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2007 Juvenile Law Issue

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AN INTRODUCTION TO RE-ENVISIONING THE ROLE OF THE
JUVENILE COURT IN THE 21ST CENTURY

by Lowell Schechter†

This introduction to the articles in this symposium issue on the juvenile court has three basic objectives. The first is to provide the reader with an understanding of the context in which these articles were prepared. Each was an integral part of a symposium held in the fall of 2006 entitled, “Re-envisioning the Role of the Juvenile Court in the 21st Century.” The second objective is to underline the interconnections between the individual articles. The third is to share some of the other insights and ideas which were discussed at the live symposium.

First, to put the articles in context, the idea for a symposium critically examining the role of the juvenile court originated as one facet of a larger project to commemorate the 100th anniversary of the establishment of Kentucky’s juvenile court in 1906.1 The commemorative project was the brain-child of Kim Brooks Tandy, Executive Director of the Children’s Law Center, Inc. a freestanding public interest law organization located in Covington, Kentucky. She assembled an ad hoc planning committee by recruiting individuals with experience in working with juvenile justice and child welfare issues from a broad range of Kentucky state agencies and non-profit organizations.2

The original concept was to commemorate the anniversary with a series of events aimed at improving public awareness of the mission and of the positive accomplishments of the juvenile court. However, members of the planning committee, based on our own professional experience, knew that the juvenile court in Kentucky, in common with juvenile courts across the country, was an institution facing serious challenges.

We were aware that in recent decades the original rehabilitative mission of the juvenile courts had come under attack by “get tough” legislation aimed at juvenile offenders. We had witnessed the Kentucky General Assembly joining state legislatures across the country in enacting measures allowing or even

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2. Committee members included Rebecca Diloreto and Tim Arnold from the Kentucky Department of Public Advocacy, Deborah Williamson and Rachel Bingham from the Administrative Office of the Courts, Kim Brooks Tandy and Katherine Siereveld from the Children’s Law Center, Lowell Schechter from Chase College of Law, and Susan Stokely-Clary, Clerk to the Kentucky Supreme Court. The Committee also received assistance from Training Resource Center at Eastern Kentucky University.
requiring transfer of jurisdiction over an increasing number of alleged juvenile offenders to adult criminal courts. In the 1990s the Kentucky General Assembly had begun chipping away at the limitations on transfer set forth in 1986 when the legislature adopted the revised Uniform Juvenile Code. In 1994, the legislature added the first mandatory transfer provision to the existing discretionary transfer provisions contained in Kentucky Revised Statutes (K.R.S.) § 635.020(2). The new provision mandated transfer to adult court of any child fourteen years or older who was charged with a felony in which a firearm was used in the commission of the offense. In 1996, the legislature amended a discretionary transfer provision, K.R.S. § 635.020(3), to reduce from two to one the number of prior adjudications necessary to render a sixteen-year-old charged with a class C or D felony subject to discretionary transfer to adult court. In 2000, the legislature amended its 1994 mandatory transfer amendment by expressly requiring transfer even if the firearm “used” in the commission of a felony was not functional.

Committee members were also aware that the jurisdiction of the juvenile court was being reduced even more drastically as a new “family court” model was replicated in counties across the Commonwealth. The “family court” had begun in 1991 with a pilot project in just one urban county, Jefferson County. However, it had gradually expanded into a number of other suburban and rural counties in the 1990s. After voters approved a state constitutional amendment making the family court a permanent part of the Kentucky constitution, the rate of expansion increased, with family courts now operating in counties which collectively contain nearly half of the state’s population.

In these counties, the new family courts acquired jurisdiction over two major categories of cases previously handled by juvenile courts: “child welfare” cases involving dependent, neglected, and abused child, and “status offenses” involving children who were runaways, truants from school, or beyond the control of their parents. The new family court was also given jurisdiction over divorce, adoption, paternity and domestic violence cases.

Without in any way disputing the possible benefits of the “One Family, One Judge, One Court” approach, one may still be concerned about the potential negative impact on the juvenile court. Removing from the juvenile court all child welfare cases, in which children are likely to be viewed with sympathy as victims of adult misbehavior, reduces the juvenile court to dealing almost

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4. The child had to have attained the age of 14 before the commission of the alleged offense.
7. Jefferson County includes Louisville, the largest city in the Commonwealth of Kentucky.
exclusively with delinquency cases in which children are much more likely to be perceived as threats to the members of the community because of their alleged offenses. Having a juvenile court dealing only with delinquents may reinforce the perception of the juvenile court as nothing more than a “minor league” version of adult criminal court.\textsuperscript{10}

Committee members also had cause for concern about the quality of justice provided to children charged with delinquent conduct who remained within the jurisdiction of the juvenile court. One cause for concern was that children in juvenile court were not legally entitled to some significant procedural safeguards, such as the right to trial by jury, enjoyed by their counterparts in adult criminal court.\textsuperscript{11} A second, greater cause for concern was the growing evidence that children in juvenile court all too often were not even receiving the safeguards that they were entitled to by law. The Executive Director and staff of the Children’s Law Center had participated in conducting assessments in Kentucky\textsuperscript{12} and in Ohio\textsuperscript{13} to determine whether juveniles charged with delinquency were actually being provided with legal representation and, if so, whether the quality of legal representation provided was adequate. Subsequently, another Center staff member had completed a comparative study of data from a number of individual state assessments which demonstrated that many, if not most, children in juvenile court were not getting the basic procedural safeguards that they were legally entitled to receive.\textsuperscript{14}

The cumulative weight of these concerns persuaded the committee members that, in addition to staging celebratory events and informational programs for the general public, we needed to put on a program for those actively working in the field, devoted to a more critical examination of the current state and future prospects of the juvenile court. The focus of this symposium came to be embodied in the title, “Re-envisioning the Role of the Juvenile Court in the 21st Century.”\textsuperscript{15}

The planners next decided that even though the symposium audience would be composed of professionals practicing in Kentucky, Ohio, and Indiana, the symposium program should be national in perspective. First, almost all the systemic problems we would be addressing were not unique to Kentucky, Ohio,

\textsuperscript{11} Dryden v. Com., 435 S.W.2d 457, 461 (Ky. 1968).
\textsuperscript{13} Kim Brooks and Darlene Kamine, Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio 25 (2002).
\textsuperscript{15} Credit for this title goes to Katherine Siereweld, a Chase College of Law student who served as coordinator for the live Symposium with special public interest fellowship funding provided by Gerard St. Amand, former Dean of Chase College of Law.
or Indiana, but were endemic in states across the nation. Second, the choice of procedural rules to be used in juvenile cases, which once rested exclusively within the province of each individual state government, had, to a certain extent, been “nationalized” by the United States Supreme Court’s decision in In re Gault.16

Third, planning for the Symposium began only a few months after the Supreme Court announced its decision in Roper v. Simmons.17 In Roper, the Court held that the United States Constitution prohibited the execution of youths under the age of eighteen.18 While the Court’s precise ruling was clear enough, there were many questions about the broader ramifications of particular parts of Justice Kennedy’s majority opinion. For example, the majority opinion had used recent social and scientific research to support a claim that even sixteen or seventeen year-old juveniles were significantly different from adults in terms of their brain development and capacities. This emphasis on the differences between youths and adults seemed to contravene the recent trend towards trying more juvenile offenders as adults in adult criminal courts. Would the Roper decision lead to a slowing or even a reversal of this trend? Or could and would this opinion be used to justify imposing greater civil disabilities upon those under eighteen, on the basis that the Supreme Court had recognized that those under eighteen still lacked the brain capacity of their elders?

Finally, it was agreed after considerable discussion that given time, resource and logistical constraints, the symposium presentations should be focused primarily on the delinquency, as opposed to the child welfare, aspect of the juvenile court docket.

Indeed, the three papers from the symposium which are included in this issue of the Northern Kentucky Law Review all focus on the juvenile justice process. While each of the three authors brings a different perspective and examines different parts of the juvenile justice process, they all end up raising serious questions as to the accuracy and fairness of the current process.

Professor Barry Feld of the University of Minnesota is the author of the first article entitled A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?19 Professor Feld writes with the perspective of someone who has been a leading scholar in the field of juvenile justice for over three decades. It should be explained that given his expertise in the field, Professor Feld was recruited by the planners to deliver the keynote address at the symposium. As the keynote speaker, Professor Feld was asked by the planners to provide an overview of the evolution of the juvenile court over the past

16. 387 U.S. 1 (1967). Gault held that some, but not all, federal constitutional safeguards required in adult criminal proceedings were also required in juvenile delinquency proceedings. Id. at 57.
18. Id. at 578-79.
century before engaging in an analysis of the problems confronting the juvenile court today. He was also asked to be forthright, and even provocative, in expressing his views for the purpose of generating discussion during the rest of the symposium.

Professor Feld’s paper manifests his adherence to these requests by presenting a provocative account of the troubled history of the juvenile court, before turning to issues of current concern. In light of the new psychological developmental research on adolescent competence and culpability, he examines three crucial issues in regard to the treatment of juvenile defendants: (1) the failure to provide them with effective legal counsel; (2) the growing practice of waiving or transferring them over to adult criminal courts for trial; and (3) the disproportionate confinement of minority offenders.

A reader can draw little comfort from Professor Feld’s analysis, which demonstrates that juvenile defendants are often the victims of “no-win” or “lose-lose” situations. For example, Professor Feld makes well-documented cases for two propositions. The first, based on the recent research on adolescent competence, is that most juveniles are simply incapable of effectively representing themselves. The second, based on recent empirical studies assessing juvenile defendants’ access to counsel, is that most juvenile defendants either do not have the benefit of any legal representation at all, or receive little more than nominal assistance from legal counsel. Demonstrating that most juvenile defendants are not able to represent themselves and are not being adequately represented by attorneys, should be sufficient by itself to raise serious doubts about the accuracy and fairness of juvenile court determinations of delinquency. However, Professor Feld does not stop there. Instead, he proceeds to make the case that those juvenile defendants who do have the presumed benefit of counsel representing them before the juvenile court are, in fact, statistically at greater risk of being incarcerated than those who don’t have legal counsel. Feld cites research, which controlling for other variables, concludes that representation by counsel is an aggravating factor, leading to imposition of harsher dispositions by juvenile court judges. The bottom line, for juvenile defendants, is that even in the best of circumstances, they must risk paying the penalty of a harsher disposition in order to receive the legal representation they need.

Feld’s article is followed by Professor Steven A. Drizin and Greg Luloff’s article, entitled *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?* Drizin and Luloff address some of the same procedural issues as Feld, such as the failure to provide juvenile defendants with adequate legal counsel. However, they do so from a different perspective and in pursuit of a different objective. They bring with them to their analysis their prior experience as clinical professor and clinical student in the Northwestern University Law School’s Innocence Project. Their Innocence Project experience leads them to
assess the juvenile justice process in terms of the accuracy of its results. The key question for them is whether the current process produces a high level of accuracy in juvenile court determinations of delinquency or an excessive number of wrongful convictions.

Drizin and Luloff argue that there is most probably a greater risk of a wrongful “conviction” in juvenile court than in adult criminal court. They point out yet another anomaly in the legal system’s treatment of juveniles. Juveniles, while less competent to defend themselves and more vulnerable to be pressured into making false confessions than adults, are, at the same time, denied under current law some of the basic due process protections routinely provided to adults. Moreover, given current practice, juveniles are much less likely to have the opportunity to appeal dubious trial court decisions.

While the substance of their critique of the current system is just as devastating as Feld’s, Drizin and Luloff try to remain optimistic and close with a long list of recommendations for providing more effective protections against wrongful convictions of juvenile defendants, including providing juvenile defendants with a non-waivable right to counsel, greater safeguards against coerced confessions, the benefits of a probable cause hearing, a right to a jury trial, and access to appellate counsel for appeals.

In contrast to Drizin and Luloff’s wide-ranging critique of current practices, Dr. Randy K. Otto’s article is tightly focused on one particular step in the process. In his article, entitled Considerations in the Assessment of Competence to Proceed In Juvenile Court, Dr. Otto raises the issue of whether juvenile courts are applying an appropriate standard in determining whether the children coming before them are in fact competent to stand trial.

Otto believes that the determination of competence is a critical step in the juvenile justice process. He argues that a child who is not competent to understand and participate in the proceedings is a child who, most likely, will not be able to make effective use of the other procedural safeguards provided for juvenile defendants.

Otto surveys state practice and finds that most states that have enunciated competency standards for juvenile defendants have simply imported the competency standards used in the jurisdiction’s adult proceedings. Based on his experience as a clinical psychologist and his review of the relevant literature, he suggests that the use of the adult standards may be problematical. For example, he questions whether the adult standards, geared toward assessing the competence of mentally retarded or mentally ill adults, are appropriate for dealing with children whose competence is in question because of their developmental immaturity.

At the live symposium in September, Dr. Otto was followed by James Bell, Executive Director of the W. Haywood Burns Institute. Mr. Bell had been asked

to provide *An International and Comparative Perspective on the Role of the Juvenile Court*. Speaking on the basis of his extensive consulting and training work in Africa, Asia, and Europe, Mr. Bell raised some additional causes for concern about the quality of juvenile justice provided in the United States. The significance of Bell’s concerns has prompted this attempt to provide, however imperfectly, a brief synopsis of his argument.

Mr. Bell suggested that if we were to broaden our perspective as to the treatment of children in general, and “delinquent” children in particular, by comparing what has been happening in the United States with what has been happening elsewhere in the world, we would find far more reason for serious concern than for self-congratulation. One source of concern for Mr. Bell was the United States’ negative response to the international conventions protective of children’s’ rights. He noted that the United States has most often refused to become a party to these human rights treaties and has refused to implement the provisions of those to which it has consented. A second concern was the much higher rate of incarceration of juveniles in the United States than in most other parts of the world. A third concern was the highly disparate rate of incarceration of African-American and Hispanic youths.

In his closing remarks, Mr. Bell struck a more positive note. He discussed what needed to be done to reduce both the overall rate of juvenile incarceration in the United States and the disparate rate of minority juvenile incarceration. In particular, he described the strategies and tactics being employed by the Haywood Burns Institute in its effort to work cooperatively with state authorities to reduce the disparate rate of minority incarceration.

It should be clear from this Introduction that the experts who participated in our assessment of the juvenile court process identified many serious concerns with the current process. However, none of them, with the possible exception of Professor Feld, were ready to “give up” on the basic concept of the juvenile court.

It should be noted that one of the other major centennial projects was the publication of a “Second Chances” book, setting forth the life stories of individuals who were “successful graduates” of the juvenile court—individuals whose treatment in the juvenile justice system instead of punishment in the adult criminal justice system gave them a “second chance” to lead productive and rewarding adult lives.

Perhaps the articles in this symposium are best approached with this concept of the “Second Chance” in mind. If after its first one hundred years, the institution of the juvenile court were itself to be given a “Second Chance,” what could and should be done to make it a “successful institution”, one its progressive parents would be proud of?

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A CENTURY OF JUVENILE JUSTICE:
A WORK IN PROGRESS OR A REVOLUTION THAT FAILED?

Barry C. Feld†

I. INTRODUCTION

A century ago, Progressive reformers adopted a more modern construction of childhood as a developmental period of innocence, dependence, and vulnerability. They embraced a more scientific understanding of social control – positive criminology – and tried to identify the causes of crime and to treat, rather than to punish, offenders. Reformers combined the new vision of childhood with new insights into criminality to create a judicial-welfare alternative to the adult criminal process. Jurisdiction over dependent as well as delinquent children reflected juvenile courts’ broader role as a child-saving welfare agency and not simply a “junior” criminal court.1

Juvenile courts simultaneously asserted families’ responsibility to raise their children and expanded states’ prerogative to act as parens patriae or “super-parent.” Because some poor and immigrant parents failed to meet their responsibilities, juvenile courts intervened to socialize and control their children.2 At its inception, they attempted to assimilate and “Americanize” the children of southern and eastern European immigrants pouring into industrial cities of the East and Midwest.3 A century later, one of juvenile courts’ primary missions is to control young black males in America’s post-industrial cities.

For most of its existence, juvenile courts’ rehabilitative goals and discriminatory means remained unquestioned and unchallenged. Systematic


criticism emerged in the 1960s and culminated in the Supreme Court’s *In re Gault* decision in 1967. Critics contested both the underlying theory of the “Rehabilitative Ideal” and the legitimacy of coercive intervention. They disputed the benevolence of juvenile justice officials, questioned whether correctional personnel could treat offenders effectively, and objected to discretionary decisions that treated minority offenders more harshly. During the 1960s, the Warren Court increasingly emphasized procedural formality to regulate criminal and juvenile justice decision-making. Court decisions formalized delinquency hearings, transformed the juvenile court from a welfare agency into a legalistic one, and fostered a convergence between the juvenile and criminal justice systems.⁵

As in so many domains of public policy, the role of race provides a window through which to view changes in juvenile justice policies. During the second-half of the twentieth century, race had two distinct and contradictory influences. In the 1950s and 1960s, the Supreme Court overturned Southern states’ “separate but equal” Jim Crow legal system and imposed national norms affirming equality and the rule of law.⁶ The Court’s school desegregation, criminal procedure and juvenile justice decisions reflected a broader constitutional agenda to protect individual rights and the civil rights of racial minorities.

Juvenile justice policies changed initially in response to *In re Gault* and subsequently with “get tough” legislation during the late-1980s and early-1990s. Beginning in the 1960s, Republican politicians attributed rising “baby boom” crime rates and urban race riots to the Court’s judicial activism which led to a breakdown of “law and order.” They pursued a “Southern Strategy” to mobilize white voters’ opposition to school integration and suburban voters’ racial antipathy and to realign the political parties around issues of race.⁷ During the

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⁶. See generally Lucas A. Powe, Jr., *The Warren Court and American Politics* 490 (2000) (arguing that the Court, beginning with *Brown v. Board of Education*, and reinforced by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, altered the “southern way of life.” “[T]he legal regime of race was nationalized with a single operative standard for the entire country. But the effort . . . was directed exclusively at the South and was designed to force the South to conform to northern – that is, national – norms.”); see generally Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1980s* 55-56 (2nd ed. 1994).

1970s-1990s, conservative politicians used crime as a “code word” for race and advocated “get tough” policies. When black youth homicide rates peaked in the early 1990s, politicians advocated a “crack down” on youth crime and enacted tougher juvenile transfer and sentencing laws to garner electoral advantage.

This article analyzes changes in juvenile justice policies over the past century. Part I provides a brief history of the juvenile court, highlights the discriminatory premises embedded in its processes, and provides a baseline against which to measure subsequent changes. Part II examines the Court’s juvenile justice decisions and puts them in the broader context of the civil rights movement and the quest for racial equality. Part III analyzes structural, criminological, racial, and political dynamics in the 1980s and 1990s to explain the ascendance of “get tough” juvenile justice policies. Part IV reviews recent developmental psychological research on adolescents’ competence and culpability and explores their implications for a justice system for children. It focuses on three policy issues: 1) procedural justice and delivery of legal services; 2) waiver of youths to criminal court for sentencing as adults; and 3) disproportionate confinement of minority offenders. It concludes with an assessment of the contemporary juvenile court.

II. THE PROGRESSIVE JUVENILE COURT – PROCEDURAL INFORMALITY AND THE “REHABILITATIVE IDEAL”

A century ago, economic modernization transformed America from a rural, agricultural, Anglo-Protestant society into an ethnically diverse, urban and industrial one. The growth of manufacturing spurred a massive influx of immigrants from southern and eastern Europe. They crowded into ethnic
The rise of manufacturing reallocated work from farms, homes, and family-shops to larger industrial settings and modified the roles of women and children in the family. The idea of childhood is socially constructed and during this modernizing era upper- and middle-class women promoted a vision of children as vulnerable, fragile, dependent, and innocent who required protection and supervision in their transition to adulthood.

The Progressive movement addressed many social problems associated with modernization including economic regulation, criminal justice, and political
reforms. Progressives created and expanded private and public agencies to assimilate and “Americanize” immigrants and their children. They enacted child-centered reforms – juvenile courts, child labor laws, social welfare laws, and compulsory school attendance laws – which reflected the new construction of children as different from adults and in need of protection. The presence of children in police stations, jails, criminal courts and prisons appalled Progressive reformers and led to the quest for institutional alternatives for misbehaving youths.  

The first function of the juvenile court was simply to provide a diversion from the adult criminal justice system. 

Ideological ferment provided Progressives with a criminological rationale to treat children differently and apart from adults. Positive criminology supplanted classical criminal law’s emphasis on crime as a free-will choice and supported a more scientific conception of social control. Progressives attributed criminal

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15. Many Progressive programs focused on controlling, molding, and protecting children. See, e.g., Wiebe, supra note 9, at 169 (“The child was the carrier of tomorrow’s hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create that bright new world of the progressives’ vision.”); Lawrence Cremin, The Transformation of the School: Progressivism in American Education, 1876-1957 (1961) (attributing compulsory school attendance laws to efforts to structure childhood); Walter Trattner, Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in New York State 119-142 (1970) (attributing child labor laws to protection of children).

16. Tannenhaus, supra note 1, at 6.

17. Franklin E. Zimring, The Common Thread: Diversion in Juvenile Justice, 88 Cal. L. Rev. 2477, 2481 (2000) (Prof. Zimring argues that diversion from the criminal process constituted an improvement per se in the handling of children. “The first belief was that a child-centered juvenile court could avoid the many harms that criminal punishment visited on the young. The reformers found penalties unnecessarily harsh, and considered places of confinement to be schools for crime that corrupted the innocent and confirmed the redeemable in the path of chronic criminality.”). 

18. Ideological assumptions about the causes of crime shape criminal justice policies. David Garland, Punishment in Modern Society 195 (1990) (noting that ideologies of crime “structure the ways in which we think about criminals, providing the intellectual frameworks (whether scientific or religious or commonsensical) through which we see these individuals, understand their motivations, and dispose of them as cases.”). For example, classical criminal law assumed free-willed actors made blameworthy choices to commit crimes and that they deserved punishment. At the turn of the 20th Century, new theories about human behavior and social deviance led Progressives to reformulate the ideology of crime and to modify criminal justice administration. Positive criminology asserted that antecedent forces—biological, psychological, social, or environmental—determined or caused criminal behavior. See, e.g., Rothman, supra note 3, at 50-52. It sought to scientifically identify the causes of crime and to prescribe appropriate remedies. Francis A. Allen, Legal Values and the Rehabilitative Ideal, in The Borderland of the Criminal Law: Essays in Law and Criminology 26 (1964) [hereinafter Allen, Legal Values and the Rehabilitative Ideal]; David Matza, Delinquency and Drift 1-32 (1964). Positivism
behavior to deterministic forces that reduced personal responsibility for crime and they employed medical analogies to rationalize treating rather than punishing offenders.\textsuperscript{19} Several criminal justice reforms – probation, parole, indeterminate sentences, and the juvenile court – reflected their “Rehabilitative Ideal.”\textsuperscript{20}

Combining the new ideologies of childhood with positivist criminology provided the rationale for “an institution that would intervene forcefully in the lives of all children at risk to effect a rescue.”\textsuperscript{21} Zimring argues that despite juvenile courts’ ambitious interventionist and rehabilitative justifications, they provided a diversionary alternative to criminal courts regardless of whether they treated youths successfully.\textsuperscript{22} Although rehabilitation provided a more politically attractive and impressive rationale for Progressive reformers, diversion was then and remains today an important part of juvenile courts’ mission.\textsuperscript{23}

Despite standard historical accounts, the juvenile court did not emerge fully-formed in Cook County, Illinois, in 1899, but rather constituted an evolutionary attributed criminal behavior to deterministic forces that compelled offenders to act as they did. Because antecedent forces determined offenders’ behavior, they bore less responsibility for their crimes and criminal justice agencies sought to reform rather than to punish them. Francis A. Allen, \textit{The Decline of the Rehabilitative Ideal} 3-7 (1981); Katherine Beckett, \textit{Making Crime Pay: Law and Order in Contemporary American Politics} 8 (1997) (“[D]eviant behavior is at least partially caused (rather than freely chosen). Progressive reformers therefore identified rehabilitation – operationally defined as the use of ‘individualized corrective measures adapted to the specific case or the particular problem’ – as the appropriate response to deviant behavior.”).

\textsuperscript{19} Matza, \textit{supra} note 18, at 12-21; Rothman, \textit{supra} note 3, at 50-52; Ryerson, \textit{supra} note 9, at 22.

\textsuperscript{20} Francis Allen describes the central assumptions of the “Rehabilitative Ideal:” The rehabilitative ideal . . . assumed, first, that human behavior is the product of antecedent causes. These causes can be identified. . . Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, . . . it is assumed that measures employed to treat the convicted offender should serve a therapeutic function; that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions and in the interest of social defense.

\textit{Allen, Legal Values and the Rehabilitative Ideal, supra} note 18, at 26. Progressives believed that the social and behavioral sciences provided them with the ability to systematically change people.

\textsuperscript{21} Zimring, \textit{supra} note 17, at 2480. \textit{See also}, Franklin E. Zimring, \textit{The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in A Century of Juvenile Justice} 145 (Margaret K. Rosenheim et al., eds., 2002). Zimring argues that “the interventionist argument emphasized the positive good that new programs administered by child welfare experts could achieve. A child-centered court was an opportunity to design positive programs that would simultaneously protect the community and cure the child.” Zimring, \textit{supra} note 17, at 2482-83.

\textsuperscript{22} Zimring, \textit{supra} note 17, at 2480 (Prof. Zimring describes the two justifications for the juvenile court as diversionary and interventionist. “The diversionary goal of the court was to save kids from the savagery of the criminal courts and prisons. The interventionist goal was to create programs that would rescue delinquents from crime and truancy.”).

\textsuperscript{23} \textit{Id}.
“work-in-progress.” Tanenhaus argues that “significant changes in the structure, rules, and self-conception of juvenile justice have been a part of its history from the beginning. Juvenile justice grew by accretion, and its experiential growth was largely fueled by local politics.” Understanding the juvenile court as a “work-in-progress” emphasizes its historically contested structure and functions and ongoing debates about its jurisdiction and who would decide how to handle different categories of children. In re Gault’s “constitutional domestication” of the juvenile court in 1967 and “get tough” policies of the 1980s and 1990s reflect the ongoing politically and legally contested, “work-in-progress” character of juvenile courts.

The juvenile court melded the ideology of childhood with positivist conceptions of social control, introduced a judicial-welfare alternative to the criminal justice system, and provided the organizational mechanism to empower the state as parens patriae. Progressive “child-savers” described the juvenile court as a benign, non-punitive, and therapeutic agency. Its jurisdiction over both delinquent and dependent children melded child welfare and crime control goals. Because reformers characterized intervention as a civil, child-welfare proceeding rather than as a criminal prosecution, they enjoyed wide latitude to supervise children. Juvenile courts’ status jurisdiction allowed them to control non-criminal behavior such as “sexual precocity,” truancy, and “immorality” as well as criminality.

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24. See, e.g., Tanenhaus, who emphasizes that:

Illinois’s pioneering juvenile court act read like a rough blueprint. Most of the features that later became the hallmarks of progressive juvenile justice – private hearings, confidential records, the complaint system, detention homes, and probation officers – were either omitted entirely from the initial law or were included without any provisions for public funding. As a result, the world’s first juvenile court opened on July 3, 1899, with an open hearing, a public record, no means to control its calendar (i.e. no complaint system), and without public funds to pay either the salaries of probation officers or to maintain a detention home for children.

Tanenhaus, supra note 13, at 42-43 (citation omitted).

25. Id. at 43.

26. TANENHAUS, supra note 1, at xxvii.

27. TANENHAUS, supra note 1, at xxvii-xxix.

28. FELD, supra note 2, at 55-57; ROTHMAN, supra note 3, at 205-35.

29. PLATT, supra note 3, at 176-181; SCHLOSSMAN, supra note 3, at 58; SUTTON, supra note 3, at 232-58.

30. FELD, supra note 2, at 46; TANENHAUS, supra note 1, at 22. Tanenhaus argues that “progressive child savers conceived of all children as being different from adults and, accordingly, did not draw sharp distinctions between dependents and delinquents and believed that a unified children’s court could serve both.” Id. at 59.

31. Reformers conceived juvenile courts as a social welfare system to control behaviors that criminal courts previously ignored or handled informally. PLATT, supra note 3, at 46-74; SUTTON, supra note 3, at 121-53. Its broader jurisdiction included not only criminal acts but also a child’s “status” and social circumstances. See, e.g., SCHLOSSMAN, supra note 3, at 151-53; RYERSON, supra note 9, at 47. The “status jurisdiction” reflected the newer conception of childhood and the
Progressives separated children from adults, diverted them to a judicial-welfare alternative to the criminal justice system, and rejected the criminal law’s procedural safeguards and jurisprudence. 32 Juvenile courts used informal procedures, excluded lawyers and juries, and adopted a euphemistic vocabulary to de-emphasize any resemblance to criminal proceedings. 33 Juvenile courts increasingly employed separate detention homes to remove delinquents from adult jails.34 The original Cook County juvenile court initially conducted public hearings because of concerns by political interests and religious groups about state intrusions into the lives of working-class and ethnic families.35 Within a decade of its creation, the juvenile court closed its doors to the public and press and conducted confidential hearings.36 Judges imposed indeterminate and non-proportional dispositions to achieve offenders’ “best interests” and future welfare rather than to punish them for past offenses.37 By the 1920s, “child-

32. See ROTHMAN, supra note 3, at 212; FELD, supra note 2, at 60-63.
33. See, e.g., NAT’L RESEARCH COUNCIL & INST. OF MEDICINE, JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001) summarize the Progressive’s conception of juvenile court procedures:

It was to focus on the child or adolescent as a person in need of assistance, not on the act that brought him or her before the court. The proceedings were informal, with much discretion left to the juvenile court judge. Because the judge was to act in the best interests of the child, procedural safeguards available to adults, such as the right to an attorney, the right to know the charges brought against one, the right to trial by jury, and the right to confront one’s accuser, were thought unnecessary. Juvenile court proceedings were closed to the public and juvenile records were to remain confidential so as not to interfere with the child’s or adolescent’s ability to be rehabilitated and reintegrated into society.
34. TANENHAUS, supra note 1, at 34-35.
35. Tanenhaus notes that:
[t]he progressive efforts to extend the reach of the state into the everyday lives of predominantly working-class urban dwellers raised troubling questions about the proper relationship of new institutions, such as the juvenile court, to “the public.” . . . The process . . . of making the juvenile court into a sheltered place to protect children . . . would take more than two decades.

TANENHAUS, supra note 1, at 25.
36. TANENHAUS, supra note 1, at 49.
37. See Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104 (1909); THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 83 (1992) (“It was a social welfare agency, the central processing unit of the entire child welfare system. Children who had needs of any kind could be brought into the juvenile court, where their troubles would be diagnosed and the services they needed provided by court workers or obtained from other agencies.”). Juvenile court judges imposed indeterminate and non-proportional dispositions that could continue for the duration of minority. FELD, supra note 2, at 69-74. “Indeterminate” meant that the dispositions had no set limit and could continue indefinitely until adulthood. Id. at 70. “Non-proportional” meant that no relationship existed between what the child allegedly did and the length of disposition. Id. The particular behavior that brought a child before the court affected neither the degree, the duration, nor the intensity of intervention. Id. Each child’s circumstances differed and judges based dispositions on their future “needs” rather than their past “deeds.”
savers” further “medicalized” delinquency and described it as a mental disorder that required an individualized treatment plan. 

38. Judges enjoyed broad discretion to diagnose and treat a child based on her lifestyle and “real needs” rather than simply her crime. 

Progressive reformers recognized that real differences existed in children’s lives and circumstances, and they expected juvenile courts to discriminate and to exercise greater control over poor and immigrant children because they had greater needs. 

They did not regard racial and ethnic discrimination as invidious, but rather as an opportunity to make “other peoples’ children” more like “our children.” 

Probation was the disposition of first resort for most delinquents, but because poor and immigrant children had farther to go and required greater controls, they quickly filtered through the benevolent system into its more punitive institutions.

40. The emergence of the “therapeutic state” affected children’s families as well as the delinquents themselves. Tanenhaus, supra note 13, at 53. Tanenhaus further states that:

> The child who got into trouble with the law . . . not only brought the state into his or her life, but also opened up the family home to state intervention and extended supervision. Thus, the entire family, not only the child, became the subject for extended case work, which could involve demands to change jobs, find a new residence, become a better housekeeper, prepare different meals, give up alcohol, and abstain from sex.

Tanenhaus, supra note 13, at 53-54 (citation omitted).

38. Tanenhaus, supra note 1, at 111–37 (describing the medicalizing of delinquency and placing it in the broader context of the increased influence of psychology and psychiatry in matters of public policy).

39. Rothman, supra note 3, at 38; Ryerson, supra note 9, at 40-41; Schlossman, supra note 3, at 157-80.

40. Grubb & Lazerson, supra note 2, at 69 (describing selective application of parens patriae ideology in a class-based society); Rothman, supra note 3, at 222; Platt, supra note 3, at 36-39; Feld, supra note 2, at 75-76; Nat’l Research Council et al., supra note 33, at 154-155 (tension between social control and social welfare and balancing best interest of the child with protection of society).

41. Feld, supra note 2, at 75-76.

42. See, e.g., Tanenhaus, supra note 1, at 35 (Tanenhaus argues that “[p]robation officers were the ‘right arm of the court’ because they investigated homes; interviewed neighbors, teachers and employers; made recommendations to the judge about what should be done with children; represented them during hearings; and supervised those on probation.”); Schlossman, supra note 3, at 77.

43. Steven Schlossman & Stephanie Wallach, The Crime of Sexual Precocity: Female Juvenile Delinquency in the Progressive Era, 48 Harv. Ed. Rev. 65, 66 (1978); Rothman, supra note 3, at 103 (Rothman notes that “[t]he exercise of judicial discretion helped to effect a dual system of criminal justice: one brand for the poor, another for the middle and upper classes. Judicial discretion may well have promoted judicial discrimination.”). Tanenhaus, supra note 1, at 37–39 (arguing that the unwillingness of private institutions to accept dependent and delinquent black children caused juvenile courts to commit them to institutions more quickly and for less serious offenses than they did their white counterparts).
III. THE CONSTITUTIONAL CONTEXT OF THE JUVENILE COURT DECISIONS

In the decades before and after World War II, Blacks migrated from the rural south to the urban north and the “great migration” made race a national rather than a regional issue and fostered a more assertive civil rights movement. These broader structural changes contributed to the Warren Court’s civil rights, criminal procedure, and juvenile court decisions during the 1960s. The Court’s decisions and Congressional passage of Civil Rights and Voting Rights laws in the mid-1960s coincided with “baby boom” increases in youth crime and urban racial riots. By the end of the decade, conservative politicians began to exploit the volatile issues of race and crime for political advantage.

A. Racial Demographics and Legal Change

Black migration from the rural South to the industrial cities of the North and West in the decades before and during World War II put the quest for racial equality and civil rights on the national political agenda. In 1914, World War I curtailed European immigration and created a demand for southern Blacks to work in northern factories. Between World Wars I and II, the mechanization of cotton-picking further reduced the need for black laborers in the South. Half-million southern Blacks migrated north between 1910 and 1920 and three-quarters of a million moved in the following decade. During the Great Depression, dire economic conditions caused an out-migration of another 400,000 Blacks to northern cities. Jim Crow laws, segregated schools, job discrimination, and Ku Klux Klan violence drove more Blacks out of the South. During World War II, one and one-half million Blacks left the rural...
South to work in northern defense-industries51 and another one and one-half million followed during the 1950s.52

Blacks settled primarily in urban ghettos when they migrated.53 Northern Whites’ racial hostility and violence reinforced segregation in housing, education, and employment.54 After World War II, northern Whites began to move to suburbs and to isolate Blacks in inner-city ghettos.55 A variety of public and private policies – federal mortgage, insurance, housing, tax, and highway construction – contributed to the growth of predominantly white suburbs surrounding poor and minority neighborhoods within most major cities.56

51. See, e.g., EDSALL & EDSALL, supra note 7, at 33; GILENS, supra note 9, at 104-05 (“The average black out-migration from the South between 1910 and 1939 was only 55,000 people per year. But during the 1940s it increased to 160,000 per year, during the 1950s it declined slightly (to 146,000 per year), and between 1960 and 1966 it fell to 102,000 per year.”); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 24 (rev. ed. 1995) (“The real changes began during the Second World War, when for the first time black Americans were courted by white society. A shortage of civilian labor forced employers to offer jobs to workers who previously had been excluded.”); Lieberson states that:

[i]n 1920, only a few years before massive new European immigration was to end, 85 percent of all blacks lived in the South. Three-fourths were still in the South when the United States entered World War II. This figure decreased in succeeding decades, thanks to the massive changes during and after the war, but in 1970 a bare majority of blacks was still living in the South.

LIEBERSON, supra note 10, at 9.

52. MASSEY & DENTON, supra note 11, at 45 (noting that 1,500,000 migrated during the 1950s and 1,400,000 during the 1960s); LEMANN, supra note 44, at 6 (between 1940 and 1970, five million blacks moved out of the South and reduced the proportion of Blacks remaining in the South from three-quarters to half).

53. See MASSEY & DENTON, supra note 11, at 45 (during the “great migration” southern blacks flooded Chicago, Detroit, Philadelphia and other northern and midwestern industrial centers); see generally Trotter, supra note 44 (analyzing causes and impact of great migration in different regions of the country); In 1910, fewer than one-quarter of Blacks lived in cities. MASSEY & DENTON, supra note 11, at 21. By 1940, half of Blacks lived in cities, and by 1960, more than three-quarters did. Id.; FIELD, supra note 2, at 85. In 1870, 80% of black Americans lived in the rural south; by 1970, 80% of black Americans resided in urban locales, half in the North and West. See MASSEY & DENTON, supra note 11, at 68; see also GILENS, supra note 9, at 105. Although African-Americans comprised only 2% of northerners in 1910, by 1960, they accounted for 7% of the northern population and 12% of urban residents. Id. at 105.

54. See MASSEY & DENTON, supra note 11, at 30 (describing upsurge of racial violence in northern cities between 1900 and 1920 and attacks on individual blacks); LIEBERSON, supra note 10, at 260 (“[B]lack segregation in the urban North increased from 1900 onward not only because their proportion of the population grew, but also because the same composition led to more isolation than it had during earlier decades.”); HACKER, supra note 51, at 18.


56. Federal mortgage, housing, and tax policies subsidized construction of privately-owned single-family homes in almost exclusively white suburbs. The federal interstate highway program facilitated suburban expansion. MASSEY & DENTON, supra note 11, at 44-45 (“In making this transition from urban to suburban life, middle-class whites demanded and got massive federal investments in highway construction that permitted rapid movement to and from central cities by car.”); KATZ, supra note 55, at 134. (“Federal policy ensured that housing development happened in suburbs rather than within cities and favored the white middle classes rather than minorities and the poor.”). Interstate highways and housing projects disrupted many black urban communities and
During the 1950s and 1960s, the Civil Rights movement confronted racism and segregation in the South, demanded racial equality and social justice, and ultimately transformed both political parties. Until the 1960s, southern Jim Crow laws, customs, and violence enforced an apartheid system of white supremacy and black subordination. The Warren Court’s school desegregation, civil rights, and criminal procedure decisions attempted to dismantle the white southern racial regime. In *Brown v. Board of Education*, the Court repudiated the “separate but equal” doctrine and initiated efforts to desegregate public schools. Southern politicians condemned *Brown* as illegitimate judicial activism and urged “massive resistance” to its intrusion on states’ prerogatives. Southern opposition to desegregation in the 1950s and Republican presidential campaigns of Barry Goldwater in 1964 and Richard Nixon in 1968 underscored the political value of appeals to white voters’ racial antipathy.

created physical barriers to contain their expansion. See id. at 135-36 (“Not only did new highways and expressways encourage commuting and population dispersal; they also divided cities into new sections, creating walls between poor or minority neighborhoods and central business districts.”); MASSEY & DENTON, supra note 11, at 55-56 (“During the 1950s and 1960s, local elites manipulated housing and urban renewal legislation to carry out widespread slum clearance in growing black neighborhoods that threatened white business districts and elite institutions.”).

57. See OMI & WINANT, supra note 6, at 95-100 (arguing that during the 1950s, the race-based Civil Rights movement contested the social construction of race).

58. Powe, supra note 6, at 490, concludes that the Warren Court explicitly intended to change southern legal and cultural traditions.

By 1953 the South had created, by law and custom (backed by whatever force necessary), a caste system based on white supremacy. From laws against miscegenation, to laws mandating segregation, to subterfuges maintaining a basically all-white electorate, to the use of peremptory challenges to ban African-Americans from juries, to the enforced customs of better jobs for whites, to mandating social deference . . . the southerners lived in a society that told all whites, no matter how poor, ignorant, or illiterate, that they were better than any African-American.

59. See Powe, supra note 6, at 492-96; Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 94 (2000) (“[T]he Supreme Court probably was a better gauge of national opinion on race than was a United States Congress in which white supremacist southern Democrats enjoyed disproportionate power because of Senate seniority and filibuster rules.”).

60. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see G. Edward White, *Warren Court (1953-1969)*, in *American Constitutional History: Selections From the Encyclopedia of the American Constitution* 279, 280 (Leonard W. Levy et al. eds., 1986) (“The context of the Warren Court’s first momentous decisions was decisive in shaping the Court’s character as a branch of government that was not disinclined to resolve difficult social issues, not hesitant to foster social change, not reluctant to involve itself in controversy.”).

61. See Powe, supra note 6, at 47 (white southern leaders urged resistance and described *Brown* as a decision by “a lawless Court, abandoning the Constitution (‘a mere scrap of paper’) for the personal and political values of unelected judges”).

62. See Edsall & Edsall, supra note 7, at 77-79; Powe, supra note 6, at 60-62 (Powe is describing southern congressional Democrats drafting the “Southern Manifesto” which denounced *Brown* as an abuse of judicial power and advocating non-compliance with an unlawful decision. In the aftermath of *Brown*, Southern racial moderates virtually disappeared under the pressure of more hard-line racists.).
The passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 created a national legal standard and imposed racial equality on the South.\(^{63}\) The majority of white Americans at least tacitly subscribe to cultural and legal norms of racial equality.\(^{64}\) Although a commitment to equality prohibits \textit{de jure} segregation or expressing racist opinions, American society, then and now, remains deeply divided over matters of race and some politicians have exploited those racial resentments for electoral advantage.\(^{65}\)

\textbf{B. Civil Rights as Impetus for Juvenile Justice Decisions}

Criminal procedure and juvenile justice reforms further advanced the Warren Court’s civil rights agenda because the poor, minorities, and the young disproportionately comprised those accused of crimes.\(^{66}\) During the 1960s, the Court’s decisions endorsed adversarial procedures and adopted constitutional rules to limit police discretion, to protect minorities from state officials, and to protect defendants’ rights.\(^{67}\) The Fourteenth Amendment and the Bill of Rights provided the Court with the constitutional authority to limit the state, to expand equality for minorities, and to control criminal justice decision-making.\(^{68}\)

\(^{63}\) \textsc{Tali Mendelberg}, \textit{The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality} 18 (2001) (arguing that the norm of racial equality emerged in the United States during the 1950s and 1960s as cultural leaders and influential elites attacked segregation, lynching and brutality, and denial of the right to vote); \textsc{Gilens, supra} note 9, at 108 (noting that passage of the Voting Rights Act led to increased registration of Blacks nationwide from 29 percent in 1962 to 67 percent in 1970); \textsc{Powe, supra} note 6, at 232 (104 of the 130 congressional votes cast against the Civil Rights Act were by southern Democrats “who fully understood that this bill was aimed directly at the white South”).

\(^{64}\) \textsc{Mendelberg, supra} note 63, at 18 (“In the age of equality, neither citizens nor politicians want to be perceived or to perceive themselves as racist. The norm of racial equality has become descriptive and injunctive, endorsed by nearly every American.”).

\(^{65}\) \textit{Id.} at 19 (“Because the civil rights era came and went without fully resolving the problems of racial inequality, individuals and institutions are forced to continue to reach decisions about racial matters, matters that count among the most difficult of our national problems.”).

\(^{66}\) \textit{E.g.,} \textsc{Powe, supra} note 6, at 198; Francis A. Allen, \textit{The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases}, 1975 U. ILL. L. FORUM 518.

\(^{67}\) \textit{See, e.g.,} Fred P. Graham, \textit{The Due Process Revolution: The Warren Court’s Impact on Criminal Law} at 110-11 (1970); Garland, \textit{supra} note 8, at 57 (“In effect, the new critique of rehabilitation was the extension of civil rights claims to the field of criminal justice, a process that had already begun with the Warren Court of the 1960s and its extension of due process protections to suspects and juveniles.”); \textsc{Powe, supra} note 6, at 386 (“African-Americans were disproportionately affected by whatever abuses or inequities there were in the criminal justice system”); Note, \textit{Developments in the Law: Race and the Criminal Process}, 101 HArv. L. Rev. 1472, 1488-94 (1988) (equality principle in reform of criminal procedures after Brown \textit{v. Board of Education}); White, \textit{supra} note 60, at 288 (“By intervening in law enforcement proceedings to protect the rights of allegedly disadvantaged persons—a high percentage of criminals in the 1960s were poor and black—the Warren Court Justices were acting as liberal policymakers.”); \textit{See, e.g.,} Gideon \textit{v. Wainwright}, 372 U.S. 335 (1963) (right to counsel); Mapp \textit{v. Ohio}, 367 U.S. 643 (1961) (exclusionary rule); Miranda \textit{v. Arizona}, 384 U.S. 436 (1966) (protection of privilege against self-incrimination).

\(^{68}\) \textit{See, e.g.,} Graham, \textit{supra} note 67, at 41-66; \textsc{Powe, supra} note 6, at 412 (“[T]he Court recognized that the Bill of Rights offered national standards for criminal procedure regardless of
The Supreme Court critically re-examined juvenile justice administration in the 1960s. In *Kent v. United States*, the Court observed that that “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children” and required procedural safeguards in judicial waiver proceedings. In 1967, the Court in *In re Gault* emphasized disjunctions between the theory and the practice of rehabilitation, the differences between criminal procedural safeguards adult defendants enjoyed and those used for delinquents, and ordered a major procedural overhaul. It rejected Progressives’ claims that delinquency proceedings were civil, non-adversarial, and rehabilitative. Instead, it focused on high recidivism rates, the stigma of a delinquency label, and the arbitrariness of the process. *In re Gault* required states to adopt “fundamentally fair” procedures for delinquents charged with criminal offenses that could lead to confinement. These protections included notice, a fair hearing, assistance of counsel, opportunity to confront and cross-examine witnesses, and the
privilege against self-incrimination.\textsuperscript{79} \textit{In re Gault} endorsed adversarial procedures both to determine the truth – factual accuracy – and to limit the power of the state – prevent governmental oppression – and asserted that “fundamentally fair” procedures would not impair courts’ ability to treat juveniles.\textsuperscript{80} \textit{In re Gault} based delinquents’ rights to notice, counsel, and confrontation on generic Fourteenth Amendment “fundamental fairness” rather than the Sixth Amendment,\textsuperscript{81} but explicitly relied on the Fifth Amendment to grant juveniles the privilege against self-incrimination.\textsuperscript{82}

Subsequent decisions further elaborated the criminal nature of delinquency proceedings. In \textit{In re Winship}, the Court required states to prove delinquency “beyond a reasonable doubt,” rather than by the civil preponderance of evidence standard.\textsuperscript{83} For the majority in \textit{In re Winship}, preventing factually erroneous convictions and limiting the power of the state outweighed the dissent’s concern

\begin{itemize}
  \item \textsuperscript{79} \textit{Id.} at 31-57; see also \textit{In re Gault}, 387 U.S. at 22, 24, 27 (discussing whether juveniles should be afforded constitutional protection through procedural safeguards); Irene Rosenberg, \textit{The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past}, 27 UCLA L. REV. 656, 662-63 (1980) (arguing that constitutional protections should attach in proceedings that may result in incarceration of a child); Barry C. Feld, \textit{Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court}, 69 MINN. L. REV. 141, 155-56 (1984).
  \item \textsuperscript{80} See \textit{In re Gault}, 387 U.S. at 21.
  \item \textsuperscript{81} U.S. CONST. amend. VI. \textit{In re Gault} made no reference to the Sixth Amendment’s provision for notice; rather, the Court held that “due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding.” \textit{In re Gault}, 387 U.S. at 33. Similarly, although the Court described a delinquency proceeding as “comparable in seriousness to a felony prosecution,” \textit{id.} at 36, the Court grounded the right to counsel in a delinquency proceeding in the “Due Process Clause of the Fourteenth Amendment” rather than the Sixth Amendment’s right to counsel. \textit{Id.} at 41. Finally, the Court’s analysis of the right to confront and examine witnesses rested on “our law and constitutional requirements” rather than the language of the Sixth Amendment. \textit{Id.} at 57. In deciding the applicability of the Fifth Amendment privilege against self-incrimination, however, the majority used an analytical strategy akin to selective incorporation, finding a functional “equivalence” between a delinquency proceeding and an adult criminal trial. See \textit{id.} at 50; see, e.g., Louis Henkin, “Selective Incorporation” in the Fourteenth Amendment, 73 YALE L. J. 74 (1963); Sanford H. Kadish, \textit{Methodology and Criteria in Due Process Adjudication – Survey and Criticism}, 66 YALE L. J. 319, 327-33 (1967) (analyzing historical constitutional debate between proponents of “selective incorporation” and proponents of “fundamental fairness” and “total incorporation” of provisions of the Bill of Rights).
  \item \textsuperscript{82} \textit{In re Gault} holds that:
  \begin{itemize}
    \item It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to “criminal” involvement. . . . [J]uvenile proceedings to determine “delinquency,” which may lead to commitment to a state institution, must be regarded as “criminal” for purposes of the privilege against self-incrimination.
  \end{itemize}
  \textit{In re Gault}, 387 U.S. at 49-50. Because \textit{In re Gault} applied the privilege against self-incrimination to delinquency proceedings, juvenile courts’ proponents could no longer characterize delinquency proceedings as either “noncriminal” or “nonadversarial.”
  \item \textsuperscript{83} \textit{In re Winship}, 397 U.S. 358, 368 (1970). The Bill of Rights does not define the standard of proof in criminal cases so \textit{In re Winship} first held that the constitution requires proof beyond a reasonable doubt in adult criminal proceedings as a matter of “due process.” See \textit{id.} at 361-64. The Court then extended the same standard of proof to juvenile proceedings for the same reason. See \textit{id.} at 365-67.
\end{itemize}
that criminal procedural safeguards would impair juvenile courts’ ability to rehabilitate delinquents or erode their differences with criminal courts. The Court in Breed v. Jones applied the Fifth Amendment’s Double Jeopardy provision to state delinquency trials because of their functional equivalence with criminal trials.

The Court in McKeiver v. Pennsylvania rejected delinquents’ appeal for a constitutional right to a jury trial. McKeiver relied on the Fourteenth Amendment Due Process clause rather than the Sixth Amendment’s jury clause, reasoned that delinquency trials required only “accurate fact finding,” and concluded that a judge could find facts as well as a jury. McKeiver employed “rehabilitative rhetoric,” ignored the reality of juvenile “treatment,” and exhibited no awareness of the dangers that closed and confidential proceedings posed for accurate fact-finding.

Despite McKeiver’s constitutional retreat, In re Gault provided impetus to transform the juvenile court from a social welfare agency into a scaled-down criminal court. In re Gault and In re Winship fostered adversarial delinquency

84. See id. at 376-77 (Burger, C.J., dissenting). According to the majority, while parens patriae intervention may be a laudable goal to deal with miscreant youths, “that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.” Id. at 367.

85. Breed v. Jones, 421 U.S. 519, 528-29 (1975). With respect to the risks associated with double jeopardy, the Court concluded that “we can find no persuasive distinction in that regard between the [juvenile] proceeding . . . and a criminal prosecution, each of which is designed to ‘vindicate [the] very vital interest in enforcement of criminal laws.’” Id. at 531 (bracketed “the” in original).

86. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Even though the Court noted that the Sixth Amendment right to a jury trial applied to state criminal proceedings by its incorporation into the Fourteenth Amendment, McKeiver relied on the Fourteenth Amendment due process and “fundamental fairness.” See id. at 540. The Court insisted that “the juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.” Id. at 541. The Court cautioned that “[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.” Id. at 545.

87. See id. at 543. In concluding that due process required only accurate fact finding, however, the Court departed significantly from its prior emphasis on the dual rationales of accurate fact finding and protection against governmental oppression. See, e.g., In re Winship, 397 U.S. at 363-64; In re Gault, 387 U.S. at 47.

88. See McKeiver, 403 U.S. at 547-48, 550 (criticizing advocates of procedural formality and a jury trial for ignoring “every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.”). There are reasons to question the accuracy of fact finding in the juvenile justice system. See, FELD supra note 2, at 153-57 (describing the inherently prejudicial nature of juvenile court fact-finding); Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 WAKE FOREST L. REV. 1111, 1140-60 (2003) (analyzing differences between judge and jury application of “beyond a reasonable doubt” burden of proof).
proceedings – attorneys, privilege against self-incrimination, and criminal standard of proof. Providing procedural safeguards shifted the focus of a delinquency trial from a child’s “real needs” to proof that she committed a crime and made the connection between criminal conduct and delinquency sanctions explicit.

C. The Politics of Crime and Race Riots – Blame the Warren Court

The Supreme Court’s criminal procedure and juvenile justice decisions during the 1960s coincided with increased crime rates and urban race riots. Crime rates escalated dramatically as “baby boom” children began to reach adolescence, more so in urban areas where crime rates generally are higher, and especially in areas of black population concentration. In the mid-1960’s riots erupted in black ghettos in cities across the nation. The National Advisory Commission on Civil Disorders – the Kerner Commission – attributed the riots to historic and continuing racial discrimination in employment, education, social services, and housing. The Kerner Commission warned that America was moving “toward two societies, one black, one white – separate and unequal.”

89. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (application of Fourth Amendment exclusionary rule to the states); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel at pre-indictment police interrogation); Miranda v. Arizona, 384 U.S. 436 (1966) (requirement of warning of rights prior to police interrogation); See GRAHAM, supra note 67, at 67-85 (discussing political reactions to Supreme Court’s decisions); FELD, supra note 2, at 87-88 (increased crime rates associated with the demographics of the “baby boom” generation and increased urbanization of Blacks); Barry C. Feld, Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,” 87 MINN. L. REV. 1447, 1480-1501 (2003) (analyzing political backlash to Supreme Court’s criminal procedure and juvenile decisions).

90. As the children of the baby boom reached their crime prone teenage years beginning in the mid-1960s, the rates of serious violent and property crimes increased more than 75 percent. The simple changes in the age structure of the population accounted for most of that rise. See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME (1975); POWE, supra note 6, at 408 (between 1963 and 1970, the homicide rate doubled from 4.6 to 9.2 per 100,000); ALLEN, supra note 18, at 30 (“Perceptions of increasing crime in the late 1960s brought with them a heightened sense of insecurity and fears of a collapse of public order. These perceptions were based in part on demographic realities.”).

91. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 66 (1997) (“Homicide rates are highest in the slum neighborhoods of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization.”); MAUER, supra note 47, at 51-52 (“[U]rbanization is generally equated with higher rates of crime.”).

92. HACKER, supra note 51, at 22; see generally UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1968), available at http://hdl.handle.net/2027/lmc.95032.1968.001 [hereinafter KERNER COMMISSION]; LEMANN, supra note 44, at 190 (“[I]t seemed at least possible that a full-scale national race war might break out.”); POWE, supra note 6, at 276 (noting that three years of riots left more than 200 dead, thousands wounded, and property damage in the tens of billions of dollars and that the assassination of Martin Luther King, Jr. in 1968 provoked hundreds more urban riots).

93. KERNER COMMISSION, supra note 92, at 1.

94. Id.
and cautioned that to continue policies that contributed to racial segregation, discrimination, and poverty would divide the nation and "would lead to the permanent establishment of two societies: one predominately white and located in the suburbs, in smaller cities, and in outlying areas, and one largely Negro located in central cities."  

Beginning in the mid-1960s, crime and race became potent political issues. Liberals echoed the Kerner Commission and emphasized the need to address social-structural conditions and racial and economic inequality to reduce crime. Conservatives emphasized personal responsibility and minimized the role of poverty, poor education, and lack of jobs. Many Whites associated the Court’s criminal procedure decisions with urban riots and rising crime rates. Conservative critics encouraged those perceptions and simplistically blamed increasing crime and urban disorder on the Warren Court’s criminal procedure and civil rights decisions.

Violent riots affected many Whites’ views of the legitimacy of Blacks’ grievances and inclined them to attribute criminality to personal choices rather than to structural forces. Conservative politicians appealed to white voters’ racial resentments and exploited the coincidence between rising crime rates and

95. Id. at 220.
96. See, e.g., Powe, supra note 6, at 495; see also Katherine Beckett & Theodore Sasson, The Politics of Injustice: Crime and Punishment in America 53-54 (2000).
97. See, e.g., Powe, supra note 6, at 495; Beckett & Sasson, supra note 96, at 53-54. Beckett argues that the competing views of crime reflect a political contest about the balance of social welfare and social control as elements of public policy:

As the civil rights, welfare rights, and student movements pressured the state to assume greater responsibility for the reduction of social inequalities, conservative politicians attempted to popularize an alternative vision of government—one that diminishes its duty to provide for the social welfare but enlarges its capacity and obligation to maintain social control. . . The conservative view that the causes of crime lie in the human “propensity to evil,” rests on a pessimistic vision of human nature, one that clearly calls for the expansion of the social control apparatus.

Beckett, supra note 18 at 10.
98. Gilens, supra note 9, at 107-10; Edsall & Edsall supra note 7, at 74-77 (Richard Nixon’s presidential campaign in 1968 focused on Supreme Court decisions that he found “highly problematic,” and he resolved the conflict by “simultaneously affirming his belief in the principles of equality while voicing opposition to the use of federal intervention to enforce compliance.”).
99. See Mauer, supra note 47, at 53.
100. Garland, supra note 8, at 97 (“Televised images of urban race riots, violent civil rights struggles, anti-war demonstrations, political assassinations, and worsening street crime reshaped the attitudes of the middle-American public in the late 1960s . . . .”); Powe, supra note 6, at 277-78 (“black power” advocates frightened white voters); Lemann, supra note 44, at 200 (“The beginning of the modern rise of conservatism coincides exactly with the country’s beginning to realize the true magnitude and consequences of the black migration, and the government’s response to the migration provided the conservative movement with many of its issues.”).
101. Hacker, supra note 51, at 22 (“As the 1970s started, so came a rise in crimes, all too many of them with black perpetrators . . . . Worsening relations between the races were seen as largely due to the behavior of blacks, who had abused the invitations to equal citizenship white American had been tendering.”); Gilens, supra note 9, at 110.
urban riots and the Court’s decisions.\textsuperscript{102} Beginning in 1966, Republicans scored electoral gains by blaming liberal social programs and the Warren Court for urban riots and increased crime.\textsuperscript{103}

IV. THE BROADER CONTEXT OF THE “GET TOUGH” ERA OF JUVENILE JUSTICE

Rehabilitation provided the dominant criminal and juvenile justice paradigm from its Progressive origins until the early 1970s.\textsuperscript{104} Beginning in the 1960s, several forces combined to erode support for indeterminate sentences and rehabilitation programs.\textsuperscript{105} By the early 1970s and for different reasons, liberal and conservative critics endorsed “just deserts,” penal proportionality, and determinate sentences.\textsuperscript{106} Critics on the political Left described indeterminate

\footnotesize
\begin{itemize}
  \item \textsuperscript{102} See Graham, supra note 67, at 71-85; Feld, supra note 89, at 1494-1501; Edsall & Edsall argue that:
    \begin{enumerate}
      \item The fusion of race with an expanding rights revolution and with the new liberal agenda, and the fusion, in turn, of race and rights with the public perception of the Democratic party, and the fusion of the Democratic party with the issues of high taxes and a coercive, redistributive government, that created the central force splintering the presidential coalition behind the Democratic party throughout the next two decades.…
    \end{enumerate}
  \textsuperscript{103} See Powe, supra note 6, at 278 (in the 1966 election, Republicans gained 47 House seats and three Senate seats and California voters elected Ronald Reagan governor by a landslide); Hacker, supra note 51, at 56 (“Conservatives believe that for at least a generation, black people have been given plenty of opportunities, so they have no one but themselves to blame for whatever difficulties they face.”).
  \textsuperscript{104} From its Progressive foundations until the early 1970s, “correctionalist commitment to rehabilitation, welfare and criminological expertise” provided the intellectual framework, cultural vocabulary, and the shared professional understandings that defined criminal justice policy and practices. Garland, supra note 8, at 27. The central tenets of the “Rehabilitative Ideal” include a focus on the individual offender, justice administration by clinical specialists and expert professionals, and welfare-oriented, indeterminate and discretionary decision-making practices. Rothman, supra note 3, at 53-61; Francis A. Allen, The Juvenile Court and the Limits of Juvenile Justice, in The Borderland of the Criminal Law: Essays in Law and Criminology 44-61 (1964).
  \textsuperscript{105} Garland, supra note 8, at 60 (“The movement for determinate sentencing reform created an unusually broad and influential alliance of forces. The campaign included not only radical supporters of the prisoners’ movement, liberal lawyers and reforming judges, but also retributivist philosophers, disillusioned criminologists and hard-line conservatives.”) Left-wing critics characterized the criminal justice system as a repressive institution of social control to maintain the status quo. See, e.g., Mauer, supra note 47, at 45. Beckett and Sasson argue that:
    \begin{enumerate}
      \item since the late 1960s, conservative politicians, together with the mass media and activists in the victim rights movement, have kept the issue of crime at the top of the nation’s political agenda. Focusing on the most sensational and violent crimes, these actors have promoted policies aimed at “getting tough” and “cracking down.”
    \end{enumerate}
  \textsuperscript{106} See Andrew Von Hirsch, Doing Justice 31-39 (1976); American Friends Service Committee, Struggle for Justice 83-97 (1971). During the 1970s, empirical evaluation studies questioned both the effectiveness of rehabilitative programs and the scientific expertise of those who administered the enterprise. Allen, supra note 18, at 33-59. In the 1970s, determinate sentences based on present offense and prior record increasingly supplanted indeterminate
sentences and rehabilitation programs as disguised instruments of social control with which the State oppressed minorities and the poor. Liberals objected that correctional personnel treated similarly-situated offenders differently and discriminated against minorities. Conservatives perceived a breakdown of “law and order” and advocated more punitive policies. Criminological studies of career criminals provided theoretical support for selectively incapacitating serious and persistent offenders. Evaluations of treatment programs

107. See AMERICAN FRIENDS SERVICE COMMITTEE, supra note 106 (arguing that no criminal justice programs or reforms could ameliorate or avoid the consequences that flowed from racial inequality and economic and social injustice in the larger society); FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 39-40 (1982); GARLAND, supra note 8, at 55; MAUER, supra note 47, at 44 (rehabilitation incompatible with coercive institution such as prison; personal change requires voluntary involvement which cannot be compelled).

