process are interrelated and can affect racial disparities cumulatively with early stage decisions (to arrest, charge, and detain) influencing later decisions in the system.<sup>161</sup>

Racial disparities also plague the transfer process. Efforts to introduce “objective” waiver criteria with a mandate that judges take racial disparity into account when deciding whether to transfer a case to adult court have not reduced the high degree of arbitrariness that mark and mar the transfer process. One state that insisted on these objective factors was Missouri. In 2009, sixty-four percent of juveniles statewide prosecuted as adults were African American.<sup>162</sup> This number was nearly double the 2001 level of juveniles prosecuted as adults who were African American, which was thirty-six percent.<sup>163</sup> Missouri law permits the prosecution in adult court of any juvenile accused of a felony, but the judge must hold a hearing on whether to transfer the most serious offenses. Juvenile court judges, by law, must consider ten factors when making the decision to transfer, including the severity of the alleged crime, any personal injury done, and the accused’s age and record.<sup>164</sup> Racial disparity represents the tenth factor.<sup>165</sup> The user’s guide to help judges apply the factors notes that proof of disparity “should weigh against” prosecuting a juvenile as an adult. Even when the system consciously tracks race in the exercise of discretion, the race effect persists and black youth continue to be overrepresented in cases transferred for adult treatment.<sup>166</sup>

The numbers are telling. While African American youth ages ten to seventeen make up approximately fifteen percent of their age group, and twenty-five percent of all juvenile arrestees, they comprise nearly sixty percent of waivers to adult criminal court nationally.<sup>167</sup> Countless studies have examined the racial dynamics in the transfer process.<sup>168</sup> Virtually all studies that track the

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160. *Id.*

161. See NAT’L COUNCIL ON CRIME & DELINQUENCY, *supra* note 146, at 4.

162. Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens are Overly Tried as Adults*, ST. LOUIS BEACON (May 10, 2011), [https://www.stlbeacon.org/#!/content/16224/black\\_teens\\_disproportionately\\_tried\\_as\\_adults](https://www.stlbeacon.org/#!/content/16224/black_teens_disproportionately_tried_as_adults).

163. *Id.*

164. *Id.*

165. *Id.*

166. See Cooper, *supra* note 152 (noting that prosecutors have an incentive to take weak cases into adult court where young people feel pressured to accept a plea bargain or potentially face adult prison time).

167. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 483–84 (2004).

168. See, e.g., AMANDA BURGESS-PROCTOR, KENDAL HOLTROP & FRANCISCO A. VILLARRUEL, CAMPAIGN FOR YOUTH JUSTICE, *YOUTH TRANSFERRED TO ADULT COURT: RACIAL DISPARITIES* (2006), available at <http://www.campaignforyouthjustice.org/documents/YouthTransferred.pdf>; MALES & MACALLAIR, *supra* note 152; THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* (2000),

race of transferred youth find that youth of color, and African Americans in particular, are overrepresented and constitute anywhere from fifty to ninety-five percent of all transferred youth.<sup>169</sup> For drug cases in 2003, for example, white youth nationally represented sixty-nine percent of cases filed, but only fifty-eight percent of cases waived into the adult criminal justice system for prosecution.<sup>170</sup> African American youth charged with drug offenses made up twenty-nine percent of cases petitioned but forty-one percent of the cases waived to adult court.<sup>171</sup> Thus, in cases involving drug offenses, white youth enjoyed an eleven percent “waiver advantage,” while African American youth carried the burden of a twelve percent “waiver disadvantage.”<sup>172</sup>

African American youth bear the brunt of the arbitrariness in the transfer process, but other youth of color suffer as well. Latino youth are forty-three percent more likely than their white counterparts to face adult criminal justice prosecution and forty percent more likely to be incarcerated in adult prisons.<sup>173</sup> Native American youth comprise the majority of youth held in the federal juvenile justice system, and thirty-one percent of the youth committed to the Federal Bureau of Prisons as adults are Native American.<sup>174</sup> A study in 2005 examining the data for transfers in Florida, the state where Cristian Fernandez faced adult prosecution, found that nearly seven out of ten children transferred into the adult criminal justice system were children of color.<sup>175</sup>

When researchers examine the racial data in different offense categories, a similar pattern emerges. A sample of representative studies offers some insights. One study found, after controlling for the seriousness of the offense, that juvenile court judges transferred youth of color more frequently than white youth, with the greatest disparities for youth charged with violent and drug offenses.<sup>176</sup> Another California study found that youth of color arrested for violent crimes

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available at [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf); JASON ZIEDENBERG, JUSTICE POLICY INST., DRUGS AND DISPARITY: THE RACIAL IMPACT OF ILLINOIS' PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT (2001), available at <http://www.justicepolicy.org/research/2059>; JOLANTA JUSZKIEWICZ, TO PUNISH A FEW: TOO MANY YOUTH CAUGHT IN THE NET OF ADULT PROSECUTION (2007), available at [http://www.campaignforyouthjustice.org/documents/to\\_punish\\_a\\_few\\_final.pdf](http://www.campaignforyouthjustice.org/documents/to_punish_a_few_final.pdf).

169. DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 57 (Marilyn D. McShane & Frank Williams eds., 2005).

170. See Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PRACTICING LAW. INST. CRIM. 397 (1999).

171. *Id.*

172. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 146, at 2.

173. NEELUM ARYA, FRANCISCO VILLARRUEL, CASSANDRA VILLANUEVA & IAN AUGARTEN, CAMPAIGN FOR YOUTH JUSTICE, AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE 6 (2009).

174. *Id.* at 26.

175. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 152, at 6.

176. Barry C. Feld, *Race and the Jurisprudence of Juvenile Justice: A Tale in Two Parts, 1950–2000*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 122, 154 (Darnell Hawkins & Kimberly Kempf-Leonard eds., 2005).

were 3.1 times more likely to be transferred and convicted than white youth arrested for violent crimes.<sup>177</sup> And finally, a study examining the treatment of juveniles in Cook County, Illinois, in the year following implementation of a law mandating adult prosecution of fifteen- and sixteen-year-olds charged with certain drug violations, found that the youth transferred were *all* African American.<sup>178</sup>

Race, rather than severity of offense, drives the transfer process. A study by the Justice Policy Institute (“JPI”) found that race seemed to be a strongly predictive factor in both arrest and transfer rates.<sup>179</sup> The JPI study did note that for every white youth arrested for a violent crime in Los Angeles County, 2.8 minority youths were arrested.<sup>180</sup> But, significantly, after the felony arrest, the youth of color is 6.2 times as likely to wind up in adult court.<sup>181</sup> As the study continued to examine the process, it found that the ratio of adult court prison sentences increased even further: youth of color arrested for violent crimes were seven times more likely to receive prison sentences than white youths arrested for and convicted of similar crimes.<sup>182</sup> The numbers were even more staggering in JPI’s statewide analysis. It observed that the numbers for black youth were particularly stark: as compared to white youths who are transferred and prosecuted in the adult system, black youths were 18.4 times more likely to be sentenced to prison by an adult court judge.<sup>183</sup> Latinos were 7.3 times more likely and Asian Americans were 4.5 times more likely than whites to be sentenced to such facilities.<sup>184</sup> The data led the JPI researchers to conclude that “the discriminatory treatment of minority youth arrestees accumulates within the justice system and accelerates measurably if the youth is transferred to adult court.”<sup>185</sup>

## 2. *The Power of Designation—“Boys will be Men?”*

A review of national data reveals a gender dimension to the transfer decision: young men are transferred to adult court more frequently than young women. Indeed, about 95% of all transferred youth are male.<sup>186</sup> Various state

177. MALES & MACALLAIR, *supra* note 152, at 10; Jason J. Washburn, Linda A. Teplin, Laurie S. Voss, Clarissa D. Simon, Karen M. Abram & Gary M. McClelland, *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 966 (2008).

178. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN 23, 36 (2000).

179. See MALES & MACALLAIR, *supra* note 152, at 10 (examining statistics from Los Angeles County and California as a whole).

180. *Id.* at 7.

181. *Id.* at 7–8.

182. *Id.* at 8.

183. *Id.* at 9.

184. *Id.*

185. *Id.* at 10.

186. MYERS, *supra* note 169, at 58.

studies reveal the pattern. A 2008 study in California found that courts were more likely to deem young men unfit to remain under juvenile court jurisdiction than young women: courts transferred 64.2% of males to adult court, finding them unfit for juvenile treatment as compared to 48.5% of females.<sup>187</sup> An Idaho study reported similar results. Between 1995 and 1999, males made up 98% of all juveniles seventeen years old and younger who were waived into adult court.<sup>188</sup> Another study noted that while males accounted for an estimated 72% of all juvenile offenses, 91% of all juveniles transferred to adult court were male.<sup>189</sup>

The prevalence of transfer provisions has led to an alarming increase in the number of transfers of younger youth. Children as young as thirteen are being admitted into adult prisons in growing numbers.<sup>190</sup> In twenty-two states and the District of Columbia, children as young as seven can be prosecuted and tried in adult court.<sup>191</sup> More than 1,600 youth waived into adult court through judicial waiver in the last twenty years were thirteen years old or younger.<sup>192</sup> When we look at the younger children transferred to adult court—twelve years old and younger—the population is disproportionately male and African American.<sup>193</sup> But perhaps what is most troubling about this figure is that these children being transferred to adult court are not necessarily those who have committed the worst offenses. Between 1995 and 2004, 170 children twelve or younger were transferred to adult court for property offenses; 19 were transferred for drug offenses; and 96 were transferred for public order offenses.<sup>194</sup>

The repercussions of subjecting children to adult treatment are only beginning to be discussed widely and better understood. Lifetime consequences—ranging from the burden of a conviction with all of its attendant collateral consequences to the increased likelihood of victimization in an adult facility—attach to the actions engaged in by someone who at the time of the offense was too young to see an “R” rated film. The discretionary choice to prosecute this child not only endangers the child and her life prospects, but it also jeopardizes the safety of the community.<sup>195</sup>

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187. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 2008 38 (2008).

188. Benjamin Steiner, *Predicting Sentencing Outcomes and Time Served for Juveniles Transferred to Criminal Court in a Rural Northwestern State*, 33 J. CRIM. JUST. 601, 604 (2005).

189. MICHELE DEITCH, AMANDA BARSTOW, LESLIE LUKENS & RYAN REYNA, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 32 (2009).

190. Woolard, Odgers, Lanza-Kaduce & Daglis, *supra* note 95, at 6.

191. DEITCH, BARSTOW, LUKENS, & REYNA, *supra* note 189, at xiii.

192. *Id.* at 30.

193. *Id.* at 32.

194. *Id.* at 31 fig.6.

195. See discussion *infra* Part III.B.

*B. Harsh Treatment Does Not Accomplish the Goals of Just Punishment*

The Supreme Court relied, in part, on scientific data to conclude that courts should not treat children the same as adults. Let's unpack the data that accounts for the often startling behavior of adolescents. Statistics on car crashes, contraceptive use, binge drinking, and criminal conduct demonstrate that adolescents have weak behavioral controls and are more likely to engage in risky behavior than adults.<sup>196</sup> Indeed, "adolescents are overrepresented in virtually every category of reckless behavior"<sup>197</sup> largely because at this stage of development they have not yet progressed to a point where they have the capacity to make reasoned and mature judgments.<sup>198</sup> The impulsive, risk-taking behavior is, in fact, so common as to be deemed a "normative characteristic of adolescent development."<sup>199</sup> And this lack of maturity and underdeveloped sense of identity, found more often in young people than adults, means that adolescents are more impulsive. They seek sensation and enjoy "the jolt of the unusual or unexpected."<sup>200</sup>

Biological impulsivity includes both minor and serious criminal activity. Official rates of crime, when tracked by age, indicate that rates of offending are highest during adolescence.<sup>201</sup> Engagement in both violent and minor crimes appears to "peak sharply" at about age seventeen and then "drop precipitously" in young adulthood.<sup>202</sup> When we add self-reporting studies to this data,<sup>203</sup> rates of offending skyrocket, suggesting that participation in delinquent and even illegal conduct is a normal part of teen life.<sup>204</sup> But, the good news appears to be that this conduct tends to be "adolescence-limited" rather than "life-course-

196. See Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55 (2007) [hereinafter Steinberg, *Risk Taking*].

197. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

198. Beatriz Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR: NEURODYNAMICAL, METHODOLOGICAL AND CLINICAL TRENDS 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009); Cauffman & Steinberg, *supra* note 141, at 756 (2000); Taylor-Thompson, *supra* note 14.

199. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992).

200. David Dobbs, *Beautiful Brains*, NAT'L GEOGRAPHIC, Oct. 2011, at 37, 49.

201. Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993).

202. *Id.* at 675; Arnett, *supra* note 199, at 343; Terrie Moffitt, *Natural Histories of Delinquency*, in CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR 3, 29 (Elmar Weitekamp & Hans-Jurgen Kerner eds., 1994).

203. ROGER HOOD & RICHARD SPARKS, KEY ISSUES IN CRIMINOLOGY 13 (1970); Malcolm W. Klein, *Watch out for that Last Variable*, in THE CAUSES OF CRIME: NEW BIOLOGICAL APPROACHES 25, 35–36 (Sarnoff A. Mednick, Terrie Moffitt & Susan A. Stacks eds., 1989).

204. DELBERT S. ELLIOTT, SUZANNE S. AGETON, DAVID HUIZINGA, BRIAN A. KNOWLES & RACHELLE J. CANTER, NATIONAL YOUTH SURVEY, THE PREVALENCE AND INCIDENCE OF DELINQUENT BEHAVIOR: 1976–1980 (1983), available at <https://www.ncjrs.gov/pdffiles1/Digitization/128841NCJRS.pdf>.

persistent.”<sup>205</sup> This “age-crime-curve” is “[o]ne of the most consistent findings across studies.”<sup>206</sup>

Choosing to treat young offenders as adults ignores the fundamental distinctions between adolescents and mature adults.<sup>207</sup> Moreover, the policy decision to transfer youthful offenders into the adult system for prosecution fails to satisfy the purposes of punishment typically advanced within the criminal justice system. Harsh treatment of youthful offenders does not serve the end of retribution because the punishment is disproportionate to the culpable act; adult treatment does not serve as an effective deterrent and instead plays little role for adolescents who experience difficulty in assessing consequences; it does not rehabilitate young people and instead causes harm that may prove irreparable. Thus, the choice to ignore critical developmental differences between the young offender and her more mature adult counterpart raises compelling questions about the justness of the punishment choice.

### *1. Punitive Treatment Does Not Serve the Ends of Retribution*

The principal rationale for harsher treatment of youthful offenders at the end of the twentieth century was retribution. Under this theory, young offenders who had committed an adult-like crime deserved to pay for that offense as an adult offender would. But broad-brush judgments about just deserts conflate questions about the offender and the offense, ignoring the critical culpability distinctions that shift with age. As the Supreme Court has recognized,<sup>208</sup> adolescent offenders have, at once, diminished moral culpability and increased capacity for change by virtue of their youth status. Therefore, teenagers do not deserve the harsh treatment typically reserved for hardened offenders.

Retributive theorists seek to hold an individual accountable for the choices that she makes.<sup>209</sup> But adolescent impulsivity diminishes a teenager’s ability to exercise the sort of mature judgment and decision making that adult courts treat as typical for adult offenders.<sup>210</sup> Retributive theory makes little sense when one is not acting freely—that is, when one cannot exercise mature judgment. Research demonstrates that judgment and decision making among adolescents differs from adults in several key ways: adolescents exhibit biologically based impulsivity and under-developed self-control mechanisms and, unlike their adult

205. Moffitt, *supra* note 202, at 20–21.

206. ROLF LIEBER, DAVID P. FARRINGTON, MAGDA STOUTHAMER-LOEBER & HELENE RASKIN WHITE, VIOLENCE AND SERIOUS THEFT 77 (2008). *See also* Moffitt, *supra* note 202, at 8; Kathryn Monahan, Laurence Steinberg, Elizabeth Cauffman & Edward P. Mulvey, *Trajectories of Antisocial Behavior and Psychological Maturity from Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCHOL. 1654 (2009).

207. *See generally* Taylor-Thompson, *supra* note 14.

208. *See supra* Part II.

209. *See generally* John Braithwaite & Philip Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 4 (1990).

210. *See* Taylor-Thompson, *supra* note 14, at 143.

counterparts, experience great difficulty diverging from peer expectations.<sup>211</sup>

These hallmark features of the adolescent lead to deficient judgment.<sup>212</sup> Adolescents are peculiarly susceptible to physical and psychological pressures toward risk taking and are less capable of controlling their social and emotional impulses.<sup>213</sup> That propensity toward risk taking exacerbates their decision-making difficulties.<sup>214</sup> For example, a study assessing maturity of judgment, written by Elizabeth Cauffman and Laurence Steinberg in 2000, found that adolescents exhibited diminished psychosocial functioning, defined as an adolescent's social and emotional capability critical to the exercise of mature judgment. Adolescents scored lower on self-reliance measures, experienced greater difficulty considering issues from the perspective of others, and faced greater trouble restraining aggressive impulses.<sup>215</sup> Even older adolescents (seventeen-year-olds) scored significantly lower than adults on specific measures of "temperance" which included "impulse control" and "suppression of aggression."<sup>216</sup> Impulse control continues to develop throughout adolescence.<sup>217</sup> In more recent studies using both self-reporting and performance measures, researchers studied variances in impulsivity between ages ten and thirty. They found that impulsivity lessened over time, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood.<sup>218</sup> As adolescents reach adulthood, impulsivity declines significantly, the ability to make more adaptive decisions improves, and they become better able to "resist the pull of social and emotional influences."<sup>219</sup>

Adolescents' heightened vulnerability to risk—perhaps counterintuitively—offers further proof of their diminished culpability. Conventional explanations typically attribute teenage risk taking to momentary lapses: "They're not thinking."<sup>220</sup> But the popular account proves wrong. Adolescents are thinking

211. *See supra* Part II.

212. Brief of J. Lawrence Aber, Marc S. Atkins, Camilla P. Benbow, Mary M. Brabeck, Jane C. Conoley, Kenneth A. Dodge, Michelle Fine, Adriana Galván, Margo Gardner, Charles F. Geier, Frances E. Jensen, Jacquesline Mattis, Pedro Noguera, Bruce D. Perry & Vincent Schmithorst as Amicus Curiae Supporting Petitioners at 10–11, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

213. *See* Adriana Galvan, Todd Hare, Henning Voss, Gary Glover & B.J. Casey, *Risk Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F8, F13 (2007) (finding strengthening impulse controls over time in a study of individuals aged seven to twenty-nine).

214. *See* Cauffman & Steinberg, *supra* note 141, at 745 (noting that the "ability to appreciate the long term consequences of an action, for example, is an important element of perspective, but requires the cognitive ability to weigh risks and benefits, and is related to the ability to forgo immediate gratification . . .")

215. *Id.* at 759.

216. *Id.* at 748–49, 754.

217. Galvan, Hare, Voss, Glover & Casey, *supra* note 213, at F13.

218. Steinberg, Albert, Cauffman, Banich, Graham, & Woolard, *supra* note 142, at 1774–76.

219. Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RESEARCH ON ADOLESCENCE 211, 220 (2100).

220. Dobbs, *supra* note 200, at 54.

and they do often recognize the danger. Research does not support the conclusion that adolescents are wholly irrational or unaware beings. In fact, studies have shown the logical reasoning abilities of fifteen-year-olds to be comparable to adults, finding that adolescents are no worse than adults at perceiving risks or sensing their vulnerability to risk.<sup>221</sup> The problem surfaces in the relative weights assigned to reward versus risk. At this stage of development, adolescents place greater value on the reward than adults do. The risk taking that features prominently among adolescents appears to be the product of logical reasoning, psychosocial factors,<sup>222</sup> and biology. But, that said, what appears to be lacking in adolescents is psychosocial capacity—such as impulse control, emotion regulation, delay of gratification, and resistance to peer pressure—and that capacity will continue to develop and mature into young adulthood.<sup>223</sup>

Human physiology may offer insights as to why adolescents are more prone to take risks, despite their ability to evaluate a risky situation. Neuroscientists continue to compile evidence demonstrating that significant changes in brain structure occur during the adolescent development stage.<sup>224</sup> Most notable among these changes is that connections between the prefrontal cortex and other brain structures continue to mature well into late adolescence.<sup>225</sup> These regions and the interconnections within the brain are critical to “executive” functions like planning, judgment, and the processing and inhibition of impulses.<sup>226</sup> Increased risk taking may flow from the interaction between two brain networks: the socioemotional network (sensitive to social and emotional stimuli and important for reward processing) and the cognitive control network that enables executive functioning such as planning, thinking ahead and self-regulation.<sup>227</sup> A “rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty” pushes the young adolescent to take risks and seek sensations.<sup>228</sup> The structural maturation of the cognitive control system gains strength later, gradually unfolding over the course of adolescence.<sup>229</sup> It is in that temporal limbo between the awakening of the socioemotional system in early

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221. Steinberg, *Risk Taking*, *supra* note 196, at 55.

222. *Id.* at 56.

223. Valerie Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision-Making: Implications for Theory, Practice and Public Policy*, 7 *PSYCHOL. SCI. PUB. INT.* 1, 1–44 (2006); Steinberg, *Risk Taking*, *supra* note 196, at 55.

224. Steinberg, *Risk Taking*, *supra* note 196, at 56.

225. Steinberg & Scott, *supra* note 7, at 1013. *See also* Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holmes, Rajneesh Batth, Terry L. Jernigan & Arthur W. Toga, *Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 *NEUROIMAGE* 587, 596 (1998).

226. ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND* 23, 24, 141 (2001); B.J. Casey, Jay N. Giedd & Kathleen M. Thomas, *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 *BIOLOGICAL PSYCHOL.* 241, 244–46 (2000).

227. Steinberg, *supra* note 139, at 54.

228. Steinberg, Albert, Cauffman, Banich, Graham & Woolard, *supra* note 142, at 1764.

229. *Id.*

adolescence and the “full maturation of the cognitive control system” that we see “a period of heightened vulnerability to risk taking during middle adolescence.”<sup>230</sup>

Adolescents are less resistant to the influence of negative external pressures, including peer pressure. Risk taking tends to be a group phenomenon.<sup>231</sup> We see adolescents spending more time with peers than adults and those relationships operate both as sources of positive experiences and factors leading to antisocial behavior. Vulnerability to peer pressure peaks at age fourteen and then slowly declines during late adolescence.<sup>232</sup> A study of 306 individuals found that exposure to peers doubled the amount of risk taking by mid-adolescents (a mean age of fourteen) and increased it by fifty percent among college undergraduates (mean age of nineteen).<sup>233</sup>

Again, biology is in play when considering adolescents’ vulnerability to peer pressure. Researchers made use of functional magnetic resonance imaging (“fMRI”), a technique to measure brain activity,<sup>234</sup> to replicate this study and to map variations in the activation of various areas of the brain. This study revealed that adolescents engaged in riskier behaviors than their adult counterparts when there was mere awareness that peers were watching.<sup>235</sup> Interaction with peers seems to be a basic need that becomes quite apparent in adolescence—adolescent

230. Steinberg, *supra* note 139, at 45, 46.

231. 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, 281 (Thomas Grisso & Robert G. Schwartz, eds. 2000) (“No matter the crime, if a teenager is the offender, he is usually not committing the offense alone.”); Jason Chein, Dustin Albert, Lia O’Brien, Kaitlin Uckert & Laurence Steinberg, *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain’s Reward Circuitry*, 14 *DEVELOPMENTAL SCI.* F1 (2011) (noting that one of the hallmarks of adolescent risk taking is that it is more likely than that of adults to occur in the presence of peers).