108. See ALLEN, supra note 18, at 87-88; GARLAND, supra note 8, at 86; ROTHMAN, supra note 3, at 82-84 (arguing that liberal disenchantment with the “Rehabilitative Ideal” reflected a broader disillusionment about the ability of the State to “do good” and its failure to deal justly with its most vulnerable citizens).

109. Conservatives’ efforts to “get tough” have produced a succession of “wars” on crime and later on drugs, longer criminal sentences, increased prison populations; and disproportional incarceration of racial minority offenders. See TONRY, supra note 8, at 94-95. For conservatives, the confluence of rising youth crime rates, civil rights marches and civil disobedience, students’ protests against the war in Viet Nam, and urban and campus turmoil indicated an even deeper moral crisis and breakdown of traditional society. CULLEN & GILBERT, supra note 107, at 4; HACKER, supra note 51, at 22; EDSALL & EDSALL, supra note 7, at 49-52.

110. See generally CRIMINAL CAREERS AND “CAREER CRIMINALS” (Alfred Blumstein et al., eds., 1986). Beginning in the 1970s, longitudinal research has focused on the development of delinquent and criminal careers. MARVIN WOLFGANG, ROBERT FIGLIO, & THORSTEN SELLIN, DELINQUENCY IN A BIRTH COHORT (1972); DONNA M. HAMPARIAN ET AL., THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS 128-30 (1978); Joan Petersilia, Criminal Career Research: A Review of Recent Evidence, 2 CRIME & JUST. 321 (1980). The criminal career research initially offered the prospect that sentencing policies significantly might reduce or prevent crime through “selective incapacitation” of the most active career offenders. Unfortunately, selective incapacitation strategies founded on the inability prospectively to predict who the high base-rate offenders will be. Jacqueline Cohen, Incapacitation as a Strategy for Crime Control: Possibilities
questioned clinicians’ ability to coerce behavioral changes and highlighted the subjectivity inherent in therapeutic justice. 111 The cumulative criticism of the “Rehabilitative Ideal” prompted calls for a return to classical principles of criminal law and shifted sentencing decisions from broad consideration of each offender to narrower, offense-based factors. The cultural and criminological erosion of support for rehabilitation combined with increases in serious and violent crimes, especially by Blacks, to push public opinion in a markedly more conservative direction. 112 Politicians discovered that “law and order” provided them with a coded method by which to discuss legitimate issues of criminal policy and simultaneously exploit Whites’ racial fears. 113

A. De-Industrialization and the Black “Underclass”

Macro-economic and racial demographic changes in American cities during the 1970s and 1980s contributed to an escalation in black youth homicide rates in the late-1980s. The epidemic of crack cocaine spurred gun violence and homicides. 114 That increase fueled the politics of crime that produced “get-tough” juvenile justice policies. Conservative politicians used youth violence as a way to evoke anti-black animus and pledged to “crack down” on youth crime. 115

During the post-World War II period, federal housing and highway policies and private banks’ mortgages and real estate sales practices spurred the growth of predominantly white suburbs surrounding poor and minority urban cores. 116 As Blacks migrated from the rural South to urban areas, Whites increasingly moved from cities to the suburbs and these population shifts altered the configuration of cities. 117

111. See, e.g., Robert Martison, What Works? Questions and Answers About Prison Reform, 35 PUB. INT. 22, 25 (1974) (“[W]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation.”); ALLEN, supra note 18, at 57-58; MAUER, supra note 46, at 48-49.
112. See EDSALL & EDSALL, supra note 7, at 111-12 (“By 1977, the percentage describing court treatment of criminals as too harsh or about right had fallen to a minimal 11 percent, and those who said the courts were not harsh enough had risen to 83 percent.”).
113. MENDELBerg, supra note 63, at 90-98; EDSALL & EDSALL, supra note 7, 69-73.
115. See e.g., Feld, supra note 2, at 206-07.
116. See MASSEY & DENTON, supra note 11, at 19-59. During the 1960s, “urban renewal” projects eliminated about 20% of the housing available in central cities in which Blacks resided. BECKETT & SASSON, supra note 90, at 39; MAUER, supra note 47, at 123; KATZ, supra note 55, at 136 (arguing that in the 1950s and 1960s, urban renewal and highway construction disrupted and destroyed many urban black communities).
117. See supra notes 46-56 and accompanying text; see also GARLAND, supra note 8, at 84 (the
From the end of World War II until the early 1970s, men with only a high school degree could get good jobs in the automobile, steel, construction, and manufacturing industries.\textsuperscript{118} Beginning in the 1970s, the transition from an industrial to an information and service economy reduced workers’ prospects in the manufacturing sectors and many of them lacked the skills or education needed to succeed in the post-industrial economy.\textsuperscript{119} The globalizing economy adversely affected the domestic automobile and steel industries and the black workers who had arrived more recently to work in them.\textsuperscript{120} The most severe losses occurred in higher-paying, lower-skilled manufacturing jobs which benefited urban minority workers.\textsuperscript{121} Job growth occurred primarily in suburbs and in information and service industries that required higher levels of education than most urban minority workers possessed.\textsuperscript{122} Over several decades, the economic, spatial, and racial reconfiguration of cities led to an urban black underclass living in concentrated poverty and in social and cultural isolation.\textsuperscript{123}
B. Crack + Guns = Black Youth Homicide

In the mid-1980s, entrepreneurs introduced crack cocaine into devastated urban areas and the drug trade produced a sharp escalation in black youth homicides.124 Crack cocaine spawned a violent drug industry in large cities and led to a sharp increase in gun murders committed by black youths.125 Youths in the drug industry arm themselves for self-protection and take more risks than do adults.126 The presence of guns during illegal drug transactions can quickly escalate to homicidal violence.127

The crack cocaine epidemic exacerbated racial differences in arrest rates for violent crimes committed by juveniles.128 Police arrest black youths for violent crimes—murder, rape, robbery, and assault—about five times more frequently than they do white juveniles.129 Between 1986 and 1993, as youth homicide

isolation – has made it possible to partially segregate this segment of the population from the political, social, and economic mainstream. [T]he emergence of the underclass and of an expanding body of the black urban poor has created a growing perception of a society in which the poor are no longer linked to the larger social network. The black urban poor have increasingly come to constitute a divergent and threatening segment of society from which ties to the mainstream through work, neighborhood, and shared communal values have been severed.

EDSALL & EDSALL, supra note 7, at 244.


125. See Blumstein, supra note 114, at 39 (“introduction of crack in the mid-1980s; recruitment of young minority males to sell the drugs in street markets; arming of the drug sellers with handguns for self-protection; diffusion of guns to peers; irresponsible and excessively casual use of guns by young people, leading to a ‘contagious’ growth in homicide . . .’”); BECKETT & SASSON, supra note 96, at 8, 28 (high homicide rate attributable to interaction of numerous factors—prevalence of guns, economic and racial inequality reflected in concentrated poverty, traffic in illegal drugs such as crack, and a “code of the streets” that encourages violent responses to disrespect); MAUER, supra note 47, at 97 (as many as half of murders may be drug-related and so changes in drug markets affect homicide rates); Cook & Laub argue that:

The leading explanation for why youth-homicide rates began increasing in the mid-1980s is the introduction of crack cocaine and, in particular, the conflict that attended its marketing . . . . [f]or many youths, the response to the increased threat of violence was to carry a gun or join a gang for self-protection, while adopting a more aggressive interpersonal style.


128. FELD, supra note 2, at 199-205.

129. See, e.g., FELD, supra note 2, at 197-206; ZIMRING & HAWKINS, supra note 91, at 76 (blacks about seven times as likely as whites to be arrested for violent crimes and eight times as likely for homicide); Cook & Laub, supra note 124, at 42-43 (“half of all juvenile violence arrests
rates escalated sharply, police arrests of white juveniles increased about 40%, while arrests of black youths increased 278%. Guns accounted for most of the increase as well as for the racial differences in youth homicide arrests. Between 1984 and 1994, the juvenile homicide rate nearly tripled and the use of guns by juveniles to kill their victims quadrupled. Because of the nexus between the crack industry and inner cities, almost all of the increases in homicides involved urban black males.

Policies to "get tough" on youth violence effectively meant targeting young black men. Because the public views juvenile courts' clientele primarily as poor, urban black males, politicians could exploit these perceptions for political advantage with demagogic pledges to "crack down" on youth crime which served as a "code word" for black males. In response to the spike in youth homicide arrests, legislators changed states' juvenile waiver and delinquency sentencing laws.

were of blacks, implying an arrest rate over five times as high as for whites".

130. See Melissa Sickmund, Howard N. Snyder & Eileen Poe-Yamagata, U.S. Dep’t of Justice, Juvenile Offenders and Victims: 1997 Update on Violence 13 (1997); Mauer, supra note 47, at 84 (between 1984 and 1993, the homicide rate for white males ages 14-17 doubled from 6.9 to 14.4 per 100,000, while the black male homicide rate quadrupled from 33.4 to 151.6 per 100,000); Zimring & Hawkins, supra note 91, at 66 ("Homicide rates are highest in the slum neighborhoods of big cities that exclusively house the black poor. The race of the residents, the socioeconomic status of the neighborhood, and city size are all associated with elevated rates of homicide victimization.").

131. The number of deaths that juveniles caused by means other than firearms averaged about 570 per year and fluctuated within a "normal range" of about 10%. See, e.g., Franklin E. Zimring, Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic, 59 L. & Contemp. Probs. 25, 29 (1996); Zimring & Hawkins, supra note 91, at 106-23; Feld, supra note 2, at 207-08.

132. See Zimring, supra note 131, at 29; Zimring, supra note 124, at 89 (rate of homicide arrests for offenders under eighteen for gun killings more than tripled between 1985 and 1994).

133. Zimring, supra note 131, at 29; see also Zimring & Hawkins, supra note 91, at 108 (guns account for more than twice as many murders as all other methods combined); Blumstein, supra note 114, at 29-30, 32 (weapons involved in adolescent conflict shifted to handguns and semi-automatic weapons; between 1985 and 1993, juveniles' use of guns nearly quadrupled).

134. See Cook & Laub, supra note 124; Blumstein, supra note 114, at 16-22; Blumstein & Cork, supra note 125, at 15-16.

135. The politicization of crime policies and the connection in the public and political minds between race and youth crime provided a powerful political incentive for changes in waiver policies and juvenile court sentencing policies that coincided with escalating rates of youth crime and violence in the late 1970s and again in the late 1980s. Feld, supra note 2, at 197-202.

136. Feld, supra note 2, at 205-09 (concentration of gun violence within the urban black male population creates a misleading perception of juvenile courts' larger role in dealing with generic youth crime).


138. See, e.g., Patricia Torbet et al., U.S. Dep't of Justice, State Responses to Serious and Violent Juvenile Crime: Research Report 3-9 (1996); Feld, supra note 2, 192-95.
C. “Get Tough” Politics and the War on Juveniles

The confluence of guns, homicide and race provided the impetus for a political “crack down” on youth crime generally and tougher juvenile justice waiver and sentencing policies. Conservative politicians exploited the public’s fears of a “blood-bath” and warned of a coming generation of “super-predators.” Public officials proposed to transfer more youths to criminal court to staunch the flood.

The politicization of crime policies and the adoption of harsher juvenile transfer and sentencing laws culminated a process that began decades earlier. In the 1950’s, conservative southerners ascribed a link between race and crime as part of a strategy to discredit the civil rights movement. Civil rights activism to desegregate schools and public facilities included civil disobedience and sit-ins. Southern politicians and sheriffs variously described protesters as “criminals,” “outside agitators,” and “mobs.” Conservative politicians equated political dissent and civil disobedience with criminality and reinforced the connection between race and crime. During the 1960s, the increase in...


140. See, e.g., JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); ZIMRING, supra note 124, at 63; MAUER, supra note 46, at 12 (“as the image of the criminal as an urban black male has hardened into public consciousness, so too, has support for punitive approaches to social problems been enhanced”).

141. See, e.g., OMI & WINANT, supra note 6, at 98.

142. See, e.g., BECKETT & SASSON, supra note 96, at 49 (Southern officials called for a crackdown on “‘hoodlums,’ ‘agitators,’ ‘street mobs,’ and ‘lawbreakers’ who challenged segregation and Black disenfranchisement, [and] these officials made rhetoric about crime a key component of political discourse on race relations.”); BECKETT, supra note 18, at 28 (“discourse of law and order was initially mobilized by southern officials in their effort to discredit the civil rights movement”); Feld, supra note 89, at 1538-52 (analyzing the politicization of crime policies and the political exploitation of those differences).

143. BECKETT, supra note 18, at 32 argues that the introduction and construction of the crime issue in national political discourse in the 1960s was shaped by the definitional activities of southern officials, presidential candidate Goldwater, and the other conservative politicians who followed his cue. Categories such as street crime and law and order conflated conventional crime and political dissent and were used in an attempt to heighten opposition to the civil rights movement. Conservatives also identified the civil rights movement—and in particular, the philosophy of civil disobedience—as a leading cause of crime. These forms of protest were depicted as criminal rather than political in nature, and the excessive “lenience” of the courts was also identified as a main cause of crime. Countering the trend toward lawlessness, they argued, would require holding criminals—...
crime and urban disorders evoked further fears of “crime in the streets” and a breakdown of “law and order.” Republican politicians blamed rising crime rates, urban riots, and social disorder on the Warren Court and liberal Democratic social policies.

Clear differences between the political parties about race-related policy issues emerged during the 1964 presidential race between Lyndon Johnson and Barry Goldwater. Democrats’ support for the civil rights movement alienated white southerners and other voters who began to see differences between the two parties. Republicans used several race-related “wedge issues” — crime, affirmative action, and welfare — to distinguish themselves from Democrats and to make crime policies a partisan issue. In 1968, George Wallace and protesters — accountable for their actions through swift, certain, and severe punishment.

144. Garland, supra note 8, at 97 argues that:
Appealing to the social conservatism of ‘hard-working’, ‘respectable’ (and largely white) middle classes, ‘New Right’ politicians blamed the shiftless poor for victimizing ‘decent’ society — for crime on the streets, welfare expenditure, high taxes, industrial militancy — and blamed the liberal elites for licensing a permissive culture and the anti-social behaviour it encouraged.

145. Edsall & Edsall, supra note 7, at 51-73; Gilens, supra note 9, at 116-23; Mendelberg, supra note 63, at 93-98; Beckett & Sasson, supra note 96, at 10 (“In response to the civil rights movement and the expansion of the War on Poverty programs of the 1960s, conservative politicians highlighted the problem of ‘street crime’ and argued that this problem was caused by an excessively lenient welfare and justice system that encouraged bad people to make bad choices.”); Beckett, supra note 18, at 87 (“By attributing the very real economic plight of ‘taxpayers’ and ‘working persons’ to the behavior of the ‘underclass,’ conservatives diminish the likelihood that these grievances will give rise to policies aimed at redistributing opportunities and resources in a more egalitarian fashion.”); Hacker, supra note 51, at 210 (“playing on white fears of ‘black crime’ has moved to the center of political campaigns. Even though most white Americans do not live in or near areas where violence stalks the streets, the issue crops up in every poll and has become a conversational staple.”).

146. Lyndon Johnson’s presidential leadership led to passage of the 1964 Civil Rights Act which Barry Goldwater, a staunch conservative, opposed. See Edsall & Edsall, supra note 7, at 35. The 1964 Republican party convention rejected a party platform in favor of civil rights by a two-to-one margin. Id. at 44.

147. Id. at 74-80; Beckett & Sasson, supra note 96, at 52-58; Gilens, supra note 9, at 116-22; Mendelberg, supra note 63, at 81-93.

148. See, e.g., Beckett, supra note 18, at 30-43; Gilens, supra note 9, at 4-8; Edsall & Edsall, supra note 7, at 4 (noting that “race has become a powerful wedge, breaking up what had been the majoritarian economic interests of the poor, working, and lower-middle classes in the traditional liberal coalition”). In the pre-civil rights era, poor southern whites supported liberal policies on a host of economic issues and a larger governmental role in medical care, education, and employment. Id. at 41-42. Southern populism and economic liberalism foundered on their hostility to blacks and the perception that federal programs primarily benefited blacks. Id. at 41. Omi & Winant, supra note 6, at 149 (describing racial politics as a powerful wedge issue that fractured the New Deal economic coalition of the poor, working, and middle-classes).

149. See Edsall & Edsall, supra note 7, at 77, 79; Omi & Winant, supra note 6, at 124 (calling Wallace a law and order, anti-State, southern populist who made racial appeals the centerpiece of his campaign); Phillips argues that:

The common denominator of Wallace support, Catholic or Protestant, is alienation from the Democratic Party and a strong trend — shown in other years
Richard Nixon attributed rising crime rates and urban riots to liberal “permissiveness” and Warren Court decisions “coddling criminals.” Against this backdrop, conservatives’ calls for “law and order” acquired a racial subtext. “Code words” implicitly invoke racial stereotypes without explicitly seeming racist or discriminatory. Conservative politicians could talk about crime and simultaneously activate white voters’ negative views of Blacks without explicitly playing the “race card.”

Republican strategists pursued a “southern strategy” to realign the political parties around racial issues and to achieve a stable electoral majority. Republicans spoke to white southern and suburban constituencies with code words like “law and order” and knew that they carried racial meanings.

and other contests – toward the GOP. Although most of Wallace’s votes came from Democrats, he principally won those in motion between a Democratic past and a Republican future.

150. Ted Gest, Crime & Politics: Big Government’s Erratic Campaign for Law and Order 14 (2001) (during the 1968 presidential campaign, Nixon gave 17 speeches on law and order); Beckett, supra note 18, at 38 (as a result of political and media attention to crime during the 1968 campaign, by 1969, 81% of poll respondents asserted a breakdown in law and order had occurred and attributed it to communists and Negroes who start riots); Powe, supra note 6, at 399 (Nixon’s domestic policy stump speech emphasized “crime in the streets” and urban riots).

151. After three years of urban riots, rising youth crime rates, anti-Vietnam protests, and the assassinations of Robert F. Kennedy and Martin Luther King, Jr., a climate of fear and anger produced political demands for “law and order.” Beckett & Sasson, supra note 96, at 51 (“The racial subtext of these arguments was not lost on the public: Those most opposed to social and racial reform were also most receptive to calls for law and order.”).

152. See, e.g., Omi & Winant, supra note 6, at 123 (code words are “phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals”); Richard Dvorak, “Cracking the Code: ‘De-Coding’ Colorblind Slurs During the Congressional Crack Cocaine Debates,” 5 Mich. J. Race & L. 611, 615 (2000) (“[L]egislators can appeal to racist sentiments without appearing racist”); Gilens, supra note 9, at 67 (“Although political elites typically use race-neutral language in discussion poverty and welfare, it is now widely believed that welfare is a ‘race-coded’ topic that evokes racial imagery and attitudes even when racial minorities are not explicitly mentioned.”).

153. See Omi & Winant, supra note 6, at 123 (defining racial “code words” as “phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals (e.g., justice, equal opportunity).”); see also Martin Gilens, “‘Race Coding’ and White Opposition to Welfare,” 90 Am. Pol. Sci. Rev. 593, 595 (1996); Dvorak, Cracking the Code, supra note 29, at 615; Robert M. Entman & Andrew Rojecki, The Black Image in the White Mind 20 (2000) (“Whites whose animosity is inflamed—including ambivalent Whites responding to specific situations and stimuli—become receptive to coded campaign appeals designed to mobilize them into coalitions with traditional racists.”).

154. Garland, supra note 8, at 96-97 (arguing that “growing crime, worsening race relations, family breakdown, growing welfare rolls, and the decline of ‘traditional values’—together with concerns about high taxes, inflation, and declining economic performance—created a growing anxiety about the effects of change that conservative politicians began to pick up on and articulate”); Lemann, supra note 44, at 201 (“The great migration then delivered the coup de grace to the Democrats as a presidential party: it hastened the movement of millions of middle-class white voters to the Republican suburbs, and it caused millions more blue-collar voters who didn’t move to stop voting for the Democratic candidate for president.”).

155. See, e.g., Phillips, supra note 7, at 22; Omi & Winant, supra note 6, at 124 (Phillips
conflating race and crime and associating both with the Democrats, Republicans turned criminal justice policies into hotly contested partisan issues. Over the next two decades, they highlighted the symbolic relationship between race and crime with campaign advertisements focused on drugs, the death penalty, youth crime, and “Willie Horton.” By the late-1980s, voters understood campaigns to “get tough” and “crack down” on “youth crime” as code words for harsher treatment of young black males.

V. COMPETENCE AND CULPABILITY IN THE CONTEMPORARY JUVENILE JUSTICE SYSTEM: ACCESS TO COUNSEL; WAIVER AND CRIMINAL SENTENCING; AND DISPROPORTIONATE MINORITY CONFINEMENT

Against the backdrop of the politicization of crime policies, some politicians blamed the increase in youth violence in the late-1980s on the failure of juvenile courts adequately to punish young offenders. By the early 1990s, nearly every state amended its laws to transfer more youths to criminal courts and to sentence delinquents more severely. The changes in waiver and sentencing laws suggested “coded” strategy of anti-black rhetoric to appeal to conservative blue-collar and southern voters; EDSALL & EDSALL, supra note 7, at 98 (arguing that “[r]ace was central . . . to the fundamental conservative strategy of establishing a new, non-economic polarization of the electorate, a polarization isolating a liberal, activist, culturally-permissive, rights-oriented, and pro-black Democratic Party against those unwilling to pay the financial and social costs of this reconfigured social order”).

156. TONRY, supra note 8, at 10; GARLAND, supra note 8, at 153 (arguing that “anxieties about crime, on top of the more inchoate insecurities prompted by rapid social change and economic recession, paved the way for a politics of reaction in the late 1970s”).

157. The 1988 Bush campaign used symbols and images – ACLU, Willie Horton, the death penalty—to appeal to white voters’ concerns about race, morality, and cultural values and to associate Democratic candidate Michael Dukakis with criminal defendants’ rights, black crime, and the erosion of traditional values. EDSALL & EDSALL, supra note 7, at 215-16; DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 224 (1995); BECKETT & SASSON, supra note 96, at 68 (Bush campaign director described Horton as “a wonderful mix of liberalism and a big black rapist.”); ENTMAN & ROJECKI, supra note 153, at 92 (Bush’s blatant anti-Black Horton advertisements deliberately raised the crime issue to arouse the fear in many Whites of dangerous Blacks).

158. See BECKETT, supra note 18; HACKER, supra note 51, at 57 (arguing that “when crime rates rise, conservatives do not call for confronting basic causes—unemployment, for example, or inferior education—but rather invoke a firmer use of force.”); MILLER, supra note 140, at 149 (arguing that “welfare and crime have never been far from the reach of any politician who wishes to posture on race without ever having actually to mention it”); Gilens, supra note 153, at 602 (arguing that public officials who use crime and welfare as “code” to mobilize anti-black sentiments for electoral advantage among white voters practice a politics of division).

159. See, e.g., GARLAND, supra note 8, at 108; BERNARD, supra note 37, at 3-5 (cyclical pattern of oscillation between severity and leniency in juvenile justice policy).

160. See, e.g., NAT’L RESEARCH COUNCIL ET AL., supra note 33, at 223. It states that:

Policies of the last decade have become more punitive toward delinquent juveniles, but especially toward juveniles who commit violent crimes. Punitive policies include easier waivers to adult court, excluding certain offenses from juvenile court jurisdiction, blended juvenile and adult sentences, increased
emphasized punishment and focused primarily on juveniles’ present offense and prior record. The shift from rehabilitation to retribution marked a substantial departure from traditional juvenile court sentencing policies. As a consequence, harsher waiver and sentencing policies raise important questions about the quality of procedural justice in juvenile courts and states’ compliance with Gault’s mandate to provide adequate legal services.

A. Right to Counsel in Juvenile Court

Progressive reformers used informal procedures to adjudicate and to impose dispositions in the child’s “best interests.” Gault granted delinquents greater procedural safeguards because of the gap between Progressives’ rhetoric and juvenile courts’ reality. However, Gault’s increased procedural formality legitimated punishment and contributed to greater severity in juvenile jurisprudence and practice. Although juvenile courts increasingly converge with criminal courts, states do not provide delinquents with all adult criminal procedural safeguards, such as the right to a jury trial, or with special procedures to protect them from their own immaturity, such as mandatory appointment of counsel. Perversely, states put juveniles on an equal footing with adults when formal equality places them at a practical disadvantage. For example, states use the adult waiver standard – “knowing, intelligent, and voluntary” under the totality of the circumstances – to gauge juveniles’ waivers of rights including the right to counsel.

authority to prosecutors to decide to file cases in adult court, and more frequent custodial placement of adjudicated delinquents.

161. See, e.g., PATRICIA TORBET ET AL., supra note 138; Feld, Responses to Youth Violence, supra note 106, at 189-261.

162. See, e.g., Feld, Responses to Youth Violence, supra note 106; NAT’L RESEARCH COUNCIL ET AL., supra note 33, at 210 (“State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability . . . include[ing] blended sentences, mandatory minimum sentences, and extended jurisdiction.”); MAUER, supra note 47, at 137-38 (sentencing discretion shifted from judges to prosecutors and “judicial discretion is exercised in an open courtroom subject to public scrutiny, but the exercise of prosecutorial discretion is conducted behind closed doors with little accountability”).

163. N. Lee Cooper et al., Fulfilling the Promise of In re Gault: Advancing the Role of Lawyers for Children, 33 WAKE FOREST L. REV. 651, 652 (1998) (describing changes in juvenile codes – waiver of younger youths, exclusion of more offenses from juvenile court jurisdiction, wider sharing of records and erosion of confidentiality, greater emphasis on punishment – and the increased importance of effective representation).

164. See Feld, Punishment, Treatment, and the Difference it Makes, supra note 106 (describing changes in juvenile court sentencing statutes to impose longer and determinate sentences); Feld, Legislative Changes in Juvenile Waiver Statutes, supra note 106 (describing legislative changes in waiver statutes to make it easier to transfer more youths to criminal court for prosecution as adults); Feld, supra note 88, at 1140-81 (criticizing procedural deficiencies of juvenile courts in light of states’ use of prior delinquency convictions to enhance adult criminal sentences).

165. See, e.g., Feld, supra note 79, at 272-76 (arguing that states treat juveniles just like adults when formal equality results in practical inequality and enables the state to take advantage of juveniles’ immaturity).
Gault likened the seriousness of a delinquency proceeding to a felony prosecution and granted juveniles the right to counsel.\textsuperscript{166} But, the Court based juveniles’ right to counsel on the Fourteenth Amendment Due Process Clause, rather than the Sixth Amendment which protects adult defendants’ right to counsel.\textsuperscript{167} Gault relied heavily on the President’s Commission on Law Enforcement and the Administration of Justice which recommended that juvenile courts appoint counsel “wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.”\textsuperscript{168} By contrast, Gault relied only on “fundamental fairness” and did not mandate appointment of counsel for delinquents, but instead only required that “the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”\textsuperscript{169}

When the Supreme Court decided Gault, lawyers seldom appeared in juvenile courts.\textsuperscript{170} After Gault, states amended their codes to conform with the constitutional requirement to make counsel available to delinquents. Despite formal changes of the “laws on the books,” the “law in action” lagged behind and most states failed to deliver legal services. Evaluations of initial compliance with Gault found that most judges did not advise juveniles of their right to or appoint counsel.\textsuperscript{171} A survey of judicial compliance conducted in Kentucky two years after Gault reported that about two-thirds of judges appointed lawyers for fewer than half of delinquents and one-third for fewer than 10\% of juveniles.\textsuperscript{172} Studies of counties or courts in several jurisdictions in the 1970s and 1980s reported that juvenile courts failed to appoint counsel for most juveniles.\textsuperscript{173}

\begin{enumerate}
\item \textsuperscript{166} In re Gault, 387 U.S. at 36-38 (asserting that as a matter of due process “the assistance of counsel is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution”).
\item \textsuperscript{167} See Gideon, 372 U.S. at 344 (granting criminal defendants a Sixth Amendment right to counsel because “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”).
\item \textsuperscript{168} In re Gault, 387 U.S. at 39 n. 65 (quoting recommendations of the President’s Commission on Law Enforcement and the Administration of Justice which emphasized the importance of counsel); President’s Comm’n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967); President’s Comm’n on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967).
\item \textsuperscript{169} In re Gault, 387 U.S. at 41.
\item \textsuperscript{170} See, e.g., Note, Juvenile Delinquents, supra note 69, at 796-99 (attorneys appear for juveniles in no more than five percent of cases).
\item \textsuperscript{171} Norman Lefstein et al., In Search of Juvenile Justice: Gault and Its Implementation, 3 Law & Soc’y Rev. 491, 506-16, 537 n.92 (1969); Elyce Z. Ferster et al., The Juvenile Justice System: In Search of the Role of Counsel, 39 Fordham L. Rev. 375 (1971).
\item \textsuperscript{172} Bardley C. Canon & Kenneth Kolson, Rural Compliance with Gault: Kentucky, A Case Study, 10 J. Fam. L. 301, 316 (1971) (reporting that most Kentucky juvenile courts failed to achieve compliance with Gault’s requirement to appoint counsel).
\item \textsuperscript{173} See, e.g., Stevens H. Clarke & Gary G. Koch, Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?, 14 L. & Soc’y Rev. 263, 297 (1980) (reporting that in North
Research in Minnesota in the mid-1980s reported that most youths appeared without counsel,¹⁷⁴ that rates of representation varied widely in urban, suburban and rural counties,¹⁷⁵ and that a substantial minority of youths whom judges removed from their homes or confined in institutions had no lawyer at their trial or sentencing hearing.¹⁷⁶ Feld’s comparative study of six states reported that only three of them appointed counsel for a substantial majority of juveniles in delinquency proceedings.¹⁷⁷ Studies in the 1990s continued to describe juvenile court judges’ failure to appoint lawyers for many youths who appear before them.¹⁷⁸ In 1995, the General Accounting Office replicated and confirmed Feld’s findings that rates of representation varied widely among and within states and that juvenile courts tried and sentenced many unrepresented youths.¹⁷⁹ Burruss and Kempf-Leonard’s study in Missouri found urban, suburban and rural variation in rates of representation (73%, 25%, and 18%) and reported that after controlling for other variables, an attorney’s presence consistently and adversely affected juveniles’ likelihood of receiving out-of-home placements in all settings.¹⁸⁰ In the mid-1990’s the American Bar Association (ABA) published two reports on the legal needs of young people. In America’s Children at Risk, the ABA reported that “Many children go through the juvenile justice system without the benefit of legal counsel. Among those who do have counsel, some...
are represented by counsel who are untrained in the complexities of representing juveniles and fail to provide ‘competent’ representation.” 181 In A Call for Justice, the ABA focused on the quality of lawyers in juvenile courts and again reported that many delinquents appeared without an attorney. 182 Since the late-1990s, the ABA has conducted a series of state-by-state assessments of juveniles’ access to counsel and the quality of representation they receive. These studies consistently report that many, if not most, juveniles appear without counsel and that lawyers who represent them often provide substandard services because of structural impediments to effective advocacy. 183 Moreover, regardless of the inadequacy of a youth’s representation, the juvenile justice process is nearly incapable of correcting its own errors. 184 Juvenile defenders rarely, if ever, appeal adverse decisions and often lack even a record with which to challenge an invalid waiver of counsel. 185

185. See, e.g. Berkheiser, supra note 61, at 633 (describing low rate of appeals from delinquency proceedings); Patricia Puritz & Wendy Shang, Juvenile Indigent Defense: Crisis and Solutions, 15 CRIM. JUST. 22, 23 (Spring 2000) (reporting that public defenders and court-appointed counsel rarely, if ever, file appeals); Donald J. Harris, Due Process vs. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania, 98 DICK. L. REV. 209 (1993) (reporting that public defenders filed about ten times as many appeals for adult defendants as for delinquents and attributing the differences to juvenile defense lawyers’ internalization of parens patriae ideology); Gary L. Crippen, Can the Courts Fairly Account for the Diminished Competence and Culpability of Juveniles? A Judge’s Perspective, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 403, 411, 414 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“[S]ervices of counsel ... must be sufficient to create a meaningful right of appeal. Without a healthy juvenile court appellate practice, legal rights are often illusory ... ”); Bookser, supra note 60, at 306 (“Post-disposition advocacy is minimal with defender offices not structured to support appeals. Excessive caseloads and restrictions on
There are several reasons why so many youths appear in juvenile courts without counsel. Public-defender legal services may be inadequate or nonexistent in non-urban areas. Juvenile court judges may encourage and readily find waivers of the right of counsel to ease administrative burdens on the courts. For example, judges may give cursory advisories of rights that imply that it is just a technicality. Judges in more traditional juvenile courts resent lawyers who challenge their discretion. In other instances, judges may not appoint counsel for a juvenile if they expect to impose a non-custodial sentence.

Waiver of counsel is the most common reason why so many juveniles are unrepresented. In most states, courts gauge juveniles’ waivers of rights by assessing whether they were “knowing, intelligent, and voluntary” under the “totality of the circumstances.” In Fare v. Michael C., the Court endorsed compensation hamper willing attorneys. Frequently, appointments officially end at disposition, making post-disposition advocacy a moot issue.

186. See A.B.A., supra note 182, at 45.
187. Canon & Kolson, supra note 172, at 323 (noting that the unavailability of lawyers in rural counties may deter judges from appointing counsel); A.B.A., supra note 182, at 45 (noting that “In rural areas, where pressure from the legal community to appoint lawyers if virtually nonexistent, youth waive counsel frequently. Furthermore, attorneys often have to travel hundreds of miles in rural counties to reach their clients, and these long distances inherently limit clients’ access to counsel.”).
188. Berkheiser, supra note 184, at 609-622 (analyzing 99 appellate cases reviewing validity of juveniles’ waivers of counsel and describing blatant judicial non-compliance with constitutional and state law requirements); Canon & Kolson, supra note 172, at 321-322 (“[J]udges whose juvenile workload is already heavy are reluctant to adopt a liberal policy of appointing counsel for indigent defendants because it is likely to make the cases all the more time consuming and the backlog that much greater.”); A.B.A., supra note 182, at 45 (reporting that judges often induce juveniles to waive counsel by suggesting that “lawyers are not needed because no serious dispositional consequences are anticipated.”).
189. Cooper et al., supra note 163, at 658 (reporting that judges rarely give juveniles as complete a waiver colloquy as that received by adults prior to waiving counsel or pleading guilty); Berkheiser, supra note 184, at 616 (describing waivers that “demonstrate a disturbingly cavalier attitude by the juvenile courts toward a child’s waiver of the right to counsel.”); Bookser, supra note 183, at 304 (reporting that “waiver is usually an uninformed decision made without consulting with an attorney and based on limited and inadequate colloquy”).
190. See, e.g., Berkheiser, supra note 184, at 617 (attributing failure of state laws and court rules to assure delivery of legal services to “resistance of juvenile court judges to externally imposed limits on their discretion”); Canon & Kolson, supra note 172, at 323 (reporting that judges who see themselves as “counsellors [sic] to the misguided youth as well as judges . . . feel that an attorney would interfere with their counseling relationship by turning it into a legal battle”).
191. Feld, supra note 79, at 190; Lefstein et al., supra note 171, at 531; Bortner, supra note 173, at 140 (noting that court officials are likely to recommend counsel only in cases with the potential for serious dispositions); see generally Burruss & Kempf-Leonard, supra note 178.
192. Feld, supra note 174, at 1324; Berkheiser, supra note 184, at 609-22 (analyzing all 99 appellate decisions reviewing validity of juveniles’ waivers of rights); Cooper et al., supra note 164; A.B.A., supra note 182, at 44-45.
193. See, e.g., Fare v. Michael C., 442 U.S. 707, 725 (1979) (articulating requirements for adequate waiver of a juvenile’s right to an attorney); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (finding that a defendant may waive her right to counsel); Berkheiser, supra note 184, at 602-07 (reviewing constitutional evolution of counsel waiver standard and its application to juveniles).
the adult waiver standard – “knowing, intelligent, and voluntary under the totality of the circumstances” – to evaluate juveniles’ waivers of *Miranda* rights.\(^{195}\) The Court rejected the idea that developmental or psychological differences between children and adults required special procedures for youths.\(^{196}\) As a result, juveniles can waive constitutional rights, like the right to counsel, without consulting with either a parent or an attorney.\(^{197}\) *Fare* asserted that the adult standard provided trial judges with appropriate flexibility to assess juveniles’ waivers of *Miranda* rights.\(^{198}\) Trial judges use the same waiver standard to evaluate juveniles’ waivers of counsel at trial.\(^{199}\)

When trial judges decide whether a juvenile made a “knowing, intelligent, and voluntary” waiver, they typically consider characteristics of the offender such as age, education, I.Q., and prior contacts with law enforcement.\(^{200}\) The “totality” approach gives judges broad discretion with which to decide whether youths understand and voluntarily waive their rights. However, a review of appellate cases reports that juvenile court judges frequently failed to give delinquents any counsel advisory, often failed to provide any record of a waiver colloquy, and readily accepted waivers of counsel from manifestly incompetent children.\(^{201}\)

194. *Fare*, 442 U.S. at 726-27 (finding a “knowing, intelligent and voluntary” waiver of *Miranda* rights by a 16½-year-old offender with several prior arrests who had “served time” in a youth camp).

195. *Id.* at 718-24. *Fare* held that a youth’s request to speak with his probation officer when police interrogated him constituted neither a *per se* invocation of his *Miranda* privilege against self-incrimination nor the functional equivalent of a request for counsel which would have required further questioning to cease. Compare, e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981).

196. *Id.* at 725. See Rosenberg, *supra* note 79 (decrying Court’s failure to provide additional procedural safeguards); McCarthy, *supra* note 74 (analyzing *Fare*’s inconsistency with earlier Court decisions); see generally Feld, *supra* note 79 (noting the Court’s departure from earlier concerns about the impact of immaturity on legal decision-making).


199. Berkheiser, *supra* note 184, at 605 (concluding that courts apply the same standard to juvenile and adult defendants in federal and state courts prohibiting waiver unless made “competently and intelligently”).

200. See, e.g., *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968) (listing factors for trial judges to consider when they assess the validity of juveniles’ waiver decisions); *Fare*, 442 U.S. at 725 (listing factors); State v. Benoit, 490 A.2d 295, 302 (N.H. 1985) (listing factors).

Research on juveniles’ adjudicative competence and ability to exercise *Miranda* rights strongly questions whether they can make “knowing, intelligent, and voluntary” waivers. Thomas Grisso has studied juveniles’ legal competencies across several domains for three decades and reports that many juveniles simply do not understand the meaning of a *Miranda* warning or counsel advisory well enough to make a valid waiver.202 If juveniles do not understand *Miranda* warnings or judicial advisories, then they cannot exercise their rights as effectively as adults.203 Significantly, juveniles most frequently misunderstood the warning that they had the right to an attorney and to have one present when police question them.204 Although older juveniles understood *Miranda* warnings about as well as did adults, substantial minorities of both groups failed to grasp at least some elements of the warning.205

Even youths who understand the abstract words of a *Miranda* warning or judicial advisory of counsel may not be able to exercise their rights effectively. Juveniles may not appreciate the function or importance of rights as well as do

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202. See Thomas Grisso, Juveniles’ Waivers of Rights: Legal and Psychological Competence 106-07 (1981) (reporting that only about half of mid-adolescents understand their *Miranda* warning, a rate lower than that of adults); Thomas Grisso, Juveniles’ Capacities to Waive *Miranda* Rights: An Empirical Analysis, 68 CAL. L. REV. 1134, 1154-54 (1980) (reporting that majority of juveniles who received *Miranda* warnings did not understand them well enough to waive their rights; that only 20.9% of the juveniles, as compared with 42.3% of the adults, exhibited understanding of all four components of a *Miranda* warning; and 55.3% of juveniles, as contrasted with 23.1% of the adults, manifested no comprehension of at least one of the four warnings) [hereinafter Grisso, Juveniles’ Capacities to Waive]; Thomas Grisso, Juveniles’ Consent in Delinquency Proceedings, in CHILDREN’S COMPETENCE TO CONSENT 131 (Gary B. Melton, Gerald P. Koocher, & Michael J. Saks eds., 1983) [hereinafter Grisso, Juveniles’ Consent].

203. Larson, supra note 75, at 648-49; J. Thomas Grisso & Carolyn Pomiciter, Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver, 1 L. & HUM. BEHAV. 321, 339 (1977) (reporting that juveniles invoked their rights in about 10% of cases compared with 40% of adults); A. Bruce Ferguson & Alan Charles Douglas, A Study of Juvenile Waiver, 7 SAN DIEGO L. REV. 39, 53 (1970) (reporting that over 90% of the juveniles whom police interrogated waived their rights, that an equal number did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects); Marty Beyer, Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases, 15 CRIM. JUST. MAG. 27, 28 (Summer 2000) (reporting that more than half of juveniles did not understand the words of the *Miranda* warning).

204. Grisso, Juveniles’ Capacities to Waive, supra note 202, at 1159; see also, Beyer, supra note 203, at 28 (reporting that juveniles’ misunderstood role of defense counsel).

205. Grisso, Juveniles’ Capacities to Waive, supra note 202, at 1157. See also, Rona Abramovitch, Karen L. Higgins-Biss, & Stephen R. Biss, Young Persons’ Comprehension of Waivers in Criminal Proceedings, 35 CANADIAN J. CRIM. 309, 319 (1993) (“[I]t seems likely that many if not most juveniles who are asked by the police to waive their rights do not have sufficient understanding to be competent to waive them.”); Chevon M. Wall & Mary Furlong, Comprehension of *Miranda* Rights by Urban Adolescents with Law-Related Education, 56 PSYCHOL. REP. 359 (1985) (reporting that urban, black high school students who participated in a “Street Law” course that included information about *Miranda* rights did not understand their rights well enough to assert them); Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 PSYCHOL. PUB. POL’Y & L. 3, 11 (1997) (summarizing research on adolescents understanding of *Miranda* warnings and reporting “good understanding for a majority of 16- to 19-year olds,” both delinquents and non-delinquents).
They have greater difficulty than adults conceiving of a right as an entitlement that they can exercise without adverse consequences. Societal expectations of obedience to authority and children’s lower social status make them more vulnerable than adults during police interrogation and more likely to acquiesce to judges’ pressures to waive counsel.

Developmental psychologists’ research on juveniles’ adjudicative competence raises further concerns about juveniles’ capacity to exercise legal rights. A defendant must be able to understand legal proceedings, make rational decisions, and process information from and assist counsel in order to be competent to stand trial. Mental illness or retardation normally produces the disabilities that substantially impair defendants’ competence. However,

206. Larson, supra note 198, at 649-53 (reviewing social psychological research and juveniles’ limited understanding of the concept of “rights” as an entitlement to be exercised); Grisso, supra note 205 (distinguishing between understanding words of warning and appreciating functions of rights that warning conveys); GRISSO, supra note 202, at 130 (reporting that majority of juveniles view “a right as an allowance which is bestowed by and can therefore be revoked by the authorities”); A.B.A., supra note 182, at 44 (reporting that youths who waived counsel explained that they felt intimidated or did not understand the vocabulary used and did not listen closely).

207. Grisso, supra note 205, at 29; Larson, supra note 198, at 651-52; Grisso, supra note 205, at 11 (arguing that a larger proportion of delinquent youths bring to the defendant role an incomplete comprehension of the concept and meaning of a right as it applies to adversarial legal proceedings.”).


209. Thomas Grisso, et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants, 27 L. & HUM. BEHAV. 333, 335 (2003) (explaining that adjudicative competence entails “a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one’s own situation in a manner that is neither distorted nor irrational (Appreciation.”). Trying only competent defendants assures the legitimacy of the criminal process, reduces the risk of erroneous convictions, and protects the dignity and autonomy of the accused. Bonnie and Grisso argue that:

The dignity of the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her. The accuracy or reliability of the adjudication is threatened if the defendant is unable to assist in the development and presentation of a defense. Finally, to the extent that decisions about the course of adjudication must be made personally by the defendant, he or she must have the abilities needed to exercise decision-making autonomy.


210. Drope v. Missouri, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”).

211. Dusky v. United States, 362 U.S. 402 (1960) (requiring defendants to possess “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of proceedings against him”).
generic developmental limitations impair juveniles’ ability to understand legal proceedings, make rational decisions, and assist counsel.\textsuperscript{212} Grisso’s recent research found significant age-related differences between adolescents’ and young adults’ adjudicative competence, legal understanding, and quality of judgment.\textsuperscript{213} Many juveniles below the age of fourteen were as severely impaired as mentally-ill adult defendants who lacked competence to stand trial.\textsuperscript{214} A significant proportion of youths younger than sixteen years of age lacked competence and some older youths exhibited substantial impairments.\textsuperscript{215} Age and intelligence interacted to produce higher levels of incompetence among younger adolescents with lower IQs than among low IQ adults.\textsuperscript{216} Even formally competent adolescents made poorer decisions than did young adults because they emphasized short-term over long-term consequences and sought peer approval.\textsuperscript{217}

\textsuperscript{212.} See, e.g., Elizabeth S. Scott & Thomas Grisso, \textit{Developmental Incompetence, Due Process, and Juvenile Justice Policy}, 83 N.C. L. Rev. 793 (2005); Grisso, et al, supra note 209; Richard E. Redding & Lynda E. Frost, \textit{Adjudicative Competence in the Modern Juvenile Court}, 9 VA. J. SOC. POL’Y & L. 353 (2001); Thomas Grisso, \textit{Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform}, 12 CRIM. JUST. 5, 7-9 (Fall 1997) (questioning youths’ ability to understand trial process, to assist counsel, and to make strategic legal decision); see, e.g., Steven A. Drizin & Richard A. Leo, \textit{The Problem of False Confessions in the Post-DNA World}, 82 N.C. L. Rev. 891, 1005 (2004) (arguing that “juvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and appear to be at a greater risk of falsely confessing when subjected to psychological interrogation techniques . . .”).

\textsuperscript{213.} Grisso, et al., supra note 209, at 343-346; Redding & Frost, supra note 212, at 374-378 (summarizing research on adjudicative competence of adolescents and reporting younger age, lower IQ, and mental illness combine to detract from juveniles’ ability to understand proceedings and to assist counsel).

\textsuperscript{214.} Grisso, et al., supra note 209, at 344 (“30% of 11- to 13-year-olds, and 19% of 14- to 15-year olds, were significantly impaired on one or both of these subscales” measuring Understanding and Reasoning); Redding & Frost, supra note 212; Bonnie & Grisso, supra note 209, at 87 (“Some youths, especially those who are nearer to the minimum age for waiver to criminal court, may have significant deficits in competence-related abilities due not to mental disorder but to developmental immaturity.”); Vance L. Cowdren & Geoffrey R. McKee, \textit{Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship}, 33 U. LOUISVILLE J. FAM. L. 629, 652 (1995) (reporting that majority of juveniles fifteen and younger failed to meet adult standard of competence).

\textsuperscript{215.} Grisso et al, supra note 209.

\textsuperscript{216.} Grisso et al, supra note 209, at 356. Reported that: approximately one fifth of 14- to 15-year-olds are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts. . . . Not surprisingly, juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial. Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is therefore even greater.

\textsuperscript{217.} Bonnie & Grisso, supra note 209, at 91; Elizabeth S. Scott & Thomas Grisso, \textit{The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform}, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Laurence Steinberg & Elizabeth Cauffman, \textit{The Elephant in the
In summary, research on juveniles’ ability to exercise *Miranda* rights and their adjudicative competence consistently reports that, as a group, younger adolescents possess less ability than adults to understand legal proceedings and to make rational decisions.

A few states recognize juveniles’ developmental differences and prohibit their waivers of counsel or incarceration without representation.218 Most states allow juveniles to waive *Miranda* rights and the right to counsel in delinquency proceedings without even consulting an attorney.219 Like many other states, Kentucky has struggled to provide adequate legal defense representation for delinquents.220 A 1996 report described substantial deficiencies in access to and quality of defense lawyers – excessive caseloads for full-time public defenders; inadequate representation by court-appointed attorneys; many unrepresented juveniles at detention hearings and court proceedings; lack of time for attorneys to meet with clients, file motions, prepare for trials, or advocate for appropriate dispositions; and lack of resources to pursue appellate remedies.221 Judicial and administrative changes in the late-1990s began to address those deficiencies.222 To avoid uninformed waivers of counsel, the Kentucky Court of Appeals in *D.R. v. Commonwealth* required mandatory consultation with counsel prior to any juvenile’s waiver.223 Despite that judicial impetus, a subsequent assessment of juvenile indigent defense services reported continuing instances of excessive

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218. See Feld, *supra* note 79, at 187 & nn.152-53 (discussing Iowa and Wisconsin); see also Institute of Judicial Admin. - ABA Joint Comm’n on Juvenile Justice Standards, Standards Relating to Pretrial Court Proceedings 5.1 cmt. 81 (advocating that the juvenile should have the mandatory and nonwaivable right to effective assistance of counsel at all stages of the proceedings).

219. See, e.g., Berkheiser who argues that:

> The broad discretion granted to juvenile court judges by the court’s founders and later by state statutes, coupled with the informality of juvenile court proceedings, have impeded the full recognition of juveniles’ constitutional rights... Juveniles do not have the capacity for sound decision making or an understanding of the significance of right to counsel and the consequences of waiving the right.


221. Brooks et al., *supra* note 220 (reporting inadequate training and compensation for attorneys who represent children and high rates of waiver of counsel by adjudicated youths and incarceration without representation).

222. Puritz & Brooks, *supra* note 220 (describing creation of Blue Ribbon Group to Improve Indigent Defense Services, creation of Juvenile Post-Disposition Branch to advocate on behalf of incarcerated juveniles, and appropriations to increase salaries, provide additional staff, and reduce case-load size).

223. *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. Ct. App. 2001) (deciding that “a child may waive the right to counsel only if that child has first been appointed, and consulted with, counsel concerning the waiver”) (emphasis omitted).
caseloads, high rates of waiver of counsel by non-detained youths, limited advocacy by attorneys at dispositional hearings, and a variety of structural barriers to effective representation.\textsuperscript{224}

Providing effective assistance of counsel for juveniles is a two-step problem. The first step is simply to assure that lawyers are available to represent juveniles in delinquency proceedings. Secondly, once states secure the presence of defense lawyers for delinquents, they must provide the resources necessary to perform adequately. Even when judges appoint lawyers for delinquents, attorneys may not represent their juvenile clients effectively.\textsuperscript{225} The juvenile court as an institution functions to thwart the adversarial process.\textsuperscript{226} Organizational pressures to maintain stable relationships and to cooperate with other people in the system may impede effective advocacy.\textsuperscript{227}

Can lawyers even perform as adversarial litigants in a \textit{parens patriae} juvenile justice system?\textsuperscript{228} Lawyers’ presence with juveniles in more traditional juvenile courts places their clients at a disadvantage.\textsuperscript{229} Judges incarcerate juveniles who appear with counsel more readily than they do those without a lawyer.\textsuperscript{230} Research that controlled for the influence of legal variables, such as

\begin{enumerate}
\item \textsuperscript{224} Puritz & Brooks, supra note 220, at 3-5 (reporting that “Effective representation is adversely effected in some parts of the state due to crushing caseloads, court docketing, and geographic challenges in multi-county officers.”).
\item \textsuperscript{225} See e.g., A.B.A., supra note 182; see e.g., Celese & Puritz, \textit{The Children Left Behind}, supra note 183 (describing inadequate quality of representation); Puritz & Brooks, \textit{Kentucky}, supra note 183 (noting that despite efforts to improve delivery of legal services, quality of representation remains problematic); Puritz et al., \textit{Virginia}, supra note 183 (reporting excess caseloads and inadequate services to provide competent representation); Brooks & Kamine, supra note 183 (reporting substantial deficiencies in quality of representation).
\item \textsuperscript{226} Feld, supra note 79, at 187 (“Organizational pressures to cooperate, judicial hostility toward adversarial litigants, role ambiguity created by the dual goals of rehabilitation and punishment, reluctance to help juveniles ‘beat a case,’ or an internalization of a court’s treatment philosophy may compromise the role of counsel in juvenile court.”); Clarke & Koch, supra note 173, at 305 (noting juvenile courts’ treatment of lawyers as an “impediment”); Bortner, supra note 173, at 136-39 (describing role of counsel in juvenile court).
\item \textsuperscript{227} See, e.g., Bortner, supra note 173, at 138 (examining the influence of court personnel on lawyer’s perceived role in juvenile court); W. Vaughan Stapleton & Lee E. Teitelbaum, \textit{In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts 102-06} (1972) (discussing the juvenile court as a “quasi-cooperative system”); Abraham S. Blumberg, \textit{The Practice of Law as Confidence Game: Organizational Cooptation of a Profession}, 1 L. & Soc’y Rev. 15, 18-24 (1967) (arguing the impact of institutional pressures upon the ability of attorneys to maintain advocacy posture); Burruss & Kempf-Leonard, supra note 178, at 61 (noting that organizational climate within juvenile court may disincline counsel to advocate on delinquents’ behalf).
\item \textsuperscript{228} See, e.g., Stapleton & Teitelbaum, supra note 227, at 156-64 (finding juvenile court philosophy limits the ability of lawyers to adequately perform as advocates).
\item \textsuperscript{229} See, e.g., Bortner, supra note 173, at 139-40 (characterizing the disadvantages of attorney representation for juvenile defendants); Clarke & Koch, supra note 173, at 304-06 (suggesting the absence of an attorney may benefit a juvenile client); Feld, supra note 174, at 1280 (describing the adverse impact of representation on juveniles’ subsequent sentences); Burruss & Kempf-Leonard, supra note 178.
\item \textsuperscript{230} Bortner, supra note 173, at 139-40 (“[R]egardless of the types of offenses with which
present offense, prior record, and pre-trial detention status, concluded that “representation by counsel is an additional aggravating factor in a juvenile’s disposition.” Every study analyzing the presence and effectiveness of counsel in juvenile court reports an adverse impact.

How to explain the consistent finding that juveniles represented by counsel fare worse? Perhaps the lawyers who appear in juvenile courts are so incompetent that they prejudice their clients’ cases. Even in jurisdictions where judges routinely appoint counsel for juveniles, many lawyers provide ineffective representation. Public defender offices may assign their least capable or newest attorneys to juvenile court to get trial experience and the neophytes may receive inadequate supervision. Similarly, court-appointed lawyers may be more concerned with maintaining an ongoing relationship with they were charged, juveniles represented by attorneys receive more severe dispositions.”

they were charged, juveniles represented by attorneys receive more severe dispositions.”

233. See, e.g., BORTNER, supra note 173, at 138-40; Clarke & Koch, supra note 173, at 297; Feld, supra note 177, at 419; Feld, supra note 174, at 1280.

234. See JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 8-9 (1984); PLATT, supra note 3, at 139; STAPLETON & TEITELBAUM, supra note 227, at 38; Lefstein et al., supra note 171, at 511-12.

235. The state of New York had the highest rate of representation, over 95%, in a six-state study of the delivery of legal services in juvenile courts. Feld, supra note 177, at 400-02. Despite the routine presence of counsel, however, Knitzer and Sobie reported Overall, 45% of the courtroom observations reflected either seriously inadequate or marginally adequate representation. Specific problems center around lack of preparation and lack of contact with the children. In 47% of the observations it appeared that the law guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all. In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians.

KNITZER & SOBIE, supra note 234, at 8-9.

236. Barbara Flicker, Providing Counsel for Accused Juveniles, in CURRENT POLICY ISSUES 1983, at 2 (June 1983) (noting that “[i]n some defender offices, assignment to ‘kiddie court’ is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments. Little attention may be paid by superiors to performance in juvenile court, providing few incentives for hard work.”). Indeed, commentators have noted that judges avoid or resist assignment to juvenile court for similar reasons. “[T]he juvenile court is considered to be the lowest rung on the judicial ladder. Rarely does the court attract men of maturity or ability. The work is not regarded as desirable or appropriate for higher judgeships.” Joel F. Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7, 17 (1965).
the appointing judge than with vigorously defending their frequently changing clients.\textsuperscript{237} Most significantly, the conditions under which many attorneys work constitute a structural impediment to quality representation.\textsuperscript{238} Observations and qualitative assessments in several jurisdictions report working conditions – crushing caseloads, inadequate compensation, lack of support services, inexperienced attorneys and inadequate supervision – that detract from or even preclude effective representation.\textsuperscript{239}

Judges may appoint lawyers when they anticipate imposing more severe sentences and this could account for the relationship between the presence of an attorney and more severe dispositions.\textsuperscript{240} In many jurisdictions, the same judge presides at a youth’s arraignment, detention hearing, adjudication, and subsequent disposition.\textsuperscript{241} However, if judges appoint a lawyer at a juvenile’s arraignment or detention because they expect to incarcerate him, have they already prejudged the case? On the other hand, if judges only appoint an attorney when a severe disposition appears more likely, then a lawyer may be unable to provide an effective defense.\textsuperscript{242}

Finally, judges may sentence delinquents who appear with counsel more severely than those who do not because the presence of a lawyer effectively insulates them from appellate reversal.\textsuperscript{243} While judges may not punish juveniles

\textsuperscript{237} Flicker, \textit{supra} note 236, at 4 (commenting that court officials’ hostility to counsel’s efforts has resulted in negative performance evaluations, slashed fees, and even pressure from the court to remove the offending attorneys from the panel).

\textsuperscript{238} Cooper et al., \textit{supra} note 163, at 658-63 (describing direct and indirect barrier to effective representation); A.B.A., \textit{supra} note 182, at 24 (describing systemic barriers to effective representation, including “underfunding, low morale, high turnover, lack of training, low status in ‘career ladders,’ political pressures, low salaries, and huge caseloads.”).

\textsuperscript{239} Analysts attribute the poor quality of attorneys’ performance to lack of preparation, crushing caseloads, and inadequate compensation. Ce\textsc{e}se & Pur\textsc{it}z, \textit{supra} note 183, at 62-65 (grueling caseloads preclude any meaningful contact with clients); Pur\textsc{it}z & Brooks, \textit{supra} note 220, at 31-35 (high caseloads and limited resources adversely affected quality of representation).

\textsuperscript{240} Aday, \textit{supra} note 173, at 115; Canon & Kolson, \textit{supra} note 172, 319-320 (reporting that “Appointment of counsel is a sign that the judge is leaning toward or had made up his mind to the effect that the defendant is going to be placed in the juvenile detention home or that the judge is going to waive his jurisdiction. . . . The judge, often on the advice of the county attorney, wants to protect his decision from collateral attack by insuring that the record shows that the accused was represented by an attorney.”)

\textsuperscript{241} Feld, \textit{supra} note 79, at 240-241.

\textsuperscript{242} Burruss & Kempf-Leonard suggest that:

\begin{itemize}
  \item timing may affect the ability of attorneys to succeed in delinquency matters.
  \item For example, juveniles may retain counsel too late in the process. . . . [A]ttorneys may not be appointed until court officials have decided informally on disposition. . . . [B]ecause juvenile courts process cases so much more quickly than adult criminal courts, the time constraints preclude preparation of a successful defense strategy.
\end{itemize}


\textsuperscript{243} Duffee & Siegel, \textit{supra} note 230, at 548-549 (contending that “When the appearance of due process has been maintained, the juvenile court should feel secure about future challenges and safer in prescribing even stricter control over its wards.”).
just because they have a lawyer, they can be more lenient with youths who appear without counsel and “throw themselves on the mercy of the court.”

But, what accounts for judicial hostility toward adversarial litigants?

The direct consequence of delinquency convictions and sentences makes the quality of procedural justice increasingly critical. The use of prior delinquency convictions to waive juvenile court jurisdiction and to enhance adult criminal sentences makes the need for counsel to assure the quality of those convictions all the more imperative.

B. Waiver to Criminal Court and Sentencing Juveniles as Adults

Waiver of juvenile court jurisdiction presents the stark choice between rehabilitation in the juvenile system and punishment in the criminal justice system. The administrative details of transfer legislation vary considerably, but judicial waiver, legislative offense exclusion, and prosecutorial direct-file represent the three generic strategies that states use. Waiver laws implicate sentencing policy choices and trade-offs, rely on different justice system actors and processes, and elicit different information to determine whether to try and sentence a young offender as an adult or as a child.

Judicial waiver represents the most common transfer strategy. Juvenile court judges may waive jurisdiction on a discretionary basis after conducting a hearing to determine whether a youth is amenable to treatment or poses a danger to public safety. These case-by-case assessments reflect traditional

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244. Canon & Kolson, supra note 172, at 320 (reporting that “when the judge feels that the case can be settled with a probated sentence, little need is seen for counsel.”); Burruss & Kempf-Leonard, supra note 178, at 61 (“Where attorneys appear least often, their unique presence may serve most to disrupt routine procedures. In such cases, they are more likely to invoke formal procedures that limit the ability of court officials to be lenient.”).

245. Feld, supra note 88.


individualized sentencing discretion. By contrast, legislatures possess wide latitude to define juvenile courts’ jurisdiction and to exclude youths based on age and seriousness of the offense. Some states exclude the most serious offenses from juvenile court jurisdiction and thereby circumvent judicial waiver provisions. About a dozen states allow prosecutors to decide in which justice system to try some young offenders. Juvenile and criminal courts share concurrent jurisdiction over certain ages and offenses (e.g., older youths and serious crimes) and prosecutors may exercise their discretion to select either forum.