232. SCOTT & STEINBERG, *supra* note 138, at 38; Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 *DEVELOPMENTAL PSYCHOL.* 608, 612, 615 (1979).

233. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 41 *DEVELOPMENTAL PSYCHOL.* 625, 626–34 (2005).

234. “MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the Earth’s. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth.” Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 *J. NAT’L CANCER INST.* 1347, 1348 (1989). *See also* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 *CURRENT OPINION IN NEUROBIOLOGY* 251–52 (2007) (discussing that “structural MRI and functional MRI (fMRI) have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of neurological changes and functional abilities associated with brain maturation.”).

235. Chein, Albert, O’Brien, Uckert & Steinberg, *supra* note 231, at F7 (adolescents showed greater activation in regions of the brain associated with reward processing when they were informed that their peers were watching them).

brains react to peer exclusion in ways similar to reactions to physical threats or threats to food supply.<sup>236</sup> The brain's socioemotional network, which processes social and emotional information, figures prominently as adolescents navigate the influence of their peers.<sup>237</sup> In fact, heightened risk taking in adolescence is the result of competition between two different brain systems: the cognitive-control system that is responsible for executive functions such as planning, self-regulation and thinking ahead and the socioemotional system.<sup>238</sup> In the presence of peers, the teenager's socioemotional system activates, diminishing the regulatory effectiveness of the cognitive-control network and substantially increasing risk taking.<sup>239</sup>

In the end, an adolescent's poor choice to engage in criminal conduct is markedly different from a mature adult's poor choice, even though each may cause harm. The evidence shows that adolescent decision making and the choice to engage in unlawful conduct is highly influenced by biological influences particular to adolescents' stage in development and thus bears little resemblance to the mature exercise of judgment on which retributive theories premise adult punishment. Even before the evidence confirmed this view, the Supreme Court observed almost thirty years ago that youthful offenders "*deserve* less punishment because adolescents may have less capacity to control their conduct and to think in long range terms than adults."<sup>240</sup>

## 2. Adolescent Decision Making Raises Questions About the Efficacy of Deterrence Rationales as a Basis for Punishment

Evidence suggests that transfer policies do not deter<sup>241</sup> youthful offenders from committing crimes and have instead led to dramatic increases in recidivism across several jurisdictions.<sup>242</sup> Deterrence rationales suggest that individuals will weigh the risks of engaging in wrongful conduct. When they juxtapose the perceived or potential benefits of criminal activity with the likelihood of apprehension and punishment, individuals should make the judgment that the punishment outweighs the benefit of committing a crime.<sup>243</sup> The problem is that adolescents tend to lack perspective to engage this analysis as an adult might. By

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236. Dobbs, *supra* note 200, at 36.

237. Steinberg, *Risk Taking*, *supra* note 196, at 56.

238. *Id.*

239. *Id.*

240. *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11) (emphasis added).

241. KUPCHIK, *supra* note 96, at 2; Fagan, Kupchik & Liberman, *supra* note 96.

242. Steiner & Wright, *supra* note 97, at 1457–58 (2006); COALITION FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING & SENTENCING YOUTH IN ADULT CRIMINAL COURT (2005); Fagan, Kupchik & Liberman, *supra* note 96, at 17, 69–70.

243. See generally JEREMY BENTHAM, THE THEORY OF LEGISLATION 325 (1802) (citing the first rule of punishment, that "[t]he evil of the punishment must be made to exceed the advantage of the offence").

virtue of their age and stage of development, adolescents tend to discount future consequences and assign greater weight to short-term payoffs.<sup>244</sup> Indeed, recidivism studies reveal that young people transferred into the adult system reoffend sooner and more often than similarly situated youth in the juvenile system.<sup>245</sup>

During adolescence, teenagers fail to comprehend consequences fully. A number of factors may contribute to this failure. First, teenagers' risk-reward calculus seems to be skewed toward reward. "[R]eward-related regions of the brain and their neurocircuitry undergo particularly marked developmental changes during adolescence."<sup>246</sup> For example, a study comparing decision making by adults and adolescents observed that adolescents, even as old as seventeen, discount or ignore long-term consequences, fail to evaluate *both* risks and rewards, and fail to consider and examine alternate options.<sup>247</sup> While, as described above, adolescents are capable of perceiving risk, they discount it when balanced against reward or sensation. This seems to be a result of immaturities in brain circuitry related to incentive processing. These still-developing connections can "lead to misevaluation of the value or predicted consequences associated with a given stimulus or action thereby biasing decision making."<sup>248</sup> They cannot fully apprehend potential negative consequences,<sup>249</sup> and consequently do not accord those risks appropriate weight.

The data seem to indicate that adolescents are less likely to be deterred by the specter of harsher punishment. The Department of Justice's Office of Juvenile Justice Programs reviewed six large-scale studies on the deterrent effects of transfers of children into the adult system. The studies utilized large

244. See, e.g., William Gardner and Janna Herman, *Adolescents' AIDS Risk-Taking: A Rational Choice Perspective*, in *ADOLESCENTS IN THE AIDS EPIDEMIC* 17, 25–26 (William Gardner, Susan G. Millstein & Brian L. Wilcox eds., 1990).

245. Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in *A SOURCEBOOK: SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDERS* 238, 249–51 (James C. Howell, Barry Krisberg, J. David Hawkins & John J. Wilson, eds. 1995); Lawrence Winner, Lon Lanza-Kaduce, Donna M. Bishop & Charles E. Frazier, *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 *CRIME & DELINQ.* 548, 555–56 (1997).

246. Tamara L. Doremus-Fitzwater, Elena I. Varlinskaya & Linda P. Spear, *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 *BRAIN & COGNITION* 114, 116 (2010).

247. Bonnie Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 *J. APPLIED DEVELOPMENTAL PSYCHOL.* 257, 265, 268 (2001). See also Elizabeth Cauffman, Elizabeth P. Shulman, Laurence Steinberg, Eric Claus, Marie T. Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 *DEVELOPMENTAL PSYCHOL.* 193, 204 (2010) (measuring reward-seeking and risk-avoidance behavior in more than 900 individuals ranging in age from 10 to 30 finding that adolescents attended more to the potential rewards of a risky decision than to the potential costs).

248. Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 *PHARMACOLOGY BIOCHEMISTRY & BEHAV.* 212, 213 (2009).

249. Arnett, *supra* note 199, at 344, 350–51.

samples (ranging between 494 and 5,476 participants), varied methodologies, and examined multiple jurisdictions with different types of transfer mechanisms. What the Justice Department found was an impressive degree of “convergent validity for the findings:” “all of the studies found higher recidivism rates among offenders who had been transferred to criminal court, compared with those who were retained in the juvenile system. This held *true even* for offenders who only received a sentence of probation from the criminal court.”<sup>250</sup> This comprehensive review led the Justice Department to conclude that “to best achieve reduction in recidivism, the overall number of juvenile offenders transferred to the criminal justice system should be minimized.”<sup>251</sup>

Some details of the studies may help to underscore the Justice Department’s conclusions. One study that compared transferred children in New York with similarly situated children in New Jersey retained in that state’s juvenile system—whose sentences did not include prison time—were 39% more likely to be rearrested for violent offenses than those children who remained in the juvenile court system. When researchers examined children who had served at least one year in prison, the findings were even more troubling. Those children serving at least one-year sentences had a 100% greater rate of violent recidivism.<sup>252</sup> A similar study in Pennsylvania revealed that transferred teenagers were 77% more likely to be rearrested than their counterparts who stayed in the juvenile justice system.<sup>253</sup> Juveniles jailed as adults in Minnesota were 26% more likely to be reconvicted.<sup>254</sup> Studies in New York, New Jersey and Florida reported similar findings.<sup>255</sup>

### *3. Adult Treatment of Youthful Offenders Fails to Provide Meaningful Rehabilitation*

Instead of rehabilitating children and releasing more productive citizens, the adult system produces individuals more likely to reoffend. Research offers compelling proof. Studies show that “juveniles prosecuted as adults reoffend more quickly and at rates equal to or higher than comparable youths retained in

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250. RICHARD E. REDDING, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY?* 6 (2010).

251. *Id.* at 8.

252. Angela McGowan, Robert Hahn, Akiva Liberman, Alex Crosby, Mindy Fullilove, Robert Johnson, Eve Moscicki, LaShawndra Price, Susan Snyder, Farris Tuma, Jessica Lowy, Peter Briss, Stella Cory & Glenda Stone, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 32 *Amer. J. Preventative Med.* S7, S13 (2007). See also Michael Tonry, *Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy if Ever There Was One*, 32 *Amer. J. Preventative Med.* S3, S3–S4 (2007).

253. McGowan, Hahn, Liberman, Crosby, Fullilove, Johnson, Moscicki, Price, Snyder, Tuma, Lowy, Briss, Cory & Stone, *supra* note 252, at S14.

254. *Id.*

255. *Id.*

the juvenile system.”<sup>256</sup> Indeed, one unexpected voice criticizing the transfer of children into the adult system is the Centers for Disease Control and Prevention (“CDC”). A CDC task force extensively reviewed all published scientific evidence covering multiple states in assessing the impact of transfer on the reduction of violence. Their report not only found that the transfer of youth to adult court had no deterrent effect, but it also concluded that “transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth.”<sup>257</sup> And then the CDC took an unusual and noteworthy step: it recommended the repeal of laws and policies facilitating the transfer of juveniles to the adult criminal justice system.<sup>258</sup>

It should perhaps come as no surprise that transferred teenagers recidivate. They often enter the adult system at quite impressionable ages and learn lessons from adult institutional settings that have lasting consequences. Qualitative research documenting the subjective experiences of young offenders in the juvenile and criminal justice systems suggest that prosecution and punishment in criminal court frequently engenders a sense of injustice that undercuts the legitimacy of the criminal sanction.<sup>259</sup> Many youth are physically and sexually abused by older prisoners and often resort to violence themselves in an attempt to regain some control over the situation.<sup>260</sup> For those teenagers who have been victims of brutal physical and sexual assaults—particularly if they have failed to receive adequate therapy—the risk of committing violent offenses increases.<sup>261</sup> In these institutional settings, teenagers will “likely [] learn social rules and norms that legitimate[] domination, exploitation and retaliation . . . [W]hat they learn[] in prison provide[s] a destructive counterbalance to their positive intentions.”<sup>262</sup> In the end, the transfer process compromises public safety by harming both communities and the children who end up in the criminal justice system.

But the developmental data suggest that adolescents have a degree of resilience that, with proper intervention, can enable the young offender to desist

256. CHILDREN’S ACTION ALLIANCE, PROSECUTING JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM: KEY ISSUES AND RECOMMENDATIONS FOR ARIZONA 12 (2003) (quoting Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 86 (2000)).

257. McGowan, Hahn, Liberman, Crosby, Fullilove, Johnson, Moscicki, Price, Snyder, Tuma, Lowy, Briss, Cory & Stone, *supra* note 252, at S7.

258. *Id.*

259. Bishop, *supra* note 256, at 85.

260. See, e.g., Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons, Training Schools: Perceptions and Consequences of Treatment–Custody Dichotomy*, 40 JUVENILE & FAMILY COURT J. 1, 10 (1989).

261. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–09 (2006)); Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 167–68 (2009).

262. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 263 (Jeffrey Fagan & Franklin Zimring eds., 2000).

from offending. The behavioral traits common to adolescence are not fixed. Instead, they appear to result from malleable factors such as maturity level and context. These traits can and do change significantly as the adolescent transitions developmentally into adulthood.<sup>263</sup> As the brain matures and connections strengthen, changes occur in how young adults perceive and calculate risk. Indeed, they typically outgrow their antisocial tendencies to engage in impetuous and reckless behavior as they age: “the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature.”<sup>264</sup>

In addition, juvenile offending is not predictive of adult offending. Even experts acknowledge that there is no reliable way to predict accurately which youthful offenders will continue to engage in criminal conduct as adults.<sup>265</sup> Various studies even demonstrate the poor predictive power of juvenile psychopathy assessments. For example, one study of seventy-five male juvenile offenders found that assessments of psychopathic characteristics did not predict general or violent reconvictions over a ten-year follow-up period.<sup>266</sup> Similarly, a recent major study looking to identify risk factors for recidivism among serious adolescent offenders confirmed that the data offer good and bad news: the good news is that the percentage who continue to offend is very small, and the bad news is that the ability to predict who will engage in future acts of criminality is “exceedingly limited.”<sup>267</sup>

Critical questions about the integrity of the justice system loom. Our justice system utilizes punishment to serve specific ends: deterrence, retribution, and rehabilitation. But the evidence suggests that the choice to prosecute children as adults simply does not neatly serve any of the legitimate purposes of punishment for which our criminal justice exists. What further compromises the system’s integrity is that the choice to punish a teenager as an adult not only fails to guarantee public safety given recidivism rates, but it also exposes the young offender to risks to her own safety.

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263. Brent W. Roberts, Kate E. Walton & Wolfgang Viechtbauer, *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 *PSYCHOL. BULL.* 1, 14–15 (2006).

264. SCOTT & STEINBERG, *supra* note 138, at 1014–15.

265. Brief for Am. Psychological Ass’n, Am. Psychiatric Ass’n & Nat’l Ass’n of Soc. Workers, as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-946, 10-947), at 21–22.

266. John F. Edens & Melissa A. Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood: Longitudinal Results from a Multiethnic Sample of Youthful Offenders*, 14 *ASSESSMENT* 57, 60 (2007).

267. Edward P. Mulvey, Laurence Steinberg, Alex R. Piquero, Michelle Besana, Jeffrey Fagan, Carol Schubert & Elizabeth Cauffman, *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *DEV. & PSYCHOPATHOLOGY* 453, 468–470 (2010). *See also* Kathryn C. Monahan, Laurence Steinberg, Elizabeth Cauffman & Edward P. Mulvey, *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 *DEVELOPMENTAL PSYCHOL.* 1654, 1665 (2009) (finding that only six percent of serious offenders persisted in high levels of antisocial behavior as adults).

#### 4. Youthful Offenders Will More Likely Suffer Harm in the Adult System

Transfer mechanisms send children into the adult system who may never have been convicted of violent offenses. But even among the population of youthful offenders who have been convicted of serious and violent offenses, there are troubling commonalities that perhaps do not justify their behavior but may offer insights into what might have gone wrong in their lives to place them on this path. A 2012 survey examining the lives of juveniles with life sentences paints a stunning picture of disadvantage.<sup>268</sup> The study noted and documented the high rates of socioeconomic hardship, education failure, and histories of abuse among and across this population of offenders.

A few statistics help to illustrate the extent of the traumas these individuals endured at young, impressionable ages prior to their life sentences. The survey found that a majority of these individuals had been exposed to violence in their homes and communities. Some 54.1% of young people sentenced to life sentences had witnessed violence weekly in their neighborhoods, with an even higher percentage (79%) having witnessed violence in their homes.<sup>269</sup> Nearly half (46.9%) experienced physical abuse and an alarming 77.3% of girls reported histories of sexual abuse.<sup>270</sup> Some 17.9% were not living with a close adult relative prior to their incarceration and some reported having been homeless at the time of the offense.<sup>271</sup> Most were from backgrounds of economic challenge with one-third having been raised in public housing.<sup>272</sup> And in those settings, educational institutions had not offered the sort of safety net and structure that one might hope. The vast majority (84.4%) had been suspended or expelled from school.<sup>273</sup> In the end, these findings suggest that the structures that we expect to protect our children—family, school, neighborhood, and government social agencies—had failed them. Then, when these children engage in offenses, we compound those harms by sending them to adult prison. Although federal law requires separation of children from adults in correctional facilities, the law does not appear to apply when the child has been certified as an adult.<sup>274</sup>

Thousands of youth are housed with adult inmates in jails and prisons across the United States.<sup>275</sup> Standards recently issued under the Prison Rape

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268. See ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY (2012).

269. *Id.* at 2.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 3.

274. DEITCH, BARSTOW, LUKENS & REYNA, *supra* note 189, at 53. In 2009, there were 2,778 youth in adult prisons, and approximately 7,220 in adult jails. See HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 2 (2010); TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 9 (2010).

275. DEITCH, BARSTOW, LUKENS, & REYNA, *supra* note 189, at 57.

Elimination Act,<sup>276</sup> as well as views expressed by the American Correctional Association,<sup>277</sup> the Juvenile Justice Prevention and Delinquency Act, and the American Bar Association Task Force on Youth in the Criminal Justice System<sup>278</sup> recommend against commingling of adults and children pre- and post-trial. Many states have begun to adopt laws that mandate separation, but despite these calls, some states and counties continue to mix adults and children to the detriment of children. In nineteen states, once a juvenile is prosecuted as an adult, she is housed with the adult inmate population.<sup>279</sup> In five states, children waived into the adult system are required to be housed in adult jails.<sup>280</sup> In Oklahoma and Utah, children as young as thirteen and fourteen are housed in adult prisons after conviction with no protections for them in place.<sup>281</sup> So, children in those jurisdictions face significant risk.

The consequences of this policy choice have no place in a system that purports to dispense justice. According to the Prison Rape Elimination Act of 2003, “young first-time offenders are at increased risk of sexual victimization” and youth in adult facilities are five times as likely to be sexually abused or to become rape victims as youth who are held in juvenile facilities.<sup>282</sup> Children are the targets of physical assaults as well. Children placed in adult prisons are fifty percent more likely to endure physical attacks by fellow inmates with a weapon.<sup>283</sup> They become easy prey because they are smaller and more

276. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, §, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–09 (2006)).

277. *Public Correctional Policy on Youth Offenders Transferred to Adult Jurisdiction*, AM. CORR. ASS’N, <http://www.aca.org/government/policyresolution/view.asp?id=51&printview=1> (last updated Jan. 14, 2009) (“The American Correctional Association supports separate housing and special programming for youths under the age of majority who are transferred or sentenced to adult criminal jurisdiction. [The ACA supports] placing people under the age of majority who are detained or sentenced as adults in an appropriate juvenile detention/correctional system or youthful offender system distinct from the adult system.”).

278. Robert E. Shepherd, Jr., *An ABA Task Force Report, Part II*, 16 CRIM. JUST. 56 (Summer 2001) (“If detained or incarcerated, youth in the adult criminal justice system should be housed in institutions or facilities separate from adult facilities until at least their eighteenth birthday.”).

279. Amanda Keller, *They’re Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK L. REV. 155, 169–70 (2005). Thirty-nine states allow juveniles to be jailed with adults, but twenty of these states provide some type of protection for them, such as actual separation within the jail or sight/sound separation. JASON ZIEDENBERG, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., *YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL SYSTEMS 10* (2011). See MELISSA CORETZ GOEMANN, TRACEY EVANS, EILEEN GELLER & ROSS HARRINGTON, *CAMPAIGN FOR YOUTH JUSTICE, CHILDREN BEING TRIED AS ADULTS: PRE-TRIAL DETENTION LAWS* (2007).

280. Of the ten states, only two mandate it for certain types of juveniles. ZIEDENBERG, *supra* note 279, at 10.

281. JAMES AUSTIN, KELLEY DEDEL JOHNSON & MARIA GREGORIOU, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *JUVENILES IN ADULT PRISONS: A NATIONAL ASSESSMENT 111* (Oct. 2000).

282. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–09 (2006)).

283. Forst, Fagan & Vivona, *supra* note 260, at 9.

vulnerable in facilities that provide little, if anything, in the way of protections for the children housed in them. Even more disturbing, these children are twice as likely to be assaulted by correctional staff.<sup>284</sup> According to one study, one in ten children reports an instance of staff abuse.<sup>285</sup>

These teens desperately look for ways to protect themselves against the physical and emotional trauma of such attacks. Youth will sometimes assault staff or engage in self-destructive behavior or even pretend to hear voices in a desperate attempt to be removed from their cells and placed in isolation.<sup>286</sup> They may feel safe in administrative segregation, but being housed in cells that may be only eighty square feet, with no natural light and no contact with others for twenty-three hours of the day is certainly not healthy for anyone, let alone a child.<sup>287</sup> The long-term effects of both physical and sexual violence against these children are almost a given but may be even more difficult to quantify. But what we do know is that one consequence of such assaults is that children in adult jails are “19 times more likely to commit suicide than are their counterparts in the general population and 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.”<sup>288</sup> The CDC estimates that for each suicide committed by young people between the ages of fifteen and twenty-four, there were likely over 100 attempts.<sup>289</sup>

Apart from the crippling psychological and emotional effects of abuse, these children, once released, will typically lack the skills necessary to compete successfully in the workforce. Anyone examining reentry patterns and failures among returning offenders understands that education improves post-release opportunities for employment.<sup>290</sup> But sadly, most correctional facilities lack the sort of basic educational services that even juvenile facilities will offer. Jails and detention facilities are temporary housing units and offer few, if any, educational services. One survey of educational programs in adult jails (as opposed to prisons) found that forty percent did not offer any educational services at all, only eleven percent offered special education classes, and only seven percent provided vocational training.<sup>291</sup> And while prisons may have some programs, far too many have long waiting lists of inmates looking to enroll in them.

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284. *Id.*

285. *Id.*

286. CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA* 13 (2007) (quoting Barry Krisberg’s testimony to the National Prison Rape Elimination Commission).

287. See ACLU, *ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES* 2013 (detailing the psychological harms, risk of suicide and developmental harms when correctional facilities place children in solitary confinement).

288. *Id.* at 10.

289. *Id.*

290. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES* 111–12 (2008).

291. DEITCH, BARSTOW, LUKENS, & REYNA, *supra* note 189, at 54.

Any hope of successful reentry for these young people will be further complicated by the burden of a criminal conviction with all of the collateral consequences that accompany that stigma.<sup>292</sup> They may suffer from a loss of critical privileges of citizenship like voting;<sup>293</sup> they could be denied access to educational loans;<sup>294</sup> they will need to alert employers of their previous convictions.<sup>295</sup> In addition, in many states they will be excluded from certain jobs and denied the opportunity to apply for and obtain certain licenses that could guarantee a better job. In the end, these children will suffer lifetime consequences for acts they engaged in when they were only children.

Still, we cleave to an adult paradigm ignoring the real dangers that adolescents face. And yet evidence continues to mount, exposing troubling flaws in our decision to treat young people as adults in our justice system. The Court has opened and deepened the dialogue about the diminished culpability and developmental resilience of adolescent offenders. That dialogue may represent the nascent steps toward a more informed set of policies to address youthful offending.