The sharp increase in black youth homicides in the late-1980s and early-1990s caused almost every state to revise its transfer laws to facilitate prosecution of more juveniles in criminal court. These changes lowered the minimum age for transfer, increased the number of offenses excluded from juvenile court jurisdiction, and shifted waiver discretion from the judicial branch – judges in a waiver hearing – to the executive branch – prosecutors who make unreviewable charging decisions. Transfer policies became especially


252. See generally, Feld, supra note 251, at 83-98.

253. Proponents of offense exclusion favor “just deserts” sentencing policies. They advocate sanctions based on relatively objective factors such as seriousness of the crime, culpability, and criminal history. They value uniform treatment of similarly situated offenders. See, e.g., Feld, supra note 251, at 102-03. Critics question whether legislators can remove discretion without making the process excessively rigid and over-inclusive. See, e.g., Zimring, supra note 251.

254. See SNYDER & SICKMUND, supra note 124; Francis Barry McCarthy, The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction, 38 ST. LOUIS U. L.J. 629 (1994); Manduley v. Superior Court of San Diego, 27 Cal. 4th 537 (Cal. 2002). Proponents of prosecutorial waiver claim that prosecutors can act as more objective gatekeepers than either “soft” judges or “get tough” legislators. See, e.g., McCarthy, supra note 131. Critics observe that prosecutors often succumb to political pressures on crime issues, exercise their discretion just as subjectively and idiosyncratically as judges, and create extensive geographic variability in the administration of juvenile justice. See, e.g., Donna M. Bishop & Charles S. Frazier, Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver, 5 NOTRE DAME J. ETHICS & PUB. POL’Y 281 (1991); Feld, Legislative Exclusion, supra note 128, at 117-19.


256. See Feld, supra note 251, at 124-29.
punitive toward youths charged with violent and drug crimes, offense categories to which black youths contribute disproportionately.

Even prior to the recent “crack down,” studies consistently reported racial disparities in waiver decisions by juvenile court judges.257 As a result of “get tough” statutory reforms, judges and prosecutors now transfer even more minority youths to criminal courts and the disparities are greatest for youths charged with violent and drug offenses.258 In nearly every jurisdiction, the proportion of minority youths transferred to criminal court greatly exceeded their proportional make-up of the general population.259 As a result of the successive screening and differential processing of youths by race, the majority of juveniles transferred to criminal court and sentenced to prison are minority youths.260

1. Adolescent Culpability, the Death Penalty and Life Without Parole

Judges sentence juveniles transferred to criminal court as if they were adults, send them to adult prisons, and, until the Supreme Court’s recent decision in

257. See, e.g., DONNA M. HAMPARIAN ET AL., U.S. DEPT’ OF JUSTICE, MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURT: BETWEEN TWO WORLDS 104-05 (1982) (nationally, 39% of all youths transferred in 1978 were black and, in 11 states, minority youths constituted the majority of juveniles waived); Joel Peter Eigen, The Determinants and Impact of Jurisdictional Transfer in Philadelphia, in READINGS IN PUBLIC POLICY 333, 339-40 (John C. Hall et al. eds., 1981) (interracial effect in transfers in which black youths who murder white victims are significantly more at risk for waiver); Jeffrey Fagan, Martin Forst, & Scott Vivona, Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court, 33 CRIME & DELINQ. 259, 276 (1987) (“[I]t appears that the effects of race are indirect, but visible nonetheless.”); U.S. GEN. ACCOUNTING OFFICE, supra note 249, at 59 (examining the effects of race on judicial waiver decisions); M. A. Bortner, Marjorie S. Zatz & Darnell F. Hawkins, Race and Transfer: Empirical Research and Social Context, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (analyzing racial disparity in juvenile transfer proceedings).

258. EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 12-14 (2000); NAT’L RESEARCH COUNCIL ET AL., supra note 33, at 216 (“A high proportion of the juveniles transferred to adult court are minorities. . . . The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes.”); Bortner et al., supra note 257, at 277 (analyzing sources of racial disparity in juvenile transfer proceedings).

259. POE-YAMAGATA & JONES, supra note 258, at 17 (minority proportion of youths transferred to criminal court was five times their make-up of the general population in Connecticut, Massachusetts, Pennsylvania, and Rhode Island); MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 7-8 (2000) (studying juvenile transfer and criminal court sentencing practices in Los Angeles and reporting that “[c]ompared to white youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and 7 times as likely to be sent to prison by adult courts”).

260. See, e.g., NAT’L RESEARCH COUNCIL ET AL., supra note 33, at 220 (“In 1997, minorities made up three-quarters of juveniles admitted to adult state prisons, with blacks accounting for 58 percent, Hispanics 15 percent, and Asians and American Indians 2 percent.”); Bortner et al., supra note 257, at 277 (analyzing cumulative consequences of racial disparities in transfer decisions).
_Roper v. Simmons_, executed them for crimes committed as children. For a decade and a half prior to _Simmons_, the Court repeatedly considered whether the Eighth Amendment prohibited states from executing offenders for crimes they committed while under 18 years of age. In 1988, a plurality of justices in _Thompson v. Oklahoma_ concluded that fifteen-year-old offenders lacked the culpability necessary to impose the death penalty. The following year, in _Stanford v. Kentucky_, a majority upheld the death penalty for youths who were sixteen or seventeen at the time of their offenses. While _Stanford_ recognized that juveniles as a class were less culpable than adult offenders, the Court rejected a categorical ban and allowed juries to decide whether some older adolescents acted with sufficient culpability to justify their execution. After Stanford exhausted his state and federal remedies, outgoing Kentucky

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262. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. Earlier decisions averred to the importance of considering youthfulness as a mitigating factor in capital sentencing. See, e.g., _Eddings v. Oklahoma_, 455 U.S. 104, 115-16 (1982) (remanding sixteen-year-old defendant for resentencing after trial court’s failure to properly consider youthfulness as a mitigating factor and noting that “youth is more than a chronological fact. . . . minors, especially in their earlier years, generally are less mature and responsible than adults”); _Lockett v. Ohio_, 438 U.S. 586, 608-09 (1978) (requiring sentencing jury to consider all relevant mitigating factors including age of defendant); _Roberts v. Louisiana_, 431 U.S. 633, 637 (1977) (per curiam) (“Circumstances such as the youth of the offender . . . are all examples of mitigating facts . . . which are considered relevant in other jurisdictions.”).

263. _Thompson_ plurality looked both to objective indicators of “evolving standards of decency,” such as state statutes and jury practices, _id_. at 821-22, and the views of national and international organizations, and to the justices’ own subjective sense of “civilized standards of decency” when it conducted its proportionality analysis. _Id_. at 830. The _Thompson_ Court emphasized that deserved punishment must reflect individual culpability and concluded that “[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.” _Id_. at 834. The justices asserted that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. . . . Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” _Id_. at 835.

264. See _Stanford_, 492 U.S. at 380.

265. _Stanford_, 492 U.S. at 375-76 (arguing that juvenile waiver and capital sentencing procedures were adequate to determine individual culpability unless there was a national consensus “not that 17 or 18 is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which no one can reasonably be held fully responsible”).

266. See _In re Kevin Nigel Stanford_, 537 U.S. 968, 968 (2002).
Governor Paul Patton, as one of his final acts in office, commuted his death sentence because he “believed sentencing a juvenile to death is an excessive punishment.”

In 2005, the Supreme Court in *Roper v. Simmons* overruled *Stanford* and categorically prohibited states from executing youths for crimes committed prior to eighteen years of age. The Court found compelling evidence of a national consensus against the death penalty for juveniles in legislative enactments and juries’ sentencing decisions. In assessing society’s “evolving standards of decency,” the Court found that juveniles lacked the maturity and judgment necessary to equate their culpability with that of adults. *Simmons* emphasized that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure” which further diminished their criminal responsibility. Finally, because juveniles’ personalities are more transitory and less fully-formed, their horrific crimes provide less evidence of confirmed depravity and culpability than do those of adults.

Deserved punishment proportions sentences to the seriousness of the offense. Two elements define the seriousness of a crime — harm and culpability. An offender’s age has little bearing on assessments of harm, such

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267. Tom Loftus, *Patton Has Short, Quiet Last Day as Governor*, LOUISVILLE COURIER-J., Dec. 9, 2003, at 1B.
268. *Simmons*, 543 U.S. at 578 (prohibiting execution of youths for crimes committed when seventeen years of age or younger).
269. *Id.* at 564 (noting that legislative trends prohibiting executing children corresponded with those in Atkins v. Virginia, 536 U.S. 304 (2002), in which the Court held that the Eighth Amendment barred execution of defendants with mental retardation); see also Feld, *supra* note 261, at 488-97 (analogizing between state laws and jury practices in executing defendants with mental retardation and juveniles).
270. *Simmons*, 543 U.S. at 569 (finding that a “lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young”); see also Feld, *supra* note 261, at 515-21 (analyzing developmental psychological and neuroscience research on juveniles’ diminished responsibility).
271. *Simmons*, 543 U.S. at 569. The Court further argued that “[t]he susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’ Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” *Id.* at 570 (quoting Thompson, 487 U.S. at 835).
272. *Simmons*, 543 U.S. at 570 (noting that “the character of a juvenile is not as well formed as that of an adult.”).
274. See *Stanford*, 492 U.S. at 393 (Brennan, J., dissenting) (“[T]he proportionality principle takes account not only of the ‘injury to the person and to the public’ caused by a crime, but also of the ‘moral depravity’ of the offender.”) (citation omitted); Enmund v. Florida, 458 U.S. 782, 815 (1982) (O’Connor, J., dissenting) (arguing that the offender’s culpability—“the degree of the
as the injury inflicted or the amount of property taken. But youthfulness bears quite directly on the character of blameworthy choices, the culpability of the actor, and thereby the seriousness of the crime. Youthfulness affects a person’s ability to reason and to exercise self-control and thus reduces somewhat a juvenile’s degree of criminal responsibility. Younger offenders are less

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275. Ernest van den Haag contends that:

There is little reason left for not holding juveniles responsible under the same laws that apply to adults. The victim of a fifteen-year-old muggers [sic] is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is [just] as dead or as raped as the victim of an older one. The need for social defense or protection is the same.


276. Just deserts theory and criminal law grading principles base the degree of deserved punishment on the actor’s culpability. For example, a person may cause the death of another individual with premeditation and deliberation, intentionally, “in the heat of passion,” recklessly, negligently, or accidentally. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 105-45 (2d ed. 1960). The criminal law treats the same objective consequence or harm—for example, the death of a person—differently depending on the nature of the choices made. In a framework of deserved punishment, to impose the same penalty upon offenders who do not share equal culpability would be unjust. When gauging the culpability of choices, youthfulness has central importance because young people are neither fully responsible nor the moral equals of adults. See Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68, 121-23 (1997).

277. See generally Feld, supra note 261, at 515-21 (analyzing developmental psychological and neurobiological research on adolescents’ diminished responsibility). Peter Arenella argues that the criminal law treats children differently than adults because, even though it expects them to adhere to moral norms, it recognizes that they only gradually will develop the capacity to understand their normative significance and abide by their dictates. And when they make a rational and voluntary choice to engage in morally objectionable conduct . . . we may hold them accountable to some sanction to teach them the significance of the rule they have broken.

But we do not treat young children as full moral agents, despite their capacity for practical reason and their freedom to act on the basis of their reasoned choices. . . . [T]hey have not yet fully developed this capacity to respond appropriately to moral reasons for action. This capacity for moral responsiveness presupposes that moral agents appreciate the normative significance of the moral norms governing their behavior. It also assumes that moral agents can exercise moral judgment about how these norms apply in a particular context. Acting on the basis of moral judgment also requires moral
blameworthy than adults because they do not have the developmental capacity to fully to control their actions. While young offenders possess sufficient culpability for the State to hold them accountable for their actions, their reduced blameworthiness requires a qualitatively different youth sentencing policy.

The Court’s decision in Simmons to bar the death penalty for adolescents has broader implications for sentencing youths. The reduced culpability of youth applies equally to sentences of Life Without Parole (LWOP) and the draconian equivalents imposed on adult offenders. Although the Court’s jurisprudence insists that “death is different,” no principled bases exist by which to distinguish adolescents’ diminished responsibility that bars the death penalty and their equally reduced culpability that warrants shorter sentences for all serious crimes.280

motivation: the capacity to use the applicable moral norm as the basis for acting.
Peter Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, SOC. PHIL. & POL’Y, Spring 1990, at 67-68; see also Elizabeth S. Scott & Thomas Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997) (arguing that adolescents’ “criminal choices are presumed less to express individual preferences and more to reflect the behavioral influences characteristic of a transitory developmental stage that are generally shared with others in the age cohort. This difference supports drawing a line based on age, and subjecting adolescents to a categorical presumption of reduced responsibility.”); Laurence Steinberg & Elizabeth Cauffman, The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders, 6 VA. J. SOC. POL’Y & L. 389, 407-09 (1999) (arguing that youths lack “ability to control [their] impulses, to manage [their] behavior in the face of pressure from others to violate the law, or to extricate [themselves] from a potentially problematic situation,” and these deficiencies render them less blameworthy).

278. See Feld, supra note 261, at 508-12 (analyzing developmental psychological research on adolescents’ short-term and long-term risk calculus, maturity of judgment, and self-control that impairs quality of choice); Jeffrey Fagan, Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment, 33 N.M. L. REV. 207, 235 (2003) (arguing that adolescents’ “judgment is immature because they have not yet attained several dimensions of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception, and the calculation of future consequences”); Scott & Steinberg, supra note 274, at 823 (“[A]ctors, whose decisionmaking [sic] capacities are less severely impaired, or who are subject to compelling (but not overwhelming) pressures and constraints that limit their freedom of choice, may pass the minimum threshold of responsibility but be judged less culpable and deserving of less punishment than the typical criminal actor.”).

279. See Scott & Steinberg, supra note 274, at 830 (“[Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic and developmental in nature (rather than simply an expression of personal values and preferences), and they undermine decisionmaking [sic] capacity in ways that are accepted as mitigating culpability.”).

280. Professor Zimring argues that doctrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control. The visible importance of diminished responsibility in these cases arises because the punishments provided for the fully culpable are quite severe, and the reductive impact of mitigating punishment is correspondingly large.
Lionel Tate’s case graphically illustrates the hazards of disproportionate sentences and adjudicative incompetence when states try young offenders in criminal court. A grand jury indicted twelve-year-old Tate for first-degree murder for brutal injuries he inflicted on a six-year-old girl. Under Florida waiver law, Tate’s indictment for a capital crime required the state to prosecute him as an adult and his conviction of first-degree murder required the judge to impose a mandatory sentence of life without parole. The Court of Appeals reversed his conviction because the trial judge failed to conduct a hearing to determine whether he was competent to stand trial. However, it rejected the claim that imposing a mandatory LWOP sentence on a twelve-year-old child was disproportionate or “cruel and unusual punishment.”

For two decades the Court has vacillated about whether the Eighth Amendment contains a “narrow proportionality principle” that “applies to noncapital sentences.” In Rummel v. Estelle, the Court held that the Eighth Amendment does not prevent a state from sentencing a three-time property offender to life in prison with the possibility of parole. In Solem v. Helm, the Court held that a sentence of life without possibility of parole for a recidivist convicted of a minor property crime violated the Eighth Amendment.

But if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle.
Subsequently, in *Harmelin v. Michigan*, a fractured Court rejected a proportionality challenge and upheld a sentence of life without parole for a first-time drug offender.\(^{289}\)

In his *Harmelin* concurrence, Justice Kennedy asserted that “[t]he Eighth Amendment proportionality principle also applies to noncapital sentences”\(^{290}\) and his opinion provides the operative judicial test for disproportionate sentence.\(^{291}\) Kennedy identified four factors – the primacy of legislative judgments about penalties, the multiplicity of legitimate penal goals, the limited role for federal judicial oversight of state sentences, and the importance of objective factors to inform proportionality review – that bear on whether a penalty is “grossly disproportionate.”\(^{292}\) In *Ewing v. California*, the Court upheld a sentence of twenty-five years to life for the theft of three golf clubs under California’s “three-strike” sentencing statute.\(^{293}\)

Courts have foundered when they apply the Court’s proportionality principle to juvenile LWOP sentences.\(^{294}\) Although proportionality requires an appropriate penal relationship between the seriousness of a crime – harm and culpability – and the sentence imposed, courts focus only on the gravity of the crime – harm – rather than the culpability of the actor when they conduct proportionality analyses.\(^{295}\) Thus, a serious crime is a serious crime because of

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\(^{289}\) Compare *Harmelin*, 501 U.S. at 994 (Scalia., J.) (announcing the opinion of the Court and arguing that the proportionality principle only limited application of the death penalty, but did not constitute a general feature of Eighth Amendment analysis) with *id*. at 997, 1009 (Kennedy, J., concurring) (upholding sentence by finding it proportional under an Eighth Amendment analysis). Neither Justice Scalia’s nor Justice Kennedy’s legal reasoning was agreed to by a majority of the Court.

\(^{290}\) *Id*. at 997.

\(^{291}\) *Id*. at 1001 (arguing that the Eighth Amendment prohibits “only extreme sentences that are ‘grossly disproportionate’ to the crime.”).

\(^{292}\) See *id*. at 998-1001 (Kennedy J., concurring). According to Justice Kennedy, [a]ll of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime.

*Id*. at 1001.

\(^{293}\) *Ewing v. California*, 538 U.S. 11, 19 and 30-31 (2003) (“We hold that Ewing’s sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.”).

\(^{294}\) See generally Logan, supra note 274, at 703-09 (reviewing cases upholding LWOP sentences on juveniles).

\(^{295}\) For example, see State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1991), where the court upheld a mandatory sentence of life without parole imposed on a thirteen-year-old juvenile convicted of aggravated murder:
the harm caused, regardless of the culpability of the actor. The court in *Harris v. Wright* rejected a constitutional challenge to a mandatory LWOP sentence imposed on a fifteen-year-old convicted of murder. The court in *Harris v. Wright* rejected a constitutional challenge to a mandatory LWOP sentence imposed on a fifteen-year-old convicted of murder. *Harris* held that the Eighth Amendment bars only grossly disproportionate sentences and insisted that

Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.

Defining the gravity of the offense solely by the harm caused excludes from a proportionality inquiry any meaningful consideration of blameworthiness and diminished responsibility. By contrast, the Justices who dissented in *Stanford* and later prevailed in *Simmons* recognized that proportionality analyses require a broader culpability inquiry. Justice Stevens emphasized that

Proportionality analysis requires that we compare “the gravity of the offense,” understood to include not only the injury caused, but also the defendant’s culpability, with the “harshness of the penalty.” . . . [J]uveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.

The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness. That test does not embody an element or consideration of the defendant’s age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder.

*Id.* at 348 (citation omitted).  
*See also* State v. Stinnett, 497 S.E.2d 696, 701-02 (N.C. Ct. App. 1998) (upholding mandatory LWOP sentence imposed on fifteen-year-old convicted of murder and noting that “when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense”).

296. *Harris v. Wright*, 93 F.3d 581, 583-85 (9th Cir. 1996).

297. See *id.* at 584 (“Disproportion analysis, however, is strictly circumscribed; we conduct a detailed analysis only in the ‘rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.’”).

298. *Id.* at 585 (citation omitted).

299. See *Logan*, supra note 274, at 703 (“By divorcing ‘crime’ from offender culpability in proportionality analysis, these courts subscribe to an essentially circular inquiry; because murder, for instance, is a very ‘serious’ crime in the eyes of the legislature, it can be met with a very ‘serious’ statutory punishment.”).

300. In re Stanford, 537 U.S. at 969 (Stevens, J., dissenting) (quoting *Stanford*, 492 U.S. at
Although Simmons barred the death penalty for crimes committed by those younger than eighteen years of age, the Court has found no constitutional minimum age for imposing sentences of life without parole.\footnote{301} While trial judges may consider an offender’s youthfulness when they sentence them, appellate courts routinely uphold LWOP and very long sentences and rebuff claims that youthfulness is a mitigating factor that should trump mandatory LWOP sentences.\footnote{303} The Florida court in \textit{Tate v. State} “reject[ed] the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child.”\footnote{304} In \textit{State v. Green}, the North Carolina Supreme Court approved a mandatory sentence of life imprisonment imposed on a thirteen-year-old convicted of a first-degree sexual offense.\footnote{305} \textit{Green} noted that many states transfer very young offenders to criminal court,\footnote{306} that age is not dispositive “in determining whether a punishment is grossly disproportionate to the crime,”\footnote{307} and that retributive and incapacitative sentencing policies apply even to young offenders.\footnote{308} In \textit{Edmonds v. State}, the Mississippi Court of

\footnote{301. But cf. \textit{Naovarath v. State}, 779 P.2d 944, 947 (Nev. 1989) (questioning the constitutionality of imposing an LWOP sentence on any thirteen-year-old, but overturning sentence on more narrow grounds).}

\footnote{302. Cf. \textit{Adams v. State}, No. CR-98-0496, 2003 WL 22026043, at 59 (Ala. Crim. App. Aug. 29, 2003) (refusing to grant weight as a factor mitigating against execution to the fact that defendant was seventeen years old at the time he committed the crime leading to his death sentence).}

\footnote{303. See, e.g., \textit{Hawkins v. Hargett}, 200 F.3d 1279, 1284 (10th Cir. 1999) (recognizing that “age is a relevant factor to consider in a proportionality analysis”); \textit{State v. Green}, 502 S.E.2d 819, 832 (N.C. 1998) (upholding life imprisonment sentence for thirteen-year-old convicted of rape, recognizing that “the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime,” but emphasizing that Green was morally responsible for the crime because he possessed sufficient mental capacity to form criminal intent).}

\footnote{304. \textit{Tate}, 864 So. 2d at 54. \textit{Tate} cited other recent Florida cases approving LWOP sentences imposed on young offenders, including \textit{Blackshear v. State}, 771 So. 2d 1199, 1200-02 (Fla. Dist. Ct. App. 2000) (approving three consecutive life sentences imposed for three robberies committed when Blackshear was thirteen years of age and noting that “[s]entences imposed on juveniles of life imprisonment are not uncommon in Florida Courts”) and \textit{Phillips v. State}, 807 So. 2d 713, 714 and 717-18 (Fla. Dist. Ct. App. 2002) (approving LWOP sentence imposed on fourteen-year-old convicted of murder and rejecting the idea that an LWOP sentence for first-degree murder could ever be so “grossly disproportionate” as to require a finding of unconstitutionality). \textit{Tate}, 864 So. 2d at 54-55.}

\footnote{305. \textit{Green}, 502 S.E.2d. at 827-28; see also Paul G. Morrissey, \textit{Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in State v. Green}, 44 \textit{Vill. L. Rev.} 707, 738 (1999) (“Green’s young age does not lend itself to a per se ruling of unconstitutionality. Once a juvenile of any age is transferred to superior court, charged with a violation of state law and convicted, the juvenile must be ‘handled in every respect as an adult.’” (footnote omitted)).}

\footnote{306. See \textit{Green}, 502 S.E.2d at 831 (finding that because at least 18 other states permit waiver of offenders thirteen or younger to criminal court, the North Carolina practice did not violate “evolving standards of decency”).}

\footnote{307. Id. at 832.}

\footnote{308. See \textit{id.} at 833 (emphasizing the judicial deference to legislative sentencing policy
Appeals upheld an LWOP sentence for a youth who was thirteen years of age at the time of his crime. In *Hawkins v. Hargett*, the Tenth Circuit Court of Appeals approved sentences totaling 100 years for burglary, rape, and robbery imposed for crimes committed when a juvenile was thirteen years of age. Around the nation, appellate courts regularly uphold sentences of life with or without possibility of parole and for extremely long terms imposed on thirteen-, fourteen-, or fifteen-year-old youths. Few courts find such sentences imposed on young offenders disproportional. In contrast with the Court’s juvenile judgments and concluding that “the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant.”

309. Edmonds v. Mississippi, No. 2004-KA-02081-COA, 2006 WL 1073460, at ¶ 1, 4 (Miss. App. April 25, 2006). The court rejected the juvenile’s request for a jury instruction as to sentencing consequences if convicted and found that LWOP sentence does not need to take account of the degree of culpability of the actor. *Id.* at ¶¶ 86-90, 95-98.

310. *Hawkins*, 200 F.3d. at 1285 (rejecting, on habeas appeal of state conviction, argument that imposing consecutive sentences for crimes committed as a thirteen-year-old constituted cruel and unusual punishment).


312. See e.g., Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (holding that life sentence for fourteen-year-old convicted of rape violated Eighth Amendment); *Naovarath*, 779 P.2d at 948-49 (Nev. 1989) (finding that LWOP sentence imposed on thirteen-year-old convicted of murder constitute cruel and unusual punishment, but granting only limited right to be considered for parole eligibility at some point). The Court in *Naovarath* did not necessarily endorse a categorical prohibition and emphasized the youth’s mental and emotional disabilities as well:

To say that a thirteen-year-old deserves a fifty or sixty year long sentence, imprisonment until he dies, is a grave judgment indeed if not Draconian. To the make the judgment that a thirteen-year-old must be punished with this severity and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds.

*Id.* at 947.

A few courts have reduced youths’ lengthy sentences because of their age or immaturity. See, e.g.,
death penalty jurisprudence, trial judges perversely may regard youthfulness as an aggravating factor and sentence juveniles more severely than their similarly situated adult counterparts.\footnote{313}

Although the Constitution does not require state legislators to enact or courts to formally recognize youthfulness as a mitigating factor in sentencing, they should explicitly adopt and apply such a principle as part of a fair and just youth sentencing policy. Mitigating punishment because of youthfulness is a principle that applies equally to capital and non-capital sentences and recognizes reduced culpability without excusing criminal conduct.\footnote{314} The criminal choices that children make are not the moral equivalents of those of adults.\footnote{315} A youth sentencing policy can simultaneously hold them accountable and yet mitigate the severity of sanctions because of diminished culpability.\footnote{316}

People v. Dillon, 668 P.2d 697, 726-27 (Cal. 1983) (reducing life sentence imposed on seventeen-year-old convicted of felony murder because he “was an unusually immature youth”); People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002) (rejecting as disproportional an LWOP sentence imposed on a fifteen-year-old, passive accessory to a felony-murder and holding that “a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant’s personal culpability such that it shocks the moral sense of the community”).

313. See Snyder & Sickmund, supra note 124, at 178 (reporting that “juvenile transfers convicted of murder received longer sentences than their adult counterparts. On average, the maximum prison sentence imposed on transferred juveniles convicted of murder in 1994 was 23 years 11 months. This was 2 years and 5 months longer than the average maximum prison sentence for adults age 18 or older, and 8 months longer than the average maximum sentence for under-18 adults convicted of murder.”); Donna Bishop & Charles Frazier, Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 227, 236-37 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (comparing the sentences imposed on youths transferred to criminal courts with those of adults and reporting that “transferred youths are sentenced more harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive. In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity.”); Tanenhaus & Drizin, supra note 283, at 665 (citing the impact of “get tough” politics and arguing that “[b]y the mid-1990’s [sic], youth had ceased to be a mitigating factor in adult court, and instead had become a liability”).

314. Zimring, supra note 274, at 278 (arguing that “even after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crime, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender”); Scott & Grisso, supra note 217, at 174 (arguing that youthfulness does not excuse criminal liability, but “the evidence disputes the conclusion that most delinquents are indistinguishable from adults in any way that is relevant to culpability, and supports the creation of two distinct culpability categories—although, of course, there will be outliers [sic] in both groups. In short, the predispositions and behavioral characteristics that are associated with the developmental stage of adolescence support a policy of reduced culpability for this category of offenders.”).

315. See Zimring, supra note 124, at 144 (“W]henever a young offender’s need for protection, education, and skill development can be accommodated without frustrating community security, there is a government obligation to do so.”); Feld, supra note 276, at 99; Scott & Grisso, supra note 217, at 182 (“Subjecting thirteen-year-old offenders to the same criminal punishment that is imposed on adults offends the principles that define the boundaries of criminal responsibility.”).

316. See, e.g., Elizabeth S. Scott, Criminal Responsibility in Adolescence: Lessons from Developmental Psychology, in Youth on Trial: A Developmental Perspective on Juvenile
Adolescents are “works in progress” who make mistakes as they gain experience and who need some protection from the consequences of their immature judgment. Adolescence is the period during which youths learn to exercise self-control and to make responsible choices. Most adolescent criminality is transitional and does not indicate a serious commitment to a criminal career. In the interim, their poor decisions reveal less about their character and blameworthiness than do the criminal choices that adults make.

A youth sentencing policy must manage the risks that juveniles pose to themselves and to others, preserve their life chances for a future in which they will learn to make more responsible choices, avoid life destructive consequences, and provide them with “room to reform.” As the Supreme Court repeatedly has recognized,

JUSTICE 291, 309 (arguing that adolescents’ choices “reflect immaturity and inexperience and are driven by developmental factors that will change in predictable and systemic ways. A legal response that holds young offenders accountable, while recognizing that they are less culpable than their adult counterparts, serves the purposes of criminal punishment without violating the underlying principle of proportionality.”).

317. See David E. Arredondo, M.D., Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making, 14 STAN. L. & POL’Y REV. 13, 14 (2003) (“Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence.”). Youth is a time of experimentation and exploration. See Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that adolescence “is an inherently transitional time during which there are rapid and dramatic changes in physical, intellectual, emotional, and social capabilities,” as well as “a period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development.”).

318. Professor Franklin Zimring long has argued that adolescence is a time of semi-autonomy, a “learner’s permit” on the road to adulthood, and that young people require special dispensations in order to learn to be responsible adults. See, e.g., FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENTS 89-96 (arguing that adolescents require a “learner’s permit” to become responsible); Zimring, supra note 274, at 283 (“At the heart of this process is a notion of adolescence as a period of ‘learning by doing’ in which the only way competence in decision making can be achieved is by making decisions and making mistakes.”).

319. See Zimring, supra note 274, at 279 (“[S]elf-control is a habit of behavior developed over a period of time—a habit dependent on the experience of successfully exercising self-control. This particular type of maturity, like so many others, takes practice.”).

320. Franklin E. Zimring argues that most youthful criminality is a relatively normal adolescent phenomenon that youths will outgrow without the necessity of major intervention; formal social control may cause more harm than good. See id. at 284; see also Terrie E. Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 PSYCHOL. REV. 674, 675-77 (1993) (arguing that most youthful offending is “adolescence-limited,” that most delinquents mature into law-abiding adults, and only a relatively small group become life-course-persistent offenders).

321. See Scott & Steinberg, supra note 274, at 801 (“Youthful involvement in crime is often a part of this [developmental] process, and, as such, it reflects the values and preferences of a transitory stage, rather than those of an individual with a settled identity.”). An adolescent’s criminal act may not be as indicative of “bad moral character” as an adult’s because youths, “whose identity is in flux and character unformed, are less culpable than typical adult criminals.” Id. at 825.

322. See ZIMRING, supra note 124, at 81-83; Zimring, supra note 274, at 283-84.
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. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly ‘during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment’ expected of adults.  

A youth sentencing policy that recognizes this simple, developmental truism would protect young people from the full penal consequences of their bad decisions.  

Simmons hinged, in part, on whether to evaluate juveniles’ culpability on an individualized or categorical basis. Although the Court’s death penalty jurisprudence consistently emphasizes the importance of individualized assessments of culpability, Simmons adopted a categorical prohibition because “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” The Court feared that the impact of a heinous crime on a jury would overpower the mitigating force of youthfulness and immaturity. Moreover, Simmons concluded that clinicians could not assist jurors to distinguish between the vast majority of immature juveniles and the rare youth who might be sufficiently culpable to be death-eligible.  

Simmons’ categorical treatment of youthfulness as a mitigating factor has broader implications for youth sentencing policy. Courts typically reject categorical bright-lines and consider youthfulness as part of a broader inquiry into culpability and blameworthiness. However, in Bryant v. State, the Court
of Appeals of Maryland concluded that while non-chronological factors are relevant to an adult defendant’s maturity and blameworthiness,

the closer his or her chronological age is to the eighteen year old baseline . . . [the more] such factor alone tends to support the establishment of immaturity and inexperience and, hence, triggers the need to consider youthful age as a mitigator. Thus, youthful age as a mitigating circumstance is determined, in the first instance, by the chronological age of the defendant, abiding evidence of atypical or unusual maturity and experience that bears on the weight to be accorded that mitigator in the ultimate weighing.  

A bright-line rule that categorically treats youthfulness as a mitigating factor based on age alone is preferable to a system of guided discretion because a rule that occasionally under-punishes the rare, fully-culpable “adolescent still will produce less aggregate injustice than a discretionary system that improperly[, harshly sentences many] more undeserving youths.” Even though Simmons recognized individual variability in culpability, the Court nevertheless endorsed a categorical bright-line.

The qualities that distinguish juvenile from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

necessarily control in the jury’s determination whether a defendant’s youth is a mitigating circumstance, nevertheless, it is certainly an important factor,” but further stating that “[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances”); Hurst v. State, 819 So.2d 689, 698 (Fla. 2002) (concluding that in order “to give a non-minor defendant’s age significant weight as a mitigating circumstance, the defendant’s age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems”); Foster v. State, 778 So.2d 906, 920 (Fla. 2000) (stating that there is no bright-line, chronological rule for applying youthfulness as a mitigating factor, and the inquiry “entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated”); State v. Bey, 610 A.2d 814, 842 (N.J. 1992) (finding that determinations of youthful age require consideration of both chronological age and other indicators of maturity, but stating that “juries should give greater weight to a defendant’s chronological age”).

330. Feld, supra note 261, at 547.
331. Simmons, 543 U.S. at 573 (arguing that “[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation – that a juvenile offender merits the death penalty”).
332. Simmons, 543 U.S. at 574.
Adolescents’ reduced criminal responsibility represents a normative judgment about deserved punishment. A sentencing policy that integrates youthfulness and reduced culpability with penal proportionality should provide all young offenders with categorical reductions of adult sentences. Formalizing youthfulness as a mitigating factor represents a social, moral, and criminal policy judgment about diminished responsibility and asserts that no adolescent deserves to be sentenced as severely as an adult convicted of a comparable crime.

There are two reasons to prefer categorical bright-lines to individualized discretionary sentencing decisions. The first is the inability to define or identify qualities of adult-like culpability among offending youths. The second is the inevitable tendency to subordinate abstract consideration of youthfulness to the reality of a horrific crime. Development is highly variable and a few youths may be mature and blameworthy prior to becoming eighteen years of age while many others may not attain maturity even as adults. Because the vast majority of juveniles lack the culpability of adults, efforts to identify those few who might be as responsible as adults will founder on the difficulties of defining and

333. See e.g., Enmund, 458 U.S. at 825 (O’Connor, J., dissenting) (“[P]roportionality requires a nexus between the punishment imposed and the defendant’s blameworthiness . . . .”). Scott and Steinberg, argue that in contemporary criminal law theory, penal proportionality may reflect either the quality of an actor’s choice or what that choice indicates about the actor’s moral character. The former focuses on the blameworthiness of the quality of choices made, while the latter focuses on what that choice indicates about the actor’s bad character. See Scott & Steinberg, supra note 274, at 801-02; see also R. A. Duff, Choice, Character, and Criminal Liability, 12 LAW & PHIL. 345, 367-68 (1993); Michael Moore, Choice, Character, and Excuse, in PLACING BLAME 548, 574-92 (1997).

334. See Scott & Steinberg, supra note 274, at 801 (“Because these developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults under conventional criminal law conceptions of mitigation.”).

335. See, e.g., Fagan, supra note 344, at 242 (arguing that adolescence, per se, is a mitigating status because youths’ developmental deficits “are not the deficits of an atypical adolescent but are ‘normal’ developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.”).


337. Id. at 397-98 (Brennan, J., dissenting) (arguing that “[i]t is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult’s culpability are not sentenced to die”).

338. Jeffrey Fagan notes that:

[t]he age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen: a few may have attained full maturity by the age threshold of sixteen set by the U.S. Supreme Court in Stanford v. Kentucky, but most will not. (footnote omitted).

Fagan, supra note 344, at 209.
measuring immaturity and will introduce a systematic bias that will redound to
the disadvantage of the less-culpable youths.339

A categorical approach avoids the risk of error inherent in discretionary
culpability assessments.340 Recognizing youthfulness as a mitigating factor
constitutes a normative judgment about deserved punishment, rather than a
clinical assessment of diminished responsibility about which an expert could
usefully testify.341 It conclusively presumes that youths’ criminal choices differ
qualitatively from those of adults. A “youth discount” provides fractional
reductions of sentences based on age-as-a-proxy-for culpability.342 A youth
could establish eligibility for categorical mitigation – a “youth discount” – with
only a birth certificate. Shorter sentences enable young offenders to survive
serious mistakes with their life chances intact.343 Such a policy recognizes that
same-length sentences impose a greater “penal bite” on younger offenders than
they do on their older counterparts.344

339. See, e.g., id. at 248 (arguing that “[t]he difficulties and statistical error rates in measuring
immaturity for juveniles invite complexity in the consistent application of the law”). Fagan
contends that:

even when individualized assessments are conducted using modern scientific
and clinical tools, the risks of error due to measurement and diagnostic
limitations suggest that it is neither reliable nor efficient for each court to assess
the competency of each juvenile individually. The precise conditions of
immaturity, incapacity, and incompetency are difficult to consistently and fairly
express in a capital sentencing context. Further, cognitive and volitional
immaturity might be easily concealed by demeanor or physical appearance and,
more importantly, obscured by the gruesome details of a murder and its
emotional impact on the victim’s family.

Id. at 253. See also Robin M.A. Weeks, Note, Comparing Children to the Mentally Retarded:
How the Decision in Atkins v. Virginia Will Affect the Execution of Juvenile Offenders, 17 BYU J.
PUB. L. 451, 479 (2003) (noting that when the Court requires individualized culpability
assessments it raises difficult definitional questions: “What is the ‘normal’ adult level of
culpability? How do we measure it?”).

340. Elizabeth Scott and Laurence Steinberg note that:
we currently lack the diagnostic tools to evaluate psycho-social maturity
reliably on an individualized basis or to distinguish young career criminals
from ordinary adolescents who, as adults, will repudiate their reckless
experimentation. Litigating maturity on a case-by-case basis is likely to be an
error-prone undertaking, with the outcomes determined by factors other than
immaturity.

Scott & Steinberg, supra note 274, at 836-37.

mercy of imperfect diagnostic assessments to determine which adolescents are ‘mature’ and which
are not.”); Scott & Steinberg, supra note 274, at 836-37.

342. See Joseph L. Hoffmann, On the Perils of Line-Drawing: Juveniles and the Death Penalty,
40 HASTINGS L.J. 229, 233 (describing age as an imperfect “proxy” for a complex of factors,
“including” maturity, judgment, responsibility, and the capability to assess the possible
consequences of one’s conduct, “that constitute culpability”); Feld, supra note 276, at 121-23.

343. See Zimring, supra note 318, at 89-96; Franklin E. Zimring, Background Paper, in
CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON

344. See Andrew von Hirsch, Proportionate Sentences for Juveniles: How Different than for
States should adopt a categorical “youth discount” and sentence youths based on a sliding scale of criminal responsibility. The “maturity of judgment and adjudicative competence of the youngest adolescents is qualitatively lower” than that of older youths or adult offenders. When sentencing youths according to a sliding scale of diminished responsibility, a fourteen-year-old offender, for example, might receive a sentence twenty-five percent of the length of the adult penalty and a sixteen-year-old defendant might receive a sentence half the length of the adult sentence. And, of course, the “youth discount” precludes LWOP and other draconian sentences. The deeper discounts for younger offenders correspond with their developmental differences in culpability and self-control. Younger adolescents are less responsible and deserve proportionally shorter sentences than do older youths or than adults.

C. Racial Disparities and Disproportionate Minority Confinement

From its inceptions, juvenile courts have used their discretion to discriminate between “our children” and “other peoples’ children.” Evaluations of juvenile adults? 3

Adulthood?, 3 PUNISHMENT & SOC’Y 221, 227 (2001) (arguing that “[a] given penalty is said to be more onerous when suffered by a child than by an adult. Young people, assertedly, are psychologically less resilient, and the punishments they suffer interfere more with opportunities for education and personal development” (citation omitted)); see also Arredondo, supra note 317, at 19 (arguing that “[b]ecause of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children”); Jeffrey Fagan, This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 21-22 (2002) (describing the substantive quality of punishment that adolescents experience in adult incarceration as far harsher than the sanctions they experience as delinquents); Feld, supra note 16, at 112-13 (contending that “youths experience objectively equal punishment subjectively as more severe”).

345. Feld, supra note 276, at 118-21. See also Scott & Steinberg, supra note 274, at 837 (“[A] systematic sentencing discount for young offenders in adult court, might satisfy the demands of proportionality.”); Tanenhaus & Drizin, supra note 283, at 697-98 (“We endorse Feld’s proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders.”); von Hirsch, supra note 344, at 226 (arguing for categorical penalty reductions based on juveniles’ reduced culpability: “While actual appreciation of consequences varies highly among youths of the same age, the degree of appreciation we should demand depends on age: we may rightly expect more comprehension and self-control from the 17-year-old than a 14-year-old, so that the 17-year-old’s penalty reduction should be smaller. Assessing culpability on the basis of individualized determinations of a youth’s degree of moral development would be neither feasible nor desirable.”); Zimring, supra note 274, at 288 (arguing that the penal law of youth crime should develop “a sliding scale of responsibility based on both judgment and the practical experience of impulse management and peer control”).

346. See Feld, supra note 261, at 552.

347. Zimring, supra note 274, at 288 (“[A]dolescents learn their way toward adult levels of responsibility gradually. This notion is also consistent with . . . long periods of diminished responsibility that incrementally approach adult standards in the late teens . . . [and with] less-than-adult punishments that gradually approach adult levels during the late teen years.”).

348. Feld, supra note 2, at 75-76; Darnell F. Hawkins and Kimberly Kempf-Leonard, Introduction in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES
court sentencing practices report two consistent findings. First, the ordinary principles of the criminal law – present offense and prior record – explain most of the variance in juvenile court sentencing practices. Because every state defines juvenile courts’ delinquency jurisdiction based on the commission of a criminal act, juvenile court judges focus primarily on the seriousness of the present offense and prior record when they sentence delinquents. Because judges emphasize legal variables when they process youths, real differences in rates of criminal behavior by black youths account for part of the racial differences in justice administration. Various measures of delinquency – official arrest and conviction data, self-report surveys, and surveys of crime victims – indicate that black youths engage in higher rates of violent offending than do white juveniles. Part of the real differences in black youths’ rates of offending reflect differential exposure to a host of risk factors associated with crime and violence – for example, poverty, segregation and isolation in crime-ridden neighborhoods, single-parent households, unsafe and deficient schools, and poor health care – as a result of the structural changes described earlier.
Research that controls for legal variables – present offense, prior record, pre-trial detention status, and the like – and thereby accounts for differences in rates of offending by race, consistently reports that individualized juvenile justice produces racial disparities in sentencing.\textsuperscript{353} Juvenile courts’ 	extit{parens patriae} ideology legitimates individualized dispositions and inevitably subjects disadvantaged youths to more extensive controls.\textsuperscript{354} In a society marked by economic and racial inequality, minority youths are most “in need” and therefore most “at risk” of juvenile court intervention.\textsuperscript{355} The structural context of juvenile courts also places minority youths at greater risk of intervention. Urban juvenile courts are procedurally more formal and sentence all delinquents more severely.\textsuperscript{356} Urban courts have greater access to detention facilities and detained youths typically receive more severe sentences than those who remain at liberty.\textsuperscript{357} Because proportionally more minority youths live in urban environments, the geographic and structural context of juvenile justice administration interacts with race to produce minority overrepresentation in detention facilities and correctional institutions. The recent legislative “crack down” on delinquents disproportionately affects minority youths who experience higher rates of pretrial detention and incarceration in the more punitive juvenile system.\textsuperscript{358}

\textsuperscript{353} See, e.g., Donna M. Bishop, \textit{The Role of Race and Ethnicity in Juvenile Justice Processing in Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice} 23, 61 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (reviewing literature and reporting that “disparities that cannot be explained by race differences in offending are apparent at nearly every stage in the juvenile justice process”); \textit{Minorities in Juvenile Justice} 23-27 (Kimberly Kempf-Leonard et al., eds., 1995); \textit{Feld, supra} note 2, at 267-72; Barry Krisberg & James F. Austin, \textit{Reinventing Juvenile Justice} 116-34 (1993) (discretionary decisions at various stages of the juvenile process amplify racial disparities as minority youths proceed through the system and produce more severe dispositions than for comparable white youths).

\textsuperscript{354} Feld, \textit{supra} note 2, at 272.

\textsuperscript{355} E.g., \textit{id.} at 271-272 (more affluent white parents can purchase private services for their troubled children, whereas poorer minority juveniles proceed by default through the juvenile justice system).


\textsuperscript{357} E.g., Clarke & Koch, \textit{supra} note 173, at 263, 294 (“being detained before adjudication had an independent effect on the likelihood of commitment, entirely apart from the fact that both detention and commitment had some common causal antecedents”); Feld, \textit{supra} note 174, at 1337-39 (“[N]egative effects of pretrial detention on subsequent sentencing.”).

\textsuperscript{358} See generally, Feld, \textit{supra} note 2, at 271-72; Snyder & Sickmund, \textit{supra} note 124, at 154-55. Poe-Yamagata & Jones, \textit{supra} note 258, at 9 (summarizing racial differences in rates of detention and reporting that “In every offense category, a substantially greater percentage of African American youth were detained than White youth.”).

\textsuperscript{359} See, e.g., Poe-Yamagata & Jones, \textit{supra} note 258, at 9, 14.
The juvenile justice process entails a succession of decisions – intake, petition, detention, adjudication or waiver, and disposition – and the compound effects of even small disparities produces larger cumulative differences. In 1997, black youths comprised about 15% of the population aged ten to seventeen, 26% of juvenile arrests, 30% of delinquency referrals, one-third of the petitioned delinquency cases, and 40% of the inmates in long-term public institutions. Minority youths, especially Blacks, are overrepresented at each successive step of the decision-making process, with the greatest disparities occurring in the initial stages. For example, probation officers who decide whether or not to file a formal delinquency petition often perceive minority juveniles as more threatening and more likely to offend in the future than they do similarly-situated white juveniles. A recent analysis of the effects of discretionary decision-making reported that “at almost every stage in the juvenile justice process the racial disparity is clear, but not extreme.” However, because the system operates cumulatively the risk is compounded and the end result is that black juveniles are three times as likely as white juveniles to end up in residential placement.

In 1988, Congress amended the Juvenile Justice and Delinquency Prevention (JJDP) Act and required states receiving federal juvenile justice funds to...
examine the sources of minority overrepresentation in detention facilities and institutions and to develop mechanisms to assure equality of treatment.\textsuperscript{365} A number of states responded to the JJDPA mandate and reported racial disparities in their juvenile justice systems.\textsuperscript{366} After controlling for legal variables, forty-one of forty-two states found minority youths overrepresented in secure detention facilities and all thirteen states that analyzed institutional commitments decisions reported disproportionate minority confinement.\textsuperscript{367} A recent assessment of disproportionate minority confinement in Kentucky reported that in 1999 black youths comprised about 10% of the juvenile population, but 41% of those held in detention – four time greater than their proportion of the population – and one-quarter (25%) of those committed to the Department of Juvenile Justice.\textsuperscript{368} Judges sentence disproportionately more minority delinquents to out-of-home placements than they do white youths, and provide white juveniles proportionately more probationary dispositions than they do black youths.\textsuperscript{369} Moreover, incarcerated black juveniles spend more time in custody than do white youths convicted of similar offenses.\textsuperscript{370}

Recent amendments to juvenile sentencing laws had a substantial negative impact on disproportionate minority confinement. The overall numbers of youths in custody on any given day increased almost 40% between 1985 and 1995, the decade of “get tough” changes in sentencing laws.\textsuperscript{371} Despite the overall increase of youths in correctional custody, the proportion of white juveniles confined in public facilities declined 7%, while the percentage of black juveniles confined increased 63%.\textsuperscript{372} Thus, the overall increase in the numbers and racial composition of correctional inmates reflects the sharp growth of minority youths in institutions. As a result, the proportion of white juveniles in custody declined from 47% to 32% of all incarcerated delinquents, while the proportion of black youths increased from 37% to 43% and that of Hispanics increased from 13% to 21% of all confined juveniles.\textsuperscript{373}

\textsuperscript{366} See Feld, \textit{supra} note 2, at 268.
\textsuperscript{369} Poe-Yamagata & Jones, \textit{supra} note 258, at 14-15.
\textsuperscript{370} Id. at 21.
\textsuperscript{371} See Feld, \textit{supra} note 2, at 270-71.
\textsuperscript{372} Id. at 271.
\textsuperscript{373} Id. see also, Krisberg & Austin, \textit{supra} note 353, at 124-28 (disproportionate minority confinement in institutions).
VI. CONCLUSION

The juvenile court emerged in response to social structural changes a century ago and spread across the nation during the first two decades of the twentieth century. Economic modernization and the social construction of childhood provided the structural, political and ideological context within which Progressive policy-makers created new institutions for the social control of children. Juvenile courts did not emerge fully formed but evolved over several decades time – marked as a “work in progress.” 374 The standard features of juvenile courts – separation from adults, procedural informality, confidentiality, euphemistic vocabulary, petitions, probation, and dispositions in the child’s “best interests” – reflected the outcomes and accommodations to contending political, social and economic interests. The juvenile courts’ broad and mutable mission and their ability to adapt to changes in their organizational environment explain their continued endurance despite persistent failure to achieve their professed rehabilitative goals.375

The issue of race has shaped the political and legal contours of juvenile justice policy and practice over the second half of the twentieth century and has evoked two separate and contradictory responses. Initially, racial injustice propelled the Warren Court’s “due process revolution” and its myriad efforts to enhance civil rights and to protect minority citizens. Gault extended some procedural rights to delinquents in juvenile courts, but McKeiver declined to provide procedural parity with adult criminal defendants. The constitutional shift in juvenile courts’ legal environment precipitated decades of judicial decisions, legislative amendments, and administrative modifications. By the 1980s and early-1990s, several decades of macro-structural, economic, and racial demographic changes led to a black underclass living in concentrated poverty and a concomitant rise in gun violence and youth homicides. Increasingly, politicians campaigned to “get tough” on youth crime, which the public understands as a code word for harsher treatment of young black males. 376 The punitive transfer laws and harsher delinquency sentences they enacted have transformed the system into a scaled-down, second-class criminal court for

374. TANENHAUS, supra note 1, at 54 (emphasizing that “It took more than a generation to pour form and substance into the idea of a juvenile court. . . . [I]t is much more instructive to view the juvenile court as a work in progress whose ‘defining features’ were a series of additions that only later became standard practices.”).


376. See GARLAND, supra note 18, at 198 (1990); see also BECKETT, supra note 18, at 107 (noting that proponents of “get tough” crime policies are “fundamentally uninterested in the social causes of criminality or in reintegrating offenders and assume instead that punishment, surveillance, and control are the best responses to deviant behavior); HACKER, supra note 51, at 225 (asserting that “few white Americans feel any obligation to make any sacrifices on behalf of the nation’s principal minority. They see themselves as already overtaxed, feel that the fault is not theirs, and have become persuaded that public programs cannot achieve a cure. Instead, calls are heard for a tougher posture toward what is seen as the misbehavior of many blacks”).
juveniles. These changes represent a cultural and legal inversion of the Progressives’ conception of youths as innocent and dependent children into our contemporary perception of “super-predators” as responsible, almost adult-like offenders.

Political leaders and policy makers have forgotten that delinquents are children and differ from adults in competence and culpability. Juveniles are substantially less competent than adults to exercise or waive their legal rights. States that use the adult waiver standard to measure juveniles’ relinquishment of counsel posit a functional equality that severely disadvantages most youths. States readily allow juveniles to waive counsel in a juvenile system that has become increasingly legalistic, complex, and punitive. Even when juveniles do receive the assistance of counsel, their lawyers often fail to provide the effective advocacy that youths need and the Constitution requires. Would any adult charged with a serious crime and facing the prospect of incarceration for years consent to be tried under the conditions that routinely prevail in juvenile courts? Four decades after *Gault*, states have yet to put the justice in juvenile justice.

For the past two decades, states have transferred more and younger juveniles to criminal court for prosecution as adults. “Get tough” politicians’ sound bites – “adult crime, adult time” or “old enough to do the crime, old enough to do the time” – characterize youths as criminally responsible and advance policies that fail to recognize youthfulness as a mitigating factor in sentencing. The Court in *Simmons* finally acknowledged what every parent knows – children are different. Adolescents differ in qualities of judgment, self-control, appreciation of consequences, and preferences for risks that diminish their responsibility and reduce their culpability. These developmental differences exist whether a state tries a youth in a juvenile or criminal court. Despite these differences, politicians and policy makers enact criminal statutes that require judges to sentence children just like adults and to impose grossly disproportional and LWOP sentences on young, immature offenders.

The cumulative consequence of punitive policies inflicts the most severe adult sentences on black youths and disproportionately confines minority youths in the juvenile justice system. For a century, juvenile courts have discriminated between “our children” and “other peoples’ children.” Progressive reformers had to choose between initiating social structural reforms to alter conditions that contribute to criminality – poverty, inequality and discrimination – or to apply “band-aids” to children damaged by those adverse circumstances. Social class and ethnic antagonisms caused them to avoid broad social structural changes and instead to “save children.” A century later, we face the same policy choices and continue to evade our responsibilities to “other peoples’ children.”

377. See e.g., Feld, *supra* note 276, at 113-15 (arguing that adolescent developmental psychology supports differences in culpability of juveniles and adults which require formal recognition of youthfulness as a mitigating factor in sentencing).
The prevalence of violent crime in certain urban areas is a reflection of power, politics, and social inequality. Concentrated poverty and racial isolation are the cumulative consequences of public policies that amplify crime and violence within inner-city minority communities. Political and public discussions about poverty, allocation of resources and benefits, inequality, and crime function as proxies for addressing issues associated with race. Conservative politicians exploit white voters’ racial animus with coded messages to sustain a right-wing coalition.\(^\text{378}\) As a result, Americans engage in a “subterranean discourse” about race based on misleading images and potent symbols.\(^\text{379}\) As long as the public and politicians identify long-term poverty and its associated problems – unemployment, drug abuse, criminality, illegitimacy – as a condition of Blacks that is separate from the American mainstream, then policy makers can evade government’s responsibility to address them.\(^\text{380}\) The political and public association of urban black males with crime has fostered punitive incarceration policies rather than efforts to expand the employment and educational opportunities to prevent crime. Although public policies and political economy contribute both to racial inequality and the skewed distribution of crime, politicians manipulate and exploit racially tinged perceptions of young offenders for electoral advantage. The transformation of the juvenile court into an explicitly punitive agency to control “other people’s children” is an instance of politicians’ exploiting the connection between race and youth crime.\(^\text{381}\) Politicians and the public view the juvenile courts’ clients as young criminals of color and refuse to commit resources necessary to improve their life conditions or to create a juvenile system that provides real justice. After a century of change – a “work in progress” – the primary virtue of juvenile courts is simply that they are not the criminal justice system.\(^\text{382}\) Regardless of

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\(^\text{378} & \text{Edsall & Edsall, supra note 7, at 281 (arguing that “[r]ace will remain an exceptionally divisive force in politics as long as the debate is couched in covert language and in coded symbols—and as long as major participants fail to be explicit about their goals”); Jon Hurwitz & Mark Peffley, Public Perceptions of Race and Crime: The Role of Racial Stereotypes, 41 Am. J. Pol. Sci. 375, 396 (1997) (arguing that race contributes to irrational and divisive analyses of crime policies that reflect passion more than reason).}\)

\(^\text{379} & \text{See e.g., Gilens, supra note 153, at 602 (arguing that explicit claims associated with race can be debated and rebutted, “but when blacks are linked with crime, welfare, or drug use only implicitly, such links are less likely to be challenged”); Mendelberg, supra, at 268 (arguing that “racial stereotypes, fears and resentments shape our decisions most when they are least discussed. . . . It is this strong but implicit reference to race that is most effective in priming racial predispositions and racializing the political choices of white citizens.”).}\)

\(^\text{380} & \text{See Edsall & Edsall, supra note 7, at 243 (arguing that the growth of white suburbs around the deindustrialized urban core isolates poor blacks and issues of joblessness, criminality, income inequality, and welfare dependency from the concerns of mainstream voters); Hacker, supra note 51, at 228-29 (attributing black youth homicide, guns and drugs in the inner city to social structural inequality and arguing that “It is white America that has made being black so disconsolate an estate. Legal slavery may be in the past, but segregation and subordination have been allowed to persist. Even today, America imposes a stigma on every black child at birth.”).}\)

\(^\text{381} & \text{Feld, supra note 2, at 245-86.}\)

\(^\text{382} & \text{Zimring, supra note 17, at 2481 (arguing that “[T]he first great virtue of the juvenile court}\)
their ability to help or rehabilitate juveniles, they do less harm than when states process children in the adult criminal justice system.

was that it would not continue the destructive impact of the criminal justice system on children. This theory of justification for juvenile court, the diversionary rationale, argues that the new court could do good by simply doing less harm than the traditional criminal processes.

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ARE JUVENILE COURTS A BREEDING GROUND FOR WRONGFUL CONVICTIONS?

Steven A. Drizin* & Greg Luloff**

INTRODUCTION

Until the 1990s, wrongful convictions were largely off the radar. Although there were a handful of academic studies of wrongful convictions throughout the 20th century, by and large the American criminal justice system stood entrenched in an impenetrable myth, embodied in the famous words of Judge Learned Hand: “Our procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream.” The idea of a wrongful conviction seemed both unrealistic and unimaginable, especially to a public transfixed by the “soft” criminal justice system that seemed rigged to allow criminals to go free on technicalities.

Then came the 1990s. New revelations about wrongful convictions, often generated by advanced DNA investigative techniques, began to change long-held perceptions about the accuracy of the criminal justice system. As more and more wrongful convictions surfaced, suddenly wrongful convictions were not an “unreal dream.” An innocence revolution had occurred and states began to reevaluate their criminal justice systems in hopes of sealing the cracks through which the innocent had fallen. For the first time since the 1960s, public support for the death penalty began to wane, driven, at least in part, by genuine concerns.

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about executing the innocent.\(^5\) Although a majority of Americans still favored capital punishment, many parties on both sides of this divisive issue found themselves in agreement that no justice system operates fairly if it cannot accurately separate the guilty from the innocent.\(^6\)

    In some of the most notorious wrongful conviction reversals, DNA played a significant role in unearthing the mistake.\(^7\) Because DNA is only available in a fraction of cases, however, its value went way beyond its limited role in unearthing wrongful convictions. DNA’s real value was that it was a “truth machine,”\(^8\) exposing the real cracks in the system, such as mistaken eyewitness identifications, false confessions, prosecutorial misconduct, police perjury, incompetent defense counsel, and unreliable jailhouse snitches and informants.\(^9\) DNA exposed errors throughout the system, both inside and outside the courtroom, demonstrating the flaws in many time-honored police and prosecutorial investigative practices, including the use of show-ups, photo arrays, line-ups, and interrogations. These flaws exist in all criminal cases - those in which DNA is left by the perpetrator and those in which it is not. In addition, although most of the DNA exonerations occurred in murder or sexual assault cases (because such crimes often leave a trail of traceable biological evidence), there is every reason to believe that wrongful convictions may also be prevalent in more routine cases, raising the specter of even larger numbers of wrongful convictions waiting to be discovered.\(^10\)


\(^6\) Id.


\(^8\) Peter J. Neufeld, Co-Dir., Innocence Project, Remarks made on behalf of the House Judiciary Comm., 108th Cong. 33, Advancing Justice Through Forensic DNA Technology: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security (July 17, 2003). (“[F]orensic DNA operates as a truth machine with the power to convict the guilty and protect the innocent in a way that will improve dramatically the efficacy of the criminal justice system.”).

\(^9\) See Findley, supra note 7, at 340; See also BARRY SCHECK, PETER NEUFELD, & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246* (Barry Scheck, Peter Neufeld, & Jim Dwyer eds., 2000). (In 62 DNA-based exonerations, “mistaken eyewitnesses were a factor in 84 percent of the convictions; snitches or informants in 21 percent; false confessions in 24 percent. Defense lawyers fell down on the job in 27 percent; prosecutorial misconduct played a part in 42 percent, and police misconduct in 50 percent.”).

\(^10\) See Findley, supra note 7, at 337; See also, Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 528-29 (2005). The recent scandals that have plagued the Broward County Sheriff’s Office serve as a potent example. Under pressure to boast high crime solving rates, police officers in Broward County cleared cases based
Although the 1990s brought increased attention to the problem of wrongful convictions in the criminal justice system, little or no attention, however, has been paid to the risks of wrongful convictions in juvenile court. There are several good reasons why it is time to start paying attention.

First, studies of wrongful convictions demonstrate that juvenile defendants may be at special risk of being wrongfully convicted in criminal court. Juveniles are prominently featured in these studies, especially when it comes to false confessions. People v. Salaam, the “Central Park Jogger” case, in which five teenagers falsely confessed to attempting to murder and raping a woman who was out for a run in Central Park, is just one of many examples of juveniles who have confessed, been convicted, and later exonerated.


12. See Gross, et al., supra note 10, at 543, 549-50. In their study of 340 exonerations between 1989 and 2003, the authors documented 33 cases of juvenile offenders, 32 of which were convicted in adult court. Of these 32, 42 percent involved false confessions. The younger the defendant, the greater likelihood of a false confession. Sixty-nine percent of the 13 juveniles aged 12-15 falsely confessed, compared to 25 percent of the 20 juveniles aged 16 and 17; See also Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 963 (2003-2004). In the largest sample of false confessions ever studied, Professors Drizin and Leo found that nearly one-third of the 125 false confessions involved juveniles.


14. See Drizin & Leo, supra note 12, at 963-70. The most recent juvenile false confession case is the case of Jeffrey Deskovic who falsely confessed in 1990 to the murder of a teenage girl in Peekskill, N.Y. in 1989. DNA testing procured by the Innocence Project excluded Deskovic as the source of semen found inside the victim and identified the true perpetrator. On September 20, 2006, Deskovic was released after serving 16 years in prison for a crime he did not commit. Fernando Santos, DNA Frees Man Imprisoned for Half His Life, N.Y. TIMES, Sept. 21, 2006, at 21
Second, developmental differences between juveniles and adults (especially in the areas of judgment, maturity, assessing and weighing risks, vulnerability to peer pressure, and an inability to see the long-term consequences of their actions) make juveniles less competent trial defendants.\textsuperscript{15} Juveniles also tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions.\textsuperscript{16}

Third, many of the same problems that cause wrongful convictions in criminal court also exist in juvenile court. For example, psychologically coercive interrogations lead to false confessions and suggestive interviewing techniques lead to mistaken eyewitness identifications.

The risk of wrongful convictions in juvenile court proceedings may also be increased by a lack of many of the due process protections afforded adult criminal defendants and the lesser capabilities of juveniles to take advantage of those due process rights. The so-called “due process revolution” of the 1960s did transform the juvenile court from a “kangaroo court” to a court system which afforded juveniles some of the same due process protections given to adults in criminal proceedings.\textsuperscript{17} Even in those instances where juveniles were given the same due process rights as adults, the rights were of little use because many juvenile defendants were not competent to exercise them.\textsuperscript{18} For example, \textit{Miranda}\textsuperscript{19} warnings offer little protection to juvenile suspects from police coercion (because they do not understand their meaning and function), the right to counsel is of no use to many juveniles who are allowed to waive this right, and the lack of meaningful probable cause hearings and the absence of jury trials may affect the reliability of the judge-made determinations of innocence and guilt. Finally, discovering and remedying wrongful convictions is further limited by the fact that few juvenile cases are appealed and even fewer post-conviction habeas cases are filed involving juveniles.

The problem of wrongful convictions in our nation’s criminal courts has spurred numerous reforms aimed at preventing wrongful convictions. To name just a few, North Carolina and New Jersey have amended procedures for analyzing the accuracy of eyewitness identification;\textsuperscript{20} Arizona has set new

\textsuperscript{17} Thomas Grisso, Forensic Evaluation in Delinquency Cases, in 11 Handbook of Psychology: Forensic Psychology 315, 315-16 (Alan Goldstein ed., 2003); See In re Gault, 387 U.S. 1, 28 (1967).
standards for lawyers in capital cases;\textsuperscript{21} and Illinois and other states have mandated electronically-recorded interrogations.\textsuperscript{22} To date, no parallel innocence-based reform movement has been aimed at the juvenile court. The era of wrongful convictions provides a new lens with which to reevaluate the state of the juvenile court and ask whether its informality, confidentiality, lack of jury trials, and other procedural deficiencies increase the chances of wrongful convictions. In this article, we undertake this examination and suggest that juvenile justice advocates and juvenile court apologists might be wise to reframe or broaden their reform efforts by focusing on the risk of wrongful convictions rather than amorphous concepts like “due process” or “fundamental fairness.”

In analyzing the issue of wrongful convictions in juvenile courts, we do not mean to simply belittle and criticize the existing system (an already beleaguered institution), but rather to reexamine entrenched juvenile justice processes and practices.\textsuperscript{23} The purpose of this article is not to declare the juvenile court broken beyond repair. Unlike Professor Barry Feld, who has called for the abolition of the juvenile court,\textsuperscript{24} we do not seek to abolish the juvenile court but to improve and strengthen it by applying some of the lessons learned from the innocence movement to it. Part I of this article briefly traces the evolution of the juvenile court from the progressive model to its present day incarnation as a second-class criminal court. Part II revisits Professor Feld’s seminal 1984 critique of the juvenile court and demonstrates that the same deficiencies in juvenile court he documented over 20 years ago persist in juvenile court today.\textsuperscript{25} Moreover, these deficiencies are juxtaposed with the documented errors that have led to wrongful convictions in adult court. Part III highlights several constitutional rights and safeguards afforded adults but denied to juveniles – safeguards which are designed to or have the effect of increasing accuracy in decision making or help

\begin{itemize}
  \item While it would be impossible to revisit every aspect of Professor Feld’s 1984 piece, this article will focus on issues of competency to waive counsel and the right to remain silent, judicial factfinding, and post-conviction relief and juvenile appeals.
\end{itemize}
to expose wrongful arrests and convictions. Part IV concludes by providing some recommendations on how the juvenile court can retain its rehabilitative mission, while at the same time improving the accuracy of its factfinding.

PART I: THE EVOLUTION OF THE JUVENILE COURT

In 1899, Illinois became the first state, through legislation, to create a separate “juvenile” court system. The Illinois Juvenile Court Act classified children along three grounds: “dependent,” “neglected,” and “delinquent.” The delinquent category included any child under the age of 16 who violated a state law and was not at the time residing at a state institution, a boys’ training school, or a girls’ industrial school. The Act was later amended to increase the age to under 17 for boys and under 18 for girls.

While some critics have questioned the actual reasons for creating the juvenile court, it became clear throughout the years that the court was seen predominately by onlookers as a benevolent institution, created for assisting and rehabilitating juveniles, a “kinder and gentler” alternative to the criminal courts. Judge Julian Mack, one of the early Cook County, Illinois juvenile judges, viewed the juvenile court’s foundation as a bold, progressive move for children. He observed that courts had previously focused their treatment of children on punishment rather than rehabilitation; moreover, he went on to condemn the pre-juvenile court practice of imprisoning children and adults together. In Judge Mack’s view, the focus of the juvenile court should be not on whether the juvenile committed a crime, but on determining the course of action that is “the best thing to do for this lad.”

29. See Sanford J. Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187, 1229 (1969-1970) (classifying the juvenile court as opportunistic, stating “the 1899 Illinois Act (1) restated the belief in the value of coercive predictions, (2) continued nineteenth-century summary trials for children about whom the predictions were to be made, (3) made no improvements in the long-condemned institutional care furnished these same children, (4) codified the view that institutions should, even without badly needed financial help from the legislature, replicate family life, and that foster homes should be found for predelinquents, and (5) reinforced the private sectarian interests, whose long role had been decried by leading child welfare reformers in the area of juvenile care.”).
32. Id. at 106-07.
33. Id. at 107.
Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wide and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then, if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.35

Thus, juvenile proceedings were seen by most scholars and judges in a paternalistic vein with the best interests of the child in mind.

During the next 60-plus years of the juvenile court, objections were raised sporadically to the lack of procedural due process in juvenile court and the arbitrary and capricious nature of judicial decision making. Because juvenile proceedings were quasi-criminal proceedings, critics argued that children were entitled to jury trials and other constitutional criminal protections.36 The juvenile court refuted these challenges, reasoning that the court was acting out of compassion, similar to a parent helping a child out of a life of crime.37 The “best interests” model, they argued, disposed of the need for constitutional criminal protections for juveniles prosecuted in juvenile court. Consequently, the “best interests” model also disposed of a need for accurate factfinding, the ability of lawyers to challenge the State’s case through cross-examination, the right to a transcript of the proceedings, the right to appeal, and other essentials of the adversary system designed to make the sure that the innocent are not convicted.

Defenders of the court’s paternalistic model beat back most of these challenges until the 1960s and 1970s, in the midst of the so-called “due process” revolution,38 when lawyers and scholars again questioned the legitimacy of the juvenile court, raising procedural due process challenges to existing court structure and practice.39 These challenges eventually made their way to the

35. Id.

36. Id. at 109-12 (discussing constitutional challenges to the juvenile court); See Robison v. Wayne Circuit Judges, 115 N.W. 682 (Mich. 1908) (holding the Detroit Juvenile Act unconstitutional because, even though it stated it was not a criminal court, the court had ability to impose a fine).


38. The due process revolution included such cases as Gideon v. Wainwright, 372 U.S. 335 (1963) (affording indigent defendants the right to counsel); Miranda, 384 U.S. at 436 (affording defendants warning on the constitutional right to remain silent and request an attorney upon arrest); Escobedo v. Illinois, 378 U.S. 478 (1964) (no questioning once a suspect has requested his lawyer); Massiah v. United States, 377 U.S. 201 (1964) (after indictment, the Sixth Amendment prevents police questioning); Wade v. United States, 388 U.S. 218 (1967) (protection against eyewitness suggestibility); and Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk permissible for weapons on the basis of reasonable suspicion of criminal wrongdoing).

United States Supreme Court and set the stage for a major procedural overhaul of the juvenile court. The first of these cases was the landmark case of *In re Gault*.\(^{40}\)

Gerald Gault was a 15 year-old boy who was arrested and charged in the juvenile court for making “lewd or indecent remarks of the adolescent sexual variety” to a neighbor over the telephone with another boy.\(^{41}\) At the time of his arrest, Gerald was home alone and no notice was given to either one of his parents that he had been taken into custody.\(^{42}\) At Gerald’s trial, the complaining witness failed to appear in court, but the judge went ahead with the hearing without swearing in any of the witnesses or making a transcript or recording of the proceeding.\(^{43}\) Gerald was not represented by counsel.\(^{44}\) The judge proceeded to question Gerald about the phone call, and according to Gerald’s mother, Gerald admitted to dialing the phone number and then handing the phone to his friend.\(^{45}\) At the end of the hearing, the judge committed Gerald to the State Industrial School “for the period of his minority (that is, until 21) unless sooner discharged by due process of law.”\(^{46}\)

Shocked by the absence of due process for Gault, the Supreme Court minced no words in its criticism of the juvenile court, stating that “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court.”\(^{47}\) The Court reversed Gault’s conviction, arming future juveniles with the right to counsel, notice of charges, confrontation and cross-examination, and to the privilege against self-incrimination.\(^{48}\) The Court noted that “Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”\(^{49}\)

*Gault* was not the only shot the Supreme Court fired at the juvenile court. In a span of less than a decade, the Court reviewed the right to counsel and to cross-examine,\(^{50}\) right to a jury trial,\(^{51}\) double jeopardy,\(^{52}\) standards of proof,\(^{53}\) and the

\(^{40}\) *Gault*, 387 U.S. at 1 (1967).
\(^{41}\) *Id.* at 4-5.
\(^{42}\) *Id.* at 5.
\(^{43}\) *Id.* at 5-6.
\(^{44}\) *Id.*
\(^{45}\) *Id.* at 6.
\(^{46}\) *Gault*, 387 U.S. at 7-8.
\(^{47}\) *Id.* at 28.
\(^{48}\) *Id.* at 32-40.
\(^{49}\) *Id.* at 18.
\(^{50}\) See generally *Id.* at 1.
\(^{51}\) McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding juveniles do not have a constitutional right to a jury trial).
\(^{52}\) Breed v. Jones, 421 U.S. 519 (1975) (holding the double jeopardy clause applies to juveniles, and thus a juvenile cannot be tried in both juvenile and adult court for the same offense).
right to a waiver hearing, giving juveniles many of the same protections afforded adults with the notable exception of the right to a jury trial.

The due process revolution of the 1960s and early 1970s, by affording juveniles many of the basic due process rights, did give advocates hope that the juvenile court would rise above its second-class status. But the promise of these reforms has never fully materialized, in part, because many juvenile offenders are not developmentally ready to exercise these rights competently and because many courts have ignored these developmental differences by expecting children to exercise these rights with adult-like precision.

The push for procedural due process in juvenile court may have triggered a backlash against the juvenile court, opening the door for a wave of so-called reforms that further blurred the distinction between juvenile and adult court proceedings. “Adult time for adult crimes” became the rallying cry for politicians across the country, leading to changes in the law in almost every jurisdiction between 1992 and 1999. These laws extended adult court jurisdiction over youths by lowering the age requirement for adult court prosecution, expanding the range of offenses which could subject a juvenile to adult prosecution, and shifting the decision over who remains in juvenile court and who goes to the criminal court from judges to prosecutors or legislators. Even the federal government jumped on the bandwagon; Congress enlarged the list of crimes for which juveniles can be charged as adults in federal courts.

This wave of draconian new laws not only shrunk the jurisdiction of the juvenile court; it also resulted in a more punitive justice system for those juveniles fortunate enough to remain in juvenile court. “Reforms” such as mandatory minimum sentences, mandatory detention for certain crimes, erosion of confidentiality, and longer sentences for juvenile offenders (previously the province of criminal courts) became part of the fabric of juvenile courts.

The juvenile court continues to evolve from its founding just over a century ago. While the “best interests” model has in many ways morphed into an

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54. Kent v. United States, 383 U.S. 541 (1966) (holding a juvenile cannot be transferred to adult court without a waiver).

55. See Barry C. Feld, The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Differences They Make, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1188-89 (1988-1989). Feld notes that even though Gault mandates juvenile right to counsel, “less than fifty percent of juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled.”

56. See Tanenhaus & Drizin, supra note 29, at 642-43, 664; See also Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in YOUTH ON TRIAL 9, 13-14 (Thomas Grisso & Robert G. Schwartz eds., 2000) (noting that Gault caused an “adultification” of the juvenile court, and a backlash in the 1990s caused a different “adultification” causing increased transfers and harsher punishments for children in juvenile court).

57. See Kim Taylor-Thompson, States of Mind/States of Development, 14 STAN. L. & POL’Y REV. 143, 143-44 (2003); See also Tanenhaus & Drizin, supra note 29, at 664-70.

58. See Taylor-Thompson, supra note 57, at 144.

59. See Steinberg & Schwartz, supra note 56 at 13-14; See also Taylor-Thompson supra note 57, at 148-49.
adversarial model, many of the due process protections extended to juveniles through *Gault* and *Winship* have failed to protect juveniles from arbitrary and capricious decision-making. For the past two decades, most of the criticism aimed at the court has focused on the Court’s inability to punish serious juvenile offenders. This focus has obscured concerns over the lack of procedural due process and the inaccuracy of factfinding in juvenile courts. The revelation, however, of numerous wrongful convictions in adult court requires that these deficiencies be reexamined, especially now that juvenile courts have come to mirror criminal courts in their emphasis on punishment of offenders.

**PART II: PROCEDURAL DEFICIENCIES IN JUVENILE COURT**

It is beyond the scope of this article to cover all of the procedural deficiencies that continue to exist in the juvenile court. Instead, this section sheds light on just a few of the most glaring deficiencies of the juvenile court and how those deficiencies make children dangerously susceptible to wrongful convictions. Unfortunately, depth is somewhat sacrificed for breadth, and the focus here is on what we consider to be the most important lessons of adult wrongful convictions for juvenile justice.

A. *Miranda Rights: Words Without Meaning to Juveniles?*

*Miranda* rights are an example of a procedural protection extended to juveniles.60 *Miranda*, however, is little more than a speed-bump for police officers when questioning adults and even less of an obstacle when interrogating juveniles. Approximately, 80-85 percent of adult criminal suspects waive their *Miranda* rights and well over 90 percent of juveniles waive their protection against self-incrimination.61

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61. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 792 (2005-2006); J. Thomas Grisso & Carolyn Pomier, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 327, 333-34 (1977); See also Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 468, 525-27 (2003-2004) (Wrapped up in the whole idea of juvenile waiver of *Miranda* and other constitutional rights is children’s reduced competency in general. Children’s lesser adjudicative competence than adults as trial defendants also makes them more susceptible to wrongful convictions. However, juveniles developmental and emotional immaturity impedes their ability to reason, understand, and participate in their defense. Similar to the manner in which people with mental retardation lesser competency makes them vulnerable to erroneous convictions, juveniles also have a reduced understanding of procedural and constitutional rights, confusion about the trial process, lower language abilities, and poorer decision-making skills.); See also Thomas Grisso, *What We Know About Youths’ Abilities as Trial Defendants*, in *YOUTH ON TRIAL*, supra note 56, at 141-43 (Adjudicative competence correlates to a defendant’s ability to understand and participate in the trial process, provide and process information with counsel, and apply all the information to the situation faced at trial). The Juvenile Competency Commission in Illinois has
Before analyzing the effect of police interrogations on juveniles, it is important to put juveniles' procedural rights in context. When the Supreme Court extended the privilege against self-incrimination to juveniles in *Gault*, the procedural protections of *Miranda* also followed. In noting that a child’s age and inexperience would affect the voluntariness of *Miranda* waivers and the accuracy of admissions, *Gault* emphasized that “admissions and confessions of juveniles require special caution.” However, as Professor Feld has noted, the Court retreated from this position somewhat in *Fare v. Michael C.*, where the Court did not deem age as a major factor when the juvenile in question had multiple arrests, police contacts, and had served time in a “youth camp.” *Fare* established courts’ willingness to assess the validity of a child’s waiver of *Miranda* rights and confessions under a “totality of the circumstances” test.

Each state, either through common-law or statute, has developed factors that the court should look to in evaluating the validity of a child’s waiver of *Miranda* rights. Most totality of the circumstances tests require assessing the child’s age, maturity, intelligence, experience, sophistication, and comprehension level. Defining what constitutes a knowing, intelligent waiver has proven to be rather difficult for the courts to address. In most instances, judges are given no direction on how to weigh any of the factors and how to determine which factors are controlling. Left with no clear-cut rules on how to apply a totality of the circumstances test, the judicial decisions regarding the factors become

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63. Gault, 387 U.S. at 45.

64. See Feld, supra note 62, at 171.


66. Id. at 726-27.

67. Feld, supra note 62, at 171.


69. See Feld, supra note 62, at 173; See also Feld, *Juvenile’s Waiver of Legal Rights: Confessions, Miranda and Right to Counsel*, in *YOUTH ON TRIAL*, supra note 56, at 113 (citing *In re W.C.*, 657 N.E.2d 908 (Ill. 1995) (“upholding validity of waiver by thirteen year-old who was illiterate and moderately retarded with an IQ of 48...the equivalent developmentally of a six-to eight-year old...[and] possessing the emotional maturity of a six-to seven year old.”)).
“amorphous, illusive, and largely unreviewable.”

Thus, as Professor Feld pointed out in 1984 (and Professor Kenneth King in 2006), when courts address children’s confessions, judges in juvenile court are left with practically unlimited judicial discretion that allows for the exclusion of *Miranda*-waived confessions in only the most egregious cases.

The *Miranda* rights were designed as a protection for adults against the inherent compulsion present in the modern psychological police interrogation. By simply invoking the right to silence or asking for an attorney, suspects could bring the interrogation to a crashing halt. The rights were not only meant to give suspects a safeguard against self-incrimination, but also as a safeguard against false confessions. In order to make use of this protection, however, a suspect must understand the meaning of the words of *Miranda* rights and the consequences of giving them up. Study after study has shown that juvenile suspects fail on both counts.

Much of the underutilization of *Miranda* rights stems from children’s lack of comprehension with regard to the privilege against self-incrimination. Children under the age of 14 and older adolescents are especially at risk for not understanding the nature of *Miranda*. In psychological testing, these children have scored significantly lower than adults, including adults with low intelligence. At age 15, children have basic intellectual skills similar to adults, but exposure to hearing *Miranda* recited does not necessarily transfer to the ability to knowingly and intelligently waive one’s *Miranda* rights. *Miranda* presents a juvenile with a set of options, and while a child might know what these options are, she might not know their significance or function. Because children, and even adolescents over the age of 15, often neither understand the function of *Miranda* nor the consequences of waiving *Miranda* rights, it is impossible for them to provide a knowing and intelligent waiver.

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70. See Feld, supra note 62, at 173 (citing Yale Kamisar, A Dissent from the *Miranda* Dissents, in POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41,43-44 (1980)).


72. The problem of juvenile false confessions was one of the reasons that the *Gault* Court extended the “right to silence” to juveniles. The Court noted that “authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by juveniles” and even referenced a probable New York false confession case (*In re Matter of W. & S.*, 224 N.E.2d 102, 104 (N.Y. 1966)) involving two 12 year-old boys (one of whom was locked in a secure psychiatric facility at the time of the crime) who had confessed to raping and assaulting two elderly women. U.S. 387 at 52.

73. See Kaban & Tobey, supra note 68, at 155.

74. Id.


76. See id.
In addition, juveniles often do not understand the concept of a right itself. Unlike adults, who conceive a right as an entitlement and something that cannot be taken away, juveniles perceive their rights as something they are allowed to do, not an entitlement.

This misunderstanding of *Miranda* is further exacerbated in the interrogation context because of children’s susceptibility to coercive pressure to waive their *Miranda* rights. Children learn at an early age to answer questions directed to them by adults. Moreover, police occupy an elevated position of power in relation to juveniles, thus creating a “status differential” in the interrogation. Juveniles’ “low status” compared to their adult interrogators, compounded with societal mores that children should obey adults, their dependence on adults, and their reduced ability to withstand intimidation, all serve to coerce juveniles to waive their *Miranda* rights. Research has demonstrated that lower-status individuals yield to the authority of a higher-status figure, resulting with children making such comments as “They the police, you do what they say.”

Neither juveniles’ increased interaction with police nor the fact that *Miranda* has become a part of our culture translates into an increased understanding by adolescents. Consistent with earlier findings, age and intelligence remain the primary predictors of *Miranda* comprehension, and even though youths have an increased exposure to *Miranda* warnings either through television or their own personal experience, today’s youth have the same difficulties in understanding their *Miranda* rights as their counterparts 30 years ago.

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77. See id. at 651.
79. The United States Supreme Court has commented on the manner in which juveniles often succumb to pressure from authority figures. See e.g., Haley v. Ohio, 332 U.S. 596, 599-600 (1948); See e.g., Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
80. Kaban & Tobey, supra note 68, at 155.
81. Id.
83. Kaban & Tobey, supra note 68, at 155.
85. See id.; See also Lois B. Oberlander, Naomi E. Goldstein & Alan M. Goldstein, Competence to Confess, in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY, 335, 342 (Alan Goldstein ed., 2003); See also King, supra note 71, at 440 (Immature brain development in the prefrontal cortex, the area of the brain that governs decision making, may also account for why juveniles have such a hard time exercising their rights during interrogations. The frontal cortex “gathers information from the various regions of the brain, sorts it out, decides what is important and what is not, and tells the person how to react and what to say.” This part of the brain is the last to develop and undoubtedly affects the ability of juveniles to exercise their legal rights).
B. False Confessions and Children’s Waivers of Miranda Rights.

Most people find it preposterous that anyone would waive her right to silence and confess to a crime she did not commit.86 Yet, false confessions are one of the leading causes of wrongful convictions. Data collected by the Innocence Project indicates that approximately 23 percent of exonerations involved false confessions or admissions.87

For years, false confessions were often the result of the “third degree.” This broad term refers to the diverse coercive interrogation strategies used by law enforcement throughout the 19th and much of the first half of the 20th century.88 These interrogation techniques ranged from psychological duress to physical brutality and torture, and quite often law enforcement combined the two.89 The era of the third degree gave way to a more psychologically-oriented method aimed at persuading suspects to believe it is in their best interests to confess.90 These psychological techniques have been accepted by the courts, in part, because of the myth that they are not likely to produce false confessions.91 The recent era of exonerations based on false confessions has punctured this myth.

Since the end of the third degree era, law enforcement has relied on sophisticated psychological tactics to manipulate, confuse, deceive, and gain confessions from criminal suspects.92 The most widely used training manual is Criminal Interrogations and Confessions.93 Now in its Fourth Edition, the manual teaches officers the “Reid Technique,” a nine-step method designed to exact a confession from a resistant suspect. According to the nine-step method, the interrogator begins by accusing the suspect of the crime (Step 1).94 This sets a tone of disbelief for the interrogation and disarms the suspect. Next, the interrogator develops “psychological themes,” face-saving explanations for how the event may have occurred so as to minimize or excuse the suspect’s behavior (Step 2).95 The interrogator is taught to interrupt the suspect’s denials with the ultimate goal of persuading the suspect that it is futile to maintain innocence (Step 3).96 Step 4 instructs the interrogator to counter all of the suspect’s emotional, factual, or moral objections to the interrogator’s statements, turning the suspect’s language against him and continuing on the stated theme.97

86. See Furman, supra note 3, at 20.
87. See Scheck, Neufeld, & Dwyer supra note 9, at 92.
89. Id.
90. Id. at 71.
91. Id. at 78.
92. Id. at 71.
94. Id. at 84.
95. Id. at 93.
96. Id. at 141.
97. Id. at 153.
the interrogator should use large physical gestures to get the suspect’s attention, as the suspect should now have become confused and withdrawn (Step 5). The interrogator should approach the suspect’s now passive mood by shortening and exaggerating the psychological themes, narrowing in on a specific theme (Step 6). In Step 7, the interrogator gives the suspect a forced choice question, where one good and one bad explanation is given for the suspect’s behavior (e.g. “Did you intend to kill her or was it just an accident?”). The good choice would result in no moral condemnation or punishment, whereas the bad choice maximizes the punishment and moral depravity of the act, thus encouraging the suspect to choose the good alternative. In Step 8, the interrogator encourages the suspect to reveal the details of the crime, and Step 9 concludes with the suspect’s oral confession transferred into a written confession. The nine-step method provides for a lengthy and repetitive interrogation, wherein the interrogator establishes emotional control and gradually obtains a confession by increasing the suspect’s anxiety and lowering the perception of the consequences of confession.

The purpose of interrogation is not a fact finding expedition; rather it is to elicit incriminating statements. As a safeguard against false confessions, police officers are instructed interrogate suspects only after they are reasonably certain that the suspect is guilty. Reasonable certainty, however, is highly subjective and is often based on mere hunches or intuition or on the officer’s erroneous belief that he can detect whether a suspect is lying by observing the suspect’s body language. This type of interviewer bias can become dangerous, however, as it can lead police to “attempt to gather only confirmatory evidence and to avoid all avenues that may produce negative or inconsistent evidence.”

Throughout the interrogation process:

An unfolding temporal logic emerges, through which the suspect’s active resistance is neutralized as he is transformed into a passive actor who has been persuaded by the interrogator’s messages and is eventually manipulated into confessing (or at least agreeing to a minimizing “theme”) to having committed the underlying act with an exculpatory motive.

98. Inbau et al., supra note 93, at 159.
99. Id. at 161.
100. Id. at 165.
101. Id. at 165-66.
102. Id. at 171, 176.
103. Leo, supra note 88, at 79.
105. Id.
107. Leo supra note 88, at 73.
The pressure, the claim of innocence falling on deaf ears, and the perceived benefit of a confession weigh heavily towards giving the police some kind of information, even if it is false.

Constant accusations against a suspect, cutting off denials, disregarding a suspect’s objections, and dismissing potential alibis all serve to make a suspect more pliable in eliciting a confession. A large part of shifting a suspect from confident to hopeless during an interrogation is to stress incontrovertible evidence of the suspect’s guilt, regardless of whether such evidence exists. If the police actually have evidence, they are likely to embellish the type or amount of such evidence in order to convey the feeling that the case against the suspect is already closed and the road to innocence is insurmountable. Thus, a person is left with no rational choice except to confess to the crime.

Even if people can get beyond their initial skepticism of false confessions, most still believe that a false confession will only result from torture or a profound lack of intelligence. This is mostly the result of the fact that police interrogation remains beyond the common knowledge of the majority of the general public. Most people do not know that false confessions can result from interrogation tactics; nor do they know that law enforcement personnel attend specialized training schools to learn interrogation techniques and ways to manipulate a suspect’s emotions and perceptions. However, recent social science research and literature document that current methods of police interrogation can, and do, force intelligent people who are cognitively unimpaired to provide false confessions to crimes in which they played no role.

While a false confession might be relatively easy to obtain, reversing one’s effects and consequences is a Herculean task. First, for the factfinder, a false confession remains the most damning piece of evidence of guilt against a defendant and has a greater prejudicial effect than any other type of evidence. According to several leading studies, most juries will return a guilty verdict even when a defendant recants his admission and physical evidence refutes the


112. See Drizin & Leo, *supra* note 12, at 910.

113. See id.

114. See id. at 910-11.


116. Id.
confession. Second, law enforcement personnel in charge of the interrogation remain unlikely to admit mistakes because that would require admitting that innocent people confess to crimes. Third, judges seem conditioned to disbelieve innocence claims and rarely suppress confessions even when those confessions are dubious. Finally, defense attorneys are more likely to encourage their clients who have confessed to plead guilty, thus making the false confession nearly impossible to expose.

Fred Inbau and his colleagues teach interrogators to use the same tactics for juvenile suspects and that the tenets of adult interrogation are “just as applicable to the young ones.” When these tactics are used on juvenile suspects, the risk of obtaining false confessions is markedly increased. Juveniles’ inferior comprehension of rights, limited language ability, and inadequate decision-making skills increase their susceptibility to interrogation tactics and thus increase the likelihood of a false confession. Studies of proven false confessions have demonstrated that juveniles (defined as those under 18), are over-represented in false confession cases. In Drizin and Leo’s study, for example, juveniles comprised 33 percent of a sample of 125 known false confessions. Because juvenile courts are not covered by most news and print media and court proceedings remain confidential in many instances, it is likely that these reported juvenile false confessions are the tip of the iceberg of the juvenile false confessions problem.

Getting a child to forfeit his or her *Miranda* protections is an easy feat for a police officer in an interrogation room. Psychological research has shown that a child’s understanding of *Miranda* warnings negatively correlates with false confessions - the better the *Miranda* comprehension, the less likely a child will falsely confess. As noted in Section A, most children do not have an adequate understanding of their *Miranda* rights, which correlates to a higher likelihood to confess falsely. Moreover, getting from admission to false confession is also not a difficult leap as demonstrated by research on children’s suggestibility in the

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118. See Ofshe & Leo, supra note 108, at 984.
120. See id. at 944-45 (see table). More than half (22 out of 40) of the juveniles in the study were aged 15 and under, thus suggesting that this age group might be particularly vulnerable to the pressures of police interrogation. Moreover, the large majority of juvenile false confession cases (33 out of 40) came from juveniles aged 14 to 17, the timeframe when they are most likely to be transferred to adult court.
122. See Ofshe & Leo, supra note 108, at 984.
123. See Inbau et al., supra note 93, at 137.
124. See Feld, supra note 61, at 526-27.
125. See Drizin & Leo, supra note 12, at 944.
126. See Goldstein et al., supra note 84, at 365.
interrogation context. While a great deal of research has been done on child witness suggestibility, child suggestibility can lead to false confessions in the juvenile suspect interrogation context.\textsuperscript{127} One recent study in which juveniles were under less stressful circumstances than an ordinary interrogation showed that juveniles were significantly more likely to claim responsibility for acts they did not commit than adults.\textsuperscript{128} Moreover, presenting children with false evidence of their involvement only heightened the likelihood of a false admission of guilt.\textsuperscript{129} Even John E. Reid and Associates, Inc., one of the leading instructors for law enforcement in interrogation techniques, has noted that juveniles are susceptible to false confessions, causing Reid to advise interrogators to “exercise extreme caution and care when interviewing or interrogating a juvenile . . .”\textsuperscript{130}

There are several reasons why juveniles may be more susceptible to police tactics during interrogation. Juveniles are less mature and do not have the same life experience to draw upon as adults, and as a result, children are more naïve and more readily influenced by police power, persuasion, or coercion.\textsuperscript{131} With limited defenses to police tactics, children have a reduced ability to cope with a stressful interrogation and are less likely to possess the psychological and emotional abilities to withstand the rigors police questioning.\textsuperscript{132} The process of interrogation not only makes children more susceptible to changing their story, but the stress of an interrogation can actually alter a child’s perception of events.\textsuperscript{133} In a recent study on juvenile suggestibility, researchers discovered that male youth in custody, when subjected to criticism and negative responses,
were more likely than non-offending adults to yield to suggestive questions. Thus, juvenile suspects can come to believe a set of events differently from what actually occurred if enough pressure is placed upon them.

Certain interviewing techniques have proven to have a disastrous effect on the accuracy of children’s reporting. For example, research shows that repeated, coercive, and leading questions as well as negative emotional tone and high-status interviews (those in which there is a marked power differential between interviewer and interviewee) all increase the risk of eliciting inaccurate information. When children are asked repetitive questions, even innocent children may assume that they got the answer wrong, and might feel pressure to give the “right” answer. This response is heightened by children’s greater compliance and eagerness to please adult authority figures. Moreover, due to adolescent brain development, youths are not as capable as adults at thinking strategically and understanding the consequences of admissions.

In addition to using the same tactics on children (ignoring any claim to innocence, discounting any alibi, and often presenting irrefutable evidence of guilt even if no such evidence exists), police interrogators are trained to use special psychological themes to induce children to confess, including blaming a youth’s environment, parents, or friends. If false confessions go largely unreported and the wrongful conviction cases are just the tip of the iceberg with adults, it stands to reason that there are many more false confessions, and thus erroneous delinquency adjudications, from children.

C. Mistaken Identifications and Child Suggestibility

Mistaken identification remains the leading cause of wrongful convictions in this country. The Innocence Project has documented that in over two-thirds of DNA exonerations to date, mistaken eyewitness identification played a

134. Goldstein et al., supra note 84, at 361.
135. See Larson, supra note 75, at 657-58.
136. See Kaban & Tobey, supra note 68, at 156.
138. See Feld, supra note 61, at 534; See also King, supra note 71, at 440. In many circumstances, a decision to confess is linked with a suspect’s inability to cope with police pressure as opposed to a tendency to give in to leading questions; See Oberlander, Goldstein, & Goldstein, supra note 85, at 350-51. Children can be particularly vulnerable to such pressure, as their desire to go home may be a motivating factor in offering a confession. In the Ryan Harris case, discussed in part IV.C., infra, the promise of a happy meal was enough to convince two children (aged 7 and 8) to falsely confess to a murder.
139. INBAU, ET AL., supra note 93, 137-38.
140. WESTERVELT & HUMPHREY, supra note 111, at 45.
significant role. In 1967, as the Supreme Court decided *U.S. v. Wade*, Justice Brennan stated, “The vagaries of eyewitness identifications are well-known; the annals of criminal law are rife with instances of mistaken identification.” While eyewitness testimony is compelling and is often considered the most persuasive story to a judge or jury, studies demonstrate that eyewitness testimony can be highly unreliable. The fact is that people under stress have difficulty making accurate identifications, and this deficiency is heightened as people attempt to identify across racial groups. In the laboratory setting, mock-jurors “often err on the side of over-believing adult eyewitnesses.” Finally, fact-finders place a large amount of faith in eyewitness identifications (in particular when eyewitnesses demonstrate confidence on the witness stand), even though there is no correlation between the witness’s certainty and accuracy.

Children have also played a role in several wrongful conviction cases based on misidentifications. The problem with children is not that they are worse at making an actual identification, but rather children and adolescents may be more vulnerable to the kinds of suggestive eyewitness interviews that have led to wrongful convictions. In fact, child witnesses have been the centerpiece of some of the most notorious wrongful conviction cases. The problems caused by suggestive child interviewing techniques of children have surfaced again and again in sexual abuse cases, where children are interviewed and then asked to testify against their adult attackers.

142. *Id.*
143. 388 U.S. 218 (1967).
144. *Id.* at 228.
146. See Scheck, Neufeld, & Dwyer, *supra* note 9, at 45.
148. *Id.*; see also Furman, *supra* note 3, at 14.
149. *Id.*
150. See Bruck et al., *supra* note 106, at 146.
Take the recent exoneration of Peter Rose and John Stoll. Ten years after he was sentenced for a rape, Peter Rose was released after DNA evidence demonstrated that he could not be the actual perpetrator and his accuser recanted her statement that Rose was her attacker. The victim was interviewed after regular business hours at the police station. The police supplied the victim with a certain sequence of events, asked if they were “on the right track,” called her un-Christian, and threatened to force the victim to take a lie detector test. In much the same manner in which the police question a suspect, the victim in this case was pressured to name her attacker and was even called a liar by the police when she resisted. The police also overstated the strength of the evidence against Rose, telling the victim that there was evidence lined up against Rose. This in turn led the victim to just go along with the police’s suggestion.

154. See id.
156. See id. Further transcripts from the interview reveal the following exchange:

*Female victim, 13: (Indecipherable).

*Officer: But you believe in the Christ, our Lord?

*Girl: No, [ ] a cross that somebody gave me.

*Officer: OK. Well then, do me a favor and tuck it out of my sight, because I keep looking at this 13-year-old young lady who keeps fibbing to me while she's wearing a Crucifix.

*Officer: OK. Let's cut to the chase a little bit. Was it Pete?

*Girl: I don't know. Seriously, I don't know.

*Girl: You guys think I'm lying?

*Officer: Hang on a second. I think you're lying, yes I do. About what you said, not necessarily about what happened.

*Girl: No, because I'm not telling you a lie.

*Officer: I believe you are. And if you're going to stick to that story, we've made arrangements to have a lie-detector test for you. ... What do you think the results would be?

157. Id.
158. Id.
159. Id. Part of the interaction between the police and the victim included this exchange: “It wasn't forced was it?” Foster [police officer] asked the girl. “Who did you really get in a fight with that day and why did you end up behind the house?” “I didn't know who it was,” she [the victim] said.
John Stoll’s wrongful conviction also highlights the way in which suggestively interviewing children can lead to wrongful convictions.\footnote{Maggie Jones, \textit{Who Was Abused?}, N.Y. TIMES, Sept. 19, 2004, § 6, at 77. (Four of the six former accusers affirmatively stated that Stoll never molested them; one stated he had no memory of being molested; only Stoll’s son maintained his story).} John Stoll was convicted of 17 counts of lewd and lascivious conduct and sentenced to 40 years in prison.\footnote{Id.} His conviction was based almost entirely on the testimony of six young boys, almost all of whom would later recant.\footnote{Id.} As an adult, one of the accusers recalled that during the interviews the police told him that “John Stoll was a bad man and [the child] needed to help put him in prison so he wouldn’t hurt any more children.”\footnote{Id.} Other children feared that they would be separated from their families if they did not provide the necessary testimony.\footnote{Id.} Four of the six of Stoll’s former accusers stated that even though they knew Stoll never touched them, each was pressured by the police to describe sexual acts.\footnote{Id.} In the end, each succumbed to the suggested testimony, and the result was Stoll’s wrongful conviction.\footnote{Id.}

The \textit{McMartin Preschool Case} and other cases overturned or thrown out due to tainted child testimony, led researchers to reexamine the suggestibility of child witnesses.\footnote{See generally Amye R. Warren & Dorothy F. Marsil, \textit{Why Children’s Suggestibility Remains a Serious Concern}, 65 LAW & CONTEMPPROBS. 127 (2002); see generally Thomas D. Lyon, \textit{The New Wave in Children’s Suggestibility Research: A Critique}, 84 CORNELL L. REV. 1004 (1999); see generally Jon’a F. Meyer, \textit{Inaccuracies in Children’s Testimony: Memory, Suggestibility, or Obedience to Authority?} (Nathaniel J. Pallone ed., 1997).} While most of the literature focused on children as witnesses in child sexual abuse cases, there is no reason why the information cannot be extrapolated to apply to child witnesses in juvenile cases.\footnote{See Jean Montoya, \textit{Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses}, 35 ARIZ. L. REV. 927, 939 (1993).} Moreover, because as many as two-thirds of the victims of violent juvenile crime are children,\footnote{Carl McCurley & Howard N. Snyder, \textit{Victims of Violent Juvenile Crime}, U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (July 2004).} children will often be key witnesses in juvenile court cases.

The most glaring problem with child witnesses is the interviewing technique, especially the use of leading questions. While there is a great deal of debate as to the level of child suggestibility,\footnote{See generally Stephen J. Ceci & Maggie Bruck, \textit{Suggestibility of the Child Witness: A Historical Review and Synthesis}, 113 PSYCHOL. BULL. 403 (1993) (demonstrating the high level of child suggestibility while being interviewed); Lyon, supra note 167, at 1084 (questioning the techniques and the underlying assumptions of those researchers who have found a high level of suggestibility in children).} there is little doubt that the nature of the
interview process has as much effect on the accuracy and completeness of a child’s testimony as the sophistication of the interviewed child. Children can provide accurate accounts, but it is vital that adults who conduct interviews with children understand child psychology and how to use non-suggestive questions and age-appropriate language. Moreover, in order to receive reliable and truthful testimony, it is important that children be allowed to provide free recall reports that minimize the use of direct questioning. This often can become a problem in crime solving as “[t]he major issue confronted by interviewers is likely to be the paradox that young children need help recalling experiences, but that direct, specific questions and other recall prompts may produce distortions and suggestibility.”

Empirical research has also demonstrated what types of interviewing techniques can undermine the veracity of children’s testimony. Although it is tempting to use leading questions with children in order to gain a more complete account, children are more likely to go along with either implied or intentional suggestions. Children’s free recall is likely to be impaired if an interviewer asks leading questions, especially when negative expectations of a person, such as someone accused of a crime, have been formed in the child’s mind. Thus, using suggestive and leading questions should be avoided by interviewers when possible. In addition, interviewers should stay away from modifying children’s answers to questions, especially if the new question alters or adds to the meaning of the child’s statement. Finally, interviewers should avoid forced-choice questions, whereby the question limits the amount of responses a child can give. This free recall approach “contrasts with the typical police interviewing

171. See Nancy E. Walker & Matthew Nguyen, Interviewing the Child Witness: The Do’s and Don’t’s, the How’s and Why’s, 29 CREIGHTON L. REV. 1587 (1996); see also Walker., supra note 151, at 156.
173. Id. at 1596.
174. See id. at 1598 (citing Ayme R. Warren & Lucy S. McGough, Research of Children’s Suggestibility: Implications for the Investigative Interview, (unpublished manuscript, on file with the University of Tennessee at Chattanooga). While most studies on children’s suggestibility involve relatively young children, there is still a problem with suggestibility among adolescents. Even though suggestibility declines with age, children in their teens are still more suggestible than adults. See Jennifer K. Ackil & Maria S. Zargoza, Developmental Differences in Eyewitness Suggestibility and Memory for Source, 60 J. EXPERIMENTAL CHILD PSYCHOL. 62, 74-75 (1995); see also Julie Robinson & Pamela Briggs, Age Trends in Eyewitness Suggestibility and Compliance, 3 PSYCHOL. CRIME & L. 187, 196-98 (1997); see also MEYER, supra note 167, at 43 (older children might be more likely to incorporate interviewer suggestions into their testimony).
175. Walker & Nguyen, supra note 171, at 1601-02. Research has documented that the an interviewee’s accuracy in response to specific and misleading questions increases with age, with young children being the least accurate. See Bruck et al., supra note 106, at 140.
176. See Walker & Nguyen, supra note 171, at 1602.
177. Id.
178. Id. at 1602-03.
179. Id. at 1604.
approach of making only a minimal effort to establish rapport [with a witness] and discouraging eyewitnesses from volunteering information freely.”

Interviewers often believe that children will not discuss their role as victims of a crime unless they are asked specific questions. However, recent research has debunked this common perception. Through training, interviewers are encouraged to ask child victims to provide narratives through the use of open-ended questions. In a 2003 study of police officers asking young children questions about sex abuse, the interviewers were able to elicit 83% of the allegations and disclosures through the use of open-ended questions. Such data counters the myth that children can only discuss their victimization through the use of specific and leading questions.

Children can and do give accurate reports when questions are asked in an appropriate and informed manner. However, it is highly unlikely that police investigators rely on principles of child psychology when questioning child witnesses. The interview techniques associated with criminal investigations often include multiple interviews, suggestive questions, and repeated questions during the interview. Interviewers who use these techniques are more likely to extract misinformation from children. When children are subjected to repeated interviews and questioning and are told by the interviewer that their answers are wrong, children are more likely than adults to adopt the interviewer’s version of events. Interview bias is present anytime the interviewer believes she knows the answer before the child divulges the information and whenever the interviewer is concerned about eliciting evidence against a suspect. Moreover, biased interviewers are unlikely to ask children open-ended questions.

182. Id.
183. Id. For example, interviewers are told to ask such questions as, “‘Tell me what happened;’ ‘You said there was a man; tell me about the man;’” etc.
184. Id. (citing study by Michael Lamb et. al, Age Differences in Children’s Responses to Open-Ended Invitations in the Course of Forensic Interviews, 71 J. CONSULTING AND CLINICAL PSYCHOL. 926 (2003)).
185. Id.
186. See Walker & Nguyen, supra note 171, at 1590-91.
189. See Ayme R. Warren & Peggy Lane, Effects of Timing and Type of Questioning on Eyewitness Accuracy and Suggestibility, in MEMORY AND TESTIMONY IN THE CHILD WITNESS 45, 47 (Maria S. Zargoza et al. eds., 1995).
190. See Bruck et al., supra note 106, at 140.
191. Id.
interviewers are most likely will resort to specific questions that become very leading as such questions often presuppose the correct answer. If we presume that the police already have a suspect when they are interviewing a child witness, they are more likely to ask, “Is this the person you saw?” “Is this the person that hit you?” etc. While police receive training in interrogating suspects, they receive little or no actual training in how to work with a cooperative witness. Police investigators rarely take a neutral stance, and moreover, police inquiry may only follow a line of questioning to which conforms to the investigation’s preferred hypothesis. In addition, if police use aggressive (“Did the boy hit you?”) as opposed to passive wording (“What did the boy do?”), then there is likely to be a greater distortion effect on children’s memory. This was exactly the problem in the McMartin Preschool Case, wherein one juror stated his concern with the questioning process: “The interviewers at Children’s Institute International [where the child interviews took place] asked questions in such a leading manner that we never got children’s stories in their own words.” In another famous child sexual abuse case, State v. Michaels, the New Jersey Supreme Court threw out a conviction because almost all police interrogation of child witnesses included “an obvious lack of impartiality,” the police failed to “pursue any alternative hypothesis,” and they used “leading questions that furnished information.”

Pressured situations for children can exist in lineups as well as interviews. Unless states start implementing lineup procedures where the interviewer informs the eyewitness that the suspect may not be included, a lineup presents the exact type of forced-choice interview that child psychologists argue should be avoided. It is vital that the police caution young children about guessing for the right answer. Finally, to further avoid the use of leading and suggestive questions, “double-blind” testing should be implemented where the interviewer is not aware of which person is the suspect in the case.

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192. *Id.*
193. *See* Wells et al., supra note 180, at 583.
195. *See* MEYER, supra note 167, at 33.
198. *Id.* at 1379.
199. *Id.* at 1380.
200. *Id.*
201. *See* Wells et al, supra note 180, at 585.
203. Wells et al., supra note 180, at 593.
204. *Id.* at 594. In one study, researchers were highly troubled by what they perceived to be false identifications made by children due to children’s willingness to guess when they were unsure of the correct answer. Michael R. Leippe et al., *Discernibility or Discrimination?: Understanding Jurors’ Reactions to Accurate and Inaccurate Child and Adult Eyewitnesses*, in CHILD VICTIMS,
The danger of inaccuracy of child testimony during police investigations is further complicated by children’s tendency to yield to authority figures. Children become more suggestible when authoritative adults give them misinformation, as children may pay closer attention to the erroneous suggestion, thus allowing it to sink deeper into their later recollections. Moreover, children can answer questions incorrectly when an adult presents information that conflicts with the child’s actual memory. Thus, when an “all-knowing” adult presents a story different from the child’s memory, the child may believe her story to be incorrect and thus change course in order to appease the adult. This dynamic is even more dramatic in the police context because when the adult asking questions demonstrates authority, children encounter problems disagreeing with the adult. Thus, a master-student relationship can be created whereby the child chooses pleasing the adult interviewer over the accuracy of the account. This phenomenon is particularly important when the police or a parent has told the child that the person suspected of the crime is a “bad” person. Moreover, a biased interviewer may selectively reinforce a child’s statements, thus tipping the child off to what types of answers the interviewer is looking for. This relationship between the police and a child witness in the investigation is “troublesome, as children incorporate subconscious cues into their testimony or try to please the adult interviewer by adding information to the report due to a belief that ‘more is better.’”

Suggestibility is not only a problem for young children, but there is ample research demonstrated that the same suggestive techniques that are dangerous for young children can also form the basis of false reporting for children in middle childhood and adolescence. In fact, in some circumstances, older children may

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205. See Meyer, supra note 167, at 46-47. This phenomenon is also highly relevant in the false confession context. Although it has been difficult to test in the laboratory (see section II.B), there is good reason to believe that the same methods that make a child provide a false statement as a witness would also produce a false confession if the child was a suspect.

206. See Warren & Lane, supra note 189, at 59-60; see also Bruck et al., supra note 106, at 147.

207. See Meyer, supra note 167, at 46.

208. Id. at 46-47.

209. See Kaban & Tobey, supra note 68, at 151.

210. See Meyer, supra note 167, at 70.

211. See Bruck et al., supra note 106, at 141 (describing one case when a young child stated she was glad the man was in jail because he was bad. When asked how she knew the man was bad, the child responded, “My mom told me.”).

212. Id.

213. Meyer, supra note 167, at 70; see Bruck et al., supra note 106, at 141-42 (noting that in one study, children not only incorporated misinformation, but went on the make additional claims that were not even suggested. Once the children believed that a suspect performed one bad act, they quickly assumed her guilty of other bad deeds).

be more susceptible to suggestive questioning than younger children.\footnote{215} This has proven true in the area of repetitive questioning, where older children change their answers more frequently when faced with repetitive questions.\footnote{216} This most likely occurs because older children better comprehend the rules of conversation where a repeated question indicates that a previous answer was incorrect.\footnote{217} This problem could be seen in the John Stoll and Peter Rose case where children were subjected to repeated questions, and interpreted such repetition as disbelief.\footnote{218}

What makes suggestive interviewing so dangerous is that children who harbor false beliefs incorporate those beliefs to such a convincing degree that it is difficult to tell them apart from children who are telling the truth.\footnote{210} Even trained professionals are unable to tell the difference between children who have been interviewed using highly suggestive techniques and those that have not.\footnote{220} This occurs because the children, especially younger children, have actually come to believe what they are telling adults and do not believe that they are telling lies.\footnote{221}

D. Access and Quality of Counsel in the Juvenile Court

Every study done on wrongful convictions has documented the role that poor and ineffective counsel has played in these tragedies.\footnote{222} Ineffective assistance of counsel has been found to be “a significant contributing factor” in about 5-five to 28\% of wrongful convictions.\footnote{223} However, the standards for lawyer incompetency remain unchanged. Scheck, Neufeld and Dwyer describe the current standards for indigent criminal lawyers as the “breath test,” where “[i]f a mirror fogs up when placed beneath the lawyer’s nostrils, he or she is not ineffective, as a matter of law.”\footnote{224} Wrongful convictions stories are replete with lawyers who slept through trial,\footnote{225} used a bar for an office,\footnote{226} and could not offer any evidence “in mitigation of their clients’ sentences because they did not know what to offer or how to offer it, or had not read the state’s sentencing statute.”\footnote{227}
Ineffective assistance of counsel is not necessarily only a problem in capital defense cases. While convictions in capital cases receive a more thorough review, and thus instances of lawyer incompetence are more likely to be uncovered, the same problems that haunt capital defense exist throughout the system, including and perhaps especially in juvenile court. The major causes of ineffective assistance of counsel are inadequate funding, lack of oversight, low motivation, and a presumption of guilt on behalf of criminal defense lawyers.

The problem of ineffective assistance of counsel may be even more serious in juvenile courts. While the punishment is nowhere near that in capital cases, children suffer the double problem of inadequate access to counsel and poor representation in juvenile court. For all the same reasons that children waive their Miranda rights, children frequently waive their right to counsel in juvenile court. Poor representation occurs for the same reasons as in adult court with the added problems of a juvenile court culture that frowns upon zealous advocacy. In many ways, access and quality of counsel in juvenile courts make children more susceptible to wrongful convictions than their adult counterparts.

1. Waiver in the Juvenile Court

Children’s waiver of their right to counsel is nothing new in juvenile court. In 1984, Professor Feld documented the problematic nature of evaluating a juvenile’s waiver of counsel under the “totality of the circumstances” test. Professor Feld noted that “a waiver of the right to counsel fundamentally alters both the structure and function of the entire juvenile justice process and the ability of a defendant to participate in adversarial proceedings.” Much of the problem lies in the juvenile courts applying the same “knowing” and “voluntary” waiver for children as is applied for adults. However, it is difficult for a waiver to be either knowing or voluntary when children often relinquish their right to counsel without any explanation of what the right means or how they may choose to exercise it. When children appear in juvenile court without counsel, they will almost undoubtedly plea to a crime that they may or may not have committed. There is a disturbing irony that, for her own protection, state and

(Quoting Thurgood Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 COLUM. L. REV. 1, 2 (1986)).

228. See Furman, supra note 3, at 17-18.
229. Bernhard, supra note 222, at 228-33.
231. See text accompanying notes 308-09; See also Montana Report, infra note 276.
233. Id.
235. Id. at 580.
federal laws prevent a child from entering into a contract, owning property, marrying, or committing a tort; yet, rarely do laws or juvenile court rules protect a child from waiving her right to counsel even though this right serves as the most fundamental protection in juvenile court.236

Children’s waiver of their right to counsel has been a cause for concern at both the state and the federal level.237 The Department of Justice stated:

> The American legal system is complex. It is based on constitutionally guaranteed rights, common law precedent, and a web of federal and state statutes, local ordinances, and procedural rules. Mounting an adequate defense in juvenile or criminal court, avoiding self-incrimination, and ensuring that rights are upheld require the assistance of competent legal counsel. Yet many minors who become involved with the juvenile justice system never realize these basic rights because they ill-advisedly waive their right to counsel…In some jurisdictions, as many as 80 to 90 percent of youth waive their right to an attorney because they do not know the meaning of the word “waive” or understand its consequences.238

Despite the fact that the IJA-ABA Juvenile Justice Standards prohibit a minor from waiving her right to counsel,239 states continue to allow juveniles to waive their right to counsel at all critical stages of litigation. In Maryland, for example, a child can waive counsel after “full advisement from the court.”240 The problem is that judges often do not try to urge youth to obtain counsel, and in letting youth waive counsel, judges rarely deliver an adequate colloquy.241 In the ABA Juvenile Justice Center’s 1995 nationwide study, 46% of public defender offices stated that “only ‘sometimes’ or ‘rarely’ is there an advisory colloquy with the judge before the youth waives [his right to counsel].”242

The need for a good, easily understandable colloquy is vital given what we know about children’s inability to understand the language and the concepts surrounding their waiver of rights, especially their right to counsel. In a recent

236. Id. at 579-80.
238. Id. at 2.
241. See id.
study with children in Massachusetts, Barbara Kaban and Judith Quinlan inquired into children’s understanding of the words used in legal proceedings. While Kaban and Quinlan’s study focused mainly on the plea procedure, their findings on children’s understanding of court language are applicable to waiver of counsel. Kaban and Quinlan found that waiver forms in juvenile court are filled with language that children do not understand. Moreover, a juvenile’s prior experience with the legal system did not necessarily facilitate an understanding of legal words, as those children failed to correctly define 86% of the legal words used in the study. Finally, even when children can identify a word, they often confuse it with a similar-sounding word or substitute a non-legal definition. It is hard to fathom the situations in which children are truly able to provide a “knowing, intelligent, and voluntary waiver.”

It appears that many juvenile court judges do not pay close attention to youth as they waive their right to counsel. In a recent study by Mary Berkheiser of 99 appeals challenging a juvenile’s waiver of counsel, 80 of the 99 waivers were overturned on appeal. The study documented one instance of a child as young as nine who had been allowed to waive his right to counsel, and another judge accepted a boy’s waiver even though the boy suffered mental health and emotional problems for which he was on medication and attended a specialized school.

Permissive judges who allow children to waive their right to counsel ensure that juvenile cases are not tried on their merits. For example, Berkheiser cites an example from her study where three boys were charged for damaging a complainant’s trailer by pushing it into a ravine. Two of the boys went without counsel and the judge found them delinquent and placed them on probation. The third boy asked for a lawyer, and was then referred to a law school clinic. After minimal investigation, a law student discovered that the complainant did not even own the trailer (the boy’s father did) and the charges were dismissed. Thus, two boys had a delinquency record and one did not just because of the presence of a lawyer.

244. Id. at 47-48.
245. Id. at 48.
246. Id.
248. Id. at 613.
249. Id. at 613-15.
250. Id. at 633.
251. Id. at 634
252. Id.
253. Berkheiser, supra note 230, at 634.
254. Id.
255. Id.
In addition to outright waiver of counsel, counsel is often appointed to indigent juveniles too late in the process. A child first enters the juvenile justice system at the time of arrest. Children who are detained prior to trial are more likely to be incarcerated if adjudicated delinquent than those who are released from custody prior to trial. Despite this fact, only one jurisdiction visited by ABA investigators in Maryland provided counsel to the juvenile at arraignment. The same is true in Georgia, where children often waive counsel at detention hearings and admit guilt to the charges even before an attorney is ever involved or consulted. Moreover, under Georgia law, a parent is can be substituted as the juvenile’s counsel even in situations where the parent is the complainant. Thus, even before a child can get to a trial to claim innocence, he or she may have already waived counsel and admitted guilt.

The problem of the high rate of juvenile waiver has begun to garner more attention. Evidence of this trend is demonstrated in the recent Amendments to the Florida Rules of Juvenile Procedure. The Rules Committee sought to ensure adequate safeguards for juveniles waiving counsel by mandating that a) the youth confer with an attorney before waiving counsel; b) the waiver of counsel must always be in writing; and c) when the youth enters a plea or is being tried, a written waiver of counsel must be given to the court in the presence of an interested adult. The majority of the Florida Supreme Court noted the various support for the changes from advocacy groups as well as the recent data of the frequency of juvenile waiver and the harm it causes. However, the Court rejected a proposal that required a child to confer with an attorney prior to waiving counsel because of the financial constraints.

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257. Id.
258. Id.
260. Id. at 13.
261. Id.
262. 894 So.2d 875 (Fla. 2005).
263. Id. at 877.
264. Id.
265. Id. at 880-81. The Court did express its approval of the new rule and its support, yet the Court chose to defer to the legislature. Id. Louisiana recently backed away from its position that an attorney must be consulted before a child may waive her right to counsel. See generally Penelope Alyss Brobst, The Court Giveth and the Court Taketh Away: State v. Fernandez—Returning Louisiana’s Children to an Adult Standard, 60 LA. L. REV. 605 (2000). Louisiana courts believed that a juvenile could not competently waive her rights to counsel before consulting
buck to the legislature, knowing that children will continue to waive their right to counsel until legislatures act. As Justice Lewis stated in his dissent: “The majority now pays only ‘lip-service’ to protecting children...The proposed amendments...rejected today were not only entirely proper, but also necessary to effectuate a meaningful constitutional right to counsel held by each of Florida’s minors.”

The U.S. Supreme Court mandated appointment of counsel for the indigent in *Gideon v. Wainwright*, recognizing that the country’s system of justice, based on procedural and substantive safeguards, could not be realized without counsel. The Court noted that “[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.” The Court went on to note the famous words of Justice Sunderland in *Powell v. Alabama*, drawing a direct connection between a lack of counsel and the risk of wrongful conviction:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. *Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.*

A child is in even more need than an adult to have a lawyer guide him through a hearing. A child’s procedural and substantive rights to a fair and accurate trial cannot be realized if counsel is never appointed.

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266. AMENDMENTS TO FLA. RULES OF JUVENILE PROCEDURE, supra note 262, at 880-81.
267. *Id.*
269. *Id.*
270. *Id.* at 344.
2. Quality of Advocacy in Juvenile Court

If a child is able to survive arraignment without waiving her right to counsel, the battle is only half over as many juvenile defendants are victims of ineffective assistance of counsel. As Professor Feld noted, even a mandatory, nonwaivable right to counsel for juveniles would not provide a complete solution as “[a]ttorneys may not be capable of or committed to representing juvenile clients in an effective adversarial manner. Organizational pressures to cooperate, judicial hostility toward adversarial litigants…or an internalization of a court’s treatment philosophy may compromise the role of counsel in juvenile court.”

Twenty years later, the ABA state studies and other researchers’ analysis of representation in juvenile courts have confirmed Feld’s observation. There are several factors that together make representation of children in juvenile court problematic and enhance the risk of a wrongful conviction: poor investigation, infrequent use of motions, high caseloads, over-reliance on pleas, a juvenile court culture of wanting to “help” juveniles, and a general lack of training among attorneys on youth and adolescents.

First, investigation is essential in being able to represent competently a client. Scheck and Neufeld, as well as other innocence projects, repeatedly demonstrate the importance of investigations in uncovering wrongful convictions. Moreover, the example of the three boys cited above by Berkheiser shows how even the most cursory investigation can make the difference between guilt and innocence. The most basic investigation begins with the client; however, the ABA studies document how infrequently juvenile attorneys meet with their clients before entering a guilty plea. As one defense attorney stated, “I don’t call my clients when I receive the paperwork from the court because I don’t have an obligation to chase them down. If they want to talk to me they know where to find me.” The ABA study in Kentucky uncovered that only about 20 percent of youth not in custody stated that they met with their attorney prior to the day of adjudication. In North Carolina, 44 percent of juvenile attorneys stated that they rarely, or never, look at the police report or other investigative materials prior to seeing their client.

Even if attorneys do meet with their clients, they often rely on the parents and children to contact witnesses and bring those witnesses into court.

278. See Jones, supra note 237, at 11.
279. See Georgia Report, supra note 259, at 23.
Juvenile attorneys rarely rely on investigators to help build a case, as was documented in Washington’s assessment of the quality of representation in its juvenile courts.\(^{280}\) In three Washington counties, all juvenile attorneys stated they never used investigative support, and of the remaining counties, not one used investigators in more than 50 percent of the cases.\(^{281}\) The failure to investigate cannot be blamed entirely on attorneys; lack of investigation is tied to the lack of funding juvenile defenders receive. However, regardless of the reason, the fact is that a majority of juvenile cases proceed to trial with minimal or no investigation, a situation that enhances the risk of wrongful convictions.\(^{282}\)

Attorneys in juvenile court rarely, if ever, file pretrial motions. While good motion practice is considered one of the bedrock principles in zealous advocacy, only some juvenile attorneys (approximately 30 percent) surveyed by the ABA Juvenile Justice Center said they filed pretrial motions.\(^{283}\) Of those that did, most were “boilerplate” motions and standard form pleadings.\(^{284}\) The states studied by the ABA uncovered similar results. In Georgia, not only did juvenile attorneys rarely file motions to suppress or dismiss, but also motions for discovery were often ignored based on the reasoning that the prosecution would willingly share all pertinent information.\(^{285}\) Georgia is not an anomaly; Washington also found that contract attorneys or public defenders rarely filed pre-trial motions.\(^{286}\) Finally, even if attorneys made motions, they often only made them orally and without accompanying legal briefs for support.\(^{287}\) While a successful motion might blur the distinction between legal and factual guilt, the complete failure to file relevant motions diminishes a juvenile’s ability to receive a fair and accurate trial.