#### IV.

##### CORRECTING COURSE BY ESTABLISHING A BRIGHT-LINE MINORITY RULE

The perceptions and attitudes toward adolescent offenders have led to two distinct policy swings: treating the youthful offender as a wayward child and treating her as an adult.<sup>296</sup> The Supreme Court's recent rulings regarding punishment of youthful offenders in the adult criminal justice system have not only raised key constitutional questions but may influence a third policy swing

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292. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1111 (2006); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1221 (2010). The Adam Walsh Child Protection and Safety Act of 2006 (SORNA), Pub. L. No. 109-248, Title I, §§ 101–635, 120 Stat. 590, 590–644 (codified at 42 U.S.C. §§ 16901–16991, 3765, 3797ee to ee-1 (2006 & Supp. II 2009) and in scattered sections of 18 U.S.C.), has far-reaching implications for juveniles committing sex offenses. SORNA mandates a national registry of people convicted of sex offenses that may subject the offender to community notification provisions. See *Juvenile Sex Offenders*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, <http://www.ncjfcj.org/our-work/juvenile-sex-offenders> (last visited Jan. 11, 2013). The application of SORNA to juvenile offenders is not without controversy. See Michael F. Caldwell, Mitchell H. Ziemke & Michael J. Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles*, 14 PSYCHOL. PUB. POL'Y & L. 89 (2008); Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008); Nastassia Walsh & Tracey Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, NAT'L ASSOC. OF CRIM. DEFENSE LAW. CHAMPION MAG., Dec. 2009, at 20.

293. See Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 282–83 (2004).

294. *Id.* at 270.

295. *Id.* at 299; ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES*, *supra* note 290, at 8.

296. See discussion *infra* Parts II–III.

toward treating a youthful offender as an adolescent in the midst of dramatic developmental change. But as mentioned earlier,<sup>297</sup> the Court seems unlikely to speak further on this topic. Thus, the forum for implementing policy changes that recognize developmental differences may once again be state legislatures. This time, hopefully, social science and neuroscience findings (rather than hyperbolic expectations) will inform those choices.

Developmental data provides strong support for a policy mandating the exclusion of all adolescents from adult court treatment. Adolescents at all ages suffer dramatically under the current criminal justice system. While blanket exclusion of adolescents from adult court prosecution would be wholly defensible, it is unlikely to occur. Legislators, courts, and the general public have become accustomed to laws and policies that extend rights and responsibilities to many older adolescents, and are, therefore, unlikely to reimagine an eighteen-year-old, for example, as anything other than a young adult. But when we consider younger adolescents, their youth status may hold sway. The data regarding the distinctive developmental traits that affect the culpability and punishment of younger offenders is particularly acute. It is especially compelling for youthful offenders under the age of sixteen, whose abilities to reflect, plan, and resist peers is all the more limited given their level of development.<sup>298</sup>

State legislatures ought to mandate that children under seventeen may not face prosecution in the adult criminal justice system. The data show that younger adolescents are less culpable and display even more pronounced differences from adult actors. With younger adolescents there is a greater likelihood of damage to the young, developing identity. As we have seen, leaving such decisions to the discretion of actors within the system does not stem the tide of young people entering the adult system and indeed increases and exacerbates racial bias. Finally, a bright-line rule would be a natural outgrowth of age-old line drawing that recognizes that youth status matters.

### *A. Making the Case for Legislative Reexamination and Change*

#### *1. Younger Adolescents Are Less Culpable*

Developmentally, the most vulnerable stages for an adolescent are in the early years—under sixteen years old. Adolescence has been described as a

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297. See discussion *infra* Part II.

298. See, e.g., Cauffman & Steinberg, *supra* note 141, at 756 (noting that significant gains in psychosocial maturity that take place after age sixteen); Leon Mann, Ros Harmoni & Colin Power, *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265, 267–70 (1989) (observing that thirteen-year-olds exhibit less knowledge, have lower self-esteem, see fewer options and are less-inclined to take consequences into consideration than 15-year-olds); Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Elizabeth Cauffman & Marie Banich, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 36 (2009) (finding “significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals”).

developmental stage “second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands.”<sup>299</sup> And young people in their early teens are entering this turbulent period with few skills and limited, if any, experience against which to assess these changes. Still grappling with the hormonal storm of puberty, early adolescents experience heightened stress and high levels of depressions.<sup>300</sup> Younger adolescents have exceedingly low self-esteem and heightened self-consciousness, which cause them to fixate on the instantaneous present.<sup>301</sup> Being new to their teenage years, these youngsters still struggle to understand and cope with the changes they are experiencing physically and in the environment around them. Indeed, when compared to older children, evidence shows that these younger adolescents are doubly disadvantaged: they lack both cognitive capacity and social and emotional skills.

Younger adolescents are engaging with the world around them with the least developed cognitive abilities. Fourteen- and fifteen-year-olds do not perform well on tests of basic cognitive skills.<sup>302</sup> Their brain circuitry is inefficient.<sup>303</sup> Young adolescents’ brain structure prevents them from making the more reasoned judgments that even a seventeen-year-old can make.<sup>304</sup> This is because the massive reorganization in brain structure, that will enable the sophisticated cognitive controls characteristic of adults, has barely begun.<sup>305</sup> This wiring upgrade, if you will, that proceeds slowly from the back of the brain to the front, strengthens and eliminates connections in brain circuitry between regions of the brain.<sup>306</sup> And that connectivity, which culminates in better abilities to control impulse, plan, and generate more complex behavior, will not complete until sometime in their mid-twenties. As we look at young adolescents and wonder what is “wrong” with them, we find that what appears to be “abnormal” behavior is all part of the normal development path that humans take.<sup>307</sup>

A layperson’s detour into neuroscience may be instructive. The adolescent

299. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *NEUROSCI. BIOBEHAV. REV.* 417, 428 (2000).

300. *Id.* at 428.

301. Jari-Erik Nurmi, *How do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 *DEVEL. REV.* 1, 12–13 (1991).

302. Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 *LAW & HUM. BEHAV.* 333, 343–50 (2003).

303. *See supra* Part II.

304. *Id.*

305. *See* Luna, *supra* note 198, at 257.

306. *See* Thomas J. Whitford, Christopher J. Rennie, Stuart M. Grieve, C. Richard Clark, Evian Gordon & Leanne M. Williams, *Brain Maturation in Adolescence: Concurrent Changes in Neuroanatomy and Neurophysiology*, 28 *HUMAN BRAIN MAPPING* 228, 228 (2007); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *ANNALS N.Y. ACAD. SCI.* 77, 77–83 (2004).

307. Dobbs, *supra* note 200, at 43.

brain develops in two specific ways that affect an adolescent's ability to control her behavior.<sup>308</sup> First, the integrity of white matter neuronal connections that support executive functions is still developing.<sup>309</sup> Second, the gray matter, where neuronal brain cells reside, is also still maturing.<sup>310</sup> Maturation of processes in the white and gray matter of the brain support the information processing that leads to voluntary control of behavior.<sup>311</sup> The brain's axons, which are the nerve fibers that neurons employ to signal other neurons, become more insulated with a fatty substance called myelin ("white matter"), ultimately increasing axon transmission speed by up to 100 times.<sup>312</sup> Myelination enhances efficient information processing and enables better integration of the circuitry needed for complex behavior.<sup>313</sup> Neuroscientists widely believe that immature myelination makes adolescents susceptible to impulsive behavior, and the quicker processing speed enabled by myelination facilitates cognitive complexity.<sup>314</sup> White matter in the brain increases gradually over time such that older adolescents and adults can rely on and profit from a larger number of myelinated neurons than younger teenagers.<sup>315</sup>

Cortical gray matter, which is the part of the brain where brain cell neurons reside and includes the top layer of the brain and the nuclei in the brain, is at its thickest, and therefore least efficient, in early adolescence.<sup>316</sup> Dendrites, which are the branchlike extensions used by neurons to receive signals from nearby axons, grow "twiggy, and the most heavily used synapses—the little chemical junctures across which axons and dendrites pass notes—grow richer and stronger. At the same time, synapses that see little use begin to wither."<sup>317</sup> This process of synaptic "pruning" causes the brain's outer layer of gray matter—the cortex where we do much of our conscious and complex thinking—to become thinner and more efficient.<sup>318</sup> Pruning does not finish until middle to late

308. Brief of the Am. Med. Ass'n & Am. Acad. Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646, 10-9647), at 20.

309. *Id.* at 25

310. *Id.* at 20.

311. *Id.*

312. Dobbs, *supra* note 200, at 43.

313. Brief of the Am. Med. Ass'n & Am. Acad. Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646, 10-9647), at 25–26.

314. Geier & Luna, *supra* note 248, at 216. See Casey, Giedd & Thomas, *supra* note 226, at 244.

315. Jay N. Giedd, Jonathan Blumenthal, Neal O. Jeffries, F.X. Castellanos, Hong Liu, Alex Zijdenbos, Tomáš Paus, Alan C. Evans & Judith L. Rapoport, *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861, 861 (1999).

316. *Id.* at 861–62.

317. Dobbs, *supra* note 200, at 43.

318. Giedd, Blumenthal, Jeffries, Castellanos, Liu, Zijdenbos, Paus, Evans & Rapoport, *supra* note 315, at 861–62; Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make them Less Culpable than Adults*, 9 QUINNIPIAC HEALTH L.J. 1, 12 (2005); Dobbs, *supra* note 200,

adolescence. The portions of the brain that assess risk and control executive functions continue to myelinate through late adolescence and into early adulthood.<sup>319</sup> In fact, in studies examining the maturation of the prefrontal cortex, findings suggest that:

[M]iddle adolescence, [roughly age fifteen to seventeen], is a time of heightened vulnerability to risky and reckless behavior because of temporal disjunction between the rapid rise in dopaminergic<sup>320</sup> activity around the time of puberty, which leads to an increase in reward-seeking, and the slower and more gradual maturation of the prefrontal cortex and its connections to other brain regions, which leads to improvements in cognitive control and in the coordination of affect and cognition. As dopaminergic activity declines from early adolescent peak, and as self-regulatory systems become increasingly mature, risk-taking begins to decline.<sup>321</sup>

Finally, brain scans reveal that the proliferation of projections of white matter tracts across different regions of the brain enables further complex development, but again, this increase in connections is only beginning in early adolescence.<sup>322</sup> Over time, the brain reveals an increase in connections among cortical areas (and between different areas of the prefrontal cortex).<sup>323</sup> It also shows evidence of increased links between cortical and subcortical areas, especially between the prefrontal regions and the limbic and paralimbic areas, including the amygdala, nucleus accumbens, and hippocampus.<sup>324</sup> This anatomical change is directly related to improved coordination of affect and cognition.<sup>325</sup> As this change completes, we see improved regulation of emotions.

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at 43.

319. Giedd, Blumenthal, Jeffries, Castellanos, Liu, Zijdenbos, Paus, Evans & Rapoport, *supra* note 315, at 862. *See also* Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function*, 1021 ANNALS N.Y. ACAD. SCI. 296, 301 (2004); Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holmes, Terry L. Jernigan & Arthur W. Toga, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859, 860 (1999).

320. Adolescence brings a peak in the brain's sensitivity to dopamine, which is a neural hormone that seems to prime and fire reward circuits. *See* Dobbs, *supra* note 200, at 55.

321. Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161 (2010).

322. Brief of the Am. Med. Ass'n & Am. Acad. Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646, 10-9647), at 25.

323. Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 139, at 54.

324. Thomas J. Eluvathingal, Khader M. Hasan, Larry Kramer, Jack M. Fletcher & Linda Ewing-Cobbs, *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in Normally Developing Children and Adolescents*, 17 CEREBRAL CORTEX 2760 (2007).

325. Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 139, at 54.