Throughout the country, juvenile attorneys handle an excessively burdensome caseload. In fact, problems such as lack of investigations and motions and reliance on pleas are directly correlated with the heavy caseloads juvenile attorneys carry. Over the past decade, the rate of increase in delinquency cases has exceeded the number of juvenile defense attorneys and


\(^{281}\) See id.

\(^{282}\) At least one commentator has argued that quality investigation is a better guarantor of accurate fact-finding than quality counsel. See Darryl Brown, The Decline of Defense Counsel and the Rise of Accuracy, 93 CAL. L. REV. 1585, 1591 (2005) (“[A]djudication is becoming a relatively less important procedural stage for truth-finding as investigation becomes more so; adjudication is weaker than we thought, but investigation is, in some compensatory ways, growing stronger as it also grows less adversarial.”). Id.

\(^{283}\) See Jones, supra note 237, at 11.

\(^{284}\) See id.


\(^{287}\) See Jones, supra note 237, at 11.
support staff for delinquency cases. In Kentucky, attorneys in two-thirds of the jurisdictions surveyed carried a caseload of 500-1,000 per year, whereas Louisiana defenders had as many as 800 cases per year and Virginia juvenile defenders carried caseloads up to 1,500. In comparison, the National Advisory Commission on Criminal Justice Standards and Goals calls on juvenile attorneys not to handle more than 200 cases per year. The effect of high caseloads sends tremors throughout the entire system, because attorneys juggling so many cases fail to investigate or file motions, and encourage guilty pleas, all of which call into question the validity of adjudications in juvenile court.

Juvenile court culture also works against a child’s ability to receive an accurate and fair hearing in juvenile court. Despite the due process revolution in the 1960s and the juvenile court’s adoption of an adversarial model, remnants of the “best interest of the child” philosophy remain. Thus, juvenile attorneys who advocate zealously for their clients may find themselves in disfavor in the eyes of judges and prosecutors. A good example comes from the ABA’s study on access and the quality of counsel in Texas. In Texas, juvenile lawyers rely on local judges for case appointments, prompting one prosecutor to comment, “[I]t is obvious that the contract attorneys are beholden to the judge.” The Texas study found that judges did not deny appointments to those attorneys who performed poorly, but commonly punished lawyers for zealous advocacy, challenging a ruling, or spending too much time on a case. In Georgia, there were complaints that juvenile courts did not respect defense advocacy in delinquency cases. Both judge and prosecutors believe in a “conspiracy of justice” whereby everyone in the courtroom should be acting in the best interest of the child. A comment by one of Georgia’s judges sums up the lack of zealous advocacy: “I expect my lawyers to act in the best interests of the child. If they can get the child off, but it is not in that child’s best interest, then they should not do it.” Observers in Montana noted that zealous advocacy was met with hostility from judges, probation officers, prosecutors, whereas other defenders who did not “rock the boat” were greeted positively. A non-adversarial culture means that no one is zealously advocating for children in

288. See id. at 8.
289. See id. at 9.
292. Id.
293. See id.
295. See id. at 30.
296. Id. at 31.
The “best interest” model also has the unintended (or intended) effect of changing the burden of proof from beyond a reasonable doubt to best interests.\^298

The juvenile court was revolutionized in the 1960s precisely because the “best interests” model led to arbitrary decision-making and injustice. Accuracy in adjudications was sacrificed to promote dispositions thought to be in a child’s best interests. As long as this persists, juveniles will be at great risk of wrongful convictions in juvenile court.

3. False Guilty Pleas

The juvenile court culture in turn creates a system in which there is an extremely high rate of guilty pleas. Guilty pleas do not, by their nature, enhance the possibility for wrongful conviction. In many ways, pleas allow for cases to be adjudicated quickly and for the child to move on, if in fact he or she is delinquent. A plea negotiation can be an opportunity for defense counsel to receive a positive outcome for her client, and it is not necessarily a failure. However, the problem is that pleas are used so often in juvenile court without investigation or advocacy that there is a high probability that innocent children are being asked by the courts and their lawyers to take guilty pleas. The literature on adult wrongful conviction is filled with stories of innocent suspects accepting false guilty pleas.\^299

There are several reasons why false guilty pleas can occur. First, it will often be the case that innocent clients are more risk averse than guilty clients, and thus are more likely to want to avoid the risk of trial.\^300 Next, guilty pleas are often encouraged out of a desire to avoid the adversarial nature of litigation.\^301 As defense attorneys work more with prosecutors and judges in the same courtroom, defense counsel feels pressure to accept deals offered by the prosecution.\^302 Litigation requires filing discovery and pretrial motions, which defense attorneys quickly learn are frowned upon by both prosecutors and judges.\^303 Finally, defense attorneys often approach their cases with an assumption that their clients are guilty, especially in cases where their clients have confessed.\^304

\^298. See Jones, supra note 237, at 14.
\^299. See Daina Borteck, Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty, 25 CARDOZO L. REV. 1429, 1439-44 (2004); see also F. Andrew Hessick & Reshma Saujani, Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge, 16 BYU J. PUB. L. 189, 190 (2002); Drizin & Leo, supra note 12, at 922 (noting that in the false confession context, defense attorneys are more likely to pressure their clients to waive their constitutional right to a trial and take a false guilty plea in the face of a confession).
\^300. See Hessick & Saujani, supra note 299, at 201-02.
\^301. See id. at 211-14.
\^302. See id. at 210-11.
\^303. See id. at 213.
\^304. See id.
The combination of heavy caseloads, juvenile court culture that frowns upon advocacy and lawyers who only meet their clients on the day of adjudication creates a system of representation ripe for wrongful convictions. In Montana, one judge reported that he only had 2-3 trials a year and defenders stated that cases rarely go to trial. One attorney explained, “I tell the clients the rights that they have, but the risks are so low, they don’t want to go through with it. The worst that they can look at is [a county facility] until 18.”

The problem with this approach, besides shirking professional responsibility, is that children do not necessarily understand the plea system and could be pleading guilty when they would like to fight the charges. Youth remain uninformed about their decisions because attorneys fail to communicate with children at an appropriate language level. Kaban and Quinlan’s study directly deals with children’s lack of understanding during the plea phase. The language that judges and lawyers use during plea negotiations is often incomprehensible to children, even those children with previous involvement with the court system. Thus, unless both the judge and lawyer use language and vocabulary that does not exceed an eighth grade level and concepts are explained more than once, there is a good chance that children will simply not understand that they are waiving their right to a trial and admitting guilt. Such was the case with one youth interviewed in Montana, who stated he “didn’t know that [he] could have fought the charges.”

False guilty pleas, like false confessions, are higher among juveniles for a variety of developmental reasons. Juveniles tend to focus on the short-term rather than the long term, they are more likely to comply with adult authority figures, and they are not as mature in their decision-making or judgment.

Innocent children find themselves at a disadvantage in a court system where the court does not speak to them in an age-appropriate manner, their attorneys are too busy to investigate the case, and judges and prosecutors frown upon assertions of innocence and exercising a right to trial. One of the enduring lessons of Gault is that due process is not just about fairness, it is about accuracy, and this type of environment is not one in which accuracy is sought or encouraged. When an innocent child pleads guilty to a crime he or she did not commit, it is not only an injustice to the individual child, but it undermines our entire juvenile justice system.

306. Id.
308. See id. at 41.
309. See id. at 48-49.
311. See generally, In re Gault, 387 U.S. at 78-81.
4. Post-Conviction Advocacy: Fewer Appeals and Limited Access to Post-Conviction Relief

Post-conviction advocacy is essential to discovering and righting a wrongful conviction. Invariably, the prison cell doors of an innocent inmate are opened by prevailing on direct appeals, state post-conviction motions, and federal habeas motions. In fact, all the innocence projects throughout the country are concerned primarily with filing post-convictions motions for DNA testing and post-conviction motions for new trials in order to reverse mistakes at the trial court level. Although due process requires that a juvenile adjudicated delinquent have the same access to appeal as a criminal defendant in the jurisdiction, and every state grants a statutory right to appeal, far fewer juvenile cases are appealed than are adult cases.312 Moreover, post-conviction relief is a statutory right, not a constitutional right, and not every state affords juveniles that right.313


313. Illinois courts, for example, have repeatedly held that the Post-Conviction Hearing Act does not apply to juvenile proceedings. See In re William M., 795 N.E.2d 269 (Ill. 2003); see also J.H. v. State, 809 N.E.2d 456 (Ind. Ct. App. 2004) (holding that post-conviction rights were not applicable to juveniles); K.O. v. State, 765 So. 2d 901, 903 (Fl. Dist. Ct. App. 2000) (“[T]here is no collateral review in juvenile delinquency proceedings comparable to adult proceedings and the criminal appeal statute is inapplicable.”); In re R.J., 842 A.2d 685 (Pa. Super. Ct. 2004); cf. State v. Doe, 34 P.3d 1110 (Id. Ct. App. 2001) (holding that Uniform Post Convictions Procedures Act applies to juveniles); In re R.M., 252 A.2d 237, 239 (N.J.Juv. & Dom. Rel.Ct. 1969) (“juvenile has the procedural right to make an application in the nature of post-conviction relief in the Juvenile and Domestic Relations Court”); Robinson v. Boley State School for Boys, 554 P.2d 44, 46 (Okla. Crim. App. 1976) (“In arriving at this conclusion we are not unmindful that the provisions of 22 O.S.1971, § 1080, et seq. [post-conviction statute] were enacted primarily for . . . adults . . . however, we HOLD that the same rights must be afforded juvenile delinquents where committed for a violation of the penal code in order to comply with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.”); State v. Golden, 47 P.3d 587, 593 (Wash. Ct. App. 2002) (juvenile has right to collateral review to withdraw guilty plea).

Some states by statute have created a right to juvenile post-conviction relief. See, e.g., TENN. CODE ANN. §37-1-302 (2004) (establishing juvenile right to post-commitment relief); WIS. STAT. ANN. §974.07 (2004) (creating statutory right for juvenile adjudicated delinquent to move for DNA testing); OHIO REV. CODE ANN. §2953.21 (2004) (explicitly allowing post-conviction relief for juveniles adjudicated delinquent). However, the majority of states are silent as to whether their post-conviction statutes apply to juveniles. The language of the statutes speaks of those who have been convicted of crimes or unlawfully imprisoned. See e.g., ALASKA STAT. §12.72.010 (2004) (“A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief”); ARIZ. REV. STAT. ANN. §13-4231 (2004) (“any person who has been convicted of or sentenced for a criminal offense may”); CAL. PENAL CODE §1473 (2005) (habeas applies for every person unlawfully imprisoned or restrained of liberty); GA. CODE ANN. §5-5-41 (2004) (DNA testing only available for a “person” convicted of a serious violent felony); IOWA CODE ANN. § 822.2 (2004); MD. CODE ANN., CRIM. PROC. § 7-101 (2004) (“a person convicted in any court in
Even in areas where juvenile defenders maintain an active and zealous practice in juvenile court, a noteworthy appellate or post-conviction practice has not followed.\textsuperscript{314} In 1990 in Allegheny County, Pennsylvania, which houses Pittsburgh and surrounding communities, 448 adult appeals were filed compared to one juvenile appeal.\textsuperscript{315} In Texas, from the period between 1980 and 1997, the Texas Supreme Court (juvenile appeals in Texas bypass the Texas Court of Criminal Appeals) published only eight decisions, four of which were \textit{per curium} decisions.\textsuperscript{316} During 1996 to 2002, Maryland saw 540 criminal appeals and 747 civil appeals, while the juvenile court produced 32 from both the defense and prosecution.\textsuperscript{317}

The ABA’s Juvenile Justice Standards state that attorneys should continue representing children past disposition.\textsuperscript{318} While some juvenile defenders point out that a good amount of juvenile cases probably need not be appealed, especially those that have short sentences when the appellate process can be quite lengthy and where the juvenile court is unlikely to stay a disposition pending appeal,\textsuperscript{319} a counterargument can be made that to prevent wrongful
convictions, appeals should be based on the merits regardless of the length of the juvenile’s sentence, especially in cases where the evidence of guilt is weak.

Institutionally, there are a great deal of barriers to providing appellate support to children in juvenile court. First, many defender offices struggle financially and with large caseloads on a daily basis, which makes building an effective appellate practice a low priority. Moreover, the high rate of pleas in juvenile court, as discussed above, diminishes a lawyer’s opportunity to appeal a decision. 320 Second, similar to juveniles’ lack of awareness of their right to counsel and right to remain silent, many juveniles are less aware and even less assertive in securing their right to appeal. 321 Finally, the main reason given for the lack of appellate work is that those in the juvenile court system feel that appeals undermine the juvenile courts’ efforts to rehabilitate the child and end the cycle of recidivism. 322 Taking an appeal requires that juveniles refrain from discussing their case, which in turn means children cannot talk with parents and teachers or participate in rehabilitation programs that often center on a child’s admission of guilt as vital step in emotional and mental health. 323 Thus, some defenders opt out of an appeal in order to protect the long-term developmental needs of their clients. 324

Barriers to appeal can be legal as well as institutional as documented by the appellate rules for juvenile court in Texas. Juvenile cases in Texas are considered civil rather than criminal in nature so the rules of civil appellate procedure, rather than appellate criminal procedure, apply. 325 Thus, when a boy wanted to appeal his juvenile court ruling and motion for a new trial, both were denied as untimely and unwaivable due to the Texas Rules Appellate procedure for civil cases. 326 In another Texas juvenile appeal case, the court held that it should not give any special treatment to juvenile appeals despite their “quasi-criminal” nature. 327 Regardless of the fact that a majority of juvenile appeals are similar to criminal appeals in terms of evidentiary challenges (i.e. expert testimony, hearsay) or challenges to the weight or sufficiency of the evidence, 328 the Texas Supreme Court neither recognizes a juvenile’s right to effective

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320. See Puritz & Shang, supra note 290, at 26.
321. See Harris, supra note 312, at 223.
322. See id. at 227-28.
323. See id. at 224.
324. The authors have seen no evidence that an admission by the child increases the child’s chances of being rehabilitated. In In re Gault, the United States Supreme Court expressed a similar skepticism of the claim that confession aids the child’s treatment, stating that where a child is induced to confess by the promise of treatment, and then is subjected to punishment (or “treatment” that feels like punishment), “the child’s reaction is likely to be hostile and adverse.” 387 U.S. at 52.
326. See Kinceade, supra note 316, at 17-18.
328. See Harris, supra note 312, at 216.
assistance of counsel on appeal, nor that *Gault* or *Kent* have any application to juvenile appeals.\(^{329}\)

However, many juvenile court adjudications can impose long-term consequences on children, such as their ability to join the armed forces or to receive certain types of financial aid, and in sex offenses, the obligation to register as a sex offender for the rest of their lives. Thus, there are many occasions where both zealous advocacy and “best interests” advocacy require that attorneys continue their representation after disposition. Also, appellate practice makes it possible for reviewing courts to make legal and factual corrections and it ensures that all parties in the juvenile court are treated fairly and uniformly.\(^{330}\) Juvenile courts exist in a culture of informality and confidentiality and effective appellate review works as a counterbalance, allowing for more fairness and accountability.\(^{331}\) As discussed in Part IV, many juvenile defenders complain that judges do not use a reasonable doubt standard.\(^{332}\) Effective appellate practice makes for better oversight and accuracy. As one juvenile defender in Maryland stated, “The judge is always going to convict. I have won five out of the last six appeals I took to the Court of Special Appeals. In one year I handle about seven to eight juvenile appeals.”\(^{333}\)

In addition, there is a dire need for post-conviction motion practice to create accountability for attorneys who provide ineffective assistance of counsel to their clients in juvenile courts. Ineffective assistance of counsel claims are the bread-and-butter of post-conviction motions. Such claims allow a court to open the record and correct any potential errors at the trial stage that could have led to a wrongful conviction.\(^{334}\) The failure of attorneys to pursue post-conviction relief on behalf of juvenile defendants has resulted in a dearth of appellate court opinions addressing what constitutes ineffective assistance of counsel in juvenile court cases. In the absence of such guidelines, there is little likelihood that juvenile court practice will ever improve.

However, there are special obstacles in raising and winning ineffective assistance of counsel appeals from juvenile court because children will have difficulty proving the two-part test articulated by the Supreme Court in

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329. See Kinceade, supra note 316, at 50.
331. See Harris, supra note 312, at 229.
332. See Part IV, infra, and accompanying text.
333. Maryland Report, supra note 259, at 32.
334. See, e.g., In re Anthony J., 11 Cal. Rptr. 3d 865, 872-73 (Cal. Ct. App. 2004) (after finding juvenile’s counsel ineffective for failing to preserve right to appeal, the appellate court found there was insufficient evidence to sustain the adjudication); In re Matthew K, No. E031468, 2002 WL 31840658, at *1 (Cal. Ct. App. Dec. 19, 2002) (by allowing habeas relief on a juvenile’s ineffective assistance of counsel claim, the trial court reversed the delinquency adjudication, finding the juvenile’s confession was coerced and inadmissible, and remanded the case); In re Parris W., 770 A.2d 202, 209-10 (Md. 2001) (after finding juvenile’s lawyer ineffective for incorrectly listing the date of subpoenas for five corroborating witnesses, the appellate court reviewed the potential statements of the witnesses and found the juvenile could have presented a sound alibi defense).
Strickland v. Washington. Strickland requires that a defendant in adult court prove 1) that his counsel committed an error so egregious, it is considered professionally unreasonable; and 2) that the error caused the defendant to be prejudiced. Juveniles will have difficulty meeting the first prong because a juvenile attorney’s competence, if measured by the degree of zealous advocacy, will be lower than in adult court because of the juvenile court’s emphasis on best interests. Even though a lack of zealous advocacy, failing to file motions or subpoena records, instructing the client to tell the judge “everything,” and accepting any and all pleas would fall below the Strickland standard for attorney competence in criminal court, it is unlikely that such conduct would fall below an objective standard of competence for juvenile attorneys. Because juvenile courts are rife with judges and lawyers who believe it is their duty to “help” children rather than ensure a complete due process adjudication, Strickland’s stress on prevailing professional norms would hinder a child’s ineffectiveness claim. Second, prejudice remains difficult to prove because children’s memories are often inadequate. The failure of children to remember what strategy planning, or lack thereof, went into the case’s preparation undoubtedly will hamper their chances on appeal or post-conviction. Moreover, because juvenile cases often result in a plea, the records are nearly empty, leaving little room to argue that the trial attorney failed to act as a zealous advocate or that if he had so acted, the outcome of the case would have been different.

Because Strickland offers juveniles limited protection against ineffective assistance by counsel, one suggestion has been to scrap the Strickland standard for juveniles and replace it with a checklist approach, whereby a responsible juvenile attorney is required to perform certain acts. A potential standard could be similar to the Ten Core Principles outlined by the National Juvenile

336. Id. at 687. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment[.]. . . [and] actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” Id. at 691, 693.
337. See Ellen Marrus, Effective Assistance of Counsel in the Wonderland of “Kiddie Court”—Why the Queen of Hearts Trumps Strickland, 39 No. 4 CRIM. L. BULL. 1 (2003).
338. See id.
339. See id.
340. See id.
341. See id. Before Strickland was decided, some courts required that defense counsel follow a checklist, derived from the A.B.A. Standards Relating to the Defense Function, and a failure to follow the checklist resulted in a successful ineffective assistance of counsel claim for the defendant. See, e.g., U.S. v. DeCoster, 487 F.2d 1197, 1203 n.23 (D.C. Cir. 1973) (“The duties articulated herein are meant as a starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance.”).
Defender Center. Requiring juvenile lawyers to follow the principles would ensure that juvenile defense lawyers engage in zealous advocacy and that juvenile defenders stay abreast in criminal, juvenile, and educational law as well as child development. In addition to formulating an alternative standard, lawyers need to be encouraged to bring more ineffective assistance of counsel claims from the juvenile courts. Only by raising claims of ineffectiveness of counsel on appeal, will there develop a larger body of case law addressing what constitutes effective assistance of counsel in juvenile courts.

Moreover, the failure to appeal prevents a juvenile from obtaining habeas relief. Attorneys can help prevent wrongful convictions by seeking a writ of habeas corpus relief in state or federal court. Indeed, the Gault case made its way to the United States Supreme Court after the Arizona Supreme Court affirmed the denial of a writ of habeas corpus. Although juveniles rarely seek federal habeas relief, there are a number of federal court decisions holding that state court juvenile convictions must be reversed because the state courts are contrary to or an unreasonable application of federal law as established by the United States Supreme Court.


343. See Marrus, supra note 337, at 1.

344. See e.g., In re Anthony J., 11 Cal. Rptr. 3d at 867 (juvenile denied effective assistance of counsel when juvenile’s lawyer failed to file an appeal from the juvenile adjudication); In re Doe, 108 P.3d 966, 970 (Haw. 2005) (holding that effective assistance of counsel should apply in juvenile cases as in adult cases, thus “a defective appeal caused by counsel, as is the case here, does not invalidate the appeal”); State ex rel. Juvenile Dep’t of Multnomah County, 80 P.3d 147, 150 (Or. Ct. App. 2003) (resolving juvenile’s ineffective assistance of counsel case under federal and state constitutional standards in adult cases when “youth alleges that he received constitutionally inadequate assistance of trial counsel”).


346. See, e.g., Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005); A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004).
PART III: FURTHER RISKS OF WRONGFUL CONVICTION—TAKING AWAY FROM JUVENILES THAT WHICH IS GRANTED TO ADULTS

Part II dealt with the procedural inadequacies in juvenile court. As stated, juveniles are afforded certain rights but either cannot take advantage of them due to developmental incompetence, unknowing and unintelligent waivers, ineffective assistance of counsel and a culture which discourages zealous advocacy. However, children in juvenile court confront additional risks of wrongful convictions that their adult counterparts never face. This part of the article documents how a denial of certain rights, including a lack of adequate probable cause procedures and jury trials may make children even more susceptible to wrongful convictions.

A. Probable Cause

Discussions of probable cause usually center around the Fourth Amendment and its central role in requiring probable cause for warrantless arrests and searches and seizures. Probable cause also plays a key role in preventing intrusions on liberty and privacy by mandating that a “neutral and detached magistrate” make probable cause determinations. In the criminal process context, a hearing to determine probable cause can act as a screening function, weeding out cases with merit from those that lack a sufficient basis for prosecution. A probable cause requirement also serves as an important discovery function; the accused has the opportunity to see some of the evidence that will be used against him as well as witnesses who might be testifying.

A probable cause requirement can have the same exact benefits in juvenile court; moreover, a probable cause statement can also serve as the notice required by Gault in juvenile delinquency adjudications. Full notice of the charges ensures that the State accurately frames the issues that comprise the basis for the claim, as well as the factual information that provides methods for discovery and the fairest determination of guilt or innocence.

Despite the benefits and the procedural safeguards of a probable cause requirement, most states do not require a probable cause hearing outside of a decision to transfer a juvenile to adult court, or as a means for holding juveniles in detention. Writing in 1984, Professor Feld commented on Minnesota’s failure to mandate a probable cause hearing for non-detained or non-transferred

349. See id.
350. 387 U.S. at 34.
352. See id. at 220-21 (discussing Minnesota juvenile court rules).
The majority of states follow a similar procedure to that of Minnesota, requiring only that the juvenile court maintain jurisdiction over the child, meaning the production of a vague document stating that the child has committed an act that makes him subject to juvenile court jurisdiction. Even in states that require the state to lay out the factual basis for the charges against the child, those jurisdictions do not require the same level of detail as in a criminal complaint or indictment. Moreover, juveniles do not have a right to a grand jury proceeding. While New York's Chief Judge Sol Wachtler once said that "[e]ven a modestly competent district attorney can get a grand jury to indict a ham sandwich", courts do not even afford juveniles this modicum of probable cause protection.

While the Supreme Court has not held that a non-detained youth has a constitutional right to a probable cause hearing, such a rule makes procedural sense in terms of accuracy and fairness. While a probable cause screening requirement poses some inconvenience on the State, a lack of such proceeding places a tremendous burden on a child. Without a probable cause screening, a child has to go through the entire delinquency process, all the way through trial, without the state ever having “to justify in writing and submit to judicial scrutiny

353. See id.
354. See id. at 222.
355. See id. at 222-23.
357. A recent juvenile wrongful conviction demonstrates that grand juries can, at times, function to prevent a wrongful conviction from occurring. In Carrollton, Georgia, twelve year old J.A. was arrested and charged with the murder of eight year old Amy Yates in juvenile court. No full blown probable cause hearing was held and J.A. was detained for more than fifteen months while the case was readied for trial. The only evidence against the boy was a so-called confession in which the boy, after being interrogated for several hours while his parents waited outside, told police he accidentally struck Amy while the two were playing. After the court denied his fully litigated motion to suppress, J.A. entered an Alford plea, which allowed him to maintain his innocence in exchange for a sentence to a rehabilitation center, as opposed to a correctional facility. See Craig Schnieder, Boy Gets Plea Deal, ATL. J. CONSTIT., July 15, 2005, at 1E. Almost one year after J.A.’s sentencing, a second teenager, Chris Gossett, came forward and confessed in great detail to having killed Yates. Gossett’s confession contained details that were not released to the public and his account of trying to sexually assault Amy and accidentally suffocating her to quiet her screaming closely matched the objective evidence of the crime. J.A.’s attorney filed a motion to vacate J.A.’s plea, which the court granted. See Don Plummer, The Amy Yates Murder: Confessions, Denials, Leave Case in Limbo, ATL. J. CONSTIT., April 9, 2006, at 1A. Faced with two confessions and not a shred of evidence tying either boy to the crime, the prosecutor convened a grand jury and presented to the jury all of the evidence the police had against both boys. Bill Torpy, Who Strangled 8-year-old? Case Goes to Grand Jury Today, ATL. J. CONSTIT., October 23, 2006, at 1B. After six days of hearing evidence, the jury indicted Chris Gossett for involuntary manslaughter, implicitly conceding that the State did not have enough evidence to indict and convict J.A. Jeffrey Scott, Yates Slaying Suspect Would Serve No More Than Two Years, ATL. J. CONSTIT, November 4, 2006, at 1A.
the underlying factual basis for that imposition.” Forcing an innocent child to go through an entire delinquency process not only places a financial burden on all, but also provides a perverse incentive for children to plead guilty because it is safer, less expensive, or more expedient. A probable cause requirement may also deter prosecutorial abuses of discretion, a recurring problem in most wrongful conviction cases.

B. Judicial Versus Jury Factfinding

The public discourse on wrongful convictions has examined the actions of prosecutors, defense lawyers, witnesses, and police but rarely has it assessed the role of judges in these miscarriages of justice. However, a closer examination reveals that judges are often some of the central actors in the wrongful conviction of an innocent defendant. In most false confession cases, for example, judges allowed the State to introduce confessions which were not only false, but also, in all likelihood, coerced. They are the gatekeepers of unreliable evidence and they routinely admit into evidence confessions that turn out to be false, eyewitness testimony that is erroneous, junk science, and jailhouse snitch testimony.

Judges also increase the risk of wrongful convictions by rebuking conscientious defense lawyers who seek to zealously advocate for a defendant. A lawyer challenging a judicial ruling is likely to result in a biased judge casting the defendant in an even worse light. The state studies by the ABA confirm this perception with numerous anecdotes about judges chastising dedicated juvenile defense attorneys. As explained in the Appearance of Justice,

On paper, each judge is subject to some higher court review, but as a practical matter, the judge who acquires an aversion to certain counsel can destroy the lawyer’s effectiveness in countless unreviewable ways.

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360. Id. at 227.
361. See Davis, supra note 348, at 739.
362. In Illinois, for example, juveniles are entitled to a “probable cause” determination at their detention hearing, but only if prosecutors seek to have the child in custody pending trial. Even under these circumstances, the State may establish probably cause via “proffer,” usually in the form of a summary of a portion of the police reports. Allowing the State to proceed using proffers prevents the defense from raising any challenges to the merit of the charges, thus losing a tool and preventing the judge from screening out extraordinarily bad cases. See 705 Ill. Comp. Stat. 405/5-501 (2004); see also In re C.J., 764 N.E.2d 1153 (Ill. App. Ct. 2002), appeal denied, 770 N.E.2d 219 (Ill. 2002) (holding that State’s ability to use proffers did not violate a juvenile’s due process rights).
364. See id. at 539-40.
365. See Drizin & Leo, supra note 12, at 922.
366. See Sherrer, supra note 363, at 563.
367. See, e.g., Maryland Report, supra note 259, at 4 (“Defenders who zealously advocate for their client are seen as interfering with the ‘best interest’ model of the juvenile court.”).
Simple matters such as continuances, the privilege of filing a slightly late brief, such courtesies of the courtroom as a full oral hearing—all of these and many more amenities are sometimes unavailable to the attorney who is in disfavor with the court.368

While a criminal defendant in adult court has the added protection of a jury, most children in juvenile court only have a judge as factfinder and arbiter of guilt or innocence.369 The Supreme Court, in *McKeiver v. Pennsylvania*, asserted that a jury is not a constitutional necessity to ensure accurate factfinding.370 Twenty years ago, Professor Feld commented on the lack of jury trials in Minnesota juvenile court proceedings and how judicial factfinding left juvenile proceedings open to abuse and inaccuracies.371

One of the main differences between jury and judicial factfinding is the application of proof of guilt “beyond a reasonable doubt.”372 In *In re Winship*, the Supreme Court held that the burden to find a youth delinquent is “proof beyond a reasonable doubt.”373 For a jury, guilt beyond a reasonable doubt involves both accurate factfinding and a complex determination of moral culpability and providing a nexus between the government’s decision to criminalize an act and the community’s sense of justice in the law’s application.374 Numerous studies have shown “that juries are more likely to acquit than are judges.”375 This sentiment was echoed in the ABA state studies with defense lawyers readily acknowledging that judges do not apply a proof beyond a reasonable doubt standard.376 Judges and juries evaluate evidence, sentiments about the law, and defendant sympathy differently, with juries more...
likely to demand heightened proof of facts and be more sympathetic to the defendant’s youthfulness.377 While in the majority of jurisdictions that allow juvenile court trials, juveniles rarely invoke the right,378 a jury can enforce the standard of proof of guilt beyond a reasonable doubt in marginal fact cases.379 In addition, a jury can reduce prosecutorial over-charging, a result which can reduce the incentive for juveniles to enter a false guilty plea.380

McKeiver was premised on the idea that judges can be just as accurate in their factfinding ability as juries.381 However, in recent decades, as juvenile justice advocates have attempted to overturn McKeiver, it has become clearer that McKeiver’s presumption of a lack of difference in jury-judicial factfinding is not on solid ground.382 Just a cursory look at case law demonstrates that juvenile court judges are often willing to “convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt.”383 In one Arkansas case, a youth was convicted of stealing $40 from his mother even though his mother, the prosecution’s only witness, testified that she never saw her son take the money.384 Moreover, the youth was never found in possession of any money.385 In Florida, a judge found a juvenile delinquent of unlawfully entering a dwelling and stealing a firearm, based only on evidence that a gun was missing and a neighbor saw the boy leave the garage area of the house in question.386 The judge ignored evidence that the boy testified he was trying to see if his friend was home; there was no evidence of forced entry; no one saw the boy inside the dwelling; no fingerprints were recovered; the boy was never seen with the gun; and there was another teenage boy in the home who had an opportunity to take

377. See Feld, Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court, supra note 18, at 245-46. Not only are juries potentially more sympathetic to youth defendants, there is also evidence that judges bring some skepticism to the eyewitness testimony of children, many of whom would testify in juvenile court. See Leippe & Romanczyk, supra note 147, at 105. In situations in which a child is the eyewitness, juries are more likely to look harder at the other evidence presented, unlike in other cases where juries have a tendency to over believe eyewitness testimony. Id. In situations in which a child testifies, juries pay closer attention to poor evidence on behalf of the prosecution, which can result in fewer guilty decisions. See id. at 115; see also Leippe et al, supra note 204, at 177.


379. See Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in the Juvenile Courts, 38 WAKE FOREST L. REV. 1111, 1150 (2003) [hereinafter Feld, McKeiver].

380. Id.

381. 403 U.S. at 543


383. Id. at 564.


385. Id.

the weapon. While such cases were overturned on appeal, there is no way to know how many other legally innocent juveniles have been saddled with wrongful convictions.

Another impediment to fair judicial factfinding is a judge’s exposure to inadmissible evidence from outside the record. If a juvenile is not granted access to a jury, the same judge who hears his trial will most likely be the judge who presides over any pre-trial suppression hearing where incriminating evidence of admissions, tangible items, and identifications will be discussed. The lack of jury proceedings in juvenile court allow suppression hearings to take place right alongside the trial, which allows the judge access to prejudicial information to which a jury would not be privy. Because a large amount of youth crime involves group activity, there is a high chance that the same judge could preside over the trial of one youth, where the other youth has already entered a guilty plea. This problem exists even without a co-conspirator, as a child could have previously appeared in front of the same judge on another case, thus increasing the judge’s difficulty in entertaining claims of innocence. While appellate courts actively engage in the fiction that juvenile court judges have the ability to compartmentalize the information they hear, the empirical evidence demonstrates that this is not the case—exposure to confidential, prejudicial information affects a judge’s impartiality.

In addition, in juvenile courts there is a tremendous problem of judges hearing repeated testimony from similar faces or similar stories. This danger is particularly heightened when judges hear testimony from the same police
officers. There are numerous, documented cases of judges crediting police testimony that was so blatantly false that the prosecution could not have possibly met its burden of presenting a credible witness.\textsuperscript{393} Judges who sit in one courtroom get to know the jurisdiction’s police officers, and if a judge forms an opinion that an officer is a “good cop,” it creates a natural tendency to believe that police officer is always telling the truth.\textsuperscript{394} In addition to police officers, a judge might have a child in front of her on several occasions, thus giving the judge access to a prior history about the child or the child’s family that could taint her ability to be impartial. Even if the child is in front of the judge for the first time, a judge’s experience of hearing years of juvenile cases might make the judge unduly skeptical of the youth’s testimony.\textsuperscript{395}

\textit{McKeiver} has long been considered ripe for overruling.\textsuperscript{396} Decades of case law and studies on jury versus judicial factfinding make the \textit{McKeiver} plurality opinion seem even more suspect and out-dated. Although the presence of a jury will not immunize a juvenile against a wrongful conviction -- juries have wrongfully convicted many innocent defendants who were later exonerated -- it provides additional protection against wrongful convictions by holding prosecutors to their standard of proof.

C. \textit{Use of the Media and Public Access to Juvenile Courts}

The media has played a tremendous role in exposing and rectifying wrongful convictions throughout this country. In \textit{Richmond Newspapers, Inc. et al. v. Virginia}, the Supreme Court recognized that the public and press have a right to attend criminal trials through the First and Ninth Amendments.\textsuperscript{397} While at times the media has prejudiced a defendant’s right to a fair trial, in recent years newspapers, magazines, and television have played leading roles in uncovering wrongful convictions.\textsuperscript{398} Examples of quality investigative reporting in the area of wrongful convictions are legion\textsuperscript{399} and stories of active journalists resonate throughout wrongful conviction stories.

\begin{itemize}
\item \textsuperscript{393} See Guggenheim & Hertz, supra note 382, at 568.
\item \textsuperscript{394} See id. at 574.
\item \textsuperscript{395} See id. Guggenheim & Hertz note that many juvenile respondents who are in possession of a gun claim they found the gun; those in possession of drugs often claim that the police planted the drugs; and those in assault cases often claim self-defense. If a judge sits over many trials and hears any one of those defenses presented falsely (or the judge considers the defense false) it makes it strikingly more difficult to keep an open mind whenever another child presents the same or similar defense. See id. at 574-75.
\item \textsuperscript{396} See Feld, McKeiver, supra note 379, at 1224 (documenting how \textit{McKeiver} was a poor decision even when written, and now in light of recent decisions, such as Apprendi v. New Jersey, 530 U.S. 466 (2000), it is time that the Court revisit \textit{McKeiver} and overrule its previous holding).
\item \textsuperscript{397} Richmond Newspapers, Inc., et al. v. Virginia, 448 U.S. 555, 580 (1980).
\item \textsuperscript{398} See Rob Warden, The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions, 70 UMKC L. Rev. 803, 804-806 (2002).
\item \textsuperscript{399} The Pittsburgh Post-Gazette ran a ten-part series on prosecutorial misconduct in 1998 and 1999, and the Chicago Tribune published a similar five part series in 1999. See id. at 805. The
Dennis Hamill at the New York Daily News occasionally makes the subject of his column people whom he believes have been wrongfully convicted. The Queens District Attorney reopened Gerald Harris’s case thanks to the work of Hamill and Harris’s boxing trainer, and the reexamination eventually led to Harris’s release. Barry Scheck and Peter Neufeld have made use of the media in their work for the Innocence Project. In the case of Walter Snyder, Scheck and Neufeld already had exculpatory DNA evidence for Mr. Snyder, but the Governor of Virginia refused to move as Mr. Snyder’s innocence was a political liability. Peter Neufeld contacted the leading newspaper in Richmond which began to run stories about Walter Snyder and his family. The Governor then changed course and pardoned Walter Snyder.

Unfortunately for juveniles, reporters have been far less aggressive in ferreting out wrongful convictions in our nation’s juvenile courts. The Supreme Court has yet to rule on whether the public and press access to criminal trials extends to delinquency proceedings as well. This has occurred for a number of reasons: first, confidentiality provisions in many state juvenile courts limit the ability of the press to report on juvenile court proceedings either by preventing them from gaining access to court files or from gaining information from traditional sources such as the police, prosecutors or defense attorneys. Many newspapers have their own policies that limit the release of the names of juvenile offenders, at least until they are prosecuted as adults. Second, although nearly every major newspaper has a criminal court reporter, few regularly assign reporters to cover the juvenile court. Covering juvenile courts is not likely to be considered a plum assignment for young reporters. Just like defense attorneys and prosecutors who use juvenile courts as a weigh station for the “real lawyering” that takes place in criminal court, reporters assigned to juvenile court are likely looking forward to the day they can leave.

However, the Ryan Harris murder case in Chicago shows just how effective the media can be when covering juvenile cases. In July 1998, Ryan Harris disappeared after last being seen riding her bike away from her grandmother’s home. Advanced DNA technology and more sensitive college journalism students has made the media more receptive to wrongful conviction claims than it was earlier in the twentieth century. See id. at 845. It was the work of the Chicago Tribune as well as that of Northwestern University Center on Wrongful Convictions that Governor George Ryan credited in putting Illinois’s death penalty on moratorium. See id. at 846.

400. See CHRISTIANSON, supra note 356, at 47.
401. Id.
402. See SHECK, NUEFELD AND DWYER, supra note 9, at 71-72.
403. See id. at 71-72.
404. Id. at 72.
406. Id. at § 1.
407. Id. at § 1.
two boys quickly confessed and were charged based on their statements because “[i]n their statements, there [were] elements of this case that would only be known to the detectives or the perpetrators.” Then three weeks later the charges against the boys were dropped as the crime lab discovered semen on the girl’s underpants. The Chicago Tribune played a large role in uncovering and documenting the flaws in the interrogation and the two young boys in the Ryan Harris murder. Tribune journalists Maurice Possley and Steve Mills continued to run stories throughout the investigation of the case, throwing light on the manner in which the juveniles were interrogated.

In subsequent articles, the journalists noted how it was easier to charge the two boys with the murder than the man who looked to be the true suspect because the Cook County State’s Attorney’s Office did not have a felony review requirement in juvenile cases. Finally, the Tribune questioned police conduct in relation to how the boys were given their Miranda warnings as well as the failure to video or audiotape the confessions. Moreover, the same journalists involved in the Ryan Harris case have continued to bring to light abuses children suffer at the hands of law enforcement. Their stories demonstrate the manner in which an active media involvement can shed light on how juveniles are treated in the law enforcement context, thereby debunking the myth that young suspects are treated with kid gloves.

The media allows for public scrutiny which is vital in a system of self-government, and there is no reason why media access would not bring the same benefits to the juvenile justice system. A jury normally serves this function by protecting “against possible oppression by what is in essence an appeal to the

410. Id.
414. See Maurice Possley & Steve Mills, Little Adds Up in Murder Case; Youth Admits Stabbing; Autopsy Shows No Knife Wounds, Chi. Trib., March 21, 1999, at 1. (documenting the plight of a young man who remained in a juvenile detention facility even after his confession was shown to contradict the evidence found in the crime); Ken Armstrong et al., Illegal arrests yield false confessions, Cops and Confessions. Tribune Investigation. Third of Four Parts., Chi. Trib., Dec. 17, 2001, at 1 (demonstrating that despite their unreliability, police continue to use interrogation tactics on children, almost always questioning them outside the presence of an adult or an attorney); Maurice Possley, Boy Convicted of Slaying at Age 10 Appeals, Chi. Trib., Jan. 11, 2000, at 1 (covering A.M.’s appeal in suppressing incriminating statements made by 10 year-old and the police tactics used to elicit the confession).
415. See id.
community conscience, embodied in the jury . . .”416 Thus, for juveniles in states that do not allow jury trials, media access is arguably even more essential in providing public oversight and scrutiny to juvenile court proceedings.

There is, of course, a counterargument that juveniles should remain protected from the glaring eyes of the media, and public exposure to juvenile delinquency proceedings can harm a juvenile’s chance at rehabilitation.417 The major fear is that the media will gain access to juveniles’ identity and publish the information.418 The breach of confidentiality might impede juvenile courts’ goals of rehabilitation and encourage recidivism.419 Those opposing full media access believe that discretion should be left to the juvenile court judge, whereby the courtroom would only be open when the judge is convinced that the youth will not be prejudiced.420

Such arguments against media access to juvenile courts are flawed for several reasons. Journalists need access to juvenile proceedings in order to relay stories that are truthful, nuanced, and accurately portray the system.421 These stories can be written without disclosing a juvenile defendant’s name, his picture, and other identifying information.422 The Chicago Tribune scrupulously guarded the identities of the two child suspects in the Ryan Harris case.423

With closed proceedings, the public continues to assume that the juvenile court is a place where children are not punished and allowed to commit crimes without any repercussions.424 These misrepresentations about the court helped fuel the public policies of transferring juveniles to the criminal court.425 However, with meaningful access, journalists can educate the public. All of the flaws mentioned in this article—from waiver of rights, to witness testimony and lack of jury trials—can be brought to the public eye. If judges are not performing their responsibility by providing detailed and accessible colloquies and if defense attorneys are only meeting with their clients for five minutes before disposition, the media can uncover and report on these and other faults in the system. Educating the public on legal proceedings can, in turn, lead to legal reform.426 In New York, family courts in Kings Country and Bronx County have

418. Id.
419. Id. at 1898-99.
420. Id. at 1939.
422. See id.  
423. See Donato, supra note 405; Mills & Possley, supra note 412.  
424. See Tanenhaus & Drizin, supra note 29, at 642-44.  
425. See id.  
426. See Rosato, supra note 421, at 165.
been opened to reporters, and instead of stigmatizing the parties, the public has received a more complex and accurate view of court.427

In addition, the juvenile court is not solely about rehabilitation, but it is also about punishment. It is hard to find another word for a system that can impose a sentence that removes a child from his family and places him in a locked-down facility with hardly any educational resources for a number of years. Moreover, it is harder to find a greater stigmatization than mandating that juveniles convicted of a certain sex crimes be required to give a DNA sample, have their profiles downloaded in the state’s DNA database, have their pictures placed on the internet website of convicted sex offenders, and be required to register as sex offenders for the rest of their lives.428 Thus, if we are indeed punishing our children in juvenile court, then the public needs to be aware in order to provide greater oversight. Juvenile proceedings are, in almost every aspect, criminal trials, and the Supreme Court has held that “in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”429

Finally, leaving the matter up to the discretion of juvenile court judges may not suffice. As documented by the ABA’s state studies, many juvenile courts are upholding neither the letter nor the spirit of Gault. 430 Given such an environment, it is difficult to imagine that many juvenile court judges will open the doors to the media to document the lack of due process that children receive in many of our nation’s juvenile courts. It is for this reason that many of the states surveyed through the ABA recommended greater media access to juvenile courtrooms.431

PART IV: RECOMMENDATIONS: HOW TO HELP PROTECT THE JUVENILE COURT FROM WRONGFUL CONVICTIONS

So the question remains: what is to be done with a system that may facilitate wrongful convictions? The procedural deficiencies documented throughout this

427. See id.
428. See Tona Kunz, Juvenile Sex Offenders Still Have to Register at Age 17, CHI. D. HERALD, July 6, 2006, at 5.
431. See, e.g., Kentucky Report, supra note 277, at 59 (recommending using the media to ensure balanced reporting, examine race and gender in juvenile court, and work with defenders to learn more about the complexities of juvenile crime and effective solutions); AMERICAN BAR ASSOCIATION, Youth in the Criminal Justice System: Guidelines For Policymakers and Practitioners 19 (2001).
article are nothing new to juvenile courts. In fact, almost all the defects in the system were pointed out by Professor Feld twenty years ago.  

One thought on how to deal with a broken system is to transfer all juvenile offenders to criminal court, and thus ensure that they receive adequate probable cause hearings, jury trials, and punishments more proportional to their crimes. On the surface, this approach has some appeal, as many practitioners bemoan the procedural irregularities of the juvenile court and would prefer to have the option of a jury trial, separate hearings for pre-trial motions, and adequate pre-trial protections.

The Juvenile Court, however, while it needs vast improvements, should not be abolished. Part of the improvement of the juvenile court must stem from the public perception of the court. While many scholars, and this article for example, harp on the failures of the juvenile court, the truth is that juvenile court success stories outnumber the failures. Studying the juvenile court for over 100 years has shown that: 1) most children who come into juvenile court do not reoffend; 2) while the juvenile court often imposes more sanctions than adult court, those sanctions are less severe; and 3) public safety does remain a priority for the juvenile court.

It is important not to equate the problems of the juvenile court with hopelessness. As Judge Gary Crippen has stated: “[T]he most common hypothesis for abolition is largely unstated, but it is rooted in the false assumption that abandonment of the juvenile justice system is a logical response to the recitation of its problems.” Everyday observations as well as recent sociological and psychological research reinforce the fact that children are different from adults. Due to the differences in their developing minds, children require a system that acknowledges and accommodates those differences. We need not lose sight of the noble foundations that led to the creation of the juvenile court just over a century ago. Rather the goal is to look towards reform

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432. See, e.g., Kentucky Report, supra note 277, at 59 (recommending using the media to ensure balanced reporting, examine race and gender in juvenile court, and work with defenders to learn more about the complexities of juvenile crime and effective solutions); AMERICAN BAR ASSOCIATION, Youth in the Criminal Justice System: Guidelines For Policymakers and Practitioners 19 (2001).

433. See Feld, supra note 24, at 96-97. It should be noted that others have called for the abolition of the juvenile court not in order to ensure greater procedural fairness, but rather because of a “public safety” approach: a view that children are just as dangerous and culpable as their adult counterparts and should be punished no differently than adults. See Gary L. Crippen, Can the Courts Fairly Account for the Diminished Competence and Culpability of Juveniles? A Judge’s Perspective, in YOUTH ON TRIAL, supra note 56, at 415.


435. Id. at 15.

and innovation to make sure that children in juvenile court receive both accurate fact finding and appropriate treatment and rehabilitation.\textsuperscript{437}

While it is impossible to address all the ways in which the juvenile court should be and needs to be reformed, there are a number of key areas in which the juvenile court can reduce its susceptibility to wrongful convictions. Although these changes will not deal with the courts’ failures to provide rehabilitative services to children, they will improve the quality of fact finding and the quality of counsel, two improvements which will cut down on the threat of wrongful convictions.

One obvious place to start is the reforms proposed in order to correct wrongful convictions at the adult criminal level. While the Illinois Commission on Capital Punishment was concerned with reducing error in capital cases, its most far-reaching recommendations applied to non-capital cases as well.\textsuperscript{438} Although some of the Commission’s recommendations are not as applicable to juveniles, others such as better training for defense attorneys and trial judges,\textsuperscript{439} access to DNA and forensic testing,\textsuperscript{440} a requirement that custodial interrogations be electronically recorded\textsuperscript{441} and instructions concerning eyewitness identification\textsuperscript{442} (just to name a few) are relevant to juveniles. Moreover, given what we understand about juvenile competency, there are additional safeguards needed in juvenile court to ensure accurate fact finding.

A. Realizing Gault’s Promise: A Nonwaivable Right to Counsel and a Meaningful Right to Remain Silent

Children’s ability to exercise their right to counsel and right to remain silent have taken center stage in the past few years with increased scholarly attention, court decisions, and the ABA’s state by state studies of children’s access to counsel. Responses to the increased amount of juvenile waiver of counsel range both in the stationhouse and the courthouse. This includes keeping the totality of the circumstances inquiry into a child’s voluntary, knowing and intelligent waiver at one end, to a per se rule that children cannot waive their \textit{Miranda} rights and their right to counsel without first consulting with an attorney at the other end.

Retaining the status quo (at least in most jurisdictions) is clearly not the answer. While youth may have heard their \textit{Miranda} warnings recited, the evidence documents that hearing \textit{Miranda} rights does not translate into an

\textsuperscript{437} See Crippen, \textit{supra} note 56, at 420-21.
\textsuperscript{440} See \textit{id.} at 58-59.
\textsuperscript{441} See \textit{id.} at 133-34.
\textsuperscript{442} See \textit{id.} at 129.
understanding. For example, when 90% of juveniles over the age of 15 waive their right to remain silent (and 95% under 15), juveniles leave themselves susceptible to coerced false confessions.

Other jurisdictions have inquired into a parental presence, or “interested adult,” requirement before a child can waive her right to counsel or Miranda. However, while this appears to be added protection from a totality of the circumstances approach, it still falls far below the procedural protections children require. First, police are instructed on how to marginalize parents during an interrogation if they are required to be present. As Inbau’s manual states, a parent who is present during the interrogation should be advised to refrain from believing they are acting in their child’s best interest, encourage children to waive their rights and speak to the police. The Central Park Jogger case was a potent example of how parental presence actually encouraged the children to cede to the police authority, the result of which was a series of false confessions.

Parents are not adequate protectors of their children’s rights because parents often do not understand Miranda themselves; 2) may have conflicting interests such as the lack of desire to pay for counsel; 3) sometimes have a third party conflict of interest, especially in cases of domestic violence; and 4) may have a personal conflict of interest, either by being the person actually responsible or by being the alleged victim of the crime. The best practice to ensure accuracy in confessions and knowing and intelligent waivers of counsel is to require a per se rule that children cannot waive their Miranda rights without first consulting an attorney. In Illinois, a non-waivable right to counsel in the stationhouse was adopted for all children under the age of 13 suspected of murder or sexual assault. The impetus for this bill grew out of several high-profile wrongful convictions of juveniles based on false confessions. This is in line with the ABA’s findings in its state by state studies calling for counsel to be appointed for juveniles much earlier in the process.

443. See Barry C. Feld, Juvenile’s Waiver of Legal Rights: Confessions, Miranda and Right to Counsel in Youth on Trial, supra note 56, at 111.
444. See Competency Commission, supra note 61, at 18 (citing and incorporating the research of Thomas Grisso).
447. See Redlich et al., supra note 88, at 110.
449. See Farber, supra note 446, at 1288-98.
450. See Detention or Shelter Care Hearing, 705 Ill. Comp. Stat. 405/5-170 (West 2002).
451. See, e.g., Maryland Report, supra note 240, at 72 (Recommendation 3 is to “ensure that no child in Maryland waives the right to counsel in a delinquency proceeding without consulting counsel at a pre-adjudicatory hearing on counsel.”); Georgia Report, supra note 259, at 45
In the wake of the Ryan Harris fiasco, in October 1998, the Cook County State’s Attorney’s Office created a Juvenile Competency Commission\(^{452}\) to analyze the problem of children under ten who are accused of serious crimes. The Commission was made up of prosecutors, defense attorneys, judges, and police and probation officers as well as child psychologists and child development specialists. While the Commission did not adopt a per se rule mandating an attorney in every instance a child waives his or her \textit{Miranda} rights, the Commission did conclude that a parent is not an adequate substitute.\(^{453}\) Moreover, given that the Commission found that “[j]uveniles as a whole lack adult competence to ‘knowingly and intelligently’ waive their \textit{Miranda} rights,”\(^{454}\) the Commission did recommend that a child cannot waive his or her \textit{Miranda} rights when 1) the youth is to be tried as an adult; 2) when the youth faces extended juvenile court jurisdiction; and 3) when the youth faces a charge that cannot be expunged as an adult (such as first degree murder and felony sex offenses).\(^{455}\)

The Juvenile Competency Commission’s recommendation, while a good starting point, did not go far enough. All juveniles need the protection of an attorney before waiving \textit{Miranda} rights. While most lawyers would advise their clients not to speak, \textit{Miranda} requires that juveniles receive due process prior to their first appearance in court. If the only way to ensure accuracy and the children’s ability to secure and exercise their rights is by giving them the opportunity to consult with an attorney in the stationhouse, then so be it.\(^{456}\) At a minimum, however, all interrogations of juvenile suspects must be electronically recorded. The recording must begin prior to giving the child his or her \textit{Miranda} warnings. On tape, police officers should be required to explain what each right means in the child’s own words.\(^{457}\)

Given the primacy placed by the United States Supreme Court on the role of counsel in preventing wrongful convictions, children must also not be allowed to waive their right to counsel in juvenile court proceedings. At the very least, no such waivers should be permitted without first affording juveniles the right to consult with a lawyer. Appointed or stand-by counsel must be knowledgeable in juvenile court proceedings, especially with regard to the collateral consequences of a juvenile adjudication, and must spend time that is necessary to impress upon

\(^{452}\) The Commission went beyond their mandate, focusing on all juveniles accused of crimes (age 16 and under) and developed six recommendations for the improvement of juvenile justice, focusing on parental notification, using juvenile’s statements and confessions, videotaping statements, strengthening the role of juvenile officers, and enhancing penalties for adults that use minors in crimes.

\(^{453}\) See Competency Commission, \textit{supra} note 61, at 82.

\(^{454}\) See \textit{id.} at 81.

\(^{455}\) See \textit{id.} at 86. This recommendation fell on deaf ears and was never adopted.

\(^{456}\) See King, \textit{supra} note 71, at 475-478.

\(^{457}\) Drizin & Colgan, \textit{supra} note 137, at 152-153.
the juvenile the potential consequences of giving up the right to counsel. Before judges accept such waivers, they must ensure that juveniles understand what they are giving up and must conduct their waiver colloquies using age-appropriate language.

Access to counsel is only the first step. In order to truly realize Gault, the quality of counsel in juvenile court must be improved in order to protect children from wrongful convictions. Children cannot fight charges they are innocent of if they are assigned poorly trained, overworked, and disinterested lawyers. As Professor Feld noted 20 years ago, a non-waivable right to counsel does not necessarily help children if attorneys are not committed to representing children in an adversarial manner and courts frown upon a juvenile court culture in which attorneys zealously advocate for their clients. First, juvenile attorneys must understand the intricacies of juvenile justice, demonstrating knowledge in juvenile competency, sociological, and psychological development. As the ABA studies demonstrated, many juvenile attorneys do not receive the necessary training to make them effective advocates for their clients. As the Montana study noted in its recommendations: “Juvenile Defenders should...educate themselves about adolescent development, special education law, mental health issues, treatment programs, and professional standards of practice.”

Second, juvenile attorneys must embrace their role as zealous advocates for children, rather than as arms of the court searching for a solution that is in the child’s best interests. Only through such a system will children be guaranteed a strong defense to charges of which they are innocent. This realignment of priorities is not just necessary among juvenile attorneys, but judges and prosecutors also need to understand the mandates of Gault, which requires a child’s attorney to represent her client zealously. Again, this reflects the ABA’s recommendations.

Third, one of the lessons of the innocence movement is that it is vital for defense attorneys to devote more time, energy, and money to investigating cases before recommending a that a client plead guilty or taking a case to trial. It is only through investigation, that lawyers can discover the facts needed to acquit their clients whether they are guilty or innocent. Investigation is especially important in juvenile cases because police work in these cases is rarely as extensive as it is in adult cases.

458. Crippen, supra note 56, at 413.
460. See id.
462. Id. (ABA’s recommendations in Montana are illustrative as juvenile defenders are asked to “[e]nsure zealous advocacy for the expressed interest of the child, rather than the best interest, from arrest through post-dispositional placement and aftercare.”); See also National Juvenile Defender Center, ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION (2006).
Finally, it is vital that judges and prosecutors who work with children receive specialized training on the risks of wrongful convictions for juvenile defendants. The ABA studies, as well as cited decisions on judicial factfinding and acceptance of juvenile waiver, demonstrate that there are still a great many juvenile court judges that fail to implement Gault. As a result of the wrongful conviction cases in Illinois, the Governor’s Commission made one of its explicit recommendations the certification and training of trial judges. The Commission found that judges trying capital cases need to stay abreast of current law and practice, and that a committee of experienced judges should oversee capital cases by providing resources and advice. There is no reason for judges to abandon completely the “best interests” model. “Best interests” can still play a role in determining the appropriate punishment for adjudicated offenders but should have no role in the pre-adjudicatory and adjudicatory phases of the case.

There is no reason why states should not require juvenile court judges to stay current in both law and research. The past decades have led to an explosion of new evidence on adolescent brain development and juveniles’ sociological and psychological development. All of this data can keep judges informed on the reliability of juvenile confessions, juvenile susceptibility to coercion and suggestion, juvenile’s understanding of Miranda warnings, juvenile brain development and decision-making capacities, as well as the lessons learned by studying wrongful convictions of juveniles and adults in the adult system.

In addition, the ABA studies show that reform in the atmosphere or culture of juvenile court is desperately needed. A court that is built on a foundation of rehabilitation does not preclude zealous advocacy on the part of juvenile defenders. Zealous advocacy is not about letting kids “beat a charge,” but rather it prevents inaccurate fact finding and forced guilty pleas that can potentially lead to wrongful convictions. Moreover, judges need to apply the Supreme Court’s precedent in Winship that demands that juveniles not be adjudicated delinquent absent proof beyond a reasonable doubt. States need to heed Judge Crippen’s, as well as the Supreme Court’s, warning in Duncan that there is no greater threat to a juvenile’s independence than unchecked judicial authority.

Police training is also vital, especially in the interrogation and eyewitness context. While police officers often receive interrogation training, their training tells them it is appropriate to interrogate juveniles as if they were adults. It is not. Moreover, while police officers may be generally aware that children are more suggestible than adults, they do not apply this knowledge to suspects who are children. As Maggie Bruck and Stephen Ceci, two leaders in the field of

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464. See id. at 100.
465. See supra, notes 80-90.
466. See id.
children’s testimony, have stated, the “major implication that we see from this field of research [child suggestibility] can be summarized in five words: ‘training, training, and more training.’”\textsuperscript{469}

Moreover, many suggestions to enhance the reliability of eyewitness identification for adults should be applied to juveniles. Police officers need to be taught to establish a rapport with child witnesses, ask open-ended questions, and caution against guessing.\textsuperscript{470} A “double-blind” method of interviewing and identification should be used when possible, where the interviewing officer does not know the suspect in order to ensure that selective reinforcement is absent from the interview. One possible option would be to use specialized interview units with an understanding of child interview strategies.\textsuperscript{471} Finally, just as recording juvenile interrogations serves as a bulwark against coerced false confessions, police departments should electronically record interviews with child witnesses and suspects in order to ensure that testimony is free of suggestion and coerced testimony.\textsuperscript{472}

Recently, some jurisdictions have begun to realize that training for law enforcement is necessary in order to stem wrongful convictions. In Broward County, in the wake of several false confessions involving mentally retarded suspects, the Broward County Sheriff’s Department enlisted the services of nationally renowned expert Richard Leo in order to better train officers on how police interrogation tactics contribute to false confessions.\textsuperscript{473} Leo was used to instruct the police officers on how to properly obtain an accurate confession as well as explaining the benefits of videotaped interrogations.\textsuperscript{474} The same kind of training is needed to educate officers about the unique vulnerabilities of youth during police interrogations.

In a similar fashion, Chicago has begun training prosecutors to guard against false confessions.\textsuperscript{475} The training sessions are meant to alert prosecutors to red flags, signaling a possible false confession. The training is intended to go beyond looking for physical injuries, but instead focuses on witness reliability.

\begin{itemize}
\item \textsuperscript{469} Bruck et al., \textit{supra} note 106, at 147.
\item \textsuperscript{470} See Wells, \textit{supra} note 180, at 593.
\item \textsuperscript{472} More research needs to be done before juvenile courts should require that photo arrays and lineups be conducted in a sequential as opposed to a simultaneous fashion. Psychological research has demonstrated that showing witnesses photos of suspects or suspects in a lineup one at a time reduces greatly the risks of mistaken identifications. The early results of research conducted with juvenile suspects suggests that juvenile accuracy in correctly rejecting a lineup when the suspect is not present is higher using simultaneous rather than sequential lineups. See Joanna D. Pozzulo & R.C.L. Lindsay, \textit{Identification Accuracy of Children versus Adults: A Meta-Analysis}, 22 L. & Hum. Beh. 549, 549-570 (1998).
\item \textsuperscript{473} Gregory Lewis, \textit{Deputies Get Interrogation Training}, SUN-SENTINEL, July 26, 2002, at 2B.
\item \textsuperscript{474} See id.
\item \textsuperscript{475} Editorial, \textit{When the Obvious Isn’t Enough}, CHI. TRIB., April 2, 2003, at 22.
\end{itemize}
corroborating evidence, and looking at the suspect’s age and mental condition.476 This is in line with the Illinois Capital Commission Report which emphasized training for both prosecutors and defense attorneys in capital cases.477 The Commission unanimously believed that prosecutors continue to receive training in the areas of false confessions, jailhouse snitches, accomplice witnesses, law enforcement tunnel vision, police investigative and interrogation methods, police discovery of exculpatory evidence, and forensic evidence.478 Moreover, the Commission urged that the police and judges receive training in the same areas.479

Much in the same way wrongful convictions in adult courts caused the Illinois legislature to re-emphasize training for capital lawyers, the potential of wrongful convictions in juvenile court, should spur a commitment to training juvenile court judges, lawyers, and police officers in new understandings of the causes of wrongful convictions. All those working with children need to be aware of issues of child competency, suggestibility, and the developmental specificities of children. Without an understanding of the cognitive and emotional needs of children, it is nearly impossible for those responsible for their adjudication to do their job accurately.

B. Strengthening the Probable Cause Requirement

Currently, the majority of states only provide for a probable cause hearing in juvenile court when the case involves detention.480 Even in those cases, the prosecution is allowed to proceed either with the use of affidavits or proffers.481 This lack of an adequate probable cause screening creates greater room for prosecutorial abuse of discretion, and thus heightens the risk of wrongful convictions for youth. The longer the delinquency process lingers, the more likely youth will seek a plea in order to put an end to this process. However, when innocent children are pleading guilty to crimes they did not commit, the entire rehabilitative goal of the juvenile court is thwarted.

Instead, juvenile courts need to implement a meaningful probable cause hearing for children, regardless of whether the situation involves potential

478. See id. at 111.
479. See id. at 110.
481. See, e.g., Detention or Shelter Care Hearing, 705 ILCS 405/5-501; C.J., 764 N.E.2d at 1153.
Probable cause hearings cannot simply be *pro forma*, but should include actual, live testimony in order to screen out those cases with merit from those that do not have sufficient evidence to warrant an indictment.483

C. *Jury Trials for Juveniles*

Children in juvenile court face dispositions that include incarceration and removal from loved ones. Before such a deprivation of liberty can take place, a child deserves the benefit of a jury trial. Without the check of a jury, judges are left to their unbridled discretion which poses a threat to both the child’s individual liberties and the public welfare.484 As Judge Crippen has noted, without checks in juvenile justice, “judicial authority in juvenile and domestic proceedings is more threatening to children than the powers of the Star Chamber.”485 Few such checks currently exist in juvenile court.

*McKeiver* was in many ways premised on the fact that judges can be just as accurate in their fact finding ability as juries. *McKeiver*’s reasoning has always been in conflict with *Duncan v. Louisiana*,486 where the Supreme Court held that “[t]he guarantees of a jury trial...reflect a profound judgment about the way in which law should be enforced and justice administered....Providing an accused with a right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” The decades since the *McKeiver* opinion have proven its central reasoning to be false, and not only are juvenile court judges worse in their fact finding, but they also often do not uphold *Winship*’s promise of guilt beyond a reasonable doubt in juvenile proceedings. The need for jury proceedings in juvenile court are arguably even greater than in adult court because of the lack of other procedural protections that juveniles receive. Juries will not make juvenile proceedings indistinguishable from adult criminal proceedings. Rather, juries will provide children with better fact finding and lead to a higher quality of adjudications in juvenile court.

483. *See*, e.g., F.C.A. §§ 325.1-325.4 (while Family Court of Act of New York requires probable cause hearing only in the case of detention, such hearings only allow non-hearsay evidence to be admitted and require live testimony).
487. *Id.* at 155-56.
D. Appellate Counsel

The evidence suggests that juveniles rarely, if ever, have the option to exercise their right to an appeal. Legal rights become meaningless without a healthy juvenile defender appellate practice, and juveniles lose their due process protections without an avenue to appeal. Because of the fast-track nature of juvenile court cases and the need for settled dispositions, any juvenile appellate procedure must be expedited in order to have any effect.

A healthy juvenile court appellate practice must begin with a state juvenile defender appellate program. The ABA studies demonstrated a lack of juvenile appeals mostly because of a lack of funding and already burdensome caseloads. However, these services are needed in order to assure juvenile dispositions are accurate and fair. In addition, a serious appellate practice is necessary in order to give judges greater guidance on issues of competency, waiver, and juvenile eyewitness testimony. As the Illinois Commission to study juvenile’s competency noted, there are important appellate cases that have reversed trial court judges who have failed to correctly apply the law in juveniles’ waiver of Miranda rights.

Private law firms can provide appellate support for juveniles. Finally, legal clinics that service youth in juvenile court should also look to take appellate cases in order to realize children’s due process rights.

Appellate work should not only consist of direct appeals, but it is important than juveniles receive meaningful post-conviction and habeas relief. DNA evidence has been used to exonerate many people who have suffered wrongful convictions. This technology is not only confined to murders and sexual assaults, it is now being used to great effect to solve property claims, the very crimes which make up a large portion of juvenile court cases. It is vital that, in cases where it is appropriate, juveniles receive the benefit of this wondrous new technology. Given the fast track nature of juvenile court cases, and the risks inherent in prolonged custody for juveniles, crime labs should prioritize juvenile cases.

A strong appellate practice may interfere somewhat with the juvenile court’s ability to deliver swift dispositions and begin children’s treatment and rehabilitation. While these are noble and important goals, we must realize that...

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488. See Crippen, supra note 56, at 411.
489. See id. at 414.
491. See Competency Commission, supra note 61, at 78 (citing In re M.W., 731 N.E.2d 358 (1st Dist. 2000); People v. Robinson, 704 N.E.2d 968 (2d Dist. 1998); People v. Montanez, 652 N.E.2d 1271 (1st Dist. 1995)).
492. Northwestern University’s Children and Family Justice Center has established a pro bono project with many law firms throughout the City of Chicago. These law firm partners represent juveniles in school expulsion cases, delinquency cases and on occasion in appeals.
they are meaningless to a child who has been wrongly adjudicated delinquent for a crime.

E. Juvenile Innocence Projects

Innocence projects have sprouted up throughout the country in response to wrongful conviction in adult court. The Innocence Network is currently composed of over 30 innocence projects around the country and even includes projects in Canada, Australia, and the United Kingdom.493 In speaking with the many of the major innocence projects we learned that not a single project had taken a case from juvenile court. This is quite understandable given that these projects often focus on capital cases and the most severe threats of the deprivation of liberty. But, there is no reason why corollary projects could not be developed that specialize in juvenile wrongful convictions. As the innocence network has demonstrated, even a single wrongful conviction, can be a catalyst for widespread legal reform.

F. Media Access to Juvenile Proceedings

Juvenile courts must become more open to the public and to the media. Although this may erode some of the confidentiality of court, this risk is easily outweighed by doing away with the secrecy and lack of oversight in juvenile courts. As those working with wrongful convictions in the adult system have demonstrated, the media can have a profound impact on ensuring accountability for accurate decision-making and fair procedures. The media’s ability to sensationalize youth crime and stigmatize children is another risk that comes with opening the juvenile courts to the media. This risk is counterbalanced by the fact that open courtrooms will give the media less room to speculate and a better opportunity to accurately portray juvenile court proceedings. A media presence can help oversee the juvenile court and create greater accountability in fact finding, thus reducing a child’s odds of being wrongfully adjudicated in juvenile court. Both the media and the public would greatly benefit from a greater understanding of juvenile proceedings and law.

CONCLUSION

Is juvenile court a breeding ground for wrongful convictions? At this point, the jury is still out on this question. Further research is needed to examine the extent of the problem of wrongful convictions in juvenile court, and we are hopeful that this article will stimulate such research. All that can be said at this point is that the juvenile court is plagued by many of the same problems that lead to wrongful convictions in the adult court and that developmental differences between juveniles and adults coupled with a culture in juvenile courts that does

493. www.innocencenetwork.org
not place a premium on the adjudicatory phase of proceedings, may make children more vulnerable to wrongful convictions in juvenile court than in adult court.

_Gault_ changed the juvenile court by requiring basic due process rights for all children in delinquency proceedings. But forty years after _Gault_, it is clear that the promise of _Gault_ has not been realized, especially as it relates to valuing accuracy in juvenile court proceedings. When juvenile advocates have demanded such due process protections for juveniles as jury trials, courts have frequently brushed these reforms aside, resting on the old adage that juvenile courts are rehabilitative in nature rather than punitive, and therefore, juvenile defendants do not need to have the same level of due process protections as their adult counterparts.

But regardless of whether the juvenile court seeks to rehabilitate or punish, the credibility of any justice system ultimately depends upon accurate fact finding. This article has tried to show that the strongest argument for jury trials, non-waivable rights to counsel, and meaningful probable cause hearings is that these rights and others are necessary to prevent wrongful convictions. By applying some of the lessons learned from the innocence revolution to the juvenile court, advocates may stand a better chance of seeing the promise of _Gault_ realized, both in terms of increased due process and in terms of increased accuracy in ascertaining the innocent and the guilty.

494. See, e.g., Feld, _supra_ note 378.
495. See, e.g., Farber, _supra_ note 446.
496. See, e.g., _McKeiver_, 403 U.S. at 543 (in denying the right to of a jury trial to juveniles, the Court held that juveniles receive a fundamental fairness standard as opposed to the full panoply of due process rights).
CONSIDERATIONS IN THE ASSESSMENT OF COMPETENT TO PROCEED IN JUVENILE COURT

Randy K. Otto

I. INTRODUCTION

Although the first juvenile court was established a little over 100 years ago,\footnote{David Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court, in The Changing Borders of Juvenile Justice: Transfer Of Adolescents To the Criminal Court* 13, 17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).} the ability of youth to participate in legal proceedings typically was not the subject of discussion and consideration until more recently.\footnote{Richard Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 73, 84 (Thomas Grisso & Robert Schwartz eds., 2000).} In the past 15 years, however, increasing attention has been paid to juveniles’ adjudicative competence. Researchers have begun to study the competence-related abilities of youth, state legislatures have revised the sections of their juvenile codes devoted to adjudicative competence, and legal commentators and appellate courts have debated what is presently and what should be required of juveniles in this context.

The flurry of attention that juveniles’ adjudicative competence received has resulted in swift changes in legal practice. Defense attorneys who appear in juvenile court regularly request that their clients’ ability to understand and participate in the legal process be assessed, whereas such evaluations rarely, if ever, occurred just 15 years ago. Juveniles adjudicated incompetent to proceed routinely have their cases stayed and are ordered to participate in treatment and rehabilitation focused on the emotional or behavioral disturbances considered to underlie their limited understanding and appreciation of the legal process with the intent of them eventually returning to court, being adjudicated competent to proceed, and having their cases resumed.\footnote{Id. at 74.} Discussed below are legal and clinical issues of primary importance to attorneys and judges in cases when a juvenile’s competence to proceed is at issue, assessment techniques that should be...
employed by mental health professionals, and strategies for attorneys and judges when considering the reports and opinions of examining mental health professionals.

II. A BRIEF HISTORY OF THE JUVENILE COURT

It has only been in the last century that special courts designed to respond to juveniles who engage in what would otherwise be classified as criminal behavior have existed.4 Through the end of the 19th century, juveniles accused of criminal acts were subject to criminal proceedings and sanctions.5 In 1899, however, the first juvenile court was established in Illinois,6 after which similar courts were quickly established around the country (and world).7 Because their goal was primarily rehabilitation rather than punishment, juvenile courts looked very different from the criminal courts from which they emerged.8 Since the proceedings were not criminal, youth were not subjected to trials to determine their guilt or innocence, but rather participated in hearings in which they might be adjudicated delinquent.9 Youth who were adjudicated delinquent and in need of services were not sentenced, but rather received a “disposition” that was crafted by the court with the intention of rehabilitating them.10 Because of the courts’ rehabilitative focus, psychologists, social workers, and other mental health professionals presumed to have expertise regarding youth, their development, their problems, and appropriate treatments, played a significant role in juvenile proceedings.11 Finally, and perhaps most importantly, children appearing in juvenile court were often not provided many of the legal protections of their adult counterparts (e.g., the right to remain silent, notice, representation by an attorney, an adversarial hearing, and confrontation of accusers).12 Indeed, for the first 50 or 60 years of the juvenile courts’ existence, an informal legal process characterized by the heavy involvement and input of mental health professionals was the norm.13

The first significant reform in the institution occurred in the 1960’s when critics questioned the juvenile courts’ intent and the larger juvenile justice system in which it was embedded.14 Observations that youth in juvenile court

4. Id. at 82.
5. Bonnie & Grisso, supra note 2, at 79-82.
6. Tanenhaus, supra note 1, at 17.
8. Bonnie & Grisso, supra note 2, at 82-83.
9. Id.
10. Id.
12. Id. at 316.
13. Id.
14. Id. at 317.
were not provided the same legal protections as adults in criminal court, but were subjected to dispositions that were similarly punitive, caught the judiciary’s attention. In a succession of cases beginning in 1966, the United States Supreme Court noted the increasingly punitive nature of, and diminished emphasis on rehabilitation in, the juvenile justice system. Further, the Court voiced its concern about the lack of procedural protections afforded youth appearing in juvenile court, and ruled that juveniles appearing in delinquency proceedings were entitled to almost all the protections afforded their adult counterparts who were subject to criminal proceedings. Just how far the juvenile court and juvenile justice system moved from benevolent institutions that acted in the best interests of their charges to punitive ones that were sanction-focused is revealed in two Supreme Court cases. In Kent v. United States the Court observed that the juvenile justice system provided minors with “the worst of both worlds”, offering neither the legal protections afforded adults who were subject to criminal proceedings, nor the genuine efforts at rehabilitation that were promised. In In re Gault, the Court, in its holding, analogized the juvenile court to a “kangaroo court” that was arbitrary, ineffective and unjust. Subsequent to this line of holdings, juvenile courts became more formal in their procedures, adopted many of the “trappings” of criminal court, and made clear that juveniles’ are entitled to a number of basic rights (including the right to avoid self incrimination, notice, legal representation, a trial or hearing, and confrontation). Some contend, however, that despite these cases and the related changes in legal process, the juvenile court system continues to inadequately protect the legal rights of minors, and recent surveys of juvenile court practices throughout the United States provide considerable support for this notion.

Although juveniles were provided many of the same constitutional protections afforded adults subsequent to the Supreme Court’s holdings in Gault, Kent, and In re Winship, rarely was attention paid to the issue of

15. Id.
16. In re Gault, 387 U.S. 1, 28 (1967); See Bonnie & Grisso, supra note 2, at 94.
18. Bonnie & Grisso, supra note 2, at 94.
juveniles’ capacity to either understand, or participate in their cases, or to exercise the rights to which they were entitled. Juveniles’ cases were still considered to be taking place in a setting in which the goal was to provide treatment and rehabilitation. Worst case scenarios involved commitment to secure residential programs for a limited period of time that typically did not extend beyond when the youth reached the age of maturity. Defense attorneys were reluctant to challenge or delay the legal process by questioning their clients’ ability to understand and participate in the proceedings. However, when still another dramatic change in the juvenile justice system occurred in the 1990’s, attorneys, courts, and legislatures began to pay increasing attention to juveniles’ adjudicative competence.

The juvenile justice system experienced its second significant reform beginning in the early 1990’s when, in response to the public’s increasing concern about juvenile crime (particularly violent crime), the majority of states made substantive changes to their juvenile justice systems. The primary objective and outcome of states reforming their juvenile justice system was to allow for more significant sanctions for juvenile offenders by explicitly identifying punishment and incapacitation as the mission of their juvenile courts, expanding the courts’ jurisdiction over youth adjudicated delinquent, and increasing the ease with which minors with histories of serious or repeat offenses could be transferred to criminal court (where they were subject to adult sanctions). According to some commentators, it was in response to this second set of reforms that the defense bar began to force the issue of the ability of youth to understand and participate in legal proceedings in juvenile court.

26. In re Winship, 397 U.S. 358, 377-78 (1970) (holding that “proof beyond a reasonable doubt” is the standard of proof required when a juvenile is charged with a crime).
27. Grisso, supra note 11, at 317.
28. Id.
29. Bonnie & Grisso, supra note 2, at 95.
33. Melton et al., supra note 21, at 420-21; see Scott & Grisso, supra note 31, at 805-11
34. See Scott & Grisso at 805-06.
III. COMPETENCE TO PROCEED

A. Common Law Underpinnings and Rationale

The requirement that a criminal defendant be able to assist in his or her defense and participate in the legal process can be traced to at least the 17th century, when courts refused to proceed against defendants considered to be incompetent as a result of a mental disorder or mental defect. This requirement is considered to promote the dignity of the legal process, the accuracy of legal judgments, and the accused’s autonomy. More specifically, prosecuting defendants who are incapable of understanding and participating in the legal process and assisting in their defense is inconsistent with conceptions about fundamental fairness of the legal process; the defendants’ and the legal system’s investment in accurate judicial outcomes (insofar as incapacitated defendants may be less able to provide information helpful to their defense and challenge the state’s allegations); and the law’s requirement that defendants, with the assistance of counsel, must ultimately make (rational) decisions about important case matters.

B. Competence to Proceed in Criminal Court

Consistent with the common-law, the Constitution requires that defendants be competent to participate in the criminal justice process. In *Dusky v. United States*, the Supreme Court ruled that a defendant must have “...sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...[and have a] rational as well as factual understanding of the proceedings against him.” The Court’s decision in *Dusky* identified only what was minimally required of defendants in order to proceed with prosecution, yet most states have adopted some variant of the *Dusky* language and approach. While some of the Court’s language in *Dusky* is vague and invites interpretation or speculation, there appears to be a general consensus regarding the standard and what it requires of defendants. Although the *Dusky* standard does not identify any predicate conditions that must be present and responsible for any

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36. See Poythress, supra note 35; Randy Otto, *Competency to Stand Trial*, 2 APPLIED PSYCHOLOGY IN CRIMINAL JUSTICE 82 at 82-83 (2006).
37. Melton et al., supra note 21, at 120-24.
40. Melton et al., supra note 21, at 123.
41. See Stafford, supra note 35, at 360-61; Melton et al., supra note 21, at 122-23.
observed deficits in competence-related abilities (e.g., mental illness, mental retardation, or normal “limitations” associated with youth), many state statutes devoted to criminal proceedings associate competence-related deficits that result from mental impairments of some type (i.e., mental illness or mental retardation). The Dusky Court’s reference to “sufficient” ability and a “reasonable” degree of understanding suggests that the defendant’s capacities need not be unimpaired, whereas language referencing the defendant’s “present” ability indicates that the focus is on competence-related capacities as they exist at the time of the evaluation and in the immediate future. The Court’s reference to both a “factual” and “rational” understanding of the proceedings suggests that simple knowledge of facts and factors relevant to the proceedings may not be enough. The defendant may also need to be able to appreciate and consider the proceedings and case facts, as well as make legally relevant decisions in a rational way that is not significantly impaired by mental disorder.

C. Competence to Proceed in Juvenile Court

As noted above, through a series of cases decided in the 1960’s the Supreme Court made clear that youth appearing in juvenile court are entitled to almost all the legal protections enjoyed by their adult counterparts who appear in criminal court, including the rights to notice, counsel, a hearing or trial, confrontation, and avoid self-incrimination. The Court, however, has never addressed whether the Constitution requires that youth be competent to participate in proceedings that occur in juvenile court. It seems reasonable to predict that the Court would rule that the Constitution requires this prerequisite on the grounds that the important procedural rights that were enunciated in Gault, Kent, and Winship would mean little if the youth could not exercise them. Yet, since the Court has distinguished juvenile proceedings from criminal proceedings in at least some ways, it can also be argued that a juvenile need not be able to understand and participate in the legal process provided that there is someone by the youth’s side (e.g., counsel) who can exercise important rights on his or her behalf. This latter argument is, at the very least, strained insofar as many of the rights outlined in Gault, Kent, and Winship require some capacity on the youth’s part in order for them to have a real impact. That is, there are many circumstances in which it is important that youth be capable of exercising these rights in order for them to have any real meaning (e.g., to confront accusers, provide defense counsel with potentially exculpatory information, and make important case decisions).

42. Bonnie & Grisso, supra note 2, at 79.
43. See Dusky, 362 U.S. at 402.
44. Id.
45. Melton et al., supra note 21.
46. See McKiever v. Pennsylvania, 403 U.S. 528, 545 (1976) (holding that juveniles do not enjoy a constitutional right to jury trials when appearing in juvenile court).
Thirty-four states and the District of Columbia specifically address the issue of competence in juvenile proceedings, and most of these states have simply imported from their criminal codes the Dusky-like criteria employed in the jurisdiction’s adult proceedings. Courts differ, however, with respect to ruling how the test enunciated in Dusky should be applied in juvenile proceedings. Some courts hold that the capacity required of a respondent in a juvenile proceeding is identical to that demanded of an adult in a criminal proceeding, whereas others hold that the Dusky standard may be conceptualized and applied differently in juvenile proceedings. For example, in Ohio v. Settles the court, in considering the state’s competence standard for minors, held that “juveniles are assessed by juvenile rather than adult norms”, and in In re Causey the court held that even non-impaired juveniles may not demonstrate the same abilities as adults with respect to rationally understanding the proceedings or working with their attorneys. Finally, at least one court has determined that juveniles need not be competent to participate in delinquency proceedings, based on the presumption that the juvenile court and juvenile justice system are focused on rehabilitation rather than punishment.

Given the developmental differences between adults and juveniles, adoption of competence standards and criteria used with adults, while relatively easy, has proven problematic. For example, some states do not require that findings of incompetence must be due to mental illness or mental retardation. As a result, juveniles whose inability to understand and participate in legal proceedings flows from normal cognitive “limitations” related to incomplete and ongoing development (sometimes referred to as “developmental incompetence” or “developmental immaturity”) cannot be adjudicated incompetent to proceed, despite their clearly documented lack of understanding and appreciation. According to Grisso, a small number of states specifically identify “developmental immaturity” as a basis for incompetence, while others recognize it as a basis for a finding of incompetence without specific statutory recognition. Grisso and Quinlan reported that approximately two-thirds of the evaluators who responded to their national survey of juvenile court clinics indicated that they sometimes recommended to the court that youth they

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47. Richard Redding and Lynda Frost, Adjudicative Competence in the Modern Juvenile Court, 9 VA. J. SOC. POL’Y & L. 353, 374 (2001); See also Bonnie & Grisso, supra note 2, at 86.
48. In the Matter of the Welfare of D.D.N., 582 N.W.2d 278, 281 (Minn. Ct. App. 1998)(noting, “the level of competence required to permit a child’s participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult.”).
52. Bonnie & Grisso, supra note 2, at 79.
evaluated be adjudicated incompetent to proceed based on developmental limitations, and one-fifth identified this as the most common basis for recommendations of adjudication as incompetent to proceed.\textsuperscript{55} Thus, although all defendants, including minors appearing in juvenile court, are presumed competent to proceed, in most jurisdictions courts are apparently willing to recognize that capacity to understand and participate in the proceedings can be affected by factors beyond mental illness and mental retardation.

IV. DEVELOPMENTAL PSYCHOLOGY AND ADOLESCENT DECISION MAKING IN LEGAL CONTEXTS

The constantly changing physical, cognitive, social and emotional capacities of children and adolescents distinguishes them from adults in important ways, many of which are relevant to their understanding of and participation in the legal process. The law often regards a youth’s level of maturity as a benchmark for decisions about his or her offense and culpability. For example, in \textit{Kent} the Supreme Court referenced that the criteria judges employed in deciding whether the juvenile courts’ jurisdiction would be waived included “the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.”\textsuperscript{56}

For years following \textit{Kent}, the notion of maturity continued to hold prominence and was referenced in psychological reports and judicial decisions, but it lacked much consensual meaning.\textsuperscript{57} Historically, conclusions about the maturity and capacities of juveniles appearing in court were often based on obvious characteristics such as age or physical development, or behaviors such as the nature and severity of the delinquent acts they are accused of committing.\textsuperscript{58} These factors, however, are not reliable indicators of true psychosocial capacity and maturity.\textsuperscript{59} There is considerable variability in the age and rate at which emotional and cognitive capacities that affect juveniles’ ability to understand and participate in the legal process develop; development does not occur in a predictable linear fashion, and development does not occur equally in all spheres.\textsuperscript{60} In the past decade, however, investigators have begun to research and operationalize the construct of psychosocial maturity which Steinberg and Cauffman define as “the complexity and sophistication of the process of

\begin{itemize}
\item \textsuperscript{55} Thomas Grisso & Janet Quinlan, A NATIONAL SURVEY OF JUVENILE COURT CLINICAL SERVICES (2005).
\item \textsuperscript{56} \textit{Kent}, 383 U.S. at 567.
\item \textsuperscript{57} Grisso, \textit{supra} note 11, at 318.
\item \textsuperscript{58} Tanenhaus, \textit{supra} note 1, at 32.
\item \textsuperscript{60} Steinberg & Schwartz, \textit{supra} note 59, at 24-25.
\end{itemize}
individual decision-making as it is affected by a range of cognitive, emotional, and social factors.61

Steinberg and Cauffman identified four capacities that are particularly important to understanding youths’ legally relevant decision making: responsibility, time perspective, social perspective, and temperance.52 Responsibility refers to the juvenile’s ability to be self-reliant and independent, act autonomously, and not be inappropriately influenced by external pressures (including peer opinion when making important decisions).63 Time perspective references the youth’s capacity to appreciate and consider both short-term and long-term consequences incident to important decisions and behaviors.64 Interpersonal perspective describes the youth’s ability to understand and appreciate the perspectives, feelings, and views of others.65 Temperance refers to the youth’s emotional and behavioral controls and his or her ability to manage emotions, impulses, and behavior.66 All of these factors should be considered with respect to how they affect the juvenile’s legal decisions.

A. Competence-Related Abilities of Juveniles

Coinciding with the legal system’s increasing attention to the adjudicative competence of juveniles in the past decade, psychologists and other researchers have begun to investigate juveniles’ competence-related abilities. Researchers have studied juveniles’ competency-related abilities and the manner and extent to which they may be affected by juveniles’ reasoning skills,67 cognitive development,68 and psychiatric disturbance.69 These studies have incorporated a range of samples, including youth from within and outside the juvenile justice system,70 youth referred for competence evaluations,71 and youth adjudicated

62. Id. at 745-49.
63. Id. at 748.
64. Id.
65. Id.
66. Id. at 748-49.
67. See Michelle Peterson-Badali et al., Young Children’s Legal Knowledge and Reasoning Ability, 39 CAN. J. CRIMINOLOGY 145 (1997).
70. See Thomas Griso et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants, 27 LAW & HUM. BEHAV. 333 (2003).
71. Geoffrey McKee, Competency to Stand Trial in Preadjudicator Juveniles and Adults, 26 J. AM. ACAD. PSYCHIATRY & L. 89 (1998); Geoffrey McKee & Steven Shea, Competency to Stand
incompetent to proceed.\textsuperscript{72} Collective findings indicate that a majority of juveniles under the age of 15, as well as 15 and 16-year-olds with compromised intellectual abilities, show significant limitations in their ability to understand and participate in the legal process, while 16 to 17-year-old juveniles typically have capacities that are more comparable to those of adults.\textsuperscript{73}

The most comprehensive study examining the competence related abilities of juveniles (which was conducted with funding from the John and Catherine T. MacArthur Foundation)\textsuperscript{74} is worthy of detailed review given its scope. Grisso and his colleagues conducted a multi-site study of adjudicative competence on a sample of over 1,300 males and females between the ages of 11 and 24.\textsuperscript{75} Approximately half the subjects were youth and young adults detained in jail or juvenile detention facilities, whereas the remaining half were community-dwelling youth and young adults similar in age, gender, ethnicity, and socioeconomic status to their detained counterparts.\textsuperscript{76} All subjects were administered a standardized battery of tests designed to assess their abilities regarding competence to stand trial, strategies of legal decision making, and emotional, behavioral and cognitive functioning.\textsuperscript{77} The MacArthur Competence Assessment Tool–Criminal Adjudication (MacCAT-CA), a normed measure designed to assess adult defendants’ capacity to understand and participate in the criminal justice process, was used to assess the subjects’ understanding of and ability to participate in the legal process.\textsuperscript{78} The MacCAT-CA, which uses a hypothetical battery case, assesses an examinee’s understanding (i.e., knowledge of procedures and courtroom personnel), reasoning (i.e., ability to recognize information relevant to a defense, process information, and make important case decisions), and appreciation (i.e., the degree to which the examinee’s case decision-making is affected by mental disorder) of legal proceedings.\textsuperscript{79}

As assessed by the MacCAT-CA, competence-related abilities did not vary by gender, ethnicity, socioeconomic status, prior experience with the legal system, or psychopathology-intelligence and age was the only significant predictor of competence-related abilities in this sample.\textsuperscript{80} Juveniles of below-average intelligence were more likely to show significant impairment than

\textsuperscript{72} Annette McGaha et al., \textit{Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida’s Competence Restoration Program,} 29 J. AM. ACAD. PSYCHIATRY & L. 427, 427 (2001).
\textsuperscript{73} Cooper, supra note 68, at 177; see also Grisso et al., supra note 70, at 356.
\textsuperscript{74} Grisso et al. supra note 70, at 362.
\textsuperscript{75} Id. at 337.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 341-56.
\textsuperscript{78} Norman Poythress et al., \textit{MANUAL FOR THE MACARTHUR COMPETENCE ASSESSMENT TOOL-CRIMINAL ADJUDICATION} (1999).
\textsuperscript{79} Grisso et al., supra note 70, at 339-40.
\textsuperscript{80} Id. at 356.
juveniles with average or above average intelligence, and consistent with prior research, a greater proportion of youth in the juvenile justice sample were of below-average intelligence than those in the community dwelling sample.\footnote{1}

As noted above, there was also a relationship between age and competence-related abilities, with older subjects demonstrating more complete understanding, reasoning, and appreciation abilities as assessed by the MacCAT-CA.\footnote{2} Youth ages 11 to 13 demonstrated a greater number of limited competence-related abilities (i.e., understanding of legal matters and ability to make legally relevant decisions) than did 14 to 15 year-olds, who demonstrated a greater number of limited abilities than 16 to 17 year-olds, whose abilities were similar to those of the young adults ages 18 to 24.\footnote{3} Whereas 30\% of the 11 to 13 year-olds demonstrated significant competence-related limitations as assessed by the MacCAT-CA, only 19\% of the 14 to 15 year-olds, and 12\% of the 16 to 17 year-olds and young adults demonstrated such limitations.\footnote{4}

Significant age differences were also apparent when it came to consideration for plea-bargaining, which is an especially important issue given the large number of juveniles who waive their right to a hearing and enter a plea.\footnote{5} When presented with a hypothetical case, half of the 18 to 24 year-olds indicated that they would enter a guilty plea and waive their right to a trial, whereas 75\% of the 11 to 13 year-olds, 65\% of 14 to 15 year-olds, and 60\% of the 16 to 17 year-olds indicated they would take such a course of action.\footnote{6} The young adults considered all outcomes, including entering a guilty plea and getting a sentence of two years or going to trial and being adjudicated guilty (six years) or not guilty (zero years).\footnote{7} In contrast, youth in the study (who were more likely to enter a guilty plea as a function of their decreasing age) paid little attention to the outcome associated with acquittal (zero years) and focused in on the comparison of two years (resulting from a plea bargain) and six years (resulting from a conviction/delinquency adjudication) in their decision making.\footnote{8} Finally, similar age-related differences were also observed when it came to the subjects’ abilities to identify the seriousness of negative consequences of various

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\begin{itemize}
\item 81. Id.
\item 82. Id. at 343-56.
\item 83. Id. at 356.
\item 84. Id. Similar findings were reported by Ficke, Hart, and Deardorff, who administered measures of intellectual, emotional and behavioral functioning along with the MacCAT-CA to a sample of 247 incarcerated youths between the ages of 9 and 18. There was a significant relationship between age and competence-related abilities as assessed by the MacCAT-CA. See Susan Ficke, Karen Hart, & Paul Deardorff, The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool–Criminal Adjudication (MacCAT-CA). Paper presented at the Annual Meeting of the Southeastern Psychological Association, Nashville, TN (2005).
\item 85. Grisso et al., supra note 70, at 352.
\item 86. Id.
\item 87. Id. at 351-53.
\item 88. Id.
\end{itemize}
decisions, the likelihood of such outcomes, and the long-term consequences of such negative outcomes.89

V. COMPETENCE TO PROCEED EVALUATIONS IN JUVENILE COURTS

A. Current Practices

Although juveniles’ competence to proceed in the delinquency process has only received significant attention in the past 15 years, a number of recent investigations provide some insight into the assessment practices of mental health professionals. Ryba and her colleagues surveyed 80 psychologists with considerable experience evaluating youth in the juvenile justice system (the group reported an average of 16 years of experience conducting these evaluations).90 Clinical constructs and factors that this group of psychologists identified as important to consider when conducting a competence evaluation included the youth’s cognitive functioning, social skills, decision-making capacities, developmental abilities, behavioral controls, and moral reasoning capacity.91 Seventy percent of the sample agreed that core elements of these examinations included assessment and description of the juvenile’s current emotional, cognitive, and behavioral functioning, understanding and appreciation of the charges, possible penalties and the legal process, ability to work with counsel, and developmental functioning as it affected competence-related issues.92

Christy, Douglas, Otto, and Petrila reviewed over 1,300 competence evaluations completed on 674 different Florida youths who were evaluated by two or more mental health professionals, adjudicated incompetent to proceed in juvenile court, and ordered to undergo competence-related treatment or rehabilitation.93 Psychologists and psychiatrists completed the large majority of evaluations, and the median number of pages per report (perhaps a gross measure of comprehensiveness) was four.94 All examiners attempted interviews of the youth and the most frequently employed tests were measures of intelligence.95 This latter finding is partly a function of the sample which, as indicated above, included only reports for juveniles who had been adjudicated incompetent to

89. Id. at 357.
91. Id. at 502.
92. Id.
94. Id.
95. Id.
proceed, as well as the fact that juveniles who are adjudicated incompetent to proceed (as compared to their adult counterparts) are more likely to meet diagnostic criteria for mental retardation. 96 Unfortunately, in few reports was there reference to third party data and collateral data, which is considered integral to competent forensic evaluation. 97 In only 40% of the reports did the examiner indicate that mental health records had been reviewed, and in a little over half (54%) of the reports was reference made to an interview of a family member or other person (e.g., guardian or foster parent) knowledgeable about the youth who was the subject of the examination. 98 The investigators also reported that the examiners’ descriptions of the youths’ clinical functioning was less than complete, and most reports did not adequately describe how any emotional or behavioral impairments that were observed affected the juveniles’ competence-related abilities. 99 In contrast, over 85% of the reports included some discussion of a number of competence-related abilities, including the examinees’ understanding and appreciation of the charges, allegations, possible penalties, the legal process and their rights, as well as their ability to work with their attorneys, testify, and participate in and understand the legal proceedings. 100 Although most of the reports included opinions or recommendations regarding the juveniles’ competence to proceed (96%) and “restorability” (84%), only 62% identified the clinical condition that was considered to be the underlying cause of the competence-related limitations. 101

B. Recommendations for Evaluating the Competence-Related Abilities of Youth

There are no published standards or practice guidelines for juvenile competence to facilitate juvenile evaluations, and principles for assessing juveniles’ competence-related abilities have largely been borrowed from adult competence literature. 102 Although a thorough discussion of the clinical-forensic competence evaluation process is beyond the scope of this chapter, a concise overview of the evaluation process and what it should entail is offered below. The interested reader is directed to other resources for additional discussion of what the evaluation process should entail. 103

96. Peter Ash, Commentary: Risk Markers for Incompetence in Juvenile Defendants, 31 J. AM. ACAD. PSYCHIATRY & L. 310, 311 (2003); Annette McGaha et al., supra note 72, at 427.
98. Christy et al., supra note 93, at 383.
99. Id. at 384.
100. Id. at 384-86.
101. Id. at 385-86.
103. GRISSO, supra note 32; Thomas Grisso, CLINICAL EVALUATIONS OF JUVENILES’ COMPETENCE TO PROCEED: A GUIDE FOR LEGAL PROFESSIONALS (2005).
When assessing a juvenile’s competence to proceed, the mental health professional’s task, at the most basic level, is to:

1. assess and describe the juvenile’s understanding of and ability to participate in the legal process (including any limitations),

2. assess and describe the juvenile’s current emotional, behavioral, or cognitive functioning as they may affect any competence related limitations, and,

3. in cases in which a finding of incompetence is likely or possible, identify whether the emotional, behavioral, or cognitive impairments responsible for the impaired capacity may be remedied, and offer specific recommendations for intervention/treatment when indicated.

All of the above is to be considered, of course, in light of the juvenile’s emotional, behavioral, and cognitive development. This requires that the examiner understand the juvenile justice system, child and adolescent development, and child and adolescent psychopathology. The examiner also must have a clear understanding of:

1. the charges, allegations, and possible sanctions the juvenile faces,

2. the juvenile’s appreciation of the charges, allegations, and possible sanctions,

3. the juvenile’s appreciation of his or her rights,

4. the juvenile’s ability to participate in and understand the legal process, and

5. the juvenile’s ability to work with his or her attorney and provide information of relevance.

As noted above, assessment of a youth’s current emotional, behavioral, cognitive, and developmental functioning is an integral part of the competence evaluation, and mental health professionals may administer tests which assist in assessment of relevant constructs (e.g., measures of mood, anxiety, attention, intelligence, memory, and academic ability). These test results, however, provide little, if any, information regarding a juvenile’s competence-related abilities.

There are no psychological “tests” that have been developed for use with juveniles whose competence to proceed is at issue. Although a number of assessment tools have been developed for use with adults whose competence is
called into question, the use of such tools with juveniles is discouraged because of the many developmental differences between adolescents and adults, and the absence of adequate data regarding juveniles’ normative performance on these assessment tools. There are, however, two recently published assessment instruments that show some promise. These instruments are not “tests” that provide scores, but rather “structured professional judgment” tools, the purpose of which is to ensure a comprehensive and reliable evaluation of the examinee’s competence-related abilities.

Grisso’s Juvenile Adjudicative Competence Interview (JACI) structures the professional’s clinical examination around those factors most relevant to understanding and participating in the legal process and directs the examiner’s attention to developmental factors that can affect a juvenile’s understanding, appreciation, and decision-making in legal contexts. The JACI guides the examiner’s assessment in 12 primary areas, including the youth’s:

1. understanding and appreciation of the charges and allegations,
2. understanding and appreciation of the purpose of the delinquency hearing,
3. understanding and appreciation of possible pleas,
4. understanding and appreciation of possible penalties,
5. understanding and appreciation of the prosecutor’s role,
6. understanding and appreciation of the defense attorney’s role,
7. understanding and appreciation of the juvenile probation officer’s role,
8. understanding and appreciation of the judge’s role,
9. ability to work with and assist counsel,
10. understanding and appreciation of the plea agreement process,
11. decision making and reasoning abilities (as affected by developmental factors such as autonomy, risk perception, time perspective, and abstract thinking) relevant to deciding

104. See Melton et al., supra note 21, at 139-50; Randy K. Otto, Competency to Stand Trial, 2 APPLIED PSYCHOLOGY IN CRIMINAL JUSTICE 82, at 102, 109-13; Stafford, supra note 35, at 366-70.
106. Grisso, supra note 54, at 73-79; see also Appendix C for Juvenile Adjudicative Competence Interview (JACI). Id. at 155-67.
whether to retain counsel, assist counsel, and make plea decisions, and

(12) ability to participate in and understand the legal proceedings, including the capacity to testify.107

The Fitness Interview Test-Revised (FIT-R), like the JACI, is not a test, but rather is a semi-structured interview which guides the examiner’s clinical assessment of the youth’s competence related abilities.108 Although the FIT-R was developed for use with adults, preliminary research indicates its utility with juveniles as well.109 The FIT-R focuses on 16 separate areas or capacities, including the juvenile’s:

(1) understanding and appreciation of the arrest process,
(2) understanding and appreciation of the charges and allegations,
(3) understanding of the roles of key participants (i.e., defense counsel, prosecutor, judge, witnesses),
(4) understanding and appreciation of the legal process,
(5) understanding and appreciation of possible pleas,
(6) understanding of court procedure,
(7) understanding and appreciation of possible sanctions,
(8) understanding and appreciation of legal defenses,
(9) understanding and appreciation of likely outcomes,
(10) capacity to communicate relevant information to counsel,
(11) capacity to work with and relate to counsel,
(12) capacity to plan a legal strategy,
(13) capacity to engage in one’s defense,
(14) capacity to challenge prosecution witnesses,

107. Id. at 75; See also Appendix C for the Juvenile Adjudicative Competence Interview (JACI). Id. at 155-57.
109. Id. at 374.
Based on these inquiries, the examiner forms judgments about the examinee’s capacities in three primary areas: his or her understanding of the legal proceedings; understanding of possible outcomes; and ability to work with counsel. Unlike the JACI, the FIT-R was not developed specifically for use with youth, and as a result, does not include any components designed to insure that the examiner considers developmental factors as they may impact the juvenile’s competence-related abilities.

C. Review and Critical Assessment of Competence Evaluations

Mental health professionals who evaluate youth appearing in juvenile court must appreciate that their role is to provide the court (i.e., judge and attorneys) with information about the youth they would not otherwise have so as to bring about more informed and accurate decisions. Accordingly, judges and attorneys are best conceptualized as consumers of these forensic evaluations.

With some exceptions, little has been written to guide attorneys in their review of juvenile forensic evaluations. Provided below is some practical guidance designed to make attorneys and judges more knowledgeable consumers of competence evaluations of youth appearing in juvenile court.

Most importantly, attorneys and judges can bring about better evaluations by ensuring that the evaluator who is retained is appropriately qualified and credentialed. As noted above, integral to evaluating the competence-related abilities of juveniles is an understanding of the juvenile justice system, child and adolescent development, and child and adolescent psychopathology. When seeking a qualified examiner, it is helpful to contact colleagues for referrals, ask potential examiners to provide copies of previously completed evaluations (with appropriate privacy protections considered), and query potential examiners about competence-related issues (including the jurisdiction’s juvenile justice system and competence laws and rules). Attorneys and judges are cautioned against the fallacy of some common sense inferences, including that expertise results simply from conducting large numbers of competence evaluations (courts have

110. Id. at 373.
111. Id.
112. Grisso, supra note 54, at 67-68.
113. See Thomas Grisso, CLINICAL EVALUATIONS OF JUVENILES’ COMPETENCE TO PROCEED: A GUIDE FOR LEGAL PROFESSIONALS (2005); American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center (2000), MENTAL HEALTH ASSESSMENTS IN THE JUVENILE JUSTICE SYSTEM: HOW TO GET HIGH QUALITY EVALUATIONS AND WHAT TO DO WITH THEM IN COURT (2000); Randy K. Otto, Randy Borum, & Monica Epstein, Forensic Evaluation of Juveniles, in COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (David Faust ed., 6th Forensic Examinations); see also Melton et al., supra note 21 at 42, 50-51.
been known to consistently appoint poorly qualified professionals); that knowledge about children and adolescents, without knowledge about the juvenile justice system and juvenile competence to proceed, is adequate (such examiners may produce evaluations that do not begin to approach the competence issue before the court); and that knowledge about the juvenile justice system and juvenile competence to proceed, without knowledge about child adolescent development and psychopathology, is adequate (such examiners may draw highly inaccurate conclusions about the youth they examine).

Moreover, it is also helpful for the attorney or court to provide the retained examiner with any background or collateral information that may be relevant to understanding the youth and his or her competence-related abilities. Documents that are clearly relevant and are ideally provided to the examiner prior to the evaluation include: case specific information such as arrest reports, witness statements, and charging documents, as well as personal information about the juvenile, including school records, juvenile justice history, medical and mental health records, and the names of and contact information for persons knowledgeable about the youth, the youth’s history, and development. Attorneys should be wary of mental health professionals who are willing to conduct the evaluation and offer opinions regarding the youth’s competence-related abilities solely based on a clinical interview of the youth and without important collateral information.

Whether the prosecutor or defense counsel is entitled to observe the competence evaluation varies according to the jurisdiction. Observation of the evaluation can provide the attorney with important information about the examination process, the examiner, and the youth’s abilities that the prosecutor or counsel might not otherwise have access to. Observing the examination is to be distinguished from interfering with the evaluation. Before an evaluation that is to be observed begins, the attorney and examiner should agree to its scope, ground rules, and resolve any points of contention. For example, there may be some aspects of the examination, such as administration of psychological testing, that the examiner might not want recorded or observed given concerns regarding test reliability, validity, and security. Audio or video recording, as an alternative to direct observation, may be just as helpful to the interested attorney, because audio or video recording can be perceived as less “intrusive” than a third party’s presence, and takes less of the attorney’s time. Further, because using a court reporter to record the evaluation is more costly and may be perceived by the examinee and examiner as more intrusive, it is recommended as a last resort.

The evaluation and associated report will be much more useful if the attorneys and judge review it before the examiner’s court appearance and testimony. A cursory review can reveal some basic but very important information about the evaluation, including when and where it took place, the length of the evaluation, important sources of information that were and were not accessed, and the specific assessment techniques that were and were not employed. Knowing the basis for any opinions offered by the examiner allows
the attorney and court to consider how much weight or credence should be accorded to them. A more thorough review of the report should reveal a summary of relevant background information (i.e., family social, educational, medical, mental health, and juvenile justice histories); a detailed description of the youth’s emotional, behavioral and cognitive functioning; an assessment of the youth’s response style or approach to the evaluation (e.g., whether the youth exaggerated, fabricated, denied, or minimized problems); a detailed description of the youth’s competence-related abilities and limitations; and opinions regarding restorability and associated treatment recommendations (if indicated).

Important to consider when reviewing the report is whether the examiner made significant distinctions between the juveniles’ knowledge, willingness, and capacity. Lack of knowledge does not necessarily indicate a lack of ability. Moreover, recommending a finding of incompetence based simply on insufficient knowledge is inconsistent with the Supreme Court’s conceptualization of competence that it enunciated in *Dusky* and makes little sense with respect to disposition since treatment or habilitation cannot remedy knowledge deficits. Conversely, presence of knowledge alone does not necessarily indicate capacity. Some youth can offer a rote, mechanistic, or memorized account of the legal process, one’s rights, or case circumstances without any real understanding or appreciation. Assessing for knowledge or lack thereof is considerably easier than probing deeper to assess the examinee’s appreciation of these issues. It is also important to distinguish the juvenile’s unwillingness to participate in the legal process or work with defense counsel from a lack of ability or capacity. Although this distinction may sometimes be difficult to discern, particularly when considered in light of the continual debate in psychology and law regarding issues of free will and determinism, examiners should be sensitive to this issue.

In cases where a finding of incapacity is suggested, the examiner should identify the suspected cause (e.g., emotional or behavioral impairment, cognitive impairment, or normal developmental maturity issues related to age) with an eye towards identifying disposition and interventions designed to treat or habilitate the cause or condition. If incapacity is considered to result from normal developmental maturity issues associated with age, then treatment or habilitation recommendations make little sense. If, however, the impairment that is responsible for the juvenile’s competence related limitations can be impacted with treatment or rehabilitation, then recommendations for intervention should be made.

VI. SUMMARY

The ability of youth to understand and participate in legal proceedings has received considerable attention from legal and mental health professionals alike over the course of the past fifteen years as a result of the juvenile court and juvenile justice system adopting a more punitive focus and de-emphasizing rehabilitation. The large majority of states require that youth be competent to proceed when appearing in juvenile court, but adoption of the competence standards that have historically been employed with adults in criminal proceedings is problematic given the significant differences between juveniles and adults with respect to their reasoning and decision making abilities.

In order to ensure that youth are able to enjoy important rights to which they are entitled when appearing in juvenile court, it is imperative that they be able to understand and participate in the proceedings. Mental health professionals called on to help attorneys and judges understand juveniles’ competence-related abilities are obligated to describe juveniles’ capacities as they are affected by their developmental abilities, and attorneys and judges must consider mental health professionals’ work and opinions carefully. The dignity and accuracy of the legal process requires no less.
I. INTRODUCTION

Before I built a wall I’d ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn’t love a wall,
That wants it down.1

A wall called the Constitution stands between government authority and the citizens of the United States. For those who by act or bad luck become subject to custodial interrogation the name of an important brick in that wall is Miranda.2 For normal adults, the recitation of Miranda rights serves as notice of individual rights and Fifth Amendment protections.3 Since the Supreme Court’s decision in Fare v. Michael C., those same words read to adults have been

2. Miranda v. Arizona, 384 U.S. 436 (1966). The Court proscribed that the accused be informed of their right to remain silent and “that anything said can and will be used against the individual in court.” Id. at 469. Moreover, the accused had the right to have counsel present prior to and during any questioning. Id. at 470. As a constitutionally guaranteed right, the financial ability of the party to retain counsel had no bearing on the right, and the state must appoint one. Id. at 473. “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490 (1964), cited in Miranda, 384 U.S. at 475.
3. Id. at 471-73.
considered sufficient notification for juveniles as well. Prior to Michael C., the case of In re Gault served as the bastion of protection for the due process rights of juveniles. In re Gault recognized that children required special consideration when under interrogation because they could be overwhelmed by the will of an adult. Under the Court’s ruling, the presence of an adult with the child’s best interests in mind was seen as a protection from the dangers of false confessions and false waivers of due process rights.

However, in Michael C., the Court presented a totality of the circumstances test for determining whether a child waived his Miranda rights voluntarily, knowingly, and intelligently. As a result, elements such as age and mental capacity have been relegated to mere factors to be considered. Each court gives as much or as little weight to those factors as it deems appropriate.

The standards of “knowingly” and “intelligently” are proving to be difficult factors for state courts to consider in a consistent manner. Not all juveniles are created equal. Juveniles, who run afoul of the law, have a range of mental capacities. For some juveniles, a lack of worldly experience is compounded by a mental deficiency that renders their intelligence, moral aptitude, and resistance to suggestion far below that of their peers. Many of these children receive special education services from local school systems. Unfortunately, children qualifying for such services constitute a majority of those currently in the juvenile justice system.

A concerned Ohio court offered an interesting solution to the dilemmas posed by special education children during custodial interrogation. According to the court, the best protection for the rights of such children was the presence

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4. Fare v. Michael C., 442 U.S. 707, 725 (1979). The Court stated, “This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights . . . .” Id.
6. Id. at 36.
7. Id. (citing Powell v. Alabama, 287 U.S. 45, 69 (1932). The Court noted, “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’” Id.
9. David T. Huang, Note, “Less Unequal Footing”: State Courts’ Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation, 86 CORNELL L. REV. 437, 448-49 (2001). Mr. Huang noted, “one major shortcoming of the totality of circumstances test is that a judge can emphasize or downplay and factor she wishes, if indeed she articulates any factor at all.” Id.
10. Id. at 448-49.
12. Id. at 340.
13. Id.
of a special education teacher or counselor. Because of familiarity with the child’s propensities and capabilities, the special education teacher or counselor would have the insight necessary to protect the child. The court’s employment of a per se interested adult standard is an excellent solution. However, special education teachers and counselors are not the best choices. Indeed, the conflicts implicit in their presence may prove to do more harm than good for that child and others.

In the discussion below, part I examines the cases of In re Gault and Fare v. Michael C. Then, a variety of state cases addressing the waivers of special education students are discussed. They represent the wide range of decisions at which various state courts have arrived. Part II presents a brief analysis of the difficulties presented by the special education children during interrogation. This section concludes with the proposition that the federal standard, embodied in 18 U.S.C.A. § 5033, presents a workable compromise between the competing necessities of protecting juveniles and protecting society from some juveniles.

II. BACKGROUND LAW

For many years, children were seen as being in need of society’s and the court’s protection; however, perceptions of children have taken a more Victorian turn of late. In the juvenile justice system, Miranda warnings are utilized in the same manner as they are for adults. In order for an adult to waive his Miranda rights, the waiver must be made voluntarily, knowingly and intelligently. However, applying the same standard to juveniles has raised significant controversy within the legal community. In fact, many legal scholars have noted that this standard is inappropriate for normal children, much less...
children who have learning difficulties. Two key decisions in the evolution and de-evolution of the standards for a proper waiver of rights by a juvenile are *In re Gault* and *Fare v. Michael C.*

A. *In re Gault*

In 1967, the United States Supreme Court considered whether a juvenile was entitled to due process rights under the Constitution in the seminal case of *In re Gault.* The Supreme Court described a juvenile court system that developed from a belief that children had a right to custody. Parents, who properly performed this custodial function, controlled their children’s conduct, and sent them to school. When the parents did not exercise proper custody, the juvenile court stepped in as *Parens Patriae* and took custody of the child so that he may be rehabilitated. Juvenile proceedings were thus characterized as “civil” and not “criminal” despite the deprivation of individual liberties. Unfortunately, somewhere along the way, the best intentions of reformers and visionaries became lost, and injustice found a home in the juvenile justice system. In reaction to this, the Court stated, “[d]ue process of law is the primary and indispensable foundation of individual freedom.”

The Court observed that utilization of due process for juveniles would not hinder efforts by the states to provide anonymity for juvenile defendants and appropriate rehabilitation facilities. In fact, the Court found a great miscarriage of justice in the Arizona decision to sentence a child to six years of imprisonment for the same act for which an adult would receive only a fine of


23. *In re Gault*, 387 U.S. at 4. Gerald Gault and his friend Ronald Lewis were taken into custody on June 8, 1964, for allegedly making lewd phone calls to Mrs. Cook. *Id.* Gault was already on probation for having stolen a wallet from a lady’s purse. *Id.*

24. *Id.* at 17.

25. *Id.*

26. BARRON’S LAW DICTIONARY 360 (4th ed 1996). *Parens Patriae* refers to the ability of the state to act on behalf of a person under a legal disability such as insanity or minority. *Id.* The term is a concept of standing used by the state when acting on the behalf of a minor to determine custody or protect property of the minor. *Id.* Interestingly, the term implies that the “child is not the absolute property of the parents, but is a ‘trust’ reposed in the parent by the state.” *Id.* The term has most often applied when the person constituted a danger to himself or the public if they were not held in the custody of the sovereign. *Id.*

27. *In re Gault*, 387 U.S. at 17. Specifically, the Court stated, “If his parents default in effectively performing their custodial functions—that is, if the child is “delinquent”—the state may intervene.” *Id.*

28. *Id.*

29. *Id.* at 19-20.

30. *Id.* at 20.

31. *Id.* at 21, 24-25.
five to fifty dollars and possible imprisonment of two months. Moreover, the Court observed that an adult would have at least received notice of the charge, sufficient to allow time to prepare a defense—notice which neither Gault, nor his parents, received.

Accordingly, the Court explained that due process of the law required that sufficient notice be given where a child’s freedom and a parent’s custodial rights may be denied. The right to counsel must also be extended to a child where the child may be subject to confinement under the Fifth and Fourteenth Amendments. Finally, where a child may be subject to confinement to a state institution, the privilege against self-incrimination under the Fifth Amendment, extended to that child, unless it was waived in the presence of counsel or the right to counsel were waived. Confessions induced from children by forceful officials, the Court stated, were not a form of therapy for the child, were not reliable, and were not trustworthy. The Court held that the sworn testimony of officials and other witnesses as to the confession of a child was not sufficient, where the confession was obtained out of the presence of parents, without counsel and without advising the child of his right to remain silent.

In re Gault is the culmination of a series of cases in which the Court placed an emphasis on the presence of an adult as a counter-measure to the overwhelming authority that the police could project onto a child. However,

32. Id. at 29.
33. In re Gault, 387 U.S. at 33.
34. Id. at 33-34.
35. Id. at 41.
36. The Court stated that incarceration against ones will was still a denial of liberty, regardless of whether it was “civil” or “criminal.” Id. at 50.
37. Id. at 47. The Court also discussed its decision in Haley v. Ohio, 332 U.S. 596, 599-600 (1948). In that opinion, Justice Douglas wrote that a child cannot be judged by more exacting standards than an adult can. Id. A child was no match for the police, who could overwhelm his mind and elicit a confession using tactics that would be unacceptable against an adult. In re Gault, 387 U.S. at 47. A child requires someone to protect his interests. Id. at 51-52.
38. Id. at 56-57.
40. Id. at 12-13. See Haley, 332 U.S. 596. In Haley, a fifteen-year-old boy was arrested in the middle of the night based on information that he acted as a lookout during the robbery of a candy store. Id. at 597. Teams of officers interrogated him for five hours straight until the confession was obtained. Id. at 598. He was not provided with an attorney or friend during the interrogation. Id. After the confession, he was sent to jail. Id. His attorney tried to see him twice but was denied. Id. The court found the interrogation suspect even if the detainee had been an adult, much less a child. Id. 600-01. The court provided that private, secret custody of either man or child cannot be used as a device to wring confessions from them. Id. at 601. See also Gallegos v. Colorado, 370 U.S. 49 (1962). Following the assault of an elderly man in a hotel room, the child was arrested and detained without access to family or an attorney for five days. Id. at 49-50. During that time period, the child confessed to the attack. Id. at 50. Police indicated that he had been informed of his right to an attorney. Id. at 54. The court stated that even the most sophisticated fourteen-year-old could not anticipate the effect of statements made to police or understand how to get the benefit of his constitutional rights. Id. at 54-55.
41. See King, supra note 22, at 447.
this protective attitude was only to last just over ten years. In the case of Fare v. Michael C., the Court adopted a new test—totality of the circumstances—to determine the admissibility of a confession.42

B. Fare v. Michael C.

Fare v. Michael C. was the first case following In re Gault and Miranda, in which the Court examined the admissibility of a child’s confession.43 After being detained by the police and advised of his Miranda rights, Michael C. requested to see his probation officer.44 When the request was refused, Michael C. agreed to provide the police with statements and drawings that implicated him in a murder.45 At trial, the defense moved to suppress the incriminating information, arguing that Michael C’s request to see his probation officer invoked his Fifth Amendment rights, in the same manner as a request for an attorney under Miranda did.46 The trial court denied the motion; however, on appeal, the California Supreme Court reversed stating that because the probation officer stood as a guardian in the juvenile’s life, such a request did invoke the Fifth Amendment.47

In considering the issue, the United States Supreme Court stated that Miranda was clear: A party must be advised that they had the right to remain silent and a right to counsel during interrogation.48 Further, any statements obtained in violation of these rules could not be admitted.49 The Court reached this decision, by explaining that the Miranda rule was based on the unique stance of lawyers as the protectors of rights for all of society.50 Therefore, the Court stated that it did not matter if the accused was an adult or a minor, only the request for an attorney in particular invoked the Fifth Amendment.51 As such, a probation officer was simply not the same and no invocation of the Fifth Amendment occurred.52 Unfortunately, the probation officer’s position of trust with the juvenile did not render him able to give effective legal advice.53 Thus,

42. Michael C., 442 U.S. at 724-25.
43. See King, supra note 22, at 448.
44. Michael C., 442 U.S. at 710.
45. Id. at 710-11.
46. Id. at 711-12.
47. Id. at 713-14.
48. Id. at 717.
49. Id. at 718.
50. Michael C., 442 U.S. at 719.
51. Id.
52. Id.
53. Id. at 722. A probation officer was no different from a clergyman or friend in his ability to give legal advice, according to the Court. Id. Thus, a request for an attorney holds a special place in the legal system for which the simple request for an adult is not the equivalent under the Fifth Amendment. Id. at 722-23. However, would not a probation officer having keen insight into the legal system, be the best qualified to tell the juvenile to ask for an attorney?
the Court discounted the statutory duty created by the state of California to protect the rights of juveniles.\footnote{Id. \textit{at} 723. Under the California statute requiring that the probation officer represent the rights of the juvenile, the probation officer is given the duty to investigate the circumstances surrounding criminal charges and make recommendations. \textsc{cal. welf. & inst. code} § 280 (West Supp. 1979), \textit{discussed in Michael C.}, 442 U.S. at 720 n.5. These contradictory duties the Court found to be an indication of the probation officer’s duty to the state, not the child. \textit{Michael C.}, 442 U.S. at 720.}

The Court also examined whether Michael C. had effectively waived his \textit{Miranda} rights.\footnote{\textit{Id.} \textit{at} 724-25.} A determination of whether statements made during custodial interrogation are admissible is made based on an inquiry into the totality of the circumstances.\footnote{\textit{Michael C.}, 442 U.S. at 725. The totality of the circumstances inquiry was utilized in \textit{Miranda}, 384 U.S. at 475-77, to determine whether rights have been voluntarily, knowingly, and intelligently.} Through inquiry into the totality of the circumstances surrounding the interrogation, the court must determine whether the statements were made following a knowing and voluntary waiver of the right to remain silent and the right to counsel\footnote{\textit{Id.} \textit{at} 725-26.}. The Court further stated,

\begin{quote}
This totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.\footnote{\textit{Id.} \textit{at} 725.}
\end{quote}

Under the Court’s version, a totality of the circumstances inquiry for a juvenile would consider the juvenile’s age, experience, education, background, and intelligence, as well as his capacity to understand the warnings and the consequences of waiver.\footnote{\textit{Id.} \textit{at} 725-26.} The Court reversed the ruling of the Supreme Court of California, after finding that there was no indication that Michael C. had not waived his \textit{Miranda} rights knowingly, intelligently, and voluntarily.\footnote{\textit{Id.} \textit{at} 726-28.}

King argues in a recent article, \textit{Waiving Childhood Goodbye: How Juvenile Courts Fail To Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights}, that the Court’s decision has led the juvenile system away from notions of fairness that guided decisions like \textit{In re Gault}.\footnote{King, \textit{supra} note 22, at 450.} As a result, fourteen states require a parent to be present during interrogation only below designated ages, or limit waiver below designated ages, and thirty-five states have adopted the totality of the circumstances test from \textit{Michael C.} without alteration.\footnote{\textit{Id.} at 451-52} According to King, even in those states limiting
waiver, the totality of the circumstances test is still used in some form.\textsuperscript{63} King points out that several waivers have been accepted, outside of the presence of parents, from children as young as eleven in South Carolina, Ohio, and Oregon.\textsuperscript{64} Courts accepting these waivers often argue by analogy that children are like adults of low intelligence.\textsuperscript{65} However, as King points out, this supposition defeats the entire purpose of the juvenile justice system.\textsuperscript{66} Children are different from adults with low intelligence as they lack the worldly experience and the knowledge time will bring.\textsuperscript{67} King contends that courts apply the totality of the circumstances test in a manner that fails to consider the child’s immaturity and incomplete development.\textsuperscript{68} Acknowledgement of understanding of rights and parroting back of rights does not indicate that a child has understood those rights and can apply them to the situation.\textsuperscript{69} Despite this fact, many state courts have accepted this as sufficient evidence that a child, even a very young one, or one of limited capacity, has waived \textit{Miranda} protections.\textsuperscript{70} States, however, are not united in their treatment of children who have been designated as having limited intellectual abilities.