Consistent with this, researchers have found increases in self-reported impulse control through the mid-twenties.<sup>326</sup>

If we set aside neuroscience and simply observe the behavior of younger adolescents, we see evidence that distinguishes them from—and disadvantages them in comparison to—adults. Young adolescents lack life experience against which to make judgments and assess choices. An adolescent's poor judgment may flow from a lack of experiential data upon which an adult would likely draw.<sup>327</sup> Although studies of cognitive abilities reveal that adolescents have similar capacity for processing information as adults,<sup>328</sup> intellectual functioning of younger adolescents (before age sixteen) may more closely resemble child-like rather than adult-like thinking. In particular, younger adolescents get locked into "either/or" thinking.<sup>329</sup> They fixate on some initial possibility in the decision-making process and fail to adjust as new information becomes available.<sup>330</sup> Adolescents often experience difficulty contemplating the meaning of a consequence, particularly with respect to long-term implications, and have less capacity to anticipate harm as an unintended result of their actions. They miss options that would be more easily recognizable to adults or even older teens. Age differences in risk perception are also significant.<sup>331</sup> Teenagers ranging in age from eleven to thirteen are less able to recognize risks than sixteen- to seventeen-year-olds.<sup>332</sup> And when compared to older teens, fewer children from eleven to thirteen years of age mention the long-range consequences of the decisions they make, suggesting limited future orientation among this group.<sup>333</sup> Middle school children struggle to plan how to divide their time on a daily basis between sports, video games, and homework. They clearly experience enormous difficulty planning for and anticipating long-term consequences of choices they might make.

So, as neurological and behavioral science demonstrates, a typical fourteen-year-old, for example, will have an underdeveloped sense of self and underdeveloped cognitive and emotional controls that will lead her to submit to peer pressure and engage in thrill-seeking, often criminal conduct. But those actions, no matter how dangerous, do not indicate that she is either irretrievably depraved or fundamentally flawed. She, fortunately, will continue to develop and

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326. Steinberg, Graham, O'Brien, Woolard, Cauffman & Banich, *supra* note 298, at 39–40.

327. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 24 (1999); Scott & Grisso, *supra* note 44, at 164 (1997); Lawrence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 26 (Thomas Grisso & Robert G. Schwartz eds., 2000) (noting that while raw intellectual capacity may be similar in adults and adolescents, other factors such as experience may limit adolescent judgment and decision making).

328. Scott & Grisso, *supra* note 44, at 160.

329. Beyer, *supra* note 327, at 17.

330. *See id.*

331. Steinberg, *supra* note 230, at 477

332. *Id.*

333. *Id.*

will mature out of offending. So, while the youngest adolescents are the least mature and least capable of resisting peer and emotional pulls, they have the greatest capacity for change.<sup>334</sup>

This group warrants a categorical rule that shifts them by law out of the adult system because they are least like adults in their judgment and in their culpability for their acts. The options that an adolescent perceives and acts upon—particularly an adolescent under seventeen—are limited by and linked to developmental factors that predictably will change with maturity. In short, adolescent decision making bears little resemblance to the mental operation that adults—and adult courts—treat as typical.

## *2. A Bright-Line Mandate Is a Natural Outgrowth of the Third Swing in Our Conception of Adolescence*

A bright-line rule prohibiting prosecution of individuals under seventeen in the adult system might begin to address the larger problems that afflict our criminal justice system. States and the federal government have long recognized that the law can and should play a more interventionist and prescriptive role with respect to the actions engaged in by children. Countless legislative examples demonstrate the perception that young adolescents are profoundly different from adults and even from older adolescents, requiring special treatment. A survey of those laws demonstrates that legislatures have concluded that an individual's youth status generally signals a level of immaturity that requires limitations on punishment and invites additional protection even over a child's own preferences. While data regarding adolescent development cannot fix a point at which a child makes the ultimate transition from adolescence into adulthood, with all the maturity of judgment that transition implies, the data does offer a range that should inform policy choices: children at the lower age range tend to be least like adults and least responsible for their acts.

Governments have been keen to mandate certain prohibitions for children and to enact mandatory protections for them. A child below fifteen typically cannot marry without parental consent,<sup>335</sup> cannot consent to sexual activity,<sup>336</sup> cannot enlist in the military,<sup>337</sup> cannot consent to donate blood,<sup>338</sup> and cannot

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334. Steinberg & Monahan, *supra* note 140, at 1540. See, e.g., Steinberg, Graham, O'Brien, Woolard, Cauffman & Banich, *supra* note 298, at 39–40.

335. Most states forbid persons under eighteen to marry without parental consent, and will allow sixteen- and seventeen-year-olds to marry with parental consent. Younger teens are denied that privilege. See Brief for Petitioner at 30, *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

336. See, e.g., N.Y. PENAL LAW § 130.05 (McKinney 2012 & Supp. 2013) (child sixteen or younger incapable of consenting to sexual activity).

337. 10 U.S.C. § 505 (2012) (child 16 or younger prohibited from enlisting in Army, Navy, Air Force, Marine Corps, or Coast Guard).

338. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 162.015 (West 2012).

enter into certain types of binding contracts.<sup>339</sup> These laws reflect universal recognition that young teens in particular need to be protected from their own lack of judgment. States limit driving privileges<sup>340</sup> and limit the sort of work in which teens below sixteen can legally engage.<sup>341</sup> In approving of these restrictions, the Supreme Court has observed that “legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.”<sup>342</sup>

While states may vary on where they draw the line of majority, they recognize that children in middle adolescence lack the capacity to handle adult responsibilities and to exercise mature judgment.<sup>343</sup> Indeed, the scientific data based on the distinctive characteristics of young adolescents remain quite compelling.

## *B. Current Economic and Political Conditions Make Legislative Action Feasible*

### *1. Economic Trends Shift the Political Incentives We Currently Have*

While the human costs of justice policies have been well documented, they have not tended to provide much impetus for policy change at the state and local level. Economic costs, at least of late, have done more of the work.<sup>344</sup> With a

339. *See, e.g.*, ALA. CODE § 27-14-5 (1975) (minors fifteen years old and above can contract for certain kinds of insurance); COLO. REV. STAT. ANN. § 10-4-104 (2013) (minors sixteen and older can contract for certain services).

340. All states, except one, have licensing laws that only allow young beginning drivers to get experience driving under conditions that reduce the risk that they would otherwise pose. Forty-five states and the District of Columbia have three-stage licensing systems to introduce safeguards for younger drivers to stem the tide of teen fatalities. J.F. Bowman, Michele Fields, Tom Rice & Arlene Greenspan, *Children, Teens, Motor Vehicles and the Law*, 35 J.L. MED. & ETHICS 81, 81 (2007) (“As of May 2006, three-stage licensing systems have been enacted in 45 states and Washington D.C.”); Christine Branch, Allan E Williams & DeDe Feldman, *Graduated Licensing for Teens*, 30 J.L. MED. & ETHICS 146, 146 (2002) (“As of June 2002, 35 states and the District of Columbia had enacted some sort of graduated licensing law.”).

341. *See, e.g.*, 29 U.S.C. §§ 203(l), 212, 213(c) (regulating child labor and making distinctions between teens younger than sixteen and teens who are sixteen or seventeen years of age); MO. ANN. STAT. §§ 294.011, 294.021, 294.040 (defining “child” as “an individual under sixteen years of age,” forbidding most employment of children under fourteen and limiting employment of children fourteen- and fifteen-years-old).

342. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011) (holding that a child’s age properly informs *Miranda*’s custody analysis).

343. *See id.* at 2403–04 (2011) (“[T]he common law has reflected the reality that children are not adults,” and has developed safeguards to “secure them from hurting themselves by their own improvident acts.” (citation omitted)); *Eddings v. Oklahoma*, 455 U.S. 104 at 115–16 (1982) (“Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”).

344. *See, e.g.*, Susan Ferriss, *Fight Brewing Over Historic California Plan To Close Last Three Youth Prisons: Budget Crises Push States to Consider Cheaper Local Alternatives*, THE CENTER FOR PUBLIC INTEGRITY (Jan. 25, 2012, 6:00 AM),

few notable exceptions, state legislatures have become more acutely attuned to the economic costs and consequences of their choices, particularly given the greater financial constraints attributable to the “Great Recession.”<sup>345</sup> Nationwide, the global financial crisis has led to one of the largest collapses in state revenues that the United States has experienced,<sup>346</sup> forcing legislators to make hard choices to rescue their budgets from a sea of red ink. Operating in these challenging economic times has led legislators to seek out new ways to reduce their overall expenditures and, consequently, to direct their attention to policy choices and funding priorities that, in healthier economic times, had seemed virtually set in stone. But now these once near-automatic funding choices could offer genuine opportunities for cost savings.

One such area that might be ripe for change is justice spending in addressing offending by juveniles, particularly given the myriad costs of handling their cases in the adult system. The Supreme Court’s rulings on juvenile offenders add needed momentum to the movement to rethink the ways that we treat this category of offender. The Court’s recognition both that children differ profoundly from adults and that adolescents are less culpable and less responsible for their actions should have far-reaching implications. Quite obviously, the rulings striking down death sentences for juveniles<sup>347</sup> and mandatory life sentences for juveniles have had—and will continue to have—significant impact on states with children in adult facilities serving those sentences.<sup>348</sup> But the ruling has not automatically resulted in better treatment for

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<http://www.publicintegrity.org/2012/01/25/7961/fight-brewing-over-historic-california-plan-close-last-three-youth-prisons>.

345. See, e.g., Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INSTITUTION (Dec. 2012), <http://www.brookings.edu/research/articles/2012/12/state-local-budgers-gordon>.

346. See, e.g., PHIL OLIFF, CHRIS MAI & VINCENT PALACIOS, CENTER ON BUDGET AND POLICY PRIORITIES, *STATES CONTINUE TO FEEL RECESSION’S IMPACT* (2012); *Recession Could Damage Even Best U.S. State, Local Budgets: S&P*, REUTERS (Dec. 13, 2012), <http://www.reuters.com/article/2012/12/13/us-usa-states-recession-idUSBRE8BC1JM20121213>.

347. Seventy-two juveniles were resentenced after the *Roper* decision. Texas felt the largest impact because it had twenty-nine juveniles on death row at the time. Texas later commuted those sentences to life without parole. Other states followed Texas’s lead. See Charles Lane, *5-4 Supreme Court Abolishes Juvenile Executions*, WASH. POST, Mar. 2, 2005, at A1; *Kentucky Governor to Commute Sentence of Juvenile Offender*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/node/821> (last visited Jan. 12, 2013); *Texas Governor Commutes 28 Juvenile Offender Death Sentences*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/juveniles-news-and-developments-2005> (last visited Jan. 12, 2013).

348. In the wake of *Miller*, North Carolina passed an amendment requiring parole board review after twenty-five years for juvenile lifers, Michigan defense lawyers began mobilizing and Pennsylvania’s Senate began looking for answers as to how to proceed, but Florida, a state with many lifers, is still grappling with how to implement *Graham*, let alone *Miller*. See Suevon Lee, *Despite Supreme Court Ruling, Many Minors May Stay in Prison*, PRO PUBLICA (Aug. 2, 2012), <http://www.propublica.org/article/despite-supreme-court-ruling-many-minors-may-stay-in-prison-for-life>; Elaine Silvestrini, *Courts Grappling with Juveniles’ Life Sentences*, TAMPA TRIBUNE, Sept. 2, 2012, at 1.

juveniles who offend, including for those directly affected by the ruling. Indeed, on the heels of the Supreme Court's decision in *Miller v. Alabama*, one state, Iowa, made a hasty decision that has already triggered challenges<sup>349</sup> and criticism.<sup>350</sup> Governor Terry Branstad elected to "commute" the mandatory life-without-parole sentences for the thirty-eight young people serving such sentences in the state to mandatory sixty-year terms.<sup>351</sup> In so doing, the governor did little more than circumvent the Court's ruling that these sentences required individualized consideration of the youths' age and circumstances.<sup>352</sup>

Rather than making a hasty policy choice that will continue to exact great costs, states can and should now take a long, hard look at how they might better hold young people accountable for serious crimes that keep in mind a young person's age and capacity for change. The average cost of incarcerating a person is \$22,000 annually.<sup>353</sup> A life sentence for an inmate who will grow up, grow old, and eventually die in prison is dramatically higher, particularly if the life sentence begins in one's late teens. The annual cost beginning at age fifty-five is closer to \$65,000, yielding a lifetime cost for taxpayers of \$2,000,000 per prisoner.<sup>354</sup> State departments of corrections are now reporting spending more than ten percent of their annual budgets on healthcare and housing for elderly inmates.<sup>355</sup> Thus, the rising costs of sentencing teens over the long term coupled with emerging information about adolescent development could combine to convince states to begin rethinking their approaches to juvenile justice.