\textbf{C. The Split among the States: Interrogation of Learning Disabled Children}

Despite the ruling in \textit{Michael C.} finding the totality of the circumstances test to be sufficient, the states have taken a variety of approaches when faced with a child possessing intellectual limitations that affect their ability to knowingly, intelligently, and voluntarily waive their rights. The most troubling circumstance for the courts is not when a child is clearly designated as mentally retarded.\textsuperscript{71} Rather, it is the child enrolled in a special education program that provides difficulty. Such children possess disabilities that most often focus on their ability or inability, rather, to process information. As the following cases illustrate, states have taken divergent stances in protecting the rights of such children.

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 452.
\item \textsuperscript{64} \textit{Id.} at 456.
\item \textsuperscript{65} \textit{Id.} at 457-58.
\item \textsuperscript{66} \textit{Id.} at 458.
\item \textsuperscript{67} King, \textit{supra} note 22, at 458. Specifically, King explained, “Equating young children or those of limited intelligence with equally limited adults wholly undermines the rationale for separate juvenile courts—children are different from adults and require protection from their youth when enmeshed with law enforcement.” \textit{Id.}
\item \textsuperscript{68} \textit{Id.} at 461.
\item \textsuperscript{69} \textit{Id.} at 459.
\item \textsuperscript{70} \textit{Id.}
\end{itemize}

The police arrested fifteen-year-old Jennifer at 2 a.m. on suspicion of murder. After being read her rights, Jennifer indicated that she understood her rights, but was still willing to talk about what happened. During the interrogation, Jennifer confessed to the shooting of a fifteen-year-old boy. At trial, Jennifer made a motion to suppress the confession stating that she did not knowingly and intelligently waive her Miranda rights. Dr. W. Merrick, a psychologist, testified that Jennifer suffered from auditory deficit disorder, meaning she did not comprehend spoken language well. Her special education teachers at both the high school and middle school levels confirmed this diagnosis. Ms. McCosky, the high school teacher, testified that Jennifer always said she understood oral instructions when she did not. She also noted that Jennifer read at a third or fourth grade level, far below the eighth grade level at which the Miranda rights are written. Ms. Stephenson, the middle school special education teacher, testified that when Jennifer did not understand she exhibited characteristic behaviors, including turning away and fidgeting. However, the interrogating officers did not observe these behaviors when Jennifer was Mirandized. Based on the observations of police in light of the testimony of Ms. Stephenson, the trial court denied the motion to suppress the confession. Ultimately, the trial court convicted and sentenced Jennifer to the Lincoln Hills School until she was twenty-one.

On appeal, the court stated that the State must merely establish a prima facie case of proper Miranda waiver by preponderance of the evidence. After examining the totality of the circumstances, the court stated that it was satisfied that Jennifer knowingly and intelligently waived her Miranda rights. The court relied on Ms. Stephenson’s assessment that if the rights were read slowly and Jennifer paid attention, Jennifer would have understood her Miranda rights. Unfortunately, neither the fact that Jennifer was a minor, nor that the psychologist testified that she would not understand the Miranda warnings being

73. Id. at *2-*3.
74. Id.
75. Id. at *3.
76. Id. at *4.
77. Id. at *6-*7.
79. Id. at *6 and *5.
80. Id. at *7.
81. Id. at *3.
82. Id. at *8.
83. Id.
85. Id. at *12.
86. Id. at *12-*13.
read to her, nor that neither her parents nor counsel were present, persuaded the court that Jennifer did not knowingly and intelligently waive her rights.87

2. People v. Lashun H. (In re Lashun H.)

Lushun H., age fourteen, was arrested in the home of his uncle for the murder of another boy.88 Both Lashun’s mother and his uncle accompanied him to the police station; however, they were both denied access to see him.89 A youth officer was summoned, who informed Lashun of his rights and asked if he would talk with police.90 Lashun indicated that he understood his rights and would talk with police.91 During the evening, Lashun told police that Anderson had committed the offense.92 Other witnesses corroborated the statement.93 The police continued questioning him and, eventually, Lashun confessed to the murder around 6 a.m.94 However, prior to the confession, police refused to allow Lashun’s uncle and his mother an opportunity to speak with him, despite repeated attempts by his mother throughout the night.95

A psychologist testified that Lashun read at the level of a seven-year-old.96 School records indicated that he met with a learning disability specialist for 40 minutes each day.97 Lashun contended that his confession was neither knowing nor voluntary because of his learning disabilities.98 After considering the intimidation techniques used by the police, the court found that the confession was not voluntary.99 With regard to the waiver element of knowingly, the court held that because Lashun was a fourteen year-old with “learning disabilities, a limited ability to express and understand words and the reading skills of a seven year-old,” he was even more vulnerable to police intimidation than a normal fourteen year-old.100 Therefore, the Appeals Court reversed the trial court ruling denying the motion.101

87. Id. at *14-*15.
89. Id. at 333.
90. Id. at 333-34.
91. Id. at 334.
92. Id.
93. Id.
94. Lashun H., 672 N.E.2d at 334.
95. Id. at 333.
96. Id. at 334.
97. Id.
98. Id. at 335.
99. Id. at 333.
100. Lashun H., 672 N.E.2d at 338.
101. Id. at 338-339. Police conduct in the questioning of Lashun had been particularly egregious. His learning disability was only one factor that the court considered in reversing the trial court ruling denying a motion to dismiss. Id. at 339.
3. People v. J.J.C. and People v. M.M.

Similar to Lashun H., J.J.C. was also interrogated outside of the custody of his parents with regard to a sexual assault. Following the holding in Lashun H., the court drew an analogy to the use of limited intelligence in considering adult confessions and found limited mental capacity merely a factor to be considered in the totality of the circumstances. Moreover, the court found the presence or absence of a parent to be a mere factor in determining whether the waiver was appropriate. The court held the statements inadmissible, and acknowledged that J.J.C., like Lashun, was more susceptible than most sixteen year-olds because of his learning disabilities and psychiatric problems.

However, the Illinois court has also found such statements to be admissible. For example, in People v. M.M., M.M. contended that his confession was not knowing and intelligent due to his mental deficiencies, which made him incapable of understanding the words of the Miranda warning. Even after considering expert testimony concerning M.M.’s diminished capacity, the court upheld the waiver under the totality of the circumstances approach.

4. People v. Blankenship

Blankenship was sixteen when he was arrested for kidnapping and murdering an elderly woman. After his arrest, Blankenship gave the police a description of the location of the victim. On appeal, Blankenship claimed that his statements were not knowing and voluntary because he lacked the mental capacity to understand what he was doing when he waived his Miranda rights. To support his contention, Blankenship offered expert testimony that his reading level and educational level were very low and he was possibly mentally retarded. The trial court and the appeals court adopted the opinion the prosecution’s experts that he “was of average intelligence and capable of understanding his rights.” After viewing the videotape of the confession, the court found him to be a “street-wise kid who was not hesitant to talk to the

102. People v. J.J.C., 689 N.E.2d 1172, 1174-75 (Ill. 1998)
103. Id. at 1180.
104. Id. at 1178
105. Id. at 1180-81.
106. People v. M.M., 627 N.E.2d 367, 369-370 (Ill. 1993). Although fifteen years old, M.M. had an overall I.Q. of 71, a mental age of 10 and low reading and vocabulary skills. Id. at 370.
107. Id. at 370. Specifically, the court noted that he had sufficient mental capacity to read his statement and make corrections. Id. at 370. Moreover, according to the court, M.M. understood through previous contact with police that he could remain silent when questioned. Id. at 370.
108. People v. Blankenship, 30 P.3d 698, 702 (Colo. 2000). Because he was designated as a runaway and beyond parental control, he was tried as an adult under 1989 Colo. Sess. Laws § 19-2-210. Id. at 706.
109. Blankenship, 30 P.3d at 702.
110. Id. at 706-07.
111. Id. at 704, 706.
112. Id. at 706.
police.’’ Based on his attitude and his previous contacts with police, the court determined that the waiver was made knowingly and intelligently.

5. State of Delaware v. C.W.

The Miranda warning for C.W. was administered outside the presence of a guardian in less than 14 seconds. C.W. contended that his statements were not voluntarily, knowingly or intelligently made because, given his low mental capacity, he did not understand his rights in the manner in which they were given and thus could not waive them. C.W. was designated as having an I.Q. of 81, Attention Deficit Hyperactivity Disorder, and Adjustment Disorder with mixed emotions and conduct. The court agreed that C.W.’s low I.Q. and other problems prevented his waiver of Miranda rights from being knowing or voluntary.

The cases above are merely illustrative of the split among the state courts concerning whether a learning disabled child can knowingly waive Miranda rights without the advise of a parent or counsel. Some states, such as Illinois, swing back and forth on the issue of what is sufficient protection for a waiver of Miranda rights by a child with learning disabilities. Other courts have ventured that even under Michael C. and the totality of the circumstances test the child, who through no fault of its own, has a learning disability that prevents understanding of Miranda rights, is entitled to greater protections than those normally afforded. Their contention is supported by scientific studies such as that conducted by Professor Thomas Grisso. Professor Grisso determined that juveniles with low I.Q. scores were not capable of understanding their constitutional rights and many times did not understand what the words meant.

D. In re J.W.—A Judicially Proposed Solution

J.W. was taken into custody by Detective Evans of the Ashland Police Department and removed to the department for interrogation. The court did

113. Id.
114. Id.
116. Id. at *11.
117. Id. at *13.
118. Id. at *14-*15.
119. See Lashun H., 672 N.E.2d at 338; J.J.C., 689 N.E.2d at 1180-81; M.M., 627 N.E.2d at 370.
121. Walters, supra note 22, at 506.
122. Id.
123. In re J.W., 682 N.E.2d at 1110.
not question whether J.W. was advised of his *Miranda* rights. Rather the court considered whether, given his age, background, and learning disabilities, J.W. was capable of withstanding the pressure of interrogation alone. J.W. was enrolled in the special education program of the Ashland City School District. According to his special education teacher, J.W., like many of the juveniles described above, was very limited intellectually and socially. He was also incapable of realizing that the behavior with which he was charged was wrong. According to the court, the best efforts of Detective Evans were not sufficient for a child like J.W. Thus, the court held:

> [W]hen the state, through a law enforcement agency, takes a child into custody for purposes of interrogation, with delinquent charges against the child to be interrogated a potential outcome, the officers of the interrogating agency must see that a person qualified, such as a special education teacher, an appropriate counselor, or other capable specialist, is present during the interrogation to assure that the child to be interrogated is able to communicate accurately, understandably, truthfully, and free of any pressure or intimidation, whether intended or not.

What the Ohio court is suggesting is a modified “per se approach” or “interested adult” standard. The court’s proposed solution to protecting the rights of special education children by utilizing their special education teachers has many positive aspects. A special education teacher is familiar with the emotional and mental capabilities of the child in question. For many special education children, their special education teacher is a supportive and trusted figure on whose judgment the child can rely. Often that teacher is a steady figure in contrast to a chaotic and even abusive home life. Many special education teachers hold for their students feelings similar to those held for their own children. Special education teachers can be the responsible, friendly adult contemplated by Colo. Rev. Stat. § 19-2-511(1), which requires the presence

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124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
130. Id. at 1111.
131. Larson, *supra* note 19, at 647. See also in footnote 97, a list of thirteen states which employ a form of the per se approach for normal children below statutorily designated ages. The Ohio court’s proposal would affect all children with learning disabilities regardless of age.
132. COLO. REV. STAT. § 19-2-511(1) (West 2006). The statute states: No statements or admissions of a juvenile made as a result of the custodial interrogation of such juvenile by a law enforcement official concerning delinquent acts alleged to have been committed by the juvenile shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation and the juvenile and his or her parent, guardian, or legal or physical custodian were advised of the juvenile’s right to remain
of a responsible adult during the custodial interrogation of a juvenile in order for statements to be admissible. However, employing special education teachers or school counselors presents some difficulties, which the court may not have considered.

III. ANALYSIS OF A VALID CONCERN

Judge McKinley was especially poignant when he wrote in his opinion that children in the special education program are “weak in the area of self-discipline; weak in the area of understanding morals, ethics and values; easily influenced by those around him; and vulnerable to saying what he thinks an authority person wants to hear.”133 Further, Judge McKinley noted that a child such as J.W. was unlikely to understand either the importance of what he was saying or the importance of telling the truth in the matter.134 In fact, he recognized that the court owed a special duty of fairness with regard to this difference in mental ability.135 Judge McKinley’s opinion reflects a growing truth in the juvenile justice system. Thirty to seventy percent of incarcerated juveniles suffer from learning disabilities that require special education classes.136 Another 53 percent have diagnosable mental health disorders.137 Providing due process protection for such children can be especially difficult.

In order for a child to waive their Miranda rights effectively, three elements are necessary.138 First, the child must have an understanding of what the words and phrases contained in the warnings mean.139 Then, effective waiver requires both the ability to reason about the consequences of the decision to waive or invoke those rights and an accurate understanding of the function of the Miranda rights.140 While special education children may understand each individual word of the Miranda rights being read to them, they have little understanding of what those rights mean as a whole.141 Research has shown that the ability to

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133. In re J.W., 682 N.E.2d at 1110.
134. Id.
135. Id. at 1111.
136. Leone et al., supra note 11, at 340.
137. Id. at 343.
139. Id.
140. Id.
141. Id. For a more in-depth discussion, see Jeffery L. Helms, Analysis of Miranda Reading Levels Across Jurisdictions: Implications for Evaluating Waiver Competency, 3 J. Forensic Psychol. Prac. 25 (2003).
understand what the rights mean correlates with experience with the juvenile justice system, I.Q., and age.\textsuperscript{142}

Moreover, juveniles have great difficulty foreseeing what waiver of their \textit{Miranda} rights may mean to them in the future. When asked about their reasons for waiving their rights, most juveniles were more concerned with their immediate detention or release.\textsuperscript{143} Long-range consequences were simply too far away for them to identify or comprehend.\textsuperscript{144} For example, in a laboratory study, 72 participants were accused of stealing 100 dollars.\textsuperscript{145} Fifty-eight percent waived their rights.\textsuperscript{146} The innocent were more likely than the guilty to waive their rights for strategic self-presentation reasons.\textsuperscript{147} They believed that others would be able to judge correctly their innocence or guilt based on their denials.\textsuperscript{148}

This inability to foresee the effects of waiver of rights translates into high rates of false confessions among juveniles. In another study, persons age twelve to twenty-six were told not to strike a key on a keyboard during a typing test.\textsuperscript{149} Each was confronted with proof that they had done so, though none actually had.\textsuperscript{150} Among those who were ages twelve to thirteen the false confession rate was 78 percent, and among those who were fifteen to sixteen, the false confession rate was 72 percent.\textsuperscript{151}

Especially troublesome in the interrogation of juveniles, is the widespread practice of training of law enforcement officers in the Reid technique of interrogation.\textsuperscript{152} The Reid technique attempts to cause suspects to engage in self-incrimination by creating increased anxiety and despair and minimizing the

\begin{itemize}
\item \textsuperscript{142} Kassin & Gudjonsson, \textit{supra} note 138, at 39-40.
\item \textsuperscript{143} \textit{Id.} at 52.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 40.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.} at 40. In an examination of 491 felony cases referred to juvenile court, nine percent of the suspects refused to speak with police. \textit{Id.} at 52.
\item \textsuperscript{148} Kassin & Gudjonsson, \textit{supra} note 138, at 40.
\item \textsuperscript{150} Kassin & Gudjonsson, \textit{supra} note 138, at 52-53.
\item \textsuperscript{151} \textit{Id.} at 53.
\item \textsuperscript{152} \textit{Id.} at 42. The steps of the Reid technique include 1) confronting the suspect with an unwavering assertion of guilt, 2) developing themes that physiologically justify or excuse the crime, 3) interrupting all efforts at denial and defense, 4) overcoming the suspects factual, moral, and emotional objections, 5) ensuring that a passive subject does not withdraw, 6) showing sympathy and encouraging cooperation, 7) offering face saving alternative constructions of the act, 8) convincing the suspect to recount details of the crime and finally 7) converting those details into a written or oral confession. \textit{Id.} at 42-43. On the Reid company website, the company boasts that 99\% of confessions obtained by persons trained by them were admitted in Minnesota and Alaska. John E. Reid & Associates, Inc. Company Information Page, http://www.reid.com/r_about.html (last visited Mar. 17, 2007).}
\end{itemize}
consequences of confession. The urge to confess to real or imagined transgressions originates in the fear of losing the love of family and others, and the fear of retaliation. Juvenile suspects are particularly vulnerable to false confessions under interrogation by authority figures. The presence of parents or other friends does little to mitigate this effect and may even worsen it. Most often parents do not believe that children should be allowed to remain silent and recommend that their children speak. Parents may even coerce their children to make statements out of embarrassment or anger.

Additionally, juveniles have little understanding of the purpose of Miranda rights. They do not understand that these rights trump the ability of the police to continue the interrogation, as they will. Many normal juveniles do not view Miranda rights as entitlements but rather as rules that can be changed by adults. Juveniles also have different interpretations of what the words of Miranda mean. “Anything you say may be used against you” in the mind of a child may become “you had better talk to the police.” If normal children hold such misconceptions, how might a special education child perceive Miranda warnings? One special education teacher, who works with EBD children, believed that his students “would not even hear them as rights, but as a challenge.”

Thus, Judge McKinley has a valid concern about the due process protections afforded those designated as learning disabled in the juvenile justice system. Their own youth, inexperience, and special mental state make them vulnerable to the mental and physical rigors of interrogation. The police and the juvenile justice system are caught in an odd quandary: protecting the juvenile’s constitutional rights and protecting society from the terrible crimes that juveniles do commit. However, the use of special education teachers to protect those rights is not practical.

153. Kassin & Gudjonsson, supra note 138, at 43.
154. Id. at 46.
155. Id. at 52.
156. Larson, supra note 19, at 655 (2003).
157. Id. at 655.
158. Id. at 665-57.
160. Krzewinski, supra note 17, at 367.
161. Id.
162. Id.
163. EBD is an acronym for Emotionally and Behaviorally Disturbed.
164. Survey No. 1. The surveys referred to in this article as Survey No.1-5 were informal questionnaires filled out by colleagues of mine.
165. Krzewinski, supra note 17, at 355.
166. Id. at 356.
A. A Question of “Authority”

To state the obvious, school personnel and teachers in particular, are not law enforcement personnel. However, in many ways they are similar since part of what teachers do every day is protect the individual from abuse by the group, and the group from abuse by the individual. School personnel, just like law enforcement, exercise authority, and control over the school community.

The line between school personnel and law enforcement is blurred by the presence of law enforcement officers assigned to the schools themselves. According to Penrose, there has been an increasing movement in modern courts away from Tinker v. Des Moines and toward a restrictive notion of students’ rights where criminal law and school discipline overlap. Criminal interrogations and school discipline have become merged into each other. The presence of school officials during interrogation has been characterized as a “pretext, for the quick referral of minors to local police department and criminal prosecution.” Moreover, courts have recognized that teachers and principals are state actors under the Fourth Amendment and maybe under the Fifth Amendment. Thus, principals may search as state actors, but the law is murky about whether they question juveniles as state actors.

School officials do question children in a custodial fashion. Consider the case of In re Killitz, which the court applied the following test to determine whether a junior high student was subject to custodial interrogation:

1. Whether the defendant could have left the scene of the interrogation voluntarily;
2. Whether the defendant was being questioned as a suspect or merely as a witness; and
3. Whether the defendant freely and voluntarily accompanied the officer to the place of questioning.

168. Tinker v. De Moines Indep. Cmty. Sch. Dist, 393 U.S. 503 (1969). Tinker and some other students protested the Vietnam War by wearing black armbands. Id. at 504. The principals of the school passed a policy, which gave suspensions to those students who did not remove the bands on arriving at school. Id. Tinker refused to remove his and was suspended. Id. The Court stated that students and teachers did not lose their constitutional rights to freedom of speech and expression at the door. Id. at 506.
169. Penrose, supra note 167, at 777.
170. Id. at 778.
171. Id. (discussing In re Angel S., 758 N.Y.S.2d 606, 607 (N.Y. App. Div. 2003)).
173. Id. at 779.
The court found all of the Paz indicia of custodial interrogation present. \footnote{175. Id. at 1383.} The child was not free to leave as school personnel controlled his movements; he was being questioned, as a suspect; and he did not voluntarily go to the principal’s office. \footnote{176. Id. at 1383-84.} As Penrose asserts, courts have been naïve when assuming that an individual pulled from class feels capable of returning to class. \footnote{177. Penrose, supra note 167, at 779.} Penrose has criticized the courts’ lack of concern over the broad latitude extended to school personnel in questioning students concerning non-school behavior. \footnote{178. Id. at 780.} School officials do work in tandem with police to pursue juvenile crimes. \footnote{179. Id. at 785-86. See State v. Heritage, 61 P.3d 1190, 1194 (Wash. Ct. App. 2002) (noting when a person is questioned by a state actor they are entitled to Miranda warnings, even when the state actor was not a law enforcement official).} Penrose argues that school officials “are more akin to law enforcement officers” and that students need a full spectrum of Miranda protections. \footnote{180. Penrose, supra note 167, at 789.}

The Ohio court’s proposal of employing special education teachers to protect the rights of students with designated leaning disabilities is not different from Michael C. and his probation officer. \footnote{181. Michael C., 442 U.S. at 724-25. Michael C. requested the presence of his probation officer during interrogation. Id. The Court held that such a request did not constitute an invocation of his Miranda rights through a request for an adult presence, because the probation officer was an officer of the law. Id.} In \textit{Fare v. Michael C.}, the Supreme Court declared that the request for a parole officer did not invoke the Fifth Amendment under \textit{Miranda}, because the parole officer was a state employee with a duty to report criminal activity, not a friend to the child. \footnote{182. See id. at 722.} While special education students do need extra protection during custodial interrogations, protection should not come in the form of pro se representation by special education teachers. Teachers, like parole officers, have conflicting loyalties when it comes to their students. On the one hand, most teachers would help a child in any way that they could. On the other, helping one child may not be in another child’s best interest. Asking teachers to choose the good of one child over another would violate the spirit of the relationship between the children and the teacher and the teacher and the parents. Additionally, when asked, special education teachers have expressed great uneasiness with being involved in criminal matters and would rather parents were involved. \footnote{183. Surveys #1-5.} Most respondents saw no role for themselves in the interrogation of a juvenile by the police even when that student was one on their own caseload. \footnote{184. Surveys #1-5.} Practically speaking, the special education teachers, themselves, are not prepared to provide a child with guidance concerning the preservation of Miranda rights. When
fear that such a requirement would open them up to increased liability and lawsuits.\textsuperscript{185}

\section*{B. A Positive Direction}

This is not to say that the suggestion by Judge McKinley that special education teachers or counselors be present during custodial interrogation is without merit.\textsuperscript{186} Rather the opinion he rendered is a much-needed reminder of the inherent weaknesses of the totality of the circumstances approach.\textsuperscript{187} Among the criticisms leveled at the totality of the circumstances approach, the lack of a specific weight given to any one factor allows judges to emphasize or downplay any factor.\textsuperscript{188} The result is uncertainty among law enforcement concerning which confessions are admissible and where the boundaries of acceptable behavior are.\textsuperscript{189} The totality of the circumstances approach also results in inconsistent rulings by the court as many of the cases above illustrate.\textsuperscript{190} Additionally, analysis conducted under the totality of the circumstances approach to custodial interrogations provides no assistance to the juvenile in determining whether to waive \textit{Miranda} rights.\textsuperscript{191}

While per se rules do provide an interested adult ways to protect the rights of the child, they have their problems as well.\textsuperscript{192} There is no constitutional mandate that a child be provided the assistance of an interested adult during interrogation.\textsuperscript{193} Per se rules place an increased administrative burden on the police to fulfill the interested adult requirement.\textsuperscript{194} Further, the likelihood of collateral litigation to determine whether an interested adult was provided and whether meaningful consultation occurred is increased.\textsuperscript{195} Finally, for some juveniles, who have committed atrocities, voluntary confessions will be discarded because of procedural irregularities.\textsuperscript{196} These criticisms receive the most ardent support by those rejecting the per se approach. The per se approach, some contend, may tie the hands of police and effective police work will not be

\begin{footnotesize}
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\item[185.] Surveys #1-5. However, one respondent said that having a special education teacher present was better than having the child face interrogation alone.
\item[186.] \textit{In re J.W.}, 682 N.E.2d at 1111.
\item[187.] Huang, \textit{supra} note 9, at 448.
\item[188.] \textit{Id.} at 448-49.
\item[189.] \textit{Id.} at 449.
\item[190.] \textit{Id.}
\item[191.] \textit{Id.}
\item[192.] For a delightfully funny, but non-academic, account of what happens when per se goes too far, see Justice William W. Bedsworth, Column, \textit{A Criminal Waste of Space: A Short History of the California Public Relatives Office}, 43 ORANGE COUNTY LAWYER 60 (2001).
\item[193.] Huang, \textit{supra} note 9, at 465.
\item[194.] \textit{Id.} at 466.
\item[195.] \textit{Id.} at 467.
\item[196.] \textit{Id.}
\end{itemize}
\end{footnotesize}
possible.\textsuperscript{197} The fear that experienced juveniles offenders will exploit the protections offered under the per se approach prevents many states from adopting such rules, and has caused others to abandon them.\textsuperscript{198}

Many of these criticisms aimed at the per se approach are similar to those leveled at \textit{Miranda} rights so long ago.\textsuperscript{199} However, per se rules focus the court’s attention on police conduct—not juvenile conduct.\textsuperscript{200} They provide clear boundaries for police action.\textsuperscript{201} With a clear analytical framework, the per se approach saves the juvenile court system time and effort in weighing the many factors of the totality-of-the-circumstances approach.\textsuperscript{202} The result is increased consistency in determinations concerning the validity of waivers.\textsuperscript{203} The price for consistency, however, is that sophisticated juveniles may prevent their confessions from being introduced.\textsuperscript{204} A solution lies in finding a middle ground between the totality of the circumstances test and the per se approach.

The path toward a solution that provides the extra protections needed by juveniles with learning disabilities, and juveniles, in general, begins in federal law. The wisdom of the Court’s decision in the case of \textit{In re Gault} lies in the recognition that juveniles are not adults and require special protection under the law. Congress recognized and utilized the Court’s decision when it passed section 18 U.S.C.A. § 5033\textsuperscript{205} of the Federal Juvenile Delinquency Act.\textsuperscript{206} Under 18 U.S.C.A. § 5033, when a juvenile is taken into custody for delinquent behavior, the arresting officer must inform the juvenile of his rights in language that is comprehensive to the juvenile.\textsuperscript{207} Moreover, the section requires that the arresting officer not only inform the Attorney General of the arrest, but also inform the child’s parents, guardians, or custodians of both the nature of the

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\textsuperscript{197}. Huang, \textit{supra} note 9, at 459-60.
\textsuperscript{198}. Huang, \textit{supra} note 9, at 459-60.
\textsuperscript{199}. Otis H. Stephens, Robert L. Flanders, & J. Lewis Cannon, \textit{Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements}, 39 TENN. L. REV. 407, 418 (1972). \textit{Miranda} was seen as a hindrance to effective police work. \textit{Id.} This is a survey concerning perceptions of \textit{Miranda} shortly following the Court’s decision. \textit{Id.}

\textsuperscript{200}. Huang, \textit{supra} note 9, at 466.
\textsuperscript{201}. \textit{Id.} at 467, 472.
\textsuperscript{202}. \textit{Id.} at 467, 472-73.
\textsuperscript{203}. \textit{Id.} at 467, 473. Another option beside totality-of-the-circumstances approach and the per se approach does exist, such as the rebuttable presumption rule. \textit{Id.} at 468. However, this rule has been roundly criticized as being just a restatement of the existing duty of the state to prove its case. \textit{Id.}

\textsuperscript{204}. Huang, \textit{supra} note 9, at 459-460.
\textsuperscript{205}. 18 U.S.C.A. §5033 (West 2006). For the statute’s full text, see \textit{supra} note 18 and accompanying text.

\textsuperscript{207}. \textit{Id.}
offense, and the rights of the juvenile.\textsuperscript{208} The juvenile must also appear before a magistrate forthwith.\textsuperscript{209} The level of due process protection established by the law is much higher than that granted to adults under \textit{Miranda} or juveniles under \textit{Fare v. Michael C}.\textsuperscript{210}

Jurisprudence surrounding 18 U.S.C.A. §5033 walks a middle path between the protections allocated to juveniles under the pro se approach and the totality of the circumstances method of evaluating custodial juvenile interrogations. For example, in \textit{United States v. Burrous},\textsuperscript{211} the court in upholding the trial court’s use of the juvenile defendant’s confession, noted specifically that law enforcement officials made “repeated and fruitless good faith efforts” to locate the parents or guardians prior to questioning.\textsuperscript{212} The parent or guardian must be advised of the juvenile’s rights immediately, not three and a half hours later.\textsuperscript{213} Moreover, failing to inform a parent or guardian that they could confer with the child prior to any interrogation was found to have violated the acts “access to meaningful support and counsel” language.\textsuperscript{214} The Ninth Circuit has developed a scheme for determining whether a violation of 18 U.S.C.A. §5033 has occurred.\textsuperscript{215} On appeal, the court first asks whether § 5033 has been violated.\textsuperscript{216} If § 5033 has been violated, the court asks whether the violation was so outrageous as to deny the juvenile due process rights.\textsuperscript{217} If so, then the case is reversed.\textsuperscript{218} If not, the court retains the discretion to reverse pending a determination of whether the juvenile was prejudiced.\textsuperscript{219} To determine prejudice, the court determines whether the § 5033 violation was a cause of the confession, and whether the prejudice itself was caused by the confession.\textsuperscript{220} If so, then the case is reversed.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{United States v. Burrous}, 147 F.3d 111 (2d Cir. 1998).
\item \textsuperscript{212} \textit{Id. at} 116
\item \textsuperscript{213} Caccarozzo, \textit{supra} note 206 (citing to \textit{United States v. John Doe}, 219 F.3d 1009, 1015 (9th Cir. 2000)).
\item \textsuperscript{215} Caccarozzo, \textit{supra} note 209 (citing \textit{United States v. Juvenile (RRA-A)}, 229 F.3d 737 (9th Cir. 2000)).
\item \textsuperscript{216} \textit{United States v. Juvenile (RRA-A)}, 229 F.3d 737, 744 (9th Cir. 2000).
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Id. at} 747.
\item \textsuperscript{221} \textit{Id. at} 744.
\end{itemize}
Federal jurisprudence also recognizes that the mere presence of a parent, guardian, or custodian is not a solution.\footnote{For an argument claiming that the presence of parents is all that is required, see Robert E. McGuire, Note: A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations, 53 VAND. L. REV. 1355 (2000).} Inherent in the requirement of notification is the purpose of providing meaningful protection of juveniles by facilitating parental involvement in the interrogation.\footnote{United States v. Female Juvenile (Wendy G.), 255 F.3d 761, 763 (9th Cir. 2001).} The presence of the parent is to provide support and counsel; thus, parents must know that they have the rights to speak with their child without the presence of police prior to interrogation, and to obtain counsel for the child.\footnote{Id. at 767.} The notification of parents, according to the court, cannot be a “statutory game of hide the ball.”\footnote{Id.} The courts requirement of substance in the notification to the parent concerning the juvenile’s predicament is not new and is supported by a long line of cases.\footnote{See also United States v. Doe, 862 F.2d 776 (9th Cir. 1988); United States v. Jose D.L., 453 F. 3d 1115 (9th Cir. 2006); United States v. Doe, 219 F.3d 1009 (9th Cir. 2000).}

Section 5033 embodies many of the elements of the per se approach to juvenile interrogation, while maintaining a degree of the flexibility found in totality of the circumstances approach. The law contains a systematic process for law enforcement personnel to follow. However, even if variation from those procedures occurs, under the Ninth Circuit scheme for case analysis, the ability of the court to retain those confessions is preserved where the court has determined that the juvenile was not prejudiced by the violation of § 5033. In this sense, the totality of the circumstances approach from Fare v. Michael C. is employed to allow the court to make an accurate determination of the validity of juvenile statements in the face of procedural irregularities. Thus, federal law has sought to maintain the protections afforded juveniles in In re Gault, while acknowledging that not all juveniles require those protections.

Perhaps, the Ohio court was pointing in the right direction when it looked to the schools to provide due process protection for special education students. Another element in finding the path to a solution which provides extra protection for students with learning disabilities does lie in the schools. Somewhere, in between the Pythagorean Theorem and mitosis, schools can teach all students what rights Miranda protects and the importance of preserving those rights. Courts have repeatedly ruled both for adults and for juveniles that an invocation of silence or the request for counsel ends custodial interrogation and that the right to counsel exists for all.\footnote{For an extensive list of cases on the effect of a request for counsel during interrogation, see Cheryl M. Bailey & Jay M. Zitter, Annotation, What Constitutes Assertion of the Right to Counsel Following Miranda Warnings—State Cases, 83 A.L.R. 4th 443 (1991); Mitchell J. Waldman, Annotation, What Constitutes Assertion of Right to Counsel Following Miranda Warnings—Federal Cases, 80 A.L.R. Fed. 622 (1986).} What a small piece of information to teach our children. By combining education with state laws patterned after 18 U.S.C.A. §
5033, the courts can begin to find a middle ground between protecting the child and protecting society.

IV. CONCLUSION

The Supreme Court’s decision in *Miranda* built a fence, a fence intended to “make good neighbors” of Fifth Amendment rights and the ability of the police to investigate and question suspects. The monumental import of the decision in *Gault*, extending *Miranda* rights to juveniles, was the recognition of the difference between children and adults. The Victorian attitude that children are merely small adults has no place in the juvenile court system. The stakes are simply too high. An adult has stronger mental fortitude than a child has, and possesses a stronger ability to resist the pressures applied by law enforcement during custodial interrogation. A child, especially one whose has a lower mental capacity, has little chance of waiving *Miranda* rights voluntarily, knowingly or intelligently.

Fences and walls are important for those on both sides. At the end of the day, both of our old law school friends, Officer Friendly and Bad Lieutenant, want to go home confident in the knowledge that today they did all the right things. Interrogation procedures based on court rulings that present clear standards of review for juvenile waivers give them that knowledge. Such procedures are fences that protect society and the individual.

“And he likes having thought of it so well,
He says again, ‘Good fences make good neighbors.’”


229. BAD LIEUTENANT (Lions Gate Films 1992). Much thanks to Professor Mark Stavsky for bringing the quote to the author’s attention.

230. FROST, supra note 1, at 84.
The Birthright of Citizenship as to Children Born of Illegal Immigrants in the United States: What Did the Drafters of the Fourteenth Amendment Intend?

Kelly Gindele∗

I. Introduction

“By not closing [the Citizenship Clause] loophole, the federal government in effect rewards law-breakers and punishes those who have chosen to follow the rules and immigrate legally. Allowing illegal aliens to give birth to American citizens, in effect, makes citizenship a license for welfare.”

Maria and Ama are both Mexican citizens and residents. They are also both expectant mothers. Maria patiently and lawfully abides by the rules and processes set forth by the United States government in order to gain entrance into the country. Maria gives birth to her son before she receives permission to enter the United States, so once she arrives in the country, she begins the long process of gaining citizenship for both herself and her son. This process will take years upon years, but Maria, thankful for the opportunity to make a better life for her and her son, follows the rules without complaint. Ama, on the other hand, waits near an inadequately patrolled portion on the Mexican side of the border until she begins to feel contractions. She quickly sneaks into the United States and heads immediately for the nearest emergency room where she delivers her baby girl who, because she was born on American soil, automatically becomes a United States citizen thanks to her mother’s crime. Ama rejoices because she too will reap the benefits of her daughter’s citizenship. Her daughter will be eligible for welfare and educational benefits – expenses Ama will not have to pay. As a matter of fact, the United States government will send welfare checks directly to Ama. Ama also knows that it will be a lot less likely

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2. 8 U.S.C.A. § 1401 (West 2005) (noting, that persons born in the United States and subject to its jurisdiction are nationals and citizens).

3. See, e.g., Alexander Vivero Neill, Human Rights Don’t Stop at the Border: Why Texas Should Provide Preventative Health Care For Undocumented Immigrants, 4 Scholar 405 (2001) discussing the Supreme Court decision in Graham v. Richardson, 403 U.S. 365 (1971), that held citizenship and residency requirements for the receipt of welfare benefits violated the Equal Protection Clause. Id. at 415. In contrast, the Supreme Court held in Matthews v. Diaz, 426 U.S. 67 (1976), that under the equal protection component of the Due Process Clause of the Fifth Amendment illegal immigrants were protected. Id. at 416. However, the broad powers allocated to Congress over naturalization and immigration permitted the federal government to deny Medicare benefits based on residency. Id.
the government will deport her back to Mexico despite her illegal entrance into the country.

The above situation exemplifies the loophole found in the Fourteenth Amendment’s Citizenship Clause as it pertains to birthright citizenship. This note discusses and analyzes the Citizenship Clause and the extent to which it should apply to children of illegal aliens born in the United States. Section II discusses the history of the Fourteenth Amendment, including the congressional debates relative to the Citizenship Clause. Section III discusses the two critical cases, *Elk v. Wilkins* and *United States v. Wong Kim Ark*, decided by the United States Supreme Court after the ratification of the Fourteenth Amendment. Section IV provides an analysis of the intent set forth by the Framers of the Citizenship Clause. The section further analyzes whether this intent was recognized and adhered to by the Courts in *Elk* and *Wong* as well as whether the Framers intended to extend birthright citizenship to children of illegal aliens born in the United States, ultimately finding that they did not. Section V concludes this article.

II. BACKGROUND LAW

A. History of the Fourteenth Amendment

The Fourteenth Amendment was the second of the collective Civil War Amendments. The Fourteenth Amendment addresses states’ rights whereas the Thirteenth and Fifteenth Amendments, the other two Civil War Amendments, address slavery and voting, respectively. The original proposed amendment, drafted by Congressman Bingham, was proposed on January 12, 1866, on behalf of the Joint Committee on Reconstruction and came up for debate in the House in February 1866; its consideration, however, was postponed after days of debate without resolution. In April 1866, Congressman Stevens submitted a new draft of the Amendment, which was written by Robert Dale Owen. The Committee accepted the proposed Amendment, which included an addition as proposed by Congressman Bingham, and it passed the House the following month. When the Amendment reached the Senate, it did not include a definition of

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7. *Id.* at 276, 305.
9. *Id.* at 215. Robert Dale Owen was an English reformer who migrated to the United States prior to the Civil War. *Id.*
10. *Id.* at 215, 219.
“citizenship,” but the definition was added, in Section One, prior to the Senate passing the Amendment in June 1866. The House approved the change made by the Senate, and the Fourteenth Amendment was submitted to the states for ratification. The Amendment was ratified by three fourths of the states in 1868 and was made a part of the Constitution on July 21, 1868.

Within the five sections of the Fourteenth Amendment there are eight clauses, and they include: the citizenship clause of Section 1; the privileges and immunities clause of Section 1; the due process clause of Section 1; the equal protection clause of Section 1; the apportionment clause of Section 2; the disqualification clause of Section 3; the debt clause of Section 4; and the enforcement clause of Section 5. For purposes of this article, emphasis will be placed upon the citizenship clause found in Section 1.

The language of the first section of the Fourteenth Amendment of the United States Constitution provides the definition of citizenship and is as follows:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

B. The Debate

When the proposed Fourteenth Amendment reached the Senate, it did not contain the citizenship clause. Senator Howard of Michigan proposed including language in section 1 “declaring that ‘all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.’” Senator Howard explained that the language merely declared that which he believed to be the existing law of the country with regard to citizenship. He clarified that such citizenship rights would not “include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the government of the United States, but [would] include every other class of

11. Id. at 255.
12. SCHWARTZ, supra note 8, at 256.
13. Id.
14. PENDERGAST ET AL., supra note 6, at 274-76.
15. U.S. CONST. amend. XIV §1.
17. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).
18. Id.
persons.”19 He further explained that this language was meant to “[settle] the great question of citizenship and [remove] all doubt as to what persons are or are not citizens of the United States.”20

Furthermore, Senator Trumbell elaborated on the definition of “subject to the complete jurisdiction thereof” in explaining that it meant “[n]ot owing allegiance to anyone else.”21 With respect to the effect of the citizenship clause on Native Americans, Senator Trumbell stated that “[i]t cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is ‘subject to the jurisdiction of the United States.’”22 Moreover, he argued against allowing the basis of citizenship to be whether one is taxed.23

Senator Johnson added to the discussion his belief on the definition of citizenship as determined by the language of the proposed amendment in commenting, “I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.”24

Finally, Senator Saulsbury reminded the Senate that “the object of [the] first section [was] simply to declare that Negroes shall be citizens of the United States. There can be no other object in it, I presume, than a further extension of the legislative kindness and beneficience of Congress toward that class of people.”25 Upon completion of extensive debates, including the arguments and statements described above, the proposed Fourteenth Amendment was passed by the Senate with the citizenship clause added to the first section as proposed by Senator Howard.26

III. FACTS AND HOLDINGS OF SUPREME COURT DECISIONS INVOLVING THE BIRTHRIGHT OF CITIZENSHIP

A. Elk v. Wilkins

In 1884, sixteen years after the ratification of the Fourteenth Amendment, the Supreme Court addressed the Citizenship Clause of the Amendment.27 John Elk, an Indian born within the United States, brought suit against Charles

19. Id.
20. Id.
21. Id. at 2893.
22. Id.
23. Cong. Globe, 39th Cong., 1st Sess. 2894 (1866). Senator Trumbell stated “I am not willing to make citizenship in this country depend on taxation. I am not willing . . . [to agree] that the rich Indian . . . shall be a citizen and the poor Indian . . . shall not be a citizen . . . You make a distinction in that respect if you put it on the ground of taxation.”
24. Id. at 2893.
25. Id. at 2897.
26. Id.
27. Elk, 112 U.S. at 94.
Wilkins, the registrar of Omaha, Nebraska, for refusing to register Mr. Elk as a qualified voter due to Mr. Elk’s lack of citizenship. Mr. Elk claimed to have completely severed all relations to any Indian tribe more than one year prior to seeking registration as a qualified voter and additionally claimed to have “completely surrendered himself to the jurisdiction of the United States.” However, Mr. Wilkins refused to register Mr. Elk as a voter, asserting that Mr. Elk’s being an Indian repudiated Mr. Elk’s stance that he was a United States citizen. The Circuit Court of the United States for the District of Nebraska dismissed the action pursuant to the defendant’s motion claiming that the complaint failed to “state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the person of the defendant; and that the court had no jurisdiction of the subject of the action.” Mr. Elk appealed the trial court’s decision.

The Supreme Court of the United States affirmed the decision of the trial court in holding that Indians who are “members of, and [owe] immediate allegiance to, one of the Indian tribes…although in a geographical sense born in the United States, are [not] ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment.” Justice Gray, in writing the majority opinion, analyzed the text of the Fourteenth Amendment, concluding that it provided two sources of citizenship: birth and naturalization. Justice Gray stated:

The persons declared to be citizens are ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof.’ The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired.

The majority further determined that Mr. Elk’s voluntary surrender to the jurisdiction of the United States was insufficient to make him a United States citizen.

28. Id. at 95-96.
29. Id. at 95.
30. Id. at 96.
31. Id. at 96-97.
32. Id. at 97.
33. Elk, 112 U.S. at 102.
34. Id. at 101.
35. Id. at 101-02.
citizen, unless the United States consented to and accepted such surrender. 36
Specifically, the Court stated, “To be a citizen of the United States is a political
privilege which no one, not born to, can assume without its consent in some form.” 37

B. United States v. Wong Kim Ark

In 1898, the Supreme Court again had to analyze the scope of the Citizenship
Clause of the Fourteenth Amendment in determining whether a child, born in the
United States of Chinese parents who were not United States citizens, though
were domiciled residents of San Francisco, California, was a United States
citizen. 38 Wong Kim Ark was born in San Francisco in 1873. 39 While Wong
Kim Ark’s parents resided in the United States, they engaged in business and
were not “engaged in any diplomatic or official capacity under the emperor of
China.” 40 In 1890, Wong Kim Ark’s parents returned to China. 41 Wong Kim
Ark also traveled to China in 1890, for a temporary visit, and returned to the
United States on July 26, 1890, where he was permitted to enter the United
States pursuant to his claim that “he was a native-born citizen of the United
States.” 42 In 1894, Wong Kim Ark again traveled to China for a temporary visit,
but upon his return to the United States in August 1895, he was denied entry due
to a lack of United States citizenship. 43 The District Court of the United States
for the Northern District of California ruled in favor of Wong Kim Ark finding
that he was a citizen of the United States. 44 The United States appealed this
decision. 45

In delivering the majority opinion, Justice Gray, despite his opinion in Elk v.
Wilkins, concluded that Wong Kim Ark was a United States citizen as defined by
the Fourteenth Amendment. 46 In reaching this conclusion, Justice Gray adopted
the English common law that citizenship is based upon the location of a person’s
birth. 47 Justice Gray further found that such common law had been in effect in
the English colonies prior to the Declaration of Independence and continued to
prevail under the Constitution of the United States. 48 Based upon the opinion,
the birthright of citizenship was not even questioned until more than fifty years

36. Id. at 109.
37. Id. at 109 (quoting United States v. Osborne, 2 F. 58, 61 (D. Or. 1880)).
38. United States v. Wong Kim Ark, 169 U.S. 649 (1898)
39. Id.
40. Id. at 651.
41. Id.
42. Id. at 651.
43. Id.
44. Wong, 169 U.S. at 652.
45. Id.
46. Id. at 705.
47. Id. at 655.
48. Id. at 658.
after the adoption of the Constitution of the United States wherein the Court found in favor of citizenship.\textsuperscript{49}

In adopting the English common law, the Court accordingly rejected the Roman law rule that a child’s citizenship was based upon the citizenship of his or her parents.\textsuperscript{50} The Court determined that although there was a trend in Europe to define citizenship based upon parentage rather than location of birth, “at the time of the adoption of the Fourteenth Amendment of the constitution of the United States there was [not] any settled and definite rule or international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.”\textsuperscript{51}

Justice Gray explained that the decision set forth in \textit{Elk v. Wilkins} “concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States born of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.”\textsuperscript{52} Justice Gray quoted language from the \textit{Elk} decision regarding a lack of citizenship to Indians not taxed, that were born in the United States.\textsuperscript{53}

In the dissent set forth by Chief Justice Fuller and Justice Harlan, Chief Justice Fuller found persuasive the Roman law rule, that the citizenship of the parents determines the citizenship of a child regardless of the child’s birthplace.\textsuperscript{54} The dissent examined the tensions that existed between England and the newly formed United States at the time the Constitution was drafted finding it unreasonable that the Framers intended “natural-born citizens” to include anyone and everyone geographically born within the United States and acknowledging the illogical conclusion that such an interpretation would mean “that the children of foreigners, happening to be born to them while passing through the county, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible for the presidency, while children of our citizens, born abroad, were not.”\textsuperscript{55}

The dissent conceded that persons born within the United States are presumptively United States citizens, but contended that such a presumption is rebuttable.\textsuperscript{56} Based upon Justice Miller’s Lectures on Constitutional Law, Justice Miller states:

\begin{quote}
If a stranger or traveler passing through or temporarily residing in this country, who has not himself been naturalized and who claims to owe
\end{quote}

\begin{footnotes}
\item[49] \textit{Id.} at 664 (citing Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y.Ch. 1844)).
\item[50] \textit{Wong}, 169 U.S. at 666-67.
\item[51] \textit{Id.} at 667.
\item[52] \textit{Id.} at 682.
\item[53] \textit{Id.} at 681.
\item[54] \textit{Id.} at 708-09.
\item[55] \textit{Id.} at 715.
\item[56] \textit{Wong}, 169 U.S. at 718.
\end{footnotes}
no allegiance to our government, has a child born here, which goes out of this country with his father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.\textsuperscript{57}

In reviewing the Civil Right Acts of 1866, the dissent examined the language “not subject to any foreign power” and determined, based upon the Act, “all persons born in the United States, and not owing allegiance to any foreign power, are citizens.”\textsuperscript{58} Justice Fuller concluded that these words were inserted into the Act “to prevent the acquisition of citizenship by the children of such aliens [who were not United States citizens] merely by birth within the geographical limits of the United States.”\textsuperscript{59} Furthermore, Justice Fuller concluded that words “subject to the jurisdiction thereof,” as used by the Fourteenth Amendment proposed merely two months after the Civil Rights Act was enacted, “were used as synonymous with the words ‘and not subject to any foreign power,’ of the act.”\textsuperscript{60} Justice Fuller pointed to the opinions of Senators Trumbull, the chairman of the committee, which reported the civil rights bill, who stated that “subject to the jurisdiction of the United States” meant “[n]ot owing allegiance to anybody else” and Reverdy Johnson who declared that “Now, all that this amendment provides is that all persons born within the United States, and not subject to some foreign power -- for that, no doubt, is the meaning of the committee who have brought the matter before us -- shall be considered as citizens of the United States.”\textsuperscript{61}

The dissent distinguished children born of parents who temporarily resided in the United States and owed permanent allegiance to foreign state and those born of parents permanently domiciled in the United States.\textsuperscript{62} The Court looked to Justice Miller, who delivered the opinion of the majority in the Slaughter-House Cases, who stated that “the children of ‘citizens or subjects of foreign states’ owing permanent allegiance elsewhere, and only local obedience here, are not otherwise subject to the jurisdiction of the United States than are their parents.”\textsuperscript{63}

Accordingly, the dissent concluded that the rule prior to the ratification of the Fourteenth Amendment “recognized an essential difference between birth during temporary and birth during permanent residence. If children born in the United States were deemed presumptively and generally citizens, this was not so

\textsuperscript{57} Id. at 718-19.
\textsuperscript{58} Id. at 720.
\textsuperscript{59} Id. at 721.
\textsuperscript{60} Id. at 721.
\textsuperscript{61} Id. at 721-22.
\textsuperscript{62} Wong, 169 U.S. at 729.
\textsuperscript{63} Id. at 723 (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872)) (noting, where the majority determined that the Privileges and Immunities Clause of the Fourteenth Amendment did not protect all rights, and, in fact, only protected those rights which were uniquely federal).
when they were born of aliens whose residence was merely temporary.\textsuperscript{64}
Further, they concluded that the Fourteenth Amendment provides birthright
citizenship to children born of permanent United States residents but does not
necessarily provide citizenship to “children born in the United States of parents
who, according to the will of their native government and of this government, are
and must remain aliens.”\textsuperscript{65}

IV. ANALYSIS

The Fourteenth Amendment congressional debates and the Supreme Court
decisions in\textit{Elk} and\textit{Wong} assist in determining whether the Citizenship Clause
should be extended to children born in the United States to illegal aliens. As
discussed below, utilizing the congressional debates, it is clear the Framers of
the Fourteenth Amendment did not intend to provide the privilege of citizenship
so broadly as to arbitrarily allow any children born in the United States to gain
automatic citizenship. The analysis of the Court’s decision in\textit{Elk} discusses the
Court’s acknowledgement of such intent in not extending birthright citizenship
to a Native American born on United States soil. Further, the analysis of\textit{Wong}
will discuss that, although the Court found a child born of legal, permanent
aliens in the United States was a United States citizen, such finding was in
accordance with the intent of the Fourteenth Amendment. The analysis will
demonstrate that holding in\textit{Wong} does not apply to children born of illegal
aliens in the United States. Finally, the societal consequences of providing
citizenship to any child physically born in the United States, especially those
born of illegal aliens, will be analyzed further justifying the need to recognize
the intent set forth by the Framers of the Fourteenth Amendment that United
States citizenship is a special privilege and not one to be given so arbitrarily.

A. Did the Framers of the Fourteenth Amendment Intend for the Citizenship
Clause to Extend to Children Born in the United States to Illegal Aliens?

In reading the congressional debates, the Framers apparently intended to
limit citizenship to even those physically born in the United States and did not
intend such privilege to extend to children born of illegal aliens. The Citizenship
Clause of the Fourteenth Amendment was drafted largely to overrule “\textit{Dred
Scott’s} narrow, state-dependent conception of United States citizenship.”\textsuperscript{66}
As stated above, the original draft of the Fourteenth Amendment did not even
include the Citizenship Clause; however, the drafters felt it necessary to settle

\begin{itemize}
  \item \textsuperscript{64} Id. at 729.
  \item \textsuperscript{65} Id. at 730.
  \item \textsuperscript{66} SCHUCK, supra note 16, at 73. \textit{See also} Dred Scott v. Sanford, 60 U.S. 393, 454 (1857)
    (holding that a free man born in the United States, of African decent, whose ancestors were brought
to the United States for the purpose of being sold as slaves, was not a citizen under the United
    States Constitution).
\end{itemize}
the “great question of citizenship” once and for all. 67 Initially, Congress sought to overturn the Dred Scott decision by affording Africans born in the United States, citizenship through the enactment of the Civil Rights Act of 1866. 68 However, in order to remove all question as to the ability of Congress to extend citizenship to Africans born in the United States, Senator Howard proposed to include the power in the Constitution. 69

The argument has been made that the language of the Citizenship Clause is inclusive in its scope as opposed to exclusive. 70 However, this was not the intent of its Drafters. 71 In the debates surrounding the Clause, there was a proposition by Senator Doolittle to explicitly exclude “Indians not taxed” from the Citizenship Clause. 72 Senator Howard vigorously opposed such inclusion because, “Indians born within the limits of the United States, and who maintain their tribal relations, they are not, in the sense of this amendment, subject to the

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67. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).
68. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866). Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. Id.
69. CONG. GLOBE, 39th Cong., 1st Sess. 2896-97 (1866). Senator Doolittle explained that the Citizenship Clause was proposed “because they had doubts as to the constitutional power of Congress to pass the civil rights bill.” Id. at 2896. Senator Saulsbury further added his assertion that no one will “pretend to disguise the fact that the object of [the Citizenship Clause] is simply to declare that negroes shall be citizens of the United States.” Id. at 2897.
70. See generally James C. Ho, Birthright Citizenship and the Original Understanding of the 14th Amendment, 9 GREEN BAG 2D 367, 369 (2006) (arguing that “the text of the Citizenship Clause plainly guarantees birthright citizenship to the U.S.-born children of all persons subject to U.S. sovereign authority and laws. The clause thus covers the vast majority of lawful and unlawful aliens.”).
71. See generally CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866). See also Adam C. Abrahms, Notes, Closing the Immigration Loophole: The 14th Amendment’s Jurisdiction Requirement, 12 GEO. IMMIGR. L.J. 469, 482 (1998). Mr. Abrahms argues: [T]he Framers of the Fourteenth Amendment and the Citizenship Clause deliberately expressed just how limiting the Amendment was to be. They made it clear that the intention of the Amendment was not to grant birthright citizenship to all, but to grant it only to those who were fully and completely subject to the jurisdiction of the United States. Persons who did not meet this criteria were not to be citizens and since illegal aliens and their children are not fully and completely subject to the jurisdiction they should not be citizens. Id.
72. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).
jurisdiction of the United States.”

Moreover, Senator Howard intended to exclude “persons born in the United States who are foreigners, aliens, who belong to the families of embassadors or foreign ministers accredited to the Government of the United States,” though the proposed amendment did not directly or expressly exclude such groups of people from its language. Senator Howard intended the language “subject to the jurisdiction of the United States” to exclude certain individuals, despite their birth in the United States, from the Fourteenth Amendment and its Citizenship Clause.

The exclusionary scope of the Citizenship Clause was recognized by Senator Trumbull as well. In discussing the scope of the language “subject to the jurisdiction” of the United States, Senator Trumbull emphasized that in order for the Citizenship Clause to apply to a person born within the United States, he or she must be “subject to the complete jurisdiction thereof.” In defining “subject to the complete jurisdiction thereof,” Senator Trumbull explained that it meant “not owing allegiance to anybody else.” He excluded Indians from the scope of the Clause, because, though physically born in the United States, they are not subject to the complete jurisdiction thereof.

Senator Williams further recognized that although anyone born within the physical boundaries of the United States is in some way subject to its jurisdiction, he or she is “not subject to the jurisdiction of the United States in every sense.” His interpretation of the phrase “subjection to the jurisdiction thereof,” like that of Senator Trumbull’s, was that in order for one to be included within the realms of the Citizenship Clause, he or she must be “fully and completely subject to the jurisdiction of the United States.”

It has been argued that the Framers intended to include children born of illegal aliens based upon discussions in the debate surrounding the Chinese and Gypsies. However, such discussions in the debates support the conclusion that

73. Id.
74. Id.
75. Id.
76. Cong. Globe, 39th Cong., 1st Sess. 2893 (1866). It appears from the debates and comments from Senator Fessenden that Senator Trumbull was the chairman of the Committee on the Judiciary, and, as such, thoroughly investigated the civil rights bill as to who would be included within its reach. Id.
77. Id.
78. Id.
79. Id.
80. Id. at 2897.
82. See Ho, supra note 70, at 370-73. The author describes discussions included in the congressional debates of the Citizenship Clause regarding extending birthright citizenship to children born in the United States of Chinese and Gypsy immigrants. Id. at 370-73. The author then argues that because in these discussions there was differentiation between legal and illegal immigrants, history supports the conclusion that the Citizenship Clause should extend to children born of illegal immigrants. Id. at 373-74. However, as the author correctly indicates, at the time of
the Framers intended to grant citizenship to children born in the United States to legal aliens only. 83 In fact, that was precisely the conclusion held by the Supreme Court in Wong. 84 However, these discussions do not give credence to the theory that the Framers supported illegal immigration by granting citizenship to children born of such aliens. 85 Further, the discussions indicate that granting citizenship to children born of Chinese and Gypsy parents was portrayed as somewhat of a non-issue based on their small population. 86

Further, legal scholars have pointed out that not only must one fully and completely surrender himself or herself to the jurisdiction of the United States in order to be "subject to the jurisdiction thereof," but also there must be some consent on behalf of the United States to such full and complete surrender. 87

Granting birthright citizenship to children born of illegal immigrants in this the debates, the United States had not yet begun to restrict immigration, and, therefore, there would be no reason to specifically address different classes of aliens. Id at 373.

83. SCHUCK, supra note 16, at 78.

84. Wong, 169 U.S. at 705 (noting, “a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States.”).

85. See Abrahms, supra note 71, at 481-82 n.68.

[T]he authors of the Amendment sought to make it clear that birthright citizenship was not absolute. They affirmatively stated that a person must owe allegiance to the nation and that foreigners and aliens do not owe such allegiance and are not “subject to the jurisdiction thereof.” It was not just the authors, Howard and Trumbull, who understood the basis behind the restriction. Senator Wade responded to Senator Fessenden’s question, “Suppose a person is born here of parents from abroad temporarily in this country,” by asserting:

The Senator says a person may be born here and not be a citizen . . . . By a fiction of law such persons are not supposed to be residing here, and under that fiction of law their children would not be citizens of the United States . . . .

I agree to that . . . .


86. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). See also SCHUCK, supra note 16, at 78-79. Professors Schuck and Smith explain that “[o]n several occasions during the debates, Congress was assured that the number of children of alien parents who would qualify for birthright citizenship under the clause would be de minimis and thus of no real concern.” Id. This was distinguished by the extensive discussions regarding Indians whereby there was a much larger population living and being born within the geographical boundaries of the United States therefore removing any de minimis argument that could be made on behalf of Chinese or Gypsy aliens. Id at 79.

87. SCHUCK, supra note 16, at 83, 85-89. The public law view of citizenship required consent prior to the grant of citizenship. Id. at 83. Professors Schuck and Smith argue that the jurisdiction requirement itself, as drafted in the Citizenship Clause, added an element of consent whereby there must be a “necessary connection between an individual and his government—a conception that was . . . more profoundly political than one emphasizing the individual’s mere presence on the soil at birth.” Id. at 85-86.
country undermines the objective of consent, because a country must have the ability to determine those it wishes to allow to live within its borders as well as to decide to whom it wishes to extend citizenship.88

Therefore, based upon the Congressional debates held by the Framers of the Fourteenth Amendment and, specifically, the remarks made by Senator Howard, it is clear that the Citizenship Clause was not intended to include any person born within the United States.89 The Framers intended the phrase “subject to the jurisdiction thereof” to exclude anyone born within the geographical boundaries of the United States who was not fully and completely subject to its jurisdiction.90 Children born within the United States to illegal aliens are not fully and completely subject to the jurisdiction of the United States; therefore, the Framers did not intend to extend the birthright of citizenship to such children.91 The scope of this exclusionary phrase was explored further by the Supreme Court in both the Elk and Wong cases.92

B. Do Elk and Wong Encompass the Framers’ Intent as to Birthright Citizenship?

As discussed below, the Court in Elk accepted and asserted the Framers’ intent, with respect to the Fourteenth Amendment, that citizenship be restricted to those completely subject to the jurisdiction of the United States when the Court acknowledged that a person’s birth in the United States was, standing alone, insufficient to gain birthright citizenship. The Court in Wong too followed the Framers’ intent in its holding where it granted birthright citizenship to a child born of legal, permanent residents of the United States; however, the Court’s analysis implies place of birth is the only factor used to determine citizenship, a proposition in direct conflict with the Framers’ intent.

88. Charles Wood, Losing Control of America’s Future—The Census, Birthright Citizenship, and Illegal Aliens, 22 HARV. J.L. & PUB. POL’Y 465, 495 (1999) (describing that granting citizenship to children born of illegal aliens undermines a nation’s ability to choose its citizens as well as “the process by which the American people and their representatives have sought to design and enforce the country’s immigration, naturalization, and citizenship laws.”).

89. See generally CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866). See also Wood, supra note 88, at 508 (explaining that “[i]t is clear that the Framers understood their language to withhold citizenship from some U.S.-born persons, in addition to those within the common law ‘exceptions’”).

90. See CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

91. See Abrahms, supra note 71, at 482 (noting, “[Framers] made it clear that the intention of the Amendment was not to grant birthright citizenship to all, but to grant it to only those that were fully and completely subject to the jurisdiction of the United States.”)