Many states have begun looking for ways to reduce their corrections outlays without sacrificing safety. For example, recently, some state legislators have reduced prison spending by supporting opportunities to invest more in treatment

349. See Isolde Raftery, *Frustrated by Supreme Court Ruling, Iowa Gov. Terry Branstad Acts to Keep Killers Behind Bars*, NBC NEWS (July 18, 2012), [http://usnews.nbcnews.com/\\_news/2012/07/18/12796477-frustrated-by-supreme-court-ruling-iowa-gov-terry-branstad-acts-to-keep-teen-killers-behind-bars?lite](http://usnews.nbcnews.com/_news/2012/07/18/12796477-frustrated-by-supreme-court-ruling-iowa-gov-terry-branstad-acts-to-keep-teen-killers-behind-bars?lite).

350. Senator Tom Harkin has criticized Governor's choice. See William Petroski, *Harkin: Branstad Made Wrong Decisions on Juvenile Killers*, DESMOINESREGISTER.COM (July 19, 2012), <http://blogs.desmoinesregister.com/dmr/index.php/2012/07/19/harkin-branstad-made-wrong-decision-on-juvenile-killers/>.

351. See James Q. Lynch, Trish Mehaffey & Mike Wiser, *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, THEGAZETTE.COM (July 16, 2012, 10:05 PM), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/>.

352. Ed Pilkington, *Iowa Governor Terry Branstad Defies US Supreme Court on Juvenile Sentencing*, THEGUARDIAN.COM (July 22, 2012), <http://www.theguardian.com/law/2012/jul/22/iowa-governor-terry-branstad-defies-us-supreme-court-on-juvenile-sentencing/>.

353. NELLIS, *supra* note 268, at 33; J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES 2001 2 (2001).

354. B. JAYE ANNO, CAMELIA GRAHAM, JAMES E. LAWRENCE, RONALD SHANSKY, JUDY BISBEE & JOHN BLACKMORE, U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, CORRECTIONS HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL AND TERMINALLY ILL INMATES 11 (2004); NELLIS, *supra* note 268, at 33.

355. RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN PRISONS* (2003); NELLIS, *supra* note 268, at 33.

for drug addiction rather than sending drug users to prison,<sup>356</sup> by increasing parole eligibility for elderly prisoners who no longer pose safety risks,<sup>357</sup> and by encouraging treatment options rather than incarceration when parolees engage in technical violations of their parole.<sup>358</sup> These legislators have begun to question and resist the familiar impulse to throw money at criminal justice issues and then simply to hope for the best. Instead, more frequently legislators are insisting on evidence showing improved outcomes.<sup>359</sup> And their choices seem not to have threatened their electoral viability. Interestingly, the move from “tough on crime” to “smart on crime” has reached the federal level as well. The Republican Party’s 2012 national platform moved away from its earlier and vocal support for policies that lock people up and throw away the key. The platform criticized the “overcriminalization of behavior,” urging that prisons do more than simply punish: “They should attempt to rehabilitate and institute proven prisoner reentry systems to reduce recidivism and future victimization.”<sup>360</sup>

## *2. Missouri’s Choice to Restructure its Juvenile Justice System Suggests that Juvenile Treatment Works*

Missouri is one state that has provided a successful alternative to the punitive models of other states and could serve as a model for other states. Its approach offers a model other states should emulate. In 1983, Missouri made the

356. Texas, Kansas, New Jersey, California, Illinois, Colorado, Arizona, Alabama, New Hampshire, and Vermont all passed legislation enhancing substance abuse treatment programs, encouraging more diversion programs, or mandating evidence-based supervision programs. For example, Texas saved \$210.5 million for the 2008–2009 year and New Hampshire is projected to save \$7.8 million and \$10.8 million over the next five years. See ADRIENNE AUSTIN, VERA INSTITUTE OF JUSTICE, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010 8–12, (Sept. 2010). See also Beth Fitzgerald, *Christie Courts Mandatory Treatment for Drug Offenders: All Nonviolent Drug Users could be Ordered to Compulsory Drug Court Instead of Prison*, N.J. SPOTLIGHT (Mar. 23, 2012), <http://www.njspotlight.com/stories/12/0322/2124/>.

357. Fifteen states now have geriatric release provisions, although the impact of such laws has also been questioned. TINA CHIU, VERA INSTITUTE OF JUSTICE, IT’S ABOUT TIME: AGING PRISONER, INCREASING COSTS, AND GERIATRIC RELEASE 6 (Apr. 2012).

358. One such program in Hawaii, HOPE, has received significant praise for its results. Mark Schoofs, *Scared Straight . . . by Probation*, WALL ST. J., July 24, 2008, at A11. Pennsylvania was the first state to implement such a program in 1997, and the Vera Institute documented its successes in the years following. RACHEL PORTER, VERA INSTITUTE OF JUSTICE, TREATING REPEAT PAROLE VIOLATORS: A REVIEW OF PENNSYLVANIA’S RESIDENTIAL SUBSTANCE ABUSE TREATMENT PROGRAM (2002). Other states do this with a fiscal incentive to decrease violation rates. See AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 17, 25, 47 (2011).

359. MARK W. LIPSEY, JAMES C. HOWELL, MARION R. KELLY, GABRIELLE CHAPMAN & DARIN CARVER, CENTER FOR JUVENILE JUSTICE REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 9 (2010).

360. REPUBLICAN NATIONAL COMMITTEE, WE BELIEVE IN AMERICA 2012 REPUBLICAN PLATFORM 38 (2012). See Suzy Khimm, *The GOP Platform’s Surprisingly Progressive Stance on Crime*, WASH. POST (Aug. 31, 2012) <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/31/the-gop-platforms-surprisingly-progressive-stance-on-crime/>.

decision to close its juvenile correctional facilities, or “training schools,” and to use less expensive, smaller, and more effective community-based programs that provide for lower recidivism and a more positive outcome for the youths in the program.<sup>361</sup> Youth live together in a bunk-like setting instead of a single-person cell, and forgo the standard prison garb for their own clothing. Only the most troubled children are kept in the system, and are subjected to a “demanding, carefully crafted, multilayered-treatment experience designed to challenge [them] and to help them make lasting behavioral changes and prepare for successful transition back to the community.”<sup>362</sup>

The Missouri Model embraces two linked operating principles: to house and treat juveniles more humanely and to keep them in smaller groups. The largest number of occupied beds allowed in any Missouri juvenile facility is fifty. Those facilities, reserved for children convicted of violent crimes, are gated, but still use the small group approach, focusing on rehabilitation.<sup>363</sup> Violent offenders are divided “into smaller groups and also receive counseling and go to school on site.”<sup>364</sup> The Department of Youth Services (DYS) operates seven secure facilities, each with a typical daily population of thirty youth and a maximum capacity of thirty-six.<sup>365</sup> Unlike other DYS facilities, these secure care youth facilities are surrounded by a perimeter fence and are locked at all times.<sup>366</sup> In many respects, the daily activities in secure care facilities mirror those in less secure residential settings. However, youth confined to secure care facilities participate less frequently in activities outside their facilities.<sup>367</sup> Instead, “secure care programs often bring the community into the facility for activities and experiences, and then gradually reintroduce youth into the community as they progress in the treatment program and demonstrate readiness.”<sup>368</sup>

The Missouri Model has made the deliberate choice to distinguish its juvenile facilities from adult prisons. Sources vary as to the exact number of juveniles housed in smaller facilities, but the range cited is usually between ten and fifteen juveniles.<sup>369</sup> Referring to Montgomery City, “built for Missouri’s worst juvenile offenders,”<sup>370</sup> one journalist notes “[s]ome things you won’t see

361. THE ANNIE E. CASEY FOUNDATION, MISSOURI MODEL 15 (2010) [hereinafter AECF].

362. *Id.*

363. Stephanie Chen, *Teen Offenders Find a Future in Missouri*, CNN (Aug. 25, 2009), <http://www.cnn.com/2009/CRIME/08/25/missouri.juvenile.offenders/>.

364. *See id.*

365. AECF, *supra* note 361, at 15.

366. *Id.* at 18.

367. *Id.*

368. *Id.*

369. *See* Chen, *supra* note 363. *See also* Tom Seider, *The Missouri Model: Redefining the Possibilities of Juvenile Justice*, V.A. L. WEEKLY (October 2, 2009), [http://www.lawweekly.org/?module=displaystory&story\\_id=2623&edition\\_id=128&format=html](http://www.lawweekly.org/?module=displaystory&story_id=2623&edition_id=128&format=html) (stating that the normal range of beds in a facility is ten to fifteen).

370. Todd Lewan, *Missouri Turns Around Troubled Teens with Homelike Settings*, LJWORLD.COM (Dec. 30, 2007), <http://www2.ljworld.com/news/2007/dec/30/>

in this detention center: razor wire, barred windows, uniformed guards, billyclubs, or kids in orange jumpsuits with broken noses.”<sup>371</sup> Children also are not housed in cold concrete cells but in “carpeted, warmly appointed dorm rooms containing ten to twelve beds, with a dresser and closet space for each young person.”<sup>372</sup> Youth in even the most secure facilities are permitted to dress in their own clothes and to keep and exhibit personal mementos.<sup>373</sup> In this space, which each young person can treat as her own, it is not unusual to find that which the young person holds dear: “dream catchers, stuffed animals, [and] Dr. Seuss books.”<sup>374</sup>

Missouri is one state that continues to allow children as young as twelve to be transferred into the adult criminal justice system for prosecution.<sup>375</sup> But the number of certifications for juveniles to be tried as adults has decreased.<sup>376</sup> The transfer system still maintains discretion in certifying juveniles for certification and that discretion still finds African American children disproportionately ending up in adult court.<sup>377</sup> As noted earlier, despite an unusual state law that requires judges to consider racial disparity when deciding whether to transfer such cases, sixty-four percent of juveniles statewide prosecuted as adults in 2009 were African Americans, nearly double the 2001 level of thirty-six percent. Black youth make up fifteen percent of the state’s population between ten and seventeen years old that falls under the jurisdiction of juvenile courts.<sup>378</sup>

In spite of this continuing problem of racial disproportion, there are three main achievements of the Missouri model: low recidivism rates, no suicides since the Missouri Model was implemented,<sup>379</sup> and low cost per juvenile.<sup>380</sup> Missouri boasts a nine percent recidivism rate, which is one of the lowest in the country.<sup>381</sup> This is an especially impressive statistic when compared to states like

missouri\_turns\_around\_troubled\_teens\_homelike\_sett/.

371. *Id.*

372. AECF, *supra* note 361, at 19.

373. *Id.* at 19.

374. Todd Lewan, *Mo. Tries New Approach on Teen Offenders*, USA TODAY (Dec. 29, 2007), [http://www.usatoday.com/news/nation/2007-12-29-2062815235\\_x.htm](http://www.usatoday.com/news/nation/2007-12-29-2062815235_x.htm).

375. U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Minimum Transfer Age Specified in Statute, 2009*, OJJDP STATISTICAL BRIEFING BOOK (Apr. 22, 2011), [http://www.ojjdp.gov/ojstatbb/structure\\_process/qa04105.asp?qaDate=2009](http://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2009).

376. *Id.*

377. Kenneth J. Cooper, *Black Juveniles Tried as Adults at Alarming Rate in Missouri*, BLACKVOICENEWS.COM (Feb. 14, 2011), <http://www.blackvoiceneews.com/news/news-wire/45715-black-juveniles-tried-as-adults-at-alarming-rate-in-missouri.html>. *See also* Cooper, *supra* note 162.

378. *Id.*

379. AECF, *supra* note 361, at 10.

380. *Id.* at 11.

381. Recidivism refers to those youth who either return to DYS or become involved in the adult correctional system within a specified time period after release from DYS. 84.1% of youth released after twelve months remain law-abiding. One year law-abiding refers to the percentage of youth released from DYS custody that do not return to DYS or become involved in the adult correctional system within 12 months after all DYS services and aftercare are complete. Total combined recidivism after 12 months from release is 16%, with recidivism to adult prison at 0.8%.

Maryland, which in 2001 had a staggeringly high recidivism rate of around sixty percent.<sup>382</sup> Missouri spends one-third less than surrounding states on juvenile corrections while enjoying a recidivism rate one-half to two-thirds below those same states. There have been essentially no escapes, and no violent attacks. “Gang activity is virtually nonexistent.”<sup>383</sup>

One of the most notable differences that Missouri boasts when compared with other juvenile justice systems and with adult corrections involves the gains they have made in educating incarcerated youth. Of confined youths, 74.7% make at least one year of academic progress for each year they are in confinement, compared to the national average of 25%.<sup>384</sup> This benefits both the youth and the community at large by allowing incarcerated youth to learn to become productive members of society, instead of a burden on taxpayers. The Missouri Model has been widely studied and praised,<sup>385</sup> however emulation of the system has been slower than one might expect.

So what enabled Missouri to get this right? They made a conscious choice to examine their current juvenile system and to change it because it did not work. In the 1980s, Missouri’s leaders in juvenile justice reform took aim at the juvenile justice system as it operated at that time. A system that focused on retribution might choose to house high numbers of inmates using standard high security facilities. But these advocates asserted that such features did not belong in a system that looked to protect children and communities.<sup>386</sup> Instead, they advocated for a rehabilitative focus with smaller numbers of children being housed in group-style living arrangements. Not only did the new model save money, it actually proved successful. In the 1990s, when other states were rushing to become more punitive, Missouri made the conscious decision to adopt an approach to juvenile justice that was more balanced and restorative. Missouri established a unified family court system in 1993 to enable more holistic services;<sup>387</sup> the state funded community-based programs to serve as alternatives

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See MO. DEP’T OF SOC. SERVS., DIVISION OF YOUTH SERVICES ANNUAL REPORT FISCAL YEAR 2010 18 (2010).

382. Seider, *supra* note 369.

383. *Id.*

384. AECF, *supra* note 361, at 10.

385. See, e.g., Jessica Bassett, “Missouri Model” for Juveniles Praised Nationally, ST. LOUIS AMERICAN (Oct. 16, 2008) [http://www.stlamerican.com/news/local\\_news/article\\_c8fefc3b-953b-5ba3-8903-4780992ac84e.html](http://www.stlamerican.com/news/local_news/article_c8fefc3b-953b-5ba3-8903-4780992ac84e.html); Scott Charton, *Missouri Juvenile Justice Practices Praised, and Copied*, ASSOCIATED PRESS, Mar. 7, 2005, available at <http://www.semissourian.com/story/157881.html>; Solomon Moore, *Missouri System Treats Offenders with Lighter Hand*, N.Y. TIMES Mar. 26, 2009, available at <http://www.nytimes.com/2009/03/27/us/27juvenile.html>; Marian Wright Edelman, *Juvenile Justice Reform: Making the “Missouri Model” an American Model*, HUFFINGTON POST (Mar. 15, 2010, 9:50 AM), [http://www.huffingtonpost.com/mariam-wright-edelman/juvenile-justice-reform-m\\_b\\_498976.html](http://www.huffingtonpost.com/mariam-wright-edelman/juvenile-justice-reform-m_b_498976.html).

386. MISSOURI JUVENILE JUSTICE ASSOCIATION, CELEBRATING 100 YEARS OF JUVENILE JUSTICE IN MISSOURI, 1903–2003 1 (2003), available at <http://www.njjn.org/uploads/digital-library/100years.pdf>.

387. *Id.* at 2

to incarceration; and the state provided mental health services at the local community-based level rather than attempting to perform mental health services only once the legal system was triggered. The system set as a goal the provision of individualized, customized solutions to meet the needs of the child, to protect the community and to ensure accountability by the young offender. For almost thirty years, Missouri's model has enjoyed broad political support from both parties.<sup>388</sup> It has been the model of juvenile justice because they embraced the view that offenders who enter the justice system should be more capable when they leave than when they entered. A number of states have begun to look to Missouri for guidance. They have seen that when Missouri closed its training schools, its youth corrections agency produced better outcomes than other states without breaking the state's budget. The state has done so consistently by offering a far more humane, constructive, and positive approach. A number of states have begun to follow suit.<sup>389</sup> In addition to the cost savings, advocates of the closures suggest smaller facilities located nearer to home of juvenile offenders will be more conducive to rehabilitation. The examples from Missouri provide an opportunity to make arguments to state legislatures that emphasize that new approaches to youthful offending are necessary and are being successfully implemented elsewhere. Indeed, adjustments that improve the outcomes in juvenile justice systems lay bare the claim that such systems do not work and cannot adequately address youthful offending when the conduct is particularly serious or violent. The success of these revised models of juvenile justice is in keeping with what we know about adolescents: with proper interventions, they have a genuine capacity to change. Placing them in situations that expose them to harm or teach them to behave like criminals cannot be the right solution.

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388. AECF, *supra* note 361 at 12.

389. Louisiana, Washington, D.C., and parts of New Mexico, California, and Virginia have adopted or are in the process of emulating the Missouri Model. According to a New Orleans Times-Picayune article, "[f]ive years ago, Louisiana accepted 'the Missouri model,' . . . [its] youth centers now have fewer than 500 juveniles under 24-hour care instead of 2,000." Gwen Filosa, *Juvenile Justice Crosses a Bridge—Jeff Center Embodies New Way of Thinking*, NEW ORLEANS TIMES-PICAYUNE, Feb. 24, 2010, at A1. The article states that "the cost of the therapeutic model is \$60,000 per year." The article discusses the Bridge City center, which "opened several newly built dorms that resemble suburban homes, with pitched ceilings and living room-type furniture, next to 14 twin beds," in 2007, and claims that Bridge City is credited by its architects with a "90 percent success rate, meaning that 90 percent of juveniles never return to any prison either as a youth or adult." In Washington, D.C., the Oak Hill youth center (located in Maryland) was closed in 2009 and replaced by the New Beginnings facility, which was "built as part of a court-ordered agreement from a 25-year-old lawsuit over its treatment of juvenile offenders . . . [and] is the most prominent example of increasing interest from other states and cities in the "Missouri model" for turning around deeply troubled, and troublemaking, young people." Martha T. Moore, *For D.C., Hope in Treating Young Offenders*, USA TODAY (May 28, 2010), [http://usatoday30.usatoday.com/news/nation/2010-05-18-offenders\\_N.htm](http://usatoday30.usatoday.com/news/nation/2010-05-18-offenders_N.htm). The Missouri Model has gained traction in Louisiana which has built dorm-style housing for its Bridge City youth prison and in San Jose, California, where Santa Clara County uses Missouri-based programs at its juvenile ranch. *Id.*

V.  
CONCLUSION

Our justice system stands at a crossroads. Justice policymakers can opt to stay the current course and continue to treat adolescents as adults despite evidence that plainly exposes the injustice of such a decision. That path, which the justice system has followed for the past few decades, has led to unconscionable racial disparities and unbridled violence against young offenders punished in a system not intended for them. What makes this choice all the more devastating is that the evidence shows that harsher punishment does not make us safer or serve any legitimate ends of punishment. Still, criminal justice policymakers could continue to gravitate toward what seems politically expedient rather than substantively informed. Or, justice policymakers can choose, instead, to put a halt to the persistent antagonism between evidence and policy. State and local legislators can embark on a path supported by science and law by recognizing that child status matters on questions of culpability and punishment. To gain traction on this path, policymakers will need to mandate a bright-line rule of minority, banning anyone under the age of seventeen from adult prosecution—no matter what the crime.

Bluntly speaking, charting a path that removes children from adult prosecution will likely take more than a trio of Supreme Court cases and hopeful dicta. Even the growing consensus of psychologists and neuroscientists, calling into question the misguided practices of courts treating the failings of an adolescent the same as those of an adult, may not create sufficient momentum to institute a minority rule. Perhaps economic pressures will lead state legislatures to rethink their choice to blindly sustain policies that have long proven ineffective and costly. Until recently, most state legislatures have been content to ignore these issues and to leave their punitive juvenile policies and practices in place because there has been no real pressure to think about juvenile reform. But as local, state, and even federal economies continue to experience pain from the financial crisis, they will need to look squarely at the evidence. And the evidence indicates quite clearly that placing our children in an adult system has both short-term and lingering effects that make them worse off and threaten the safety of our communities.

A data-driven public discourse seems long overdue. Indeed, such a conversation could prove not only instructive, but effective in creating the impetus for policy change. Of course, such a conversation cannot expect to be effective if it shies away from the raw emotion and fear that has animated policy choices around crime and violence for the past few decades. But in engaging that debate, policymakers and criminal justice practitioners can powerfully raise questions about the efficacy of the path we have traveled for the past few decades. Adult prosecution of youthful offenders has failed to improve public safety and instead has left the public more at risk. In state after state, youthful offenders processed in the adult system recidivate more often and more quickly

than their counterparts in juvenile court. But a choice to block entry into the adult system for adolescents under seventeen would likely decrease the rates of recidivism. As importantly, adolescents will typically age out of offending. Thus, developing treatment practices, such as those developed under the Missouri Model, that reflect their age and diminished culpability and recognize the limited window within which criminal conduct occurs, may ultimately prove more effective in advancing the common good.

There is room for cautious optimism. In the past eight years, twenty-three states have made substantive legislative changes to reduce the prosecution of youth in adult court and to halt the practice of housing adolescents in adult correctional facilities.<sup>390</sup> Twelve states (Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Maryland, Nevada, Ohio, Utah, Virginia, and Washington) changed their transfer laws making it more likely that youth will remain in the juvenile justice system.<sup>391</sup> Eight states (California, Colorado, Georgia, Indiana, Texas, Missouri, Ohio, and Washington) have revised their mandatory minimum sentencing laws to take developmental differences into account.<sup>392</sup> Four states (Connecticut, Illinois, Mississippi, and Massachusetts) have extended their juvenile court jurisdiction, raising the age at which a state can automatically try a teenager as an adult in criminal court.<sup>393</sup> And eleven states (Colorado, Idaho, Indiana, Maine, Nevada, Hawaii, Virginia, Pennsylvania, Texas, Oregon, and Ohio) have enacted laws limiting the ability of their state corrections to house youth in adult jails and prisons.<sup>394</sup> Mandating a minority rule against adult prosecution for offenders under seventeen years of age is the next logical step.

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390. CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2011–2013 1 (2013), available at <http://www.campaignforyouthjustice.org/documents/ST2013.pdf>.

391. *Id.* at 5–6.

392. *Id.* at 7–8.

393. *Id.* at 4.

394. *Id.* at 1–3.