1. Elk v. Wilkins

In Elk, Justice Gray explained that in order for Elk to be a United States citizen, he must have fully and completely surrendered himself to the jurisdiction of the United States in order to be “subject to the jurisdiction thereof.”\(^93\) He declared that “[t]he evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.”\(^94\) Such requirement of full and complete surrender to the jurisdiction of the United States was precisely that which was intended by the Framers of the Fourteenth Amendment as documented by the debates as discussed above.\(^95\)

Justice Gray further clarified that, in order to qualify for the birthright of citizenship, a person born in the United States must be completely subject to its jurisdiction at the time of birth.\(^96\) If the person is not fully and completely subject to the jurisdiction of the United States at the time of his or her birth, he or she must rely on the process of naturalization in becoming a United States citizen.\(^97\) However, Justice Gray was insistent that one’s birth within the physical boundaries of the United States was not enough, by itself, to apply the Citizenship Clause.\(^98\) As such, he recognized that the Framers of the Fourteenth Amendment and the Citizenship Clause contained therein required more.\(^99\) Moreover, he acknowledged several instances wherein one might be born within the United States but not “subject to the jurisdiction thereof” by explaining that:

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power), although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.\(^100\)

Additionally, Justice Gray argued that full and complete surrender in and of itself was insufficient, and, in recognizing a consent requirement of the Citizenship Clause, he explained that “[t]hough plaintiff alleges that he ‘had fully and completely surrendered himself to the jurisdiction of the United States...\(^93\) Elk, 112 U.S. at 98-99.
\(^94\) Id. at 102.
\(^95\) See CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).
\(^96\) Elk, 112 U.S. at 102.
\(^97\) Id.
\(^98\) Id.
\(^99\) Id.
\(^100\) Id.
States,’ he does not allege that the United States accepted his surrender.”\textsuperscript{101} In setting forth the principles adopted in \textit{United States v. Osborne}, Justice Gray acknowledges the privileges afforded United States citizens.\textsuperscript{102} He indicates that such privileges cannot be gained without consent of the United States.\textsuperscript{103} However, as Justice Gray explained, utilizing the decision in \textit{Osborne}, Indians, though born in the United States, were not born subject to the jurisdiction thereof and thus not citizens at birth.\textsuperscript{104} Further, the only way in which such a person could become a citizen was to become naturalized, which required consent by the United States.\textsuperscript{105}

Three principles espoused by \textit{Elk} unequivocally echo the intent of the Framers of the Citizenship Clause.\textsuperscript{106} The debates indicate the belief that the phrase “subject to the jurisdiction thereof” required complete surrender to the jurisdiction of the United States as opposed to partial surrender.\textsuperscript{107} Though not discussed in the debates, the language of the Citizenship Clause itself indicates the requirement that one must be “subject to the jurisdiction thereof” at the time of birth in order to attain the privilege of birthright citizenship.\textsuperscript{108} Finally, the debates surrounding the phrase “subject to the jurisdiction thereof” articulated the public-law view of citizenship at the time the Fourteenth Amendment was drafted, which required consent by the United States prior to any person becoming a citizen.\textsuperscript{109} The restrictions on birthright citizenship articulated by the Court in \textit{Elk} acknowledge and accept those intended by the Framers of the

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\item \textsuperscript{101} \textit{Elk}, 112 U.S. at 99.
\item \textsuperscript{102} \textit{Id}. at 109 (quoting \textit{United States v. Osborne}, 2 F. 58, 61 (D. Or. 1880)).
\item \textsuperscript{103} \textit{Id}.
\item \textsuperscript{104} \textit{Id}.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} \textit{Elk}, 112 U.S. 94. The Court relied on the “subject to the jurisdiction thereof” provision of the Citizenship Clause to restrict citizenship to Elk. \textit{Id}. Further, the Court thoroughly discussed the congressional intent behind the phrase. \textit{Id}. at 102. Additionally, the Court discussed the requirement that the individual be subject to the jurisdiction thereof at the time of birth. \textit{Id}. Finally, the Court discussed that in order for citizenship to be granted, there must be mutual consent on behalf of the individual as well as the United States. \textit{Id}. at 109. \textit{See also} \textit{Minor v. Happersett}, 88 U.S. 162 (1874) (explaining that the Court expressed doubt as to whether the children born of aliens within the territory of the United States should be considered citizens). \textit{Id} at 167-68.
\item \textsuperscript{107} CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).
\item \textsuperscript{108} \textit{See U.S. Const. amend. XIV §1}. \textit{See also} \textit{Schuck, supra} note 16, at 84 (noting that the Court in \textit{Elk} “emphasized that under the clause, the jurisdiction requirement must be satisfied at ‘the time of birth’ in order for birthright citizenship to attach”).
\item \textsuperscript{109} \textit{See Schuck, supra} note 16, at 86. Professor Schuck argues that the jurisdiction requirement of the Citizenship Clause:
\begin{itemize}
\item demanded a more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth, in which the government consented to the individual’s presence and status and offered him complete protection. In the public-law view . . . this protection and citizenship extended to the child, but only through the government’s consent to the parents, whose consent was in turn taken provisionally to stand for that of the child’s. \textit{Id}.
\end{itemize}
\end{itemize}
Citizenship Clause in that citizenship should only be provided to individuals fully and completely subject to the jurisdiction of the United States regardless of place of birth.110

2. United States v. Wong Kim Ark

Surprisingly, although also authored by Justice Gray, the opinion in Wong relies very little on the intent of the Framers of the Citizenship Clause.111 Instead, Justice Gray thoroughly discusses English case law, English common law, and United States citizenship law prior to the adoption of the Fourteenth Amendment.112 Justice Gray discusses in great detail the English common law principal that the place of birth is the only factor in determining citizenship.113 In order to support this view, he asserts that because the Fourteenth Amendment did not define “subject to the jurisdiction thereof,” it must be interpreted in light of English common law principles.114 This is a stark contrast from Justice Gray’s analysis in Elk, which contains absolutely no discussion of common law principles in interpreting the Citizenship Clause and relies almost entirely on the Framers’ intent.115

However, the concept of citizenship based solely upon birthplace, with few exceptions as relied upon by Justice Gray in the Wong opinion, was not intended by the Framers of the Citizenship Clause.116 If the only factor they felt important to United States citizenship was birthplace, they would have had no reason to include the phrase “subject to the jurisdiction thereof.”117 Further, the debates themselves demonstrate that the Framers intended much more than mere birth within the geographical boundaries of the United States.118 Prior to the grant of United States citizenship, they believed the Citizenship Clause required a person born within the United States to be fully and completely subject to its jurisdiction; they believed that it required such person to owe allegiance to no country but the United States.119

Justice Gray attempted to reconcile his opinion in Elk with that in Wong by explaining:

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States . . . The real object of the Fourteenth

111. See generally United States v. Wong Kim Ark, 169 U.S. 649 (1898)
112. See generally Id.
113. Id. at 655-58.
114. Id. at 654-55.
115. See generally Elk v. Wilkins, 112 U.S. 94 (1884).
117. Id.
119. Id.
Amendment of the Constitution, in qualifying the words ‘all persons born in the United States’ by the addition ‘and subject to the jurisdiction thereof,’ would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which . . . by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.120

However, he failed to demonstrate adequately that the exclusionary phrase in the Citizenship Clause was intended to be read as narrowly as he indicated in the \textit{Wong} opinion.\textsuperscript{121} To the contrary, the Framers’ insistence that citizenship was granted only to those fully and completely subject to the United States’ jurisdiction, indicates a willingness to create a broader exclusion.\textsuperscript{122}

Regardless of Justice Gray’s failure to rely on the actual intent of the legislative history behind the Fourteenth Amendment, the holding in \textit{Wong} does support such intent.\textsuperscript{123} Though many have utilized \textit{Wong} as a basis to extend citizenship to children born in the United States of illegal aliens, the holding in \textit{Wong} was limited to extending citizenship to a child born in the United States of legal, permanent aliens.\textsuperscript{124} The discussion in the debates surrounding the Citizenship Clause does not preclude such a holding; in fact, the discussions involving children born of Chinese and Gypsy residents seem to embrace it.\textsuperscript{125} Furthermore, there were additional factual circumstances in \textit{Wong} that precluded \textit{Wong}’s parents from obtaining citizenship, specifically a treaty between China and the United States prohibiting Chinese immigrants and their children from becoming United States citizens, thus limiting them to remain in their status as

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  \item \textsuperscript{120} \textit{Wong}, 169 U.S. at 682. \textit{See also} Calvin’s Case, 7 Rep. 1, 18b; Cockburn on Nationality, 7; Dicey Conflict of Laws, 177; Inglis v. Sailors’ Snug Harbor, 3 Pet. 99, 155; 2 Kent Com. 39, 42.
  \item \textsuperscript{121} \textit{See generally} United States v. \textit{Wong Kim Ark}, 169 U.S. 649 (1898). Justice Gray indicates that the birthright of citizenship in the Citizenship Clause should be read narrowly, excluding only children born of Indians, “children born of alien enemies in hostile occupation,” and “children of diplomatic representatives of a foreign state.” \textit{Id.} at 682. However, though Justice Gray indicates this was the “real object of the fourteenth amendment,” he does not look to the congressional debates or legislative history to support this assertion. \textit{Id.} Rather, Justice Gray turns to cases decided prior to the ratification and enactment of the Fourteenth Amendment, stating that “[t]he principles upon which each of these exceptions rests were long ago distinctly stated by this Court.” \textit{Id.}
  \item \textsuperscript{122} \textit{Cong. Globe}, 39th Cong., 1st Sess. 2897 (1866).
  \item \textsuperscript{123} \textit{See Schuck, supra} note 16, at 78 (noting, “The legislative history of the Citizenship Clause, as we have seen, strongly supports the \textit{Wong Kim Ark} majority’s conclusion.”).
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{See Cong. Globe}, 39th Cong., 1st Sess. 2891-92 (1866).
\end{itemize}
legal, permanent aliens.126 The fact remains, however, that the Wong Court left open the question whether birthright citizenship extends to children born of illegal aliens.127

The dissent in Wong acknowledged the inconsistent analysis between Wong and Elk, as they discussed the historical and legislative events leading up to the passage of the Fourteenth Amendment, and analyzed the congressional debates discussing the use of the phrase “subject to the jurisdiction thereof.”128 In its analysis, the dissent dismissed the theory that the drafters of the Citizenship Clause intended to adopt the English common law that granted citizenship based only on the place of birth.129 Despite the fact that the dissent’s overall conclusion that the Framers did not intend for the Citizenship Clause to extend to Wong was incorrect, their analysis invariably demonstrates the inconsistency between the majority’s reasoning for extending the birthright citizenship to Wong based upon the English common law and the actual intent of the Framers of the Fourteenth Amendment.130

There is nothing in the congressional debates to support Justice Gray’s assertion in Wong that the Citizenship Clause of the Fourteenth Amendment was meant to constitutionally adopt the English common law.131 To the contrary, and as discussed above, the debates demonstrate the Framers’ objective in establishing a broad exclusionary provision in order to restrict the privilege of United States citizenship only to those who fully and completely subject themselves to its jurisdiction.132 Such restriction does not give credence to the suggestion that the Framers intended to grant citizenship to essentially all persons born within the United States.133 Though the final holding in Wong asserts the intent to grant citizenship to children born of legal aliens in the

126. See SCHUCK, supra note 16, at 78. At the time Wong was decided, a treaty existed between the United States and China wherein Chinese parents and their children were explicitly denied citizenship through naturalization. Id. The naturalization statute in place at the time also prohibited Chinese immigrants and their children from becoming United States citizens. Id.
127. See Wong, 169 U.S. 694.
128. See Wong, 169 U.S. at 705-30.
129. See Wong, 169 U.S. at 714 (explaining, “It is beyond dispute that the most vital constituent of the English common law rule has always been rejected in respect of citizenship of the United States.”).
130. See Wong, 169 U.S. 705-30. The dissenters analyzed the applicability of the English common law to United States citizenship, the historical events leading up to the adoption of the Fourteenth Amendment including the decision set forth in Dred Scott, as well as the congressional debates surrounding the Citizenship Clause wherein the Framers defined “subject to the jurisdiction thereof” and how the same definition was applied in Elk v. Wilkins.
131. See generally CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866) (where there is no discussion as to English common law nor even an implication that the Framers intended to grant citizenship to all individuals born within the United States).
132. CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).
United States, the analysis purporting to find that the Citizenship Clause intended to adopt the English common law is contrary to the actual intent of its Framers.

C. Societal Consequences of Granting Citizenship to Children Born of Illegal Immigrants

Undoubtedly, this country’s current policy of granting citizenship to any person born within the United States provides an incentive for illegal immigration. According to a study conducted in San Diego, California, 65 percent of women, who came to the United States to give birth, admitted that “ensuring that their babies were born U.S. citizens was a compelling reason for their coming to America.”

As recognized by Justice Gray in Elk, there are privileges associated with United States citizenship. Many public benefits afforded to United States citizens are not provided to illegal aliens. However, eligibility for many public programs depends upon the citizen status of the child. For example, Aid to Families with Dependent Children provides financial assistance to families with children who are United States citizens. In effect, though the parents are not themselves eligible for public benefits, they are benefiting from the citizenship status of their children as they live and eat with children receiving public assistance. In California, “children born to illegal alien mothers constitute the largest case load increase in welfare applicants in counties across [the state].”

In addition to the indirect financial incentive, through having children born as United States citizens, illegal aliens may also receive a more direct benefit; it

134. Schuck, supra note 16, at 78.
135. See generally Cong. Globe, 39th Cong., 1st Sess., 2890-97 (1866) (where there is no discussion as to English common law nor even an implication that the Framers intended to grant citizenship to all individuals born within the United States).
137. Smith et al., supra note 136, at 927-28 (1997). Professor Helen Wallace of the Graduate School of Public Health at San Diego State University and Professor Judith Fullerton of the School of Medicine at the University of California, San Diego conducted the study discussed. Id. at 927. The study consisted of 83 Hispanic women who came to the United States in order to receive prenatal care or to deliver their children. Id. at 928. The women were interviewed within 72 hours after delivering their babies. Id.
138. Elk, 112 U.S. at 109 (quoting United States v. Osborne, 2 F. 58, 61 (D. Or. 1880) (noting, “To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form.”)).
139. Smith et al., supra note 136, at 927.
140. Id.
141. Id.
142. Id.
143. See Abrahms, supra note 71, at 473.
opens the door for arguing against the deportation of a family member, especially the parent, of a citizen child. 144 Although, legally many courts have determined that deportation of an illegal alien parent is not de facto deportation of the citizen child, 145 from a practical standpoint, the question is not nearly as settled. 146 The Office of Immigration Statistics reports that in 2004 over sixty percent of the hundreds of thousands of immigrants who become legal permanent residents of the United States each year, do so through family-sponsored grants. 147 Sixty-five percent of the family-sponsored legal permanent residents obtain their legal status based on their immediate relations to a United States citizen. 148

Further, the concept of granting citizenship to children born of illegal immigrants undercuts the basic principle of fairness. 149 Many people worldwide could potentially wait years in order to legally immigrate to the United States in hopes of eventually attaining United States citizenship for not only themselves but their children as well; however, our country’s policy provides awards, by granting automatic citizenship to anyone born on American soil, to those who circumvent the legal process of immigration and naturalization. 150

The financial burdens placed upon legal citizens and residents of the United States by illegal immigration are immense. 151 The Office of Immigration Statistics reported that as of January 2005, there were an estimated 10.5 million illegal aliens residing in the United States. 152 It was further estimated that in 2002, 383,000 children were born to illegal alien mothers within the geographical boundaries of the United States, accounting for nearly ten percent

144.  Wood, supra note 88, at 497.
145.  Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977).  See also Wood, supra note 88, at 498 (citing Gonzalez-Cuevas v. I.N.S., 515 F.2d 1222 (5th Cir. 1975); Perdido v. I.N.S., 420 F.2d 1179 (5th Cir. 1969) (noting “several courts have already rejected this concept”).
146.  Wood, supra note 88, at 497-98.  A former United States Attorney for the San Diego region stated that “he could recall no case in the last ten to fifteen years where the illegal alien parents of a U.S. citizen child were deported.”  Id. (citing N. Cleeland & E. Young, Living in Shadowland—Citizen Children: Offspring of Illegal Immigrants Face an Uncertain Future, SAN DIEGO UNION-TRIBUNE, June 2, 1995, at A-1).
148.  Id.
149.  See Abrahms, supra note 71, 476-77.
151.  See Abrahms, supra note 71, at 488.
of all births in the country.\textsuperscript{153} Granting birthright citizenship to children born of such illegal aliens merely provides an incentive for increased illegal immigration.\textsuperscript{154} The societal consequences of granting citizenship to children born in the United States of illegal immigrants exemplify the justifications to restricting the privilege of birthright citizenship.

V. CONCLUSION

The Fourteenth Amendment provides citizenship, by birth or naturalization, to those “subject to the jurisdiction” of the United States.\textsuperscript{155} By including the phrase “subject to the jurisdiction” the Framers intended to restrict granting the privilege of United States citizenship.\textsuperscript{156} The congressional debates pertaining to the Citizenship Clause indicate the intent not to grant citizenship to everyone physically born in the United States but to restrict birthright citizenship to only those who were completely subjected to the jurisdiction of the United States.\textsuperscript{157} The Court in \textit{Elk} recognized this intent in acknowledging birth within the physical boundaries of the United States, standing alone, was insufficient to determine birthright citizenship.\textsuperscript{158} Subsequently, the Court in \textit{Wong}, though avoiding discussion of the Framers’ intent, nonetheless reached a conclusion adhering to that intent by granting birthright citizenship to a child born of legal, permanent aliens.\textsuperscript{159} \textit{Wong} has been used to bolster the argument in favor of granting birthright citizenship to children born of illegal aliens within the United States;\textsuperscript{160} however, it is critical to recognize that \textit{Wong} came to no such conclusion.\textsuperscript{161} In fact, the Supreme Court has yet to rule on this issue.\textsuperscript{162}

Birthright citizenship for children of illegal aliens imposes serious societal consequences. It provides an incentive for illegal immigration as children born in the United States who become automatic citizens are eligible for federal and state assistance.\textsuperscript{163} Further, it undermines the principals of fairness, because it provides a reward to those who purposefully and intentionally break the laws of

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\textsuperscript{153} Steven Camarota, Center for Immigration Studies, Births to Immigrants in America, 1970 to 2002 5 (2005).
\textsuperscript{154} See Wood, supra note 88, at 497.
\textsuperscript{155} U.S. Const. amend. XIV §1.
\textsuperscript{157} Cong. Globe, 39th Cong., 1st Sess. 2893 (1866).
\textsuperscript{158} Elk, 112 U.S. at 102.
\textsuperscript{159} Wong, 169 U.S. at 682. See also Schuck, supra note 16, at 78.
\textsuperscript{160} See Ho, supra note 70, at 375.
\textsuperscript{161} See Schuck, supra note 16, at 78. The \textit{Wong} Court held that “the Citizenship Clause extended birthright citizenship to an American-born son of permanent residents of California” who were of Chinese ancestry only, not birthright citizenship to children of illegal aliens. \textit{Id.} at 78.
\textsuperscript{162} See Abrahms, supra note 71, at 483 (noting, “no court has ever directly decide the question of whether illegal aliens’ children are granted citizenship under the Fourteenth Amendment”).
\textsuperscript{163} See Wood, supra note 88, at 497; see also Smith et al, supra note 136, at 927.
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the United States; yet, those who wade through the obstacles and endless processes of our immigration system will patiently wait years to reap the same benefit. The criminal aspect of illegal immigration should not be tolerated and should definitely not be rewarded. Such societal consequences justify restricting birthright citizenship to only those born to legal residents of the United States, and such restriction follows the intent of the Framers of the Citizenship Clause.

164. See Abrahms, supra note 71, at 476-77 (noting, “those who have waited through the quota system justifiably feel spurned by such a policy.”)

165. See Dan Stein and John Bauer, Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants? 7 Stan. L. & Pol’y Re. 127 (1995-1996). The Court has never expressly stated that the children of illegal immigrants were citizens. Id. at 128. The court implied in Plyler v. Doe, 457 U.S. 202, 211 (1985) that “jurisdiction” included the children born of illegal immigrants, but such language was merely dictum provided in a footnote of the opinion. Id. at 128.
LIFE OR DEATH: HOW ROPER V. SIMMONS AFFECTS JUVENILE ABORTION JURISPRUDENCE

by W. Matt Nakajima*

I. INTRODUCTION

On a cold November night, a sixteen-year-old girl, after only three weeks of motherhood, suffocates her newborn child. Although the premeditated murder of an infant is a monstrous crime, the jury cannot sentence the girl to death because the Supreme Court has decided juveniles lack the maturity necessary to understand the consequences of their actions and, therefore, lack the requisite culpability for the death penalty.¹ Now imagine the same sixteen-year-old girl who this time instead of conceiving, and eventually murdering her child, decides to have an abortion. Afraid of what her parents will think, the young girl seeks a judicial bypass where a judge will decide if she is mature enough to have an abortion without parental consent or notification.² At a judicial bypass hearing, a judge decides that she has the requisite maturity to end the life of her unborn child based on factors as simple as the young girl’s appearance and her ability to articulate her feelings.³

The hypothetical paradox above exemplifies the Supreme Court’s contradictory holdings on the two most fundamental issues confronting juvenile law: the termination and inception of a child’s life. In Roper v. Simmons, the

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¹ Roper v. Simmons, 543 U.S. 551, 559-60 (2005) (quoting State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003)).
² See Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 526-27 (1990) (noting that judicial bypass proceedings allow a judge to determined whether a pregnant minor is mature enough and well enough informed to make her abortion decision, independently with her doctor without consent or notification of her parents or that the abortion would be in her best interests any way).
³ See Hodgson v. Minnesota, 497 U.S. 417, 477 (1990) (Stevens, J., concurring) (citing G. B. Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79, 81 (1987)) (noting, “judicial bypass proceedings are merely pro forma [and] . . . there is no evidence that they promote more reasoned decisionmaking or screen out adolescents who may be particularly immature or vulnerable. . . . The hearings typically last less than 15 minutes. Despite the complex issues involved (maturity and the best interests of the minor), experts are rarely if ever called to testify.”); In re Anonymous, 806 So.2d 1269, 1274 (Ala. 2001) (noting that in determining a pregnant minor’s level of maturity, a trial judge “may draw inferences from the minor’s composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions.”).
Supreme Court admirably abolished the juvenile death penalty. Accordingly, many juvenile law advocates believe that the abolition of the juvenile death penalty was a significant step in creating consistency in the treatment and assessment of minors. However, others believe that the underlying implications of this apparent victory in juvenile law might be the very thorn in the side of its development.

This note discusses and analyzes Roper v. Simmons, a Supreme Court case holding that the Eighth Amendment prohibits the execution of juvenile offenders due to society’s recognition of their immaturity and lack of culpability. Section II of this note lays out the background law needed to understand Roper and its potential impact on juvenile abortion. Section III provides an overview of the facts and holding of the case, along with the concurring and dissenting opinions. Section IV analyzes Roper’s holding and explores the Court’s reasoning. This section concludes by discussing the influence that it will have on the issue of juvenile abortion. Section V concludes the note.

II. BACKGROUND/FACTS

A. Background Law

In 1976, in Planned Parenthood v. Danforth, the Supreme Court held unconstitutional a Missouri statute that required a minor to receive consent from a parent or guardian as a condition for an abortion. In reaching its conclusion, the Supreme Court stated, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”

4. Roper, 543 U.S. at 559-60.
5. Nicole A. Saharsky, Note, Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence, 85 MINN. L. REV. 1119, 1169-70 (2001) (discussing the importance of consistency within juvenile abortion law and juvenile offenders facing the death penalty).
7. Roper, 543 U.S. at 578-79.
   No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except...[w]ith the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of 18 years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.
   The Supreme Court concluded that §3(4) is unconstitutional because “the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his [minor] patient to terminate the [minor] patient’s pregnancy. . . .” Danforth, 428 U.S. at 74.
“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”\textsuperscript{10} However, the Court also “recognized that the State has somewhat broader authority to regulate the activities of children than of adults.”\textsuperscript{11} In reaching its conclusion, the Court weighed the expecting juvenile’s right to privacy against the State’s interests, and the interests of “safeguarding the family unit” and “parental authority.”\textsuperscript{12} Ultimately, the Court held that the “State does not have the constitutional authority to give a third party an absolute” veto over the decisions of a mature minor and her doctor.\textsuperscript{13} Therefore, the Court inferred that there are at least some minors, who “regardless of age” may have the requisite maturity necessary to consent to an abortion.\textsuperscript{14}

Three years later, in \textit{Bellotti v. Baird}, a plurality of the Court held that, if a pregnant minor seeks a judicial bypass and the court deems the minor sufficiently mature in the bypass hearing, then the court must authorize the mature minor’s right to an abortion without parental consent or notice.\textsuperscript{15} However, it is important to understand that the plurality in \textit{Bellotti} did not base its holding on the idea that minors as a class are sufficiently mature to make an informed decision such as consenting to an abortion.\textsuperscript{16} In fact, the plurality opinion in \textit{Bellotti} overwhelmingly established that the Court believes that most minors are not capable of making complex, informed decision such as consenting to an abortion.\textsuperscript{17} However, due to an expecting minor’s “constitutional rights to

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\bibitem{10} Id.
\bibitem{11} Id. The Court explained, “[c]ertain decisions are considered by the State to be outside the scope of a minor’s ability to act in his own best interest or in the interest of the public,” such as “the sale of firearms and deadly weapons to minors without parental consent,” “exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors.” \textit{Id.} at 72.
\bibitem{12} \textit{Id.} at 74-75.
\bibitem{13} \textit{Id.} at 73-75.
\bibitem{14} \textit{Danforth}, 428 U.S. at, 74-75.
\bibitem{16} \textit{Id.} at 640-41. The plurality reiterated “that our holding . . . [did] not suggest that every minor, regardless of age or maturity may give effective consent for termination of her pregnancy.” \textit{Id.} at 641 (quoting \textit{Danforth}, 428 U.S. at 75). Further, the Court explained that it is highly unlikely that a 17 year old is “capable of selecting and obtaining a competent physician” because they “are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals.” \textit{Id.} at 641 n.21.
\bibitem{17} \textit{Id.} at 636-42. The plurality explained that, “minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. \textit{Id.} at 640. “It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision -- one that for some people raises profound moral and religious concerns.” \textit{Id.} Moreover, the Court reiterated:
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There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support
seek an abortion” and the Court’s responsibility to “safeguard” the minor’s “constitutionally protected interests” the plurality held, “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”

In 1982, in *Edding v. Oklahoma*, the Supreme Court reversed and remanded a decision sentencing a juvenile offender to death because the lower courts failed to consider mitigating evidence that would have shown the juvenile’s violent and abusive home life. In reaching its conclusion, the Supreme Court relied on prior abortion precedent in *Bellotti* in order to attempt to establish a consistent view of juvenile maturity. Specifically, because the *Bellotti* Court determined that “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults,” the Supreme Court in *Eddings* concluded that a minor’s age and background must be considered as mitigating factors.

In 1998, in *Thompson v. Oklahoma*, a plurality of the Court held that because adolescents as a class are less mature and responsible than adults, “it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense.” In reaching its conclusion, the Supreme Court stated that the executing of a juvenile under sixteen would have no deterrent effect because, “[t]he likelihood that the teenage offender has from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

*Id.* at 641 (quoting *Danforth*, 428 U.S. at 91) (Stewart J., concurring).

18. *Id.* at 649, 651. The *Bellotti* holding was not the legal victory that it appeared on its face to be. John H Garvey, *Freedom and Choice in Constitutional Law*, 94 Harv. L. Rev. 1756, 1760 (1981) (“For all of *Bellotti v. Baird*’s talk about the child’s right to ‘seek’ an abortion, five members of the Court agreed that the state could prevent an immature minor from making that decisions – four by committing the choice to a court, one by committing it to the child’s parents.”). See also Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and their Status under Law*, 10 U.C. Davis J. Juv. L. & Pol’y 275, 327 n.263 (2006) (“To be clear, the plurality did uphold a third-party veto—a judge could prohibit a minor from obtaining an abortion.”); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 Hofstra L. Rev. 589, 591 (2002) (commentators have, in error, viewed the abortion cases as bestowing rights on children.).


20. *Id.* at 115-16 (citing *Bellotti*, 443 U.S. at 635). See Cunningham, *supra* note 18, at 299-300. The Supreme Court explained, “But youth is more than a chronological fact.” *Edding*, 455 U.S. at 115. “It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Id.* “Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. *Id.* at 115-16. “Particularly ‘during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment’ expected of adults.” *Id.* at 116 (citing *Bellotti*, 443 U.S. at 635).


made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”

23. Thompson, 487 U.S. at 837.


It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards. But even if the requisite degrees of maturity were comparable, the age statutes in question would still not be relevant. They do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing.

Stanford, 492 U.S. at 374-75.


27. Roper, 543 U.S. at 556-57. Simmons and a companion murdered Mrs. Crook after Simmons proposed that they could commit burglary and murder and get away with it because they were minors. Id at 556. On the night of the murder, Simmons and his companion entered the victim’s house; duct taped her mouth and eyes, bound her hands and then drove her to a state park. Id. “There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from a bridge, drowning her in the water below.” Id. at 557.

28. Id. at 557. Prior to the murder, Simmons “stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles.” Roper, 112 S.W.3d at 419.
trial judge imposed the death penalty, accepting the jury’s recommendation. The Missouri Supreme Court affirmed. Subsequently, in 2002, after the United States Supreme Court’s holding in Atkins, the Missouri Supreme Court set aside Simmons’s death sentence, finding the same rationale in Atkins to apply to juvenile offenders. The United States Supreme Court then granted certiorari to consider whether the Eighth Amendment prohibits the execution of a juvenile who was under 18 when the crime was committed.

C. The Majority Holding, Rationale, and Justice Stevens’s Concurring Opinion

In Roper, the United States Supreme Court affirmed the decision of the Missouri Supreme Court finding that the Eighth Amendment prohibits the execution of an offender for crimes committed under the age of eighteen. In making this decision, the Court referred to the “evolving standards of decency that mark the progress of a maturing society.” The Court determined these standards by legislative enactment, state practices, and ultimately by the Justices’ own judgment. By looking at legislative enactments and state practices, the Court found that similar to Atkins, there was a national consensus prohibiting the juvenile death penalty based on a prohibition on juvenile executions in a majority of states and a consistent trend towards eliminating the practice in all states.

Accordingly, the Court took the objective evidence and combined it with their “own independent judgment” to determine “whether the death penalty is a disproportionate punishment for juveniles.” In making this decision, the Court

29. Roper, 453 U.S. at 557-58. The jury recommended the death penalty after hearing both the mitigating and aggravating factors surrounding the case. Id. at 558. “The State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.” Id. at 557. The defense submitted testimony that Simmons had no prior criminal record and that he had the ability to show love to his family. Id. at 558.


31. Roper, 112 S.W.3d at 399. The Missouri Supreme Court held: [S]ince Stanford was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since Stanford, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.

Id at 399.

32. Roper, 543 U.S. at 559-60.

33. Id. at 578-79.

34. Id. at 561-62 (quoting Trop, 356 U.S. at 100-01).

35. Roper, 543 U.S. at 564.

36. Id. at 567 (citing Atkins, 536 U.S. at 316).

37. Id. at 564.
analyzed whether juveniles can be rationally classified within the “narrow category” of offenders for which “the death penalty is reserved.” The Court noted that scientific and sociological studies have overwhelming recognized that because of juveniles’ lack of maturity, they more often than adults make “impetuous and ill-considered actions and decisions.” Furthermore, “from a moral standpoint,” because juveniles as a class are more vulnerable, less mature, and have an underdeveloped sense of identity as compared to an adult, “it would be misguided to equate the failings of a minor with those of an adult.” Consequently, the two distinct social purposes served by the death penalty, retribution and deterrence of capital crimes, would not be appropriate for a juvenile with diminished culpability. Moreover, the Court determined that there is an “unacceptable likelihood” that the jury, upon hearing the brutality of a crime, will execute a juvenile offender in spite of his or her immaturity, vulnerability and insufficient culpability. Therefore, the Court held that the Eighth Amendment prohibits the execution of juvenile offenders. The Court further found “significant confirmation” in its holding based on “the opinion of the world community.” Writing separately, Justice Stevens concurred with the holding and reiterated that the Court must interpret the Eighth Amendment based on the “evolving standards of decency,” not by what forms or modes of punishment would have been considered cruel and unusual when the Amendment was originally adopted.

38. Id. at 569. See Atkins, 536 U.S. at 319.
39. Roper, 543 U.S. at 569.
40. Id. at 569-70.
41. Id. at 572.
42. Id. at 573.
43. Id. at 578.
44. Roper, 543 U.S. at 577. In Justice O’Connor’s dissent, she reiterated that what makes the Eighth Amendment unique from other provisions is that it “draws its meaning directly from the maturing values of civilized society.” Id. at 604-05 (O’Connor, J., dissenting). Accordingly, the Court noted that the United States was the only country in the world that continued to allow the execution of juveniles. Id. at 575. Therefore, because the Court measures what is cruel and unusual based on the maturing values of civilized society, the majority and Justice O’Connor, in her dissent, recognized that it only makes sense to use the opinions of the world community. Id. at 604-05 (O’Connor, J., dissenting). See Trop, 356 U.S. at 100-01. Further, the Court explained that the Eighth Amendment phrase, “cruel and unusual punishment,” was taken directly from the English Declaration of Rights of 1688. Roper, 543 U.S. at 577; see also Trop, 356 U.S. at 100 (citing 1 Wm. & Mary, 2d Sess. (1689), c. 2). Further, the United Kingdom abolished the juvenile death penalty over a half a century ago, in 1948. Roper, 543 U.S. at 577-78. Therefore, the Court further supported its holding by acknowledging the overwhelming world consensus against the execution of juvenile offenders. Id. at 577-78.
45. Roper, 543 U.S. at 587 (Stevens, J., concurring). But see Stanford, 492 U.S. at 396 (describing the common law at the time of the Amendment’s adoption).
D. Justice O’Connor’s Dissenting Opinion

In Justice O’Connor’s dissent, she agreed with the majority that in determining this issue, the Court “must look to whether such punishment is consistent with contemporary standards of decency.” 46 However, she concluded that there was no national consensus forbidding the execution of juveniles.47 She further stated that unlike in Atkins, there was not a “compelling proportionality argument” prohibiting the execution of juveniles.48 Further, she criticized the Court for comparing the culpability of juveniles with that of the mentally retarded and expressly stated that when determining juvenile culpability “age is not an unfailing measure of psychological development, and common experience suggests that many seventeen-year-olds are more mature than the average young adult.” 49 Moreover, similar to a judicial bypass hearing in juvenile abortion cases, Justice O’Connor explained that the proper way to address a juvenile’s culpability is “through individualized sentencing in which juries are required to give appropriate weight to the defendant’s immaturity, susceptibility to outside pressures,” and the ability to understand the consequences of his or her action, “and so forth.” 50 Finally, she concluded that international law, although relevant, should not dictate the outcome.51 Therefore, she ultimately determined

46. Roper, 543 U.S. at 605 (5-4 decision) (O’Connor, J., dissenting).
47. Id. at 607 (noting that the Court failed establish that no juvenile is mature enough to deserve the death penalty and that juries are incapable of properly weighing mitigating factors).
48. Id. at 606 (noting it was “highly unlikely, and perhaps impossible, that [the mentally retarded] could act with the degree of culpability necessary to deserve death”). See Atkins, 536 U.S. at 318.
49. Roper, 543 U.S. at 601-02 (internal quotations omitted). Justice O’Connor stated, “it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence.” Id. at 602. Further, the Supreme Court recognized that “mentally retarded persons suffer from major cognitive and behavioral deficits, i.e., “subaverage intellectual functioning” and “significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.” Id. at 592-93 (quoting Atkins, 536 U.S. at 318). Moreover, “[b]ecause of their impairments, such persons] by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Id. at 592-93. (quoting Atkins, 536 U.S. at 318). However, “[f]or purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the mentally retarded.” Id. at 602. In fact, some 17-year old murderers are, without question, mature enough for the death penalty. See id. at 601. Finally, “common experience suggests that many 17-year-olds are more mature than the average young ‘adult.’” Id.
50. Id. at 602-03 (O’Connor, J., dissenting).
51. Id. at 605 (noting, “At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.”).
that the Court was wrong to substitute its own subjective views, which lacked merit, in place of the “democratically elected legislatures.”

E. Justice Scalia’s Dissenting Opinion

In Justice Scalia’s dissent, he stated that the proper way to determine whether the Eighth Amendment prohibits the execution of juveniles is to look at whether it would have been considered cruel and unusual when the Bill of Rights was adopted. However, Justice Scalia stated, even when analyzing this issue by looking at the evolving standards of decency, there is no national consensus. In fact, he explained that there is considerable support for the execution of juveniles amongst legislatures and voters. Further, he stated that the Court completely contradicted prior precedents where the Court previously determined that a juvenile mother might be considered mature enough to make life or death decisions, regarding the “much more complex decision” of abortion. Therefore, Justice Scalia concluded that the Court decided to abolish the juvenile death penalty by choosing to supplant the consensus of the American people for the “Justices’ views” of what is morally acceptable. Additionally, he noted in detail that foreign law has no place in this decision.

III. ANALYZING ROPER AND ITS FUTURE INFLUENCE ON JUVENILE ABORTION

A. Analyzing the Court’s Decision to Abolish the Juvenile Death Penalty

In support of the Court’s holding to abolish the juvenile death penalty, the Court relied on the “evolving standards of decency that mark the progress of a maturing society.” The Justices measure these standards by using objective

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52. Id. at 607 (“[T]his Court should not substitute its own ‘inevitably subjective judgment’ on how best to resolve this difficult moral question for the judgments of the Nation’s democratically elected legislatures.” (citing Thompson, 487 U.S. at 854 (O’Connor, J., concurring)).

53. Roper, 543 U.S. at 609 n.1 (Scalia, J., dissenting) (“The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.’”) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

54. Roper, 543 U.S. at 609 (Scalia, J., dissenting) (“Words have no meaning if the views of less than 50% of the death penalty States can constitute a national consensus.”).

55. Id. at 613. Justice Scalia noted that “both the Missouri and Virginia Legislatures—which at the time of Stanford, had no minimum age requirement—expressly established 16 as the minimum.” Id. at 613. See Mo. Rev. Stat. § 565.020.2 (2000); Va. CODE ANN. § 18.2-10(a) (Lexis 2004). Further, “[t]he people of Arizona and Florida have done the same by ballot initiative.”

56. Roper, 543 U.S. at 613-14

57. Roper, 543 U.S. at 620.

58. Roper, 543 U.S. at 620.

59. Id. at 561 (quoting Trop, 356 U.S. at 100-01).
evidence and eventually using their “own independent judgment.”

Although Justice O’Connor was correct in noting that the objective evidence submitted was not dispositive, the objective evidence, combined with the moral proportionality analysis and scientific evidence clearly established that the standards of decency had changed. The Court explained, in Stanford, that the scientific evidence overwhelmingly established that juveniles, “are more vulnerable, more impulsive, and less self-disciplined than adults,” and are without the same “capacity to control their conduct and to think in long-range terms.” Therefore, it defies logic to justify the death penalty for juveniles when society recognizes their diminished culpability. Thus, it goes without question that, sentencing juveniles to death, does not measurably contribute to the two social purposes of the death penalty, retribution, and deterrence.

However, in Justice Scalia’s dissent, he criticized the Court for using a moral proportionality analysis. In his opinion, it has “no foundation in law or logic” and contradicts the precedents set in Stanford. However, in actuality the Supreme Court has explicitly acknowledged the “constitutional principle of proportionality” for over a century. In fact, the Court has consistently found that a moral proportionality test is of “central importance to the constitutionality of the sentence imposed.” Furthermore, “this focus on a defendant’s

60. Id. at 564.
61. Id. at 597.
64. Roper, 543 U.S. at 572-73 (“The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”).
65. Id. at 571-72.
66. Id. at 616 (Scalia, J., dissenting) (“On the evolving-standards hypothesis the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?”).
67. Id. at 616-17. See Stanford, 492 U.S. at 361 (1989). Although Justice Scalia’s criticizes the Court for not following prior precedents, it is important to recognize that in his plurality opinion in Stanford, he failed to acknowledge prior precedents when he considered the inquiry into the juvenile death penalty complete after only reviewing legislative enactments and the work of sentencing juries. Id. at 376-77.
68. Stanford, 492 U.S. at 393 (Brennan, J., dissenting) (“The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.”) (quoting Solem v. Helm, 463 U.S. 277, 286 (1983)).
69. Stanford, 492 U.S. at 393. See Enmund, 458 U.S. at 798. The Court’s emphasis on a moral proportionality analysis in Roper is consistent with the Court’s own jurisprudence. For instance, in Trop, the Court determined whether the Eighth Amendment prohibits the taking of an individual’s citizenship. Trop, 356 U.S. at 101. The plurality noted that the task of deciding this issue was “inescapably” theirs, and therefore, the Court relied heavily on a proportionality analysis in reaching its conclusion. Id. at 103-04. Further, in Thompson, the Court concluded that the Eighth Amendment prohibited the execution of juveniles under sixteen based primarily on the fact that the execution of a juvenile was disproportionate no matter what the crime. Thompson, 487 U.S. at 837-38. Moreover, the Court recognized, “[a]lthough the judgment of legislatures, juries,
blameworthiness runs throughout our constitutional jurisprudence relating to capital sentencing.”70 Accordingly, in \textit{Roper}, the Justices’ correctly recognized that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty” for juveniles.71

In reaching its conclusion in \textit{Roper}, the Court extended its holding in \textit{Thompson}, recognizing that it would offend modern standards of decency to execute a person for crimes committed when he was below the age of eighteen.72 Moreover, the Court relied on scientific evidence regarding the known differences between juveniles and adults.73 Specifically, because of juveniles’ lack of maturity and capability, “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”74 Further, without a categorical rule, there is an “unacceptable likelihood” that the jury, upon hearing the brutality of a crime, will execute a juvenile offender in spite of his or her insufficient culpability.75

Yet, Justice Scalia criticized the Court’s bright line rule by inferring that there is no evidence indicating even the possibility that a jury might execute a juvenile without sufficient culpability.76 On the contrary, however, adolescents that have been sentenced to death “appear typically to have a battery of

and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits the imposition of the death penalty” on a juvenile offender. \textit{Id.} at 833 (quoting \textit{Enmund}, 458 U.S. at 797). Finally, in \textit{Atkins}, the Court explained that when analyzing an issue involving a consensus, the Justices must use their own judgment ultimately to decide whether there are reasons to agree or disagree with citizenry’s elected legislature. \textit{Atkins}, 536 U.S. at 313 (quoting \textit{Coker}, 433 U.S. at 597) (“in cases involving a consensus, our own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and it legislators.”).


74. \textit{Roper}, 543 U.S. at 572.

75. \textit{Id.} at 572-573.

76. \textit{Id.} at 620-21 (Scalia, J., dissenting) ([T]hat juries will be unable to appreciate the significance of a defendant’s youth when faced with details of a brutal crime. This assertion is based on no evidence.”).
psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness.\textsuperscript{77}

Finally, Justice Scalia and Justice O’Connor criticized the Court for taking the execution of juveniles out of the hands of the legislature and declared that the Court had overstepped its authority.\textsuperscript{78} However, this is a complete fallacy. Every Justice on the Supreme Court is “oath-bound to defend the Constitution” and protect the individual rights of the American citizens.\textsuperscript{79} Moreover, “the provisions of the Constitution are not time-worn adages or hollow shibboleths.”\textsuperscript{80} “They are vital, living principles that authorize and limit governmental powers in our Nation.”\textsuperscript{81}

In over “106 instances since [the Supreme] Court was established it has determined that congressional action exceeded the bounds of the Constitution.”\textsuperscript{82} Therefore, when the government acts to take away a juvenile’s life, the Court has a duty to judge the congressional enactment by the standards of the constitution.\textsuperscript{83} Thus, “[a] judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.”\textsuperscript{84} As such, because the execution of juveniles conflicted with the Eighth Amendment as being cruel and unusual punishment, the Court had “no choice but to enforce the paramount commands of the Constitution” by abolishing the juvenile death penalty.\textsuperscript{85}

\textsuperscript{77} Stanford, 492 U.S. at 398 (Brennan, J., dissenting). In a “diagnostic evaluation of all 14 juveniles on death row,” seven were psychotic, four suffered from mood disorders, and the remaining three suffered from paranoia. Stanford, 492 U.S. at 398. (Brennan, J., dissenting) (citing Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 AM. J. PSYCHIATRY 584 (1988)). Further, all but two of the juvenile inmates scored below the normal range in IQ testing and ten offenders “showed impaired abstract reasoning.” Stanford, 492 U.S. at 398. Moreover, “[a]ll but two of the adolescents had been physically abused, and five sexually abused . . . [and] [w]ithin [their] families, violence, alcoholism, drug abuse and psychiatric disorders were commonplace.” Id. Clearly, individualized consideration of juvenile culpability before sentencing has failed to ensure that only the truly culpable will be executed. Id. at 398-99. Moreover, in\textit{Penry}, the jury recommended the death penalty knowing that Penry had an IQ of 59, the mental age of a six–year-old, and even the State’s psychiatrist stated that Penry had an extremely limited mental capacity and seemed unable to learn from his mistakes. Penry v. Lynaugh, 492 U.S. 302, 308-10 (1989). Furthermore, in\textit{Furman v. Georgia}, the fact that juries haphazardly sentenced certain offenders to death was a prime factor in the Court holding that the death penalty was unconstitutional, not just for juveniles, but for all offenders. Furman v. Georgia, 408 U.S. 238 (1972),\textit{cited in Thompson}, 487 U.S. at 831.

\textsuperscript{78} Roper, 543 U.S. at 609 (O’Connor, J., dissenting); \textit{id.} at 615-16 (Scalia, J., dissenting).

\textsuperscript{79} Trop, 356 U.S. at 103.

\textsuperscript{80} Id.

\textsuperscript{81} Id.


\textsuperscript{83} Trop, 356 U.S. at 103-04.

\textsuperscript{84} Thompson, 487 U.S. at 823 n.4 (quoting Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

\textsuperscript{85} Trop, 356 U.S. at 104.
B. Analyzing the Court’s Holding in Roper and its Potential Influence on Juvenile Abortion

The *Roper* Court’s abolishment of the juvenile death penalty is having a tremendous effect on juvenile law. However, other legal scholars have noted that it appears that the assessment of juvenile maturity in juvenile death penalty cases undermines the same assessment in juvenile abortion jurisprudence.\(^86\) In an attempt to explain this apparent divide in assessing juvenile maturity, it is important to focus on what *Roper* and *Bellotti* stand for. *Roper* takes the position that a juvenile offender, who commits a crime under the age of majority, lacks the requisite maturity and culpability to warrant the imposition of the death penalty.\(^87\) Similarly, *Bellotti* adopts the proposition that generally, an expecting minor “lack[s] the ability and maturity to give informed consent to an abortion” without parental consent.\(^88\) Therefore, contrary to Justice Scalia’s dissenting argument in *Roper*, the Supreme Court has consistently advocated that juveniles are generally lacking in mature decision-making ability “whether they are committing capital crimes or seeking to terminate an unwanted pregnancy.”\(^89\)

Prior to *Roper*, in 2001 twenty-three states permitted the execution of juvenile offenders.\(^90\) However, in comparison forty-two states had express provisions restricting the rights of expecting juveniles to obtain abortions without parental consent or notification.\(^91\) Accordingly, until the Supreme Court

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89. Mutcherson, supra note 86, at 954.
juvenile death penalty, the *Roper* Court actually corrected the Supreme Court’s prior contradiction in which it allowed the juvenile death penalty in spite of a national consensus restricting juveniles’ rights to seek an abortion due to their general lack of maturity.

However, in spite of the overwhelming objective evidence, Justice Scalia still sharply criticized the Court by stating that the abolishment of the death penalty was inconsistent with prior abortion precedents. In reaching this opinion, Justice Scalia focused on the fact that the Court previously “struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions.” Because abortion jurisprudence allowed mature minors to seek a judicial bypass, Justice Scalia alleged that he could not “see why” the assessment of juvenile maturity in capital sentencing proceedings “should be any different” from juvenile abortion precedents. However, in making this statement Justice Scalia overlooked the fact that the Supreme Court has consistently advocated the proposition that minors are “ill-equipped to make” the decision to have an abortion “without mature advice and emotional support.” Further, the Court created the judicial bypass exception to the general rule because of the constitutional implications involved in juvenile abortion proceedings, not because the Court believed that juveniles have the requisite maturity to give informed consent.

Moreover, the Court explained, “[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.” Accordingly, an expecting juvenile’s constitutionally protected Fourteenth Amendment right to privacy over her own body is the unique feature that distinguishes juvenile abortion jurisprudence from all other juvenile law issues.

(minimum age for execution of sixteen; one-parent consent for abortion); Mississippi (minimum age for execution of sixteen; two-parent consent for abortion); Missouri (minimum age for execution of sixteen; one-parent consent for abortion); North Carolina (minimum age for execution of seventeen; one-parent consent for abortion); Pennsylvania (minimum age for execution of sixteen; one-parent consent for abortion); South Carolina (minimum age for execution of sixteen; one-parent consent for abortion); South Dakota (minimum age for execution of sixteen; one-parent notification for abortion); Texas (minimum age for execution of seventeen; one-parent notification for abortion); Utah (minimum age for execution of sixteen; two-parent notification for abortion, no judicial bypass); Virginia (minimum age for execution of sixteen; one-parent notice for abortion); and Wyoming (minimum age for execution of sixteen; one-parent consent for abortion).

95. *Id.* See, e.g., *Bellotti*, 443 U.S. at 643-44; *Danforth*, 428 U.S. at 74-75.
97. *Bellotti*, 443 U.S. at 641 (citing *Danforth*, 428 U.S. at 91 (Stewart J., concurring)).
98. *Id.* at 641-42.
99. *Id.*
100. *Id.* at 633-36. “A child, merely on account of his minority is not beyond the protection of the Constitution.” *Id.* at 633. “As the Court said in *In re Gault*, 387 U.S. 1, 13 (1967), ‘whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults
For example, in prior juvenile death penalty cases, the Court focused on the two social purposes of the death penalty, retribution, and deterrence, instead of juveniles’ rights and parental interests. Further, in capital sentencing proceedings, because the offender has been convicted of a capital offense, his or her individual interests are secondary to society’s interest in retribution for crimes committed and/or society’s interest in punishing the offender to deter future crimes. To the contrary, in abortion proceedings the Court acknowledged that although the State and the family have strong interests in the abortion decision, the primary interest is the expecting mother herself. Thus, the Court explained, in Planned Parenthood v. Casey, that when dealing with the issue of abortion:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

Accordingly, because of expecting minors’ “constitutional rights to seek an abortion,” the Supreme Court was constitutionally bound to conclude, “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.” Therefore, any attempt to use the judicial bypass exception in abortion jurisprudence to criticize the Court’s holding in Roper is groundless because the two decisions turned on completely different constitutionally protected rights. Specifically, Justice Scalia’s stern criticism of the Court’s holding in light of juvenile abortion precedents is unfounded because juvenile abortion jurisprudence turned on an expecting minor’s constitutionally protected Fourteenth Amendment right to privacy and the abolishing of the juvenile death penalty turned on the Eighth Amendment’s protection against cruel and unusual punishment.

Further, in Justice Scalia’s dissent he used scientific evidence from prior abortion decisions to criticize the Court’s decision to abolish the juvenile death penalty alone.”

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101. Roper, 543 U.S. at 620 (citing Atkins, 536 U.S. at 319).
106. See Roper, 543 U.S. at 578; Bellotti, 443 U.S. at 633-36.
penalty. Specifically, he stated that the American Psychological Associations (APA) studies, which the Court based its holding in \textit{Roper}, are contradictory to the prior studies the APA previously submitted to the Court on juvenile abortion issues. In support of his position, Justice Scalia focused on the fact that the APA previously found a “rich body of research showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement.” However, even if the facts are viewed in a light favorable to Justice Scalia’s proposition that the APA flip-flopped its characterization of juveniles, the abolishing of the juvenile death penalty is still harmonious with juvenile abortion precedents.

In \textit{Roper}, the Court analyzed at length the APA’s scientific findings and clearly relied on scientific evidence more than in abortion jurisprudence. However, in doing so it appears that the Court was attempting to harmonize the assessment of juvenile maturity in capital sentencing proceedings with the assessment of expecting minors’ maturity levels in judicial bypass proceedings. In fact, the Court stated that, without question “some under 18 have already attained a level of maturity some adults will never reach.” Accordingly, the \textit{Roper} Court indirectly inferred that adolescent women could have the requisite maturity necessary to give informed consent to an abortion. However, in capital sentencing proceedings, even if a juvenile offender possesses a certain degree of maturity, it does not mean that he/she has the requisite maturity in character to give rise to the necessary level of culpability warranting the death penalty.

In capital sentencing proceedings, a court first determines an adolescent’s culpability by analyzing his or her maturity, and maturity of character at the time the crime was committed, and secondly, the juvenile’s culpability in relation to the two social purposes served by the death penalty: retribution and deterrence. However, in a juvenile abortion bypass proceeding, a court is looking solely at whether an expecting minor has the requisite maturity to give informed consent to an abortion. Accordingly, because the scope of the assessment of juvenile maturity in each issue is different, as well as the interests at stake, it is obvious that to some extent the amicus briefs regarding juvenile abortion would differ from the briefs on the juvenile death penalty.

\begin{itemize}
\item 107. \textit{Roper}, 543 U.S. at 617-18 (Scalia, J., dissenting).
\item 108. \textit{Id.}
\item 110. \textit{Roper}, 543 U.S. at 569-70.
\item 111. See \textit{id.} at 574.
\item 112. \textit{Id.} at 574.
\item 113. See \textit{id.}
\item 114. \textit{Id.}
\item 115. \textit{Roper}, 543 U.S. at 571.
\item 116. \textit{Bellotti}, 443 U.S. at 650
\item 117. \textit{Mutcherson}, \textit{supra} note 86, at 955-58.
\end{itemize}
because the juvenile death penalty and the issue of juvenile abortion focus on different aspects of juvenile maturity, it is only natural that the Court’s interpretation and reliance on the scientific evidence would differ in each.  

Therefore, in light of the scientific evidence in capital sentencing proceedings, the Court stated, “[u]nless the imposition of the death penalty . . . ‘measurably contributes’ to either the retribution or deterrence goals of the death penalty ‘it is nothing more than the purposeless and needless imposition of pain and suffering’, and hence an unconstitutional punishment.”

The Supreme Court explained that retribution can be defined as the community’s “attempt to right the balance for the wrong to the victim.” Based on this definition, the Court stated that if the culpability of the average competent adult murderer is insufficient to warrant the death penalty, it goes without question that a juvenile offender does not deserve the death penalty as retribution. In terms of deterrence, the Supreme Court explained that, “the same characteristics that render juveniles less culpable than adults, suggest as well that juveniles will be less susceptible to deterrence.” Further, “the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” Accordingly, the Court explained that because “juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” The Court based this finding on the scientific community’s determination that, it is almost impossible to separate those adolescents whose criminal conduct is transitory from those whose criminal conduct will become a part of their fully formed character.

In the APA Amicus Curia Brief submitted on behalf of the Petitioner, Donald Roper, the APA expressly stated, “Although mental health professionals are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited.” Accordingly, the APA explained in great detail that the “two common sentencing

118. Id.
120. Roper, 534 U.S. at 571.
121. Id. at 571 (citing Atkins, 53 U.S. at 319) (the Court noted, “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.”).
122. Id.
123. Id. at 572.
124. Id. at 570.
125. Id. at 573; see also Brief for American Psychological Ass’n, & Missouri Psychological Ass’n as Amici Curiae Supporting Respondent at 23, Roper v. Simmons, 543 U.S. 551 (2005) (No. 06-633), 2004 WL 1636447.
factors of character and future dangerousness present special problems of reliability in capital sentencing proceedings" that are unique from other issues that assess juvenile maturity.¹²⁷ In fact, “mental health professionals’ ability to reliably distinguish between the relatively few adolescents who will continue as career criminals and the vast majority of adolescents who will, as adults, repudiate their reckless experimentation is limited.”¹²⁸ Further, “the manual that governs professional evaluations for psychiatric disorders wisely bars diagnosis of antisocial personality disorder in individuals under the age of 18.”¹²⁹ As such, it goes without question that the ability of mental health professional to predict at capital sentencing the character formation of a juvenile offenders and there potential dangerousness in adulthood is “inherently prone to error.”¹³⁰ Therefore, based on the overwhelming scientific evidence, the Supreme Court determined, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility existed that a minor’s character deficiencies will be reformed.”¹³¹

Yet, Justice Scalia refused to adopt these scientific findings but did little to rebut them. In fact, he merely stated that the evidence offered by the Court failed to show that “all individuals under eighteen are unable to appreciate the nature of the crimes.”¹³² This, however, was not the issue in Roper, as the Court noted that there might be an extremely rare case where a juvenile has sufficient culpability, including the requisite character traits for his crimes to warrant the death penalty.¹³³ However, the overwhelming scientific evidence that the Court relied on acknowledged that the time during adolescence is the most difficult period in which to detect personality patterns.¹³⁴ In fact, the American Psychiatric Association cautioned that juveniles cannot be properly diagnosed except in the “relatively unusual instance in which the individual’s particular maladaptive personality traits appear to be pervasive, persistent and unlikely to be limited to a particular development stage.”¹³⁵ Therefore, based on these

¹²⁷. Id.
¹²⁸. Id. (citing Steinberg & Scott, Less Guilt by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014-1015 (2003)) (internal quotes omitted).
¹³⁰. Id. at 20.
¹³¹. Roper, 534 U.S. at 570.
¹³². Id. at 618 (Scalia, J., dissenting).
¹³³. Id. at 572.
¹³⁴. John F. Edens et al., Assessment of “Juvenile Psychopathy” and Its Association with Violence: A Critical Review, 19 BEHAV. SCI. & L. 53, 77 (2001) (noting, “Because most adolescents manifest some ‘traits’ and behaviors during this period that may be phenotypically similar to symptoms of psychopathy, adolescence may be the most difficult stage of life in which to detect this personality pattern.”).
finding, the Court explained that the real issue is that by not having a categorical
rule, there is an “unacceptable likelihood” that the jury, upon hearing the
brutality of a crime, will execute a juvenile offender in spite of his or her
insufficient culpability.\textsuperscript{136}

Therefore, when a juvenile commits a heinous crime, the State can take away
his “most basic liberties,” but there is nothing dignified in “extinguishing a
juvenile’s life and taking away his potential to attain a mature understanding of
his own humanity.”\textsuperscript{137} Thus, the \textit{Trop} Court recognized that “[t]he basic concept
underlying the Eighth Amendment is nothing less than the dignity of man.”\textsuperscript{138}

Similarly, in \textit{Bellotti}, the Court recognized that an expecting minor’s right to an
abortion is a constitutionally protected right under the Fourteenth amendment
that protects not only adults but also minors.\textsuperscript{139} Therefore, although the Supreme
Court may believe that minors lack the maturity necessary for the death penalty
and to give informed consent to an abortion, because the Eighth Amendment
protects juveniles against cruel and unusual punishment, and because the
Fourteenth Amendment protects expecting minor’s right to privacy, the Court is
oath bound to protect the minor’s interest first and foremost.\textsuperscript{140}

\textbf{IV. CONCLUSION}

In \textit{Roper v. Simmons}, the United States Supreme Court correctly held that
the Eighth Amendment prohibited the execution of offenders who were under
the age of eighteen when their crimes were committed.\textsuperscript{141} The Court made the
correct decision because without the abo lishment of the juvenile death penalty
there is an unacceptable likelihood that courts will execute juvenile offenders
despite their immaturity, vulnerability, and lack of culpability.\textsuperscript{142} Moreover,
because the Court has a duty to uphold the paramount command of the
Constitution, limit certain powers of government, and protect the individual

\textsuperscript{136.} \textit{Roper}, 543 U.S. at 572-73. In his dissent, Justice Scalia infers that because the criminal
justice system requires individual consideration, including weighing mitigating factors such as age,
a jury would not be persuaded into making the wrong decision. \textit{Id.} at 620-21. Ironically, although
Justice Scalia implies that a jury could not be persuaded by skillful rhetoric, in his dissenting
opinion in both \textit{Thompson} and in \textit{Roper}, he cunningly attempts to persuade the reader by
elaborating in detail about the brutality of the crimes committed by the juvenile in order to
circumvent the mitigating factors offered by the Court. \textit{See Thompson}, 487 U.S. at 859-60 (“I
begin by restating the facts since I think a fuller account of William Wayne Thompson’s
participation in the murder, and of his certification to stand as an adult, is helpful in understanding
the case”); \textit{Roper}, 543 U.S. at 618 (“Christopher Simmons, who was only seven months shy of his
18th birthday when he murdered Shirley Crook”).

\textsuperscript{137.} \textit{Roper}, 543 U.S. at 573-74.

\textsuperscript{138.} \textit{Trop}, 356 U.S. at 100.

\textsuperscript{139.} \textit{Bellotti}, 443 U.S. at 633-36.

\textsuperscript{140.} \textit{Trop}, 356 U.S. at 103.

\textsuperscript{141.} \textit{Roper}, 543 U.S. at 578.

\textsuperscript{142.} \textit{See id.} at 572-73.
rights of the American citizens, the Court made the right decision. 143 Although critics claim that *Roper* conflicts with prior abortion precedents, they fail to see the big picture. Similar to *Roper*, because of the fundamental rights and liberties guaranteed by the Constitution, the Supreme Court in prior abortion precedents had no choice but to create a judicial bypass exception for expecting juveniles because of the Fourteenth Amendment. 144

In a society based on constitutionally protected civil liberties such as freedom of speech and the right to privacy, it is only natural that men and women will express disagreement on whether an expecting juvenile has a right to privacy over her own body. However, as the Supreme Court stated, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.” 145 As such, when the Supreme Court Justices are faced with controversial decisions involving “profound moral and spiritual” dilemmas they have consistently expressed that their “obligation is to define the liberty of all” citizens regardless of age. 146 Therefore, when it comes to controversial issues such as the juvenile death penalty and juvenile abortion “although men and women of good conscious can disagree” on the decisions, the Court always has a duty to uphold the paramount command of the Constitution, by limiting certain powers of government in order to protect the individual rights of all American citizens. 147

146. *Bellotti*, 443 U.S. at 640; see also *Casey*, 505 U.S. at 850.